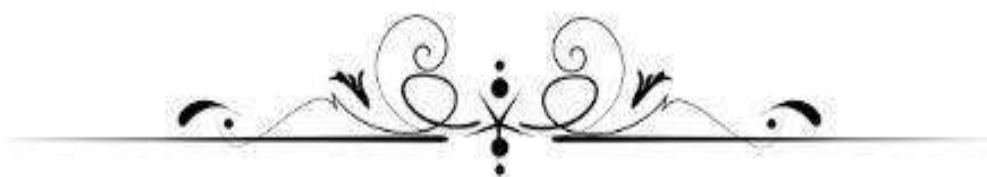




E-Compendium of CESTAT Case Laws

Pro - Revenue



एम. अजित कुमार
अध्यक्ष
M. Ajit Kumar
Chairman



भारत सरकार
वित्त मंत्रालय
राजस्व विभाग
केन्द्रीय अप्रत्यक्ष कर एवं सीमा शुल्क बोर्ड
नॉर्थ ब्लॉक, नई दिल्ली-११०००९

Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes & Customs
North Block, New Delhi-110001
Tel. No.: +91-11-23092849, Fax : +91-11-23092890
E-mail : ajit.m@gov.in



Chairman's Message

It gives me immense pleasure to launch E-compendium of CESTAT case laws. These case laws pertain to Customs, Excise and Service Tax, the ratios of which are still relevant in the GST regime. Being a compilation of pro-revenue cases, I am sure this compendium would be highly useful and handy for the Departmental officers in the process of investigation and adjudication of cases.

The initiative undertaken by the office of the Chief Commissioner (AR) is commendable. I wish them all the best in future.


(M. Ajit Kumar)

New Delhi, 9th April, 2021



AJAY JAIN

SPECIAL SECRETARY & MEMBER



भारत सरकार
GOVERNMENT OF INDIA
वित्त मंत्रालय / राजस्व विभाग
MINISTRY OF FINANCE / DEPARTMENT OF REVENUE
केन्द्रीय अप्रत्यक्ष कर एवं सीमा शुल्क बोर्ड
CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS
नॉर्थ ब्लॉक, नई दिल्ली-110001
NORTH BLOCK, NEW DELHI-110001
Tel. No. +91-11-23092628, Fax No. : +91-11-23092346
E-mail : memcxlegal.cbic@nic.in

Message

Case laws are an important part of our jurisprudence. The orders of Hon'ble CESTAT, unless stayed by higher Courts, are binding precedent on jurisdictional Departmental Authorities. Therefore, there is a need for all Departmental officers to stay abreast with the latest CESTAT orders in their respective areas of work. Important case laws in favour of Revenue should be regularly used to strengthen our show cause notices, the orders-in-original and orders-in-appeal, as well in our appeals before appellate fora.

The Chief Commissioner (AR) Sh. Satish Kumar Agrawal and his team have prepared an e-compilation of important case laws by CESTAT of the last 3 years which are in favour of Revenue. These case laws pertain to Service Tax, Customs and Central Excise. Being downloadable in a mobile, tablet or computer, it will be a handy tool for all officers of CBIC. The search facility for keywords can be used to search case laws relevant to a particular issue.

The selection of case laws has been made by keeping in mind that ratio contained in these case laws may also be relevant even in the present tax regime of GST. The major issues covered under these case laws are taxability, classification, valuation, standard of evidences, limitation, eligibility of exemption notifications, etc.

I commend the ARs working in the Chief Commissioner (AR) Office for the efforts made and wish them all the best in future.


(Ajay Jain)

New Delhi, 13th April 2021



सत्यमेव जयते

सतीश कुमार अग्रवाल

मुख्य आयुक्त (ए.आर.)

Satish Kumar Agrawal

Chief Commissioner (AR)



Tel.: 91-11-2617 8422
Fax : 91-11-26179499

भारत सरकार

वित्त मंत्रालय (राजस्व विभाग)

मुख्य आयुक्त (ए.आर.) कार्यालय

सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण

वैस्ट ब्लॉक-2, दूसरा खण्ड, प्रथम तल,

आर. के. पुरम, नई दिल्ली-110 066

GOVERNMENT OF INDIA

MINISTRY OF FINANCE (DEPARTMENT OF REVENUE)

OFFICE OF THE CHIEF COMMISSIONER (AR)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

WEST BLOCK 2, WING NO.2, 1ST FLOOR,

R.K. PURAM, NEW DELHI-110 066

Editor In Chief: Preface

This is the fourth year since the introduction of GST in July, 2017. Despite a sizeable liquidation of appeals under the *Sabka Vishwas (Legacy Dispute Resolution) (SVLDR) Scheme*, we still find more than 40,000 appeals of Central Excise and Service Tax pending at CESTAT and inflow of such appeals at the Hon'ble Tribunal has not much dwindled. In addition, there are around 18,000 appeals of Customs also pending. Hence, it is safe to say that Hon'ble CESTAT will have considerable work load for some more years, before the entire Central Excise and Service Tax pendency is wiped out and only Customs appeals remain with it.

Since the laws of Central Excise, Service Tax and GST are *pari materia* to a large extent, the ratio of the orders of Hon'ble CESTAT will hold relevance in the GST era as well. The professional compilations of case laws available in the market do miss out on case laws in favour of Revenue. So, an effort is being made to compile the recent orders of Hon'ble CESTAT (of last 3 years) favourable to Revenue for the benefit of the Departmental Officers. This compendium has been titled as "*E-Compendium of Recent CESTAT Case Laws*". It can be easily downloaded and stored in mobile phones or desktops. The E-Compendium is in the form of a pdf file with the facility of searching for case laws containing particular keywords / phrases like classification, valuation, penalty etc. The judgements have been selected in terms of their importance and the relevance in the GST era as well.

I hope that the present E-Compendium will prove to be a useful tool for all the Departmental Officers.

I acknowledge the work done by the team of ARs in bringing out this compendium.

Satish K Agrawal
(Satish K Agrawal)

Chief Commissioner (AR)

Editor in Chief:

- Satish K Agrawal, Chief Commissioner (AR)

Executive Editor:

- Partha Roy Chowdhury, Commissioner (AR)

Co-Editors:

- J.P. Singh, Commissioner (AR)
- Reyaz Ahmed, Commissioner (AR)
- Vivek Pandey, Additional Commissioner (AR)
- Dr Radhe Tallo, Deputy Commissioner (AR)

Contributors:

- Sanjay Lawania, Additional Commissioner (AR)
- Tamanna Alam, Joint Commissioner (AR)
- Ravi Kapoor, Deputy Commissioner (AR)
- Rakesh Agarwal, Deputy Commissioner (AR)
- Pradeep Juneja, Assistant Commissioner (AR)
- K. Poddar, Assistant Commissioner (AR)
- R. K. Maji, Assistant Commissioner (AR)
- R. K. Mishra, Assistant Commissioner (AR)
- Sunil Kumar, Assistant Commissioner (AR)
- O P Bisht, Assistant Commissioner (AR)
- Yashvir Singh, Assistant Commissioner (AR)
- Pradeep Gupta, Additional Assistant Director (AR)
- Rakesh Kumar, Additional Assistant Director (AR)
- Anup Thapiyal, Additional Assistant Director (AR)
- Jai Bhagwan, Superintendent (CCU)

Service Tax

S No.	Title	Keywords
1	M/S JPG CONSTRUCTION PVT. LTD. VS. COMMISSIONER OF GOODS AND SERVICE TAX, GST DELHI EAST	Refund of Service Tax within the stipulated time.
2	M/S MGF EVENT MANAGEMENT VS. CST, DELHI – II	Parking fees, Operation of parking space in malls taxable under Management, Maintenance or repair service.
3	M/S C P SYSTEMS PVT. LTD VS. COMMISSIONER OF SERVICE TAX, NEW DELHI	Cross Objection has to be filed within 45 days of the receipt of the notice.
4	M/S MODI APOLLO INTERNATIONAL LIMITED VS. COMMISSIONER (ADJUDICATION), DELHI	Limitation for filing a Restoration Application.
5	M/S PRASAR BHARTI (BROADCASTING CORPORATION OF INDIA) DOORDARSHAN VS. COMMISSIONER OF SERVICE TAX, DELHI	Issues covered by two show cause notices are independent and separate.
6	M/S INNOVATIVE CLAD SOLUTIONS PVT. LTD VS. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, INDORE	Strict Interpretation of Exemption Notification, Refund rejected.
7	M/S JOHRI CABLE NETWORK VS. THE COMMISSIONER (AUDIT), CENTRAL GOODS AND SERVICE TAX, JODHPUR-I	Condonation of delay application of 6 years rejected.
8	M/S ARIHANT TILES & MARBLES PVT. LTD VS. COMMISSIONER (APPEALS), JODHPUR	Interest on delayed payment of interest by 10 years denied.
9	M/S BRIJESH CABLE NETWORK VS. COMMISSIONER (AUDIT), CENTRAL GOODS & SERVICE TAX, JODHPUR	Condonation of delay application of 5 months rejected.
10	M/S DIAMOND CONSTRUCTION VS. COMMISSIONER OF CUS., CE & ST, JABALPUR	Condonation of delay application.
11	M/S HDFC BANK LTD. VS. COMMISSIONER OF CENTRAL EXCISE, THANE-II	'Mark-up' charges relating to credit card Service Taxable.
12	M/S SAHARA INDIA TV NETWORK VS. COMMISSIONER OF SERVICE TAX, MUMBAI-II	Hiring of satellite Transponder held taxable under infrastructure support service.
13	M/S NATIONAL SECURITIES DEPOSITORY LTD. VS. COMMISSIONER OF SERVICE TAX-V, MUMBAI	"Provision and transfer of information and data processing" services.
14	M/S GO AIRLINES (INDIA) LTD VS. COMMISSIONER OF SERVICE TAX – I, MUMBAI	Initial discharge of tax liability.
15	M/S BANK OF AMERICA, NATIONAL ASSOCIATION VS. PRINCIPAL COMMISSIONER, MUMBAI EAST	Strict interpretation of the fiscal statute.
16	CC. GST, MUMBAI WEST VS. M/S JUHU BEACH RESORT LTD.	Refund of pre-deposit.

17	<u>M/S TAFE REACH LTD. VS. CENTRAL GST, SALEM</u>	Both exempted and taxable services.
18	<u>M/S TALKING TECHNOLOGY (P) LTD. VS. COMMISSIONER OF SERVICE TAX, CHENNAI</u>	Manpower Supply Services.
19	<u>M/S EMARS MINING CONSTRUCTION PVT. LTD VS. COMMISSIONER OF SERVICE TAX, KOLKATA</u>	Artificial bifurcation is not acceptable.
20	<u>M/S TATA STEEL LTD VS. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, JAMSHEDPUR</u>	‘Self service’, claim of assessee denied.
21	<u>M/S N C PAUL & COMPANY VS. COMMISSIONER OF CENTRAL EXCISE, BOLPUR</u>	Cargo handling service or Transportation of coal within mining area.
22	<u>M/S COAL MINES PROVIDENT FUND ORGANISATION VS. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, RANCHI</u>	Sovereign functions, Management of coal mines provident fund scheme held taxable.
23	<u>M/S S D BUSINESS ENTERPRISES PVT. LTD VS. COMMISSIONER OF SERVICE TAX, KOLKATA</u>	Expenditure claimed as deduction by the appellant is not permissible.
24	<u>M/S EASTERN RETREADS (P) LTD. VS. COMMISSIONER, GST, COCHIN</u>	Retreading of tyres. Maintenance, Management and Repair Service
25	<u>M/S KERALA CO-OPERATIVE DEPOSIT GUARANTEE FUND BOARD VS. COMMISSIONER OF CENTRAL TAX AND CENTRAL EXCISE, THIRUVANTHAPURAM</u>	Cooperative deposit fund, Deposit Insurance and Credit Guarantee Corporation of India (DICGC).
26	<u>M/S MANGALORE INTERNET CITY PVT. LTD VS. COMMISSIONER OF CENTRAL EXCISE & CENTRAL TAX, MANGALORE COMMISSIONERATE</u>	Payment of penalty without issuance of SCN in accordance with law.
27	<u>M/S CHALET HOTELS PVT. LTD VS. COMMISSIONER OF CENTRAL TAX, BENGALURU EAST</u>	Cancelled Contract. Contention that no service was provided and hence the provision of Section 11B of CEA, 1944 is not applicable is devoid of merit.
28	<u>M/S FUTURE FOUNDATIONS PVT. LTD VS. COMMISSIONER OF CENTRAL TAX AND CENTRAL EXCISE, THIRUVANTHAPURAM</u>	Period of limitation as provided under Section 11B of the CEA, 1944 is applicable in the case of refund and the statutory time limit cannot be extended by any authority.
29	<u>M/S TPI ADVISORY SERVICES INDIA PVT.LTD VS. COMMISSIONER OF CENTRAL TAX, BANGALORE NORTH</u>	No provisions u/s 11B of the CEA, 1944 for the refund of duty/tax that was liable to be paid legitimately.
30	<u>M/S BROADBRIDGE FINANCIAL SOLUTIONS INDIA (P) LTD. VS. COMMISSIONER OF CENTRAL GST, SECUNDERABAD</u>	Health insurance services are clearly excluded from the Rule 2(l) of CCR 2004.
31	<u>M/S GIMPEX PVT. LTD VS. COMMISSIONER OF CENTRAL GST, TIRUPATI</u>	Notification No. 41/2012-ST. relevant date to be considered for one year for filing refund claim is the date of ‘let export order’.
32	<u>M/S A.H. TOURS & TRAVELS ORGANIZERS VS. CENTRAL GST, HYDERABAD-I</u>	Rent-a-Cab service.

33	M/S BHARAT HEAVY ELECTRICALS LTD VS. CENTRAL GST, SECUNDERABAD	No legal provision under which refund can be granted for unutilized CENVAT credit as cash refund.
34	M/S MIND Q. SYSTEMS PVT. LTD VS. COMMR. OF CUS., C. EX. & S.T., HYDERABAD-II	Sale of books is not a separate enterprise. Books, registration fee and the examination fee are not billed separately. Deductions not admissible.
35	M/S HYDERABAD RACE CLUB VS. COMMISSIONER OF CUS. & C. EX, HEDERABAD	Providing space to bookmaker in the race cub for 'commission'
36	M/S USHODAYA ENTERPRISES PVT. LTD VS. COMMR. OF CUS., C. EX. & S.T., HYDERABAD	Business Support Service, Hire/lease of transponders attached to satellites, activity is classifiable under BSS.
37	M/S NVAYUGA ENGINEERING COMPAY LTD VS. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, VISAKHAPATNAM-I	Franchisee Service. Service Tax or 'toll free' collection.
38	M/S FLYTECH MEDIA PVT. LTD VS. COMMR. OF C. EX., CUS. & S.T., HYDERABAD-II	Appeals against revisionary orders.
39	CENTRAL GST AND CUSTOMS, HYDERABAD-IV VS. M/S NATIONAL REMOTE SENSING AGENCY.	Franchisee No exemption available, unless there is a specific exemption notification in respect of services rendered to autonomous institutions.
40	M/S VIVIMED LABS LTD. VS. COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX, HYDERABAD – III	Services for placing Foreign Currency Convertible Bonds (FCCB) in the International Capital Market to raise capital falls squarely within the definition of merchant banker in terms of the SEBI (MBR 1990).
41	M/S COMEXX VS. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, AHMEDABAD	Refund under CEA, 1944 would be governed by Section 11B and by the provisions of limitation prescribed under Section 11B of CEA, 1944.
42	M/S KETAN CONSTRUCTION LTD VS. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, RAJKOT	Collection of toll fee in respect of National Highway Authority of India.
43	M/S. CHHATARIYA DEHYDRATES EXPORTS VS. COMMISSIONER OF CENTRAL EXCISE & ST, BHAVNAGAR	Service Tax on sales commission on reverse charge basis. Dehydrated onion cannot be called as agricultural produce in terms of Notification No.13/2003-ST.
44	M/S SHREE GURUKRUPA CONSTRUCTION COMPANY	Sub-Contractor liable to pay

	<u>VS. COMMISSIONER OF CENTRAL EXCISE & ST. RAJKOT</u>	Service Tax.
45	<u>M/S. IILM BUSINESS SCHOOL VS. COMMISSIONER CE & ST, RAJKOT</u>	Notification No. 10/2003-ST, Commercial Coaching, appellant not recognised by Law to grant degree.
46	<u>M/S MASTI TOURS & TRAVELS VS. COMMISSIONER CE & ST, SURAT-I</u>	Credit of tax deducted by International Air Transport Association (IATA) Agents.
47	<u>M/S S SOOD AND COMPANY VS. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, LUDHIANA</u>	Service Tax collected and not deposited.
48	<u>SHRI GURUPREET SINGH MATAHRU VS. COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH-I</u>	Receipt of commission by Amway distributor taxable.
49	<u>M/S INDO GLOBAL ESTATES VS. COMMISSIONER OF C.E. & S TAX CHANDIGARH I</u>	Section 11B to constitute “law” within the meaning of Article 265 of the Constitution. Supreme Court (Mafatlal). Refund rejected.
50	<u>COMMISSIONER OF SERVICE TAX, DELHI VS. M/S MELANGE DEVELOPERS PVT. LTD</u>	Sub-Contractor liable to pay Service Tax.
51	<u>M/S AKBAR TRAVELS OF INDIA PRIVATE LIMITED VS. PRINCIPAL COMMISSIONER OF CENTRAL GOODS & SERVICE TAX, JAIPUR-I</u>	Condonation of delay, or delay of 1390 days rejected.
52	<u>M/S HANUMANT CONSTRUCTION VS. COMMISSIONER CE & ST, RAIPUR</u>	Activity of removal of over burden taxable under site foundation service.
53	<u>INDIRA GANDHI RASHTRIY AURAN AKADEMI VS COMMISSIONER OF CE & ST LUCKNOW</u>	Refund application is time barred under Section 11B.
54	<u>M/S MESSRS XSYS ALERT VS. CST & ST, AHMEDABAD</u>	Non-disclosure by party amounts to suppression.
55	<u>M/S SAVITRI LEASING & FINANCE LTD. VS. C.C.E. & CGST, JAIPUR</u>	Time limit for issuing notice under Section 111(2) of VCES will be applicable only if the assessee is entitled to file the VCES.
56	<u>M/S SUBWAY SYSTEMS INDIA PRIVATE LTD. VS. CST, DELHI – II</u>	Franchise Service. Advertisement expenses taxable as part of gross amount.
57	<u>M/S WILD EXPEDITION TOURS & TRAVELS VS. CCE, BHOPAL</u>	Rent-a-Cab Service.
58	<u>M/S CAPL HOTELS AND SPA PVT. LTD VS. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, GURGAON</u>	Jurisdiction of Tribunal when Notice & Adjudication by different Authority falling under different Tribunals.
59	<u>M/S PVR LTD Vs COMMISSIONER OF SERVICE TAX, DELHI</u>	Pouring Fees
60	<u>M/S POONAM ROOFING PRODUCTS PVT. LTD. VS. COMMISSIONER OF CENTRAL EXCISE, PUNE-III</u>	Trademark
61	<u>M/S INDIAN INSTITUTE OF PLANNING AND MANAGEMENT VS. COMMISSIONER OF SERVICE TAX, DELHI</u>	Certificates not recognized by Law do not deserve exemption

62	M/S SATYA PRAKASH BUILDERS PVT. LTD. VS. COMMISSIONER OF CENTRAL EXCISE, JAIPUR-I	No direct consideration
63	M/S ICICI BANK LTD VS. COMMISSIONER OF SERVICE TAX-IV, MUMBAI	Premium paid on deposit insurance to DICGE not an 'Input Service'
64	M/S SHREE RANIE GUMS AND CHEMICALS PVT LTD VS. COMMISSIONER OF CENTRAL EXCISE, JAIPUR-II	Normal period is sustainable even when the extended period is not sustainable

Central Excise

S.No	Title	Key Words
1.	M/S ROTOCAST INDUSTRIES LTD VS. CCE, RAIPUR	Valuation, Additional Consideration
2.	M/S BHARAT HEAVY ELECTRICALS LTD VS. CCE, KANPUR	Interest, Differential Duty, Provisional Assessment
3.	M/S PANASONIC AVC NETWORKS INDIA CO. LTD VS. COMMISSIONER OF CENTRAL EXCISE, NOIDA-I	Classification, Sub- Assembly of TV, Complete TV
4.	M/S ADHUNIK MEGHALAYA STEEL PVT LTD VS. CCE, SHILLONG	Refund, Notification No. 32/99-CE
5.	M/S H S BUILDERS & ORS VS. CCE & ST, BHUBNESHWAR	Excisability, Steel tanks, Fabrication
6.	M/S MAHASHAKTI CEMENTS VS. CCE & ST, GUWAHATI	Special Rate of Valuation, Interpretation of Notification
7.	M/S TEXMACO LTD VS. CCE, KOLKATA -III	CENVAT, SAD, Reversal
8.	M/S DIAMOND BEVERAGES PVT. LTD VS. CCE, KOLKATA – VI	Interest on interest. Not Permissible
9.	M/S LUKWAH TEA ESTATE VS. CCE, DIBRUGARH	Conditions of Notifications, Expansion
10.	M/S HALDIA PETROCHEMICAL LTD VS. CCE & ST, HALDIA	VAT, Incentive Scheme, Additional Consideration
11.	M/S SOVA SOLAR LTD VS. CCE & ST, DURGAPUR	EOU, DTA, Exemption Notification
12.	M/S BRAHMAPUTRA CRACKER & POLYMER LIMITED VS. CCE, DIBRUGARH	Registration, Separate Plants, CENVAT Credit
13.	M/S DECCAN CEMENTS LTD VS. COMMISSIONER OF CENTRAL TAX, RANGAREDDY	Clean Energy Cess, CENVAT
14.	M/S VIJAYNAGAR BIOTECH LTD VS. COMMISSIONER OF CENTRAL TAX VISAKHAPATNAM GST COMMISSIONERATE	Capital goods, No separate machinery, Rule 6 (4) of CENVAT Credit Rules, 2004
15.	M/S WIPRO ENTERPRISES LTD VS. COMMISSIONERATE OF CENTRAL TAX, TIRUPATI	Penalty, Rule 15 (2), Intention
16.	M/S ADANI POWER LTD VS. COMM. OF C.T.- RANGAREDDY – GST, TELANGANA	Rebate, Refund, SEZ, DTA
17.	M/S FINECHEM VS. COMMISSIONER OF CCE & ST, HYDERABAD-I, COMMISSIONERATE	Penalty, Mens Rea, Rule 26 (2), Issue of Invoice without delivery of goods
18.	M/S RANI PLASTIC PIPE INDUSTRIES, VS. COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX, TIRUPATI	No Refund of unutilised credit, Factory closed
19.	M/S BIOMAX LIFE SCIENCES LTD VS. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, HYDERABAD-IV	Classification, Aloe-vera Powder/Juices, Amla Powder Juices
20.	M/S VISHNU CHEMICALS LTD AND ORS VS. COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX, HYDERABAD-I	Clandestine Removal, Shortage, Private Records, Late Retraction

21.	<u>M/S NCL INDUSTRIES LTD VS. COMMISSIONER OF CENTRAL TAX, GUNTUR</u>	Outward Transportation
22.	<u>M/S HARIKA RESINS PVT. LTD AND SAMA RAJASEKHAR VS. CCE & ST, GUNTUR</u>	Clandestine Removal, Statements, Cross Examination, Evidentiary value, Documentary evidences.
23.	<u>M/S LITTLE STAR FOODS PVT. LTD VS COMMISSIONER OF CENTRAL TAX, HYDERABAD</u>	Valuation, up to place of removal, Job Work, Benefit of Notification
24.	<u>M/S KAIRA CAN COMPANY LTD VS. CCE & ST, AHMEDABAD-III</u>	Valuation, Free supply, Additional Consideration
25.	<u>M/S GUJARAT STATE FERTILIZERS AND CHEMICALS LIMITED VS. CCE & ST, VADODARA</u>	Sulphuric Acid, Notification No. 12/20012-CE, Phosphoric Acid
26.	<u>M/S A K CHATURVEDI VS. CCE-AHMEDABAD-II</u>	Fly Ash content, Exemption Notification
27.	<u>M/S NARESH AGRAWAL VS. CCE & ST, VADODARA-II</u>	Only paper CENVAT credit, No supply of goods
28.	<u>M/S BHARAT RESINS LTD VS. CCE & ST, SURAT-I</u>	CENVAT Credit, Time Limit, Extended Period, Amendment Prospective
29.	<u>M/S F TECH ENGINEERING CO. VS. CCE & ST, RAJKOT</u>	Clandestine Removal, Confessional statements
30.	<u>M/S HI SCAN PVT. LTD VS. CCE, AHMEDABAD-II</u>	Job Worker, Principal, SSI Exemption
31.	<u>M/S J & J PLAST VS. CCE-AHMEDABAD-II</u>	SSI Exemption, Job Worker
32.	<u>M/S JOLLY ELECTRICAL INDUSTRIES VS. CCE & ST, VADODARA-II</u>	Clubbing, Production facility
33.	<u>M/S MEENAKSHI FOOD PRODUCTS PVT. LTD VS. CCE & ST-AHMEDABAD-III</u>	Pan Masala, Gutkha, Declaration
34.	<u>M/S MEGHMANI ORGANIC LTD VS. CCE-AHMEDABAD-II</u>	Coordination Compound, Fertiliser, Test Report, Classification
35.	<u>M/S MID INDIA POWER AND STEEL LIMITED VS CCE & ST, RAJKOT</u>	Refund, Challenge, Finality
36.	<u>M/S MILI DETERGENT INDUSTRIES VS. CCE-AHMEDABAD-II</u>	Clandestine Removal, Loose Papers, Confessional Statements
37.	<u>M/S RISHI CAST PVT. LTD VS. CCE & ST, RAJKOT</u>	Classification, Limitation, Manhole Cover
38.	<u>M/S SHALU SYNTHETIC VS. CCE, DAMAN</u>	Accumulated CENVAT Credit, Refund, Interest, Surrender of Registration
39.	<u>M/S SILVASSA SPAN YARN VS. CCE & ST, TAPI</u>	Conditions of Notification, CENVAT Credit, extended period, Suppression, one to one correlation
40.	<u>M/S STANDARD PESTICIDES PVT LTD VS. CCE & ST, VADODARA</u>	Rebate, Refund,

41.	<u>M/S VIJAY FIRE VECHILES AND PUMPS LTD VS. CCE & ST, SURAT-I</u>	Refund claim under Rule 5, Section 11B, Limitation
42.	<u>M/S SHRI KRISHNA TOBACCO PRODUCTS VS. CCE & ST-AHMEDABAD-III</u>	Tobacco, Snuff, Bulk Packing, Retail Packing, Supression
43.	<u>M/S AMRITPOLY PLAST PVT LTD AND ORS VS. CCE & ST, JAMMU</u>	Restoration of Appeal, No Review
44.	<u>CCE & ST, ROHTAK VS. M/S SOM FLAVOUR MASALA PVT. LTD.</u>	Refund, Interest, Deposit
45.	<u>M/S PANACEA BIOTEC LTD VS. CCE & ST, LUDHIANA</u>	Common Electricity connection, CENVAT Credit
46.	<u>M/S MODERN DAIRIES LTD VS. CCE & ST, PANCHKULA</u>	Actual date of Refund of pre-deposit
47.	<u>M/S ACCUSYNTH SPECIALITY CHEMICALS P. LTD VS. COMMISSIONER OF CGST-PALGHAR</u>	Refund, Rule 5 of CCR, 2004, Limitation
48.	<u>M/S MALI PIPE INDUSTRIES AND ORS VS. CCE, PUNE-III</u>	SSI Exemption, Clubbing of Units
49.	<u>M/S SHRI DNYANESHWAR SSK LTD VS. CCE & ST, NASIK</u>	Credit, Denied On Pre-Deposit
50.	<u>M/S ISMT LTD VS. CCE & ST, NASIK</u>	Refund, Proof of Export
51.	<u>M/S SHIVNATH RAI HARNARAIN (INDIA) LTD VS. CCE, KOLHAPUR</u>	Remand
52.	<u>M/S SHRI VITTHALSAI LTD VS. CCE & ST, NAGPUR</u>	Refund of CENVAT Credit on closure of factory
53.	<u>M/S TECHNOCRAFT INDUSTRIES (I) LTD VS. CCE, THANE-I</u>	Refund, Rejected, Rule 5 of CENVAT Credit Rules
54.	<u>M/S PARENTAL CREATIONS PVT. LTD. AND ORS. VS. CCE, THANE-I</u>	Rebate, Bogus, Export
55.	<u>M/S SHRI GANAPATHY PACKAGING VS. CCE, TIRUNELVELI</u>	Match Boxes, Use of power
56.	<u>M/S SERVO PACKAGING LTD. VS. COMMISSIONER OF CGST & CENTRAL EXCISE</u>	Refund in cash of CENVAT credit
57.	<u>M/S PRESTIGE FOOD VS. THE COMMISSIONER CGST & CENTRAL EXCISE, INDORE</u>	No interest on delayed payment.
58.	<u>M/S ARIHANT TILES & MARBLES PVT. LTD VS. THE COMMISSIONER (APPEALS), JODHPUR</u>	Interest on interest
59.	<u>M/S CONTINENTAL ENGINES LIMITED VS. COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, ALWAR</u>	Interest on upward price revision, Post removal of goods.
60.	<u>M/S GURUHARKISHAN INDUSTRIES AND ORS VS. RESPONDENT: CCE, DELHI-II</u>	Electronic evidences
61.	<u>COMMISSIONER OF C. EX. & S.T.-LTU, DELHI VS M/S GAS AUTHORITY OF INDIA LTD.</u>	Non consideration of relevant evidences by Adjudicating Authority illegal
62.	<u>M/S KAIRA CAN COMPANY VS. COMMISSIONER OF CENYTRAL EXCISE AND SERVICE TAX, VADODARA-I</u>	Value of packing material supplied free of cost includable in the Assessable value
63.	<u>M/S RATNAMAI METALS & TUBES LTD. VS COMMISSIONER OF C. EX. & S.T., AHMEDABAD-III</u>	No interest payable when any amount not adjudged as Tax

Customs

S No.	Title	Keywords
1	SHRI BADRI NARAYAN SHARMA VS. COMMISSIONER OF CUSTOMS	Gold Seizure, Disposal, Sale Proceeds
2	M/S KOTHARI FOODS & FRAGRANCE PVT. LTD VS. COMMISSIONER OF CUSTOMS (EXPORT), NEW DELHI	Non-disclosure, Limitation DFIA
3	M/S FRIENDLY VIDEO VISION SHRI RAKESH KUMAR BHAGAT VS. C.C. (IMPORT & GENERAL), NEW DELHI	Detention & Seizure
4	M/S MCT DELUXE HONOUR INDUSTRIES PVT. LTD VS. C.C., NEW DELHI, ICD	Red Sanders, Mis-declaration, Prohibited goods
5	SHRI ROHIT BHASIN VS. CC, NEW DELHI	BIS Certification, Mis-declaration, Confiscation
6	M/S JAI SHIV TRADING CO. VS. CCE , NEW DELHI	Valuation
7	CC (IMPORT), ICD, TKD, NEW DELHI VS. M/S SODAGAR KNITWEAR	Valuation
8	M/S LAXMI ENTERPRISES VS. CC (PREV.) NEW DELHI	Valuation, Admissibility of electronics evidence as per Section 138C Customs Act, 1962.
9	M/S EAST INDIA HOTELS LTD VS. COMMISSIONER OF CUSTOMS, NEW DELHI	Exemption Notification, Use of aircrafts for only family members qualifies as private purpose against the provisions of Notification.
10	M/S BIRD RETAIL PVT. LTD AND ORS. VS. COMMISSIONER OF CUSTOMS (IMPORT)	Mis-classification, Extended Period
11	M/S KEIHIN AUTOMOTIVE SYSTEMS INDIA PRIVATE LTD VS. PR. COMMISSIONER OF CUSTOMS, NEW DELHI	Limitation, Mis-classification, Extended Period
12	COMMISSIONER OF CUSTOMS VS. M/S HANUMAN PRASAD & SONS	Enhanced value once accepted in writing shall be deemed to be Transaction Value.
13	RAJESH MAIKHURI VS. COMMISSIONER OF CUSTOMS (EXPORTS), NEW DELHI	MRP/RSP provisions not adhered to by the CHA, Liable to penalty.
14	M/S INDUS CHEMITEX LTD. VS. CC, NEW DELHI	Demurrages charges cannot be borne by detaining authority
15	COMMISSIONER OF CUSTOMS (EXPORTS), NEW DELHI VS. M/S R.U. IMPORTS-EXPORTS PVT. LTD	CBLR 2013, Allied Acts, Penalty imposed on CHA under Customs Act, 1962.
16	M/S SKYTRAIN SERVICES VS. COMMISSIONER OF CUSTOMS (AIRPORT & GENERAL), NEW DELHI	CHA License Revocation

17	<u>M/S SILICONE CONCEPTS INTERNATIONAL PVT. LTD VS. PRINCIPAL COMMISSIONER OF CUSTOMS, ICD, TKD (IMPORT), NEW DELHI</u>	Cross-examination
18	<u>M/S BURBERRY INTERNATIONAL VS. COMMISSIONER OF CUSTOMS, NEW DELHI</u>	Valuation
19	<u>M/S CMR NIKKEI INDIA PVT. LTD. AND ORS. VS. COMMISSIONER OF CUSTOMS, NCRB, & M/S CENTURY METAL RECYCLING LTD VS. CC NCRB, JAIPUR</u>	Valuation, Aluminium Scrap
20	<u>M/S SHUBHLAXMI TEXTILE AND ORS. VS. CC, NEW DELHI (ICD TKD) (IMPORT)</u>	Mis-Classification, Fabrics, Test Report
21	<u>SHRI B.L. GOYAL, RAIPUR (C.G.) VS. COMMISSIONER (APPEALS), CUSTOMS, CENTRAL GOODS & SERVICE TAX &CENTRAL EXCISE, INDORE</u>	Exemption Notification No. 96/2008-Customs, dt. 13.08.2008
22	<u>COMMISSIONER OF CUSTOMS (IMPORT), ICD, TKD VS. M/S A.R. FABRICS</u>	Valuation, Acceptance in Writing
23	<u>M/S SUPER ECO AUTOMOTIVE CO. LLP VS. COMMISSIONER OF CUSTOMS (EXPORT), ICD, TKD</u>	Condonation of Delay Application
24	<u>SHRI JEEVAN JAIN, PROPRIETOR OF M/S OM UDYOG VS. COMMISSIONER OF CUSTOMS (APPEALS), NEW DELHI</u>	Mis-declaration/Mis Classification
25	<u>COMMISSIONER OF CUSTOMS (IMPORT), ICD, TKD, NEW DELHI VS. M/S R.M. IMPEX</u>	SAD Refund, Limitation
26	<u>SHRI AMANULLAH VS. COMMISSIONER OF CUSTOMS (GENERAL) NEW DELHI</u>	Condonation of delay application
27	<u>M/S VINAYAK CARGO APPELLANT VS. COMMISSIONER OF CUSTOMS (PREVENTIVE), JAIPUR</u>	CBLR 2013, Judgement once Pronounced in open court is pronounced for world at large.
28	<u>M/S LLOYD INSULATION (I) LTD. VS. COMMISSIONER OF CUSTOMS</u>	Pre-Deposit
29	<u>M/S ALOK INDUSTRIES LIMITED VS. DG, AD</u>	Condonation of Delay Application
30	<u>M/S INDO RAMA SYNTHETICS (INDIA) LIMITED VS. DG, AD</u>	Condonation of Delay Application
31	<u>M/S MITA INDIA (P) LTD. VS. COMMISSIONER OF CUSTOMS</u>	Condonation of Delay Application
32	<u>M/S NITRO CHEMICAL INDUSTRY LTD. VS. DG, AD</u>	Normal Confidentiality Value,
33	<u>M/S PAP FAST MOVERS I. LTD. VS. COMMISSIONER OF CUSTOMS(PREV), JODHPUR</u>	Red Sanders, CBLR 2013, Penalty under Section 114A of Customs Act, 1962.
34	<u>M/S R.N. METAL (INDIA) PVT. LIMITED VS. COMMISSIONER OF CUSTOMS EX. & GST. JAIPUR</u>	Classification and Valuation, Chartered Engineer
35	<u>M/S HLPL GLOBAL LOGISTICS PVT. LTD VS. COMMISSIONER OF CUSTOMS, NEW DELHI</u>	CBLR 2004, Penalty Under Section 114(I), KYC Verification
36	<u>M/S MULTI WINGS CLEARING & FORWARDING P. LTD VS. CC (GENERAL), NEW DELHI</u>	Revocation Of CHA License

37	M/S BALAJI ACTION BUILDWELL VS. COMMISSIONER OF CUSTOMS, NEW DELHI	Classification, DFIA License
38	M/S MAULI WORLD VIDE LOGISTICS VS. CC, NEW DELHI	CBLR 2013
39	M/S OLYMPIC EXPORTS VS. COMMISSIONER OF CUSTOMS, NEW DELHI	Section 111(D) of Customs Act, 1962, Classification, CKD
40	M/S PIONEER EMBROIDERY LIMITED VS. CC, NEW DELHI	Limitation
41	SADANAND CHAUDHARY VS. CC (G), NEW DELHI	CHA, Penalty, Forfeiture of Security as per CBLR 2013
42	M/S LEO CARGO SERVICES PVT. LTD. VS. COMMISSIONER OF CUSTOMS, NEW DELHI	Time-limit prescribed under Regulation 20(5) of CBLR 2013
43	M/S SMART TECHNOLOGIES THROUGH ARVIND JAWA (PROPRIETOR), NEW DELHI VS. COMMISSIONER OF CUSTOMS (ACC), NEW DELHI	Mis-declaration, Undervaluation
44	M/S CONTAINER CORPORATION OF INDIA (CCI) LTD VS. COMMISSIONER OF CUSTOMS, JAIPUR-I	Cost Recovery Charges, HCCAR 2009
45	CC, NEW DELHI(ICD TKD)(IMPORT) VS. M/S J G IMPEXPVT. LTD	SAD Refund
46	CC, NEW DELHI(ICD TKD)(IMPORT) VS. M/S INDU EXPORTERS	SAD Refund
47	CC, NEW DELHI(ICD TKD)(IMPORT) VS. M/S D K IMPOTRADE	SAD Refund
48	CC, NEW DELHI(ICD TKD)(IMPORT) VS. M/S NAV BHARAT TRADING CORPORATION	SAD Refund
49	CC, NEW DELHI(ICD TKD)(IMPORT) VS. AGGARWAL TRADING COMPANY	SAD Refund
50	M/S EXIM CARGO SERVICE VS. CC, NEW DELHI	CBLR 2013, Undervaluation, Mis-declaration
51	M/S KOTSONS PVT. LTD. VS. CC, NEW DELHI	Limitation
52	M/S EXIM CARGO SERVICES VS. CC, NEW DELHI	Rectification of Mistakes Application
53	M/S NATIONAL GLASS EMPORIUM VS. DIRECTORATE GENERAL OF ANTIDUMPING AND ALLIED DUTIES	Condonation of Delay Application
54	M/S VAIBHAV GLOBAL LIMITED VS. COMMISSIONER, CGST, CENTRAL EXCISE, JAIPUR	Re-Import
55	M/S NEO CORP. INTERNATIONAL LTD. M/S PRISM FLEXIBLE SOLUTIONS PVT. LTD. VS. CC, INDORE	Condonation of Delay Application
56	M/S ADEPT LOGISTICS VS. COMMISSIONER OF CUSTOMS, NEW DELHI	CBLR 2013, Forgery, Limitation
57	ASHWINI KUMAR ALIAS AMANULLAH VS. COMMISSIONER OF CUSTOMS ACC (EXPORT), DELHI	Prohibited Goods, Penalty under Section 114A and 114AA
58	COMMISSIONER OF CUSTOMS (PREVENTIVE), LUCKNOW VS. M/S BUSHRAH EXPORT HOUSE	Seizure of export goods, Overvaluation

59	<u>SHRI SANJEEV SINGH YADAV AND OTHERS VS. C.C., DELHI</u>	High Sea Sale
60	<u>M/S MERCEDES BENZ INDIA PRIVATE LIMITED & ORS VS. CC, DELHI</u>	TRA, DEPB, FPS, VKGUY, DFIA, Penalty
61	<u>SHRI CHINTA HARAN OJHA CHA & OTHERS VS. CC, DELHI</u>	Mis-declaration, PoSDevices, Software
62	<u>M/S INGRAM MICRO INDIA PVT. LTD VS. CC, DELHI</u>	Fake/Invalid ETA
63	<u>M/S N.R.INTERNATIONAL VS. CC, DELHI</u>	Conduct of the Appellant, Mis-Declaration, Under-valuation
64	<u>M/S RUBAL LOGISTICS PVT. LTD VS. COMMISSIONER OF CUSTOMS, NEW DELHI</u>	CBLR 2013, Negligence
65	<u>COMMISSIONER OF CUSTOMS, DELHI VS. M/S SARASWATI IMPEX</u>	Mis-Declaration
66	<u>M/S SRIAANSHU LOGISTICS VS. COMMISSIONER OF CUSTOMS, NEW DELHI</u>	CBLR 2013, Sublet, Due Diligence, Revocation
67	<u>PR. COMMISSIONER OF CUSTOMS, ACC (IMPORT), DELHI VS. M/S VIVO MOBILE INDIA PVT. LTD</u>	Additional Ground, Refund, Consumer Welfare Fund, Unjust-enrichment, Re-assessment, Finality
68	<u>M/S JAI SHIV TRADING CO. VS. CC, NEW DELHI</u>	Evasion of ADD
69	<u>M/S NEVINNOMYSSKY AZOT VS. DIRECTORATE GENERAL OF ANTI-DUMPING AND ALLIED DUTIES</u>	Condonation of Delay Application, Sufficient cause
70	<u>M/S CHINTAN ALUMINIUM PVT. LTD VS. CC, KANDLA</u>	Aluminium Foil Scrap, Valuation, Discount
71	<u>M/S VARSHA PLASTICS PVT LTD VS. CC, KANDLA</u>	Refund, Unjust-Enrichment, CA Certificate
72	<u>M/S AJANTA LIMITED VS. COMMISSIONER OF CUSTOMS, KANDLA</u>	Classification, Rules of Interpretation, HSN Explanatory Note
73	<u>M/S NAYARA ENERGY LTD VS. CC, KANDLA</u>	Exemption Notification No. 121/2002-Cus, Petromax HD catalyst gets consumed in final product.
74	<u>M/S ASIA MOTOR WORKS VS. CC, KANDLA</u>	EPCG, Valuation, Limitation
75	<u>M/S AL AMIN EXPORTS VS. C.C.E. & S.T., SURAT-I</u>	Illegal diversion, Extended time limit, Statement, Retraction, Cross-Examination, Option to pay reduced penalty
76	<u>M/S MULCHAND M ZAVERI VS. COMMISSIONER OF CUSTOMS, AHMEDABAD</u>	Past Import, WhatsApp Messages, Limitation
77	<u>M/S FLEXI TUFF INTERNATIONAL LTD VS. CC, KANDLA</u>	High Speed Diesel Oil, Exemption
78	<u>M/S SHREYANSH MARBLE TILES PVT. LTD VS. COMMISSIONER OF CUSTOMS, JAMNAGAR</u>	Seizure, Amendment Provisions of Section 110(2)

79	SHRI BATRA JAY VS. CC, AHMEDABAD	Prohibited goods, Absolute confiscation, green channel
80	M/S MIRACLE FOOD PROCESSORS INTERNATIONAL LTD VS. COMMISSIONER OF CUSTOMS	EPCG, Role of EPCG Committee vis-à-vis Customs
81	RAVI KUMAR R M VS. CC, BANGALORE	Gold biscuits, Foreign markings, Town seizure
82	M/S 3M INDIA LTD VS. COMMISSIONER OF CUSTOMS, BANGALORE-I	Classification, “Skin Barriers Micropore Surgical Tapes”, Notification No. 21/2002-Cus.
83	M/S ARBEE BIOMARINE EXTRACTS PVT. LTD VS. COMMISSIONER OF CUSTOMS	Classification, Squalene, Fish oil.
84	M/S PARISONS AGROTECH PVT LTD, M/S PARISONS FOODS PVT LTD VS. CC, COCHIN	Confiscation, Redemption Fine, Penalty
85	M/S LIBERTY OIL MILLS LIMITED VS. CC, COCHIN	Restriction on Palm oil through Kochi ports, Even if goods not available physically, Redemption fine leviable.
86	SHAMSHEENA MOHAMMED SHIHAVUDHEEN VS. CC, MANGALORE	Maintainability of Appeal, Smuggling
87	RAJNISH KANSAL VS. CC, LUDHIANA	Export of prohibited/restricted item
88	M/S SUN INTERNATIONAL VS. CC, DELHI	Branded goods, Counterfeit, Absolute confiscation
89	M/S TOUCHWOOD INDUSTRIES VS. COMMISSIONER OF CUSTOMS, DELHI	Classification, Educational charts, Printed books
90	M/S BERYL INFOSOL PVT. LTD. VS. CCE, DELHI	STP scheme, Capital goods installed and removed clandestinely.
91	M/S ZYMONUTRIENTS PVT. LTD VS. COMMISSIONER OF CUSTOMS, CHENNAI	Classification, Dried yeast, Chapter 21 or 23.
92	M/S COMPUAGE INFOCOM LIMITED, VS. PR. COMMISSIONER OF CUSTOMS, CHENNAI	Classification, CCTV, Television Camera
93	M/S HONDA SIEL POWER PRODUCTS LTD. VS.COMMISSIONER OF CUSTOMS (PORT-EXPORTS), CHENNAI	SAD Refund, Exemption Notification
94	GAURAV AGARWAL, PROPRIETOR M/S GURAV PAYAL BHANDAR VS. COMMISSIONER OF CUSTOMS, TIRUCHIRAPALLI	Import of silver, Foreign origin established from packing.
95	M/S VAS NOORULLAH & CO. VS. COMMISSIONER OF CUSTOMS (AIR), CHENNAI	Leather, Mis-declaration, Goods re-exported, RF imposed.
96	LIEUTENANT COLONEL GANESAN S. (RETD.) VS. COMMISSIONER OF CUSTOMS, CHENNAI	Import of gold, Complicity of security agency, Reliance on call records.
97	M/S SEA SWAN SHIPPING & LOGISTICS VS. COMMISSIONER OF CUSTOMS, CHENNAI	Penalty, CBLR 2013, COD Application, Issue of livelihood
98	MR. SURESH RAJARAM VS. COMMISSIONER OF CUSTOMS, CHENNAI	Smuggling of Gold Bars, Declaration not filed.

99	<u>SHRI. RAVI SADANAND VS. COMMISSIONER OF CUSTOMS, TUTICORIN</u>	Red Sanders, Burden of proof, Smuggling
100	<u>M/S TRL KROSAKI REFRACTORIES LTD VS. COMMISSIONER OF CUSTOMS, VISAKHAPATNAM</u>	Refund, Exemption notification, Re-assessment
101	<u>M/S COROMANDEL INTERNATIONAL LTD VS. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, GUNTUR</u>	Refund, Discount, Reassessment
102	<u>COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, HYDERABAD VS. M/S S.V. TECHNOLOGIES PVT LTD.</u>	Refund, Re-classificaion, Demand under Section 28
103	<u>COMMISSIONER OF CUSTOMS (PORT), KOLKATA VS. M/S CHIRAG CORPORATION</u>	Exemption Notification No. 21/2012, Power Tiller, Classification, Circular of Agricultural Ministry will not help.
104	<u>SHRI BIKASH SAHA, PROPRIETOR M/S BISHAL EXPORT VS. PRINCIPAL COMMISSIONER OF CUSTOMS (PREVENTIVE), KOLKATA</u>	Confiscation, Only Excess quantity liable for SAFTA Certificate.
105	<u>M/S INDIAN FARMERS FERTILIZER CO-OPERATIVE LIMITED VS. COMMISSIONER OF CUSTOMS (PREVENTIVE), BHUBANESWAR</u>	Refund
106	<u>SHRI BIKASH SAHA, PROP. OF M/S MOLY EXPORTS,VS. CC (PREVENTIVE), KOLKATA</u>	Misdeclaration, Confiscation, Mens-rea not essential for confiscation and penalty.
107	<u>M/S ADVANI PLEASURE CRUISE COMPANY PVT LTD VS. COMMISSIONER OF CUSTOMS (I), NHAVA SHEVA</u>	Classification of Casino Ship, Persuasive value.
108	<u>COMMISSIONER OF CUSTOMS (IMPORT), NHAVA SHEVA VS. M/S STAR INDUSTRIES</u>	Roasting of ore, No exemption benefit under Notification No. 4/2006-C.E.
109	<u>M/S GMR INFRASTRUCTURE LTD VS. COMMISSIONER OF CUSTOMS (EXP.), MUMBAI</u>	Import of machine for laying bituminous pavement, Exemption Notification No. 621/2002-Cus dated 01.03.2002, Sub-Contractor
110	<u>M/S HINDUSTAN PETROLEUM CORPORATION LTD VS. COMMISSIONER OF CENTRAL EXCISE, PUNE</u>	Notification No. 21/02-Cus, 82/04-Cus and 11/05-Cus. Import of commercial butane (LPG), Refund, ITC-SC relied.
111	<u>M/S HONDA SIEL CARS INDIA LTD VS. COMMISSIONER OF CUSTOMS (EXPORT PROMOTION), MUMBAI</u>	Refund under Notification No. 102/07-Customs, Limitation
112	<u>MS PRERNA SINGH, CEO, M/S SEVILLE PRODUCTS LTD VS. COMMISSIONER OF CUSTOMS (IMPORT-II), MUMBAI</u>	Mis-declaration of TV and RSP, Penalty on overseas company and person, parallel invoices, statement never retracted.
113	<u>M/S SAKAR INDUSTRIES PVT LTD VS. COMMISSIONER OF CUSTOMS, NHAVA SHEVA-I</u>	Exemption from Countervailing Duty (CVD), Molybdenum ore concentrate.
114	<u>M/S UNITED TRADERS VS. COMMISSIONER OF CUSTOMS, NHAVA SHEVA</u>	Manipulation of BIS Certificates, Samsung LED & Plasma Goods re-exported liable for confiscation as per Supreme Court (Western Components).

115	M/S VIJAYSHREE ALLOYS PUNE PVT. LTD VS. COMMISSIONER OF CUSTOMS, NHAVA SHEVA-V	Import of old and used pipes in place of aluminium scrap tread duty, Fine and Penalty upheld.
116	M/S. A V AGRO PRODUCTS LTD VS. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & CENTRAL GST, NEW DELHI	Settlement Commission, Co-noticee will not get automatic waiver, No blanket immunity.
117	COMMISSIONER OF CUSTOMS NEW DELHI (ICD, TKD) VS. M/S DAXEN AGRITECH INDIA PVT LTD	Persuasive Value
118	M/S WARNER BROS. (F.E.) INC. VS. COMMISSIONER OF CUSTOMS (I), MUMBAI	Royalty
119	COMMISSIONER OF CUSTOMS NEW DELHI (ICD TKD) (IMPORT) VS. BHARAT FOILS LTD	Limitation period for claiming Refund
120	M/S SAURASHTRA CEMENT LIMITED VS. C.C. JAMNAGAR (PREV)	Different Connotation
121	M/S LAXMI ENTERPRISES VS. COMMISSIONER OF CUSTOMS PREV. NEW DELHI	Electronic Evidence
122	M/S UNISONS CEARING PVT. LTD. VS. THE PRINCIPAL COMMISSIONER OF CIUSTOMS (GENERAL) MUMBAI	Time limits contained in CBLR directory in nature

BRIEF NOTES OF THE CASES

Service Tax

[Back](#)

1. [M/S JPG CONSTRUCTION PVT LTD Vs. COMMISSIONER OF GOODS AND SERVICE TAX, DELHI EAST](#)

Service Tax Appeal No.ST/50807/2019-[DB]-Delhi
Final Order No. 51040/2021

ST: *The issue arises for consideration is as to whether the appellant had submitted the application for refund of Service Tax within the stipulated time since the application filed for refund has been rejected on the sole ground that it was not submitted within the time with the Department. This Application was filed beyond the period prescribed in sub-section (3) of section 102 of Finance Act.*

Held: In absence of any provision for condoning the delay in filing the application, Commissioner (A), committed no illegality in upholding the order passed by Assistant Commissioner rejecting the application filed by appellant for refund of Service Tax on the ground that it was not filed within the time stipulated.

2. [M/S MGF EVENT MANAGEMENT Vs. COMMISSIONER OF CENTRAL EXCISE](#)

Service Tax Appeal No.ST/ 53191 /2014-[DB]-Delhi
Final Order No. 50154/2020

ST: *Appellant is operating parking areas in five Malls by way of providing parking to the patrons/visitors of shopping malls and collecting parking fees for which they have appointed an outside agency (Third Party Agency) for managing the parking area which is collecting "Parking Fees" on behalf of the appellants and remitting the proceeds to the appellant.*

Held: If the consideration is in terms of some benefit to the service provider which can be measured or converted into money it will constitute a valid consideration. Order-in-Original is upheld as far as legality of levy of Service Tax on the activity under 'management, maintenance or repair service' is concerned. However, the appellant will be entitled to avail CENVAT credit of Service Tax paid by the service providers and cum-tax benefit.

3. [M/S C. P. SYSTEMS PVT. LIMITED. Vs. COMMISSIONER OF SERVICE TAX](#)

ST: *Issue regarding filing of Cross Objection.*

Held: Cross Objection have to be filed within 45 days of the receipt of the notice of the Appeal as provided for under Section 86(4) of the Finance Act, 1942. However, sub section (5) of Section 86 provides that the Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objection after the expiry of the period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period. Bad financial condition of Company or the fact that main Appeal is still pending for final decision has no consequence on condoning delay for filing such application.

[Back](#)

4. [M/S MODI APOLLO INTERNATIONAL LIMITED Vs. COMMISSIONER \(ADJUDICATION\), DELHI](#)

Service Tax Appeal No. 00214/2012

Final Order No. 50023/2020

ST: *Time limit for filing Restoration of Appeal application.*

Held: Period of three months for filing the Appeal should be considered as the limitation for filing a Restoration Application. The explanation for the delay has to be accounted and supported with evidence.

5. [M/S PRASAR BHARTI \(BROADCASTING CORPORATION OF INDIA\) DOORDARSHAN Vs. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE, NEW DELHI](#)

Service Tax Appeal No. 55702/2014

Final Order No. 50762/2019

ST: *Overlapping periods covered in both show cause notices.*

Held: Though the first show cause notice dated 17 October 2008 that was issued to the appellant is for a part of the Financial Year 2007-08, namely from April 2007 to September 2007 which period is included in the second show cause notice dated 18 May 2009, but what needs to be pointed out is that the first show cause notice is based on the total income shown by the appellant in the ST-3 return for the said period. The show cause notice alleges that even on the taxable value shown in the ST-3 return, the appellant short paid Service Tax. It does not challenge the correctness of the taxable value shown in the ST-3 return. The second show cause notice, on the other hand, challenges the taxable value indicated by the appellant in the ST-3 return for the FY 2003-04 to 2007-08. It is stated that lesser taxable value has been shown. Therefore, no overlapping of issues in the two show cause notices.

6. [M/S INNOVATIVE CLAD SOLUTIONS PVT LTD Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, INDORE](#)

Service Tax Appeal No. ST/51361-64 & 51355/2016-[DB]-Delhi

Final Order No. 50374-50378/2019

ST: *Refunds were rejected by the lower authorities for being filed beyond the time limit of one year from the end of month in which actual payment of Service Tax was made by the SEZ unit to the registered service provider.*

Held: Notification No. 40/2012-ST dated 29.06.2012 exempts the services on which Service Tax is eligible under Section 66b. The said exemption is amended to have been provided by way of refund of Service Tax paid specified services received by the SEZ unit or the developer of SEZ and use for the authorized operations however subject to the conditions as mentioned therein including that the claim especially be filed within the year from the end of the month in which actual payment of Service Tax was made by such SEZ unit or developer of SEZ to the registered service. The refund claim was filed beyond the time limit as prescribed above. Admittedly there was no former application seeking condonation of the said delay except the oral submission of appellant before adjudicating authority. Law has been settled that the exemption Notification has to be construed strictly and there has to be strict interpretation of the same by reading the same literally. Once the said eligible criteria has not been made with or any condition pre-requisite for the said benefit has not been made that the benefit of exemption Notification cannot be made available to the assessee.

[Back](#)

7. [M/S JOHRI CABLE NETWORK Vs. THE COMMISSIONER \(AUDIT\), CENTRAL GOODS AND SERVICE TAX, JODHPUR-I](#)

Service Tax Appeal No. ST/52257/2018-[DB]-Delhi

Final Order No. 50348/2019

ST: *Appeal has been preferred against the OIA vide which the appeal of the appellant against the OIO has been dismissed on the ground of limitation*

Held: The absence of any effort to enquire about the orders in furtherance of the recovery proceedings as mentioned in the Newspaper, except a letter, is not sufficient for condoning delay of almost 6 years.

8. [M/S ARIHANT TILES & MARBLES PVT. LTD. Vs. COMMISSIONER \(APPEALS\), JODHPUR](#)

Service Tax Appeal No. ST/50120-50122/2019-[DB]-Delhi

Final Order No. 51400-51402/2019

ST: Delayed payment of interest amount. Assessee pleading interest, compensatory in nature and delay of 10 years in getting interest refunded, entitles assessee to be compensated for the same.

Held: As per Section 11BB of Central Excise Act, 1944, interest is allowed on delayed refunds but provision is silent about any interest on delayed payment of interest as claimed herein. Inordinate delay for grant of justified claim may entitle person to get compensation against that delay. However, Tribunal not empowered to award compensation as not being provided by statute.

9. [M/S BRIJESH CABLE NETWORK Vs. THE COMMISSIONER \(AUDIT\), CENTRAL GOODS & SERVICE TAX, JODHPUR](#)

Service Tax Appeal No. ST/52244/2018-ST [SM]

Final Order No. 50395/2019

ST: *Case of the appellant, where the appeal was filed before the Commissioner (Appeals) beyond limitation period.*

Held: No concrete efforts taken by the appellant to file the appeal despite it being published in the newspaper. Limitation being a statutory mandate, Commissioner (Appeals) cannot condone the delay. The appeal is hereby dismissed.

10. [M/S DIAMOND CONSTRUCTION Vs. COMM. OF CUS., C. EX. & S.T., JABALPUR](#)

ST Appeal Nos. ST/51592 with 51593/2016

Final Order Nos. ST/A/50340-50341/2019-CU(DB).

ST: Condonation of delay - Appeal filed beyond period of two months and extended period of one month from date of communication of order dismissed by Commissioner (Appeals).

Held: Appellate Authority can entertain appeal by condoning delay only up to 30 days beyond normal period for preferring appeal, which is 60 days. Commissioner (Appeals) therefore, justified in dismissing appeal on the ground of limitation.

11. [M/S HDFC BANK LTD Vs. COMMISSIONER OF CENTRAL EXCISE, THANE-II](#)

Service Tax Appeal No. 89458/2014(DB) - Mumbai

Final Order No. A/85818/2020

ST: The holders of credit cards provided by the appellant, as issuing bank, procure goods and services from merchant establishments and the expenditure so incurred becomes due for payment by the holder to the appellant at the end of the agreed-upon cycle as indicated in the billing statement. The debt to the merchant establishment is transferred, at pre-determined discount, to an acquiring bank, viz., VISA or Master card, which is credited by the issuing bank with the invoiced amount and the said discount is split between them. In cross-border procurements, the inter-bank transaction is agreed to be effected at rates of exchange of the currencies involved that prevail on the date of the transaction and to which the issuing bank adds 'mark-up' while billing the holder of the credit card. It is this additional amount [mark-up] retained by the appellant that is bone of contention between the tax authorities and the assessee.

[Back](#)

Held: The 'mark-up' charged by the appellant is neither received nor billed in convertible foreign currency and such being the determinant, along with location, for the rendering of service outside the tax jurisdiction, the claim of the appellant to be exempt from tax fails.

12. [M/S SAHARA INDIA TV NETWORK Vs. COMMISSIONER OF SERVICE TAX, MUMBAI-II](#)

Service Tax Appeal No. 85354/2015(DB) - Mumbai

Final Order No. A/85326-85327/2020

ST: It was observed that the appellant had incurred expenditure in foreign currency towards the services received from M/S Asia Satellite Telecommunication Company Ltd. (AsiaSat) for providing C-Band Transponder on Asisat-3S Satellite. The aforesaid activity of providing the C-Band Transponder, appeared to be provision of an infrastructural support to the business of assessee. Since AsiaSat was not having any establishment in India, assessee was required to discharge Service Tax liability as recipient of the services as per Section 66A of FA, 1994 r/w Rule 3(iii) of Taxation of Services Rules, 2006.

Held: The services rendered by M/S AsiaSat to assessee are nothing but "infrastructure support services" for supporting the business of broadcasting services undertaken by assessee.

13. [M/S NATIONAL SECURITIES DEPOSITORY LTD. Vs. COMMISSIONER OF SERVICE TAX-V, MUMBAI](#)

Service Tax Appeal No. 87451/2016(DB)-Mumbai

Final Order No. A/85598/2020

ST: The issue for consideration is, whether the services provided by assessee to their Depository participants are in nature of "provision and transfer of information and data processing" services taxable under category of Banking and Other Financial Services as defined by Section 65(12) of FA, 1994.

Held: The services provided by them to Depository Participants are covered by definition of Banking and Financial services and are liable to Service Tax under that category.

14. [M/S GO AIRLINES \(INDIA\) LTD Vs. COMMISSIONER OF SERVICE TAX – I](#)

Service Tax Appeal No. 89286/2013(DB)-Mumbai

Final Order No. A/85801/2020

ST: *Whether the impugned activity conforms to section 65(105)(zh) of Finance Act, 1994 and or to section 65(105)(zzzze) of Finance Act, 1994 and whether extended period can be invoked.*

Held: Though the information and database may be accessed at either end only by the appellant and intending passengers or agents, the taxability is in relation to such performace that can be undertaken only with the software and hosting provided by the overseas entity. The appellant, by entering into the impugned contract, has a customer-supplier relationship with M/s Radixx Solutions International Inc. This, undoubtedly, is in conformity with the taxable service. Also the liability to pay tax during extended period cannot be extinguished by adopting the plea of revenue neutrality.

[Back](#)

15. [M/S BANK OF AMERICA, NATIONAL ASSOCIATION Vs. PRINCIPAL COMMISSIONER, MUMBAI EAST](#)

Service Tax Appeal No. 87659/2016(DB) & 88202/2019(DB)-Mumbai

Final Order No. A/85801/2020

ST: *Scheduled Commercial Banks are required to deposit certain amount as premium for insuring the depositors account to the Deposit Insurance Credit Guarantee Corporation (DICGC). On the premium paid by them to the DICGC, they pay Service Tax, and claim the same as CENVAT Credit treating these services as input services for providing the output services. The issue before the bench was the admissibility of CENVAT credit on the insurance premium paid to DICGC and Service Tax paid on the commission paid to the brokers for underwriting the government securities etc. and for making investments in securities to maintain mandatory SLR as per the Banking Regulation Act, 1949.*

Held: The bench observed that the provisions of Finance Act, 1994 and the CENVAT Credit Rules, 2004 should be considered in the light of the said principles of interpretation as laid down by Apex Court. By extending the benefit by referring to insurance of the bank, and the banking business, may not be the justified approach as per this decision. The matter needs to be referred to President for constituting a larger bench to clarify the issues in this regard.

16. [CC, GST, MUMBAI WEST Vs. M/S JUHU BEACH RESORT LTD](#)

Service Tax Appeal No.87076/2019(DB)– Mumbai

Final Order No. A/86832/2019

ST: *Appellant applied for interest on refund of pre-deposit.*

Held: Pre-deposit having been made in 2008, assessee's entitlement for interest on the refund of pre-deposit would be from the date after expiry of 3 months from the date of communication of order in their favour. Accordingly, the impugned order granting interest from date of payment of pre-deposit was set aside.

17. [M/S TAFE REACH LTD. Vs. CENTRAL GST, SALEM](#)

Service Tax Appeal No.40793/2019(DB)-Chennai

ST: *Appellant providing both taxable as well as exempted services.*

Held: The Rules of CCR, 2004 for trading activity relating to consumables used for providing the service, cover situations where assessee provides both exempted and taxable services. Wherever someone undertakes activities that cannot be called a service or which is not “manufacture”, that activity goes out of the purview of both Central Excise Act, 1944 as well as Finance Act, 1994. In such cases, an assessee would be ineligible for claiming input-Service Tax credit on an output which is neither a service nor excisable goods. There is no provision to cover situations where an assessee is providing a taxable service and is undertaking another activity which is neither a service nor manufacture. In such a situation, the only correct legal position appears to be that it is for the assessee to segregate the quantum of input service attributable to trading activity and exclude the same from the records maintained for availing credit.

[Back](#)

18. [M/S TALKING TECHNOLOGY \(P\) LTD. Vs. COMMISSIONER OF SERVICE TAX, CHENNAI](#)

Service Tax Appeal No.41151/2013(DB)-Chennai

Final Order No.40679/2020

ST: *Case of the appellant providing manpower supply services, classification disputed by the appellant.*

Held: From the excerpts of the contract, it can be safely concluded that the nature of the contract is for supply of manpower. The consideration is paid on the basis of man-hours. It can also be seen that the work is executed as per the guidance of M/S. WTI. Thus, for carrying out the development, maintenance, etc., of software, the persons so deployed by the appellant to M/S. WTI are under the control of M/S. WTI and they work under the guidance and supervision of M/S. WTI. Hence the tendered service was held as Manpower recruitment and supply service.

19. [M/S EMARS MINING CONSTRUCTION PVT LTD Vs. COMMISSIONER OF SERVICE TAX, KOLKATA](#)

Service Tax Appeal No.194/2012(DB)-Kolkata

Final Order No. 75057/2020

ST: *The appellant is engaged in providing services relating to raising, extracting and transportation of iron ore. The appellant entered into the supplementary agreement from 2007-08 whereby the consideration receivable by the appellant was split into mining charges(40%) and transportation charges (60%).Demand on the ground that the such activities are clearly falling under ‘Mining Services’ and it cannot be artificially split into ‘Mining Services’ and ‘GTA Services’.*

Held: The activity undertaken by the appellants is composite activity. For the sake of interpretation and applicability of Service Tax, the contract cannot be vivisected. The terms of the contract being categorical, the division of the amount payable in a ratio appears to be only for the convenience of the parties involved and therefore it cannot be concluded that the services rendered by the appellants are under two different heads. Such an artificial bifurcation is not acceptable.

20. [M/S TATA STEEL LTD Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, JAMSHEDPUR](#)

Service Tax Appeal No.372/2011(DB)-Kolkata

Final Order No. 76176/2019

ST: *self service*

Held: Failure by assessee to prove that it was case of 'Self Service'. Revenue clearly establishing that it was service for which payment made to service provider by service recipient. Services rendered by the appellant was for consideration, in case of orders for executing service, the appellant had sub-contracted after making payment for which, the appellant had also taken credit for the Service Tax amount charged.

21. [M/S N.C. PAUL & COMPANY Vs. COMMISSIONER OF CENTRAL EXCISE, BOLPUR](#)

Service Tax Appeal No.132/2009(DB)-Kolkata

Final Order No.76934/KOL/2019

ST: *Contracts for transportation of Coal from Coal Handling Plant (CHP) Stock Yard to Railway Siding up to 06-07 K.M. and loading the Coal into Railway Wagon with incidental loading/unloading are essentially for transportation of Coal.*

Held:Two kinds of contracts undertaken i.e. contract for hiring of pay loader for loading of Coal into tippers for transportation within the mines and hiring of pay loader for loading of Coal at the Railway Siding for outward transportation but no separate quantification of demand in respect of each of them. Activities of hiring of pay loaders for loading of Coal at pit head within the mines for internal transportation cannot be classified under the category of Cargo Handling Service.

[Back](#)

22. [M/S COAL MINES PROVIDENT FUND ORGANISATION Vs. COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, RANCHI](#)

Service Tax Appeal No.70470/2013(DB)-Kolkata

Final Order No.75300/2020

ST:*The appellant manages funds like Coal Mines Provident Fund Scheme, Coal Mines Family Pension Scheme etc. The issue is whether the appellant has provided the service of asset management under the category of "Banking and Other Financial Services".*

Held: They are not performing any sovereign functions of the State. They are managing some funds and performing some functions for the workers of Coal Companies and are getting paid for such services. The appellant's functions are akin to the activities of other commercial organizations owned by the Government, such as, PSUs, While the nature of their activity is commercial, being owned by the Government, their business is so conducted to take into account some social objectives and goals. This, by itself, will not make their activities a sovereign function or get them exempted from the tax.

23. [M/S S.D. BUSINESS ENTERPRISES PVT. LTD. Vs. CST, KOLKATA](#)

Service Tax Appeal No.159/2008(DB)-Kolkata

Final Order No.76602/2019

ST:*Non-payment of Service Tax on the expenditure incurred towards warehousing, transportation, etc. sought to be claimed as reimbursement from the principal.*

Held: The amount of expenditure claimed as deduction by the appellant is not permissible and hence the appellant is liable to pay the demanded Service Tax.

24. [M/S EASTERN RETREADS \(P\) LTD. Vs. COMMISSIONER, GST, COCHIN](#)

Service Tax Appeal No. ST/41/2008-DB

Final Order No. 21005/ 2019

ST: *Non-payment of Service Tax on retreading of tyres.*

Held: Retreading of tyres falls under the category of "Maintenance, Management and Repair Service" and is liable to Service Tax

25. [KERALA COOPERATIVE DEPOSIT GUARANTEE FUND BOARD Vs. COMMISSIONER OF CENTRAL TAX AND CENTRAL EXCISE, THIRUVANTHAPURAM](#)

ST: *The assessee is a board constituted for administration of cooperative deposit fund, by the State Govt of Kerala. The contribution to the fund is the sum of money payable to the fund by the credit societies at the rate specified & the purpose of the scheme is to provide guarantee for the deposits made in the credit societies and to create confidence among depositors and attract more.*

Held: There is no doubt that the assessee's activities are similar to those of Deposit Insurance and Credit Guarantee Corporation of India (DICGC). Hence, if DICGC is liable to pay Service Tax, so is the assessee.

[Back](#)

26. [M/S MANGALORE INTERNET CITY PVT. LTD Vs. COMMISSIONER OF CENTRAL EXCISE AND CENTRAL TAX, MANGALORE](#)

Service Tax Appeal No.ST/20735/2019-[DB]-Bengaluru
Final Order No. 21216/2019

ST: *The appellant filed refund claim stating to have paid an amount of Service Tax with interest and penalty, following audit objections. However, the assessee later realized that there was no need to pay interest or penalty u/r 15 of CCR or u/s 78 of Finance Act, as they had sufficient balance of credit during the material period of alleged wrong availment of credit.*

Held: It is seen that the payment of 15% penalty was voluntary and based on this voluntary payment, SCN was waived and there was no protest raised by the assessee while making the payment. Further, as per the Board clarification dated 18/08/2015, payment of penalty without issuance of SCN was in accordance with law.

27. [M/S CHALET HOTELS PVT. LTD Vs. COMMISSIONER OF CENTRAL TAX, BENGALURU EAST](#)

Service Tax Appeal No. ST/20340/2019-SM
Final Order No. 20467/2019

ST: *Service Tax on advance collected, where contract was cancelled.*

Held: Appellant received the advance from the buyers along with Service Tax and paid the same to the Government as Service Tax and subsequently, the contract was cancelled between the appellant and his buyers and the appellant filed the refund claim filed beyond the period of one year as required under Section 11B and therefore the entire claim was hit by limitation of time. The contention that no service was provided and hence the provision of Section 11B of Central Excise Act is not applicable is devoid of merit.

28. [M/S FUTURE FOUNDATIONS PVT. LTD Vs. COMMISSIONER OF CENTRAL TAX AND CENTRAL EXCISE, THIRUVANTHAPURAM](#)

Service Tax Appeal No.ST/21074/2019-[DB]-Bengaluru
Final Order No. 20065/2020

ST: *Appellant paid Service Tax by mistake but came to know subsequently when the Board issued the Circular. The refund claim rejected as being hit by limitation. The appellant submitting that since tax paid is collected by department against authority of law envisaged in Article 262 of the Constitution, the same is refundable.*

Held:Period of limitation as provided under Section 11B of the Central Excise Act is applicable in the case of refund and the statutory time limit cannot be extended by any authority.

29. [M/S TPI ADVISORY SERVICES INDIA PVT. LTD Vs. COMMISSIONER OF CENTRAL TAX, BANGALORE NORTH](#)

Service Tax Appeal No.ST/20808/2019-[DB]-Bengaluru
Final Order No. 20067/2020

ST: *GST Regime came into being w.e.f. 01.07.2017 and subsequently between September and November, the appellant raised Credit Notes and another four invoices and paid GST on the same. After paying GST, appellants are seeking refund of the Service Tax of Rs.17,84,952/- which was paid during the period April to June 2017 on the ground that they have paid Service Tax and GST on the same four transactions.*

Held: Bench found that the appellant issued the GST invoices subsequently in the month of September and November 2017 simply at the instances of their clients. When the Service Tax was paid for the services rendered during the relevant period, the same was liable to be paid. The Service Tax paid by the appellant is in order and correct and there are no provisions u/s 11B of the CEA, 1944 for the refund of duty/tax that was liable to be paid legitimately.

[Back](#)

30.[M/S BROADBRIDGE FINANCIAL SOLUTIONS INDIA \(P\) LTD Vs. COMMISSIONER OF CENTRAL GST, SECUNDERABAD](#)

Service Tax Appeals No: 30910/2018 and 30911/2018
Final Order No: A/30624-30625/2019

ST: *The eligibility of input credit on health insurance service and services related to activities of scaffolding.*

Held: The activities such as scaffolding for replacement of facade glass of out gate area, fixing of toughen glass etc. are Works Contract Services and therefore, clearly excluded in the definition of 'input services' under Rule 2(l) as above. Health insurance services are clearly excluded from the Rule 2(l) of CCR 2004. Accordingly, the appellant is not entitled to the benefit of CENVAT credit on the invoices issued by M/S IFFCO-TOKIO towards health insurance.

31. [M/S GIMPEX PVT. LTD Vs. COMMISSIONER OF CENTRAL GST, TIRUPATI](#)

Service Tax Appeal No. 31016/2018
Final Order No.A/30618/2019

ST:*Refund claim filed under Notification No. 41/2012-ST, after one year from the date of let export order in respect of exported goods.*

Held:Notification No. 41/2012-ST clearly states that relevant date to be considered for one year for filing refund claim is the date of 'let export order'. As the entire benefit of refund accrues to the appellant only from the notification but for which no refund is admissible in this case, LEO is the relevant date to be considered and not the relevant date provided under Section 11B of the Central Excise Act. Notification, being an exception to the general rule, must be strictly construed. In the instant case as refund is filed beyond one year from the date of LEO, rejection of refund claims upheld.

32. [M/S A. H. TOURS & TRAVELS ORGANIZERS Vs. C GST, HYDERABAD-I](#)

Service Tax Appeal No. 810/2009
Final Order No.30900/2020

ST:*Assessee claims that the cab or motor car is not rented out but let out on hire.*

Held: When rent-a-cab scheme operator gives the car on rent, de facto possession is, of course, there but, it is not acceptable to uphold that wherever de jure control and possession of the vehicle stands transferred in law from the owner to the person on renting/hiring the service that the Service Tax is leviable and this is, of course, not different than services rendered on a contractual basis, providing transport service for fixed amount of periodical return or fare. Therefore, demand is upheld.

33. [M/S BHARAT HEAVY ELECTRICALS LTD Vs. CENTRAL GST, SECUNDERABAD](#)

Service Tax Appeal No. 30525/2019

Final Order No: A/31159/2019

ST: *Assessee filed application for cash refund of CENVAT Credit which remained unutilized. The said credit could not be utilized since this transitory cess amount could not be carried forward under GST Law.*

Held: Cash refund of unutilized of CENVAT credit is not permissible as there is no legal provision under which the same can be sanctioned.

[Back](#)

34. [M/S MIND Q. SYSTEMS PVT. LTD Vs. COMMISSIONER OF CUS., C. EX. & S.T., HYDERABAD-II](#)

Service Tax Appeal Nos. ST/636 & 647/2011

Final Order Nos. A/30661-30662/2019

ST: *Appellant claimed deduction from gross amount pertaining to sale of books, registration fee and examination fee under Commercial Training or Coaching Services.*

Held: Sale of books is not a separate enterprise by the assessee and not priced separately. The cost of the books, registration fee and the examination fee is also not billed separately. Hence, deductions not admissible.

35. [M/S HYDERABAD RACE CLUB Vs. COMMISSIONER OF CUS. & C. EX., HYDERABAD](#)

Service Tax Appeal Nos. 3376/2012; 20266/2014; and 30352/2016

Final Order Nos: A/30734-30736/2019

ST: *Appellant is providing space to bookmaker in the race club to run business of booking bets and charging book-makers stall fee. They also collected 'commission' which is the percentage of the betting amounts collected by the bookies for providing Inter-venue Betting Services.*

Held: Any service which is in relation to business or commerce and helps in enhancement of business amounts to Business Support Service. Providing a space in the club to a bookmaker is a facility given to run the business. The said service is, therefore, in relation to the business of bookie and thus definitely amounts to Infrastructural Support being provided to the booker by the assessee and is covered under Explanation to Section 65(104c) of Finance Act, 1994 defining BSS.

36. [M/S USHODAYA ENTERPRISES PVT. LTD Vs. COMMISSIONER OF CENTRAL TAX, HYDERABAD](#)

Service Tax Appeal Nos. ST/2775/2011 & 2787/2011

Final Order Nos. 31165-31166/2019

ST: *Hire/lease of transponders attached to satellites under Business Support Services.*

Held: Agreement is between one party of the contract in India and another beyond the territory of India. As such the transaction is not eligible to be classified/to be known as sale. Resultantly the question of hire/leasing of goods from a person who is not in the territory of India cannot be classified/known as deemed sale. Service of providing

transponders on hire basis by IGSMIL to UEPL classifiable under Business Support Services inviting tax liability.

37. [M/S NAVAYUGA ENGINEERING COMPANY LTD Vs. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, VISAKHAPATNAM-I](#)

Service Tax Appeal No: ST/730/2010

Final Order Nos. 30902/2020

ST: *Appellant who is a Engineering and Construction firm, constructed a bridge on BOT basis and was allowed to collect toll fee by the Government to recover the investment made. Appellant transferred the right to collect toll to its subsidiary for a consideration. The transferee collected toll fee in the name of the appellant.*

Held: The toll payer was under the impression that they were dealing with the appellant. As the entire amount has been paid upfront, the toll fee is retained by the franchisee. Adopting a convenient method of financial arrangement, would not take the service outside the ambit of Franchisee service.

[Back](#)

38. [M/S FLYTECH MEDIA PVT. LTD Vs. COMMISSIONER OF CENTRAL TAX, HYDERABAD-II](#)

Service Tax Appeal No. 1485/2011

Interim Order No. IO/ST/3/2020

ST: *Orders Passed by Commissioners after 19-8-2009 when Section 84 of Finance Act, 1994 was amended to provide appellate remedy against order of adjudicating authority subordinate to Commissioner, instead of revision earlier, and omitting "or Section 84" from Section 86(1) ibid enlisting appealable orders Whether Tribunal has a right to entertain appeals against Orders-in-Revision after 19-8-2009 in the absence of any explicit provisions by way of saving clause in Section 86 ibid?*

Held: In view of conflicting decisions given by Tribunals of Bangalore and Mumbai, matter is referred to Larger Bench for a decision on the maintainability of appeals filed under Section 86 of Finance Act, 1994 after 19-8-2019 by both the Revenue and the assessee against Orders-in-Revision passed by the Commissioners.

39. [CENTRAL GST AND CUSTOMS, HYDERABAD-IV Vs. M/S NATIONAL REMOTE SENSING AGENCY](#)

Service Tax Appeal Nos. 401 & 402/2008

Final Order Nos. 30898-99/2020

ST: *The nature of the services rendered by the appellant are photo processing of aerial films, general photography, photography by low level flying aircrafts specially suited for the purpose etc.*

Held: Tribunal held that all these services squarely fall under the definition of 'Photography service' as per Chapter V of the Finance Act, 1994. NRSA not being a commercial concern, cannot be charged prior to 01-07-2012 as the term 'commercial concern' has been substituted by the term 'any person' only from 01-07-2012.

40. [M/S VIVIMED LABS LTD Vs. COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX, HYDERABAD – III](#)

Service Tax Appeal No. 1325/2011

Final Order No. A/30908/2020

ST: *The appellant availed services for placing Foreign Currency Convertible Bonds (FCCB) in the International Capital Market to raise capital.*

Held: The nature of services rendered by the service providers falls squarely within the definition of merchant banker in terms of the SEBI (MBR 1990). Therefore, in terms of Section 65(12)(a)(iii) the services rendered squarely fall under the definition of bank and other financial services. As the recipient of these services, the appellant was required to pay Service Tax under reverse charge mechanism in terms of Section 66A of the Finance Act, 1994 r/w Rule 2 of Service Tax Rules, 1994.

41. [M/S COMEXX Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, AHMEDABAD](#)

Service Tax Appeal No. 592/2011(DB)-Ahmedabad
Final Order No. A/10859/2020

ST: *The assessee is engaged in booking orders for its foreign principals and receive commission for the services in convertible foreign currency. They are seeking refund of the amount of Service Tax paid by them as they were not liable to pay any Service Tax. There were decisions holding that provisions of Section 11B are not applicable to any amount which was paid by mistake or which was not payable.*

Held: The refund claim filed by assessee would be governed by the provisions of limitation prescribed under Section 11B of CEA, 1944. Since the refund was filed after expiry of limitation, the same cannot be entertained.

[Back](#)

42. [M/S KETAN CONSTRUCTION LTD Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, RAJKOT](#)

Service Tax Appeal No. 278/2010(DB)-Ahmedabad
Final Order No. A/ /2019

ST: *The issue at hand is whether the services rendered by the assessee in respect of collection of toll fee in respect of National Highway Authority of India will attract Service Tax under the heading of Business Auxiliary Service.*

Held: The appellant therein issued bills in the form of toll fee tickets to the users and also collected toll fee on behalf of its client from the users of the toll road and also arranged for security of such amount. The appellant therein also submitted information about different types of vehicles passing through the road and also about exempted vehicles. Hence the appellant therein was held to have provided services incidental and ancillary to its client. Therefore the tax liability under Business Auxiliary Service is uphold.

43. [M/S CHHATARIYA DEHYDRATES EXPORTS Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX](#)

Service Tax Appeal No. ST/626-628/2011(DB)-AHD
Final Order No. A/11476-11478/2019

ST: *The assessee is exporter of Dehydrated onion and paying commission to sales agents abroad. Demand has been made in respect of Service Tax on said sales commission on reverse charge basis.*

Held: Commission to sales agent located abroad and the demand is raised in terms of Section 66A. Entitlement for full exemption under Notification NO. 14/2004-ST dated 10.09.2004 as service was in respect of agriculture products and also under Notification No. 13/2003-ST dated 20.06.2003, as amended by Notification No. 8/2004-ST dated 09.07.2004 which grants esemtotion in respect of commission paid for sale of agricultural produce. Dehudrate onion is not covered by the said definition and Dehudrate onion cannot be called as agricultural produce. Dehydrate onion cannot be called as agricultural produce in terms of Notification No. 13/2003/ST. Notification NO. 14/2004-ST dated 10.09.2004 is also not applicable as the service provided are not covered by any clause of the said notification.

44. [M/S SHREE GURUKRUPA CONSTRUCTION COMPANY Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, RAJKOT](#)

ST: *The assessee had obtained work orders from Gujarat State Police Housing Corporation Limited (GSPHCL) and had constructed residential quarters for the staff of Gujarat Police.*

Held: There is no dispute on the taxability as has been held by Larger Bench that the subcontractor is independently liable to pay Service Tax even though Service Tax liability has been discharged by the main contractor. Therefore, the demand on merit is clearly sustainable.

45. [M/S IILM BUSINESS SCHOOL Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, RAJKOT](#)

ST: *The appellants are engaged in imparting courses such as MBA, PGP Program (industry integrated). SCN was issued to the appellants demanding Service Tax on this activity under the head of 'Commercial Coaching and Training'.*

Held: The appellant is not recognized by law to grant any degree and therefore, the service provided by the appellant qualifies as 'Commercial Coaching and Training'.

[Back](#)

46. [M/S MASTI TOURS & TRAVELS Vs. COMMISSIONER OF C.E. & S.T., SURAT-I](#)

ST: *Credit of tax deducted by International Air Transport Association (IATA) agent. Assessee providing services to IATA agent and receiving commission on which IATA agent had paid Service Tax.*

Held: The credit has been taken by the assessee on certain invoice raised by the IATA agent. Assessee were providing services to IATA agent and receiving commission on which the IATA agent had paid Service Tax. They had taken credit on the said Service Tax. The Credit is inadmissible because if the assessee was providing service to IATA then it was responsibility of the appellant to pay Service Tax and not by IATA agents. Moreover if the appellant were providing services on the commission basis to IATA agents, then IATA agents could have availed the credit in these circumstances.

47. [M/S S SOOD AND COMPANY Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, LUDHIANA](#)

ST: *Amount collected representing Service Tax, has to be deposited irrespective of correct classification of service.*

Held: During the impugned period, the appellant had collected certain amount as Service Tax for the services in question from their clients but not deposited. The same is required to be deposited under Section 73(D) of the Finance Act, 1994. Appellant directed to deposit whole of the amount collected as Service Tax from their clients along with interest within 30 days of the receipt of this order.

48. [GURUPREET SINGH MATAHRU Vs. COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH-I](#)

ST: *The assessee is engaged as a distributor for products manufactured by M/S Amway India Enterprises and did not discharge the Service Tax liability on the consideration paid to them by M/S Amway.*

Held: RCM (Right Concept Marketing) Business Marketing Plan is a clear Multilevel Marketing Services Scheme. The consideration/commission received by the appellants is the result of the marketing/promotion of Amway Products by the appellants and constitutes a service (business Auxiliary Service), provided in respect of Amway products to M/s Amway. The commission/consideration is provided according to the terms and conditions, for marketing / promotion efforts by the appellant. The receipt of commission by the appellants clearly made them providers of "Business Auxiliary Service" as defined under Section 65(19) of the Act.

49. [M/S INDO GLOBAL ESTATES Vs. COMMISSIONER OF C.E. & S TAX CHANDIGARH I](#)

Service Tax Appeal No. ST/1397/2010-[DB]-Chandigarh
Final Order No. A/60335/2020

ST: *Case of refund filed by the appellant.*

Held: Hon'ble Supreme Court (Constitutional Bench-9 Member Bench) in Mafatlal Industries Ltd. observed that the Central Excise Act, 1944 and the Rules made thereunder including Section 11B to constitute "law" within the meaning of Article 265 and the said provisions are exclusive in their nature, no claim for refund is maintainable except and in accordance therewith.

[Back](#)

50. [COMMISSIONER OF SERVICE TAX, NEW DELHI Vs. M/S MELANGE DEVELOPERS PVT. LTD](#)

Service Tax Appeal No. 50399/2014
Final Order No. 50255-50256/2019

ST: *Applicability of Service Tax on sub-contractor.*

Held: CESTAT Larger Bench held that it is not in dispute that the activity undertaken by the sub-contractor falls under the category of WCS. From the provisions of the Finance Act, 1994 viz. Section 66 & 68, it is clear that every person (which would include a sub-contractor) providing taxable service to any person (which will include a main contractor) shall pay Service Tax at the rate specified in Section 66 in the manner specified and the manner has been provided for in the CCR. Thus, in the scheme of Service Tax, the concept of CENVAT credit enables, every service provider in a supply chain to take input credit of the tax paid by him, which can be utilized for the purpose of discharge of taxes on his output service.

51. [M/S AKBAR TRAVELS OF INDIA PRIVATE LIMITED Vs. PRINCIPAL COMMISSIONER OF CENTRAL GOODS & SERVICE TAX, JAIPUR- I](#)

COD Application No. ST/COD/50393/2019
Service Tax Appeal No. 50932/2019-DB-New Delhi
Final Order No. 50945/2019

ST: *Condonation of delay application by the appellant.*

Held: Application of 1390 days delay dismissed by Hon'ble CESTAT. The Appellate Court is not a Court of remedy for lethargy and laidback attitude of the party. Further, Hon'ble Tribunal observed that it has become very common in filing appeals along with an application seeking condonation of delay by stating trivial reasons. If Courts are liberal in granting such relief, it will lead to multiplicity of proceedings and waste of valuable judicial time. If the party has not shown any diligence in pursuing the matter, no reason to entertain the appeal.

52. [M/S HANUMANT CONSTRUCTION PVT LTD Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, RAIPUR](#)

Service Tax Appeal No. 56566/2013(DB)
Final Order No. 52288/2018

CCAR NEW DELHI

ST: *Service Tax on site formation service in a mining area.*

Held: The activity of removal of over burden is liable for Service Tax under site formation service. Even though such activity is carried out in the mining area, the contract does not cover any other activity related to mining. Hence, it is to be considered as a service contract simpliciter for the activity of removal of over burden.

53. [M/S INDIRA GANDHI RASHTRIYA URAN AKADEMI Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, LUCKNOW](#)

Service Tax Appeal No. ST/70741/2016-CU [DB]—Allahabad
Final Order No. 70173/2019

ST:*The Hon'ble High Court on 21.01.2014, decided an issue in favour of the party for the period 2004-05 to 2009-10. Based on this High Court's Order dated 21.01.2014, party filed refund claim on 22.04.2014, for the Service Tax paid in 2012 on the same issue.*

Held:CESTAT held that relevant date under Section 11B is the date of payment of duty and therefore, the refund application is barred by limitation.

[Back](#)

54. [M/S MESSRS XSIS ALERT Vs. C. S. T. & S. T. AHMEDABAD](#)

Appeal No. ST/505/2010-DB-AHMEDABAD
Final Order No. A/10469/2019,

ST: *Service Tax not paid on sou-moto assumption.*

Held: The appellant had not suo-moto disclosed their intention of not paying the Service Tax on their belief that the activity is not taxable. It is only when the department started inquiry by writings letter, the appellant responded that the service is not taxable; therefore, it amounts to suppression of facts.

55. [M/S SAVITRI LEASING AND FINANCE LTD Vs. COMMISSIONER OF CENTRAL EXCISE AND GST](#)

Appeal No. ST/52834/2018[SM]-DELHI
Final Order No. 53345/2018

ST: *Time limit for issuing show cause notice in a case of VCES.*

Held: The argument of the appellant that the Show Cause Notice is barred by limitation held to be not sustainable, because the time limit for issuing notice under section 111(2) of VCES will be applicable only, if the assessee is entitled to file the VCES. Once, it is apparent on record that rejection of VCES of appellant is correct due to a wrong declaration and non compliance of statutory provision, there is no need to look into the issue of limitation.

56. [M/S SUBWAY SYSTEMS INDIA PRIVATE LTD Vs. CST, DELHI – II](#)

Service Tax Appeal No. 50099 and 50101 of 2016—ND
Final Order No. 50411-50412/2019

ST:*Whether bifurcating the amount of weekly gross sales into the payment of royalty (@ 8% thereof) and the payment towards Franchise Advertisement Fund (@ 4. 5% thereof) takes the later value out of the ambit, what is called as gross value.*

Held: The franchise service is not confined merely to the representational right to sale or manufacture goods or to provide the service, but it extends to any process identified with franchisor with respect to the trade mark, service mark, trade name etc. The

amount, in question, is the part of the weekly gross sales being given by the service recipient to the service provider mutually consenting for the same to be used for the process identified by the assessee to advertise the subway brand/trade name. Hence, it is not simpliciter on advertising service, but is very much the part of the franchise service. The Appellants were discharging their tax liability qua the royalty amount received from the franchise which was equal to 8% of the total gross sales, but, no liability was being discharged for an amount received equal to 4.5% of the weekly gross sales towards the contribution referred to as Subway Franchise Advertisement Fund Trust (SFAFT)

57. [M/S WILD EXPEDITION TOURS & TRAVELS Vs. CCE, BHOPAL](#)

Service Tax Appeal No. 50218/2014-ND
Final Order No. 53531/2018

ST:Service Tax on rent-a-cab service.

Held:Providing cars on monthly basis falls under the category of Rent-a-Cab Service. The Assessee cannot escape tax liability on the grounds that the hiring is different from renting as the intention of the Government is to tax provider of service which involves both hiring and renting of a cab for a longer duration. Hon'ble Tribunal's Judgement of R. S. Travels has been reversed by Hon'ble Gujarat High Court in Vijay Travels case.

[Back](#)

58. [M/S CAPL HOTELS AND SPA PVT. LTD Vs. COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, GURGAON](#)

Defect Diary No. 50013/2018
Defect Miscellaneous No. 95/2019

ST:Based on the audit of the assessee, the Show Cause Notice was issued by Commissioner of Service Tax, New Delhi, but after restructuring the Assessee fell under the jurisdiction of Commissioner of Service Tax, Gurgaon, who adjudicated the Show Cause Notice. The assessee argued that based on the location of the Commissionerate, who conducted audit of the assessee and who issued the SCN, the location of Appellate Tribunal should be decided.

Held: Hon'ble CESTAT distinguished the Hon'ble Supreme court Judgment of M/S Ambica Industries and decided that the regular appeal will lie at CESTAT, Chandigarh.

59. [M/S PVR LTD Vs COMMISSIONER OF SERVICE TAX, DELHI](#)

Service Tax Appeal No. 241/2012
Final Order No. 52843/2017

ST: Pouring fee is taxable under BAS.

Held: Regarding consideration received as "pouring fees" from Pepsi, for display and sale of various Pepsi products by multiplex cinema halls, it was held that pouring fees is not an additional discount and is taxable under BAS. If pouring fee is to be considered as non-compete fee, first of all there should have been indication in the agreement to that effect and second such non-compete arrangement should be enforceable by law. Payment of an amount to dissuade the appellant from displaying competitor's products by itself cannot be equated to a non-compete agreement. Pouring fees cannot be considered as a discount for sale transaction or as a payment for non-compete. Plea regarding non-taxability of the said consideration was rejected. The Appellants, who was registered with the department did not disclose the receipt of consideration as pouring fees in any of their returns.

[Back](#)

60. [M/S POONAM ROOFING PRODUCTS PVT. LTD. VS. COMMISSIONER OF CENTRAL EXCISE, PUNE-III](#)

Service Tax Appeal No. 85557 & 8558/2014
Final Order No. A/85255-85256/2018

ST: Permitting the use of 'trademark' which remains under the control of owner/transferor is a service under IPR.

Held: The factual matrix in the case is that no exclusive rights to use trade name 'Swastik' has been given to the transferee. The transferor is free to give this trademark to others even in the same territory. The transferee is not free to permit use of trademark by anybody else, i.e. they cannot sub-license. The transfer is only for certain currency of time. In effect, permitting the use of 'trademark' which remains under the control of owner/transferor, is a service under IPR.

61. [M/S INDIAN INSTITUTE OF PLANNING AND MANAGEMENT VS. COMMISSIONER OF SERVICE TAX, DELHI](#)

Service Tax Appeal No. 523/2012
Final Order No. 51033/2018

ST: Courses awarding certificates not recognized by law do not deserve exemption from taxability under Commercial Training or Coaching Service.

Held: Commercial Training or Coaching Service occurs when any institute or establishment is imparting skill, knowledge or lessons on any subject or field, irrespective of whether such imparting of skill knowledge or lessons is in respect of particular discipline or a broad spectrum of disciplines / academic areas, however, such activities provided by any entity, institution or establishment which is excluded by a specific and legislated exclusionary clause would alone be outside the fold of the taxable activity.

62. [M/S SATYA PRAKASH BUILDERS PVT. LTD. VS. COMMISSIONER OF CENTRAL EXCISE, JAIPUR-I](#)

Service Tax Appeal No. 50438/2014
Final Order No. 52777/2017

ST: Valuation in cases of no direct consideration to be under Rule 3(b) of Valuation Rules, 2006, where the basis of valuation is 'Cost of Provision of Service'.

Held: Appellant, a builder, collected fund from purchasers of residential units to be transferred to the Welfare Association, as and when formed, for maintenance and management of the said residential complex. Valuation of the taxable service to be done under Rule 3(b) of Valuation Rules, 2006 read with Section 67 of the Finance Act, 1994. When tax liability of the Appellant is upheld, the method of arriving at the tax value has to be made in terms of Rule 3(b), which prescribes the equivalent money value equal to cost of provision of such taxable service.

63. [M/S ICICI BANK LTD VS. COMMISSIONER OF SERVICE TAX-IV, MUMBAI](#)

Service Tax Appeal No. 86237/2015
Final Order No. A/85281-85290/2019

ST: The activity of accepting deposits of the customers by the banks is neither a taxable service nor an output service under CENVAT Scheme. Accordingly, any Service Tax paid in relation to the premium for insuring such deposit cannot be considered as cenvatable.

Held: Premium paid on deposit insurance to DICGE (Deposit Insurance and Credit Guarantee Corporation) is not an 'Input Service'. Appellants are not eligible to avail CENVAT credit of the amount of service tax paid to DICGC for insuring the deposit of the customers involving the period post 01.04.2012.

64. [M/S SHREE RANIE GUMS AND CHEMICALS PVT LTD VS. COMMISSIONER OF CENTRAL EXCISE, JAIPUR-II](#)

Service Tax Appeal No. 1052-1060, 1474 & 1750/2011
Final Order No. 53507-53517/2017

ST: The demand for normal period is sustainable even when the demand for Larger/Extended period is not sustainable.

Held: On the issue whether the demand for normal period would be saved or not, the

Hon'ble Tribunal held that the right of the Revenue to recover Service Tax not paid or short-paid is a substantive right in terms of Section 73(1). The said provision is invoked by Central Excise Officer to demand Service Tax, not paid or short paid. The period of limitation being procedural has to be examined in this context. When the demand for longer period was held to be not sustainable, then the whole demand will not fall and demand for normal period will be saved.

Central Excise

[Back](#)

1. [M/S ROTOCAST INDUSTRIES LTD VS. CCE, RAIPUR](#)

Excise Appeal No. E/1918/2010(DB)

Final Order No. 50985/2019

CE: *The appellant argued that when there is no additional consideration flowing from the customer to the assessee, the cost of any drawing provided by the customer is beyond the scope of Section 4 of Central Excise Act, 1944.*

Held: Tribunal held that there was no reason to differ from the earlier decision in Final Order No. A/56665 of 2017-Ex (DB) dated 21.09.2017 in the case of Magadh Precision Equipment Ltd. VS. Commissioner of Central Excise, Indore. It is statutory mandate that any other expertise as that of drawings, technical knowhow etc., if it is utilized in the manufacture of a product the value thereof, irrespective of whether it was, or not in terms of money has to be part of the transaction value.

2. [M/S BHARAT HEAVY ELECTRICALS LTD VS. CCE, KANPUR](#)

Excise Appeal Nos. E/1164/2011, 70734/2016, 70874/2018(SM)

Final Order No. 71802-71804/2019

CE: *In these cases, the assesses issued provisional invoices in large number of contracts, the price variation clause was available.*

Held: The final price was arrived subsequently and the assessee paid the differential duty on finalisation of assessment by way of issuance of supplementary invoices. In all such cases interest becomes payable from the date when the duty was required to be paid till the date it was paid.

3. [M/S PANASONIC AVC NETWORKS INDIA CO. LTD VS. COMMISSIONER OF CENTRAL EXCISE, NOIDA-I](#)

Excise Appeal No.70167/2016

Final Order No. 70073 / 2020

CE: *Assessee is engaged in manufacture of sub-assemblies of colour T.V. and audio systems falling under Chapter 85 of the First Schedule to the Central Excise Tariff Act, 1975. The dispute relates to the correct classification of the colour Television (C.T.V.) sub assembly manufactured by the appellants and cleared by them. Revenue held a believe that the goods cleared by appellant were nothing but complete TV sets.*

Held: Various parts of television sets cleared in SKD conditions have to be treated as clearance of complete television sets falling under CTH 85 29 00.

4. [M/S ADHUNIK MEGHALAYA STEEL PVT LTD VS. CCE, SHILLONG](#)

Excise Appeal No. E/206/2009DB)

Final Order No. 75346/2020

CE: *Goods procured and cleared by the manufacturer as such and claimed refund of the amount paid under Notification No. 32/99-CE.*

Held: The exemption contained therein, though made operational through a refund mechanism, shall be applicable to the goods manufactured by the units and not to goods procured and later cleared by the manufacturer as it is.

[Back](#)

5. [M/S H S BUILDERS & OTHERS VS. CCE & ST, BHUBANESHWAR](#)

Excise Appeal No. E/494/2009(DB)

Final Order No. 75371-75373/2020

CE: *Steel tanks were fabricated by the assessee and shifted to the premises of Oil Companies. The end pieces of the steel tanks and valves etc., are being attached at site. Assessee claimed that before the steel tanks reached the buyers' premises, they are incomplete and cannot be called as steel tank at all. The issues were whether the tanks fabricated by the assessee are goods and whether they are liable to Central Excise Duty.*

Held: The impugned goods are liable to excise duty. Tribunal's decision in the case of V.D. Engineering VS. CCE, Jabalpur [2019(366) ELT 123 (Tri. Del.)] was followed.

6. [M/S MAHASHAKTI CEMENTS VS. CCE & ST, GUWAHATI](#)

Excise Appeal No. E/507/2010(DB)

CCAR NEW DELHI

CE: Assessee is availing benefit under Notification No. 33/1999-CE dt. 08.07.1999 for area specific rate of valuation. The assessee made application to the jurisdictional Central Excise Commissioner for determination of special rate beyond the stipulated time period.

Held: This issue has been settled by the Hon'ble Supreme Court. On the question of condonable limit for delay in the case of Singh Enterprises VS CCE, Jamshedpur [2008 (221) ELT 163 (SC)] which is against the assessee. The delay cannot be condoned beyond statutory time limit. Further, it is now well settled that the exemption notification must be strictly construed according to intention of legislature.

7. [M/S TEXMACO LTD VS. CCE, KOLKATA - III](#)

Excise Appeal Nos. 521 and 624/2010

Final Order No. 75327-75328/2020

CE: Assessee availed CENVAT credit on the amount of additional duty of Customs (CVD) and special additional duty of Customs (SAD) paid on the imported inputs. Some of such inputs were transferred to their Sister Unit after reversing the CENVAT Credit. They reversed only the CVD and not the credit of SAD availed by them.

Held: Assessee treated the transferred goods as duty paid and also reversed some portion of the CENVAT Credit so availed. The amount of CENVAT Credit so reversed was taken as credit by the sister unit. Under the circumstances, Tribunal found no force in the argument of the Assessee that the goods which were treated by them as duty paid for the purpose of reversing CENVAT Credit of CVD must be treated as duty free for the purpose of reversing SAD. Once the Assessee has reckoned the goods as a duty paid, they must reverse the entire amount of CENVAT Credit availed on them.

8. [M/S DIAMOND BEVERAGES PVT. LTD VS. CCE, KOLKATA - VI](#)

Excise Appeal No.540 of 2009

Final Order No. 75221/2020

CE: The assessee were sanctioned refund as well as interest on the refund as applicable under Section 11BB of the Central Excise Act, 1944. Now they claim interest on belated payment of interest.

Held: There is no provision for payment of interest on such interest if the interest itself was paid belatedly. The question of law which arises is when there is no explicit provision for payment of interest on interest, whether it can be paid. This question of law was decided by Three Member Bench of the Apex Court in the case of Commissioner of Income Tax, Gujarat VS. Gujarat Fluoro Chemicals: 2013 (296) ELT 433 (SC).

[Back](#)

9. [M/S LUKWAH TEA ESTATE VS. CCE, DIBRUGARH](#)

Excise Appeal No.75002 of 2015

Final Order No. 76924/2019

CE: The assessee has submitted their application after nine years from the date of completion of expansion seeking exemption under Notification No. 33/99-CE dated 08.07.1999 and not stated any reasons for the inordinate delay.

Held: Tribunal found that the exemption Notification in question was conditional. It required the manufacturer to submit a statement of duty paid etc. on a monthly basis to the Assistant/Deputy Commissioner, who is required to verify the same and refund the amount. Tribunal followed the judgement of the constitutional bench of the Hon'ble Apex Court in the case of Dilip Kumar (supra) wherein it was categorically held that benefit of an exemption Notification must be construed strictly and any benefit of doubt must go in favour of the Revenue.

10. [M/S HALDIA PETROCHEMICALS LTD VS. CCE & ST, HALDIA](#)

Excise Appeal No. 75674/2017

Final Order No. 75330/2020

CE: *As per scheme of West Bengal VAT Department, Appellants were entitled to applicable rate of VAT on their clearances and collect the same as VAT from the customers but they did not pay to the State government. Revenue is of the opinion that the additional amount which has been collected by the appellant from their customers as representing VAT but which was not been deposited as VAT forms an additional consideration for sale and therefore, Excise Duty had to be paid on the same.*

Held: The question was whether the amount of VAT collected from buyers and not paid to the Govt. in includible in assessable value. The issue was finally decided by the Hon'ble Apex Court in the case of M/s Bharat Roll Industry (CA No. 4621/2008) wherein it was held that Central Duty had to be paid on such amount which are retained by the assessee.

11. [M/S SOVA SOLAR LTD VS. CCE & ST, DURGAPUR](#)

Excise Appeal No. 75677/2017

Final Order No. 75365/2020

CE: *The issue in dispute is whether the appellant is entitled to duty-free inputs (both imported and indigenous) under the exemption Notifications 52/2003-CUS dated 01.03.2003 and 22/2003-CE.*

Held: It is undisputed that the appellant is a 100% EOU, they imported inputs availing the benefit of exemption notification available only to 100% EOUs. These exemption notifications are available to the EOUs even if the final products are cleared to DTA. However, where the final products are cleared to DTA and such final products are not excisable, no benefit of exemption on the inputs is available to the appellant. The demands on this ground must sustain. Tribunal also found that the appellant was not entitled to the benefit of exemption Notification No. 24/2005-CUS or notification no. 132/206-CUS in respect of inputs procured by them and not consumed for non-adherence to the procedure set out in the Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996. Further, the appellant was found not entitled to the benefit of exemption Notification No. 06/2006-CE as parts which they have produced either by importing or from other indigenous suppliers, were not consumed within the factory of production.

[Back](#)

12. [M/S BRAHMAPUTRA CRACKER & POLYMER LIMITED VS. CCE, DIBRUGARH](#)

Excise Appeal No. 75336 of 2018

Final Order No. 75077/2020

CE: *The assessee wanted to include registration of one of their plants where no excisable commodity was manufactured with another plant situated at a distance of 48 km but connected with pipelines for the purpose of availing CENVAT credit on capital goods installed at the former.*

Held: The Tribunal held that processing unit where no excisable goods were produced are not entitled for registration under Central Excise. Since registration was not permitted, there is no question on the eligibility of CENVAT credit on Capital goods. The judgement of Dilip Kumar & Company (SC) relied upon.

13. [M/S DECCAN CEMENTS LTD VS. COMMISSIONER OF CENTRAL TAX, RANGAREDDY](#)

CE: CENVAT credit on Clean Energy Cess.(CEC)

Held: CENVAT credit of Clean Energy Cess not admissible as (i) Rule 3 of Cenvat Credit Rules, 2004 does not specify said Cess as duty of which credit has been specifically allowed to be taken; (ii) Finance Act, 2010, has not made Section 37 of Central Excise Act, 1944 and Rules made there under applicable on CEC; (iii) spirit of levying CEC was to discourage use of polluting forms of energy and encourage using cleaner energies based on Polluter Pays principle and accordingly allowing credit of this Cess would defeat very purpose of levy.

14. [M/S VIJAYANAGAR BIOTECH LTD VS. COMMISSIONER OF CENTRAL TAX VISAKHAPATNAM GST COMMISSIONERATE](#)

Excise Appeal No. 30211/2019
Final Order No. A/30737/2019

CE: CENVAT credit on on taxable and exempted products.

Held: In the instant case, starch is the dutiable final product and gluten, maize germ are final products which are exempted. Even if the manufacturing process is an integrated one, if separate machinery is used for processing the exempted products after it has been separated from the main product or raw material and such machinery is used only for processing exempted products, CENVAT Credit cannot be availed in view of the explicit provisions of Rule 6(4) of CCR 2004.

15. [M/S WIPRO ENTERPRISES LTD, HINDUPUR VS. COMMISSIONER OF CENTRAL TAX, TIRUPATI](#)

Excise Appeal No. 31318/2018
Final Order NO. A/31115/2019

CE: Assessee has availed CENVAT credit twice on the same invoice and also had short paid CENVAT credit on capital goods removed after being put to use. Assessee reversed the aforesaid amounts on being brought to their notice.

Held: The intention of the assessee is self-evident and the violation of Act and Rules are undisputed. Hence, penalty imposed under Rule 15(2) of CCR, 2004 read with section 11AC is proper.

[Back](#)

16. [M/S ADANI POWER LTD VS. COMM. OF CENTRAL TAX, RANGAREDDY](#)

Excise Appeal Nos. 30513, 30603 & 30898/2018
Final Order No. A/31018-31020/2019

CE: SEZ unit received goods from DTA, on which appropriate excise duty was paid by the DTA unit and collected from SEZ unit. No bill of export is filed for goods procured on strength of commercial invoice. SEZ unit applied for refund.

Held: Goods from DTA supplied to SEZ are to be treated at par with exports. In the instant case, no ARE-1 or Bill of export is filed since, the SEZ Rules, provides a mechanism for clearance of goods only under bond and there is no mechanism under SEZ Rules for claiming rebate/refund on goods procured from the DTA, refund rejected. Also, as there is no challenge to the assessment of goods either by SEZ or DTA, refund application not maintainable.

17. [M/S FINECHEM HYDERABAD VS. COMMISSIONER OF CCE & ST, HYDERABAD-I](#)

Excise Appeal No. 25305/2013
Final Order Nos. A/30967/2019

CE: *The co-noticee claims that penalty under Rule 26(2) can be imposed only on a natural person and not on a partnership firm as it is not a natural person. Also, registered dealer is covered only under Rule 25 of CCR, 2002 and excluded from Rule 26 of CCR, 2006.*

Held: Rule 26(2) does not require the element of mens rea. The appellant has issued excise duty invoice without delivery of goods and is, therefore, liable for penalty under Sub Rule 2 of Rule 26 of Central Excise Rules, 2002.

18. [M/S RANI PLASTIC PIPE INDUSTRIES, KURNOOL VS. COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX, TIRUPATI](#)

Excise Appeal No. 877/2011
Final Order No. 30886/2020

No refund can be sanctioned under Section 11B, if the assessee is unable to utilize CENVAT credit on account of closure of the manufacturing activities.

19. [M/S BIOMAX LIFE SCIENCES LTD VS. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, HYDERABAD-IV](#)

Excise Appeal No. 25 of 2012, 27333 of 2013, 20088 of 2014,
20772 of 2014, 30952 of 2016, 30953 of 2016
Final Order No.30911-30916/2020

CE: *Dispute about classification under Chapter 13 or under Chapter 20.*

Held: No ground to call the powders manufactured by the appellant as juices as powder is solid and the juice is liquid. There is nothing in the description of Chapter Heading 2009 to suggest that it also includes powders. Therefore, the aloe vera powder and amla powder manufactured by the appellant cannot be classified under Chapter Heading 2009. As far as the aloe vera juice and amla juice are concerned, both chapter heading 1302 and Chapter Heading 2009 equally merit consideration and therefore Chapter Heading 2009 being the last in the numerical order prevails in terms of General Rules of Interpretation Rule 3(c). With regard to Aloe vera powder and amla powder it is held that they are not juices, thereby are not classifiable under Tariff Heading 2009. Being extracts of vegetables, they are classifiable under 1302.

[Back](#)

20. [M/S VISHNU CHEMICALS LTD, AND OTHERS VS. COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX, HYDERABAD – I](#)

Excise Appeal No. E/77, 78 & 94/2007
Final Order No. A/30707-30709/2019

CE: *Demand based on statements, private records etc.*

Held: It is held that the demand was raised based on the Panchanama, undisputed statements and the private records seized from the premises of the appellant as well as statements of the alleged buyers of the clandestinely removed products and is therefore sustainable. By their very nature, unrecorded production and clearance of goods can only be found based on evidence gathered during investigation such as stock taking, private records, private notebooks, statements of persons concerned, their examination and cross-examination which will lead to conclusion whether there was a clandestine removal of goods and if so, to what extent. Private note books seized

from the factory under Panchanama during the course of investigation and their analysis, as supported by the statements of various persons in the factory, form a fairly sound basis for demanding duty on such clearance.

21. [M/S NCL INDUSTRIES LTD VS. COMMISSIONER OF CENTRAL TAX, GUNTUR](#)

Excise Appeal No. E/30419/2018

Final Order No. A/30910/2020

CE: *Issue to be decided is whether goods (cement) sold by the appellant to their customers on FOR destination basis can claim CENVAT credit on the outward transportation of goods from their premises to the buyer's premises or otherwise.*

Held: Hon'ble Apex Court in Ispat Industries [2015 (324) ELT 670 (SC)] laid down that where the goods are sold on FOR destination basis i.e., where the ownership of the goods gets transferred only at the buyer's premises, no CENVAT credit is admissible transportation charges.

22. [M/S HARIKA RESINS PVT LTD AND SAMA RAJASEKHAR VS. CCE & ST, GUNTUR](#)

Excise Appeal No. E/386-387/2012-(DB)

Interim Order No. 30117-30118/2020

CE: *Case of clandestine removal of goods by mis-declaration.*

Held: The assessee was clearing resins clandestinely in the guise of Orthoxylene. The statements of the persons recorded at the time of investigation is based or co-relatable with documentary evidence. Such documentary evidence having not been denied, the denial of clandestinely removed goods in cross-examination is of no avail to the appellant and such evidence is reliable. The case of Revenue is not proved on the principle of preponderance of probability but on documentary evidence brought on record in the course of investigation and duly supported by oral evidence of several persons and also supported by some of the key persons involved in the transaction, the allegation of Revenue is established and accordingly the appeals are dismissed.

23. [M/S LITTLE STAR FOODS PVT. LTD. VS. COMMR. OF CENTRAL TAX, HYDERABAD](#)

Excise Appeal Nos. 1768 & 1781 of 2012;
20234-20235 of 2014; and 21160 & 21173 of 2015

Final Order Nos. A/30714-30719/2019

CE: *The assessee manufactures 'Cadbury perk with glucose energy' on job work basis and supplies to principle manufacturer and claims benefit of exemption Notification No. 3/2006 describing the product as 'wafer biscuits'.*

Held: The product in question is 'coated wafers' and not 'wafer biscuits. Hence, benefit of exemption is not available as the notification covers only 'wafer biscuits. Commissioner v. Dilip Kumar & Company- 2018 (361) E.L.T. 577 (S.C.) relied upon.

[Back](#)

24. [M/S KAIRA CAN COMPANY LTD VS. CCE & ST, AHMEDABAD - III](#)

Excise Appeal No. 423/2012

Final Order No. A/ 12297-12326 /2019

CE: *Metal Containers, supplied free of cost by the buyers not included in assessable value of the final product. The contention of Revenue is that since the packing material i.e. corrugated boxes were supplied free of cost by the buyers, the cost of the same needs to be included in the assessable value as in the form of supply of corrugated box, there is also an additional consideration flowing directly or indirectly from the buyers resulting in under valuation of Excisable goods and short levy of duty.*

Held: Tribunal found that as far as inclusion of cost of packing material supplied Free of Cost for the purpose of packing of final product by the appellant, there was no ambiguity in the law as the same is includable in the Transaction Value of the Metal container manufactured and supplied by the appellant.

25. [M/S GUJARAT STATE FERTILIZERS AND CHEMICALS LIMITED VS. CCE & ST, VADODARA](#)

Excise Appeal No. 10576 of 2019
Final Order N. A/10703/2020

CE: *The assessee procuring Sulphur availing benefit of Notification No. 12/2012-CE dated 17 March 2012. Some quantity of Sulphur is also used in the manufacture of Phosphoric Acid and Phospho Gypsum (bye-product). Phosphoric Acid is mainly used captively for manufacture of fertilizers i.e. Ammonium Phosphate Sulphate (APS). Some part of the Phosphoric Acid is sold by them in the open market on payment of duty. They admitted his liability of duty on Sulphur used in such Phosphoric Acid.*

Held: Tribunal found that liability for Central Excise Duty would arise only in respect of Sulphur used in the manufacture of Phosphoric Acid which was cleared on payment of duty.

26. [SHRI A K CHATURVEDI VS. C.C.E.-AHMEDABAD- II](#)

Excise Appeal No. 94/2009
Final Order No. A/ 10578-10583 /2020

CE: *The goods contain fly ash less than 25%. Based upon statements of quality assurance, production, maintenance and finance employees and seized records, it was proposed that M/S GCL were not eligible for exemption under concessional rate of duty as the fly ash content in manufactured product was less than 25% and the Appellant Unit had shown incorrect consumption.*

Held: Tribunal found that the fly ash content in some quantity of Asbestos Sheet was admittedly less than 25%, and duty of Rs.2,80,000/- was liable to be upheld.

27. [SHRI NARESH AGRAWAL VS. CCE & S.T.-VADODARA-II](#)

Excise Appeal No. 614/2012-DB
Final Order No. A/10567 / 2020.

CE: *Appellant is a registered dealer who facilitates manufacturers to avail CENVAT credit without actually supplying goods.*

Held: Penalty under Rule 26 (2) is imposable on the person who has issued the invoices without supply of goods.

28. [M/S BHARAT RESINS LTD VS. C.C.E. & S.T., SURAT-I](#)

Excise Appeal No. 11846/2018-SM
Final Order No. A/11369/2019

CE: *Availment of CENVAT Credit beyond stipulated time limit.*

The assessee availed CENVAT credit beyond stipulated time limit of six months. Subsequent amendment in Notification extending this time limit to one year is only prospective.

[Back](#)

29. [M/S F TECH ENGINEERING CO. VS. C.C.E. & S.T., RAJKOT](#)

Excise Appeal No. 12676/2018-SM
Final Order No. A/11510-11511/2019

CE: *Clandestine clearance of finished goods and wrongly availment of exemption under Notification No. 12/2012 dated 17.03.2012*

Held: No infirmity in the impugned order.

30. [M/S HI SCAN PVT LTD VS. C.C.E. AHMEDABAD - II](#)

Excise Appeal No. 113/2009
Final Order No. A/ 11071 /2019

CCAR NEW DELHI

CE: *The principals who had supplied the goods for manufacture on job work basis to the appellant were neither registered nor they had filed any declaration/ undertaking under Notification 214/86-CE. Materials supplied by principal was not included in the aggregate value of the job worker while computing the aggregate value of clearance of Rs. 300 Lakhs/ 400 Lakhs in a financial year. Revenue entertained the view that only registered persons who are paying Central Excise Duty can supply the goods under Notification No. 214/86.*

Held: The liability to pay duty in respect of goods produced on job work basis lies with the appellant being manufacturer of goods. Therefore, benefit of Notification No. 24/86 rightly denied to a job worker.

31. [M/S J & J PLAST VS. C.C.E.-AHMEDABAD - II](#)

Excise Appeal No. 491 of 2009
Final Order No. A/ 11707-11714 /2019

CE: *The case of the department is that the principal manufacturer is using the job worker manufactured goods in the manufacture of exempted goods, therefore, the job worker being a manufacturer are required to pay excise duty.*

Held: In case of job worker where the procedure under Notification No. 214/86- CE is not followed and the principal manufacturer is not discharging the excise duty on their final product, job worker is required to pay excise duty.

32. [M/S JOLLY ELECTRICAL INDUSTRIES VS. CCE & ST, VADODARA - II](#)

Excise Appeal No. 862/2009
Final Order No. A/11889-11890 /2019

CE: *The goods cleared by the assessee was manufactured by their other two units. Demand of duty was raised after clubbing of all the clearances. The units are found liable to be clubbable on the basis of strong evidences such as insufficient production facility, electricity consumption and various other aspects.*

Held: Demand was rightly made.

[Back](#)

33. [M/S MEENAKSHI FOOD PRODUCTS PVT. LTD VS. C.C.E. & S.T.-AHMEDABAD-III](#)

Excise Appeal No. 11672/2018
Final Order No. A/ 11143-11146 /2019

CE: *The assessee had manufactured the notified goods in contravention of their declaration, therefore as per the provisions of Rule 9 of the PMPM Rules, 2008 the rate of duty applicable to goods of Highest Retail sale i.e. Retail sale price of Rs. 3 shall be applicable in respect of all packing machines operated by the Appellant.*

Held: The Unit had filed declaration on 01.04.2011 in terms of Rule 6 of the Pan Masala Pcking Machine (PMPM) Rules, 2008 wherein they declared the details of packing machines to be used for packing of Gutkha along with specific MRP of the pouches. However, the unit was found to be engaged in packing pouches of higher MRP in contravention of declaration filed by them under Rule 6 of PMPM Rules, 2008. Clearly the Appellant unit contravened the provisions of Rule 6 (6), 7 and 9 of the

PMPM Rules, 2008 and since the notified goods were manufactured in contravention of their declaration, therefore as per the provisions of Rule 9 of the PMPM Rules, 2008 the rate of duty applicable to goods of Highest RSP, Rs. 3 in this case will be applicable in respect of all packing machines operated by the Appellant and they are liable to pay duty as per said RSP on all machines. Therefore, the impugned order in as much as it relates to demand of duty and penalty against the appellant company is concerned is upheld.

34. [M/S MEGHMANI ORGANICS LTD VS. C.C.E.-AHMEDABAD - II](#)

Excise Appeal No. 280 of 2012

Final Order No. A/11703 / 2019

CE: *The assessee imported some chemicals and re-packed it as fertiliser which is duty free.*

Held: Test report finds them as Co-ordination compound which is leviable to duty. Revenue's contention upheld.

35. [M/S MID INDIA POWER AND STEEL LIMITED VS. CCE & ST, RAJKOT](#)

Excise Appeal No. 897 of 2010

Final Order No. A/11934 / 2019

CE: Adjudicating authority rejected the refund application of the appellant on the ground that the order-in-Original rejecting the refund was not appealed before Commissioner (Appeals).

Held: Rejection of Refund claim not challenged, hence attained finality.

36. [M/S MILI DETERGENT INDUSTRIES VS. CCE, AHMEDABAD-II](#)

Excise Appeal No. 1263 of 2009

Final Order No. A/11127-11130/2019

CE: *Loose Papers recovered from the factory premises of the assessee. Consignee accepted that these papers pertain to clearance of impugned goods which was corroborated by authorised signatory of another stakeholder.*

Held: Demand of duty confirmed by the lower authority was upheld by the Tribunal despite the facts that author of these loose papers was not investigated.

37. [M/S RISHI CAST PVT. LTD VS. CCE & ST, RAJKOT](#)

Excise Appeal No. E/692/2011

Final Order No. A/11475/2019

CE: *The assessee manufacturing 'Manhole Cover' which were classified by them under heading 7324 and were assessed to duty under Section 4A of the Central Excise Act, 1944.*

Held: This change of classification by the assessee was not the result of any bonafide doubt but it was a conscious decision on their part to change the classification. Extended period was rightly invoked.

[Back](#)

38. [M/S SHALU SYNTHETICS VS. CCE, DAMAN](#)

Excise Appeal No. 12471 of 2018

Final Order No. 21518/2019

CE: *Interest on refund.*

Held: Interest on refund of CENVAT credit on surrender of registration denied on the ground that refund has been granted following the ratio of Hon'ble High Court decision in case of Slovak India Trading Company Pvt. Ltd. honouring judicial discipline. The refund was therefore not sanctioned under any express provision of law. In these circumstances when the refund is not under any provisions of Central Excise Act, 1944 the provisions of the act relating to interest do not apply to the facts of the case.

39. [M/S SILVASSA SPAN YARN INDS VS. CCE & ST, TAPI](#)

CE: *The assessee claimed that credit on inputs was reversed and department was intimated which was countered by Revenue.*

Held: The assessee could not establish one to one correlation as regard the use of inputs in the manufacture of dutiable and exempted goods therefore, as per the findings of the lower authorities it is established that the appellant availed the CENVAT credit in respect of inputs used in the manufacture of goods cleared under Notification No. 30/04-CE, therefore the appellant has no case on merit as they have violated the condition of Notification.

40. [M/S STANDARD PESTICIDES PVT. LTD VS. CCE & ST, VADODARA](#)

Excise Appeal No. 11160/2018
Final Order No. A/11257/2020

CE: *Tribunal has no jurisdiction on cases of Rebate of Duty.*

Held: No dispute that appellant have claimed rebate of duty paid on the goods exported through merchant exporters. Therefore, even though the Commissioner has given findings as regards unjust-enrichment, the nature of rebate is not altered. Since the duty is refunded as rebate claim and not as a normal refund. Appeal before CESTAT non-maintainable on the ground of jurisdiction.

41. [M/S VIJAY FIRE VEHICLES AND PUMPS LTDVS. CCE & ST, SURAT - I](#)

Excise Appeal No. 10066/2019
Final Order No. A/11279 / 2020

CE: *Appellant's refund claim was rejected on grounds of limitation.*

Held: The refund claim relates to the period June to August, 2015 and the same was filed on 22nd September, 2017 which clearly beyond the scope of limitation prescribed under section 11B of the Central Excise Act, 1944. In these circumstances, no error in the order of Commissioner.

42. [M/S SHRI KRISHNA TOBACCO PRODUCTSVS. C.C.E. & S.T. -AHMEDABAD - III](#)

Excise Appeal No. 821/2010
Final Order No. A/11524/2019

CE: *The assessee very consciously made a modus operandi to evade the excise duty, by issuing excise invoices for bulk and even though the re-packing from bulk to retail pack was being carried out within the factory. They have purposely suppressed the clearances of retail pack, thereby evaded the Central Excise Duty.*

Held: The assessee intentionally devised a method whereby first they have cleared bulk snuff of tobacco captively and issued invoices and paid the duty thereon, thereafter the same goods were re-packed for retail pack in their own factory and issued commercial invoices on higher value, thereby they suppressed the value of the finished goods cleared from the factory.

[Back](#)

43. [M/S AMRIT POLYPLAST PVT. LTD. AND ORS. VS. CCE & ST, JAMMU](#)

Excise Appeal No. E/61559/2018
Final Order No. 60241-6250

CE: *Tribunal had dismissed the appeals and cannot review its own order.*

Held: The ROA applications are devoid of merit as Tribunal has no vested power under the Law to review its own order.

44. [M/S SOM FLAVOUR MASALA PT. LTD. VS. CCE & ST ROHTAK](#)

Excise Appeal No. 61049 of 2019-(DB)
Final Order No. 60385/2020

CE: *Refund of deposit made during investigation has to be strictly governed as per provisions of Sec.11B and Sec. 11BB.*

Held: Commissioner (Appeals) order directing payment of interest from the date of deposit of the said amount is devoid of merit and accordingly set aside.

45. [M/S PANACEA BIOTEC LTD VS. CCE & ST, LUDHIANA](#)

Excise Appeal No. 60728/2017

Final Order No. 60794/2019.

CE: *The assessee had given on lease their premises to another entity namely M/S Panheber/Panera Biotec Pvt. Ltd. allegedly manufacturing vaccines which attracted Nil rate of duty. Revenue entertained the view that such vaccines were in fact manufactured by the assessee themselves and they circumvented Rule 6 (3) by not maintaining separate accounts for CENVAT credit purposes.*

Held: No goods can be manufactured without utilization of electricity/power. From the entire record of the appeal and submissions made by the appellant, we do not find any iota of evidence to indicate that M/S Panheber/Panera Biotec Pvt. Ltd. had independently utilized power for manufacture of vaccine. Therefore, it is clear that M/S Panera Biotec Ltd. only existed on paper and actually goods are manufactured by the appellant in the name of Panera Biotec Ltd. Department has rightly raised the issue of mis-utilization of the CENVAT credit.

46. [\(I\) M/S MODERN DAIRIES LTD VS. CCE & ST, PANCHKULA-APPEAL NO. E/61085/2019](#)

Ex/SM Final Order No. 60413/2020

(II) M/S SALUJ.A MOTORS VS. CCE CHANDIGARH- APPEAL NUMBER- E/60175/2020-ST/SM

Final order No. 60414/2020)

CE: Interest on refund of pre-deposit made under Section 35F.

Held: Interest to be granted only after three months of the communication of the order of the Tribunal.

47. [M/S ACCUSYNTH SPECIALITY CHEMICALS PVT. LTD VS. COMMISSIONER OF C.G.ST. - PALGHAR](#)

Excise Appeal No. 85589/2019

Final Order NO. A/85149/2020

CE: *The issue is whether the time period under Section 11B is applicable for refund under Rule 5 ibid.*

Held: Issue is no more res integra in view of the Tribunal decision in Technocraft Industries (I) Ltd. Order No. A/85514/2019. It is held that the limitation period provided u/s 11B of CEA, 1944 is applicable for refund claim of accumulated CENVAT credit in terms of rule 5 of CCR, 2004.

[Back](#)

48 [M/S MALI PIPE INDUSTRIES AND ORS. VS. CCE, PUNE - III](#)

Excise Appeal No. 415/2010

Final Order No. A/86566/2019

CE: *Denial of SSI exemption by clubbing of units.*

Held: Two units of the assessee were shown to be separate on paper only but factually, the entire operation and business of both the units was controlled and managed by one person that is Shri. Kumar Shankar Mali. The clearances of both the units are to be clubbed. Relying on the judgements in the cases of Libra Engineering Works-[2016 (339) E.L.T. 610 (Tri.-Ahmd.)] and Himgiri Plastics [2018 (360) E.L.T. A137 (S.C.)], where the facts were similar, the OIA was set aside.

49. [M/S SHRI DNYANESHWAR SSK LTD VS. CCE & ST, NASIK](#)

Excise Appeal No. 88943/2018

Final Order No. A/85658 / 2020

CE: CENVAT Credit not available on deposit made under Section 35F..

Held: Credit availed on pre-deposit was denied.

50. [M/S ISMT LTD. APPELLANT VS. CCE & ST, NASIK](#)

Excise Appeal No. 88080 of 2018

Final Order NO. A/86467/2019

CE: *The party could not file Proof of export (POE) within stipulated period, paid duty on goods exported. Subsequently filed refund of such duty on receipt of POE. Refund rejected.*

Held: The Hon'ble Supreme Court in the cases of Doaba Co-operative Sugar Mills, Anam Electrical Manufacturing Co. and Miles India Ltd. has ruled that in making claims for refund before the departmental authorities, an assessee is bound within the four corners of the statute and the period of limitation prescribed there under must be adhered to and that the authorities functioning under the statute cannot place different interpretations and are bound to follow the provisions of the statute alone.

51. [M/S SHIVNATHRAI HARNARAIN \(INDIA\) LTD VS. CCE, KOLHAPUR](#)

Excise Appeal No. 1000/2010

Final Order No. A/85040/2020

CE: *Appellant was not able to produce the “proof of export” of Sugar, within the period as prescribed. Thus, demands were confirmed along with interest and penalty was also imposed. The Procedure prescribed under Notification No. 42/2001 CE (NT), 26.06.2001 was applicable.*

Held: The appellant failed to fulfil the conditions of the notification and deliberately tried to adopt their own method for proving their exports. Tribunal held that it is a settled position in law that any person claiming the benefit of an exemption notification is required to fulfill the conditions specified in the notification and that it is also a settled position that when law requires something to be done in particular manner then that has to be one in that manner only.

52. [M/S SHRI VITTHALSAI SSK LTD VS. CCE & ST, NAGPUR](#)

Excise Appeal No. 88298-99/2018

Final Order No. A/86724-86725/2019

CE: *The assessee filed refund claim for unutilized CENVAT credit which was allowed by the Asst Commissioner relying on the decision in the case Union of India VS. Slovak India Trading Co. (P) Ltd. Thereafter, such refund granted was disallowed by the Commissioner (Appeals) relying on the decision in Phoenix Industries Pvt. Ltd. VS. CCEX, Raigad.*

[Back](#)

Held: In view of the findings of the High Court of Mumbai wherein it was held that the order of the Apex Court in Slovak India Trading Co. (P) Ltd. cannot be read as a declaration of law since SLP was dismissed, leaving the question of law open and the same has been answered by holding that refund is impermissible under Section 11B and Section 11B(2) where CENVAT credit could not be utilized due to closure of manufacturing activities.

53. [M/S TECHNOCRAFT INDUSTRIES \(I\) LTD VS. CCE, THANE - I](#)

Excise Appeal No. E/921/2011

Final Order No. A/85514/2019

CE: *The appellant had filed a cash refund claim of accumulated CENVAT Credit under*

CCAR NEW DELHI

Rule 5 of CENVAT Credit Rules, 2004. The refund claim was rejected being barred by limitation prescribed under Section 11B of Central Excise Act, 1944.

Held: The limitation period provided u/s 11B of CEA, 1944 is applicable for refund claim of accumulated CENVAT credit in terms of Rule 5 of CCR, 2004.

54. [M/S PARENTAL CREATIONS PVT. LTD. AND ORS. VS. CCE, THANE - I](#)

Excise Appeal No. 1166/2010

Final Order No. A/85107-85113/2020

CE: *Fraudulent/bogus exports shown to avail inadmissible export benefits such as rebate etc.*

Held: There are sufficient evidences to show the transactions shown to be fictitious payments made by the Appellant to the supplier of the raw material have been found to be bogus. Transport documents as well as documents showing payment of toll/octroi during transit not shown. Admission by one of stakeholders of non-receipt of the inputs/ goods on which CENVAT Credit has been availed is there. Thus, without receipt of any goods, only exportation was shown to avail the fraudulent credit.

55. [M/S SHRI GANAPATHY PACKAGING VS. CCE, TIRUNELVELI](#)

Excise Appeal No. 40658/2013(DB)-Chennai

Final order No. 41321-41354

CE: *Revenue entertained the view that the assessee were not eligible for availing the benefit of Notification No. 4/2006-CE dated 01.03.2006 as the match splints purchased was manufactured using aid of power even though the assessee did not use any power for packing and painting the match boxes with red phosphorus.*

Held: Even if power was not used in the factory of manufacturer but used outside, the benefit of Notification is not available as Notification forbids use of power.

56. [M/S SERVO PACKAGING LTD. VS. COMMISSIONER OF CGST & CENTRAL EXCISE, INDORE](#)

Excise Appeal No. 41700/2019

Final Order No. 40098 / 2020

CE: *Refund of CENVAT credit availed due to introduction of GST on Customs Duty Paid on inputs due to non-fulfilment of export obligation.*

Held: Admittedly, the inputs imported have gone into the manufacture of goods meant for export, but the export did not take place. At best, the appellant could have availed the CENVAT Credit, but that would not ipso facto give them any right to claim refund of such credit in cash with the onset of G.S.T. because CENVAT is an option available to an assessee to be exercised and the same cannot be enforced by the CESTAT at this stage.

[Back](#)

57. [M/S PRESTIGE FOOD VS. THE COMMISSIONER CGST & CENTRAL EXCISE, INDORE](#)

Excise Appeal No. 51326/2018 [SM]

Final Order No.51316/2019

CE: *No interest on delayed payment.*

Held: There is no illegal detainment of the impugned amount by the department as is apparent from the arguments put forth by the Department Representative that the amount in question was deposited only after Hon'ble Supreme Court had confirmed the deposit of 1/4th amount of duty as was proposed to be recovered vide show cause notice of the year 1994. There is no apparent delay that too intentional or mala fide or even negligent on part of the department as is alleged by the Appellant. The Appellant is held not entitled for the interest as prayed.

58. [M/S ARIHANT TILES & MARBLES PVT. LTD VS.COMMISSIONER \(APPEALS\), JODHPUR](#)

Excise Appeal No. 50125/2019 [SM]

Final Order No.50125/2019

CE: *Interest on interest not payable.*

Held: Argument of the appellants that they are entitled for interest on interest being compensatory in nature is not sustainable. Technically interest on interest cannot be called as compensation Suo moto, nor has been so prayed by the appellant himself.

59. [M/S CONTINENTAL ENGINES LIMITED VS. COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX, CUSTOMS AND CENTRAL EXCISE, ALWAR](#)

Excise Appeal No. 53834/2018(SM)

Final Order No.51560-51561/2019

CE: *Interest payable on differential duty resulted due to escalation clause.*

Held: Interest is payable on the differential excise duty with retrospective effect that became payable on the basis of escalation clause, under Section 11AB of the Central Excise Act, 1944.

60. [M/S GURUHARKISHAN INDUSTRIES AND OTHERS VS. RESPONDENT: CCE, DELHI-II](#)

Excise Appeal No. 51175/2017

Final Order No.51970-51979/2018

CE: Electronic evidences in the form of print outs are admissible as Evidence. A single line Retraction does make oral statement null & void.

Held: Initially admitting and subsequently retracting. Retraction is to be ignored in the light of circumstances of the case and existence of corroborative evidences. Data retrieval/print outs from electronic media taken before independent Panchas admissible as appellants refused to witness the same despite repeated summons.

61. [COMMISSIONER OF C. EX. & S.T.-LTU, DELHI VS M/S GAS AUTHORITY OF INDIA LTD.](#)

Excise Appeal No. 55666/2014

Final Order No.53338/2018

CE: Non consideration of Relevant Evidences by Adjudicating Authority in deciding the recurring issue of classification is grossly illegal.

Held: Then respondents were clearing Natural Gasoline Liquid (NGL) by classifying it as Naptha which attracts lower rate of duty and also the benefit of exemption Notification No. 18/2009/CE dated 07.07.2009 as amended. The entire demand was dropped by the adjudicating authority considering chemical characteristics of the product and universally accepted parameters of Naptha. While classifying the product the adjudicating authority further relied on the definition and description of Naptha as per various technical literatures as also on the report received from Indian Institute of Petroleum. The Hon'ble Tribunal found that the Chemical Examiner's Report which was never contested by the respondents was totally ignored by the adjudicating authority. The Hon'ble Tribunal further held that the Supplementary chapter note specifically defined natural gasoline liquid (NGL) as a low boiling liquid petroleum product extracted from natural gas and the chemical examiner report specifically mentioned the product as low boiling liquied petroleum product extracted from natural gas. Once it was so, there was no reason to hold the product as Naptha.

62. [M/S KAIRA CAN COMPANY VS. COMMISSIONER OF CENYTRAL EXCISE AND SERVICE TAX, VADODARA-I](#)

Excise Appeal No. 1003/2010

Final Order No.A/11550/2018

CE: The value of packaging material supplied free of cost by the customer is includable in the Assessable value.

Held: Inclusion of the value of packing material supplied free of cost by the customer in the
CCAR NEW DELHI

assessable value of the goods manufactured by the appellant was contested on the ground that Valuation Rule cannot over ride the act in terms of Section 4 and only transaction value which is paid or payable against the sale of the goods shall be assessable value. It was held that the authority of Rule 6 was flowing from Section 4(1)(b) only. In terms of Section 4 read with Rule 6 of Valuation Rules, 2000, the packing material supplied free of cost by the customer was includible in the transaction value (Assessable Value) and the same would be chargeable to excise duty.

63. [M/S RATNAMAI METALS & TUBES LTD. VS COMMISSIONER OF C. EX. & S.T., AHMEDABAD-III](#)

Excise Appeal No. 10170/2015

Final Order No.A/11311/2018

CE: No interest is payable on any amount which has not been adjudged as Tax/Duty.

Held: Amount paid during investigation is to adjudged as duty as there is no provision in Central Excise to make a deposit and the refund of such duty amount, if any, is clearly governed by the Section 11B of CEA, 1944 and in terms of this Section. Interest is payable from the date after completion of 3 months from the date of filing the refund application.

Customs

[Back](#)

1. [SHRI BADRI NARAYAN SHARMA VS. COMMISSIONER OF CUSTOMS](#)

Customs Appeal No. 50493/2017 [SM]

Final Order No. 50008/2020

Cus: *The disposal of gold was held in accordance with the statutory provisions in the year 2001. The order for return of seized gold was ordered 14 years after the said disposal.*

Held: What can be returned while complying with the directions of return of seized gold is the sale proceeds of the said gold received at the time of disposal thereof. Also it is apparent that present appellant was held owner of the seized & confiscated gold vide order of the Tribunal, dated 13-5-2005. Time taken till the order of Tribunal, dated 24-7-2015 directing the return of the impugned gold is on account of mistaken identity of Shri Badri Narayan, the appellant himself. The order of confiscation was otherwise served on Shyam Lal Pal as well as Shri Badri Narayan who was held owner of the impugned gold vide order of the year 2005. The said Badri Narayan impersonated the actual Badri Narayan whose appeal was decided in his favour in the year 2015, does not reflect any mistake or even delay on part of Department.

2. [M/S. KOTHARI FOODS & FRAGRANCE PVT. LTD. VS. COMMISSIONER OF CUSTOMS \(EXPORT\)](#)

Customs Appeal No. 53217/2015 [SM]

Final Order No. 51295/2019

Cus: *The present appeal is a remanded matter by High Court on a limited issue of limitation, whereas on merit the Departmental plea was allowed. Bar of limitation had been raised on the ground that no ingredients of Section 28 of Customs Act, 1962 have been invoked.*

Held: Show cause notice has been issued after a expiry of two years period but the show cause notice itself has alleged suppression of facts on part of the exporter. The same has even been confirmed by the original adjudicating authority by observing that the nondisclosure of the technical characteristics is a consciously done act of the exporter and hence extended period invokable.

3. [M/S. FRIENDLY VIDEO VISION, SHRI RAKESH KUMAR BHAGAT VS. C.C. \(IMPORT & GENERAL\), NEW DELHI](#)

Customs Appeal No.C/137-138/2009-CU [SM]

Final Order No. 50324-50325/2019

Cus: *Case where appellant had voluntarily deposited and later retracted his statements.*

Held: Voluntary deposit of duty without any mention of coercion or pressure in making statement, is sufficient reliable evidence to hold demand. Retraction letter, that too, by advocate after 45 days of statement has no value. Statement made before Customs authorities is binding in departmental proceedings.

4. [M/S. MCT DELUXE HONOUR INDUSTRIES PVT. LTD. VS. C.C., NEW DELHI, ICD](#)

Customs Appeal No. C/52163/2018

Final Order No. 50267/2019

Cus: *Case of mis-declaration of goods in export consignment of handicraft furniture and wood/ metals items. Red sanders packages absolutely confiscated being prohibited items, and remaining goods also liable for confiscation as the appellant sought export of red sander in the guise of these goods. But these goods are not contravened goods, therefore, allowed to be redeemed on payment of redemption fine.*

Held: Penalty under Section 114 (iii) of the Customs Act, 1962 for attempting to export prohibited goods affirmed, but reduced under Section 114 (i) as was imposed on higher side.

5. [SHRI ROHIT BHASIN VS. C.C., NEW DELHI](#)

Customs Appeal No.C/52231/2018-CU [SM]
Final Order No. 50278/2019

Cus: *Specific Intelligence was received by the DRI about some importers being engaged in mis-declaration of LED TVS. as TV panels. Various Searches were conducted including the premises of appellant whereby 60 pieces of complete LED TVS. were recovered. No valid documents were recovered or produced by the appellant establishing the legal procurement of the said 60 pieces of LED TVS.*

Held: The order is upheld in view of confiscation of goods being the result of improper import and non production of mandatory BIS Certificate.

6 [M/S JAI SHIV TRADING CO. VS. COMMISSIONER OF CUSTOMS](#)

Customs Appeal No. C/53151/2016-CU[DB]
Final Order No. 55379/2017.

Cus: *Redetermination of value has been carried out in terms of Rule 7 of the Customs Valuation Rules which provides for determination of value on the basis of the price of identical or similar imported goods in India. Proprietor of the appellant, Shri Jayshiv, was shown the market enquiry report. He has voluntarily accepted the increased valuation of the imported goods.*

Held: It is settled position of law that once the importer has admitted the re-determination of value on record and has accepted the method of valuation, he cannot subsequently challenge the re-determined value.

7 [CC \(IMPORT\), ICD, TKD, NEW DELHI VS. M/S SODAGAR KNTWEAR](#)

Customs Appeal No. 50546/2018
Final Order No. 51708/2018.

Cus: *Redetermination of value has been carried out in terms of Rule 7 of the Customs Valuation Rules which provides for determination of value on the basis of the price of identical or similar imported goods in India.*

Held: It is settled position of law that the facts which are admitted need not be proved. [CCE, Madras vs. Systems & Components Pvt. Ltd.-2004 (165) ELT 136 (SC)]. Once the importer has admitted the re-determination of value on record and has accepted the method of such valuation, he cannot subsequently challenge the re-determined value.

8 [M/S LAXMI ENTERPRISES VS. CC \(PREV.\) NEW DELHI](#)

Customs Appeal No.C/51536/2017
Final Order No.50544/2018

Cus: *The print outs from the laptop has been admitted by Shri Sumit Chawla, son of the proprietor in clear terms. It is admitted by him that these invoices recovered, reflect the valuation at which the transaction was concluded with the supplier and the prices indicated in the invoices/commercial invoices could be taken for assessment of all past imports.*

Held: There is no infirmity on the part of the adjudicating authority in re-determining the value of the past imported goods on the basis of such invoices. Under the facts and circumstances of the present case, there is no need for the Revenue to collect evidence in the form of contemporaneous imports.

9 [M/S. EAST INDIA HOTELS LTD. DELHI VS. COMMISSIONER OF CUSTOMS, NEW DELHI](#)

Customs Appeal No. 558/2010
Final Order No. 50094/2020

Cus: *Usage of impugned aircraft post import is not for non scheduled passenger/charter air transport services but only for private use.*

Held: This amount to violation of undertaking based upon which exemption was granted to appellant from paying customs duty.

10 [M/S BIRD RETAIL PVT. LTD. VS. COMMISSIONER OF CUSTOMS \(IMPORT\) INLAND CONTAINER DEPOT, TUGHLAKABAD, NEW DELHI.](#)

Customs Appeal No. 51007/2019

Final Order NO. 50362/2020

Cus: “Segway” imported in CKD condition were components when put together would work as complete Segway product classifiable under CTH 8711 90 91. Appellants consciously misdeclared their product as CKD parts of electrically operated two wheelers of captive use classifying the same under Tariff Item 8714 99 90 of Customs Tariff Act, 1975 to evade Customs duty by availing concessional rate of the duty under Notification No. 12/2012-Cus.

Held: Liable for confiscation under Section 111(m) of Customs Act, 1962. Imposition of penalty on them under Sections 114A and 114AA of Customs Act, 1962 justified.

11 [M/S. KEIHIN AUTOMOTIVE SYSTEMS INDIA PRIVATE LTD. VS. PRINCIPAL COMMISSIONER OF CUSTOMS ICD TUGHLAKABAD \(IMPORTS\), NEW DELHI.](#)

Customs Appeal No. 51059/2019 [DB]

Final Order No. 51548/2019

Cus: Mis-classification of imported goods.

Held: Since bill of entry filed under self-assessment regime, importer need to be doubly sure that their claim is legally correct. Department committed no error while holding act to be intentional misrepresentation, when Section Note 2 to Section 16 ibid specifically provides methodology of classification of pumps and parts of engines. Classifying product under wrong entry continuously for as many as more than 50 bills of entry cannot be act of ignorance.

12 [COMMISSIONER OF CUSTOMS ICD PATPARGANJ VS. M/S HANUMAN PRASAD & SONS AND ORS.](#)

Customs Appeal No. 51601/2019 and 35 others

Final Order No 51584-51619/2020

Cus: Case of under valuation and department increased the value by loading.

Held: Having once accepted the loaded value of the goods and paid duty accordingly thereon without any protest or objection, they are legally not correct from taking somersault and to deny the correctness of the same. The enhanced value once accepted in writing under Section 17(5) of the Customs Act, 1962 shall be deemed to be the transaction value. All the 36 orders passed by the Commissioner (Appeals) that have been impugned, therefore, deserve to be set aside and are, accordingly, set aside and the 36 Appeals filed by the Commissioner of Customs are allowed.

13 [SHRI RAJESH MAIKHURI, DIRECTOR OF M/S R.U. IMPORTS-EXPORTS PVT. LTD. DELHI VS. COMMISSIONER OF CUSTOMS \(EXPORTS\) ICD, TUGHLAKABAD, NEW DELHI.](#)

Customs Appeal No. 50523/2018

Final Order No. 51490/2019

Cus: Food supplements imported without declaring MRP/RSP and name and address of importer on packages in violation of Rules 6 and 10 of Legal Metrology (Packaged Commodity) Rules, 2011. Goods also found to be undervalued, unsafe and misbranded in violation of Sections 3(1)(zz)(v), 3(1)(zf) and 25 of Food Safety and Standard Act, 2006 read with C.B.E. & C. Circular No. 3/2011-Cus., dated 06.01.2011.

Held: Importing firm is neither registered with FSSAI nor obtained NOC from it. Liable to penalty under Section 112(a) of Customs Act, 1962. Director of CHA firm is also liable to penalty under aforesaid Section.

14. [M/S. INDUS CHEMITEX LTD. VS. CC, NEW DELHI](#)

Customs Appeal No. C/56846/2013

Misc. Order No. 50009/2019

Cus: *As the Department has already made the compliance of this Tribunal's Order regarding the release of these goods and by giving necessary direction to the custodian of the goods. It is the duty of the appellant to take the release consignment from the custodian of the goods on payment of appropriate charges due to them.*

Held: The demurrages charges cannot be compensated by the Department and the Appellants had to pay the said charges to get the goods released.

15. [THE COMMISSIONER OF CUSTOMS \(EXPORTS\), NEW DELHI VS. R.U. IMPORTS-EXPORTS PVT. LTD.](#)

Customs Appeal No 50196/2018

Final Order No 51492/2019

Cus: *The appellant has been given a license as per the provisions of the Customs Broker Regulations, 2013 which mandate them to ensure compliance of provisions of the Customs Act, 1962.*

Held: Since they have failed in their duty and such act have rendered the subject consignment liable for confiscation as per provisions of Section 111(d) of the Customs Act, 1962, a penalty under Section 112(a) of Customs Act, 1962 is required to be imposed.

16. [M/S. SKYTRAIN SERVICES VS. . COMMISSIONER OF CUSTOMS \(AIRPORT & GENERAL\), NEW DELHI](#)

Customs Appeal No. 50777/2019

Final Order No. 1252/2019

Cus: *Case of revocation of CHA license.*

Held: G-Card holder of the appellant being physically and actually involved in entire series of acts, Customs Broker failed in observing due diligence about verifying the antecedents regarding KYC of the importer thereby resulting in violation of Regulations 11(e)/14(e) of Customs Brokers Licensing Regulations, 2013.

17. [M/S SILICONE CONCEPTS INTERNATIONAL PVT. LTD. VS. PRINCIPAL COMMISSIONER OF CUSTOMS ICD, TKD \(IMPORT\) NEW DELHI](#)

Customs Appeal No. 50796/2019

Final Order No. 50963/2019

Cus: *Right of cross-examination, statement of Directors of a company, evidencing value.*

Held: No cross-examination of Directors is neither violative of principle of natural justice.

18. [M/S BURBERRY INTERNATIONAL VS. COMMISSIONER OF CUSTOMS, NEW DELHI](#)

Custom Appeal No. 52214/2019

Final Order No. 50746/2020

Cus: *Case of under valuation.*

Held: The appellant failed to bring any cogent evidence regarding value on record, even before the Tribunal, inspite of being regular importer importing under their own brand name. Thus, apparently the appellant has not come with clean hands before this Tribunal. Accordingly, agreeing with the findings of the Commissioner (Appeals), we uphold the impugned order in appeal and dismiss the appeal in toto.

19. [M/S CMR NIKKEI INDIA PVT. LTD. AND ORS. & CENTURY METAL RECYCLING LTD. FARIDABAD VS. COMMISSIONER OF CUSTOMS, NCRB, JAIPUR](#)

Customs Appeal No. 50609-12/2019; C/50457-458/2019

Final Order Nos: 51393-51398/2019

Cus: *New law point brought out by the appellants at the stage of Tribunal.*

Held: The order passed by the Hon'ble Supreme Court in case of Sanjivani Non-Ferrous Trading Ltd. in Civil Appeal No. 18300-18305 of 2017 was not available before the Commissioner (Appeals). In the circumstances. Accordingly, we do not find any infirmity in the impugned order and sustain the same.

20. [M/S SHUBHLAXMI TEXTILE AND ORS. VS. C.C., NEW DELHI \(ICD TKD\)\(IMPORT\)](#)

Customs Appeal No. C/52331& 52558/2018-DB

Final Order Nos. 50293- 50294/2019

Cus: *Consignment of fabrics imported by main appellant mis-classified. The test report stated that the order was not cotton plain dyed fabrics but of polyester texturized/viscose texturized yarn fabric. They were classifiable under different head. The Department obtained the Report from the 1st Secretary officer (COIN) from Hong Kong from their counterpart from China regarding the export price of the past consignments.*

Held: As far as demand pertaining to live consignment is concerned, the same has been accepted, we without going into further details uphold the same but without any penalty as there is no deliberate mis-declaration as part of the appellant. Reliance is placed on decision of System and Components Pvt. Ltd. 2004(165) ELT 136(SC).

21. [M/S B.L. GOYAL, RAIPUR VS. COMMISSIONER \(APPEALS\) CUSTOMS](#)

Customs Appeal No. 52274/2019

Final Order No. 50715/2020

Cus: *Case of mis-declaration for benefit under Notification No. 96/2008-Cus, dt. 13.08.2008.*

Held: The import documents and the chemical examination report of the consignments establish that consignments were other Natural Gum. Notification No. 96/2008 Cus, dt. 13.08.2008 only exempts Gum Arabic, classifiable under CTH 13012000 from the levy of the customs duty.

22. [COMMISSIONER OF CUSTOMS \(IMPORT\)ICD DELHI VS. M/S A R FABRICS](#)

Customs Appeal No.51076/2019

Final Order No.51856/2019

Cus: The Department was in appeal against the order of Commissioner (Appeals) who allowed the plea of the assessee that even if they had accepted the enhanced value at the time of import, they had all the right to appeal.

Held: Case remanded to Commissioner (Appeals) for re-appreciation of the facts in accordance with Law and pass de novo order in light of direction of Tribunal.

23. [M/S SUPER ECO AUTOMOTIVE COMPANY GWALIOR VS. COMMISSIONER OF CUSTOMS \(EXPORT\) ICD N DELHI, CUSTOMS](#)

COD Application No.51149/2019

Final Order No. 51802/2019

Cus: *Condonation of delay application filed by the appellant.*

Held: The subject order being challenged was acknowledged to have been received by the assessee within 10 days of it being passed. Regardless of the fact that the assessee's employee left the company, the assessee still had sufficient time to avoid the delay. Hence there is lack of due diligence on part of the assessee. Besides, the reason of demise of family member that too will not be of any avail to the assessee, since such incident occurred after the limitation period for filing appeal had already lapsed. Hence the delay in filing appeal cannot be condoned.

24. [SHRI JEEVAN JAIN, PROPRIETOR OF M/S OM UDYOG, VS. COMMISSIONER OF CUSTOMS \(APPEALS\)](#)

Customs Appeal No. C/53292/2018 & C/53282/2018
Final Order No. 51840/2019

Cus: *Case of mis-declaration.*

Held: The order of Commissioner (Appeals) rejecting the appeal of the appellant is primarily based on the findings of CRCL reports. Thus, the appellant has not adduced any evidences to contradict the findings of CRCL and therefore on merit, we find no reason to interfere with the findings of Commissioner (Appeals).

25. [COMMISSIONER OF CUSTOMS \(IMPORT\) INLAND CONTAINER DEPOT, TUGHLAKABAD, NEWDELHI. VS. M/S R.M. IMPEX](#)

Customs Appeal No. 52189/2018.
Final Order No. 50609/2019

Cus: *Refund application filed by the respondent beyond statute limit.*

Held: The amending Notification No. 93/2008 is arising out of the statute, i.e. Section 25(2A) of the Customs Act, 1962 hence, the findings of the Commissioner (Appeals) that the amendment introducing one year from the date of payment of additional duty as a time to claim the refund thereof to be without statutory amendment, is not sustainable rather is opined to be legally erroneous. We are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962.

26. [SHRI AMANULLAH VS. COMMISSIONER OF CUSTOMS \(GENERAL\), NEW CUSTOMS HOUSE, DELHI](#)

COD Application No. 50741/2019
Final Order No. 50148/2020

Cus: *Condonation of delay application filed by the appellant.*

Held: In the given circumstances and the confirmation of the proposal of confiscation and the imposition of penalty upon the appellant, we are not inclined to accept the reason quoted to be a sufficient cause. More so, for the reason that the order under challenge has given the importer an opportunity for paying redemption fine. The applicant is miserably silent about seeking the said option. Seen from any angle, the reason mentioned by the applicant is held not to be the sufficient cause to explain the 110 days delay. Accordingly, the Condonation of Delay is declined.

27. [M/S VINAYAK CARGO VS. COMMISSIONER OF CUSTOMS \(PREVENTIVE\) JAIPUR](#)

Customs Appeal No. 52044/2018
Final Order No. 50121/2020

Cus: *Can an order pronounced and dictated in open court be reversed?*

Held: The Hon'ble Apex court in Vinod Kumar Singh vs. Banaras Hindu University and others reported in 1988 SCC (1) 80 has led reliance upon the decision of Surender Singh and has reaffirmed the findings of the Final Order No. 50372/2019, dt.05.03.2019 which has already been pronounced. The point of consideration as was subsequently raised accordingly stands disposed of against the appellant. What is pronounced in Open Court is pronounced for world at Large. Hon'ble Tribunal upheld its order pronounced and dictated in open court.

[Back](#)

28. [M/S. LLOYD INSULATION \(I\) LTD. VS. COMMISSIONER OF CUSTOMS NEW DELHI](#)

Customs Diary No. 54315/2018

Final Order Defect Misc. No. 12/2019

Cus: *The appellant in this case has not deposited pre-deposit as per the requirement of Section 129E of the Customs Act, 1962.*

Held: We, therefore, have no hesitation in holding that the requirements set out in Section 129E of the Customs Act, 1962 as amended on 6 August 2014 have to be satisfied in regard to Appeals filed on or after 6 August, 2014.

29. [M/S ALOK INDUSTRIES LIMITED VS. DESIGNATED AUTHORITY, DIRECTORATE GENERAL OF ANTI-DUMPING & ALIED DUTIES](#)

Anti-Dumping Appeal No. 53873/2018

Final Order No. 51250/2019

Cus: *A condonation of delay application.*

Held: Application for COD as well as Appeal dismissed.

30. [M/S INDO RAMA SYNTHETICS \(INDIA\) LIMITED, VS. DESIGNATED AUTHORITY, DIRECTORATE GENERAL OF ANTIDUMPING & ALLIED DUTIES](#)

Anti-Dumping COD Application No. 50676/2019

Anti-Dumping Appeal No. 53725/2018

Final Order No. 51251/2019

Cus: *The appellant filed a condonation of delay application. The appeal was filed with a delay of 211 days.*

Held: The contention of the learned Counsel for the Appellant cannot be accepted for the reason cited that Bombay Dyeing & Mfg. Co. had filed Anti Dumping A.No. 53725/18 Writ Petition in the Bombay High Court in April, 2018. The delay in filing appeal because of filing Writ petition is not satisfactory. The application deserves to be rejected and is, accordingly, rejected. The appeal also stands dismissed.

31. [M/S MITA INDIA \(P\) LTD. VS. COMMISSIONER OF CUSTOMS, NEW DELHI](#)

Customs Appeal No. 52541/2018

Final Order No. 51126/2019

Cus: *The impugned appeal was filed after a delay of 205 days. However, the delay was condoned by the Misc. Order No. 50790/2018, dated 26.10.2018. Matter has come up for final hearing several number of times.*

Held: Absence of promptness in the given circumstances coupled with absence of appellant today before this Tribunal is sufficient for us to hold that the appellant is not interested in pursuing the appeal. We therefore order for the appeal to be dismissed for want of prosecution. We draw our support from the decision of Apex Court in Ram Siromani Tripathi & Ors VS. State of U.P. & Ors in Civil Appeal No. 9142-9144 of 2010 with Civil Appeal No. 6156 of 2012 dated 07 February, 2019. Accordingly, the appeal is hereby dismissed.

32. [M/S NITRO CHEMICAL INDUSTRY LTD. VS. DGAD NEW DELHI – 110 001](#)

Anti-Dumping Appeal No. 50572/2019,

Final Order No. 51668-51669/2019

Cus: *The levy of definitive ADD on the import of Non-Plasticized Industrial Grade Nitrocellulose excluding Nitrocellulose Damped in Ethanol and Waterwet originating in or exported from Brazil, Indonesia and Thailand has led to the filing of these two appeals by the two exporters from Thailand.*

Held: Nitrocellulose, which is the PUC, has been imported to India from the aforesaid three countries below normal value; the Domestic Industry has suffered material injury. Thus, what has to be seen is, whether the satisfaction of the Designated Authority regarding confidentiality was proper and whether the Domestic Industry was justified in not providing summarization under Rule 7 of the 1995 Rules. The Designated Authority, in the present case, on being satisfied about the claims of confidentiality made by the Domestic Industry, did not call upon the Domestic Industry to make any further disclosure. The finding of the Designated Authority in regard to confidentiality, therefore, does not suffer from any infirmity so as to call for any interference in this appeal. Thus, for all the reasons stated above, there is no merit in the appeals. They are, accordingly, dismissed.

33. [M/S PAP FAST MOVERS I. LTD. VS. THE COMMISSIONER OF CUSTOMS \(PREV\) JODHPUR](#)

Customs Appeal No. 53775/2018 [DB]
Final Order No.51151/2019

Cus: *This is a case of smuggling of red sanders along with the consignment clearance where the Appellant was custom broker. Penalty under Section 114(A) of Customs Act, 1962 was imposed upon the appellant by the adjudicating authority.*

Held: We are of the opinion that pendency of appeal cannot be allowed to be a ground for the appellant to avoid the illegality already noticed against him. Simultaneous absence of the Appellant for the day is sufficient for us to hold that he is not interested in pursuing the matter and is rather gaining time and the benefit of avoiding penalty already impressed upon him by keeping the appeal pending.

34. [M/S R. N. METAL \(INDIA\) PVT. LIMITED R. N. SHARMA, MANAGING DIRECTOR VS. CCE & GST, JAIPUR](#)

Custom Appeal Nos. 50529 & 50482/2018,
Final Order 51709-10/2018

Cus: *Importer classifying "Grinding Media Balls" as 'Alloy Steel Melting Scrap' under CTH 72042990 of Customs Tariff Act, 1975 based on Pre-inspection Certificate issued at foreign port of export by an agency approved by DGFT. Goods classifiable under CTH 73259100 ibid when opined by independent experts, Chartered Engineer and National Test House that same were new and unused, though not satisfied IS Standards.*

Held: Reports of Indian experts on examination of imported goods at Indian port to be given more credence over Pre-inspection Certificate issued at load port of exporting country.

35. [M/S HLPL GLOBAL LOGISTICS PVT. LTD VS. CC, NEW DELHI](#)

Customs Appeal No. C/50697/2018 & C/50691/2018
Final Order No. 53243-53244/2018

Cus: *Deliberate overvaluation of imported rough diamond by importer. CHA penalized for non-verification of KYC norms under Regulation 13(o) of CBLR, 2004.*

Held: Functioning of client from declared address not properly verified by CHA. Serious lapse on part of CHA in verifying KYC before taking up Customs clearance of consignment.

36. [M/S MULTI WINGS CLEARING AND FORWARDING PVT. LTD. VS. CC \(GENERAL\), NEW DELHI](#)

Customs Appeal No. 50906/2018
Final Order No. 50542/2019

Cus: *Misuse of Custom Broker licence for imports by Shri Surender Kumar claiming to be assessee's employee and submission of KYC documents belatedly before Licence Issuing Authority.*

Held: Necessary KYC documents were actually not present with the assessee at time of visit by investigating agency. Charge of replacement of goods substantiated as investigation proved that high value goods suspected to be concealed/misdeclared removed clandestinely from import consignments.

37. [M/S. BALAJI ACTION BUILDWELL VS. COMMISSIONER OF CUSTOMS, NEW DELHI](#)

Customs Appeal No.50390/2018 (DB)

Final Order No.51834/2018

Cus: Clearance of imported chemical 'Melamine' against DFIA licences covering "Syntan". Assessee claiming item "Syntan" refers to synthetic tanning agent and cover goods imported since said goods capable of being used as synthetic tanning agent.

Held: HS codes clearly showing two chemicals to be entirely different and said fact also endorsed by Central Leather Research Institute. Benefit to be extended only to Syntan.

38. [M/S MAULI WORLD VIDE LOGISTICS VS. CC, NEW DELHI](#)

Customs Appeal No. C/50767/2018

Final Order No.51728/2018

Cus: The Appellant was involved in the clearance of goods imported from China for M/S Sanco Industries Pvt. Ltd. through M/S Sky Park India, a logistic service provider. It was found that there was mis-declaration of the goods. Though it was declared "Calcium Carbonate" in the bill of entry, it was found to be "Fire Crackers and Telescopic Channels" in all the four containers. Finally, the authorities have revoked the appellant's CHA license along with forfeiture of the security amount.

Held: By considering the totality of the facts, for the reasons mentioned in our earlier order, we find no reasons to interfere with the impugned order. The present appeal is nothing but misuse of the judicial process.

39. [M/S OLYMPIC EXPORTS. VS. CC, NEW DELHI](#)

Customs Appeal No. 51061/2018,

Final Order No. 52630/2018

Cus: Appellant pleading that restrictions on import of MV under Chapter 87 of Customs Tariff Act, 1975 not applicable as said goods are to be assembled in India and hence not covered under definition of new motor vehicle Policy.

Held: The contention of the appellant is not acceptable because what has been imported is complete motor vehicle in CKD condition. CKD import is only for ease of import and transportation. Said item having electricity capacity of more than 250 watt clearly covered under Motor Vehicle Rules, 1989 requiring registration with MV authorities.

40. [M/S PIONEER EMBROIDERY LIMITED VS. CC, NEW DELHI, CUSTOMS](#)

Customs Appeal No. C/51856/2018(DB)

Final Order No. 52798/2018

Cus: The appellant was allowed to import various goods under EPCG licence dated 30.4.2002 under Custom Notification No. 49/2000-Cus. dated 27.4.2000 at the concessional rate of 5% of Custom duty subject to the condition of the Notification.

Held: The reason cited doesn't appear to be sufficiently justifiable. There is an apparent delay in filing the appeal before Commissioner (Appeals) of two years. As per Section 128 of Customs Act, there is prescribed time limit of two months to file an appeal and the Commissioner (Appeals) has been vested with discretion to condone the delay for another a month only. Singh Enterprises VS. CCE, Jamshedpur-2008 (221) ELT 163 is impressed upon.

41. [SADANAND CHAUDHARY VS. CC \(G\), NEW DELHI](#)

Custom Appeal No. 50361/2018,

Final Order No. 51545/2018.

Cus: Misdeclaration of imported goods and failure to verify importer's KYC documents and to give correct advice to him for BIS certification of such goods

Held: Since bill of entry filed based on documents provided by another freight forwarder and without verifying importer's KYC, violation of Regulations 11(a), 11(b) and 11(d) of Customs Brokers Licencing Regulations, 2013 established particularly when imported goods misdeclared and found to be branded Measuring Tape requiring BIS certification. Imposition of penalty and forfeiture of security deposit upheld.

42. [M/S. LEO CARGO SERVICES PVT. LTD. VS. COMMISSIONER OF CUSTOMS, NEW DELHI](#)

Customs Appeal No. 50691/2019
Final Order No. 51292/2019

Cus: *Case of diversion of warehoused goods from public bonded warehouse into domestic markets without payment of customs duty. The Director of the company forged himself as owner of the fictitious companies and creating forged/fabricated documents endorsing the re-export of warehouse goods. Director is not cooperating with the Revenue as per the requirement of Regulation 20(5) of CBLR, 2013.*

Held: The intention of the custom broker to not enable the department to adhere to the impugned time limit shall not vitiate the action taken against the defending custom broker.

43. [M/S. SMART TECHNOLOGIES THROUGH ARVIND JAWA \(PROP.\) VS. COMMISSIONER OF CUSTOMS \(ACC\), NEW DELHI](#)

Customs Appeal No. 50858/2019 [DB]
Final Order No. 51145/2019

Cus: *Case of mis-declaration and undervaluation of imported goods when examined 100% by SIIB.*

Held: The adjudicating authority has rightly upheld the undervaluation and demand of differential duty has seen upheld.

44. [M/S CONTAINER CORPORATION OF INDIA \(CCI\) LTD. VS. COMMISSIONER OF CUSTOMS, JAIPUR-I](#)

Customs Appeal No. C/50718/2018 [DB]
Final Order No. 50739/2018

Cus: *Tribunal vide Final Order No. 50679/2017 dated 08.02.2017 remanded the matter back to the original authority for denovo adjudication holding that the action of Commissioner in proceeding and confirming the cost recovery charges without due consideration of various guidelines issued by the Ministry and more specifically regarding the entitlement of the appellant for exemption, which has already been granted by the Ministry vide their letter dated 23.05.2006, is not legally sustainable.*

Held: We observe that the point of dispute revolves around the liability of appellant to pay cost recovery charges for the period w.e.f. 01.04.2009 to 31.12.2012. Initially, this Tribunal opined lack of documents to ever been placed before the competent authority for deciding the liability of the appellant for cost recovery charges due to which the matter was remanded back. Vide the impugned order, the Tribunal held that no new fact have emerged despite fresh adjudication. It is still for the Department/ Board either to waive or recover the cost recovery charges, it being the discretion of the Department.

45. [CC, NEW DELHI \(ICD TKD\) \(IMPORT\) VS. M/S J G IMPEX PVT. LTD.](#)

Customs Appeal No. C/52393/2018 [DB]
Final Order No. 53157/2018

Cus: *The Respondent had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus, dt. 14.09.2007. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975.*

Held: We are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007-Cus, dt. 14.09.2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962.

46. [CC, NEW DELHI \(ICD TKD\) \(IMPORT\) VS. M/S INDU EXPORTERS,](#)

Customs Appeal No. C/52435/2018[DB]

Final Order No. 53156/2018

Cus: *The Respondent had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus, dt. 14.09.2007. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975.*

Held: We are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007-Cus, dt. 14.09.2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962.

47. [CC, NEW DELHI \(ICD TKD\) \(IMPORT\) VS. M/S D K IMPOTRADE](#)

Customs Appeal No. C/52434/2018/DB

Final Order No. 53155/2018

Cus: *The respondent had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus, dt. 14.09.2007. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975.*

Held: We are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007-Cus, dt. 14.09.2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962.

48. [CC, NEW DELHI\(ICD TKD\)\(IMPORT\) VS. M/S NAV BHARAT TRADING CORPORATION](#)

Customs Appeal No. C/52436/2018 [DB]

Final Order No. 53154/2018

Cus: *M/s Nav Bharat Trading Corporation herein had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus, dt. 14.09.2007. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975.*

Held: We are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007-Cus, dt. 14.09.2007 has to be filed within one year in view of Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962.

49. [CC, NEW DELHI\(ICD TKD\)\(IMPORT\) VS. M/S AGGARWAL TRADING COMAPANY](#)

Customs Appeal No. C/52392/2018[DB]

Final Order No. 53153/2018

Cus: *M/s Aggarwal Trading Comapanyherein had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus, dt.14.09.2007. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975.*

Held: We are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007-Cus, dt.14.09.2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962.

[Back](#)

50. [M/S EXIM CARGO SERVICES VS. CC, NEW DELHI](#)

Customs Appeal No. C/50754/2018

Final Order No. 51744/2018

Cus: *The detailed investigation undertaken by the SIIB into the affairs of the appellant leading to misdeclaration and undervaluation of customs duty has established beyond doubt the contravention of various requirements under the CBLR, 2013. The customs broker is expected to function as an extended arm of the Customs Department and is required to act in such a manner that the provisions of Customs Act, 1962 and enacted rules and regulations are implemented efficiently.*

Held: For the acts of omission and commission which stand established against the appellant, we are of the view that the appellant is liable for penal consequences under the CBLR, 2013.

51. [M/S KOTSONS PVT.LTD. VS. C.C., NEW DELHI](#)

Customs Appeal No. C/52063/2018 [DB]

Final Order No. 52956/2018

Cus: *Application praying for Condonation of Delay citing that the export-import manager of the appellant was sick, therefore, the Appeal could not have been filed within time.*

Held: The decision of Hon'ble Supreme Court in the case of Singh Enterprises VS. C.C.E., Jamshedpur 2008 (221) E.L.T. 163 (S.C.) impressed upon which reads as - "The language used makes the position clear that the legislature intended the appellate authority to entertain the Appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring Appeal.

52. [M/S EXIM CARGO SERVICES VS. CC, NEW DELHI](#)

Customs ROM Application No. C/ROM/50603/2018

Final Misc. Order No. 50467/2018

Cus: *Rectification of mistake apparent on record in the Final Order No. C/A/51744/2018 – CU [DB], dt. 08.05.2018 passed in Appeal.*

Held: Though Customs Act has a specific provision of 129(B)(2) of Customs Act, 1962 empowering the Tribunal to rectify the mistake apparent on record but for exercising the said powers it is mandatory for the Tribunal to keep into consideration that the term "rectify any mistake" in the said provision can be used in two distinct senses: (a) the procedural rectification/ review and (b) rectification/ review of merits. The power of the Court or Tribunal is inherent or implied in the former case for setting aside a palpably erroneous Order passed under any mis-apprehension. However, unless and until there is an express power of rectification/ review and that the error sought to be corrected is apparent on the face of record that the rectification/review on merits of an Order is not permissible.

53. [M/S. NATIONAL GLASS EMPORIUM, CHENNAI VS. DESIGNATED AUTHORITY, DIRECTORATE GENERAL OF ANTI DUMPING AND ALLIED DUTIES](#)

Anti-Dumping Appeal No. 53094/2018

Final Order No. 51403/2019

Cus: *The present application has been filed by the appellant for condoning the delay in filing their appeal.*

Held: The Anti Dumping Bench had specially assembled to hear the Delay Condonation Application and even though, the matter called out, no one has appeared to press the Delay Condonation Application. The Tribunal did not find the reason sufficient to condone the delay and the appeals were dismissed.

54. [M/S. VAIBHAV GLOBAL LIMITED VS. COMMISSIONER, CGST, CENTRAL EXCISE, JAIPUR](#)

Customs Appeal No. 50897/2018,
Final Order No. 50446 /2019

Cus: *The appellant are engaged in the manufacture of stone studded gold jewellery and silver jewellery and are availing the benefit of Notification No. 53/1997-Customs, dt. 03.06.1997 and Notification No. 52/ 2003-Cus, dt.31.03.2003 as amended on re-import/import of goods. The department denying the availability of exemption provided under the said notification has alleged the appellant to have evaded payment of customs duty.*

Held: The Court after the order of denovo adjudication had affirmed the amount as liable along with reduced redemption fine and proportionate penalties.

55. [M/S NEO CORP. INTERNATIONAL LTD. M/S PRISM FLEXIBLE SOLUTIONS PVT. LTD. VS. COMMISSIONER OF CUSTOMS, INDORE.](#)

COD Applications No. 51186 &51202/2018
Final Order No. 50126-50127/2019

Cus: *These are condonation of delay applications filed for condoning the delay of 227 days in appeal No. 53528 of 2018 and 195 days in appeal No. 53571 of 2018.*

Held: The Hon'ble bench finds that the application for condonation of delay is very vague and no concrete reason has been given for not filing the appeal within the prescribed time limit. The only explanation which has been given by the appellant is that the clerk of the Advocate who was handling the matter has left the job and, therefore, appeal could not be filed in time. We find that no details of as to who was the clerk who was actually handling the job of filing the appeal, when did he left the job of the Advocate and whether the Advocate did not have any other person to handle the urgent appeal matters.

56. [M/S ADEPT LOGISTICS VS. COMMISSIONER OF CUSTOMS, NEW DELHI](#)

Customs Appeal No. 53554/2018
Final Order No. 51161/2019

Cus: *This is a case of forgery of import documents to avoid mandatory requirement of BIS certificate.*

Held: Tribunal held that SCN shall be deemed to have been issued by the Commissioner of Customs if after signing the same he has put it in the process of dispatch in such a way that it was out of his control on such date which falls within the stipulated period of limitation, such SCN cannot be held to be barred by limitation. Tribunal also held that event of issuance ought to precede event of service of notice, and hence, service of notice cannot be covered under word "shall issue". Revocation of License upheld by Hon'ble Tribunal.

57. [M/S ASHWINI KUMAR ALIAS AMANULLAH VS. COMMISSIONER OF CUSTOMS ACC \(EXPORT\), DELHI](#)

Customs Appeal Nos. 52084-52121/2019
Final Order Nos. 51622-51623/2020

Cus: *Case of unauthorized import of gold by concealing them under courier mode or under false identity proofs. Goods confiscated under Section 111 (i), 111(l) and 111(m), but Section 111(d) not invoked. Imposition of Penalty under Section 114A preferred to Section 112 by Adjudicating Authority and redemption of gold allowed. Penalty under Section 114AA also imposed.*

Held: Tribunal held that gold was prohibited for import and hence liable for confiscation under Section 111(d) in the instant case; that in view of the decision of the Hon'ble High Court of Delhi in the case, not calculating the amount of duty payable in this case cannot vitiate the penalty under section 114A imposed by the Commissioner in the impugned order and, therefore, the penalty imposed under Section 114A was correct and called for no interference; that Import of gold is not absolutely prohibited but is restricted and hence there was no infirmity in allowing redemption of gold; and finally that Penalty under Section 114AA was rightly imposed.

58. [COMMISSIONER OF CUSTOMS \(PREVENTIVE\), LUCKNOW VS. M/S BUSHRAH EXPORT HOUSE](#)

Customs Appeal No. 70210/2020

Final Order Nos. 51626/2020

Cus: *Based on market enquiry of goods akin to the export goods and reasonable belief that goods were grossly overvalued with intention of claiming undue drawback, Rebate of State Levy (RoSL) and Merchandise Export from India Scheme (MEIS) and therefore liable for confiscation under Section 113, export consignment was seized under Section 110(1). Exporter instead of participating and co-operating in investigation rushed to prefer Appeal before Commissioner (Appeals) against the Seizure Memo. Seizure set aside by Commissioner (Appeals) observing that comparison of export value with local market value was arbitrary and unreasonable, and contrary to provisions of Section 14 and Customs Valuation Rules, 2007 the reason to belief for confiscation of goods was not formable. Revenue in Appeal before Tribunal against Commissioner's (Appeals) Order.*

Held: Tribunal held that all that was required to be considered for exercising power under section 110(1) of the Customs Act, 1962 was whether there was a reason to believe that the goods are liable to confiscation. Further, observing that the Commissioner (Appeals) completely failed to appreciate the provisions of section 110(1) of the Customs Act, 1962 and proceeded to examine the matter as if he was examining an order of confiscation under section 113(i) of the Customs Act, 1962 and not an order of seizure of goods under section 110(1) of the Customs Act, 1962 where the proper officer should only have reason to believe that the goods are liable to confiscation, the departmental Appeal was allowed by setting aside Commissioner's (Appeals) Order.

59. [SHRI SANJEEV SINGH YADAV AND OTHERS VS. CC, DELHI](#)

Customs Appeal No. 50313/2019

Final Order Nos. 51607/2019

Cus: *Case of unauthorized import of Fireworks (Crackers), telescopic Channels and other trading goods by concealing/mis-declaring as Calcium Carbonate. Goods ordered and originally imported by a trading firm was sold on high sea sale basis to an actual user firm to give impression that Calcium carbonate was being imported by an actual user.*

Held: Duty demanded and Penalty/Redemption Fine imposed were upheld by Hon'ble Tribunal.

60. [M/S MERCEDES BENZ INDIA PRIVATE LIMITED & OTHERS VS. CC, DELHI](#)

Customs Appeal No. 52009/2018

Final Order No. 50031-50060/2020

Cus: *Case of alleged use of false and fabricated Telegraphic Release Advice (TRA) by the importers to clear the goods imported by them against various scrips namely DEPB, FPS, VKGUY and DFIA obtained on the basis of faked/forged/fabricated export documents.*

Held: The State cannot be deprived of its share of duty if the same is claimed by fraudulent act of exporters. Where DEPB was fraudulently procured by the predecessor of appellant, the duty demand from the appellant cannot be withdrawn, as the importers who utilized these licenses had placed forged document before seller and they cannot be allowed to retain the benefit that were obtained illegally.

61. [SHRI CHINTA HARAN OJHA CHA & OTHERS VS. CC, DELHI](#)

Customs Appeal No. 52445/2018

Final Order No. 50571/2020

Cus: *Case of alleged mis-declaration of description and value of imported goods namely Point of Sale Devices (POS) and Mobile Point of Sale Devices (MPOS). The value of software was not declared despite so agreed and such consideration paid to the foreign supplier.*

Held: Unscrupulous Importer/CHA's/Consultants/unauthorized persons not only changed the description of goods to get the Bills of Entry facilitated by RMS to circumvent FTP Provisions, but also produced fake/forged/fabricated invoices of lower value of goods to Customs to evade duty. Duty demanded and Penalty/Redemption fine imposed upheld by Hon'ble Tribunal.

62. [M/S INGRAM MICRO INDIA PVT LTD. VS. CC, DELHI](#)

Customs Appeal No. 50259/2019

Final Order No. C/A/51067/2019

Cus: *Case of alleged clearance of imported goods namely Fitbit wireless devices against fake/invalid ETA certificates.*

Held: Tribunal held that once it is established that ETA(Equipment Type Approval) were fake and not issued by Ministry of Telecommunications, all other arguments that country of origin not required on ETA, etc., meaningless. Further, Tribunal followed the law laid down by the Apex Court that *mens rea* is not necessary for contravention of a Civil Act. It was also observed by Tribunal that compliance of statutory requirements with regard to valid importation of goods is primary responsibility of importer.

63. [M/S N. R. INTERNATIONAL VS. CC, DELHI](#)

Customs Appeal No. 52328/2018

Final Order Nos. 51159/2019

Cus: *Case of alleged mis-declaration of quantity and value of imported goods. Partner of importing firm admitted such mis-declaration and paid voluntarily the differential duty. Appellant sought adjournment on numerous occasions.*

Held: Duty demanded and Penalty/Redemption fine imposed upheld by Hon'ble Tribunal.

64. [M/S RUBAL LOGISTICS PVT. LTD. VS. COMMISSIONER OF CUSTOMS, NEW DELHI](#)

Customs Appeal No. 51106/2018

Final Order No. 50797/2019

Cus: *Case of imposition of penalty on Custom Broker for violation of provisions of CBLR, 2013. CB in his statement acknowledged the negligence on his part to properly ensure the compliance of his obligations.*

Held: Tribunal held that CB definitely committed violation of Regulations by observing that these regulations caused a mandatory duty upon CB, who is an important link between the Customs Authorities and the importer/exporter, and any dereliction/lack of due diligence since has caused the Exchequer loss in terms of evasion of Customs Duty.

65. [COMMISSIONER OF CUSTOMS, DELHI VS. M/S SARASWATI IMPEX](#)

Customs Appeal No. 50093/2019

Final Order Nos. 51853/2019

Cus: *Case of alleged mis-declaration of description, value and quantity of imported goods namely fabrics. Case of suppression of willful mis-statement/suppression of fact established during adjudication proceedings. Though duty demand was confirmed under Section 28(4), mandatory penalty under Section 114A was not imposed on the importer. Revenue challenged the Adjudication Order.*

Held: Tribunal allowed departmental appeal and imposed penalty equal to duty demanded.

66. [M/S SRIAANSHU LOGISTICS VS. COMMISSIONER OF CUSTOMS, NEW DELHI](#)
Customs Appeal No. 51429/2018
Final Order No. C/A/53398/2018
Cus: Customs broker allowed unauthorized persons to use its license for large scale import clearances of mis-declared goods. They filed BEs in respect of two consignments without having ever met IEC Holder/proprietor/ Director/owner of these importing firms. Scrutiny of facts disclosed clear case of sub-letting of License.
Held: Authorization not obtained by appellant in respect of companies who are clients of persons to whom license sub-let. KYC received on e-mail and no connection exists between appellant and both the importing firms for ascertaining the correctness of any information. Revocation of License upheld by Hon'ble Tribunal.
67. [PR. COMMISSIONER OF CUSTOMS, ACC \(IMP.\), DELHI VS. M/S VIVO MOBILE INDIA PVT. LTD.](#)
Customs Appeal Nos. 52388-389/2019
Misc. Order No Nos. 50178-50179/2020
Cus: Revenue preferred appeal against Commissioner's (Appeals) Order to the effect that Refund was not hit by the bar of Unjust Enrichment. Commissioner (Appeals) did not have opportunity to examine issue of necessity of re-assessment before claiming refund as Revenue did not press it in wake of Hon'ble Delhi High Court's direction in Micromax Informatics Ltd [2016 (335) ELT 446 (Del.)) to the effect that re-assessment is not mandatorily required for claiming refund.
Held: Tribunal observed that the Department could neither have filed an appeal before the Commissioner (Appeals) against a part of the order passed by the Deputy Commissioner nor it could have filed cross-objections in the appeal filed by the M/S Vivo Mobile before the Commissioner (Appeals) against that part of the order sanctioning the refund amount since the right to file cross-objection has not been conferred under Section 128 of the Customs Act, 1962 which deals with appeal to the Commissioner (Appeals). Revenue's Application for raising additional ground was allowed.
68. [M/S JAI SHIV TRADING CO.VS. CC, DELHI](#)
Anti-Dumping Appeal No. 50426/2018
Final Order No. 50425/2019
Cus: Case of import of functional calculators imported in the guise of calculator parts/calculators in SKD condition with intent of Anti Dumping Duty (ADD) evasion.
Held: Tribunal held that appellant imported calculators in SKD condition with a view to evade anti-dumping duty. It cannot, therefore, be permitted to re-export the calculators in SKD condition when the Department detained the goods and after examination concluded that after assembly fully functioned calculators came into existence and dismissed the appeal.
69. [M/S NEVINNOMYSSKYAZOT VS. DESIGNATED AUTHORITY DIRECTORATE, GENERAL OF ANTI-DUMPING AND ALLIED DUTIES, AND OTHERS](#)
Anti-Dumping Appeal No. 51217/2020
Final Order No. 51042/2021
Cus: COD Application filed praying condonation of delay mainly on grounds that there was denial of principle of natural justice and that they had a good case on merit.
Held: Tribunal observed that the appellant was not able to satisfy the Tribunal that the appellant was prevented by sufficient cause from filing the appeal in time.
70. [M/S CHINTAN ALUMINIUM PVT. LTD. VS. CC, KANDLA](#)
Customs Appeal No. 382/2009
Final Order No/11131/2019
Cus: Declared value of Aluminium foil scraps found to be 70% less than the value of the contemporaneous imports.
Held: Valuation declared by the appellants correctly rejected by lower authorities.

71. [M/S VARSHA PLASTICS VS. CC, KANDLA](#)

Customs Appeal No. 186/2012

Final Order No A/11459/2019

Cus: *Appellants produced CA certificate issued in 2004 & 2010. The unjust enrichment has to be examined only at the time of release of the refund.*

Held: In absence of books of accounts for the current period, only based on CA certificate which is again based on books of accounts, the burden cannot be discharged.

72. [M/S AJANTA LIMITED VS. CC, KANDLA](#)

Customs Appeal Nos. 368-370/2010

Final Order No. A/11783-785/2019

Cus: *The appellant has classified Rotors, Stators, Down Case, Top Case and Down Rod of motor required for electric fan under CTH 85030090 as electric motor.*

Held: Correct classification done by the department under CTH 84149030 as parts of electric fan. Customs Tariff heading include within its purview the incomplete/unfinished items also when presented unassembled/disassembled if the said items have essential characteristics of finished goods.

73. [M/S NAYARA ENERGY LIMITED VS. CC, KANDLA](#)

Customs Appeal No. 474/2011

Final Order No. A/11702/2019

Cus: *Petromax HD catalyst imported by the appellant claiming benefit of Notification No. 21/2002-Cus. Product in question gets consumed in the manufacture of final product and it is not used for running, repair and maintenance of refinery.*

Held: Exemption as per Entry No. 45 of List 17 of Sr No. 228 of Notification No. 21/2002-Cus available only if the product is used for setting up of petroleum refinery or the goods should be used for running, repair and maintenance of plant. Exemption denied.

74. [M/S ASIA MOTOR WORKS VS. CC, KANDLA.](#)

Customs Appeal No. 12 & 72/2010

Final Order No. A/11945-946/2019

Cus: *Non-inclusion of freight amount to the assessable value.*

Held: Not including amount which was paid to Freight Forwarders to the assessable value of imported goods. Rule 9(2) of Customs Valuation Rules. Proviso thereof can be invoked only where the cost is not “ascertainable”. In the present case, the cost was very much ascertainable and the was ascertained in respect of 10 out of 15 bills of entry at the time of import. Intention to evade becomes obvious as appellants avoided inclusion of freight element actually paid by them to the freight forwarder.

75. [M/S AL AMIN EXPORTS VS. CCE & ST, SURAT-I](#)

Customs Appeal No. 295/2011

Final Order No. A/12093-12109/2019

Cus: *Case of diversion of duty free imported material.*

Held: Confirmatory statements given by different individuals. No physical evidence of transportation of finished goods by importer. This shows that M/S Laurel instead of using of duty free raw material in the manufacture of finished goods to be exported, sold the raw material in open market. Case based on documentary evidences and not only statements, hence, cross examination cannot be made the sole criteria for setting aside the demands.

76. [MULCHAND ZAVERI VS. CC, AHMEDABAD](#)

Customs Appeal No. 10749-10750/2017

Final Order No. A/12330-12331/2019

Cus: *Case of Import of gold mixed with mud, cement, etc to artificially claim something that could be camouflaged as Natural Gold Ore Concentrate.*

Held: Notification No.12/2012-CE exempts “Ores”. Goods which are produced by subjecting pure gold, sand and other materials to various processes to appear like ore cannot by any stretch of imagination be called “Ore”. Benefit of exemption denied. Duty confirmed. Confiscation upheld.

77. [M/S FLEXI TUFF INTERNATIONAL LTD VS. CC, KANDLA](#)

Customs Appeal No. 185/2011

Final Order No.A/10245/2020

Cus: *The Appellants contended that Notification 43/2002-Cus dated 19.04.2002 exempted levy of additional duty of Customs (HSD) also.*

Held: Notification No. 43/2002-Cus exempted material imported into India against Advance license from Basic Customs duty. No exemption from Additional Duty of Customs (High Speed Diesel Oil) leviable under Section 116 of the Finance Act, 1999.

78. [M/S SHREYANSH MARBLE TILES PVT. LTD VS. CC, JAMNAGAR](#)

Customs Appeal No. 11953/2019

Final Order No. A/10522/2020

Cus: *Whether Commissioner of Customs can exercise powers granted to him under Section 110(2) of the CA 1962 without issuance of SCN and without granting PH to the appellant – noticee ?*

Held: Extension of time limit for issuance of show cause notice under Section 110(2) of the Customs Act, 1962. Amendment in 2006 Section 110(2) has been softened. No SCN necessary for extending time limit for further six months.

79. [SHRI BATRA JAY VS. CC, AHMEDABAD](#)

Customs Appeal No. 13152/2018

Final Order No.A/11112/2020

Cus: *Illegal import of gold bar by passenger without declaration, attempt to cross through green channel but caught by Customs Officer, Gold concealed in socks.*

Held: Absolute Confiscation of Gold Bars illegally imported upheld. Intention of passenger was clear to evade duty by concealing the gold in socks and attempt of appellant to cross through green channel.

80. [M/S. MIRACLE FOOD PROCESSORS INTERNATIONAL LTD. VS. COMMISSIONER OF CUSTOMS, COCHIN](#)

Customs Appeal No.585/2008,

Final Order No.21184/2019

Cus: *Case of Import of Fruit Dehydration Plant (Spray Evaporation Machine–SPV 10) from Germany under EPCG Scheme to avail concessional rate of duty.*

Held: The appellants have failed to fulfill the export obligation and accordingly, Department has issued a showcause notice to recover the applicable duty on the imported goods. Department was within its rights to impose the conditions of the Bond for violation of the provisions therein. The impugned show-cause notice is about the recovery of duty foregone in terms of the conditions of the Notification. The appellants having not appealed against the assessment of the Bill of Entry and having not requested for provisional assessment, cannot demand the same while replying to the show-cause notice. Such a request, is beyond the scope of the provisions of Customs Act, 1962. Once a machine is imported in terms of the EPCG license wherein certain export obligation has been fixed by the DGFT authorities and particularly, in the case when the EPCG Committee has rejected the appeal made by the appellant, Customs cannot revalue the goods and reduce the export obligation accordingly.

81. [RAVI KUMAR RM PARTNER M/S. AISHWARYA INVESTMENTS VS. CC, BANGALORE,](#)
Customs Appeal No.21393/2018,
Final Order No.21028/2019

Cus: *Case of smuggling of gold biscuits of foreign markings along with unaccounted cash during seizure under Section 132 of the Income Tax Act, 1961.*

Held: The purchase invoices from the local jewellers were not produced during the investigation. Therefore, the Department could not verify the authenticity of those invoices. There is no infirmity in the impugned order which is upheld, appeal dismissed, decided against appellant.

82. [M/S 3M INDIALTD, SHRI KULVEEN SING BALI, SHRI M.S. SWAMINATHAN VS. COMMISSIONER OF CUSTOMS, BANGALORE-I,](#)

Customs Appeal No. 25625/25676/25677 of 2013
Final Order No. 20343-20345/2020

Cus: *Classification of Micropore, Transpore and Tegaderm for availing the exemption contained in Notification No. 21/2002-Customs, dt. 01/03/2002 as amended from time to time. The contention of the appellants is that their products are rightfully eligible for the exemption contained in the notification under the description "Skin Barriers Micropore Surgical Tapes", whereas Department contends that there exists a product which suits the description "Skin Barriers Micropore Surgical Tapes" and the notification should not be read as per convenience.*

Held: The department has established that a product named and known as "Skin Barriers Micropore Surgical Tapes" exists. There is no ambiguity in the notification and there is no need to interpret the notification by supplying what is assumed to be missing in the notification. The impugned order is correct as far as it holds that the items imported by the appellants are not eligible for the exemption contained in the Notification No.21/2002-Cus, dt. 01.03.2002.

83. [M/S ARBEE BIOMARINE EXTRACTS PVT. LTD. VS. COMMISSIONER OF CUSTOMS](#)

Customs Appeal No. 20876/2019
Final Order No. 20352/2020

Cus: *Classification of 'Squalene' under CTH 15042090 or CTH 29012990. The chemical reports issued by CIFT and Customs Laboratory indicated the impugned product to be of marine origin. It is also confirmed by CIFT that the sample analysis was done using Perkin Elmer Gas Chromatograph FID equipped with a column specific for the analysis of fatty acids and hydrocarbons in oils. Therefore, it was confirmed that the sample was of marine origin and rich in Squalene.*

Held: We find that there is no reference to the percentage of unsaponifiable matter with respect to the classification under CTH 1504. Even going by the principles of "ejusdem generis" or "Noscitur a sociis", the impugned goods being of animal origin are rightly classifiable under Chapter 1504. The test reports give a fair idea of the nature and characteristics of the product. In the instant case, CIFT and Customs Laboratories have reported that the impugned product is fish oil. Therefore, we find that it cannot be classified under Chapter 2901 as saturated or unsaturated acyclic hydrocarbons along with ethylene, propene, butene, acetylene, heptene etc.

[Back](#)

84. [M/S PARISONS AGROTECH PVT LTD & M/S PARISONS FOODS PVT LTD, CALICUT VS. CC, COCHIN](#)

Customs Appeal No. C/452-453/2009
Final Order No. 20969-20972/2019

Cus: DGFT vide Notification No 39 (RE-2007) /2004-2009 dated 16-10- 2007 imposed a condition to the effect that import of palm oil and its fractions, whether or not refined, but not chemically modified, would not be permitted at the port of Cochin.

Held: The Revenue has successfully demonstrated that unlike penalty under Sections 112(b), 114A and 114AA of Customs Act, 1962, *mens rea* is not essential criteria for imposing penalty under Section 112(a) of the Customs Act. Appeals filed by Revenue are maintainable and suitable redemption fine in lieu of confiscation is imposable on the appellants.

85. [M/S LIBERTY OIL MILLS LIMITED VS. CC, COCHIN](#)

Customs Appeal No. 362 & 392 of 2009,
Final Order No. 20349-20350/2020

Cus: Restriction on import of Palm oil through Kochi Port.

Held: The importer has not made out any case to show the compelling circumstances under which they could not either cancel the Contract or alter the Port of discharge. The importer was required to comply with the Notification No. 39(RE-2007)/2004-09, dt. 16.10.2007, inasmuch as they could not produce an irrevocable commercial letter of credit as required by the Notification. Therefore, the impugned goods are liable for confiscation in terms of Section 111 (d) of Customs Act, 1962. The Learned Commissioner erred in holding that no redemption fine could be levied as the goods were not physically available. The goods were provisionally released in terms of a bond submitted by the importers. Redemption fine upheld, but the quantum is reduced.

86. [SHAMSHEENA MOHAMMED SHIHAVUDHEEN VS. CC, MANGALORE](#)

Custom Appeal No. C/20929/2018-SM
Final Order No. 21055/2019

Cus: Case is regarding the maintainability of appeal under Section 129(A) of Customs Act, 1962. Gold smuggled in baggage of passenger by way of concealment. The Department had alleged that the appellant has indulged in smuggling and has confiscated the unfinished gold from the possession of the appellant under 111(d), 111(i), 111(l) and 111(m) of the Act and also imposed penalty on the appellant under Section 112(a) of the Act for her omission and acts rendering the goods liable for confiscation under Section 111 of the Act.

Held: Penalty under Section 112(a) of the Act upheld.

87. [RAJNISH KANSAL & RINKU KANSAL VS. CC LUDHIANA](#)

Customs Appeal No. C/60013-60014/2019
Final Order No. 60530-60531/2019

Cus: Case of mis-declaration of Export goods. Export of Murate of Potash (MOP) in guise of Nuts and bolts. MOP restricted/prohibited for export. Usage of fake/forged/fabricated documents. Imposition of Penalty under Section 114 and 114AA challenged before Tribunal.

Held: Tribunal upheld the penalties, quantum of penalty in respect of one appellant reduced.

88. [M/S SUN INTERNATIONAL VS. CCE DELHI-IV](#)

Customs Appeal No. C/ 57170/2013

Final Order No. 60141/2020

Cus: *Case of unauthorized import of branded, unbranded and counterfeit goods. Mis-declaration of description and quantity was resorted to by Appellants. Branded goods restricted for import. Adjudicating authority ordered absolute confiscation of goods. Appellant challenged the Impugned order before Tribunal for release of goods other than Restricted branded goods.*

Held: Tribunal upheld the Impugned Order and dismissed appeal.

89. [M/S TOUCHWOOD INDUSTRIES VS. CCE DELHI-IV](#)

Customs Appeal No. C/3145/2012

Final Order No. 60214/2020

Cus: *Case of determination of Classification of goods declared as educational charts. Alternative plea of the Appellant to classify goods as printed book with benefit of Exemption Notification No. 21/2002-Cus, dt. 01.03.2002 was also turned down.*

Held: Revenue classified the goods under CTH 49119990 based on CTH and HSN Explanatory notes. Tribunal upheld Impugned Order and dismissed the appeal.

90. [M/ S BERYL INFOSOL PVT. LTD. VS. CCE, DELHI](#)

Customs Appeal Nos. C/120-122/2012

Final Order No. 60128-60129/2020

Cus: *Case of Import of Capital Goods without payment of Customs duty to set up computer software under STP Scheme. Capital goods installed and removed clandestinely. Appellants failed to discharge export obligation. Adjudicating Authority confirmed duty demand for duty foregone and imposed penalty.*

Held: Appeal preferred before Tribunal was summarily dismissed.

91. [M/S ZYMONUTRIENTS PVT. LTD. VS. CC, CHENNAI](#)

Customs Appeal No. 119/2012

Final Order No. 41574-41580/2019

Cus: *Appellants classified used dried yeast as animal feed. The issue was whether it falls under chapter 21 or 23 of Customs Tariff.*

Held: Chapter 23 includes products of any kind used in animal feed. CTH21022000 specifically mentions yeast active or inactive. Therefore, when yeast has a specific mention under heading 2102, that cannot be classified under any other heading under chapter 23 in view of the chapter note mentioned above. Under rule 3 (a) of Interpretative Rules, that the heading which provides most specific description shall be preferred to heading providing a more general description.

92. [M/S COMPUAGE INFOCOM LTD. VS. PR.CC, CHENNAI](#)

Customs Appeal No. 41027/2019

Final Order No. 40071/2020

Cus: *Classification of CCTV under CTH 8525 8010 as television cameras or under CTH 8525 8090 (others).*

Held: From the HSN Notes read with the Customs Tariff Heading 8525, we find that there is no entry specifically for CCTV cameras and it is nowhere even hinted that CCTV cameras, which according to the appellant are neither digital cameras nor video camera recorders, would fall under the category of television cameras itself and hence, this argument of the assessee cannot be accepted. For these reasons, they cannot be classified under television camera, but rightly under "Others" for the period in dispute, since we cannot add or substitute our views/opinions, to negate Revenue's classification, just to go with appellant's claim which is based only on arguments.

93. [M/S HONDA SIEL POWER PRODUCTS LTD.VS. CC, CHENNAI](#)

Customs Appeal Nos. 42343-42345/2014 & 40688/2015

Final Order No. 41140-41143 / 2019

Cus: *Case of refund of SAD availing the benefit of Notification No. 102/2007-Cus, dt. 14.09.2007.*

Held: The question of strict versus liberal interpretations of the exemption notifications has now finally been settled by the judgment of the Constitutional Bench of the Hon'ble Apex Court on 30th July 2018 in the case of Dilip Kumar & Company [2018 (361) ELT 577 (SC)], any exemption notification must be strictly interpreted and any benefit of doubt must go in favour of the Revenue and against the assessee. Appeals dismissed.

94. [GAURAV AGARWAL VS. CC, TIRUCHIRAPALLI](#)

Customs Appeal No. 41798/2016

Final Order No. 41733/2019

Cus: *Case of smuggling involving silver, foreign origin of seized silver established from packaging.*

Held: The boxes contained the exact quantity of silver granules mentioned on them. How is it possible for the appellant to purchase 6 carton boxes exactly mentioning 10 kgs of silver granules from road side shop in Sowcarpet. Further, the boxes also show the date of manufacture, purity as also lots nos. The details given by department in another case (silver granules imported by Sh. Shiv Sahni) establishes that the manufacturer mentioned on the carton boxes is a manufacturer/supplier of silver granules. These facts would sufficiently prove that the case set up by the appellant that the carton boxes were purchased from roadside to be false and unacceptable.

95. [VAS NOORULLAH & CO. VS. CC \(AIR\), CHENNAI](#)

Customs Appeal No. 40133/2013

Final Order No. 41246/2019

Cus: *Case of mis-declaration*

Held: As is evident from the second test report of CLRI dt. 27.12.2010 reproduced above, the sample was tested by CLRI to see if it matches the description in the shipping bill. In the first test report, it was tested on the specifications for "Nubuck Leather of cows or buffaloes" while the description of the goods by the appellant was "Sheep Nubuck leather". The second sample was ordered to be tested which was tested and it was again confirmed that it is not Nubuck Leather at all as the process of snuffing essential for making nubuck leather has not been undertaken. From the above, it is clear that there was misdeclaration of the goods in the shipping bill by the appellant.

96. [LIEUTENANT COLONEL GANESAN S. \(RETD.\) VS. CC, CHENNAI](#)

Customs Appeal No. 42206/2017

Final Order No. 40083/2020

Cus: *Case of gold smuggling.*

Held: The appellant's explanation regarding the call records coupled with the extracts of statements of persons apprehended on the early hours of the eventful day lead us to understand that considering the gravity and nature of the offence/activity alleged, the explanation offered in the form of reply is not at all sufficient to conclude as to the innocence of this appellant, as pleaded. Appeal Dismissed.

97. [M/S SEA SWAN SHIPPING AND LOGISTICS VS. CC, CHENNAI](#)

Customs Appeal No 41776/2019
Final Order No. 40545 / 2020

Cus: *Delay of 764 days in filing of appeal. Therefore, this appeal for condonation of delay.*

Held: The appellant has failed to promptly avail the appeal remedy. Though law of limitation is not meant to destroy the right of parties, it cannot favour those who are sleeping. In the present case, the appellant has deliberately opted not to file appeal initially. Thereafter, this appeal is filed only on the advice given that the penalty can be set aside as per the decision of the Hon'ble High Court of Delhi. As discussed earlier, there is no evidence to show that the livelihood of appellant is affected or his intention to expand business is interrupted. Appeal Dismissed.

98. [SURESH RAJARAM VS. CC, CHENNAI](#)

Customs Appeal No. 41815/2019
Final Order No. 40781 / 2020

Cus: *Case of gold smuggling.*

Held: There is no dispute that the appellant tried to smuggle the gold, ie., he tried to bring the above gold bars from Singapore into India without payment of applicable duties and without even declaring the same when he was duty bound to do so. The purchase of the same and the final destination/usage may not be of any significance when such an act of smuggling is carried out, since what is important is primarily the declaration, followed by the payment of applicable duties/taxes.

99. [RAVI SADANAND VS. CC, TUTICORIN](#)

Customs Appeal Nos. 40237-40238/2017
Final Order No. 40028-40029 / 2020

Cus: *Case of smuggling involving Red Sanders.*

Held: Burden of proof has been discharged by the adjudicating authority. Revenue has linked each and every chain in the whole loop of the master plan to smuggle the contraband by identifying the involvement and role of each and every person whereas nothing is brought on record by the appellants to dislodge even as small link in the above chain. No reasons to interfere with the meticulous findings of the Original Authority. Impugned Order-in-Appeal is upheld. Appeals Dismissed.

100. [M/S T.R.L. KROSAKI REFRACTORIES LTD. VS. CC & SERVICE TAX, VISAKHAPATNAM](#)

Customs Appeal No. 30495/2019
Final Order No. A/31111/2019

Cus: *Case of refund following re-classification of goods.*

Held: Refund cannot be sanctioned in any case including in case of self-assessment unless the assessment is itself challenged. ITC Limited v. Commissioner-2019 (368) E.L.T. 216 (S.C.) Followed.

101. [M/S COROMANDEL INTERNATIONAL LTD, SECUNDERABAD VS. COMMISSIONER OF CUSTOMS CENTRAL EXCISE AND SERVICE TAX GUNTUR](#)

Customs Appeal Nos.30280/30281/30284/30286 of 2019
Final Order No. A/30797-30800/2019

Cus: *Reduction in import value post clearance of the goods. Exporter at the time of clearance paid duty on the entire value. Subsequently, the overseas supplier gave discount on account of the goods being cleared well in time. Hence the importer filed refund application.*

Held: No refund can be sanctioned without challenging the assessment order, whether such assessment is done prior to the amendment to Section 17 of the Customs Act, where the assessment had to be done by the officers or post such amendment where the assessment is done under the self-assessment scheme. ITC Limited v. Commissioner - 2019 (368) E.L.T. 216 (S.C.)-Followed.

102. [COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, HYDERABAD-II VS. M/S S.V. TECHNOLOGIES PVT LTD.](#)

Customs Appeal No. 662/2007
Final Order No.A/30606/2019

Cus: *Validity of Demand u/s 28 of the Customs Act, 1962 without challenging bill of entry.*

Held: Cases pertaining to issue of demand under Section 28 after clearance of the case under Section 47 are covered by the judgment of the Hon'ble Apex Court in the case of Jain Shudh Vanaspati Ltd., which clearly held that a demand can be raised under Section 28 even after clearance of the case under Section 47. Accordingly, the case decided in favour of revenue.

103. [COMMR. OF CUSTOMS \(PORT\), KOLKATA VS. M/S CHIRAG CORPORATION](#)

Customs Appeal No.76038/2015
Final Order No.75299/2020

Cus: *The party imported Powers Tillers and claimed benefit of exemption Notification No.12/2012-Cus which is available to Rotary Tiller/Weeder.*

Held: The benefit of exemption notification is not available to the power tillers imported by the appellant of subject goods to the customs exemption notification.

104. [SHRI BIKASH SAHA, PROPRIETOR M/S. BISHAL EXPORT VS. PRINCIPAL COMMISSIONER OF CUSTOMS \(PREVENTIVE\), KOLKATA](#)

Customs Appeal No.77314/2019
Final Order No.76874-76875/2019

Cus: *Goods imported in excess of what was declared in the BoE and other documents. Goods imported from Bangladesh as per the South Asia Free Trade Agreement (SAFTA). Only the excess quantity of goods which have been imported by them without declaring in any of the documents not covered by SAFTA certificate and in violation of Customs Act, 1962.*

Held: Excess goods and not the entire consignment liable to confiscation under Sections 111(e) and 111(l) ibid. Amount of redemption fine as well as the penalties imposed by the impugned order upon the appellants need to be proportionately reduced.

105. [M/S INDIAN FARMERS FERTILIZER CO-OPERATIVE LIMITED VS. COMMISSIONER OF CUSTOMS\(PREVENTIVE\), BHUBANESWAR](#)

Customs Appeal No.78100/2018
Final Order No. 76702-76705/2019

Cus: *Appellant filed refund claim with respect to fertilizers which have been imported on which they have paid excess Customs duty taking the wrong value for the purpose of calculation. Refund claim was filed after finalization of provisional assessment and the final assessment order was not challenged.*

Held: The appellant was not entitled to the refund without having first challenged the assessment order itself and therefore the impugned order denying such refund is correct . The decision of the larger Bench of the Hon'ble Supreme Court in the case of ITC Ltd. v. Commissioner of Central Excise, Kolkata-IV followed.

106. [SHRI BIKASHSAHA, PROP. OF M/S MOLY EXPORTS VS. CC \(PREVENTIVE\), KOLKATA](#)

Customs Appeal No.248/2009
Final Order No.76159/2019

Cus: *The appellant mis-declared goods at the time of importation. Goods were seized and confiscation & imposition of penalties proposed in the notice.*

Held: *Mens rea* is not an essential ingredient either for the purposes of confiscation under Section 111 or for levy of penalty under 112(a) of the Customs Act, 1962. Confiscation upheld.

107. [M/S ADVANI PLEASURE CRUISE COMPANY PVT LTD VS. COMMISSIONER OF CUSTOMS \(I\) NHAVA SHEVA,](#)

Customs Appeal No. 681/2012
Final Order No. 86982/2019

Cus: *The assessee has imported second hand/used Casino Ship M V Majesty vide BoE. From the examination report, it is quite evident that casino games have been fitted on all the three decks of the vessel, and the layout of the decks including those of chairs and stools on the deck was to facilitate the playing of those casino games.*

Held: Once the vessel is fitted with casino games across the entire three decks with no regular seating plan, the same cannot be called a passenger ship. It is also not the case of assessee that there is a fare charged by them for the voyages that can be undertaken on vessel imported. The HSN explanatory notes along with the relevant tariff have been analyzed by bench of Tribunal in case of *Waterways Shipyard Pvt Ltd*, and the classification determined by application of Rules of Interpretation under heading 8903. Following the decision of Tribunal in case of *Waterways Shipyard Pvt Ltd*, the Tribunal held the classification of imported vessel under heading 8903 as determined by the impugned order.

108. [COMMISSIONER OF CUSTOMS \(IMPORT\) NHAVA SHEVA VS. M/S STAR INDUSTRIES](#)

Customs Appeal No. 86231/2013
Final Order No. A/86334/2019

Cus: *Whether the process of roasting of ores into concentrate should be considered as manufacture activity under Chapter Note 4 of Chapter 26 of Central Excise Tariff Act, 1975.*

Held: The issue is no more res integra in view of judgment of Supreme Court in case of respondent itself. The Apex Court have held that in view of Chapter Note 4 appended to Chapter 26 of Tariff Act, the process of roasting of ores into concentrate shall be considered as manufacture and thus, the benefit of duty exemption provided under Notification No. 4/2006-C.E. should not be available.

109. [M/S GMR INFRASTRUCTURE LTD VS. COMMISSIONER OF CUSTOMS \(EXP.\)
MUMBAI](#)

Customs Appeal No. 86101/2013

Final Order No. 86983/2019

Cus: *The appellant filed BoE for clearance of goods described as Electronic Sensor Paver Vogel Model 1800-2 with AB 600-2-TV for laying bituminous pavement upto 9 meters along with multiplex big SKJ and its accessories. The appellant classified the item under CTH 84306100 and claimed exemption under Notification No. 621/2002-Cus, dt. 01.03.2002 as amended.*

Held: The issue at hand stands resolved by the Apex Court through its decision in *Gammon India Ltd*, wherein it was held to be well settled principle that a provision providing for an exemption has to be construed strictly. It was also held that in the context of the principle that in a taxing statute, there is no room for any ambiguity. Moreover, the Apex Court in *Dilip Kumar & Co* reiterated the principle of strict construction of notification and also that in case of ambiguity, ambiguity has to be construed in favour of the Revenue.

110. [M/S HINDUSTAN PETROLEUM CORPORATION LTD VS. COMMISSIONER OF
CENTRAL EXCISE, PUNE-I](#)

Customs Appeal No. 1341/2006

Final Order No. A/85651/2020

Cus: *The issue involved for determination is, whether the assessee is entitled to refund of Customs duty paid during September, 2004 to April, 2005. Two amended notifications of the basic Notification No. 21/02-Cus were in force during the period namely, Notification No. 82/04-Cus and Notification 11/05- Cus. In both amending Exemption Notification, concessional rate of duty + Nil rate of duty as the case may be prescribed to be applicable only to Liquefied Petroleum Gases falling under Chapter 2811.1900.*

Held: Applying the principles of strict interpretation, the exemption notification cannot be made applicable to the clearances of commercial butane (Liquefied Petroleum Gas) during the said period. Tribunal also agrees with the contention of Revenue that in absence of successfully challenging the assessment order, correcting the classification of commercial butane to that of Liquefied Petroleum Gases by filing necessary appeal before higher forum, the methodology followed by filing the refund claim is contrary to the principles of law laid down by Supreme Court in *Priya Blue Industries* case, which has been recently upheld in *ITC* case.

111. [M/S HONDA SIEL CARS INDIA LTD VS. COMMISSIONER OF CUSTOMS
\(EXPORT PROMOTION\) MUMBAI-I](#)

Customs Appeal No.681/2011

Final Order No. A/86917/2019-WZB

Cus: *The appellant imported cars and cleared the same on payment of duty by debiting the duty under DEPB scheme. Upon import, the appellant paid 4% SAD through TR-6 challan. Later, on sale of imported cars, it filed for refund of such 4% SAD as per Notification No. 102/07-Cus. The refund claim was rejected by the adjudicating authority on grounds of limitation.*

Held: Considering the decision of the Bombay High Court in *CMS Info Systems Pvt Ltd VS. UoIt* is clear that the period of limitation even if specifically not mentioned under the Notification No. 102/07-Cus before its amendment, all refund of Customs duty being governed under Section 27 of the Customs Act, 1962 the limit of one year from the date of payment of 4% SAD would be applicable. In the present case, as the refund was filed after one year from the payment of 4% SAD, the same is barred by limitation.

[Back](#)

112. [Ms PRERNA SINGH, CEO M/S SEVILLE PRODUCTS LTD VS. COMMISSIONER OF CUSTOMS \(IMPORT-II\) MUMBAI.](#)

Customs Appeal No. 89693-89695/2018

Final Order No. A/85065-85066/2020

Cus: *Imposition of penalty on CEO, based abroad.*

Held: Imposition of Penalty under Section 112(a) on M/S Seville Product and its CEO, Ms. Prerna Singh, both based in Dubai. CESTAT held that If violation of provision of statute is committed within the said country, then the consequence in conformity to the legal provision of the country would ensue, no matter the violator is a resident of the country or an alien. It is, therefore, necessary to determine if the "act or its omission" committed is in violation of law and accordingly to punish the violator and not to determine if such violation has been committed by a legal person based in the Country or not. Appellant Prerna Singh had also confessed during regarding of her statement as CEO of her company that appellant Seville Products Ltd. used to raise two invoices for same import having low value and high value recorded in those invoices which were despatched through a computer of third party named Prakesh Menon for presentation of the invoices having lower value before the Customs for payment of customs duty and clearance and that the commercial invoice against which payment was received was not shown to the Customs. Meaning of word abetment is "to help someone in wrong doing'. In the instant case, such wrong doing had its effect in the Mumbai Customs jurisdiction and appellants had aided the importer in such wrong doing, therefore, penalty u/s 112 was rightly involved.

113. [M/S SAKAR INDUSTRIES PVT LTD VS. COMMISSIONER OF CUSTOMS NHAVA SHEVA-I](#)

Customs Appeal No. 89376/2018

Final Order No. A/86792/2019

Cus: *The appellant imported Molybdenum Ore Concentrate declaring the same as Molybdenum Ore and claimed exemption from Countervailing Duty (CVD) as per Notification No. 04/2006-CE. Upon investigation by the DRI, it was found that the item imported was not Molybdenum Ore but was Molybdenum Ore Concentrate.*

Held: Since the goods were mis-declared, the appellant is not eligible for benefits under Notification No. 04/2006-CE. It is a fact that the goods imported are molybdenum Concentrate and appellants have declared the same as Molybdenum Ore on the Bill of Entries and the documents relating to import clearance. For the acts of omission and commission leading to misdeclaration of the goods, for which they become liable for confiscation.

114. [M/S UNITED TRADERS VS. COMMISSIONER OF CUSTOMS NHAVA SHEVA-V](#)

Customs Appeal No. 85040/2018

Final Order No. A/86702/2019

Cus: *Case of undervaluation of goods based on examination.*

Held: The importer as well as the CHA were both unable to produce the BIS certificate in respect of such goods. Moreover, rather than producing the certificate, the appellants attempted to manipulate the certificate and produced some other documents so as to cover up the imports. Such irregularities in the import were acknowledged by the proprietor of the appellant. Once it is established that goods imported were contrary to provisions of the Customs Act, 1962 they become liable for confiscation under Section 111 of the Customs Act, 1962. The person importing such goods attracts penalty under Section 112 of the Customs Act, 1962.

[Back](#)

115. [M/S VIJAYSHREE ALLOYS PUNE PVT LTD VS. COMMISSIONER OF CUSTOMS \(IMPORT\), NHAVA SHEVA](#)

Customs Appeal No. 87305/2013

Final Order No. A/85689/2020

Cus: *The appellant had filed the BoE for clearance of "Aluminium Scrap Tread" by mis-declaring the goods inasmuch as, out of the total quantity of goods imported by assessee, goods weighing 13.5 MT were found to be old and used pipes, classifiable under CTH 7608 with 10% BCD.*

Held: Since, the correct information was not furnished in import documents, the transaction value was appropriately rejected. Thus, assessee is exposed to the consequences provided under statute for payment of differential duty, fine and penalty.

116. [M/S. A V AGRO PRODUCTS LTD. VS. COMMISSIONER OF CUSTOMS, NEW DELHI](#)

Customs Appeal No. 361-63/2010

Final Order No. 50155-50157/2020

Cus: *Case where the noticee acknowledged guilt by approaching Settlement Commission and the co-noticee's (Appellant) guilt to be decided separately or together.*

Held: Co-noticee cannot avoid adjudication. Merits of case against co-noticees to be examined separately and only if co-noticees found to commit same offence as that committed by main noticee, settlement mechanism provides for settlement of entire case as a whole. Where act of noticees separately and distinctly liable for penal consequences, co-noticee not to automatically get penalty set aside on ground that case of main noticee settled. Settlement Commissioner granted liberty to Revenue to take appropriate action against remaining noticees i.e. appellants herein. Benefit of KVS Scheme not to be suomotu extended to appellants.

117. [COMMISSIONER OF CUSTOMS NEW DELHI \(ICD, TKD\) Vs M/S DAXEN AGRITECH INDIA PVT LTD](#)

Customs Appeal No. 52498/2014

Final Order No. 50102/2018

Cus: Recognition / Classification of any product by Drug Control Act/Authority cannot be the basis for classification under Customs.

Held: The classification under Customs Tariff should be guided by the statutory entries and the explanatory notes including HSN notes. The parameters as laid down in other legal acts /authorities can have persuasive value only. Drug licence by itself cannot be basis for classification.

118. [M/S WARNER BROS. \(F.E.\) INC. VS. COMMISSIONER OF CUSTOMS \(I\), MUMBAI](#)

Customs Appeal No. 705,729 & 743/2004

Final Order No. A/85694-85696/2017

Cus: If any part of the 'Sale Proceeds' of the subsequent use of the imported good goes to the Seller (abroad) than that part needs to be added in the Assessable value under Customs Act, 1962.

Held: It is seen that any amount of royalty or license fee paid during a transaction of sale, as a condition of such sale, would be includible in the transaction value. In the instant case there is no sale involved. The cine prints are imported for nominal consideration, however as a condition of such import, the appellants are required to pay a percentage of the gross revenue earned by them by use of such cine prints. If the same is considered as the license fee then the same needs to form part of the assessable value, as the same is paid as a condition of import.

[Back](#)

119. [COMMISSIONER OF CUSTOMS NEW DELHI \(ICD TKD\) \(IMPORT\) VS. BHARAT FOILS LTD](#)

Customs Appeal No. 52429/2018
Final Order No. 53152/2018

Cus: Limitation period for claiming refund, granted vide any notification also needs to be governed by the limitation prescribed by the statute.

Held: Refund claim of additional duty due to exemption provided by the Notification No. 102/2007 has to be governed by the limitation period as per subsequent Notification No.93/2008-Customs read with Section 27 of Customs Act, 1962.

120. [M/S SAURASHTRA CEMENT LIMITED VS. C.C. JAMNAGAR \(PREV\).](#)

Customs Appeal No.453-454/2010
Final Order No.A/11253-11254/2018

Cus: “For use” Vs. “To use” both have different connotation, if used in End use Exemption Notification.

Held: The Hon’ble Supreme Court interpreting the terms of the Notification No. 13/1997 held that the terms mentioned in the Notification No. 13/1997-Cus is ‘for use’ which was clarified that ‘for use’ means intended for use, therefore, even if certain quantity was not put to use, the exemption cannot be denied. However in the present case, the notification prescribes various condition unlike in the Notification No. 13/1997-Cus. As per the conditions, the importer is duty bound to execute a bond binding himself to use the imported materials in his factory and not only that, he has to submit a certificate of the jurisdictional Excise Officer regarding enduse of the goods. Since the appellant could not use quantity of 997.340 MTs, the Jurisdictional Officer also did not issue enduse Certificate. All these conditions are mandatory in case of Notification No. 40/2006-Cus. In failure to comply with this substantive condition, the appellants is not eligible for exemption Notification. This ruling has been given by the Hon’ble Supreme Court in the case of Mangalore Chemicals & Fertilizers Ltd. Vs .Duputy Commissioner 1991 (55) ELT ELT 437 (SC).

121. [M/S LAXMI ENTERPRISES VS. COMMISSIONER OF CUSTOMS PREV. NEW DELHI](#)

Customs Appeal No. 51536/2017
Final Order No. 50544/2018

Cus: Valuation details/documents recovered from Laptop/Computer are admissible as evidence.

Held: In the main ground of the appeal. It has been argued that transaction value was required to be accepted in the absence of evidence produced by Revenue of contemporaneous import of identical/similar goods. The appellant argued that the documents printed-out from the electronic media are not admissible for non-compliance of specified conditions specified in the Section 138C of the Customs Act, 1962. The appellant raised objection to the admissibility of the documents recovered from the laptop. They have cited the provisions of Section 138C of the Customs Act, 1962. The Tribunal found such objections without basis in as much as the truth of the documents printed-out from the laptop has been admitted by Shri Sumit Chawla son of the proprietor in clear terms.

122. [M/S UNISONS CEARING PVT. LTD. VS. THE PRINCIPAL COMMISSIONER OF CIUSTOMS \(GENERAL\) MUMBAI](#)

Customs Appeal No. 51319-51328/2014
Final Order No. A/61280-61288 & 61312/2016

Cus: The time limits contained in CHALR/CBLR (CHA/Customs Broker Regulations Act) cannot be construed to be Mandatory but are directory in nature.

Held: The time limitation for suspension of CHA License contained in regulation 20 of CBLR cannot be construed to be mandatory and is only directory in nature. It cannot be laid down as an 'Absolute Proposition of Law' that delay in taking immediate action of suspension of initiation of inquiry within a period of 90 days would vitiate the action of Commissioner of Customs.

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Service Tax Appeal No. 50807 OF 2019

Arising out of Order-in-Appeal No. 186/ST/DLH/2018, Dated: 18.01.2019
Passed by Commissioner (Appeals-I) Central Tax & GST, New Delhi

Date of Hearing: 27.01.2021

Date of Decision: 09.02.2021

**JPG CONSTRUCTION PVT LTD
F-7, FIRST FLOOR, 1521, WAZIR NAGAR KOTLA
MUBARAKPUR, NEW DELHI-110014**

Vs

**COMMISSIONER OF GOODS AND SERVICE TAX
GST DELHI EAST COMMISSIONERATE, CENTRAL
REVENUE BUILDING, NEW DELHI-110002**

Appellant Rep by: Shri Ved Prakash Batra, Consultant

Respondent Rep by: Shri Arun Thapliyal, AR

CORAM: Hon'ble Mr. Justice Dilip Gupta, President

Hon'ble Mr. Justice P V Subba Rao, Member (T)

FINAL ORDER NO. 51040/2021

Per: Dilip Gupta:

1. This appeal seeks the quashing of the order dated January 18, 2019 passed by the Commissioner (Appeals), Central Tax and GST Delhi the Commissioner (Appeals), by which the appeal has been dismissed and the order dated August 31, 2018 passed by the Assistant Commissioner rejecting the refund claim of Rs. 64,68,025/- filed by the appellant under the provisions of section 102 of the Finance Act, 1994 the Finance Act, has been upheld.

2. The services provided by the appellant to governmental authority or local authority for construction, erection, commissioning, installation etc. were exempted from the levy of service tax by Notification dated June 20, 2012. This exemption was however, withdrawn by Notification dated March 01, 2015 that was made effective from April 01, 2015. The appellant claims that upon withdrawal of this exemption, it paid service tax during the period commencing April 01, 2015 upto February 29, 2016 on the services provided by the appellant to government authorities or local authorities.

3. The Finance Act, 2016, which was presented in the Parliament on February 29, 2016, inserted sections 101, 102 and 103 to the Finance Act. Section 102 contains special provision for exemption in certain cases relating to construction of Government buildings. Sub-section (1) of section 102 provides that notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing April 01, 2015 and ending with February 29, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning etc., under a contract entered into before March 01, 2015. Sub-section (2) of section 102 provides that refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times. Sub-section (3) provides that notwithstanding anything contained in the Chapter (i.e. Chapter VA), an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill 2016 receives the assent of the President. Section 102 of the Finance Act is reproduced below:

"102. Special provision for exemption in certain cases relating to construction of Government buildings.

(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of—

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;

(b) a structure meant predominantly for use as—

(i) an educational establishment;

(ii) a clinical establishment; or

(iii) an art or cultural establishment;

(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act, under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President."

4. The Finance Bill 2016 received the assent of the President on May 14, 2016.

5. The appellant claims that it submitted an application online through Automation of Central Excise and Service Tax ACES portal on October 13, 2016 and also filed a hard copy of the refund claim on December 20, 2016 in the office of the Assistant Commissioner of Service Tax-Division-I the Assistant Commissioner.

6. The Assistant Commissioner wrote a letter dated January 17, 2017 to the appellant in connection with the refund claim filed by the appellant on December 20, 2016 mentioning therein that while processing the refund claim it was noticed that some documents were not filed by the appellant. The appellant was, therefore, asked to submit the documents. This letter of the Assistant Commissioner was followed by reminders dated April 28, 2017 and November 29, 2017.

7. Thereafter, the appellant sent a letter dated December 16, 2017 to the Superintendent (Refund) pointing out that the appellant had paid service tax as per the bills, but service tax components were not received from NBCC(India)Limited, which was the main contractor, as the project was exempted from service tax. The Superintendent (Refund), however, sent a letter dated January 31, 2018 to the appellant in connection with the aforesaid letter dated December 16, 2017 requiring the appellant to furnish information for processing the refund claim. The appellant claims that it submitted the documents on March 16, 2018 through a letter dated March 15, 2018.

8. Thereafter, a show cause notice dated June 28, 2016 was served upon the appellant mentioning therein that the application filed by the appellant for refund of service tax on December 20, 2016 appeared to be time barred since the application for refund could have been filed upto November 30, 2016 in view of the provisions contained in sub-section (3) of section 102 of the Finance Act.

9. The appellant filed a reply to the show cause notice.

10. The Assistant Commissioner framed two issues for consideration, namely,:

(i) Whether the refund filed by the appellant was barred by time; and

(ii) Whether the copy of online refund request dated October 13, 2016 filed with the documents on December 20, 2016 can be considered to be within the prescribed time limit or barred by time.

11. After examining the provisions of the Finance Act, the Assistant Commissioner rejected the refund application. The observations are as follows:

*"9.2 Further, to examine whether the online refund request filed on 13.10.2016 through ACES be considered for filing within time limit, it is submitted that although copy of online refund request filed on 13.10.2016 was submitted to this office but alongwith the documents filed on 20.12.2016, which is beyond the time limit as discussed above. **Further, to examine the authenticity of online refund request, the ACES portal was accessed and any such request was not found to be pending. It is also observed that the helpline facility of the ACES portal was also accessed through cbecmitra.helpdesk@icegate.gov.in but status of such request was not***

confirmed by the helpline. Hence, it appears that the online refund request filed on 13.10.2016 could not be validated.

10. I find that in view of the provisions of Section 102(3) of the Finance Act, 1994 governing the refund claim and the circumstances prevailing, there are no grounds left to consider the **refund request of the assessee that appears to be time barred in all respect.**

11. On the basis of foregoing discussions and in the light of provisions stated above, I am of the considered opinion that in the instant case, amount of service tax for Rs. 64,88,025/- is liable to be rejected."

(emphasis supplied)

12. This order dated October 31, 2018 passed by the Assistant Commissioner was assailed by the appellant before the Commissioner (Appeals). The contentions advanced on behalf of the appellant were, however, not accepted and the appeal was dismissed holding that application submitted by the appellant was beyond the time stipulated in sub-section (3) of section 102 of the Finance Act. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below:

"8. I observe that the assent to the Finance Bill 2016 had been given by the Hon'ble President on 14.05.2016. The time limit prescribed for refund of service tax specified that the claim should be made within a period of six month from 14.05.2016. **Hence appellants were required to file the refund claim on or before 13.11.2016.** Further, it is only by way of Section 102(2) that the refund of tax paid during 01.04.2015 and 29.02.2016 was provided for. However, this is subject to time limit for filing claim prescribed in Section 102(3). Provisions of Section 102 being special dispensation, levy of service tax was normal and proper except for the stipulations under Section 102. The provisions of the Act being substantive, delay in filing claim cannot be treated as procedural infirmity.

9. The appellants claimed to have filed the online refund claim on 13.10.2016, but, filed the hard copies along with necessary documents on 20.12.2016. This means that the refund claim had been filed beyond the limit of six months, which was prescribed in the provisions of the Act. I note that the provisions of Section 102 are very specific and there is no scope for deviation from the same. Appellants have claimed refund under the provisions of Section 102 only and if the claim is filed as per Section 102(2), it is inevitable that Section 102(3) becomes applicable. Therefore, the provision for time limit under Section 102(3) cannot be ignored and there being no provision for condonation of delay, the same cannot be applied.

9. Appellants contended that date of 'online application should be taken as date of refund application. However, the Adjudicating Authority could not verify the authenticity of online refund request either through pendency list or through ACES helpline. **The enquiry could not validate the claim of appellants to have filed online request. From the copy of online claim printout submitted by the appellants, it is seen that appellants entered "offline" against the item "mode of submission of supporting documents."** That being the case, appellants have not explained more than two months delay in submitting documents i.e. if they themselves stated in an online application on 13.10.2016 that supporting documents would be submitted offline, why did they submitted such documents on 20.12.2016 only when they were aware that the last date for filing claim was 13.11.2016. Such behavior raises doubt over fact of filing online application which could not be ascertained by the AA. To get the refund, one has to submit hard copies of such application along with the documents. In absence of such copies processing of refund application, could not in any way have been done by the authorities. It is clear that appellants had not filed the hard copy of application along with requisite documents on time. They were actually submitted on 20.12.2016. However, no cogent reason has been provided by the appellants as to why such submission of hard copies was delayed. In terms of Apex Courts judgment in the case of N. Balakrishnan vs. M. Krishnamurthy reported in 2008 (228) E.L.T. 162 (S.C.), the length of delay in filing of appeal is not relevant and what is relevant is acceptability of the explanation of delay, that in this case there is no explanation of which justify the late submissions of such documents. Thus, there is no ground to interfere with the observations & findings of the adjudicating authority.

(emphasis supplied)

13. Shri Ved Prakash Batra, learned Consultant appearing on behalf of the appellant made the following submissions:

(i) The Commissioner (Appeals) erred in not accepting the e-filing date of the refund claim as the date of filing the refund claim, as the Department itself had allowed on-line filing of refund claims and had also prescribed the procedure to do so. In this connection reference has been made to the Trade Notice dated September 17, 2009 that prescribes the procedure to avail the facility of ACES as also the Circular dated March 23, 2010 that provides for the procedure for electronic filing of the returns;

(ii) The Commissioner (Appeals) erred in holding that the refund claim was "time barred" on the ground that the appellant had not provided cogent reasons for delayed filing of the hard copy of the refund application accompanied by the relevant documents; and

(iii) In any view of the matter, the claim for refund would be governed by the provisions of section 11B of the Central Excise Act 1944 the Excise Act, wherein the time period prescribed for filing an application for refund is within one year. Thus, the time period for filing refund claim cannot be restricted to six months from the date on which the Finance Bill, 2016 received the assent of the President under the provisions of sub-section (3) of section 102 of the Finance Act.

14. Shri Arun Thaplial, learned Authorized Representative of the Department, however, submitted that the order passed by the Commissioner (Appeals) does not suffer from any illegality. It is his submission that the appellant could not substantiate that the application for refund was actually submitted online on October 13, 2016 and, therefore, since the hard copy of the refund application was filed on December 20, 2016, it was clearly barred by time in view of the limitation of six months contemplated under sub-section (3) of section 102 of the Finance Act. It is also his submission that the provisions of section 11B of the Excise Act would not have any application to the present case.

15. The submissions advanced by the learned Consultant for the appellant and the learned Authorized Representative of the Department have been considered.

16. The issue that arises for consideration in this appeal is as to whether the appellant had submitted the application for refund of service tax within the stipulated time since the application filed for refund has been rejected for the sole reason that it was not submitted within the time prescribed.

17. As noticed above, section 102 of the Finance Act deals with special provision for exemption in certain cases relating to construction of Government buildings. Sub-section (1) provides that notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from April 01, 2015 and ending with February 29, 2016 in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration under a contract entered into before March 01, 2015. Sub-section (2) provides that refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times. Sub-section (3), which is relevant for the purpose of determining the issue involved in this appeal, provides that notwithstanding anything contained in this Chapter (i.e. Chapter VA), an application for claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 received the assent of the President. Parties do not dispute that the President gave the assent on May 14, 2016.

18. The appellant claims that it submitted the refund application online on October 13, 2016. It is, therefore, necessary to examine the procedure for filing an application online. According to appellant, the procedure is provided in the Trade Notice dated September 17, 2009 as also the Circular dated March 23, 2010 issued by the Central Board of Excise and Customs.

19. The Trade Notice provides that to transact business on ACES, a user has to first register with the ACES through a process called "Registration with ACES". A detailed procedure for taking registration has also been provided for new assessee, existing assessee, non-assessee and large taxpayer unit. The Trade Notice further provides that an assessee can electronically file a statutory refund by either filing it online or by

downloading the offline return utilities which can be filled in offline and uploaded to the system through internet. Steps for preparing and filing returns have also been provided. The relevant portion is reproduced below:

Returns

The assesses can electronically file statutory returns of Service Tax by choosing one of the two facilities being offered by the department at present: (a) they can file it online, or (b) download the off-line return utilities which can be filled-in off-line and uploaded to the system through the internet.

Steps for preparing and filing returns

(i) Assessee downloads the Offline return preparation utility available at <http://www.aces.gov.in> (under Download)

(ii) Prepares the return offline using this utility. The return preparation utility contains preliminary validations which are thrown up by the utility from time to time.

(iii) Assessee logs in using the User ID and password.

(iv) Selects RET from the main menu and further chooses required activity such as e-filing/amending/Revise return as the case may be and uploads the return.

(v) Returns uploaded through this procedure are validated by the ACES before acceptance into the system which may take up to one business day. Assessee can track the statue of the return by selecting the appropriate option in the RET sub menu. The status will appear as "uploaded" meaning under process by ACES, "Filed" meaning successfully returns can be resubmitted after corrections.

(vi) Returns can also be prepared and filed on line by selecting the 'File Return' option under RET module after logging into the ACES.

(vii) All validations are thrown up during the preparation of the return in this mode and the status of the return filed using the online mode is instantaneously shown by ACES.

(viii) The Service Tax returns can be modified once as per rules up to 90 days from the dated of filling the initial return.

Service Desk

In case of any difficulty in accessing or using the ACES Application, assesses can seek help of the ACES Service Desk by sending e-mail to aces.servicedesk@icegate.gov.in or calling up national toll free number 1800 425 4251 on any working day from Monday to Friday between 9 AM to 7PM.

20. The Circular dated March 23, 2010 issued by the Central Board of Excise and Customs also deals with procedure of electronic filing of Central Excise and Service Tax returns and for electronic payment of excise duty and service tax. This has been divided into 10 modules, including electronic filing of refund claims and their processing. It also provides for registration by a new assessee, existing assessee or non assessee and a Large Tap Payer. It also provides that an assessee can electronically file statutory returns by either filing it online or downloading the off-line return utilities which can be filled in off-line and uploaded to the system through the internet. Steps for preparing and filing returns have also been also provided. They are reproduced below:

a. Steps for preparing and filling returns

(i) Returns can be prepared and filed on line by selecting the 'File Return' option under RET module after logging into the ACES.

(ii) All validations are thrown up during the preparation of the return in this mode and the status of the return filed using the online mode is instantaneously shown by ACES.

(iii) Returns can also be prepared and filed off-line. Assessee downloads the offline return preparation utility available at <http://www.aces.gov.in> (Under Download)

(iv) Prepares the return offline using this utility. The return preparation utility contains preliminary validations which are thrown up by the utility from time to time.

(v) Assessee logs in using the User ID and password.

(vi) Selects RET from the main menu and uploads the return. Instructions for using the offline utilities are given in detail in the Help section, under 'Download' link and assesses are advised to follow them.

(vii) Returns uploaded through this procedure are validated by the ACES before acceptance into the system which may take up to one business day. Assessee can track the status of the return by selecting the appropriate option in the RET sub menu. The status will appear s "uploaded" meaning under process by ACES, "Filed" meaning successfully accepted by the system or "Rejected" meaning the ACES has rejected the return due to validation error. The rejected returns can be resubmitted after corrections.

(viii) Once the Central Excise returns are filed online in ACES or uploaded to the system using the off-line utility, the same can not be modified or cancelled by the assessee. The Service Tax returns, however, can be modified once as per rules up to 90 days from the date of filing the initial return.

(ix) Self-assessed CE returns, after scrutiny by the competent officer, may result into modification. Both the 'Original' and the 'Reviewed' return can be viewed by the assessee online.

21. The Circular also deals with validation of the entries made while filling return and they are as follows:

d. Validation of the entries made while filling return

1. *At the time of making entry in the electronic format of the relevant return, the software does some preliminary validation for ensuring correctness of data, either concurrently or at the time of saving/ submitting the return. This validation process is automated. The user is prompted by the application software to correct the particulars entered wherever required. In respect of certain entries, although the application alerts the assessee about any entry found erroneous or inconsistent, as per the automated validation process, the assessee is still allowed to proceed further to complete data entry of the return and finally submit it electronically. But in some cases the assesseees are not allowed to proceed further unless the error indicated is corrected.*

2. *A return filed electronically is subject to automatic verification process by the application and defective returns are marked to the departmental officer for review and correction. While reviewing the return the officer may seek some clarification from the assessee, call for some information, records or documents which should be furnished by the assesseees. In case of review and correction of returns by the departmental officers, assesseees will receive a message from the application and they can log in to the application to view the reviewed returns online.*

3. *Returns, captured off-line using the Downloadable utility and uploaded later on, are further subjected to certain validation checks. Processing of uploaded returns, using the off-line versions, is done at the end of one business day and the status can be viewed by the assesseees under the 'VIEW STATUS' link under 'RET' module. Status is described as 'UPLOADED', 'FILED' or 'REJECTED' and they denote as follows:*

- *UPLOADED denotes that return is uploaded and under processing (assesseees are advised to view the status after the end of a business day).*

- *FILED denotes that uploaded return is accepted by system.*

- *REJECTED denotes that return is rejected due to errors. (The assesseees are required to correct the return and upload it again.)*

4. *There is no provision in ACES application to allow assesseees to make corrections to the returns filed by them. Once the return is accepted by the system as successfully 'filed', no modification can be made by the assessee. However, if the return is rejected, the assessee can correct the errors and upload it again. The assesseees are, therefore, advised to take utmost care while fill-in in the returns. They may, however, bring it to the notice of the departmental officers.*

22. The contentions advanced on behalf of the parties can now be examined.

23. According to the Department, the refund application should have been filed on or before November 13, 2006 but since it was actually filed on December 20, 2016, it was barred by time.

24. The submission of the learned Consultant for the appellant is that the application was first filed online on October 13, 2016 and so it was within time and in any view of

matter, in view of the provisions of section 83 of the Finance Act, section 11B of the Excise Act would be applicable and the application for refund could be filed within one year from the relevant date. In support of this contention reliance has been placed upon a decision of a learned Member of the Tribunal in *M/s RoopAutomotives Ltd. vs. The Commissioner of G.S.T. & Central Excise, Chennai Outer Commissionerate 2019 (7) TMI 907- CESTAT CHENNAI*.

25. The submission advanced by the learned Consultant for the appellant regarding the applicability of section 11B of the Excise Act needs to be first addressed because if it is accepted it may not be necessary to examine whether the appellant had actually submitted the application on-line on October 13, 2016 since the hard copy of the refund application, in that case, was filed within one year.

26. As noticed above, initially by Notification dated June 20, 2012 the services provided by the appellant to Governmental authority or local authority for construction, erection, commissioning etc., were declared as exempted service. This exemption was subsequently withdrawn by Notification dated March 01, 2015 that was made effective from April 01, 2015. The appellant claims that after the withdrawal of the exemption, the appellant started paying service tax. However, in view of the provisions of section 102 of the Finance Act that was inserted by Finance Act 2016, no service tax was to be levied or collected during the period April 01, 2015 to February 29, 2016 on the aforesaid services and under sub-section (2) refund was to be made of all such service tax which was collected but which would not have been so collected had sub-section (1) been in force at all relevant times. Sub-section (3) provides that an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill receives the assent of the President. This is a special provision for exemption from service tax in certain cases and, it provides that the refund claim for service tax has to be filed within a specified time. When a specific provision has been made in section 102 of the Finance Act for claiming refund of service tax paid during the period commencing April 1, 2015 upto February 29, 2016 in respect of the specified services and it also prescribes that the application for the claim of refund of service tax shall be made within six months from the date the Finance Bill 2016 receives the assent of the President, the said time period prescribed for making the refund application has to be strictly adhered to and resort cannot be taken to the other provisions, including section 11B of the Excise Act.

27. The contention of the learned Consultant for the appellant, however, is that in view of the provisions of section 83 of the Finance Act that makes applicable section 11B of the Excise Act to service tax, the limitation for filing the application for refund of service tax would be as provided in section 11B of the Excise Act and not that provided under sub-section (3) of section 102 of the Finance Act.

28. Section 83 of the Finance Act, on which reliance has been placed by learned Consultant for the appellant, deals with application of certain provisions of the Excise Act to service tax. It is reproduced below:

"83. Application of certain provisions of Act 1 of 1944

The provisions of the following sections of the Central Excise Act, 1994, as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:-

******* 11B **** "***

29. Though section 11B of the Excise Act has been mentioned in section 83 of the Finance Act, but what needs to be noticed is that the provisions of the Excise Act would apply, so far as may be, in relation to service tax as they would apply in relation to a duty of excise. Thus, if there is a specific provision in the Finance Act itself for claiming refund of service tax, the provisions of section 11B of the Excise Act dealing with refund would not apply. There cannot possibly be two time limits prescribed for making an application for refund of service tax. When the time limit prescribed in sub-section (3) of section 102 of the Finance Act or sub-section (3) of section 104 of the Finance Act is applicable, the time limit prescribed in section 11B of the Excise Act would not be applicable.

30. Learned Consultant for the appellant has, however, placed reliance on the decision of a learned Member of the Tribunal in *Roop Automotive*. After referring to the provisions of section 104 of the Finance Act, the learned Member held that the time

prescribed in section 11B of the Excise Act, which is one year, would be applicable to even applications made for refund of service tax under section 104 of the Finance Act. The observations are as follows.

5.1 *The main crux of the arguments of the assessee through its Ld. Advocate is that Section 104 is under Chapter VA of the Finance Act, 1994, whereas Section 83 falls under Chapter V of the Finance Act, 1994, and therefore, the right of the service recipient to claim refund is governed by Section 83 read with Section 11B of the Central Excise Act, 1994 and not by Section 104(3) ibid. Further, it is his case that Section 104(3) does not override Section 11B since both Section 83 and Section 104(3) fall under different Chapters and it is Section 83 that makes provisions of Section 11B applicable to Service Tax matters as well.*

5.2 *In view of the above, **it is the case of the assessee that the refund application is required to be filed under Section 11B read with Section 83 ibid. and consequently, the time-limit available is one year and not six months as held by the lower authorities.***

8.2 *The above Section starts with a non obstante clause operating as an exclusion clause to exclude the charging Section 66 or Section 66B. Further, Sub-Section (3) of Section 104 also starts with a non obstante clause, to exclude anything contained 'in this Chapter' i.e. Chapter VA per se. A possible takeaway from section 104, read as a whole, is vide sub- Section (1) the applicability of charging Section is excluded and that refund of service Tax paid, if any, has to be claimed per application within a period of six months from the date on which the Finance Bill, 2017 received the assent of the President. Clearly, Section 104 does not prescribe any format for refund claim and perhaps the only recourse therefore is to file such an application under Section 11B via Section 83 of the Finance Act. It is important to note here that the exclusion is limited to chapter VA and not chapter V and hence, the operation of section 104 (3) starting with a non obstante clause does not exclude the operation of any other provisions other than the ones coming under the same Chapter (VA).*

8.3 *At the cost of repetition, the Section reads that "Notwithstanding anything contained in this Chapter, an application.... shall be made within a period of six months...." and Section 104 does not prescribe the Form of application for refund and for this, the only recourse is to Section 11B qua Section 83. The Revenue may take a stand that Section 104 (3) does not mention about the filing of any annexures, documentary evidences, etc., along with an application for refund, but no statute contemplates filing of an empty application seeking refund, without any documents/evidences, at least to the effect that the amount claimed as refund was in fact remitted to the Government account. A cursory look at the CBIC website (<http://www.cbic.gov.in/resources//htdocs-cbec/refund-rebate/refundrebate-docs.pdf>;jsessionid=E715A9021149926E0FC4240BB1DC5D13) contains inter alia types of refund/rebate applications and the list of documents to be filed along with the applications. For an application for refund is contemplated only under Section 11B and a number of documents are mentioned to be filed along with the prescribed format. Hence, there may not be any difficulty in mentioning that an application referred to is a complete application since filing of an 'empty' application is not an empty formality; it has to go with all enclosures and documentary evidences in support for enabling the appropriate officer to understand the issue from such a complete application and thereafter, it is for that officer to call for additional documents/evidences, if need be.*

9.1 ***Therefore, a harmonious reading of the provisions points to one and only conclusion that though section 104 is a special provision, it is practically dependent on section 11B and Section 83 connects both the above provisions and thus, all procedures as in Section 11B would apply.*** There may be applications within six months, as contemplated in Section 104 (3), but that cannot take away the applicability of section 11B.

10. ***In view of the above discussions and on the peculiar nature of facts involved, the time-limit prescribed under Section 104(3) is only directory, but however, the time as well as the procedure prescribed under section 11B applies in full.*** The Adjudicating Authority is therefore required to grant refund if the refund application is within the time-limit prescribed under Section 11B and not otherwise.

(emphasis supplied)

31. Though the learned Consultant for the appellant is correct in his submission that what was stated by the learned Member in connection with section 104 of the Finance Act would also apply to section 102 of the Finance Act, but it is not possible to accept the views expressed by the learned Member in the aforesaid decision that the time limit prescribed for making the refund application under sub-section (2) of section 102 of the Finance Act would be that as prescribed under section 11B of the Excise Act and not that as provided in sub-section (3) of section 102 of the Finance Act.

32. It would be seen from the aforesaid decision in Roop Automotive that much emphasis has been placed on the fact that since section 83 of the Finance Act is contained in Chapter V, whereas section 104 is contained in Chapter VA of the Finance Act, section 11B of the Excise Act would be applicable since sub-section (3) of section 104 begins with "notwithstanding anything contained in Chapter VA." Emphasis has also been placed on the fact that section 104 does not prescribe any format for refund of claim and, therefore, the only course open is to file an application under section 11B of the Excise Act.

33. It is not possible to accept the views expressed by the learned Member in the aforesaid decision. Stipulation in section 83 of the Finance Act that the certain sections of the Excise Act shall apply so far as may be, in relation to service tax as they apply in relation to duties of excise have not been examined. Though section 102 or section 104 of the Finance Act do not prescribe any format but a procedure for filing an application for refund of service tax has been prescribed in the Trade Notice and the Circular. It is also not the case of the appellant that the appellant was not aware of the procedure since it is the appellant that had placed the Trade Notice and the Circular.

34. Such being the position, it is not possible to hold that the limitation for making an application for refund of service tax would be that as provided in section 11B of the Excise Act. The Application for refund of service tax has to be made within the period stipulated in sub-section (3) of section 102 of the Finance Act.

35. It now needs to be examined as to whether the appellant had submitted the application for refund of service tax online on October 13, 2016. The appellant has placed reliance upon the Trade Notice dated September 17, 2009 regarding automating all major processes in Central Excise and Service Tax through ACES. In order to transact the business of ACES, a user has to first register through a process called "Registration with ACES". Detailed steps for taking registration have also been provided. The system generates a registration number and it is only thereafter that an assessee can transact business through ACES. The appellant has enclosed a copy of the application, which the appellant contends was submitted online. Registration Number has, however, not been indicated by the appellant. The appellant, therefore, could not have transacted any business through ACES. This procedure for registration has also been prescribed in the Circular dated March 23, 2010, which has also been relied upon by the appellant.

36. It also transpires that from a perusal of the Trade Notice that an assessee can electronically file a statutory return by either filing it online or downloading off-line return utilities which can be filled-in off-line and uploaded to the system through internet. The returns uploaded through this procedure are validated by the ACES before acceptance into the system and an assessee can track the status of the return by selecting the appropriate option in the sub-menu which would show the status as "uploaded" which means under process by ACES, or "filed" which means successfully uploaded. The appellant has not stated that the online application was successfully uploaded. It also provides that in case of any difficulty in accessing ACES application, an assessee can seek the help of the Service Desk.

37. The Circular also provides that an assessee can electronically files statutory returns of Central Excise and Service Tax by either filing it online or downloading the online return utilities which can be filed off-line and uploaded to the system through the internet. The Circular provides that the returns uploaded are validated by ACES before acceptance into the system.

38. The Assistant Commissioner and the Commissioner (Appeals) have considered whether the online refund request said to have been filed by the appellant through ACES could be considered for determining whether the application was filed within time. A finding has been recorded that the ACES portal was accessed but the request

was not found to be pending and even the helpline facility of ACES portal that was accessed did not confirm the status of such a request. The Commissioner (Appeals) has also noticed that the online print out that was submitted by the appellant also showed "off-line" against the item "off-line".

39. It is, therefore, clear that though an attempt was made by the appellant to submit the application online but the process that was required to be undertaken for making an application online was not complied to with as even the regulation was not done. The application cannot be treated to have been filed on time. If there was any difficulty in submission the application, the appellant could have sought the help of the help desk but the appellant has not stated that he made an attempt to seek help.

40. The appellant, therefore, cannot contend that the online application was actually made on October 13, 2016 as there is nothing on the record to substantiate that such an application was actually filed.

41. The appellant filed a hard copy of the application only on December 20, 2016 in the office of the Assistant Commissioner and the records do indicate that correspondence did take place between the Department and the appellant in connection with this application. This Application was filed beyond the period prescribed in sub-section (3) of section 102 of the Finance Act. In the absence of any provision for condoning the delay in filing the application, the Commissioner (Appeals), committed no illegality in upholding the order passed by the Assistant Commissioner rejecting the application filed by the appellant for refund of service tax on the ground that it was not filed within the time stipulated.

42. Thus, for all the reasons stated above, there is no merit in this Appeal. It is, accordingly, dismissed.

(Pronounced in open court on 09.02.2021)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. I**

Service Tax Appeal No. 53191 of 2014

Arising out of the Order-in-Original No. 22/2013-14, Dated: 04.03.2014
Passed by The Commissioner of Central Excise, Delhi - II, New Delhi

**Date of Hearing: 05.08.2019
Date of Decision: 03.02.2020**

**M/s MGF EVENT MANAGEMENT
MGF HOUSE, 17-B ASAF ALI ROAD
NEW DELHI - 110002**

Vs

**COMMISSIONER OF CENTRAL EXCISE
C.R. BUILDING, I.P. ESTATE, DELHI - 110109**

Appellant Rep by: Shri A K Batra, CA & Ms Vibha Narang, Adv.
Respondent Rep by: Shri V P Pandey, AR (DR)

CORAM:Hon'ble Mr. Justice Dilip Gupta, President
Hon'ble Mr C L Mahar, Member (T)

FINAL ORDER NO. 50154/2020

Per: C L Mahar:

The present appeal has been filed against the impugned Order-in-Original whereby the learned Commissioner has confirmed service tax demand of Rs. 2,47,31,755/- besides demanding interest and imposing penalties under different Sections 25, Section 78 of the Finance Act, 1994 respectively, arising out from three show cause notices, the details of which are given below: -

Show Cause Notice date	Period of demand	Amount of Demand in Rs.
21/04/2011	01/10/2005 to 31/03/2010	1,52,04,251/-
26/08/2011	01/04/2010 to 31/03/2011	44,22,031/-
20/09/2012	01/04/2011 to 31/03/2012	51,05,473/-

2. Brief facts of matter are that the appellant is operating parking areas in five Malls by way of providing parking to the patrons/visitors of shopping malls and collecting parking fees for which they have appointed an outside agency (herein after referred to as the Third Party Agency) for managing the parking area who is collecting "Parking Fees" on behalf of the appellants and remitting the proceeds to the appellant. The third-party agency raises the invoice for operating cost and its management fee and charges Service tax on these amounts and pays the remainder amount of gross collection on monthly basis after deducting its direct operating cost and management fee. The entire revenue generated by way of selling parking tickets belongs to the appellant. Parking income is recorded as revenue by the appellant in its books of accounts. The appellants claims that the income earned from parking fees belongs to appellants entirely and nothing is remitted to the mall owners from the collections made or otherwise. It is the claim of the appellant that it has no written contract with the Mall owners and is not paying any amount by way of rent or space allocation or by whatever name it may be called to the Mall owners for operating the parking area. The appellant asserts that the only interest of Mall owners is that there should be a hassle free parking and that the space available for parking should be utilized to the maximum possible extent so that there is adequate parking space for the vehicles, otherwise it will affect the popularity of the Mall and may cause traffic chaos in nearby areas of the Mall which may affect the business of the shops located in the Mall and ultimately the Mall owners. No service tax was paid by the appellant on the income generated from the parking

fees. An audit of the appellant was conducted by the service tax department and on the basis of the audit, the above three show cause notices were issued to the appellants alleging that the activity of the appellant amounted to 'management, maintenance or repairs' which was leviable to service tax as per the provisions of Finance Act, 1994. The allegations made in the show cause notice were confirmed vide the impugned Order-in-Original against which appellant is in appeal before the Tribunal.

3. In the appeal memorandum and submissions made during the course of hearing by Shri A.K. Batra, Chartered Accountant and Ms. Vibha Narang, Advocate, it has been submitted that the impugned activity of providing parking facility in the Malls was not taxable as Mall owners did not receive any payment or consideration and were not recording any transaction in their financial records. They are only concerned with the hassle free parking and are not charging any amount for providing the parking space to appellant. There is, therefore, no provision of services by the appellant to the mall owners and no service provider & recipient relationship existed between them. Appellant is a partnership firm and is operating the parking area of the malls as an independent business; there has been no arrangement or agreement to provide "Management, Maintenance or Repair Services"; they are working on principal to principal basis; there was no intention for provision of services in the nature of management, maintenance or repair services and the only essence was to provide a hassle free parking; no consideration flows from Mall owners to the appellant; the amount received from various vehicle owners as a consideration for parking cannot be taken for taxing the appellant for the alleged services rendered to Mall owners and no consideration is paid or received from the mall owners; the income earned from parking fees belongs to assessee entirely and nothing is remitted to the mall owners from the collections made or otherwise; there is no privity of contract between the person who is paying the parking charges and the Mall owners; there should be a direct link between provision of services and consideration received; consideration of Service may be provided by the third party who is interested in the service to be provided to the participant i.e. consideration should either flow from beneficiary or from a third person on behalf of the beneficiary; they were conducting own business as they are operating the parking area by employing own resources and labour and they are bearing all the related expenses on their own account and booking the same as business expenses; they are not managing the parking facilities for the mall owners but rendering parking services to the visitors or customers of the mall. The "Management, Maintenance or Repair Services" has been rendered to self by the appellant in order to run the business of parking. The learned Counsel for the appellant further argued that Revenue cannot guide any person as to how it should conduct its business. That it was mall owner's discretion that they did not want to charge any consideration against providing parking space to the appellant. They relied upon the case law in *Hero Cycles (P) Ltd. versus CIT (Central), Ludhiana and SA Builders Ltd. versus CIT (Appeals), Chandigarh & Anr.*, The learned Counsel further claimed that operation activity is different from management and that the appellant is operating the parking area and not managing the same for the mall owners. They are also in arrangement with the mall owners for operating, managing and letting out of kiosks, space etc. for the purpose of advertisements in the respective five malls i.e. :- (a) The Metropolitan, Gurgaon (b) The Plaza Gurgaon (c) MGF Megacity, Gurgaon (d) The Metropolitan, Saket, New Delhi and (e) The Metropolitan, Jaipur. Appellant have been paying monthly charges to owner of Metropolitan Mall, Gurgaon and The Plaza Mall, Gurgaon only and no charges have

been paid to the developers of the three malls towards temporary space utilized. They are paying service tax under taxable category "Sale of Space" and "Renting of immovable property" which was duly accepted by the department hence, no allegation is made with regard to the above activity with respect to Malls from whom no monthly charges have been taken. Similarly, upon the parking charges, no Service Tax is being discharged as no amount is paid to the Mall owners and hence department adopted a biased approach and challenged the same commercial arrangement for creating demand on parking income under "Management, Maintenance or Repair Services". It is further added that dual approach of the department upon same commercial transaction is unjustified. They have further claimed that instances exist where the service provider not only provides the services on free of cost basis but also gives money or incentives to the service recipient to avail its services like in Computerized Reservation System (CRS) software provided by Galileo India, Amadeus India and Calleo Distribution to encourage their business. In fact they pay incentives to Air Cargo Agent or Travel Agents for using the software. Similarly, in the present case, the Mall owners also find it more commercial viable to give space to the appellant for managing the parking on its own, account instead of bearing the cost and expenses of the managing the parking space themselves. They claimed that renting of immovable property service more appropriately classify the transaction but as no consideration is charged under this category, they cannot be made liable for service tax.

4. The learned Departmental Representative, however, vehemently argued supporting the Order-in-Original and maintained that the services of the appellant was duly covered under the category of 'management, maintenance or repairs' and attracted levy of service tax in terms of the provisions of Section 65(105)(zzg) of the Finance Act, 1994. He has supported the impugned order and has submitted that it was highly improbable that there was no agreement between the appellant and the mall owners as no mall owner would allow unhindered activities at the will of the lessee/occupants of the premises without any preconditions and without any financial consideration. He further supported the finding that the appellant is engaged in providing the service of 'management, maintenance or repairs' of malls and in consideration thereof the appellant was given right of space, including parking area for collecting income earned from the parking fees. He further argued that it is admitted that parking space in the malls belong to the mall owners and it cannot be accepted that the applicant has been given permission to use such valuable space without any consideration. It is also an admitted fact that the applicant is incurring huge liabilities in managing and maintaining the parking space including the costs paid to the third party agency through which the appellant was managing the parking facilities. As the third party agency was paying service tax on the invoices issued to the appellant, the appellant in turn was also liable to pay service tax for the same service which it was providing to the mall owners for which the consideration was in terms of receipts of the parking fees collected from the visitors.

5. We have carefully gone through the rival arguments and have perused the record of the appeal.

6. To begin with, we cannot accept the appellant's plea that huge parking space area was given to the appellant without any agreement with respect to financial consideration or without an agreement with respect to contingent liabilities with respect to theft, injuries, fire or other liabilities. It is difficult to believe that such an enormous responsibility was given without any agreement. Even otherwise, the activity of the appellant is covered within the definition of 'management, maintenance or repairs'. It

is not necessary that the service recipient, which are the mall owners in this case should receive any pecuniary consideration from the service. Even a service without any direct pecuniary benefit to the service recipient is also a service. Even if we take that the interest of the mall owners is that the appellant should provide a hassle free parking, it is a service to the mall owners by the appellant. Again, the plea of the appellant that no monetary consideration is being paid by the mall owners is without substance. The appellant has been allowed to use space and collected parking fee. This is a valid consideration in terms of the service tax provisions as it is not necessary that the consideration should always be directly in the form of money. If the consideration is in terms of some benefit to the service provider which can be measured or converted into money it will constitute a valid consideration. Reference can be made to the relevant provisions of Section 67 of the Finance Act, 1994 regarding valuation of the taxable service. It is as follow :

SECTION 67. Valuation of taxable services for charging service tax. -

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation. - For the purposes of this section, -

(a)"consideration" includes - (i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.

7. Section 67(1)(i) clearly stipulates that where the consideration is not wholly or partly consisting of money, it would be such amount in money as, with the addition of service tax charged, is equivalent to the consideration. Further, in Section 67(1)(i) consideration has be taken as the gross amount charged by the service provider. Thus, there is no doubt

that the right to collect parking fees given by the mall owners is nothing but a consideration provided to the appellant by the mall owners and the measure of such consideration is the gross income generated through the parking fees.

8. We further find that the learned Counsel for the appellant has sought to repudiate the liability on the impugned activity by contending that they are merely operating the parking area which is different from the service of 'management maintenance and repairs'. We are not inclined to accept this distinction because as far as the business activity is concerned qua the appellant, it is operation of the parking area but when this activity is examined qua the mall owners they are providing the service of 'management, maintenance or repairs' to the mall owners.

9. We also find that the case laws cited by the appellant are not relevant in the light of these findings. However, we accept the additional plea of the learned Counsel of the appellant that such gross income will include service tax also and the taxable income has to be computed after abating the amount of service tax from the gross income in terms of Section 67(2) of the Finance Act. Therefore, the income shown in the balance sheet as parking fees will be considered as cum-tax value for determination of service tax. We also accept the argument of the learned Counsel of the appellant that they will be eligible to avail the Cenvat credit of the service tax paid on input services, which have been provided to the appellant by third party agency or any other service providers in providing the said service of 'management, maintenance and repairs' of the parking area.

10. However, we cannot accept the plea of the appellant that no extended period was invocable as there was no wilful suppression of facts on their part as they were submitting regular service tax returns to the department. We find that there was a clear mis-declaration and wilful suppression in as much as the appellant has suppressed the income of parking fees in the relevant returns with an ulterior motive to evade the service tax. They have wilfully designed their mode of operation to evade the service tax. As such we find that the extended period is invocable in the case.

11. In view of entire above discussion we uphold the order-in-original so far as legality of levy of service tax on the activity under 'management, maintenance or repair service' is concerned. However, the appellant will be entitled to avail Cenvat credit of service tax paid by the service providers and cum duty benefit. The penalties under Section 78 of Finance Act, 1994 need to be reworked accordingly.

12. In view of the above findings we remand the case to the Adjudicating Authority to re-determine the taxable demand, interest and penalties in the light of above findings. The appeal is, accordingly, allowed to the extent indicated above.

(Order pronounced in open court on 03.02.2020)

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. I

Service Tax Condonation of Delay Application No. 50663 of 2018

(on behalf M/s C. P. Systems Pvt. Limited)

IN

Service Tax Cross Appeal No. 50662 of 2018

(Arising out of order-in-original No. 135-136/GB/2013 dated 27.09.2013 passed by the Commissioner, Service Tax, New Delhi).

M/s C. P. Systems Pvt. Limited

201, 2nd Floor, Kailash Bhawan
Commercial complex
35, Wazirpur Industrial Area Ashok
vihar, New Delhi-110052.

Appellant

VERSUS

Commissioner of Service Tax,

M.G. Marg, I.P. Estate
17-B, IAEA House, Delhi-110002.

Respondent

IN

Service Tax Appeal No. 50787 of 2014

(Arising out of order-in-original No. 135-136/GB/2013 dated 27.09.2013 passed by the Commissioner, Service Tax, New Delhi).

Commissioner of Service Tax,

M.G. Marg, I.P. Estate
17-B, IAEA House, Delhi-110002.

Appellant

VERSUS

M/s C. P. Systems Pvt. Limited

201, 2nd Floor, Kailash Bhawan
Commercial complex
35, Wazirpur Industrial Area Ashok
vihar, New Delhi-110052.

Respondent

APPEARANCE:

Shri Ajay Kumar, Advocate for the Applicant

Shri R. K. Manjhi, Authorised Representative of the Department

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT HON'BLE MR.
BIJAY KUMAR, MEMBER (TECHNICAL)**

DATE OF HEARING/DECISION: 23.07.2019

MISCELLANEOUS ORDER NOS. 50567-50568/2019

CCAR NEW DELHI

Justice Dilip Gupta

M/s C. P. Systems Pvt. Limited¹, a respondent in the appeal filed by the Department, has filed a cross appeal with an application for condoning the delay in filing the appeal. The delay condonation Application has come up for hearing.

2. The appeal was filed by the Department on 31 January, 2014 to assail that part of the order dated 27 September, 2013 passed by the Commissioner of Service Tax, New Delhi by which relief in part was granted to the Applicant. The records indicate that a communication dated 19 March, 2014 was sent by the Registry of the Tribunal to the Applicant by speed post bearing No. ED 310025420 IN forwarding a copy of the appeal that had been filed by the Department.

3. Subsequently, a communication dated 08 February, 2017 was also sent to the Applicant by the Registry of the Tribunal by speed post mentioning therein that the appeal would be listed for final hearing before the Tribunal on 27 February, 2017. This letter dated 8 February, 2017 was admittedly received by the Applicant on 14 February, 2017.

4. When the matter was taken up by the Tribunal on 27 February, 2017, Shri Prakash Sinha, a learned Counsel appeared for the Applicant and the Bench directed the Registry to provide a copy

1. The Applicant of appeal to the counsel while adjourning the matter on 5 April 2017. The order sheet indicates that when the matter was taken up on 5 April, 2017, one Shri Ramanand appeared for the Applicant and sought adjournment. Thereafter, on 12 May, 2017 Shri A. S. Hasija, learned Counsel appeared for the Applicant and sought adjournment. The order sheet further indicates that on various dates different Counsel appeared for the Applicant. On 22 August, 2017 Ms. Shreya Ganju, learned Counsel appeared and on 27 September, 2017 Shri Nilotpal Shyam, learned Counsel had appeared on behalf of the Applicant. The order sheet pertaining to the year 2017 indicates that the hearing of the Appeal was adjourned on as many as eight occasions on requests made by the learned Counsel for the Applicant. On 25 January, 2018 Shri Ajay Kumar, learned Counsel appearing on behalf of the Applicant made a request that the matter may be adjourned to enable him to file a vakalatnama. On his request the matter was again adjourned on 19 February 2018 to 15 March, 2018. On 15 May, 2018, no Counsel appeared and the Bench, by way of last chance, adjourned the matter to 20 June, 2018. On 20 June, 2018, the matter was again adjourned as a last chance after imposing a cost of Rs.5,000/- on the Applicant. On 05 July, 2018, the matter was adjourned to 26 July, 2018.

5. The Cross Appeal was filed by the Applicant on 20 July, 2018 with an application for condoning the delay in filing the Cross Appeal.

6. It needs to be pointed out that Cross Objection have to be filed within 45 days of the receipt of the notice of the Appeal as provided for under Section 86(4) of the Finance Act, 1994². However, sub section (5) of Section 86 provides that the Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objection after the expiry of the period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

7. The Application that was filed by the Applicant for condoning the delay of 468 days in filing the cross-objection against the order dated 27 September, 2013 passed by the Commissioner contains twelve paragraphs and they reproduced below:-

"1. That Applicant has filed the accompanying application challenging the Order in Original No. 135-136/GB/2013 dated 27.09.2013 passed by the

Commissioner of Service Tax, audit-II, Delhi. Contents of the same are not being repeated herein for the sake of brevity. Appellant seeks to refer and rely upon the same for the purpose of this application.

2. That Applicant Company was in a bad financial health from 2013 onward which compelled it to shed many employees. Since 2013, the company's accountant also shifted to some other company/ office leaving behind the records pertaining to the case in mess. Many of the records and documents could not be found by the Applicant Company which was required for filing of appeal/ objection.

3. Order impugned dated 27.09.2013 has adjusted illegally the excess tax paid of Rs. About 3 Crore, thus causing extreme financial hardship to the Company.

4. That Appellant company received notice of this Hon'ble Court issued in ST Appeal No. 50787 of 2014 on 14.02.2017, and approached his counsel for filing of response thereof. However, due to financial crunch, the Applicant was not able to pursue the matter effectively.

6. During March 2017, since the matter could not be pursued effectively, the Applicant Company engaged another Lawyer for contesting the case. That owing to financial crunch resulting mainly from the fund illegally stuck by virtue of the impugned order, Applicant Company could not service its credit facility obtained from the HDFC and as a consequence, its account was declared NPA on 01.05.2017. On 22.02.2018, the credit facility stood withdrawn by the Bank. Presently, the Applicant Company is negotiating a One Time Settlement (OTS) with the Bank and the matter stand so awaiting liquidity inflow.

7. In the meanwhile, since the Lawyers engaged during March 2017 did not pursue the matter effectively, the brief was transferred to the present counsel during the month of February, 2018.

8. That office of the present counsel informed the applicant company that apart from filing of reply, it would be advisable to file a cross-appeal/ Cross-Objection. Accordingly, all the records were requisitioned from the Applicant Company.

9. As stated earlier, office and record of Applicant Company was completely disorganised due to bad financial health and staff crunch, procurement of records pertaining to the years 2004-05 to 2011-12 turned out to be a time taking and cumbersome task. However, with painstaking efforts the applicant could procure some original documents of the case file with the help of which the present Cross- Objection is drafted and is being filed.

10. That in the entire process, a delay of 468 days has ensued in preferring the present Cross-Objection, which is neither intentional nor deliberate.

11. That Department's appeal is presently pending and it would be in the interest of justice that this application for condonation of delay in filing cross-objection be allowed and Applicant's cross-objection be taken on record and be heard on merits.

12. That this is a case of unjust enrichment by collection of tax by illegal, arbitrary and unjustifiable order. The order in original reveals manifest error causing unjust enrichment. This is contrary to the mandate of Constitution".

8. It is this application that has come up for consideration.

9. Learned counsel for the Applicant placed the facts stated in the Application and strenuously urged that the delay in filing the Application should be condoned. Learned Counsel stated that the speed post sent by the Registry of the Tribunal on 19 March, 2014 was not received by the Applicant and the delay has been adequately explained after receipt of the speed post that was sent by the Registry of the Tribunal on 8 February, 2017 on 27 February, 2017. Learned Counsel for the Applicant also submitted that the appeal filed by the Department is pending consideration before this Tribunal and so a liberal approach should be adopted for condoning the delay in filing the cross-objection so that the cross-objections are heard on merit. In support of this contention, learned Counsel placed reliance on the decision of the Jharkhand High Court in **Voltas Ltd., vs. Deputy Commr., C. Ex. Jamshedpur**³ and the decision of the Supreme Court in **V. N. Bharat vs. Delhi Development Authority and another**⁴.

10. Shri R. K. Manjhi, learned Authorised Representative of the Department, however, strongly refuted the contentions advanced by the learned Counsel for the Applicant. Learned Representative submitted that the period of limitation in filing the Cross objection should be calculated from the date of receipt of the speed post sent by the Registry of the Tribunal on 19 March, 2014, which delay has not been explained at all and in any case the delay from the receipt of the subsequent communication of the Tribunal on 27 February, 2017 has not been explained sufficiently. Learned Representative, therefore, submitted that the Application should be rejected.

11. The submission advanced by the learned Counsel for the Applicant and the learned representative of the Department have been considered.

12. The facts stated in the Application clearly indicate that notice of the appeal with a copy of the appeal that was filed by the Department on 31 January, 2014 was sent to the Applicant by the Registry of the Tribunal by speed post on 19 March, 2014. There is no specific denial regarding receipt of this notice in any of the paragraphs of the application. All that has been stated in paragraph 4 of the application is that the notice issued in Service Tax Appeal No. 50787 of 2014 was received by the Applicant on 14 February, 2017 and it approached its Counsel for filing a response. It also needs to be stated that pursuant to the order dated 16 July, 2019 passed by the Tribunal, the office has put up a note that the communication dated 19 March, 2014 was sent to the appellant by speed post on 27 March, 2014 bearing No. ED 310025420 IN. In such a situation, in the absence of any specific denial by the Applicant about receipt of the aforesaid speed post on 27 March, 2014, the cross-objections should have been filed within 45 days from the date of receipt of the communication, which can safely be assumed to be within two or three weeks thereafter. There is absolutely no explanation for any delay from April, 2014 to 27 February, 2017, which is the date on which the applicant claims to have received the second notice dated 8 February, 2017. It needs to be noted that the address mentioned in both the notices is same.

13. The case of the Applicant is based mainly on the communication dated 08 February, 2017 that was sent to the Applicant by the Registry of the Tribunal by speed post informing that the appeal filed by the Department would come up for hearing before the Tribunal on 27 February, 2017. According to the Applicant, the said speed post was received by it on 14 February, 2017 and it is this date from which the delay of 468 days in filing the cross-objection has to be calculated after excluding the limitation period of 45 days.

14. Paragraph 2 of the Application mentions about the bad financial health of the Applicant from 2013 and also the fact that the Accountant of the Applicant also joined another company, leaving behind the records in a mess. Paragraph 3 of the application mentions about the order dated 27 September, 2013

passed by the Commissioner against which the Department had filed the Appeal. Paragraph 4 mentions that the notice dated 8 February, 2017 sent by the Registry of this Tribunal regarding the hearing of the Appeal on 27 February, 2017 which notice was received on 14 February, 2017. It further mentions that thereafter, the Applicant approached a Counsel for filing a response. However, due to financial crunch the Applicant was not able to pursue the matter effectively. Paragraph 5 states that during March, 2017, the matter could not be pursued effectively so the Applicant engaged another lawyer for contesting the case. Paragraph 6 states that owing to financial crunch, the Applicant company was declared a Non Performing Asset on 1 May, 2017 and thereafter, the Applicant negotiated with a Bank for a one-time settlement. Paragraph 7 mentions that since the lawyers engaged by the Applicant during March, 2017 did not pursue the matter effectively, the brief was transferred to a new Counsel in February, 2018. Paragraph 8 states that office of the present counsel informed the Applicant that apart from filing a reply, it was advisable to file cross-objection and so all the records were requisitioned from the Applicant. Paragraph 9 states that since the records of the company were disorganized due to bad financial crunch and lack of adequate staff, it took time to trace them out and after they were traced out, the cross-objection was drafted for being filing. Paragraph 10 of the Application states the delay was neither intentional nor deliberate. Paragraph 11 mentions that the Appeal filed by the Department was pending and so it would be in the interest of justice that the delay is condoned and the Cross-objections are heard on merits.

15. The delay sought to be explained by the Applicant is with regard to the second notice dated 08 February, 2017 that was sent by the Tribunal by speed post informing that the appeal filed by the Department would be listed before the Tribunal on 27 February, 2017. This notice dated 8 February, 2017 was received by the Applicant on 14 February, 2017. The period of 45 days prescribed for filing the Cross-Objection expired on 31 March, 2017. The cross-objection contemplated under Section 86(4) of the Act were required to be filed within 45 days. The order sheet reveals that the matter was regularly listed before the Tribunal on as many as nine occasions in 2017 and except for the order dated 22 August, 2017 which mentions that the matter was being adjourned to 27 September, 2017 (without indicating as to on whose behalf adjournment was granted), all the orders specifically mention that the matter was being adjourned on requests made on behalf of the Applicant by its Counsel. The Applicant was represented by many Counsel, as can be seen from the order sheet. The names of the Counsel are also mentioned. The delay condonation application mentions that the Counsel engaged by the Applicant in 2017 did not pursue the matter effectively. The Applicant had obtained service tax registration under “construction service” and had undertaken many construction activity. It was also represented by many Counsel. It is, therefore, not possible to accept the contention of the learned Counsel for the applicant that as the Counsel did not pursue the matter effectively, cross-objection were not filed and it was only when a new Counsel was engaged in 2018, and advice was given to file cross-objections, that cross-objections were filed on 20 July, 2018 with a delay of 468 days. This inordinate delay of 468 days has not been explained to the satisfaction of the Tribunal. It is no doubt true that each day’s delay has not to be explained, but at the same time an Applicant is required to satisfy the Tribunal that there was sufficient cause for not presenting the cross-objection within the stipulated period of 45 days. In the present case, we are more than satisfied that the Applicant has miserably failed to satisfy that there was sufficient cause in not filing the cross-objections within the stipulated period.

16. The decision of the Supreme Court in **V. N. Bharat** that has been relied upon by the learned Counsel for the Applicant to submit that it was for the Department, when there was a denial about the receipt of the letter, to substantiate by documentary evidence that the speed post sent had actually been served. This decision will not come to the aid of the Applicant, as in the present case, there is no averment in the delay condonation application that the notice dated 19 March, 2014 that was sent by speed post was not served on the Applicant. In any view of the matter even the delay from the receipt of the second notice on 27 February, 2017

has not been sufficiently explained.

17. Voltas, on which reliance has also been placed by learned Counsel for the Applicant, was a case where the party had filed two appeals with delay condonation application. The Department had also filed an appeal in which cross-objection was filed by the party. It is for this reason that the High Court observed that since the matter was engaging the attention of the Tribunal in the cross-objection filed by the party, it would be appropriate to condone the delay in filing the appeal. This decision, therefore, does not support the Applicant.

18. Even otherwise, the delay in filing the cross-objection is inordinate and under Section 86(5) of the Act, the Appellate Tribunal can permit the filing of the cross-objection even after the expiry of 45 days, if it is satisfied that there was sufficient cause for not presenting them within that period. It has been found as a fact that the Applicant has been unable to satisfy the Tribunal that it was prevented by sufficient cause from preferring the Appeal within the stipulated period.

19. There is no explanation for the delay from April, 2014 and the delay from 27 February, 2017 has also not been satisfactorily explained.

20. Thus, for all the reasons stated above, it is not possible to condone the delay in filing the cross-objection. The delay condonation Application is, accordingly, rejected. As the Application for condonation of delay has been rejected, the cross-objection also stand rejected.

21. The Appeal may be listed for final hearing on **12 September, 2019**.
(Dictated and pronounced in open Court).

(Justice Dilip Gupta)
President

[Back](#)

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

PRINCIPAL BENCH - COURT NO. 1

**SERVICE TAX RESTORATION OF APPEAL NO. 51364 OF 2019 IN
SERVICE TAX APPEAL NO. 00214 OF 2012**

(Arising out of CESTAT Final Order No. 51581 of 2018 dated 19 April, 2018)

Modi Apollo International Limited 24-A, Lajpat Nagar-V New Delhi – 110 024		Appellant
VERSUS		

Commissioner (Adjudication) Service Tax IAEA House, 17-B, IP Estate MG Marg New Delhi – 110 002		Respondent

APPEARANCE:

Shri Vishal Kumar, Advocate, for the Appellant
Shri R.K. Manjhi, Authorised Representative of the Respondent

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

MISC. ORDER NO. 50023/2020

DATE OF HEARING/DECISION: 10.01.2020

JUSTICE DILIP GUPTA :

The Appellant had filed this Appeal before the Tribunal on 11 November, 2011 to assail the order dated 11 August, 2011 passed by the Commissioner (Adjudication). The records indicate that the hearing of the Appeal was adjourned on various dates because of requests made by learned Counsel appearing for the Appellant. The records also indicate that when the Appeal came up for hearing on 19 April, 2018, no one appeared on behalf of the Appellant even in the revised list nor any Application seeking adjournment was filed. The Bench, therefore, observed that the Appellant was no longer interested in pursuing the matter and, therefore, dismissed the Appeal in default.

2. The Appellant filed an Application dated 04 June, 2018 for recall of the order dated 19 April, 2018. This Application came up for hearing before the Tribunal on 22 June, 2018. On that date also, no one appeared to press the Application. It was, therefore, rejected.

3. The Appellant thereafter filed another Application on 23 December, 2019 with a prayer to recall the order dated 22 June, 2018 and restore the Appeal. It is this Application dated 23 December, 2019 that has come up for hearing today.

4. The Application contains six paragraphs and they are reproduced below :

“1. This is an application for restoration of appeal, against Final Order No 51581/2018 dated 19.04.2018, whereby the Hon'ble Tribunal dismissed the appeal of the Applicant for

default. The aforesaid appeal was filed by the Applicant against common Order-in-Original No. 3-5AKM/CST(Adj.)/2011 dated 11.08.2011, which confirmed total service tax demand amounting to Rs. 4,58,41,474/- along with interest and penalty, in relation to disputed "commercial training or coaching service" and "intellectual property service" alleged to have been provided by the Applicant. However, while dismissing the appeal, the Hon'ble Tribunal was pleased to allow restoration of the appeal, on an application being filed and subject to reasonable cause being shown by the Application for non-appearance. The copy of Final Order dated 19.04.2018 is enclosed herewith As Annex - 1.

2. The events leading to the dismissal of the appeal was due to the fact that the Applicant has changed its Counsel, a day before the scheduled date of hearing. Since the new Counsel was not properly represented on account of non-furnishing of NOC from the previous Counsel, the appeal was dismissed in default.

3. Subsequently, the Applicant filed application for restoration of appeal dated 04.06.2018, assigning the aforesaid reasons. Copy of application for restoration of appeal is enclosed herewith as Annex - 2.

4. In the wake of introduction of Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, ("SVLDR Scheme"), the Applicant inquired from the Counsel about the status of the restoration application, in light of exploring the possibility of availing amnesty under the SVLDR Scheme. The Counsel for the Applicant was under the impression that since it did not receive any communication regarding the date of hearing with respect to the restoration application from CESTAT Registry, the said application was still pending till date. Thereafter, upon learning that CESTAT Registry had discontinued the practice of issuing physical communication of hearing notices and that all relevant details were available on CESTAT website, it checked the said website for the status of the application. Subsequently, to its surprise, on 19.12.2019, the Counsel learnt that the application for restoration of appeal was dismissed for non-appearance vide Misc. Order No. 50372/2018 dated 22.06.2018. A copy of Misc. Order dated 22.06.2018 is enclosed herewith as Annex-3.

5. By way of the present application, the Applicant seeks restoration of the appeal, which was dismissed due to ignorance of the Counsel and on account of no fault on the part of the Applicant. The Applicant has all along been serious in pursuing the appeal, however, has been prevented for reasons aforesated.

6. In view of the above reasons, the Applicant humbly prays before the Hon'ble Bench to recall its Misc. Order dated 22.06.2018 and restore its appeal."

5. It would also be useful to reproduce the paragraphs of the earlier recall Application that was filed on 04 June, 2018 and the same are as follows :

"1. That the aforesaid Appeal was lastly listed on 19th April 2018 before the Hon'ble Court. On that date this Hon'ble Court for the reasons specified in the court proceedings dismissed the Appeal in default. Copy of the Hon'ble Court's order dated 19th April 2018 (received by us through Counsel at his office on 5th May 2018) is annexed hereto and marked as Annexure A-1.

2. Through this application, the applicant herein seeks restoration of the Appeal. The facts relevant for this Hon'ble Forum to consider restoration are mentioned in the following paragraphs.

3. That the Appellant in this matter decided to change counsel to represent it before this Hon'ble Forum a day before the scheduled date of hearing i.e. 19th April 2018 and issued telephonic instructions to the present counsel to appear in Court and seek an adjournment for necessary preparation.

4. An associate of the present counsel Mr. Shivnath Mahanta, Advocate appeared before this Hon'ble Court accordingly on the 19th April 2018; and apprised this fact to the Hon'ble Court, which however instructed such counsel to produce letter of authority

or written instructions from the Appellant Client, which at that point of time Mr. Mahanta didn't have with him. In such circumstances the Counsel contacted with the Appellant Client over phone and request to organize email instructions at the least. Immediately the Appellant acted upon such request and sent an email at about 1.53pm on the same day. Relevant portion of the said email reads as follows:

"The matter under reference is listed for hearing today before Hon'ble CESTAT. We are the appellant Company in the said matter; till date we have been availing professional services of Mr. Ravinder Narain & Co. Advocates to represent us before the Hon'ble Court.

We have decided to shift these files to your office for you to handle; and are in the process of collating necessary documents. Soon we will be executing Vakalatnama in your favour.

Please place these facts on Court record and plead for some time for us to organize."

Copy of the Appellant Representative's such email is annexed hereto and marked as Annexure A-2.

5. Immediate on receipt of the aforesaid email (Annexure A-2) the present counsel took print of the same and reached court around 2.30pm; however, by that time Hon'ble Members on the Bench concluded all the matters in the cause list and had risen for the day.

6. In the aforesaid circumstances the present counsel made a request to the personal staff of the Hon'ble President and met him in his Chamber around 3.45pm. Hon'ble President was kind enough to hear the counsel and advise him to follow the order passed by then in the matter.

7. Thereafter, the present Counsel had to go to Odisha/ his hometown Nabarangpur for more than 15 days to attend to certain unavoidable family needs. This application is being moved immediately after his return."

6. Shri Vishal Kumar, learned Counsel appearing for the Applicant, has placed the Application dated 23 December, 2019 and made the following submissions :

(i) One day before the Appeal was to come up for final hearing on 19 May, 2018, the Appellant had changed the Counsel and since the second Counsel, who had been engaged, did not have proper instructions as he did not have the Vakalatnama or a "No Objection Certificate" from the earlier Counsel, he did not appear. Learned Counsel, however, submitted that the second Counsel was seeking instructions from the Appellant, but in the meantime, the Appeal came up for hearing and it was dismissed;

(ii) By the time the second Counsel could receive the instructions, the order had already been passed;

(iii) The Application for Restoration could not be immediately filed after 19 May, 2018 as the second Counsel had to leave for his home town for more than 15 days. The Application was thereafter immediately filed when he returned;

(iv) The second Counsel could not appear before the Tribunal on 22 June, 2018 when the said Application was to be heard as neither the Applicant nor the second Counsel had any knowledge about the said date. It has been submitted that the second Counsel for the Applicant was under an impression that since he did not receive any communication regarding the date of hearing of the first Restoration Application from the Registry of the Tribunal, the Application was still pending;

(v) In fact, it is only when the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 was introduced, that the Applicant inquired from the second Counsel about the status of the Restoration Application so that the possibility of availing the scheme could

be explored. The second Counsel checked the CESTAT website for the status of the Application. He was surprised to learn that the first Application for restoration of the Appeal was dismissed for non-appearance on 22 June, 2018. It has been submitted that only when the Applicant contacted the Counsel for finding out the fate of the Application that the Counsel learnt that the Registry of the Tribunal had discontinued the practice of issuing communication of hearing notices since all the relevant details were available on the website of the Tribunal; and

(vi) The second Restoration Application was, accordingly filed immediately on 23 December, 2019. In such circumstances, there is no fault of the Appellant which had otherwise been pursuing the Appeal and had nothing to gain by getting the Appeal dismissed in default.

7. Learned Authorised Representative of the Department has opposed the said Application and submitted that :

(i) Neither was there good reason for the learned Counsel for the Applicant not appear on 19 April, 2018 nor was there any good reason not to appear on 22 June, 2018;

(ii) The Registry of the Tribunal had sent a communication dated 06 June, 2018 by Registered Post with acknowledgement due to the Appellant to inform that the Restoration Application filed by the Appellant would be taken up for final hearing on 22 June, 2018. A copy of this letter was also endorsed to the learned Counsel for the Appellant and the Department;

(iii) After the Restoration Application was dismissed for non-appearance of the learned Counsel on 22 June, 2018, Registry of the Tribunal had sent a communication dated 03 July, 2018 to the Appellant as also its learned Counsel and Department by registered post with acknowledgement due which letter was also received by the Department. It is, therefore, his submission that the contention of the Applicant that the Registry of the Tribunal did not inform the Applicant about the hearing of the Application on 22 June, 2018 is incorrect.

(iv) In any view of the matter, not only the subsequent Application filed for recall of the order dated 22 June, 2018 is not maintainable in view of the decision of Parwati Automotives Pvt. Ltd. vs Commissioner of Central Excise, Kanpur¹, but it has also been filed with a delay of more than 500 days without filing any Application for Condonation of Delay since the limitation for filing a Restoration Application is three months as has been observed by the High Courts that a Restoration Application has to be filed within the limitation provided for filing an Appeal. In support of his contention, learned Authorized Representative has placed reliance upon a judgment of the Bombay High Court in Kirtikumar J. Shah vs Union of India² as also a decision of the Division Bench of the Tribunal in Kirtikumar J. Shah vs Commissioner of Central Excise, Nagpur³;

(v) The contention of the Applicant that it had changed the Counsel one day prior to the hearing of the Appeal on 19 April, 2018 is not correct in view of the contents of the email sent by the Applicant to its Counsel on 19 April, 2018 at 1.43 pm;

(vi) The Applicant may not have appeared on 19 April, 2018 when the Appeal was listed for final hearing for the reason that the Tribunal had already on 20 March, 2018 decided a controversy raised by IIPL; and

(vii) It is not that the Applicant cannot avail of the benefit of the Scheme even if the Appeal was dismissed on 19 April, 2018. The Applicant can still avail of the benefit but he would have to pay 10% more amount.

8. The contentions advanced by the learned Counsel for the Applicant as also the learned Authorised Representative of the Department have been considered.

9. As noticed above, the Appeal was filed on 11 November, 2011 to assail the order dated 11 August, 2011 passed by the Commissioner (Adjudication) confirming the demand of service tax. The order sheet indicates that from February, 2017, the Appeal was being regularly adjourned because of requests made by the learned Counsel for the Appellant seeking adjournment. When the matter came up before the Tribunal on 19 April, 2018, no one appeared on behalf of the Appellant to press the Appeal nor any adjournment application was available on the record. The appeal was, accordingly, dismissed for default.

10. The Appellant thereafter filed an Application for recall of the order dated 19 April, 2018 on 04 June, 2018. The case set out by the Applicant in this Restoration Application is that, on 18 April, 2018 the Appellant had changed the earlier Counsel and had instructed the second Counsel to appear in the Court and seek adjournment for preparation. An associate of the second Counsel did appear before the Court on 19 April, 2018, but the Court instructed the Counsel to produce a letter of authority or written instructions from the Appellant and it is in such circumstances that the Counsel left the Court and contacted the Appellant over phone. An email was then sent by the Appellant to the Counsel at 1.53 pm on the same day. However, by that time the order had already been passed. It has also been stated in the Application that the second Counsel had to go to his home town for more than 15 days for some work and as soon as he returned, the Application for recalling the order dated 19 April, 2018 was prepared and verified on 28 May, 2018 and subsequently filed before the Tribunal on 04 June, 2018. The Vakalatnama of the second Counsel is also dated 28 May, 2018.

11. The facts, which have been stated in the Application regarding the appearance of the associate of the Counsel on 19 April, 2018 and the instructions of the Court to obtain a Vakalatnama or a communication from the client, are not contained in the order dated 19 April, 2018. The Order mentions that even after the list had been revised, no one had appeared for the Appellant nor there was any adjournment application available on record in spite of notice having been served. It would also be appropriate to examine the email sent by the Appellant to its Counsel which has been reproduced in paragraph 4 of the first Application. We have read this email more than once, but are unable to gather anything from this that may indicate that the second Counsel had been engaged on 18 April, 2018. In fact, it clearly transpires from the email that "till date" i.e 19 April, 2018, the first Counsel was representing them. It further states that the Appellant has decided to shift these files to the office of the second Counsel for him to handle and they were in the process of collating necessary documents and that soon the Appellant will execute a Vakalatnama in favour of the second Counsel. Thus, the facts mentioned in the Application are not borne out from the order passed by the Tribunal on 19 April, 2018 nor they are borne out from the email sent by the Appellant to the second Counsel. It is, therefore, not possible to accept the contention of the Applicant that a new Counsel had been engaged on 18 April, 2018.

12. Thus, the explanation offered by the Appellant for non- appearance of the learned Counsel on 19 April, 2018 cannot be accepted.

13. What is also important to notice is that even after having acquired knowledge on 19 April, 2018 that the Appeal had been dismissed in default, the Application for Restoration was filed only on 04 June, 2018.

14. It also needs to be noted that the notice was sent to the Appellant by Registered Post with acknowledgement due on 06 June, 2018 informing the Appellant that the Restoration Application would be listed for final hearing on 22 June, 2018 before the Tribunal. A copy of this notice was also sent to the learned Counsel for the Appellant and the Authorized Representative of the Department. The Restoration Application does not specifically mention about this notice dated 06 June, 2018. In fact, it states that the Counsel for the Applicant was under an impression that since it did not receive any communication regarding the date of hearing of the Restoration Application from CESTAT Registry, the said Application was still pending till date. In fact, the Application further

mentions that “CESTAT Registry had discontinued the practice of issuing physical communication of hearing notices and that all relevant details were available on CESTAT Website.” Learned Counsel, therefore, checked the website for the status of the Application and then found that the Restoration Application had been rejected on 22 June, 2018 as no one had appeared to press it.

15. The aforesaid facts are also incorrect. As stated above, the Registry of the Tribunal had sent a notice dated 06 June, 2018 to the Appellant by registered post with acknowledgement due that Restoration Application would be listed before the Tribunal on 22 June, 2018. There is no averment in the Application that this letter sent by registered post with acknowledgement due was not received by the Appellant. On the other hand, it has been stated that the practice of sending notices had been discontinued by the Tribunal since the details were available on the Website. If that be so, then there is no reason as to why learned Counsel did not visit the website of the Tribunal to find out the details. The factual position is that, sending of notices was discontinued after October, 2018 and not before that and that is why the Registry of the Tribunal had sent a communication dated 06 June, 2018 to the Appellant to inform that the Restoration Application would be listed before the Tribunal on 22 June, 2018. In such circumstances, the explanation offered by the Appellant for non-appearance of the Counsel on 22 June, 2018 cannot also be accepted.

16. What further needs to be noticed is that the second Restoration Application was filed on 23 December, 2019 for recall of the order dated 22 June, 2018. This Application is not accompanied by any Application seeking Condonation of Delay in filing the Restoration Application. Though no time limit has been specifically prescribed for filing a Restoration Application, but the Mumbai High Court in **Kirtikumar J. Shah** observed that the period of three months for filing the Appeal should be considered as the limitation for filing a Restoration Application. Though it is correct that the Appellant has not filed any Application seeking condonation of delay, but the explanation for the delay has been offered in the Application and, therefore, it will not be proper to reject the Application for this reason. However, the facts stated in the Application explaining the delay would have to be examined to find out whether the explanation offered for the delay of 500 days is satisfactory or not.

17. The records indicate that the order dated 22 June, 2018 was sent to the Appellant by registered post with acknowledgement due on 03 July, 2018. A copy of the letter was sent to the Authorized Representative of the Department who has also stated that he received the copy of the order/letter. There is no averment in the Application that this letter sent to the Appellant by registered post was not received by the Appellant. This apart, and as has also been stated in the Application, orders/final orders were uploaded on the website of the Tribunal. This fact has been admitted by the learned Counsel for the Appellant. Such being the position, there is no reason as to why no attempt was made either by the Appellant or the learned Counsel for the Appellant to visit the website of the Tribunal to find out the order passed on the second restoration application. There is no satisfactory explanation that has been offered to explain this enormous delay of 500 days to the satisfaction of the Tribunal.

18. It will also be appropriate to examine the contention of learned Authorized Representative of the Department that the second Restoration Application is not maintainable in view of the decision of this Tribunal in **Parwati Automotives Pvt. Ltd.** It is seen that in the said case the first Restoration Application was disposed of by a speaking order and the second Application was filed on a different ground. It is for this reason that the Tribunal observed that the proper remedy was to have filed an Application for Rectification of the Mistake in case there was any error apparent on the record. In the present case, the first Restoration Application was dismissed in default and, therefore, the observations made by the Tribunal in **Parwati Automotives Pvt. Ltd.** would not help the Department. The second Restoration Application has been filed for recall of the order dated 22 June, 2018 and, therefore, would be maintainable as it is not for recall of the order dated 19 April, 2018.

19. The facts stated above leave no manner of doubt that the Appellant had adopted a very callous approach and had not pursued the Appeal or the Restoration Application with any sense of responsibility.

20. The application, therefore, deserves to be rejected and is, accordingly, rejected.

(Pronounced in the open Court on 09 January, 2020)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

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

PRINCIPAL BENCH – COURT NO. 1

SERVICE TAX Appeal No. 55702 of 2014

(Arising out of Order-in-Appeal No. DEL/SVTAX/ADJ/COM/103/2014-15
dated 06.08.2014 passed by COMMISSIONER OF CENTRAL EXCISE-New
Delhi)

M/s. Prasar Bharti

...Appellant

(Broadcasting Corporation of India)

Doordarshan Commercial Service, Doordarshan Bhawan, Copernicus Marg,
Mandi House, New Delhi

Versus

Commissioner of Customs,

Central Excise, New Delhi.....Respondent

MG Marg, IP Estate,

17-B, IAEA House, IP Estate New Delhi

APPEARANCE:

Mr. Rajeev Sharma, Advocate for the Appellant

Mr. Vivek Pandey, Authorised Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

Date of Hearing/ Decision: 20.05.2019

FINAL ORDER No.: 50762/2019

JUSTICE DILIP GUPTA

1. This appeal has been filed to assail the order dated 6 August 2014 that confirms the demand of service tax amounting to Rs. 3,55,03,646/- with interest and penalty under section 76 and

77 of the Finance Act 1994¹. The said order was passed by Commissioner (Adjudication).

1. The Act.

2. The records indicate that show cause notice dated 17 October 2008 was issued to the appellant mentioning therein:

“On scrutiny of ST-3 return for the period April 2007 to September 2007, it has been noticed that the total taxable value in this return is mentioned as Rs.2,51,19,50,469/-. The service tax liability (@ of 12.24% for the month of April 2007 and @ of 12.36% payable for May 2007 to September 2007) on this value comes to Rs.30,99,77,593/-. But the total service tax paid by the assessee is only Rs.27,73,65,985 (through cash Rs.26,54,50,182/- + through CENVAT Rs.1,19,15,803/- = Rs.27,73,65,985/-). Therefore, the assessee has short paid service tax amounting to Rs.3,26,11,608/-.

In this regard the assessee was asked vide letter C. No.DL-I/ST/R- X/ST-3/RETURN/08 dated 05.09.2008 by fax and by post. The assessee was asked to deposit the short payment amounting to Rs.3,26,11,608/- for the period April 2007 to September 2007 with interest till the date of payment within a week's time on receipt of this letter.

In response to the above referred letter, the assessee vide letter no. DCS-41/45/2007-08/2563 dated 29.09.2008, (received on 01.10.2008) has submitted the revised service

tax return for the period April 2007 to September 2007. On scrutiny of the revised ST-3 return for the period April 2007 to September 2007, it has been found that the value of taxable service is Rs. 2,51,19,50,469/- and the service tax liability on this value works out to Rs. 30,99,77,593/- but the assessee has paid total service tax Rs.27,44,73,947/- (through Cash Rs.26,54,50,182/- + through CENVAT Rs.90,23,765/-). Hence, the assessee has short paid / not paid service tax amounting to Rs.3,55,03,646/-. Therefore, it appears that the service tax amounting to Rs.3,55,03,646/- short paid / not paid by the assessee is recoverable from them under Section 73 of the Finance Act, 1994. It also appears that the interest as applicable on this amount till the date of payment is recoverable from them under section 75 of the said Finance Act. The assessee is also liable for penalty under section 76 and 77 of the said Finance Act.

Now, therefore, the assessee M/s Prasar Bharti Broadcasting Corporation of India, Doordarshan Commercial Service, Doordarshan Bhawan, Copernicus Marg, Mandi House, New Delhi-110001 is hereby called upon to show cause to the Commissioner of Service Tax, 17-B, IAEA House, I P Estate, New Delhi within 30 days of the receipt of this notice as to why:-

- i. The value of taxable services rendered by the assessee on which tax is required to be paid should not be assessed as Rs. 30,99,77,593/- in terms of the provisions of Section 72 of the Finance Act, 1994 as amended.
- ii. Short Payment of Service Tax amounting to Rs. 3,55,03,646/- inclusive of Edu Cess should not be demanded and recovered from them under proviso of Section 73(i) of the Finance Act, 1994.
- iii. Interest on the due amount should not be charged and recovered under section 75 of the Finance Act, 1994.
- iv. Penalty under Section 76 and 77 of the act *ibid* should not be imposed for various omissions and commissions in violation of the Finance Act, 1994 and Service Tax Rules, 1994.
- v. Penalty under section 77 and 77 of the act *ibid* should not be imposed for various omissions and commissions in violation of the Finance Act, 1994 and Service Tax Rules, 1994 as mentioned above.”

3. Thereafter another show cause notice dated 18 May 2009 was issued to the appellant for the period from the Financial Year 2003-04 to 2007-08. It was *inter alia* stated:

“Whereas, PBCL have declared a collective taxable value of Rs.34,45,22,63,554/- in the Service Tax Return (ST-3) for the relevant Financial Years 2003-04 to 2007-08 and discharged their tax liability. The said ST-3 are relied upon and enclosed herewith and marked as RUD-III. However, PBCL received a total of gross receipts of Rs. 42,77,10,86,995/- being the taxable value under Section 67 read with Rules, thereunder and on which service tax liability has to be discharged. Therefore, PBCL Ltd. short paid service tax on the taxable value of Rs.8,31,88,23,441/- at the applicable rates, amounting to Rs.87,10,47,545/- (Rupees Eight Seven Crores Ten Lakhs, Forty Seven Thousand Five Hundred and Forty Five only). For the sake of brevity, the reconciliation of Income shown in receipts and payment account of Balance Sheets for the Financial years 2003-04 to 2007-08 (RUD-II), the entries and service tax payment as per ST-3 Returns (RUD-III), head wise for services discussed at para 4 to 4.3, is tabulated below:

Year	Combined Income Receipts of DD and AIR Wing of the notice as per Balance Sheets – for Financial Year 2003-04 to 2007-08					Taxable value per in ST-3 Returns	Difference	S. Tax (incl. Cess)-Short paid
	Commercial Receipts – Sec. 65 (15)	Prof. / Cons. Services – Sec. 65 (31)	Income from Towers – Sec. 65 (90a)	Receipt from Govt. Business – Sec. 65(15)	Total Income Receipts for levy of ST-Sec. 67			
2003-04	5452768508	6879219	0	92195961	5551843688	3642929679	1908914009	152713121
2004-05	6819436426	24970900	0	524044929	7368452255	5600459348	1767992907	180335277
2005-06	9316920635	24306191	0	932227821	10273454647	8725054760	1548399887	157936788
2006-07	9224440119	17018460	0	0	9241458579	7327877609	1913580970	234222311
2007-08	9891653256	13513789	430710781	0	10335877826	9155942158	1179935668	145840049
Total	40705218944	86688559	430710781	1548468711	42771086995	34452263554	8318823441	871047545

Whereas the above reconciliation receipt of incomes being taxable value as per Section 67 of the Act and Rules collectively amounting to Rs.42,77,10,86,995/- for rendering taxable service under Section 65(15), Section 65(90a) and having paid service tax on Rs.33,45,22,63,554/-, PBCL was liable to pay service tax amounting to Rs.87,10,47,545/- on balance taxable value of Rs.8,31,88,23,441/- on which service tax was evaded and short-paid, along with interest.

Whereas PBCL was informed of the foregoing vide D.O. Letter No. I-26(494)ST/APR/GRAII/234/2008 letter dated 22.04.2008 (RUD-IV), requesting them to co-operate with the service tax check compliance exercise. Agreeing, PBCL paid an initial sum of Rs.10,00,00,000/- (Rupees Ten Crores) as service tax towards their total liability of Rs.87,10,47,545/-, through e-payment on 8.5.2009 (RUD-V) as discussed above.”

4. The aforesaid second show cause notice was adjudicated by order dated 5 May 2011 by the Commissioner, Service Tax Commissionerate, New Delhi. The Service Tax demand of Rs.85,55,74,397/- was confirmed with interest and penalty.

5. An appeal was filed against the aforesaid order dated 5 May 2011 which was disposed off by the Tribunal on 5 March 2018. The order is reproduced below:

“2. Brief facts of the case are that the appellant is a Corporation, established under the Prasar Bharati Act, 1990. During the disputed period, the appellant had provided the taxable services falling under the category of “Broadcasting Service”, “Advertising Space or Time Service and Consulting Engineer Service”, as defined under the Finance Act, 1994. While scrutinizing the records of the appellant, it was observed by the Audit Wing of the Service Tax Department that the appellant did not pay the Service Tax for the above taxable services provided by it. The difference in the duty liability was discharged by the appellant subsequently. However, in the adjudication order, the Department has confirmed the entire Service Tax liability along with interest and also imposed penalty on the appellant.

3. The ld. Advocate appearing for the appellant fairly concedes that the appellant is liable to pay Service Tax for the taxable services provided by it. However, he submitted that the cum-tax benefit has not been extended by the original authority. With regard to imposition of penalties, the ld. Advocate submits that the appellant is a statutory body and malafides cannot be attributed for imposition of the penalty. Further, he also pleads for the benefit of Section 80 of the Act, for non-imposition of penalty under Section 77 & 78 of the Act.

4. On the other hand, the ld. DR appearing for the Revenue reiterates the

findings recorded in the impugned order. Heard both sides and perused the case records.

5. Since the appellant concedes that it had already deposited the Service Tax alongwith interest for providing the taxable services, we are not considering the merits of the case as to whether service tax is payable by the appellant or not. However, we find that the Cum-Tax benefit has not been extended to the appellant in this case, to which it is legally entitled to. Therefore, we are of the view that the matter should go back to the original authority for a limited purpose of re-quantification of the service tax liability. Therefore, we remand the matter to the original authority for re-quantification of the actual Service Tax liability, which is payable by the appellant.

6. Since there is reasonable cause for non-payment of ServiceTax within the stipulated time frame, we are of the view that the provisions of Section 80 of the Act can be invoked for non-imposition of penalties under Section 77 and 78 of the Act. Therefore, we set aside thepenalty imposed in the impugned order under Section 77 and 78.”

6. The Appellant also filed a reply to the Show Cause Notice dated 17 October 2018 that led to the passing of the order dated 6 August 2014 that has been assailed in this appeal. The relevant portion of the reply is reproduced below:
“Reference is invited to your letter No. C No. IV(16)Hqrs/Adj/PB/390/ST/08/55025 dated 17.10.2008 making Prasar Bharati accountable for payment of „Short paid service tax” for a fractional period of six months only from April to September 2007 during the FY 2007-08 and fixing the date of hearing on 19.12.2013. A copy of the said SCN has been collected personally by the Doordarshan wing of Prasar Bharati on 1012.2013.

In this context, your kind attention is drawn to another „Show Cause Notice” No. C No. 1-26(494)ST/APR/Gr.III/107/2008 dated 18.05.2009 wherein Prasar Bharti was asked to deposit Rs.87.10 crore as „Short paid Service Tax” for the period of pat 5 years from 2003-04 to 2007-08. In compliance thereof, a lump sum amount of Rs. 10 crore was deposited forthwith and subsequently a reply to the Notice was sent to the Service Tax Deptt. in details along with calculations of service tax liability computed by this Secretariat. A personal hearing was also held in the chamber of the Commissioner of Service Tax (Shri R.D. Negi) on 1.11.2010. A representation of PB for allowing a special dispensation of CENVAT credit for the relevant years on pro-rata basis (as suggested bythe Commissioner during the hearing was sent to M/o. I & B on Finance. When this was under process in the MIB, the Learned Comissioner unilaterally passed the order-in-original No. 16/RDN?2011 dated 5.5.2011 (received on 11.5.2011).

As a law abiding entity, Prasar Bharti had deposited a total sum of Rs.160.28 crore (which included penalty of 25% and interest) in June 2011itself i.e. within 30 days. The position was informed to the CST forwarding therewith a copy of Challan (copy enclosed for ready reference). Prasar Bharti however filed an Appeal before CESTAT in August 2011 praying for refund of excess payment made by PB.

Under the above circumstances, issuance of SCN and calling for a separate hearing would be sub judice to the above appeal.

You are therefore, requested to kindly reconsider in proceeding further with proposed hearing and take appropriate action as deem fit and proper.”

7. Learned counsel for the appellant has submitted that the second show cause notice dated 18 May 2009 which resulted in theorder dated 5 May 2011 was examined by the Tribunal in Service Tax Appeal no. 1228/2011 that was decided on 5 March 2018. The Tribunal found that cum-tax benefit had not been granted to the appellant to which it was legally entitled to and so the matter was remanded to the Adjudicating Authority for a limited purpose of quantification of the service tax liability. It is, therefore, his submission that since the period involved in the show cause notice dated 17 October 2008 from April 2007 to September 2007 is included in the second show cause notice dated 18 May 2009, the order dated 6 August 2011 passed by the

Commissioner(Adjudication) should be set aside and appeal should be allowed.

8. Shri Vivek Pandey, learned authorised representative for the Department has, however, submitted that the issue involved in the first show cause notice is entirely different from the second show cause notice and, therefore, it is not open to the appellant to contend that the order should be set aside for this reason.

9. We have considered the submissions advanced by the learned counsel for the appellant and the learned Authorised Representative for the Department.

10. In order to appreciate the submissions, it would be appropriate at this stage to examine the chart that is contained in the second show cause notice dated 18 May 2009. The said chart is for the Financial Years 2003-04 to 2007-08. It gives the total income receipt for each of the Financial Years and the taxable value as per ST-3 returns for each of the Financial Years. It then gives the difference in the taxable values for each of the Financial Years and the short paid service tax in each Financial Year.

11. It is no doubt true that the first show cause notice dated 17 October 2008 that was issued to the appellant is for a part of the Financial Year 2007-08, namely from April 2007 to September 2007 which period is included in the second show cause notice dated 18 May 2009, but what needs to be pointed out is that the first show cause notice is based on the total income shown by the appellant in the ST-3 return for the said period. The show cause notice alleges that even on the taxable value shown in the ST-3 return, the appellant short paid service tax. It does not challenge the correctness of the taxable value shown in the ST-3 return.

12. The second show cause notice, on the other hand, challenges the taxable value indicated by the appellant in the ST-3 return for the Financial Year 2003-04 to Financial year 2007-08. It is stated that lesser taxable value has been shown. There is, therefore, no overlapping of issues in the two show cause notices.

13. The appellant has unnecessarily raised this submission. What the appellant has missed out is that the allegations made in the two show cause notices are entirely different. The first show cause notice is for the tax short paid on the taxable value shown by the appellant in the ST-3 returns. The second show cause notice requires the appellant to deposit the short paid service tax as the taxable value shown in the ST-3 return for the five financial years including 2007-08 was lesser than the income receipts as per the balance sheet.

14. It is, therefore, not possible to accept the contention of learned counsel for the appellant.

15. In the end, learned counsel for the appellant has contended that the Commissioner (Adjudication) was not justified in imposing penalties under sections 76 and 77 of the Act for the reason that penalty was set aside in the earlier proceedings before the Tribunal in regard to the second show cause notice.

16. Only penalties under section 77 and 78 of the Act were set aside in view of the provisions of Section 80 of the Act. We therefore, set aside, only the penalty imposed under section 77 of the Act. The impugned order, to this extent, is set aside. The appeal is, accordingly, allowed only to the extent indicated above. The remaining portion of the impugned order is upheld.

(Dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, NEW DELHI-110066
BENCH-SM
COURT NO. IV**

Service Tax Appeal No. ST/51361/2016 [SM]

Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-188-15-16, Dated: 11.02.2016
Passed by the Commissioner of Service Tax, Indore

Service Tax Appeal No. ST/51362/2016 [SM]

Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-187-15-16, Dated: 11.02.2016
Passed by the Commissioner of Service Tax, Indore

Service Tax Appeal No. ST/51363/2016 [SM]

Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-189-15-16, Dated: 11.02.2016
Passed by the Commissioner of Service Tax, Indore

Service Tax Appeal No. ST/51364/2016 [SM]

Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-190-15-16, Dated: 11.02.2016
Passed by the Commissioner of Service Tax, Indore

Service Tax Appeal No. ST/51355/2016 [SM]

Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-186-15-16, Dated: 11.02.2016
Passed by the Commissioner of Service Tax, Indore

**Date of Hearing: 21.01.2019
Date of Decision: 15.03.2019**

**INNOVATIVE CLAD SOLUTIONS PVT LTD
Vs**

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
INDORE**

Appellant Rep by: Mr Suresh Malik & Mr Yogender Singh, CAs
Respondent Rep by: Mr K Poddar, DR

CORAM: Rachna Gupta, Member (J)

FINAL ORDER NOS. 50374-50378/2019

Per: Rachna Gupta:

Present Order disposes of 5 Appeals, the details whereof are as follows:

Appeal No.	SCN Dated	Period of demand	Refund Claimed
ST/51361/2016	19.01.2015	01.04.2010 to 31.03.2011	2,36,264/-
ST/51362/2016	19.01.2015	01.04.2010 to 31.03.2011	3,30,516/-
ST/51363/2016	19.01.2015	01.04.2010 to 31.03.2011	42,721/-
ST/51364/2016	16.01.2015	01.10.2013 to 31.12.2013	27,458/
ST/51355/2016	19.01.2015	01.04.2012 to 30.09.2012	3,12,340/-

Relevant facts are as follows that the appellant filed refund of service tax for the respective amount and the respective period in terms of Notification No. 17/2011-ST as amended by Notification No. 40/2012 - ST. The said refunds were rejected by both the adjudicating authorities for being filed beyond the time limit of one year from the end of month in which actual payment of service tax was made by the SEZ unit to the registered service provider without any reason for condonation of delay in filing the claim. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Mr. Suresh Malik and Mr. Yogender Singh, Ld. CAs on behalf of the appellant and Mr. K. Poddar, Ld. DR on behalf of the Department.

3. It is submitted that Notification 40 of 2012 is extending a substantive benefit in favour of the appellant. The same cannot be disallowed merely on the procedural lapse. Decision of Hon'ble Supreme Court in the case of *N. Balakrishnan Vs. M. Krishnamurthy reported in 2008 (228) E.L.T. 162 (S.C.)* was relied upon to emphasise that though everyday delay has some lapse on part of the litigant concerned however that alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of malafides or it is put forward as part of a dilatory strategy, the Court must show utmost consideration to the litigant except when there is a reasonable ground to hold that delay was occasioned by the litigant deliberately to gain time then the court should lean against the expense of the explanation. The Order of Commissioner(Appeals) are therefore prayed to be set aside and appeals are prayed to be allowed.

4. Per contra, Ld. DR has impressed upon that the refund claim under Section Notification 40/2012 has to be filed within one year from the end of the month in which actual payment of service tax was made by the SEZ unit to the registered service provider as one of the condition to claim a refund. The condition was very much part and parcel of the Notification and it is only subject to fulfilment of said condition that benefit of refund could have been allowed to the assessee. While justifying the Order it is submitted that the relevant case law has duly been discussed by the adjudicating authorities. Appeal is accordingly prayed to be dismissed.

5. After hearing both the parties, I observe and hold as follows that Notification No. 40/2012 - ST dated 29.06.2012 exempts the services on which service tax is eligible under Section 66b of the said Act received by a unit allocated in Special Economic Zone (SEZ) or developer of SEZ and used for authorised operation from the whole of the service tax education cess and secondary and higher education cess leviable thereupon. The said exemption is amended to have been provided by way of refund of service tax paid specified services received by the SEZ unit or the developer of SEZ and use for the authorised operations however subject to the conditions as mentioned therein including that the claim especially be filed within one year from the end of the month in which actual payment of service tax was made by such SEZ unit or developer of SEZ to the registered service provider or such extended period as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit.

6. It is apparent from the Order under challenge that admittedly the refund claim was filed beyond the time limit as prescribed above. Admittedly there was no former Application seeking condonation of the said delay except the oral submission of appellant before adjudicating authority below about shortage of staff. I observe that the said plea of the appellant has duly been dealt with in the Order under challenge holding the said explanation is not satisfactory as the appellant was otherwise running business and all other operations pertaining to their business. The law has been settled that the exemption Notification has to be construed strictly and there has to be strict interpretation of the same by reading the same literally as it was held by Hon'ble Apex Court in the case of *Uttam Industries Vs. Commissioner of Central Excise, Haryana reported in 2011 (265) E.L.T. 14 (S.C.)*. It was clarified by the Hon'ble Apex Court while relying its previous decision in the case of *Kartar Rolling Mills Vs. Commissioner of Central Excise reported in 2006 (4) SCC 772* that the conditions of the Notification are the eligibility criteria to claim the benefit out of the said Notification. Once the said eligible criteria has not been made with or any condition pre-requisite for the said benefit has not been made that the benefit of exemption Notification cannot be made available to the assessee. In view of the said settled principle of law, I am of the opinion

that there is no infirmity in the Orders under challenge. Same are accordingly upheld. Resultantly, these Appeals stand dismissed.

(Pronounced in the open Court on 15.03.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066
BENCH-SM
COURT-IV**

Service Tax Appeal No.ST/52257/2018-ST [SM]

Arising out of Order-in-Appeal No.210 (AG)/CE/JDR/2018, Dated: 13.04.2018

Passed by the Commissioner (Audit), Central Excise & CGST, Jodhpur

Date of Hearing: 19.02.2019

Date of Decision: 19.02.2019

JOHRI CABLE NETWORK

Vs

**THE COMMISSIOENR (AUDIT), CENTRAL GOODS AND SERVICE TAX
JODHPUR-I**

Appellant Rep by: Mr Chirag Jain, Adv.

Respondent Rep by: Mr K Poddar, DR

CORAM: Rachna Gupta, Member (J)

FINAL ORDER NO. 50348/2019

Per: Rachna Gupta:

The present appeal has been preferred against the order in appeal No.210 dated 12.04.2018 vide which the appeal of the appellant against the Order-in-Original No.114 dated 30.10.2009 has been dismissed on the ground of limitation.

2. The appellant herein is engaged in rendering services of cable operator. The Department during the scrutiny of records of M/s. Rajasthan Telematics Ltd. from whom the appellant was receiving signals observed that during the period w.e.f. 16.08.2002 to 31.03.2006 that M/s. Rajasthan Tele Matrix had raised bills upon the appellant on account of service being provided for receiving the cable signals from them for the onward re-transmission to their subscribers in Kota. However, the appellant has not discharged its service tax liability thereupon. Where-after show cause notice No.14243 dated 19.10.2007 was served upon the appellant demanding serviced tax amounting to Rs.65,827/- alongwith the interest at the appropriate rate and the proportionate penalties under section 76, 77 and 78 of the Finance Act. The aforementioned order in original had confirmed the said proposal due to the lack of evidence tendered by the appellant.

3. It is submitted on behalf of the appellant that after the Department scrutinized the records of the appellant, the appellant very-much joined the investigation and provided all relevant details. However, the impugned show cause notice was never served at the appellant's address. No intimation, even subsequently, he got about the impugned adjudication. It is apparent from Order-in-Original as well that the same was passed ex-parte. It is further submitted that the appellant came to know about the Order-in-Original only from a recovery note published in the Newspaper dated 28.01.2012. In response there to be deposited the amount of Service Tax i.e. Rs.65827/-. On the assurance of the Department that if he deposits the amount of Service Tax there will be no further proceeding against him, that he deposited the said amount. However, in the year 2015 appellant got a phone call from the Department that he has been declared as un-traceable assessee. To find out the exact position, the appellant wrote a letter to Department on 13.02.2012. No response was received from the Department. It is thereafter that in 17.02.2016, appellant again enquired about the status of the adjudication against him. Seeking no further response that appeal is before Commissioner appeals was filed on 20th May, 2016. It is submitted that all these facts were also brought to notice of the Commissioner (Appeals). However, the same has not been considered and the appeal has been dismissed on the ground of limitation. The appellant has relied upon the decision of *DR Mangli vs. Commissioner of Central Excise, Nagpur reported in 2014 (54) STR 396 (Tri. Mumbai)*, impressing upon that the period of

3 months available to the Commissioner to condone the delay has to reckon from the date when the appellant actually receives the copy of order in original. Affidavit of the appellant has also been placed on record to this effect. Order accordingly prayed to be set aside. Appeal is prayed to be allowed.

4. Per-contra Id. DR has submitted that Commissioner (Appeals) has no statutory power to condone the delay beyond 3 months. The appeal in hand was filed after a delay of 6 years. It is further impressed upon that there is no cogent reason apparent on record, which may be considered as reasonable for the said delay of 6 years. It is impressed upon that as per appellants own submission, he got the knowledge of Order-in-Original in the year 2012 itself. Justifying the order, Appeal in hand is prayed to be dismissed.

5. In addition, it is submitted that the Department subsequently also delivered the copy of Order-in-Original to the appellant on 05.04.2010, as is apparent from the letter dated 26.07.2018 being sent by the Department to the appellant's Counsel enclosed therewith the copy of the acknowledgement due received in furtherance thereof.

6. After hearing both the parties and perusing the entire record, it is observed that there is no denial on part of the appellant about the scrutiny of the records and also about the demand as has been proposed vide the impugned show cause notice though it is an argument that even the show cause notice was not received by the appellant. However, in view of the above admission and in view of any evidence to the contrary, the same argument is not acceptable. From Order-in-Original also it is apparent that the order of confirming demand has been announced only due to lack of evidence, as was to be tendered by the appellant.

7. It is appellant's own case that the knowledge of the demand against the appellant came to his notice from Newspaper "Dainikbhaskar" dated 28 January, 2012 whereafter he made the deposit of the amount of service tax of 65,827/-. The absence of any effort to enquire about the orders in furtherance whereof the recovery proceedings as mentioned in the said Newspaper except a letter dated 13.02.2012 is not opined sufficient for condoning delay of almost 6 years. It is apparent that reminder to said application dated 13.02.2012 was given on 23.02.2016 i.e. after a gap of 3 years, same rather amount to be highly negligent act.

8. I also draw my support from the case law in the case of *Singh Enterprises vs. CCE, Jamshedpur* reported in 2008 (221) ELT 163 (S.C.) it is held as follows:-

"10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay does not stand to be reason. I.T.C.'s case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed, which we direct. There will be no order as to costs."

9. Though the Commissioner (Appeal) has held that there is a delay of 28 days on the ground that as per Shri Chirag Jain, CA for the appellant the order has received by appellant on 22nd February 2016 and the appeal was filed on 20th May, 2016. But the said observation is wrong as the appeal from the said submission appears to have been filed within the period of 90 days but as per Section 35 of Central Excise Act. The appeal before Commissioner (Appeals) can be filed within sixty days from the date of communication to him of such decision or order. The proviso of the said Section allows the Commissioner (Appeals) to condone a delay of further period of 30 days if a sufficient cause from not presenting the appeal within the aforesaid period of 60 days is shown to the Commissioner (Appeals). It becomes clear that even from the appellant's perspective the appeal was not filed within the said 60 days from the date of receipt of order.

10. From the above discussion, we are already of the opinion that there is no sufficient cause shown by the appellant even for delay in obtaining the copy of the order. On the other hand Department has tendered documentary proof of the service of the order at the place of the appellant, the acknowledgement due thereof and above all, the admission that of on behalf of the appellant that the said order was received by the wife of the appellant. In such circumstances, I am of the opinion that Commissioner (Appeals) is justified while denying the time extension even of 30 days as mentioned in Section 35 (Proviso) of Central Excise Act. The case law *G. Swarupa Rani vs Commissioner of Customs, Tirupathi reported in 2009 (245) ELT 364 (Tri.-Bangalore)*, as relied upon by the appellant about son and daughter to not to be the authorized agent is not applicable to the facts and circumstances of the present case as the appellant in the said case was abroad when his son received the copy of order, which otherwise was not sent by registered post with acknowledgement due. None of those is the fact for the present case. Resultantly, we find no infirmity in the order under challenge. Otherwise also, no reasonable or sufficient cause of delay of 6 years is observed. The order is, accordingly, upheld. The appeal stands dismissed.

(Dictated and pronounced in the Open Court)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. IV]

Ms. Rachna Gupta, Member (J)

ARIHANT TILES & MARBLES PVT. LTD.

Versus

COMMISSIONER (APPEALS), JODHPUR

Final Order Nos. A/51400-51402/2019-SM(BR), dated 31-10-2019 in Appeal Nos.
ST/50120-50122/2019-SM

Shri K. Poddar and Ms. Tamana Alam, Authorized Representatives (DRs), for the Respondent.

[Order]. - With the present order three appeals as mentioned above are disposed of the order-in-appeal/the order-under-challenge being common to three of these appeals and also the issue involved is same.

2. Facts in brief relevant for the purpose are :

The appellant herein is engaged in manufacture of marble slabs and tiles. The appellant on 29-8-2008 & 29-6-2009 filed three refund claims in respect of service tax paid on certain services received and used for export of goods, during the period from April, 2008 to June, 2008 in terms of Notification No. 41/2007-S.T., dated 6-10-2007, relating to refund of service tax paid on GTA services, Port services and technical testing and analysis services. Three of the said claims have been rejected by the Deputy Commissioner, Central Excise, Udaipur, vide Order-in-Original No. 113 dated 2-3-2009 and Order-in-Original No. 402, dated 25-9-2009. Aggrieved by the order of the Deputy Commissioner, the appellant filed an appeal against rejection of their refund claim. The Commissioner (Appeals-II), Jaipur vide Order-in-Appeal No. 282, dated 12-8-2010 and Order-in-Appeal No. 409, dated 27-10-2010, dismissed the appeal of the appellant. Being still aggrieved, the Appellant filed an appeal before this Tribunal challenging the order of the Commissioner (Appeals-II).

2.1 Tribunal vide Final Order No. 50115-50117/2015 (DB), dated 9-1-2015, affirmed the eligibility of the appellant to refund claim and remanded the matter to the lower authorities for re-examination.

In compliance thereof a detailed submission before the Assistant Commissioner, Central Tax, Udaipur, was filed by the appellant on 11-2-2015. Vide Order-in-Original No. 02/15-ST(Ref), dated 7-5-2015 and Order-in-Original No. 03/15-ST(Ref), dated 7-5-2015 the refund in respect of the three of the refund claims was sanctioned. However, interest from the date of filing of refund application was not sanctioned. Aggrieved therefrom the appellant filed an appeal before Commissioner (Appeals), Jodhpur who vide Order-in-Appeal No. 173(CRM)/ST/JDR/2017-18, dated 27-3-2018 and Order-in-Appeal No. 174(CRM)/ST/JDR/2017-18, dated 27-3-2018, since three months from the date of sanction of refund had expired, sanctioned interest from the date of receipt of the application for refund i.e. 29-6-2009 and 6-7-2009, and not 11-2-2015.

2.2 The appellant, however, filed letter dated 18-4-2018 with the Department for interest @ 12.5% on the refund amount sanctioned to them. The Department issued three Show Cause Notices (SCN's) to the appellant, pursuant to the letters

submitted by them denying the interest amount to the extent of 12% rate and that the calculation of interest by the Appellant was alleged to be incorrect.

The appellant filed a detailed reply contesting the allegations and also the proposal for denial of the interest calculated by the appellant before the Assistant Commissioner, Udaipur. In appeals 50120, 50121 & 50122 of 2019 claim for the interest of Rs. 33,54,833/-, Rs. 17,27,601/- & Rs. 79,15,871/- respectively was filed by the appellant.

As against this, the Assistant Commissioner vide Orders-in-Original No. (i) 28, dated 6-7-2018, (ii) 29, dated 6-7-2018 (iii) 30, dated 6-7-2018 sanctioned the charge sequence of three amounts also Rs. 18,45,273/-, Rs. 8,29,314/- & Rs. 4,27,681/- respectively to the appellant as interest.

2.3 To assail the said order, the appellant filed an appeal before Commissioner (Appeals), Jodhpur who vide Order-in-Appeal No. 1129-1131, dated 11-10-2018 (impugned order), observed the following :-

1. There is no provision for interest on interest.
2. Notification No. 67/2003-C.E. (N.T.), dated 12-9-2003, prescribes 6% interest rate per annum for the purpose of Section 11BB of the Excise Act, therefore Appellant is not eligible to interest beyond the statutory 6% interest on delayed payment of refund claims.

Being aggrieved of this order appellant is before this Tribunal.

3. I have heard Mr. Narender Singhvi, Learned Advocate for the appellant and Mr. K. Poddar, Learned Authorised Representative for the Department.

It is submitted on behalf of appellant that in furtherance of the order of CESTAT dated 9th January, 2015, the appellant became entitled for the interest w.e.f. the year 2008-09, but it could get sanctioned, only in the year 2018. The delay of more than 10 years for getting the amount of interest refunded entitles the appellant to be compensated for the same. It is impressed upon that interest is compensatory in nature, therefore, interest on delayed sanction of interest is payable. Learned Counsel has relied upon the decision of Hon'ble Supreme Court in the case of *Sandvik Asia Ltd. v. CIT* reported as 2006 (196) E.L.T. 257 (S.C.) and that the ratio has not [been] disapproved by Hon'ble Larger Bench in *Gujarat Fluoro Chemicals v. CIT* reported as 2008 (300) ITR 328 (Guj.).

3.1 It is submitted that the said decision has not been overruled rather has been relied upon by Supreme Court in a subsequent decision in the case of *CIT v. Gujarat Fluoro Chemicals* itself. Even the Division Bench of Gujarat, after the matter was referred back by the Supreme Court, is of the opinion that there is general principle for awarding compensation to the assessee for the delay in receiving interest properly due to it. It is alleged that the Appellate Authority below has ignored the said decisions rather the order-under-challenge suffer from gross misinterpretation of these decisions. Learned Counsel has also placed reliance upon the decision of *State of Gujarat v. Unjha Pharmacy* reported as 2016 (341) E.L.T. 211 (Gujarat) wherein the decision of *Gujarat Fluoro* (supra) has been followed holding that compensation for prolonged delay in sanction of interest has to be granted.

3.2 In alternative submission, it has been submitted that when principal amount is payable with interest, payment made by the department is to be first adjusted towards the interest and thereafter towards the principal amount. Thus, to the extent of short fall in refund of principal amount after first appropriating the sanctioned amount towards interest, the liability of Revenue to grant interest

still stands. Learned Counsel has relied upon the decision in the case of *V. Kala Bharathi and Ors. v. Oriental Ins. Co. Ltd.* reported as AIR 2014 (S.C.) 1563, decision of *Industrial Credit and Development Syndicate v. Smithaben H. Patel & Ors.* reported as AIR 1999 (SC) 1036 have been relied upon by the appellant. Finally, impressing upon that on the delayed sanction of refund of interest on 6th July, 2018, the appellant is entitled to interest in the terms of Section 11BB for the period from 28-9-2009 to 6-7-2018. Therefore, the order challenge is prayed to be set aside and three of the appeals are prayed to be allowed.

4. While rebutting these arguments, Learned D.R. has submitted that there is no provision in the relevant statute to grant interest on delayed payment of interest amount and that the appellant vide the impugned appeal is actually asking for the interest on the delayed amount of interest which has been sanctioned in favour of the appellant with reference to the refund which could not be disbursed within three months of the sanction thereof. The claim herein is not for the compensations, as is impressed by the appellant. Hence, none of the case law, as relied upon is applicable to the present facts & circumstances.

4.1 It is submitted that rather the appellant is wrongly interpreting the decision of *Sandvik Asia Ltd.* (supra). It has been pointed out that the Hon'ble Supreme Court has clarified therein that it is only that interest as provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest. It was only the compensation which as per Hon'ble Apex Court may be granted to the assessee. There is no power vested with the Tribunal to grant compensation in view of delay, if any. It is impressed upon that there is no infirmity, as alleged, in the order-under-challenge. Appeal is, accordingly, prayed to be dismissed.

5. After hearing the rival contentions of the parties and perusing the appeal record as well as the case law relied upon. We observe and hold as follows :

Present is the case where the appellant had filed refund claims in respect of service tax paid on certain services received and used for the export of goods during the period from April, 2008 to June, 2008. The refund claims were accordingly filed on 29-8-2008 & 29-6-2009.

These refund claim Appeals were initially rejected, however, this Tribunal vide order dated 9-1-2015 while affirming the eligibility of the appellant to said refund claims, remanded the matter back to the lower authorities for re-examination. It is, thereafter that three of refund claims as were filed under Notification No. 41/2007, dated 6-10-2007 were got sanctioned by the original adjudication authority vide its order dated 7-5-2015. However, no interest was sanctioned from the date of filing of the refund application. The interest was finally sanctioned on delayed refund of service tax vide order dated 27-3-2018.

6. In furtherance whereof the demand of the sanctioned interest that too @ 12.5% on the refund amount was filed by the appellant. The interest was disbursed @ 6% vide order dated 6-7-2018. The appellant today has not contested the rate of interest. However, has claimed the interest on the said disbursed amount of interest on the ground that the same was disbursed after a reasonable delay. Hence, the only question is to be adjudicated is opined as :

Whether the appellant is entitled to interest on the sanctioned amount of interest *qua* refund claims which could not be disbursed with three months thereof.

6.1 The relevant provision in this respect is Section 11BB of Central Excise Act, 1944, it reads as follows :

Section 11BB. Interest of delayed refunds. - If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below ten per cent. and not exceeding thirty per cent. per annum as is for the time being fixed by the Board, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty :

Provided that where any duty ordered to be refunded under sub-section (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation. - Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any court against an order of the Assistant Commissioner of Central Excise, under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.

The provision makes it, abundantly, clear that the interest is allowed on delayed refunds. But the provision is silent about any interest on delayed payment of interest as claimed herein. Learned Counsel for appellant has relied upon *Sandvik Asia Ltd.* (supra) case, impressing upon that the Hon'ble Apex Court has allowed such amount in case of apparent delay. But it is observed that there has been expressed clarification that such interest only can be claimed by an assessee which is provided under the statute and no other interest on such statutory interest can be granted.

The relevant para of the decision of a Division Bench of Hon'ble Supreme Court while considering a reference doubting correctness of their previous decision of *Sandvik Asia* case had held as :

"In our considered view, the aforesaid judgment has been misquoted and misinterpreted by the assessees and also by the Revenue. They are of the view that in *Sandvik* case (supra) this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, the interpretation placed is that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.

7. As we have already noticed, in *Sandvik* case (supra) this Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest".

14. The aforesaid shows that in the latter decision of the Larger Bench, it was held that the decision in the case of *Sandvik Asia Ltd.* (supra) cannot be read to mean that Revenue is obliged to pay interest on interest in the event of its failure to refund the interest payable within the statutory period. The Apex Court further held that in the peculiar facts and circumstances of the case of *Sandvik Asia Ltd.* (supra) the Court had come to the conclusion that there was inordinate delay on

the part of the Government to refund certain amount, which includes statutory interest and, therefore, directed the Revenue to pay compensation for the same, but not interest on interest.

15. In our view, as per the above referred observations of the Apex Court in the case of *Gujarat Fluoro Chemicals* (supra), obligation on the part of the Government to pay compensation for non-payment of the statutory interest by way of interest on interest was not approved. Further, in the above referred decision of the Larger Bench of the Apex Court at paragraph 7, it was observed that the interest provided under the statute, which may be claimed by the Assessee from the Revenue would be available and interest on such statutory interest would not be available.

16. From the conjoint reading of the decision of the Apex Court in the case of *Sandvik Asia Ltd.* (supra) and the latter decision of the Larger Bench in the case of *Gujarat Fluoro Chemicals* (supra) it appears that the liability to pay interest on interest by the Revenue is not approved and to that extent the contention of the Revenue can be maintained. But the further contention of the Revenue that no interest whatsoever would be payable if the refund of the amount of tax or refund of the amount deposited towards tax is to be made, no interest whatsoever would be available by way of compensatory measure.

17. In our view, the general principles for awarding compensation to the Assessee for the delay in receiving monies properly due to it is not disapproved by the Larger Bench of the Apex Court in the case of *Gujarat Fluoro Chemicals* (supra).

18. In view of the aforesaid observations and discussion, we find that the petitioner-Assessee would be entitled to compensation and the interest can be awarded by way of compensation, but would not be entitled to further compensation by way of interest on such interest, which is awarded as compensation.

19. Under these circumstances, we find that the Court can take a reasonable approach when the interest is to be awarded by way of compensatory measure, but with further caution that the interest on such interest cannot be ordered as per the above referred latter decision of the Apex Court in the case of *Gujarat Fluoro Chemicals* (supra)."

The Hon'ble Apex Court in this case while relying upon the decision of *Commissioner of Income Tax v. Narender Doshi*, 254 ITR 606 (S.C.) has, however, held that the Revenue is liable to pay compensation on the amount of interest which it should have given to the assessee but has unjustifiably failed to do this. It becomes clear that inordinate delay for the grant of justified claim may entitle the person to get compensation against that delay the power of granting compensation is an inherent power. Present being a tribunal is not vested with any such inherent power. This Tribunal is a quasi judicial authority which is absolutely bound by the statutory provisions. No power as that of awarding compensation is available with the Tribunal as not being provided by the statute. Otherwise also it has never been the prayer of the appellant. Appellant is praying for entitlement of interest on the amount of delayed interest. Same cannot be called as the claim of compensation.

7. No doubt the decision of *Sandvik Asia Ltd.* (supra) has not been overruled by the Hon'ble Apex Court in the subsequent decision of *Gujarat Fluoro Chemicals* (supra). But, perusal of that decision shows that the question to be adjudicated in that decision before the Supreme Court was whether an assessee is entitled to be compensated by the Income Tax department for the delay in paying interest on the refunded amount, admittedly, due to the assessee. The question was

adjudicated in affirmative. Revenue was directed to pay compensation for the delay in making payment after the lapse of statutory period. In that case also Hon'ble Supreme Court has clarified that amount, specifically, is compensation and is not an interest on interest. The similar clarification has come in the subsequent case of *Gujarat Flouro Chemicals* (supra) also i.e. "we clarify that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest".

8. Thus, the first argument of the appellants that they are entitled for interest on interest being compensatory in nature is not sustainable. Since, it technically is interest on interest it cannot be called as compensation *suo motu*, nor has been so prayed by the appellant himself.

In view of this discussion, we answer the afore framed question in favour of Revenue.

9. Now coming to the alternate argument of the Appellant that from the amount of refund sanctioned since there is an interest liability, the amount should be first adjusted towards the interest liability. It is observed that this rule of first appropriating the interest is applicable only to the debts or to the decretal amount. The case law as relied upon by the appellant is also either *qua* debts or *qua* the decretal amount. Hence, the same is not applicable to the present case of refund of indirect taxes. The said rule of interpretation is otherwise contained in order 21 Rule 1 of Civil Procedure Code relating to execution of decrees for recovery of money. Such a provision stands absolutely excluded from the Central Excise Act, 1944. Further, Hon'ble Apex Court in the case law relied upon by the Appellant i.e. in the case of *V. Kala Bharathi* (supra) has rather clarified that, "*after such appropriation the decree holder is entitled to interest only to the extent of unpaid principal amount. Hence, the interest be calculated on the unpaid principal amount.*" This clarification stands unsatisfied by the Appellant in the present case. Hence, the second line of argument of Appellant is also opined not applicable to the given set of facts & circumstances.

10. In view of entire above discussion, we do not find any infirmity in the orders under challenge. Accordingly, same are upheld hereby. Three of these appeals, consequently, stand dismissed.

(Pronounced in the open Court on 31-10-2019)

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066**

BENCH-SM

COURT-IV

Service Tax Appeal No.ST/52244/2018-ST [SM]

[Arising out of Order-in-Appeal No.79 (AG)/CE/JDR/2018 dated 07-02-2018
passed by the Commissioner (Audit), Central Excise & CGST, Jodhpur]

M/s. Brijesh Cable Network,

...Appellant

Vs.

The Commissioner (Audit), Jodhpur

...Respondent

Present for the Appellant: Mr.Chirag Jain, CA

Present for the Respondent: Mr.K. Poddar,D.R.

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 19/02/2019

Final ORDER NO. 50395/2019

PER: RACHNA GUPTA

The appellant herein is engaged in rendering services of cable operator. While scrutiny of its record for the period from 16.08.2002 to 31.03.2006, the Department observed that the party was receiving signals of various Television Networks through Multi System Operator (MSO) managed by M/s. Rajasthan Telematics Ltd., Kota and M/s. Radhaswamy Communications, Kota. The party also received signals of the broadcast relay by the MSO. The services provided by the party are taxable services w.e.f. 16.08.2002, which were charged to Service Tax at the rate of 5% upto 13.05.2003 and at the rate of 8% upto 09.09.2004 and thereafter @ 10% alongwith 2% of education cess during the period from 10.09.2004 to 31.03.2006 on the gross amount charged by the cable operator from the subscribers for the said service.

1.1 The Department further observed that during the period from 16.08.2002 to 31.03.2006 both the MSOs raised bills to the appellant on account of service provided for receiving cable signals from them for onward re-transmission to their subscribers in Kota. However, the appellant failed to discharge the service tax liability. Resultantly, the show cause notice No.13662 dated 09.10.2007 was served upon the appellant. The appellant despite joining the investigation did not provide any documentary evidence. Even the original adjudicating authority afforded five opportunities to the appellant to appear and submit documents. But appellant opted to not to supply the same. Resultantly, the order in original No.854-857 dated 25.08.2009 was passed confirming the demand of service tax of Rs.41,042/- for want of evidence on behalf of the appellant alongwith the interest and the penalty under Section 78 of the same amount. In addition, penalty under Section 76 and 77 was also imposed. Being aggrieved of the said order the appellant preferred the appeal which has been dismissed on the ground of limitation vide the order in appeal No.79 dated 31.01.2018. Being aggrieved, appellant is before this Tribunal.

2. I have heard Mr.Chirag Jain, ld. Chartered Accountant for the appellant and Mr.K. Poddar, ld. D.R. for the Revenue.

3. It is submitted on behalf of the appellant that after the Departments scrutinized the records of the appellant, the appellant very-much joined the investigation and provided all relevant details. However, the impugned show cause notice was never served at the appellant's address. No intimation, even subsequently, he got about the impugned adjudication. It is apparent from Order-in-Original as well that the same was passed ex-parte. It is further submitted that the appellant came to know about the Order-in-Original only from a recovery note published in the Newspaper dated 28.01.2012. In response thereto he deposited the amount of Service Tax i.e. Rs.41,042/- on 23rd July, 2013. On the assurance of the Department that if he deposited the amount of Service Tax there will be no further proceeding against him, that he deposited the said amount. However, in the year 2015 appellant got a phone call from the Department that he has been declared as un-traceable assessee. To find out the exact position, the appellant wrote a letter to Department on 6th August, 2015. No response was received from the Department. It is thereafter that in December, 2015, appellant again enquired about the status of the adjudication against him. Seeking no further response that appeal is before Commissioner appeals was filed on 16.01.2016. It is submitted that all these facts were also brought to notice of the Commissioner (Appeals). However, the same has not been considered and the appeal has been dismissed on the ground of limitation. The appellant has relied upon the decision of **DR Mangli vs. Commissioner of Central Excise, Nagpur reported in 2014 (54) STR 396 (Tri. Mumbai)**, impressing upon that the period of three months available to the Commissioner to condone the delay has to reckon from the date when the appellant actually received the copy of order in original. Affidavit of the appellant has also been placed on record to this effect. Order accordingly is prayed to be set aside. Appeal is prayed to be allowed.

4. Per-contra Id. DR has submitted that Commissioner (Appeals) has no statutory power to condone the delay beyond three months (60+30 days) The appeal in hand was filed after a delay of six years. It is further impressed upon that there is no cogent reason apparent on record, which may be considered as reasonable for the said delay of six years. It is also impressed upon that as per appellant's own submission, he got the knowledge of Order-in-Original in the year 2012 itself. Justifying the order, Appeal in hand is prayed to be dismissed. filed the reply to the show cause notice. Thus the order announced against the appellant is for lack of evidence.

5. After hearing both sides and perusing entire record, I observe and held as follows:-

The impugned is the case of cable operator services. Those services brought into the tax net w.e.f. 16.08.2002 by amending Section 65 of Finance Act, 2008. Despite that the party had neither obtained registration from the Department under cable operator services nor filed ST-3 return to the Department. Rather, kept suppressing their value of taxable service till the year 2006, when the matter was actually scrutinized by the Department. There is no denial of the appellant that during the investigation, in furtherance of said scrutiny, his statement was recorded and requisite documents were provided by him. It is thereafter that the impugned show cause notice dated 09.10.2007 was issued by the Department. Though the appellant has denied receiving the same, but he has not denied the scrutiny and participating the investigation. In addition there is no submission on his part that since the time of his joining the investigation till the date of issuance of impugned show cause notice there was any change of his address and that the said change was duly intimated to the Department as is prescribed under Rule 4 (2) of the Central Excise Rules. From the Order in Original it is apparent that the appellant despite being called almost five times could not appear. It is also apparent from the order that he not even filed the reply to the show cause notice. Thus the order announced against the appellant is for lack of evidence.

6. As per Department contention, the order was duly issued on the date of order itself at the address as was available with the Department. There is

nothing on record to show that the order so issued ever got received back unserved with the endorsement of change of address to the Department. It is coming out from the submissions on behalf of appellant and even from the affidavit of the appellant as placed on record that the appellant came to know of the demand proceedings going on against it through a local daily newspaper, „Dinikbhaskar” dated 28.01.2012 under the article heading “Demand from General Notice”.

However, no copy of said Newspaper note is annexed with the affidavit. But it becomes an admitted fact that the knowledge of the impugned adjudication/ Order-in-Original came to the notice of the appellant in the year 2012 itself. It is also appellant’s own admission that in furtherance of the said demand note, he made a deposit of Rs.41,042/- on 23rd July, 2013. It cannot be presumed from any stretch of imagination that demand notice would be containing only the demand of the service tax without specifying about the interest and the amount of penalty to also have been recovered from the appellant. Thus, it becomes clear that the knowledge of Order-in-Original was with the appellant in the year 2012 for filing the appeal which was filed in the year 2016.

7. The only another ground of appellant is that he received a phone call from the Department about him being declared as untraceable assessee. No document is placed on record to support the same except an application dated 6th August, 2015. The perusal thereof shows that the application is also silent about any cogent reason for appellant to note to be aware of the interest and the penalty to have also been his liability along with the amount of service tax Rs.41,042/- as was deposited by him through challan No.0009 dated 23.04.2013. Otherwise also since the time of deposit till the aforesaid application a period of more than 2 years has already elapsed and in filing of the said appeal, there is another period of six months from the date of the said impressed upon letter. Perusal of appellants affidavit shows that the copy of Order-in- Original was received by him on 7th August, 2015. The appeal in hand is still filed on 16th January, 2016 i.e. beyond the period of 5 months. Accordingly, the case law relied upon by the appellant that is **DR Mangli (supra)** is opined not applicable to the given circumstances. Above all, Commissioner (Appeals) had limitation being a statutory mandate to not to condone the delay of more than three months. The delay herein is of six years and for sake of arguments, if the argument of appellant about the period to reckon from the date of receipt of order is considered, the delay is still is of more than 5 months.

8. Despite the knowledge and receipt of impugned SCN, the absence of any effort to enquire about the orders in furtherance whereof the recovery proceedings as mentioned in the said Newspaper except a letter dated **6th August, 2015** is not opined sufficient for condoning delay of almost 6 years. Same rather amount to be highly negligent act.

9. I draw my support from the case law in the case of

Singh Enterprises vs. CCE, Jamshedpur reported in 2008

(221) ELT 163 (S.C.) it is held as follows:-

“10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was

only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay does not stand to be reason. I.T.C.'s case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed, which we direct. There will be no order as to costs."

10. In view of the entire above discussion, I do not find any infirmity in the order under challenge. In addition, I do not find any cogent reason still to provide opportunity to the applicant for the delay of 6 years from the date of Order-in-Original to have been condoned. The appeal resultantly, is hereby dismissed.

[Dictated and pronounced in the Open Court]

[Back](#)

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

PRINCIPALBENCH-COURTNO.1

Service Tax Appeal No.51592 of 2016

M/s Diamond Construction Appellant

Near Paras STD, Parasia
District- Chhindwara- 480441(M.P.)

Versus

**Commissioner of Customs, Central Excise.....Respondent
& Service Tax**

Jabalpur(M.P.)

With

Service Tax Appeal No.51593 of 2016

(Arising out of common Order-in-Appeal No. BHO-EXCUS-002-APP-333-
334-15-16 dated 11.02.2006 passed by the Commissioner (Appeal), Central
Excise & Service Tax,Raipur)

M/s Sai Shree Construction Appellant

Near LIC Office
Parasia, District-Chhindwara-480441(M.P.)

Versus

**Commissioner of Customs, Central Excise.....Respondent
& Service Tax**

Jabalpur(M.P.)

APPEARANCE:

Shri Bipin Garg & Sh. Himanshu Bansal, Advocates for the Appellant
ShriR.K.Manjhi, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR.V.PADMANABHAN, MEMBER (TECHNICAL)**

FINALORDERNO.50340-50341/2019

PER JUSTICE DILIP GUPTA:

These two appeals seek to assail the order dated 11 February, 2016 by which the Commissioner (Appeals) Customs, Central Excise & Service Tax, Raipur has dismissed the appeals as having been filed beyond the period of two months and the extended period of one month from the date of communication of the Order.

2. It would be appropriate to first state the necessary facts. The Order was passed by the Additional Commissioner of Customs & Central Excise, Bhopal on 30 August, 2013. This order was admittedly served upon the appellant on 20 September, 2013. Section 85(3A) of the Finance Act, 1994 provides that an appeal can be filed before the Commissioner (Appeals) within two months from the date of receipt of the decision or order of such authority in relation to service tax, interest or penalty. It further provides that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.

3. In the instant case the order was served upon the appellant on 20 September, 2013 but the appeal was presented before the Commissioner (Appeals) on 05 February, 2016 after a period of almost two years and five months. It is, therefore, clear that the appeal was not filed within a period of two months or even within the extended period of one month. The Commissioner (Appeals), after placing reliance upon the decision of the Supreme Court in **Singh Enterprises vs. Commissioner of C.Ex., Jamshedpur** reported in **2008(221)ELT163(S.C.)** dismissed the appeal for this reason.

4. It is contended by the learned Counsel for the appellant that there was good and sufficient cause that prevented the appellant from preferring the appeal within the period stipulated period provided for in Section 85(3A) of the Finance Act and for this purpose an affidavit of Advocate has also been filed before the Tribunal on 15 February, 2019. It is stated in the affidavit that the learned Counsel was under the impression that his office had filed the appeal against the order dated 30 August, 2013, but he subsequently came to know that the appeal was not filed and the appeal was filed when he conveyed this fact to the appellant. Learned Counsel for the appellant submitted that the delay should be condoned and in support of his submission he has placed reliance upon a decision rendered by a learned member of the Bench of the Tribunal at Mumbai in **Uapp India automotive Systems Pvt. Ltd., vs. CCE & ST, Pune-I** reported in **2019(365)ELT109(Tri.Mumbai)** and also on the decision of the Supreme Court in **M. P. Steel Corporation vs. Commissioner of Central Excise** reported in **2015 (319) ELT373 (S.C.)**. Learned Counsel, therefore, vehemently urged that the delay in filing the appeal should be condoned.

5. Learned Representative of the Department has, however, placed reliance on the decision of the Supreme Court in **Singh Enterprises** and has contended that in view of the provisions of Section 85(3A) of the Act, the Tribunal, at best can condone the delay of one month after the expiry of the statutory period of two months. It is his submission that the Division Bench of the Tribunal at Mumbai subsequently in Appeal No.ST/89394/2018(**Muktabai Govind Pawar vs. CC,CE&ST, Aurangabad**) held that the Commissioner (Appeals) cannot condone the delay in filing the appeal after the expiry of the extended period of one month under the proviso to sub section(3A) of Section 85 of the Act. Learned Representative of the Department has also placed before the Tribunal the decision of the other Benches of the Tribunal and submitted that the decision of the Supreme Court in **M. P. Steel Steel Corporation** would not come to the aid of the appellant.

6. We have considered the submissions advanced by both the parties.

7. In order to appreciate the contentions advanced by the parties it would be appropriate to reproduce Section 85(3A) of the Finance Act which is as follows:

“**85.**Appeals to the Commissioner of Central Excise(Appeals)

(3A)An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill,2012 receives the assent of the President, relating to service tax,interest or penalty under this Chapter:

PROVIDED that the Commissioner of Central Excise(Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.”

8. A perusal of sub section (3A) of Section 85 clearly indicates that an appeal shall be presented within two months from the date of receipt of the order of the adjudicating authority in relation to service tax, interest or penalty. It further provides that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month. The discretion of the Commissioner to condone the delay is, therefore, circumscribed by the condition set out in proviso and the delay can be condoned only if the appeal is presented within a further period of one month after the expiry of the statutory period of two months, provided of course, he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within a period of two months.

9. In the present case, admittedly, the order of the adjudicating authority was received by the appellant on 20 September, 2013 but the appeal was presented before the Commissioner on 05 February, 2016. It was clearly not presented within the period of two months nor within the extended period of one month. The Commissioner (Appeals) dismissed the appeal after placing reliance on the decision of Supreme Court in **Singh Enterprises**.

10. The provision of Section 35 of the Central Excise Act,1944 relating to appeals before Commissioner(Appeals) had come up for consideration before the Supreme Court in **Singh Enterprises**. Section 35 of the Central Excise Act,1944 provides that any person aggrieved by any decision or order passed under the Act,

may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days. The provisions of Section 35 of the Central Excise Act, 1944 are paramateria with Section 85(3A) of the Finance Act. The Supreme Court held that the period upto which the prayer for condonation can be accepted is limited by the proviso to sub section (1) of Section 35 of the Act and the position is crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of thirty days after the expiry period of sixty days. In other words, the appellate authority can entertain the appeal by condoning the delay only upto 30 days beyond the normal period for preferring the appeal, which is 60 days. The Commissioner (Appeals) was, therefore, justified in dismissing the appeal on the ground of limitation.

11. The decision of a learned member of the Mumbai Bench of the Tribunal in Yapp India Automotive Systems Private Limited seeks to distinguish the decision of the Supreme Court in Singh Enterprises by merely observing that the appeal that was filed before the Supreme Court was against an order of the High Court dismissing a Writ Petition under Article 226 of the Constitution and so the principles would not be applicable when the jurisdiction of the Tribunal is invoked. It is for this reason that the learned member observed that the Tribunal cannot be divested of its power to condone the delay for a period even beyond the extended period of one month.

12. We express our inability to accept this conclusion drawn by the learned member as the artificial distinction drawn by the learned member is without any basis. The decision in Yapp India Automotive Systems Private Limited is completely contrary to the law laid down by the Supreme Court. The principle of law laid down by the Supreme Court is binding on all.

13. The decision of the Supreme Court in M. P. Steel Corporation will not come to the aid of the appellant as it is in connection with Section 14 of the Limitation Act, 1963.

14. The Division Bench of the Mumbai Tribunal in Muktabai Govind Pawar held that the Tribunal would have no power to condone the delay after the expiry of the extended period of one month.

15. The Commissioner (Appeals), therefore, did not commit any illegality in dismissing the appeal. The present appeal is, therefore, dismissed.

(Dictated & pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(V. PADMANABHAN)
MEMBER (TECHNICAL)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI**

Service Tax Appeal No. 89458 of 2014

Arising out of Order-in-Original No: 33/AC/COMMR/Th-II/ST/2014, Dated:
12.08.2014

Passed by the Commissioner of Central Excise, Thane - II

Date of Hearing: 11.09.2019

Date of Decision: 11.09.2020

**HDFC BANK LTD
KAMALA MILLS COMPOUND, TRADE WORLD, C WING
10TH FLOOR SENAPATI BAPAT MARG, LOWER PAREL
MUMBAI - 400013**

Vs

**COMMISSIONER OF CENTRAL EXCISE, THANE-II
4TH FLOOR, NAVPRABHAT CHAMBERS, RANADE ROAD
DADAR (W), MUMBAI - 400028**

Appellant Rep by: Shri Abhishek Rastogi, Adv.

Respondent Rep by: Shri M Suresh, Joint Commissioner (AR)

CORAM: Hon'ble Mr. C J Mathew, Member (T)

Hon'ble Mr. Ajay Sharma, Member (J)

Per: C J Mathew:

Impugned in this appeal of M/s HDFC Bank Ltd is the finding of Commissioner of Central Excise, Thane-II that the 'mark-up', charged by them for recovery from the holders of credit cards issued by them towards transactions entered into with overseas merchant establishments, is provider of service intended to be taxed by section 65(105)(zm) of Finance Act, 1994 for a part of the disputed period from April 2002 to April 2007 and that intended by section 65(105)(zzzw) of Finance Act, 1994 for the remaining period. The primary challenge to order in-original no. 33/AC/COMMR/Th-II/ST/2014 dated 12th August 2014, confirming tax of Rs. 2,03,83,370 under section 73 of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, and imposition of penalty of like amount under section 78 of Finance Act, 1994 on the appellant as provider of 'banking or financial services', defined in section 65 (12) of Finance Act, 1994, till 30th April 2006 and as provider of 'credit card service', defined in section 65(33a) of Finance Act, 1994, thereafter, is that the service, having been exported, is beyond the pale of taxation and that the activity, pertaining, as it did, to conversion of foreign exchange, was not liable to tax till the incorporation of section 65(105)(zzk) in Finance Act, 1994 to tax 'purchase and sale of foreign exchange including money changing' with effect from 16 May 2008 or, at best, when the expanded definition of 'credit card service' was rendered taxable with a separate, and specific, enumeration in May 2006.

2. This dispute is before us for the second time having, on the former occasion, been remanded to the original authority vide order no. A/561/2012 dated 14th June 2012, on the application for inclusion of additional grounds, broached then for the first time in the proceedings commencing with issue of show cause notice, and that, now, are the primary grounds of challenge here. The holders of credit cards provided by the appellant, as issuing bank, procure goods and services from merchant establishments and the expenditure so incurred becomes due for payment by the holder to the appellant at the end of the agreed-upon cycle as indicated in the billing statement. The debt to the merchant establishment is transferred, at pre-determined discount, to an acquiring bank, viz., VISA or Mastercard, which is credited by the issuing bank with the invoiced amount and the said discount is split between them. In cross-border procurements, the inter-bank transaction is agreed to be effected at rates of exchange of the currencies involved that prevail on the date of the transaction and to which the issuing bank adds 'mark-up' while billing the holder of the credit card. It is this

additional amount retained by the appellant that is bone of contention between the tax authorities and the assessee.

3. It is of interest to note that the scope of tax, as provider of 'banking or other financial service', has, during the period of dispute, undergone changes including the hiving out of 'credit cards' as separate taxable facility as elaborated by the Tribunal in *Standard Chartered Bank v. Commissioner of Service Tax, Mumbai-I* [2015(40) STR 104(Tri-LB. Likewise, the treatment accorded to export of services has also evolved during the period. Circular No. **36/4/2001** dated 8th October 2001 of Central Board of Excise & Customs (as it then was) clarified that statutory limits of geographical jurisdiction precluded tax on services provided beyond territorial waters while Circular No. **56/5/2003** dated 25th April 2003 of Central Board of Excise & Customs (as it then was) clarified that, notwithstanding the rescinding of notification no. 6/99-ST dated 9th April 1999, which had exempted all receipts in convertible foreign exchange from tax under Finance Act, 1994, to subject, by notification no. 2/2003-ST dated 1st March 2003, all transactions of enumerated services consumed or rendered in India to tax irrespective of currency contracted for payment, services that were exported would continue to be exempted. Thus, till the notification of Export of Service Rules, 2005, tax treatment was, by and large, determined upon the territorial aspect of the transaction.

4. Export of Service Rules, 2005, as originally issued under section 94 of Finance Act, 1994 with effect from 15th March 2005 and, in acknowledgment of the complexity of determining the stage at which intangible services cross territorial frontiers, trifurcating the taxable enumerations in the context of the target of the activity, the place of performance and the location of the recipient, was amended by notification no. 28/2005-ST dated 7th June 2005 for incorporating delivery and usage outside India as well as receipt of payment in convertible foreign exchange as conditions. Further amendments, effected by notification no. 13/2005-ST dated 19th April 2006, appropriated authority for the issuance of the Rules from section 93, besides the existing section 94, of Finance Act, 1994 while re-numbering the existing trifurcation within sub-rule (1) of rule 3 and the conditions of delivery-cum-use and payment in convertible foreign exchange under sub-rule (2) of rule 3 of Export of Service Rules, 2005.

5. These clarifications, including those issued after the disputed period, and amendments were brought to our notice by Learned Counsel in furtherance of his submissions that, for much of the period, currency of payment was irrelevant and that the activity was not 'credit card service' but 'purchase and sale of foreign exchange including money changing' that was taxable from the appellant only from 16th May 2008 by incorporation in section 65(12)(a)(iv) of Finance Act, 1994. Reliance is placed on the decision of the Tribunal in *SBI Cards and Payment Services Pvt Ltd v. Commissioner of Service Tax, New Delhi* [2016 (41) STR 846 (Tri-Del)], in *Citibank NA v. Commissioner of Service Tax, Chennai* [2009 (15) STR 727 (Tri-Chennai)] and the ratio of the decisions of the Hon'ble High Court of Bombay in *Commissioner of Service Tax v. Reliance Money Express* [2017 (10) TMI 853 (Bom HC)] and of the Tribunal in *Paul Merchants Ltd v. Commissioner of Central Excise, Chandigarh* [2013 (29) STR 257 (Tri-Del)], in *Cox & Kings India Ltd v. Commissioner of Service Tax, New Delhi* [2014 (35) STR 817 (Tri-Del)] , and in *Gati Ltd v. Commissioner of Central Excise, Hyderabad* [2010 (19) STR 877 (Tri-Bang)]. The last of these, being disposal of application for stay, is not relevant to this proceeding. The irrelevance of receipts in foreign exchange has been highlighted by reference to the finding of the Tribunal in *Nipuna Services Ltd v. Commissioner of Central Excise & Service Tax (A-II), Hyderabad* [2009 (14) STR 706 (Tri-Bang)] that

'16. We find that the condition of payment in foreign exchange is not mentioned in Rule 3 (1). When that condition is not mentioned, there is no requirement for services enumerated in 3 (1) for receipt of payment in foreign exchange rate so as to qualify (sic) as export of Foreign Service. In other words, 3 (1) and 3 (2) appear to be independent. As far as the appellant is concerned, their services would squarely fall within the category of 3 (1) and therefore, the conditions given in 3 (2) would not be applicable to them. In fine, Notification dated 19-4-2006 has not changed the position as far as the appellant is concerned.'

upon considering the amendment effected by notification no. 2/2007-ST dated 1st March 2007 as indication that

'17. 1 && . the condition enumerated in sub- rule (2) are applicable to the services mentioned in sub- rule (1). This notification is effective from 1-3-2007. In other words, all the services which are mentioned in the sub- rule (1) including the services rendered by the appellant would be deemed to be treated as export of service only when the payment is received by the service provider in convertible foreign exchange. Alternatively, the appellant has to fulfil the condition of receipt of payment in convertible foreign exchange only with effect from 1-3-2007.&& '

urged before us.

6. It is the contention of Learned Authorized Representative that the decision in re SBI Cards and Payment Services Pvt Ltd was, in the light of decision of the Hon'ble Supreme Court in Union of India v. West Coast Paper Mills Ltd [2004 (164) ELT 375 (SC)], in jeopardy owing to the appeal of Revenue having been admitted by the Hon'ble Supreme Court on 24th March 2017. He points out that the decision of the Tribunal in Tata Steel Ltd v. Commissioner of Service Tax, Mumbai-I [2016 (41) STR 689 (Tri-Mumbai)] had distinguished the decision in re Cox & Kings India Ltd cited by Learned Counsel and had, therefore, been inappropriately relied upon in the other decisions preferred on behalf of the appellant.

7. Learned Counsel for appellant has contended that the impugned order lacks acceptability owing to being cryptic and for inadequate acknowledgement of several issues pleaded in the adjudication proceedings. Considering the submissions, and elaborately too, made before us, we think that no purpose will be served by directing the original authority to decide the matter for the third time. Before considering the merits of the rival submissions, it would be worthwhile to pause, and deliberate upon, the contention of Learned Authorized Representative that admission of an appeal deprives the decision impugned therein of status as binding precedent. Doubtlessly, the Hon'ble Supreme Court did, in re West Coast Paper Mills Ltd, take note that

'14. Article 136 of the Constitution of India confers a special power upon this Court in terms of an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgement of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgement is in jeopardy.'

but its assistance to the proposition of Revenue is not immediately obvious.

8. The architecture of appellate ascendance under Customs Act, 1962, and replicated in Central Excise Act, 1944 as well as in Finance Act, 1994, leads all the way to the highest court in the land as a statutory prerogative and the trajectory of the argument of Learned Authorized Representative would have it that, in the event of appeal before superior for a, inferior appellate bodies are not bound by their own rulings, even if in identical circumstances, and in disputes of the very same assesseees. That surely goes against the grain of judicial consistency and cannot but contribute to erosion of the ideal of tax certainty. It would, therefore, appear that the context in which the Hon'ble Supreme Court did make that observation supra has been glossed over in the attempt to persuade us to discard some of the decisions of the Tribunal.

9. The dispute in re West Coast Paper Mills Ltd arose from a commercial engagement of the respondents therein with Indian Railways, as carrier of freight, that, having been placed before the Railway Rates Tribunal following revision of rates on 1st February 1964, was held to be unreasonable leading to special leave petition by the Indian Railways which was ultimately dismissed by the Hon'ble Supreme Court on 14th October 1970. A consequential application by M/s West Coast Paper Mills Ltd before the Hon'ble High Court, seeking issue of writ for refund of excess charged, was dismissed on 29th October 1973 with liberty accorded for filing of suit for recovery. The contention of Indian Railways, that these suits were barred by limitation, not having been accepted by the trial court and not having found favour with the High Court, was carried in appeal before the Hon'ble Supreme Court.

10. While considering the plea of the Indian Railways that the bar of limitation operated with reference to the date on which the Railway Rates Tribunal pronounced its order, and in accordance with section 58 of Limitation Act, 1963, the Hon'ble Supreme Court, in doubt over the correctness of the law laid down in PK KuttyAnuja Raja & another v. State of Kerala & another [JT 1996 (2) SC 167], referred the issue to a larger bench which opined that the said decision was not applicable for not having noticed certain crucial decisions and the doctrine of merger. In deciding upon the

applicability of limitation, various aspects and circumstances, including the recourse to constitutional courts under writ remedies, were taken into consideration before holding that the logical, even in the absence of statutory, recourse must be completed before the ticking of the clock commenced was decided upon. Not only was the issue entirely different but even the reference to appeal rendering the order impugned being in jeopardy was not to preclude the applicability of precedent, however tentative it may be, in deciding upon a later dispute. Hence, the reliance on the decision in re West Coast Paper Mills Ltd to deprive another decision of its status as binding precedent is totally misplaced and need not concern us.

11. By issuing credit cards, a 'customer-institution' relationship between the holder and the appellant as a banking company. A Larger Bench of the Tribunal, in re Standard Chartered Bank, had, in a dispute pertaining to taxability of that component of discount charged by the 'acquiring bank' from a 'merchant establishment' which was passed on to the 'issuing bank' and designated as 'interchange fee' as consideration for providing 'banking and other financial services', occasion to consider the scope of the activities pertaining to 'credit cards' within section 65(105)(zm) of Finance Act, 1994. The assessee therein contended that the transactions of the parties, other than that of 'issuing bank' with 'card holder', are not covered by the specified constituent. The observation therein that

'26. On the basis of the above broad principles guiding interpretation including of taxing statutes we now proceed to analyse the ambit of credit card services in BOFS, the taxable service in issue. The identification of which of the transactions among the several transactions that occur during the use of a credit card, fall within the definition and enumeration of credit card services, appears to be a facially nebulous and substantially interpretative problematic issue.

27. On a literal construction of the relevant provisions it appears at first blush that any service provided to a customer by a banking company, etc. in relation to credit card services, is a taxable service. Acceptance of this construction would lead to infinite expansion of the taxable event. Not only would credit facilities provided by an issuing bank to the cardholder fall within the scope of the service but services such as receipt and processing of credit card applications; transferring of embossing data issuing bank's personalisation agency; teller machine personal identification number generation; renewal or replacement of a credit card; change of address; payment updates and an statement generation; settlement of accounts transacted through credit card; services provided by the owner of trademarks or bank name to the issuing bank for use of the trademark or brand name; and a host of other services which are interspersed in the sequence of transactions occurring on the use of a credit card, would all these services provided in relation to credit card services. These services are expressly enumerated in sub- clauses (ii), (iii), (vi) and (vii) of Section 65 (33a), w.e.f 1-5-2006...'

makes it abundantly clear that the ambiguity was restricted to the transactions that is not germane to the 'card holder'-'issuing bank' engagement and that too for the period prior to May 2006. The determination thereafter that

'40. On the basis of the principles and guidance derived from aforementioned authority we are compelled to the conclusion that in the context of BOFS, credit card services cover only such services as a provided by an issuing bank to cardholder. This conclusion is fortified by the clarification issued in Board's circular dated 9-7-2001, RBI Circular dated 12-12-2003, RBI Master Circular and the express and specific statutory explication of several services which Parliament has specified the included in card services, Incorporated in the definition of card services, for the subsequent period w.e.f 1-5-2006, in Section 65 (33 a.)....'

again leaves no room for doubt, notwithstanding such in relation to other stakeholders, as to the taxability of the transaction between 'issuing bank' and 'cardholder' as provider of 'banking and other financial services' and as provider of 'credit card service' during the period of dispute. The Tribunal, in re Citibank NA, did not appear to have been placed in possession of the several aspects, including the extract supra, that were considered by the Larger Bench. In the circumstances, the sole issue remaining for consideration is the inclusion of recovery, over and above the reimbursement effected to the 'acquiring bank', by the 'issuing bank' from the 'card holder' which brings it within the scope of section 67 of Finance Act, 1994.

12. The amount recovered from the 'card holder', to the extent paid out by 'issuing bank' to 'acquiring bank', is not in dispute. The claim made on behalf of the appellant

is that the 'mark-up' is also an element of the 'foreign exchange' rate for conversion of the invoice amount to Indian currency. This submission does not find favour as this 'mark-up' is, demonstrably, not shown separately, either as exchange rate or additionally, in the statement issued to the 'card holder'. Exchange rate for reimbursement to 'acquiring bank' is contractually enshrined and, in the absence of any other cost associated with the conversion taxation to be borne by the 'issuing bank', is not an element of the rate for conversion of the invoice amount to domestic currency. The amount charged by the appellant from the 'card holder' is in excess of the purchase price contracted with the 'member establishment' for the goods or service transacted and as the 'issuing bank' escapes tax liability only to the extent of the purchase price, the 'mark-up' represents consideration for a service. This is, thus, liable to tax except if the consideration was, as claimed by Learned Counsel, transacted for export of service.

13. It is contended by Learned Counsel that an identical dispute was settled in favour of assessee by the Tribunal in re SBI Cards and Payments Services Ltd and followed in re Citibank NA. In the first of the two, it is seen that the appeal was allowed with the finding that

'13. Considering the above discussion and findings we hold that the mark up charges accruing to the appellant when cardholder uses card to pay in foreign exchange abroad is not liable to service tax under 'Credit Card Services' during the impugned period. This conclusion is based on merit of scope of 'Credit Card Services' during the relevant period and lack of jurisdiction of charge.'

which was arrived at with reference to decision of the Larger Bench in re Standard Chartered Bank and in re Cox & Kings India Ltd. We take note that, in re Standard Chartered Bank, the specific findings of the Tribunal on the 'interchange fee' appears to have been argued without drawing the attention to the elucidation of the unambiguous element of 'banking and other financial services' therein. Relying upon the congruity of the fact that the location of the recipient of service in the impugned purchase transactions and in the outbound tour impugned in re Cox & Kings India Ltd was, indisputably, outside India, the contention of the assessee that the service had been exported was accepted. The correctness of the decision in re Cox & Kings India Ltd, relied upon for excluding tax liability, was doubted by a coordinate bench of the Tribunal in the appeal of M/s Cox & Kings India Ltd against order-in-original no. 34/ST/SB/2011-12 dated 12th March 2012 of Commissioner of Central Excise & Service Tax, Mumbai and is yet to be settled. Furthermore, as pointed out by Learned Authorized Representative, the location at which the taxable service was used had been held to be irrelevant by the Tribunal in re Tata Steel Ltd, by a majority of two to one consequent upon reference to Third Member arising from difference of opinion between the constituents of the original Division Bench which did not extend to the applicability of the decision in re Cox & Kings India Ltd. Its precedential value appears to have been limited to 'outbound tours' in which the recipient of the enumerated service was outside India when the service was provided. We have no reason, therefore, to follow these decisions and are required to consider the merit of the submissions independently.

14. We are not familiar with the facts and circumstances of the dispute in re SBI Cards and Payments Services Ltd and in re Citibank NA. If the proposition put forth on behalf the appellants that transactions occurring outside India are outside the jurisdictional coverage of Finance Act, 1994 because the service has been exported is to be accepted, it must also be shown that the 'card holder' was on foreign soil when the card was used. In the digitalized economy, physical presence at the premises of a 'merchant establishment' is not of essence. We find nothing on record that the impugned transactions were undertaken outside the country. Further, from the elaborate discussion in re Standard Chartered Bank, it is also made clear that the overt sale and purchase between 'card holder' and 'member establishment' is a sequence of 'behind the scenes' series of services from which the price of the sale is outside the pale of tax. None of these occur at the precise moment of the overt transaction and, therefore, must be adjudged on the performance thereof; only then can the principle of 'destination based consumption tax' find its true fulfillment. The billing occurs in India as does the payment to the 'issuing bank', and even the 'rate of exchange', though relevant to the date of transaction, is applied only when the 'acquiring bank' debits the 'issuing bank'; the impugned transaction can only be subsequent to it. There is no evidence on record that the recipient of 'banking and

other financial service', by being the 'card holder' was not in India when those services were rendered. The presumption of the 'card holder' being located outside the taxable jurisdiction is a stretch too close to the breaking point.

15. In the intangible world of service transactions, the location of recipient and flow of consideration in foreign currency are sure demonstration of exports. In the present dispute, there is no doubt that the recipients are domestically based and the claim of overcoming the first test by temporary location overseas is but a poor excuse. Learned Counsel submits that, for the entire period of the dispute, repatriation of consideration in convertible foreign currency, was not a necessary qualification. Notification no. 6/99-ST dated 9th April 1999, circular no. 36/4/2001 dated 8th October 2001 of Central Board of Excise & Customs and notification no. 2/2003-ST dated 1st March 2003 do not address exemption to export of services but with taxability when the services are rendered in India even though clarifying for exemption, or otherwise, in the circumstances narrated therein. This is apparent from circular no. 56/5/2003 dated 25th April 2003 of Central Board of Excise & Customs which distinguishes exports for exemption despite domestic rendition of services being taxable even if transacted in convertible foreign currency. The essential qualification of export is the delivery thereof outside the territory of India and, in the absence of palpable markers, there can be no alternative to receipt of consideration in foreign currency as the underlying condition even if not articulated specifically. It was only with the notification of Export of Service Rules, 2005 that legislative silence on the means of acknowledgment was broken. Even then, it did not purport to grant exemption which was invoked only by Export of Services (Amendment) Rules, 2006 with the insertion of section 93 of Finance Act, 1994 as one of the empowering provisions. It would, therefore, appear that the Export of Service Rules, 2005, as originally issued, was intended to enable refunds under rule 5 of CENVAT Credit Rules, 2004 and extended to exempt exports from tax upon the incorporation of taxability of services rendered in the reverse direction. Therefore, there is no statutory basis for arriving at the conclusion that delivery of service outside the tax jurisdiction could be established without corresponding inflow of convertible foreign currency.

16. The dispute in re Nipuna Services Ltd arose from a claim for refund of tax paid on input services used by the appellant therein for rendering services through its agent who received consideration in foreign exchange which was passed on to the provider of service after conversion. It was held therein by the Tribunal that it was only after the Export of Service (Amendment) Rules, 2007 had been notified that receipt in foreign currency was a necessary requirement in qualifying as 'export' for the purposes of rule 5 of CENVAT Credit Rules, 2004. That is not the issue in the present appeal which is solely on the controversy of exemption of the service that is claimed to have been exported from the jurisdiction of tax. The 'mark-up' charged by the appellant is neither received nor billed in convertible foreign currency and such being the determinant, along with location, for the rendering of service outside the tax jurisdiction, the claim of the appellant to be exempt from tax fails.

17. The complexity of exports and the lack of distinguishment for exports during much of the period of dispute is obvious from our exposition supra and it may not be unnatural for an assessee to resort to superficial interpretation without intention to evade tax. We also find that the show cause notice, and the impugned order, lack convincing evidence of suppression or misrepresentation and, in the circumstances of discharge of tax liability, along with interest, for the period of dispute, it would have been appropriate for the proceedings to have terminated under section 73(3) of Finance Act, 1994 without issue of show cause notice. The imposition of penalty under section 78 of Finance Act, 1994 is not merited.

18. We, therefore, allow the appeal to the extent of setting aside the penalties.

(Order pronounced in the open court on 11.09.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, MUMBAI
COURT NO. II**

Service Tax Appeal No. 85354 of 2015

Arising out of Order-in-Original No. 101-102/ST-II/RS/2014, Dated:
14.10.2014

Passed by Commissioner of Service Tax-II, Mumbai

WITH

Service Tax Appeal No. 85355 of 2015

Arising out of Order-in-Original No. 101-102/ST-II/RS/2014, Dated:
14.10.2014

Passed by Commissioner of Service Tax-II, Mumbai

Date of Hearing: 06.01.2020

Date of Decision: 26.02.2020

**M/s SAHARA INDIA TV NETWORK
CTS 40-44, SAHARA INDIA POINT, S.V. ROAD
GOREGAON (W), MUMBAI - 400104**

Vs

**COMMISSIONER OF SERVICE TAX
MUMBAI-II, 4TH FLOOR, NEW CENTRAL EXCISE BLDG.
MAHARSHI KARVE ROAD, CHURCHGATE, MUMBAI - 400020**

Appellant Rep by: Shri S S Gupta, CA

Respondent Rep by: Shri Suresh Merugu, Joint Commissioner, AR

CORAM: Hon'ble Mr.S K Mohanty, Member (J)
Hon'ble Mr. Sanjiv Srivastava, Member (T)

Per: Sanjiv Srivastava:

These appeals are directed against order in original No.101-102/ST-II/RS/2014 dated 14.10.2014 of the Commissioner of Service Tax -II, Mumbai. By the impugned order, the Commissioner held as follows:

"I. Show Cause Notice issued under F.No STII/ Audit/Gr.6/98/SITV/11-12/Pt.I dated 08.04.2013 amounting to Rs 3,94,10,566/- for the period April 2008 to June 2012

48.1(a) I confirm, in terms of Section 73(2) of the Finance Act, 1994, the demand of Service Tax of Rs 3,94,10,566/- (Rupees Three Crore Ninety Four Lakhs Ten Thousand Five Hundred and Sixty Six Only) made in the Show Cause Notice, as payable by/ recoverable from M/s Sahara India T V Network, Mumbai 400104.

48.2(a) I order recovery of interest at the appropriate rate, on the amount confirmed at par 48.1(a) above from the due date(s) under the provisions of Section 75 of the Finance Act, 1994, from M/s Sahara India T V Network, Mumbai 400104. 48.3(a) I impose penalty of Rs 10,000/- (Rupees Ten Thousand Only) under Section 77 of the M/s Sahara India T V Network, Mumbai 400104.

48.4(a) M/s Sahara India T V Network, Mumbai 400104, shall also pay appropriate late fee for each return at the rate specified in Rule 7C of the Service Tax Rules, 1994 during the relevant period, subject to a maximum of Rs 20,000/- (Rupees Twenty Thousand only), specified under Section 70 of the Finance Act, 1994, for their failure to file periodical returns.

48.5(a) I impose penalty of Rs 3,94,10,566/- (Rupees Three Crore Ninety Four Lakhs Ten Thousand Five Hundred and Sixty Six Only) on M/s Sahara India T V Network, Mumbai 400104, under Section 78 of the Finance Act, 1994

II. Statement of Demand/SCN under Section 73(1A) of The Finance Act, 1994 issued under F.No ST-II/Dn- IV/Gr.II/Shara/04/EA2000/SCN12-13/2013-14 dated 07.04.2014 amounting to Rs 1.41,31,667/- for the

period June 2012 to June 2013

48.1(b) I confirm, in terms of Section 73(2) of the Finance Act, 1994, the demand of Service Tax of Rs 1,41,31,667/- (Rupees One Crore Forty One Lakhs Thirty One Thousand Six Hundred and Sixty Seven Only) made in the Show Cause Notice, as payable by/ recoverable from M/s Sahara India T V Network, Mumbai 400104.

48.2(a) I order recovery of interest at the appropriate rate, on the amount confirmed at par 48.1(b) above from the due date(s) under the provisions of Section 75 of the Finance Act, 1994, from M/s Sahara India T V Network, Mumbai 400104.

48.3(a) I impose penalty of Rs 10,000/- (Rupees Ten Thousand Only) under Section 77 of M/s Sahara India T V Network, Mumbai 400104.

48.4(b) I impose penalty under Section 76 of the Finance Act, 1994, which shall be,-

i) One hundred rupees for every day during which such failure continues or

ii) At the rate of two per cent of such tax, per month,

Whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax, provided that the total amount of the penalty payable in terms of this section shall not exceed fifty percent of the service tax payable."

2.1 Appellants are registered with the department and are providing various taxable services namely "broadcasting services", "business auxiliary services", "renting of immovable property services", "erection, commissioning and installation services", "advertising services" and "manpower recruitment/ supply agency services".

2.2 During the course of EA 2000 audit it was observed that they had incurred expenditure in foreign currency towards the services received from M/s Asia Satellite Telecommunication Company Ltd, Hong Kong (AsiaSat) for providing C-Band Transponder on Asisat-3S Satellite, as per the agreement commencing from 15.06.2005.

2.3 The said transponder was used for uplinking the programme to be broadcasted to the satellite and the same was essential for broadcasting operations. Appellant were uplinking the programmes from the teleport situated at their complex in NOIDA. The satellite transponder was an infrastructural requirement for providing the broadcasting services. The aforesaid activity of providing the C-Band Transponder, appeared to be provision of an infrastructural support to the business of the appellant i.e. broadcast of T V channel, and the service was appropriately classifiable as "Support Services for Business or Commerce" as defined under Section 65(105)(zzzq) of the Finance Act, 1994.

2.4 Since AsiaSat was not having any establishment in India, Appellant was required to discharge the service tax liability as recipient of the services as per Section 66A of the Finance Act, 1994 read with Rule 3(iii) of the Taxation of Services (Provided from outside India and received in India) Rules, 2006.

2.5 By not discharging the service tax liability in respect of the services so received by them appellant had contravened various provisions of Finance Act, 1994 and Service Tax Rules, 1994. Thus a Show Cause Notice dated 08.04.2013 was issued to them asking them to show cause as to why:-

- Service tax amounting to Rs 3,94,10,566/- not paid by them in respect of the said services received by them during the period April 2008 to June 2012 should not be demanded and recovered from them by invoking proviso to Section 73(1) of the Finance Act, 1994;

- Interest on the amounts of service tax not paid by the due date be not demanded and recovered at appropriate rate as per Section 75 of the Finance Act, 1994

- Penalty under Section 77 and 78 of the Finance Act, 1994 should not be imposed on them.

2.6 For the subsequent period June 2012 to June 2013, a statement of demand as per Section 73(1A) dated 07.04.2014 was issued for demanding and recovering service tax amounting to Rs 1,41,31,667/- along with interest under

Section 75 and for imposition of penalty under Section 76 and 77 of the Finance Act, 1994.

2.7 Show Cause Notice dated 8.04.2013 and Statement of Demand dated 7.04.2014 were adjudicated by the Commissioner as per the impugned order referred in para 1, supra.

2.8 Aggrieved by the impugned order, Appellant have preferred these appeals.

3.1 We have heard Shri S.S. Gupta, Chartered Accountant for the Appellants and Shri Suresh Merugu, Joint Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned Chartered Accountant submitted that-

- Service provided to them by AsiaSat are very specialized services which cannot be carried out by the appellant themselves;

- The category of taxable service i.e. Business Support Service is only for the activities which are outsourced by the organization and are in the nature of routine transaction of business as per the clarifications given in a) Circular No **334/4/2006-TRU** dated 28.02.2006, b) Circular No **159/10/2012-ST** dated 16.06.2012 and c) Circular No **109/3/2009-ST** dated 23.02.2009.

- In the present case they have obtained space in transponder from the third party as this activity could not have been carried out in house. Thus availing space on the transponder cannot be said to be outsourced service, which could be levied to service tax under the category of business support services;

- By application of principle of ejusdem generis, the phrase "infrastructure support service" in the definition, should be interpreted to include the services which are in nature of supporting sales, purchase, transaction processing and accounting;

- As per explanation to 65(104c) and CBEC Circular No 334/1/2006-TRU dated 28.02.2006, office shall be provided along with various facilities in order to attract service tax under the category of infrastructure support service. This view is also as per the decisions in following cases

- o Air Liquid North India (P) Ltd [2017 (4) GSTL 230 (TDel)]*

- o Dish TV India Ltd [2015 (38) STR 857 (T-Del)]*

- o Mundra Port& Special Economic Zone Ltd [2012 (27) STR 171 (T-Ahm)]*

- M/s AsiaSat has transferred the "right to use" of transponder, hence no service tax is payable. As per clause (d) to Article 366(29A) of the Constitution of India, such transaction of transfer of right to use is deemed to be sale and thus not leviable to service tax. In case of *Imagic Creative Ltd [2008 (9) STR 337 (SC)]* it has been held that if the transaction is considered as "sale", it cannot be considered as "service".

- Hon'ble Karnataka High Court has in case of *Antrix Corporation Ltd* held that leasing of transponder of INSAT Satellites amounts to transfer of right to use the goods. Hence, their agreement with AsiaSat is a transaction for sale and no service tax is payable.

- There is duplication of demand as the demand of same service tax in respect of the payments made to AsiaSat was also made by Commissioner Central Excise NOIDA. The demand confirmed is under challenge before CESTAT Allahabad. Parallel proceedings cannot be pursued for the same matter pertaining to the same period as per the following decisions

- o Paro Food Products [2005 (184) ELT 50 (T-Bang)]*

- o Solitaire Machine Tools Ltd [2008 (222) ELT 404 (T-Ahmd)]*

- Once CESTAT has confirmed the order and upheld the jurisdiction of the NOIDA Commissionerate in the matter then the same service cannot be also taxed by the Mumbai Commissionerate or else it will lead to parallel jurisdiction with different officers having different view.

- It is not mandatory for the Bench to follow the judgement given on the same matter by another Bench of the CESTAT if the new evidence has been brought to light which was missing in that case

- Since the amount of service tax sought to be demanded from them on principle of reverse charge shall be available to them as CENVAT Credit the demand is totally revenue neutral. Since it is revenue neutral the invocation of extended period of limitation for making the demand cannot be sustained as per the following decisions:

o Nirlon Ltd [2015 (320) ELT 22 (SC)]

o Tenneco RC India Pvt Ltd [2015 (323) ELT 299 (Mad)]

o Coca Cola India Pvt Ltd [2007 (213) ELT 490 (SC)]

- Since the issue is in relation to interpretation of statute and appellant has reasonable cause for non-payment of service tax imposition of penalties cannot be justified.

3.3 Arguing for the revenue learned Authorized representative submitted that-

- All the pleadings advanced by the Appellant counsel in the matter were also advanced by them before the Allahabad bench of CESTAT in respect of similar proceedings undertaken in respect of the Noida branch. Rejecting the argument on merits tribunal has confirmed the demand for normal period.

- The agreement under consideration has been entered between AsiaSat and Sahara India Commercial Corporation Limited (Appellant is a unit of SICCL) Goregaon, Mumbai for the period 2010 to 2015. - The payments as per the agreement were made from the appellants office at Mumbai.

- No notice after the first Show Cause Notice except the one covering the period from 2007-2011 has been issued by NOIDA authorities.

- Reliance is placed on the decisions as follows:

o Hospital Mazdoor Sabha & Others [(1960) 2 SCR 866]

o Indus Towers Limited [2014 (35) STR 459 (Del)]

o Indus Tower Limited [2017 (52) STR J81 9SC]

o Indus Tower Ltd [2012 (285) ELT 3 (Kar)]

o Tower Vision India Pvt Ltd [2016 (42) STR 249 (TLB)]

o Essar Telecom Infrastructure Pvt Ltd [2015 (40) STR 591 (T-Mum)]

o Sahara India TV Network [Final Order No 71339/2018 dated 5.07.2018 of CESTAT Allahabad Bench.]

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments on appeal.

4.2 The matter was earlier heard by the co-ordinate bench and written submissions dated-

- 10th October 2018 and 29th October 2018 were made by the appellant counsel;

- 18.12.2018 were made by the learned Authorized Representative;

These written submissions have also been taken on record while considering the matter.

4.3.1 Appellants have during the course of hearing submitted a chart showing the duplication of demand by way of Show Cause Notice issued by NOIDA Commissionerate and that issued by the Mumbai Commissionerate. We reproduce the relevant extract of chart as produced by the appellant counsel below:

Payment Date	SN of Annexure to SCN		Amount (Inclusive of TDS)		Service Demand Tax		Remark
	Mumbai	Noida	Mumbai	NOIDA	Mumbai	Noida	
16.04.08	1	9	15104554	16894580	1866923	2088170	1
10.07.08	2	10	18001357	18001357	2224968	2224968	-
15.12.08	3	11	20580606	20580606	2543763	2543763	-
20.02.09	4	12	21093473	21093473	2607153	2607153	-
01.06.09	5	13&14	20042416	20042416	2064369	2477243	2
31.08.09	6	15	20654510	20654510	2127415	2127415	-
23.11.09	7	16	19696342	19696342	2028723	2028723	-

23.02.10	8	17	19567680	19456421	2015471	2004011	3
03.05.10	9	18	18955680	18844421	1952435	1940975	4
02.06.10	10	19	19848248	19731527	2044370	2032347	5
23.09.10	11	20	23561336	23561336	2426817	2426817	-
07.12.10	12	21	23121212	23121212	2381485	2381485	-
10.03.11	13	22	23226167	23226167	2392295	2392295	-
Total			263453581	264904368	28676187	29275365	
1	Rs 1790026/- paid towards TDS inadvertently not disclosed to officers in Mumbai						
2	Mumbai demanded Service Tax @ 10.30% while NOIDA @ 12.36%						
3	Additional TDS of Rs 111259/- paid after providing the amounts to officers at NOIDA						
4	Additional TDS of Rs 111259/- paid after providing the amounts to officers at NOIDA						
5	Additional TDS of Rs 116721/- paid after providing the amounts to officers at NOIDA						

4.3.2 Counsel for the appellants have submitted that the there has been duplication of demand, as indicated above and in the case CESTAT Allahabad, has by deciding the issue in respect of these demands conferred the jurisdiction in respect of this issue to the Noida Commissionerate. Hence the demands made by Mumbai Service Tax Commissionerate are not sustainable in respect of the same issue.

4.3.2 We have seen the order of CESTAT Allahabad, [Final Order No 71339/2018 dated 5.07.2018]. In the said order we do not find any such plea of jurisdiction being raised or being considered by the tribunal. Even if CESTAT Allahabad has passed the said order it cannot be said that they have conferred the jurisdiction in respect of the issue to Noida Commissionerate.

4.3.3 In case of multiple registrations of the same entity in different jurisdictions each jurisdiction in which the unit/ person is registered is having jurisdiction over the transactions entered into by the unit/ registrant in that jurisdiction. Commissioner has in para 28 &29 of his order recorded as follows:

"28. The noticee has also stated that similar service received by M/s Sahara India TV Network, Noida registered separately as Service Tax assessee at Noida has been classified under Business Support Service for the purposes of levy of Service Tax and accordingly the Commissioner of Central Excise and Service Tax, Noida confirmed the demand of Service Tax for the Service Tax registration pertaining to Noida vide Order in Original No 08/Commissioner Noida/2013-14 dated 17.06.2013 on the following grounds:-

- The services provided by AsiaSat are of infrastructural support to the business of TV Channel*
- Admittedly, Broadcasting cannot be done without uplinking to the satellite.*
- The transponder of AsiaSat is an infrastructural requirement which allows TV Channels to be viewed.*
- The definition of Business Support Services clearly states that the support service provided in relation to Business or Commerce, in any manner is covered under this service.*

29. The noticee have contended that service tax amounting to Rs 23,992,295/- was demanded both by Noida and Mumbai authorities. AsiaSat issued invoices to Sahara India Commercial Corporation Limited, Sahara India T V Network, Noida quoting the PAN Number as AADCA7848N. The PAN Number for the purpose of Service Tax registration at Mumbai is AADCS6118F. Service Tax registration numbers of NOIDA and Mumbai are different. Therefore the contention that demand of Rs 23,92,295/- is common in the SCNs issued at Mumbai and Noida is without basis and is not sustainable"

4.3.4 We have perused the invoices issued by AsiaSat against which the demand of Service tax has been made in the present case. The details as they appear on invoices are tabulated below:

SN	Invoice		Invoiced To	Invoice 'USD
1	AS3S/460/07	15.10.2007	Sahara India Commercial Corporation Ltd Sahara One Tower, Kamala Mill Compound, Lower Parel, Mumbai	400,000
2	AS3S/048/08	21.02.2008		400,000
3	AS3S/399/08	21.04.2008		400,000
4	AS3S/324/08	21.10.2008	Sahara India Commercial Corporation Ltd Sahara India T V Network Sahara India Point, CTS 40-44, S V Road, Goregaon (West) Mumbai.	400,000
5	AS3S/043/09	21.01.2009		400,000
6	AS3S/141/09	14.04.2009		400,000
7	AS3S/253/09	15.07.2009		400,000
8	AS3S/365/09	20.10.2009		400,000
9	AS3S/163/10	10.05.2010		487,500
10	AS3S/254/10	12.07.2010		487,500
11	AS3S/363/10	19.10.2010		487,500
12	AS3S/153/11	18.04.2011		487,500
13	AS3S/043/11	25.01.2011		487,500
14	AS3S/047/10	21.01.2010		400,000
15	AS3S/261/11	18.07.2011	Sahara India Commercial Corporation Ltd Sahara India T V Network, Sahara India Complex, C-2/3/4 Sector 11, NOIDA	487,500
16	AS3S/384/11	19.10.2011		487,500
17	AS3S/044/12	16.10.2012		487,500

4.3.5 From the facts as they emerge from the Table in para 4.3.4, it is quite evident that in respect of the invoices mentioned at Sl No 1 to 14, the address indicated of the service recipient shown on invoices is that of Mumbai and not of Noida. When the appellant themselves recognize that these services are being received by them for providing the Broadcasting Services from their registered premises at Mumbai, the issue of jurisdiction needs to be decide accordingly.

4.3.6 We have also examined the ST-2 certificates of Appellant issued from Mumbai, as per the ST-2 certificate issued Address of the Business Premises is same as that indicated on the invoices. Interestingly, though Appellants had taken centralized registration at Noida, they have not indicated said business premise in ST-2 certificate issued at Noida. The business premise in Mumbai from where they were providing the taxable services including the Broadcasting Services was indicated as "Sahara India TV Network, B-12, 1st Floor, Ghanshyam Chamber, Opp City Mall, New Link Road, Lokhandwala, Andheri (West), Mumbai. Address of the premises or office paying service tax under centralized billing or centralized accounting under sub-rule (2) and (3A) of rule 14 of the Service Tax Rules, 1994 on the ST-2 certificate issued from Noida is indicated as "Sahara India Complex, C-2, C-3, C-4, Sector 11, Noida." While the ST-2 Certificate at Mumbai was issued on 01.01.2002 and last amended on 19.09.20014, that issued at Noida was issued on 16.09.2006 and last amended on 29.01.2014. These facts clearly show the existence of the premises indicated on the invoices issued by M/s AsiaSat and mentioned at Sl No 1 to 14 as separate registrant for the purpose of providing taxable service and registered in the jurisdiction of Mumbai Commissionerate. In our view the jurisdiction in respect of these 14 invoices to demand service tax on reverse charge basis vests with the Mumbai Commissionerate only. In respect of the invoices mentioned at Sl No 15, 16 & 17 which are in the name of the appellants registered premises as per the registration certificate issued by the Noida Commissionerate the jurisdiction will vest with the Noida Commissionerate, accordingly demand in respect of these invoices made by the Mumbai Commissionerate needs to be deleted.

4.3.7 Counsel for the appellant have relied upon the decision of Hon'ble Apex Court in case of *Sayed Ali [2011 (265) ELT 17 (SC)]* to argue that for exercising

power, the officer should have proper jurisdiction, if there is no jurisdiction then it cannot issue show cause notice. The relevant para of the said decision is reproduced below:

*"14. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions. Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officers". **In our view therefore, it is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.**"*

In our view the said decision do not help the cause of the appellants because in respect of the premises, registered with the Mumbai Service Tax Commissionerate, the power to assess was vested with the Mumbai Commissioner only and hence the proceedings initiated against the appellant by Commissioner in Mumbai cannot be faulted with.

4.4.1 On merits of the issue appellants have argued that services rendered by M/s AsiaSat do not qualify to be Business Support Services as defined by the 65(105)(zzzq) of the Finance Act, 1994. The definition as incorporated in the Finance Act, 1994 is reproduced below:

"Section 65(104c) of the Finance Act, 1994

*"**Support Services of Business or Commerce**" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.*

Explanation -For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;

Section 65 (105) (zzzq) of the Finance Act, 1994

"Taxable Service" means any service provided or to be provided to any person, by any other person, in relation to support services of business or commerce, in any manner;"

4.4.2 Revenue has sought to classify the said service under this category by holding that the service provided by the AsiaSat to the Appellant is "infrastructural support services". Commissioner has in his order in para 17 to 23 of impugned order Commissioner has observed as follows:

"17 The Show Cause Notice alleges that the activity undertaken is provision of infrastructural support under "Business Support Services." The noticee have contended that they have not received an infrastructural facilities like those mentioned in above Explanation and therefore, they are not liable to pay Service Tax under the category of infrastructural support services classifiable under Business Support Services.

18. In the instant case, the noticee have hired C-band transponder of Asiasat-3S

satellite for uplinking of the programmes to be broadcasted, i.e., to support their business of Broadcasting Services provided by them. It is an admitted fact that without uplinking of the programmes with the support of Cband capacity provided by AsiaSat satellite space, the Broadcasting services provided by the noticee cannot be done. Therefore I am inclined to examine whether the services received by the noticee get covered under the definition of Business Support Services as defined under Section 65(104c) and as classifiable under Section 65(105)(zzzq) of the Finance Act, 1994 in the nature of infrastructural support.

19. As can be seen, the expression "includes" in the above explanation clearly establishes that the definition of "infrastructural support services" itself is exhaustive and those infrastructural support services which are contentious are specified/ explained in the further inclusive part. Therefore, the expression "infrastructural support services" mentioned in the definition itself is adequate to cover the activities received by the noticee. The essential criteria to be satisfied for classification under the said service is that it should support the business or commerce of the recipient and the emphasis is on "in any manner".

20. CBEC circular issued under D O F No **334/4/2006-TRU** dated 28.02.2006 explains the scope of the said service as under:

"3.13 BUSINESS SUPPORT SERVICES: Business entities outsource a number of services for use in business or commerce. These services include transaction processing, routine administration or accountancy, customer relationship management and tele-marketing. There are also business entities which provide infrastructural support such as providing instant offices along with secretarial assistance known as "Business Centre Services". It is proposed to tax all such outsourced services. If these services are provided on behalf of a person, they are already taxed under Business Auxiliary Service. Definition of support services of business or commerce gives indicative list of outsourced services."

21. The CBEC vide Circular No **109/3/2009-ST** dated 23.02.2009 further clarified that Business Support Service is a generic service of providing support to the business or commerce of the service receiver. In other words, the principal activity is to be undertaken by the client while the service received is to support the business or commerce of the recipient.

Thus the infrastructural support services are those services which are often outsourced and used for the business activity undertaken by the client.

22. In the instant case, the noticee applied for and obtained Service Tax registration for providing Broadcasting service. The noticee entered into an agreement with M/s Asia Satellite for hiring C-band transponder on AsiaSat 3S satellite. The said transponder was meant for use for uplinking the programme to be broadcasted. In other words, the noticee outsourced the space in C-band transponder for provision of Broadcasting Service. The noticee is entitled to treat the said service as input service used for providing the output service namely Broadcasting service. The Noticee have not denied having received the services and their use for providing the output services. In fact, the output service could not have been provided without the support service.

23. From the foregoing, I am of the considered view that the Noticee has received services (as deemed service provider) for use in their business activity which get appropriately covered within the scope of the taxable services of "Business Support Services" as defined under Section 65(104c) and classifiable under Section 65 (105)(zzzq) of the Finance Act, 1994."

4.4.3 Appellants have argued that the services provided to them by M/s AsiaSat are specialized services without which the Broadcasting would be impossible. These services cannot be called as outsourced service or infrastructural support service, for classification of these service under the category of Business Support Services. They further stated that the phrase "infrastructure support service" used while defining the "Business Support Service" should be interpreted along with the other terms used in definition by application of principle of "ejusdem generis" or "noscitur a sociis" (Reliance placed on Hon'ble Apex Court decision in case of *Siddheshwari Cotton Mills (P) Ltd [1989 (39) ELT 498 (SC)]*). It is thus their argument that such specialized service provided by M/s AsiaSat, cannot be covered by phrase "infrastructure support service", as used in the definition clause.

4.4.4 We have considered the argument of the appellant. However we do not find ourselves to be in agreement with what is stated by them. The principle of "ejusdem generis" and "noscitur a sociis" are essentially principle of construction of the statute, provide that the words used in a statute should be interpreted along with the words in company which they occur i.e. the word occurring together derive the colour from each other. This essentially mean that the word which are more general in nature get restricted by the other words used therein. However the said principles are not applicable when the words used in the statute are simple plain and clear. Hon'ble Supreme Court has in case of *Hospital Mazdoor Sabha & Others* [(1960) 2 SCR 865] in para 9 held as follows:

"It is, however, contended that, in construing the definition, we must adopt the rule of construction noscitur a sociis. This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in " Words and Phrases " (Vol. XIV, P. 207): "Associated words take their meaning from one another under the doctrine of noscitur a sociis, the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim Ejusdem Generis." In fact the latter maxim "is only an illustration or specific application of the broader maxim noscitur a sociis ".

*The argument is that certain essential features or attributes are invariably associated with the words "business and trade" as understood in the popular and conventional sense, and it is the colour of these attributes which is taken by the other words used in the definition though their normal import may be much wider. We are not impressed by this argument. It must be borne in mind that noscitur a sociis is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the Legislature is associating wider words with words of narrow significance is doubtful, or otherwise not clear that the present rule of construction can be useful applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the Legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service. As has been observed by Earl of Halsbury, L. C., in *The Corporation of Glasgow v. Glasgow Tramway and Omnibus Co. Ltd.* (1), in dealing with the wider word used in s. 6 of Valuation of Lands (Scotland) Act, 1854 " the words 'free from all expenses whatever in connection with the said tramways' appear to me to be so wide in their application that I should have thought it impossible to qualify or cut them down by their being associated with other words on the principle of their being ejusdem generis with the previous words enumerated". If the object and scope -of the statute are considered there would be no difficulty in holding that the relevant words of wide import have been deliberately used by the Legislature in defining "industry" in section 2(j). The object of the Act was to make provision for the investigation and settlement of industrial disputes, and the extent and scope of its provisions would be realised if we bear in mind the definition of "industrial dispute " given by Section 2(k), of "wages" by Section 2(rr), "workman" by Section 2(s), and of "employer" by Section 2(g). Besides, the definition of public utility service prescribed by s. 2(m) is very significant. One has merely to glance at the six categories of public utility service mentioned by Section 2(m) to realise that the rule of construction on which the appellant relies is inapplicable in interpreting the definition prescribed by Section 2(j)."*

In the *Siddheshwari Cotton Mills (P) Ltd* [1989 (39) ELT 498 (SC)], Hon'ble Supreme Court has applied the principle of "Ejusdem Generis" for interpreting the phrase like "or any other process" as is evident from the para 8 of the decision reproduced below:

"8. The preceding words in the statutory provision which, under this particular rule of construction, control and limit the meaning of the subsequent words must represent a genus or a family which admits of a number of species or members. If there is only one species it cannot supply the idea of a genus.

In the present case the expressions bleaching, mercerising, dyeing, printing, water-proofing, rubberising, shrink-proofing, organdie processing' which precede the expression 'or any other process' contemplate processes which impart a change of a lasting character to the fabric by either the addition of some chemical into the fabric or otherwise. 'Any other process' in the section must, share one or the other of these incidents. The expression "any other process" is used in the context of what constitutes manufacture in its extended meaning and the expression "unprocessed" in the exempting notification draws its meaning from that context. The principle of construction considered appropriate by the Tribunal in this case appears to us to be unsupportable in the context in which the expression "or any other process" has to be understood."

It is not the case herein wherein separate identifiable words have been used in the definition clause. Hence following the decision of Hospital Mazdoor Sabha, supra we hold that the said principles of "Noscitur a Sociis" and "Ejusdem Generis" to be not applicable in the present case.

4.4.5 Relying on the explanation to Section 65(104c) and the decision of the tribunal in the case of *Air Liquide North India (P) Ltd [2017 (4) GSTL 230 (T-Del)]* and *Dish TV India Ltd [2015 (38) STR 857 (T-Del)]* appellants have argued that for the service to be considered as "infrastructural support service", office should have been provided along with various other facilities. In the decision of *Air Liquide North India*, CESTAT has held as follows:

"10. The appellants strongly pleaded that the scope of infrastructure support as mentioned under tax entry 'business support service' will not cover the present case. Reliance was placed on the explanation to state that the nature of activities which are to be generally considered as infrastructural support service can be ascertained from such inclusive definition. These are mainly administrative and office related support. The type of activities like putting up and managing gas storage facility in industrial unit are not fitting into overall scope of the infrastructural support service as contemplated by the inclusive definition given in the explanation. We note that though the activities of the appellant, can be brought under very generic understanding of infrastructure support, when examined with statutory scope as per explanation indicating nature of services which are to be brought under tax net than it would appear that the present activity will not get covered under the said tax entry. We also take note that in legal interpretation, there are situation where the word 'includes' in certain context be a word of limitation (South Gujarat Roofing Tiles Manufactures- 1997 (1) SCR 878). In certain situations the nature of included items would not only partake of the character of the whole, but may be construed as clarificatory of the whole. In the present case even considering the explanation for infrastructural support service is only defined in an inclusive way, still it will not be incorrect to hold such inclusive definition will throw light upon what are all the nature of services which are sought to be taxed."

In our view the said decision do not lay down that office should be provided as must for the service to be classified under the category of "infrastructural support service". Nor do the explanation to Section 65(104c) state so. In the case of *South Gujarat Roofing Tiles Manufactures*, relied upon by the bench while passing the said decision, Hon'ble Supreme Court was interpreting the entry 22 of Minimum Wages Act, 1948 and held that the items included in it were plainly comprised in the expression 'potteries industry' which showed that the word 'includes' was not to extend the normal meaning of this expression. The conclusion was that the word includes was used in the explanation in the sense of 'means' and the definition provided by the explanation was exhaustive. From the explanation, it is evident that "infrastructural support service" has been defined using the phrase "includes" and not the word, "means". Hon'ble Supreme Court has in case of *Rajasthan TexchemLtd* held as follows:

"....The word includes gives a wider meaning to the words or phrases in the Statute. The word includes is usually used in the interpretation clause in order to enlarge the meaning of the words in the statute. When the word include is used in the words or phrases, it must be construed as comprehending not only such things as they signify according to their nature and impact but also those things which the interpretation clause declares they shall include....."

4.4.6 Appellants have argued that in this case they were granted the right to use

the C-Band Transponder and hence in view of Article 366(29A)(d) such transfer of right to use amounts to transaction of sale and cannot be taxed as service. We have perused the agreement between the Appellant and M/s AsiaSat. In the said agreement following has been provided:

"2. TRANSPONDER CAPACITY

2.1 AsiaSat hereby agrees to make available the Transponder Capacity for the Permitted Facilities to the Customer during the Term and the Customer hereby agrees to comply with the terms of this Agreement.

2.2 The Customer is hereby granted the right to be availed of the Transponder Capacity for the Permitted Facilities only. The Customer shall not change the Permitted Facilities without first submitting a written report to AsiaSat on the proposed changes and without the prior written consent of AsiaSat, which consent AsiaSat shall not unreasonably withhold. The Customer shall conform to the parameters as set out in Annex 5 when being availed of the Transponder Capacity.

2.3 (a) The Customer will follow practices and procedures established by the ITU for frequency coordination and will not do anything to the Transponder Capacity in any manner that would harm the Transponder Capacity or cause interference to any other transponder capacities on the Satellite, or any other satellites. The Customer shall configure, equip and operate its transmit earth facilities to conform to the technical parameters of the Satellite, and to follow AsiaSat's procedures for transmission to the Satellite as set out in Annex 1 (as may be revised from time to time to conform with ITU regulations and recommendations). The Customer shall be responsible for the acts and omissions of any third parties that it retains for such transmission.

(b) The Customer shall prior to being availed of Transponder Capacity provide AsiaSat with the Customer's written transmission plans in sufficient detail to enable AsiaSat to ensure that the availability of the Transponder Capacity to the Customer does not or will not cause interference with other customers on the satellite or other satellites nor adversely affect AsiaSat's ability to co-ordinate the satellite with other satellite operators. Following receipt of such details, AsiaSat shall promptly notify the Customer in writing whether the transmission plans are acceptable to AsiaSat and, if not, shall notify the Customer in sufficient detail to enable the Customer to amend the transmission plans and submit such amendments until final acceptance by AsiaSat. Thereafter, the Customer shall not amend, modify or alter its transmission plans (which shall include a change of plans due to migration to Substitute Transponder Capacity or transponder capacity on any Replacement Satellite) without AsiaSat's prior approval and AsiaSat shall respond with reasonable promptness to requests from the Customer to approve amended transmission plans.

2.4 The Transponder Capacity shall be provided to the Customer on a non-pre-emptible basis, meaning that the Transponder Capacity will not be subject to deliberate interruption or cessation of availability by AsiaSat and will only be provided with the protection as set out in clause 7.2. Notwithstanding the foregoing, the Customer acknowledges that AsiaSat may pre-empt or interrupt the Customer's being availed of the Transponder Capacity if such action is required to protect the overall health and performance of the Satellite or if there is an anomaly or other emergency situations affecting the Transponder Capacity, the Transponder or the Satellite or during the Maintenance Window Period. AsiaSat shall give the Customer as much advance notice as is possible in the circumstances and, other than in emergency situations. AsiaSat shall advise the Customer the action it proposes to take under this Clause over a reasonable period prior to exercising its rights under this Clause.

2.5 (a) AsiaSat shall, in its sole discretion, allocate the Transponder number to the Customer and inform the Customer of that number at least ten (10) Business Days before the Commencement Date. AsiaSat shall have the right at any time either prior to or during the Term, to move the Customer (i) to the Substitute Transponder; or (ii) onto the Substitute Transponder Capacity; PROVIDED that the performance specifications of such Substitute Transponder or Substitute Transponder Capacity are not materially and adversely different to the performance specifications of the Transponder as specified in Appendix 1 or the

Transponder Capacity, as the case may be. Upon any such change in Transponder or Transponder Capacity, all rights and obligations of the Parties hereunder shall apply in all respects to such Substitute Transponder or Substitute Transponder Capacity and shall be otherwise unaffected by such change in the Transponder or Transponder Capacity, as the case may be, and from the date the Customer has migrated to the Substitute Transponder or Substitute Transponder Capacity, as the case may be, all references in the Agreement to "Transponder", "Transponder Capacity" and "Annexes" shall be deemed to be references to the Substitute Transponder, Substitute Transponder Capacity and the annexes in respect of such Substitute Transponder or Substitute Transponder Capacity, respectively.

(b) AsiaSat shall give the Customer as much notice as possible in the circumstances of its intention to take action under paragraph (a) of this Clause 2.5 and use its reasonable endeavours to minimise the inconvenience to the Customer"

From the above agreement, it is quite evident that M/s AsiaSat has just granted right to use passive infrastructure of Transponder Capacity available on its Satellite. Hon'ble Karnataka High Court has in case *Indus Tower Ltd [2012 (285) ELT 3 (Kar)]* specifically held that such transaction is not within the ambit of Article 366 (29A)(d) of the Constitution of India. Hon'ble High Court has held as follows:

"63.The right conferred by the assessee on the mobile operator is in the nature of a personal right granted to him to do something upon the passive infrastructure belonging to the assessee. It does not amount to creation of an interest in the passive infrastructure itself. It is purely a permissive right and is personal to the grantee. The licence has no other effect than to confer a liberty upon the licensee to go upon the land which would otherwise be unlawful. A dominant legally creating lease and licence in favour of the licensee cannot create encumbrance on the immoveable property for the simple reason that whenever the licence is created in favour of the licensee, the licensee is always treated to be in permissive possession. He is given only an authority to enter into the premises. The possession is always with the licensor. Only entry in the premises is made legal. It does not create any title in favour of the licensee. A licence is a mere grant of a personal privilege to do something upon, without conferring an estate in the land. If a document gives only a right to use a property in a particular way under certain terms while it remains in the possession and control of the owner thereof, it will be a licence. The legal possession thereof continues to be in the owner of the property but the licensee is permitted to make use of the premises for the particular period. But for the permission his occupation would be unlawful, and does not create in his favour any estate or interest in the property.

64.It is well settled that, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of the transfer. From a close reading of all the clauses in the agreement it appears to us that under the terms of the contract there is no transfer of right to use the passive infrastructure conferred on the sharing operator/mobile operator. What is permitted under the contract is, a permission in the nature of a licence to have access to the passive infrastructure and permission to keep the equipments of the mobile operator in the pre-fabricated shelter with permission to have ingress and egress only to the authorised representatives of the mobile operator. It is because an owner of a property has a bundle of rights, namely right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc.. Therefore, to constitute a deemed sale under Article 366(29A)(d) having regard to the object with the 46th Constitutional Amendment was inserted, it is clear the right that is transferred under a contract should be a bundle of rights minus right to title. It is because of the earlier Constitution Bench judgment of the Apex Court where the right to use the property was transferred by the person who retained the title as only a nominal owner with the benefit of the goods has been passed on to the transferee, without paying taxes to the exchequer, that the Constitution was amended to bring within its fold such transactions which are styled as deemed sales. Therefore, in deciding whether a transaction falls within Article 366(29A)(d) so as to constitute a deemed sale, the

purpose of the 46th Amendment, the mischief sought to be remedied and the object sought to be achieved by the said provision cannot be lost sight of. In that background, in the facts of this case, if we look into the various terms of the agreement it is clear under the contract, the assessee has not transferred any right in the passive infrastructure to the mobile operators. The right that is conferred on the mobile operator is a permission to have access to the passive infrastructure, a permission to keep the active infrastructure in the site belonging to the assessee, a permission to mount the antennae on the tower erected by the assessee and to have the benefit of a particular temperature so as to operate the equipments belonging to the mobile operator. No sale of goods or transfer is involved in the transaction in question. Therefore, it does not fall within the mischief of Article 366(29A)(d) of the Constitution as held by the learned Judge as well as the assessing authority. Therefore, the impugned order passed by the learned single Judge as well as the assessing authority cannot be sustained."

4.4.7 In case of *Indus Tower, Limited* [2014 (35) STR 459 (Del)] , Hon'ble Delhi High Court has held as follows:

"16. The main point urged on behalf of the petitioner was that there was no transfer of the right to use any goods by Indus in favour of the sharing telecom operators since the provision of "Passive Infrastructure" was essentially a service which was taxed as a service provided "in relation to support services of business or categories, in any manner" under section 65 (105) (zzzq) of the Finance Act, 1994. It was contended that the same transaction which was treated as a taxable service cannot also be treated as a sale or deemed sale under the DVAT Act. It was contended that at any rate there was no transfer by Indus of the right to use any goods in favour of the sharing telecom operators.

17. We were taken through the agreement dated 25.02.2009 (which is referred to as the "master service agreement" or MSA) and it was contended on the basis of the terms thereof that the Passive Infrastructure provided by the petitioner does not involve any transfer of right to use any goods in favour of the sharing telecom operators. Strong reliance, inter alia, was placed on the judgment dated 07.09.2011 of the Karnataka High Court reported as Indus Towers Ltd. vs. Deputy Commissioner of Commercial Taxes Enforcement, 2012 (285) ELT 3 (Kar), a judgment which disposed of several writ appeals filed by different petitioners of which the present petitioner was one. It was pointed out that the terms and conditions of the MSA were examined by the Karnataka High Court which came to the conclusion that no transfer of any right to use the goods was involved. It was submitted that the Karnataka High Court (supra) has concluded, for reasons stated in the judgment, that the petitioner provided services in relation to site access, power conversion, air- conditioning and safe keeping for which it received a consolidated service revenue from the sharing telecom operators and that there was neither a sale of goods nor a deemed sale so as to attract levy of tax under the Karnataka Value Added Tax, 2003.

18.

19. We are in respectful agreement with the view taken by the Karnataka High Court in the judgment cited (supra). The right to use the goods - in this case, the right to use the passive infrastructure - can be said to have been transferred by Indus to the sharing telecom operators only if the possession of the said infrastructure had been transferred to them. They would have the right to use the passive infrastructure if they were in lawful possession of it. There has to be, in that case, an act demonstrating the intention to part with the possession of the passive infrastructure. There is none in the present case. The passive infrastructure is an indispensable requirement for the proper functioning of the active infrastructure which is owned and operated by the sharing telecom operators. The passive infrastructure is shared by several telecom operators and that is why they are referred to as sharing telecom operators in the MSA. The MSA merely permits access to the sharing telecom operators to the passive infrastructure to the extent it is necessary for the proper functioning of the active infrastructure. The MSA also defines "site access availability" as meaning the availability of access to the sharing operator to the passive infrastructure at the site. Clause 2 of the MSA which has been quoted above provides for "site access" and Clause 1.7 limits the site access availability to the sharing operator on use - only basis so far as it is necessary for installation, operation and maintenance

etc. of the active infrastructure; the clause further states that the sharing operator does not have, nor shall it ever have, any right, title or interest over the site or the passive infrastructure. The Clause also takes care to declare that the sharing operator shall not be deemed to be the tenant of Indus and no tenancy rights shall be deemed to exist over the site/passive infrastructure. Clause 2.1.8, presumably by way of abundant caution, states that it is expressly agreed by the sharing operator that nothing contained in the MSA or otherwise shall create any title, right, tenancy, or any similar right in favour of the sharing operator.

20.

21. When Indus has not transferred the possession of the passive infrastructure to the sharing telecom operators in the manner understood in law, the limited access provided to them can only be regarded as a permissive use or a limited licence to use the same. The possession of the passive infrastructure always remained with Indus. The sharing telecom operators did not therefore, have any right to use the passive infrastructure,

22. A careful perusal of the judgment of the Karnataka (supra) shows that the following propositions were laid down: -

a) No operation of the infrastructure is transferred to the sharing telecom operator. The latter is only provided access to use the passive infrastructure, but Indus has retained the right to lease, licence etc. the passive infrastructure to any advertising agency;

b) The entire infrastructure is in the physical control and possession of Indus at all times and there is no parting of the same nor any transfer of the right to use the equipment or apparatus;

c) The permission granted to the telecom operator to have access to the passive infrastructure for limited purposes is loosely termed by the taxing authorities as "a right to use the passive infrastructure";

d) There is no intention on the part of the Indus to transfer the right to use; it is only a licence or an authority granted to telecom operator as defined in Section 52 of the Easements Act, 1952. A licence cannot in law confer any right; it can only prevent an act from being unlawful which, but for the licence, would be unlawful. A licence can never convey by itself any interest in the property;

e) The entire MSA has to be read as a whole without laying any undue emphasis upon a particular word or clause therein. What is permitted under the MSA is a licence to the telecom operators to have access to passive infrastructure and a permission to keep equipments of the sharing telecom operator in a prefabricated shelter with provision to have ingress and egress only to the authorised representatives of the mobile operator."

4.4.8 Hon'ble Madhya Pradesh High Court has in case of *Bharti Infratel Ltd* [2018 (17) GSTL 225 (MP)] (Affirmed by Hon'ble Supreme Court as reported in [2018 (17) GSTL J51 (SC)]) held as follows:

"35. We are in respectful agreement with the view taken by the Karnataka High Court in the judgment cited (supra). The right to use the goods - in this case, the right to use the passive infrastructure - can be said to have been transferred by the petitioner to the sharing telecom operators only if the possession of the said infrastructure had been transferred to them. They would have the right to use the passive infrastructure if they were in lawful possession of it. There has to be, in that case, an act demonstrating the intention to part with the possession of the passive infrastructure. There is none in the present case. The passive infrastructure is an indispensable requirement for the proper functioning of the active infrastructure which is owned and operated by the sharing telecom operators. The passive infrastructure is shared by several telecom operators and that is why they are referred to as sharing telecom operators in the MSA. The MSA merely permits access to the sharing telecom operators to the passive infrastructure to the extent it is necessary for the proper functioning of the active infrastructure. The MSA also defines "site access availability" as meaning the availability of access to the sharing operator to the passive infrastructure at the site. Clause 2 of the MSA which has been quoted above provides for "site access" and Clause 1.7 limits the site access availability to the sharing operator on use -

only basis so far as it is necessary for installation, operation and maintenance etc. of the active infrastructure; the clause further states that the sharing operator does not have, nor shall it ever have, any right, title or interest over the site or the passive infrastructure. The Clause also takes care to declare that the sharing operator shall not be deemed to be the tenant of petitioner and no tenancy rights shall be deemed to exist over the site/passive infrastructure. Clause 2.1.8, presumably by way of abundant caution, states that it is expressly agreed by the sharing operator that nothing contained in the MSA or otherwise shall create any title, right, tenancy, or any similar right in favour of the sharing operator."

4.4.9 In view of the above decisions of High Court we are unable to agree with the submissions made by the Appellant that the agreement between them and M/s AsiaSat, was one transferring right to use and shall be covered by the 366(29A)(d) to be deemed sale of goods and hence cannot be contract for service. Since we refer to the later decisions of High Court of Karnataka than the decision in case of *Antrix Corporation Ltd* we have not taken up this decision for analysis. Furthermore the appeal filed in the matter has been admitted by the Hon'ble Apex Court as reported at [2018 (361) ELT A63 (SC)].

4.4.10 We also note that CESTAT Allahabad has in the Appellants own case for their Noida Registration has upheld the demand of Service Tax on merits. In our considered opinion the services rendered by M/s AsiaSat to appellant are nothing but "infrastructure support services" for supporting the business of broadcasting services undertaken by the appellants. Thus these services are appropriately classifiable as "Business Support Services" by the Section 65(104c) of the Finance Act, 1994 and taxable as per Section 65 (105)(zzzq) *ibid*.

4.4.11 Since the service provider i.e. M/s AsiaSat do not have any fixed business establishment in India, appellants as recipient of service are required to discharge the service tax liability as per Section 66A of the Finance Act, 1994 read with Rule 3(iii) of the Taxation of Services (Provided from outside India and received in India) Rules, 2006.

4.5.1 Appellants have argued that certain portion demand made vide show cause notice issued from F No. STII/ Audit/Gr.6/98/SITV/11-12/Pt.I dated 08.04.2013 is barred by limitation. The only argument advanced by the appellant against the invocation of extended period of limitation for making the demand is that the issue is completely revenue neutral as any service tax paid by them on the basis of reverse charge as recipient of service would be available to them in the form of CENVAT Credit. Thus they do not gain anything by having not paid the service tax and there cannot be any intention to evade payment of tax attributed.

4.5.2 We are not in position to agree with the said submissions made by the appellants. Unlike the erstwhile proviso to section 11A(1) Central Excise Act, 1944 where the intention to evade payment of duty was material factor in cases where suppression etc; was invoked, the construction of Section 73(1) of Finance Act, 1994 is different. Commissioner has in his order in para 37 to 41 held as follows:

"37. The next question that arises is whether the Department is justified in invoking the proviso clause to Section 73 (1) to demand Service Tax as confirmed above, not paid by the Noticee for the aforesaid period. The proviso clause to Section 73(1) of the Finance Act, 1994, provides that Service Tax which has not been paid, can be demanded, under proviso clause to Section 73(1) within five years (from the relevant date) wherever such short payment was " by reason of:-

a)Fraud; or

b)Collusion; or

c)Wifflful mis-statement; or

d)Suppression of facts; or

e)Contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of Service Tax."

Thus, it is very clear from the seriatim listing of the situations mentioned against (a) to (e) under the proviso clause to Section 73(1) that these are independent of each other and existence of any/each of the situations specified against (a) to (e)

above, is individually good enough to attract demand for extended period under the proviso clause to Section 73(1). In other words, "suppression of facts" alone is a reason sufficient enough to invoke this clause; there is no need to prove that there was "willful mis-statement" too.

38. There is no material to establish that non-payment of Service Tax is on account of bonafide reasons. In fact, the noticee argues that no service tax is payable. On the other hand, there are adequate evidences to establish the fact of suppression of material facts and contravention of provisions of law with intent to evade payment of Service Tax leading to nonpayment of Service Tax.

39. It has been alleged that the Noticee have not obtained Service Tax registration in respect of 'Business Support Service' for payment of Service Tax; they failed to disclose the fact that they had been receiving the said services; they failed to declare the correct value of the taxable services received by them from their foreign service provider; they have not assessed the Service Tax correctly and not paid the same within the time limit prescribed; they have not furnished to the Department ST- 3 returns-with the full and correct details of services rendered by them and thereby willfully contravened the provisions of law with intent to evade payment of due Service Tax.

40. Requirement under law to file proper ST-3 returns with full disclosure is not a mere procedural formality but a statutory requirement. In the instant case, the Noticee has not paid Service Tax on the value (amounts) paid by them as consideration for taxable service, classifiable under 'Business Support Service' services received from their foreign service provider, viz., AsiaSat. The department had no knowledge of such non-payment of Service Tax, as the activities were never declared to the department. Had it not been for the EA-2000 audit conducted on the records of the noticee, the above mentioned facts would not have come to the notice of the department. The noticee, being a registered Service Tax assessee, being well aware of the statutory provisions, have refrained from obtaining Service Tax registration in respect of the 'Business Support Services' received by them, have suppressed the facts and have willfully evaded payment of Service Tax. Thus, there are valid, adequate and justifiable grounds to conclude suppression of material facts by the Noticee resulting in non-payment of Service Tax, thereby warranting invocation of the extended period of limitation to demand the Service Tax.

41. Therefore, I hold that the proviso clause to Section 73(1), as it existed at the material time, to demand Service Tax for an extended period of five years, is rightly invocable in respect of the Service Tax not paid during the period April 2008 to March 2012. Therefore, the demand of Service Tax amounting to Rs.3,94,10,566/- made in the Show Cause Notice under proviso to Section 73(1) of the Finance Act, 1994 is justified."

4.5.3 We are in complete agreement with the findings recorded by the Commissioner. If the argument of revenue neutrality was to be considered a valid argument under the scheme of Finance Act, 1994, then entire provisions relating to payment of service tax on reverse charge will become otiose and every service recipient will claim that what so ever service tax he pays on reverse charge basis will be available to him as CENVAT Credit. Argument of revenue neutrality thus would not be available in case where the service tax is demanded by the recipient of service on the reverse charge basis. Hon'ble Supreme Court has in case of *Star Industries* [2015 (324) ELT 656 (SC)] dismissing the argument of revenue neutrality held as follows:

"35. It was submitted by the learned counsel for the assessee that the entire exercise is Revenue neutral because of the reason that the assessee would, in any case, get Cenvat credit of the duty paid. If that is so, this argument in the instant case rather goes against the assessee. Since the assessee is in appeal and if the exercise is Revenue neutral, then there was no need even to file the appeal. Be that as it may, if that is so, it is always open to the assessee to claim such a credit."

4.5.4 In case of *DharampalSatyapal* [2005 (183) ELT 241 (SC)] Supreme Court has dismissed the argument of revenue neutrality on the basis of availability of MODVAT Credit stating as follows:

25.Modvat is basically a duty collecting procedure which provides relief to the

manufacturer on the duty element borne by him in respect of the inputs used by him. The relief is given under the modvat scheme on the actual payment of duty on the input. On such payment, the assessee gets a right to claim adjustment/set-off against the duty on the final product. The question of duty adjustment/set-off against duty on the final product was not in issue. In any event, no record on credit entitlement was produced. A right to claim proforma/modvat credit against duty on final product was different from the defence of bonafides in a case where circumstances mentioned in the proviso to section 11A(1) stands proved by the department for invoking larger period of limitation. The burden to prove the defence of bonafides was on the assessee and the assessee in this case has failed to prove its bonafides. Under modvat, excisable finished products made out of duty-paid inputs are given relief of excise duty to the extent of duty paid on inputs. In the circumstances, we are satisfied that the department was justified in invoking the extended period of limitation under the proviso to Section 11A(1).

4.5.6 Thus we uphold the demand made in this Show Cause Notice by invoking the extended period of limitation as per proviso to Section 73(1) of Finance Act, 1994.

4.5.7 The demand made as per Statement of Demand/SCN under Section 73(1A) of The Finance Act, 1994 issued under F.No. ST-II/Dn-IV/Gr.II/Sahara/04/EA2000/SCN12-13/2013-14 dated 07.04.2014 is also upheld. Once we hold that the services provided by the M/s AsiaSat to appellants is a service, it is covered by the definition of Service as per Section 65(44B) of Finance Act, 1994 and is not one in the negative list or in the list of the exempted services. Since the services received by the appellants are taxable service, they were required to discharge the service tax liability in respect of these services as the service provider M/s AsiaSat is not having any fixed business establishment in India.

4.6. Appellants have argued against demand of interest made from them in terms of Section 75 of Finance Act, 1994. However we do not find any merits in those submissions in view of the decision following decisions:

- *P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)] affirmed by the Hon'ble Supreme Court [2016 (335) ELT 196 (SC)]*

- *Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]*

- *TCP Limited [2006 (1) STR 134 (T-Ahd)]*

- *Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]*

- *Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]*.

4.7 While discussing the issue in respect of interest under Section 11AB and penalty under Section 11AC of the Central Excise Act, 1944 which are pari-materia to Section 75 and 78 of the Finance Act, 1994, Hon'ble Bombay High Court has in its decision referred in para 4.6 held as follows:

"7. Considering the scheme together, it is evident that interest chargeable u/s. 11AB is a sort of civil liability of the assessee, who has failed to pay the duty or who has short paid the duty. This is irrespective of the fact whether such non-payment/short payment is innocent or mala fide. So far as penalty u/s. 11AC is concerned, it is certainly a provision, penal in nature. This is because, it comes into play only when non-payment/short payment is result of fraud, collusion or any wilful misstatement/ suppression of facts or contravention of any of the provisions of the Act/Rules on the part of the assessee, with intent to evade payment of duty. There is a sense of deliberate evasion and scheming for the purpose on the part of the assessee and that is why in that case, there is no discretion to impose penalty lesser than 100% or 25% in case duty determined is paid within 30 days from the date of determination. The distinction of civil liability and criminal liability stands further demonstrated by Explanation (1) to subsection (2B) of Section 11A, which reads thus :

"Explanation (1): Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short levied or was short paid or was erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty."

8. The ratio laid down in the matter of *Rashtriya Ispat Nigam Ltd. v. Commissioner of Central Excise, Visakhapatnam* - 2003 (161) E.L.T. 285 (Tri.-Bang.), relied upon by learned Counsel for assessee, which view was confirmed by the Hon'ble the Apex Court while dismissing the appeal of the department, that in case the duty is paid before issuance of show cause notice, no penalty u/s. 11AC is imposable, was a decision of the Tribunal at Bangalore dated 13-11-2002. Taking into consideration the hierarchy of authorities under the Central Excise Act, 1944 i.e. Assessment Officer conducting enquiry and determining the duty evaded or short paid, Commissioner (Appeals) and thereafter CESTAT, it can safely be said that this was a decision regarding the non-payment of duty of the period prior to insertions by Amendment Act No. 14/2001 with effect from 11-5-2001 by which sub-sections (2A), (2B) and (2C) are inserted in the main Act. Naturally, the Explanation (1) to sub-section (2B), reproduced hereinabove, was neither on the statute book nor was under consideration before the Tribunal or before the Hon'ble the Supreme Court. If the effect of Explanation is taken into consideration, the liberty to pay evaded excise duty as may be ascertained by Central Excise Officer u/s. 11A(2) or on the basis of duty ascertained by himself, was not available to the assessee prior to 11-5-2001. We must say that by insertion of sub-sections (2A) to (2C) and more particularly Explanation (1) to sub-section (2B), the position stands drastically changed. Since there is no liberty to the assessee, who has evaded the duty intentionally, by exercising fraud, collusion etc. for the purpose, the liberty to pay the evaded duty under sub-section (2B) is not available and the terminal portion of sub-section (2B)

".....and inform the Central Excise Officer of such payment in writing, who on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid;"

cannot render any assistance to such an assessee. In other words, the proceedings of ascertainment of evaded duty, imposition of interest and penalty cannot be dropped by virtue of above terminal clause of sub-section (2B) in the cases of assessee, who had intentionally evaded payment of duty by use of fraud, collusion etc. as contemplated by Section 11AC.

In the cases where the finding of fact regarding existence of fraud, collusion, wilful mis-statement/suppression of facts or contravention of any provisions of the Act or Rules with intent to evade the payment of duty is confirmed, it may not be open to the assessee to claim that no penalty is imposable upon him u/s. 11AC, because of payment of evaded duty before issuance of show cause notice, after amendment as inserted by Act No. 14/2001 with effect from 11-5-2001.

As already discussed hereinabove, there is no discretion with the authorities to impose any lesser penalty than 100% and 25% in case duty after being determined u/s. 11A(2), the assessee pays it within 30 days. This answers both the substantial questions of law on which appeal is admitted, so far as penalty imposable u/s. 11AC is concerned."

9.

10. So far as interest u/s. 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the Official Gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable u/s. 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s. 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied/short paid/non-levied/unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of sub-section (1) of Section 11, which runs thus :

"Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under subsection (2) or has paid the duty under sub-section (2B) of

Section 11A, shall in addition to the duty be liable to pay interest at such rate

The terminal part in the quotation above, which is couched with the words "shall" and "be liable" clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional."

4.8 Since we uphold the invocation of extended period of limitation in respect of the show cause notice dated 08.04.2013, the penalties imposed under Section 78 cannot be faulted with in view of the above referred decision of the Hon'ble Bombay High Court and the decision of Hon'ble Supreme Court in case of *Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)]* .

4.9 Penalty has been imposed by the Commissioner under Section 77 for various infractions noticed in complying with provision of law. For imposing penalty under Section 77 Commissioner has recorded as follows:

"45. The Show Cause Notices also proposed penalty action under Section 77 of the Finance Act, 1994. It is observed from the records that the Noticee has failed to obtain Service Tax registration in respect of the Business Support services received by them from the service provider, located outside India; failed to file proper statutory returns in form ST-3 and also failed to pay Service Tax within the prescribed time limit. Thus, they have contravened the provisions of Section 66, 67, 68, 69 and 70 of the Finance Act, 1994 read with Rule 4, 5, 6 and 7 of the Service Tax Rules, 1994. Therefore, they are liable to penalty under Section 77 of the Finance Act, 1994. For the reason of not filing Service Tax Returns, they are also liable to pay appropriate late fee as specified under Rule 7e of Service Tax Rules, 1994 subject to ceiling of Rs. 20,000/- each Return, provided under Section 70 of the Finance Act, 1994."

Penalty under Section 77 are civil in nature and are imposed for infractions noticed. Hon'ble Supreme Court has in case of *Gujarat Travancore Agency vs. Commissioner of Income Tax [1989 (42) ELT 350 (SC)]* Hon'ble Supreme Court held as under:

4. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mensrea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum Volume 85, page 580, Paragraph 1023 :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

Since there is no dispute about such infractions as recorded by the Commissioner in his impugned order, penalties as imposed under Section 77(2) are justified.

4.10 Commissioner has in para 47 of his order recorded as follows for imposing penalties under Section 76 of the Finance Act, 1994.

"47. As regards penalty proposed under Section 76 of the Finance Act, 1994 in the Show Cause Notice dated 07.04.2014, any person liable to Service Tax fails to pay the same is required to pay the same is required to pay penalty under Section 76 at the rate specified therein from time to time, in addition to Service Tax and

the interest thereon."

Hon'ble Kerala High Court has in case of *Krishna Poduval* [2006 (1) STR 185 (Ker)] held as follows:

"11. The penalty imposable under S. 76 is for failure to pay service tax by the person liable to pay the same in accordance with the provisions of S. 68 and the Rules made thereunder, whereas S. 78 relates to penalty for suppression of the value of taxable service. Of course these two offences may arise in the course of the same transaction, or from the same act of the person concerned. But we are of opinion that the incidents of imposition of penalty are distinct and separate and even if the offences are committed in the course of same transaction or arises out of the same act, the penalty is imposable for ingredients of both the offences. There can be a situation where even without suppressing value of taxable service, the person liable to pay service tax fails to pay. Therefore, penalty can certainly be imposed on erring persons under both the above Sections, especially since the ingredients of the two offences are distinct and separate. Perhaps invoking powers under S. 80 of the Finance Act, the appropriate authority could have decided not to impose penalty on the assessee if the assessee proved that there was reasonable cause for the said failure in respect of one or both of the offences. However, no circumstances are either pleaded or proved for invocation of the said Section also. In any event we are not satisfied that an assessee who is guilty of suppression deserves such sympathy. As such, we are of opinion that the learned Single Judge was not correct in directing the 1st appellant to modify the demand withdrawing penalty under S. 76. Therefore, the judgment of the learned Single Judge, to the extent it directs the first appellant to modify Ext. P1 by withdrawing penalty levied under S. 76, is liable to be set aside and we do so. The cumulative result of the above findings would be that the Writ Petitions are liable to be dismissed and we do so. However, we do not make any order as to costs."

Thus in our view penalty imposed under Section 76 is justified.

4.11 Since on the issue in question appellants have not placed on record anything to show that their non payment of tax was a bonafide act, we do not find any reason for allowing the benefit of section 80 of the Finance Act, 1994.

4.12 In view of discussions as above we summarize our findings as follow:

i. Mumbai Service Tax having jurisdiction over the appellant registered in Mumbai, have jurisdiction do demand and recover service due in respect of invoices mentioned at Sl No 1 to 14 in the table in para 4.3.4 supra. In respect of three invoices mentioned at Sl No 15, 16 & 17 the jurisdiction is with Noida Commissionerate.

ii. Service Received by the Appellant from M/s AsiaSat are "infrastructure support services" and are appropriately classifiable as "Business Support Services" as defined by Section 65(105)(zzzq) read with Section 65(104c) of the Finance Act, 1994.

iii. The demand of service tax made from the Appellant to extent of 14 invoices as stated at "i" above in Show Cause Notice dated 8.04.2013 is upheld. In respect of the three invoices which pertain to Noida Jurisdiction demand made by Mumbai Commissionerate is dropped.

iv. The demand of service tax made from the Appellant as per Statement of Demand dated 7.04.2014 is upheld.

v. Demand of interest under Section 75 of Finance Act, 1994 is upheld.

vi. Penalty imposed under Section 78 of Finance Act, 1994 is upheld but reduced by the amount of Service Tax demanded on the three invoices mentioned at Sl No 15, 16 & 17 in table in para 4.3.4.

vii. Penalty imposed under Section 76 and Section 77 of Finance Act, 1994 is upheld.

5.1 In view of discussions as above-

i. Appeal No ST/85354/2015 is dismissed;

ii. Appeal No ST/85355/2015 is partially allowed to extent of reducing the demand by amount of service tax on the three invoices mentioned at Sl No 15, 16 & 17 in the table in para 4.3.4 supra. Penalty under Section 78 is also

reduced to that extent. With the above modification impugned order is upheld.
(Order pronounced in the open court on 26.02.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, MUMBAI**

Service Tax Appeal No. 87451 of 2016

Arising out of Order-in-Original No. 26/STC-V/SKD/16-17, Dated: 30.06.2016
Passed by Commissioner of Service Tax-V, Mumbai

Date of Hearing: 09.01.2020

Date of Decision: 08.06.2020

**M/s NATIONAL SECURITIES DEPOSITORY LTD
4TH FLOOR, A WING, TRADE WORLD, KARNALA MILLS COMPOUND
SENAPATI BAPAT MARG, LOWER PAREL, MUMBAI-400013**

Vs

**COMMISSIONER OF SERVICE TAX-V
MUMBAI, 3RD FLOOR, UTPAD SHULK BUILDING
BANDRA-KURLA COMPLEX, BANDRA (E), MUMBAI-400051**

Appellant Rep by: Shri S Tirumalai, Adv.

Respondent Rep by: Shri Suresh Merugu, Joint Commissioner, AR

CORAM: Hon'ble Mr. S K Mohanty, Member (J)
Hon'ble Mr Sanjiv Srivastava, Member (T)

Per: Sanjiv Srivastava:

This appeal is directed against order in original No 26/STCV/ SKD/16-17 dated 30.06.2016 of Commissioner Service Tax – V, Mumbai. By the impugned order, the Commissioner has held as follows:

"5.01 I hold that the services provided by M/s National Securities Depository Ltd to their Depository Participants during the period from 01.04.2004 to 31.03.2009 are classifiable under the category of "Banking and Other Financial Services" as defined under Section 65 (12)(vii) and Section 65 (105)(zm) of the Finance Act, 1994;

5.02 I, confirm the demand of Service Tax totally amounting to Rs 52,36,20,950/- (Rupees Fifty Two Crores Thirty Six Lakhs Twenty Thousand Nine Hundred and Fifty only) for the period 01.04.2004 to 31.03.2009 in terms of Section 73(2) of the Finance Act, 1994, read with Section 66 and Section 68 ibid and Rule 6 of Service Tax Rules, 1994;

5.03 I order for recovery of interest under Section 75 of the Act , at the appropriate rates on the amount of confirmed demand ordered for recovery at Para 5.02 above;

5.04 I impose a penalty of Rs. 500/- (Rupees Five Hundred only) under Section 75A of the Finance Act, 1994.

5.05 I impose a penalty of Rs 52,36,20,950/- (Rupees Fifty Two Crores Thirty Six Lakhs Twenty Thousand Nine Hundred and Fifty only) under Section 78 of the Act. If the Noticee pays the Service tax confirmed, as mentioned in para 5.02 above, along with the interest on delayed payment within 30 (thirty) days from the date of communication of this Order, the amount of penalty liable to be paid by the Noticee under Section 78 of the Act shall be twenty five percent of the service tax payable/ confirmed in para 5.02 above. However, the benefit of reduced penalty under Section 78 of the Act, shall be available only i the said Service Tax confirmed, Interest and the Penalty of twenty five percent of the service tax payable/ confirmed, so imposed under the aforesaid Order, is paid within the period of 30 (thirty) days from the date of communication of this Order.

5.06 I impose penalty of Rs 5000/- (Rupees Five Thousand only) on the Noticee for each failure to file proper periodical returns as prescribed under Section 70 of the

Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 on the due dates and for failure to furnish the list of all accounts maintained by them in relation to Service Tax as required under Rule 5(2) of the Service Tax, 1994, respectively under Section 77 of the Act. 5.07 I, refrain from imposing penalty under Section 76 of the Act, as I have imposed penalty under Section 78 of the Act at 5.05 above."

2.1 Intelligence gathered by the officers of Directorate General Of Central Excise Mumbai Zonal Unit to effect that Appellants were not discharging service tax on operational income received on account of transaction fees, custodial fees etc, by wrongly claiming exemption from service tax as per Board Circular No.**B.II/1/200/TRU** dated 09.07.2001. These amounts received by the Appellants from Depository Participants appeared to be liable to taxation under the category of "Banking and Financial Services".

2.2 Acting on intelligence investigation were initiated and relevant details in respect of Operational Income received under various heads namely Annual Fees, Custodial Fees, Transaction Fees, Software License Fees etc. Along with Balance Sheet, Copy of MOU and projects agreements, service tax returns , registration etc., were called for. Statements of various functionaries of Appellants as detailed below were also recorded:-

- Shri TejasKulin Desai, Sr Vice President on 15.10.09

- Shri Hiten Pratapral Mehta, Vice President on 22.10.2009

2.3 Investigation made revealed that-

- Appellants' are a "body corporate" being a company incorporated under Companies Act, 1956 to whom the certificate of commencement of business was provided by SEBI.

- Appellants hold securities (like shares, debentures, bonds, Government Securities, units etc.) of investors in electronic form.

- They also provide related to transactions in securities;

- They interface with the investors through their agents called as Depository Participants;

- As per Balance Sheet, Appellants Depository Segment includes providing various services to the investors like dematerialization, re-materialization, transfer and pledge of securities in electronic form through closed user group network of business partners viz issuers/ Registrar & Transfer Agents and Depository Participants (DP);

- There electronic platform is designed to provide information in relation to securities and enables the DP or their investors to have access to their securities holding at any time;

- Processes of de-materialization/ re-materialization. Pledge, transfer of securities indicate that there is provision of information, transfer of information and data processing through electronic media;

- Appellants are providing "provision and transfer of information and data processing" taxable under the category of "Banking and Financial Services" as defined by Section 65 (12)(a) of the Finance Act, 1994;

- The amounts charged and recovered by the appellants from the DP's by the Appellant for the provision of these services would be the taxable value on which service tax is liable to be paid;

2.4 After completion of investigations a show cause notice dated 23.10.2009 was issued to appellant asking them to show cause as to why-

i. the services provided by them during the period from 1.04.2004 to 31.03.2009 to their Depository Participants as mentioned above, should not be classified as "Banking and Other Financial Services" as defined under Section 65(12)(vii) and Section 65 (105)(zm) of the Act;

ii. the Service Tax amounting to Rs 52,36,20,950/- (Rupees Fifty Two Crores Thirty Six Lakhs Twenty Thousand Nine Hundred and Fifty only) on the taxable amount of Rs 454,34,55,334/-, as detailed in Annexure -A, should not be demanded and recovered from them under proviso to section 73(1) read with

section 66 and section 68 of the said Act under "Banking & Financial Services" category;

iii. the interest on the said ST demanded and payable as mentioned above should not be demanded and recovered from them under Section 75 of the Act;

iv. Penalty should not be imposed upon them under the provisions of Section 75A of the Finance Act, 1994 for failure to make an application for registration in form ST-1 within the prescribed time as required under Section 69 of the Act read with Rule 4 of Service Tax Rules, 1994;

v. Penalty should not be imposed upon them under the provisions of Section 76 of the Finance Act, 1994 for failure to pay service tax in accordance with the provisions of Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994;

vi. Penalty should not be imposed upon them under the provisions of Section 77 of the Finance Act, 1994 for failure to furnish prescribed returns as required under Section 70 of the Act read with Rule 7 of Service Tax Rules, 1994 and failure to furnish the list of all accounts maintained by them in relation to service tax as required under Rule 5(2) of the Service Tax Rules, 1994;

vii Penalty should not be imposed upon them under the provisions of Section 78 of the Finance Act, 1994 for suppressing the value of the taxable services with intent to evade payment of service tax;

2.5 The show cause notice has been adjudicated by the Commissioner as per the impugned order referred in para 1, supra.

2.6 Aggrieved by the impugned order appellants are in appeal.

3.1 We have heard Shri S Tirumalai, Advocate for the Appellant and Shri Suresh Merugu, Joint Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submitted that:-

- They have entered into agreement with the Income Tax department for provision of services (non depository segment) and to operate TIN Facilitation centres. For providing these services TIN facilitation Centres have obtained registration with Service Tax department and have paid the service tax due, under the category of Business Auxiliary Services.

- These services and certain other services in respect of which service tax has been paid have been included in the demand resulting in duplication of demands to tune of Rs 19,81,59,112/-. The submissions made by them on this account have been rejected by the adjudicating authority for the reason that Shri T K Desai, SR V P has described various heads under which the service tax has been paid and did not include the service tax paid under this head.

- They had also produced a Chartered Accountant Certificate dated 25.04.2013 in respect of error in computation of demand in SCN, which has been brushed aside contrary to the decisions in following cases;

- o Gopikrishna Processors [2007 (218) ELT 529 (TDel)]*

- o Vijay Leasing & Company [2019 (3 TMI 49 CESTAT HYD)]*

- As per the following decisions the same transaction could not have been taxed twice

- o Speed and Safe Courier Service*

- o ABN Amro Bank*

- o Chottey Lal RadheyShyam*

- The entire activity relating to the issue of PAN is a sovereign function and TIN facilitation Centres are only agents who have discharged the tax liability. As per Tribunal decision in case of *UTI Technology Services Ltd* such services rendered in relation to Sovereign function cannot be taxed under the category of Business Auxiliary Services.

- From perusal of the correspondences with the department prior to registration on 17.11.2003/ 19.04.2004 CBEC Circular **F No B-II/2001 TRU** dated 09.07.2001, stating that service tax will not be leviable on NSDL or CDSL fee paid to the depositories and received from the customers on actual basis, clearly

show that department was fully aware of all facts and hence the demand made by invoking extended period of limitation as per proviso to Section 73 (1) is not sustainable as held in following decisions:

o Anand Nishikawa [2005 (188) ELT 149 (SC)]

o Kapoor Lampshade [2016 (337) ELT 14 (P & H)]

o Adani Gas Ltd [2019-VIL-239-CESTAT-Ahm]

o Macleods Pharmaceuticals [2013 (296) ELT 379 (T)]

o Accurate Chemical Industries [2014 (300) ELT 451 (T)]

o Raymond Limited

- Extended period could not have been invoked in cases of interpretation of law and bonafide belief on their part

o Microtek Forgings

o Maruti Suzuki India Ltd [2014(307) ELT 625 9SC]

o Super Syntex (India Ltd [2014 (301) ELT 273 (SC)]

o Srei Equipment Finance Ltd [2018 (17) GSTL 598 (CAL)]

o Bismee India Enterprises [2018 (10) TMI 1560]

o Vicco Ltd [2007 (218) ELT 647 (SC)]

o Madura Coats [2016 (4) TMI 989 MHC]

- They are governed by Depositories Act, 1996; SEBI (Depositories and Participants) Regulations, 1995 and the Bye Laws and Business Rules of The Appellant in terms of Depositories Act.

- Depository Participants are merely an agent Depositories. There is no service in the nature of Depository Service provided by the Appellant to the DP's. This is because in terms of the charging entry under the FA 1994 namely Section 65(105)(zm) the service is to be rendered to a customer. DP's provide the service to the customer/ client. There is no service in nature of Depository provided to the DP's as they are not customers in terms of the explanation provided under Board Circular **F No B-II/2000-TRU** dated 9.07.2001.

- "The word "customer" was substituted by the word "any person" from 16.05.2008. In case of *Standard Chartered Bank* it has been held that the understanding in terms of above Board Circular with regard to the meaning of the word "customer" should prevail.

- They provide infrastructure to DP's and no depository service is provided to them. Board has vide Circular No **50/11/2002-ST** dated 18.12.2002 clarifying that the services of "EASI" provided by CDSL is part and parcel of the depository service and covered under Banking and Other Financial Services.

- Their Business model requires them to recover from the DP's fixed fees as approved by the Bye Laws under SEBI Regulations. The DP's are entitled to charge customers based on the services rendered which shall include the aforesaid fixed fees for depository. The tax is collected on the gross amount charged by the DP's from the customers and the portion relating to the fixed fee is paid by DP's to the Depository.. Such a fee is tax paid and therefore there is no need to tax this once again.

- The SCN dated 23.10.2009, alleges that there services will fall under ambit of 65(12)(vii) which is "provision and transfer of information and data processing", on the basis of Master Circular No **96/7/2007-ST** dated 23.08.2007. This is contrary to Circular **F No B-II/2001-TRU** dated 09.07.2001 and Circular No **50/11/2002-ST** dated 18.12.2002, as per which their services were held to be depository services.

- As per CBEC Letter No **137/57/2006-CX.4** dated 18.05.2007 it has been clarified in context of stock exchange services that processing, clearing and settlement services provided by NSE/ BSE/ MCX/ NCDEX/ NSCCL/ BIOSL/ CCIL do not fall under any of the applicable taxable services such as online information and database access or retrieval, business auxiliary service or club and association services. "Provision and transfer of information and data

processing' was considered in the context of stock exchange services and it was clarified that these individual services cannot be categorized as stock exchange services. By the same logic there service services cannot be categorized as such.

- Provision and transfer of information should be an independent activity and not be an integral part of some other activity. It is not the principal service provided by them and no independent charges are collected for the same. Even if they are required to pay service tax under the category of Banking and Other Financial Service then the same will be under 65(12)(v) and not under 65 (12)(vii)

- In *CMA CGM Global (India) Ltd [2016 (41) STR 292 (T-Mum)]* it has been held that it is necessary for levy of service tax to classify the service under a specific clause. Similar view has been in case of *United Telecom Ltd [2011 (21) STR 234 (T-Bang)]* - Board Circulars are binding on the department and beneficial circular cannot be withdrawn retrospectively as has been held in case of *Ultra Tech Cement*.

- Since the depository participants act as agents for the purpose of depository services and have discharged Service Tax on entire consideration including fees. Tribunal in case of *Canara Bank [2012 (6) TMI 274 CESTAT]* held that there cannot be any tax liability on these activities. Hon'ble Supreme Court has in the case of *The Cement Allocation and Coordination Organization [1971 (9) TMI 161 Supreme Court]* held that exemption available to principal will be available to agents also.

- If it is presumed that they are providing the services to Depository Participants then also the same could be only "infrastructure support service" which is in the nature of Business Support Service and not the Banking and Other financial Service.

- Commissioner has erroneously confirmed the demand on the basis of two circular namely Circular No. **50/11/2002** dated 18.12.2002 and Circular No. **96/7/2007** dated 23.08.2007. The second circular contradicts the earlier circular with regards to the category of service.

- A vague show cause notice which is not specific and demand confirmed on the basis of such vague show cause notice cannot be sustained as has been held in following decisions:

- o Brindavan Beverage (P) Ltd [2007 (213) ELT 487 (SC)]*

- o Ballarpur Industries Ltd [2007 (215) ELT 489 (SC)]*

- Entire issue is revenue neutral as the service tax paid by them on services provided to DP's will be available as credit to the DP's

- Penalty is imposable when there is deliberate and malafide intention on their part to evade payment of taxes by suppression/ misrepresentation etc. They had filed proper returns on the due dates

- Apart from bald assertion there is no substance to show the fact of wilful suppression. Hon'ble Supreme Court has in the case of *Uniworth Textiles Ltd [2013 (288) ELT 161 (SC)]* held that the burden to prove suppression etc is on the department.

- They have not collected the service tax from their DP's under bonafide belief that they were not liable to pay any service tax.

- Counsel submitted additional documents as directed by the bench, at time of hearing, in form of ST-3 returns for the period 2004-05 to 2008-09.

3.3 Arguing for the revenue learned Authorized Representative while reiterating the findings recorded in the impugned order submitted that-

- The issue involved in the matter is with regards to the services of "provision and transfer of information and data processing" and not in respect of the custodial depository services as argued by the appellant counsel;

- The issue is covered by the decision of the tribunal in case of *Bank of Baroda [2016 (43) STR 141 (T-Mum)]*. In similar facts of the case it has been held that the services provided are classifiable under the taxable category of "Banking and Other Financial Services" as "provision and transfer of information and data processing".

- The issue in respect of limitation is squarely covered by the decision in the case of *Neminath Fabrics* [2010 (256) ELT 369 (Guj)]

- Further tribunal has in case of *Star India Pvt Ltd* [2015 (380 STR 884 (T-Mum)] it has been held that not filing of the ST-3 return or not declaring the complete particulars of the service rendered on the ST-3 returns, amount to suppression and extended period of limitation as per proviso to Section 73 (1) is invokable.

4.1 We have considered the impugned order along with submissions made in appeal and during the course of argument of appeal and in written submission filed.

4.2 The issue for consideration in the present appeal before us is, "whether the services provided by the appellant to their Depository participants are in nature of "provision and transfer of information and data processing" services taxable under the category of Banking and Other Financial Services as defined by Section 65(12) of the Finance Act 1994.

4.3 Period of demand in the present case is for the period 01.04.2004 to 31.03.2009. Section 65 (12) of the Finance Act, 1994 reads as follows:

Section 65(12). –

"Banking and Other Financial Services" means

(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or any other person namely :-

(i) financial leasing services including equipment leasing and hire-purchase;

(ii) credit card services;

(iii) merchant banking services;

(iv) securities and foreign exchange (forex) broking;

(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, but does not include case management;

(vi) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;

(vii) provision and transfer of information and data processing; and

(viii) banker to an issue services; and

(ix) other financial services, namely, lending; issue of pay order, demand draft, cheque, letter of credit and bill of exchange; transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults; operation of bank accounts.

(b) foreign exchange broking provided by a foreign exchange broker other than those covered under sub-clause (a).

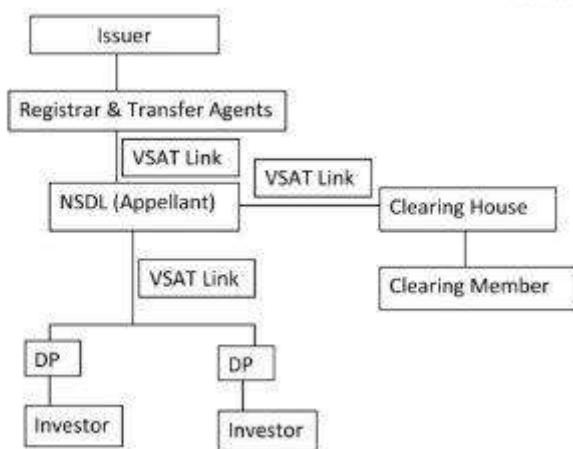
4.4 Appellants do not dispute that they are a body corporate and are covered by the phrase "other body corporate" used in the definition of Banking and Other Financial Services.

4.5 As per para 4.4 of impugned order undisputedly appellants provide following services to the Depository Participants:-

- De-materialization i.e. converting physical certificates to electronic form;
- Re-materialization i.e. converting securities in de-mat form to physical certificates;
- Facilitating repurchase/ redemption of units of mutual funds or debt instruments;
- Electronic settlement of trades in stock exchanges connected to NSDL
- Pledging/ hypothecation of de-materialized securities;
- Electronic credit of securities allotted in public issues, rights issue;
- Receipt of non-cash corporate benefits such as bonus, in electronic form;

- Freezing of de-mat accounts, so that the debits from the account are not permitted;
- Nomination facility for de-mat accounts;
- Services related to change of address;
- Affecting transmission of securities;
- Instructions to DP over internet through SPEED e-facility;
- Account monitoring facility over internet through SPEED facility;
- Other facilities viz holding debt instruments in the same account, availing stock lending/ borrowing facility etc.

4.6 For providing these facilities appellants are electronically linked via satellite to various functionaries such as Depository Participants (DPs), issuing companies and their registrars and transfer agents, clearing corporations/ clearing houses of stock exchanges etc. Appellants in para 3.2.4 of their appeal memo provided the following schematic diagram in respect of the interconnections between them and various functionaries electronically:



4.7 From the schematic diagram submitted by the appellant, it is quite evident that Appellant's are in fact having an electronic system providing for transmission of data to various participants/ partners in their business. In fact they provide the platform to their Depository Participants (DP's) through which they interact with Investor, Issuer, Registrar and Transfer Agents & Clearing House. For providing these services they charge certain fees from their Depository participants.

4.8 Section 4, 5, 9 & 10 of Depositories Act, 1996 read as follows:

"4. Agreement between depository and participant.

(1) A depository shall enter into an agreement with one or more participants as its agent.

(2)

5. Services of depository.

Any person, through a participant, may enter into an agreement, in such form as may be specified by the bye-laws, with any depository for availing its services.

9. Securities in depositories to be in fungible form.

(1) All securities held by a depository shall be dematerialised and shall be in a fungible form.

(2)

10. Rights of depositories and beneficial owners.

(1) Notwithstanding anything contained in any other law for the time being in force, a depository shall be deemed to be the registered owner for the purposes of effecting transfer of ownership of security on behalf of a beneficial owner."

4.9 On their website, Appellants have specifically stated as follows:

Basic Services

Under the provisions of the Depositories Act, NSDL provides various services to investors and other participants in the capital market like, clearing members, stock exchanges, banks and issuers of securities. These include basic facilities like

account maintenance, dematerialisation, rematerialisation, settlement of trades through market transfers, off market transfers & interdepository transfers, distribution of non-cash corporate actions and nomination/ transmission.

The depository system, which links the issuers, depository participants (DPs), NSDL and Clearing Corporation/ Clearing house of stock exchanges, facilitates holding of securities in dematerialised form and effects transfers by means of account transfers. This system which facilitates scripless trading offers various direct and indirect services to the market participants.

Further in FAQ available on their web-site following have been stated:

"How can I avail the services of depository?"

A depository interfaces with the investors through its agents called Depository Participants (DPs). If an investor wants to avail the services offered by the depository, the investor has to open an account with a DP. This is similar to opening an account with any branch of a bank in order to utilise the bank's services. Suggestions on how to select a DP are given in Section IV.

Is it possible to give delivery instructions to DP over the internet and if yes, how?

Yes. NSDL has recently launched a facility for delivering instructions to your DP over the Internet, called SPEED-e. The facility can be used by all registered users. Your DP will help you in registering for the facility.

How does SPEED-e work

You can submit delivery instructions electronically, on the SPEED-e website <https://www.speed-e.nsdl.com>, after your DP has authorised you to operate your account through the SPEED-e facility. You can monitor the status of such delivery instructions to ensure that the instructions have been executed.

How can I as de-mat account holder/ clearing member benefit from Speed-e?

The benefit offered by SPEED-e to a demat account holder / Clearing Member is the convenience of conducting demat account transactions using an Internet connection from anywhere at anytime eliminating paperwork. Time and efforts for obtaining delivery instruction forms from your DP and submitting them to the DP everytime you sell securities is saved.

How can I register myself for SPEED-e?

For using the SPEED-e facility it is essential that your DP must be registered with NSDL for this facility. There are two types of users for this facility, one is password based user who logs in with his password and can transfer securities only to three prespecified broker accounts of his choice. The second is the smartcard based user who is issued a smart card for logging on to the site and can transfer the securities to any account. A password user can visit the SPEED-e website, fill-up the registration form available on the website. The website would allot a registration number and the DP of the client would authorise him for using the facility upon submission of a request with the registration number.

A smart card user can download the form from the website, fill it and submit the same to its DP. The DP will process the form and enable the client for using the facility. The smart card user will also be issued a smart card reader and a smart card.

What will be the charges for account opening and other depository related services?

NSDL charges the DPs and not the investors. NSDL's charges to its DPs are fixed and are based on the usage of NSDL system. Complete details of NSDL charges as are payable by the DPs are available on NSDL website (www.nsdl.co.in). The DP charges its client for the services offered. The charges that the DP will be charging you for various services are mentioned in the Schedule of Charges which forms a part of the account opening agreement. You may keep a copy of this for your future reference. You can get the details of the charges from the DPs. You can also get a comparative list of DP charges from NSDL's office or

from the NSDL website."

Your DP may revise charges by giving you 30 days notice in advance."

What precaution does NSDL take to protect the data in its depository system?

The data carries a high importance in the NSDL depository system. NSDL has taken necessary steps to protect the transmission and storage of data. The data is protected from unauthorized access, manipulation and destruction. The following backup practices are adopted to protect the data:

- o Local Backup

- o Remote Backup

- o Disaster Recovery Site

In addition to this, every DP is required to take daily backup, at the end of each day of operation"

4.10 As per the Business Rules of the Appellant, Depository participants are charged fees under various heads such as Entry Fees, Transaction Related Fees (namely Settlement Fees, Pledge Fee & Custody Fees) Fee for Dematerialization & Re- Materialization, Security Deposit, Annual Maintenance Fee for Corporate Accounts & Minimum Fee. The business rules make it clear that all such fees will be charged from and paid by the depository participant. Similar fees are charged from issuers. These rules further define the following terms as follows:

"3.1.5 Depository Module (DM) means the software installed at the depository;

3.1.6 Depository Participant Module (DPM) means the software(s) provided by the depository relating to the depository operations deployed and/ or assessed using the User Hardware system. This shall be either the DPM (DP), DPM (CC) or the DPM (SHR). The DPM (DP) shall include the e(DPM) and the Local DPM.

3.1.7 Depository Participant Module (Depository Participant) – [DPM (DP)] means the software relating to the Depository operations relating to the Depository operations installed on the hardware system of the Participant and Depository Participant Module (Clearing Corporation) – [DPM (CC)] means the software relating to the Depository operations relating to the Depository operations installed on the hardware system of the Participant which is a Clearing Corporation.

3.1.8 Depository Participant Module (Issuers/ Registrars) – [DPM (SHR)] means the software installed on the hardware system of the Issuer or its Registrar and Transfer Agent.

3.1.9 Depository System means the hardware, software and telecommunication network established by the Depository to facilitate the operations of the Depository. This shall include the Depository Module, Depository Participant Module, User Hardware System and the hardware installed at the Depository.

3.1.15 User Hardware System (Depository Participant)-(DP) means the hardware set up of the Participant relating to Depository operations and User Hardware System (Clearing Corporation)-(CC) means the hardware set up of the Participant which is a Clearing Corporation relating to Depository operations. This shall consist of servers, workstations, router and the communication line linking them to the Depository.

3.1.16 User Hardware System (Issuers/ Registrars)-[UHS (SHR)] means the hardware setup of the Issuer or its Registrar and Transfer Agent relating to Depository operations. This shall consist of servers, workstations, router and the communication line linking them to the Depository."

Further these Business Rules lay down:

"4.1 Depository System

4.1.1 The User shall carry out transactions relating to the Depository only through the approved User Hardware System located at approved locations of the office of the user. No other workstation, computer system or hardware may be connected to the User Hardware System without the prior approval of the Depository.

4.1.2 Each User shall have a unique identification number provided by the Depository called BP ID which shall be used to identify that User by the Depository and by Other Users.

4.1.3 A User shall have a non-exclusive permission to use the DPM as provided by the Depository in the ordinary course of its business as such User.

4.1.4 The permission to use the DPM shall be subject to the payment by the User of such charges as may be specified by the Depository.

4.1.5

4.1.6 A Participant shall not, by itself or through and other person(s) on its behalf, publish, supply, show or make available to any other person or reprocess, retransmit store or use any information provided by the Depository for any purpose other than in the ordinary course of its business as a User of the Depository, except with the explicit approval of the Depository.

5.3 Fess and Charges

The Participant shall have the discretion to charge any fees to its Clients. Further, the Participant may charge different type of fees to its various Clients. In the event of the Client committing a default in the payment of any of the charges within a period of thirty days from the date of demand, without prejudice to the right of the Participant to close the account of the Client, the Participant may charge interest @ not more than 24% p.a. or such other rate as may be specified by the Executive Committee from time to time for the period of such default.

Provided further that the Participant shall file the charge structure every year, latest by 30th April, with the Depository and also inform the depository the changes in their charge structure as and when they are effected.

11.3.6 The Participant shall execute the instructions for Repurchase or Redemption of securities in the DPM (DP).

11.3.7 The Issuer or its Registrar and Transfer Agent shall verify the request in the DPM (SHR), and if in order, confirm the request for Redemption or Repurchase in the DPM (SHR) and pay the proceeds directly to the Client.

11.4.6 The Participant shall execute the instructions for conversion of securities in the DPM (DP).

11.4.7 The Participant shall authorize the ICF, enclose the client details printed from the DPM(DP) and forward it to the Issuer or its Registrar and Transfer Agent.

11.4.8 The Issuer or its Registrar and Transfer Agent shall verify the request in the DPM (SHR), and if in order, confirm the request for ISIN in the DPM (SHR) and provide to the Depository the details of the request for conversion of ISIN.

11.5.6 The Participant shall execute and forward the request electronically for transfer of holdings held in other eligible SGL entity to an account held with the Participant in the DPM System and shall inform the SGL entity name and SGL account number of the other eligible entity to NSDL in such form and manner as may be prescribed.

11.6.7 The Participant shall execute and forward the request electronically for transfer of holdings held in dematerialized form to other eligible SGL entity for transfer to an SGL account with other eligible entity, and shall inform the SGL entity name and SGL account number of the other eligible entity to NSDL in such form and manner as may be prescribed.

11.6.9 In case the request was for transfer to an SGL account with other eligible entity, the Depository shall confirm the acceptance of RRF-GS electronically to the Participant, after obtaining approval from RBI."

4.11 All what has been stated in para 4.8, 4.9 & 4.10, above is stated in the Show Cause Notice. Show Cause Notice also refers to Statements of Shri TejasKulin Desai Senior Vice President of Appellant and Shri Hiten Prataprai Mehta, Vice President of Appellant wherein they were confronted with the above and they have stated as follows:

Statement of Shri TejasKulin Desai:

5.1. On being asked, Shri TejasKulin Desai stated that NSDL is having its Regd Office at 4tl floor, A-Wing, Trade World, Kamal Mill Compound, Senapati Bapat Marg, Lower Parel, Mumbai-4000013 and branch offices at New Delhi, Pune, Calcutta and Chennai; that NSDL is formed under the Depositories Act, 1996 and the regulatory framework has been notified by SEBI; under SEBI Depositories &.

Participants) Regulations, 1996; that the Bye-laws and the Business Rules of NSDL govern the functioning and operational procedures of NSDL; that NSDL is a body providing infrastructure to all its DPs and DPs in turn are mandated to provide services to investors; that NSDL is a depository whose depository-participants provide 'Depository Service' in respect of securities to its clients. .

5.2 On being asked as to how NSDL is providing services to Depository Participants, Shri TejasKulin Desai stated that NSDL is having Centralized Data Base along with the dosed user group of its depository participants; that these DPs are Banks, Custodians, Public Financial Institutions, Stock Brokers, NBFCs; that there are about 280 DPs all over India; that NSDL maintains securities, consisting of shares, debentures, bonds, commercial paper etc. of the securities holder in dematerialized form on being asked about the operation and functioning of NSDL, he stated that an investor

wishing to avail depository related services like Dematerializing physical securities (certificates in paper form), transfer on sale/purchase of securities in demat form, account transfer etc. has to approach a DP and was required to open an account with any DP appointed by the depositories like NSDL; that the investor would submit his physical securities with the DP where he had opened his account; that the DP would capture the required details in his system and forward the physical documents to the concerned company/registrar; that the electronic data captured by DP would be shown/displayed in the System of the Registrar; that the Registrar would also be connected with NSDL; that the registrar, on receipt of the physical documents, would verify the same and confirm the demat in his system; that the data captured by the DP was transferred to NSDL and stored in its Centralized System; that the demat request could be viewed and confirmed by the Registrar through NSDL system; that on confirmation by the registrar, the investor would get credit of securities in his demat account; that many banking companies and stock broking companies have been appointed as DPs of NSDL; that investors avail depository services from their DPs; that NSDL provides infrastructure to DPs in order to enable them to provide services to ultimate investors, that NSDL does not have specific mandate for DPs as regards their service charges and commercial strategy vis-à-vis their customers and therefore the service charge may differ from one DP to another.

5.3. On being asked about the different charges collected by NSDL from the DPs/Issuers/others, he stated that NSDL is collecting following charges under invoices from DPs/Issuers/others :-(A) **Different types of fees charged** namely (i) fees for steady; (ii) fees for speed facility; (iii) IDEAS fees; (iv) Speed-e fees; (v) Corporate Action Fees; (vi) Fees for change of share registrar (vii) Custody fees; (B) **Fees from TIN Projects**:- (a) e-Return Intermediary Registration; (b) Fees for accepting physical returns; (c) Fees for e-TDS/TCS/AIR upload; (d) Fees for PAN applications; (e) Fees for TIN (processing fees); (f) Fees for e-TDS/TCS/AIR processing charges; (g) Fees for TAN applications; (h) PAN Registration; (i) Fees for processing charges (CBEC); (C) **Fees on MAPIN** (D) **Misc. Income**:- a) Dividend Distribution; b) Exchange Traded Scheme. On being asked Shri Tejas Desai stated that the Operational Income shown consists of: (a) Annual fees; (b) Settlement fees i.e. (i) Transaction fees; (ii) Pledge Fees; (iii) Lending fees; (iv) Penalty fees; (v) Reversal of erroneous TRF; (c) Remat Fees; (d) Entry Fees; (e) Software Fees; (f) Recovery on A/c of ISDN; (g) Processing charges; (h) IDM Fees; (i) Training fees; (j) Fees for Wan to Wan etc.; that NSDL has not paid service tax on the aforesaid services and the reason for non payment of service-tax was that they were not providing custodial services as defined under 'Banking and other Financial Services'; that NSDL had collected the aforesaid charges/fees under invoices without charging service-tax for the reasons mentioned above.

5.4. Shri Tejas Kulin Desai, inter alia, stated that under 'Banking and other Financial Services', NSDL have been paying service tax under the head (a) Corporate Action (Benpos); (b) Corporate Action (fees); (c) Custody fees (one time); (d) Corporate action fees (freezing); (e) Corporate action (NSC/KVP); (f) Custody fees; (g) Corporate action fees (unlisted companies); (h) fees for change of share registrar (i) fees for speed (j) fees for steady (k) Corporate action (Delisting co.) (l) Speed fees received in advance (m) fees for Steady received in advance (n) fees received in advance; that NSDL charges DPs transaction charges for every transfer of shares (only on Debits from the Demat account), Demat, Remat, Pledge of securities, etc.;

Statement of Shri Hiten Prataprai Mehta:

6.1. On being asked about the constitution of NSDL, he stated that M/s. National Securities Depository Ltd., are having Regd Office at 4th floor, A-Wing, Trade World, Kamal Mill Compound, Senapati Bapat Marg, Lower Parel, Mumbai-400013 and branch offices at New Delhi, Pune, Calcutta and Chennai; that NSDL is formed under the Depositories Act, 1996 and the regulatory framework has been notified by SEBI under (Depositories & Participants) Regulations, 1996; that the Bye-laws and the Business Rules of NSDL govern the functioning and operational procedures of NSDL; that NSDL is a body providing infrastructure to all its DPs and DPs in turn are mandated to provide services to investors; that NSDL is a depository whose depository participants provide 'Depository Service' in respect of securities to its clients; On being asked how NSDL is providing services to Depository Participants, Shri Hiten Desai stated that NSDL is having Centralized Data Base along with the close user group of its depository participants; that these DPs are Bank, Custodian, Public Financial Institution, Stock Brokers, NBFCs; that there are about 280 DPs all over India. NSDL maintains securities, consisting of shares, debentures, bonds, commercial papers etc. of the securities holders, in dematerialized form;

6.2. On being asked what is meant by Depository Participant Module and its use? Shri Mehta stated that DPM means a software relating to the Depository operations installed on the User hardware system; that Depository System means the hardware, software and telecommunication network established by the Depository to facilitate the operations of the Depository; that Depository Module means the software installed at the Depository.

6.3. On being asked about Speed-e and IDEAS facilities, Shri Mehta stated that these are the internet based facilities to enable the investors to submit instructions to DPs/NSDL and view statement of transactions respectively; that Speed-e facility is optional.

6.4. On being asked whether DPs can access securities information (Centralized system) maintained by NSDL electronically, Shri Desai stated that DPs are connected to NSDL and DPM software enables them to access the information maintained at NSDL pertaining to its own clients.

6.5. On being asked which are the fees collected under invoices by NSDL but no Service Tax was discharged on the same, Shri Mehta stated that invoices are raised on DPs for the fees viz., (a) Annual fees; (b) Settlement fees i.e. (i) Transaction fees; (ii) Pledge Fees; (iii) Lending fees; (iv) Reversal of erroneous TRF; (c) Remat Fees; (d) Entry Fees; (e) Software Fees; (f) Recovery on A/c of ISDN; (g) Processing charges; (h) IDM Fees; (i) Training fees; (j) Fees for WAN to WAN; etc. that the reason for non payment of service-tax on these fees was that they were not providing custodial services as defined under Banking & Financial Services.

6.6. On being asked as to whether the systems of the DP & NSDL were interconnected and how, Shri Mehta stated that DPs are connected to NSDL through leased line, V-SAT, Modem, ISDN.

- 6.7.** On being asked as to how the DP's deal with investors and NSDL, Shri Mehta stated that the DP opens demat account of investor who wishes to hold/transact in securities in demat form, accepts demat/remat requests, executes securities transfer instructions submitted by the investor, executes pledge instructions etc. DP's are connected to NSDL through leased line, V-SAT, Modem, ISDN; that the transactions of the demat account holders of the DP are reflected in NSDL central system.
- 6.8.** On being asked as to what is/are the information(s) required to be filled in by the DP's in DPM, Shri Mehta stated that the DP captures the properly authorized instructions provided by the investor in the prescribed formats in the DPM system at its end.
- 6.9.** On being asked as to where and how does the DP fill up such information and what is the mode of passing on the information filled in by the DP to NSDL, Shri Mehta stated that the DP captures the properly authorized instruction provided by the investor in the prescribed formats in the DPM system at its end; that the information is transmitted to NSDL system through leased line, V-SAT, Modem, ISDN.
- 6.10.** On being asked as to how does NSDL become aware about the receipt of information from DP's, Shri Mehta stated that DP's release the transactions for execution on the DPM, which must be completed before the EOD process initiated at NSDL. In case the EOD has been initiated, any release of transactions shall be recorded for the next working day.
- 6.11.** On being asked what does NSDL do with the information received from DP's, Shri Mehta stated that NSDL maintains all records in electronic form and ensures the integrity of DM to ensure that the data is not lost, destroyed or tampered with and in the event of loss or destruction, ensures that sufficient back up of records is available at all time at a different place.
- 6.12.** On being asked as to whether NSDL transfers the information received from DP's to the Issuer, Registrar & Transfer Agent and the reasons for doing so and as to what is meant by Depository Participant Module Issuers/Registrars? Shri Mehta stated that the information pertaining to demat requests of the clients captured by DP's to Issuers/R & T Agents. NSDL also provides reports updating beneficial owners on a weekly basis to the Issuers, Registrars & Transfer Agents as per the agreement executed between NSDL, Issuers and/or the R & T. Agents; that DPM (Issuer/Registrars) means the software installed on the hardware system of the Issuer or its Registrar and Transfer Agent.
- 6.13.** On being asked as to whether NSDL receives back any information from the Issuer, Registrar & Transfer Agent and what does that information contain, Shri Mehta stated that no information is received back from Issuer, Registrar & Transfer Agent; that the confirmation of demat/remat request for effecting credit into demat account of the investor is received.
- 5.14.** On being asked as to what information does NSDL system store and reveal, Shri Mehta stated that as per Rule 38 of the SEBI (Depositories and Participants) Regulations, 1996, every depository is required to maintain the following statutory records:
- Records of securities dematerialized and rematerialized,
 - the names of the transferor, transferee and dates of transfer of securities,

setup namely "Desktop as Server", "Entry Level Server without hardware RAID", "Entry Level Server with Hardware RAID" or "High End Server"; that Participants may choose appropriate option depending on anticipated business volume; that the document "Sizing Guidelines for Participants" is provided to help the Participant arrive at an appropriate configuration and the document "Overview of points to be followed for hardware installation & connectivity with NSDL" enlists the steps to be followed by Participant to establish their DPM setup; Shri Mehta explained the specifications of the I.T. setup required by a Participant; Shri Mehta explained that considering the rapidly changing models of Server and Client PCs resulting into improvised processor at a competitive cost, NSDL has empanelled minimum configuration for Server & Client as mentioned in the above table to be used in the setup for NSDL operations; that Participants are free to procure any model of Server & Client, of any hardware brand certified by the Microsoft Operating System with empanelled configuration mentioned in the above table; that Participants are required to procure Router and Modem only from the list of specific models empanelled by NSDL; that NSDL provides the Participants with DPM Application Software;

4.12 All the above business rules of the appellants and the Statements of their Senior Vice President and Vice President show that they are providing for "provision and transfer of information and data processing" and these are provided in relation to their depository operations. In our view by providing for provision and transfer of information and data processing in relation to the depository services appellants have provided the "Banking and Other Financial Services" as defined by 65(12)(a)(vii) to the Depository Participants. Depository Participants have in turn utilized these as input services to provide Depository Related services to their users/ clients. Commissioner has in para 1.33 to 1.37 observed as follows:

1.33 From the above facts, it appeared that NSDL holds securities (like shares, debentures, bonds, Government Securities, units etc.) of investors in electronic form. Besides holding securities, NSDL also provides services related to transactions in securities. NSDL interfaces with the investors through its agents called Depository Participants (DPs). As per the Balance Sheet of NSDL, Depository Segment includes providing various services to the investors like dematerialization, rematerialisation, transfer and pledge of securities in electronic form through closed user group network of business partners viz., Issuers/Registrar & Transfer

Agents and Depository Participants. It appears that the NSDL system is designed to provide information relating to securities in electronic form. It further appeared that the platform provided by NSDL is to enable the DPs or their investors to have access to their securities holding at any given point of time electronically. The processes involved in dematerialization, rematerialisation, pledge, transfer of securities appear to indicate that there is provision of information, transfer of information and data processing through electronic means. The nature of services provided by NSDL, as explained in detail in the preceding paragraphs, appear to indicate that they are providing 'provision and transfer of information and data processing services which are taxable services under 'Banking and other Financial services' under Section 65 (12) (a) (vii) of the Act. Further, it is not in dispute in this case that NSDL are a 'body corporate', being a company incorporated under the Companies Act, 1956 to whom the certificate of commencement of business was provided by SEBI. This fact has not been disputed by NSDL and they have accepted that that NSDL, being a body corporate, have provided infrastructure to all their DPs and the DPs, in turn, were mandated to provide services to investors. Therefore, it appears that the services provided by NSDL to their DPs are taxable services under 'Banking and other Financial services' and the amounts charged and recovered from the DPs by NSDL for provision of these services would be the taxable value on which service tax at the appropriate rates appears to be leviable.

1.34 The Central Depository Services Limited (CDSL) has introduced a system called EASI (Electronic Access to Securities Information) to assist a CDSL demat account holder to easily adapt to the fast reducing settlement cycle. EASI is a Internet-enabled services to empower a demat account holder in managing his securities 'anytime-anywhere' in an efficient and convenient manner, all in a state-of-the-art secure environment. EASI enables a 'Demat Account Holder or Beneficial Owner' (BO) / Broker or Clearing Member' (CM) to view the holdings and transactions. EASI is a convenient, easy to operate internet based facility, which allows registered Beneficial Owners (BOs) & Clearing Members (CMs) to access their demat account through the internet to check the details of their holdings and/or transactions, anytime anywhere, through CDSL's website. In the light of the above discussions, it appears that the services offered by NSDL to DPs are similar to the services of CDSL, including that of EASI. In NSDL's FAQs mentioned earlier, it is stated that NSDL provides its' services to investors through its agents called depository participants (DPs); that NSDL charges the DPs and not the investors. NSDL's charges to its DPs are fixed and are based on the usage of NSDL system; that NSDL has taken necessary steps to protect the transmission and storage of data.

*1.35 This issue has been dealt with in detail in Circular No. **96/7/2007-ST** dated 23-8-2007. In response to a query as to "Whether depository services and Electronic Access to Securities Information (EASI) services provided by Central Depository Sendees (India) Ltd., (CDSL) are liable to service tax under Banking and other Financial Services [section 65(105) (zm)]", it has been clarified that "Services provided by CDSL fall within the scope of 'provision and transfer of information and data processing'. These services are not in the nature of 'on-line information and data base access or retrieval services'. Therefore, the depository services provided by CDSL including Electronic Access to Securities Information (EASI) for a fee are liable to service tax under Banking and other Financial Services [section 65(105)(zm)]." Further, earlier also, doubts were raised with the Board as to whether Service Tax is payable on the services rendered by Central Depository Services (India) Limited (CDSL), CDSL was providing depository services in respect of DEMAT stocks to its customers. It had also implemented "Electronic Access to Securities Information" (EASI) to enable the owner to access accounts in the first phase and transact depository business in the second phase of the project. CDSL charged certain fees such as registration fee, annual fee etc. for providing service of EASI. The Board, vide Circular No. **50/11/2002-ST** dt, 18.12.2002, clarified that depository service is one of the services covered under the category of 'Banking and other financial services.' The service of 'EASI' provided by CDSL is a part and parcel of depository service and hence covered under the category of "banking and other financial services". They are liable to pay service tax on all depository service even if service is provided through Internet. Since the services offered by NSDL to DPs are similar to the services of CDSL, the aforesaid clarifications appear mutatis*

mutandis applicable to NSDL.

1.36 NSDL have contended that even though they are a body corporate providing taxable services to their DPs, the value of such service is not liable to service tax on the following grounds:

(a) . It was clarified vide instruction **F.No.B-II/2000 TRU** dated 09.07.2001 that service tax will not be leviable on NSDL or CDSL fee paid to the depositories and recovered from the customers on actual basis.

(b) . Board, vide letter No. **137/57/2006-CX.4** dated 18.05.2007, has clarified that the services provided by the Stock Exchanges and transaction charges recovered by them under different categories of services do not fall under the category of any of the existing taxable services. The activities of NSDL and its status as an infrastructural nodal body is analogous to those of stock exchanges and the services provided by them to the DPs would also not fall under any of the existing taxable services.

1.37 It is observed that the clarification provided vide letter F.No.B-II/2000 TRU dated 05.07.2001 was given in the context of "custodial depository and trust services" [falling under category (v) of Section 65 (12) (a)], not in the context of "provision and transfer of information and data processing" [falling under category (vii) of Section 65 (12) (a)]. In this letter, it was, inter alia, clarified that "Custodial Depository Services" means safe keeping of securities of a client and providing services incidental thereto and includes (a) maintaining accounts of securities of a client; (b) collecting the benefit of rights accruing to the client in respect of securities; (c) keeping the client informed of the action taken or to be taken by the issuer of securities, having bearing on the benefits or rights accruing to the client; and maintaining and reconciling records of the services referred to in sub-clauses (a) i.g (c). Therefore, the clarification that service tax will not be leviable on NSDL or CDSL fee paid to the depositories and recovered from the customers on actual basis, does not appear to be relevant in the context of the taxable service viz. "custodial, depository and trust services". Similarly, the clarification given vide Board's letter No. **137/57/2006-CX.4** dt. 18.05.2007 in the context of services provided by Stock Exchanges does not appear to be applicable to the depository services provided by NSDL to Depository Participants in view of the Board's clarifications dt.18.12.2002 and 23.8.2007 mentioned above. It is also significant to mention that during the relevant time, the Depository Participants were discharging service tax only on the amounts involving services rendered by them to their investors/clients. These Depository Participants were not discharging service tax on the fees payable to NSDL as NSDL were liable to pay service tax on the fees collected from the Depository Participants.

4.13 On the same issue this tribunal has in case of Bank of Baroda [2016 (43) STR 141 (T-Mum)] held as follows:

"7. We find from the impugned order that the appellant is receiving the services from SWIFT, the service involved is transfer of information and also includes data processing. As far as transfer of information, there is no dispute even by the appellant. As regard the provision of data processing the messages sent through SWIFT are encrypted and decrypted in SWIFT's central system and thereafter it is re-encrypted before the transaction to the beneficiary SWIFT customer. Thus the message data is processed at both locations to prevent data loss. This clearly shows that the data is processed in the entire process of transferring of messages through SWIFT operating centre.

7.1 On further perusal of record, we observe that the SCN contended that services provided by SWIFT relate to transmission and exchange of financial messages through SWIFT NETWORK between two users, with SWIFT acting as the carrier of such messages on a day-to-day basis. As per the information available on the SWIFT website, SWIFT provides the proprietary communications platform, products and services that allow their customers to connect and exchange financial information securely and reliably; SWIFT is solely a carrier of messages. It does not hold funds nor does it manage accounts on behalf of customers, nor does it store financial information on an ongoing basis. As a data carrier, SWIFT transports messages between two financial institutions. This activity involves the secure exchange of proprietary data while ensuring its confidentiality and integrity. As per the history of SWIFT available in the said website, SWIFT started

the mission of creating a shared worldwide data processing and communications link and a common language for international financial transactions. The services provided by SWIFT involves providing of information related to financial transactions viz. transfer of funds; transfer of information contained in the said message after processing the data contained therein. Data processing in any computer is a process that converts data into information. The data contained in the said financial message when presented for processing is raw data which when processed become useful information for the customers viz. banks, financial institutions, etc., who then use the said processed information to debit and credit the customers accounts accordingly, i.e., funds settlement between the banks. The computer network operating systems, i.e., SWIFT network, installed at BOB, SWIFT Network at Belgium and at the recipient's end, for whom the message is intended, manipulate raw data into information and likewise information systems typically take raw data as input to produce information as output. In the context of data processing, data are defined as numbers or characters that represent measurements from the real world. Measured information is then algorithmically derived and/or logically deduced and/or statistically calculated from the multiple data available from the said messages transmitted from BOB. Information is defined as either a meaningful answer to a query or a meaningful stimulus that can cascade into further queries. More generally, the term data processing can apply to any process that converts data from one format to another. From this perspective, data processing becomes the process of converting information into data and also the converting of data back into information. The terms 'information' and 'data' are not synonyms. Data is defined as raw facts while information is processed data. Information is the thing that one knows and data is the representation of the information. Information has meaning while data does not. Computers work with data and not information. Information is a subject of data. Data is unstructured, lacks context and may not be relevant to the recipient. When data is correctly organized, filtered and presented with context, it can become information because it then has "value" to the recipient. Data which is not information is often called raw data. The terms "data", "computer network", "information" are defined under various provisions of the ACT read with the relevant definitions provided under the Information Technology Act, 2000. From the discussions above, it appeared that to facilitate transmission of financial messages, computer network systems known as SWIFT network are installed at BOB and at the receiver's end, i.e., between all intended sender's and recipient's end and SWIFT network based at Belgium, which acts as the transporter/carrier of messages, receives, processes and transmits data between such intended users. Therefore, it appears that the entire activity of messaging of financial transactions with the intention to transfer funds, confirm receipt of such messages, etc., is done exclusively with the objective to retrieve the information contained in the said financial message, process the same and then transfer the processed information to the respective customers, i.e., presenting and recipient banks, financial institutions, etc., as the case may be. After the processing is complete in all respects, such processed data leads to settlement of funds between BOB and the recipient banks. It further appeared that messaging data through magnetic media or through communication backbone leads to data being transferred between two intended users related to the same financial transaction.

7.2 From the above detailed process involved, it is clear that the activities appear to amount to provision and transfer of information and data processing in relation to banking and other financial services, as defined under the Act and clearly covered under the entry provided in sub-clause (a)(vii) of Section 65(12), i.e., "provision and transfer of information and data processing".

7.3 As regards the contention of the appellant that SWIFT does not fall under the category of 'banking and other financial institutions' as SWIFT is not engaged in the business of banking and other financial services, we find that if any person provides the service which is covered under the four corners of definition of "Banking and Other Financial Services", it shall be taxable. Moreover there is no dispute that the SWIFT is a 'body corporate' and covered under the definition of "Banking and Other Financial Services". As per the plain reading of the definition, apart from 'banking and other financial institutions', the category of a person such as 'body corporate' and 'any other person' are also covered. Therefore, it is not

significant as to what is the nature of the person who is providing the service, but if the service is covered under the definition, such service is liable to service tax, even if it is presumed that SWIFT is not involved in "Banking and Other Financial Services". The service shall remain taxable as the service is clearly covered under the definition of "Banking and Other Financial Services" in clause (vii) of Section 65(12). Moreover the appellant being liable to pay the service tax is 'deemed service provider'. Therefore, the status of the appellant is required to be considered and not the status of service provider who is located outside India. For this reason the appellant is undisputedly the deemed 'banking and other financial institution'. Hence, the submission of ld. counsel does not hold water and it is rejected."

4.14 Thus we find that throughout Appellants were providing for "provision and transfer of information and data processing" and these are provided in relation to their depository operations. Thus the services provided by them to Depository Participants are covered by the definition of Banking and Financial services and are liable to service tax under that category. Appellants have taken the stand that extended period of limitation cannot be invoked as the relevant facts were in knowledge of the revenue and hence they had not suppressed anything from the revenue authorities with the intention to evade payment of tax. They have relied upon various case laws on the subject. From the facts as available on record specifically the correspondences with CBEC, referred to by them we find that the issue involved in those correspondences were in relation to Central Depository Services and not in relation to services of providing for "provision and transfer of information and data processing". Since the services which are subject matter for the present dispute were never disclosed to the concerned revenue authorities hence we are not in position to uphold the contentions raised by the appellant's against invoking extended period of limitation to demand the tax from them. For upholding the invocation of extended period of limitation we rely on the decision Hon'ble Gujarat High Court in case of *Neminath Fabrics* [2010 (256) ELT 369 (Guj)] and *CESTAT in case of Star India Pvt Ltd* [2015 (380 STR 884 (T-Mum)].

4.15 Appellants have challenged the quantification of demand on two counts, stated as follows:

- The amount collected by them from the DP's was the gross amount collected and if the tax was to be demanded then this amount should be treated as inclusive of Service Tax payable. Thus treating this amount as cum tax amount the tax payable should be computed as per Section 67(2) of the Finance Act, 1994.

- They had paid a certain amount of taxes during the period of dispute. The amounts paid by them towards the tax was also reflected in their ST-3 returns. This tax paid should have been taken into account while determining the tax payable by them.

4.16 Commissioner has dealt the two issues raised by the appellants in para 4.19 and 4.20 of his order. These para's are reproduced below:

"4.19 The noticee have claimed that there is a computation error in the SCN and excess calculation of Rs.20.03 crores towards alleged liability of Service Tax has been made in the SCN. I have gone through the discrepancies pointed out by the noticee in the Annexure (computation statement) attached to the SCN, the computation statement as provided by the noticee and the documents available on record and find that the objections raised by the noticee with regard to the demand amount is bereft of merit. The contention of the noticee that service tax is not leviable on penalties collected by them from their customers is not acceptable since Service Tax is leviable on the gross amount charged by the service provider in terms of Section 67 of Chapter V of the Finance Act, 1994 and penalties collected by noticee form a part of the gross receipts. The noticee has further claimed that Service tax is already paid on 'Fees for ETDS (AIR) Upload', 'Fees for E-TDS Upload 04-05', 'Fees for ETDS Upload 05-06', 'Fees for Tin (Pan 45)' 'Fees for Digitisation charge' and 'Fees for Tin (Tan 35)'. In this regard, I have gone through the statement dt. 15.10.2009 of Shri TK Desai, Senior Vice-president of noticee, wherein he has described all the different heads on which Service Tax has. been paid by the noticee. I do not find mention of the heads on which service tax is alleged to have been paid by the noticee in the statement. Therefore, I am not inclined to accept their contention. As regards the noticees contention that Service Tax is calculated twice on same item 'Recovery on A/c of ISDN', I find from the

data provided by noticee that there are two distinct items 'Recovery on A/c of ISDN (Tin)' and 'Recovery on A/c of ISDN'. Therefore the Service tax calculation is done correctly. The noticee has also contended that 'DpmLicence fees', 'MS Exchange Licence fees' and 'SQL – Licence fees' are together called 'Software Licence fees' and that the department has erred in taking this amounts once individually and again under the broad heading resulting in doubling of demand. I find from the records that all the four heads find separate mention in the date provided by noticee and therefore the same are correctly reflected in the Annexure to SCN. In view of the above, I find that the computation of demand is correctly done as made out in the SCN.

4.20 Another contention of the noticee is that even if service tax is payable on the value of services rendered, then the liability if any has to be determined as if the value is inclusive of service tax. Cum-tax value is provided for in Section 67(2) of the Finance Act, 1994 which is reproduced below:

Section 67 Valuation of taxable services for charging service Tax

- (1)
- (2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.
- (3)
- (4)

It is not the argument of the noticee that the consideration collected by them is inclusive of service tax nor that is a fact. Provisions of Section 67(2) of the Finance Act, 1994 are not applicable to them."

4.17 We are in agreement with the submissions made by the appellant that benefit of cum tax value and the tax paid by them during the relevant period should have been taken into account while determining the tax payable by them. Larger Bench of Tribunal has in case of *Shri Chakra Tyres [1999 (108) ELT 361 (T-LB)]* held as follows:

"9.1 We have carefully considered the pleas advanced from both sides, assessable value is required to be determined in terms of Section 4 of the Act. Sub-section 4(4)(d)(ii) envisages deduction of aggregate effective duty payable on the goods under the Act, and all other Acts, if the wholesale price at which goods are sold includes all such excise duties. Wholesale price is the total consideration received by an assessee against sale of excisable goods in wholesale trade. Wholesale price will include the element of duty payable on any goods because such duty forms part of the consideration for sale of the goods according to terms of sale of the goods. If any further demand of duty is created against an assessee and such further demand of duty cannot be passed on to a customer in view of the terms of sale of any goods between the assessee and a customer, the original consideration (including duty, if any) received by an assessee for sale of the goods in wholesale trade, has to be taken as cum duty price for the purpose of demand of higher duty subsequently. Any hypothetical consideration that the sale price would have gone up had correct duty been paid in the first instance cannot, in our opinion, be made the basis for nonabatement of differential duty from the realised sale price. We have to take into account the facts as they are, not what they might have been. Total duty proposed to be demanded shall have to be abated from the cum-duty price actually received and liable to be received as a consideration for sale of goods. This is the mandate of Sub-section 4(d)(ii). Contention of assessees, as given in examples in para 6.2 above is correct and in conformity with the provisions of Section 4(4)(d)(ii). We take support for our view from the Apex Court's judgment in *Pravara Pulp (supra)*. Analysis made by the Tribunal in *Express Rubber (supra)*, relevant portion of which has already been extracted above is apt in our view. We endorse the same."

Same view was expressed by the Hon'ble Apex Court in case of *Maruti Udyog [2002 (141) ELT 3 (SC)]* in following words

"A reading of the aforesaid Section clearly indicates that the wholesale price which a charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax or other taxes which is included in the wholesale

price is to be excluded in arriving at the excisable value. This Section has been so construed by this Court in *Asstt. Collector of Central Excise & Others vs Bata India Ltd.*, [1996] 4 SCC 563, and it is thus clear that when cum-duty price is charged, then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded. The Tribunal has, therefore, rightly proceeded on the basis that the amount realised by the respondent from the sale of scrap has to be regarded as a normal wholesale price and in determining the value on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price, must be excluded. There is nothing to show that once the demand was raised by the Department, the respondent sought to recover the same from the purchaser of scrap. The facts indicate that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller, namely, the respondent. In such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case the said taxes on the goods sold are to be deducted under Section 4(4)(d)(ii) and this is precisely what has been directed by the Tribunal. There is also nothing to show that the sale price was not cum-duty."

4.18 Hence in our view the benefit of "cum tax value" as per section 67(2) of the Finance Act, 1994 should be extended to the appellant's while determining the tax payable. In our view the Commissioner has erred in not extending the benefit of tax already paid by the appellant in respect of certain services sought to be taxed again in the present proceedings. Hence the matter for quantification of demands on the above lines need to be remanded back to the original adjudicating authority for denovo consideration.

4.19 Since we uphold the demand of tax made, we uphold the demand of interest made under Section 75 of the Finance Act 1994. For doing so we rely upon the decisions as follows:

- *P V Vikhe Patil SSK* [2007 (215) ELT 23 (Bom)] affirmed by the Hon'ble Supreme Court [2016 (335) ELT 196 (SC)]

- *Kanhai Ram Thakedar* [2005 (185) ELT 3 (SC)]

- *TCP Limited* [2006 (1) STR 134 (T-Ahd)]

- *Pepsi Cola Marketing Co* [2007 (8) STR 246 (T-Ahd)]

- *Ballarpur Industries Limited* [2007 (5) STR 197 (T-Mum)].

4.20 Penalty has been imposed by the Commissioner under Section 75A & 77 for various infractions noticed in complying with provision of law. For imposing penalty under these Sections Commissioner has recorded as follows:

"4.22 As regards imposition of penalty under Section 75A of the Act, I find that they failed to apply for registration as required under Section 69 of the Act read with Rule 4 of Service Tax Rules, 1994 and therefore penalty under Section 75A of the Act is rightly imposable.

4.25 As regards proposed penalty under Section 77 of the Act, I find that the noticee have failed to file proper periodical return as prescribed under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 on the due dates and also failed to furnish the list of all accounts maintained by them in relation to Service Tax as required under Rule 5(2) of the Service Tax Rules, 1994. By virtue of the provisions of Section 77 and by the acts of omission by M/s. NSDL as mentioned above, I hold M/s. NSDL liable to penal action under Section 77 of the Act."

Penalties under Section 77 are civil in nature and are imposed for infractions noticed. Hon'ble Supreme Court has in case of *Gujarat Travancore Agency vs. Commissioner of Income Tax* [1989 (42) ELT 350 (SC)], Hon'ble Supreme Court held as under:

4. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of

coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mensrea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum Volume 85, page 580, Paragraph 1023 : "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

Since there is no dispute about such infractions as recorded by the Commissioner in his impugned order, penalties as imposed under Section 77(2) are justified.

4.21 While imposing penalty under Section 78 of Finance Act, 1994, Commissioner has observed as follows:

"4.23 As regards proposed penalty under Section 78 of the Act, it is seen from the case records that the noticee had provided the services for a commercial consideration and have deliberately failed to assess and pay Service Tax due on the value received by them on account of these taxable services provided. They also did not file periodical ST-3 returns for these taxable services provided which clearly proves that they had avoided payment of Service Tax within the due dates stipulated under STR, which but for the said investigation initiated by DGCEI would not have come to light, thereby making them liable to penalty under Section 78 of the Act. Moreover extended period under proviso to Section 73(1) has been correctly invoked in the subject case. Noticee's reliance, in this regard, on various case laws like: (i) Nizam Sugar Factory vs CCE AP [2006 (197) ELT 465 (SC)] (ii) Dolphin Detective Agency vs CCE Belgaum [2006 (4) STR (25)] (iii) Ugamchand Bhandari vs CCE Madras [2004 (167) ELT 491 (SC)] (iv) Mentha & Allied Products Ltd. [2004 (167) ELT 494 (SC)] wherein the matter is relevant to the Departmental Assessment era of 1991, and other similar judgments are misplaced and not relevant to the subject case. Penalty is punitive as well as preventive measure to act as an deterrent against recurrence of breach of law and also to discourage non compliance of law especially when there has been deliberate avoidance of payment of tax. Penalty prescribed under Section 78 of the Act is for deliberate avoidance of payment of tax. Noticee's case is squarely covered under the provisions of Section 78 of the Act for imposition of penalty. In view of the above, Noticee have no case for non imposition of penalty and as such penalty under Section 78 of the Act is rightly imposable in respect of his case."

Since we uphold the invocation of extended period of limitation in the present case, the penalties imposed under Section 78 cannot be faulted with in view of the above referred decision of the Hon'ble Bombay High Court {para 4.19, supra} and the decision of Hon'ble Supreme Court in case of *Rajasthan Spinning and Weaving Mills* [2009 (238) ELT 3 (SC)] .

4.22 Thus we summarize our findings in the appeal as follows:

- the services provided by the appellant to depository participants are aptly of "provision and transfer of information and data processing", classifiable under (vii) of Banking and Financial Services as defined under Section 65(12) of Finance Act, 1994;
- Extended period of limitation as per proviso to Section 73(1) of Finance Act, 1994, for demanding the service tax is invocable.
- benefit of cum tax value as per sub-section (2) of Section 67 of Finance Act, 1994 is admissible to the appellants and so is also the benefit of the tax already paid as per the ST- 3 returns filed by them, hence matter needs to be remanded back to adjudicating authority for requantification of demand.
- Demand of interest under Section 75 of Finance Act, 1994 is justified.
- Penalties imposed under Section 75A, 77 & 78 of Finance Act, 1994 is justified but needs to be redetermined in light of re-quantification of demand in de-novo proceedings.

5.1 In light of the discussions as above we uphold the impugned order but remand the matter for re-quantification of the demand after allowing the benefit

cum tax value as per section 67(2) of Finance Act, 1994 and amount of tax paid by the appellants as per the ST-3 returns for relevant period filed by the appellant. Thus the appeal is allowed to this extent and matter remanded to adjudicating authority for re-quantification of demand and determination of penalties under Section 75A, 77 and 78.

(Order pronounced in the open court on 08.06.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI**

Service Tax Appeal No. 89286 of 2013

Arising out of Order-in-Original No: 24/STC-I/SKS/13-14, Dated: 29.07.2013
of Commissioner of Service Tax-I, Mumbai

Date of Hearing: 29.08.2019

Date of Decision: 11.09.2020

**GO AIRLINES INDIA LTD
C-1 WADIA INTERNATIONAL CENTRE, PB MARG, WORLI
MUMBAI - 400013**

Vs

**COMMISSIONER OF SERVICE TAX - I
115 NEW CENTRAL EXCISE BUILDING, MK ROAD, CHURCHGATE
MUMBAI - 400020**

Appellant Rep by: Shri Dinesh Agarwal, CA

Respondent Rep by: Shri Dilip Shinde, AC (AR)

CORAM: Hon'ble Mr C J Mathew, Member (T)

Hon'ble Mr Suvendu Kumar Pati, Member (J)

Per: C J Mathew:

This appeal of M/s Go Airlines (India) Pvt Ltd, challenging the recovery of Rs. 56,58,312 under section 73 of Finance Act, 1994 read with section 66A of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, besides imposing penalty of like amount under section 78 of Finance Act, 1994 and Rs. 10,000 under section 77 of Finance Act, 1994 vide order-in-original no. 24/STC-I/SKS/13-14 dated 29th July 2013 of Commissioner of Service Tax-I, Mumbai, is limited to the finding therein that the impugned activity conforms to section 65(105)(zh) of Finance Act, 1994 and not to that in section 65(105)(zzzze) of Finance Act, 1994 as claimed by the assessee. It is common ground that the appellant is a recipient of service, provided by M/s Radixx Solutions International Inc., USA, to whom the first payment under the contract was made on 27th June 2006 and that the appellant had discharged tax liability of Rs. 28,01,753 on payments effected after 16th May 2008 with the incorporation of 'information technology software' among the taxable services in section 65(105) of Finance Act, 1994. The liability, for the period of dispute from 26th July 2006 to 31st August 2009, was fastened upon them by the operation of the legal fiction in section 66A of Finance Act, 1994 that deemed the recipient as provider to accord jurisdiction for collection of tax on services procured from outside India. The total liability of Rs. 73,43,647 for the period was partly adjusted from the voluntary payment of Rs. 16,85,335 towards the dues from 15th November 2006 to 20th July 2007. As the self-assessed payment of Rs. 28,01,753 has been discharged, the amount in dispute before us is restricted to Rs. 28,56,559.

2. Learned Chartered Accountant appearing for the appellant informs that the contract with M/s Radixx Solutions International Inc involved licensing of software that was utilised for management of the data of the appellant for their own enterprise-wide resource programming. It was pointed out that the product licensed to them was being extensively, and exclusively, used for their operations and, by its very nature, was rendered taxable only with the enumeration of 'information technology software' service in Finance Act, 1994. The allegation that the contract purported to provide 'online information database access and retrieval' service is, according to him, misconstruing of a minuscule component pertaining to the handling of the 'booking platform' accessed by their customers and agents. He also distinguished the said product from that involved in the decision of the Tribunal in *Jet Airways India Ltd v. Commissioner* [2016 (44) STR

465 (Tri-Mum)] as control over the data remained with the appellant and was accessed, as well as used, primarily by their employees.

3. Referring to the findings of the impugned order that

'4.6..... What exactly is relevant is what is the outcome of the service provided by Radiix. For providing any Online Data Access or Retrieval process, there would definitely be some software and some operating system and both need be worked on some server. The particular software appears to be the property of Radiix and Radiix allow them to use by their customer. It is very important to understand that Radiix is not only giving the software but Radiix also operate the software on their own server which results in to generation of certain outcome....'

Learned Chartered Accountant contends that this clear admission of the nature of the activity should have relieved them of the tax burden from the earlier date proposed in the notice. Further, it is submitted that the due discharge of liability as the recipient of 'information technology software' from June 2008 as well as provision of service, under the classification decided upon in the impugned order, being outside India with consequent exemption from tax is ample evidence of the clear absence of intent to evade tax. The decision, of the Tribunal in re Jet Airways India Ltd and upheld by the Hon'ble Supreme Court, that the revenue neutrality inherent in entitlement to CENVAT credit of the duty paid by them on 'reverse charge', according to Learned Chartered Accountant, also suffices to extinguish the intent of evading tax. He, therefore, submits that show cause notice dated 15th December 2009 is barred by limitation for recovery of the any amount prior to their voluntary acceptance of taxability.

4. Learned Authorised Representative contends that the taxability as provider of 'information technology software service' cannot be said to apply to the appellant as the software, and control thereof, remains with M/s Radixx Solutions International Inc and access alone is afforded to the licensee for uploading, and retrieval, of data which can, thereafter, be manipulated for management of the business of the appellant. Clarifying that the payments are also effected on per transaction basis, he contends that the activity is no different from that which was disputed in *Jet Airways India Ltd v. Commissioner of Service Tax, Mumbai* and in *British Airways v. Commissioner of Central Excise (Adjudication)* and, the demand therein having been set aside not on the ground of not having been received in India but on the bar of limitation, the impugned order must be upheld. According to him, the voluntary payment for part of the period before assessing themselves as liable to tax under section 65 (105) (zzzze) of Finance Act, 1994 establishes the correctness of the finding of the adjudicating authority. Reliance was placed upon the decision of the Tribunal in *Compton Greaves Ltd v. Commissioner of Central Excise, Aurangabad* [2004 (177) ELT 1032 (Tri-Mumbai)], in *Commissioner of Central Excise, Chandigarh v. Dharampal Prem Chand Ltd* [2011 (265) ELT 81 (Tri-Del)], in *Nitin Spinners Ltd v. Commissioner of Central Excise, Jaipur-II* [2017 (355) ELT 562 (Tri-Del)], *Shree Ranie Gums & Chemicals Pvt Ltd v. Commissioner of Central Excise, Jaipur-II* [2017 (4) GSTL 340 (Tri-Del)] and of the Hon'ble Supreme Court in *Dharampal Satyapal v. Commissioner of Central Excise, New Delhi* [2005 (183) ELT 241 (SC)].

5. The primary contention of Learned Chartered Accountant is that, unlike the finding of levability, though held as irrecoverable, in re Jet Airways India Ltd and in re British Airways, the contract entered into with M/s Radixx Solutions International Inc is not one of 'computerised reservation system' but a comprehensive, enterprise-wide software. Undoubtedly, the dispute in the cited decisions pertained to contract for the reservation system providing interface for agents and travelling public but the said decisions did not restrict 'online information database access and retrieval' service to 'computer reservation system' alone. Admittedly, the impugned contract does provide the very same interface and is intended as a travel business solution. In the definition clause of the contract, it is seen that 'Radixx System is

'the Radixx proprietary software system, incorporating the Radixx Software, for use in providing call center and Internet-based consumer reservation and information management services for travel -related business...'

and the hosting of service is to be the responsibility of the licensor of the software. It is also clear from the appended schedules and exhibits that annual payments are to be effected on the basis of 'passenger segment' as the variable.

6. As claimed on behalf of the appellant, it is quite probable that the licensed software is deployed across the functional and operational spread of the organisation. Nevertheless, the airline industry is entirely dependent on passenger/cargo traffic and it is the booking/reservation system that is at the heart of it. All other functions, notwithstanding their scale of investment or intensiveness of manpower, are auxiliary to the ticketing of passengers/booking of cargo. Hence, the agreement is intended for the deployment of a system of data accumulation, to enable passenger facilitation, and data retrieval which, in turn, ensures optimal deployment of resources. There is also no doubt that the system of 'online information database access and retrieval' interfaces the appellant with intending travellers. This, however, does not exclude the transaction between the appellant and the overseas contractor from the ambit of taxation as it is leviable on

'(zh) to any person, by any person, in relation to on-line information and database access or retrieval or both in electronic form through computer network, in any manner;'

in section 65 (105) of Finance Act, 1994. Though the information and database may be accessed at either end only by the appellant and intending passengers or agents, the taxability is in relation to such performance that can be undertaken only with the software and hosting provided by the overseas entity. The appellant, by entering into the impugned contract, has a customer-supplier relationship with M/s Radixx Solutions International Inc. This, undoubtedly, is in conformity with the taxable service. Therefore, the tax liability devolves for the receipt of the service throughout the entire period of dispute.

7. The conclusion of the Tribunal that

'10.7 In our considered view, we have to read the order holistically, i.e. British Airways case; on merit is against the appellant in this case while on the issue of revenue neutrality the order of British Airways supports appellant's case. The ratio of the Bench applies clearly to the case in hand accordingly respectfully following to ratio we have to hold that the appellant has made out a case in their favour on the question of revenue neutrality. In view of a direct decision on the self same issue, we are not recording any findings on the other case laws relied upon by both sides on the question of revenue neutrality....'

In *re Jet Airways India Ltd* is the ground cited by Learned Chartered Accountant for extending the same benefit to the appellant. Our finding *supra* are not based upon, and did not place reliance on, the decision in *re British Airways*. It is after examining the facts and submission made on behalf of the appellant and subjecting the terms of the contract to scrutiny that the conformity to the description of the taxable service has been determined.

8. On the other hand, the several decisions cited by Learned Authorised Representative establishes that the liability to pay tax during the extended period cannot be extinguished by adopting the plea of revenue neutrality. While revenue neutrality may be pleaded as evidence of lack of intent to evade tax, it may not, in every circumstance, justify the negation of the scope for invoking the extended period. We find no evidence on record that the appellant had been guided by expert advice to, consciously, be ignorant of the leviability for the said activity. The legal opinion furnished in evidence by Learned Chartered Accountant has been obtained after the issue of default had been raised; moreover, it would appear from the contents therein that it relates to the liability of the appellant under section 66A of Finance Act, 1994 as provider of 'information technology software service' and not to the primacy of this service over the one sought to be fastened on the appellant by the tax authorities.

9. It is contended by Learned Chartered Accountant that self-assessment to tax, on incorporation of 'information technology software service' in section 65(105)(zzzza) of Finance Act, 1994, is ample evidence of their diligence in discharge of tax liability to exclude the possibility of having contemplated evasion of tax. In terms of the activity that is sought to be taxed by these two entries, the connection with electronic data processing is unmistakable. Considering the

mechanism incorporated in the two definitions to render the activity functional, the minor differences between them should have led to a similar speculative reasoning on the part of the assessee and the deliberate discard of applicability after initial discharge of tax liability should have been justified in the proceedings instead of relying upon decisions of the Tribunal rendered subsequent to the period of dispute. The discharge of tax liability after incorporation of the new levy occurred during the investigations and, therefore, does not obtain for themselves the halo of diligence. The observation of the Hon'ble Supreme Court, in re DharampalSatyapal, that

'25..... A right to claim pro forma/modvat credit against duty on final products was different from the defence of bonafides in a case where circumstances mentioned in the proviso to section 11 A (1) stands proved by the Department for invoking larger period of limitation. The burden to prove the defence of bonafides was on the assessee and the assessee in this case has failed to prove its bonafides...'

leads to the inevitable conclusion that the plea of operation of the bar of limitation cannot be acceptable in the circumstances sought for by the appellant.

10. We take note that the impugned order has imposed penalty of Rs. 56,58,312 under section 78 of Finance Act, 1994. It is seen that appellant has been discharging tax liability since 16th May 2006 and, with payment of taxes amounting to Rs. 16,85,335 at some stage before ceasing to do so in July 2007, the unpaid dues is limited to Rs. 28,56,559. Accordingly, while upholding the impugned order as being consistent with the law, the penalty under section 78 of Finance Act, 1994 is capped at this amount.

11. The appeal is, therefore, dismissed save for this modification.

(Order pronounced in the open court on 11.09.2020)

.....

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, MUMBAI**

Service Tax Appeal No. 87659 of 2016

Arising out of Order-in-Original No. 34/STC-I/SM/16-17, Dated: 16.09.2016
Passed by Commissioner of Service Tax-I, Mumbai

WITH

Service Tax Appeal No. 88202 of 2019

Arising out of Order-in-Original No. 44/MVSC/PR. COMMR/ME/2019-20,
Dated:
04.09.2019 passed by Principal Commissioner of GST & C.E. Tax-I, Mumbai

Date of Hearing: 13.10.2020
Date of Decision: 02.11.2020

**M/s BANK OF AMERICA, NATIONAL ASSOCIATION
ONE BKC A WING, G BLOCK, BANDRA-KURLA COMPLEX
BANDRA (E), MUMBAI - 400051**

Vs

**PRINCIPAL COMMISSIONER, MUMBAI EAST
9TH FLOOR, LOTUS, LOTUS INFOCENTRE, NEAR PAREL STATION
PAREL (E), MUMBAI - 400012**

Appellant Rep by: Shri Prasad Paranjape with Shri Sanjeev Nair, Advs.
Respondent Rep by: Shri D M Shinde, AC (AR)

CORAM: Hon’ble MrS K Mohanty, Member (J)
Hon’ble Mr Sanjiv Srivastava, Member (T)

INTERIM ORDER NO. 7-8/2020

Per: Sanjiv Srivastava:

The Appeal No ST/87659/2016 is directed against Order in Original No 34/STC-I/SM/16-17 dated 16.09.2016 of the Commissioner of Service Tax-I, Mumbai, and the appeal No ST/88202/2019 is directed against the Order in Original No 44/MVSC/PR. COMMR/ME/2019-20 dated 04.09.2019 of Principal Commissioner, CGST and Central Excise Mumbai East Commissionerate.

1.2 By the order dated 16.09.2016 the Commissioner has adjudicated the dispute for the period from 2010-11 to 2014-15 and by the order dated 04.09.2019, the dispute for the period April 2015 to June 2017 has been adjudicated.

1.3 Since the issues involved in both the appeals are identical both the appeal were heard and taken up for consideration together. The issues involved in the two appeals are summarized in the table below:

Appeal No	ST/87659/2016	
Issue	Credit Denied	Penalty
Service Tax Paid on premium paid to DICGC	10563561	10563561
Service Tax Paid on Brokerage	1409650	1409650
Irregular credits already reversed prior to SCN	0	2573795
Total	11973211	14547006
Appeal No	ST/88202/2019	
Issue	Credit Denied	Penalty

Service Tax Paid on premium paid to DICGC	23939687	2393969
Service Tax Paid on Brokerage	2124235	212423
Total	26063922	2606392

2.1 Appellant is a scheduled commercial bank and is providing various banking and Financial Services. For undertaking the various operations in relation to conduct of their business as a bank they are required to undertake certain activities which are statutorily prescribed.

2.2 They are required to deposit certain amount as premium for insuring the depositors account to the Deposit Insurance Credit Guarantee Corporation (DICGC). On the premium paid by them to the DICGC, they pay service tax, and claim the same as CENVAT Credit treating these services as input services for providing the output services.

2.3 They are also authorized by the Reserve Bank of India as a primary dealer (PD), to underwrite government securities. In addition to earning interest and trading profits on these government securities, they also get underwriting commission which is subject to service tax (w.e.f). As per Section 11(2)(b)(ii) of the Banking Regulation Act, 1949, they are statutorily required to deploy 20 to 25% of their funds in Government Securities and are also required to maintain mandatorily prescribed Statutory Liquidity Ratio (SLR). For the purpose of these they avail the services of stock brokers to buy and sell these government securities in open market.

2.4 A show cause notice dated 08.10.2015 was issued to the appellant proposing to deny the CENVAT Credit availed by them in respect of these input services, for the period of Financial Year 2010-11 to 2014-15. This show cause notice has been adjudicated vide order dated 16.09.2016, referred in para 1, supra.

2.5 Another show cause notice dated 26.02.2018 was issued seeking to deny the CENVAT Credit in respect of the same services claimed to be input services by the Appellant. This show cause notice has been adjudicated by the Commissioner vide his order dated 04.09.2019.

2.6 Aggrieved by both the adjudication order Appellants have preferred these appeals before CESTAT.

3.1 We have heard Shri Prasad Paranjape, Advocate for the Appellant and Shri D M Shinde, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellants learned Counsel submits that,-

- Issue in respect of admissibility of CENVAT Credit of the service tax paid on the premium paid to DICGC, by the banks, has been settled by the larger bench of the tribunal in case of *South Indian Bank*, holding that CENVAT Credit is admissible. Following this decision the Mumbai Bench has also decided the issue in favour of admissibility of credit to the banks in case of *DBS Bank Ltd [Appeal No ST/89524/2018 decided on 07.09.2020]*, *Yes Bank Ltd [Appeal No ST/86654/2016, decided on 15.09.2020]* and *IndusInd Bank [Appeal No ST/86705/2016 decided on 29.09.2020]*. Thus following the ratio of these decisions the credit in respect of these services should be allowed to them.

- They receive the services of the stock brokers for the purchase on sale of government securities in the open market for the following reasons,-

- o They underwrite government securities and to ensure sufficient liquidity to make market for each subsequent mandatory auction, they are required to trade in the government securities including those underwritten.

- o To maintain capital adequacy standards prescribed by RBI.

- o To maintain the SLR as per the Banking Regulation Act, 1949.

- o To comply with the Section 11 (2) (b)(ii) of The Banking Regulation Act, 1949, 20 to 25% of its profits is mandatorily deployed in cash or government securities.

- They are required to comply with these statutorily prescribed requirements, and

for these they engage the services of the stock brokers. Since the services of stock brokers are required to comply with the statutorily prescribed requirements, the CENVAT Credit in respect of these services should be admissible to them as has been held by the Hon'ble Karnataka High Court in case of *PNB Metlife India Insurance Co Ltd*.

- In case of *Reliance Industry Ltd [2016 (1) TMI 19 CESAT Mumbai]*, tribunal has allowed the cenvat credit on stock broker services availed an assessee engaged in manufacturing and clearing of goods, on the ground that the same is included in the inclusive part of the definition.

- Since the services of stock broker is essential for providing underwriting services to the RBI and also for maintaining prescribed SLR. Hus there being a direct nexus between the input and output service the ratio of larger bench in case of *South Indian Bank*, referred above is applicable in this case also.

- Thus in view of the above decisions, the CENVAT Credit, availed by them on the commission paid to stock brokers will be admissible.

- Rule 6 (3B) of the CENVAT Credit Rules, 2004 as it existed at appropriate time, provided for reversal of the credit availed. This reversal is in lieu of non maintenance of separate accounts towards taxable and exempt business. Since they have complied with the said provisions there cannot be separate demand for denial/ reversal of credit availed in respect of individual input services, as per the decision of tribunal in case of *South Indian Bank*.

- Demand for the period between April 2010 to September 2013 is barred by limitation, in view of the decisions as follows:

- o Continental Foundation [2007 (216) ELT 177 (SC)]*

- o Tamil Nadu Housing Board [1994 (90) TMI 69 SC]*

- o Uniworth Textiles Ltd [2013 (288) ELT 161 (SC)]*

- Penalty imposed under Section 78 needs to be set aside and relief granted under Section 80 of the Finance Act, 1994, in view of the decisions in following cases:

- o Uniflex Cables Ltd [2011 (271) ELT 161 (SC)]*

- o Bharat Hotels Ltd [2018 (12) GSTL 368 (Del)]*

- Even if the penalty under Section 78 is to be maintained it should be restricted to 25% of the disputed CENVAT amount.

- In respect of the penalty of Rs 25,73,798/-, imposed in respect of certain disputed credits which had been availed by them, but reversed along with interest prior to issuance of show cause notice, benefit of Section 73(3) should be allowed and no penalty imposed. It has been held so in various decisions referred below:

- o Tirupathi Fuels Pvt Ltd [207 (6) TMI 477 (AP)]*

- o Adecco Flexione Workforce Solutions Ltd [2011 (9) TMI 114 (Kar)]*

- o C Ahead Info Technologies India P Ltd [2010 (19) STR 276 (T-Ahd)]*

- o Nischint Engineering Consultants Pvt Ltd [2010 (19) STR 276 (T-Ahd)]*

- o Gupta Coal Fields & Washeries Ltd [2013 (29) STR 166 (T-Mum)]*

3.3 Arguing for the revenue learned Authorized Representative while reiterating the findings recorded in the order submits that:

- in relation to the admissibility of the CENVAT Credit of the Service Tax paid on the premium paid to Deposit Insurance Credit Guarantee Corporation to the Bank, the Larger Bench of Hon'ble Tribunal has in its recent judgment in the case of *South Indian Bank VS The Commissioner of customs, Central Excise and Service Tax, Calicut* has held that the CENVAT credit service tax paid on insurance premium paid to DIGCC can be availed by the bank. A letter has been written to the concerned Commissionerate enquiring whether any appeal has been filed against the said judgment. Reply is still awaited.

- In respect of the second issue i.e. wrong availment of CENVAT credit of service

tax paid on brokerage on the sale/purchase of government securities, the appellants state that they have availed the broking service for various activities, and these activities are essential and statutorily prescribed for conducting the business of Bank. These activities are as follows:

o The services of broker are essential for underwriting government securities.

o To maintain the SLR (Statutory Liquidity Ratio) as prescribed by the banking regulations act, 1949.

o They invest in government securities for earning profit or interest or generating money.

- Since these activities are not in relation to the providing the output services the services of the brokerage for the same cannot be said to be an input service as defined by the Rule 2 (k) of the CENVAT Credit Rules, 2004 and hence the service tax paid on broking commission will not be admissible as CENVAT Credit to the appellant.

- the underwriting is completed when appellant takes over unsubscribed portion of the securities if any, and the assessee gets commission for the same. Subsequent sale of these government securities, is simply an act of trading in these securities and cannot be said to be input service for providing the output services.

- As per section 11 of the Banking Regulation Act, 1949 the banks are required to maintain a prescribed percentage of their assets in liquid form viz cash and/or approved securities. It is a fact that cash is the most liquid asset, however, it does not generate any revenue whereas 'approved securities' are investments which generate revenue. Thus, the objective of maintaining the SLR in approved securities is to maximize the profits for shareholders and not for providing any service to their clients.

- Thus these are an investment and have nothing to do with the output service i.e. lending.

- Since these activities of purchase/ sale of government securities through the brokers is for appropriately investing their funds to maximize their profits on account of such investments they cannot be said to be in relation to providing the output services. Further these activities are in nature of trading activities of the appellant and not in the nature of service. The service tax paid on the brokerage/ commission paid cannot be said to be an input service for providing the output service.

4.1 We have considered the impugned order along with the submissions made in appeal made during the course of arguments. We have also considered the submissions made by the appellants in their written submissions dated 9th October 2020 and 14th October 2020, and by the revenue in the written submissions dated 19th October 2020.

4.2 There are three issues before us for consideration in this appeal, namely,-

i. Admissibility of the CENVAT credit of the service tax paid on the insurance premium paid to DICGC.

ii. Admissibility of the CENVAT credit of the service tax paid on the commission paid to the brokers for underwriting the government securities etc and for making investments in securities to maintain mandatory SLR as per the Banking Regulation Act, 1949

iii. Penalties imposed

4.3 There is no dispute about the fact that the issue in respect of the admissibility of CENVAT Credit of the Service Tax paid on the premium paid by the bank to the DICGC, has been decided by the three member bench of this tribunal in case of South Indian Bank, referred to by the learned Counsel and Authorized Representative. Learned Authorized Representative submits that they have enquired from the concerned jurisdictional Commissioner, as to whether any appeal against this decision has been preferred by the revenue and the reply is still awaited. This decision of the larger bench has been followed by the tribunal in various decisions referred in para 3.2 above.

4.4 In respect of the admissibility of the CENVAT Credit of the service tax paid on the commission paid by the appellants to the stock brokers for various services of under writing etc, the argument advanced by the learned counsel for the appellant is that these services have been availed by them for undertaking mandated obligations as per the Reserve Bank of India or the Banking Regulation Act, 1949, and hence the service tax paid on the commission paid to the stock brokers for undertaking these statutorily mandated activities, would be admissible to them as per the decisions of the larger bench of tribunal in case of South Indian Bank referred above. They have also relied upon the decision of the Karnataka High Court in the case of PNB Metlife Insurance and CESTAT West Bench decision in the case of Reliance Industries to argue that CENVAT Credit of service tax paid by them on the stock broker services is admissible.

4.3 We find that in the case of South India Bank, larger bench of tribunal has relied upon the decision of the Karnataka High Court in case of PNB Metlife Insurance to decide upon the admissibility CENVAT Credit in respect of the service tax paid on the premium paid to DICGC. The relevant paragraphs from the decision of South India Bank are reproduced below:

"8. The Appellants herein are banking companies as defined under section 5(c) of the Banking Regulation Act, 1949. The Deposit Insurance Corporation is a subsidiary of the Reserve Bank of India and has been established under the Deposit Insurance and Credit Guarantee Corporation Act, 1961 for the purpose of insuring deposits and guarantee credit facilities. The Deposit Insurance Corporation transacts business of insuring the "deposits" accepted by the banks. It has to register every existing "banking company" as also a "new banking company" as an insured bank and the insured bank has to pay a premium to the Deposit Insurance Corporation at the rate notified by the Deposit Insurance Corporation. In the event of banking failure/winding up/ liquidation of a bank, the Deposit Insurance Corporation protects the deposits of the customers up to a maximum of Rs. 1 lakh per depositor. The banks pay service tax on this premium paid to the Deposit Insurance Corporation and avail CENVAT credit of such service tax for the "output services", which the banks provide in relation to "banking and other financial services" as defined under section 65 of the Finance Act, 1994 by treating the service rendered by the Deposit Insurance Corporation as "input service". These services provided by the banks in relation to 'banking and other financial services' are leviable to service tax as the banks do not receive consideration for the same in the form of interest. In terms of rule 6(3B) of the CENVAT Credit Rules, 2004, the banks also reverse 50% of the total CENVAT credit availed on input and input services during a particular month.

9. The banks claim that they are engaged in "accepting" deposits from the public, which deposits are used for the purpose of lending or investment and though no consideration is charged for making the deposits, but the banks thereafter provide number of services like discounting of cheques, minimum balance charges, handling charges for gold loans, locker rent and similar services, which are in relation to "banking and other financial services" and are chargeable to service tax as consideration for providing such services are not received in the form of interest. The list of services on which the banks have to pay service tax under "banking and other financial services", can be bifurcated into two categories. The first category consists of services which have a direct nexus with the activity of "accepting" deposits, while the second category consists of those services which have a direct nexus with the "lending" activity of the banks. The services under the aforesaid two categories have been stated by the banks to be as follows:

i. Direct nexus with the activity of accepting deposits.

- Charges towards issuance of Cheque book;*
- Charges to maintain minimum balance;*
- Debit Card charges;*
- Duplicate Pass Book/ Bank Statement charges.*
- Stop payment charges*
- Cheque return charges*

- Demand Draft charges

- Charges for providing bank guarantee

- Safe deposit locker facilities; etc

ii. *Direct nexus with the lending activity.*

- Processing fee towards obtaining necessary sanctions/approvals for lending money to customers;

- Documentation charges towards completing loan sanction with respect to preparing, printing and executing the various documents required post appropriate sanctions/ approvals being taken.

- Inspection charges towards compensation for the time spent in visiting and inspecting the factory/godown/other assets of the borrowers.

10. The banks claim that they have availed credit of service tax paid on "input services" such as core banking software, renting of premises of the bank, maintenance of ATMs by agencies, on which credits no dispute has been raised by the Revenue. The dispute that has been raised by the Revenue is with regard to the service provided by Deposit Insurance Corporation to the banks for insuring the deposits, which service is not considered by the Revenue as an "input service" for the reason that the activity of "accepting deposits" is not a service defined under the Finance Act and so the deposit insurance service received in relation to "accepting" of deposits would not be an "input service" under rule 2(l) of the 2004 Rules. It is for this reason that show cause notices were issued to the banks for recovery of the CENVAT credit availed by the banks on the service tax paid on insurance service received by the banks by invoking the provisions of rule 14 of the 2004 Rules.

11. A reply was submitted by the banks to the show cause notices. It was pointed out that the banks are engaged in "accepting" deposits and not "extending" the deposits and so section 66D(n) of the Finance Act would not be applicable. It was also pointed out that though no consideration was charged by the banks for "accepting" the deposits, but thereafter charges for various services rendered by the banks are recovered from the depositors, for which service tax is paid by the banks. The banks also highlighted that the payment of insurance premium would fall under the main part of the definition of "input service" since any default in making payment of this insurance premium may result in cancellation of the registration of the banks with the Deposit Insurance Corporation which could also ultimately lead to the cancellation of the licence of the banks by the Reserve Bank of India. The banks, therefore, claimed that they were justified in availing the credit of such service tax for providing "banking and other financial services" as "output services".

12. The contention of the banks in reply to the show cause notices was not accepted by the Adjudicating Officers and the demands have been confirmed. It has been found that "accepting" of deposits by the banks is not a service defined under the Finance Act and in fact is covered under the negative list of services under section 66 D(n) of the Finance Act. Thus, the "banking and other financial services" provided by the banks could not be considered as "output service" and in turn the insurance services received by the banks in relation to "accepting" of deposits would not be "input service". Insurance on deposits, it has been noted, is taken by the banks for the purpose of securing the deposits of the public and the insurance premium does not protect the actions taken consequent to the deployment of the funds mobilised by the banks through deposits. Thus, the insurance premium is linked only to the deposits accepted by the banks and has no nexus with any output service. Therefore, even if the said service is received by the banks from the Deposit Insurance Corporation to fulfil a statutory requirement, such service would not qualify as an "input service", unless the service rendered utilising such input service falls under the scope of "output service". The deposit of insurance premium could be said to be an activity relating to the business of the banks, but the "activities relating to business" of the banks have been deleted by Notification dated 1 March, 2011."

4.4 From the facts as narrated and recorded by the larger bench in its order, it is quite evident that there two separate stream of services provided by the banking companies. One stream is in relation to the deposits and the other stream is in

relation to the lending. These streams are distinctly identifiable and the law also admits the same. Even the DICGC, insures only the deposits and not the lending. That being so the "business of banking" cannot be said to be insured under the DICGC. Larger bench has in its decision referred to the statement of object and reasons, of the Deposit Insurance Act, Para 33 and 34 of the order reads as follows:

"33. The relevant provisions of the Deposit Insurance Act can now be examined;

Statement of Objects and Reasons.

"The question of establishing statutory Corporation for insuring deposits in commercial banks has been under consideration for some time.....

2. The Deposit Insurance Corporation will be established as a wholly-owned subsidiary of the Reserve Bank with a paid-up capital of a crore of rupees. It will insure all deposits in commercial banks including the State Bank and its subsidiaries,..... The premium rate will be determined by the Corporation from time to time with the previous approval of the Central Government.

3. The Corporation's liability will arise and be discharged in the event of the liquidation of a bank or the enforcement in relation to it for a scheme of compromise or arrangement or reconstruction or amalgamation. The payment due to the depositors up to the limit of the insurance cover offered by the Corporation will be made in the most convenient and expeditious manner which may be possible.

2. In this Act, unless the context otherwise requires:

(a) "banking" means the accepting, for the purpose of lending or investments, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise.

(b) "banking company" means any company which transacts the business of Banking in India and includes the State Bank, and a Subsidiary bank but does not include the Tamilnadu Industrial Investment Corporation Ltd."

(g) "deposit" means the aggregate of the unpaid balances due to a depositor (other than a foreign Government, the Central Government, a State Government, a corresponding new bank, Regional Rural Bank or a banking company or a cooperative bank) in respect of all his accounts by whatever name called, with a corresponding new bank or with a Regional Rural Bank or with a banking company or a co-operative bank and includes credit balances in any cash credit account but does not include, xxxxxxxxxxxxxx

(h) "existing banking company" means a banking company carrying on the business of banking at the commencement of this Act which either holds a licence at such commencement under section 22 of the Banking Regulation Act, 1949, or having applied for such licence has not been informed by notice in writing by the Reserve Bank that a licence cannot be granted to it and includes the State Bank and a subsidiary bank, but does not include a defunct banking company;

(k) "new banking company" means a banking company which begins to transact the business of banking after the commencement of this Act under a licence granted to it under section 22 of the Banking Regulation Act, 1949,

(l) "premium" means the sum payable by an insured bank under section 15 of this Act;

34. Sections 10, 11, 13, 15, 15A and 16 of the Deposit Insurance Act are also relevant and they are as follows:

"10. The Corporation shall register every existing banking company as an insured bank before the expiry of thirty days from the date of commencement of this Act.

11. The Corporation shall register every new banking company as an insured bank as soon as may be after it is granted a licence under section 22 of the Banking Regulation Act, 1949.

13. The registration of a banking company as an insured bank shall stand cancelled on the occurrence of any of the following events, namely:

(a) if it has been prohibited from receiving fresh deposits; or

(b) if it has been informed by notice in writing by the Reserve Bank that its licence has been cancelled under section 22 of the Banking Regulation Act, 1949 or that a licence under that section cannot be granted to it; or

(c) if it has been ordered to be wound up; or

(d) if it has transferred all its deposit liabilities in India to any other institution; or

(e) if it has ceased to be a banking company within the meaning, of sub section (2) of section 36A of the 'Banking Regulation Act, 1949, or has converted itself into a nonbanking company; or

(f) if a liquidator has been appointed in pursuance of a resolution for the voluntary winding up of its affairs; or

(g) if in respect of it any scheme of compromise or arrangement or of reconstruction has been sanctioned by any competent authority and the said scheme does not permit the acceptance of fresh deposits; or

(h) if it has been amalgamated with any other banking institution.

15. (1) Premium- Every insured bank shall, so long as it continues to be registered, be liable to pay a premium to the Corporation on its deposits at such or rates as may, with the previous approval of the Reserve Bank, be notified by the Corporation, from time to time, to the insured bank and different rates may be notified for different categories of insured banks.

15 A. Cancellation of registration of an insured bank for non-payment of premium

(1) The Corporation may cancel the registration of an insured bank if it fails to pay the premium for three consecutive periods: Provided that no such registration shall be cancelled except after giving to the concerned bank one month's notice in writing calling upon that bank to pay the amount in default.

(2) The Corporation may restore the registration of a bank whose registration has been cancelled under sub-section (1), if the concerned bank requests the Corporation to restore the registration and pays all the amounts due by way of premia from the date of default till the date of payment together with interest due thereon, on the date of payment.

Provided that the Corporation shall not restore the registration unless it is satisfied, on an inspection of the concerned bank or otherwise that it is eligible to be registered as an insured bank.

16 (1) Where an order for the winding up or liquidation of an insured bank is made, the Corporation shall, subject to the other provisions of this Act, be liable to pay to every depositor of that bank in accordance with the provisions of section 17 an amount equal to the amount due to him in respect of his deposit in that bank at the time when such order is made:

Provided that the liability of the Corporation in respect of an insured bank referred to in clause (a) or clause (b) of sub-section (1) of section (13) or clause (a) or clause (b) of section 13 C shall be limited to the deposits as on the date of the cancellation of the registration.

Provided further that the total amount payable by the Corporation to any one depositor in respect of his deposit in that bank in the same capacity and in the same right shall not exceed Rs. 1,00,000/-."

4.5 From the plain reading of the above provisions the scheme and purpose of the DICGC, is evident, and it is quite evident that such a corporation and insurance of depositor has been envisaged in law, to statutorily mitigate the risk of the depositors in making the deposits with the bank. The banking company does not operate to accept deposits but will make use of the money mobilized through the deposits, and earn profits by way of lending the money at much higher interest rates. The actual risk which banking business faces is vis a vis the lendings and not the deposits. We would find the case for non performing assets, (NPA), and when such NPA increase a bank starts going bust. So the actual risk to banking business lies in the lendings and not in the deposits. However no such statutory scheme has been envisaged for insuring the bank against the lending's. However the banks are always free to mitigate the risk involved, by asking the borrower to insure the loans advanced through a separate insurance

scheme. All these facts point that what has been insured is not the bank or the banking business, but the deposits made in the bank, by the depositors, and against that the reason why section 16(1) of the Deposit Insurance Act, provides that the corporation will be liable to pay to every depositor of that bank. Thus the manner in which the scheme operates is to mitigate the risk faced by the depositor while making the deposits with the bank and not the risk which bank or banking business incurs.

4.6 The larger bench has while deciding the case of South India Bank relied heavily on the decision of the Karnataka High Court, in case of PNB Metlife Insurance. The relevant paragraph quoting from the said decision of Karnataka High Court is reproduced below:

"59. In Commissioner of Central Excise, Bangalore vs. PNB Metlife India Insurance Co. Ltd, the issue that came up for consideration before the Karnataka High Court was whether an assessee can avail CENVAT credit of service tax paid on reinsurance services by treating the said service as an "input service". PNB Metlife India Insurance Company was carrying on life insurance business and on the insurance policy issued by it, service tax was charged from the customers. It also procured reinsurance service from overseas insurance companies and availed CENVAT credit of service tax paid on such services received by it. This CENVAT credit was denied by the Department for the reason that re-insurance service cannot be considered as an "input service" since it takes place after the insurance policy is issued. The Karnataka High Court examined whether CENVAT credit availed and utilized by the insurance company on service tax paid for re-insurance service is an "input service" for the output service of insurance that the company was providing and held that the process of issuance of the policy by the insurer and subsequent procurement of re-insurance policy from another company, which is a statutory requirement, is an integral part of the entire process and the insurance process does not come to end merely on the issuance of the insurance policy since it continues till the existence of the term of the policy. The High Court noted that since re-insurance has to be taken under section 101 A of the Insurance Act, it is a statutory obligation and, therefore, has to be considered as having nexus with the "output service" and, therefore, would be an "input service", for which CENVAT credit can be availed. The portion of the judgment of the High Court pertaining to this aspect is reproduced below:

"6. Having heard the learned counsel for the parties and in the fact of this case, we are of the opinion that the order of the Tribunal does not require any interference. Rule 2(l) of the Cenvat Credit Rules 2004 provides that 'Input Service' means service used by a provider of taxable service for providing an 'Output Service'. The submission of the learned counsel for the appellant that once the Insurance Policy is issued by the Insurer, the transaction comes to an end (and would not depend on the reinsurance policy) and as such the service provided would not come within the ambit of input service, is not worthy of acceptance. The process of issuance of an Insurance Policy by the Insurer and subsequent procurement of reinsurance policy from another company (which is a statutory requirement) is an integral part of the total process. The process of insurance does not come to an end merely on the issuance of the Insurance Policy by the Insurer. In fact, it continues till the existence of the term of the policy. The re-insurance is taken by the Insurer immediately after the insurance policy is issued, as is required under Section 101A of the Insurance Act, 1938. Since reinsurance is a statutory obligation, and the same is coterminus with the Insurance policy issued by the respondent, we are of the opinion that the stand taken by the Tribunal is correct that the transfer of a portion of the risk of the re-insurance has to be considered as having nexus with the output service, since the reinsurance is a statutory obligation and the same is coterminus with the Insurance Policy. We only reiterate that the issuance of insurance policy by insurer, and then taking of reinsurance by it, is a continuous process, and in the facts of the present case, it cannot be said that the same would not be an "input service" eligible for Cenvat credit within the meaning of Rule 2(l) of the Cenvat Credit Rules, 2004.

7. We may further add that the Service Tax is levied for certain service rendered and the provision of giving the Cenvat credit is so that there may not be double taxation. If a person has collected service tax, no doubt the same has to be

deposited, but if in the process of the same transaction he has paid some service tax, which is necessary for its business, then he is entitled to the Cenvat credit to the extent of service tax which has been paid by it. In the present case, if the entire Service Tax which is collected by the Insurer, while selling its insurance policies, has to be deposited without being given the credit of the tax which is paid by it while procuring a policy of reinsurance as (mandatorily required in law), the same would be against the ethos of Cenvat credit policy, as the same would amount to double taxation, which is not permissible in law."

4.7 From the facts, as narrated in the case of reinsurance the insurance company was mitigating its risk by seeking the insurance from the certain other foreign based insurance company. To mitigate such risk they took the insurance cover from the foreign based company, and paid the premium for obtaining such an insurance cover. The service tax paid against such insurance scheme cannot be equated with the scheme as envisaged under the Deposit Insurance Scheme, because in that case what was mitigated was the risk of the insurance company and not the insured person. Definitely for the person insured it was reinsurance but for the insurance company it was the insurance service received, and was an input service. Further the decisions rendered in the case of PNB Metlife Insurance case etc, all have been rendered much prior to the decision of the Apex Court in the case of *Dilip Kumar and Co*, wherein a five member bench of Hon'ble Apex Court has favored the strict interpretation of the fiscal statute. Even the decision of South India Bank has been passed without consideration of the said decision of Hon'ble Apex Court. Relevant paragraph from the said decision are reproduced below:

"25. We are not suggesting that literal rule de hors the strict interpretation nor one should ignore to ascertain the interplay between 'strict interpretation' and 'literal interpretation'. We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.

26. Justice G.P. Singh, in his treatise 'Principles of Statutory Interpretation' (14th ed. 2016 p. – 879) after referring to *Re, Micklethwait*, (1885) 11 Ex 452; *Partington v. A.G.*, (1869) LR 4 HL 100; *Rajasthan Rajya Sahakari Spinning & Ginning Mills Federation Ltd. v. Deputy CIT, Jaipur*, (2014) 11 SCC 672, *State Bank of Travancore v. Commissioner of Income Tax*, (1986) 2 SCC 11 and *Cape Brandy Syndicate v. IRC*, (1921) 1 KB 64, summed up the law in the following manner" A taxing statute is to be strictly construed. The well-established rule in the familiar words of LORD WENSLEYDALE, reaffirmed by LORD HALSBURY AND LORD SIMONDS, means: 'The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words. In a classic passage LORD CAIRNS stated the principle thus: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute. VISCOUNT SIMON quoted with approval a passage from ROWLATT, J. expressing the principle in the following words: "In a taxing Act one has to look merely at what is clearly said. This is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." It was further observed:

"In all tax matters one has to interpret the taxation statute strictly. Simply because

one class of legal entities is given a benefit which is specifically stated in the Act, does not mean that the benefit can be extended to legal entities not referred to in the Act as there is no equity in matters of taxation...." Yet again, it was observed:

"It may thus be taken as a maxim of tax law, which although not to be overstressed ought not to be forgotten that, "the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him", [Russel v. Scott, (1948) 2 All ER 1]. The proper course in construing revenue Acts is to give a fair and reasonable construction to their language without leaning to one side or the other but keeping in mind that no tax can be imposed without words clearly showing an intention to lay the burden and that equitable construction of the words is not permissible [Ormond Investment Co. v. Betts, (1928) AC 143]. Considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity [Mapp v. Oram, (1969) 3 All ER 215]. It has also been said that if taxing provision is "so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect [IRC v. Ross and Coutler, (1948) 1 All ER 616]." Further elaborating on this aspect, the learned author stated as follows:

"Therefore, if the words used are ambiguous and reasonable open to two interpretations benefit of interpretation is given to the subject [Express Mill v. Municipal Committee, Wardha, AIR 1958 SC 341]. If the Legislature fails to express itself clearly and the taxpayer escapes by not being brought within the letter of the law, no question of unjustness as such arises [CIT v. Jalgaon Electric Supply Co., AIR 1960 SC 1182]. But equitable considerations are not relevant in construing a taxing statute, [CIT, W.B. v. Central India Industries, AIR 1972 SC 397], and similarly logic or reason cannot be of much avail in interpreting a taxing statute [Azam Jha v. Expenditure Tax Officer, Hyderabad, AIR 1972 SC 2319]. It is well settled that in the field of taxation, hardship or equity has no role to play in determining eligibility to tax and it is for the Legislature to determine the same [Kapil Mohan v. Commr. of Income Tax, Delhi, AIR 1999 SC 573]. Similarly, hardship or equity is not relevant in interpreting provisions imposing stamp duty, which is a tax, and the court should not concern itself with the intention of the Legislature when the language expressing such intention is plain and unambiguous [State of Madhya Pradesh v. Rakesh Kohli & Anr., (2012) 6 SCC 312]. But just as reliance upon equity does not avail an assessee, so it does not avail the Revenue." The passages extracted above, were quoted with approval by this Court in at least two decisions being Commissioner of Income Tax vs. Kasturi Sons Ltd., (1999) 3 SCC 346 and State of West Bengal vs. Kesoram Industries Limited, (2004) 10 SCC 201 [hereinafter referred as 'Kesoram Industries Case' for brevity]. In the later decision, a Bench of seven Judges, after citing the above passage from Justice G.P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute:

"(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency; (ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly".

27. Now coming to the other aspect, as we presently discuss, even with regard to exemption clauses or exemption notifications issued under a taxing statute, this Court in some cases has taken the view that the ambiguity in an exemption notification should be construed in favour of the subject. In subsequent cases, this Court diluted the principle saying that mandatory requirements of exemption clause should be interpreted strictly and the directory conditions of such exemption notification can be condoned if there is sufficient compliance with the main requirements. This, however, did not in any manner tinker with the view that an ambiguous exemption clause should be interpreted favouring the revenue. Here again this Court applied different tests when considering the ambiguity of the exemption notification which requires strict construction and after doing so at the

stage of applying the notification, it came to the conclusion that one has to consider liberally.

28. With the above understanding the stage is now set to consider the core issue. In the event of ambiguity in an exemption notification, should the benefit of such ambiguity go to the subject/assessee or should such ambiguity should be construed in favour of the revenue, denying the benefit of exemption to the subject/assessee? There are catena of case laws in this area of interpretation of an exemption notification, which we need to consider herein. The case of *Commissioner of Inland Revenue vs. James Forrest*, [(1890) 15 AC 334 (HL)] – is a case which does not discuss the interpretative test to be applied to exemption clauses in a taxation statute – however, it was observed that 'it would be unreasonable to suppose that an exemption was wide as practicable to make the tax inoperative, that it cannot be assumed to have been in the mind of the Legislature' and that exemption 'from taxation to some extent increased the burden on other members of the community'. Though this is a dissenting view of Lord Halsbury, LC, in subsequent decisions this has been quoted vividly to support the conclusion that any vagueness in the exemption clauses must go to the benefit of the revenue. Be that as it is, in our country, at least from 1955, there appears to be a consistent view that if the words in a taxing statute (not exemption clause) are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and it does not matter if the taxpayer escapes the tax net on account of Legislatures' failure to express itself clearly (See the passage extracted hereinabove from *Kesoram Industries Case* (supra)).

29. The first case with which we need to concern ourselves is the case in *Union of India v. The Commercial Tax Officer, West Bengal and Ors.*, AIR 1956 SC 202. It may be noted that this case was dealt with by five learned Judges of this Court resulting in two different opinions; one by the then Chief Justice of India, S.R. Das for the majority, and Justice B.P. Sinha (as His Lordship then was) rendering minority view. The question before this Court was whether the sale of goods made by one private mill to the Government of India, Ministry of Industries and Supplies were to be deducted as taxable turnover of the mill for the exemption given under Section 5 of the Bengal Finance (Sales Tax) Act, 1941 (Bengal Act VI of 1941). The exemption under Section 5(2)(a)(iii) of the Bengal Finance (Sales Tax) Act, 1941 provided for exemption 'to sales to the Indian Stores Department, the Supply Department of the Government of India, and any railway or water transport administration'. The Court was to interpret the aforesaid provision in order to ascertain whether the sale to the Government of India, Ministry of Industries and Supplies would be covered under the Section.

30. The majority was of the view that the Government of India, Ministry of Industries and Supplies was not similar to those mentioned in the exemption notification. The majority extensively relied on the history and origin of Ministry of Industries and Supplies and concluded that the functions of the aforesaid Ministry were different from the erstwhile departments mentioned under the exemption provision. The majority reasoned that the exemption being the creation of the statute itself, it should have to be construed strictly and the interpretation cannot be extended to sales to other departments. We might find some clue as to the content of a strict construction also. It was canvassed before the Court that the object of Section 5(2)(a)(iii) of the relevant statute, was to give exemption not to the particular departments but to the sale of such goods to those departments and, therefore, sale of those goods made to any Departments of the Government of India, which came to be charged with the duty of purchasing those goods should also come within the purview of the exemption. The Court while repelling the aforesaid interpretation, reasoned as under:

"We are unable to accept this line of reasoning. This interpretation will unduly narrow the scope and ambit of the exemption by limiting it to sales of only those goods as, at the date of the Act, used to be sold to those two departments and sales of other goods even to those two departments, however necessary for the prosecution of the war, would not get benefit of the exemption. Such could not possibly be the intention of the Legislature as expressed by the language used by it in framing the Section."

31. The aforesaid placitum is suggestive of the fact that the Courts utilized the rule

of strict interpretation in order to decipher the intention of the Legislature and thereafter provide appropriate interpretation for the exemption provided under the provisions of the Act which was neither too narrow nor too broad. It may be noted that the majority did not take a narrow view as to what strict interpretation would literally mean; rather they combined legislative intent to ascertain the meaning of the statute in accordance with the objective intent of the Legislature.

32. On the contrary, the minority opinion of Justice B.P. Sinha (as His Lordship then was) provided a purposive interpretation for Section 5(2)(a)(iii) of the Act, which is clear from the following passage:

"The judgment under appeal is based chiefly on the consideration that the exemption clause in question does not in terms refer to the newly created department which now goes by the name of the Ministry of Industry and Supply. But this department in so far as it deals with industry, is not concerned with the main purchasing activities of the Government of India. The exemption was granted in respect of the purchasing activity of the Government of India and that function continues to be assigned to the Supply Department which has now become a wing of the newly created department of the Government. The question therefore arises whether in those circumstances the Government of India could claim the benefit of the exemption. The High Court in answering that question in the negative has gone upon mere nomenclature. It has emphasized the change in the name and overlooked the substance of the matter."

33. The minority construed 'strict interpretation' to be an interpretation wherein least number of "determinates in terms of quantity" would fall under the exemption. The minority referred to an old English case of *Commissioner of Inland Revenue v. James Forrest*, (1890) 15 AC 334. It may be relevant to note that the minority could not find the justification to apply strict interpretation as the exemption notification was broad enough to include exemptions for commodities purchased by the Government of India. The Court was of the opinion that the strict interpretation provided by the majority was uncalled for as there was no additional burden on others by giving such exemptions. The relevant observations are as follows" The High Court referred to the observations of Lord Halsbury in the case of *Commissioner of Inland Revenue v. James Forrest* (1890) 15 AC 334, to the effect that exemptions from taxation should be strictly construed because otherwise the burden of taxation will fall on other members of the community. Those observations, in my opinion, have no relevance to the facts and circumstances of the present controversy, because we know that the exemption was granted to the Government of India in the department dealing with purchase of certain commodities and articles without reference to quantity. As already pointed out, the Indian Stores Department was concerned with purchase of stores for public services on behalf of all Central Departments of Government and local Government, etc., and the Government of Bengal as then constituted was one of the provinces of India which have been receiving subsidies and subventions to make up the deficit in their budgets. As a matter of fact, as stated on behalf of the Bengal Government the concession was granted in order to enable business communities within the province of Bengal to compete on favourable terms with others outside Bengal in the matter of supplying the needs of the Government. Hence, there is no question of liberal construction of the exemption resulting in throwing a greater burden on other citizens. On the other hand, the larger the sales in the province of Bengal as it used to be, the greater the benefit to the business community doing business within that province. It was therefore stated at the Bar that though the present case involved taxes amounting to less than Rs.10,000, the question arising for determination in this case affected much larger amounts because such sales within the province amounted to several crores. I should have thought that the business community in the province of Bengal having had the advantage of the transactions of sale, the Government of Bengal in all fairness should have allowed the purchasing agency of the Government of India the benefit of the exemption until that benefit was in terms withdrawn sometimes in the beginning of 1949."

34. In *Hansraj Gordhandas v. H.H. Dave*, Asst. Collector of Central Excise & Customs, Surat and Ors., AIR 1970 SC 755 = (1969) 2 SCR 253 [hereinafter referred as 'Hansraj Gordhandas Case' for brevity], wherein this Court was called upon to interpret an exemption notification issued under the Central Excise Act. It would be relevant to understand the factual context which gave rise to the

aforesaid case before the Court. The appellant was sole proprietor who used to procure cotton from a cooperative society during the relevant period. The society had agreed to carry out the weaving work for the appellant on payment of fixed weaving charges at Re.0.19 np. per yard which included expenses the society would have to incur in transporting the aforesaid cotton fabric. In the years 1959 and 1960, the Government issued an exemption notification which exempted cotton fabrics produced by any cooperative society formed of owners of cotton power looms, registered on or before 31st March, 1961. The question before the Court was whether the appellant who got the cotton fabric produced from one of the registered cooperative society was also covered under the aforesaid notification. It may be of some significance that the revenue tried to interpret the aforesaid exemption by relying on the purposive interpretation by contending that the object of granting the above exemption was to encourage the formation of cooperative societies which not only produced cotton fabrics but also consisted of members, not only owning but having actually operated not more than four power looms during the three years immediately preceding their having joined the society. The policy was that instead of each such member operating his looms on his own, he should combine with others by forming a society to produce clothes. It was argued that the goods produced for which exemption could be claimed must be goods produced on his own and on behalf by the society. The court did not countenance such purposive interpretation. It was held that a taxing legislation should be interpreted wholly by the language of the notification. The relevant observations are:

"It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the taxpayer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different, but that is not the case here. In this connection we may refer to the observations of Lord Watson in *Salomon vs. Salomon & Co.*, (1897) AC 22):

'Intention of the Legislature is a common but very slippery phrase, which, popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.' It is an application of this principle that a statutory notification may not be extended so as to meet a *casus omissus*. As appears in the judgment of the Privy Council in *Crawford v. Spooner*.

'... we cannot aid the Legislature's defective phrasing of the Act, we cannot add, and mend, and, by construction, make up deficiencies which are left there.' Learned Counsel for the respondents is possibly right in his submission that the object behind the two notifications is to encourage the actual manufacturers of handloom cloth to switch over to power looms by constituting themselves in cooperative Societies. But the operation of the notifications has to be judged not by the object which the rule making authority had in mind but by the words which it has employed to effectuate the legislative intent."

35. In the judgment of two learned Judges in *Union of India v. Wood Papers Limited*, (1990) 4 SCC 256 [hereinafter referred as '*Wood Papers Ltd. Case*' for brevity], a distinction between stage of finding out the eligibility to seek exemption and stage of applying the nature of exemption was made. Relying on the decision in *Collector of Central Excise vs. Parle Exports (P) Ltd.*, (1989) 1 SCC 345, it was held "Do not extend or widen the ambit at the stage of applicability. But once that hurdle is crossed, construe it liberally". The reasoning for arriving at such conclusion is found in para 4 of *Wood Papers Ltd. Case* (supra), which reads "... Literally exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, specially, in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective etc. That is why its construction, unlike charging provision, has to be tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is

construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principles requires it to be construed strictly. Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject, but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction..." **(emphasis supplied)**

36. In *Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commissioner of Commercial Taxes*, (1992) Supp. 1 SCC 21 [hereinafter referred as 'Mangalore Chemicals Case' for brevity], the facts of the case were that the State Government issued a notification in exercise of power under Section 8A of the Karnataka Sales Tax Act, 1957, providing certain incentives to entrepreneurs starting new industries in the State pursuant to State's policy for "rapid industrialization". The notification contains a package of reliefs and incentives including one concerning relief from payment of sales tax with which the case was concerned. There was no dispute that the appellant was entitled to the benefit of the Notification dated June 30, 1969. There was also no dispute that the refunds were eligible to be adjusted against sales tax payable for respective years. The only controversy was whether the appellant, not having actually secured the "prior permission" would be entitled to adjustment having regard to the words of the Notification of August 11, 1975, that "until permission of renewal is granted by the Deputy Commissioner of Commercial Taxes, the new industry should not be allowed to adjust the refunds". The contention of the appellants therein was that the permission for the three years had been sought well before the commencement of the respective years but had been withheld for reasons which were demonstrably extraneous. Therefore, contention was that if, in these circumstances, the Deputy Commissioner could withhold the permission.

37. This Court while accepting the interpretation provided by the appellant, observed on the aspect of strict construction of a provision concerning exemptions as follows:

"... There is support of judicial opinion to the view that exemptions from taxation have a tendency to increase the burden on the other unexempted class of tax payers and should be construed against the subject in case of ambiguity. It is an equally well known principle that a person who claims an exemption has to establish his case.

... The choice between a strict and a liberal construction arises only in case of doubt in regard to the intention of the legislature manifest on the statutory language. Indeed, the need to resort to any interpretative process arises only where the meaning is not manifest on the plain words of the statute. If the words are plain and clear and directly convey the meaning, there is no need for any interpretation. It appears to us the true rule of construction of a provision as to exemption is the one stated by this Court in *Union of India v. Wood Papers Ltd.* [(1990) 4 SCC 256 = 1990 SCC (Tax) 422 = JT (1991) SC 151]" Three important aspects which comes out of the discussion are the recognition of horizontal equity by this court as a consideration for application of strict interpretation, subjugation of strict interpretation to the plain meaning rule and interpretation in favour of exclusion in light of ambiguity.

38. We will now consider another Constitution Bench decision in *Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal*, (2011) 1 SCC 236 [hereinafter referred as 'Hari Chand Case' for brevity]. We need not refer to the facts of the case which gave rise to the questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question, viz., whether manufacturer of a specified final product falling under Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of excise duty on specified intermediate goods as per the Central Government Notification dated 11.08.1994, if captively consumed for the manufacture of final product on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with

procedure set out in Chapter 10 of the Central Excise Rules, 1994, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in *Hansraj Gordhandas Case* (supra), to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows "The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the noncompliance of which would not affect the essence or substance of the notification granting exemption."

39. The Constitution Bench then considered the doctrine of substantial compliance and "intended use". The relevant portions of the observations in paras 31 to 34 are in the following terms –

"31. Of course, some of the provisions of an exemption notification may be directory in nature and some are mandatory in nature. A distinction between the provisions of a statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished... Doctrine of substantial compliance and "intended use"

32. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequential aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if a clear statutory prerequisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the Court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed.

33. A fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance with an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the noncompliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive noncompliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted.

34. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance with those factors which are considered as essential."

40. After considering the various authorities, some of which are adverted to above, we are compelled to observe how true it is to say that there exists unsatisfactory state of law in relation to interpretation of exemption clauses. Various Benches which decided the question of interpretation of taxing statute on one hand and exemption notification on the other, have broadly assumed (we are justified to say this) that the position is well settled in the interpretation of a taxing statute: It is the law that any ambiguity in a taxing statute should endure to the benefit of the subject/assessee, but any ambiguity in the exemption clause of exemption notification must be conferred in favour of revenue – and such exemption should be allowed to be availed only to those subjects/assesses who demonstrate that a case for exemption squarely falls within the parameters enumerated in the notification and that the claimants satisfy all the conditions precedent for availing exemption. Presumably for this reason the Bench which decided *Surendra Cotton Oil Mills Case* (supra) observed that there exists unsatisfactory state of law and the Bench which referred the matter initially, seriously doubted the conclusion in *Sun Export Case* (supra) that the ambiguity in an exemption notification should be interpreted in favour of the assessee.

41. After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State."

4.8 Thus the provisions of the Finance Act, 1994 and the CENVAT Credit Rules 2004 should be considered in the light of the said the principles of interpretation as laid down by the Apex Court in the above referred decision. In our view by extending the benefit by referring to insurance of the bank, and the banking business, may not be the justified approach as per this decision. In our view the matter needs reconsideration, in light of this decision of the Hon'ble Apex Court.

4.9 Since we are unable to agree with the interpretation given to the legal provisions specifically on the point that in respect of the admissibility of CENVAT Credit of the service tax on the services received for fulfilling statutory obligations by the three-member bench in the case of *South India Bank*, the matter needs to be referred to President for constituting a larger bench to clarify the issues in this regard. Hon'ble Supreme Court has in the case of *Paras Laminates* [1990 (49) ELT 322] held

"9. It is true that a Bench of two members must not lightly disregard the decision of another Bench of the same Tribunal on an identical question. This is particularly true when the earlier decision is rendered by a larger Bench. The rationale of this rule is the need for continuity, certainty and predictability in the administration of justice. Persons affected by decisions of Tribunals or Courts have a right to expect that those exercising judicial functions will follow the reason or ground of the judicial decision in the earlier cases on identical matters. Classification of particular goods adopted in earlier decisions must not be lightly disregarded in subsequent decisions, lest such judicial inconsistency should shake public confidence in the administration of justice. It is, however, equally true that it is vital to the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings bring to light what is perceived by them as an erroneous decision in the earlier case. In such circumstances, it is but natural and

reasonable and indeed efficacious that the case is referred to a larger Bench. This is what was done by the Bench of two members who in their reasoned order pointed out what they perceived to be an error of law in the earlier decision and stated the points for the President to make a reference to a larger Bench. That the President has ample power to refer a case to a larger Bench is not in doubt in view of sub-section (5) of section 129-C, which we have set out above. That provision clearly says that in the event of the members of a Bench differing in opinion on any point, and the members are equally divided, the case shall be referred to the President for hearing on any such point by one or more of the members of the Tribunal, and such point shall be decided according to the opinion of the majority of the members. It is true that sub-section (5) refers to difference of opinion arising amongst members of a Bench in a particular case, and not specifically where the members of a Bench doubt the correctness of an earlier decision. However, section 129-C confers power of reference upon the President. That power should be construed to be wide enough to enable the President to make a reference where members of a Bench find themselves unable to decide a case according to what they perceive to be the correct law and fact because of an impediment arising from an earlier decision with which they cannot honestly agree. In such cases, it is necessary for the healthy functioning of the Tribunal that the President should have the requisite authority to refer the case to a larger Bench. That is a power which is implied in the express grant authorizing the President to constitute Benches of the Tribunal for effective and expeditious discharge of its functions.

10. In our view, the Bench of two members acted within their power in stating the points of law which required clarification and the President acted equally within the bounds of his power in constituting larger Bench to hear and decide those points."

4.10 Following this decision of Hon'ble Supreme Court, in case of *Asia Brown Boveri Ltd* [2000 (120) ELT 228 Tri Del], a five member bench of this tribunal held as follows:

"5. As regards the constitution of the Larger Bench by the Hon'ble President pursuing the referral order, ld. Counsel had pointed out that inasmuch as the Tribunal decision in *M/s. American Auto Services* (supra) being a decision of a Larger Bench consisting of three members, the same was binding on the other Benches of the Tribunal and to the extent the referral order had recommended to the Hon'ble President the constitution of a Larger Bench to resolve a divergence of opinion between a three Member Bench and a Single Member Bench was not a proper and legal order and the order of the Hon'ble President constituting a five Member Bench to determine the difference of opinion between a three Member Bench and a Single Member Bench was beyond the competence of the Hon'ble President. In response to queries from the Bench ld. JDR, Shri S. Srivastava submitted that there was no bar to a Single Member Bench doubting the correctness of an earlier decision of the Tribunal even if that decision was rendered by a Bench consisting of a larger number of Members than the Bench doubting the correctness of the earlier decision. In this connection, he relied on the observations of the Apex Court in *Union of India v. Paras Laminates (P) Ltd.* reported in 1990 (49) E.L.T. 322 at Paras 9 to 12 thereof. He submitted that in terms of Section 129C(5) of the Customs Act, 1962, where the Members of a Bench of the Tribunal differed in opinion on a point the point, it is to be decided according to the opinion of the majority. If there was no majority of the Members and if the Members were equally divided, they should state the point or points on which they differed and make a reference to the Hon'ble President who may either hear the point or points himself or refer the case for hearing of such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of the Members who have heard the case, including those who first heard it. Ld. JDR submitted that under Section 129C(5) the Hon'ble President was competent to hear the point himself or refer the matter for hearing by one or more of the other Members of the Tribunal. He underlined the fact that the Hon'ble President himself had the power to hear the point or points and decide the matter himself. Alternatively, he could also refer the point or points to be heard by one or more of the other Members of the Tribunal. Reliance was also placed on the observations of the Apex Court in *Paras Laminates* case (supra) in which it has been observed that it was vital to the administration of the justice that those

exercising judicial powers must have necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings brought to light what is perceived by them as erroneous decision in an earlier case. In such cases, it was reasonable and efficacious that the case is referred to a Larger Bench. In the Paras Laminates case, a two Member Bench had doubted the correctness of a decision of an earlier Bench consisting of three Members and reference to a Larger Bench made by the Hon'ble President was upheld by the Apex Court in the said judgment. Following the ratio of the said judgment, Id. JDR submitted that there was no legal infirmity in the referral order nor in the constitution of the present Larger Bench of five Members to hear the divergence of opinion between the three Member Bench decision in the American Auto Services case and the Single Member Bench decision in Chandigarh Bottling Co. case. In this connection, he also relied on the Supreme Court decision in Bengal Immunity Co. case reported in AIR 1955 661 (S.C).

6. On a consideration of submissions made by both the sides and the case law relied on by the Departmental representative, we note that the Apex Court judgment in Paras Laminates case has examined both the aspects, viz., (a) the competence of one Bench of the Tribunal to differ from the view taken by another Bench of the Tribunal and (b) the power of the Hon'ble President to constitute and refer a case to a Larger Bench a matter where Members of the Bench differ in opinion on any point and to refer such a case to one or more Members of the Tribunal. It has been observed in Paragraph 11 of the said judgment that Section 129C confers the power of reference upon the Hon'ble President and the power should be construed to be wide enough to enable the Hon'ble President to make a reference where Members of a Bench find themselves unable to decide a case according to what they perceive to be the correct law and fact because of the impediment of an earlier decision with which they cannot honestly agree. The Apex Court had stated: "In such cases, it is necessary for the healthy functioning of the Tribunal that the President should have the requisite authority to refer the case to a Larger Bench. That is the power which is implied in the express grant authorizing the President to constitute Benches of the Tribunal for effective and expeditious discharge of its functions".

7. Respectfully following the ratio of the aforesaid judgment we find no infirmity in the Single Member Bench in Chandigarh Bottling case not following the three Member Bench decision in American Auto Service case, though we also at the same time fully reiterate and emphasise the observation of the Apex Court in Para 9 of the Paras Laminates case stating that a two Member Bench must not lightly disregard the decision of another Bench of the Tribunal on an identical question particularly when the earlier decision is rendered by a Larger Bench in the interest of continuity, certainty and predictability in the administration of justice. For the same reason we find also no infirmity in the order of the Hon'ble President in referring the present issue to this Larger Bench."

4.11 In view of the decisions as above we refer the matter to Hon'ble President for referring the matter to larger bench, for resolving the issues as follows:

a. Whether the interpretation of the legal provisions contained in Section 65 and 66 of the Finance Act, 1994 made in the decision of the CESTAT, in case of South India Bank, satisfy to the test laid down by the five member bench of Hon'ble Supreme Court in case of Dilip Kumar and Co, referred above.

b. Whether the CENVAT credit of the Service Tax paid on the services availed to fulfill a statutory obligation, should be admissible even if the services availed do not otherwise qualify to be input services as defined under rule 2(k) of the CENVAT Credit Rules, 2004 as amended.

c. Whether Rule 6(3B), of the CENVAT Credit Rules, 2004, is an authority for the banks to claim the credit in respect of all the services without establishing that the services under consideration are the common input services for providing the exempted and taxable services.

(Order pronounced in the open court on 02.11.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, MUMBAI**

[COURT NO. I]

COMMISSIONER OF CUSTOMS & GST, MUMBAI WEST

Versus

JUHU BEACH RESORT LTD.

Final Order No. A/86832/2019, dated 3-10-2019 in Appeal No. ST/87076/2019

REPRESENTED BY: Shri Onil Shivadikar, AC (AR), for the Appellant.
Shri Chirag Shetty, Advocate, for the Respondent.

CORAM: Hon'ble Dr. D.M. Misra, Member (J)
Hon'ble Shri Sanjiv Srivastava, Member (T)

[Order per : D.M. Misra, Member (J)]. –

Heard both sides and perused the records.

2. Briefly stated the facts of the case are that during the course of investigation, the appellants had deposited an amount of Rs. 50 lakhs. On completion of investigation, a show cause notice was issued, demanding duty of Rs. 6.23 crores, which on adjudication, was reduced to Rs. 5.11 crores and the amount of Central Excise duty paid during the course of investigation, has been appropriated. Considering the said amount, this Tribunal directed to deposit further amount of Rs. 1.50 crores while disposing their application under Section 35F of Central Excise Act, 1944. Aggrieved by the said order, they filed an appeal before the Hon'ble Bombay High Court and Order dated 19-3-2009, the Hon'ble Bombay High Court directed to execute a bank guarantee for the sum of Rs. 1.50 crores. After hearing their appeal finally, this Tribunal vide Order No. A/85566-85568/2018, dated 7-3-2018, allowed the appeals by way of remand to the lower authority for *de novo* adjudication. Consequently, the appellants filed the refund claim of the deposited amount of Rs. 50.00 lakhs on 24-8-2018 and the same was sanctioned on 16-10-2018 without allowing interest on the same. Aggrieved by the said order, the appellants preferred an appeal before the Learned Commissioner (Appeals). The Learned Commissioner (Appeals), allowing their appeal, directed the Revenue to pay interest from 2-1-2008 to the date of refund of pre-deposit. Hence, the Revenue is in appeal.

3. It is the contention of the Revenue that the Learned Commissioner (Appeals) has failed to appreciate the provision of Section 35FF of Central Excise Act, 1944 as was in existence, on the date the pre-deposit was made. In the amended Section 35FF of Central Excise Act, 1944, the amount deposited prior to the date of amendment i.e. 6-8-2014 has been stated to be governed under the earlier provisions. Thus, the Learned Commissioner (Appeals) has erred in directing payment of interest from 2-1-2008 i.e. the date when the Tribunal granted stay subject to the deposit of the said amount.

4. The Learned Advocate for the respondent reiterates the findings of the Learned Commissioner (Appeals).

5. We have carefully considered the submissions advanced by both sides and perused the records. The short issue involved in the present appeal is whether interest is payable on the pre-deposit made by the appellant pursuant to the order of the Tribunal dated 2-1-2008. It is not in dispute that while disposing their application under Section 35F of Central Excise Act, 1944, this Tribunal, on 2-1-2008 directed them to deposit Rs. 2 crores, of which Rs. 50.00 lakhs was already deposited, hence took into consideration the said deposit. The contention of the respondent that on disposal of the appeal by CESTAT in their favour, they are entitled to interest on refund of pre-deposit amount from the date of the stay order. Revenue's contention, on the other hand, that as per existing provision i.e. Section 35FF of Central Excise Act, 1944, the interest on pre-deposit is

admissible only from the date, on expiry of 3 months consequent to the order of the Appellate authority in terms of Section 11BB of Central Excise Act, 1944. It is their further contention that the amended Section 35FF brought into force w.e.f. 6-8-2014 and the amount deposited under Section 35FF prior to the said date, continued to be governed under the existing provisions of Section 35FF of Central Excise Act, 1944 as it stood before the commencement of the said Act i.e. 6-8-2014. To appreciate the true scope of the said provisions, both are reproduced below :-

Before 6-8-2014 :

35FF. Interest on delayed refund of amount deposited under the proviso to Section 35F.-

Where the amount deposited by the Appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal (hereinafter referred to as the appellate authority), under the first proviso to Section 35F, is required to be refunded consequent upon the order of the Appellate authority and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in Section 11BB after the expiry of three months from the date of communication of the order of the appellate authority, till the date of refund of such amount.

From 6-8-2014 :

35FF. Interest on delayed refund of amount deposited under the proviso to Section 35F. -

Where the amount deposited by the appellant under Section 35F is required to be refunded consequent upon the order of the appellate authority, there shall be paid to the appellant interest at such rate, not below five per cent and not exceeding thirty-six per cent per annum as is for the time being, fixed by the Central Government, by notification in the Official Gazette, on such amount from the date of payment of the amount till the date of refund of such amount.

Provided that the amount deposited under Section 35F, prior to the commencement of the Finance (No. 2) Act, 2014, shall continue to be governed by the provisions of Section 35FF as it stood before the commencement of the said Act.

6. A plain reading of aforesaid provisions makes it clear that the appellants are entitled to interest from the date only after expiry of 3 months from the date of communication of the order i.e. in the present case from 17-3-2019. Consequently, the impugned order is modified and for calculation of the interest on the refund amount, the matter is remanded to the Adjudicating authority. Revenue's appeal is partly allowed.

(Operative part of the order pronounced in the open Court)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

Service Tax Appeal No. 40793 of 2019
(Arising out of Order-in-Appeal No. 130/2019-ST dated 06.03.2019 passed by
the Commissioner of G.S.T. & Central Excise (Appeals), Coimbatore, Circuit
Office at Salem, No. 1, Foulke's Compound, Anai Road, Salem - 636 001)

Decided On: 13.11.2019

TAFE Reach Ltd.
Vs.
The Commissioner of G.S.T. & Central Excise, Salem Commissionerate

Hon'ble Judges/Coram:

P. Dinesha, Member (J)

Counsels:

For Appellant/Petitioner/Plaintiff: N. Viswanathan, Advocate

For Respondents/Defendant: Sridevi Taritla, Authorized Representative

ORDER

P. Dinesha, Member (J)

1. The appellant is a registered Authorized Service Station ('ASS' for short) rendering services relating to repair and maintenance of TATA brand of motor vehicles. There is no dispute that the appellant is discharging its Service Tax on the taxable value of the above services rendered by them.

2.1. The appellant, in the course of its service, claims to have sold engine oil, coolants, etc., apart from replacement of worn-out parts when required. It is the case of the appellant that they do not independently sell any of the above items to any other customer at their work shop; that the same are exclusively used while rendering the taxable service. It is also a matter of record that upon completion of the service undertaken, the appellant raised a common invoice containing the value of the service portion and also the value of the material/consumable portion used in providing their services; that they paid Service Tax on the value of services rendered and also paid VAT on the consumables used/sold, as required under the respective State Act.

2.2. In view of the above facts, the dispute that has led to the present appeal is - "whether the appellant was required to reverse the proportionate common input service tax credit availed by them in respect of Telephone and Renting of Immovable Property Service as per Rule 6(3) of the CENVAT Credit Rules, 2004 since the consumables sold by the appellant while rendering service was alleged to be a trading activity which is an exempted service from April 2011?" Show Cause Notice came to be issued, to which the appellant filed its effective reply which culminated in the confirmation of demand vide Order-in-Original No. 05/2018 dated 26.04.2018. Thereupon, the same was also upheld by the Ld. First Appellate Authority vide impugned Order-in-Appeal dated 06.03.2019.

3. When the matter was taken up for hearing, Shri. N. Viswanathan, Ld. Advocate, appeared for the assessee-appellant and Ms. Sridevi Taritla, Ld. Joint Commissioner (Departmental Representative) appeared for the Revenue.

4. Facts are not in dispute.

5.1. Ld. Advocate for the appellant vehemently contended that the authorities below were not correct in treating the consumables sold while rendering services under ASS as trading activity since the authorities failed to appreciate the crucial differences between a conventional trading activity as opposed to the sale of consumables in the present case.

5.2. He further submitted that the primary and only activity of the appellant was servicing of cars and that it is only during the course of rendering such service, if needed, they would use engine oil, coolants as top-up and/or worn-out parts were also replaced; that the same was not provided independently to any buyer/customer. This, according to the Ld. Advocate, amounted to the rendering of a bundled service with repair and maintenance being predominant; that the same is not complete without the use of consumables. Therefore, the supply of the above consumables was only incidental to the provision of service which could not be segregated.

5.3. Ld. Advocate placed reliance on the C.B.E.C. Circular No. 699/15/2003-CX : MANU/EXCR/0050/2003 dated 05.03.2003 in his support. He also relied on the decision of the Hon'ble jurisdictional High Court in the case of Commr. of C.Ex., Salem Vs. M/s. Salem Co-operative Sugar Mills Ltd. reported in 2014 (35) S.T.R. 450 (Mad.).

6.1. Per contra, Ld. A.R. for the Revenue supported the findings of the lower authorities. She submitted that trading activity was specifically brought within the ambit of "exempted service" under Rule 2(e) of the CENVAT Credit Rules, 2004 and as such, Rule 6 of the CENVAT Credit Rules was made applicable whereby the appellant was required to reverse the proportionate CENVAT Credit availed on the input services in respect of the exempted service, i.e., the trading activity.

6.2. She further submitted that the assessee, however, had followed the above procedure from 01.04.2014 onwards and also reversed the proportionate input service credit attributable to the exempted service, which would prove the Revenue's case as to the appellant's liability even for the earlier period.

6.3. Ld. A.R. relied on the decision of the Hon'ble Delhi High Court in the case of M/s. Lally Automobiles Pvt. Ltd. Vs. Commissioner (Adjudication), C.Ex. reported in MANU/DE/2610/2018 : 2018 (17) G.S.T.L. 422 (Del.).

7. In reply, Ld. Advocate submitted that the period involved is from 2012-13 to 2015-16; the Show Cause Notice issued in 2017 (dated 27.07.2017) is clearly beyond the normal period, which in the absence of suppression, fraud, etc., cannot be sustained. He further submitted that the appellant did not take any credit of the input duty on such consumables used/sold by them and therefore, for the above reasons, the allegation as to treating the appellant's service as trading, which is exempt, requiring the appellant to reverse the common input service tax credit availed is not correct and proper and hence, the same is liable to be set aside.

8. I have heard the rival contentions, perused the documents placed on record and also gone through the decisions/orders referred to during the course of arguments.

9.1. The C.B.E.C. Circular No. 699/15/2003-CX : MANU/EXCR/0050/2003 (supra), relied upon by the appellant, has clarified the issue regarding Service Tax on Authorized Service Station during the course of providing service, wherein such ASS replaces engine oil, gear oil, coolants, etc., as per the request of the customer, in the following manner:

"Subject: Clarification regarding service tax on authorised service station.

.....

.

.

.

2. During the course of providing service, an authorised service station also replaces engine oil, gear oil and coolants, etc. as per the request of the customer. The price charged by authorised service station for engine oil, gear oil, and coolants is towards sale of these consumables to the customer. Therefore, the sale of consumable during the course of providing service is akin to sale of parts and accessories and therefore value of such consumables is not includible in the value of taxable services, provided value of such consumables is shown separately."

9.2. The law underwent a change with effect from 20.06.2012 with the inclusion of 'exempted service' under Rule 2(e) of the CENVAT Credit Rules, 2004, which under its ambit covered trading of goods. The above Circular dated 05.03.2003 is therefore issued much earlier, obviously without having the benefit of the subsequent development.

9.3. The Hon'ble High Court of Delhi in the case of M/s. Lally Automobiles Pvt. Ltd. (supra) has dealt with a somewhat similar issue. Following are the relevant paragraphs:

"...14. It was submitted that in this case, the assessee was engaged in trading activities in common premises. Those activities were not subjected to service tax, as they involved distribution, sale or vending of goods. The question of any such activity being "exempt" on account of the 2011 amendment Rules, does not arise. The amendment only stated the obvious. However, that did not mean that trading was subject to service tax. If any activity was not subjected to that levy, the question of claiming any credit in respect of it could never arise. The Revenue submitted that in this background, the assessee's claim that the extended period of limitation could not be invoked, is unsustainable.

Analysis and conclusions

15. Rule 6(2) of the Cenvat Credit Rules, is extracted below:

"Where a manufacturer or provider of output service avails of Cenvat credit in respect of any inputs or input services, /***/, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take Cenvat credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable."

16. Therefore, the issue is whether the assessee could claim the credit on input which were not services. Input credits can be used for payment of service on output service provided such services are used to provide output services. Undoubtedly, there cannot be an exact correlation between one kind of input and corresponding. That is the reason the Rules cover situations where assessees provide both exempted and taxable services. Wherever someone undertakes activities that cannot be called a service or which is not "manufacture", that activity goes out of the purview of both Central Excise Act as well as Finance Act, 1994. In such cases, an assessee would be ineligible for claiming input-service tax credit on an output which is neither a service nor excisable goods. There is no provision to cover situations where an assessee is providing a taxable service and is undertaking another activity which is neither a service nor manufacture.

In such a situation, the only correct legal position appears to be that it is for the assessee to segregate the quantum of input service attributable to trading activity and exclude the same from the records maintained for availing credit. This cannot be done in advance as it may not be possible to foretell the quantum of trading activity as compared with taxable activity. The obvious solution would be to ensure that once in a quarter or once in a six months, the quantum of input service tax credit attributed to trading activities according to standard accounting principles is deducted and the balance only availed for the purpose of payment of Service tax of output service.

17. In the present case, the assessee's argument that there is no mechanism to reverse credit, once taken, in the opinion of this Court, cannot be accepted. The assessee was well aware of the exact nature and extent of its service tax liability. It was also aware of the eligible service tax inputs. Therefore, when it did claim successfully and unchallenged input credits in respect of activities that were not subjected to service tax levy, it was aware that the claim was excessive and could not be justified. If, for instance, input credits were claimed in respect of goods or rents, attributable to retail business, those credits were clearly impermissible. In these circumstances, this Court finds no infirmity with the concurrent findings of the lower authority and the CESTAT, which concluded that show cause notice and recoveries were in order."

9.4. I find that the issue on hand is squarely covered by the dictum of the Hon'ble High Court (supra) and therefore, I do not find any merit in the appellant's claim. Accordingly, this ground of the appeal is dismissed.

10.1. With regard to limitation, i.e., invoking the extended period of limitation, I find that the Hon'ble High Court in the case of M/s. Lally Automobiles Pvt. Ltd. (supra) has also dealt with the same issue, in the subsequent paragraphs, as under:

"18. As regards the method of calculation and invocation of extended period of penalty, the assessee's contentions again, to the Court's mind, are groundless. The assessee concededly did not maintain regular separate accounts in respect of non-service tax leviable activities. Therefore, the adjudicating authority adopted the method of proportionate turnover based attribution to the assessee's liability:

"I find that it was clear in 2008 itself that no Cenvat Credit is available for services used for trading as decided by Hon'ble CESTAT in the Metro shoes case. The noticee has availed the Cenvat Credit used for exempted services namely trading without reversing the proportionate credit. They have never informed the department about taking the wrong credit. This would have been undetected if the facts were not noticed during audit. M/s. Lally Automobiles Private Ltd. have failed to inform the department that they are not maintaining the separate records for input services used for taxable and exempted services. It is already noted that the law requires an assessee to maintain separate records of Cenvat credit received on taxable or non-taxable services. In case the separate records are not maintained, the Cenvat credit is to be reversed as per Rule 6(3) of the Cenvat Credit Rules, 2004;. I find that : M/s. Lally Automobiles Private Ltd. have not reversed the same by suppression of material facts. The excess credit availed utilized by them is liable to be recovered in terms of Rule 14 of Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of Finance Act, 1994."

19. This Court is of opinion that the lack of any method in the rules in such cases, would only mean that a reasonable and logical principle should be applied, not concededly that what should and could not be claimed as input credit, (but was in fact so claimed) ought to be "left alone" because of the composite nature of the assessee's business. While any assessee has a right to organize its business in the most convenient and efficient manner, it cannot claim that that such organization is so structured that its tax liabilities cannot be clearly discerned. In this case, the adjudicating authority adopted the proportionate percentage to the turnover method approach, which in this Court's opinion, is reasonable.

.....

20. This Court is also of the opinion that the invocation of the extended period of limitation was warranted in the circumstances of the case. Being conscious of its trading activity and that it was not liable to service tax (since it did not include the amounts earned from that business, in its returns) meant that the assessee was aware of what it was doing. It cannot now take shelter under the plea that non-trading activity was expressly exempt from claiming credit, in 2011. That amendment made no difference, given that trading was never taxable under the Finance Act, 1994. In these circumstances, the Revenue was justified in invoking the extended period of limitation in this case.

21. In the light of the above findings, all the questions framed are answered in favour of the Revenue and against the assessee. The appeal is, therefore, dismissed."

10.2. Further, it is a fact borne on record that the appellant itself has chosen to follow the procedure laid down under Rule 6(3A) on and from 01.04.2014 by reversing the proportionate input service credit attributable to the exempted service of trading, which clearly shows the knowledge of the appellant as to the requirement of law, which was also done prior to the issuance of the Show Cause Notice. In this connection, I find it apt to refer to paragraph 20 of the decision of the Hon'ble Delhi High Court in the case of M/s. Lally Automobiles Pvt. Ltd. (supra), which is reproduced at the cost of repetition:

"20. This Court is also of the opinion that the invocation of the extended period of limitation was warranted in the circumstances of the case. Being conscious of its trading activity and that it was not liable to service tax (since it did not include the amounts earned from that business, in its returns) meant that the assessee was aware of what it was doing. It cannot now take shelter under the plea that non-trading activity was expressly exempt from claiming credit, in 2011. That amendment made no difference, given that trading was never taxable under the Finance Act, 1994. In these circumstances, the Revenue was justified in invoking the extended period of limitation in this case."

10.3. In the light of the above facts, the decision of the Hon'ble High Court of Judicature at Madras in the case of M/s. Salem Co-operative Sugar Mills Ltd. (supra) is distinguishable.

11. In view of the above, I do not find any merit in the contentions of the Ld. Advocate for the appellant and accordingly, the appeal is dismissed.

(Order pronounced in the open court on 13.11.2019)
.....

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, CHENNAI**

Service Tax Appeal No. 41151 of 2013

(Arising out of Order-in-Appeal No. 103/2013 (MST) dated 20.02.2013 passed by
the Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034)

Decided On: 03.03.2020

M/s Talking Technology (P) Ltd.

Vs.

Commissioner of Service Tax, Chennai

Hon'ble Judges/Coram:

Hon'ble SulekhaBeevi C.S., Member (J)

Hon'ble Anil G. Shakkarwar, Member (T)

Counsels:

For Appellant: N. Viswanathan, Advocate

For Respondents: L. Nandakumar, Authorized Representative (A.R.)

ORDER

Per SulekhaBeevi C.S:

1. Brief facts are that the appellants are registered with the Service Tax Department for providing Commercial Training and Coaching Service, Business Support Service, etc. They had entered into an agreement with M/s. WTI Advanced Technology Ltd. ('M/s. WTI' for short) by which it was agreed that the appellants would offer the services of its selected employees to work on the projects identified and allocated by M/s. WTI to carry out such functions and project related activities as allocated by M/s. WTI from time to time.

2. The Department was of the view that the said activity would fall under the taxable service of 'Manpower Recruitment and Supply Agency Service' for which the appellants had not discharged any Service Tax. Show Cause Notice dated 14.10.2009 was issued for the period from 01.04.2008 to 31.03.2009 to demand Service Tax under 'Manpower Recruitment and Supply Agency Service' on the consideration received from M/s. WTI during this period. After due process of law, the Original Authority vide Order-in-Original No. 24/2011 dated 11.03.2011 confirmed the demand along with interest and imposed penalties. On appeal, the Commissioner (Appeals) vide order impugned herein upheld the same. Hence, this appeal.

3.1. On behalf of the appellant, Learned Counsel Shri N. Viswanathan appeared and argued the matter. He submitted that the appellant provided services as CAD consultant involving customization of software for M/s. WTI by deputing their engineers to the job site of M/s. WTI. That such services do not fall under 'Manpower Recruitment and Supply Agency Service'.

3.2. After the issuance of the Show Cause Notice dated 14.10.2009, on 10.11.2009 the Superintendent of the concerned Commissionerate had issued a letter to the appellant to pay up Service Tax under the category of 'Information Technology Software Service' which have become taxable with effect from 16.05.2008. The appellant thus paid the Service Tax on the consideration received from M/s. WTI under Information Technology Software Service for the period from 16.05.2008 to 31.10.2009. The appellant has been continuously paying Service Tax under this category. The considerations received from M/s. WTI during the disputed period is

not for any Manpower Recruitment and Supply Agency Service, but is in fact for providing Information Technology Software Service.

3.3. He further submitted that Section 65(68) of the Finance Act, 1994, which defines 'Manpower Recruitment and Supply Agency Service', was amended with effect from 16.05.2008 by substituting the words "to a client" with the words "to any person". The Department has not established that M/s. WTI is the client of the appellant. The transaction was only on principal to principal basis and the authorities below have erred in holding that M/s. WTI is the client of the appellant. That for such reasons, the activity of the appellant will not fall under Manpower Recruitment and Supply Agency Services.

3.4. It is also argued by the Learned Counsel that the Show Cause Notice issued is not maintainable as the same did not allege that the activities of the appellant involved supply of manpower which involves work under the control of M/s. WTI. The said category of taxable service would be applicable only if the employees worked under the control of M/s. WTI. As the Notice does not allege that the employees worked under the control and supervision of M/s. WTI, the demand under the category of Manpower Recruitment and Supply Agency Service cannot sustain.

3.5. Further, that the reliance placed by the Commissioner (Appeals) on the decision of the Tribunal rendered in M/s. Future Focus Infotech India (P) Ltd. v. Commissioner of Service Tax, Chennai reported in MANU/CC/0024/2010 : 2010 (18) S.T.R. 308 (Tri. - Chennai) is incorrect as the facts do not apply to this case.

3.6. He prayed that the demand may be set aside.

4.1. Learned Authorized Representative Shri L. Nandakumar appeared and argued the matter on behalf of the Department. He supported the findings in the impugned order. He adverted to the contract entered between the appellant and M/s. WTI to contend that from the terms of the contract it is very much clear that the contract is for supply of manpower. The consideration is paid on the basis of man-hours and it is clearly stated that the employees of the appellant will not be entitled to overtime charges or to work on any holidays, etc. That the agreement is not for providing services under 'Information Technology Software Service' as argued by the appellant.

4.2. He submitted that the Commissioner (Appeals) has rightly relied upon the decision in M/s. Future Focus Infotech India (P) Ltd. (supra) wherein the Tribunal held that when computer engineers were supplied to IT companies to work on software projects and the said engineers were under the supervision and control of the IT companies, the activity would fall under Manpower Recruitment and Supply Agency Service. In the present case also the contract reveals that the employees were under the supervision and control of M/s. WTI to whom the manpower was supplied. The consideration received by the appellant from M/s. WTI during the disputed period as per the agreement would thus be taxable under Manpower Recruitment and Supply Agency Service.

4.3. He argued that the impugned order does not call for any interference.

5. Heard both sides.

6. The moot point for consideration is whether the activity would fall within the definition of "Manpower Recruitment and Supply Agency Service". For better appreciation, the said definition is reproduced as under:

"SECTION 65. Definitions.-- In this Chapter, unless the context otherwise requires,-

.

[(68) "manpower recruitment or supply agency" means any [person] engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, [to any other person];]"

7.1. The following clauses in the agreement entered between the appellant (BA) and M/s. WTI would bring out the nature of the transaction:

"WHEREAS, WTI, among other business, is in the business of developing, constructing, licensing, updating, enhancing, implementing, maintaining, supporting and marketing computer application software system;

AND WHEREAS, BA has represented to WTI that it has a pool of highly skilled and

specialized Employees experienced in the development, enhancement, implementation and maintenance of Software Projects and proposed to WTI that it is willing to provide on subcontract basis technical assistance in respect of computer application software system development, implementation and maintenance work undertaken by WTI from its various clients by deputing its Employees to WTI/WTI Client locations to work on the project along with WTI Project team.

.

3. SCOPE OF BA ACTIVITIES: As WTI' Business Associate, BA shall engage in the following activities with due diligence;

a) Upon the request of WTI, BA will offer the technical assistance to WTI through services of its selected Employees to work on the computer software application development, implementation and maintenance of specific projects to be identified and allocated by WTI at its sole and absolute discretion and to carry out such functions and project related activities as may be allocated by WTI from time to time on a fixed man month (consisting of all days in a month excluding weekly offs and holidays declared by WTI or its Clients) fee basis as hereunder agreed under overall guidance and supervision of WTI, as per terms of this agreement.

b) BA and its Employees on the project will perform all activities commonly known and referred to as "Software Development and Maintenance" activities. Such activities include without limitation development, installation, demonstration, Parameters Setting, User Training, Providing Guidance to User, warranty support functions, etc. The Employees deputed by BA will also perform such other functions as may be called upon to do by WTI from time to time.

c) BA shall secure all necessary registrations, authorizations and licenses as required to formalize its appointment hereunder or engagement of Employees by it and fully comply with from time to time and at all times all rules, regulations and laws as may be applicable to performance of its obligations and/or the obligations of its Employees hereunder.

d) BA and its Employees assigned by WTI to its clients shall, at all times, comply with security and confidentiality policies and procedures of WTI and clients.

6. CONSIDERATION

6.1. For the work to be carried out by BA for WTI, WTI shall pay BA technical fees as under:

a) WTI will pay to BA at the rates agreed in terms of Schedule of Technical Fees attached hereto. A person month shall consist of minimum eight (8) hours per day multiplied by number of working days in a calendar month at the location of work.

b) In case of deputation of BA Employees on overseas assignments, WTI shall bear all expenses connected with visa, travel and pay the living expenses of the BA Employees.

c) All payments to BA in terms of clause (a) above shall be made in Indian Rupees only as under:

1. 50% of invoice value within thirty (30) days of submission of invoice

2. Balance payable within thirty (30) days thereafter after proper scrutiny of the invoice submitted by BA

d) BA Employees shall not be entitled to any overtime charges or to work on any holidays as a compensation for the leave taken or absence from work on any other working days. BA employees shall also not be paid for working on any weekends or holidays declared by WTI or its Clients.

.

6.4. In case, on verification of an invoice, it is found that the BA personnel have not worked for the number of hours invoiced, WTI shall be at liberty to adjust the invoice value proportionately.

6.5. BA shall provide to WTI all, documents, data and information about the salary and other benefits provided by it to its Employees as and when called upon to do so by WTI. However, in case of BA Employees sent on Overseas deputation, BA shall provide this said information in the prescribed form every month.

.

.

6.7. WTI shall have the right to withhold payment under the following circumstances,

(a) If, upon a request by WTI, BA has not replaced any Employee(s) within a period of fifteen (15) days from such request having been made, which Employee(s) is (are), in the sole discretion of WTI, incapable of performing the functions assigned to him/her/them by the WTI Project Leader and/or is otherwise considered by WTI in its sole discretion to be replaced for whatsoever reason.

(b) If, BA has not replaced the Employee(s) who has become incapable of performing the obligations of BA under the terms of this agreement, such incapability arising due to death, disease, resignation or by whatsoever means, within a period of fifteen days from such incapability. ..."

(Emphasis added)

7.2. From the above excerpts of the contract, it can be safely concluded that the nature of the contract is for supply of manpower. The consideration is paid on the basis of man-hours. It can also be seen that the work is executed as per the guidance of M/s. WTI. Thus, for carrying out the development, maintenance, etc., of software, the persons so deployed by the appellant to M/s. WTI are under the control of M/s. WTI and they work under the guidance and supervision of M/s. WTI.

8. The very same issue was discussed by the Tribunal in M/s. Future Focus Infotech India (P) Ltd. (supra). The relevant portion of the order is extracted as under:

"12. We find that the arguments advanced on behalf of the appellants are mainly based on the various clauses in the agreements executed between them and their clients namely TCS and Infosys. We are of the view that not only the wordings of these clauses are to be considered but also how different clauses of the contracts actually operate have to be seen. We find that the appellants are supplying various skilled personnel to TCS and Infosys to work on software projects undertaken by TCS and Infosys from their respective clients. The personnel deputed by the appellants appear to be working at the site of the clients of TCS and Infosys or in the premises of TCS and Infosys. There is no evidence produced before us to indicate that any of the software projects undertaken by TCS and Infosys from their respective clients has been sub-contracted to the appellants or that the appellants are working on any such project on their own. What has emerged clearly is that the appellants have deputed skilled personnel including computer engineers to work under the supervision and control of TCS and Infosys personnel in-charge of projects undertaken by TCS and Infosys. The appellants are getting paid in terms of the man hours for the persons deputed to work under the control and supervision of TCS and Infosys.

13. No doubt there are clauses relating to deliverables and quality of work in the contracts but these by themselves do not indicate that the appellants are providing information technology software services to TCS and Infosys. Any person or organization obtaining skilled personnel has to ensure that such men deliver work of standard quality. No one would employ a person who is not skilled enough and no one would pay for shoddy work even if done by a skilled man. The relevant clauses in the contract in this regard on which much emphasis was sought to be put by the learned senior counsel for the appellants have to be viewed in the light that TCS and Infosys are merely seeking to obtain personnel from the appellants with necessary skill who will work diligently on the projects undertaken by TCS and Infosys.

14. The learned special counsel for the Department has rightly pointed out a significant provision in the contracts which require the appellants to replace personnel who leave the job by suitably trained personnel as substitutes. Such provisions in the contract go to show that the number of skilled persons supplied is important from the point of view of TCS and Infosys. If the appellants were actually to deliver the software projects, TCS and Infosys would have nothing to say about

how many personnel the appellants engage to complete the project or who they employ.

15. Looking at all aspects of the case and taking into account all the arguments made before us, we come to the conclusion that the appellants are only supplying skilled manpower for which they are liable to pay Service tax for supply of manpower services. We note that for similar activities of the appellants in respect of two other clients namely IBM and CAP GEMINI, the appellants have paid Service tax under the category 'manpower supply service' and their clients in turn took credit of such Service tax paid by the appellants."

9. Learned Counsel for the appellant has made much effort to contend that the services are 'Information Technology Software Services' and not 'Manpower Recruitment and Supply Agency Services'. However, from the agreement entered by the appellant with M/s. WTI it is very much clear that activity falls within the four corners of Manpower Recruitment and Supply Agency Service. We therefore hold that the demand is legal and proper.

10. The appeal is without any merits and is dismissed accordingly.

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH
COURT NO. II**

Service Tax Appeal No.194 of 2012

Arising out of Order-in-Original No.70/Commr/ST/Kol/2011-12, Dated: 31.01.2012
Passed by Commissioner of Service Tax, Kolkata

Date of Hearing: 14.01.2020

Date of Decision: 15.01.2020

**M/s EMARS MINING CONSTRUCTION PVT LTD
(2C & 2D, GREEN ACRES, 2, NAZIR ALI LANE
KOLKATA-700019.)**

Vs

**COMMISSIONER OF SERVICE TAX
KOLKATA, (KENDRIYA UTPAD SHULK BHAVAN, 3RD FLOOR
180, SANTIPALLY, RAJDANGA MAIN ROAD, KOLKATA-700107**

Appellant Rep by: Dr Samir Chakraborty, Senior Adv. & Shri Ajoy Sanoria, CA
Respondent Rep by: Shri S S Chattopadhyay, AR

CORAM: Hon'ble Justice P K Choudhary, Member (J)
Hon'ble Justice P Anjani Kumar, Member (T)

Per: P Anjani Kumar:

Briefly stated the facts of the case are that the appellant, M/s.Emars Mining Construction Pvt.Ltd., are engaged in providing services inter alia in raising, extracting and transportation of iron ore for Mrs.Mala Roy, lease holder of Jalahori Iron & Manganese Mines in Orissa. The appellants were being paid a fixed rate per ton of the iron ore. On scrutiny of the ST-3 returns and other documents, the department has observed that the appellants have short paid Service Tax on 'Transport of Goods by Road', 'Mining Service', 'Site Formation and Clearance, Excavation and Earthmoving and Demolition Service' during the period 2005-06 to 2009-10. Accordingly, a show cause notice dated 19.10.2010 was issued to the appellants demanding Service Tax of Rs.9,12,40,927/-; Education Cess of Rs.18,24,821/- and Higher Education Cess of Rs.5,01,545/- under the proviso to Section 73(1) of the Finance Act, 1994 while proposing to impose penalty under Section 78 of the Finance Act. The show cause notice was adjudicated by the Commissioner vide Order-in-Original No.70/Commr/ST/Kol/2011-12 dated 31.01.2012 wherein Service Tax of Rs.2,90,48,791/- was confirmed with equal penalty and interest. Hence this appeal.

2. Learned Sr.Counsel for the appellant submits that the original agreement was dated 24.03.2005 and similar agreements were entered in respect of subsequent financial years 2006-07 to 2009-10; during 2005-06 and during 2006-07, the appellant did not charge or collect any consideration towards raising/shifting of iron ore and started charging the same from financial year 2007-08 onwards. Learned Sr.Counsel submits that that substantial portion of the activities comprised in transportation of iron ore therefore the appellant entered into the supplementary agreement from 2007-08 whereby the consideration receivable by the appellant was split into mining charges(40%) and transportation charges (60%). The learned Sr.Counsel submits that Service Tax on mining activities were levied w.e.f. June 1, 2007 and the appellant has started paying Service Tax under the category of 'Mining Services' in respect of 40% of the consideration they received. In respect of balance 60% of the consideration the lease holder paid Service Tax as per the terms of the agreement. The learned Commissioner has dropped the demand in respect of 'GTA Services' and in respect of 'Cargo Handling Service' and 'Site Formation and Clearance Service' he dropped the demand pertaining to financial years 2005-06 and

2006-07 for the reason that it was not recovered from the lease holder. However, the learned Commissioner confirmed the demand in respect of both the services for the period April and May 2007. The learned Commissioner also confirmed the entire demand in respect of 'Mining Services' allowing the credit of Service Tax paid by the lease holder on GTA in respect of 60% of the consideration.

3. Learned Sr.Counsel for the appellant submits that the issue relating to handling and transportation of coal from pit head to the mines premises was covered by the following decisions:-

(i) *Karamjeet Singh & Co. Ltd. Vs. Commissioner of C.Ex. & Service Tax [2008 (17) GSTL 255 (T)]*

(ii) *Commissioner Vs. Karamjeet Singh & Company Limited [2018 (17) G.S.T.L. J 48 (S.C.)]*

(ii) *H.N.Coal Transport Pvt.Ltd. Vs. Commissioner of C.Ex. & S.T. [2019 (26) GSTL 214 (T)]*

(iii) *Commissioner of Central Excise & Service Tax, Raipur Vs. Singh Transporter [2017 (4) GSTL 3 (SC)]*

3.1 Learned Sr.Counsel submits that as held in the above cases, the activity undertaken by the appellant is correctly classifiable under 'GTA Services' and Service Tax on the same has already been paid only to the extent of 60% of the consideration received and Service Tax was also paid by them under 'Mining Services' for the 40% of the remuneration they have received. He submits that in view of the case law cited above, Commissioner's order is not tenable.

4. With reference to the confirmation of demand of Rs.18,35,945/- as 'Cargo Handling Service' for the period April 2007 to May 2007 was erroneous and not sustainable in view of the following decisions:-

(i) *Shree Ganraj Coal Transport Private Limited Vs. CCE & ST [2018 (14) G.S.T.L. 394 (T)] Affirmed by the Supreme Court in Commissioner Vs. Shree Ganraj Coal Transport Private Limited [2018 (14) G.S.T.L. J122 (SC)].*

(ii) *R.K.Transport Company Vs. Commissioner of Central Excise, Raipur [2012 (27) S.T.R. 496 (T)] Affirmed by the Supreme Court in Commissioner Vs. R.K.Transport Company [2018 (16) G.S.T.L. J 78 (S.C.)]*

Learned Sr.Counsel, however, fairly concedes the confirmation of Service Tax to the extent of Rs.12,23,964/- for the period April and May 2007 under 'Site Formation and Clearance Service'.

Learned Sr.Counsel also relied upon Hon'ble Apex Court's judgement in the case of *Continental Foundation JT. Venture Vs. Commissioner of C.Ex., Chandigarh-I as reported in 2007 (216) E.L.T. 177 (S.C.)*.

5. The learned Authorized Representative for the department reiterates the findings of the Order-in-Original and submits that the case law submitted by the appellant is not applicable as the operations undertaken by the appellant is clearly falling under 'Mining Services' and it cannot be artificially split into 'Mining Services' and 'GTA Services' . He relies upon the case of *Hazaribagh Mining &Engg. Pvt.Ltd. [2017 49) S.T.R. 289 (Tri.-Kol)]* .

6. Heard both sides and perused the records of the case.

7. We find that the appellants are undertaking the activity for the lease holder in excavation raising and transport of ore. The terms of Para 3 of the contract dated 10.04.2008 is follow: -

"3. The contractor shall extract Iron ore from the said mine and shall deliver the exclusively to the leaseholder. In consideration thereof, the Leaseholder shall pay to the contractor in the following manner.

Iron Ore Rate per MT

Iron Ore R.O.M. Rs.500/-

Iron Ore Fines Rs.75/-

Iron Ore 10-40 (R.O.M.) Rs.465/-

Iron Ore 20-40 (R.O.M.) Rs.465/-

The R.O.M. (Crude ore) shall mean iron ore in run of mine from which can be profitably marked only after processing converting and sorting into the prescribed standards by the contractor.

The parties here to further agree to review from time to time the extraction charges of crude ore considering the change in cost and for that purpose if necessary to sign addendum to this agreement."

7.1 This agreement was supplemented on 28th April 2008 wherein all other terms being unchanged. The following is inserted:-

"This agreement is in continuation of the original agreement made between the parties on 10th day of April 2008 for raising of iron ore from the mine at Jalahuri wherein in the following price consideration was agreed upon by both the parties.

Rate per MT

Iron Ore R.O.M. Rs.500/-

Iron Ore Fines Rs.75/-

Iron Ore 10-40 (R.O.M.) Rs.465/-

Iron Ore 20-40 (R.O.M.) Rs.465/-

The essence of the contract is that the Contractor has vast experience and possess technical knowhow and expertise including personnel, mining tools, machinery and other necessary equipment to undertake exploration, excavation, processing, transportation and marketing of iron ore from said Mine.

It has now been agreed upon that out of the above agreed rate it has been felt necessary to bifurcate the expenses relating to mining and transportation as these are the main major heads of operating expenses. After through discussion it has now been agreed upon that the contractor however will have to restrict the mining and transportation billing to the ratio of 40:60 (Approx.) and henceforth the payments of the bills will be made according to this supplemental agreement.

In view of the above the implementation of service tax will be as under.

-For raising activities service tax shall be payable by the contractor

*-For Transportation and other Logistics service tax shall be payable by the Leaseholder
All other terms and condition will remain unchanged and binding upon both the parties."*

8. Ongoing through the terms of the contract, we find essence of the contract is that the contractor i.e. the appellant shall extract iron ore from the said mine and shall deliver it exclusively to the leaseholder. In consideration thereof the leaseholder shall pay to the contractor in the manner decided. We find that the rates are fixed for different types of iron ore i.e. iron ore R.O.M., iron ore fines, iron ore 10-40 R.O.M.; and iron ore 20-40 (R.O.M.). We also find that the Supplementary Agreement has been expanded to bifurcate the expenses relating to mining and transportation in the ratio 40:60 while making payments. The contracts and supplement over the years were in identical manner. Thus, it is apparent that the contracts undertaken by the appellant are composite contracts involving excavation and transportation of iron ore. The case laws relied upon by the Sr. Counsel i.e. the cases Karamjeet Singh & Co. (supra), Singh Transporters (supra) appear to be for the cases where the appellants therein are engaged in the transportation of excavated ore from the pit head to dump yard. Therefore, it was held in such cases that the activity undertaken by the concerned parties would not fall under 'Mining Services'. However, as seen above, the activity undertaken by the appellants is composite activity. For the sake of interpretation and applicability of Service Tax the contract cannot be vivisected. Learned Sr.Counsel attempted to submit that as the payments are received separately for mining and transportation activities they need to be considered as different services. We are not inclined to subscribe to this view. The terms of the contract in the instant case being categorical and the division of the amount payable in a ratio appears to be only for the convenience of the parties involved and therefore it cannot be concluded that the services rendered by the appellants are under two different heads. Such an artificial bifurcation is not acceptable. We find that this Bench of the Tribunal in the case of Hazaribagh Mining & Engg. Pvt.Ltd. (supra) having gone through the scope of the contract therein have concluded that the work undertaken by the appellants therein amounted to 'Mining Services'. In the instant

case also the learned Sr.Counsel for the appellant other than merely showing that there is a division of payment could not produce any documentary proof so as to conclude that the contract is vivisectable. Therefore, we find that the learned Commissioner has correctly concluded that the activities undertaken by the appellants is 'Mining Service' w.e.f. 01.06.2007 and is chargeable to Service Tax accordingly. Learned Sr.Counsel at this juncture submits that the entire Service Tax amount has been paid by the appellants along with interest and 25% of the penalty.

9. Coming to the demand of Rs.18,35,945/- under 'Cargo Handling Services' for the period April 2007 to May 2007, we find that the case law submitted by the learned Commissioner for the appellant squarely covers the issue. We find that there are a catena of judgments indicating that such service cannot be treated as 'Cargo Handling Service' therefore to that extent the arguments of the appellants are acceptable.

10. In view of the above, the appeal is partially allowed in the following terms: -

(i) The demand is confirmed to the extent of Rs.2,59,88,882/- under the taxable head 'Mining and Mineral, Oil, Gas Service' for the period 01.06.2007 to 31.03.2010 and Rs.12,23,964/- on 'Site Formation and Clearance Service' for the period April 2007 to May 2007.

(ii) Penalty under section 78 is restricted to 25% of the above confirmed amounts.

(Order pronounced in the open court on 15.01.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, KOLKATA
COURT NO. I**

S. Tax Appeal No. 372 of 2011

Arising out of Order-in-Original No.16/ST/Commissioner/2011, Dated: 30.05.2011

Passed by the Commissioner of Central Excise & Service Tax, Jamshedpur

Date of Hearing: 27.08.2019

Date of Decision: 29.08.2019

**M/s TATA STEEL LTD
GAMHARIA-832108 DT. SARAIKELA-KHARSWAN, JHARKHAND**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
JAMSHEDPUR 143, NEW BARADWARI, SAKCHI
JAMSHEDPUR - 831001, JHARKHAND**

Appellant Rep by: Dr Samir Chakraborty, Sr. & Abhijit Biswas, Advs.

Respondent Rep by: Mr A Roy, AR

CORAM: Hon'ble Justice Mr. P Anjani Kumar, Member (T)

Hon'ble Justice Mr P Dinesha, Member (J)

Per: Bench:

This appeal is filed by the Assessee (T.G.S. for short) against the Order-in-Original No.16/ST/Commissioner/2011 dt. 30/05/2011 passed by the Commissioner of Central Excise and Service Tax, Jamshedpur. Brief facts leading to the present Appeal, inter-alia, are that the appellant during the year under dispute had provided "Commissioning and Installation" and "Maintenance or repair services" without payment of Service Tax; that the same was noticed during the course of checking of records of the appellant-assessee by the Preventive Team of the Revenue, that the Appellant appeared to have taken input/service credit for providing above services; that the assessee had provided the above services to M/s. Tata Steel without payment of Service Tax though there was a contract for the above services, etc. Vide Show Cause Notice dt.08/10/2010, TGS was asked to explain inter-alia the non-payment of Service Tax, in response to which, it appears that the appellant filed its replies on various dates contending that the contract and the provision of service was only by one unit to another unit which is otherwise a service for the self and therefore, there was no liability to Service Tax. The Adjudicating Authority vide Impugned Order-in-Original, however considering the explanation, the contract entered into between the appellant and the Tata Steels and the Statements recorded held that the appellant was an independent service provider and consequently, the receipt of service by Tata Steels Ltd. was liable to Service Tax which is not a service rendered to the self and thus confirmed the demands proposed in the Show Cause Notice.

2. Today, when the matter was taken up for hearing, the Senior Advocate, DrSamir Chakraborty & Abhijit Biswas, Advocate, appeared for the assessee and A. Roy, Ld. DR appeared for the Revenue.

3. The Ld. Senior Advocate reiterates the contentions urged before the Lower Authority and he would also submit, drawing our attention to the Show Cause Notice, that the period in dispute is January 2005 to 31/03/2010 for which the Show Cause Notice, has been issued on 08/10/2010 by invoking the extended period of limitation while all the details as to the alleged suppression had been picked up only from the records maintained by the appellant, by the Preventive Team of the Central Excise Headquarters and therefore, the demand is not justified. The Ld. Senior Advocate also relied on following decisions in support of his submission: -

(i) *General Manager, BSNL Cellular Mobile Services Vs. Commr. of GST & C. Ex., 2019 (25) GSTL 238 (T)*

(ii) *Sahara India Commercial Corporation Vs. Commr. of C. Ex., 2019 (21) GSTL 170 (T)*

(iii) *C. C., C. Ex. & S. T. Vs. Parker Markwel Industries Pvt. Ltd.*, 2019 (24) GSTL 42 (T)

(iv) *Indian Oil Corporation Ltd. Vs. Commissioner of C. Ex.*, 2007 (8) STR 527 (T-Kol)

(v) *Precot Mills Ltd. Vs. Commissioner of Central Excise*, 2006 (2) STR 495 (T)

(vi) *Tata Steel Ltd. (Growth Shop) Vs. Commr. of C. Ex. & S. T.*, 2014 (35) STR 374 (T-Kol)

(vii) *Tata Iron & Steel Co. Ltd. Vs. Commr. of C. Ex.*, 2008 (228) ELT 124 (T-Kol)

He also submitted a copy of Annual Report for the period 2013-14 to point out that the appellant is not a separate entity.

4. Per Contra, A. Roy, Ld. AR, submits that there is a valid contract entered into by the appellant with the Service Tax recipient, both are two different entities having both the two different status as far as income tax is concerned, as they have obtained different PAN Numbers which is mandatory for obtaining Service Tax registration. The Ld. DR also drew our attention to various clauses in the contract to buttress that both are different entities and that there is no service to self as contended by the assessee/appellant. He also pointed out to page 55 wherein, the gross price is shown to include Service Tax and Education Cess and there is also Arbitration clause in case of any disputes arising on account of the contract.

5. We have considered the rival contentions, have gone through the documents placed on records and have also gone through various decisions relied upon by the Ld. Senior Advocate. From the Perusal of the documents and the explanations filed by the appellant, we note that but for pleading that there was no service recipient rather service is for self, no documentary evidence is furnished for the satisfaction of either the Ld. Commissioner/Adjudicating Authority or before us. We also find that the Adjudicating Authority has given a finding on the contentions of the appellant; that the services rendered by the appellant was for consideration and that in case of orders for executing service, the appellant had sub-contracted after making payment for which, the appellant had also taken credit for the Service Tax amount charged. There is also a finding by Ld. Commissioner that the appellant did indeed allot vendor code and ledger to Tata Steel Ltd. by treating the other as its customers on which there is no refutation/rebuttal by the appellant and it is also a part of the record that the services rendered were the results of open bidding/tender where even the appellant amongst others, participated. On being successful, purchased order was placed and the contract came up executed.

6. On considering above discussions by the Ld. Adjudicating Authority, suffice it to say that the appellant has failed to prove that it is the case of 'Self Service' but the Revenue has clearly established that there exists service, there is a service provider, there is also a service recipient; and for which the payment has been made. In the backdrop of the above, therefore, we are of the humble opinion that the decisions relied on by the Ld. Senior Advocate are distinguishable. But however, it is a matter of record that the Revenue has come to know of the above facts only during the course of checking of records and not from an independent source and therefore, the same cannot be said to have been suppressed with an intention to evade tax and consequently, the demand cannot be raised beyond of the Normal period. We also find that there is no specific allegation of suppression, fraud, etc., to justify invoking larger period of limitation. In the light of the above, therefore the demand in so far as the normal period of limitation alone can be sustained, which we hereby do.

7. In the result, the matter is remanded back to the file of the Adjudicating Authority for working out for liability, if any, for the normal period alone. Matter is partly allowed and partly remanded on the above terms.

(Pronounced on 29.08.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH**

Service Tax Appeal No.132 of 2009

**M/s N C Paul & Company
(Ukhra, Burdwan, Dist-Burdwan, WB)**

Vs

COMMISSIONER OF CENTRAL EXCISE, BOLPUR

Appellant Rep by: Shri KartickKurmy, Advocate.

Respondent Rep by: Shri A Roy, Authorized Representative.

CORAM: Hon'ble Mr P K Choudhary, Member (J)

Hon'ble Mr Bijay Kumar, Member (T)

Date of Hearing: 24.10.2019

Date of Decision: 17.12.2019

Final Order No. 76934/KOL/2019

[Order per: P.K. Choudhary, Member (J)]. –

This appeal is arises out of Order (Original) No. 38/Commr./BOL/09, dated 23-2-2009 passed by Ld. Commissioner, Central Excise, Bolpur.

2. The facts of the case in brief are that during the period 16-8-2002 to 31-3-2007, the appellant provided transportation of Coal including incidental loading/unloading to various sites of ECL (M/s. Eastern Coalfields Ltd.). The appellant also provided loading of Coal into Tippers for transportation within the mines and further provided loading of coal into Railway Wagon for outward transportation.

3. The activities of transportation of coal with incidental loading/unloading is provided by the appellant to ECL, SonpurBazari, which involves loading of crushed coal into automated tippers at ground stock inside the mines, its transportation up to 06-07 K.M. then automated unloading without human intervention inside the mines near railway siding and then loading the same into the railway wagon by pay loaders. The rate is composite. No separate charges are collected for loading/unloading activities. A perusal of the work order dated 27-4-2005 at Page 59 shows that the parties entered into the contract for transportation of 16.5 lakhs ton coal from CHP (Coal Handling Plant) to Siding. A perusal of Clause 16 of the work order shows that for commencement of work, the appellant has to furnish a list of trucks/tipping trucks to be deployed for carrying out the transportation activities. Similar work orders dated 26/27-2-2004 (Page 68), dated 21-10-2003 (Page 71) and dated 7-6-2004 (Page 64) are awarded by ECL, SonpurBazari Area.

4. The appellant has further executed work of only loading coal into tipping trucks at pit head for transportation inside the mines and also loading at railway siding into railway wagon for outward transportation. Separate rates are provided for loading of coal at pit head for transportation inside the mines and loading of coal into railway wagon for outward transportation. The contract is divisible. Such work orders were executed for ECL, Jhanjhra Area vide work order dated 21/22-5-2004 (Page 109), Work Order No. GM/JNR/Sales/35/563 (Page 112), Work Order No. GM/JNR/Sales/35/199 (Page 115).

5. The appellant has further executed work order dated 31-3-2006 (Page 124) and other similar work orders for work of loading coal into railway wagon for outward transportation at ECL, Pandveswar Area.

6. The Ld. Additional Director General, DGCEI, Kolkata, issued Show Cause Notice dated 15-10-2007, demanding Service Tax of Rs. 2,71,55,189/- under the

category of Cargo Handling Service for the period from 16-8-2002 to 31-3-2007 along with interest and proposing penalties under Sections 76, 77 and 78. Under Para 6 of the show cause notice at Page 96, out of total service tax demand of Rs. 2,75,60,137/- , Service Tax demand of Rs. 2,47,60,534/- is demanded on transportation of coal with incidental loading/unloading under the category of Cargo Handling Service and the balance Service Tax of Rs. 27,99,603/- is demanded on loading activities i.e. loading at pit head for internal transportation and loading of railway wagon for outward transportation under the category of Cargo Handling Service.

7. The Ld. Advocate for the appellant, Sri Kartik Kurmy, submits that the Service Tax of Rs. 2,47,60,534/- is demanded on transportation contracts with incidental loading/unloading which cannot be classified under the category of Cargo Handling Service. In support of his contentions he relies on the decision of the Tribunal in the case of *Tycoons Industries Pvt. Ltd. v. CST* reported in 2019-TIOL-1509-CESTAT-KOL, *Khanduja Coal Transport Co. v. CGST* reported in 2019-TIOL-1018-CESTAT-Del., *R.K. Transport Co. v. CCE* reported in 2012 (27) S.T.R. 496 (Tri. - Del.) as affirmed by the Hon'ble Supreme Court reported in 2018 (16) G.S.T.L. J78 (SC) and *CCE v. Singh Transporters* reported in 2017 (4) G.S.T.L. 3 (SC). As regards the demand of Service Tax of Rs. 27,99,603/-, he submits that the said demand is raised on activities of loading at pit head for internal transportation and also loading at railway siding into railway wagon for outward transportation and under the contract separate rates are provided. It is submitted by him that loading of coal at pit head for internal movement inside the mines cannot be classified under the category of Cargo Handling Service. The Ld. Advocate relies on the decision of the Tribunal in the case of *Sainik Mining & Allied Services Ltd. v. CCE* reported in 2008 (9) S.T.R. 531 (Tri. - Del.) and Final Order No. 76815/2018, dated 11-10-2018, in the case of *Sainik Mining & Allied Services Ltd.*, in Appeal No. ST/91/2008-DB. The Ld. Advocate further submits that the railway sidings are located within the mines and loading of coal at the railway siding inside the mines into railway wagons for outward transportation also cannot be classified under the category of Cargo Handling Service. He further submits that in the show cause notice there is no allegations that the appellant is a cargo handling agent and what is handled is nothing but cargo, hence, in absence of twin requirement of Section 65(23), the tax cannot be levied upon them under the category of Cargo Handling Service, by implication. He relies on judgment of the Supreme Court in the case of *DCCE v. Sushil & Company* reported in 2016 (42) S.T.R. 625 (S.C.) and in the case of *Signode India Ltd. v. CCE* reported in 2017 (50) S.T.R. 3 (S.C.).

8. On the ground of limitation, the Ld. Advocate submits that the demand for the period from 16-8-2002 to 31-3-2006 is barred by normal period of limitation of one year and only demand from 1-4-2006 to 31-3-2007 is within limitation. It is further submitted that during the material period there were genuine interpretation dilemma in the trade and also within the department during the infancy stage of levy which is taken cognizance in the cases of *Vishal Traders v. CCE* reported in 2010 (19) S.T.R. 509 (Tri. - Del.), *Singh Brothers v. CCE* reported in 2009 (14) S.T.R. 552 (Tri. - Del.) and in the case of *Sainik Mining & Allied Services Ltd.* cited supra dated 11-10-2018 and the demand is confined to normal period of limitation and penalties are waived.

9. *Per contra* the Ld. Authorised Representative for the respondent supports the impugned Order. It is submitted by him that the services provided by the appellant is clearly taxable under the category of Cargo Handling Services. He relies upon the decision of the Hon'ble Tribunal in the case of *Shreem Coal Carriers (P) Ltd. v. CCE* reported in 2015 (37) S.T.R. 1067 (Tri. - Mum.) and in the case of *Karamjeet Singh & Co. Ltd. v. CCE* reported in 2018 (17) G.S.T.L. 255 (Tri. - Del.).

10. The Ld. Advocate for the appellant submits that the decision of the *Shreem Coal Carrier (P) Ltd.* is set aside by the Hon'ble Bombay High Court and remanded back as reported in 2016 (42) S.T.R. J314 upon remand by the Supreme Court reported in 2016 (41) S.T.R. J49 and reported in 2016 (41) S.T.R. J304.

11. Heard both the sides and perused the appeal records.

12. We find from the impugned Order passed by the Ld. Commissioner that the Service Tax demand of Rs. 2,47,60,534/- on transportation with incidental loading/unloading is upheld mainly on the ground that the contracts are not for "mere transportation of goods", hence, it is covered under the category of Cargo Handling Services and since, there is no separate rates provided for transportation, loading and unloading activities, the appellant is liable to pay service tax on the gross amount charged as clarified by the Board vide Circular No. B11/1/2002-TRU, dated 1-8-2002.

13. In respect of the Service tax demand of Rs. 27,99,603/- on loading activities, it is held by the Ld. Commissioner that loading of coal which is cargo is specifically covered under Section 65(23) as Cargo Handling Services and the decision of the Tribunal in the case of *Sainik Mining & Allied Services Ltd.* holding that loading of tippers done at pit head for internal transportation of Coal within the mining area is not Cargo Handling Services, does not apply.

14. We find that the Service Tax demand of Rs. 2,47,60,534/- on contracts for transportation of Coal from CHP Stock Yard to Railway Siding up to 06-07 K.M. and loading the Coal into Railway Wagon are essentially for transportation of Coal which is evident from the intention of the parties as found from the Work Orders. The work orders are awarded for transportation of coal. In the case of *Tycoon Industries Pvt. Ltd. v. CST* reported in 2019-TIOL-1509-CESTAT-Kol, it is held by this Tribunal while dealing with similar facts and circumstances, that the dominant activities under the contract are movement of mineral within the mining area and loading to Railway Wagon, which includes loading and unloading, are merely incidental while the activities undertaken are principally transportation of coal within the mining area, hence, the gross amount received for the same cannot be taxed under the category of Cargo Handling Services. Therefore, we are of the view that the Service Tax demand of Rs. 2,47,60,534/- on activities of transportation with incidental loading and unloading including wagon loading is principally and dominantly for transportation of coal within the mines and hence, cannot be taxed under the category of Cargo Handling Service and accordingly, set aside.

15. We find that the Service Tax demand of Rs. 27,99,603/- is confirmed on two kinds of contracts i.e. contract for hiring of pay loader for loading of coal into tippers for transportation within the mines and hiring of pay loader for loading of coal at the Railway Siding for outward transportation. There is no separate quantification of demand in respect of each of them. We find that the activities of hiring of pay loaders for loading of coal at pit head within the mines for internal transportation cannot be classified under the category of Cargo Handling Service as held by the Tribunal in the case of *Sainik Mining & Allied Services Ltd.*, cited supra and accordingly, Service Tax demand on the said portion of the demand out of Rs. 27,99,603/- is set aside.

16. We find that the Service Tax demand on the activity of hiring of pay loader for loading of coal into railway wagon at railway siding for outward transportation is taxable under the category of Cargo Handling Service as held by the Tribunal in the case of *Gajanand Agarwal v. CCE* reported in 2009 (13) S.T.R. 138 (Tri. - Kol.). However, in the case of *Vishal Traders v. CCE* cited supra, *Singh Brothers v. CCE* cited supra and *Sainik Mining & Allied Services Ltd.* cited supra, the Tribunal taking note of genuine interpretation dilemma in the trade and within the department during the infancy stage of levy, has confined the demand to normal period of limitation and has set aside the penalties. Accordingly, in respect of work orders for hiring of pay loaders for loading of coal at railway siding for outward transportation, we uphold the tax demand on merit but restrict such levy to the normal time limit and set aside the penalties.

17. In the light of the above discussions, we set aside Service Tax demand of Rs. 2,47,60,534/- along with interest and penalties on transportation contracts with incidental loading/unloading. In respect of levy of Service Tax on loading of coal at pit head for internal material, we set aside the service tax demand along with interest and penalty. However, we uphold the Service Tax demand along with interest in respect of contracts for hiring of pay loaders for loading of coal at railway siding for outward transportation but restrict the same to the normal period of limitation. Since, there is no separate quantification/break-up of the Service Tax demand of Rs. 27,99,603/-, hence, we remand the matter to the Adjudicating Authority for the limited purpose of separate quantification of demand in respect of hiring of pay loaders for loading of coal at pit head within the mines and hiring of pay loaders for loading of coal at railway siding for outward transportation. As the service tax demand on contracts for hiring of pay loaders for loading of coal at railway siding for outward transportation is upheld but restricted to normal period of limitation, the Adjudicating Authority is directed to restrict such levy to the normal time limit.

18. The appeal is thus partly allowed in the above terms.
(Pronounced in the open Court on 17-12-2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH
COURT NO. II**

Service Tax Appeal No.70470 of 2013

**M/s Coal Mines Provident Fund Organisation
(Near Police Line, Hirapur, Dhanbad-826001)**

Vs

**Commissioner of Central Excise and Service Tax,
Ranchi**

Date of Hearing: 28.01.2020

Date of Decision: 25.02.2020

Appellant Rep by: None

Respondent Rep by: Shri A K Das, Authorized Representative.

CORAM: Hon'ble Mr P K Choudhary, Member (J)

Hon'ble Mr P Venkata Subba Rao, Member (T)

Final Order No. 75300/2020

Per P.V.Subba Rao:

None appeared on behalf of the appellant. We find that the case has been regularly listed on various dates and none appeared. No application for adjournment has been received. As the case pertains to 2013, we take up the matter for hearing and decision on merit.

2. Ld.Special Counsel, Shri AKDas, appeared on behalf of the Respondent Department.

3. Heard the Ld.Special Counsel for the respondent and perused the records.

4. This appeal is filed against the impugned Order-in-Original No.08/ST/Commr./2013 dated 22.02.2013. On the basis of Audit Report from DAG (CRA), Office of PAG (Audit). Jharkhand, investigations were initiated by the officers of Central Excise and Service Tax, which culminated in the issuance of show-cause notice dated 21.11.2011 to the appellant. The appellant is a Body Corporate as per Section 3B of Coal Mines Provident & Miscellaneous Provisions Act, 1948 and manages the following funds:

- (i) Coal Mines Provident Fund Scheme;
- (ii) Coal Mines Family Pension Scheme (merged with Pension Scheme in 1998);
- (iii) Coal Mines Pension Scheme;
- (iv) Coal Mines Deposit Linked InsuranceScheme.

They collect these fund amount from Coal Companies and the Coal Mine Workers and invest them in various Banks and Securities so as to ensure a good return and pay provident fund, pension, etc., to the Coal Mine Workers as per specified rates. For such asset's management, they are paid an amount of 3% of the total amount so collected by the Coal Companies. It is the case of the Department that the appellant has provided the service of asset management (including management of provident fund; pension scheme and insurance scheme) which

falls under the category of “Banking and Other Financial Services” as per Section 65(12) and is taxable under this head w.e.f.

16.07.2001 as per Section 65(105)(zm) of the Finance Act, 1994. It is also the case of the Revenue that as per the provisions of Section 65 (45) of the Finance Act, 1994, “Financial Institution” has the meaning of Section 45-I (vi)(c) of RBI Act, 1934 and the appellant is covered by it. On receipt of the Audit objection, the Department wrote to the appellant, after which they obtained service tax registration on 16.03.2011 under the category of Banking and Financial Services”, but they have not paid service tax. Therefore, the Department again wrote letters dated 02.05.2011, 23.05.2011, 21.06.2011, 11.07.2011, 28.07.2011 & 03.08.2011 asking them to pay service tax and file challans, but they failed to do so. Therefore, a show-cause notice was issued to the appellant demanding service tax amounting to Rs.50,89,14,218/- for the period 2006-07 to 2010-11 under the first Proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75. It also proposed to impose penalties upon the appellant under Sections 76, 77 and 78 of the Finance Act, 1994.

5. The appellant contested the demand on merit as well as on limitation on the following grounds:

(i) They are a statutory organization performing statutory functions and hence, they cannot be treated as having rendered a taxable service. They are under direct control of the Central Government.

(ii) They were created under the provisions of The Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 (CMPFMP Act)

(iii) As per their mandate, they are managing funds; their job is one of ensuring some social security, which finds its root in the Directive Principles of State Policy.

(iv) It cannot be disputed that their organization is functioning for the welfare of the people of the country.

(v) Services provided by an organization, which are statutory in nature, are not taxable.

(vi) In the case of CBFC, the Board vide Circular No.89/7/2006-ST dated 18.12.2006, clarified that the activities of that organization, do not constitute provision on taxable service.

(vii) What they are collecting is only administration charge for rendering this service.

(viii) Imposition of any tax on them would be contrary to public policy and therefore, perverse.

(ix) They are neither a banking company nor a financial institute, nor a body corporate, nor a commercial concern, therefore, not covered by the definition of “Banking and Financial Service”. As the levy of service tax itself is contrary to law, the question of imposition of penalty does not arise.

(x) Lastly, the notice is time barred and extended period of limitation cannot be invoked.

6. After considering the submissions made by the appellant, the Adjudicating Authority confirmed the demand as proposed along with interest under Section 75 and also imposed penalties. Aggrieved, the present appeal is filed on the following grounds:

(i) They are a statutory organization created under the Act. They are performing duties of Welfare State Mandatory by the Directive Principles of State Policy under the Constitution.

(ii) They have been exempted from Income Tax by CBDT under Section 10 (25) of the Income Tax Act, 1961.

(iii) The Order passed by the Commissioner is without jurisdiction and violating principles of natural justice.

They also contested the invocation of extended period of limitation and imposition of penalty. They prayed that the impugned order may be set aside and the appeal may be allowed.

7. The Ld. Special Counsel for the Revenue, contends all the assertions in the grounds of appeal. He would submit that the only thing necessary to be examined is whether or not the appellant is covered by the Finance Act, 1994 and whether their services are covered by the definition of “Banking and Financial services”

under it. The Banking and Financial Services is defined as follows:

“banking and other financial services” means -

(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or [commercial concern], namely

(i) financial leasing services including equipment leasing and hire-purchase; [Explanation.—For the purposes of this item, “financial leasing” means a lease transaction where—

(i) contract for lease is entered into between two parties for leasing of a specific asset;

(ii) such contract is for use and occupation of the asset by the lessee;

(iii) the lease payment is calculated so as to cover the full cost of the asset together with the interest charges; and

(iv) the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment;

(ii) [.....]

(iii) merchant banking services;

(iv) Securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing;

(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services,

(vi) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;

(vii) provision and transfer of information and data processing; Banker to an issue services; and other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of exchange, transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults, operation of bank accounts;”

He would submit that there is no doubt whatsoever that the appellant is performing asset management functions and managing the pension and provident fund of the coal mine workers. These are specifically covered under the above definition. The second point to be examined is whether the appellant is a Banking Company or Financial Institution or any other Body Corporate or Commercial concern. He would submit that the appellant's organization has been created under the provisions of The Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 (CMPFMP Act) and is headed by Board of Trustees. In terms of Section 3B of the Act, they shall be a Body Corporate under the name specified in the notification and statutorily have a perpetual succession. Therefore, the argument that they are Body Corporate, is not only far from truth but contrary to the provisions to the very Act which created the appellant. He would therefore, submit that there cannot be any doubt that the appellant is a Body Corporate and there is also no doubt that they are managing assets. There is also no doubt that they are receiving the consideration @ 3% of the total fund from the Coal Companies for managing these assets. The appellant's activities were especially covered under the definition of Banking and Financial Services.

8. On the question whether the appellant's activities are statutory functions, the Ld. Spl. Counsel submits that there is a distinction between the Ministry or Department and Organizations created by the Government, which though owned by the State, are separate legal entities. All Public Sector Corporation, such as, ECIL, BHEL, IDBI etc. are created by Acts of Parliament, but they are performing commercial functions. Therefore, they are commercial organizations created and owned by the Government to perform commercial functions with some social

objectives also in mind. Merely because these Companies or Corporations or Organizations are functioning under the State and also have same social objectives of the Government in mind, they do not cease to be commercial organizations. Otherwise, no Government Company or Organization must be subjected totax.

9. Further, he would submit that SBI and nationalised banks are also owned by the Government. Many of these were originally Private Banks, but were subsequently, nationalized by the State, so that they function, keeping in view some social objectives. Similarly, the major insurance companies, such as, LIC and GIC also function under the Government. If the logic of the appellant is agreed to, then none of these organizations are leviable to any taxes. These organisations are not exempted from service tax under the Finance Act,1994.

10. On the question of the appellant's claim that they are working for the welfare of the people and hence should not be taxed, he would submit that fiscal statutes must be strictly construed as they are drafted withoutanyintendment as has been held by the Constitutional Bench of Hon'ble Apex Court in the case of Dilip Kumar (in Civil Appeal no. 3327/2007).

If the appellant falls under the charging section, there is no escape from tax. It has been demonstrated by the respondent that the nature of activity undertaken by the appellant falls within the definition of Banking and Financial services and the Organization itself is a Body Corporate. Therefore, they are covered by the chargingsection.

11. On the appellant's claim that they are exempted under the Income Tax Act, he would submit that the exemption under I.T. Act, does not mean that there is also exemption from all othertaxes.

12. On the question of invocation of extended period of limitation, he would submit that the appellant never came forward to take a registration on their own. It is only after repeated letters and reminders, they took a registration, but still failed to file service tax return or pay service tax. This shows that the appellant's intention is to evade payment of service tax because they considered themselves to be above the law laid down by theParliament.

13. For the same reasons, he would submit that the imposition of penalties upon the appellant is fullyjustified.

14. We have considered the arguments of both sides and perused the records. We find a little force in the arguments of the appellant that they are not a Body Corporate, but a Government Department performing some functions because the very Act which created them and entrusted them with the power states that they are a Body Corporate. Section 3B of the CMPFMP Act,1948,specificallymentionsthattheappellantisaBodyCorporate. The next question to be considered is whether the appellant is covered by the definition of Banking and Finance Services. As can be seen from the definition reproduced above, asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, are squarely covered by the definition of "banking and financial services". The appellant's organization functions under Board of trustees and under Section 3A of the Act it is a Body Corporate. Their responsibilities as evident from the submissions of the appellants themselves are nothing but funds management, for which they received service charges of @3% from the Coal Companies. Therefore, we find that the appellant is squarely covered by the definition of "Banking and Financial services" and therefore, is liable to pay service tax under this Heading.

15. We have considered the arguments put forth in the appeal that the appellants are performing services to the country. Evidently, they are not performing any sovereign functions of the State. They are managing the some

funds and performing some functions for the workers of Coal Companies and are getting paid for such services. These services rendered by the appellants, are not like the services of RTO of issuing driving license after charging a fees for the purpose or the State Drugs control who issues license for manufacture of pharmaceuticals after charging the requisite fees both of which are sovereign functions of the State. The appellant's functions are akin to the activities of other commercial organizations owned by the Government, such as, Public Sector Undertakings, Public Sector Banks etc..Inall such organizations, while the nature of their activity is commercial, being owned by theGovernment,theirbusinessissoconductedtotakeintoaccountsomesocial objectives and goals. This, by itself, will not make their activities sovereign functions or get them exempted from the tax.

16. We also find that once the Parliament has passed an Act imposing tax in a particular way that cannot be wished away by the appellant claiming noble objectives of their organization. Once a law is passed, it must be implemented as it is drafted without any intendment. We find that the Hon'ble Supreme Court in the case of **Dilip Kumar** (supra), has ruled as under:

"19. The well settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expand those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In the Kanai Lal Sur vs. ParamnidhiSadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of theAct.

20. In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose. Not only that, if the plain construction leads to anomaly and absurdity, the court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect totaxation.

21. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making. Insofar as taxation statutes are concerned, Article 265 of the Constitution 32, Assistant Commissioner Gadag Sub Division, Gadag vs. Mathapathi Basavannewwa, [1995(6)SCC 355. Taxes not to be imposed save by authority of law. No tax shall be levied or collected except by authority of law, prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature."

17. In a conclusion, we find that the appellant is liable to pay servicetax.

18. In so far as invocation of extended period of limitation is concerned, this must be examined with reference to the facts of each case. In this case, the appellant has not applied for service tax registration or paid service tax. There is nothing on record to show that the appellant had written to the Department

intimating their activities and seeking to know if they are liable to pay service tax. On the other hand, when their activities were detected during Audit and the Department had written several letters and reminders, only then they obtained service tax registration. Even after obtaining the service tax registration, they have not paid the service tax nor filed any returns. This conduct of the appellant does not show their bonafides. It demonstrates that they intended to evade payment of service tax at every stage. It is true that an individual may not have personally benefitted from the evasion. It is the organization which has demonstrably evaded the tax to profit. It cannot now profit from its own wrong and escape taxliability. In view of the above, we find that the invocation of extended period of limitation is fully justified in this case.

19. As the interest under Section 75, is directly linked to the payment of duty, the interest must accordingly be paid by the appellant.

20. We also find nothing inconsistent or wrong in the impugned order imposing statutory penalties under Sections 78, 77 & 76 of the Finance Act, 1994, since the appellant has made every possible effort to knowingly evade tax.

21. In view of the above, the impugned order is upheld and the appeal is rejected.

(Pronounced in the open Court on **25.02.2020**)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH
COURT NO. II**

Service Tax Appeal No.159 of 2008

**M/s S D Business Enterprises Pvt Ltd
(14, Hare street Kolkata-700001.)**

Vs

**Commissioner of Service Tax,
Kolkata**

Date of Hearing: 24.07.2019

Date of Decision: 24.07.2019

Appellant Rep by: Shri Sanjay Bhowmik, Advocate

Respondent Rep by: Shri K Chowdhury, Authorized Representative.

CORAM: Hon'ble Mr P K Choudhary, Member (J)

Hon'ble Mr P Venkata Subba Rao, Member (T)

Final Order No. 76602/2019

PER P.KCHOUDHARY:

The instant appeal has been filed by M/s. S D Business Enterprise Private Limited against demand of service tax of Rs. 58,29,459/- alongwith interest and penalty vide Order dated 02.06.2008 passed by the Ld. Commissioner of Service Tax, Kolkata, for the period October 2001 to March 2005, which is under challenge in this appeal.

2. Briefly stated, the facts of the case are that the appellant assessee is engaged in rendering taxable services under the category of Clearing and Forwarding services on which service tax is being paid. Show Cause Notice dated 05.03.2007 (SCN) was issued for non-payment of service tax on the expenditure incurred towards warehousing, transportation, electricity, travelling & conveyance, stationary & allied charges sought to be claimed as reimbursement from the principal i.e. the client of the assessee. It is the case of the department that the said expenditures are necessarily to be incurred to render the services of clearing and forwarding services without which said services cannot be rendered and that the assessee cannot artificially bifurcate them to claim deduction from the assessable value for payment of service tax.

3. Sri Sanjay Bhowmik, Ld. Advocate, appeared for the appellant and Sri K Chowdhury, Ld DR. appeared for the Revenue.

4. The Ld. Advocate appearing for the appellant submitted that service tax has been rightly paid on the amount charged towards remuneration for providing the clearing and forwarding services and that the expenses amount recovered from the principal cannot be included in the assessable value for demanding service tax. He also contested the demand on time bar and imposition of penalty. On the other hand, the Ld. Departmental Representative (DR) submitted that the case is squarely covered by the Tribunal's Larger Bench decision in the case of Sri Bhagavathy Traders vs. CCE Cochin [2011 (24) STR 290 (Tri-LB)] wherein it

has been held that such expenses cannot be termed as reimbursement for seeking exclusion from value of taxable services. He specifically relied on the following observation made by the Larger Bench:-

“6.4 The claim for reimbursement towards rent for premises, telephone charges, stationery charges, etc. amounts to a claim by the service provider that they can render such services in vacuum. What are costs for inputs services and inputs used in rendering services cannot be treated as reimbursable costs. There is no justification or legal authority to artificially split the cost towards providing services partly as cost of services and the rest as reimbursable expenses.”

The Ld. DR also relied on subsequent decisions of the Tribunal in case of Modern Business Solutions vs. CST Ahmedabad [2019 (24) GSTL 353 (Tri-Ahmd)] and in the case of Adarsh Agency vs. CCE Nagpur [2017 (6) GSTL 157 (Tri-Mum)] wherein the Larger Bench decisions have been relied by the Tribunal. On the basis of said decisions, the Ld. DR submitted that there is no merit in the case of the appellant and hence, the appeal be rejected.

5. Heard both sides and perused the appeal records.

6. We find that the issue is no longer res integra inasmuch as the same stands decided by the Larger Bench of the Tribunal in the case of Sri Bhagavathy Traders (Supra). Therefore, the amount of expenditure claimed as deduction by the appellant is not permissible and hence the appellant is liable to pay the demanded service tax. The plea of limitation raised by the appellant is not acceptable inasmuch as the fact of recovery of said expenses were not disclosed by the appellant. With regard to imposition of penalty, the Ld. Advocate pleaded for waiver in terms of Section 80 of the Finance Act, 1994. We are of the view that the appellant is entitled to relief by way of waiver of penalty under the aforesaid provisions and hence, order accordingly. Thus, penalty imposed on the appellant is set aside.

7. The appeal is thus partly allowed in the above terms.

(Operative part of the order was pronounced in the open court)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE**

Appeal(s)Involved:

ST/41/2008-DB

[Arising out of Order-in-Appeal No. 85/2007 dated11/12/2007 passed by the
Commissioner of Central Excise, Customs & Service Tax, Cochin]

Eastern Retreads (P) Ltd.

Vazhakulam,Muvattupuzha-686670
Kerala

Appellant(s)

Versus

C.C.,C.E.&S.T-Cochin

C.RBuilding,
I.S Press Road,Ernakulam,Cochin-682018,
Kerala

Respondent(s)

Appearance:

Shri. Joy Thattillttoop,Advocate

For the Appellant

Shri. Gopakumar, Jt.Commr.(AR)

For the Respondent

Date of Hearing:28/10/2019

Date of Decision: 14/11/2019

CORAM: HON'BLE SHRI S.S GARG, MEMBER (JUDICIAL)

HON'BLE SHRI P.ANJANI KUMAR, MEMBER (TECHNICAL)

Final Order No. 21005 /2019

Per:S.SGARG

The present appeal is directed against the impugned order dt.11/12/2007 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has upheld the Order-in-Original but dropped the penalty under Section 77.

2. Briefly the facts of the present case are that the appellants are engaged in the services of retreading of worn-out tyres of automobiles. As it appeared that the activities fall under the scope of extended definition of taxable service in the category of "Maintenance or Repair Service" w.e.f. 16/06/2005 and the appellant has failed to pay the service tax and to file a statutory return, a show-cause notice was issued to them demanding an amount of Rs.4,32,840/- (Rupees Four Lakhs Thirty Two Thousand Eight Hundred and Forty only) towards service tax and education cess and proposing penalties under Sections 76 and 77 of the Finance Act. The original authority after due process of law confirmed the demand and imposed penalties. Aggrieved by the said order, appellant filed appeal before the Commissioner (Appeals) on the ground that the lower authority has failed to appreciate the true spirit of the definition under Section 64 and Section 65(9) of the Finance Act 1994 and the relevant notification issued by the Government that their service will not come under the head "Management, Maintenance or Repair" as their business is excluded as an activity connected with motor vehicle and the section itself has clarified that the maintenance and repair of motor vehicles is excluded and the other ground raised by the appellant is that if at all the activity of the appellant is to be covered then it is covered under the head of Authorized Service Station but the Commissioner (Appeals) has rejected the appeal of the appellant.

3. Heard both the parties and perused records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the retreading of tyres is excluded from the Service Tax under Section 65(64). He further submitted that retreading of tyre is also a part of motor vehicle and same is excluded under Section 65(64) of the Finance Act, 1994. He further submitted that this issue was considered by the Hon'ble Kerala High Court in the case of **Kuttukaran Trading Ventures V. CCE** wherein the Hon'ble High Court has held that repair and reconditioning of engine of a vehicle is excluded being part of the motor vehicle which is exempted under Section 65 (64). He further submitted that the SLP filed by the Revenue against the decision of the High Court has also been dismissed by the Hon'ble Apex Court.

5. On the other hand the learned AR defended the impugned order and submitted that the issue of taxability of a specific activity "retreading of tyre" has been considered by various judicial forum including the CESTAT and the Hon'ble Apex Court and it has been consistently held that it attracts service tax under the category of "Management, Maintenance and Repair Service". The learned AR further submitted that this issue is no more *res integra* and has also been settled by the Hon'ble Apex Court in the case of **Safety Retreading Company (P) Ltd. Vs. CCE, Salem decided on 18.01.2017** wherein the Apex Court has held that retreading of tyre would attract service tax under the category of "Maintenance and Repair Service". The learned AR relied upon the following decisions in support of his submission:

- i. *CCE, Mysore Vs. Karthik Tyre Service – 2018 (8)*
- ii. *M/s. Chakra Tyres Vs. CC, CE&ST, Salem – 2019 (6)*
- iii. *C.C, C.E&ST, Cochin Vs. Hi-tech Tyres – 2019 (1)*
- iv. *CC, CE&ST, Guntur Vs. Gripwell Retreads Pvt. Ltd. – 2019 (2)*

V. *M/s. Suprem eTyres Pvt. Ltd. Vs. CCE&ST, Guwahati-2016*

(11)

vi. *M/s.Highway Tyres Pvt. Ltd. Vs. CCE&ST, Chandigarh-1-2015 (11)*

vii. *Udaipur Tyre Retreading Co. P. Ltd. Vs. CCE, Jaipur-11-2015(9)*

5.1. He also submitted that the decisions relied upon by the appellant is distinguishable because M/s. Kuttukaran Trading Ventures is an authorized Service Centre of automobiles whereas the present appellant is not falling under that category. He further submitted that nowhere in that order, the activity of tyre retreading is discussed. Repair, reconditioning, overhauling parts of motor vehicles like I.C Engines and others are only discussed whereas tyre retreading is a specific activity and the retreading is done on any tyre which is brought to the assessee by anybody. The tyre retreading is a general service offered. It cannot be brought under the ambit of the issue discussed in the order of the Hon'ble High Court.

6. After considering the submissions of both the parties and perusal of the material on record, we find that various Benches of the Tribunal has consistently held that retreading of tyre falls under the category of "Maintenance, Management and Repair Service" and is liable to service tax. Further we find that the Apex Court has also in the case of **Safety Retreading Company Ltd.** cited supra has specifically held that retreading of tyre is a service which falls under the category of "Management, Maintenance and Repair Service". Further we find that the decision of the Hon'ble High Court is not squarely applicable in the present case because the activity of retreading of tyre was not an issue in the case decided by the Hon'ble High Court of Kerala whereas the Apex Court has specifically in the case of Safety Retreading has held that retreading of tyre would attract service tax under Management, Maintenance and Repair Service. Further we find that this Tribunal in the case of **CCE Vs. Hi-tech Tyres** cited supra has held in para 5 as under:

"5. After considering the submission of the learned AR and perusal of the impugned order, we find that the process of retreading done by the respondent is not manufacturing process as no new product emerges but it is a process in which the pre-cured tread rubber/tread rubber is affixed on the surface of the worn-out tyres and subjecting the same to a process of curing in tyre mould using steam and this activity fall under the category of "Maintenance, Repairs and Reconditioning Service". Further, we find that the Division Bench of this Tribunal in the case of Udaipur Tyre Retreading Co. P. Ltd. cited supra has held that the activity of retreading of tyre does not tantamount to maintenance and repair including the recondition or restoration or servicing of motor vehicles. Further the Tribunal has relied upon the decision in the case of PLA Tyre Works [2008 (9) STR 20 (Tri.-)] wherein the CESTAT clearly held that the impugned service is covered under the "maintenance and repair service". Further in the case of P.C. Cheriyan cited supra, the Hon'ble Supreme Court has held that retreading of old tyre does not amount to manufacture. Therefore, by following the ratio of the above said decisions, we are of the considered view that the impugned order holding that the process of retreading of tyre amounts to manufacture is not sustainable in law and therefore we set aside the impugned order. As far as imposition of penalty under various provisions are concerned, since the issue relates to interpretation and there were divergent views during the relevant period, we are not inclined to confirm the imposition of penalties, by extending the benefit of Section 80. Accordingly, we confirm the demands and set aside the penalties. Appeal is partly allowed."

7. In view of our discussion above, we do not find any infirmity in the impugned order which we upheld by dismissing the appeal of the appellant to the extent of service tax which the appellant is liable to pay. As far as penalty under Section 76 is concerned, we are of the opinion that the issue relates to interpretation of the service and there were divergent views during the relevant time, therefore we extend the benefit of Section 80 to the appellant and drop the penalty. Appeal is partly allowed.

(Order was pronounced in Open Court on **14/11/2019**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, BANGALORE
COURT NO. I**

**Service Tax Appeal No. 20162 of 2018 &
Service Tax Appeal No. 20164 of 2018**

Arising out of Order-in-Original No. TVM-EXCUS-000-COM- 64 & 65-17-18, Dated:
17.10.2017

Passed by Commissioner of GST and Central Excise, Thiruvananthapuram,
TRIVANDRUM

**Date of Hearing: 30.10.2019
Date of Decision: 12.02.2020**

**KERALA COOPERATIVE DEPOSIT GUARANTEE FUND BOARD
TC25/1955(4), MANJALIKULAM ROAD, THIRUVANTHAPURAM
695001, REP BY THE SECRETARY -TREASURER
TRIVANDRUM KERALA - 695001**

Vs

**COMMISSIONER OF CENTRAL TAX AND CENTRAL EXCISE
THIRUVANTHAPURAM P.B.NO.13, I.C.E BHAWAN
PRESS CLUB ROAD THIRUVANTHAPURAM KERALA-695001**

Appellant Rep by: Shri Ashok M Cherian & Shri P S Raghukumar, Advs.

Respondent Rep by: Smt D S Sangeetha, Joint Commissioner, (AR)

CORAM: S S Garg, Member (J)

P Anjani Kumar, Member (T)

FINAL ORDER NOS. 20109-20110/2020

Per: P Anjani Kumar:

Brief facts of the case are that the appellant, Kerala Cooperative Deposit Guarantee Fund Board is constituted, under Kerala Cooperative Deposit Guarantee Scheme, 2012 for administration of Cooperative deposit fund, by Government of Kerala, who notified the scheme vide S.R.O. No. 28/2012 with G.O.(P) No.03/2012/Co-op dated 11-1-2012, vide powers vested in them under Section 57(B) of the Kerala Co-operative Societies Act, 1969. The minister in charge of Cooperation would be the chairman of the Board and all other members are nominated by the Government of Kerala. The contribution to the fund is the sum of money payable to the fund by the credit societies at the rate specified; the purpose of the scheme is to provide guarantee for the deposits made in the credit societies and for creating confidence among the depositors and for attracting more details; all Cooperative societies have to follow this; the fund is to be utilized for the settlement of the claims in respect of the deposits which are guaranteed; all the moneys of the fund are to be deposited in the State of District Cooperative Banks or in the treasury; there is no provision that the interest accrued to be added to the corpus fund; if a credit society is unable to make payment to the depositor, the depositor shall be free to approach the Board for assistance. The Department have issued two SCNs dated 31.01.2017 & 12.09.2017 for the periods 2012 to 2016, alleging that their activity must not be charged to Service Tax being 'Services' under Section 65B of Finance Act, 1994

from 01.07.2012 onwards; the SCNs came to be confirmed by a common Order 64 & 65 dated 17.10.2017. Hence, the present appeals.

2. Sh. Ashok M.Chcrian, Learned Counsel, appearing for the appellants submits that the demand was built upon on a wrong premise that the activity of the appellant is identical to the service rendered by Deposit Insurance And Credit Guarantee Corporation (DICGC); whereas the DICGC came into existence by an Act and none of the Directors shall be an officer of the Government or Reserve Bank of India whereas in their case, Chairman and Members of the Boards are Ministers and Government officials; DICGC is an Insurance company whereas the Board is constituted for rendering necessary assistance to the depositors of the societies which contributed fund; whereas DICGC indemnifies the Banks and guarantees the deposits made by individual depositors up to Rs.1 Lakh, the Board administers the fund and the guarantee is provided by the Government; the nature of collection of contribution to the fund is to create a corpus and not to levy a fee or provide a service to any business entity. The activity undertaken by the appellant which is under a Kerala Government scheme provided in tune with the Article 43B of the Constitution of India.

2.1 Learned Counsel further submits that in order to constitute a service, four elements must be there, the service provider, the service receive, actual service and consideration for the service; what is chargeable to Service Tax is not the transaction in money itself as it cannot be considered a Service within the meaning of Section 65B(44)(a)(iii). The contribution to the fund is not in the nature of insurance premium or guarantee fee which could be termed as a 'Service' as defined under Section 65B(44) of Finance Act, 1994; a transaction in money can be termed as 'Service' only if it is specifically mentioned in Explanation 2 to Sub-Section 44 of Section 65B; the Explanation carves out an exception to the exclusionary part of the definition by providing that: (i) any activity relating to use of money or its conversion by cash or by any mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged; (ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out - (a) by a lottery distributor or selling agent in relation to promotion, marketing, organizing, selling of lottery or facilitating in organizing lottery of any kind, in any other manner; (b) by a Forman of chit fund for conducting or organizing a chit in any manner, shall not be considered as a transaction in money. Therefore, the only activity, for which a separate consideration is charged, and which cannot be considered as a transaction in money is the activity mentioned in the Explanation 2, and Service Tax would accordingly be charged on the consideration received in respect of such an activity, then it follows that all other cases of 'transaction in money' shall be excluded from the charge of Service Tax. Learned Counsel further submits that the Commissioner has seriously erred in following the Education guide issued by CBEC ignoring the above Explanation.

2.2. Learned Counsel further submits that the finding of the Learned Commissioner that the activity of the appellant is 'service' is on an erroneous application of law in view of the well settled legal position as laid down by the Hon'ble High Court of Delhi in *Delhi Chit Fund Association Vs UOI, 2013 (30) STR 347 (Del.)*, which was adopted by the Hon'ble Supreme Court in *UOI and Others Vs M/s Margadarshi Chit Funds Pvt. Ltd., etc (Civil Appeal No. 5724-5725/2011- decided on 04.07.2017)*, that the exclusionary part in definition clause (a)(iii) in Sub-Section 44 of Section 65B is construed in the light of or with the aid of Explanation 2 then any activity not being an activity of the nature explained in the said Explanation would be out of the clutches of the definition; applying this principle the activity of the appellant, which is only a transaction in money, would not be a 'service' as defined under Sub-Section 44 of Section 65B of Finance Act, 1994.

3. Learned AR for the Department reiterated the findings of the learned Commissioner and submits that the Board is created under Kerala Cooperative Deposit Guarantee Scheme; the payment is mandatory for the Cooperative societies; upon joining the scheme, the liability of the cooperatives is taken care of; the case of *DICGC decided by CESTAT, Mumbai,, 2015-TMI-143-CESTAT*; the contributions of the societies is not a transaction in money as it is fixed at a rate of 10 paisa for every 100 rupees of deposit.

4. Heard both sides and perused the records of the case. In terms of Section 65 B (44) of Finance Act, 1994 "Service" is "any activity carried out by a person for another for consideration and includes a declared service ". Some exclusions are provided in the said Section itself like an activity constituting merely a transaction in money or actionable claim etc. The appellant claims that they are not collecting any consideration for any particular service rendered but are only receiving contribution towards building a corpus fund and therefore, no service is involved. The appellants vehemently claimed that the transactions they do with the Co-operative societies is that of transaction in money and as per Educational Guide to Service Tax issued by CBEC, transactions only in money or actionable claims do not constitute Service Tax. We have gone through the said Guide and we see that at Para 2.8.1 of the Circular referred to by the Advocate for the appellants, it is clarified that:

2.8.1. What kind of activities would come under 'transaction only in money'?

- The principal amount of deposits in or withdrawals from a bank account.

- Advancing or repayment of principal sum on loan to someone.

- Conversion of Rs.1,000 currency note into one-rupee coins to the extent amount is received in money form.

5. Going by the above explanations, we find that the collection of contribution to build a corpus fund to secure the depositors' interest is not a mere transaction in money. The service rendered by the appellants does not find place either in the exclusion or in the Negative List. Therefore, we find that the Learned Commissioner has correctly concluded that the activity undertaken by the appellants is not transaction in money. Further, Learned Commissioner referring to the Indian Contract Act, 1872 shows that the premium collected by the appellants constitutes a consideration as defined under Section 2(d) of the said Act. Consideration for a promise is defined as under:

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise".

6. We find that the Advocate for the appellants has relied upon the case of Margadarashi Chit Funds Pvt. Ltd. (supra). However, we find that the case pertains to chit fund companies who function like a Bank and the activity of the appellants is not comparable to that of the appellants therein. Therefore, the case of Margadarashi Chit Funds Pvt. Ltd. (supra) would not be of any help to the appellants. We find that Learned Commissioner has relied upon the case of Deposit Insurance and Credit Guarantee Corporation. The appellants argued that "it would be pertinent to note that the analogy of the Deposit Insurance and Credit Guarantee Corporation of India (DICGC) does not apply in the instant case. We find that Learned Commissioner has rightly observed that DICGC is also providing guarantee for the deposits made by the public in commercial banks. The only difference between the activity performed by DICGC and the appellants is that whereas the former is extending guarantee to the deposits made by the public in commercial banks, the appellant is extending guarantee in respect of deposits made by the public in Co-operative credit societies. The nature of the service is same. Likewise,

the consideration obtained might be accounted under different Heads. However, the fact remains that both are getting a consideration for the activity performed. It was submitted by the Authorized Representative for the Department that contribution is collected at the rate of 10 paisa for every 100 rupees of deposit. This fact is not countered by the appellants. Learned Advocate for the appellants submits only to the extent that so far there was no occasion to use the corpus fund for securing the deposits of public in any of the co-operative societies. In view of the above, we find that the case of DICGC is squarely applicable to the case of the appellants. We find that the Tribunal in the case has gone into various aspects and have concluded that "it is clear that deposit insurance undertaken by the appellant falls within ambit of general insurance business defined in Section 65(49) read with Section 65(105)(d) of the Finance Act, 1994". Tribunal has further observed as follows:

5.4.11. If we apply the above legal principles to the facts of the case in hand, there is no scintilla of doubt that deposit insurance like other insurance is a contract of indemnity and is amenable to the provisions of the Indian Contract Act. Merely because it has been made compulsory under the DICGC Act, 1961, it does not cease to be a contract of insurance. Insurance of the kind described in Paras 5.4.9 and 5.4.10 above, which are statutorily prescribed and where there are more than two parties in many cases, the insurer, the insured and the beneficiary, are also considered as coming under the category general insurance business and nothing has been brought before us to show that they are not so considered/understood in law. By the same logic, Deposit Insurance Contract is also a general insurance contract as defined in law and merely because they are statutorily prescribed, they do not cease to be contract of insurance. The insurer is the Corporation, the insured are the banks and the beneficiary is the depositor(s)".

7. In view of the above, we have no doubt, whatsoever, in our minds that the activity of the appellant is same as that of DICGC and if DICGC is liable to pay Service Tax so is the appellant liable to pay Service Tax. Coming to penalties imposed, we find that the appellants are a body constituted by the Government. There are a number of decisions by the Tribunal and Higher Courts that mens rea cannot be attributed to the Public Sector Units. The appellant is a body constituted by Government. Therefore, we find that it is not expedient and necessitated to impose penalties. Therefore, while confirming the duty demand along with interest, we hold that the penalties imposed under Section 77 & 78 are liable to be set aside, by invoking the provisions of Section 80 of the Finance Act, 1994.

8. In the result, Appeal No. ST/20162/2018 & ST/20164/2018 are partly allowed confirming the duty demanded and setting aside the penalties imposed.

(Order pronounced in the open court on 12.02.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, BANGALORE
COURT NO. I**

Service Tax Appeal No. 20735 of 2019

Arising out of Order-in-Appeal No. MLR-EXCUS-000-APP-MS-238-2018-19, Dated:
10.04.2019

Passed by the Commissioner of Central Tax, Belgaum (Appeals)

Date of Hearing: 26.08.2019

Date of Decision: 16.12.2019

**MANGALORE INTERNET CITY PVT LTD
C-1, MAXIMUS COMMERCIAL COMPLEX, LIGHT HOUSE HILL ROAD
MANGALORE - 575001 KARNATAKA**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND CENTRAL TAX
MANGALORE COMMISSIONERATE 7TH FLOOR, TRADE CENTER
BUNTS HOSTEL ROAD MANGALORE-575003 KARNATAKA**

Appellant Rep by: Mr K Dayanand, CA

Respondent Rep by: Mrs D S Sangeetha, Jt. Commr. (AR)

CORAM: S S Garg, Member (J)

FINAL ORDER NO. 21216/2019

Per: S S Garg:

The present appeal is directed against the impugned order dated 10/04/2019 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellants are holders of Service Tax Registration and are engaged in rendering taxable services. The appellants filed a refund claim of service tax of Rs. 8,97,340/- (Rupees Eight Lakhs Ninety Seven Thousand Three Hundred and Forty only) dated 18/12/2017 before the respondent (received on 20/12/2017). In the instant refund claim, it was stated by the appellant that they had paid service tax of Rs. 59,82,624/- (Rupees Fifty Nine Lakhs Eighty Two Thousand Six Hundred and Twenty Four only), interest of Rs. 44,363/- (Rupees Forty Four Thousand Three Hundred and Sixty Three only) and penalty of Rs. 8,97,340/- (Rupees Eight Lakhs Ninety Seven Thousand Three Hundred and Forty only) as per the audit objections. However, later on, they realized that there was no necessity of payment of interest or penalty under Rule 15 of Cenvat Credit Rules or under Section 78 of the Finance Act, as they had sufficient balance of cenvat credit during the material period of alleged wrong availment of credit.

2.1. On receipt of the said refund claim, it was noticed by the respondent that the appellant had voluntarily paid penalty along with principal service tax and interest in response to communications received from the departmental auditors who had conducted audit of their records for the period from July 2014 to March 2016. Further they had availed the benefit of 15% penalty and sought closure of the issue. They had also confirmed to the Audit that amounts were paid voluntarily and no further appeal shall be

filed in the matter including no refund shall be claimed in future. Therefore, a show-cause notice under C. No. IV/10/57/2017 STR dated 31/01/2018 was issued to the appellant as to why the instant refund claim should not be rejected for the reason that the same was unsubstantiated in terms of any specific statutory provisions, as it appeared to be an afterthought to reopen the closed issue.

2.2. By following the due process, the Assistant Commissioner vide Order-in-Original dated 15/03/2018 rejected the refund claim. Aggrieved by the said order, appellant filed appeal before the Commissioner who also rejected the same. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts. He further submitted that there was no suppression on the part of the appellant and therefore, the question of payment of penalty does not arise. He further submitted that the penalty cannot be imposed without issuance of show-cause notice. He also submitted that there was no suppression on their part and the demand was for the normal period and neither the audit had alleged anything regarding suppression of facts. He further submitted that tax and interest was paid before the issuance of show-cause notice and the said amount was paid out of the credit and the said credit was not used. He further submitted that appellant was not given sufficient time to produce the documents which were available with them. He further submitted that even the payment of interest was also not required and all the payments forcibly made to the Revenue are required to be refunded to the appellant. He further submitted that when the tax was paid under Section 73, penalty is not applicable. He further submitted that the penalty amount was paid under mistake of law and therefore the appellant is to get the refund of the same. In support of his submission, he relied upon the following decisions:

a. CCE & ST, LTU, Bangalore Vs. Adecco Flexione Workforce Solutions Ltd.

b. Krishna H T Vs. Commissioner of Central Tax.

c. Jossy Edwin Pinto Vs. CCE & CT, Mangalore

d. Aerosol Filters Pvt. Ltd. Vs. CCT

5. On the other hand, learned AR defended the impugned order and submitted that the Commissioner (Appeals) has given cogent reason for denying the refund. She further submitted that during the course of audit, appellants have voluntarily made the payment and requested for waiver of show-cause notice. The payment was made without any protest. She also submitted that as per the Board clarification **F.No. 137/46/2015-ST** dated 18/08/2015 it was provided that payment of penalty without issuance of show-cause notice was in accordance with law. She further submitted that there is no bar in law to demand service tax under proviso to Section 73 invoking suppression, fraud, willful misstatement etc. even when the demand is within the normal period.

6. After considering the submissions of both the parties and perusal of the material on record, I find that the payment of 15% penalty was voluntary and based on this voluntary payment, show-cause notice was waived and there was no protest raised by the appellant while making the payment. Further, I find that as per the Board clarification dated 18/08/2015, payment of penalty without issuance of show-cause notice was in accordance with law. Further, I find that the claimant had filed a declaration while seeking waiver of show-cause notice that the amount paid will not be sought as refund. Further, I find that the Commissioner (Appeals) has given sufficient reason for denial of refund and it is pertinent to reproduce the finding of the Commissioner (Appeals) recorded in para 9 & 11, which is reproduced herein below:

"9. I note that the respondent pointed out that the audit had given an option to the appellant to admit the audit objections and in the event of disagreement with the said objections to submit a detailed reply against the same. However, the appellant vide their letter dated 30/11/2016 accepted all the objections and vide further letter dated 26/12/2016 also informed the details of payment of service tax, interest and penalty made by them in pursuance of audit objections. I note that, further the respondent under Para 13, pointed out that as per Board clarification contained in letter **F.No. 137/46/2015-ST** dated 18/08/2015 wherein it is clarified that in the event waiver of show-cause notice is sought by the assessee after payment of applicable penalty, there is no obligation on the part of the Department to proceed further in the matter. It was also indicated that such notion is based on verdict of Hon'ble Supreme Court in the case of CC, Mumbai vs. Virgo Steels, reported in 2002 (141) E.L.T. (598) SC. It was held by the Hon'ble Court that the individual always had a right to waive off such right i.e., issue of show-cause notice. In view of the above, the respondent held that since the appellant had already exercised his right, cannot go back on the same again and rejected the refund claim.

....

11. The appellant had also argued that they had sufficient balance of credit and accordingly, there arise no liability of interest, there was no suppression on their part, demand was for normal period etc. For the reasons stated above, I note that no such questions can be determined at this stage. It was essentially the appellant who has chosen not to litigate further and paid the penalty. There is no dispute that Department has not followed any procedure as per audit manual like issuances of FAR, discussion/consultation with the appellant. It is anybody's guess that the appellant was quite aware of the fact that for what reasons the penalty was being paid by them. No questions of coercion, pressure, etc. has been brought up on by them by the Auditors. As indicated from the records, it was conscious and voluntary act on their part. As already pointed out above, since the interest of the Department is also involved in the matter and grant of refund would harm the interest of the Department, the findings of the respondent in the matter does not warrant any intervention." Further I find that the decisions relied upon by the appellant are not applicable in the facts and circumstances of the present case.

7. In view of my discussion above, I do not find any infirmity in the impugned order which is upheld by dismissing the appeal of the appellant.

(Order pronounced in the open court on 16.12.2019)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH BANGALORE**

ST/20340/2019-SM

[Arising out of Order-in-Appeal No. 34/2019 dated
01/02/2019 passed by Commissioner of Central Tax,
BANGALORE-I (Appeal)]

M/s Chalet Hotels Ltd

No17/2 Raheja Point No 202-203 2nd Floor
Magrath Road Ashok Narar
BANGALORE KARNATAKA 560025

Appellant(s)

Versus

**Commissioner Of Central Tax,
Bengaluru East**

BMTC BUILDING
OLD AIRPORT ROAD,
DOMLUR, BANGALORE
KARNATAKA 560071

Respondent(s)

Appearance:

Mr. Rajesh mar, CA
Mr.Gopa Kumar, AR

For the Appellant
For the Respondent

Date of Hearing:07/06/2019

Date of Decision:12/06/2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIALMEMBER

Per:S.SGARG

Final Order No. 20467/2019

The present appeal is directed against the impugned order dated 01.02.2019 passed by the Commissioner (Appeals) where by the Commissioner(Appeals) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellants are rendering taxable service of ‘Construction of Residential Complex Service’. The appellants had undertaken construction of a residential complex named VIVERA at property bearing No.21,Koramangala Industrial layout, Bangalore, planning to construct 25 floors. The project was undertaken after obtaining due NOC from M/s Hindustan Aeronautics Ltd. (HAL), and the Bruhat Bangalore Mahanagara Palike(BBMP). Subsequently,M/s HAL revoked the NOC, against which the appellant filed WP No. 37571/2013(GM-RES) before the Hon’ble High Court of Karnataka, who issued an interim order dated 23.10.2013 to the effect that no construction should be undertaken over above 40.00 meters from the ground level and accordingly the said residential complex was restricted to 17 floors. In the wake of the said litigation, various customers who had booked individual residential flats in the said residential complex cancelled their bookings and sought refund of the amounts paid by them. Accordingly, related agreements were cancelled and the amounts involved repaid/refunded back to the customers by M/s Chalet Hotels Pvt. Ltd. Consequently, M/s Chalet Hotels Pvt. Ltd. filed refund claims with the Department seeking refund of Service Tax paid by them in respect of such amounts collected and refunded to the customers. The details of such refund claims are given in the table below:

SI No	Name	Flat No.	Cancellation Date	Invoice Value	Tax Deposited
1.	Sandeep Balla	VIVB FFF0 602	31.07.2017	1,77,12,72 4/-	4,75,205 /-
2.	Arjun Imtiaz and Mohamed Imtiaz	VIVB FH07 01	15.07.2017	2,23,39,39 4/-	6,57,538 /-
3.	NS Vinodh and Sheela Vinodh	VIVB FC11 01	15.07.2017	3,04,51,45 1/-	7,93,252 /-

The refund claim is in respect of 03 customers to whom the refund was made by the claimant, originally, the earliest date of payment of service to the exchequer was between September 2010 to April 2013, but the claim for refund has been filed on 21.08.2017. Hence, it appeared that the claim for refund has been filed beyond the period of one year as required under Section 11B and therefore the entire claim was hit by limitation of time. After following the due process, the Assistant Commissioner vide Order-in-Original dated 03.08.2018 rejected the refund claim being timebarred as the refund claim was filed beyond one year period in terms of Section 11B of the Central Excise Act as made applicable to Service Tax vide Section 83 of the Finance Act, 1994. Aggrieved by the said order, the appellant filed appeal before the Commissioner (Appeals) who rejected the same. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned Consultant appearing for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and the decisions rendered by various Tribunals. He further submitted that Section 11B of the Central Excise Act is not applicable as they are claiming refund of service tax paid in advance for which the appellant had not provided any service in terms of Rule 6(1) of the Service Tax Rules. He further submitted that in terms of Rule 6(3) of the Service Tax Rules, 1994, they are entitled to take back credit on service not provided for any reason. He also submitted that when the service is not provided then the assessee is entitled to refund claim without limitation of Section 11B. In support of his submission, he relied upon the following decisions:

- *Commissioner v. Madhvi Procon Pvt. Ltd.*–2015(38)STR74(Tri.)
- *Radico Khaitan Ltd. v. Commissioner*–2014(34)STR586(Tri.)
- *Wolters Kluwer India Ltd. v. CST*–2014(36)STR396(Tri. Del.)
- *Sunrays Engineers Pvt. Ltd. v. Commissioner*–2015(318)ELT583(SC)
- *Indo-Nippon Chemicals Co. Ltd. v. UOI*–2005(185)ELT19(Guj.)
- *CCE, Pune v. Ispat Industries Ltd.*–2007(220)ELT218(Tri. Mum.)
- *SS Agro Industries v. Commissioner of Customs, Air Cargo (Export), New Delhi* –2014(309)ELT334 (Tri. Del.)
- *CCE, Kolhapur v. Pratibha Constn. Engr. & Contr. (I) Pvt. Ltd.*–2011(22)STR182(Tri. Mum.)
- *Commissioner of C. Ex., Bangalore v. KVR Construction*–2012(26)STR195 (Kar.)
- *Chambal Fertilisers and Chemical Ltd. v. Commissioner of C. Ex, Indore* –2017(52)329(Tri. Del.)

5. On the other hand, Learned AR defended the impugned order and submitted that Section 65(105)(zzzh) prescribes Service Tax on construction of residential complex. When advance is received, Service Tax is leviable and in the instant case, the appellant provided this service, collected Service Tax and paid to the Government exchequer. Hence, the amount paid is Service Tax only as per the law and hence it cannot be treated as deposit. The provisions governing Service Tax will apply. He further submitted that the decisions relied upon by the appellant in support of his submission are not applicable to the factual situation and they have been distinguished in subsequent decisions of the Tribunal and finally, the Larger Bench in the case of *Veer Overseas Ltd. v. Commissioner of Central Excise, Panchkula* – 2018 (15) GSTL 59 (Tri. LB) has settled the issue regarding Section 11B of the Central Excise Act. Besides this, he also relied upon the following decisions:

- *ELGI Equipments Ltd. v. Commissioner of C. Ex., Coimbatore*–2013(31)STR583(Tri. Chennai)
- *Benzy Tours & Travels Pvt. Ltd. v. Commissioner of Service Tax, Mumbai-I*–2016(43)STR 625(Tri. Mumbai)
- *Andrew Telecom (India) Pvt. Ltd. v. Commissioner of Customs & Central Excise, Goa* – 2014(34)STR562 (Bom.)

6. After considering the submissions of both the parties and perusal of the material on record, I find that when the appellant received the advance from the buyers along with Service Tax and paid the same to the Government as Service Tax and if subsequently, the contract was cancelled between the appellant and his buyers and the appellant filed the refund claim on the ground that no service was provided and hence the provision of Section 11B of Central Excise Act is not applicable is devoid of force in view of the Larger Bench decision of the Tribunal in the case of *Veer Overseas Ltd.* (supra). The Larger Bench of the Tribunal in the said case has analyzed various contradictory

decisions and has held in Para 7 to 10 as under:

“7. What is crucial is that the appellants paid the claimed amount as service tax. They have approached the jurisdictional authority of service tax for refund of the said money. It is clear that the jurisdictional service tax authority is governed by the provisions of Section 11B as the claim has been filed as per the said mandate only. Here, we have specifically asked the Learned Counsel for the appellant under what provision of law he is seeking the return of the money earlier paid. He admitted that the claim has been preferred in terms of the provisions of Section 11B. If that being the case, it cannot be said that except for limitation other provisions of Section 11B will be made applicable to the appellant. The Learned Counsel also did not advance such proposition. He repeatedly submitted that the amount is paid mistakenly. The same is not a tax and should be returned without limitation as mentioned in Section 11B. We are not convinced by such submission.

8. Here it is relevant to note that in various cases the High Courts and the Apex Court have allowed the claim of the parties for refund of money without applying the provisions of limitation under Section 11B by holding that the amount collected has no sanctity of law as the same is not a duty or a tax and accordingly the same should be returned to the party. We note such remedies provided by the High Courts and Apex Court are mainly by exercising powers under the Constitution, in writ jurisdiction. It is clear that neither the jurisdictional service tax authority nor the Tribunal has such constitutional powers for allowing refund beyond the statutory time-limit prescribed by the law. Admittedly, the amount is paid as a tax, the refund has been claimed from the jurisdictional tax authorities and necessarily such tax authorities are bound by the law governing the collection as well as refund of any tax. There is no legal mandate to direct the tax authority to act beyond the statutory powers binding on them. The Hon'ble Supreme Court in *Mafatlal Industries Ltd.* (supra) categorically held that no claim for refund of any duty shall be entertained except in accordance with the provisions of the statute. Every claim for refund of excise duty can be made only under and in accordance with Section 11B in the forms provided by the Act. The Apex Court further observed that the only exception is where the provision of the Act where under the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. We note in the present case there is no such situation of the provision of any tax levy, in so far as the present dispute is concerned, held to be unconstitutional. As already held that the appellant is liable to pay service tax on reverse charge basis but for the exemption which was not availed by them. We hold that the decision of the Tribunal in *Monnet International Ltd.* (supra) has no application to decide the dispute in the present referred case. We take note of the decision of the Tribunal in *XL Telecom Ltd.* (supra). It had examined the legal implication with reference to the limitation applicable under Section 11B. We also note that the said ratio has been consistently followed by the Tribunal in various decisions. In fact, one such decision reached Hon'ble Supreme Court in *Miles India Limited v. Assistant Collector of Customs - 1987 (30) E.L.T. 641 (S.C.)*. The Apex Court upheld the decision of the Tribunal to the effect that the jurisdictional customs authorities are right in disallowing their refund claim in terms of limitation provided under Section 27(1) of the Customs Act, 1962. We also note that in *Assistant Collector of Customs v. Anam Electrical Manufacturing Co. - 1997 (90) E.L.T. 260 (S.C.)* referred to in the decision of the Tribunal in *XL Telecom Ltd.* (supra), the Hon'ble Supreme Court held that the claim filed beyond the statutory time limit cannot be entertained.

9. The Apex Court in *Mafatlal Industries Ltd.* (supra) observed that the

Central Excise Act and the Rules made thereunder including Section 11B too constitute “law” within the meaning of Article 265 and that in the face of the said provisions-which are exclusive in their nature no claim for refund is maintainable except and in accordance there with. The Apex Court emphasized that “the provisions of the Central Excise Act also constitute “law” within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under “the authority of law” within the meaning of the said Article”.

10. *Having examined various decided cases and the submissions of both the sides, we are of the considered view that a claim for refund of service tax is governed by the provision of Section 11B for period of limitation. The statutory time limit cannot be extended by any authority, held by the Apex Court.”*

Since the Larger Bench after examining the various decided cases has come to the conclusion that the claim of refund of Service Tax is subject to the provision of Section 11B for period of limitation. By following the ratio of the above said decision, I am of the view that there is no infirmity in the impugned order which is upheld by dismissing the appeal of the appellant.

(Order was pronounced In Open Court on **12/06/2019**)

S.S GARG
JUDICIAL MEMBER

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, BANGALORE
COURT NO. I**

Service Tax Appeal No. 21074 of 2019

Arising out of No. TVM-EXCUS-000-APP-493-2019-20, Dated: 20.09.2019

Passed by Commissioner of Central Tax, COCHIN (Appeal)

Date of Hearing: 16.01.2020

Date of Decision: 27.01.2020

**M/s FUTURE FOUNDATIONS PVT LTD
FUTURE HOUSE, TEMPLE ROAD, SASTHAMANGALAM
THIRUVANTHAPURAM - 695010 KERALA**

Vs

**COMMISSIONER OF CENTRAL TAX AND CENTRAL EXCISE
P.B.NO.13, I.C.E BHAWAN, PRESS CLUB ROAD
THIRUVANTHAPURAM -695001 KERALA**

Appellant Rep by: Mr P Harikumar, Managing Director of the Company

Respondent Rep by: Mr S Devarajan, Jt. Commissioner (AR)

CORAM: S S Garg, Member (J)

FINAL ORDER NO. 20065/2020

Per: S S Garg:

The present appeal is directed against the impugned order dated 20.9.2019 passed by the Commissioner (A) whereby the Commissioner (A) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellants are service providers under the taxable category 'work contract service'. They are holders of service tax registration for collection and payment of service tax on the taxable service provided by them. On the basis of Circular No. 108/2/2009 dated 29.1.2009, the appellant filed a refund claim on 5.5.2009 for service tax amounting to Rs.7,95,980/- paid during the period February 2008 to November 2008. After due process, the claim was rejected by the original authority and appeal against the same was also rejected by Commissioner (Appeals) vide Order-in-Appeal No.TVM-EXCUS-000-APP-022-15-16 dated 28.4.2015. The appellant filed appeal against this in CESTAT, Bangalore which was allowed and remanded the matter to the original authority vide *Final Order No.31130/2016 dt.8.11.2016*. Based on the said order, the appellant filed a refund claim for Rs.7,95,980/- being the service tax paid of works contract service during the period February 2008 to November 2008. A part of the said refund claim, being the payments made by the assessee prior to 6.5.2008 in respect of 5 challans dated between 4.3.2008 and 5.5.2008 for a total amount of Rs.4,41,123/- were found to be hit by time bar and hence ineligible for refund. Refund of an amount of Rs.3,54,857/- which was not hit, as such, by time bar was sanctioned by the Assistant Commissioner. Aggrieved by the order of the Assistant Commissioner, the appellant filed appeal before the Commissioner (A) for disallowing the refund of Rs.4,41,123/- and the Commissioner (A) after hearing the learned counsel for the appellant, dismissed the appeal.

3. Learned authorized representative, Mr. P. Harikumar, Managing Director of appellant-company, appeared and submitted that the impugned order is not sustainable in law as the same has been passed by wrongly relying upon the decision in the case of *M/s. Andrew Telecom (I) Pvt. Ltd. vs. Commissioner Customs and Central Excise, Goa reported in 2014 (34) S.T.R. 562 (Bom.)*. He further submitted that the said decision of the Bombay High Court is not applicable to the present case. He further submitted that the issue of refund in the context of Board Circular

No. **108/2/2009** dated 29.1.2009 had not been discussed but the Hon'ble High Court dismissed on the ground that there is no substantial question of law involved in that case. He further submitted that the appellant paid the service tax by mistake but came to know subsequently when the Board issued the Circular. He further submitted that subsequent to the issuance of Board Circular, appellants realized that they are not required to pay service tax but paid the same under the mistake of fact/law and therefore, they filed the refund claim. He further submitted that demand of service tax is opposed to Article 262 of the Constitution because the same was collected by the department against the authority of law.

4. On the other hand, the learned AR defended the impugned order and submitted that this issue is no more res integra and has been settled by the Larger Bench of the Tribunal in the case of *M/s. Veer Overseas Ltd. vs. CCE, Panchkula reported in 2018 (4) TMI 910 - CESTAT CHANDIGARH*. He further submitted that it is wrong to say that the Bombay High Court in the case of *M/s. Andrew Telecom (I) Pvt. Ltd. (supra)* has not considered the issue of limitation as provided under Section 11B of the Central Excise Act.

5. After considering the submissions of both the parties and perusal of the material on record, I find that the only issue involved in the present case is whether the period of limitation as provided under Section 11B of the Central Excise Act is applicable in the present case or not. This issue has been considered by the Larger Bench in the case of *M/s. Veer Overseas Ltd. vs. CCE, Panchkula* cited supra and after examining the various decisions of the Tribunal and the Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd. vs. Union of India: 1996 (12) TMI 50-SC* the Larger Bench in paragraph 9 and 10 has held as under:

"9. The apex court in Mafatlal Industries Ltd. (supra) observed that the Central Excise Act and the Rules made thereunder including Section 11B too constitute 'law' within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature, no claim for refund is maintainable except and in accordance therewith. The apex court emphasized that "the provisions of the Central Excise Act also constitute 'law' within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said Article".

10. Having examined various decided cases and the submissions of both the sides, we are of the considered view that a claim for refund of service tax is governed by the provisions of Section 11B for period of limitation. The statutory time limit cannot be extended by any authority as held by the Apex Court."

5.1 Further, I find that even the Bombay High Court in the case of *M/s. Andrew Telecom (I) Pvt. Ltd.* cited supra in paragraph 19 has held that the period of limitation as provided under Section 11B of the Central Excise Act is applicable in the case of refund. Paragraph 19 of this judgment by the Hon'ble High Court is reproduced herein below:

"19. Before us, the undisputed position is that the amount was paid by the appellant as service tax. That tax was not imposable or leviable on export of services was a clarification made by the Department and relying on that clarification, the refund of duty or service tax was claimed. This was squarely a case falling within the provisions of the Central Excise Act, 1944 and therefore, the rule of limitation under Section 11B was applied. That was applied when the application for refund was made invoking Section 11B of the Central Excise Act, 1944. We have no manner of doubt that when this was the provision invoked, same applies with full force including the rule of limitation prescribed therein. For these reasons, we are of the opinion that the decisions relied upon cannot be of any assistance."

6. By following the ratio of the above said decisions, I am of the considered view that there is no infirmity in the impugned order, which is upheld by dismissing the appeal of the appellant.

(Order was pronounced in Open Court on 27.01.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, BANGALORE
COURT NO. I**

Service Tax Appeal No. 20808 of 2019

Arising out of Order-in-Appeal No. 131/2019-CT, Dated: 16.07.2019

Passed by Commissioner of Central Tax, BANGALORE-II (Appeals)

Date of Hearing: 16.10.2019

Date of Decision: 27.01.2020

**M/s TPI ADVISORY SERVICES INDIA PVT LTD
NO 25 4TH FLOOR SHANKARANARAYANA BUILDING I M G ROAD
BANGALORE KARNATAKA-560001**

Vs

**COMMISSIONER OF CENTRAL TAX
BANGALORE NORTH NO-59, HMT BHAWAN GROUND FLOOR
BELLARY ROAD BANGALORE KARNATAKA-560032**

Appellant Rep by: Mr K S Ravi Shankar & Mr N Anand, Advs.

Respondent Rep by: Mrs C V Savitha, Superintendent (AR)

CORAM: S S Garg, Member (J)

FINAL ORDER NO. 20067/2020

Per: S S Garg:

The present appeal is directed against the impugned order dated 16.07.2019 passed by the Commissioner (A) whereby the Commissioner (A) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellant is registered with Service Tax Department for providing Business Management & Consultancy Services. The appellants have filed a refund application on 28.03.2018 for the refund of Service Tax of Rs.17,84,952/- under Section 11B of Central Excise Act, 1944 as made applicable to Service Tax Refund matters. The appellant has raised four invoices on three clients, totally for an amount of Rs.1,18,99,689/- and has charged total Service Tax of Rs.17,84,952/- for the period from April 2017 to June 2017. These transactions were declared along with Service Tax liability of Rs.17,84,952/- in the ST 3 Return filed for the period April to June 2017. They also paid the Service Tax liability using the CENVAT credit available at that time. In their refund claim, they informed that their clients did not accept the Service Tax invoices and as per client's request, the appellant has raised the Credit Notes and have paid the GST with fresh invoices raised subsequently and hence they filed this refund application. After verification and scrutiny of the refund claim, the Asst. Commissioner of Central of Tax, Bangalore vide OIO No. 58/2018-19 (R) ND2 dated 10.01.2019 rejected the refund claim of Rs.17,84,952/- for the reasons that the raising subsequent invoices under GST as per the request of the clients and claiming for the refund of Service Tax already paid under erstwhile Finance Act, 1994 is not under the purview of the law to consider for refund of Service Tax paid for the correctly declared invoice value in the ST 3 Returns. Aggrieved by the said order, the appellant filed appeal before the Commissioner (A) on various grounds and the Commissioner after considering the grounds raised by the appellant dismissed the appeal. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned Counsel for the appellants submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that it is an undisputed fact that the appellant had paid both ST as also GST on the very same transactions performed for three customers. The First Appellate Authority as also Adjudicating Authority

acknowledge and admit that the appellant was not liable to pay GST at all. He further submitted that once the Revenue admits that the appellant has wrongly paid the GST, they were obliged to refund the Service Tax levied and collected earlier. He further submitted that it is the mandate in Article 265 that "no tax shall be levied or collected except by authority of law". The authorities have neither refunded GST paid though holding that it was not due, nor Service Tax paid which is in gross violation of Article 265 of the Constitution. He further submitted that the Government has benefited twice over on the payments made by the appellant and the authorities below were duty bound to refund money wrongly collected. They neither refunded the ST nor the GST though the latter was much higher than the ST paid or payable. In support of his submission, he relied upon the following decisions:

- *Total Environment Woodwork Pvt. Ltd. Vs CCE, 2017 (357) ELT 1215 (Tri. Bang.)*

- *GL & V India Pvt. Ltd. Vs CCE, 2013 (30) STR 550 (Tri. Mum.)*

- *Dew-Pond Engineers (P) Ltd. Vs CCE, 2017 (348) ELT 714 (Tri. Mum.)*

- *CCE Vs Cipla Ltd., 2004 (166) ELT 421 (Tri. Mum.)*

- *Godrej & Boyce Mfg. Co. Ltd. Vs CC, 2001 (134) ELT 429 (Tri. Mum.)*

- *KansalNerolac Paints Ltd. Vs CC, 2014 (300) ELT 255 (Tri. Mum.)*

- *Bharat Heavy Electricals Ltd. Vs CCE, 2010 (253) ELT 339 (Tri. Del.)*

4.1. He further submitted that the appellant cancelled the invoices issued earlier by issuing Credit Notes and the effect of such cancellation is that the Service Tax charged earlier were nullified and the appellant had in-turn raised GST invoices/bills charging GST. He also submitted that the legal and accounting effect of cancellation of Service Tax invoices/bills and raising of Credit Notes have not been appreciated by both the authorities.

5. On the other hand, learned AR defended the impugned order and submitted that both the authorities have observed that the appellant paid the Service Tax of Rs.17,84,952/- on the basis of invoices raised on 17.04.2017, 16.06.2017, 30.06.2017 & 30.06.2017. He further submitted that the Service Tax which was rightly paid under the Finance Act for the services rendered before coming into GST cannot be refunded under GST Regime.

6. After considering the submissions of both the parties and perusal of the material on record, I find that the appellant has filed the refund of Service Tax paid during the period April 2017 to June 2017 for the services rendered before June 2017. This tax liability was correctly paid and declared by them in their ST 3 Returns for the period April to June 2017. The said amount of Service Tax was paid through debit in their CENVAT credit at that time. GST Regime came into being w.e.f. 01.07.2017 and subsequently between September and November, the appellant raised Credit Notes and another four invoices and paid GST on the same. After paying the GST, the appellants are seeking refund of the Service Tax of Rs.17,84,952/- which was paid during the period April to June 2017 on the ground that they have paid Service Tax and GST on the same four transactions. Further, I find that when the Service Tax was paid on the basis of self-assessment and declaration in their ST 3 Returns for the period April to June 2017, the Service Tax was paid correctly for the services which were provided during the period April to June 2017 as per Section 68 of the Act. Further, I find that the appellant issued the GST invoices subsequently in the month of September and November 2017 simply at the instances of their clients. Further, I find that when the Service Tax was paid for the services rendered during the relevant period was liable to be paid. Further, I find that the Commissioner (A) in Para 10, 11 & 12 have given cogent reasoning for denial of the refund claim by the authorities and it is relevant to reproduce the said findings which are reproduced herein below:

"10. Hence the service tax paid by the appellant as on the date of provision of services during April to June 2017 for the services rendered were his liability discharged as is correct as per law. The appellant claims that because of the insistence of the customers he had to pay the GST on September 2017 to December 2017. It is to be

noted that as per the provisions of Section 9(1) of CGST Law which has created the levy of GST states "subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-state supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under Section 15 and at such rates, not exceeding twenty percent, as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person". Hence for any supply of goods or services made after the appointed date i.e., 1/7/2017 the supplier has to pay GST on all intra-state or interstate supplies. This also makes it clear that only supplies made after the appointed date attracts GST. In the instant case, the provision of service was before the introduction of GST and the supply was NOT made after the introduction of GST. Hence the appellant was not liable to pay the GST.

11. Further, as per the provisions of Section 122(1) of the CGST Act which talks of penalties that have to be imposed states that "where a taxable person who (ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the Rules made thereunder; he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under Section 51 or short deducted or deducted but not paid to the Government or tax not collected under Section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher." The fact of the case makes it clear that the appellant has issued subsequent four invoices on 30.9.2017, 8.11.2017, 8.11.2017 & 31.12.2017 without any supplies under the GST regime which in itself is violation warranting rejection of refund. The appellant has violated the provisions of the GST law by issuing an invoice without supply of goods.

12. The tax paid during April to June 2017 against the service tax invoices was the legitimate tax that was due to the Government as per the prevailing Finance Act, 1994. Hence, the service tax paid by the appellant is in order and correct and there are NO provisions under Section 11B of the Central Excise Act for the refund of the duty that was liable to be paid legitimately.

7. Further, I find that the case laws relied upon by the appellant cited supra are not applicable in the facts and circumstances of the present case and are distinguishable. In view of my discussion above, I am of the considered view that there is no infirmity in the impugned order which is upheld by dismissing the appeal of the appellant.

(Order pronounced in Open Court on 27.01.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
SINGLE MEMBER BENCH
COURT NO. I**

Service Tax Appeal No. 30910 of 2018

Arising out of Order-in-Appeal No. HYD-EXCUS-MD-AP2-0009-18-19, Dated:
25.04.2018

Passed by Commissioner (Appeals-II), GST & Central Excise, Hyderabad

Service Tax Appeal No. 30911 of 2018

Arising out of Order-in-Appeal No. HYD-EXCUS-MD-AP2-0010-18-19, Dated:
25.04.2018

Passed by Commissioner (Appeals-II), GST & Central Excise, Hyderabad

**Date of Hearing: 03.07.2019
Date of Decision: 03.07.2019**

**BROADBRIDGE FINANCIAL SOLUTIONS INDIA PVT LTD
S.NO. 64, BESIDE CYBER TOWERS, MADHAPUR VILLAGE, SERILINGAMPALLY
RANGA REDDY DISTRICT, TELANGANA - 500081**

Vs

**COMMISSIONER OF CENTRAL TAX
SECUNDERABAD GST KENDRIYA SHULK BHAVAN, L.B.STADIUM ROAD
BASHEERBAGH, HYDERABAD - 500 004 TELANGANA**

Appellant Rep by: Shri Gorky Tiwari, Chartered Accountant
Respondent Rep by: Shri V R Pawan Kumar, Superintendent AR

CORAM: P Venkata Subba Rao, Member (T)

FINAL ORDER NOS. A/30624-30625/2019

Per: P Venkata Subba Rao:

1. These two appeals have been filed by the appellant on the same issue and hence the same are being disposed of together.
2. Heard both sides and perused the records.
3. The appellant herein is an entity incorporated under the Companies Act, 1956 and is a 100% Export Oriented Unit (EOU) registered under the Software Technologies Parks of India (STPI) Scheme. They are engaged in software development and information technology enabled services which they provide to their associated enterprises located outside India. They are registered with the Service Tax Department under the categories of "Business Auxiliary Services" and "Information Technology Software Services". They filed refund claims under Rule 5 of CENVAT Credit Rules 2004 seeking refund of the CENVAT credit used in the output services relatable to their export of services. These refund claims were partly allowed and partly rejected by the original authority and subsequently on appeal, partly modified by the first appellate authority. The details of these are as follows:

APPEAL No. ST/30910/2018

S N o	Service	Refund disallowed	Reasons for rejection
1	General Insurance Service	Rs. 10,67,130	On perusal of the documents (Input invoices) submitted, it was observed that the insurance premium was paid for the

			benefit of the employees and their respective family members and is in the nature of life insurance. The appellants have not established that the said insurance is in the nature of accident insurance or its being pertaining to the assets of the company or it was statutorily required under any law. Since the Insurance premium has been paid for the benefit of the employees as well as their families, it specifically falls under the exclusion clause of the definition of input service under Rule 2(1) of the CCR.
2.	Works Contract Service	Rs. 1,52,210	On perusal of the documents i.e. copies of the invoices submitted by the appellants it was observed that, 3 out of 5 documents submitted by the appellants indicate the nature of the activity being relatable to civil works in connection with alterations/replacements undertaken on the structure of the premises of the appellants and thus fall under the exclusion clause under Rule 2(l)(A) read with explanation II to Section 66E of the Finance Act, 1994.
3.	Meals Coupons and food bills	Rs. 899	Not contested by the appellant.
	Total	Rs. 12,20,239	

S.No.	Service	Refund disallowed	Reasons for rejection
1.	Works contract service	Rs. 5,73,409	On perusal of the documents i.e. copies of the invoices submitted by the appellants, it was observed that, 4 out of 5 documents submitted by the appellants indicate the nature of the activity being relatable to civil works in connection with alterations/replacements undertaken on the civil structure of the premises of the appellants and thus fall under that exclusion clause under Rule 2(l) (A) read with explanation II to Section 66E of the Finance Act, 1994.
2.	Family day celebrations	Rs. 3,84,954	The copy of the invoice issued by M/s Kethana Eternal Projects, Hyderabad does not indicate that the said service has been procured in connection with the provision of output service and admittedly used for family day celebrations i.e. for personal consumption of the employees and their respective families; in such cases, it is incumbent on the appellants to establish the admissibility of credit in terms of Rule 9(6) of the CCR 2004 which they have not fulfilled.
	Total	Rs. 9,58,363	

4. Aggrieved by the orders of the first appellate authority, the present appeals have

been filed. In respect of appeal No. ST/30910/2018, the appellant is contesting only two types of services which were denied to them viz; General Insurance Service and Works Contract Service. A small amount related to Meals coupons and food bills is not contested by the appellant. Ld. CA, representing the appellant, explained the details of each of these services as follows:

1.	ICICI Lombard	Invoice dated 28.06.2016
2.	IFFCO - TOKIO	ITG182/2016-17/GMC/109
3.	IFFCO - TOKIO	ITG182/2016-17/GMC/110
4.	IFFCO - TOKIO	Broadridge/2016-17/2002
5.	TATA AIG	Invoice dated 08 June 2016

5. In respect of the invoice issued by ICICI Lombard General Insurance Company Ltd., Ld. CA submits that the insurance is not for the benefit of any individual employee but it is an insurance for the Directors and their Officers against any liability which they may incur during the course of their official work. He draws the attention of the Bench to the definition of 'input services' under Rule 2(l) of CCR 2004, as applicable during the relevant period, as follows:

- (l) input service" means any service*
- (i) used by a provider of output service for providing an output service; or*
- (ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,*
- and includes services used in relation to modernisation, renovation or repairs of a factory, premises of the provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation up to the place of removal; but excludes:*
- (A) service portion in the execution of a works contract and construction services including (hereafter referred to as specified services) in so far as they are used for -*
- (a) construction or execution of works contract of a building or a civil structure or a part thereof; or*
- (b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or*
- (B) services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital good; or*
- (BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by -*
- (a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person ; or*
- (b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or*
- (C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel when such services are used primarily for personal use or consumption by any employee."*

6. He would argue that the definition of 'input service' is quite comprehensive but for the exclusions mentioned above. Insofar as the General Insurance is concerned, the only exclusion is with respect to general insurance in relation to motor vehicles. Further, it also excludes life insurance and health insurance. The insurance in question was to cover the professional liability of the Directors and Officers in the course of their official work. Clearly, such insurance is directly relatable to their official functions. There is no exclusion clause with respect to such insurance in

Rule 2(l). Ld. DR argues on this point that the impugned order has clearly held that the general insurance in question is for covering the personal liability of individual employees and therefore is excluded by clause 'C' of Rule 2(l) of CCR, 2004.

7. Countering the argument, Ld. CA submits that on similar issue in respect of *Ernst and Young Associates LLP as reported in* it has been held that professional indemnity service is used by the assessee and is not excluded as an input service under Rule 2(l) of CCR 2004.

8. On examining the issue, I find that the insurance in question was not for the personal benefit of any individual or Director, it only covers any liability that may arise on them in the course of their official work. Therefore, respectfully concurring with the decision of CESTAT, Chandigarh in the case of *Ernst and Young Associates* (supra), I hold that the appellant is entitled for the benefit of CENVAT credit under Rule 2(l) and consequently refund under Rule 5 of CCR 2004 in respect of this invoice.

9. IFFCO-TOKIO General Insurance Co. Ltd.: These three invoices provide medical insurance for the employees and their families. Ld. CA argues that they should be entitled CENVAT Credit as well as refund of credit on these services. He relies on the case law of *Sundaram Fasteners Limited [2016(43)S.T.R. 454 (Tri.-Chennai)]* and *Fiem Industries Limited [2016(43)S.T.R (Tri- Chennai)]*. In both these case laws, the Ld. Member held that the health insurance is excluded only if it is relatable to the travel of an employee on vacation not otherwise. Ld. DR asserts that a plain reading of the exclusion clause 'C' of Rule 2(l) of CCR, 2004, health insurance is excluded and not merely health insurance while on vacation. Therefore, no CENVAT Credit is admissible on these invoices. I have gone through the relevant clause which reads as follows:

"Such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel when such services are used primarily for personal use or consumption by any employee."

10. A plain reading of the above clause shows that there are various services such as outdoor catering, beauty treatment, health services etc. including travel benefits extended to employees on vacation such as leave or Home travel concession are excluded as such services are used primarily for personal use or consumption by any employee. It does not appear that all the services listed in the above clause have to be relatable to employees being on vacation such as Leave or Home Travel Concession. Such an interpretation would lead to absurd conclusions. It is inconceivable that the company provides outdoor catering to an employee who is on leave or home travel concession. Similarly it is absurd to say that the company may be providing beauty treatment or health services or plastic surgery or membership of a club, health and fitness centres etc., while the employee is in vacation or Home travel concession. For this reason, each of these expressions in this clause have to be read by themselves and travel benefits extended to employees on vacation such as leave or Home travel concession is one of the excluded categories. Other categories such as beauty treatment or health services or plastic surgery are not linked to the employee being on vacation. I, therefore, respectfully disagree with Ld. Member (Judicial) in the case of *Sundaram Fasteners Limited* and *Fiem Industries Limited* (supra). I hold that the health insurance services have been clearly excluded from the Rule 2(l) of CCR 2004. Accordingly, the appellant is not entitled to the benefit of CENVAT credit on the invoices issued by M/s IFFCO-TOKIO towards health insurance.

11. Invoices issued by M/s TATA AIG General Insurance Co. Ltd.: A perusal of these invoices clearly shows that no individual has been made the beneficiary in this invoice. It is a commercial liability insurance meant for the company itself. Therefore, this is clearly not excluded under clause 'C' of Rule 2(l). I, therefore, find that the appellant is entitled for CENVAT Credit on the invoice issued by M/s TATA AIG General Insurance Company Limited.

12. Invoices issued by New Vision Interiors for works contract services: It is

undisputed that all these invoices pertain to Works Contract Services. A perusal of the invoices shows that they pertain to preparation of caution signages and scaffolding for facade glass and fixing of thick toughen glass, lift low side work purpose etc. It is the contention of Ld. CA that Rule 2(l) of CCR 2004 includes services used in modernisation, renovation or repairs of a factory premises of provider of output services or an office relating to such factory or premises. Therefore, they are clearly entitled to CENVAT credit on this account. Ld. DR, on the other hand, asserts that the definition of 'input service' as above is subject to the exclusion specifically indicated in clauses (A), (B), (BA) and (C). Clause 'A' explicitly excludes service portion in exclusion of the works contract and construction services insofar as they are used for "(a) construction or execution of works contract of a building or a civil structure or a part thereof, or (b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services". He would argue that the works contract services used in relation to execution of works contract of a building have been specifically excluded within the definition of input services under Rule 2(l) and therefore the appellant is not entitled to the benefit of CENVAT Credit.

13. On going through the invoices submitted by the appellant, it is evident that all these are "Works contracts" and they pertain to several activities such as scaffolding for replacement of facade glass of out gate area, fixing of toughen glass etc. Therefore, they are clearly excluded in the definition of 'input services' under Rule 2(l) as above. I, therefore, hold that the appellant is not entitled to CENVAT Credit on these services.

14. In conclusion, with respect to Appeal No. ST/30910/2018, I find that the impugned order needs to be modified to the extent of allowing refund of CENVAT credit in respect of the invoices issued by M/s ICICI Lombard GIC Limited for providing professional liability insurance to the Directors and the invoice issued by TATA AIG General Insurance company Limited with reference to Commercial Liability Insurance of the Company. The remaining part of the impugned order is upheld.

15. With respect to appeal No. ST/30911/2018, the disputed claims of refund which were rejected by the lower authorities are as follows:

(i) Works Contract Service: With respect to these services for the aforesaid reasons, I find that the appellant is not entitled to refund of CENVAT.

(ii) Family day celebrations: A copy of the invoice issued by M/s Kethana Eternal Projects, Hyderabad based on which CENVAT Credit was claimed, shows that it is an event organised by the company for the employees and their families. It does not appear that it is meant to be an official function and for official purpose clearly the benefits of these individual employees and their families. The services include food, catering and other event management activities. In view of the above, I find that the benefits of these services have gone to the individual employees and therefore same are excluded by Clause 'C' of Rule 2(l) of CCR 2004. Accordingly, I find that the appellant is not entitled to the benefit of refund of CENVAT credit on these invoices.

16. In conclusion, appeal No. ST/30910/2018 is partly allowed as indicated above and appeal No. ST/30911/2018 is rejected.

(Operative portion of the order pronounced in open court on conclusion of hearing)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
SINGLE MEMBER BENCH
COURT NO. I**

Service Tax APPEAL No. 31016 of 2018

Arising out of Order-in-Appeal No. TTD-EXCUS-000-APP-002-18-19, Dated:
25.04.2018

Passed by Principal Commissioner(Appeals) of Central Tax & Customs, Guntur

Date of Hearing: 05.07.2019

Date of Decision: 05.07.2019

**GIMPEX PVT LTD
OPP. RAILWAY STATION, KODUR R S, KADAPA
ANDHRA PRADESH-516101**

Vs

**COMMISSIONER OF CENTRAL TAX
TIRUPATI-GST TIRUPATI COMMISSIONERATE
WEST CHURCH COMPOUND, MR PALLI ROAD, CHITTHOOR
ANDHRA PRADESH-517507**

Appellant Rep by: Shri P Sudhakar Reddy, DC

Respondent Rep by: None

CORAM: P Venkata Subba Rao, Member (T)

FINAL ORDER NO. A/30618/2019

Per: P Venkata Subba Rao:

1. None appeared on behalf of the appellant despite the matter being listed on the CESTAT website. The matter was earlier listed on 12.04.2019, 09.05.2019 and 07.06.2019. None appeared on behalf of the appellant on any of these days also. As the appellant is not prosecuting the matter, I proceed to examine the issue and decide it on merits. Heard Learned DR and perused the records. The issue which falls for consideration is whether the appellant is entitled to refund of Rs. 25,87,200/- as per Notification No. 41/2012-ST. The appellant is an exporter of Barytes which are classified under Central Excise Tariff Heading 251110 and chargeable to nil rate of duty. When these products were exported, the appellant availed the services of various service providers and have paid service charges alongwith service tax on such services. They filed a refund claim for the service tax paid under Notification No. 41/2012-ST dated 29.06.2012 (as amended) in respect of export of 81200 metric tonnes of Barytes powder. The refund application was partly rejected and partly allowed by the Assistant Commissioner. On appeal, the First Appellate Authority has further allowed refund of some amount but rejected refund of Rs. 25,87,200/- on the ground that the application was filed beyond the time limit. The findings of the First Appellate Authority in this regard are were as follows:

5. I have gone through the impugned order, grounds of appeals and written submissions made during Personal Hearing. The questions to be decided are

i) Whether the decision of adjudicating authority rejecting the refund of Rs. 25,87,200/- for the reason that the appellant filed 13 shipping bills beyond one year from the date of letter of export is proper or otherwise.

ii) Whether the decision of adjudicating authority rejecting the refund of Rs. 3,01,365/- for the reason that there was short receipt of amounts in Bank Realization Certificates in respect of certain shipping bills is proper or otherwise.

5.1 With regard to submission of refund claim pertaining to 13 shipping bills, the appellant accepted that claims were filed on 05.06.2017 whereas the LEOs date was between 27.05.2016 to 30.05.2017 which resulted in late filling of claim beyond one year from the date of LEOs. They have cited a judgment of Hon'ble Tribunal in the case of *Ashok Granites Ltd., Vs CCE&ST - 2016-TIOL-2167-CESTAT-MAD* for their reliance

that time limit of one year has to be reckoned only form the date of shipment and not from the date of issuance of LET Export Order.

5.2 In this regard, I have gone through the Notification and find that as per 3(g) of Notification No. 41/2012-ST dated 29.06.2012, the claim should be filed within one year from the date of export to claim for rebate of service tax paid on the specified services used for export of goods. Since the appellant had not adhered to the conditions specified in the Notification and there is no procedure prescribed in the impugned Notification to condone for late filing of rebate claim. Therefore, the request of the appellant to condone the late filing of claim is not feasible. With regard to applicability of case law cited above, the appellant did not submit the date of shipments to examine whether the claim is submitted within one year period from the date of shipments or not. In the absence of relevant data of date of shipments of exports in respect of 13 shipping bills, it cannot be verified the fact of filing of rebate claims within the period of one year from the date of shipment for applying the ratio of decision pronounced in the aforesaid tribunal judgment. In view of the foregoing discussions, I hold that the appellant is not eligible to claim the rebate of Rs. 25,87,200/- and uphold the decision of adjudicating authority.

5.3 With regard to rejection of Rs. 3,01,365/- concerned, the appellant contended that there is no short receipt of sale proceeds of exported goods as they had realized in full amount mentioned in the shipping bills and also enclosed copies of BRCs for evidencing the same. From the impugned order, I observed that there was a short receipt of 565060 USD in respect of shipping bill no. 8460784 dated 24.06.2016, which ultimately resulted in rejecting of refund claim of Rs. 3,01,365/-. On verification of BRCs in respect of aforesaid shipping bill, I find that there is no short receipt of sale proceeds. With regard to difference of 80 USD concerned, the appellant stated that the same was deducted by the Bank towards charges for processing sale proceeds. The details are furnished below for ready reference:

Sl.No.	Shipping Bill/date	Amount as per shipping bill in USD	BRC No./Date	Amount realized in USD
1.	8460784/24.06.2016	1155000	-	-
2.	8460784/24.06.2016		PUNB49028/15.06.2017	284980
3.	8460784/24.06.2016		PUNB49027/15.06.2017	199980
4.	8460784/24.06.2016		PUNB49026/15.06.2017	104980
5.	8460784/24.06.2016		PUNB04861/14.09.2017	564980
		1155000		1154920

5.4 Since the appellant submitted requisite documentary evidence in respect of short receipt of sale proceeds, I opine that appellant had adhered the conditions laid down in Para(4) of the Notification No. 41/2012-ST and eligible to avail refund of Rs. 3,01,365/- .

5.5 In view of the foregoing discussions, I disallow the refund of Rs. 25,87,200/- as discussed in Para No. 5.2 and allow the refund of Rs.3,01,365/- as discussed in Para 5.4. It is clear from the above that the appellant had filed a refund claim after one year from the date of let export order in respect of exported goods. The relavant date to be

considered for one year for filing refund claim under Notification No. 41/2012-ST is the date of 'let export order'. I have also considered the reliance placed by the appellant on the order of Tribunal in the case of *Ashok Granites Vs Commissioner of Central Excise and Service Tax, Salem* [2016 (046) STR 0875 (Tri-Mad)] . It has been held therein that since Section 11B of the Central Excise Act prescribes the relevant date for the purpose of that section to be, inter alia, "in the case of goods exported out of India, where a refund of excise duty paid is available in respect of the goods themselves or the excisable materials used in the manufacture of such goods, if the goods are exported by sea or air, the date on the which ship or aircraft in which such goods are loaded, leaves India", this "relevant date" prevails over the "date of LEO" prescribed in the notification." It was, therefore, reasoned that refund is admissible within one year from the date of sailing of the ship. I respectfully disagree with this view. The entire benefit of refund accrues to the appellant only from the notification but for which no refund is admissible in this case. Any notification, being an exception to the general rule, must be strictly construed. If the notification prescribes any time limit it must be complied with. It is not open to this Bench to change the notification to enlarge, constrict or otherwise modify it. The vires of the notification has not been questioned or tested nor has any portion of it been declared ultra vires. In this case, the refund application was filed more than one year after the export. Accordingly, the refund is not admissible as per the Notification No. 41/2012-ST. I therefore, find no infirmity in the order of the First Appellate Authority in partly rejecting the refund claim to the extent it is time barred. The impugned order is upheld and the appeal is rejected.

(Dictated and pronounced in open court)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD**

**M/S A.H. TOURS & TRAVELS ORGANIZERS
VERSUS
THE COMMISSIONER OF CENTRAL EXCISE CUSTOMS AND SERVICE TAX
HYDERABAD-I**

Service Tax Appeal No. 810 of 2009 [DB] FINAL ORDER
NO.30900/2020

Dated: - 24 June 2020

Appellant Rep by: Shri Mohammed Arif Ali, Advocate

Respondent Rep by: Shri N. Bhanu Kiran, Authorized Representative

CORAM: Hon'ble Mr. P.VenkataSubba Rao, Member (Technical)

Hon'ble Mr. P.VenkataSubba Rao, Member (Technical)

Per: Rachna Gupta:

The brief facts of the case are the appellant is a proprietary concern of vehicle hiring business under the name M/s. A.H. Tours & Travels Organization.

2. On gathering intelligence that M/s AHT & T were providing the taxable service and realizing the gross- amounts charged from their customers for the said service but not paying service tax to the departments, investigations were carried out which revealed that M/s AHT & T have made a payment of only ₹6,09,490/- towards service tax against their actual and much high tax-liability for the financial year 2003-04 and 2007-08. Accordingly, vide a SCN it was alleged that M/s AHT & T despite providing taxable services to various customers and realizing the values of the said services, did not disclose the same to the department and thereby have deliberately suppressed the material facts with intent to evade payment of service tax. Accordingly, recovery of ₹25,14,763/- & ₹3,50,301/- along with interest at appropriate rate and proportionate penalty was proposed. The said proposal got confirmed vide order-in-original No. 52/2008 dated 26.12.2008. The appeal thereof has been dismissed by Commissioner (Appeals) vide Order-in-Appeal No. 19/2009 dated 30.06.2009. This order has been assailed before this Tribunal.

3. We have heard both sides. It is submitted on behalf of appellant that the appellant got registered under the provisions of the Finance Act, 1944. The service receiver failed to pay the service tax against the services received. The turnover is net amount of hire charges without any service tax component. The appellant is having no enforcing power to levy and collect the service tax. It is further submitted that the nature and activity of the appellant/assessee is distinctly contrary to the service mentioned in the charging section 66 of Finance Act 1994 as the appellant retains the control of the vehicle with himself/driver. It is impressed upon that the charges collected as per km basis is out of the purview of Service Tax Sec-65(105)(O) of the Finance Act 1994 wherein the cab or motor car is not rented out but let-out on hire. Neither the vehicle is same nor the driver. The hirer/service receiver calls for vehicle. There upon, as their requirement, number of vehicles along the driver is sent to the service receiver/BSNL retaining the control of the vehicle with the driver himself. Ld. Counsel relied upon **West Bengal and Anr. Vs. V. Kesoram Industries Ltd. Ors. (AIR 2005 SC 1646)**. It is also submitted that the charging section does not empower the appellant/assessee to collect the service tax forcibly from the service receiver. The respondent should have notified the service receivers to pay the service tax against. It is finally submitted that the Hon'ble H.C. of Uttarkhand at Nainital, in Commissioner of Customs & Central Excise Vs. Sachin Malhotra has comprehensively dealt with the issue submitted before this Hon'ble Court.

Case is squarely covered by the SachinMalhotra'scase.

4. Learned DR, on the other hand, while justifying the order has prayed for dismissal of appeal. After hearing the rival contentions of the parties and perusing the record, we are of the opinion as follows:

The issue herein is as to whether the appellant has provided Rent-of-cab service. Foremost the relevant law is discussed as follows:

Section 65(48)(o) of the Act defines "taxable service" as follows :

"taxable service" means any service provided or to be provided to any person, by a rent-a-cab scheme operator in relation to a renting of a cab."

The words "in relation to" would mean "concerning with" or "pertaining to" and therefore, any service having direct or indirect connection with a specified service needs to be treated "in relation to" that specified service.

Any person engaged in the renting of the cabs has been taken in a tax net for the purpose of levying service tax for rendering such service. In a wide definition made under Section 35(38) of the Finance Act, 'Rent-a-cab Scheme Operator' suggests that those who operate in renting of cabs are covered. 'Cab' is also defined under Section 65(9) of the Finance Act which means "maxi cab' or 'motor cab' and both 'maxi cab' and 'motor cab' are defined under Sections 2(25) and 2(22) of the Motor Vehicles Act respectively.

In plain terms, it can be said that a rent-a-cab scheme operator is made liable to pay service tax.

Prior to amendment by Finance (No. 2) Act of 1998, under Section 65(32), the definition of "Rent-a-Cab Scheme Operator" was as follow:

"rent-a-cab scheme operator" means a person who is the holder of a licence under the Rent a Cab Scheme, 1988 framed by the Central Government under the Motor Vehicles Act, 1988 (59 of 1988)."

After the amendment "Rent-a-Cab Scheme Operator" is defined under Section 65(76) as follow:

"rent-a-cab scheme operator" means any person engaged in the business of renting of cabs."

The revised definition has made much larger the scope of the earlier definition where a person holding licence with minimum cab of 50 numbers was termed as rent-a-cab scheme operator. Those having less number of vehicles were neither required to obtain license nor liable to pay any service tax. The question, therefore, arises as to whether, consequent upon revision of definition, those persons engaged in the business of rendering specified service and not covered earlier by the definition of "Rent-a-Cab Scheme Operator" also get covered by this changed definition.

Section 3(42) of the General Clauses Act defines word "person" as under :

"person" shall include any company or association or body of individuals, whether incorporated or not;'

A person would be either natural person or juristic person and therefore, it would also include individual, partnership firm, Hindu United Family, company, etc.

It would be pertinent to note at this stage the definition of "cab" which would be vital for determining the taxable service. Prior to 1-6-2007, Section 65(20) of the Finance Act defined "Cab" as follows:

"Cab" means -

(i) a motor cab, or r (ii) a maxi cab, or r (iii) any motor vehicle constructed or adapted to carry more than twelve passengers excluding the driver for hire or reward;"

Section 65(70) and Section 65(71) assign the same meaning to the definitions of “motor cab” or “maxi cab” respectively as given under the Motor Vehicles Act.

Definition of “motor cab” under Section 2(25) of the Motor Vehicles Act is as follow :

“motorcab” means any motor vehicle constructed or adapted to carry not more than six passengers excluding the driver for hire or reward;’

Definition of “maxicab” under Section 2(22) of the Motor Vehicles Act is as follow :

“maxicab” means any motor vehicle constructed or adapted to carry more than six passengers, but not more than twelve passengers excluding the driver, for hire or reward;

Therefore, prior to 1-6-2007, any motor cab carrying not more than six passengers excluding driver and any maxi cab carrying more than six passengers but less than twelve passengers excluding driver were treated as “cab” and renting of such cab would be treated as taxable service. After 1-6-2007, Section 65(20) was substituted an explanation clause.

5. At this stage, it would be worthwhile to consider the definition of “Rent”. Rent means the act of payment for the use of something. It is the act of letting out or allowing the use like apartment, house or car.

Short Oxford English Dictionary, defines “Rent” as under :

“Source of revenue or income, separate pieces of property yielding a certain return to the owner.” “A tax or similar charge levied by or paid to a person.”

As per the Reader’s Digest Great Encyclopedic Dictionary, “Rent” means “Tenant’s periodical payment to owner or landlord for use of land, house, or room; payment for hire of machinery etc. charge, periodical charge on land etc. reserved to one who is not the owner-free, exempt from rent; roll, register of person’s lands etc. with rents due from them; sum of person’s income from rents; sum of person’s income from rents-service, (tenure by) personal service in lieu of or addition to rent. Take, occupy, use, at a rent; let or hire for rent; be let at specified rent; impose rent on (tenant).”

As per MacMilan Dictionary “Rent” means an amount of money that you pay regularly for using a house, room, office etc. that belongs to someoneelse.

As far as word “hire” is concerned, “hire” means “payment under contract for the use of something.”

“Hiring” is bailment by which the use of thing or the services are contacted for, at a certain price and reward.

As per Black’s Law Dictionary, “hiring” means “a contract by which one person grants to another either the enjoyment of a thing or the use of the labor and industry, either of himself or his servant, during a certain time, for a stipulated compensation, or where one contracts for the labor or services of another about a thing bailed to him for a specified purpose.

Renting means a usually fixed periodical return, especially, an agreed sum paid at fixed intervals by a person for any use of the property or car. It is also the amount paid by a hirer to the owner for the use of the property or a car. Hiring is also engaging services or wages or other payment. It also amounts to engaging temporary use.

It cannot be disputed that both in “renting” and “licensing”, de facto possession of the thing is enjoyed. Difference is well carved out under the law wherein both, de jure possession and control is given, but in “renting”, it is right-in-rem whereas in “licensing”, it is right-in-persona. When rent-a-cab scheme operator gives the car on rent, de facto possession is, of course, there but, it is not acceptable to uphold that wherever de jure control and possession of the vehicle stands transferred in law from the owner to the person on renting/hiring the service that the service tax is leviable and this is, of course, not different than services rendered on a contractual basis, providing transport service

for fixed amount of periodical return or fare.

This was reiterated by Hon'ble High Court of Allahabad in the case of **Anil Kumar Agnihotri Vs. Commissioner of Central Excise, Kanpur reported as 2018(10) G.S.T. 288(All)** earlier also. The Punjab & Haryana High Court was also considering the question as to whether transport service provided by the respondent-firm to the Indian Oil Corporation was liable to service tax or not. The Court, after considering various provisions as also decision of the High Court of Judicature at Madras in the case of Secretary, Federation of Bus-operators Assn T.N. v. UOI (supra), applied all vital observations of Madras High Court mutatis mutandis to the case before the High Court. Accordingly, it held that transport service provided to Indian Oil Corporation was the taxable service and it set aside the decision of the Tribunal by upholding the view canvassed by the Revenue.

6. Hon'ble High Court of Gujarat in the case of **Commissioner of Service Tax Vs. Vijay Travels reported in (2014) 36 STR 513(Guj)** has held as follows:

“The Legislature has not made any distinction between hiring of vehicle, which the appellant claimed to do so as to be excluded from the tax net, and renting of vehicle for the purpose of levy of Service Tax. Scheme having been formulated for regulating the business of renting of motor cabs or motorcycles to persons desirous of driving by themselves or through drivers, either for their own use or for matters connected therewith, nature of services provided while hiring and renting is the same such that such services are taxable - Fact that legal possession of vehicle not handed over to person renting the vehicle, such that de jure possession continues with owner/provider of service, would not exclude the service from tax net. Thus, respondent cannot escape tax liability on ground that hiring is different from renting as intention of Government is to tax service provider of a service which involves both hiring and renting of a cab for a longer duration. Further, even those persons, natural or juristic, who do not have exclusive control over the vehicle, can be taxed thereto - Respondent was, thus, liable for Service Tax. However, invocation of extended period requires deliberate act of suppression or mala fide intention, which was not there as service having been recently brought under the tax net, there was ambiguity prevailing in respect of the same. Thus, order of Tribunal disallowing invocation of extended period, proper - Sections 65(91), 65(105)(o), 68 and 73(1) of Finance Act, 1994 - Sections 74 and 75 of Motor Vehicles Act, 1988 - Section 35G of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994.

Rent-a-Cab Scheme Operator Service, Scope of, for demand of Service Tax, Rent-a-Cab Scheme was formulated in 1989 in exercise of powers under Section 75(l) of Motor Vehicles Act, 1988 for regulating the business of renting of motor cabs or motorcycles to persons desirous of driving either by themselves or through drivers, motor cabs or motorcycles for their own use or for matters connected therewith. Tax on service was introduced w.e.f. 1-7-1994 so as to bring under tax net those persons rendering specific kinds of services which constituted a major portion of GDP and service provided by a Rent-a-Cab Scheme Operator in relation to renting of a cab was made a taxable service. Thus, any person engaged in renting of cabs has been taken under tax net for purpose of levying Service Tax, such that Rent-a-Cab Scheme Operator is liable to pay Service Tax. Further, when any person carries on continuous activity of renting of a cab, i.e. letting for the use in case of maxi cab or motor vehicle, such renting out of vehicle would be taxable service. Furthermore, there is no difference between renting and hiring of vehicle for levy of Service Tax under Sections 65(91), 65(105)m(o), 68 and 73(1) of Finance Act, 1994 Sections 74 and 75 of Motor Vehicles Act, 1988 - Section 35G of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994.

Words and Phrases - Rent - It means the act of payment for the use of something - Renting means a usually fixed periodical return, especially, an agreed sum paid at fixed intervals by a person for any use of the property or car. It is also the amount paid by a hirer to the owner for the use of the property or a car. On facts, Legislature

not having made distinction between renting and hiring for levy of Service Tax, Rent-a-Cab Scheme Operator liable therefore Sections 65(91), 65(105)(o), 68 and 73(1) of Finance Act, 1994 Sections 74 and 75 of Motor Vehicles Act, 1988 Section 35G of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994. [paras 14.2,14.3]

Words and Phrases - Hire - It means payment under contract for use of something - Hiring is bailment by which use of thing or the services are contracted for, at a certain price and reward. Hiring is also engaging services or wages or other payment. It also amounts to engaging for temporary use. On facts, Legislature not having made distinction between hiring and renting for levy of Service Tax, Rent-a-Cab Scheme Operator liable there for “

7. Even Principal Bench of this Tribunal in the case of **Carzonrent (India) Pvt. Ltd. Vs. Commissioner of Service Tax, Delhi reported at 2017(50) STR 172(Del)** has held that taxable service means any service provided or to be provided to any person by a rent-a-cab scheme operator in relation to renting of a cab. No reference to period of renting in statutory provisions. Liability to tax arises when a rent-a-cab operator provides a vehicle to another person on rent and receives consideration. Nature of arrangement may vary from party to party. Premium for insurance paid by appellant, who have effective control of insured vehicles. Maintenance and repair charges of vehicles paid by assessee and even workshop in which the vehicle has to be serviced decided by it does not make any difference. Clients never became owners of cabs but can only use cabs as long as they are paying rent to assessee for such usage. Clients do not possess full effective control of the cabs, which are leased to them. But appellant is liable to Service Tax in respect of services rendered by it under category of “rent-a-cab” service. The case relied upon by appellant is not relevant as being prior in time than above discussed law in favour of revenue. In **R.S. Travels Vs. Commissioner of Central Excise, Meerut 2008(12) STR 27** it was held when a cab operator provides his cab with a driver to his client on demand for going from one place to another and charges him on per kilometer basis or a lump sum amount on distance, as fixed with the client and control of the vehicle always remains with the cab operator/driver, he is providing transport service and this activity would be outside the purview of the entry - ‘rent-a-cab operator’s service’.

In **Kuldeep Singh Gill Vs. Commissioner of Central Excise, Jabalpur reported as 2006(3) STR 689** it was held the contract was clear that the public sector undertaking was not renting out any particular number of vehicles, but, was making payment for operating trips to various places. The vehicle continued to remain with the appellant only and whenever the trips were required to be made, the appellant was asked to carry out the same and he was paid per trip depending upon distance, time, etc. as per the rate sheet. The Tribunal, on taking note of the fact and taxing provisions of the Act, held that it was providing a transport service and was not amounting to a renting of a cab.

But these adjudications stand overruled in view of the above discussed case law.

8. In view of entire above discussion and applying the same to the contracts herein vide which the appellant is providing several numbers of vehicles to BSNL etc. on monthly basis against considerations which otherwise are on yearly basis. Also keeping in view the appellant is admittedly registered as rent-a-cab service provider, we hereby answer the question so framed in affirmative i.e. in favour of revenue.

9. We, therefore, do not find any infirmity in the order-under-challenge. Same is hereby upheld. Appeal, accordingly, stands dismissed.

[Pronounced in the Open Court On 24/06/2020]

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
SINGLE MEMBER BENCH
COURT NO. I**

Service Tax Appeal No. 30525 of 2019

Arising out of Order-in-Appeal No.HYD-EXCUS-SC-AP2-123-18-19-ST, Dated: 25.03.2019
Passed by CGST & CE (Appeals-II), Hyderabad

Date of Hearing: 23.12.2019

Date of Decision: 23.12.2019

**BHARAT HEAVY ELECTRICALS LTD
POWER SECTOR, SOUTHERN REGION, 39
SAROJINI ROAD, EK TARA BUILDING
SECUNDERABAD, TELANGANA - 500003**

Vs

**COMMISSIONER OF CENTRAL TAX
SECUNDERABAD-GST, KENDRIYA SHULK BHAVAN, L.B. STADIUM ROAD
BASHEERBAGH, HYDERABAD, TELANGANA - 500004**

Appellant Rep by: Shri T Venugopal Swamy & Shri Makrand, Advs.

Respondent Rep by: Shri A Rangadham, AR

CORAM: P Venkata Subba Rao, Member (T)

FINAL ORDER NO. A/31159/2019

Per: P V Subba Rao:

1. This appeal is filed against Order-in-Appeal No.HYD-EXCUS-SC-AP2- 123-18-19-ST dt.25.03.2019.

2. The appellant M/s BHEL is a large public sector undertaking which manufactures various products and avails benefit of Cenvat credit. After the introduction of GST they have moved from the excise and service tax into the GST regime. As per the new provisions of GST, Cenvat credit lying in balance in their accounts at the time of the transition could be taken as input service credit and utilized accordingly. However, as per June, 2017 ST- 3 Return of the appellant, Cenvat credit amounting to Rs.1,46,733/- remained unutilized. his CenvatTcredit pertains to Education Cess (EC), Secondary & Higher Education Cess (SHEC) and Krishi Kalyan Cess (KKC). They submitted an application to the Principal Commissioner of Central Tax, Hyderabad dt.30.05.2018 stating "Since this transitory cess amount cannot be carried forward under GST law, we are lodging a claim in Form-R for refund of Rs.1,46,733/- (EC-Rs.96,483/-, SHEC-Rs.47,349/- & KKCRs. 2,901/-)". Along with that letter they have submitted an application for refund of excise duty under Rule 173S of the Central Excise Rules for the aforesaid amount. This application was rejected by the original authority as there is no legal provision under which the refund could have been sanctioned. On appeal, the first appellate authority upheld the order of the original authority and rejected the appeal. Hence, this appeal.

3. After hearing both sides and perusing the records, it is apparent that the application for refund was with respect to the Cenvat credit which has accumulated and remained unutilized on account of EC, SHEC & KKC. Admittedly, these Cesses could not be carried forward by the appellant to the GST as per the provisions of CGST Act. Hence they wanted cash refund of this amount. The application was filed for refund under section 11B of the Excise Act. Section 11B allows refund of duty paid and not of Cenvat credit. In the scheme of Cenvat, the duty/service tax/cesses which have been paid can only be taken as credit by the manufacturer and utilized towards payment of duty/service tax/Cesses, etc., on their final products. There is no scheme under which Cenvat credit can be refunded to them in cash except under Rule 5 of Cenvat Credit Rules (CCR), 2004 in respect of Cenvat credit utilized in manufacture exported goods or exported services. Since export of both goods and services are exempt, cash refund of Cenvat credit which has gone into manufacture of the goods

exported or services exported is allowed under Rule 5 of CCR, 2009. Otherwise, there is no provision under which Cenvat credit can be refunded in cash.

4. Learned departmental representative draws the attention of the bench to the judgment of the Larger Bench of the Hon'ble High Court of Bombay in the case of *Gauri Plasticulture Pvt Ltd* on this issue in which questions framed by the Hon'ble Larger Bench were as follows:

"(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?"

(b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of unutilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?"

(c) Whether what is observed in the order dated 25th January 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

and they were answered as follows:

"40. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble Supreme Court in the case of Slovak India (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India."

5. Per contra, learned counsel for the appellant relies on the judgment of the Hon'ble High Court of Madras in the case of *Sutherland Global Services Pvt Ltd [2019 (11) TMI 278 – Madras HC]* to assert that the accumulated credit of EC, SHEC & KKC does not lapse on switchover to the GST regime and could be carried forward as credit under GST.

6. I have carefully considered the judgments relied upon by the both sides. The judgment of the Larger Bench of the Hon'ble High Court of Bombay was precisely on the point as to whether the assessee can get cash refund of Cenvat credit which they were not able to utilize and it was answered in negative. The Hon'ble High Court of Madras was examining a different issue as to whether the precision of the credit of EC, SHEC & KKC into the new GST regime was permissible or otherwise. The Hon'ble High Court of Madras has not dealt with the issue of cash refund of unutilized Cenvat credit which is the question in dispute. In view of the above, I find that there is no legal provision under which the assessee's appeal could be entertained.

7. Accordingly, the appeal is rejected and the impugned order is upheld.

(Dictated and pronounced in the open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
DIVISION BENCH
COURT NO. I**

Appeal No. ST/636/2011

Arising out of Order-in-Appeal No.89/2010 (H-II) S.Tax, Dated: 30.11.2010
Passed by CCCE & ST (Appeals-II), Hyderabad

Date of Hearing: 04.06.2019

Date of Decision: 11.07.2019

**M/s MIND Q SYSTEMS PVT LTD
8-3-214/7, SRINIVASA NAGAR COLONY (W), S.R. NAGAR
HYDERABAD - 500038**

Vs

**COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD - II, KENDRIYA SHULK BHAVAN, L B STADIUM ROAD
BASHEERBAGH, HYDERABAD, TELANGANA - 500004**

Appeal No. ST/647/2011

Arising out of Order-in-Appeal No.89/2010 (H-II) S.Tax, Dated: 30.11.2010
Passed by CCCE & ST (Appeals-II), Hyderabad

**COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD - II, KENDRIYA SHULK BHAVAN, L.B. STADIUM ROAD
BASHEERBAGH, HYDERABAD, TELANGANA - 500004**

Vs

**M/s MIND Q SYSTEMS PVT LTD
8-3-214/7, SRINIVASA NAGAR COLONY (W), S R NAGAR
HYDERABAD-500038**

Appellant Rep by: Shri K Vijay Kumar, Adv.

Respondent Rep by: Shri N Bhanu Kiran, AR

CORAM: P Venkata Subba Rao, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NOS. A/30661-30662/2019

Per: P Venkata Subba Rao:

1. These two appeals are filed by the assessee and the department against the same impugned Order-in-Appeal No. 89/2010 (H-II) S.Tax dated 30.11.2010 and hence are being disposed of together.

2. The assessee is challenging the demand of service tax upon them and penalty imposed equal to the service tax for the period 01.07.2004 to 31.03.2008 in their appeal ST/636/2011 whereas the department is aggrieved by the first appellate authority allowing the assessee the benefit of notification 24/2004-ST dated 10.09.2004 read with notification 19/2005- ST dated 07.06.2005 for the period 10.09.2004 to 15.06.2005. According to the department the benefit of this exemption notification is not available to the assessee.

3. The facts of the case in brief are that the assessee herein is imparting commercial training or coaching services related to software and are registered with the Central Excise department and are filing periodical returns. Intelligence was gathered by the department that the assessee is not discharging service tax properly on the services rendered by them. Accordingly a search was conducted by the officers of Anti-Evasion, Service Tax, Hyderabad - II Commissionerate on 13.10.2008 and several documents were recovered. Examination of the documents, records and corresponding ST-3 returns filed by the assessee showed that the assessee has not disclosed the full value of the taxable services rendered during the period as follows:

Year	Value as shown in ST-3 Returns (in Rs,)	Value as shown in Balance Sheet	Taxable Value	Difference in taxable value
2004-05	898549	3494750	3179279.49	2272730
2005-06	511000	4652650	422005.44	3711005
2006-07	652818	10141973	9035970.24	8743429

4. Thereafter they recorded the statements of Shri M. Gopala Reddy, Managing Director of assessee firm and Shri Bhikshapathy, Chartered Accountant and questioned about the difference between the value of taxable services shown in the returns and that shown in the Balance Sheet. Shri Bhikshapathy confirmed that the amounts shown under the head 'Course fee' in their records was higher and it represented (a) the application fee, (b) registration fee, (c) sale of study materials and (d) examination fee and coaching fee. When asked if they were discharging service tax on the entire amount, he explained that they have not paid tax on amounts received from the students towards supply of materials on the ground that the same are exempted and therefore they have not discharged service tax on the full value. He also paid an amount of Rs.4,99,999/- during the investigation on 04.11.2008 towards service tax on the value not shown in their returns and agreed to work out the differential service tax and pay the same along with interest. Further examination of the records showed that the explanation of the assessee that they claimed exemption for the value of study materials appeared incorrect because they were raising a single invoice on the students for the services rendered and the amount collected is a composite amount for training and there is no separate cost of study materials or examination fee. It was further found that there is no price printed on the study materials provided by the assessee. During the present proceedings, learned counsel for the assessee showed us sample copies of the study materials and also agreed that there is no separate price printed on the study material. A show cause notice was issued to the assessee on 15.05.2009 demanding differential service tax along with interest and proposing to impose penalties under Sec.76, 77 & 78 of the Finance Act, 1994. This demand was confirmed vide Order-in-Original No. 37/2009 dated 17.08.2009. On appeal by the assessee, the Commissioner (Appeals), vide Order-in-Appeal No. 79/2009 (H-II) ST dated 27.11.2009, remanded the matter back to the original authority with a direction to pass the order after following principles of natural justice. In pursuance of this order, Order-in-Original No. 38/2010 (denovo) (S.Tax) dated 12.05.2010 was passed confirming the demand along with interest and imposing penalties under Sec.76, 77 & 78 of the Finance Act, 1994. Aggrieved by this order, the assessee appealed before the first appellate authority who, vide the impugned order, modified the order of the lower authority to the extent of allowing benefits of exemption notification 24/2004-ST dated 10.09.2004 read with notification 19/2005-ST dated 07.06.2005 for the period 10.09.2004 to 15.06.2005. This is the order which is under challenge in the present appeals.

5. After hearing both sides, we find that assessee has not discharged the service tax on the entire amount collected by them from the students under "Commercial Coaching and Training Services" claiming the following as exempted there from.

(1) Sale of books

(2) Registration fee

(3) Examination fee for examinations conducted by Indian Testing Board.

6. It is not in dispute that the sale of books is not a separate enterprise by the assessee. These books are supplied to the students as study materials. They are not priced separately. There is no separate invoice raised upon the students for the sale of books. The cost of the books is also part of the total cost of training rendered by the assessee. Similarly, registration fee and the examination fee claimed by the assessee are also not billed separately. There is no evidence that the examination fee collected by the appellant is an

expense and corresponding amount has been paid by them to any Board conducting the examinations. All these deductions are reckoned by the assessee on their own, out of the gross amount collected from the students towards rendering training services. Hence, there is a difference between the amount which was actually collected by them from the students and the amount which was shown by the assessee in their ST-3 Returns on which service tax was paid.

7. During hearing, learned counsel for the assessee could not produce any evidence to show that the amounts on which they have not paid service tax were not part of the consolidated fee collected by them from the students for rendering commercial training and coaching services. It would have been a different case if the books in question were priced publications being sold separately under the invoice. There is nothing on record to show that the books in question are not even priced. Under these circumstances, we find the assessee is liable to discharge service tax on the entire amount collected from the students as fees for commercial training and coaching conducted by them. The next question to be decided is whether the first appellate authority was correct in holding that the assessee was entitled to the benefit of notification 24/2004-ST dated 10.09.2004 read with notification 19/2005-ST dated 07.06.2005. This notification reads as follows:

"Exemption to vocational/recreational training institute for providing commercial training or coaching services

Notification No. 24/2004 ST

Dated 10-9-2004

[As amended by Notification No. 19/2005 ST dated 07-06-2005]

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services provided in relation to commercial training or coaching, by, -

(a) a vocational training institute; or

(b) a recreational training institute,

to any person, from the whole of the service tax leviable thereon under section 66 of the said Act.

[Provided that nothing contained in this notification shall apply to the taxable services provided in relation to commercial training or coaching by a computer training institute.]

Explanation. - For the purposes of this notification, -

(i) "vocational training institute" means an Industrial Training Institute or an Industrial Training Centre affiliated to the National Council for Vocational Training, offering courses in designated trades as notified under the Apprentices Act, 1961 (52 of 1961)

(ii) "recreational training institute" means a commercial training or coaching centre which provides training or coaching relating to recreational activities such as dance, singing, martial arts or hobbies.

(iii) "computer training institute" means a commercial training or coaching centre which provides coaching or training relating to computer software or hardware."

8. The proviso in the above notification was inserted with effect from 07.06.2005 excluding taxable services provided in relation to commercial training or coaching by a computer training institute. It is the case of the assessee that prior to the introduction of this proviso the benefit of this exemption was available to computer training institutes as well because they were not excluded. It is the case of the department that a plain reading of the notification prior to this amendment shows that the exemption was available only to (a) vocational training institute or (b) a recreational training institute. There was no exemption notification for computer training institutes at all. Therefore, the proviso which was introduced was nothing more than an explanation introduced vide notification 19/2005-ST dated 07.06.2005. To buttress their argument learned departmental representative also draws the attention of the bench to notification 09/2003 which was in existence prior to notification 24/2004. This notification exempted services provided in relation to commercial training or coaching by (a) vocational training institute, (b) a computer training institute or (c) a recreational training institute. Subsequent notification 24/2004-ST restricted the

exemption only to vocational training institute and recreational training institute. There was no exemption notification for computer training institutes which, according to the department, is a conscious decision of the Government. The subsequent proviso introduced vide notification 19/2005 dated 17.06.2005 is only by way of explanation/clarification and even without the proviso no benefit was available for computer training institutes.

9. Learned counsel for the assessee, on the other hand, argues that the proviso was introduced with effect from 07.06.2005 specifically stating that the benefit of this notification is not available for commercial training or coaching by computer training institute. It was not an explanation but a proviso. The proviso cannot be presumed to exist prior to this date. In the absence of proviso the presumption is the benefit of notification extends to computer training institutes also. Therefore, they are fully entitled to the benefit of exemption notification. We do find that notification 09/2003-ST dated 20.06.2003 provided for exemption to a vocational training institutes, computer training institutes as well as recreational training institutes up to 30.06.2004. The successor notification 24/2004-ST dated 10.09.2004 provided such exemption only to vocational training institutes and recreational training institutes. Viewed from this point of view the proviso which was inserted excluding computer training institutes from the benefit of this exemption notification is redundant because computer training institutes were not covered at all in the notification. The other way of looking at it is to view the proviso as having made an exception to the notification with effect from 07.06.2005 when it was introduced. We, therefore, find that both views are possible in reading the exemption notification 24/2004-ST dated 10.09.2004 prior to 07.06.2005. As per the judgment of the Hon'ble Apex Court in the case of *Dilip Kumar & Co. and others (Civil Appeal No. 3327/2007)* an exemption notification must be strictly construed and in case of ambiguity the benefit of doubt has to go to the revenue and against the assessee. This is a case of glaring ambiguity created by inserting a proviso excluding the category which was not covered at all in the notification in the first place. We have no choice but to follow the judgment of the Constitutional Bench of the Hon'ble Supreme Court in interpreting this notification and hold that the assessee is not entitled to the benefit of notification 24/2004-ST dated 10.09.2004 for the period prior to 07.06.2005 also because the computer training institutes were not covered by the notification. Therefore, the Commissioner (Appeals) has erred in extending the benefit of this notification to the assessee.

10 In view of the above, we find that the assessee is not entitled to deductions on account of sale of books, registration fee, examination fee etc., because no amounts were collected under these heads and gross amount for total services rendered were invoiced to the students by the assessee. Service tax is leviable on the gross amount charged. Assessee is also not entitled to the benefit of exemption notification 24/2004-ST dated 10.09.2004 for the period prior to 07.06.2005 because they were not clearly covered by the exemption notification. In view of the above, the department's appeal is liable to be allowed and the assessee's appeal is liable to be rejected and we do so.

11. The assessee's appeal is rejected and the department's appeal is allowed.

(Pronounced in the Open Court on 11.07.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
COURT NO. I**

Service Tax Appeal No. 3376 of 2012 [DB]

Arising out of Order-in-Original No.21/2012-S.Tax, Dated: 20.07.2012
Passed by the Commissioner of Customs, Central Excise & Service Tax, Hyderabad

WITH

Service Tax Appeal No. 20266 of 2014 [DB]

Arising out of Order-in-Original No.Hyd-EXCUS-002-COM-050-13-14, Dated: 30.10.2013
Passed by the Commissioner Service Tax, Hyderabad

AND

Service Tax Appeal No. 30352 of 2016 [DB]

Arising out of Order-in-Original No.Hyd-EXCUS-002-COM-064-15-16, Dated: 31.03.2016
Passed by the Commissioner Service Tax, Hyderabad

Date of Hearing: 06.06.2019

Date of Decision: 09.08.2019

**M/s HYDERABAD RACE CLUB
HIREGAMGE & ASSOCIATES, CHARTERED ACCOUNTANTS , 1010, 1ST FLOOR
ABOVE CORPORATION BANK, 26TH MAIN, 4TH T BLOCK, JAYANAGAR
BANGALORE - 560041**

Vs

**COMMISSIONER OF CUSTOMS AND CENTRAL EXCISE
HYDERABAD-II, COMMISSIONERATE, BASHEERBAGH, HYDERABAD-500001**

Appellant Rep by: Shri Y Sreenivasa Reddy, Adv.
Respondent Rep by: Shri C Mallikarjun Reddy, AR

CORAM: P Venkata Subba Rao, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NOS. 30734-30736/2019

Per: Rachna Gupta:

This order disposes of three appeals together as the issue being common to all three of these appeals. Orders-in-Original, as detailed below have been challenged in the impugned appeals vide which the demands made against the appellant under the taxable service of Business Support Service (BSS) and Renting of Immovable Property Service (RIPS) has been confirmed alongwith interest and the penalty.

2. Details of three of the appeals are as follows:-

Sl. No.	Appeal No.	SCN date	OIO No. & Dt.	Period	Amount (Rs.)
1.	ST/3376/2012	13.04.2011	21/2012 dated 20 th July, 2012	May 2006 to September 2009 & Oct., 2009 to September 2010.	6,61,81,472/- (demand under BSS)
2.	ST/20266/2014	04.04.2012	No.Hyd-EXCUS-002-COM-050-13-14 dated 30.10. 2013	Oct. 2010 to Sept. 2011	61,69,447/- (demand under BSS)
3.	ST/30352/2016	23.10.2013	No.Hyd-EXCUS-002-	Oct. 2011 to June. 2012	49,48,887/- (demand under

			COM-064-15- 16 dated 31.03. 2016		BSS)

3. The facts in brief are as follows:-

The appellants, M/s. Hyderabad Race Club are involved in providing the taxable services falling under Club or Association Membership Services w.e.f. 05.01.2006 and for providing renting of immovable property services w.e.f. 05.05.2009, since when they are registered for the same, under Service Tax. They are the company registered under Section 25 of Companies Act, 1956, in the state of Andhra Pradesh, with main object of carrying on the business of a Race Club in all its branches.

4. Department during the verification of books of accounts of the appellant, noticed that they have received amounts for various taxable services rendered by them. However, no Service Tax liability has been discharged. The details of various services rendered by them were observed as follows:-

- i) M/s. HRC have rented out space/immovable property to ING Vyasya Bank and to the caterers appointed by the Club;
- ii) have also collected entrance fee from the members of the Club;
- iii) have provided infrastructural support facilities to the Book makers operating in the club premises;
- iv) have provided live telecast of races of other centers/ Race Clubs;
- v) have conducted Inter venue betting of the other racing clubs on which the club was receiving a share of income and
- vi) have permitted the Book makers to accept bets from the customers on which the club was receiving a share of income.

5. On being pointed out, service tax liability qua the services at Sl. No.(i) & (ii), as above, was discharged by the appellant though under protest, but the liability qua the remaining services has not been discharged. Resultantly, the respective show cause notices as mentioned above for the above mentioned respective periods were issued to the appellants proposing the respective demands alongwith the interest at the appropriate rate and the proportionate penalties. The said demands were confirmed by the adjudicating authority below alongwith the interest at appropriate rate and the proportionate penalties. Being aggrieved the appellant is before this Tribunal.

6. We have heard Shri Y. Srinivas Reddy,ld. Advocate for the appellant and Mr. C. Mallikarjun Reddy, ld. D.R. for the Department.

7. It is submitted on behalf of the appellants that the show cause notice has not appropriately considered the nature of activity, the prospective of the same, documents on record, the scope of activities undertaken and the nature of activity involved but is based on assumptions, presumptions and surmises, which all has been confirmed by the adjudicating authority below. The same is impressed upon, as the important ground for setting aside the impugned order. It is submitted that M/s. Hyderabad Race Club is an Institution registered under Section 25 of the Companies Act, 1956 in the State of Andhra Pradesh with the main object of carrying on the business of Race Club in all its branches. It conducts the Horse Races and is also governed by the provisions of Andhra Pradesh (Telungana Area) Horse Racing and Betting Tax Regulations 1358 F. It is submitted that appellant does not involve in betting but facilitates the better at the "totalizator" which is a machine connected to a server. Betting can be done by the punters either at the said totalizator or with the "book-makers". Book makers/Bookies are the persons, who are given license by the club to operate as book/bet at the races. They collect bids and pay price money to the punters, who bet on winning horses. It is submitted that these book makers act independently and in a sense are the competitors to the appellant.

8. It is further impressed upon that as per the aforesaid regulations these bookies have to operate from the premises of the appellant and an enclosure, accordingly, is provided to the bookies in the appellant's club where the race is actually conducted in the appellant premises or is telecasted in case the race is conducted in the club other than the appellant's club. The appellant charges fee from the bookies in two components one is fixed amount under the head "stall fee" and the other is a variable amount under the head "commission" which is the percentage of the betting amounts collected by such bookies. However, both these amounts are collected towards

the stall fee only. It is submitted giving stalls on rent is not business support service and therefore, the demand is liable to be set aside. It is further submitted that the adjudicating authority below has held that the appellant has provided the services of auditing of books of these bookies which amounts to providing Business Support Services but the findings are alleged as wrong. As the book-makers themselves have not outsourced any of the activity, the auditors are engaged by the appellant only to avoid illegal betting by the bookies, so that the auditor of the appellant may get the details of the betting amount and the tax collected by the bookies. However, the nominal amount collected from the bookies as auditor charges are paid to the auditor. Since the appellant is not retaining any amount from these audit charges, the activity of auditing cannot be called as Business Support Service. Otherwise also, the entire amount collected is in lieu of the stall being provided to the appellant, the stall-fee cannot be called as an amount charged for rendering Business Support Service.

9. With respect to the income with respect to live telecast of races, it is submitted that appellant allows other race clubs to give live telecast of the races conducted at the appellants place for which they get share of income from the other clubs and vice versa the appellants pays such share of income to such other club whose race is agreed to be telecasted at the appellants club (inter-venue betting). In this transaction, no service is provided to the bookies, hence, the demand is alleged to wrongly been confirmed under Business Support Services.

10. With respect to the amounts received towards royalty from the caterers, the same is denied to be treated as rent and as such to be classified under Renting of Immovable Property Services. It is submitted that appellant is providing the common/shared areas and facilities to the caterers inside the club premises against an agreement that caterers shall pay the club is specific consideration in form of royalty since no year mark space is provided to the caterers. The said royalty received has wrongly been classified as the money received for providing renting of immovable property services. Appellant has relied upon the *Royal Western India Turf Club Ltd. vs. CST, Mumbai reported in 2015 (38) STR 811 (Tri.-Mum.)*.

11. With these submissions, the demand confirmed for the respective activities under the respective category, i.e., BSS & RIPS qua caterers is alleged as highly unreasonable and accordingly, is prayed to be set aside. Learned Counsel has relied upon *Royal Western India Turf Club Ltd. Vs. Commissioner of Service Tax, Mumbai reported in 2015 (38) S.T.R. 811 (Tri.-Mumbai)* to impress that the issue is no more res integra. Board Circular No. **334/4/2006-TRU** dated 28.02.2006 and Circular No. **109/3/2009-ST** dated 23.02.2009 is also relied upon. Appeals, accordingly, are prayed to be allowed.

12. While rebutting these arguments, it is submitted by the Id. D.R. that admittedly the appellants are receiving two different amounts, one in the name of stall fee towards the enclosure/ space provided by the appellant to their licensed bookies and another is the commission at the rate of certain percentage of the revenue collected. It is impressed upon that the said commission cannot be categorized as stall fee, as is submitted by the appellant, as the same is with respect to other support services, as that of auditing, facility of live telecast, facility of caterer etc. being provided to the said licensed bookies in the appellant's club. Hence, the commission is the consideration for providing the Business Support Service by the appellant as such the demand has rightly been confirmed.

13. Coming to the royalty charges as received by the caterers are since the caterers are admittedly serving the food stuff in the premises of the appellant under an agreement entered into between the two, the same definitely amounts to providing a space in the appellant's premises and hence, the said royalty has rightly been confirmed to be the consideration against providing the Renting of Immovable Property Service to the said caterer. As such, there is no infirmity in the order under challenge. The appeal is accordingly, prayed to be dismissed.

14. After hearing both the parties and perusing the entire record of the impugned appeals, we are of the opinion as follows:-

The Appellants are receiving the amount from their licensed bookies and the caterers on the following counts:-

- 1) Book makers stall fee
- 2) Commission from book-makers:
 - (i) For inter-venue betting
 - (ii) Consideration for live telecast, and;

3) Royalty from caterers

15. The first two counts are alleged to be the Business Support Services being provided by the appellant to their licensed bookies and the third one is held to be the consideration in lieu of providing Renting of Immovable Property Services to the caterer. To adjudicate whether these have rightly been classified by the adjudicating authority or not, we first need to look into the definitions of Business Support Service under Section 65 (104c) of the Finance Act, 1994 and Renting of Immovable Property under Section 65 (90a) of the Finance Act, 1994 which reads as follows:-

"Support Services of Business or Commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

Explanation -For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security; (Section 65(104c) of the Finance Act, 1994)

"Taxable Service" means any service provided or to be provided to any person, by any other person, in relation to support services of business or commerce, in any manner; (Section 65 (105) (zzzzq) of the Finance Act, 1994)

16. As per Sec. 65 (105) (zzzz) of the Finance Act, 1994, the taxable service under the category of "Renting of immovable property service" – means service rendered to any person, by any other person by renting of immovable property or any other service in relation to such renting, for use in the course of or for furtherance of business or commerce;

Explanation 1 – For the purpose of this sub-clause, "immovable property" includes –

i) Building and part of a building, and the land appurtenant thereto;

ii) Land incidental to the use of such building or part of a building;

iii) The common or shared areas and facilities relating thereto; and

iv) In case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto within such complex or estate,

v) Vacant land given on lease or licence for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce;

Explanation 2 – For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce.

The period involved in three of these appeals is pre as well as post negative list era.

17. Coming to the pre-negative list period first, we adjudicate as follows:-

Definition of Business Support Service, as above, makes it abundantly clear that any service which is in relation to business or commerce and helps in enhancement of business amounts to Business Support Service. Even the infrastructural support provided to run a business is a Business Support Service. In the present case from the license as given by the appellant to the bookmaker, it is abundantly clear that the appellant while providing an enclosure/stall in the appellant's race club to the bookies is providing as space to him to run his business of booking bets from the bunters available within the premises of the appellants' Club. The bet has to be on the Races being conducted by the Club in its premises. Hence, providing a space in the Club to such a book-maker is nothing but a facility being given for him to properly run his business and infact, to have more business. The said service is, therefore, in relation to the business of bookie and thus definitely amounts to Infrastructural Support being provided to the booker by the appellant which is well covered under explanation to Section 65(104C) Finance Act defining BSS. Admittedly, appellant is receiving some stall fee towards the said Infrastructural Support Service. Definitely since the premises are to aid the business of the book-maker and the arrangement is such that in absence of the premises the question of book-maker to conduct his business does not at all arise. Then this service provided by Club to him is not merely a renting of immovable property as has been held in the case of M/s. Royal Western India Turf Club Ltd. (supra). It definitely amounts to Business Support Service.

18. The facts of the present case are different from M/s. Royal Western India Turf Club Ltd. (supra) case in the terms that of providing stall to the bookie in the club to be Show cause notice in Royal Western India Turf case alleged this service to be taxable under the category of renting of immovable property, where the Tribunal held that it is more an infrastructural support than mere Renting of Immovable Property. In the present case, the show cause notice has been issued alleging that said service to be a Business Support Service. Hence applying the said decision, we hold that the appellant has wrongly interpreted the decision. No doubt, demand under renting of immovable property as far as the stall fee is concerned is not maintainable but the said demand is well maintainable under Business Support Service defined under Section 65(104C) of Finance Act, 1994.

19. Now coming to the demands with respect to the charges received by the appellant from the bookies in the name of commission, but for providing Inter-venue Betting Services, Auditing Services, live telecast services and for the catering services being available to the book-makers. As already discussed above, in the given arrangement, the bookmaker can run his business if and only if the Club is able to provide him the aforementioned services. This is sufficient for us to hold that the services are nothing, but the services are provided by appellants in relation to the business of the book-makers. The admission that accounting facility has also been provided by the appellant to the book-makers corroborates the aforesaid opinion. The arguments of the appellant that auditors were provided only to discharge their statutory liability of maintaining the proper accounts and the charges collected from the book-makers against the auditors fee were handed over as such to the auditors does not appear reasonable, as there is nothing on record that in addition to stall fee and the commission amount, as mentioned in the impugned license any other amount has been paid by the book-maker to the appellant. All these activities when taken together are covered under the definition of Business Support Service, as mentioned above. Hence, we do not find any infirmity in the order of the adjudicating authority below while confirming these demands.

20. The decision of M/s. Royal Western India Turf Club Ltd. (supra) again is not applicable to the present case because in that case the demand for the live telecast facility was alleged to be a Broadcasting service, which came into tax-net only in the year 2010 and the demand in that case was pre 2010. With respect to this service to be an Intellectual Property Right Service, the Tribunal has held that the demand for such service can be raised only when there is a transfer of Intellectual Property Rights by the holder of such rights to the person who receives or uses the said Intellectual Property Rights. In the present case, there is no transfer of Intellectual Property Rights from the appellant Club to the book-maker though there may be such service between the two Clubs where Race is being conducted in one Club and is being telecasted in another Club but the said transaction is not the subject matter of the present show cause notice. It becomes clear that the service of live telecast provided by the appellant Club to the bookie is neither a Broadcast service nor an Intellectual Property Right Service. But it is definitely a Business Support Service for the bookmaker provided by the appellant club. Hence, we hold that demand has rightly been confirmed.

21. The Circular No. **334/4/2006-TRU** dated 28.02.2006 is also opined to have been wrongly interpreted. We are of the opinion that mere use of word "outsource" in that Circular does not alter the definition of Business Support Service as being given in the statute. Therefore, the argument of the appellant that if the bookmaker has not outsourced the services to the Club, the services cannot be Business Support Service, is not acceptable. It has already been observed that the services which have been received by the book-maker from the appellant Club are the Infrastructural Support for which the appellant is receiving the stall fee and the support of Accountancy, Customer Relationship (bunters being available to the book-maker within the appellant's Club), Inter-venue betting and the structural support in the form of live telecast for the same all combined together are definitely the Business Support Services being provided by the Club to the book-makers. Thus, we are of the firm opinion that the demands in hand have rightly been confirmed and that the same is not in contradiction to M/s. Royal Western India Turf Club Ltd. (supra) case.

22. Finally, coming to the demand for providing services to the caterers. The said demand has been confirmed under the head of Renting of Immovable Property. Admittedly, the caterer is allowed to roam around in the entire premises of the appellant to offer the food and the catering services. The appellant has provided a space to the caterer to put his staff within the Clubs premises. Thus, in the case of caterer, the Club is not providing any other service either in the form of cutlery crockery or in the form of serving boys. Hence, the service provided by the

appellant is merely Renting of Immovable Property Service. In Royal Western India Turf Club Ltd. case, the said service was alleged and confirmed by the adjudicating authorities as Business Support Service, but was held to be Renting of Immovable Property Service. The present show cause notice has proposed the demand for service provided to the caterer as Renting of Immovable Property Service only. Hence, irrespective the facts of the present case and Royal Western India Turf Club Ltd. case are similar but the proposal in show cause notice for the M/s. Royal Western India Turf Club Ltd. (supra) case and the present case is altogether different. Hence, the adjudication is not completely binding on the facts and circumstances of the present case.

23. For the period which is post negative list era i.e. beyond the year 2012. Value of all the services other than those services specified in negative list, provided or agreed to be provided in the taxable territory by one person to another shall be levied to tax, as is emphasized in Section 66 B, which was introduced with Finance Act, 2012. Hence, for the post negative list era, the services need not to be classified specifically. Whenever there is a service rendered and a consideration in lieu thereof, in whatever form, has been received, the same is leviable to tax. In the present case, admittedly, the book-makers were provided a space inside the appellants' premises. The appellant.... was arranging a live telecast of the Matches conducted in the Race Clubs other than the appellants' own Club, appellant was also providing auditing facility and the catering services were also made available to the book-makers within the appellants' premises. Admittedly, the appellant was charging money from the book-makers on two counts; a fixed amount for stall fee and a profit based amount as commission. These admissions make it abundantly clear that both the requirements of Section 66B stands fulfilled. Hence, we are of the opinion that there is no infirmity in confirmation of demand for the post negative period as well.

24. In view of the entire above discussion, we are of the opinion that the demand qua receiving stall fee and commission from the bookies for services in relation to business including infrastructural support as consideration received for providing Business Support Service to the bookmakers and qua receiving charges from caterers to roam in the appellant's premises as consideration for providing Renting of Immovable property Service has rightly been confirmed. Thus, there is no infirmity in the order under challenge. Order is accordingly, upheld. Appeals are hereby rejected.

(Pronounced in the open Court on 09.08.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
COURT NO. I**

Service Tax Appeal No. 2775 of 2011

Arising out of order-in-Original No. 15/2011-ST-HYD III Adjn-Commr, Dated: 30.06.2011
Passed by Commissioner of Central Excise, Customs & Service Tax, Hyderabad-III

Date of Hearing: 18.11.2019

Date of Decision: 18.11.2019

**M/s USHODAYA ENTERPRISES PVT LTD
TELEVISION DIVISION, RAMOJI FILM CITY, HYDERABAD**

Vs

**THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD III, COMMISSIONERATE, 7TH FLOOR
KENDRIYA SHULK BHAVAN, BASHEERBAGH, HYDERABAD-500004**

Service Tax Appeal No. 2787 of 2011

Arising out of order-in-Original No. 15/2011-ST-HYD III Adjn-Commr, Dated: 30.06.2011
Passed by Commissioner of Central Excise, Customs & Service Tax, Hyderabad-III

**THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD III, COMMISSIONERATE, 7TH FLOOR
KENDRIYA SHULK BHAVAN, BASHEERBAGH, HYDERABAD-500004**

Vs

**M/s USHODAYA ENTERPRISES PVT LTD
TELEVISION DIVISION, RAMOJI FILM CITY, HYDERABAD**

Appellant Rep by: Mr M V S Sridhar, Adv.

Respondent Rep by: Mr A V L N Chary, AR

CORAM: P Venkata Subba Rao, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NOS. 31165-31166/2019

Per: Rachna Gupta:

The appellant herein M/s Ushodaya Enterprises Pvt Ltd (UEPL) is a division of Ramoji Film City Rangareddy Distt who is operating satellite T.V. channels. Department while verifying the ledgers of M/s UEPL observed that they have paid hire charges for the purpose of lease/rent of transponders which are attached to satellite owned by M/s Intelsat Global Sales and Marketing Ltd., England (IGSML) and that the said transponders are used by the appellant for providing broadcasting services. The said hire charges observed to have been paid in terms of lease service contract between M/s UEPL and IGSML on 18.02.2004 for hiring their transponders attached to satellite No. Apr-I for the following periods

1st July 2003 to 31st may 2007

1st July 2003 to 9th February 2008

1st July 2003 to 9th February 2011.

The department was of the opinion that the service of providing transponders on hire basis by IGSML to UEPL appears to be classifiable under Business Support Services inviting tax liability from 1st May 2006 onwards resultantly a show-cause notice No. 215/2010-ST dated 24.03.2010 as was received by the appellant on 7.04.2011 was served upon M/s UEPL proposing to recover the service tax amounting to Rs 3,79,26,213/- for the period from 2006-07 to 2009-10 along with interest at the appropriate rate and the proportionate penalty. This proposal has been confirmed by the Commissioner vide his order-in-original No. 15/2011 dated 30th June 2011 holding that the hire charges paid by the appellant to M/s IGSML for leasing of three numbers of transponders attached to the satellite owned by IGSML are liable towards service tax as the said value is received in lieu of providing business support service

by the appellant to M/s IGSML. The proposal for recovery of interest and imposition of penalty was also confirmed. It is to assail the said order being aggrieved thereof that the appellant is before this Tribunal.

2. We have heard Shri M.V.S. Sridhar learned advocate for the appellant and Shri A.V.L.N. Chary learned A.R. for the department. It is submitted on behalf of the appellant that transponders attached to the satellites are in the form of a machine and as such are goods. Webster's Dictionary and Chambers Dictionary has been emphasised for the purpose. It is submitted that hiring of such transponders with ownership to still to remain with the owner i.e. IGSML amounts to transfer of right to use the goods. It is further emphasised that as for amendment of Article 366 of Constitution of India in the year 1983 Transfer of right to use goods has been included in the definition of sale. Thus transfer of right to use even without transfer of ownership of property is deemed as a sale. Accordingly hire/lease of goods is a deemed sale and is liable to sales tax. Thus hiring of transponder of satellite can never be a case of providing taxable service. The findings of adjudicating authority are mainly assailed on the reasons above. Learned counsel has placed his reliance upon the decision of Hon'ble High of Karnataka in the case of *Antrix Corporation Ltd Vs Asstt Commr of Commercial Taxes Bangalore [2016(337)ELT 530(Kar)]* wherein transponder of satellite was held to be goods within the meaning of Article 366(12) of Constitution of India and the hiring thereof is held to be a deemed sale as being within the scope of sub-clause (d) of Clause 29(a) of Article 366 of the Constitution of India.

3. In addition to the arguments on merits of the appeal, learned counsel has impressed upon the impugned show-cause notice to be barred by limitation as has been issued by invoking longer period of limitation. It is a fact that there is no allegation of suppression of facts, fraud, collusion, wilful mis-statement, contravention of provisions of rules with and intention to evade payment of tax. Learned counsel has brought to our notice a letter of the department bearing No. DL/SC/AE/INQ/GR.1(2)/82/09/42/28273 dated 28.12.2009 issued from the Commissionerate of Service Tax, New Delhi acknowledging the fact about appellants paying hire charges on the transponders. Thus the issue was in their notice since then, the demand vide the impugned show-cause notice cannot be allowed to be extended beyond a period of one year as being permissible period of limitation. Reliance has been placed upon the following judgements:

i) *Commissioner of Central Excise & Customs Daman Vs Arti Industries Ltd [2008(229)ELT 667 (Tri-Ahmd)]*

ii) *Athungal Sales Corporation Vs CCE Cochin [2008(11)STR 40 (Tri-Bang)]*

In addition, it is submitted that even if for the sake of argument the hire charges for transponder are acknowledged to be liable to service tax, the same could have been availed by the appellant as CENVAT Credit since the transponder is an input in the output broadcasting services of the appellant as such it will be revenue neutral situation resulting into no loss to the govt. Learned A.R. while justifying the order in challenge has impressed upon that the transaction of leasing of transponders between the appellant and M/s IGSML is in the nature of import due to the reason that the latter has no office in the territory of India. It is rather based in a foreign country. As such the question of attracting sales tax/VAT on such a transaction does not at all arise. It otherwise is an admitted fact the services of leasing of the said transponder rendered by M/s IGSML are in the nature of support services to the business of broadcasting undertaken by the appellant as the leased space in the transponder is used by the assessee to transmit the signals which are amplified and sent back for broadcasting. As such hire charges paid by M/s UEPL for the purpose was rightly held to be liable to service tax under the category of business support service. Finally justifying the confirmation of demand along with the order of recovery of interest and imposition of penalty, learned A.R. has prayed for dismissal of the impugned appeal. After hearing both the parties, the rival contentions thereof and perusing the entire record we understand that the admitted transaction between the appellant and M/s IGSML is about hire/lease of transponders, a part of the satellite owned by M/s IGSML. The said transaction is asserted to be transaction of deemed sale in view of Article 366(29A) (d) of Constitution of India, a transponder being in the nature of goods. Whereas department has alleged the transaction to be an activity amounting to service called as business support service being rendered by the owner of the satellite/transponder to the appellant who is doing a business of broadcasting. For the purpose, we foremost need to understand as to what transponder is. From the definitions given in Webster's as well as Chambers dictionary as relied upon by the appellant,

transponder appears to be a segment in a satellite which orbits the earth. Transponder is an electronic equipment which receives signals from one such communication circuit and transmits corresponding signal to another circuit. It can simply be called a transmitter-cum-receiver which transmits signal. A satellite may have number of transponders. Tribunal Mumbai in the case of *Set India Pvt Ltd Vs Commissioner of Customs Cochin [2003(152)ELT 190(Tri-Mum)]* has already held satellite as a whole to be a machine and accordingly the goods. From the definition of goods given under sale of goods Act 1930, Section 2(7) thereof the goods are defined as all types of movable property other than The inclusive part of the definition includes stock and shares, growing crops attached to or forming part of the land which are required to be severed before sale or under the contract of sale.

4. Once this becomes apparent status of transponder it becomes relevant for us to proceed adjudicating whether the hire and lease thereof in the given circumstances as to deemed sale in furtherance of Article 366 of Constitution of India sub-clause (29A)(d) thereof. The said article was incorporated vide 46th Amendment of the Constitution in the year 1983 based on 61st report of law commission that the Constitution conferred exclusive power to the states to levy sales tax by explaining entry 54 list 2 by insertion of this article 366(29A) i.e. the subject matter of hire purchase and leasing was constitutionally characterised as deemed sale. It was clarified that the deemed sale was no more open to be taxed by the parliament under Entry No. 97 List (1). The said opinion was confirmed by the Hon'ble Apex Court in the case of *K.L. Johar[1965(2)SCR 112. Hon'ble Apex Court in the case of Gannon Dunkerley Madras [1959 SCR 379]* has already held that words "sale of goods" had the same meaning which those words have in the Sale of Goods Act 1930. It was clarified in that case that the legislature cannot extend its taxing power by defining words "sale of goods" to cover transactions which had been constituted "sale of goods" within 1930 Act. In this case, the provisions of Madras General Sales Tax Amendment Act 1947 defining sale to include a works contract therefore held ultra vires. In view of this decision we first need to understand what amounts to sale and whether the transaction herein can fall under that definition. We hold that the words "sale" is *nominjurisi* i.e. consensual contract. The word "sale" connotes both a contract and conveyance or transfer of property. Thus the essential ingredient of 'sale' which agreement to sale movables/goods for a price and property passing therein pursuant to an agreement. We further observe that sale is defined under Sale of Goods Act 1930. This is applicable all over India except for Jammu and Kashmir which means under this Act, the goods sold from owner to buyer for certain price at a given period of time but within the territory of India excluding State of Jammu and Kashmir has already above that concept of deemed sale has already been held by Hon'ble Apex Court to connote first to the definition of sale and that admitted fact of the case is that the owner of the impugned goods i.e. transponder is a foreign based company situated in England that had no office in India. The agreement herein is the one between one party of the contract in India and another beyond the territory of India. As such the transaction is not eligible to be classified/to be known as sale. Resultantly the question of hire/leasing of goods from a person who is not in the territory of India cannot be classified/known as deemed sale. We observe that adjudicating authority has rightly relied upon the decision of the Hon'ble Apex Court in the case of *...Finance Corporation Ltd and Anr. Vs State of Maharashtra [2000 (6) SCC 12]* wherein it was held that if sale takes place outside the states or which is a sale in the course of import or export, the State in exercise of powers under Entry 54 of list 2 read with Article 366(29A) (d) is not competent to levy sales tax on the transfer of right to use goods which is a deemed sale.

5. Though learned counsel has relied upon the decision of Hon'ble High court of Karnataka in the case of *Antrix Corporation Ltd (supra)* a wholly owned Govt of India Company holding that the providing of space segment capacity in the transponder attached to the satellite belonging to M/s Insat a Company based in India with the company which is also within the State of Karnataka (India) but in view of the above discussion, we are of the opinion that the said very fact is sufficient enough to distinguish the present case from M/s Antrix Corporation Ltd (supra) because as here one out of the two parties is situated outside the territory of India which is why the transaction between the two cannot be called as deemed sale.

6. Once the transaction is within the scope of sale and admittedly the transponder is hired by the appellant from M/s IGSML for supporting his business of broadcasting we are of the opinion that department has rightly categorised the said transaction as an activity being

provided by M/s IGSML to M/s UEPL in view of supporting the business of the later classifying it as a business support service.

7. Irrespective of those findings we are unable to accept the demand confirmed as a whole in view of the ground of limitation raised by the appellant. We observe that period of dispute is with effect from 2006-07 to 2009-10. The show-cause notice was received by the appellant only on 7th of April 2011 though it appears to have been issued on 24.03.2010 but we observe that department could not have produced any document of it to have been dispatched within the reasonable time or about the service thereof on the date other than as mentioned by the appellant. From the letter given by the appellant to the department in April 2011 itself which has duly been acknowledged by the department without objecting the date of receipt as mentioned therein, we have no reason to hold that the show-cause is beyond the prescribed period of limitation. We observe that the appellant admittedly were getting audited by the department with no such objection ever raised by the department. Department rather had served a letter dated 22.12.2009 upon the appellant asking for clarify on the notice. The subsequent show-cause notice cannot propose the demand for a period beyond one year of the period in dispute nor can raise the allegation as that of suppression of facts or misstatement on the part of appellant that too with an intention to evade the tax. In these circumstances, the Proviso to Section 73 of the Finance Act extending the said period of limitation from one year to five years could not have been invoked by the department. In view of these findings, we are of the opinion that the impugned show cause notice is barred by limitation. Coming to the last limb of argument about revenue neutral situation, we observe that once the value of hire charges paid by the appellant to the service provider is available to the credit thereof in case such a value is categorised as service tax, there remains no question of any loss to the exchequer and the situation can very well be categorized as revenue neutral situation. As the facts are indicating absence of intention to evade tax in the circumstances, question of imposition of penalty does not at all arise nor that of recovering the interest while drawing our support from the decision of the Tribunal Bangalore in the case of *Athungal Sales Corporation Vs Commissioner of Customs Excise* [2008(11)STR 40] we are of the opinion that imposition of penalty in this case is rather a harsh decision.

8. In view of the entire case position, though we are not convinced that the argument of the appellant that the impugned transaction is the transaction as that of deemed sale, rather we are confirming the observation of the department for it to amount an activity as that of business support services being received by the appellant but would have been liable to discharge the liability of service tax under reverse charge mechanism but for the show-cause notice being barred by time, we are of the opinion that the demand has still been confirmed. For these reasons, we set aside the impugned demand. As a result the appeals stand allowed.

(Order pronounced and dictated in open court)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD**

**NAVAYUGA ENGINEERING COMPANY LTD
VERSUS
COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, VISAKHAPATNAM
- I**

Service Tax Appeal No. 730 of 2010
Final Order No. A/30902/2020 Dated: - 03.07.2020

Appellant Rep by: Shri Vipin Varma, Advocate

Respondent Rep by: Shri P.R.V. Ramanan, Authorized Representative

CORAM: Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. P. Venkata Subba Rao, Member (Technical)

1. This appeal has been filed against the Order-in-Original No. 15/2009 (RS)dt.20.11.2009.

2. Heard both sides and perused the records.

3. The appellant is a Multi-disciplinary Engineering & Construction firm engaged in civil, electrical and mechanical works, civil construction projects and infrastructural facilities. They entered into an agreement with the Government of Andhra Pradesh on 06.10.1999 according to which they had to construct a bridge across Gowtami branch of river Godavari between Yanam & Yedurulanka (Y-Y Bridge) on Build-Operate- Transfer (BOT) basis. As per the agreement they were supposed to conduct survey, investigation, studies, planning, design and construct a bridge and maintain it. They were allowed to collect a fee till the recovery of investment is made after which they were supposed to hand it over to the Government of Andhra Pradesh. The estimated total cost of the project was ₹110 crores, of which the Government of Andhra Pradesh gave them a subsidy of ₹ 69 crores while the rest of the investment had to be made by the appellant. The appellant was entitled to collect a fee on the motor vehicles and users of the bridge during the concessionaire period of 15 years. The salient features of this agreement were as follows:

a. M/s NEC is permitted to levy fee (toll) for a concession period of 15 years during which period they are also liable for maintaining the facility.

b. The fee to be collected by M/s NEC is to be retained by them as a nominee of GOAP during the concession period.

c. M/s NEC should not attempt to assign the project to others.

d. M/s NEC is permitted to develop way-side facilities like advertisements, hoardings etc., to generate revenue during the BOT period.

e. The land along with the properties and fee booths etc., so developed by M/s NEC to be handed over to GOAP after the expiry of BOT period.

f. The ownership of the bridge continues to vest with the GOAP.

g. M/s NEC shall maintain the project/ facility during the period of operation.

4. Para 3.1.1 of the agreement specifically prohibited the appellant from assigning their rights under the agreement to any party other than the financial institutions financing this project.

5. Despite such explicit prohibition of assignment, the appellant formed a 100% subsidiary

company by name of M/s Godavari Toll Bridge Pvt Ltd (GTBPL) and transferred the rights to collect toll and maintain the bridge for a consideration. The transferee, GTBPL had been issuing receipts in the name of the appellant themselves and collecting user fee from the users of the bridge and motor vehicles. Revenue was of the opinion that the service being rendered by GTBPL by way of maintaining the toll bridge and allowing its use was being done in the name of the appellant. As per section 65(105)(zze) of Chapter 5 of the Finance Act, 1994,

“taxable service” means any service provided or to be provided to franchisee by the franchisor in relation to franchise. The term “franchise” has been defined in section 65(47) as “franchise means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with the franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved”. The term “franchisor” is defined under section 65(48) as “franchisor means any person who enters into franchise with a franchisee and includes any associate of franchisor or a person designated by franchisor to enter into franchise on his behalf and the term “franchisee” shall be construed accordingly”. As the appellant had allowed GTBPL to provide service in their name and the invoices were also being issued in the appellant’s name, this falls under the definition of franchise service in terms of section 65(105)(zze) of the Finance Act, 1994. Accordingly, a show cause notice was issued on 03.06.2008 to the appellant calling upon them to explain as to why;

i. The service provided by them to GTBPL in relation to transfer of rights over Y-Y bridge, to collect toll etc., should not be classified as taxable services relating to franchise service under section 65(105) (zze) of the Finance Act, 1994;

ii. An amount of ₹ 12,50,00,000/- being the service tax payable on the franchise service rendered to GTBPL should not be demanded from them under section 73(1) of the Finance Act, 1994 read with the proviso contained therein;

iii. An amount of ₹ 25,00,000/- being the Education Cess payable franchise service rendered to GTBPL should not be demanded from them under section 73(1) of the Finance Act, 1994 read with the proviso contained therein;

iv. Interest should not be demanded from them under section 75 of the Finance Act, 1994; and

v. Penalty should not be imposed on them under section 76, 77 & 78 of the Finance Act, 1994.

6. The appellant contested the demand on merits as well as on limitation. After following due process, the learned Commissioner by the impugned order held that service provided by the appellant to GTBPL is a franchise service in terms of section 65(105)(zze) of the Finance Act, 1994. Accordingly, she confirmed the demand of service tax amounting to ₹ 12,50,00,000/- under the proviso to section 73(1) of the Finance Act, 1994. She also confirmed the demand of Education Cess of ₹ 25 lakhs along with interest under section 75 of the Finance Act, 1994. Further she imposed a penalty of ₹ 12,75,00,000/- upon the appellant under section 78 of the Finance Act, 1994.

7. Aggrieved, the present appeal is filed by the appellant on the following grounds:

a) The OIO has been passed by the learned Commissioner without appreciating the factual position and legal provisions in proper perspective and therefore, needs to be set aside.

b) The arrangements between the appellant and the GTBPL are not covered under the taxable category of franchise service as there is no franchisor, franchisee relation between the appellants and GTBPL. M/s GTBPL being 100% subsidiary of the company is their associate and not a franchisee. The term “franchisor” means any person, enters into franchise with franchisee and includes any associate of franchisor. Therefore, GTBPL is their associate and hence is covered by the definition of franchisor and therefore, they cannot be a franchisee also at the same time.

c) No service has been provided or is to be provided by the appellant to GTBPL. They only have assigned the right to collect toll and maintain the bridge to GTBPL which is

a special purpose vehicle floated by them only for this purpose. They have sold their right to collect toll to GTBPL for a

consideration for the remaining concession period of 11 ½ years through a Board Resolution by their Board of Directors and it has been accepted by a Board Resolution of the GTBPL.

d) The franchisee service necessarily requires a representational right to be given to the franchisee. The right indicates an entitlement to do or an authority to take action which is legally enforceable i.e., a party must be able to go to court and assert that a right exists in his favour. In the instant case the appellants had sold their right to GTBPL and hence there is no relationship that of a principal and an agent. GTBPL is collecting toll pursuant to the purchase of the right from the appellants. If GTBPL is collecting toll on behalf of the appellant as an agent then toll proceeds must flow back to the appellant and GTBPL should only get a commission from the toll. In this case, the entire toll proceeds are retained by GTBPL.

e) Maintenance of roads and bridges is the sovereign function of the state and the same is identified with the state.

f) The right to collect toll is not representational right. In the instant case no rights were granted by the appellant to GTBPL for rendering any service which is identified by them.

g) The consideration received for construction of bridges is exempted from the service tax under the taxable category of works contract and the same cannot be taxed under a different head.

h) The value of the taxable service received otherwise than by way of money is not taxable prior to 18.04.2006.

i) Without prejudice to contest the case on merits, the value of service should be taken as cum-tax value.

j) The demand is time barred and there is no evidence of fraud, collusion, wilful misstatement or suppression of facts or contravention of the Act or Rules with intent to evade payment of service tax.

k) There was a bonafide belief that no service tax is payable under franchise service. It involves interpretation of the law and therefore, extended period of limitation cannot be invoked.

l) No interest is payable as demand itself is not sustainable.

m) No penalties are imposable as it is question of bonafide belief in interpretation of law.

8. Learned counsel for the appellant reiterated the above submissions and vehemently argued that they have transferred their right to collection of toll to their own subsidiary. It is true that the subsidiary was collecting toll and issuing receipts in their own name until the investigations began. Thereafter, they started issuing toll receipts in their own name. He would assert that by no stretch of imagination can this be called a franchisee agreement as in the first place, no service was provided or service charge is collected. GTBPL has only collected toll fee from the users of the bridge. They have received an amount towards transfer of such right for collection of toll fee. Therefore, it cannot be called a franchisee service at all.

9. He would also argue that the consideration in this case was paid in the form of allotment of equity shares which, prior to 18.04.2006, cannot be considered as a consideration paid for the service. He also argued that if the case is decided against them on merits, they must be given the cum-tax benefit. He, further, argued that the demand was time barred and no penalties must be imposed.

10. Learned Special Counsel for the revenue would submit that the appellant was permitted to collect toll fee as a nominee of the Government of Andhra Pradesh for a period of 15 years and retain the amount so collected. They were required to maintain the project or facility during the period of operation. They w

ere not entitled to assign the project to anybody else.

Both the bridge and the booths were to be handed over to the Government of Andhra Pradesh after a period of 15 years. The appellant collected fees and maintained the bridge up to 31.03.2006 and thereafter for the remaining 11 ½ years of the concession agreement they transferred this right to GTBPL. Along with the right to collect the toll, they have also transferred the responsibility of maintenance and use of the property in such manner as may be beneficial to the interest of the appellant.

11. For this transfer of right, the appellant was paid an amount of ₹ 125 crores. A statement of Shri K.R. Kishore, DGM of the appellant was recorded on 18.06.2008 in which he averred that the right to collect toll has been assigned to GTBPL and the concerned authorities of the Government of Andhra Pradesh were informed about it. He admitted that the toll fee receipts were issued in the name of the appellant but the amounts were accounted for in the name of GTBPL. Learned special counsel also takes the bench through copies of receipts issued from June, 2008 onwards by GTBPL in the name of the appellant until the investigations were initiated and thereafter, in their own name.

12. He would submit that the department's case is that appellant has given representational right to GTBPL in respect of Y-Y bridged concessionaire agreement which amounts to franchise service. The extended period of limitation has been correctly invoked as the fact that the rights have been transferred to GTBPL was not disclosed to the department at any stage. In fact, these were internal Board resolutions of the two companies i.e., the appellant and the GTBPL. The appellants are registrants of Service Tax and have been filing returns. At no point of time, have they disclosed these facts to the department, hence, they cannot plead bonafide belief.

13. As per clause (3) of agreement between the appellant and the Government of Andhra Pradesh, the appellant was permitted to assign its rights only to banks or financial institutions for financing the project and not to any other person or entity. Hence, any assignment of representational rights would require fresh agreement and no such agreement was produced. It is evident that appellant had done this assignment without taking the approval of the Government of Andhra Pradesh. As confirmed by Shri K.R. Kishore, as on June 2008 their activity was not ratified by the Government of Andhra Pradesh. They did not produce any letter from the Government of Andhra Pradesh in this respect.

14. The appellant has stated that in their offer dated May, 1999, they had intimated to the Government of Andhra Pradesh about the confirmation of a separate company. However, the agreement finally executed in October, 1999, specifically bars assigning the project to anybody else.

15. The assignment was, in real terms, an internal and private arrangement between the appellant and the GTBPL. M/s GTBPL was discharging the obligations cast on the appellant under the main contract for a consideration. One of the significant obligations was maintenance of the bridge for a period of 15 years.

16. The toll receipts were issued in the name of the appellant until the investigation began. Therefore, for 20 months, any toll payer dealing with GTBPL was given the impression that they were dealing with the appellant.

17. The appellant's argument that the receipts were taken on the books of GTBPL and not transferred to them is immaterial because consideration for franchise was already paid to them in one go and the GTBPL was allowed to retain the proceeds and had to carry out the maintenance work for the next 11 ½ years.

18. In view of the above, appellant has been rightly regarded as franchisor and GTBPL as franchisee in terms of section 65(105)(ze).

19. The argument that the consideration received for construction of bridge is exempted from service tax under works contract is irrelevant because there is no demand at all on any amount received for construction of the bridge.

20. As far as the argument of value of taxable services received otherwise than by way of money was not taxable prior to 18.04.2006 is concerned, he argued that section 67 was substituted by the Finance Act, 2006 and it merely clarifies the methods of valuation of

services under different situations. The expression “gross amount charged” is a comprehensive term. Besides, non-money transactions were not excluded from section 67 as it existed prior to 18.04.2006.

21. On the question of limitation, learned special counsel argued that appellants were not new to service tax regulations and they had registration of service tax. They were fully aware of the obligations under self assessment scheme. The agreement which they entered with GTBPL was a private arrangement which was not disclosed to the department. There was no precedent decision which could have lead them to believe that no service tax was payable in their case. There is nothing on record to show that the appellant had obtained any legal opinion or sought any clarifications from the department which could have lead them to believe that they are exempted from service tax. The argument that they sold their rights to GTBPL is not correct because it could not have done so under the contract with the Government of Andhra Pradesh. The purported change in the toll fee receipts after investigations have commenced is also indicative of their effort to suppress the fact of their intent to evade payment of tax. In view of the above, the appellant’s appeal has no merits and the demand needs to be confirmed along with interest and penalties imposed also need to be upheld.

22. We have considered the arguments on both sides and perused the records. Construction of roads and bridges is done by the Government either directly or sometimes it is done on Build-Operate-Transfer basis. In the latter case, the Government, instead of investing either the whole or part of the money itself, gives the responsibility to build the bridge to a private party and gives them the right to collect a user fee or toll fee, by whatever name called, from the users of the bridge. The user fee is allowed to be collected over a specified number of years after which the bridge is turned over to the Government. This scheme is known as Build- Operate-Transfer scheme. Evidently, a private company has no interest in building roads for public good. They do it as a profitable business venture. Where a bridge or road is required and it is not there, it is profitable for the public to have such a bridge or road built and maintained. In return for the use of such road or bridge, they pay a consideration in the form of toll fee. However, like in the case of any licenses, there is an element of monopoly in this and therefore, the amounts which can be collected are regulated by the Government. Nevertheless, the fact remains that the user of the bridge is a consumer of the service and for the enjoyment of the facility he pays a consideration to the company which builds and maintains the bridge.

23. In this case, the Government of Andhra Pradesh has assigned the construction of this bridge to the appellants. They allowed them to collect user fee as per the schedule in the agreement. In addition, the Government of Andhra Pradesh also gave them a subsidy of ₹ 69 crores towards construction of the bridge. The total estimated cost of the bridge was ₹110 crores. The appellant was expected to get the remaining investment and recovered the same and profits through toll fee collected over a period of 15 years.

24. It is very clear from the agreement that the Government of Andhra Pradesh allowed the appellant to assign their rights and responsibilities under the agreement only to the financial institutions which finance their project and not to anybody else. There is no whisper of separate subsidiary company being formed and taking over this particular project in the agreement. Thus, we have no doubt that the agreement had prohibited assigning the rights and responsibilities to the appellant on to any other company. However, the appellant formed a separate legal entity in the form of 100% subsidiary and assigned their rights and responsibilities under the agreement to them in exchange for an amount received in the form of taking over debt and assigning some shares.

The value of both these debt and the shares has been quantified and is specifically included in the arrangement between appellant and their subsidiary, M/s GTBPL. Thus, the amount received as consideration for assigning these rights and responsibilities is evident.

25. There is nothing on record to show that the Government of Andhra Pradesh has modified any of the terms of the agreement so as to permit such assignment to third party. Evidently, this has been done behind the back of the Government of Andhra Pradesh. The DGM of the appellant firm had, in a statement, indicated that they have informed the Government of Andhra Pradesh but there is nothing on record to show that this assignment has been approved by the Government of Andhra Pradesh or the agreement has been modified. Thus, the arrangement between the appellant and GTBPL was not

disclosed to the Government of Andhra Pradesh. It was also not disclosed to the Revenue in this case to enable them to examine the arrangement from the service tax point of view. In fact, it was done through a Board resolution by the appellant company and accepted by another Board resolution by GTBPL. We, therefore, find that it was never an open arrangement and it had not come to light until intelligence was gathered and investigations were initiated by the Revenue.

26. In this case, the appellant was to provide services to the consumers in the form of maintaining the bridge and allowing its use for which they were entitled to collect remuneration in the form of toll fee. The toll fee, evidently was to be collected in the name of the appellant because they were entitled to collect it as per the agreement with the Government of Andhra Pradesh. This was the business model of the appellant as far as this project is concerned. The appellant had given this right to GTBPL who was rendering all the services which the appellant was required to render and was collecting fees which the appellant was entitled to collect. The receipts were also issued in the name of the appellant themselves. This changed only when the investigations had begun. Until these investigations had begun, every user of that bridge was given the impression that the appellant was rendering service and he was paying a fee for it. Similarly, the Government of Andhra Pradesh was also under the impression that the appellant was rendering service and was collecting fees as we understand from the agreement to which no changes have been produced before us. No document has been produced before us that the Government of Andhra Pradesh has either agreed to the arrangement between the GTBPL and the appellant or has concurred to it.

27. Thus, we find that, as far as both the Government of Andhra Pradesh and the users are concerned, the service which GTBPL was rendering was being rendered by the appellant and the fee which they were collecting was being collected by the appellant. This is akin to McDonald's restaurant being run in a town by a franchisee. The consumer sees it as McDonald's restaurant although it is actually being operated by the franchisee. In view of the above, we find that the appellant has provided franchisee service to GTBPL and had collected an amount towards it.

28. Learned counsel for the appellant argued that if they were rendering service the amounts collected as toll fee should have been transferred to them, whereas, GTBPL has actually taken these amounts in their accounts. We do not find much force in this argument. In a franchise agreement, the franchisor and franchisee can have any convenient method of financial arrangement. What is important is the service must be provided and the franchisor must allow franchisee to provide that service and collect the amounts. The franchisor and franchisee can have an arrangement where a portion of amount is paid to the franchisor on every transaction or they could have an arrangement of lump sum payment or any combination of two or any other suitable arrangement. In this case, the entire amount has been paid upfront in one go by the franchisee, GTBPL, to the appellant. Therefore, the entire toll fee is being retained by the franchisee, GTBPL.

29. It has also been argued by the learned counsel for the appellant that the amount was not paid in money. We do not find much force in this argument as the amount was indeed paid in terms of money. It is not necessary for the amount to be paid in cash whether prior to 2006 or thereafter. The money could be paid in the form of cash, cheques, drafts or any other acceptable form. What is important is that the amount must be paid and that amount must be a consideration for the service rendered. In this case both the franchisee taking over the liability of debt of the franchisor and paying an amount by way of shares has been quantified in terms of money and that is how the SCN has computed the demand. There is no doubt that the entire amount has been paid only for consideration of this service. There is no other arrangement in this case. Therefore, we find that the case is against the appellant on merits.

30. As far as the question of limitation is concerned, it can be invoked if there is fraud or collusion or wilful misstatement or suppression of facts or violation of Act or Rules with intent to evade payment of service tax. In this case, nothing was disclosed to the Revenue by the appellant either in their ST3 returns or by way of letters or intimation to the department. In fact, the agreement was entered into privately between the appellant and the franchisee GTBPL through Board resolutions. One reason for such an arrangement could be the express prohibition of assignment of contracts in the agreement entered into

with the Government of Andhra Pradesh. It is not for us to examine whether there was a violation of the agreement with the Government of Andhra Pradesh and its implications. We are merely concerned with the arrangement between the appellant and GTBPL which we have already held to be in the nature of franchise service. Evidently, nothing was disclosed to the department at any stage until the investigations revealed these facts. Therefore, we find sufficient grounds to invoke extended period of limitation in this case. For the same reasons, we find that the imposition of penalty under section 78 is also sustainable. As far as the question of valuation is concerned, we do find in favour of the assessee and any consideration which was received by the appellant must be considered as cum-tax value and accordingly, the service tax must be recomputed. For this limited reason, we remand the matter back to the original authority.

31. In view of the above, the appeal is disposed of as below:

- a) The demand of service tax invoking extended period of limitation along with interest is upheld.
- b) The service tax, however, must be computed taking the amounts received as cum-tax value.
- c) The imposition of penalty under section 78 is upheld.
- d) The appeal is remanded to the original authority for the limited purpose of computation of the service tax taking the amounts received as cum-tax values and corresponding changes in the interest and amount of penalty.

(Pronounced in the open court on 03.07.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
COURT NO. I**

Service Tax Appeal No. 1485 of 2011

Arising out of order-in-revision No 01/2011(R) Adjn. ST (Commr), Dated: 11.03.2011

Passed by Commissioner of Central Excise Hyderabad-II

Date of Hearing: 12.02.2020

Date of Decision: 10.06.2020

**M/s FLYTECH MEDIA PVT LTD
3RD AND 4TH FLOOR, NAGAM TOWERS
MINISTER ROAD, SECUNDERABAD**

Vs

**COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX
HYDERABAD-II L.B. STADIUM ROAD, BASHEERBAGH
HYDERABAD**

Appellant Rep by: Ms Radha Arun, Adv.

Respondent Rep by: Mr C Mallikarjuna Reddy AR

CORAM: Ashok Jindal, Member (J)

P Venkata Subba Rao, Member (T)

INTERIM ORDER NO. 3/2020

Per: P V Subba Rao:

This appeal is filed against order-in-revision No.01/2011(R)-Adjn ST(Commr) dated 11.03.2011. Heard both sides and perused the records.

2. Sections 84 & 86 of the Finance Act, 1994 were amended with effect from 19.08.2009. Prior to this amendment as per Section 84 the Commissioner of Central Excise had the power to revise any order passed by an officer subordinate to him and pass an order-in-revision. An appeal against such orders-in-revision lay with the CESTAT under Section 86. To align these provisions with corresponding central excise provisions, both Sections 84 & 86 of the Finance Act were revised with effect from 19.08.2009. The power of the Commissioner of Central Excise to issue orders-in-revision has been replaced by a provision enabling the department to file an appeal with the Commissioner of Central Excise (Appeals). Corresponding changes have also been made to Section 86 providing for appeals to the Tribunal against orders-in-revision passed by the Commissioner of Central Excise (Appeals).

3. When Section 84 was amended, an explanation was inserted therein to the effect that if any order was passed by the adjudicating officer subordinate to Commissioner of Central Excise before commencement of these (revised) provisions, they shall continue to be dealt with by the Commissioner of Central Excise as if this section had not been substituted. Thus, it was a saving clause which allowed the

Commissioner to pass orders-in-revision even after 19.08.2009 if the original adjudication order was passed prior to the amendment. However, corresponding saving clause was not inserted in Section 86. Therefore, the question which arises is whether the CESTAT can entertain appeals in respect of orders passed after 19.08.2009 under the erstwhile Section 84 by orders-in-revision. The relevant provisions before amendment and after amendment were as follows:

Section 84 as it stood prior to amendment:

Revision of orders by the Commissioner of Central Excise.

84. (1) The Commissioner of Central Excise may call for the record of a proceeding under this Chapter in which an adjudicating authority subordinate to him has passed any decision or order and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Chapter, pass such order thereon as he thinks fit.

(2) No order which is prejudicial to the assessee shall be passed under this section unless the assessee has been given an opportunity of being heard.

(3) The Commissioner of Central Excise shall communicate the order passed by him under sub-section (1) to the assessee, such adjudicating authority and the Board.

(4) No order under this section shall be passed by the Commissioner of Central Excise in respect of any issue if an appeal against such issue is pending before the Commissioner of Central Excise (Appeals).

(5) No order under this section shall be passed after the expiry of two years from the date on which the order sought to be revised has been passed.

Section 84 as it stood after amendment:

Appeals to Commissioner of Central Excise (Appeals)

84. (1) The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceedings in which an adjudicating authority subordinate to him has passed any decision or order under this Chapter for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner of Central Excise (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order.

(2) Every order under sub-section (1) shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

(3) Where in pursuance of an order under sub-section (1), the adjudicating authority or any other officer authorised in this behalf makes an application to the Commissioner of Central Excise (Appeals) within a period of one month from the date of communication of the order under sub-section (1) to the adjudicating authority, such application shall be heard by the Commissioner of Central Excise (Appeals), as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Chapter regarding appeals shall apply to such application.

Explanation.-For the removal of doubts, it is hereby declared that any order passed by an adjudicating officer subordinate to the Commissioner of Central Excise immediately before the commencement of clause (C) of section 113 of the Finance (No. 2) Act, 2009, shall continue to be dealt with by the Commissioner of Central Excise as if this section had not been substituted.

Section 86 as it stood prior to amendment

Appeals to Appellate Tribunal.

86. (1) Any assessee aggrieved by an order passed by a Commissioner of Central Excise under section 73 or section 83A or section 84, or an order passed by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal.

Section 86 as it stood immediately after amendment Appeals to Appellate Tribunal.

86. (1) Any assessee aggrieved by an order passed by a Commissioner of Central Excise under section 73 or section 83A, or an order passed by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal.

4. In this case, the relevant dates were as follows:

4.12.2008 Show cause notice

13.03.2009 JC's order-in-original

19.08.2009 Amendment to Sections 84 & 86

04.02.2010 Revision notice from Commissioner

16.04.2010 Reply to revision notice

11.03.2011 Order-in-revision (impugned order)

According to the learned counsel for the appellant, they are entitled to appeal before this Bench against the order-in-revision as per the order of the Bangalore Bench of CESTAT in the case of *T.A. Pai Management Institute [2013(29)STR 577 (Tri-Bang)]*. Relying on the provisions of General Clauses Act, it has been held that in terms of Section 6 clauses c & e of the General Clauses Act, the rights and privileges accrued under the repealed enactment will not be lost by

the repeal of the Act itself. Therefore, the appellant has a right to appeal to the CESTAT even though there is no explicit savings clause in Section 86 of the Finance Act 1994.

5. Per contra learned A.R. relies on the order of the Mumbai Bench of CESTAT in the case of *Commissioner of Service Tax Mumbai I Vs Zee Entertainment Enterprises Ltd [2017(47)STR 297(Tri-Mum)]* in which the Tribunal has held that the Committee of Chief commissioners have no power to review an order-in-revision after amendment to Section 86 of the Finance Act 1994 and therefore dismissed the Revenue's appeal as non-maintainable. Learned A.R. states that the ratio of this judgement should apply in the present case.

6. We have considered the arguments from both sides. We find that the orders of the Bangalore Bench of the Tribunal in the case of T.A. Pai Management Institute (supra) and Tribunal Mumbai in the case of Zee Entertainment Enterprises Ltd (supra) are contrary to each other. Both cases involve the question as to whether the Tribunal has a right to entertain appeals against orders-in-revision after 19.08.2009 in the absence of any explicit provisions by way of saving clause in section 86 of the Finance Act 1994. The only difference we find is that in the case of T.A. Pai (supra) it was the assessee who wanted to appeal before Tribunal Bangalore and the appeal was allowed as maintainable and in the case of Zee Entertainment Enterprises (supra) the Revenue wanted to appeal before the Tribunal Mumbai which has been held as not maintainable. We are of the opinion that the same yardstick should be applied regardless of which party appeals and in view of the conflicting decisions between the Tribunal Bangalore and the Tribunal Mumbai, we find that this is a fit case to be referred to larger bench for a decision on the maintainability of appeals filed under Section 86 after 19.08.2009 by both the Revenue and the assessee against orders-in-revision passed by the Commissioners.

7. In view of the above, Registry is directed to present the file before the Hon'ble President for constitution of a larger bench to decide the following question:

"Are appeals by the Revenue and assessee against orders-in-revision passed after 19.08.2009 maintainable before the CESTAT in the absence of any specific saving clause in Section 86 of the Finance Act 1994? "

(Order pronounced in open court on 10.06.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
DIVISION BENCH
COURT NO. I**

Service Tax Appeal No. 401 of 2008

Arising out of Order-in-Original No.05/2008, Dated: 27.03.2008

Passed by CCCE & ST, Hyderabad - IV

Date of Hearing: 21.11.2019

Date of Decision: 24.06.2020

**NATIONAL REMOTE SENSING AGENCY
BALANAGAR, HYDERABAD, TELANGANA - 500037**

Vs

**COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD - IV, POSNETT BHAWAN, TILAK ROAD, RAMKOTI
HYDERABAD, TELANGANA - 500001**

Service Tax Appeal No. 402 of 2008

Arising out of Order-in-Original No.05/2008, Dated: 27.03.2008

Passed by CCCE & ST, Hyderabad - IV

**COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD - IV, POSNETT BHAWAN, TILAK ROAD, RAMKOTI
HYDERABAD, TELANGANA - 500001**

Vs

**NATIONAL REMOTE SENSING AGENCY
BALANAGAR, HYDERABAD, TELANGANA - 500037**

Appellant Rep by: Shri M Taraka Srinivas, Adv.

Respondent Rep by: Shri P R V Ramanan, AR

CORAM: P Venkata Subba Rao, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NOS. A/30898-30899/2020

Per: P V Subba Rao:

1. These two appeals are filed by the assessee and the revenue against the same impugned order and hence are being disposed of together.

2. Heard both sides and perused the records.

3. The facts of the case in brief are that M/s National Remote Sensing Centre (NRSC), Balanagar, Hyderabad is an autonomous body under the Department of Space Research, Government of India. The department informed NRSC that their activities related to photography services, scientific or technical consultancy service and commercial training and coaching services, etc., are taxable services and therefore, they are liable for payment of tax. Accordingly, the assessee applied for and obtained registration to the service tax department under the heads "Photography service", "Scientific and Technical Consultancy service" and "Commercial Training & Coaching service". Records and data were obtained from the appellant by the department and statements of Shri Janardhan Rao, Head of Accounts & Financial department of NRSC, were recorded. After investigating the nature of their activities a show cause notice was issued to the appellant covering period 16.06.2005 to 31.02.2005 invoking extended period of limitation on 23.10.2006. In this SCN, NRSC was called upon to explain why an amount of Rs.19,89,66,570/- should not be demanded from them as service tax on photography services and scientific and technical consultancy services rendered by them. Education Cess amounting to Rs.24,24,689/- was also demanded from them. Interest was also proposed to be demanded on the aforesaid amounts and some amounts of tax and interest already paid by them were proposed to be appropriated against

the aforesaid demands. It was also proposed to impose penalties under section 76, 77 & 78 of the Finance Act, 1994 upon the appellant.

4. After following due process, the learned adjudicating authority, by the impugned order, confirmed the demands on photography services and scientific and technical consultancy services along with interest and appropriated the amounts already paid by them towards these demands. He also imposed penalties under section 76, 77 & 78 of the Finance Act, 1994. However, he dropped the demand to the extent of Rs.73,53,987/- towards service tax and Rs.1,18,369/- towards Education Cess in respect of the consultancy projects undertaken by the appellant for other autonomous organisations within the same department treating the same as in-house projects.

5. Revenue is aggrieved by the Adjudicating authority dropping the demands in respect of the projects under which services were rendered by the appellant to other organisations under the same department, such as ISRO, RRSC, treating them as in-house projects. It is the case of the revenue that just like NRSC both ISRO and RRSC have separate legal existence as evidenced from the statements of financial advisor of NRSC, Shri Janardhana Rao. Their annual reports are separate. They fall under the definition of 'client' and NRSC has received consideration for the taxable services rendered from the clients. These projects, therefore, cannot be considered as in-house projects. Service tax, therefore, needs to be confirmed even on such amounts, according to the revenue.

6. On the other hand, the assessee is aggrieved by the entire confirmation of the demand itself. Learned counsel for the assessee contested the demands both on merits and on limitation. He also contested the imposition of penalties upon the assessee. On the date of hearing i.e., 21.11.2019, learned counsel for the assessee was requested to provide sample copies of the project reports which they have prepared and supplied to their clients within a month. On 27.01.2020, learned counsel has submitted a note along with the copies of some documents but none of the project reports were submitted. The documents that he submitted were only copies of sanction orders issued by various Ministries to their clients copies of which have also been marked to the appellant. Therefore, we proceed to decide the issues on merits based on the records which are available and submissions made by both sides. Learned counsel for the assessee submits that they are a society registered under Societies Registration Act, 1860, created as per a resolution passed by the Union Cabinet. They initially started functioning under the administrative control of department of science and technology and were subsequently brought under the control of department of space. He submits that they are an autonomous body under the department of space. Subsequently, w.e.f. 01.09.2008, NRSA has been converted into National Research Space Center, a center under the department of Space/ISRO. They conduct aerial surveys and digital mapping surveys. The services which were rendered by them were classified by the revenue as (i) Photography services and (ii) Scientific & Technical Consultancy services. It is his assertion that the services which they have rendered are in the nature of "survey and map making services" covered by section 65(104)(b) and section 65(105)(zzzc) of the Finance Act, 1994 and not under Photography services and Scientific & Technical Consultancy services. He would submit that while the nature of their service is survey and map making, if such services are provided by an agency under the control or authorized by the Government in relation to survey and map making, they get excluded from the taxability by virtue of section 65(105)(zzzc). Section 65(104)(b) and Section 65(105)(zzzc) of the Finance Act, 1994 are reproduced as below:

"65(104)(b) – 'Survey and map-making' means geological, geophysical or any other prospecting, surface, sub-surface or aerial surveying or map-making of any kind, but does not include survey and exploration of mineral."

"65(105)(zzzc) – to any person, by any other person, *other than by an agency under the control of, or authorised by, the Government*, in relation to survey and map-making."

7. It is his assertion that survey and map making services were brought under the tax net w.e.f. 2005-06 and the scope of these services and the taxability were explained by TRU in its Letter No.**B1/6/2005-TRU** dt.27.07.2005 as follows:

"8.2 This service covers geological, geophysical, geochemical and other prospecting services by studying the properties of the earth and rock formation and structures. It also includes services providing information on sub-surface earth formations by different methods such as seismographic, gravimetric, magnetometric methods or other sub-surface surveying methods."

8.3 Further, it covers surface surveying, services of gathering information on the shape, position or boundaries of a portion of earth's surface by methods such as transit, photogrammetric, or

hydrographic, for the purpose of preparing maps. It also includes surveying or collection of data by satellites.

8.5 Map making consists of preparation or revision of maps of all kinds such as topographic, hydrographic, roads, planimetric, cadastral, city maps etc. using various information sources.

8.6 However, survey and map-making services rendered by an agency under the control of the Government or authorised by the Government, such as 'Survey of India' are specifically excluded and are outside the scope of this service."

8. He would submit that the case of the revenue is that the services rendered by them fall under the definition of 'Photography service' under section 65(78) & 'Scientific and technical consultancy service' under section 65(92) of the Finance Act, 1994. These read as follows:

"Section 65(78) – 'Photography' includes still photography, motion picture photography, laser photography, aerial photography and fluorescent photography."

"Section 65(92) – 'scientific or technical consultancy' means any advice, consultancy or scientific or technical assistance rendered in any manner, either directly or indirectly, by a scientist or a technocrat or any science or technology institution or organization, to any person, in one or more disciplines of science or technology."

9. With respect to the demand under the head photography service, he would submit that they are undertaking different projects for clients. It is the case of the department that they undertake projects in which aerial survey or mapping is done and aerial photography is within the scope of the terms 'photography'. Accordingly, the demand on this ground has been confirmed. With respect to demand under scientific and technical consultancy services, he submits that these pertain to activities which involve photography, conducting surveys and preparation of reports. Learned counsel for the assessee would submit that the nature of their work would squarely fall under the definition of 'survey and map making services' and therefore, the same cannot be called as 'scientific and technical consultancy service'. Therefore, he would submit that the demand on both accounts must be dropped.

10. He would further submit that National Remote Sensing Agency (NRSA) has now been converted into a Government entity called as NRSC under the department of Space and therefore, the Government of India would be remitting tax as NRSC from Consolidated Fund of India and receiving the same as CBIC into the Consolidated Fund of India in case of an adverse decision of the Tribunal. Thus, it will be a case Government paying to itself.

11. With respect to the invocation of extended period of limitation, he would submit that there was no evidence of fraud or suppression of facts or wilful intention to evade tax as the organisation is run by the Government officials who would not benefit in any way if the organisation evades taxes. Therefore, for this reason, the extended period of limitation cannot be invoked. He relies on the Hon'ble Apex Court's decision in the case of *CCE vs Chemphar Drugs & Liniments [1989 (40) ELT 276 (SC)]* . He would further assert that the bonafide of the assessee is apparent. Therefore, extended period of limitation cannot be invoked. He would, therefore, urge that the revenue's appeal may be rejected and their appeal may be allowed with consequential relief.

12. Learned special counsel for the revenue, on the other hand, takes us through the facts of the case and explains that NRSA is an autonomous body under the Government of India and has been rendering certain services to the Government departments, Public Sector Undertakings, Private Sector Undertakings and other organisations on payment of fees and charges. The SCN has been issued under the heads photography services and scientific and technical consultancy services covering the period 16.07.2001 to 31.12.2005. Demands have also been made for the period 16.06.2005 to 31.12.2005 on the advances received against these services. The assessee is in appeal against the confirmation of demand to the extent of Rs.19.39 Crores by the Commissioner along with interest and imposition of penalties while revenue is in appeal against the dropping of demand of Rs.74.72 lakhs in respect of consultancy projects undertaken by the assessee for other autonomous organisations under the same department. It is not in dispute that they have been paid for these services also.

13. As far as the demand on photography services is concerned, he would submit that "photography" has been defined under Chapter V of the Finance Act, 1994 and it includes aerial photography in particular. The Photography division of NRSA (now NRSC) is concerned with processing of aerial films, general photography and data acquisition; aerial division is concerned with aerial photography by low level flying aircrafts specially designed for the purpose. They have

rendered these services to other organisations including Government organisations and they charged amounts for these services. They received payments/fees for the projects undertaken by them and none of these were rendered as a social obligation or for some general good or for charitable purposes. These services have been rendered in their capacity as a commercial concern or agency. The term "commercial concern" in the photography services has been replaced by the term "person" w.e.f. 07.06.2005. Even after such amendment, these services do fall under the head of photography services. Therefore, the demand of photography services is correctly confirmed.

14. As far as the demand on scientific and technical consultancy services is concerned, it is on the amounts received under the following projects:

(A) Projects completed under Grants in Aid received from other Government departments: In these cases, it is the case of the assessee that the activities have been undertaken by them under Grants-in-Aid which is misleading. The grants have been given to the various Government departments and organisations and they, in turn, hired the appellant to carryout part of their work. After completing the work, they prepare a report and submit it which is in the nature of rendering technical assistance and advice. The details of these projects are as follows:

- a. Land use/ Land cover mapping
- b. Mapping of ground water prospective zones
- c. Forest type and density mapping
- d. Wasteland mapping and monitoring
- e. Mapping of natural resources on watershed basis
- f. Identification and area estimation of major crops
- g. Mapping vegetation condition
- h. Periodic inventory of snow cover
- i. Geological and geomorphological mapping
- j. Generating information on major natural disasters

These would show that expertise of highly technical nature is required for rendering the services including preparing reports and it does not involve mere retrieval of raw data from the archives and supplying the same to the user departments. These being highly technical subjects, mere provision of data would not help the clients, who, do not have the expertise. Therefore, the nature of these services rendered by the appellant is definitely "scientific and technical consultancy" and is not merely making maps.

(B) National Agricultural Technology Projects (NATP): These projects were executed by NRSC rendering technical consultancy services to the client NATP. NRSC claimed exemption under Notification 16/2002 dt.02.08.2002 which was applicable only to services rendered to international organisations and in this case no service was rendered to an international organisation. Only the project was funded by the World Bank. Therefore, learned Commissioner had correctly rejected the claim of NRSC.

(C) IIRS Projects: These projects are undertaken not by the appellant but by M/s IIRS which is a division of NRSC and whose income from these services is accounted for in the books of NRSC as income. Therefore, the appellant is liable to pay service tax on this income.

(D) Research Projects: Research projects were executed for Indian Council of Agricultural Research (ICAR) for standardization of methodology for large-scale soil mapping data. The assessee's contention is that these were mere research projects. However, the services which were rendered were not merely sharing of data/information but involved evolving standardized methodology and delivering detailed study of the existing methods, availability of data, organisation of systematic requirements arriving at an optimal solution and making recommendations. Thus, it was in the nature of technical consultancy for ICAR, who paid for the services rendered by the appellant.

(E) System Projects for Defence: These services relate to services rendered in respect of earth station at Delhi for which the appellant received payments from the Ministry of Defence and accounted for it under the head 'consultancy' projects. These are also in the nature of scientific and technical consultancy services.

(F) Consultancy projects to ISRO/RRSC: The assessee's contention is that these were "in-house projects" which contention has been accepted by the learned Commissioner in the impugned order. It is the contention of the learned special counsel that the appellant is a different legal entity and ISRO and RRSC are different legal entities and it is for this reason, they have been paid amounts for rendering services. Therefore, they cannot be considered as part of the same organisation and the services rendered cannot be considered as self-service.

(G) Data dissemination and Photo products project: Under this head, the assessee provides user specific information covering geological studies, mineral exploration, city map preparation, land use and vegetation cover mapping etc. The appellant's contention is that these involve merely providing data and information on electronic media for a price and did not involve any consultancy. This is not true as they did not just involve provision of data but also its interpretation and providing report. The demand on this account has been confirmed by the learned Commissioner.

15. Learned special counsel contests the assessee's arguments that the nature of their services is mere survey and mapping services which were subject to service tax only from 16.06.2005. As can be seen from the nature of the activities above, they do not merely involve survey and mapping services but have a much larger scope and involves providing technical assistance and consultancy. Thus, these services fall under scientific and technical consultancy services.

16. On the question of invocation of extended period of limitation, learned special counsel would argue that the assessee never disclosed the nature of their activities to the department. But for the investigations conducted by the department, their activities would not have come to light. This certainly constitutes suppression of facts and justifies invoking extended period of limitation. The penalties imposed by the learned Commissioner are also sustainable for these reasons. He would, therefore, submit that the revenue's appeal may be upheld and the assessee's appeal may be rejected.

17. We have considered the arguments on both sides and perused the records. Although the appellant obtained registration under three categories of services the demand in this SCN is only under the heads of 'Photography services' and 'Scientific and technical consultancy services'. We proceed to examine the case on merits in the first place and then on limitation and finally examine the imposition of penalties. As far as the demand under the head of 'Photography services' is concerned, the assessee's contention is that the nature of the services does not fall in the definition of 'Photography services' at all. The definition of Photography Service is as follows:

"Taxable service" means any service provided or to be provided by a commercial concern to any person, by a photography studio or agency in relation to photography, in any manner."

Photography is defined under section 65(78) as follows:

"Section 65(78) – 'Photography' includes still photography, motion picture photography, laser photography, aerial photography and fluorescent photography."

18. Thereafter, the scope of this service has been enlarged to cover the service rendered by any person instead of services rendered only by a commercial concern only. We find that the nature of the services rendered by the appellant are photo processing of aerial films, general photography, photography by low level flying aircrafts specially suited for the purpose etc. In our view, all these services squarely fall under the definition of 'Photography service' as per Chapter V of the Finance Act, 1994. However, the second question is whether NRSC is a commercial concern or just another legal person. We find from the narration of the nature of the organisation in the SCN, impugned order and in the submissions made by both the parties that it is an autonomous organisation of the department of Space, Government of India. It is not primarily a commercial concern like any public sector undertaking. It is registered as a Society under the Societies Registration Act. Therefore, we find that it is a legal entity and is a juridical person but is definitely not a commercial concern. Having said that, the services rendered by them, for other organisations are in the nature of services in return for a payment. To that extent the nature of the activity is certainly commercial but the organisation itself is not. Therefore, we find that prior to 01.07.2012 the assessee cannot be charged service tax on photography services rendered by them. After this date, the service tax can be charged from the assessee.

19. As far as the projects completed by the appellant for Rajiv Gandhi Water Mission, Waste Land mapping, bio-electric generation etc., for other Government departments under grants-in-aid are concerned, we find that assessee's argument is that services rendered under grants-in-aid cannot be charged to service tax. We find "grants-in-aid" is a method under which the Government grants some aid to the individual departments or organisations for carrying out specific activities which

are in public good. In order to use the grants so received, they, in turn, need to engage other organisations or individuals and avail their services. For this purpose, they may procure goods or receive services from others. The supplier of such goods and the provider of such services is quite distinct from the person receiving the grants-in-aid. Such persons will not automatically get exempted from payment of service tax or excise duty unless there is a specific exemption notification in respect of such services. For instance, if a department receives grant-in-aid, say, to construct roads, the amount received is a grant-in-aid at the hands of the department. However, in order to build those roads, they will hire other contractors and pay them. At the hands of the contractors who provide necessary services, the amounts are commercial receipts for their services. Therefore, the same cannot be treated as grants-in-aid at the hands of the contractor. Otherwise, all services and goods which are ever used by any Government department will have to be exempted. Learned counsel for the assessee also argues that the payment of service tax by the assessee would mean one organisation of Government of India paying it to another. Even if it is so, if this tax has to be paid it must be. In fact, even if the Service Tax Department itself hires taxis and service tax is payable on such service, they have to pay the same out of their budget along with the billed amount to the service provider who pays the Service Tax to the Government although the amount comes back to the Government as revenue in the form of service tax. We, therefore, find no force in the argument of the appellant that no service tax must be charged on the grants-in-aid. The nature of these services, as can be seen from the records available, clearly indicates that they are in the nature of scientific and technical consultancy provided by the expertise of the assessee.

20. As far as the NATP projects are concerned, the assessee's argument was that these were conducted with funds received from the World Bank and hence must be treated as exempt under notification No.16/2002 dt.02.08.2002. We find that the exemption notification does not extend to every project which is funded by the World Bank but extends only to service which are rendered to international organisations. Therefore, if any service is rendered to World Bank the same could have been exempted but every project which is funded by the World Bank will not get exempted.

21. As far as the projects rendered by IIRS is concerned, it is undisputed that this is a division of NRSC itself though located in Dehradun and the income received by IIRS is recorded as income of NRSC and therefore, as a registrant the assessee is liable to pay service tax on such services.

22. As far as the research projects for ICAR are concerned, as discussed above, we find that these also involve the assessee's consultancy and advice to enable ICAR to develop and evolve standardized methodologies. Therefore, these are in the nature of 'scientific and technical consultancy services' for which the assessee has been paid service charges and on which service tax has to be paid.

23. Similarly, the assessee has to pay service tax on the projects they had undertaken for the Ministry of defence for which they receive consultancy charges and the receipts have been recorded as 'consultancy' in their own books of accounts. As far as the Revenue's appeal with respect to services rendered by the assessee to ISRO/RRSC is concerned, the only ground on which the learned Commissioner has dropped this demand is on the ground that these should be treated as "in-house projects" and not services rendered by the assessee to ISRO/RRSC. It is not in doubt that the assessee is an autonomous organisation registered as Society. So are the ISRO and RRSC independent & autonomous organisations. If they were a part of the same organisation, there is no question of any amount being paid by one division to another. Since they are independent, autonomous organisations the services rendered by one to another becomes a service rendered to a client. The services rendered were in the nature of consultancy projects and the demand on this ground needs to be upheld on merits and we do so. To this extent, the order of the Commissioner needs to be set aside. As far as the demand under data dissemination and Photo product projects are concerned, the assessee under these projects provided geological studies, mineral exploration, city map preparation, land use and vegetation cover mapping backed by technical assistance to the customers to help them execute projects. Therefore, this falls under definition of 'scientific and technical consultancy service'.

24. In view of the above, we find that the demands, as raised in the SCN, need to be upheld on merits. However, we find that the assessee in this case is an autonomous organisation under the department of Space, Government of India. It is not a private business entity. They have, of course, undertaken several research projects for a price and that is part of their revenue model. They generate funds from these projects which are used for running the organisation. For these projects, they get paid by other Governmental and non-Governmental organisations under various heads. If the assessee was clearly aware that they had to pay service tax, they could have

billed their clients for the Service Tax as well. By not paying the service tax, the assessee is not gaining anything. It is a Governmental organisation run by bureaucrats and scientists, none of whom have any personal interest in evading service tax. In fact, by evading service tax nothing would be gained either by anyone individually or by their organisation. Revenue's argument is that the assessee had not come forward to disclose all their activities and therefore, they have suppressed the fact which is sufficient to invoke extended period of limitation. We do not agree with this contention. The assessee could have genuinely believed that they were not liable to pay service tax and not disclosed facts to the department or sought any advice or guidance from the department regarding taxability of their services. In this factual matrix, by no stretch of imagination can we hold that the assessee has committed fraud or collusion or wilful misstatement or suppression of facts with an intent to evade payment of service tax. Under these circumstances, we find the extended period of limitation cannot be invoked in this case. The demand, if any, within the normal period of limitation can only survive.

25. As far as the penalties are concerned, in view of our finding that there is no evidence of wilful suppression of facts with intent to evade payment of service tax, we find no penalty is imposable under section 78 of the Finance Act, 1994. We find this a fit case to invoke section 80 of the Finance Act, 1994 and waive all the penalties imposed upon the appellant.

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

- 1) The demands under the head of 'Photography services' prior to 01.07.2012 are set aside and after this date, demands are upheld only within the normal period of limitation.
- 2) The demand of service tax under the head 'Scientific & Technical consultancy service' is also upheld on all projects including the services rendered by the appellant to other autonomous organisations of the department of Space viz., ISOR and RRSC only within the normal period of limitation.
- 3) The interest, if any, payable on such amounts are also upheld.
- 4) The amount of service tax and interest, if any, paid by the assessee needs to be adjusted against these demands.
- 5) All demands beyond the normal period of limitation are set aside.
- 6) All penalties are set aside invoking section 80 of the Finance Act, 1994.

27. Both appeals are remanded to the original authority for the limited purpose of calculation of service tax payable.

(Pronounced in the open court on 24.06.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
DIVISION BENCH
COURT NO. I**

Service Tax Appeal No. 1325 of 2011

Arising out of Order-in-Original No.19/2010-ST-Hyd-III-Adjn-Commnr, Dated: 25.10.2010
Passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad

Date of Hearing: 06.03.2020

Date of Decision: 06.07.2020

**VIVIMED LABS LTD
2ND FLOOR, VEERNAG TOWERS, HABSIGUDA
HYDERABAD, TELANGANA - 500008**

Vs

**COMMISSIONER OF CENTRAL EXCISE CUSTOMS AND SERVICE TAX
HYDERABAD - III, KENDRIYA SHULK BHAVAN L.B. STADIUM ROAD
BASHEERBAGH, HYDERABAD TELANGANA - 500004**

Appellant Rep by: Shri P Venkata Prasad, CA

Respondent Rep by: Shri N Bhanu Kiran, AC

CORAM: Anil Choudary, Member (J)

P V Subba Rao, Member (T)

FINAL ORDER NO. A/30908/2020

Per: P V Subba Rao:

1. This appeal is filed against Order-in-Original No.19/2010-ST-Hyd-IIIAdjn- Commnr, dated 25.10.2010.

2. Heard both sides and perused the records. The appellant manufactures speciality chemicals and bulk drugs at their factories in Medak District in Telangana and Bidar in Karnataka and obtained Central Excise Registration for both the units and have been paying excise duty. The appellant had availed the services of M/s Hanovar Square Capital (UK) Ltd., M/s City Bank N.A. (Singapore) and M/s Atherstone Capital Markets Ltd., Mumbai for placing Foreign Currency Convertible Bonds (FCCB) in the International Capital Market to raise capital. The appellant paid fees to the above companies in the form of Lead Manager Charges, Agreement Fee, Corporate Advisory Fee, Listing Fee and other professional charges. After investigation, the officers of Directorate General of Central Excise Intelligence (DGCEI) told the appellant that since they had availed the services of the above companies located outside India and paid service charges, as service recipients, they were required to pay service tax under reverse charge mechanism under Section 66A of the Finance Act, 1994. The total service tax amounting to Rs. 58,86,315/- was paid by the appellant along with an interest of Rs. 5 lakhs during the investigation itself. Later, a show cause notice dated 09.10.2009 was issued to the appellant demanding the aforesaid service tax and proposing to appropriate the amount already paid by them as service tax along with interest and further proposing to impose a penalty equal to the amount of service tax under Section 78 of the Finance Act, 1994. This show cause notice culminated in the issue of the impugned order confirming the demand along with interest and imposing penalties as proposed. Aggrieved, the appellant filed the present appeal. The appellant contested the demand both on merits and on limitation. The appellant also contested the levy of interest and imposition of penalties upon them.

3. Learned Chartered Accountant representing the appellant argues that the demand has been made in the show cause notice under the head of "banking and other financial services". He would argue that the services rendered by the foreign service providers were in relation to placing of FCCBs in those countries and therefore the services were consumed outside India and hence they cannot be charged to service tax in India. Giving details of the

services availed, he would submit that they had paid service charges to their service providers under the heads of Lead Manager Charges and Listing Charges. It is his argument that the Corporate Advisory Services and professional charges can by no stretch of imagination classified as "banking and other financial services" and also cannot be classified as "merchant banker services" As per the Stock Exchange Board of India (SEBI) Rules, "Merchant Banker" refers to "any person who is engaged in the business of issue management either by making arrangement regarding buying, selling or subscribing to securities or acting as manager, consultant or referring corporate advisory services in relation to such issue management". The corporate advisory services and professional services were not in relation to the above.

4. With regard to the period of limitation, he would submit that even if they were liable to pay service tax on these services the same would be available as CENVAT credit of tax paid on "input services" for their final products. The entire exercise is one of Revenue neutrality. He would submit that thus the appellant cannot have any intention to evade payment of service tax because whatever tax is paid can be readily taken by them as CENVAT credit and utilized. The intention to evade is evidently lacking in such a situation. Without the intention to evade payment of service tax, the extended period of limitation cannot be invoked. In this regard, he relies on the following case laws:

i) Nirlon Ltd., Vs Commissioner [2015 (320) ELT 22 (SC)]

ii) Hindustan National Glass and Industries Ltd., [2018 (8) TMI 328 – Cestat – Hyd]

iii) Bharat Forge Ltd., Vs CCE, Pune-III [2016 (42) STR 312 (Tri-Mum)]

iv) British Airways Vs Commissioner [2014 (36) STR 598 (Tri-Del)]

5. On the issue of limitation, he would further argue that the service tax was not paid by them on their bonafide understanding that no such service tax was payable and this bonafide belief negates any allegation of suppression of facts. Further, he argued that this is a case of interpretation of the legal provision by the Revenue as opposed to their interpretation and no malafide intention attributed to them.

6. Lastly, he would argue that since the service tax itself cannot be charged being barred by limitation no interest is chargeable or penalty imposable upon them.

7. Per contra, Learned DR submits that specific information was gathered by DGCEI Officers that the appellant had floated FCCBs in the International Capital Market and paid charges towards lead manager charges agreement fees, advisory fees, etc., to foreign service providers. The above services were provided in relation to the FCCBs and they fall under the category of banking and financial services w.e.f. 15.07.2001 and the appellant being the recipient of the services were required to pay service tax in terms of Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994. He would draw the attention of the Bench to the definition of Banking and other Financial Services under the Finance Act, 1994 which was as follows:

"Banking and Other Financial Services" means —

(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or [commercial concern], namely :—*

(i) financial leasing services including equipment leasing and hire-purchase;

Explanation.—For the purposes of this item, "financial leasing" means a lease transaction where—

(i) contract for lease is entered into between parties for leasing of a specific asset;

(ii) such contract is for use and occupation of the asset by the lessee;

(iii) the lease payment is calculated so as to cover the full cost of the asset together with the interest charges; and

(iv) the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment;

(ii) Omitted

(iii) merchant banking services;

(iv) securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing;

(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services ,

(vi) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;

(vii) provision and transfer of information and data processing; and

(viii) banker to an issue services; and

(ix) other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of exchange, transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults, operation of bank accounts;";

(b) foreign exchange broking and purchase or sale of foreign currency including money changing provided by a foreign exchange broker or and authorised dealer in foreign exchange or an authorised money changer, other than those covered under sub-clause (a);

He would submit that the merchant banking services have specifically been included under the head of banking and financial services. The term merchant banking services refers to the services rendered by a merchant banker. As per SEBI Merchant Banking Regulations, 1990 "merchant banker means any person who is engaged in the business of issue management either by making arrangements regarding selling, buying or subscribing to securities or acting as manager, consultant, advisor or referring corporate advisory services in relation to such issue management".

8. There is no doubt that the amounts were paid by the appellant to the service providers only with respect to the floating of their securities namely foreign currencies convertible bonds for the arrangements made and services rendered with respect to these bonds. Therefore, the entire amount spent by the appellant to the overseas service providers were towards merchant banking services. Therefore, in terms of Merchant Banking Rules, 1990 read with the definition of bank and financial services under Finance Act, 1994, the appellant was required to pay service tax under reverse charge mechanism on the amounts.

9. On the question of limitation, he would submit that at no point of time, had the appellant voluntarily disclosed that they have floated these FCCBs or that they availed the services of foreign service providers. Collection of intelligence and subsequent investigations only revealed these facts. On being pointed out, the appellant have not contested the liability of service tax and has already paid the same at the time of investigation. Therefore, the appellant has suppressed the information from the department which justifies the invocation of extended period of limitation as well as imposition of penalty. He relies on the case law of *Paramount Communications Ltd.*, [2019 (29) GSTL 322 Tri-Delhi] in which a similar case, the Principal Bench of the Tribunal has held that service tax was chargeable under reverse charge mechanism on the services availed for floating FCCBs and commercial borrowings and also upheld the invocation of the extended period of limitation in that case. He would therefore submit that the appeal needs to be dismissed.

10. We have considered the arguments on both sides and perused the records. It is not in dispute that the appellant availed the services from foreign service providers in relation to floating of FCCBs in those countries. The nature of services referred by the service providers falls squarely within the definition of merchant banker in terms of the SEBI (MBR 1990). Therefore, in terms of Section 65(12)(a)(iii) the services referred squarely fall under the definition of bank and other financial services. As the recipient of these services, the appellant was required to pay service tax under reverse charge mechanism in terms of Section 66A of the Finance Act, 1994 r/w Rule 2 of Service Tax Rules, 1994.

11. It is not in dispute that the appellant has not paid the service tax and had not disclosed these facts to the Revenue at any stage. Investigation by the officers revealed these facts and on being pointed out the appellant paid the entire amount of service tax along with some interest. Therefore, on merits, we find the case against the assessee and in favour of the Revenue.

12. As far as the invocation of extended period of limitation alleging fraud, collusion, wilful misstatement or suppression of facts is concerned, we find no evidence in the particular

facts and circumstances of this case that the appellant tried to actively suppress or misstate facts. It is true that they have not paid service tax which they were required to. It is equally true had they paid the service tax they could have immediately taken the CENVAT credit of the entire amount so paid and utilized it. By delaying the payment, the appellant would only be liable to pay interest which also cannot be claimed as CENVAT credit. Thus, by not paying Service Tax, the appellant would have lost something but gained nothing. We, therefore, find that the intention to evade payment of service tax is lacking in this case. It is a well-established legal principle that in case of revenue neutrality, the intention to evade cannot be presumed because the assessee would gain nothing by evading payment of service tax or excise duty. The case law of Paramount Communications Ltd., relied upon by the Learned DR is distinguishable on facts as it has been found in that case that the assessee had even after issue of multiple SCNs failed to discharge service tax liability. The conduct of the appellant in the present case is quite the contrary and nothing in it suggests their intention to evade payment of Service Tax. Under these circumstances, we find that there is no ground to invoke extended period of limitation. As the entire period of demand is beyond the normal period the same needs to be set aside along with the interest. Consequently, the penalty imposed under Section 78 also needs to be set aside and we do so.

13. In view of the above, the appeal is allowed and the impugned order is set aside with consequential relief, if any.

(Order pronounced on 06.07.2020 in open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Service Tax Appeal No. 592 of 2011

Arising out of Order-in-Original No OIO-STC/REF/169/GAR-AC/DIN-III/10-11, Dated:
29.01.2011

Passed by Commissioner of Central Excise & ST, Ahmedabad

Date of Hearing: 23.01.2020

Date of Decision: 18.03.2020

COMEXX

**16, SWASTIK HOUSE, 1ST FLOOR, NEAR INCOME TAX
UNDER BRIDGE, NAVRANGPURA, AHMEDABAD, GUJARAT**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
AHMEDABAD, 7 TH FLOOR, CENTRAL EXCISE BHAWAN
NR. POLYTECHNIC, CENTRAL EXCISE BHAVAN, AMBAWADI
AHMEDABAD, GUJARAT-380015**

Appellant Rep by: Shri Rohan Thakkar, CA

Respondent Rep by: Shri Sanjiv Kinker, Superintendent (AR)

CORAM: Hon'ble Mr Ramesh Nair, Member (J)

Hon'ble Mr Raju, Member (T)

Per: Raju:

This appeal has been filed by M/s. Comexx against rejection of refund claim filed by the appellant.

2. The appellant M/s. Comexx are an authorized agent for M/s. Zhangjiagang Kailin Trading Company Limited located in China. The appellant were registered with Service Tax Commissionerate under the category of Business Auxiliary Service. Learned Chartered Accountant appearing for the appellant pointed out that they are engaged in booking orders for its foreign principals. He pointed out that appellant receive commission for the services in convertible foreign currency. The appellants have paid service tax on the said amount received as commission. He pointed out that they are seeking refund of the said amount of service tax paid by them as they were not liable to pay any service tax.

2. Learned Chartered Accountant further pointed out that Revenue has sought to reject the said refund claim on the ground that appellant did not produce evidence or documentary proof that the appellant has not passed the incidence of duty to its customers. It was also alleged that the appellant has not submitted documentary evidence like Contract/MoU to establish that the service provided by the appellant is in the nature of export of service under Export of Services Rules, 2005. The refund was also sought to reject on the ground of limitation as the refund claim was filed after one year from the date of payment of service tax as specified under Section 11B of the Central Excise Act, 1944 made applicable to service tax under Section 83 of the Finance Act, 1994. Learned Chartered Accountant relied on the following decisions to assert that if any amount is paid by mistake, same cannot be treated as duty and therefore, limitation applicable relating to time-limit under Section 11B is not applicable:-

(a) Hon'ble Karnataka High Court in the case of CCE (Appeals), Bangalore vs. KVR Constructions – 2012 (7) TMI – KARNATAKA HIGH COURT

(b) Tribunal decision in the case of Hitachi Metals (India) Pvt. Limited vs. CCE & ST, Gurgaon – 2019 (6) 3120 CESTAT Chandigarh.

(c) CESTAT New Delhi decision in the case of Oriental Insurance Company Limited vs. CCE & ST, New Delhi – 2020 (1) TMI 324 – CESTAT New Delhi.

In these circumstances, he argued that provisions of Section 11B can only be invoked if the refund relates to legally payable duty. He, however, admitted that they have filed the refund claim invoking the provisions of Section 11B themselves.

3. Learned Authorised Representative pointed out that there is plethora of decisions that all the refund claims under service tax or Central Excise are governed by limitation prescribed under Section 11B of Central Excise Act, 1944. He relied on the following decision:-

(a) Petronet LNG Limited vs. CC, Ahmedabad

(b) 2018 (15) GSTL 59 (Tri. LB) – Veer Overseas Limited vs. CCE, Panchkula.

(c) 1987 (30) ELT 641 (SC) – Miles India Limited vs. Assistant Collector of Customs.

(d) 2017 (5) GSTL 291 (Tri. Del.) – LNG Security Services Pvt. Limited vs. CST, Delhi.

4. We find that there are decisions on the either side of the issue. There were decisions holding that provisions of Section 11B are not applicable to any amount which was paid by mistake or which was not payable. In these decisions the arguments forwarded was that the amount paid is not duty and Section 11B applies only to duty. It is difficult to comprehend that as to under what circumstances the provisions of Section 11B of Central Excise Act, 1944 can be invoked to claim the refund. The only provision under Central Excise Act which permits refund is Section 11B of the Act. The decisions relied by learned Chartered Accountant held that any amount which was not due to be paid or which was paid by mistake is not duty and therefore, the provisions relating to limitation under Section 11B does not apply. It needs to be noted that entire Section 11B relates to refund of duty. This issue has been examined by Hon'ble Apex Court in the case of *Collector of Chandigarh vs. Doaba Co-operative Sugar Mills – 1988 (37) ELT 478 (SC)* wherein it has been observed that:-

"6. It appears that where the duty has been levied without the authority of law or without reference to any statutory authority or the specific provisions of the Act and the Rules framed thereunder have no application, the decision will be guided by the general law and the date of limitation would be the starting point when the mistake or the error comes to light. But in making claims for refund before the departmental authority, an assessee is bound within four corners of the Statute and the period of limitation prescribed in the Central Excise Act and the Rules framed thereunder must be adhered to. The authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the department, the provisions of limitation prescribed in the Act will prevail. It may, however, be open to the department to initiate proceedings in the Civil Court for recovery of the amount due to the department in case when such a remedy is open on the ground that the money received by the assessee was not in the nature of refund. This was the view taken by the Tribunal in a previous decision in the case of Miles India Ltd. v. The Assistant Collector of Customs but it was assailed before this Court. The appeal was withdrawn. This Court observed that the Customs Authorities, acting under the Act, were justified in disallowing the claim for refund as they were bound by the period of limitation provided therefor in the relevant provisions of the Customs Act, 1962. If really the payment of the duty was under a mistake of law, the party might seek recourse to such alternative remedy as it might be advised. See the observations of this Court in Miles India Ltd. v. The Assistant Collector of Customs [1987(30) E.L.T.641 (S.C.) = 1985 E.C.R. 289].

7. In the aforesaid view of the matter the Tribunal was right. The appeal, therefore, has no merits and it is accordingly not entertained and dismissed. There is no order as to costs."

The Tribunal in the case of *Petronet LNG Limited vs. CC, Ahmedabad* has examined the above decision and came to following conclusion:-

"4. We have carefully considered the submissions made by both the sides and perused the record. We find that the limited issue to be decided by us is, whether refund claim filed by the appellant is governed by Section 27 of the Customs Act, 1962 and consequently it is

time-barred or otherwise. We find that though the amount of refund claim is related to duty paid and the said amount is customs duty including the duty on the actual receipt quantity. Therefore, the entire amount paid by the appellant is nothing but customs duty only irrespective to the fact that certain portion of the duty was not payable. Under the Customs Act, any amount which is refundable has to pass the test provided under Section 27 of the Customs Act, 1962. In the said Act, there is no other provisions made for refund of any amount which was paid either without authority of law or was not payable for any reason. Therefore, all the refund claims under the Customs Act has to be dealt with under the provisions of Section 27. The departmental authority has no legal authority to process and sanction the refunds going out of Section 27 of the Customs Act, 1962. Therefore, the Customs authorities have to process and dispose the refunds only and only under Section 27 of the Customs Act, 1962. Though in the identical facts, the Hon'ble Bombay High Court in the judgment cited by Ld. Counsel, in case of refund, in respect of duty paid on short imported goods held that limitation under Section 27 is not applicable. However, the Hon'ble Supreme Court in various judgments held that all the refund claims of customs and excise has to be governed by Section 27 of the Customs Act or Section 11B of the Central Excise Act, 1944. In the case of Collector of Central Excise, Chandigarh v. Doaba Co-operative Sugar Mills - 1988 (37) E.L.T. 478 (S.C.), the Hon'ble Apex Court held as under :-

"6. It appears that where the duty has been levied without the authority of law or without reference to any statutory authority or the specific provisions of the Act and the Rules framed thereunder have no application, the decision will be guided by the general law and the date of limitation would be the starting point when the mistake or the error comes to light. But in making claims for refund before the departmental authority, an assessee is bound within four corners of the Statute and the period of limitation prescribed in the Central Excise Act and the Rules framed thereunder must be adhered to. The authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the department, the provisions of limitation prescribed in the Act will prevail. It may, however, be open to the department to initiate proceedings in the Civil Court for recovery of the amount due to the department in case when such a remedy is open on the ground that the money received by the assessee was not in the nature of refund. This was the view taken by the Tribunal in a previous decision in the case of Miles India Ltd. v. The Assistant Collector of Customs but it was assailed before this Court. The appeal was withdrawn. This Court observed that the Customs Authorities, acting under the Act, were justified in disallowing the claim for refund as they were bound by the period of limitation provided therefore in the relevant provisions of the Customs Act, 1962. If really the payment of the duty was under a mistake of law, the party might seek recourse to such alternative remedy as it might be advised. See the observations of this Court in Miles India Ltd. v. The Assistant Collector of Customs [1987 (30) E.L.T. 641 (S.C.) = 1985 E.C.R. 289].

7. In the aforesaid view of the matter the Tribunal was right. The appeal, therefore, has no merits and it is accordingly not entertained and dismissed. There is no order as to costs." From the above judgment, it is clear that even if there is refund of duty which was recovered without authority of law, the refund made before the departmental authority, limitation provided under Customs/Central Excise Act shall be applicable. The Hon'ble Supreme Court has held that authorities functioning under an Act is bound by its provisions and any refund proceedings beyond the limitation provided under the Customs/Central Excise Act, the same can be initiated in the Civil Court. Accordingly, the time limit under the Customs Act is applicable. We are also of the view that the Tribunal being creature of the statute and under Customs Act have to deal with any refund case within four corners of the Customs Act, since the provisions for refund is only provided under Section 27 of the Customs Act, 1962. This Tribunal also cannot by-pass the same and decide the refund claims under general law. The Hon'ble Supreme Court in a landmark judgment in the case of Mafatlal Industries Limited v. UOI - 1997 (89) E.L.T. 247 (S.C.) endorsed the aforesaid judgment in the case of Doaba Co-operative Sugar Mills (supra). In the case of UOI v. Namdang Tea Estate - 2004 (164) E.L.T. 132 (S.C.), the Hon'ble Supreme Court held that claim filed beyond the stipulated time is not admissible. In the case of UOI v. VIP Industries Limited - 1998 (101) E.L.T. 8 (S.C.) the Hon'ble Supreme Court in the facts of the case held that assessee filing refund claim for past four years following a favourable decision on classification in the case of a manufacturer of similar goods, set aside the Hon'ble High Court order which directed the Assistant Commissioner

to consider the claim for beyond limitation period without taking into consideration the question of limitation. Accordingly, the High Court judgment was set aside. In the case of *Porcelain Electrical Manufacturing Company v. Collector of Central Excise, New Delhi* - 1998 (98) E.L.T. 583 (S.C.), the Hon'ble Supreme Court held that refund claim filed before the departmental authorities to be governed by the time limit provided under the statute, general law of limitation not available. The decisions where assessee has invoked extraordinary jurisdiction of the High Courts and the Courts have applied the period of limitation of three years, the same is inapplicable to cases where the refund application has been moved before the Revenue authority. The decision in the case *Escorts Limited v. UOI* - 1998 (97) E.L.T. 211 (S.C.), the Hon'ble Apex Court has held that application for refund is presented before the Customs authority under Section 27 of Customs Act, 1962, the said authority must necessarily operate within the four corners of the said Act and cannot have recourse to Section 72 of the Indian Contract Act, 1872 and the delayed application rightly rejected as time barred. The Hon'ble Supreme Court in the case of *UOI v. Amines and Plasticizers Limited* held that refund claims filed beyond the period prescribed under Customs Act, 1962, the High Court order directing the Revenue to ignore the period of limitation and dispose of the refund claim stands set aside in the light of law declared in *Mafatlal's* case and the refund claim was held to be dismissed as barred by time. The Hon'ble Supreme Court in the case of *UOI v. Kirloskar Pneumatic Company* - 1996 (84) E.L.T. 401 (S.C.) held that the High Courts under writ jurisdiction cannot direct the Customs authorities to ignore the time limit prescribed under Section 27 of the Customs Act, even though High Court itself may not be bound by the time limit of the said Section, Articles 226 and 227 of the Constitution of India, in view of the above judgment, only the High Court, under writ jurisdiction, can exercise the inherent power provided in it but the said power cannot be enjoyed by the Tribunal. In the case of *Paros Electronics Pvt. Limited v. UOI* - 1996 (83) E.L.T. 261 (S.C.), the Hon'ble Supreme Court held that customs authorities cannot grant refund, being a creation of statute they are bound by limitation of Section 27 of the Customs Act.

5. On the analysis of above judgments of Hon'ble Supreme Court, the gist is that any refund filed before the Customs/Central Excise authorities can only process the claim under Customs/Central Excise Acts and the departmental authorities have no jurisdiction to go beyond the provisions made under the Act and limitations provided under Section 27/Section 11B."

5. A similar view has also been given by Larger Bench of the Tribunal in the case of *Veer Overseas Limited vs. CCE, Panchkula* – 2018 (15) GSTL 59 (Tri. LB). In the said decision, in Para 8 and 9 the Larger Bench examined the decisions of various Courts where Section 11B has been held to be not applicable to refund of any amount made under any mistake of law. The Larger Bench, after examining the said issue, has come to the following conclusion:-

"7. What is crucial is that the appellants paid the claimed amount as service tax. They have approached the jurisdictional authority of service tax for refund of the said money. It is clear that the jurisdictional service tax authority is governed by the provisions of Section 11B as the claim has been filed as per the said mandate only. Here, we have specifically asked the Learned Counsel for the appellant under what provision of law he is seeking the return of the money earlier paid. He admitted that the claim has been preferred in terms of the provisions of Section 11B. If that being the case, it cannot be said that except for limitation other provisions of Section 11B will be made applicable to the appellant. The Learned Counsel also did not advance such proposition. He repeatedly submitted that the amount is paid mistakenly. The same is not a tax and should be returned without limitation as mentioned in Section 11B. We are not convinced by such submission.

8. Here it is relevant to note that in various cases the High Courts and the Apex Court have allowed the claim of the parties for refund of money without applying the provisions of limitation under Section 11B by holding that the amount collected has no sanctity of law as the same is not a duty or a tax and accordingly the same should be returned to the party. We note such remedies provided by the High Courts and Apex Court are mainly by exercising powers under the Constitution, in writ jurisdiction. It is clear that neither the jurisdictional service tax authority nor the Tribunal has such constitutional powers for allowing refund beyond the statutory time-limit prescribed by the law. Admittedly, the amount is paid as a tax, the refund has been claimed from the jurisdictional tax authorities

and necessarily such tax authorities are bound by the law governing the collection as well as refund of any tax. There is no legal mandate to direct the tax authority to act beyond the statutory powers binding on them. The Hon'ble Supreme Court in *Mafatlal Industries Ltd.* (supra) categorically held that no claim for refund of any duty shall be entertained except in accordance with the provisions of the statute. Every claim for refund of excise duty can be made only under and in accordance with Section 11B in the forms provided by the Act. The Apex Court further observed that the only exception is where the provision of the Act where under the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. We note in the present case there is no such situation of the provision of any tax levy, in so far as the present dispute is concerned, held to be unconstitutional. As already held that the appellant is liable to pay service tax on reverse charge basis but for the exemption which was not availed by them. We hold that the decision of the Tribunal in *Monnet International Ltd.* (supra) has no application to decide the dispute in the present referred case. We take note of the decision of the Tribunal in *XL Telecom Ltd.* (supra). It had examined the legal implication with reference to the limitation applicable under Section 11B. We also note that the said ratio has been consistently followed by the Tribunal in various decisions. In fact, one such decision reached Hon'ble Supreme Court in *Miles India Limited v. Assistant Collector of Customs* - 1987 (30) E.L.T. 641 (S.C.). The Apex Court upheld the decision of the Tribunal to the effect that the jurisdictional customs authorities are right in disallowing the refund claim in terms of limitation provided under Section 27(1) of the Customs Act, 1962. We also note that in *Assistant Collector of Customs v. Anam Electrical Manufacturing Co.* - 1997 (90) E.L.T. 260 (S.C.) referred to in the decision of the Tribunal in *XL Telecom Ltd.* (supra), the Hon'ble Supreme Court held that the claim filed beyond the statutory time limit cannot be entertained.

9. The Apex Court in *Mafatlal Industries Ltd.* (supra) observed that the Central Excise Act and the Rules made thereunder including Section 11B too constitute "law" within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature no claim for refund is maintainable except and in accordance therewith. The Apex Court emphasized that "the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said Article".

10. Having examined various decided cases and the submissions of both the sides, we are of the considered view that a claim for refund of service tax is governed by the provision of Section 11B for period of limitation. The statutory time limit cannot be extended by any authority, held by the Apex Court."

6. In the aforesaid circumstances, we find that the decisions relied on by the appellant in his support were passed without appreciating the decision of Hon'ble Apex Court in the case of *Doaba Co-operative Sugar Mills* (supra) and in the case of *Mafatlal Industries Limited vs. UOI* – 1997 (89) ELT 247 (SC). In both these decisions it has been categorically held that refund under Central Excise Act would be governed by Section 11B. In these circumstances, we find that the refund claim filed by the appellant would be governed by the provisions of limitation prescribed under Section 11B of Central Excise Act, 1944. Since the refund was filed after expiry of limitation the same cannot be entertained.

7. As regards the issue of unjust-enrichment, we find the same is not dealt in the impugned order. This question would not arise as a refund is not sanctioned on merit. In these circumstances, refund is not admissible being barred by limitation as prescribed under Section 11B of Central Excise Act, 1944. In view of the claim being barred by limitation, other issues do not remain relevant.

We find no merit in the appeal and the same is dismissed.

(Pronounced in the open court on 18.03.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. I**

Service Tax Appeal No. 278 of 2010-DB

Arising out of OIA no. 494/426-RAJ/2009/COMMR-A-/RAJ, Dated: 20.10.2009
Passed by Commissioner of Central Excise-RAJKOT

Date of Hearing: 06.12.2019

Date of Decision: 18.12.2019

**KETAN CONSTRUCTION LTD
A/21, NEW YORK TOWER, NR THALTEJ TOWER
AHMEDABAD GUJARAT**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
RAJKOT, CENTRAL EXCISE BHAVAN
RACE COURSE RING ROAD...INCOME TAX OFFICE
RAJKOT, GUJARAT – 360001**

Appellant Rep by: None

Respondent Rep by: Shri D Kanjani, AR

CORAM: Hon'ble Mr Ramesh Nair, Member (J)
Hon'ble Mr Raju, Member (T)

Per: Raju:

This appeal has been filed by Ketan Construction Ltd. against demand of Service Tax and imposition of penalty. The matter was listed on 5 February, 2019, 27th February, 2019, 01 April, 2019, 01 May, 2019, 20 August, 2019, 27 September, 2019, 28 November, 2019, 18 November, 2019 and no one appeared on behalf of the appellant. On 06 December, 2019, the matter was listed again and no one appeared for the appellant again. Therefore, the matter is taken up for disposal without further delay.

2. Learned Authorised Representative points out that the issue involved in the instant case is that if the services rendered by the appellant in respect of collection of toll fee in respect of National Highway Authority of India are liable to tax under the head of Business Auxiliary Services. He pointed out that the said issue is squarely covered by the decision of this Tribunal in the case of *Larson & Toubro Ltd. 2019 (21) GSTL 428 (Ahmd.)* and also the decision of this Tribunal in the case of *Rishi Enterprises 2019 (25) GSTL 579 (Tri – Del.)*

3. We have considered rival contentions made by Learned AR and also the grounds of appeal. We find that in the instant case is squarely covered by the decision of this Tribunal in the case of *Larson & Toubro Ltd. (supra)*. In the aforesaid decision following has been observed:

"4. We have gone through the rival submissions. The definition of BAS at the material time read as follows :

"Business Auxiliary Service" means any service in relation to :-

(i) Promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) Promotion or marketing of service provided by the client; or

(iii) Any customer care service provided on behalf of the client; or

(iv) Any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services, and includes service as a commission agent, but does not include any information technology service.

Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this clause 'information technology service' means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems."

It can be seen that the definition has four limbs. The clause (i) relates to promotion or marketing or sale of goods and therefore, is not relevant in the instant case. The clause (ii) reads as "promotion or marketing of service provided by the client". Ld. Counsel has relied on the decision of Tribunal in case of Intertoll India Consultants (P) Ltd. (supra) and Ideal Road Builders P. Ltd. (supra). It is seen that none of these decisions consider clause (iii) of the definition to ascertain the liability to tax under BAS. There is no doubt that in the transaction for collection of toll the AMTRL are providing the service to the road users and the road users pay to the AMTRL the toll for using the road. Ld. Counsel has used two arguments. The first argument being that the toll collected is a tax, and therefore, there cannot be any service tax liability on the toll collection. The second argument being that the provision of good roads is responsibility of Government and the same cannot be treated as a service provided by the Government. Therefore, no service is provided by AMRTL to road users and clause (ii) of the definition of BAS cannot be invoked to levy service tax on the appellant.

4.1 The Service Tax in the instant case has been demanded, not on the amount of toll collected, but on the compensation received by the appellant with respect to collection of such toll. While the toll may be a tax, the compensation received by the appellant is not a tax. The compensation received by the appellant is for the service provided by the appellant to AMTRL in respect of collection of toll and other assorted services. There is no exemption to any service provided in respect of collection of tax, and therefore, first argument of the Ld. Counsel cannot be sustained.

4.2 In this regard the agreement between AMTRL and the appellant is relevant. The following clauses of the agreement are relevant in this regard :

(A) The State of Gujarat (the "State") is one of the highly industrialized states in India. The Government of the State ("GoG"), in order to meet the growing demand for a developed, efficient, goods quality and expensive system of road transportation, has formulated a policy enabling private participation in the development, construction, reconstruction, repair, upgrading, management, operation and maintenance of roads within the State. In order to enable to due implementation of this policy, The Bombay Motor Vehicles Tax Act, 1958, which had earlier prohibited the levy of the tolls on motor vehicles utilizing roads within the territory of the State, has been amended, by the Bombay Motor Vehicles Tax (Gujarat Amendment) Act, 1994, to enable GoG to levy tolls on motor vehicles utilizing roads that have been either constructed, reconstructed, upgraded or repaired by private enterprises which have been specifically authorized by GoG to do so. The amended Act upgrading or repaid of the road to collect the toll in relation to such road on the terms and conditions and in such manner as may be prescribed.

(B) Infrastructure Leasing & Financial Services Limited ("IL&FS") is a company providing financial services one of the main objectives of which is to promote, establish, develop, finance and implement projects establishing infrastructure facilities, including roadways, bridges, transportation systems, power, telecommunications and integrated area development programmes.

(C) GoG, pursuant to the aforementioned policy of involving private participation in the development of roads in the State, entered into a Memorandum of Agreement with IL&FS (the "MOA"), on 31 October, 1995, wherein GoG and IL&FS agreed to the implementation of projects relating to the development, upgrading, repair, operation and maintenance of roads in the State on a commercial basis, through private participation and utilizing private financial resources.

(D) ...

(E) ...

(F) ...

(G) IL&FS, pursuant to the decision of GoG to implement the Project under the MOA, initiated negotiations with the International Bank for Reconstruction and Development (the "World Bank") in order to make the Project eligible for the line of credit available to IL&FS from the World Bank. IL&FS also appointed through competitive bidding process Scott Wilson Kirkpatrick India Pvt. Ltd. ("SW") to undertake a detailed feasibility study of the Project in order to prepare the technical and financial details of the implementation of the Project.

(H) In view of the feasibility report submitted by SW, GoG has decided that the Project should be implemented on a Build, Own, Operate and Transfer basis ("BOOT") by a corporate entity incorporated in the State and promoted by GoG and IL&FS, specifically for the purpose of developing and implementing the Project on a BOOT basis.

(I) ...

(J) GoG granted the Owner, the Concession Agreement, the concession to implement, on strictly commercial principles, the Project and to that end design, construct, manage, operate and maintain the Facility in accordance with the terms of the Concession Agreement.

(K) ...

(L) After due evaluation of the various bids submitted in response to the RFP, the Owner has awarded the tender for the design and construction of the Project to Larsen & Toubro Limited the Contractor. From the above it is apparent that IL&FS has agreed to take up development, upgrading, repair, operation and maintenance of roads on a 'commercial basis'. The construction and operation and maintenance has been sub-contracted to the appellant by IL&FS through a corporate entity incorporated in the state and promoted by Govt. of Gujarat and IL&FS specifically for this purpose. From the above terms of the contract, it is apparent that the construction of road, and its operation and management have been undertaken strictly on commercial basis and the toll tax collected is being used for recovery of investment and operating cost on Build Own Operate Transfer (BOOT) basis. In these circumstances merely because a project is funded by toll tax, it cannot be said no service has been provided. Especially on the ground that during the phase when the toll tax is collected, the property owned by a corporate, promoted by Govt. of Gujarat and IL&FS. In view of above, it is apparent that the toll collected is a compensation given to a private operator for providing the services of road used to the public on BOOT basis. Thus, the facility and usage of road against payment of toll is a service provided by the AMTRL.

4.3 Perusal of the contract shows that the appellant are, inter alia, required to maximize the collection of toll. The appellants are also required to minimize the incidents and duration of any period during which the facility or any part thereof is accessible to use. The appellants are also required to maintain the facility against damage or deterioration. They are also required to ensure that all the services provided under the contract comply with prudent utility practices. In these circumstances, it can be said that appellants are engaged in promotion or marketing of service provided by AMTRL. The term "Marketing" is defined in Oxford dictionary is as under :

"The action or business of promoting and selling products or services, including market research and advertising."

The term "Marketing" is defined in Cambridge dictionary is as under :

"a job that involves encouraging people to buy a product or service."

The term "Marketing" is defined in Merriam Webster dictionary is as under :

(1) a : The act or process of selling or purchasing in a market did most of her marketing in local stores,

b : The process or technique of promoting, selling, and distributing a product or service.

(2) An aggregate (see AGGREGATE 1) of functions involved in moving goods from producer to consumer.

From the above definitions it is apparent that marketing of service is a very wide term. The activities of the appellant which are clearly intended to maximize the Revenue of the Principal comes under the ambit of promotion and/or marketing of service.

4.4 Ld. Counsel for the appellant has argued that the road user is not a customer, and therefore, they would not be cover under clause (iii) of the said definition. Clause (iii) of the

definition of BAS reads as "Any Customer Case service provided on behalf of the client". The Ld. Counsel has relied on the decision of Tribunal in the case of Intertoll India Consultants (P) Ltd. (supra) wherein it has been held that road user is not a customer. Para 8 of the said decision reads as under :

"8. At the outset, we find that NTBCL was declared as owner of the "8. DND bridge by the Noida Authority under the Govt. of U.P. The owner had given rights of collection of toll tax to the appellant and to retain a percentage of it and remit the balance. It can be seen that the appellant herein is collecting an amount as toll from the users of the DND bridge. To our mind, the users of toll fee paid bridge cannot be considered as customers. The persons who are using the DND bridge cannot be called as customers of either the appellant or NTBCL for a simple reason, because the expression 'customer' as defined in Advanced Law Lexicon read as under :-

"Customer is a person with whom a business house or a business man, has regular or repeated dealings; a purchaser of goods; one who frequents any place of sale for the sake of purchasing or ordering goods. A business customer is one who has the use and habit of resorting to the same person or place to do business; therefore, a stranger who goes into bank to get a cheque collected, is not a customer of the bank."

It can be seen from the above definition, a person is considered as customer of a business house when he has repeated dealings with the business house. To our mind, by any stretch of imagination, individual using the DND bridge and pays toll to the authority cannot be considered as a customer. The definition of the BAS either prior to 10-9-2004 or post - 10-9-2004 has to be considered from the point of view of whether the appellant has provided any customer care services on behalf of the client. First and foremost, it is to be noted that NTBCL is not a client of the appellant as the appellant is not promoting any customer care service of NTBCL. There is no visible activity done to please the user of the DND bridge to take care of their needs or something which is done which induces to come again and again to the said DND bridge. It may be noted that the users of DND bridge may be paying the toll fees reluctantly as that is the only means to connect the two banks of the rivers."

We respectfully disagree with conclusion reached in the said paragraph. The said paragraph relies on the definition of customer as it appears in Advanced Law Laxicon. According to the said definition only a person who has regular or repeated dealing can be a customer. Customer has been defined as follows in dictionaries :

The term "Customer" is defined in Oxford dictionary is as under :

- "A person who buys goods or services from a shop or business."

- "A person of a specified kind with whom one has to deal."

The term "Customer" is defined in Cambridge dictionary is as under : "A person who buys goods or a service."

The term "Customer" is defined in Merriam Webster dictionary as under :

- "one that purchases a commodity or service."

- "an individual usually having some specified distinctive trait."

From the above definitions it is apparent that even a single time buyer of service or goods also qualifies as customer. Moreover, the conclusion in para 8 of the decision of Intertoll India Consultant P. Ltd. (supra) is based on the presumption that all the road users of the said road are one time users. There is no basis for the said presumption as it is possible that a lot of road users would be using the said product on daily, weekly, or monthly basis and thus qualifying as customer even by definition relied upon in the case of Intertoll (supra). It is seen that the appellants were responsible to all maintenance services for traffic. They were also responsible to take action during accidents and to clear obstructions, wreckage and broken down vehicles. They were required to ensure road availability of ambulance and toll vehicles at all times. The appellants were also required to arrange and liaison with road transport facilities and local police for the traffic arrangements. In these circumstances, we find that every user is a customer of AMTRL and the appellants are providing services to the customers (the users) on behalf of AMTRL and thus the activity would also be covered under clause (iii) of the definition of BAS.

From the above it is apparent that the appellants are providing a bouquet of services to the customers on behalf of the principal AMTRL and thus the appellants are also covered by the clause (iii) of the definition of BAS.

4.5 It is also seen that appellants are engaged in the following activities :

- Supply of toll tickets to users and collect toll from users;*
- Maintain books and records about toll collected, traffic volumes, vehicles classification, exempted vehicles, etc.;*
- Establish toll procedures, minimize time taken in collection of toll, ensure that exempted vehicles use only service roads and maintain toll plaza;*
- Deposit each business day collection in to the toll account and ensure security of the amount;*
- The toll shall be collected by single tickets using Toll Ticket Machines which shall store all the data for further electronic processing;*
- Establish enforcement procedures to ensure that all the vehicles pass only after payment of toll tax and in case of failure shall compensate for loss;*
- Shall augment the toll collection on the basis of traffic forecast; Ld. Counsel has argued that the issue of toll tickets is not the same as billing. We, however, do not agree with the said contention. Issue of toll ticket is nothing but billing. The activity of billing is identifying the service availed and charging for the same. The appellants in the instant case would be identifying the size of vehicle and the destination to ascertain toll charges. Thereafter toll ticket is issued and money is collected. In view of above activities undertaken by the appellant, they would also be covered under clause (iv) of the definition of BAS.*

4.6 In view of the above we are of the opinion that the decision in case of Intertoll India Consultants (P) Ltd. (supra) is per incurium as it ignores the common parlance definition of the term 'Customer'. As described above the activity of the appellant would be squarely covered by definition of BAS and would be chargeable to service tax during period prior to 10-9-2004 also.

4.7 The appellants have sought benefit of limitation. We find that the appellants are providing the BAS and there is no doubt regarding the same. Merely, because they are collecting the said amount on behalf of the corporate entity backed by Government it does not constitute a bona fide belief for exemption. The definition of BAS is very clear. Thus, they cannot be given any benefit on account of limitation.

5. The appeal is consequently dismissed.

3.1 It is seen that in the instant case, the nature of services is similar to that of services in the case of Larson & Toubro Ltd. (supra) as can be seen from para 4.4 & 4.5 of the Show Cause Notice:

"4.4 The form of agreement dated 31/05/2003 (alongwith the Bid Document) between M/s KCL and M/s AVEXCL was scrutinized b the officers of DGCEI, Ahmedabad. The toll services provided by M/s KCL are given at para 3.6 Scope of work (Section 3A) appearing at page no. 19 of the Bid Notice. The said form of agreement dated 31.05.2003 (along with the Bid document) is enclosed as Annexure-'A' to this SCN. It is evident from said document that M/s KCL were required to mainly provide following services:-

- i. Collection and control of Toll revenue at each plaza by manual computerized method.*
- ii. Transfer of Toll revenue to M/s AVEXCL account on a daily basis.*
- iii. Insurance of Toll revenue as per the terms agreed upon with M/s AVEXCL.*
- iv. Safe keeping, handling, transporting, reconciliation and banking of toll revenue.*
- v. Control of traffic for the Toll plaza area.*
- vi. Control of and accounting for all the tolls collected.*
- vii. Toll reporting and administration.*
- viii. Toll related personnel management.*
- ix. Security of toll plaza.*

4.5 It appears from the statements of Shri Suresh Ambalal Mistry and 'form of Agreement' dated 31.05.2003 (alongwith the Bid document) discussed in above para that M/s KCL was providing incidental and auxiliary support Service to M/s ACEXCL in collection of toll fee. They were issuing bills in the form of toll fee tickets to the users. M/s KCL were also collecting toll fee on behalf of their client M/s AVEXCL from the users of said road, and were depositing the same in Toll account and also making arrangement for security of the said amount, M/s KCL were maintaining the accounts of the toll fee collected by them from the users and were remitting the same to M/s AVEXCL. They were submitting the information about different types of vehicles which passed through the road and also the exempted vehicles. It thus appears that M/s KCL were providing following incidental and auxiliary support services to their client M/s AVEXCL:

- i. Billing of toll fee in the form of toll fee tickets issues to the users of the road;
- ii. Collection of toll fee on behalf of M/s AVEXCL from all the users of road, safety of the money collected and its depositing in Toll Fee Account of M/s AVEXCL;
- iii. Maintenance of accounts of the toll fee collection in the toll collection machines in electronic form and remittance of the same to its client M/s AVEXCL. In fact, they were providing services like types of vehicles which used the said road and number of exempted vehicles using the road;"

4. Since we find that the nature of services provided is practically similar to the nature of services involved in the case of Larson & Toubro Ltd. (supra). Relying on the decision in the case of Larson & Toubro Ltd. (supra), appeal is dismissed.

(Pronounced in the open court on 18.12.2019)

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

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 626 of 2011

[Arising out of Order-in-Appeal No OIA-55/2011/BVR/DSINGH/COMMR-A-
/AHD dated 07.07.2011 passed by Commissioner(Appeal) of Central Excise &
ST, Bhavnagar]

M/s. Chhatariya Dehydrates Exports **....Appellant**

VERSUS

Commissioner of Central Excise & ST,Bhavnagar **....Respondent**

And

Service Tax Appeal No. 627 of 2011

[Arising out of Order-in-Appeal No OIA-55/2011/BVR/DSINGH/COMMR-A-
/AHDdated07.07.2011 passed by Commissioner(Appeal) of Central Excise & ST,
Bhavnagar]

M/s. Chhatariya Dehydrates Exports **....Appellant**

VERSUS

Commissioner of Central Excise & ST, Bhavnagar **....Respondent**

WITH

Service Tax Appeal No.628 of 2011

[Arising out of Order-in-AppealNoOIA-55/2011/BVR/DSINGH/COMMR-A-
/AHDdated07.07.2011 passed by Commissioner(Appeal) of Central Excise &
ST,Bhavnagar]

M/s. Chhatariya Dehydrates Exports **....Appellant**

VERSUS

Commissioner of Central Excise & ST,Bhavnagar **....Respondent**

APPEARANCE:

Shri Amal Dave, Advocate for the Appellant

Shri S.N. Gohil, Superintendent (AR) for the Respondent

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

HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO.A/11476-11478/2019

DATE OF HEARING : 10.07.2019

DATE OF DECISION: 06.08.2019

RAJU:

These appeals have been filed by M/s. Chhatariya Dehydrates Exports against demand of service tax on commission paid on reverse charge basis.

2. Ld. Counsel for the appellant pointed out that there are three showcause notices. He argued that prior to 18.04.2006, when Section 66A was introduced in Finance Act, 1994, there can be no liability under reverse charge basis as held by the Hon'ble Bombay High Court in the case of *Indian National Shipowners Association vs. UOI – 2009 (13) STR 235 (Bom.)*. He further argued that they are engaged in manufacturing of Dehydrate onions and export abroad. The appellants are paying commission to sales agent located abroad and the demand is raised in terms of Section 66A. Ld. Counsel pointed out that they are entitled for full exemption under Notification No.14/2004-ST dated 10.09.2004 as their service was in respect of agriculture products. He also argued that they are also entitled to Notification No. 13/2003-ST dated 20.06.2003, as amended by Notification No.8/2004-ST dated 09.07.2004 which grants exemption in respect of commission paid for sale of agricultural produce. He argued that products manufactured by them being Dehydrate onion, is an agriculture produce.

3. He also argued that the issue was under dispute and benefit of section 80 of Finance Act, 1994 for penalties should be extended. He also argued that in view of the decision of Hon'ble Supreme Court in the case of *Nizam Sugar Factory vs. CCE, AP-2008(009)STR314(SC)*, a part of the period in the second show cause notice is also barred by limitation as the first showcause notice on the same was already issued and therefore, second time extended period could not be invoked.

4. Ld. AR relies on the impugned order. He also relied on the decision of Tribunal in the case of *Uniworth Textiles Limited vs. CCE, Nagpur-2009(244) ELT 401 (Tri. Del.)* wherein it was held that extended period can be invoked even after issue of an earlier show cause notice invoking extended period, in case the assessee fails to give documents and data in time. He also relied on the definition of word 'processing' given in the Agricultural and Processed Food Products Export Development Authority Act, 1985.

He argued that the documents asked were not supplied by the assessee as is apparent from Para 14.3 and 14.4 of the impugned

order.

5. We have gone through the rival submissions. We find that appellants are exporters of Dehydrated onion and paying commission to sales agents abroad. Demand has been made in respect of service tax on the said sales commission on reverse charge basis. It has been already held by Hon'ble Bombay High Court in the case of *Indian National Shipowners Association* (supra) that no demand can be sustained prior to 19.04.2006 as per Section 66A. Therefore the said demand for the period prior to 19.04.2006 is set-aside.

6. Ld. Counsel claimed the benefit of Notification No. 13/2003-ST. It is seen that Notification No. 13/2003-ST, as amended, exempts commission paid in respect of sale of agricultural products. The said notification defines the agricultural produce as under:-

“(ii) “agricultural produce” means any produce resulting from cultivation or plantation, on which either no further processing is done or such processing is done by the cultivator like tending, pruning, cutting, harvesting, drying which does not alter its essential characteristics but makes it only marketable and includes all cereals, pulses, fruits, nuts and vegetables, spices, copra, sugar cane, jaggery, raw vegetable fibres such as cotton, flax, jute, indigo, unmanufactured tobacco, betel leaves, tendu leaves, rice, coffee and tea but does not include manufactured products such as sugar, edible oils, processed food and processed tobacco.”

It is seen that Dehydrate onion is not covered by the said definition and Dehydrate onion cannot be called as agricultural produce. Dehydrate onion cannot be called as agricultural produce in terms of Notification No. 13/2003-ST. Notification No. 14/2004-ST dated 10.09.2004 is also not applicable in the instant situation as the service provided are not covered by any clause of the said notification.

7. The next claim of the appellant is invocation of extended period in the second show cause notice. Ld. Counsel has relied on the decision of Hon'ble Apex Court in the case of *Nizam Sugar Factory* (supra). Ld. AR has relied on the decision of the Tribunal in the case of *Uniworth Textiles Limited* (supra) wherein in Para 5.3 and 5.4, the following has been observed:-

“**5.3** On carefully considering the rival submissions on this point, we are of the view that the ratio of the Hon'ble Supreme Court judgments in the cases of *P&B Pharmaceutical Pvt. Ltd. v. CCE* (supra) and *Nizam Sugar Factory* (supra) is that once a show cause notice for demand of short levied/short paid duty for a particular period is issued on the basis of certain set of facts, show cause notice for recovery of short levied/short paid duty for the subsequent period cannot be issued by alleging willful statement, fraud, suppression of facts etc. on the basis of the same set of facts. In the case of *Nizam Sugar Factory*, first show cause notice for recovery of short paid duty for the period from February 1978 to September 1982 had been issued on 28-2-84 invoking extended period by making allegation of willful misstatement, suppression of facts etc. and subsequently a second

show cause notice dated 16-7-87 was issued for the subsequent period from October 1982 to March 1987 on the basis of same set of facts making allegation of wilful statement, suppression of facts, and it is in this background that Hon'ble Supreme Court held that the second show cause notice could not be issued by invoking extended period on the basis of same set of facts. The facts of this case are different. There is no dispute about the fact that during the period from August 1997 to March 2002, the appellants have committed a fraud for evasion of duty by clearing prime quality fabrics as rejects and the show cause notice for the entire period would have been issued on 13-8-02, had UTL furnished the figures of their sales to UIL for July 2001 to March 2002 period in time. A separate show cause notice for the period from July 2001 to March 2002 had to be issued after issue of the first show cause notice dated 13-8-02 only because the information for the period from July 2001 to March 2002 was received subsequently that is after issue of the first show cause notice. In view of these circumstances, we are of the view that extended period is applicable even for the second show cause notice.

5.4 Since this is a case where the appellant have committed a fraud, UTL would be liable for penalty under Section 11AC of Central Excise Act and other notices would be liable for penalty under Rule 209A of the erstwhile Central Excise Rules, 1944/Rules 26 of the Central Excise Rules 2001-02.”

In this case too the appellant had resisted supplying documents and data. The facts are not disputed by the appellant and in these circumstances we find that there was suppression of facts and consequently, extended period has been rightly invoked, in the subsequent notice also.

8. In view of the above, the entire demand for the period after 18.04.2006 is upheld. Penalty imposed under Section 78 is also revised as equal to the demand confirmed in the order. Appeal is partly allowed in the above terms.

(Pronounced in the open court 06.08.20019)

(Ramesh Nair)
Member (Judicial)
(Raju)
Member (Technical)

[Back](#)

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

REGIONAL BENCH-COURT NO.3

Service Tax Appeal No.12368 of 2014

[Arising out of Order-in-Appeal No OIA-RJT-EXCUS-000-APP-67-14-15 dated 02.06.2014 passed by Commissioner(Appeal) of Central Excise & ST, Rajkot]

Shree Gurukrupa Construction Company	Appellant
<i>VERSUS</i>	
Commissioner of Central Excise & ST,Rajkot	...Respondent

APPEARANCE:

Shri Amal Dave, Advocate for the Appellant

Shri L.Patra, Assistant Commissioner(AR) for the Respondent

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

FINAL ORDER NO.A/11471/2019

DATE OF HEARING:18.07.2019

DATE OF DECISION:05.08.2019

RAMESH NAIR:

The brief facts of the case are that the appellant had obtained workorders from Gujarat State Police Housing Corporation Limited (GSPHCL forshort) and accordingly during the year 2009-10 to 2011-12 had constructedresidential quarters for the staff of the Gujarat Police. The appellant had also carried out construction of residential complex for Rajkot Municipal Corporation (RMC for short) as sub-contractor of M/s. Avadh Construction.The appellant had not paid service tax on the said construction service provided to GSPHCL and RMC,therefore the demand was raised and confirmed under the category of Residential Complex Service.

2. Shri Amal Dave, Ld. Counsel appearing on behalf of the appellant fairly concede that the appellant being sub-contractor is liable to pay service tax as held by the Larger Bench of this Tribunal in the case of *CST, New Delhi vs. Melange Developers Pvt. Limited-2019*. However, he submits that the entire demand is time-barred as the showcause notice was issued beyond the normal period.He submits that there isno malafide on the part of the appellant.The appellant had not paid service tax as there was confusion that whether the sub-contractor is liable to payservice tax when the entire service tax was paid by the main contractor.On this issue there were conflicting judgments and finally the issue was settledby the Larger Bench in the case of *Melange Developers Pvt. Limited (supra)*.Therefore,in these circumstances,it cannot be said that the appellant suppressed the facts or had malafide intention to evade the service tax.Therefore, the demand for the longer period is time-barred.In support, he relied on the following judgments:-

- (a) CCE & ST vs. Saurashtra Cement Limited - 2016(42) STR 632(Guj.)
- (b) Marsha Pharma Pvt. Limited vs. CCE, Vadodara - 2009(248) ELT687(Tri.-Ahmd.)
- (c) CCE,Vapivs.Kolety Gum Industries-2016(335)ELT581(S.C.)
- (d) Copy of CESTAT order No.A/11071/2019 dated 05.07.2019 in case of M/s.HiScan Pvt. Limited passed by CESTAT Ahmedabad.
- (e) Copy of CESTAT order No.A/11715/2018 dated 30.07.2018 in case of M/s.Dharti Automobiles passed by CESTAT Ahmedabad.
- (f) CCE,Delhi vs. Soni & Toni Electrical- 2007(217)ELT457(Tri.-Del.)
- (g) Principal Commissioner GST & Central Excise, Chennai vs.C.Kamalakanan- 2018 (18)GSTL589 (Mad.)
- (h) Principal Commissioner vs.SKS Ispat and Power Limited-2018
- (14)GSTLJ75(Chhattisgarh)
- (i) CST,Delhivs.MelangeDevelopersPvt.Limited-2018-TIOL-1983-CESTAT-DEL
- (j) CST,NewDelhivs.MelangeDevelopersPvt.Limited-2019-TIOL-1684-CESTAT-DEL-LB
- (k) BCC Developers and Promoters Pvt. Limited vs. Commissioner ofC.Ex., Jaipur-2017(52)STR 22 (Tri.-Del.)
- (l) Power Mech Projects Limited vs. Commissioner of Guntur-2017(48)STR 165 (Tri.-Hyd.)
- (m) National Building Construction Corpnn. Limited vs.CCE&ST.Patna- 2011(23)STR593 (Tri.-Kolkata)
- (n) Order No.A/11314/2013 dated 07.10.2013 passed by the Hon'ble CESTAT,Ahmedabad in case of M/s.Mahalaxmi Infracontract Limited.
- (o) Order No.A/12878/2017 dated 06.10.2017 passed by the Hon'ble CESTAT,Ahmedabad in case of M/s.SAI Consulting Engineers Pvt. Ltd.

3. Shri Gobind Jha, Ld. Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that the confusion on the issue that whether the sub-contractor is liable to pay service tax or otherwise has arisen only due to issuance of Board Circular in the year 2002, clarifying that when the main contractor discharged the service tax liability, sub-contractor need not to pay service tax. Subsequently, the Board Circular was modified in the year 2005 according to which the assessee, even though acted as sub-contractor, required to pay service tax. Therefore, after issue of Board Circular in the year 2005, there was no reason to believe that the sub-contractor is not liable to pay service tax. He further submits that the appellant failed to obtain registration therefore, there is a clear suppression of facts on their part. He further submits that all the judgments on limitation are related to the issue on merits or pertaining to the period prior to the issuance of Board Circular in the year 2005 and in the present case, the period involved is 2007-08 which was much after the Board modified the circular in 2005. Therefore, there cannot be a bonafide belief for non-payment of tax. He placed reliance on the following judgments:-

- (a) Deogiri Infrastructure Pvt.Limited vs. Commissioner of C.Ex. Aurangabad-2017(5)GSTL45(Tri.Mumbai)
- (b) Madhukar Mittal vs. Commissioner of C. Ex. Panchkula - 2017 (4)GSTL412 (Tri.Chan.)
- (c) Madhukar Mittal vs. Commissioner-2017(3)GSTLJ-317(P&H)
- (d) Central India Engineering Company vs. Commissioner of C.Ex. Nagpur-2016(44)STR657(Tri.Mum.)
- (e) Exemption Notification No. 28/2010-ST dated. 22.06.2010 regarding Construction of Residential Complex service.
- (f) Max Tech Oil & Gas Services Pvt. Limited vs. Commissioner of Service Tax,Delhi-2017(52)STR508(Tri.Del.)
- (g) Krishna Engineering Works vs. CCE & ST.,Vadodara-2019(22)GSTL409 (Tri.Ahmd.)
- (h) Sew Construction Limited vs. CCE, Raipur – 2011 (22) STR 666(Tri.Del.).

4. Heard both sides and perused the record. We find that there is no dispute on the taxability as has been held by the Larger Bench that the sub-contractor is independently liable to pay service tax even though service tax liability has been discharged by the main contractor. Therefore, in the present case, demand on merit is clearly sustainable. As regards the limitation argued by the Id. Counsel, we find that the confusion arose due to Board Circular issued in 2002 wherein the Board has clarified that in case of sub-contractor, the service tax is not payable by sub-contractor if service tax is discharged by the main contractor. However, the Circular was amended in 2005 and thereafter the issue became clear that the sub-contractor was required to pay service tax and the conflicting judgments were due to the earlier Board Circular. However, after 2005, there was no reason for the assessee to believe that the sub-contractor is not liable for payment of service tax. If any assessee is of the belief that being sub-contractor they are not liable to pay service tax, in the light of amendment in Circular in 2005, the assessee should have approached the department and make the position clear regarding their bonafide belief. But in the present case, the appellant did not approach the department regarding their bonafide belief nor they obtained the registration. Therefore, when the Board issued amendment in 2005, it cannot be said that the appellant entertained bonafide belief correctly.

5. Further, we find that the judgments cited by the Id. Counsel on the issue of limitation are pertaining to the period prior to the Board Circular whereby the sub-contractor was made liable to pay service tax. Therefore, the said judgments cannot be made applicable for the subsequent period particularly in the present case which is for the period 2007-08 and 2008-09.

We also find that in the case of *Max Tech Oil & Gas Services Pvt. Limited (supra)*, on the identical issue of taxability on sub-contractor, it was clearly held that extended period is invocable. Similarly, in the case of *Sew Construction Limited (supra)*, the Tribunal has dealt with the liability to pay service tax by the sub-contractor and has clearly held that since registration was not sought, claim of bonafide belief cannot be accepted and demand for the extended period was

maintained and penalty was also intact.

6. In view of our above observations,the impugned order is upheld,the appeal is dismissed.

(Pronounced in the open court 05.08.2019)

(Ramesh Nair)

Member(Judicial)

(Raju)

Member(Technical)

[Back](#)

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

REGIONAL BENCH- COURT NO.1

Service Tax Appeal No. 681 of 2011

[Arising out OIA-143/2011/COMMR-A-/RBT/RAJ passed by Commissioner of
ServiceTax-RAJKOT]

M/s. Iilm Business School..... Appellant

B-ii/61, Mohan Co Operative Industrial
Estate, Mathura Road,
NEW DELHI, 110044.

VERSUS

C.C.E. & S.T. Rajkot..... Respondent

CENTRAL EXCISE BHAVAN,
RACE COURSE RING ROAD. INCOME TAX OFFICE,
RAJKOT, GUJARAT-360001

APPEARANCE:

None appeared for the Appellant

Shri K. J. Kinariwala, Authorised representative for the Respondent

**CORAM: HON'BLE PRESIDENT JUSTICE DILIP GUPTA
 HON'BLE MEMBER (TECHNICAL), MR. RAJU**

FINAL ORDER NO. A/ 12227 /2019

DATE OF HEARING: 03.10.2019

DATE OF DECISION: 21.11.2019

RAJU

This appeal has been filed by IILM against order demand of service tax, interest and imposition of penalty under Section 77 and 78 of the Finance Act, 1994.

1.1 None appeared on behalf of the appellant despite notice. The matter was adjourned five times earlier; therefore, the matter is taken up for final disposal.

2 The facts of the case are that the appellants are engaged in imparting courses such as MBA, PGP programme (industry integrated). A Show cause notice was issued to the appellant demanding service tax on this activity under the head of 'Commercial Coaching and Training'. The demand was confirmed and penalty was imposed. The said order was upheld by Commissioner (Appeals) and hence this appeal. From the grounds of appeal, it is seen that the IILM Business School was set up by

International School of Learning in Management trust a Public Charitable Trust and it was an approved center of Eastern Institute of Integrated Learning in Management University Sikkim which in turn is approved by University Grants Commissioner. It was also stated that Eastern Institute of Integrated Learning in Management University Sikkim has full authority and legal sanction to grant degrees and diplomas as per section

22 of the said Act to its student upon successful completion of the course. The appellant got approval from the University vide its letter dated 12.02.2009 to be its knowledge hub and to enrol students for the management classes i.e. M.B.A. All the students of the appellant were enrolled for getting degree/diploma/certificate from a University duly recognized under the law, after qualifying the exams. All the enrolled students were required to complete the course as prescribed by the university and have to adhere to the rules and regulations such as minimum attendance, eligibility etc as prescribed by the university so as to be able to appear for the examinations conducted by the university.

It is seen that the original adjudicating authority has confirmed the demand on the ground that noticee has been authorized by Eastern Institute of Integrated Learning in Management as knowledge hub of EIILM University Sikkim. The order in original observes that the appellants are not granting any degree recognized by law but are acting as a knowledge hub for EIILM University set up by State Government of Sikkim and which is approved by University Grant Commissioner. The order in appeal also upholds the order in original on the same ground.

The appellant have also contended that they are entitled to Notification No. 10/2003 dated 20.06.2003 on the ground that they are providing Coaching or Training confirming and essential part of course curriculum of any other institute or establishment leading to issuance of any certificate or diploma or degree or education qualification recognized by law.

3. Learned Authorized Representative relies on the decision of Hon'ble High Court, State of Telangana in case of NRI Academy Guntur 2019 20 GSTL 23 (AP). We have considered rival submissions. We find that the appellants themselves are not recognized by law to grant any degree and therefore, the service provided by the appellant qualifies as Commercial Coaching and Training. Notification 10/2003 reads as under:-

“Commercial training or coaching centre providing commercial training or coaching of specified type exempted

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services provided by a commercial training or coaching centre, in relation to commercial training or coaching, which form an essential part of a course or curriculum of any other institute or establishment, leading to issuance of any certificate or diploma or degree or educational qualification recognised by law for the time being in force, to any person, from the whole of the service tax leviable thereon under sub-section

(2) of section 66 of the said Act :

Provided that this exemption shall not be applicable if the charges for such services are paid by the person undergoing such course or curriculum directly to the commercial training or coaching centre.

2. This notification shall come into force on the 1st day of July, 2003.”

It is seen that to claim the Notification benefit, the appellant have to establish that the charge for such services are not paid by the service recipient to the service

provider. In the instant case, the order in original as well as the impugned order record that the payment has been made to the appellants by the service recipient and thus, the benefit of Notification 10/2003-ST is not available.

4. In similar circumstances Larger Bench of Tribunal in the case of Sri Chaitanya Educational Committee 2015 TIOL 1175 CESTAT – BANGALORE has observed as follows:

“78. The main contention of the learned Advocate for the appellants is that the Appellant Society through their own junior colleges and the junior colleges of other societies, under its management, imparts education to the students for intermediate 11th and 12th Standards, like any other school/college providing education for 11th and 12th Standard, anywhere in the country, each of the colleges, either belonging to the Appellant Society or belong to other societies and run by the Appellant Society are recognized by the Andhra Pradesh Intermediate Board and are monitored and regulated by the Board. The Appellant Society introduced optional stream of courses in the year 1991, much before service tax was introduced on “Commercial Training or Coaching Centre” in 2003, for students undergoing intermediate courses in their colleges. These optional courses are offered to students securing high percentage of marks in intermediate examination and to enable the students to appear and score high marks in various entrance examinations such as IIT, JEE, Engineering and Medical Common Entrance Test (EAMCET), etc. The contention of the learned Advocate is that as per the Section 65(27), an institute or establishment, which provides training or coaching for imparting skill, knowledge or lessons is a “Commercial Training or Coaching Centre”. But, the institute or establishment, provides training or coaching or imparting skill, knowledge or lessons and issues a certificate/educational qualification recognized by law, would be excluded from the levy of Service Tax. In the present case, the Appellant Society provides the coaching classes to the students, which is integral part of the intermediate course conducted by the college and the certificates issued by BIE (Board of Intermediate Education), Government of Andhra Pradesh and duly signed and endorsed by the Principal of the respective college, are recognized by law. So, it is not covered under the definition.

79. For the purpose of proper appreciation of the case, the definition of “Commercial Training or Coaching Centre” under Section 65(27) of Finance Act, 1994 is reproduced below :-

“ ‘Commercial training or coaching centre’ means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes but does not include pre-school coaching and training centre or any institute or establishment which issues any certificate or diploma or degree or any educational qualification recognized by law for the time being in force.”

80. The definition of “Commercial Training or Coaching Centre” have both inclusive and exclusive part, i.e., it may include certain things and exclude others. The word “any”, e.g., institute or establishment providing Commercial Training or Coaching in the main part of the definition, is a word having very wide meaning. It is noted that the definition also categorically includes “coaching or tutorial classes”. The word “includes” in the definition makes it

clear that the intention was to make it more extensive. In this perspective, the exclusion part of the definition suggests a very limited purpose to “pre-school coaching and training centre” and any institute or establishment, which issues any certificate or diploma recognized by law. The “coaching or tutorial classes” mentioned in the inclusive part of the definition and it cannot be covered in the exclusive portion of the definition. While interpreting the definition of “Commercial Training or Coaching Centre”, the exclusion part must be strictly construed, what is being included in the definition cannot be excluded, unless it is specifically mentioned. In the present case, according to the appellant, they were offering coaching classes to the students of intermediate standard of their colleges and other colleges for appearing joint entrance examination of IIT, JEE, etc. In my considered view, when “coaching classes” have categorically included in the definition, then, it cannot be excluded by stretching the meaning of exclusion clause of the definition.

81. The learned Advocate strongly relied upon the Board’s Circular No. 59/8/2003-S.T., dated 26-6-2003, whether Service Tax is applicable on institute or establishment providing commercial coaching in addition to the recognized degree courses. It is clarified that some institutes like colleges, apart from imparting education for obtaining recognized degree/diploma/certificate, also impart training for competitive examinations, various entrance tests. Such institutes or establishments, which issue a certificate, diploma or degree recognized by law, are outside the purview of “Commercial Training or Coaching” institute. Thus, even if such institutes or establishment provides training for competitive examinations, etc., such services rendered would be outside the scope of Service Tax. In my view, while deciding the words “any institute or establishment which issues certificate or diploma or degree or any educational qualification recognized by law”, ordinarily, would not include coaching or tutorial classes. After close reading of Board Circular and the definition, it appears that the institute or establishment issuing certificate, recognized by the law, is also conducting coaching classes, would be outside of the purview of the levy of Service Tax. The learned Advocate stated that in the present case, the coaching classes are integrally connected with the intermediate courses conducted by the colleges. The contention of the learned Advocate that the certificate issued by Andhra Pradesh Board is endorsed by the Principal of the college, which would cover the exclusion part of the definition. In this context, it is required to examine the facts of the case as to whether the coaching classes offered by the Appellant Society are integrally connected with the intermediate courses.

82. The learned Member (Technical) in his order had elaborately discussed the facts and held that the courses have no nexus with intermediate courses of the colleges. The adjudicating authority had also given detailed findings on this issue as the coaching classes are conducted in different places (campuses and special fields). These facts were admitted by the appellant in their statements. The relevant portions of the findings of the adjudicating authority are reproduced below :-

“58. In his statement dated 2-3-2006 given before the Superintendent of Central Excise under Section 14 ibid, Sri Yarlagadda Sasi Kumar, Campus Incharge of Sri Chaitanya EAMCET Coaching Centre, Sri Vyshnavi Bhavan, Gurunanaknagar Colony, had stated that “intensive coaching for

EAMCET would be given in their premises; that the duration of the coaching is 8 to 10 months, that depending on the performance of the students, fees from Rs. 20,000/- to 50,000/- would be collected from each student; that the collection of fees and the details would be done at the Central Office and that in this premises, Attendance Register and records connecting to education were only maintained.

59. In the Statement dated 13-3-2006 given before the Superintendent of Central Excise under Section 14 of the Central Excise Act, 1944, Dr. B.S. Rao, President, Sri Chaitanya Educational Committee had stated that “their accounting was centralized at Vijayawada for all the branches that in every branch, Principal to look into academic and administration was posted; that in the Head Office at Vijayawada, Dr. B. Jhansi Laxmi and himself would look after the general administration; that some students were day students and some stay as boarders; that the courses offered were Bi.P.C., M.P.C., M.E.C. both English and Telugu media; that *the boarding facilities were only for M.P.C. and Bi.P.C.* and Boarding facilities were given both for intermediate and coaching students of competitive examinations; that for the students who score more than 90% in 10th class, there was no fees at all, while some concession would be given for the students who got more than 80% in 10th class; that for competitive exams also, the students were offered free seats who got a rank of below 2500 in the previous examination; that there were some more concessions, like 75% concession for the students who got a rank in between 2500-3000, 50% concession who got a rank between 3000-4000 and 25% fee concession for the students who got 4000-5000.” *From the above, it is evident that the concessions, benefits were given by Sri Chaitanya Educational Committee to the students on the basis of merit but not on the basis of economic conditions of the students.*”

83. The students appear for the intermediate examinations under the hall ticket issued by the respective colleges and the students after passing examination, are awarded a certificate which issued by Intermediate Board Education duly endorsing stamp of respective college. However, the students of said colleges underwent coaching in different campus of the appellant on payment of fee ranging from Rs. 8,000.00 to Rs. 75,000.00 which was accepted by Shri K.V. Subba Rao, Accounts Manager of the appellant in his statement dated 28-2-2006. He also confirmed that the amount was collected from the different students of different colleges who underwent coaching of JE-IIT, EAMCET, etc., in different branches of the Appellant Society situated in Andhra Pradesh and other places of India. It is clearly evident from the facts of the case that the coaching classes were conducted in different campuses, separate fees and totally independent and had no nexus with the intermediate courses of the colleges. So, I agree with the finding of the learned Member (Technical) that Service Tax is leviable on the Appellant Society on such coaching classes.

84. The next issue is whether the extended period of limitation is invocable as held by learned Member (Technical) or not invocable as held by learned Member (Judicial). Learned Member (Technical) observed that the appellants were aware of their tax liability as they have registered in Kota, Rajasthan and paid Service Tax. There is no logic or rational on different stand taken by the appellant in Kota and Andhra Pradesh. The appellants are not entitled to a *bona fide* belief that they are not liable to pay Service Tax.”

We find that in view of the decision of Tribunal in case of Shri Chaitanya Educational Committee (supra) the appellants are liable to pay service tax on the service provided by them as the appellants are not falling under any category excluded from the definition of Commercial Coaching and Training.

5. Relying on the aforesaid decision, we hold that the demand of duty, interest and penalty under Section 77 and 78 are upheld. The appeal is consequentially dismissed.

(Pronounced in the open court on 21.11.2019)

(JUSTICE DILIP GUPTA)
HON'BLE (PRESIDENT)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH: AHMEDABAD
REGIONAL BENCH: COURT NO-1**

Service Tax Appeal No.12658 of 2018-SM

(Arising out of OIA no. CCESA-SRT--APPEALS-PS-106-2018-19 dated
25/06/2018 passed by Commissioner (Appeals) Commissioner of Central
Excise, Customs and Service Tax-SURAT-I)

Masti Tours & Travels

Appellant

Nr.Md.Tower,MahendraNiwasVarachha
Road, Mini BazarSURAT
GUJARAT.

-VERSUS-

C.C.E.& S.T.-Surat-i

Respondent

New Building...Opp. Gandhi Baug,Chowk
Bazar,Surat,Gujarat,395001

Present For the Appellant:Shri Manish Barot,Supdt.

Present For the Respondent : Shri S.K.Shukla,
Supdt.(AR)

CORAM:

HON'BLE MEMBER(TECHNICAL), MR.RAJU

FINAL ORDER NO.A/11382/2019

Date of Hearing: 12/07/2019

Date of Decision: 12/07/2019

RAJU

This appeal has been filed by M/s Masti Tour & Travels against demand of Cenvat Credit.

2. Ld. Counsel for the appellant pointed out that they were availing credit on Service tax deducted by the IATA agent by giving them a commission in respect of sales. The appellants were working as travel agent and utilizing the main IATA agent for booking tickets for their clients. The appellants were paying Service Tax on the processing charges. IATA agent was giving them certain commission and from that Commission, IATA agent was deducting certain amount under the head of Service Tax. Ld. Counsel could not point out what services they were receiving from IATA on which the service tax was paid.

3. Ld. AR relies on the impugned order. He argued that in absence of any specific services which the appellant was receiving from IATA agent any Service Tax element shown in the invoice has no relevance.

4. I have considered rival submission. I find that credit has been taken by the appellant on certain invoice raised by the IATA agent. Ld. Counsel argued that they were providing services to IATA agent and receiving commission on which the IATA agent had paid Service Tax. They had taken credit on the said service tax. I do not find merit in the said argument for the reason that if the appellant was providing service to IATA then it was responsibility of the

appellant to pay Service Tax and not by IATA agents. Moreover if the appellant were providing services on the basis of Commission to IATA agents, then IATA agents could have availed the credit in these circumstances. I do not find merit in the appeal,the same is dismissed.

(Dictated and pronounced in the open court)

(Raju)
Member(Technical)

[Back](#)

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

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.13163 of 2014

(Arising out of OIO-SUR-EXCUS-001-COM-010-14-15 Central Excise, Customs and Service Tax-SURAT-I) passed by Commissioner of

Shree Hindustan Fabricators

107, Chancellor,
Opp R T O Office, Ring Road,
Surat, Gujarat

.....Appellant

VERS

US

C.C.E. & S.T.-Surat-i

New Building...Opp. Gandhi Baug, Chowk
Bazar,
Surat, Gujarat- 395001

.Respondent

With

Service Tax Appeal No.10391 of 2016

(Arising out of OIO-SUR-EXCUS-001-COM-027-15-16 passed by
Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Hindustan Fabricators..... Appellant

107, Chancellor,
Opp R T O Office, Ring Road,
Surat, Gujarat

VERSUS

C.C.E. & S.T.-Surat-i

..... Respondent

New Building . Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat- 395001

APPEARANCE:

Shri Jigar Shah, Advocate for the Appellant

Shri Sameer Chitkara, Additional Commissioner (AR) for the Respondent

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

Final Order No. A/ 10337-10338 /2020

DATE OF HEARING: 15.10.2019 DATE OF DECISION: 29.01.2020

These appeals have been filed by M/s. Hindustan Fabricators against

demand of Service Tax, Interest, and imposition of penalty.

2. Learned Counsel for the appellant pointed out that they are engaged in provision of service under the category of Works Contract Service, Commercial and Industrial Construction Service and Business Auxiliary Service and held registration under Service Tax for that purpose. During disputed period i.e. 2008-09 to 2013-14 the appellants were engaged in execution of various contract for laying of pipelines for water supply and drainage system and other Civic amenities for Surat Municipal Corporation, Gujarat Water Supply and Sewerage Board (GWSSB), Canal Division, NHAI And M/s. Surat Urban Development Authority which are all Government Organizations. The appellants engaged as main contractor as well as sub-contractor. In some cases the appellants were issued Show Cause Notice demanding Service Tax under the Erection, Commissioning or Installation Service (ECIS) in respect of services provided by them to local authorities for laying of pipelines. The said demand was confirmed by the Original Adjudicating Authority and hence these appeals.

Learned Counsel argued that while demand has been made under Erection, Commissioning or Installation Service there are decisions which hold that such service cannot be classified under the category of ECIS. Learned counsel relied on the decision of tribunal in case of INDIANHUME PIPE CO. LTD. VS COMMISSIONER OF C. EX., Trichy 2008 (12)

S.T.R. 363 (Tri.-Chennai) wherein, it was held that the activity of laying of long distance pipelines would not fall under the definition of ECIS. He argued that the said decision has been upheld by Hon'ble High Court of Madras as reported in 2015 40 S.T.R. 214 (Mad.). He also pointed out that the issue is squarely covered by the decision of larger bench in case of LANCO INFRATECH LTD. VS. CC,CE&ST, HYDERABAD 2015 (38) S.T.R. 709 (Tri.-LB) wherein, it was held that construction of pipelines/conduit for transmission of water/sewerage and associated works like digging of the earth, supporting pipeline/conduit, construction of pumping station together with associated machinery and other construction works cannot be classified under ECIS. He argued that the said decision classified such services under Commercial or Industrial Construction Service for the period up to 01.06.2007 but after that period it is not liable to Service Tax. He also pointed out that the said decision of Larger Bench was followed by tribunal in case of SHONAN SIDDHART (J.V) VS CCE 2017 (51) STR 64 (Tri.- Mumbai).

Learned Counsel pointed out that while the demand has been raised under the head of ECIS and the activity cannot be classified under the head of ECIS. In these circumstances no demand can be sustained under any other head of service. He also relied on the decision of tribunal in case of REAL VALUE PROMOTERS PVT. LTD. VS COMMISSIONER OF GST & CENTRAL EXCISE 2018- TOIL-2867-CESTAT-MAD. He argued that

the tribunal in case of CONCEPT MOTORS PVT. LTD. vide Order no. A/11717/2018 dated 07.08.2018 held that the service tax demand raised under wrong classification cannot be sustained. He argued that in the present case the services of laying of pipeline and allied works are classifiable under Commercial or Industrial Construction Service or Works Contract Service and not under ECIS and, therefore, demand cannot be sustained.

Learned counsel further pointed out that the services provided by them are not commercial in nature in so much as the services have been provided to various Government Organizations like Surat Municipal Corporation, Gujarat Water Supply and Sewerage Board (GWSSB) and Surat Urban Development Authority. He also relied on the decision of Hon'ble High Court of Gujarat in case of BMS PROJECTS PVT. LTD. 2018

(8) GSTL 13 (Guj.) wherein, it was held that the activity conducted by Gujarat Water Supply and Sewerage Board does not have a profit motive and therefore, the services provided to the board cannot be considered commercial activity. Learned Counsel also relied on decision in case of BJSHIRKE CONSTRUCTION TECHNOLOGY PVT LTD 2019-TIOL-646-HC- MUM-ST wherein it was held that the services provided for construction which are not used for commercial

purpose cannot be charged for Commercial Or Industrial Construction Service category.

Learned counsel further argued that after 01.07.2012 the said services are specifically exempted by the negative list. He pointed out that Entry No. 12,13 & 25 of Notification No. 25/2012-ST dated 20.6.2012 clearly covers the activities under taken by them in the negative list.

Learned counsel further pointed out that demand has been raised under Business Auxiliary Service category also. He pointed out that the exact sub-clause of section 65 (19) of the Finance Act, 1994 has not been pointed out while raising the demand under Business Auxiliary Service. He relied on the decision of tribunal in case of SWAPNIL ASNODKAR 2018 (1) TMI 266- CESTAT MUMBAI to hold that demand under these circumstances cannot be sustained.

3. Learned Authorized Representative relied on the impugned order.

4. Learned Counsel argued that the ground relating to non- commercial nature of SMC/GWSSB was not raised before the lower authorities and has been raised for the first time in tribunal. Learned Authorized Representative argued that the appellants have contended that the activity would fall under Works Contract Service. He pointed out that there is no exemption under Works Contract Service in the negative list. Learned Authorized Representative further pointed out the services provided by them was not to SMC or GWSSB in all cases but was to other contractors who were in turn providing services to GWSSB, SMC & Surat Urban Development Authority. Learned Authorized Representative pointed out that the activity done by them is squarely covered under the definition of ECIS. He pointed out that the definition of ECIS at the material time reads as follows:

“Erection, Commissioning or Installation” means any service provided by a commissioning and installation agency, in relation to,—

- (i) *erection, commissioning or installation of plant, “machinery, equipment or structures, whether pre-fabricated or otherwise” or*
- (ii) *installation of—*
 - (a) *electrical and electronic devices, including wirings or fittings therefor; or*
 - (b) *plumbing, drain laying or other installations for transport of fluids; or*
 - (c) *heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or*
 - (d) *thermal insulation, sound insulation, fire proofing or water proofing; or*
 - (e) *lift and escalator, fire escape staircases or travelators; or*
 - (f) *such other similar services;*

He pointed out that the said category specifically covers plumbing, drain laying or other installations for transport of fluids.

5. We have considered rival submissions, we find that the primary defense of the appellant is that the activity under taken by them does not fall under the category of ECIS. It has been argued that since the demand has been made under ECIS only, no demand under any other classification such as Commercial or Industrial Works Construction Service or Works Contract Service can be sustained. For this argument they have relied on the decision of REAL VALUE PROMOTERS PVT. LTD. (supra) and on the decision in the case of CONCEPT MOTORS PVT. LTD. (supra). In the case of CONCEPT MOTORS PVT. LTD. (supra) tribunal has observed as follows :

“As regard the demand of service tax on referral fees received by the appellant from HDFC Chubb insurance company, we find that the service is in connection with business of insurance of HDFC Chubb. In terms of Sub Section 65 of Finance Act, 1994, the service provided by the appellant falls under definition of Insurance Auxiliary Services whereas the Revenue has raised the demand under wrong head. On this ground the demand of service tax under Business Auxiliary Services does not sustain. As per our above discussion, the impugned order is set aside and appeal is allowed.”

The next argument of the appellant is that the service provided by them is not covered under ECIS as held by tribunal in case of INDIAN HUME PIPE CO. LTD. (supra) affirmed by the Hon'ble High Court of Madras. In Para 8, 8.1 & 8.2 of the decision of tribunal in case of INDIAN HUME PIPE CO. LTD. following has been observed:

“8. We have considered the rival arguments. The dispute involves the meaning of the expression and legislative intent behind scope of the levy on erection, commissioning or installation. The impugned order found that up to 16-6-95, the assessee had rendered the taxable activity of erection, commissioning or installation of a plant. The Commissioner found that “plant represented a fixed investment for carrying out certain institutional activity for business”. The water supply system involving pipelines is therefore seen as a plant. The activity undertaken by IHPL is construction of pipeline by earthwork excavation, conveying and lowering of PSC/MS pipes and MS specials, AC pipes, PVC pipes, CI/GI pipes and jointing materials into the trench; laying to proper grade and alignment; refilling the trenches with excavated soil after laying of pipes, construction of sluice valve pits, scour valve pits, air valve pits, thrust blocks, etc.

We find ourselves in agreement with the appellants' reading of the expressions contained in the relevant entry, namely, 'erection, commissioning or installation'. We find it elementary that 'erection' connotes construction or building of a structure and laying of pipeline does not involve erection. We find no ambiguity in the expression installation. It applies to machinery already made which are formally made ready to operate at the site. Installation implies setting up the machinery ready for use, like giving power connections or installing driver software in the case of a machine run with the aid computer software. Commissioning involves the operationalisation of the machinery after which it starts functioning regularly. In laying of long distance pipeline, earth is dug and pipes laid and jointed, and the pipes pass through sumps with boosters at intervals, if necessary. This activity will not involve erection.

As rightly argued by IHPL, the CBEC Circular No. 62/11/2003-S.T., dated 21-8-2003, inter alia, clarified the levy to the same effect as follows :

“1.2 As commonly understood, the activity of installation means the act of putting an equipment, machinery or plant into its place and making it ready for use. The activity of installation will start after erection which would refer to putting up civil structures. Commissioning of a plant would mean operationalising an installed plant/equipment/machinery.”

Whereas erection became part of the entry only from 10-9-04, from 16-6-05 onwards meaning of 'erection, commissioning or installation' [Section 65(39a)] was enlarged to include installation of various devices and equipments. An entry “plumbing, drain laying, or other installation for transport of

fluids” was introduced under sub-section (ii)(b). The impugned order found that the service involved was specifically covered from 16-6-05 under the same head by the entry “plumbing, drain laying, or other installation for transport of fluids”. We are inclined to agree with the appellants that this entry covers such facility provided in a building as it appears in the company of air-conditioning system, lifts, electronic devices including wiring etc. which are installed in a building. The Commissioner found that “plant represented a fixed investment for carrying out certain institutional activity for business”. The ld. Consultant for the department has tried to defend the interpretation of the Commissioner of the expression plant. The Commissioner’s interpretation of a plant would cover a long distance pipeline. We find it difficult to accept the above reading of the word plant in the context it is used. It is an inappropriate selection of the various meanings of this simple word. Plant in popular usage means a cluster of buildings or a building in which machinery are installed usually for manufacture of goods. Long distance pipeline is not even remotely associated with this common understanding of the word plant. We also find that a water supply project is an infrastructure facility and a civic amenity the State provides in public interest and not an activity of commerce or industry. The impugned order also did not hold it to come under a service of commercial or industrial nature as submitted by the ld. Consultant for the Revenue. Therefore, the impugned order demanding duty on the activity of laying of pipeline interpreting it to be erection, commissioning and installation of a plant is totally misconceived and unacceptable.”

While affirming the decision of tribunal in case of INDIAN HUME PIPE(supra), the Hon’ble High Court of Madras relied on the decision of Larger Bench of tribunal in case of LANCO INFRATECH LTD. 2015 (38) S.T.R.709 (Tri.-LB). Hon’ble High Court observed as follows:

“10. On the question as to what happens if the case is covered by Section 65(25b), a larger Bench of the Customs, Excise and Service Tax has already held in *Lanco Infratech Ltd. v. Commissioner of Customs, Central Excise and Service Tax, Hyderabad* [2015 TIOL-768-CESTAT-BANG-LB = [2015 \(38\) S.T.R. 709](#) (Tri. - Bang)] as follows :

“Considered in the light of the precedents referred to herein above; the definitions of ECIS and CICS; the Board clarification dated 7-1-2010; the Dictionary meanings ascribed to the word “conduit”; and provisions of Section 65A(2)(a) and (b), we conclude that construction of a pipeline/conduit for transmission of water/sewerage and involving associated works like digging of the earth, supporting pipeline/conduit, construction of pumping stations together with associated machinery and other construction works, including for transmission of water in lift irrigation projects, cannot be classified under ECIS. These services are only classifiable as CICS. Where the pipeline/conduit laying is executed for Government or Government undertakings as part of irrigation, water supply, or sewerage projects, the works are not exigible to service tax under CICS (prior to 1-6-2007), since these are not primarily for commercial or industrial purposes and are excluded from the scope of the taxable services qua the exclusionary clause definition of CICS, in Section 65(25b) of the Act.”

11. As rightly pointed out by the Tribunal, the assessee was entrusted with the task of laying a long distance pipeline to enable the Tamil Nadu Water Supply and Drainage Board to supply water. It was an activity in public interest, to take care of the civic amenities liable to be provided by the State. Therefore, the Tribunal was right in holding in favour of the assessee.

Hence, the question of law is answered in favour of the assessee.”

In view of categorical findings of Larger Bench as well as Hon'ble High Court of Madras cited above we respectfully hold that the activities under taken by the appellant cannot be classified under ECIS.

The other arguments of revenue regarding classification of services under Works Contract Service or Commercial or Industrial Construction Service become irrelevant as no demand under the said head has been raised by revenue. No charge for classification of the serviced provided by the appellant under the head of Works Contract or Commercial or Industrial Construction Service has been made against the appellant. In these circumstances we are unable to uphold the demand raised against the appellant in respect of activities relating to laying of pipelines for Surat Municipal Corporation, Gujarat Water Supply and Sewerage Board (GWSSB), Canal Division, NHA and M/s. Surat Urban Development Authority.

The revenue has also argued that in some cases the appellant have acted as sub-contractor and not as main contractor. We find that the said argument is of no use as the demand has been raised solely under the category of ECIS and in view of the decision of Hon'ble High Court of Madras and the Large Bench cited above, no demand under the said head can be raised against the appellant.

6. The second part of the dispute relates to service tax under the category of Business Auxiliary Service. A demand of Rs. 1,23,856 has been sustained in respect of sales commission received by the appellant from M/s. Electrosteel Castings Ltd., M/s. Lanco Industries Ltd., and M/s. Pacific Pipe Systems Pvt. Ltd. It has been argued by the appellant that the specific sub-clause of the Business Auxiliary Service under which tax is sought to be demanded has not been identified. He placed reliance on the decision of tribunal in case of SWAPNIL ASNODKAR (supra). We find that in Para 6.1 of the Show Cause Notice in the said para after identifying the amount received as the sales commission following has been expressly stated.

“It also reveals from the details submitted by M/s. Electrosteel Castings Ltd., Ahmedabad that they have given work to M/s. Shree Hindustan to act as their sales commissioner agent for pipes. The said work of commissioner agent fails in the Business Auxiliary Services. M/s. Electrosteel Castings Ltd., Ahmedabad has paid Rs. 5,29,110/- to M/s. Shree Hindustan against the services provided to them which includes amount of Service Tax.”

6.1. Similar, assertions have been made in case of all such three clients of the appellant. We find that specific clarity of charge has been made to levy Service Tax under the category of Business Auxiliary Service and no

prejudice is caused to the appellant on account of this the demand under the head of Business Auxiliary Service is confirmed. The interest and penalty in respect of Business Auxiliary Service is also upheld. The demand of duty, interest and penalties in respect of demand under ECIS category is set aside.

7. Appeal is partly allowed in above terms.

(Pronounced in the open court on 29.01.2020)

(RAMESH NAIR)MEMBER (JUDICIAL)

Mehul

(RAJU)MEMBER (TECHNICAL)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, CHANDIGARH
COURT NO. I**

Appeal No. ST/410/2010 -[DB]

Arising out of Order-in-Original No. 14/LDH/09/R, Dated: 01.01.2010
Passed by the Commissioner, Ludhiana

Date of Hearing: 28.11.2019

Date of Decision: 28.11.2019

**M/s S SOOD AND COMPANY
(161/3, COL, GURDIAL SINGH, ROAD, THE MALL, LUDHIANA
PUNJAB 141001)**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
LUDHIANA, (F-BLOCK RISHI NAGAR, LUDHIANA
PUNJAB 141001)**

WITH

Apennpeal No. ST/411/2010 -[DB]

Arising out of Order-in- Original No. 14/LDH/09/R, Dated: 01.01.2010
Passed by the Commissioner, Ludhiana

**Mr SANJAY SOOD
(161/3, COL, GURDIAL SINGH, ROAD, THE MALL
LUDHIANA, PUNJAB - 141001)**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
LUDHIANA, (F-BLOCK RISHI NAGAR, LUDHIANA
PUNJAB 141001)**

Appellant Rep by: Shri Anil Sood, Adv.

Respondent Rep by: Shri Rajiv Gupta & Shri Bhasha Ram, ARs

CORAM: Ashok Jindal, Member (J)

Bijay Kumar, Member (T)

FINAL ORDER NOS. 61104-61105 of 2019

Per: Ashok Jindal:

The appellants are in appeal against the demand of service tax confirmed against them along with interest and various penalties have been imposed on them.

2. The facts of the case are that an intelligence was gathered that the appellant is a practicing chartered accountant and also providing services, namely, field

investigation, collection of payments, recovery of loans etc. to various banks and financial institutions, therefore, on these services the appellant is liable to pay service tax. On the basis of record provided by the appellant before the Revenue and on the basis of the statement of the appellant, it was alleged that the appellant is liable to pay service tax under the category of business auxiliary service with effect from 01.07.2003 and under the category of business support services with effect from 01.05.2006, it was also revealed from the records that the appellant is collecting the service tax from their clients on the services in question and not deposited in the same with the department. Neither the appellant is showing the same in ST-3 return nor they have paid service tax or the service tax in question being exempted, therefore, the show cause notice dated 23.10.2008 was issued to demand service tax under the category of practicing chartered accountant service, business auxiliary service and business support services for the period of 01.07.2003 to 31.03.2008. The matter was adjudicated. As there is no dispute with regard to payment of service tax on practicing chartered accountants and the same was paid by the appellant in time, therefore for the rest of the services the adjudicating authority confirmed the demand of service tax under the category of Business Auxiliary Service along with interest and various penalties under the finance act were also imposed on both the appellants. Against the said order, both appellants are before us.

3. The Id. Counsel appearing on behalf of the appellants submits that whatever amount they have collected from their clients for providing the services in question on which demand has been confirmed, the appellant has paid the same along with interest before issuance of the show cause notice. He further submitted that the case of the Revenue falls flatly as per the show cause notice itself. As for the period prior to 01.05.2006, the service tax is demanded under business auxiliary service and thereafter under business support service, the service tax can't be demanded under 'Business Auxiliary Service' as held by this Tribunal in the case of *M/s S.R. Kalyanakrishnan Vs. Commissioner of C.ExCochin reported in 2008 (9) S.T.R 255 (Tri.-Bang.)* which states that if the service rendered by the assessee falls under Business Support Service, therefore, no service tax is payable prior to 01.05.2006 under the category of Business Auxiliary Service. In that circumstances, the show cause notice is not sustainable with regard to demand of service tax under Business Auxiliary Service and the impugned order is also not sustainable as the adjudicating authority has gone beyond the allegation in the show cause notice demanding service tax under the business auxiliary service, whereas show cause notice demands under the business support service.

4. On the other hand, Ld. AR opposed the contention of the Ld. Counsel and submits that the service tax has been demanded from the appellants under both the categories i.e. Business Auxiliary Service and Business Support Service, therefore, the adjudicating authority has rightly classified their service under Business Auxiliary Service and demand of service tax is rightly confirmed. He further submits that during the course of investigation, the appellants themselves have admitted that they have collected the service tax and the same has not paid. The said collection of service tax is neither shown in their ST-3 return nor shown as exempted service. He further submitted that the appellant has not paid interest

as per the records placed before the adjudicating authority. He further submits the decision of the S.R. Kalyanakrishnan (Supra) is distinguishable from the facts of the case and the same has been taken care in the impugned order.

5. Heard the parties and considered the submissions.

6. In this case the facts which are not in dispute are that (A) the appellant is practicing chartered accountant and apart from the same, the appellants are providing various services, namely field investigation, collection of payments, recovery of loans etc. to various banks and financial institutions.

7. It is also admitted fact that prior to 01.05.2006 i.e. from 01.07.2003 it has been alleged that the appellant is liable to pay service tax on these services under the category of Business Auxiliary Services, from 01.05.2006 it is alleged in the show cause notice that the appellant is liable to pay service tax under Business Support Service. As these are admitted facts, in this case, as per Revenue's of the view that prior to 01.05.2006 the appellant was not liable to pay service tax under the category of Business Support Service. As per the show cause notice after 01.05.2006 the liability of the appellant arises under the category of Business Support Service. The Ld. adjudicating authority in the impugned order has not correctly examined the decision of S.R. Kalyanakrishnan (Supra) as in the case of S.R. Kalyanakrishnan (Supra) wherein this Tribunal held that if a service has been classified in a particular service at a later stage, the said service is not liable to be taxed under any other category prior to that date. Admittedly in the show cause notice, it has been alleged that after 01.05.2006 the merit classification of the services rendered by the appellant do qualify under Business Support Service, therefore, for the period prior to 01.05.2006, demand of service tax cannot be raised against the appellant under the category of Business Auxiliary Service, therefore, the said demand is set aside.

8. After 01.05.06 it is alleged in the show cause notice that the merit classification of the services in question is under the category of Business Support Service, whereas, the adjudicating authority held that said service do qualify under the Business Auxiliary Services which means the adjudicating authority has gone beyond the scope of the show cause notice, therefore, the adjudication order deserves no merits, hence the same is set aside.

9. On perusal of the record, we record the fact the appellant has collected the service tax from their clients and during the impugned period the appellant has collected certain amount as service tax from the service in question from their clients and the same is required to be deposited by the appellant under Section 73(D) of the Finance Act, 1994, therefore, we direct the applicant to deposit whole of the amount collected as service tax from their clients along with interest within 30 days of the receipt of this order. In the facts and circumstances of the case, no penalty is imposable on the appellants.

10. In these terms, the appeals are disposed of.

(Dictated and pronounced in the open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, CHANDIGARH
COURT NO. I**

Service Tax Appeal No. 407 of 2010

Arising out of OIA- 208-213/CE/LDH/2009, Dated: 15.10.2009
Passed by the Commissioner (Appeals) of Central and Customs,
Chandigarh

Date of Hearing: 03.03.2020

Date of Decision: 03.03.2020

**GURUPREET SINGH MATAHRU
R/O H.NO. 66, PARAS ESTATE LEATHER COMPLEX ROAD
NEAR BASTIPUR DADD, JALANDHAR (PUNJAB)**

Vs

**COMMISSIONER OF CENTRAL EXCISE
CHANDIGARH-I, PLOT NO. 19, CENTRAL REVENUE BUILDING
SECTOR 17-C, CHANDIGARH 160017**

Appellant Rep by: None

Respondent Rep by: Shri Amandeep Kumar, AR

CORAM: D M Misra, Member (J)

Sanjiv Srivastava, Member (T)

FINAL ORDER NO. A/60350/2020

Per: D M Misra:

None present for the appellant. Heard the Ld. AR for the Revenue.

2. This is an appeal against the OIA No. 208-213/CE/LDH/2009 dated 15.10.2009 passed by the Commissioner (Appeals) of Central and Customs, Chandigarh.

3. Briefly stated the facts of the case are that the appellant are engaged in distributors of M/s Amway India Enterprises and are not discharging the service liability on the consideration paid to them by M/s Amway. Consequently, show cause notice was issued to them for recovery of the service tax not paid during the relevant period with interest and penalty. On adjudication, the demand was confirmed alongwith interest and penalty. Aggrieved by the said order, they filed an appeal before the Ld. Commissioner (Appeals), who in turn, rejected their appeal. Hence, the present appeal.

3. The Ld. AR for the Revenue brought to our notice that the issue relating to liability of service tax on the distributors in multi-level marketing system has been settled by this Tribunal in the case of *Surendra Singh Rathore vs.*

Commissioner of Central Excise, Jaipur-I-2014 (34) STR 147 (Tri.-Del.) and also in the case of *Lalit Indore vs. Commissioner of Central Excise, Nashik – 2015 (40) STR 486 (Tri.-Mumbai)*.

4. We find that the facts and circumstances of the case involved in the present case is more a similar to the judgement cited by the Ld. AR for the Revenue. The liability of service tax in multi-level marketing system has been considered by this Tribunal in Surendra Singh Rathore's case (supra) and later followed by the Tribunal in Lalit Indore's case (supra). This Tribunal in Surendra Singh Rathore's case (supra) analysing the agreement which is more or less to the similar facts and circumstances of the case had observed as follows:-

"4. The agreement between the appellants and FSL was for the purpose of selling the company's product as per the RCM Business Marketing Plan (RCM stands for Right Concept Marketing Plan). According to terms and conditions of the agreement between the parties, FSL issues a scratch card having a password along with a standard product "Kit of the Products" by charging a price for same. Any person can submit an application through the internet using password and after acceptance becomes a distributor of the company for the purpose of selling the company's product under the RCM plan. Minimum purchases in terms of RCM products prescribed by the company from time to time is compulsory for a distributor during the month in which he desires to have the commission credited in his account. Company is obligated to remit consideration to the distributor for selling the company's product as per terms of conditions specified in the "RCM Business Marketing Plan" of the company. Particulars of the RCM Business Marketing Plan have been set out in the adjudication order. As per this plan a distributor gets commission on the supply made by FSL and also a share in the commission for introducing new customers, after such distributor propagates/promotes FSL products under "share your views with your friends and relatives concept." Thereafter, when a new customer starts using FSL products they in turn will propagate/promote FSL products to other persons and the distributor gets commission in respect of purchases made by such introducees, down the line. He shares the commission with others on such purchases. Consequently FSL sales are boosted.

5. The question is whether the commission received by the appellants as a consequence of the "RCM Business Marketing Scheme" in relation to discounts offered, constitutes consideration paid by the service receiver FSL to the service provider/appellants.

6. Shri Sarwal ld. Counsel for the appellants submitted that the "RCM Business Marketing Plan" is a Multilevel Marketing Scheme and in this scheme the first distributor 'A' approaches FSL and purchases their products of certain minimum value. 'A' recommends FSL products to another distributor 'B' and 'B' recommends to subsequent introducees to the scheme namely 'C', 'D' and 'E' and the further introducees 'C', 'D' and 'E' are not known to 'A'. Ld. Advocate has submitted that 'A' gets commission on

purchases made by 'C', 'D' and 'E'. It is alternatively contented on behalf of the appellants that the so-called commission paid by FSL to the appellant in respect of purchases made by subsequent distributors 'C', 'D' and 'E' does not amount to commissions for promotion or marketing activities permitted by the petitioner but is dividend paid to 'A' for his efforts for introducing the scheme to new introducees who also become distributors of FSL.

7. On analysis of the terms and conditions of similar agreements between the FSL and the petitioners, the adjudicating authority confirmed the tax liability against the appellants. We are satisfied that RCM (Right Concept Marketing) Business Marketing Plan is neither a new arrangement nor there is any concept of dividends as suggested by the Id. Counsel. This is a clear Multilevel Marketing Service Scheme. The consideration/commission received by the appellants from FSL (this fact is not disputed) is the result of the marketing/promotion of FSL products by the appellants and constitutes a service (Business Auxiliary Service), provided in respect of FSL products to FSL. The commission/consideration is provided according to the terms and conditions, for marketing/promotion efforts by the appellants. The receipt of commission by the appellants clearly makes them providers of "Business Auxiliary Service" as defined under Section 65(19) of the Act. The appellate and adjudication orders are impeccable on this analysis and warrant no interference."

We don't find any reason not to follow the aforesaid precedents. Consequently, following the same, the impugned order is upheld and the appeal being devoid of merit, accordingly, dismissed.

(Operative part of the order was pronounced in the open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, CHANDIGARH
COURT NO. I**

Service Tax Appeal No. 1397 of 2010

(Arising out of Order-in-Appeal No. 36/ST/APPL/CHD-II dated
08.03.2010 passed by the Commissioner (Appeals), Chandigarh)

M/s Indo Global Estates

(SCO 30, Kalgidhar Enclave, Kalka Road, Baltana, Zirakpur, Punjab

Vs

Commissioner of C.E. & S.T.-Chandigarh I

(CR Building, Plot No. 19, Sector 17-C, Chandigarh 160017)

Date of Hearing: 02.03.2020

Date of Decision: 02.03.2020

Appellant Rep by: None

Respondent Rep by: Shri Bhasha Ram, AR

CORAM: Hon'ble Dr D M Misra, Member (J)

Hon'ble Mr Sanjiv Srivastava, Member (T)

FINAL ORDER NO. A/60335/2020

PER SANJIV SRIVASTAVA:

This appeal is directed against order in appeal No 36/ST/APPL/CHD-II/2010 dated 8.03.2010 of Commissioner of Central Excise (Appeal) Chandigarh II. By the impugned order Commissioner (Appeal) has upheld the order in original No 58/AC/DB/STC/08 dated 30.12.2008 of assistant Commissioner Central Excise DeraBassi holding as follows:

“15. Having regard to the facts and circumstances of the case, I reject the refund claim of the noticee”

2.1 Appellant have vide their letter dated 26.04.2008 filed in the office of jurisdictional Deputy Commissioner on 06.06.2008 claimed refund of Rs 24,62,063/- paid by them during the period 12.07.2005 to 10.07.2006. For filing the refund claim they relied upon the CBEC's Letter F No 332/35/2006-TRU dated 01.08.2006.

2.2 Since the refund claim was filed beyond the period of one year from the relevant date as defined under Section 11B of the Central Excise Act, 1944, the same was rejected by the jurisdictional Assistant Commissioner.

2.3 Aggrieved by the order of Assistant Commissioner, Appellants filed the appeal before Commissioner (Appeal). Commissioner (Appeal) has vide the impugned order rejected the appeal.

24 Aggrieved appellants have preferred this appeal before CESTAT.

3.1 In their appeal, appellants have assailed the impugned order stating that-

- The money deposited by them was deposited under mistaken belief that the tax was payable, however the same was not payable. Any amount deposited under the mistake of law will continue to remain as deposit will not acquire the character of tax, and hence the limitation as prescribed by Section 11B will not be applicable.
- They rely on the decision in following cases to support the said arguments:
 - Motorola India P Ltd [2006 (206) ELT 90(Kar)]
 - Indian Ispat Works P Ltd [2006 (3) STR 161(T)]
 - Binjraka Steel Tubes Ltd [2007 (218) ELT 563(T)]
- The refund claim has been filed only for that amount the burden of which has not been passed on to their customer/ clients. Hence the same is not hit by bar of unjust enrichment. In support they had produced the certificate dated 5.1.2010 of Chartered Accountant Shri S K Aggarwal before the Commissioner(Appeal).
- They rely on various circulars and order of various authorities to argue that the amount deposited by them was not tax, because as per these authorities the tax was not payable by them under the category of "*Construction of Complex Services.*"

4.1 The matter was listed for hearing on 03.09.2019, 17.12.2019 and on 02.03.2020. None appeared for hearing on any of these dates despite the notice, nor has any written request for adjournment been received.

4.2 Since none is appearing in the matter, Shri Bhasha Ram, Authorized Representative for the revenue was heard.

4.3 Learned Authorized Representative while reiterating the findings recorded in the impugned order submitted that-

- Appellant had paid the Service Tax amounting to Rs 24,62,063/- during the period 12.07.2005 to 10.07.2006 under the taxable category of "*Construction of Complex Service*";
- Later on they realized that the tax paid by them was not payable by them and filed the refund claim for the said amount;
- The refund claim has been rejected by both the authorities below for the reason that the same had been filed beyond prescribed period of limitation, and also the appellant has not been able to show that they have not passed on the burden of tax paid by them to their customers/clients.
- It is admitted that the amount claimed as refund was paid by the appellant voluntarily without any protest.
- Since the appellant had paid the tax and voluntarily even if the refund was to be claimed it could have been claimed within the period of limitation as prescribed.

- Hon'ble Supreme Court (Constitutional Bench – 9 Member Bench) has in case of Mafatlal Industries [1997 (89) ELT 247 (SC)] has very categorically stated so. Further in case of Anam Electrical Manufacturing Co [1997 (90) ELT 260 (SC)] has again stated the same. Same view has been expressed by the Larger Bench of Tribunal In case of Veer Overseas Ltd [2018 (15) GSTL 59(T-LB)]
- Since the issue is squarely covered by the decisions as above the appeal needs to be rejected.

5.1 We have considered the impugned order along with the submissions made in appeal memo and by the authorized representative during the course of hearing.

5.2 The short point for consideration in this appeal is whether the refund claim filed by the appellant is hit by limitation as provided under Section 11B of the Central Excise Act, 1944 as made applicable to Service Tax matters by Section 83 of Finance Act, 1994.

5.3 We find that the issue involved in the matter is squarely covered by the decision of the **Larger Bench of Tribunal** In the case of **Veer Overseas Ltd [2018 (15) GSTL 59 (T-LB)]**, wherein it following has been held:

7. What is crucial is that the appellants paid the claimed amount as service tax. They have approached the Jurisdictional Authority of service tax for refund of the said money. It is clear that the Jurisdictional Service Tax Authority is governed by the provisions of Section 11B as the claim has been filed as per the said mandate only. Here, I have specifically asked the learned Counsel for the appellant under what provision of law he is seeking the return of the money earlier paid. He admitted that the claim has been preferred in terms of the provisions of Section 11B. If that being the case, it cannot be said that except for limitation other provisions of Section 11B will be made applicable to the appellant. The learned Counsel also did not advance such proposition. He repeatedly submitted that the amount is paid mistakenly. The same is not a tax and should be returned without limitation as mentioned in Section 11B. I am not convinced by such submission.

8. Here it is relevant to note that in various cases the High Courts and the Apex court have allowed the claim of the parties for refund of money without applying the provisions of limitation under Section 11B by holding that the amount collected has no sanctity of law as the same is not a duty or a tax and accordingly the same should be returned to the party. We note such remedies provided by the High Courts and Apex court are mainly by exercising powers under the Constitution, in writ-jurisdiction. It is clear that neither the Jurisdictional Service Tax Authority nor the Tribunal has such Constitutional powers for allowing refund beyond the statutory time limit prescribed by the law. Admittedly, the amount is paid as a tax, the refund has been claimed from the Jurisdictional Tax Authorities

and necessarily such tax authorities are bound by the law governing the collection as well as refund of any tax. There is no legal mandate to direct the tax authority to act beyond the statutory powers binding on them. The Hon'ble Supreme Court in *Mafatlal Industries Ltd.* (supra) categorically held that no claim for refund of any duty shall be entertained except in accordance with the provisions of the statute. Every claim for refund of excise duty can be made only under and in accordance with Section 11B in the forms provided by the Act. The Apex court further observed that the only exception is where the provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the Constitutional limitations. This is a situation not contemplated by the Act. We note in the present case there is no such situation of the provision of any tax levy in so far as the present dispute is concerned is held to be unconstitutional. As already held that the appellant is liable to pay service tax on reverse charge basis but for the exemption which was not availed by them. I hold that the decision of the Tribunal in *Monnet International Ltd.* (supra) has no application to decide the dispute in the present referred case. I take note of the decision of the Tribunal in *XL Telecom Ltd.* (supra). It had examined the legal implication with reference to the limitation applicable under Section 11B. I also note that the said ratio has been consistently followed by the Tribunal in various decisions. In fact, one such decision reached Hon'ble Supreme Court in *Miles India Limited vs. Assistant Collector of Customs* – 1987 (30) E.L.T. 641 (S.C.). The Apex court upheld the decision of the Tribunal to the effect that the Jurisdictional Customs Authorities are right in disallowing the refund claim in terms of limitation provided under Section 27 (1) of the Customs Act, 1962. We also note that in *Assistant Collector of Customs vs. Anam Electrical Manufacturing Co.* – 1997 (90) E.L.T. 260 (S.C.) referred to in the decision of the Tribunal in *XL Telecom Ltd.* (supra), the Hon'ble Supreme Court held that the claim filed beyond the statutory time limit cannot be entertained.

9. The Apex court in *Mafatlal Industries Ltd.* (supra) observed that the Central Excise Act and the Rules made thereunder including Section 11B too constitute "law" within the meaning of Article 265 and that in the face of the said provisions—which are exclusive in their nature—no claim for refund is maintainable except and in accordance therewith. The Apex court emphasized that "the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said Article".

10. Having examined various decided cases and the submissions of both the sides, we are of the considered view that a claim for refund of service tax is governed by the provision of Section 11B for period of limitation. The statutory time limit cannot be extended by any

authority as held by the Apexcourt.”

5.4 Since the issue is squarely covered by the decision of the Larger Bench of the Tribunal, we do not find any merits in this appeal.

6.1 The appeal is dismissed and the impugned order upheld.

(Dictated and pronounced in the open court)

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL No. 50399 OF 2014

(Arising out of Order-in-Original No. 125/GB/2013 dated 27 September, 2013 passed by the Commissioner of Service Tax, Delhi)

Commissioner of Service Tax

...Appellant

Versus

M/s Melange Developers Private Limited

...Respondent

APPEARANCE:

S/Shri Amresh Jain, R.K. Manjhi & Vivek Pandey, Authorised Representatives of the Appellant

Shri A.K. Batra, Chartered Accountant, Shri Anil Sood, Ms. Vibha Narang & Swati Garg, Advocates, for the Respondent

Date of hearing: 26.11.2018

Date of decision: 23.05.2019

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

MISC. ORDER NO. 50388/2019

JUSTICE DILIP GUPTA :

A Division Bench of this Tribunal in its order dated 23 March, 2018 noticed that there were conflicting decisions of Division Benches of the Tribunal on the issue as to whether a sub-contractor is liable to pay Service Tax even if the main contractor has discharged the Service Tax liability on the gross amount and, therefore, considered it appropriate to place the matter before a Larger Bench. This Larger Bench has, accordingly, been constituted.

2. The Respondent was registered with the Service Tax Commissionerate for "Commercial or Industrial Construction" services (section 65(105)(zzq)), "Works Contract" services (section 65(105)(zzza) and "Transport of Goods by Road in a Goods Carriage" services (section 65(105)(zzp)) under the Finance Act, 1944 (hereinafter referred to as the 'Act'). During the period 01 October, 2007 to 31 March, 2012, the Respondent was engaged in providing "Works Contract" service as a sub-contractor to the main contractors and details of the contracts are as follows :

S. No.	Main Contractor	Work Order date	Nature of Work Done by sub-contractor
1.	M/s S. S. Enterprises	08 January, 2007	Supply and application of Prim Paints on Tanks and Piping – Works Contract Service

2.	M/s Vijay Nirman Co. P	04 April, 2009	Blasting and Painting Works – Works Contract Service
3.	M/s D. K. Industries	20 May, 2008	Grill Blasting and Painting – Works Contract Service

3. It was noticed by the Department that in regard to the work orders awarded by M/s S. S. Enterprises, M/s Vijay Nirman Company Private Limited and M/s D.K. Industries, the Respondent had provided services mentioned in the above table as a sub-contractor, but had not paid Service Tax. Accordingly, a show cause notice dated 23 April, 2013 was issued to the Respondent requiring it to explain as to why Service Tax should not be demanded and recovered from it by invoking the extended period of limitation with penalty and interest. The Respondent contended, on the basis of letters received from the main contractors, that since the main contractors had discharged Service Tax liability on the entire amount of contract, it being a sub-contractor, was not required to discharge Service Tax liability on the services provided in these projects.

4. The Commissioner, Service Tax Commissionerate, New Delhi, passed a detailed order dated 06 September, 2013 dropping the proceedings initiated by the show cause notice dated 23 April, 2013 insofar as the demand of Service Tax is concerned, but imposed a penalty of Rs. 10,000/- on the Respondent under Section 77 of the Act for various omissions and commissions. The Commissioner referred to the Circulars dated 02 July, 1997, 13 October, 1997, 07 October, 1998, 17 December, 2004 and the Master Circular dated 23 August, 2007 and observed that till 22 August, 2007 a sub-contractor was not required to pay any Service Tax in cases where the principal contractor had discharged the Service Tax on the gross amount paid by it to the sub-contractors. The Commissioner further observed that even after the issuance of the Master Circular dated 23 August, 2007 that superseded all the earlier circulars, clarifications and communications and provided that a sub-contractor is essentially a taxable service provider, the payment of Service Tax by a sub-contractor would result in double taxation and in any case it would be admissible to the main contractor as CENVAT Credit resulting in revenue neutrality. In reaching such a conclusion, the Commissioner felt bound by the observations made by the Ahmedabad Tribunal in **M/s Urvi Construction vs CST, Ahmedabad**, reported in **2010 (17) STR 302 (Tri. -Ahd)**. The proceedings initiated by the show cause notice were, therefore, dropped by the Commissioner but penalty was imposed as the assessee had failed to adhere to the provisions of the CENVAT Credit Scheme for discharge of Service Tax liability. This was, according to the Commissioner, for the reason that at every stage under the CENVAT Scheme the provision of service is taxed and would not lead to double taxation as the credit of the tax earlier paid would be available at a subsequent stage and this would also ensure correct payment of tax to the government exchequer. The relevant observations of the Commissioner in the order are reproduced below:

“20. In this connection, I observed that it is a fact that no tax can be levied on single

activity twice as per the statutory provisions of service tax law. Section 66 of the Act, speaks levy of service tax on the taxable services mentioned in Section 65 of the Act *ibid*. However, in case of service provider liability of paying service tax has cast upon on them whereas the service tax is ultimately collected from the service receiver itself. This all has been done by the legislature to safeguard the government revenue in case the service recipient does not make payment of service tax on the services received by them. In the instant case, the service receivers have themselves discharged whole the service liability on the gross amount received by the sub- contractors from them which is also not disputed in the SCN itself. Therefore, requirement of payment of service tax on the taxable service as per Section 66 of the Finance Act is fulfilled. Hence, I find force in the contention of the assessee that in case the assessee is made to pay tax on the gross amount received by them as sub-contractor from

23.08.07 to 31.03.10, it will amount to double taxation which

is totally against the provisions of the Service Tax Law. Further, in the case of *M/s Urvi Construction Vs. CST, Ahmedabad – 2010 (17) STR 302 (Tri. -Ahmd.)*, the Hon'ble Tribunal has held that the assessee as a sub-contractor is not liable to pay service tax when the main contractor has paid service tax on the service.

21. I also find that even if the service tax under Section 68 of the Act read with Rule 6 of the Rules would have been paid by the noticee on the construction service rendered to their principle contractors (*M/s SS Enterprises, M/s Vijay Nirman Co. Pvt. Ltd., & M/s D.K. Industries*) as sub-contractor then the said amount of tax would have been admissible to the main contractors as CENVAT credit under CENVAT Credit Rules, 2004, therefore, there would be revenue naturally in the instant case and it is a well settled legal position that where revenue neutrality arises, no service tax can be demanded by the revenue.
22. In view of the above discussions, I hold that the noticee is not liable to pay service tax on the gross amount received by them as a sub-contractor as alleged in the SCN. Further, as no service tax is either demandable or recoverable from the noticee, the allegations with respect to interest payable by the noticee as well as question of imposing penalties under section 76 and 78 of the Act as proposed in impugned SCN do not survive.
23. However, while holding that the same amount representing the value of taxable services cannot be subjected to incidence of Service Tax both at the hands of sub-contractor and the main contractor but to my view it is equally important that under the CENVAT scheme every stage of provision of service is required to be taxed and cannot be ignored in as much as the Scheme does not lead to any double taxation as at every stage the credit of earlier tax paid is available at subsequent stage and also ensures the correct payment to the government exchequer. Further, the department's clarifications issued vide Circular No. 96/7/2007-ST dated 23. 08. 2007 clearly supports my above view. Therefore, I am of considered opinion that the noticee has miserably failed to discharge their procedure liability laid down under the provisions of Finance Act, 1994, as amended read with Service Tax Rules made thereunder, in as much as it is not open to any assessee to determine the stage of discharge of their due Service Tax liability particularly when the same has been clearly provided under

the relevant provisions itself. Further, such procedural lapse could have lead to tax evasion which is admittedly not there as per the documents available on record and also the fact of discharge of due Service Tax by the main contractor instead of sub-contractor is not disputed in the SCN itself. Although, I am of the view that the noticee should be punished very heavily in the present case but I am constrained to impose the maximum penalty which I am empowered to impose under the provisions of Section 77 of the Act.

24. Accordingly, I pass the following order :-

ORDER

In view of the above discussions and findings, I order to drop the proceedings initiated vide SCN No. 53/Audit/ 2013-14 dated 23. 04. 2013 issued under C. No. I-26(494)ST/ AMR/Gr. A7/53/2011-12 against M/r Melange Developers Pvt. Ltd., C-7/231, IInd Floor, Sector-7, Rohini, New Delhi- 85, to the extent of demanding Service Tax including Cess & SHEC amounting to Rs. 69,95,854/- under proviso to Section 73(1) of the Act along with proposal for imposing penalties under Section 76 and 78 of the Act. However, I hereby impose a penalty of Rs. 10,000/- upon the noticee under Section 77 of the Act for their various omissions & commissions.”

5. Shri Amresh Jain and Shri Vivek Pandey, learned Authorised Representatives of the Department, submitted that at the time when Service Tax was introduced w.e.f. 01 July, 1994, there was no credit mechanism and so to remove any cascading effect, Circulars were issued from time to time for exemption from payment of Service Tax by a sub-contractor. However, credit mechanism was introduced through Service Tax Credit Rules w.e.f. 01 August, 2002 that gave benefit of tax paid on input services, if input services and output services fell under the same taxable service. An amendment was subsequently made on 14 May, 2003 in the Rules giving the benefit of tax paid on input services, even if the input services and output services belonged to different taxable categories. Later, with effect from 10 September, 2004 the Service Tax Credit Rules were superseded by CENVAT Credit Rules, 2004. Learned Authorised Representative, therefore, contended that after the issuance of the Master Circular dated 23 August, 2007 that superseded all circulars, clarifications and communications, a sub-contractor, being essentially a taxable service provider is required to pay Service Tax. Elaborating his submissions, it was contended that every service provider has to discharge Service Tax liability on the activity undertaken by him on the consideration received, and if the recipient of the Service Tax undertakes a further taxable service, he has to discharge Service Tax liability by taking credit of the Service Tax paid at the preceding stage so that there is no double taxation.

6. Shri A. K. Batra, learned Chartered Accountant and Shri Anil Sood, learned Counsel both appearing for the sub-contractors, however, contended that imposition of any Service Tax liability on a sub-contractor will amount to double taxation, which would not only be against the spirit of Service Tax Law, but would also be violative of the provisions of Article 265 of the Constitution since it would result in demand of Service Tax without any authority of law. The

submission, therefore, that was advanced was that in a situation when the main contractor has discharged Service Tax liability, there will be no revenue loss to the Department if the sub-contractor does not pay the Service Tax and in any view of the matter recovery of tax from the sub-contractor shall give rise to a revenue neutrality situation. Reliance was placed by learned Counsel on certain decisions, to which we shall refer to at the appropriate stage, to contend that Service Tax imposed upon a sub-contractor is liable to be set aside on grounds of 'Double Taxation' and 'Revenue Neutrality'.

7. We have considered the submissions advanced by the learned Authorised Representative of the Department and the learned Chartered Accountant and learned Counsel for the Respondent.

8. It is w.e.f. 01 June, 2007 that sub-section (zzzza) was inserted in Section 65(105) of the Act in relation to execution of 'Works Contract'. Taxable Service under Section 65(105)(zzzza) is defined as :

“65(105)(zzzza) - to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation—For the purposes of this sub-clause, “works contract” means a contract wherein,—

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out,—
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or waterproofing, lift and escalator, fire escape staircases or elevators; or
 - (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
 - (c) construction of a new residential complex or a part thereof; or
 - (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
 - (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;”

9. It is not in dispute that the activity undertaken by the sub-contractor falls under the category of 'Works Contract' service. What is sought to be contended is that the main contractors, who had given sub-contracts to the sub-contractor through various work orders, had already discharged the Service Tax liability on the entire contract amount and, therefore, the sub-contractor was not required to pay any Service Tax.

10. Section 66, as substituted by the Finance Act, 2007, provides that there shall be levied a tax (hereinafter referred to as the 'Service Tax') @ 12% of

the value of taxable services of various sub-clauses of clause (105) of section 65 and collected in such a manner as may be prescribed. Section 68 of the Act provides that every person providing taxable service to any person shall pay Service Tax at the rate specified in section 66 in such a manner and within such a period as may be prescribed. Section 94 of the Act deals with power to make Rules. Sub-section (1) provides that the Central Government may, by Notification in the official gazette, make Rules for carrying out the provisions of Chapter V of the Act. Sub-section (2)(a) provides that such Rules may provide for collection and recovery of Service Tax under sections 66 and 68 of the Act. In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 and section 94 of the Act and in supersession of the CENVAT Credit Rules, 2002 and Service Tax Credit Rules, 2002, the Central Government framed the CENVAT Credit Rules, 2004. It is, therefore, clear that **every person** (which would include a sub-contractor) providing taxable service to **any person** (which will include a main contractor) **shall pay Service Tax** at the rate specified in section 66 in the manner provided for. The manner has been provided for in the CENVAT Credit Rules of 2004. 'Input Service' has been defined to mean, any service used by a provider of output service for providing an output service. 'Output Service' has been defined to mean any service provided by a provider of service located in the taxable territory. Rule 3 stipulates that a provider of output service shall be allowed CENVAT Credit of the Service Tax leviable under Section 66, 66A and 67B of the Act. Thus, in the scheme of Service Tax, the concept of CENVAT Credit enables every service provider in a supply chain to take input credit of the tax paid by him which can be utilized for the purpose of discharge of taxes on his output service. The conditions for allowing CENVAT Credit have been provided for in Rule 4. The mechanism under the CENVAT Credit Rules also ensures that there is no scope for double taxation.

11. In the face of these provisions, it may not be open to a sub-contractor to contend that he should not be subjected to discharge the Service Tax liability in respect of a taxable service when the main contractor has paid Service Tax on the gross amount, more particularly when there is no provision granting exemption to him from payment of Service Tax.

12. It is true that prior to 2007, various Service Tax, Trade Notices/ Instructions/Circulars/Communications had been issued exempting certain category of persons from payment of Service Tax. A sub-contracting Customs House Agent was exempted from payment of Service Tax on the bills raised on the main Customs House Agent. When an architect or interior decorator sub-contracted part/whole of its work to another architect or interior decorator, then no Service Tax was required to be paid by the sub-contractor, provided the principal architect or interior decorator had paid the Service Tax.

However, all these Trade Notices/Instructions/ Circulars/ Communications were superseded by the Master Circular dated 23 August, 2007 issued by the Government of India, Ministry of Finance. The Circular noticed that when Service Tax was introduced in the year 1994 there were only three taxable services, but later 100 services had been specified as taxable services and that since the

introduction of Service Tax, number of clarifications had been issued, but it had become necessary to take a comprehensive review of all the clarifications keeping in view the changes that had been made in the statutory provisions, judicial pronouncements and other relevant factors. The relevant portion of the Master Circular, insofar as it relates to sub-contractors, is reproduced below :

999.03 / 23.08.07	A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.	A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.

13. The Master Circular clarifies that the services provided by sub-contractors are in the nature of input services and since a sub-contractor is a essentially taxable service provider, Service Tax would be leviable on the taxable services provided. It has also been clarified that even if a taxable service is intended for use as an input service by another service provider, it would still continue to be a taxable service.

14. It can be used that if a main contractor has paid Service Tax on the entire amount of the main contract out of which a portion has been given to a sub-contractor, then if a sub-contractor is required to pay Service Tax, it may amount to 'Double Taxation', but this issue has to be examined in the light of the credit mechanism earlier introduced through Service Tax Credit Rules, 2002 granting benefit of tax paid on input services if the input services and the output services fell under the same taxable services and the subsequent amendment made on 14 May, 2003 granting benefit of tax paid on input services even if the input service and the output service belonged to different taxable categories. The aforesaid Service

Tax Credit Rules were later superseded on 10 September, 2004 by CENVAT Credit Rules, 2004. Rule 3 of these Rules provides that a manufacturer or producer of final product or a provider of output service shall be allowed to take credit (known as 'CENVAT Credit') of various duties under the Excise Act, including the Service Tax leviable under sections 66, 66A and 66B of the Act. Rule 3(4) further provides that CENVAT Credit may be utilized for payment of Service Tax on any output service. It is for this reason that the Master Circular dated 23 August, 2007 was issued superseding all the earlier Circulars, Clarifications and Communications.

15. It is not in dispute that a sub-contractor renders a taxable service to a main contractor. Section 68 of the Act provides that every person, which would include a sub-contractor, providing taxable service to any person shall pay Service Tax at the rate specified. Therefore, in the absence of any exemption granted, a sub-contractor has to discharge the tax liability. The service recipient i.e. the main contractor can, however, avail the benefit of the provisions of the CENVAT Rules. When such a mechanism has been provided under the Act and the Rules framed thereunder, there is no reason as to why a sub-contractor should not pay Service Tax merely because the main contractor has discharged the tax liability. As noticed above, there can be no possibility of double taxation because the CENVAT Rules allow a provider of output service to take credit of the Service Tax paid at the preceding stage.

16. It is in this light that the main contention of learned Counsel for the Respondent that if a sub-contractor is required to pay Service Tax when the main contractor has actually discharged Service Tax liability, it would amount to 'Double Taxation', has to be examined. For this contention, reliance has been placed by the learned Counsel for the Respondent on the following decisions of this Tribunal :

- (i) *Urvi Construction vs Commissioner of Service Tax, Ahmedabad*, reported in 2010 (17) STR 302 (Tri. -Ahmd.);
- (ii) *BCC Developers and Promoters Pvt. Ltd. vs Commissioner of Central Excise, Jaipur*, reported in 2017 (52) STR 22 (Tri. -Del.);
- (iii) *M/s Dhaneshra Engineering Works vs Commissioner of Central Excise, Allahabad*, reported in 2018 (2) TMI 788 – CESTAT – Allahabad;
- (iv) *Power Mech Projects Ltd. vs Commissioner of Customs, Guntur*, reported in 2017 (48) STR 165 (Tri. -Hyd.); and
- (v) *M/s Edac Engg. Ltd. vs CST, Chennai*, reported in 2017 (6) TMI 685 CESTAT Chennai.

17. In **Urvi Construction** a learned Member of the Tribunal observed :

- “2. Further the learned advocate also submits that in the Master Circular issued by the Board vide Circular No. 96/7/2007-S. T., dated 23-8-2007, a stand has been taken that there is no exemption to a sub

contractor from payment of service tax merely because the contractor pays the tax. However, he submits that for the period circular issued late by the Board in 1997 was applicable and according to this Circular where the services have been provided by the sub-contractors such sub contractors are not liable to pay service tax and service tax liability is on the main contractor. Taking note of the fact of the contention that main contractor has paid the service tax and charging service tax on the sub- contractor again would amount to taxing the same service twice and also taking note of the circular cited by the learned advocate and the decisions of the Tribunal cited, I find that if the appellant is required to pay the service tax it would amount to taxing the same service twice and the circular and the Tribunal's decision are squarely applicable to the facts of this case and accordingly appeal is allowed with consequential relief to the appellant."

18. In **BCC Developers and Promoters Pvt. Ltd.** it was observed:

"6.1. We agree with the submission of the ld. Counsel that no double taxation is permissible under the law. The Constitution (Article 265) provides to take the exact amount of tax i.e. neither more nor less. In the instant case, if the principal has already paid the Service Tax, then the same cannot be demanded from the appellant. As per the clarification of the Board's Circular dated 23.8.2007 as well as dated 7.10.1998, if the principal had not paid the Service Tax then the same can be charged. If the Service Tax has already been paid by the principal, then the same cannot be demanded again."

19. **M/s Dhaneshra Engineering Works** followed the aforesaid decision in **BCC Developers and Promoters Pvt. Ltd.**

20. In **M/s Edac Engg. Ltd.**, the Division Bench, after placing reliance upon the decision of the Tribunal in **Urvi Construction**, observed :

"6.2. We are therefore of the considered opinion that these case laws are distinguishable from the decision taken by this very Bench in the case of the present appellants Edac Engineering Ltd. in Final order dated 19.12.2016. We also find that the very same Board's Circular No. 97/8/2007-ST dated 23.08.2007, relied upon by the Ld. AR has been taken note of by the Tribunal in **Urvi Construction (supra)**. This being so, we have no hesitation in ruling that when service tax has been paid by the main contractor, charging the sub- contractor again will amount to taxing the same service twice. In the circumstances, the issue at hand also requires to be remanded to the adjudicating authority to verify whether the service rendered by the appellant has suffered tax in the hands of the principal contracts. If that aspect is able to be proved by the appellants, no tax liability will accrue to them. Towards this end, the adjudicating authority will give suitable opportunity to the appellants to present their case. Appellants are also produce all evidence and documents to establish their claim that the tax liability required to be discharged by them has already been paid up by the main contractor. If that is provided, their will obviously

be no demand for interest unless such demands have been made belatedly. Once this aspect is also able to be proved by the appellant, imposition of penalty will also not arise.”

21. The aforesaid decisions do not take into consideration the impact of the CENVAT Rules. It would, therefore, not be correct to conclude that double taxation would result if a sub-contractor is required to discharge the Service Tax liability even if the main contractor has discharged the tax liability.

22. The decisions of the Tribunal holding that double taxation will not result if a sub-contractor discharges the tax liability because of the CENVAT Rules, now need to be referred to.

23. In Max Tech Oil & Gas Services Pvt. Ltd. Vs Commissioner of Service Tax, Delhi, reported in 2017 (52) STR 508 (Tri. -Del.), the Division Bench has held :

- “6. Regarding the contention of the appellant that they have acted only as a sub-contractor and demanding service tax from them will amount to double taxation as the main contractor also is rendering similar service to ONGC, we find no legal basis for the contention of the appellant. The service tax leviable at the hands of each service provider is decided by nature of activities undertaken by them. If the same is covered by scope of the taxable entry under Finance Act, 1994 tax liability arises. The said service becomes part of final service rendered by main contractor is of no consequence to determine the tax liability of each and every service provider. **If at all, the service tax paid by a sub-contractor which becomes part of service further provided by the main contractor, the scheme of credit as envisaged by the Cenvat Credit Rules, 2004 will come into play subject to fulfilment of conditions therein.** It is nobody’s case that the sub-contractors per se are not liable to service tax even if they rendered taxable service. ”

[emphasis supplied]

24. The same view was taken by the Division Bench of the Tribunal in **CCE & ST, Raipur vs. M/s J. K. Transport**, reported in **2017 (9) TMI 993 – CESTAT New Delhi**. The relevant paragraph is reproduced below :

- “5. We find that the CBEC vide Circular dated 23.08.2007 has clarified that the services provided by the sub-contractor is a taxable service, even if the same is used for completion of the work by the main service provider. Thus, for providing the taxable service, the sub-contractor is liable for payment of service tax on provision of such service. ”

25. Similar views were taken by the Tribunal in (i) **Max Logistics Ltd. vs Commissioner of Central Excise, Raipur**, reported in **2017 (47) STR 41 (Tri. -Del.)**; (ii) **Hargovind Electric Decorators vs. Commissioner of Central Excise, Jaipur-I**, reported in **2016 (43) STR 619 (Tri. -Del.)**; and (iii) **Sew Construction Ltd. vs Commissioner of Central**

Excise, Raipur, reported in **2011 (22) STR 666 (Tri. -Del.)**.

26. At this stage, it would also be useful to refer to a larger Bench decision of the Tribunal in **Vijay Sharma & Company vs CCE, Chandigarh**, reported in **2010 (20) STR 309 (Tri.-LB)**. The issue that arose before the larger Bench was as to whether service provided by a sub-broker are covered under the ambit of Service Tax and taxable or not. After noticing that a sub-contractor is liable to pay Service Tax, the larger Bench examined as to whether this would result in double taxation if the main contractor has also paid Service Tax and observed that if service tax is paid by a sub-broker in respect of same taxable service provided by the stock broker, the stock broker is entitled to the credit of the tax so paid in view of the provisions of the CENVAT Credit Rules. The relevant paragraph 9 is reproduced below :

- “9. It is true that there is no provision under Finance Act, 1994 for double taxation. The scheme of service tax law suggest that it is a single point tax law without being a multiple taxation legislation. In absence of any statutory provision to the contrary, providing of service being event of levy, self same service provided shall not be doubly taxable. If Service tax is paid by a sub-broker in respect of same taxable service provided by the stock-broker, the stock broker is entitled to the credit of the tax so paid on such service if entire chain of identity of sub-broker and stock broker is established and transactions are provided to be one and the same. In other words, if the main stock broker is subjected to levy of service tax on the self same taxable service provided by sub-broker to the stock broker and the sub-broker has paid service tax on such service, the stock broker shall be entitled to the credit of service tax. Such a proposition finds support from the basic rule of Cenvat credit and service of a sub-broker may be input service provided for a stock-broker if there is integrity between the services. Therefore, tax paid by a sub-broker may not be denied to be set off against ultimate service tax liability of the stock broker if the stock broker is made liable to service tax for the self same transaction. Such set off depends on the facts and circumstances of each case and subject to verification of evidence as well as rules made under the law w. e. f. 10-9-2004. No set off is permissible prior to this date when sub-broker was not within the fold of law during that period.”

27. The Commissioner did express in the impugned order that under the CENVAT Scheme every stage of provision of service is required to be taxed and if a sub-contractor discharges the Service Tax liability, it will not result in double taxable even if the main contractor discharges the Service Tax liability because the credit of the earlier tax paid is available at a subsequent stage, but it is because of the decision of the Tribunal in **Urvi Construction**, that the Commissioner held that double taxation would result if a sub-contractor is also required to discharge Service Tax liability when the main contractor has discharged the entire liability.

28. Learned Counsel for the Respondent has, however, relied upon the decision of the Supreme Court in **Larsen and Toubro Ltd. vs**

Additional Deputy Commissioner of Commercial Taxes and Anr., reported in **2016-TIOL-155-SC-VAT**. In this case, the contracts which were secured by the Appellant therein were works contract and a part thereof was assigned to the sub-contractor who had submitted returns and said taxes for the execution of the works contract. During the course of the assessment, the Appellant submitted that the sub-contractors had already been taxed and, therefore, the Appellant cannot be taxed again under Section 6B of the Karnataka Sales Tax Act. The submission, therefore, was that the value of the work entrusted to the sub-contractors could not be taken into account while computing the total turnover of the Appellant for the purpose of taxation under the Karnataka Sales Tax Act. It is in view of the provisions of the Karnataka Sales Tax Act that the Supreme Court observed that the value of the work entrusted to the sub-contractors or payments made to them shall not be taken into consideration while computing total turnover for the purposes of Section 6-B of the Karnataka Sales Tax Act. This decision of the Supreme Court will not come to the aid of the Respondent in this case in view of the specific provisions of Section 66 and 68 of the Act as also the CENVAT Rules discussed in the foregoing paragraphs of this order. It also needs to be noted that there is no provision for input tax credit on deemed sales in levy of VAT.

29. The submission of the learned Counsel for the Respondent regarding 'revenue neutrality' cannot also be accepted in view of the specific provisions of Section 66 and 68 of the Act. A sub-contractor has to discharge the Service Tax liability when he renders taxable service. The contractor can, as noticed above, take credit in the manner provided for in the CENVAT Credit Rules of 2004.

30. Thus, for all the reasons stated above, it is not possible to accept the contention of the learned Counsel for the Respondent that a sub-contractor is not required to discharge Service Tax liability if the main contractor has discharged liability on the work assigned to the sub-contractor. All decisions, including those referred to in this order, taking a contrary view stand overruled.

31. The reference is, accordingly, answered in the following terms:

"A sub-contractor would be liable to pay Service Tax even if the main contractor has discharged Service Tax liability on the activity undertaken by the sub-contractor in pursuance of the contract. "

32. The Appeal shall now be placed before the Division Bench for hearing.

(Pronounced in the open Court on 23. 05. 2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. I**

Service Tax Appeal No. 52142 of 2016

Arising out of the Order-in-Original No. DLI/SV/TAX/001/COM/027/15-16, Dated: 29.02.2016

Passed by The Principal Commissioner of Service Tax, New Delhi

Date of Hearing: 20.01.2020

Date of Decision: 20.01.2020

**M/s AKBAR TRAVELS OF INDIA PVT LTD
PLOT NO. 17, 1ST FLOOR, OPP. PUSA ROAD CITY HOSPITAL
17, PUSA ROAD, KAROL BAGH, NEW DELHI-110005**

Vs

**THE PRINCIPAL COMMISSIONER OF SERVICE TAX
17-B, I.A.E.A. HOUSE, I.P. ESTATE, M.G. ROAD
NEW DELHI - 110002**

Appellant Rep by: Shri S S Gupta, CA

Respondent Rep by: Dr RadheTallo, AR (DR)

CORAM: Hon'ble Mr Dilip Gupta, President

Hon'ble Mr C L Mahar, Member (T)

FINAL ORDER NO. 50146/2020

Per: Dilip Gupta:

This appeal seeks to assail the order dated 29 February 2016 passed by the Principal Commissioner of Service Tax, New Delhi the Principal Commissioner, by which the demand of service tax has been confirmed after invoking the extended period of limitation provided for under the proviso to section 73 (1) of the Finance Act, 1994 the Act. After invoking the provisions of section 72 of the Act, the taxable value of services has been computed under rule 6 (7) of the Service Tax Rules, 1994 the Rules. The Principal Commissioner has also ordered for recovery of Cenvat credit not admissible and wrongly availed. The Principal Commissioner has also ordered for payment of interest and penalty.

2. The appellant is engaged in the business of booking of tickets by air and is registered under the category of air travel agent. It filed ST-3 returns. For the period 2007-2008 to 2011-2012 it opted to make payment of service tax on an amount calculated @0.6% of the basic fare in case of domestic booking and @1.20% of the basic fare in case of international bookings of passage for travel by air during any calendar month or year. The Appellant has stated that the total number of airlines for which the appellant booked tickets is 73, but as some of the airlines are small, no bookings took place

in particular months. It has also been stated that the method of payment of commission to the agents varies from airline to airline. Some of the airlines do not make payment of commission, but permit making recovery of transaction charges. Some of the airlines pay commission on the basic fare and some of the airlines pay commission on basic fare plus fuel surcharge, for which the code name is YQ. The appellant claims that the total fare recovered from the customers by an agent is normally broken up in the ticket in components like :-

(i) Basic fare

(ii) YQ = (fuel surcharge)

(iii) WO = (passenger service fee)

(iv) Other tax.

3. The Appellant is required to submit a Billing Settlement Plan BSP statement every fortnight of every airline. This statement gives the breakup of the fare of the ticket between basic fare, fuel surcharge, miscellaneous expenses and other charges. This amount, it is claimed, is not the income of the Appellant, but is the amount payable to the airlines. The income of the Appellant is only from the commission received from the airline, which is accounted for in the financial ledger.

4. A show cause notice dated 16 April 2013 was issued to the appellant. It mentions that during the audit conducted in March/April 2013 for the period 2007-2008 to 2010-2011, the appellant produced records pertaining to the period 2010-2011 and 2011-2012 only. The show cause notice, therefore, computed the value of taxable service under section 72 of the Act that relates to best judgment assessment. A demand on various other charges under different categories recovered by the appellant was also made and the appellant was also denied Cenvat credit.

5. The appellant filed a detailed reply. The Principal Commissioner did not agree with the method adopted for computation of the taxable service under section 72 of the Act and adopted a different method after taking into account the BSP statement made available by the appellant. The demand made on various other income has also been confirmed by the Principal Commissioner.

6. Shri S.S. Gupta, learned Chartered Accountant appearing for the appellant has submitted:

(i) Under Rule 6 (7) of the Rules, a person liable for paying service tax in relation to the services provided by an air travel agent shall have the option to pay an amount calculated @ 0.6% of the basic fare in case of domestic bookings and @ 1.2% of the basic fare in case of international bookings, of passage for travel by air towards the discharge of the service tax liability instead of paying service at the rate specified in Section 66 of the Act. The basic fare has been defined in the Explanation to mean that part of the air fare on which commission is normally paid to the air travel agents by the

airlines. Thus, as only four airlines out of seventy three airlines handled by the appellant were paying commission on fuel surcharge, this commission could not have been included in the "basic fare", since it is normally not paid to the air travel agent by the airline ;

(ii) This was specifically stated by the appellant in reply to the show cause notice, but the Principal Commissioner failed to advert to this issue in the impugned order ;

(iii) Even the method adopted by the Principal Commissioner for computing the taxable income under section 72 of the Act is not correct and even otherwise no opportunity was provided by the Principal Commissioner to the appellant to make any submission on the said method adopted by the Principal Commissioner. If opportunity had been given to the appellant, it could have satisfied the Principal Commissioner that commission is not received on international bookings, but the Principal Commissioner has accounted the average commission as 3% of domestic as well as international bookings ;

(iv) The Principal Commissioner committed an error in denying the benefit of Cenvat credit; and

(v) The demand on other incomes has also been confirmed without any discussion. The appellant, however, is not pressing the demand on incentive to abacus since only a meager amount of Rs. 12,500/- has been demanded on this.

7. The learned Authorized Representative of the Department has, however, supported the impugned order and has stated that since the appellant did not furnish the records for the years 2007-2008, 2008-2009 and 2009-2010, the Principal Commissioner was justified in computing the taxable income on the basis of best judgment assessment as contemplated under section 72 of the Act. The learned Authorized Representative also submitted that the commission paid on fuel surcharge would be included in the basic fare as it is normally paid by the airlines to the travel agents. Learned Authorized Representative has also submitted that the demand on other heads has been correctly confirmed.

8. The submissions advanced by the learned Authorized Representative of the appellant and the learned Authorized Representative of the Department have been considered.

9. According to the learned Authorized Representative of the appellant, the main dispute is with regard to the service tax on the commission received by the appellant, which is to the extent of Rs. 7,75,00,000/- out of the total demand of Rs. 8,15,00,000/- that has been confirmed by the Principal Commissioner. The contention is that the commission received by the appellant could not have been added to the basic fare for the reason that fuel surcharge is normally not paid to the air travel agents by the airlines and though this issue was specifically raised by the appellant in reply to

the show cause notice, but it has not been considered by the Principal Commissioner in the impugned order.

10. As noticed above, under rule 6 (7) of the Rules, a person is liable to pay service tax in relation to the services provided by an air travel agent, has an option to pay an amount calculated @0.6% of the basic fare in case of domestic bookings and @1.2% of the basic fare in case of international bookings. 'Basic fare' has been defined in the Explanation to mean that part of the air fare on which commission is normally paid to the air travel agent by the airlines. According to the appellant, commission is normally not paid to the air travel agents by the airlines on fuel surcharge and, therefore, commission, if any, received from the four airlines out of the seventy three airlines for fuel surcharge could not have been subjected to service tax under rule 6 (7) of the Rules. In support of this submission, learned Chartered Accountant has placed reliance upon the decision of the Division Bench of this Tribunal in *Kafila Hospitality and Travels Ltd. versus Commissioner of Service Tax, Delhi 2015 (38) S.T.R. 184 (Tri. – Del.)*

11. It is a fact that though a defence was taken by the appellant in reply to the show cause notice that the commission received on fuel surcharge could not have been subjected to levy of service tax under rule 6 (7) of the Rules, but there is no discussion of this issue in the impugned order.

12. In *Kafila Hospitality & Travels Ltd.*, Explanation to rule 6 (7) came up for interpretation before the Tribunal and the observations are as follows :-

"7. The appellant as IATA Agent have two options to discharge Service Tax liability. The first option is to pay Service Tax on the gross amount of commission received. However, Rule 6(7) provides another option to them to pay Service Tax @ 0.6% of the basic fare in respect of domestic bookings and @1.2% of the basic fare in respect of the international booking. The [term], "basic fare" is defined in the Rule as the part of the airfare on which the commission is normally paid to the Air Travel Agent by the Airlines. The explanation to Rule 6(7) defining the term "basic fare" clearly indicates that the basic fare for the purpose of this sub-rule is not the gross fare but is the part of the gross airfare charged from the passengers on which the Airlines normally pay commission to the Air Travel Agent. The expression "air fare on which the commission is normally paid" means the portion of airfare, whether 100% or a lesser percentage, on which most of the Airlines pay the commission ignoring¹ the stray cases in which commission is paid on a different part of airfare. The appellant's plea is that they have discharged Service Tax liability under Rule 6(7), only on that part of the gross airfare on which the commission was paid to them by the Airlines and most of the Airlines pay commission only on that portion of fare. In other words, the appellant's plea is that they have paid Service Tax on the basic fare as defined in the Rule. The department's contention, however, is that since the appellant have not given the break-up of the gross fare into basic fare and the fuel surcharge to enable the department to determine the basic fare component for the purpose of Rule 6(7), they would not be eligible for the

facility of discharge of Service Tax under Rule 6(7) of the Service Tax Rules and accordingly, the department has determined the Service Tax liability on the basis of the gross commission. In our view, the term "basic fare", in terms of its definition in Rule 6(7), is not the gross fare including fuel surcharge, but is that part of the gross airfare on which the concerned Airlines normally pay the commission to the Air Travel Agent. Therefore, what is relevant for the purpose of Rule 6(7) is as to on which part of the airfare, the commission was being normally paid by the Airlines to the Air Travel Agents. According to the appellant, they have evidence to prove that they have discharged the Service Tax liability under Rule 6(7) only on that part of the fare on which the commission was being paid, but this plea has not been considered by the Commissioner. In view of this, the impugned order is set aside and the matter is remanded to the Commissioner for de novo decision after considering the appellant's plea and also our observations in this order. Misc. application for additional evidence is also allowed. In course of de novo proceedings, the Commissioner shall consider the documents produced by the appellant in support of their plea that they have paid Service Tax on that part of the airfare on which the commission is normally paid by the Airlines. The appeal, stay application as well as misc. application stand disposed of as above".

13. The appellant contends that out of the seventy three airlines only four airlines pay commission on fuel surcharge and, therefore, it cannot be said that commission is normally paid to the air travel agent by the airlines on fuel surcharge. It was, therefore, obligatory on the part of the Principal Commissioner to have considered this issue raised by the appellant in response to the show cause notice, but that has not been done. The matter, therefore, has to be remitted to the Principal Commissioner to decide this issue. It shall be open to the parties to place additional evidence, if so required, before the Principal Commissioner for a proper determination of this issue.

14. It is only when this issue is decided against the appellant, that would be necessary for the Principal Commissioner to take recourse to the provisions of section 72 of the Act for determination of the taxable value. This issue again would have to be decided by the Principal Commissioner afresh as it has been submitted by the learned Authorized Representative of the appellant that a new method was adopted by the Principal Commissioner without providing any opportunity to the appellant to make submission. The appellant contends that commission is not charged in international bookings but this has also been taken into consideration by the Principal Commissioner. Certain other issues have also been raised by learned Chartered Accountant of the appellant to dispute the correctness of the method adopted by the Principal Commissioner. As this issue may have to be considered afresh by the Principal Commissioner, if a finding is recorded against the appellant on the first issue, it is not considered appropriate to deal with this issue on merits. All the contentions with

regard to this issue are left open to be decided by the Principal Commissioner afresh.

15. Learned Chartered Accountant of the appellant has also made submissions on the denial of Cenvat credit to the appellant and also confirmation of demand under other heads of services. In this connection, it has been pointed out that the demand has been confirmed and the Cenvat credit has been denied without taking into consideration the submissions that were advanced and, therefore, the demands have to be set aside. A perusal of the impugned order does indicate that reasons have not been indicated and the submissions of the appellant have not been taken into consideration. It is, therefore, appropriate that the Principal Commissioner examines these issues also afresh.

16. Thus, for all the reasons stated above, the impugned order dated 29 February 2016 deserves to be set aside and is set aside. The Principal Commissioner shall pass a fresh order in accordance with the observations made above. The appeal is allowed to the extent indicated above.

(Dictated and pronounced in open court)

[Back](#)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL

West Block No. 2, R. K. Puram, New Delhi, COURT -II

Date of hearing/decision: 20. 06. 2018

Appeal No. ST/56566/2013-DB

[Arising out of Order-in-Appeal No. 64-ST-RPR-I-2012 dated 26/11/2012
passed by the Commissioner of Central Excise, CUSTOMS(Adjudication)-RAIPUR(
Appeal)]

Hanumant Construction Pvt. Ltd. Appellant

Vs.

C.C.E. & S.T.-Raipur Respondent

Appearance:

Ms Rinki Arora, Advocate for the appellant Shri V. Pandey, DR for the
Respondent **Coram:**

Hon'ble Mr. V. Padmanabhan, Member (Technical) Hon'ble Ms. Rachna Gupta,
Member (Judicial)

Final Order No. 52288/2018

Per: V. Padmanabhan:

1. The present appeal is directed against Order-in-Appeal No. 64-ST/2012 dated 26/11/2012. The period under dispute is January, 2006 to January, 2007. The appellant executed certain contracts for M/s Lafarge India Pvt. Ltd, Gopalnagar, Bilaspur. M/s Lafarge has a cement factory and the contract executed was for removal of over burden in the mine attached to the cement factory. The Department was of the view that the activity carried out by the appellant was liable for payment of Service Tax under the category of 'Site Formation and Clearance, Excavation, Earth moving and Demolition Services' which is covered under Section 65 (97a) of the Finance Act, 1994. Accordingly, show cause notice was issued and both the Authorities below ordered payment of Service Tax amounting to Rs. 9,68,857/- along with interest and penalties. Aggrieved by the order for payment of Service Tax, present appeal has been filed.

2. In this connection, we heard Ms Rinki Arora, Ld. Counsel for the Appellant and Shri V. Pandey, Ld. DR for the Revenue.

3. The Ld. Advocate summarized the grounds of appeal made by the appellant as follow:-

- i. The demand for Service Tax has been raised under the category of 'Site Formation and Clearance' but the activity carried out by the appellant was in the mines attached to the cement plant of M/s Lafarge. She drew our attention to the relevant contract executed by the appellant with M/s Lafarge and pointed out that the appellant was required to deploy various equipments such as HEMS, suitable excavator, tipper and dozer for top soil removal in the mine. Hence, she submitted that the activity is to be considered as relating to mining and since the mining

service was made liable for payment of Service Tax only w. e. f 01/06/2007, she pleaded that the demand for Service Tax for the period prior to the date is not sustainable.

ii. She also relied on the following case laws:-

a. *Hazaribagh Mining & Engineering P. Ltd. V/s CCE, C &ST, BBSR-I 2017 (49) STR 289 (Tri. -Kolkata)*

b. ***M. Ramakrishna Reddy V/s Commissioner of C. EX &CUS., Tirupathi 2009 (13) STR 661 (Tri. -Bang.)***

iii. She also argued that the demand is hit by limitation since for the period January, 2006-07 the show cause notice was issued on 15/04/2011.

iv. She also submitted that the Commissioner (Appeals) in the impugned order has recorded his opinion that the activity will be covered within mining service w.e.f. 01/06/2007.

4. The Ld. DR justified the impugned order.

5. He submitted that the activity, even though carried out in the mine, was limited only to removal of over burden. Such activity is to be carried out prior to the actual mining activity. He brought to our notice CBEC Circular 232/2006-CX. 4 dated 12/11/2007 in which various activities were explained in relation to levy of Service Tax on mining. He submitted that the activity of removal of over burden is liable for Service Tax under Site Formation Service and other activities such as coal cutting and mineral excavation will be liable to Service Tax under Mining Services after 01/06/2007. Finally he submitted that the present contract is only for removal of over burden and not for mining and hence Service Tax is liable to be paid under the category of 'Site Formation'.

6. We have heard both sides and perused the record.

7. The nature of the activity carried out by the appellant for M/s Lafarge is evident from perusal of the relevant contract. The contract is dated 11/05/2006 and the activities are :-

“-DEPLOYMENT OF HEMS (SUITABLE EXCAVATOR, TIPPER AND DOZER) FOR TOPSOIL REMOVAL AT ARASMETA CEMENT PLANT.

- EXCAVATION, TRANSPORTATION, DUMPING & DOZING

APPROX AREA TO BE DEVELOPED: 37,000 SQ. MTR.

AVERAGE DEPTH OF TOPSOIL- 2 TO 3. 5 MTR. APPROX VOLUME-1,18,500 CUM MTR.

LEAD FOR TRANSPORTATION WILL BE APPROX-1. 5KM (ONE SIDE)

RATE APPLICABLE RS 52/- (RS FIFTY TWO ONLY) PER CUBIC MTR.

-SCOPE OF WORK

-Deployed HEMs should be in Tiptop condition and should be roadworthy.

-All required safety gadgets to be fitted on the HEM equipments.

-Maintenance of HEMs equipments will be under your scope & cost

-You should deploy competent & sufficient crew along with safety supervisor for

timely and safe completion of the job.

-Your crew deployed for operating the HEMs should have valid license at per norms.

-You will arrange required fuel & lubricants at your own cost for deployed HEMs

-Work should be carried out in two shifts & generally to be carried out during day light hours.

-You will not engage any female workers for the job.

-Before commencement of work joint measurement/ levels to be taken for deriving volumetric basis.”

8. From the terms of the contract it is evident that the activity carried out by the appellant was limited to removal of over burden only. Even though such activity has been carried out in the mine area, the contract does not cover any other activity relating to mining. Hence, it is to be considered as a service contract simplicitor for the activity of removal of over burden. This activity is very much covered within the definition of ‘Site Formation and Clearance Services’ which was included in the statute w.e.f. 16/06/2005. Consequently, we are of the view that during the period under dispute the appellant will be liable to payment of Service Tax under the category of Site Formation.

9. We have perused the various case laws cited in support of the appeal. We note that all these case laws are dealing with composite contracts which include not only the removal of over burden and similar activities, but also the mining activities such as removal of ore and segregation thereof. No doubt the Tribunal has held in those cases that such composite contracts will be liable to Service Tax only under the category of mining w.e.f. 01/06/2007. But in the case before us it is a case of contract simplicitor only for removal of over burden and hence we are of the view that the ratio of such case laws will not be applicable to present case.

10. The appellant has also raised the argument of time bar. But it is seen from the record that the appellant has failed to discharge their responsibility in terms of self assessment of the tax and filing statutory returns. Hence, we are of view that the revenue is justified in invoking the extended period in raising the present demand.

11. In view of above, impugned order is upheld and the appeal is rejected.
(Dictated and pronounced in the open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD**

COURT No. I

APPEAL No. ST/70741/2016-CU[DB]

(Arising out of Order-in-Appeal No. 271-ST/APPL-LKO/LKO/2016 dated 31/03/2016 passed by Commissioner of Central Excise & Customs (Appeals), Lucknow)

M/s Indira Gandhi Rashtriya Uran Akademi, ...Appellant

Vs.

Commissioner of Central Excise & S. T., Lucknow **...Respondent**

Appearance:

Shri Dharmendra Srivastava, Chartered Accountant for Appellant

Shri Gyanendra Tripathi, Assistant Commissioner (AR), for Respondent

CORAM:

Hon'ble Smt. Archana Wadhwa, Member (Judicial)

Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 10/12/2018

Date of Pronouncement : 29/01/2019

FINAL ORDER NO-70173/2019

Per: Archana Wadhwa

As per facts on record, the appellant is engaged in providing 'Commercial Training' to the various eligible candidates. As per the revenue the activities undertaken by them were liable to service tax under the category of "Commercial Training or Coaching Services". As such service tax demand of around Rs. 5. 26 crores was raised against them by way of the show cause notice, which was confirmed by the Original Adjudicating Authority. The order of the Commissioner was appealed against by the assessee before the Tribunal who vide its Final Order No. ST/A/56872-56885/2013-U(DB) dated 02. 07. 2013 set aside the same and held that the services provided by the appellant cannot be held to be taxable. The said order of the Tribunal was appealed against by the revenue before the Lucknow Bench of Hon'ble Allahabad High Court, who rejected the revenue's appeal.

2. However, it seems that subsequent to the confirmation of demand by the Original Adjudicating Authority in the above set of proceeding, the appellant got a registration and started paying service tax on their activities, till the matter was decided by the Tribunal. It is important to mention that the appellant neither paid the service tax under protest nor took recourse to provisional assessment. However, on finalization of the dispute by the Tribunal and subsequently by the Hon'ble Allahabad High Court (Lucknow Bench) vide their Order dated 21.01.2014, they filed a refund claim of Rs. 3,86,51,321/- on 22.04.2014 for refund of the service tax paid by them during the period December, 2009 to October, 2012. The said claim was made on the ground that the

same was erroneously paid by them, as it clear from the subsequent order of the Tribunal, as upheld by the Lucknow Bench of Hon'ble High Court.

3. Revenue, being of the view that such refund claim filed by the appellant claiming refund of service tax for the period subsequent to the earlier order of the Commissioner, was barred by limitation, inasmuch as the same stands filed after a period of one year from the relevant date prescribed under Section 11B of the Central Excise Act, which stands made applicable to the provisions of service tax. Accordingly, the appellant was issued with a show cause notice proposing denial of the said refund claim on the point of limitation as also on unjust-enrichment. The Original Adjudicating Authority denied the claim as barred by limitation, which stands upheld by Commissioner (Appeals). Hence, the present appeal by the appellant.

4. Arguing the matter, learned Chartered Accountant Shri Dharmendra Srivastava submits that they were initially not paying service tax, when a demand of show cause notice was issued to them raising demand of service tax for the period from 2004-05 to 2009-10. The said show cause notice was confirmed by the Commissioner and hence, thereafter they started paying service tax on the activity undertaken by them. The dispute in the earlier case reached the Tribunal and subsequently before the Hon'ble High Court of Allahabad. Both the authorities have held that the appellant is not liable to pay any tax. As such, he submits that the relevant date should be considered to be the Hon'ble High Court's order dated 20.

01. 2014, when the disputed issue attend finality and as such refund claim filed on 22. 04. 2014 should be considered as having been filed within the time.

5. The Commissioner (Appeals) while dealing with the said plea of the assessee has observed as under:-

"In the case, the appellant has pleaded that they filed claim in consequence to the Hon'ble High Court's order, thus, the relevant date should be considered as the date of High Court's order i.e. 20.01.2014 and their refund claim filed on 22.04.2014 is within the prescribed period as provided under Section 11B of the Central Excise Act, 1994. Here, I find that the Hon'ble High Court has passed order in respect of Service Tax demand of the appellant for the period 2004-05 to 2009-10 and so relief consequent to said order will be limited to refund of Service Tax covered by the said order. The appellant has filed refund claim of Service Tax deposited during the year 2012 against the tax liability pertaining to the period December, 2009 to October, 2012 on 22.04.2014. Thus, the refund claim of Service Tax which is neither covered by the said order of High Court nor been paid under protest has been filed after stipulated period of one year from the date of payment of tax in the year 2012. It has also come to the notice that the department has filed SLP before the Supreme Court against the said order of High Court and issued notices for demand of Service Tax for the subsequent period and decision is pending till date. Therefore, in the situation, I am of the view that the "date of payment of duty" is the relevant date as per clause (f) of Explanation (B) of Section 11B (5) of the Central Excise Act, 1994. Thus, the refund claim of the appellant is premature as the demands pertaining to the period in question are subjudice as also the decision of High Court has not reached finality being

challenged before the Apex Court by the department. The refund claim has been filed after the expiry of one year from the relevant date i.e. date of payment of duty and the same is non-maintainable on limitation aspects as well.”

6. Admittedly, the period before the Hon’ble High Court was from December, 2009 to October, 2012. The same was a demand case and the Hon’ble High Court held that no tax liability would arise against the assessee as the activity undertaken by them do not fall under the category of ‘Commercial Training and Coaching Services’. The Tribunal’s order setting aside the confirmed demand, was upheld by Hon’ble High Court. The consequence of the said order of the Hon’ble Allahabad High Court would relate to the demand, which was earlier confirmed by the Original Authority for the period 2004-05 to 2009-10 and if the appellant had deposited any amount towards this confirmed demand, the same would be refundable to the assessee.

However, in the present case the refunds claim by the appellant are for the period subsequent to the period involved in the earlier set of proceeding and has got no relevance with the earlier demand proceedings. The same has to be independently adjudged in the light of Section 11-B. As provided in terms of Section 11B of Central Excise Act, 1994 the relevant date is the date of payment of duty and the refunds, if any, are required to be filed within a period of one year from the relevant date. It is not the appellant’s case that subsequent to arising of dispute with the revenue they started paying duty under protest or adhered to provisional assessment. It was open to the appellant to pay duty under protest, by following the procedure prescribed for the same, in which case upon the success of their earlier matter, the tax paid for the subsequent period would become refundable to them, inasmuch as, there is no limitation for refund of tax paid under protest. The appellant having not adopted any of the such circumstances, the refund filed beyond the period of one year from the relevant date have to be governed by the provisions of Section 11 B of the Central Excise Act. The Hon’ble Supreme Court in the case of Porcelain Electrical Manufacturing Co. reported as 1998

(98) ELT 583 (SC) have held that the authorities working under the provisions of the Act are bound by the same and cannot relax the time limit provided under Section 11 B for the refund of erroneously paid duty. As such, we are of the view that the refund claimed by the assessee having no connection with the earlier demand of tax by revenue and the same having being filed beyond the period of one year from the relevant date, stands rightly rejected by the lower authorities as barred by limitation.

7. Accordingly, we uphold the impugned order and reject the appeal filed by the appellant.

(Pronounced in Court on-29/01/2019)

(Anil G. Shakkarwar)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL WEST ZONAL BENCH AT AHMEDABAD**

Appeal No. ST/505/2010-DB

[Arising out of OIA-216/2010/STC/MM/COMMR-A-/AHD dated 02/08/2010
passed by Commissioner of Service Tax-SERVICETAX – AHMEDABAD]

M/s Messrs Xsis Alert

...Appellant

Vs.

C.S.T. & S.T. - Ahmedabad

...Respondent

Represented by:

For Appellant: Shri Amal Paresh Dave & S. Bissa (Advocate)

For Respondent: Shri S.N. Gohil (AR)

CORAM:

HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)

HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Date of Hearing/Decision: 05.03.2019

Final Order No. A / 10469 /2019

Per: Ramesh Nair

The issue involved is demand of service tax on repair and maintenance of computer UPS, computer systems and computer peripherals for the period 2003. The adjudicating authority in the first adjudication order dropped the demand on time bar. The order was appealed against before Commissioner (Appeals) by the Revenue, the Commissioner (appeals) did not agree that the demand is time barred and accordingly, the matter was remanded to the adjudicating authority to be decided the matter afresh on merit. Against the order of Commissioner (Appeals), the appellant filed the appeal which was disposed of. Against the same order, the appellant filed the present appeal. Therefore, the limited issue involved is that whether the demand dropped by the adjudicating authority on limitation is correct or otherwise.

2. Shri. Amal Paresh Dave along with S. Bissa Ld. Counsels appearing on behalf of the appellant submits that the appellant was under bonafide belief that during the relevant period, the repair and maintenance of computer peripherals were not taxable, therefore, the service tax was not paid. He submits that on this issue the superintendent on 30.09.2004 filed ST-3 letter regarding payment of service tax of the said service which was responded by the appellant vide letter dated 13.10.2004 wherein, they have expressed views that the repair and maintenance of computer peripherals is not taxable. Subsequently, the matter was taken up with Superintendent as a letter dated 10.10.2007 was filed. The SCN came to be issued on 10.03.2008, therefore, the facts regarding non payment of service tax was within knowledge of the department hence, the demand is time bar. Therefore, the adjudicating authority had rightly dropped the demand on time bar. He placed reliance on the following judgment:

- Ajit India Pvt. Ltd-2018 (19) GSTL 659 (Tri.-Mumbai)
- Mattel Toys (India) Pvt. Ltd-2015 (320) ELT 628 (Tri. Mumbai)
- Mac Charles (India) Ltd. -2009 (248) ELT 632 (Tri. Bang.)

- Mac Charles (India) Ltd. -2010 (254) ELT 59 (Kar.)
- Haldia Petrochemicals Ltd. -2006 (197) ELT 97 (Tri.-Del)

3. On the other hand, Sh. S. N. Gohil Ld. Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order. He submits that the case was made out on the basis of inquiry/investigation made by the department. The appellant have not informed in advance to the department regarding their bonafide belief, therefore, there is clear suppression of fact on the part of the appellant. Hence the extended period was rightly invoked.

4. On careful consideration of the submission made by both the sides and perusal of the record, we find that only issue involved is that whether the demand is time barred or otherwise. As per the facts, the appellant had not suo-moto disclosed their intention of not paying the service on the belief that the activity is not taxable to the department. It is only when the department started inquiry by writing letter dated 30/09/2004, the appellant responded that the service is not taxable, therefore, before initiation of the inquiry, the appellant has never disclosed the fact that they do not intend to pay service tax on their bonafide belief therefore, the fact which was digged out by the Revenue, shows that the appellant have not disclosed the fact and they have suppressed the facts. As regard, the judgment cited by Ld. Counsel, on going through the same, we find in all such cases, the assessee first informed the department regarding facts, thereafter the extended period was involved. In such cases, it is clear that there is no suppression of fact on the part of the assessee, therefore, considering the facts of the present case, we are of the view that there is clear suppression of fact on the part of the appellant. Hence, the demand was wrongly dropped by the adjudicating authority. Ld. Commissioner (Appeals) has remanded the matter to decide on merit by setting aside the adjudicating order holding that demand cannot be set aside on time bar. The appellant has liberty to pursue the matter on merit before adjudicating authority. Accordingly, impugned order is upheld appeal is dismissed.

(Dictated & Pronounced in the open court)

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM,
NEW DELHI-110066**

BENCH-SM
COURT – IV

Service Tax Appeal No. ST/52834/2018 [SM]

[Arising out of Order-in-Appeal No. 53 (RK) ST/ JPR/2018-19
dated 31.05.2018 passed by the Commissioner (Appeals),
DGGSTI, Jaipur]

Savitri Leasing & Finance Ltd.

...Appellant

Vs.

C.C.E. & CGST

...Respondent

Present for the Appellant : Mr. Rahul Lekhwani, Advocate

Present for the Respondent: Mr. K. Poddar & Mr. S. Nunthuk, DRs

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER(JUDICIAL)

Date of Hearing: 5.11.2018

Pronounced on :3.12.2018

FINAL ORDER NO. 53345/2018

PER: RACHNA GUPTA

The appellant herein are engaged in providing renting of immovable property services and have got themselves registered on 26.02.2007. The appellant under Voluntary Compliance Encouragement Scheme dated 30.12.2013 had filed VCES-I declaring the tax dues of Rs. 4,50,756/- against renting of immovable property services for the period w. e. f. 01.10.2008 to 31.03.2010 vide challan No. 50518 dated 28.12.13. On examination of the said VCES-I, the Department observed that the tax dues declared by the appellant were for the subsequent period on the same issue for which a show Cause Notice dated 04.01.2011 for the period w.e.f. 01.01.2009 to 31.03.2010 had already been issued. Accordingly, a Show Cause Notice dated 25.02.2014 was issued proposing the rejection of the said VCES-I. The said proposal was confirmed vide Order-in-Original No. 1 dated 18.05.2015. It is thereafter that another Show Cause Notice No. 1216 dated 01.03.2016 was issued proposing the recovery of the service tax on Rs. 4,50,756/-. The said recovery has been confirmed vide the Order-in-Original dated 22.05.2018. Being aggrieved, the Appeal in hand have been filed. The said rejection of VCES was confirmed vide Order-in-Original No. 1 dated 18.05.2015. Being aggrieved the appeal was preferred before Commissioner(Appeals) who vide Order No. 53 dated 31.05.2018 has upheld the Order of rejection. Still being aggrieved Appeal is before this Tribunal.

2. I have heard Mr. Rahul Lekhwani, Ld. Advocate for the appellant who has mentioned that the VCES-I of appellant has been rejected by the Department relying upon second proviso to Section 106(1) of Finance Act, 2013

on the ground that it involved the same issue for the subsequent period as of that involved in Show Cause Notice dated 04.01.2011, consequent to audit conducted in case of the assessee. It is submitted that the issue for the Show Cause Notice dated 04.01.2011 and for the present Show Cause Notice dated 25.02.2014 is absolutely different except that both the Show Cause Notices are about the liability of renting of immovable property services by the appellant. It is impressed upon that the same category of service cannot be considered as the same issue which has been wrongly interpreted by the Department. It is further submitted that the Show Cause Notice is otherwise beyond the normal period of one year of the limitation and there was no intention of the appellant to evade the duty, extended period could not be invoked. Show Cause Notice is therefore barred by time and thus is liable to be set aside on this ground itself. Appeal is accordingly prayed to be allowed.

3. Mr. PR Gupta, Ld. DR while rebutting these arguments has submitted that there is no wrong interpretation on the part of the adjudicating authority below as alleged vide the previous Show Cause Notice of the year 2011. The liability of the appellant on account of renting of immovable property services for the same period for which the VCES has been filed was issued. The VCES has rightly been held to be covered under proviso 2 of Section 106. Appeal is prayed to be dismissed.

4. After hearing both the parties before proceeding further Section 106 of Voluntary Compliance Encouragement Scheme (VCES), 2013 is to be looked into. It reads as follows:

“106. (1) Any person may declare his tax dues in respect of which no notice or an order of determination under Section 72 or Section 73 or Section 73A of the Chapter has been issued or made before the 1st day of March, 2013:

Provided that any person who has furnished return under Section 70 of the Chapter and disclosed his true liability, but has not paid the disclosed amount of Service tax or any part thereof, shall not be eligible to make declaration for the period covered by the said return:

Provided further that where a notice or any order of determination has been issued to a person in respect of any period on any issue, no declaration shall be made of his tax dues on the same issue for any subsequent period.”

Section 106 is an enabling provision which deals in a situation where a particular class of assessee is liable to take advantage of the VCES Scheme and submit a declaration. Under this Section, any person may declare his tax dues in respect of which no notice or an Order of determination under Sections as mentioned above has been issued or made before first day of March 2013. It further provides that where a notice or Order of determination has been issued to any person that person is debarred to avail the benefit of Scheme. Ld. Counsel for the appellant has challenged the Order alleging that the adjudicating authority below has given a wrong interpretation of the word “any issue” and “same issue” as used in Section 106. The term “issue” has nowhere being defined in the Finance Act 1944, or even in the Central Excise Act, 1994.

Tribunal being a quasi-judicial authority can well rely upon the Civil/ Criminal Procedural Codes in the situations of ambiguity as the one in hand. Order 14 of Civil Procedure Code is about settlement of issues. Rule 1 sub-rule 1 thereof says that issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Sub-rule 3 thereof says that each material proposition affirmed by one party and denied by other shall form the subject of distinct issue. In the present case, Show Cause Notice dated 04.01.2011 was issued to the appellant calling him upon to pay the service tax liability qua renting of immovable property services for the period w.e.f. 01.01.2009 to 31.03.2010. Vide the impugned VCES-I, the appellant has declared his tax dues of Rs. 4,50,756 against the renting of immovable property services for the period w.e.f. 01.10.2008 to 31.03.2010. This perusal makes it clear that it is not merely that the category of service rendered is same but the allegation of not discharging the tax liability for rendering the said service and that the period for the alleged default is also same. Thus it becomes clear that a notice has already been issued to the appellant in respect of the same issue for the same period for which the appellant made the declaration under VCES-I. In view thereof I am of the firm opinion that the said declaration is prohibited under proviso 2 to Section 106(1) of VCES 2013. The Adjudicating Authority below are held to have committed no error while rejecting the said VCES Scheme. Order is held to have no infirmity. Appeal is accordingly dismissed.

5. The argument of the appellant for Show Cause Notice to be barred by time are also held to be not sustainable because the time limit for issuing notice under 101 of VCES will be applicable if and only if the assessee is entitled to file the VCES. Once it is apparent on record that rejection of VCES of appellant is correct due to a wrong declaration and non compliance of statutory provision. There is no need to look into the issue of limitation. As a result, I hold that there is no infirmity. Appeal is dismissed.

[Pronounced in the open Court on 03.12.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

[Back](#)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

West Block No. 2, R. K. Puram, New Delhi – 110 066.

Principal Bench, New Delhi

COURT NO. IV

DATE OF HEARING : 11/01/2019. DATE OF DECISION : 22/03/2019.

Service Tax Appeals No. 50099 and 50101 of 2016

[Arising out of the Order-in-Appeal No. 55 and 54/ST/DLH/20 dated 30 October 2015 passed by The Commissioner (Appeals – I), Service Tax, New Delhi.]

M/s Subway Systems India Private Ltd. Appellant

Versus

CST, Delhi – II Respondent

Appearance :

Shri Abhishek A. Rastogi, Advocate – for the appellant.

Shri Vivek Pandey, Authorized Representative (DR) – for the Respondent.

CORAM : Hon'ble Shri Bijay Kumar, Member (Technical)

Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 50411-50412/2019

Dated : 22/03/2019

Per. Rachna Gupta :-

This order disposes of two appeals arising out of common order-in-appeal No. 55 and 54/ST/DLH/20 dated 30 October 2015 and issue also being common to both the appeals. Factual matrix relevant for adjudication is that the appellant M/s Subway Systems Pvt. Ltd. (SSIPL) are registered with the Service Tax Commissionerate, New Delhi under the category of franchise service. The appellant is a 100% subsidiary company of M/s Subway System International BV (SIBV), a Netherlands based company. After the course of the audit of appellant's record as was conducted during 20 June 2008 to 24 June 2008 it was observed that SSIPL/appellant entered into a master license agreement dated 01/10/2002 with SIBV for developing franchise and service Sandwich shops to be known as franchise to SSIPL. The Department further observed that as per the said agreements Clause 3.03 thereof each franchise was liable to pay weekly royalty and an amount equal to 8% of their total gross sales and an advertising fee equal to 4.5% of their total gross sales and the appellant had further to pay royalty amount @ 35% to SIBV of all fee and royalties derived from each and every sandwich shop that is the franchise in India. However, it was noticed that the appellants were discharging their tax liability qua the royalty amount received from the franchise which was equal to 8% of the total gross sales, but, no liability was being discharged for an amount received equal to 4.5% of the weekly gross sales towards the contribution referred to as Subway Franchise Advertisement Fund Trust (SFAFT). Resultantly show cause notice No. I-26(494)ST/APR (Gr. III) 14/2008/4253 dated 13 February 2009 was served upon the appellant proposing the recovery of

service tax alongwith the interest and penalty as follows :-

- (i) Service tax amounting to Rs. 10,06,940/- on account of reverse charge mechanism being the recipient of services;

The service tax amounting to Rs. 1,44,624/- on account of non-payment of service tax on value of withholding tax ; Service tax amounting to Rs. 30,86,667/- on account of non-payment of service tax on the amount recovered as Franchise Advertisement Fund ; Service tax amounting to Rs. 3,83,711/- on the “amount shown as amount received but unidentified” in balance sheet. The said show cause notice was originally adjudicated vide order No. 28/NK Mallick/2013-14 dated 18/02/2014 vide which the demand on the amount received but unidentified and the demand on account of Franchise Advertisement Fund alongwith the respective education cess was confirmed alongwith the interest and the proportionate penalties. Being aggrieved, the appeal was preferred. Commissioner (Appeals) vide the orders under challenge/order-in-appeal No. 56/ST/DLH/20 dated 30 October 2015 rejected the appeal resultantly the appellant is before this Tribunal.

2. We have heard Shri Abhishek A. Rastogi, learned Advocate for the appellant and Shri Vivek Pandey, learned DR for the Department. Learned Counsel for the appellant had conceded the liability as confirmed about the amount received but unidentified and acknowledged for the same to have been deposited alongwith the interest and the proportionate penalty. However, with respect to the demand confirmed on account of Franchise Advertisement Fund it is submitted that the said demand is about the contribution for an advertisement Fund (SFAFT) which do not qualify as a franchise service for not being covered under the definition of “franchise” under Section 65 (47) of the Finance Act, 1944. The said contribution was collected by the appellant acting merely as a pure agent without providing any service. Learned Counsel has placed reliance on the decision in the case of **Kumar Beheray Rathi vs. CCE, Pune – III – 2014 (34) S.T.R. 139 (Tri. – Mumbai)**. It is submitted that the order under challenge has failed to consider that under Rule 5 (2) of Service Tax (Determination of Value) Rules 2006 vide which the expenditure or costs incurred by the service provider as a pure agent as the recipient of service has to be excluded from the value of taxable services. It is further submitted that the amount collected in SFAFT, the utilization thereof is undertaken by the franchise themselves and there is no control of the appellant upon the said amount. Even after the said amount remotely benefited the appellant had still cannot be the consideration for the service provided by the appellant as that of “franchise”. Above all the said amount is reflected as a liability in the books of account of the appellant and is not accounted as income. The decision of **Philips India Ltd. vs. CCE, Pune – 1997 (91) E.L.T. 540 (S.C.)** is relied upon, whereby it was held that the advertisement expenses shared by the dealer thereby do not form part of the assessable value. The appellant also relied upon the decision of **Intercontinental Consultants & Technocrafts Pvt. Ltd. vs. Union of India – 2013 (29) S.T.R. 9 (Del.)**, wherein it was held that for valuation of taxable service only consideration which is paid as *quid pro quo* can be brought to the charge. Finally, it is

impressed upon that there is no mala fide intent on the part of the appellant to evade any payment of service tax as is alleged. Question of imposition of penalty does not at all arise. Order under challenge is accordingly prayed to be set aside and appeal is prayed to be allowed.

Rebutting these arguments, it is submitted on behalf of the respondent that the amount collected by the appellant in the name of Subway Franchise Advertisement Fund, in the account of SFAFT is nothing but a bifurcation of the gross value received by the appellant, for providing the service of "franchise". The bifurcation is with the intent of evading/short paying the service tax liability. Section 67 of the Finance Act is being impressed upon to submit that the amount of Franchise Advertisement Fund is not the expenses but is the part of the income of the franchisor being paid to him as is very much part of the payment clauses of the franchise agreement. From any set of imagination same cannot be considered being excluded from the gross value/transaction value. Justifying the impugned order appeal is prayed to be dismissed.

3. After hearing both the parties at length, keeping in view the rival contentions and perusing the entire record including the impugned 'Franchise Agreement', we are of the considered view as follows :-

Out of the several demands proposed vide impugned show cause notice, the original Adjudicating Authority confirmed two demands :

- (a) on the unaccounted amount of liability shown in balance sheet
- (b) on the amount collected from Franchise in the name of Advertisement Fund.

4. With respect to former liability, the same has duly been conceded by the appellant and stands discharged too. Now the controversy only remains about the value given by the Franchise to the appellant/Franchiser in the name of Franchise Advertisement Fund. The said Franchise Advertisement Fund is 4.5% of the weekly gross sales which is paid in addition to 8% of weekly gross sales as 'Royalty'. Thus, the main controversy to be adjudicated by us is as follows :-

Whether bifurcating the amount of weekly gross sales into the payment of royalty (@ 8% thereof) and the payment towards Franchise Advertisement Fund (@ 4.5% thereof) takes the later value out of the ambit what is called as transaction value/the gross value.

Normally what is the integral part of service provided forms the part of gross value as was also held by Tribunal Kolkata in Naresh case reported as 2008 - TIOL - 1016 - TRI. - KOL. Value is derived from the price and value is the function of price themselves. This is the conceptual meaning of value. Section 67 is the sole repository of law governing value of taxable service no ambiguity persists in Section 67 of the Act whatever is included in the section has to be considered as the value for taxable service. The wording of the said provision being absolutely clear no other interpretation can be attributed to the same. We draw our support from the decision of Apex court in the case of Government of Andhra Pradesh vs. P. Laxmi Devi - (2008) 4 SCC 720, wherein it was held that if the words used in a taxing statute are

clear, one cannot try to find out the intention and the object of the statute. Thus the correct assessable value of the service provided since service commands that value only and that should only be taxed without any hypothetical rule of computation of value of taxable service under Section 67 of the Act. Section 67 reads as follows :-

“7. Section 67 of the Act deals with valuation of taxable services. This Section was amended w.e.f. April 18, 2006. Un-amended provision reads as under:

“67. Valuation of taxable services for charging service tax.- For the purposes of this Chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him.

Explanation 1. - For the removal of doubts, it is hereby declared that the value of a taxable service, as the case may be, includes,- the aggregate of commission or brokerage charged by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker;

- (a) the adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;
- (b) the amount of premium charged by the insurer from the policy holder;
- (c) the commission received by the air travel agent from the airline;
- (d) the commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;
- (e) the reimbursement received by the authorised service station from manufacturer for carrying out any service of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by such manufacturer; and
- (f) the commission or any amount received by the rail travel agent from the Railways or the customer, but does not include –
 - (i) initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telegraph or telex or for leased circuit;
 - (ii) the cost of unexposed photography film, unrecorded magnetic tape or such other storage devices, if any, sold to the client during the course of providing the service;
 - (iii) the cost of parts or accessories, or consumable such as lubricants and coolants, if any, sold to the customer during the course of service or repair of motor cars, light motor vehicle or two wheeled motor vehicles;
 - (iv) the airfare collected by air travel agent in respect of service provided by him;
 - (v) the rail fare collected by rail travel agent in respect of service provided by him;
 - (vi) the cost of parts or other material, if any, sold to the customer during the course of providing maintenance or repair service;
 - (vii) the cost of parts or other material, if any, sold to the customer during the course of providing erection, commissioning or installation service; and
 - (viii) interest on loans.

Explanation 2. - Where the gross amount charged by a service provider is inclusive

of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.

Explanation 3. - For the removal of doubts, it is hereby declared that the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.”

- (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
- (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;
- (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.
- (2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.
- (3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.
- (4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation. - For the purposes of this section.

- (a) “consideration” includes any amount that is payable for the taxable services provided or to be provided;
- (b) “money” includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;
- (c) “gross amount charges” includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called „suspense account’ or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]”

8. After the amendment, Section 67 of the Act is as follows :

Section 67. Valuation of taxable services for charging service tax. –

- (1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall, -
 - (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

- (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;
- (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.
- (2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.
- (3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.
- (4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation. - For the purposes of this section,-

- (a) ["consideration" includes –
 - (i) any amount that is payable for the taxable services provided or to be provided;
 - (ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;
 - (iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.]
- (c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]"

5. On the reading of above definition, it is clear that both prior and after the amendment the value on which service tax is payable has to satisfy that (i) the value is the gross amount charged i.e. the entire contract value between the service provider and the service recipient without deduction of any expenses ; (ii) the amount charged should be for "for such service provided" that the gross amount charged by the service provider has to pay for the service provided. By using the word "for such service provided", the Act has provided a nexus between the amount charged and the service provided.

- 6. For appreciating the first ingredient we revert to the master license dated 01/10/2002 between the SIBV and SIIPL authorizing the later to enter into series of franchise agreements to develop franchise and service sandwich shops in the territory of Republic of India. Clause 3 thereof is the payment clause vide which SIBV is entitled to receive 33% of all the fees and royalties derived by SIIPL. Clause

3.03 talks about the payment received by SSIPL from the franchise it develops in furtherance of said master license. It reads as follows :- “3.03 Master Licensee shall also cause payments of all weekly royalties and advertising fees due from all Sandwich Shops franchised pursuant to this Agreement, to be delivered to Master Licensee or the Franchise Advertising Fund (FAF) timely by the Franchisees and deposited in Master Licensee’s and FAF’s respective bank account. Pursuant to the Franchise Agreements, Franchisees shall pay weekly a royalty in an amount equal to Eight Percent (8%) of their total Gross Sales and an advertising fee in an amount equal to at least Three and One Half Percent (3.5%) of their total Gross Sales. (“Gross Sales” means all sales or revenues, including catering or delivery, from their Sandwich Shop’s business, inclusive of value-added tax.)”

7. The afore-said 33% of the royalties as to be paid to the master licensee (SIBV) is out of the payment of fees and royalties as collected from the franchisees. Though Clauses 3.00 and 3.05 mentioned that the said 33% excludes the advertisement fee but it is received in the context of providing ‘franchise service’ from SSIPL to the franchise (various Subway Sandwich Shop in the Territory of India). Also the said advertising fee is nothing but is @ 4.5% of the amount collected out of weekly gross sales. The royalty @ 8% is also the part of said weekly gross sales and is admittedly taxable. Thus, we are of the opinion that by merely mentioning that for master licensee 33% of all the fees collected shall exclude advertising fee does not take that amount out of the tax net of the amount received from franchisees for providing them the ‘Franchise Service’. Thus the sole reason of this advertisement fee is also the part of the contract value. More so, this value is not at all the expense incurred by the franchise for advertising his own outlet but this is the amount out of his income from the sales passed on to the service provider SSIPL in lieu of the franchise agreement between the two. Hence, we are of the firm opinion that this ‘Franchise Advertisement Fund’ is despite a different nomenclature of being a different fund but actually is the value received by the appellant for providing franchise service to its franchisees.

8. Coming to the second ingredient it is observed that the appellant/assessee had submitted that advertising service is not the part of franchise service and that the amount is not to be retained by SSIPL but is to be diverted back to the respective franchisees for advertisement in their local area the same has been rebutted by the department submitting that it is SSIPL only which ultimately is getting the benefit out of the said service. To adjudicate, the same we first look into the definition of franchisees/franchise service. As per Section 65 (105) (z) ‘franchise service’ is :

any service provided or to be provided to a franchise by the franchiser in relation to franchise.

The Finance Act, 2005 had substituted this definition w.e.f. 16/06/2005 as follows :-

Franchise means an agreement by which the franchise is granted representational right to sale or manufacture the goods or to provide service or undertake any process identified with franchiser, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved.

Thus after the amendment, the franchise service is not confined merely to the representational right to sale or manufacture goods or to provide the service but it extends to any process identified with franchiser with respect to the trade mark, service mark, trade name etc. The amount, in question, is the part of the weekly gross sales being given by the service recipient to the service provider mutually consenting for the same to be used for the process identified by SSIPL to advertise the subway brand/trade name. Hence, it is not simplicitor on advertising service, but is very much the part of the franchise service rather than by the appellant to the franchisees. Hence, definitely qualify for “for such service provided”. From the above discussion, we are of the firm opinion that the amount of weekly gross sales @ 4.5% but for franchise advertisement fund is nothing but the part of gross value of the contract for providing the franchise service and, hence, was equally taxable as 8.5 % of the said weekly gross sales is taxable.

9. The case laws as relied upon by the appellant are not applicable to the facts and circumstances of the present case for the simple reason that present is not issue between dealer and manufacture. It is a case of providing the franchise service where representational right to use or identify/advertise the trade name is very much part of the franchise service itself. Similarly, **Intercontinental Consultants and Technocrats Pvt. Ltd.** (supra) is also not applicable in view of the above discussion about Section 67 of the Act in accordance where off the valuation of taxable service is nothing more or nothing less than the consideration paid as *quid pro quo* for the service. As already discussed above even 4.5% of weekly gross value, irrespective given as franchise advertisement fund, is the value as a *quid pro quo* service.

The argument of appellant to be acting merely as a pure agent is also held not sustainable because appellant being the franchiser is simultaneously getting benefit out of the advertisements. More so, the money fixed for advertisement was not the expenditure separately either on the part of franchiser or on the part of the franchise but is very much the part of the franchise fee given to franchiser in compliance of the terms of the franchise agreement between the two.

Finally coming to the issue of show cause notice being barred by time, we have already observed that the bifurcation of weekly gross sales by the appellant is a mere strategy to cut short its tax liability. Thus we opine that the element of mis-representation is very much apparent on part of the appellant that too with an intent to evade payment of tax. The decision of Hon'ble Apex court in the case of **Nizam Sugar Factory – 2006 (197) E. L. T. 465**, as relied upon by the appellant is therefore not applicable to the present case. Resultantly it is held that the Department was entitled to invoke the extended period as per proviso to Section 73 (3) of the Act. Show cause notice dated 13/02/2009 proposing the demand for the period w.e.f. April 2007 to March 2008 is therefore denied to be barred by time. As a result of entire above discussion, we do not find any infirmity with the order under challenge. Same is accordingly upheld. Consequent thereupon both the appeals stand dismissed.

(Order pronounced in open court on 22/03/2019.)

(Rachna Gupta)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

[Back](#)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 26/10/2018. DATE OF DECISION : 26/10/2018.

Service Tax Appeal No. 50218 of 2014

[Arising out of the Order-in-Appeal No. BPL-EXCUS-000-APP- 102-13-14 dated 07/10/2013 passed by The Commissioner (Appeals), Central Excise, Bhopal.]

M/s Wild Expedition Tours & Travels

...Appellant

Versus

CCE, Bhopal

...Respondent

Appearance

Ms. Rinki Arora, Advocate – for the appellant.

Shri Vivek Pandey, Authorized Representative (DR) – for the Respondent.

CORAM:

Hon'ble Shri Justice Dilip Gupta, President Hon'ble Shri C. L. Mahar, Member
(Technical)

Final Order No. 53531/2018 Dated : 26/10/2018 Per. C.L. Mahar :-

The brief facts are that the appellant is engaged in the business of providing rent a cab service. The department after undertaking a detailed investigation issued show cause notices that were adjudicated by the Competent Authority in the manner indicted in the following chart :-

Sl. No.	SCN No. /date	OIO No. / Date	Value of taxable service	Amount of service tax confirmed	Amount of penalty imposed
1.	S. Tax/SCN/ Rent-a-cab/ JBP/AE/04 / 200212383 dated 10/09/04	DC/JBP/ ST/ ADJ/72/ 05-06 dated 13/06/05	1600200/ -	109612/-	Under Section 76 – Rs. 109612/-, Section 78 – Rs. 109612/-
2.	S. Tax/O. Case/ CAB/Wild/J BP/	AC/JBP/S T/ ADJ/319/	5419530/ -	351672/-	Under Section 76 –

	05/11252 dated 14/09/2005	05-06 dated 24/03/06			Rs. 351672/-, Section 78 – Rs. 703344/-

2. It was alleged by the department that the appellant had not declared the correct taxable value of rent a cab service as they had been providing cab on higher basis to West Central Railway Zone as well as Indian Army and the value of services provided to these organizations were not included in the taxable value by the appellant for the period 2001-2002 to 2004-2005.

3. The above-mentioned order-in-originals were challenged by the appellant before the Commissioner (Appeals). The Commissioner (Appeals) vide his order-in-appeal dated 27 December 2005 as well as order-in-appeal dated 3 August 2006 dismissed the appeals and upheld the levy of service tax and imposition of penalty.

4. Being aggrieved by above-mentioned order-in-appeals, these appeals have been filed before this Tribunal.

5. The Tribunal in its previous final order dated 08/04/2009 ordered that the matter be decided afresh on denovo basis and the observations are :-

“it would therefore proper to remand back the matter to the learned adjudicating authority to re-examine the matter afresh on the touch stone of law and the decisions of the tribunal. It would be open to the appellant to argue on all legal points before the learned adjudicating authority in view of remand we made by this order”.

The Tribunal passed the order because of the observations made by the Tribunal in **R.S. Travels vs. CCE, Meerut – 2008 (12) S.T.R. 27:-**

“Rent-a-cab service operators service – Renting vis-a-hiring – service tax – to rent is allowing use of something one owns in exchange of payment. – Test for ascertaining whether activity covered involves giving cab to client for a certain period of time for some consideration. Vehicle being at disposal and under control of client – can operator providing can with driver for going from one place to another on per kilometer basis or on lumpsum amount based on distance is providing transport service, control of vehicle remaining with cab operator/driver – latter service is outside purview of Rent-a-cab operator service – Matter remanded to ascertain facts. Section 65 (91) and 65 (105) (o) of Finance Act, 1994”.

6. In view of above order of this Tribunal, the Original Adjudicating Authority by order dated 29/05/2012 has confirmed service tax amount of Rs. 4,61,284/- under Section 73 of the Finance Act, 1994; penalty of an equal amount has also been imposed individually both under Section 76 and under Section 78 of the Finance Act, 1994. Against the above-mentioned order-in-originals, the appellant went before the Commissioner (Appeals) who vide his order dated 07/10/2013 has upheld the original order of Adjudicating Authority. The appellant

are before us against the above-mentioned order of Commissioner (Appeals) dated 07/10/2013.

7. The learned Counsel appearing for the appellant has contended that the department has made out a case against the appellant only on the basis of figures given in their balance sheet and the profit and loss account and have calculated the taxable value of the appellant without substantiating the same with any documentary evidences, except that they had received certain payments from West Central Railway Zone as well as from establishment of the Indian Army. It has also been pleaded that the appellant have received certain amounts in foreign exchange and the required details in Form X for the period 2001-2002 to 2004-2005 were submitted for consideration before Commissioner (Appeals) stating that as per the provisions of Notification No. 21/2003-ST, the amount of the payments received by them for rent a cab service in convertible foreign exchange was exempted from payment of service tax. It is submitted that the Commissioner (Appeals) failed to consider their claim and has not allowed deduction of such payments from the entire taxable receipts. The learned Counsel has also relied upon certain decisions of the High Court specially in **Commissioner of Customs and Central Excise, Meerut – I vs. R. S. Travels – 2015 (38) S. T. R. 3 (Uttarakhand)** and **CCE vs. Sachin Malhotra – 2015 (37) S. T. R. 684 (Uttarakhand)** and a decision of this Tribunal in the case of **CCE, Nagpur vs. P. B. Bobde – 2015 (40) S. T. R. 953 (Tri. – Mumbai)**.

8. We have also heard the learned Departmental Representative who has submitted that the decision of this Tribunal in the case of

R.S. Travels vs. Commissioner – 2008 (12) S. T. R. 27 (Tribunal) has been discussed by Hon'ble Gujarat High Court and same has been reversed by the High Court in the case of **CST vs. Vijay Travels – 2014 (36) S. T. R. 513 (Guj.)**. It is his submission that the same cannot be relied upon for deciding the taxability of rent-a-cab activity. It has also been contended by the learned Departmental Representative that the claim of the appellant that they had received payment of certain rent-a-cab services in convertible foreign exchange, is not correct as the certificate submitted by them mentions that they had received payment in Indian currency only.

9. We have heard both the sides and perused the records of the appeal.

10. It would be appropriate to refer to the relevant provisions before proceeding to consider the submission. Section 65 (105) (o) defines Rent-A-Cab service to mean any service provided or to be provided to any person by a rent a cab scheme operator in relation to the renting of a cab. Section 65 (91) defines a rent a cab scheme operator to mean any person engaged in the business of renting a cab.

11. It is a matter of record that the appellant had been renting cars on monthly charge basis to West Central Railway Zone as well as Indian Army establishment in Jabalpur and other places. As per the department, the appellant has been agitating that the department has not adduced any evidences other than the fact that they provided certain number of cabs on

rental basis to West Central Railway Zone and they have arbitrarily taken the full value of receipt shown in the balance sheet and profit and loss account for calculation of service tax.

12. We have perused the records of the appeal and find that the appellant has failed to prove that the receipts in the balance sheet and profit and loss account are accountable for activity of rent a cab service. We find that the appellant has been changing its stand before various authorities in an attempt to get out of the service tax liability. At one stage they argued that they did not own the required number of vehicles for providing rent a cab service and were providing car only on commission basis. We find that the appellant has been providing rent a cab service and they have not discharged their service tax liability on the same. The decision in the case of **Commissioner of Customs & Central Excise, Meerut – I vs. R.S. Travels – 2015 (38) S.T.R. 3 (Uttarakhand)** is of no help to the appellant as same has been considered in the case of **Vijay Travels** (supra), and a contrary view, as follows has been taken:-

“14.3. Renting means a usually fixed periodical return, especially, an agreed sum paid at fixed intervals by a person for any use of the property or car. It is also the amount paid by a hirer to the owner for the use of the property or a car. Hiring is also engaging services or wages or other payment. It also amounts to engaging temporary use.

When rent-a-cab scheme operator gives the car on rent, de facto possession is, of course, there but, it is not acceptable to uphold that wherever de jure control and possession of the vehicle stands transferred in law from the owner to the person on renting/hiring the service that the service tax is leviable and this is, of course, not different than services rendered on a contractual basis, providing transport service for fixed amount of periodical return or fare. We also need to remind ourselves that concept of providing transportation service where de jure control remains with the owner or company of the vehicle and the driver and yet, it functions in accordance with the wish and desire of the person hiring such vehicle is extremely popular in India unlike the concept of person renting the cab desiring to drive himself by having all liabilities on himself. In absence of any specific exclusion in the statute of such service from the taxing net, large portion of such services cannot be held to be non inclusive by any artificial interpretation.

14.4. From the aforesaid discussion, it can be said that the petitioner cannot escape tax liability on the ground that the hiring is different from renting as the intention of the Government is to tax service provider of a service which involves both hiring and renting of a cab for a longer duration and distinction as sought to be carved out by the petitioner is not finding favour with this Court.

21. In view of the discussion above, it is to be concluded that the service tax which was introduced for levying the tax on certain taxable services as such services contributed substantially to Gross Domestic Product (GDP) and rent-a-cab service is specifically covered under the tax net. The question Nos. I and II needs to be answered this wise that the services provided by the respondent herein would get covered under rent-a-cab service and thereby, respondent is to be held liable for the service tax thereon.

22. This brings us to the question Nos. V and VI which concern invoking of extended period of five years for levying service tax in case of the respondent”.

13. Thus, it can be seen that the type of services provided by the appellant is covered within the scope of Rent-A-Cab service. The appellant has failed to discharge its service tax liability on the same and, therefore, we do not find any fault with the conclusions arrived at by Commissioner (Appeals).

14. In so far as the submission of the learned Counsel for the appellant that as certain part of receipts were received in convertible foreign exchange, they are entitled for Notification No. 21/2003-ST dated 20 November 2003, it is necessary to examine the certificate which has been issued under Form X CCAE. The scanned copy of such certificate is reproduced below:-

FORM No. 10 CCAE
(See sub-rule (5), 15.88A)

Certificate from a person making payment to an assessee engaged in the business of a hotel, or of a tour operator or the travel agent, out of Indian Currency obtained by conversion of foreign exchange received from or on behalf of a foreign tourist or a group of tourists

Name of hotel / tour operator / travel agent making the payment received from or on behalf of foreign tourist or group of tourists
ESADEE TRAVEL EXPRESS (P) LTD

Address
301, PLODIA-104, LAJAPUR, SAFDARJUNG ENCLAVE,

Licence number granted by the Reserve Bank of India under Section 94 of the Foreign Exchange Regulation Act, 1973 (46 of 1973)

I / We hereby certify that :

(1) I / We have paid bill number of detailed below, of WORLD EXOTIC TRAVEL AND TOURS on behalf of foreign tourist or a group of tourists in Indian Currency.

(2) the aforesaid payment has been made out of Indian currency obtained by conversion of foreign exchange received in, or brought in to India through an authorised dealer, the details of which are as follows

(3) that details of the foreign tourist / group of tourists are as follows :-

Date/Period	Reference / Name of Group/Foreign Tourist	Amount	Name of Foreign Agent (Name of Assessee)	Currency	Amount of Foreign Exchange	Details of Drafts			Invoice of claim of Tour Operator / Travel Agent on Overseas Remitter		
						No.	Date	Bank on which drawn	Invoice No.	Date	Invoice Am. In U.S\$
2001 to	Nick Hays Group	530678-00	Travelhost Inc	Dollar	3546	199820	26/2/02	Bank of America	4398	1/2/2002	46524
2002	Walter Mark Group			Dollar	7869	199877	21/10/01	Bank of America	4398	1/2/2002	46524
	Walter & Mark			Dollar	34903	199903	19/12/01	Bank of America	4398	1/2/2002	46524

I hereby declare that the above particulars are true and correct to the best of my knowledge and nothing has been concealed thereon and this certificate is given in my capacity as Finance Controller.

Place : Delhi
Date : 28/04/02

Signature Akbar
Name A. A. HUSSAIN

15. A perusal of above certificate indicates that the appellant has in fact received the payment in lieu of providing the rent a cab service in the form of Indian currency. Payment has been received in convertible foreign exchange by the main service provider namely, Ess Dee Travel Express Pvt. Ltd. and not by the appellant.

16. We are, therefore, of the view that the benefit of Notification 21/2003-ST dated 20 November 2003 cannot be extended to the appellant as a plain reading of the notification indicate that exemption will be available to persons who receive payment in the convertible foreign exchange. This apart, the benefit of the notification may have been availed of by M/s Ess Dee Travels Express Pvt. Ltd.

17. The appeal is, therefore, without any merit. It is, accordingly dismissed.

(Operative part of the order pronounced in the open court.)

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

DEFECT DIARY No. 50013 of 2018

(Arising out of Order-in-Original No. DLI/SVTAX/004/COM/082/16-17 dated 31.03.2017 passed by Commissioner of Service Tax, Delhi- IV, Gurgaon)

M/s. CAPL Hotels and Spa Pvt. Ltd.

... Appellant

34, Babar Lane, Bangali Market, New Delhi- 122001

Versus

Commissioner of Central Excise Respondent

And Service Tax, Gurgaon Plot No.36-37, Sector- 32, Gurgaon, Haryana **APPEARANCE:**

Mr. J.K. Mittal, Advocate for the Appellant

Mr. Vivek Pandey, Authorised Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 20 September, 2019

Date of Decision: 27 September, 2019

DEFECT MISCELANEOUS No.: 95/2019

JUSTICE DILIP GUPTA

The Appeal was filed before the Principal Bench of the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) at New Delhi on 19 September, 2017. The appeal papers were, thereafter, transferred to the Chandigarh Regional Bench of the Tribunal by a communication dated 10 October, 2017 sent by the office of the Principal Bench. The Appellant, however, filed Writ Petition(C) 10959 of 2017 before the Delhi High Court against the sending of the papers to the Chandigarh Regional Bench by the office of the Principal Bench of the Tribunal. In view of the statement made on behalf of the respondent-Tribunal before the Delhi High Court that the question whether the appeal would be heard by the Principal Bench at New Delhi or any other Regional Bench would be decided on the judicial side, the writ petition was disposed by the Delhi High Court.

2. Pursuant to the order passed by the Delhi High Court, a communication was sent by the office of the Principal Bench at New Delhi to the Assistant Registrar of the Regional Bench of the Tribunal at Chandigarh to return the records of the appeal. Accordingly, the records were returned by the Chandigarh Regional Bench of the Tribunal to the Principal Bench at New Delhi by a letter dated 19 December, 2017. The matter has, accordingly, been placed before the Bench.

3. Shri J.K. Mittal learned Counsel appearing for the Appellant has pointed out that the demand-cum-show cause notice dated 23 October, 2013 was issued by the Commissioner in the office of the Commissioner of Service Tax at New Delhi and it also required the Appellant to file a reply to the Commissioner of Service Tax Commissionerate at New Delhi. Learned Counsel also pointed out that the Appellant is registered with the Service Tax Commissionerate at Delhi and the Service Tax audit of the Appellant was also conducted by the Officers of the Service Tax Commissionerate at New Delhi from 25 June of 2013 to 27 June of 2013 on the basis of which the show cause notice was issued. In view of this factual position, learned Counsel for the Appellant submitted that the Principal Bench of the Tribunal at New Delhi would alone have the jurisdiction to hear the appeal. In support of his contention learned Counsel placed reliance upon a decision of the Supreme Court in **Ambica Industries Vs. Commissioner of Central Excise, 2007 (213) ELT 323 (SC)**.

4. Learned Authorised Representative of the Department, however, pointed that though the show cause notice was issued on 24 October, 2013 by the Commissioner of Service Tax at New Delhi to the Appellant, whose address is Galaxy Towers, Part-II, Sector-

15, Gurgaon but, after the restructuring of the Service Tax Commissionerate, the Appellant fell under the jurisdiction of Service Tax Commissionerate at Gurgaon in terms of Trade Notice No. 02/ 2014 dated 1 October, 2014. The show cause notice was, therefore, ultimately adjudicated upon by an order dated 28 February, 2017 passed by the Commissioner of Service Tax at Gurgaon. It is, therefore, his submission that when the Appellant is situated at Gurgaon and the order was also passed by the Commissioner of Service Tax at Gurgaon, the Regional Bench of the Tribunal at Chandigarh would alone have the jurisdiction to hear the appeal.

5. The submissions advanced by the learned Counsel for the Appellant and the learned Authorised Representative of the Department have been considered.

6. A show cause notice was issued by the Commissioner of Service Tax at New Delhi on 28 February, 2017 calling upon the Appellant to submit a reply before the Commissioner of Service Tax at New Delhi. This show cause notice was issued on the basis of an audit conducted by the Officers of the Service Tax Commissionerate at New Delhi in June 2013. A perusal of the order dated 28 February, 2017 passed by the Commissioner of Service Tax at Gurgaon indicates that after the issuance of the show cause notice, there was a restructuring of the Service Tax Commissionerate, as a consequence of which the jurisdiction of the Appellant fell under the Service Tax Commissionerate at Gurgaon. The order dated 28 February, 2017 states that this restructuring was done in terms of Trade Notice No. 02 /2014 dated 1 October, 2014. The impugned order, therefore, mentions that the show cause notice was being adjudicated upon by the Commissioner of Service Tax at Gurgaon. Thus, what is important to notice is that not only is the Appellant situated at Gurgaon, but the impugned order was also passed by the Commissioner of Service Tax at Gurgaon.

7. Earlier, all matters arising out from the Union Territory of Chandigarh, the States of Punjab and Haryana, Himachal Pradesh and Jammu & Kashmir fell within the jurisdiction of Principal Bench at New Delhi. However, by a notification dated 1 November, 2013 that was published in the Government of India Gazette dated 2 November, 2013, the Central Government notified the creation of six additional Benches of the Tribunal, including three at the existing

locations at New Delhi, Mumbai and Chennai and three new Benches at Chandigarh, Allahabad and Hyderabad with effect from the date the Notification was published in the Gazette. The Government of India, Ministry of Finance by letter dated 13 November, 2013 also specified the location and jurisdiction of the proposed new Benches. In respect of the Bench at Chandigarh, it was provided that the jurisdiction of the Bench at Chandigarh was carved out from Delhi jurisdiction **to deal with matters arising** from the Union Territory of Chandigarh, the States of Punjab and Haryana, Himachal Pradesh and Jammu & Kashmir. The Regional Bench at Chandigarh was established by a Notification No. 02/2015 dated 4 November, 2015 and it started functioning from 1 November, 2015.

8. According to learned Counsel for the Appellant, the Principal Bench at Delhi would have the jurisdiction because not only was the audit of the Appellant conducted by the Officers of Service Tax Commissionerate at New Delhi, but the Show Cause Notice was also issued by the Commissioner at New Delhi and it called upon the Appellant to submit a reply before the Commissioner at New Delhi. It is no doubt true that the show cause notice was issued by the Commissioner of Service Tax at New Delhi but, subsequently by Trade Notice of 02/2014 dated 1 October, 2014 restructuring the Service Tax Commissionerate took place and the jurisdiction of the Appellant that is situated at Gurgaon, fell under the jurisdiction of the Service Tax Commissionerate at Gurgaon. It is for this reason that the show cause notice was adjudicated upon by the Commissioner of Service Tax at Gurgaon. It is, therefore, clear that the matter arose from the territorial jurisdiction of the State of Haryana, in which case, the Regional Bench of the Tribunal of Chandigarh alone would have the jurisdiction.

9. In **Ambica Industries**, on which reliance has been placed by learned Counsel for the Appellant, the issue was regarding determination of the High Court before which Appeals would lie under Section 35G (1) of the Central Excise Act, 1944 (the Act). The Appellant carried business at Lucknow and the matter was ultimately decided by the Tribunal

at New Delhi since the Tribunal at New Delhi exercised jurisdiction in respect of cases arising within the territorial limits of Uttar Pradesh, National Territory of Delhi and the States of Maharashtra. Having regard to the situs of the Tribunal, an appeal in terms of Section 35F of the Act was filed before the Delhi High Court. The Delhi High Court, however, held that it had no territorial jurisdiction in the matter. It is in this context that the Supreme Court held:

- “12. The said decision proceeded on the basis that part of the cause of action may arise at the forum where the appellate order or the revisional order is sourced. If, thus, a cause of action arises within one or the other High Court, the petitioner shall be the dominus litis. Indisputably, if this set of reasoning is to be accepted, the impugned judgment as also the decision rendered in *Bombay Snuff* (supra) would not be correct. Before dilating on the said proposition of law it may be noticed that the decision of a Tribunal would be binding on the Assessing Authority. If the situs of the appellate Tribunal should be considered to be the determinative factor, a decision rendered by the Tribunal shall be binding on all the authorities exercising its jurisdiction under the said Tribunal.
13. The Tribunal, as noticed hereinbefore, exercises jurisdiction over all the three States. In all the three States there are High Courts. In the event, the aggrieved person is treated to be the dominus litis, as a result whereof, he elects to file the appeal before one or the other High Courts, the decision of the High Court shall be binding only on the authorities which are within its jurisdiction. It will only be of persuasive value on the authorities functioning under a different jurisdiction. If the binding authority of High Court does not extend beyond its territorial jurisdiction and the decision of one High Court would not be a binding precedent for other High Courts or Courts or Tribunals outside its territorial jurisdiction, some sort of judicial anarchy shall come into play. An assessee, affected by an order of assessment made at Bombay may invoke the jurisdiction of the Allahabad High Court to take advantage of the law laid down by it and which might suit him and thus he would be able to successfully evade the law laid down by the High Court at Bombay.
14. Furthermore, when an appeal is provided under a statute, Parliament must have thought of one High Court. It is a different matter that by way of necessity, a Tribunal may have to exercise jurisdiction over several States but it does not appeal to any reason that Parliament intended, despite providing for an appeal before the High Court, that appeals may be filed before different High Courts at the sweet will of the party aggrieved by the decision of the Tribunal.”

10. In the present case, it is not in dispute that the Appellant is situated in Gurgaon and the impugned order was passed by the Commissioner of Service Tax at Gurgaon. The aforesaid decision of the Supreme Court in *Ambica Industries* cannot be pressed by the Appellant to contend that the Principal Bench of the Tribunal at New Delhi would have jurisdiction to hear the appeal. The jurisdiction to hear the appeal would lie with the Regional Bench of the Tribunal at Chandigarh.

11. The records of the appeal shall, therefore, be sent to the Regional Bench of the Tribunal at Chandigarh. The Office is directed to take necessary steps.

(Order pronounced in the open Court on 27 September, 2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, NEW DELHI - 110 066
PRINCIPAL BENCH, NEW DELHI
COURT NO III**

Service Tax Appeal No. 241 of 2012

Arising out of the Order-in-Original No. 32-33-ST/PKJ/CCE/ADJ/ 2011 Dated:
17.11.2011

passed by The Commissioner of Central Excise (Adjn.), New Delhi

Date of Hearing: 10.4.2017

Date of Decision: 10.4.2017

M/s PVR LTD

Vs

COMMISSIONER OF SERVICE TAX, DELHI

Appellant Rep by: Shri Srinivas Kotni, Adv.

Respondents Rep by: Shri Amresh Jain & Ranjan Khanna, Authorized Representative (DRs)

CORAM: S K Mohanty, Member (J)

B Ravichandran, Member (T)

ST - 'Pouring fees' received by the appellant cannot be considered as a discount for sale transaction or as non-compete fee - it is more in the nature of fee received for promotion of Pepsi products - correctly held as taxable under BAS by adjudicating authority - appellants did not disclose the receipt of consideration as 'pouring fees' in any of their returns, therefore, extended period of limitation correctly invoked - penalties also upheld - impugned order correct and legal - appeal dismissed: CESTAT [para 5, 6]

Appeal dismissed

FINAL ORDER NO. 52843/2017

Per: B Ravichandran:

The appeal is against order dated 17/11/2011 of Commissioner (Adjudication), New Delhi. The appellant is in the business of running multiplex cinema houses in different parts of the country. They are registered with the Department for the payment of service tax under various taxable categories. The dispute in the present appeal is relating to their service tax liability on the consideration received as "pouring fees" from Pepsi, the soft drink company with whom they have a contractual arrangement for display and sale of various products of the client.

2. The brief facts of the case are that the appellant entered into an agreement with Pepsi Foods Limited on 02/04/2002 for promotion of products of the client in the multiplex run by the appellant. The agreement envisaged supply of various products alongwith dispensing equipment's. The appellant agreed to install the dispensing equipments and to promote and sale products of the clients in various premises under their control. The appellants were discharging service tax on the income received from Pepsi which are attributable to marketing/promotion of their products. The dispute in the present appeal is restricted to appellant's tax liability on "pouring fees" paid by Pepsi to the appellant in terms of Clause 12 of the agreement readwith Schedule 5. The said schedule stipulated that for a period of six years Pepsi shall pay 'pouring fees' starting from Rs. 52 lakhs for the first year and after progressive increase to pay Rs. 129 lakhs for the 6th year. This agreement is with reference to certain specific cinema complexes run by appellant. The Revenue proceeded to consider the said pouring fees as taxable income under the category of Business Auxiliary Service. The appellants have promoted the products of Pepsi and the consideration is attributable to said promotion. Accordingly, the proceedings initiated against the appellant concluded in the

confirmation of demand of service tax of Rs. 40,14,042/- for the period 01/07/2003 to 31/03/2007. The Original Authority also imposed penalty of equivalent amount under Section 78 and further penalty of Rs. 5,000/- under Section 77 of the Finance Act, 1994.

3. The learned Counsel for the appellant submitted that the agreement with Pepsi is basically for buying products of Pepsi for sale in their premises. The pouring fees received from Pepsi is correctly to be considered as an additional discount in such sale transaction. The learned Counsel also submitted that they have, exclusive arrangement for supply of beverages, with Pepsi and, as such, the pouring fees is to be considered as an amount received for not allowing other competing products to be displayed and sold in their premises. In other words, he contended that it should be considered as non-compete fees not liable to service tax. The learned Counsel also contested the demand for extended period referring to the terms of agreement which states that any service tax liability shall be in the account of Pepsi. As such, he pleaded that there is no malafide intend on the part of the appellant for not discharging service tax on pouring fees. There is a bonafide interpretation as understood by the appellant. Accordingly, the demand for extended period and penalty under Section 78 are not sustainable.

4. The learned AR supported the findings of the Original Authority. On merit, he submitted that the agreement is not only for sale and purchase of products of Pepsi. As can be seen from the terms of the agreement, the appellants are having obligation with reference to installation, display of vending machines and marketing of various products of Pepsi in their premises. It is not a simple sale agreement of products. Regarding the argument of the appellant on the nature of pouring fees, the learned AR submitted that the agreement itself did not elaborate the nature of such fee. However, from the context and the schedule of payment, it is clear that the said pouring fee is nothing but a consideration for promotional activity undertaken by the appellant. Regarding demand for extended period and imposition of penalty, learned AR submitted that the appellant were registered with the Department and were paying service tax under BAS. They did not include the full consideration received from Pepsi in their periodical returns filed with the Department. It is only after the investigation by the officers of DGCEI that the appellant got clarification from Pepsi and also defended their nonpayment attributing the same to bonafide belief. When the appellant received various considerations under different headings which are not directly attributable to sale of Pepsi products, then such receipts should have figured in their return under gross income. As such, the learned AR supported the findings of the Original Authority for demand invoking extended period and penalty.

5. We have heard both the sides and perused the appeal records. On the merits of the case, we note that the agreement itself simply states that Pepsi shall pay the appellant, pouring fees as per Schedule 5. The nature of such fee and the reason for such payment is not elaborated in the agreement. The appellant submits that it is nothing but an additional discount. We are not able to appreciate such argument in the absence of any specification to that effect in the agreement itself. In fact Clause 5 of the agreement clearly stipulates the price consideration and the discounts entitled, very clearly. There is no reason to consider pouring fees as additional discount. Regarding the argument that it should be considered as a non-compete fee pursuant to an exclusive arrangement between Pepsi and the appellant, we note that there is no stipulation regarding noncompete obligation on the part of the appellant in the agreement itself. There is no linkage of a particular act of the appellant to receive the pouring fees. In fact, in the letter dated 23/01/2012 Pepsico clarified to the appellant that the said fee is paid to dissuade PVR from entering into similar contract with other competitor of Pepsi. We note that if pouring fee is to be considered as non-compete fee, first of all there should have been indication in the agreement to that effect and second such non-compete arrangement should be enforceable by law. Payment of an amount to dissuade an appellant from displaying competitor's products by itself cannot be equated to a noncompete agreement. In fact this type of submission is made based on clarification of Pepsi. There is no clause in the agreement itself regarding the nature of such fee. We have perused the terms of agreement, various clauses regarding the role of

the appellant in receipt, display and arrangement with reference to Pepsi products, manner of display and marketing and promotion services to be rendered by the appellant. Clause 12 is in continuation, after elaborating the various details of promotional support to be provided by the appellant for Pepsi. We find that pouring fees as received by the appellant cannot be considered as a discount for sale transaction or as a payment for non-compete reason as given by the appellant. The indication is that it is more in the nature of fee received for promotion of Pepsi products. As such, we find no merit in the appellant's plea regarding non-taxability of the said consideration received by them.

6. Regarding the plea of the appellant on the question of time bar and imposition of penalty, we find that the appellants were registered with the Department under taxable categories of BAS and other tax entries and the appellants did not disclose the receipt of consideration as 'pouring fees' in any of their returns. The facts remains that even on enquiry the appellants did not take any effort to get the issue clarified except seeking advice from Pepsi. When the appellants were showing and discharging service tax on receipts for various promotional activities it is apparent that significant portion of receipt under the category of 'pouring fees' received for such activities should have been included in the tax returns during the material time. The tax, if any, paid could have been reimbursed from Pepsi, by itself does not establish the bonafide of the appellant. Having examined the reasons recorded by the Original Authority for invoking the demand for extended period and for imposing penalty, we find no reason to vary the finding. Accordingly, the appeal is dismissed.

(Order dictated and pronounced in open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. II**

APPEAL NO. ST/85557 & 85558/14

Arising out of Order-in-Appeal no. PUN-EXCUS-003-APP-302-303-13-14

Dated: 01.11.2013 Passed by the Commissioner of Central Excise (Appeals), Pune-III

Date of Hearing: 8.01.2018

Date of Decision: 31.01.2018

M/s POONAM ROOFING PRODUCTS PVT LTD

Vs

COMMISSIONER OF CENTRAL EXCISE, PUNE-III

Appellant Rep by: Shri Bharat Raichandani, Adv.

Respondent Rep by: Shri Dilip Shinde, Asstt. Commr. (AR)

CORAM: Ramesh Nair, Member (J)

Raju, Member (Technical)

ST - Intellectual Property Service – Sections 65(55a), 65(55b), 65(105)(zzr) of Finance Act, 1994 - Appellants are the owners of brand name "SWASTIK and had entered into an agreement with M/s New Sahyadri Industries Ltd. for permitting them to use the said trade name – consideration received of 0.01.% of value of sale of goods by M/s New Sahyadri Industries Ltd. is taxable under Intellectual Property Service – no merit in argument of appellant that the said transaction is not liable to Service Tax under Finance Act, 1994: CESTAT [para 4.5 to 4.7]

ST - It is not in the jurisdiction of this Tribunal to adjudicate on the leviability of VAT or otherwise - Tribunal is competent to adjudge regarding leviability of Service Tax under the Finance Act, 1994 only and insofar as the payment of VAT is concerned, the appellant may approach the appropriate authority: CESTAT [para 4.8]

ST – Penalty –Section 78 of FA, 1994 - Elements for imposing the penalty are identical to those necessary to invoke the extended period of limitation, therefore, no separate specific findings are needed for imposition of penalty under Section 78 of the Finance Act, 1994: CESTAT [para 4.9, 4.10]

Appeal dismissed

FINAL ORDER NO. - A/85255-85256/18

Per: Raju:

These appeals have been filed by M/s Poonam Roofing Products Pvt. Ltd. against confirmation of demand of Service Tax along with interest and imposition of penalty under Section 78 of the Finance Act, 1994.

2. Learned Counsel for the appellant pointing out that 2 show-cause notices were issued to them for the period October, 2005 to March, 2010 issued on 29.3.2011 and for the period April, 2010 to March, 2011 issued on 19.10.2011. Learned Counsel pointed out that they are the owners of brand name "SWASTIK and had entered into an agreement with M/s New Sahyadri Industries Ltd. for permitting them to use the said trade name. As per the agreement, the appellants were charging 0.01% of the value of the sale of the goods from M/s New Sahyadri Industries Ltd. He pointed out that Revenue has treated this amount as a consideration for the taxable service provided under Intellectual Property Service and demanded Service Tax on the same. Learned Counsel argued that they have paid VAT on this receipt treating brand name as goods. Learned Counsel further pointed out that under the VAT Laws, brand name is treated as goods and therefore, transfer of right to use of goods is taxable under VAT. He argued that since they have paid the VAT, there cannot be any levability of Service Tax.

2.1 Learned Counsel relied on the decision of Hon'ble High Court of Mumbai in case of *Tata Sons Ltd. & Another Vs. The State of Maharashtra & Another*. He argued that in the said case in almost identical circumstances, it has been held that on the transactions of transfer of right to use trade mark or brand name, VAT is payable. Learned Counsel also relied on the decision of Hon'ble High Court of Mumbai in case of *Mahyco Monsanto Biotech (India) Pvt. Ltd. Vs. Union of India - 2016 (44) STR 161 (Bom)* wherein Hon'ble High Court has held as under :-

"38. We must note that Mr. Venkatraman's submission that the BSNL test must always be present in each and every case for a transaction to be considered a transfer of the right to use goods is over broad. We do not think that in BSNL the Supreme Court intended to prescribe a test of global or universal application without regard to individual circumstances. The judgment of the Supreme Court (in Paragraph 90) notes the factual aspects. Therefore, the entire infrastructure, instruments, appliances and exchange remained in the physical control and possession of the petitioner at all times and there was neither any physical transfer of such goods nor any transfer of the right to use such equipment or apparatuses. One of the issues that arose for consideration was whether there was any transfer of the right to use goods by providing access or a telephone connection by the telephone service provider to a subscriber. This BSNL test, was, therefore, set out in these circumstances. The Court had no occasion to consider its applicability to intangible property like intellectual property. This is how BSNL has been interpreted by us in *Tata Sons*. We think that this interpretation is correct. In any case, it binds us. The Kerala High Court in *Malabar Gold*, in Paragraph 35, took a contrary view. It took the BSNL twin test to be applicable as a general proposition, i.e., one that admits of no variance. As discussed above, we do not think this can ever be the a correct reading of BSNL.

In para 38 captured above, Hon'ble High Court was responding to the argument presented in para 27 of the said decision, which read as follows: -

27. Mr. Venkatraman concludes his summation of the law on the transfer of the right to use goods by relying on the Supreme Court decision in *Bharat Sanchar Nigam Limited v. Union of India - 2006 (2) S.T.R. 161 (S.C.)*. In his separate but concurrent judgment, Lakshmanan J listed the five attributes that must be present for a transaction to qualify as a transfer of the right use goods. Most pertinent, Mr. Venkatraman says, are Attributes 4 and 5. He refers to these two collectively as the BSNL "twin test". Paragraph 91 lists these attributes as follows :

To constitute a transaction for the transfer of the right "91. to use the goods the transaction must have the following attributes:

- a. There must be goods available for delivery;
- b. There must be a consensus ad idem as to the identity of the goods;
- c. The transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licences required therefore should be available to the transferee;
- d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute - viz. a transfer of the right to use and not merely a licence to use the goods;**
- e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."**

(Emphasis added)"

2.2 Learned Counsel also relied on the decision of Hon'ble High Court of Kerala in case of *Malabar Gold Pvt. Ltd.*, wherein Hon'ble High Court of Kerala differed with the decision of Hon'ble High Court of Bombay in case of *Tata Sons* (supra) and held that franchise agreement considered in that case will not attract the provisions of Kerala Value Added Tax (KVAT) Act. Earlier a Single Judge Bench of Hon'ble High Court of Kerala in its order reported in had held that royalty received by the dealer in the said

case is excisable to tax under Section 6(1)(c) of the KVAT Act. Learned Counsel pointed out that the decision of jurisdictional High Court in the case of Tata Sons (supra) would be binding on the Tribunal even though the Hon'ble High Court of Kerala has differed with the same.

2.3 Learned Counsel took us through the provisions of the agreement. The terms of the agreement were as follows: -

"Company hereby confirms to use of trademark namely Swastik on the following terms and conditions:-

1. You have agreed to permit us for our use of trademark namely Swastik in manufacturing, selling, marketing and other allied business activities for a period of ten years commencing from 1st January 2006.

2. A company will pay a license fee for use of trademark @ 0.1% of its sales.

3. The company shall pay the monthly license fee regularly on or before 15th day of succeeding month subject to tax deduction at source.

4. During the term of license, New Sahyadri Industries Ltd. shall use the trademark for its own business activities and shall not assign the trademark to any other party.

5. These understandings are for a period ten years, which may be renewed for further period on such terms and conditions as mutually agreed by both of us. Anyone of us shall be entitled to terminate this understanding by giving the notice to other party for the period not less than three months.

6. The Company shall be entitled to use the said trademark for the purpose of lawful business and shall not use the trademark for any other purpose, than explicitly stated in this letter.

7. You shall not permit to any other party for use of trademark Swastik during the period of licensing arrangement with us without our prior consent in writing.

In the token of your acceptance of conditions of this letter, please sign and return duplicate copy of this letter for our record.

2.4 Learned Counsel further pointed out that in terms of Trade Mark Act if the trade mark is not renewed then the same is available for anybody to use after expiry of 10 years. He pointed out that tenure of this agreement was also 10 years. Learned Counsel further pointed out that the impugned order does not give any reason for imposition of penalty and is silent and non-speaking in that aspect.

3. Learned AR relies on the impugned order. Learned AR pointed out that decision of Hon'ble High Court in the case of Tata Sons Ltd. (supra) pertains to the period 2001-02 and during the said period, there was no taxable service under the head of IPR and therefore, the provisions of Finance Act, 1994 were not before the Hon'ble High Court. Learned AR relied on the decision of Hon'ble High Court of Delhi in the case of *McDonalds India Pvt. Ltd. - 2017 (5) GSTL 120 (Del)*. In the said case, relying on the decision of Hon'ble High Court of Kerala in the case of *Malabar Gold Pvt. Ltd. (supra)* held as follows: -

"45. Likewise, the Supreme Court in State of Andhra Pradesh and Anr. v. Rashtriya Ispat Nigam Ltd. - [2002] 126 S.T.C 114 (S.C.) upheld the Andhra Pradesh High Court's decision that the essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. A similar decision was made in Malabar Gold Private Ltd. v. CTO - (2013) 63 VST 496 = 2013 (32) S.T.R. 3 (Ker.), where a Division Bench of the Kerala High Court considered the nature of the franchise agreement as well as the scope of the expression "transfer of right to use the goods...". The High Court concluded that the tests laid down in the BSNL (supra) case were squarely applicable, that there were no goods which were deliverable at any stage and there was no transfer of right to use any trademark.

46. For a transfer of the right to use goods to be effective, such transfer of right should be one that the transferee can exercise in exclusion of others; which is not the case in the

present appeals and petitions, as the franchise agreement only grants a non-exclusive right, retaining the franchisor's right to transfer the composite bunch of services to other parties, apart from it retaining ownership to the same. The ownership in the trademark, logo, service marks, and brand name is solely vested in appellant and the petitioners and has not been transferred; as is clearly manifested in the various clauses of the franchise agreements. The appellant and the petitioners grant a non-exclusive license to the franchisees, which can be revoked upon non-compliance of the terms and conditions as stipulated in their franchise arrangement. Clearly, this does not amount to a transfer of the right to use goods.

47. The peculiarity of intangibles or incorporeal property, of the kind this Court has to deal with, i.e. intellectual property, is that unlike real property, its boundaries are unset. These rights are only real and effective to the extent they enable the owner or transferee to keep out from use those who are not permitted to do so. In other words, the nature of intellectual property and the remedies provided for their enforcement, hinge upon the right to exclude others from using it. The distinctiveness of a mark, earned through dint of continuous use and brand building, results in the trademark which is classically known as a badge of origin that assures the user of the products the constancy of the quality associated with it. Only ensuring that others who do not own it are prevented from using or appropriating it ensures its enforcement. In the case of the franchise agreements involved in the present case, none of the franchisees or in the case of the trademark licensee (or in GSK's petition the trademark licensee), are empowered to safeguard violation of the mark, through enforcement mechanisms, such as filing suits for injunction or damages. This underlines that the most important attribute of ownership or transfer (even in the most evanescent sense) is absent. Furthermore, by reason of Section 48 of the Trade Marks Act, the utilization of the mark by the franchisee/licensee would accrue to the trademark owner. Therefore, the reputation or brand building which accrues on account of increased volume of business because of the franchise/licensing arrangement, continues to be with the owner. No brand building or brand benefit accrues or arises to the franchisee/licensee.

48. From the above analysis, what irrefutably follows is that the franchise agreements in the three cases (and trade mark licensing agreement in GSK's petition) permit a limited right to use the composite system of the respective businesses of the appellant and the petitioners to the franchisors/licensee, and the dominant intention, as well as the specific provisions arising from the franchise agreements are not of a "transfer of the right to use goods."

3.1 Learned AR pointed out that even in this case there is no exclusive right to use the said trade mark in favour of New Sahyadri Industries Pvt. Ltd. Learned AR also relied on the decision in the case of *Mahyco Monsanto Biotech (India) Pvt. Ltd. Vs. Union of India* 2016 (44) STR 161 (Bom). He pointed out that in the said case, there were two appeals considered. While in case of *Mahyco Monsanto Biotech (India) Pvt. Ltd.*, the decision was against the Revenue but in case of *M/s Subway*, the decision was in favour of Revenue. He particularly relied on the following paragraphs of the said decision: -

"57. Mr. Shroff's argument on behalf of Subway is that the franchise agreement is not one for sale or transfer of right to use but merely permits the franchisee to display certain marks and to use certain technologies and methods in preparing the salads and sandwiches for sale. Therefore, he submits, it is liable to be taxed as a service, which Subway has been paying in any case. He adopts virtually all of Mr. Venkatraman's arguments. Mr. Shroff also refers to the cases of *Tata Sons*. He relies on these cases to urge that in Subway's case, all that is granted is a permissive use. The franchisee under the agreement obtains a mere permission to display the name Subway in a particular fashion, along with other services.

58. Mr. Shroff formulates his case on several distinct grounds. First, the franchisee is entitled to display the name Subway only for a limited period of time as stipulated in the agreement. After the expiry of this period of time, as provided in Clauses 8 and 8(g) of the Franchise Agreement, Mr. Shroff submits, and we agree with him, all the rights of the franchisee are terminated. A breach of the agreement also results in potential termination

at the option of Subway. Second, Mr. Shroff argues that the franchisee cannot sub-franchise the mere permission it obtains under the agreement on account of the prohibition in Clause 9(a) of the agreement. Third, there is no territorial restriction or competition restriction of any kind placed on Subway. It is entitled to enter into as many or as few franchisee agreements as it wants, even simultaneously, and it can on its own directly compete with its franchisees too.

69. We believe that Mr. Shroff is correct when he says that the agreement between Subway and its franchisees is not a sale, but is in fact a bare permission to use. It is, therefore, subject only to service tax. In our opinion, the fact that the agreement between Subway and its franchisee is limited to the precise period of time stipulated in the agreement is vital to Subway's case. At the end of the period of the agreement, or before in case there was any breach of its terms, the right of the franchisee to display the mark Subway and its trade dress, and all other permissions would also end. This is what sets this agreement apart from the case of Monsanto and its sub-licensee. There, the seed companies could do as they pleased with the seeds; they could alienate or even destroy them. In Subway's case, there are set terms provided by the agreement which have to be followed. A breach of these would result in termination of the agreement. We believe that there is no passage of any kind of control or exclusivity to the franchisees. In fact, this agreement is a classic example of permissive use. It can be nothing else. For all the reasons in law and fact that the sub-licensing of technology in Monsanto is held to be a transfer of right to use, this franchising agreement must be held to be permissive use.

70. We do not mean to suggest that every franchise agreement will necessarily fall outside the purview of the amended MVAT Act. There is conceivably a class of franchise agreements that would have all the incidents of a sale or a deemed sale (i.e., a transfer of the right to use). Black's Law Dictionary defines a franchise, in the context of a commercial transaction as (Black's Law Dictionary, 8th Ed.):

The sole right granted by the owner of a trade mark or a trade name to engage in business or to sell a good or service in a certain area.

74. In our opinion, the mere inclusion of franchises under the MVAT Act would not automatically make all franchise agreements liable to sales tax. What must be looked at is the real nature of the transaction and the actual intention of the parties. The agreement must be considered holistically, and effect must be given to the contracting parties' intentions. The label or description of the document is irrelevant. An agreement styled as a franchise might, on a proper examination, turn out to be nothing more than a mere licence (as in Subway's case). On the other hand, an agreement that calls itself a licence might actually be a franchise. If, in a given case, a franchise agreement is effectively nothing more than a mere permissive use, it cannot be made liable to VAT. It would be a service, and hence liable to service tax. When interpreting a taxing statute, or for that matter any statute, full effect must be given to the words used by the Legislature. This, however, does not mean that this principle must be stretched to a point which leads to an absurd result, or one that was not contemplated by the Legislature. The Legislature is presumed to know the law and to have acted in accordance with it. We, therefore, do not think that the Legislature intended for this Notification to have such a sweeping effect as to bring all franchise agreements within the ambit of the MVAT Act. Presumably, what the Legislature intended was to be included only those franchise agreements that involved a transfer of the right to use or some other aspect of a deemed sale as defined under Article 366(29A) of the Constitution. As discussed above, we find that Subway's franchise agreement grants to the franchisee nothing more than mere permissive use of defined intangible rights. It is, therefore, a service, and is not amenable to VAT. We also hasten to clarify that we are not determining whether any particular kind of arrangement is or is not a franchise. Any examples, we have given are merely illustrative, and not binding or final findings.

4. We have gone through the rival submissions. We find that Hon'ble High Court of Mumbai in case of Mahyco Monsanto (supra) has clearly held as under: -

74. In our opinion, the mere inclusion of franchises under the MVAT Act would not automatically make all franchise agreements liable to sales tax. What must be looked at

is the real nature of the transaction and the actual intention of the parties. The agreement must be considered holistically, and effect must be given to the contracting parties intentions. The label or description of the document is irrelevant. An agreement styled as a franchise might, on a proper examination, turn out to be nothing more than a mere licence (as in Subway's case). On the other hand, an agreement that calls itself a licence might actually be a franchise. If, in a given case, a franchise agreement is effectively nothing more than a mere permissive use, it cannot be made liable to VAT. It would be a service, and hence liable to service tax. When interpreting a taxing statute, or for that matter any statute, full effect must be given to the words used by the Legislature. This, however, does not mean that this principle must be stretched to a point which leads to an absurd result, or one that was not contemplated by the Legislature. The Legislature is presumed to know the law and to have acted in accordance with it. We, therefore, do not think that the Legislature intended for this Notification to have such a sweeping effect as to bring all franchise agreements within the ambit of the MVAT Act. Presumably, what the Legislature intended was to be included only those franchise agreements that involved a transfer of the right to use or some other aspect of a deemed sale as defined under Article 366(29A) of the Constitution. As discussed above, we find that Subway's franchise agreement grants to the franchisee nothing more than mere permissive use of defined intangible rights. It is, therefore, a service, and is not amenable to VAT. We also hasten to clarify that we are not determining whether any particular kind of arrangement is or is not a franchise. Any examples, we have given are merely illustrative, and not binding or final findings.

It is apparent from the above decision that the terms of agreement need to be examined in each case before the decision regarding leviability of VAT or Service Tax can be taken. Hon'ble Apex Court in the case of *BSNL - 2006 (2) STR 161 (SC)* had prescribed the following test: -

"91. To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes :

- a. There must be goods available for delivery;
- b. There must be a consensus ad idem as to the identity of the goods;
- c. The transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;
- d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute - viz. a transfer of the right to use and not merely a licence to use the goods;
- e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

4.1 Learned Counsel for the appellant have argued that in case of *Tata Sons (Supra)*, Hon'ble High Court had not applied the test laid down by Hon'ble Apex Court by observing as follows: -

"51. It is in relation to such a controversy that the observations, findings and conclusions must be confined. We do not see as to how they can be extended and in the facts and circumstances of the present case to the enactment that we are dealing with. Going by the plain and unambiguous language of the Act of 1985 we cannot read into it the element of exclusivity and a transfer contemplated therein to be unconditional. Therefore the tests in para (d) and (e) cannot be read in the Act of 1985.

It is seen that in the said case, Hon'ble High Court order was concerned with leviability of Sales Tax under Maharashtra Sales Tax (on Transfer of Right to use any goods for any purpose) Act, 1985 With respect to the test prescribed, the Hon'ble Apex Court has observed as follows: -

38. We must note that Mr. Venkatraman's submission that the BSNL test must always be present in each and every case for a transaction to be considered a transfer of the right to use goods is overbroad. We do not think that in *BSNL* the Supreme Court intended to prescribe a test of global or universal application without regard to individual

circumstances. The judgment of the Supreme Court (in Paragraph 90) notes the factual aspects. Therefore, the entire infrastructure, instruments, appliances and exchange remained in the physical control and possession of the petitioner at all times and there was neither any physical transfer of such goods nor any transfer of the right to use such equipment or apparatuses. One of the issues that arose for consideration was whether there was any transfer of the right to use goods by providing access or a telephone connection by the telephone service provider to a subscriber. This BSNL test, was, therefore, set out in these circumstances. The Court had no occasion to consider its applicability to intangible property like intellectual property. This is how BSNL has been interpreted by us in Tata Sons. We think that this interpretation is correct. In any case, it binds us. The Kerala High Court in *Malabar Gold*, in Paragraph 35, took a contrary view. It took the BSNL twin test to be applicable as a general proposition, i.e., one that admits of no variance. As discussed above, we do not think this can ever be the a correct reading of BSNL.

4.2 From the above discussions, it is apparent that there are no universal tests for testing of levy of Sales Tax or Service Tax and each contract is to be examined with respect to its own terms. In this regard, the facts in the case of *Mahyco Monsanto* (supra) were as follows: -

11. The Petitioner in Writ Petition No. 9175 of 2015, *Monsanto India*, is a joint venture company of *Monsanto Investment India Private Limited* ("MIPL") and the *Maharashtra Hybrid Seeds Co.* *Monsanto India* develops and commercializes insect-resistant hybrid cottonseeds using a proprietary "Bollgard technology", one that is licensed to *Monsanto India* by *Monsanto USA* through its wholly-owned subsidiary, *Monsanto Holdings Private Limited* ("MHPL"). This technology is further sub-licensed by *Monsanto India* to various seed companies on a non-exclusive and non-transferable basis to use, test, produce and sell genetically modified hybrid cotton planting seeds. In return for this technology, *Monsanto India* receives trait fees based on the number of packets of seeds sold by the sub-licensees. These sub-licensing agreements, with almost 40 seed companies, are the transactions in question. Respondent Nos.1 and 2 in the *Monsanto Writ Petition* are the Union of India and the State of Maharashtra respectively. Respondent No. 3 is the Principal Commissioner of Service Tax. Respondent No. 4 is the Commissioner of Sales Tax.

12. The *Monsanto Petition*, filed under Article 226 of the Constitution of India, brings a challenge to Entry 39 of Schedule C to the Maharashtra Value Added Tax Act, 2002 ("the MVAT Act"); the definitions under Section 65(105)(zzr), 65(55a) and 65(55b) of the Finance Act, 1994; and sub-clause (c) of Section 66E of the Finance Act, 1994. The challenge is on two grounds. First, that these are ultra vires Articles 14, 19(1)(g) and 265 of the Constitution of India. Second, that the exercise of power of the Respondent No.1 under Entry 54 of List II of the Constitution is ultra vires; it encroaches on the power vested exclusively in the Union under Entry 97 of List I.

13. The principal question of this dispute is whether these agreements whereby the *Monsanto* technology is granted by the Petitioner to the seed companies amounts to mere permissive use and, therefore, a service under Section 65B(44) of the Finance Act, 1994 ("Finance Act") read with Entry 97 of List I of the Constitution, or whether it is a deemed sale in the nature of transfer of right to use goods under clause (b)(iv) of the Explanation to Section 2(24) of the MVAT Act read with Article 366(29A)(d) and Entry 54 of List II of the Constitution.

14 A brief background of the *Monsanto* technology and business structure is necessary. *Bacillus Thuringiensis* ("BT") is a naturally occurring bacterium that produces proteins that kill specific insects. Using biotechnology, *Monsanto USA* introduces a specific BT gene into the cotton genome. This produces a toxin protein in the cotton seed sufficient to kill specific insects, viz., boll weevils or bollworms. These Bollgard cotton seeds, called the donor seeds", containing the BT gene were initially imported by MHPL in India from *Monsanto USA*. MHPL also uses these seeds to produce more donor seeds in its facilities, and licences the technology to *Monsanto India* in return for a 16.5% royalty on the latter's turnover. The process thereafter is as follows. *Monsanto India* enters into sub-licensing agreements with other seed companies through which it claims to grant permissive use of

the technology via donor seeds. A sample of such sub-licensing agreement is annexed (Monsanto Petition, Exhibit D, pp. 44-69.). Monsanto India delivers fifty sample BT donor seeds to the seed companies for BT cotton hybrid production, along with the Standard Operating Procedure (SOP) manual prepared by Monsanto USA. The seed companies produce or generate additional donor seeds from these given seeds. Monsanto India provides initial training to the seed companies to assist them in using the donor seeds and developing foundation seeds, which will enable them to eventually produce BT cotton hybrids. Monsanto India thereafter provides training to the seed companies to carry out the Zygoticity Test, which tests the execution of the breeding plan. The sub-licensees, at the end of this process, are required to undertake regulatory trials to obtain the relevant approvals from the various institutes such as the Institutional Biosafety Committee of the Department of Biotechnology, Ministry of Science and Technology, Ministry of Environment, Genetic Engineering Advisory Committee (GEAC) and others responsible. These approvals need certificates of validation and test reports, which are provided by Monsanto India. Once such approval is obtained from the GEAC, each sub-licensee can produce BT cotton hybrid seeds. These BT cotton hybrid seeds are then sold to farmers.

15. At present, the technologies licensed are Bollgard I ("BG I") and Bollgard II ("BG II"). The agreement provides for a few restrictions on the seed companies : the technology is non-transferable, non-exclusive, and cannot be assigned except in the manner provided in the agreement. The seed companies cannot grant further sub-licences, and the sub-licensee is not permitted to reverse engineer, modify or use the BT gene without the prior consent of Monsanto India. Under the agreement, Monsanto India has also to provide training to produce hybrids at various stages, apart from assisting the seed companies in obtaining the required approvals and conducting Zygoticity Tests. This training includes classroom training and sharing of protocols. Under the sub-licensing agreement, Monsanto India receives consideration from the seed companies in the form of a one-time fixed fee and a recurring variable based on the sale of the genetically modified seeds; in essence, a trait fee.

4.3 The terms of agreement were examined in para 40 and 42 of the said decision, where Hon'ble High Court has observed as follows: -

"40. We are, therefore, in complete agreement with Mr. Sonpal when he says that this is a case of a transfer of the right to use goods. He points out certain clauses in the Monsanto India s sub-licence agreement which, in our opinion, further substantiate this. Clause 1.1 defines Cotton Proprietary Germplasm to mean proprietary hybrid cotton parent lines developed or owned by the sub-licensee during the term of the agreement. The word owned implies that a sale has taken place. The term of the agreement, as provided under Clause 9.1, is for an initial period of ten years and is further renewable in increments of five years by mutual consent of both parties, unless it is otherwise terminated earlier. What happens after the expiry or termination of the agreement is most interesting. Under Clause 9.4, the sub-licensee is not bound to return to Monsanto India any portion of the initial fifty seeds given under the agreement, nor any additional donor seeds the sub-licensee may have produced. The control (and ownership) of the Bollgard Technology contained in those initial fifty donor seeds, as also in the additional donor seeds produced by the sub-licensee is with the sub-licensee. Monsanto India has nothing whatsoever to do with this portion of the technology. The only restriction appears to be on the sale of the GMO cotton planting seeds. The sub-licensee is given a two-years window to sell or otherwise dispose of any remaining GMO planting seeds. After this period, Monsanto India has the option of requiring the sub-licensee to sell these planting seeds to Monsanto India itself or to dispose of them for non-planting purposes. This clause makes it evident that the ownership of even the planting seeds is with the sub-licensee. Clause 2.5(d) then provides that Monsanto India can further sub-licence the Bollgard Technology to a maximum of three other companies in the same territory as that of the original sub-licensee. For additional transfers, Monsanto India would have to first consult the sub-licensee. Mr. Sonpal rightly states that this suggests that a transfer of the right has, in fact, taken place; and, even on Mr. Venkatraman s own illustrations, this case would not fall within the third illustration, but within the second and perhaps even the first. The degree of territorial exclusion is surely irrelevant; the question is whether or not there is any exclusivity. If it were mere permissive use, there would be no question of the

Monsanto India having to first consult the sub-licensee before effecting further transfers. Further, under Clause 7.1 the sub-licensee can assign the agreement and its rights and obligations under it to its wholly-owned subsidiaries without Monsanto India's permission. Mr. Sonpal rightly says that this can never happen in a case of a permissive use. In law, a wholly-owned subsidiary is a distinct legal entity. In a case of service or permissive use, a person can never assign the goods or rights to a third person.

41. At this stage, we find that a parallel to practical, everyday examples would be useful. Take, for instance, the example of when one buys a book from Amazon for their Kindle device. In this case, Amazon can transfer the intellectual property of the book to multiple other users simultaneously, but each single transaction would still be a sale. This would also be true of the example of a music CD. The CD is the medium by which the intellectual property, viz. the songs, passes to the buyer. The manufacturer can sell it to an end-user or to an intermediate retailer. The same song can be put on countless CDs. This too is a sale. When one buys a car, one buys the technology that is contained in the body of the car; the body is just the medium. On iTunes, when one buys a song, the song is transferred into a format which is accessible to the buyer, a proprietary format that needs a special device or software. Yet it is a sale. Limitless iTunes users can buy the song simultaneously. This is a sale to each of them. In the case of CD containing software, say for example Microsoft Word, the medium would again be the CD holding the intellectual property, which would be the software technology. This would also be a sale, despite the fact that this same software technology could be put on unlimited number of CDs and sold to multiple users simultaneously. Effective control of that particular software on that one CD is passed to the buyer. The buyer could use it, alienate it, destroy it, and do anything at all that he likes with it. If he made illicit copies of it, this would constitute infringement; and that in itself would not make the transfer of the software on a CD a service. Even if the buyer transferred this non-transferable software, it would amount to a breach of contract provided in the CD package, just as it would under Monsanto India's sub-licensing agreement. However, this does not do anything to disqualify the transaction itself from being a sale. These are all sales.

42. In our opinion, the most fundamental aspect of permissive use of goods is that at the end of the period for which the use is granted, the goods must be returned to the transferor. Let us consider this in the context of a car hire service, a book library service, Amazon Kindle Unlimited and iTunes Radio. When a car is taken on hire, a fee is paid and the car can be used for a certain period of time. During this time, the person renting the car can only use it. He cannot part with it and certainly cannot destroy it. Once the period of hire comes to an end, the car must be returned to the transferor. Therefore, the effective control over the car remains with the transferor. Likewise, in the case of a book library, the books must be returned to the library. With the Kindle Unlimited, one must pay a subscription fee to gain access to an unlimited number of books in the proprietary AZW format. When the subscription expires, all the books are repossessed. iTunes Radio too is a similar concept. A subscription fee is paid, which allows access to music. Once this expires, access to the music is denied. These, in our opinion, are cases of permissive use. The Monsanto India sub-licensing transaction could only be a service in one circumstance, i.e., if the seed companies gave Monsanto India a bag of seeds to mutate and improve with the Bollgard Technology which would, thereafter, be returned to the seed companies. That might perhaps be a service.

In this context, the Hon'ble High Court held that the transactions undertaken by Mahyco Monsanto were in the nature of sale.

4.4 In case of Subway, the facts before Hon'ble High Court were as follows: -

"55. A brief description of Subway's business is this. Subway was granted a non-exclusive sub-license by Subway International B.V. (SIBV), a Dutch Limited Liability Corporation to establish, operate and franchise others to operate SUBWAY-branded restaurants in India. This non-exclusive license was granted to SIBV itself by Subway Systems International Ansalt, which in turn was granted such a license by Doctor's Associates Inc., an entity that owns the proprietary system for setting up and operating these restaurants. These restaurants serve sandwiches and salads under the service mark SUBWAY. The agreement includes not only the trade mark SUBWAY, but also

associated confidential information and goodwill, such as policies, forms, recipes, trade secrets and the like. Typically, Subway enters into franchise agreements with third parties, under which it provides specified services to the franchisee. In return, the franchisee undertakes to carry on the business of operating sandwich shops in Subway's name. The agreement only provides for a very limited representational or display right, and the franchisee cannot transfer or assign these exclusive rights to any third person. Subway also reserves the right to compete with these franchisees in the agreement. Under this agreement, Subway receives two kinds of consideration, one being a one-time franchisee fee which is paid when the agreement is signed; and the second is a royalty fee paid weekly by the franchisee on the basis of its weekly turnover. A sample franchise agreement is annexed (Subway Petition, Exhibit A, pp. 30-49). Under these agreements, the franchisees have not more than a right to display Subway's intellectual property in the form of marks and logos, and a mere right to use such confidential information as Subway discloses and as prescribed by the franchise agreement.

Learned Counsel for M/s Subway elaborated the terms of contract in his own words as follows: -

"58. Mr. Shroff formulates his case on several distinct grounds. First, the franchisee is entitled to display the name Subway only for a limited period of time as stipulated in the agreement. After the expiry of this period of time, as provided in Clauses 8 and 8(g) of the Franchise Agreement, Mr. Shroff submits, and we agree with him, all the rights of the franchisee are terminated. A breach of the agreement also results in potential termination at the option of Subway. Second, Mr. Shroff argues that the franchisee cannot sub-franchise the mere permission it obtains under the agreement on account of the prohibition in Clause 9(a) of the agreement. Third, there is no territorial restriction or competition restriction of any kind placed on Subway. It is entitled to enter into as many or as few franchisee agreements as it wants, even simultaneously, and it can on its own directly compete with its franchisees too.

After analyzing the aforesaid facts, Hon'ble High Court has observed as follows: -

69. We believe that Mr. Shroff is correct when he says that the agreement between Subway and its franchisees is not a sale, but is in fact a bare permission to use. It is, therefore, subject only to service tax. In our opinion, the fact that the agreement between Subway and its franchisee is limited to the precise period of time stipulated in the agreement is vital to Subway's case. At the end of the period of the agreement, or before in case there was any breach of its terms, the right of the franchisee to display the mark Subway and its trade dress, and all other permissions would also end. This is what sets this agreement apart from the case of Monsanto and its sub-licensee. There, the seed companies could do as they pleased with the seeds; they could alienate or even destroy them. In Subway's case, there are set terms provided by the agreement which have to be followed. A breach of these would result in termination of the agreement. We believe that there is no passage of any kind of control or exclusivity to the franchisees. In fact, this agreement is a classic example of permissive use. It can be nothing else. For all the reasons in law and fact that the sub-licensing of technology in Monsanto is held to be a transfer of right to use, this franchising agreement must be held to be permissive use.

72. We find, on facts, that the Subway franchise does not meet these tests. There is no such exclusivity. The agreement itself says that Subway may itself open and operate its own outlets in direct competition with the franchisee [Subway Petition, Clause 11(l) of the Agreement, p. 46]. The agreements themselves expressly contemplate that Subway may create further franchisees in the very area in which these franchisees operate [Subway Petition, Clause 11(l) of the Agreement, p. 46]. The franchisee cannot unilaterally sub-franchise [Subway Petition, Clause 9 of the Agreement, p. 42.]; if it could do without Subway's prior permission or leave, then the consideration might be wholly different and it may then be possible to say that there is a transfer of the right to use. We find that the right of transferability is extremely restricted and is impossible without Subway control throughout. Similarly, if there is no requirement of having to cease display and use [Subway Petition, Clause 8(e) of the Agreement, p. 41], or return the intangible property at the end of the franchise agreement's term [Subway Petition, Clauses 8(e) and (j) of the Agreement, p. 41.], then the transaction might arguably be a sale. Exercises in co-

branding or sub-branding, where one party franchises its mark on a territorially-restricted basis and allows the franchisee to combine it with its own or other marks may also well have an element of sale. Similarly, where a dealership for, say, automobiles, has a territorial exclusivity, then it may amount to a franchise. The Subway franchise model has none of these elements. The so-called system is controlled by Subway and it is exclusive to Subway. At the end of the franchise term, it cannot be used. Some (though not all) of the ingredients - breads, salad dressings and other key items - are to be sourced from Subway or Subway-authorized vendors and nowhere else. This gives Subway deep and pervasive control and dominion over the franchisee's daily operations, without, at the same time, ceding to the franchisee the slightest hint or latitude in what it may do with the permitted marks and technology. This is, therefore, diametrically opposed to the Monsanto model, for Monsanto India has no control whatever in what its licensee does with the BT-infused donor seeds; that licensee may choose not to use them at all. There is also no question of any return or cessation to Monsanto India. Thus, viewed from any perspective, and on the facts of the case, we are unable to hold that the Subway franchise agreements have any of the necessary elements of a sale or a deemed sale.

74. In our opinion, the mere inclusion of franchises under the MVAT Act would not automatically make all franchise agreements liable to sales tax. What must be looked at is the real nature of the transaction and the actual intention of the parties. The agreement must be considered holistically, and effect must be given to the contracting parties' intentions. The label or description of the document is irrelevant. An agreement styled as a franchise might, on a proper examination, turn out to be nothing more than a mere licence (as in Subway's case). On the other hand, an agreement that calls itself a licence might actually be a franchise. If, in a given case, a franchise agreement is effectively nothing more than a mere permissive use, it cannot be made liable to VAT. It would be a service, and hence liable to service tax. When interpreting a taxing statute, or for that matter any statute, full effect must be given to the words used by the Legislature. This, however, does not mean that this principle must be stretched to a point which leads to an absurd result, or one that was not contemplated by the Legislature. The Legislature is presumed to know the law and to have acted in accordance with it. We, therefore, do not think that the Legislature intended for this Notification to have such a sweeping effect as to bring all franchise agreements within the ambit of the MVAT Act. Presumably, what the Legislature intended was to be included only those franchise agreements that involved a transfer of the right to use or some other aspect of a deemed sale as defined under Article 366(29A) of the Constitution. As discussed above, we find that Subway's franchise agreement grants to the franchisee nothing more than mere permissive use of defined intangible rights. It is, therefore, a service, and is not amenable to VAT. We also hasten to clarify that we are not determining whether any particular kind of arrangement is or is not a franchise. Any examples we have given are merely illustrative, and not binding or final findings.

4.5 In view of the above decision, we examined the terms of the contract in the appellant's case. The agreement reads as follows: -

"Company hereby confirms to use of trademark namely Swastik on the following terms and conditions:-

1. You have agreed to permit us for our use of trademark namely Swastik in manufacturing, selling, marketing and other allied business activities for a period of ten years commencing from 1st January 2006.
2. A company will pay a license fee for use of trademark @ 0.1% of its sales.
3. The company shall pay the monthly license fee regularly on or before 15th day of succeeding month subject to tax deduction at source.
4. During the term of license, New Sahyadri Industries Ltd. shall use the trademark for its own business activities and shall not assign the trademark to any other party.
5. These understandings are for a period ten years, which may be renewed for further period on such terms and conditions as mutually agreed by both of us. Anyone of us shall be entitled to terminate this understanding by giving the notice to other party for the period not less than three months.

6. *The Company shall be entitled to use the said trademark for the purpose of lawful business and shall not use the trademark for any other purpose, than explicitly stated in this letter.*

7. *You shall not permit to any other party for use of trademark Swastik during the period of licensing arrangement with us without our prior consent in writing.*

In the token of your acceptance of conditions of this letter, please sign and return duplicate copy of this letter for our record.

It is apparent from the agreement that, (i) No exclusive right to use the trade mark "Swastik" has been given to M/s New Sahyadri Industries Ltd. The appellants are free to give this trade mark to other even in the same territory. (ii) M/s New Sahyadri Industries Ltd. are not free to permit use of the trade mark to anybody else i.e. they cannot sub-license. (iii) If M/s New Sahyadri Industries Ltd. wish to permit to any other support for use then they have to seek permission of the appellant. The trade mark cannot be assigned to anybody by M/s New Sahyadri Industries Ltd. (iv) While the agreement is for a period of 10 years, both parties have option to terminate the agreement by giving the notice of three months.

4.6 In the above circumstances, it is apparent that the agreement is very similar to the agreement examined by Hon'ble High Court in respect of M/s Subway in the decision reported in case of Mahyco Monsanto (supra). The agreement in the instant case is an agreement of permissive use of the trade mark "Swastik and no transfer of right to use of the said trade mark.

4.7 In these circumstances, we do not find any merit in argument of the appellant that the said transaction is not liable to Service Tax under Finance Act, 1994.

4.8 Learned Counsel has further argued that they have paid VAT and therefore, no Service Tax can be demanded. It is not in the jurisdiction of this Tribunal to adjudicate on the levability of VAT or otherwise. This Tribunal is competent to adjudge regarding levability of Service Tax under the Finance Act, 1994 only. In these circumstances, in so far as the payment of VAT is concerned, the appellant may approach the appropriate authority.

4.9 Learned Counsel has further argued that the impugned order does not give any findings with respect to imposition of penalties. We find that the Commissioner (Appeals) in his order as observed as under: -

"18. The appellant have contended that they had not suppressed the facts from the department, when they had produced all the documents before the investigating officers and the demand in the initial case (Appeal No. 191/2013) is hit by time limitation. I find that the appellant had obtained registration under the category of Intellectual Property Service only on 25.6.2007 and were filing Nil returns against this service. During auditing of the records of the appellant, the Department came to know that the appellant was not discharging their Service Tax liability on this service. It is a fact that in their Service Tax-3 returns for the relevant period, the Appellant had willfully mis-stated that they have received zero amount towards provision of this service. The appellants contention that the impugned services were non-taxable is not legally correct, as already concluded above. Thus, willful mis-statement on the part of the appellant stands established and thus extended period has been correctly invoked in the initial case (appeal No. 191/2013).

4.10 In so far as the invocation of extended period is concerned, we find that the elements for imposing the penalty are identical to those necessary to invoke the extended period of limitation. In these circumstances, no separate specific findings are needed for imposition of penalty under Section 78 of the Finance Act, 1994.

5. The appeals are consequently dismissed.

(Pronounced in Court on 31.01.2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-110066
COURT NO.IV**

**Appeal No. ST/532/2012-DB
ST/CROSS/2349/2012**

Arising Out of Order-in-Original No. 17-49/GB/2012, Dated: 24.1.2012

Passed by Commissioner of Service Tax-DELHI-I (Appeal)

Date of Hearing: 8.3.2018

Date of Decision: 20.3.2018

COMMISSIONER OF SERVICE TAX, DELHI

Vs

M/s INDIAN INSTITUTE OF PLANNING AND MANAGEMENT

Appellant Rep by: Shri Amresh Jain, DR

Respondent Rep by: Shri Amit Singh, Adv.

CORAM: S K Mohanty, Member (J)

V Padmanabhan, Member (T)

FINAL ORDER NO. 51033/2018

Per: V Padmanabhan:

1. The present appeal is filed by the Revenue against the Order-in-Original No. 17-49/2012 dated 27/01/2012 passed by the Commissioner of Service Tax, Delhi. Vide the impugned order the Ld. Adjudicating Authority dropped most of the Service Tax demand raised by Revenue on the respondent, Indian Institute of Planning and Management (IIPM). He however confirmed the demand of Service Tax along with interest and penalties to the extent of Rs. 8,08,000/- on the respondent. Aggrieved by the same, Revenue is in appeal before us.

2. The facts relevant to the case are briefly summarized below:-

IIPM is engaged in conducting management courses leading to the award of Certificate of Associate Fellow in Indian Institute of Planning and Management (AFIIPM), Fellow Indian Institute of Planning and Management (FIIPM) of IIPM and also MBA, BBA Degrees of International Management Institute (IMI), Europe. Head Office and Institutes are situated in New Delhi with various branch offices and institutions in other places. Intelligence was received by DGCEI that IIPM was not paying Service Tax on the fees collected for the various academic courses like MBA, BBA, FIIPM, AFIIPM and also various training courses being organized by them. Accordingly, investigation was undertaken by DGCEI, Chennai Unit. After collecting relevant documents and recording the statements of various persons connected with IIPM Show Cause Notice dated 10/02/2006 was issued and after the due process of adjudication the impugned order came to be passed. It is pertinent to record that the respondent was not registered centrally under the provisions of Finance Act, 1994; hence show cause notices demanding Service Tax were answerable to various Jurisdictional Service Tax Authorities. The Commissioner, Service Tax, Delhi adjudicated the matter as a Common Adjudicating Authority nominated by CBEC vide Order No. 2/2007 dated 06/09/2006. Revenue has filed the present appeal contending that the Ld. Adjudicating Authority has erred in dropping the bulk of the demand of Service Tax made in the show cause notice.

3. The allegations raised in the Show Cause Notice are summarized below:-

i. The investigation undertaken by the DGCEI has concluded that IIPM were charging huge amounts of about Rs. 5 Lakhs per student in the case of MBA-2 Years Courses and around Rs. 8 Lakhs to 9 Lakhs per student in respect of BBA-3 Years courses. These facts have been deposed by Shri Shouvik Duta, Dean, IIPM.

ii. The academic courses conducted by IIPM are not approved by All India Council of

Technical Education (AICTE) which is under Ministry of Human Resources Development. The Institute is also not affiliated to any University or recognized by UGC or any State or Central Act and they are not following any of the regulations of AICTE, UGC etc. These facts have been declared by IIPM in their prospectus as well as advertisement routinely released in newspaper.

iii. In view of the above, since the training courses conducted by IIPM do not result in award of any certificate/ Diploma/ Degree or any other educational qualification recognized by the law being in force, the activity will fall under the category of Section 65 (105) (zzc) of the Act and is a taxable service liable to payment of Service Tax.

4. The findings of the Adjudicating Authority leading to the dropping of demand are summarized below:-

i. The Adjudicating Authority referred to the legal provisions i.e. Section 65 (105) (zzc) of the Act and found that some of the courses conducted by the IIPM in the form of purely training programs intended for providing skill or knowledge in the respective fields are covered within the above statutory definitions and are liable to payment of Service Tax. Accordingly, he has confirmed the demand of Service Tax to the extent of Rs. 8,08,000/-.

ii. He has considered the training programs leading to the award of Certificate such as AFIPM, FIIPM of IIPM as well as MBA and BBA degrees of IMI, Europe as academic programs. After referring to definitions of the Commercial Training or Coaching under Section 65 (26) of the Act, he has concluded that such programs are by way of academic education and are distinct from the ambit of Commercial Training or Coaching. Accordingly, he has dropped the demand of Service Tax on the fees collected by IIPM towards such courses.

5. With this background we heard Shri Amresh Jain, Ld. DR for the revenue as well Shri Amit Singh, Ld. Advocate appearing for the respondent.

6. The Ld. DR submitted the arguments of Revenue which are summarized below:-

i. The Adjudicating Authority has erred in making a distinction between academic courses and Commercial Training or coaching. The statute provides for a specific definition for both Commercial Training or Coaching [Section (65) (26)] as well as Commercial Training or Coaching Centre [Section (65) (27)]. Only those centers which are covered under the exclusions provided in Section 65 (27) will fall outside the Service Tax ambit. Evidently, the activity of IIPM is in a field other than sports, or pre-school coaching. The Certificates/ diploma/ degree issued by IIPM are not recognized by law since they do not have the approval of AICTE or UGC. IIPM is also not affiliated to any University. Consequently, the exclusion provided in the statutory definition is not applicable to IIPM.

ii. The adjudicating authority has classified the course run by IIPM under the category of academic education and has excluded the same from the ambit of Service Tax. This view is totally erroneous in as much as the statutory definition does not provide for such exclusion.

iii. Referring to the meaning of the term 'Education' as listed in WIKIPEDIA, he argued that the term 'Education' has a very wide meaning and includes all modes of learning. He submitted that any kind of learning through any course conducted by any institute which is not covered by exclusions in Section 65 (27) will be liable to Service Tax. Since the degrees awarded by IIPM for its academic courses are not recognized by law, Service Tax is liable to be paid on such fees recovered.

iv. He also relied on the Tribunal decision in the case of M/s Unitech Southcity Educational Charitable Trust and others V/s CST (Adj.), New Delhi vide Final Order No. 55907-55911/2017 dated 17/08/2017 wherein the Tribunal has upheld the demand for Service Tax in respect of courses run by the appellant in that case which resulted in award of degree by the University in U.K.

7. He also filed written submissions dated 08/03/2018 in which he has mainly contended as follows:-

7.1 The Adjudicating Authority has erred in making a distinction between "Academic

Education" vis-a-viz "Training or Coaching"-

The adjudicating authority erred in citing the situation of a secondary school or a degree college to make such distinction and observing that such an institution is engaged in providing 'academic education', thus, not liable to service tax, even when they do not confer any degree, diploma or certificate, therefore, could have been chargeable to service as they do not fall under the exclusion clause. However, the adjudicating authority while making such observation erred in not considering that such school or college is attached/affiliated to any of various Central or State Education Boards or Universities or Deemed Universities, recognized by the law, and their students are awarded such degrees, diplomas or certificates, recognized by law, issued by such Board or University. Such school or college follows the curriculum, instructions, guidelines, regulations etc. of the Board or the University to which it is affiliated or attached. Therefore, it is quite clear that such institutions were not liable to service tax only by virtue of exclusion clause prevailing at the relevant time in section 65(105) (zzc) of the Act, *ibid.* In Board's letter F. No. 334/1/2010-TRU dated 26.02.2010 in para 6.1 it has been clearly stated that the schools, institutes, colleges, universities providing courses that lead to award of recognized diplomas, degrees and sports education were kept out of tax net. As such, it cannot be argued that 'academic education' is distinct from 'training' or 'coaching' and that, since, these institutions were imparting 'academic education', they were not liable to service tax.

7.2 Erroneous import of words "Education" and "Academic" by Adjudicating Authority-

The legislative intent of the taxing entry has been clearly brought out in the legal provisions contained in Section 65 (105) (zzc) read with Section 65 (26) and Section 65 (27) of Finance Act, 1994, where under, definition of 'Commercial training and Coaching' is clearly stipulated. In such a scenario, as per the rules of interpretation, there was no need for Adjudicating Authority to import words like "Education" & "Academic".

Even otherwise as per Wikipedia, Education has been defined as follows:-

"Education is the process of facilitating learning, or the acquisition of knowledge, skills, values, beliefs, and habits. Educational methods include storytelling, discussion, teaching training and directed research. Education frequently takes place under the guidance of educators, but learners may also educate themselves".

The above clearly shows that acquisition of knowledge or skills through training or coaching clearly falls within the follicles of the taxing entry. The only exceptions provided are sports and the training or coaching which results in grant of certificate or diploma or degree recognized by law.

7.3 The activity of the respondent does not fall under any exception or exemption:-

It may be seen that the only exception/exemption which the Finance Act provides are as follows:-

(a) Commercial training and coaching in the field of sports.

(b) Commercial training and coaching resulting in grant of certificate or diploma or degree which is recognized by law.

(c) Commercial training and coaching which are vocational in nature.

The activity of the respondent does not fall in any of the above and hence, would be charged to service tax. The Revenue also relies on the Final Order No. ST/A/55907-55911-CU[DB] dated 17.08.2017.

8. Shri Amit Singh, Ld. Advocate appearing for the respondent on the strength of his written submission, submitted as follows:-

i. He justified the impugned order in which Service Tax demand has been substantially dropped by the Ld. Adjudicating Authority.

ii. He referred to the statutory definition Section 65 (26) and argued that the term "Commercial Training or Coaching" refers to courses other than academic courses. He argued that most of the courses conducted by IIPM are in the nature of academic

courses leading to various certificates/ degrees. Such courses cannot be brought within the definition of Commercial Training or Coaching as has been rightly held by the Adjudicating Authority.

iii. The activity of imparting education is not subject to Service Tax. He has referred to Supreme Court decisions and submitted that in construing the fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law.

iv. He relied on the decision of the Hon'ble High Court, Delhi in the case of Delhi Music Society V/s Director General of Income Tax in Writ Petition (C) No. 4726/2011 dated 16/12/2011. In the above case, the Hon'ble High Court considered the status of the petitioner with reference to Section 10 (23) C of the Income Tax Act. The Hon'ble High Court held that even though the petitioner was not an Institution recognized by UGC for imparting formal education, they cannot be considered as Coaching or Training Institute. The petitioner was held to be an Educational Institution. On similar lines he submitted that IIPM is to be considered as an Academic Educational Institution and not covered within the definition of "Commercial Coaching or Training Centre".

v. Referring to the case law of United Southcity (supra) relied upon by the Ld. DR, he submitted that even going by the said case law, the demand is required to be restricted to that falling within the normal time limit.

vi. He also argued that the levy of Service Tax on Commercial Coaching or Training Services was not free from doubt and hence there is no justification for invoking the extended time limit.

9. We have carefully considered the submissions made by both sides. Our findings and conclusions are given below.

10. The statutory definitions which are relevant for the purpose of present dispute are reproduced below for ready reference.

Sections 65(26) and 65(27) of the Finance Act, 1994 defines commercial training or coaching as follows :-

'(26) "commercial training or coaching" means any training or coaching provided by a commercial training or coaching centre;'

'(27) "commercial training or coaching centre" means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes but does not include pre-school coaching and training centre or any institute or establishment which issues any certificate or diploma or degree or any educational qualification recognized by law for the time being in force.'

The taxable service was defined in Section 65(105)(zzc) as follows :-

(zzc) any service provided or to be provided to any person, by a commercial training or coaching centre in relation to commercial training or coaching."

An explanation was inserted in sub-clause (zzc) vide Finance Act, 2010 retrospectively with effect from 1-7-2003 which read as follows :-

Explanation. - For the removal of doubts, it is hereby declared that the expression "commercial training or coaching centre" occurring in this sub-clause and in clauses (26), (27) and (90a) shall include any centre or institute, by whatever name called, where training or coaching is imparted for consideration, whether or not such centre or institute is registered as a trust or a society or similar other organisation under any law for the time being in force and carrying on its activity with or without profit motive and the expression "commercial training or coaching" shall be construed accordingly;

11. The issues pertaining to interpretation of 'commercial training or coaching', taxable service specified in Section 65(105)(zzc) of the Finance Act, 1994, Section 65(26) defining 'commercial training or coaching' and Section 65(27) defining 'commercial training or coaching centre' were referred to a Larger Bench of this Tribunal and the Larger Bench in the *Great Lakes Institute of Management Ltd. 2013 (32) STR 305 (Tri.-LB)* examined these issues at length after considering the various decisions on the

matter and the circulars issued in this regard by the C.B.E. & C. and answered the reference as follows :-

"25. On the aforesaid analysis, we answer the reference as follows :

(i) The taxable service of "commercial training or coaching" occurs when any institute or establishment is engaged in the activity of imparting skill, knowledge or lessons on any subject or field (excluding sports), irrespective of whether such imparting of skill, knowledge or lessons is in respect of particular discipline or a broad spectrum of disciplines/academic areas; irrespective of the nomenclature or description of the institute or establishment, as a coaching or training centre or an educational institution; regardless of whether an institute or establishment is incorporated by or registered under any law; and irrespective of distinctions on the basis of curriculum, course content, teaching methodology, course duration or otherwise. Activities of imparting skills, knowledge, lessons on any subject or field or when provided by any entity, institution or establishment which is excluded by a specific and legislated exclusionary clause would alone be outside the fold of the taxable activity."

12. If we apply the above ratio to the facts of the case before us, we are led to the conclusion that there is no scope to exclude "Academic Courses", conducted by IIPM from the purview of Service tax levy. The exclusion provided in Section 65 (27) is available to any institute or establishments which issues any certificate or any educational qualification recognized by law for the time being in force. But it is an admitted position that the certificates and degrees awarded by IIPM and also by IMI, Europe do not enjoy the recognition from AICTE or UGC. These facts have been declared by IIPM in their prospectus and advertisements and such facts have been admitted by the Dean of IIPM in his statements before the investigating authorities. Therefore, IIPM clearly falls under the definition of Commercial Training or Coaching Centre as defined in law Section 65 (27) and the services rendered by them are liable to Service Tax, and we hold accordingly. In respect of the few management courses conducted by IIPM which are categorized by the Adjudicating Authority himself as other than academic, Service Tax demand has already been confirmed in the impugned order.

13. The Ld. Advocate appearing for the respondent has relied on the decision of the Hon'ble Delhi High Court in the case of Delhi Music Society (supra). He has argued that even though the respondent is an Educational Institution, they cannot be considered as Coaching or Training Centre. After perusing the decision of the Hon'ble Delhi High Court, we note that the decision has been rendered in the context of Section 10 (23) of the Income Tax Act. In Section 65 (27) of the Finance Act, 1994, there is a specific definition for the term Commercial Training or Coaching Centre. As discussed Supra, we are of the view that the activities of the respondents fall under the above definition. Consequently, the Hon'ble Delhi High Court's decision, which is on different facts is distinguishable and cannot be applied to the facts of the present case.

14. The next issue for consideration is whether extended period of time could be invoked in the present case for confirmation of Service Tax demand. Revenue has relied on the Tribunal decision in the case of Unitech Southcity Educational Charitable Trust and others. In the said decision the appellant in that case was held to be liable for payment of Service Tax under the category of "Commercial Training or Coaching Centre" for the reason that the courses being run lead to a Degree by the Foreign University but the demand was restricted to normal time limit. The reason cited in the order for such restriction is the retrospective amendment carried out by the Finance Act, 2010 in the definition of Section 65 (27) wherein an "Explanation" was inserted w.e.f. 01/07/2003. The Explanation is relevant only in respect of a "Commercial Training or Coaching Centre" which is registered as an Organization carrying out activity without profit motive.

In the facts of the present case this aspect of IIPM is not in debate. This plea has neither been taken before the Adjudicating Authority nor before us. Consequently, we are of the view that the case of M/s Unitech Southcity Educational Charitable Trust and others is distinguishable to this extent from the facts of the present case.

15. It is on record that IIPM neither took registration nor registered themselves with

Department up to 22/07/2005. On the said day the registration was taken only at Bangalore even though IIPM has Institutes in many other places. They also did not pay any Service Tax or file ST-3 Returns even though the tax on Commercial Training or Coaching Centre was levied w.e.f. 01/07/2003. Since they have failed to obtain registration or file returns or even intimate the Department of the activities undertaken, the Department is fully justified in issuing show cause notice to demand of Service Tax along with interest by invoking the extended period of time.

16. In view of the above discussions we find that Adjudicating Authority has erred in dropping the demand of the Service Tax by considering the activities as falling outside the scope of Commercial Training or Coaching Centre. For the reasons set out above we conclude that the impugned order is not sustainable. We set aside the impugned order to the extent of dropping of Service Tax demand and uphold the entire demand of Service Tax raised in the show cause notice dated 10/02/2006. Such demand will be payable along with interest under Section 75. IIPM will also be liable to pay penalty equal to the Service Tax demanded under Section 78 as well as under Section 77 of the Finance Act, 1994. Since penalty under Section 78 is upheld, we do not impose penalty under Section 76.

(Order Pronounced in the open court on 20.3.2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO.2, R K PURAM, NEW DELHI-110066
BENCH-DB, COURT -III**

Service Tax Appeal No. ST/50438/2014 ST [DB]

Arising out of Order-in-Appeal No.147 (VC) ST/JPR-I/2013 Dated: 9.10.2013

Passed by the Commissioner (Appeals-I), Customs & Central Excise, Jaipur-I

Date of Hearing: 6.4.2017

Date of Decision: 6.4.2017

SATYA PRAKASH BUILDERS PVT LTD

Vs

COMMISSIONER OF CENTRAL EXCISE, JAIPUR-I

Appellant Rep by: Mr Alok Kothari, Adv.

Respondent Rep by: Mr Ranjan Khanna, DR

CORAM: S K Mohanty, Member (J)

B Ravichandran, Member (T)

FINAL ORDER NO. 52777/2017

Per: B Ravichandran:

The appellant is aggrieved by the order dated 09.10.2013 of Commissioner (Appeals - I), Jaipur. The appellants are engaged in construction of the residential complex and they are registered with the Service Tax Department. The dispute in the present appeal relates to the period 16.06.2005 to 30.09.2009 with reference to non-payment of service tax by the appellant under the category of management, maintenance and repair service in respect of one of their projects of residential complex.

2. The brief facts of the case are that the appellants built a residential complex having multiple units. They have collected from their clients a fixed amount towards corpus fund in respect of each dwelling unit, apart from the consideration for construction of the residential unit. The said fund is to be transferred to the welfare association of residents, as and when formed, for maintenance and management of the said complex. As the project was on-going and the welfare association was yet to be formed, the appellants undertook the work of maintenance of the whole project premises, which included already sold dwelling units in which some of the residences were occupied. The Revenue entertained a view that the appellants have rendered service of management maintenance and repair of the said dwelling units/ complex and are liable to pay service tax. As there is no direct consideration received from the occupants of the flats, the Revenue invoked the provisions of valuation rules, to arrive at equivalent consideration for tax value. The interest, based on prime lending rate on the corpus fund deposited by the buyers of the flat, was considered on notional basis and tax demand was confirmed against the appellant. The original authority apart from confirming the service tax liability of Rs.9,96,844/- imposed penalties under Section 76, 77 and 78 of the Finance Act, 1994. On appeal, the order was upheld by the impugned order.

3. The ld. Counsel for the appellant submitted that the project was still under completion and as a promoter - builder, they were bound to maintain the said complex in good condition as some of the residential units are yet to be disposed of. Such maintenance of their own project cannot be taxed under management, maintenance and repair service. Further, the valuation adopted by the Revenue is strongly disputed. Admittedly, when the corpus fund was never spent, there can be no consideration to be taxed under the said tax entry. The method of taxing notional interest on such corpus fund is not supported by the law. The ld. Counsel also contested the demand on the question of time bar. He submitted that as the appellant did not receive any consideration from the occupants of the flats, they have, bonafidely, believed that there is no taxable service in maintaining the ongoing project. As such, he pleaded for setting

aside the demand on the question of time bar and also setting aside various penalties imposed on them.

4. The Id. A.R. while reiterating the findings of the lower authorities submitted that the appellant did provide service of maintenance to various occupants of the residential complex. There is no direct consideration received for this. However, the occupants of the flats already deposited the corpus-fund towards maintenance of their complex and such fund is very much available with the appellant. The said fund is to be transferred, in future, to the welfare association to be formed after all occupants duly joined to create such association. As the taxable service has been provided and no direct consideration is available as per the accounts, Revenue correctly resorted to the provisions of valuation rules, to arrive at equivalent consideration by following the principles laid down under Rule 3 of Service Tax (Determination Value) Rules, 2006. Regarding time bar, the Id. A.R. submitted that the appellant did provide taxable service and did not take steps to fulfill the legal obligation for discharging the tax. As such, he supported the findings of the lower authorities in this regard.

5. We have heard both the sides and perused the appeal records. The admitted facts of the case are that the appellants did maintain the residential complex in which there were various occupants. There is a taxable service under the category of management, maintenance and repair in terms of Section 65(64) of Finance Act, 1994. The main dispute in the present appeal is with reference to valuation of such taxable service. Admittedly, the appellant did not receive any separate consideration from the occupants of the flats for such management/ maintenance of their property.'

6. However, a fixed amount of deposit was received, alongwith consideration for construction of the flats, with a specific reason for transferring the same to the welfare association which will be in-charge of management and maintenance of the said complex. Till the formation of the association the appellants as a builder/ promoter did undertake the work of management / maintenance of the complex. As such, we are of the opinion that the appellant did provide taxable service to various occupants of the complex under tax entry of "management, maintenance and repair service" which specifically talks about management and maintenance of immovable properties.

7. Regarding the valuation of such taxable service, we find that the notional interest adopted by the Revenue will not Form a proper basis. Admittedly, there is no evidence regarding accrual of interest to the appellant on the deposit/ corpus fund received from the occupants of the flats. No such finding has been recorded by the lower authorities. The appellant also contested that all the residential units in the complex were not sold or occupied by various owners. A portion of the building is still under the control / maintenance of the appellants themselves. We find that while tax liability of the appellant has to be upheld, the method of arriving at the tax value has to be in terms of Rule 3 (b). For applying the provision of Rule 3 (b), the stipulation is that the value shall not be less than the cost of provision of such taxable service. The equal money value has to be arrived at based on the documents and supporting evidence to be submitted by the appellant. In case, no separate supporting evidences are available, a value, not below minimum benchmark value of cost of provision of such taxable service should be arrived at. For this, we remand the matter to the Original Authority, who will examine the evidences to be submitted by the appellant to arrive at a proper value in terms of Section 67 read with Valuation Rules, 2006. Since the case is remanded to determine the quantum of tax liability, we find that the plea of appellant on the question of time bar as well as their liability to penalty under various Sections may also be looked into by the original authority afresh. The appeal is disposed of in the above terms.

(Dictated and pronounced in the open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI**

**Appeal Nos. ST/86237, 86142, 86060, 86176, 86221, 87616, 86393, 86297/20
15,86032/2017, 85380/2018 ST/MISC/85599/2018 ST/86297/2015**

Arising out of Order-in-Original No. 03/STC-IV/SKS/14-15, Dated: 13.3.2015, OIO No.01//STC-IV/SKS/14-15, Dated: 18.2.2015, OIO- 74/STC-I/SKS/14-15, Dated: 2.2.2015, OIO-02/STC-IV/SKS/14-15, Dated: 18.2.2015, OIO-82/STC-I/SKS/14-15, Dated: 12.3.2015, OIO-44/STCI/SKS/14-15, Dated: 16.9.2015, OIO-271/COMMR.-WLH-/LTUM/ CX/2014, Dated: 18.3.2015, OIO-292/COMMR.-WLH-/LTU-M/CX/2014, Dated: 31.3.2015, OIO-PUN-SVTAX-000-COM-040-16-17, Dated: 17.1.2017, OIO-PUN-CGS and CX-002-COM-007-17-18, Dated: 31.10.2017

Passed by the Commissioner of Customs and Central Excise

Date of Hearing: 24.8.2018

Date of Decision: 12.2.2019

ICICI BANK LTD

Vs

COMMISSIONER OF SERVICE TAX MUMBAI-IV, MUMBAI-IV,

Appellant Rep by: Shri V Sridharan Sr. Adv. with Shri Vinay Jain, & Shri Jay Chheda, C.A. for ICIC Bank Shri S.S. Gupta, C.A. for IDBI Bank Shri Bharat Raichandani, Adv. for State Bank of India Shri Sanjay Khemani, C.A. for Bank of India Shri D. K.Sahu, Adv. for Union Bank of India Shri S. Ananathan, C.A. with Shri R. Luthia, C.A. for Bank of Baroda, Dena Bank, & Bank of Maharashtra

Respondent Rep by: Shri R. Kapoor, Commissioner (A.R) Shri M.K. Sarangi, Jt. Commr. (A.R.)

Appeal Nos. ST/86160 & 85915/2016

Arising out of Order-in-Original No. -54/STC-IV/MRRR/15-16, Dated: 30.11.2015, OIO-PUN-SVTAX-000-COM-043-15-16, Dated: 15.12.2015

Passed by the Commissioner of Customs and Central Excise

**COMMISSIONER OF SERVICE TAX
MUMBAI-IV, PUNE-I**

Vs

**BANK OF INDIA
BANK OF MAHARASHTRA**

Appellant Rep by: Shri Roopam Kapoor, Commr. (A.R.) Shri M K Sarangi, Jt. Commr. (A.R)

Respondent Rep by: Shri Sanjay Khemani, C.A. for Bank of India Shri S Ananathan, C.A. with Shri R. Luthia, C.A. for Bank of Baroda, Dena Bank, & Bank of Maharashtra

CORAM: Dr. D M Misra, Member (J)

Mr Sanjiv Srivastava, Member (T)

FINAL ORDER NOS. A/85281-85290/2019

Per: Dr. D M Misra:

Out of twelve appeals, ten are filed by respective assessee- Appellants and two are filed by the Revenue against respective orders in original passed by the concerned commissioners of central excise customs and service tax. All these appeals since involve common issues are taken up together for disposal. The amount of credit and penalty involved in each of the appeal is mentioned as below:

Name	of	the	Period	of	Amount of credit	Amount	of

Appellant & Appeal No.	Dispute	involved Rs.	Penalty in Rs.
ICICI Bank Ltd. ST/86237/2015	June, 2012 to Dec., 2013	30,10,85,994/-	3,00,00,000/-
Bank of Baroda ST/86142/2015	March, 2013 to Nov., 2013	38,88,52,482/-	3,00,00,000/-
State Bank of India ST/86060/2015	April, 2012 to Dec., 2013	141,99,92,593/-	10,00,00,000/-
Bank of India ST/86176/2015	Nov., 2012 to Dec., 2012	18,18,33,981/-	2,00,00,000/-
Dena Bank ST/86221/2015	April, 2012 to Nov., 2013	10,90,91,460/-	5,00,00,000/-
Dena Bank ST/87616/2015	May, 2014 to Nov., 2014	6,07,09,296/-	50,00,000/-
IDBI Bank ST/86297/2015	Feb., 2013	12,81,91,842/-	1,00,00,000/-
Union Bank ST/86393/2015	11.4.2012 to 27.11.2013	30,70,97,564/-	7,50,00,000/-
Bank of Maharashtra ST/86032/2017	April, 2014 to March, 2015	13,09,61,394/-	65,48,070/-
Bank of Maharashtra ST/85380/2018	April, 2015 to Sept, 2016	24,01,13,260/-	1,20,05,663/-
CCE& ST/86160/16	Jan. 2013 to Nov.2014	-----	Penalty U/s 76 not quantified
CCE& ST/85915/16	April 2012 to July 2013	12,47,19,859/-	-----

2. Facts are almost common to all these appeals. However, to appreciate the question of law involved , it would suffice to state the facts of the appellant M/s ICICI Bank Ltd. Briefly stated the facts of the said case are that the appellants are engaged in providing taxable services of banking and other financial services. During the relevant period they had availed cenvat credit in respect of service tax paid on various input services including deposit insurance service provided by Deposit Insurance and Credit Guarantee Corporation (DICGC). Alleging that the premium paid on deposit insurance to DICGC since not an 'input service' as defined under Rule 2 (I) of Cenvat Credit Rules, 2004 show cause notices were issued to the appellants, after completion of necessary investigation, for recovery of the credit availed on the service tax paid on such insurance service with interest and penalty. On adjudication, the demand was confirmed with interest and penalty. Aggrieved by the said order, the appellants are in appeal.

3. Ld. advocate Shri V. Sridharan appearing for the appellant ICICI Bank has submitted that it is a scheduled bank at the relevant point of time and has been rendering banking services in India and overseas. The appellants offer a wide range of banking services across retail and corporate sector and are registered with the Department for payment of service tax. The appellant had been duly discharging their service tax liability wherever applicable and also they have been availing cenvat credit of service tax paid on various input services received and used in providing the taxable output service. In terms of rule 6(3B) of the Cenvat Credit Rules, 2004, the appellant was liable to reverse 50% of the total Cenvat Credit availed during a particular month, which they have been meticulously complying with during the relevant period. It is his contention that as per RBI norms, the appellant is required to have a capital adequacy ratio of 9% and should be registered with the Deposit insurance and credit guarantee Corporation (DICGC), a subsidiary of Reserve Bank of India. The DICGC protects small depositors, in the event of failure of bank, by way of ensuring return of the deposits up to Rs. 100,000/- per depositor. Every bank in India is mandatorily required to insure its deposits through DICGC. During the relevant period from July 2012 to March 2014 the

appellant ICICI Bank Ltd. have paid Rs.4,869,765,276/- towards insurance premium to DICGC on which they paid service tax amounting to Rs. 70,49,47, 822/-and consequently avail credit of the said amount.

4. Referring to the definition of 'input service', the learned advocate for the appellant has submitted that the case of the Department mainly rests on three counts; (i) the insurance service is for the benefit of the depositors and not for the bank. DIGCC has not insured the Bank and thus the bank cannot be treated as an insured person; (ii) Deposit insurance premium is linked only to deposits accepted by banks and has no nexus with any other service provided by banks so it cannot be termed as 'input service' used for rendition of any output service.; (iii) The appellant did not charge any consideration for the acceptance of the deposit, so it is a transaction in money only and outside the purview of service tax.

5. Responding to the said observation in the impugned order, the learned advocate has submitted that the services in the present case are covered by 'means' clause of the definition of 'input service'. He has submitted that the insurance services are essential for rendering output services and the banks primary source of income is in the form of interest out of its lending activity. Such interest is not liable to service tax by virtue of being included in the negative list of the definition of 'service' with effect from 01.7.2012. But, it is directly linked to the lending activity. The bank receives taxable incomes as well as in the form of interest which are consideration for services performed consequent to the lending activity or the activity of acceptance of deposits and on such other incomes service tax has been discharged by the appellant. He has further submitted that all these considerations received for identifiable services performed, and are not independent of the activity of accepting deposits. In other words, such services have a direct nexus to the activity of accepting deposits. The appellants have also submitted that all services cannot be rendered without the bank having accepted the money from depositors. It can be concluded that deposit insurance is an input service by virtue of it being directly linked to the activity of accepting deposits from which a bank earns various charges and on which service tax liability have been discharged.

6. Ld. advocate has further submitted that the expression 'used for provision of output service' is wider than the expression 'used in manufacture of goods' in the definition of "input service". Rule 2(l) of the Cenvat Credit Rules provides that input service means any service used by a provider of output service for providing an output service. It also provides that the input service means any service used by the manufacturer in relation to the manufacture of final product. In other words, the definition of input service is wider for a service provider in comparison to a manufacturer. In support, the learned advocate referred to the Larger bench decision assessed at in the case of *Jawarhar Mills Ltd Vs. CCE, Coimbatore 1999 (108) ELT 47(Trb.)* wherein it is held that 'used for' is wider than the phrase 'used in' and 'used for' would cover any of the goods if used for producing or bringing about any change in any substance for the manufacture of final product would be capital goods and thus qualify for input credit. Similarly the learned advocate has also referred to the judgement of this Tribunal in the case of *Mundra Port & Special Economic Zone Ltd. Vs. CCE, Rajkot 2009 (13) STR 178(Tri.-Ahmd.)*, whereunder the credit of duty paid on cement and steel used in construction of jetty were held to be not admissible but the said judgment was set aside by the Hon'ble Gujarat High Court reported at 2015 (39) STR 726(Guj.) .

7. The Ld. advocate has further submitted that insurance being a statutory obligation, the reserve Bank of India has power to cancel the license of the bank for non-compliance, thus, the service of DICGC is not only commercially expedient but also mandatory nature. It is submitted that deposit insurance, being a statutory obligation for bank, non-compliance with the same could impact the mobilization activity of the bank, without which the lending activity cannot be judiciously carried out. He has further submitted that the service of DICGC is mandatory nature, and without it Bank cannot function at all. Hence, the amount paid to DICGC will certainly qualify as an input service.

8. Further, referring to the definition of 'input service', the Ld. Advocate has submitted

that its scope is very wide; not only it includes the services used for provision of services, but also services necessary to run day-today business or services, commercially expedient avail. Therefore, for a service to qualify as an input service, it has to be either used for provision of service or if such nexus is not present, it shall be included in the inclusive component of the said meaning. He has also submitted that in the inclusive portion of the definition of 'input services' the service viz." services in relation to "financing" is specifically mentioned; since the services of DICGC are essential and mandatory for raising money by bank and deposits are the main source of finance for any Bank, hence it is an input service.

9. Further, the Ld. advocate has submitted that even though there is a direct nexus between the deposit insurance services received by the appellant and output services provided by the appellant, without accepting, even if it is as assumed that some part of the deposit is not used for provision of output services, then also the appellant are entitled for the credit as the appellant has already paid the 50% of total cenvat credit taken in terms of Rule 6(3B) of Cenvat Credit Rules, 2004.

10. Further, rebutting the observation that collection of deposits, loans or advances so far as the consideration is represented by way of interest, is a transaction in money hence not a 'service' being covered under the negative list prescribed at section 66D of Finance Act 1994, hence not an output service, the Ld. Advocate has submitted that in the present case, the appellant while accepting deposits from the public under obligation to be insured. He has submitted that the theory of negative list has been misconstrued by the Department. Further, he has submitted that it is incorrect to look at the transaction of receiving deposits in isolation. The appellant is in the banking business whose activities comprise of accepting deposits and granting loans. Without the activity of receiving the deposits, the appellant would not be able to grant loans. Further, it is an undisputed fact that the appellant has discharged service tax on various charges/incomes earned in the course of providing loans such as documentation services, loan processing service, delay payment charges etc.. Acceptance of deposits was in the normal course of banking business. The same has been explained in the judgement of *Indian Bank Ltd., Madras Vs. Commissioner of Income Tax, Madras 1959 3 SCC (Madras HC)*.

11. The Ld. advocate assailing the observation that the insurance services were received by the depositor and not by the Bank, hence credit of the service tax paid on such premium not admissible, submitted that the Commissioner has travelled beyond the scope of the show cause notice as no such allegation was made thereunder. Secondly, the contractual relationship between the bank and the DICGC exists and not between the depositor and DICGC. The uncertain event in the deposit insurance, is liquidation or winding up of the insured bank. It is this risk which might impair the capacity of the insured bank to repay its debt/liability to the depositor, that is being insured with certain limit (Rs. 1.00 lakh per depositor). DICGC is not even aware who is the depositor, what type of account he is holding and other personal particulars of the depositor. Therefore in such circumstances the appellant is the recipient of the service and not the depositor. Further as per the provisions of DICGC Act, the appellant bank is debarred from recovering the cost of insurance premium from the depositors. The Ld. Advocate has submitted that since the credit availed by them is legal and proper and not in contravention of any of the rules, no interest is payable nor imposition of penalty is warranted.

12. Learned Advocate Shri S.S. Gupta for the appellant M/s IDBI Bank Ltd., referring to the judgment of this Tribunal in the case of Deposit Insurance and credit Guarantee Corporation Vs. Commissioner of Central Excise & Service Tax, Mumbai, submitted that this Tribunal while examining the issue of levability of Service Tax on Insurance premium collected by DICGC from the Banks observed that the Corporation is assessed to Income Tax as a company and its function as an Insurer, the insured are the various banks who pay the insurance premium and the beneficiaries are the depositors of the insured banks. It is his contention that the service is provided by DICGC to Banks who pay the premium and beneficiaries are the depositors of the Bank. Therefore, the observation of the learned Commissioner that Banks are not recipients of service is

incorrect. Further, he has referred to the judgment of the Tribunal in *M/s Paul Merchants Ltd. Vs. Commissioner of C.Ex. 2013 (29) STR 257(Tri.-Del.)* to emphasize that the Banks are receiver of the services and the contract to provide service since between the Bank and the DICGC and not between the depositor and DICGC, therefore, the services are received by the Banks.

13. Further, he has submitted that the adjudicating authority erred in observing that the insurance service was in relation to exempted supply and is also for exempted output service, therefore, payment of Service Tax on such insurance is not admissible as credit being exempted from Service Tax. Referring to the definition of 'Banking' under the Banking Regulation Act, 1949, he has submitted that such definition prescribes that the deposit is accepted for the purpose of lending, hence, acceptance of deposit is to provide the output services of lending. Thus, the acceptance of deposit is directly linked to the output supply of lending. Further, he has submitted that there are various types of deposits, which are made by customers, namely, fixed deposit, saving account, current account etc. When the customer open an account and operates the said account, various charges like, issuance of Demand Draft, RTGS charges, Cheque Book issue charges, Debit-credit card issue charges etc. are collected by the Bank from the customers, which are chargeable to Service Tax. These charges are collected on supply of service made to the customers only when he opens the account for deposit. Therefore, the acceptance of deposit is not wholly exempted from Service Tax.

14. Further, he has submitted that as per Section 10 of the DICGC Act, 1961, every Bank is required to register with DICGC. It is a compulsory registration. Further, Section 15A of the said Act provides that the Corporation may cancel the registration of an insured bank, if it fails to pay the premium for three consecutive period. This default will ultimately lead to cancellation of License granted under section 22 of the Banking Regulation Act, 1949. Therefore, no output services can be provided unless the statutory requirement of insuring the deposit has been complied with. Hence, obtaining insurance deposit is having direct nexus with the provision of output service, therefore, such payment of insurance premium be considered as 'input service'. Further, he has submitted that wherever there is any statutory obligation, and without compliance of such statutory provisions, no output service can be provided, the compliance ought to be considered as an 'input service'. In support, the learned C.A. referred to the judgment of *M/s Nhava Sheva International Container Terminal (P) Ltd. - 2017 (30 STL 509 (Tri-Mum)*; *M/s Rane TRW Steering Systems Ltd. - 2017 (4) GSTL-133 (Tri-Chennai)*.

15. Further, he has submitted that in the definition of 'input service' applicable to a service provider, the word "used for" has been very wide as interpreted by various Courts. In the present case, the appellant cannot provide any output service without obtaining insurance cover from the depositors. Therefore, obtaining of insurance from DICGC on deposits shall be considered as input service. In support, he has referred to the judgment of this Tribunal in the case of *Utopia India Pvt. Ltd. - 2011 (23) STR 25 (Tri-Bang)*, *JSW Steel (Salav) Ltd. - 2017 (46) STR 863 (Tri- Mum)*, *DSCL Sugar - 2014 (34) STR 59 (Tri-Del)*.

16. Further, referring to Rule 6(3B) of the CENVAT Credit Rules, 2004, the learned C.A. has submitted that in compliance with the said Rules, they have already reversed 50% of the total CENVAT Credit availed on various input and input services. This is a statutory obligation to reverse the credit. It is his contention that the learned Commissioner has erred in demanding the credit on the entire amount when the appellant had already reversed 50% of the credit. Further, he has submitted that the issue relating to admissibility of credit on deposit insurance premium is settled in their favour by two judgments of this Tribunal reported as *DCB Bank Ltd. - 2017 (6) GSTL 479 (Tri-Mum)* and *M/s Punjab National Bank*. Further, he has submitted that no penalty is imposable as the issue relates to interpretation of statutes.

17. Similar arguments have been advanced on behalf of other appellants.

18. Per contra, learned Commissioner (AR) Shri Roopam Kapoor for the Revenue has submitted that there are two issues involved in the present case: -

(i) Whether the transaction between DICGC and the Banks falls within the definition of

input service particularly when the definition of the output service is read in conjunction with the definition of input service; (ii) Whether service is being received by the Bank or by the depositor.

19. Elaborating his argument, he has submitted that so far as scope of 'input service' for availing CENVAT Credit under the CENVAT Credit Rules is concerned, clause (eee) of sub-section (2) of Section 94 of the Finance Act, 1994 empowers the Central Government to frame Rules pertaining to "the credit of Service Tax paid on the services consumed or duty paid or deemed to have been paid on goods used for providing a taxable service". Thus, it is his contention that scope of the rules framed under Section 94(2)(eee) of Finance Act, 1994 is limited to the service consumed in providing taxable services. Further, referring to the definition of 'input service' prescribed under rule 2(l) of the CENVAT Credit Rules, 2004, the learned AR has submitted that between clause (i) and clause (ii) of said Rule, absence of phrase "in or in relation to" in clause (i) shows that the scope of input services for provider of output service is narrower, when compared to that applicable to manufacturer. Further, he has submitted that so far as the scope of 'output service' is concerned, it is limited within the scope of taxable service as defined under section 65B(51) of the Finance Act, 1994 as "any service on which Service Tax is leviable under Section 66B." Section 66B excludes the service provided in the negative list (specified under Rule 66D of the Finance Act, 1994) from the scope of taxable service. In the said negative list of services, clause (ii) excludes services by way of - (i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount. The definition of 'output service' w.e.f. 1.7.2012 has been changed to mean "any taxable service excluding the taxable service referred to under clause (zzp) of clause (105) of Section 65 of the Finance Act, provided by the provider of taxable service, to a customer, client, subscriber, policy holder or any other person, as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly." Thus to cover within the scope of input service, the services should be consumed or at least used for providing the output services.

20. He has further submitted that the definition of input service has undergone change after 1.4.2011. From the scope of amended definition of 'input service' "activities relating to business" has been deleted. In the amended definition, it contained two limbs. The first limb allowed the credit of tax paid on any services used by the provider of taxable service for providing output service; the second limb is inclusive clause which included specific services used in relation to various activities used by provider of taxable service. It is submitted that any interpretation making a legislative provision redundant must be avoided and as the legislature has given an extended meaning to the definition of 'input service' for the manufacturer in clause (ii) of the definition and a restrictive meaning to that a service provider clause (i) should be appreciated. Further, he has submitted that since the activities of advancing principal amount of loans cannot be treated as 'output service', insurance premium paid for depositors cannot be considered as input service. Answering the argument that deposit is basically as input service for all other activities undertaken by the Bank, the learned AR has submitted that it is not correct in so far as deposit are solely transaction in money and are raised for providing loan, which is also a transaction in money not covered within the scope of Service Tax or excluded as per Section 66B being not a taxable service. He has further submitted that there are host of other services provided by the Banks, namely, safe deposit vault, issuance of DD against cash, issuance of cheque books for transferring money, providing Bank Guarantee etc. In all such cases, common input services namely, hiring of premises, security service, management, maintenance and repair service, on which credit would be available to the Banks. Further, in case of issuance of DD, cheque books etc., no Service Tax is leviable on the principal amount, tax is charged only on the fees levied by the Bank for issuance of these services. Thus, any transaction in money including making deposit, receiving deposits/extending loan cannot be treated as input or output service.

21. Further, he has submitted that DICGC provides insurance only to the depositor of the Bank and this was not for the benefit of the Bank or for protecting the interest of the Bank. It was meant for the benefit of small depositors. Reference in this regard was

made to the judgment of this Tribunal in the case of M/s DICGC's case (supra). The learned AR submitted that there is no contractual relationship between the appellant and the Bankers. The Corporation does not execute any contract with the Bank, as the activity is statutory in nature. The learned AR further submitted that the Bank cannot be treated as an 'insured person' and hence accordingly, not the recipient of insurance service from DICGC. This is the reason the Bank has no freedom but to insure all their deposits which is limited to the extent of Rs.1.00 lakh. In the event of liquidation, the Bank is not paid by DICGC any amount to offsets its liabilities. The recipient of the benefit is the depositor, hence Bank cannot claim the receipt of the service. merely because the Bank pays the premium will not make the Bank as recipient of service.

22. Referring to the judgment of the Hon'ble Supreme Court in *Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi - 2009 (240) ELT 641 (SC)*, he has submitted that in the said case, it has been held that in case where electricity is used for sale outside the factory, the nexus between the process and the use gets disconnected, hence the credit is admissible. Drawing analogy from the principles laid down in the said case, it is his contention that the service has not been consumed for providing the taxable services. Firstly, these services have not at all been consumed by the Banks but have been consumed by the depositors; secondly the service has not been consumed for providing the "taxable service". Replying to the argument of the appellant that they have already discharged 50% of the CENVAT Credit availed in compliance with Rule 6(3B) of CCR, 2004 the learned AR has submitted that the terms 'input and output service' have already been defined and if the tax paid on the invoices does not fall within the scope of the 'input services', thus credit could not have been availed on the same. It is his contention that in the present case if the service provided by the DICGC is held not to be covered within the scope of input service then irrespective of Rule 6(3B), the credit of the same cannot be availed. He has submitted that the provision of law is to be read in harmony and even the interpretation which is inconsistent with the legal provision ought to be avoided. He has submitted that interpretation advanced by the appellant that since they have already been allowed to avail credit by depositing 50% of the credit availed, therefore, the credit availed on Service Tax paid on insurance premium automatically admissible to them, is incorrect inasmuch as a person can avail credit of input service and not all services that were used in running the business. Accordingly, irrespective to the scope of Rule 6(3B), the credit of the Service Tax paid on insurance premium to DICGC by the Bank not admissible. The learned AR further submitted that the principles referred by the appellant laid down by the Hon'ble High Court of Gujarat in *Mundra Ports & Special Economic Zone - 2015 (39) STR 726 (Guj)* and the judgment of Hon'ble Andhra Pradesh High Court in the case of *Sai Samhita Storage Ltd. - 2011 (23) STR 341 (AP)* have already been considered by the jurisdictional Hon'ble Bombay High Court in the case of *Bharat Airtel Ltd. Vs. CCE - 2014 (35) STR 865 (Bom)*. The Hon'ble High Court in para 27 of the judgment observed that the towers cannot be considered as an integral part in providing the telecom services.

23. Referring to appeals mentioned at Sr. No. 3 and 6, the learned AR submitted that the appellant have availed Service Tax credit under Rule 9 of CENVAT Credit Rules, 2004. The appellants had already deposited the Service Tax. It is now their claim that this is a procedural irregularity and hence CENVAT Credit cannot be denied to them. Since they have contravened the provisions of Rule 9 of the CENVAT Credit Rules, which is mandatory in nature, therefore, availing credit at back dated invoice cannot be allowed.

24. Heard both sides at length and perused the records.

25. The short issue involved in the present appeals for determination is: whether the appellants are eligible to avail CENVAT Credit of the amount of Service Tax paid to DICGC for insuring the deposits of the customers involving the period after 01.4.2012.

26. The main arguments of the appellants, are that it is a statutory obligation in carrying out the banking business to comply with the provisions of DICGC Act, 1961 where under the deposits of customers are required to be insured. Also, it is contended that without accepting the deposits, the core banking business i.e. lending cannot be

carried out, therefore, payment of insurance premium be construed as used for providing output service i.e. banking service. Besides, it is pleaded that the scope of the definition 'input service' is very wide and it covers all services that are required for providing an output service, to be considered as an input service. It is their further argument that Rule 6(3B) of CENVAT Credit Rules, 2004 prescribes that a Banking Company engaged in providing services by way of extending deposits, loans or advances has the option to discharge 50% of the CENVAT Credit availed in a month, therefore, accepting deposits from the public be considered as a service and the appellants are eligible to avail CENVAT Credit on the Service Tax paid on premium amount of insurance paid to DICGC.

27. Revenue's contention on the other hand is that accepting deposits from the customers by the appellants is not a "service" as defined under Section 65B(44) of the Finance Act, 1994; the activity of lending is also not a service, as the consideration in the form of interest finds a place under the negative list enumerated under Section 66D of the Finance Act, 1994; also it falls under the exclusion sub-clause (iii) of the clause (a) of the said definition, being a transaction in money. It is their further argument that once the activity of accepting deposit is not a service, consequently cannot come within the scope of "output service" as defined under Rule 2(p) of CENVAT Credit Rules, 2004. Hence, the definition of input service laid down at Rule 2(l) of the CENVAT Credit Rules, 2004 is also not satisfied. It is also contended that Section 94(eee) of the Finance Act, 1994, empowers to make rules in relation to the credit of service tax paid on the services consumed, accordingly, the input service definition cannot be interpreted to provide the meaning beyond the scope of rule making power. The revenue has also argued that Rule 6(3B) of CCR, 2004 is applicable when the input service qualifies to be eligible to credit, It cannot be interpreted to mean that the said provision allows the appellant to avail credit on the activity which is not at all a 'service' least an input service.

28. To examine the rival contentions, analysis of relevant provisions needs to be carried out. However, before undertaking such an exercise, it is necessary to have a brief understanding of the historical growth of credit scheme of the duty/tax paid on the inputs, input services and capital goods which are used in the activity of manufacture of dutiable goods or providing taxable services. Initially credit of the duty paid on the inputs used at the manufacturing stage, extended in a limited sense in the form of proforma credit under the Rule 56 of the erstwhile Central Excise Rules, 1944. It covered limited number of raw materials/inputs on which credit was allowed when used in the manufacture of few dutiable final products. But, with the introduction of MODVAT scheme in the year 1986, its scope was expanded by inserting chapter VAAA in the erstwhile Central Excise Rules, 1944, where under more 'inputs' were covered by providing definition of 'input' and 'final product'. Later, the Modvat credit was extended to 'capital goods' in the year 1994. Even though service tax levy on various services introduced into the indirect tax system by passing Finance act, 1994, however, credit of service tax paid on input services has been allowed only from 2004 by replacing CENVAT Credit Rules, 2002 with the new set of Credit Rules. Needless to emphasize, the sole objective of the credit system, from the very beginning, as a measure of tax reform has been to avoid cascading effect, that is, to minimize and avoid tax on tax already paid on the inputs/raw materials/services. With this objective, tax paid on the inputs, input services, capital goods used in or in relation to manufacture of the final products and for providing output services has been allowed as credit for its utilization in discharging the liability on final product and out put service.

29. Reading the provisions governing the credit scheme since its beginning, it could easily be discerned that though the objective has always been to avoid cascading effect, but simultaneously through various parameters/restrictions including by way of laying down the definition of 'inputs', capital goods, input services, and other provisions prescribing necessary procedure, the extent of credit of the tax/duty paid as admissible to off set against the duty/tax liability on the goods manufactured or service provided has been legislated under the rulemaking power. It has never been the intention of the legislator that whatever duty or tax paid on any of the inputs, capital goods, input

services which has been used/consumed in or in relation to the manufacture of finished goods or for providing taxable service would be eligible as credit to offset the liability of duty/tax payable on the manufacture of final products or taxable services rendered, as the case may be.

30. In the present case, the central point of dispute is admissibility of CENVAT Credit of the Service Tax paid on insurance premium by the appellant bankers to DICGC insuring the small investors which is mandatory under the DICGC Act, 1961. Payment of such Service Tax whether comes within the definition of 'input service' or otherwise is the question needs an answer. But, to make our task easier it is essential to restate the principle of interpretation applicable to a tax legislation. The Hon'ble Bombay High Court in the case of *GREATSHIP (INDIA) LTD.Vs.COMMISSIONER OF SERVICE TAX, MUMBAI-I2015 (39) S.T.R. 754 (Bom.)* observed as:

"34. It would thus appear that it is settled position of law that in taxing statute, the Courts have to adhere to literal interpretation. At first instance, the Court is required to examine the language of the statute and make an attempt to derive its natural meaning. The Court interpreting the statute should not proceed to add the words which are not found in the statute. It is equally settled that if the person sought to be taxed comes within the letter of the law he must be taxed, however, great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. It is further settled that an equitable construction, is not admissible in a taxing statute, where the Courts can simply adhere to the words of the statute. It is equally settled that a taxing statute is required to be strictly construed. Common sense approach, equity, logic, ethics and morality have no role to play while interpreting the taxing statute. It is equally settled that nothing is to be read in, nothing is to be implied and one is required to look fairly at the language used and nothing more and nothing less. No doubt, there are certain judgments of the Apex Court which also holds that resort to purposive construction would be permissible in certain situation. However, it has been held that the same can be done in the limited type of cases where the Court finds that the language used is so obscure which would give two different meanings, one leading to the workability of the Act and another to absurdity."

31. The definition of 'input service' as prescribed in the year 2004 though amended from time to time, but undergone a metamorphosis in the year 2012. Therefore, it is relevant to read the said definitions for the period prior to 01.4.2012 and there after.

Prior to 01.4.2012:

(1) "input service" means any service, -

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal ;

After 01.4.2012:

(1) "input service" means any service, -

(i) used by a provider of [output service] for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and

quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

[but excludes], -

[(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for -

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or]

[(B) [services provided by way of renting of a motor vehicle], in so far as they relate to a motor vehicle which is not a capital goods; or

[(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by -

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or]

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee;]

32. To attempt a simple analysis of the definition as has been in force after 01.4.2012, the same could broadly be divided into four parts. The first part lays down, any service used by a provider of output service for providing the output service, and the second part prescribes use of any service by a manufacturer who uses the services directly or indirectly in or in relation to manufacture of the final product; the inclusive portion of the definition which is common to both service provider and manufacturer, enumerates the specific services which are used in various activities both by the service provider as well as the manufacturer; finally, the exclusion clause enumerates various services, which in any case, shall not be considered as input services. Therefore, it can safely be concluded that all or any of services that suffers service tax in the hands of the service providers or the manufacturer, as the case may be, cannot said to be an 'input service' as defined under Sec. 2(l) of CCR, 2004 and eligible to credit.

33. To appreciate the true meaning and scope of the 'input service', which means any 'service', it is necessary to refer to the meaning of 'service', and the scope of negative list of services, as defined under Finance Act, 1994; 'output service', 'exempted service' as defined under the Cenvat Credit Rules, 2004.

Sec. 65B(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) an activity which constitutes merely, -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in

force.

Section 66D Negative list of services:

(a).....

(n) services by way of-

(i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;

(ii) inter se sale or purchase of foreign currency amongst banks or authorised dealers of foreign exchange or amongst banks and such dealers;

Rule (2) of Cenvat Credit Rules, 2004

p) "output service" means any service provided by a provider of service located in the taxable territory but shall not include a service, -

(1) specified in section 66D of the Finance Act; or

(2) where the whole of service tax is liable to be paid by the recipient of service.]

[(e) "exempted service" means a -

(1) taxable service which is exempt from the whole of the service tax leviable thereon; or

(2) service, on which no service tax is leviable under section 66B of the Finance Act; or

(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;

[but shall not include a service -

(a) which is exported in terms of rule 6A of the Service Tax Rules, 1994; or

(b) by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India;]

34. In the present case, the Revenue's arguments is that the deposit received from the customers has been insured by the banks and the activity of accepting 'deposits' being not a service, inasmuch as the consideration on deposits, in the form of interest flows from the Banks to the customers, hence, the Banks are receivers of service of deposit against consideration of the interest paid by them to depositors; when the Banks deposit their money in another Banks/institutions, such deposits are not insured, and the interest paid/received on such deposits falls under the negative list of service. Similarly, the activity of loans or advances provided by the Banks as service providers to the customers out of the deposits received from the public, the consideration thereof received by the Banks as 'interest' from the borrower is placed in the negative list defined under Section 66D of the Finance Act, 1994, accordingly, falls outside the scope of 'output service'; and consequently also falls outside the scope of 'input service'. The argument of the appellant banks, on the other hand, is that deposit is an activity/service which has a direct bearing/nexus on the core banking function i.e. lending and borrowing, also it is being mandatory to insure the small investors/depositors under the DICGC Act, 1961, therefore, insuring the deposits ought to be considered as an input service.

35. Considering the arguments vis-à-vis the statutory provisions and keeping in mind the concept of credit facility of the tax paid on services used for discharging Service Tax, it cannot be denied that all services/activities which are required for promoting or running the business cannot be considered as 'input service' ; the CENVAT Credit facility of the tax paid on such services, could be allowed only when it falls within the scope of the present definition of 'input service'.

36. Needless to mention, there are myriad activities/functions, the modern banks undertake to augment the banking business and it is not limited to the precincts of deposit and lending only. The money deposited in a locker, and the rent paid by the customer to the bank for such purpose, is a service provided by the Bank to the customer and the consideration in the form of rent is taxable; consequently, it is an output service for the Banks. While placing the extent to which the banking activities/operations be subjected to Service Tax levy, it has been made clear under Section 66D of the Finance Act, 1994, that is, the negative list; which prescribes that

services rendered by way of extending deposit, loans or advances, to the extent the consideration is represented by interest is not leviable to service tax. In other words, the consideration received in extending deposit, loan or advance being out of the service tax net cannot come under the scope of taxable services, defined at Section 66B of the said Act. Hence, the activity for providing the said service cannot also be an input service.

37. It is a common knowledge that the customers deposit their money in the Banks and in turn receive interest as consideration from the Banks. The money received by the Bank from the customers is not kept idle but further invested by them in various manners in furtherance to their Banking business, one such way is by providing loans or advances, for which the Banks receive consideration as interest. The deposits kept in the Bank are in different forms like, saving bank deposit, current deposit, fixed deposit etc. The consideration received by the customers, in the form of interest, and such deposit per se is not a taxable service, since the consideration, in the form of interest, does not come under the Service Tax net. Thus, the inference that could safely be drawn from the above analysis is that even though deposit is an activity relating to banking business but not a taxable service under the Finance Act, 1994, as the consideration for such service is exempted.

38. The contention of the Advocates for the appellants that since lending is the core banking business and without accepting the deposit, lending business by the Bank since not possible, therefore, the activity of accepting deposit be considered as provision of service for the core business of the banking. Also, the argument of the appellants is that compliance of the provisions of DICGC Act, 1961 as per the RBI guidelines is mandatory and to commence and continue the business of banking, therefore, it is an input service used for providing output service. Both these arguments would not also hold good, firstly, in view of the above analysis that deposit by customers does not involve any service by the bank to the customer, and interest against loans or advances covered under the provisions of Section 66D of the Finance Act, 1994; secondly, this plea would have some basis under the definition of 'input service' as was in force prior to 01.4.2012, which, inter alia in the inclusive portion contained the expression 'the activities relating to business'. With the deletion of the said expression, all the activities which contribute to the commencement and continuation of the banking business may not be relevant for bringing the same within the fold of definition of 'input service' post amendment era. It is settled principle of interpretation that the specific 'words' or 'expression' used in the provision carries with it the intention of the legislature, therefore, its incorporation or deletion be given due importance in understanding the meaning of the provision. Thus, the deletion of the expression 'activities relating to business' post 01.4.2012 is with some significance and in that sense, the new amended provision has to be read and understood. Hence, the argument that to commence and continue the banking business, insuring the deposits of customers is mandatory, accordingly, the service tax paid on such insurance premium, become an input service, in our opinion could not be sustained under the amended definition of 'input service' brought into effect from 01.4.2012. Besides, it is not the business of the bankers which has been insured, but the deposit of the customers, with the social objective of the Government/RBI to protect the interest of small depositors, in the event the banks undergoing liquidation, the customers will be directly paid the insured amount.

39. Now, coming to the interpretation relating to Rule 6(3B) of CENVAT Credit Rules, 2004 advanced by the appellant in support of their argument that since already 50% of the credit was directed to be reversed under the said provision, therefore, recovery of the remaining 50% of the credit is untenable in law. To address the said argument, it is necessary to refer Rule 6 of the CENVAT Credit Rules, 2004, which reads as under: -

6. [Obligation of a manufacturer or producer of final products and a [provider of output service]]

(1) The CENVAT credit shall not be allowed on such quantity of [input used in or in relation to the manufacture of exempted goods or for provision of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for

provision of exempted services], except in the circumstances mentioned in sub-rule (2):

[PROVIDED that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.]

[Explanation 1: For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 shall include non-excisable goods cleared for a consideration from the factory.

Explanation 2: Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.]

[(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for-

(a) the receipt, consumption and inventory of inputs used-

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services-

(i) In or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) In or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal;

(iii) For the provision of exempted services; and

(iv) For the provision of output services excluding exempted services, and shall take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of clause (b).]

[(3) Notwithstanding anything contained in sub-rules (1) and (2), The manufacture of goods or the provider of output service, opting not to maintain separate accounts, shall follow 2[any one] of the following options, as applicable to him, namely:-

[(i) (i) pay an amount equal to 4[six per cent.] of value of the exempted goods and 5 [seven per cent. of value of the] exempted services; or

(ii) pay and amount as determined under sub-rule (3A); or

(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment:

PROVIDED that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i):

PROVIDED FURTHER that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be [seven per cent.] of the value so exempted:]

[PROVIDED that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 percent of value of

the exempted services.]

Explanation I: If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II:For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exempted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services.

Explanation III:NO CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services.]

(3A)

[(3B)] Notwithstanding anything contained in sub-rules (1), (2) and (3), a banking company and a financial institution including a non-banking financial company, 3[engaged in providing services by way of extending deposits, loans or advances] shall pay for every month an amount equal to fifty per cent. of the CENVAT credit availed on inputs and input services in that month.

.....

40. A plain reading of the aforesaid sub-rule (1) reveals that CENVAT Credit is not admissible of the service tax paid on inputs used in the manufacture of exempted goods or for providing exempted service. The subsequent sub-rule (2) prescribes that in the event common inputs are used both for taxable and exempted services, separate accounts for receipt and use of input service in the providing taxable and exempted service be maintained. The sub-rule (3) lays down the procedures, for the assessee who is unable or choose not to comply with the provisions of sub-rule (2), whereunder he can opt to reverse certain presumptive amount i.e. 6%, or reverse the amount as per the formula prescribed under Sub- Rule (3A) or avail credit only on the inputs or input services used in the manufacture of dutiable goods or in providing taxable service on the basis of records maintained. However, sub-rule (3B), as was in force during the material time, which begins with the non-obstante clause, was applicable to banking company and financial institutions, engaged in providing services by way of extending deposits, loans or advances shall be required to pay 50% of the Credit availed on the inputs and input services during the month. Therefore, it is clear that irrespective of the situation whether common inputs or input services are used for providing output services and exempted services, a banking company and a financial institution is required to be 50% of the credit availed on the input and input services in that month. The argument of the appellant that they become eligible to avail credit of the service tax paid on insurance premium for deposits to DICGC , in view of the sub-rule (3B), in our opinion, is fallacious. The said sub-rule directs payment of 50% credit on the input or input services availed. In the aforesaid analysis, we came to the conclusion that the insurance premium paid on deposits to DICGC is not an input service, consequently, the service tax paid on such insurance premiums, cannot be available as credit to the appellant during a particular month. The payment of 50% credit means that it is from the admissible amount of credit on inputs or input services as defined under the cenvat credit rules, 2004.

41. Since we have decided the issues on merit holding that cenvat credit of the service tax paid on insurance premium is not admissible, we do not find necessary to deliberate other procedural issues denying the credit on the same.

42. On going through the case laws cited by the appellants and the revenue, we find that the same are pertaining to the definitions as was in existence period prior to 1.4. 2011, hence could not be of much assistance and accordingly not applicable to the facts of the present case. The finding by SMC of this Tribunal in DSC Bank Ltd.'s case which was followed subsequently in Punjab National Bank's case(supra) is per incuriam in as much it has been passed without considering the relevant statutory provisions and

hence cannot be considered as binding precedent

43. On the issue of penalty, it cannot be denied that there has been a lot of changes in the cenvat credit provisions after 01.4.2011 and also on introduction of negative list service tax regime from July 2012. Therefore, since the present issue relates to interpretation of law, and the demand notices have been issued for normal period, we do not find justification in imposing penalty on the appellants.

44. To sum up, the amount of service tax paid on the insurance premium relating to the deposits of customer to DICGC by the Appellant Banks cannot be considered as an "input service" accordingly, credit of the said amount is not admissible to the Appellants. The amount of 50% of the available credit in a month, required to be paid under Rule 6(3B) of CCR, 2004 by the Appellants, cannot include the inadmissible credit of service tax paid on insurance premium paid to DICGC. Since the issue involved is a pure question of interpretation of law, no penalty is imposable on the appellants. Consequently, the impugned orders against which the appellants are in appeal are modified by setting aside penalties imposed and appeals are partly allowed to that extent.

45. As far as revenue's appeal are concerned, Appeal No. ST/86160/16 which is filed challenging the impugned Order on the issue of penalty, the same is hereby rejected. The appeal No. ST/85915/16 which is filed assailing the impugned order on merit, the same is allowed, setting aside the impugned order of the Ld. Commissioner to the extent it is contrary to the findings recorded above.

46. All appeals are disposed of as above. MA disposed.

(Pronounced in court on 12.02.2019)

(Sanjiv Srivastava)
Member (Technical)

(Dr. D.M. Misra)
Member (Judicial) SM.

47. While concurring with the order as per learned brother Member (Judicial), I would add as follows:-

47.1 The issue for consideration can be summarized as follows:-

(i) Whether the services in taking deposits for the purpose of further lending can be considered as a service under Section 65B(44) of the Finance Act, 1994.

(ii) If so, whether such services fall under the negative list under Section 66D.

(iii) Whether the credit in respect of service tax paid on premium to insure the deposits can be considered as an input service for purpose of allowing the credit.

(iv) Whether Rule 6(3)(b) of the Cenvat Credit Rules be a factor for determining the eligibility to the credit in respect of services which otherwise do not qualify as input services under Rule 3 of the Cenvat Credit Rules.

47.2 Learned brother has succinctly laid down the facts of the case and also the provisions of law on the subject, hence I am not reproducing the same and would be referring to the para's from his order.

47.3 In para 32, Section 65B(44) definition of 'service' has been extracted. It clearly shows that for an activity to be considered as a service, the said activity should be performed for a consideration. The word 'consideration' as used in the said section refers to the consideration by the service recipient of the service provided. Thus consideration is paid by recipient to the service provider. In the present case the deposits are being made by various depositors with the financial institutions/banks. Banks need these deposits for the purpose of conducting their business and in turn for receiving deposits, paid certain amounts as interest to the depositors. Thus banks are not receiving any consideration for deposits taken by them from the depositors. Even otherwise the DICGC Act provides for protection of the interest of the depositors and not the bank in case the bank goes worst. In absence of any consideration from the depositors to the bank for the activity of accepting deposits, the same cannot be

considered as a service in terms of Section 65B(44).

47.4 If that be so, any service tax paid in relation to the premium for insuring interest of the depositors cannot be considered as an input service as defined under Rule 2 of the Cenvat Credit Rules, 2004. (The definition has been reproduced in para 30.

48. Further, Cenvat Credit Rules for the purpose of service tax has been made in terms of Section 94(eee) of the Finance Act, 1994. Any rules framed in terms of the said section need to be interpreted in terms of the said section and for purpose of carrying out the same section. Section 94(eee) of the Finance Act is as follows:-

"the credit of service tax paid on the services consumed or duties paid or deemed to have been paid on goods used for providing a taxable service."

A reading of the said section makes it clear that the Central Government could have made rules only in respect of allowing the credit of the service tax paid on services consumed for providing a taxable service. In case the service provided is not a taxable service, in that case the Central Government could have made any rules for allowing credit in respect of service tax paid on the service consumed in providing such taxable service.

49. It has been argued that after 1.4.2012, the word 'output service' has been defined to mean a service provided by the provider of service located in the taxable territory. This means that output service could be both taxable and non-taxable service. Such interpretation will go contrary to the scheme of Section 94 (eee) and could not be agreed to. Definition of output service and will have to be read in consonance with the provisions of Section 94 (eee) of the Finance Act, 1994 and thus it will be referring only to taxable services. In case of *Intercontinental Consultants and Technocrats [2018 (10) GSTL 0401 (SC)]* = **2018-TIOL-76-SC-ST** re-stated the said principle as follows:

"26) It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner: "Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."

27)The aforesaid principle is reiterated in Chenniappa Mudaliar holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the Act.

28) It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in Taj Mahal Hotel:

'the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect.'

29) In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the learned counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited⁸ wherein it was observed as under:

"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of word sprinted on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as

one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Visà- vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in *Phillips v. Eyre* [(1870) LR6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in *L'Office Cherifiendes Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd.* Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

50. Rule 3 of the Cenvat Credit Rules provides that credit of taxes paid on input services can be allowed only if it is used for providing an output service. In case there is no output service which is taxable or is falling under the category of exempted services or fall outside the definition of the service itself, CENVAT credit is not taxable except in a situation when the same common input service is being used for providing both taxable and nontaxable output service. In the present case the service tax paid for which credit is sought is in respect of the services which,-

- firstly, do not fall within the definition of service.

- Secondly, if they fall within the definition of service, then they are excluded by virtue of negative list prescribed under Section 66D,

hence get excluded from the scheme of output service. If deposits do not fall within the category of output service, CENVAT credit in respect of services that go exclusively for taking such deposits is not admissible. There can be certain services such as renting of immovable property, I.T. services which are used as common input service for accepting deposits and for providing other taxable services which qualify as output service under the scheme of Cenvat Credit Rules. Credit in respect of these input services, is eligible, and availed but to the extent of providing such non-taxable services/exempted services is sought to be reversed by application of Rule 6.

51. Rule 6(3B) referred to in para 38 of the order is a mechanism for reversal of credit used for such activities which are an output service but qualify to be exempt service. Rule 6(3B) when interpreted in light of Section 94 (eee) of the Finance Act, 1994, would imply that "Banking and financial institutions including a non-banking financial company engaged in providing services by way of extending deposits, loans or advances" are required to reverse 50% of the CENVAT credit availed i.e. eligible credit taken by them during that month. This rule does not create an additional mechanism for allowing credit of those service taxes paid which do not qualify to be eligible credit in

terms of Rule 2 and 3 of the Cenvat Credit Rules, 2004.

52. It has been argued that phrase "services by way of extending deposits, loans or advances" used in Section 66D is identical to the phrase used in Rule 6(3B) of the CENVAT Credit Rules, 2004. Hence the credit in respect input services for extending/ accepting deposits is admissible, in terms of the said Rule subject to reversal of 50% of the same. Fallacy in the said argument is self evident from the reading of the two provisions. While in Section 66D the phrases is used qua the expression service, in Rule 6(3B) it is used qua the person providing such service. Rule 6(3B) casts an obligation on such person who provides such service to reverse to reverse the eligible credit. This rule in no way creates an additional entitlement to the credit over and above as available in terms of Rule 3.

53. Thus Rule 6(3B) of CENVAT Credit Rules, 2004 cannot be used for extending the benefit of ineligible credit and thus allowing reversal of 50% of eligible and ineligible credit availed by the appellants during the month.

54. Thus the four questions posed in para 46.1 are answered as follows:

- i. The activity of taking the deposits by Bank/ Financial Institution, is not covered by the term "service" as defined by section 65B(44) of the Finance Act, 1994.
- ii. The question becomes irrelevant as the deposits taken by the bank without any consideration are not covered by the term "service" as stated in 'i.' above.
- iii. Since deposits have been held not to be service, they go out of the definition of output services as defined by Rule 2 of CENVAT Credit Rules, 2004, the CENVAT Credit in respect of the input/ input services exclusively in relation to such deposits is not admissible.
- iv. Rule 6(3B) of CENVAT Credit Rules, 2004 casts an obligation and specifies the quantum of eligible credit to be reversed by the person specified in the said rule. It does not create any eligibility to credit.

55. In light of above observations, I concur with the order of the learned brother Member (Judicial).

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO. 2, R K PURAM, NEW DELHI - 110 066
PRINCIPAL BENCH, NEW DELHI
COURT NO III**

Service Tax Appeals No. 1052 - 1060 with 1474 and 1750 of 2011

Arising out of the Order-in-Appeal No. 181-185/CB/ST/JPRII/ 2011 Dated
11/04/2011 with

No. 287-288/CB/ST/JPR-II/2011 dated 29/06/2011 and

No. 429/CB/ST/JPR-II/2011 dated 15/09/2011

All Passed by The Commissioner (Appeals - II), Customs & Central Excise, Jaipur

Date of Hearing: 21.3.2017

Date of Decision: 26.5.2017

M/s SHREE RANIE GUMS AND CHEMICALS PVT LTD

M/s JAINSONS (INDIA) INDUSTRIES

M/s BASANT

M/s SATYAM ENTERPRISES (UNIT I)

M/s SATYAM ENTERPRISES (UNIT II)

M/s SHREE RAM GUM CHEMICALS LTD

Vs

COMMISSIONER OF CENTRAL EXCISE

JAIPUR - II

Appellant Rep by: Shri O P Agarwal, C A

Respondent Rep by: Ms Neha Garg, Authorized Representative (DR)

CORAM: S K Mohanty, Member (J)

B Ravichandran, Member (T)

FINAL ORDER NO. 53507-53517/2017

Per: B Ravichandran:

These 11 appeals are on identical issue of service tax liability of the appellants, on reverse charge basis, in respect of commission paid to the overseas agents as a consideration for providing marketing services, covered under category of "Business Auxiliary Service". The period involved in these appeals are from 18/04/2006 to 06/07/2009. The Revenue initiated recovery proceedings by issue of show cause notices to all the appellants and the case was adjudicated by the Original Authority. The Original Authority confirmed service tax liability on the appellants for the period from 18/04/2006 in terms of Section 66A of Finance Act, 1994. However, no penalties were imposed except in two cases where penalty under Section 76 alongwith Section 77 (one case) was also imposed.

2. Contesting the impugned orders the learned Counsel for the appellant submitted on the following grounds:-

(a) The appellants are entitled for Cenvat credit on the service tax now demanded and the said credit is refundable under Rule 5 of Cenvat Credit Rules, 2004 or under Rule 18 of Central Excise Rules, 2002. Further, the commission paid to the foreign agent is eligible for exemption for part of the period, under Notification 41/2007-ST, as amended by Notification No. 17/2008-ST;

(b) the whole of service tax now demanded is available as a credit to the appellants and, as such, it is a revenue neutral situation and the demands was not sustainable on this ground alone. On the issue of revenue neutrality even the Original Authority dropped the demand in a similar set of facts vide order dated 29/07/2016 issued with reference to M/s Shree Nath Gum & Chemicals, Jodhpur and vide order dated 25/11/2016 in respect of M/s Mec Shot Blasting Equipment Pvt. Ltd. As such, when benefit is given to

similar by placed assessees, the demand in the present cases are also should be held as untenable.

(c) major portion of the demands are also hit by time bar. There was a bonafide belief on the part of the appellants, regarding non-taxability of services rendered in foreign country, during the material time. Even the Board vide a Circular dated 08/10/2001 clarified that services provided beyond territorial waters of India are not liable to service tax. Even the Original Authority as well as First Appellate Authority held in these proceedings, that penalties are not imposable as the issue involved is one of interpretation of law and in any case, the matter is revenue neutral ;

(d) all the notices which are subject matter of these appeals were issued prior to 10/05/2013 invoking proviso to Section 73 (1) of the Finance Act, 1994. As there is no case for suppression of facts with intent to evade payment of service tax, to demand for normal period also cannot be upheld. Section 73 was amended by Finance Act, 2013. W.e.f. 10/05/2013 sub-Section (2A) was inserted under Section 73. Prior to that date, there is no provision to restrict the demand to normal period, in case the demand for extended period was held to be not sustainable.

3. The learned AR submitted that Section 66A of the Act is very clear and unambiguous. Admittedly, the appellants availed services of foreign selling agents and paid consideration for such services. The liability to service tax under BAS cannot be disputed. The appellants are taking a plea regarding revenue neutrality and unsustainability of demand due to time bar only to avoid the legitimately payable service tax. The revenue neutrality can be a defence to plead for bonafide belief and nonexistence of malafide intent on the part of the assessees.

Revenue neutrality by itself cannot be pleaded for non-payment of service tax. If such proposition is accepted any assessee who is entitled to avail Cenvat credit of tax paid can choose to not to pay tax at all. Such proposition will be against the very basis of taxation. Regarding sustainability of demand even for normal period, if the demand for extended period was held unsustainable, the learned AR submitted that the authorities who issued show cause notice are competent to issue notice both for normal period as well as for extended period. In case, if the demand was issued for extended period it does not mean that the normal period demand cannot be part of the same. In other words, prior to 10/05/2013 it is not the case that for each proceedings involving longer period two show cause notices are to be issued one for normal period and another for extended period. Such proposition will be legally unsustainable.

4. We have heard both the sides and perused the appeal records.

5. Admittedly, the appellants did avail services of foreign selling agents and such services are clearly covered by the tax entry Business Auxiliary Services in terms of Section 65 (19) of the Finance Act, 1994. Even the appellants do not challenge the legal position in this regard. However, the demands are contested on various other technical grounds.

6. The first one is to the effect that the demands are not sustainable as there is a revenue neutral situation. In case the service tax is paid on such services the appellants are eligible for credit of tax paid and thereafter eligible for refund of such tax under Rule 5 of Cenvat Credit Rules, 2004. The appellants relied on certain case laws in this regard. Tribunal in the case of Taxyard International vs. CCE, Trichy reported in 2015 (40) S.T.R. 322 (Tri. - Chennai) held that the appellants were exporters of taxable articles. The Foreign Trade Policy does not allow the export of taxes. Following the general principle that the tax paid by the appellants are available as a credit in that case, the Tribunal set aside the demand. We note that in the said case it was recorded that the demand was hit by limitation.

7. Before applying the principles of revenue neutrality, it is to be noted that the eligibility of credit to the appellant should be clearly established with supporting evidence. Further, the appellants claim for refund of the said credit is subject to various conditions stipulated under Rule 5 of Cenvat Credit Rules, 2004 or Rule 18 of Central Excise Rules, 2004. We cannot record a categorical finding regarding the eligibility of the appellants for such benefits as these matters are not before us for decision. As

rightly contended by the Revenue that revenue neutrality as a concept will help the appellants to defend their case of bonafide belief against service tax liability and accordingly to defend against penal action or demand for extended period. The penal action and demand for extended period arises when the ingredients of suppression, willful mis-statement etc. are established. Further, we also note that there can be no general rule to the effect that the assessee need not pay tax if the same is available as a credit to them. In other words, a purported revenue neutral situation cannot, by any means, mitigate a tax liability of an assessee, which is otherwise payable in view of clear legal position of charging section and the tax entry, found correctly applicable to the assessee. The whole scheme of Cenvat credit as envisaged by the Cenvat Credit Rules, 2004 will become redundant if the proposition of revenue neutrality is invoked for non-payment of service tax or duty on inputs/input services. We find that such interpretation of law will be against the very basis of value added taxation and leaves the discharge of tax liability to the discretion of the assessee. We find no legal sanction for such interpretation.

8. Having examined and upheld the liability of the appellants to pay service tax on reverse charge basis, in respect of services availed from foreign commission agents, we note that the appellants have a strong case regarding limitation. Wherever the demands issued invoking the provisions applicable to extended period, we find that the same is not legally sustainable for such longer period. The Original Authority himself recorded that the issue is one of interpretation of provision of law and refrained from imposing penalty. It is relevant to note that the penalty was not waived under the provisions of Section 80, but the penalty was held to be not imposable. A perusal of the impugned orders indicate that no sustainable reasons were recorded to support the demand for extended period. We find, only a passing remark to the effect that the appellant did not inform the facts to the Department and these facts came to the notice of the Department only at the time of enquiry and, hence, the appellants suppressed the facts from the Department. We find such summary assertions cannot support the demand for extended period. Admittedly, the tax liability under reverse charge basis itself is a new concept and was subjected to various litigations and clarifications. In such situation, we find no scope for invoking extended period for demand of service tax. There is no case for fraud, collusion, willful mis-statement or suppression of facts with intent to evade service tax in these cases. Accordingly, we hold the service tax liability should be restricted to the normal period available under Section 73 (1) of the Finance Act, 1994.

9. The appellants contested that once the demand is held to be not sustainable for extended period, the same cannot be held to be tenable even for normal period. The amendment carried out in Section 73 w.e.f. 10/05/2003 was quoted in support of such assertion. It is the case of the appellant that the demand for normal period can stand only for the period after 10/05/2013 when sub-Section (2A) was inserted under Section 73. The appellants relied on the decision of Hon'ble Calcutta High Court in *Infinity Infotech Parks Ltd. vs. Union of India* reported in 2014 (36) S.T.R. 37. The Hon'ble High Court relied on the decision of Hon'ble Supreme Court in *Alcobex Metals - 2003* (4) SCC 630. However, on examination of these decisions, we find that no law has been laid down by the Hon'ble Supreme Court regarding the non-sustainability of demand for normal period in case the demand for longer period was held untenable. The Hon'ble Calcutta High Court in *Naresh Kumar & Co. Pvt. Limited vs. Union of India* reported in 2014 (35) S.T.R. 506 (Calcutta) held as below :-

"13. In case of Collector of Central Excise, Jaipur v. Alcobex Metals reported in 2003 (153) E.L.T. 241 (S.C.), one of the plea agitated before the Supreme Court was whether the show cause notices can still be treated as invalid for the period which is within the normal period of limitation. The Apex Court did not lay down the law on the above subject but proceeded to declare the show cause notice as invalid on the ground that the same was issued by an authority not competent under the relevant statute. The aforesaid judgment, in my view, is not pointer to an issue whether the show cause notice can still be validated for a period which is within the normal period enshrined under the statute."

10. The provision of Section 73 (1) are as below:-

"Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within eighteen months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of -

(a) fraud ; or

(b) collusion ; or

(c) willful mis-statement ; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "[eighteen months]", the words "five years" had been substituted".

11. It is clear that in show cause notice for demand of service tax short paid or not paid can be issued only under the provisions of sub-Section (1) of Section 73. The proviso to the said sub- Section does not form the basis for demand of service tax. The said proviso only has got the effect of fixing the time period of 5 years instead of 18 months for issue of show cause notice, if such short payment is by any one of the reasons mentioned therein. As such, it is clear that any show cause notice issued by Central Excise officer for demanding service tax can be only in terms of Section 73 (1). If the ingredients of proviso to the said sub- Section is found to be not available in respect of any show cause notice, then apparently the Adjudicating Authority can restrict the demand for the normal period, as per the main sub-Section. This is clear even from the newly inserted sub-Section (2A) of the said Section. It states that where any appellate Authority or Tribunal or Court concludes that the notice under proviso to sub-Section (1) is not sustainable, then the Central Excise officer shall determine the service tax payable for the period of 18 months, as if the notice has been issued with a limitation applicable under sub-Section (1). It is clear that the said sub-Section refers to only findings by the Appellate Authority. It means that when the Original Authority himself decides, that based on evidences, the ingredients of proviso clause is not available in a particular case then he himself will restrict to the demand to the normal period. Such restriction of demand to the normal period can be done in case of direction by appellate Authority also. Considering the fact that there cannot be two different show cause notices against the same assessee simultaneously, one under the main sub-Section (1) of Section 73 and another one invoking proviso to sub- Section (1) of Section 73, it is apparent that a demand issued for longer period includes the demand of normal period, falling under the very same main sub-Section. It is relevant to note that the officer who issued the show cause notice is competent to issue, invoking either one of the time limit. In case, the limitation of longer period was invoked, it is well within his right to determine the demand for normal period also.

12. Considering the above legal position, we find that there is no merit in the submission of the appellant that when the demand for longer period was held to be not sustainable, then the whole demand will fall. As discussed above that such proposition is not supported by the provisions of Section 73. We may also note that here we are dealing with period of limitation, not the power to demand and recover short paid tax. The Hon'ble Supreme Court in *Thirumalai Chemicals Ltd. vs. Union of India* reported in 2011 (268) E.L.T. 296 (S.C.) held that law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law. The Hon'ble Supreme Court held as below :-

"15. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to few of those decisions. This Court in Garikapati Veeraya v. N. Subbiah Choudhry & Ors. - AIR 1957 SC 540, New India Insurance Company Limited v. Smt. Shanti Mishra - (1975) 2 SCC 840, Hitendra Vishnu Thakur & Ors. v. State of Maharashtra & Ors. - (1994) 4 SCC 602; Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar & Ors. - (1999) 8 SCC 16; Shyam Sundar & Ors. v. Ram Kumar & Anr. - (2001) 8 SCC 24, has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This court has held the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.

16. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective".

13. The right of the Revenue to recover service tax not paid or short paid is a substantive right in terms of Section 73 (1). As already noted that the said provision is invoked by Central Excise officer to demand service tax, not paid or short paid. The period of limitation being procedural has to be examined in this context. In the present cases demands were issued within the prescribed periods, by the competent officer.

14. In view of above discussion and analysis, we hold that the appellants are liable to service tax on reverse charge basis in respect of commission paid to foreign agents. Such liability will be only w.e.f. 18/04/2006 and restricted to the normal period of demand. There can be no justification for imposition of penalty on any of the appellants. Accordingly, the penalty imposed in two cases is set aside. The appeals are disposed of in the above terms.

(Order pronounced in open court on 26.5.2017)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

**Excise Appeal No. 1918 of 2010 with
Miscellaneous Application No. 51145 of 2018**

Arising out of the Order-in-Appeal No. 85/RPR-I/2010, Dated: 11.03.2010
Passed by The Commissioner (Appeals-I), Central Excise & Customs, Raipur (C.G.)

**Date of Hearing: 26.07.2019
Date of Decision: 26.07.2019**

**M/s ROTOCAST INDUSTRIES LTD
PLOT NO. 591, URLA INDUSTRIAL COMPLEX, RAIPUR (C.G.)**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND CUSTOMS
CENTRAL EXCISE BUILDING, DHAMTARI ROAD, TIKARAPARA
RAIPUR (CHHATTISGARH)**

Appellant Rep by: Ms Surabhi Sinha, Adv.

Respondent Rep by: Shri V B Jain, AR (DR)

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 50985/2019

Per: Rachna Gupta:

The present appeal is against order-in-appeal No. 85/RPR-I/2010 dated 11/03/2010.

2. The facts, in brief, for the impugned adjudication are that the appellants are engaged in manufacture of excisable goods and are also availing Cenvat credit benefit under Cenvat Credit Rules, 2004. Department, during the scrutiny of their record observed that the appellants are manufacturing and clearing casting items (machinery parts) to various customers. These casting items were manufactured as per the specification of drawing supplied by the buyers of such casting items. With this observation, Department while forming an opinion that the value of the said drawings has not been added in the assessable value that the show cause notice dated 4 November 2008 was served upon the appellant proposing the recovery of amount of Rs. 6,33,497/- alongwith interest at the appropriate rate and the proportionate penalty. The said proposal was initially confirmed by the original Adjudicating Authority vide order No. 94 dated 22 July 2009. The appeal thereof has been rejected vide the order under challenge. Being aggrieved, the appellant before this Tribunal.

3. We have heard Ms. Surabhi Sinha, learned Counsel for the appellant and Shri V.B. Jain, learned Departmental Representative for the Revenue. It is submitted on behalf of the learned Counsel for the appellant that the issue is no more res-integra. It stands already decided that when there is no additional consideration flowing from the customers to the assessee the cost of any drawing provided by the customer is beyond the scope of Section 4 of Central Excise Act, 1994. Learned Counsel has relied upon the decision of this Tribunal in the case of *Commissioner of Central Excise, Pune versus Maharashtra Scooter Ltd. reported in 2009 (246) E.L.T. 209 (Tri. - Mumbai)*. The learned Counsel has also impressed upon that there was prevalent confusion during the relevant period of dispute regarding the inclusion of the value of drawing and technical knowhow etc. to be included in the assessable value. Hence, it cannot be said that the appellant had an intention to evade the duty rather the appellant under bonafide belief for non-payment. Hence, the penalty has wrongly been confirmed against the appellant. The order is accordingly set aside. It is prayed to be allowed.

While rebutting the said submission the learned Departmental Representative has placed reliance on the final order of this Tribunal No. A/56665 of 2017 - EX (DB) dated 21 September 2017 in the case of *M/s Magadh Precision Equipments Ltd. versus Commissioner of Central Excise, Indore* submitting that the issue about the inclusion of casting of drawings rather stands decided in favour of the department. The appeal is accordingly prayed to be rejected.

4. After hearing both the parties, we observe and hold as follows :-

(i) The only contention to be adjudicated is as to whether the value of drawings provided by the customers to the appellant for manufacturing of the casting items has to be included in the assessable value or not.

(ii) Section 4 of Central Excise Act read with with Rule 6 of Central Excise Valuation (Determination of Price of the Excisable Goods), Rules, 2000 are relevant for the purpose. Both reads as follows :-

Section 4 :

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) In a case where the goods are sold by the assessee, for delivery of the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) In any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation : For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods."

Rule 6 reads as follows :-

"Where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

Explanation 1 - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the allowing goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost to use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely :-

(i) Value of materials, components, parts and similar items relatable to such goods ;

(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods ;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods".

5. The bare reading makes it clear that the statute provides for adding the value of drawings, blue prints, technical expertise, maps and of such similar items as are used in production of the goods. Apparently and admittedly the drawings herein, for the goods manufactured/produced, are provided by the customers and the value thereof has not been included in the assessable value. Rule 6, as above, specifically includes the value thereof in the assessable value. Irrespective those drawings have been provided free of cost to the appellants, the value thereof is required to be included as per Rule 6 itself. Even in terms of Section 4, as above, the value of these drawings is something else in addition to money. Hence, we are of the opinion that the value of the impugned drawings is liable to be included in the assessable value. Thus we have no reason to differ from the earlier decision of this Bench in final order No. A/56665 of 2017 - EX (DB) dated 21 September 2017 in the case of *M/s Magadh Precision Equipments Ltd. versus Commissioner of Central Excise, Indore* . The decision of the Tribunal, as relied upon by the appellant is opined to be not applicable to the facts and circumstances of the present case.

6. Coming to the aspect of imposition of penalty on the appellant. The appellant has taken the plea of prevalent confusion but we observe from the record that the appellant was several time asked by the department to produce the evidence about receipt of drawings free of charge and that the same never provided nor ever was declared in the ER-1 returns. Such a conduct of the appellant rather corroborate the alleged intention of

the appellant to not to include the value of drawings into the assessable value so as to evade the duty. Otherwise also, the question of confusion has no meaning once it is statutory mandate that any other expertise as that of drawings, technical knowhow etc., if is utilized in the manufacture of a product the value thereof, irrespective not in terms of money has to be the part of the transaction value. We are therefore not inclined to accept the submission of the appellant. Accordingly, we do not find any infirmity in the order under challenge. Same is hereby upheld. The appeal stands rejected. The miscellaneous application filed by the appellant also stands disposed of.

(Dictated and pronounced in open court)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH – COURT NO.I

Excise Appeal No.1164 of 2011

(Arising out of Order-in-Appeal No.54-CE/APPL/KNP/2011 dated 24/02/2011 passed by Commissioner (Appeals), Customs & Central Excise, Kanpur)

M/s. Bharat Heavy Electricals Ltd. Appellant

(P.O. BHEL, Vill. Khailar, Jhansi-284129 (U.P.))

VERSUS

Commissioner of Central Excise Respondent

(117/7 Sarvodaya Nagar Kanpur)

WITH

Excise Appeal No.70734 of 2016

(Arising out of Order-in-Appeal No.15/CE/Appeal/KNP/2016 dated 11/04/2016 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Kanpur)

M/s. Bharat Heavy Electricals Ltd. Appellant

(P.O. BHEL, Vill. Khailar, Jhansi-284129 (U.P.))

VERSUS

Commissioner of Custom

& Central Excise, Kanpur

..... Respondent

(177/7 Sarvodayanagar, Kanpur 208005 (U.P.))

AND

Excise Appeal No.70874 of 2018

(Arising out of Order-in-Appeal No.35/CE/Appeal/Audit/LKO/2018 dated 15/02/2018 passed by Commissioner (Audit), Central Goods & Service Tax And Central Excise, Lucknow)

Dy General Manager (Finance & Accounts),

Bharat Heavy Electricals Ltd. Appellant

(P.O. BHEL, Vill. Khailar, Jhansi-284129 (U.P.))

VERSUS

Commissioner (Audit) Goods &

Services Tax and Central Excise, Lucknow..... Respondent

(7-Havelok Road Lucknow-226001)

APPEARANCE:

Shri Z.U. Alvi, Advocate for Appellant

Shri Anupam Kumar Tiwari, Authorized Representative for Respondent

CORAM :

Hon'ble Mrs. ARCHANA WADHWA, MEMBER (JUDICIAL)

DATE OF HEARING: 29 October, 2019

DATE OF DECISION: 29 October, 2019

FINAL ORDER NO. 71802-71804/2019

The issue involved in all the three appeals is identical and as such all the appeals are being disposed of by a common order.

2. After hearing both sides duly represented by Shri Z.U. Alvi, advocate for the appellant and Shri Anupam Kumar Tiwari, AR for the Revenue. I find that the appellant, who is engaged in the manufacture of transformers and parts thereof, cleared the manufactured goods to various customers under provisional invoices inasmuch as in large number of contracts, the price variation clause was available. The final price of the goods, so supplied were arrived at subsequently and the appellant paid the differential duty, on finalization of the assessment, by way of issuance of supplementary invoices. The dispute in the present appeal relates to the interest confirmed against them. The lower authorities by relying upon Hon'ble Supreme Court's judgement in the case of CCE, Pune vs. SKF Ltd. as reported in 2009 (07) LCX001 has held against the appellant.

3. It is seen that the Hon'ble Supreme Court decision in the case of SKF Limited was subsequently referred to three Judge Bench in the case of Steel Authority of India Limited. The three Judge Bench of the Hon'ble Supreme Court in the case of SAIL reported as 2019 (366) E.L.T. 769 (S.C.) has held that where the differential duty, on account of variation/enhancement in the price is paid subsequently, the interest element gets raised from the date when the duty was required to be paid till the date when it was paid.

4. As the issue now stands decided against the assessee by the above referred decision of the Hon'ble Supreme Court, I find no reasons to interfere in the impugned orders of the authorities below and reject all the three appeals.

(Dictated and Pronounced in open Court)

Sd/-
(Archana Wadhwa)
Member (Judicial)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH – COURT NO.I

Excise Appeal No.70167 of 2016

(Arising out of Order-in-Original No.23-24/COMMR/NOIDA-I/2015-16
dated 13/11/2015 passed by Commissioner of Central Excise, Noida-I)

M/s Panasonic AVC Networks India Co. Ltd. Appellant

(C-52, Phase-II, Noida, U.P.-201305)

VERSUS

Commissioner of Central Excise, Noida-I Respondent

(Renu Towers, C-56/42, Sector 62, Noida, U.P.)

APPEARANCE:

Shri Rajesh Kumar, Advocate for Appellant

Shri Anupam Kumar Tiwari, Authorized Representative for Respondent

CORAM :

Hon'ble Mrs. ARCHANA WADHWA, MEMBER (JUDICIAL)

Hon'ble Mr. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO.70073 / 2020

DATE OF HEARING: 01 November, 2019

DATE OF PRONOUNCEMENT: 10 January, 2020

ARCHANA WADHWA

The present impugned order stands passed by the Commissioner in remand proceedings when the matter was remanded by the Tribunal vide Final Order No.FO/A/57508-57530/2013-EX(DB) dated 07 August, 2013 for fresh decision in the light of the law declared by the Hon'ble Supreme Court in the case of M/s Salora International Ltd. V/s Commissioner of C.EX., New Delhi reported at 2012 (284) E.L.T. 3 (S.C.).

2. As per facts on record, the appellant is engaged in the manufacture of sub assemblies of colour T.V. and audio systemsetc. falling under Chapter 85 of the First Schedule to the Central Excise Tariff Act, 1985. The dispute relates to the correct classification of the colour Television (C.T.V.) sub assembly manufactured by the appellants and cleared by them. It is seen that during the period February 2000, appellants had filed declaration claiming the goods to be complete unit of C.T.V. and the same were being cleared as C.T.Vs only. Thereafter they changed their stand and started clearing the goods as sub-assembly of CTVs . Revenue by entertaining a believe that the goods cleared by appellant were nothing but complete CTV sets, raised demands against them by way of issuance of two show cause notices dated 06 December, 2001 covering the period from November, 2000 to 31 March, 2001 for demand of Rs.73,50,272/- and vide show cause notice dated 27 February, 2002 covering the period April, 2001 to 31 July, 2001 raising the demand to the extent of

Rs.43,31,748/-. The said demands stand confirmed by the Original Adjudicating Authority totaling to the extent of Rs.1,16,82,020/- along with confirmation of interest and imposition of penalty to the extent of Rs.20 lakhs and Rs.10 lakhs in terms of Rule 173 Q of Central Excise Rules read with Rule 25 of the said Rules. The order passed by the Commissioner is impugned before the Tribunal.

3. After hearing both the sides duly represented by Shri Rajesh Kumar learned advocate appearing on behalf of the appellant and Shri Anupam Kumar Tiwari, leaner A.R., we note that the crux of the issue relates to the correct classification of the products manufactured by the assessee i.e. whether the same have to be treated as sub-assembly of CTV or a complete colour television set. The appellants were clearing cabinets fitted with a coloured picture tube/Spk. Packing material etc as also CTV chassis (populated PCB duly wired with remote control). The said goods were being cleared by them to M/s C.K. Electronics (P.) Limited, Mohali (Punjab) and M/s TTRV Electronics Products (P) Limited, Bhiwadi. The buyers were assembling these sub-assemblies and were clearing the same as complete CTVs. The Revenue has observed that the goods namely cabinet fitted colour picture tube and CTV chassis constitute a complete CTV and need only screw fitting/connection. The model and function of CTV are well defined and the same have all the essential character of television. As such, the product would fall under complete television set classifiable under Chapter sub-heading 8528.00 instead of Chapter sub-heading 8529.00 claimed by the party. The Adjudicating Authority has observed that CTV basically consists of PVBs and CPT fitted inside a cabinet and connected through wire and cables. The audio and video signals are received through devices known as assembly and sub-assembly. Assemblies and sub-assemblies are manufactured by mounting complicated integrated electric circuits on board in a preplanned way. By connecting all such assemblies and sub-assemblies, essential character of a signal receiving device come into existence. Inasmuch as chassis, sub-assembly was manufactured by the party by mounting various integrated circuits and components, they lose their character as a part and are called as sub-assemblies and various sub-assemblies like cabinet assembly, chassis assembly etc have essential character of TV receiver. The appellant has complete facility to manufacture the CTVs. The various sub-assemblies along with picture tubes and other component parts are captively used by appellants to manufacture CTVs and the same are also sent to the buyers for specific models which can simply be assembled at the buyers end. The process undertaken by the buyer at their end was only fitting of the assembly and sub-assembly in the chassis and connection of wire/cables. No activity of manufacture of substantial nature takes place at the end of buyers. Even the packing material was being supplied by the appellant. The appellant was not selling these assemblies/sub assemblies in the general market or to OEMs, who were not selling the same in the open market. The same number of assemblies /sub-assemblies were supplied to the OEMs as is the number of CTVs intended to be assembled at their premises. The supplying of assembly or sub-assembly was not in bulk but was matching each television sets. He has further observed that the assemblies or subassemblies supplied by the appellant to the television manufacturers were exactly in the same number as was the number of CTV sets assembled by the buyers in their premises. They were just put together in assembled form and no vital manufacturing activity took place at their end. As such, by relying upon the Hon'ble Supreme Court decision in the case of Salora International Ltd. referred supra he held that the goods cleared from the appellant's factory were fully manufactured coloured television sets and have to be assessed accordingly.

4. Learned advocate appearing for the appellant has not disputed the fact that as per the Hon'ble Supreme court decision in the case of Salora International Ltd., the complete set of assembly and sub-assembly cleared from the manufacturer's premises and requiring only assembling in the buyers premises so as to convert them into coloured television sets have to be assessed as CTVs only. However, his contention is that in case of Salora International Ltd. the manufacturer was first assembling all the parts in his factory so as to check the working of the CTVs and thereafter the goods were being unassembled and cleared as parts.

However, we note that the said factual difference, if at all, does not distinguish the present case from the facts of the case available in the decision of the Salora International Ltd. Even if the said fact is taken into consideration, the same will not make substantial difference inasmuch as in terms of interpretative Rule 2(a), the incomplete television or unfinished television having essential character of television is to be assessed as complete television when removed in unassembled or disassembled from.

Inasmuch as the goods being cleared from the assessee's factory were having all the essential character of CTV, the same were required to be assessed under Chapter Heading 8528.00. Inasmuch as the issue stands decided by the said decision of the Hon'ble Supreme Court in the case of Salora International Ltd., we find no justifiable reason to take a view different than the one taken by the Hon'ble Supreme Court. We, further note that the said decision of the Hon'ble Supreme Court was followed by

the Tribunal in the case of Vewvox Systems V/s Commissioner of Cus., E. EX. & S.T., Noida-I reported at 2017 (355) E.L.T. 148 (Tri.-All.) and it was held that various parts of television sets cleared in SKD conditions have to be treated as clearance of complete television sets falling under sub-heading 8529.00. Assessee's appeal against the said decision of the Tribunal stands rejected by the Hon'ble Supreme Court reported as Vewvox Systems V/s Commissioner reported at 2017 (355) E.L.T. A24 (S.C.). The Tribunal decision in the case of Salora International Ltd. V/s Commissioner of C.Ex., Delhi-II reported at 2018 (12) G.S.T.L. 173 (Tri.-Del.), by following the earlier decision of the Hon'ble Supreme Court, is also to the same effect.

5. In view of the forgoing we find that the issue stand covered by the Hon'ble Supreme Court in the case of Salora

International Ltd., and find no infirmity in the impugned order of the Commissioner. The same is accordingly upheld and appeal is rejected.

(Order Pronounced in the open Court on 10/01/2020)

Sd/-

(Archana Wadhwa)
Member (Judicial)

Sd/-

(Anil G. Shakkarwar)
Member (Technical)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Excise Appeal No.206 of 2009

(Arising out of Order-in-Original/CCE/Shillong No.01/2009 dated 21.01.2009
passed by Commissioner of Central Excise, Shillong)

M/s Adhunik Meghalaya Steel Pvt. Ltd.

.....Appellant

VERSUS

Commissioner of Central Excise, Shillong

.....Respondent

Appearance:

Shri A.K.Bhattacharya, Consultant for the Appellant

Shri K.Chowdhury, Authorized Representative for the Appellant

CORAM:

**HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT HON'BLE
SHRI P. ANJANI KUMAR, TECHNICAL MEMBER**

FINAL ORDER NO.75346/2020

Date of Hearing 16.01.2020

Date of Decision : 16.01.2020

Per P.AnjaniKumar :

1. Heard both sides and perused the records of the case.
2. Briefly stated the facts of the case are that the appellant is engaged in the manufacture of excisable goods, i.e. Ferro Silicon and Ferro Silico Manganese falling under Chapter 72 of the Central Excise Tariff Act, 1985. The appellant has been availing benefit of Notification No.32/99-CE dated 08.07.1999 as applicable to specific areas in the State of Meghalaya. During the period October 2006 to February 2007, the appellant removed capital goods, namely, Sub-merged Arc Furnace after using the same in the factory; it filed a refund claim at the end of the month in terms of Notification and such refund was granted.
3. Revenue issued a show-cause notice dated 24 September 2007 proposing to recover the refund granted alleging that the same was erroneously granted; the said show-cause notice was issued under the provisions of Section 11A of Central Excise Act, 1944; the Show-cause notice was confirmed by the learned Commissioner of Central Excise, Shillong vide Order-in-Original/CCE/Shillong No.01/2009 dated 21.01.2009. Hence, this appeal.
4. The learned Counsel for the appellant contends that the issuance of show-cause notice under the provisions of Section 11A of Central Excise Act, 1944, is erroneous and the learned Commissioner should have utilized the provision of review as contained in Section 35E (2) of the Central Excise Act, 1944. In his defence, he relies on the decision of the Hon'ble Guwahati High Court in the case of Commissioner of Central Excise, Shillong Vs. Jellalpure Tea Estate as reported in 2011 (268) ELT 14 (Gau.); on the decision of the Tribunal in the case of Commissioner of Central Excise, Shillong Vs. Assam Surfactants as reported in 2007 (217) ELT 123 (Tri.-Kolkata).

5. Per contra, the learned Authorised Representative, appearing for the Revenue, submits that the brief issues involved in the instant case are as to whether the amount is payable under Sub-Rule 5 of Rule 3 of Cenvat Credit Rules, 2004, or not and as to whether the exemption in terms of Notification No.32/99-CE dated 08.07.1999, is applicable to the goods, which are procured by the appellants and removed afterwards. Learned Authorised Representative also submits that the exemption would be applicable only to the goods to be produced by a manufacturer in the specified area. Distinguishing the judgment of the Hon'ble Guwahati High Court, learned Authorised Representative submits that Hon'ble High Court has referred to the decision of the Madras High Court in the case of Ponds (India) Ltd. Vs. Assistant Collector of Excise, Madras as reported in 1994 (73) ELT 272 (Mad.); impugned goods in the case before the Hon'ble Guwahati High Court, were the goods manufactured by the appellant therein, but not the goods procured by them. The learned Authorised Representative for the Revenue, relies on the judgment of the Hon'ble Supreme Court in the case of Grasim Industries Ltd. Vs. Commissioner of Central Excise, Bhopal as reported in 2011 (271) ELT 164 (S.C.), wherein it was held that in order to recover the refund, Section 11A is the appropriate remedy.

6. We find that there are two issues involved in the instant appeal that require our attention. The first one is on the applicability of the provisions of Section 11A to recover amount refunded in such cases. Learned Counsel for the appellant submitted that Section 11A would not be applicable in the instant case, as the issue is about area based exemption and refund was granted in accordance with the mechanism provided in the Notification. It is the submission that refund did not arise out of an order of assessment of goods or applicable rate of duty.

7. Section 11A of the Central Excise Act, 1944 reads as under:-

“11A. Recovery of duties not levied or not paid or short paid or short-levied or short-paid or erroneously refunded

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason ...”

8. A plain reading gives a clear understanding that it not only provides for the recovery of duties not paid/ not levied or short paid/short levied but also provides for recovery of duty erroneously refunded irrespective of the fact whether or not the refund is on account of any assessment. Alternatively, any order under any provision of this Act or the Rules made thereunder amounts to assessment if such a decision concerns the levy of duty. It is to be seen that basically the exemption provided by the Notification No 32/99 is operationalised by way of granting refund of the duty paid by the units which claimed the exemption contained therein. It cannot be said that the refund did not arise from an order of assessment. The scheme of Section 11 A indicates that it would be operational even in cases of erroneous refunds whether or not such refunds relate to assessment. In the operation of Notification No 32/99, the assessee is required to pay the duty initially and then claim it as a refund at the end of the month. In view of the same, we are not inclined to accept the contention of the learned Counsel for the appellant. We find that the Commissioner has deliberated in a detailed manner on the issue as to whether, the amount that is payable in terms of sub-rule (5) of Rule 3 of the Cenvat Credit Rules, 2004, is a duty or an amount. We find that going by a plain reading of the provisions of the Rule, it is an amount. The only concession given to the manufacturer is that they can clear such inputs or capital goods on payment of amount equal to credit availed by them, when the inputs or capital goods, are received in their factory. Understandably, the amount is to be paid from the credit of duties availed by the manufacturer, on the inputs and capital goods used by him. Once the amount is refunded in terms of Notification 32/99, it acquires the nature of duty and therefore, the provisions of Section 11A are attracted. Therefore, we find that the Revenue has correctly invoked the provisions of Section 11A to recover the amount or duty erroneously refunded in the instant case.

9. Ongoing through the provisions of the Notification No.32/99-CE dated 08.07.1999, it is abundantly clear that the scheme of the Notification is available to the manufacturer in the specified area mentioned therein in the Notification. Paragraph 1A of the Notification clearly states that “in cases where all the goods produced by a manufacturer are eligible for exemption under this notification, the exemption contained in this notification shall be available subject to the condition that the manufacturer first utilizes whole of the Cenvat credit available to him on the last day of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash”. The provisions of this notification indicate that the intention of the Government is to give incentive to the manufacturer, who establishes a new unit/ production facility or incurs expenses to increase the capacity of the existing factory in the specified area with a view to boost the industrial infrastructure. Therefore, we find that the exemption contained therein, though made operational through a refund mechanism, shall be applicable to the goods manufactured by the units and not to goods procured and later cleared by the manufacturer. Cenvat Credit has been allowed to manufacturers to reduce the cascading effect of taxation and as such manufacturers were allowed to avail the credit of duties paid on inputs and Capital goods. A provision has been made in the Cenvat Rules to allow the manufacturers to remove the inputs and Capital Goods as such or after use by debiting the credit availed by them or by paying an amount attributable to the credit availed in the cases they have no sufficient balance of credit. These Rules are made to operationalise the credit mechanism. For this reason, goods produced and cleared by a manufacturer and inputs and Capital goods cleared by a manufacturer after procurement cannot be equated and it cannot be argued that exemption available for goods manufactured in specified areas is applicable to inputs and Capital Goods procured and cleared by the manufacturer. An interpretation that the exemption would be applicable to all the goods cleared by the manufacturer, would defeat the very purpose of the notification. At this juncture, learned Authorised Representative, highlighting the intention of the Notification, submits that the intention of the Government was to incentivize production activity in specified areas: If exemption is made applicable to inputs and capital goods cleared by manufacturers after procurement, the specified areas would turn out to be trading hubs rather than production centres. We find that there is substance in the contention of the learned Authorised Representative.

10. Learned Counsel for the appellant, intervenes and submits that they have acted upon subsequent to a letter submitted by them to the jurisdictional Superintendent on 4 October 2006 and a clarification given by the Range Superintendent on 12.10.2000. We find that the Superintendent has clarified only to the extent that the appellant is required to first utilize the Cenvat credit available and the balance be paid through PLA when capital goods are removed. We find that the clarification by the Superintendent, does not in any manner confer any right to the appellant to make a claim of refund of duty paid in terms of Notification No.32/99-CE dated 08.07.1999.

11. The learned Counsel for the appellant further, seeks to rely on the CBEC Circular dated 9 July 1999. On going through the provisions of the said Circular, we find that the said Circular was issued to operationalise the notification and as such cannot come to the rescue of the appellant.

12. In view of the above, we find that the Department has correctly invoked the provisions of Section 11A to recover the amount refunded erroneously. Reliance placed by the appellant on the decision of the Hon'ble Guwahati High Court and the exemption claimed, shall not be applicable to the goods procured and cleared by the appellant.

13. In view of the above, we find that the appeal is devoid of any merit and thus, liable to be dismissed. Accordingly, the Appeal is dismissed.

(Dictated and pronounced in the open court)

[Back](#)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
KOLKATA

REGIONAL BENCH – COURT NO.2

Ex. Appeal No.494 of 2009

(Arising out of Order-in-Appeal No.62/CE/B-I/2009 dated 30.06.2009 passed by
Commr. (Appeals) of Central Excise, Customs & S.Tax, BBSR)

M/s H.S.Builders

Plot No.524, 1st Floor, Satya
Nagar, Bhubaneswar.

VERSUS

Applicant (s)

CCEx., Cus., S.Tax, BBSR
C.R.Building, Rajaswa Vihar,
Bhubaneswar-751007, Orissa

Respondent (s)

APPERANCE :

Shri C.R.Das, Advocate for the Appellant
Shri S. S. Chattopadhyay, Authorized Representative for the Respondent

WITH

Ex.Appeal No.148 of 2010

(Arising out of Order-in-Appeal No.138/CE/B-I/2009 dated 21.12.2009 passed
by Commr. (Appeals) of Central Excise, Customs & S.Tax, BBSR)

M/s Gurmit Constructions
Plot No.254, Ground Floor, Satya
Nagar, Bhubaneswar.

Applicant (s)

VS

CCEx., Cus., S.Tax, BBSR
C.R.Building, Rajaswa Vihar,
Bhubaneswar-751007, Orissa

Respondent (s)

APPERANCE :

Shri C.R.Das, Advocate for the Appellant

Shri S. S. Chattopadhyay, Authorized Representative for the Respondent

AND

Ex.Appeal No.206 of 2010

(Arising out of Order-in-Appeal No.138/CE/B-I/2009 dated 21.12.2009 passed by Commr. (Appeals) of Central Excise, Customs & S.Tax, BBSR)

CCEx., Cus., S.Tax, BBSR
C.R.Building, Rajaswa Vihar,
Bhubaneswar-751007, Orissa.

Applicant (s)

VERSUS

M/s Gurmit Constructions
Plot No.254, Ground Floor, Satya Nagar, Bhubaneswar.

Respondent (s)

APPERANCE :

Shri S. S. Chattopadhyay, Authorized Representative for the Appellant
Shri C.R.Das, Advocate for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)

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

FINAL ORDER NO. F/O-75371-75373/2020

DATE OF HEARING : 24.06.2019

DATE OF DECISION : 28 July 2020

Order Per : P.V.SUBBA RAO :

All these three appeals are involved the same issue and hence, are being disposed off together.

2. Ex. Appeal No.494 of 2009, is filed by the assessee, M/s H.S.Builders against confirmation of demand of Rs.5,26,615/- and imposition of penalty of an equal amount. Ex.Appeal No.148 of 2010 is filed by M/s Gurmit Construction against the demand of duty of Rs.19,41,722/- and imposition of equal amount of penalty by the original authority, which has been remanded by the first appellate authority for re-computation after taking the price collected by the appellant as cum-duty price. Ex.Appeal No.206 of 2010 is filed by the Revenue against the first appellate authority giving the benefit cum-duty price while confirming the demand.

3. The facts of the case in brief are that the assessee herein are engaged in fabrication of steel tanks for Oil Companies, such as, M/s Bharat Petroleum Company Ltd., M/s Indian Oil Corporation Ltd. and M/s Indo-Burma Petroleum

Company Ltd. as per their specifications. The Department received intelligence that the appellants did not obtain Central Excise Registration even after exceeding the SSI exemption limit of turnover Rs.1.00 Crore. Accordingly, the Officers investigated the matter, inspected the premises of the assesses, issued summons and recorded statements and came to the conclusion that the assesses have not obtained Central Excise Registration nor have they paid duty on the steel tanks, which have been manufactured for the aforesaid Oil Companies. Show-cause notices were issued proposing to recover the aforesaid short paid duty and impose penalties. While proposing to recover the duty for extended period of limitation in the show-cause notices, no specific allegation of fraud, collusion, willful mis-statement, suppression of facts or violation of provisions of Act and Rules, with an intent to evade payment of duty, has been alleged or evidenced.

4. The specific activities of the appellants are that they purchase steel sheets and bend them into cylindrical structures and at the site attach side sheets to fabricate steel tanks, in which, Oil is stored by the Oil Companies. It is undisputed that these tanks are being fabricated by the assessee and shifted to the premises of these Oil Companies. The end pieces of the steel tanks and the valves etc., are being attached at site. The cylindrical tank is being fixed on the foundation and is placed below the ground.

5. It is the case of the assessee that no steel tank has come into existence at their premises. It is not complete when it leaves the factory gate. The steel tank comes into existence only at the premises of the buyers of Oil Companies when all parts are welded together. At this place, the steel tanks are fixed to the foundation and are placed under-ground. Therefore, they cease to be the goods because they are attached to the earth. No Excise duty is, therefore, leviable on the goods because the steel tanks, when they came into existence, are attached to the earth and cannot be called as goods at all. Before the steel tanks reached the buyers' premises, they are incomplete and cannot be called as steel tank at all. Therefore, they are not liable to pay Excise duty at all and have not taken Central Excise Registration nor have they paid Central Excise duty and there is nothing wrong in this contention.

6. The Ld.Counsel for the assessee also argued that the show-cause notices specifically lack either an allegation or any evidence of fraud, collusion, willful mis-statement or suppression of facts or violation of any provisions of the Act or Rules with an intent to evade payment of duty. Although, show-cause notices do not specifically make these allegations that the demand was raised for the extended period of limitation. Therefore, they were never given any opportunity to defend themselves against allegation of elements necessary for invoking extended period of limitation. Therefore, demand has to fail for the extended period of limitation on this ground alone.

7. Thirdly, he argued that they had reason to believe that they were not liable to pay Central Excise duty because their tanks were attached to the foundation and placed under-ground. They honestly believed that they do not qualify to be called as goods and therefore, no Central Excise duty was payable. For this reason, no penalty under Section 11AC is imposable upon them. Penalties imposed upon them need to be set aside even if on merit, the demand is upheld.

8. Further, Ld.Counsel argued if the demand is decided against them, the prices received by them may be taken as cum-tax prices and CENVAT Credit on inputs may be given to them.

9. The Ld.Departmental Representative, on the other hand, submits that the assessee have had at no point of time taken Registration or informed the Central Excise Department regarding their activities. They have not paid any Central Excise duty and they have dealt with large Oil Companies under large contracts and it was expected from them to have acted responsibly and paid Central Excise duty. If they had any doubt, they could have sought clarification from the Department. They did no such thing. They have clandestinely manufactured and cleared the goods without informing the Department. Therefore, the extended period of limitation is invokable

and penalties under Section 11AC are rightly imposable. On merit, he argued that it is now well settled that merely because the goods are attached to the earth, they do not cease to be goods. The goods can always be removed from the earth and sold. There is no force in the contention of the assessee that tanks do not come into existence in their factory because essential character of the tank is very much present when the tank left the factory. Even if, end piece, valves etc. are attached at the customers' premises, the tank can only be said to be an in-complete article when it left the factory which should be classified as complete article for the purpose of levies of Central Excise duty. Even if, the manufacture is undertaken outside the factory premises of the assessee, the Central Excise duty is still payable. Merely because the tank is placed on a foundation and is eventually placed below underground, it does not cease to be goods.

10. I have considered the arguments of both sides and perused the records.

11. The first issue is to be decided is whether the tanks fabricated by the assessee are goods and whether they are liable to Central Excise duty. From the facts narrated by the Id.Counsel for the appellants, it is evident that they indeed manufactured tanks, although some parts of the tanks are finally attached at the buyers premises only. The goods, which left the factory, can, at best, be called incomplete or un-finished tanks. They have to be classified as "tanks". The next question is about marketability of these products, which is not in doubt because the tanks are being marketed by the assessees to the Oil Companies. Section 3 of the Central Excise Act levies duties of excise on excisable goods manufactured or produced in India. Excisable goods are defined in Section 2 of the Act as those specified in the Schedules to the Central Excise Tariff Act, 1985. The term "goods" is not defined in the Central Excise Act. Sale of Goods Act, 1930, defines "goods" in Section 2 (7) as follows :

" "goods" means every kind of moveable property other than actionable claims and money ; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale ;"

12. The question to be addressed is if the goods, say, the tanks in question are attached to the foundation in the earth whether they continue to be goods or they cease to be so. The term "attached to earth" is not defined either in the Sale of Goods Act or in the Central Excise Act. In the absence of any definition of "attached to earth", the question arises as to how to interpret this expression in the context of Central Excise Act. This has been answered in the judgment of the Hon'ble Apex Court in the case of Solid & Correct Engineering Works [2010(252)ELT 481 (S.C.)] and the definition in the Transfer of Property Act, 1882 has been adopted. Respectfully following the ratio, I also adopt the same definition. The relevant portion of the judgment of Apex Court is as follows:

"10. Section 3 of the Central Excise Act, 1944, inter alia, sanctions what was during the relevant period called "central excise duty" on all "excisable goods" produced or manufactured in India at the rates set forth in First Schedule to the Central Excise Tariff Act, 1985. The term "excisable goods" appearing in Section 3 has been defined under Section 2(d) of the said Central Excise Act which reads as under :

"2(d) : "excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt.

Explanation : For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable."

11. Entry 8474 in the First Schedule to the Central Excise and Tariff Act, 1985 stipulates the rate at which excise was payable on machinery of the kind enumerated in that Entry which reads :

“Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry moulds of sand.”

12. It is evident from the above that any machinery which is used for mixing is dutiable. That Asphalt Drum/Hot Mix Plant is a machinery meant for mixing etc. was not disputed before us. It was fairly conceded by Mr. Bagaria that assembling, installation and commissioning of Asphalt Drum/Hot Mix Plants amounted to manufacture inasmuch as the plant that eventually came into existence was a new product with a distinct name, character and use different from what went into its manufacture. Super added to the above is the fact that Section 2(f) of the Central Excise Act does not define the term “manufacture” exhaustively. The definition is inclusive in nature and has been understood to mean bringing into existence a new product with a distinct name, character and use. [See (i) *Union of India v. Delhi Cloth and General Mills Co. Ltd.* - [1977 \(1\) E.L.T. 199](#), (ii) *BPL India Ltd. v. CCE* - (2002) 5 SCC 167, (iii) *Sirpur Paper Mills Ltd. v. Collector of Central Excise, Hyderabad* (1998) 1 SCC 400].

13. Mr. Bagaria strenuously argued that even when the setting up of the plant has been held to be tantamount to manufacture of a plant and even when the plant may be machinery covered by Entry 8474 of the First Schedule to the Central Excise Act, the same would not necessarily amount to manufacture of “exigible goods” keeping in view the fact that such plants have to be permanently embedded in earth. Reliance in support was placed by Mr. Bagaria upon the finding recorded by the Tribunal that the plant is required to be fixed to a foundation that is 1 and ½ ft. deep for the sake of stability of the plant which causes heavy vibrations while in operation. The following passage from the Tribunal’s order was in particular relied upon by Mr. Bagaria in support of his submission that the size and nature of the plant was such as made its fixing to the ground essential :

“The individual element such as feeder bins, conveyor, rotary mixing drum, asphalt tank, fuel tanks, etc. have to be separately embedded into the earth. This is done on a civil foundation of 1.5 deep. This is because the weight of the material as well as the vibrations caused by the movement thereof is very substantial. The drier at one time holds 40MT of raw material.”

14. Relying upon certain decisions of this Court, Mr. Bagaria argued that the plants in question did not satisfy the test of marketability and moveability. According to Mr. Bagaria, the setting up of the plant was no more than an accretion/annexation to immovable property which was far from manufacture of goods exigible to excise duty. We shall presently refer to the decisions relied upon by Mr. Bagaria, but before we do so we may briefly refer to the relevant statutory provisions to examine, what would constitute moveable or immoveable property.

15. The expression “moveable property” has been defined in Section 3(36) of the General Clauses Act, 1897 as under :

“Section 3(36) : “movable property” shall mean property of every description, except immovable property.”

16. From the above it is manifest that the answer to the question whether the plants in question are movable property, would depend

upon whether the same are immovable property. That is because anything that is not immovable property is by this very definition extracted above “moveable” in nature.

17. Section 3 of the Transfer of Property Act, 1882 does not spell out an exhaustive definition of the expression “immovable property”. It simply provides that unless there is something repugnant in the subject or context ‘immovable property’ under the Transfer of Property Act, 1882 does not include standing timber, growing crops or grass. Section 3(26) of the General Clauses Act, 1897, similarly does not provide an exhaustive definition of the said expression. It reads :

“Section 3(26) : “immovable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.”

18. It is not the case of the respondents that plants in question are per se immoveable property. What is argued is that they become immovable as they are permanently imbedded in earth in as much as they are fixed to a foundation imbedded in earth no matter only 1½ feet deep. That argument needs to be tested on the touch stone of the provisions referred to above. Section 3(26) of the General Clauses Act includes within the definition of the term “immovable property” things attached to the earth or permanently fastened to anything attached to the earth. The term “attached to the earth” has not been defined in the General Clauses Act, 1897. Section 3 of the Transfer of Property Act, however, gives the following meaning to the expression “attached to the earth”:

“(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls and buildings;

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.”

19. It is evident from the above that the expression “attached to the earth” has three distinct dimensions, viz. (a) rooted in the earth as in the case of trees and shrubs (b) imbedded in the earth as in the case of walls or buildings or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1½ feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition. Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached.”

13. The definition of this term in Section 3 of the Transfer of Property Act may be considered which defines it as follows :

“ “attached to the earth” means –

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings ; or

(c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached;”

From the above, it is evident that the goods in question, namely, tanks, do not fall under the category of immovable property “attached to earth” as per the above definition but continue to be goods.

14. In view of the above, on merits, I find that the assesses are liable to pay the Central Excise duty.

15. The next question is of invoking extended period of limitation. On behalf of the Revenue, it has been canvassed that the assesses have not been obtained Central Excise Registration nor have they filed any Returns with the Department, nor have they declared in any manner that they are engaged in manufacturing these goods. Therefore, they have suppressed the facts and extended period of limitation is correctly invoked. On behalf of the Assesseees, it has been pointed out that the extended period of limitation has been invoked without specifying any of the elements necessary for invoking the extended period of limitation, nor showing as to how those elements have been fulfilled in their case. On perusal of the records, I find it so. Therefore, I find that the assessee has not been put to notice to explain why the extended period of limitation cannot be invoked in the case. This vitiates the demand for extended period of limitation. Therefore, the demand only within the normal period of limitation, sustains and the demand for extended period of limitation does not survive.

16. For the same reason, I find that the penalties under Section 11AC also do not sustain and need to be set aside.

17. In so far as the Appeal of the Department (Ex.Appeal No.206 of 2010) against giving benefit cum-duty for the clearance of goods, is concerned, the said issue has now been settled by the judgement of the Hon’ble Apex Court in the case of Commissioner of Central Excise, Delhi Vs. Maruti Udyog Ltd. reported in 2002 (141) ELT 3 (S.C.), wherein it has been held that in case where duty has not been paid, the price which has been recovered by the assessee, should be taken as cum-duty price. The Department sought to rely on the judgement of the Hon’ble Apex Court in the case of Amrit Agro Industries Ltd. Vs. Commissioner of Central Excise, Ghaziabad reported in 2007 (210) ELT 183 (SC). In that particular case, based on the facts and circumstances, the Hon’ble Apex Court held that the lower authorities had to examine whether the price charged by the assessee to his customers contains profit element or duty element or otherwise. In view of the specific facts of the case, the Hon’ble Apex Court has remanded the matter to the lower authorities. I find no such justification in the present case. I also find that if the assesses have to pay duty, CENVAT Credit cannot be denied to them.

18. The appeal filed by the Revenue is liable to be rejected and I do so and the appeals filed by the assesses are rejected on merit, but demand for extended period of limitation, cannot be sustained.

19. In view of the foregoing, the appeals are disposed of as follows :

- (i) Demands for normal period, is confirmed in both the impugned orders.
- (ii) Demands for extended period is set aside.
- (iii) Cenvat credit is available to the assesses.

(iv) The prices received by them may be taken as cum-duty prices and duty calculated accordingly.

(v) All penalties are set aside.

(vi) Appeals are remanded to the original authority for the limited purpose of computation.

SD/ (P.V.SUBBA RAO)
Member (Technical)

Order per : P. K. Choudhary, Member (J) :

1. After having gone through the order dictated by my Learned brother Shri P. V. Subba Rao, I agree with him as regards the non applicability of extended period of limitation, appellant's entitlement of cum-tax benefit and Cenvat credit on inputs and waiver from imposition of penalty. However, as regard merits of the case, I have a different opinion. Most respectfully, I feel that my learned brother has not gone into the detailed facts and the legal pleadings made by the appellant and the settled judicial pronouncements having a direct bearing on the case before us, I proceed to deal with the same.

2. The issues to be decided in the instant case is whether the tanks fabricated by the assessee are 'goods' and whether they are liable to Central Excise duty and on what value. From the facts narrated by the Ld. Counsel for the assessee, it is evident that they indeed fabricated steel sheets for conversion to cylindrical tank which is a part of the manufacturing process, although some part of the tanks are finally attached at the buyers' premises only. The goods, which left the factory, can, at best, be called incomplete or unfinished tanks. It is not in dispute that the assessee is under obligation to fix the cylindrical tank underground wherein civil work is also involved and link the pipelines for filling and evacuating / clearing of Oil through pipelines, after having fabricated the steel sheets into the desired sizes. I have also carefully perused the photographs provided by the Ld. Advocate which shows that the fabricated tanks are installed underground which also involves civil work. Considering the arguments of the assessee that the tank becomes immovable, which I think proper to separately discuss below, I find that in the entire proceedings, the very aspect of correct valuation for duty ascertainment has not been examined since not raised in SCN and the demand has been incorrectly raised on the entire contract value.

3. The proceedings have mainly focused on the aspects whether the activities undertaken constitute 'manufacture' for levy of excise duty. I also find that the fabricated tank after being removed from the factory to the site is fastened by undertaking civil construction on all four sides of the tank and then necessary nozzles, tubes, dip pipes, etc. are attached and a complete foundation is made on the top of the tank which is said to be the complete tank in a usable condition. The said facts have nowhere been disputed in the entire proceedings. Moreover, the photographs produced by the assessee also clearly depicts the chain of activities involved post fabrication of steel sheets into cylindrical incomplete tank, including the underground fixation of fabricated tanks involving civil works.

4. In my view, the duty is payable only on the activities for fabrication of steel tank, by applying the provisions of Rule 8 read with Rule 11 (i.e. residuary rule providing application of reasonable means) of the Central Excise Valuation Rules, 2000, which have not been invoked in the present case. The Tribunal in *Indian Hume Pipe Co. Ltd vs. CCE, Trichy* [2015 (321) ELT 460 (Tri-Chennai)], while dealing with the valuation of pipes manufactured by assessee for use in execution of contract awarded by State Water Board for laying down the pipelines, has held that the valuation has to be done on cost construction basis plus 15% / 10%, as applicable during the material period as per Rule 8 read with Rule 11 of the Valuation Rules, which provided that value shall be determined using reasonable means consistent with the principles and general provisions of the Valuation Rules and Section 4(1) of the Act.

5. In the present case, it is not in dispute that the fabricated tanks in cylindrical shape, when they left the assessee's factory were incomplete, which is actually the stage where the duty could be levied. The above view is also supported by the decision of the Tribunal in **Stumpp, Scheule & Somappa Ltd. vs. CCE, Bangalore** [2007 (212) ELT 118 (Tri-Bang)], wherein it was held that :

*“5. On a careful consideration, we notice from the facts alleged in the Show Cause Notice that the appellants had cleared only semi-finished goods. The goods had not attained the fully finished condition. In a circumstance like this, the Commissioner's direction to assess the goods as fully finished goods is not supported by law. The said findings are not sustainable. The goods have to be assessed on the “as in where” basis when they are cleared from the factory to another unit for further manufacture. This view was expressed by this Bench in the case of *IFB Automation India Ltd.* (cited supra). The findings recorded in Paras 5(d) and 5(e) are reproduced herein below :*

“(d) After carefully going through the relevant Rules, we are of the view that the Commissioner's reasoning is not sound. We shall show it presently. In the present case, the appellant ‘A’ manufactures at his factory an incomplete product ‘P’ and duty is paid on this incomplete product. Hence, this product is excisable and there is no dispute on this fact. The incomplete product is not sold because it is cleared to the sister unit ‘S’. Can we say that the appellant uses the incomplete product for consumption in the sister unit? Yes, it is not incorrect to hold that the appellant uses the incomplete product for consumption in the sister unit. In the sister unit many other processes are undertaken and a complete product emerges. An incomplete product emerges as a complete product in the sister unit. The appellants have quoted relevant section note, wherein it is stated that the processes by which an incomplete item becomes a fully manufactured item amounts to process of manufacture. Hence, here is a case where excisable goods are not sold by the assessee but are used on his behalf in the production of other articles. A complete product is different from an incomplete product. We do not agree with the Commissioner that the identity of the product does not change. The identity definitely undergoes a change. If the identity does not change, there is no point in sending the incomplete product to the sister unit. Hence, the Commissioner's reasoning is not sound. Assuming but not admitting that his contention is correct, we can also take it that the incomplete product is used for consumption by him. In either of the cases, the transfer of the goods is squarely covered by Rule 8. The appellants have correctly discharged the duty liability under Rule 8. The

Commissioner has given a finding that Rule 7 is applicable to the present case. We shall show how Rule 7 is not applicable. We reproduce Rule 7 herein below ”

6. Further, in the decision of this Tribunal in Otis Elevator Company (India) Ltd vs. CCE, Bangalore [2008 (229) ELT 568 (Tri-Bang)], it was held as under:

“9. On a very careful consideration of the entire issue, we find that the main point herein is the valuation of the parts and components cleared from the Jigani factory to the sites of the customers for erection and installation of the lifts. The valuation of the parts and components cleared to the National Service Centre for Annual Maintenance Contract and also for modernization, is involved. The appellant had adopted the valuation based on the cost construction under Rule 8 read with Rule 11 of the Central Excise Valuation Rules. We find that the appellants have actually entered into works contract with various customers for the installation and erection of the lifts. Therefore we are of the view that this contract is an indivisible contract and no sale value of the components cleared is available. In other words, we do not have a transaction value. Therefore Section 4(1)(a) of the Central Excise Act cannot be applied to the present case. Alternatively Section 4(1)(a) value is not at all available. If Section 4(1)(a) value is not available, then one should go to Section 4(1)(b) and then to the Valuation Rules. That means, in terms of the Central Excise Act, the value has to be determined within the frame work of Valuation Rules, if the value is not available under Section 4 (1) (a). There is no escape from this method. Therefore we are in agreement with the learned Advocate that transaction value cannot be determined from the total contract value by means of certain deductions. The method of valuation adopted should be within the ambit of Section 4 read with Valuation Rules. The learned Advocate has clearly shown that while arriving at the reduced transaction value, the Commissioner has simply gone by certain estimate. Compared to the method adopted by the Commissioner, we are of the considered view that the valuation method adopted by the appellant is more acceptable as it is within the ambit of Valuation Rules. It is very clear that the valuation cannot be dealt in terms of Rules 4, 5, 6, 7, 8, 9 & 10 and then finally, one has to come to Rule 11. While coming to Rule 11, the nearest thing which is consistent with Section 4 is only the cost construction method. We are also in agreement with the learned Advocate that the Commissioner has erred in holding that the cost construction method can be applied only if the goods are used for consumption for manufacture of other excisable goods. The word “article” is not limited to excisable goods. In the present case, the components were cleared to the sites and in the sites, they were actually used in the manufacture of the lifts or elevators which should be considered as article. Even in respect of the components cleared for modernization and also for Annual Maintenance Contract, the nearest rule which is consistent with Section 4(1)(a) will be Rule 8 and not the deductive method adopted by the Commissioner ”

7. In view of the aforementioned decisions, I am of the view that the duty could be recovered from the appellant assessee upto the stage of fabrication of incomplete steel tanks and not on the whole value paid by the clients which included the price for installation of fabricated tanks below the ground. Having not invoked the relevant provisions contained in Rule 8 read with Rule 11 of the Valuation Rules, the entire proceedings initiated by the Revenue is liable to be set aside. At this stage, it is important to mention that the Hon’ble Supreme Court in the case of **CCE, Nagpur vs. Ballarpur Industries Limited** [2007 (215) ELT 489

(SC)] has deliberated on the importance of the SCN in the very context of Valuation Rules, the relevant portion is extracted below:

“21. Before concluding, we may mention that, in the present case, the second and the third show cause notices are alone remitted. The first show cause notice dated 21-5-1999 is set aside as time-barred. However, it is made clear that Rule 7 of the Valuation Rules, 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show cause notices. It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule.”

8. Moreover, it is also relevant to note that since the Revenue never proposed levy of duty as per the correct legal position discussed above, the Tribunal cannot make out the case against the assessee to raise a demand for the portion which is actually amenable to Central Excise levy when the Revenue has failed to do so. While holding so, I take note of the decision of the Hon’ble Supreme Court in **Reckitt & Colman of India Ltd vs. CCE** [1996 (88) ELT 641 (SC)], wherein the Apex Court made a very important observation that the Appellate Tribunal is not competent to make out a case in favour of the Revenue which was never canvassed. The relevant portion of the judgment is reproduced hereinunder:

“3. It will be remembered that the case of the Revenue, which the appellant had been required to meet at every stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet. It is upon this ground alone that the appeal must succeed.”

The above legal position has also been upheld by the Larger Bench of the Hon’ble Supreme Court in **SACI Allied Products Ltd. vs. CCE, Meerut** [2005 (183) ELT 225 (SC)].

9. Regarding the issue whether the Oil storage tank in question could be said to be ‘goods’, it is the stand of the assessee that the tanks become ‘immovable’ as they are affixed underground. In an identical situation, in the case of **Prodip Engineering Works vs. CCE Kolkata** [2007 (216) ELT 534 (Tri-Kol)], the various activities undertaken by the contractor for fabrication of oil storage tanks for underground installation have been examined. In this case, the Tribunal observed that the said underground tanks were not removable. The Tribunal came to the conclusion that those tanks which were not removable without being dismantled or causing significant destruction could not be said to be ‘goods’ and hence, were not dutiable. I find that in the instant case, the Revenue has not made out the case that the subject tanks could be removed without causing significant destruction, so as to render them movable. In this context, the relevant portion of the decision of this Tribunal in **Servesham Construction Ltd vs. CCE Jaipur** [2004 (171) ELT 204 (Tri- Del)] is reproduced:

“6. The Adjudicating Authority has left out two tanks in question which were of

the diameter 3.8 Mtr. x height 4.4 Mtr. with capacity of 49.9 Cub. Mtr. each and demanded duty in respect of the same on the ground that these being in smaller in size than the other ten tanks, could be removed, transported and installed anywhere. But the authority has lost sight of the fact that these tanks along with other ten tanks were fabricated by same process and embedded to earth permanently. These could not be removed from the earth without dismantling. The benefit of Board Circular dated 15-1-2002 allowing exemption from duty liability to the tanks made and capable for storage of petroleum products in oil refineries or installation at the site and being not able to move without dismantling, could not be denied to these two tanks in question. These tanks had been fabricated for storage of raw naphtha, urea, etc. along with other ten tanks. The ratio of law laid down in *M/s. Triveni Industries v. CCE* [2000 (120) E.L.T. 273 (S.C.)] and *M/s. Bhagwanpura Sugar Mills* [2001 (134) E.L.T. 673

(T) = 2001 (47) RLT 409] which has been extended to denied these two tanks in question in the light of the facts detailed above. The fact that these two tanks were fabricated at one place and then shifted to their respective foundations, as observed by the adjudicating authority in the impugned order on the basis of statement of Shri C.S. Naik, Project Manager of the Principal contractor, did not make them as movable goods when these had been also embedded to earth permanently and could be removed only after dismantling the same. These tanks could be taken out only as sheets/scraps. Therefore, the duty demand raised in respect of these two tanks cannot be sustained..”

10. Since, the instant case pertains to the mobility of the goods in question, the definitions of ‘immovable property’ as per Section 3(26) of the General Clauses Act, 1897 and ‘attached to the earth’ as per Section 3 of the Transfer of Property Act, 1882 are reproduced: “*immovable property*” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;”

“attached to the earth” means--

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;”

On a conjoint reading of the above definitions, it is clear that anything attached to the earth, which has been so attached for permanent beneficial enjoyment qualifies as ‘immovable property’. In the instant case, the tanks are permanently fastened and placed underground for storing oil. Therefore, I find that such tanks are ‘immovable’ and cannot be made exigible to levy of central excise duty.

11. Further, on the question of invocation of extended period of limitation, it has been submitted that the said ground was not raised in the Show Cause Notice. Therefore, I am of the view that the Revenue has travelled beyond the scope of the Show Cause Notice in invoking the extended period of limitation.

12. It is pertinent to mention that on the date of hearing i.e. 26.06.2019, we had held that the assessees were liable to pay Central Excise duty for the normal

period of limitation on cum-duty basis, for which the assessee's appeals were partly allowed by way of remand for computation purpose and the Department's appeal bearing Ex. Appeal no. 206 of 2010 filed against allowing the benefit of cum-duty was rejected. In view of the legal position discussed in the foregoing paragraphs, I am of the view that the Tribunal is duty bound to follow the same, as also to ensure consistency on applicability of taxation, and hold that the duty is legally not payable in the instant case.

13. I would like to visit the obvious question that arises, as to whether the order pronounced in Open Court can be recalled and subsequently, a different decision altogether can be rendered by the Tribunal. In this regard, it is pertinent to refer to the decision of the Income Tax Appellate Tribunal in the case of **Kamaljit Singh vs. Income Tax Officer, Bathinda** [[2019] 106 taxmann.com 251 (Amritsar – Trib.)], wherein the Tribunal relying on the Supreme Court decision in **Kaushalbhai Ratanbhai Rohit vs. State of Gujarat**, held that the Court could recall its order and change its mind even if the draft copy is signed and order is dictated in the open Court. The relevant portion of the decision is quoted below:

“3.1 The question arises as to whether the Bench while hearing the appeal has given any decision. May be the assessee got the impression in good faith. Even if the impression went to the assessee then also the same does not have any effect on the order of the Court as it is well settled law that a judge can recall the order and change his mind in extreme case where the though draft copy signed and dictated in the open, as held in the case of Kaushalbhai Ratanbhai Rohit v. State of Gujarat [2014] 45 taxmann.com 250/126 SCL 442 (SC), by the Apex Court. For ready reference and brevity the relevant part of decision referred above is reproduced herein below.—

.....

3.2 From the dictum of the Hon'ble Apex Court it is clear that until and unless the order is signed and sealed cannot be treated as final and as per wisdom of the Court, in certain circumstances the order can be recalled and altered to a certain extent, even if it was dictated in the Open Court. Hence, the contention of the assessee to the effect that the Bench had shown their mind to remand the case to the file of the Ld. CIT(A) and therefore the rectification of the order is necessary, is not sustainable ”

14. In view of the above discussion, I am of the view that since no central excise duty is payable, the appeals filed by the assessee are to be allowed in totality and the appeal filed by the Revenue is liable to be dismissed.

Sd/

(P. K. Choudhary)
Member (Judicial)

DIFFERENCE OF OPINION

Whether central excise demand is legally sustainable on merits for the normal period of limitation as held by the learned Member (Technical) or the entire demand is unsustainable on merits as held by the learned Member (Judicial). Registry is directed to place the matter before Hon'ble President to consider referring the same to a third Member to settle the difference of opinion.

SD/

(P.V.SUBBA RAO)
Member (Technical)

SD/

(P. K. Choudhary)
Member (Judicial)

1. The Division Bench of the Tribunal heard the present appeals on 24/06/2019 but there was a difference of opinion between learned Member(Judicial) and learned Member(Technical) while disposing of these three appeals involving a common issue together vide the Interim Order dt. 24/06/2019. I was nominated by the President to settle the difference of opinion. Before I proceed to discuss the relevant findings rendered by each learned Member, it is pertinent to reproduce the difference of opinion between the two learned Members, which is reproduced herein below:

Whether central excise demand is legally sustainable on merits for the normal period of limitation as held by the learned Member(Technical) or the entire demand is unsustainable on merits as held by the learned Member(Judicial)?

2. Before proceeding further, it is necessary to examine the facts of the case and submissions of the parties, which are as under:-

- Excise Appeal No.494 of 2009, is filed by the assessee, M/s H.S. Builders against confirmation of demand of Rs.5.26,615/- and imposition of penalty of an equal amount. Excise Appeal No.148 of 2010 is filed by M/s Gurmit Construction against the demand of duty of Rs.19.41,722/- and imposition of equal amount of penalty by the original authority, which has been remanded by the first appellate authority for re-computation after taking the price collected by the appellant as cum-duty price. Ex. Appeal No.206 of 2010 is filed by the Revenue against the first appellate authority giving the benefit cum-duty price while confirming the demand.
- That the assessees herein are engaged in fabrication of steel tanks for Oil Companies, such as, M/s Bharat Petroleum Ltd., M/s Indian Oil Corporation Ltd. and H/s Indo-Burma Petroleum Company Ltd. as per their specifications. The Department received intelligence that the appellants did not obtain Central Excise Registration even after exceeding the SSI exemption limit of turnover Rs.1.00 Crore. Accordingly, the Officers Investigated the matter, inspected the premises of the assessees, issued summons and recorded statements and came to the conclusion that the assessees have not obtained Central Excise Registration nor have they paid duty on the steel tanks, which have been manufactured for the aforesaid Oil Companies. Show-cause notices were issued proposing to recover the aforesaid short paid duty and impose penalties. While proposing to recover the duty for extended period of limitation in the show-cause notices, no specific allegation of fraud, collusion, wilful mis-statement, suppression of facts or violation of provisions of Act and Rules, with an intent to evade payment of duty, has been alleged or evidenced.
- The specific activities of the appellants are that they purchase steel sheets and bend them into cylindrical structures and at the site attach side sheets to fabricate steel tanks, in which, Oil is stored by the Oil Companies. It is undisputed that these tanks are being fabricated by the assessee and shifted to the premises of these Oil Companies. The end pieces of the steel tanks and the valves etc., are being attached at site. The cylindrical tank is being fixed on the foundation and is placed below the ground.

- It is the case of the assessee that no steel tanks have come into existence at their premises. It is not complete when it leaves the factory gate. The steel tank comes into existence only at the premises of the buyers of Oil Companies when all parts are welded together. At this place, the steel tanks are fixed to the foundation and are placed under-ground. Therefore, they cease to be the goods because they are attached to the earth. No Excise duty is, therefore, leviable on the goods because the steel tanks, when they came into existence, are attached to the earth and cannot be called as goods at all. Before the steel tanks reached the buyers' premises, they are incomplete and cannot be called as steel tank at all. Therefore, they are not liable to pay Excise duty at all and have not taken Central Excise Registration nor have they paid Central Excise duty.
- The Ld. Counsel for the assessee also argued that the show-cause notices specifically lack either an allegation or any evidence of fraud, collusion, wilful mis-statement or suppression of facts or violation of any provisions of the Act or Rules with an intent to evade payment of duty. Although, show-cause notices do not specifically make these allegations that the demand was raised for the extended period of limitation. Therefore, they were never given any opportunity to defend themselves against allegation of elements necessary for invoking extended period of limitation. Therefore, demand has to fail for the extended period of limitation on this ground alone.

Thirdly, he argued that they had reason to believe that they were not liable to pay Central Excise duty because their tanks were attached to the foundation and placed under-ground. They honestly believed that they do not qualify to be called as goods and therefore, no Central Excise duty was payable. For this reason, no penalty under Section 11AC is imposable upon them. Penalties imposed upon them need to be set aside even if on merit, the demand is upheld.

- Further, Ld. Counsel argued if the demands are decided against them, the prices received by them may be taken as cum-tax prices and CENVAT Credit on inputs may be given to them.

- The Ld. Departmental Representative, on the other hand, submits that the assessee have had at no point of time taken Registration or informed the Central Excise Department regarding their activities. They have not paid any Central Excise duty and they have dealt with large Oil Companies under large contracts and it was expected from them to have acted responsibly and paid Central Excise duty. If they had any doubt, they could have sought clarification from the Department. They did no such thing. They have clandestinely manufactured and cleared the goods without informing the Department. Therefore, the extended period of limitation is invokable and penalties under Section 11AC are rightly imposable. On merit, he argued that it is now well settled that merely because the goods are attached to the earth, they do not cease to be goods. The goods can always be removed from the earth and sold. There is no force in the contention of the assessee that tanks do not come into existence in their factory because essential character of the tank is very much present when the tank left the factory. Even if, end piece, valves etc. are attached at the customers' premises, the tank can only be said to be an incomplete article when it left the factory which should be classified as complete article for the purpose of levies of Central Excise duty. Even if, the manufacture is undertaken outside the factory premises of the assessee, the Central Excise duty is still payable. Merely because the tank is placed on a

foundation and is eventually placed below under-ground, it does not cease to be good.

Further after considering the above submissions of the parties, learned Member(Technical) disposed of the appeals as follows:-

- i. Demands for normal period are confirmed in both the impugned orders.
- ii. Demands for extended period are set aside.
- iii. Cenvat Credit is available to the assessees.
- iv. The prices received by them may be taken as cum-duty prices and duty calculated accordingly.
- v. All penalties are set aside.
- vi. Appeals are remanded to the original authority for the limited purpose of computation.

3. On the other hand, learned Member(Judicial) agreed with learned Member(Technical) as regards the non- applicability of extended period of limitation, appellants' entitlement of cum-duty benefits and cenvat credit on inputs and waiver from imposition of penalty but on merits, learned Member(Judicial) has held that no central excise duty is payable by the assessee on the impugned goods. Further both the learned Members agreed that Department's appeal needs to be dismissed and the same was dismissed.

4. After considering the submissions of both the parties and perusal of the records, I find that the only issue on which both the learned Members have contrary view is whether the tanks fabricated by the assessee are goods and whether they are liable to Central Excise duty. Learned counsel for the appellant submitted that learned Member(Technical) while upholding the demand for the normal period of limitation has mainly relied upon the decision of the Hon'ble Apex Court in the case of CCE, Ahmedabad Vs. Solid & Correct Engineering Works [2010(252) ELT 481 (SC)]. He further submitted that the decision of the Apex Court as relied upon by learned Member(Technical) is not applicable to the facts in hand and is quite distinguishable. In the case before the Apex Court, the Asphalt Drum Mix plant was attached on a foundation at a depth of 1.5 feet not for permanently but for a fixed period of time and after the period is over, the same is removed and shifted to other place. The attachment of the plant to the earth is only intended to provide stability and to prevent vibration. He also submitted in those the circumstances, the Apex Court has held that such plant is excisable. Learned counsel further referred to the definition of 'excisable goods' as provided in Section 2(d) of Central Excise Act and also the definition of 'movable property' as provided in Section 3(36) of the General Clauses Act, 1897 and definition of 'immovable property' as provided in Section 3(26) of the General Clauses Act, 1897. He also referred to the definition of 'attached to earth' as provided in Section 3 of Transfer of Property Act, 1882. After referring to these definitions, the learned counsel submitted that the goods in question i.e. 'steel tanks' after being removed from the factory in semi-finished and incomplete condition are placed on the civil foundation permanently for storage of petrol / diesel and they are permanently attached to the earth. In such circumstances, the tanks qualify to be immovable property and not liable to duty of excise. Learned counsel also submitted six photographs in order to exhibit the manner of erection of such tanks on civil foundation. He also submitted that if these tanks are removed / detached from the civil foundation, then it will be recovered

only as a scrap and not in the form of tank. He also submitted that since tanks are attached permanently, the liability of excise duty on such tanks does not arise and learned Member(Judicial) is correct to hold that the tanks are not excisable goods being permanently attached to the earth. He also argued that learned Member(Judicial) has rightly relied upon the decision in the case of Prodi Engineering Works Vs. CCE, Kolkata [2007(216) ELT 534 (Tri. Kol)] and Servesham Construction Ltd. Vs. CCE, Jaipur [2004(171) ELT 204 (Tri. Del.)]. He also submitted that the decision in the case of V.D. Engineering Vs. CCE, Jabalpur [2019(366) ELT 123 (Tri. Del.)] relied upon by the learned AR is not applicable in the present case as the said decision has been passed without considering the statutory provisions of Central Excise Act, Transfer of Property Act, General Clauses Act or Sale of Goods Act as has been elaborately raised by the appellant in the present case.

5. On the other hand, the learned AR submitted that the findings returned by the learned Member(Technical) is perfectly in accordance with law and should be upheld. He further submitted that learned Member(Judicial) has gone beyond the case as set up by the Revenue in the show-cause notice. He further submitted that the valuation of the impugned goods was not the issue at any stage and further even in appellants' ground of appeal also, the appellants have not raised this issue and hence setting aside the demand of excise duty even for normal period is not legally sustainable in law. He also submitted that the Division Bench decision of the Delhi Tribunal in the case of V.D. Engineering cited supra has held that storage tanks (impugned goods in the present case) are liable to excise duty as the activity of converting steel sheets into the form of storage tank amounts to manufacture. He also submitted that the Division Bench decision of the Delhi Tribunal in V.D. Engineering case was not brought to the notice of the Bench at the time of hearing the case and further the findings returned by the learned Member(Technical) is in consonance with the decision of the Delhi Tribunal in the case of V.D. Engineering.

6. I have examined the submissions of both the sides. From the facts as submitted by the learned counsel for the appellants, I find that the appellant manufacture tank in their factory, although some parts of the tanks are finally attached at the buyers' premises only. I agree with the submission of the learned counsel for the appellant that the impugned goods when left the factory is incomplete and unfinished tanks. But they are still classified as tanks and is liable to excise duty under CETH 73090090 of CETA. Further I find that learned Member(Technical) has considered the definition of 'goods' and the definition of 'attached to earth' and has rightly relied upon the decision of the Apex Court in the case of Solid & Correct Engineering Works cited supra. The relevant portion of the said decision is as follows:-

10. Section 3 of the Central Excise Act, 1944, inter alia, sanctions what was during the relevant period called 'central excise duty' on all "excisable goods" produced or manufactured in India at the rates set forth in First Schedule to the Central Excise Tariff Act, 1985. The term "excisable goods" appearing in Section 3 has been defined under Section 2(d) of the said Central Excise Act which reads as under:

"2(d): "excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt.

Explanation: For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable."

11. Entry 8474 in the First Schedule to the Central Excise and [Tariff Act](#), 1985 stipulates the rate at which excise was payable on machinery of the kind enumerated in that Entry which reads:

"Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry moulds of sand."

12. It is evident from the above that any machinery which is used for mixing is dutiable. That Asphalt Drum/Hot Mix Plant is a machinery meant for mixing etc. was not disputed before us. It was fairly conceded by Mr. Bagaria that assembling, installation and commissioning of Asphalt Drum/Hot Mix Plants amounted to manufacture inasmuch as the plant that eventually came into existence was a new product with a distinct name, character and use different from what went into its manufacture. Super added to the above is the fact that [Section 2\(f\)](#) of the Central Excise Act does not define the term "manufacture" exhaustively. The definition is inclusive in nature and has been understood to mean bringing into existence a new product with a distinct name, character and use. (See (i) [Union of India V. Delhi Cloth and General Mills Co. Ltd.](#) (1977) 1 ELT 199, (ii) [BPL India Ltd. V. CCE](#) (2002) 5 SCC 167, (iii) [Sirpur Paper Mills Ltd. V. Collector of Central Excise, Hyderabad](#) (1998 (1) SCC 400).

13. Mr. Bagaria strenuously argued that even when the setting up of the plant has been held to be tantamount to manufacture of a plant and even when the plant may be machinery covered by Entry 8474 of the First Schedule to the [Central Excise Act](#), the same would not necessarily amount to manufacture of 'exigible goods' keeping in view the fact that such plants have to be permanently embedded in earth. Reliance in support was placed by Mr. Bagaria upon the finding recorded by the Tribunal that the plant is required to be fixed to a foundation that is 1 and = ft. deep for the sake of stability of the plant which causes heavy vibrations while in operation. The following passage from the Tribunal's order was in particular relied upon by Mr. Bagaria in support of his submission that the size and nature of the plant was such as made its fixing to the ground essential:

"The individual element such as feeder bins, conveyor, rotary mixing drum, asphalt tank, fuel tanks, etc. have to be separately embedded into the earth. This is done on a civil foundation of 1.5 deep. This is because the weight of the material as well as the vibrations caused by the movement thereof is very substantial. The drier at one time holds 40MT of raw material."

14. Relying upon certain decisions of this Court, Mr. Bagaria argued that the plants in question did not satisfy the test of marketability and moveability. According to Mr. Bagaria, the setting up of the plant was no more than an accretion/annexation to immovable property which was far from manufacture of goods exigible to excise duty. We shall presently refer to the decisions relied upon by Mr. Bagaria, but before we do so we may briefly refer to the relevant statutory provisions to examine, what would constitute moveable or immoveable property.

15. The expression "moveable property" has been defined in [Section 3\(36\)](#) of the General Clauses Act, 1897 as under:

["Section 3\(36\)"](#) : "movable property" shall mean property of every description, except

immovable property."

16. From the above it is manifest that the answer to the question whether the plants in question are movable property, would depend upon whether the same are immovable property. That is because anything that is not immovable property is by this very definition extracted above "moveable" in nature.

17. [Section 3](#) of the Transfer of Property Act, 1882 does not spell out an exhaustive definition of the expression "immovable property". It simply provides that unless there is something repugnant in the subject or context 'immovable property' under the [Transfer of Property Act](#), 1882 does not include standing timber, growing crops or grass. [Section 3\(26\)](#) of the General Clauses Act, 1897, similarly does not provide an exhaustive definition of the said expression. It reads:

"[Section 3\(26\)](#) : "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

18. It is not the case of the respondents that plants in question are per se immovable property. What is argued is that they become immovable as they are permanently imbedded in earth in as much as they are fixed to a foundation imbedded in earth no matter only 1= feet deep. That argument needs to be tested on the touch stone of the provisions referred to above. [Section 3\(26\)](#) of the General Clauses Act includes within the definition of the term "immovable property" things attached to the earth or permanently fastened to anything attached to the earth. The term "attached to the earth" has not been defined in the [General Clauses Act](#), 1897. [Section 3](#) of the Transfer of Property Act, however, gives the following meaning to the expression "attached to the earth":

"(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls and buildings;

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."

19. It is evident from the above that the expression "attached to the earth" has three distinct dimensions, viz.

(a) rooted in the earth as in the case of trees and shrubs (b) imbedded in the earth as in the case of walls or buildings or

(c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1= feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition. Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also the attachment of the plant to the foundation at which it rests does not fall in

the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached.

7. Further I find that the issue involved in the present case is squarely covered by the Division Bench decision of the Delhi Tribunal in the case of V.D. Engineering cited supra relied upon by the learned AR wherein identical goods were involved. Though the decision was rendered prior to the decision of this case, the same was not brought to the notice of the Bench at the time of hearing the matter. It is pertinent to reproduce the relevant findings of the Tribunal recorded in para 6 to 9 and reproduced herein below:-

6. *Heard both sides and carefully and perused the record. We have also perused some of the work orders placed by IOCL/ HPCL on the appellant. In terms of such work orders, IOCL/ HPCL would supply steel sheet to the appellant and using them the latter, is required to fabricate the storage tanks of the required capacity and return the manufactured tanks to IOCL/ HPCL. From the nature of the work in the appellant's factory, it is evident that the appellant has undertaken the activity of manufacture i.e. activity of converting steel sheets into the form of storage tanks. Storage tank is commodity which is liable for payment of excise duty under CETH 73090090 of the Central Excise Tariff. Consequently, the liability of excise duty on the tanks fabricated by the appellant is established and hence the same is sustained.*

7. *Next we deal with the arguments advanced on behalf of the appellant that such storage tanks are embedded to the earth and hence no duty is payable. It also stands argued that tanks are not marketable. We are of the view that liability for excise duty is to be determined on the basis of the activity carried out in the appellant's factory and not on the basis of the use of such products after clearance from the factory. Inasmuch as the storage tanks have arisen in the factory of the appellant, the liability for payment of excise duty gets fastened on the appellant.*

8. *The arguments regarding the tanks being not marketable is also to be discarded since the tanks are in fact procured by the customer i.e. IOCL/ HPCL even though in the form of job work contract.*

9. *In the result, the impugned order merits no interference. The same is sustained and the appeals are dismissed.*

8. As the ratio of the Division Bench decision is squarely applicable in this case, by following the said decision, I hold that the impugned goods are liable to excise duty and the opinion expressed by the learned Member(Technical) is in accordance with law and I also hold the same opinion.

9. Now the matter may be placed before the concerned Division Bench for further action.

Raja...

SD/

(S.S. GARG) MEMBER (JUDICIAL)

MAJORITY DECISION

10. In view of the majority decision, Central Excise demand is legally sustainable on merits for the normal period of limitation and the appeals are disposed of as follows :

- (i) Demands for normal period, is confirmed in both the impugned orders.
- (ii) Demands for extended period is set aside.

(iii) Cenvat credit is available to the assesseees.

(iv) The prices received by them may be taken as cum-duty prices and duty calculated accordingly.

(v) All penalties are set aside.

(vi) Appeals are remanded to the original authority for the limited purpose of computation.

(Pronounced in the open Court on 28 July 2020.)

(P.K.CHOUDHARY)

MEMBER(JUDICIAL)

(P.V.SUBBA

RAO),

MEMBER(TECHNICAL)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
KOLKATA**

Regional Bench – Court No. 2

Appeal No. E/507/2010

(Arising out of Order-in-Original No.15/SR/GHY/2009-10 dt.05.04.2010 passed
by CCE &ST, Guwahati)

Mahashakti Cements

Village-Brynihat, NH-37, Sonapur, District-Kamrup, Assam

VERSUS

.....Appellant

Commissioner of Central Excise & Service Tax, Guwahati

Sethi Trust Building, 5th Floor, G.S.Road, Bhangagarh, Guwahati – 781 005

.....Respondent

Appearance

None for the Appellant.

Shri K. Choudhary, Authorized Representative for the Respondent.

Coram:

HON'BLE Mr. P.K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. 77057/2019

[Order per: P. VENKATA SUBBA RAO.]

Date of Hearing: 25.11.2019

Date of Decision: 25.11.2019

1. This appeal is filed against Order-in-Original No. 15/SR/GHY/2009-10 dt.05.04.2010.
2. The appellant is a manufacturer of cement from bought out clinker falling under Chapter 25 of the Central Excise Tariff. The appellant's factory is located in Kamrup, Assam which entitles them to special exemption available to units in north-eastern India. Notification No. 33/1999-CE dt.08.07.1999, as amended, allows exemption to the extent of duty payable on value addition undertaken in the manufacture of the specified goods by the units located in north-eastern states subject to fulfilment of some conditions. The notification also specifies the rates of value addition for different commodities.
3. However, if the manufacturer finds that their actual value addition in the manufacture of goods is at least 115% of the rate specified in the notification they may make an application to the jurisdictional Central Excise Commissioner for determination of special rate stating all relevant facts and supporting their claim with a certificate from the auditor. Para 2.1(1) of the notification provides that such an application must be made by the manufacturer in writing to the

Commissioner not later than 30th of September. It, further, provides that Commissioner may, if satisfied that the manufacturer was prevented by sufficient cause from making the application within the time, allow such manufacturer to make an application within a further period of 30 days. Thus, the condonable period ends on 30th of October.

4. The appellant prepared their application dt.30.10.2009 but submitted it to the Commissioner only on 03.11.2009. As the application for special rate of value addition was hit by limitation of time, the same has been rejected by the Commissioner without going into merits of the claim.

5. Aggrieved by this order, the present appeal is filed seeking condonation of the delay and a direction to the Commissioner of Central Excise to fix a special rate based on the application and clarifications by the appellant.

6. Learned departmental representative supports the impugned order and argues that the delay cannot be condoned in this case and the rejection was justified.

7. We have considered the arguments on both sides and perused the records. Two questions which arise in this case are as follows:

- a) Where there is a statutory time limit with statutory condonable period, can the Commissioner or this Tribunal go beyond provisions of statute and condone the delay beyond the condonable limits?
- b) If the exemption notification provides for exemption subject to some conditions and if one of the conditions required for getting a larger refund has not been fulfilled by the appellant, can the exemption notification be read, ignoring such conditions?

8. We find that both these issues have been settled by the Hon'ble Supreme Court. On the question of condonable limit for delay in the case of *Singh Enterprises vs CCE, Jamshedpur* [2008 (221) ELT 163 (SC)] the Hon'ble Supreme Court has held as follows:

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the 'Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that

there was no power to condone the delay after the expiry of 30 days period.”

Thus, it has been held that where a statutory time limit is fixed for condonation, the delay cannot be condoned beyond the time limit so fixed.

9. The second question is about interpretation of the exemption notification. There were several views on how exemption notifications must be interpreted i.e., either strictly or liberally. There were judgments taking both views at various levels including by the Hon'ble Apex Court, some case laws viewing exemption notifications strictly and others viewing them liberally. It has also been held in some decisions that beneficial notifications must be viewed liberally and the substantive benefits should not be denied on procedural grounds. In view of the conflicting decisions, the matter was referred to a five member Constitutional Bench of the Hon'ble Supreme Court which, in the case of Dilip Kumar & Co. [2018 (361) ELT 577 (S.C)], has held as follows:

“52. To sum up, we answer the reference holding as under -

- 1) **Exemption notification should be interpreted strictly;** the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*
- 2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.*
- 3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stand overruled.”*

10. Thus, it is now well settled that the exemption notification must be strictly construed against the person who is claiming it. In this case, if the appellant wants to claim a higher rate of refund under exemption notification, the condition therein that they should have made an application by 30th of September must be fulfilled. If they were prevented by sufficient cause from making such application the Commissioner could have condoned the delay only up to 30th of October and not beyond. The application was clearly made beyond the condonable time limit and therefore, was correctly rejected. In view of the above, we find no infirmity in the impugned order and uphold the same.

11. The impugned order is upheld and the appeal is rejected.

(Operative part of this order was pronounced in the open court on conclusion of hearing)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal Nos. 521 of 2010

Arising out of Order-in-Original Nos.01/COMMR./CE/KOL-III/2020-11 dated
06.04.2010 passed by Commissioner of Central Excise, Kolkata – III.

M/s. Texmaco Ltd.

Agarpara Works,
P.O. Belgharia,
Kolkata – 700056.

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata – III

180, Shantipally, Rajdanga Main Road, Kolkata – 700 107.

.....Respondent

With

Excise Appeal No. 624 of 2010

Commissioner of Central Excise, Kolkata – III

180, Shantipally,
Rajdanga Main Road, Kolkata – 700 107.

...Appellant

VERSUS

M/s. Texmaco Ltd.

Agarpara Works,
P.O. Belgharia, Kolkata –
700056.

.....Respondent

APPEARANCE

Shri Pulak Saha, C.A. & Ms. Dimple Jogani, C.A. for the Appellant assessee
Shri H.S. Abedin, Authorized Representative for Department.

CORAM:

HON'BLE SHRI S.S. GARG, MEMBER(JUDICIAL)

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

Final Order No. 75327-75328/2020

PER P.V.SUBBA RAO :

Appeal No. E521/2010 is filed by the appellant assessee, while Appeal No. E 624/2010 has been filed by the revenue against the same impugned Order. Hence, both Appeals are being taken up together for disposal. Learned Counsel for the Appellant Assessee submits that the name of the Company has been changed from M/s. Texmaco Ltd. to M/s. Texmaco Rail and Engineering Ltd. as per the Order of the Hon'ble High Court Calcutta dated 6th September 2010. Accordingly, we direct that the name of the Appellant/Respondent may be recorded M/s. Texmaco Rail and Engineering Limited.

2. The facts of the case are that the Assessee is registered with the Central Excise Department and are manufacturing excisable goods such as structural materials, Pressure Vessels, parts of Sugar Mills machinery, railway wagons, etc. They have imported wheel sets for use in the manufacture of railway wagons. They availed CENVAT credit on the amount of additional duty of Customs (CVD) and special additional duty of Customs (SAD) paid on the imported wheel sets on the strength of the Bills of Entry. However, after availing the CENVAT Credit they have not used some of the wheel sets for manufacture of railway wagons, but instead transferred them to their Sister Unit at Sodepur during the period May 2008 to October 2008 after reversing the CENVAT Credit.

3. Scrutiny of the records of the Assessee by the department revealed that while they availed CENVAT Credit on both the CVD and SAD they have reversed only the CVD and they have not reversed the credit of SAD availed by them.

4. Therefore, a Show Cause Notice dated 20.10.2009 was issued to the Appellant demanding an amount of Rs.63,40,120.00 equal to the credit of SAD availed by them along with interest under Rule 14 of CENVAT Credit Rules 2004. It was also proposed to impose a penalty under Rule 15 of CENVAT Credit Rules 2004 read with Section 11 A of the Central Excise Act 1994.

5. After following due process, the Learned Commissioner, by the impugned Order, confirmed the demand along with interest as proposed. He also imposed a penalty of equal amount under Rule 15

(2) of CENVAT Credit Rules 2004 read with Section 11AC of the Central Excise Act 1944. The Assessee is aggrieved by this Order confirming the demand and also imposing the penalty. Revenue is aggrieved by the fact that no penalty has been imposed under Rule 15 (1) of the CENVAT Credit Rules 2004.

6. Learned Counsel for Assessee Appellant contests the demand on the following grounds :-

(i) Against the same Bills of Entry which are subject of dispute in the present appeals, they had imported wheel sets both "on payment of duty" and without payment of duty under DEEC Licence. The goods which were imported under DEEC Licence were not subject to any duty and therefore they had not availed any CENVAT Credit at all on the goods. Therefore, they were not required to reverse any CENVAT Credit at all while transferring the goods to their Sister Unit. By mistake, they reversed CENVAT Credit of the CVD taken. The amount of CVD so reversed has been taken as credit by the receiving Sister Unit. Therefore, the question of reversing more amount towards the SAD does not arise. He gave the details of the imports as follows :-

Sl. No.	Bills of Entry No. and date	Quantity (nos.)	Quantity (nos.) Imported on payment of appropriate duty	Total Quantity (nos.) covered by Bill of Entry	Quantity (nos.) removed to Sodepur Works from	Remarks Inadvertently reversed the credit, allegation
					imported goods received under DEEC Licence as reflected in column (C)	that removed from goods received as reflected in column (D) is not correct.
(A)	(B)	(C)	(D)	(E)	(F)	(G)
1.	37787 dated 26/11/2007	425	325	750	325	322
2.	335971 dated 11/04/2007	274	326	600	82	82
3.	342281 dated 16/05/2007	488	146	634	56	56
4.	381155 dated 12/12/2007	680	800	1480	370	370
	TOTAL	1867	1597	3464	833	830

(ii) Even if it is held that they were required to reverse the CENVAT Credit, it cannot be alleged that they had an intention to evade payment of duty since the entire exercise is revenue neutral. Whatever CENVAT was reversed by them was taken as credit by their sister unit. For this reason extended period of limitation cannot be invoked for raising the demand.

iii. For the same reason, the penalty imposed under Rule 15 (2) of CENVAT Credit Rules 2004 read with Section 11 AC of the Central Excise Act 1944 is liable to be set aside.

(iv) With respect to the appeal filed by the Revenue he would argue that there is no case for imposition of penalty under Rule 15 (1) of CCR 2004. This Sub - Rule was not invoked in the SCN at all. During the period this Sub - Rule read as follows :-

“ If any person, takes or utilises CENVAT Credit in respect of the input of capital goods or input services wrongly or in contravention of any of the provisions of this Rule 6 of such goods shall be liable to confiscation and such person shall be liable to penalty not exceeding the duty or services taken on such goods or services as the case may be, or Rs.2,000.00, whichever is higher”.

Learned Counsel for the Assessee would submit that there is no allegation in the entire SCN that they have availed or utilized CENVAT Credit wrongly. The only allegation is that they have not reversed the CENVAT Credit while transferring the goods to their sister unit. Therefore Rule 15 (1) of CCR 2004 does not apply to their case.

On a specific query from the Bench as to how they have inventorised the imported wheel sets and which wheel sets have been transferred to their sister unit i.e. whether duty paid and CENVAT availed wheel sets were transferred or duty free DEEC cleared wheel sets were transferred, he submits that the two types of wheel sets cannot be distinguished. They maintain bill of entry-wise stocks of the wheel sets but cannot

say on which wheel sets duty was paid and on which it was not against the same Bill of Entry.

7. Learned D.R. reiterates the grounds of appeal as far as the imposition of penalty under Rule 15 (1) is concerned. As far as the substantive question of reversal of CENVAT Credit availed on SAD is concerned, he would submit that it is not the revenue which has decided that the goods which were transferred were duty paid and CENVAT availed. The assessee themselves who have reckoned the transferred wheel sets as duty paid and CENVAT availed. Therefore, they have reversed the CENVAT Credit availed on the goods but only partly and the demand is with respect to the nonreversed part of the CENVAT Credit. He would, therefore, argue that the demand has been correctly confirmed and the penalty has been correctly imposed.

8. We have considered the argument on both sides and perused the records. It is not in dispute that the appellant assessee availed CENVAT Credit on the imported wheel sets in respect of both the CVD and SAD paid by them. It is not in dispute that against the same Bill of Entry some wheel sets were cleared on payment of duties and some were cleared under DEEC without payment of duty and it is not possible to separate duty paid goods from the goods cleared under DEEC. Therefore, the only way to decide whether the goods which were transferred to the sister unit were duty paid or duty free is based on the records of the assessee and how they treated the transferred goods.

9. It is not in dispute that the appellant assessee has treated the transferred goods as duty paid and also reversed some portion of the CENVAT Credit so availed. The amount of CENVAT Credit so reversed has been taken as credit by the sister unit. Under the circumstances we find that no force in the argument of the Assessee that the goods which were treated by them as duty paid for the purpose of reversing CENVAT Credit of CVD must be treated as duty free for the purpose of reversing SAD. Just as a man cannot be both married and unmarried at the same time, the goods in question cannot be both duty paid and duty free at the same time. Once the Assessee has reckoned the goods as a duty paid, they must reverse the entire amount of CENVAT Credit availed on them. Therefore, on merits, we do not find any force in the argument of the assessee. They must reverse the CENVAT Credit availed on SAD in respect of the transferred goods. Since they have not done so, the demand, along with the interest on this ground has been correctly confirmed by the original authority in the impugned order.

10. However, we had find force in the argument of the assessee that their sister unit gets credit of the amount of CENVAT Credit reversed by the appellant and therefore no malafide can be attributed to them. For extended period of limitation to be invoked, there must be fraud or collusion or willful misstatement or suppression of facts or violation of the provisions of the Act or Rates with an intent to evade payment of duties. We find none of these elements in the present case. For this reason, we find that extended period of limitation under Section 11 (A) cannot be invoked. For the same reason, we also find that the imposition of penalty under Rule 15 (2) of CENVAT Credit Rules 2004 read with Section 11 A C of the Central Excise Act 1944 is liable to be set aside.

11. So far as the appeal of revenue is concerned we find that penalty under Rule 15 (1) of CCR 2004 is imposable only when any person takes or utilizes CENVAT Credit wrongly. There is no such allegation at all in the Show Cause Notice. Therefore revenues appeal is liable to be rejected and we do so.

12. In view of the above, the appeals are disposed of as below :-

- a. Revenues – Appeal E/624/2010 is rejected.
- b. The demand of reversal of CENVAT Credit within the normal period of limitation is upheld along with applicable interest.
- c. The demand, if any, for the extended period of limitation is set aside.
- d. The penalty under Rule 15 (2) of CCR 2004 read with Section 11AC of the Central Excise Act 1944 imposed in the impugned order is set aside.

- e. The appeal is remanded to original authority for the limited purpose of calculation of the amount of CENVAT Credit to be reversed for the normal period of limitation.
(Pronounced in the open Court on 02.03.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.2

Excise Appeal No.540 of 2009

(Arising out of Order-in-Appeal No.04/Kol.VI/2009 dated 27.08.2009 passed by Commr. of
Central Excise (Appeals), Kolkata)

M/s Diamond Beverages Pvt. Ltd.

P-41, Taratala Road, Kolkata-700088

VERSUS

CCEx., Kolkata VI

180, Shantipally, Rajdanga Main Road, Kolkata 700107

APPEARANCE :

None for the Appellant

Shri S.Mukhopadyyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)

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

FINAL ORDER NO...75221/2020

DATE OF HEARING : 29.01.2020
DATE OF DECISION : 29.01.2020

PER P.V.SUBBA RAO :

This appeal is filed by the appellant against the Order-in-Appeal No.04/Kol.VI/2009 dated 27.08.2009 passed by Commissioner of Central Excise (Appeals), Kolkata.

2. None appeared on behalf of the appellant. As the matter is very old pertaining to 2009 and the issue is in a narrow compass, the matter has been taken up for decision even in the absence of the appellant.

3. Heard the Ld.D.R. for the Revenue and perused the records.

4. The appellant had been sanctioned refund as well as interest on the refund as applicable under Section 11BB of the Central Excise Act, 1944. The appellant also sought an interest on the interest, which has been rejected by the first appellate authority in the impugned order.

The relevant portion of the impugned order at Page 4 in Para 4, is reproduced below :

"4. I have gone through the materials on record, the appeal petition and the records of personal hearing. The Commissioner (Appeals) in his Order-in-Appeal dated 25.03.2008 has ordered as under :

'in view of the above, the impugned order is set aside and Lower Authority is directed to refund the interest amount paid.'

Accordingly, the Assistant Commissioner, Central Excise, Taratala IV Division, in compliance of the above Order-in-Appeal dated 25.03.2008 sanctioned the refund of interest of Rs.1,27,340.00. I find that the Order-in-Appeal dated 25.03.2008 has not allowed refund of "interest on interest". I do not find any flaw in the order dated 11.06.2008 of the Assistant Commissioner. The present appeal has not merit and therefore stands dismissed."

5. The relevant claim in the Appeal Memorandum in Sl.No.14, is "to quash and/or set aside the order appealed against, and refund the Interest on Interest". The grounds of appeal are as follows :

(i) *The Commissioner (Appeals) in the said order has further observed that none of the ingredients namely, suppression of fact, willful mis-statement with intent to evade payment of duty was present. If the said ingredients are not present the provision of Section 11AB of the Act is not applicable.*

(ii) *It is settled that interest becomes due after three months of becoming eligible for refund. If such interest is not paid interest on interest is payable.*

(iii) *The Commissioner of Central Excise, Appeal II, vide his Order-in-Appeal No.14/Kol.VI/2008 dated 25.03.2008 discussed regarding our claim i.e. interest on interest with various judgements and lastly directed to lower authority to refund the interest.*

(iv) *The lower authority passed by the Assistant Commissioner of Central Excise, Taratala-IV Division vide his Order-in-Original No.R- 72/AC/Tara-IV/Kol-VI/2008 dated 11.06.2008 refunded the interest of Rs.1,27,340/- only but not the interest on interest.*

(v) *We have also filed the appeal before the Commissioner of Central Excise, Appeal Kolkata II for payment of interest on interest, who without going through the various judgements of CESTAT dismissed the appeal vide his order No.04/Kol.VI/2009 dated 27.08.2009.*

(vi) *For that further and in any event and without prejudice to the aforesaid, the Commissioner of Central Excise, Appeal, Kolkata II failed to appreciate that the appellant all along acted bonafide in the matter and there had been no dishonest or willful disregard of any statutory provision on its part.*

(vii) *For that the order appealed against is otherwise erroneous on facts and/or in law. The appellants craves leave to add to alter, amend or modify the grounds taken herein.*

6. Section 11B of the Central Excise Act, 1944 provides for refund of duty paid. If the refund is not sanctioned within prescribed time limit, a provision has been made under Section 11BB for payment of interest. However, there is no provision for payment of interest on such interest if the interest itself was paid belatedly. The question of law which arises is when there is no explicit provision for payment of interest on interest, whether it can be paid. This question of law was decided by Three Member Bench of the Apex Court in the case of Commissioner of Income Tax, Gujarat Vs. Gujarat Fluoro Chemicals : 2013 (296) ELT 433 (SC), in which, a batch of SLP were disposed off. Although the case pertains to the income tax, the question of law is identical to the present one inasmuch as where the interest on the refund is paid belatedly, whether the assessee is entitled to interest on such interest, in the absence of any explicit provisions of law for such payment. This issue has been decided by the Hon'ble Apex Court in negative. Paras 7,8 & 9 of this judgement, are reproduced below :

7. As we have already noticed, in Sandvik case (supra) this Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest.

8. Further it is brought to our notice that the Legislature by the Act No. 4 of 1988 (w.e.f. 1-4-1989) has inserted Section 244A to the Act which provides for interest on refunds under various contingencies. We clarify that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest.

9. With the aforesaid clarification we now refer back all the matters before a Two Judge Bench of this Court to consider each case independently and take an appropriate decision one way or the other."

8. Respectfully following the judgement of the Larger Bench of the Hon'ble Supreme Court, we hold that the appellant is not entitled for interest on interest and there is no infirmity in the impugned order rejecting such a claim for interest on interest.

9. In view of the above, the impugned order is upheld and the appeal is rejected.
(Dictated and pronounced in the open court)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75002 of 2015

(Arising out of Order-in-Appeal No.112/DIB/CE(A)/GHY/14 dated 10.11.2014 passed by Commissioner of Customs & Central Excise (Appeals), Guwahati.) Lukwah Tea Estate of

**M/s. RNT Plantations Limited
(1 & 2, Old Court House Corner, Kolkata-700001.)**

...Appellant

VERSUS

Commissioner of Central Excise, Dibrugarh

(Minan Nagar, "F" Lane, Dibrugarh, Assam.)

.....Respondent

APPEARANCE

Ms.Chandreyee Alam, Advocate for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

**CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)**

FINAL ORDER NO. 76924/2019

P.V.SUBBA RAO :

**DATE OF HEARING :25 November 2019
DATE OF DECISION : 18 December 2019**

This appeal is filed by the appellant challenging the Order-in-Appeal No.112/DIB/CE(A)/GHY/14 dated 10.11.2014.

2. The facts of the case in brief are that the appellant is a manufacturer of tea and has submitted an application on 02.01.2008 seeking exemption from duties of excise in terms of Notification

No.33/99-CE dated 08.07.1999 on the ground that they have increased their overall installed capacity by 37% during the period 01.01.1998 to 01.07.1999. They also submitted a Chartered Engineer's assessment report for installed capacity, invoices/challans in respect of the new machinery installed by them, diagrammatic representation of the machines before and after expansion, etc.. The department issued a show cause notice on 29.09.2008 alleging that the appellant has submitted their application after about nine years from the date of completion of expansion or the date of the said Notification. It is also alleged that they have not stated any reasons for the inordinately long delay nor submitted original copies of the relied upon documents. In reply the appellant submitted copies of the relevant documents and informed that the original copies were available in the factory. They also informed that though they have submitted reports or documents on 02.01.2008 a letter forwarding the copy of the machinery, lay out plan duly certified and accepted by the Chief Inspector of Factories

was submitted and acknowledged by the jurisdictional range office. During the hearing, the appellant did not submit copy of the letter acknowledged by the jurisdictional range. By their letter dated 09.03.2010 they further said that they have actually submitted RT-12 returns to the range office informing about the registration of new machinery. The appellant was repeatedly asked, in vain, to submit the particular copy of RT-12 returns on which they have claimed the exemption Notification and submitted the fact of expansion of their plant capacity. Therefore the Deputy Commissioner of Central Excise rejected the claim as time barred. Being aggrieved the appellant filed an appeal before the Commissioner(Appeals), Guwahati, who ruled in favour of the appellant on the ground that the appellant informed the department about their expansion in the month of December 2000. The department filed an appeal against this order of Commissioner(Appeals) before CESTAT, Kolkata and during the pendency of this case the appellant filed a Writ Petition in the Hon'ble High Court of Guwahati who passed an order directing the department to implement the order of Commissioner(Appeals). Finally, CESTAT, Kolkata passed an order remanding the matter to the original adjudicating authority for re-adjudication.

3. While re-adjudicating, the adjudicating authority have found

(1) that the original copies of the documents were submitted only on 16.12.2009 i.e. one year after the submission of refund application.

(2) that the appellant could not prove that they have informed the range office about their expansion in 2001.

(3) though the Commissioner(Appeals) had, in his original order, held that the appellant informed the department through RT-12 returns in December 2000, but a copy of that was only submitted by the appellant before CESTAT and the RT-12 returns did not bear any endorsement as claimed by the appellant.

(4) the claim of the appellant regarding endorsement in RT-12 is a willful misstatement on their part with *mala fide* intention of getting benefit of exemption Notification. Thus holding, the adjudicating authority rejected refund claim as time barred.

4. Aggrieved by this order (*de novo*) of the adjudicating authority, the appellant appealed to the first appellate authority, who upheld the order of the adjudicating authority and rejected their appeals. Hence the present appeal.

5. Learned Counsel for the appellant would submit that they have substantially met the requirement of the exemption Notification inasmuch as they have declared in their RT-12 returns that they have expanded the capacity of their plant in order to avail the benefit of exemption Notification. The second main ground for rejection of their claims was that they are time barred. There is no dispute or doubt that they are eligible for the benefit of refund under Notification No.33/99-CE dated 08.07.1999. She relied on the following case laws:-

(a) CCE, Shillong v. Shiv Dham Industries Private Limited

2002 (141) E.L.T. 272 (Tri.-Kol) – in which it was held that RT-12 returns were filed

within seven days from the duty paid month, they can be taken as statements showing payment of duty to avail benefit of refund of duty under Notification No.33/99.

(b) CCE, Shillong v. K.K.Beverages Private Limited 2002 (148) E.L.T. 567 (Tri.-Kol)

(c) CCE, Shillong v. Vinay Cement Limited
2002 (147) E.L.T. 724 (Tri.-Kol)

6. In view of the above she would urge that they are eligible for the benefit of the exemption Notification and the substantive benefit of this exemption Notification No.33/99-CE dated 08.07.1999 cannot be denied on procedural grounds especially when they had already indicated in their RT-12 returns that they are expanding the capacity of the plant in order to avail the benefit of exemption Notification. She would therefore urge that their appeal may be allowed and the impugned order may be set aside.

7. On a specific query from the Bench as to whether their RT-12 returns which have been assessed have been challenged before any higher judicial forum, she replied in the negative.

8. Learned Authorized Representative on the other hand draws the attention of the Bench to the paras 2 and 3 of the exemption Notification No. which are as follows:-

2. The exemption contained in this notification shall be given effect to the following manner, namely:-

(a) The manufacturer shall submit a statement of the duty paid from the said account current to the Assistant Commissioner or the Deputy Commissioner of Central excise, as the case may be, by the 7th of the next month in which the duty has been paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001.

(b) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after such verification, as the case may be deemed necessary, shall refund the amount of duty paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001, during the month under consideration to the manufacturer by the 15th of the next month.

[**Provided** that such refund shall not exceed the amount of duty paid less the amount of the CENVAT credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this notification.]

(c) If there is likely to be any delay in the verification, Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th of the next month to the month under consideration and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer.

3. The exemption contained in this notification shall apply only to the following kind of units, namely :-

(a) New industrial units which have commenced their commercial production or on after the 24th day of December, 1997;

(b) Industrial units existing before the 24th day of December, 1997 but which have undertaken substantial expansion by way of increase in installed capacity

by not less than twenty five per cent on or after the 24th day of December, 1997.

9. He would submit that this exemption Notification is a special exemption meant for North-East Region available conditionally, therefore, it is essential that all the conditions of the exemption Notification are met before they are given the benefit of the exemption Notification. As can be seen para 2 of the exemption Notification requires the manufacturer to submit a monthly statement to the Assistant Commissioner or Deputy Commissioner of Central Excise. It further requires the Assistant Commissioner or Deputy Commissioner to carry out the necessary verifications. Undisputedly, in this case that neither the statements were submitted by the appellant, nor was any verification carried out. He draws attention of the Bench to the copies of the RT-12 returns submitted by the appellant in the present appeal in support of their contention that they have declared necessary details in their RT-12 returns. He points out that such a declaration is neither explicit nor is available in all the RT-12 returns. In the RT-12 return dated 02.01.2001 received by the Inspector of Central Excise on 05.01.2009 it states as follows:-

“N.B.: We have installed machinery in factory for exemption benefit.”

From the above it can neither be inferred that they were claiming the benefit of exemption Notification No.33/99 nor that they are expanding or have expanded their installed capacity as per the requirements in the exemption Notification. He would further draw the attention of the Bench to the subsequent returns enclosed in the appeal memorandum to show that the other returns do not even contain this cursory remark. He would argue that by no stretch of imagination can this ambiguous endorsement by the appellant in one of the returns be taken as a substitute for the substantial requirement in para 2 of the exemption Notification. He would argue that the facts in the case laws relied upon by the appellant were different and there is nothing in this case to show that in their RT-12 returns they have claimed the benefit of exemption Notification or the fact that they are likely to claim it.

10. He would further argue that the scope of the availability of benefit of exemption Notifications has been a matter of dispute. In several judicial fora including by the Hon'ble Apex Court two types of decisions were taken. In some cases it has been held that the substantive benefit of an exemption Notification cannot be denied to the assessee on mere procedural grounds. This view was also taken in the three case laws relied upon by the appellant. The second set of decisions held that the exemption Notification being an exception to the general rule, must be construed strictly against the person claiming the exemption. In view of the conflicting decisions, the question of interpretation of an exemption Notification was referred to a five member constitutional Bench of the Hon'ble Apex Court in the case of Commissioner vs. Dilip Kumar [2016 (339) ELT A-146 (SC)], which has finally decided that any exemption Notification must be construed strictly and in case of any doubt, the benefit of doubt must go in favour of the Revenue and against the assessee. In view of this judgement of the constitutional Bench of Hon'ble Supreme Court, which is binding on this Tribunal, the benefit of this exemption Notification cannot be granted to the appellant as they have not fulfilled the conditions of submitting statements as per para 2 of the exemption notification. In view of the judgment of the constitutional bench in the case of Dilip Kumar (supra), RT-12 return cannot be taken as a substitute for the statements required under the notification. They have not even

mentioned the benefit of this exemption Notification in their RT-12 returns nor fulfilled other conditions required therein. All previous orders of this Tribunal or the Hon'ble High Courts get over-ruled in view of the judgement of the constitutional Bench of the Hon'ble Apex Court in the case of Dilip Kumar (supra).

11. He would further argue that another important aspect of this refund is whether the refund can be sanctioned without first amending the assessment itself. He would submit that the exemption Notification in question was not claimed in the RT-12 returns which were assessed/self-assessed. These returns, admittedly were neither challenged nor set aside by any higher judicial forum. The question which arises is whether refund can be claimed without revising the assessment itself and whether officers sanctioning the refund can revise the assessment/self-assessment done by the assessing officer/assessee. This issue has been decided by the Hon'ble Apex Court in the cases of Priya Blue Industries Limited v. CC(Prev.) [2004 (172) E.L.T. 145 (SC)] and CCE, Kanpur v. Flock India Private Limited [2000 (120) ELT 285 (SC)]. In both these judgements it has been held that whenever a refund arises out of an assessment, it cannot be sanctioned unless the assessment itself is appealed against and revised. The process of sanction of refund is a mere mechanical process consequent upon the assessment/self-assessment. Subsequently, the Hon'ble High Court of Delhi had, in a few cases where there was no assessment order, but there was self-assessment, distinguished those cases and held that in such cases refund can be sanctioned even without revising the assessment. These judgements of the Hon'ble High Court along with several others were taken up by a larger Bench of the Hon'ble Apex Court in the case of ITC Limited V. CCE, Kolkata-IV (Civil Appeal No.293-294 of 2009) recently decided by the Hon'ble Apex Court. It has been held that once an assessment is finalized whether the assessment is done by the officer or it is a case of self-assessment, no refund can be sanctioned unless the assessment is first appealed against and revised. It has been categorically held that the definition of assessment includes self-assessment and therefore self-assessment can also be challenged before first appellate authority or higher judicial forum. It has also been held that no refund can be sanctioned unless such re-assessment has been done. He would submit that in view of the strict interpretation of the exemption Notification with benefit of doubt going in favour of Revenue as held by the constitutional bench of the Hon'ble Supreme Court in the case of Dilip Kumar (supra) and the fact that the assessments were not challenged in these cases, no refund can be sanctioned to the appellant. Both these judgements being judgements of the Hon'ble Apex Court prospectively apply in other decisions of the Tribunal or High Courts. The appeal may therefore be rejected.

12. We have considered the arguments of both sides and perused the records.

13. We find that the exemption Notification in question is a conditional exemption Notification available by way of refund. Para 2 of that exemption Notification prescribes the procedure for claiming it. This procedure requires the manufacturer to submit a statement of duty paid etc. on a monthly basis to the Assistant/Deputy Commissioner, who is required to verify the same and refund the amount. Admittedly the appellant had not done so. We have considered the learned Counsel's arguments that the RT-12 returns submitted by them should be considered as equal to the statements has been held by the CESTAT in the cases relied upon by her. Clearly the exemption Notification provides for a

separate statement and not merely the RT-12 returns which have to be filed in the way. Therefore to that extent the appellant has not fulfilled the condition of the exemption Notification. Secondly we have also examined the copies of RT-12 returns submitted by the learned Counsel in the appeal book. We find except for the cursory remark on one of the returns stating that they are expanding the capacity of the plant to claim exemption. There is nothing in the returns to show that they had intended to claim the benefit of exemption Notification No.33/99-CE or actually claimed in any of their returns whatsoever. In our considered view, this cannot be equated with fulfilling the conditions required under para 2 of the exemption Notification. We respectfully follow the judgement of the constitutional bench of the Hon'ble Apex Court in the case of Dilip Kumar (supra) wherein it has been categorically held that benefit of an exemption Notification must be construed strictly and any benefit of doubt must go against the assessee and in favour of the Revenue. In this case the availability of benefit is clearly not beyond any reasonable doubt. For that reason we find that the appellant is not entitled to the benefit of this exemption Notification. All the three case laws relied upon by the appellant pertain to the period prior to the legal position was settled by the Constitutional Bench in the case of Dilip Kumar and therefore stand over ruled.

14. We further find that RT-12 returns which have been assessed were not challenged by the appellant. On a specific query from the Bench learned Counsel for the appellant had admitted so. As held by the larger Bench of the Hon'ble Apex Court in the case of ITC Limited (supra), the refund which arises out of an assessment cannot be sanctioned unless the assessment itself has been challenged which is not the case in this appeal. For these reasons we find that the appellant is not entitled to the benefit of the refund claim.

In view of the above, the impugned order is upheld and the appeal is rejected.

(Order pronounced in the open court on 18 December 2019.)

SD/ **(P.K.CHOUDHARY)**
MEMBER (JUDICIAL)

SD/

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

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
REGIONAL BENCH – COURT NO.1**

Ex. Appeal No. 75674 of 2017

(Arising out of Order-in-Original No.01-03/Commissioner/CE/Haldia/Adjn/2017 dated 22/02/2017 passed by the Commissioner of Central Excise, Haldia.)

M/s. Haldia Petrochemicals Ltd.

Hpl Link Road, Haldia
Distt. Purba, Medinipur,
Haldia-721602

Appellant (s)

VERSUS

**Commissioner of Central Excise & Service Tax,
Haldia**

15/1, Strand Road,
Kolkata-700001

Respondent

APPEARANCE :

Mr. Harakamal Chakraborty, DGM for the
appellant

Mr. S. S. Chattopadhyay, A. R. for the
Respondent

CORAM:

HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)

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

FINAL ORDER NO.75330/2020

Date of Hearing: 06/02/2020

Date of Decision: 02/03/2020

PER P. V. SUBBA RAO :

This appeal is filed against Order-in-Original No. 01-03/Commissioner/CE/Haldia/Adjn/2017 dated 22/02/2017.

2. Heard both sides and perused the records.

3. The appellant assessee is a manufacturer of various petrochemicals. They cleared them on payment of Central Excise Duty. As per the scheme of the West Bengal VAT Department, they are entitled to invoice for applicable rate of VAT on their clearances and collect the same as VAT from the customers but not pay to the State government. This is referred to as remission under the scheme known as West Bengal Incentive Scheme, 1999.

4. Revenue is of the opinion that the additional amount which has been collected by the appellant from their customers as representing VAT but which has not been deposited as VAT forms an additional consideration for sale and therefore, Excise Duty has to be paid on the same. It is the case of the assessee that they are not liable to pay Excise Duty on this amount.

5. Ld. Counsel for the appellant contests the demand confirmed on the impugned order on the following grounds:-

- (i) No Excise Duty is payable on the amounts which they have collected as representing VAT, but which they have not paid to the State Government under the Remission Scheme. He would submit that in the impugned Order, the Adjudicating Authority has confirmed the demand relying upon the judgment of the Hon'ble Apex Court in the case of Super Synotex (India) Ltd. [2014 (301) E.L.T. 273 (S.C.)] in which the Hon'ble Apex Court has held that where an amount is collected as the representing VAT/Sales Tax but which has not been paid to the State Government, is includable in the assessable value for the purpose of Central Excise Duty. Ld. Counsel would argue that this judgment of the Hon'ble Apex Court has not taken into account the fact that VAT itself is payable on the price plus Excise Duty. Therefore, if VAT is then added to the assessable value, we will get into loop in which the determination of the liability of VAT and Excise Duty become impossible. He also relies on the Order of Tribunal, Mumbai in the case of Welspun Corporation Ltd. 2017 (358) E.L.T. 630 (Tri.-Mumbai) in which that Bench had distinguished that case from the case of Super Synotex (Supra) and held that the Sales Tax actually payable at the time of removal but not paid is not includable in the transaction value for the purpose of Excise Duty.
- (ii) The impugned Show Cause Notices were as follows:-

SCN no.	Period of demand	Duty (InRs. cr.)	Total (Ts. Cr)	Demand raised under
7037/3.5.2011	2006-07	6.88	21.53	Provisoto sec. 11A(1);
	2007-08	7.03		penalty u/s 11AC
	2008-09	5.86		
	2009-10	1.76		
	2010-11	4.11	4.11	
7418/7.5.2012	Apr'11 to Dec'11	3.35	3.35	Sec. 11A(1) & 11A(1)(a); penalty u/r

				25
2839/8.2.2013	Jan'12 to May'12	2.04	2.04	Sec. 11A(1) & Penalty u/r 25
Total			31.03	

He would submit that the demands up to period 2009-10 were all time barred as there is no evidence of fraud, collusion, willful miss-statement, suppression of facts, etc. In fact, earlier, a demand on exactly the same issue for the period July 2000 to December 2000 was decided in their own case by the Haldia Commissioner by this Order dt. 27/08/2004 in their favour. He held that no Excise duty is payable on such amounts. Revenue has not filed any appeal against the Order of the Commissioner. Therefore, it cannot be said by any stretch of imagination that there was fraud, collusion, etc on the part of the appellant.

- (iii) For the same reasons, no fine and penalty can be imposed upon them.
- (iv) This matter is also a case of “res judicata” as the issue once settled in their favour cannot be opened again and again by the Department even for a different period.
- (v) The quantification of the duty is erroneous. Even if, on merits, the matter is held against them, it is a well-settled legal position that for such cases, the amounts which have been received must be taken as Cum Duty Price.

6. Ld. Departmental Representative supports the impugned Orders and counters the arguments of the appellant. He would submit as follows:-

- (i) As far as the merits of the case are concerned, the question of law to be decided is whether in any case where the assessee collects from the customers some amount as representing VAT but does not deposit the same with the State Government as per some Scheme and is entitled to keep the amount, the amount so collected and retained can be treated as additional consideration for sale. Accordingly, whether Excise Duty can be charged on such amounts. He would submit that this issue has been discussed at length in batch of civil appeals decided by the Hon’ble Supreme Court in the case of Super Synotex (Supra).
- (ii) Paras 20 to 28 of this judgment read as follows:-

20. *The question that would still remain alive is that what would be the effect of amendment of Section 4 which has come into force with effect from 1-7-2000. The Section 4(3)(d) which defines “transaction value”, reads as follows :-*

“4. Valuation of excisable goods for purposes of charging of duty of excise. -

- (1) & (2) *
- (3) For the purposes of this section, -
- (a) to (cc)

(d) “transaction value” means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.”

21. *After the substitution of the old Section 4 of the Act by Act, 10 of 2000 as reproduced hereinabove, the Central Board of Excise and Customs, New Delhi, issued certain circulars and vide Circular No. 671/62/2002-CX, dated 9-10-2002 clarified the circular issued on 1-7-2002. In the said circular reference was made to the earlier Circular No. 2/94-CX 1, dated 11-1-1994. It has been observed in the circular that after coming into force of new Section 4 with effect from 1-7-2000 wherein the concept of transaction value has been incorporated and the earlier explanation has been deleted, the circular had lost its relevance. However, after so stating the said circular addressed to the representations received from the Chambers of Commerce, Associations, assessees as well as the field formations and in the context stated thus :-*

“5. The matter has been examined in the Board. It is observed that assessees charge and collect sales tax from their buyers at rates notified by the State Government for different commodities. For manufacture of excisable goods assessees procure raw materials, in some State, by paying sales tax/purchase tax on them (in some States, like New Delhi), raw materials are purchased against forms ST-1/ST-35 without paying any tax). While depositing sales tax with the Sales Tax Deptt. (on a monthly or quarterly basis), the assessee deposits only the net amount of sales tax after deducting set off/rebate admissible, either in full or in part, on the sales tax/purchase tax paid on the raw materials during the said month/quarter. The sales tax set off in such cases, therefore, does not work like the central excise set off notifications where one to one relationship is to be established between the finished product and the raw materials and the assessee is allowed to charge only the net central excise duty from the buyer in the invoice. The difference between the set off operating in respect of central excise duty and that for sales tax can be best illustrated through an example. If the sales tax on a product ‘A’ of value Rs. 100/- is, say 5% and the set off available in respect of the purchase tax/sales tax paid on inputs going into the manufacture of the product is, say, Re. 1/-, then the sales tax law permits the assessee to recover sales tax of Rs. 5/-. But while paying to the sales tax deptt. he deposits an amount of Rs. 5 – 1 = Rs. 4 only. On the central excise duty payable would have been Rs. 5 – 1 = Rs. 4, in view of the set off notification, and the assessee would recover an amount of Rs. 4 only from the buyer as Central Excise duty. Thus, it is seen that the set off scheme in respect of sales tax operate in these cases somewhat like the Cenvat Scheme which does not have the effect of changing the rate of duty payable on the finished product.

6. Therefore, since the set off scheme of sales tax does not change the rate of sales tax payable/chargeable on the finished goods, the set off is not to be taken into account for calculating the amount of sales tax permissible as abatement for arriving at the assessable value u/s 4. In other words only that amount of sales tax will be permissible as deduction under Section 4 as is equal to the amount legally permissible under the local sales tax laws to be charged/billed from the customer/buyer.”

22. *It is evincible from the language employed in the aforesaid circular that set off is to be taken into account for calculating the amount of sales tax permissible for arriving at the “transaction value” under Section 4 of the Act because the set off does not change the rate of sales tax payable/chargeable, but a lower amount is in fact paid due to set off of the sales tax paid on the input. Thus, if sales tax was not paid on the input, full amount is payable and has to be excluded for arriving at the “transaction value”. That is not the factual matrix in the present case. The assessee in the present case has paid only 25% and retained 75% of the amount which was collected as sales tax. 75% of the amount collected was retained and became the profit or the effective cost paid to the assessee by the purchaser. The amount payable as sales tax was only 25% of the normal sales tax. Purpose and objective in defining “transaction value” or value in relation to excisable goods is obvious. The price or cost paid to the manufacturer constitutes the assessable value on which excise duty is payable. It is also obvious that the excise duty payable has to be excluded while calculating transaction value for levy of excise duty. Sales tax or VAT or turnover tax is payable or paid to the State Government on the transaction, which is regarded as sale, i.e., for transfer of title in the manufactured goods. The amount paid or payable to the State Government towards sales tax, VAT, etc. is excluded because it is not an amount paid to the manufacturer towards the price, but an amount paid or payable to the State Government for the sale transaction, i.e., transfer of title from the manufacturer to a third party. Accordingly, the amount paid to the State Government is only excludible from the transaction value. What is not payable or to be paid as sales tax/VAT, should not be charged from the third party/customer, but if it charged and is not payable or paid, it is a part and should not be excluded from the transaction value. This is the position after the amendment, for as per the amended provision the words “transaction value” mean payment made on actual basis or actually paid by the assessee. The words that gain signification are “actually paid”. The situation after 1-7-2000 does not cover a situation which was covered under the circular dated 12-3-1998. Be that as it may, the clear legislative intent, as it seems to us, is on “actually paid”. The question of “actually payable” does not arise in this case.*

23. *In view of the aforesaid legal position, unless the sales tax is actually paid to the Sales Tax Department of the State Government, no benefit towards excise duty can be given under the concept of “transaction value” under Section 4(4)(d), for it is not excludible. As is seen from the facts, 25% of the sales tax collected has been paid to the State exchequer by way of deposit. The rest of the amount has been retained by the assessee. That has to be treated as the price of the goods under the basic fundamental conception of “transaction value” as substituted with effect from 1-7-2000. Therefore, the assessee is bound to pay the excise duty on the said sum after the amended provision had brought on the statute book.*

24. *What is urged by the learned counsel for the assessee is that paragraphs 5 and 6 of the circular dated 9-10-2002 do protect them, as has been more clearly stated in paragraph 5. To elaborate, sales tax having been paid on the inputs/raw materials, that is excluded from the excise duty when price is computed. Eventually, the amount of tax paid is less than the amount of tax payable and hence, the concept of “actually paid” gets satisfied. Judged on this anvil the submission of the learned counsel for the assessee that it would get benefit of paragraph 6 of the circular, is unacceptable. The assessee can only get the benefit on the amount that has actually been paid. The circular does not take note of any kind of book adjustment and correctly so, because the dictionary clause has been amended. We may, at this stage, also clarify the position relating to circulars. Binding nature of a circular was examined by the Constitution Bench in CCE v. Dhiren Chemical Industries -*

(2002) 2 SCC 127 = 2002 (139) E.L.T. 3 (S.C.), and it was held that if there are circulars issued by C.B.E. & C. which placed different interpretation upon a phrase in the statute, the interpretation suggested in the circular would be binding on the Revenue, regardless of the interpretation placed by this Court. In CCE v. Ratan Melting & Wire Industries - (2008) 13 SCC 1 = 2008 (231) E.L.T. 22 (S.C.) = 2008 (12) S.T.R. 416 (S.C.), the Constitution Bench clarifying paragraph 11 in Dhiren Chemical Industries (supra) has stated thus :-

“7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

25. *The legal position has been reiterated in the State of Tamil Nadu and Anr. v. India Cement Ltd.- (2011) 13 SCC 247. Therefore, reliance placed on the circular dated 9-10-2002 by the Tribunal is legally impermissible for two reasons, namely, the circular does not so lay down, and had it so stated that would have been contrary to the legislative intention.*

26. *In view of the aforesaid analysis, we are of the considered opinion that the assesseees in all the appeals are entitled to get the benefit of the circular dated 12-3-1998 which protects the industrial units availing incentive scheme as there is a conceptual book adjustment of the sales tax paid to the Department. But with effect from 1-7-2000 they shall only be entitled to the benefit of the amount “actually paid” to the Department, i.e., 25%. Needless to emphasise, the set off shall operate only in respect of the amount that has been paid on the raw material and inputs on which the sales tax/purchase tax has been paid. That being the position the adjudication by the Tribunal is not sustainable. Similarly the determination by the original adjudicating authority requiring the assesseees to deposit or pay the whole amount and the consequential imposition of penalty also cannot be held to be defensible. Therefore, we allow the appeals in part, set aside the orders passed by the Tribunal as well as by the original adjudicating authority and remit the matters to the respective Tribunals to adjudicate as far as excise duty is concerned in accordance with the principles set out hereinabove. We further clarify that as far as imposition of penalty is concerned, it shall be dealt with in accordance with law governing the field. In any case, proceeding relating to the period prior to 1-7-2000 would stand closed and if any amount has been paid or deposited as per the direction of any authority in respect of the said period, shall be refunded. As far as the subsequent period is concerned, the Tribunal shall adjudicate as per the principles stated hereinbefore.*

27. *Coming to the appeals preferred by the assesseees, the challenge pertains to denial of benefit of the Central Sales Tax Act, the aforesaid reasoning will equally apply. The submission that the concession of excise duty is granted by the Excise Department of the Central Government is not acceptable. On a perusal of the circulars dated 12-3-1998 and 1-7-2002 we do not find that they remotely relate to any exemption under the Central Sales Tax imposed on the goods. What is argued by the learned counsel for the assesseees is that the benefit should be extended to the Central Sales Tax*

as the tax on sales has a broader concept. The aforesaid submission is noted to be rejected and we, accordingly, repel the same. In view of the aforesaid, the appeals preferred by the assessee stand dismissed.

28. *In the result, both sets of appeals stand disposed of accordingly. There shall be no order as to costs.*

(iii) He would submit that one of the appellants in that case, namely M/s. Bharat Roll Industry (CA No. 4621/2008) also had their case decided in the matter with respect to the specific scheme of remission of VAT under the West Bengal Government VAT Scheme. Aggrieved by the Order of the Hon'ble Apex Court, M/s. Bharat Roll Industry filed a review petition which was dismissed by the Hon'ble Apex Court with the following words:-

“Applications for open hearing of the review petitions are rejected.

We have perused the Review Petitions and record of the Civil Appeals and are convinced that the Order of which Review has been sought does not suffer from any error apparent warranting its reconsideration.

The Review Petitions are accordingly, dismissed. (Bharat Roll Industry Pvt. Ltd. V. Commissioner (2015) 317 E.L.T. A 187 (SC).”

He would therefore, urge that the ratio of the judgment of the Hon'ble Apex Court is binding in this Bench and there is no scope for taking any different view.

(iv) As far as the question of invoking the extended period of limitation, alleging suppression, etc. and imposition of penalty is concerned, he reiterates the impugned order.

(v) On the argument of the issue being res judicata, he would argue that after the year 2000, valuation of each consignment is a separate assessment in itself. Merely because the Department has not challenged an order passed by the Commissioner for an earlier period, it does not mean that the Department is estopped from raising a demand for a subsequent period. Therefore, there is no force in the argument that the matter is hit by the principle of res judicata.

(vi) On the argument that the Tribunal Mumbai had in the case of Welspun Corporation Ltd. (Supra) distinguished the case from the case of Super Synotex Ltd. (Supra), he would take us through the case and submit that in Para 5.5 of the Order, it is clearly recorded that the Commissioner (Appeals) in that case distinguished that case from the case of Super Synotex. Revenue's proposal to challenge this finding was rejected by the Bench only on the Technical Ground that such refutation was not part of the Review Order/Appeal. Therefore, he would submit that the distinction was not made by the Tribunal on merits of that case but only a technicality which should not bind this bench in this case. He would therefore, urge that the appeal is without merits and needs to be rejected.

7. We have considered the arguments on both sides and perused the records. There are several schemes of State Governments in which, as an incentive, businesses are allowed to collect amounts as representing VAT/Sales Tax but not remit the amount to the State Government. The question is whether in such cases the amounts so retained form part of the assessable value for the purposes of Excise Duty. Since such matters were pending in various States all these appeals or at least many of them were disposed of by the Hon'ble Apex court who held that Excise Duty has to be paid on such amounts which are retained by the assessee.

8. We note that this judgment was not confined to any particular law of a particular state or a particular scheme but has laid down the law. Review Petitions filed against this judgment were also dismissed by the Hon'ble Apex Court. There is

nothing on record to show that a larger Bench of Supreme Court has taken any contrary view. We therefore, find this judgment is binding on us and leaves us with no option but to hold that the assessee in the present case is bound to pay Excise Duty on the amounts collected as representing VAT but which were not paid to the government under the scheme. Ld. Counsel would argue that the Supreme Court's judgment was not correct inasmuch as it had not taken in their account the computational difficulties which would arise. We are not impressed by this argument considering that the Review Petition has also been dismissed by the Supreme Court. It is not for this bench to sit in judgment over the law laid down by the Apex Court. We are bound to follow it.

8. The case of Welspun Corporation Ltd. (Supra) relied upon by the Ld. Counsel is a judgment of the Tribunal Mumbai Bench, where the case law laid down by the Hon'ble Apex Court was not considered on a technical ground that the same was not part of the appeal. Such technicality in that case does not prevail over the judgment of the highest Court of the land. We, therefore, find the case in favour of the revenue and against the appellant on merits.

9. As far as the argument of res judicata is concerned, it estops either party from raising the same case again and again. In Central Excise Duty, each individual consignment is an assessment by itself and a mistake made in one assessment by either party and not challenged by the other, does not mean that the other party is bound by such decision contrary to law for all subsequent periods. Such a view will lead us to absurd conclusions. For instance, Service Tax was paid by many assesseees on Works Contract Service prior to 01/06/2007 although subsequently, it was held by the Hon'ble Apex Court that no such tax is payable. Merely because assesseees had paid Service Tax wrongly for an earlier period, it does not mean that they are bound to pay Service Tax for subsequent periods also on the principle of res judicata. In this particular case, when there is a clear ruling by the Hon'ble Apex Court, the assessee cannot be get away from tax liability on the ground that a wrong decision was taken for some earlier period by the Commissioner which was not challenged for that period by the Revenue.

10. As far as the invocation of extended period of limitation is concerned, we find such a suggestion preposterous considering that it is clearly on record that the Revenue is aware of *modus operandi* of the assessee. To allege fraud, collusion, willful misstatement or suppression of fact or violation of Act or rules with an intent to evade payment of duty and invoke extended period has no basis. For this reason, we find the demand for extended period of limitation needs to be set aside and we do so. For the same reasons, we also find that the penalty imposed upon the appellant is sustainable.

11. In view of the above, the appeal is disposed of as follow:-

- (a) The demand for the normal period of limitation is upheld and the demand for extended period of limitation is set aside.
- (b) The amounts which have been collected by the appellant as VAT and retained must be taken as cum duty price and Excise Duty are calculated accordingly.
- (c) The penalties imposed upon the appellant are set aside.
- (d) The appeal is remanded to the Adjudicating Authority for the limited purpose of re-computation of duty.

(Pronounced in open Court on 02/03/2020.)

Sd/-

**(S. S. Garg) Member
(Judicial)**

Sd/-

(P. V. Subba Rao)

Member (Technical)

[Back](#)

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL
BENCH AT KOLKATA**

Division Bench

Court No. 2

Excise Appeal No. 75677 of 2017

**(Arising out of Order-in-Original No.80-
83/COMMR/DGP/2016dt.26.02.2016 passed by CCCE& ST,
Durgapur Commissionerate)**

**M/s Sova Solar Ltd
Layout Plot No.25, EPIP,**

VERSUS

.....Appellant

**Commissioner of Central Excise & Service Tax,
Durgapur**

.....Respondent

Appearance

Shri A.K. Raha& Shri Aditya Das Gupta, Advocates for the Appellant.
Shri S.S. Chattopadhyay, Authorized Representative for the Respondent.

Coram:

HON'BLE MR. S.S. GARG, MEMBER (JUDICIAL)

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

FINAL ORDER No. 75365/2020

Date of Hearing: 04.02.2020
Date of Decision: 03/07/2020

[Order per: P. VENKATA SUBBA RAO.]

1. This appeal is filed by the appellant challenging the impugned Order-in-Original No.80-83/COMMR/DGP/2016 dt.26.02.2016.
2. Heard both sides and perused the records. The appellant is a 100% Export Oriented Unit (EOU) registered with the department. EOUs are units which are primarily setup to manufacture of goods for export and are given special concessions by the Government. The capital goods, raw materials, etc., which are procured by them are exempted from payment of customs duties (in case of imports) and Central Excise duty (in case of domestic procurement). They are required to export their final products. They are also permitted to sell some portion of their final products within the country (Domestic Tariff Area) subject to conditions as specified from time to time. As EOUs are practically duty-free, they are also treated as if they are outside India. Therefore, in respect of any goods which are cleared by the EOU for sale within India, excise duty is collected at a rate equivalent to Customs duty leviable on identical goods imported into India in terms of the proviso to section 3 of Central Excise Act, 1944.

3. In this case, the appellant had imported inputs claiming the benefit of exemption notification No.52/2003-CUS dt.31.03.2003 for Basic Customs Duty and applicable Central Excise Duty (on indigenously procured raw materials). They were supposed to manufacture solar modules and export. However, the appellant was not able to export goods and had cleared their final products in DTA claiming exemption under notification Nos.24/2005-CUS as amended by notification No.132/2006-CUS and notification No.06/2006-CE and notification No.12/2012-CE. Final products manufactured by the appellant have zero basic customs duty because they appear in List-5 of notification No.06/2006-CUS dt.01.03.2006 and at Sl.No.332 of notification No.12/2012-CE dt.17.03.2012. In other words, the final products manufactured by the appellant were fully exempted from payment of duty. The question which arises is, under such circumstances, whether the appellant is entitled to claim the benefit of exemption notifications meant for 100% EOUs in respect of the inputs which they had procured. It is the case of the revenue that the appellant is not entitled to the benefits of exemptions on the inputs. It is the case of the assessee that they were entitled to the benefits of these exemption notifications. Four Show Cause Notices (SCN) were issued as follows:

Sl.No.	SCN No. & Date	Issued by	Period of demand
1	71/Commr/Bol/13 dt.07.10.2013	Commissioner of Central Excise, Service Tax & Customs, Bolpur	Feb 2011 to March 2013
2	33/Commr/Bol/14 dt.29.04.2014	-do-	April 2013 to Dec 2013
3	06/Commr/Dgp/15 dt.29.01.2015	Commissioner of Central Excise, Service Tax & Customs, Durgapur	Jan 2014 to Aug 2014
4	35/Commr/Dgp/15 dt.01.10.2015	-do-	Sep 2014 to July 2015

4. The appellant contested the jurisdiction of the adjudicating authority as two of the SCNs were issued by the Commissioner of Central Excise, Bolpur and the other two SCNs were issued by the Commissioner of Central Excise, Durgapur. All were decided by the Commissioner of Central Excise, Durgapur. During hearing, learned Departmental Representative (DR) has clarified that there was only re-organisation of the Commissionerates' jurisdiction and as a result, the Commissioner of Central Excise and Service Tax, Durgapur had decided all the four matters. Learned Counsel for the appellant also did not press this point before us. It is not in dispute that the appellant's final products were exempted from payment of duty under both the customs notifications and the central excise notification. As the appellant is a 100% EOU the duty has to be paid on their final products cleared to the DTA as if such goods are imported into India i.e., at the rate at which customs duties will be applicable if similar goods were imported to India. If such goods were imported to India they would be subjected to basic customs duty as per the Customs Tariff and additional duty of customs (also known as CVD) as per the Central Excise Tariff. Both the basic customs duty and additional duty of customs are 'NIL' for their final products by virtue of the exemption notifications available to them. Therefore, no duty was paid on the final products cleared by the appellant to the DTA. There is no dispute regarding the eligibility of the exemption notification for their final products.
5. What is in dispute is whether the appellant is also entitled to duty-free inputs (both imported and indigenous) under the exemption notifications 52/2003-CUS dt.01.03.2003 and 22/2003-CE.
6. It is undisputed that the notification Nos.52/2003-CUS and 22/2003-CE are meant for exemption to 100% EOUs. It is also not in dispute that both these exemption notification are issued by the Finance Ministry in consonance with corresponding provisions of Foreign Trade Policy. Para 6 of notification No.22/2003-CE reads as follows:

"6. Notwithstanding anything contained in this notification, the exemption contained herein shall also apply to the goods used for the purposes of processing, manufacture, production or packaging of articles in an user industry and such articles (including rejects, wastes, scrap and remnants arising out of such processing, manufacture, production, or packaging of such articles) even if not exported out of India are allowed to be cleared outside the user industry under and in accordance with the Export and Import Policy and subject to such other limitations and conditions as may be specified in this behalf by Development Commissioner, or the Board of Approval or the Inter Ministerial Standing Committee (IMSC), as the case may be, on payment of appropriate duty of excise, or where such articles are cleared to the warehouse appointed or registered under notification of the Government of India in the Ministry of Finance, Department of Revenue, No. 26/98-Central Excise (NT), dated the 15th July, 1998 or No. 46/2001-CE (NT), dated 26th June, 2001 or cleared to the warehouse authorised to carry on manufacturing process or other operation under section 65 of the Customs Act, 1962 (52 of 1962) and under the Manufacture and Other Operations in Warehouse Regulations, 1966, or cleared to the holders of certificate for duty free import from Apparel Export Promotion Council and Council for Leather Export as specified in paragraph 6.9(e) of Export and Import Policy, without payment of duty. Provided that goods which have been repaired, reconditioned, re-engineered shall not be allowed to be cleared outside the units. Provided further that where such articles (including rejects, waste and scrap materials) are not excisable, duty foregone equal in amount to that leviable on the inputs obtained under this notification and used for the purpose of manufacture of such articles, which would have been paid but for the exemption under this notification, shall be payable at the time of clearance of such articles."

4 Similarly, Para 3 of notification No.52/2003-CUS dt.01.03.2003 reads as follows:

“3. Notwithstanding anything contained in this notification, the exemption herewith shall also apply to goods which on importation into India or procurement, are used for the purpose of manufacture of finished goods or services and such finished goods and services, (including by-products, rejects, waste and scrap arising in the course of production, manufacture, processing or packaging of such goods) even if not exported, are allowed to be sold in Domestic Tariff Area in accordance with the Export and Import Policy and subject to such other limitations and conditions as may be specified in this behalf by Development Commissioner, or the Board of Approval or the Inter Ministerial Standing Committee, as the case may be, on payment of appropriate duty of excise leviable thereon under section 3 of the Central Excise Act, 1944 (1 of 1944) or where such finished goods (including by-products, rejects, waste and scrap) or services are cleared to the warehouse appointed or registered under notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 26/98-Central Excise (NT), dated the 15th July, 1998 or No. 46/2001-Central Excise (NT), dated the 26th June, 2001 or cleared to the warehouse authorised to carry out manufacturing process or other operation under section 65 of the Customs Act, 1962 (52 of 1962) and under the Manufacture and Other Operations in Warehouse Regulation, or cleared to the holders of certificate from Apparel Export Promotion Council and Council for Leather Export for duty free imports as referred to in clause (e) of the paragraph 6.9 of the Export and Import Policy, without payment of duty.

Provided that where such finished goods (including rejects, waste and scrap and remnants) are not excisable, customs duty equal in amount to that leviable on the inputs imported under this notification and used for the purpose of manufacture of such finished goods, which would have been paid but for the exemption under this notification shall be payable at the time of clearance of such finished goods.

Provided further that the Software Technology Park (STP) unit and the Electronic Hardware Technology Park (EHTP) unit engaged in manufacture of electronic hardware and software in integrated manner, shall be allowed to sell software, data entry and conversion, data processing, data analysis, control data management or rendering of call center services through data communication link and or tele communication link subject to such conditions as may be specified by the Commissioner of Customs or Commissioner of Central Excise, as the case may be.”

5. As may be seen, both the exemption notifications extend the exemption even to inputs which are used for manufacture of goods which are cleared to DTA. However, if such final products are “not excisable”, duty foregone equal in amount to that leviable on inputs obtained under these notifications and used for manufacture of such articles would have to be paid at the time of clearance of such articles. This is evident in the second proviso to Para 6 of notification No.22/2003-CE above and first proviso to Para 3 of notification No.52/2003-CUS.

6. That takes us to the next question as to what is the meaning of “not excisable”, within the context of this particular exemption notification. This is clear from the corresponding Foreign Trade Policy. Para 6.08(J) of Foreign Trade Policy 2015-2020 as well as Para 6.8(J) of Foreign Trade Policy 2009-2014 which explained that non-excisable products in the context of

EOU/EHTP/STP/BTP includes any product where the basic customs duty and CVD is 'NIL'. This Para reads as follows:

“ In case of DTA sale of goods manufactured by EOU/EHTP/STP/BTP, where basic duty and CVD is nil, such goods may be considered as non-excisable for payment of duty.”

7. It is the case of the revenue that since the final products cleared by the appellant were chargeable to 'NIL' basic customs duty and 'NIL' CVD and were also cleared paying 'NIL' rate of duty, they are not excisable and the exemption on the inputs under the notification No.52/2003-CUS and 22/2003-CE on the inputs is not available to the appellant. Accordingly, the following duties were demanded in the four SCNs.

Sl.No.	SCN No. & Date	Central Excise Duty	Customs Duty	Total
1	71/Commr/Bol/13 dt.07.10.2013	77,65,349	1,61,64,228	2,39,29,577
2	33/Commr/Bol/14 dt.29.04.2014	71,19,907	1,22,95,842	1,94,15,749
3	06/Commr/Dgp/15 dt.29.01.2015	66,34,027	76,39,578	1,42,73,605
4	35/Commr/Dgp/15 dt.01.10.2015	1,37,80,071	2,63,08,348	4,00,88,419
TOTAL		3,52,99,354	6,24,07,996	9,77,07,350

Interest was also demanded on the aforesaid amounts and penalties were proposed to be imposed under section 11AC of Central Excise Act and Rule 25 of Central Excise Rules (CER), 2002. Penalty was also proposed to be imposed under section 112 of Customs Act, 1962. The appellant contested the demands and after following due process, the learned Commissioner, in the impugned order, held as follows:

“ In view of the discussions made hereinbefore, I pass the following order:

- i. I confirm the demand of Central Excise duty of an amount Rs.3,52,99,354/- (Rupees Three Crore Fifty-two lakh Ninety-nine thousand Three hundred Fifty-four only) and order recovery of the same from M/s Sova Power Ltd., under proviso to erstwhile Section 11A(1) and Section 11A(10) of the Central Excise Act, 1944.
- ii. I impose interest at appropriate rate under provision of Section 11AA (Erstwhile Section 11AB) of Central Excise Act, 1944.
- iii. I impose penalty Rs.3,52,99,354/- (Rupees Three Crore Fifty-two lakh Ninety-nine thousand Three hundred Fifty-four only) on the said notice Company under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944.

- iv. I confirm the demand of Customs duty of amount Rs.6,24,07,996/- (Rupees Six crore Twenty-four lakh Seven thousand Nine hundred Ninety-six only) and order recovery of the same from M/s Sova Power Ltd., in terms of Section 28(2) of Customs Act, 1962 as amended from time to time.
- v. I impose interest at appropriate rate under provision of Section 28AB of Customs Act, 1962 (Section 2811 wherever applicable).
- vi. I impose penalty of Rs.6,24,07,996/- (Rupees Six crore Twenty-four lakh Seven thousand Nine hundred Ninety-six only) on teh said notice Company under section 114A of Customs Act, 1962.”

7. Aggrieved, the appellant filed the present appeal. Before filing this appeal, the appellant had approached the Hon’ble High Court of Kolkata by filing Writ Petition No.10544/2016 which was dismissed by the Hon’ble High Court of Kolkata on 15.07.2016 giving the appellant the opportunity to seek alternative remedy before this Tribunal. Thereafter, they filed the present appeal. The SCN was issued seeking to deny benefit of notification No.52/2003-CUS and 22/2003-CE on the inputs which they used to manufacture. Learned counsel for the appellant did not contest that they were not eligible for the aforesaid two notifications. Instead his argument was that even if they were not entitled to the benefit of the aforesaid two notifications, they were indeed entitled to the benefit of notification Nos.24/2005-CUS dt.01.03.2005 as amended by notification No.132/2006-CUS dt.30.12.2006 read with notification No.06/2006-CE dt.01.03.2006 and notification No.12/2012-CE dt.17.03.2012 in respect of the inputs which were imported as well as which were procured indigenously. His argument was that if they are covered by other exemption notifications, even if they are not entitled to the benefit of exemption notifications which they had sought, they would still be eligible for the exemption and therefore, no demand can be confirmed against them. Accordingly, the entire demand needs to be set aside along with interest and penalties.

13. Learned DR argues in the first place that this bench cannot go beyond the scope of the SCN which only sought to deny the benefit of such exemption notifications which they were admittedly not entitled to. However, even if the submissions of learned counsel were accepted, the appellant was not entitled to the benefit of the other exemption notifications which they now claimed in respect of these inputs which they had procured. Therefore, he submits that this appeal needs to be rejected.

14. In this factual background, we proceed to examine the appellant’s eligibility to exemption notifications which are now being sought. Notification No.24/2005-CUS reads as follows:

“ In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962(52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, herebyexempts the following goods, falling under the heading, sub-heading or tariff-item of the First Schedule to the CustomsTariff Act, 1975 (51 of 1975) and specified in column (2) of the Table below, when imported into India, from the wholeof the duty of customs leviable thereon under the said First Schedule, namely:-

TABLE	
S.No.	Goods falling under Heading, Sub-heading or Tariff item
1.	3818 00
2.	8456 91 00, 8469 11 00, 8470, 8471, 8473 21 00, 8473 29 00, 8473 30, 8473 50 00
3.	8517, 8520 20 00, 8523 (other than those falling under tariff item 8523 3000), 8524 31, 852440, 8524 91, 8525 20, 8531 20 00, 8532, 8533, 8534 00 00, 8541, 8542, 8543 11 00, 8543 81 00, 8544 70
4.	9009 11 00, 9009 21 00, 9009 91 00, 9009 92 00, 9009 93 00, 9009 99 00, 9010 41 00, 9010 4200, 9010 49 00, 9013 80 10, 9013 90 10, 9026, 9027 20 00, 9027 30, 9027 50, 9027 80,

9030 4000, 9030 82 00, 9031 41 00

All goods for the manufacture of goods covered by S.Nos. 1 to 4 above, provided that

5. the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.

(This was amended by notification No.132/2006 dt.30.12.2006.)

Notification No. 132/2006-CUS dt.30.12.2006:

“ In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962(52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.24/2005-Customs, dated the 1st March, 2005, namely:-

In the said notification

(i) in the opening paragraph for the words, figures and letters “following goods, falling under the heading, sub-heading or tariff-item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and specified in column (2) of the Table below”, the words “following goods of the description as specified in column (3) of the Table below and falling under the heading, sub-heading or tariff-item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as specified in the corresponding entry in column (2) of the said Table” shall be substituted;

(ii) for the table, the following table shall be substituted, namely:-

TABLE		
Heading,		
S.No.	Sub-heading or Tariff item	Description
23.	8541	All goods
39.	All Chapters	All goods for the manufacture of goods covered by S.Nos. 1 to 38 above, provided that the importer follows the procedure set out in the Customs (Import of Goods at

Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.

15. Notification No. 06/2006-CE reads as follows:

“In exercise of the powers conferred by sub-section (1) of section 5A of theCentral Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary inthe public interest so to do, hereby exempts the excisable goods of the description specified in column (3)of the Table given below read with the relevant List appended hereto, as the case may be, and fallingwithin the Chapter, heading or subheading or tariff item of the First Schedule to the Central Excise TariffAct, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), as are given in thecorresponding entry in column (2) of the said Table, from so much of the duty of excise specified thereonunder the First Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at therate specified in the corresponding entry in column

(4) of the said Table and subject to the relevantconditions specified in the Annexure to this notification, and condition number of which is referred to inthe corresponding entry in column (5) of the Table aforesaid:

Provided that nothing contained in this notification shall apply to goods specified against S.No.10 of thesaid Table on or after the 1st day of May 2007.

Explanation.-For the purposes of this notification, the rates specified in columns of the said Table aread valorem rates, unless otherwise specified.

TABLE				
S.No.	Chapter or heading or sub-heading or tariff item of the	Description of excisable goods	Rate	Condition No.
First Schedule				
84	Any Chapter	Non-conventional energy devices/ systems specified in List 5	Nil	-----

(See S. No.85 of the Table)

- (1) Flat plate solar Collector
- (2) Black continuously plated solar selective coating sheets (in cut length or in coil) and fins and tubes
- (3) Concentrating and pipe type solar collector
- (4) Solar cooker
- (5) Solar water heater and system
- (6) Solar air heating system
- (7) Solar low pressure steam system
- (8) Solar stills and desalination system
- (9) Solar pump based on solar thermal and solar photovoltaic conversion
- (10) Solar power generating system
- (11) Solar photovoltaic module and panel for water pumping and other applications
- (12) Solar crop drier and system
- (13) Wind operated electricity generator, its components and parts thereof including rotor and wind turbine controller
- (14) Water pumping wind mill, wind aero-generator and battery charger
- (15) Bio-gas plant and bio-gas engine
- (16) Agricultural, forestry, agro-industrial, industrial, municipal and urban waste conversion device producing energy
- (17) Equipment for utilising ocean waves energy
- (18) Solar lantern
- (19) Ocean thermal energy conversion system
- (20) Solar photovoltaic cell
- (21) Parts consumed within the factory of production of such parts for the manufacture of goods specified at S. Nos. 1 to 20 above."

16. Notification No.24/2005-CUS exempts certain goods including the final products manufactured by the appellant viz., solar modules which fall under the Customs Tariff 8541. These are covered at Sl.No.3 of the table. The inputs which they used are admittedly not covered

at Sl.No.3. Learned counsel for the appellant submits that all goods used for manufacture of goods covered at Sl.No.1 to Sl.No.4 of the table are also covered at Sl.No.5 of the table which is reproduced above.

17. This notification was revised by notification No.132/2006-CUS which also covers the products at Sl.No.23 of the table and their inputs at Sl.No.39 of the table. Both S.No.5 of Notification No.24/2005-CUS and S.No.39 of the Notification No.132/2006-CUS require the importer to follow the procedures set out in Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996. These rules require the claimant to obtain a registration from the department and also follow some procedures. However, they were already registered with the Central Excise department as an EOU. The CBEC had issued a clarification in DOF No.334/7/2017/TRU dt.01.02.2017. Para 6 of which interalia reads as follows:

“ ... EOUs will also be eligible to import or procure raw materials/ inputs at other concessional/ nil rate of BCD, excise duty/ CVD or SAD, as the case may be, provided they fulfil all conditions for being eligible to such concessional or nil rate of duty. For these purposes, if an EOU is already registered with the jurisdictional central excise authority, it will not be required to take any fresh registration under the Customs (Import of Goods at Concessional Rate of duty for manufacture of Excisable Goods and Other Goods) Rules, 2016, as the case may be.”

18. Learned counsel would submit that although the clarification was issued by the CBEC in 2017, this should be applied to earlier periods also as it is only a question of technicality of being registered once or registered twice. Therefore, they cannot be denied the benefit of this exemption notification on the ground that they were not registered separately under the Rules.

19. Per contra, learned DR argues that a plain reading of the clarification shows that the exemption was given only with respect to the registration clarifying that two registrations, one with Central Excise department in the normal course of business and another for this purpose under the Customs (Import of goods at Concessional Rate of Duty for Manufacture of Excisable goods) Rules, 1996 was not required. This clarification was issued in the context of 2016 Rules which are more or less similar to the 1996 Rules. A perusal of these rules shows that several procedures have to be followed under these rules and the registration is only one of the steps. What has been exempted by the Board is only an additional registration but the remaining part of the rules has not been exempted. He would take us through these rules which read as follows:

“ In exercise of the powers conferred by section 156 of the Customs Act, 1962 (52 of 1962), and in supersession of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2016 except as things done or omitted to be done before such supersession, the Central Government hereby makes the following, namely: –

1. Short title and commencement. –

(1) These rules may be called the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017.

(2) They shall come into force on the 1st day of July, 2017.

2. Application. –

(1) These rules shall apply to an importer, who intends to avail the benefit of an exemption notification issued under sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and where the benefit of such exemption is dependent upon the use of imported goods covered by that notification for the manufacture of any commodity or provision of output service.

(2) These rules shall apply only in respect of such exemption notifications which provide for the observance of these rules.

3. Definition. –

In these rules, unless the context otherwise requires, –

(a) “Act” means the Customs Act, 1962 (52 of 1962);

(b) “exemption notification” means a notification issued under sub-section (1) of section 25 of the Act;

(c) “information” means the information provided by the manufacturer who intends to avail the benefit of an exemption notification;

(d) “Jurisdictional Custom Officer” means an officer of Customs of a rank equivalent to the rank of Superintendent or an Appraiser exercising jurisdiction over the premises where either the imported goods shall be put to use for manufacture or for rendering output services;

(e) “manufacture” means the processing of raw material or inputs in any manner that results in emergence of a new product having a distinct name, character and use and the term “manufacturer” shall be construed accordingly;

(f) “output service” means supply of service with the use of the imported goods.

4. Information about intent to avail benefit of exemption notification.–

An importer who intends to avail the benefit of an exemption notification shall provide the information to the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, the particulars, namely:-

(i) the name and address of the manufacturer;

(ii) the goods produced at his manufacturing facility;

(iii) the nature and description of imported goods used in the manufacture of goods or providing an output service.

5. Procedure to be followed. –

(1) The importer who intends to avail the benefit of an exemption notification shall provide information –

(a) in duplicate, to the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, the estimated quantity and value of the goods to be imported, particulars of the exemption notification applicable on such import and the port of import in respect of a particular consignment for a period not exceeding one year; and

(b) in one set, to the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs at the Custom Station of importation.

(2) The importer who intends to avail the benefit of an exemption notification shall submit a continuity bond with such surety or security as deemed appropriate by the Deputy Commissioner of Customs or Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, with an undertaking to pay the amount equal to the difference between the duty leviable on inputs but for the exemption and that already paid, if any, at the time of importation, along with interest, at the rate fixed by notification issued under section 28AA of the Act, for the period starting from the date of importation of the goods on which the exemption was availed and ending with the date of actual payment of the entire amount of the difference of duty that he is liable to pay.

(3) The Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, shall forward one copy of information received from the importer to the Deputy Commissioner of Customs, or as the case may be, Assistant Commissioner of Customs at the Custom Station of importation.

(4) On receipt of the copy of the information under clause (b) of sub-rule (1), the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs at the Custom Station of importation shall allow the benefit of the exemption notification to the importer who intends to avail the benefit of exemption notification.

6. Importer who intends to avail the benefit of an exemption notification to give information regarding receipt of imported goods and maintain records. –

(1) The importer who intends to avail the benefit of an exemption notification shall provide the information of the receipt of the imported goods in his premises where goods shall be put to use for manufacture, within two days (excluding holidays, if any) of such receipt to the jurisdictional Customs Officer.

(2) The importer who has availed the benefit of an exemption notification shall maintain an account in such manner so as to clearly indicate the quantity and value of goods imported, the quantity of imported goods consumed in accordance with provisions of the exemption notification, the quantity of goods re-exported, if any,

under rule 7 and the quantity remaining in stock, bill of entry wise and shall produce the said account as and when required by the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service.

(3) The importer who has availed the benefit of an exemption notification shall submit a quarterly return, in the Form appended to these rules, to the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, by the tenth day of the following quarter.

7. Re-export or clearance of unutilised or defective goods. –

(1) The importer who has availed benefit of an exemption notification, prescribing observance of these rules may re-export the unutilised or defective imported goods, within six months from the date of import, with the permission of the jurisdictional Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service:

Provided that the value of such goods for re-export shall not be less than the value of the said goods at the time of import.

(2) The importer who has availed benefit of an exemption notification, prescribing observance of these rules may also clear the unutilised or defective imported goods, with the permission of the jurisdictional Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service, within a period of six months from the date of import on payment of import duty equal to the difference between the duty leviable on such goods but for the exemption availed and that already paid, if any, at the time of importation, along with interest, at the rate fixed by notification issued under section 28AA of the Act, for the period starting from the date of importation of the goods on which the exemption was availed and ending with the date of actual payment of the entire amount of the difference of duty that he is liable to pay.

8. Recovery of duty in certain case. –

The importer who has availed the benefit of an exemption notification shall use the goods imported in accordance with the conditions mentioned in the concerned exemption notification or take action by re-export or clearance of unutilised or defective goods under rule 7 and in the event of any failure, the Deputy Commissioner of Customs or, as the case may be, Assistant Commissioner of Customs having jurisdiction over the premises where the imported goods shall be put to use for manufacture of goods or for rendering output service shall take action by invoking the Bond to initiate the recovery proceedings of the amount equal to the difference between the duty leviable on such goods but for the exemption and that already paid, if any, at the time of importation, along with interest, at the rate fixed by notification issued under section 28AA of the Act, for the period starting from the date of importation of the goods on which the exemption was availed and ending with the date of actual

payment of the entire amount of the difference of duty that he is liable to pay.

8. References in any rule, notification, circular, instruction, standing order, trade notice or other order pursuant to the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 and any provision thereof or to the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2016 and any corresponding provisions thereof shall, be construed as reference to the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017.

20. He would submit that the above rules are not a mere formality but have a specific purpose of ensuring that the goods are not diverted and they are used for a particular purpose. The appellant has neither registered under the Rules nor followed any of the procedures required. Unless all the conditions of an exemption are fulfilled, the benefit of this exemption cannot be given. He would further argue that even if it is held that both views are possible the benefit of doubt has to go in favour of the revenue and against the assessee while applying an exemption notification as per law laid down by the Constitutional Bench of the Hon'ble Supreme Court in the case of Dilip Kumar and Co. & Ors [2018 (361) ELT 577 (SC)]. Learned counsel for the appellant argues that once they are exempted from the registration under the rules, it automatically means that they are exempted from all the remaining rules altogether. Therefore, they are entitled to the exemption even though they have not followed any of the Rules.

21. As far as the Central Excise duty is concerned, the learned counsel for the appellant submits that their final products are exempted by notification 06/2006-CE and they had indeed availed the benefit of this exemption notification. Their goods are covered at Sl.No.84 of the table in this exemption notification. This notification refers to List-5 annexed to the exemption notification. Sl.No.11 of the List-5 reads "Solar Photovoltaic module and panel for water pumping and other applications." There is no dispute that their final products fall under this category being solar modules. Therefore, their parts are covered at Sl.No.21 which reads "Parts consumed within the factory of production of such parts for the manufacture of goods specified at Sl.No.1-20 above". He would, therefore, argue that all the parts which they have imported are covered by Sl.No.21 List-5 read with Sl.No.84 of the table of exemption notification 06/2006-CE. Therefore, no demand can be sustained on the CVD components as well as on the indigenously procured goods.

22. Per contra, learned DR argues on this point that a plain reading of exemption notification undoubtedly exempts the final products of the appellant being covered at Sl.No.84 of the table read with Sl.No.11 of List-5. In fact they have also availed benefit of exemption notification. As far as Sl.No.21 of List-5 is concerned, it is very specific that it exempts parts consumed within the factory of production of such parts. It does not exempt parts which are sold outside the factory. There is no dispute that the parts have not been manufactured by the appellant. In fact, there is no demand on any parts manufactured by the appellant and used within the factory of the manufacture. The demand is on account of the parts which are either been purchased by them from other suppliers or parts which have been imported by them. In either case, they are clearly not covered by Sl.No.21 of List-5. Therefore, the appellant is not entitled to the benefits of this exemption notification as well.

23. In conclusion, learned counsel for the appellant submits that since they are entitled to the benefit of the aforesaid notification i.e., 24/2005-

CUS, as amended by notification 132/2006-CUS dt.30.12.2006 and notification 06/2006-CE, regardless of the fact that the parts which were used were not manufactured within their factory of production and regardless of the fact that they have not followed the rules required for claiming the Customs exemption notification, they should be given the benefit of these exemption notifications on all the inputs which they have used. If they do get the benefit of these exemption notifications, no demand will survive and therefore, the impugned order needs to be set aside.

24. The learned DR, in conclusion, argues that the SCN was with respect to two exemption notifications which admittedly are not available if the final products cleared by the appellant to the DTA were exempted from duty. There is no doubt that the final products were exempted from duty and were indeed cleared without payment of duty. Therefore, the demand is on the duties foregone on the inputs in terms of the exemption notifications. In the first place, this bench, at this stage, cannot go beyond the SCN and give the benefit of some other exemption notifications which was not the point of dispute in SCNs themselves. Further, he would argue that even if the benefit of these exemption notifications now claimed by the appellant are considered, a plain reading of all the exemption notifications shows that the appellant was clearly not entitled to the benefit of these exemption notifications. Even if it is argued that more than one view is possible, with respect to the exemption notifications, the benefit of doubt, if any, cannot go to the appellant and must go in favour of the revenue as per the ratio of the judgment of the Constitutional Bench of the Hon'ble Apex Court in the case of Dilip Kumar & Co. and Ors. (supra).

25. We have considered the arguments made exhaustively by both sides and perused the records. It is undisputed that the appellant is a 100% EOU, they imported inputs availing the benefit of exemption notifications available only to 100% EOUs. These exemption notifications are available to the EOUs even if the final products are cleared to DTA. However, where the final products are cleared to DTA and such final products are not excisable, no benefit of exemption on the inputs is available to the appellant. The term non-excisable in this context has been clarified in the Foreign Trade Policy (in consonance of which the exemption notifications are issued) as "such goods which are exempted from both the basic customs duty and additional duty of customs".

26. It is not in dispute that the final products manufactured and cleared by the appellant are exempted from both the basic customs duty and additional duty of customs. Therefore, they are non-excisable and inputs used in their manufacture are clearly not covered by the exemption notifications originally claimed by the appellant and which were sought to be denied in the SCNs. Hence the demands on this ground must sustain.

27. The argument before us by the learned counsel is that even if their inputs are not covered by exemption notifications which they claimed and which are disputed in the SCN, they are covered by other exemption notifications. Therefore, no demand can be sustained against them. Learned DR argues that in the first place this amounts to going beyond the scope of the SCN. He also argues that they are otherwise also not entitled to the benefit of these exemption notifications. It is true that once an SCN is issued, the demand cannot go beyond the scope of the SCN nor can any penalties not proposed in the SCN be imposed. However, the noticee is not estopped from putting forth other grounds of defence and if he does so, fairness requires that they are also considered. We, therefore, find in favour of the appellant as far as the question as to whether the new exemption notifications not being the subject matter of the SCN can be raised as a point of defence at this stage of appeal. Evidently, if the goods are otherwise covered by another exemption notification and the appellant is entitled to such exemption notification, fairness requires that such benefit should be given to the appellant.

28. This leads us to the next question as to whether the appellant was entitled to the benefit of the exemption notifications now claimed. We find that the notification 24/2005-CUS dt.01.03.2005 as well as amended notification 132/2006-CUS dt.30.12.2006 exempt the final products manufactured by the appellant unconditionally. However, they exempt the inputs used by the manufacturer conditionally the condition being that they have to follow the procedure set out in the Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996. Among these rules is also a requirement of registration with the department. In 2017, TRU clarified that if the appellant is already registered with the Central Excise department, obtaining a fresh registration under the rules is not required. However, the remaining conditions of the rules which are equally substantive have not been waived by the department. They must be followed to claim the exemption notification. At this stage, we feel that it is also pertinent to consider whether CBEC can enlarge or modify the scope of an exemption notification which is in the form of a subordinate legislation through a letter or circular. Taxing statutes have to be strictly construed and the power of taxation lies with the Parliament. The power to issue exemption notifications rests with the Central Government. Every exemption notification which is issued is placed before the Parliament and is subjected to scrutiny by a Committee of sub-ordinate legislation of each House which at times modify the notifications on their instructions. Therefore, as far as the exemption notifications issued by the Government are concerned, they are clearly in the nature of sub-ordinate legislations. We do not think that a letter issued by the CBEC can enlarge the scope of the exemption notifications thereby truncating the scope of taxation levied by the Parliament. Even if it is presumed that CBEC had such power, these letters are not subject to scrutiny and review by the Parliament.

29. Notwithstanding the above observations, we find that the exemption given by the CBEC by way of a letter was only to the extent of avoiding two registrations but no exemption has been given with respect to following remaining conditions of the Rules to be followed. In view of this, we find that the appellant is not entitled to benefit of the exemption notification 24/2005-CUS or 132/2006-CUS in respect of the inputs procured by them.

30. As far as the exemption notification 06/2006-CE dt.01.03.2006 is concerned, what is claimed is an exemption available for “parts consumed within the factory of production of such parts for manufacture of goods specified at Sl.No.1-20 above” (Sl.No.21, List-5 read with Sl.No.84 of the table). Clearly, there is no dispute with regard to the parts manufactured by the appellant and consumed within their factory. What is in dispute is that the parts which they have procured either by importing or from other indigenous suppliers, those are not consumed within the factory of production. There is no exemption for such parts. Therefore, the appellant is also not entitled to the benefit of exemption notification 06/2006-CE.

31. Notwithstanding the above observations and our clear finding that appellant is not covered by any of the exemption notifications claimed, even if a view can be taken that the exemption notifications may be available to them, the benefit of such doubt cannot go to the appellant as this is a case of exemption notification which must be interpreted as per the ruling of the Constitutional Bench of the Hon’ble Supreme Court in the case of Dilip Kumar & Co. and Ors (supra). Para 52 of this reads as follows:

“52. To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled.”

32. In view of the above, we find that the appellant is not entitled to the benefit of the exemption notifications which they have wrongly claimed and is liable to pay duties on the inputs as demanded in the SCNs.

33. Now coming to the penalties imposed under Rule 25 of the Central Excise Rules, 2002 and Section 114A of the Customs Act, 1962, we find that in the impugned order, the learned Commissioner imposed penalties under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944 without specifying as to which particular clause of Rule 25 has been contravened by the appellant. None of the show-cause notices mentioned regarding the violation of particular clause of Rule 25. In such circumstances, as per the Apex Court's decision in the case of Amrit Foods Vs. CCE, UP [2005(190) ELT 433 (SC)], imposition of penalty is bad in law and is liable to be set aside. This decision of the Apex Court was subsequently followed by the Apex Court in the case of Noble Moulds Pvt. Ltd. Vs. CCE [2010(259) ELT 338 (Del.)] wherein the Hon'ble Apex Court has held in para 9 as under:-

9. We may, with advantage, referred to another judgment of the Apex Court in the case of Amrit Foods v. Commissioner of Central Excise, U.P. - 2005 (190) E.L.T.

433 (S.C.). In that case, penalty was imposed under Rule 173Q of the Central Excise Rules, 1944 without mentioning that provision in the show cause notice. The said penalty was set aside and in the process, the Court made the following observations :-

“5.The Revenue has preferred an appeal from the order of the Tribunal setting aside the imposition of penalty under Rule 173Q of the Central Excise Rules, 1944. The Tribunal has set aside the order of the Commissioner on the ground that neither the show cause notice nor the order of the Commissioner specified which particular clause of Rule 173Q had been allegedly contravened by the appellant. We are of the view that the finding of the Tribunal is correct. Rule 173Q contains six clauses the contents of which are not same. It was, therefore, necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable under the provisions of the 173Q. This not having been done the Tribunal's finding cannot be faulted. The appeal is, accordingly, dismissed with no order as to costs.”

Further, the Apex Court decision in the case of Amrit Foods cited supra was followed by the Tribunal in the following cases:-

i. Tata Motors Ltd. Vs. CCE, Jamshedpur [2006(199) ELT 837 (Tri. Kol.)]

ii. Shree Precoated Steel Vs. CCE, Pune [2006(203) ELT 506 (Tri. Mum.)]

Hence by following the ratio of the above said decisions, we set aside the penalties imposed under Rule 25 which is parimateria to erstwhile Rule 173Q.

34. Coming to the penalties imposed under Section 114A of the Customs Act, 1962, we find that in all the 4 show-cause notices issued to the appellant, penalty was proposed under Section 112 of the Customs Act, 1962 but while passing the impugned order, the learned Commissioner imposed penalty under Section 114A of the Customs Act by observing in para 5.12.5 of the impugned order that the provision of Section 114A of the Customs Act is more appropriate in the present case. Here we note that it is settled law that any penalty not proposed in the show-cause notice cannot be imposed. The justification given by the learned commissioner for imposition of penalty under Section 114A instead of Section 112 of the Customs Act, 1962 as proposed in the show-cause notice is not tenable in law and do not apply to penalty provisions which are to be strictly construed in view of the following judgments:-

i. CCE, Nagpur Vs. Ballarpur Industries Ltd.

[2007(215) ELT 489 (SC)]

ii. B. Lakshmi Chand Vs. GOI [1983(12) ELT 322 (Mad.)]

iii. Shree Precoated Steel Vs. CCE, Pune [2006(203) ELTG 506 (Tri. Mumbai)]

Hence by following the ratio of the decisions cited supra, we also set aside the penalty imposed under Section 114A of the Customs Act, 1962.

35. In the result, both the penalties imposed under Rule 25 of the Central Excise Rules, 2002 and Section 114A of the Customs Act, 1962 are set aside and rest of the impugned order remains intact and is upheld. The appeal is accordingly disposed of.

(Pronounced in the open court on 03-07-2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75336 of 2018

(Arising out of Order-in-Original No.IV(16)28/TECH/COMMR/DIB/2017-18/PART-III/8254 dated 26 October 2017 passed by Commissioner of CGST & Central Excise, Dibrugarh.)

M/s. Brahmaputra Cracker & Polymer Limited

(Main Fire Station Building, 1st Floor, BCPL Project Site Lepetkata, Dibrugarh-786007.)

...Appellant

VERSUS

**Commissioner of CGST & Central Excise,
Dibrugarh**

(Milan Nagar, Dibrugarh-786003.)

.....Respondent

APPEARANCE

Mr.Z.U.Alvi, Advocate for the Appellant (s) Mr.K. Chowdhury, Authorized Representative

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL) HON'BLE SHRI P.V.SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO 75077/2020

DATE OF HEARING : 25 July 2019
DATE OF DECISION: 15 January, 2020

PER BENCH:

STATEMENT OF FACTS

1. M/s.Brahmaputra Cracker & Polymer Limited (hereinafter referred to as the 'Appellant'), a public sector undertaking (PSU), filed the present appeal against the impugned order/letter C.No. IV(16)28/TECH/COMMR/DIB/2017-18/PART-III/8254 dated 26.10.2017 issued by the Commissioner of CGST & Central Excise, Dibrugarh

(hereinafter referred to as the impugned letter) refusing to grant registration to the premises of the appellant at Duliajan wherein, according to the appellant, certain activities related to manufacture have been undertaken. As a result, they are unable to avail CENVAT Credit on capital goods – both imported and indigenous installed and services of Erection & Commissioning received and consumed at Duliajan Plant.

2. The Appellant, *inter alia*, manufactures and sells various grades of polypropylene which is dutiable/ taxable under both Central Excise and GST Law. Their main manufacturing unit is in Lepetkata, Dibrugarh, Assam and their associated units are at Duliajan, Lakwa and Tinsukia which carry on certain activities. The units located at Duliajan and Lepetkata fall within the same jurisdiction of the same Central Excise Commissionerate, though under different ranges.

3. Another unit of the Appellant is at Lakwa where C2+Liquid is manufactured and transferred to the Lepetkata for which they have taken separate Excise Registration of Lakwa Unit as dutiable goods are being manufactured.

4. Their Duliajan unit is a gas compression and dehydration unit (hereinafter referred to as 'GDU') where they purchase natural gas from Oil India Ltd, compress it and dehydrate and transfer it to their Lepetkata unit located 48 km away through a 18 inch pipe for use in manufacture of dutiable polymers. The gas which is left after manufacture (lean gas) is again sent by their manufacturing unit at Lepetkata unit to the Duliajan unit which pumps it back into the Oil India Ltd.

5. Thus, in their Duliajan plant they only compress and dry the gas and do not create any new marketable commodity and they are also not registered with the central excise department. They also receive the lean gas and return it to the Oil India Ltd. The appellant wanted their processing plant at Duliajan to be included in the Registration of their Lepetkata unit (where the goods are actually manufactured) so that they can avail CENVAT credit on the capital goods (both domestic and imported) installed at Duliajan and they can also avail CENVAT credit of the service tax paid on input services used in Duliajan.

6. The appellant filed an application with Superintendent CE Dibrugarh dt.25.11.2011 seeking registration under Rule 9 of Central Excise Rules, 2002 and were issued a Registration Certificate No: AADCB2356EEM001 dt.09.12.2011 for the Lepetkata Plant, Dibrugarh Assam as manufacturer of Excisable goods. The certificate of registration was re-issued on 24.07.2012. In their ER-1 Return they claimed CENVAT credit on imported and indigenous capital goods installed not in their factory at Lepetkata but in their processing plant at Duliajan which was not part of their registered premises at all but which was located 48 km away. They also filed a request with the Superintendent of Central Excise seeking to include the following additional facilities in their Central Excise Registration on the ground that these units are connected by pipe lines to their manufacturing unit at Lepetkata.

(i) LPG recovery plant Kakwa,

(ii) Gas Compressor (GDU) Station Duliajan and,

(iii) Tinsukhiya Rly Sdg,

They further followed up with the Commissioner who, by the impugned letter rejected their request for inclusion of their Duliajan processing plant in their Registration for Lepetkata manufacturing unit. Hence, this appeal. The series of events and dates as submitted by the appellant are as follows.

List of Dates & Events

Date	Event
30.03.2010	BCPL's order No:BCPL/C&P/MR-5055/SK/2015 for Gas Turbine Package on M/s.BHEL Hyderabad.
26.02.2011 to 20.11.2011	Filing of Bill of Entries by M/s.BHEL Hyderabad towards imported consignment of Gas Turbine Package by BHEL on payment of Basic Customs Duty and CVD.
05.05.2011	Filing of B/E No: 3413437 by BHEL at JNPT for the consignment of Gas Turbine Package imported by them against M/s.BCPL's order dt:30.03.2010 on payment of Customs Duty including total CVD + Addl. Duty Rs.2,10,091/-.
07.07.2011	Filing of B/E No:40080060 by BHEL at JNPT for the consignment of Gas Turbine Package imported by them against M/s.BCPL's order dt:30.03.2010, on payment of Customs Duty including total CVD + Addl.Duty Rs.21,125/-.
30.08.2011	Filing of B/E No:4504712 & 4504801 by BHEL at JNPT for the consignment of Gas Turbine Package imported by them against M/s.BCPL's order dt:30.03.2010, on payment of Customs Duty including total CVD + Addl. Duty Rs.21,125/-.
26.09.2011	Despatch of consignments comprised in B/E NO.:4504581 vide L/R No:71271 ex-JNPT after clearance on payment of Customs Duty and Addl.Duty/CVD.
26.09.2011	Despatch of consignments comprised in B/E No.3413437 dt:05.05.2011,4008060 dt: 07.07.2011 & 4504712 dt: 30.08.2011 vide L/R No:71272 ex-JNPT after clearance on payment of Customs Duty and Addl. Duty/CVD.
30.09.2011	BHEL's (importer's) invoice No: ID-HY-3010867 for the Gas Turbine Package covered under BCPL's PO dt:10.05.2010 and dispatched ex-JNPT to BCPL Duliajan vide LR No:71271 and 71272 both dated 26.09.2011, involving Addl. Duty/CVD of Rs.18,54,88,945/-.
25.11.2011	Filing of Application by M/s.BCPL for Registration U/r-9 CER 2002 as manufacturer of excisable goods with Superintendent CE Dibrugarh.
27.12.2011	Filing of B/E No: 5576147 by BHEL at JNPT for the consignment of Gas Turbine Package imported by them against M/s.BCPL's order dated 30.03.2010, on payment of Customs Duty including total CVD + Addl.Duty Rs.1,15,41,437/-.
09.12.2011	Registration Under Central Excise Rules as manufacturer of Excisable goods by M/s.BCPL Lepetkata Dibrugarh Assam and issuance of Registration Certificate No:AADCBB2356EEM001.
January 2012	Filing of ER-1 Return by M/s.BCPL Lepetkata Dibrugarh Assam exhibiting availment of Credit on imported Capital Goods amounting to Rs.18,48,35,920/- on imported Capital Goods and Rs.29,70,57,181/- on indigenous Capital Goods.
03.03.2012	Filing by M/s.BCPL Lepetkata Dibrugarh Assam application vide BCPL/Tax/ED/2011-12 to Superintendent CE Dibrugarh for inclusion in the Registration of the connected Plants/Installations at: GAIL – LPG Recovery Plant Lakwa Distt.Sibsagar, BCPL – Compressor (GDU) Station Duliajan Distt.Dibrugarh. BCPL – Railway siding Lalmati Distt. Dibrugarh.
24.07.2012	Issuance by Superintendent CE Dibrugarh of amended Registration Certificate U/r 9 CER 2002 to BCPL Lepetkata Dibrugarh.
March 2012 to January 2014	No response from the Department as regard BCPL's request dt:03.03.2011 for inclusion in the Registration as Manufacturer of Excisable goods U/r 9 CER 2002 of three installations including the connected Compressor (GDU) Station Duliajan.
22.01.2014	Email from acesadmin@icegate.gov.in (Assistant Commissioner C.E.) for physical verification of the sites of the connected installations for inclusion in the Registration U/r 9 CER 2002 of BCPL Lepetkata Dibrugarh.
03.02.2014	BCPL's letter to Superintendent CE Dibrugarh furnishing 2 sets of requisite documents namely application for amendment to the CE Registration for inclusion of the three installations at Lakwa, Duliajan and Tinsukhia Rly. Sdg. And other financial documents.
01.03.2014	Query from Sr. Manager Finance BCPL about modus-operandi for availment of credit of CVD on consignment imported by BHEL, B/E being in the name of BHEL who raised importer invoice on BCPL.
04.03.2014	Email from Sr. Manager Finance BCPL to GM (PE) GAIL about admissibility of Credit to BCPL on imported Capital goods.

22.04.2015	BCPL's letter to Assistant Commissioner CE Dibrugarh further to their initial request dt:03.03.2012 and communication dt:03.02.2014 to Superintendent C.E. Dibrugarh for inclusion in C.Ex Registration of BCPL Lepetkata amongst three connected installations of the Compressor (GDU) Station Duliajan. Requisite clarification furnished to ACCEDibrugarh.
18.05.2015	Filing in the office of Commissioner CE Dibrugarh by BCPL (in furtherance to initial request dt:03.03.2012 and further clarifications dt:03.02.2014 and 22.04.2015) of the letter furnishing documents about commonality of work force, management, Sales Tax & Income Tax Assessment and Connectivity of operations of the three sites/ installations at Lakwa, Duliajan and Lalmati Rly. Sdg.. Copies of the letters marked to Addl. Commissioner C.E. Dibrugarh.
17.12.2015	Assistant Commissioner, O/o Commissioner C.E. Dibrugarh's letter to BCPL Lepetkata referring their letter dt:18.05.2015 and communicating that Commissioner C.E. rejected the request for common C.Ex. Registration for three Addl. premises purportedly on the ground of segregation by public road/Railway Line and non satisfaction of conditions vide para-6 Chapter-2 of C.Ex. Manual.
18.12.2015	BCPL's letter to the Department regarding confirmation as to whether the activity undertaken at Duliajan Installation of compressing Natural Gas into CNG constituted manufacture U/S 2(f), CNG becomes an intermediate product for the main Installation of Cracker and Polymer Plant.
2015-2016	Availment of Credit amounting to Rs.11..... Crores by BPCL on Capital goods received in Duliajan Installation.
2016-2017	Reversal of the credit entry of Rs.11..... Crores by BPCL on the apprehension lest the availment of credit BCPL on the Capital goods installed in Duliajan Installation may be deemed as irregular.
08.07.2016	BCPL's request to Chief Commissioner C.CE & ST Shillong for Single Registration for whole of Assam under BCPL being. BCPL being a joint venture Public Sector Company with Share holding of GAIL (CPSU) 70%, OIL (CPSU) and Numaligarh Refinery Ltd. (NRL), Govt. of Assam (PSU) engaged in the manufacture of HDPE, LLDPE AND PPE of capacity 0.28 Million Ton per year using Natural Gas, Naptha & Butene-1. The main Cracker Plant being located Lepetkata Dibrugarh while case sweetening and C2 + recovery Unit at Lalwa and (intake of Natural) Gas de-hydration & Compression at Duliajan. Tinsukhia Rly. Sdg. Serving as facility unloading Naptha, one of the three main inputs.
27.09.2016	Assistant Commissioner CGST Excise & Service Tax Dibrugarh's letter in response to BCPL's 8/07/2016 to BCPL rejecting U/Not:19/2016-CE(NT) dt:01.03.2016 the request for Single Registration for whole of Assam purportedly on the ground of installation of plant at different locations.
10.03.2017	BCPL's letter dt:10.03.2017 to Addl. Commissioner GST, C & CE in response to Commissioner rejection dt:27.09.2016 of Single Registration clarifying the position as regards intertwined operations of the three installations at Duliajan, Lakwa and Lapetkata.
06.04.2017	BCPL's letter to Commissioner Dibrugarh emphasizing the inseparable integrity of the intertwined operations of the three installations and pressing their request for inclusion of the operationally interconnected installations within the registration for Lepetkata Plant.
06.07.2017	Former meeting in the office of Commissioner CGST C, & CE OF BCPL's representative with Chief Commissioner CGST, C & CE on the issue of Single Registration for the four integrated installations and admissibility of the credit on the capital goods installed therein.
11.07.2017	BCPL's letter (pursuant to the meeting dt:06.07.2017) praying for carry forward of the CENVAT Credit on Capital goods installed at: -Lakwa (Gas Sweetening & C2+Recovery Plant), -Duliajan (intake of Natural Gas and de-hydration Compression and Pumping the main CNG inputs directly to Lepetkata Plant), -Lepetkata Plant turning out the final products, HDPE, LLDPE and PPE. -and Tinsukhia Rly. Sdg. (uploading Naptha input and pumping the same to Lepetkata Plant). -The request was accompanied with Diagrammatic representation of integrated manufacturing processes spread over the four installations and justification for Single Registration.

15.07.2017	BCPL's letter to Commissioner CGST, C & CE Dibrugarh, referring to the deliberations of the meeting dt:06.07.2017 emphasizing the factors justifying single registration namely, All installations were under jurisdiction of CE Range. Processes undertaken at each installation inseparably intertwined and interconnected with the other. None unit operating under any area based exemption. Entire accounting movement and record keeping relevant for the purpose being at one place – Lepetkta. And offering further justification for Single Registration and consequent availment of credit on capital goods and its carry forward from pre-GST Regime to the post regime.
21.07.2017	BCPL's letter to the Assistant Commissioner Dibrugarh highlighting the problem and difficulty on the part of BCPL in taking two registration and pressing for confirmation of Single Registration in order to enable to BCPL to carry forward the credit on capital goods installed at Duliajan plant, purportedly relying upon CESTAT's ruling in Adani Gas Vs. CCE dt:30.01.2017.
25.09.2017	BCPL's representative meeting with Chief Commissioner GST C & CE Shillong.
27.09.2017	BCPL's letter in continuation to their representative meeting with Chief Commissioner GST Shillong urging him to supersede the decision dt:26.09.2017 of Joint Commissioner CGST & CE purportedly denying single registration, admissibility of credit on Capital goods and carrying forward in the new GST Regime.
20.10.2017	BCPL's letter to Commissioner GST Dibrugarh and Chief Commissioner CGST Shillong urging for superseding the negative decision of JCE-CGST dt:26.09.2017.
25.10.2017	Addl. Commissioner CGST & CE Shillong's letter to BCPL in reply to their representation dt:27.09.2017 suggesting filing of appeal against Commissioner CGST & CE Dibrugarh's decision before Hon'ble CESTAT.
26.10.2017	Commissioner CGST, C & CE letter referring inter alia to Chief Commissioner letter dt: 25.10.2017 besides other correspondence to the Commissionerate Dibrugarh's letter dt: 26.09.2017 and reaffirming the decision and basis thereof for non-acceptance of request for single registration of the Duliajan premises and Lepetkta/Lakwa premises and consequent ineligibility to avail CENVAT Credit on Capital goods installed at unregistered premise of Duliajan.
02.02.2018	Filing of appeal against Commissioner CGST & CE's order dt:26.09.2017 before Hon'ble CESTAT Kolkata.

7. Ld. Counsel for the appellant submits that the following are the two issues to be decided:

- a) Whether they are eligible for common registration for their Duliajan plant and Lepetkata plant by inclusion of the former in their registration certificate already issued for the latter.
- b) Admissibility of CENVAT credit on the capital goods received in their Duliajan plant based either on common registration or irrespective of the registration.

8. He asserts that the Duliajan plant only provides inputs for further manufacture in their Lepetkata plant and both are connected through their own 48 km pipeline and hence both should be given one registration regardless of the fact that they are located far from each other and they are also located in different range offices of the Commissionerate. He relies on the CBEC's manual chapter 2 para 3.2 of which reads as follows:

"3.2 Separate registration is required in respect of separate premises except in cases where two or more premises are actually part of the same factory (where processes are interlinked) but are segregated by public road, canal or railway-line. The fact that the two premises are part of the same factory will be decided by the Commissioner of Central Excise based on factors, such as:

- (1) Interlinked process product manufactured/produced in one premises are substantially used in other premises for manufacture of final products.*
- (2) Large number of raw materials are common and received/proposed to be received commonly for both/all the premises.*

(3) *Common electricity supplies.*

(4) *There is common labour/work force.*

(5) *Common administration/work management.*

(6) *Common sales tax registration and assessment.*

(7) *Common Income Tax assessment.”*

9. He would urge that both their plants are only separated by their pipeline and hence they squarely fall under this para and hence are eligible for a single registration.

10. As an alternative argument, he states that even if they are not granted a single registration, CENVAT credit on the capital goods used in their processing plant at Duliajan should also be allowed to be taken and used in their Lepetkata plant.

11. Ld. DR opposes the claim of the appellant and supports the impugned letter. He also asserts that the appellant is not entitled to CENVAT credit on capital goods not used in the manufacture of their final products.

12. We have considered arguments on both sides and perused the records. The two issues in this case have been accurately put forth by the Ld Counsel for the appellant (para 7 above) which we now proceed to decide.

Registration

13. The first issue which falls for our consideration is whether the appellant's Duliajan plant where the gas is merely dried and compressed for supply to their manufacturing facility at Lepetkata located 48 km away should be considered as part of the same manufacturing facility and included in their registration or otherwise. It would be profitable to examine the relevant legal provisions as applicable during the relevant period. Article 246 of the Constitution gives the Parliament exclusive jurisdiction to legislate on matters included in List I to the Seventh Schedule to the Constitution. Entry 84 of this list reads as follows:

“Duties of excise on tobacco and other goods manufactured or produced in India except-

(a) Alcoholic liquor for human consumption;

(b) Opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph(b) of this entry.”

14. Central Excise Act, 1944 pre-dates the Constitution but continues to be in force as per Article 372 of the Constitution. Nevertheless, this Act is squarely covered by the aforesaid entry 84 of List I of the Seventh Schedule.

15. Section 3 of the CE Act is the charging section and the other sections are the machinery sections which provide the modalities for giving force to the charging section (including the provisions for registration). It reads as follows:

“Section 3. *Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied. -*

(1) There shall be levied and collected in such manner as may be prescribed, -

(a) a duty of excise to be called the Central Value Added Tax (CENVAT)] on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods excluding goods produced or manufactured in special economic zones specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule.

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,-

(i) Omitted.

(ii) by a hundred per cent export-oriented undertaking and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)."

16. From this section, it is evident that there must be goods which are excisable goods and which must be either manufactured or produced for this charging section to apply. If these elements are missing, the activity falls outside the scope of this Act. The key terms used in the charging section are 'excisable goods', 'manufacture' and 'production'. 'Excisable goods' is defined in Section 2 (d) and 'manufacture' in section 2 (f). The term 'production' is not defined in the Act and neither is the term 'goods'. **Sections 2 (f) and 2(d)** are as follows:

"Section 2(d): "excisable goods" means goods specified in the First and Second Schedules of Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt; **Section 2(f):** "manufacture" includes any process, -

- i) incidental or ancillary to the completion of a manufactured product;
 - ii) which is specified in relation to any goods in the Section or Chapter notes of the First and Second Schedules to Central Excise Tariff Act, 1985 as amounting to manufacture;
 - iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;
- and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account."

17. The term 'goods' itself is not defined and hence, through a series of judicial decisions, it is now well settled that 'goods' is understood as having the same meaning as in the **Sale of Goods Act section 2 (7)** of which defines 'goods' as follows:

"goods" means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

18. Thus, for the excise duties to apply, they must be "goods" in terms of the above definition and the goods must be "excisable goods" and they must be either manufactured or produced. The definition of 'manufacture' in section 2(f) is an inclusive definition indicating what all elements need to be included in the manufacture. Through a series of judicial decisions, it is now well settled that every processing of goods does not amount to manufacture and only such processes which result in emergence of new distinct, marketable goods amount to manufacture. Else, excise duty cannot be levied as mere processing does not amount to manufacture. It is not open for the officers to treat any odd process as manufacture and to compel the processor to obtain registration and pay excise duty. Conversely, it is not open to the processor to say that he wants to call his process as manufacture even if it is not and to ask for central excise registration and pay excise duty. However, the definition of 'manufacture' under the Central Excise Act includes any activity which is incidental or ancillary to manufacture. For

instance, ‘packing’ (except in respect of some goods where a legal fiction is created), does not amount to manufacture. However, if the factory is manufacturing the product and then packing and dispatching it, the packing becomes included in the manufacture. The manufacturer cannot exclude the packing value while paying the central excise duty. On the other hand, if A manufactures the product and sells it to B who only packs or repacks and sells it/ transfers it further, B is not a manufacturer and is not liable to excise duty.

19. Unlike Income Tax, Central Excise Law is focused on the manufacturing facility or the factory and not on the corporate entity. If a corporate entity has several manufacturing facilities and some other offices and establishments, a separate registration has to be obtained for each of the manufacturing facilities and none for the other establishments and offices. If one of the other facilities undertakes some processing which is clearly not manufacturing, it is not open either for the Revenue or for the Assessee to treat it as manufacture. The test of manufacture must pass. Conversely, it is not open to either side to say that although some activity amounts to manufacture, they want to treat it as “not manufacture”.

20. The relevant provisions regarding Central Excise Registration are as follows:

Section 6 of the Central Excise Act, 1944

“SECTION 6. Registration of certain persons. -Any prescribed person who is engaged in-

(a) the production or manufacture or any process of production or manufacture of any specified goods included in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), or

(b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of any specified goods included in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), shall get himself registered with the proper officer in such manner as may be prescribed.”

Rule 9 of the Central Excise Rules, 2002

“Rule 9 Registration. –

(1) Every person, who produces, manufactures, carries on trade, holds private store-room or warehouse or otherwise uses excisable goods, shall get registered:

***Provided** that a registration obtained under rule 174 of the Central Excise Rules, 1944 or rule 9 of the Central Excise (No. 2) Rules, 2001 shall be deemed to be as valid as the registration made under this sub-rule for the purpose of these rules.*

(2) The Board may by notification and subject to such conditions or limitations as may be specified in such notification, specify person or class of persons who may not require such registration.

(3) The registration under sub-rule (1) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.”

CBEC’s manual chapter 2 para 3.2 as applicable during the period:

“3.2 Separate registration is required in respect of separate premises except in cases where two or more premises are actually part of the same factory (where processes are interlinked) but are segregated by public road, canal or railway-line. The fact that the two premises are part of the same factory will be decided by the Commissioner of Central Excise based on factors, such as:

(1) Interlinked process product manufactured/produced in one premises are substantially used in other premises for manufacture of final products.

-
- (2) *Large number of raw materials are common and received/proposed to be received commonly for both/all the premises.*
 - (3) *Common electricity supplies.*
 - (4) *There is common labour/work force.*
 - (5) *Common administration/work management.*
 - (6) *Common sales tax registration and assessment.*
 - (7) *Common Income Tax assessment.”*

21. As can be seen from the above, Central Excise Registration is required for a manufacturing facility and not for any facility owned by the manufacturer. If there are more than one manufacturing facilities, each of these require a separate registration. In fact, the appellant themselves have two registrations. There are cases where the same factory is split on to opposite sides of a road or pipeline or railway track. In such cases, effectively, it is the same factory with different parts of it working on either side. For such cases, CBEC's manual instructs that a single registration may be given.

22. The present case is not one such. It is case where the assessee has a registered manufacturing facility and a facility 48 km away where no manufacturing but only some processing (which undisputedly does not amount to manufacture) takes place and the two facilities have a common pipe through which the processed gas is transported to the manufacturing facility. The appellant's argument is that since the gas is transported through the pipeline (and not through trucks, etc.) and the pipeline is connected to both the processing unit and the manufacturing facility, both should be treated as a single unit and they should be given a single registration. It is their assertion that this is covered by the CBEC's manual. We do not agree with this assertion for following reasons:

- a) The CBEC's manual dealt with cases where the factory is split by the intervening road, railway line or pipe etc. and not cases where two units, located far from each other, are merely connected by pipes.
- b) Central Excise Registration has a specific requirement and it is not open for either the assessee or the Revenue to register or not register any premises beyond the legal provisions.
- c) The Duliajan plant in this case is merely processing the gas and is not engaged in any manufacture and therefore, it cannot be treated as a part and parcel of the manufacturing facility at Lepetkata.
- d) Conversely, it is also not open to the Revenue to compel registration of premises of any assessee where no manufacturing takes place even if such places are connected by pipes to a manufacturing facility. It is also not open to the Revenue to demand duty on the processing activities carried out at such premises even if they are connected by a pipe to actual manufacturing unit.
- e) The provisions relating to the Registration are in the CE Act and Rules and it is not open to this Tribunal to modify them or enlarge or constrict their scope.

23. In conclusion, we find in the given factual matrix that the appellant is not entitled to get their Duliajan processing plant included in their registration for Lepetkata manufacturing plant.

CENVAT Credit.

24. The second issue to be considered is whether the appellant is entitled to the CENVAT credit on the capital goods and services received at their Duliajan plant even if it is not part of their registered premises. CENVAT credit is governed by the Cenvat Credit Rules, 2004 framed under Section 37 of the Central Excise Act, 1944 and Section 94 of the Finance Act, 1994. Both these sections empower the Central Government to frame Rules under the respective Acts. Thus, CCR, 2004 is a delegated legislation. Whenever the Parliament delegates powers to make Rules, it always does so to some arm of the State which is answerable to it

such as the Government. The Rules which are notified are then placed by the Government before the Parliament where the Committee on Subordinate Legislation and at times the rules are changed on the directions of the Committee to bring them in conformity with the legislative intent.

25. It is now settled by a five member Constitutional bench of the Hon'ble Supreme Court in the case of Commissioner of Customs (Import) Mumbai vs Dilip Kumar and Company [2018 (361) ELT 577(SC)] that where the words in a statute are clear and plain and unambiguous and only one meaning can be inferred, Courts are bound to give effect to the said meaning irrespective of the consequences. Their Lordships were seized of the question of whether an exemption notification should be construed strictly or liberally. In that background, their Lordships examined the core principles of interpretation of statutes, especially fiscal statutes in various judicial pronouncements dating back as far as 1890 till that date and held as follows in paras 19, 20, 25 & 26 of the judgment.

“19. The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

20. In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose [Assistant Commissioner, Gadag Sub-Division, Gadag v. Mathapathi Basavanneewwa, 1995 (6) SCC 355]. Not only that, if the plain construction leads to anomaly and absurdity, the Court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation.

25. We are not suggesting that literal rule de hors the strict interpretation nor one should ignore to ascertain the interplay between ‘strict interpretation’ and ‘literal interpretation’. We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well-settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.

26. Justice G.P. Singh, in his treatise ‘Principles of Statutory Interpretation’ (14th ed. 2016 p-879) after referring to Re, Micklethwait, (1885) 11 Ex 452; Partington v. A.G., (1869) LR 4 HL 100; Rajasthan Rajya Sahakari Spinning & Ginning Mills Federation Ltd. v. Deputy CIT, Jaipur, (2014) 11 SCC 672, State Bank of Travancore v. Commissioner of Income Tax, (1986) 2 SCC 11 and Cape Brandy Syndicate v. IRC, (1921) 1 KB 64, summed up the law in the following manner

“A taxing statute is to be strictly construed. The well-established rule in the familiar words of LORD WENSLEYDALE, reaffirmed by LORD HALSBURY AND LORD SIMONDS, means : ‘The subject is not to be taxed without clear words for that purpose : and also that every Act of Parliament must be read according to the natural

construction of its words. In a classic passage LORD CAIRNS stated the principle thus: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute. VISCOUNT SIMON quoted with approval a passage from ROWLATT, J. expressing the principle in the following words: **"In a taxing Act one has to look merely at what is clearly said. This is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."**

26. This judgment of the five member Constitutional bench of the Supreme Court, which prevails over any contrary decisions of the lower courts or smaller benches leaves us with no option but to interpret the Act and Rules as they were framed and applicable during the period without any intendment and regardless of the consequences.

27. Our role is to apply the Rules as they existed during the relevant period. Rule 2(a) of the CCR 2004 defines capital goods as below:

"(a) "capital goods" means:-

(A) the following goods, namely:-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;

(ii) pollution control equipment;

(iii) components, spares and accessories of the goods specified at (i) and (ii);

(iv) moulds and dies, jigs and fixtures;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; and

(vii) storage tank, used-

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(2) for providing output service;

(B) motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-clauses (f), (n), (o), (zr), (zzp), (zzt) and (zzw) of clause (105) of section 65 of the Finance Act;"

28. Input service is defined in Rule 2 (l) of the CCR, 2004 as follows:

"input service" means any service,-

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;"

29. A plain reading of the above Rules makes it clear that there is no room in them to provide for Capital Goods credit on capital goods used in a processing facility outside the factory which does not manufacture any goods but only supplies the processed goods as inputs to the manufacturing facility. Similarly, there is no scope in the Rules to allow CENVAT credit of service tax paid on services used not in the manufacturing facility itself but elsewhere in a processing facility owned by the same legal entity.

30. Learned Counsel for the appellant relied upon the case of the case of the Vikram Cement vs CCE Indore [2006 (194) ELT 3 (SC)] in which the Hon'ble Apex Court allowed MODVAT credit/ CENVAT credit on inputs, viz., explosives used for blasting mines to produce limestone for manufacture of cement/ clinkers even though these inputs were not used in the factory of manufacture. A perusal of this judgment shows that their Lordships interpreted the erstwhile MODVAT Rules under which Rule 57J provided for credit of duty in respect of inputs used in an intermediate product which, in turn, is used for manufacture of final products. The CENVAT Credit Rules which replaced the MODVAT Rules did not have a provision corresponding to Rule 57J. Their Lordshipsheld that there is no difference between the CENVAT and MODVAT Rules and even in the absence of an explicit provision, credit of CENVAT of explosives is still available. The present case is completely different as the question is not with respect to MODVAT Credit/ CENVAT Credit on inputs but is the question of CENVAT Credit on capital goods.

31. Learned counsel also relied upon the judgement of the Apex Court in the case of Vikram Cement [2006 (197)ELT 145] in which it was held that MODVAT /CENVAT credit on capital goods used in captive mines which form an integrated unit with the factory is available. The ratio of this judgment does not apply to the present case as we have specifically examined the facts of this case and ruled that the processing plant at Duliajan is a separate processing plant and is not part of the manufacturing unit at Lepetkata. Further, we are also bound now by the five member Constitutional bench of the Supreme Court in the case of Dilip Kumar & Company (supra) which categorically held that fiscal statutes must be interpreted applying the Rule of plain meaning without any intendment and regardless of any consequences or hardships caused.

32. For these reasons, we find that the appellant is not entitled to CENVAT credit on the capital goods installed and the services used in their processing plant in Duliajan.

33. The appeal is rejected.

(Order pronounced in the open court on ...15 January, 2020....)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
HYDERABAD**

DECCAN CEMENTS LTD,

M/S BHARATHI CEMENT CORPORATION PVT LTD, M/S ZUARI CEMENT LTD,
M/S PENNA CEMENT INDUSTRIES LTD UNIT IV, I, M/S RAIN CEMENTS LTD

VERSUS
COMMISSIONER OF CENTRAL TAX, RANGAREDDY, TIRUPATI – GST,
COMMISSIONER OF CUSTOMS, CENTRAL EXCISE &
SERVICE TAX, NELLORE, TIRUPATI

Appeal No. E/30305, 30532, 30704, 30731, 31072, 31076/2016, E/30037,
30634/2017, E/30220/2018
Order No. - A/30684-30692/2019 Dated: - 16 July 2019

MEMBER (JUDICIAL) And MR. P. VENKATA SUBBA RAO, MEMBER
(TECHNICAL)

Present for the Appellant: Shri Y. Sreenivasa Reddy, Shri B. Venugopal
And Shri G. Prahlad, Advocates.

Present for the Respondent: Shri Gautam Mukherjee, Shri D. Nagesh, Y.
Srinivasa Murthy And Shri Juvvala Srinivasa, Authorized Representatives.

ORDER

PER: P. VENKATA SUBBA RAO

1. All these 9 appeals are on the same issue and hence are being disposed of together. The details of these appeals are as follows:

Appeal No.	Appellant	CENVAT creditavailed (in Rs)	Interest(in Rs)	Penalty (inRs)
E/30305/2016	Deccan Cements Ltd	5,09,24,537	As applicable	-
E/30532/2016	Bharathi Cement Corporation Pvt Ltd	4,12,85,200	-	41,28,520
E/30704/2016	Deccan Cements Ltd	1,72,76,172	-	2,000
E/30731/2016	Zuari Cement Ltd	10,42,51,048	33,68,209	1,04,25,106
E/31072/2016	Penna CementIndustries Ltd	3,38,05,371	-	10,00,000
E/31076/2016	Penna CementIndustries Ltd	3,22,34,230	-	30,00,000
E/30037/2017	Rain Cements Ltd	4,94,86,230	-	10,00,000
E/30634/2017	Penna CementIndustries Ltd	2,28,14,148	-	10,00,000

E/30220/2018	Deccan Cements Ltd	17,55,97,455	-	5,000

2. The appellants in all these cases have taken Cenvat credit of the Clean Energy Cess (CEC) which they paid on the coal imported by them for use in their factory. It is the case of the appellants that they are entitled to the Cenvat credit on the CEC paid by them while it is the case of the revenue that no Cenvat credit can be granted for the Clean Energy Cess as it is not covered under Rule 3 of Cenvat Credit Rules (CCR), 2004. Show cause notices have been issued and demands have been confirmed proposing recovery of the allegedly wrongly availed Cenvat credit along with interest and penalties have been imposed as indicated in the table above. Aggrieved by the impugned orders, the present appeals have been filed.

3. We have heard the learned Counsels for the appellants as well as the learned Departmental Representatives at length. It is the case of the appellants that the CEC is levied as per Section 83 of the Finance Act, 2010 which specifically states that “they shall be levied and collected in accordance with the provisions of this Chapter, a Cess to be called, Clean Energy Cess, as a duty of excise on goods specified in Tenth Schedule being goods produced in India at the rate set forth in the said Schedule for the purposes of financing and promoting clean energy initiatives, fund the research in the area of clean energy or for any other purpose relating thereto.” They argued that the CEC is nothing but a duty of excise and is collected by the Central Excise officers and therefore there is no reason to deny them the credit of Cenvat under Rule 3 of CCR, 2004. While agreeing that the CEC is not explicitly listed in Rule 3 of CCR as one of the taxes on which credit can be taken, it is the argument of the appellants that this should not be the reason for denying them the Cenvat credit because CEC is also a form of excise duty. They rely on the case law of Shree Renuka Sugars [2014 (302) ELT 33 (Kar.)] in which the Hon’ble High Court of Karnataka held that with reference to sugar cess which was also in the nature of duty of excise that Cenvat credit is admissible even though it is not explicitly mentioned in Rule 3 of CCR, 2004. They would also place reliance in the order of CESTAT- Bangalore in the case of The Ramco Cements Ltd [2018 (10) TMI 10 (CESTAT-Bang.)] in which the Tribunal held that the assessee is entitled to the Cenvat credit of CEC relying on the aforesaid judgment of Hon’ble High Court of Karnataka in the case of Shree Renuka Sugars. They also placed reliance on the decision of State Street Syntel Services Pvt Ltd [2019-TIOL-1468-CESTAT-Mumbai] in which the Tribunal allowed Cenvat credit of Swachh Bharat Cess which is also not indicated in Rule 3 of CCR, 2004 as a duty eligible for Cenvat credit.

4. With respect to imposition of interest, it is their contention that credit of CEC and interest cannot be imposed because credit has been availed after 01.04.2012 and interest can therefore be imposed only if the credit has been availed as well as utilized and not otherwise. In this regard they place reliance on the judgment of the Hon’ble High Court of Karnataka in the case of Bill Forge Pvt Ltd [2011-TIOL-799] in which it was held that if the assessee has reversed wrongly availed Cenvat credit without utilizing, it will amount to not taking credit at all. Therefore, if Cenvat credit is availed by the party but is unutilized and subsequently reversed, it amounts to nonavailment of Cenvat credit and no interest accrues.

5. On the question of penalty, it is submitted on behalf of the appellants that a plain reading of Rule 15(1) of CCR shows that penalty has to be levied in cases where Cenvat credit is availed or utilized. However, the Hon’ble High Court of Madras in the case of Strategic Engineering Pvt Ltd [2014 (310) ELT 509] held that mere taking of Cenvat credit is not sufficient for imposition of interest as well as penalty. In view of the above, they pleaded that the impugned orders may be set aside and their appeals may be allowed.

6. On behalf of the revenue, learned departmental representatives forcefully argued that no Cenvat credit is admissible with respect to CEC under CCR, 2004 for the following reasons:

(1) A plain reading of Rule 3 of CCR, 2004 shows that the manufacturer or

producer of final products or a provider of output service shall be allowed to take credit only of the following duties and cesses:

- i. the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;
- ii. the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;
- iii. the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);
- iv. the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
- v. the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);
- vi. the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004);
- vii. the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);
- viii. the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (vii);
- ix. the service tax leviable under section 66 of the Finance Act;
- ix. the service tax leviable under section 66A of the Finance Act; ix. the service tax leviable under section 66 of the Finance Act;
- x. the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004); and
- xa. the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and
- xi. the additional duty of excise leviable under section 85 of Finance Act, 2005 (18 of 2005) paid on-
 - (i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004; and
 - (ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004 including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86- Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547 (E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004.

7. Therefore, every form of cess or tax paid by the appellant is not admissible for Cenvat credit under CCR, 2004. They concede that CEC is collected as a duty of excise. However, they point out that various other forms of cesses are also collected by the Government and all Cesses are collected as if they are a form of duty of excise. If the intention of the Legislature/ Government was to provide credit of any duty of excise or any cess paid by the assessee, Rule 3 would have

been worded so, instead of listing a few specific forms of duty of excise and cesses as eligible for credit. Therefore, simply because a particular tax is collected as a duty of excise, it does not automatically entitle the assessee to avail Cenvat credit on such duty. They further argue that the case of Shree Renuka Sugars (supra) does not apply to present case as that was in the context of sugar cess and not in respect of CEC. Although sugar cess was also not explicitly covered in CCR, 2004, the Hon'ble High Court of Karnataka had allowed such credit against which they filed an SLP which is pending before the Hon'ble Apex Court as reported in 2015 (319) ELT A.119 (SC). Even the reasoning given by the Hon'ble High Court of Karnataka for allowing Cenvat credit of sugar cess does apply to this case. In the case of sugar cess, all provisions of Central Excise Act and Rules were made applicable to sugar cess as well. However, with respect to the CEC, Notification No. 02/2010 has been issued making some provisions of the Central Excise Act, 1944 applicable to the CEC. These Sections are 5A, 6, 9, 9A, 9AA, 9C, 9D, 9E, 11, 11A, 11AA, 11AB, 11AC, 11B, 11BB, 11C, 11D, 11DD, 11DDA, 12A, 12B, 12C and 12D; Chapters III, VI, VIA

and VIB. From the above, it is evident that other provisions of Central Excise Act do not apply to the CEC. The CCR, 2004 have been framed under Section 37 (Chapter VII) of the Central Excise Act, 1944. Neither Chapter VII nor Section 37 has been made applicable for CEC at all. Therefore, any rule that has been framed under Section 37 including CCR, 2004 cannot, by any stretch of imagination, be made applicable to CEC. Therefore, the ratio of the judgment of the Hon'ble High Court of Karnataka in the case of Shree Renuka Sugars (supra) with respect to sugar cess for which the entire Central Excise Act and Rules were made applicable, will not apply to the present case.

8. They further argued that the CEC has been levied by the Parliament for a specific purpose. It is based on the principle "Polluter pays" which is a well established principle in the field of environment and has been emphasized by the Hon'ble Apex Court in several cases related to the environment. This principle states that if any activity is causing pollution, the polluter has to pay for the cleanup. Coal is a cheaper but a polluting form of energy. Therefore, cess has been levied on it so as to increase the cost of such form of energy. The amounts so collected from the CEC are to be used for development of cleaner forms of energy. Thus, it is a case of environment protection and those who are using dirty forms of energy such as coal have to pay for it. If the assesseees are allowed Cenvat credit of CEC, it would amount to returning with one hand what has been collected from them with the other to discourage use of dirty polluting fossil fuels. This defeats the purpose of levying CEC. Therefore, no Cenvat credit should be given for the CEC paid by the appellants.

9. They, further argued that Cenvat credit or erstwhile Modvat credit or present day GST input tax credit system are all based on the principle of avoiding cascading effect of taxes. The tax is levied at several stages and the tax paid at each stage is given as credit to the next stage payer. Thus, the tax paid gets set off against the tax paid at the next stage. Ultimately, the consumer bears the full burden of tax on the full value. Therefore, where there is only levy of one tax at one point, no Cenvat credit is admissible. If Cenvat credit or any other form of refund of the tax is given with respect to taxes levied at single point, there is no point in collecting taxes at all. In the present case, the CEC is levied at one and only one stage. There is no CEC again on the cement or other products manufactured by the assesseees. This is similar to the basic customs duty which is also levied at one point and no Cenvat credit is given on such duty.

10. With respect to interest they would assert that once the assessee has availed or utilized Cenvat credit, interest is payable. On the question of penalty also they would assert that penalty is imposable on all the appellants for wrongly availing Cenvat credit in clear violation of CCR, 2004. They relied on the order of this Bench in the case of Singareni Collieries Co. Ltd [2016 (341) ELT 378 (Tri-Hyd)] to assert that the CEC was imposed on the principle of 'Polluter pays' and therefore it stands on a different footing than other Cesses.

11. We have considered the arguments on both sides and perused the records. The short point to be decided is whether the appellants are entitled to Cenvat credit of the CEC paid on the coal imported by them or otherwise. The CEC was levied under Section 83 of the Finance Act, 2010 which reads as follows:

*“83. (1) This Chapter extends to the whole of India. (2)
(3) There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Clean Energy Cess, as duty of excise, on goods specified in the Tenth Schedule, being goods produced in India, at the rates set forth in the said Schedule for the purposes of financing and promoting clean energy initiatives, funding research in the area of clean energy or for any other purpose relating thereto.
.....”*

The purpose of levying the CEC is evidently to promote and finance clean energy initiatives by taxing the coal.

12. A plain reading of Rule 3 of CCR, 2004 shows that it did not provide for Cenvat credit of every duty of excise and cess but only of some and this list does not include CEC imposed in Finance Act, 2010. It is the case of the assessee that since CEC is also a form of excise, they are entitled to Cenvat credit even in the absence of an explicit provision under Rule 3 of CCR, 2004. It is also their assertion that following the ratio of the decision of the Hon’ble High Court of Karnataka in the case of Shree Renuka Sugars (supra) with respect to sugar cess, Single Member Bench of Tribunal-Bangalore in the case of The Ramco Cements Ltd (supra) allowed credit of CEC. Therefore, the ratio may be followed and they may be allowed Cenvat credit. We proceed to decide this issue on merits. It is undisputed that a plain reading of Rule 3 of CCR, 2004 shows that Cenvat credit is admissible only in respect of some cesses and not in respect of all the cesses and duties of excise. The Hon’ble High Court of Karnataka gave benefit of credit of sugar cess in respect of Shree Renuka Sugars (supra) expanding the scope of Cenvat Credit Rules by taking a broader view and holding that sugar cess also being duty of excise Cenvat credit may not be denied.

13. It is, however, now a well settled legal position laid down, after the aforesaid decision of Hon’ble High Court of Karnataka that fiscal statutes must be interpreted strictly as per the letter of word and not the spirit of the law, ignoring any amount of hardship and eschewing any equity in taxation. However, in the event of ambiguity in taxation liability statute, the benefit should go to the assessee. From a plain reading of Rule 3 of CCR, 2004, we do not find any ambiguity. If the intention was to allow credit of all forms of duties of excise and cesses, the Rule would have said so. Instead, it only listed some forms of duties of excise, additional duties of customs and cesses on which credit will be admissible and CEC is not one of them.

14. We have also considered the argument of the appellants that the ratio of judgment of Hon’ble High Court of Karnataka in the case of Shree Renuka Sugars (supra) not being overturned by any superior judicial forum, must apply. On going through the judgment of the Hon’ble High Court of Karnataka, we find that in that case the entire Central Excise Act and Rules were applicable to sugar cess but in the case of CEC, only some provisions of Central Excise Act have been made applicable. Section 37 of the Central Excise Act under which the CCR, 2004 as well as other Rules are framed are not made applicable to the CEC. Therefore, the Finance Act itself does not conceive of applying Cenvat Credit Rules to the CEC. In the absence of any explicit provision, they cannot be made applicable to the CEC. In other words, neither does Rule 3 of CCR provide for credit of CEC nor do the provisions of CEC make CCR and any other Rules under Central Excise Act applicable to it. Therefore, this is clearly distinguishable from the case of the Hon’ble High Court of Karnataka in the case of Shree Renuka Sugars (supra).

15. Although it is now settled that taxing statutes must be literally interpreted, we have also examined the spirit and purpose of levying the CEC. It is evident

from Section 83 of Finance Act, 2010 that CEC has been levied on coal to discourage use of the polluting forms of energy and encourage use of cleaner forms of energy. This is based on the principle of 'Polluter pays'. If the CEC collected by the Government is returned to the assessee through the backdoor in the form of CCR, 2004, we will be doing a great disservice to the country by replacing the principle of 'Polluter pays' with 'Pollution pays'. We will be encouraging use of polluting forms of energy by undoing the very purpose for which CEC has been levied.

16. We also proceed to examine the matter in the larger context of our legal system. The Constitution of India has divided the powers between Legislature, Executive and Judiciary. The law making power has been given to the Legislature which frames the Acts. Subordinate legislations in the form of rules, regulations, notifications (including CCR, 2004) are notified by the Government and are then placed before the Parliament whose Committee of subordinate legislation examines them to see whether they reflect the intent of the Act and get modifications made, if necessary. Thus the legislative power delegated to the Government is again subject to control of the legislature. It is for this reason the rule making power is not delegated to any other arm of State but only to Government which is answerable to the legislature.

17. However, where there is a conflict between the constitutional provisions and the laws made or the parent act and the subordinate legislations vires of such act and rules are tested and decided by the Hon'ble Supreme Court and Hon'ble High Courts under Article 32 and 226 of the Constitution of India. The Tribunals (including this Tribunal) are created under Article 323B of the Constitution of India which was inserted by the 42nd amendment to the Constitution. The Jurisdiction of the Tribunals and their powers have been examined by the Five Member Constitutional Bench of the Supreme Court in the case of L. Chandra Kumar Vs Union of India in Civil Petition No. 481/1980 vide judgment dated 18.03.1997. Paras 94 and 100 of which are reproduced below:

"94. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

100. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme

Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.”

18. From the above, it is evident that this Tribunal can also examine the vires of the Act and Rules with the condition that the Statute under which this Tribunal was created (Customs Act, 1962) cannot be questioned by this Tribunal. Further, the power of this Tribunal to decide on the vires of the Act or Rules is subject to scrutiny by Division Bench of the High Courts.

19. It may be seen that the scope of this Tribunal may extend to testing the vires of rules, regulations etc., but certainly does not extend to making the rules or modifying them. In the absence of any explicit provision to give Cenvat credit of CEC under Rule 3 of CCR, 2004, it is not for this Tribunal to enlarge its scope. To sum up:

a) Rule 3 of CCR, 2004 does not provide for Cenvat credit of CEC.

b) Rules under Central Excise Act including CCR, 2004 or Section 37 under which they are framed are not made applicable to CEC under the Finance Act, 2010.

c) It is not open for this Tribunal to enlarge or modify the scope of Act or rules and they should be interpreted as they are drafted without any intentment.

d) If Cenvat credit of CEC is allowed, it will undo the very purpose for which it is levied and vitiate ‘polluter pays’ principle.

e) The ratio of the judgment of the Hon’ble High Court of Karnataka in the case of Shree Renuka Sugars (supra) does not apply to CEC.

Hence, we find that the assesseees are not entitled to Cenvat credit under Rule 3 of CCR, 2004. We respectfully disagree with the Order of the Hon’ble Single Member in the case of The Ramco Cements Ltd (supra) in view of the above, especially the inapplicability of Section 37 and by implication, the CCR, 2004 framed thereunder to the Clean Energy Cess.

20. Insofar as the interest on Cenvat credit taken is concerned, wherever Cenvat credit has been availed but not utilized, the interest need not be paid but it has to be paid in cases where the Cenvat credit has been taken as well as utilized as has been held by the Hon’ble High Court of Karnataka in the case of Bill Forge Pvt Ltd (supra).

21. As far as the imposition of penalties are concerned, we find that this is an interpretational issue and it is possible for the assesseees to have held a genuine belief that they are entitled for Cenvat credit of CEC and hence have taken Cenvat credit. Therefore, we find that the imposition of penalty under Rule 15 of CCR, 2004 is not justified and needs to be set aside. In conclusion, the impugned orders are modified as follows:

A. The denial of Cenvat credit on Clean Energy Cess is upheld.

B. In all cases where Cenvat credit has been availed but not utilized, no

interest is payable and in cases where Cenvat credit has been availed and utilized, appropriate amount of interest is payable.

C. All penalties are set aside.

22. The appeals are partly allowed as herein above.

(Order Pronounced in the open court on 16.07.2019)

Separate assenting order - Per Ms. SulekhaBeevi C.S.

(SULEKHA BEEVI C.S)MEMBER (JUDICIAL) (P.VENKATA SUBBA RAO)MEMBER
(TECHNICAL)

23. I have gone through the order recorded by brother Member (Technical) in these appeals. I agree with the conclusion arrived by my brother Member as to the issue whether credit is eligible on Clean Energy Cess paid by the appellant. However, I do not concur with the entire discussions recorded by my brother Member for reaching such conclusion. I therefore record separate order as under:-

24. Clean Energy Cess is levied as duty of excise on goods specified in Tenth Schedule. Thus, it is a cess in the nature of excise duty on the 'production' of coal and is collected at the time of removal of raw coal, raw ignite and raw peat from the mines of the factory. The intention of the levy of this cess is for the purposes of financing and promoting clean energy initiatives, fund the research in the area of clean energy or for anyother purposes relating thereto. It is specifically stated in the notification that this cess has to be paid by cash. The liability to pay cess cannot be discharged using CENVAT credit.

25. As already discussed by brother Member, Rule 3 of CENVAT Credit Rules, 2004 does not expressly provide for availing credit on Clean Energy Cess. The sixth proviso introduced in Rule 3(4) of CENVAT Credit Rules, with effect from 29.6.2010, provides that CENVAT credit on any duty specified in sub-rule (1) shall not be utilized for payment of Clean Energy Cess leviable under section 83 of the Finance Act, 2010 (14 of 2010). Thus, CEC has to be paid using cash only. This consequently implies that no credit can be availed on C.E.C so as to utilize it for making payment of any other duty.

26. The argument put forward by the Revenue pointing out that facts in the case of M/s. Shree Renuka Sugars Ltd. (supra) cannot be applied to the facts of these appeals also merits consideration. In Shree Renuka Sugars (supra), the question was with regard to the eligibility of credit on sugar cess paid by the assessee therein. The Hon'ble High Court of Karnataka held the issue in favour of assessee observing that the entire provisions of Central Excise Act / Rules are made applicable to sugar cess. In respect of Clean Energy Cess, only certain provisions of Central Excise Act are made applicable. The CENVAT Credit Rules have been made on exercise of powers conferred by Section 37 of Central Excise Act, 1944. However, Section 37 has not been made applicable to Clean Energy Cess. Thus, it can be seen that there was no intention to allow credit on the clean energy cess levied. For these reasons, I concur with the conclusion arrived by Member (Technical) that credit on Clean Energy Cess is not eligible.

27. I agree with para 20 and 21 with regard to demand of interest and penalties imposed. Further, wherever refund of the unutilized credit on cess is sought, the refund is not eligible since the credit itself is wrongly availed and ineligible.

The appeals are partly allowed as above.

(Pronounced in open court on 16.07.2019)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CESTAT HYDERABAD**

**Central Excise Appeal No. 30211/2019
Final Order No. - A/30737/2019
Dated: - 26 August 2019**

**VIJAYANAGAR BIOTECH LIMITED
VERSUS
COMMISSIONER OF CENTRAL TAX, VISAKHAPATNAM GST**

**MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)
Shri G. Prabhakara Sastry, Advocate for the Appellant
Shri C. Mallikharjun Reddy,
Superintendent/AR for the Respondent.**

PER: MR. P. VENKATA SUBBA RAO

1. This appeal is filed by appellant against Order-in-Appeal No. VIZ-EXCUS- 001-APP-021-18-19, dated 27.04.2018. This is the second round of litigation after the matter was earlier remanded vide Final Order No. 21727/2014, dt. 16.09.2014 to the original authority, without expressing any opinion and leaving all matters open and with a direction to reconsider the manufacturing process once again and the use of machinery by the appellants, afresh.

2. The appellant herein is a manufacturer of Maize Starch and Dextrine falling under CETH 1108 11200 and 3505 1090 of the first schedule of Central Excise Tariff Act, 1985. They are registered with the Central excise Department and avail CENVAT Credit under CCR 2004. A show cause notice dated 19.11.2010 was issued to the appellants by the Revenue seeking to disallow CENVAT Credit on capital goods availed by them on the following items on the ground that as per Rule 6(4) of CCR 2004, no CENVAT Credit shall be allowed on capital goods which are used exclusively for the manufacture of exempted products:

i) Decanter for Gluten

ii) CPD (Flash Dryer) used for drying the Gluten.

iii) Tubular Dryer or Rotary Dryer used for drying maize fibre/Germ taken by them during the period November 2007 to April 2008.

3. It has been alleged in the show cause notice that the appellants manufacture both dutiable as well as exempted products. While starch is a dutiable product, Gluten, maize fibre and Germ are exempted products. In the manufacturing process, starch gets separated from the maize at some stage beyond which the other exempted products are also processed and packed and sold. As per Rule 6(4) of CCR 2004, no CENVAT Credit shall be allowed on capital goods which are used exclusively for the manufacture of exempted goods and on verification by the Department it was found that the appellant had wrongly availed CENVAT Credit on the aforesaid three capital goods which are used exclusively for the manufacture of exempted products, beyond the stage at which they get separated from the dutiable product. In other words it is the position of the Revenue that after the dutiable product viz; Starch has been separated from the process, these exempted products get processed using the aforesaid three capital goods and on which they have wrongly availed CENVAT Credit on capital goods with an intent to wrongly

availing CENVAT Credit. Accordingly, a demand was raised to recover the aforesaid CENVAT Credit under Rule 14 of CCR 2004 read with proviso to Section 11A(1) of Central Excise Act, 1944 along with interest under section 11 AB. It was also proposed to impose penalty under section 11AC of Central Excise Act, 1944.

4. After the matter was remanded, the original authority re-examined the entire manufacturing process which he described as follows:

“PROCESS DESCRIPTION:

Initially they take corn approximately at 14% moisture and corn will be cleaned through cleaning machine and separate cobs and dust etc.

Corn fed into the steeping vats and maintain 50 – 52 degree centigrade with SO₂ water for 44 – 50 hours to achieve final moisture of corn 30 – 40%.

Germ separation:

After steeping, steeped maize fed into the Grinder 1 & 2 for separating the Germ through Germ cyclone. Along with Germ, Starch and Protein liquid is also going along with Germ to Germ filter and Squeezer (squeezing machine) for reducing the moisture and rest of starch and protein liquid goes to main process and semi wet germ (55% moisture) will be goes to Tubular dryer for drying and packing.

Fibre separation:

Rest of the material like Starch, protein and Fibre fed into the fine milling. In this process all the ingredients are completely grinded and finally it goes to the multi stage (fibre separation area). Liquid (starch and protein) again it goes to process and after squeezing, Fibre will dry through Tubular Dryer or Rotary Dryer and will be packed. After squeezing the fibre the moisture content of the fibre is 55%, due to its perishable nature they have to dry immediately through Tubular Dryer or Rotary Dryer to reduce moisture to the level of 5%.

Gluten (Protein Flour) Separation:

Rest of Starch and Protein passes through different separation equipments like Main stream Thickener, Primary Separator, gluten Decanter.

During separation of Starch and Gluten (Protein), the Gluten has very low solid content approximately 2

– 3%, without Gluten Decanter they cannot concentrate the Gluten and run the plant.

After concentration of liquid Gluten, it goes through the vacuum filter for further reducing the moisture and left over liquid contains fine Gluten and again it goes to the main process for recovery. Finally semi wet Gluten (Protein flour) obtained from the vacuum filter 60% moisture content Gluten goes to the CPD Flash dryer and obtained final moisture 10% and packed.

After vacuum filter gluten cake moisture is 60%, as protein (Gluten) is perishable product we have to dry through CPD Flash Dryer to achieve moisture 10%.

Starch Separation:

Finally they get the liquid Starch and this will go through nine different stages for better refining and starch liquid passes through centrifuge machine and finally dry it through the dryer and get Native Starch. Centrifuge overflow and filtrate water again goes to the main process. In modified starches they add chemical in the liquid starch stage for reaction in separate tanks to maintain the different parameters. Finally, after reaction with chemicals, starch liquid goes through the centrifuge machine and finally dry through starch dryers.

This process is totally integrated with main process and all the by products which they are separating in liquid form with density difference. So in every process during separation, some starch and protein liquid go along with the by product. During squeezing and filtration process the liquid again and again reprocessing to the main

process for recovery of Starch and Gluten (Protein Flour).”

5. Accordingly, he confirmed the demand for recovery of CENVAT Credit along with interest and imposed penalties as proposed in the show cause notice

6. Aggrieved, the appellant appealed to the first appellate authority who affirmed the order of the lower authority. Hence this appeal.

7. Ld. Counsel for the appellant submits that the process of manufacture in their factory is a continuous one and an integrated one and therefore they should not be denied CENVAT Credit on the disputed capital goods. He sought to rely on the order of the Principal Bench of CESTAT in the case of Rana Sugar Ltd. vs. CCE, Ludhiana [2012(11)TMI 299-CESTAT, New Delhi] in which it is held that in case the capital goods/inputs were used in the process of manufacture of intermediate exempted goods which were further used in the manufacture of dutiable products, CENVAT Credit cannot be denied. With respect to the specific three capital goods, he submitted as follows:

*“ a) **DECANTER FOR GLUTEN:** Gluten is an intermediate stage in the manufacture of starch and it is subjected to the decantation for obtaining pure starch which is dewatered and starch is processed and packed for sale. Hence the decanting cannot be treated as used for manufacture of gluten, but it is a process for manufacture of starch.*

*b) **CPB (Flash DRYER) USED FOR DRYING THE GLUTEN:** Flash Dryer is used for extracting process water and protein flour from the process material and unless the water along with starch is extracted and used in the system neither gluten nor substantial process of starch refining can be completed. In a process involving multiple operations, it is not possible to earmark any equipment for any one product and separation of water containing starch and obtaining clean water from other process is a basic requirement for obtaining the finished excisable goods namely, starch.*

*c) **TUBULAR DRYER OR ROTARY DRYER USED FOR DRYING MAIZE FIBRE/GERM:** Tubular Dryer or Rotary Dryer is used for drying of Maize Fibre/Germ. Drying of the products at both intermediate stage and also at dutiable goods stage are same and are part of the manufacturing process. In the above background the capital goods employed as above are eligible for availing CENVAT Credit on them as per the role played mainly in recovery of starch from the process material functions, rendered by each of the item as explained above.”*

8. After hearing, both sides were given one week to make additional submissions, if any. Accordingly, an unsigned copy of the written notes was sent by the Ld. Counsel which explained the process of manufacturing of various products and the equipment used at each stage, as follows:

“The Maize seed contain 64% starch and the same is sought for recovery by employing the following:

Processes carried out	Nature of process	Equipment used	% of starch recovered	REMARKS
First Stage	Cleaning	Seed drum, seed cleaner, destoners	NIL	IT IS THE FIRST STAGE OF MANUFACTURE
Second Stage	Sweeping	Vats, Circulation pumps and heat exchangers, SO2 burner	NIL	THE SEEDS ARE TREATED WITH HOT WATER AND KEPT FOR 4 – 5 HOURS SOAKING
Third Stage	Milling	2 stage Grinders, Germ Cyclones, Fine Grinding	NIL	THE SWOLLEN SEED IS GROUND INTO SLURRY

<i>Fourth stage</i>	<i>Fiber washing</i>	<i>7 stage pressure screen</i>	<i>NIL</i>	<i>FROM SLURRY IT IS FILTERED</i>
<i>Fifth stage</i>	<i>Separation of starch from gluten</i>	<i>MST, PS, GT</i>	<i>70% starch with impurities @ 40% moisture</i>	<i>THE STGARCH TO SOME EXTENT IS OBTAINED</i>
<i>Sixth stage</i>	<i>Washing of starch with raw water to remove the fine layer of gluten which would not be removed from the separation stage</i>	<i>9th stage</i>	<i>99.6% Pure starch with 40% moisture is obtained at the laststage</i>	<i>The Starch Separated Is To Be Made Free Of Impurities Like Germ, Gluten And Fibre Which Is Completed At The Last Stage</i>
<i>Seventh stage</i>	<i>Gluten drying</i>	<i>Vacuum drier, cage mill drier</i>	<i>Gluten (65% protein+25% starch+10% moisture)</i>	<i>The starch of over 10% is further recovered from waste by washing stiling and cage mill dryer.</i>
<i>Eighth stage</i>	<i>Starch Drying</i>	<i>Centrifuge and Flashed Drying</i>	<i>Starch @ 12% moisture and 0.4% gluten</i>	<i>The Final produce offered for sale is with 0.4% Gluten.</i>
<i>Ninth Stage</i>	<i>Fiber and Germ drying</i>	<i>Screw press and bundle drier</i>	<i>All remnant starch is recovered to the maximum extent</i>	<i>Also fibre and Germ are removed by washing and drying the process water containing starch is recycled to recover more starch.</i>

By the processes, an average of 63% starch of 99.5% purity at 12% moisture is recovered and is offered for sale.

9. Ld. DR, on the other hand, reiterates the findings of the lower authorities and asserts that the case of Rana Sugar Limited (supra) stood on a different footing as the issue was whether the CENVAT Credit can be denied on capital goods used for manufacture of intermediate products which are exempted but which are further used in the manufacture of dutiable final products. The present case is different. Although the process is integrated one, starch is separated by the appellant from the maize corn and after the separation the other by-products namely Gluten and Maize Germ etc. come out. Thereafter, these exempted products are further dried and processed to pack and market them. What is sought to be denied is only the credit used on such goods which have been procured and used only for the processing of these exempted products after their separation from the main product. Therefore, the appellant is clearly not entitled to CENVAT Credit on these capital goods and they have wrongly availed CENVAT Credit with an intent to avail ineligible CENVAT Credit and accordingly the impugned orders are correct and require no interference.

10. I have considered the arguments on both sides and perused the records. The lower authority has explained the process lucidly. The disputed capital goods are used at the following stages.

- i) Decanter for Gluten – for Decanter for Gluten after separating free from the starch. Thereafter Gluten is done concentrating through vacuum filters and dried and packed.
- ii) CPD (Flash Dryer) used for drying the Gluten – it is used for drying gluten after it has been decanted in the Gluten Decanter.

iii) Tubular Dryer or Rotary Dryer or Rotary Dryer used is used to squeeze the fiber to reduce the moisture content from 55% to 5% making it suitable for further processing and packing.

11. The case of Rana Sugar Limited (supra) sought to be relied upon by the appellant was on a different footing where the sugar factory was manufacturing denatured alcohol which is dutiable and the intermediate product in the process of manufacturing was ethyl alcohol which was exempted. It has been held by the Tribunal that CENVAT Credit on the inputs and capital goods used in the manufacture of exempted intermediate product cannot be denied when the final product is dutiable. In the present case, the starch is the dutiable final product and gluten maize germ are final products which are exempted. What is sought to be denied is CENVAT Credit of capital goods on such machinery which is used for processing the exempted products after they are separated from the raw material. Ld. Counsel for the appellant sought to impress upon the Bench that the entire process is an integrated one and therefore CENVAT Credit cannot be denied on the capital goods. Even if the process is an integrated one, if a separate machinery is used for processing the exempted products after it has been separated from the main product or raw material and such machinery is used only for processing exempted products, CENVAT Credit cannot be availed by the appellant in view of the explicit provisions of Rule 6(4) of CCR 2004. I have also gone through the table submitted by the Counsel for the appellant cited above but the equipment indicated therein do not include the three equipments in dispute. Therefore, this argument does not carry their case any further.

12. In view of the above, I find that the impugned order does not call for any interference and it needs to be upheld and I do so.

13. The impugned order is upheld and the appeal is rejected. (Pronounced in open court on 26.08.2019)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CESTAT HYDERABAD**

**WIPRO ENTERPRISES LIMITED
VERSUS
COMMISSIONER OF CENTRAL TAX, TIRUPATI - GST**

**Excise Appeal No. 31318 of 2018
Order No. - A/31115/2019
Dated: - 05 December 2019**

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

None for the Appellant.

Shri L.V. Rao, Authorized Representative for the Respondent.

PER: P.V. SUBBA RAO.

1. None appeared on behalf of the appellant despite the matter being listed. It is seen from the records that the appellant had not been represented during the previous hearings also. Heard the learned departmental representative and perused the records of the case and proceed to decide the matter on merits.

2. This appeal is filed by the appellant against Order-in-Appeal No. TTD-EXCUS-000-APP-034-18-19 dt.26.07.2018.

3. The appellants are manufacturers of Hydraulic Cylinders falling under CETH 8412 1000 of the Central Excise Tariff and are registered with the Central Excise department. During scrutiny of the Cenvat credit availed by the appellant, the department observed that they had availed Cenvat credit of ₹ 7,614/- on the same invoice twice in the month of June 2014. The department further observed that they had short paid Cenvat credit of ₹ 9,869/- on capital goods cleared after putting them to use. Accordingly, a show cause notice dt.18.04.2016 was issued proposing to recover irregularly availed Cenvat credit under Rule 14 of Cenvat Credit Rules (CCR), 2004 read with section 11A(4) of the Central Excise Act. It was further proposed to impose a penalty under Rule 15(2) of CCR, 2004 read with section 11AC. The appellant had not disputed the fact that they had availed Cenvat credit twice on the same invoice and also had short paid Cenvat credit on capital goods removed after being put to use. However, they contended that they have reversed the aforesaid amounts on being brought to their notice by the department. Therefore, they argued that no penalty should be imposed upon them. After following due process, the adjudicating authority confirmed the demands and appropriated the amounts already reversed by the appellant. He also imposed a penalty of ₹ 7,614/- and

₹ 9,869/- under Rule 15(2) of CCR, 2004 read with section 11AC(1) of the Central Excise Act, 1944. Aggrieved, the appellant filed an appeal before the first appellate authority who, upheld the order of the lower authority and rejected the appeal. Hence, this appeal. In this appeal they are contesting the imposition of penalty on the ground that they had no intention to evade payment of Cenvat credit and they had already reversed the amounts on being pointed out by the department. They had further contended that they had sufficient balance in their Cenvat credit account.

4. Learned departmental representative supports the impugned order and argues that it is not in doubt that the appellant had availed Cenvat credit twice on the same invoice which was in complete violation of any provisions of CCR, 2004. This would have gone unnoticed if there was not an audit by the department. This shows that the appellant had the intention to evade ineligible Cenvat credit without backing of any document and has put such intention to practice. When caught, he reversed the Cenvat credit. Similarly, he has not reversed Cenvat credit on the capital goods fully while removing them. This shows the intention of the appellant

to evade wrongly availed Cenvat credit and thereby evade payment of excise duty to that extent. The mere fact that they have reversed the amounts on being caught does not render the appellant innocent. It is not in doubt that the availment of Cenvat credit and non-reversal of Cenvat credit fully on clearance of capital goods was in violation of the Act and Rules. Therefore, the penalty has been correctly imposed.

5. I have considered the arguments on both sides and perused the records. I have no doubt that the appellant had wrongly availed Cenvat credit twice in the same invoice. It is not the case where one could have a doubt about the admissibility of such Cenvat credit. Evidently, nobody can legitimately claim Cenvat credit twice on one invoice. Similarly, with respect to the capital goods removed after use, they have reversed inadequate amount of Cenvat credit which remains undisputed. In this factual matrix, I find that the intention is selfevident and the violation of Act and Rules are undisputed. Therefore, I find no infirmity in the impugned order.

6. The appeal is rejected and the impugned order is upheld.

(Operative part of this order was pronounced in the open court on conclusion of hearing)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CESTAT HYDERABAD**

**M/S ADANI POWER LTD
VERSUS
COMMISSIONER OF CENTRAL TAX – RANGAREDDY, MEDCHAL,
SECUNDERABAD - GST**

**Excise Appeal No. 30603 of 2018, 30513 of 2018, 30898 of 2018
Order No. - A/31018-31020/2019
Dated: - 05 November 2019**

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

Shri Joseph Prabhakar, Advocate for the Appellant.

Shri V.R. Pavan Kumar, Authorized Representative for the Respondents.

ORDER

PER: P.V. SUBBA RAO.

1. These three appeals are on the same issue and hence are being disposed of together.
2. Heard both sides and perused the records. The appellant M/s Adani Power Ltd, Gujarat are co-developers of Multi-Product Special Economic Zone in Gujarat. They procured stores, spares and consumables from M/s HBL Power Systems Ltd (HBLPSL), Kothur Division, Hyderabad-II. Appropriate excise duty was paid while clearing the goods to the appellant. It appeared to the appellant that they are not liable to pay excise duty and hence they filed refund applications with the jurisdictional Central Excise Officer of the supplier which were rejected. Aggrieved, the appellant appealed to the first appellate authority, who, vide the impugned orders rejected their appeals. Hence, these appeals.
3. Learned counsel for the appellant submits that in terms of the Special Economic Zone (SEZ) Act, 2005, they are entitled to procure goods and services required for undertaking the authorized operations without any duty or tax liability in terms of section 7 and section 26 of the SEZ Act. The SEZ Act is a self-contained code and provides for the mode and the mechanism for claiming exemption from payment of different duties. Insofar the supply of goods from Domestic Tariff Area (DTA) to SEZ unit is concerned, such supplies would be exempt from payment of duty and such exemption has to be claimed by the developer/entrepreneur after executing an appropriate bond-cum-legal undertaking as per Rule 22 of the SEZ Rules. They are also required to maintain proper accounts, financial year wise, which should indicate the value of the goods imported or procured from DTA, their consumption, etc. On receipt of the goods at the SEZ gate, in respect of which exemptions, drawback or concession are to be claimed by the developer for undertaking authorized operations, a Bill of Export is required to be filed by the unit/developer on behalf of the supplier which has to be assessed by the authorized officer. Upon such assessment the goods are admitted into the SEZ and the bill of export copy is endorsed by the authorized officer. However, where the unit or the developer has not claimed any exemption, drawback or concession at the time the goods are brought into the SEZ, the goods procured from the DTA can be brought into the SEZ on the basis of invoice or a transport document issued by the DTA supplier. As per Rule 25 of the SEZ Rules a developer/entrepreneur is liable to refund the exemption, drawback or concession claimed by it under the Customs Act, Central Excise Act etc., if the goods have not been used for the authorized operations. In their case, they have procured the goods on the strength of normal commercial invoice and the goods were cleared by their suppliers after paying appropriate duty.
4. Thereafter, they filed refund applications under section 11B of the Central

Excise Act which were rejected by the authorities. Hence, these appeals.

5. Regarding the refund application not having been filed with the jurisdictional Central Excise Officer as per Rule 47(5) of SEZ Rules, he would submit that this Rule pertains to sales in DTA by the SEZ and it does not pertain to procurement of goods by the SEZ unit/developer. As per Rule 47(5), refund, demand adjudication, review and appeal, with regard to matters relating to authorized operations under SEZ Act, 2005, transactions and goods and services related thereto, shall be made by the jurisdictional Customs & Central Excise authorities in accordance with the relevant provisions contained in the Customs Act, 1962, Central Excise Act, 1944 and the Finance Act, 1994 and the rules made there under or notifications issued there under. He would submit that this reference to the jurisdictional excise officer or customs officer having jurisdiction over the SEZ unit for the purpose of clearance of goods by the SEZ units to the DTA. In the present case, the goods were cleared by their supplier in Hyderabad to the SEZ unit. Therefore, the appropriate officer before whom the application for refund can be filed is the jurisdictional officer of Central Excise in Hyderabad. He would submit that in their own case, CESTAT-Kolkata held so in Final Order No. F/76332-76339/2017 dt.30.07.2017. He would submit that in this order the Tribunal has held that a refund under section 11B can be filed not just by the assessee by any person who suffers Central Excise duty which is not payable as per the law. Therefore, he would urge that they are entitled to refund and the impugned orders may be set aside and they may be allowed refund. He further submits that they are also entitled to interest at appropriate rate from the date of filing of the refund claims till the date of payment of the refund amounts.

6. Learned departmental representative, on the other hand, reiterates the findings of the lower authorities and asserts that there is no provision under which the SEZ unit/developer can claim refund of duties paid by their supplier. He draws the attention of the bench to Rule 30 of the SEZ Rules which reads as follows:

“30. Procedure for procurements from the Domestic Tariff Area.- (1) The Domestic Tariff Area supplier supplying goods to a Unit or Developer shall clear the goods, as in the case of exports, either under bond or as duty paid goods under claim of rebate on the cover of ARE-1 referred to in Notification number 42/2001-Central Excise (NT) dated the 26th June, 2001 in quintuplicate bearing running serial number beginning from the first day of the financial year.

(2) Goods procured by a Unit or Developer, on which Central Excise Duty exemption has been availed but without any availment of export entitlements, shall be allowed admission into the Special Economic Zone on the basis of ARE-1.

(3) The goods procured by a Unit or Developer under claim of export entitlements shall be allowed admission into the Special Economic Zone on the basis of ARE-1 and a Bill of Export filed by the supplier or on his behalf by the Unit or Developer and which is assessed by the Authorised Officer before arrival of the goods:

Provided that if the goods arrive before a Bill of Export has been filed and assessed, the same shall be kept in an area designated for this purpose by the Specified Officer and shall be released to the Unit or Developer only after completion of the assessment of the Bill of Export.

(4) A copy of the ARE-1 and/or copy of Bill of Export, as the case may be, with an endorsement by the authorized officer that goods have been admitted in full into the Special Economic Zone shall be forwarded to the Central Excise Officer having jurisdiction over the Domestic Tariff Area supplier within forty-five days failing which the Central Excise Officer shall raise demand of duty against the Domestic Tariff Area supplier.

(5) Where a Bill of Export has been filed under a claim of drawback or Duty Entitlement Pass Book, the Unit or Developer shall claim the same from the Specified Officer and jurisdictional Development Commissioner respectively and in case the Unit or Developer does not intend to claim entitlement of drawback or Duty Entitlement Passbook Scheme, a disclaimer to this effect shall be given to the Domestic Tariff Area supplier for claiming such benefits:

Provided that the Duty Entitlement Passbook Scheme may be claimed by Domestic Tariff Area supplier from the Development Commissioner or their jurisdictional Regional Licensing Authority of the Directorate General of Foreign Trade.

(6) The Bill of Export shall be assessed in accordance with the instructions and procedures, including examination norms, laid down by the Department of Revenue as applicable to export goods:

Provided that at the time of assessment, it shall be specifically examined whether the goods are required for the authorized operations by the Unit or Developer, with reference to the Letter of Approval or the list of goods approved by the Approval Committee for the Developer.

(7) On arrival of the goods procured from the Domestic Tariff Area at the Special Economic Zone gate, the Authorized Officer shall examine the goods in respect of description, quantity, marks and other relevant particulars given in the ARE-1, invoice, Bill of Export of packing list and also as per the examination norms laid down in respect of export goods in cases where the goods are being procured under claim of an export entitlement.

(8) Drawback or Duty Entitlement Pass Book credit against supply of goods by Domestic Tariff Area supplier shall be admissible provided payments for the supply are made from the Foreign Currency Account of the Unit.

Provided that the reimbursement of duty in lieu of drawback or Duty Entitlement Pass Book credit against supply of goods by Domestic Tariff Area supplier to Special Economic Zone developers shall be admissible even if payment is made in Indian Rupees. Reimbursement of duty in lieu of drawback against supply of goods to Special Economic Zone developer shall be made as per the procedure prescribed by the Central Government.

(9) A copy of the Bill of Export and ARE-1 with an endorsement of the Authorised Officer that the goods have been admitted in full in the Special Economic Zone, shall be treated as proof of export.

(10) Where the goods are to be procured by a Unit or Developer from a Domestic Tariff Area supplier who is not registered with the Central Excise authorities, or is a trader or merchant exporter, the procedure under sub-rules (1) and (2) above shall apply, mutatis mutandis, except that the goods shall be brought to the Special Economic Zone under the cover of an invoice and the ARE-1 shall not be required.

(11) The Unit or Developer may also procure goods from Domestic Tariff Area without availing exemptions, drawbacks and concessions on the basis of invoice or transport documents, issued by the supplier:

Provided that such invoices or transport documents shall be endorsed to the effect that no exemptions, drawbacks and concessions have been availed on the said supplies.

(12) Procedure for procurement from warehouse shall be as under:-

(a) where goods are to be procured from warehouse, a Unit or Developer shall file a Bill of Entry with the Specified Officer;

(b) the Unit or Developer shall submit Bill of Entry assessed by the Authorized Officer to the Customs Officer in charge of the warehouse from where the Special Economic Zone Unit or Developer intends to procure the goods;

(c) the Customs Officer in charge of the warehouse shall allow clearance of the goods from the warehouse for supply to the Unit or Developer without payment of duty on the cover of exbond Shipping Bill and on the basis of Bill of Entry duly assessed by the Authorized Officer;

(d) where the re-warehousing certificate by way of endorsement by the Authorized Officer on the copy of ex-bond Shipping Bill is not received by the Customs Officer in charge of warehouse within forty-five days from the date of clearance of the goods from the warehouse, the Customs Officer in charge of the

warehouse shall proceed to demand applicable duty from the supplier:

Provided that for procurement of goods from Nominated Agency located in Special Economic Zone, the procedure as specified by Specified Officer shall be followed and there shall be no requirement of assessment of Bill of Entry or transfer of the goods under the cover of ex-bond Shipping Bill.

(13) A Special Economic Zone Unit or Developer may also procure goods from international exhibitions held in India following the procedures under sub-rule (12).

(14) A Unit or Developer may also procure goods or services, without payment of duty from an Export Oriented Unit or Software Technology Park Unit or Bio-Technology Park Unit, by following procedures under sub-rule (12).

(15) A Unit or Developer may procure goods and services from another Unit located in the same or any other Special Economic Zone, subject to following conditions, namely:-

(i) the receiving Unit or Developer shall file Bill of Entry for home consumption with the Authorized Officer, in quintuplicate, giving description of the goods along with an invoice and packing list for assessment;

(ii) on the basis of such assessed Bill of Entry, the goods shall be allowed to be transferred to the receiving Unit or Developer under transshipment permit;

(iii) there shall be no requirement to file any additional document or bond(s) for the purpose of transshipment of goods and the transshipment permission shall be stamped on the Bill of Entry itself;

(iv) the supplying Unit shall submit the re-warehousing certificate to the Specified Officer having jurisdiction over the supplying unit within forty-five days, failing which the Specified Officer of the supplying Unit shall write to the Specified Officer having jurisdiction over the receiving Unit or Developer for demand of duty from the receiving Unit or Developer;

(v) where the supplying and receiving Units or Developer are located in the same Special Economic Zone, the provisions of subrules (i) and (iv) shall not apply and the movement of goods shall be allowed and such transactions shall be recorded in the regular books of accounts of the receiving Unit or Developer and the supplying Unit and no Bill of Entry shall be required to be filed.

(16) Procurement of cut and polished diamonds and precious and semiprecious stones from Domestic Tariff Area-A gem and jewellery Unit may procure cut and polished diamonds and precious and semi precious stones from the Domestic Tariff Area, as per the following procedure, namely:-

(i) the parcel shall be brought into the Zone in a sealed condition by the authorized representative of the Domestic Tariff Area supplier or Customs House Agent, who shall present the invoice clearly marked original, duplicate and triplicate to the Authorized Officer at the gate;

(ii) the Authorized Officer shall register the invoice at the gate of Special Economic Zone and endorsing the registration number on the original and duplicate copies of the invoice and the parcel shall be allowed to be taken into the premises of the Unit and such goods shall be separately accounted for by the Unit.

(iii) the duplicate copy of the invoice with the endorsement of the Authorized Officer shall be forwarded to the supplier in the Domestic Tariff Area for claiming Replenishment Licence from the Development Commissioner of the Special Economic Zone.

7. He would assert that there is no exemption for supply of goods to SEZ units just as there is no exemption notification for export of goods. In fact, SEZ is treated, for all purposes, as a place outside India and it is for this reason goods are procured by filing an ARE-1 by the supplier and a Bill of Export before the goods enter the SEZ unit. Therefore, the supplies to SEZ developer/unit are at par with the exports. The mechanism provided for such supply in the SEZ Rules only provides for supply against a bond or legal undertaking after following the process

and procedure indicated therein. Any SEZ unit claiming a refund is like an overseas buyer of exported goods claiming refund of Central Excise duty for which there is no legal provision. He would submit that the assessee has not made out a case to show under what law they have claimed refund of the excise duty. He would further urge that the Hon'ble Supreme Court has, in the case of Priya Blue Industries Ltd [2004-TIOL-78-SC-CUS] and Flock India Pvt Ltd [2000 (6) SCC 650], clearly held that no refund can be claimed in respect of the goods which have already been assessed unless the assessment itself has been challenged. In this case there is no evidence, whatsoever, that the assessment of the goods by the supplier M/s HBLPSL, Hyderabad to the appellant has been challenged either by M/s HBLPSL themselves or by the appellant. In view of the above, the question of refund does not arise.

8. He further submits that as decided by the Hon'ble Apex Court in the case of Dilip Kumar & Co. and others (Civil Appeal No. 3327/2007) when the appellant is claiming an exemption notification, it must be strictly construed and any benefit of doubt must be given to the revenue and decided against the assessee. In this particular case, the SEZ Rules do not provide for refund of duty in respect of goods which have been procured from DTA at all and neither does the Central Excise Act or Rules provided for such refund. The exemption which is available under SEZ Rules is only through the process of bond/legal undertaking. Therefore, the appeal needs to be dismissed both on merits and on the grounds of lack of jurisdiction.

9. I have considered the arguments on both sides and perused the records. The appellant, a developer of SEZ unit has procured goods from a DTA unit which he could have also procured without payment of excise duty if he had followed the appropriate procedure prescribed under SEZ Act and Rules. SEZ area is treated for all practical purposes as a place outside India. For this reason, goods which are imported into SEZ are not subject to customs duties. Goods from DTA which are supplied to SEZ units are treated at par with exports. In fact, documents such as ARE-1 and Bill of Export which are usually filed in case of exports are also filed in case of SEZ units. In case of actual exports, Central Excise Act provides for two options viz., (1) Export under Bond under Rule 19 and (2) Export under claim for rebate under Rule 18 of Central Excise Rules, 2002. The SEZ Rules, however, have only provided a mechanism for clearance of goods under bond. I find that there is no mechanism under SEZ Rules for claiming rebate/refund on goods procured from the DTA.

10. In the absence of any specific provision for exemption by way of refund in the SEZ Rules or under Central Excise Rules, I find that the appellant is not entitled to refund of the duty. I find that in the assessee's own case decided by the CESTAT-Kolkata, vide Final Order No. F/76332- 76339/2017 dt.30.07.2017, this issue does not appear to have been contested by the revenue or discussed. In the light of the judgment of the Constitutional Bench of the Hon'ble Apex Court in the case of Dilip Kumar & Co. and others (supra), I find that no exemption by way of refund can be sanctioned to the appellant in the absence of any explicit provisions.

11. I also find that the assessment by the supplier of goods has not been challenged. At least, there is nothing on record to indicate so. It has been held by the Hon'ble Apex Court in the case of Priya Blue Industries Pvt Ltd (supra) and Flock India Pvt Ltd (supra) that unless the order of assessment has been challenged no claim for refund under section 11B can be made. These judgments were distinguished by the Hon'ble High Court of Delhi in the case of Aman Medical Products Pvt Ltd [2009-TIOL-566-HC-DEL-CUS] and Micromax Informatics Ltd [2016 (355) ELT 446 (Del)]. However, the Larger Bench of the Hon'ble Supreme Court has now decided in the case of ITC Ltd [2019-TIOL-418-SC-CUS-LB] that the ratio of Priya Blue Industries Pvt Ltd (supra) and Flock India Pvt Ltd (supra) applies in every case and no refund can be sanctioned even in cases of self assessment unless such assessment itself is appealed against before the Commissioner (Appeals). In view of the above, I find that the assessee is not entitled to refund at all in the present case, both on account of lack of explicit provision for such refund as well as on the ground that the assessments were not

challenged by the appellant.

12. In view of the above, appeals are rejected. (Order pronounced in the open court on 05.11.2019)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CESTAT HYDERABAD**

**FINECHEM
VERSUS
COMMISSIONER OF CENTRAL EXCISE CUSTOMS & SERVICE TAX, HYDERABAD-I
COMMISSIONERATE**

Central Excise Appeal No. 25305/2013

Order No. - A/30967/2019

Dated: - 22 October 2019

HON'BLE MS. SULEKHA BEEVI C.S, MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Shri R. Narasimha Murthy, Consultant for the appellant

Shri A.V.L.N. Chary, AR for the respondent

PER: MS. SULEKHA BEEVI C.S

1. The facts of the case are that the appellant is a co-noticee in the show cause notice issued alleging fraudulent availment of CENVAT Credit based on invoices issued without actual supply of material mentioned in the invoices. The DGCEI, on receiving information, conducted search operations on 29.09.2010 at the factory and office premises of M/s Reliance Cellulose Products Limited, M/s Y.M. Drugs, the office premises of M/s Aerochem Impex Limited, M/s Finechem (Registered Central Excise dealer and appellants herein) and recovered certain incriminating documents and records. Search operations were also conducted at the office and factory premises of M/s Pavan Drugs on 15.03.2011 and relevant records were recovered.

2. Scrutiny of records revealed that M/s Reliance Cellulose Products Limited have shown that they supplied 6,00,000 Kgs of 'Micro Crystalline Cellulose' to M/s Aerochem Impex Pvt. Ltd. during February and March 2010 and accordingly Central Excise invoices were issued. This entire quantity was shown as received by M/s Aerochem Impex Pvt. Ltd. in their records and shown as supplied 5,15,000 Kgs and 85,000 Kgs of Micro Crystalline Cellulose to M/s Y.M. Drugs and M/s Pawan Drugs respectively. It was noticed that CENVAT invoices were issued by M/s Aerochem, M/s Y M Drugs and M/s Pavan Drugs without actual supply of material. It appeared that M/s Y M Drugs and M/s Pawan Drugs have shown as processed Micro Crystalline Cellulose received by them and shown as supplied Micro Crystalline Cellulose powder to M/s Finechem, another Central Excise dealer and in turn M/s Finechem has shown as supplied Micro Crystalline Cellulose powder received by them to M/s Reliance Cellulose Products Limited for which dealer invoices were issued by them. Basing on the CENVAT invoices issued by M/s Finechem which are issued without actual supply of material mentioned therein, M/s Reliance Cellulose Products Ltd. availed CENVAT credit even though they did not receive the goods namely Micro Crystalline Cellulose powder from M/s Finechem. Enquiry made with M/s Finechem showed that they neither received MCC from M/s Y M Drugs and Pavan Drugs nor supplied the same to M/s Reliance Cellulose Products Limited.

3. Since the goods as shown in the duty paying documents were not supplied by the dealers, the usage of the same by M/s Y M Drugs or M/s Pavan Drugs or M/s Reliance Cellulose Products Limited in relation to manufacture of finished products is not possible and the CENVAT Credit in such cases where the inputs were not actually received or used in the manufacture of final products was not admissible. Separate show cause notices were issued to M/s Y M Drugs & Chemicals Limited and M/s Reliance Cellulose Products Limited and M/s Pavan Drugs and Chemicals Pvt. Ltd. Proceedings were initiated against M/s Finechem as a co-noticee (appellant herein).

4. After due process of law, the original authority vide Order-in-Original dated 31.10.2012 (impugned order) confirmed the demand against the noticees. A penalty of ₹ 22.00 lakhs

was imposed under Rule 26(2) of Central Excise Rules, 2002 upon the appellant. Aggrieved by such order, the appellant is now before the Tribunal.

5. The Ld. Consultant, Shri R. Narasimha Murthy appeared on behalf of the appellant. He referred to Rule 26(2) of Central Excise Rules, 2002 and submitted that a bare perusal of the provision would indicate that penalty under this provision can be imposed only on a natural person. The appellant is a partnership firm and per se is not a natural person. Therefore, the provision of imposing penalty would not attract in the instant case. He relied upon the decision in the case of Homag India Pvt. Ltd. vs. CCE, ST & Customs, Bangalore reported in [2017(357)E.L.T. 1194 (Tri.-Bang.)] and also M/s Apple Sponge and Power Limited vs. CST, Audit-I reported in [2018(362)E.L.T. 894 (Tri.-Mum.)]. The appellant being a registered dealer is excluded from the purview of Rule 26 of Central Excise Rules, 2002 as a registered dealer can be covered only under Rule 25 of Central Excise Rules, 2002. He prayed that the penalty may be set aside.

6. The Ld. AR Shri A.V.L.N. Chary supported the findings in the impugned order. He referred to the said provisions contained in Central Excise Rules, 2002 and submitted that the penalty has been imposed under Sub Rule 2 of Rule 26. He referred to the provisions contained in Rule 26(1) of Central Excise Rules 2002 and argued that only Rule (1) deals with the intention of the knowledge of fraudulent act for imposing penalty. Whereas, Rule (2) does not talk about any such mens rea required for the fraudulent act. The penalty imposed in the present case is under Rule 26(2) and not under Rule 26(1). Sub rule (2) of Rule 26, even though uses the word "any person" as per general clauses act "person" includes legal person also. The penalties imposed therefore are legal and proper.

7. Heard both sides. For better appreciation, the relevant provisions of Rule 26(1) and Rule 26(2) of Central Excise Rules, 2002 are reproduced as under:

"26. Penalty for certain offences.-

[(1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees [two thousand rupees,] whichever is greater.]

[Provided that where any proceeding for the person liable to pay duty have been concluded under clause (a) or clause (d) of sub-section (1) of section 11AC of the Act in respect of duty, interest and penalty, all proceedings in respect of penalty against other persons, if any, in the said proceedings shall also be deemed to be concluded.]

(2) Any person, who issues-

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made there under like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund,

shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.]"

8. As per Sub Rule (2) clause (i) if any person issues an excise duty invoice without delivery of the goods, the penalty under the sub rule would apply. Sub Rule (1) of Rule 26 adds a condition that such person should have knowledge or reason to believe that the goods are liable for confiscation. Such a qualification is absent in Rule 26(2). The Ld. Counsel has relied upon the decisions passed by Single Member in the case of Homag India Pvt. Ltd. as well as Apple Sponge and Power Limited (supra). In the present case, the appellant is a partnership firm and has received the invoices from M/s Pavan Drugs and M/s Y.M. Drugs without receiving any goods. The invoices were again passed on to M/s Reliance Cellulose Products Limited who availed the fraudulent credit. Thus, without receiving goods or supply of goods, the appellant has received invoices and also issued cenvatable invoices, facilitating M/s Reliance Cellulose Products Limited to avail fraudulent credit. The appellants having issued excise duty invoice without delivery of goods is, therefore, liable

for penalty under Sub Rule 2 of Rule 26 of Central Excise Rules, 2002. We, therefore, do not find any grounds to interfere with the findings of the Commissioner that the appellant is liable for penalty under Rule 26(2). However, taking into consideration the entire facts and circumstances of the case, we are of the opinion that the penalty of ₹ 22.00 lakhs imposed on the appellant is on the higher side. We hold that imposition of fine of ₹ 5.00 lakhs (Rupees five lakhs only) would meet the ends of justice.

9. The impugned order is modified to the extent of reducing the penalty imposed on the appellant under Rule 26(2) to ₹ 5.00 lakhs only.

10. The appeal is partly allowed in above terms, with consequential reliefs, if any. (Operative portion of the order pronounced in open court on conclusion of hearing)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
DIVISION BENCH
COURT NO. I**

Excise Appeal No. 877 of 2011

Arising out of Order-in-Appeal No.02/2011(T) CE, Dated: 31.01.2011
Passed by Commissioner of Central excise & Customs, Guntur

**Date of Hearing: 03.03.2020
Date of Decision: 12.06.2020**

**COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX
TIRUPATI NO. 9/86-A, WEST CHURCH COMPLEX
AMARAVATHI NAGAR, MR PALLI ROAD, THIRUPATHI, CHITTOR
ANDHRA PRADESH - 517502**

Vs

**RANI PLASTIC PIPE INDUSTRIES
B-15, INDUSTRIAL ESTATE, NANDYAL, KURNOOL DIVISION
ANDHRA PRADESH - 518501**

Appellant Rep by: Shri C Mallikarjun Reddy, Superintendent

Respondent Rep by: Shri P Rosi Reddy, Adv.

CORAM: Anil Choudary, Member (J)
P V Subba Rao, Member (T)

FINAL ORDER NO. A/30886/2020

Per: P V Subba Rao:

1. This appeal is filed by the Revenue against Order-in-Appeal No. 02/2011(T) CE, dated 31.01.2011.
2. The respondent is a manufacturer of PVC Pipes and PVC Compound and was availing the benefit of MODVAT credit under Rule 57 of the erstwhile Central Excise Rules 1944. They filed a refund claim for Rs. 1,81,23,725/- on 24.05.2010 with the Joint Commissioner pursuant to order no. 1/2010-CEx dated 08.04.2010 issued by the Hon'ble Settlement Commissioner.
3. The background of the case is that originally a show cause notice dated 21.03.2010 was issued to the appellant demanding an amount of Rs. 3,14,53,090/- on account of alleged unaccounted manufacture and clearance of goods without payment of excise duty. The respondent approached the Hon'ble Settlement Commission in January who, after following due process, issued its final order dated 08.04.2010 determining the duty liability at Rs. 2,36,75,539/- along with simple interest at a rate of 5% and imposed some penalties. The Settlement Commission while passing this order has also allowed the assessee to take credit of Rs. 1,81,23,725/- in their MODVAT account being the duty involved on the unaccounted duty paid raw materials. The appellant paid the dues as per the order issued by the Hon'ble Settlement Commission. However, their unit was closed by this time. They, therefore, filed a refund claim for Rs. 1,81,23,725/- in cash on the ground that their unit was closed and they were not able to utilise the MODVAT credit which they were entitled to take. The original authority examined the application and found that the Hon'ble Settlement Commission has only ordered MODVAT credit to be given and not cash refund. Further, in terms of the Rule 5 of Cenvat Credit Rules, 2004 (which were in vogue at the time this decision was taken), refund of credit can only be allowed in case input or input services is used in export of goods or services and for any reason, such credit cannot be used towards domestic clearance of goods. Therefore, the adjudicating authority rejected the refund claim filed by the appellant.

4. Aggrieved, the appellant appealed to the First Appellate Authority who, by the impugned order, reversed the order of the lower authority and held that the appellant is entitled to refund of the MODVAT/CENVAT in cash. Aggrieved, Revenue filed this appeal.

5. Learned Counsel for the respondent relies on the judgment of the Hon'ble High Court of Karnataka in the case of *Slovak India Trading Company Pvt Ltd.*, [2006 (201) ELT 559, (Kar)] in which the Hon'ble High Court expressed the view that Rule 5 of Cenvat Credit Rules, 2004 does not specifically prohibit refund of cenvat credit if the factory is closed and has allowed refund in that case. He further submits that this judgment of the Hon'ble High Court of Karnataka was upheld by Hon'ble Supreme Court in the case *Union of India Vs Slovak India Trading Co. Pvt Ltd.*, [2008 (223) ELT A170 (SC)]. He would further submit that the issue is well settled and the matter has been decided by the Commissioner (Appeals) in the impugned order as per the settled legal position.

6. Per contra, Learned DR asserts that a bare perusal of the order of the Hon'ble Supreme Court shows that the SLP in that case has been dismissed with the following words:

"Learned ASG appearing for the Union of India fairly concedes that those judgments of the High Court which were relied upon by the Tribunal have not been appealed against. In view of the concessions made by the Learned ASG, this Special Leave Petition is dismissed".

Learned DR would submit that prima facie, it appears that the Hon'ble Apex Court has not laid down the law as far as the judgment of the Hon'ble High Court of Karnataka in the case of *Slovak India* is concerned but the case was dismissed in view of the concession made by the Learned ASG.

7. He would submit that the question which arises in such a case is whether the judgment of the Hon'ble Apex Court in the aforesaid SLP will be a declaration of law under article 141 of the Constitution of India which binds all the courts in the country or otherwise. This issue was examined at length by the Larger Bench of Hon'ble High Court of Bombay in the case of *Gauri Plasti Culture P Ltd., and others* [2019 (6) TMI 820 Bombay] Hon'ble High Court framed the following questions:

"(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?

(b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of un-utilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?

(c) Whether what is observed in the order dated 25th January 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India Vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

These questions were answered by the Hon'ble Larger Bench of Bombay High Court in para 40 as follows:

40. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble Supreme Court in the case of Slovak India (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India.

8. He would further rely on the order of the Tribunal in the case of *Phoenix Industries Pvt Ltd.*, [2015 (330) ELT 303 Tri-Mum] in which it has been held that refund under Rule 5 of Cenvat Credit Rules, 2004 is subject to conditions laid down in Notification No. **5/2006-CE(NT)** and no refund can be sanctioned beyond this.

9. We have considered the arguments on both sides and perused the records. Rule 5 of Cenvat Credit Rules, 2004 reads as follows:

"RULE 5. Refund of CENVAT Credit.- Where any input or input service is used in the final products which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so

used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

(i) duty of excise on any final products cleared for home consumption or for export on payment of duty; or

(ii) service tax on output service,

and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification:

Provided that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty.

Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, as amended by clause 72 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill, under the Provisional Collection of Taxes Act, 1931, the force of law, shall be utilised for payment of service tax on any output service.

Explanation: For the purposes of this rule, the words 'output service which are exported' means any output service in respect of which payment is received in India in convertible foreign exchange and the same is not repatriated from, or sent outside, India.

Provided that the CENVAT credit or inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule."

10. This is the only provision under which a refund of Cenvat credit can be allowed. Such refund is also subject to conditions notified by the Government. There is no provision in the Cenvat Credit Rules for refund of cenvat credit if the assessee is not able to utilise it for any other purpose, such as the factory being closed. The Hon'ble High Court of Karnataka in the case of *Slovak India* (supra), has however allowed such refund. The SLP filed by the Revenue against this judgment has been dismissed by the Hon'ble Apex Court in view of the concessions made by the ASG. The question which arises is in such a case the dismissal by the Hon'ble Supreme Court of the SLP should be treated as a law laid down under article 141 of the Constitution or otherwise. This issue was examined by the Larger Bench of the Hon'ble High Court of Bombay which also examined whether unutilised cenvat credit can be refunded on account of the closure of manufacture activities of the factory. The Hon'ble Larger Bench has found that the law has not been laid down by the Hon'ble Apex Court and the SLP was merely dismissed on account of the concession made by the ASG. Further, the Larger Bench of Hon'ble High Court of Bombay has held that no refund can be sanctioned under Section 11B if the assessee is unable to utilise cenvat credit on account of closure of the manufacturing activities.

11. In view of the above, we find that the ratio of the judgment of the Larger Bench of the Hon'ble High Court of Bombay is binding and prevails and accordingly no refund of MODVAT/Cenvat credit can be sanctioned to the respondent. We also find that the law has now been laid down by the constitutional bench of the Hon'ble Supreme Court in the case of *Dilip Kumar and Company & Other* [2018 (361) ELT 577 (SC)] and it is held that the fiscal laws must be interpreted as they are, without any intendment, regardless of the consequences. As per the ratio of this judgment also we cannot sanction a refund against the explicit provisions. In view of the above, the appeal filed by the Revenue is allowed and the impugned order is set aside.

(Order pronounced on 12.06.2020 in open court)

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

CESTAT HYDERABAD

M/S BIOMAX LIFE SCIENCES LTD

VERSUS

**COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX,
HYDERABAD-IV**

**Central Excise Appeal No. 25 of 2012, 27333 of 2013, 20088 of 2014,
20772 of 2014, 30952 of 2016, 30953 of 2016
FINAL ORDER No.30911-30916/2020**

Dated: - 22 July 2020

Mr Anil Choudhary, Member(Judicial)

Mr. P. Venkata Subba Rao, Member (Technical)

Mr. Vipin Verma Adv for the Appellant

Ms. Sailaja Kumari, A.R. for the Respondent.

These six appeals involve the same issue and hence are being disposed of together. Appeal No. 25/2012 is challenging order-in-original No. 32/2011 dated 11/12/2011 passed by the Commissioner of Central Excise and it covers the period April 2007 to February 2011. For the subsequent periods, show-cause notices were issued which were adjudicated by the Joint Commissioner/Additional Commissioner and appeals against them were decided by the Commissioner (Appeals) against the assessee. The remaining five appeals are against these orders of Commissioner (Appeals) The details of these appeals are as follows:

AppealNo.	E/25/12	E/27333/13	E/20088/14	E/20772/14	E/30953/16	E/30952/16
OIA No & Date		33/2013(H- IV)CE dt30.03.2013	70/2013(H- IV)CE dt 11.09.2013	118/2013(H- IV)CE dt 21.11.2013	Hyd.Cex- 004- 006&007-16- 17-CE dt 29.04.2016	Hyd-Cex- 004- 006&007-16- 17-CE dt 29.04.2016
OIO No. & Date	32/2011 dt 11.10.2011	74/2012-C.Ex dt 31.08.2012	77/2013- Adjn(ADC)C.Ex Dt. 31.07.2013	107/2013(ADC) C.Ex dt 31.07.2013	14/2014- Adjn(ADC) C.Ex Dt 31.01.2014	18/2014-15- Adjn(JC) C.Ex Dt 05.02.2015
Period	April 2007 to February 2011	March 2011 to January 2012	February 2012 to September 2012	October 2012 to March 2013	April 2013 to October 2013	November 2013 to April 2014
SCN No. & Date	32/2010 dt 09.04.2010	O.R. No. 66/2012- Adjn.CE(ADC) dt 03.04.2012	O.R. No. 318/2012 dt 27.12.2012	O.R. No. 110/2013-Adjn (ADC)CE Dt 05.06.2013	O.R. No. 252/2013- Adjn(ADC) C.Ex dt 16.12.2013	O.R. No 151/2014- Adnj(ADC) CE dt 26.06.2014

Amount involved	₹ 1,83,22,191/- Along with interest and equal penalty	Aloevera juice & Powder ₹ 12,05,553/- Amla juice & Powder ₹ 6,18,050/- Along with interest and penalty of ₹ 20,000/-	Aloevera juice & Powder ₹ 31,28,850/- Amla juice & Powder ₹ 6,65,122/- Along with interest and penalty of ₹ 50,000/-	Aloevera juice & Powder ₹ 28,28,810/- Along with interest and penalty of Rs 50,000/-	Aloevera juice & Powder ₹ 43,00,506/- Amla juice & Powder ₹ 16,629/- Along with interest and penalty of Rs 10,000/-	Aloevera juice & Powder ₹ 18,86,903/- Along with interest and penalty of Rs 10,000/-
Demand Barred by limitation	Upto February 2009					
Issue Involved	Classification of aloevera juice & aloevera powder	Classification of aloevera and amla in juice and powder form	Classification of aloevera and amla in juice and powder form	Classification of aloevera juice & Aloevera powder	Classification of aloevera and amla in juice and powder form	Classification of aloevera juice & aloevera powder

2.The appellants manufacture Aloe Vera Juice and Aloe vera powder from Aloe vera plant and Amla juice and Amla powder from amla fruit. They registered with central excise department and have been filing ER-I returns with the department, as required. Initially they classified their products under Chapter 6 of the Central Excise Tariff. A show- cause notice dated 09.04.2010 was issued to them under Section 11A invoking extended period of limitation proposing to reject the classification of the products under Chapter 6 of the Central Excise Tariff and instead proposing to classify them under Chapter 13 and accordingly demanded differential duty along with interest. It was also proposed to impose a penalty equal to the differential duty upon the appellant. Subsequent demands are periodical demands which also confirmed differential duty along with interest and imposed penalties upon the appellant. The issues which fall for consideration in these appeals are:

- (i) whether the Aloe Vera juice, Aloe Vera powder, amla juice and amla powder manufactured by the appellant are classifiable under chapter 6 as originally classified by the appellant or under Chapter Heading 13021919 as confirmed in the impugned order or under Chapter Heading 20098990 as now claimed by the appellant.
- (ii) Whether differential duty along with interest is recoverable from the appellant.
- (iii) Whether there are sufficient grounds to invoke extended period of limitation in the demands made under Section 11A in respect of Appeal No. E/25/2012.
- (iv) Whether interest is chargeable on the duty demanded.
- (v) Whether penalties are imposable on the appellant under Section 11AC of Central Excise Act, 1944 and Rules 25 of Central Excise Rules 2002.

3.Before proceeding further, it would be profitable to review, in brief, the relevant legal provisions. Central Excise duty is levied and collected as per Section 3 of the Central Excise Act, 1944 on 'excisable goods' manufactured or produced in India at the rates set forth in the Schedule to the Central Excise

tariff Act, 1985 (Central Excise Tariff, for brief) in 'such manner as may be prescribed' and this prescription was done by way of Central Excise Rules, 2002.

Charge of excise duty and responsibility of the assessee to assess and pay duty and file returns

4. Although the charge of the duty is on the 'goods' and therefore its burden gets passed on along with the goods from manufacturer to distributor, wholesaler, retailer and so on till the last consumer of the goods, but the Central Excise Rules place the onus of assessing the duty and paying it on the manufacturer or producer and penalties have been prescribed for contraventions. These Rules require the manufacturer to get registered (Rule 9), maintain daily stock account (Rule 10), not remove goods from the factory except on an invoice (Rule 11), self-assess the duty payable (Rule 6) and pay the duty (Rule 8) by the 6th of the following month and file Returns (Rule 12) in the prescribed form within ten days of the close of the month.

Exemptions from payment of duty

5. Section 5A of the Central Excise Act empowers the Central Government to grant exemptions from payment of duty, which could be full or partial and conditional or unconditional. Unconditional exemptions are available to all while conditional exemptions are available to only those who fulfil the conditions. Thus, the amount of central excise duty leviable on the goods depends on under which heading of the Central Excise Tariff the goods fall and the corresponding rate of duty in the tariff read with any exemption notifications that may be applicable.

Classification of goods

6. The most important point of dispute in these appeals is the classification of the goods under the Central Excise Tariff. Unlike its predecessors, this tariff is based on the internationally accepted Harmonised System of Nomenclature (HSN)- a system which classifies every conceivable type of goods including plants and animals in a systematic manner. HSN, as well as the Central Excise Tariff are divided into Sections and Chapters within each Section. The scope of each section including specific inclusions and exclusions are spelt out in the Section notes of that section. Similarly, the scope of each Chapter including specific inclusions and exclusions are spelt out in the Chapter notes of that chapter. The Chapters are given a two digit numbers and within each chapter, tariff headings of the goods are given in four digits and further into six digit sub-headings. Although the Central Excise Tariff is based on the HSN, it is not exactly identical and some modifications are made to suit the purpose of the tariff.

7. Despite the systematic classification of the goods and the Section notes and Chapter notes, there could be ambiguity as to which of the two competing entries of the tariff is the correct classification of the goods. General Rules of Interpretation of the tariff help answer such questions.

Valuation of goods for calculating excise duty in case the duty was not paid and also not charged by the assessee from the buyer

8. If the tariff prescribes, as it does in most cases, duty on ad valorem basis, the value to be reckoned for calculating the duty shall, as per Section 4 of the Act, be the transaction value where the price is the sole consideration for sale. Special provisions have been made for cases where there is no sale or where price is not the sole consideration for sale or where the transactions are between related persons. In these cases, there is no dispute about the transaction value. Usually, the manufacturer bills the buyer for the sale price of the goods and adds the excise duty payable to it and the sales tax payable on the cost plus excise duty (since sales takes place after the manufacture the same sequence is followed while invoicing). Thus, the buyer of the goods

shoulders the burden of the excise duty paid by the manufacturer. A question which arises is where the goods were sold by the manufacturer without paying any excise duty and without billing his buyer for it as well and thereafter a demand is confirmed holding that the manufacturer is liable to pay duty on the goods which were so removed, on what value should the duty be reckoned. Through a series of judicial decisions, it has been held that in such cases, the amount paid by the buyer as the price of the goods must be taken as cum-duty value and the price of the goods reckoned and the duty calculated accordingly. For instance, if the goods are priced at ₹ 110 and the duty payable is 10%, the assessable value of the goods should be taken as ₹ 100 and the duty as ₹ 10 thus bringing the total to ₹ 110 which has been paid by the buyer. This has come to be called commonly as 'cum duty benefit' and has been given even in cases where the goods were clandestinely removed.

Recovery of short paid duty and refund of duty paid in excess

9. If the duty is not levied, short levied, not paid, short paid or erroneously refunded, Section 11A of the Act provides for a mechanism of issuing a Show Cause Notice and adjudicating such matters. Conversely, if excess duty is paid, Section 11B enables the assessee (or some other person who may have borne the burden of the duty) to claim refunds. Time limits have been set out both for the department to issue an SCN proposing a demand of differential duty and for the claimant to claim refund. A demand under Section 11A can be raised by the Revenue only within one year. However, if the non-levy, short levy, non-payment, short payment or erroneous refund is by reason of (a) fraud; (b) collusion; (c) wilful misstatement; (d) suppression of facts; or (e) contravention of any provisions of the Act or the rules made thereunder with an intent to evade payment of duty, the demand under Section 11A can be made within five years from the relevant date.

Interest for short paid duty

10. Interest is also payable under Section 11AB on the amount so short paid.

Penalties

11. If the short levy, non-levy, short payment or non payment is on account of the aforesaid fraud, collusion, wilful misstatement or suppression of facts or contravention of any provisions with an intent to evade payment of duty, a penalty equal to the amount of duty evaded is leviable under Section 11AC of the Act.

12. Further, subject to the aforesaid provisions of Section 11AC, under Rule 25 of the Central Excise Rules if the manufacturer:

- a) Removes any excisable goods in contravention of any of the provisions of the Rules or notifications issued under the Rules;
- b) Does not account for any excisable goods produced or manufactured or stored by him;
- c) Engages in the manufacture, production or storage of any excisable goods without having applied for registration certificate required under section of the Act; or
- d) Contravenes any of the provisions of the Rules or notification issued under the rules with an intent to evade payment of duty,

then all such goods are liable to confiscation and the assessee is liable to penalty.

13. In the impugned order of Appeal no. 25/2012, penalties have been imposed both under both Section 11AC of the Central Excise Act and under Rule 25 of Central Excise Rules. In the impugned orders pertaining to the

remaining appeals, penalty has been imposed under Rule 25 only.

CENVAT Credit

14. The last relevant factor to this case is the CENVAT credit which enables the manufacturer, subject to the Cenvat Credit Rules, 2004, to take credit of the excise duty paid on the inputs and service tax paid on the input services which were used in the manufacture of the goods and use it to pay the excise duty. If no duty is payable on the final product, no CENVAT credit is admissible on such inputs and input services but if duty is payable, the manufacturer can take credit as per the Rules.

15. Initially, the appellant classified their products under Chapter 6 of the Central Excise Tariff which covers live trees and plants, bulbs, roots, cut flowers and ornamental flowers and ornamental foliage. The show-cause notice proposed to classify their products under Central Excise Tariff Heading 13021919. During the adjudication proceedings, the appellants conceded before the adjudicating authority that their products do not merit classification under Chapter 6. Instead, they claimed that they are classifiable under Chapter 20 of the tariff being in the nature of fruit juices and not under Chapter 13 as extracts. The appellant continues to maintain this position. Therefore, the question of classification under Chapter 6 is not a point of dispute before us. The competing headings for classification are Chapter heading 13021919 (alleged by the Revenue) and Chapter heading 2009 (claimed by the assessee).

16. According to the appellant aloe plant has an outer rind and a yellow bitter liquid just inside it known as aloe latex. Inside this latex is the inner leaf juice. The Central Excise Tariff Heading 13021919 is applicable only to the aloe latex which is separately extracted and not to the aloe juice which they are manufacturing. They explained the process which they follow for manufacture as follows:-

Step 1: The aloe vera leaves are sorted out manually from foreign matters, damaged portions of the leaves are separated.

Step 2: Clean the Aloe vera leaves and by decontamination in washing conveyer to remove the mud and surface adhering material

Step 3: Thereafter leaves are kept in chlorine water to remove bacterial or fungal infections present in the leaves. Step 4: Chlorine water treated leaves are transferred to the washing conveyer to spray the water for dechlorination.

Step 5: After the leaves are finally cleaned, leaves are transferred on the elevated conveyer for crushing the cleaned aloe vera leaves.

Step 6: Crushed the whole leaves in fruit mill.

Step 7: The crushed material is sent for filtration into GYRO screen to separate the pulp and juice (called as first digestion juice).

Step 8: Take pulp from the GYRO and do 2nd digestion with water, after digestion separate the pulp and juice using GYRO screen.

Step 9: Mix the first and second digestion juices passed through the clarifier to remove the sludge material and to get the clear juice.

Step 10: Give carbon treatment to clarified juice to remove the aloin content.

Step 11: After carbon treatments filter the juice and sent for HPL analysis to analyze the aloin content, if the analysis report is NMT 1 only will go to RO for concentration.

Step 12: The juice [filtrate from the above carbon treatment filtration] is passed through the reverse osmosis filtration (RO) where all the juice and water is separated.

Step 13: After removal water we will get concentrated juice. Step 14: Spray dry

the concentrated juice to make powder.

Step 15: Mill the material to make fine powder, sift the material, blend the powder and pack the material. Thus they are not extracting only the latex part of the plant but are extracting juice from the entire leaf which can be consumed as aloe juice. They also spray dry the concentrated juice to make it into aloe vera powder. As per the explanatory notes to HSN of Chapter 13, the saps and extracts under Chapter Heading 1302 include inter alia, aloes, a thickened sap with a very bitter taste, obtained from several varieties of plants with the same name (lillace family). The learned counsel would argue that if the intention of the classification was to cover all forms of aloe vera juice, there was no need to include only the yellow bitter sap. Therefore, they are clearly excluded by Chapter Heading 1302. On the other hand, he would argue that Chapter Heading 2009 includes fruit juices and vegetable juices unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter. Nothing in the Chapter Notes to Chapter 20 indicate that this Chapter excludes aloe vera juice or amla juice. There can be no dispute that both the amla and aloe vera are vegetables and therefore their juices must be covered as vegetable juices under Chapter 2009.

17. Learned counsel would also argue that even if it is accepted for the sake of argument that both chapter 13 and Chapter 20 may cover the products manufactured by them, as per General Rule of Interpretation 3(a), the heading which gives a more specific description should be preferred over the one which gives a general description. He would submit that Chapter Heading 13021919 deals with extracts. Therefore, it is a more general description and Chapter Heading 2009 is a more specific description which covers juices which must prevail. Further, as per General Rule of Interpretation 3(c), if the goods cannot be classified with reference to Rules 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration. He would, therefore, argue that even as per this Rule 3(c), their products should fall under Chapter 20. He relies on the decision in the case of *Forever Living Health Vs CCE Mumbai* [2006(193) ELT 45 (Tri-Mum)] in which it was decided that aloe vera gel, aloe vera nectar and aloe vera freedom were held classifiable under 2009.90. He also relied upon the case law of *Commissioner of Commercial Taxes Lucknow Vs Forever Living Imports (I) Ltd* [2018(9) GSTL 11(A11)] upheld by the Hon'ble Supreme Court in 2018(9) GSTL J39(SC) in which it was held that aloe vera juice was classifiable under Entry No. 103 of Schedule-II of U.P. Value Added Tax Act 2008.

18. On the question of invocation of extended period of limitation, learned counsel would submit that there is no dispute that they had obtained registration, declared the nature of their product correctly in their ER-I returns and claimed the classification which they deemed appropriate at that time and paid duty accordingly. No element of fraud or collusion or wilful misstatement or suppression of facts was brought out in the show-cause notice or established in the impugned order to justify the invocation of extended period of limitation. He would draw the attention of the Bench to para 19 of the order-in-original 32/2011 passed by the learned Commissioner in which he records "the assesses have submitted in their reply that extended period of limitation is not invocable as all facts were in the knowledge of the department and that they have filed the returns regularly. The contention of the assessee is not acceptable inasmuch as they failed to correctly assess the duty payable on the impugned goods and have wrongly assessed the goods to 'Nil' rate of duty under Chapter 6 of the Central Excise Tariff Act 1985 whereas they attract duty and rightly merit classification under Chapter 13 of the Central Excise Tariff Act 1983 and as such the extended period of demand of duty is rightly invocable". He would submit that from the above, it is evident that the only ground on which extended period of limitation has been invoked in the impugned order is that they have classified the goods under a wrong heading. This is not a ground on which extended period of limitation can be invoked under Section 11A.

19. On the question of interest under Section 11AB, he would submit that

since the entire demand itself is not sustainable, interest is also not payable. On the question of penalty under Section 11AC, he would argue that no penalty is imposable upon them even if the matter is decided against them as it is only a question of classification and the dispute is whether the department's classification is correct or their classification. On the question of penalty under Rule 25, he would argue that this is not imposable as none of the elements mentioned in this Rule are established and there is also no order of confiscation.

20. If the matter is decided against them on merits, he would submit that they would be eligible to CENVAT credit on inputs and input services which may be allowed to them. Further, he would submit that since they have sold the goods without charging any excise duty thereon, the cum tax benefit treating the sale price as cum-duty price will be available to them which may also be allowed.

21. Per contra, learned A.R. supports the impugned order. He would submit that the products manufactured by the appellant are rightly classifiable under Chapter Heading 1302 and not under 2009 as claimed by the appellant. He would submit that it is not in dispute that the appellant has manufactured aloe vera juice, aloe vera powder, amla juice and amla powder by extracting them from the aloe vera plants and amla fruit. These are squarely covered under Chapter Heading 1302 and not as vegetable juices under 2009. A perusal of the juices covered under 2009 shows that juices such as oranges, grape fruit juice, pineapple juice, tomato juice, apple juice, mango juice etc. are covered in this Heading. Aloe vera juice and amla juice and aloe vera powder and amla powder are not in this category. Countering the argument of the learned counsel that only yellow latex which is a yellowish layer in aloe vera gets covered under 1309, he would submit that the explanatory notes to HSN Chapter 13 relied upon by the appellant only clarifies that certain saps and extracts are included in this heading. It does not exclude other saps and extracts. While the thick aloe sap is specifically included, aloe juice manufactured by the appellant is not excluded from this Chapter. A perusal of the process of manufacture of the products presented by the appellant themselves shows that their products are manufactured by extracting from plants and fruit, thus cannot be treated as fruit juices and vegetable juices meant for consumption which are classifiable under 2009. Regarding the case law of Forever Living Health (supra) relied upon by the appellant, he would submit that the products in that case were different and the issue in question was different as well. The department in that case wanted to classify the products as food supplements under Chapter 16 while the appellant claimed the classification under Chapter 20. Therefore, the Tribunal had only to decide as to which is a better classification between the two and it was decided that aloe vera products manufactured by that appellant in that case were not food supplements. Therefore, the ratio of that classification should not apply to the present case as neither the products are identical nor is the question of classification. As regards the case law of Commissioner of Commercial Taxes Vs Forever Living (supra) decided by the Hon'ble High Court of Allahabad and upheld by the Hon'ble Apex Court, he would submit that these case laws are irrelevant to the present case as the dispute in these cases was with reference to classification under Entry No. 103 of Schedule-II of U.P. Value Added Tax Act 2008. The present case is on classification of products under CETA which is based on HSN and which has no similarity to U.P. Value Added Tax Act Schedule-II. On the question of invoking extended period of limitation, he would argue that it was for the appellant to correctly classify their products and pay appropriate amount of duty. They classified their products under Chapter-6 which pertains to live plants even though the appellants have themselves admitted even before the adjudicating authority that their products do not merit classification under Chapter-6. Therefore, the intention to evade payment of duty is evident and accordingly the extended period of limitation has been correctly invoked. He also supports the demand of interest on the differential duty and imposition of penalties in the impugned orders.

22. After hearing both sides, both sides were given 10 days to make additional submissions. Learned counsel for the appellant made additional submissions on 16.03.2020 which reiterated the aforesaid arguments.

23. We have considered the arguments on both sides and perused the records. Coming to the first question of classification, there is no dispute at this stage that the original classification by the appellant under Chapter 6 was not correct and the dispute now is between Chapter 13 and Chapter 20. Chapter 13 deals with lac, gums, resins and other vegetable saps and extracts. Chapter note 1 specifically shows that Chapter Heading 1302 applies, inter alia, to liquorice extract and extract of pyrethrum, extract of hops and extract of aloes. This note also excludes certain types of products to which this heading does not apply. The exclusions in this chapter note do not cover aloe vera juice, aloe vera powder, amla juice and amla powder. The exclusion also does not cover specifically any product which can also be covered under Chapter 20. It is pertinent to note that this Chapter or Chapter Heading 1302 do not confine themselves to juices. Other forms of extracts are also covered in this chapter. A plain reading of Chapter heading 1302 shows that this covers the vegetable saps and extracts, pectic substances and pectates agar agar and other mucilages and thickeners, whether or not modified, derived from vegetable products. Evidently, this chapter covers products which are either in liquid form or otherwise. There cannot be any dispute that both amla and aloe vera are plants and the juices and powders which are extracted from them can therefore be clearly covered under Chapter Heading 1302. On the other hand, Chapter Notes to Chapter 20 also do not exclude any products which may fall under Chapter 13. Chapter Heading 2009 clearly covers fruit juices and vegetable juices, unfermented and not containing added spirit whether or not containing added sugar or sweetening matter. Therefore, it is equally logical to classify the aloe vera juice and amla juice under Chapter Heading 2009 as claimed by the appellant. However, we find no ground to call the powders manufactured by the appellant as juices as powder is a solid and the juice is a liquid. There is nothing in the description of Chapter Heading 2009 to suggest that it also includes powders. Therefore, we find that the aloe vera powder and amla powder manufactured by the appellant cannot be classified under Chapter Heading 2009.

23.1 Learned counsel argued before us that the vegetable juice under 2009 is a more specific heading than the vegetable extracts under Chapter Heading 1302. We do not find any reason to hold that one is more specific description than the other. We, therefore, find that as far as the aloe vera juice and amla juice are concerned, both chapter heading 1302 and Chapter Heading 2009 equally merit consideration and therefore Chapter Heading 2009 being the last in the numerical order prevails in terms of General Rules of Interpretation Rule 3(c). Therefore, aloe vera juice and amla juice are classifiable under Central Excise Tariff Heading 2009 as claimed by the appellant.

24. As far as the aloe vera powder and amla powder are concerned, as they are not juices, they are not classifiable under Tariff Heading 2009. Being extracts of vegetables, they are classifiable under 1302.

25. In view of the above, we find that the demand on aloe vera juice and amla juice for the entire period is to be calculated reckoning their classification under Chapter 20 and the demand of duty for aloe vera powder and amla powder needs to be upheld.

26. As far as the question of limitation is concerned, it is evident from the order of the adjudicating authority that the only ground on which the extended period of limitation has been invoked and upheld in this case is that the appellant has wrongly classified the products in their ER-1 returns and paid less duty. We find that in terms of Section 11A of the Central Excise Act, extended period of limitation can be invoked only in cases of fraud, collusion, wilful misstatement, suppression of facts or violation of Act or Rules with an intention to evade payment of duty. Claiming wrong classification cannot be the ground for invoking extended period of limitation, therefore, the entire demand

beyond normal period of limitation needs to be set aside and we do so.

27. Learned counsel for the appellant has pleaded that cum duty benefit and also credit on inputs if any applicable be given to them. We find in favour of the appellant on this ground. The duty therefore needs to be calculated accordingly.

28. As far as the interest is concerned, once the duty is payable to some extent, interest on that amount has to be paid as per law and this is not a matter of discretion.

29. As far as the penalties imposed upon the appellant are concerned, we find that no penalty can be imposed under Section 11AC as there is no element of fraud, collusion wilful misstatement or suppression of facts or violation of the provisions of the Act or Rules with an intent to evade payment of duty. No penalty is imposable upon the appellant under Rule 25 also as the assessee has not violated any Rules and it is only a matter of difference of opinion regarding classification by the assessee and by the department. Therefore all penalties need to be set aside and we do so.

30. In view of the above, all appeals are disposed of as below:-

- 1) Aloe vera juice and amla juice are classifiable under 2009 being the later entry of the two headings equallymeriting consideration.
- 2) Aloe vera powder and amla powder are classifiable under 1309.
- 3) Extended period of limitation cannot be invoked and the demand beyond the normal period is set aside.
- 4) The demand shall be recomputed taking the sale price as cum-duty price and extending the benefit ofCENVAT credit on inputs and input services if any, available to the appellant as per CENVAT Credit Rules.
- 5) Interest, as applicable, on the demands is upheld.
- 6) All penalties are set aside as the issue is only one of interpretation.
- 7) All appeals are remanded to the original authority for the limited purpose of calculation of demand asabove.

(Order pronounced in open court on 22/07/2020)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CESTAT HYDERABAD**

**M/S. VISHNU CHEMICALS LTD, M.V. RAMANA MURTHY, CENTRAL EXCISE
INCHARGE AND CH.KRISHNA MURTHY, MANAGING DIRECTOR
VERSUS
COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX, HYDERABAD
- I**

**Excise Appeal No. E/77, 78 & 94/2007
Final Order No. - A/30707-30709/2019
Dated: - 18 July 2019**

MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)
Shri K. Nagaraja Rao, Advocate for the Appellant.
Shri N. Bhanu Kiran, Authorized Representative for the Respondent.

These appeals have been filed by the appellants against the same impugned order and hence are being disposed of together.

2. Heard both sides and perused the records. The facts of the case in brief are that the appellant M/s Vishnu Chemicals Ltd (VCL) is engaged in manufacture of Sodium Bichromate (SB) falling under Chapter heading 2841.10, Basic Chromium Sulphate (BSS) falling under heading 2833.00 and Yellow Sodium Sulphate (YSS) falling under heading 2833.00. They have been paying Central Excise duty on these products. On receiving information that they are not discharging the duty liability on the full value of their clearances, the officers of Central Excise searched the premises and took stock and found that there was shortage of 5.060 MTs of Sodium Bichromate Mother Liquor (SBML) in the factory on which the duty liability comes to ₹ 28,567/-. Further, they conducted detailed investigation and recorded statements of various persons and seized private records which showed removal of goods without showing them in the Central Excise records and paying Central Excise duty. After analysing all these records, they issued a Show Cause Notice OR No. 54/99-Adjn. dated 10.04.2000 demanding the following duty from VCL.

Annexure	Product	Quantity (MT)	Period	Duty
A	SBML	33.555	4/1997 to 6/1998	2,16,007
B	SB as YSS	59.5	7/1997 to 6/1998	3,87,351
C	SB as BCS	12.95 SB & 12.5 of BCS	3, 9 & 10/1997	1,36,750
D	SB, SBML & BCS	11.595 SB, 8.598 of SBML & 1 of BCS	June 1998	1,52,624
E	SB	172.064	8/1997, Jan to May 1998	12,69,832
-	Shortage SBML	5.060	Panchanama	28,567
				21,91,131

It was also proposed to impose penalties on the other appellants.

3. The period of dispute in this case was March, 1997 to June, 1998. The appellants submitted their replies to the adjudicating authority and sought cross-examination of some persons. After following due process, but without allowing cross-examination, the OIO No. 04/2002 dated 25.01.2002 was passed confirming the demand of duty with equal amount of penalty, interest as well as penalties under Rule 173Q upon M/s VCL and personal penalty of ₹ 50,000/- under Rule 209A on the Managing

Director, Shri CH. Krishna Murthy, a penalty under Rule 209A of ₹ 10,000/- on Shri M.V. Murali Krishna, Marketing Manager and penalty of ₹ 2,000/- on Shri M.V. Ramana Murthy, Central Excise Incharge of M/s VCL.

4. Aggrieved by the order, the appellants appealed to the Tribunal who, vide Final Order No. 961- 963/2002 dated 24.07.2002, remanded the matter to the adjudicating authority directing him to allow cross-examination as sought by the appellants. The department's appeal to the Hon'ble High Court against this order of the Tribunal was dismissed on 07.07.2003. On 31.07.2006, the cross-examination of Shri Krishnaiah, Shri Ramana Murthy, Shri Vinay Mehta, Shri Krishna R Latwade and Shri Surender Jhawar were allowed. The appellants also gave written submissions to the adjudicating authority on 24.08.2006. Thereafter the adjudicating authority vide the impugned Order-in-Original No. 18/2006 dated 24.08.2006:

- a) Confirmed the demand of ₹ 21,91,131/- under section 11A upon M/s VCL along with interest under section 11AB.
- b) Imposed a penalty equal to the amount of duty under section 11AC upon M/s VCL.
- c) Imposed penalty of ₹ 10,00,000/- under Rule 173Q upon M/s VCL.
- d) Imposed penalty of ₹ 1,00,000/- under Rule 209A on Shri CH. Krishna Murthy, Managing Director of M/s VCL.
- e) Imposed penalty of ₹ 10,000/- on Shri Murali Krishna, Marketing Manager of M/s VCL.
- f) Imposed penalty of ₹ 5,000/- on Shri M.V. Ramana Murthy, Central Excise Incharge of M/s VCL.

5. Aggrieved by this impugned order the present appeals have been filed by M/s VCL, Shri M.V. Ramana Murthy and Shri CH. Krishna Murthy. Learned Consultant for the appellants takes the bench through the chronology of events and summary of demands raised. He submits that the SCN has raised a demand of ₹ 28,567/- on shortage of SBML found during the stock taking as recorded in the panchanama. He submits that the remaining amount of the demand is based on the analysis of various documents which have been summarized in Annexures A to E attached to the SCN. These are as follows.

- 1) Annexure-A - the details of SBML cleared in excess over the invoice quantities during the years 1997-98 and 1998-99. The total amount of differential duty demanded on this differential quantity was ₹ 2,16,007/-.
- 2) Annexure-B - the details of clearances of SB made in the guise of YSS during 1997-98 and 1998-99. The differential duty demanded on this count is ₹ 3,87,351/-.

- 3) Annexure-C - the details of the BCS cleared without payment of duty and without any bill. The differential duty demanded on this head is ₹ 1,36,750/-.
- 4) Annexure-D - details of actual production of SB, SBML and YSS as per the recovered notebook during the period 01.06.1998 to 15.06.1998. The differential quantity, the value and the duty on this count were as follows.

DETAILS OF DIFFERENTIAL QUANTITIES BETWEEN NOTE BOOK AND RG-1

PRODUCT	DIFFERENTIAL	RATE PMT	VALUE	DUTY
	QUANTITY	(Rs.)	(Rs.)	(Rs.)
SBML	8,598	41,000/-	3,52,618/-	63,453/-
SB	11,595	41,000/-	4,75,395/-	85,571/-
BCS	1,000	20,000/-	20,000/-	3,600/-

		TOTAL DUTY		1,52,824/-
	QUANTITY	(Rs.)	(Rs.)	(Rs.)
SBML	8,598	41,000/-	3,52,618/-	63,453/-
SB	11,595	41,000/-	4,75,395/-	85,571/-
BCS	1,000	20,000/-	20,000/-	3,600/-
		TOTAL DUTY		1,52,824/-

5) Annexure-E is the details of actual production of SB & YSS as per the labour contractor reports. He submits that on this count the demand was raised on the difference between RG-1 quantities and quantities indicated as produced in the labour contractor reports. However, the actual amount of differential duty on this count has not been indicated in the Annexure-E. However, the learned Commissioner in the impugned order calculated this duty as ₹ 12,69,832/- and confirmed the demand accordingly.

6. Learned counsel fairly submits that the demands were raised based on the investigation conducted by the department and various notes and other records recovered from the factory by the departmental officers. These have been collated into five annexures to the SCN as indicated above. When questioned, the company officers have confirmed in their statements that the clearances in Annexure-A, B & C were unrecorded clearances. These statements have not been retracted by the officers of the company so far. However, as far as Annexure-D and E are concerned, he argued that Annexure-D is based on the difference between RG-1 quantity and the quantity recorded in a private note book maintained in the factory and the differential duty has been demanded. On this issue, he submits that even if it is presumed that there was excess production which was not shown in the RG-1, there is no evidence that goods so manufactured have been removed and in the absence of evidence of removal the demand does not sustain. He, further, argues that this demand of goods based on the presumption that there was excess unrecorded production, must be set off against any alleged unrecorded clearances in Annexure-A, B & C. The logic for this is simple. If there is allegation that there was unrecorded clearance of goods, such production must have come from unrecorded manufacture or recorded manufacture. If the clearance was on account of recorded manufacture, the same would have been reflected as shortage during stocktaking. If it was from unrecorded manufacture, a separate demand cannot be raised first, on the ground that there was unrecorded manufacture and second, again on the ground that unrecorded goods have been cleared. As far as Annexure-E is concerned, he would submit that this is based on note book which was maintained for the purpose of making payments to the labour contractor, Shri Ganga for the services rendered by him. The signature of Shri Ganga was not there and during cross-examination it was confirmed that he was an uneducated and cannot read or write. The authenticity of this annexure has not been established by the department. Further, the alleged clandestinely manufactured products must also be set off against the alleged clandestinely removed goods and there cannot be a charge of duty twice – first on the manufacture and again on its removal. He would, therefore, urge that as far as Annexure-E is concerned, they do not subscribe to the authenticity of the records and the department has not been able to establish the same. In view of the above, he pleads that their appeals must be allowed and the impugned order may be set aside.

7. Learned departmental representative reiterates the findings of the OIO. He submits that the assessee was allowed an opportunity to cross-examine the person whose statements were referred to while passing the OIO and four persons appeared for cross-examination on 31.07.2006 and retracted the statements given by them in 1998. The persons are (a) Shri Surender Jhawar, Proprietor of M/s Piyush Chemicals Ltd, (b) Shri Vinay Mehta, Proprietor of M/s Delight Enterprises, (3) Shri Krishna R

Latwade, Partner of M/s Krishna Chemicals and (4) Shri K. Krishnaiah, Managing Partner of M/s Kalyani Chemicals Ltd. During the entire intervening period of eight years, these persons never approached the department or retracted their statements. All these four persons are the alleged recipients of the clandestinely removed goods. The incriminating documents were recovered from the factory on 16.06.1998 under a Panchanama and hence the entries made therein must be considered as substantial evidence and the case is built up based on the differences noticed in these documents and statutory documents such as RG-1 returns and invoices. Further, the Chartered Engineer's report submitted by the appellant was also considered by the adjudicating authority and a detailed perusal of the said report was made in Para 7.5 of the OIO. The efficiency of the plant at 92.5% was also taken into consideration while arriving at the different products manufactured by the assessee. Even after taking the Chartered Engineer's certificate into account, there were still differences between the production particulars and the records in RG-1 which could not be explained by the assessee and hence the demands were confirmed. He would submit that production figures were reckoned by taking the molecular weights of the raw materials and final products through stoichiometric calculations. These calculations show what should be the production based on pure chemical equations. The actual production would be less depending upon the efficiency of the plant which factory has been brought out by the Chartered Engineer whose certificate was produced by the appellants themselves. Accordingly, the difference in production was worked out and the duty has been demanded and penalties have been imposed.

8. I have considered the arguments on both sides and perused the records. The SCN lists out the framework for raising the demand and imposing penalties. I do not find from the SCN any reliance on stoichiometric calculations or on the Chartered Engineer's certificate. In this regard, I reproduce Para 13 of the SCN which reads as follows.

"13. Reliance for issue of this notice is based on the following documents,-

- i. Panchanama dt.16.6.98 drawn at the factory premises of the assessees.*
- ii. Panchanama dt.16.6.98 drawn at the Regd./Admn office premises of the assessees.*
- iii. Statement dated 16.6.98 of Shri E.V. Koteswar Rao, Chemist.*
- iv. Statements of Shri M.V. Ramana Murthy, Central Excise Incharge given on 16.5.98, 14.8.98, 20.8.98 & 24.12.98.*
- v. Statements of Shri M.V. Murali Krishna, Marketing Manager given on 17.6.98, 4.8.98, 12.8.98, 22.8.98, 23.9.98, 26.9.98 & 11.12.98.*
- vi. Statement dated 18.6.98 of Shri D. Venkat Reddy, Partner M/s Kalyani Chemicals, Hyderabad.*
- vii. Letter dated 14.8.98 of Shri M.V. Murali Krishna, Marketing Manager.*
- viii. Statement dated 18.8.98 of Shri K. Krishnaiah, Managing Partner, M/s Kalyani Chemicals, Hyderabad.*
- ix. Statement dated 18.8.98 of Shri Md. Fazal Rahman, Managing Partner, M/s Chromochem, Hyderabad.*
- x. Letter dated 31.8.98 of Shri Md. Fazal Rahman, Managing Partner, M/s Chromochem, Hyderabad.*
- xi. Statements of Shri Ch. Krishna Murthy, Managing Director, M/s Vishnu Chemicals Pvt Ltd, Khazipalli given on 2.9.98 & 16.1.99.*
- xii. Statement dated 15.9.98 of Shri S. Ganga, Labour Contractor M/s Ganga Transport.*
- xiii. Statement dated 15.10.98 of Shri Vinay Mehta, Prop. Enterprises, Bombay.*
- xiv. Statement dated 26.12.98 of Shri Krishna R Latwade, Partner, M/s Krishna*

Chemicals, Ichalkaranji.

- xv. Letter dated 16.12.98 of Shri Aman Gupta, Prop. M/s Chem Enterprises, New Delhi.
- xvi. Statement dated 30.11.98 of Shri R.K. Mittal, Partner, M/s United Chemplast, New Delhi.
- xvii. Statement dated 21.12.98 of Shri Surender Jhawar, Prop. M/s Piyush Chemicals Ltd, Secunderabad.
- xviii. Statement dated 18.9.98 and 12.12.98 of Shri Kamleshbhai Manibhai Patel, Partner M/s RubiRed (I), Vapi.
- xix. A Notebook recovered vide Sl.No.5 of the Panchanama dt.16.6.98 drawn at the factory premises.
- xx. Scribbling pads in 11 Nos. recovered vide Sl.No.38 to 48 of the Annexure to the Panchanamadt.16.6.98 drawn at the Regd./Admn. Office of M/s Vishnu Chemicals Pvt Ltd, Hyderabad.
- xxi. Files recovered vide Sl.No. 4, 8 & 10 of the Annexure to the Panchanama dt.16.6.98 drawn at the Regd./Admn. Office, M/s Vishnu Chemicals Pvt Ltd, Hyderabad.
- xxii. Made up file recovered vide Sl.No.6 of the Annexure to the Panchanama dt.16.6.98 drawn at the factory premises.
- xxiii. RG-1 registers for the period 1196-97, 1997-98 & 1198-99.
- xxiv. Invoices raised during the relevant period."

9. As can be seen, the demand was raised based on the Panchanama, statements and the private records seized from the premises of the appellant as well as statements of the alleged buyers of the clandestinely removed products. All these have been summarized into Annexures-A to E enclosed to the SCN giving cross reference to Pg.Nos., File Nos. and Note book Nos., etc. As far as Annexure-A, B & C are concerned, learned counsel for the appellants fairly submits that these have been agreed to by the officers of the company in their statements and which have not been retracted so far. These are as follows.

- a) Annexure-A: Details of Sodium Bichromate Mother Liquor cleared in excess over the invoice quantities during the years 1997-98 & 1998-99.
- b) Annexure-B: Details of clearances of Sodium Bichromate made in the guise of Yellow Sodium Sulphate by M/s. Vishnu Chemicals Pvt Ltd during the year 1997-98 & 1998-99.
- c) Annexure-C: Details of Sodium Bichromate and Basic Chromium Sulphate cleared without payment of duty and without any bill.

10. All these pertain to alleged clandestine clearances of goods. As far as Annexure-D is concerned, he fairly submits that the notebook in this case was also seized from the premises of the factory and the differential duty was worked out. However, he submits that differential duty worked out as per this annexure alleging that there was excess unrecorded production which must be set off against demand of alleged excess unrecorded clearance as in Annexure-A, B & C. As far as Annexure-E is concerned, he submits that this was a notebook meant for payment to the labour contractor and it cannot form a sound basis for alleging that there was clandestine production and clandestine clearance of the goods. Therefore, the demand on this account is not sustainable.

11. This is a case of alleged clandestine removal of goods. Therefore, it is unthinkable that there will be official records of the clandestine manufacture and clandestine clearance. If these were recorded, they will no longer be clandestine. By their very nature, unrecorded production and clearance of goods can only be found based on evidence gathered during investigation such as stock taking, private records, private

notebooks, statements of persons concerned, their examination and cross-examination which will lead to conclusion whether there was a clandestine removal of goods and if so, to what extent. Private notebooks seized from the factory under panchanama during the course of investigation and their analysis, as supported by the statements of various persons in the factory, form a fairly sound basis for demanding duty on such clearance. These statements can be supported by the statements of alleged recipients of the clandestinely removed goods. Such statements were recorded in this case. After a gap of eight years, during cross-examination, four of them have retracted their statements. However, this can, at best, be said to be an afterthought. Any person who makes statement under duress or coercion will, at the earliest opportunity, retract the statement so made. The conduct of these persons does not instil confidence that they have not voluntarily given the statements. Nevertheless, even if the statements of the alleged recipients are ignored, as far as Annexure-A, B & C are concerned, the statements of the factory employees themselves also support the evidence of clandestine removal of the goods. Therefore, the demand to that extent needs to be sustained.

12. As far as the alleged clandestine production of goods is concerned, this is listed in Annexure-D and E of the SCN. Annexure-D deals with the differential production arrived at from the differences between the RG-1 and the private notebooks also seized from the factory of the manufacturer. Learned Counsel for the appellants submits that if this production is considered then the demand on this account needs to be set off against the alleged clandestine removal as listed in Annexure-A, B & C. I find considerable force in this argument. Even if the assessee is clandestinely manufacturing and removing the goods without accounting for the same in their Central Excise returns and registers, duty cannot be demanded first alleging that they have clandestinely manufactured the goods and again alleging that they have clandestinely removed the same. In fact, I find in the initial order of the adjudicating authority in 2002 that this set off was allowed and accordingly, the demand was confirmed for a much lower amount than was indicated in the SCN. In view of the above, I find that the demand raised under Annexure-D needs to be set off against demands alleging clandestine clearance for the same period under Annexure-A, B & C. As far as Annexure-E is concerned, this is based on labour contractor reports which are meant for paying amounts to the labour contractor, Shri S. Ganga. It is not clear as to who has prepared these records. Shri

S. Ganga himself states to be an uneducated person and is unable to support the statement as

representing the manufacture of the goods clandestinely removed during the period. Further, I find that there is no quantification of the demand in this annexure. For these reasons, I find demand in Annexure-E is not sustainable and needs to be set aside. In conclusion, the demands raised under Annexure-A, B & C to the SCN are upheld; demand under Annexure-D is upheld but the same needs to be set off against any demand on the ground of clandestine clearance in Annexure-A, B & C for the same period; demand based on the alleged clandestine production based on labour contractor reports in Annexure-E are not sustainable and are set aside; demand on shortage of SBML noticed during panchanama is upheld. Consequently, the demand of interest has to be recalculated and the penalty under section 11AC upon the appellants/assessee also needs to be recalculated. Considering the reduction in the demand, the penalty under Rule 173Q upon the assessee M/s VCL is reduced to 2,00,000/-; the personal penalty on Shri CH. Krishna Murthy, Managing Director of M/s VCL, under Rule 209A is reduced to 50,000/-; penalty on Shri M.V. Murali Krishna is reduced to 8,000/- and the penalty on Shri M.V. Ramana Murthy, Central Excise Incharge of M/s VCL is reduced to 2,000/-.

13. The appeals are remanded to original authority for the limited purpose of calculation as above. The appeal is disposed of as herein above.

(Order pronounced in the open court on 18.07.2019)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

CESTAT HYDERABAD

M/S NCL INDUSTRIES LTD.

VERSUS

COMMISSIONER OF CENTRAL TAX, GUNTUR – GST COMMISSIONERATE

Excise Appeal No. 30419 of 2018

FINAL ORDER No. A/30910/2020

Dated: - 14 July 2020

Mr. ANIL CHOUDARY, MEMBER (JUDICIAL)

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

Shri G. Prahlad, Advocate for the Appellant.

Shri B. Guna Ranjan & Shri C. Mallikarjun Reddy,

Superintendents for the Respondent

1. Heard both sides and perused the records.

2. The present appeal has been filed by the appellant against Order-in-Appeal No. GUN-EXCUS-000- APP-175-17-18, dated 31.01.2018.

3. After hearing both sides and perusing the records, we find that the short issue to be decided is in a case where goods (cement) is sold by the assessee to their customers on FOR destination basis, if the appellant can claim CENVAT credit on the outward transportation of goods from their premises to the buyers premises or otherwise. It is the case of the appellant that when they sell goods on FOR (buyer's premises) basis, the "place of removal" shifts to the buyer's premises as held by the Hon'ble Apex Court in the case of Roofit Industries [2015 (319) ELT 221 (SC)] as the sale takes place only at the buyer's premises. Therefore, they are entitled to the benefit of the CENVAT credit on the outward transportation of goods up to the buyer's premises. It is the case of the Revenue that the buyers' premises can never be the place of removal as has been decided by the Hon'ble Apex Court in the case of Ispat Industries [2015 (324) ELT 670 (SC)]. Therefore, no CENVAT credit is admissible on the outward transportation of goods from the assessee's premises to the buyer's premises even though the sale of goods is on FOR destination basis.

4. We find that an identical matter was before the Hon'ble Apex Court in the case of CCE and ST Vs Ultra Tech Cement [2018 (9) GSTL 337 (SC)]. It has been decided by the Hon'ble Apex Court that no CENVAT credit is admissible for transport of goods by the assessee to the buyer's premises.

5. Briefly, the appellant is a manufacturer of cement and also avails the benefit of CENVAT credit under CENVAT Credit Rules, 2004. CENVAT credit is available on the inputs and input services which are used in the manufacture of the product. Rule 2(l) of CENVAT Credit Rules, 2004 defines input service and it was amended w.e.f. 11.03.2008 as follows:

(l) "input service" means any service, -

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of the provider of output service or an office relating

to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal;

Prior to 01.03.2008 the words used in this definition were “outward transportation from the place of removal”. Thus upto 01.03.2008 all assessees were entitled to claim CENVAT credit on outward transportation of goods. After 01.03.2008 they were entitled to claim benefit of CENVAT credit only on goods transport agency service up to the place of removal and not beyond. The term “place of removal” is defined in Section 4 of Central Excise Act, 1944 as follows:

(c) “place of removal” means -

- (i) a factory or any other place or premises of production or manufacture of the excisable goods;
- (ii) a warehouse or any other place on premises wherein the excisable goods have been permitted to be deposited without 3[payment of duty;
- (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;] from where such goods are removed.

The same definition was introduced in CENVAT Credit Rules post 11.07.2014. The appellant’s appeal is on the following grounds:

- a) Service on outward transportation used by the appellant qualifies as input service in terms of the definition of input service
 - b) The value of services of outward transportation is included in the value of excisable goods and thus not allowing CENVAT credit thereon would be against the scheme of the CENVAT credit The “includes” part of the definition of the input service cannot restrict the “means” part of the definition
- c) CENVAT credit on outward transportation services is admissible as the sale is on FOR basis.

6. We find that this issue is no longer Res integra. It has been settled by the Hon’ble Apex Court in the case of Ultra Tech Cement (supra) and the issues were identical. In that case, the original adjudicating authority namely the Assistant Commissioner had denied the benefit of CENVAT credit on the outward transportation of the goods from the factory to the buyer’s premises when the sale was on FOR destination basis. The assessee challenged the order of the original authority and the Commissioner (Appeals), relying on the Board Circular dated 23.08.2007 has held that the appellant is entitled to the benefit of CENVAT credit on the outward transportation of goods up to the buyer’s premises. This order of the Commissioner (Appeals) was also upheld by the Hon’ble CESTAT, Bangalore and Hon’ble High Court of Karnataka. The approach of these courts has been held to be untenable by the Hon’ble Apex Court and it has been held that no CENVAT credit is admissible.

Paras 8, 9 and 13 of this judgment are as follows:

8. The aforesaid order of the Adjudicating Authority was upset by the Commissioner (Appeals) principally on the ground that the Board in its Circular dated August 23, 2007 had clarified the definition of ‘place of removal’ and the three conditions contained therein stood satisfied insofar as the case of the respondent is concerned, i.e. (i) regarding ownership of the goods till the delivery of the goods at the purchaser’s door step; (ii) seller bearing the risk of or loss or damage to the goods during transit to the destination and; (iii) freight charges to be integral part of the price of the goods. This approach of the Commissioner (Appeals) has been approved by the CESTAT as well as by the High Court. This was the main argument advanced by the learned counsel for the respondent supporting the judgment of the High

Court.

9. We are afraid that the aforesaid approach of the Courts below is clearly untenable for the following reasons :

13. The upshot of the aforesaid discussion would be to hold that Cenvat Credit on goods transport agency service availed for transport of goods from place of removal to buyer's premises was not admissible to the respondent. Accordingly, this appeal is allowed, judgment of the High Court is set aside and the Order-in-Original dated August 22, 2011 of the Assessing Officer is restored.

7. We further note that after the aforesaid judgment a review petition was filed by the assessee which was disposed of by the Hon'ble Apex Court with the following words:

"Delay condoned.

The instant Review Petition is filed against the order dated 1-2-2018 whereby the aforementioned appeal was allowed.

We have carefully gone through the Review Petition and the connected papers. We find no error much less apparent in the order impugned. The Review Petition is, accordingly, dismissed."

Thus, we find that after considering all aspects, in the original judgment, as well as in review petition, the Hon'ble Apex Court has laid down that where the goods are sold on FOR destination basis i.e., where the ownership of the goods gets transferred only at the buyer's premises also no CENVAT credit is admissible for transportation of goods to the buyer's premises.

8. Respectfully following the judgment of the Hon'ble Apex Court, we hold that no CENVAT credit is admissible to the appellant. Accordingly, the appeal is rejected.

(Order pronounced on 14.07.2020 in open court)

[Back](#)

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CESTAT HYDERABAD**

**HARIKA RESINS PVT LTD AND SAMA RAJASEKHAR
VERSUS
COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, GUNTUR**

**Excise Appeal No. E/386-387/2012
INTERIM ORDER No. 30117-30118/2020
Dated: - 18 November 2020**

**MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
MR. P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)
Shri C.V. Narasimham, Advocate for the Assessee.
Shri N. Bhanu Kiran, Authorized Representative for the Revenue**

The Registry is directed to put up the appeal record before the Hon'ble President for nomination of learned third Member to consider the aforementioned questions and difference of opinion, for his opinion.

Heard both sides and perused the records. Both these appeals arise from the same impugned order and hence are being disposed of together. Appeal E/386/2012 has been filed by the assessee while appeal E/387/2012 has been filed by Shri Sama Rajasekhar, Managing Director of the assessee firm challenging personal penalty imposed upon him. The Show Cause Notice (SCN) in this case was issued on 31.10.2005 which culminated in an adjudication order by the Commissioner which, on appeal has been remanded for denovo adjudication by this bench by its earlier final order No.A/1649-1656/2009 dt.24.11.2009. Meanwhile, the assessee company has gone into liquidation and therefore the matter was argued on behalf of the company by the learned counsel for the official liquidator before us.

2. The appellant/assessee was a manufacturer of Alkyd, Phenolic and Malleic Resins (herein after referred to as "resins") falling under Chapter heading 3907.50/3909.51 of the First Schedule to the Central Excise Tariff Act, 1985. Shri Sama Rajasekhar was the Managing Director of the appellant/assessee and is the appellant in the appeal E/387/2012. Officers of DRI conducted searches and seizures, investigated and came to the conclusion that the appellant was clearing resins in excess quantity which were being booked for transportation under fictitious bills issued in the name of M/s Kalyan Chemicals, M/s Prasad Chemicals and M/s Priya Chemicals. It was further found that the goods in such invoices were declared as Orthoxylene, MTO, Xylene, etc. During searches they found 10 barrels of chemicals at the premises of the transporter M/s SRMT Ltd issued under the cover of two bills of M/s Kalyan Chemicals, Vijayawada and the goods therein were declared as orthoxylene. Further investigation by the officers showed that the goods were indeed the resins manufactured by the appellant/assessee and were misdeclared as orthoxylene and booked in the name of M/s Kalyan Chemicals. Chemical analysis of the samples confirmed that the goods were indeed resins.

3. After completing their investigations two show cause notices were issued by the officers of the DGCEI, Chennai OR No.57/2003 dt.19.04.2004 and OR No.54/2005 dt.31.10.2005 for ₹ 1,00,000/- and ₹ 67,47,513/- respectively. These, on adjudication, culminated in an Order-in-Original passed by the Commissioner of Central Excise which on appeal was remanded to the original authority by CESTAT Bangalore by Final Order No.1397-1404/2009 and S.O. 1649-1656/2009 dt.24.11.2009. The specific direction given while remanding the matter was to provide to the appellants copies of all the relied upon documents and allow cross examination of various witnesses sought by the appellant and pass an order after following principles of natural justice.

4. In compliance of these directions, the impugned adjudication order (denovo) has been

passed which is under challenge in these cases. During the denovo proceedings cross examination was conducted in respect of 12 of the 18 persons whose statements were relied upon. The list of these statements is as follows:

S.No.	Statement dt.	Name, designation/status of the deponent
1.	19.08.2004	V. Durga Prasad, Agent of M/s SRMT Ltd, Vijayawada
2.	28.07.2005	S.S. Abrar, Proprietor, M/s Inter City Cargo Movers, Vijayawada
3.	21.10.2003 03.12.2003 24.12.2003	V. Srinivas Mahesh, Marketing Representative at Chennai for M/s Harika Resins Pvt Ltd, Vijayawada
4.	21.10.2003 22.10.2003 05.08.2004 26.07.2005	Sama Rajasekhar, Managing Director, Harika Resins Pvt Ltd, Vijayawada
5.	09.08.2004	M. Kalyana Chakravarthy, clerk-cum-typist, Harika Resins Pvt Ltd, Vijayawada
6.	09.08.2004	V.B.S. Durga Prasad, Sales Executive, Harika Resins Pvt Ltd, Vijayawada
7.	09.08.2004 28.07.2005	Ch. Siva Durga Prasad, Accountant, Harika Resins Pvt Ltd, Vijayawada
8.	31.08.2005	Yogesh Manmohan Vora, Proprietor, M/s Krishna Petrochem, Mumbai
9.	19.09.2005	K. Prabhuraj, Proprietor, M/s Sandhya Trading Co., Hyderabad
10.	21.10.2003	Nagarajan, Proprietor, M/s Balaji Enterprises, Anna Nagar East, Chennai
11.	22.10.2003	M. Mohan of M/s Sujatha Paints, Washermanpet, Chennai
12.	21.10.2003 30.12.2003	V. Veera Raghavan, Proprietor, M/s Vee Kay Jay Paints & Chemicals, Chennai

13.	21.10.2003	R. Radhakrishnan, Proprietor, M/s Star Paints, Tondiarpet, Chennai
14.	03.08.2004	R. Karthick (alias) R. Daniel Karthick, Proprietor, M/s Raja Colour Tech and formerly Proprietor of M/s Raja Paints, Old Washermanpet, Chennai
15.	14.07.2005 25.08.2005	Smt S. Shanti, W/o Late Sri P. Sekhar, Proprietrix of M/s Vivek Paints, Muthugounderpalayam, Erode
16.	18.07.2005	Kalyanasundaram, Managing Director, M/s Veena Paints Pvt T. Ltd, Solaialagupuram Street, Madurai
17.	29.08.2005	K. Nagaraj, Partner, M/s Nirma Paints & Chemicals, Bellary
18.	10.07.2005	Sri Rajesh Mehta, Partner of M/s Oilchem India, Indore

5 Of the above, cross examination of S.No.1, 3, 8, 11, 15 & 18 could not be completed. S.No.11 above had died and therefore, could not be cross examined, while, S.No.15 has expressed her inability to comebecause of her severe lower back pain. Thus only 12 of the 18 witnesses could be cross examined.

8. As far as the relied upon documents are concerned, it is the case of the revenue that all relied upon documents were already supplied along with the original SCN. As relied upon documents were not legible, fresh copies of all relied upon documents, except five, have been supplied to the appellant. The five documents which could not be supplied were S.No.23, 42, 44, 46 & 48 of Annexure-C to the SCN which are as follows:

“23. Made-up file No.1 with pages (odd-numbered) from 1 to 447.

5 CE Invoices of HRPL for 2000-01, 2001-02 and 2003-04, in totally 29 books, submitted by Sri Sama Rajasekhar vide letter dated 10.08.2004.

8. Invoices of Priya Chemicals (two no.s) submitted by Sri N. Nagarajan of M/s Balaji Enterprises, Chennai vide letter dated 27.10.2003.

a. Bill, letter of Kalyan Chemicals and copy of SRMT-LR, submitted by Star Paints, Chennai.

\ldblquote Invoice of Kalyan Chemicals, submitted by Nirma Paints, Bellary.”

6. The reason for the inability of the department to supply these documents was that the original documents could not be traced in the office of DGCEI.

7. At this stage, it would be pertinent to discuss the evidentiary value of the statements made by various persons before the officers of Central Excise. Such statements are made under section 14 of the Central Excise Act and such enquiry shall be deemed to be a judicial proceeding within the meaning of section (14)and section 228 of the Indian Penal Code. The statements so made are relevant for any prosecution of offence before the Court under the Act and also before any other proceeding under the Act other than before the Court as per section 9D subject to some conditions. Section 14 & section 9D of this Act are reproduced below:

“Section 14. Power to summon persons to give evidence and produce documents in inquiries under this Act. -

(iii) Any Central Excise Officer duly empowered by the Central Government in this behalf, shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(iv) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required :

Provided that the exemptions under Sections 132 and 133 of the Code of Civil Procedure, 1908 (5 of 1908) shall be applicable to requisitions for attendance under this section.

16. Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860 (45 of 1860).

Section 9D. Relevancy of statements under certain circumstances. -

A statement made and signed by a person before any Central Excise Officer of a Gazette rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(22) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.”

18. It has been the practice for a long time to accept the statements made before the officers of Central Excise under section 14 as evidence in judicial/quasi-judicial proceedings without having regard to the provisions of section 9D. This matter came up before the Hon’ble High Court of Punjab & Haryana in the case of Jindal Drugs Ltd [2016 (340) ELT 67 (P & H)] and the Hon’ble High Court has held that section 9D is a mandatory provision and no statement before an officer under section 14 is relevant as evidence in any judicial/quasi-judicial proceedings unless the requirement of section 9D is fulfilled viz., the person being examined as witness and the Court being of the opinion that having regard to the circumstances of the case, the statement should be admitted as evidence in the interest of justice. Thus, if any statement is made under section 14 before an officer and the person making the statement has not been examined as witness, it cannot be admitted as evidence or used in any judicial/quasi-judicial proceedings. Para 25 of the judgment of the Hon’ble High Court is reproduced below:

“25. In the light of the above, respondent no. 2 is directed to adjudicate the Show Cause Notice issued to the writ petitioners by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial authorities in this regard, including the principles of natural justice, in the following manner:

20. In the event that the Revenue intends to rely on any of the statements, recorded under Section

14 of the Act and referred to in the Show Cause Notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No 2 to summon the makers of the said statements, so that the Revenue would examine them in chief before the adjudicating authority, i.e. before Respondent No 2.

21. A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e. to Ambika and Jay Ambey in this case.

22. Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined in chief before the adjudicating authority, i.e. before Respondent No 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the Show Cause Notice.

*23. Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e. on Respondent No2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in *Arya Abhushan Bhandar v U.O.I.*, 2002(143)ELT 25 (SC), *Swadeshi Polytex v Vollector*, 2000 (122) ELT 641 (SC)."*

2. In the present case, only 12 out of 18 statements can be considered as these were the cases where the persons were cross examined during the proceedings before the adjudicating authority.

3. The case of the department rests on the following 6 pieces of evidence:

The representative samples drawn from barrels seized at the premises of M/s SRMT Ltd, Chennai, the transporter, by Panchnama dt.14.04.2004 and the test report indicated that the materials are resins and not orthoxylene as declared. The modus operandi adopted by the assessee in clearing the resins clandestinely in the guise of orthoxylene is therefore, held to be proven beyond doubt. When the assessee was questioned, their only explanation was they were not concerned with the seized consignment because it was not theirs.

Goods were cleared from the factory of the appellant as per the statement of Shri V. Durga Prasad, Booking clerk of M/s SRMT Ltd dt.19.08.2004. Consignment notes were being written at the place of loading i.e., factory in the name of another firm and as per the description given to them. These clearances were also maintained in the form of registers by the transport company. The ten barrels of chemical described as orthoxylene which was seized by DGCEI were booked in the name of M/s Kalyan Chemicals. This confirms the modus of misdeclaration of the nature of the goods and also of booking the consignment in the name of front companies.

In the case of Inter City Cargo Movers, Shri S.S. Abrar, Proprietor, in his statement dt.28.07.2005 said that they were clearing the material from the consignor's godown only. However, Shri Abrar has negated his own statement during the cross examination although there was no specific retraction by him before the cross examination.

Private books of accounts maintained by the employees of the appellant contained references to the consignment notes, quantities and actual quality/grade of the goods and the realisation actually done. In some cases, the books contained entries other than those

transported by the above two transporters viz., M/s SRMT and M/s Inter City Cargo Movers. These entries were explained by the authors of the books in their statements under section 14 of the Central Excise Act. The two authors who made the entries were Shri V. Srinivas Mahesh, Marketing Representative of the appellant and Shri V.B.S. Durga Prasad, Sales Executive of the appellant. Shri Srinivas Mahesh was not cross examined. Shri Durga Prasad reaffirmed his original statement during the cross examination.

Corroborative evidence taken in the form of statements by the buyers as follows:

Statement dt.18.07.2005 of Shri T. Kalyana Sundaram, Managing Director of M/s Veena Paints, Madurai.

Statements dt.21.10.2003 and 31.12.2003 of Shri V. Veera Raghavan, Proprietor of M/s Vee Kay Jay Paints & Chemicals, Chennai.

Statement dt.21.10.2003 of Shri N. Nagarajan, Proprietor, M/s Balaji Enterprises, Chennai.

Statement dt.21.10.2003 of Shri R. Radha Krishnan, Proprietor of M/s Star Paints, Chennai.

Statement of Shri M. Mohan, working in M/s Sujatha Paints, Chennai given on 22.10.2003.

(3) Statement of Shri R. Karthick (Alias R. Daniel Karthick), Proprietor of M/s Raja Colour Tech, Chennai recorded on 03.08.2004.

(4) Statement dt.29.08.2005 of Shri K. Nagaraj, Partner of M/s Nirma Paints & Chemicals, Bellary.

(5) Statements of Smt. S. Shanthi, W/o P. Sekar (late), Proprietrix of M/s Vivek Paints, Erode recorded on 14.07.2005 and 25.08.2005.

All but two of the above eight were cross examined. During the denovo proceedings when the above were cross examined, all the above purchasers have held that they purchased only resin from M/s HRPL, the appellant under proper invoices thus supporting the assessee's case. They have not, however, retracted their earlier statements made under section 14.

Evidence of sale proceeds flowing back to the appellant by way of cash/DD was discovered during investigation. The counterfoils of deposit slips pertaining to deposits of cash and cheques into savings bank account of Shri V. Srinivas Mahesh, Marketing Representative with Canara Bank were recovered. Some of the DD application counterfoils showed that DDs were obtained favouring the appellant and M/s Priya Chemicals. The amounts collected from customers in cash as well as in cheques were deposited into accounts of Shri V. Srinivas Mahesh and further the DDs were obtained against cash from the said accounts. Shri V. Srinivas Mahesh dt.21.10.2003 said that three different accounts were maintained by him as per instructions of Shri Sama Rajasekhar to avoid tracing; he had purchased DDs out of sale proceeds collected by him under different names including the name of the assessee/appellant and the DDs were sent by courier along with the covering letter; that he sent an amount of ₹ 70,00,000/- in this manner.

4. The assertion of the learned counsel for the appellant before us is that the entire case is based on assumptions and presumptions and does not hold water. The only physical evidence which the officers have collected were some barrels of Chemicals which the transporter M/s SRMT booked in the name of M/s Kalyan Chemicals and which were described as orthoxylene which on testing proved to be resin. These barrels are not related to them. All documents showed that they pertain to M/s Kalyan Chemicals. Therefore, clearance of these barrels cannot be attributed to them.

5. He would argue that although the seizure was with respect to these barrels, the case was made out to be much larger and this case was built on the basis of statements of 18 persons and several relied upon documents. Of the 18 persons, 6 were not examined/cross examined by the adjudicating authority even during the denovo proceedings and hence their statements cannot be relied upon. As far as the remaining 12 are concerned, the alleged buyers of the goods, whose statements were relied upon, have negated their statements during the cross examination and affirmed that they only purchased resin from the assessee/appellant under the cover of proper documents and made payments accordingly. Thus, their statements do not support the contention of the department that goods were cleared in the name of M/s Kalyan Chemicals, M/s Prasad Chemicals etc., describing the goods as orthoxylene, xylene etc., while the actual goods were resins manufactured by the assessee/appellant clandestinely and sold to them. The department could not also establish that the goods were indeed manufactured by the appellant/assessee. The department also could not establish that the money has flown back to the assessee. With regard to the above 6 specific pieces of evidence on which the department's case is built up, he would argue as follows:

(g) The samples of the chemicals drawn from the seized barrels do not pertain to them as has been always maintained by them from date of seizure.

(h) The statement of Shri V. Durga Prasad, Booking clerk of M/s SRMT Ltd (transporter) was relied upon by the department to assert that the goods were indeed collected from the assessee/appellant. Shri V. Durga Prasad was not examined under section 9D or cross examined during the proceedings and therefore, his statement cannot be relied upon. Once the statement of Shri V. Durga Prasad is not relied upon, nothing survives against the assessee as far as the seized barrels are concerned.

The statement of Shri S.S. Abrar, Proprietor of M/s Inter City Cargo Movers, another transporter was relied upon by the revenue in which he said that he was collecting material from the assessee/appellant although the bills were issued in the name of M/s Kalyan Chemicals. It is true that Shri S.S. Abrar has not retracted his statement on his own. However, when he was examined/cross examined during the denovo proceedings, he negated his own statement and affirmed that he was only collecting materials from the consignor's godown. In view of section 9D of the Central Excise Act, his statement having been negated by Shri S.S. Abrar, this evidence also does not stand.

The alleged private books of accounts maintained by employees/ agents of the assessee/appellant was the fourth piece of evidence relied upon by the revenue. These were maintained by Shri V. Srinivas Mahesh, Marketing Representative, who gave his statement on 21.10.2003, 03.12.2003 & 24.12.2003. Shri V. Srinivas Mahesh was not cross examined and therefore, in terms of section 9D his statement is not relevant and cannot be considered in these proceedings. Shri V.B.S. Durga Prasad, Sales executive has stood by his earlier statement that he is an employee of the assessee/appellant and that he opened a unit in the name of M/s Prasad Chemicals on instructions of Shri S. Rajasekhar within the factory of the assessee only. The firm was run in his name from the same premises as the assessee and it does not have any independent business. Only documents are signed in the name of Prasad Chemicals. Similarly, Shri Kalyana Chakravarthy, another employee of the assessee has confirmed that Kalyan Chemicals was a unit opened in his name and he was actually only an employee of the assessee and only papers are drawn in the name of M/s Kalyan Chemicals. Both Shri Kalyana Chakravarthy and Shri V.B.S. Durga Prasad have affirmed their statements during the cross examination. Learned counsel would submit that these statements, per se, would not be sufficient to assert that M/s Kalyan Chemicals and M/s Prasad Chemicals are fictitious firms created as front for assessee. He would submit that separate VAT registrations have been obtained for each of these companies and have been filing returns also.

The statements of the buyers taken by the revenue as evidence are no longer relevant because of the buyers who have been cross examined have negated their statements made before the officers.

As far as the evidence in the forms of sale proceedings flowing back to the assessee by way of cash/DD are concerned, he would submit that these allegations are based on the statement of Shri V. Srinivas Mahesh who was not cross examined.

(iii) In view of the above, he would urge that there is no evidence, whatsoever, adduced by the revenue in the case and the entire case has been built on assumptions and presumptions. Consequently, the case needs to be dismissed and impugned order needs to be set aside and their appeal needs to be allowed with consequential relief.

(iv) Per contra, learned Departmental Representative (DR) supports the impugned order. At the outset, he would argue that in case of clandestine removal it will be impossible to have records with mathematical precision. If everything has been recorded in the books of accounts then the clearance will not be clandestine at all. Such cases must necessarily take into account various pieces of evidence which come to light during investigations such as the private records, cash flow details, statements of various persons concerned, etc. He would submit that case started on the basis of specific intelligence. The barrels of the chemicals seized at the transporter M/s SRMT Ltd was just the beginning of the case. The barrels weremarked in the name of M/s Kalyan Chemicals and were said to contain orthoxylene but had the resin instead. The person who booked the consignments, Shri V. Durga Prasad, agent of M/s SRMT Ltd was questioned and he confirmed that the goods were received from the appellant's place. Subsequent investigation showed that there were three dummy firms viz., M/s Kalyan Chemicals, M/s Prasad Chemicals and M/s Priya Chemicals while the goods were all being cleared by the assessee/appellant. The other companies were mere dummy firms. Two of these were opened in the premises of the assessee by their own employees. The so called owners of M/s Kalyan Chemicals and M/s Prasad Chemicals were actually the employees of the assessee. When examined, they have confirmed that they are only employees and they have affirmed this position during the cross examination made by the assessee's own advocate. Thus, there cannot be any doubt that these are dummy firms. The third company M/s Priya Chemicals was opened in the name of the wife of the owner of the assessee firm which was also a dummy firm.

6. Statements were also records from other transporters such as Shri S.S. Abrar of M/s Inter City Cargo Movers. Statements of the buyers of the chemicals who were mainly the paint manufacturers were also recorded. None of these people have retracted their statements. The buyers as well as Shri S.S. Abrar have negated their statements during the cross examination which was conducted after several years. The learned adjudicating authority has correctly held that such negation during cross examination without having retracted their statements made several years ago cannot be accepted and their original statements must be relied upon. Therefore, it must be held that appellant has cleared goods clandestinely in the name of three dummy firms.

7. He would further submit that not only has the clearance of goods been established but the flow back of money has also been established by producing evidence of cash deposits and DDs being made in the favour of the assessee. In view of the above, he would submit that the case is fully established and the impugned order is correct and balanced and needs to be upheld and the appeals may be rejected.

8. We have considered arguments of both sides and perused the records. At the outset, we observe that the evidentiary value of any statement made before the Central Excise officer under section 14 of Central Excise Act is subject to fulfilment of procedure under section 9D of the Act. This is a statutory provision in the Act itself and has been interpreted as such by the Hon'ble High Court of Punjab & Haryana in the case of Jindal Drugs Pvt Ltd (supra). Therefore, the statement of six persons who could not be cross examined are not relevant for the present proceedings and only the statements of 12 persons who have been cross examined are relevant. Of the persons who have been cross examined, we find that Shri Kalyana Chakravarthy and Shri V.B.S. Durga Prasad have stood their ground and affirmed their original statements made before the Central Excise officers. Shri Kalyana Chakravarthy worked as clerk/typist in the assessee's firm and has opened another company in the name of M/s Kalyan Chemicals. He confirmed when cross examined by the assessee's counsel that it was a dummy firm created at the behest of Shri Sama Rajasekhar, Managing Director of the appellant firm and no manufacturing activity takes place there and only papers are made in

the name of M/s Kalyan Chemicals for the goods actually cleared by the assessee. Similarly, Shri V.B.S. Durga Prasad, Sales executive has also confirmed that M/s Prasad Chemicals was dummy firm opened by him at the behest of his employer Shri Sama Rajasekhar, through which only bills are raised while the actual goods are cleared by the assessee. All the buyers of the paints have however retracted their original statements and affirmed that they were buying only from assessee/appellant under the cover of proper invoices and paying for the goods.

9. Thus, we find, as far as the present case is concerned, the alleged buyers of the clandestinely removed goods have negated their own statements when cross examined before the adjudicating authority. Without such examination/cross examination before the adjudicating authority their statements are not relevant and cannot be relied upon. The learned adjudicating authority has observed that although they negated their statements, such negation is only an afterthought as they have not retracted their statements before. We find that the admissibility of the statements itself depends upon the examination/ cross examination of the person making the statement under section 9D. If the statement has been negated during such cross examination, the evidentiary value of such statement is in doubt. Similarly, the statement of Shri S.S. Abrar, Proprietor of M/s Inter City Cargo Movers also has been negated by him during the cross examination. Thus, the evidence, as far as the transportation of the goods alleged to be clandestinely manufactured and removed as well as their sale to the prospective buyers has not been established to a reasonable degree of certainty in this case. As far as the manufacture and clearance are concerned, the alleged owners of M/s Kalyan Chemicals and M/s Prasad Chemicals have confirmed that they have set up dummy units at the behest of Shri Sama Rajasekhar, Managing Director of the assessee only to make paper entries. They have affirmed this position during the cross examination by the assessee's advocate. The assessee's advocate could not establish during the cross examination that their statements were false.

2 As far as the flow back of cash is concerned, we find that there is some evidence of the accounts being opened and cash being deposited and counterfoils of DDs present but we find it not sufficient to establish with a reasonable degree of certainty that the money has flown back to the assessee.

3 To sum up, in this factual matrix, we find as follows:

1 The fact that M/s Kalyan Chemicals and M/s Prasad Chemicals were dummy firms has been established by the revenue and it has not been countered effectively by the assessee.

2 The evidence regarding transportation of goods alleged to be clandestinely manufactured and removed and their sale to the buyers have not been established as both the transporters and the buyers have all negated their statements during cross examination before the adjudicating authority. In terms of section 9D the statements are only admissible if the persons were examined before the adjudicating authority. Thus, the evidential value of the original statement is in doubt.

3 As far as the alleged flow back of money is concerned, we do find that there is some evidence regarding cash deposits and counterfoils of DDs but we do not find this sufficient to establish a flow back of money to the assessee.

4 We are aware that the case under Central Excise Act is civil case and preponderance of probabilities is the level of evidence required and not proof beyond reasonable doubt. We are also fully conscious of the fact that in case of clandestine removals there cannot be a 100% accurate point to point correlation with mathematical precision. If such accounts are maintained then it will no longer be clandestine removal. However, in this factual matrix where the evidence is based on statements and all but two of which have, during cross examination, reneged on the original statements and thus negated their value in terms of section 9D, we find that the revenue could not establish the case based on the preponderance of probabilities and statements which are admissible in terms of section 9D that the assessee/appellant has clandestinely removed goods without paying Central Excise duties.

5 In view of the above, we find that the impugned order needs to be set aside and we do so.

6 The appeals are allowed and the impugned order is set aside with consequential relief, if any. (Pronounced in the open court on _____)

(separate order)

**(ANIL CHOUDHARY)
MEMBER (JUDICIAL)**

(P. VENKATA SUBBA RAO)

ANIL CHOUDHARY:

I have the benefit of going through the order recorded by learned brother Shri P. V. Subba Rao, Member (Technical) but I am unable to agree with the same. I hereby record my separate order as follows:-

Revenue had intelligence of evasion of duty by the appellant company and accordingly parallel search was organised in the premises of the appellant and also in the premises of some of the suppliers as well as buyers of finished goods, as well as transporters. Search was also conducted at the residential premises of employees / sales agent. From all these places incriminating documents were seized and the concerned persons admitted to the removal of excisable goods clandestinely by the appellant, which is morefully discussed in the following paragraphs.

2 The Managing Director - Shri S. Rajsekhar of M/s Harika on being confronted with the documents and statements of other connected person(s), admitted clandestine removal in his statement recorded on 22.10.2003 and also on other dates. He categorically admitted that he was clearing part of his finished goods in the name of M/s Kalyan Chemicals, a trading concern the proprietor of which was Shri N. Kalyan Chakraworty (employee). The plot where the trading premises of M/s Kalyan Chemicals was situated is owned by Managing Director Shri S. Rajsekhar. Shri N. Kalyan Chakraworty was working as a Typist in M/s Harika Resins who admitted in his statements that M/s Kalyan Chemicals has been set up at the behest of Shri S. Rajsekhar. Further, he categorically admitted that his duty included typing, correspondence, maintaining various records and other things in HRPL. He also looked after the work of M/s Priya Chemicals, the other firm owned by Mrs. M. Varalaxmi w/o Shri S. Rajsekhar, the Managing Director. He further admitted that he has signed various documents like bank account opening forms, cheque books, bills, sales tax registration application, etc. etc. on the instruction of Shri S. Rajsekhar. He did not know the details of the business and was signing on the dotted line, as being instructed by Shri S. Rajsekhar. He categorically stated that he has nothing to do with the amount deposited in the bank account No. 1142 and 1248 with Global Trust Bank, Vijayawada. He also stated that the cheque book and passbooks were kept with Shri S. Rajsekhar only. He also identified various bills issued in the name of M/s Kalyan Chemical and corresponding slips written by him at the instruction of Shri S. Rajsekhar. He also categorically stated that the bills of M/s Kalyan Chemicals were used to cover the finished goods clandestinely removed by M/s HRPL to various customers. Such bills were prepared, showing the bills for sale of orthoxylene, M.T.O. or castor oil etc., which are actually the raw material for manufacture of resin. He further stated that the purchasers made payment of the actual value, as per the slips annexed to the bills, either by cash or demand draft through the employees/ agent of M/s HRPL situated at Chennai or were deposited in the account held in Global Trust Bank in his name or in the name of other employees. On being questioned by Revenue as to the non accountal of the sale transaction, despatched through the transporter SRMT or ICCM in his books, he replied that sale bills and sale tax return of M/s Kalyan Chemicals were also prepared as per the instruction of Shri S. Rajsekhar and he did not know any details, etc. Further, purchase invoices in the name of M/s Kalyan Chemicals were also arranged by Shri S. Rajsekhar. He also stated that he has done all these activities on the instruction of his employer - Shri S. Rajsekhar to save his job, without any other consideration.

3 Shri Kalyan Chakraworty was cross examined on 08.12.2010, and he stood by his earlier statement given during investigation. He also filed written submission being reply to the show

cause notice, wherein he also reiterated the facts as aforementioned and affirmed his statement.

4 Further, ten barrels of goods described as orthoethylene were seized by the Revenue from the godown of transporter – SRMT at Chennai, consignor - M/s Kalyan Chemicals. On the test being done of the samples drawn, the goods were found to be 'resin' and not 'orthoethylene'. M/s Kalyan Chemicals has not purchased resin nor have the manufacturing facility to manufacture resin. Thus, evidently the ten barrels of resin were despatched clandestinely by M/s HRPL, in the name of M/s Kalyan Chemicals misdeclared as orthoethylene to evade payment of duty.

8. Similarly, appellant has created another proprietorship concern in the name of style of M/s Prasad Chemicals, Prop. Shri C.S. Durga Prasad, an employee – Accountant, working for HRPL and M/s Priya Chemicals. Under similar modus operandi finished goods of M/s HRPL has been cleared through M/s Prasad Chemicals.

9. Further, from the documents seized, simultaneous despatch on the same date was found to the same buyer, wherein some part of despatch was accounted as despatch by M/s HRPL and some despatch was shown in the name of either M/s Kalyan Chemicals or M/s Prasad Chemicals under misdeclaration. Even the LR nos. was found to be consecutive. Further, the transporters have also affirmed that they were lifting the goods from the premises of M/s HRPL, partly consigned by M/s HRPL and partly (purportedly) consigned by M/s Kalyan Chemicals or M/s Prasad Chemicals. The transporters categorically stated that they had ignored the anomaly in view of their business interest.

10. Shri Durga Prasad, agent of M/s SRMT, Vijayawada (transporter), in his statement dated 19.08.2004 stated that they use to go with lorry for pick up to the premises of M/s HRPL, for booking of resin barrels. He use to deal with Shri S. Rajsekhar for getting the transport orders for M/s HRPL and its sister concern M/s Priya Chemicals. On being questioned as to the booking made by them in the name of M/s Kalyan Chemicals he stated that he did not know where M/s Kalyan Chemicals were actually located or to whom it belongs. He categorically stated that the bills in the name of M/s Kalyan Chemicals were actually for covering the barrels which were loaded at M/s HRPL factory, as required by Shri S. Rajsekhar. He also stated that the staff of M/s HRPL used to give the bills in the name of M/s Kalyan Chemicals also, which were signed by M. Kalyan Chakrawarty, a Clerk of HRPL.

11. Usually the number of barrels despatched by HRPL, which were loaded at the same time from its factory, were spilt by issue of separate invoices by HRPL and M/s Kalyan or M/s Prasad Chemicals. As per instructions, he took two or more sets of LRs for booking. Such LRs usually had continuous or consecutive sl. Numbers. He further pointed out that the LR numbers were available on the bills and the LRs were prepared by him, both for M/s HRPL and M/s Kalyan Chemicals. He also identified and explained the contents of the 'outward register' maintained by M/s SRMT and identified the pages /entries made by him and other staff. On being queried as to the name of M/s Prasad Chemicals, appearing in the outward register of M/s SRMT (till June, 2001), Shri Durga Prasad explained that prior to giving bills of M/s Kalyan Chemicals, M/s HRPL use to give the bills under the name of M/s Prasad Chemicals in the same/ similar manner as in the name of M/s Kalyan Chemicals. He also stated that the address of M/s Prasad Chemicals is indicated as Kabela area, Vijayawada, but the goods were actually loaded and booked for transport at M/s HRPL factory only.

The aforementioned facts are further corroborated from letter dated 15.10.2003 written by M/s Kalyan Chemicals on its letterhead to M/s SRMT, with regard to claim for damage of goods suffered during transit. As per the letter, the consignments were booked in the name of M/s Kalyan Chemicals vide LR Nos. 1218202 and 1218203 both dated 04.09.2003 and consigned to parties at Chennai were stated to be paints/ resin and the value of damaged or leaked quantity was required to be settled @ ₹ 49/- per kg. Further, as evident from M/s SRMT booking register and also from the copy of LR, these two consignments were originally booked by describing the goods as orthoethylene with value at ₹ 10/- per kg. Thus, this fact also corroborates the clandestine despatch of resin (finished goods) by M/s HRPL by resorting to misdeclaration and under the invoice of M/s Kalyan Chemicals.

2 Similar dispatches in the name of M/s Kalyan Chemicals was also found through another transporter

– Inter cities Cargo Movers, Vijayawada (ICCM in short). From the consignment notes found and recovered from the premises of ICCM, it was found that these bookings under the name of M/s Kalyan Chemicals were made from May, 2003 onwards while in the earlier period certain booking of M/s HRPL were available. Evidently in the consignment note No. 8114 dated 01.05.2003 pertaining to the first booking in the name of M/s Kalyan Chemicals by ICCM, the consignor name column was written as 'M/s Kalyan Chemicals, Vijayawada c/o Harika'. The goods were usually indicated as 'alkyd resin' and the values reflected in the LR was about ₹ 10/- per kg.

9. The Proprietor of ICCM Shri S.S. Abrar in his statement dated 28.07.2005 stated that they were transporting for M/s HRPL being resin in barrels to Chennai through railway. He further stated - regarding consignments of M/s Kalyan Chemicals, these were also brought by the staff of M/s HRPL for transport to Chennai. Shri Abrar identified LRs and they were indicative of M/s Harika in the consignor name, was written to identify the party in case of any need. He reiterated that the barrels covered under the bills of M/s Kalyan Chemicals were brought by M/s HRPL staff only.

10. Revenue also searched Room No. 20 at Shivkasi Nadar Mansion at Chennai which was taken on rent by Shri V. B. Durga Prasad, Sales Executive of M/s HRPL who looked after the sales, collection of sales proceeds by visit to the outstation customer(s) at Chennai and other places. Certain documents were found and recovered which included 'Executive Diary -2003' containing handwritten entries. The entries contained details of payment receipt/ collection from different parties, party name, outstanding balance and noting etc. Diary appears to be maintained in regular course of business showing particulars of (a) party name/ short name (b) a multi digit Sl. No. followed by (c) an encircled number (d) coded description of goods, (e) quantity in number of barrels and weight per barrel, and (f) rates/ price per kg. On verification, the aforementioned particulars at (a) to (e) were found to match with the details of consignee name, LR No., the quantity in barrels and total weight respectively of the consignment booked for transport from Vijayawada in the name of M/s Kalyan Chemicals also corroborated with record of the transporter. The dates of entry in the diary by and large correlated to the date on which the consignments were booked for transport at Vijayawada (as per the transporter records), or were either of immediately preceding or following dates. While the description and value as per the available transport record of the consignment were those of orthoxylene / zylene /MTO etc. having value approximately ₹ 10/- per kg., the particulars denoted at Sl. No. (d) and (f) as mentioned above pertain to the actual description of the goods as resin of different variety as indicated in short or code form, as RML, RMD, etc. having value/ price in the range of ₹ 50 per kg.

The following representative examples found in the Diary would illustrate the above deductions:-

2 In page of the date of 24th March, 2003 – two handwritten entries read as follows:

8. Raja Paints (C), 5 RMD >951413 – 5- RMD 5 x 190 @ 49 – PAID

9. Bhagwan Paints (C), 951414 – 5 RMD – 5 x 190 @ 49 – PAID

The above date (24 march, 2003), party-names and the numbers 951413 and 951414 were correlatable to the date, consignee –names and LR Numbers in the SRMT's booking Registers, pertaining to the consignments booked under the name 'Kalyan Chemicals', consisting of 5 barrels in each consignment, which also tallied with the quantity indicted in the entry as above. The indication 'C' was apparently a reference to 'Chennai', where the party was located as also used in other instances. However, for booking the transport, the goods were declared as 'Orthoxylene' with the price at ₹ 10/- per kg., while in actuality, the goods were Resin i.e., RMD (Rosinated Medium DCO (Dehydrated Castor Oil-based) Alkyd Resin of value at ₹ 49/- per kg., as depicted in the above entry.

21. Similarly, in the page dated 17th March, 2003 of the said Diary, the following handwritten entry was available:

Vivek, Erode - 951202 -10

RMD (LAV) - 9@ 48

MM -1@50

These particulars were correlatable to a consignment booked under LR No. 951202 of SRMT, Vijayawada, the consignor – name being Kalyan Chemicals, of 10 barrels declared to be containing ‘Orthoxylene’. However, as the above entry shows, the goods actually consisted of 9 barrels of Alkyd Resins indicated as RMD-LAV plus one barrel consisting of Malleic Resin denoted as ‘MM’ beneath these entries and the total value was arrived at as ₹ 91,580/- against which the payment of ₹ 49,580/- was deducted and the balance indicated as ₹ 42,000/- (which was also indicated as subsequently paid on 04.06.03). The details of payment of ₹ 49,580/- were also written with details of the Demand Draft number and date, etc.

24. Thus, the aforementioned Executive Diary - 2003 was found to be a privately maintained record, showing the actual description and value of resin that were supplied to various parties under the fictitious bills of M/s Kalyan Chemicals during the period from January, 2003 to October, 2003. Further, in respect of various consignments/ parties, the datewise detail of payment receipt were also found available in this diary, and the noting ‘PAID’ was written against the specific consignmentwise entries. This diary contained despatches made both in the name of M/s Kalyan Chemicals as well as M/s HRPL. It was also found that certain despatches by M/s HRPL purportedly as trading despatches, example - vide invoice No. T-364 dated 18.01.2003 showing sale of MTO 950 kg. in five barrels @ 16.70 per ltr., valued ₹ 16,500/-booked to M/s Durga Coating, Bangalore through SRMT vide LR No. 767607. This transaction in the said diary was recorded on dated 18.01.2003 as –Durga Coating LR No. 767607 (5) and RMD @ ₹ 45/-. Similarly other trading invoices of M/s HRPL for purportedly sale of MTO were correlatable to the entries in the diary wherein the actual description and value recorded shows the goods were actually resin.

25. Further, small diaries ‘Dolphin’, ‘Vajawat’ ledgers were recovered vide Mahazar Sl. No. 2 and 3 maintained as pocket ledger containing partywise account for the period January, 2003 onwards. Such parties accounts were maintained containing name or short name of the party such as ‘Master’ for ‘Master Paints, Chennai’, ‘Archana’ for ‘Archana Colour coatings, Chennai’ etc.. Each such account contained datewise particulars and amounts posted accordingly as debit and credit and also the balance after each transaction/ entry. The particulars of debit included description of the goods i.e. resin –RML/RMD /RDCO/ Soya etc. followed by a number in brackets such as (2) or (5) etc. The particulars of credit amount were indicated as ‘by chq’ or ‘cash’ also with cheque /DD number. On verification the date and particulars pertaining to the debit in the party’s account, matched with the date, description and the party name as recorded in the Executive Diary-2003. While the number in bracket match with the quantity in terms of number of barrels, and these were further correlatable to the particulars of the consignment transported through SRMT or ICCM. Most of the entries in the private ledger /diary were correlatable to the consignment transported through SRMT or ICCM in terms of date, party name, quantity and also the actual description of the consignment transported under the bill of M/s Kalyan Chemicals. The amounts written in partywise account in the private ledger were found to be expressed in code, as was evident from comparison with the value arrived at from the entries in the Executive Diary-2003 (i.e. rate per kg. and total quantity in kgs.). For example, the figures 389.50 were written in ledger to denote ₹ 38,950/-. For illustration, in folio No. 30 of pocket ledger vide Mahazar Sl. No. 2 pertaining to the party ‘BHARANI’, such entry dated 09.06.2003 is RMD 5 barrels x 190 kg.- 475.00. But, in page for 09.06.2003 in the Executive Diary-2003, the supply of 5 barrels of 190 kg. each of RMD @ ₹ 50/- is equal to ₹ 47,500/- supplied vide LR No. 1144296 to BHARANI was mentioned. Similarly, in folio 50 of the pocket ledger against ten barrels @ ₹ 49/- per kg. was mentioned. Thus, the debit apparently pertains to the value of supplies and credit for the payments received against the supplies.

26. The record recovered vide Mahazar Sl. No. 4 was a small notebook containing various notings including datewise details of expenses apparently incurred by Shri V. B. Durga Prasad

in the course of his duty and also certain notings showing the actual description, quantity and value/ rate of certain consignments, which was on verification, pertained to those cleared under the bills of M/s Kalyan Chemicals.

26. Further, various loose sheet slips including computer printed partywise account – statement of M/s HRPL, letters/ correspondence of M/s HRPL, M/s Priya Chemicals etc. were found and recovered and placed in a file at Sl. No. 5 in the Mahazar. The following documents in the said file were found to be of significance:-

29. Pages 19, 25 to 31, 145, 381 to 385 of the said file Sl. No. 5 consisting of the LR of SRMT/ ICCM pertaining to consignments booked under the name Kalyan Chemicals to various parties at Chennai, bills No. 1/98 of Kalyan Chemicals (corresponding to the LR dated 04.08.03 of ICCM) and No. 2/11 dated 20.08.03 and a letter on the letterhead of Kalyan Chemicals dated 04.08.03, addressed to Check-post authorities requesting clearance, in the absence of Way-bills. The said letter contained the signature of M. Kalyan, as proprietor of 'Kalyan Chemicals'. The said name and signature were identical to those appearing in a letter on the letterhead of HRPL containing C-Form reminder dated 30.07.2003, signed by 'M. Kalyan' as Manager, HRPL, available at page 327 of the same file.

30. Pages 279 to 283, 319, 321, 323, 351, 365 & 411 of the said file Sl. No. 5 were handwritten statements (including faxcopies and originals at page 351, 411) showing the details of Resin' consignments supplied during June and July, 2003 to various parties. The particulars of each consignment in these statements include date, party-name, LR number, transport name, the actual description/ coded name of the Resin, quantity in no. of barrels, price per kg. etc. On verification, the particulars of consignments in these statements were found to be correlatable to those booked under the name of Kalyan Chemicals, wherever transported through SRMT and ICCM, except the description of goods (indicated as Xylene/ Orthoxylene, etc. in SRMT's LRs) and the values.

31. Page 257 of the above said file Sl. No. 5 was a small slip dated 26.07.03 bearing handwritten particulars as "RMD10X190 kgs. @ 46/- to Star Paints, Chennai through SRMT (Door delivery)", which on verification, apparently showed the actual description (and price) of the consignment booked with SRMT under the name of Kalyan Chemicals vide LR No. 1171077 to M/s Star Paints, Chennai on 26.07.03, however with goods described as 'orthozylene'.

32. Page 371 of the above said file consists of a handwritten statement of party-wise outstanding amounts, showing certain remarks, additions and adjustments from different parties' amounts. The caption on the page 'Mahesh book and boss book' appeared to be self-indicative that the details pertained to a reconciliation between the amounts reflected in the privately maintained ledger of Sri V. Srinivas Mahesh, the employee of HRPL at Chennai and the amounts as per the 'boss-book' an obvious reference to Sri Sama Rajasekhar, M.D. of HRPL.

33. More importantly, page 299 of the above said file was a printed List of products i.e. Resins manufactured by HRPL (with the printed company name and address). In this sheet, prices were handwritten against many items and in addition notings/ remarks were written as the prices being effective from 1st August, 2002 and also that the rates are including CST. The said handwriting was identical to that appearing in the small slips (showing the actual description and price/ rates), as also the other privately maintained documents including those showing the consignment-wise details of the actual description and values correlatable to the bills of Kalyan Chemicals.

It thus appeared that the above documents pertained to and showed the actual sales of Resin by HRPL, (including those made under the bills of Kalyan Chemicals, with mis-declared description), collections made against the same from various parties and other related details, which were apparently recorded by Sri V.B. Durga Prasad in the course of his day-to-day activities as Sales Executive of HRPL. The particulars in the above pages, sheets, etc. were found to be identical or matching with the entries in the Executive Diary-2003 vide Mahazar Sl.

No. 1 and the ledgers, vide Mahazar Sl. No. 2 & 3 detailed above, and thus, the later records appeared to be maintained as a regular/ consolidated record of the transactions and basing on the entries noted down in loose sheets, slips, etc.

The aforementioned details and record were identified and explained by Shri V. B. Durga Prasad in his statement under Section 14 of the Act.

31. One Shri V. Srinivas Mahesh was the Marketing representative of the HRPL at Chennai from 1997 till about June, 2003. In the course of search at his residence, certain privately maintained account notebooks and other documents were found. These were similar to those recovered from the room of Shri V. B. Durga Prasad and discussed hereinabove relating to the period 2000-2001 to 2002-2003. In the pocket / small ledger notebooks recovered vide Mahazar Sl. No. 4 and 5, the accounts were maintained in the name / short name such as 'Master' for 'Master Paints', Chennai, 'Archana' for 'Archana Colour Coatings', Chennai etc. These accounts contained details of debit and credit and the balance amount after each transaction/ entry in similar fashion, as in the small diary recovered from Shri V. B. Durga Prasad. On finding the correlation between the entries in these private ledgers and the consignment booked under the name of M/s Kalyan Chemicals, M/s Prasad Chemical and M/s Priya Chemical etc. has been tabulated in Annexure D-1 to the show cause notice.

32. The other records / documents recovered from the residence of Shri V. Srinivas Mahesh include – made up file No. 1 containing various documents as party's account – statements, correspondence, etc. pertaining to HRPL and M/s Priya Chemicals. Sheet 64 and 65 of the file consist of Bill No. 1/65 dated 20.06.2003 of M/s Kalyan Chemicals, Vijayawada showing supply of goods declared as orthoxylene ten barrels x 190 kg. @ ₹ 10/- per kg. total value ₹ 19,000/- (including CST) to M/s Ranga Paints, Chennai vide LR No. 1009160 of SRMT for door delivery. Sheet 66 is the small slip, stapled to sheet No. 64 and

32. containing handwritten details as follows:-

20.06.2003: Ranga Paints, Chennai, RML (LAV)- 10x 190 kg. @ 49/-; SRMT – Door delivery.

Thus, from the matching of the particulars and date, consignee, quantity and transporter's name in the bill and LR with the small slip, it is apparent that the goods supplied were resins (EML-LAV denoting Resonated Medium Linseed Resin with Low Acid Value) at a price of ₹ 49/- per kg., while the corresponding bill was issued showing supply of orthoxyzylene @ ₹ 10/- per kg.

2 Similarly, sheet No. 57 to 62 consist of set of LR of SRMT, Vijayawada and corresponding small handwritten slip confirming supply of Resin @ ₹ 50/- or ₹ 51/- whereas as per the invoice of M/s Kalyan Chemicals and in LR the description was orthoxyzylene @ ₹ 10/- per kg.

Sheet No. 53 and 54 of the file consist of photocopy of various cheques received during June and July, 2003 all payable to M. Kalyan Chakraworty. Further, counterfoils of bank deposit slips and demand draft application forms were also found as mentioned in Sl. No. 8 to the Mahazar.

34. The counterfoils of deposit slips found pertaining to deposit of cheque and cash into the saving account No. 2273, 1834 and 2034 of Shri V.S. Mahesh with Canara Bank at Chennai. The pay in slips also indicated the source of receipt mentioned on the reverse side such as 'Master', 'Ranga', 'VKJ' etc. pertaining to the parties to whom resin were supplied. Further, from the copy of demand draft application, it was found that these are obtained in favour of firms like Oswal Traders, Oilchem India etc. and also in the name of employees of HRPL at Vijayawada namely Shri C. Durga Prasad, Shri M. K. Chakraworty, Shri V. Durga Prasad, Shri T. Sharma, Saroj Rani etc., Copy of counterfoil at page 44 showing demand draft for ₹46,859/- was obtained on 17.01.2001 out of ₹ 47,090/- received from Sujatha Paints. The entry in the ledger book vide Mahazar Sl. No. 5 maintained by Shri V. S. Mahesh, on verification was found to be to the date, party name and amount as appearing on the bank deposit / demand draft application counterfoil. Similarly, folio No. 69 of ledger vide Mahazar Sl. No. 5 seized from V.S. Mahesh relates to Surya Chemicals containing details of receipt of cash amounting to ₹ 14,785/- on 04.04.2002. Oncomparing the same bill entry and report of Shri V.S. Mahesh

dated 04.04.2002 available at sheet No. 389 and 391 of made up file seized from the room of Shri V. Durga Prasad, it is evident that ₹ 14,790/- was collected in cash by Shri V.S. Mahesh from Surya Chemicals on 04.04.2002.

Thus, HRPL was receiving the flowback i.e. cash/ cheque for clandestine removal through Shri V.S. Mahesh, cheque received were encashed in the personal account of Shri V.S. Mahesh and further demand draft were obtained against cash or transfer from the account as narrated hereinabove.

434 Further, Shri V.S. Mahesh, the Marketing Representative of HRPL in his statement recorded with the department on various dates under Section 14 has identified the documents and admitted the same as being maintained in the normal course of business at the instance of Shri S. Rajsekhar. He further admitted that he has been employee of HRPL from 1997 till June, 2003 stationed at Chennai and his duty included contracting buyers of resin manufactured by HRPL, procuring orders, forwarding the same to HRPL, receiving the LR and collecting the sale proceeds from the buyers. Normally he communicated the orders for sale to Shri S. Rajsekhar over phone and resin was despatched generally by door delivery through SRMT, Vijayawada. That after dispatch of resin Shri S. Rajsekhar used to send the third copy of the LR alongwith a chit and bill of Kalyan Chemicals or Prasad Chemicals or Priya Chemicals. That the chit contained details of the buyers name, description of goods, quantity and actual rate at which the resin was supplied. That the set of documents i.e. LR, chit and bill was received by courier and were handed over by him to the respective buyers, who in turn issued a chit being an acknowledgement of receipt of goods and in these chits also the actual rate, quantity and total value of the goods were indicated. That on due date of payment, he contacted the buyers and collected the amount as per the chit and returned the chit issued by the buyer on receipt of the full value/ amount. He also identified that sheet No. 57 and of the made up file No. 1 recovered from his residence where some of the chits and LRs received from HRPL for resin supplied through SRMT. He further identified sheet No. 30 of the message received by him from HRPL informing the despatch of ten barrels of resin through ICCM to VKJ Paints, Chennai. He further affirmed that in this manner demand draft totalling about ₹ 70.04 lakhs were purchased by him out of sale proceeds of clandestine removal. He further identified and explained that the entry of the reverse side of pay in slips denotes from whom the sale proceeds were received and the name of such buyers and the amount realised. He further admitted that the private records were maintained as per the instruction of Shri S. Rajsekhar in order to closely monitor the outstanding amount from the various customers. Shri V. Mahesh also identified the documents recovered from the room of Shri V. Durga Prasad which were in his handwriting, such as collection – daily report, partywise account, amount etc.

iii. The department also obtained copy of account statement from Canara Bank, Chennai relating to saving account Nos. 2273, 1834 and 2034 opened and operated by Shri V. S. Mahesh. Account statement of account No. 2273 showed various deposits of relatively larger amount during the period 2001-02, also from which amounts were drawn in cash or demand draft obtained. These deposits correlated to the sale proceeds collected from the parties as per the entries in privately maintained ledger by Mahesh. The total amounts thus deposited in the bank account of Shri V. Mahesh amounted to ₹ 39.04 lakhs. The said practice of collecting the flow back or amount of clandestinely removed goods is also evident from the bank account in Global Trust Bank in the names of employees of HRPL, namely Shri V. B. Durga Prasad, C.S. Durga Prasad and M. Kalyan Chakraworty. The said practice is evident from the following documents found and recovered.

Page 21 of the made-up file No. 77/1, recovered from the factory of HRPL during the search on 21.10.03 was a type-written sheet/ letter, unsigned, but bearing the rubber-stamp impression of HRPL. The contents of this documents were as follows: "Dear Mahesh, Today, we opened Current Account Premium at Global Trust Bank Ltd., in the name and style of M. KalyanaChakrawarthy A/c No. 29011 01142. Today onwards, you deposit all the 'without funds' in the above account. Also we are going to close V. Durga Prasad A/c. So please do the necessary action immtdly".

35. On requisition, Global Trust Bank, Vijayawada furnished the copies of the Account-Statements of the above said accounts alongwith copies of the Account-Opening forms and related documents. The relevant details as per these documents, are as follows:

Name S/Shri	Account Number	Period operated	Total amounts deposited
Ch. Siva Durga Prasad	29000 – 18190	October, 2001 to March, 2002	₹ 27.54 lakhs (excl. Transfers)
V. Durga Prasad	29011 -01075	July, 2002 to May, 2003	₹ 62.64 lakhs
M. Kalyana Chakravarthy	29011- 01142	March, 2003 to October, 2003	₹ 1.1 crores approx.
M. Kalyana Chakravarthy	29011-01248	October, 2003 to November, 2003	

For the above accounts, the introduction for the account opening in the name of V. Durga Prasad was given by Ch. S. Durga Prasad (who held the account operated in the immediately preceding period), while in respect of Shri M. Kalyan Chakraworty account, the introduction was given by Sri V. Durga Prasad. The telephone numbers given (namely 414124) in the Account-Opening forms for accounts in the names of S/Sri Ch. Siva Durga Prasad and V. Durga Prasad was the factory-telephone number of HRPL. The amounts deposited into each of the above accounts, were relatable to the payment/ realisation details available in the privately maintained ledgers/ records of Shri Srinivas Mahesh and Sri V. Durga Prasad, as detailed above and also the DDs/ deposits remitted by Sri Srinivas Mahesh / Sri Durga Prasad, as evident from the documents seized from their respective residential premises. Apart from this, amounts pertaining to deposits/ remittances made at other places such as Bangalore, Trichy, Madurai, Nagapattinam etc. and also those at Chennai - Kilpauk (in the period not covered in the above records), were also found to be credited into the above accounts. The withdrawals/ debits in these accounts were broadly in the form of

- iv. cash/ ATM withdrawals, (ii) Demand drafts obtained payable at Mumbai, Hyderabad etc., and (iii) cheques issued in the names of different parties.

36. Shri S. Rajsekhar, the Managing Director of M/s HRPL in his statement dated 22.10.2003 inter alia admitted that the bills of M/s Kalyan Chemicals were used for covering the transport of resin clandestinely cleared by M/s HRPL. He also submitted certain records of M/s Kalyan Chemicals which included sale - bill books and other files containing purchase documents, vouchers, sales tax return, etc. On scrutiny of the records, it was observed that the sales reflected in the sale bill of M/s Kalyan Chemicals were mostly for castor oil cleared to various parties located in and around Vijayawada within the State. Thus, none of the sale/ consignment booked for transport through SRMT and ICCM were accounted for in this record. All the aforementioned records were found handwritten by Shri Kalyan Chakraworty. Significantly, the vouchers for rent payment by M/s Kalyan Chemicals were in the signature of the rent recipient, identified as Shri S. Rajsekhar, the Managing Director of Harika. As regards similar records of M/s Prasad Chemical, Shri S. Rajsekhar vide his letter dated 10.08.2004 specified that the records of M/s Prasad Chemicals as well as those of M/s Kalyan Chemicals for the earlier period were destroyed and hence not available. Shri S. Rajsekhar further confirmed that Plot No. R.S. 409/2 which was the address of M/s Prasad Chemicals belongs to him and the address of M/s Kalyan Chemicals D. No. 25-52/1, Kabela Road was a room in a corner of the plot which was used by the Watchman who stayed there and reared cattle. He also identified and admitted the rent receipts of M/s Kalyan Chemicals as issued by him. He also affirmed that all the letters in the name of M/s Kalyan Chemicals were delivered at HRPL factory (located nearby).

47. Thus, it is evident that M/s Prasad Chemicals and M/s Kalyan Chemicals were created and registered with the Sales Tax Authority in the name of employees of HRPL to clandestinely purchase raw materials for HRPL and also clandestine clearance of the finished goods of HRPL for the purpose of evading Central Excise duty and other taxes. Further, bank accounts were opened in the name of the said employees namely Shri M. Kalyan Chakraworty, V. B. Durga Prasad, C. S. Durga Prasad etc. to facilitate the receipt of flow back of money for the clandestinely cleared finished products. The transaction of large amounts reflected in these bank accounts, hereinabove mentioned, is abnormal and unexplained in respect of status of these individuals who are the employees of M/s HRPL at meagre salary. Further, these employees in their statements have admitted that these accounts were opened and operated at the instance of Shri S. Rajsekhar.

48. Shri M. Kalyan Chakraworty - employee of M/s HRPL, in his statement dated 09.08.2004 stated that he had joined M/s HRPL sometime in the year 2000 as a Typist-cum-Clerk and his duty included typing, correspondence, maintaining various records of M/s HRPL, M/s Priya Chemicals, and some other firms belonging to Shri S. Rajsekhar. On being questioned regarding the large amounts regularly transacted in the two bank accounts with Global Trust Bank, Vijayawada, he stated that the said two accounts were opened at the instruction of Shri S. Rajsekhar and he had nothing to do with the amount deposited in or paid from the said account(s). He had signed on the account opening form and other form / enclosures and given his certificates, etc. He had also signed the cheques, withdrawal/ deposit slips as and when asked by Shri S. Rajsekhar. That the cheque books and passbooks to these accounts were kept by Shri S. Rajsekhar. He further identified various bills of M/s Kalyan Chemicals with the corresponding slips, forming part of the seized records as written and prepared by him on the instructions of Shri S. Rajsekhar. He further stated that as instructed by Shri S. Rajsekhar, he used to prepare the bills of M/s Kalyan Chemicals and these were used to cover the transport of resin manufactured by M/s HRPL to various customers showing the goods as orthozylene/ MTO/ Castor oil etc. The copy of the LR alongwith the slip showing the actual description, quantity and rate (prepared by him mostly), were sent to the party or M/s HRPL's representative. He further stated that the buyers made the payment as per the value indicated in the slip either by cash or demand draft, and further admitted that these amounts were deposited in the account held in Global Trust Bank in his name or in the name of other employees. That the demand drafts were also obtained favouring certain raw material suppliers from the said account. He also stated that all the records of M/s Kalyan Chemicals like sales bills, sales tax return etc. were also prepared as instructed by Shri S. Rajsekhar, and he did not know anything or any details. He also stated that the purchase invoices for M/s Kalyan Chemicals were also arranged by Shri S. Rajsekhar and he did not know the manner of disposal of the purchases. Further, he categorically stated that he has done all activities in the name of M/s Kalyan Chemicals on the instruction of Shri S. Rajsekhar, being the employee and have not received any additional consideration for the same.

49. Shri V. B. Durga Prasad, Sales Executive of M/s HRPL in his statement dated 09.08.2004 deposed, that in connection with his duty he used to visit Chennai and other places frequently for procuring orders and collection of payment from the customers. That the amount(s) collected were deposited in the account of M/s HRPL and also in the account of Shri M. Kalyan Chakraworty in Global Trust Bank, and sometimes the customer deposited the payments directly in the accounts as per the instructions of Shri S. Rajsekhar. He used to note down the details of despatches of resin and collection of payment. He had taken a room on rent in Shivkasi Nadar Mansion, Chennai for his stay. He also identified the Executive Diary -2003 recovered from his room at Chennai, containing the datewise details of despatch of resin from M/s HRPL for the period January, 2003 to 17.10.2003. He also explained the contents therein including the abbreviation(s) used for description of the resin, and admitted that the same was maintained by him. He also identified the small diary recovered vide sl. No. 2 as maintained by him, containing the details of resin supplied from M/s HRPL to the customers (both accounted & clandestine), and the balance of payment due from them. He also identified the other ledger book recovered vide Sl. No. 3, wherein entries were mostly written by Shri V. S. Mahesh the former Sales Executive of M/s HRPL and explained the contents therein. He also explained the contents as queried in respect of various pages in the made up File No. 5 including the details of actual description and value of resin supplied from M/s HRPL to various customers and the collections/ realisation against such supplies. He also admitted that bank account No. 29011 - 01075 with Global Trust Bank, Vijayawada in his name was opened at the instance of Shri S.

Rajsekhar who operated the said account till its closure in May, 2003. The said account was used to deposit the unaccounted money realised out of the unaccounted / clandestinely sale of resin, under the bills of M/s Kalyan Chemicals. He has no personal interest in the transactions in the said account as the same was operated as per the direction of Shri S. Rajsekhar. He had signed blank cheque books and handed over the same to Shri S. Rajsekhar. He further identified and explained the documents at pages 3 and 7 in the made up File No. 6 showing details of payment(s) deposited in the account of M/s HRPL and Shri M. Kalyan Chakraworty denoted in code as – HK and KC respectively and such entries were written by him.

50. Shri C. S. Durga Prasad, Accountant of M/s HRPL in his statement dated 09.08.2004 and 29.07.2005 inter alia stated that the firms M/s Kalyan Chemicals and M/s Prasad Chemicals were created at the instance of Shri S. Rajsekhar to cover up the clandestine clearance of M/s HRPL. He was working as Accountant of M/s HRPL and also handled the work of M/s Priya Chemicals and some other firms belonging to Shri S. Rajsekhar and his relatives. He further admitted that he created the proprietorship concern M/s Prasad Chemicals at the instance of Shri S. Rajsekhar, obtained the Sales Tax registration, opened the bank account, signed the blank cheques and everything at the instance of Shri S. Rajsekhar. He has no personal interest in M/s Prasad Chemicals or in the bank account No. 29000 -18190 opened in Global Trust Bank, Vijayawada. He further affirmed that the said account was used for depositing the unaccounted amounts (flow back) from the sale of resin removed clandestinely by M/s HRPL under the invoices of M/s Prasad Chemicals or M/s Kalyan Chemicals. He also stated that he has not received any additional consideration in this matter.

51. In the course of enquiry made with M/s Oilchem India, they admitted that they have supplied raw materials to M/s HRPL as well as M/s Prasad Chemicals on receipt of payment by way of demand draft.

52. Further, the clandestine purchase of raw materials by M/s HRPL, is also established from several payments made from the aforementioned bank accounts of Shri V. B. Durga Prasad and Shri M. Kalyan Chakraworty during the year 2002-2003 in the name of Shri K. Rajeswar Rao and Shri K. Rajnikant. These payments aggregate to about ₹ 32 lakhs which were mainly credited in the name of these two persons in their bank account held with Global Trust Bank at Hyderabad. The copy of the account statement obtained by Revenue from Global Trust Bank, Hyderabad with respect to the said accounts being No. 1111011-4983 and 1111011-7088, shows receipt of money in the said accounts from the employees of M/s HRPL namely Shri V. B. Durga Prasad and Shri M. Kalyan Chakraworty. In the account opening forms of these two accounts Phone No. 24557077 appeared which belongs to 'M/s Sandhya Trading Company' who are brokers in oils, oilseeds etc and find mention also in certain acknowledged courier receipts available in made up File No. 77/2, recovered from the factory of M/s HRPL. In his statement recorded under Section 14, Shri K. Prabhuraj, Prop. M/s Sandhya Trading Co., on perusing the bank documents, confirmed that Shri K. Rajeshwar Rao and Shri K. Rajnikant were his two sons and the amount credited in their account in Global Trust Bank were received from M/s HRPL towards payment of supplies of castor oil, soya oil and cotton oil etc. which were arranged by him. He also stated that as per request of Shri S. Rajsekhar the supplies were arranged by him on commission, without any bills. He also confirmed that the payment for such clandestine supplies to M/s HRPL were received by him in the bank account of his sons, as aforementioned. He further stated that the documents of the transactions with M/s HRPL were not available with him as he has periodically destroyed on completion of the transaction.

53. Further, several buyers of the clandestinely removed goods by M/s HRPL, like M/s Balaji Enterprises, Chennai through its Prop. N. Natarajan have admitted to received resin from M/s HRPL under the invoices of M/s Prasad Chemicals/ M/s Priya Chemicals etc. He further stated that demand drafts were taken in the name of the firm as per the invoice and the difference amount was collected in cash by Shri S. Mahesh of M/s HRPL or deposited by his employee in the bank account in the name of Shri Kalyan Chakraworty. He also identified the entries in Diary No. 3 pertaining to the payment made by him on various dates to HRPL, including those through Shri S. Mahesh, particularly for procurement of 30 barrels during 2003 for which no bills were issued and he had scored out the entries, as HRPL clandestine confirmed the receipt of amount in cash. He also accepted the clandestine transactions recorded in the resumed private records vide Mahazar from V. S. Mahesh and V. B. Durga Prasad.

54. Similar confirmation was made by other buyers of clandestinely removed goods namely - M/s Sujatha Paints, Chennai through its Partner Shri M. Mohan, by M/s Vee Kay Jay Paints & Chemicals, Chennai through its prop. V. Veeraraghavan, M/s Star Paints, Chennai through its Prop. Shri R. Radhakrishnan, M/s Raja Paints, Chennai through its Prop. R. Karthikeyan etc.

55. From the aforementioned documentary facts which were revealed in the course of investigation and enquiry, I find that the statements of various persons are supported by documentary evidence. Such documentary evidence have been admitted by the concerned employees of M/s HRPL and also admitted by Shri S. Rajsekhar, the Managing Director of M/s HRPL. Both clandestine purchases of raw materials, clandestine removal of finished goods, evidence of transport, flow back of sale proceeds of the clandestinely removed goods have been established. I further hold that retraction of the statements by some of the persons at the later stage as well as non appearance of some of the witness in the adjudication proceedings, is of hardly any consequence in view of the overwhelming documentary evidence discussed hereinabove. Revenue in this matter has established the full cycle of the clandestine activity, which is normally not easy to establish. In this view of the matter, the appeals are fit to be dismissed.

56. Accordingly, I uphold the impugned order-in-original and dismiss both the appeals filed by the appellant company and its Managing Director Shri S. Rajsekhar.

(Anil Choudhary)

Member (Judicial)

DIFFERENCE OF OPINION:

In view of the difference of opinion, the following questions arise for consideration by learned third Member:-

1. There is lack of sufficient evidence, as evidence being the statement of some of the persons given in the course of investigation is not reliable, as such persons have not stood by their earlier statement at the time of cross examination or not appeared for crossexamination, as held by learned Member (Technical)

Or

The statements of the persons recorded at the time of investigation is based or co-relatable with documentary evidence. Such documentary evidence having not been denied, the denial of clandestinely removed goods in cross-examination is of no avail to the appellant and such evidence is reliable for the purpose of adjudication as held by Member (Judicial).The case of Revenue is not proved on the principle of preponderance of probability and accordingly the appeals are fit to be allowed as held by learned Member (Technical)OrIn view of the documentary evidence brought on record in the course of investigation and duly supported by oral evidence of several persons and also supported by some of the key persons involved in the transaction, including in the course of cross-examination, the allegation of Revenue is established and accordingly the appeals are fit to be dismissed as held by Member (Judicial).

The Registry is directed to put up the appeal record before the Hon’ble President for nomination of learned third Member to consider the aforementioned questions and difference of opinion, for his opinion.

(Pronounced in the open court on 18.11.2020)

(Anil Choudhary)

Member (Judicial)

(P. Venkata subba Rao)

Member (Technical)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, HYDERABAD
DIVISION BENCH
COURT NO. I**

Excise Appeal No.1768/2012

Arising out of Order-in-Original No. 09/2012-Adjn. (Commr.) CE, Dated: 26.03.2012
Passed by Commissioner of Customs and Central Excise, Hyderabad-IV

Date of Hearing: 09.07.2019

Date of Decision: 06.08.2019

**LITTLE STAR FOODS PVT LTD
PLOT NO. 153, IST FLOOR, PHASE-III, KAMALAPURI COLONY
HYDERABAD - 500073, TELANGANA**

Vs

**COMMISSIONER OF CENTRAL TAX
MEDCHAL COMMISSIONERATE, MEDCHAL GST BHAVAN
11-4-649/B, LAK DI KA POOL, HYDERABAD - 500004 TELANGANA**

WITH

Excise Appeal No.1781/2012

Arising out of Order-in-Original No. 09/2012-Adjn. (Commr.) CE, Dated: 26.03.2012
Passed by Commissioner of Customs and Central Excise, Hyderabad-IV

**CADBURY INDIA LTD
C/O. LITTLE STAR FOODS PVT. LTD., D-153, PHASE-III, IDA
JEEDIMETLA, HYDERABAD - 500055 TELANGANA**

Vs

**COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD-IV COMMISSIONERATE, POSNETT BHAVAN TILAK ROAD
RAMKOTI, HYDERABAD-500001 TELANGANA**

WITH

Excise Appeal No.20234/2014

Arising out of Order-in-Original No. 68/2013-Adjn. (Commr.) CE, Dated: 14.10.2013
Passed by Commissioner of Customs & Central Excise, Hyderabad-IV

**LITTLE STAR FOODS PVT LTD
PLOT NO. 153, IST FLOOR, PHASE-III, KAMALAPURI COLONY
HYDERABAD - 500073 TELANGANA**

Vs

**COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD-IV COMMISSIONERATE, POSNETT BHAVAN TILAK ROAD
RAMKOTI, HYDERABAD-500001 TELANGANA**

WITH

Excise Appeal No. 20235/2014

Arising out of Order-in-Original No. 68/2013-Adjn. (Commr.) CE, Dated: 14.10.2013
Passed by Commissioner of Customs & Central Excise, Hyderabad-IV

**CADBURY INDIA LTD
19, BHULABHAI DESAI ROAD, MUMBAI - 400026
MAHARASHTRA**

Vs

**COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD-IV COMMISSIONERATE, POSNETT BHAVAN, TILAK ROAD
RAMKOTI, HYDERABAD-500001 TELANGANA**

WITH
Excise Appeal No. 21160/2015

Arising out of Order-in-Original No. HYD-EXCUS-004-COM-011-14-15, Dated:
05.01.2015

Passed by Commissioner of Customs & Central Excise, Hyderabad-IV

LITTLE STAR FOODS PVT LTD
PLOT NO. 153, 1ST FLOOR, PHASE-III, KAMALAPURI COLONY
HYDERABAD - 500073 TELANGANA

Vs

COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD-IV COMMISSIONERATE, POSNETT BHAVAN, TILAK ROAD
RAMKOTI, HYDERABAD-500001 TELANGANA

AND
Excise Appeal No. 21173/2015

Arising out of Order-in-Original No. HYD-EXCUS-004-COM-011-14-15, Dated:
05.01.2015

Passed by Commissioner of Customs & Central Excise, Hyderabad-IV

MONDELEZ INDIA FOODS PVT LTD
(FORMERLY CADBURY INDIA LIMITED)
MONDELEZ HOUSE UNIT NO. 2001, 20TH FLOOR, TOWER-3, WING C
INDIA BULLS FINANCE CENTER, PAREL, MUMBAI - 400013
MAHARASHTRA

Vs

COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX
HYDERABAD-IV COMMISSIONERATE, POSNETT BHAVAN, TILAK ROAD
RAMKOTI, HYDERABAD-500001 TELANGANA

Appellant Rep by: Shri V Lakshmi Kumaran, Sr. & Shri Vipin Verma, Advs.

Respondent Rep by: Shri V R Pawan Kumar & Shri C Mallikharjun Reddy,
Supdts./ARs

CORAM: S S Garg, Member (J)

P V Subba Rao, Member (T)

FINAL ORDER NOS. A/30714-30719/2019

Per: P Venkata Subba Rao:

1. These six appeals pertain to the same issue and hence are being disposed of together. *Appeal No. E/1768/2012 is filed by M/s Little Star Foods Pvt. Ltd.* (hereinafter referred to Little Star) while *appeal No. E/1781/2012 is filed by Mondelez India Foods Pvt. Ltd.* (hereinafter referred to Mondelez) (previously called Cadbury India Limited) against the demands raised covering the period October 2009 to September 2011. The remaining appeals are for the subsequent periods. The details are as follows:

Appeal No.	E/1768/2012 & E/1781/2012	E/20234-20235/2014	E/21160/2015 & E/21173/2015
Period involved	Oct. 2009 to Sept. 2011	Oct. 2011 to August 2012	Sept. 2012 to Sept. 2013
Demand in Rs.	Rs. 5,66,51,110/- + Interest Penalty-5,66,51,110	Rs. 1,17,10,253/- + Interest Penalty-30,00,000/-	Rs. 2,64,09,290/- + interest Penalty-50,00,000/-
Penalty on Mondelez	Rs. 2,00,00,000/-	Penalty of Rs. 30,00,000/-	Penalty of Rs. 50,00,000/-
Amounts paid	Rs. 2,04,80,588/-	-	-

2. The issues which fall for consideration in these appeals are:

(a) whether Little Star is entitled to the benefit of exemption Notification No. 03/2006 (Sl. No. 19) for the goods "Cadbury Perk with Glucose Energy" manufactured by them on behalf of M/s Mondelez;

- (b) whether the dealer's margin, RD markup and post manufacturing expenses claimed by the appellant in their price list but included in the assessable value by the original authority need to be included for determining the excise duty payable or otherwise;
- (c) whether the extended period of limitation for raising the demand under section 11A can be invoked in respect of appeals No. E/1768/2012 and E/1781/2012;
- (d) whether the differential duty is recoverable along with interest from the appellants and if so to what extent;
- (e) whether penalties have been correctly imposed upon Little Star and
- (f) whether penalties have been correctly imposed upon Mondelez.

3. The facts of the case in brief are that Little Star manufactures 'Cadbury perk with glucose energy' and supplies them to Mondelez on job work basis. The products are, thereafter, sold by Mondelez from their depots through their marketing chain. Mondelez is the brand owner of the products. The entire manufacture by Little Star is as per the specifications and directions of Mondelez in their agreement. Being the manufacturers of the products, Little Star discharges Central Excise duty. Little Star claimed the classification of their products under 1905 3290 of Central Excise tariff. The relevant entry is as follows:

1905	BREAD, PASTRY, CAKES, BISCUITS AND OTHER BAKERS' WARES, WHETHER OR NOT CONTAINING COCOA; COMMUNION WAFERS, EMPTY CACHETS OF A KIND SUITABLE FOR PHARMACEUTICAL USE, SEALING WAFERS, RICE PAPER AND SIMILAR PRODUCTS	Kg	Nil
1905 10 00	Crispbread	Kg	Nil
1905 20 00	-Gingerbread and the like -Sweet biscuits; waffles and wafers:	Kg	Nil
1905 31 00	Sweet biscuits	Kg	6%
1905 32	-Waffles and wafers -Communion wafers:		
1905 32 11	Coated with chocolate or containing chocolate	Kg	12.5%
1905 32 19	Other	Kg	12.5%
1905 32 90	Other	Kg	12.5%
1905 40 00	Rusks, toasted bread and similar toasted products	Kg	Nil
1905 90	Other:	Kg	Nil
1905 90 10	Pastries and cakes	Kg	6%
1905 90 20	Biscuits not elsewhere specified or included	Kg	6%
1905 90 30	Extruded or expanded products, savoury or salted	Kg	Nil
1905 90 40	Papad	Kg	Nil
1905 90 90	Other	Kg	Nil

4. Initially, a show cause notice dated 08.11.2011 was issued to the appellants covering the period October 2009 to September 2010 proposing to classify the product under 1905 3211 and demanding appropriate amount of differential duty. It was also proposed in that show cause notice that the product deserved to be valued under section 4A instead of Section 4 of Central Excise Act, 1944. Thereafter, another show cause was issued to the appellant covering the period October 2009 to September 2011. In this second show cause notice, the department did not contest either classification by the appellant or the fact that they are not covered by Section 4A but are covered by Section 4 for the purpose of valuation. The second show cause notice only sought to deny the exemption notification claimed by the appellant and also sought to value the goods under section 4 of Central Excise Act, 1944 as per the price list denying some exclusions claimed by the appellant. Both the show cause notices were decided by Ld. Adjudicating authority vide O-I-O No. 09/2012-Adjn. (Commr.) CE, dt. 26.03.2012. He dropped the proceedings in pursuance of the first show cause notice. Therefore, the dispute with regard to the classification and valuation under section 4A instead of under Section 4 have reached finality. The adjudicating authority has also held that their products are classifiable under chapter heading 1905 3290 and that their products are not covered under section 4A and therefore are chargeable as per valuation under section 4. The subsequent show cause notices are periodical demands which have been confirmed by the Adjudicating authority and are in challenge in these appeals.

5. Accordingly, the differential duty was demanded and confirmed along with interest by (a) denying them the benefit of exemption notification No. 3/2006 (Sl.No. 19) and (b) denying them the deduction from their price of the dealer's margin, RD mark up and post manufacturing expenses from the assessable value. Penalties have been imposed upon Little Star under section 11 AC of the Central Excise Act and on Mondelez under Rule 26 of Central Excise Rules, 2002.

6. Before examining the rival contentions made on both sides, it will be necessary to set out the relevant legal provisions.

(a) Excise duty on tobacco and other goods manufactured in India except alcoholic liquor for human consumption, opium and other narcotic drugs are included in the union list in the Constitution of India (list-1 of Seventh Schedule of the Constitution). The relevant statute for levy of these excise duties is as the Central Excise Act, 1944. Section 3 of this Act is the charging section which states "there shall be levied and collected in such a manner as may be prescribed a duty of excise to be called Central Value Added Tax on excisable goods which are produced or manufactured in India as, and at the rates, set forth in Schedule-I of the Central Excise Tariff Act".

(b) The term 'Excisable goods' has been defined as "goods specified in the first schedule and the second schedule to the central Excise Tariff Act as being subject to a duty of excise and includes salt" (Section 2(d) of the Act). The duty of excise is leviable either based on quantity (specific rate of duty) or value (ad valorem rate of duty) as specified in the tariff. However, in respect of the goods which are notified under section 4A of the Central Excise Act, the duty is levied based on the retail sale price with some abatement.

(c) Section 5A of Central Excise Act empowers the Central Government to grant, by notification, exemptions from the Central Excise duties. These exemptions can be either full or partial and can be either conditional or unconditional.

(d) To sum up, if any excisable goods are manufactured or produced in the country, they are chargeable to Central Excise duties at the rates set forth in the schedules to Central Excise Tariff Act, 1985, read with any exemption notifications that may apply.

(e) Where the excise duty has to be levied based on the value, the value shall be determined as per Section 4 of Central Excise Act and the Central Excise Valuation Rules.

(f) Where any duty of excise has not been levied or paid or short levied or short paid or erroneously refunded, the same can be recovered by raising a demand under Section 11A of the Act. Further, if such non-levy, short-levy, non-payment, short-payment or erroneous refund is by reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder with intent to evade payment of duty, the demand can be raised within an extended period of limitation of five years from the relevant date.

7. In these appeals, it is not in dispute that the excisable goods have been manufactured and they are leviable to Central Excise duty at the rates set forth in the Central Excise Tariff and that the valuation of these goods is covered by Section 4 read with Central Excise Valuation Rules. The initial contention of the Revenue in the first show cause notice that these goods are notified under Section 4A and hence chargeable to duty based on retail sale price, has been dropped by the Commissioner in his Order-in-Original and the decision of the Commissioner has been contested by the Revenue. Therefore, the only disputes which remain in this case are:

(i) whether the assesseees are eligible for exemption notification No. 3/2006 (S.No. 19) issued under Section 5A claimed by them which is sought to be denied by the Revenue;

(ii) what value should be adopted for reckoning the Central Excise duty;

(iii) Whether extended period of limitation under Section 11A can be invoked for raising the demand and

(iv) whether penalties are imposable upon the appellants.

8. On the question of exemption notification, Ld. Counsel for the appellants submits that it is undisputed that Little Star are manufacturing "Cadbury Perk with Glucose Energy" which has been described by them as 'chocolate coated wafers for some period and subsequently as coated wafers. He produces before us a sample copy of the product, the label of which also describes the product as 'coated wafers'. He explains

that in the coating, they have been using only coco powder but not coco butter and therefore the same cannot be called as chocolate coating and hence they described the product as coated wafers. The relevant entry (Sl.No. 19) in exemption notification 3/2006 reads as follows:

"EFFECTIVE RATES OF DUTY FOR GOODS OF VARIOUS CHAPTERS

GENERAL EXEMPTION No. 46

Exemption and effective rate of duty for specified goods of Chapters 1 to 24 - in exercise of the powers conferred by Sub Section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below and falling within the Chapter, heading or sub heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), as are given in the corresponding entry in column (2) of the said Table, from so much of the duty of excise specified thereon under the First Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (5) of the Table aforesaid.

Explanation. - for the purposes of this notification, the rates specified in column 4 of the said Table are ad valorem rates, unless otherwise specified.

TABLE

S.No.	Chapter or heading or sub heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
(1)	(2)	(3)	(4)	(5)
19	1905 32 19 or 1905 32 90	Wafer biscuits	4%	--

9. Ld. Counsel submits that the classification of their product is not in dispute and the department has accepted the classification under chapter heading 1905 32 90 and there is no condition for availing the benefit of this exemption notification. The description of the product for which the exemption is available is 'wafer biscuits' whereas they described their product as chocolate coated wafers or coated wafers and therefore the Revenue sought to deny them the benefit of exemption notification. He asserts that all wafers are essentially biscuits and therefore their wafers must be considered as 'wafer biscuits' and they should be entitled to the benefit of exemption notification No. 03/2006. He relies on the case laws of *International Foods vs. CCE, Hyderabad [1978(2)ELT (J 50) (A.P.)]* and *R. Sikaria vs. CCE, Hyderabad [2000(125)ELT 141 (A.P)]* in which the Hon'ble High Court of Andhra Pradesh having jurisdiction over this Bench, had held that wafer is a kind of biscuit although it may be different in size and in shape and therefore the same is chargeable to Central Excise duty in terms of item (1)(c) of the erstwhile Central Excise Tariff. He would assert that the jurisdictional Hon'ble High Court has already decided that wafer is indeed a biscuit and this decision of Hon'ble High Court is binding on this Bench and therefore they cannot be denied the benefit of exemption available to wafer biscuits. He also cites the Cambridge dictionary which explains the meaning of 'wafer' as under:

" noun

- (1) *A thin, crisp cake or biscuit, often sweetened and flavoured.*
 - (2) *A thin disk of unleavened bread, used in the Eucharist, as in the Roman Catholic Church.*
 - (3) *A thin disk of dried paste, gelatin, adhesive paper, or the like, used for sealing letters, attaching papers etc.*
 - (4) *Medicine/Medical. A thin sheet of dry paste or the like, used to enclose a powder to be swallowed.*
 - (5) *Any small, thin disk, as a washer or piece of insulation."*
- He also cites the Oxford dictionary's meaning of ' wafer ' as under:
- " *A thin, light, crisp biscuit, especially one of a kind eaten with ice cream.*
- *A thin piece of something. 'wafers of smoked salmon' Synonyms*
1. *A thin disc of unleavened bread used in the Eucharist.*

2. *Electronics* A very thin slice of a semiconductor crystal used as the substrate for solid-state circuitry.

Synonyms

3. (also *wafer seal*) a disc of red paper stuck on a legal document as a seal.

4. *historical* A small disc of dried paste used for fastening letters or holding papers together.

VERB [WITH OBJECT]archaic

- Fasten or seal (a letter or document) with a wafer.

Derivatives *wafery* adjective.

Origin

Late Middle English from an Anglo-Norman French variant of Old French *gaufre* (see *goffer*), from Middle Low German *wāfel* 'waffle'; compare with *waffle*. Compare with *WAFFLE*."

He further cited description of "waffles and wafers" in the HSN as under:

"Waffles and wafers, which are light fine bakers' wares baked between patterned metal plates. This category also includes thin waffle products, which may be rolled, waffles consisting of a tasty filling sandwiched between two or more layers of thin waffle pastry, and products made by extruding waffle dough through a special machine (ice cream cornets, for example). Waffles may also be chocolatecovered. Wafers are products similar to waffles."

10. On the question of valuation, he would take us through the impugned Order-in-Original No. 09/2012-Adjn. (Commr.) CE, dt. 26.03.2012 and explain that in their case there is no transaction value because they do not sell the goods but manufacture them on job work basis. Little Star manufactures the goods on job work basis for Mondelez and supplies them directly to the depots of the latter. Mondelez, in turn, sells the goods through their marketing net work. Little Star gets their job work charges. Section 4 of the Central Excise Act reads as follows:

"Section 4 in the Central Excise Act, 1944

4. Valuation of excisable goods for purposes of charging of duty of excise.—

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall—

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

*Explanation.—*For the removal of doubts, it is hereby declared that the pricecum- duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purposes of this section,—

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) persons shall be deemed to be "related" if—

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and distributor of the assessee, or a subdistributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other. Explanation.—In this clause—

(i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and

(ii) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956);

(c) "place of removal" means —

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place on premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;] from where such goods are removed;

4[(cc) "time of removal", in respect of the excisable goods removed from the place of removal referred to in sub-clause (iii) of clause (c), shall be deemed to be the time at which such goods are cleared from the factory;

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

11. He would submit that since the goods are not sold by them, they are not covered by Section 4(1)(a) but are covered by Section 4(1)(b). The prescription mentioned in 4(1)(b) is as per the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, Rule 10A of these Rules is relevant to their case which reads as follows:

"RULE 10A. Where the excisable goods are produced or manufactured by a job-worker, on behalf of a person (hereinafter referred to as principal manufacturer), then, -

i. in a case where the goods are sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker, where the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the transaction value of the said goods sold by the principal manufacturer;

ii. in a case where the goods are not sold by the principal manufacturer at the time of removal of goods from the factory of the job-worker, but are transferred to some other place from where the said goods are to be sold after their clearance from the factory of job-worker and where the principal manufacturer and buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of said goods from the factory of job-worker;

iii. in a case not covered under clause (i) or (ii), the provisions of foregoing rules, wherever applicable, shall mutatis mutandis apply for determination of the value of the excisable goods : Provided that the cost of transportation, if any, from the premises, wherefrom the goods are sold, to the place of delivery shall not be included in the value of excisable goods.

Explanation. - For the purposes of this rule, job-worker means a person engaged in the manufacture or production of goods on behalf of a principal manufacturer, from any inputs or goods supplied by the said principal manufacturer or by any other person authorised by him."

12. Little Star have, indeed, paid the duty on the value at which the principal manufacturer Mondelez has sold the goods to their buyers. Since Mondelez gets such goods manufactured by a large number of firms across the country, they have a uniform method of pricing the goods which is set out in the price list prepared by

them. This price list has been re-produced in the impugned Order-in-Original No. 09/2012-Adjn. (Commr.) CE, dt. 26.03.2012 at para 20.13, which is as follows:

PRICE LIST FOR REST OF INDIA																			
VARIABLE DEALER MARGIN										10.00%									
RD MARK UP										5.83%									
AV SALES TAX										12.73%									
PME (Rs./Kg)										5.78%									
EXCISE DUTY										Perk_Wht 4.00%									
CESS										Perk_Wht 3.00%									
Total Excise %										4.12%									
List No.	Description	Consumer End price	Units/quintals	Total	Dealer margin	Dealer Cost	RD Mark up	RD Cost	Sales Tax	Invoice Price	Less PME	Net price	Less Excise Duty	Gross	Assessable value	Add PME	Comp. Price	Other Items/Chgs	Multi factor
D 2 8 0 0 0 8	PKB 7.5g x 55-4 U FREE IN POUCH H PRO MO	2.00	55	110	10	100	5.31	94.49	10.87	88.82	2.56	81.26	3.12	0.09	78.04	2.56	80.60	16.0	0.442

13. The entire demand has been raised based on the figures indicated in this price list itself. As can be seen, the price list indicates the consumer end price and various margins at various levels and indicates the invoice price which is the price at which the depots sell to the distributors including taxes. If the excise duty, Cess and post manufacturing expenses are deducted from this invoice price, we get the assessable value of Rs. 78.04 for a pouch of 55 retail packs which, according to him, is the correct invoice price which is adopted by Mondelez and the same should be adopted for determining the tax liability of Little Star as well. In para 20.15 of the impugned order, Ld. Commissioner sought to include dealer margin, RD Markup and the post manufacturing expenses in the assessable value. As far as the Dealer margin is concerned, Ld. Commissioner held that the dealer is the assessee's own place of removal or otherwise, it would have been reflected as retailer margin. Ld. Counsel would submit that this conclusion is preposterous. They have dealers as well as retailers and redistributors in their chain of net work. The re-distributor who buys from the depot cannot be the same as the retailer who sells it to the consumer. There is no evidence to show that the retailer is the same as the dealer and it is extremely unlikely that in a product with a retailer price of Rs. 2/- per piece, the retailer is the one who goes to the depots of the manufacturer and buys the goods from them. Therefore, the dealer's margin is to be excluded from the value. As far as the RD Markup is concerned, Ld. Commissioner presumed that this is an amount set aside for R&D purpose by M/s Cadbury (Mondelez) and held that the same is includable in the assessable value. Ld. Counsel for the appellant submits that there is nothing on record to show that RD Markup being the R&D expenses. In fact, RD Markup stands for re-distributor mark up. The re-distributors form part of their marketing chain and they get this margin for their service. Therefore, the same cannot be included in the assessable value. As far as the third item sought to be included in the assessable value by Ld. Commissioner is concerned, Ld. Counsel would submit that the post manufacturing expenses are actually nothing but cheque discounting charges which they paid to their banks. He would submit that the cheque discounting charges have been held by the Tribunal in their own case (*Cadbury India Limited*) to be admissible deduction as reported at [2015(323) ELT 606 (Tri.-Del.)]. He also produces copies of agreements which they had with their re-distributors in support of his contention that they indeed had re-distributors who were given a margin.

14. As far as the first period covering October 2009 to September 2010 is concerned, he would submit that the first show cause notice issued by the Department on 08.11.2010 and the second one on 08.11.2011 invoking the extended period of limitation under section 11A. Section 11A of Central Excise Act permits invocation of extended period only if the elements necessary for invoking the extended period namely fraud, collusion, wilful misstatement, suppression of facts or violation of the provisions of the Act or Rules with an intent to evade payment of duty are present. It is on record that all facts are presented before the department. The returns were filed periodically and honestly by them. The first show cause notice dated 08.11.2010 was issued within the normal period of limitation proposing to classify the products under different tariff heading and valued them as per Section 4A based on retail sale price. This shows that the department was fully aware of what they are doing and they have taken a particular view and issued show cause notice accordingly. Using the same information but proposing a different classification and a different method of valuation, the second show cause notice was issued invoking the extended period of limitation. This shows

that there was no element necessary for invoking the extended period of limitation because all facts were known to the department before the first show cause notice was issued. Therefore, the extended period of limitation cannot, in any case, be invoked in the second show cause notice. The demand has to fail to that extent on this ground also. Ld. Counsel also produced before us copies of letters written by the assessee to the Central Excise Officers informing them about the nature of their products.

15. On the question of imposition of penalty, he would urge that the entire matter is nothing but a question of interpretation of the eligibility of exemption notification as well as the valuation. No facts were either actively suppressed or not disclosed to the department. On the question of interpretation itself, they held a consistent view but the department changed its stand. Penalty under section 11AC can be imposed where duty has not been paid or short paid or not levied or short levied or erroneously refunded or by an act of fraud, collusion, wilful misstatement, suppression of facts or contravention of any provisions of the Act or Rules with an intent to evade payment of duty. Since none of these elements are provided/established, no penalty can be imposed upon them under Section 11 AC. As far as the penalty imposed upon M/s Mondelez under Rule 26 of Central Excise Rules, 2002 is concerned, he would draw the attention of this Bench to this rule which reads as follows:

"26. Penalty for certain offences.-

[(1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees [two thousand rupees,] whichever is greater.]

[Provided that where any proceeding for the person liable to pay duty have been concluded under clause (a) or clause (d) of sub-section (1) of section 11AC of the Act in respect of duty, interest and penalty, all proceedings in respect of penalty against other persons, if any, in the said proceedings shall also be deemed to be concluded.]

[(2) Any person, who issues-

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made there under like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.]"

16. Ld. Counsel would submit that none of the elements necessary for invocation of Rule 26 as above have been proved or established in their case, therefore the penalty imposed on Mondelez under Rule 26 needs to be set aside. He would draw the attention of the Bench to para 23.2 of the impugned order which reads as follows:

"Regarding penalty proposed on M/s Cadbury India Limited under Rule 26, it is seen that they are the principal manufacturers of the impugned goods. The said rule stipulates that any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or rupees [two thousand rupees,] whichever is greater.] Obviously, the assesseees are only job workers for CIL and act on their instructions or otherwise they would lose their livelihood. Moreover, CIL is a multi-national company having their own legal cell and are expected to possess wide knowledge of the provisions. Accordingly, it can be said that they are well aware that the impugned goods do not fall under the category of "wafer biscuits" nor they would get the benefit of deductions claimed by them. By their own admission, the goods are 'coated wafers' and that valuation is required to be done under Rule 10A, which required the depot invoices to be submitted by them to the Department and LSFPL cannot do anything about it. However, they failed to submit the same even by the date of passing of this order, which indicates that they have something to suppress in the matter. Thus, they have flaunted an irresponsible attitude of defiance and blatant non-compliance of the provisions, which they knew or believed, can lead to confiscation of the impugned goods. In this regard, their contention

that they have not provided any incorrect data is not acceptable since the price list data is not the proper data to arrive at the AV as per the provisions applicable to the case on hand. Also, since they have received and distributed/sold the impugned goods, which they knew are misclassified/undervalued (by their own admissions regarding description of goods and declaration that they will follow Section 4 r/w Rule 10A and are liable for confiscation, the provisions of Rule 26 are squarely applicable in their case. As such, for the reasons discussed supra, the impugned goods are liable for confiscation (which is not being done for want of seizure of the goods) and consequently, CIL would be liable for penalty as provided under the said Rule."

17. He would assert that the only dispute is regarding the interpretation by the department as opposed to the interpretation of the appellants and therefore no penalty can be imposed under Rule 26 of Central Excise Rules, 2002.

18. Ld. DR reiterates the statements and arguments made in the impugned order. He agrees that the only two points of dispute on merit are (a) whether the appellants are entitled to the benefit of exemption notification 3/2006 (Sl.No. 19) for "Cadbury perk with glucose energy" manufactured by them and (b) whether the dealer's margin, re-distributors margin, post manufacturing expenses have to be included in the assessable value or otherwise. There is no dispute regarding the classification of the product or that it deserves to be asserted under section 4 and Rule 10A of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. On the first point of availability of exemption notification, he asserts that a plain reading of the exemption notification shows that it is not available to all goods which may fall under chapter heading 1905 3290 but to only "wafer biscuits". If the intention had been to give the benefit of exemption to any goods which falls under the heading, the description of the goods in the notification would have been "all goods" similar to some other entries in the same exemption notification such as S.No. 26, 26B, 27 etc. This brings the question whether the goods which are cleared by the appellant are "wafers biscuits" or otherwise. ER-1 returns filed by the appellant that the department described the goods as 'chocolate coated wafers' (for some period) or 'coated wafers'. The invoices are also described the product so. The wrappers of the product also indicates them as coated wafer layers. It nowhere specifies that these are 'wafer biscuits'. Therefore, neither has the appellant had at any point of time described the product as 'wafer biscuits' to the department nor has the product has been so described in any of the documents. Everyone from the manufacturer down to the ultimate consumer in the market understand the disputed products as coated wafers or chocolate coated wafers and NOT as wafer biscuits. It is quite evident that when the wrapper describes them as coated wafers, the dealers, retailers and consumer will not understand them as 'wafer biscuits'. Even till date, the appellant continues to describe their product as coated wafers and not as "wafer biscuits". That leads us to the next question whether wafers are same as wafer biscuits or otherwise. Ld. Counsel for the appellant had relied on the judgment of Hon'ble High Court of Andhra Pradesh in the case of International Foods (supra) and R. Sikaria (supra). A plain reading of both these judgments show that the question as to whether 'wafers can be charged to Central duty under the category of biscuits under the erstwhile Central Excise Tariff'. Ld. DR submits that prior to 1985 (when the Central Excise tariff Act was passed), there was an old Central Excise tariff which was not based on HSN. It only had a list of items and the rates at which excise duty has to be collected. The question in both these judgments of Hon'ble High Court was whether the wafers can also be charged to central excise duty at the rates applicable to biscuits in that particular tariff. The Hon'ble High Court has held that wafers are in essence biscuits and can be so charged. The judgments were not in the context of the new Central Excise tariff which is a detailed and elaborate one nor is it in the context of interpreting the exemption notification. He further argues that exemption notifications were interpreted in a number of ways, some strictly and some liberally by various judicial fora including by the Hon'ble Apex Court. In view of the conflicting decisions, the matters were referred to the Constitutional Bench of Hon'ble Apex Court in the case of *Commissioner of Customs (Import) Mumbai vs. Dilip Kumar & Company & others as reported in*, in which the Hon'ble Apex Court held as follows:

"To sum up, we answer the reference holding as under:

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."

19. He would submit that any exemption notification being an exception to the general rule that tax must be paid at the rates in the tariff, must be interpreted strictly. If there is an ambiguity as to whether an exemption notification is applicable or otherwise, the benefit of doubt must go in favour of the Revenue and against the assessee as per the law laid down by the Constitutional Bench of Hon'ble Apex Court in the landmark judgment above. He would urge that in this case, there is absolutely no ambiguity at all that the goods which are being manufactured are coated wafers and they are described as such by the assessee to their consumers and to the department in their returns and in all other documents. Nowhere have been described as wafer biscuits. Therefore, the exemption available to wafer biscuits only cannot be extended to get wafers manufactured by the appellant.

20. On the question of valuation, he would submit that the Ld. Commissioner has recorded quite clearly that the assessee has not produced the depot invoices at which the goods are sold and therefore the Ld. Commissioner has, in the impugned order, relied on the price list of M/s Mondelez and calculated their assessable value correctly. He also asserted that the extended period of limitation has been correctly invoked and penalties need to be upheld.

21. We have considered the arguments on both sides and perused the records. It is not in dispute that the appellant has manufactured coated wafers (described for some time also as chocolate coated wafers) and cleared them. The goods were not described as "wafer biscuits" either to the department or in the invoices or on the wrappers of the product. Therefore, both the Revenue and everyone in the trade including the consumer understands them as wafers or coated wafers and not as wafer biscuits. It is true that wafer is technically a thin biscuit by itself. Therefore, in the context of the erstwhile Central Excise tariff, the Hon'ble High Court of Andhra Pradesh has held that the same can be charged to Central Excise Duty on the tariff item 1(C) as biscuits. However, this judgment was not in the context of either the new Central Excise Tariff or on how to interpret the exemption notification. The interpretation of exemption notification has to be done strictly giving the benefit of any ambiguity in the exemption notification to the Revenue and against the assessee as has now been laid down by the Constitutional Bench of Hon'ble Apex Court in the case of Dilip Kumar & Company and others (supra). A plain reading of the exemption notification does not show that it is intended to cover all products covered by the tariff heading 1905 3290 or wafers (coated or uncoated) falling under tariff heading. It specifically includes only wafer biscuits falling under tariff heading. If the intention of the notification was to exempt 'wafers' also, it would have said so. The assessee's products are not described as 'wafer biscuits' by the assessee themselves either to the department or in any of the documents or to the ultimate consumers on their wrappers. Thus, we find nobody in the chain of trade from the manufacturer to the ultimate consumer know the products as 'wafer biscuits' but know them only called as coated wafers. It is not for this Tribunal to enlarge the scope of an exemption notification meant for 'wafer biscuits' to cover 'coated wafers' as well. Even if it is held that 'wafers' could possibly be broadly considered as wafer biscuits, the matter is definitely not free from doubt/ambiguity. Under these circumstances, in terms of ratio laid down by the Hon'ble Apex Court in the case of Dilip Kumar and Company & others, we have no option but to hold that the assessee is not entitled to the benefit of exemption notification No. 03/2006.

22. Coming to the question of valuation, it is not in dispute that the assessee is manufacturing the goods on job work basis and are therefore covered by Rule 10A of Central Excise Valuation (Determination of price of Excisable Goods) Rules, 2000. This rule reads as follows:

"RULE 10A. Where the excisable goods are produced or manufactured by a job-worker, on behalf of a person (hereinafter referred to as principal manufacturer), then, -

i. in a case where the goods are sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker, where the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the

sale, the value of the excisable goods shall be the transaction value of the said goods sold by the principal manufacturer;

ii. in a case where the goods are not sold by the principal manufacturer at the time of removal of goods from the factory of the job-worker, but are transferred to some other place from where the said goods are to be sold after their clearance from the factory of job-worker and where the principal manufacturer and buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of said goods from the factory of job-worker;

iii. in a case not covered under clause (i) or (ii), the provisions of foregoing rules, wherever applicable, shall mutatis mutandis apply for determination of the value of the excisable goods : Provided that the cost of transportation, if any, from the premises, wherefrom the goods are sold, to the place of delivery shall not be included in the value of excisable goods.

Explanation. - For the purposes of this rule, job-worker means a person engaged in the manufacture or production of goods on behalf of a principal manufacturer, from any inputs or goods supplied by the said principal manufacturer or by any other person authorised by him."

23. It is also not in dispute that the Little Star paid duty based on the values declared by Mondelez. These values are reflected in the price list discussed above. The only point of dispute are the three elements which the Ld. Adjudicating Authority sought to include in the assessable value i.e. the Dealer's margin, RD Markup and Post Manufacturing expenses. As far as the dealer's margin is concerned, the Ld. Adjudicating authority felt that there is no dealer and the dealer's premises are the assessee's own premises. From the sample contract with the dealer produced by the Ld. Counsel for the appellant before us, we are convinced that there are indeed dealers. Therefore the dealer's margin cannot be included in the assessable value. We further find that in a commodity which costs Rs. 2/- per piece, it is inconceivable that M/s Mondelez was selling these goods directly to individual retailers across the country. Therefore, there is no room for disallowing dealer's margin as a deduction.

24. As far as the RD Mark up is concerned, the Ld. Commissioner considered this to be an R&D cost and Ld. Counsel for the appellant clarifies that this is a margin given to the re-distributors. There is no evidence on record to show that this actually pertains to R&D expenses. Therefore, inclusion of R&D mark up in the assessable value is not sustainable and it deserves to be set aside.

25. As far as the PME (post manufacturing expenses) is concerned, inclusion of these expenses depends upon the nature of the post manufacturing expenses. In case where these are expenses incurred upto the place of removal, the same have to be included in the assessable value. However, if these represent other expenses such as cheque discounting charges as has been asserted by the Ld. Counsel before us, they cannot be included in the assessable value, as has been held by the Tribunal in their own case (supra). This is a fact which can be verified by the adjudicating authority based on any evidence that may be provided by the appellants.

26. On the question of invoking the extended period in appeals No. E/1768/2012 and E/1781/2012, we find from the records that all necessary information was already made available to the department based on which a show cause notice was initially issued and thereafter a subsequent show cause notice was issued, invoking the extended period of limitation alleging suppression of facts which is certainly not sustainable. Once all facts were noted in the department and the department has come to some tentative conclusion regarding the classification and valuation under section 4A of the Central Excise Act and thereafter after a period of one year based on the same facts issued a different show cause notice, coming to a different set of conclusion, all that can be said, it was a question of interpretation which the department itself was not sure about it. Therefore, the demand of extended period of limitation cannot be sustained. Accordingly, the demand to that extent has to fail.

27. As far as the imposition of penalties are concerned, penalties under section 11AC can be imposed where there is fraud, collusion, wilful misstatement, suppression of facts or contravention of any provisions of the Act or the rules made there under with an intent to evade payment of duty. In the present case, we have already held with respect to the invocation of the extended period on limitation that these factors have

not been established. Clearly, this is only a question of interpretation regarding the exemption notification and value. Therefore, the penalties imposed under Section 11AC need to be set aside and we do so.

28. As far as penalty under Rule 26 upon Mondelez is concerned, on a plain reading of this Rule (supra), we do not find any grounds to uphold the penalties imposed upon them (Mondelez), as we have already held that the elements of fraud, collusion, wilful misstatement, suppression of facts or violation of act of Rules with an intent to evade payment of duty, have not been established. In view of the above, the appeals are disposed of as under:

ORDER

(I) The benefit of Exemption Notification No. 3/2006 (Sl.No. 19) meant for wafer biscuits is not available to the appellant (Little Star) as their products are not wafer biscuits.

(II) The dealer's margin and RD Mark up are not includable in the assessable value of the products manufactured by the assessee (Little Star).

(III) As far as the post manufacturing expenses are concerned, the matter is remanded to the original authority to enable the assessee (Little Star) to establish that these pertain to the cheque discount charges as asserted by them or any other expenses not covered by Section 4.

(IV) The demand for the extended period of limitation is unsustainable and is consequently set aside.

(V) The demand and interest in all appeals have to be recomputed as above and for this limited purpose of computation, the matters are remanded to the original authority.

(VI) As the matter is an interpretational one and no elements of fraud, collusion, wilful misstatement or suppression of facts or violation of Acts or Rules made there under, are established, the penalties imposed under Section 11 AC on Little Star and the penalties imposed under Rule 26 upon Mondelez are set aside.

29. Appeal Nos. E/1781/2012, E/20235/2014 and E/21173/2015 filed by Mondelez are allowed. Appeal Nos. E/1768/2012, E/20234/2014, E/21160/2015 filed by Little Star are partly allowed as above by way of remand for the limited purpose of verification of nature of post manufacturing expenses and re-determining the duty and interest excluding any demand for extended period of limitation.

(Pronounced in open court on 06.08.2019)

[Back](#)

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

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 423 of 2012

(Arising out of OIA-55/2012-AHD-III-/KANPAZHAKAN/COMMR-A-/AHD

Passed by Commissioner of Central Excise-AHMEDABAD-III)

M/s. Kaira Can Company Ltd

.....Appellant

Kanjari Unit, Near Railway Station, Village-Kanjari,Kheda, Gujarat

VERSUS

C.C.E & S.T- Ahmedabad-iii

.....Respondent

Custom House... 2nd Floor,

Opp. Old Gujarat High Court, Navrangpura,Ahmedabad, Gujarat-380009

WITH

- i. **Excise Appeal No. 566 of 2012 (Kaira Can Company Limited)**
- ii. **Excise Appeal No. 567 of 2012 (Kaira Can Company Limited)**
- iii. **Excise Appeal No. 568 of 2012 (Kaira Can Company Limited)**
- iv. **Excise Appeal No. 642 of 2008 (Kaira Can Company Limited)**
- v. **Excise Appeal No. 795 of 2011 (Kaira Can Company Ltd)**
- vi. **Excise Appeal No. 943 of 2011 (Kaira Can Company Ltd)**
- vii. **Excise Appeal No. 1003 of 2010 (Kaira Can Company Ltd)**
- viii. **Excise Appeal No. 10038 of 2017 (Kaira Can Company Ltd)**
- ix. **Excise Appeal No. 10112 of 2014 (Kaira Can Company Limited)**
- x. **Excise Appeal No. 10321 of 2017 (Kaira Can Company Ltd)**
- xi. **Excise Appeal No. 10322 of 2017 (Kaira Can Company Ltd)**
- xii. **Excise Appeal No. 10386 of 2013 (Kaira Can Company Limited)**
- xiii. **Excise Appeal No. 10556 of 2015 (Kaira Can Company Limited)**
- xiv. **Excise Appeal No. 10557 of 2015 (Kaira Can Company Limited)**
- xv. **Excise Appeal No. 10558 of 2015 (Kaira Can Company Limited)**
- xvi. **Excise Appeal No. 10559 of 2015 (Kaira Can Company Limited)**
- xvii. **Excise Appeal No. 11487 of 2016 (Kaira Can Company Limited)**
- xviii. **Excise Appeal No. 11555 of 2016 (Kaira Can Company Limited)**
- xix. **Excise Appeal No. 11708 of 2015 (Kaira Can Company Limited)**
- xx. **Excise Appeal No. 13100 of 2014 (Kaira Can Company Limited)**
- xxi. **Excise Appeal No. 13467 of 2014 (Kaira Can Company Limited)**
- xxii. **Excise Appeal No. 13468 of 2014 (Kaira Can Company Limited)**
- xxiii. **Excise Appeal No. 13469 of 2014 (Kaira Can Company Limited)**
- xxiv. **Excise Appeal No. 13470 of 2014 (Kaira Can Company Limited)**
- xxv. **Excise Appeal No. 13471 of 2014 (Kaira Can Company Limited)**
- xxvi. **Excise Appeal No. 13472 of 2014 (Kaira Can Company Limited)**
- xxvii. **Excise Appeal No. 13473 of 2014 (Kaira Can Company Limited)**
- xxviii. **Excise Appeal No. 13474 of 2014 (Kaira Can Company Limited)**
- xxix. **Excise Appeal No. 13475 of 2014 (Kaira Can Company Limited)**

(Arising out of OIA-COMMR-A-/204-209/VDR-I/2012 passed by Commissioner of CentralExcise, Customs and Service Tax-VADODARA-I)

(Arising out of OIA-59/2011-AHD-III-KCG/COMMR-A-/AHD passed by Commissioner ofCentral Excise-AHMEDABAD-III)

(Arising out of OIA-86/2011-AHD-III-KCG/COMMR-A-/AHD passed by
Commissioner of Central Excise-AHMEDABAD-III)

(Arising out of OIA-COMMR-A-/13/VDR-I/2010 passed by Commissioner of Central
Excise, Customs and Service Tax-VADODARA-I)

(Arising out of OIA-VAD-EXCUS-003-APP-247-2016-17 passed by Commissioner of
Central Excise-VADODARA-I(Appeal))

(Arising out of OIA-VAD-EXCUS-003-APP-311-312-2016-17 passed by Commissioner
(Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I(
Appeal)
)

(Arising out of OIA-VAD-EXCUS-003-APP-311-312-2016-17 passed by Commissioner
(Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I(
Appeal))

(Arising out of OIO-AHM-CEX-003-COM-030-031-2013 passed by Commissioner of
Central Excise-AHMEDABAD-III)

(Arising out of OIA-VAD-EXCUS-001-APP-612-615-14-15 passed by Commissioner
of Central Excise, Customs and Service Tax-VADODARA-I)

(Arising out of OIA-VAD-EXCUS-003-APP-570-571-2015-16 passed by Commissioner
of Central Excise and Service Tax-ANAND)

(Arising out of OIA-VAD-EXCUS-ANAND-APP-175/15-16 passed by Commissioner of
Central Excise, Customs and Service Tax-ANAND)

(Arising out of OIA-VAD-EXCUS-003-APP-570-571-2015-16 passed by Commissioner
of Central Excise and Service Tax-ANAND)

(Arising out of OIA-AHM-EXCUS-003-APP-030-14-15 passed by Commissioner of
Central Excise-AHMEDABAD-III)

(Arising out of OIA-VAD-EXCUS-001-APP-222-230-2014-15 passed by Commissioner
of Central Excise, Customs and Service Tax-VADODARA-I)

APPEARANCE:

Shri. Devan Parikh (Advocate) with Shri. Nirav Shah (Advocate) for the Appellant
Shri. K.J. Kinariwala, Authorized Representative for the Respondent

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

Final Order No. A/ 12297-12326 /2019

RAMESH NAIR

DATE OF HEARING :06.08.2019
DATE OF DECISION: 02.12.2019

The brief facts of the case are that the appellant are engaged in the Manufacture of Metal Containers falling under Chapter Heading 73 of the Central Excise Tariff Act, 1985. During the course of audit it was noticed that for the purpose of packing of their final product i.e. Metal Container, they are using corrugated boxes which were supplied by their buyers free of cost. However, the cost of such corrugated boxes supplied free of cost by the buyers were not included in assessable value of the final product. The case of the department is that since the packing material i.e. corrugated boxes were supplied free of cost by the buyers, the cost of the same needs to be included in the assessable value as in the form of supply of corrugated box, there is also an additional consideration flowing directly or indirectly from the buyers resulting in under valuation of Excisable goods and short levy of duty. Accordingly various Show Cause Notices were issued for different periods demanding duty on cost of corrugated boxes. The Adjudicating Authority confirmed the demand of duty along with interest and also imposed penalty equal to duty Under Rule 25 of Central Excise Rules, 2002. Being aggrieved to the Order-In-Original, the appellant had filed appeals before the Commissioner (Appeal) which came to be dismissed. Therefore, the present appeals filed by the appellants.

2. Sh.Devan parikh, Learned Senior Counsel along with Sh. Nirav Shah(Advocate) appearing on behalf of the appellant argued the appeal on various points. Later on a detailed written submission was submitted on 24.10.2019 which was taken on record. Learned Senior Counsel submits that in case of three Show Cause Notices dated 31.1.2007, 3.05.2010 & 22.2.2011 it has invoked extended period. He submits that the issue involved in the given case is appreciation of Section 4 and interpretation of Rule 8, therefore, the larger period cannot be rendered applicable. It is held in the various judgments that when issue is of interpretation and differences on the legal view of a matter the larger period cannot be applied. There is bound to be bona fide belief either. He placed reliance on the following judgment;

- Graphite India Ltd. Vs. Commissioner of Central, Nashik-2017
(358) E.L.T. 263
- Reliance Life Insurance Co. Ltd. Vs. Commissioner of Service Tax, Mumbai-2018
(363) E.L.T. 1050

3. He further submits that in the present case there is no discovery of new facts. The case of the department is not based upon the unit being raided or some new facts being coming on record. The case was made out on the basis of audit of the appellant's records, therefore, there is no suppression of any fact. Since all the facts were available on record and the same was pointed out during audit. He submits that the declarations were filed wherein it was specifically mentioned that corrugated cartons are supplied Free of Cost by the customers and there is no impact on the assessing value is to narrate that this value is not included in Assessable Value.

4. In any case there was sufficient material on record that the department to have included this material. At the relevant time it is also mentioned in the declaration that when such material is supplied free the unit does not charge for packing material cost. However, when the packing material is supplied by the unit the value is included therefore, there is no suppression of facts. In this undisputed fact the "demand for the longer period in any case is not sustainable". As regard the merit he submits that in the normal course the Metal Containers are sold by packing them on plastic pallets which are returnable. On rare occasions they are also sent on wooden pallets. On some occasions they are also sold loose by merely tying with string. He submits that as per the representative copies of invoices along with lorry receipts the clearances of Metal Containers were made on pallets. He submits that the cans are otherwise marketable by packing the same in a pallet. The marketability of the cans does not depend at all on putting the same in any cartons, the cartons if

at all are used primarily when the customers so requires. The cartons are basically used to serve the purpose of the customers and not to render cans marketable. The cartons supplied by various dairies have absolutely no mention of appellants name or their product.

5. On the contrary the cartons mentioned the name of customer and also mentioned the product which is going to be packed in the container. In this regard he invited our attention to the photographs produced. Thus, AMUL supplied Cartons with the symbol of AMUL thereon and with the details as well as details of their products, say Milk powder or Ghee, etc. Such cartons have no details whatsoever of the appellants. The customer on receiving the cans in these cartons used the cans to pack this product in it and put the packed cans in this very carton. This is for the convenience of the customer but has no connection with the marketability of the appellant's product. He further submitted that for the period prior to new Section 4 came into effect, the issue whether such cartons provided Free of Cost by the customers to the appellants are includable in the Assessable value of cans stands concluded by the judgment of an authority not less than the Hon'ble High Court in the case of the appellant themselves. The Hon'ble High Court in special CA No. 1994/1980, as held that in case where the buyers supplied the packing material on their own cost the same cannot be included in the value. It held that if this is so, they were entitled to refund of Excise Duty.

6. Since this Judgment of 22.2.1990 till new Section 4 came into force, the appellant have continuously followed his practice and on not a single occasion has any demand being raised for including the cost of cartons supplied free by their customers in the assessable value. He further submits that only after the new section 4 came into operation that the litigation was restarted. The very basis of the Show Cause Notice for the period after the introduction of New Section 4 is that the new Section 4 changed the basis of valuation as compared to old Section 4. While passing the main impugned order of the Commissioner dated 14.03.2008 clearly holds that there is distinction between Old and New Section 4 and that it is due to this that any activity of packing prior to sale (Whether or not it renders the product marketable) could be includable in the Transaction Value. A reference was also made to the Board Circular to reiterate that under new Section 4 nature of packing is irrelevant and it is immaterial whether it is ordinarily supplied.

7. Thus, the entire basis of the demand was that the new Section 4 was different from the old Section 4. In this regard he submits that even after enactment of the new Section 4 the Hon'ble Supreme Court in the various judgments it was held that there is no departure from old Section 4 and the judgments given in context with the old Section 4 is to hold the field even for the cases after new Section 4 was enacted. He placed reliance on the following judgments.

- Commissioner of Central Excise, Indore Vs. Grasim Industries Ltd., 2014 (304) E.L.T. 310
- JAUSS Polymers Ltd. Vs. Commissioner of Central Excise, Meerut, 2003 (157) E.L.T. 626 SC
- Commissioner of Central Excise, Mysore Vs. TVS Motors Co. Ltd. 2016 (331) E.L.T. 3 (S.C.).
- TATA Motors Ltd. Vs. Union of India, 2012 (286) E.L.T. 161 (Bombay).
- Commissioner of Central Excise, Delhi-III Vs. Innovative TechPack Ltd., 2017 (358) E.L.T. 409
- Nova Iron and Steel Ltd., Vs. Commissioner of Central Excise, Raipur, 2016 (343) E.L.T. 660
- Goyal M.G. Gases Pvt. Ltd. Vs Commissioner of Central Excise, Ghaziabad, 2014 (309) E.L.T. 327
- Commissioner of Central Excise, Allahabad Vs. Indian AirGases Ltd., 2015 (318) E.L.T. 434

He further submits that while the aforesaid some Judgment directly on the point, there are innumerable other judgments under old Section 4 which hold that prices of

packing material supplied Free of Cost by the customers cannot be included in the value. They are as follows;

- I) 2014 (309) E.L.T. -385
- II) 2008 (230) E.L.T.- 3
- III) 2010 (256) E.L.T. -321
- IV) 2008 (229) E.L.T. A183
- V) 2007 (216) E.L.T. -77
- VI) 2008 (230) E.L.T. -104
- VII) 2006 (206) E.L.T. -191
- VIII) 2003 (157) E.L.T. -626
- IX) 2003 (160) E.L.T. -314
- X) 2006 (202) E.L.T. -355
- XI) 2001 (136) E.L.T. -1025
- XII) 2000 (122) E.L.T. -535

. He further submits that the department has not brought any evidence on record that without cartons the product cannot be sold. On the contrary, the department's case is that Marketability is irrelevant to the inclusion of packing charges. He submits that the cans Manufactured by the appellant can be supplied without corrugated boxes. The corrugated boxes supplied by the buyers are for the benefit of the said customers as they find it convenient to repack their goods in this very carton containing Containers. It assists their handling and their factory. These cartons are therefore, essential packing for their final products and are not essential packing for merely the containers. He also submits that it is consistently held that even the bought out item supplied with the required product cannot be included in the value unless it is essential for its functioning or renders it marketable. Such view was taken in the following.

- i) 2005 (192) E.L.T. 620 (Para-4)
- ii) 2005 (191) E.L.T. 379 (Para-1)
- iii) 2009 (235) E.L.T. 737 (Paras- 3.4, 6.1, 31 & 32)
- iv) 2017 (351) E.L.T. -307 (Paras- 1 &3)

The analogy of the above judgment is that free supply of cost of carton which have no role to play any product nor render the same marketable, its value cannot be included in the value of the final product of the appellant.

8. On the other hand, Sh. K.J. Kinariwala, Learned Assistant Commissioner (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order. He referred to the Central Excise Valuation Rules, 2000 and pointed out that as per the new Rule effective from July, 2000 the packing material supplied Free of Cost by the customer, the value consideration of the said packing material needs to be included in the Assessable Value. He submits that there was no Pari- materia provision of this rule in the Old rules. Therefore, As per Learned Counsel there is no change in the old Section and the new Section 4 is incorrect. As per the specific provision the lower authorities have rightly included the cost of packing material supplied Free of Cost to the customer in the Assessable Value of the appellant's final product. Therefore, the impugned orders are sustainable.

9. We have carefully considered the submission made by both the sides and perused the record. As regard the facts of the case there is no dispute that the appellant are manufacturer of Metal Containers and the same is supplied to AMUL where this Container are used for Manufacture and filling of various products such

as milk powder, baby milk powder, Ghee, etc. In the normal course these Metal containers are supplied on pallet used by the appellant for packing of this cans. In some cases M/s AMUL are supplying corrugated boxes Free of Cost wherein, the appellant packed the final product i.e. Metal container and supplied to M/s. AMUL. The revenue included the value of corrugated box in the Assessable Value for the purpose of charging Excise Duty. The entire defense of the appellant is that there are various judgments of the Hon'ble Supreme Court according to which any packing material supplied Free of Cost or packing of the final product the value of such packing material is not includable in the assessable value. All those judgments are in context with the provision of unamended Section 4 and Central Excise Rules, 1975 for the period prior to 1.07.2000. The appellant heavily relied upon the judgments in the case of Hon'ble Supreme Court in the case of TVS Motors Co. Ltd. (supra) and the Larger Bench judgment of Hon'ble Supreme Court in the case of M/s. Grasim Industries Ltd. (supra) whereby they submitted that these judgments are in respect of new Section 4 wherein, it was held that there is no substantial change between the old Section 4 and new Section 4. Therefore, the judgments delivered with reference to the old Section 4 will still hold the field on the issue herein.

10. In this regard, on going through all the judgments and the statutory provision we find that as far as inclusion of cost of packing material supplied Free of Cost for the purpose of packing of final product by the appellant there is no ambiguity in the law. For the ease of reference we reproduce the new Section 4 .

"1/4. Valuation of excisable goods for purposes of charging of duty of excise.-

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall-

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed. 2[Explanation.-For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]"

From the above section 4 it can be seen that only in cases where the transaction value is sole consideration such transaction value shall be the Assessable Value for charging of Excise Duty. However, in the present case apart from the transaction value the packing material supplied Free of Cost by the customer was also used by the appellant. The value of such packing material was not included. When any Excisable product is manufactured and cleared the value of such goods shall be the total value of the goods in the form it is cleared from the factory of the Assessee. It is immaterial that whether a part of the material contained in the final product to borne the cost. In the present case undisputedly the case of the appellant i.e. Metal Container cleared were packed in the corrugated boxes. Therefore, the value of the Metal Containers duly packed in the corrugated box has to be valued. Since the appellant have charged the value excluding the Cost of packing material the revenue is right in including the Cost of the packing material for a very simple reason that the goods were cleared duly packed in such corrugated boxes. Merely because the corrugated box was supplied by the customer that does not make difference as far as inclusion of cost of packing material required to arrive at the Assessable value. Since the Transaction Value is not the sole consideration as the packing cost was not included the value has to be determined resorting to the Valuation Rules made by authority of Section 4. The relevant Rule 6 of the Central Excise Valuation (Determination of price on excisable goods) Rules 2000 reads as under:

“Rule 6. - Where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

Explanation 1. - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely :-

(i) value of materials, components, parts and similar items relatable to such goods;
(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;
(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

Explanation 2. - Where an assessee receives any advance payment from the buyer against delivery of any excisable goods, no notional interest on such advance shall be added to the value unless the Central Excise Officer has evidence to the effect that the advance received has influenced the fixation of the price of the goods by way of charging a lesser price from or by offering a special discount to the buyer who has made the advance deposit. Illustration 1. - X, an assessee, sells his goods to Y against full advance payment at Rs. 100 per piece. However, X also sells such goods to Z without any advance payment at the same price of Rs. 100 per piece. No notional interest on the advance received by X is includible in the transaction value.

Illustration 2. - A, an assessee, manufactures and supplies certain goods as per design and specification furnished by B at a price of Rs. 10 lakhs. A takes 50% of the price as advance against these goods and there is no sale of such goods to any other buyer. There is no evidence available with the Central Excise Officer that the notional interest on such advance has resulted in lowering of the prices. Thus, no notional interest on the advance received shall be added to the transaction value.”

From reading of the above rule it is absolutely clear that the said rule was made amongst other circumstances for the purpose of inclusion of Cost of packing material, if it is supplied Free of Charge by the buyer. Therefore, by virtue of the above Rule 6 read with Explanation 1 Clause-iii the value of packing material supplied Free of Cost by the buyer mandatorily needs to be included in the price of final product. Therefore, in view of the above Section 4 read with Rule 6 there is absolutely no ambiguity on the issue involved in the present case in as much as the cost of corrugated boxes supplied by the buyer to the appellant is includable in the Assessable Value. As regard the submission made by the appellant that the final product of the appellant in Metal Containers is fully manufactured without packing, therefore, the packing cost of the corrugated box supplied by the buyer is not part of the manufacture of the final product.

11. We find that every goods manufactured is otherwise complete in its manufacturing before packing. However, even though the packing is part of the manufacturing activity or otherwise, the Excise Duty is chargeable on the value of the goods in the form it is cleared from the factory of the manufacturer. In the present case, there is no dispute that the Metal Containers manufactured by the appellant are packed in the corrugated box and the same duly packed are cleared for sale to their customers. Therefore, since the goods are cleared in the packed form, the cost of packing material needs to be included in the Assessable value. Hence the argument of the appellant that the packing of the Metal container is beyond the stage of manufacturing will not help as long as the Valuation of goods for the purpose of charging Excise Duty in the form it is cleared. As regard the judgment of the Hon'ble

Gujarat High Court in the appellants own case. We find that the said judgment was given with reference to the old Section 4 and the judgments delivered in that reference. We agree that with reference to the old Section 4, as per the various judgments of the Hon'ble Supreme Court in the case of JAUSS polymers Ltd., Hindustan Polymers Ltd. 1989

(43) E.L.T. 165(SC), the cost of packing material supplied Free of Cost by the buyer was not included in the Assessable Value. The legislature to overcome the judgment of the Hon'ble Supreme Court on the issue of inclusion of cost of packing material amended the Section 4 and made new Valuation Rules of 2000 according to which no scope was left for interpretation of the issue which was existing prior to 1.07.2000. Therefore, after introduction of amended Section 4 and New Central Excise Valuation Rules, 2000 the law is very clear that in case where the packing material is supplied Free of Cost by the buyer to the assessee the cost thereof is includable in the Assessable value.

12. As regard the heavy reliance placed on the Hon'ble Supreme Court Judgment which are with reference to the New amended Section 4 from 1.07.2000. We find that in case of TVS Motors Co. Ltd. the issue was related to Pre-Delivery Inspection and after sale service charges. These charges were not collected, the same was incurred by the manufacturer of Motor Vehicle after clearance of the goods. Therefore, there is no extra consideration flowing to the manufacturer. On that basis the Hon'ble Supreme Court held that the Pre-Delivery Inspection and after Sale Service Charges are not includable in the value. The facts of that case is totally different from the facts of the present case. As in the present case the issue of inclusion of packing material supplied Free of Cost by the buyer is involved. Therefore, the judgment of Hon'ble Supreme Court in the case of TVS Motors Co. Ltd being on altogether different facts and the issue shall not apply in the present case. In case of Grasim Industries Ltd. (supra) the Larger Bench of the Hon'ble Supreme Court dealing with old Section 4 and New Section 4 held that there is no difference in statutory concept of Transaction Value and judicially evolved meaning of normal price. The appellant on this basis argued that with these judicial pronouncements all the judgments given with reference to the old Section 4 i.e. before amendment of 2000 shall equally apply in the cases related to the period after amendment of 2000.

13. On going through the facts of the said judgment we find that the assessee are charging to their customer certain amounts under different heads namely packing charges, facility charges, Service Charges, Delivery and Collection charges, rental charges, repair and testing charges. The facts of the present case is different as the appellant is not charging separately. The issue involved in the present case is that the Cost of corrugated boxes which were supplied by the customer Free of Cost and such corrugated boxes are used for packing of the final product is includable as clearly provided under Rule 6 of Central Excise Valuation Rules, 2000. Therefore, the facts of the present case is completely different from the facts of the Hon'ble Supreme Court judgment in the case of Grasim. Moreover, as per Rule 6 of Central Excise Valuation Rules, 2000 it is explicit wherein, the provision for inclusion of cost of packing material supplied Free of Cost by the customer is provided. The Hon'ble Supreme Court in the case of Grasim (supra) have not dealt with the provision of Rule 6 of the Central Excise Valuation Rules, 2000. It is also pertinent that the Central Excise Valuation Rules, 2000 have not been struck down by the Hon'ble Supreme Court in the case of Grasim's judgment (supra). It is also observed from the judgment that the Hon'ble Supreme Court in Para 18 referring to the Bombay Tyres International Ltd. on principle agreed that the Cost of primary packing needs to be included. This provision was not under dispute even in the old Section

4. In the present case there is no dispute that the corrugated box even though supplied by the buyer was used as primary packing. For this reason also the judgment of Hon'ble Supreme Court of Grasim would not adversely affect the revenues case. As regards the judgment in the case of Innovative Tech Pack Ltd., decided by this tribunal, we find that the entire case was decided on the fact that the packing material was meant only for transportation of manufactured goods to the buyer and it is not necessary for rendering the said goods marketable. In the present case, since the box was used as a primary packing it would not be said that it is used

only for transportation of the goods. Moreover in some of the supplies the appellant's units are located within the premises of the customer i.e. M/s. AMUL despite that the Metal Containers were packed and supplied in corrugated box. Therefore, the corrugated box used for packing of Metal Containers is not for transportation of goods, therefore, the decision of Innovative Tech Pack Ltd. is clearly distinguished. As regards the reliance placed on the Nova Iron and Steel Ltd., we find that in the said judgment it was decided that the cost of packing is not includable only on the basis that the goods otherwise was marketable in the loose form and the fact was also noted that the goods namely sponge iron were being supplied without packing if dispatched through road transport. In the said case the packing was done particularly for dispatch of goods through Railways. In the present case, it is undisputed that in some cases where the customer has not provided the corrugated box the goods i.e. Metal Container were not supplied in loose condition whereas, the same were supplied on the pallet therefore the goods of the appellant i.e. Metal container is not capable of being dispatched without any packing. Therefore, the facts of the present case is different from that of M/sNova Iron Steel Ltd.(supra).

14. As per our above discussion we are of the view that the cost of corrugated boxes supplied Free of Cost by the customer to the appellant is includable in the Transaction Value of the Metal container manufactured and supplied by the appellant. As regard the limitation vehemently argued by the Learned Senior Counsel on behalf of the appellant, we have examined the facts. We find that the issue involved in the present case is based on strict interpretation of Section 4 of Central Excise Act, 1944 and rules made there under. There are various judgments on this issue therefore, it cannot be said that the appellant had any mala fide intention. It is also observed that the appellant have never suppressed any fact as regard non-inclusion of the Cost of corrugated box supplied Free of Cost by their buyer for the reason that this facts was noticed by the Audit Officer from the records which was existing at the time of Audit. It is also observed that the appellant have made a specific declaration about the fact that they are receiving corrugated cartons Free of Cost from their customers. It is also mentioned in the declaration that there is no impact on the assessable value and the value of such corrugated box was not included in the Assessable Value. Therefore, when the supply of corrugated box Free of Cost by the customer to the appellant was declared by the appellant to the department, it was open for the department to make out a case if they desire and issue the Show Cause Notice well within the stipulated time period of one year but despite all the details available with the department the Show Cause Notice was not issued in the normal period. In this fact the demand for the period before one year of the date of Show Cause Notice is time barred and we set aside the demand for extended period.

15. As per our discussion and finding given herein above on merit the demand is sustainable and on Limitation demand for the extended period is set aside. Appeal Nos. E/642/2008, E/795/2011, E/10112/2014 are partly allowed and all other appeals are dismissed.

(Pronounced in the open court on 02.12.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Excise Appeal No. 10576 of 2019

Arising out of Order-in-Original No OIO-VAD-EXCUS-001-COM-21-18-19, Dated:
11.01.2019

Passed by Commissioner of Central Excise & ST, Vadodara

**Date of Hearing: 03.02.2020
Date of Decision: 28.02.2020**

**GUJARAT STATE FERTILIZERS AND CHEMICALS LTD
PO FERTILIZER NAGAR, VADODARA GUJARAT**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
VADODARA, 1ST FLOOR, CENTRAL EXCISE BUILDING
RACE COURSE CIRCLE, VADODARA, GUJARAT-390007**

Appellant Rep by: Shri Willingdon Christian, Adv.

Respondent Rep by: Shri T G Rathod, Joint Commissioner (AR)

CORAM: Ramesh Nair, Member (J)
Raju, Member (T)

FINAL ORDER NO. A/10703/2020

Per: Raju:

This appeal has been filed by M/s. Gujarat State Fertilizers & Chemicals Limited in respect of demand of duty on Sulphur purchased by them by availing benefit of exemption Notification No. 12/2012-CE dated 17 March 2012.

2. Learned Counsel for the appellant pointed out that Notification No. 12/2012-CE dated 17 March 2012 exempts goods falling under Chapter heading 25030010 from whole of Central Excise duty if the same are used for manufacture of fertilizer subject to the condition that where such use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure laid down in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 is followed. Entry 55 to the table of Notification No. 12/2012-CE dated 17 March 2012 reads as follows:-

Sl. No.	Table Sl. No. Chapter of heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition
1	2	3	4	5
55	25030010	All goods for manufacture of fertilizers	Nil	2

Learned Counsel pointed out that there is no dispute regarding following the condition specified in the said notification and therefore, the only issue before the Tribunal is if the goods, namely Sulphur, procured by them availing benefit of Notification No. 12/2012-CE dated 17 March 2012 is used in the manufacture of fertilizers or otherwise. Learned Counsel pointed out that there are four different issues involved. Learned Counsel produced a flow chart which indicates the use of Sulphur in four different streams in the factory. He pointed out that each one of different stream is used and being dealt differently to establish the used of Sulphur for the manufacture of fertilizer.

3. The first issue relates to the use of Sulphur for manufacture of Sulphuric Acid/Oleum which in turn is used in the Urea Plant for manufacture of Molten Urea.

The Molten Urea is in turn used as fertilizer or in the manufacture of Melamine. Learned Counsel pointed out that since Molten Urea is manufactured, the condition specified in Notification No. 12/2012-CE that Sulphur is used for manufacture of fertilizer is satisfied. He pointed out that they use of Molten Urea, which itself is a fertilizer, in the manufacture of Melamine. He relied on the decision of Hon'ble Apex Court in their own case reported at 1997 (91) ELT 3 (SC) where a similar issue was dealt with. In the said case, under Notification No. 75/84-CE dated 01.03.1984 granted concessional rate of duty to raw Naphtha intended for use in the manufacture of fertilizers and ammonia. Notification No. 40/85-CE dated 17.03.1985 granted total exemption to ammonia used in the manufacture of fertilizers. The ammonia so manufactured was used captive for manufacture of Molten Urea. In the said circumstances, it was held that Molten Urea is undisputedly classifiable as a chemical fertilizer under Heading 31.02 of Central Excise Tariff Act, 1985.

3.1 Learned Counsel also pointed out that the said decision has been wrongly distinguished by the original adjudicating authority by stating that Sulphuric Acid manufactured out of Sulphur has not been used to manufacture urea but for maintaining PH level of Cooling Towers. He pointed out that Sulphuric Acid is used in the manufacture of Urea and it is also used for cooling towers. The issue relating to cooling towers is being dealt separately. Learned Counsel argued that in view of the decision of Hon'ble Apex Court in their own case, the benefit of Notification No. 12/2012-CE cannot be denied.

3.2 Learned Counsel pointed out that second issue relates to the use of Sulphur in Caprolactam Plants where the Sulphuric Acid is used to manufacture Caprolactam and Ammonium Sulphate. He pointed out that Ammonium Sulphate is fertilizer. He pointed out that Sulphur used in Caprolactam Plant (HX Plant) which in turn used in the manufacture of HAS. He further pointed out that a part of Hydroxyamine Sulphate (HAS) is also cleared on payment of duty. He pointed out that in respect of Hydroxyamine Sulphate sold by them they are admitting their duty liability. He further pointed out that whatever duty is payable on Sulphur used in the manufacture of HAS, the same is available to them as Cenvat credit and therefore the situation is Revenue neutral. As regards the sulphur used in the manufacture of Caprolactam which in turn used for Ammonium Sulphate is concerned, they are entitled for the benefit of Notification No. 12/2012-CE. He pointed out that the issue is squarely covered by Hon'ble Delhi High Court decision in their own case reported at 2009 (241) ELT 190 (Delhi) In the said case, identical issue was dealt in respect of Sulphuric acid used to manufacture of fertilizers exempted under Notification Nos. 74/66-CE and 81/75-CE. He pointed out that the said decision of single Member Bench of Delhi High Court was challenged before the Division Bench of Delhi High Court by Revenue and the Division Bench dismissed the appeal of Revenue as reported at 2010 (252) ELT 339 (Del.). He argued that the said decisions were wrongly distinguished by the Adjudicating Authority on the ground that the said decision relates to use of Sulphuric Acid and not Sulphur. It is also argued that in this process, Ammonium Sulphate is only a bye-product and the Caprolactam is the main product manufactured. He pointed out that if 5 ton of Ammonium Sulphate is produced, the production of Caprolactam is just 1-ton therefore, it cannot be called bye-product.

3.3 Learned Counsel pointed out that the 3rd issue relates to use of Sulphuric Acid in the cooling towers. He pointed out that Sulphuric Acid is used to maintain PH balance in the cooling towers. Learned Counsel pointed that the said use is covered by following decisions:-

(a) 1999 (112) ELT 448 (Tri.) – *Indo Gulf Fertilizers & Chemicals vs. CCE*.

(b) 1996 (15) RLT 498 (SC) – *Indian Farmers Fertilizers Cooperative Limited vs. CCE*

(c) 1997 (23) RLT 594 (CEGAT) – *Fertilizers Corporation of India Limited vs. CCE*

(d) 1996 (85) ELT 187 (T) – *CCE vs. Hindustan Fertilizers Corporation of India Limited*

(e) 1987 (30) ELT 507 (T) – *Fertilizers Corporation of India Limited vs. CCE*

He pointed out that maintaining of PH balance is essential in the manufacturing of fertilizers using sulphur for such purpose amounts to use in the manufacture of Urea and Ammonia Sulphate.

3.4 Learned Counsel pointed out that the 4th issue is Sulphur used in the manufacture of Phosphoric Acid and Phospho Gypsum (bye-product). He pointed out

that Phosphoric Acid is used captively for manufacture of fertilizers i.e. Ammonium Phosphate Suplhate (APS). He pointed out that part of the Phosphoric Acid is sold by them in the open market on payment of duty. He admitted his liability of duty on Sulphur used in such Phosphoric Acid. He pointed out that the exercise would be Revenue neutral as they would be entitled for Cenvat credit for sulphur used in the manufacture of Phosphoric Acid which is sold on payment of duty. He pointed out that use of Phosphoric Acid for manufacture of Ammonium Phosphate Sulphate, Ammonium Sulphate and Phospho Gypsum amounts to use in fertilizers and thus entitled for exemption Notification No. 12/2012-CE. He pointed out that the benefit of notification has been denied on the ground that a product, other than fertilizers, namely Phospho Gypsum is manufactured. He pointed out that as far as production and clearance of Phospho Gypsum is concerned, the issue is covered by the following judgments:-

- (a) 2008 (232) ELT 193 (SC) – CCE vs. National Organic Chemical Industries Limited
- (b) 2007 (211) ELT 193 (SC) – CCE vs. Chennai Petroleum Corpn. Limited (c) 2011 (207) ELT 200 (Guj.) – CCE vs. Sterling Gelatin
- (d) 1997 (92) ELT 294 (SC) – Indian Petrochemicals Corpn. Limited vs. CCE.

3.5 Learned Counsel also pointed that penalty has been imposed under the provisions of Section 11AC which is improper as they are entitled exemption of Notification No. 12/2012-CE in respect of Sulphur used in manufacture of fertilizers. He pointed out that in respect of Sulphur used in manufacture of Hydroxyl Amine Sulphate and Phosphoric Acid sold on payment of duty, they are entitled to Cenvat credit therefore, there is no intention to evade payment of duty.

4. Learned Authorised Representative relies on the impugned order. He pointed out that impugned order differentiate the case laws relied on by the appellants. He pointed out that they are seeking to deny benefit of Notification No. 12/2012-CE on Sulphuric Acid directly used in the manufacture of Urea. He also pointed out that the said decision relates to use of raw naphtha in manufacture of Urea and not in respect of Sulphur used in the manufacture of Urea. He pointed out that in so far as Sulphuric Acid claimed to be used in the manufacture of Urea is concerned, the use of Sulphur for maintaining PH balance of cooling towers does not amount to use of Sulphur in manufacture of fertilizers.

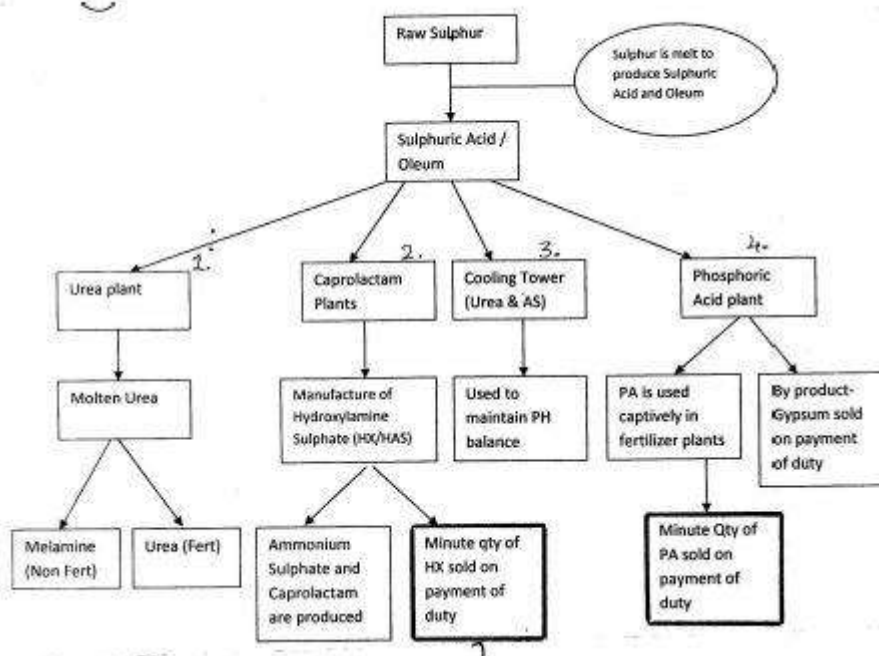
4.1 In so far as the issue No. 2 is concerned, learned Authorised Representative tried to distinguish on the ground that notification under consideration in two decisions is not the same. He pointed out that the decision in the case of *Indo Gulf Fertilizers & Chemicals vs. CCE – 1999 (112) ELT 448 (T)*, relied on by the appellant relates to issue No.3 and he relied on the same for this issue.

4.2 In respect of 4th issue relating to use of Sulphur for manufacturing of Phosphoric Acid and Phospho Gypsum, learned Authorised Representative relies on the same arguments as for the use of Sulphur used in the manufacture of Ammonium Phosphate and Phospho Gypsum. Learned Authorised Representative further pointed out that there is no Revenue neutrality in the instant case.

5. We have considered the rival submissions. We find that the appellant are seeking benefit of Notification No. 12/2012-CE dated 17 March 2012. Notification 12.2012-CE grants exemption to goods falling under Chapter heading 25030010 from payment of Central Excise duty subject to condition, entry 55 which reads as under:-

Sl. No.	Table Sl. No. Chapter of heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition
1	2	3	4	5
55	25030010	All goods for manufacture of fertilizers	Nil	2

The appellant have placed on record a flow diagram detailing the manner the Sulphur is used:-



6. The first issue relates to use of Sulphur used for manufacture of Sulphuric Acid/ Oleum which in turn used for manufacture of Molten Urea. Revenue's objection is that the some quantity of Molten Urea is used as input for the manufacture of Malamine and therefore, the appellants are not entitled to benefit of notification. It is noticed that Molten Urea which comes into existence is itself a chemical fertilizer, as held by Hon'ble Apex Court in the appellant's own case reported at 1997 (91) ELT 3 (SC). The Hon'ble Apex Court observed as under:-

"10. Then next we turn to exemption Notification No. 40 of 1985, dated 17-3-1985. As per the said notification, as amended from time to time, it had been laid down that the Central Government was pleased to exempt goods of the description mentioned in column (2) of the Table and falling under Chapters 25, 27, 28, 29 and 31 or 32, as the case may be, of the Schedule to the Tariff Act, from the whole of the duty of excise leviable thereon under Section 3 of the Central Excises and Salt Act, 1944, subject to the conditions, if any, laid down in the corresponding entry in column (3) thereof. column (2) of the Table referred to the description of goods and at Sl. No. 3 is mentioned ammonia. Thus ammonia which was manufactured by the appellant out of raw naphtha came under the sweep of the said exemption notification. The condition for earning exemption from excise duty on ammonia as laid down in column (3), which is relevant for our present purpose, is Condition No. (ii) which provides that ammonia should be used in the manufacture of fertilisers. It is not in dispute that ammonia was captively consumed by the appellant in manufacturing molten urea. Therefore, the moot question is whether ammonia could be said to have been utilised for manufacturing any fertiliser. It is no doubt true that molten urea in its turn became an input for producing the final product, namely, melamine which admittedly was not a fertiliser. But as required by the express language of the notification we have to find out whether molten urea which was manufactured out of ammonia was a fertiliser or not. It is now well settled by a catena of decisions of this Court that for deciding whether an exemption notification gets attracted on the facts of a given case, the express language of the exemption notification has to be given its due effect. In this connection, we may refer to a decision of this Court to which our attention was invited by Shri Dave, learned Senior Counsel for the appellant. In *M/s. Hemraj Gordhandas v. H.H. Dave, Assistant Collector of Central Excise & Customs, Surat and Ors.* [1978 (2) E.L.T. (J 350)], a Constitution Bench of this Court speaking through Ramaswami, J. has made the following pertinent observations in paragraph 5 of the Report :

"....It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different but that is not the case here..."

In *Steel Authority of India Ltd. v. Collector of Central Excise* [1996 (88) E.L.T. 314 (S.C.)], one of us S.P. Bharucha, J. speaking for a Bench of two learned Judges, while dealing

with an exemption notification in connection with raw naphtha laid down in paragraph 5 of the Report that due emphasis had to be given to the clear language of the condition mentioned in the exemption notification. Same view was reiterated in the case of *Prince Khadi Woollen Handloom Prod. Coop. Indl. Society v. Collector of Central Excise* [1996 (88) E.L.T. 637 (S.C.)]."

"13. That takes us to the consideration of the main submission canvassed by Shri Bhat, learned Additional Solicitor General, that the CEGAT had taken the view that ammonia which was utilised by way of captive consumption by the appellant for manufacture of molten urea was subjected to a continuous process of manufacturing which had resulted in the end product melamine which was admittedly not a fertiliser. That may be so. However, the question remains whether ammonia could be said to have been used in the manufacture of molten urea which was a chemical fertiliser. We have to recall that molten urea itself is an excisable commodity even though it might have been exempted from payment of excise duty by a notification issued by the Central Government. But for the said exemption notification molten urea would have been required to bear the full duty. As seen earlier, it has been classified as a chemical fertiliser under Heading 31.02 by the authorities themselves. For levying excise duty on such a commodity, namely, molten urea, if the department takes the view that it is to be subjected to excise duty as a chemical fertiliser on its clearance even for captive consumption, it is difficult to appreciate the contrary stand of the very same authority that it would cease to be a fertiliser for the purpose of exemption Notification No. 40 of 1985, even though ammonia results in the manufacture of the same excisable item, namely, molten urea. Such a stand cannot be permitted to be adopted by the department, as it would amount to blowing hot and cold at the same time. If molten urea is treated to be an excisable item under Heading 31.02 as a chemical fertiliser, it has to be treated on the same lines while construing the sweep of exemption Notification No. 40 of 1985 which expressly refers to Chapter 31 amongst others. In short, molten urea must be treated to be a fertiliser for the purpose of its exigibility to duty under Heading 31.02 of the Tariff Act and simultaneously also for the purpose of exemption Notification No. 40 of 1985. It is also easy to visualise that if molten urea would have been sold by the appellant in outside market instead of being captively consumed further for the manufacture of melamine, it would have borne full duty subject to exemption notification, if any, under Tariff Item 31.02. Only because it was captively consumed in the onward process of manufacture which had resulted into melamine, it could not be said that the final product for the purpose of Excise Act had not emerged in the shape of molten urea by the captive consumption of ammonia."

Revenue has sought to distinguish this decision by stating that Sulphuric Acid used in Cooling Towers does not qualify as use in the manufacture of Urea. We find that claim of the appellant that Sulphuric Acid is directly used in the manufacture of Urea has not been contested by Revenue in the impugned order. We find that distinction made is not logical as Sulphuric Acid is also directly used in the manufacture of Urea as claimed by the appellant. In this circumstance, we find no merit in the Revenue's case in so far as the use of Sulphur in manufacture of Urea is concerned. Exemption in respect of Sulphur used in manufacture of Urea is allowed.

7. The second issue relates to use of Sulphur in the manufacture of Sulphuric Acid/Oleum which in turn used in Caprolactam Plant. Caprolactam is manufactured along with Ammonium Sulphate, which is undisputedly a chemical fertilizer, and therefore, the appellant would be entitled to avail benefit of Notification No. 12/2012-CE in respect of use of Sulphur which in turn used in the manufacture of Ammonium Sulphate. The issue is also covered by the decision of Single Member Bench of Hon'ble Delhi High Court in their own case reported at 2009 (241) ELT 190 (Del.) and approved by Division Bench of Hon'ble Delhi High Court reported at 2010 (252) ELT 339 (Del.). The Division Bench of Hon'ble Delhi High Court observed as follows:-

"7. Admittedly, the Respondent uses Oleum in the manufacture of Ammonium Sulphate and Caprolactam but according to the Appellant Ammonium Sulphate is only a by-product and as such Oleum is not used in the manufacture of fertilizers. There is no dispute that Ammonium Sulphate is nothing but a chemical fertilizer. The learned Single Judge rightly held that the exemption notifications, on a plain reading, make no mention of a by-product or a primary product. All that is to be seen is whether the use of fuming sulphuric acid results in the manufacture of a fertilizer. In this case, the answer must be in the affirmative since the use of Oleum results in the manufacture of Ammonium Sulphate which is nothing but a chemical fertilizer.

8. Under the circumstances, both the ingredients of the exemption Notifications have been met by the Respondent, namely, that it is using fuming sulphuric acid which is included in the expression sulphuric acid falling in T.I. 14G of the First Schedule to the Act and that this fuming sulphuric acid is intended for use in the manufacture and is in fact used in the manufacture of fertilizer that is Ammonium Sulphate."

The impugned order seeks to distinguish this decision on the ground that Ammonium Sulphate produced by the appellant in this stream is only a bye-product and Caprolactam is main product. It has been argued that appellant produce 5 ton of Ammonium Sulphate to produce just 1ton of Caprolactam therefore, it cannot be treated as bye-product. We find that sulphur used for production of Ammonium Sulphate alongwith Caprolactam is exempted as held by Hon'ble Delhi High Court in the appellant's case reported at 2009 (241) ELT 190 (Del.). Relevant Para 30 of the decision is reproduced below:-

30. The crucial terms here are sulphuric acid "intended for use in the manufacture of fertilizers". There are no restrictive terms cutting down the width of the phrase "intended for use". Applying the canon of construction mentioned earlier, i.e. that such exemption notifications are to be considered in their own terms, the Court holds that the express terms here do not make a distinction between "primary" and "secondary" product or "main product" and "by-product". As far back as in *Hansraj's case*, it was ruled that :

"It is well-established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling

(emphasis supplied)

In this case the notification does not prohibit the use of diverse technologies that may enable a manufacture to produce two kinds of goods, simultaneously, in the same process. It is not denied that for each ton of Caprolactum produced 5.1 tonnes of ammonium sulphate is produced. If indeed this is deemed a by-product it appears to be a case of the proverbial tail wagging the dog. The Court cannot be unmindful, here of the object of the notification which was to make fertilizers less expensive, and more widely accessible. The innovative use of a relatively less known technology to achieve production of ammonium sulphate concededly a fertilizer, cannot be denied the benefit of the exemption notification, which contains no support for the distinction between "main product" and "by-product" relied upon by the revenue. Consequently, this question too has to be answered against the revenue.

In these circumstances, we find merit in the arguments of the appellant. However, we find that a small quantity of Hydroxylamine Sulphate (HX/HAS) sold by the appellant and they have admitted their liability in respect of duty free Hydroxylamine Sulphate sold by them in the open market on payment of duty and their argument is only Revenue neutrality. We find, in so far as demand of duty on Sulphur used in the quantity of Hydroxylamine Sulphate sold by them in the open market needs to be confirmed. Accordingly, demand in so far as Sulphur used in the manufacture of Sulphuric Acid/Oleum used for manufacture of Ammonium Sulphate and Caprolactam, is set-aside.

8. 3rd issue relates to use of Sulphuric Acid in maintaining PH balance in cooling towers. In this context, the appellant relied on various decisions of Hon'ble Apex Court and Tribunal as referred to in Para 3.3 above. In the case of *Indo Gulf Fertilizers & Chemicals vs. CCE - 1999 (112) ELT 448 (Tri.) (supra)*, the issue has been examined and following has been observed:-

"4. We find that the issue is covered by the earlier decision of the Tribunal in appellants' own case in appeal No. E/1357/95-C and the Tribunal vide Final Order No. 435/99-C, dated 19-5-1999 allowed the benefit of Notification 81/75-C.E. in respect of sulphuric acid used in the cooling tower in appellants' unit. The Tribunal held as under :

"The contention of the appellants is that the sulphuric acid is used in the cooling tower for the control of acid alkaline ratio (pH value) of the water which was later on used in the ammonia plant. The contention of the appellants is that since this sulphuric acid was used in or in relation to the manufacture of fertilisers, therefore, they are eligible for the benefit of the notification. The Notification No. 81/75-C.E., dated 22-3-1975 exempts from excise duty the sulphuric acid intended for use in the manufacture of fertilisers. We find the issue is covered by the decision of the Tribunal in the case of *Fertiliser Corporation of India Limited v. C.C.E., Patna* reported in [1997 (23) RLT 594 (CEGAT)]. In

this case, the Tribunal, while following the earlier decisions in the cases of Fertilizer Corporation of India Limited v. C.C.E., Patna reported in [1987 (30) E.L.T. 507] and C.C.E., Patna v. Hindustan Fertiliser Corporation reported in [1996 (85) E.L.T. 187] held that sulphuric acid used in the fertiliser plant is eligible for the benefit of Notification No. 81/75-C.E."

We find merit in the decision and therefore, relying on the said decision, we allow the appeal in so far as use of Sulphuric Acid in the Cooling Towers is concerned.

9. 4th issue relates to use of Sulphuric Acid in the manufacture of Phosphoric Acid (and Phospho Gypsum) which in turn used to produce Ammonium Phosphate. The benefit has been sought to be denied on the ground that bye-product Phospho Gypsum is also manufactured and sold in the open market on payment of duty. It is not in dispute that Ammonium Sulphate is fertilizer. In this regard, the arguments in respect of Sulphuric Acid used in the manufacture of Urea would equally apply that Sulphuric Acid was in turn used for production of Ammonium Sulphate.

9.1 Another objection raised, is in respect of use of Sulphuric Acid and Phosphoric Acid consumed for production of Phospho-gypsum which is a bye-product and sold in the market on payment of duty. The appellant have relied on the extracts of Year Book 2016 (Part-III) wherein following has been stated:-

"Phospho-gypsum is produced as a by-product during the manufacture of phosphoric acid by wet process.

Presently, most phosphoric acid plants dispose the phospho-gypsum generated, by way of stacking it within the plant premises. These stacks are subsequently sold off when demand arises for them. Phospho-gypsum generated from phosphoric acid plants contains three types of impurities such as residual acid, fluorine compounds and trace elements, including those that are radioactive that are considered to be potentially harmful."

The appellant have also relied on various decisions of Hon'ble Apex Court and High Courts as referred to in Para 3.4 above. In the case of *National Organic Chemical Industries Limited reported at 2008 (232) ELT 193 (SC) (supra)*, the Hon'ble Apex Court observed as follows:-

"6. The respondent manufactures petro chemicals falling under chapters 27 and 29 from raw naptha. Raw Naptha is cracked in cracker containing number of burners and heated upto 800 degree centigrade. After the process of cracking, Ethylene and Propylene gases are produced in the factory. These gases are also captively consumed as a refrigerant for cooling since they have the property of reducing temperatures upto 100 degree c. and 30 degree c. respectively.

7.

8. It is the further case of the appellant that as per Exemption Notification No. 217/86-C.E., dated 2-4-1986, the inputs ethylene and propylene (falling under chapter 29) captively consumed in the manufacture of finished goods falling under chapter 29 are exempted from excise duty. As per the said notification such exemption will not be available to ethylene and propylene used in the manufacture of goods falling under chapter 27, namely methane and ethane. In other words, excise duty will have to be paid by the respondent assessee for such of the quantity of ethylene and propylene (inputs) captively consumed and used in the manufacture of products falling under chapter 27 namely methane and ethane.

9 to 29

30. We have heard the learned counsel for the parties at length and perused the judgments cited at the Bar. The Tribunal's finding that the ethylene and propylene used as refrigerant has been used in or in relation to the manufacture of the same goods. The inevitable and automatic emergence of ethane and methane, therefore, by itself is no ground for denying the exemption contained in the notification. The Tribunal came to the categoric finding that the respondent could not have manufactured ethylene and propylene without manufacturing its by-products ethane and methane. The Tribunal held that in any technology the emergence of ethane and methane was inevitable and hence while it is no doubt correct to say that the ethylene and propylene have been used in or in relation to the manufacture of ethane and methane, the identical quantity of the same goods has simultaneously been used in the manufacture of ethylene and propylene. The

emergence of ethane and methane, therefore, cannot be a ground to deny the benefit of exemption to the respondent.

31. In our considered view, no interference is called for in the well-reasoned judgment/order of the Tribunal. The appeal being devoid of any merit is accordingly dismissed. However, in view of the facts & circumstances of the case, the parties are directed to bear their own costs."

We find that ratio of aforesaid decision squarely apply to the instant case.

9.2 Thus, we find no merit in the Revenue's arguments that benefit of Notification No. 12/2012-CE dated 17 March 2012 can be denied on the ground that during manufacture of Phosphoric Acid which in turn used in the manufacture of fertilizer and Phospho-gypsum is manufactured. We find that appellant have admitted liability in respect of Sulphur which is used in the manufacture of Sulphuric Acid and sold in the open market on payment of duty. They have contended that it is Revenue neutral situation. However, we find that liability for Central Excise duty would arise nonetheless in respect of Sulphur used in the manufacture of Phosphoric Acid which was cleared on payment of duty.

10. In this background, we find no penalty can be imposed under Section 11AC, as there is no apparent malafide intention and the issue relates to interpretation. In view of above, we set-aside the demand except for the demand within limitation on the quantity of Sulphur used in the manufacture of Hydroxylamine Sulphate (HX/HAS) and Phosphoric Acid sold by them on payment of duty. In these circumstances the benefit of limitation is also extended.

11. Appeal is partly allowed in the above terms.

(Order pronounced in the open court on 28.02.2020)

Customs, Excise & Service Tax Appellate Tribunal

West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 94 of 2009

(Arising out of OIO-19/COMMISSIONER/RKS/AHD-II/2008, Dated-24/10/2008 passed by Commissioner of Central Excise-AHMEDABAD-II)

M/s. A K Chaturvedi

.....Appellant

Ex-Vice President, Gujarat Composite Ltd.,

House No. 60, Sector-20, Indira Nagar,
Lucknow, Uttarpradesh

VERSUS

C.C.E.-Ahmedabad-II

.....Respondent

Custom House... First Floor,

Old High Court Road, Navrangpura,
Ahmedabad, Gujarat-380009

WITH

9. Excise Appeal No. 95 of 2009 (N K Bangur);

10. Excise Appeal No. 96 of 2009 (PurushottamSoni);

11. Excise Appeal No. 97 of 2009 (Basant Kumar Bangur);

12. Excise Appeal No. 98 of 2009 (H N Maheshwari);

13. Excise Appeal No. 103 of 2009 (Gujarat Composite Ltd);

(Arising out of OIO-19/COMMISSIONER/RKS/AHD-II/2008, Dated-24/10/2008 passed by Commissioner of Central Excise-AHMEDABAD-II)

APPEARANCE:

Shri. Anand Nainawati, Advocate for the Appellant

Shri. H.K. Jain, Authorised Representative for the Respondent

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

Final Order No. A/ 10578-10583/2020

DATE OF HEARING: 31.01.2020

DATE OF DECISION: 27.02.2020

RAMESH NAIR

The present appeals are filed by M/s Gujarat Composite Ltd. (M/s GCL), Shri A.K. Chaturvedi (Vice-president, Works), Shri N.K. Bangur, Managing director, Shri PurshottamSoni (Senior G.M- Finance), Shri H.N.Maheshwari, Executive Director and Shri Basant Kumar Bangur against Order No. 19/COMMISSIONER/RKS/AHD-II/2008 dt. 24.10.2008 passed by Commissioner of Central Excise, Ahmedabad. The facts of the case are that M/s GCL are engaged in manufacture of Asbestos Cement Products viz. Sheets and Pipes falling under chapter 68 of the Central Excise Tariff Act, 1985. They are using Fly Ash, Asbestos Fibre and Cement as an Input. M/s GCL were availing benefit of concessional rate of duty in terms of exemption notification No. 5/99 CE dt. 28.02.99, 6/2000 – CE dt. 01.03.2000 under which they were paying concessional duty on clearances of sheets and pipes subject to the condition that the products should have contained not less than 25% by weight of fly ash or phosphorous Gypsum or both by usage.

1. On the basis of investigation and search, they were issued show cause

notice alleging that on the basis of actual weight mixtures report seized from the factory and production shown in the actual wet mixture, the goods contain fly ash less than 25%. The office premise of M/s Vikram foundation and Shree Hanuman Trading company the fly ash suppliers were searched on 17.08.2004 in presence of Shri BasantkumarRaghunathdasBangur, authorised signatory of said firms and he accepted that many times M/s Hanuman Trading only issued bills of Fly ash to M/s GCL without actual supply and such amount was returned in cash. The show cause notice relied upon the Wet Mixture report alleged to be actual and also adjusted. Based upon statements of quality assurance, production, maintenance and finance employees and seized records in the show cause notice it was proposed that M/s GCL are not eligible for exemption under concessional rate of duty as the fly ash content in manufactured product was less than 25% and the Appellant Unit has shown incorrect consumption. It was proposed to demand duty of Rs. 24,65,54,345/- leviable on Asbestos products viz. Pipe and Sheet cleared during the period 01.01.2004 to 17.08.2004 by denying the concessional duty exemption as the goods were cleared in contravention of the same; to impose penalty under section 11AC; to confiscate the finished goods lying in factory as the same was intended to be cleared by availing ineligible exemption and since the same was not available for confiscation, to enforce the condition of Bond. The show cause notice also proposed penalty upon Shri N.K. Bangur, Chairman cum Managing Director, Shri H.N. Maheshwari, Executive Director, Shri Arun Kumar Chaturvedi, Vice-President (Works) , Shri PurshottamSoni, Senior General manager (Finance), Shri Basant kumarBangur, authorised signatory of M/s Vikram Foundation and Shree Hanuman trading. Vide impugned order the demands and penalties as proposed in show cause notice were confirmed by the adjudicating authority. Hence the present appeals.

2. Shri. V. Sridharan, Learned Senior Counsel appearing for the appellants submits that they were maintaining Wet Mixture Report showing consumption of raw material shift wise in a day and the same was prepared under the signature of Shift In charge. They were also maintaining Log Sheet which is prepared by the Shift In-charge giving details of

production of Sheets/pipes made in his shift. The Wet Mixture report collected by the quality assurance department also notes down the shift wise production on the back side of the Wet mixture report. In addition they also maintain RG-1 Register showing daily production, Note book showing entire production and stocks matured and un-matured, Physical lab register which gives complete break up of finished and unfinished goods, General Shift and Sheet furnishing report prepared by quality control department In charge. It also contains details of materials released for dispatch and production from which details are entered in finished goods record. He submits that vide impugned order a duty demand of Rs. 21,34,09,778/- has been made on sheets and demand of Rs. 3,31,76,764/- on pipes on the ground that the goods contain less than 25% fly ash. The allegation is based upon the consumption of fly ash shown in Wet Mixture report. The actual report as per show cause notice is in register A1, A/4,A5 to A/10 and the Adjusted Wet Mixture report is in document A/2,A/3,A/11 to A/15. The demand in case of Pipes has been confirmed on the ground that the duty liability stands admitted before Settlement Commission. The demand in case of sheets was confirmed on ground that the weight of sheet in dry condition alone is relevant and that the quantity of fly ash used has to be seen vis a vis the total weight of sheet in dry condition. The goods were also ordered to be confiscated on the ground that the goods were in ready to dispatch condition. He takes us through the relevant Exemption Notifications for impugned product issued from time to time. In Notification No. 60/91- CE dt. 25.07.91 the exemption was to goods "containing more than 25% more by weight of fly ash or phosphor-gypsum". In Notification No. 38/93 – CE dt. 28.02.93 the exemption was given to goods "in which more than 30% by weight (minus the water content) of fly ash of phosphor-gypsum or both has been used". In Notification No. 38/93 – CE dt. 28.2.93 as amended by Notification No. 79/93-CE dt. 12.03.93 the exemption was given to "goods in which not less than 25% by weight of fly-ash or phosphor-gypsum or both has been used. Further amendments vide notification No. 17/95-CE dt. 16.03.95 added the proviso "provided that the manufacturer maintains proper account in such form and in such manner as the collector of central excise may specify in this behalf for receipt and use of those fly-ash or phospho-gypsum or both, in the manufacture of all goods falling under chapter 68 of the schedule to the central excise tariff act, 1985 and files a monthly return in the form and manner as may be specified by the Collector of Central Excise with the Assistant Collector of Central Excise". He submits that in all the successive notifications the conditions are identical. He further submits that in case of Asbestos sheet, the adjudicating authority has confirmed demand on the ground that the weight of finished goods has to be taken in dry condition. The actual weight mixture report gives production details based on standard weight i.e Number of sheets x standard weight of sheet, Standard weight of sheet is 38.4 Kg in dry condition as stated by the officer of the company and as per actual Wet Mixture report consumption of Fly Ash had been less than 25%. The finding of the adjudicating authority that weight of finished goods in dry condition is relevant for determining the percentage of use of fly ash is correct but the conclusion that the use of fly ash is less than 25% is wrong. The weight of the finished goods with respect of which the percentage of fly ash has to be arrived at should be determined without any moisture content in finished goods. Vide Circular No. 6/92 dt. 21.10.92, the CBEC Board clarified to maintain shift wise register for ascertaining the percentage of fly ash in final product. However vide Circular No. 477/43/99– CX4 dt. 10.08.99 it was clarified that the percentage by weight of fly ash has to be calculated taking into account of fly ash used with reference to weight of the finished product in dry condition. That circular No. 5/64 dt. 30.6.64 issued in context of notification No. 33/64 granting concessional rate of duty on paper containing not less than 40% of bagasse, jute stalks or cereal straw in form of pulp was issued by CBEC and it was noted that the dry weight of raw materials has to be considered. Thus even if percentage of fly ash has to be determined with respect to finished goods, the weight of finished goods has to be considered without any moisture content. He relies upon decision in case of Sikka Paper Mills Ltd. 1999 (111) ELT 432. He submits that even in the decision of Eternit Everest Ltd. 2002 (150) ELT 1151 (TRI) relied upon by the revenue, the decision supports their contention that weight of goods with respect to which the percentage has to be arrived at should be determined as if no water is contained in those goods. He submits that M/s GCL are engaged in manufacture of Asbestos articles falling under chapter 68. The composition of raw material used by Appellant is Asbestos fibre 5% to 9%, Pulp 1.5% to 2%, Cement 50% to 55%, Fly ash 30% to 36%, H.G Waste 1.5% to 2%. The exemption was denied by lower authority on ground

that if quantity of water used is taken into account then the percentage of fly ash will go down below 25%. The tribunal held that weight of the finished goods is to be considered for arriving at percentage should be in dry condition. Each of the raw material used by them viz. Fly ash, cement, pulp and asbestos fibre are bone dry material and water used has to be ignored as finished goods has to be weighed in dry condition. That in all cases the fly ash used for manufacture of sheet is more than 25%. He also submits that the decision of High Court of Rajasthan cited by the revenue in case of A. Infrastructure Ltd. 2005

9. ELT 111 (RAJ) is not on issue whether weight of finished goods to be taken with moisture or without moisture. He also submits that even if chemically bonded water is taken into account, fly ash use will be more than 25%. After the material is sheeted out from slurry it is in wet condition and the water is added for 21 days to cure/hydrate the cement in the product. Even when the product is used by the customer, it keeps gaining or losing weight by absorbing/ releasing moisture. Therefore dry condition referred to in circular dt. 10.08.99 at the best can include chemically bonded water. He relies upon Volume Encyclopedia of Chemical Technology by Kirk and

Othmer, 5th Edition, Volume 5 and Concrete Technology by AM Neville and JJ Brooks, 1987 Edition (ELBS edition) (a) page 13 read with table at page 10

(b) page no. 245 of appeal paper book to support his above submission. That in present case as is evident from the wet mixture report alleged to be actual by the Revenue, it shows that in the raw material mix, cement constitutes 55%. 25% (chemically bonded water present after hydration) thereof would be 13.75% dry weight of mix of the raw material. Therefore if total raw material is 100 kgs, the weight of chemically modified water would be 13.75kgs. If dry condition of asbestos sheet is assumed to include chemically treated water, the total weight of asbestos sheet in dry condition would be 113.75 Kgs. Therefore fly ash used is 28.5 Kgs in batch of 100 kgs would be 25% of 113.75 kgs. That whenever fly ash used is not less than 28.5% of the total weight of raw materials namely fly ash, cement, asbestos fibre and pulp used in batch, then in such cases fly ash would be more than 25% of weight of asbestos in dry condition, even if it is assumed that dry condition will include chemically combined water. In the present case the actual wet mixture report shows that the fly ash used is not less than the 28.5% for each shift for each day for entire five years except few shifts involving total quantity of 342 mtrs. He relies upon the statement dt. 13.01.2005 of Shri A.K. Chaturvedi based upon experiment conducted in December 1992 that even in normal condition the moisture is 19 to 20% in standard weight. Therefore when the moisture is removed to adjust the weight of sheet, the weight of fly ash would be more than of the weight of sheets. The actual wet mixture report shows that the fly ash mixed is always more than 30% for each shift for each day except some days for a very small quantity as shown by them in their appeal. He takes us through the chart and calculations annexed to the appeal based upon reports in support of his submission. He thus submits that the conditions of the exemption notification were followed and no demand can be made against them.

6 As regard demand on pipes without admitting the demand he submits that the appellants are entitle for adjustment on account of cum duty price and Modvat Credit admissible on Cement Pipes.

4.1 He further submits that the adjudicating authority has confiscated 3270 MT of Asbestos Cement sheets and 4589 MT of Asbestos Cement pipe on the ground that they were fully finished and their curing period was also over however they were not recorded in RG-1 register and were thus intended to be cleared without payment of excise duty. In this regard, he submits that goods properly accounted for by the appellants and their confiscation under Rule 25 (1)(b) is not warranted. The appellants were maintaining various records for stock and that none of the goods manufactured in the factory goes unaccounted. He submits that records of production are maintained at various stages and only at the final stage the goods are accounted in RG-1 register, therefore, there is no intention to clear the goods without payment of duty. He submits that the appellant have made correspondence vide letter dated. 02.07.1996 the regarding stage at which entries is made in RG-1 register, therefore the stage of entries in RG-

1 register was disclosed to the department. In support, he placed reliance on the following judgments:-

- 14.M/s. RehsamPetrotech Ltd-2010 (258) ELT 60 (Guj.)
- 15.M/s. Madhu Crimpers Pvt. Ltd-2004 (166) ELT 414 (T)
- 16.M/s. Marigold Paints Pvt. Ltd-2014 (308) ELT 421 (T)
- 17.M/s. Koch Rajes C.C. Industries Pvt. Ltd-2006 (193) ELT 566

4.2. He also submits that the issue involved is of interpretation of notification and the appellants understanding regarding such interpretation have submitted Vide there letter No. AR/IV/Fly Ash/98 dated 13.10.1998 to the department. They further made a correspondences vide letter dated 22.10.98, 15.09.99, 29.09.99 and the department's letter dated 26.05.2000 regarding percentage of Fly Ash, therefore, there is no suppression of fact, hence the demand for the extended period is not in sustainable.

4.3. As regard appeal of Shri Basant Kumar Bangur, he submits that during the pendency of appeal Shri Basant Kumar Bangur expired and therefore the appeal filed by him may be abated.

- 18.Shri Sameer Chitkara ld. AR appeared in the first hearing and during rehearing Shri H.K.Jain appeared for the revenue and reiterate the findings of impugned order. He submits that since as per actual wet mixture reports the content of fly ash was found to be less than 25%, the demands have been correctly made. For the same reason the penalty is also imposable.
- 19.Heard both the sides and perused the case records. The exemption notification in question i.e 5/99 – CE dt. 28.02.99, 6/2000 – CE dt. 01.03.2000 and other analogues notification during the material time provided exemption to the goods falling under chapter 68 of the CETA of

Description “Goods, in which not less than 25% by weight of fly-ash or phosphor-gypsum or both have been used” subject to condition of maintenance of proper accounts. The show cause notice on the basis of actual wet mixture reports has alleged that the content of fly ash in Asbestos Sheet was found to be 24.03% and in pipes 14.87%. The adjudicating authority has confirmed demand in case of sheets that the weight of finished goods has to be taken in dry condition; actual weight mixture report gives production details based on standard weight i.e Number of Sheets x standard weight of sheet; standard weight of sheet is 38.4 Kgs in dry condition as stated by the officers of the Appellant Company and as per actual wet mixture report consumption of fly ash has been less than 25%.

15. The Appellant in their reply to show cause notice as well as appeal has submitted chart based upon actual Wet Mixture report, gives details of percentage of quantity of Fly ash used vis-a-vis total raw materials consumed in the manufacture of sheet as per wet mixture report which is almost 31.5% on average basis. Taking date of production of 30.12.2001, the chart takes into account, the date of production/ consumption, Total production as per production report of all three shifts in respect of sheets, pipes and moulded goods, details of fly ash consumed shift wise, percentage of fly ash used vis a vis shift wise production as per production report, total raw materials consumed shift wise as per actual wet mixture report and percentage of fly ash used shift wise. On the basis of shift wise entries the actual production as per actual wet mixture report is Shift-I 27.904 MT, Shift – II 25.856 MT, Shift-III- 33.024 MT. The fly ash content in said production in wet form is as under:

Shift – I : $6.93/27.904 \times 100 = 24.8351\%$
Shift – II : $6.27/25.856 \times 100 = 24.2497\%$
Shift – III : $8.58/33.024 \times 100 = 25.9811\%$

The raw materials used for the production of sheet as per Actual Wet mixture Report shiftwise were Shift – I- 21.966 MT, Shift – II – 19.874 MT, Shift – III – 27.196 MT. The percentage of fly ash vis-a-vis total raw material ignoring the moisture is as under:

Shift – I – $6.93/21.96 \times 100 = 31.54876\%$
Shift – II – $6.27/19.874 \times 100 = 31.5487\%$
Shift – III – $8.58/27.196 \times 100 = 31.5487\%$

7.1 The above undisputed position emerging from actual production and consumption based upon actual wet mixture reports the use of Fly ash in Sheets were above 25%. The CBEC vide Circular No. 6/92 dt. 21.10.92 clarified to maintain shift wise register for ascertaining the percentage of fly ash in final product. Vide Circular No. 477/43/99 – CX.4 dt. 10.08.99, the Board clarified that the percentage by weight of fly ash has to be calculated taking into account the weight of fly ash used with reference to the weight of the finished product in dry condition. The gist of the same is as under:

“I am directed to say that it has been brought to the notice of the Board that there is non-uniformity in the practice with regard to determine of percentage of fly ash in the asbestos cement products for the purpose of eligibility of exemption available under Notification No. 60/91 and succeeding notifications presently Notification No. 5/99 (S. No. 179). Some Commissionerates, reportedly have taken a view that percentage of fly ash should be determined taking into account weight of all the raw materials including water used in the manufacture whether continued or not in the final product, whereas some other have taken a view that water contents should not be considered for the purpose of calculating the proportion of fly ash. Some Commissionerates are calculating the percentage with reference to the weight at the wet stage and others at the dry stage of asbestos cement products.

The matter has been re-examined by the Board and it is clarified that the percentage by weight of fly ash has to be calculated taking into account the weight of fly ash used with reference to the weight of the finished product in dry condition i.e. weight of fly ash x 1000/weight of asbestos cement products. The Commissioner may keep the proforma as prescribed under Board’s Circular No. 6/92, dated 21-10-1992 issued from F. No. 134/7/92-CX.4 in mind while specifying the accounts to be maintained by the manufacturers.”

(15) From the above, it is an accepted position of revenue that weight of fly ash used should be with reference to the weight of the finished product in dry condition and thus the percentage of fly ash has to be determined with respect to weight of finished goods without moisture content. In case of Eternit Everest Ltd 2002 (150) ELT 1151 (TRI), the percentage use of raw material was Asbestos fibre 5% to 9%; Pulp 1.5% to 2%, Cement 50% to 55%, Fly ash 35 to 36%; H.G. waste 1.5% to 2%. The tribunal held that the weight of goods with respect to which the percentage has to be arrived at should be determined as if no water is contained in these goods. In the present case the raw material for use in production i.e fly ash, cement, pulp and asbestos fibre are bone dry. The water used in process has to be ignored for computing the ash percentage and weight of finished goods. Since the fly ash used in production is more than 25% as is apparent from the wet mixture content report, therefore it has to be

considered that the goods fulfil the condition of the Exemption notification. We also note that in case of Sikka Paper Mills Ltd. 1999 (111) ELT 432, the Tribunal upheld the order passed by the adjudicating authority wherein he held that the paper contains moisture of 5% and additives of 3% and therefore deducted 8% from the total weight of finished paper to arrive at the pulp content. The Baggasse pulp used by the assessee was compared with the total pulp so computed by backward calculation and the adjudicating authority concluded that baggasse has been used to the extent of 75% by weight so as to become eligible for exemption under Notification No. 48/99 – CE which provided use of pulp containing more than 75% baggasse pulp. The decision of the Tribunal thus clearly shows that moisture has to be ignored while arriving at weight of finished goods. Thus we find that the fly ash content in sheet is more than 25% and the Appellant are eligible for the exemption on Asbestos Sheet. However in respect of some quantity of Asbestos Sheet it was admitted by the appellant that fly ash quantity is less than 25% on which duty liability comes to Rs. 2,80,000/- which is liable to be upheld. Accordingly duty demand of Rs. 21,31,29,778/- (Rs. 21,34,09,778 - 2,80,000/-) in respect of Asbestos Cement Sheet and corresponding, Interest and penalty are set aside.

(v) As regard asbestos pipes, we find that the Appellant could not establish that the contents of fly ash in asbestos pipe are more than 25%. Unlike in sheet, the use of fly ash in pipe is much lower than 25% even after excluding the water content. The appellant also not pressed much upon the issue related to pipe. Their main contention in regard to demand on pipe is that they are entitled for cum duty price and modvat credit on the inputs used in the manufacture of Asbestos Pipe. We agree with the appellant on these points that the appellant is legally entitled for the benefit of cum duty price and modvat credit as settled in catena of judgments. Accordingly the duty demand on the Asbestos Pipe shall be re-quantified after allowing the benefit of cum duty price and modvat credit. As per re-quantification submitted by the appellant, the duty on Asbestos Pipe comes to Rs. 2,32,20,340/- and on asbestos sheet Rs. 2,80,000/- which is subject matter of verification by the adjudicating authority. Since the duty on pipe/sheet shall be re-quantified, the option of 25% penalty under section corresponding to such re-quantified duty on pipe and sheet is also extended to the appellant in terms of proviso to section 11AC of Central Excise Act, 1944.

(vi) The adjudicating authority in the impugned order confiscated Asbestos Cement pipe and sheets. Considering the submission made in this regard by the Learned Counsel, we find that the appellant in the various correspondences informed the department regarding the stage of making entries in RG-1. It is also observed that the appellant, apart from RG-1 register have been maintaining various other records such as Wet Mixture Reports, Daily Production Reports/Register, Physical Lab Register, General shift furnishing report, Stock register, RG-1 register. Maintenance of these records were not in dispute, as some of these records were relied upon in show cause notice raising the demand, therefore, it cannot be said the stock of goods not entered in RG-1 register is with intent to clear the goods without payment of duty. Moreover, not a single incident of clandestine removal was brought on record by the Revenue. In this fact, we find that the adjudicating authority has erred in confiscating the goods on the pretext of non accountal of the same in RG-1 register. We therefore, set aside the confiscation and consequential redemption fine imposed upon the appellant.

17. As regard personal penalty imposed upon various persons related to the appellant company, we find that the penalty was imposed commensurate to the quantum of total duty and in view of gravity of offence. As held by us above the duty demand has been reduced substantially and the issue involved is of interpretation of notification, therefore the personal penalty also need to be reduced. Accordingly, considering the overall facts & circumstances of the case and our above discussions, the penalty is reduced on Shri Shri A.K. Chaturvedi (Vice-president, Works) to Rs. 3,00,000/-, on Shri Shri N.K. Bangur, Managing Director to Rs. 3,00,000/-, on Shri

PurshottamSoni (Senior G.M- Finance) to Rs.50,000/- and on Shri H.N.Maheshwari, Executive Director to Rs.2,00,000/-.

18. All the appeals are partly allowed in the above terms, except the appeal filed by Shri Basant Kumar Bangur which is abated due to his demise.

(Pronounced in the open court on 27.02.2020)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH : COURT NO - 3

Excise Appeal No. 614 of 2012-DB

(Arising out of OIO No. COMMR-A-/225/VDR-II/2012 dated 13.04.2012 passed by Commissioner of Central Excise-VADODARA-II)

Naresh Agrawal

...Appellant

Proprietor Of M/s, Agrawal Impex,
Plot No. 331, Shop No. 09, Jivan Deep Building,
GANDHIDHAM,
GUJARAT

-Versus-

C.C.E. & S.T.-Vadodara-ii

...Respondent

1ST FLOOR... ROOM NO.101,
NEW CENTRAL EXCISE BUILDING,
VADODARA,
GUJARAT
390023

Present For the Appellant : Shri S.J. Vyas, Advocate

Present For the Respondent : Shri Sanjiv Kinker, Superintendent (Authorised Representative)

CORAM:

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

FINAL ORDER NO. A/10567 / 2020

Date of Hearing: 11/02/2020

Date of Decision: 27/02/2020

RAMESH NAIR

The facts of the present case is that the appellant is a registered dealer who has issued Cenvatable invoices on which M/s Kothi Steel Ltd. had availed the Cenvat Credit. The case of the department is that the appellant has issued bogus invoice and no goods were sold under those invoices to M/s Kothi Steel Ltd. The appellant sold waste and scrap of iron steel (imported as well as domestic) to M/s Kothi Steel Ltd. To adjust the payment received from M/s Kothi Steel Ltd., there is no evidence of clearance. For this offence, a penalty under Rule 15 of Cenvat Credit Rules, 2004 and Rule 26 of Central Excise Rule, 2002 were imposed on the ground that the appellant alongwith Shri Mohammad Firdos Kothi, Managing Director of M/s Kothi Steel Ltd. involved in devising a well orchestrated plan to default the Government Revenue by arranging bogus invoices and subsequent availment of Cenvat Credit on the strength of those invoices by M/s Kothi Steel Ltd. A Show Cause Notice was issued wherein penalty under Rule 15 of Cenvat Credit Rules, 2004 and Rule 26 of Central Excise Rules, 2002 for their alleged violation of provision of Rule 10,11 & 12 of Central Excise Rules, 2002 and

Rule 3,4,7 & 9 of Cenvat Credit Rules, 2004 was proposed. The Adjudicating Authority, while adjudicating the case, imposed a penalty of Rs. 10 lakhs on the present appellant, Shri Naresh Agrawal, proprietor of M/s Agrawal Impex under Rule 15 of Cenvat Credit Rules, 2004. In addition, one more penalty of Rs. 10 lakhs was imposed on the appellant under Rule 26 of Central Excise Rules, 2002. The appellant, being aggrieved by the Order-in- Original, filed an appeal before the Commissioner (Appeal), who vide impugned order upheld the decision of the Adjudicating Authority in the Original order dated 29/10/2011 and consequently, the appeal filed by the appellant was rejected. Therefore, the present appeal filed by the appellant.

20. Shri S.J. Vyas, learned counsel appearing on behalf of the appellant submits that as regard imposition of penalty under Rule 15, the said penalty is imposable only on the person who takes or utilizes Cenvat credit. In the present case, the appellant has neither taken nor utilized Cenvat Credit whereas the same was availed and utilized by M/s Kothi Steel Ltd. in whose favour the invoice was issued. Therefore, the penalty under Rule 15 of Cenvat Credit Rules, 2004 was wrongly imposed on the appellant. As regard the penalty imposed under Rule 26 of Central Excise Rules, 2002, he heavily relied on the decision of Madras High Court in the case of M/s Aeon Formulations Pvt. Ltd v/s The Commissioner of Central Excise, Puducherry 2019 (12) TMI 530.

21. Shri Sanjiv Kinker, Learned Superintendent (Authorised Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that the judgment in the case of Aeon Formulations Pvt. Ltd. (supra) relied upon by the learned counsel cannot be applied in the present case as the facts of that case are entirely different from the facts of the present case. He submits that in the said case, the assessee had paid the entire amount of duty with interest on mistake being pointed out. In the said case, the Hon'ble High Court of

Madras has held that in the case of appellant, imposition of 100% penalty under Rule 26 of Central Excise Rule, 2002 is excessive under the circumstances as alleged ineligible credit probably passed on to buyer is not only recoverable under Rule 14 of Cenvat Credit Rules, 2004, but also because the appellant has paid the amount back with interest before issuance of show cause notice. The penalty was reduced to a token penalty of Rs. 5,000/-. He submitted that the submission of the learned counsel that Rule 26 (2)(ii) of Central Excise Rules, 2002 was held not correct as the Hon'ble High Court did not express its opinions on jurisdiction or validity of Rule 26 (2)(ii) of Central Excise Rules, 2002. Therefore, the facts of the Hon'ble Madras High Court judgment are different from the facts of the present case.

22. We have heard both sides and perused the records. The appellant has challenged the imposition of penalty under Rule 15 of Cenvat Credit Rules, 2004 and Rule 26 of Central Excise Rules, 2002. Rule 15 of Cenvat Credit Rules, 2004 is reproduced below:

“Rule 15. Confiscation and penalty.-

23. If any person, takes or utilises CENVAT credit in respect of input or capital goods or input services, wrongly or in contravention of any of the provisions of these rules, then, all such goods shall be liable to confiscation and such person, shall be liable to a penalty not exceeding the duty or service tax on such goods or services, as the case may be, or two thousand rupees, whichever is greater.

24. In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made thereunder with intent to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of section 11AC of the Excise Act.

25. In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of

these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of service tax, then, the provider of output service shall also be liable to pay penalty in terms of the provisions of Section 78 of the Finance Act.

26. Any order under sub-rule (1), sub-rule (2) or sub-rule (3) shall be issued by the Central Excise Officer following the principles of natural justice.”

From the plain reading of the above, it is clear that the penalty under Rule 15 can be imposed only on that person who takes or utilizes the Cenvat credit. If in any case, any manufacturer who is liable to pay duty on final product wrongly avails and utilizes the credit in respect of inputs, he is liable for penalty under Rule 15. In the present case, the appellant has neither taken the credit, nor utilized the credit, whereas he has only issued a Cenvatable invoice to some other company M/s Kothi Steel Ltd. Therefore, the Rule 15 is not applicable in the present case. Hence, penalty imposed under Rule 15 of Cenvat Credit Rule, 2004 by the lower authorities is illegal and incorrect. Hence, the same is set aside.

4.1 As regard penalty imposed under Rule 26 of Central Excise Rules, 2002, the learned counsel has heavily relied upon the case of Aeon Formulations Pvt. Ltd. (supra). However, we find that as pointed out by the learned Authorised Representatives, there are differences in the facts between the present case and in the case of Aeon Formulations Pvt. Ltd. (supra). It is also observed that High Court has not held penalty under Rule 26(2)(ii) as invalid. Therefore, ratio of this judgment is not directly applicable. On the contrary, we find that the same issue has been considered by the Hon'ble High Court of Punjab & Haryana in the case of

Vee Kay Enterprise 2011 266 ELT 436 (P&H) which was followed by this Tribunal in the case of Commissioner of Central excise, Ahmedabad v/s Navneet Agarwal 2012

6 E.L.T. 515 (Tri- Ahmd.) wherein it was held that penalty under Rule 26 (2) is imposable on the person who has issued the invoices without supply of goods. The Tribunal's order is reproduced below:

“4. I have considered the submissions made by learned DR. In this case, the issue as to whether Shri Navneet Agarwal is liable to penalty under Rule 26 of the Central Excise Rules, 2002 when the Rule 26(2) was not in force. For ready reference, Rule 25 and 26 of Central Excise Rules, 2002 are reproduced as below :-

“Rule 25 - Confiscation and Penalty:

10. Subject to the provisions of Section 11AC of the Act, if any producer, manufacturer, registered person or a warehouse or a registered dealer-

remove any exciseable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or

does not account for any exciseable goods produced or manufactured or stored by him; or

engages in the manufacture, production or storage or any exciseable goods without having applied for the registration certificate required under section 6 of the Act; or

contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the exciseable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [rupees two thousand] whichever is greater.

—11. An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice.”

“Rule 26. Penalty for certain offences :

Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or [two thousand rupees], whichever is greater.

Any person, who issues-

27. an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

28. any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of CENVAT Credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.”

29. *After considering the issue and relevant rules the Hon’ble High Court observed as follows in Para 10 of the decision in the case of Vee Kay Enterprises :-*

“10. In spite of non-applicability of Rule 26(2), penalty could be levied as the appellant was concerned in selling or dealing with the goods which were liable to confiscation inasmuch as the appellant claimed to have sold the goods in respect of which the cenvat credit was taken. In such a case, Rule 25(1)(d) and 26(1) are also applicable. The person who purports to sell goods cannot say that he was not a person concerned with the selling of goods and merely issued invoice or that he did not contravene a provision relating to evasion of duty. The appellant issued invoices without delivery of goods with intent to enable evasion of duty to which effect a finding has been recorded and which finding has not been challenged. We are, thus, unable to hold that appellant was not liable to pay any penalty.”

\ldblquote The view taken by the Hon’ble High Court of Punjab & Haryana was that when a person was concerned in selling and dealing with the goods which were liable to confiscation under Rule 25(1)(d), Rule 26(1) is also applicable. In this case also, as in the case of M/s. Vee Kay Enterprises, the appellant claimed to have sold goods in respect of which cenvat credit was taken. The

Hon’ble High Court observed that a person who proposed to sell the goods cannot say that he was not a person concerned with selling of goods and merely issued the invoices. In view of the decision of Hon’ble High Court of

Punjab & Haryana, the decision of the Larger Bench of the Tribunal cannot be followed. Moreover, the decision of the Hon’ble High Court is subsequent to the decision of the Larger Bench decision. Further, the Hon’ble High Court has clearly held that penalty is imposable even prior to amendment of Rule

by inserting Rule 26(2) of Central Excise Rules, 2002.

In view of the above discussions, impugned order is set-aside and appeal filed by the Revenue is allowed.”

(vii) In view of above settled position, we are of the view that the penalty under Rule 26 was rightly imposed on the appellant. Hence, the same is upheld. Appeal is partly allowed in the above terms.

(Pronounced in the open court on 27/02/2020)

(Ramesh Nair)
Member (Judicial)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. I**

Appeal No. E/11846/2018-SM

Arising out of OIA no. CCESA-SRT-Appeals-PS-843-2017-18, Dated: 20.03.2018
Passed by Commissioner(Appeals)Commissioner of Central Excise, Customs and
Service Tax-Surat-I

**Date of Hearing: 12.07.2019
Date of Decision: 18.07.2019**

**BHARAT RESINS LTD
UNIT - II, PLOT NO. A-1/284/4/GIDC
INDUSTRIAL ESTATE, UMBERGAON, VALSAD, GUJARAT**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
NEW BUILDING...OPP. GANDHI BAUG, CHOWK BAZAR
SURAT, GUJARAT - 395001**

Appellant Rep by: Shri Amal Dave, Adv.

Respondent Rep by: Shri S N Gohil, Supdt. AR

CORAM: Raju, Member (T)

FINAL ORDER NO. A/11369/2019

Per: Raju:

This appeal has been filed by M/s Bharat Resins against confirmation of demand of Cenvat Credit.

2. Ld. Counsel for the appellant pointed out that for the invoice issued during the period 02/04/2014-31/08/2014, they availed credit on 28/02/2015. At the material time sub-rule (7) of Rule 4 of Cenvat Credit Rules restricted availment of credit by virtue of the following proviso:

"Provided also that the manufacturer or the provider of output service shall not take Cenvat Credit after six months of the date of issue of any of the documents specified in sub-rule (1) of rule 9."

2.1 Ld. Counsel pointed out that immediately thereafter on 01/03/2015 the said proviso was amended and the word 'six months' was replaced by 'one year'. Ld. Counsel argued that however credit was taken after six months after payment of duty, it was taken within one year within payment of duty. He argued that credit should not be denied in these circumstances.

2.2 As an alternate argument, Ld. Counsel pleaded that once the credit has been utilized, demand under Rule 14 of the Cenvat Credit Rules cannot be sustained. For this purpose, he relied on the decision of *Sejasm Industries India Pvt. Ltd. Vs. CCE & S.T., Ahmedabad-iii Order no. A/13015/2017 dated 03.10.2017* wherein in similar circumstances credit has been allowed. Ld. Counsel also argued that the matter is barred by limitation as extended period has been invoked.

3. Ld. AR relies on the impugned order. He also relied on the decision of the Hon'ble High Court of Bombay in the case *JCB India Ltd. vs. Union of India reported at 2018 (15) G.S.T.L. 145 (Bom.)*. He argued that the Cenvat Credit Rules are strongly implemented as it seen as a concession granted and not as a right. He also relied on the decision in the case of *SICGIL Industrial Gases Ltd. Vs. C.C.E. & Cus. Anand. FO no. A/13086/2017 dated 12/10/2017*.

4. I have gone through rival submission. I find that it is not in dispute that when the credit was taken i.e. on 28.02.2015, proviso to sub rule (7) of Rule 4 of CCR provided that such credit could not have been availed. I find significant force in the argument of

Ld. AR wherein he relied on the decision of Hon'ble High Court of Bombay in the case of JCB India Ltd. (supra):

This Rule sets out conditions for allowing Cenvat credit. One of the conditions and which is heavily relied upon by the Learned Additional Solicitor General is to be found in sub-rule (7) of Rule 4. It is, therefore, evident that the fifth proviso to sub-rule (7) of Rule 4 would indicate that availment of Cenvat credit is conditional upon the satisfaction of all the provisos. Thus, there is a period stipulated for availment of this Cenvat credit. In addition thereto, there are conditions imposed for the availment.

56. To our mind, therefore, the learned Additional Solicitor General is right in his contention that a Cenvat credit is a mere concession and it cannot be claimed as a matter of right. If the Cenvat Credit Rules under the existing legislation themselves stipulate and provide for conditions for availment of that credit, then, that credit on inputs under the existing law itself is not a absolute but a restricted or conditional right. It is subject to fulfilment or satisfaction of certain requirements and conditions that the right can be availed of.

4.1 The rule was clear and there was no ambiguity in the Rule. The rule changed with effect from 01/03/2015 and the words 'six months' were changed to 'one year'. In the case of SICGIL Industries Ltd. (supra), the Tribunal has observed as follows:

"4. On careful consideration, I find that the provisions inserted in Rule 2(l) of Cenvat Credit Rules, 2004 on 11.7.2014 reads as under:

"Provided also that the manufacturer or provider of output service shall not take cenvat credit after six months of the date of issue of any of the documents specified in sub-rule (1) of Rule 9"

It can be seen from the above reproduced provision, the Rule specifically mandate that cenvat credit shall not be taken after six months of the date of issue of any of the documents. I have no hesitation to hold that this proviso will apply from the date 1.9.2014 for the availment of cenvat credit after that date. Undisputedly, the case in hand, the cenvat credit was availed on documents indicating the date of issue of the said document prior to the date of availing the credit though they may have been shown prior to 1.9.14."

Relying on the aforesaid decision, I hold that amendment made to the said proviso vide notification no. **06/2015-C.E. (N.T.)** dated 01.03.2015 would have prospective effect. Consequently, the credit would not be admissible to the appellant since the duty was paid during the period 02.04.2014-31.08.2014 and credit was availed on 28.02.2015. Ld. Counsel argued that demand cannot be confirmed if credit is already utilized. For this purpose, he relied on the decision of the Tribunal in the case of Sejasmi Industries India Pvt. Ltd. (supra). It is seen that in the said case, the credit was sought to be denied on the ground that proper records were not maintained and credit was availed on finished goods in contravention of provisions of Rule 16 of Central Excise Rules. Reliance has been placed on the decision of *M/s Hi-Tech Blow Moulders Pvt. Ltd. Vs. Commr. of C. Ex., Bangalore 2016 (341) ELT 419 (Tri- Bangalore)* . In the case of *M/s Hi-Tech Blow Moulders*, the facts were that certain goods which were not in the factory and on which credit was availed were cleared after certain processes on payment of duty. Revenue challenged the process undertaken did not amount to manufacture. It is in this background that the said decision was passed. If the goods brought in the factory on which credit was availed and when the process undertaken on it did not amount to manufacture then for the reason that no new product came into existence, payment of duty would have amounted to reversal of credit on the same goods. Moreover, in that case if the process did not amounted to manufacture, there was no Central Excise levy and therefore, since the amount was paid by reversal of Cenvat Credit where no Cenvat reversal liability arise. In those circumstances, it was held that the Cenvat Credit cannot be denied. In view of that I find that the decision relied upon by the appellant are in totally different facts.

4.1 I also find that the Ld. Counsel has raised the point of limitation. I find that the proviso to sub rule (7) of Rule 4 of CCR clearly prescribes as follows:

"Provided also that the manufacturer or the provider of output service shall not take Cenvat Credit after six months of the date of issue of any of the documents specified in sub-rule (1) of rule 9."

There is absolutely no ambiguity in the law and thus, the availment of credit within six months clearly amounts to misdeclaration, suppression and fraud. Thus, extended period has been rightly invoked.

5. In these circumstances, I do not find any merit in the appeal. The appeal is dismissed.

(pronounced in the open court on 18.07.2019)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH : COURT NO – 3

Excise Appeal No. 12676 of 2018-SM

(Arising out of OIA No.- RAJ-EXCUS-000-APP-228-229-2017-18 dated 13.02.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

F Tech Engineering Co.

Appellant

Mansata Industrial Area, Street No. 1, Gondal Road, St Workshop,
RAJKOT, GUJARAT

-VERSUS-

C.C.E. & S.T., Rajkot

Respondent

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat, 360001

WITH

Excise Appeal No. 12677 of 2018-SM

(Arising out of OIA No.- RAJ-EXCUS-000-APP-228-229-2017-18 dated 13.02.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

Jignesh Pambhar

Appellant

Partner, M/s F Tech Engineering Co., Mansata Industrial Area, Street No. 1,
Gondal Road, St Workshop,
RAJKOT
GUJARAT

-VERSUS-

C.C.E. & S.T., Rajkot

Respondent

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat, 360001

Present For the Appellant : Shri S. J. Vyas, Advocate

Present For the Respondent : Shri K.J. Kinariwala, Asst. Commissioner(AR)

CORAM:

HON'BLE MEMBER (JUDICIAL) , MR. RAMESH NAIR

FINAL ORDER NO. A/ 11510-11511/ 2019

Date of Hearing: 30/07/2019

RAMESH NAIR

The appellants are engaged in the manufacture of pumps & pump sets. On the basis of intelligence that the appellants are indulged in evasion of Excise duty by way of clandestine clearance of their finished goods and also by wrongly availing exemption under notification 12/2012 dated 17.03.2012, an enquiry was conducted. The Show Cause Notice was adjudicated. The Adjudication Authority dropped the demand of Rs. 13,60,895/- related to notification no. 12/2012. Further, a demand of Rs. 1,20,465/- against the clandestine removal of the goods was confirmed. Consequently, penalty of equal amount was also confirmed. Penalty was also imposed on the partner of the appellant. Being aggrieved by the OIO, Appellants filed appeal before Commissioner (Appeal), who concurring with the Adjudicating Authority, upheld the OIO. Therefore, present appeals.

30. Shri R. Subramanya, Ld. Counsel appearing on behalf of the appellant submits that the demand was raised on the basis of delivery challans record of the appellant. In this regard statements of two buyers were recorded whereas there are a number of buyers whereas only on the basis of statement of two buyers, entire demand was confirmed. He also submits that the appellant have issued invoices. Therefore, there is no clandestine removal. He submits that at the most, demand can be confirmed only in respect of two buyers who have admitted the purchase of clandestinely removed goods. On the query from the bench to the Counsel that whether there is any correlation or reconciliation between the so called delivery challan and invoices were submitted to the lower authority. He fairly denied any such exercise done by the appellant.

31. Shri S.N. Gohil, Ld. Supdt. (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He invited my attention to the Show

Cause Notice as well as the statements of the appellant's partner wherein it was admitted that they have cleared the goods with or without invoices.

32. I have heard both sides and perused the records. I find that demand of Rs. 1,20,465/- was confirmed on the basis of challans recovered from the appellant which were accepted in the confessional statements of the partners of the appellant firm. The appellant could not produce any proof that against the goods cleared under any invoices were issued. Therefore, it is clear that the goods cleared under challan, there were no invoices issued by the appellant. Consequently, no excise duty was paid. Therefore, this is a clear case of clandestine removal of goods. Accordingly, I do not see any infirmity in the impugned order, hence, the impugned order is sustained.

4.1 As regard the appeal filed by partner, I find that the partnership firm has already been penalized. There cannot be separate penalty against the partner as held in the judgment in the case of Shri Pravin N. Shah vs. CESTAT 2014 (305) E.L.T. 480 (Guj.). As a result, appeal no. E/ 16276/2018 on F Tech Engineering Co. is dismissed. Appeal no. E/12677/2017 filed by the Shri Jignesh Pambhar is allowed.

(Dictated and pronounced in the open court)

(Ramesh Nair)

Member (Judicial)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

Excise Appeal No. 113 of 2009-DB

[Arising out of OIA-119/2008-AHD-II/CE/SBS/COMMR-A-/AHD passed by
Commissioner of Central Excise-AHMEDABAD-II]

M/s Hi Scan Pvt Ltd

...Appellant

Survey No. 304, Sarkhej Bavla Highway, Changodar,

Ahmedabad-Gujarat

VERSUS

C.C.E.-Ahmedabad-ii

...Respondent

Custom House... First Floor,
Old High Court Road, Navrangpura,
Ahmedabad,Gujarat-380009

APPEARANCE:

Shri. P.M. Dave (Advocate) for the Appellant

Shri. Govind Jha, Authorized representative for the Respondent

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

FINAL ORDER NO. A/11071/2019

DATE OF HEARING:29.03.2019

DATE OF DECISION:05.07.2019

RAJU

This appeal has been filed by M/s Hi Scan Pvt. Ltd. against confirmation of demand and imposition of penalty.

- 33.Ld. Counsel pointed out that the appellants are engaged in manufacturing plane/ printed cartons and boxes, labels, envelopes etc. on their own. They are also manufacturing various goods of Chapter 38, 48 and 49 on job work and using material supplied by various principals like Vinay Printing Press, Gujarat Education Board etc. The appellants were availing benefit of small scale exemption Notification 8/03-CE. The appellant had taken into account only the value of clearance of those goods which were being manufactured by them on their own while availing Notification 8/03. They had not included the value of goods which was manufactured by them on job work basis on behalf of the various principals. On 13.09.2006 the appellant had taken the Central Excise Registration after crossing the Rs. 400 Lakhs limit in the year 2005-06. On 30.09.2006 and 04.07.2006 Central Excise Officers visited the premises and withdrew samples and documents and also recorded statements of various employees. The appellant deposited duty of Rs. 6,80,253/- for clearance from 01.04.2006 to September 2006. Thereafter a SCN was issued to the appellant seeking to include the value of goods manufactured on job work basis for the period 2003-04 to 2006-07. After such addition, it was alleged that the appellants were not entitled to small scale exemption from the entire period of financial year 2003-2004 to 2006-2007 and duty of Rs. 26,51,382/- was demanded. All the above allegation were based on the assertion that

— none of the principals who had supplied the goods for manufacture of job work basis to the appellant were registered and they had not filed any declaration/ undertaking under Notification 214/86-CE. Ld. Counsel pointed out that Tribunal had held in many cases that the benefit of job work notification cannot be denied to job worker even if the supplier of raw material had not followed the procedure prescribed in Notification 214/86. He pointed out that even the Additional Commissioner had in the O-I-O held that the benefit of job work notification cannot be denied merely because the supplier of material had not followed the procedure of the Notification. He pointed out that para 3A(e) of SSI Notification 08/03 provides that clearance value of the goods laid on job work under Notification 214/86 or 83/94 or 84/94 are not to be taken into account the aggregate value of excisable goods under 2(vii) of SSI Notification. Consequently, the original adjudicating authority had dropped the demand for the period prior to 01.04.2006 and the demand for the period after 01.04.2006 was confirmed. Revenue reviewed the said decision and Commissioner (Appeals) in the impugned order confirmed the demand and also imposed equal penalty.

2.1 It was argued that all the goods like books, catalogues, booklets etc. exempt under Notification 214/86 if manufactured on job work basis out of material supplied by principals they had not included the said aggregate value while computing the aggregate value of clearance of Rs. 300 Lakhs/ 400 Lakhs in a financial year. He pointed out that in the following decision, it has been held that benefit of Notification 214/86 cannot be denied to a job worker only because the principal has not follow the procedure of filing the declaration/ undertaking.

34. SreeRayalseem Dutch Kassenbouw Ltd. 2006(203)ELT248 (Tri. Bang)

35. Moon Chemicals 2007 (83) RLT 253 (CESTAT-Che.)

36. Salem Weld Mesh 2007 (83) RLT 568 (CESTAT-Che.)

37. Suvikram Plastex (P) Ltd. 2008 (84) RLT 605 (CESTAT Bang.)

38. Aggarwal Rolling Mills 1997 (93) ELT 615 (Tri.)

39. India Fabricators 2005 (191) ELT 339.

2.2 It was argued that in terms of Section 35A(3) of the Central Excise Act, the Commissioner and enhance penalty only after giving reasonable opportunity of showing cause against the proposed order and that Commissioner can pass any order requiring payment of any duty not levied or paid or short payment only giving notice within the time limit prescribed under Section 11A to SCN against the proposed order. He argued that in this case no notice was issued thus the order of Commissioner (Appeals) confirming demand of duty and imposition of penalty are without jurisdiction. He pointed out that in the instant case the receipt of goods, manufactured of finished goods on job work basis and returned of goods is not disputed and thus benefit of Notification 214/86 cannot be denied only because the supplier of raw material had not furnished an undertaking upon himself to pay Central Excise duty on the goods produced on job work basis. He relied on the following decisions in support of his case:

40. Commr. v/s Bharat Foundry 2009 (246) ELT 561

41. G.G. Automotive Gears Ltd. 2014 (308) ELT 546

42. Inar Profiles Pvt. Ltd. 2014 (310) ELT 200

2.3 He further argued that the notice is barred by limitation the appellant had a bonafide belief that in these circumstances the goods manufactured on job work basis are exempted from Central Excise duty. He further pointed out that all the decisions rendered by Tribunal also held that if the supplier of raw material does not follow any procedure the benefit of Notification 214/86-CE cannot be denied. He argued that since the appellant took registration as soon as they cross the limit of 400 Lakhs by the end of

financial year 2005-06 it shows the bonafide of the appellant.

7 Ld. AR relies on the decision of Larger Bench of the Tribunal in the case of Tehrmax Babcock & Wilcox Ltd. 2018 (364) ELT 945 (Tri. LB). He pointed out that in case of job work the liability to duty is of the job worker and not of the principal. He argued that in the instant case it was not merely a case of failure to give declaration but a case of ineligibility of the principals to avail notification to supply the goods under Notification 214/86. He pointed out that only registered persons who are paying Central Excise duty can supply the goods under Notification 214/86.

8 Subsequently, vide additional submissions Ld. Counsel submitted that liability to duty in case of job work was in doubt and that doubt was settled to rest by decision of Larger Bench in case of Thermax Babcock & Wilcox Ltd. (supra). He argued that since there was a dispute in law and the matter was referred to Larger Bench extended period of limitation cannot be invoked. He relied on the decision of Tribunal in the case of Marsha Pharma Pvt. Ltd. 2009 (248) ELT 687. He argued that the fact that the matter was referred to Larger Bench, itself indicate that there was a reason to have a bonafide doubt.

9 We have gone through rival submissions. We find that in the instant case it is not in dispute that the appellant has received material for manufacture under job work and has failed to take into account the goods manufactured on job work basis into the aggregate value of goods cleared by the appellant. It is also not in dispute that the supplier of goods have not followed the procedures prescribed under Notification 214/86.

10 The appellants have pointed out that at the material time there were various decisions which held that failure to follow the procedure prescribed under Notification 214/86-CE does not disentitle the assessee from the benefit of the said notification. Moreover, it has been argued that the liability of duty on goods manufactured on job work basis, on the manufacture vis a vis the principal who supplied the material, was also in doubt. The issue regarding liability of manufacturer vis a vis the principal was referred to Larger Bench of Tribunal. Larger Bench in case of Thermax Babcock & Wilcox Ltd. (supra) finally resolved the doubt. He pointed out that in view of above, the extended period of limitation cannot be invoked. In support of this contention, he relied on the decision of Tribunal in the case of Marsha Pharma Pvt. Ltd. (supra).

12. We find that as per the decision of Thermax Babcock & Wilcox Ltd. (supra) the liability to pay duty in respect of goods produced on job work basis lies with the appellant being manufacturer of goods. However, since the issue regarding liability of duty on manufacturer vis a vis principal was referred to Larger Bench of Tribunal in case of Thermax Babcock & Wilcox Ltd. (supra) extended period of limitation cannot be invoked in view of the decision of Tribunal in case of Marsha Pharma Pvt. Ltd. In view of above, demand beyond the normal period of limitation is set aside. The penalty is also set aside. Appeal is partly allowed in above terms.

(Order pronounced in the open court on 05.07.2019)

(Ramesh Nair)

Member (Judicial)

(Raju)

Member (Technical)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

Excise Appeal No. 491 of 2009

[Arising out of OIA-58-61/2009-AHD-II-CE/ID/COMMR-A-/AHD passed by CCE-AHMEDABAD-II]

M/s J & J Plast

.....Appellant

Near Jay Fam, Opp. Gokul Hotel, Nr Gota Chowkdi,
Sarkhej-Gandhinagar Highway, Ahmedabad, Gujarat

VERSUS

C.C.E.-Ahmedabad-ii

.....Respondent

Custom House... First Floor,

Old High Court Road, Navrangpura,
Ahmedabad,
Gujarat-380009

WITH

- 1. Excise Appeal No. 492 of 2009 (M/s Jayprakash Vachhani)**
- 2. Excise Appeal No. 493 of 2009 (M/s Dineshbhai B Khetani)**
- 3. Excise Appeal No. 494 of 2009 (M/s Pradeepbhai Chunilal Khetani)**
- 4. Excise Appeal No. 875 of 2009 (M/s Apex (guj) Plastrochem Pvt. Ltd)**
- 5. Excise Appeal No. 876 of 2009 (M/s Deepakbhai Raojibhai Patel)**
- 6. Excise Appeal No. 111 of 2010 (M/s Balaji Multiflex Pvt. Ltd)**
- 7. Excise Appeal No. 112 of 2010 (M/s Chandrakantbhai Vallbhobhai Bhalara)**

[Arising out of OIA-58-61/2009-AHD-II-CE/ID/COMMR-A-/AHD passed by CCE-AHMEDABAD-II]

[Arising out of OIA-43-44/2009-AHD-III-CE/KCG/COMMR-A- passed by Commissioner of Central Excise-AHMEDABAD-III]

[Arising out of OIO-33/COMMR/2009 passed by Commissioner of Central Excise, Customs and Service Tax-RAJKOT]

APPEARANCE:

Sh. P.M. Dave with Sh. D.K. Trivedi, Advocate & Sh. K.C. Rathod, Consultant for the Appellant

Sh. L. Patra, Sh. S.K. Shukla & T.G. Rathod (AR) for the Respondent

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

FINAL ORDER NO.A/ 11707-11714 /2019

DATE OF HEARING: 14.05.2019

DATE OF DECISION: 06.09.2019

RAMESH NAIR

The brief facts of the case are that appellant M/s J & J Plast and M/s Balaji Multiplex Pvt. Ltd are engaged in manufacture of Plastic jerry can and pet bottles on job work basis for the principal manufacturer M/s Ankur Oil Industries, Ankur Protein Industries Ltd and Balaji Wafers Pvt. Ltd. Similarly, M/s Apex (guj) Plastochem Pvt. Ltd, Vijapur, Mehsana are engaged in manufacture of Plastic Container (jar) on job work basis for oil manufacturer namely, M/s Vimal Oil and Food Ltd, Mehsana and M/s Gujarat Spices and Oil Seed Growers Co-Op Union Ltd, Anjar. The raw materials are supplied by the principal manufacturer directly from the place of supplier to the job worker. The job workers are not paying duty on the goods manufactured on job work basis and clear to their principal. The case of the department is that the principal manufacturer are using the job worker manufactured goods in the manufacture of exempted goods, therefore, the job worker being a manufacturer are required to pay excise duty. Accordingly, the excise duty demand was confirmed against the present appellants, therefore, these appeals.

2. Sh. P.M. Dave with Sh. D.K. Trivedi Ld. Counsel & Sh. K.C. Rathod, Ld. Consultant for the appellant submits that at the material time there was general impression among the job worker that job work production i.e. goods produced out of inputs and raw material supplied by others was not to be considered as goods manufactured by the job worker and liabilities of excise duty for the such goods were to be discharged by the supplier of the raw material. He submits that even though as per SSI Exemption Notification No. 1/93-CE & 8/2003-CE, this Tribunal held in few of cases that value of goods produced on job work was not be taken into consideration while determining the aggregate value of clearances from the factory gate. Para 3(A) (e) of SSI exemption Notification provided for exclusion of goods which were exempted under Notification No. 214/86-CE dated 25.03.1986 and two other job work Notification even though the supplier of the material had not followed the procedure of job work Notification. In view of such impression about the job work production, the appellant have not paid the duty on packaging material produced by them on job work and valuation of such job work production is also not been taken into consideration while determining the aggregate value of clearances from their factories in a financial year. There is no evidence of any statement of any person belonging to appellant's organization indicating that duty was not paid even though the appellant knew that they were required to pay excise duty on their job work production or that the supplier of raw material had informed that they were required to pay excise duty on packaging materials produced on job work because such principals were using packaging material for manufacturing of exempted goods. The impression of the job worker appellant was based on various judgments which are cited below:

- a. Aggarwal Rolling Mills 1997 (93) ELT 615 (Tribunal)
- b. Sree Rayalaseema Dutch Kassenbouw Ltd 2006 (203) ELT 248 (Tri.-Bang.)
- c. Moon Chemicals 2007 (83)RLLT 253 (CESTAT-Chennai)

d. Salem Weld Mesh 2007 (83) RLT 568 (Cestat-Chennai)

e. SuvikramPlastex (P) Ltd 2008 (84) RLT 605 (Tri.-Ban.)

f. India Fabricators 2005 (191) ELT 339 (Tri.-Chennai)

3. He submits that in the above and many other cases, the Tribunal held that in case of job work, the principal supplier of the raw materials are liable to pay the excise duty on the job work goods manufactured by the job worker. Only after so many judgments, the Tribunal's Division Bench has taken a different view and the matter was referred to Larger Bench. The Larger Bench in the case of Thermax Babcock Wilcox Ltd 2018 (364) ELT 945 (Tri.-LB) held that in case of job work, where the principal supplier of raw material is not following the procedure under Notification No. 214/86-CE, the job worker is required to pay the duty. He submits that since after so many judgments in favour of assessee, subsequently Larger Bench has taken a different view no malafide can be attributed to the job worker appellant, therefore, demand for the extended period is not sustainable. In this regard, he placed reliance on the following judgments:

a. Marsha Pharma Pvt. Ltd 2009 (248) ELT 687 (Tri.Ahmd.) against the said judgment, the Revenue filed Tax Appeal No. 2399 of 2009 which was dismissed by Hon'ble Gujarat High Court vide order dated 30.09.2010.

b. Charak Pharma P. Ltd 2012 (278) ELT 319 (Guj.)

c. Rajarshi Auto Deals Pvt. Ltd vide Final Order No. A/10551/2019 dated 12.03.2019 passed by CESTAT-Ahmedabad.

d. Dharti Automobiles vide Final Order No. A/11715/2018 dated 30.07.2018 passed by CESTAT-Ahmedabad.

He further submits that the job worker (appellants) were entitled for cenvat credit in respect of raw material supplied directly from the supplier to job work. He invited our attention to some sample invoices of Reliance Industries wherein the name of the appellant are also appearing. He submits that since the appellant was legally entitled for the cenvat credit, there cannot be any malafide intention. In this regard, he placed reliance on the following judgments:

Kirloskar Brothers Ltd 1988 (34) ELT 30 (Bom.)

Apex Steel (P) Ltd 1995 (80) ELT 368 (Tribunal)

Fedders Lloyd Corporation Ltd 2001 (135) ELT 1331 (Tri.Del.)

4 He further submits that for determining the value of goods produced on job work, the element of excise duty involved in inputs and raw material is required deduction as held by Larger Bench of this Tribunal in case of Dai IchiKarkaria Ltd 1996 (81) ELT 676 (Tribunal). This decision of the Tribunal was confirmed by Hon'ble Supreme Court in case of Dai IchiKarkaria Ltd reported in 1999 (112) ELT 353 (SC). He further submits that in view of above facts, the demand for the larger period of limitation and penalty needs to be set aside on all the appellants and other benefits like proper valuation of Cenvat credit in case any duty liability is confirmed may also be allowed. Subsequently vide Advocate's letter dated 12.07.2019 a copy of this Tribunal's Final order No. A/11071/2019 dated 05.07.2019 in the case of Hi scan Pvt. Ltd passed by this Tribunal was submitted and submits that the same may be considered. In the matter of appeals filed by M/s Apex (guj) Plastochem Pvt. Ltd & DeepakbhaiRaojibhai Patel, their Consultant Sh. K.C. Rathod adopted the submission made by Ld. Counsel Sh. P.M. Dave. Being identical issue involved.

5 On the other hand Sh. L. Patra Ld. Assistant Commissioner (AR), Sh. S.K. Shukla, Superintendent (AR) & Sh. T.G. Rathod, Joint Commissioner (AR) appearing on behalf of

the Revenue reiterates the findings of impugned order. He placed reliance on the following judgments:

Allied Bitumen complex (India) Pvt. Ltd 1997 (90) ELT 374 (T)

Desh Rolling Mills 2000 (122) ELT 481 (T)

Smithkline Beecham Asia Ltd 2004 (168) ELT 40 (T)

Agrofab Machinerries (India) Ltd 2017 (5) GSTL 257 (T)

Thermax Babcock Wilcox Ltd 2018 (364) ELT 945 (Tri.-LB)

We have carefully considered the submission made by both the sides and perused the records. We find that Ld. Counsel has not made any contest on the merit of the case in the light of Larger Bench judgment in case of Thermax Babcock Wilcox Ltd (supra), however, he strongly submits that in the facts and circumstances, the demand for the larger period is not sustainable. We find that there is no dispute that on the issue that in case of job work whether job worker is liable to pay duty or the principal raw material supplier was subject to legal dispute and as submitted by Ld. Counsel there were many judgments such as Aggarwal Rolling Mills, Sree Rayalaseema Dutch Kassenbouw Ltd, Salem Weld Mesh, SuvikramPlastex (P) Ltd, India Fabricators (supra) were in favour of the assessee that the duty was required to be paid by the principal supplier of raw material. In the case of Thermax Babcock Wilcox Ltd (supra), Division Bench of Mumbai Tribunal referred the matter to Larger Bench and then only the Larger Bench has held that in case of job worker when the procedure under Notification No. 214/86-CE is not followed and the principal manufacturer is not discharging the excise duty on their final product, job worker is required to pay excise duty. Therefore the appellants have correctly entertained the bonafide belief that on the basis of various judgments that excise duty was payable by the principal supplier of the raw material. It is settled law in various judgments in the case of Marsha Pharma Pvt. Ltd (supra) which was upheld by Hon'ble Gujarat High Court and also in case of Charak

Pharma P. Ltd (supra) that the demand for the extended period of limitation was not permissible when the issue was referred to Larger Bench of Tribunal. Considering this judgment in case of Dharti Automobiles (supra) vide Final Order No. A/11715/2018 dated 30.07.2018 passed by CESTAT-Ahmedabad, the Tribunal has held under:

7 We have carefully considered the submissions made by both the sides and perused the records. We find that there is no dispute that the issue was not free from doubt, there were conflicting opinion from different bench and the matter was referred to Larger Bench. The issue was also clarified by the board Circular No. 87/5/2006 dated 06.11.2006. In these circumstances, the entertaining bonafied belief by the appellant appears to be reasonable. Therefore, the malafide intention cannot be attributed to the appellant. Accordingly, the demand for the extended period does not survive. Hence, impugned order is set aside only on ground of limitation. Therefore, we do not address the issue on merit. The appeal is allowed.

6. In the case of Rajarshi Auto Deals Pvt. Ltd (supra), the Tribunal passed the following order:

“4. Heard both the sides and perused the records. We find that as regard merit of the case, as conceded by the Ld. Counsel demand for the normal period is sustained. As regard limitation, we find that the issue was not free from doubt as the same was finally decided by Larger Bench in case of Pagariya Auto Center (Supra). The Hon'ble Gujarat High Court in the case of Charak Pharma (Supra) also held that when the matter was referred to Larger Bench, extended period cannot be invoked. As regard decision cited by Ld. AR, we observed that in case of Gopinath Agencies (Supra), there was no issue of limitation. In the case of Javiya Marketing, the decision of the

Jurisdiction High Court of Gujarat in the case of Charak Pharma was not considered, therefore, the same are not applicable.

a. *As per our above discussion, the impugned order is set aside to the extent of demand for the extended period. On the same line, the entire penalty is also set aside. The appeal is partly allowed in above terms."*

7. Similar view was taken by this Tribunal in the Tribunal Final order No.A/11071/2019 dated 05.07.2019 in the case of Hi scan Pvt. Ltd wherein Tribunal held as under

"5. We have gone through rival submissions. We find that in the instant case it is not in dispute that the appellant has received material for manufacture under job work and has failed to take into account the goods manufactured on job work basis into the aggregate value of goods cleared by the appellant. It is also not in dispute that the supplier of goods have not followed the procedures prescribed under Notification 214/86.

16. The appellants have pointed out that at the material time there were various decisions which held that failure to follow the procedure prescribed under Notification 214/86-CE does not disentitle the assessee from the benefit of the said notification. Moreover, it has been argued that the liability of duty on goods manufactured on job work basis, on the manufacture vis a vis the principal who supplied the material, was also in doubt. The issue regarding liability of manufacturer vis a vis the principal was referred to Larger Bench of Tribunal. Larger Bench in case of Thermax Babcock & Wilcox Ltd. (supra) finally resolved the doubt. He pointed out that in view of above, the extended period of limitation cannot be invoked. In 5 | P a g e / 1 3 / 2

8. 0 9 - D B support of this contention, he relied on the decision of Tribunal in the case of Marsha Pharma Pvt. Ltd. (supra).

(16) We find that as per the decision of Thermax Babcock & Wilcox Ltd. (supra) the liability to pay duty in respect of goods produced on job work basis lies with the appellant being manufacturer of goods. However, since the issue regarding liability of duty on manufacturer vis a vis principal was referred to Larger Bench of Tribunal in case of Thermax Babcock & Wilcox Ltd. (supra) extended period of limitation cannot be invoked in view of the decision of Tribunal in case of Marsha Pharma Pvt. Ltd. In view of above, demand beyond the normal period of limitation is set aside. The penalty is also set aside. Appeal is partly allowed in above terms."

In view of above consistent view taken by this Tribunal, we have no hesitation in holding that since in the present case is of prior to Larger Bench decision, the matter was in favour of the assessee in many judgments and the matter was finally settled by Larger Bench. The period involved in the present case is much before the Larger Bench Decision, therefore, there is no malafide on the part of the appellant. Hence the demand for the extended period is set aside.

(viii) We further find that if any demand for the normal period exists, the adjudicating authority should be recomputed. As per the submission of the appellant, the appellant were receiving inputs along with duty paying documents, accordingly, they are entitled for the Cenvat credit subject to verification of duty paying document. As regard, the deduction of excise duty on inputs to arrive at valuation of the job work goods, it is settled law as per Hon'ble Supreme Court judgment in case of Dai IchiKarkaria Ltd (supra), therefore, if any demand arise for the normal period, the same needs to be re-quantified by giving benefit of Cenvat credit and deduction on Cenvat credit for the purpose of valuation of job work goods.

(ix) As per our above discussion, the appeals related to the demand of extended period are allowed and in respect of demand for the normal period it is remanded to the adjudicating authority for re-quantification of the demand. It is made clear that since we have held that there was no malafide on the part of the appellants, no penalty is imposable on all the appellants in respect of any duty liability arise after re-quantification. The appeals are disposed of in above terms.

(Pronounced in the open court on 06.09.2019)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 861 of 2009

[Arising out of Order-in-Appeal No OIO-47/VDR-II/JOLLY/MAK/COMMR/08-09
passed by Commissioner of Central Excise, Customs and Service Tax-
VADODARA-II]

M/s Jolly Electrical Industries

.... Appellant

S-09, Aries Complex, 87, Sampatrao Colony, Bpc Road, Vadodara, Gujarat-
390007

VERSUS

C.C.E. & S.T. Vadodara-ii Respondent

1st Floor.. Room No.101,
New Central Excise Building, Vadodara, Gujarat-390023

AND

Excise Appeal No. 862 of 2009

[Arising out of Order-in-Appeal No OIO-47/VDR-II/JOLLY/MAK/COMMR/08-09
passed by Commissioner of Central Excise, Customs and Service Tax-
VADODARA-II]

Nilesh V Shah

.... Appellant

Jolly Electrical Industries,
S-09, Aries Complex, 87, Sampatrao Colony, Bpc Road, Vadodara, Gujarat-
390007

VERSUS

C.C.E. & S.T. Vadodara-ii Respondent

1st Floor.. Room No.101,
New Central Excise Building, Vadodara, Gujarat-390023

APPEARANCE :

Sh. P.M. Dave, Advocate for the Appellant

Sh. L. Patra., Assistant Commr. (AR) for the Respondent

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

FINAL ORDER NO. A/11889-11890/2019

DATE OF HEARING : 17.06.2019

DATE OF DECISION: 01.10.2019

The brief facts of the case are that the appellant M/s Jolly Electrical Industries were engaged in the manufacture of plain paper copier and transmitting apparatus classifiable and chargeable to duties of excise, heading/sub-heading 9009.00 and 8425.00 respectively of the Central Excise Tariff Act, 1985. There are other two units, namely M/s Jolly Enterprises located at K-1, 16-15/GIDC-Dabhoi District-Vadodara (hereinafter referred to as 'Jolly' for the sake of brevity) having Central Excise Registration for manufacture of electrical switches transmitting apparatus, micro film, reader printer and computer classifiable and chargeable to duties of excise under heading/ sub-heading no. 8536.90, 9525.00 and 8471.00 respectively of Central Excise Tariff Act, 1985 and M/s Kinitronics located at Shed No. 21-22, GIDC Waghodia Distt. Vadodara (hereinafter referred to as 'Kini' for the sake of brevity) having Central Excise Registration for manufacture of TV sets, Modular Systems, Plain Paper Copier, paper shedding machine and data display monitors classifiable and chargeable to duty under chapter heading no. 8528.00, 8517.00, 9009.00, 8472.00 and 8471.00 respectively of the Central Excise Tariff Act, 1985. The Central Excise departmental officers carried out massive investigation of all the three units and found that in fact the other two units i.e. Kini and Jolly were not manufacturing the goods whereas the goods manufactured by Jolly Electricals Industries were being cleared under exemption in the name of Kini and Jolly. During investigation various statements of the employees of the appellant and other persons were recorded. The status of the units were also verified and from all these evidences it was revealed that all the clearance shown to have made by Kini and Jolly are in fact manufactured and cleared from Jolly Electrical Industries. Accordingly, the demand of excise duty was raised against the appellant M.s Jolly Electrical Industries. A SCN dated 02.03.1994 was issued wherein demand of duty, penalty, and confiscation of land and building plant and machinery was proposed against M/s Jolly Electrical Industries. M/s Kini and Jolly were proposed for recovery of modvat credit wrongly availed and utilized and also corresponding penalty was proposed to be imposed. Personal penalties under Rule 209A of Central Excise Rules, 1944 was also proposed to be imposed against various persons including partners of all the three partnership firms. The said SCN was adjudicated by the Collector of Central Excise Vadodara vide Order-in-Original No. 117/BRC/MP/95 and held that goods of all the three firms were different for which separate excise license were given and recorded various findings and dropped the SCN against all the noticees. Being aggrieved by the said order in original dated 06.10.1995 the Revenue filed an appeal before the Appellate Tribunal Mumbai praying for setting aside the order in original dated 06.10.1995. The Tribunal remanded the matter vide order dated 08.07.2004. The appellant filed application before the Tribunal for restoration of appeal which was dismissed. Another application was filed by the present appellant for restoration of the Revenue's appeal and for recalling the order dated 08.07.2004 however the Appellate Tribunal rejected the said application vide order dated 09.07.2007. In the meanwhile, the Tribunal's Order of remand was complied with and Collector passed de novo order confirming the duty demand against the present appellants with interest and penalties. Aggrieved by the de novo order in original dated 31.01.2007, the appellants filed appeal along with stay petition before this Appellate Tribunal. The Tribunal remanded the matter to the original authority. The Commissioner of Central Excise- Vadodara in the second round of remand has passed the impugned order whereby the duty demand against M/s Jolly Electrical Industries was confirmed and a penalty of Rs. 80 Lakhs was imposed under Rule 173Q(1D) of Central Excise Rules, 1944. It was also ordered for confiscation of land, plant, building, machinery etc. of M/s Jolly Electrical Industries under Rule 173Q(2) and an option was given to redeem the said asset on payment of redemption fine of Rs. 10 Lakhs. A penalty of Rs. 10 Lakhs was also imposed on Sh. Nilesh V Shah, partner of M/s Jolly Electrical Industries under Rule 209A of Central Excise Rules, 1944. Being aggrieved by the impugned order in original dated 06.02.2009, the present appellants filed these appeals.

2. Sh. P.M. Dave, Ld. Counsel appearing on behalf of the appellant submits that in the first round of adjudication the Collector of Central Excise, Vadodara

vide Order dated 06.10.1995 dropped the proceedings against all the noticees holding that all the three firms i.e. M/s Jolly Electrical Industries, M/s Kinitronics and M/s Jolly Enterprises are separate units and both cannot be clubbed. Against the said order dated 06.10.1995, the Revenue filed only one appeal i.e. against M/s Jolly Electrical Industries, therefore, finding with regard to the clubbing of two units i.e. M/s Kinitronics and M/s Jolly Enterprises were held to be independent. The clearance of those units cannot be clubbed with the clearances of the appellant M/s Jolly Electrical Industries, therefore, the demand is not sustainable. He submits that in the impugned order demand of modvat credit against M/s Kinitronics and M/s Jolly Enterprises was dropped though it was proposed in the SCN. He submits that if these two units are treated as dummy units for facade created by M/s Jolly Electrical Industries then modvat credit taken and utilized by these alleged dummies had to be denied and recovered but no adverse order for recovery of modvat credit has been made against these two manufacturers. The Commissioner has indirectly recognized them as real and genuine manufacturer. This is fatal legal infirmity in the impugned order and therefore, clubbing of clearances of these two manufacturers with the appellant M/s Jolly Electrical Industries is liable to be set aside on this ground itself. Without prejudice to the above submission, he further submits that in the first round of adjudication, adjudicating authority dropped the proceedings against two of alleged dummies which was not challenged by the Revenue, therefore, in the adjudication against other two units i.e. M/s Kinitronics and M/s Jolly Enterprises, the adjudication order became final and conclusive and therefore, the value of other clearances cannot be clubbed with the clearances of the appellant herein. He placed reliance on the following judgments:

- Elemec Industries 2003 (158) ELT 595 (Tri. Del.)
- CCE vs Tightwell Fastners 2008 (230) ELT 163 (Tri. Ahmd.)
- CCE vs Supreme Electrical Appliances 2001 (113) ELT 271 (Tri. Del.)
- CCE vs Meco Tronics Pvt. Ltd. 2003 (159) ELT 628 (Tri. Chen.)
- CCE vs Campco 2006 (199) ELT 630 (Tr. Bang.)

He submits that there was only one appeal filed by the Revenue against order in original dated 06.10.1995 namely, Appeal No. E/2474/1996-Bombay and the name of the Respondent against serial No.

2 of EA-5 form was of M/s Jolly Electrical Industries. The notice for hearing of this appeal was also served only on M/s Jolly Electrical Industries. In the order dated 08.07.2004 made by Appellate Tribunal – Bombay also only M/s Jolly Electrical Industries was shown as the Respondent. If appeals were filed against other two firms also then there will be two more appeals where the ground about demand of modvat credit would have been taken and prayer against these two firms would also have been made and hence notices would have been issued to these two firms also by the Registry of the Appellate Tribunal. Only because it was written in the caption of memo of revenue's appeal – M/s Jolly Electrical Industries & Ors., the Commissioner could not have now held that appeals were filed against other firms also. He placed reliance on the following judgments:

- Krishna Clearing Agency vs UOI 2016 (334) ELT 427 (Guj.)
- M/s Vyas Shantilal Jethala Sons Co. Order No. A/10721/2018 dated 03.04.2018 passed by CESTAT, Ahd.

He further submits that if appeals filed by the Revenue against the alleged dummies were dismissed as time barred (and not on merits) then also clubbing of clearances is not admissible because the situation is that the order dropping the proposal of clubbing for such units has become final. The case of clubbing alleged dummies has become final, the case of clubbing of other clearances with main unit also does not survive. In this

support, he placed reliance on the following judgment:

- CCE vs Supreme Electrical Appliances 2001 (113) ELT 271 (Tri. Del.)
- CCE Trichirapalli v/s Devi Silicates (P) Ltd. 2004 (178) ELT 1018 (Tri. Chennai)

He further submits that in remand proceedings also the Commissioner has not called M/s Kinitronics and M/s Jolly Enterprises for hearing, because the case against them was dropped by virtue of order in original dated 06.10.1995 and that order was not challenged by the filing the appeals against these two firms. In case of clubbing of clearances, no order can be passed without joining alleged dummies as parties are co-noticees in adjudication proceedings. In this regard he placed reliance on the following judgments:

- K.R. Balachandran 2003 (151) ELT 68 (Tri. Chennai)
- CGST vs Unitech Containers Pvt. Ltd. 2017 (358) ELT 99 (Del.)
- CCE vs Diamond Scaffolding Co. 2011 (274) ELT 10 (Cal.)
- Premier Heavy Engineering Corpn. 2016 (337) ELT 332 (Guj.)

As regard Commissioner's observation that as per letter dated 11.11.1996 forwarding the memorandum of appeal and appeal paper book to the Assistant Registrar – CESTAT, Bombay, a copy of memorandum was also forwarded to all 8 noticees to whom the SCN was issued, he submits that this objection seems to be incorrect as this matter is not on record and it is not established that a copy of appeal memorandum was actually forwarded to all 8 noticees. He submits that but assuming without admitting that appeal memorandum was forwarded to M/s Kinitronics and M/s Jolly Enterprises also as held by Hon'ble Gujarat High Court in the case of M/s Premier Heavy Engineering Corporation 2016 (337) ELT 332 Guj., certifying a copy of the notice on the alleged dummy units is immaterial because the question whether the unit was dummy or not had to be decided with full participation of such alleged dummy.

As regard the facts on the issue of clubbing, he further submits that the findings of the facts recorded by the predecessor Commissioner while passing order in original dated 06.10.95 have not been considered by the predecessor Commissioner for recording the findings of the facts while passing OIO dated 06.10.95 has also not been considered by the Respondent Commissioner in the remand proceeding, therefore, the findings in the impugned order is contrary to the findings already recorded by the predecessor Commissioner as regard facts of the case and thus impugned order passed on incorrect and non-existent facts deserves to be set aside. He submits that in the OIO dated 06.10.95 it was recorded that all the three units had manufactured and cleared excisable goods independently on their own and their function was not on paper but they were actually in existence and working. The predecessor Commissioner has considered statutory records while recording this finding. As against the said finding the respondent Commissioner has now recorded in the impugned order that the three units were functioning as one unit and all the manufacturing activities were maintained at premises of Jolly Electrical Industries only. He submits that all the staff were looking after activities of all the three units, therefore, all the three units were working independently. The predecessor Commissioner has recorded in the order dated 06.10.95 that electricity in the factories of M/s Kinitronics and M/s Jolly Enterprises was less because the manufacturing activity over there was only of assembling of imported and otherwise procured parts and components so as to produce goods like electrical switches, fax machines, micro film reader and printer as well as telephone sets, plain paper copier and paper shredders. In view of screw driver technology adopted by these two manufacture electricity consumption in their factory was less. In the impugned order now passed by the Respondent Commissioner, it is held that electricity consumption being of less units in the factories of M/s Kinitronics and M/s Jolly

Enterprises and electricity consumption of Jolly Electrical Industries being at higher the manufacturing activities were undertaken only in the factory of Jolly Electrical Industries. He submits that only because electricity consumption in one of the three factories was higher it could not be held that other two factories actually did not undertake any process of manufacture. He submits that all the findings given by the Respondent Commissioner is contrary to the findings given by the predecessor Commissioner therefore the impugned order is not sustainable.

He further submits that as regard clubbing of clearances a trade notice No. 59/1992 was issued by the Vadodara Collectorate as far back as 14.07.1992 based on an order No. 6/1992 issued by CBEC under Section 37B of the Act from file No. 213/15/92-C-Ex.-06 and it was clarified thereunder that clubbing of manufacturers and factories was not permissible if (i) all the manufacturers were independent in the sense that they were having their own factories, sheds, machineries and other infrastructural facilities like power (ii) the source of raw material and source of funding was also separate and independent for all the manufacturers (iii) the manufacturers and other factories were registered and recognized as separate entities under various Central and State Legislatures applicable to manufacture and sale activities (iv) the manufacturers were independent in the matters of management and administration of their affairs and one manufacture was not controlling the management of the others and (v) the manufacturers were independent entities and also juristic persons and in such case even if one or two partners, directors were common, said commonness was absolutely irrelevant. He placed reliance on the following judgments:

- Prabhat Dyes and Chemicals 1992 (62) ELT 469 (Tri.)
- Swastik Engg. Works 1992 (62) ELT 313 (Tri.)
- Diamond Engineering & Trading Corpn. 1989 (44) ELT 92
- Bhagwandas Kanodia & Ors. 1987 (32) ELT 204 (Tri.)
- Alpha Toys Ltd. 1993 (66) ELT 375 (Raj.)
- Rang Udyog 1996 (83) ELT 648
- Prima Control (P) Ltd. 1994 (71) ELT 689 (Tri.)

He submits that in view of above judgments the principles werelaid down that in each case clubbing of clearances is permissible, taking support of above of the above judgment. He submits that as per the facts of the present case, all the three units cannot be clubbed together.

As regard time bar, he submits that all the three manufacturers were licensed by the Central Excise Department separately. All the three manufacturers have availed benefit of Modvat Credit by maintaining Modvat Register and filing Modvat declaration. All the three manufacturers have paid duty after exceeding SSI limits. All the units were maintaining RG-1 and filing RT-12 returns, therefore, all the activities of three units were well within knowledge of Revenue Officers. The predecessor Commissioner has recorded in the order dated 06.10.95 that the Central Excise Authorities were aware about these manufacturing activities, therefore, the demand for the extended period of limitation is time barred.

He further submits that the demand, if any arise, the same needsto be recomputed by extending the benefit of cum duty price as held by the Larger Bench of CEGAT in the case of Shri Chakra Tyres 1999 (108) ELT 361 and in the case of Dugar Tetenal (India) Ltd. 2008 (224) ELT 180 (SC). Accordingly, the demand of Rs. 80,83,376/- was wrongly made

and the same atleast deserves to be reduced.

As regard penalty he submits that since there is no violation of any nature committed by the appellant and they have bonafidely acted. Moreover, there is no specific reason or ground spelled out in the order for imposing penalty and thus penalty could not be imposed on hearsay or presumption. Regarding penalty imposed on Sh. Nilesh Shah, he submits that there is no evidence or statement on record to link Sh. Nilesh Shah with the alleged offences, therefore, penalty under 209A could not have been imposed.

3. Sh. L. Patra, Ld. Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He further submits that all the arguments made by Ld. Counsel will not help their case for the reason that as per the facts of this case M/s Jolly Electrical Industries cleared the goods clandestinely in the guise of manufacture and clearance of goods by other two units M/s Kinitronics and M/s Jolly Enterprises. For the same reason, the extended period was also rightly invoked. In support of the Revenue's case, he placed reliance on the following judgments:

- Elemec Industries 2003 (158) ELT 595 (Tri. Del.)
- CCE vs Tightwell Fastners 2008 (230) ELT 163 (Tri. Ahmd.)
- CCE vs Supreme Electrical Appliances 2001 (113) ELT 271 (Tri. Del.)
- CCE vs Meco Tronics Pvt. Ltd. 2003 (159) ELT 628 (Tri. Chen.)
- CCE vs Sompura Ceramics 2001 (130) ELT 195 (Tr. Del.)
- CCE Trichirapalli v/s Devi Silicates (P) Ltd. 2004 (178) ELT 1018 (Tri. Chennai)
- K.R. Balachandran 2003 (151) ELT 68 (Tri. Chennai)
- CGST vs Unitech Containers Pvt. Ltd. 2017 (358) ELT 99 (Del.)
- CCE vs Diamond Scaffolding Co. 2011 (274) ELT 10 (Cal.)
- Premier Heavy Engineering Corpn. 2016 (337) ELT 332 (Guj.)
- Krishna Clearing Agency vs UOI 2016 (334) ELT 427 (Guj.)
- M/s Vyas Shantilal Jethala Sons Co. Order No. A/10721- 10723/2018 dated 03.04.2018 passed by CESTAT, Ahd.

4. We have heard both the sides and perused the records. In the first round of adjudication order, the adjudicating authority has dropped the demand holding that all the three units are independent in respect of manufacture and clearance of the goods, therefore, they should not be clubbed. Being aggrieved by the order in original dated 06.10.95 Revenue filed appeal before the Tribunal. The Tribunal allowed the Revenue's appeal by remanding to the adjudicating authority to re-determine the issue. The present appellants application for restoration of appeal was also dismissed by the Appellate Tribunal. Second application was filed by the present appellant for restoration of Revenue's Appeal was also rejected by the Tribunal. Meanwhile, the adjudicating authority passed a de novo order whereby the duty demand against the present appellants with interest and penalties were confirmed, therefore, the present appeal filed by the appellants. Ld. Counsel vehemently argued on the following points:

- (i) In the first round the then Ld. Collector dropped the proceedings against all the noticees whereas the Revenue filed appeal only against Jolly Electrical Industries. Accordingly, the finding in the

first order that M/s Kinitronics and M/s Jolly Enterprises are not dummy units attained finality if that be so, then the clearances of all the three units cannot be clubbed.

- (ii) Though in the SCN there was proposal to demand Modvat Credit from M/s Kinitronics and M/s Jolly Enterprises but the same was dropped in the impugned order, therefore, the allegation of these two units being dummy does not sustain.
- (iii) For clubbing of clearances of all alleged dummy units, against all the units, appeal should have been filed, therefore, in absence of any appeal filed by the Revenue before the Tribunal against M/s Kinitronics and M/s Jolly Enterprises their clearances cannot be clubbed with the clearances of Jolly Electrical Industries.
- (iv) As per the findings of facts in the order dated 06.10.95 clubbing is not permissible.
- (v) The case of the appellant does not fulfill the criteria as laid down by the Trade Notice dated 14.07.92 based on CBEC Order No. 6/92 for clubbing of more than one unit.
- (vi) The demand is time barred as no suppression of facts involved.
- (vii) The appellant is eligible for cum duty price.

5. As regard the submission regarding the first adjudicating order dropping proceeding against two of the alleged dummies and the same was not challenged by the Revenue, we observe from the copy of the appeal memo filed by the Revenue under Appeal No. E/2474/96 of Bom before the Mumbai Tribunal, the cause title shows as under:

*“Commissioner of Central Excise and Customs ... Appellant Vs
M/s Jolly Electrical Industries and Others ...Respondent”*

From the above cause title it is very clear that the appeal was filed not only against M/s Jolly Electrical Industries but all others which were noticees in the SCN.

6. In the Revenue's appeal memo the relief sought in the appeal was as under:

“(13) Therefore, under the provisions of Section 35E
(1) of the Act, the Commissioner, Central Excise, Vadodara,

hereby apply to Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as the 'Tribunal') for the correct determination of the following points arising out of the said order:-

(a) whatever after taking into consideration the facts stated above, ready with Show Cause Notice, the said order of the Commissioner in dropping the demand of duty, non- confiscation of land, building, plant and machinery allowing Modvat benefit and non-imposition of penalty on the noticees is legal and proper?

(b) Whether by an order passed under Section 55C of the Act, the Tribunal should set aside the order passed by the Commissioner? And

(c) Whether the Tribunal should pass any other order as deemed fit?”

7. From the above points raised in the appeal by the Revenue, they sought to set aside the entire order which is against all the noticees, therefore, this shows that the appeal filed by the Revenue is not only against M/s Jolly Electrical

Industries but also against other noticees in the SCN.

8. The adjudicating authority has observed and recorded in the order that as per the letter F. No. V(Misc.)2-494/96/RC dated 11.11.1996 memorandum of appeal and appeal paper book was forwarded to the Assistant Registrar – CESTAT- Bombay and a copy of the same was also forwarded to all 8 noticees to whom the SCN was issued. We find that even if one appeal was filed making number of parties as respondent in the Revenue's appeal itself the appeal deemed to have been filed against all the respondents.

9. It is also observed from the remand order of this Tribunal bearing No. A/622/WZB/2004/C-III dated 08.07.2004 that the following order was passed.

“When the matter was called, no one appeared for the Respondents. Heard the Departmental Representative and nothing that the issue in this appeal filed by the Revenue involved the clubbing of clearances of two units with that of the clearances effected from the Respondents' unit and finding that some of the partners are common, the appeal filed by the revenue is allowed as remand to the original authority to redetermine the issue, after hearing the respondents. While redetermining the issues, the Supreme Court's decision in the case of Supreme Washers Pvt. Ltd. vs CCE 2003 (151) ELT 14 (SC) should be applied.

2. Revenue's appeal allowed in above terms.”

E/ROA-2456/04-MUM *Annex - VII/106*
Date: - 01.10.2004

BEFORE THE CUSTOMS, EXCISE AND SERVICES TAX APPELLATE TRIBUNAL, MUMBAI

In Appeal No. E/2474/96
CCE, Baroda

Annex:-
Appellant

Versus

M/s Jolly Electrical Industries
Petitioner/Respondent

Subject: - Prayer for restoration of appeal & recalling of final order No. A-622 / WZB / 2004 / C-III dt. 08.07.2004 by the respondent.

The above numbered appeal has been decided ex-parte by the Hon'ble Tribunal vide the above numbered Final Order. (Copy of the order is annexed hereto as 'A')

The departmental appeal was listed for a hearing for the first time on 08.07.2004.

However on this date, the Counsel of this appellant could not appear for the hearing on account of his serious sickness. To this effect a fax was sent on 07.07.2004 followed by a letter through speed post to the Hon'ble Tribunal in advance which was also placed before the Hon'ble Bench. (Copies of fax/letter, fax journal and speed post receipt, are enclosed as annexures 'B')

Hon'ble Tribunal is, therefore, prayed to recall its Final Order & list this appeal for a hearing. For this favour, the appellants shall be deeply obliged.

This prayer/petition is supported by the following judgments: -

1. 2004 (163) E.L.T. A 039 in the case of **Commissioner Vs. Elepur Industries (India) Pvt. Ltd.**
2. 1996 (086) E.L.T. 0472(S.C) in the case of **J.K. Synthetics Ltd. Vs. Collector of Central Excise.**
3. 2002 (149) E.L.T. 1455(T) in the case of **Ganesh Agro pack (P) Ltd. Vs. Collector of Central Excise, Madurai.** (The Tribunal relied upon two High Courts' judgments in support of its judgment, Scanned of Calcutta and another of Kerala High Court)

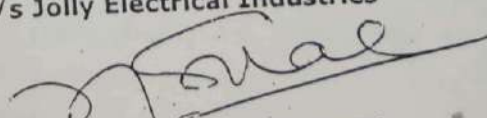
Contd...2...

It must, however, be submitted that the departmental appeal is otherwise not maintainable/sustainable on account of the Department having failed to also file two more appeals in the cases of the two clubbed parties i.e. M/s Jolly Enterprises & M/s Kinitronics. And this proposition is supported by the following judgments: -

1. **2003 (158) E.L.T. 0595(T) in the case of Elemec Industries Vs. Commissioner of Central Excise, Pune.**
2. **2001 (131) E.L.T. 0271(T) in the case of Collector of Central Excise, Bombay Vs. Supreme Electrical Appliances.**
3. **2003 (159) E.L.T. 0628(T) in the case of Commissioner of Central Excise, Chennai Vs. Meco Tronics (P) Ltd.**
4. **2001 (130) E.L.T. 0195(T) in the case of Commissioner of Central Excise, Rajkot Vs. Sompura Ceramics.**
5. **1999 (113) E.L.T. 0597(T) in the case of Commissioner of Central Excise, Mumbai Vs. Maganlal Nandlal & Sons.**

As in duty bound, the petitioners pray accordingly.

For and on behalf of
M/s Jolly Electrical Industries


(Nilesh V. Shah)

From the above application it can be seen that after disposal of the appeal by the Tribunal in respect of all the respondents the appellant have raised a specific ground in the ROA application that departmental appeal is not maintainable as the same was not filed against clubbed parties M/s Kinitronics and M/s Jolly Enterprises. This Tribunal dismissed the application for restoration, vide order No. M- 250/WZB/2004-C-III dated 25.11.2004. As per above given facts firstly, we are of the view that the Revenue had filed appeals against all the respondents which further get reinforced on the basis that even though the appellants have raised specific ground for restoration of appeal that the appeals were not filed against M/s Kinitronics and M/s Jolly Enterprises but the same was dismissed, therefore, the issue that the Revenue's appeal was against all the noticees attained finality. The appellants have not challenged either the remand order or the Miscellaneous Order by which the application for restoration of appeal was dismissed. In this position, the appellant has no locus standi to dispute or to raise the issue that the Revenue's appeal was only against one party i.e. M/s Jolly Electrical Industries. We therefore, hold that the Revenue's appeal was filed against all the noticees before this Tribunal; therefore, the issue related to all the noticees were open before the adjudicating authority in de novo adjudication.

10. The appellants have strongly argued that the present adjudicating authority has not considered the findings of fact narrated by the predecessor

Commissioner in the first Adjudication Order dated 06.10.1995. In this regard, we find that the first adjudication order was set aside in the Revenue appeal, therefore, the present adjudicating authority is not judicially required to look into the said order as the same was not in existence. Once, the earlier adjudication order was set aside the entire case has gone back to the stage of SCN and thereafter since the entire matter was kept open the present adjudicating authority was free to take independent view on the overall case without getting influenced by the first order and finding of the predecessor Commissioner, therefore, the submission of the Ld. Counsel on this count is fatal and cannot be accepted.

11. As regard, the submission made by the Ld. Counsel that all the three units are independent and registered with various authorities, filing of returns with various tax authorities does not help their case for the reason that in the present case the case of the department is not on the basis of that all the three units are independently manufacturing and clearing the goods and due to mutual interest, inter unit fund flow availing of common amenities etc., the units are clubbable whereas the adjudicating authority on the basis of strong evidences such as insufficient production facility, electricity consumption and various other aspects came to the conclusion that the other two units i.e. M/s Kinitronics and M/s Jolly Enterprises did not have set up for manufacture of excisable goods, therefore, the present case of the department is that all the goods cleared were manufactured by M/s Jolly Electrical Industries and not by M/s Kinitronics and M/s Jolly Enterprises, if that be so, then all the clearances are of M/s Jolly Electrical Industries and the clearances claimed to have manufactured by M/s Kinitronics and M/s Jolly Enterprises are clearly a clandestine removal of M/s Jolly Electrical Industries, therefore, the demand was rightly made from M/s Jolly Electrical Industries. The submission of Ld. Counsel that since M/s Kinitronics and M/s Jolly Enterprises were not demanded duty, the clubbing of clearances is illegal. As we discussed above, there is no clearance of M/s Kinitronics and M/s Jolly Enterprises but all the clearances are of M/s Jolly Enterprises, therefore, there is no reason or question to implicate M/s Kinitronics and M/s Jolly Enterprises for the purpose of making demand, therefore, even though these two parties were not implicated in the order in original does not make any impact on the demand raised against M/s Jolly Electrical Industries. On these facts even the judgments relied upon by the Ld. Counsel that for clubbing of clearances of other units they should be made party in the case is not relevant. As regard, the argument of Ld. Counsel that though the demand of Modvat Credit was raised in the SCN against M/s Kinitronics and M/s Jolly Enterprises and the same was dropped in the impugned order, it is otherwise established that they have rightly availed the modvat credit and therefore, the clubbing of both the units with M/s Jolly Electrical Industries cannot be made. In this regard, we find that there was an independent proceeding of modvat case against both the units even though the demand was dropped against both the units therefore but at the same time all the clearances of so called M/s Kinitronics and M/s Jolly Enterprises were also considered, the clearances of M/s Jolly Electrical Industries and the demand was confirmed. The dropping of modvat demand has no impact as far as clandestine removal of goods manufactured and cleared by M/s Jolly Electrical Industries in the guise of manufacture and clearances of M/s Kinitronics and M/s Jolly Enterprises, therefore, merely because the case proceedings of modvat credit has been dropped against M/s Kinitronics and M/s Jolly Enterprises it will not affect the case of clandestine removal against M/s Jolly Electrical Industries, therefore, this argument is of no help to the appellant.

12. As regard the heavy reliance made by Ld. Counsel on the Trade Notice No. 59/1992, we find that we have already given our above finding that all the clearances are of M/s Jolly Electrical Industries, therefore, the Trade Notice which deals with the admitted clearances of more than one unit, is not relevant in the facts of the present case.

13. Ld. Counsel also argued vehemently on the point of time bar. As we observed above that M/s Jolly Electrical Industries were indulged into clandestine removal of excisable goods to intention to evade duty in the guise of manufacture and clearance of goods from M/s Kinitronics and M/s Jolly Enterprises, there is a clear fraud, suppression of fact, misstatement, collusion with intention with evade duty, therefore, as per the facts of the present case it is a fit case to invoke the extended period, therefore, the demand for extended period is clearly sustainable.

14. As regard, the relief sought by the appellants with regard to the benefit of cum duty price, we find that this issue is no longer res-integra and the same has been decided in following judgments in favour of the assessee that as and when the duty is calculated the sale price has to be taken as cum duty price and for the purpose of demand the excise duty needs to be deducted. The judgments are cited below:

- Hans Ispat Ltd Vs. Commr. Of C.E.X. C.U.S. & S.T., Rajkot 2016 (343) E.L.T. 622 (Tri.-Ahmd.)
- Commissioner of Central Excise Vs. Uday Auxichem 2012 (275) E.L.T. 565 (Tri.Ahmd.)
- Saafalya Industries Pvt. Ltd. Vs. Commr. Of C.EX. (Appeals), Manglore 2010 (261) E.L.T. 1071 (Tri.-Bang.)
- Commr. Of Cen. Ex., Delhi Vs. Maruti Udyog Ltd. 2002 (141) E.L.T. 3 (S.C.)

15. In view of the above settled position of law, the appellant is entitled for the cum duty benefit. Accordingly, the demand of duty and corresponding penalty needs to be recomputed by extending the benefit of cum duty price.

16. As per the above discussion and findings, the appeals are dismissed except for the re-quantification of the duty by extending the cum duty price. Appeals are disposed of in the above terms.

(Pronounced in the open court on 01.10.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

Customs Appeal No. 13009 of 2018

[Arising out of OIO-AHM-EXCUS-003-COM-014-017-18-19 passed by
Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-III]

M/s Meenakshi Food Products Pvt. Ltd
901, GIDC, Engineering Estate, Sector-28

.....Appellant

Gandhinagar, Gujarat

VERSUS

C.C.E. & S.T.-Ahmedabad-iii

.....Respondent

Custom House, 2nd Floor, Opp.

Old Gujarat High Court,
Navrangpura, Ahmedabad,
Gujarat-380009

WITH

1. Excise Appeal No. 11672 of 2018 (shri Jagdishprasad Mohanlal Joshi)

2. Excise Appeal No. 11673 of 2018 (Shri Sachin J Joshi)

3. Excise Appeal No. 10026 of 2019 (Shri DilipkumarAmrutlal Jani)

[Arising out of OIO-AHM-EXCUS-003-COM-014-017-18-19 passed by
Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-III]

APPEARANCE:

Sh. P.P. Jadeja, Consultant & M. Joshi, Advocate for the Appellant
Sh. A. Mishra, Authorized Representative for the Respondent

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

FINAL ORDER NO.A/ 11143-11146 /2019

DATE OF HEARING: 28.03.2019
DATE OF DECISION: 17.07.2019

RAMESH NAIR

The present appeals have been filed by M/s Shree Meenakshi Food Products Pvt. Ltd. (SMFPPL) and its directors Shri DilipkumarAmrutlal Jani and Shri Jagdishprasad Mohanlal Joshi and Shri Sachin Joshi. The brief facts of the case are that M/s MFPL are engaged in the manufacture of Gutkha falling under chapter 24 of the CETA, 1985. They were discharging duty under the provisions of Pan Masala Packing Machines (Capacity Determination and collection of duty) Rules, 2008 as amended hereinafter referred to as „PMPM Rules, 2008. M/s

SMFPPL hadfiled declaration on 01.04.2011 in terms of Rule 6 of PMPM Rules wherein they declared the details of packing machines to be used for packing of Gutkha along with specific MRP of the pouches. The said declaration was as under:

TABLE-‘A’

Sl. No.	Floor	Description of machines
1	Ground Floor	3 PMPM manufacturing Gutkha pouches having MRP of Rs. 3/-. 17 PMPM manufacturing Gutkha pouches having MRP of Rs. 1.5/-.
2	First Floor	3 PMPM manufacturing Gutkha pouches having MRP of Rs. 1/- each.
3	Second Floor	5 PMPM manufacturing Gutkha pouches having MRP of Rs. 2.5/-. 19 PMPM manufacturing Gutkha pouches having MRP of Rs. 1/-.
	TOTAL MACHINES OF VARIOUS MRPs	37 Pan Masala Packing Machines of MRP of Re. 1/- 17 Pan Masala Packing Machines of MRP of Re. 1.5/- 5 Pan Masala Packing Machines of MRP of Re. 2.5/- 3 Pan Masala Packing Machines of MRP of Re. 3/-
	TOTAL MACHINES IN THE FACTORY	62 Pan Masala Packing Machines

However during surprise check it was found that in case of machines installed on ground floor the machines were manufacturing pouches as under:

TABLE-‘B’

Machine Sr.No.	As per declaration filed under Rule-6 of PMPM Rules, 2008, declared MRP of pouches manufactured	Actual MRP of pouches being manufactured at the time of surprise check	Remarks
43 to 59	Rs. 1.5/-	NO MRP	Export Quality
60 to 62	Rs. 3/-	Rs. 3/-	-

In respect of machines at First Floor, It was found that in respect of machines with serial no. 1 to 18 having been declared to be manufacturing 1 Re. Pouch, the position of machines was as under:

In respect of machines installed at Second Floor the position was as under:

TABLE-‘D’

Machine	As per declaration filed under Rule-6 of PMPM Rules, 2008,	Actual MRP of pouches being manufactured	Remarks

Sr. No.	declared MRP of pouches manufactured	at the time of surprise check	
19	Re.1/-	Re.1/- sealed pack roll	-
20	Re.1/-	Re.1/-	-
21	Re.1/-	Re.1/(Branch GOA 1000)	-
22	Re.1/-	Re.1/-sealed pack roll	-
23	Re.1/-	Re.1/- sealed pack roll	-
24	Re.1/-	Re.1/-No roll	-
25	Re.1/-	Re.1/-(Branch GOA 1000)	-
26	Re.1/-	Re.1/-	-
27	Re.1/-	Re.1/-	-
28	Re.1/-	Re.1/-	-
29	Re.1/-	Re.1/-	-
30	Re.1/-	Re.1/-	-
31	Re.1/-	Re.1/-(Branch GOA 1000)	-
32	Re.1/-	Re.1/-(Branch GOA 1000)	-
33	Re.1/-	Re.1/-	-
34	Re.1/-	Re.1/-(Branch GOA 1000)	-
35	Re.1/-	Re.1/-	Gutkha pouches having MRP of Rs. 1.5/- lying in front of the machine
36	Re.1/-	Rs. 1.5/- (Brand GOA 1000)	-
37	Re.1/-	No packing roll	-
38	Re.2.5/-	Re.2.5/-	-
39	Re.2.5/-	Re.2.5/-	-
40	Re.2.5/-	Re.2.5/-	-
41	Re.2.5/-	Re.2.5/-	-
42	Re.2.5/-	Re.2.5/-	-

It was alleged that in respect of machines installed at first floor, though M/s SMFPPL have declared that pouches of Re. 1/- MRP would be produced but actually they were packing pouches of Rs. 1.5/-. Also that

in respect of packing machines installed at second floor, they had declared the pouches to be packed of 1/- on 19 machines and Rs. 2.5 on 5 machines, but actually they were packing Gutkha having Rs. 1.5/- on 6 machines declared for the pouches of Rs. 1/- MRP. That Shri Pradeep Sharma, employee of the Appellant could not give any reply regarding such packing. All the stock lying on the 1st Floor was of “GOA 1000” Brand having MRP of Rs. 1.5/- and not even a single pouch of Rs. 1/-was found in factory premises. Shri Sharma stated that the pouches of MRP of Rs. 1.5/- pertain to the production of that day itself i.e. 21.04.2011. No records and accounts were found from the factory. After investigation and recording of statements of employees, director and other

persons and enquiry from the Registrar of Companies, a show cause notice dated 09.03.2016 was issued alleging that the M/s SMFPPL is a group company of JMJ Group and the entire activity of the group is controlled by Shri J. M. Joshi and his son Shri Sachin Joshi. M/s SMFPPL was using logo of the JMJ Group till August/ September 2011 and website of JMJ Group was showing unit as part of group. They even had registered office at Mumbai which is corporate office of JMJ Group. The shareholding of M/s SMFPPL was in hands of Shri J.M. Joshi. The directors of the company on record are only for namesake and did not hold any shares and did not have any control on company. The shares were held by Shri J.M. Joshi, his wife and his HUF and entire shares were sold by them on 19.04.2011 to nine different persons. This act of selling shares was necessitated by the DGCEI booking offence case against M/s SMFPPL and the same appears to be keep away himself completely from activities of Appellant Unit and thereby to conceal his actual involvement in the clandestine activities of Appellant unit and to escape the penal actions that may be initiated against him by the department. That in term of section 277 and 270 of the Companies Act, the existing directors are not qualified to be director as they do not hold any shares. That the Appellant unit with malafide intention knowingly mis declared the fact of manufacturing of Gutkha of different MRP using various Pan Masala Machines (PMPM) installed in factory premises in the month of April 2011, manufactured the pouches of GOA brand of higher MRP (Rs. 1.5/-) on machines declared for manufacturing gutkha of Re. 1/- MRP in contravention of declaration filed by them under Rule 6 of PMPM Rules, 2008 and has evaded the Central Excise duty. The show cause notice alleged that the Appellant unit has contravened the provisions of Rule 6 (6), 7 and 9 of the PMPM Rules, 2008 and that as the Appellant has manufactured the notified goods in contravention of their declaration, therefore as per the provisions of Rule 9 of the PMPM Rules, 2008 the rate of duty applicable to goods of Highest Retail sale i.e. Retail sale price of Rs. 3 shall be applicable in respect of all packing machines operated by the Appellant and a central excise duty of Rs. 22,32,00,000/- is payable by the Appellant unit. That the above acts of omission and commission on the part of Appellant unit has been committed wilfully with intention to evade duty and the extended period as provided under Section 11 A (4) of the Central Excise Act is applicable. It was therefore proposed to demand duty of Rs. 22,32,00,000/- along with interest from the Appellant Unit and the amount of duty of Rs. 10,73,50,000/- already paid in respect of declared capacity be adjusted against the same. Penalty under Rule 17 of the PMPM Rules along with Section 11AC was also proposed. Personal penalty was also proposed upon DilipkumarAmrutlal Jani, director of Appellant unit and Shri Jagdishprasad Mohanlal Joshi, Sachin Joshi under Rule 26 (1) of CER, 2002. The Appellant, its director and individuals Shri ShriJagdishprasad Mohanlal Joshi and Shri Sachin Joshi filed reply to the SCN contesting the charges made against them in SCN. The adjudicating authority vide impugned order confirmed the demand and imposed penalties upon all the Appellants. Aggrieved, the Appellants have filed the present appeals.

Shri P.P. Jadeja, Ld. Consultant appearing for the Appellants submits that the demand confirmed against appellants is not sustainable. He submits that the levy of duty is on manufacture of goods in terms of Section 3 of the Central Excise Act, 1944 and therefore the duty is payable only on manufacture of notified excisable goods in manner as prescribed under Section 3A and PMPM Rules, 2008. The levy of excise duty is attracted on higher MRP only when goods of higher MRP are manufactured in the factory. In the present case the highest MRP Goods i.e. Rs. 3 MRP were not manufactured for whole month but only for a day. The Higher MRP goods of Rs. 1.5/- value were being manufactured and that too due to mistake on the part of the labour that they loaded roll of Rs. 1.5/- pouch. He submits that the duty can be demanded only of Rs. 1.5/- MRP. He also submits that for the above reason no penalty can be imposed upon Shri DilipkumarAmrutlal Jani.

6 Shri Makrand Joshi, Id. Counsel appearing for Shri Jagdishprasad Mohanlal Joshi and Shri Sachin Joshi submits that the duty demand under rule 9 of PMPM Rules is on “presumptive basis”. The duty has been demanded without any investigation or allegation of or finding of actual manufacture and removal of goods. Penalty under Rule 26 is not sustainable in absence of any investigation or transaction and involvement of the Appellant in any such clandestine manufacture and removal of goods. The adjudicating authority has held that in terms of section 266 and 270 all the directors existing during April“2011 are not qualified to be directors as they do not hold any shares. The Id. Adjudicating authority has reproduced in the impugned order only partial text of Section 266 of the Companies Act and has conveniently ignored reciting or referring to sub-section (5) of Section 266 of the Companies Act. Sub-section (5) of Section 266 of the Companies Act stipulates that provisions of Section 266 do not apply to a private company. Even otherwise, section 266 is wholly irrelevant, as the same is applicable to a company which is to be incorporated and not to an existing company. The Id. Commissioner has referred to Section 270 of the Companies Act to hold that the Directors existing in April 2011 were disqualified however he has ignored Section 273 of the Companies Act which categorically states that Section 270 will not apply to a private company. He also draws attention to clause 27 of Articles of Association of SMFPPL, which states that it shall not be necessary for a director to hold any share in the company. He submits that it is on record that Mr J.M. Joshi was not a director of SMFPPL since year 2000 and had also sold all his shares prior to initiation of investigation of the instant case. Therefore the Appellants had no control whatsoever on the operations of SMFPPL. Further, MrSachin Joshi was neither a shareholder nor a director nor an employee of SMFPPL and therefore he cannot have any control on the operations of SMFPPL.

7 He submits that the adjudicating authority has relied upon the statements of the employees Shri Maurya, Shri Manoj Kumar, Shri Sawant, Shri Gehlot, Shri Gautam. However these statements of witnesses were not recorded by the Officers of the Central ExciseDepartment who have investigated the instant case, pertaining to the month of April 2011. These are the statements recorded by the officers of DGCEI pertaining to the investigation in an independent case pertaining to March 2011 and are, therefore, wholly irrelevant. Appellants had requested for cross examination of these witnesses, which was denied by the Commissioner during the adjudication. It is, therefore, submitted that in term of Section 9D of the Central Excise Act, 1944, these statements cannot be relied upon. The impugned order denying cross examination of witnesses is a gross violation of principles of natural justice and should be quashed and set aside as held by the Hon“ble Supreme Court in Andaman Timber Industries Vs CCE, Kolkata (2015 (324) ELT 641 (SC). Shri J.M. Joshi was not a director of SMFPPL since year 2000 and that he had sold all his shares even before the investigation in the instant case had begun. None of the witnesses has made any statement to the effect that the Appellants were aware of or involved in the alleged clandestine removal by SMFPPL. Therefore, penalty under Rule 26 cannot be imposed on the Appellants. The statements of witnesses cannot be relied upon unless they are corroborated with cogent evidence whereas there is no iota of corroborative evidence to support statements of witnesses and hence statements cannot be relied upon. Mere observation that Appellants had overall control or played a role in clandestine removal would not support imposition of penalty under Rule 26. The Order must disclose connection between the transactions and directors / appellants so as to impose penalty under Rule 26. In absence of any finding or evidence showing connection between the transaction and the directors/ appellants, penalty under Rule 26 cannot be imposed. Unless there is a finding that role was played by the Appellants in acquiring possession of or appellants were in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or in any other manner dealt with any excisable goods which they knew or had reason to believe were liable for confiscation under Central Excise Act, 1944 or the Rules, penalty under Rule 26 cannot be imposed.

Shri A. Mishra Ld. AR appearing for the revenue supports the findings of the impugned order. He submits that since the goods other than of declared RSP has been found to be manufactured by the Appellant Unit, therefore the duty is liable to be paid as per highest RSP goods. He also supports the findings for imposition of penalty upon co-appellants.

8 Heard both the sides and perused the records. We find that the Unit had filed declaration on 01.04.2011 in terms of Rule 6 of PMPM Rules wherein they declared the details of packing machines to be used for packing of Gutkha along with specific MRP of the pouches. However the unit was found to be engaged in packing pouches of higher MRP in contravention of declaration filed by them under Rule 6 of PMPM Rules, 2008. Clearly the Appellant unit contravened the provisions of Rule 6

(6), 7 and 9 of the PMPM Rules, 2008 and since the notified goods were manufactured in contravention of their declaration, therefore as per the provisions of Rule 9 of the PMPM Rules, 2008 the rate of duty applicable to goods of Highest RSP, Rs. 3 in this case will be applicable in respect of all packing machines operated by the Appellant and they are liable to pay duty as per said RSP on all machines. The language of Rules is absolutely clear in this regard and leaves no scope of any doubt. We thus hold that the duty demand is sustainable and the impugned order in as much as it relates to central excise duty liability on the basis of Highest retail sale price i.e. Rs. 3, interest on duty and penalty on Appellant Unit as imposed by the adjudicating is legal and we do not find any reason to interfere with the same. Therefore the impugned order in as much as it relates to demand of duty and penalty against the appellant company is concerned is upheld.

9 Coming to the personal penalty imposed upon the Appellant Shri Dilipkumar Amrutlal Jani, director of the Appellant Unit and Shri Jagdishprasad Mohanlal Joshi and Shri Sachin Joshi we find that at the time of the visit of the officers, the affairs of the unit was being found to

be managed by Shri Dilipkumar Amrutlal Jani as stated by Production Supervisor Shri Pradeep G Sharma, Labour Supervisor, Shri Narpatsingh Kishorsingh Khichi and Shri Pappuram Mangaram and Authorised signatory Shri Balraj Chamansingh Maurya. Shri Dilipkumar Amrutlal Jani in his statement dt. 25.04.2011 also agreed with the facts of panchnama dated 21/22.04.2011 and also agreed with the verification of machines. He also accepted filing declaration and was aware of the law that the „Guthka“ is notified goods and manufactured in Appellant's Unit. In such case we find that the director Shri Dilipkumar Amrutlal Jani being managing the affairs of the unit was responsible for violation of Rule 6 of PMPM Rules, 2008. The impugned goods were manufactured in violation of Rule 6 of PMPM Rules, 2008 and since Shri Dilipkumar Amrutlal Jani being involved in violation of subject rules being director of the unit is liable for penalty. However considering the amount of duty and imposition of penalty on the company, we are of the view that personal penalty imposed upon Shri Jani is on higher side, which requires reduction. Therefore we find it appropriate to reduce the penalty, accordingly penalty imposed upon Shri Dilipkumar Amrutlal Jani is reduced from Rs. 5,00,00,000/- to Rs. 4,00,00,000/-. Therefore the impugned order against Shri Dilipkumar Amrutlal Jani is modified to the above extent.

8. As regard penalty upon Shri Jagdish M Joshi and Shri Sachin Joshi, we find that no involvement of above persons is on record. We do not find any act committed by both Appellants to evade payment of duty or to violate the Pan masala packaging Rules. Shri Dilipkumar Amrutlal Jani has not named any of these persons to be involved in any act of violation of law nor any of the persons

whose statements has been relied upon i.e. production Manager or Supervisors has named the Appellants to be involved in any act of violation. The show cause notice has relied upon the statements of employees Shri Maurya, Shri Manoj Kumar, Shri Sawant, Shri Gehlot, Shri Gautam recorded in relation to some other case booked by the DGCEI against the Appellant Unit to hold both the Appellant's responsible for alleged violation in present case.

However we find that in the present case no involvement of these Appellants is on record. The Appellant had sought cross examination of the aforesaid persons which has been denied by the adjudicating authority. In such case when the statements were not recorded in investigation of present case, the same cannot be relied upon. Even also in absence of cross examination in terms of Section 9D of the Central Excise Act, 1944, these statements cannot be relied upon. We find that Shri J.M. Joshi was not a director of SMFPPL since year 2000 and that he had sold all his shares even before the investigation in the instant case had begun. None of the witnesses has made any statement to the effect that the Appellants were aware of or involved in the alleged clandestine removal by SMFPPL. Also Shri Sachin Joshi was not even director of the Appellant Unit at any point of time. There is no acceptance of the any of two Appellants to manage the affairs of the unit. The Ld. Adjudicating authority has relied upon section 266 and 270 of the Companies Act and to hold that Shri Dilipkumar Amrutlal Jani is director for namesake only and the Appellants hold the company. We find that even before the present case the shares were transferred by the Appellant and he was not even shareholder. Even if assumed to be that he was holding shares, then too without any evidence it cannot be said that any of the Appellant was involved in violation of any law. The adjudicating authority has relied upon section 266 of the Companies Act, to hold that a person cannot become director if he does not hold any shares. However we find that the Sub - Section (1) is applicable only where the company is filing a prospectus of an intending company. It is not applicable in case of an existing company. Further sub - section 5 of section 266 clearly states that the section shall not apply to a private company. In the present case the Appellant unit is a private ltd company and hence section 266 is not applicable to the present case. Therefore the contention of adjudicating authority is incorrect.

9. As regard applicability of section 270, it is submitted that said section is applicable to the person named in Articles of Association as director. It is not applicable to appointment of subsequent directors or nominated directors. Pertinently the Articles of Association of the appellant company permits a person to be director even if he is not a shareholder. We also find that penalty has been imposed under Rule 26 on the Appellant. The said section is applicable on person involved in clearance of goods by different ways as enumerated in Rule 26. Whereas, in the present case the duty demand has been made by interpreting the Pan Masala Packing Machines (Capacity Determination and collection of duty) Rules, 2008 and not on basis of clearance of goods. There is no evidence that any of both the Appellants has concerned himself in transporting, depositing, selling or purchasing of excisable goods which they knew or had reason to believe that the goods were liable for confiscation. There is no findings that the Appellants had played role in acquiring, possessing of, or Appellants were in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or in any other manner dealt with, any excisable goods which they knew or had reason to believe were liable for confiscation under Central Excise Act, 1944 or the Rules.

Therefore penalty under Rule 26 cannot be imposed. Moreover, it is also seen that in the present case, there was no proposal to confiscate goods. Hence for this reason also the penalty under Rule 26 cannot be imposed. Even above all we do not find any involvement of Appellant in alleged act of violation. Shri J.M. Joshi was director only till year 2000 and no involvement of him or Shri Sachin Joshi

who was previously authorised signatory is appearing on record or either through statement of any person. Therefore in absence of any evidence of involvement of both of these persons in any act of violation of Pan masala Packing Machinery Rules, 2008 or central excise law, we do not find any reason to impose penalty upon them. We therefore set aside the impugned order only to the extent, it imposes penalty upon Shri J.M. Joshi and Shri Sachin Joshi, resultantly the penalty on both of these persons is set aside.

17. As a result of our above discussions and observations, appeal filed by M/s Minakshi Foods Pvt. Ltd. is dismissed, appeal filed by Shri Dilip Kumar Amritlal Jani is partly allowed in the above terms and appeals filed by Shri J.M. Joshi and Shri Sachin Joshi are allowed.

(Pronounced in the open court on 17.07.2019)

[Back](#)

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

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 280 of 2012

[Arising out of OIA-21/2012-AHD-II-CE/MM/COMMR-A-/AHD passed
Commissioner of Central Excise-AHMEDABAD-II]

M/s Meghmani Organics Ltd

.... Appellant

Block No. 403, 404 And 452, Village-
Chharodi, Tal-Sanand, Ahmedabad
Gujarat-382210

VERSUS

C.C.E.-Ahmedabad-ii

.... Respondent

Custom House, First Floor,
Old High Court Road,
Navrangpura, Ahmedabad,

Gujarat-380009

APPEARANCE:

Sh. Amal Dave, Advocate for the Appellant
Sh. G. Jha, Authorized Representative for the Respondent

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

HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. A/11703/2019

DATE OF HEARING: 19.08.2019
DATE OF DECISION: 06.09.2019

RAJU

This appeal has been filed M/s Meghmani Organics Ltd against denial of refund claim.

Ld. Counsel for the appellant pointed out that the appellant had paid the duty under protest on the product 'Megaboost' cleared during the period 11.08.2010 to 31.12.2010 on the ground that the said goods did not attract duty. The said refund claim was rejected by the lower authority after issuance of SCN. It was asserted in the SCN that the appellant had imported these goods and during the import of goods, the said goods were clarified under Chapter 31 of Customs Tariff Act. The said goods were re-packed in smaller packs under brand name 'Megaboost'. It was alleged by the Excise Authority that the said goods were not fertilizer as claimed by them before Customs Authority but are classifiable under Chapter 29 therefore, were liable to be assessed to duty. The appellant paid the said duty under protest.

2.2 The samples of the goods were taken and send for chemical examination. The chemical examiner, Central Excise Laboratory, Vadodara vide his letters F. No. RCL/AH/C.Ex./10 and No. RCL/AH.C.Ex./11 both dated 16.12.2008 communicated the test result as under:

(A) Megaboost FE

—The sample is in the form of light brown powder. It is ethylene Diamine Tetra Acetic Acid Di-Sodium-Iron Complex. It is a co-ordination compound. It is having following characteristics:

Iron (chelated by EDTA) =11.9%

PH (1%) =4.00

Noter-Co-ordination Compound are finds mentioned in

Chapter29 Noters 5 (c) (3)¶.

(B) Megaboost ZN

—The sample is in the form of light brown powder. It is ethylene Diamine Tetra Acetic Acid Di-Sodium-Zinc Complex. It is a co-ordination compound. It is having following characteristics:

10. Zinc (chelated by EDTA) =13.6% PH (1%) =4.00

Noter-Co-ordination Compound are finds mentioned in Chapter29 Noters 5 (c) (3)¶.

The test report was challenged by the appellant and retest report was received from the Director (Revenue Laboratories), Central Revenue Control Laboratory, New Delhi vide their letter F. No. 75-Exo/C-18/2009-10 dated 26.03.2010. The test result is as under:

MEGABOOST Fe

Lab No. CLR/28,dated.24.02.2010

—The sample is in the form of light brown powder. It is ethylene Diamine Tetra Acetic Acid Disodium (EDTA) – Iron (Fe) Complex. It is a co-ordination compound.

Iron content in the same under reference is more than 12% by wt (on sample as such). It does not contain any nitrogen, phosphorous and potassium (NPK) based fertilizer.

Regarding the classification of the sample under reference, attention is invited to Notification No.: Central Excise Circular No. 392/1998, dated 19.05.1998 issued by the Central Board of Excise & Customs.¶

MEGABOOST Zn

Lab No. CLR/29,dated.24.02.2010

—The sample is in the form of white powder. It is ethyleneDiamine Tetra Acetic Acid Disodium (EDTA) – Zinc (Zn) Complex. It is a co-ordination compound.

Zinc content in the sample under reference is more than 12% by wt. It does not contain any nitrogen, phosphorous and potassium (NPK) based fertilizer.

Regarding the classification of the sample under reference, attention is invited to Notification No.: Central Excise Circular No. 392/1998, dated 19.05.1998 issued by the Central Board of Excise & Customs.¶

The appellant were not satisfied with that test report and sought for retest of the sample in the Office of Assistant Director of Agriculture Fertilizer Testing Laboratory. The said request was forwarded by Revenue to CRCL, New Delhi for examination in terms of para 8.10 of

Chapter 11 of the CBEC's Excise Manual of Supplementary Instruction-2005 which reads as under:

—Where an assessee requests for retest in a laboratory other than a Control Laboratory (hereinafter in this paragraph referred to as —Outside Laboratory¶) whether on the remnant or the duplicate or triplicate sample, such request may be allowed for testing the sample from an outside Government or semi-Government laboratory with the prior permission of the Commissioner or the Appellant or the Reversionary Authority, as the case may be after Director (Revenue Laboratories) has confirmed that the departmental laboratories does not have the facilities for performing the particular test in question. The request for retest in outside laboratories will be conditional upon the party concerned meeting the cost of retest.¶

The DGCRL, New Delhi vide letter dated 29.12.2010 replied the clarification as under:

—In this connection, it is to inform you that each of the two samples under reference was received in a unit packing in a printed Carton.

As such each is a Ethylene Diamine Tetra Acetic Acid Disodium (EDTA)-Iron (Fe) and Zinc (Zn) Complex- a co-ordination compound. It is true that each of the two samples contains Nitrogen, but this nitrogen is from EDTA only. Each is free from Mineral or chemical fertilizers-Nitrogenous covered under Chapter 31 which is evident from the Iron and Zinc contents in the samples as mentioned under Chapter 31. EDTA chelates are not covered under nitrogenous fertilizers. Therefore each merits classification under Chapter 29 of Central Excise Tariff.

Further, as per Central Excise Circular No. 392/1998, it is also stated that Notification under FCO covering micronutrients is irrelevant for deciding classification under the Central Excise Tariff and regardless of such notification, the appropriate consideration should be —whether or not the micronutrient in question is a separate chemically defined compound, if it is, the classification under Chapter 31.05 is rules out¶

On the basis of report it was alleged by the Revenue that the product i.e. Megaboost is 'Coordination Compound' which finds mention in Note 5 (c)

11. of Chapter 29 and therefore it appears that the product is rightly classified under Chapter 29 of the Central Excise Tariff Act, 1985 and chargeable to duty accordingly.

8 It was also noticed that test reports of appellant contained the word 'Chelated Fe' and 'Chelated Zinc'. Ld. Counsel was asked to explain the meaning of word 'Coordination Compound' and the word 'Chelated'. Ld. Counsel refused to assist and stated that the matter should be decided only on the basis of decision given in case of Ciba India Ltd 2009 (237) ELT 207 (Tri.Chennai) and in their own case reported in 2010

(254) ELT 172 (Tri.Bang.).

9 Ld. Counsel argued that matter has been settled by the decision of this Tribunal in the case of Ciba India Ltd (Supra). He argued that in Ciba India Ltd relying on Note 6 of Chapter 31, Tribunal has held that product would be classifiable under Chapter 31. The para 1 & 2 of the said decision reads as under:

1. The issue in this appeal relates to classification of —LIBREL Brand Micronutrients— imported by the appellants herein for agricultural use — whether under Customs Tariff Heading 29.22 as held by the Commissioner or under CTH 31.05 as claimed by the importers. The imported item contains Ethylene Diamine Tetraacetic Acid (EDTA) which is a chelating agent and also contains nitrogen, zinc, manganese and iron. There is no dispute that it is used as a fertilizer. As per Note 6 to Chapter 31 of the CETA, 1985, the term —other fertilizers— applies only to products of a kind used as fertilizers containing, as an essential constituent (emphasis applied) at least one of the fertilizing elements nitrogen, phosphorous or potassium. The department has relied upon clarification issued by the Regional Fertilizer Control Laboratory, Chennai under cover of letters dated 30-10-2006 and 4-1-2007 that the products are micronutrient fertilizers under the Fertilizer Control Order and incidentally contained small quantities of nitrogen because of the chemical composition and cannot be claimed as primary source of nitrogen, to hold that nitrogen is not an essential constituent so as to classify the goods under Chapter 31. However, we note that the International Institute of Biotechnology and Toxicology (IIBAT) has certified on 19-12-2006 that during the process of supply of potential micronutrients for the plant growth, once the micronutrients are delivered at the plant system EDTA breaks out resulting in elemental nitrogen which further helps to promote the plant growth and that without nitrogen it is not possible to deliver the metal ions or micronutrients to the plant system. This certificate was placed by the appellants before the authorities below. Further reliance placed by the Revenue on the specific exclusion of separate chemically defined compounds from Heading 3105.90 in the HSN Explanatory Notes (the EDTA chelate is separate chemically defined compound) is also misplaced for the reason that HSN Explanatory Notes to Chapter 29 clearly state that separate chemically defined compounds containing other substances deliberately added during or after their manufacture are excluded from Chapter 29 and the product in dispute contains zinc/manganese/iron which is deliberately added. In the light of the above discussion, we hold that the imported item falls for classification under CTH 3105.90 of the Customs Tariff Act, 1975 as micronutrient and not under CTH 29.22, that the benefit of the

exemption from payment of CVD and SAD under Notification 4/2006 (S. No. 63) and 20/2006 (S. No. 4) is available to the goods, set aside Order-in-Original No. 7114/2008 dated 30-1-2008 challenged in Appeal No. C/88/2008 and allowed the Customs appeal.

Appeal No. E/96/2008, E/103, 104 and 105/2008 which arise out of Order-in-Original No. 33/2007 dated 30-11-2007 holding that the product falls under Chapter Heading 29.22 of the CETA and confirming duty demand of Rs. 86,93,511/- together with Education Cess of Rs. 1,73,870/- on micronutrients repacked and relabelled by M/s. Swathi Organics & Chemicals (P) Ltd. and imposing penalties of Rs. 88,67,381/- on M/s. Swathi Organics & Chemicals (P) Ltd. and Rs. 9 lakhs and Rs. 4.5 lakhs respectively on its Managing Director and Executive Director and Rs. 7.50 lakhs on M/s. Ciba India Ltd. are also allowed, in the light of our finding on classification of the product under Chapter Heading 31.05 of the Customs Tariff as there is no deeming fiction in Chapter 31 of the CETA, 1985 that repacking and relabelling amounts to manufacture so as to give rise to duty liability of M/s. Swathi Organics & Chemicals (P) Ltd. (such deeming fiction is contained in Chapter 29 of the CETA, 1985). In the result, the impugned orders are set aside and the appeals allowed.

He further argued that the said decision relied in their own case reported in 2010 (254) ELT 172 to hold that same product would fall under chapter 31. After hearing on 19.08.2019, on the next day Ld. Counsel sought permission to submit written submission and the same were submitted on 28.08.2019. In the said written submission again he relied on these aforesaid decisions of Tribunal in case of Ciba India Ltd and in their own case. He also relied on the fact that the Gujarat Government has given the permission to sale the product as fertilizer. It has been also argued that once the Customs had done the classification under Chapter 31, it is not open for Central Excise Authority to change the classification to Chapter 29. The Ld. Counsel has however not provided any assistance by giving meaning of words 'Coordination Compound' and 'Chelated'.

10 Ld. AR relies on the impugned order.

11 We have gone through arguments of both the sides. We find that the issue under consideration is if the product sold by the appellant is classifiable under chapter 31 as fertilizer or under chapter 29 specifically defined chemical. It is seen that the decision in case of Ciba India Ltd (Supra) was taken without considering Chapter Note 5 of Central Excise Tariff Act, 1985 which reads as under:

—(C) Subject to Note 1 to Section VI and Note 2 to Chapter 28:

12. Inorganic salts of organic compounds such as acid-, phenol- or enol-function compounds or organic bases, of sub-Chapters I to X or heading 2942, are to be classified in the heading appropriate to the organic compound; and

Salts formed between organic compounds of sub-Chapters I to X or heading 2942 are to be classified in the heading appropriate to the base or to the acid (including phenol- or enol-function compounds) from which they are formed, whichever occurs last in numerical order in the Chapter.

13. Co-ordination compounds, other than products classifiable in sub Chapter XI or heading 2941, are to be classified in the heading which occurs last in numerical order in Chapter 29, among those appropriate to the fragments formed by "cleaving" of all metal bonds, other than metal-carbon bonds.¶

The earlier decision of Tribunal in the appellant's own case was based essentially relying on the decision of Tribunal in the case of Ciba India Ltd (Supra). In the said decision also the Chapter Note 5 of the Chapter 29 was not examined.

18. The term 'Coordination Compound' is defined in Wikipedia as

follows:

—A coordination compound is a compound containing one or more coordinate bonds, which is a link between a pair of electrons in which both electrons are donated by one of the atoms. In other words, it is a compound that contains a coordination complex.¶

From the above definition, it is seen that the 'Coordination Compound' is a molecule consisting of metal item with numbers of other items or groups, thus it is separately defined chemical and not a mixture of different items. In this context, Ld. Counsel for the appellant was asked to assist by providing the meaning of words 'Coordination Compound' and the word 'Chelated' appearing in Chapter Note 5 to Chapter 29 and in test report which Ld. Counsel refuse to give.

9. Perusal of the Test Report No. C/619/08/08/S of Gujarat Laboratory produced by appellant themselves, describes the product as Iron Chelated. Similarly the Test Report No. C/620/08/08/S of Gujarat Laboratory produced by appellant also describes the product as Zinc Chelated. The certificate of analysis appearing in page 42 of the appeal from Sichuan Jiannachun International Economic & Trade Co. Ltd also describes the product as Zinc Chelated. The letter of Micronutrient Project (ICAR) appears at page 49 of the appeal describes the product as 'chelated Iron' and 'Chelated Zinc'. The Term Chelated is defined in website Free Dictionary.com as follows:

A chemical compound in the form of a heterocyclic ring, containing a metal ion attached by coordinate bonds to at least two nonmetal ions.¶

From the above, it is apparent that the chelate is specifically separately defined chemical and not a mixture. The chemical examiner report clearly points out that the Chapter Note 5 (c) is relevant for the classification of the product as the said product has been described by the chemical examiner as 'Coordination Compound'.

(17) It is also seen that the Ld. Counsel has claimed that the product is mixture of goods whereas the test report describes the product as 'Coordination Compound' and not as a mixture. The literature of foreign supplier as well as the test reports produced by the appellant also describe product as 'chelated Iron' or 'Chelated Zinc'. It is seen that the decision in case of Ciba India Ltd (supra) was taken in respect of Ethylene Diamine Tetraacetic Acid (EDTA) which is a chelating agent and also contains Nitrogen, Zinc, Manganese and Iron. In the said case, the reliance has been placed on Note 6 of Chapter 31 of Central Excise Tariff Act, 1985 which reads as under:

—6. For the purposes of heading 3105, the term —other fertilizers applies only to products of a kind used as fertilizers and containing, as an essential constituent, at least one of the fertilizing elements nitrogen, phosphorus or potassium.¶

It fails to notice that the Chapter 31 does not include separate chemically defined compounds. Chapter Note 1 to Chapter 31 reads as under:

—1. This Chapter does not cover: (a) Animal blood of heading 0511; (b) Separate chemically defined compounds (other than those answering to the descriptions in Note 2(a), 3(a), 4(a) or 5, below); or

(x) Cultured potassium chloride crystals (other than optical elements) weighing not less than 2.5 g each, of heading 3824; optical elements of potassium chloride (heading 9001).¶

In respect of separately defined chemical, the chapter Notes permits classification under Chapter 31 only with reference to chapter 2(a), 3(a), 4(a) or 5 to Chapter 31. It is apparent that separately define chemical which may also answered to Note 6 to Chapter 31 would not be covered under Chapter 31. Moreover, it is seen that Chapter 29 covers all separate chemical define organics compound. The Note 2 of Chapter 29 excludes only Urea falling under heading 3102 or 3105 from the purview of Chapter 29. On combine reading of Chapter Note 1 of Chapter 29 and Chapter Note 2(e) of chapter 29, Chapter Note 1 (b) of Chapter 31 and Chapter Note 6 of Chapter 31 shows that separately define compound which might answer to Chapter 6 would not be classifiable under Chapter

19. It is seen that the decision in case of Ciba India Ltd (Supra) and Meghmani Organics Ltd (Supra) are per incurium as they have fail to examine the aforesaid Chapter Notes before reaching to conclusion.

(5) The second issue relates to the appellant's claim that it is open to Central Excise Authority to change the classification made by the Customs Authority. It is apparent that two authorities i.e. Customs and Excise Authority are totally independent authority and mistake by one need not be carried out or followed by another.

(6) In view of above, we do not find any merit in the appeal and the same is dismissed.

(Pronounced in the open court on 06.09.2019)

(Ramesh Nair)

Member (Judicial)

(Raju)

Member (Technical)

[Back](#)

Customs, Excise & Service Tax Appellate Tribunal,

West Zonal Bench : Ahmedabad

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 897 of 2010

[Arising out of Order-in-Appeal No OIA-113/2010/COMMR-A-/RAJ dated 08.03.2010
passed by Commissioner (Appeal) of Central Excise & ST, Rajkot]

M/s Mid India Power And Steel Limited

.... Appellant

332, GIDC Estate, Phase-ii, Village-Motirohar,
Taluka-Gandhidham, Kutch, Gujarat-370201.

VERSUS

Commissioner of Central Excise & ST, Rajkot

.... Respondent

Central Excise Bhavan,

Race Course Ring Road, Income Tax Office,

Rajkot, Gujarat-360001

APPEARANCE :

Shri Dhaval K. Shah Advocate for the Appellant

Shri S.N. Gohil, Superintendent (AR) for the Respondent

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

FINAL ORDER NO. A/11934 / 2019

DATE OF HEARING/ DECISION : 15.10.2019

RAMESH NAIR :

The brief facts of the case are that appellant filed six refund claims before the Adjudicating Authority and all the six refund claims were rejected by the Adjudicating Authority. Against which, for the refunds pertaining to June 2008 to September 2008, appellant filed appeal before Commissioner (Appeals) which came to be allowed and the appellant received refund. However, refund claims for the period October 2008 and November 2008, though the same were also rejected by the Adjudicating Authority, the appellant did not file any appeal. Against rejection of refund in respect of these two refunds, the appellant approached the Adjudicating Authority for sanction of the refunds on the ground that Commissioner (Appeals), in respect of four refund claims has sanctioned and allowed the refund. The Adjudicating Authority rejected the request of the appellant on the ground that against the order-in-original rejecting the refunds, the appellant had not filed appeal before the Commissioner (Appeals). Against such rejection of request of the appellant, the appellant filed appeal before the Learned Commissioner (Appeals), who also concurring with the stand of the Adjudicating Authority, dismissed

the appeal, therefore, the present appeal.

2. Shri Dhaval Shah, Learned Counsel appearing on behalf of the appellant submits that since the admissibility of refund has already been decided in respect of four refund claims, therefore, for other two refund claims the appellant is entitled for refund.

3. Shri S.N. Gohil, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He relied on the Hon'ble Supreme Court decision in the case of *Collector of Central Excise, Kanpur vs. Flock (India) Pvt. Limited – 2000 (120) ELT 285 (SC)*.

4. We have heard both the sides and perused the record. We find that there is no dispute for the fact that, in respect of original rejection of refund claims, the appellant did not challenge the adjudication order before the Commissioner (Appeals). Therefore, the first adjudication attained finality by not challenging the same. The appellant, on the basis of order of the Commissioner (Appeals), which was in favour of the appellant cannot challenge before whom the matter of other claim relief in other case, where the rejection of refund order was not challenged. In the case of *Flock(India) Pvt. Limited (Supra)* the Hon'ble Supreme Court clearly held that without challenging the order, refund cannot be claimed. Therefore, agreeing with the view taken by both the lower authorities, we are also of the view that since the appellant have not challenged the rejection order passed by the Adjudicating Authority, the said order attained finality according to which the refund stand rejected and the same cannot be given to the appellant. Accordingly, the impugned order is upheld and the appeal is dismissed.

(Dictated and pronounced in the open court)

Ramesh Nair)

Member (Judicial)

(Raju)

Member (Technical)

[Back](#)

Customs, Excise & Service Tax Appellate Tribunal

West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 1263 of 2009

[Arising out of OIO-09/COMMISSIONER/RKS/AHD-II/2009 passed by
Commissioner of Central Excise-AHMEDABAD-II]

M/s Mili Detergent Industries

.....Appellant

C/o. H/5, Deshna Apartments, Mirambica School Road,
Near Bhavin Vidhya Vihar, Opp. Jain Upashray,
Naranpura, Ahmedabad-Gujarat-380013.

VERSUS

C.C.E-Ahmedabad-ii

.....Respondent

Custom House... First Floor,

Old High Court Road, Navrangpura,
Ahmedabad,Gujarat-380009

WITH

- 1. Excise Appeal No. 1264 of 2009 (M/s Superchem)**
- 2. Excise Appeal No. 1265 of 2009 (Shree Jalaram Chemicals Industries)**
- 3. Excise Appeal No. 1266 of 2009 (Sonal Cosmetics (exports) Ltd.)**

[Arising out of OIO-09/COMMISSIONER/RKS/AHD-II/2009 passed by
Commissioner of Central Excise-AHMEDABAD-II]

APPEARANCE:

Sh. Anil Gidwani, Advocate for the Appellant
Sh. L. Patra, Authorised Representative for the respondent

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

HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Final Order No. A/11127-11130/2019

DATE OF HEARING: 29.03.2019

DATE OF DECISION: 16.07.2019

RAMESH NAIR

The present appeals have been filed by M/s Mili Detergent Industries, M/s Superchem, M/s Shree Jalaram Chemical Industries and M/s Sonal Cosmetics (Exports) Ltd. against OIO dated 21.04.2009 passed by the Commissioner, Central Excise, Ahmedabad-

The brief facts of the case are that the officers visited the M/s Sonal Cosmetics (Exports) Ltd (SCEL), who are engaged in packing of Detergent Powder which is procured from other three Appellants. The Managing Director of M/s SCEL, Shri Yogesh Shah is also partner of

M/s Mili Detergent Industries. Search conducted at the office premises of M/s SCEL led to seizure of records and documents including loose papers. The director of M/s SCEL Shri Akashbhai Vinodbhai Shah stated that the loose papers pertained to the detergent powder sent by M/s Superchem, M/s Mili Detergent Industries and M/s Jalaram Chemical Industries to them and explained

the details written in different columns in said papers. Shri Akashbhai Vinodbhai Shah and Shri Yogeshbhai Jesinghbhai Shah confirmed the facts of Panchnama in their statements dated 4.4.94 and 1.8.94 respectively. Shri Yogesh in his statements dated 16.5.94 and 1.8.94 stated that the vehicle mentioned in the said seized papers was purchased in the name of M/s SCEL and was sold to one Shri Mashrubhai Bharwad. That the work related to the transportation of

goods were being looked after by one Shri Nemichand Zaverilal Sharma and the papers contained details of transportation of detergent powder, slurry, soda ash during April'93 to July'93 from different factories to M/s SCEL. That the datewise details were got written by Shri Mashrubhai Bharwad through his man showing the

consignments and the consignees. Shri Mashrubhai Bharwad, tempo driver in his statement dated 29.11.94 stated that he used to deliver detergent powder in the godown of M/s SCEL from co-appellants' factories and used to keep the account of such

transportation on *kachha* papers, which he used to get written by one of his friends known as "Ustad" as he himself was an illiterate person. On being shown the papers seized under Panchnama from M/s SCEL, he stated that the details therein were of the transportation of goods from various factories on day-to-day-basis. That he had handed over

the above papers containing accounts of transportation to M/s SCEL. In his subsequent statements dated 20.12.94 and 22.03.95, Shri Yogeshbhai Jesinghbhai Shah confirmed that on comparing the

details of datewise details of goods as shown in the papers of Shri Mashrubhai Bharwad, seized from his office on 4.2.94 with the relevant books of accounts, the same did not tally as the same did not figure in the books of accounts of M/s SCEL nor were any gate passes found to have been issued by the units in respect of the clearances of the said goods. That the quantity of detergent powder, as mentioned in the said seized papers, had been received in loose condition without any central excise gate pass and that he was giving the statement in the capacity of a partner of M/s Mili Detergent Industries. The statement of Shri Nemichand Zaverilal

Sharma was recorded on 17.1.1995 wherein he admitted that he was the authorized signatory of M/s Jalaram Chemical Industries and M/s Superchem. That no Central Excise Gate Passes were prepared for 237960 kg of detergent powder delivered on 4.4.93, 10.4.93, 12.4.93 and 22.4.93 in the name of M/s Superchem, as mentioned in the seized papers. Similarly, as mentioned in the said papers, 96,000 kg Detergent Powder had also been cleared from M/s Jalaram Chemical Industries, Vatva to Shahwadi in the month of July 1993. On verification of the central excise gate passes issued by M/s Superchem and M/s Jalaram Chemical Industries, it was noticed that no central excise gate pass has been prepared in respect of such clearances and no central excise duty was paid by M/s Superchem and M/s Jalaram Chemical Industries on the said goods. Shri Nirav Arvind Shah, proprietor of M/s Jalaram Chemical Industries in his statement dated 21.3.1995 admitted the authorization of Shri Nemichand Sharma to sign all documents etc. He also agreed with the statement of Shri Nemichand Sharma regarding clearance of goods without payment of excise duty. Shri IndravadanJesingbhai Shah, proprietor of M/s

Superchem in his statement dated 22.3.95 stated that he has authorized Shri Nemichand Sharma for giving statement and agreed with the statement of Shri Nemichand Sharma recorded on 17.1.95. He also agreed that detergent powder found to be entered in the papers seized from the office of SCEL was transported without issuing central excise gate pass and without payment of excise duty. Based on the above statement and the seized documents, M/s Mili Detergent Industries, M/s SCEL and M/s Jalaram Chemical Industries were issued show cause notice dated 26.6.95 demanding duty of Rs. 82,83,811/-, Rs. 16,33,002/- and Rs. 12,51,600/- respectively on Detergent Powder manufactured and cleared without payment of duty by them. Penalty was also proposed and SSI exemption of Rs. 30 lakh availed by all the above units was proposed to be denied on the ground that the units have suppressed the production / clearances with an intent to evade payment of excise duty. M/s Mili Detergent Industries was also proposed to be disallowed the SSI exemption under Notification No. 1/93-CE dated 28.2.93 during 1994-95 as the value of clearances of excisable goods from their factory was exceeded the SSI exemption limit. The Show cause notice was decided ex-parte by the adjudicating authority vide order dated 29.1.98 and the appellant filed an appeal against the said order before the Tribunal, who remanded the case back for giving opportunity of hearing to all

the appellants. The adjudicating authority vide order-in-original dated 29.12.2000 set aside the demands and the penalties. The said order was reviewed by the Board and an appeal was filed before the Tribunal, who allowed the appeal filed by the Department by way of remand for giving reasonable opportunity of being heard. In de novo adjudication proceeding, vide order-in- original dated 29.2.2008, the demands were confirmed by the adjudicating authority against which the appellants filed appeal before the Tribunal, who vide order dated 6.10.2008 set aside the impugned order and remanded the matter to Commissioner for fresh decision after hearing the appellants in person. The adjudicating authority, after giving an opportunity of being heard to the appellants and taking their submissions on record, vide impugned order has again confirmed the demand. Being aggrieved, the appellants have filed the present appeals.

2. Ld Counsel Sh. Anil Gidwani appearing for the appellants submits that the impugned order is not sustainable as the adjudicating authority has erred by not allowing cross examination of Shri MashrubhaiBharwad, tempo driver, who alleged to have transported the goods in his tempo, Shri M.H. Modi and Shri N.R. Malek, both departmental officers. There is no documentary evidence available with the department to substantiate the charges of clandestine removal as the same is based on the 11 loose papers recovered from the office of the third party and the tempo driver and other parties.

The driver of tempo, when in the year 2000 during cross examination , had deposed that he was carrying various goods in his tempo and entries in loose papers were

made commonly, hence it cannot be said that whatever quantity of detergent powder as stated in the loose papers, might have been cleared from the premises of the appellants. The Ld. counsel placed reliance on the Tribunal judgments in case of Arsh Castings Pvt Ltd - 1996 (81) ELT276 (Tri), Emmtex Synthetics Ltd – 2003 (151) ELT 170 (Tri), Takshila Spinners

– 2001 (131) ELT568 (Tri) and other judgments to support the

contention that without cross examination, the allegations in the show cause notices cannot be proved. The Ld. counsel submits that on the basis of 11 loose unauthenticated papers recovered from the premises of a third party M/s SCEL, the clandestine removal cannot be alleged as the author of these papers is neither the appellant nor any representative of the appellant. Therefore, the demand cannot be confirmed. There is no document evidence except the 11 loose unauthenticated papers. The Ld. counsel submits that the detergent powder was supplied to M/s SCEL where it was packed and labelled with OK brand and supplied to M/s Tata Oil Mills Ltd, who would never buy any non-duty paid goods. The Ld. Counsel also relies upon the judgments in case of Murugan Enterprises – 2003 (162) ELT 233 to state that the admission by the proprietors in absence of any

evidence to prove clandestine removal is not sufficient to confirm the demand. Reliance has also been placed in case of Velavan Spinning Mills – 2004 (167) ELT 91 (T), Sayaji Iron & Engg. Co. Ltd – 1990 (45) ELT 104 (T), Sunshine Exports - 2004 (168) ELT 363 (T), Bipin Silk & Synthetics – 2004 (163) ELT 102 (T), Raj Sandeep Co – 2003 (162) ELT 1028 (T), Orkay Polyester - 2003 (161) ELT 227 (T) and Shree Narottam Udyog Pvt Ltd – 2003 (158) ELT 40 (T). That the demands are time barred as the clearances were for the period April 93 to June 93; the show cause notice was issued by not invoking proviso to Section 11A(1), but only by invoking Section 11A. The Ld. Counsel prays to set aside the impugned order and allow the appeal.

10 Shri L. Patra, Ld. AR appearing for the revenue reiterates the findings of the impugned order and prays to uphold the same.

11 Heard both the sides and perused the case records. We find that

this is the 4th round of litigation before the Tribunal. In the first round, the Tribunal remanded the case back to the adjudicating authority as the order was passed ex-parte. In the second round of litigation, the demand were dropped by the adjudicating authority and the Revenue filed an appeal. The case was again remanded back to the adjudicating authority. In the third round of litigation, the demands were confirmed and the case was remanded back on the ground that the hearing notices could not be served. This is the 4th round of litigation before us. Since the matter has been lingering for last 24 years, we deem it appropriate to decide the same on basis of case records.

Having heard the Ld. Counsel for the Appellants and Ld. AR for the revenue and going through the case records, we find that the officers seized 11 loose papers containing details of clearances of detergent powder from the office of M/s SCEL, who were consignee of these goods cleared from M/s Mili Detergent Industries, M/s Superchem and M/s Jalaram Chemical Industries. The director of

SCEL Shri Yogeshbhai Shah and partner of M/s Mili Detergent Industries has accepted the fact that the seized papers contained details of clearances made by the 3 Appellants to M/s SCEL. Even though the appellants have challenged the demand on the ground that the author of these papers was not investigated but the fact remains that the clearances mentioned in the said papers stand accepted by Shri Mashrubhai Bharwad, tempo driver, who had transported these goods to M/s SCEL. Further Shri Yogeshbhai Shah who is Managing Director of M/s SECL and partner of M/s Mili Detergent Industries himself has accepted that the papers pertained to goods cleared by the three units to M/s SECL. In such case when the partner of the

consignor unit and Managing Director of consignee unit has accepted removal of receipt of goods from M/s Mili Detergent to M/s SECL, it leaves no doubt that the details found in loose papers pertain to clandestine clearance by three units to M/s SECL. Further even the authorized signatory of M/s Jalaram accepted the details found in papers to be clearances made by them without payment of duty to M/s SECL. The directors of M/s Jalaram and M/s Superchem also agreed with the statement of authorized signatory. The Ld. Counsel has pleaded that the cross examination of Shri MashrubhaiBharwad, Tempo owner and investigating officer was not allowed. We find that cross examination of Shri MashrubhaiBharwad was already allowed earlier and therefore there was no reason for the adjudicating authority to grant cross examination again and again and cannot be considered to be violative of principles of natural justice. We also do not find any reason to grant cross examination of the officers as there

is no doubt about the investigation proceedings. Since on merits we find that the clandestine removal stands by the consignors as well as consignee and also by the transporter stands accepted, therefore we do not find any reason to interfere with the impugned order and uphold the same. Consequentially all the appeals are dismissed.

(Order pronounced in the open court on 16.07.2019)

(Ramesh Nair)

Member (Judicial)

(Raju)

Member (Technical)

[Back](#)

Customs, Excise & Service Tax Appellate Tribunal,

West Zonal Bench : Ahmedabad

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 691 of 2011

[Arising out of Order-in-Appeal No OIA-34/2011/COMMR-A-/CMC/RAJ dated 28.02.2011 passed by Commissioner (Appeal) of Central Excise & ST, Rajkot]

M/s. Rishi Cast Pvt Limited

.... Appellant

National Highway, 8-B, Veraval

(Shapar), Taluka-KotdaSangani,

RAJKOT - GUJARAT

VERSUS

Commissioner of Central Excise & ST, Rajkot

.... Respondent

CENTRAL EXCISE BHAVAN,

RACE COURSE RING ROAD

INCOME TAX OFFICE,

RAJKOT, GUJARAT-360001

APPEARANCE :

Shri Amal Dave, Advocate for the Appellant

Shri K.J. Kinariwala, Assistant Commissioner (AR) for the Respondent

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

HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. A/11475 / 2019

DATE OF HEARING : 10.07.2019

DATE OF DECISION: 06.08.2019

RAJU :

This appeal has been filed by M/s. Rishi Cast Pvt. Limited against the demand of Central Excise duty, interest and confirmation of penalty.

Ld. Counsel for the appellant pointed out that they are manufacturing certain items falling under Chapter heading 7324 and 7325 and one of the

items manufactured by them is 'manhole cover'. The appellant were classifying the product under heading 7324 whereas the Revenue seeks to classify the item under 7325.10. He pointed out that rate of duty is same on both however, the chapter heading 7324 is liable to be taxed under Section 4A of the Central Excise Act, 1944 as it has been notified under Notification No. 13/2002-CE (NT) dated 01.03.2002.

Ld. Counsel pointed out that they are not contesting the issue on merits however, contesting the issue solely on limitation. He argued that

the product 'manhole cover' were classified by them under heading 7324 and were assessed to duty under Section 4A of the Central Excise Act, 1944. They were printing MRP on the said manhole covers. He argued that vide their letter dated 02.08.1999 they had declared the manufacturing process. He further pointed out that they were regularly manufacturing the said product and were filing ARE-1 returns. He pointed out that in ARE-1 they were describing the product as 'Cast Iron Manhole Cover'. He pointed that the entire issue was in the knowledge of Revenue therefore, extended period could not have been invoked to demand duty under Section 4 in respect of the product Manhole Cover which they were cleared under Section 4A by declaring the product classified under heading 7324. In Para 6 of the show cause notice where it has been acknowledged that they had vide letter dated 26.09.2009 addressed to the jurisdictional Range Superintendent, indicated the product manufactured by them is being cleared/dispatched in a set of Manhole Cover along with its frame. In the said letter it was also informed that they were printing MRP on the said Manhole Cover.

Ld. Counsel relied on the following decisions:-

- a. Stadmed Pvt. Limited vs. CCE, Lucknow – 2017 (349) ELT 312 (Tri. All.)³
Excise Appeal No. 691 of 2011 CCE Delhi vs. Ishaan Research Lab (P)
Limited – 2008 (230) ELT 7 (SC)
- b. Wipro Limited vs. CCE, Aurangabad – 2005 (179) ELT 211 (Tri. Mum.)
- c. Cap & Seal (Indore) Pvt. Limited vs. CCE & ST, Ujjain – 2018 (15) GSTL 74
(Tri. Del.)

Ld. AR relies on the impugned order. He particularly relied on Para 13 of the show cause notice wherein it has been alleged that the appellant had never informed the correct nomenclature of the product and it was during the audit of the record came to the notice of the Revenue that the product is Manhole cover. He also pointed out that in the registration certificate itself, the appellant had classified the product CI Casting under heading 7325.10 and CI Sanitary Fittings under heading 7324. He argued that the registration certificate issued in 1999 showed that appellant was classifying the product correctly under Chapter heading 7325.10. He further brought to our notice that in the Invoice No. 148 dated 04.01.2000 the appellant had classified the product as 7325.10 however in the Invoice No. 618 dated 26.03.2001, they had changed the classification as 7324.00 and again in Invoice No. 498 dated 25.03.2002, 634 dated 30.03.2003 and in 643 dated 18.03.2004 etc. they classified the product as 7324. He pointed out that appellant had changed the classification just to avail the benefit of Section 4A and they were aware of the correct classification as 7325 as in the registration certificate obtained in 1999 and invoice No. 148 dated 04.01.2000 issued by them showing classification as 7325.10. He argued that the case law relied upon by the appellant is related to the issue where the appellant had bonafide doubt regarding classification. He argued that in the instant case, the appellants were aware in the year 1999/2000 that the correct classification of the product is 7325.10 they themselves changed the classification as 7324 later on.

12 We have gone through the rival submissions. We find that the issue is being contested only on limitation. The appellant argued that they were not sure of the classification and they had doubt which resulted in non-payment of duty. From the facts of the case it is apparent that in 1999, in registration certificate itself they had sought classification as CI Casting under heading 7325.10 and CI Sanitary Fittings under 7324. The appellant were classifying the product in the year 2000 under heading 7325.10 as apparent from Invoice No. 148 dated 04.01.2000 and subsequently they changed the classification. There was a conscious decision to change classification after 2000. In invoice/ declaration prior to 01.04.2000, they have correctly classified and alter they have changed the classification. Thus, it is apparent that appellant had no bonafide belief otherwise. Consequently, the extended period of limitation has rightly been invoked. Since the appellant are contesting the issue only on limitation, the appeal filed by the appellant is rejected and the impugned order is upheld.

(Pronounced in the open court on 06.08.2019)

(Ramesh Nair)

Member (Judicial)

(Raju)

Member (Technical)

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH : COURT NO - 1

EXCISE Appeal No. 12471 of 2018-SM

(Arising out of OIA no.CCESA-SRT-APPEAL-PS-150-2018-19 dated 19/07/2018
passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and
Service Tax-SURAT-I)

Shalu Synthetics

Appellant

9/a-b, Behind Sakar Healthcare, Changodar,
AHMEDABAD,

GUJARAT
382210

-VERSUS-

C.C.E.-Daman

Respondent

CUSTOM HOUSE... FIRST FLOOR,
OLD HIGH COURT ROAD, NAVRANGPURA,
AHMEDABAD,

GUJARAT
380009

Present For the Appellant : Shri S. Bissa, Adv.

Present For the Respondent : Shri S.K. Shukla, Supdt. (AR)

CORAM:

HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO. A/ 11518 /2019

Date of Hearing: 12/04/2019

Date of Decision:08.08.2019.

RAJU

This appeal has been filed by M/s Shalu Synthetics Pvt. Ltd. against denial of interest on a refund already sanctioned to the appellant.

2. Ld. Counsel for the appellant pointed out that they had filed the refund claim on 06/12/2007 under Rule 5 of the Cenvat Credit Rules for refund of unutilized Cenvat Credit lying in the balance at the time of surrendering of Central Excise Registration. A Show Cause Notice was issued to them on 31/01/2008 and the same was adjudicated to Dy. Commissioner who vide the Order in original dated 15/03/2008 rejected the refund claim. Thereafter, the appellant filed the refund claim under section 11B of the

Central Excise Act, 1944 on 25/07/2008. The same was rejected by Dy. Commissioner on 11/12/2008. The appellant challenged both the rejections, under Rule 5 of Central Excise Rules, 2002 as well as rejection under section 11B of the Central Excise Act, 1944, before Commissioner (A). Such rejection was upheld by Commissioner (A) vide Order in Appeal dated 31/03/2009.

The said order of Commissioner (A) was challenged before the Tribunal and Tribunal vide order no. A/11503/2014 dated 10/06/2004 set aside the impugned order and allowed the appeal with consequential relief. Consequently, the appellant filed a refund claim on 25/06/2014. Simultaneously, Revenue had filed an appeal against the Tribunal order before Hon'ble High Court of Bombay along with the stay application. The appellant meanwhile filed the application before the Tribunal for implementation of the Tribunal order dated 10/06/2014. Tribunal directed the authorities to sanction the refund claim if no stay is obtained from High Court within 6 weeks. The said refund claim was thereafter sanctioned on 10/04/2015. However, interest of the said refund was not sanctioned by the Original Adjudicating Authority on the ground that the said claim was sanctioned in pursuance of Tribunal order without specifying if the said refund was sanctioned under Rule 5 of Central Excise Rules or under section 11B of the Central Excise Act, 1944. The Ld. Counsel relied on the decisions of the Tribunal in the case of AnnapuranaPlasto Pack P Ltd. 2004

1. ELT 529 (Tri-Mumbai) wherein it has been held that liability to pay interest arise not only in case of refund but also refund of MODVAT credit. He also relied on the decision of Tribunal in the case of Birla Texture Ltd. 2010 (257) ELT 146 (Tri) where it was held that refund of pre deposit cannot be allowed by way of credit in the CENVAT account if the assessee has started to avail exemption. It was also found that in the said case that in such circumstances, the assessee is also entitled to interest. Ld. Counsel also relied on the decision of Hon'ble Apex Court in the case of Ranbaxy Laboratories Ltd. 2011 (273) E.L.T. 3 (SC) wherein relying on the circular of CBEC no. 670/61/2002-CX dated 01/10/2002, it was held by Hon'ble Apex Court that interest for delay after expiry of three months from the date of receipt of application has to be granted in case of refund under section 11(B) of the Central Excise Act, 1944.
2. Ld. AR relies on the impugned order. He pointed out that the appellant had not reversed the amount in their RG-23 account at the time of filing the refund and technically the said amount was available in the account of the appellant. He argued that in these circumstances, the balance was throughout maintained by the appellant and, therefore, no interest can be demanded.
3. I have considered rival submissions. I find that the OIO relies on the following observations in the remand order of the Tribunal to deny the claim of interest:

"It can be noted that the refund of the appellant does not fall under the any of the rules and that there are no express or implicit provisions in the Central Excise Act and Cenvat Credit Rules for grant of refund of Cenvat Credit balance lying unutilized at the time of closure of the unit.

4.1 I find that Hon'ble High Court of Karnataka in the case of Slovak India Trading Company Pvt. Ltd. 2006 (201) ELT 559 (Karn.) has observed as following:

12 *Admitted facts would reveal of a claim of cash refund and admitted facts would reveal of rejection at the hands of the Assistant Commissioner and also the appellate authority. The Tribunal has chosen to allow the claim application on the ground that refund cannot be rejected when the assessee goes out of Modvat scheme or when the*

Company is closed. The argument is that there is no provision for refund in terms of Rule 5 of Cenvat Credit Rules, 2002. Rule 5 reads as under:

“Rule 5. Refund of CENVAT Credit: When any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification:

Provided that no refund of credit shall be allowed if the manufacturer avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty.”

There is no express prohibition in terms of Rule 5. Even otherwise, it refers to a manufacturer as we see from Rule 5 itself. Admittedly, in the case on hand, there is no manufacture in the light of closure of the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly ruled by the Tribunal. The Tribunal has noticed that various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee.

4.2 It can be seen that the Hon’ble HC has held that there is no bar under Rule

13 The three questions put before the Hon’ble High Court was as follows:

Whether under the facts and circumstances of the case the Tribunal is right in ordering for refund even if there is no provision in Rule 5 of Cenvat Credit Rules 2002, to refund the unutilized Credit?

Whether under the facts and circumstances of the case the Tribunal is right in ordering for refund even if there is no production and there is no clearance of finished goods?

4. *Whether under the facts and circumstances of the case the Tribunal is right in holding that respondent is entitled for refund even if it goes out of Modvat Scheme or Company is closed?*

All the questions have been answered in the favour of assessee.

5. It can be seen from the above discussion that Hon’ble High Court has held that there is no provision for grant of refund in rule 5 under the present circumstance. The Hon’ble High Court, however, allows the refund. The lower authorities have followed the ratio of this decision. Thus the present proceeding which follow the decision of Hon’ble High Court also conclude with the same ratio as laid down by the Hon’ble High Court of Karnataka. Thus, the refund has been granted following the ratio of Hon’ble High Court decision in case of Slovak India Trading Company Pvt. Ltd. (supra) honouring judicial discipline. The refund is, therefore, not sanctioned under any express provision of law. In these circumstances, when the refund is not under any provisions of Central Excise Act, the provisions of the act relating to interest do not apply to the facts of the case.

6. The appeal is, therefore, dismissed.

(pronounced in the open court on 08.08.2019)

(Raju)
Member (Technical)

[Back](#)

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

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 1621 of 2010

[Arising out of Order-in-Appeal No OIA-SKSS/126/VAPI/2010 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI]

M/s Silvassa Span Yarn Inds

.... Appellant

Plot No. 3, Survey No. 259/1/1,
Navneet Shah Indl. Estate, Dadra,

Silvassa-Dadra & Nagar Haveli

VERSUS

C.C.E. & S.T. Vapi

.... Respondent

4th Floor Adharsh Dham Building,

Opp. Town Police Station, Vapi-Daman Road, Vapi
Vapi, Gujarat-396191

APPEARANCE :

Sh. Aditya Tripathi, Advocate for the Appellant Sh. K.
Kinariwala (AR) for the Respondent

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

FINAL ORDER NO. A/ 11473 2019

DATE OF HEARING : 02.08.2019

DATE OF DECISION: 02.08.2019

RAMESH NAIR

The case of the department is that the appellant have availed the cenvat credit on the inputs and used in the manufacture of crimped yarn on which benefit of Notification No. 30/04-CE dated 09.07.2004 was availed. As per the condition of the Notification the appellant was not supposed to avail the cenvat credit in respect of inputs used in the manufacture of final product. Since the appellant have availed credit, the benefit of Notification 30/04-CE was denied and consequently duty was demanded.

1. Sh. Aditya Tripathi, Ld. Counsel appearing on behalf of the appellant submits that goods which were lying in stock was job work goods and as regard cenvat credit availed, the same was reversed on the stock lying as on 08.06.2006 and the intimation for the same was given, therefore, the appellant is entitled for the exemption. Alternatively, he submits that the demand is also time barred for the reason that the appellant intimated to the department that they are availing the benefit of Notification 30/04-CE and 29/04-CE simultaneously and also the credit in

respect of input to be used in the manufacture of goods cleared under 30/04-CE has been informed, therefore, there is no suppression of fact.

2. Sh. K. Kinariwala, Ld. Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the findings of the impugned order. He submits that the appellant could not establish the fact that they have not availed the credit on the inputs used in the exempted goods. As regard the limitation, he submits that though they have given an intimation to the department that too in June 2006 which is much after the relevant period of this case and the fact that they are availing the credit in respect of the exempted goods has not been intimated to the department, therefore, there is clear suppression of fact.
3. Heard both the sides and perused the records. We find that the appellant even before this Tribunal could not establish one to one correlation as regard the use of inputs in the manufacture of dutiable and exempted goods, therefore, as per the findings of the lower authorities it is established that the appellant availed the cenvat credit in respect of inputs used in the manufacture of goods cleared under Notification 30/04-CE, therefore, the appellant have no case on merit as they have violated the condition of Notification. As regard the limitation, we find that the fact regarding availment of cenvat credit of the inputs has not been disclosed to the department. It is obligatory on the appellant that once they are availing the exemption Notification they are bound to follow the condition that cenvat credit should not be availed on the input used in the manufacture of such exempted goods. Accordingly, there is a clear suppression of fact on the part of the appellant.
4. As per our above discussion, there is no infirmity in the impugned order and the same is upheld. Appeal is dismissed.

(Dictated and pronounced in the open court)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Excise Appeal No. 11160 of 2018

Arising out of Order-in-Appeal No. OIA-VAD-EXCUS-001-APP-743-2017-18, Dated:
25.12.2017

Passed by Commissioner (Appeal) of Central Excise & ST, Vadodara

Date of Hearing: 06.10.2020

Date of Decision: 06.10.2020

**STANDARD PESTICIDES PVT LTD
PLOT NO. 1, SWASTIK CERAMIC COMPOUND AT & POST :
SANKARDA, VADODARA, GUJARAT**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
VADODARA, 1ST FLOOR, CENTRAL EXCISE BUILDING
RACE COURSE CIRCLE, VADODARA, GUJARAT-390007**

Appellant Rep by: Shri Paritosh Gupta, Adv.

Respondent Rep by: Shri S N Gohil, Superintendent (AR)

CORAM: Ramesh Nair, Member (J)

Raju, Member (T)

FINAL ORDER NO. A/11257/2020

Per: Ramesh Nair:

This appeal has been filed against the order of the Commissioner (Appeals) whereby the learned Commissioner (Appeals) has upheld the rejection of rebate claim of the Excise Duty paid on the goods exported through merchant exporters.

2. Shri S.N. Gohil, learned Superintendent Authorised Representative has raised preliminary objection that since the case relates to rebate of duty, the Tribunal has no jurisdiction to entertain the appeal whereas the right forum is Revisionary Authority, Additional/ Joint Secretary to the Government of India.

3. Shri Paritosh Gupta, learned Counsel appearing on behalf of the appellant submits that in the impugned order, learned Commissioner (Appeals) has given categorical findings that goods were sold to merchant exporters. Accordingly, the incidence of duty has been passed on hence refund claim is not admissible. He submits that as per this finding of the learned Commissioner (Appeals), the case relates to refund and it is appealable in this Tribunal.

4. Learned Authorised Representative has submitted following judgments to submit that the case relates to rebate hence the appeal is not maintainable:-

(a) 2011 (268) ELT 339 (Guj) — CCE, Surat vs. Imtiyaz Traders

(b) 2011 (270) ELT 334 (Kar) — CCE, Mysore vs. Woifra Tech P Ltd

(c) 2010 (20) STR 243 (Tri-Ahmd) — Rivaa Exports vs. CCE, Surat-I

(d) 2002 (149) ELT 340 (Tri-Chennai) — CCE, Chennai-III vs. Kiwi TTK Limited

(e) 1991 (54) ELT 235 (Tri) — India Jute & Industries Limited vs. CCE

(f) 2014 (34) STR 732 (Tri-Del) - Glyph International Limited vs. CCE, Noida

(g) 2009 (246) ELT 646 (Tri-Kol) - Mercury Exports & Mfg P Limited vs. CC, (Port), Kolkata

(h) 2005 (181) ELT 328 (SC) — Sahakari Khand Udyog Mandal Limited vs. CC

(i) 2016 (344) ELT 782 (GOI) — Padam Fashion

(j) 2012 (280) ELT 575 (GOI) — Sabare International Limited

5. Heard both sides and perused the record. We find that there is no dispute that appellant have claimed rebate of duty paid on the goods exported through merchant exporters. Therefore, even though the Commissioner has given findings as regards unjust-enrichment, the nature of rebate is not altered. As against the export of goods, the duty is refunded as rebate claim and not as a normal refund. Therefore, we are of the clear view that this case relates to rebate of duty paid on export of goods. As per Section 35B (1) proviso (b), the Tribunal has no jurisdiction in the cases relates to rebate of duty. The appellant has liberty to approach the right form, Additional/ Joint Secretary to Government of India, Revisionary Authority by filing revision application. Accordingly, appeal disposed of as non maintainable on the ground of jurisdiction without going into merits of the case.

6. As per the request of the learned Counsel, Registry is directed to return the appeal papers to the appellant.

(Dictated in the open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Excise Appeal No. 10066 of 2019-SMC

Arising out of Order-in-Original/Appeal No- CCESA-SRT-APPEALS-PS-411-2018-19,
Dated 14.09.2018

Passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and
Service Tax-SURAT-I

Date of Hearing: 22.10.2020

Date of Decision: 22.10.2020

**VIJAY FIRE VEHICLES AND PUMPS LTD
PLOT NO.232, 231/1 & 233, GIDC, UMBERGAON
VALSAD, GUJARAT**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
SURAT-I, NEW BUILDING...OPP. GANDHI BAUG
CHOWK BAZAR, SURAT, GUJARAT, 395001**

Appellant Rep by: Shri R Vishwanathan, Consultant

Respondent Rep by: Shri S Airan, AC (AR)

CORAM: Raju, Member (T)

FINAL ORDER NO. A/11279/2020

Per: Raju:

This appeal has been filed by M/s Vijay Fire Vehicles & Pumps Ltd. against rejection of refund claim filed under Cenvat Credit Rules, 2004.

2. Learned Consultant for the appellant pointed out that the refund claim has been rejected on the ground of limitation. He pointed out that the manufacture and export of fire vehicle took place in June to August, 2015 and refund claim was filed on 22nd September, 2017. He pointed out that there was ambiguity in the notification 27/2012-CE (N.T.). Therefore, vide notification 14/2016-C.E.(N.T.), clause 3(b) of the notification 27/2012-CE was amended. He pointed out that the limitation should only be applied to cases after issue of notification 14/2016-C.E. (N.T) dated 01.03.2016. He pointed out that there was ambiguity in the notification no 27/2012-CE(N.T.) which necessitated the issue of notification 14/2016- C.E.(N.T.).

3. Learned Authorised Representative pointed out that notification 18/2012 dated 18/06/2012 which substitutes Rule 5 in the in the Cenvat Credit Rules, 2004 itself prescribes that the refund has to be claimed within a period of one year from to the commencement of the CENVAT Credit (Third Amendment) Rules, 2012. He pointed out that there was no ambiguity in the notification 27/2012-C.E. (N.T.) dated 18/06/2012 in so far as its application to manufacturer is concerned. Clause 3(b) of notification 27/2012 reads as follows:

"3 (b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed by the claimant, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944)."

The above provision at paragraph 3(b) was substituted by following paragraph 3(b) vide notification 14/2016-C.E. (N.T.) dated 01/03/2016:

"(b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed as under :

(i) in case of manufacturer, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944);

(ii) in case of service provider, before the expiry of one year from the date of -

(a) receipt of payment in convertible foreign exchange, where provision of service had been completed prior to receipt of such payment; or

(b) issue of invoice, where payment for the service had been received in advance prior to the date of issue of the invoice."

3.1 He pointed out that notification 14/2016 was essentially issued to provide some relaxation to service providers. He pointed out that there was no change as far as the its application to manufacturers is concerned and there was no ambiguity in respect of manufacturers.

4. I have considered rival submissions. I find that substantial force in the argument of Learned Authorised Representative. Clause 3(b) of Notification 27/2012 prescribes as follows so far as limitation is concerned:

"3 (b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed by the claimant, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944)."

It clearly prescribes that as section 11B of the Central Excise Act, 1994 will be applicable to all claims made under Rule 5. Vide notification **14/2016-CE (N.T.)** dated 01/03/2016, the aforesaid clause 3(b) was replaced by the following:

"(b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed as under :

(i) in case of manufacturer, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944);

(ii) in case of service provider, before the expiry of one year from the date of -

(a) receipt of payment in convertible foreign exchange, where provision of service had been completed prior to receipt of such payment; or

(b) issue of invoice, where payment for the service had been received in advance prior to the date of issue of the invoice."

It is seen that as far as the manufacturer is concerned, there is no change. However in the case of service provider certain relaxation is granted. In the instant case, the appellant is a manufacturer and, therefore, there is no ambiguity. The refund claim relates to the period June to August, 2015 and the same was filed on 22nd September, 2017 which clearly beyond the scope of limitation prescribed under section 11B of the Central Excise Act, 1944. In these circumstances, I find no error in the order of Commissioner. The appeal is dismissed.

(Dictated and pronounced in the open court)

[Back](#)

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

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 821 of 2010

[Arising out of OIA-55/2010-AHD-III-KCG/CE/COMMR-A- passed by Commissioner of
Central Excise-AHMEDABAD-III]

M/s Shri Krishna Tobacco Products

.... Appellant

Opp. Bank Of Baroda, Station Road Ranuj,
Ranuj, Patan
Gujarat-384275

VERSUS

C.C.E. & S.T. -Ahmedabad-iii

.... Respondent

Custom House, 2nd Floor,

Opp. Old Gujarat High Court,
Navrangpura, Ahmedabad,
Gujarat-380009

APPEARANCE:

Sh. Amal Dave, Advocate for the Appellant Sh. S.N.
Gohil (AR) for the Respondent

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

FINAL ORDER NO. A/ 11524 / 2019

DATE OF HEARING: 07.08.2019

DATE OF DECISION: 07.08.2019

RAMESH NAIR

The brief facts of the case are that the appellant was engaged in manufacture of Snuff of Tobacco falling under Chapter 24 of the Schedule to Central Excise Tariff Act, 1985 and registered with Central Excise Department as a manufacturer of tobacco Snuff. On the basis of specific intelligence that the appellant is evading the central excise duty by way of unaccounted manufacture of illicit clearances of excisable goods namely, Snuff of tobacco officers of DECEI carried out searches at the premises of the appellant and their buyers. On scrutiny of seized records and investigation, it was found that during the financial year 2002-03 to 2006-07 (till 27.07.2006), the appellant have cleared snuff of tobacco in retail packages of 50gms, 100gms, 200gms, and 500gms bearing Umashanker and Krishna brand having gross value of Rs. 18,24,550/- by declaring less assessable value and making payment of central excise duty on lesser value of snuff in bulk used within their factory for the manufacture of snuff in retail packages. An amount of clearances of snuff within factory during said period which were used for manufacture snuff of tobacco in retail packages within the factory. Thus, tobacco snuff having assessable value of Rs. 11,28,235/- (arrived at on basis of cum duty price) were cleared by the appellant without preparing appropriate central excise

invoices for the retail pack involving central excise duty to the tune of Rs. 7,19,651/- and out of this amount an amount of Rs. 1,92,165/- was already paid by them on such tobacco snuff in bulk, thereby they evaded central excise duty amounting to Rs. 5,27,486/-. Sh. Ashish B Amin, Proprietor of the appellant concern in his statement admitted the above fact, accordingly, they have voluntarily paid an amount of Rs. 1 Lac towards duty evaded before issuance of SCN.

2. In this circumstance, the SCN dated 15.03.2007 was issued to the appellant for demand of central excise duty amounting to Rs. 5,27,486/- along with interest and imposition of penalty under Section 11AC of the Central Excise Act, 1944 and Rule 25 of the Central Excise Rules, 2002. The adjudicating authority vide Order-In-Original dated 02.09.2008 confirmed the demand of duty along with interest and imposed penalty of an equal amount of duty under Section 11AC of Central Excise Act, 1944. A penalty of Rs. 50,000/- was also imposed on Ashish B. Amin, Proprietor of the concern. Being aggrieved by Order-In-Original, appeal was filed by the appellant which was rejected except for setting aside the penalty of Rs. 50,000/- imposed on Sh. Ashish B. Amin, Proprietor of appellant firm, therefore, the present appeal was filed by the appellant.

3. Sh. Amal Dave Ld. Counsel appearing on behalf of the appellant at the outset submits that the appellant is not contesting the merit of the case i.e. demand of differential duty. However, he strongly submits that the show cause notice is time bar as the same was issued for the period 2002-03 to 2006-07 on 15.03.2007. He submits that the appellant was registered with Central Excise Department and they were filing monthly ER-1 return. They were under bonafide belief that once the goods was manufactured in bulk form, the duty is payable on the value of bulk snuff of tobacco and not on retail pack. He refer to Board Circular No.818/15/2005-CX dated 15.07.2005 to submit that departmental officer have not properly scrutinise the ER-1 return at the relevant time, therefore, there is no suppression of fact on the part of appellant. He submits that they have correctly declared the production and clearances in their ER-1 return. The extended period cannot be invoked on the ground that certain information was not declared in the ER-1 return which otherwise was not required. He placed reliance on the following judgments in support of his submission:

- a. Dynamic Industries Ltd 2014 (307) ELT 15 (Guj.)
- b. Accurate Chemicals Industries 2014 (310) ELT 441 (All.)
- c. Ultratech Cement P. Ltd 2014 (302) ELT 334 (Guj.)
- d. Himalayan Tea P. Ltd 1997 (94) ELT 52 (P&H)

4. Sh. S.N. Gohil Ld. Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that the appellant with very consciously made a modus operandi to evade the excise duty, therefore, they issued excise invoices for bulk and even though the re-packing from bulk to retail pack was being carried out within the factory. They have purposely suppressed the clearances of retail pack, thereby evaded the central excise duty. Therefore, the modus operandi adopted with clear intention to evade the excise duty. He further submits that the appellant instead of declaring the removal of retail pack value thereof, they have declared quantity of bulk snuff of tobacco and its value in their ER-1 return, thereby they have suppressed the fact.

5. We have carefully considered the submissions made by both the sides and perused the records. We find that the appellant is not disputing the duty demand on merit of the case. We find that since the appellant in the factory premises manufacturing snuff of tobacco in bulk and in the same premises they were converting from bulk pack to retail pack and the final clearances for sale of goods was made in the retail pack by charging the higher value, therefore, undisputedly the appellant was supposed to pay duty on the value of retail pack. Even otherwise as per Chapter Note of Chapter 24 at the relevant time, the activity of

re-packing of goods from bulk pack to retail pack was amount to manufacture, accordingly, there is no doubt that the duty was payable on the clearances of goods in retail pack. As regard limitation raised by the Ld. Counsel, we find that even though there is unambiguous Chapter Note in Chapter 24, the appellant have intentionally devised a method whereby first they have cleared bulk snuff of tobacco captively and issued invoices and paid the duty thereon, thereafter the same goods were re-packed for retail pack in their own factory and issued commercial invoices on higher value, thereby they suppressed the value of the finished goods cleared from the factory. In their ER-1 return, they have not declared the correct clearance value of retail pack whereas they have declared in the ER-1 return only the bulk snuff of tobacco and its value to mislead the department that they have declared the goods in bulk form only. With this modus operandi, the department could not know about their activity of payment of duty on the bulk and removal of goods in the retail form, therefore, there is a clear suppression of fact and mis-declaration on the part of the appellant.

6. The judgments on which the Ld. Counsel have relied upon in the case of Accurate Chemicals Industries (supra) of Hon'ble Allahabad High

Court, on going through the said judgment, we find that in the said judgment, the fact was that the appellant was clearing the final product to their own unit and the issue involved was of valuation of goods cleared to related person. However, in the present case, the appellant were showing the clearances in bulk instead of clearances on retail pack, therefore, the facts of the present case is entirely different from the case cited above.

7. As per our above discussion, we are of the clear view that the extended period was rightly invoked in the facts of the present case. Accordingly, the impugned order is upheld on merit as well as limitation. The appeal is dismissed.

(Operative portion of the order pronounced in the open court)

[Back](#)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

COURT NO. I

**EXCISE APPEAL NO. E/61559-61561,61565-61566,
61562-61564,61608-61609/2018**

Date of hearing/decision: 26.10.2018

M/s Amrit Polyplast Pvt. Ltd.

M/s S S Sambyal

M/s Parag Gupta

M/s Sanjay SinghalM/s Manu Gupta: Appellant(s)

VS

C.C.E., - Jammu & Kashmir

: Respondent(s)

Appearance:

Present for the Appellant(s): Shri R.k Hasija (Advocate)

Present for the Respondent(s): Shri Harvinder Singh (AR)

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Hon'ble Mr. Anil G Shakkarwar, Member (Technical)

Final ORDER NO.63398-63407/2018

Per : Ashok Jindal

The appellants have filed these appeals with a delay of almost 651 days and seeking condonation of delay on the ground that initially against the impugned order, the main party went to the Hon'ble High Court of Punjab & Haryana who set aside the adjudication order, thereafter, the Hon'ble High Court has recalled the order and directed to the main party to approach this Tribunal, therefore, the appellants have filed these appeals before this Tribunal with a delay, in that circumstances, it is prayed that the delay is condoned.

2. We heard the Ld. Counsel for the appellants. It is a fact on record that the appellants before us have not challenged the impugned order before the Hon'ble High Court of Punjab & Haryana and remained silent and opted not to challenge the impugned order. After the order of the Hon'ble High Court in the case of the main party wherein it has been held that the main party can approach this Tribunal, the appellant approached this Tribunal and filed these appeals with a delay. The appellants have failed to explain why they have not challenged the impugned order before this Tribunal in time. As the appellant neither approached the High Court and nor approached this Tribunal in time, in that circumstances, there is no satisfactory explanation to condon the delay of 651 days. It is pertinent to mention that the Hon'ble High Court has not passed any order in case of the appellant, therefore,, the appellant can not take the benefit granted to third party.

In these terms, the applications for condonation of delay are dismissed, consequently, the appeals filed by the appellants are also dismissed.

(Order dictated and pronounced in the open court)

Anil G Shakkarwar
Member (Technical)
Ashok Jindal
Member (Judicial)

[Back](#)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Excise Stay Application No.: 60003 of 2020 Excise Appeal No. 61049 of 2019

[Arising out of OIA No. Appeal/CE/PKL/47/2017 dated 11.07.2019 passed by the Commissioner (Appeals), Central Excise, Panchkula, SCO No.407- 408, Sector-7, Panchkula)

M/s. Som Flavour Masala Pvt. Ltd

Respondent

(Village Nathupur, Sonapat, Haryana-131029)

Versus

Commissioner of Central Excise & ST

Village Nathupur, Sonapat, Haryana-131029)

Appellant

APPEARANCE:

Present for the Appellant: Shri Rajeev Gupta & Vijay Gupta, ARs

Present for the Respondent: Shri R.R. Yadav, Consultant

CORAM:

HON'BLE Dr. D.M.MISRA, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.60385 / 2020

DATE OF HEARING/DECISION: 02.03.2020

PER: Dr. D.M. MISRA

This stay application is filed by the Revenue seeking stay of the Order-in-Appeal passed by the Commissioner (Appeals), Rohtak. The stay application as well as the appeal are taken up together for hearing and disposal as per the earlier order dated 20.01.2020 and with the consent of both sides.

2. The Revenue is in appeal assailing the impugned order on the ground that the learned Commissioner (Appeals) erroneously directed refund of ₹ 29,91,483/- and interest on the amount paid during investigation from the date of actual payment of the duty to the payment of refund.

3. To appreciate the dispute, it is necessary to analyse the facts of the case giving rise to refund of the duty claimed by the respondent. The respondent are engaged in the manufacture of Chewing tobacco without lime which has been subjected to compounded levy being notified under section 3A of the Central Excise Act, 1944. The respondent had filed necessary declaration under relevant rules declaring the number of machines installed in the factory for determination of annual capacity of production of the installed machines and in turn for payment of duty. The adjudicating authority, to ascertain the correctness of the commodity declared as manufactured, drawn samples and sent for testing at CRCL, New Delhi. From the test report it revealed that the appellant are engaged in the manufacture of Jarda Scented Tobacco classifiable under CSH 24039910 and not Chewing Tobacco without lime tube falling under CSH 24039930 as declared. Consequently, after handing over the test report, the adjudicating authority determined the annual production capacity

of installed machines considering the commodity as Jarda Scented Tobacco for the period from July 2015 to January 2016. The respondent assailed the said orders by filing Appeals before the Commissioner (Appeals). In the meantime, on the basis of intelligence, an investigation was initiated by the Department and on completion of the investigation, it is alleged that the respondent had manufactured Jarda Scented Tobacco but discharged less duty considering the manufactured products as Chewing tobacco without lime tube. During the course of investigation, after the test report was issued, the respondent paid differential duty of ₹17,99,72,033/- as applicable to Jarda Scented Tobacco and interest of Rs.41,43,757/- for the period from July 2015 to January 2016 under protest. Later, show cause notice was issued on 01.07.2016 proposing various action against the respondent including appropriation of the duty, interest paid during the course of investigation.

4. The orders fixing the annual capacity of production under the relevant rules were passed by the Deputy Commissioner and the same were challenged before the Commissioner (Appeals), who disposed the appeal observing that on the same issue of classification of the declared commodity, show cause notice dated 01.7.2016 issued by the Dept. is pending adjudication, hence the appeals are premature and infructuous. The said order was accepted by the respondent, however, challenged by the Revenue disputing certain findings of the learned Commissioner (Appeals) being the subject matter of Appeal No. E/60106/17. The said appeal was disposed by the Tribunal with direction to the Commissioner, Central Excise to adjudicate the pending Show Cause Notice 01.7.2016 at the earliest.

5. The present dispute relates to refund claim of

₹15,61,27,927/- filed by the Respondent on 20.04.2017. It was filed on the ground that they have paid/deposited the differential duty under protest during investigation, but the show cause notice dated 01.07.2016 issued on completion of investigation had not been adjudicated till that date. A show cause notice proposing rejection of the refund claim was issued to the respondent. On adjudication, the refund claim was rejected. Appeal against the said order before the Commissioner (Appeals) also got rejected. Aggrieved by the same, they filed second appeal before this Tribunal, and by order dated 30.8.2018 this Tribunal allowed their appeal and directed the adjudicating authority to refund the amount. Pursuant to the said direction, the adjudicating authority scrutinised the quantum of refund claim and noticed that an amount of ₹29,91,483/- was not supported with payment particulars. Accordingly, a letter was written to the respondent to place evidence in support of the said amount. As the respondent did not have any evidence relating to the said claim of ₹29,91,483/-, they withdrew the same from the total claim. However, later they filed appeal before the Ld. Commissioner (Appeals) against rejection of the said amount and also claimed interest on the amount deposited. The learned Commissioner (Appeals) allowed their appeal. Hence, the Revenue is in appeal.

6. The Id. A.R for the Revenue has submitted that the learned Commissioner (Appeals) is erred in allowing the refund amount of ₹29,91,483/-, even though the respondent had voluntarily withdrew the said amount since they could not produce evidence in support of payment of the said amount. Further, he has submitted that the finding of the Commissioner (Appeals) that the said amount relates to payment of duty for 3 days during which the factory was closed, is extraneous and devoid of merit. It is his contention that refund claim cannot be filed under section 11B of Central Excise Act, 1944 for the period of closure of the factory as the respondent was engaged in manufacturing and packing of Jarda Scented Tobacco and paying central excise duty as per Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. The Respondent should have claimed abatement for non-production of goods in accordance with Rule 10 of the said Rules. Since the laid down procedure has not been followed, therefore, the abatement is also inadmissible.

7. The learned AR for the Revenue has further submitted that since the learned Commissioner (Appeals) held that the amount deposited during the course of investigation is not a duty but deposit, accordingly, interest is admissible under section 11BB of Central Excise Act, 1944 from the date of deposit of differential duty is unsustainable in law. He has further contended that reliance placed by the Ld Commissioner (Appeals) on the judgement of Tribunal in the case of Amidhara Texturising Private Limited Vs. CCE-2012 (278) ELT 257 is misplaced as the facts involved in the said case is different from the present one. In the present case, the Respondent deposited the differential duty pursuant to the capacity determination order of the adjudicating authority, since the commodity declared, on chemical test, found to be 'Jarda Scented Tobacco' and not 'Chewing Tobacco without lime tubes'. He has submitted that the said Orders of adjudicating authority still holds good as the Appeals against the said Orders by the party were rejected by the Commissioner (Appeals). He has submitted that till the time, the show cause notice dated 01.07.2016 is not decided the differential duty paid by them pursuant to the said Orders and during investigation cannot be construed as deposit and not duty. Consequently, interest directed to be paid from the date of deposit of the said amount by the Ld Commissioner (Appeals) is unsustainable in law.

8. Ld. Consultant for the Respondent reiterating the findings of the Ld. Commissioner (Appeals) submitted that the amount deposited during investigation has been refunded to them as directed by the Tribunal, as the issue of classification of the commodity was pending adjudication for a long time. It is his contention that therefore the interest from the date of deposit of the differential amount ought to have been paid to them. For the refund amount of Rs.29,91,483/-, the Consultant has submitted that since the amount has been collected by the Department at the end of the month, no further evidence is required to be submitted about its payment, hence the Ld. Commissioner (Appeals) also allowed the refund of the same. He has fairly submitted that through their letter dt.05.4.2020 they have withdrew the claim amount of Rs.29,91,483/-.

9. Heard both sides and perused the records.

10. The issues involved in the present appeal for determination are –

- (i) Whether the refund amount of Rs.29,91,483/- is correctly allowed to the Respondent;
- (ii) Interest on the total refund amount of Rs.15,61,27,257/- is payable to the respondents from the date of its deposit.

11. We find that the appellant had declared the goods manufactured by them as 'Chewing Tobacco without lime tube' and accordingly discharged duty @ Rs.38.64 Lakhs under Section 3A of Central Excise Act, 1944 read with relevant Notification on the number of machines installed in the factory for the period from July, 2015 to January, 2016. Later, on chemical analysis at the instance of the Dept. at CRCL, New Delhi, the commodity was found to be not Chewing Tobacco but Jarda Scented Tobacco classifiable under sub-heading 24039930 of Central Excise Tariff Act, 1985. Thus, the duty required to be discharged on Jarda scented Tobacco as per the relevant notification was Rs. 82.11 lakhs, higher than the duty that was paid on Chewing Tobacco without lime tube during the relevant period by the respondent. Consequently, investigation was initiated against the respondent. The respondent during the course of investigation, deposited the differential duty amount of Rs.17,99,72,033/- and interest of Rs.41,43,757/- for the period

July, 2015 to January, 2016. A show-cause notice was issued to the Respondent on 01.07.2016 proposing to appropriate the differential duty & interest amount paid and other actions against the respondent. Later, the respondent had filed refund claim of Rs.15,61,27,927/- during the pendency of the adjudication of the said show-cause notice on the ground of inordinate delay in adjudication. The adjudicating authority rejected the said claim and on appeal, the Id. Commissioner (Appeals) upheld the said rejection Order. However, on further appeal to Tribunal, the refund claim was directed to be paid and consequently the adjudicating authority sanctioned the refund claim.

13. From the said refund claim, an amount of Rs.29,91,483/- was denied to the respondent on the ground that no documentary evidence was placed before the adjudicating authority in support of the said claim and the respondent subsequently withdrew the said claim. The Revenue has challenged the finding of the Id. Commissioner (Appeals) allowing the said amount to the Respondent as admissible. We do not find any merit in the observation of the Id. Commissioner (Appeals) in allowing the rejected amount of Rs.29,81,483/- when the respondent himself withdrew the refund claim in absence of documentary evidence of payment of duty for the period from July, 2015 to January, 2016. Since, the said amount was withdrawn by the respondent the adjudicating authority has no occasion to examine its admissibility and record a finding in this regard. The Commissioner (Appeals) finding that the respondent would have paid the duty during the closure of the factory is based on extraneous factors, and thus *de hors* the records of the case and accordingly devoid of merit, hence unsustainable in law. Consequently, the finding of the Id. Commissioner (Appeals) allowing the said refund amount is devoid of merit and accordingly set aside.

14. As far as the issue of interest on the deposit is concerned, it is not clear whether the same was also raised before the adjudicating authority. We find that the show-cause notice dt. 01.7.2016 issued alleging mis-classification of the commodity declared by the respondent and also there is proposal for appropriation of the differential duty paid with interest consequent to the capacity determination order passed. The said notice is yet to be adjudicated/decided. Till the time the show cause notice is adjudicated, the amount paid by the respondent cannot be said to have attained finality and refundable to them. The Tribunal directed the return of the said amount deposited by the respondent during investigation in all fairness attributable to inordinate delay of adjudication of the Show Cause Notice issued by the department. Needless to emphasize it is an interim measure caused to mitigate the hardship to the respondent for the delay in adjudication by the department. But, that does not mean that respondent can retain the said amount even if the issue of classification is decided against them. Therefore, the Id. Commissioner (Appeals) order directing payment of interest from the date of deposit of the said amount is also devoid of merit and accordingly set aside.

15. In the result, the Order impugned is set aside and the Revenue's appeal is allowed. Stay application is also disposed off.

(Operative portion of the order pronounced in court)

(D. M. MISRA)

MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)

MEMBER (TECHNICAL)

PER: SANJIV SRIVASTAVA

While concurring with the order proposed by my learned brother Member (Judicial), I would like to add as follows:

2.0 Any refund made under a taxing statute are governed by the provisions of the said statute, and no refund can be made beyond the provisions of said statute as has been held by the nine member bench of the Apex Court, in case of Mafatlal Industries [1997 (89) ELT 247 (SC)]. In the said decision Hon'ble Apex Court has clearly laid down that there can be no refund made in terms of Section 11B of the Central Excise Act, 1944 without a refund claim. The relevant excerpts from the decision are reproduced below:

"96. It would be evident from the above discussions that the claims for refund under the said two enactments constitute an independent regime. Every decision favourable to an assessee/ manufacturer, whether on the question of classification, valuation or any other issue, does not automatically entail refund. Section 11B of the Central Excise Act, 1944 and Section 27 of The Customs Act, 1962, whether before or after 1991 amendment - as interpreted by us herein - make every refund claim subject to proof of not passing on the burden of duty to others. Even if a suit is filed, the same very condition operates. Similarly the High Court while examining its jurisdiction under Article 226 and this Court under Article 32 - would insist upon the said condition being satisfied before ordering refund. Unless the claimant for refund establishes that he has not passed on the burden of duty to another, he would not be entitled to refund, whatever be the proceedings and whichever be the forum. Section 11B/ Section 27 are constitutionally valid, as explained by us hereinbefore.

They have to be applied and followed implicitly wherever they are applicable.

99. *The discussion in the judgement yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and proposition in the body of judgement.*

(i) to (ix)

(x) By virtue of sub-section (3) to Section 11B of Central Excise Act, 1944, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section 3 to Section 27 of the Customs Act, 1962, as amended by the aforesaid Amendment Act, all claims of refund (excepting those which arise as result of declaration of unconstitutionality of the provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of respective enactment. No suit for refund of duty is maintainable in that behalf. So far as jurisdiction of High Court under Article 226 of the Constitution, or this Court under Article 32 - is concerned it remains unaffected by the provisions of the Act. Even so, the court would while exercising the jurisdiction under the said articles, have regard to legislative intent manifested by the provisions of the Act. The writ petitions would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the

regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it over-ride it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

(xi) & (xii) "

3.0 Section 11BB of the said act, *ibid*, provides for interest from the date, three months from the date of filing the refund claim. Same is provided in the case of refund of pre-deposit, made under Section 35F of the Act, as per Section 35 FF, *ibid*.

3.0 Admittedly the present case is not the case of refund of pre-deposit, but of certain amounts which were deposited by the respondents during the course of investigation/ inquiry. Hence such a refund even if arising as result of order of CESTAT, has to be strictly governed as per the provisions of Section 11B and Section 11BB. This is the law laid down by the Apex Court in case of Mafatlal Industries.

4.0 We find that in case of refund under Income Tax Act, 1961, Hon'ble Apex Court has in case of Sandvik Asia Ltd [2006

(196) ELT 257 (SC)] has held as follows:

"In the present context, it is pertinent to refer to the Circular on Trade Notice issued by the Central Excise Department on the subject of refund of deposits made in terms of Section 35F of the Central

Excise Act, 1944 and 129E of the Customs Act, 1962. The Circular is reproduced hereunder:-

"Refund/Return of deposits made under Section 35F of CEA, 1944 and Section 129E of Customs Act, 1962 - Clarifications The issue relating to refund of pre-deposit made during the pendency of appeal was discussed in the Board Meeting. It was decided that since the practice in the Department had all along been to consider such deposits as other than duty, such deposits should be returned in the event the appellant succeeds in appeal or the matter is remanded for fresh adjudication.

2. *It would be pertinent to mention that the Revenue had recently filed a Special Leave Petition against Mumbai High Court's order in the matter of NELCO LTD, challenging the grant of interest on delayed refund of pre-deposit as to whether :*

(i) *the High Court is right in granting interest to the depositor since the law contained in Section 35F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and,*

(ii) *the refunds so claimed are covered under the provisions of Section 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F of the Central Excise Act, 1944.*

The Hon'ble Supreme Court vide its order dated 26-11-2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for dismissal, it can well be construed in the light of its earlier judgment in the case of Suvidhe Ltd. and Mahavir Aluminium that the law relating to refund of pre-deposit has become final.

3. *In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11B(1) of the Central Excise Act, 1944 or under Section 27(1) of the Customs Act, 1962 need not be insisted upon. A simple letter from the person who has made such deposit, requesting the return of the amount, along with an attested Xerox copy of the order-in-appeal or CEGAT order consequent to which the deposit made becomes returnable and an attested Xerox copy of the Challan in Form TR6 evidencing the payment of the amount of such deposit, addressed to the concerned Assistant/Deputy Commissioner of Central Excise or Customs, as the case may be, will suffice for the purpose. All pending refund applications already made under the relevant provisions of the Indirect Tax Enactments for return of such deposits and which are pending with the authorities will also be treated as simple letters asking for return of the deposits, and will be processed as such. Similarly, bank guarantees executed in lieu of cash deposits shall also be returned.*

4. *The above instructions may be brought to the notice of the field formations with a request to comply with the directions and settle all the claims without any further delay. Any deviation and resultant liability to interest on delayed refunds shall be viewed strictly.*

5. *All the trade associations may be requested to bring the contents of this circular to the knowledge of their members and the trade in general.*

6. *Kindly acknowledge receipt.*

[Source : M.F.(D.R.) F.No. 275/37/2K-CX.8A, dated 2-1-2002]"

A close scrutiny of the contents of the Circular dated 2.1.2002 would disclose as to the modalities for return of pre-deposits. It again reiterated that in terms of the Supreme Court order such pre-deposit must be returned within 3 months from the date of the order passed by the Tribunal, Court or other fiscal authority unless there is a stay on the order of the fiscal authority, tribunal, court by a superior court. The Department has very clearly stated in the above circular that the delay beyond the period of 3 months in such cases will be viewed adversely and appropriate disciplinary action will be initiated against the concerned defaulting officers, a direction was also issued to all concerned to note that defaulter will entail a interest liability if such liability accrue by reason of any orders of the Tribunal/Court such orders will have to be complied with and it may be recoverable from the concerned officers. All the Commissioners were advised implementation of these instructions and ensure their implementation

through a suitable monitoring mechanism. It is also specifically mentioned that the Commissioners under respective jurisdiction should be advised that similar matters pending in the High Courts must be withdrawn and compliance reported and that the Board has also decided to implement the orders passed by the Tribunal already passed for payment of interest and the interest payable shall be paid forthwith."

4.0 After taking the note of the draft circular reiterating the circular of 2002 placed before it, Supreme Court in Commissioner of Central Excise v. ITC Limited, [(2005) 179 ELT 15 (SC)], interest was payable for the period commencing from three months after the final disposal of the matter till the date of refund. The Circular of 2004 is reproduced below:

"Circular No.802/35/2004-CX

8th December, 2004F.No.387/5/2001-JC

Government of India Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs

Subject: Return of deposits made in terms of Section 35F of the Central Excise 1944 and Section 129E of the Customs Act, 1962.

Reference earlier instructions on the above subject and looking to the instances arising out of non-implementation of the judicial orders, the Board has reason to review and reiterate the earlier Circulars on the subject of non-implementation of orders of CESTAT or any Final Authority in relation to returning pre- deposits made as per directions of CESTAT or any other Final Authority in terms of Section 35F of the Central Excise Act, 1944& Section 129E of the Customs Act, 1962. The Board has taken a strict view with regard to non-returning of such deposits.

2. *As we are all aware the CESTAT has in a number of such cases awarded interest on pre-deposits where its orders havenot been implemented and the Department had challenged this and filed Civil Appeals in the Supreme Court.*

3. *The Board has noted the observations of the Hon'ble Supreme Court in its order dated 21.9.2004 and has decided that pre-deposits shall be returned within a period of three months of the disposal of the appeals in the assessee's favour.*

4. *Accordingly, the contents of the Circular No. 275/37/2000- CX.8A dated 02.01.2002, as to the modalities for return of the pre-deposits are reiterated. **It is again reiterated that in terms of Hon'ble Supreme Court's order such pre-deposit must be returned within 3 months from the date of the order passed by the Appellate Tribunal/Court or other Final Authority unless there is a stay on the order of the Final Authority/CESTAT/Court, by a superior Court.***

5. *Delay beyond this period of three months in such cases will be viewed adversely and appropriate disciplinary action will be initiated against the concerned defaulting officers. All concerned are requested to note that default will entail an interest liability, if such liability accrues by reason of any orders of the CESTAT/Court, such orders will have to be complied with and it may be recoverable from the concerned officers.*

6. *All Commissioners may advise implementation of these instructions and ensure their implementation through a suitable monitoring mechanism. Field formation may be suitably informed. Copies of the instruction issued may be endorsed to this office for information.*

7. *Commissioners under your jurisdiction should be advised that similar matters pending in the High Courts must be withdrawn and compliance reported. The board has also decided to implement the CESTAT Orders already passed for payment of interest and the interest payable shall be paid forthwith.*

8. *This issues with the approval of Chairman/Member (L&J), CBEC.*

9. *Kindly acknowledge receipt.."*

5.0 Same view was expressed by a three member bench of the Hon'ble Apex Court in case of Tata SSL [2007 (218) ELT 493 (SC)]. It is settled law as per the above decisions of the Apex Court, and the Circulars issued by the Board, that in case of refund of pre-deposit made as per the order of Courts/ Tribunals, the interest should have been granted within three months of date of the order.

6.0 Hon'ble jurisdictional High Court i.e. High Court of Punjab and Haryana has in case of Shreewood Products Pvt Ltd [2016

(44) STR 592 (P & H)] held as follows:

*“7. Keeping in view the aforesaid facts and circumstances, in our opinion, the appellant herein is entitled to payment of interest @ 12% per annum **for the period after three months till the refund was granted after passing of the order by the Tribunal on 2.5.2008.** The questions, referred to above, are answered accordingly.”*

7.0 Similarly in case of Nino Chaka [2019 (9) TMI 1166], Hon'ble Delhi High Court held as follows:

“10. Moreover, it appears from the facts of the case that CESTAT order is dated 20.11.2003 and it has been ordered by CESTAT, New Delhi that if the amount is not returned to the petitioner by the respondents within a period of three months the interest shall be payable. The said period comes to an end on 21.02.2003. As the amount at Rs.28,76,578/- was not paid on 21.02.2003 by the respondents, the payment of interest starts till the actual date of payment. The amount was refunded by the respondents on 14.05.2004. Hence, at the highest, the petitioner is entitled to get interest at a reasonable rate of interest for the period running from 21.02.2003 to 13.05.2004.

11. In fact, the petitioner is in search of payment of interest from March/May, 1998 which cannot be granted because there is no provision for the payment of interest nor the aforesaid amount was deposited under any coercion or compulsion. Moreover, the aforesaid amount was deposited by the petitioner voluntarily and, that too, prior to the issuance of the show cause notice dated 04.04.2001.

12. Thus, we see no reason to entertain this writ petition for grant of interest from March/May, 1998 upon an amount at Rs.28,76,578/-. The principal amount has already been paid by the respondents to the petitioner on 13.05.2004. Thus, after three months period is over from the date of the order of the CESTAT (20.11.2003) till the actual payment of the amount (14.05.2004) i.e. for the period running from 21.11.2003 to 13.05.2004, the respondents are hereby directed to make the payment of interest upon the amount at Rs.28,76,578/- @ 6% p.a.”

8.0 Same view has been expressed by Mumbai Bench of CESTAT, in the case Juhu Resorts [Final Order No A/86832/2019 dated 03.10.2019], after taking the note of Section 11B and 11BB in following words:

“5. A plain reading of aforesaid provisions makes it clear that the Appellants are entitled to interest from the date only after expiry of 3 months from the date of communication of the order i.e. in the present case from 17.03.2019. Consequently, the impugned order is modified and for calculation of the interest on the refund amount, the matter is remanded to the Adjudicating authority. Revenue's appeal is partly allowed.”

9.0 In view of the discussions as above I do not see any merits in the impugned order and concur with the order proposed by the learned brother setting aside the same and allowing the appeal filed by revenue

(SANJIV SRIVASTAVA) MEMBER (TECHNICAL)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH REGIONAL BENCH,
COURT NO. I**

Excise Appeal No. 60728 of 2017

[Arising out of the Order-in-Original No. 33/CE/CHD-II/2017 dated
18/05/2017 passed by The Commissioner of Central Excise, Chandigarh.]

M/s Panacea Biotec Ltd.

Appellant

VERSUS

**The Commissioner of Central Excise
and Service Tax,**

Respondent

Appearance

Shri T.R. Rustagi, Advocate – for the appellant.

Shri Bhasha Ram, Authorized Representative (DR) – for the
Respondent.

CORAM: **HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)HON'BLE SHRI
C.L. MAHAR, MEMBER (TECHNICAL)**

FINAL ORDER NO. 60794/2019

DATE OF HEARING : 04/04/2019.DATE
OF DECISION: 01/10/2019.

C.L. MAHAR :-

The brief facts of the matter are that M/s Panacea Biotec Ltd. (appellants) manufactured and cleared certain dutiable P orP Medicines (drug formulations, but not vaccines – whether in bulk or otherwise) classifying under Chapter 30 of the Central Excise Tariff Act, 1985 from their factory located at Chandigarh – Ambala Highway, Lalru, Punjab. It is claimed by the appellant that in the same premises another independent manufacturing unit in the name of Panheber Biotec Pvt. Ltd. (now name has been changed to Panera Biotec Pvt. Ltd. w.e.f. 02/07/2008) manufactured vaccine namely Haemophilus Influenzae Vaccine. It is claimed that M/s Panera Biotech has taken some portion of premises of the appellant on lease for manufacture of vaccine. During the period April 2008 to April 2009 vaccine attracted nil rate of duty. The vaccine manufactured by M/s Panheber Biotec Pvt. Ltd. was entirely supplied to the appellant. During the scrutiny of the statutory records of the appellant it had been noticed by the Department that quantities of vaccine manufactured and cleared supposedly by M/s Panheber Biotec Pvt. Ltd. have been entered into RG-1 register of the appellant and clearances have been shown in the appellants records. The Department therefore entertained a view that it is only the appellant who is manufacturing the vaccines which is nil rated for central excise duty and the appellant is not maintaining separate statutory record for Cenvat credit which have been availed on manufactured and exempted goods.

2. Entertaining the above view, the Department had issued a show cause notice dated 17/12/2012 whereunder the provisions of Rule 6 (3) of the Cenvat Credit Rules, 2004 have been invoked and the appellant have been asked to reverse back the Cenvat credit equivalent to 10% of the total turnover of exempted goods namely vaccine cleared by them from their factory premises. Accordingly, a demand for reversal of the Cenvat credit amounting to Rs.1,65,92,802/- has been demanded, other provision such as demand of interest as well as penalty under Rule 15 read with

Section 11AC of the Central Excise Act, 1944 has also been invoked. The matter got adjudicated on the first round of litigation by the Commissioner vide his order No. 76/CE/CHD-II/2013 dated 29/11/2013, whereunder the learned Adjudicating Authority has held that the appellant has been indulging into the manufacture of exempted item namely vaccine in the same premises and the details of the production and clearance of the exempted vaccine has been entered into RG-1 register and also filed monthly return in this regard and therefore it has been held by the Adjudicating Authority in his order dated

29 November 2013 that the appellant need to reverse back Cenvat credit amounting to Rs.1,65,92,802/- as per the provision of Rule 6 (3) of the Cenvat Credit Rules, 2004, interest and penalty has also been confirmed by the Adjudicating Authority.

3. The appellant have approached this Tribunal against the above-mentioned order-in-original and this Tribunal vide its final order No. A/52883/2015 – CX (DB) dated 14/09/2015 has passed the following order :-

“6. In this case the claim of the appellant is that they are not the manufacturer of vaccine which is an exempted product. In fact same is manufactured by M/s Panheber Biotec Pvt. Ltd. a separate legal entity located in the same factory compound. This fact is required to be ascertained by verifying whether M/s Panheber Biotec Pvt. Ltd. is a separate entity and manufacturer of vaccine only. The fact that whether the appellant is manufacturer of vaccine or not is also to be verified, which the lower authority has failed to do so. In these circumstances, the impugned order does not deserve any merits. Accordingly, the same is set aside and the matter is remanded back to the Adjudicating Authority first to ascertain whether appellant is manufacturer of vaccine, in question, which is duty free or not and thereafter to pass an appropriate order in accordance with law after consideration of the issues raised by the appellant in their defence by affording reasonable opportunity to the appellant. The appeal is disposed of in the above terms”.

4. Accordingly, the matter was remanded back to the Original Adjudicating Authority. The learned Commissioner in compliance to the above-mentioned final order of this Tribunal has adjudicated the matter again vide its order-in-original No. 33/CE/CHD-II/2017 dated 18/05/2017, whereunder the Commissioner have again confirmed the demand of Cenvat credits under Section 11A read with Rule 14 of the Cenvat Credit Rules equal amount of the penalty has also been imposed as well as the interest as per the provision of Section 11AA of Central Excise Act, 1944 has also been confirmed.

5. The appellant is before us in the second round of the litigation against the above-mentioned impugned order-in-original.

6. The learned Advocate appearing for the appellant submitted that M/s Panheber is a separate legal entity having necessary drug manufacturing license dated 23 September 2002 issued by the Drug Controller General of India for manufacture of vaccine. It has further been mentioned that all the necessary documents, such as, Memorandum and Article of Association of M/s Panheber/Panera Biotec Pvt. Ltd., the certificate of incorporation by the Deputy Registrar of Companies, the drug manufacturing license as well as a letter dated 06/06/2007 whereunder a permission has been granted to M/s Panheber Biotec Pvt. Ltd. for manufacture of raw material (new bulk drug substance issued by Drug Controller General of India) has been provided which categorically establishes that M/s Panera Biotec Pvt. Ltd. existed independently of the appellant and they manufactured and supplied the vaccine to the appellant. It has further been contended that there have been no violation of Rule 6 of the Cenvat Credit Rules, 2004. It has further been submitted that the Assistant Commissioner Dera Basi has not examined the record available in the entirety and failed to take note of the fact that M/s Panacea Biotec Pvt. Ltd. Lalru was also maintaining RG-

23 register in which the vaccine received from M/s Panheber/Panera was shown as input receipt and its subsequent disposal in use in or in relation to manufacture of final products by the appellant in its factory. In the accounts maintained by the appellant it has categorically been recorded that the vaccine, in question, has been manufactured by M/s Panheber Biotec Pvt. Ltd. and sold to the appellant.

7. An inference has already been made by the Assistant Commissioner only on the basis of entries in the RG-1 register and ER-1 register filed by the appellant. It has further been emphasized that the appellant has already given enough evidence to the Adjudicating Authority that they have not manufactured vaccine and same was manufactured by M/s Panheber/Panera

and supplied to them.

8. The learned Advocate has further contended that appellant have submitted a license from the Drug Controller of Government of Punjab which indicate that the appellant did not have necessary license for manufacture of vaccine in its plant at Lalru unit. This very fact should put all the doubts to the rest because a vaccine cannot be manufactured without a proper drug license, however, the Adjudicating Authority has ignored this point and proceeded to confirm the reversal of the Cenvat credit as demanded in the show cause notice.

9. The learned Advocate has also contended that the Department in the show cause notice has not identified the particular services which are alleged to have been used as common services and manufactured dutiable as well as exempted goods.

10. We have also heard learned Departmental Representative who has reiterated findings as given in the order-in-original.

11. Having heard the rival contention and after perusal of the record of the appeal, we feel that it will be appropriate to first refer to the earlier order of this Tribunal dated 21 September 2015 whereunder the Adjudicating Authority had been directed by this Tribunal that to verify whether M/s Panheber Biotec Pvt. Ltd. is a separate entity who was engaged in manufacture of the vaccine or not. We find from the impugned order-in-original that the learned Adjudicating Authority has called for a report from the concerned Jurisdictional Assistant Commissioner. The Jurisdictional Assistant Commissioner vide his letter No. V (13) 13 & 28/D/Panacea/DB/15/2014 dated 10/02/2017 submitted his report wherein he has reported as under :-

“3.4.1 that on further perusal of the records available with his office, it has been observed that the production and clearance of “Haemophilus Influenzae Vaccine” was shown in ER-1 returns of M/s Panacea Biotec Ltd. Lalru and which was also shown in VAT returns for the period 2008-2009 filed with VAT Department as a stock transfer to M/s Panacea Biotec Ltd. Okhla New Delhi and M/s Panacea Biotec Ltd. Vill. Malpur, Baddi, whereas to manufacture the vaccine, the Drug License was issued by State Drugs Controlling and Licensing Authority to M/s Panheber Biotec Pvt. Ltd. on 18/01/2008 and subsequently the same license was endorsed in the name M/s Panera Biotec Ltd. w.e.f. 15/09/2008. With regard to financial transactions, it was submitted that as per verification of the purchase records the payments for raw material used for manufacture of above vaccine were made by Panacea Biotec Ltd.

that no return relating to production was filed with the Drugs Authority as intimated by the Drug Control officer, Mohali, who also informed that there is no procedure or requirement to file any return for production of Bulk Drugs and as per Drugs & Cosmetics Act, 1940 & Rules, 1945.

that with reference to Para 6 of the final order of the Hon'ble CESTAT in question, it is submitted that M/s Panera Biotec Ltd., (Formerly Panheber Biotec Pvt. Ltd.) was issued drugs License on 18/01/2008 to manufacture the vaccine whereas as per records of his office M/s Panera Biotec Ltd., applied for Central Excise Registration on 07/03/2011 and was issued on 16/05/2011. In the registration application, ground plan of M/s Panacea Biotec Ltd. was also changed because the part of Building Block was leased to Panera Biotec Pvt. Ltd., but there is no record in his office which reveals that Panera Biotec Ltd., was legal entity in the same premises before 2011. that in light of the above, his office is of the view that it cannot be established that M/s Panera Biotec Ltd. was a separate legal entity during the relevant period as they got themselves registered with the department in the year 2011”.

12. It can be seen from the above that the Assistant Commissioner has very categorically mentioned that (i) there is no mention about the existence of M/s Panheber/Panera in the original ground plant. It is also worth taking a note that M/s Panera Biotec Ltd. was issued a drug license on 18/01/2008 to manufacture vaccine whereas as per the central excise record M/s Panheber Biotec Pvt. Ltd./Panera Biotec has applied for central excise registration only on 07/03/2011 which was provided to them on 16/05/2011. We also take note of the fact that the financial statements of M/s Panera for the relevant period i.e. 2008-2009 did not show any supply of vaccine to the appellant. We find that the appellant have not been able to advance any potent evidence to controvert the findings of the Department that vaccine was being manufactured by the appellant on the strength of vaccine manufacturing license issued by the competent authority to M/s Panera Biotech.

13. It is a matter of the common sense that any independent manufacture need to have a independent power connection of electricity or sub-meter for supply of electricity etc. It is surprising that the appellant have not been able to produce any evidence to prove that M/s Panheber/Panera Biotec Pvt. Ltd. existed on their premises independently and they had their own independent electricity connection or sub-lease connection from the main unit of M/s Panacea Biotec Ltd. We take note of the fact that no goods can be manufactured without utilization of electricity/power and from the entire record of the appeal and submissions made by the appellant, we do not find any iota of evidence to indicate that M/s Panheber/Panera Biotec Pvt. Ltd. had independently utilized power for manufacture of vaccine.

14. We also find that as per the contract, in case M/s Panheber/Panera used the facilities of machinery, equipment, etc., they would pay charges at the rate of Rs. 3 lakhs per day to the appellant. It has been pointed out to us that and no payment have been made for use of plant and machinery of the appellant. However, balance sheet of M/s Panheber reveals that Panheber had plant and machinery (Gross value of only) Rs. 8,64,423/- and the total asset were amount of Rs. 14,76,702/- as on 31/03/2008 and 31/03/2009. Further Schedule XIII – Significant Accounting Policies and Notes to accounts at point No. 8 shows that there was no transaction between Panheber and the appellant in this regard. Nor does the balance sheet show receipt of Rs. 4.5 crore by Panheber in 2008-2009.

15. These facts clearly bring out that M/s Panera Biotec Ltd. only existed on paper and actually goods are manufactured by the appellant in the name of Panera Biotec Ltd.

16. Its matter of record that manufacturing and clearance of vaccine has been shown by the appellant in their own statutory records for the relevant period including in VAT records. As the appellant is professionally managed manufacturing plant and it is beyond our comprehension that the goods manufactured by some other plant which is a separate legal entity will find a place in the records of the appellant's statutory books or stock records. We find that these evidences cannot be rejected lightly and the Department has rightly raised the issue of mis-utilization of the Cenvat credit.

17. In view of the entire above discussion, we are of the view that from the record of the appeal and all the arguments it appears that the appellant have failed to adduce any evidence to prove that M/s Panheber/Panera Biotec Pvt. Ltd. had any independent manufacturing facility within the appellant's own premises and we do not find any fault in the Department's conclusion that it is the appellant who had manufactured the vaccine in the name of M/s Panheber/Panera Biotec Pvt. Ltd.

18. Thus, we do not find that any legal infirmity in the impugned order-in-original. We uphold the same and the appeal is dismissed.

(Order pronounced in open court on 01/10/2019)

[Back](#)

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH-COURT NO.I

[Arising out of the OIA No.07/Commr/PKL/2009-10 dated 12.08.2009 passed by the CCE (Appeals), Panchkula]

M/s Modern Diaries Ltd.

Appellant

Vs.

CCE, Panchkula

Respondent

Appearance Sh. Manish Gaur, Advocate- for the appellant

Sh. G.M. Sharma, AR- for the respondent

CORAM:HonbleMr.Ashok Jindal, Member (Judicial)

HonbleMr.Devender Singh, Member (Technical)

FINAL ORDER NO.: 61530 / 2016

PER: ASHOK JINDAL

1. The appellant is in appeal against the impugned order denying the cenvat credit on certain items used in the fabrication of storage tanks, platforms and pipelines.

2. The brief facts of the case are that the appellant is engaged in the manufacture of casein and lactose. The appellant was operating under the Cenvat scheme and availing cenvat credit on inputs and capital goods. During the period from 31.12.2005 to 30.06.2007, the appellant availed cenvat credit on various steel plates, stainless steel rolled coil, stainless steel H.R. Coils, SS Strips Coil, Asbestos packing/Tape, Channels, Shapes and sections, Mill Plates, bars, Joists, etc. and used them in the fabrication of storage tanks, platforms and pipelines. An audit was conducted in the premises of the appellant and raised an objection to the availment of the cenvat credit on these items used in the manufacture of exempted capital goods under Notification No. 67/95-CE dated 16.03.1995. The matter was contested by the appellant but the adjudicating authority denied the cenvat credit. Consequently, the demand was confirmed and penalty was also imposed on the appellant. Aggrieved from the said order, the appellant is before us.

3. The Id. Counsel for the appellant submits that these items in question have been used by the appellant in the fabrication of storage tanks, platforms and pipelines and the usage was explained to the adjudicating authority in detail. Therefore, the appellant is entitled to avail cenvat credit on the steel items used in fabrication of storage tank, as storage tank is the capital goods are entitled for cenvat credit under Rule 2(a) of the Cenvat Credit Rules, 2004. He further submits that the storage tank is fixed with nuts and bolts and it can be unfastened, therefore, it cannot be said that it is the immovable property and therefore no manufacture. In that circumstances, the impugned order to be set aside.

4. To support this Contention he relied on the certificate issued by the Chartered Engineer where the Chartered Engineer has visited the factory of the appellant on 03.09.09 and examined the various machinery installed in the factory and filed the detailed report.

5. On the other hand, the Id. AR submits that the Chartered Engineer has given the report without examination, therefore, the same cannot be relied upon.

6. Heard the parties and considered the submissions.

7. The Id. Counsel during the course of arguments have produced Chartered Engineer certificate/report which has been issued after examining the storage tank installed in the factory premises of the appellant and that Chartered Engineer report is self explanatory for usage of the items but the same has not been placed before the

adjudicating authority for consideration but placed before us. In that circumstances, it would be in the interest of justice to remand matter back to the adjudicating authority for denovo consideration of the issue to entitlement of the cenvat credit on steel items which is claimed by the appellant to be used in fabrication of storage tank etc.

8. In view of the above observations, we set aside the impugned order. The matter is remanded back to the adjudicating authority to pass an appropriate order after considering the report of the Chartered Engineer placed before us by the appellant and in the light of the various judicial pronouncements as on date on the issue.

Appeal is disposed of in the above manners.

(Dictated and pronounced in the open court)

(Devender Singh)
Member (Technical)

(Ashok Jindal)
Member (Judicial)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI
REGIONAL BENCH
COURT NO. II**

Excise Appeal No. 85589 of 2019

Arising out of Order-in-Appeal No. NA/GST A-III/MUM/271/18-19, Dated: 12.11.2018
Passed by Commissioner of GST and CX. (Appeals-III), Mumbai

Date of Hearing: 20.01.2020

Date of Decision: 20.01.2020

**M/s ACCUSYNTH SPECIALITY CHEMICALS PVT LTD
SHIVAM CHAMBERS, 106/108, 1ST FLOOR, S.V. ROAD
GOREGAON WEST, MUMBAI-400062**

Vs

**COMMISSIONER OF CGST
PALGHAR, UTPAD SHULK BHAWAN, 5TH FLOOR
BANDRA KURLA COMPLEX, BANDRA EAST
MUMBAI-400051**

Appellant Rep by: Shri Rajiv Gupta, Consultant

Respondent Rep by: Shri N N Prabhudesai, AR

CORAM: S K Mohanty, Member (J)

FINAL ORDER NO. A/85149/2020

Per: S K Mohanty:

Heard both sides and perused the records.

2. The learned Commissioner (Appeals) vide the impugned order dated 12.11.2018 has denied the refund benefit claimed by the appellant under Rule 5 of the Cenvat Credit Rules, 2004, holding that the period of limitation provided under Section 11B of the Central Excise Act, 1944 should be applicable for claiming the refund amount. The issue arising out of the present dispute is no more res integra in view of Order No. A/85514/2019 dated 13.03.2019 of this Tribunal, passed in the case of *Technocraft Industries (I) Ltd.* The Tribunal has held that the limitation period provided under Section 11B ibid is applicable for refund claim of accumulated Cenvat credit in terms of Rule 5 ibid. The relevant paragraphs in the said order are extracted herein below:-

"7. The short issue involved in the present appeal for determination is whether the cash refund claim of accumulated CENVAT Credit under Rule 5 of CENVAT Credit Rules, 2004 for the period January to Sept, 2008 filed by the appellant on 3.9.2010 is barred by limitation or otherwise. Undisputedly, the exports were carried out from the date of filing of refund claim. The contention of the appellant that the period prescribed under Section 11B to claim the cash refund of the accumulated Cenvat credit is not applicable. The Revenue relied upon the judgment of Hon'ble Madras High Court in GTN Engineering (supra), which was subsequently followed in Hyundai Motors' case (supra). We find that the issue has been considered at length by the Hon'ble Madras High Court in the case of GTN Engineering (supra) and observed as follows: -

"14. The said notification prescribes a period of one year, as provided under section 11B of the Central Excise Act, for the purpose of making application in Form-A along with prescribed enclosures and also the relevant extracts of the records maintained under the Central Excise Rules, 2002, Cenvat Credit Rules, 2004 or Service Tax Rules, 1994 in original. That application should be filed before the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be. For the purpose of finding out as to the relevant date for the purpose of making claim for refund of CENVAT credit, Rule 5 should be made applicable. It is the contention of the learned counsel for the assessee that the provision defining relevant date does not cover the claim for refund of CENVAT credit. We may point out that when a statute empowered for such claim, the said provision must be read to find out as to the relevant date. Rule 5 specifies that "where any input or input service is used in the manufactures of final product which is cleared for

export under bond or letter of undertaking as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed."

15. A reading of the above rule, though there is no specific relevant date is prescribed in the notification, the relevant date must be the date on which the final products are cleared for export. If any other conclusion is arrived, it will result in disentitling any person to make a claim of refund of CENVAT credit. Admittedly, the respondent has made a claim only invoking Rule 5 of the CENVAT Credit Rules, 2004. In that view of the matter, there cannot be any difficulty for us to hold that the relevant date should be the date on which the export of the goods was made and for such goods, refund of CENVAT credit is claimed.

16. The learned counsel for the respondent would rely upon a judgment of the Gujarat High Court reported in 2008 (232) E.L.T. 413 (Guj.) [Commissioner of Central Excise and Customs, Surat-I v. Swagat Synthetics]. That was a case relating to sub-rule (13) of Rule 57F of Central Excise Rules, 1944, which reads as under :

"(13) Where any inputs are used in the final products which are cleared for export under bond or used in the intermediate products cleared for export in accordance with sub-rule (4), the credit of specified duty in respect of the inputs so used shall be allowed to be utilised by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification in the Official Gazette."

The said rule does not prescribe any time-limit. In the absence of such prescription as to the limitation, the Gujarat High Court has held that the claim of refund could not be rejected on the ground of limitation.

17. The learned counsel would also rely upon a Judgment of Madhya Pradesh High Court at Indore reported in 2009 (236) E.L.T. 248 (M.P.) [STI India Ltd. v. Commissioner of Customs and Central Excise, Indore]. In that case, though the Court has held that Clause 6 of Appendix read with Section 11B of Central Excise Act, 1944, cannot be made applicable insofar as the period of limitation is concerned when a claim for CENVAT credit is made, a reading of the said provision shows that there is no reference to Rule 5. With great respect, we are not in agreement with the said judgment as the judgment was rendered based on the rules and the notification which are procedural in nature. As we have found that but for the provision of Rule 5 r/w notification, the respondent could not have filed the application for refund, he has to satisfy the limitation clause as provided under Section 11B of the Act.

18. In view of the above, the order of CESTAT holding that the limitation is not applicable to the facts in question to the case has to be set aside. Accordingly the same is set aside.

8. We do not find any reason not to follow the ratio laid down by of the Hon'ble Madras High Court in GTN's case (supra). Consequently, the impugned order is upheld and appeal, being devoid of merit, is dismissed."

3. In view of the above decision of the Tribunal, I do not find any infirmity in the impugned order passed by the learned Commissioner (Appeals) in denying the refund benefit to the appellant on the ground of limitation. Accordingly, the appeal filed by the appellant is dismissed.

(Dictated and pronounced in the open court)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 415 of 2010

(Arising out of Order-in-Appeal No. P-III/VM/242-245 dated
23.11.2009 passed by the Commissioner of Central Excise (Appeals),
Pune-III)

Commissioner of Central Excise, Pune-III Appellant

ICE House, 41-A, Sassoon Road, Opp. Wadia College
Pune – 411001, Maharashtra

Versus

M/s Mali Pipe Industries Respondent

Plot No. 67, 68, 69, 84 & 85,
Sangola Co-op Industrial Estate, Kamlapur,
Sangola, Solapur – 413307, Maharashtra

M/s Kumar Polyextrusion,

Plot No. 94 & 95, Sangola Co-op Industrial Estate,
Kamlapur, Sangola, Solapur – 413307

**Shri Kumar Shankar Mali,
Proprietor of M/s Mali Pipe Industries**

Plot No. 67, 68, 69, 84 & 85,
Sangola Co-op Industrial Estate, Kamlapur,
Sangola, Solapur – 413307, Maharashtra

**Smt. Latika Kumar Mali,
Proprietor of M/s Kumar Polyextrusion**

Plot No. 94 & 95, Sangola Co-op Industrial Estate,
Kamlapur, Sangola, Solapur – 413307

Appellant Rep by: Shri N N Prabhudesai, Supdt, AR

Respondent Rep by: Shri M P Joshi, Adv.

CORAM: D M Misra, Member (J)

P Anjani Kumar, Member (T)

FINAL ORDER NO. A/86566/2019

Per: D M Misra:

This is an appeal filed by the Revenue against Order-in- Appeal No. P-III/VM/242-245 dated 23.11.2009 passed by the Commissioner of Central Excise (Appeals), Pune-III.

2. Briefly stated the facts of the case are that the respondent M/s Mali Pipe Industries is a proprietorship firm having its proprietor Shri Kumar Shankar Mali engaged in the manufacture of excisable goods namely, PVC pipes of various sizes falling under Chapter sub-heading 39 of Central Excise Tariff Act, 1985. They have availed benefit of SSI exemption under the relevant notification No. 8/2003-CE dated 1.3.2003 for the clearances made during the relevant financial years 2005-06 & 2006-07. On the basis of investigation that the respondent had wrongly availed the SSI exemption benefit for the financial year 2005-06 & 2006-07 against clearance of PVC pipes by not including the value of clearances from the other unit namely, M/s Kumar Polyextrusion, which is owned by the wife of the proprietor Shri Kumar Shankar Mali, show-cause notice was issued to the respondent for recovery of duty short paid for the said financial years 2005-06 and 2006-07, amounting to Rs.27,66,055/- by clubbing the clearance of both the units; proposed confiscation of unaccounted raw materials in M/s Kumar Polyextrusion valued at Rs.63,29,950/-, proposed for confiscation of machinery and raw materials valued at Rs.12,00,000/- and penalty under relevant provisions; personal penalty on the another noticees. On adjudication, the demand was confirmed with interest and penalty; seized materials were directed to be confiscated with an option to release the same on payment of fine and personal penalty imposed on other noticees. Aggrieved by the said order, the respondents filed appeal before the learned

Commissioner (Appeals), who in turn, partly allowed their appeal by upholding confiscation of goods directed by the adjudicating authority, however, set aside the demand of duty, penalty and interest of Rs.27,66,055/- confirmed on clubbing the clearance, confiscation of unaccounted raw materials, demand of Rs.34,466/- confirmed against M/s Kumar Polyextrusion, set aside the penalty against Mrs. Latika Kumar Mali and reduced the penalty to Rs.25,000/- against Shri Kumar Shankar Mali. Hence, the Revenue is in appeal with the prayer that the Order of the Commissioner (Appeals) be set aside as far as clubbing issue is concerned.

3. Learned AR for the Revenue reiterated their grounds of appeal. He has further submitted that the learned Commissioner (Appeals) has ignored the statements recorded during the course of investigation, the evidence on record indicating that even though on paper M/s Mali Pipe Industries and M/s Kumar Polyextrusion are shown to be separate legal entities but in fact in the former Unit, Shri Kumar Shankar Mali was the proprietor and in M/s Kumar Polyextrusion, his wife Mrs. Latika Kumar Mali was the proprietress for name sake. All the activities of both units have been controlled and managed by Shri Kumar Shankar Mali.

4. Further, he has submitted that during the course of search of all the units and common office premises, it was noticed that the screens of different brands were lying in the factory of M/s Kumar Polyextrusion, 150 Nos. of 63mm and 315 Nos. of 90 mm size were found short when compared with RG-1 Stock of M/s Mali Pipe Industries and the Manager Shri Waghmare has admitted that these pipes were cleared on 20.4.2007 without preparing invoices and without duty paying documents. Similarly, the vehicle bearing No. MH-45-0012 loaded with 400 pipes of 90mm and 70 pipes of 50mm of Supriya brand was found at M/s Kumar Polyextrusion without any documents. Further, during the course of investigation, Shri Vitthal Ganpat Waghmare, Manager of M/s Mali Pipe Industries admitted to have been looking after production and clearance of both the units and loading of pipes were done as per Kumar Shankar Mali's instructions. The sales invoices were for both Units were prepared at the instruction of Shri Kumar Shankar Mali and manufacturing of pipes of different sizes in both the units were undertaken according to the direction of Shri Kumar Shankar Mali. Raw materials required for both the units were purchased by Shri Kumar Shankar Mali. All instructions in respect of M/s Kumar Polyextrusion was received from Shri Kumar Shankar Mali and the proprietress Mrs. Latika Kumar Mali was neither involved in day-to-day activity nor looking after the business of the company. Further, he has submitted that the screens of brand names viz, 'Mali Pipe', 'Finoflex' and 'Finorex' are in the custody of M/s Kumar Polyextrusion.

5. He has further contended that in his statement, Shri Kumar Shankar Mali has admitted to have financed M/s Kumar Polyextrusion by selling agricultural land and from the profit earned and loan from Sangola Branch of Pandharpur Urban Bank. Further in his statement, he had stated that he was looking after all the activities of M/s Kumar Polyextrusion. The learned AR has further submitted that Mrs. Latika Kumar Mali in her statement admitted that she was not at all concerned with the day-to-day working of unit and entire work of factory was looked after by her husband for which she has executed the Power of Attorney in his name. Further, she has admitted that she was not aware of anything about business activity of M/s Kumar Polyextrusion and not knowing who is doing what work in M/s Kumar Polyextrusion; when specifically asked about the status of the company, she has stated that she did not know what is a power of attorney and that as per direction of her husband she has signed all the papers and what was written on the paper was not known to her; she had also stated that whenever required her husband was taking her signatures on papers and she did not know anything and that her husband never gave her full information, he used to ask her to sign and she used to sign. She also admitted that she was only a housewife and just lent her name as proprietress. Further, the learned AR has submitted that the aabak & Jabak i.e. incoming and outgoing records were maintained in the common office for both the units and the amount of Rs.2,00,000/- though advanced by M/s Mali Pipe Industries to M/s Kumar Polyextrusion, which the later had claimed to have been returned subsequently, but no evidence has been produced in this regard.

6. It is his contention that the goods are manufactured at both the units under common brands and common private records maintained for purchase, issue for production of raw material and sale of finished products for both units, common register for inward/outward movement of manufactured goods and raw materials are maintained at M/s Mali Pipe Industries. In support, the learned AR has referred to the extract of incoming and outgoing register mentioned at para 34 of the adjudication order. It is his contention that learned Commissioner (Appeals) has erred in appreciating the said

evidence brought on record by the Department that even though both the units are separate on paper, but controlled by one person i.e. Shri Kumar Shankar Mali, proprietor of M/s Mali Pipe Industries. It is argument that in such circumstances, the clearance of M/s Kumar Polyextrusion be added to the clearance value of M/s Mali Pipe Industries. In support, he has referred to the judgment of this Tribunal in the case of *Libra Engineering Works Vs. Commissioner of Central Excise, Ahmedabad-I - 2017 (339) ELT 610 (Tri-Ahmd)*, *Himgiri Plastics Vs. Commissioner of Central Excise, Delhi -II - 2017 (357) ELT 153 (Tri-Del)*, which has been upheld by the Hon'ble Supreme Court reported as *2018 (360) ELT A137 (SC)*, and *Sansuk Industries Vs. Commissioner of Central Excise, Mumbai-IV - 2017 (350) ELT 265 (Tri-Mum)*.

7. Per contra, learned Advocate for the respondents has submitted that show-cause notice was issued to them on 16.10.2007 to all the four respondents proposing to deny SSI exemption by clubbing clearance of M/s Mali Pipe Industries and M/s Kumar Polyextrusion, which on adjudication was confirmed and personal penalty imposed on other two respondents. All the four respondents had filed appeal before the learned Commissioner (Appeals). It is his contention that the Revenue has filed only one appeal mentioning all the four respondents whereas the Revenue ought to have filed separate appeals against every party. Since only one appeal has been filed, therefore, the appeal becomes infructuous.

8. On merit, the Ld. Adv. has submitted that both these units having separate Income Tax PAN No., Sales Tax registration, Bank A/c No., SSI registration etc. and these are separate in existence and also function independently having full-fledged machinery and manufacturing activity. It is his argument that there is no free flow of finance between respondent No. 1 and 2. Initially in the year 2001-02, a loan of Rs.2.00 lakhs was advanced to Shri Kumar Shankar Mali, which was later returned by M/s M/s Kumar Polyextrusion. Shri Kumar Shankar Mali is proprietor of Mali Pipe Industries. It is his contention that merely because two units are owned by husband and wife, clearance of one unit cannot be clubbed with another in considering the SSI exemption notification. Further, he has also submitted that merely because both Units were operating from common office, common inward and outward register of materials and finished goods, common staff etc. cannot be a ground to club clearance of both units. In support, they have referred to the judgment of this Tribunal in the case of *Commissioner of Central Excise, Kanpur Vs. Sharad Industreis - 2013 (294) ELT 561*, *Commissioner of Central Excise, Vadodara Vs. Tightwell Fasteners - 2008 (230) ELT 163*, *Shri Natraja Industries Vs. Commissioner of Central Excise, Salem - 2005 (187) ELT 45*, *Renu Tandon Vs UOI - 1993 (66) ELT 375 (Raj.)*.

9. In his rejoinder, the Ld. A.R. for the revenue has submitted that there is no necessary to file separate appeals for each respondent against order of the Commissioner (Appeals). The Department has complied with the provisions of section 6 A of the CESTAT (procedure)Rules, 1982 .

10. Heard both sides and perused the records.

11. The short question involved in the present appeal is whether M/s Mali Pipe Industries and M/s Kumar Polyextrusion are entitled for SSI exemption benefit under Notification No. 8/2003-CE dated 1.3.2003 separately or the clearance value of M/s Kumar Polyextrusion be clubbed with that of M/s Mali Pipe Industries, in considering the said SSI benefit of exemption notification for the later Unit.

12. It is the contention of the learned Advocate for the respondents that both M/s Mali Pipe Industries and M/s Kumar Polyextrusion though proprietorship concerns and the husband and wife are proprietors of the said units respectively, but they have separate premises for manufacture and clearance of the same got separate existence in law inasmuch as they procured/purchased raw materials separately and processed the same in their units and. They possess separate Income Tax PAN No., Sales Tax/ VAT registration number, hence clubbing of clearance of these two units in considering the benefit of exemption notification is not sustainable in law.

13. The Revenue, on the other hand, mainly relies upon the evidence of the proprietors of the respective concern. It is the argument of the Revenue that even though on paper M/s Kumar Polyextrusion has been shown a separate legal entity, whose proprietress is Smt. Latika Kumar Mali, W/o Shri Kumar Shankar Mali, but in fact, the said unit is fully controlled by Shri Kumar Shankar Mali, husband and proprietor of M/s Mali Pipe Industries. In her statement, Smt. Latika Kumar Mali has admitted that she is not at all aware of any of the activities of M/s Kumar Polyextrusion nor even aware of how the said unit is functioning and carrying out its day-to-day business of manufacture and sale of

the finished goods. In her statement, she has categorically stated that the entire business and management had been carried out by her husband Shri Kumar Shankar Mali and she being a housewife signs all the paper as directed by her husband from time to time without being aware of what paper was placed before her for signature. The statements furnished by the proprietors and the employees were never retracted nor had been challenged during the entire proceeding as untrue or collected by application of force or question. Therefore, these statements cannot be ignored in absence of reasons.

14. We find that the learned Commissioner (Appeals) has erred in appreciating the evidence as a whole and in particular the control and management of the unit M/s Kumar Polyextrusion by Shri Kumar Shankar Mali of M/s Mali Pipe Industries even though on paper both the units were shown and claimed to have separate existence and functions separately carrying out its business of manufacture and sale of goods independent to each other. On the contrary, the entire operation and business of both the units undoubtedly controlled and managed by one person that is Shri Kumar Shankar Mali, hence, the clearance of both units be clubbed. The facts of the present case are more or less similar to the facts of the case in Libra Engineering Works (supra) and Himgiri Plastics (supra) case, hence by the judgment of this Tribunal delivered in the said case. In these circumstances, we do not find merit in the impugned order setting aside the demand arrived at by clubbing the clearance value of M/s Kumar Polyextrusion with that of M/s Mali Pipe Industries while considering the benefit of SSI exemption under Notification No. 8/2003-CE dated 1.3.2003 as amended from time to time.

15. The learned Advocate for the respondents raised another issue that the Revenue has not filed four appeals but instead filed only one appeal, therefore, the same is not maintainable. Revenue's answer to the said argument is that the department has complied with the provisions of Rule 6A of CESTAT(Procedure) Rules, 1982 in filing the number of appeals as per the number of adjudication orders. We find merit in the contention of the Revenue. The learned Commissioner (Appeals) has decided the issues partly in favour of the respondents, modifying the Order of the adjudicating authority, therefore, the Revenue has filed only one appeal challenging the Order-in-Appeal only to the extent it was not accepted by the Revenue, that is on the issue of clubbing of clearance. Consequently, we are of the view that the Appeal is sustainable.

16. In the result, the impugned order is modified by setting aside the same to the extent of dropping the demand of Rs.27,66,055/-, interest and penalty on the issue of clubbing of clearance of M/s Mali Pipe Industries & M/s Kumar Polyextrusion and the Order-in-Original to that extent is restored. Appeal disposed of accordingly.

(Pronounced in court on 06.09.2019)

[Back](#)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH AT MUMBAI**

REGIONAL BENCH - COURT NO. 02

Excise Appeal No. 88943 of 2018

(Arising out of Order-in-Appeal No. NSK/EXCUSS/000/APPL/155/18-19 dated
05.07.2018 passed by Commissioner of GST and Central Excise (Appeals),
Nashik)

M/s Shri Dnyaneshwar SSK Ltd.

Dnyaneshwarnagar,
Post-Bhende SK-414605,
Taluka:Newasa,
Dist.: Ahemednagar.....**Appellant**

Vs

**Commissioner of Central Excise
& Service Tax, Nasik**

Kendra Rajaswa Bhawan,
Old Agra Road, Gadkari Chowk,
Nasik - 422002.....**Respondent**

FINAL ORDER NO. A/85658 / 2020

Date of Hearing: 06.03.2020

Date of Decision: 06.03.2020

Brief facts: Appellant had availed Cenvat credit on the strength of the invoice issued by M/s Dnyaneshwar Trust. The amount mentioned therein was paid as per a stay order . This was objected by the Department. Matter reached CESTAT. Appellants relied upon the decision in the case of Central Excise, Jaipur-II Vs. Hindustan Zinc Ltd., [2013 (290) E.L.T. 398 (Tri.-Del.)].

Stand of the Revenue. :Cenvat credit of only those duties and service tax mentioned under Rule 3 of the Cenvat Credit Rules, 2004 are allowed as credit. The pre-deposit made under Section 35F of the Central Excise Act, 1944 is mentioned in Rule 3 . Revenue relied upon case laws in (i) Suvidhe Ltd. Vs. Union of India – 1996 (82) E.L.T. 177 (Bom.), (ii) Nelco Limited Vs. Union of India – 2002 (144) E.L.T. 56 (Bom.) and (iii) Hindustan Zinc Ltd. Vs. Commissioner of Central Excise, Jaipur-II – 2013 (292) E.L.T. 260 (Tri.-Del.) etc.

Held : CESTAT vide **Order No.** A/85658 / 2020 dated 6/3/2020 of CESTAT, Mumbai. Held that : The credit availed of pre-deposit was denied. However, the Tribunal found that the appellant had bona fidely believed that the amount paid by the service provider should be entitled as credit to the appellant and thus waived penalty.

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, MUMBAI**

Excise Appeal No. 88080 of 2018

Arising out of Order-in-Appeal No. NSK-EXCUS-000-APPL-416-17-18, Dated: 28.03.2018
Passed by Commissioner of CGST & Central Excise (Appeals), Nashik

Date of Hearing: 26.02.2019

Date of Decision: 26.08.2019

**M/s ISMT LTD
PLOT NO. C-1, MIDC AREA, AHMEDNAGAR-414111**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
NASIK, KENDRA RAJASWA BHAWAN, OLD AGRA ROAD
GADKARI CHOWK, NASIK - 422002**

Appellant Rep by: Ms Padmavati Patil, Adv.

Respondent Rep by: Ms Anuradha Parab, AR

CORAM: S K Mohanty, Member (J)

FINAL ORDER NO. A/86467/2019

Per: S K Mohanty:

This appeal is directed against the impugned order dated 28.03.2018 passed by the learned Commissioner (Appeals), CGST & Central Excise, Nashik.

2. Briefly stated, the facts of the case are that the appellants are engaged in manufacture of seamless pipes and tubes, falling under Chapter 7304 of the Central Excise Tariff Act, 1985. During the period 2013-14 and 2014-15, the appellants had exported the finished goods without payment of central excise duty, by executing the letter of undertaking. The proof of export in respect of the goods were not received within a period of six months and accordingly, the appellants had paid central excise duty involved on the goods cleared for export. Subsequently, the proof of export was received by them in the year 2016 and was submitted before the jurisdictional central excise office. Thereafter, the appellants had filed the refund applications, claiming refund of central excise duty paid on the exported goods. The applications were filed under Section 11B of the Central Excise Act, 1944. Vide order dated 18.01.2017, the original authority had rejected the refund applications on the ground that the same were filed beyond the period of one year from the relevant date and as such, are barred by limitation of time as per the provisions of Section 11B *ibid*. The impugned order has upheld the adjudication order, so far as it rejected the refund applications filed by the appellants. The learned Commissioner (Appeals) has held that relevant date in the case of the refund applications should be considered as the date of payment of duty and since the applications were filed beyond one year from such relevant date, the claim is clearly barred by limitation of time. Further, he has also held that the appellants did not deposit the duty amount under protest and not opted for the provisional assessment. Feeling aggrieved with the impugned order, the present appeal is preferred before this Tribunal.

3. The learned Advocate appearing for the appellants submitted that the goods in question were duly exported by the appellants and due to non-availability of proof of export within the prescribed time frame, the central excise duty amount was deposited by the appellants. Thus, she submitted that upon receipt of proof of export, since the refund claim applications were filed within one year from the date of such receipt, the refund claim will not be barred by limitation of time. In other words, it was stated that submission of proof of export should be considered as the "relevant date" for filing of the refund application under Section 11B *ibid*. The learned Advocate further submitted that the amount in question deposited by the appellants into the Government exchequer should be considered as 'deposit of amount' and not as 'payment of duty' and thus, the time limit prescribed under Section 11B would not be applicable.

4. On the other hand, the learned AR appearing for Revenue reiterated the findings recorded in the impugned order and further submitted that since the appellants had paid the duty amount voluntarily and filed the refund applications beyond the prescribed period of one year from the date of such payment, the claim applications are clearly barred by limitation of time. She further submitted that since the refund applications were filed by the appellants and considered by the authorities under the provisions of Section 11B *ibid*, the time limit prescribed there under has to be strictly adhered to and different interpretation cannot be placed to decide the matter in another way. She has relied upon the judgment of Hon'ble Supreme Court in the case of *Miles India Limited Vs. Assistant Collector of Customs-1987 (30) E.L.T. 641 (S.C.)*, *Collector of C.E., Chandigarh Vs. Doaba Cooperative Sugar Mills-1988 (37) E.L.T. 478 (S.C.)* and *Assistant Collr. of Cus. Vs. Anam Electrical Manufacturing Co.-1997 (90) E.L.T. 260 (S.C.)* to justify such stand.

5. Heard both sides and perused the records.

6. Section 11B *ibid* provides the mechanism for filing of refund application and consideration of the same by the statutory authorities. The statutory provision *inter alia*, mandates that the refund application should be filed by the claimant before the expiry of one year from the relevant date. The phrase 'relevant date' has been explained in Section 11B *ibid* as under:-

"(B) "relevant date" means,--

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,-

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;

(f) in any other case, the date of payment of duty."

7. As per the explanation contained in Section 11B *ibid*, the term 'relevant date' for consideration of the present dispute can be itemized either under clauses (eb) or (f) of the above reproduced explanation. In this case, it is an admitted fact on record that the appellants did not resort to the provisional assessment for payment of duty in question on removal of final product from the factory. Thus, the case of the appellants will not be governed under clause (eb) above for consideration of the relevant date differently. On the contrary, the case of the appellant squarely falls under purview of clause (f), whereunder the relevant date should be construed as "the date of payment of duty". Admittedly, in this case, the appellants had filed the refund applications beyond the

period of one year from the date of payment of duty attributable to exportation of goods. Since the provisions of Section 11B *ibid* have not prescribed any specific relevant date for consideration of filing of refund claim after obtaining the proof of export of goods, the relevant date for such purpose should be governed only under clause (f) contained in the explanation appended to Section 11B *ibid*.

8. In this case, the appellants had deposited the central excise duty on removal of excisable goods from the factory premises. Such amount of duty was deposited into the Central Government account under proper accounting code. Thus, under the circumstances, it cannot be pleaded that the duty amount deposited by them should be construed as 'mere deposit' in the hands of the Government and for grant of the said refund amount, the provisions of Section 11B *ibid* would not be applicable. Since, statute clearly mandates that refund claim has to be lodged within a period of one year from the relevant date; such prescribed time limit has to be strictly adhered to by the authorities functioning under the statute. In this context, the Hon'ble Supreme Court in the case of Doaba Co-operative Sugar Mills (*supra*), have ruled that in making claims for refund before the departmental authorities, an assessee is bound within the four corners of the statute and the period of limitation prescribed there under must be adhered to and that the authorities functioning under the statute cannot place different interpretations and are bound to follow the provisions of the statute alone. Further, in the case of Anam Electrical Manufacturing Co. (*supra*), the Hon'ble Apex Court have also held that statutory time limit not extendable by any authority or court in case of claim of refund filed under the central excise statute. The Hon'ble Apex Court in the case of Miles India Ltd. (*supra*), in a Customs refund case have also ruled that the authorities acting under the Act are justified in disallowing the claim for refund, as they were bound by the period of limitation provided under the statute. Though, the said judgment was delivered by the Hon'ble Apex Court in context with the Customs statute, but the ratio of the said judgment is squarely applicable to the facts of the present case inasmuch as both the Customs as well as Central Excise statutes prescribe the time limit for filing of refund application.

9. In view of the above discussions and analysis, I do not find any infirmity in the impugned order passed by the learned Commissioner (Appeals) and uphold the same. Accordingly, appeal filed by the appellant is dismissed.

(Pronounced in the open court on 26.08.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, MUMBAI
COURT NO. I**

Excise Appeal No. 1000 of 2010

Arising out of Order-in-Original No. 2/CEX/2010, Dated: 24.02.2010

Passed by Commissioner of Central Excise, Kolhapur

Date of Hearing: 05.12.2019

Date of Decision: 14.01.2020

**M/s SHIVNATH RAI HARNARAIN INDIA LTD
B-16, BHAGWANDAS NAGAR
NEW DELHI-110001**

Vs

**COMMISSIONER OF CENTRAL EXCISE
KOLHAPUR, VASANT PLAZA, RAJARAM ROAD
KOLHAPUR - 416003**

Appellant Rep by: Shri R K Verma & D K Singh, Advs.

Respondent Rep by: Ms A S Parab, AC (AR)

CORAM: D M Misra, Member (J)

Sanjiv Srivastava, Member (T)

FINAL ORDER NO. A/85040/2020

Per: Sanjiv Srivastava:

This appeal is directed against the Order in Original No 2/CEX/2010 dtd 24.02.2010 of Commissioner Central Excise Kolhapur. By the impugned order Commissioner held as follows:

(i) All the relevant bonds shall be enforced against M/s SRH if the above amounts of duty as confirmed below are not paid by them.

(ii) I, confirm the demand for Central Excise duty amounting to Rs 3,15,73,845/- (Rs Three Crores Fifteen Lakhs Seventy Three Thousand Eight Hundred and Forty Five Only) under the provisions of erstwhile provisions of Rule 13 of the C Ex Rules, 1944 and or Rule 19 of the Central Excise (No 2) Rules, 2001 and the provisions of Notification No 42/2001 CE(NT) dtd 26.06.2001 and the procedure laid down thereto.

(iii) The Merchant Exporter should also pay the interest as appropriate on such duty from the date of removal for export from the place of procurement till the date of payment of duty in terms of B-1 bond (General) read with clause 2(v)(b) of Notification No 42/2001 CE(NT) dtd 26.06.2001 as amended, read with Section 11 (AB) of C Ex Act, 1944.

(iv) I impose a penalty of Rs 75,00,000/- (Rupees Seventy Five Lakhs only) on M/s Shivnath Rai Harnarain (India) New Delhi under the provisions of Rule 26 of Central Excise (No 2) Rules, 2001.

2.1 Appellant is a Merchant Exporter having "Star Trading House" status. He has executed B-1 bond, as indicated in table below for removal of sugar for export from various factories located in various jurisdiction. Since they are "Star Trading House", the bonds were executed without any security. The quantum of sugar removed for export and quantum of duty involved on such removals is also as indicated. Appellant was not able to produce the "proof of export " within the period as prescribed in respect of the goods cleared by them for export without payment of duty as per Notification No **42/2001 CE(NT)** 26.06.2001. The proceeding were initiated against them for recovery of the duty not paid by them at the time of clearance of sugar in term of the bond executed by them.

S.N	Date/Value of Bond	Name of Unit M/s	Quantity Quintals	Duty forgone' Rs
1	11.06.2001/1,30,00,000	Shree Sankar SSK Ltd, Sadashiv Nagar	64,929	55,18,965
2	11.06.2001/2,30,00,000	S M S M P SSK Ltd	2,69,956	2,29,46,260

3	31.08.2001/72,25,000	Gadhinglaj Taluka SSK Ltd., Harali	48,628	41,33,380
4	11.06.2001/1,70,00,000	Krishna SSK Ltd Rathre	22,664	19,26,440
5	24.04.2001/1,06,25,000	Sant Tukaram SSK	1,25,000	56,93,750
4	Total		3,83,513	3,25,98,605

2.2 Three show cause notices were issued to the appellant asking them to show cause as to why-

i. Central Excise Duty amounting to Rs 55,18,965/- in respect of sugar procured from Shree Shankar SSK Ltd Sadashiv Nagar (SCN No V(17)15-58/Adj/P-II/02 dated 17.06.2002);

ii. Central Excise Duty amounting to Rs 2,29,46,260/- in respect of sugar procured from S M S M P SSK Ltd (SCN No V(17)15-57/Adj/P-II/02 dated 17.06.2002);

iii. Central Excise Duty amounting to Rs 41,33,380/- in respect of sugar procured from Gadhinglaj Taluka SSK Ltd., Harali (SCN No V(17)15-57/Adj/P-II/02 dated 12.07.2002);

iv. Central Excise Duty amounting to Rs 19,26,440/- in respect of sugar procured from Krishna SSK Ltd Rathre (SCN No VGN (19)1/SRHIL/02 dated 09.08.2002);

v. Central Excise Duty amounting to Rs 56,93,750/- in respect of sugar procured from Sant Tukaram SSK Ltd. (SCN NO VIII/CUS/POE/2001 04.08.2003);

a. should not be recovered from them;

b. interest in terms of the General B1 Bond read with clause 2(v)(b) of Notification No **42/2001 CE(NT)** should not be recovered from them;

c. penalty under Rule 209A of the Central Excise Rules, 1944 read with Section 38A and Rule 26 of the Central Excise (No. 2) Rules, 2001 should not be imposed on them.

2.3 First four Show Cause Notices were earlier adjudicated twice. By Order in Original No 7/CEX/07 dated 23.03.2007, in respect of these four show causes, the demand of duty of Rs 2,09,48,84/- was confirmed along with interest and penalty of Rs 2,09,48,845/-. Against this order Appellant preferred the appeal before CESTAT along with the application for pre-deposit in terms of Section 35F. CESTAT vide its order No 5/654/207/CI(EB) dated 03.09.2007 directed them to make a pre-deposit of Rs 50 Lakhs. Against this order of CESTAT, appellant filed appeal before Mumbai High Court. Mumbai High Court has vide its order dated 29.02.2008 held as follows:

"2. Similarly by another order of 31st December, 2005 pertaining to another sugar factory (in respect of other than 3 sugar factories which are subject matter of the earlier appeal) set aside the order with the direction to obtain decision of the Board and thereafter to proceed in the matter.

3. The Board thereafter by its Order No. 17/2006-Central Excise dated 16th June, 2006 directed consolidation of four show cause notices as set out in the order.

Grievance of the petitioners is that the Board has not consolidated all the show cause notices which were required to be consolidated so that an effective order could be passed. We now find that in respect of the show cause notice issued to M/s. Sant Tukaram S.S.K. Ltd., Kasarsai it is kept in the D.C. Pune Division and in case of M/s. Daulat S.S.K. Ltd., the documents are kept pending with A.C. (Bond) Mumbai - for finalization of proof of export order of consolidation is yet to be passed.

In case any other show cause notices are pending relatable to the issue we direct the petitioners herein to apply to the Board for consolidation of these show cause notices also with the show cause notice already consolidated by the order dated 16th June, 2006. We are informed that there are two other show cause notices. The decision to be taken as early as possible on the petitioners so applying.

4. It is the contention of the petitioners that for the purpose of showing that in fact the goods had been exported they would require the documents in respect of the sugar factories which have participated in the export proceedings and as such these documents should be made available to them when the show cause notices are being adjudicated. We find that the request is reasonable. We, therefore, direct the respondents and the Adjudicating Officer to call for the record and proceedings which the petitioners may apply for in the proceedings before the A.O. so as to enable the petitioner to establish their case. It will be open to the petitioners to apply for documents from the proceedings for the purpose of producing them before the A.O. in support of their contention.

5. Considering the above the impugned order dated 3rd September, 2007 is set aside and consequent by the order of the Commissioner (Appeals) dated 23rd March, 2007 is also set aside and the matter is remanded back to the Commissioner of Central Excise, Pune II, to proceed with the matter in terms of what we have aforesaid.

6. The Commissioner, Central Excise, Pune II, before whom the four show cause notices have been consolidated to proceed in the matter after the Board passes the order on the representation made by the petitioners herein. Such representation to be made within four weeks from today."

2.4 In terms of the directions issued by the Hon'ble Bombay High Court Order, Central Board of Excise and Customs has vide its order dated 11th August 2008, along with earlier four show cause notice consolidated for adjudication by Commissioner Central Excise Pune – II (Order dated 16th June 2006), directed consolidation of the Show Cause Notices issued in respect of the clearances made from Sant Tukaram SSK and Daulat SSK. Since no notice was issued in respect of the clearance made from Daulat SSK, the show cause notice issued in respect of Sant Tukaram SSK was also taken up for hearing and adjudication by the Commissioner Central Excise Pune-II.

2.5 Since the main grievance of the appellants in earlier proceedings before all the authority was that during the period under consideration they had exported sugar cleared not only from these unit, but from 13 units located in Maharashtra, and hence the clearances made from all the thirteen units should be taken into record and reconcile. Accordingly Commissioner has considered the documents pertaining to all the 13 units. He records in para 3 of the order as follows:

"I have considered the documents pertaining to the clearances of sugar from all the 13 units mentioned by M/s SRH while passing the order."

2.6 Commissioner has in para 5 of the impugned order recorded as follows:

"5 The above five show cause notices are issued because of irreconcilable deficiencies and discrepancies between the various documents namely AR-4/ARE-1, Shipping Bill, Bill of Lading, Invoices, Bank Realization Certificate etc. which have been produced by the noticee for acceptance of proof of export. Broadly, these discrepancies can be categorized as under:

(i) Original and duplicate AR-4/ARE-I with the Customs endorsement not produced.

(ii) The country of destination shown in the AR4/ARE-I and shipping bills are not tallying.

(iii) The sugar was removed from the factory in 100 Kgs. Bags but the shipping documents shown the shipment in 50 Kgs bags.

(iv) Date of shipment/let export in the shipping document is prior to date of ARE-I which is physically impossible.

(v) The shipping bill and the other shipping documents show procurement of the sugar from other Commissionerates than the Commissionerate in whose jurisdiction the sugar factory is located.

(vi) In case of some clearances from Sant Tukaram SSK, the sugar which was shown to have been exported was found to have been loaded on to railway wagons for direct shipment to Pakistan, but the AR-\$ which the exporter claimed to relate shipment was cleared from the factory nearly a month earlier.

(vii) AR-4 does not contain the country of export or the marks and nos on the packages so they cannot be matched with the shipping bills.

(viii) Quantity indicated in AR-4 does not tally with the quantity in shipping bill.

(ix) Date of Bank Realization Certificate is prior to the date of export.

(x) Bill of lading or Mate Receipts or both not produced."

2.6 After considering the documents produced and the submissions made by the appellant in respect of each of the issue specified above, Commissioner has vide the impugned order referred in para 1, supra adjudicated the matter.

2.7 Aggrieved by the impugned order, appellants are in appeal before CESTAT.

3.1 We have heard Shri R K Verma and Shri D K Singh, Advocates for the appellants and Ms A S Parab, Assistant Commissioner, Authorized Representative for revenue.

3.2 Arguing for the Appellants learned Advocate submitted that:-

- There was absolutely no diversion of the goods cleared for export from the various

factories located in Maharashtra. These goods were actually exported, however these demands are made for the reason that these exports have not been duly supported by the proper proof of export.

- All ARE-1s which are under dispute and all other ARE-1s are duly endorsed by the Customs Officer at the port of export. In some cases ARE-1s are perfectly correct and in some cases the endorsements are made under which the quantity cleared from factories under relevant ARE-1s and SBs do not tally. However the fact is that these ARE-1s were produced before the Customs Officer and have been duly endorsed by him certifying the actual export.

- Whatever goods were cleared for Mumbai Port under ARE-1s of different Sugar Mills were ultimately exported under 198 SBs (197 from Mumbai + 1 from Amritsar under which destination has been changed to Pakistan). On comparison of the goods cleared under these ARE-1s and exported under 198 Shipping Bills, only the 272 MT cannot be reconciled (approx 220 Grams per Quintal) which is due to handling wastage during re-packing of the same.

- Band Realization Certificate (BRC) has also been produced in respect of 196 SBs and only in respect of two SBs accounting for 350 MT the BRC are not available and not produced.

- Demand has been confirmed under Annexure "A" of impugned OIO on the basis of non production of Original copy of Original and Duplicate ARE-1s, photocopies of same duly by Customs have been produced. Hon'ble Mumbai High Court has in the matter of *M/s U M Cables [2013 (293) ELT 641 (Bom)]* held that demand could not have been confirmed merely for the reason that original of original and duplicate copy of ARE-1s have not been produced.

- Demand has been confirmed under Annexure "B" of impugned OIO on the basis that the ARE-1s were endorsed with the SBs which were prior to the date of clearance of sugar from the factory, which is not possible and in some cases Excise Commissionerate of goods cleared were shown as Hyderabad under the relevant SBs. Though it's a fact that goods could not have been exported prior to the clearance of the goods from the factory, but it is also true that the endorsement has been made by the Customs Officer. The goods were unloaded at the port and re packed in 50 kg bags from the original packing of 100 kgs the identification of the goods factory wise was not possible as sugar got mingled with the sugar cleared from other factories. Thus only option was to make endorsement on the basis of First in First Out (FIFO) basis but such criteria was not adopted which resulted in such mis match. They had submitted that there was no clearance of sugar from the factories located in Hyderabad and the same is mistakenly mentioned on the shipping bills in EDI system.

- Demand has been confirmed under Annexure "C" of impugned OIO on the basis that the quantity in SBs which was endorsed on the back of ARE-1s was more than the quantity cleared under ARE-1s, and on some shipping bills clearance of goods was mentioned as Hyderabad Commissionerate which have been endorsed on the ARE-1s. The goods were not exported ARE-1 wise, and in number of cases the shipping bill covered number of ARE-1s. The total quantity of these ARE-1s is vice versa tallied with the quantity of SBs and in some cases do not. Commissioner has confirmed the demand in respect of those cases where the quantity matched. In their view the only option was to make endorsement on the basis of First in First Out (FIFO) basis but such criteria was not adopted which resulted in such mis match. They had submitted that there was no clearance of sugar from the factories located in Hyderabad and the same is mistakenly mentioned on the shipping bills in EDI system.

- On the basis of above mis matches demand has been confirmed against them. In case of *Formica India [1995 (77) ELT 511 (SC)]*, Hon'ble Supreme Court held "Once the Tribunal took the view that they were liable to pay duty on the intermediary product and they would have been entitled to the benefit of the notification had they met with the requirement of Rule 56A, the proper course was to permit them to do so rather than denying to them the benefit on the technical ground that the point of time when they could have done so had elapsed and they could not be permitted to comply with Rule 56A after that stage had passed."

- They would also rely on the decisions as follows in their support

- *Continental Cement Company [2014 (309) ELT 411 (ALL)]*

- *Arya Fibres Pvt Ltd [2014 (311) ELT 529 (T-Ahmd)]*

- *Model Buckets & attachments (P) Ltd [2007 (217) ELT 284 (T-Bang)] affirmed at [2014 (300) ELT 510 (Kar)]*

- They are in possession of SBs and BRC evidencing the exports. Adjudicating authority has himself recorded that the goods were repacked at the port, thus admits that the goods had reached the port.

- Hon'ble Apex Court has in case of *Suksha International & Nutan Gems & Anr [1989 (39) ELT 503 (SC)]* and *A V Narasimhalu [1983 (13) ELT 1534 (SC)]* stated the administrative authorities should instead of relying on technicalities, act in a manner with broader concept of justice.

- In interest of justice the matter should be remanded back to adjudicating authority for reconsideration.

3.3 Arguing for the revenue learned Authorized Representative while reiterating the findings recorded in the impugned order submitted that:-

- From 2002 onwards it has been the strategy of the appellant's to moot for tallying the total quantity of white sugar procured from 13 mills in Maharashtra against the total quantity of white sugar procured from 13 Mills in Maharashtra against the total quantity of sugar exported as per rte shipping bills submitted by them. Throughout it has been their submission throughout that the total quantity of sugar exported by them as per these shipping bills tally with the sugar cleared by them from various factories located in Maharashtra as per the ARE-1s;

- Proofs of Export in respect of sugar cleared from 7 factories in Maharashtra have already been accepted by the department and are not subject/concern of the present proceedings. These proceeding concern 6 factories in respect of which the proper proof of export has not been furnished.

- The contention of the appellant is not acceptable, as the documents do not match and shipping Bills contain declared jurisdiction of other Commissionerates. In such a situation the abstract claim of appellants cannot be validated in any manner and also the it may not be possible administratively to cause such verification.

- To accept gross, cumulative quantity matching of S/Bs with AR4s, without details even matching, is not the procedure and will amount to gross violation of the conditions of notification No **42/2001 CE(NT)** r/w Rule 13 of Central Excise Rules, 1944/Rule 19 of Central Excise Rules, 2001, paras 13.2 and para 13.7 of the Chapter 7 of Part 1, Manual of Supplementary Instructions, 2001.

- Hon'ble Supreme Court has constantly in series of decisions rendered by them held that "It is an equally well known principle that a person who claims an exemption has to establish his case."

o Novopan India Ltd [1994 (73) ELT 769 (SC)]

o Parle Exports (P) Ltd [1989 (1) SCC 345]

o Rajasthan Spinning and Weaving Mills Ltd [1995 (77) ELT 474 (SC)]

o Dilip Kumar & Company [2018 (361) ELT 577 (SC)]

- Hon'ble Supreme Court has in case of *Mihir Textiles Ltd [1997 (92) ELT 9 (SC)]* held as follows:

"..... This is not a case where a certain provision is mandatory or directory. Here the question is whether concessional relief of duty which is made dependent on the satisfaction of certain conditions can be granted without compliance of such conditions. No matter even if the conditions are only directory."

- In view of the above submissions there is no merits in the submissions made by the appellants to the effect that the benefit of exemption under Notification No **42/2001 CE(NT)** should be admissible to them by tallying the entire quantity exported against the Shipping Bills produced by them which tallies with the total quantity of sugar cleared from the 13 different sugar mills located in Maharashtra.

4.1 We have considered the impugned order along with the submissions made in appeal, during the course of arguments and in written submissions filed.

4.2 The three annexures as per which the demand has been confirmed against the appellant by the adjudicating authority are reproduced below:

Annexure

A (to the OIO No 2/CEX/2010 in r/o of M/s Shivnath Rai Harnarain, New Delhi) List of AR-4/ARE-1 whose original and Duplicate copies endorsed by

Customs officer not produced in respect of-			
S.No	AR-4/ARE-1 No/Date	Quantity Removed ' Qtls	Duty Demanded 'Rs
(a) M/s S M S M P SSK Ltd			
1	14/15.07.2001	9970	8,47,450
2	15/16.07.2001	7481	6,35,885
3	20/23.07.2001	8140	6,91,900
4	24/28.07.2001	11440	9,72,400
5	37/14.08.2001	7640	6,49,400
Total			37,97,035
(b) M/s Shankar SSK Ltd			
1	6/02.07.2001	6790	5,77,150
2	7/03.07.2001	8210	6,97,850
3	8/19.07.2001	810	68,850
4	9/20.07.2001	6840	5,81,400
5	10/21.07.2001	8830	7,50,550
6	11/22.07.2001	3520	2,99,200
Total			29,75,000
(c) M/s Gadhinglaj SSK Ltd			
1	20/06.09.2001	14300	12,15,500
2	21/07.09.2001	12610	10,71,850
3	26/20.09.2001	1790	1,52,150
4	27/21.09.2001	5420	4,60,700
5	28/22.09.2001	7270	6,17,950
6	29/23.09.2001	7060	6,00,100
7	30/24.09.2001	178	15,130
Total			41,33,380
Annexure A - Grand Total (a) + (b) + (c) = 1,09,05,415/-			

Annexure B (to the OIO No 2/CEX/2010 in r/o of M/s Shivnath Rai Harnarain, New Delhi) List of AR-4/ARE-1 where particulars do not match the Shipping Documents-				
S.No	AR-4/ARE-1 No/Date	Quantity Remove d ' Qtls	Duty Demand ed 'Rs	Discrepancies
(a) M/s S M S M P SSK Ltd				
1	2/17.06.200 1	552	4,69,200	The shipping bill No 5148726 dated 18.06.2001 indicated that the sugar was originally procured from the jurisdiction of Division VI Hyderabad - I Commissionerate
2	3/18.06.200 1	291	2,47,350	The shipping bill No 5148727 dated

				18.06.2001 indicated that the sugar was originally procured from the jurisdiction of Hyderabad Commissionerate
3	7/23.06.200 1	849	7,21,650	The shipping bill No 5148726 dated 18.06.2001 indicated that the sugar was originally procured from the jurisdiction of Division 1 Hyderabad Commissionerate . Further the actual removal of the sugar from the registered factory was on whereas the relevant shipping bill No 5145341 dated indicated that the shipment of the consignment on 11.06.2001. The Mate Receipt No 46 dated indicated the date of receipt of the consignment on Board the vessel on 21.06.2001.
4	8/25.06.200 1	651	5,53,350	The actual removal of the sugar from the registered factory was on whereas the relevant shipping bill No 5145160 dated indicated that the shipment of the consignment on 08.06.2001. The Mate Receipt No 46 dated indicated the date of receipt of the consignment on Board the vessel on 16.06.2001.
5	21/24.07.20 01	198.7	1,68,895	The shipping bill No 5157333 dated and 5153885 dated indicated that the sugar was originally procured from the jurisdiction of Division VII of Pune - I Commissionerate and as per the details available on shipping bill No 5153885 dated the actual shipment was taken place on 12.07.2001. The relevant Mate Receipt No 3701 dated indicated the date of receipt of the consignment on Board the vessel on 17.07.2001.
6	25/29.07.20 01	922.7	7,84,295	The actual removal of the sugar from the registered factory was on whereas the relevant shipping bill No 5156864 dated indicated that the shipment of the consignment on 24.07.2001. Mate Receipt not produced
7	32/09.08.20 01	1167.3	9,92,205	The actual removal of the sugar from the registered factory was on 09.08.2001 whereas the relevant shipping bill No 5147417 dated 26.07.2001 indicated that the shipment of the consignment on 27.07.2001. The Mate Receipt No 1835 dated 03.08.2001 indicated the date of receipt of the consignment on Board the vessel on 03.08.2001.
8	35/12.08.20 01	632	5,37,200	The shipping bill No 5140660 dated 16.05.2001 and 5157332 dated 27.07.2001 indicated that the sugar was originally procured from the jurisdiction of Hyderabad

				Commissionerate . Further the removal of the sugar from the registered factory was on 12.08.2001 whereas the relevant shipping bill indicated that the shipment of the consignment had taken place on 26.07.2001 and 07.08.2001 respectively.
9	36/13.08.2001	898	7,63,300	As per AR-4 the export destination was shown a Pakistan but as per the shipping bill No 5159832 dated 03.08.2001 the consignment originally exported to Malaysia. Further the actual removal of the sugar from the registered factory was on 13.08.2001 whereas the relevant shipping indicated that the shipment of the consignment had taken place on 06.08.2001.
10	39/16.08.2001	40	34,000	The actual removal of the sugar from the registered factory was on 16.08.2001 whereas the relevant shipping bill No 5159832 dated 03.08.2001 indicated that the shipment of the consignment on 03.08.2001.
11	40/21.08.2001	1183	10,05,550	The actual removal of the sugar from the registered factory was on 21.08.2001 whereas the relevant shipping bill No 5158070 dated 27.07.2001 and 5159832 dated 03.08.2001 indicated that the shipment of the consignment on 28.07.2001 and 06.08.2001 respectively
12	41/22.08.2001	782.8	6,65,380	The actual removal of the sugar from the registered factory was on 22.08.2001 whereas the relevant shipping bill No 5162477 dated 18.08.2001 and 5162468 dated 18.08.2001 indicated that the shipment of the consignment on 18.08.2001 and 21.08.2001 respectively
Total 69,42,375				
(b) M/s Shankar SSK Ltd				
1.	3/19.06.200 1	389	3,30,650	The shipping bill No 5148726 dated 18.06.2001 indicated that the sugar was originally procured from the jurisdiction of Division VI Hyderabad - I Commissionerate
2	12/04.08.2001	331	2,81,350	The actual removal of sugar from the registered factory was on 04.08.2001 whereas the relevant shipping bill Nos 5140660 dated 16.05.2001 indicated that the shipment of the consignment on 26.07.2001. Further the relevant shipping bill indicated that the sugar was originally procured from the jurisdiction of Division I Hyderabad - I Commissionerate
3	13/05.08.20	433	3,68,050	The actual removal of sugar from

	01			the registered factory was on 05.08.2001 whereas the relevant shipping bill Nos 5140660 dated 16.05.2001 indicated that the shipment of the consignment on 26.07.2001. Further the relevant shipping bill indicated that the sugar was originally procured from the jurisdiction of Division I Hyderabad Commissionerate
4	14/06.08.2001	01 228.9	1,94,565	The actual removal of sugar from the registered factory was on 06.08.2001 whereas the relevant shipping bill Nos 5140660 dated 16.05.2001 indicated that the shipment of the consignment on 26.07.2001. Further the relevant shipping bill indicated that the sugar was originally procured from the jurisdiction of Division I Hyderabad Commissionerate
			11,74,615	
(c) M/s Gadhinglaj SSK Ltd				
1	11/12.04.2001	1200	10,20,000	Let export allowed on the S B is 07.04.2001 and the sugar removed from factory on 12.04.2001
2	12/13.04.2001	1066.4	9,06,440	Let export allowed on the S B is 07.04.2001 and the sugar removed from factory on 13.04.2001
Total			19,26,440	
Annexure B - Grand Total (a) + (b) + (c) = 1,00,43,430/-				

Annexure B (to the OIO No 2/CEX/2010 in r/o of M/s Shivnath Rai Harnarain, New Delhi) Showing mis match between Shipping documents and AR-4/ARE-1 Sri Sant Tukaram SSK Ltd Part-II (List of Shipping Bills AR-4 wise)						
Sr No	S Bill No/Date as per AR-4	Quantity of Sugar as S/Bill MT	AR-4 No/Date	Quantity indicated in AR-4 MT	BRC Date	Remark if any
1	5148727/18.06.2001	850	1/2.5.01	250	9.8.01	Hyderabad
2	546813/11.06.2001	1884.8	4/9.5.01	203	17.7.01	Hyderabad 1
			8/10.5.01	304		
			10/12.5.01	293		
			33/25.5.01	249		
3	2120/13.6.2001	1000	2/7.5.01	94	4.6.01	--
			3/8.5.01	326		
			5/9.5.01	253		
			6/10.5.01	224.5		
			13/13.5.01	401.8		
			37/27.5.01	85.5		
			38/27.5.01	500		
4	5149948/22.6.2001	1000	7/10.5.01	512	17.7.2001	--
5	1000020063/30.4.2001	200	9/11.5.01	600	12.7.2001	--
6	1000020082/30.4.2001	200			8.6.2001	--
7	1000020084/30.4.2001	200			7.6.2001	--
8	5145160/4.6.2001	1000	11/12.5.01	568	17.7.2001	--

9	5145339/4.6.2001	1000			17.7.2001	
10	5150696/26.6.2001	1000			17.7.2001	
11	5155341/4.6.2001	1000			17.7.2001	
12	5145339/4.6.2001	1000	12/13.5.01	280	17.7.2001	Pune-II
			39/29.5.01	687		
13	5157194/24.7.2001	1000	14/14.5.01	155	8.9.2001	--
			16/15.5.01	193		
			36/26.5.01	247		
			41/30.5.01	227.8		
14	5151328/28.6.2001	400	15/14.5.01	390	31.7.2001	Pune-II
15	5150139/28.6.2001	500	17/15.5.01	640	1.9.2001	--
16	5146814/11.6.2001	860	18/16.5.01	262	25.6.2001	Pune-II
			19/16.5.01	596		
17	5151329/28.6.2001	500	20/17.5.01	312	30.8.01	Hyderabad
			24/19.5.01	201.5		
18	5158702/	1000	21/17.5.01	656	1.8.01	A'Nagar/A'Bad
			22/18.5.01	284		
19	5154610/13.7.2001	900	23/18.5.01	49.7	30.8.01	--
			31/23.5.01	234		
			35/26.5.01	247		
20	51406662/16.5.2001	1000	25/20.5.01	237	25.6.01	--
			26/20.5.01	384		
			28/21.5.01	298		
			29/22.5.01	105		
			40/30.5.01	35		
			42/31.5.01	25.2		
21	5150869/27.6.2001	230	27/21.5.01	187	10.7.01	Sholapur/Pune
22	5162519/18.8.2001	1000	30/22.5.01	483	18.4.01	Sholapur/Pune
23	5150868/27.6.2001	230	18/16.5.01	262	10.7.01	Sholapur/Pune
			19/16.5.01	596		
			32/24.5.01	46		
			34/25.5.01	223		
Total Quantity Removed for Export: 12500 MT Duty Involved Rs 1,06,25,000/-						

4.3 The goods are allowed clearance from the factory of manufacturer for exports in terms of Rule 13 of Central Excise Rules, 1944/Rule 19 of Central Excise Rules, 2001. The Rule 13 of Central Excise Rules, 1944 is pari materia to Rule 19 of Central Excise Rules, 2001. The said rule reads as follows:

"19. Export without payment of duty .-

(1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

(2) Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.

(3) The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be notified by the Board."

4.4 In terms of sub-rule (3) of Rule 19, Board has issued notification No **42/2001 CE(NT)** prescribing conditions, safeguards and procedure for allowing clearance of goods for export without payment of duty. The said relevant excerpts of the notification are reproduced below:

"In exercise of the powers conferred by sub-rule (3) of rule 19 of the Central Excise (No.2) Rules, 2001, the Central Board of Excise and Customs hereby notifies the conditions and

procedures for export of all excisable goods, except to Nepal and Bhutan without payment of duty from the factory of the production or the manufacture or warehouse or any other premises as may be approved by the Commissioner of Central Excise, namely: -

1. Conditions: -

1. that the exporter shall furnish a general bond in the Form specified in Annexure-I to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory, warehouse or such approved premises, as the case may be, or the Maritime Commissioner or such other officer as authorised by the Board on this behalf in a sum equal at least to the duty chargeable on the goods, with such surety or sufficient security, as such officers may approve for the due arrival thereof at the place of export and their export therefrom under Customs or as the case may be postal supervision. The manufacturer-exporter may furnish a letter of undertaking in the Form specified in Annexure-II in lieu of a bond.

2. that goods shall be exported within six months from the date on which these were cleared for export from the factory of the production or the manufacture or warehouse or other approved premises within such extended period as the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or Maritime Commissioner may in any particular case allow;

3. that when the export is from a place other than registered factory or warehouse, the excisable goods are in original packed condition and identifiable as to their origin;

4. that exports of mineral oil products falling under Chapter 27 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as stores for consumption on board of an aircraft on foreign run shall be subject to conditions and limitations, to be applied mutatis mutandis, as notified in the Ministry of Finance (Department of Revenue), Notification No.40/2001-Central .Excise (N.T.) dated 26th June, 2001 issued under rule 18 of Central Excise (No.2) Rules, 2001.

2. Procedure: -

(i) Procedure for removal without payment of duty under this notification: -

(a) After furnishing bond, a merchant-exporter shall obtain certificates in Form CT-1 specified in Annexure-III issued by the Superintendent of Central Excise having jurisdiction over the factory or warehouse or approved premises or Maritime Commissioner or such other officer as may be authorised by the Board on this behalf and on the basis of such certificate he may procure excisable goods without payment of duty for export by indicating the quantity, value and duty involved therein;

(b) the exporter who has furnished bond shall ensure that the debit in bond account does not exceed the credit available therein at any point of time;

(c) the manufacturer-exporter may remove the goods without payment of duty after furnishing the letter of undertaking as specified under condition (i).

(d) such General bond or letter of undertaking shall not be discharged unless the goods are duly exported, to the satisfaction of the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise or Maritime Commissioner or such other officer as may be authorised by the Board on this behalf within the time allowed for such export or are otherwise accounted for to the satisfaction of such officer, or until the full duty due upon any deficiency of goods, not accounted so, and interest, if any, has been paid.

(ii) Sealing of goods and examination at place of despatch. -

(a)

(b)

(c)

(d)

(e)

(iii) Dispatch of goods by self-sealing and selfcertification. -

(a)

(b)

(c)

(d)

(iv) *Examination of goods at the place of export. –*

(e) *On arrival at the place of export, the goods shall be presented together with original, duplicate and quintuplicate (optional) copies of the application to the Commissioner of Customs or other duly appointed officer;*

(f) *The Commissioner of Customs or other duly appointed officer shall examine the goods with the particulars as specified in the application and if he finds that the same are correct and exportable in accordance with the laws for the time being in force, shall allow export thereof and certify on the copies of the application that the goods have been duly exported citing the shipping bill number and date and other particulars of export:*

Provided that if the Superintendent or Inspector of Central Excise sealed packages or container at the place of despatch, the officer of customs shall inspect the packages or container with reference to declarations in the application to satisfy himself about the exportability thereof and if the seals are found intact, he shall allow export.

(g) *The Commissioner of Customs or the other duly appointed officer shall return the original and quadruplicate (optional copy for exporter) copies of application to the exporter and forward the duplicate copy of application either by post or by handing over to the exporter in a tamper proof sealed cover to the officer specified in the application, with whom the exporter has furnished bond or a letter of undertaking.*

(h) *The exporter shall use the quintuplicate copy for the purposes of claiming any other export incentive.*

(v) *Cancellation of applications:*

(a)

(b)

(vi) *Procedure in respect of exported goods subsequently re-imported and returned to the factory:*

(a)

(b)

Explanation I. - For the purpose of this notification, "merchant exporter" mean any exporter who procures and exports excisable goods manufactured by any other person.

Explanation II. -

4.5 Appellants herein are merchant exporters and have cleared the goods (sugar) from various factories for export in terms of Rule 13 of Central Excise Rules, 194/Rule 19 of Central Excise Rules, 2001 after executing the required bond as per the Notification No 42/2001 CE(NT) . They being Star Trading House were not required to furnish required security against the bonds so executed. They had executed the bonds with relevant jurisdictional officers of Central Excise. In terms of the Notification 42/2001 CE(NT) and also in terms of the conditions specified in the bond, they had to furnish the proof of export of the goods cleared to the authority with whom the bond had been executed or were required to pay the duty on the goods with interest @ 24% in case of failure to furnish the proof of export in manner as has been prescribed by the Notification, to the satisfaction of bond accepting authority.

4.6 In the present case as directed by the Hon'ble Bombay High Court the matter of the exports under taken by the Appellants in respect of the goods cleared from various factories in Maharashtra was taken up by the common adjudicating authority appointed by the Board. The direction of the Bombay High Court is in respect of the consolidation of the proceedings initiated by various show cause notices in respect of the clearances made for export from the factories located in Maharashtra before common adjudicating authority. (Refer para 2.3 and 2.4, supra).

4.7 After considering the documents furnished by the appellant, adjudicating authority has demanded the duty in the cases where he was not satisfied with proof of export for the reasons as stated in the three Annexures to the impugned order reproduced in para 4.2 supra.

4.8 It is now settled position in law that any person claiming the benefit of an exemption notification is required to fulfill the conditions specified in the notification. Hon'ble Supreme Court has in case of *Dilip Kumar & Co [2018 (361) ELT 577 (SC)]* held as follows:

"25. We are not suggesting that literal rule de hors the strict interpretation nor one should ignore to ascertain the interplay between 'strict interpretation' and 'literal interpretation'. We may reiterate at the cost of repetition that strict interpretation of a statute certainly

involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well-settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.

27. Now coming to the other aspect, as we presently discuss, even with regard to exemption clauses or exemption notifications issued under a taxing statute, this Court in some cases has taken the view that the ambiguity in an exemption notification should be construed in favour of the subject. In subsequent cases, this Court diluted the principle saying that mandatory requirements of exemption clause should be interpreted strictly and the directory conditions of such exemption notification can be condoned if there is sufficient compliance with the main requirements. This, however, did not in any manner tinker with the view that an ambiguous exemption clause should be interpreted favouring the revenue. Here again this Court applied different tests when considering the ambiguity of the exemption notification which requires strict construction and after doing so at the stage of applying the notification, it came to the conclusion that one has to consider liberally.

52. To sum up, we answer the reference holding as under - (1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."

4.9 We are also not in agreement with the submissions made by the appellant that they are not able to co-relate the documents in view of the certain erroneous method adopted by the Customs Authority while endorsing the documents. In case of Mihir Textiles [1997 (92) ELT 9 (SC)] Hon'ble Supreme Court while rejecting such arguments stated the law as follows:

"11. Learned counsel for the appellant raised an alternative contention that the deficiency in the contract for obtaining the concessions should not have been taken so seriously and the Customs Authorities should have granted the reliefs as the appellants had performed their part in complying with the conditions. Non-compliance of the conditions, according to the counsel, was only due to the lapses on the part of the authorities concerned. This contention was expatiated to the extent that the conditions prescribed in the proviso to entry No. 84.66 are merely directory and not mandatory. According to the counsel, the conditions prescribed, if interpreted strictly, would result in the denial of concessional reliefs which statute has conferred on the citizen.

12. In support of that contention, counsel invited our attention to the decision of a Constitution Bench of this Court in State of U.P. v. Manbodhan Lal Srivastava, 1958 SCR 533, wherein their Lordships were considering the implication of non-compliance with the conditions provided in Article 320(3) of the Constitution on an order imposing punishment to a Government servant without reference to the Public Service Commission. While considering that question learned Judges made a reference to the Privy Council decision in Montreal Street Railway Company v. Normandin - AIR 1917 PC 142 and the Federal Court decision in Biswanath Khemka v. Emperor - AIR 1945 FC 67. The Constitution Bench held that the provisions of Article 320(3) are not mandatory and non-compliance of those provisions does not afford any cause of action in a court of law. Privy Council in the above quoted decision has observed that the question whether provisions in a statute are directory or imperative depends upon the object of the statute and no general rule can be laid down. "When the provisions of the statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory." This is not a case where a certain provision is mandatory or directory. Here the question is whether concessional relief of duty which is made dependent on the satisfaction of certain

conditions can be granted without compliance of such conditions. No matter even if the conditions are only directory.

13. In *Formica India Division v. Collector of Central Excise*, 1995 (77) E.L.T. 511 (SC), non-compliance with Rule 56A of the Central Excise Rules, 1944 was held to be insufficient to deny the benefit of a notification to the assessee. But the said benefit was afforded on the special circumstances of a case as could be seen from the following words :

"The circumstances in which the appellants did not pay the duty on the intermediary product before putting the same to the captive consumption for producing that stage, the appellants contested the correctness of the classification and had, therefore, not paid the duty on the intermediary product. When it was found that they were liable to pay duty on the intermediary product and had not paid the same, but had paid the duty on the end product, they could not ordinarily have complied with the requirements of Rule 56A."

Nor can we find support from the ratio in *B.O.I. Finance Ltd. v. The Custodian & Others*, JT 1997 (4) 15, that "infringements of the instructions issued by the Reserve Bank of India under the Banking Regulations Act prohibiting the banks from entering into buy-back arrangements do not invalidate such contracts entered into between the banks and its customers", as it involved a question of invalidation of the contract. Here neither the contract nor the import is invalid or illegal and the question is only whether the importer is entitled to the concessional duty."

4.10 Hon'ble Bombay High Court has in case of *U M Cables* [2013 (293) ELT 641 (Bom)] held as follows:

"15. In the situation in the two writ petitions, the rebate claims that were filed by the Petitioner would have to be duly bifurcated. As noted earlier the first writ petition [Writ Petition 3102 of 2013] relates to two claims dated 20 March, 2009 and 8 April, 2009 in the total value of Rs. 12.54 lacs. In respect of the second of those claims dated 8 April, 2009, of a value of Rs. 10.08 lacs, the Petitioner has averred that the goods were loaded by the Shipping Line on the vessel and the vessel sailed on 18 April, 2008 whereas the Let Export Order was passed by the customs authorities on 19 April, 2008. The Petitioner has stated that in view of this position the customs authorities withheld the endorsement of the ARE-1 forms and the issuance of the export promotion copy of the shipping bill [Paragraphs 8(g) and 8(h) of the petition]. We find merit in the contention of counsel appearing on behalf of the Revenue that in these circumstances, the rejection of the rebate claim dated 8 April, 2009 by the adjudicating authority and which was confirmed in appeal and in revision cannot be faulted. Admittedly even accordingly to the Petitioner the goods came to be exported and the vessel had sailed on 18 April, 2008 even before a Let Export Order was passed by the customs authorities. The primary requirement of the identity of the goods exported was therefore, in our view, not fulfilled. In such a case, it cannot be said that a fundamental requirement regarding the export of the goods and of the duty paid character of the goods was satisfied."

16. However, it is evident from the record that the second claim dated 20 March, 2009 in the amount of Rs. 2.45 lacs which forms the subject matter of the first writ petition and the three claims dated 20 March, 2009 in the total amount of Rs. 42.97 lacs which form the subject matter of the second writ petition were rejected only on the ground that the Petitioner had not produced the original and the duplicate copy of the ARE-1 form. For the reasons that we have indicated earlier, we hold that the mere non-production of the ARE-1 form would not ipso facto result in the invalidation of the rebate claim. In such a case, it is open to the exporter to demonstrate by the production of cogent evidence to the satisfaction of the rebate sanctioning authority that the requirements of Rule 18 of the Central Excise Rules, 2002 read together with the notification dated 6 September, 2004 have been fulfilled. As we have noted, the primary requirements which have to be established by the exporter are that the claim for rebate relates to goods which were exported and that the goods which were exported were of a duty paid character. We may also note at this stage that the attention of the Court has been drawn to an order dated 23 December, 2010 passed by the revisional authority in the case of the Petitioner itself by which the non-production of the ARE-1 form was not regarded as invalidating the rebate claim and the proceedings were remitted back to the adjudicating authority to decide the case afresh after allowing to the Petitioner an opportunity to produce documents to prove the export of duty paid goods in accordance with the provisions of Rule 18 read with notification dated 6 September, 2004 [Order No. 1754/2010-CX, dated 20 December, 2010 of D.P. Singh, Joint Secretary, Government of India under Section 35EE of the Central Excise Act, 1944]. Counsel appearing on behalf of the Petitioner has also placed on the record other orders passed by the revisional authority of the Government of India taking a similar view [*Garg Tex-O-Fab Pvt. Ltd.* - 2011 (271) E.L.T. 449] and *Hebenkraft* - 2001 (136) E.L.T. 979. The

CESTAT has also taken the same view in its decisions in Shreeji Colour Chem Industries v. Commissioner of Central Excise - 2009 (233) E.L.T. 367, Model Buckets & Attachments (P) Ltd. v. Commissioner of Central Excise - 2007 (217) E.L.T. 264 and Commissioner of Central Excise v. TISCO - 2003 (156) E.L.T. 777."

4.11 It is also a settled position that when law requires something to be done in particular manner then that has to be one in that manner only and all other method of doing are barred. Hon'ble Supreme Court has in case of *Competent Authority vs Bangalore Jute Factory* [(2005) 13 SCC 477] stated the law as follows:

".....It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning....."

4.12 Since the issue involved is not in respect of clandestine clearance, but is in respect of the non submission of proof of export to the satisfaction of the bond accepting authority the decision of Hon'ble Allahabad High Court in case of Continental Cables and tribunal in case of Arya Fibres and Model Buckets and Attachments relied upon by the appellant Counsel are distinguishable and not applicable. Since we find that decision of five member bench of Hon'ble Supreme Court in case of Dilip Kumar & Co applicable to present case we are not in position to accept the submissions made by the appellant counsel relying on the decisions of Hon'ble Apex Court in case of Formica India Ltd, A V Narasimhalu and Suksha International & Nutan Gems.

4.13 In view of the above decisions of the Hon'ble Apex Court and Bombay High Court (para 15 of the order reproduced above) the view taken by the adjudicating authority in the impugned order in respect of Annexure B and C cannot be faulted with. However the view of the adjudicating authority in respect of ARE-1s in Annexure A is contrary to the decision of Hon'ble Bombay High Court in para 16 and needs to be reconsidered.

4.14 Thus while upholding the demand made by the adjudicating authority in respect of the documents (ARE-1/AR- 4) in Annexure B and C we set aside the demand confirmed in respect of Annexure A and remand the matter back to adjudicating authority for consideration of the same vis a vis the documents that may be furnished by the appellant. We also set aside the penalty imposed by the adjudicating authority which needs to be re-determined by the adjudicating authority after taking into account the total of demand confirmed against the appellant in respect of Annexure B and C and the demand confirmed by him in respect of Annexure A in the remand proceedings.

5.1 The appeals is thus partially allowed as stated in para 4.14 supra and the matter remanded to adjudicating authority for reconsideration of demand made under Annexure A of the impugned order and for imposition of penalty after such redetermination.

5.2 Since the matter is quite old adjudicating authority should decide the matter in remand proceedings within four months of receipt of this order after allowing the personal hearing to the appellants.

(Order pronounced in the open court on 14.01.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI**

Excise Appeal No. 88298 of 2018

**Arising out of Order-in-Appeal No. NGP-I/APPL/137/2017-18, Dated:
04.05.2018**

Passed by the Commissioner of CGST & Central Excise (Appeals), Nagpur-I

WITH

Excise Appeal No. 88299 of 2018

**Arising out of Order-in-Appeal No. NGP-I/APPL/139/2017-18, Dated:
04.05.2018**

Passed by the Commissioner of CGST & Central Excise (Appeals), Nagpur-I

**SHRI VITTHALSAI SSK LTD
RAJIV GANDHI NAGAR, MURUM, TAL.- OMERGA
OSMANABAD, AURANGABAD, MAHARASHTRA - 431003**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
NAGPUR, P.O BOX 81, TELANGKHEDI ROAD
CIVIL LINES, NAGPUR, MAHARASHTRA - 440001**

Date of Hearing: 20.06.2019

Date of Decision: 27.09.2019

CX -Refund -Cenvat - Closure of factory- The assessee entered into an agreement with Maharashtra State Cooperative Bank, through which it took over the closed Sugar unit of another entity for a period of two years - Such agreement was subsequently renewed for further period for 6 years, but was subsequently terminated by the bank - The cenvat credit for the same could not be utilized by the assessee - It then sought refund of the same which was granted by the Asst Commr. relying on the decision in the case Union of India Vs. Slovak India Trading Co. (P) Ltd. - Thereafter, such refund granted was disallowed by the Commr.(A) relying on the decision in Phoenix Industries Pvt. Ltd. Vs. CCEX, Raigad - Hence the present appeal by the assessee.

Held - In view of the findings of the High Court of Mumbai wherein it was held that the order of the Apex Court in Slovak India Trading Co. (P) Ltd. cannot be read as a declaration of law since SLP was dismissed, leaving the question of law open and the same has been answered by holding that refund is impermissible u/s 11B and Section 11B(2) where Cenvat credit could not be utilized due to closure of manufacturing activities - Hence the assessee's appeals have no merit: CESTAT

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

COURT NO. I

Appeal No. E/921/2011

(Arising out of Order-in-Appeal No. SB/144/Th-I/2011 dated
12.4.2011 passed by the Commissioner of Central Excise
(Appeals), Mumbai-I).

M/s Technocraft Industries (I) Ltd. Appellant

Vs.

Commissioner of Central Excise, Thane-I Respondent

ORDER NO. A/85514 / 2019

Date of Hearing: 13.03.2019

Date of Decision: 13.03.2019

Brief Facts :The appellant had filed a cash refund claim of accumulated CENVAT Credit on 3rd September 2010 pertaining to the period January 2008 to September 2008 under Rule 5 of CENVAT Credit Rules, 2004. The refund claim was rejected being barred by limitation prescribed under Section 11B of Central Excise Act.

Appellant's stand : That the period of limitation prescribed under section 11B of Central Excise Act will not be applicable to their case inasmuch as no relevant date has been prescribed in the said notification. In support, he has referred judgment of this Tribunal in the case of *Tata Motors Ltd. – 2012 (284) ELT 593 (Tri)* which has later been upheld by the Hon'ble Supreme Court – *2015 (319) ELT 147 (SC)*.

Department's/ Revenue's stand :Under the Notification No. 5/2006-CE dated 14.3.2006 issued under Rule 5 of CENVAT Credit Rules, 2004, the period for filing refund claim has been incorporated to be the period specified under Section 11 of Central Excise Act, 1944. It is his contention that Hon'ble Madras High Court in the case of *GTN Engineering (I) Ltd. – 2012 (281) ELT 185 (Mad)* and *Hyundai Motors – 2017 (355) ELT 342 (Mad)* has held that the period of limitation prescribed under Section 11B of Central Excise Act, 1944 is applicable to the refund claim filed under Rule 5 of CENVAT Credit Rules, 2004.

Held :The limitation period provided u/s 11B of CEA, 1944 is applicable for refund claim of accumulated CENVAT credit in terms of rule 5 of CCR, 2004 .

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Excise Appeal No. 1166 of 2010

(Arising out of Order-in-Original No. 21/BR-21/Th-I/2010 dated 06.04.2010
passed by Commissioner of Central Excise & Customs, Thane-I)

M/s. Parental Creations Pvt. Ltd.
103, Shyam Chambers,
Opp. Sub-Jail, Ring Road, Surat

Appellant

Vs.

Commissioner of Central Excise, Thane-I

Respondent

4 floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

Appearance:

Shri Piyush Chhajed, C.A., for the Appellants in E/1166, 1172 &
1206/10

Shri Mukund Chouhan, Advocate, for the Appellant in E/1196/10

None for other Appellants

Shri Anil Choudhary, Deputy Commissioner and Shri N.N. Prabhudesai,
Superintendent, Authorised Representatives for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85107-85113/2020

Date of Hearing: 16.12.2019

Date of Decision: 31.01.2020

PER: SANJIV SRIVASTAVA

ORDER

(I) I confirm the demand for the Cenvat credit amounting to Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) fraudulently availed during the period between September 2004 to February 2005 as detailed in Annexure I to the notice, made under the Rule 14 of the Cenvat 4 E/1166,1172,1196,1206,1225,1226,1726/2010 Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944, and order its recovery from M/s. Parental Creations Private Limited.

(II) I order for recovery of interest at appropriate rate from M/s. Parental Creations Private Limited, under Section 11AB of the Central Excise Act, 1944, on the demand amount confirmed at (I) above.

(III) I impose a penalty of Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) on M/s. Parental Creations Private Limited under [Section 11AC](#) of the Central Excise Act, 1944 read with Rule 15 of the Cenvat Credit Rules, 2004 & Rule 27 of the Central Excise Rules, 2002.

(IV) I hold the 13 (thirteen) number of rebate claims filed by them (as detailed in Annexure-II to the notice) on the strength of no objection certificate obtained by them from their claimed exporters, totally amounting to Rs.48,72,328/- (Rupees forty eight lakhs seventy two thousand three hundred and twenty eighty only) as not admissible.

(V) I do not order confiscation of the 794798 sq.mtrs of processed fabrics valued at Rs.8,45,04,443/- (Rupees eight crores forty five lakhs four thousand four hundred and forty three only) as detailed in Annexure II to the notice, exported by the merchant exporters, claimed to have been procured from M/s. Parental Creations Private Limited which are not under any seizure or detention under Rule 25 of the Central Excise Rules, 2002 read with Rule 15 of the Cenvat Credit Rules, 2004.

(VI) I impose a penalty of Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) on Shri Dinesh Agarwal, under Rule 26 of the Central Excise Rules, 2002. I do not impose any penalty on him under Rule 27 of the Central Excise Rules, 2002.

(VII) I impose penalty of Rs.18,00,000/- (Rupees forty lakhs only) on M/s. Kabir Exports, New Delhi under Rule 26 of the Central Excise Rules, 2002.

5 E/1166,1172,1196,1206,1225,1226,1726/2010 (VIII) I impose penalty of Rs.8,00,000/- (Rupees eight lakhs only) on M/s. Cusp International under Rule 26 of the Central Excise Rules, 2002.

(IX) I impose penalty of Rs.40,00,000/- (Rupees forty lakhs only) on M/s. Aryan's under Rule 26 of the Central Excise Rules, 2002.

(X) I impose penalty of Rs.8,00,000/- (Rupees eight lakhs only) on M/s. Kalinga Exports under Rule 26 of the Central Excise Rules, 2002.

(XI) I impose penalty of Rs.40,00,000/- (Rupees forty lakhs only) on M/s. Vrindavan Mills Pvt. Ltd. under Rule 26 of the Central Excise Rules, 2002.

(XII) I impose penalty of Rs.20,00,000/- (Rupees twenty lakhs only) on M/s. Olympia Creations Unlimited under Rule 26 of the Central Excise Rules, 2002.

(XIII) I impose penalty of Rs.14,00,000/- (Rupees fourteen lakhs only) on M/s. Shreeman Textiles under Rule 26 of the Central Excise Rules, 2002.

(XIV) I impose penalty of Rs.1,00,000/- (Rupees one lakh only) on M/s. Sajjan Textiles, under Rule 26 of the Central Excise Rules, 2002.

(XV) I do not impose penalty under Rule 27 of the Central Excise Rules, 2002 on the noticees, viz. M/s. Kabir Exports, M/s. Cusp International, M/s. Aryan's & M/s. Kalinga Exports, all of New Delhi, M/s. Vrindavan Mills Pvt. Ltd., M/s. Olympia Creations Unlimited of Surat, M/s. Shreeman Textiles and M/s. Sajjan Textiles, Bhiwandi, above, by the noticee under [Section 11AC](#) of Central Excise Act, 1944 shall be 25% of the demand confirmed at Sr.No. (I) above. The benefit of reduced penalty shall be available only if the amount of penalty so imposed is paid within the period of 30 (thirty) days from the date of communication of this order."

2.1 Appellant 1 (M/s Parental Creations Pvt Ltd), had taken the credit on the strength of the invoices/ documents issued by M/s 6 E/1166,1172,1196,1206,1225,1226,1726/2010 Sajjan Textiles, M/s Shreeman Textiles, Appellant 3 (M/s Vrindavan Dyeing Mills P Ltd and Appellant 4 (M/s Olympia Creations Unlimited). They have cleared the goods for export to various merchant exporters namely Appellant 5 (M/s CUSP International Ltd), Appellant 6 (M/s Aryans), Appellant 7 (M/s Kabir Exports), M/s Kalinga and M/s Vibrant Exports. Appellant 2 (Shri Dinesh Hariprasad Agarwal) is Director of Appellant 1. Appellant 1 had after obtaining no objection from the merchant exporter filed rebate claim for claiming the refund of duty paid by them making debit from their CENVAT Credit account.

2.2 Appellant 1 was at relevant time having two units one operating at Amrut Industrial Estate Mira Road Thane falling in the jurisdiction of Thane II Commissionerate and the second one operating at Gauri Pada, Dhobi Tala , Bhiwandi, District Thane, falling in the jurisdiction of Thane I Commissionerate. Bhiwandi unit was registered on 14.09.2004 for manufacture of process MMF. When Range officer visited the premises of Bhiwandi Unit on 25.04.2005, he found that the registered premises was used for manufacture of made up articles with sewing machine, this change in activities was intimated vide letter dated 31.01.2005 addressed to Kalyan - I Division.

2.3 Unit at Bhiwandi was claiming the CENVAT credit in respect of the inputs received and was clearing the finished goods after debiting the duty payable, from their CENVAT account. They had issued ARE-1 Nos 1/04-05 to 18/04-05 and corresponding invoices No 1/27.09.04 to 18/09.01.05 showing clearance for exports to four Merchant exporters namely M/s Kabir Exports, M/s Aryan Exports, M/s Cusp International and M/s Kalinga Exports. Further vide invoice no 25 & 26 both dated 11.02.2005 and invoice No 27 & 28 both dated 28.02.2005 they showed clearance of 1,85,149.35 L Mtrs of fabrics claimed to be lying in their stock to their unit at Mira Road Thane.

2.4 Bhiwandi unit had vide its letter dated 16.06.2005 received in range office surrendered the registration and informed that they had stopped their activities in the said unit from 01.03.2005 7 E/1166,1172,1196,1206,1225,1226,1726/2010 and that they had filed all their returns for the period upto 15.06.2005.

2.5 Based on the reference received from the Central Excise Commissionerate Thane-II vide letter dated 22.07.2005 to the effect that Appellant 1 unit at Mira Road Thane, was generating bogus ARE-1s by showing itself as supporting manufacture for the manufacture of "dyed and/ or printed fabrics" and the said bogus ARE-1s were issued to various Merchant Exporters for claiming the fraudulent rebate. It was also stated that Shri Dinesh Aggarwal, Director has in his statement recorded, admitted he had also obtained registration in the name of M/s Parental Creation Pvt Ltd in Kalyan I Division Thane I Commissionerate for his Bhiwandi unit and Bhiwandi unit is also indulging in the similar activity of issuing bogus ARE-1s. Also Bhiwandi unit had issued CENVAT Invoices from their Bhiwandi unit to Mira Road unit.

2.6 Based upon the information received investigations were undertaken at the Bhiwandi unit in jurisdiction of Thane - I Commissionerate. Investigations undertaken revealed that Appellant-1 had not received any goods and had taken the CENVAT credit on the basis of bogus invoices/ duty paying documents. Further as they had not received any goods as inputs the documents for the clearance of the goods viz ARE-1s and invoices issued by them to were fraudulently issued without actual removal of goods. On the basis of such fraudulent documents they had filed the rebate claims and also passed on the remaining credit to their own unit located at Mira Road in the jurisdiction of Central Excise Commissionerate, Thane - II.

2.7 A show cause notice dated 9th October 2009 was issued to the Appellants herein and others asking them to show cause as to why-

- Parental Creations (Appellant 1), o The CENVAT credit amounting to Rs 82,91,790/- (Rupees Eighty Two Lakhs Ninety One Thousand Seven Hundred and Ninety Only) fraudulently availed 8 E/1166,1172,1196,1206,1225,1226,1726/2010 during the period September 2004 to February 2005 as detailed in Annexure I to this notice, should not be demanded and recovered from them under the Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to [Section 11A\(1\)](#) of the Central Excise Act, 1944;

- o A penalty should not be imposed on them under [Section 11AC](#) of the Central Excise Act, 1944 read with Rule 15(2) of the CENVAT Credit Rules 2004 & Rule 26 of Central Excise Rules, 2002;

- o An interest at appropriate rate under [Section 11AB](#) of the Central Excise Act, 1944 read with Rule 14 of the CENVAT Credit Rules, 2004, should not be charged and recovered from them;

- o The 13 (thirteen) number of rebate claims by them (as detailed in Annexure-II to this notice on the strength of no objection certificates obtained by them from their claimed exporter totally amounting to Rs 48,72,328/- (Rupees Forty Eight Lakhs Seventy Two Thousand Three Hundred and Twenty Eight only) which does not represent 'duty' shown paid on clearances shown should not be rejected; o 794798 L Mtrs of processed fabric valued at Rs 8,45,04,443/- as detailed in Annexure II to this notice; exported by the merchant exporters, claimed to have been procured from M/s Parental not available for seizure should not be confiscated under Rule 25 of the Central Excise Rules, 2002 read with Rule 15 of the CENVAT Credit Rules 2004;

- o Since the goods are not available for confiscation, fine in lieu of confiscation should not be imposed on them.

- Shri Dinesh Agarwal, Director of Parental Creations (Appellant 2), penalty should not be imposed on him under Rule 26 of Central Excise Rules, 2002;

9 E/1166,1172,1196,1206,1225,1226,1726/2010 – M/s Cusp International Delhi (Appellant 5), M/s Aryan Delhi (Appellant 6), M/s Kalinga Exports Delhi (Appellant

7), M/s Kabir Exports Delhi, penalty should not be imposed on him under Rule 26 & Rule 27 of Central Excise Rules, 2002;

– M/ Vrindavan Mill Pvt Ltd., Surat (Appellant 3) Olympia Creations Unlimited, Surat (Appellant 4), M/s Shreeman Textiles Bhiwandi and M/s Sajjan Textiles Bhiwandi, penalty should not be imposed on him under Rule 26 & Rule 27 of Central Excise Rules, 2002;

2.7 The show cause notice was adjudicated by Commissioner as per the impugned order referred in para 1, supra.

2.8 Aggrieved by the impugned order appellants have filed these appeals.

3.1 We have heard Shri Piyush Chhajed, Chartered Accountant for Appellant 1, 2 and 4, Shri Mukund Chouhan Advocate for Appellant 3. None appeared for appellants 5, 6 & 7. We have heard Shri Anil Choudhary, Deputy Commissioner and Shri N NPrabhudesai, Superintendent, Authorized Representatives for the revenue.

3.2 Arguing for the Appellant 1, learned Chartered Accountant submitted-

– Issue is in respect of denial of CENVAT Credit taken by them against the purchases made by them from (a) Vrindavan Dyeing Mills Pvt Ltd (Rs 44,90,609/-), (b) Olympiad Creation Unlimited (Rs 22,05,688/-) (c) Shreeman Textile (Rs 14,32,360/-) and (d) Sajjan Textile (Rs 1,67,133/-).

– They are engaged in exporting the goods procured from third party after getting them processed by third party manufacturers. The exports are done through merchant exporter;

– Department has proceeded against them merely on the basis of contradictory statements recorded behind their back and concluded that there was no movement of the 10 E/1166,1172,1196,1206,1225,1226,1726/2010 goods hence the entire chain of transactions from the suppliers to the Merchant Exporters was bogus.; – These contradictory statements on which reliance has been placed by the revenue have no evidentiary value, as the persons who had made the statements were never cross examined by them;

– No evidence has been recovered and placed on the record to show that documents produced by them namely invoices, transport receipts, ARE forms, Shipping Bill, Bank realization certificate (BRC) etc were fraudulent; – In case of their MIRA Road unit in similar circumstances, departmental enquiry was initiated against the conduct of concerned departmental officers for helping them. The said enquiry has been concluded holding that the export were genuine:

– Department has in the present case confirmed the demand of CENVAT Credit and also denied the rebate claims made by them, thereby demanding the tax twice. This is clear indication of the biased mind against the appellant; – They have filed extensive documentation in total 21 Volumes of paper books to show that the transactions undertaken by them were genuine;

– Demand has been made by invoking extended period of limitation. In similar circumstances, Hon'ble Gujarat High Court has in case of Prayagraj Dyeing Mills Pvt Ltd [2013 (290) ELT 61 (GUJ)] has held that extended period could not have been invoked;

– Various suppliers had supplied the goods to them against the invoices and duty paying documents against which they had claimed the CENVAT Credit. These documents or the documents filed by them for claiming the rebate have not been held to be forged;

– Penalty has been imposed on them under [Section 11AC](#) of the Central Excise Act, 1944 read with Rule 15 of CENVAT Credit Rules, 2004 and Rule 27 of the Central Excise Rules. There was no proposal to impose penalty under Rule 27 11 E/1166,1172,1196,1206,1225,1226,1726/2010 hence to that extent order in original has gone beyond the scope of show cause notice;

3.3 Arguing for the Appellant 2 and 4, learned Chartered Accountant submitted that, the penalty imposed on him under Rule 26 cannot be sustained as it is the case of the department that there were no goods involved and all the transactions were merely paper transactions. Since Appellant 2 and 4 had not dealt with any goods liable for confiscation the penalty imposed under Rule 22 is bad in law;

3.4 Arguing for Appellant 3, learned advocate submitted that-

→ Penalty has been imposed upon him under Rule 26.

Undisputedly they are "Body Corporate" and it has been held in the following decisions that penalty under Rule 26 is not impossible on "Body Corporate"

o Woodmen Industries [2004 (170) ELT A 307 (SC)] o Apple Sponge and Power Ltd [2018 (362) ELT 894 (T-Mum)] o Homag India Pvt Ltd [2017 (357) ELT 1194 (T)] → During the course of personal hearing before the adjudicating authority they had submitted copy of all the statutory records like RG 23A Part-I and Part -II, RG-1, Lot Register, PLA, Excise Invoice, Rt-12 return, challan for payment of duty etc. etc. Thus it is crystal clear that they had followed all the statutory provisions; → During the month of January 2005, they had paid certain amounts towards the Central Excise Duty from their PLA account also, thereby leaving no doubt that they had received inputs in their factory and finished goods were cleared on payment of duty;

→ They would relying on the following decisions that in these circumstances penalty could not have been imposed on them:

Shree Shiv Vijay Processors Pvt Ltd. [2011 (264) ELT 540 (T-Ahmd)] S K Foils Ltd [2015 (315) ELT 258 (T)] 12 E/1166,1172,1196,1206,1225,1226,1726/2010

3.5 Arguing for the revenue learned Authorized Representative submitted that-

In Appeal No 1166, 1172, 1208, 1225 & 1226/2010- Mum, he reiterates the findings recorded by Commissioner in the impugned order. Further all the documents relied upon in the Show Cause Notice were supplied to the appellant as is clearly pointed out in para 85 of the impugned order. In para 87, 88 & 89, Commissioner has considered the request in relation to the cross examination and has recorded the reasons for not allowing the same, in case were the appellant sought cross examination.

In Appeal No E/1196/2010 - Mum, Appellant 3, the only reason for objecting the penalty imposed under Rule 26, is that being "Body Corporate" penalty could not have been imposed under this rule upon him. The decision of Woodmen Industries relied upon by the Appellant is clearly distinguishable as it was in the case of firm and not in case of limited Company. On the contrary in case of MadhumilanSyntex Ltd [2007 (210) ELT 484 (SC)] it has been held that as company is not a natural person it cannot be imprisoned, but being a legal or juristic person can suffer payment of fine etc. To similar effect are the decisions of Apex Court in case of Iridium India Telecom Ltd [Appeal No 688 of 2005 Order dated 20.10.2010], Mohanlal JitamaljiPorwal [AIR 1987 SC 1321], Standard Chartered Bank [2006 (197) ELT 18 (SC)] → In Appeal No E/1726/10-Mum, Appellant 7, the points urged by the Appellant have been discussed and discarded in the following decisions:

o Everest Metal Works [2009 (239) ELT 79 (T-Del)] o Ranjeev Alloys Ltd [2009 (236) ELT 124 (T-Del)] & [2009 (247) ELT 27 (P & H)];

o Vee Kay Enterprises [2011 (266) ELT 436 (P &H)]; o M S Metal [2014 (309) ELT 241 (P &H)];

13 E/1166,1172,1196,1206,1225,1226,1726/2010 o Ajay Kumar G Baheti [2017 (348) ELT 115 (T- Mum)] o Navneet Agarwal [2012 (276) ELT 515 (T-Ahmd)] o Sanjay VimalbhaiDeora [2014 (306) ELT 533 (P &H)]; o Amx Alloys Pvt Ltd [2013 (296) ELT 229 (P &H)]; o Wipro td [2006 (196) ELT 226 (T-Mum)]; o Patel Engineering Ltd [2014 (307) ELT 862 (Bom)]; o Shreewood Products (P) Ltd Enterprises [2008 (231) ELT 671 (T-Del)];

o P K Brothers [1993 (64) ELT 439 (T)] 4.1 We have considered the impugned order along with submissions made in appeal, during the course of arguments and in the written submissions filed by the appellants and revenue.

4.2 Show Cause Notice dated 9th October 2009 and the impugned order is in respect of 10 persons as indicated in table below:

S No.	Noticee	Appeal No
1	Parental Creations Pvt Ltd, Surat. Unit at Bhiwandi, Thane	E/1166/2010
2	Shri Dinesh Agarwal, Director Parental Creations	E/1172/2010
3	M/s Vrindavan Mills Pvt Ltd Surat	E/1196/2010
4	M/s Olympia Creations Unlimited, Surat	E/1206/2010
5	M/s Sajjan Textiles, Thane	---
6	M/s Shreeman Textiles Thane	---
7	M/s Kalinga Exports, New Delhi	---
8	M/s Kabir Exports New Delhi	E/1726/2010
9	M/s Cusp International, New Delhi	E/1225/2010
10	M/s Aryan, New Delhi	E/1226/2010

4.3 As is evident from the table above three Noticees namely

M/s Sajjan Textiles, Thane, M/s Shreeman Textiles, Thane and M/s Kalinga Exports New Delhi are not in appeal before us.

14 E/1166,1172,1196,1206,1225,1226,1726/2010 4.4 Appellants had argued that they had not received the documents in respect of the show cause notice issued to them. However in para 85 of the impugned order, Commissioner has categorically recorded as follows:

"85. FINDINGS; - I have carefully gone through the entire case records including written and oral submissions made by the noticees during the hearings and the provisions of law relating to the issue. It is clear from the, records that the service of the subject notice was carried out along with the relied upon documents listed in the relevant Annexure of the notice in pursuance of the provisions of Section 37 C of the Central Excise Act, 1944, by way of service at their registered premises under a regular panchanama and delivery by registered post in the first fortnight of October, 2009, itself. The notice is signed by the issuing authority, with designation indicated below it, and is within its power of demand set by the Board. Calling such a valid and legal notice, an illegal one because all its pages are not signed by the officer is a ridiculous argument. The acknowledgement of a heavy parcel is on record indicating that a complete set of photocopies of the relied upon documents was received by the main two notices also. However, none of the noticees and especially, the main two noticees, file any reply to the notice even after lapse of around two months time. They did not, till then, felt it necessary to go through the notice and the documents supplied therewith. As late as in December, 2009 when the case was posted for hearing, for the first time, the main two noticees came up with a plea dated 05.12.09, that the notice received by them was a big one and that they needed 5-7 weeks time to analyze the same. After the case was posted for second hearing, the main two noticees filed their so called first part-submission dated 09.12.09, similarly seeking five to seven weeks time to file their reply and that they may require some additional documents/ information. In spite of this letter they did not come up with any requisition for the documents till the third hearing was granted and till a specific request was made to them to come up with details of the documents required by them. Upon this letter of the third hearing they came up with a list of host of documents required for their defense, followed by another such requirement from the jurisdictional Division office. The requests were 15 E/1166,1172,1196,1206,1225,1226,1726/2010 .accommodated and the investigating section was directed to provide them with the documents 'needed by them. The investigation, after verifying their request reported that most of the documents sought for were nothing but the relied upon documents of the notice itself, which were already provided to them at the time of the service of the notice itself. The two noticees have not denied the receipt of these sets as apparent from their correspondence with

the Preventive (Section) of Central Excise directly, where while acknowledging the receipt of the notice with the said documents, they had stated that a few pages of the notice were illegible. Still, the documents, other than those relied upon mentioned in their two requests; one made to the adjudicating authority and the other to the divisional DC, were provided to them by the investigating, Preventive (Section) of Central Excise under letter dated 20.01.10, making the above position clear. Apparently, upon receipt of these documents they came up with the contention that the show cause notice was not a true/legal show cause notice as it's all the pages were not authenticated and also that the documents supplied to them were also not attested and so were not reliable. The entire episode indicates that against the claim made by them every now and then about cooperating with the department and seeing justice, they were more interested in raking up trivial issues to falter the adjudication process. The two noticees requesting for certain relied upon documents, who have reportedly received the requisite documents, were at least expected after that, to come out with some evidence glaring from these documents, or even by stating the circumstances for the adjudicating authority to ponder over, to show that the transactions carried out by them were genuine and there were records, such as transportation, payments which could establish their innocence with regard to alleged acts against them. However, this has not happened. When they filed reply it was simple denial of charges not substantiated with any material evidence against the allegation in the notice, and request for 'attested' documents already supplied. There was also an unnecessary haggling over the issue of the authentication of the photocopies, without bringing out a single case that the copies were not genuine or that, they had reason to believe that fake copies could have been supplied to them. Thus, in the end there is only denial of charges by them on the 16 E/1166,1172,1196,1206,1225,1226,1726/2010 record, which will be dealt later. However, the entire course from the beginning indicates that all out attempts to impart natural justice have been made by the adjudication process, the main two noticees have also availed it, but have, on the contrary, appeared to have used the same as a tool to delay the proceedings. Thus, observing that the requirements of principles of natural justice have been amply followed, by way of proper service of the notice, supply of copies of documents; even additionally asked for, opportunity to take additional copies required or to inspect the records, and granting a number of hearings spread over a period of four months to put forth the effective defense, the case has to be taken up for decision even if the main noticees till end have chosen not to appear for the hearing. The whole episode clearly indicates that since the main noticees, do not have any proper defense for the case against them, they have chosen to ignore the proceedings of adjudication and yet grumble without any basis that the justice to this end is not imparted to them. This clearly looks like stretching of principles of natural justice beyond limits to suit their ends. The case law, in the case of M/s. Sanghi Textile Processors 1993(65) ELT 357(SC) clearly lays down the principles of natural justice for adjudicating authority in such circumstances, which guides that simple steps of supplying photocopies of relied documents and extending the opportunity of inspection after service of the notice would meet the justice. This has been done in this case from the beginning of the process itself; therefore the requirements of principles of natural justice are complied with."

Chartered Accountant appearing for the Appellant 1 had submitted that they had not received some of the documents relied upon in the show cause notice. Considering the submissions made, bench had on 4.12.2019 made the following order:

"The learned C.A. for the appellants submits that the certain documents mentioned in the SCN though requested by them have not been received. He requests time to prepare list of documents which was not supplied and also the correspondence from the Department time to time during the course of 17 E/1166,1172,1196,1206,1225,1226,1726/2010 adjudication and request of cross-examination of the witnesses. He seeks time to furnish the details of these documents on the next date of hearing. Adjourned to 16/12/2019."

On 16.12.2019, instead of filing the details of the documents not received by him along with the request for cross examination etc, learned Chartered Accountant admitted that they had received all the documents and matter may be taken up. Accordingly the matters were taken up for arguments and consideration.

4.5 Appellant 3 i.e. M/s Vrindavan Dyeing Mills Pvt Ltd Surat had requested for cross examination of Shri Dinesh Agarwal (Appellant 2), Shri Mahesh Agarwal (employee of Appellant 1) and Shri Ravi Sharma, Broker. However his request has been turned down by the Commissioner as per para 87, 88 & 89 of the impugned order. In his appeal or during the course of arguments or in the written submissions filed Appellant 3 has not pressed that denial of cross examination has caused any prejudice to him in making his submissions.

4.6 In their appeal and arguments Appellant 1, have submitted that the revenue has proceeded to the book this case against them, alleging that they had not received any material against the invoices received by them and against which they had taken the CENVAT Credit. They submit that on the contrary they have all the records to show the receipt of the goods against which they had taken the CENVAT Credit. It is also not correct, to say that the suppliers of the input materials were bogus as these suppliers are in existence and M/s Vrindavan Mills Pvt Ltd, Surat (Appellant 3) and M/s Olympia Creations Unlimited, Surat (Appellant 4) are even before tribunal. The other two suppliers namely M/s Sajjan Textiles, Thane and Shreeman Textiles, Thane two existed and were filing regular returns to the concerned jurisdictional officers.

4.7 After the receipt of inputs they had cleared the processed fabrics to various merchant exporters namely M/s Kalinga Exports, New Delhi, M/s Kabir Exports, New Delhi (Appellant 5), 18 E/1166,1172,1196,1206,1225,1226,1726/2010 M/s Cusp International, New Delhi (Appellant 6) and M/s Aryan New Delhi (Appellant 7). These goods cleared to Merchant Exporter, were actually exported by them through various ports in Delhi. Not only the fact of export has been confirmed by the concerned authorities at port of exportation, in the enquiries made from them. Against the exports made Foreign Exchange remittances have also been received. The goods which were not cleared for exports were transferred by them to their unit at MIRA Road after payment of the duty equivalent to the CENVAT Credit taken 4.6 However on the basis of the investigations made and allegations levelled, Commissioner has put on hold the rebate claims filed by them and has also sought to deny the CENVAT Credit taken/availed by them. If the case of revenue is that they had not received any goods and consequently not cleared anything for exportation, then all the entries made in their CENVAT account are nothing but the book entries. It should also be noted since as alleged they had not cleared the goods for exportation the reversal made by them in their CENVAT Credit account, for the clearance of goods itself was not required as nothing was actually being cleared.

4.8 Annexure 1 to Show Cause notice reproduced below, gives the detail of the documents against which the Appellant 1 claim to have received the inputs have availed the CENVAT Credit.

S	Invoice	Quantity	Value	Duty in Rs	Vehicle No
N	No Date		CENVAT	EDU Cess	
Supplier: Olympia Creations Unlimited				Goods: Fabrics	
1	133 16.09.04	25417	2338364	187069	3741 GJ1TT9888
2	134 17.09.04	25457	2342044	187364	3747 MH15AG2155
3	135 18.09.04	30620	2817040	225363	4507 MCY2960
4	136 19.09.04	17006	1564552	125164	2503 MTT9068
5	137 20.09.04	25190	2317480	185398	3708 MH15AG2155
6	138 21.09.04	20200	1858400	148672	2973 GJ1TT9888
7	139 22.09.04	26650	2451800	196144	3923 MCY2960
8	140 23.09.04	28008	2576736	206139	4123 MTT9068
9	141 24.09.04	28050	2580600	206448	4129 GJ1TT9888
19 E/1166,1172,1196,1206,1225,1226,1726/2010 10 142 25.09.04 20838 1917096 153368 8067 MH15AG2155 11 143 26.09.04 25004 2300368 184029 3681 GJ1TT9888 12 144 27.09.04 20704 1904768 152381 3047 MTT9068 Total 293144 26969248 2157539 48149 Supplier: Vrindavan Dyeing Mills Pvt Ltd Goods: Dyed Polyester 13 217 06.12.04 43774 4183480 334678 6694 -- 14 218 07.12.04 42794 4090057 327205 6544 -- 15 219 13.12.04 44556 4375563 350045 7001 -- 16 220 14.12.04 52847 5190023 415202 8304 -- 17 227 01.01.05 40448 3971408 317718 6354 -- 18 228 01.01.05 24331 2389060 191125 3822 -- 19 229 01.01.05 28299 2778615 222289 4446 -- 20 230 01.01.05 28145 2764043 221123 4422 -- 21 231 01.01.05 36591 3593165 287453 5749 -- 22 232 05.01.05 48481 4705312 376425 7528 -- 23 233 06.01.05 25033 2429642 194371 3887 -- 24 234 07.01.05 27412 2659594 212767 4255 -- 25 235 13.01.05 39475 3831516 306521 6130 -- 26 236 14.01.05 27812 2707976 216638 4332 -- 27 237 15.01.05 55265 5362520 429001 8580 --					
Total		565263	55031974	4402561	88048
Supplier: Shreeman Textiles				Goods: Grey Fabrics	
28	986 31.12.04	41930	3270540	261643	5233 EFD

29 987 31.12.04	42050	3279900	262392	5248	EFD
30 988 31.12.04	46160	3600480	288038	5761	EFD
31 989 31.12.04	25070	1955460	156437	3129	EFD
32 990 31.12.04	30111	2348658	187893	2758	EFD
33 995 31.12.04	39880	3110640	248851	4977	EFD
Total	225201	17565678	1405254	27106	

Supplier: Sajjan Textiles

Goods: Grey Fabrics

33 247 17.12.04	26259	2048202	163856	3277	EFD

Grand Total 1109867 101615102 8129210 1656580 Total CENVAT Credit in Dispute Rs 8295790 4.9 Similarly Annexure 2 to the Show Cause Notice records the details of purported clearances claimed to have been made by the Appellant 1. The relevant extracts from the said Annexure are reproduced below:

20 E/1166,1172,1196,1206,1225,1226,1726/2010 SN Merchant ARE-1/ Bill/ lading or AWB VehiclQuantit FOB Value Port/ Exporter Invoice e y Shippin No Date No Date g 1 M/s Kabir 1 27.09.04 54200477 4.10.04 MH04 50874 6866082 IGI Exports 235 F9592 Airport 2 2 27.09.04 54200477 4.10.04 47262 6427724 IGI 245 Airport 3 3 29.09.04 DEL-KAR- GJ1TT 45390 6125948 ICD, 2447 9888 TKD 4 4 29.09.04 54200477 4.10.04 54658 7376780 IGI 256 Airport 5 5 29.09.04 DEL-KAR- MH15 48888 6598046 ICD, 2447 AG21 TKD 6 6 2.10.04 54200477 5.10.04 MTT9 45708 6168866 IGI 875 068 Airport 7 M/s Aryans 7 31.12.04 SS/DEL/04 MCY2 47581 6128588 ICD, /ISL/D051 960 TKD 8 M/s Cusp 8 31.12.04 SS/DEL/04 MH15 28737 7585436 ICD, Internation /ISL/D051 BG25 TKD 9 al 9 31.12.04 37 56 30171 ICD, TKD 10 M/s Kalinga 10 01.01.05 DEL/2005/ MH04 44502 5730475 ICD, Exports 4475 F9598 TKD 11 11 01.01.05 52940 6816951 ICD, TKD 12 M/s Cusp 12 01.01.05 SS/DEL/04 MH04 42402 10560609 ICD, Internation /ISL/D054 F6678 TKD 13 al 13 01.01.05 45 39611 ICD, TKD 578724 76385505 4.10 Commissioner has in para 92 of impugned order recorded as follows:

"92. On supply/supplier of inputs side, M/s. Parental have shown receipt of their inputs; grey fabrics, from principally, M/s. Sajjan Textiles, M/s. Shreeman Textiles, M/s. Olympia Creations 21 E/1166,1172,1196,1206,1225,1226,1726/2010 Unlimited and further, have shown processing got done on grey fabrics purportedly bought from M/s. Shreeman and M/s. Sajjan Textiles at M/s. Vrindavan Dyeing, Surat. Of these, Shri Manoj Agrawal, proprietor, of M/s. Olympia, incidentally brother of Shri Dinesh, was examined and his records were taken up. This has revealed that:-

A(i) Although, M/s. Olympia seem to have shown supply of goods to M/s. Parental worth nearly Rs.2.70 crores in merely 12 days (from 16.09.04 to 27.09.04), they have not substantiated it with private records viz. commercial invoices, lorry receipts, octroi receipts, purchase orders, documents showing payments, etc. which can establish purchase of fabrics, their processing and movement of finished processed fabrics from Surat to Bhiwandi.

(ii) M/s. Olympia, Surat have not been able to name any one other person to whom they have supplied their fabrics. They have supplied the fabrics to M/s. Parental. For these supplies M/s. Olympia Creations Unlimited have purchased processed fabrics from M/s. Parental Creations Pvt. Ltd., Bhayander, itself and without carrying out any process, have sold the same to M/s. Parental Creations Pvt. Ltd., Bhiwandi, both firms owned by Shri Dinesh Agarwal (his brother). The circumstantial evidence shows as to why the processed fabrics will be transported from Bhayander to Surat, and then again brought back to Bhiwandi, without carrying out any process as stated by Shri Manoj Kumar in his statement dated 30.09.05, and sold back to M/s. Parental. This shows that the transaction is nothing but an eye-wash to mislead the department and to enable M/s. Parental to avail Cenvat credit on the invoices of a seemingly unrelated party. This fact is further confirmed by the fact that Shri Manoj Agarwal is unable to produce any evidence such as LRS, Octroi receipt, escort receipts etc. for the transportation of the processed fabrics from Bhayander to Surat & from Surat to Bhiwandi.

(iii) Further, the claimed suppliers of M/s. Olympia Creations Unlimited have been declared bogus/non-existent as per the Alert Circular issued by Surat-I Commissionerate, hence M/s. Olympia Creations Unlimited, could not have received the inputs, 22 E/1166,1172,1196,1206,1225,1226,1726/2010 was not eligible for any Cenvat credit accordingly is ineligible to issue any invoice for passing on the said bogus Cenvat credit.

(iv) Thane-II Commissionerate investigating the affairs of M/s. Parental Creations, Bhayander (dealer) with M/s. Olympia Creations Unlimited, Surat, on the basis of whose invoices Cenvat credit was availed.

(v) M/s. Olympia itself has been declared bogus/fake by the jurisdictional Surat-I Commissionerate.

(vi) M/s. Olympia Creations, who is also one of the noticees of this notice have not come forward with any defense against these allegations, substantiated by the circumstantial evidences. B. Summonses were issued to Shri Suresh Purohit, Proprietor of M/s. Sajjan Textiles and M/s. Shreeman Textiles. However, the same were returned by the postal authorities. M/s. Shreeman Textiles and M/s. Sajjan Textiles have been declared bogus unit vide alert Circular No.08/2006 dated 19.06.06 of Thane-I Commissionerate. The two units are also noticees of this notice but have not participated in the proceedings from the beginning. In fact, there is also a separate notice issued to these units for the alleged issuance of invoices without supply of any material for which the alert circular is issued against them. Therefore, the supplies of the two units cannot be genuine. C. M/s. Parental have availed Cenvat credit of nearly Rs.45 lakhs on the invoices issued by M/s. Vrindavan Dyeing Mills Pvt. Ltd., Surat. However as per record these invoices were for the processed fabrics for which the grey fabrics was shown supplied from the units of M/s. Sajjan and M/s. Shreeman. Since, these two units itself are declared fake, there could not be any supply of grey to M/s. Vrindavan from them and so the credit, it turn, coming from them to M/s. Parental also could not be practically possible. Further, transactions of M/s. Vrindavan against the claim of Shri Dinesh Agrawal have been examined and the same has revealed that there are serious contradictions in their statements such as:-

i) Shri Dinesh Agarwal in his statement dated 25.08.05 had stated that the transportation as well as payment for 23 E/1166,1172,1196,1206,1225,1226,1726/2010 transportation of the grey fabrics from M/s. Parental to M/s. Vrindavan was arranged by M/s. Vrindavan whereas Shri Navdiwala, Excise Clerk of M/s. Vrindavan in his statement dated 16.05.06 & 28.09.06, had categorically stated (which has been confirmed by Shri Harishchandra Udaynarayan Singh, Director of M/s. Vrindavan) that the transportation was arranged by Shri Mahesh Agarwal of M/s. Parental and the transportation charges has also been paid by M/s. Parental.

ii) Shri Dinesh Agarwal, in his statement dated 25.08.05, had stated that there was no broker involved in the transaction between them and M/s. Vrindavan, whereas Shri Navdiwala has contradicted this and stated that Shri Ravi Sharma was the broker in the deal. This fact has also been corroborated by Shri Ravi Sharma, the Broker, in his statement.

iii) Shri Dinesh Agarwal has stated that Shri Mahesh Agarwal was the person responsible for most of his work, which has enabled him to take credit of nearly Rs.61 lakhs from M/s. Vrindavan, M/s. Shreeman & M/s. Sajjan. However, his failures to give any address, etc. of such an employee raised suspicion that he has avoided this to prevent the facts from coming out in the open.

iv) Shri Mahesh Agarwal in his statement dated 16.06.09 has categorically denied all the activities claimed by Shri Dinesh Agarwal as been done by him. He has specifically stated that he has never visited Parental, Bhiwandi premises, its purchasers or suppliers.

Hence, it is indicated that all the transaction involving M/s. Vrindavan, M/s. Sajjan & M/s. Shreeman, the suppliers and the supply transactions are all proven bogus. M/s. Parental have been unable to produce any evidence to counter these facts."

4.11 The fact that even the so called payments made by the Appellant to the supplier of the raw material have been found to be bogus. Commissioner has in para 96 observed as follows:

"With regards to the second aspect, cheques shown issued to the claimed suppliers of the inputs were found to have gone into the accounts of third parties, discounted in a number of banks at 24 E/1166,1172,1196,1206,1225,1226,1726/2010 Surat and none of the payments are gone to the claimed buyers. These, findings on the main four aspect of the operations, the allegation of paper transactions without dealing in any goods is cemented."

4.12 Apart from the above observation made by the Commissioner we also do not find the submissions made by the Appellant in respect of the goods cleared for export as

having any merits because of the time lag between the date of clearance of the goods from the premises of the Appellant and the date of "let export order" indicated on the ARE-1. It is also not understood as to why the goods which were exported were transported from Thane, Mumbai to Delhi for exportation from ICD Tughlakabad and IGI Airport New Delhi, when the gateway port for ICD Tughlakabad is Jahawar Custom House, Nhava Sheva. The act of incurring the expense on transportation of goods from Thane Mumbai to New Delhi and then back to Nhava Sheva, could not be explained by the Appellants or the merchant exporters. Table below indicates the purported date of clearance extracted from ARE-1's and the date of Let Export Order, after actual examination and stuffing of the goods in container at the port of exportation.

SN	ARE-1	S/Bill	Let Export Order date
No	Date	No	Date
1	1	27.09.2004 5324717	4.10. 2004
2	2	27.09.2004 5324724	4.10. 2004
3	3	29.09.2004 1420481	1.10. 2004
4	4	29.09.2004 5324720	4.10. 2004
5	5	29.09.2004 1420482	1.10. 2004
6	6	02.10.2004 5324725	4.10. 2004
7	7	31.12.2004 1449711	3.01. 2005
8	8	31.12.2004 1449721	3.01. 2005
9	9	31.12.2004 1449721	3.01. 2005
10	10	01.01.2005 1450794	6.01. 2005
11	11	01.01.2005 1450653	6.01. 2005
12	12	01.01.2005 1449719	3.01. 2005
13	13	01.01.2005 1449719	3.01. 2005
25 E/1166,1172,1196,1206,1225,1226,1726/2010			

Above table above it is quite evident that goods which are cleared from the premises of Appellant premises have been allowed let export from the port located in Delhi within a week time which is highly improbable as the normal travel time of the cargo from Thane-II to Delhi is much higher than that. Also it is noted that the goods as per the consignment notes were consigned and delivered at the premises of the merchant exporter and not directly to the port of exportation. This also would have added some time delay and most likely these goods were not the same goods which were exported by the merchant exporter under the cover of these shipping bills. Appellants have also not produced copies of any documents evidencing the payment of toll/octroi at any of toll/ octroi naka that would have been crossed in course of transporting the goods from Thane to Delhi.

4.13 The facts about non receipt of the inputs/ goods against which the Appellant 1 have availed the CENVAT Credit of Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) has been admitted by the Shri Dinesh Agarwal (Appellant 2) Director of Appellant in various statements recorded. The gist of the statements to this effect is reproduced below:

i) In his statements dated 18/7/2005 and 21/7/2005 Shri Dinesh Agarwal, Director of M/s Parental Creations Pvt. Ltd., recorded before Supdt. C. Ex. Thane II stated that they had issued 18 ARE1s without actually delivering any goods and followed the same modus operandi in his premises at Bhiwandi, which was registered earlier.

ii) Shri Dinesh Agarwal on 8/8/2005, 9/8/2005 and 23/8/2005 inter alia stated that their premises at Bhiwandi was procured on rental basis from Shri Asgar Ali, Company's Bank accounts are at UTI Bank and Indian Overseas Bank, both at Surat, that they had never paid any electricity charges nor there was any 3- phase connection to the said premises, that the premises did not have any water connection, he gave details of equipment as were in the gala (which he changed in subsequent statement), 26 E/1166,1172,1196,1206,1225,1226,1726/2010 that one Shri Mahesh

Agarwal (having Mobile no.9376814151) was employed in their Company who was looking after all operations of the company, that they authorized Pawan Singhal C.A. for obtaining C. Ex. Registration, that the address of Shri Mahesh Agarwal was not known to him, that his unit received grey fabrics from M/s Shriman Textiles and M/s Sajjan Textiles both of Bhiwandi, that the grey fabrics were directly delivered to the premises of M/s Vrindavan Dyeing Mills Pvt. Ltd., Surat and as per the arrangement the said processor was lifting the fabrics from Supplier's premises and transported to Surat., that after processing the said fabrics were delivered to his unit at Bhiwandi by the processor under C. Ex. invoices, thereafter the processed fabrics were subjected to cutting and packing, that they availed credit based on the invoices and used the same for payment of duty, that in a few case where the grey fabrics were lifted by his unit and brought to their premises and the same were subjected to bleaching and dyeing without aid of power.

iii) On 25/8/2005, Shri Dinesh Agarwal stated that one Shri Singh is a Director of M/s Vrindavan Dyeing Mills Pvt. Ltd. (Textile Processors) (para 10 and 12 of SCN) and their employee Bharatbhai was dealing with them, the job charges were inclusive of transportation, that the transportation was arranged by M/s Vrindavan Dyeing Mills P Ltd., that no broker was involved in these dealings, transportation was arranged by M/s Vrindavan Dyeing Mills P Ltd., and he did not know the name and address of transporters, processed fabrics were transported to his factory in trucks and Shri Mahesh Agarwal used to receive the goods in the factory, that material received were cut and packed and cleared to Delhi, that transportation was arranged by merchant exporters, that normally a representative of the buyer used to visit his premises to inspect the fabrics before they are packed, the representative of the merchant exporter comes to his factory to prepare ARE1 and packing list, that goods were transported by road to Delhi, that Approx. Rs.10 Lakhs was paid to Vrindavan as job charges. (charge Rs.8 to 10 per Liner mtr.), that his unit availed Cenvat credit on grey fabrics as well as on 27 E/1166,1172,1196,1206,1225,1226,1726/2010 processed fabrics. He did not produce any transportation documents produced. He also stated that his brother Manoj Agarwal was proprietor of M/s Olympia Creations Unlimited.

4.14 All the facts as stated above along with the findings recorded by the Commissioner abundantly make it clear that the appellant 1 had not received any goods against which they had availed the CENVAT Credit and have not cleared the same for exportation or any other purpose. In our view Appellant 1 have fraudulent availed the CENVAT Credit of Rs 82,91,790/- (Rupees Eighty Two Lakhs Ninety One Thousand Seven Hundred and Ninety Only), without receiving any inputs. We are also of the opinion that since the Appellant 1 has not received any goods the clearance of the same by him for exportation or any other purpose also was fraudulent, so that they could have converted the fraudulent credit to cash by claiming the rebate of the duty paid by them by debiting from the fraudulent credit availed by them.

4.15 The evidences in the case in the case clearly suggest that Shri Dinesh Agarwal (Appellant 2), Director of Appellant 1 has in connived with the various suppliers namely M/s Shreeman Textiles, M/s Sajjan Textiles, M/s Olympia Creations Unlimited & M/s Vrindavan Dyeing Mills Pvt Ltd and merchant exporters namely M/s Kalinga Exports, M/s Kabir Export, M/s Aryans & M/s Cusp International to hatch the scheme/ plot for availing the fraudulent credit and then converting the same to cash. The scheme hatched was meant to defraud the exchequer by claiming inadmissible rebate by way of refund of duty paid from the inadmissible credit. To a specific query made counsel for Appellant 1, admitted that they had not been paying any duty for which the rebate claims have been filed in cash and the entire amounts were paid by them from the CENVAT account only. The Appellants in the case before us were part and parcel of the scheme hatched by Appellant 1 through it Director (Appellant 2), to manipulate the documents fraudulently.

4.16 Appellant 1 have argued heavily relying on the decision of Hon'ble Gujarat High Court in case of Prayagraj Dyeing & 28 E/1166,1172,1196,1206,1225,1226,1726/2010 Printing Mills Pvt Ltd [2013 (290) ELT 61 (Guj)] that extended period of limitation cannot be invoked for denying the CENVAT Credit taken by him. In the said decision Hon'ble High Court held as follows:

"8. Therefore, the question that falls for determination is whether the department can escape its liability to find out a person who was registered with them and to pursue him for payment of duty. There is also no dispute in these cases that the goods were purchased by the merchant manufacturer officially and they have suffered the duty thereon and the amounts have been paid through cheques.

9. It is also not a case where the invoices are manufactured documents not signed by the original manufacturer. The invoices which are accounted for in the Return of the

person, were the invoices accounted for in the Return of the persons registered with the Central Excise. Thus, merely because the manufacturer cannot be found at the present, such fact cannot make the invoices fake or fraudulent documents in the eye of law. These are actual invoices issued by the manufacturer who is duly registered under the Central Excise Act and, therefore, those cannot be said to be forged documents. In our opinion, merely because today, the original manufacturer, who is registered with the Revenue, is not traceable, it does not mean that he did not exist at the relevant point of time. If today, a manufacturer is not available for various reasons that does not mean that at the relevant point of time, such manufacturer who was registered with the Central Excise, did not exist. In our opinion, once receipt of goods is not disputed by a person taking credit and necessary invoices are issued, he is entitled to take credit provided however that he took reasonable steps to ensure that the inputs or the capital goods in respect of which he had taken CENVAT credit are the goods on which appropriate duty of excise as indicated in the documents accompanying the goods, has been paid.

10. In this connection, we find substance in the contention of Mr. Parikh, the learned senior advocate appearing on behalf of 29 E/1166,1172,1196,1206,1225,1226,1726/2010 the appellants, that there is a marked distinction between a forged document and a document issued by practising fraud. If it appears that a document is a forged one or a manufactured one, it is concocted or a created one in the eye of law and it is in the eye of law a non-existent document. On the other hand, a document issued in the context of a fraud or misrepresentation, is by itself a genuine document and according to settled law, such document is, at the most, voidable and is valid till it is set aside. A transaction that takes place on the basis of such document is good one and can even give a good title to the holder in due course for valuable consideration. At this juncture, we may profitably refer to the observations of the Supreme Court made in the case of CCE v. Decent Dyeing Co., reported in 1990 (45) E.L.T. 201 = (1990) 1 SCC 180 wherein, the Supreme Court held that it would be intolerable if the purchasers were required to ascertain whether excise duty had already been paid as they had no means of knowing it. It was further pointed out that duty of excise is primarily a duty levied on a manufacturer or purchaser in respect of a commodity manufactured or produced. As pointed out by a Division Bench of this Court in the case of Commissioner of Central Excise v. D.P. Singh reported in 2011 (270) E.L.T. 321, the judgment of the Supreme Court in the case of New India Assurance Company (supra), was distinguished, being one relating to a forged document which renders a document null and void, and as such, has no application to this type of cases. Similarly, reliance over the judgment of the Supreme Court in the case of Commissioner of Customs (Preventive) v. Aafloat Textiles (I) P. Ltd. reported in 2009 (235) E.L.T. 587, cannot be supported as Afloat case is one pertaining to a forged document but not in respect to a document otherwise genuine, issued by practising fraud. The facts stated in the case of Afloat indicated that the same was a case of a forged invoice and thus, the principles laid down therein cannot have any application to an invoice which is, otherwise, genuinely issued by a manufacturer registered with the Revenue. Justice Arijit Pasayat who delivered the judgment 30 E/1166,1172,1196,1206,1225,1226,1726/2010 of the Supreme Court in the case of Afloat (supra), in a subsequent case of Commissioner of Customs v. Ajay Kumar & Company, reported in 2009 (238) E.L.T. 387, clearly indicated that the same being not a case of forged document but one of issue of license by practising fraud, the Tribunal was right in holding that the transferee of the license should not be made liable. It may not be out of place to mention here that the Tribunal, in its judgment, reported in 2006 (205) E.L.T. 747 indicated in paragraph-7 as follows :

"if that be so, the concept that a fraud vitiates everything would not be applicable to cases where a transaction of transfer of license is for value consideration without notice, arising out of mercantile transactions, governed by common law and not provisions of any statute."

11. We, therefore, find no substance in the contention of the learned counsel for the Revenue that simply because the original manufacturer is now not traceable, is sufficient for reversal of cenvat credit already taken by the appellants by virtue of the original invoices. However, at the same time, we find substance in the contention of Mr. Oza and Mr. Champaneri, the learned counsel appearing on behalf of the Revenue, that in order to get the credit of CENVAT, Rule 7(2) cast a further duty upon the appellants to take all reasonable steps to ensure that the inputs or the capital goods in respect of which the Appellants had taken the credit of CENVAT are the goods on which appropriate duty of excise as indicated in the documents accompanying the goods, has been paid. The Explanation added to Rule 7(2) even describes the instances which are the reasonable steps. The Appellants in these cases, however, not having taken those steps, cannot get the benefit of the credit even

though he is not party to fraud. In this connection, we fully agree with the views taken in the case of Sheela Dyeing (supra), and hold that the said decision supports the case of the Revenue and taking of all reasonable steps as provided in Rule 7(2) is an essential condition of availing the credit. The distinction sought to be made by Mr. Parikh that the period involved therein related to 31 E/1166,1172,1196,1206,1225,1226,1726/2010 June, 2003 is not tenable because sub-rule (e) of Rule 7 was introduced even earlier with effect from April 1, 2003.

12. The next question is whether demand of reversal is barred by the period of limitation. In our opinion, in view of our above finding that if the original document is issued even by practising fraud, a holder in due course for valuable consideration unless shown to be a party to a fraud, cannot be proceeded with by taking aid of a larger period of limitation as indicated in Section 11A(1) of the Act. It is now settled law that Section 11A(1) is applicable when there is positive evasion of duty and mere failure to pay duty does not render larger period applicable. In the case before us, it is not the case of the Revenue that the transferees were party to any fraud and therefore, the Revenue cannot rely upon a larger period of limitation. Our aforesaid view finds support from the following decisions of the Supreme Court :

(i) CCE v. Chemphar Drugs & Liniments, reported in 1989 (40) E.L.T. 276.

(ii) Padmini Products v. Collector of Central Excise, reported in 1989 (43) E.L.T. 195.

(iii) Lubrichem Industries Limited v. CCE, Bombay, reported in 1994 (73) E.L.T. 257.

(iv) Nestle (India) Limited v. CCE, Chandigarh, reported in 2009 (235) E.L.T. 577.

13. We thus find substance in the contention of Mr. Parikh that in the case before us, in the absence of any allegation that the appellants were parties to the fraud, the larger period of limitation cannot be applied, and thus, even if the original document was assumed to be issued by practising fraud, the appellants being holders in due course for valuable consideration without notice, the larger period of limitation cannot be extended in the case before us. In this connection, we may profitably refer to the decision of the Supreme Court in the case of Commissioner of Central Excise, Belapur v. E. Merck India Ltd. reported in 2009 (238) E.L.T. 386 (S.C.) where the Supreme 32 E/1166,1172,1196,1206,1225,1226,1726/2010 Court took a view that in the absence of a willful misdeclaration on the part of the respondent-assessee, there was no scope of invoking Section 11A of the Act."

4.14 This decision of High Court was distinguished by the CESTAT Ahmedabad Bench in case of Shri Labdhi Prints [2014 (308) ELT 178 (T-Ahmd)] stating as follows:

"5. Heard both sides and perused the case records. So far as admissibility of Cenvat credit on invoices of grey fabrics is concerned, it is evident from the evidences on record, especially statement dated 20-4-2005 of Shri Biren H. Vakharia, Partner of the main appellant, that only invoices were received by the appellant without receipt of grey fabrics covering those invoices. The supplier of the grey fabrics have been found to be non-existent hence the invoices on the basis of which credit has been taken are to be considered as forged. Shri Vakharia in his statement, inter alia, admitted that the whole transactions are sham being mere paper transactions. He explained that the impugned invoices of grey fabrics were made available to him by one Shri Girdharilal Dadhich. In his statement, Shri Dadhich admitted that he in conspiracy with one Shri Yogesh Vashi fraudulently obtained registration in the name of M/s. Inder Silk Mills and M/s. I.G. Fabrics and made fraudulent declaration of stock to avail deemed credit. The evidence in the form of Panchnama and alert circulars have not been challenged nor there is any retractment of statements.

5.1 Hon'ble High Court of Gujarat in the case of Prayagraj Dyeing and Printing Mills Pvt. Limited v. UOI (supra) made following observations in Paras 9 and 12, reproduced below :-

"9.

10.

11.

12."

5.2 It is evident from the above observations that the facts before the Hon'ble High Court were different then the facts of 33 E/1166,1172,1196,1206,1225,1226,1726/2010 this case. In the present proceedings appellant was a party to the fraud committed in availing Cenvat credit on grey fabrics which was never received. Accordingly, Cenvat credit has been correctly denied by the lower authorities by invoking extended period."

4.17 In view of above we are of the view that the CENVAT Credit availed by the appellants fraudulently without receiving the corresponding inputs covered by the duty paying documents/ invoices needs to be denied to the Appellant 1 by invoking extended period of limitation as per Rule 14 of CENVAT Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944. Since no inputs were received by the Appellant 1 the clearance of the goods by him by debiting the duty against such fraudulent clearances from the CENVAT Account is also not sustainable. In fact as no goods were received they have also not been cleared and hence the debits made from the CENVAT accounts which is subject matter of thirteen rebate claims filed by the Appellant after taking no objection from the merchant exporters is also not sustainable. Accordingly all the rebate claims filed by the Appellant 1 and subject matter of these proceedings need to be disallowed as have been done by the Commissioner by withholding the same. However since we hold the credit itself as fraudulent the debits made from the CENVAT account to be fraudulent. Thus in absence of the clearance of the goods by the appellant, if the duty is sought to be demanded from appellant 1 against the goods which were never cleared by them for export would amount to double jeopardy. In case of the goods cleared by the appellants to their sister concerned by debiting the fraudulent CENVAT Credit availed by them, the appellants have fraudulently transferred this CENVAT Credit to their sister concern who would have utilized the same. Hence these amounts need to be recovered from the Appellant 1, whereas in case of exports under the claim of rebate, the denial of rebate claim will amount to recovery of the fraudulent CENVAT Credit.

34 E/1166,1172,1196,1206,1225,1226,1726/2010 4.18 In view of discussions as above we uphold the order of Commissioner denying the CENVAT Credit to the tune of Rs 82,91,790/- (Rupees Eighty Two Lakhs Ninety One Thousand Seven Hundred and Ninety Only) in terms of Rule 14 of CENVAT Credit Rules, 2004 read with proviso to Section 11A(1) of Central Excise Act, 1944. However the part of the credit denied which is covered by the thirteen rebate claims [Rs.48,72,328/- (Rupees forty eight lakhs seventy two thousand three hundred and twenty eighty only)] filed by the Appellant and withheld by the Commissioner will be recovered by denying the rebate claims. Remaining amount which is not covered by these claims needs to be recovered in cash from appellant 1.

4.19 In para 4.12 supra, we have held that all the appellants have connived with appellant 1 and 2 in their nefarious design to defraud the exchequer by hatching the scheme of availing the fraudulent credit having held so we hold that the penalties imposed on the appellants to be justified. In view of the Apex Court decision in case MadhumilanSyntex Ltd [2007 (210) ELT 484 (SC)], Iridium India Telecom Ltd [Appeal No 688 of 2005 Order dated 20.10.2010], Mohanlal JitmaljiPorwal [AIR 1987 SC 1321], Standard Chartered Bank [2006 (197) ELT 18 (SC)] we are not in position to accept the arguments advanced by the appellants to effect that penalty under Rule 26 could not have been imposed on body corporate. Hon'ble Apex Court has clearly laid down as follows:

"23. It is no doubt true that company is not a natural person but 'legal' or 'juristic' person. That, however, does not mean that company is not liable to prosecution under the Act. 'Corporate criminal liability' is not unknown to law. The law is well settled on the point and it is not necessary to discuss it in detail. We may only refer to a recent decision of the Constitution Bench of this Court in Standard Chartered Bank &Ors. v. Directorate of Enforcement &Ors., (2005) 4 SCC 530 : JT (2005) 5 SC 267. In Standard Chartered Bank, it was contended on behalf of the company that when a statute fixes criminal liability on corporate bodies and also provides for imposition of substantive sentence, 35 E/1166,1172,1196,1206,1225,1226,1726/2010 it could not apply to persons other than natural persons and Companies and Corporations cannot be covered by the Act. The majority, however, repelled the contention holding that juristic person is also subject to criminal liability under the relevant law. Only thing is that in case of substantive sentence, the order is not enforceable and juristic person cannot be ordered to suffer imprisonment. Other consequences, however, would ensue, e.g. payment of fine etc.

24. K.G. Balakrishnan, J. (as His Lordship then was), speaking for the majority, summarized the law thus :

"As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy."

36 E/1166,1172,1196,1206,1225,1226,1726/2010

25. In our opinion, therefore, it cannot be successfully contended that prosecution could not have been ordered against the company and no charge could have been framed.

26. So far as Directors are concerned, it is alleged in the show- cause notice as well as in the complaint that they were 'principal officers' of the company. In the show-cause notice, it was asserted that the appellants were considered as principal officers under Section 2(35) of the Act. In the complaint also, it was stated that the other accused were associated with the business of the company and were treated as principal officers under Section 2(35) of the Act and hence they could be prosecuted. Dealing with an application for discharge, the trial Court observed that accused No. 1 was company whereas other accused were Directors. Whether they could be said to be principal officers or not would require evidence and it could be considered at the stage of trial and the application was rejected. In Revision, the First Additional Sessions Judge took similar view.

27. The learned Counsel contended that the Courts committed an error of law in ordering prosecution against the Directors. The counsel, in this connection, invited our attention to certain decisions. In *Municipal Corporation of Delhi v. Ram Kishan Rohtagi & Ors.*, AIR 1983 SC 67, the accused invoked the jurisdiction of the High Court under Section 482 of the Code praying for quashing of criminal proceedings initiated against them under the Prevention of Food Adulteration Act, 1947. Whereas accused No. 1 was Manager of the company, accused Nos. 2-5 were Directors. A complaint was filed by the Food Inspector of the Municipal Corporation, inter alia, alleging that 'Morton toffees' sold by the accused did not conform to the standards prescribed for the commodity. The Metropolitan Magistrate issued summons to all the accused for violating the provisions of the Act. It was contended on behalf of the accused that proceedings were liable to be quashed as it was not shown that accused persons were in-charge of and responsible for the conduct of business. The High Court allowed the petition and 37 E/1166,1172,1196,1206,1225,1226,1726/2010 quashed the proceedings. Aggrieved Municipal Corporation challenged the decision. This Court was called upon to consider as to whether the High Court was right in quashing the proceedings against the accused.

28. The Court reproduced clause (5) of the complaint which read thus --

"That the accused No. 3 is the Manager, of accused No. 2 and accused Nos. 4 to 7 are the Directors of accused No. 2 and as such they were in charge of and responsible for the conduct of business of accused No. 2 at the time of sampling." (emphasis supplied)

29. Considering the above clause, this Court held that as far as the Manager was concerned "it was not and could not be reasonably argued that no case is made out against him because from the very nature of his duties, it is manifest that he must be in the knowledge about the affairs of the sale and manufacture of the disputed sample". But so far as accused Nos. 4 to 7 were concerned, it was alleged that they were Directors. Interpreting the words 'as such' the Court observed that there was no clear averment that the Directors were in charge of and responsible for the conduct of business and the complainant has merely presumed that the Directors of the company must be guilty because they were holding a particular office.

30. This Court, in the circumstances, observed :

"So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence, vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore we find ourselves in complete agreement with the argument of the High Court that no case 38 E/1166,1172,1196,1206,1225,1226,1726/2010 against the Directors (accused Nos. 4 to 7) has been made out ex facie on the allegations made in the complaint and the proceedings against them were rightly quashed."

31. A similar question came up for consideration before the Court in *Municipal Corporation of Delhi v. Purshotam Dass Jhunjunwala & Ors.*, AIR 1983 SC 158. There also, a complaint was filed under the Prevention of Food Adulteration Act, 1947 against the Directors of the company.

32. In Para 5 of the complaint, it was stated :

"That accused Ram Kishan Bajaj is the Chairman, accused R.P. Neyatia is the Managing Director and accused Nos. 7 to 12 are the Directors of the Hindustan Sugar Mills Ltd. and were in charge of and responsible to it for the conduct of its business at the time of commission of offence."

(emphasis supplied)

33. Setting aside the order of the High Court quashing the proceedings against the Directors and distinguishing *Ram Kishan Rohtagi*, the Court held that there was a clear averment as to the active role played by the accused and the extent of their liability. A prima facie case for summoning of accused was, therefore, made out and the High Court was wrong in holding that allegations were vague. Further details could be given only in evidence.

34. In *Puran Devi & Ors. v. Z.S. Klar, Income Tax Officer*, (1988) 169 ITR 608, the High Court of Punjab & Haryana held that a person or a partner of a firm prosecuted for false verification of return must have been in charge of and responsible to the firm for the conduct of its business. Necessary allegations, therefore, must be made in the complaint.

35. In *K. Subramanyam v. Income Tax Officer*, (1993) 199 ITR 723, the High Court of Madras held that before prosecuting a person under the Act, it must be proved that the person was 'in charge' of and 'responsible to' the Firm or Company for the 39 E/1166,1172,1196,1206,1225,1226,1726/2010 conduct of business. The Court observed that the word used is 'and' and not 'or'. Both the ingredients, therefore, have to be pleaded and proved by the prosecution and the burden is on the prosecution that the accused was 'in charge of' and 'responsible to' the Firm or Company.

36. In *Jamshedpur Engineering & Machine Manufacturing Company Ltd. & Ors. v. Union of India & Ors.*, (1995) 214 ITR 556, the High Court of Patna (Ranchi Bench) held that no vicarious liability can be fastened on all Directors of a company. If there are no averments in the complaint that any Director was 'in charge of' or 'responsible for' conduct of business, prosecution against those Directors cannot be sustained.

37. In *M.A. University & Ors. v. Deputy Commissioner of Income Tax (Assessment)*, (1996) 218 ITR 606, the High Court of Kerala held that when there was failure to deduct tax at the source by a firm, prosecution can be launched for violating the provisions of the Act against the Firm. But if the complaint is filed against partners also, there must be specific allegation that such partners were responsible for conduct of business of firm. In absence of such allegation, proceedings against the partners cannot continue.

38. Attention of the Court was also invited to a decision of this Court in *Sham Sunder v. State of Haryana*, (1989) 4 SCC 630. In *Sham Sunder*, this Court indicated that it is not uncommon that some of the partners of a firm may not even be knowing what is going on day to day in the firm. There may be partners known as 'sleeping partners' who are not required to take any part in the business of the firm. Then there may be ladies and minors who are admitted to the partnership firm only for the benefit of business. They also may not be aware about the business of the firm. It would be a travesty of justice to prosecute all the partners and ask them to prove that the offence

was committed without their knowledge. The requisite condition, according to this Court, was that it is for the prosecution to prove that the partner was responsible for 40 E/1166,1172,1196,1206,1225,1226,1726/2010 carrying on business and was, during the relevant time, in charge of the business.

39. Reference was also made to State of Karnataka v. Pratap Chand &Ors., (1981) 2 SCC 335. In that case, this Court held that 'person in charge' would mean a person in overall control of day to day business. A person who is not in overall control of such business cannot be held liable and convicted for the act of firm.

40. In MonabenKetanbhai Shah &Anr. v. State of Gujarat &Ors., (2004) 7 SCC 15 : JT (2004) 6 S.C. 309, dealing with the provisions of Sections 138 and 141 of the Negotiable Instruments Act, 1881, this Court observed that when a complaint is filed against a firm, it must be alleged in the complaint that the partners were in active business. Filing of the partnership deed would be of no consequence for determining the question. Criminal liability can be fastened only on those who at the time of commission of offence were in charge of and responsible for the conduct of business of the firm. The Court proceeded to observe that it was because of the fact that there may be sleeping partners who were not required to take any part in the business of the firm; there may be ladies and others who may not be knowing anything about such business. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. "For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and established that fact."

41. Finally, the counsel referred to S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla &Anr., (2005) 8 SCC 89 : JT (2005) 8 S.C. 450, wherein this Court held that essential averments must be made in the complaint that the person against whom complaint is made was in charge of and responsible for the conduct of 41 E/1166,1172,1196,1206,1225,1226,1726/2010 business of the company. Without such averment, no criminal liability would arise.

42. From the statutory provisions, it is clear that to hold a person responsible under the Act, it must be shown that he/she is a 'principal officer' under Section 2(35) of the Act or is 'in charge of' and 'responsible for' the business of the Company or Firm. It is also clear from the cases referred to above that where necessary averments have been made in the complaint, initiation of criminal proceedings, issuance of summons or framing of charge, cannot be held illegal and the Court would not inquire into or decide correctness or otherwise of the allegations levelled or averments made by the complainant. It is a matter of evidence and an appropriate order can be passed at the trial."

In view of the above decision of the Apex Court we are not impressed by the arguments advanced relying on certain decisions of tribunal (which if contrary to principles laid down by the Apex Court are per-incuriam) to effect that penalty under Rule 27 could have not been imposed on the body corporate.

4.20 Thus we summarize our findings in all the seven appeals under consideration as follows:

→ CENVAT Credit of Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) availed by the Appellant 1, fraudulently without receiving the goods is disallowed in terms of Rule 14 of CENVAT Credit Rules, 2004 read with proviso to Section 11A(1) of Central Excise Act, 1944.

→ The amount of CENVAT Credit so disallowed, shall be recovered after allowing the adjustment of the amounts of Rs.48,72,328/- (Rupees forty eight lakhs seventy two thousand three hundred and twenty eighty only) involved in the 13 rebate claims filed by the Appellant 1 and which have been held to be inadmissible.

→ Interest on the CENVAT Credit taken fraudulently is demandable under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944.

42 E/1166,1172,1196,1206,1225,1226,1726/2010 → Penalty under Section 11AC imposed on Appellant 1 is justified.

→ Penalties imposed on other appellants under Rule 26 too are justified.

5.1 Thus we dispose of the appeals as follows:

i. Appeal No E/1166/2010 is partially allowed to the extent of restricting the recovery of CENVAT Credit amount disallowed, to the amount of credit disallowed reduced by the amount involved in 13 rebate claims filed by the Appellant. With the above modification the impugned order is upheld. ii. Appeal No E/1172/2010, E/1196/2010, E/1206/2010, E/1225/2010, E/1226/2010 & E/1726/2010 are dismissed.

(Order pronounced in the open court on 31.01.2020)

(Dr. D.M. Misra) Member (Judicial)

(Sanjiv Srivastava) Member (Technical) tvu

[Back](#)

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

Regional Bench — Court No. III

Excise Appeal No. 40658 of 2013

(Arising out of Order-in-Appeal No.111/2012dt. 21.12.2012 passed by the
Commissioner of Central Excise (Appeals),Madurai)

M/s. Sri Ganapathy Packaging
139-A/6-Ganeshpuram ManthithoppuKovilpatti.

VS

The Commissioner of GST & Central Excise
TractorRoad,NGO'A'ColonyTiruneJveli.

APPEARANCE: | Shri S. Renganathan, Advocate, Shri S. Venkatachalam, Advocate
and Shri M. Kannan, Advocate for the Appellants. Shri S. Govindarajan, AC (AR)
and Shri L. Nandakumar, AC. (AR) for the Respondents a CORAM:

HON'BLE Ms. SULEKHA BEEVI C. S., | MEMBER (JUDICIAL) |

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

Per P Venkata Subba Rao

1. The facts of the case and the arguments made on both sides have been detailed
by Hon'ble Member (Judicial) and I find no reason to reiterate them. The question
to be decided in this case is whether or not the appellants are entitled to the
benefit of Notification Na. 4/2006 -CE dated 1.3.2006 (S.No. 72). in respect of
the matches manufactured and cleared by them during the period September
2010 to August 2011. This notification reads as follows:

Exemption and effective rate of duty for specified goods of Chapters 25 to 49 in
exercise OF the powers conferred by Sub-section (1) of [section 5A](#) of the Central
Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it
is necessary in the public interest so to do, hereby exempts excisable goods of the
description specified in column (3) of the Table below read with the relevant List
appended hereto, as the case may be, and falling within the Chapter, reading: or
sub- "heading or tariff item of the First Schedule to the [Central EXcise Tariff Act](#),
1985 (5 of 1986) (hereinafter - referred to as the [Central Excise Tariff Act](#)), as are
given in--the "corresponding entry in column (2) of the said Table, from 50% of
the ~ duty of excise specified thereon under the First Schedule to the Central
"[Excise Tariff Act](#), 'as is in excess of the amount calculated at the rate. "specified
in the corresponding entry in column (4) of the said Table and subject to the
relevant conditions specified in the Annexure to this notification, and the
Condition number of which, is referred to in the | corresponding entry in column
(5) of the Table aforesaid. We Explaination.-- For the purposes of this notification,
the rates specified in column: (4) of the said Table are ad valorem rates, unless
otherwise specified.

S. Chapter Description of _excisable Rate | Condition 'No. or . No. heading or sub-
heading or tariff --

item of the First .

Schedut. .

(4) 2) 8) — (4) (5)

72. 3605 00 Matches, in or in relation to Nil -- 10° or the manufacture of which 3605 00 none of the following 90 processes is ordinarily carried on with the aid of power, namely:

| Gi) the process of giving the 'veneer flats or strips, the configuration of a match box including the outer Slide or the inner slide with the use of match Paper, .

(ii) frame filling;

(ii) dipping. of splints in the 'composition. for match heads; .

(iv) filing of boxes with matches; a

(v) pasting of labels on match boxes or veneers or cardboards;

. (vi) packaging A plain reading of the above notification. shows that there is no stipulation in it that all the above processes have to take place within the same factory. It also does not stipulate that the benefit is available if the power is not used by the person claiming the benefit of the exemption notification or his job workers. Therefore, the place of use of power is irrelevant. The person who a | Ky uses the power is also irrelevant. The = only thing that is relevant, is that the power should not. have been used in any of the. Six processes mentioned "therein. It does not matter if the power is used in any - of the other processes in the manufacture of the Matches, the benefit is still available as long as the power is not used in the above SIX processes. If power is used in any of the above SIX processes, then 'the benefit of the exemption _ notification is not available regardless of who used the power in that process or on whose account..

2; The assessee could either undertake the entire manufacture themselves: or outsource any of the processes to a job worker (who completes the process on account of the assessee) or they could purchase

- goods from a vendor. (who completes the process on his own account and sells to the assessee) and then complete the remaining- processes. It is immaterial as far as the notification is concerned which method is adopted. What is crucial 'is whether the power has been used in any of these processes.

3. In the case of Standard Fireworks dealing with a notification similar to the present notification, Hon'ble Apex Court held that benefit of the notification is not available even if the processes were undertaken outside | . the factory of the assessee: with- the aid of power. In that: case, the power was used by' the Job workers in one of the processes. In the present case, ' the power is used by the vendor in one of the processes.-What is relevant for .the exemption notification is whether power 'was used in one of the six processes and NOT who used it. The ratio of the judgment of the Hon'ble Apex Court. in the case of [Standard Fireworks Industries vs CCE](#) [1987 (28) ELT 56 (SC)] (supra) squarely applies to the Present case inasmuch as in "O both cases, the notification only specified the processes in which: the power should not be used 'without specifying who should not be using the power in that processes and it is. held that even if the power is not used in the factory of the manufacturer but it is used 'outside, the benefit of the exemption notification: is not available.

4. To say that the exemption is. not available only if the power was not used by the assessee, one needs to insert the words 'by the manufacturer or his job workers' in the notification and read it as Matches, in or in relation to the manufacture of which none of the following processes -is ordinarily" carried on with the aid of power by the assessee'.

5. .° To hold that the exemption is not available only if the power was not used by the assessee or his job workers, one needs to insert the words 'by the manufacturer or his. job workers' in the notification and read. it as Matches, in or in relation to the manufacture of which none of the following _ processes is ordinarily carried on with the aid of power by the assessee or his job workers'. "Such enlargement of the scope of the notification is beyond the powers of this Tribunal.

6. The Constitution of India divides the powers between Legislature, Executive -and Judiciary with legislation being solely domain of the Parliament. Subordinate legislation such as this notification is made by the Government which is answerable to the Parliament. Further each and every | notification is placed before the Parliament whose Committee on Subordinate Legislation scrutinises the

notification and directs any changes which it feels: is necessary. It is for this reason, the power of making subordinate legislation is. delegated to the Government which is answerable to the Parliament and 'not. to other arms of the State.

7. It is therefore, not open for the Tribunal to: enlarge the scope of the exemption notification by reading into it the additional words that do not exist. Even if it is 'viewed that the: exemption notification can also be interpreted to mean that the power should. not be used -by the assessee-or his job. workers only, it cannot be denied that a plain reading of the exemption notification forbids. the use of power in processes. without reference to who undertakes the processes.

8. ~Over years, two different approaches were taken while interpreting the : exemption 'notifications - strict and . liberal or purposive construction. . Beneficial exemption notifications. have, at times, . been interpreted SO as to | serve the purpose - of the exemption notification 'without being unduly " restricted by the words of the notification. Both approaches to interpret the notifications were taken even by. the Supreme Court and therefore the issue - a was. "referred to. the five member Constitutional bench of the 'Hon'ble Supreme Court which | has finally settled the law in the case of Dilip Kumar & Co. [2018 (361) ELT 0577 (SC)] in-the following words: «52. To sum UP, we answer the reference holding as under - (1) Exemption notification should be interpreted strictly; the burden. = of proving applicability would be on the aSSESSee to show that his.case comes within the parameters of the exemption clause or exemption notification. | | (2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be qv yn

-2?-

Claimed by the subject/assessee and it must be interpreted in favour| ; of the revenue. | (3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case { supra) stands overruled.

The ratio of the judgments of [Standard Fireworks Industries vs CCE](#) [1987 (28) ELT 56 (SC)] and Dilip Kumar & Co. [2018 (361) ELT 0577 (SC)] are binding on all courts and tribunals leaving. me with no option but to conclude. | that the appellant assessee is not entitled to the benefit of the exemption notification.

9. It has also been canvassed on behalf of the appellants that what they . are doing is mere packing of the splints into boxes and no new commodity has come into. existence and there is no 'Chapter note in 1.the Central Excise © Tariff to hold that packing of matches amounts to manufacture. it has also been argued that the Tariff heading indicates the standard unit as kg and: not as boxes and hence there | is no intention to tax matches packed. in boxes. Even a child knows that the match. box is not. merely a packing material but it has half the chemicals required to make fire through friction. It does not take too much effort to understand that the splints Hameooie Ge and the matches in boxes are "different commodities as known to the market. The standard unit indicated in the tariff does not determine whether duty is: "payable or not. Match boxes are countable but they can also be weighed. ~ Simply because they can be easily counted and the standard unit indicated "in the tariff is kg, it does not mean that. no excise. duty is payable on matches in boxes. Several other goods in the same chapter which are ql "equally countable such as safety fuses, detonators, signalling flares, etc., all have the standard unit as kg. This does not make them not dutiable.

10. - It has also. been argued on behalf of the appellants that with respect to an exemption notification no. 49/86-CE for footwear, CBEC issued circular NO. 1/93-CX -dated 2-12-1993 indicating that the particular exemption notification is available even in cases where the suppliers of the inputs used power. Therefore, 'the same logic should apply to them. I find that in the first place, CBEC's circular is binding on the department but not on the Tribunal, Secondly, the circular dealt with a different. exemption notification and it ~ cannot be treated as a binding ratio and extended to other exemption notifications. Thirdly, the circular was issued at a.time when the issue of how to. interpret an exemption notification was not settled by the Constitutional bench. of the Supreme Court in the case of Dilip. Kumar (supra). Lastly, any © clarification by the Board in the form of a Circular cannot prevail over the ruling of the Hon'ble Apex Court that the exemption notifications must be interpreted strictly with benefit of: any doubt going against the assessee and | in favour. of the Revenue. Thus, I find that the 'circular relied upon does not carry the case of the appellants any further.

41. In view of the above, I find that the benefit of the exemption notification no. 4/2006-CE is not available to the assessee and the demands confirmed by the impugned orders need to be upheld and the assessee is liable to be rejected.

(P. V. E. Iyer [Judge Member (Technical)])

24. 'Registry is directed to place the matter before the Hon'ble President to refer the matter to a third member to decide the following question: "Whether the appellants are eligible for the exemption notification no. 4/2006-CE dated 1.3.2006 as held by Member (Judicial) or they are not eligible for the exemption as held by Member (Technical)." (Order pronounced in open court on)

- (SULEKHA BEEVIES.S.) | (Pp VENKATA SUBBA RAO) Member(Judicial) member (Technical) PER P. DINESHA (THIRD MEMBER) : --

~ The above matter has come up for hearing as per the order of reference by the Hon'ble President vide letter in F.No. -- 01(06)/DOO/CESTAT/Reg./2017 dated 18.09.2019.

2.1 When the matter was taken up for hearing on _ 16.10.2019, Shri. Ss. Venkatachalam, Ld. Advocate appearing for the appellants, submitted a Memo for withdrawal of Excise Appeal No. 40692 of 2013 in respect of M/s. Jeyakannan Matches Pvt. Ltd., Sivakasi, stating that the appellant is exploring the 'possibility of availing the benefit of the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 and thus requested that the appeal may be permitted to be withdrawn.

2.2. The scope and cause of reference to the Third Member is limited to the difference of opinion between the Members and therefore, as a Third Member, I cannot go beyond the reference to entertain the above application. However, I deem it proper to place the above application before the regular Bench for any order on the application: --

3.1. The facts have been meticulously reflected in the Interim Order and therefore, the same are not repeated here. The only issue to be decided by me is whether the

- appellants are eligible for the benefit of exemption of Notification No. 04/2006-C.E. dated 01.03.2006. _ 3.2 The Member (Judicial) has held that the appellants are eligible for the benefit of the Notification (supra) and : has set aside the "demand whereas, the Member (Technical) has held that the benefit of the exemption Notification (supra) is not available to the assessee and

- has accordingly confirmed the demand. The only question

- formulated by the Members on the Difference of Opinion is "whether the appellants are eligible for the exemption . Notification No. 04/2006-C.E, dated 01.03.2006 as held &.

by Member (Judicial) or they are not eligible for the -- exemption as held by Member (Technical)." 4.4 During the hearing on 16.10.2019, Shri. S. Renganathan, Shri. K. Ramachandran and Shri. S. ~ Venkatachalam, Ld. Advocates, appeared for the appellants and inter alia contended that in Chapter Note 3

- of Chapter 36, there is no mention as regards packing of match sticks amounting to manufacture; that the appellants are purchasing - duty paid match splints and ; that if dipped splints | are matches, then there was no

- further : manufacture taking place in the appellants'

- factory, etc.

4. 2 - They further relied on their arguments recorded in the Interim Order.

5.1 Per - contra, -- Shri. Ss. Govindarajan, Ld. Departmental Representative, appeared for the Revenue:

-He- would submit that the Notification No. . 04/2006 (supra) is issued | In order to encourage the industries | which are manufacturing goods without the aid of

power, and the same is available only if all the processes mentioned therein are carried out without the aid of : power. -

5.2. He also drew support from the findings of the lower . authorities to inter alia contend that the dipped match splints by itself cannot be considered as matches; that _ the same are manufactured with the aid of power, are . marketable and excisable and so are a lot of intermediate products which are sold in the market; that. the. 'match _ Splints. manufactured with the aid. of power are raw . materials for the appellants and therefore, the appellants have not satisfied the conditions for claiming the benefit of the exemption Notification (supra).

5:3 He concluded that the ratio in the case of M/s. -- Standard Fireworks Industries Vs: Collector of Central Excise, Madurai reported in 1987 (28) E.L.T.I : a* 56 (S.C.) squarely applies and therefore, the ratio of the Tribunal: or of other High Courts | need not be considered in the light of a clear Supreme Court Judgement.

6. I have considered the rival contentions and os perused the documents placed on record.

7 Ld. Advocate submitted that there is no issue with regard to the interpretation 'of the exemption Notification © - since the conditions | are very clear and that the appellants/manufacturers have 'satisfied the conditions : inasmuch as, they have not used 'the power in so far as. their manufacturing activities are concerned. Ld. DR also contends that there is no issue with regard to the Notification since, according to him, the manufacturing , activity is 'required to be looked into as a - whole. comprising of all the processes and hence, in one of the processes the. power having been admittedly used, that is 7 _ sufficient to dislodge claim of appellants that they are 'entitled to the benefit. He vehemently contended that the benefit is qua processes and not qua manufacture and not even: qua person since the very purpose of impugned Notification is to encourage manufacturing sector wherein power is not at all used.

'| 8.1 I consider. it expedient to. first set out some principles of interpretation that will guide me 'in this exercise. In Union of India VS. Elphinstone Spinning & ; Weaving Co. Lid. " reported in AIR 2001 SC 724, the Hon'ble 'Apex. 'Court formulated what it termed the cardinal principle of construction in the following words: "a statute is a command of the Legislature. The interpreter must, therefore, in interpreting and construing the statute, identify the intention of the Legislature; that. in identifying the intention of the Legislature by the "process of constructing, the Court will have to adopt both literal and purposive approaches. This would mean that - the true or legal meaning of an enactment is derived by construing / the . meanings of the words. used in the Be .

o% enactment in the | fight of any discernible purpose or Yo object which comprehends the mischief of its remedy | to which: the enactment is directed. "

8.2 In State of Uttar Pradesh Vs. Vijay Anand reported in AIR 63.SC 946, the Hon'ble Apex Court inter alia n _ observed that "when the language is plain and | unambiguous | and admits of only one meaning, no ~ question of construction of a statute arises, for the Act speaks | for itself....".

8. 3 Thus, when the meaning is s plain and unambiguous, "no process of construing. or interpreting a statute can . : proceed beyond the literal or textual interpretation except if absurdity results asa consequence. In my considered opinion, the 'same. principles apply to _ construing 'notifications too.

8.4 Although. courts. have historically taken the | assistance of common law principles | in interpreting : statutory law, there is very little. common-about the tax - : laws. 'There are a sul generis set of principles that apply 7 to the 'interpretation of taxing statutes. ".....It is the well ° settled proposition that the subject -is not to be taxed without clear words for that purpose; and every Act of Parliament must. be. read according . to the natural construction of its words....., held the Hon'ble, Apex Court _in Member Secretary, AP; State Board for Prevention and -- Control of Water Pollution Vs. Andhra Pradesh Rayons Ltd. AIR 1989 SC 611. se .

8, 5 In Commissioner of Central Excise, Pondicherry Vs. 7 ACER 'India Ltd. Reported | in (2004).8 SCC 173 and

- Commissioner of Central Excise. Vs. Kisan Sahkari Chinni 7 Milis Ltd. Reported in (2001) 6 SCC.697, the Hon'ble Apex Court inter alia observed that "win a taxing. Act, one has to look merely at what. is clearly said. There is no room "for any intendment. There "is no equity about a tax. There is no presumption.as to tax. Nothing is to be read

- in, nothing is to be implied. One can only look fairly at the a e

- language used... . It is also an equally well- settled rule . that exemption notifications are to be construed strictly to ~ the extent that their applicability is being examined. 9.1 Now, I may proceed' to apply these principles in . 'figuring out if the appellants qualify for exemption "notification no. 4/2006-CE dated Ol. 03.2006 which is 'presently | under dispute and since appropriate extracts of 'the notification. have already been reproduced by both the Ld. Members, I need not do so once again.

"912. In view of broader principles laid down by any ~. number of judgments including those quoted in the above paragraphs, it is imperative that all the words used in the _ notification/statute are to be taken into consideration and all 'the words should 'be given the most. natural/possible meaning. Statutory: pronouncements must be read in a . manner that they are given effect to in the most complete "manner, .

9.3. Firstly, the notification reads as:* Matches, in or in 'relation to the manufacture of which". It is important that it is' either in the manufacture or in relation. to manufacture. of Matches with no caveat to either of the _ cases. 4 9.4 Secondly, the use of the word "ordinarily" in Sl. No... 72 in the exemption notification no. 4/2006-CE is thus of particular significance and cannot be ignored. it has the . effect of further widening the scope of the restrictions. ~ The restriction that the processes must not be carried out. with the. aid. of power applies not just to the specific goods under consideration but the same goods whenever | manufactured. In, other words, if the specified processes in relation' to such goods are, in the ordinary. course of commerce, carried out with the aid of power, the | "restrictions would apply and the exemption would not be. available. This conclusion may be reached de hors the: facts of the specific cases at hand. Thus, in order to: succeed in its claim for exemption, the burden on the é assessee is heavy ~ it must prove that the specified or

- listed processes are not ordinarily carried out with the aid of power and not merely that power was not used in its specific case. This burden has not been discharged. 9.5 I may also » point out that in the case of Omega 7 Packing relied on by. the Member(Judicial), this 'tribunal has clearly noted that the condition in the notification considered there (Notification No, 71/83-CE) was that "such containers are produced without the aid of power." = Such a finding of the tribunal would indicate that the word "ordinarily" used in the present notification constitutes a 'material departure from: the law as it then stood. 9.6 I may point ¢ out in passing that, presumably, the Intention of the subordinate legislation. was to prevent 'businessmen from. artificially splitting ~ up the

- manufacturing processes across multiple. assessees to enable a larger than deserving claim for exemption.

10. | Further, Member(Judicial) rightly points out that ~ the notification does 'not require that the processes listed |

- therein are required to be carried out by a single/same

-manufacturer. However, for the reasons I have given above, the converse too is not true. That is, the absence of such a requirement does not. automatically entitle the assessee to the exemption. -

11. The very heading of the Notification, i.e., GENERAL. EXEMPTION NO. AT reads thus: "Exemption and: effective ' rate of duty for SPECIFIED GOODS of chapters 25 to 49" : and it applies. to exempt excisable goods. of the | description specified in column (3) of the table. So, the conditions upon which the exemption depends is relatable snot to the assessee, not the manufacture and not even ~ the manufacturer, but only to the goods specified.

12. It is the case of the - appellants that they have procured dipped match splints from other manufacturers . who have removed such goods on payment of duty. I find that this would not make any difference: since the entitlement to exemption is

to be determined separately - in each assessee's case. The fact that duty has been paid - on some intermediate/ semi-finished goods not themselves entitled to exemption is in no manner -- relevant to whether 'exemption is to be granted at a

- subsequent stage to the finished goods. In any event, the - cascading effect is effectively mitigated by CENVAT credit. ' The exemption notification must be applied only to the goods it seeks to cover.

13... There are also references to many Circulars/Notifications by Member(Judicial), but as is well known, each Notification/ Circular is issued in particular circumstances, in- respect of particular: areas or sectors, | with particular intentions. I am of the view that we must" be circumspect. in determining their analogous applicability to other circumstances. One size. does not fit: all. There can be no generality.

'14. - The notification under consideration refers to many activities i.e, processes, right from- procurement of

- inputs/raw materials, that culminate. in or in relation to manufacture of Matches and. hence, there is no scope to ignore/omit any. - process/es to claim the benefit. As" regards raw. materials, 'I need not burden myself with that: -. | issue | as. the - exemption notification - doesn' t. whisper - anything about it, since the same is qua processes and 'not even qua manufacture - or. the manufacturer. Moreover, it is none of the processes 'that is ordinarily "carried on with the aid of power AND NOT the o manufacture per se, at is carried on with or without the aid of power. That 'is, the center of gravity is the 'Processes' and not' manufacture'.

"is. In_ its judgment in the case of M/s. Standard Fireworks. (supra), Hon'ble Supreme court has inter alia. W held as under: .. The Notification purports to allow exemption 'from duty only when in relation. to. 'the - b

- . | | 32 -

"manufacture of the goods no process is ordinarily carried on with the aid of power. It is. not disputed that the 'cutting of the steel wires or the treatment of paper is a process for the manufacture of goods in question. Since - those. processes were carried on with the aid of power | though carried outside the factory, the requirement of the notification would not be answered so as to entitle the - appellants to exemption from duty. It is not necessary to refer to any authority. inasmuch as on the analysis , indicated above the claim for refund appears to have a | been rightly rejected... -

16. On 'an overall analysis of facts in the cases on hand, I find that the above ratio decidendi squarely applies to the. facts on hand and hence, I am of the | opinion that the appellants are not eligible for the. benefit of exemption. notification No.4 ibid and: accordingly, I . concur with the éonclusions drawn by the Member (Technical).. Registry is directed to place the matter before the Division Bench for recording majority/Final | - oo- . Orders. accordingly.

- osoo-- . (Order pronounced in the open court on A. |. et A ce, (P. DINESHA) MEMBER QUDICIAL) on 1 2019.

wmec! Sddon . 33 MAJORITY ORDER _In view of. the order of the Third Member Hon'ble

- Shri. P. Dinesha, Member (Judicial), agreeing with the view taken by the Hon'ble Member (Technical), the appeals are dismissed.

ot (Order pronounced in. the open court on 19.11.2019) Janata Mews . (SULEKHA BEEVI C.S.) 'MEMBER (JUDICIAL) ANT (P. ANJANI KUMAR) MEMBER (TECHNICAL) .

Sdd

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. I

Excise Appeal No. 41700 of 2019

(Arising out of Order-in-Appeal No. 326/2019 (CTA-I) dated 17.10.2019 passed by the Commissioner of G.S.T. & Central Excise (Appeals-I), 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034)

M/s. Servo Packaging Limited

: Appellant

,88/1, Cuddalore Pondy Main Road, Kattupakkam,
Manapet (Post) Puducherry – 607 402

VERSUS

The Commissioner of G.S.T. and Central Excise,

:

Puducherry Commissionerate,

Respondent

No. 1, Goubert Avenue, Beach Road, Puducherry – 605
001

APPEARANCE:

Shri. V. Ravindran, Advocate for the Appellant

Ms. Sridevi Taritla, Authorized Representative (A.R.) for the
Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 40098 / 2020

DATE OF HEARING:

24.01.2020

DATE OF DECISION:

05.02.2020

This appeal is filed by the assessee against the denial of refund of Countervailing Duty (CVD) and Special Additional Duty (SAD) of Rs. 22,24,104/-.

2. Brief facts leading to the present controversy are, the assessee made a request for refund of the Customs Duty paid, due to unfulfilled export obligation against Advance Authorization, under Section 142 (3) of the C.G.S.T. Act, 2017. The assessee-appellant could not fulfil its export obligation in some cases, as per annexure to its request for refund dated 16.05.2019, owing to lack of export orders, which prompted the appellant to pay off the Customs Duties on account of short export and thereby close the export obligation under the above Advance Licences. It is also an admitted fact that the above Customs Duty was paid along with appropriate interest. It is the case of the appellant that since the inputs imported by it were used in the manufacture of final products on which Central Excise Duty/G.S.T., as the case may be, was paid/to be paid,

they were eligible for refund of CVD and SAD paid. Further, post the introduction of G.S.T, the appellant having left with no option to claim the above credit under the CENVAT Credit Rules with also no scope to report the same under Transitional Credit while migrating to G.S.T., the refund incash was claimed under Section 142 (3) *ibid*.

3. The Adjudicating Authority vide communication dated 06.06.2019 after considering the contentions of the appellant insofar as refund was concerned, intimated that the refund claim of the assessee of Customs Duty (i.e., CVD and SAD) which were legitimately payable, having been paid for non-fulfilment of the conditions of import under Advance Licence, was not covered under Section 142 *ibid* and consequently, the refund was rejected. Aggrieved, the assessee preferred an appeal before the Commissioner of G.S.T. and Central Excise (Appeals-I), Chennai, who vide impugned Order-in-Appeal No. 326/2019 (CTA-I) dated 17.10.2019 upheld the rejection. Consequently, the present appeal is filed before this forum.

4. When the matter was taken up for hearing, Shri. V.Ravindran, Ld. Advocate, appeared for the assessee- appellant and Ms. Sridevi Taritla, Ld. Joint Commissioner (Authorized Representative), appeared for the Revenue- respondent.

5. Ld. Advocate for the appellant reiterated the grounds and contentions urged before the lower authorities. He also submitted that when the import was made and the applicable duty was paid, the same would tantamount to a normal import and hence, the CENVAT Credit would remain available. He also relied on the following decisions of various Benches of the Tribunal :

- (i) *T2S Software Solutions Pvt. Ltd. v. Commr. of G.S.T. & Central Excise* [2019 (7) T.M.I. 1299 – CESTAT Chennai];
- (ii) *Rawalwasia Ispat Udyog Pvt. Ltd. V. C.C.E., Panchkula* [2019 (7) T.M.I. 1242 – CESTAT Chandigarh];
- (iii) *JMT Consultant Detailing Pvt. Ltd. v. Commr. of Central Tax, Bengaluru East* [2019 (12) T.M.I. 648 – CESTAT Bangalore];
- (iv) *German Remedies Ltd. v. C.C.E., Goa* [2004 (177) E.L.T. 539 (Tri. – Del.)]

Per contra, Ld. Authorized Representative for the Revenue supported the findings of the lower authorities. Ld. Authorized Representative also pointed out that by Advance Authorization, the appellant was permitted to import without payment of duty which the assessee has done, but the same was subject to the condition of fulfilling export obligation of the final product; that the appellant having not fulfilled the said obligation, the same has rightly suffered Customs Duty because of the duty free import.

With regard to the cases relied on by the assessee, she would submit that the decisions are on refund *per se* under Rule 5 of the CENVAT Credit Rules, 2004 and hence, the same ratio is not applicable to a refund of duty arising on account of non-fulfilment of export obligation under Advance Authorization.

7. In rejoinder, Ld. Advocate would submit that the Advance Licence was always renewed and there is no finding by the lower authorities as regards the lapse of the period prescribed for export. Moreover, he would submit, that the appellant had voluntarily paid the Customs Duty because the appellant did not get export order and the voluntariness has never been questioned by the lower authorities.

Heard both sides. The only issue to be decided is, “whether the appellant has made out a case for refund under Section 142 (3) *ibid*, of the Customs Duty paid in view of non-fulfilment of its export obligations?”

None of the decisions relied on by the assessee are dealing with the refund arising on account of failure to comply with export obligation *vis-à-vis* Advance Authorization and therefore, as pointed out by the Ld. Authorized Representative for the Revenue, the same are not applicable to the facts of this case.

Advance Authorization is issued in terms of paragraph 4.03 of the Foreign Trade Policy [FTP (2015- 20)] and the relevant Notification is Notification No. 18/2015-Cus. dated 1st April, 2015. The said Notification exempts materials imported into India against a valid Advance Authorization issued by the Regional Authority in terms of paragraph 4.03 of the FTP subject to the conditions laid down thereunder. One of the conditions, as per clause (iv), is that it requires execution of a bond in case of non-compliance with the conditions specified in that Notification. Further, paragraph 2.35 of the FTP also requires execution of Legal Undertaking (LUT)/Bank Guarantee (BG) : (a) Wherever any duty free import is allowed or where otherwise specifically stated, importer shall execute, Legal Undertaking (LUT)/Bank Guarantee (BG)/Bond with the Customs Authority, as prescribed, before clearance of goods.

Further, there is no dispute that the above is guided by the Handbook of Procedure ('HBP' for short) and paragraph 4.50 of the HBP prescribes the payment of Customs Duty and interest in case of *bona fide* default in export obligation (EO), as under :

"(a) Customs duty with interest as notified by DoR to be recovered from Authorisation holder on account of regularisation or enforcement of BG / LUT, shall be deposited by Authorisation holder in relevant Head of Account of Customs Revenue i.e., "Major Head 0037 - Customs and minor head 001-Import Duties" in prescribed T.R. Challan within 30 days of demand raised by Regional / Customs Authority and documentary evidence shall be produced to this effect to Regional Authority / Customs Authority immediately. Exporter can also make suo motu payment of customs duty and interest based on self/own calculation as per procedure laid down by DoR."

10. Thus, the availability of CENVAT paid on inputs despite failure to meet with the export obligation may no hold good here since, firstly, it was a conditional import and secondly, such import was to be exclusively used as per FTP. Moreover, such imported inputs cannot be used anywhere else but for export and hence, claiming input credit upon failure would defeat the very purpose/mandate of the Advance Licence. Hence, claim as to the benefit of CENVAT just as a normal import which is suffering duty is also unavailable for the very same reasons, also since the rules/procedures/conditions governing normal import compared to the one under Advance Authorization may vary because of the nature of import.

11. The import which would have normally suffered duty having escaped due to the Advance Licence, but such import being a conditional one which ultimately stood unsatisfied, naturally loses the privileges and the only way is to tax the import. The governing Notification No. 18/2015 (*supra*), paragraph 2.35 of the FTP which requires execution of bond, etc., in case of non-fulfilment of export obligation and paragraph 4.50 of the HBP read together would mean that the legislature has visualized the case of non-fulfilment of export obligation, which drives an assessee to paragraph 4.50 of the HBP whereby the payment of duty has been prescribed in case of *bona fide* default in export obligation, which also takes care of voluntary payment of duty with interest as well.

Admittedly, the inputs imported have gone into the manufacture of goods meant for export, but the export did not take place. At best, the appellant could have availed the CENVAT Credit, but that would not *ipso facto* give them any right to claim refund of such credit in cash with the onset of G.S.T. because CENVAT is an option available to an assessee to be exercised and the same cannot be enforced by the CESTAT at this stage.

12. There is no question of refund and therefore, I do not see any impediment in the impugned order.

13. Accordingly, the appeal is dismissed.

(Order pronounced in the open court on **05.02.2020**)

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 51326 / 2018 [SM]

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-604-17-18 dated 13.02.2018 passed by the, Commissioner (Appeals) CGST&CE, Indore]

Prestige Food

Vs.

The Commissioner CGST & Central Excise

APPEARANCE:

Mr. Rajesh Rawal, Advocate for the Appellant

Mr. K. Poddar, Authorised Representative for the Respondent

Coram: HON'BLE MRS. RACHANA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 07.10.2019 DATE OF DECISION : 07.10.2019

FINAL ORDER No. 51316/2019

The Appellant herein are engaged in manufacture of vegetable oil and by products thereof. The amount of Rs. 18,90,323/- (Rs. 4,72,600/- and Rs. 14,17,723/-) was deposited by the Appellant on 29.12.2003 and 02.03.2012. The said amount was initially proposed to be recovered vide show cause notice dated 31.05.1994 and the proposal thereof was confirmed in April, 1998. The Commissioner (Appeals) also ordered pre-deposit of 100% duty. However, penalty in full was waived off. It is only vide order dated 06.08.2012 in an SLP of the Appellant that Hon'ble Supreme court directed for restoration of the previous appeal, directing the Commissioner (Appeals) to dispose of the same on merits without taking any coercive steps during the pendency thereof. In furtherance of the said order Commissioner (Appeals) allowed the appeal of the Appellant vide order dated 08.02.2016 holding the Appellant to be entitled for the refund of the aforesaid entire amount.

2. In furtherance thereof the said amount got refunded on 19.04.2006. It is thereafter that the Appellant demanded interest, however, the impugned show cause notice bearing No. 4118 dated 28.01.2017 was served upon the Appellant proposing the rejection of the claim of interest on the said amount that to from the date of deposit. The said proposal was confirmed initially vide Order-in original No. 031 dated 28.08.2017 the appeal thereof was dismissed vide Order No. 604 dated 13.02.2018 which has been assailed before this Tribunal.

3. I have heard Mr. Rajesh Rawal, Advocate.

It is submitted on behalf of the Appellant that the appellant was forced to make a deposit of Rs. Rs. 4,72,600/- in 2003 and 14,17,723/- in 2012, the same has finally been refunded in 2016 but the fact remains is that the amount was lying detained

with the department unlawfully over these years which entitles the Appellant for the interest on the said refunded amount that too from the date of the payment thereof. Learned Counsel has relied upon (i) **2004 (174) E.L.T. 422 (All.) Hello Minerals Water (P) Ltd. Vs. Union of India** (ii) **2009 (243) E.L.T. 560 (Tri.-Bang.) ,Omjai Bhavani Silk Mills (P) Ltd. Vs. C.C.E., Cus. & S.T., Hyderabad** (iii) **1997 (95) E.L.T. 3 (S.C) Kuil Fireworks Industries Vs. Collector of Central Excise** (iv) **2009(240)**

E.L.T. 124 (Tri.-Bang.) Toyota Kirloskar Auto Parts Pct. Ltd.

Vs. COMMR. Of CUS, Bangalore to justify the submissions.

While rebutting these arguments, it is mentioned by learned Department Representative that the amount was deposited in furtherance of the due adjudication orders not only of the adjudicating authorities of the department but also by the High Courts and even by the Hon'ble Supreme court. It is submitted that interim order of Commissioner, Bhopal directing pre-deposit of 100% duty was challenged by the Appellant before High court, Jabalpur where ^{1/4}th amount of duty was directed to be pre-deposited within three weeks time vide Order dated 07.05.1999, the SLP thereof was also dismissed vide Order dated 15.07.1999. Before the pendency of said SLP, since Commissioner (Appeals) had already dismissed the appeal Hon'ble Apex Court ordered the restoration thereof. The order of Commissioner (Appeals) was challenged before CEGAT/present CESTAT. However, the appeal was dismissed vide Order dated 07.02.1999. The writ petition against the said order as was filed before High court, M.P, Jabalpur bench was also dismissed. LPA thereof was also dismissed, the SLP thereof was also rejected by Hon'ble Supreme Court on 22.07.2002. It is thereafter that the ^{1/4}th amount of duty that is Rs. 4,72,600/- was deposited on 29.12.2003. In view of the submissions, it is impressed upon by learned Department Representative that the arguments of the Appellant for amount to have been detained by the department illegally and unlawfully are absolutely false. It is submitted that in furtherance of subsequent order of Hon'ble Supreme court directing restoration and disposal of appeal on merits that Commissioner (Appeals) ordered for refund of amount on 08.02.2016 which was finally refunded/disbursed on 29.04.2016 i.e within a period of three months. Hence, no question of any entitlement of the Appellant for interest at all arises, appeal is prayed to be dismissed.

After hearing both the Parties, it is observed that the narrow compass of the present adjudication is :

Whether Appellant is entitled for interest on the amount refunded w.e.f the date of respective payments in accordance of Section 35 FF of the Central Excise Act, 1944.

For the purpose the section is relevant to be quoted

35FF. Where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal (hereinafter referred to as the appellate authority), under the first proviso to section 35F, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in section 11BB after the expiry of three months from the date of communication of the order of the appellate authority, till the date of refund of such amount.

It is observed that this provision is the amended provision as applicable w.e.f 06.08.2014, the proviso makes it abundantly clear that this will be applicable only for such deposits as are made after coming into existence of this amendment. Apparently

and admitted, the amounts in this case were paid in the year 2003 and 2012. The both payments being prior the aforesaid amendment in Section 35FF, this provision is not applicable. Otherwise also it is an admitted fact that order of refund was announced on 08.02.2016, the amount was disbursed on 29.04.2016 once the payment is made within three months of the refund, no question of any interest to be paid along therewith at all arises.

The case law as relied upon by the Appellant is not applicable to the facts and circumstances of the present case, as in the present case there is no illegal detainment of the impugned amount by the department as is apparent from the arguments put forth by the Department Representative that the amount in question was deposited only after Hon'ble Supreme Court had confirmed the deposit of 1/4th amount of duty as was proposed to be recovered vide show cause of the year 1994. The said order was initially passed in December, 2003 and the residual payment of Rs. 14,17,723/- on 02.03.2012 was also made in furtherance of the directions of the Hon'ble Supreme Court. The amount deposited was, therefore, in furtherance of the direction of the Apex Court hence cannot be called as illegally detained amount. Further no doubt Hon'ble Supreme Court in August, 2012 directed the department to dispose of the matter on merits and that the order was passed on 08.02.2016 but there is no apparent delay that too intentional or mala fide or even negligent on part of the department as is alleged by the Appellant.

It is observed from the order of Hon'ble Supreme Court dated 06.08.2012 that there are no findings about the entitlement, if any, of the Appellant except ordering restoration of the appeal and disposal thereof on merits. Keeping in view the same even for the period since August, 2012 till February, 2016, the Appellant is held not entitled for the interest as prayed.

As a result of these findings, I do not find any merit in the contention of the appellant. Appeal is accordingly stands dismissed.

(Rachna Gupta) Member (Judicial)

BK

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Service Tax Appeal Nos. 50120-50122 of 2019 [SM] (Arising out of Order-in-Appeal Nos. 1129-1131(CRM)/ST/JDR/2018 dated 11.10.2018 passed by the Commissioner (Appeals) CE & CGST, Jodhpur (Raj.))

Decided On: 31.10.2019

**Arihant Tiles & Marbles Pvt. Ltd.
Vs.
The Commissioner (Appeals), Central Excise & CGST**

Hon'ble Judges/Coram:
Rachna Gupta, Member (J)

Counsels:
For Appellant/Petitioner/Plaintiff: Narender Singhvi, Advocate
For Respondents/Defendant: K. Poddar and Tamana Alam, Authorised Representatives (DRs)

ORDER

Rachna Gupta, Member (J)

1. With the present order three appeals as mentioned above are disposed off, the order-in-appeal/the order-under-challenge being common to three of these appeals and also the issue involved is same.

2. Facts in brief relevant for the purpose are:

The appellant herein is engaged in manufacture of marble slabs and tiles. The Appellant on 29.08.2008 & 29.06.2009 filed three refund claims in respect of service tax paid on certain services received and used for export of goods, during the period from April 2008 to June 2008 in terms of Notification No. 41/2007-ST, dated 06.10.2007, relating to refund of service tax paid on GTA services, Port services and technical testing and analysis services. Three of the said claims have been rejected by the Deputy Commissioner, Central Excise, Udaipur, vide Order-in-Original No. 113 dated 02.03.2009 and Order-in-Original No. 402-402 dated 25.09.2009. Aggrieved by the order of the Deputy Commissioner, the Appellant filed an appeal against rejection of their refund claim. The Commissioner (Appeals-II), Jaipur vide Order-in-Appeal No. 282 dated 12.08.2010 and Order-in-Appeal No. 409 dated 27.10.2010, dismissed the appeal of the appellant. Being still aggrieved, the Appellant filed an appeal before this Tribunal challenging the order of the Commissioner (Appeals-II).

2.1. Tribunal vide Final Order No. 50115-50117/2015 (DB) dated 09.01.2015, affirmed the eligibility of the appellant to refund claim and remanded the matter to the lower authorities for re-examination.

In compliance thereof a detailed submission before the Assistant Commissioner, Central Tax, Udaipur, was filed by the appellant on 11.02.2015. Vide Order-in-Original No. 02/15-ST(Ref) dated 07.05.2015 and Order-in-Original No. 03/15-ST(Ref) dated 07.05.2015 the refund in respect of the three of the refund claims was sanctioned. However, interest from the date of filing of refund application was not sanctioned. Aggrieved there from the Appellant filed an appeal before Commissioner (Appeals), Jodhpur who vide Order-in-Appeal No. 173(CRM)/ST/JDR/2017-18 dated 27.03.2018 and Order-in-Appeal No. 174(CRM)/ST/JDR/2017-18 dated 27.03.2018, since three months from the date of sanction of refund had expired, sanctioned interest from the date of receipt of the application for refund i.e. 29.06.2009 and 06.07.2009, and not 11.02.2015.

2.2. The Appellant, however, filed letter dated 18.04.2018 with the Department for interest @ 12.5% on the refund amount sanctioned to them. The Department issued three Show Cause Notices (SCN's) to the Appellant, pursuant to the letters submitted by them denying the interest amount to the extent of 12% rate and that the calculation of interest by the Appellant was alleged to be incorrect.

The Appellant filed a detailed reply contesting the allegations and also the proposal for denial of the interest calculated by the Appellant before the Assistant Commissioner, Udaipur. In appeals 50120, 50121 & 50122 of 2019 claim for the interest of Rs. 33,54,833/-, Rs. 17,27,601/- & Rs. 79,15,871/- respectively was filed by the appellant.

As against this, the Assistant Commissioner vide Orders-in-Original No. (i) 28 dated 06.07.2018, (ii) 29 dated 06.07.2018 (iii) 30 dated 06.07.2018 sanctioned the charge

sequence of three amounts also Rs. 18,45,273/-, Rs. 8,29,314/- & Rs. 4,27,681/- respectively to the appellant as interest.

2.3 To assail the said order, the Appellant filed an appeal before Commissioner (Appeals), Jodhpur who vide Order-in-Appeal No. 1129-1131 dated 11.10.2018 (impugned order), observed the following:-

1. There is no provision for interest on interest

2. Notification No. 67/2003-CE(NT), dated 12.09.2003, prescribes 6% interest rate per annum for the purpose of Section 11BB of the Excise Act, therefore Appellant is not eligible to interest beyond the statutory 6% interest on delayed payment of refund claims. Being aggrieved of this order appellant is before this Tribunal.

3. I have heard Mr. Narender Singhvi, learned Advocate for the Appellant and Mr. K. Poddar, learned Authorised Representative for the Department.

It is submitted on behalf of appellant that in furtherance of the order of CESTAT dated 9th January, 2015, the appellant became entitled for the interest w.e.f. the year 2008-09, but it could get sanctioned, only in the year 2018. The delay of more than 10 years for getting the amount of interest refunded entitles the appellant to be compensated for the same. It is impressed upon that interest is compensatory in nature, therefore, interest on delayed sanction of interest is payable. Learned Counsel has relied upon the decision of Hon'ble Supreme Court in the case of Sandvik Asia Ltd. Vs. CIT reported as 2006 (196) ELT 257 (S.C.) and that the ratio has not be disapproved by Hon'ble larger bench in Gujrat Fluorochemicals Vs. CIT reported as 2008 (300) ITR 328 (Guj.).

3.1. It is submitted that the said decision has not been overruled rather has been relied upon by Supreme Court in a subsequent decision in the case of CIT Vs. Gujarat Fluoro Chemicals itself. Even the division bench of Gujrat, after the matter was referred back by the Supreme Court, is of the opinion that there is general principle for awarding compensation to the assessee for the delay in receiving interest properly due to it. It is alleged that the Appellate Authority below has ignored the said decisions rather the order-under-challenge suffer from gross misinterpretation of these decisions. Learned Counsel has also placed reliance upon the decision of State of Gujarat Vs. Unjha Pharmacy reported as 2016 (341) ELT 211 (Gujrat) wherein the decision of Gujrat Fluoro (Supra) has been followed holding that compensation for prolonged delay in sanction of interest has to be granted.

3.2. In alternative submission, it has been submitted that when principal amount is payable with interest, payment made by the department is to be first adjusted towards the interest and thereafter towards the principal amount. Thus, to the extent of short fall in refund of principal amount after first appropriating the sanctioned amount towards interest, the liability of Revenue to grant interest still stands. Learned Counsel has relied upon the decision in the case of V. Kala Bharathi and Ors. Vs. Oriental Ins. Co. Ltd. reported as AIR 2014 (S.C.) 1563, decision of Industrial Credit and Development Syndicate Vs. Smithaben H. Patel & Ors. reported as AIR 1999 (SC) 1036 have been relied upon by the appellant. Finally, impressing upon that on the delayed sanction of refund of interest on 6th July, 2018, the appellant is entitled to interest in the terms of Section 11BB for the period from 28.09.2009 to 06.07.2018. Therefore, the order challenge is prayed to be set aside and three of the appeals are prayed to be allowed.

4. While rebutting these arguments, learned D.R. has submitted that there is no provision in the relevant statute to grant interest on delayed payment of interest amount and that the Appellant vide the impugned appeal is actually asking for the interest on the delayed amount of interest which has been sanctioned in favour of the appellant with reference to the refund which could not be disbursed within three months of the sanction thereof. The claim herein is not for the compensations, as is impressed by the appellant. Hence, none of the case law, as relied upon is applicable to the present facts & circumstances.

4.1. It is submitted that rather the appellant is wrongly interpreting the decision of Sandvik Asia Ltd. (Supra). It has been pointed out that the Hon'ble Supreme Court has clarified therein that it is only that interest as provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest. It was only the compensation which as per Hon'ble Apex Court may be granted to the assessee. There is no power vested with the Tribunal to grant compensation in view of delay, if any. It is impressed upon that there is no infirmity, as alleged, in the order-under-challenge. Appeal is, accordingly, prayed to be dismissed.

5. After hearing the rival contentions of the parties and perusing the appeal record as well as the case law relied upon. We observe and hold as follows:

Present is the case where the appellant had filed refund claims in respect of service tax paid on certain services received and used for the export of goods during the period from April, 2008 to June, 2008. The refund claims were accordingly filed on 29.08.2008 & 29.06.09. These refund claim Appeals were initially rejected, however, this Tribunal vide order dated 09.01.2015 while affirming the eligibility of the appellant to said refund claims, remanded the matter back to the lower authorities for re-examination. It is, thereafter that three of refund claims as were filed under Notification No. 41/2007, dated 06.10.2007 were got sanctioned by the original adjudication authority vide its order dated 07.05.2015. However, no interest was sanctioned from the date of filing of the refund application. The interest was finally sanctioned on delayed refund of service tax vide order dated 27.03.2018.

6. In furtherance whereof the demand of the sanctioned interest that too @ 12.5% on the refund amount was filed by the appellant. The interest was disbursed @ 6% vide order dated 06.07.2018. The appellant today has not contested the rate of interest. However, has claimed the interest on the said disbursed amount of interest on the ground that the same was disbursed after a reasonable delay. Hence, the only question is to be adjudicated is opined as: Whether the appellant is entitled to interest on the sanctioned amount of interest qua refund claims which could not be disbursed with three months thereof.

6.1. The relevant provision in this respect is Section 11BB of Central Excise Act, 1944, it reads as follows:

Section 11BB. Interest of delayed refunds-

If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below ten per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Board, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

Provided that where any duty ordered to be refunded under sub-section (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation : Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any court against an order of the Assistant Commissioner of Central Excise, under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.]

The provision makes it, abundantly, clear that the interest is allowed on delayed refunds. But the provision is silent about any interest on delayed payment of interest as claimed herein. Learned Counsel for appellant has relied upon Sandvik Asia Ltd. (Supra) case, impressing upon that the Hon'ble Apex Court has allowed such amount in case of apparent delay. But it is observed that there has been expressed clarification that such interest only can be claimed by an assessee which is provided under the statute and no other interest on such statutory interest can be granted.

The relevant para of the decision of a division bench of Hon'ble Supreme Court while considering a reference doubting correctness of their previous decision of Sandvik Asia case had held as:

"In our considered view, the aforesaid judgment has been misquoted and misinterpreted by the assesseees and also by the Revenue. They are of the view that in Sandvik case (supra) this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, the interpretation placed is that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.

7. As we have already noticed, in Sandvik case (supra) this Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest."

8. The aforesaid shows that in the latter decision of the Larger Bench, it was held that the

decision in the case of Sandvik Asia Ltd. (supra) cannot be read to mean that Revenue is obliged to pay interest on interest in the event of its failure to refund the interest payable within the statutory period. The Apex Court further held that in the peculiar facts and circumstances of the case of Sandvik Asia Ltd. (supra) the Court had come to the conclusion that there was inordinate delay on the part of the Government to refund certain amount, which includes statutory interest and, therefore, directed the Revenue to pay compensation for the same, but not interest on interest.

9. In our view, as per the above referred observations of the Apex Court in the case of Gujarat Fluoro Chemicals (supra), obligation on the part of the Government to pay compensation for non-payment of the statutory interest by way of interest on interest was not approved. Further, in the above referred decision of the Larger Bench of the Apex Court at paragraph 7, it was observed that the interest provided under the statute, which may be claimed by the Assessee from the Revenue would be available and interest on such statutory interest would not be available.

10. From the conjoint reading of the decision of the Apex Court in the case of Sandvik Asia Ltd. (supra) and the latter decision of the Larger Bench in the case of Gujarat Fluoro Chemicals (supra) it appears that the liability to pay interest on interest by the Revenue is not approved and to that extent the contention of the Revenue can be maintained. But the further contention of the Revenue that no interest whatsoever would be payable if the refund of the amount of tax or refund of the amount deposited towards tax is to be made, no interest whatsoever would be available by way of compensatory measure.

11. In our view, the general principles for awarding compensation to the Assessee for the delay in receiving monies properly due to it is not disapproved by the Larger Bench of the Apex Court in the case of Gujarat Fluoro Chemicals (supra).

12. In view of the aforesaid observations and discussion, we find that the petitioner - Assessee would be entitled to compensation and the interest can be awarded by way of compensation, but would not be entitled to further compensation by way of interest on such interest, which is awarded as compensation.

13. Under these circumstances, we find that the Court can take a reasonable approach when the interest is to be awarded by way of compensatory measure, but with further caution that the interest on such interest cannot be ordered as per the above referred latter decision of the Apex Court in the case of Gujarat Fluoro Chemicals (supra)."

The Hon'ble Apex Court in this case while relying upon the decision of Commissioner of Income Tax Vs. Narender Doshil 254 ITR 606 (S.P.) has, however, held that the Revenue is liable to pay compensation on the amount of interest which it should have given to the assessee but has unjustifiably failed to do this. It becomes clear that inordinate delay for the grant of justified claim may entitle the person to get compensation against that delay the power of granting compensation is an inherent power. Present being a tribunal is not vested with any such inherent power. This Tribunal is a quasi judicial authority which is absolutely bound by the statutory provisions. No power as that of awarding compensation is available with the Tribunal as not being provided by the statute. Otherwise also it has never been the prayer of the appellant. Appellant is praying for entitlement of interest on the amount of delayed interest. Same cannot be called as the claim of compensation.

7. No doubt the decision of Sandvik Asia Ltd. (Supra) has not been overruled by the Hon'ble Apex Court in the subsequent decision of Gujarat Fluoro Chemicals (Supra). But, perusal of that decision shows that the question to be adjudicated in that decision before the Supreme Court was whether an assessee is entitled to be compensated by the Income Tax department for the delay in paying interest on the refunded amount, admittedly, due to the assessee. The question was adjudicated in affirmative. Revenue was directed to pay compensation for the delay in making payment after the lapse of statutory period. In that case also Hon'ble Supreme Court has clarified that amount, specifically, is compensation and is not an interest on interest. The similar clarification has come in the subsequent case of Gujrat Flourochemicals (supra) also i.e. "we clarify that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest".

8. Thus, the first argument of the appellants that they are entitled for interest on interest being compensatory in nature is not sustainable. Since, it technically is interest on interest it cannot be called as compensation suo moto, nor has been so prayed by the appellant himself. In view of this discussion, we answer the afore framed question in favour of Revenue.

9. Now coming to the alternate argument of the Appellant that from the amount of refund sanctioned since there is an interest liability, the amount should be first adjusted towards the

interest liability. It is observed that this rule of first appropriating the interest is applicable only to the debts or to the decretal amount. The case law as relied upon by the appellant is also either qua debts or qua the decretal amount. Hence, the same is not applicable to the present case of refund of indirect taxes. The said rule of interpretation is otherwise contained in order-21 Rule-1 of Civil Procedure Code relating to execution of decrees for recovery of money. Such a provision stands absolutely excluded from the Central Excise Act, 1944. Further, hon'ble Apex Court in the case law relied upon by the Appellant i.e. in the case of V. Kala Bharathi (supra) has rather clarified that, "after such appropriation the decree holder is entitled to interest only to the extent of unpaid principal amount. Hence, the interest be calculated on the unpaid principal amount." This clarification stands unsatisfied by the Appellant in the present case. Hence, the second line of argument of Appellant is also opined not applicable to the given set of facts & circumstances.

10. In view of entire above discussion, we do not find any infirmity in the orders under challenge. Accordingly, same are upheld hereby. Three of these appeals, consequently, stand dismissed.

[Pronounced in the open Court 31.10.2019]

[Back](#)

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

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 53834 of 2018-SM

(Arising out of order-in-appeal No. 397(SM)CE/JPR/2018 dated 13.09.2018 passed by the Commissioner (Appeals), Central Excise, Central Goods, Service Tax Jaipur).

M/s Continental Engines Limited

Appellant

VERSUS

**Commissioner of Central Goods and
Customs and Central Excise**

Respondent Service Tax,

AND

Excise Appeal No. 54024 of 2018-SM

(Arising out of order-in-appeal No. 359(SM)CE/JPR/2018 dated 10.08.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods, Service Tax Jaipur).

M/s Continental Engines Limited

Appellant

VERSUS

**Commissioner of Central Goods and
Customs and Central Excise**

Respondent Service Tax,

APPEARANCE:

Shri Abhishek Jaju, Advocate for the appellant

Shri K. Poddar & Ms. Tamanna Alam, Authorised Representatives for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NOS. 51560 – 51561/2019

DATE OF HEARING: 10.07.2019
DATE OF DECISION: 10.07.2019

ANIL CHOUDHARY:

The issue involved in both these appeals is whether in the event of upward price revision, post removal of goods, whether the appellant-assessee is liable to pay interest under Section 11AB of the Central Excise Act for the period when the Central Excise duty was due as per the original invoice, upto the date of payment of balance duty, under the supplementary invoice raised.

2. Heard the parties.

3. The similar issue was considered by the Hon'ble Supreme court in **Steel Authority of India Ltd. Vs. Commissioner of Central Excise, Raipur – 2019 (5) TMI 657 (SC)** wherein by judgment dated 08.05.2019, considering the similar issue of interest on differential duty, due to price escalation clause, the Larger Bench of the Supreme court framed the issue – Whether interest is payable on the differential excise duty with retrospective effect that became payable on the basis of

escalation clause, under Section 11AB of the Central Excise Act, 1944. The Larger Bench of the Hon'ble Supreme Court considered the following questions for fresh decision:

“7. In our view, the following questions will fall to be decided by us:

- 1) Whether the decision in SKF case and also in International Auto lay down the correct law having regard to the decision of this Court in MRF case which was in fact rendered by a Bench of three Judges.
- 2) The effect of the judgment in J.K. Synthetics vs. State of Rajasthan as also the other judgements cited before us in regard to demand for interest under fiscal statutes.
- 3) Whether the determination of duty under Section 11A(2) is necessary to sustain the demand for interest under Section 11AB of the Act.
- 4) The impact of Rule 7 of the Central Excise Rules, which contemplates provisional assessment.
- 5) Whether payment of differential duty can be treated as a case of payment of duty under the head “short paid”.
- 6) The effect of decisions under the Income Tax Act relating to accrual of income and the impact of accrual of income under the Income Tax Act on the liability under Section 11AB of the Act having regard to the statutory scheme under the Act and the Rules”.

4. The Hon'ble Supreme Court answered the questions in para 63 of the judgment as follows:

“63. We are of the view that the reasoning of this Court in the order referring the cases to us (to this Bench) that for the purpose of Section 11AB, the expression “ought to have been paid” would mean the time when the price was agreed upon by the seller and the buyer does not square with our understanding of the clear words used in Section 11AB and as the rules proclaim otherwise and it provides for the duty to be paid for every removal of goods on or before the 6th day of the succeeding month. Interpreting the words in the manner contemplated by the Bench which referred the matter would result in doing violence to the provisions of the Act and the Rules which we have interpreted. We have already noted that when an assessee in similar circumstances resorts to provisional assessment upon a final determination of the value consequently, the duty and interest dates back to the month “for which” the duty is determined. Duty and interest is not paid with reference to the month in which final assessment is made. In fact, any other interpretation placed on Rule 8 would not only be opposed to the plain meaning of the words used but also defeat the clear object underlining the provisions. It may be true that the differential duty becomes crystalised only after the escalation is finalised under the escalation clause but it is not a case where escalation is to have only prospective operation. It is to have retrospective operation admittedly. This means the value of the goods which was only admittedly provisional at the time of clearing the goods is finally determined and it is on the said differential value that admittedly that differential duty is paid. We would think that while the principle that the value of the goods at the time of removal is to reign supreme, in a case where the price is provisional and subject to variation and when it is varied retrospectively it will be the price even at the time of removal. The fact that it is known, later cannot detract from the fact, that the later discovered price would not be value at the time of removal. Most significantly, section 11A and section 11AB as it stood at the relevant time did not provide read with the rules any other point of time when the amount of duty could be said to be payable and so equally the interest. We would concur with the views expressed in SKF case (supra) and International Auto (supra).” In view of the law laid down by the Hon'ble Supreme Court, I hold that the appellant is liable to pay interest. Learned Counsel states that the amount of pre-deposit made by them, exceeds the amount of interest payable under Section 11AB

of the Act. Accordingly, I direct the adjudicating authority to verify the calculation of interest as submitted by the appellant and to refund the excess amount paid by the appellant (if any), with interest as provided under Section 35FF of the Act.

5. Both the appeals stand dismissed.

(Dictated and pronounced in open Court).

(Anil Choudhary)
Member (Judicial)

Pant

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

Appeal Nos. E/51175, 51475, 51477, 51478, 51479, 51480, 51481, 51495, 51496, 51476/
2017-EX(DB) (Arising out of Order-in-Original Nos. 32-33/SS/CE/D-II-2016-17 dated
15.03.2017 passed by the Commissioner of CE, Delhi-2) and Final Order Nos. 51970-
51979/2019

Decided On: 23.05.2018

Appellants: **M/S Guruharkishan Industries and Ors.**

Vs.

Respondent: CCE, Delhi-II

Hon'ble Judges/Coram:

V. Padmanabhan, Member (T) and Ajay Sharma, Member (J)

Counsels:

For Appellant/Petitioner/Plaintiff: Vineet Kumar, Advocate

For Respondents/Defendant: R.K. Mishra, DR

ORDER

V. Padmanabhan, Member (T)

1. The present appeal is filed against the Order-in-Original No. 32-33/2016-17 dated 15.03.2017.

2. M/s. Guruharkishan Industries (GHI), situated at WZ-424, Gali No. 19, Sant Garh, Tilak Nagar, New Delhi, was visited by the Central Excise Officers on 21.11.2012 and the premises was searched, in connection with the intelligence that GHI was indulging in the evasion of Central Excise duty. During the search, Shri Mukhtiar Singh, Prop. was present. It was observed that GHI was engaged in the manufacture of hydraulic door closers under various brand names, such as, "Samrat", "Doorwell", "Alcon", "Turbo", "AAI-JEE". The factory premises of GHI, was built on a plot of area of 100 Sq Yds and its back side was interconnected in the ground floor with plot Nos. 423 & 422. The plot No. 422 measured about 85 sq yds and had a big hall and one small room. Back side of ground floor of plot No. 423 and entire back side of plot No. 424 consisting of three floors were interconnected with each other to make one full factory premises. The two floors on the front portion of plot No. 424 were used as office. 08 lathe Machines, 10 Drill Machines, 2 Grinder Machines, 3 pressing Machines, 01 patta, 01 Adda and one digital weighing machines were found on the ground floor. First floor comprising of one big hall and four rooms was used for storage of finished/semi-finished goods, and for enamelled painting and drilling of the goods. Eight drill machines, two grinders and one painting machine were installed on that floor. Second floor comprising of one big room was used as storage of finished/semi-finished goods for enameled painting of the goods.

3. During verification of physical stock of finished goods with various brand names, the stock valued at Rs. 6,51,100/- was seized. The officers also recovered certain incriminating documents along with the "Weston" Digital External Hard Disk for further investigation.

4. The statement of Shri Mukhtiar Singh was recorded on 17.12.2012 in which he admitted that he was manufacturing door closers under different brand names of different buyers and were selling their goods through their dealers. Such goods were being sold under sale bills and delivery challans. Shri Mukhtiar Singh failed to appear before the Departmental Officers on subsequent dates even though summons were issued for his appearance on several different dates.

5. The statement of Shri Amarpreet Singh, authorized signatory of GHI, appeared before the Departmental Officers on 16.04.2013 under the authorization of Shri Mukhtiar Singh and his statement was recorded. He admitted in his statement that GHI was engaged in the manufacture of door closers bearing different brand names out of which for "Doorwell" they had applied for

allotting the brand name. No other brand names belonged to them.

6. Shri Mukhtiar Singh, prop. was summoned for being present to witness the opening of the recovered hard disk and to print-out the data contained therein, but he chose not to appear. Finally on 27.08.2013, in the presence of two independent witnesses and under panchnama proceedings, data from the hard disk was retrieved by a computer expert. Both the deleted data as well as readable data of the said hard disk was printed-out. Such data included the details as below:

- a) Challans issued in the name of different buyers for the period 2010-11 to 2012-13. Such details retrieved were found to tally with the physical copies of the challans retrieved from the factory during search operation.
- b) Soft copy of month-wise/date-wise details of goods delivered to different buyers. The details were found to tally with other seized documents.
- c) Bills indicating sale of goods to M/s. Jai Durga Hardware and Jai Mata Hardware.
- d) Soft copies of various retail invoices indicating that the data in the hard disk was in relation to appellant 's transactions.
- e) One folder containing the details of payments received during May to June, 2013.

The data retrieved indicated the clearance of goods during the period 2008-09 to 2012-13 (upto 21.11.2012) to the tune of Rs. 15,60,36,729/-.

7. Investigation was also made with the various transporters, prominent among them was M/s. P.K. Transport Corporation, Punjabi Bagh, Delhi. Shri Manjit Singh, partner, in his statement, accepted transporting goods from the appellant to different buyers during 2010-11 and 2011-12. He further admitted that the charges were received in cash and that they did not mention their bill numbers in the GRs.

8. After conclusion of investigation, two separate SCNs were issued to the appellants. Vide the SCN dated 17.05.2013, the seized goods were proposed for confiscation and vide the SCN 16.12.2013, duty demand to the extent of Rs. 3,64,33,287/- was proposed.

9. During the course of adjudication proceedings before the lower authority, the appellant sought cross-examination of various witnesses including the Departmental Officers, who participated in the investigation; Shri Manjit Singh, partner, M/s. PK Transport Co.; panch witnesses in whose presence the hard disk was opened; as well as many of the buyers. The adjudicating authority permitted cross-examination of various buyers and during cross-examination some of them retracted their statements. Finally, the impugned order was passed in which:

- a) The seized goods were ordered for confiscation and allowed for redemption on payment of redemption fine and penalty;
- b) Duty demand was confirmed amounting to Rs. 3,64,33,287/- along with interest and equal penalty;
- c) Penalties were also imposed on various connected persons including buyers.

10. All the appeals have been filed challenging the impugned order and are being disposed-of through this common order.

11. On behalf of all the appellants, we heard Shri Vinee Kumar, Advocate. Revenue was represented by Shri R.K. Mishra, DR.

12. Submissions made on behalf of the appellants:

- i) It was submitted that the appellant, namely, M/s. Guruharkishan Industries (GHI) was only a distributor of M/s. Guru Harkishan Mechanical Works (GHMW). GHI is situated at WZ-424 whereas the premises at 422-423 belong to M/s. GHMW. It is submitted that the door closers were manufactured by GHMW and GHI has acted only as a distributor for the NCR territory

since 2011. In this connection, he filed an affidavit by Shri Nirmal Singh prop. of GHMW.

II) He submitted a copy of electricity bill dated 18.12.2012 for the premises at WZ 422-423 and submitted that such connection is "Industrial Type" and from the number of units consumed, it can be seen that manufacture was done by GHMW. On the other hand, he submitted that the electricity connection for premises of 424 was a domestic connection indicating very few units consumed. He also submitted a copy of the Income Tax Return and Balance Sheet of Shri Nirmal Singh for the period ending 31st March, 2012 indicating a turnover of about Rs. 64 lakhs to support the above arguments.

iii) He argued that the data printed-out from the hard disk drive cannot be used in evidence against the appellant since the same was printed-out without the presence of any authorized person of the appellant

iv) The case is built entirely based on third party evidence in the form of register seized from the transporter as well as the statements of several buyers, many of whom have retracted their statements subsequently.

v) The Revenue has failed to prove procurement of huge quantity of raw materials and packing materials required for manufacture of the alleged quantity of clandestine clearances. It was argued that the activity carried-out in GHI was only repair and refurnishment of old door closers.

vi) The department also did not make available all the witnesses for cross-examination.

13. The ld. DR, opposed the arguments raised by the appellant.

(i) He justified the impugned order. He specifically drew our attention to the search proceedings held at the appellant's factory on 21.11.2012, during which the officers found that GHI was engaged in the manufacture of hydraulic door closers bearing various brands. It was further observed that the factory premises was built on a plot area of 100 Sq Yds and further that the backside was interconnected on ground floor of plot Nos. 423 & 422. The front portion of plot No. 424 was used as office. On the ground floor, various machineries including lathe, drilling machine, grind machine, pressing machine, digital weighing machine etc. were found installed, whereas the first and second floors were used for drilling of goods as well as various operations and storage of goods. He submitted that the entire arrangement was made to camouflage the activity of manufacture being carried-out.

ii) The ld. DR further submitted that Shri Mukhtiar Singh, prop. of GHI had adopted an attitude of total non-cooperation in the investigation. He initially refused to sign the search warrant during search proceedings, did not respond to as many as 16 summons issued for joining the investigation; and in spite of specifically requesting his presence at the time of data retrievable, he did not honour the summons. Accordingly, the Departmental Officers had retrieved the data in the presence of two respectable witnesses with the help of computer expert. Hence, he submitted that the validity of the data retrieved from the seized hard disks cannot be questioned.

iii) The data printed-out from the hard disk tallied with the physical copies of the challans resumed from the factory during search. Further, most of the buyers have also admitted receipt of the clandestinely cleared goods, by identifying the challans bearing their name. He submitted that this corroborates data retrieved from the hard disk drives.

iv) Regarding the retraction of statements by some witnesses at the time of cross-examination before the adjudicating authority, he submitted that such retraction alone will not render the evidence of the original statements as null and void, as has been held by the Tribunal in the case of M/s. MM Industries vide Excise Appeal No. 51686-51687/2017.

v) He submitted that the affidavit dated 08.05.2018 filed by Shri Nirmal Singh to the effect that GHI was their sole distributor is nothing but a belated attempt to save his brother Shri Mukhtiar Singh from the tax net. No credence should be given to such an affidavit. Finally, he submitted that the impugned order may be upheld.

14. In the re-joinder, the ld. Advocate submitted that Shri Mukhtiar Singh did not appear before the Departmental Officers for fear of harassment. He further submitted that from the turnover as indicated in the Income-tax Return of GHMW, it is evident that they were the manufacturers and

not GHI. Finally, he submitted that the impugned order merits to be set-aside. He also relied on various case laws including:

- a) Sunrise Food Products Vs. Commissioner MANU/CE/0773/2016 : 2017 (357) ELT 599.
- b) Commissioner Vs. KP Pouches MANU/CE/0542/2017 : 2017 (352) ELT 29 (Tri. DL)
- c) Continental Cement Co. Vs. Union of India MANU/UP/1995/2014 : 2014 (309) ELT 411.

15. Heard both sides at length and perused the voluminous record.

16. It is seen that the allegations raised in the SCN and confirmed in the impugned order are based on elaborate investigation carried-out by Revenue. As briefly stated in the above paragraphs, this evidence includes incriminating documents recovered from the factory of the appellant, statements recorded from various persons including the transporter as well as various buyers and also significantly the data printed-out from the electronic devices recovered during the search proceedings. One of the main defences advanced by the appellant is that the data printed-out from the electronic devices should not be relied since the same was printed-out without the presence of Shri Mukhtiar Singh, prop. or anybody else representing the appellant. The other main ground is that in the statement of Shri Mukhtiar Singh and also many buyers have been retracted. Also, it is claimed that the goods, in question, were not manufactured by GHI but by GHMW. The appellant has also sought to differentiate the premises of GHI as well as GHMW.

17. Initially, we take up the issue regarding data printed-out from the electronic devices. It is not in dispute that these electronic devices were recovered from the factory premises of the appellant under proper Panchnama. Several summons were issued to Shri Mukhtiar Singh, prop. requiring the presence in the office for retrieval of data from such devices. But Shri Mukhtiar Singh chose to ignore such summons and did not respond with his presence. Finally, retrieval of data from the resumed electronic devices was done on 27.08.2013 with the help of an expert under proper Panchnama. The Panchas, who witnessed the activity, were also offered for cross-examination before the adjudicating authority when they were also cross-examined. Consequently, we are of the view that such data is to be considered, as admissible evidence, in the case.

18. The adjudicating authority has analyzed and discussed the data printed-out from the electronic devices, in detail, on the impugned order. It is seen that the details of the challans, so retrieved, tallied with the physical copies of the challans resumed from the factory during such operation. Further, it is seen that various details of the goods delivered to different buyers, such as, challan number, name of the party, data, description, quantity, etc. were found in the soft copy. These details were found to tally with the record physically resumed. Many of the buyers, whose statements were recorded, also confirmed the receipt of the goods. In view of above, it is clear that the data in the electronic devices were in relation to the transactions undertaken by the appellant and for such transactions, no evidence of excise duty payment have been produced by the appellant.

19. The second main ground is regarding the retracted statements. Shri Mukhtiar Singh, prop., in his initial statement dated 17.12.2012, admitted to the manufacture of various types of door closers bearing various brand names, which were not owned by him. Subsequently, in his statement dated 28.12.2012, he stated that the door closers were not manufactured by him but by GHMW run by his brother. It is also pertinent to record that during the period between the above two statements, the Departmental Officers also recorded the statement of Shri Aman Preet Singh on 16.04.2013, for which he was authorized by Shri Mukhtiar Singh. He had also admitted to the manufacture of door closers with the brand name not registered with them. It is also alleged that some of the buyers retracted their original statement at the time of cross-examination before the adjudicating authority. It is the argument of the appellant that all these statements lose their evidentiary value on account of retraction.

20. It is a settled position of law that the original statement does not become null and void only because it has been retracted on a subsequent date. Such retraction is to be assessed by the adjudicating authority in the light of the circumstances of the case and the existence of corroborated evidence. In the present case, we note that Shri Mukhtiar Singh has gone against his original statement, several years after the initial admission. Likewise, the buyers retracting such statements at the time of cross examination by itself will not make their statement

inadmissible. Such retraction especially when supported by other evidences is to be ignored as has been held in the following cases:

i) KP Abdul Majeed Vs. CC Cochin-MANU/KE/1138/2014 : 2014 (309) ELT 671. (Ker.)

ii) CC Vs. Shamshuddin M.A. Kedar - MANU/MH/1153/2010 : 2010 (259) ELT 44 (Bom.)

iii) CCE Vs. Praveen Kumar & Co.-MANU/CE/0105/2015 : 2015 (328) ELT-220 (T. Del.)

Similarly views have been taken by the Tribunal in the case of MM Industries Pvt. Ltd. vide Appeal No. 51686-51687/2017 dated 08.05.2018.

21. It is further seen that Shri Mukhtiar Singh was not responding to as much as 16 summons issued by the department soliciting his presence to join the investigation. But he chose to ignore the summons and hence his version could not be recorded during the time of the investigation.

22. The appellant has argued that the premises bearing the address WZ-424 belonged to GHI whereas the premises situated at WZ-422 & 423 belonged to GHMW. It is further argued that GHMW was the manufacturer of the door closer and GHI was only the sole distributor. To this effect, an affidavit of Shri Nirmal Singh, prop. of GHMW, has been submitted during the course of hearing of the appeal along with a copy of the electricity bill for premises at 422 & 423 claiming that this was industrial connection.

Such claim has never been made before the investigating or adjudicating authorities. Such claim also merits to be ignored since it appears to be only an attempt made belatedly at the time of the appeal before this Tribunal. The Panchnama, at the time of search on 21.11.2012, records that the premises situated at 422-423 and 424 were all connected together at the back side and all the machines required for manufacture were found in the building comprising all the three plot numbers. The front portion of 424 has been made to appear as the office of GHI whereas in reality the factory premises situated over all the three plot numbers has been used for manufacture. On the basis of the documents recovered and the statements recorded, it leaves very little scope for doubt that such manufacture has been done by GHI.

23. In view of the above detailed discussions, we are led to the inescapable conclusion that the allegation of clandestine manufacture and clearance and evasion of duty stands established. Further, the seized goods are also liable for confiscation.

24. In the result, we upheld the impugned order along with the reasons mentioned therein and the appeals are consequently dismissed.

(Pronounced in the court on 23.05.2018)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

Shri Bijay Kumar, Member (T) and Ms. Rachna Gupta, Member (J)

COMMISSIONER OF C. EX. & S.T.-LTU, DELHI

Versus

GAS AUTHORITY OF INDIA LTD.

Final Order No. A/53338/2018-EX(DB), dated 30-11-2018 in Appeal No. E/55666/2014-DB

REPRESENTED BY :Shri Harpreet Singh, Standing Counsel, for the Appellant.

Shri V. Lakshmi Kumaran, Advocate, for the Respondent.

[Order per : Rachna Gupta, Member (J)]. - The present is an appeal filed by the Revenue Department against the order of Commissioner Central Excise & Service Tax (LTU), the Order-in-Original No. 12-16/Commr./14-15, dated 23-7-2014.

2. The facts relevant for the purpose are that the respondent herein that is M/s. GAIL (India) Ltd. is primarily engaged in the transportation of natural gas through pipelines. In addition to appellants are also engaged in manufacture of petroleum gases and other gaseous hydrocarbons, petroleum oils and oils obtained from bituminous minerals other than crude i.e. the products falling under Chapter heading 2710 of Excise Tariff at their different units situated at Gandhar, Vaghodiya, Pata and Vijaypur. All having separate Central Excise registration certificates for the manufacture of the said excisable goods. Subsequently they have also obtained CTU membership on 10-4-2012. The Department observed that the respondent is misdeclaring one of the products that is “Natural Gasoline Liquid” (NGL) as “Naphtha” at the time of clearance from their factory premises NGL has a specific entry as Central Excise Tariff item 2710 12 20 (earlier at 2710 11 20), which attracts Central Excise Duty of 14 % *ad valorem* + Rs. 15 per liter whereas Naphtha has specific entry 2710 11 90 (earlier 2710 12 90) of the schedule to Central Excise Tariff Act 1985 (CETA) and that it attracts the duty at the rate of 14 per cent *ad valorem* along with the benefit of exemption under Notification No. 18/2009/CE, dated 7-7-2009 (as amended). The Department on the basis of test Reports, alleged that respondents by such misdeclaration have short paid the duty to the extent of Rs. 15 per litre on manufacture and clearance of NGL. Resultantly following five Show Cause Notices for the different units of the respondents were issued.

S. N.	SCN issued by (Comm.)	Plant	Date of issue	Period of demand	Amount of demand (in Rs.)
1.	Vododara-II	Vaghodia	30-1-2012	January, 2011-November, 2011	20,11,91,106/-
2.	Vododara-II	Gandhar	12-3-2012	April, 2011-January 2012	83,51,72,354/-
3.	DGCEI, Nasik	Vajaipur	4-2-2013	January, 2008-March, 2012	4,26,55,00,071/-
4.	DGCEI, Nasik	Pata	4-3-2013	Feb., 2008-March, 2012	2,84,87,77,806/-
5.	LTU, Delhi	Vaghodia & Gandhar	7-1-2013	Dec., 2011-March, 2012 Feb., 2012-March, 2012	15,25,45,176/-

The said show cause notices were adjudicated by the common order of the Commissioner LTU, that is the one under challenge, vide which she has dropped the entire demand concluding as follows :

(i) Naphtha and NGL are two different products, under the category of light oils and preparations falling under the broad sub-heading of 2710 12 of the Central Excise Tariff Act, 1985.

(ii) Naphtha can be classified under Tariff Item 2710 12 19 under the sub category of motor spirit other than SBPS, (special boiling point solvent) as it was earlier (old six digit tariff) grouped under the sub category of motor spirits or it can be classified under Tariff Item 2710 12 90 under the category of light oils and preparations, other than Motor spirits and NGL.

(iii) The product Naphtha falling under Heading 2710 is entitled for exemption under Notification No. 23/2006, dated 1-3-2006 upto 6-7-2009 and thereafter under Notification No. 18/2009, dated 7-7-2009.

(iv) Naphtha is a petroleum product and liquid product of natural gas not less than 10% of which distils below 175°C and 95% of which distils below 240°C when subject to standard method test as per Bureau of Indian Standards and Hawley's Condensed Chemical Dictionary. Both NGL and Naphtha are low boiling liquid petroleum products under the category of light oils and preparations.

(v) Naphtha has RVP slightly more than 10 psi can be treated as Naphtha, whereas NGL is having RVP more than 10 and upto 34 psi depending upon its volatility.

(vi) Both Naphtha and NGL contain pentane and heavier hydrocarbon.

(vii) The product cleared by the Noticee broadly satisfies the universally accepted parameters of Naphtha and also the definition and description of Naphtha as per various technical literature. The parameters of the product Naphtha cleared by the Noticee is similar to that of other manufactures of Naphtha i.e. ONGC, BPCL and MRPL. The product is bought and sold as Naphtha as is otherwise apparent from respondent, major customers and on the basis of individuals test reports submitted at the time of clearance of the product. Further Indian Institute of Petroleum has also certified the product as Naphtha.

(viii) There is no suppression of fact on the part of the Noticee with the intent to evade payment of duty, as there is no evidence of alleged act. Hence no penalty can be imposed under Section 11AC of CEA. Being aggrieved of the said order the Department is before us vide the present appeal.

3. We have heard Shri Harpreet Singh Standing Counsel for the appellant and Shri V. Lakshmi Kumar Ld. Advocate & Shri Anurag Kapur Ld. Advocate for the respondent/assessee.

4. It is submitted on behalf of Department that the committee of Chief Commissioner constituted statutorily under Section 35E(1) of the Act, after examining the order-in-original has viewed the same as "not legal nor proper" as the same has wrongly determined the product of the respondent as Naphtha despite obtaining the parameters from the Like M/s. MRPL, ONGC, BPCL and India Institute of Petroleum Dehradun pointing it to be natural gasoline liquid. It is submitted that the Adjudicating Authority below has ignored the statements of the customers of the respondent indicating that the product manufactured is NGL. It is otherwise an admission of the respondent themselves that they were initially clearing their product as NGL. There is neither the change in procedure of manufacture nor in the customers of the respondent despite the alleged change from manufacturing NGL to manufacture of Naphtha. It is further impressed upon that there is not only the ample evidence but the enough technical literature as well as data available on the net as well which are indicative of the fact that the product cleared by respondent is the product other than Naphtha has been held by the Chief Chemical Analyst vide its report dated 30th August 2011. He has accordingly held the product of respondent as low boiling point liquid extracted from Natural gas which is other than Naphtha. NGL is specifically defined vide supplementary note of chapter 27 of CETA as low boiling petroleum product extracted from natural gas. Since, the chemical examiner report also duly classifies the impugned samples having same property, the Adjudicating Authority has committed blatant error while still holding the samples/product of respondent as Naphtha. NGL and Naphtha are impressed as two different products as have otherwise been recognized differently even by CETA.

4.1 The Ld. Counsel also impressed upon the fact that the only drawn sample along with test memo was the first sample having the report dated 31st August 2011. The remaining samples'

test reports as have been relied upon to an extent by the respondent, were obtained without preparation of any test memo. As the result, the Report of 31st August, 2011 only can be relied upon based whereupon it is abundantly clear that the product of respondent is not Naphtha but NGL inviting extra duty of Rs. 15 per litre in addition to 14 per cent *ad valorem* duty. The authority below is therefore alleged to have committed an error while ignoring the said test report. It is also impressed upon that the contents are otherwise acknowledged and admitted in the statements of the officer in charge of respondents and also in the statements of the respondent's customers. While miserably ignoring those statements as a corroborative piece of evidence to the report of chemical examiner the Adjudicating Authority definitely has committed error. The Department has accordingly prayed for the order under challenge to be set aside. In addition it is submitted that since there is major duty difference between NGL and Naphtha, the impugned misclassification cannot be ruled out to be a deliberate strategy with intention to evade the payment of additional duty on NGL. The Department was thus entitled to invoke the extended period of limitation. The findings of the order under challenge to that effect also are prayed to be set aside appeal is accordingly prayed to be allowed.

5. While rebutting all these arguments, it is submitted on behalf of the respondent-assessee that they are the manufacturers of liquefied petroleum gas (LPG) and Naphtha at four of their plants. It is submitted that initially they were manufacturing NGL, however, due to presence of high amounts of pentane their product was extremely volatile. Due to which the provisions were made to spike the manufactured NGL back into the feed stream along with the lean gas. It is impressed upon that the said factum has dully been recorded by this Tribunal in respondent's own case i.e. *GAIL v. CCE Indore and Vadodara*, 2004 (170) E.L.T. 75 (Tri-Del.), and that the said decision was also upheld by the Hon'ble Supreme Court vide its decision reported at 2015 (319) E.L.T. 5 (S.C.). The said process change and manufacturing of pentane and Special-Boiling Point Solvents (SBPS) was brought to the notice of the Department vide respondent's letter, dated 21-2-2000. It is thereafter that the Government instructed respondent to stop manufacturing SBPS due to potential misuse thereof and to manufacture an alternate product since then the respondent is manufacturing Naphtha. The Ld. Counsel has impressed upon the procedure adopted by respondent/assessee for manufacturing Naphtha, from natural gas by first converting gas into a liquefied portion then subjecting it to further fractioning thereby removing the lighter hydro carbons mainly Methane (C1), Ethane (C2) and Propane (C3). Thereafter the content is transferred to the LPG column where mixture of Propane (C3), Butane (C4) is separated from the top of the column and the heavier fractions that is Pentane and Hexane are fed into NGL fractioning column. From the top of this column Pentane is separated and the bottom product having hydro carbons ranging from Hexane (C6) and above are stored as Naphtha. Due to the product being classified as Naphtha having Tariff Item 2710 11 90 that the respondent were availing the benefit on the concessional rate of duty under Notification No. 18/2009-C.E., dated 7-7-2009. In the line of these submissions it is alleged that the Department had initiated a wrong investigation against the respondent. The show cause notices have wrongly proposed the demand of differential duty of excise on the product of respondent that is Naphtha wrongly alleging the same to be a Natural Gasoline Liquefied (NGL) classified under Tariff Item 2710 11 20.

6. It is submitted that the chemical examiner's report dated 30th August 2011 is based on the false presumption that since the product is derived from natural gas it is a low boiling liquid other than Naphtha. It is submitted that there is ample of technical literature even the lab texts reports the shows that even Naphtha can be manufactured from natural gas as contrary to the stand of Chemical Examiner. The Ld. Counsel further impressed upon that the cross-examination of the Chemical Examiners vanishes entire sanctity in the report which is the sole criteria for the Department to inhibit the impugned adjudication against the respondent. The Ld. Counsel further impressed upon that the Chemical examiner has miserably been silent about giving any reason as to why sample tested cannot be treated as Naphtha. The Chemical Examiner is alleged to have a wrong understanding that Naphtha and NGL are two different chemical/petroleum products obtained from two different sources. It is reiterated that Naphtha can also be obtained from Natural Gas. The report of examiner is, therefore, alleged to be full of discrepancies and thus is unreliable.

6.1. The sample which was drawn by the Department subsequently were with the *mala fide* motive of testing Reid Vapour Pressure (RVP), the same being differentiating criteria for the impugned both the products. However no new test memo was issued at the time of subsequently drawn samples. There otherwise is discrepancy about who visited Vadodara unit for drawing and testing samples. Ld. Counsel pointed out towards the contradiction in the statement of chemical

examiner and that of Mr. Krishan Kumar, in-charge of engineering laboratory in Vadodara unit. The samples from Gandhar as well as Vadodara were collected at the same time by one and the same person despite the fact that there is the distance of almost 125 Km. between the two units due to which it is not practically possible for one single person to visit both the units and to collect samples and also to test them on the same day. Otherwise also there appear no bases for the Chemical Examiner for arriving at the conclusion about RVP of the sample from Gandhar and Vadodara Unit to be found as 10.23 PSI.

6.2. It is further submitted that non availability of Mr. Pradeep Maru who is asserted to have gone for collecting said samples, is sufficient to extend the benefit in favour of the assessee and to falsify the allegations of the department. As he would have been the most-relevant witness for bringing the precise clarity about the controversy in question. With holding his availability for being cross-examined by the assessee clearly establishes the *mala fide* of the Department to assert and get confirmed a wrong claim heavily detrimental to the interest not only of the respondent but to the industry as a whole.

6.3 Further, while justifying the order under challenge, Ld. Counsel for respondent has submitted that as per the Technical literature, tests reports of respondent's product and the specification of other manufactures Naphtha have duly been compared by the Adjudicating Authority below for rightly holding that the product in question is Naphtha. Legal and technical literature as to Naphtha (Acquisition Sales Search and Prevention of Use in Automobile) order, 2000, Indian standard glossary of Petroleum terms, Hawley's condense dictionary, literature from Indian Institute of Petroleum, Dehradun and handbook of hydro carbons, manual of Department Instruction of Excisable Manufactured Products etc. has been relied upon by the respondent to define Naphtha as a product different from natural gasoline liquid and as one having such specification as are reflected in the chemical examination reports dated 30th August 2011 thereby impressing upon that the product manufactured and cleared by the respondent-assessee is nothing but Naphtha to which the exemption under Notification No. 18/2009 and 18/2012 was very much available to the respondent. In alternative, it is argued that no duty can be demanded as the impugned product is classified under Chapter Heading 2709.

6.4 It is further impressed upon that the end use of Naphtha and natural gasoline liquid are absolutely different. However Naphtha can also be manufactured from natural gas contrary to the stand of the chemical examiner. Had the respondent been not providing Naphtha to its customers he would have been amenable to litigation on account of the breaching its contractual obligations. Since the definition of Naphtha has not been provided within the frame work of laws, it is required that Naphtha is to be understood. Finally it is submitted that in the manner the persons engaged in the trade understand it to be in commerce parlance and that the onus of classification lies upon the Revenue. The respondent-assessee has relied upon [following] case laws;

7. After hearing both the parties, at length and perusing the entire record and literature referred we are of the opinion :

8. The moot question to be adjudicated herein is as to whether the product manufactured by the respondent/assessee is Natural Gasoline Liquid (NGL) having excise duty at the rate of 14 per cent *ad valorem* plus Rs. 15 Per litre having Tariff Entry as 2710 12 20 or it is Naphtha having the excise duty at the rate of 14 per cent *ad valorem* and tariff entry as 2710 12 90.

Since, the entire case rests upon the reports given by the Chemical Examiner and that the product manufactured and cleared is the petroleum chemical product, it is foremost relevant to understand the chemistry of both these products.

9. For the purpose we have perused the literature as has been impressed upon by the respondent-assessee i.e. Indian Standard Glossary of Petroleum Terms, Hawley's Condense Dictionary, Indian Institute of Petroleum Dehradun literature, handbook of Industrial Hydro Carbons Process Manual of Departmental Instructions on excisable manufactured products.

10. In addition the Handbook on Petroleum Products by Gems G. Schied and also, the wikipedia portal is being looked into with respect to the Chemistry of products from petroleum refinery. We have concluded our observation as far as the chemistry involve for various products of petroleum refineries with the specific reference of the products under adjudication i.e. NGL and Naphtha as follows :

Name of the fraction at the different condensation levels (% in crude oil)	Number of C atoms in the hydrocarbon molecule fraction	The approximate boiling range in the C of the fraction	Uses of the fraction Many are useful fuels-alkenes hydrocarbons but they are non-renewable fossil fuels-specific use depends on physical properties (see later)
Fuel Gas, LPG refinery gas (1-2%)	C 1 to 4 Mainly propane and butane gases which can be compressed or liquefied	<25°C	Methane CH ₄ (domestic heating) ethane another gaseous fuel, C ₃ -4 easily liquefied petroleum gas, portable energy source e.g. bottled gas for heating and cooking (butane), higher pressure cylinders (propane), feedstock for other organic chemicals
Gasoline	C 5 to 7	25 to 75°C	Easily vaporised, highly flammable, easily ignited, car fuel-petrol molecules
Naphtha (20-40%)	C 6 to 10	75 to 190°C Light Naphtha 150 to 240°C Heavy Naphtha	No goods as a fuel, but valuable raw material source of organic chemicals to make other things, cracked to make more petrol and alkenes
Paraffin, Kerosene (10-15%)	C 10 to 16	190 to 250°C	Less volatile, less flammable than petrol, domestic central heating fuel, (paraffin) aircraft jet fuel (kerosene)
Diesel oil, gas oil (15-20%)	C 14 to 20	250 to 350°C	Less volatile than petrol, diesel fuel for some cars and larger vehicle like haulage trucks, trains, central heating fuel, also cracked to make more petrol and alkenes
Heavy fuel oil, heating oil, lubricating oil, greases	C> 20 to 30	>350°C	Not so easily evaporated, not as flammable, safe to store, liquid fuel oil for power stations and ships, quite viscous (sticky) and can also be used for lubricating oils (lubricants, mineral oils) and greases.
Residue-fuel oil, lubricating oils, waxes and Bitumen (40-50%)	C>30, maybe up to several hundred	High boiling liquids or low melting solids, that boil over 350°C Bitumen Components boil over a 500°C-700°C	Low melting solids used as candle wax, clear waxes and polishes (can be dyed) and the biggest molecules make bitumen/asphalt-low melting solid used on roads as it forms a thick, black, tough and resistant adhesive surface on cooling, used as a roofing waterproofing material (it sticks rock chips on roofs or road surfaces)

Based on the above mentioned literature we have been concluding that the NGL and Naphtha are highly overlapping constituents of oil refineries both being hydro carbons ranging from Butane (C4) to that of Heptanes (C12) and even above. However, with the help of entire above mentioned literature including those as relied upon by the respondent we have concluded the following differences between the impugned two products as :

NGL	Naphtha
Produced from natural gas or produced during extraction process in the field <i>by way of retrograde condensation</i> and also by isomerisation of normal pentane.	Produced from crude oil <i>by way of fractional distillation</i> & even from natural gas condensation & even by destruction distillation of wood.
The <i>first unit in extraction process is light end fractionate</i> followed by liquefied petroleum gas column from the top where propane and butane are removed as LPG and at the bottom of this column are collected pentane & hexane as NGL.	The <i>first unit is crude oil distillation</i> unit or fractional unit. Also available at the bottom of LPG column where NGL distils into aromatic rich Naphtha (ARN) superior kerosene oil (SKO) High speed diesel (HSD) Aviation Turbine Fuel (ATF).
Initial B.P. 35°C. Final boiling point is 75° more than 50 % evaporates at 60° C	Final B.P. 240°C though initial B.P. is 35°C light Naphtha (35°C - 140°C) Heavy Naphtha (140°C-240°C). Not less than 10% distils below 175°C
It contains Mostly Pentanes (C5) with traces of Hexanes (C6/C6).	It contains traces of Hexane and more of larger hydro carbons, Light Naphtha (C6-C8). Heavy Naphtha (C8-C12)
Flash point is around 20.	Flash point is as low as -2
Transparent clear liquid of low boiling point.	Translucent, flammable, liquid of boiling point as 240°C (though within the range of low boiling point liquid)
Density is around 80 API	Around 10 API.
NGL is a set of ARN, SKO, HSD & ATF.	Naphtha is subset thereof being the fractionating product
Octane Rating - low octane content	High octane content

11. Applying the entire above chemical/ technical discussion about the impugned products to the facts and circumstances as well as the evidence of the present case we proceed to adjudicate the question as formulated above as follows. The entire case revolves upon the report of chemical examiner dated 30th August 2011 as reproduced below :

Test Report from SCN or O-I-O.

“The samples are in the form of clear colourless low boiling liquid. It is mainly composed of lighter mineral hydrocarbon oil, having following characteristic,

% C5	= 53.21
%C6	=33.50
% Evaporation at 60°C	= 66.0
Distillation Range	= 38°C to 121°C
Density at 15°C	= 0.6730

The sample is a low boiling liquid, extracted from Natural gas. It confirms to the requirement of “Natural Gasoline liquid” (NGL) as specified in CETA. It is other than Naphtha”.

12. The samples from two units were subsequently withdrawn and the test reports result thereof are as follows;

VADHODIA				GANDHAR		PATA	VIJAYPUR
N		30-8-2011	10-1-2012	30-8-2012	10-1-2012	23-3-2012	23-3-2012
1.	Density at 15°C	0.673		0.6863		0.6728	0.6798
2.	API gravity				74.6	78.81	76.65
3.	Flash Point (Below)		25°C		25°C	25°C	25°C

4.	Distillation range	38-121°C	38-121°C	41-121°C	36-121°C	39-125°C	39-128°C
5.	% of evaporated at 60°C	66	70	40	70	65	58
6.	C5	53.21	86.71	37.5	74.6	55.1	44.47
7.	C6	33.5		39.4		32.4	37.02
8.	RVPat 37.8°C (psi)		10.23		10.23	10.15	10.1
9.	Colour		Colourless		Colourless	colourless	Colourless
10.	End Point		121°C		121°C		

13. If all these reports looked in comparison to the above observations based on the chemical literature, it is observed as :

13.1 The presence of lower hydro carbon i.e. pentane was found more than Hexane. As per the glossary of terms in Bureau of Indian standards, NGL is such petroleum product having fairly higher proportions of pentane and even butane and propane than the presence of higher hydro carbons. Had it been Naphtha, the sample would have traces of pentane with more of higher hydro carbons. But as per the chemical examination report, the impugned sample was found to have only two kinds of hydro carbons i.e. Pentane (C5) and Hexane (C6). Though the Ld. Counsel had impressed upon the same to be called as light Naphtha having the hydro carbon as that of Pentane, Hexane, heptanes etc but number of hydro carbon being the key difference between the two products herein, more presence of lower hydro carbon with traces even of butane is sufficient to classify the product as NGL and not even light NAPHTHA.

13.2 The flash point for Naphtha is as low as -2 if it is below 25° it is more the characteristic of NGL. The flash point finding also corroborates the sample to the NGL. Apparently and admittedly the appellants were manufacturing their product from natural gas. As already discussed above that it is the natural gasoline liquid which is produced from natural gas by way of retrograde condensation whereas Naphtha is extracted by way of distillation that too from crude in normal course. No doubt, the Naphtha can also be obtained from the bottom of distillation chamber after extraction of NGL but the same does not sounds reasonable in the terms that when the product can be extracted directly from crude why the element of more steps shall be involved in extracting the main product indirectly, involving ore expedition had it been the main product as is thus, it becomes clear that since natural gas is used as raw material the main product extracted is NGL.

13.3 No doubt the boiling range for Naphtha (light as well as heavy) is from 30°C to 240°C and that of NGL is 30°C to 140°C i.e. the range is overlapping but the range classifies that for a product to be Naphtha only 10 per cent and more thereof has to be distilled below 175°C as per impressed upon definition of Hawley's Condensed Chemical Dictionary (relied upon the respondent assessee). Whereas in the present case more than 66% of product has evaporated at 60° temperature. Thus there remains no doubt that the sample belongs to the product having comparatively lesser boiling point range, which is NGL as apparent from above discussed chemistry. Thus irrespective, that both are NGL as well as Naphtha classified as low boiling liquid petroleum product extracted from natural gas but the fact remains is that the product herein is the one which is evaporating at its maximum at lower temperature and as observed from the above table concluded from the literature provided by the respondent, it is NGL which has lesser boiling point range than that of Naphtha. The argument of respondent that light Naphtha also has lower range of boiling point is also not acceptable because the sample herein has more number of Pentane (C5) with traces of Hexane (C6) & as discussed, for sample to be classified as light Naphtha, it first has to be Naphtha i.e. The compound having more Hexane (C6) and even higher hydrocarbons with traces of Pentanes (C5).

13.4 Chemical Examination report classified that sample has 53.21% of C5 and lesser percentage of C6 i.e. 33.20-%. Number of carbon being the key difference (as mentioned above) between NGL & Naphtha, we are of the opinion that Chemical examiner has not committed any mistake in his report dated 30th August 2011 while making the observation that the sample is the low boiling point liquid other than Naphtha. The respondent had never contested the said report at the appropriate stage in appropriate manner.

14. The case law as relied upon by the respondent to impress that it was the duty of Department to prove the classification of the product/article is not applicable to the present facts and circumstances as department herein has already discharged its burden of proving the product manufactured by respondent is NGL and not Naphtha. Thereafter it is for respondent to rebut if they feel aggrieved. But there is nothing brought on record to falsify the said report except the minor procedural discrepancy while obtaining the samples from the other units of respondent and while getting those samples tested. Also the respondent had opportunity to contest the said report below itself. But admittedly said option has not been exercised by the respondent. From the above discussion it becomes clear that chemistry involved in extraction & segregation of various hydrocarbons in a refinery or petroleum industry supports that the product extracted by respondent is Natural Gasoline liquid and not Naphtha.

15. For further appreciation from the view point of evidence on record herein we observe and opine as :

15.1 Various statements of the office bearers, employees and even the customers of the respondent assessee, are looked into. It is observed that the General Manager of Respondent Mr. M.B. Gohil has specifically defined the assessee's product as "low boiling liquid petroleum product extracted from natural gas". The said description is in due corroboration of the chemical examiner's report on which based is the Department's case. Mr. Gohil has gone to the extent of clarifying that the proportion of propane and butane are fairly high in their product in its instability condition which are removed to yield a stabilised natural gasoline. The same is acknowledged as a distinct product extracted from a specified raw material viz. natural gas. In his statement dated 31st August 2012, he also acknowledged the feasibility report of LPG recovery plant Pata as was submitted by the senior officer of respondent itself, that the said report specifically envisages the product therein to be NGL. He specifically stated that the plant was initially erected to manufacture NGL however some modifications were carried out subsequently to produce some other products such as Special Boiling Point Solvents (SBPS) and Naphtha. He then detailed the procedure adopted at their factory deposing that natural gas is used as the raw material by them from which first LPG (C3, C4) got separated in the LPG chamber. The condensate thereof is transferred to the NGL fractioning chamber from the top whereof is recovered NGL (C5, C6) and from the bottom whereof the another low boiling point liquid i.e. Naphtha is collected.

This witness when was specifically asked about the key differences between NGL and Naphtha, he expressed his inability. Similar inability was expressed by Shri L.R. Gupta, the General Manager, (Finance and accounts) of the respondent. He deposed about decentralisation of all locations of respondents as far as the finance is concerned. However payments of Central Excise duties are being made from respective units. He could not depose as to product of which unit is Naphtha. Not even in terms of the duty deposited by Gandhar Units whose sample has been acknowledged as NGL. Mr. M.B. Gohil and Shri C.N. Chatruvedi Executive Director (petrochemicals) of the respondent also deposed about distillation range of Naphtha that not less than 10 % of which distils below 175° C and not less than 95 % of which distils below 240° C. Accordingly, to them he rather deposed that he is not competent enough to offer any comments in the matter regarding the classification of the product and the differential duty liability in the matter. In his statement dated 3-3-2012.

"He deposed that, what leaves the LEF/C2-C3 column, in their plant after removal of lighter components, which further enters into Propane or LPG column for their extraction, may be termed as Natural Gasoline Liquid which as per above said definition is nothing but the wild form of Natural Liquid. In the succeeding column, the Propane and Butane are further removal from this liquid, by way of fractional distillation and what leaves the said columns appears the stabilized form of National gasoline and not Naphtha. The said liquid being qualified to be called as a "low boiling liquid", as understood in the Petroleum Chemistry of Petroleum Engineering has already been discussed in foregoing paras, which has also been corroborated by the Chemical Examiner Grade. 1, Vadodara".

Even the Adjudicating Authority has opined that Shri Gohil in his above said statements has himself described unstable and stable form of National Gasoline Liquid and has also explained that removal of lighter fraction makes the Natural Gasoline liquid a stable product. Thus, it appeared that what is manufactured by the Noticee under the name and narration of Naphtha is nothing but stabilized form of Natural Gasoline Liquid.

15.2 Mr. Anup Kumar Gupta Chief Manager (gas processing unit) has also deposed that from the bottom of the LPG column NGL is extracted and to reduce its volatility that the procedure of Pentane removal, was later incorporated. He also deposed that the goods produced at Pata unit of respondent : are Ethane/Propane mixture, LPG, Pentane and Naphtha. The hydrocarbons extracted from Natural gas. He also deposed that the procedure of extraction in due corroboration to Mr. M.B. Gohil. However with reference to NGL, he denied his knowledge even about the full name thereof. Now, if the statement of Mr. Arjan Kalara Jadav Chief Manager Operations is perused. It appears that respondents were extracting the NGL from the bottom of LPG column, he also deposed that before year 2011 respondent used to crack the said NGL further to form MFO but thereafter the said NGL used to be sent to a butanizer to obtain the required suitable product.

15.3 When all these testimonies it becomes clear that the product manufactured by respondent is the one as is collected from the bottom of LPG column the said product was earlier used to be cracked to be converted into MFOs but beyond the year 2011 the said product is simply butanized. It is also apparent from the statement of Mr. M.B. Gohil that the sample as was collected on 24-8-2011 with test report of chemical examiner dated 30th August 2011, was collected from the loading area. Above all these statements makes it ample clear that the de-butanized product of LPG column goes to the loading area. Thus it becomes clear that the product manufactured by the respondent has not come across the stage of distillation of NGL whereafter only the product collected could be Naphtha, as can readily be observed from the above discussed chemistry and even from the above said statements. From another statement of Mr. Kalara senior chemist of the respondent, it is clear that the sample is not denied. He specifically deposed that in their lab they were instructed only to test the density, IBP and FBP of the product manufactured they were never asked to report as to whether the said sample is Naphtha. Perusal of the statement of this witness makes it clear that he could not offer comments as to whether the density, IBP and FBP values as given in his report matches the characteristic of NGL or that of Naphtha.

16. Senior Manager, Production, Mr. Rajiv Kumar of M/s. Reliance Industries Petro Chemical, the major customer of the respondent/assessee was also examined. He specifically deposed that the material which they are getting from the respondents are the hydro carbons ranging from (C5 & C15). Though he specifically deposed that the product which is received from respondent is Naphtha but simultaneously he deposed that after receiving the same M/s. RIL need to de-butanize the product. As already discussed above the presence of Butane is a key characteristic of NGL. Hence it stands corroborated that the product purchased by M/s. RIL from the respondent-assessee was NGL. Otherwise also, this witness, was also specifically asked about any idea regarding the product as that of natural gasoline liquid but he out rightly denied his knowledge. He being Senior Manager Production is supposed to be chemically and technically sounds for the products cleared by his unit such a vague denial affects the respondent adversely. Shri Pritesh Patel Director of M/s. Maa Bijasani Petrochemical Pvt. Ltd. (a customer of respondent) has deposed that product purchased from M/s. Gail is produced from natural gas and is costlier. Irrespective he named this it becomes clear that since natural gas is used, the main product extracted is NGL and not Naphtha product as Naphtha but Natural Gasoline Liquid. He denied any knowledge about Natural Gasoline Liquid. We opine that denied adversely affects the respondent.

16.1 The statements of the people from other petro chemical industries as that of M/s. Bharat Petroleum Corporation (BPL) M/s. ONGC the major oil marketing companies as were recorded are also perused. They all acknowledged that the Naphtha they are manufacturing is extracted from refined crude oil in their crude distillation units. As already discussed above, that is the characteristic manufacturing process for Naphtha. Admittedly and apparently, the Naphtha by respondent assessee is not manufactured by crude oil but by natural gas that too not by the method of distillation but by method of condensation. Mr. M.B. Gohil more specifically defined the product of respondent based on Indian Glossary of Petroleum Products as low boiling liquid petroleum product extracted from natural gas. When these testimonies are read together these are observed to have ample. He has gone to the extent of stating that Propane and Butane are fairly high natural gas which are removed to yield stabilized natural gasoline thus natural gasoline is classified by him as the distinct product from a specific parameters finds natural gas.

16.2 Thus from the statements of various customers of the respondent-assessee it is coming as an apparent admission that the product purchased by them from the respondent that is M/s. GAIL is different from Naphtha which has been purchased from other Naphtha manufacturing

companies.

17. From the above discussions it becomes clear that chemically NGL and Naphtha are two different products having overlapping physical and chemical properties but the key differences as discussed above have been seen in relation with the statements on record have established it beyond doubt that the product manufactured by the respondent-assessee is natural gasoline liquid (NGL) which attracts duty at the rate of 14 per cent *ad valorem* + Rs. 15 per litre and not Naphtha.

18. Now having seen the controversy from the Central Excise point of view we hold that;

The Product of the respondent is admittedly the one falling under the chapter 27, the controversy is as to whether it falls under 2710 12 20 that is NGL or under 2710 12 90 i.e. Naphtha. Chapter 27 deals with mineral fuels, mineral oils and product of their distillation; bituminous substances, mineral waxes. Chapter note 2 keeps petroleum oils and oils obtained from bituminous substances under heading 2710. *Chapter supplementary note specifically defines Natural Gasoline Liquid (NGL) as a low boiling liquid petroleum product extracted from natural gas.* It is observed that in the old Tariff Naphtha and NGL were specifically mentioned to be classified under motor spirit and both had specific entries in tariff. But in the new Tariff NGL is treated separate from motor spirit and continues to have a specific entry i.e. 2710 12 20 but Naphtha finds no mention under the new Tariff. However both have been grouped under “light oils and preparations”. If at this stage the report of chemical examiner about the sample in question is observed, it specifically mentions the product as a low boiling liquid petroleum product extracted from natural gas. The new tariff defines such a product specifically as NGL. Once this is so, there is no reason to still hold the product as Naphtha. To our opinion the findings of the Adjudicating Authority below that the chemical examiner have not given any reason as to why the sample tested is to be treated as Naphtha. The findings are rather opined to be based on pre-supposition that the product in question is Naphtha.

18.1 Central Excise Tariff in its various Notifications distinguishes NGL & Naphtha. Since NGL is defined in Chapter notes, NGL reflected in the Notification is a derivative of Natural Gas and Naphtha being shown separately other than NGL, it is a product of Petroleum oil. Also in the exemption Notification Naphtha has been categorically placed under CETA 2710 of the schedule to CETA, thus it becomes clear that Naphtha can be classified under the broad category of other light oils and preparations i.e. under 2710 11 90 also.

19. Thus irrespective of that Naphtha is a low boiling liquid petrol product but as is discussed above, it is not directly extractable from natural gas this may be the reason for no specific entry called Naphtha under Chapter 27. The classification of the product in the Central Excise Tariff has to be done as per the rules of Interpretation, Chapter notes and Section notes contained in the Tariff. The definition under the trade parlances and Commercial understanding or definition under any other literature including scientific literature can only be referred if specific definition is not given in the chapter or the section notes. Hon’ble Supreme Court in the case of *Cannought Plaza Restaurant Pvt. Ltd.*, 2012 (286) E.L.T. 321 (S.C.) has held that the classification of an excisable goods shall be determined according to the terms of headings as per Rules of Interpretation in the First Schedule, to the Tariff Act. Rule 2 thereof says that it is only when the headings of the chapter or section notes are not clearly determinative of the classification that Rules 3, 4 or 5 of the said general rules of Interpretation will come into the effect. The entries are to be construed according to common parlance understanding the goods only in a situation where there is no statutory definition of the product. Hon’ble Apex Court further clarified that ordinary rule of construction is that a provision to statute must be construed in accordance with the language used therein unless there are compelling reasons such that the literal construction would reduce the provision to absurdity or would prevent manifest intension of the legislature from being carried out. Naphtha described here is in generic term. Since two separate origin of the product Naphtha has been described, the product can be named as “Petroleum Naphtha” if derived from oil/petroleum and “gas Naphtha” if derived from Natural gas, such a terminology is not uncommon in the Petroleum industry Gas Naphtha here also contain low boiling point hydrocarbons and is liquid as well. But the fact remains is that present Tariff has nothing called Naphtha. *Per Contra*, NGL has specifically been classified & defined too.

20. The Hon’ble Apex Court in a recent decision *Commissioner of Customs Mumbai v. M/s. Dilip Kumar & company and Others*, 2018 TIOL 302 (S.C.) = 2018 (361) E.L.T. 577 (S.C.) while overruling the decision on *Sun Export Case*, 2002 TIOL 118 (S.C.) = 1997 (93) E.L.T. 641 (S.C.)

has held that when words in statute are clear and unambiguous and only one meaning can be inferred the courts are bound to give effect to the said meaning irrespective of the consequences.

It was further held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is consistent with the alleged policy of the act. Hon'ble Apex Court has also clarified that the exemption notification also has to be strictly construed so that if the person claiming exemption does not fall strictly within the letter and spirit of the notification, he cannot claim exemption. The respondent in the present case is also availing the benefit of exemption Notification about Naphtha but word Naphtha has not found any place under new Tariff Entry. Any benefit cannot be claimed of non-existing entry irrespective of that the product exist and is classifiable under any other Tariff head. At this stage it may be seen that chapter Heading 2710 in old 6 digit Tariff, which existed in 2005 there was a specific sub-heading 2710 14 for Naphtha and 2710 15 for NGL, both were the products grouped under broad heading of motors spirit however in the present 8 digit Tariff entry Naphtha has been removed and natural gasoline liquid is grouped under a variety of light oils and preparations (2710 12) and continues to exist being classified under Tariff item 2710 12 20. Supplementary note (b) of Chapter 27 of CETA defines NGL as a low boiling liquid petroleum product extracted from natural gas. NGL has been separated from the group of Motors sprits. Earlier NGL, SBPS and Naphtha all were under the Tariff Group of Motors spirits, (as discussed above). This we take as a ground to hold that legislature intended to segregate NGL, it being a different product than Naphtha irrespective of both being low boiling point liquids.

21. The Authority relied upon by the respondent are not opined applicable to the present case. As in that case the product was the one as that of remnant/return stream. The Hon'ble Apex Court in that case has specifically held that in the absence of the definition of Naphtha in Central Excise Tariff, its understanding in technical books along with the report of Chief Chemist should be accepted for its classification. But, in the present case the product is the one as was admittedly collected from the bottom of LPG column and was de-bottanized later and from the technical understanding as well as from the Report of chief chemist, it is NGL, i.e. the low boiling liquid other than Naphtha. It was also held by Hon'ble Supreme Court that as per the Rules of Interpretation an Item if it is not specifically covered by way of the precedent entries, it would fall under a residuary entry. This finding rather support the product in the present case as the one falling under the specific entry that is 2710 12 20 i.e. NGL sufficiently established that the product of respondent is not Naphtha as has been reported by the chief chemical examiner in his report dated 30-8-2011 (as discussed above). In addition, Naphtha is defined to be a compound having carbon atoms ranging from C4 to C12. As discussed above, the evidence on record is that the product of respondent has more of C5 with traces of C6 and other higher hydro carbons as nil. Seen from this angle the product in hand is NGL having a specific definition in the Tariff. The question of construing it as Naphtha from the view point of the ordinary or popular sense has no relevance.

21.1 No doubt the onus is upon the department for establishing that goods are classifiable under a particular tariff entry, we are of the opinion that the chemical examiner report dated 30th August 2011 is the sufficient evidence with department to discharge the said burden. Due test memo was prepared while collecting the sample of the said report on 24th August 2011. The Chemical Examiner was cross-examined by the respondent. Except the minor contradictions nothing could be extracted to prove the product as Naphtha. The respondent has nowhere confronted the chemical examiner with the specifications of Naphtha and that the specifications of the sample match with that of Naphtha. Further, the contradictory stand of respondent is very much apparent from his reliance upon the case *Gail v. Commissioner*, 2004 (170) E.L.T. 75 (Tri - Del.) where the respondent has impressed upon the NGL to have fallen under Chapter Heading 2719. Also respondent in alternative, has prayed for rejecting this appeal on this grounds submitting that no extra duty is leviable under Heading No. 2719. This submission rather amounts as apparent acknowledgment on the part of the respondent for its product to be NGL and not Naphtha. It is also observed from this case law that it was acknowledged on the part of the M/s. Gail "it is universally known that in the process of extraction of LPG from natural gas NGL would be imparted. As already discussed above the product of respondent is the one which is extracted from LPG column it has to be NGL and not Naphtha. The said case however is not applicable to the present case for the reason that the product involved therein was the condensate whereas the product in hand is the one collected from the bottom of LPG column. Similar acknowledgment of appellant is apparent in another of its case *Commissioner v. Gail*, 2015 (319) E.L.T. 5 Supreme Court where M/s. Gail took the stand that natural gas after

extraction of LPG remains natural gas, and therefore, lean gas is also to be classifiable under sub-heading 2711 21 the product in hand is not natural gas but natural gasoline liquid specifically defined under Chapter Heading No. 2710.

22. Further as per the information available in Wikipedia, respondent i.e. M/s. Gail is the largest natural gas processing and distribution agency in India initially it was given the responsibility of constructing, operating and maintaining Hazira/Vijaypur/Jagdishpur /HVJ pipeline product it is one of the largest natural gas pipeline product in the world. Its business is to secure gas for being transported to various parts of the country though M/s. GAIL has diversified into petro chemicals and liquid hydro carbons but the key product of M/s. Gail is still natural gasoline liquid (NGL) (78.15), LPG 10 %, propane 3.5%, Naphtha 0.5% and other products 0.45 %. The sample collected is admittedly of the major product of the respondent seen from this information as well there is no reason to hold the product of respondent as Naphtha. Adjudicating Authority is therefore opined to have committed an error.

23. In the light of the entire above discussion, we conclude as follows;

a) The Adjudicating Authority below has rightly concluded that Naphtha and the NGL are two different products however under the category of light oils and preparations. Naphtha is a petroleum product of which not less than 10 % distils below 175°C and 95 % of which distils below 240°C when subjected to standard method test and both contains pentanes and heavier hydro carbons. But the Adjudicating Authority failed to observe that the product in hand has only two kinds of hydro carbons i.e. pentanes and hexanes that too with more of pentanes (53.21%). No doubt both these products are overlapping but still the key difference (as discussed above) is that for a product to be Naphtha it should have traces of pentanes and more of higher hydro carbons groups even to the extent of C12. Apparently and admittedly latter is not the case the product hence has wrongly been concluded as Naphtha. The distillation range of the product is less than 175°C. As per the conclusion of original Adjudicating Authority and the chemical definitions about Naphtha it is the product of which not more than 10 % distils below 175°C, when the entire amount of the sample got distils below 121°C and this the literary evidence that NGL has much lower distillation range than Naphtha, the Adjudicating Authority has committed the blatant error while still holding the product as Naphtha. The conclusion arrived at by the Adjudicating Authority below are the correct characteristic for a product to be Naphtha. But the authority has failed to apply those conclusions to the evidence on record and the available literature (chemistry). The decision under challenge is held to be non-speaking decision reflecting a presupposed mind of the authority in ignorance of the entire material on record.

24. Finally coming to the plea of show cause notices being barred by time; From the entire above discussion, it is clear that the product of the respondent has wrongly been classified by the respondent as Naphtha. It is also apparent fact that the Naphtha has much lesser Excise Duty as less as Rs. 15 per litre. In view thereof misdeclaration cannot be ruled out to be a strategy for tax evasion. We also opine that the act to the extent of even claiming exemption on the misdeclared product is a positive act of misrepresentation of the facts with sole intention to evade duty. Resultantly the Department, in view of the proviso to Section 73 of Central Excise Act, is held to be very much entitled to invoke the extended period of limitation. Not only this, the penalties are also held to have been rightly proposed in the show cause notices but wrongly done away by the Adjudicating Authority below. The case law as relied upon by the respondent to impress that it being PSU no *mala fide* can be attributed is not applicable to M/s. GAIL where Government of India is not the only stake holder. We draw our support rather, from *Bharat Petroleum Corporation Limited v. Commissioner* - 2015 (326) E.L.T. A33 (S.C.) where it was held that mandatory penalties can be imposed on PSU there are precedent of involving penalty on PSUs. Hon'ble High Court Madras in another case *CCE, Chennai v. Peter & Miller Packers* - 2015 (319) E.L.T. 631 (Mad.), has also held that ignorance of law is not an excuse even to PSU, if there is element of apparent on its part. In the present case the misdeclaration on part of respondent has already been established. Major duty difference on the misdeclared product is also held to be the strategy of tax evasion. Merely that assessee is PSU is not sufficient to set aside the SCN as being barred by time. To this aspect also Adjudicating Authority below is held to be incorrect.

25. It is held that the Adjudicating Authority below has committed a blatant error while dropping such a heavy demand that too vide nonspeaking order having just the recitals of the facts and the statements with not cogent reasoning of arriving to the conclusion that the product is Naphtha. The entire chemical literature and even the evidence in the form of statements (as discussed above) has miserably been ignored by the Adjudicating Authority below. He has failed

to connect the same with the conclusions drawn in Order-in-Original. The conclusions of Commissioner detailed above, in view of the entire above technical and factual discussions are held to be mere conclusion about characteristic features of the product of the respondent without any finding as to whether these concluded characteristics are of NGL or Naphtha. The findings of ours, based on chemical literature available and the evidence on record, classify the product of respondent as Natural Gasoline Liquid (NGL). Hence it is held that Commissioner rather has proceeded with the pre-supposed mind of holding the product of respondent being Naphtha. The findings accordingly are held as apparently wrong hence are hereby set aside. Resultantly the impugned order is set aside and the appeal of the Department is hereby allowed.

(Pronounced in open Court on 30-11-2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD**

Appeal No.E/1003/2010-DB

Arising out of Order-in-Original-COMMR-A-/13/VDR-I/2010, Dated: 21.10.2010

Passed by the Commissioner (Appeals) Vadodara-i

Date of Hearing: 18.7.2018

Date of Decision: 27.7.2018

M/s KAIRA CAN COMPANY LTD

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
VADODARA-I**

Appellant Rep by: None

Respondent Rep by: Mr T K Sikdar, AR

CORAM: Ramesh Nair, Member (J)

Raju, Member (T)

FINAL ORDER NO. A/11550/2018

Per: Ramesh Nair:

The issue involved in the present case is that whether the value of packing material supplied by the customer should be included in the assessable value of the goods manufactured by the appellant i.e. Metal Container during the period involved in the present case i.e. Feb 2007 to September 2007.

2. None appeared on behalf of the appellant despite notice. The Bench has recorded at last hearing i.e. on 09.06.2018 that today's hearing is the last chance given to the appellant. However, none appeared, therefore, the appeal is taken up for disposal on the basis of records available and considering the grounds.

3. Sh. T K Sikdar Ld. Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order, wherein it was held that in terms of new section 4 effective from 01.07.2000 and Valuation Rules, 2000 made thereunder, particularly in terms of Rule 6, the packing material supplied free of cost by the customer is includable in the assessable value.

4. We have carefully considered the submission made by Ld. AR and perused the records. From the ground of appeal, we observe that the appellant's main submission is that Valuation Rule cannot override the act that in terms of section 4 only transaction value which is paid or payable against the sale of the goods shall be the assessable value. It also submitted that the board's circular which is contrary to section 4 cannot prevail. We reproduce the section 4 which is effective from 01.07.2000 and relevant in the present case as under:

"Section 4

1/4. Valuation of excisable goods for purposes of charging of duty of excise.—

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall—

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed. 2[Explanation.—For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]"

From the above section 4 it can be seen that if the price is a sole consideration for the sale of the goods, the transaction value for such sale of the goods shall be assessable value in terms of Clause (a) of sub section (1) of the section 4. However, in any other case the value shall be determined in such manner as may be prescribed. In the present case the customer supplied free of cost packing material to the appellant. For this purpose the relevant Rule 6 of Central Excise Valuation (Determination of price on excisable goods) Rules, 2000 reads below:

"Rule 6. - Where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

Explanation 1. - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely :-

(i) value of materials, components, parts and similar items relatable to such goods;

(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

Explanation 2. - Where an assessee receives any advance payment from the buyer against delivery of any excisable goods, no notional interest on such advance shall be added to the value unless the Central Excise Officer has evidence to the effect that the advance received has influenced the fixation of the price of the goods by way of charging a lesser price from or by offering a special discount to the buyer who has made the advance deposit.

Illustration 1. - X, an assessee, sells his goods to Y against full advance payment at Rs. 100 per piece. However, X also sells such goods to Z without any advance payment at the same price of Rs. 100 per piece. No notional interest on the advance received by X is includible in the transaction value.

Illustration 2. - A, an assessee, manufactures and supplies certain goods as per design and specification furnished by B at a price of Rs. 10 lakhs. A takes 50% of the price as advance against these goods and there is no sale of such goods to any other buyer. There is no evidence available with the Central Excise Officer that the notional interest on such advance has resulted in lowering of the prices. Thus, no notional interest on the advance received shall be added to the transaction value."

From the plain reading of Rule it can be seen that the value of packing material consumed in the production of goods shall be included in the transaction value. The appellant also made submission that the packing material which supplied by customer free of cost was used after the manufacture of final product i.e. Metal Container and not consumed in the manufacture. In this

regard we are of the view that packaging of goods is carried out only after the final product is manufactured. The packaging material cannot be consumed and loses its identity in the manufacture of final product, therefore, the term used consumed in the production means only for packing of final product. Therefore, the interpretation made by appellant is absolutely incorrect. As regard the contention of the appellant that Rule 6 cannot overriding the effect on the section 4. In this regard, we find that authority of Rule 6 is flowing from section 4(1)(b) only, therefore, it cannot be said that Rule 6 has overriding effect on the section. Therefore, we are of the clear view that in terms of section 4 read with Rule 6 of valuation Rules, 2000, the packing material supplied free of cost by the customer is includable in the transaction value (Assessable Value) and the same will be chargeable to excise duty. Therefore, the Ld. Commissioner (Appeals) after analyzing all the statutory provision and distinguishing the judgments which were related to the departed provision of section 4 and Valuation Rules, 1975 given a clear finding that cost of packing material shall be included in the assessable value. We do not find any infirmity in the findings of the Ld. Commissioner (Appeals), accordingly, the impugned order is upheld and the appeal is dismissed.

(Pronounced in the open court on 27.7.2018)

IN THE CESTAT, WEST ZONAL BENCH, AHMEDABAD
Shri Ramesh Nair, Member (J)

RATNAMAI METALS & TUBES LTD.

Versus

COMMR. OF C. EX. & S.T., AHMEDABAD-III

Final Order No. A/11311/2018-WZB/AHD, dated 26-6-2018 in Appeal No. E/10170/2015-SM

REPRESENTED BY :Shri Rahul Gajera, Advocate, for the Appellant.

Shri J. Nagori, AR, for the Respondent.

[Order]. - This issue involved in the present case is that whether the appellant is entitled for interest on refund of amount of duty paid during the investigation of the case from the date of deposit or after 3 month from the date of filling appeal in the event when the demand was dropped by the Tribunal order.

2. Shri Rahul Gajera, Ld. Counsel appearing on behalf of the appellant submits that the appellant have paid an amount during the investigation of the case. The said amount was not towards the duty but it was deposit. Refund is not governed under Section 11B. Accordingly, the appellant is entitled for the interest on the refund of such pre deposit right from date of deposit and not from the date after 3 month of filling the refund application. He relied up on the decision of this Tribunal, in the case of *Futura Ceramics Pvt. Ltd. v. CCE & ST, Vadodara-I* passed by CESTAT Ahmedabad Vide Order No. A/13764/2017, dated 21-11-2017.

3. Shri. J. Nagori, Ld. Additional Commissioner (AR), appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that the amount paid by the appellant is towards the duty due to the investigation for demand of duty initiated. Therefore, the payment made during the investigation by the appellant is the amount of duty only. Hence, the refund of the same is applicable under Section 11B of Central Excise Act, 1944. Hence, the interest provided under Section 11BB is only from the date after 3 months of filling of refund claim, therefore, the interest in the present case is not payable by the revenue to the appellant. In support of his submission, he placed reliance on the following judgments :

- *Ajay Metachem Sud Lchemie Pvt. Ltd. v. Commr. or C. EX., Ranchi* - 2014 (303) E.L.T. 280 (Tri.-Kolkata)
- *Gyal M.G. Gases Pvt. Ltd. v. Commissioner of Central Excise, Indore* - 2015 (319) E.L.T. 174 (Tri.-Del.)
- *Kamakshi Tradexim (India) Pvt. Ltd. v. Union of India*, 2017 (351) E.L.T. 102 (Guj.)
- *Ruchi Soya Industries Ltd. v. Union of India* - 2016 (336) E.L.T. 423 (Guj.)
- *Lorenzo Bestonso v. Commissioner of Customs, JNCH* - 2017 (347) E.L.T. 104 (Tri.-Mumbai)

4. I have carefully considered the submissions made by both the sides and perused the Records.

5. I find that the limited issue to be decided by all this case is that in case, of deposit made during the investigation of the demand case whether interest on refund of such amount shall be payable from the date of deposit of such amount or from the date after 3 months of filling the refund application. As regard, the deposit made during the investigation it is obvious that there is no provision in Central Excise or to make a deposit. Whatever payment made it is towards the probable Excise duty liability for which the investigation is undergoing, therefore, it cannot be said that any deposit made during the investigation so made by the assessee is not a duty but only a deposit. Once the adjudication authority confirms the demand the said amount stands confirmed as duty only, the same being the duty stands appropriate against the demand

confirmed in the adjudication order. For this reason also the amount even though that paid during the investigation, shall be considered as payment of duty. When this be so the refund of such duty amount is clearly governed by the Section 11B of Central Excise Act, 1944. In case of refund under Section 11B provision, of interest is available under Section 11BB. In terms of such section, of interest is payable only from the date after completion of 3 months from the date of filling the refund application. Therefore, the interest in any case is not payable from the date of deposit of the amount during the investigation. On the issue of interest on refund of duty the Hon'ble Supreme Court in the case of *Ranbaxy Laboratories Ltd. v. Union of India*, 2011 (273) E.L.T. 3 (S.C.) wherein, the Court has held that the interest on refund under Section 11B is payable only from the date of expiry of three months from the date of receipt of application for refund. Therefore, now there is no ambiguity or doubt that from which the date interest is payable in case of refund of duty. As Regard the decision relied upon by the Ld. Counsel in the case of *Futura Ceramics Pvt. Ltd.* (supra). I find that this decision has not considered the various judgment relied upon by the Ld. AR particularly the case of *Ranbaxy Laboratories Ltd.*, *Kamakshi Tradexim (India) Pvt. Ltd.*, therefore, the decision of this Tribunal dated 21-11-2017 is distinguished. As per my above discussion, the impugned order is upheld. The appeal is dismissed.

(Dictated and pronounced in the open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 50493 of 2017 [SM]

Arising out of Order-in-Appeal No. 01/Refund/2015, Dated: 24.11.2016
Passed by the Commissioner, CE ST, Jaipur

Date of Hearing: 26.09.2019

Date of Decision: 08.01.2020

**SHRI BADRI NARAYAN SHARMA
1186, 2ND FLOOR, KUCHA MAHAJANI, CHANDANI CHOWK
NEW DELHI - 110006**

Vs

**COMMISSIONER OF CUSTOMS
CENTRAL EXCISE AND SERVICE TAX
JAIPUR, NCR BUILDING STATUE CIRCLE, C-SCHEME
JAIPUR - 3022005**

Appellant Rep by: Mr Jatin Mahajan, Adv.

Respondent Rep by: Mr K Poddar, AR

CORAM: Rachna Gupta, Member (J)

FINAL ORDER NO. 50008/2020

Per: Rachna Gupta:

The order of Commissioner (Appeals) bearing No. 1068/2016 dated 22.12.2016 is assailed vide the present appeal. The facts relevant for the purpose in brief are as follows:

2. In furtherance of a specific information about a person with smuggled gold that on 02.06.1999 a person namely, Shayam Lal Pal, Son of Rampal was stopped outside the Railway station, Bikaner. From the pocket of his trousers 3 pieces of gold weighing 5 grams each alongwith a slip dated 01.06.1999 and a railway ticket No. 148344 from Delhi to Bikaner was recovered. Also from his cloth-belt were recovered 10 biscuits of 10 grams each. Said Shyam Lal Pal could not produce any valid document/bill showing the lawful possession of the gold as recovered.

3. The department considered the recovered gold as smuggled one. Accordingly, seized it under Section 110 of Customs Act and served a notice of confiscation thereof under Section 111 of Customs Act, 1962. In the statement of Shyam Lal Pal as was recorded on 02.06.1999 itself, he stated that the said gold was given to him by his owner, Mr. Gopal Sita, owner of Shop No. 668, Kucha Mahajani, Chandni Chowk on 01.06.1999 with the directions to deliver the same to Shri Shyam Sunder Soni of Thakuro Ka Mohalla, Bikaner. However, said Shri Gopal Sita on being interrogated denied any affiliation with Shyam Lal Pal. Shyam Sunder Soni statement could be recorded only on 22.06.1999 that to in furtherance of directions of Additional Session Judge, Jodhpur who stated Shyam Lal to be the servant of Shri Badri Narayan Sharma of M/s Dhancholia Sons. He also stated that he placed an order for gold with said Shri Badri Narayan Sharma. Statement of Shri Badri Narayan Sharma was also got recorded on 04.08.1999 who stated about giving the 10 gold bars with Bill No. 3 dated 01.06.1999 to Shri Shyam Lal Pal to deliver the same to Shyam Sunder Soni at Bikaner. Thus based upon said investigation the show cause notice proposing confiscation of seized goods and for imposition of penalty was served upon all the above named persons.

4. The said show cause notice was adjudicated vide Order-in-Original No. 03/2000 dated 23.03.2000 as was passed by Additional Commissioner (Customs), Jodhpur Rajasthan ordering confiscation of 10 gold biscuits weighing 100 grams and 3 pieces of gold weighing 5 grams. Simultaneously, proposing penalty on all the noticees. The said order was assailed before Commissioner (Appeals), Jaipur who vide Order-in-Appeal No. 566-569 dated 31.08.2004 has upheld the order of confiscation, however, had reduced the penalty by 50%. Still an appeal was preferred by Shri Badri Narayan Sharma before this Tribunal which was allowed vide *Order No. A/523378/2015 SM dated 04.08.2015* with

the directions to the adjudicating authority to release the impugned goods to the Appellant therein i.e. Shri Badri Narayan Sharma.

5. Consequent to the said order that an application dated 18.09.2015 was filed by the Appellant seeking release of the seized goods. The said application was adjudicated by the Order bearing No.01/Refund/2015. dated 14.12.2015. It was observed that Dy. Commissioner, by the said order, had sanctioned an amount of Rs. 4,84,545/- the value of sales proceeds of 10 gold biscuits and 3 pieces of gold in favour of the Appellant. The Appellant being aggrieved filed an appeal challenging the order on the ground that the original adjudicating authority has committed the contempt for not obeying the order of CESTAT dated 04.08.2015 vide which the seized gold was ordered to be released. The sale proceeds of the seized gold as on 26.03.2001 were alleged to be illegal and improper and contrary to the aforesaid verdict. However, the appeal thereof was also rejected. Consequent thereto the Appellant is before this Tribunal.

6. We have heard Shri Jatin Mahajan, learned Advocate for the Appellant and Mr. K. Poddar, learned AR for the Department, it is submitted that department had not followed any procedure for the disposal of the gold and the said fact has been admitted by the department vide their letter dated 16.03.2018. It is further emphasized that as per the procedure laid down in Customs Preventive Manual, department is duty bound to issue notice to the owner or to the person from whom such goods were recovered. In the present case admittedly, no such notice was issued. The disposal of the gold, therefore, is bad in law. Appellant, therefore, is entitled either for the return of the gold seized. Finally, submitting that irrespective there was the dispute regarding the ownership of the goods, the procedure laid down for disposal of the goods as per Department's manual was strictly to be followed. The failure thereof entitles the Appellant to have the present market value of the gold disposed of. Order under challenge is, accordingly, prayed to be set aside, appeal is prayed to be allowed.

7. Per contra learned DR has submitted that the initial show cause notice was adjudicated vide Order dated 23.03.2000 the confiscation of the seized gold was confirmed vide Order-in-Appeal No. 566-569/2004 dated 31.08.2004. It is further submitted that there was ambiguities about the ownership of the gold. Initially, vide Order dated 13.05.2005 Shri Narayan Sharma was held to be the owner of the gold seized. Subsequently, a miscellaneous application was filed by Shri Badri Narayan Sharma who filed an appeal before this Tribunal in the year 2005 against the order of Commissioner Appeals dated 31.08.2004. The Tribunal observed that the appeal of Badri Narayan Sharma has already been disposed of vide Order dated 13.05.2005. This created a doubt in the mind of the Bench about as to who is real Badri Narayan Sharma. Matter was, accordingly, referred to identify the real Badri Narayan Sharma. It is thereafter that the order dated 04.08.2015 was passed. Since the goods were seized as early as on 02.06.1999 and were confiscated vide Order in original dated 23.03.2000 that the department undertook the process of disposal of seized/confiscated goods. It is due to this reason that the order dated 04.08.2015 of this Tribunal directing the release of impugned goods to the Appellant could not be complied with. However, in furtherance thereof the amount of sale proceeds as was received at the time of disposal of confiscated goods was released to the Appellant vide Cheque No. 109003 dated 11.12.2015 for an amount of Rs. 4,84,585/- which has already been encashed by the Appellant on 11.01.2016. Impressing upon that the disposal of seized gold was absolutely in furtherance of the procedure as prescribed under the statute and the department manual and that there is no infirmity in the order upholding the sanction of sale proceeds while complying the order of this Tribunal dated 04.08.2015, the appeal is, accordingly, prayed to be dismissed.

8. After hearing the rival contentions and perusing the entire record, I am of the opinion that the moot question to be adjudicated herein is as to

Whether in view of the given facts and circumstances and the order of this Tribunal dated 04.08.2015, the appellant is entitled to receive the market value of the gold as prevalent for the year 2015 despite that the said gold was disposed of in the year 2001 for value of Rs. 4,84,585/-.

To adjudicate the same the notification No. 31/1986- Customs dated 05.02.1986 as has been brought to the notice by the department is hereby perused. This notification specifies the goods which have to be dealt with in accordance of Section 110(1A) of Customs Act, 1962. The same reads as follows:

(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of

storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in which manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

From this notification it is apparent that gold in all forms, including bullions, ingot, coin, ornament, crude jewellery is one of the specified goods therein.

9. Further it is observed that the gold was seized on 02.06.1999, the order of confiscation was announced on 23.03.2000. The aforesaid provision permits the disposal of seized goods. In the present case pursuant to the said seizure the original adjudicating authority had confirmed the confiscation where after only the department proceeded for disposal of goods, it being one of the specified goods, in terms of the notification as passed under Section 110(1A) of the Customs Act.

10. I further observe that Section 1B of 110 of Customs Act provides a procedure to be undertaken by the proper officers for disposal of the goods. It is apparent from record that the said procedure was also duly followed by the department as the inventory of the seized goods was got prepared on 02.06.1999 on the date of seizure itself. The same was also got verified by the Additional Civil Judge (Jr. Division)-Cum-Judicial-Magistrate, Bikaner that too twice i.e. on 03.06.1999 and also on 16.05.2000. Thereafter the impugned goods were deposited in the Malkhana of New Customs House, IGI Airport, New Delhi on 13.07.2000 from where the gold was handed over to State Bank of India (SBI) on 20.03.2001 for disposal which was ultimately sold by SBI on 26.03.2001 for an amount of Rs. 4,84,545/-. This particular perusal is clear enough to show that the disposal of goods was very much in compliance of the statutory procedure. Otherwise also there is always a presumption of correctness in the act of discharge of duty by a competent officer as was held by Tribunal, Chennai in the case of *Ajanta Music Palace Vs. Collector of Customs reported as 1993 (68) ELT 414*. There is no evidence produced by the Appellant to rebutt the said presumption.

11. It is further perused that the order of confiscation of year 2000 was confirmed by Commissioner Appeals vide the order dated 31.08.2004, it is mentioned by the department that at the time of the said adjudication before Commissioner Appeals, the factum of disposal was brought to the notice of the Appellant. Though the said order is not on record. However, it is simultaneously not the case of the Appellant that the disposal of gold during pendency of appeal before Commissioner (Appeals) was ever objected by the Appellant. The said order of 31.08.2004 was assailed by Appellant before this Tribunal vide his appeal No. C/254/2005. There also the present Appellant except highlighting the controversy of his mistaken identity had failed to challenge the disposal of the seized gold.

12. It is coming apparent from the order of 24.07.2015 of this Tribunal that the order of appeal dated 31.08.2004 passed by Commissioner (Appeals) confirming the confiscation was earlier appealed by Shri Badri Narayan Sharma on 31.08.2004 was already assailed by Shri Badri Narayan Sharma and the said appeal was disposed of vide order dated 13.05.2005. Appellant had put no effort to place on record the copy of the previous appeal to prove that the disposal of the seized gold either was never brought to his notice or ever was challenged by him. There is no denial of Shyam Lal Pal admittedly the servant of the present Appellant to have received the notice at the time of the disposal of the seized goods. Resultantly, I am of the opinion that the disposal of the seized goods was absolutely in accordance of the statutory provisions. The order of return of seized gold has been announced 14 years later than the said disposal. What can be returned while complying with the directions of return of seized gold is the sale proceeds of the said gold received at the time of disposal thereof. Also it is apparent that present appellant was held owner of the seized & confiscated gold vide order of this Tribunal dated 13.05.2005. Time taken till the order of Tribunal dated 24.07.2015 directing the return of the impugned gold is on account of mistaken identity of Shri Badri Narayan the appellant himself. The order of confiscation was otherwise served on Shyam Lal Pal as well as Shri Badri Narayan who was held owner of the impugned gold vide order of the year 2005. The said Badri Narayan impersonated the actual Badri Narayan whose appeal was decided in his favour in the year 2015 does not reflect any mistake or even delay on part of Department. It is already held that they followed due procedure for disposal of said gold in the year 2001.

13. The Hon'ble High Court of Bombay in the case of *Shabbir Ahmed Abdul Rehman Vs. Union of India reported as 2009 (35) ELT 402* has held that when the confiscated gold was handed over for disposal immediately after serving the order of confiscation thereof. The

sale of the said gold during the pendency of appeal before Commissioner Appeals is though not justified. However, the claim of the petitioner in seeking the market value of gold cannot be accepted. The Customs Authority is liable to return the entire sale proceeds, however, without deducting there from the duty. In the present case the gold was sold after the confirmation of confiscation and prior the appeal challenging the same was filed. The said order of Bombay High court has been affirmed by Hon'ble Supreme court vide the decision reported as 2010(253)ELT A142 Tribunal Ahmedabad also in the case of *Om Merchant Exports Pvt. Ltd. Vs. CCE, Lucknow* 2017(358) ELT 643 has held that the appellant therein to be entitled for immediate release of their confiscated goods. It was, simultaneously, held that in case the goods have been auction sold in meantime, the Appellant shall be entitled to sale proceeds of the same in accordance with law. The plea of Appellant of no notice being served before disposal is otherwise not acceptable in view of the admitted mistaken identity of the owner of the gold. Admittedly and apparently, two different persons representing them as Badri Narayan Sharma filed the appeal challenging the order of confiscation of the goods, as discussed above.

14. In the given circumstances and in the light of the fact that gold is a commodity the value where of has been increased enormously since the date of impugned disposal in the year 2001 till the date of the order of return in the year 2015 and that there is no apparent fault on part of the department while disposing the same. The department rather has duly complied with the order of return of confiscated goods of the year 2015 by refunding the sale proceeds of the gold as was received in the year 2001. The said amount has duly been encashed by the Appellant that to more than a year prior filing of the impugned appeal.

15. As a result the question framed herein above is answered with the finding that in the given facts & circumstance, the order of this Tribunal dated 04.08.2015 stands duly complied with when department returned the sale proceeds of impugned gold as were received in the year 2001 when this gold was auction sold. Thus the appellant is not held entitled for the gold as such nor for its market value as prevalent in the year 2015. Seen from any angle, there is opined no infirmity in the order under challenge. The appeal in hand has no legal ground to succeed. Appeal is, accordingly, dismissed.

(Pronounced in the Open Court on 08.01.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 53217 of 2015 [SM]

Arising out of Order-in-Original No. 08-2015-AD-COMMR-EXP-ICD-TKD, Dated:
04.06.2015

Passed by the Commissioner of Customs (Export), ICD, TKD, New Delhi

Date of Hearing: 27.09.2019

Date of Decision: 27.09.2019

**M/s KOTHARI FOODS AND FRAGRANCE PVT LTD
201, CITY CENTER 63/2, THE MALL KANPUR**

Vs

**COMMISSIONER OF CUSTOMS (EXPORT)
ICD TUGHALAKABAD NEW DELHI**

Appellant Rep by: None

Respondent Rep by: Shri K Poddar, AR

CORAM: Rachna Gupta, Member (J)

FINAL ORDER NO. 51295/2019

Per: Rachna Gupta:

None is present for the Appellant. Learned D.R has brought to the notice that this appeal has been remanded back by the Hon'ble High court of Delhi vide the final order dated 26.11.2018. It is impressed upon the Revenue had approached the High court being aggrieved of final order of this Tribunal bearing no. A/56364-56365/2017 dated 01.09.2017. On merits, the appeal of Revenue has been allowed the matter has been remanded only for the limited purpose of adjudicating certain other issues, including particularly the question of limitations. It's also impressed upon that infact there is no other issue as has been raised by the Appellant in the grounds of appeal. Since the demand against him stands already confirmed and since there is no notice for any appeal to have been filled by the assessee against the Hon'ble High court possibility of Appellant to no more be interested in pursuing the present appeal can not be ruled out.

In view of the submissions, the order of Hon'ble High court is perused and the appeal in hand is disposed of in the following terms:

A show cause notice bearing no. 556 dated 21.06.2013 was served upon the Appellant observing the contravention on part of Appellant exporter for the provisions of para 4.55 point 3 hand book of restructure volume 1(2004-2009)/ volume 1 of FTP 2009-2014 which enjoined the exporters to disclose technical characteristics, quality and specifications of the essential oil said to have been used in manufacture of Paan Masala/Gutka in their shipping bills at the time of export and thereafter while applying for the duty free import authorisation (DFA licences) under chapter 4 of Foreign trade policy 2004 to 2009 .

Accordingly, the confiscation of goods & the imposition of penalty upon the Appellant was proposed. The proposal was confirmed by the original adjudicating authority vide order no. 08/2015 dated 04.06.2015. The said order was set aside vide the Order of single member bench of this Tribunal bearing No. A/56364- 56365/2017 dated 01.09.2017. Being aggrieved the department approached the Hon'ble High court of Delhi. It is observed that Hon'ble High court has been of the considered view that the arguments of Revenue have merits and deserves acceptance. The contention of the exporter that the declaration requirement of the exception notification is applicable only if the exported goods are included in the list of items enumerated in paragraph 4.55.3 was not accepted by the Hon'ble High court. In furtherance whereof the following questions were framed :

"(i) Did the Customs Excise and Sales Tax Appellate Tribunal (hereinafter 'CESTAT') fall into error in its interpretation of Notification No. 40/2006-Cus dated 01.05.2006, and also with respect to para 4.55.3 of the Handbook of Procedure for Export and Import;

(ii) Did the CESTAT err in law in its appreciation of specifications that the exporter had to provide and the declaration required, in terms of the above Notification No. 40/2006-Cus

read with para 4.55.3 of the Handbook of Procedure for Export and Import) in the circumstances of the case?"

The same have been decided in affirmative i.e. in favour of Revenue and against the assessee. The matter has been remanded for certain other issues, including particularly the question of limitations to be reconsidered by this Tribunal as is apperent from para 19 of the said order of Hon'ble High Court

At this stage, grounds of appeal are perused. There is no other issue as has been raised by the Appellant then the merits/facts/circumstances as were required for the adjudication of the aforementioned two issues except that in para 23 thereof the issue of bar of limitation has been raised on the ground that no ingredients of section 28 of the Customs and Excise Act has been invoked. No doubt the show cause notice in the present case has been issued after a period of expiry of two years as mentioned in the said section. But the show cause notice itself has alleged the suppression of facts on part of the exporter. The same has even been confirmed by the original adjudicating authority as in Para-21 of the order dated 04.06.2015 it is appreciated that the non-disclosure of the technical characteristics as a consciously done at of the exporter. It has also been held in Para-22 thereof :

On scrutiny of the said correspondences it was observed that DGFT, Kanpur had issued SCNs dated 18.07.2012 to the Exporters under Section 13 of Foreign Trade Development & Regulation (FTD&R) Act 1992 wherein, it has been inter-alia, alleged that the technical characteristic, quality and specifications of the essential oil used in the export product had not been mentioned on the Shipping Bills in contravention of 4.55.3 handbook of procedure 2004/09 thereby suppressing the facts from the licensing authority while availing facility of transferable DFIA; that by doing so the said DFIA's were obtained by suppression of facts and utilized for the purpose for which they were not used.

When this order was challenged before the Hon'ble High court in para-6 of the order by high court, the commissioner's view that DFI licences were obtained by suppression and distortion of facts has been observed with no contrary finding to the said observations. From the record, I found no other reason to differ from the said observations of suppression and distortion of facts and the act being a consciously done act of the exporter. Hence, I am of the view that department has committed no error by invoking the extended period of limitation.

The order of remand is otherwise clear that the tribunal is bound by the decision already given by the high court. Hence, merits are no more to be touched as stands finally decided. Limitation is found to be extendable. As a result of entire above discussion, the appeal stands dismissed.

(Dictated and pronounced in the open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, NEW DELHI-110066
BENCH-SM
COURT NO. IV**

Customs Appeal Nos. C/137-138/2009-CU [SM]

Arising out of Order-in-Original No.32/MKG/2008, Dated: 31.12.2008
Passed by the Commissioner of Customs (Import and General), New Delhi

Date of Hearing: 11.12.2019

Date of Decision: 7.3.2019

**M/s FRIENDLY VIDEO VISION
SHRI RAKESH KUMAR BHAGAT**

Vs

**COMMISSIONER OF CUSTOMS
(IMPORT AND GENERAL)
NEW DELHI**

Appellant Rep by: Mr A R Jain, Adv.

Respondent Rep by: Mr P Poddar, & Mr S Nunthuk, DRs

CORAM: Rachna Gupta, Member (J)

FINAL ORDER NOS. 50324-50325/2019

Per: Rachna Gupta:

The appellant is a 100% Export Oriented Unit and is engaged in the import of Video tape for manufacture and export of blank video cassettes out of it. The Department got a specific intelligence that video cassettes manufactured by the appellant are out of old and used tapes instead of the brand new tapes imported duty free fallen under the 100% EOU Scheme and the container of such tapes bearing No. CRXU 2689406 which had already been dispatched to Bombay on 12.09.1998. The Officers of Customs (Preventive) Branch, New Delhi reached Bombay in presence of Mumbai Port Trust got examined the said container on 30th September 1998. After breaking open four seals (intact) 640 cartons were recovered. 60 were randomly selected and examined. Each of those sample was found to contain 200 spools of video magnetic tapes packed in 46 (each set of 5 spools) and to have 850 feet tape. The Customs Officers drew samples from 12 cartons (five spools from each carton) and took the shipping bill No.1032006 dated 07.09.1998 covering the above consignment into their possession vide Panchnama dated 30.09.1998 drawn on the spot. It is after subsequent investigation in the form of searches and recording the statement of all concerned that the impugned goods were seized on 19th November, 1998 and a show cause notice under Section 124 of Customs Act, bearing No.5606 dated 19.03.1999 was served upon the appellant calling him to explain as to why the seized goods i.e. 630 cartons containing Rs.1,26,000/- pieces of video magnetic tapes shall not be confiscated and that the duty amounting to Rs.19,83,883/- as deposited by the proprietor of the appellant on 16.10.1998 (Rs.18,00,000/-) and on 08.10.1998 (Rs.1,83,883/-) may not be adjusted against the duty of customs foregone by the appellant on the import of the goods alongwith the imposition of penalty upon the appellant.

1.1 The said Show cause notice was adjudicated by Commissioner of Customs (General) vide order No.36 dated 02.08.2000 against the appellant. An appeal was filed before CEGAT. Vide *Final Order No.459 dated 27.03.2002* the Tribunal remanded the case to the adjudicating authority for a fresh adjudication after allowing the cross-examination of Station Engineer, Doordarshan Kendra, New Delhi (who tendered his report about tapes) and after affording a reasonable opportunity of hearing to the appellant, it is thereafter that the matter was re-adjudicated vide Order-in-Original No.43 dated 03.12.2004 vide which the

impugned goods were confiscated alongwith the appropriation of the duty amount herein. However, an option to get redeem the said goods on payment of fine of Rs.10.00 Lakhs was given. In addition, the penalty was also imposed. An appeal was again filed against this order, which was decided vide *Final Order No.249 dated 20.03.2007* of CESTAT upholding the order of Original adjudicating authority. However, against this order and also against the *Final Order of CEGAT No.459 dated 27.03.2002* that the civil appeal was filed in Supreme Court, which was decided vide order dated 02.09.2008 remanding the matter on the question of limitation, as the matter was already been remanded by the Tribunal to the Commissioner for fresh decision on merits. It is thereafter that the order under challenge i.e. *Order No. 32/2008 dated 31.12.2008* was announced confirming the demand of the impugned show cause notice after holding the show cause notice well within the period of limitation. The appellants still being aggrieved have preferred the impugned appeal.

2. It is submitted on behalf of the appellant that appellant was 100% EOU and the magnetic tapes which were imported by the appellant were used to be stored in its bonded warehouse under the supervision of Central Excise authorities. The finished goods i.e. the spools of these tapes and the cassettes were also under the lock and key of the Central Excise Authorities. Hence, the Commissioner, Customs had no authority to issue the show cause notice. The order under challenge has failed to consider this aspect, despite the matter being remanded time and again. It is impressed upon that the customs authority do not qualify to be called as, "proper officer", as required under the statute, to issue the notice specially when "let-export" order was issued by Central Excise Officer. It is further submitted that the goods were detained on 19.09.1998 at Mumbai. The show cause notice issued on 19.03.1999 and served on 28.03.1999 was beyond the limitation as the period had to reckon from the date of detention itself but the adjudicating authority has committed an error while distinguishing detention from seizure. The Id. Counsel has relied upon *Ferro Alloys Corporation Ltd. Vs. Collector of Appeals, Bhubaneswar - 1995 (77) ELT 310 (L.B.)* and on *Pharma Chemicals reported in 2005 (181) ELT 339 (S.C.)*. It is also submitted that no demand of duty can be ordered without issuance of SCN. Reliance is placed upon:

- *CC Calcutta Vs. Tin Plate Co. Of India Ltd. 1996 (87) E.L.T. 589 (S.C.)*.
 - *Raju Fabrics Vs. CC, Ahmedabad 2004 (166) E.L.T. 468 (T)*
 - *Nath International Corp Vs. CC, Mumbai 2003 (152) E.L.T. 430 (T)*
- It is also submitted that reliance is placed upon:

- *Uma Rajeshwarrao Patra Vs. UOI 1999 (109) E.L.T. 123 (Cal.)*
- *UOI Vs. Kanti Tarafdar 1997 (91) E.L.T. 51 (Cal.)*
- *Kantilal Somehand Shah and Anr. Vs. CC & CCE, West Bengal and Anr. 1982 (10) E.L.T. 902 (Cal.)*

3. With respect to the merits of the case, it is submitted that the decision is solely based upon the test report from Doordarshan, but there have been doubts as to the fairness of the testing for the reason that there was no test memo prepared by the Department. The samples were obtained in the form of spools but as per the report these were the video cassettes which have been examined. It has specifically been admitted by Doordarshan Kendra vide letter dated 28.04.2006 that the Kendra has no testing laboratory for testing VHS video tapes nor they have the equipments to carry out physical tests on the video nor even any machine to assemble the video tapes from hub form to cassettes form. Thus, the report cannot be looked into and there remains no other reason for ordering confiscation of the seized goods of the appellant nor there was any reason for imposition of penalty. The order under challenge is accordingly prayed to be set aside. Reliance is placed upon:

- *York Exports Vs. CC (Exports) 2004 (169) E.L.T. 175 (T)*
- *Nanavati Engineering Co. (P) Ltd. Vs. CCE 2000 (40) RLT 240 (T)*
- *Hari Kewal Vanaspati Mills Vs. CCE 2010 (262) E.L.T. 331 (T)*

4. While rebutting these arguments, it is submitted by the Department that present case is not covered by Ferro Alloys case because irrespective of duality of control of Excise Commissionerate as well as Customs Commissionerate, in case of 100% EOU, but the moment manufactured goods leave the premises under the control of Excise Commissionerate, Customs Commissionerate acquires jurisdiction. Notification No. 27 dated 07.07.1997 has been relied upon and it is submitted that Commissioner, Customs was the competent officer/the proper officer to issue the impugned show cause notice.

4.1 With respect to the limitation issue, it is submitted that Mumbai Customs received a letter dated 28.09.1998 about the impugned consignment to be restrained for the purpose of examination. It is in furtherance thereof that the goods were detained on 28.09.1998 itself and were examined on 30.09.1998. It is after this examination that the goods were seized on 19.11.1998. Resultantly, the show cause notice as issued on 27.03.1999 is well within the period of 6 months. Limitation issue has rightly been adjudicated against the appellant by the order under challenge.

4.2 With respect to the merits of the case, it is submitted that the proprietor of appellant Mr. Rakesh Kumar Bhagat himself vide his voluntary statement dated 05.10.1998 admitting entire incrimination against him confessing that the video tapes which were imported by him vide bill of entry No.111376 dated 09.10.1997 were sold by him in the local market in India. He also admitted for purchasing old and used video cassettes from the local market and export the same packed in 630 cartons vide shipping bill No.1032006 dated 07.09.1998. There is no retraction of this admission which otherwise is the best evidence against the appellant, except Mr. Bhagat's Counsel letter dated 23.11.1998. It is impressed upon that said letter has rightly been ignored by the adjudicating authority while confirming the confiscation, appropriation of duty and imposing the penalty. It is further submitted that at the first round of litigation, the appellant was allowed to cross-examine the Engineer from Doordarshan Kendra. Nothing cogent in favour of the appellant could come on record out of the said cross-examination as may support the appellant.

5. Thus, the order under challenge has no infirmity. Appeal is accordingly prayed to be dismissed.

6. After hearing both the parties and perusing the entire record, we observe and hold as follows:-

Appellant has raised two issues, one about jurisdiction of the officer who issued SCN and another about the said SCN being hit by principle of limitation. I deal with these issues separately as:

6.1 JURISDICTION

6.1.1 The Issue to be decided is as to whether the Commissioner, Customs had competent jurisdiction to issue a show cause notice proposing confiscation, to a 100% EOU under the supervision of Central Excise Officers.

6.1.2 The appellant is impressing upon that the Commissioner, Customs is not the proper officer for the purpose and he has placed reliance upon Ferro Alloy (supra) case. Perusal of this decision shows that the Tribunal was of the opinion that in a situation of clearance of warehoused goods, the jurisdiction for raising demand for short levy or refund on re-assessment will be with the proper officer under Central Excise Act granting ex-bond clearance. Thus, it becomes clear that jurisdiction of a Custom House in case of 100% EOU has been barred by this decision for such short levy or refund on re-assessment where the goods were assessed on an "into-bond" bill of entry for the purpose of being warehoused or on "ex-bond" clearance from said warehouse.

6.1.3 But the fact of the present case is that the goods manufactured in the EOU of appellant had left the warehouse and had reached Mumbai Customs after having been given "Let Export Order" by Delhi Customs and it was an intelligence by Delhi Customs only on the basis of which the goods were intercepted detained and subsequently seized. Thus, I am of the opinion that above referred case law is not applicable, facts being distinct.

6.1.4 In the case of EOU there is duality of jurisdiction. The proper Officer of Excise has jurisdiction till the goods are warehoused and are released for clearance, but beyond this stage, the proper officer is the one under Customs Act. Otherwise also, in case of exports, the Customs procedure finds conclusion at the Customs because thereafter the goods actually leave the Indian Territory. Notification 27 dated 07.07.1997 as impressed upon by the Department is perused vide entry No.7 of the said Notification Commissioner of Customs, Delhi has been declared as the proper officer to carry out Customs Procedure. Thus, the moment the manufactured goods enter the precincts of Customs Commissionerate they have to be dealt with by them and Notification No. 27 has to come into play. This stands clarified from Section 69 of the Customs Act, which speaks about clearance of warehoused goods for export, Section 2 (34) of the Customs Act define proper officer in relation to any functions to be performed under this Act to mean the officer of Customs. Stage clearance of warehoused goods onwards is a function under Customs Act, the proper Officer is definitely the Officer of Customs. The situation stands clarified vide Circular **No.126** dated 12.12.1995 stands modified vide Circular **No.27** of 10.05.1996. It has been clarified that there is no overlapping of jurisdiction but a clear cut demarcation of function to be performed by Central Excise Commissionerate and Customs formation. Since in the present case, the goods were intercepted at Mumbai Customs area. They had already reached into the jurisdiction of Customs Commissionerate. To my opinion, the Commissioner, Customs was the competent /"proper Officer" to issue the impugned show cause notice. The issue of jurisdiction is therefore decided against the appellant.

6.2 LIMITATION

Whether the show cause notice dated 19.03.1999 is within the period of 6 months in terms of Section 124 of the Customs Act.

6.2.1 The appellants' plea is that the goods were detained on 30.09.1998 itself. Hence, the period of 6 months as mentioned under Section 124 of Customs Act has to reckon from this date. It is emphasized that detention and seizure has no different meaning. However, the Department has rebutted the arguments. To adjudicate, I observe that seizure is made under Section 110 (1) of the Customs Act which says that if the proper Officer has reason to believe that any goods are liable for confiscation under this Act, he may seize such goods. From the bare reading, it becomes clear that prior seizing the goods, the proper Officer has to do such act which may give him a reason to believe that the goods are liable for confiscation. Thus, the seizure under Section 110 connotes something different from the simple and mere detention of the goods for the examination thereof for sake of reason as mentioned in Section 110(1) of Customs Act.

6.2.2 It was way-back been clarified by Hon'ble High Court of Kolkata in the case of *Collector vs. Hindustan Motors reported in 1979 (4) ELT 313* that mere direction of the proper Officer asking the owner of the goods to not to remove them except with the permission may be a simple prohibitory order but when there is an overt act that amounts to exercise of dominion over the goods that it becomes an act of seizure of goods. Hon'ble Allahabad High Court in State of Uttar Pradesh vs. Lavkush Kumar has also made a distinction between detention and seizure stating that detention can be for the purpose of enquiries without making seizure. It was clarified by Hon'ble High Court of Madras in another case of *Promusical vs. Joint Commissioner of Customs (Preventive)* Mumbai that at the time of enquiry the assessee has all opportunity to produce the documentary proof in order to establish the correctness. If the documents prove bonafide, the goods detained shall be returned with immediate effect without any formal procedure to be followed. But in case those documents are not sufficient to satisfy the objection raised by the Competent Officer, it is at this stage that the control of goods shall be taken by the Department and loss of complete domain over the goods and the technical order of the competent authority about something called as seizure is announced.

6.2.3 This distinction is sufficient for us to hold that the detention is a case prior of acquiring conveyance that seizure is required and hence is different from seizure. As per Section 124 of Customs Act, period of 6 months has to reckon from the date of seizure. Resultantly, I am of the opinion that the show cause

notice is well within the limitation period. In view of above discussion and the quoted law, the case law as relied upon by the appellant is not applicable.

7. Now coming to the merits of the case, it is impressed upon by the appellant that the statement of Mr. Rakesh Kumar Bhagat dated 05.10.1998 as is relied upon by the adjudicating authority to confirm the demand and impose the penalty was retracted vide letter dated 23.11.1998, since it amounts to withdrawal of admission, if any, the same cannot be read against the appellant. The order confirming the penalties is therefore, liable to be set aside.

7.1 The submission is rebutted on the ground that retraction has come beyond 45 days and that the appellant had already deposited the duty and the value of confiscated goods that too voluntarily.

8. In the light of these submissions and perusing the record, I observe that the Proprietor of appellant vide his first statement had admitted about the discrepancy, as noticed by the Department, to have been committed by him that he was manufacturing blank video cassettes out of the raw-material (tape) imported vide Bill of Entry No. 111376 dated 09.10.1997 and was releasing them to the bonded warehouse. Also that he sold those cassettes in the open market in India. He also admitted about purchasing old and used video cassettes from the local market and about manufacturing 126000 pieces of Video Tapes on single hubs of 850 feet length for 3 Hours duration and subsequently exported the same packed in 630 cartons vide shipping bills No.1032006 dated 07.09.1998. I also observe that on the very next date of this statement, he deposited duty amounting to Rs.18.00 Lakhs and remaining Rs.1,83,883/- were deposited on the next date without taking any protest about the statement to be got recorded under pressure, threat or coercion. This act of the appellant to my opinion is sufficient corroboration to the admission of appellant's guilt. Had that been the fact, there was no compulsion on the appellant to deposit the duty confirmed.

8.1 Though there has been a letter dated 23.11.1998 retracting the said admission but to our opinion same is not sufficient, in view of above discussed circumstances and also for the reason that the retraction came not from the horses mouth but by the appellants' Counsel that too vide a letter. Hon'ble High Court of Madras in the case of Collector of Central Excise vs. V.K. Ranganathan as decided in the year 1995 has held that the admissions made before the statutory authorities are binding upon the person concerned in the Departmental proceedings a retraction of confession that too belated is not withstanding. In view thereof, the Counsel's letter is not opined to be sufficient withdrawal of the admission which was already acted upon without any protest. I therefore, find no infirmity in the order while relying upon the confessional statement of the proprietor of the appellant for confirming the impugned demand.

9. Finally coming to the grievance of the appellant about the test report as prepared by Doordarshan about the impugned samples, I am of the opinion that to test the veracity of the examiner thereof, the appellant was granted the opportunity of cross-examination. Perusal thereof shows that the test report mentioned the initials AKM i.e. of Mr. Anil Kumar Mangli, who was Station Engineer, Doordarshan Kendra, Delhi and was competent to conduct the impugned test.

10. It was admitted by the witness that Doordarshan Kendra had tape recording maintenance unit and all those tests were carried out by the said unit. With respect to no use of testing equipment it was deposed that the physical condition of video tapes were so bad that no such equipment was required. From the physical appearance itself, the tape had scratches and wrinkles on the edges i.e., the condition was such as no new tape could have. Further deposed that the test clarified that the tapes have erased characteristics as such no further elaboration was required to hold that the tapes of the samples recovered by impugned Panchnama were the old and used tapes. The reply of Doordarshan Kendra dated 28.04.2006 as impressed upon by the appellant is opined to have no significance in view of the above deposition as made by the witness, who prepared the test report. The entire above evidence also falsifies

any need for Department to investigate the scrap vendors from the local market from whom the appellant admittedly purchased the old video cassettes.

11. In view of entire above discussion, we do not find any infirmity in the order under challenge. Same is accordingly, upheld. Appeal stands dismissed.

(Pronounced in the Open Court on 07.03.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO II, R K PURAM, NEW DELHI-110066
BENCH-SM
COURT NO. III**

Customs Appeal No. C/52163/2018

Arising out of Order-in-Appeal No.CC(A) CUS/D-
II/ICD/Export/TKD/809/2018, Dated
Passed by the Commissioner (Appeals), New Delhi

Date of Hearing: 28.01.2019

Date of Decision: 28.01.2019

M/s MCT DELUXE HONOUR INDUSTRIES PVT LTD

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD**

Appellant Rep by: Mr S S Dabas, CA

Respondent Rep by: Ms Tamanna Alam, DR

CORAM: Ashok Jindal, Member (J)

FINAL ORDER NO. 50267/2019

Per: Ashok Jindal:

The appellant is in Appeal against the impugned order wherein the export consignment has been confiscated and part consignment is allowed to be redeemed on payment of redemption fine and penalties are also imposed.

2. The facts of the case are that the appellant filed a shipping bill on 14.04.2014 for export of handicraft items. There were 70 packages packed in a consignment, which were packed in a container. On examination of the container containing the consignment, it was found that out of 70 consignments 6 packets are red sanders, which is prohibited item and cannot be exported. In these set of facts, proceedings were initiated against the appellant. Various statements were recorded. Thereafter, the show cause notice was issued to the appellant to confiscate the entire consignment and to take action against the appellant. The matter was adjudicated. The 6 packets of red sanders were absolutely confiscated. Remaining goods, namely, handicraft furniture of woods /metal were held liable for confiscation and allowed to redeem on redemption fine of Rs.2.00 Lakhs. Penalties under Section 114 (i) & 114 (iii) of the Customs Act, 1962 were imposed of Rs.5.00 Lakhs and 3.00 Lakhs respectively. Against the said order, appellant is before me.

3. The ld. Counsel for the appellant submits that the value taken by the authorities below while valuing the red sanders as well as the handicraft furniture is not correct. As the value of the whole consignment was about Rs.11.00 lakhs and value of red sanders is of about Rs.1,38,000/- but they have taken the value of red sanders at Rs.3,06,000/- and others at Rs.11,27,111/- respectively. But nothing was explained how the value of the said goods were arrived. Therefore, the value taken by the Revenue and imposing redemption fine is not correct. He further submits that as all the goods were separately packed in separate packages, therefore, the handicraft furniture of woods/ metal cannot be confiscated as held by this Tribunal in the case of *Mazda Chemicals vs. CC (Prev.)*, Ahmedabad - 1996 (88) ELT 767 (Tri.) and *Santosh Radio Products vs. CC (Port)*, Kolkata - 2018 (359) ELT (713) (Tri.-Kolkata). He further submitted that if the goods are held liable for confiscation, in that circumstances also, the redemption fine imposed of 2.00 Lakhs on the appellant is on higher side.

4. With regard to penalty imposed of Rs.3.00 Lakhs under Section 114 (iii) of the Customs Act, it is his submission that the said penalty can impose only if

the goods are held liable for confiscation under Section 113 of the Act and in this case goods were not confiscated under Section 113 of the Act, therefore, penalty under Section 114(iii) cannot be imposed. With regard to penalty is of Rs.5.00 Lakhs imposed on the appellant, it is his submission that the value of red sanders is Rs.1,38,000/- whereas penalty imposed of Rs.5.00 Lakhs which is on higher side. With regard to absolute confiscation of red sanders, it is his submission that red sander has been loaded without the knowledge of the appellant by the staff of the appellant. Therefore, the red sanders cannot be confiscated, as the same has been purchased by the appellant under auction by Tamil Nadu Government and appellant has applied for a license on 13th February, 2014 for manufacturing certain items out of that red sander. Therefore, he prayed that impugned order is to be set aside.

5. On the other hand, ld. A.R. supported the impugned order and submits that red sander is a prohibited item and cannot be exported. Therefore, appellant was exporting red sander under the guise of handicraft items . In that circumstance, whole of the consignment is liable to be confiscates and redemption fine and penalty imposed on the appellants are justified.

6. Heard both the parties. Considered the submissions.

7. On consideration of submissions made by both the sides, the facts are not in dispute that the appellant filed a shipping bill containing 70 packages and on examination 6 packages were found of red sanders. On being asked about the invoice, the ld. Counsel for the appellant failed to produce the invoice before the Bench for proper examination of the contents of the invoice. Therefore, adverse view has been taken against the appellant and it is observed that in the guise of handicraft furniture and woods/ metals the appellant intended to export red sander. Therefore, red sander is absolutely confiscated. For that part of the order, I do not find any infirmity.

8. With regard to the confiscation of handicraft furniture and wood/ metals the main contention of the ld. Counsel for the appellant is that they were in separate packages and are free items for export. Therefore, the same cannot be confiscated. To support this contention he relied on the two decisions of this Tribunal, viz. Mazda Chemicals (supra) and Santosh Radio Products (supra). I have gone through both the decisions. In the case of Mazda Chemicals (supra), I find that from the facts, it is not coming out whether it is an export consignment or import consignment. Moreover, the case of the appellant in the said case was absolute confiscation of Soda Ash whereas in the Truck containing certain contravened items. But in that said case, the appellant did not sought the release of the contravened items and disowned the same. But in this case both red sander as well as handicraft items are owned by the appellant. Therefore, facts of the said case are not applicable to this case. Further, in that case of Santosh Radio Products (supra), the appellant was an importer and having no knowledge of the goods found in the container. But in this case, the red sander as well as the other handicraft items were owned by the appellant and shipped from their own premises for export of the same. Therefore, the said facts are not applicable in this case.

9. Further, the ld. Counsel for the appellant has raised an issue of valuation, how the valuation has been arrived. On the contrary the appellant has failed to produce the invoices of the said goods. Therefore, the valuation taken by the Revenue is taken as correct. At this time, the Bench also found that as the appellant has raised an issue of valuation, therefore, why not matter be transferred to Division Bench of this Tribunal, but on perusal of the records, I find that the said issue has been dealt by this Tribunal on 28.09.2018 wherein, this Tribunal hold that it is a case of mis-declaration and is to be dealt by Single Member Bench. Therefore, I am dealing this issue.

10. Therefore, I hold that the other goods are also liable for confiscation as in the guise of these goods, the appellant sought export of red sander. As goods are held liable for confiscation, but these goods are not contravened goods, therefore, allowed to be redeemed on payment of redemption fine of Rs.1,50,000/-.

11. With regard to penalty of Rs.3.00 Lakhs imposed on the appellant, as it has been held that goods are liable for confiscation, therefore, penalty under Section 114 (iii) is rightly imposed on the appellant to the tune of Rs.3.00 Lakhs. Therefore, penalty of Rs.3.00 Lakhs imposed on the appellant is affirmed.

12. With regard to penalty of Rs. 5.00 Lakhs imposed on the appellant under Section 114 (i) of the Customs Act, 1962 for attempting to export prohibited goods, I find that the said penalty imposed on the appellant is on higher side; therefore, the same is reduced to Rs.3.00 Lakhs.

13. In view of the above, the following order is passed:-

a) Red sander being 450 Kg is absolutely confiscated.

b) The other goods, namely, handicraft furniture of wood/metal are liable for confiscation and can be redeemed on payment of redemption fine of Rs.1,50,000/-.

c) Penalty of Rs.3.00 Lakhs under Section 114 (iii) of the Customs Act, 1962 is affirmed and penalty of Rs.3.00 Lakhs is reduced under Section 114 (i) of the Act for attempting to export of prohibited goods.

(Dictated & Pronounced in the open Court).

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, NEW DELHI-110066
BENCH-SM
COURT NO. IV**

Customs Appeal No. C/52231/2018-CU [SM]

Arising out of Order-in-Original No.02/2018/RNS/COMMR/ IMP/ICD/TKD,
Dated: 07.02.2018

Passed by the Commissioner of Customs (Import), New Delhi

Date of Hearing: 07.02.2019

Date of Decision: 07.02.2019

SHRI ROHIT BHASIN

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI**

Appellant Rep by: Ms Priyadarshi Manish, Adv.

Respondent Rep by: Mr P R Gupta, DR

CORAM: Rachna Gupta, Member (J)

FINAL ORDER NO. 50278/2019

Per: Rachna Gupta:

Present is an appeal preferred against Order-in-Original No.2 dated 7th February, 2018. The said adjudication is arising out of show cause notice No.5263 dated 25.09.2015 which was served upon the appellant as one of the noticees therein, on the basis of a specific intelligence as was received by the Directorate of Revenue Intelligence (DRI) about some importers being engaged in mis-declaration of LED TVs as LED TV panels, which were being cleared through various Ports in India. It was observed that the parts were got removed from these LED TVs and were being separately imported. The LED TVs were separately imported as LED panels. Those imported panels were re-fitted with those imported parts and were sold in the domestic market as LED TVs. In furtherance thereof, various searches were conducted by the Department including in the premises of the present appellant that is M/s. Gyani Electronics Repairs and M/s. Mania Enterprises, both at Saraswati Marg, Karol Bagh, New Delhi. The appellant being the proprietor of both the firms was present at the time of the search whereby 60 pieces of complete LED TVs were recovered being packed in their respective original cartons of LED TVs bearing details as that of brand-name, model No. etc. However, no valid documents were recovered or produced by the appellant establishing the legal procurement of the said 60 pieces of LED TVs. Thus, the Department got a reasonable belief that the TVs so recovered are liable to confiscation. Accordingly, the impugned show cause notice was served upon proposing the confiscation as well as the penalties upon the appellant and other two co-noticees. The said proposal has been confirmed vide the order under challenge. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Ms. Priyadarshi Manish, ld. Advocate for the appellant and Mr. P.R. Gupta, ld. D.R. for the Department.

3. It is submitted on behalf of the appellant that the order of absolute confiscation is absolutely erroneous as the confiscation has been confirmed on the ground not only of the TVs proposed to have been improperly imported but also on the ground that BIS certification was not available for the goods in question. It is impressed upon that all the LED TVs as recovered from the appellants' premises, the cartons thereof specifically mentioned that the TVs are of 80CMs i.e. 31.5 Inches. She impressed upon the RTI information as received

from Ministry of Electronics and Information Technology to impress upon that the BIS is required for LED TVs where the screen size is 32 Inches and above. It is submitted that since the TV in Question were less than 32 Inches, the adjudicating authority has committed an error while still ordering confiscation of those TVs for want of BIS Registration. It is submitted that the appellant here is the small trader. The penalty imposed is not arising out of any of his fault and shall rather affect him adversely. The order under challenge is accordingly prayed to be set aside. Appeal is prayed to be allowed.

4. While rebutting these arguments, it is submitted on behalf of the Department that there was a specific intelligence received by the DRI that the various searches including the one in both the premises of the appellant were conducted. It is impressed upon that during the search of any of those premises no authenticated document proving the proper import of the impugned TVs could have been produced. Rather the appellant himself admitted that the LED TVs were purchased from the market without any bills on cash payments but on hefty discounts from various agents. Same is sufficient to prove the improper import as has been held by the adjudicating authority. It is further submitted that all the recovered TV sets were of 32 Inches, as is clearly apparent from the model Nos. for these TVs as mentioned in the table annexed to the show cause notice. The another relied upon document by the adjudicating authority is the confirmation from M/s.Soni India and M/s.Samsung India Electronics that none of the seized LED TVs models are registered with these companies and that the TV in their own name are being imported directly. It is also clarified that their products have BIS Certification. It is impressed upon that thus there is no infirmity while confirming the proposal of the show cause notice based on the said two grounds. Appeal is prayed to be dismissed.

5. After hearing both the parties and perusing the entire record, I observe that the Department recovered the LED TVs under question during search conducted in the premises of the appellant that too in his own presence and the Panchnama dated 27th September, 2014 was prepared that too in the presence of the appellant itself. After conducting raid in both of his companies detail of each of the LED TV recovered as far as the model, size, brand-name etc. were duly noted while seizing the same. It is thereafter that summon was served upon the appellant to get his statement recorded under Section 108 of the Customs Act. His statement got recorded on 14th November, 2014, though he failed to join the investigation at the first available opportunity. In the said statement, it is observed that there is a clear admission on part of the appellant that the LED TVs are purchased by him from the local sales without bills as the local sellers were offering the hefty discounts. These local sellers works through selling agents. Names of such few agents were disclosed by the appellant himself in the said statement. He again was summoned and a subsequent statement was recorded on 1st May, 2015, where he, after acknowledging the correctness of his previous statement dated 14th November, 2014, signed the same adding to the previous statement that the purchased TVs were cheaper as compared to those purchased against the regular bills. He clearly acknowledged that it was in his knowledge that these goods were smuggled in nature and the same were smuggled by the syndicates of those agents. However, he deposed that he purchased those TVs without bills with the motive of earning profits. The law of admission is absolutely clear that admissions needs no further proof unless and until contrary is proved or are withdrawn. I observe that despite being summoned for more than four times and despite being recorded twice there is no retraction on part of the appellant for the admission of impugned LED TVs to have been procured by way of improper imports. Rather the statement of the co-noticees goes on to further corroborate the admission of the present appellant. Thus, I do not find any infirmity in the order under challenge while directing the confiscation of goods being the result of improper import.

6. Now coming to the another ground taken about BIS Certification, I observe that it is an acknowledgement on the part of the appellant that BIS Certification is required for all such LED TVs, which are measuring 32 Inches and above, as is also apparent from the appellants emphasis about the information received from Ministry of Electronics and Information Technology dated 24th May, 2017. Though appellants defense is that the LED TVs recovered from their premises

are of 80 CMs. i.e. 31.5 Inches, measurement being less than 32 Inches, no BIS registration is required. But seen from the Panchnama having the details of the TVs recovered from the appellant, as also got acknowledged by the appellant himself in his defence reply, it is apparent that there is the complete details about the model No., the size of the panel and the brand as well. Perusal thereof shows that LED for Samsung brand as well as for Sony brand are mentioned to be of 32 Inches. The appellant could not produce any other document to support that the dimension thereof was 31.5 Inches. in absence thereof and in view of the above noticed acknowledgement on part of the appellant, I hold that adjudicating authority has committed no error while holding these LED TVs of 32 Inches for which mandatory BIS Certification is required as per Electronic and Information Technology goods (Requirement of Compulsory Registration) Order, 2012 as was notified on 3rd October, 2012.

7. In view of the entire above discussion holding no infirmity in the order under challenge, same is hereby upheld. Appeal stands dismissed.

(Dictated and pronounced in the Open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-110066
COURT NO.I**

Appeal No. C/53151/2016-CU[DB]

Arising out of the Order-in-Appeal No. 16/Comm/RNS/2016, Dated: 15.9.2016
and

Passed by the Commissioner of Central Excise, New Delhi

Date of Hearing: 9.6.2017

Date of Decision: 20.7.2017

M/s JAI SHIV TRADING COMPANY

Vs

COMMISSIONER OF CENTRAL EXCISE, NEW DELHI

Appellant Rep by: Shri S N Panda, Adv.

Respondent Rep by: Shri R K Manjhi, DR

CORAM: Dr Satish Chandra, President
V Padmanabhan, Member (T)

FINAL ORDER NO. A/55379/2017

Per: V Padmanabhan:

The present appeals have been filed by the appellant against the order Nos. 16/2016 dated 15.09.2016.

2. The appellant is a trader engaged in trading of calculators, watches, clocks, etc. They imported certain non branded items from China and filed Bill of Entry no. 4432821 dated 02.03.2016 declaring the goods as "*Baby watch, watch modules, ladies watch, wall clock, incomplete calculators, and some accessories (PCB, solar dummy + patti, LED bulb)*" declaring the assessable value amounting to Rs. 9,16,364/-.

3. On the basis of specific intelligence received from Directorate of Revenue Intelligence, the container was examined by the customs officers on 30.04.2016 and found that goods imported were unbranded and generic in nature. It was noticed during examination that the list of imported goods did not fully tally both in respect of description as well as total quantity in respect of many items declared in the Bill of Entry. Further, it was noticed that the goods declared as incomplete calculators were in fact complete calculators "*in semi knock down condition (SKD)*". From the components imported, complete calculator can be easily assembled by the addition of a few missing components viz. Diode number 103, connecting wire and solar panel with battery. Authorities were also of the view that the value of imported goods was mis-declared.

4. Investigations were carried out into the value of imported goods. Since the imported goods were unbranded and generic in nature, for which NIDB data should not be applied readily owing to the lack of quality mentioned in the data, market enquiries were conducted with importers in respect of various goods. Consequent upon the market enquiry assessable value was re-determined after giving standard deduction for VAT (12.5%), retailer margin (20%), wholesaler margin (15%), duty component and other incidental expenses (5%) and also Customs duty (29.441%). The total value of the goods was revised to Rs.56,61,033/- as against the declared value of Rs.9,16,364/-.

5. The Department further observed that the goods calculators imported from China were liable for anti dumping duty at the rate of US\$1.22 per piece in terms of notification no. 24/15-Cus (ADD) dated 29.05.2015. Since the imported goods contained calculators in SKD form, it was proposed to levy anti dumping duty at the re-determined value. Accordingly, the Department adjudicated the goods for mis-declaration as well as levy of Anti Dumping Duty. The impugned order was passed upholding re-determination of value, levy of

customs duty, anti dumping duty on the enhanced value. Penalty equal to duty was also imposed. Confiscated goods were also allowed to be redeemed on payment of fine and penalty. Penalty was imposed under section 114 equal to duty as well as under section 114 AA of the Customs Act 1962. Aggrieved by the impugned order, present appeal has been filed.

6. With the above background, we have heard Shri S.N. Panda, Advocate for the appellant and Shri R.K. Manjhi, DR for the respondent.

7. The impugned order has been challenged mainly on the following grounds:

i) The appellant has imported parts and accessories of calculators in SKD condition. Since the imported goods were not complete calculators, levy of anti dumping duty is not justified.

ii) Enhancement of value of the imported goods has also been challenged with the argument that market enquiry has been conducted by the customs authorities behind the back of the importer since relevant documents were not supplied to them.

8. The Ld. Advocate explained the grounds and also relied upon some case laws.

9. The Ld. DR supported the impugned order. He argued that what has been imported by the appellant were calculators only and the absence of one or two components should not be cited as reason for non imposition of anti dumping duty. He also argued that the enhancement of value has been accepted by the importer. Shri Jay Shiv, Proprietor of the appellant had appeared before the customs officers on 08.07.2016 in which he was shown the relevant market enquiry report dated 22.06.2016. Since the report as well as the enhancement of value has been accepted by him, the appellant cannot challenge the same in appeal.

10. Heard both the sides and perused the records.

11. The declaration of goods made in the relevant Bill of Entry by the importer was not substantiated by the examination report when the goods were taken up for 100% examination. Significant differences were noticed in respect of description as declared in the Bill of Entry as well as actual value. The quantities declared were also found to be not correct. Consequently, the charge of mis-declaration stands established against the importer and hence we find no reason to interfere with the confiscation of the goods ordered by the adjudicating authority in terms of the section 114 *ibid*.

12. The second issue for decision before us is whether anti dumping duty is liable to be levied on the electronic calculators imported from China in terms of notification no. 24/15-Cus (ADD) dated 29.05.2015. The above notification imposed anti dumping duty at the rate of US\$ 1.22 per piece on electronic calculators imported from China. When the goods were examined, it was found that various parts and accessories of calculators have been imported which can be easily assembled to make calculators. However, it is not in dispute that the calculators will become functional only by addition of a few more components such as Diode and connecting wire, etc. Even if the imported parts and accessories make up 98% of the calculator we are of the view that the imported goods cannot be considered as calculators imported from China. Consequently, the non functional calculators cannot be levied to anti dumping duty in terms of the notification (*supra*). Accordingly, the levy of anti dumping duty in the impugned order is required to be set aside.

13. The appellant has also challenged the valuation adopted by the customs authorities. From records, it is seen that such re-determination of value has been carried out in terms of Rule 7 of the Customs Valuation Rules which provides for determination of value on the basis of the price of identical or similar imported goods in India. It is further seen from records, that the proprietor of the appellant, Shri Jayshiv, was shown the market enquiry report at the time of recording his statement on 08.07.2008. Further, in the statement he has voluntarily accepted the increased valuation of the imported goods. It is settled position of law that once the importer has admitted the re-determination of value on record and has accepted the method of such valuation, he cannot

subsequently challenge the same on the same ground. Consequently, we uphold the re-determination of value carried out by the customs authorities.

14. In view of the observations above, impugned order is modified as below:

i) We uphold the re-determination of value from Rs.9,16,364/- to Rs.56,61,033/-.

ii) Customs duty is to be paid on such increased value. However, anti dumping duty will not be payable.

iii) Confiscation of goods under section 111 is upheld. Goods are however allowed for redemption on payment of fine of Rs. 7.50 lakhs.

iv) Importer will be liable for payment of penalty under section 114 A equal to the duty re-determined as above.

14. In the facts and circumstances of the case, we are of the view that penalty is not leviable under section 114 AA.

15. The appeal is partially allowed and impugned order modified as above.

(Pronounced in the open court on 20.7.2017)

[Back](#)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. I]

Justice Dr. Satish Chandra, President and Shri V. Padmanabhan, Member (T)

COMMR. OF CUS. (IMPORT), ICD, TKD, NEW DELHI

Versus

SODAGAR KNITWEAR

Final Order No. 51708/2018, dated 8-5-2018 in Application No. C/Stay/20265/2018
in Appeal No. C/50546/2018

REPRESENTED BY :Shri R.K. Manjhi, AR, for the Appellant.

Shri Avijit Dikshit, Advocate, for the Respondent.

[Order per : V. Padmanabhan, Member (T)]. - The present appeal is against the Order-in-Appeal No. CC(A) CUS/D-II/ICD/TKD/Imp/1256/2017, dated 22-11-2017 passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi.

2. The respondent-assessee imported certain goods and filed Bill of Entry No. 7080250, dated 14-10-2016 under EDI at ICD, Tuglakabad, New Delhi and declared various items such as Baby Caps, Cloth Gloves, Baby Bootie, Baby Tights and Baby tops. When the goods were examined on 2nd check basis, certain discrepancies were noticed in respect of the total quantities on some of the declared goods. Further, certain extra items were also found during examination including adult jacket of 'Versace' brand. The Customs Authorities investigated the charges of misdeclaration as well as undervaluation of the impugned goods and recorded the statement of Sh. Eklovey Chug, Manager of the assessee firm, in which he admitted that certain goods of the nature of adult jacket of 'Versace' brand and children jacket were inadvertently sent by the supplier. He also admitted that the imported goods were not as per the declarations made in the Bill of Entry. Further, he also agreed with the manner of calculating the assessable value and differential duty on the basis of market enquiry conducted by the Customs Officers. The importer waived the issue of show cause notice and personal hearing. The case was adjudicated by the Additional Commissioner in which the declared transaction value was rejected under Rule 12 of the Customs Valuation Rules; the assessable value was redetermined in terms of Rule 7 and enhanced to Rs. 39,64,694/-. The adjudicating authority upheld the confiscation of the goods under Section 111(1) and (m) of the Customs Act, 1962 and allowed redemption of the same on payment of redemption fine and penalties. Differential duty of customs was demanded and penalties were also imposed on the appellant as well as the Partners.

3. When the order of the Original Authority was challenged before the Commissioner (Appeals) he held that there was no misdeclaration of the goods, since the departmental officers have not recorded the length of the garment in the examination report. He also set aside the redetermination of the value of the imported goods on the basis of market enquiry. Finally, he set aside the confiscation of goods and penalties imposed. Aggrieved by the impugned order, Revenue has filed the present appeal in which it has been submitted that the Order-in-Original merits to be upheld since the importer had admitted the misdeclaration as well as redetermination of value on record. They also relied on the decision of the Tribunal in the case of *Commissioner v. Jai Shiv Trading Company* vide order dated 20-7-2017.

4. With the above background, we heard Sh. R.K. Manjhi, Ld. AR for the Revenue as well as Sh. Arijit Dikshit, Ld. Advocate for the assessee.

5. Heard both sides and perused record.

6. The respondent-assessee filed Bill of Entry for import of certain goods and when the consignment was examined it was noticed that, the quantities of goods imported did not tally with that declared in the Bill of Entry. It was noticed that a few

extra items were also found, the details of the goods as declared and as found are given in the following table :-

Details of the goods as per import documents			Details of the goods as per panchnama dated 21-10-2016 documents (was also mentioned in the OIO)	
Sr. No.	Description of the goods	Quantity (in pcs)	Description of the goods	Quantity (in pcs)
1.	Cloth Cloves	4,800	Gloves	4,800
2.	Baby Bootie	24,120	Baby Bootie	24,120
3.	Baby Caps	43,800	A. Baby Caps B. Adult Caps	27,000 20,400
4.	Baby Tights	2,040	Adult Tights	2,040
5.	Baby Tops	3,972	Baby Jackets	792
6.			Children Jackets	2,880
			Adult Jackets (Versace Brand)	480

7. From the above, it is evident that extra items have been found including adult jacket ‘Versace’ brand. In particular, it is evident that the branded goods bearing the brand name Versace stand imported in the consignment which has not been declared at all. Consequently, we are of the view that there has been misdeclaration on the part of the importer and hence, confiscation of the imported goods under Section 111(1) is upheld.

8. The second issue in the present appeal is regarding the value of the imported goods. The Customs Authorities redetermined the value of the imported goods in terms of Customs Valuation Rules, 2007. Since the importer had failed to advance any documents/invoice to substantiate the value of the goods, the transaction value stands rejected and the value of the goods have been redetermined as per Rule 7 of the Customs Valuation Rules, 2007. It is noteworthy that the representative of the importer has been specifically shown the basis for redetermination of the value and his statement recorded by the Customs Officers. It is on record that Sh. Eklovey Chug, Manager of the importer has specifically admitted in his statement dated 31-12-2016 that he agreed with the manner of calculating the assessable value and differential duty.

9. It is settled position of law that the facts which are admitted need not be proved. In the case of *CCE, Madras v. Systems & Components Pvt. Ltd. - 2004 (165) E.L.T. 136* (S.C.), the Hon’ble Apex Court in para 5 of the order has observed as follows :

“... .. 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 what is admitted need not be proved”.

10. Further, this Tribunal in the case of *Jai Shiv Trading Company* vide F. O., dated 20-7-2017 has observed as follows :

“The appellant has also challenged that valuation adopted by the customs authorities. From record, it is seen that such redetermination of value has been carried out in terms of Rule 7 of the Customs Valuation Rules which provides for determination of value on the basis of the price of identical or similar imported goods in India. It is further seen from records, that the proprietor of the appellant, Sh. Jayshiv, was shown the market enquiry report at the time of recording his statement on 8-7-2008. Further, in the statement he has voluntarily accepted the increased valuation of the imported goods. It is settled position of law that once, the importer has admitted the redetermination of value on record and has accepted the method of such valuation, he cannot subsequently challenge the same on the same ground. Consequently, we uphold the redetermination of the value

carried out by the customs authorities”.

The ratio of the above judgment is squarely applicable to the instant case.

11. In view of the above discussion, the impugned order is set aside and Order-in-Original No. 38/2017, dated 9-3-2017 is restored. However, in the facts and circumstances of the present case, we are of the view that the redemption fine merits reduction from Rs. 5 lakhs to Rs. 3 lakhs under Section 125 of the Customs Act. Further, the penalty imposed on Sh. Jaganath, Partner under Section 112(b) of the Act is reduced from Rs. 3 lakhs to Rs. 1.5 lakhs.

12. In the result, the appeal filed by the Revenue is partially allowed, the Order-in-Original is restored but with the above modification. Stay application also stands disposed.

(Pronounced on 8-5-2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-110066
COURT NO. I**

Appeal No.C/51536/2017

Arising out of Order-in-Original
No.DLI/Custom/Pre/MKV/PR.Commr/14/2017, Dated: 14.06.2017
Passed by Principal Commissioner of Customs, (Prev.), New Delhi

**Date of Hearing: 30.01.2018
Date of Decision: 05.02.2018**

M/s LAXMI ENTERPRISES

Vs

**COMMISSIONER OF CUSTOMS
PREV. NEW DELHI**

Appellant Rep by: Shri Prabhat Kumar, Adv.

Respondent Rep by: Shri R K Manjhi, DR

CORAM: Dr Satish Chandra, President
V Padmanabhan, Member (T)

FINAL ORDER NO.50544/2018

Per: V Padmanabhan:

The present appeal is filed against Order-in-Original No.14/2017 dated 14.06.2017. The appellant imported certain goods described as Reflective Sheeting and Luminescent Film and filed bill of entry No.9962802 dated 20.07.2015. After examining the consignment, the Customs Authorities were of the opinion that there was mis-declaration in the quantity of goods since 578 rolls of the material were found as against 577 rolls, declared the Bill of Entry. It further appeared that the goods were mis-declared in terms of value also. To probe the matter further, searches were conducted on 20.08.2015 at the business premises of the importer, residence of the proprietor as well as other connected premises. During the search, one laptop as well as mobile phone found was recovered and the data contained therein was retrieved and printed through panchnanma proceedings on 24.08.2015 and 27.08.2015 in the presence of witnesses as well as S/Shri Sumit Chawla and Rajiv Chawla, the concerned persons of the importer. The data retrieved included proforma invoices, price list, commercial invoices, etc. of various goods imported by the appellant in the past. Shri Sumit Chawla, authorized representative and son of the proprietor of M/s Lakshmi Enterprises, was interrogated and his statements were recorded in relation to the documents recovered from the laptop and mobile phone. In his statement dated 17.09.2015, he confirmed that the documents like invoices, proforma invoices related to consignments imported by him for which the real value of the goods was hidden from the Customs Authorities. In his further statement dated 19.01.2017, towards conclusion of the investigation, he confirmed that the grade and specification of goods imported by them in the past were not cleared in the Bill of Entry; the invoices/commercial invoices recovered could be taken for re-assessment for past import; he further accepted the duty liability for the past consignments on the basis of invoice/commercial invoice found in the electronic devices, as per the following table:

SN	Description of goods	Rates found (USD) per Roll	Ref. Invoice/ Commercial Invoice No.	Corresponding Bill of Entry
1	Glitter Film (Size-90 cm 50 cm)	51.50 FOB	HY121213 dated 13.12.2013	5303180
2	Multi Lens Film	103	HY121213 dated	

	(Size 90*100 CM)		13.12.2013	
3	Reflective Sheeting (Size 1.24*45.7 m) Grade A	70.835	YGM1306035 dated 11.12.2013	4466023 dated 27.01.2014
	Reflective Sheeting (Size 1.24*45.7 m) Grade B	66,9048		
	Reflective Sheeting (Size 665*91.4 m) Grade B	64.171		
4	PVC Self Adhesive Tape with pet release (size 45.7m*1.27)	32.70	1207X dated 17.02.2013	8513918 dated 08.03.2013

2. Shri Sumit Chawla further admitted in his statement dated 19.01.2016 that the differential amount, over and above declared in the bills of entry, was remitted in Indian currency to the representative of supplier through un-official channels.

3. The goods covered by the current bill of entry were provisionally released to the appellant and on conclusion of investigation, SCN dated 11.08.2016 was issued to the appellant demanding the differential customs duty for past consignments. This SCN was finalized by issue of impugned order as follows :-

i) Declared Customs value in respect of past clearances made under 32 bills of entry was rejected and re-determined on the basis of the documents recovered during investigation.

ii) Differential customs duty amounting to Rs.1,10,86,061/- was demanded along with interest.

iii) Goods seized in various places were ordered for confiscation and redemption fine imposed.

iv) Penalty equal to the customs department demanded was imposed on the appellant.

4. Aggrieved by the impugned order, the present appeal has been filed mainly on the following grounds:

i) The case has been made based upon the relied upon documents in the form of prints-out from laptop and mobile phone. These documents are not permissible evidence under Section 138C of the Customs Act, 1963, since there is nothing on record to show that the conditions specified in relation to the data have been satisfied.

ii) The adjudicating authority has not followed the Customs Valuation Rules sequentially in arriving at the valuation for demand of duty.

iii) He has failed to cite the value of contemporaneous import of the same kind and quality of goods and hence the transaction value cannot be rejected.

iv) The adjudicating authority has ignored the evidence produced by the appellant regarding contemporaneous import of identical/similar goods.

v) The alleged invoices/commercial invoices cannot be applied to past imports. In particular, the 32 import consignments are spread-over a period of two years and four months which have been re-valued on the basis of evidence of December, 2013. This is improper since these invoices cannot be used to recover a period of more than 90 days

vi) They also relied on various case laws, to the effect that transaction value is required to be accepted.

5. With the above background, we heard Shri Prabhat Kumar, Id Advocate, representing the appellant. He explained the facts of the case as well as various grounds of appeal, in detail.

6. We also heard Shri R.K. Manjhi, Id DR on behalf of the Revenue. He submitted that the original invoices/commercial invoices pertain to the past imports were found in the laptop and mobile phone recovered during the search proceedings of 20.08.2015. Shri Sumit Chawla, in his statements, has admitted the under-valuation of the past consignments and has given his consent for re-determining the value of past consignments on the basis of the above invoices. He specifically pointed-out that none of the statements has ever been retracted. He submitted that the impugned order is fully justified and may be sustained.

7. We have heard both sides and perused the record. The appellant has imported certain goods described as "Self Adhesive Reflective Sheeting" and filed bill of entry dated 20.07.2015 at ICD Tughlakabad, New Delhi. While examining the goods imported under the above bill of entry, the department was of the view that the value declared by the appellant was incorrect and the goods were under valued. There was also mis-declaration in the total quantity of goods imported. As part of the investigation against under-valuation, the department searched the business premises of the importer and other connected premises on 20.08.2015. During the search, along with various documents, electronic media, in the form of laptop and mobile phone, was recovered and the data contained therein was printed-out under panchnama proceedings. These devices were found to contain invoices/commercial invoices, price list, etc. in respect of the same goods imported in the past. In the statements recorded from Shri Sumit Chawla son of proprietor, he admitted that many of the past consignments were under valued and that the documents recovered from the electronic devices pertain to the consignments imported earlier by the appellant. Accordingly, the department proceeded to demand differential duty in respect of goods imported earlier by the appellant and covered by 32 bills of entry. The present appeal challenges the demand for differential duty and imposition of penalties, levied by the impugned order.

8. In the main grounds of the present appeal, it has been argued that transaction value was required to be accepted in the absence of evidence produced by Revenue of contemporaneous import of identical/similar goods. The appellant has argued that the documents printed-out from the electronic media are not admissible for non-compliance of specified conditions specified in the Section 138C of the Customs Act.

9. The valuation of imported goods is required to be done in terms of Section 14 of the Customs Act, 1962, read with the Customs Valuation Rules, 2007. The transaction value of imported goods can be rejected only as per the provisions of Rule 12 of the Customs Valuation Rules. In the present case, in respect of 32 Bills of Entry pertaining to imports, certain documents were recovered during the course of search from the laptop and mobiles phones. From among the documents recovered from the laptop and mobile phone, the department has recovered the invoices/commercial invoices pertaining to the goods imported under these Bills of Entry. Such invoices indicate that the goods were procured by the appellant from the foreign supplier at significantly higher prices than what has been declared to the department at the time of filing Bills of Entry. It further has been admitted by Shri Sumit Chawla, son of the proprietor, that these invoices, printed-out from laptop/mobile phone, reflect the correct value of imports. He has even admitted that the differential amount, over and above the invoice originally declared, have been paid to the foreign supplier through means other than the banking channels.

10. In the light of the evidence, as above, we are of the view that the adjudicating authority has rightly rejected the transaction value of goods imported under the 32 Bills of Entry, in terms of Rule 12 of the Customs Valuation Rules, 2007. In fact, Explanation (f) to Rule 12 ibid specifically provides for rejection of the transaction value in the case of fraud or manipulated documents as in the present case.

11. The appellant has raised objections to the admissibility of the documents recovered from the laptop. They have cited the provisions of Section 138C of the Customs Act. We find such objections without basis in as much as the truth of the documents printed-out from the laptop has been admitted by Shri Sumit Chawla son of the proprietor in clear terms. Further, their clear admission by

him that these invoices recovered, reflect the correct valuation at which the transaction was concluded with the valuation supplier. Further the appellant was given an opportunity to prove the correct transaction value of the goods imported under 32 bills of entry by providing bank attested genuine invoices but Shri Sumit Chawla did not make same available. On the other hand, in his statement dated 19.01.2016, that the prices indicated in the invoices/commercial invoices could be taken for assessment of all past imports as the rate of product did not change much during period of imports. We are of the view that there is no infirmity on the part of the adjudicating authority in re-determining the value of the past imported goods on the basis of such invoices. In the peculiar facts and circumstances of the present case, there is no need for the Revenue to collect evidence in the form of contemporaneous imports.

12. In view of above discussions, we find no infirmity in the impugned order, which is upheld and the appeal dismissed.

(Pronounced in Court on 05.02.2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 558 of 2010

Arising out of Order in Appeal No. 20-Commr-HKC-2010, Dated: 27.07.2010
Passed by Commissioner (Appeals), Central Excise & Central Goods and Service
Tax, New Delhi

**Date of Hearing: 21.08.2019
Date of Decision: 14.01.2020**

**M/s EAST INDIA HOTELS LTD
7, SHAMNATH MARG, DELHI**

Vs

**COMMISSIONER OF CUSTOMS CENTRAL EXCISE AND CENTRAL GST
NEW DELHI, NEW CUSTOMS HOUSE, NEAR IGI AIRPORT
NEW DELHI-110037**

Appellant Rep by: Mr Narender M Sharma & Ms Anandita Saha, Advs.

Respondent Rep by: Mr Rakesh Kumar, AR

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 50094/2020

Per: Rachna Gupta:

1. The order in original no. 20-Commr-HKC-2010 dated 27.07.2010 has been assailed vide present appeal. The relevant facts in brief for the purpose are that M/s. East India Hotels Ltd. imported a new aircraft, Hawker 850 XP vide Bill of Entry no. 218981 dated 21.05.2007 with the declared value of Rs. 56.15 crores. The appellant availed an exemption from payment of customs duty under notification no. 21/2002-cus dated 1.3.2002 as amended (Sl. No. 347 C). The importer/appellant had also obtained a no objection certificate from Director General of Civil Aviation (DGCA) on 20.06.2007 for using the said aircraft for the purpose of non scheduled air transport services, under passenger category.

2. The Department got intelligence that the said aircraft had been imported for private use by the appellant under the guise of non scheduled operator (passenger permit) herein after referred to as NSOP, with sole intention to evade the payment of customs duty. The Department alleging violation of the condition in said notification, provisions of Customs Act 1962 and that of Foreign Trade Policy issued a show cause notice upon appellant bearing no. 5192 dated 27.6.2008 proposing confiscation of the aforesaid aircraft along with the recovery of total customs duty amounting to Rs.13.92 crores as was not paid due to said exemption. The interest under section 28 AB of the Customs Act and the penalties under section 112 read with section 140 of the Customs Act were simultaneously proposed. This proposal has been confirmed by the order in original bearing no. 20-Commr-HKC-2010 dated 27.07.2010. Being aggrieved of the said order that the present appeal has been filed before this Tribunal.

3. We have heard Mr. Narender M. Sharma & Ms. Anandita Saha, Advocates for the appellant and Mr. Rakesh Kumar, Authorised Representative for the Respondent.

4. It is submitted on behalf of the appellant that no condition of NSOP permit as was granted by DGCA in favour of appellants (EIH Ltd.) has been violated by the appellant. It is impressed upon that once a license is being issued by DGCA, the same cannot be questioned by the licensing authority. It is submitted that the Department cannot refuse the benefit of exemption notification on the allegation that there was mis-representation on part of the appellant/importer of aircraft

while availing the said benefit. It is further submitted that the show cause notice is otherwise illegal and without jurisdiction as no show cause notice under section 28 of the Customs Act 1962 can be issued for failure to comply with post importation condition. Otherwise also the show cause notice is issued by Commissioner (Preventive) who is not a jurisdictional Commissioner, hence he is not a proper officer under the provisions of the Act.

5. Learned Counsel in addition has submitted that the impugned aircraft was provisionally released after EIH Ltd. furnished a bond of Rs.56,15,42,299/- and the Bank Guarantee of Rs. 14,03,85,600/- dated 5.7.2008 in compliance of the stay order of this Tribunal dated 1.4.2011. The said Bank Guarantee is still alive and is valid upto 31.3.2020. The same is liable to be released. Learned Counsel has brought to the notice that an order has been passed by this Tribunal in *Reliance Transport and Travel Ltd. vs. CCE New Delhi in appeal no. C/497/2010-Cus (DB) dated 15.10.2018*. The Tribunal has held that Reliance Transportation and Travel Ltd. (RTTL) had rightly availed the benefit of exemption and concession of notification no. 21/2002-Cus read with notification no. 61/2007-Cus as amended. The appeal of RTTL has been allowed by the coordinate bench of this Tribunal by setting aside the order in original passed by the adjudicating authority. It is submitted that the facts of the present case are absolutely identical to RTTL case. Appellant has prayed that the similar order may be passed in the present case as well in favour of the appellants. Appeal is accordingly prayed to be allowed. The learned Counsel has relied upon the decision of this Tribunal in the case of *CC New Delhi Vs. Sameer Gehlot reported as 2011 (263) ELT 129 (Tri-Del)* wherein it was held that the entire condition no. 104 of Notification no. 21/2002-Cus (Sl. No. 347B) as amended by notification no. 61/2007-Cus is a pre-importation condition. The Tribunal held that these conditions stands complied with by the importer in case he produces DGCA permit for non scheduled air transport services along with an undertaking to the effect that aircraft would be used only for providing said services. Learned Counsel laid emphasis on the recent decision in the case *Reliance Transport & Travels Ltd. Vs. CCE New Delhi in Customs appeal no. 497/2010* as was decided on 15.10.2018. Submitting that irrespective there are two contradictory opinions of two co-ordinate benches of this Tribunal and that the matter had already been referred to Larger Bench and as on date it stands sub judice before Hon'ble Supreme Court of India. Still this tribunal vide the aforesaid decision in the case of *M/s. Reliance Transport and Travels Ltd.* has decided the appeal in favour of assessee holding that the permit of the assessee therein has been renewed from time to time by DGCA. Thus, there is no apparent objection by DGCA which is sufficient to hold that there is no violation of the impugned condition. Decision in the case of *Sameer Gehlot's* has also been relied upon. Ld. Counsel therefore prayed that order under challenge to be set aside and appeal in hand to be allowed.

6. Department on the other hand has submitted that by using the aircraft for the personnel of the appellant company itself, the appellant has violated the undertaking for using the said aircraft for NSOP purposes as was given to DGCA while taking the license at the time of import of the aircraft and for availing the benefit of exemption from payment of customs duty. As such there is no infirmity in the order under challenge declining the benefit of exemption and demanding the customs duty, the exemption whereof was claimed based on the said condition. Learned DR has relied upon the decision of Mumbai Tribunal in the case of *King Rotors and Air Charter Pvt Ltd. Vs. CC(ACC & Import) Mumbai reported as 2011 (269) ELT 343 (Tri Mum)* where the benefit of exemption notification has been denied to the assessee on account of furnishing wrong undertaking to DGCA in compliance of condition no. 104 of the said notification. After having heard the rivals contention of both the parties and perusing the entire record as well as the relevant statutory provisions, we opine that the moot controversy to be adjudicated in this case is:-

Whether the appellant herein has violated condition no. 104 (under sl. No. 347 N) of notification no. 21/2002-Cus as amended by notification no. 61/2007-Cus while importing an aircraft vide B/E No. 218981 dated 21.05.2007 by not complying with the undertaking as was given to DGCA at the time of said import.

7. Foremost requirement for the purpose is to have a look on the impugned notification which is as follows:

(i) The aircraft are imported by an operator who has been granted approval by the competent authority in the Ministry of Civil Aviation to import aircraft for providing non-scheduled (passenger) services or non-scheduled (charter) services and

(ii) The importer furnishes an undertaking to the Deputy Commissioner of Customs or Asstt. Commissioner of Customs, as the case may be, at the time of importation that :-

(a) The said aircraft shall be used for providing non-scheduled (passenger) services or non-scheduled (charter) services; and

(b) He shall pay on demand, in the event of his failure to use the imported aircraft for the specified purposes, an amount equal to the duty payable on the said aircraft but for the exemption under this notification.

Explanation. - for the purposes of this entry.

(a) Operator means a person, organization, or enterprises engaged in or offering to engage in aircraft operation;

(b) Non-scheduled (passenger) services means, air transport services other than scheduled (passenger) air transport services as defined in Rule 3 of the Aircraft Rules, 1937.

(c) Non-scheduled (charter) services means services provided by a nonscheduled (charter) air transport operator, for the charter on a hire of an aircraft to any person, with the published tariff, and who is registered with and approved by the Directorate General of Civil Aviation for such purposes, and who conforms to the civil aviation requirement under the provision of Rule 133A of the Aircraft Rules, 1937.

Provided that such Air Charter operator is a dedicated company or partnership firm, for the above purposes. Notification No. 21/2002 stood amended by Notification No. 61/2007, which provided for exemption of additional duty of customs also."

8. Clause (i) clarifies that import of aircraft is permissible but to an operator who is granted approval by the competent authority in the Ministry Of Civil Aviation to import aircraft for providing non scheduled (passenger services) or non schedule charter services (hereinafter called as NSOP/C). In respect of import of aircraft there has been a DGFT notification no. 2(RT-6)2004-09 dated 7.4.2006. This notification allows import of aircrafts and helicopters by a person who has been granted permission by the Ministry of Civil Aviation, Government of India for operating scheduled or non scheduled air transport services subject to the condition that the import of the aircraft or helicopter and there use is in accordance with that permission. This notification, therefore, clarifies that the use of imported aircraft has to confirm to the permission granted by Ministry of Civil Aviation.

9. The minimum requirements for grant of permit as mentioned above, Ministry of Civil Aviation has to relate to:

a. Civil Aviation Requirement Rules. Perusal of these rules, section 3 precisely, clarifies that while issuing the permit to a non scheduled operator, he has to clarify as to whether the aircraft is to be used in private category or as a non-scheduled operator. This article therefore clarifies that NSOP is different from the private aircraft operator.

b. This observation further stands clarified from air transport circular no. 998 dated 21.4.1998 which makes a specific categorisation of NSOP/C flight into following:

i. International Cargo Freight

ii. Non Revenue passenger charter flight:

a. Private aircraft owned by individuals

b. Private aircraft owned by companies/corporations

iii. Aircraft belonging to non scheduled/scheduled operators.

c. Further, Rule 3(43) of Aircraft Rules 1937 defines the private aircraft as an aircraft other than the public/passenger transport.

d. Rule 3(39) of Aircraft Rules 1937 defines passenger aircraft as an aircraft which effects the public transport of passengers. The definition also find place under Rule 3(45) thereof. Also DGCA vide letter dated 30.7.2010 clarified that a non revenue charter flight will fall under the category of private flight.

10. To give further elaboration to the observation that the Aviation Rules and Aircraft Rules intend to create a distinction between public and private operators, we bank upon the meaning of word public in popular dictionary of English. We observed that

a. Collin's Dictionary of English described public to mean:

Community or people in general, New World Dictionary explains public to be people as a whole or community at large,

b. As per New Shorter Oxford Dictionary public is to mean: Public collectively and the

c. Concise Oxford English Dictionary explains public as:

Ordinary public in general, the community at large,

d. Oxford Advanced learners Dictionary has given the meaning to public as: Ordinary people in society in general.

11. Sub clause 1 of the impugned notification talks about non scheduled/passenger charter services, we need to know as to how statute defines these services. It is observed that the definition of non scheduled services is given in this notification itself in explanation (C) thereof as quoted above. The basic characteristics of NSOP appears to be as follows:

a. Aircraft is used either passenger or charter air transport services.

b. On hire or on published tariff.

c. Aircraft is such as is registered with Directorate General of Civil Aviation (DGCA).

d. To be used for such purpose as declared DGCA and approved by it.

e. It must confirm to civil aviation requirement in terms of Rule 133 A (applicable to non scheduled air transport services (charter services) Rules 1937).

12. From the above discussion, we are able to hold that there are three categories of airport transport services operators:

a. Scheduled air transport services operators (SOP)

b. Non scheduled air transport services operators passenger or charter (NSOP/C)

c. Private Operators

Under the impugned notification condition no. 104 to avail the benefit of exemption from payment of customs duty, any of these operators may import an aircraft, however the exemption under Notification No.21/2002-Cus dated 01.03.2002 as amended is available only to SOP and NSOP/C and that to private operators. Scheduled air transport (SOP) services is defined under Rule 3 (49) which is para materia to clause 3.2 of Civil Aviation Rules which says that it is the air transport services undertaken between the two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognisably systematic series, each flight being open to use by members of the public. Aircraft rules define non scheduled air transport services is under Rule 3(49) of Aircraft Rules which is para materia to clause 3.3 of CAR to mean air transport service other than scheduled air transport service being operated for carriage of passengers, mail and goods and includes charter operations. Word air transport has also been defined In Rule 43 of Aircraft Rules to mean all carriage of person effected by aircraft for a remuneration in any nature whatsoever and all carriage of persons or things

effected by such aircraft with such remuneration, if the carriage is effected by an air passenger undertaking."

13. These definitions are sufficient for us to hold that the only difference between two types of air transport services i.e. SOP & NSOP/C lies in the simple fact that one is a scheduled while other is non scheduled (the words passenger and air transport service shall carry the same meaning for the both as discussed above). This would mean that scheduled air transport services involve flight services operated on the basis of a schedule of time whereas the non scheduled air transport services are without any time schedule for the flights. We draw support to this observation from clause 9.2 of passenger CAR which while dealing with non scheduled operator and their operation says "in such operations the operator shall not publish their time schedule as the operations are of non scheduled nature". Other features are common to both scheduled and non scheduled services.

13A. Thus we are of the opinion from the above discussion that scheduled as well as non scheduled air transport services firm (whether for passenger or charter) are open to use by the members of public and as such stands distinguished from what can be called as private use of the aircraft. The another thing which distinguishes scheduled air transport services and non scheduled from being called as the private use of aircraft is being published tariff/hire charges/remuneration against use of the said aircraft by any group but of public. Coming to the clause 2 of the impugned notification where lies the impugned controversy we observe that this notification if read as a whole has two conditions to be complied with at the time of import of aircraft while seeking the exemption from payment of customs duty:-

a. Approval by competent authority in the Ministry Of Civil Aviation to import the aircraft;

b. Furnishing and undertaking by the importer at the time of import to the competent authority i.e. (DGCA) to the effect that the said aircraft shall be used for providing non scheduled passenger/charter services.

14. In the present case as per the Department, this undertaking has been violated due to which the importer appellant is denied exemption of customs duty as was extended to him at the time he imported the aircraft. The DR has relied upon the King Rotors & Air Charter Case (Supra).

15. Per contra it is the case of the appellant that there is no violation of the said undertaking as the competent authority i.e. DGCA is renewing the permit given to the appellant from time to time. While laying this emphasis learned counsel has re-impressed upon the case of Sameer Gahlot (Supra).

16. We observe that both these decisions are diagonally contrast decision rendered by two coordinate benches of this Tribunal due to which a reference was made for the matter to be considered by the Larger Bench. However, before Larger Bench could take into consideration the impugned controversy that the pendency of another appeal titled as *CC Mumbai Vs. Global Vectra Helicorp Ltd. 2016 (332) ELT A188 (SC)* involving the same issue of violation of the undertaking given in furtherance of notification no. 61/2007-Cus dated 3.5.2007 before the Hon'ble Supreme Court was brought to the notice and the Larger Bench thus kept the issue pending till the decision of the Hon'ble Apex court. However, subsequently the Division Bench of this Tribunal in *Reliance Transport and Travels Ltd. (Supra)* case has decided similar controversy in favour of the appellant importer therein distinguishing the facts of *Reliance Transport and Travels Ltd.* case from the case of *King Rotors & Air Charter* as well as that of *Sameer Gehlot's*.

17. The Division bench has specifically held that facts herein are at variance. Support has been drawn from the decision of Hon'ble Supreme Court in the case of *Collector Vs. Al Noori Tobacco Products-2004 (170) ELT 135 (SC)*.

In the present case we are also of the firm opinion that facts of the present case are different from the case of *King Rotors & Air Charter (Supra)* and that of *Sameer Gehlot (Supra)* because the main allegation qua the violation of undertaking was based on the fact that the undertaking was given for using the

aircraft only for NSOP (passenger service) whereas the assessee therein were found to use the same for NSOC (charter services). Both the cases are pre 2010 when there had been an amendment in this notification. With the introduction of new CAR issued by DGCA on 1.6.2010, it has been clarified that non scheduled air transport services can be the passenger as well as charter services simultaneously.

18. Prior to amendment clause (ii)(a) of the notification used to read as:

"The aircraft shall be used only for providing non scheduled passenger services or non scheduled charter services, as the case may be"

Whereas new CAR 2010 rules read this condition as:

"The aircraft shall be used for providing non scheduled passenger services or non scheduled charter services."

19. The deletion of word "only" and "as the case may be" clarifies that prior this deletion the importer/assessee, at the time of import of aircraft had to undertake that the use of aircraft shall be either for Non Scheduled Passenger Services (NSOP) or for non scheduled charter services, (NSOC) whereas post said deletion by way of amendment in year 2010 the undertaking given in terms of condition no. 104 of the impugned notification includes providing both or either of the kind of services without specifying the same in the undertaking. Hence we are of the opinion that irrespective of pendency of issue related to this notification before the Hon'ble Apex Court, the facts of these other cases are very much different from the facts of the present case, the earlier cases being prior the amendment of year 2010 and the present one being post amendment in CAR. The issue in the earlier cases is as to whether undertaking for using the aircraft for non-scheduled operator services includes the use thereof for non-scheduled charter services. The amendment of CAR 2010 clarifies that both are inclusive. The issue in the present case primarily is whether the undertaking for using the imported aircraft of non-scheduled passenger/charter services includes the use thereof only for private purposes or not.

20. Reverting back to the present case, since the undertaking has been given for using the imported aircraft for NSOP/C services published tariff to the public is still the mandatory requirement. Clause 2 of condition no. 104 of notification no. 21/2002 as amended by 61/2007, lays down the requirement that the importer has to furnish the undertaking to the Customs Department to use the imported aircraft only for an avowed purpose. As mentioned in the said undertaking, the purpose of such undertaking is to avail the exemption of customs duty which otherwise were to be paid to the Customs Department except in case of the use of the imported aircraft for the specific purpose in a specified manner as mentioned in the said undertaking. It becomes absolutely clear that any breach of such undertaking will definitely be actionable. From this discussion we hold that furnishing of undertaking by the importer to the Ministry of Civil Aviation (DGCA) to make the specific use i.e. NSOP/C of the said aircraft is sufficient to permit the import of the aircraft, that too with exemption from payment of customs duty. This undertaking binds the importer that he shall use the aircraft for NSOP/C. This indicates that the said use of the aircraft will be possible only after the aircraft is imported pursuant to the said permission of DGCA. Accordingly, we held that the nature of use as to whether it is in terms of the undertaking given or not. can be appreciated only post import.

21. The sole motive of impugned notification is to get exemption from customs duty which is the domain of Customs Department, DGCA has no concern beyond taking on record the furnished undertaking. It shall be a duty of Customs Department only to ensure as to whether the importer after putting the imported aircraft to use, is continuing to be eligible to remain exempted from paying customs duty as per the terms of undertaking furnished by him. Otherwise also, impugned notification has been issued in furtherance of section 25 of Customs Duty Act and the exemption from payment is towards customs revenue. It is definitely the Customs Department's duty to ensure continuous compliance of the undertaking as was furnished by the importer at the time of importing the aircraft. As already discussed above, the usage of aircraft for NSOP/C services continuously against the published tariff the passengers who

are none but the public will satisfy the continuous compliance of the said undertaking. Absence of any of these conditions will make the usage different from NSOP/C services and the said variation will definitely amount to violation of the said undertaking and the benefit of exemption from payment of customs duty as was extended to the importer of aircraft at the time of import thereof shall not be allowed to continue to still be available to the importer.

22. Notifications otherwise have to be strictly and rigidly followed. Interpretation should also be rigid unless and until is required for the intent of legislature. The exemptions from payment of customs duty are granted to the importers with the sole object of extending some benefit to the public at large. Otherwise there seems no reason to have any such exemption clause to air transport service operators. As already discussed above private operators have been differentiated from the scheduled/non scheduled air transport passenger services. Thus we are of firm opinion that any usage of imported aircraft, if amounts to private usage of the said aircraft though under the guise of it being non scheduled NSOP/C air transport services, the same shall definitely be in violation of the undertaking as furnished under condition no. 104 of the impugned notification. Since in absence of the said undertaking the importer was liable to pay customs duty while importing the aircraft, the violation of the undertaking subsequent thereto shall definitely be a case of non payment of customs duty. We therefore, hold that the Customs Department has committed no error while initiating the investigation the Commissioner (Preventive) has committed no error while confirming the demand of customs duty as was allowed to be exempted at the time of import pursuant to the undertaken for using the imported aircraft for NSOP/C used.

23. We conclude from the above discussion in the terms that for seeking the benefit of impugned notification two conditions were required (as already quoted above). The former that is taking an approval from Civil Aviation subject to impugned undertaking as a pre import condition and verifying the compliance of the said undertaking as a post import condition. This finding has been corroborated from clause (ii)(b) of Condition no. 104 of the Notification no. 21/2002 as amended by 61/2007 which has already been quoted above. A perusal makes it abundantly clear that in the event of importer failing to use the imported aircraft for the purpose as is specified in the undertaking that an amount equal to the duty payable on the said aircraft shall be paid by the importer on demand. The amount to be paid apparently and admittedly is the amount of customs duty which was to be paid at the time of import at the undertaking for using the aircraft for the specified purpose i.e. NSOP/C being given. Clause 2A thus clarifies that the correlative right to monitor the manner of use of the aircraft and determine whether it was being used for the said purpose as undertaken vests in Customs Department. The DGCA authority to monitor the manner of utilisation of the permit is subtly another thing which can in no way effect the jurisdiction of the Customs Department. Hon'ble Supreme Court in the case of *Shashank Sea Foods Pvt. Ltd. Vs. UOI reported as 1996 (88) ELT 626 (SC)* while considering analogous question in reference to another notification no. 116/1988-Cus held as follows:

"We do not find in the provisions of import and export policy or the handbook of procedure issued by Ministry of Commerce, Government of India, anything that even remotely suggest that the aforesaid power of Customs authority had been taken away or abridged or that an investigation into such alleged breach could be conducted only by the licensing authority that the licensing authority (DGCA in the present case)."

24. In that case, the licensing authority therein (Ministry of Finance) was empowered to conduct such an investigation as far as downsize of the said notification were concerned while Hon'ble Apex Court held that such power does not by itself preclude the Customs Authority from doing verification on their part.

25. In the present case, neither the Civil Aviation Rules nor Aircraft Rules empower DGCA to investigate about the compliance of the undertaking. The undertaking is given in furtherance of the notification issued by the Customs Department in compliance of the Statutory Provisions of the Customs Act 1962.

The verification as to whether the benefit of exemption from payment of customs duty should continue or not is opined definitely to lie with Customs Department only.

26. In the facts of the present case we observe that the appellant has imported Hawker 850 XP aircraft pursuant to the permission/no objection certificate given by the Ministry of Civil aviation vide B/E No. 21898 dated 21.5.2007. The undertaking as is required under the impugned notification was furnished by the importer appellant on 22.5.2007 to the effect that the aircraft once imported would only be used for providing non scheduled air transport services (passenger only). No doubt the permit is renewed from time to time. It was specifically stated in the undertaking as follows:

"We further undertake to pay on demand, in event of failure to use the said imported aircraft for the specified purpose, an amount equal to the duty payable on the said aircraft but for the exemption under the notification no. 21/2002-cus sl. No. 347 (P) Condition no. 104." Irrespective permit is renewed from time to time but it was not only noticed by the Custom Department but has also been admitted by the importer and as also otherwise apparent from the passenger logbook and passenger manifest that the chairman of the appellants company and other officers of the company have frequently travelled under the category of non revenue flight which can only be for personal use of the company and its officials. The said voluntary statement as never been retracted by the appellant except refuting allegations on the ground that the NSOP permit has been renewed from time to time by DGCA in their favour.

27. Applying the entire above discussion to the facts of the present case, we hold that restricted use of the imported aircraft under the impugned notification only for a particular category of the people takes the use of the said aircraft from the ambit of what is called as 'passenger services' which are otherwise meant to be open to public. No doubt the restricted group is a part of public and the person in the group are in any case the member of the public but the use of the aircraft which has been undertaken to be used for public as such it gets restricted to a particular group irrespective that restricted group is paying revenue or not it comes out of the ambit of the authorised public use of such imported aircraft. The notification condition requires not merely the payment of revenue per usage of such aircraft either for passenger or for charter services; either against the issuance of individual tickets or the price for the aircraft as a whole in case of charter, it requires that the use of the aircraft has to be kept open to public at large or to any other group of the said public not so restricted as to mean private; it shall forfeit the intention of legislature. It has been brought to the notice that Global Vectra Case stands decided by Hon'ble Apex Court with following findings:

"Offering service to the public at large also included entering into agreement for providing regular service to a few members of the of the public on a regular basis over a period of time. The expression person included company which also forms part of the general public. Further, printing of tickets was not the essential requirement of the Notification. Therefore, denial of benefit of Notification no. 21/2002-Cus as amended by Notification no. 61/2007-Cus on the ground that imported helicopters were not used in providing non-scheduled passenger services and no printing tickets issued, could not be justified."

28. The Department's circular that the benefit of notification is still available if the aircraft is providing NSOP/C certificate to the related or group company the same also doesn't hold good in the present case because there is no evidence about anyone else except the Oberoi Group to have used the impugned aircraft in the given circumstances that too without any tariff. The usage, of the impugned aircraft post import is not for non scheduled passenger/ charter air transport services but only for private use. The same amount to violation of the undertaking based upon which the exemption was granted to the appellant from paying the customs duty. Consequent to the said violation the appellant has made himself liable to pay the said customs duty as if he has failed to pay the same at the relevant point of time to the jurisdictional customs authority from any point of imagination cannot be ruled out. They are held to vest with the jurisdiction to demand the customs duty. Since the benefit of exemption has been claimed by giving an undertaking whereupon the appellant has failed to

stand with the possibility of intent of the appellant to evade said duty at the time of import of the aircraft cannot be ruled out especially when there is no evidence produced on record by the appellant.

29. In the light of the entire above discussion we do not find any ambiguity or infirmity in the order under challenge. Same is hereby upheld. Appeal stands dismissed.

(Order pronounced in the open court on 14.01.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

**Customs Miscellaneous Application No. 50487 of 2019
(on behalf of appellant) in
Customs Appeal No. 51007 of 2019**

Arising out of the Order-in-Original No. 01/2019/Pr. COMMR/IMP/ICD/TKD,
Dated: 28.01.2019

Passed by The Commissioner of Customs (Import), Inland Container Depot,
Tughlakabad, New Delhi

Date of Hearing: 28.08.2019

Date of Decision: 24.02.2020

**M/s BIRD RETAIL PVT LTD
E-9, CONNAUGHT HOUSE, CONNAUGHT PLACE
NEW DELHI - 110001**

Vs

**COMMISSIONER OF CUSTOMS (IMPORT)
INLAND CONTAINER DEPOT, TUGHLAKABAD
NEW DELHI**

WITH

Customs Appeal No. 51008 of 2019

Arising out of the Order-in-Original No. 01/2019/Pr. COMMR/IMP/ICD/TKD,
Dated: 28.01.2019

Passed by The Commissioner of Customs (Import), Inland Container Depot,
Tughlakabad, New Delhi

**SHRI RONY ABRAHAM, MANAGER SALES
M/s BIRD RETAIL PVT LTD
E-9, CONNAUGHT HOUSE, CONNAUGHT PLACE
NEW DELHI - 110001**

Vs

**COMMISSIONER OF CUSTOMS (IMPORT)
INLAND CONTAINER DEPOT, TUGHLAKABAD
NEW DELHI**

AND

Customs Appeal No. 51009 of 2019

Arising out of the Order-in-Original No. 01/2019/Pr. COMMR/IMP/ICD/TKD,
Dated: 28.01.2019

Passed by The Commissioner of Customs (Import), Inland Container Depot,
Tughlakabad, New Delhi

**SHRI ANKUR BHATIA, DIRECTOR
M/s BIRD RETAIL PVT LTD
E-9, CONNAUGHT HOUSE, CONNAUGHT PLACE
NEW DELHI - 110001**

Vs

**COMMISSIONER OF CUSTOMS (IMPORT)
INLAND CONTAINER DEPOT, TUGHLAKABAD
NEW DELHI**

Appellant Rep by: Shri J M Sharma, Consultant

Respondent Rep by: Shri Rakesh Kumar, AR (DR)

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 50362/2020

Per: C L Mahar:

The brief facts of the matter are that the appellant No. I was appointed a distributor of "Segways" manufactured and patented by M/s Segways Inc., U.S.A. for Indian territory on 01/02/2010. The agreement authorized the appellant No. I as the distributor for Segway and thereafter have been revalidated on 01/11/2012 and 19/03/2015. As per the agreements, the appellant are required to sale the Segway products/Segway personal transport products purchased from M/s Segway Inc., U.S.A. The appellant have been importing 'Segway' product in CKD condition in the form of very assemblies such as power assembly, transmission assembly, wheel assembly etc. as well as Air Cargo Complex, New Delhi wherein they have filed bills of entry for assessment and clearance of the imported consignment declaring the product as "CKD Parts of electrically operated two wheeler/personal transport/lithium ION battery for captive use". The product has been classified under Customs Tariff Heading 87149990/87144011 etc. They have also claimed benefit of Notification No. 21/2002- Cus. dated 01/02/2002 (Sl. No. 345) and Notification No. 12/2012-Cus. dated 17/03/2012 (Sl. No. 443 and 444). The department working on an intelligence has initiated investigations against the appellant for mis-declaration of the product at the time of import and have entertained a view that the importer/appellant have imported a complete units of the Segway personal transport self-balancing vehicle in CKD condition. However, at the time of the import, they have mis-declared the same as "CKD parts of personal transport/electrically operated two wheelers for captive use and have mis-classified the same under Customs Tariff Heading 87149990 and thereby has evaded huge amounts of customs duty. It's a matter of record that during the course of investigation, the Departmental officer have visited the business premises of the appellant and the appellant was asked to produce the sample of the imported consignments. Shri Rony Abraham (appellant No. II) was present at the time of the visit of the DRI officers at their business premises. On the request of the DRI officers, Shri Rony Abraham presented sample of the imported vehicle/item before one Shri Vinod Soorma, Chartered Engineer which was appointed by the Department for examining the sample of the imported consignment. Shri Vinod Soorma, Chartered Engineer after examination of the goods and submitted his report on 01/08/2016 saying that :

"(i) this is to certify that I have inspected/examined the following units, which were imported by M/s Bird Retail Pvt. Ltd., New Delhi. The same were found in the form of assemblies off. ; (a) transmission assembly, (b) power base assembly (without batteries) ; (c) wheel assembly with tyre (d) info key [incomplete form].

(ii) All the above units were in the form of assemblies and not in knocked down condition. These units were in the form of assemblies are absolutely complete and are ready for use and only to be attached and fixed each other for use of the final product namely Segway. The said inspection was carried out at DRI, New Delhi office on 26/07/2016.

2. During the course of investigation, the DRI officers have also made a request to the National Automobile Testing and R&D Infrastructure Product, NBCC Place, Lodhi Road, New Delhi to depute a suitable expert for examining gear box and transmitting assembly imported by the appellant. One Shri Devesh Parikh, Deputy Manager was deputed by National Automobile Testing and Infrastructure Institute on 22 December 2016. Shri Devesh Parikh after examining the samples of gear boxes and power base of the Segway submitted that the gear box and power base were in assembled condition.

3. After investigation, show cause notice was issued to the appellants by the Principal Commissioner/Commissioner of ICD, Tughlakabad, whereunder the appellants were asked to reply as to why -

(A) (1) The Segway (electrically operated) imported by them in parts with Gear Box/Power Base in Pre-assembled form mis-declaring them CKD parts of

electrically operated two wheeler/of Personal Transport/Lithium ION Battery for captive use as detailed in Serial No. 1, 2 & 7 of Annexure - A to the Show cause Notice, should not be classified under CTH 87119091 and the benefit of Notification No. 12/2012-Cus. (Serial No. 444) dated 17/03/2012, as amended, fraudulently claimed by them towards the import of these goods should not be denied and BCD @ 30% should not be charged in view of Notification No. 12/2012-Cus. (Serial No. 443) (1) (b) dated 17/03/2012, as amended, towards the import of these goods ;

(2) The seized goods valued at Rs. 20,43,777/- should not be confiscated under Section 111 (m) of the Customs Act, 1962 ;

(3) The imported goods valued at Rs. 2,84,79,194/- other than the seized goods, as mentioned in Sr. No. (i) above should not be held liable for confiscation under Section 111 (m) of the Customs Act, 1962 ;

(4) The differential Customs duty amounting to Rs. 73,24,680/- (Rupees Seventy Three Lacs Twenty Four Thousand Six Hundred and Eighty only) evaded/ short paid by them as detailed in Serial No. 1, 2 & 7 to Annexure - A to the show cause notice should not be demanded and recovered from them by invoking the extended period as per provisions of Section 28 (4) of the Customs Act, 1962 ;

(5) Interest should not be demanded and recovered from them on the aforesaid evaded/short paid Customs duty in terms of Section 28AA of the Customs Act, 1962 ;

(6) Penalty should not be imposed upon them under Section 114A and 114AA of the Customs Act, 1962, as discussed in paras above ;

(A1) Now, therefore, that Shri Ankur Bhatia, Director of M/s Bird Retail Pvt. Ltd., E-9, Connaught House, Connaught Place, New Delhi - 110 001 and Shri Rony Abraham, Manager (Sales) M/s Bird Retail Pvt. Ltd., E-9, Connaught House, Connaught Place, New Delhi - 110 001 are hereby called upon to show cause to the Principal Commissioner/ Commissioner of Customs (Import), Inland Container Depot, Tughlakabad, New Delhi - 110 020 within 30 days of the receipt of this notice, as to why penalty should not be imposed upon them under Section 112 and/or 114AA of the Customs Act, 1962, as discussed in paras above".

(B) Now, therefore, M/s Bird Retail Pvt. Ltd., E-9, Connaught House, Connaught Place, New Delhi - 110 001 are hereby called upon to show cause to the Additional/ Joint Commissioner of Customs, Air Cargo (Import), New Custom House, Near I.G.I. Airport, New Delhi - 110 037 within 30 days of the receipt of this notice, as to why -

(1) The Segway (electrically operated) imported by them in parts with Gear Box/Power Base in Pre-assembled form mis-declaring them CKD parts of electrically operated two wheeler/of Personal Transport/Lithium ION Battery for captive use as detailed in Serial No. 3, 4, 5, 6, 8 & 9 of Annexure - A to this Show cause Notice, should not be classified under CTH 87119091 and the benefit of Notification No. 12/2012-Cus. (Serial No. 443 (1) (a) and 444) dated 17/03/2012, as amended, fraudulently claimed by them towards the import of these goods should not be denied and BCD @ 30% should not be charged in view of Notification No. 12/2012-Cus. (Serial No. 443) (1) (b) dated 17/03/2012, as amended, towards the import of these goods ;

(2) The seized goods valued at Rs. 6,86,154/- should not be confiscated under Section 111 (m) of the Customs Act, 1962 ;

(3) The imported goods valued at Rs. 1,23,33,275/- other than the seized goods, as mentioned in Sr. No. (i) above should not be held liable for confiscation under Section 111 (m) of the Customs Act, 1962 ;

(4) The differential Customs duty amounting to Rs. 32,16,660/- (Rupees Thirty Two Lacs Sixteen Thousand Six Hundred and Sixty only) evaded/ short paid by them as detailed in Serial No. 3, 4, 5, 6, 8 & 9 to Annexure - A to the show cause notice should not be demanded and recovered from them by invoking the extended period as per provisions of Section 28 (4) of the Customs Act, 1962 ;

(5) Interest should not be demanded and recovered from them on the aforesaid evaded/short paid Customs duty in terms of Section 28AA of the Customs Act, 1962 ;

(6) Penalty should not be imposed upon them under Section 114A and 114AA of the Customs Act, 1962, as discussed in paras above ;

(B1) Now, therefore, that Shri Ankur Bhatia, Director of M/s Bird Retail Pvt. Ltd., E-9, Connaught House, Connaught Place, New Delhi - 110 001 and Shri Rony Abraham, Manager (Sales) M/s Bird Retail Pvt. Ltd., E-9, Connaught House, Connaught Place, New Delhi - 110 001 are hereby called upon to show cause to the Additional/Joint Commissioner of Customs, Air Cargo (Import), New Custom House, Near I.G.I. Airport, New Delhi - 110 037 within 30 days of the receipt of this notice, as to why penalty should not be imposed upon them under Section 112 and/or 114AA of the Customs Act, 1962, as discussed in paras above".

(C) Now, therefore, M/s Bird Retail Pvt. Ltd., E-9, Connaught House, Connaught Place, New Delhi - 110 001 are hereby called upon to show cause to the Deputy/Assistant Commissioner of Customs, Inland Container Depot Patparganj, Delhi within 30 days of the receipt of this notice, as to why -

(1) The Lithium Ion Batteries (which were the essential part of the Segway (electrically operated) imported by them in parts with Gear Box/Power Base in Pre-assembled form vide Bill of Entry No. 5146942 dated 04/05/2016 at New Custom House, Air Cargo (Import), Near I.G.I. Airport, New Delhi) imported by them by mis-declaration as Lithium Ion Batteries for Segway for captive consumption vide B/E No. 5413240 dated 27/05/2016 as detailed in Serial No. 10 of Annexure - A to this Show cause Notice, should not be classified under CTH 87119091 as part of the complete Segway and BCD @ 30% should not be charged in view of Notification No. 12/2012-Cus. (Serial No. 443 (1) (b)) dated 17/03/2012, as amended, towards the import of these goods ;

(2) The seized goods valued at Rs. 7,64,643/- should not be confiscated under Section 111 (m) of the Customs Act, 1962 ;

(3) The imported goods valued at Rs. 1,91,161/- other than the seized goods, as mentioned in Sr. No. (i) above should not be held liable for confiscation under Section 111 (m) of the Customs Act, 1962 ;

(4) The differential Customs duty amounting to Rs. 2,32,032/- (Rupees Two Lacs Thirty Two Thousand and Thirty Two only) evaded/ short paid by them as detailed in Serial No. 10 to Annexure - A to the show cause notice should not be demanded and recovered from them by invoking the extended period as per provisions of Section 28 (4) of the Customs Act, 1962;

(5) Interest should not be demanded and recovered from them on the aforesaid evaded/short paid Customs duty in terms of Section 28AA of the Customs Act, 1962 ;

(6) Penalty should not be imposed upon them under Section 114A and 114AA of the Customs Act, 1962, as discussed in paras above ;

(C1) Now, therefore, that Shri Ankur Bhatia, Director of M/s Bird Retail Pvt. Ltd., E-9, Connaught House, Connaught Place, New Delhi - 110 001 and Shri Rony Abraham, Manager (Sales) M/s Bird Retail Pvt. Ltd., E-9, Connaught House, Connaught Place, New Delhi - 110 001 are hereby called upon to show cause to the Deputy/Assistant Commissioner of Customs, Inland Container Depot Patparganj, Delhi within 30 days of the receipt of this notice, as to why penalty should not be imposed upon them under Section 112 and/or 114AA of the Customs Act, 1962, as discussed in paras above".

4. The matter has been got adjudicated vide order-in-original No. 1/19/Pr. Commr./Import/ICD/TKD dated 28 January 2019. Vide the impugned order dated 28 January 2019 all the charges as leveled in the show cause notice have been confirmed by the Adjudicating Authority. The appellant are before us against the impugned order-in-original.

5. The learned Advocate appearing for the appellant has submitted that the appellant have imported the goods vide finally assessed bills of entry through

ICD, TKD Tughlakabad at ICD Airport, New Delhi and ICD, Patparganj, New Delhi at lower rate of the basic customs duty at 10% in terms of Notification No. 21/2002-Cus. dated 01/02/2002 under Sl. No. 345 and thereafter under Notification No. 12/2012-Cus. dated 17/03/2012 by declaring the same as CKD parts assembly (part of electrically operated two wheeler for captive use) classifying the same under Customs Tariff Heading 87149990 primarily. The lithium Ion battery imported separately were classified under Chapter Heading 85076000 and appropriate rate of customs duty under the said heading has been paid at the time of import. The learned Advocate has contended that the Adjudicating Authority has erred in classifying the product under CTH 87119091 as this heading is applicable only for electrically operated motorcycles (including mopeds) and cycle fitted with auxiliary motors with or without cars. The learned Advocate has tried to impress that Segway in common parlance is not understood as motorcycle or moped or cycle fitted within an auxiliary motor. It has further been added by the learned Advocate that the Adjudicating Authority has wrongly taken a view that wheel power fitted for movement of a person are akin to the goods covered under CTH 8711. It has been the contention of the learned Advocate that Segway being battery operated vehicle cannot be classified to be a motor vehicle as per Motor Vehicle Act, 1988 as its maximum speed is 12.5 miles per hour equal to 20 km. and, therefore, Segway cannot be equated with the electrically operated motorcycle or moped or cycle fitted with the auxiliary the motor. It has further been argued that though the appellant had classified their product under a particular customs tariff heading and if the Department wants to change the classification of the product to some other tariff heading the burden of proof for classifying the product in a different tariff heading has to be discharged by the Department. The learned Advocate has taken reliance of following cases in support of his argument on this count : (a) *Commissioner of Central Excise, Nagpur versus Vicco Laboratories - 2005 (179) E.L.T. 17 (S.C.)* ; (b) *Raptakos Brett & Co. Ltd. versus Commissioner of Central Excise, Raigad - 2014 (307) E.L.T. 565 (Tri. - Mumbai)*

6. It has further been submitted that the Commissioner has wrongly denied them the benefit under Notification No. 12/2012-Cus. dated 17/03/2012 at Sl. No. 443 (1) (a) saying that the gear box imported by the appellant were in pre-assembled condition at the time of the import and, therefore, the benefit of above said notification is not available to the appellant. The learned Advocate submitted that the basic evidence for denying the benefit of this notification to the appellant is Chartered Engineer certificate and Chartered Engineer Shri Vinod Soorma has not been made available for cross-examination to the appellant at the time of adjudication. The report given by him cannot therefore be made basis for arriving at the conclusion that the gear box imported by them were at the pre-assembled form.

7. Regarding opinion of Shri Devesh Pareekh, it is submitted that during cross examination, in reply to question 7, he stated that the parts shown to him were not motorcycle parts and were parts of Segway. The opinion of Shri Pareekh doesn't support the Department's case that others electrically operated motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side-cars classifiable under CTH 87119091 were imported.

8. The appellant further submit that learned Commissioner erred in denying the alternative submission of the appellant claiming benefit of Notification No. 12/2012-Cus. dated 17/03/2012 as per entry 444. Entry 444 of the said notification is extracted below for ready reference.

1	2	3	4	5	6
444	8714 91 00, 8714 92, 8714 93, 8714 94 00, 8714 95, 8714 96 00. 8714 99	All goods other than Bicycle parts and components	10%	-	-

A perusal of packing list will show that the parts (in sets) required to assemble Segways classifiable under Chapter Heading 8714 9990 are fully covered under

Serial No. 444 of Notification No. 12/2012-Cus. dated 17/03/2012 attracting basic customs duty @ 10%.

It has further been submitted that all the ten bills of entry, after examination and after several queries from the Customs Appraising Officers, were cleared against 10 finally assessed bills of entry. All the invoices, packing list etc. were submitted to the Department and nothing was concealed or suppressed by the importer. The value of goods and the description of goods declared by the appellant has not been disputed by the Department. The only dispute relates to interpretation of clauses of Notification No. 12/2012-Cus. dated 17/03/2012; therefore invoking extended period of limitation in respect of 7 B/E dated prior to 11/01/2015 (beyond two years), ignoring the various submissions of the appellant discussed in Ground - G of the appeal, is not sustainable.

9. That the learned Commissioner in the impugned order confiscating the seized goods and holding other than seized goods liable to confiscation u/s 111 (m) of Customs Act 1962 and imposing penalties u/s 112, is not sustainable. The appellant also submit that as per Annexure - A of the show cause notice the differential duty has been demanded in respect of all goods including seized goods, which were cleared for home consumption against 10 finally assessed B/E. The said goods are not covered by the definition of imported goods which definition excludes goods which have been cleared for home consumption. The duty less paid on such goods can be recovered under Section 28 of the Customs Act, 1962. In the present case the notice for recovery of differential duty has been issued under Section 28 (4) of the Customs Act, 1962.

10. The penal provisions in respect of duty short paid etc. are contained in Section 114A of the Customs Act, 1962 which Section 114A contains inter-alia a proviso that where any penalty has been levied under Section 114A, no penalty shall be levied u/s 112 or Section 114. The said Sections 112 and 114 provide for penalties consequent to confiscation of goods or holding goods liable to confiscation u/s 111 or 113 of the Act *ibid*. It is appellant submissions that once demand of differential duty on disputed goods u/s 28 of the Customs Act has been issued, the penalty under Section 114A can only be imposed. The provisions contained in Sections 111 and 112 cannot be invoked in respect of same goods which are outside the definition of imported goods under Section 2 (25) of the Customs Act, 1962.

11. That the learned Commissioner's impugned order imposing penalty on appellant No. 1 under Section 114A and 114AA are not acceptable.

12. We have also heard the learned Departmental Representative who has vehemently supported the findings as given in the impugned order-in-original.

13. We have heard both the sides and have also perused the record of the appeal.

14. The issue for consideration before us in these proceedings is whether the consignments imported by the appellant vide 10 subject bills of entries were 'Segway electrically operated personal balancing vehicle' in condition of completely knocked down condition classifiable under Chapter Heading 87119091 or whether these were CKD parts and assemblies of parts of electrically operated two wheelers for captive use as declared by the appellant in their import bills of entries whereunder they have classified the same under Chapter Heading 87149990 and whether the appellant are entitled for the benefit of the Notification No. 21/2002-Cus. dated 01/02/2002 (Sl. No. 345) and Notification No. 12/2012-Cus. dated 17/03/2012 (Sl. No. 443 and 444); (ii) whether the appellants have mis-declared the description of the imported goods with an intent to evade customs duty ; (iii) whether appellant are liable to pay the differential amount of the customs duty under Section 28 (4) of the Customs Act, 1962 and are also liable for penalty under provisions of Section 112, 114A and 114AA of the Customs Act, 1962. Before proceeding further in the matter, it is relevant to first have a glance at what is being imported by the appellant. It emerges from the investigation that the appellant No. II namely Shri Rony Abraham business head of the appellant No. I has submitted the samples of the import consignment which were in the 'same form and condition' as were being

imported by them before the officers as well as before Shri Vinod Soorma - Chartered Engineer. The samples of the imported goods were in the form of power base, transmission assembly, gear box, info key and wheels with tyres. These products were produced before the Chartered Engineer. The Chartered Engineer vide his report dated 1 August 2015 submitted as follows :

"This is to certify that I have inspected/ examined the following units which were imported by M/s Bird Retail Pvt. Ltd., New Delhi. The same were found in the form of assemblies of -

- 1. Transmission Assembly ;*
- 2. Power Base assembly (without Batteries) ;*
- 3. Wheel Assembly with tyre ; and*
- 4. Info Key (in complete form).*

All the above units were in the form of assemblies and not in knocked down condition. These units which are in the form of assemblies, are absolutely complete and are ready for use and only need to be attached/fixed to each other for use off the final product i.e. Segway. The said inspection was carried out at DRI - Delhi office on 26/07/2016".

15. During the course of investigations statement of several other relevant persons including Shri Rony Abraham - appellant No. II were recorded. Shri Rony Abraham in his statement dated 08/07/2016 has stated that Segway were being imported by them in parts and they consisted with the following components :

*"(i) **Power Base** : which was the main part of the Segway and was in the form of a platform on which the rider stands and which contains sensons, computer parts etc. ;*

*(ii) **Info Key** : the remote control which controls the operation of the Segway (all the components required for operations of the Segway were contained in it) ;*

*(iii) **Fender frame** : which was made of plastic ;*

*(iv) **Wheel** : used in the Segway for its movement, each wheel consisted of one rim, one tyre and one tube (only in 12 model) ;*

*(v) **Gear Box** : mentioned as transmission assembly in the Bill of Entry and which controls the speed of the Segway requiring no further assembly ;*

*(vi) **Battery** : imported in complete ready to use condition, each Segway having two batteries.*

That all the components required for assembly of a Segway were being imported in a single Bill of Entry or mere including Nuts, screw etc., user manual as received from the manufacturer; that they neither procured nor required any local part/component for assembling a Segway and the same was being assembled with the imported parts only; that Segway could be assembled easily with the help of instructions contained in the manual being imported with the help of the available imported components; that the parts/components being imported were not further worked except to assemble them in to a Segway".

16. Further Shri Devesh Pareekh, Deputy Manager, International Centre for Automobile Technology at Manesar on 22 December 2016 has examined the samples of the gear boxes imported as transmission assembly by the appellant as well as the power base in presence of Shri Rony Abraham (appellant No. II) and specifically opened that samples of gear box/ transmission assembly and power base were in "pre-assembled form".

17. We find from the above facts that it categorically emerges from the entire discussions, which have also been not rebutted by the appellant, that under the various bills of entries the appellant have imported all parts including screw, nuts and user manual etc. for assembling Segway in India. The parts and assemblies imported were not subjected to any modification or addition of the local parts or hardware. The imported assemblies, such as, transmission assembly, power base assembly, wheel assembly with tyre, info key assembly and batteries were just put together by following the instructions with the screw

driver technology and complete Segway unit came into existence. It also emerges from the entire investigation that gear box mentioned as the transmission assembly were imported in the form of the pre-assembled unit and same were used, as such, while assembling the 'Segway' the final product.

18. It also emerges that no plant, machinery was required for assembling 'Segway' imported by the appellant and the 'Segway' were imported in the CKD condition, which were got assembled with the help simple hand tools like spanner, screw driver etc. and it also emerges from the investigations that sometimes the product were got assembled at the buyer's premises itself.

19. Thus, it emerges that the Segway product was being imported in a CKD condition under various bills of entries and same was got assembled in India for further sale with the simple screw driver technology. It is also matter of fact that the parts such as Power Base, Gear Box were imported in assembled forms and not in CKD condition and thus these crucial parts were assembled/ready to use components for further assembly of 'Segway' product.

20. For deciding the appropriate classification for imported consignments of the Segway in CKD condition it will be appropriate to have look at the relevant Customs Tariff Heading 8711 and 8714.

21. It can be seen that Chapter 8711 covers primarily motorcycles and like products which includes mopeds, side cars, scooters as well as electrically operated bicycles. It is relevant to mention here that Harmonization Committee of the World Customs Organization in its 58th Session of the Committee has further elaborated the scope of classification under Chapter Heading 8711 to cover the products such as self-balancing, electrically power two wheel transportation devices which are known by various names, such as, hover board, smart scooter, drift vehicle. The relevant extract is reproduced here below :-

No.	Product Description	Classification	HS Codes considered	Classification rationale
17	Self-balancing, electrically - powered, two-wheeled transportation device (commercially known as "hoverboard", "smart scooter", or "drift vehicle"), designed for use within low speed areas such as pavements (sidewalks), paths, and bicycle lanes. The maximal speed of the device is 10 km/h and maximum distance per charge is 15 - 20 km.	8711.60 (HS 2017)	87.11 and 95.03	GIRs 1 and 6

The Segway product which is the subject matter of this dispute also falls under this very category.

22. It can also be seen that as per the interpretative rules to the Customs Tariff Act, the general rule for interpretation of the Schedule II provides as follows :-

"Rule 2 (a) : Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished for falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled".

23. The above-mentioned Rule 2 (a) makes it clear that any product, which is imported in the form of completely knocked down condition (CKD) and if such components imported in CKD condition have all the essential ingredients to work as a complete vehicle after assembly of the same, in that case such components need to be classified as a complete motor vehicle, motorcycle etc. In the present case it has very categorically been established that the products which were imported were completed assemblies of the components when put together would work as complete Segway product. It has also categorically been opined by the Chartered Engineer who in his report dated 1 August 2016 has categorically certified that the various assemblies which have been imported by the appellant, such as, transmission assembly, power base assembly (without batteries), wheel assembly with tyre and info key etc. were imported in the form of the assemblies not in the knocked down condition and the final product namely Segway can be made just by attaching these assemblies with the simple screw driver technology. Thus, it proved without any doubt that what has been imported by the appellant were various assemblies, such as, transmission assembly, power base assembly etc. to make a product called Segway. Thus, it can be seen that the correct classification for the product imported in the CKD condition as is the case in this particular appeal, same need to be classified under Chapter sub-Heading 87119091. We have also analyzed the declaration which have been made by the appellant while making import of various complete assemblies of various components of Segway and find that the classification adopted by the appellant was under CTH 87149990, which primarily pertains to parts and accessories of the vehicles of heading classifiable under 8711 to 8713. Since it has already been established with the help of an expert that the components imported by the appellant while put together will form a complete operative Segway product. We, therefore, feel that classification claim by the appellant while getting clearance of the consignment appears to be not correct. Since the technical person has given his categorical finding that what has been imported by the appellant were the Segway product in the CKD condition and the appellant did not have any evidence to contradict the finding of the technical expert, we are inclined to accept the opinion expressed by the technical expert. We also take support of a decision given by Hon'ble Gujarat High Court in the case of *Inter Continental (India) versus Union of India - 2003 (154) E.L.T. 37 (Guj.)*. to rely on the expert opinion. The relevant extract of the above decision is reproduced here below :-

"19. Mr. Patel during the course of discussion referred to the provisions of Prevention of Food Adulteration Act, 1954 as well as Rules thereunder with special reference to Sec. 6 of the said Act and Rule 5 which defines standards of quality on various articles as specified in Appendix "B" to the Rules. Our attention was invited to various standards set out in Appendix "B" to urge that only slight difference was there between the different kinds of oils for the purpose of ascertaining whether oil was of edible grade or not. It is not necessary for our purpose to deal with the various technical aspects laid down in Appendix "B" for the simple reason that it is an admitted position between the parties that when the imported goods entered territorial waters of India, the Boarding Officer had drawn samples of the product for test in the presence of the representative of the Master of Vessel, the Shipping Agent and representative of the Importer; and such samples had been sent for testing to the Chemical Examiner, Customs House, Kandla, who has opined that the same does not conform specification for crude palm oil (edible grade) as per IS-8323-E-1977. It appears that the said sample was also forwarded through the Referral Hospital and Community Health Centre, Mundra-Kutch, to the Public Analyst, Food and Drug Laboratory, Vadodara for opinion. He has opined to the effect that the sample conforms to the standards and provisions laid down under the Prevention of Food Adulteration Rules, 1955, for palm oil and cannot be used as such for human consumption. Therefore, once the competent authority who is technically qualified to tender opinion in relation to the technical standards prescribed under the provisions of Food Adulteration Act and Rules thereunder has tendered his opinion it would not be open to any one to take a contrary stand, unless and until such technical opinion is displaced by specific and cogent evidence in the form of another technical opinion. Merely by approaching the matter by stating that the goods could be converted into palm oil of edible grade by carrying out certain processes, the respondent No. 3 who is

an officer of the department cannot displace the report of technical expert, nor can he insist that inspite of such report the importer must establish that end-use of the product shall not be other than one as regards entry in which the goods admittedly fall at the time of import".

24. Now coming to the question whether the benefit of the Notification No. 12/2012-Cus. dated 17/03/2012 is available to the appellant or not it will be proper to have a glance at the relevant entry of the above notification for sake of convenience:-

443.	8711	Motor Cycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars, and side cars, new, which have not been registered anywhere prior to importation, - (1) As a completely knocked down (CKD) kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle, with, - (a) Engine, gearbox and transmission mechanism not in a pre-assembled condition ; (b) engine or gearbox or transmission mechanism in pre-assembled form, not mounted on a body assembly, (2) in any other form.	10% 30% 60%	-- -- --	-- -- --
444.	87149100, 871492, 871493, 87149400, 871495, 87149600, 871499	All goods other than Bicycle parts and components	10%	--	--

25. It can be seen from the entry 443 of the above-mentioned Notification No. 12/2012-Cus. dated 17/03/2012 that the concessional rate of Customs duty @ 10% available under category 1 (a) for engine, gear box and transmission mechanism not in a pre-assembled condition. We find that the benefit under this category has wrongly been claimed and availed by the appellant as from the expert opinion as well as from the facts of the matter it has come out specifically that what has been imported by them were not CKD condition components or parts, such as, engine, gear box, transmission mechanism etc. rather they were in the form of completely assembled components in the form of transmission assembly, power base assembly, wheel assembly with tyre etc. and, therefore, the benefit of the concessional rate of the duty were certainly not available to them.

26. In view of entire above discussion, we find that appellant have mis-declared their import consignment and what they have imported were Segway product classifiable under Customs Tariff Heading 87119091 in completely knocked down condition. We, therefore, uphold the findings of the impugned order-in-original classifying the import consignments under 87119091. We also find no reason to interfere with the order-in-original with regard to demand of Customs duty under Section 28 (4) of the Customs Act, 1962 by invoking the extended time proviso as we find that the appellant have been fully aware as to what is being imported by them and they have consciously mis-declared their product as CKD parts of electrically operated two wheelers of captive use classifying the same under chapter sub-Heading 87149990. As discussed in preceding paragraphs it is come out very categorically that what has been imported by the appellant was Segway product in the CKD condition which required to classified under Chapter sub-Heading 87119091. This attempt of mis-declaration was consciously was done to evade customs duty by availing concessional rate of the duty. Notification No. 12/2012- Cus. dated 17/03/20912. In view of this, we

uphold the correlating finding of the order-in-original with regard to confiscation of the mis-declared goods under Section 111 (m) of the Customs Act, 1962 as well as imposition of the penalties on the appellant No. 1 as per the provision of Section 114A and 114AA of the Customs Act, 1962 as well as the demand of the interest under the provisions of the Customs Act under Section 28AA.

27. With regard to imposition of penalty on appellant No. 2 namely Shri Rony Abraham, Manager Sales and appellant No. 3 namely Shri Ankur Bhatia, Director of the appellant No. 1. From the record of the appeal, we find that both the appellant 2 and 3 were fully aware that M/s Bird Retail Pvt. Ltd. is importing complete Segway electrically operated product in CKD condition by mis-declaring the same as CKD parts of components such as Power unit, transmission kit etc. Both the appellants were aware that the components which have been imported just indeed screw drive technology to make the same as functional Segway product. Shri Rony Abraham, Sales Manager was looking after the work pertaining to import, preparation of import documents and liaising with the customs clearing agent and subsequent sale of Segway products in a complete functional form. Shri Ankur Bhatia was controlling the activity of the imports as he was financing the same and gave financial approval for various activities of the import of the Segway product. Both of them were instrumental and devising a modus-operandi to evade customs duty by wrongly availing the benefit of the Notification No. 12/2012-Cus. dated 17/03/2012. Considering the involvement of both the appellants in entire activity, we feel that the Adjudicating Authority is right in imposing penalty upon them under provision of Section 114A and Section 114AA of the Customs Act, 1962 and we refrain from interfering the finding and imposition of the penalty upon these two appellants also.

28. The miscellaneous application filed by the appellant for additional ground have also been considered and while deciding the above appeal and same are also being kept in mind and accordingly the miscellaneous application also stand disposed of as being decided in the case of the main appeal.

29. In view of above, all the appeals are dismissed.

(Order pronounced in open court on 24.02.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 51059 of 2019 [DB]

Arising out of Order-in-Appeal No. 02/2019/PC/MKS/ICD/TKD, Dated:
04.02.2019

Passed by the Principal Commissioner, New Delhi

**Date of Hearing: 23.08.2019
Date of Decision: 23.08.2019**

**M/s KEIHIN AUTOMOTIVE SYSTEMS INDIA PVT LTD
KEIHIN INDIA MANUFACTURING PRIVATE LTD
A-1 AND 2, SECTOR-81, PHASE-II
NOIDA, GAUTAM BUDDHA NAGAR UTTAR PRADESH-201305**

Vs

**OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS
ICD TUGHLAKABAD (IMPORTS) INLAND CONTAINER DEPOT
TUGHLAKABAD, NEW DELHI**

Appellant Rep by: Shri Rahul Shukla & Ms Sakshi, Advs.

Respondent Rep by: Shri Rakesh Kumar (DR)

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 51548/2019

Per: Rachna Gupta:

M/s Keihin Automotive Systems India Pvt. Ltd. (KASIPL) is a company incorporated which is engaged in imports of fuel pump unit assembly. Various bills of entry from 29.01.2014 to 18.02.2016 for import of said fuel pump from Thailand at a combined assessable value of Rs. 426752486/- were filed by the Appellant. They were classifying the said goods under the tariff item 8409-91-99 of first schedule to Customs Tariff Act, 1975 (Tariff Act). And were availing exemption from Basic Customs Duty BCD) in furtherance of notification 85/2004-CUS dated 31.08.2004 which provides for exemption from BCD to the extent of 50% of the rates prescribed therein on the import of specified goods from Thailand. Entry No. 43 of said notification includes all goods classifiable under sub-heading 8409-91.

2. During test check of EDI data, department noticed that the appellant has wrongly classified the goods and that Rule 126 of General Rules of Interpretation (GIR) of harmonized system for classification of goods have not been followed. The Rules inter-alia provides that, "for legal purposes, classification shall be determined according to the terms of headings and any relative section or chapter notes". Accordingly, an opinion was formed that the pumps for liquid whether or not fitted with a measuring device are classifiable under chapter 8413 and fuel lubricating or cooling medium pumps for internal combustion piston engines are classified under sub-heading 8413-30. In pursuance thereto show cause notice bearing No. 144 dated 26.11.2018 was served upon the appellant denying the eligibility of the appellant to the benefits of exemption under notification No. 85/2004 and proposing the recovery of short paid BCD of Rs. 3,83,93,215/-. Simultaneously, the interest is prayed to be levied and the penalty is to be imposed. The said proposal has been confirmed vide the Order No. 02/2019 dated 04.02.2019 being aggrieved the appellant is before this Tribunal.

3. It is submitted on behalf of the appellant that there is no contravention of any provision of Customs Act or the Customs Tariff Act on part of the appellant, as alleged by the department. It is submitted that foremost it is important to

understand the nature and functioning of the impugned goods (fuel pump unit assembly) which comprises of two items:

1. Pumps

2. Floaters

It is further submitted that these goods are placed inside the fuel tank of a two-wheeler and are specifically designed for use with spark ignition internal combustion engines of Yamaha. These pumps cannot be used with two-wheelers of other brands. The main function of these goods is to pump the fuel into cylinders of an engine so as to keep the engine running in smooth condition. The amount of fuel pump into the engine and the power generated is also patrolled by this pump. As such the impugned goods being, specifically, designed for use with internal combustion engine, it is nothing but the part thereof and as such has rightly been classified under chapter 8409 sub-heading 91-99. The order-under-challenge is alleged to have failed to appreciate that chapter heading 8409 talks about the parts which are suitable for use, "solely or principally". The order-under-challenge is alleged erroneous and is prayed to be set aside, appeal is prayed to be allowed.

4. Per contra the order under challenge is being justified by the DR. It is submitted that as per the first rule of interpretation, the head-note of the chapter and the description of goods of each entry as provided in HSM code has to be the foremost criteria to classify the goods. Chapter 84 is about the nuclear reactors, boilers, machinery and mechanical appliances and the parts thereof. Description of goods for 8409 and 8413 in itself is sufficient to hold that the fuel pump unit assembly is specifically classifiable under 8413. It is alleged that the appellant has wrongly classified under 8409 may be to take the undue benefit of notification 85/2004. Impressing upon no infirmity in the order, appeal is prayed to be dismissed.

5. After hearing both the Parties, perusing the record and the order under challenge, I observe and hold as follows:

6. The appellant has imported fuel pump unit assembly, classifying the same under chapter heading 84099199. During the random check, the department formed an opinion that the goods imported are rather classifiable under chapter heading 84133090. Apparently, 54 bills of entry have already been cleared under the classification of 84099199 seeking an exemption of 50% BCD furtherance of notification 85/2004 denying the applicability of the said notification upon the appellant for the goods imported being classified under 8413 to which the notification is not applicable, that the benefit of exemption is denied and recovery to the extent of Rs. 38393215/- has been confirmed which has been challenged by the Appellant before us. Thus, it becomes clear that the controversy is about the classification of the impugned goods. For the purpose, foremost we need to look into the HSN code chapter 84 thereof.

A: As proposed by the department:

Section XVI	Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers; and parts and accessories of such articles.		
Chapter 84	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.		
Tariff Item	Description of goods	Unit	Rate
8413	Pumps for liquids, whether or not fitted a measuring device: liquid elevators		
8413 30	Fuel, lubricating or cooling medium pumps for internal combustion piston engines		
8413 30 90	--- Other	Kg.	7.5%

B: As declared by the Importer in 54 :

Section XVI	Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers; and parts and accessories of such articles.		
Chapter 84	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.		
Tariff Item	Description of goods	Unit	Rate
8409	Parts suitable for use solely or principally with the engines of heading 8407 or 8408.		
8409 91	Suitable for use solely or principally with spark-ignition internal combustion piston engines.		
8409 91 99	--- Other	Kg.	7.5%

7. No doubt, the fuel pump unit assembly of the appellant is meant to be used with the spark ignition internal combustion engine but admittedly it is such part which is rather a pump. It is the admission of the appellant that the impugned goods are responsible for pumping fuel into cylinders of an engine of two-wheelers while offering, control over the amount of fuel pumped into the engine and the power generator. Thus admittedly, this part of engine is a pump. Pumps are, specifically, classified under sub-heading 8413 as noted above.

8. A conjoint reading of description of goods for tariff item 8413 and 8409 makes it abundantly clear that all pumps meant for fuel lubricating or cooling medium for internal combustion piston engines are classified under 841330 and all other pumps for internal combustion piston engines for other than lubricating or cooling medium are classified under 84133090.

9. Thus, the tariff Act itself gives a clear cut distinction between a good which is merely a part or the part which can, specifically, be classified as a pump.

10. Now coming to the principles of classification of parts of machines of chapter 84, as contained in section note 2 to section 16 of the Customs Tariff, it provides as under:

2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules : (a) parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings; (b) other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517; (c) all other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8487 or 8548.

11. It becomes clearer that the items which are specifically included in CTH 8413 are clearly excluded from CTH 8409 irrespective they are used solely or principally with the engines of heading 8407 and 8408.

12. Coming to Rule 1 of General Rules of Interpretation, we note that the classification has to be determined as per the heading and related section or chapter notes. The relevant extract is reproduced as follows:

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

13. From the entire above discussion, we are of clear opinion that fuel injecting pumps are neither an accessory not the spare part of the engine of a motor

vehicle. These pumps are classifiable only under heading 8413, the parts of these pumps are classifiable only under heading 841391.

14. We draw our support from the decision of this Tribunal in the case *Monitor Enterprises Vs. Commissioner of Customs reported in 2001 (239) ELT 2017* wherein it was held that fuel injection pumps for ignition engine are excluded from heading 8409 as per explanatory notes volume 3 at page 1152 of the HSN explanatory notes.

15. Section note 2 clarifies that the parts which in themselves constitute an article those all have to be classified in their appropriate heading irrespective they are specifically designed to work as a part of a specific machine. The importance of HSN explanatory notes in the matters relating to classification has been time and again underlined holding that more reliance has to be placed on chapter notes and explanatory notes to HSN. We find no infirmity in the order under challenge when reliance is placed on the decision of *CCE Hyderabad Vs. Bakelite Hyman Ltd reported as 1997(91) ELT 13 (SP)*.

16. In view of this opinion and in view of the fact, we observe that notification 85 of 2004 has no such entry which includes items of chapter 8413. We are of the firm opinion that the appellant has wrongly availed the benefit of exemption of 50% BCD of the products imported by him by wrongly classifying them as the parts solely and exclusively used with the engines ignoring the specific entry for classification of pumps. There is no denial that the goods which are classified by him as parts are actually meant to function as pumps. Accordingly, we do not find any infirmity in the order-under-challenge. Finally, coming to the plea that the show cause notice is barred by time, we are of the opinion that :

17. In view of above discussion, it stands clear that the appellant has wrongly classified his goods classifiable under CTH 831330 intentionally under Customs Tariff Heading of 840991 with an intend to wrongly avail the benefit of exemption of 50% of BCD. It is worth taking a note of the fact that the bill of entry was filed under self-assessment regime and the importer need to be doubly sure that what they are claiming is legally correct.

18. We are of the opinion that department has committed no error while holding such an act on the part of the appellant as an intentional misrepresentation, which the section note 2 to section 16 of the Customs Tariff specifically provides a methodology of classification of pumps and parts of engines. In view entire discussion, we are of the opinion that classifying the product under a wrong entry continuously for as many as more than 50 bills of entry cannot be an act of ignorance. Hence, we hold that department has committed no error while invoking the extended period of limitation and, therefore, the show cause notice cannot be held to be barred by time.

19. Consequence to the above discussion, the order under challenge is hereby upheld. Appeal, accordingly, stands dismissed.

(Operative Part Pronounced in the Open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Customs Appeal No. 51601 of 2019

Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/ICD-PPG/SONEPAT/95-121/2019-20, Dated: 26.04.2019
Passed by Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi-110037

WITH

Customs Appeal Numbers

**51602/2019 52396/2019 52397/2019 52398/2019
52399/2019 52400/2019 52401/2019 52402/2019 52403/2019
52450/2019 52451/2019 52452/2019 52453/2019 52454/2019
52465/2019 52466/2019 52467/2019 52468/2019
52469/2019 52633/2019 52634/2019 52635/2019 52636/2019
52637/2019 52638/2019 52639/2019 52640/2019 52641/2019
52642/2019 52643/2019 52644/2019 52645/2019 52646/2019
52647/2019 52648/2019**

Date of Hearing: 20.10.2020

Date of Decision: 20.10.2020

**COMMISSIONER OF CUSTOMS
ICD PATPARGANJ DELHI - 110096**

Vs

**M/s HANUMAN PRASAD AND SONS
455, KHERA KALAN NEW DELHI - 110082**

Appellant Rep by: Shri Sunil Kumar and Shri Rakesh Kumar, ARs

Respondent Rep by: Shri B L Narasimhan, Shri Rachit Jain and Shri Ashwani Bhatia, Advs.

CORAM: Dilip Gupta, President
P V Subba Rao, Member (T)

FINAL ORDER NOS. 51584-51619/2020

Per: Dilip Gupta:

M/s Hanuman Prasad and Sons Hanuman Prasad and M/s Niraj Silk Mills Niraj Silk had imported various kinds of polyester knitted fabric of different weights and colours the goods and had submitted 27 and 9 Bills of Entry respectively, declaring the value of the goods @ 1.2 USD per kg. The Assessing Officer enhanced the assessable value, on the basis of contemporaneous imports data and which value was also accepted by Hanuman Prasad and Niraj Silk in writing, to 1.80 USD per kg for Hanuman Prasad and 1.94 USD per kg Niraj Silk. However, appeals were filed against each of the Bills of Entry by Hanuman Prasad and Niraj Silk before the Commissioner of Customs (Appeals) the Commissioner (Appeals), who by an order dated April 26, 2019 allowed all the 27 appeals filed by Hanuman Prasad and by an order dated May 08, 2019 allowed all the 9 appeals filed by Niraj Silk. The Department has, accordingly, filed these 36 appeals to assail the orders passed by the Commissioner (Appeals).

2. The records indicate that Hanuman Prasad had submitted 27 Bills of Entry declaring the value of the goods at 1.2 USD per kg and Niraj Silk had submitted 9 Bills of Entry declaring the value of the goods at 1.2 USD per kg. The Assessing Officer believed that he had reason to doubt the accuracy of the value so declared, since it was lesser than the contemporaneous export data. On being confronted with such data, both Hanuman Prasad and Niraj Silk submitted identical letters in connection with the Bills of Entry. Hanuman

Prasad specifically stated that though it had declared the value of the goods at 1.2 USD per kg but on contemporaneous data having been shown, it agrees for enhancement of the value to 1.80 USD per kg and that it did not want any show cause notice to be issued to it or personal hearing to be provided, nor did it want any speaking order to be passed on the aforesaid Bills of Entry. It further stated that it was voluntarily relinquishing the rights provided to it under sections 124 and 17(5) of the Customs Act, 1962 the Customs Act. The letter written by Niraj Silk is identically worded, except for agreeing to the enhancement of the value of the declared goods to 1.94 USD per kg.

3. A copy of one such letter dated January 3, 2019 submitted by Hanuman Prasad to the Assessing officer in connection with the assessment of the Bills of Entry is reproduced below:

" DT.03.01.2019

To,

The Deputy Commissioner of Customs, DICT Sonipat Haryana

Subject: Request for Assessment of BE No 9509107 dated 03.01.2019

Respected Madam,

With reference to the above B/E's, we have imported Polyester Knitted Fabric of different Weights & colors. Our Declared Value is 1.20 USD Per Kg. However, we have been shown Contemporaneous data & we agree for enhancement of Value @ 1.80 USD Per Kg.

In this regard, we submit that we do not want any Show cause Notice & Personal Hearing on this matter as envisaged under section 124 of Customs Act, 1962 read with Section 28 of this Act. We do not want any Speaking Order of Aforesaid B/E's. We, therefore, voluntarily relinquish our Rights provided u/s 124 & 17(5) of Customs Act, 1962.

Thanking you.

Your's Faithfully,

For HANUMAN PRASAD AND SONS

Sd/- (Proprietor)"

4. A copy of a letter written by Niraj Silk in connection with the Bills of Entry is also reproduced below :

" Date_____

To,

The Deputy Commissioner of Customs, DICT Sonipat Haryana

Subject: Request for Assessment of BE No 2189854 & 2189909 dated 25/02/2019 & 25/02/2019

Respected Madam,

With reference to the above B/E's, we have imported Polyester Knitted Fabric of different Weights & colors. Our Declared Value is 1.20 USD Per Kg. However, we have been shown Contemporaneous data & we agree for enhancement of Value @ 1.94 USD Per Kg.

In this regard, we submit that we do not want any Showcause Notice & Personal Hearing on this matter as envisaged under section 124 of Customs Act, 1962 read with Section 28 of this Act. We do not want any Speaking Order of Aforesaid B/E's. We, therefore, voluntarily relinquish our Rights provided u/s 124 & 17(5) of Customs Act, 1962.

Thanking you.

Your's Faithfully,

For NIRAJ SILK MILLS

Sd/- (Proprietor)"

5. The value of the declared goods was thereafter enhanced by the Assessing Officer to 1.80 USD per kg. in the case of Hanuman Prasad and to 1.94 USD per kg. in the case of Niraj Silk.

6. However, Hanuman Prasad and Niraj Silk challenged the order passed by the Assessing Officer on the Bills of Entry by filing 36 appeals before the Commissioner (Appeals).

7. The Commissioner (Appeals), by two separate orders dated April 26, 2019 and May 08, 2019, allowed the 36 appeals. The relevant portion of the order dated April 26, 2019 relating to the 27 Bills of Entry in the matter of Hanuman Prasad is reproduced below :

*"5.3 The appellant has contended that the acceptance of enhanced value proposed by the Revenue during assessment and clearance to save demurrages by the appellant does not preclude from challenging the enhancement by way of appeal. I find considerable force in the contention of the appellant. The issue as to whether an assessee can file an appeal against assessment made in respect of Bill of Entry has been settled by judicial pronouncements. It is settled legal proposition that there is no estoppel in taxation matters. The Hon'ble Supreme Court in the case of Dunlop India Limited Vs. UOI reported in 1983(13) ELT 1566(SC) **has laid down that even assuming that there is an acceptance it does not preclude the assessee from challenging by way of appeal as there cannot be an estoppel against law.** Similar view was held in [2015(329) ELT 307(T)] and 2016(343) ELT 963(T).*

5.4 The appellant has assailed that the enhancement of assessable value is arbitrary and illegal as the practice of not making the assessment on the declared value in terms of the mandate of Section 14 of the Customs Act, 1962 read with Rule 3 of Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 (CVR, 2007), is against the provisions of law. Rule 3 of CVR, 2007 provides that subject to Rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provision of Rule 10 and unless the price actually paid for the particular transaction falls within the exceptions in Rule 3(2), the Customs authorities are bound to assess the duty on the transaction value. There is no question of determining the value under the subsequent Rules if the same does not fall within the exception provided therein. The appellant relied upon the above mentioned judgments in their support.

5.5 I find that an obligation was cast on the assessing authority to pass a speaking order disclosing the grounds for rejecting the declared value and then resorting to loading and enhancement in value. The declared value can be rejected on the basis of reasonable and cogent evidence only and Revenue should discharge the heavy burden to prove that invoice value does not represent the true transaction value in the international market.

5.6 I find that in the Bills of Entry for a large period of time the assessable values are being enhanced uniformly which, in my view, is not correct. Parameters like nature, quality, level of import, time etc. are to be looked into while applying the value of contemporaneous imports. Uniform value loading in each Bill of Entry at uniform price on the basis of DRI Alerts, DGoV Circulars and other Standing orders, etc., is not in consonance with the provision of the Customs Act & Rules.

5.7 xxxxxxxxxx xxxxxxxxxx xxxxxxxxxx

5.8 It is settled law by the following decisions of the Hon'ble Supreme Court that unless there is additional consideration involved or any of the exceptions of Rule 4(2) is attracted, transaction value cannot be rejected :

xxxxxxx xxxxxx xxxxxx

5.9 If the circumstances mentioned in proviso to Rule 4(2) are not applicable, the Department is bound to assess the duty of transaction value. NIDB data alone cannot be made basis of enhancement of value.

5.10 In the case of M/s Maruti Fabric Impex & Ors., where the enhancement of value was resorted to by the Department and was rejected by Commissioner of

Customs (Appeals), Delhi and the matter travelled to the Hon'ble CESTAT by Department's Appeal, the Hon'ble CESTAT vide Final Order No. C/A/51690-51694/2016-CU(DB) dated 27.04.2016 held that for rejecting the transaction value, first it has to be rejected as incorrect value and there being no evidence to show that the importer has paid over the above the transaction value to the seller of goods, there is virtually no reason to reject the transaction value. Similar view has been held by Tribunal in Final Orders C/A/52972/2016 dated 08.08.2016 and C/A/52685-86 dated 27.07.2016.

5.12 Hon'ble Supreme Court in the case of Noida Vs. M/s Sanjivani Non-Ferrous Trading Pvt. Ltd. (Civil Appeal No. 18300-18305/2017) held vide judgement dated 10.12.2018 that "The normal rule is that assessable value has to be arrived at on the basis of the price which is actually paid, as provided by Section 14 of the Customs Act. That the declared price could be rejected only with cogent reasons by undertaking the exercise as to on what basis the assessing Authority could hold that the paid price was not the sole consideration of the transaction value. Since there is no such exercise done by the Assessing Authority to reject the declared in the Bills of Entry, Order-in-Original was therefore clearly erroneous."

5.15 In view of the facts and findings, supra, I set aside the re-assessment of goods covered under the impugned Twenty Seven Bills of Entry. I allow the appeals filed by the appellant accordingly and restore the assessment at the declared values."

[emphasis supplied]

8. The order dated May 08, 2019 passed relating to 9 Bills of Entry in the matter of Niraj Silk is identical and, therefore, is not being reproduced.

9. Shri Rakesh Kumar, learned Authorized Representative of the Department has made the following submissions:

(i) The Assessing Officer had reason to doubt the accuracy of the value declared in the Bills of Entry submitted by the importers as they were grossly undervalued as compared to the contemporaneous import data and since the two importers had submitted letters clearly stating that they have agreed for enhancement of the value to 1.8 USD per kg and 1.94 USD per kg and did not require any personal hearing or a speaking order, the Assessing Officer enhanced the value. Thus, once having accepted the value of the goods in writing, it was not open to the importers to challenge the value of the goods, nor was it open to the importers to file appeals for the reason that the requirement of not passing any speaking order is to reduce litigation;

(ii) The decisions relied upon by the Commissioner (Appeals) are clearly distinguishable on facts, as in the present case, letters were submitted voluntarily by the importers accepting the enhanced value based on contemporaneous data;

(iii) The findings of the Commissioner (Appeals) that the importers had accepted the value to avoid demurrages and detention is not borne out from the records;

(iv) The Commissioner (Appeals) was not justified in making a general statement about uniform enhancement of value by the Assessing Officer on the basis of NIDB data;

(v) The finding of the Commissioner (Appeals) that the valuation of the declared goods has to be first rejected under rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 the Valuation Rules, is not correct in the facts and circumstances of the present case;

(vi) The Commissioner (Appeals) committed an error in observing that the Assessing Officer should have passed a speaking order, in view of the specific statements made by the importers that they did not want a speaking order; and

(vii) The Commissioner (Appeals) was not justified in holding that the transaction value declared by the importers should have been determined in accordance with the provisions of section 14 of the Customs Act and rule 3 of the Valuation Rules.

10. Shri B.L. Narasimhan, learned Counsel appearing for the importers made the following submissions:

(i) The issue involved in the appeals stands settled in favour of the importers by the decisions of the Tribunal in CC, *Delhi vs M/s Maruti Fabric Impex, M/s Hanuman Prasad & Sons, M/s Uniexel Polychem Pvt. Ltd., M/s AVS Global and M/s Girik International Pvt. Ltd.* 2016 (5) TMI 668 – CESTAT New Delhi and *Commissioner of Customs, Noida vs. M/s Hanuman Prasad and Sons Customs Appeal No. 70417 of 2019*) decided on September 12, 2019.

(ii) Section 17 of the Customs Act does not preclude an assessee from filing an appeal against a Bill of Entry;

(iii) The Department did not follow the procedure contemplated under rule 12 of the Valuation Rules to reject the transaction value declared by the importers. Reliance has been placed on the following decisions :

(i) *Eicher Tractors Ltd. Vs. Commissioner of Customs, Mumbai* 2000 (122) ELT 321 – CESTAT (SC)

(ii) *Century Metal Recycling Pvt. Ltd. Vs. Union of India* 2019 (367) ELT 3 – CESTAT (SC)

(iv) NIDB data cannot be the sole basis to reject the transaction value without any cogent reasons. Reliance has been placed on the following decisions: `

(i) *M/s Sai Exports Vs. Commissioner of Customs* 2019(8) TMI 432 – CESTAT Chennai

(ii) *Commissioner of Customs, New Delhi Vs. Rainbow Impex* 2013(296) ELT 207 – (Tri.-Del.)

(iii) *Commissioner of Customs, New Delhi Vs. Century Metal Recycling Pvt. Ltd.* 2013(295) ELT 726 – (Tri.-Del.)

(iv) *Commissioner of Customs, New Delhi Vs. Marble Art* 2013(289) ELT 346 – (Tri.-Del.)

(v) *Commissioner of Central Excise, Rohtak Vs. Sail Sales Corporation* 2012(278) ELT 197 – (Tri.-Del.); and

(v) The burden of proof lies upon the Department to prove the charge of under valuation, which burden has not been discharged in the present case.

11. The submissions advanced by the learned Authorized Representative for the Appellant and the learned Counsel for the respondent have been considered.

12. What transpires from the records is that both Hanuman Prasad and Niraj Silk had declared the value of the goods in the Bills of Entry as 1.2 USD per kg. Section 14 of the Customs Act deals with 'Valuation of Goods' and is reproduced below:

"Section 14. Valuation of goods. - (1) *For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:*

Provided xxxxxx xxxxxx xxxxxx"

13. It would be seen that section 14 of the Customs Act provides that the transaction value of goods shall be the price actually paid or payable for the goods when sold for export to India where the buyer and the seller of the goods are not related and the price is the sole consideration for the sale, subject to such other conditions as may be specified in the rules made in this behalf. The Valuation Rules have been framed in exercise of the powers conferred by section 14 of the Customs Act. Rule 12 deals with rejection of the declared value and is reproduced below :

"Rule 12. Rejection of declared value. - (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule(1) of rule 3.

(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

Explanation.-(1) For the removal of doubts, it is hereby declared that:-

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents."

14. Rule 12 provides that when the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of rule 3(1). Explanation (iii) to rule 12 provides that the proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons, which may include any of the six reasons contained therein, one of which is that there is a significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed

15. The proper officer doubted the value of the goods declared by Hanuman Prasad and Niraj Silk since the contemporaneous data in respect of the goods imported by Hanuman Prasad was 1.80 USD per kg, while that for Niraj Silk was 1.94 USD per kg. On being confronted with this contemporaneous data, both Hanuman Prasad and Niraj Silk submitted letters. Hanuman Prasad specifically stated that it agrees for enhancement of the value of goods to 1.80 USD per kg. and that it did not desire that any show cause notice to be issued or personal hearing to be provided, as is contemplated under section 124 of the Customs Act. It also stated that it did not desire that a speaking order, as

contemplated under section 17(5) of the Customs Act, should be passed on the Bills of Entry. A similar letter was written by Niraj Silk.

16. The relevant portion of section 17(5) of the Customs Act is reproduced below:

"Section 17. Assessment of duty.- (1) *An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.*

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

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

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

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

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

17. It would be seen that though in a case where re-assessment has to be done under sub-section (4) of section 17 of the Customs Act, the proper officer is required to pass a speaking order on the re-assessment, but if the importer or exporter confirms his acceptance of the re-assessment, a speaking order is not required to be passed.

18. In view of the specific requests made in the letters that were submitted by Hanuman Prasad and Niraj Silk in regard to all the 36 Bills of Entry that they had agreed for the declared value of the goods to be enhanced to 1.80 USD per kg and 1.94 USD per kg, the assessing officer assessed the value of the goods at 1.80 USD per kg for Hanuman Prasad and 1.94 USD per kg for Niraj Silk.

19. It is after the payment of duty on the aforesaid assessments made by the assessing officer that Hanuman Prasad and Niraj Silk filed 36 Appeals before the Commissioner (Appeals), which Appeals were ultimately allowed by orders dated April 26, 2019 and May 08, 2019.

20. The Commissioner (Appeals) allowed the Appeals primarily for the following reasons :

(i) The acceptance of the enhanced value proposed by the Revenue does not preclude an assessee from filing an Appeal to challenge the assessment order;

(ii) An obligation was cast on the assessing officer to pass a speaking order disclosing the grounds for rejecting the declared value and only thereafter the proper officer could have resorted to enhancement of the value;

(iii) The declared value can be rejected on the basis of reasonable and cogent evidence only and the Revenue has to discharge this burden by proving that the invoice value did not represent the true transaction value in the international market;

(iv) For a considerable period of time, the Bills of Entry were being enhanced uniformly, which in the opinion of the Commissioner (Appeals), was not correct.

Parameters like nature, quality, level of import, time etc. were required to be looked into while applying the value of contemporaneous imports;

(v) Unless there is an additional consideration involved or any of the exceptions of rule 4(2) of the Valuation Rules are attracted, the transaction value cannot be rejected. NIDB data alone cannot be made the basis of enhancement of value; and

(vi) In view of the judgment of the Supreme Court in *C.C.E. & S.T., Noida vs. Sanjivani Non-Ferrous Trading Pvt. Ltd.* 2019 (365)E.L.T. 3 (S.C.), the transaction value has to be arrived at on the basis of the price that is actually paid as provided by section 14 of the Customs Act and the declared price can be rejected only by giving cogent reasons, but no such exercise was undertaken by the Assessing Authority to reject the value declared in the Bills of Entry.

21. The Commissioner (Appeals), despite a categorical statement made by the importers that they did not desire a speaking order to be passed, observed "an obligation was cast on the assessing authority to pass a speaking order disclosing the grounds for rejecting the declared value and only then the assessing officer could have enhanced the value." This finding of the Commissioner (Appeals) is perverse as it is clearly contrary to the specific statement made by the importers in the letters submitted by them to the assessing officer. What has also to be kept in mind is that section 17(5) permits the importer to waive this right.

22. It is seen from a perusal of section 17(4) of the Customs Act that the proper officer can re-assess the duty leviable, if it is found on verification, examination or testing of the goods or otherwise that the self-assessment was not done correctly. Sub-section (5) of section 17 provides that where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer, the proper officer shall pass a speaking order on the re-assessment, except in a case where the importer confirms his acceptance of the said re-assessment in writing.

23. In the present case, as noticed above, the proper officer doubted the truth or accuracy of the value declared by the importer for the reason that contemporaneous data had a significantly higher value. It was open to the importers to require the proper officer to intimate the grounds in writing for doubting the truth or accuracy of the value declared by them and seek a reasonable opportunity of being heard, but they did not do so. On the other hand, the importers submitted in writing that though they had declared the value of the imported goods at 1.20 USD per kg., but on being shown contemporaneous data, they have agreed that the value of the goods should be enhanced to 1.80 USD per kg for Hanuman Prasad and to 1.94 USD per kg. for Niraj Silk. The importers also specifically stated that they did not want to avail of the right conferred on them under section 124 of the Customs Act and, therefore, they did not want any show cause notice to be issued to them or personal hearing to be provided to them. The importers also specifically stated that they did not want a speaking order to be passed on the Bills of Entry. It needs to be noted that section 124 of the Customs Act provides for issuance of a show cause notice and personal hearing, and section 17(5) of the Customs Act requires a speaking order to be passed on the Bills of Entry, except in a case where the importer/exporter confirms the acceptance in writing.

24. It is no doubt true that the value of the imported goods shall be the transaction value of such goods when the buyer and the seller of goods are not related and the price is the sole consideration, but this is subject to such conditions as may be specified in the rules to be made in this behalf. The Valuation Rules have been framed. A perusal of rule 12(1) indicates that when the proper officer has reason to doubt the truth or accuracy of the value of the imported goods, he may ask the importer to furnish further information. Rule 12(2) stipulates that it is only if an importer makes a request that the proper officer shall, before taking a final decision, intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared and provide a reasonable opportunity of being heard. To remove all doubts, Explanation 1(iii)(a) provides that the proper officer can have doubts regarding the truth or

accuracy of the declared value if the goods of a comparable nature were assessed at a significantly higher value at about the same time.

25. Explanation (1)(i) to rule 12 of the Valuation Rules, however, provides that the rule only provides a mechanism and procedure for rejection of declared value and does not provide a method for determination of value and if the declared value is rejected, the value has to be determined by proceeding sequentially in accordance with rules 4 to 9.

26. In Century Metal Recycling, the Supreme Court summarized the provisions of rule 12 of the Valuation Rules and the observations are as follows :

"15. The requirements of Rule 12, therefore, can be summarised as under :

(a) The proper officer should have reasonable doubt as to the transactional value on account of truth or accuracy of the value declared in relation to the imported goods.

(b) Proper officer must ask the importer of such goods further information which may include documents or evidence.

(c) On receiving such information or in the absence of response from the importer, the proper officer has to apply his mind and decide whether or not reasonable doubt as to the truth or accuracy of the value so declared persists.

(d) When the proper officer does not have reasonable doubt, the goods are cleared on the declared value.

(e) When the doubt persists, sub-rule (1) to Rule 3 is not applicable and transaction value is determined in terms of Rules 4 to 9 of the 2007 Rules.

(f) The proper officer can raise doubts as to the truth or accuracy of the declared value on certain reasons which could include the grounds specified in clauses (a) to (f) in clause (iii) of the Explanation.

(g) The proper officer, on a request made by the importer, has to furnish and intimate to the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to the imported goods. Thus, the proper officer has to record reasons in writing which have to be communicated when requested.

(h) The importer has to be given opportunity of hearing before the proper officer finally decides the transactional value in terms of Rules 4 to 9 of the 2007 Rules.

16. Proper officer can therefore reject the declared transactional value based on certain reasons to doubt the truth or accuracy of the declared value in which event the proper officer is entitled to make assessment as per Rules 4 to 9 of the 2007 Rules. What is meant by the expression grounds for doubting the truth or accuracy of the value declared has been explained and elucidated in clause (iii) of Explanation appended to Rule 12 which sets out some of the conditions when the reason to doubt exists. The instances mentioned in clauses (a) to (f) are not exhaustive but are inclusive for there could be other instances when the proper officer could reasonably doubt the accuracy or truth of the value declared."

27. It is non-consideration of the factual position emerging from the statements made by Hanuman Prasad and Niraj Silk that led the Commissioner (Appeals) to believe that the declared value could be rejected only on the basis of reasonable and cogent evidence, which burden the Revenue failed to discharge as it could not prove that the invoice did not represent the true transaction value in the international market.

28. Despite the specific requests made by the importers in the letters submitted by them, it was sought to be contended by the importers in the Appeals filed by them before the Commissioner (Appeals) that the transaction value of the imported goods alone should have been treated to be the value of the goods, as provided for under rule 3(1) of the Valuation Rules, since none of the conditions stipulated in the proviso to sub-rule (2) of rule 3 were attracted and in any case, if the declared value could not be determined under sub-rule (1) of rule 3, it was required to be determined by proceeding sequentially through rules 4 to 9.

29. Rule 3 of the Valuation Rules is, therefore, reproduced below:

"Rule 3. Determination of the method of valuation.- (1) Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule 10;

(2) Value of imported goods under sub-rule (1) shall be accepted: Provided that –

(a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which –

(i) are imposed or required by law or by the public authorities in India; or

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules; and

(d) the buyer and seller are not related, or where the buyer and seller are related, that transaction value is acceptable for customs purposes under the provisions of sub-rule (3) below:

(3) xxxxxxxx xxxxxxxx xxxxxxxx

(4) If the value cannot be determined under the provisions of sub-rule (1), the value shall be determined by proceeding sequentially through rule 4 to 9."

30. The very fact that the importers had agreed for enhancement of the declared value in the letters submitted by them to the assessing authority, itself implies that the importers had not accepted the value declared by them in the Bills of Entry. The value declared in the Bills of Entry, therefore, automatically stood rejected. Further, once the importers had accepted the enhanced value, it was really not necessary for the assessing authority to undertake the exercise of determining the value of the declared goods under the provisions of rules 4 to 9 of the Valuation Rules. This is for the reason that it is only when the value of the imported goods cannot be determined under rule 3(1) for the reason that the declared value has been rejected under sub rule 2, that the value of the imported goods is required to be determined by proceeding sequentially through rule 4 to 9. As noticed above, the importers had accepted the enhanced value and there was, therefore, no necessity for the assessing officer to determine the value in the manner provided for in rules 4 to 9 of the Valuation Rules sequentially.

31. In this connection, it would be useful to refer to a decision of this Tribunal in *Advanced Scan Support Technologies vs Commissioner of Customs, Jodhpur 2015 (326) ELT 185 (Tri.-Del)*, wherein the Tribunal, after making reference to the decisions of the Tribunal in *Vikas Spinners vs Commissioner of Customs, Lucknow 2001 (128) ELT 143 (Tri.-Del)* and *Guardian Plasticote Ltd. v. CC (Port), Kolkotta 2008 (223) ELT 605 (Tri.-Kol)*, held that as the Appellant therein had expressly given consent to the value proposed by the Revenue and stated that it did not want any show cause notice or personal hearing, it was not necessary for the Revenue to establish the valuation any further as the consented value became the declared transaction value requiring no further investigation or justification. Paragraph 5 of the decision is reproduced below:

"5. We have considered the contentions of both sides. We find that whatever may be the reasons, the appellant expressly gave its consent to the value proposed by Revenue and expressly stated that it did not want any Show Cause Notice or personal hearing. Even the duty was paid without protest. By consenting to enhancement of value and thereby voluntarily foregoing the need for a Show Cause Notice, the appellant made it unnecessary for Revenue to establish the valuation any further as the consented value in effect becomes the declared transaction value requiring no further investigation or justification. To allow the appellant to contest the consented value now is to put Revenue in an impossible situation as the goods are no longer available for inspection and Revenue rightly did not

proceed to further collect and compile all the evidences/basis into a Show Cause Notice as doing so, in spite of the appellant having consented to the enhancement of value and requested for no Show Cause Notice, could/would have invited allegation of harassment and delay in clearance of goods. When Show Cause Notice is expressly foregone and the valuation is consented, the violation of principles of natural justice cannot be alleged. In the present case, while value can be challenged but such a challenge would be of no avail as with the goods not being available and valuation earlier having been consented, the onus will be on the appellant to establish that the valuation as per his consent suffered from fatal infirmity and such onus has not been discharged. Further, valuation of such goods requires their physical inspection and so re-assessment of value in the absence of goods will not be possible. The case of *Eicher Tractors v. Union of India* (supra) cited by the appellant is not relevant here as in that case there was no evidence that the assessee had consented to enhancement of value."

[emphasis supplied]

32. In *Vikas Spinners*, the Tribunal dealing with a similar situation, observed as under :

"7. In our view in the present appeal, the question of loading of the value of the goods cannot at all be legally agitated by the appellants. Admittedly, the price of the imported goods declared by them was US \$ 0.40 per Kg. but the same was not accepted and loaded to US \$ 0.50 per Kg. **This loading in the value was done in consultation with Shri Gautam Sinha, the Representative and Special Attorney of the appellants who even signed an affirmation accepting the loaded value of the goods on the back of the Bill of Entry dated 7-5-1999.** After loading of the value, the appellants produced the special import licence and paid the duty on the goods accordingly of Rs. 4,22,008/- on 19-5-1990. **Having once accepted the loaded value of the goods and paid duty accordingly thereon without any protest or objection they are legally estopped from taking somersault and to deny the correctness of the same.** There is nothing on record to suggest that the loaded value was accepted by them only for the purpose of clearance of the goods and that they reserved their right to challenge the same subsequently. They settled their duty liability once for all and paid the duty amount on the loaded value of the goods. The ratio of the law laid down by the Apex Court in *Sundar N. Images*, (supra) is not at all attracted to the case of the appellants. The benefit of this ratio could be taken by them only if they had contested the loaded value at the time when it was done, but not now after having voluntarily accepted the correctness of loaded value of the goods as determined in the presence of their Representative/Special Attorney and paid the duty thereon accordingly."

[emphasis supplied]

33. In *Guardian Plasticote Ltd.*, the Tribunal after placing reliance on the decision of the Tribunal in *Vikas Spinners*, had also observed as follows :

"4. The learned Advocate also cites the decision of the Tribunal in the case of M/s. Vikas Spinners v. C.C., Lucknow - 2001 (128) E.L.T. 143 (Tri.-Del.) in support of his arguments. We find that the said decision clearly holds that enhanced value once settled and duty having been paid accordingly without protest, importer is estopped from challenging the same subsequently. **It also holds that enhanced value uncontested and voluntarily accepted, and accordingly payment of duty made discharges the burden of the department to establish declared value to be incorrect.** In view of the fact that the Appellants in this case have not established that they had lodged any protest and on the contrary their letter dated 21-4-1999 clearly points to acceptance of the enhanced value by them, the cited decision advances the cause of the department rather than that of the Appellants contrary to the claim by the learned Counsel."

[emphasis supplied]

34. In *BNK Intrade (P) Ltd. vs Commissioner of Customs, Chennai* 2002 (140) ELT 158 (Tri.-Del), the Tribunal observed as follows :

"2..... It is also to be noted that the importer had also agreed for enhancement of the price based on contemporaneous prices available with the

Department. We, therefore, find no merit in the contention raised in the appeal challenging the valuation and seeking the refund of the differential duty paid by the appellants on enhancement."

35. The following position emerges from the aforesaid decisions of the Tribunal:

(i) When an importer consents to the enhancement of value, it becomes unnecessary for the revenue to establish the valuation as the consented value, in effect, becomes the declared transaction value requiring no further investigation;

(ii) When an importer accepts the loaded value of the goods without any protest or objection, the importer cannot be permitted to deny its correctness; and

(iii) The burden of the Department to establish the declared value to be in correct is discharged if the enhanced value is voluntarily accepted.

36. Learned Counsel appearing for the Respondent has, however, placed reliance upon certain decisions passed by the Tribunal to contend that the transaction value has to be first rejected and thereafter the assessing officer can re-assess with reasons and in accordance with the provisions of the Valuation Rules.

37. The first decision is Maruti Fabric Impex, a matter concerning the present appellant. The Tribunal observed:

*"2. As per facts on record, the respondents imported fabrics and filed bills of entries declaring the transaction value as the assessable value in terms of the provisions of Section 14 of Customs Act. **The bills of entries were assessed by the proper officer by enhancing the declared assessable value. The respondents cleared the goods on payment of duty on the enhancement.***

3. The Appellate Authority took into consideration various facts including the issue as to whether an assessee can file an appeal against assessment made in the bills of entries, once he pays duty on the same and clears the goods, observed that acceptance of enhanced value proposed by the Department by an assessee does not preclude him from challenging the enhancement by way of appeal.

As regards enhancement of assessable value, he observed that no reasons stand given by the Revenue for such an enhancement. There is no rejection of the transaction value and in such a scenario, the transaction value has to be adopted as the assessable value. He also observed that though no reasons stand reflected in the Revenue's assessment but the same seems to have been done on the basis of a DRI Alert dated 9-5-2011.

xxxxxx xxxxxx xxxxxx

*6. As regards the second issue, we find that Commissioner (Appeals) has gone into detailed examination of the provisions of Section 14 as also the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. **As rightly observed by him, for adopting the provision of Customs Valuation Rule, the transaction value is required to be rejected as incorrect value. There being no evidence to show that the importer has paid over and above than the transaction value, to the seller of the goods, there is virtually no reasons to reject the transaction value.*** It is also a settled law that DRI Alerts cannot be adopted as a reason for enhancing the value. As such, we find no infirmity in the views adopted by Commissioner (Appeals) so as to interfere in the impugned order. Accordingly, the appeals filed by the Revenue are rejected."

[emphasis supplied]

38. The Tribunal noticed that with regard to the enhancement of the assessable value, the Appellate Authority had observed that no reasons had been recorded by the assessing officer for such enhancement and there was no rejection of the transaction value. It needs to be noted that there is nothing in the decision which may indicate that the importer had himself accepted the transaction value indicated by the proper officer in writing or that he had forgone his right to a speaking order.

39. This decision of the Tribunal in Maruti Fabric Impex was followed in Hanuman Prasad.

40. The next decision relied upon by learned Counsel for the Respondent is Artex Textile Private Limited. The Tribunal observed that:

*"2. The brief facts are that the respondent importer of polyester knitted fabrics were filing Bill of Entry from time to time at ICD Sonapat on the basis of self assessment of duty on the declared transaction value. **The Bills of Entry were assessed by Assistant/Deputy Commissioner of Customs, by enhancing the value over and above the declared value. However, no speaking order was passed giving reasons for rejection of the declared value and enhancement thereof.***

xxxxxx xxxxxx xxxxxx

7. Having considered the rival contentions, we find that assessing officer have been making enhancement in a routine manner and the respondent who are regular importers are left with no choice but to sign on the dotted line for taking delivery of their goods to carry on their business, and also save the demurrage charges if the consignment is delayed in the port for want of clearance. Relying on the precedent Final Order No. 63455-63456/2018 dated 25.10.2018 of this Tribunal and also in view of the Order-in-Appeal No. CC(A)/CUS/D- II/ICD/788-1083/2014 dated 31.12.2014 had been accepted in respondent own case, we uphold the impugned common order(s) in appeal. Accordingly, these appeals by Revenue are dismissed being without merit. The stay applications also stand disposed of accordingly."

41. A perusal of the aforesaid decision also does not indicate that the importer had accepted the declared value in writing or that the importer had waived his right to a speaking order. In fact, only a general statement has been made that the assessing officer have been making enhancement in a routine manner and that an importer has no choice but to sign in order to save demurrage charges.

42. It has to be noted that the two importers, Hanuman Prasad and Niraj Silk, had not made any statement that they have accepted the value of the goods proposed by the Revenue to save demurrage charges nor did they state in the letter that the value was being accepted by them under protest and they would agitate the matter in appeal. It is only in this appeal that it has been suggested that the value was accepted to save demurrage charges, perhaps prompted by the observations made by the Tribunal in Artex Textile Private Limited.

43. Learned Counsel for the Respondent also relied upon the decision of the Tribunal in *Commissioner of Customs, New Delhi (ICD TKD) vs M/s Uniexcel Polychem Pvt. Ltd 2016 (8) TMI 829- Cestat New Delhi*. The Tribunal observed that :

*"4. On the merit of enhancement of value, we are in agreement with the findings in the impugned order. **No detailed reason has been given by the Original Authority for rejection of the transaction value. Apparently he was guided only by DRI alert which formed basis of enhancement of value.** It has been repeatedly held by this Tribunal as well as Hon'ble High Courts that the transaction value cannot be rejected mechanically based on suspicion or general alert without supporting evidence to the effect that the invoice value does not reflect the transaction value required for assessment. In the present case, we find that no evidence of any nature has been brought out or discussed before such enhancement. Even contemporaneous value of similar or identical goods have not been examined and discussed."*

44. This decision also does not indicate that the importers had accepted the value of the goods proposed by the Revenue in writing or that the importers had waived their right to a speaking order. In fact, it was the DRI alert that formed the basis of enhancement of value.

45. The Supreme Court observed in Eicher Tractors Ltd., which decision has also been relied upon by the learned counsel for the Respondent, that it is only when the transaction value under rule 4 of the Valuation Rules is rejected that the transaction value is required to be determined by proceeding sequentially through rules 5 to 8. The decision of the Supreme Court in Century Metal

Recycling also holds that if the declared transaction value is rejected, then it has to be determined in accordance with the procedure prescribed in rules 4 to 9. These decisions of the Supreme Court, for the reasons stated above, do not help the respondent.

46. Learned counsel for the respondent has also emphasized that NIDB data cannot be the sole basis to reject the transaction value without any cogent reasons. As seen above, the importers had in writing accepted the transaction value and it is perhaps for this reason that they did not require any show cause notice to be issued to them or a personal hearing to be granted to them. The respondent is, therefore, not justified in asserting that the transaction value has been determined on the basis NIDB data. It was their acceptance of the value that formed the basis for determination of the value. The decisions relied upon by the respondent to support the contention sought to be raised are, therefore, of no benefit to them.

47. The general observations made the Commissioner (Appeals) in the impugned order that the value declared in the Bills of Entry were being enhanced uniformly by the Department for a considerable period of time was uncalled for. The Commissioner (Appeals) completely failed to advert to the crucial aspect that the importers had themselves accepted the enhanced value. The Commissioner (Appeals) in fact, proceeded to examine the matter as if the assessing officer had enhanced the declared value on the basis of other factors and not on the acceptance by the importers. This casual observation is not based on the factual position that emerges from the records of the case.

48. Thus, for all the reasons above, the Commissioner (Appeals) was not justified in setting aside the orders passed by the assessing officer on the Bills of Entry.

49. When on merits it has been found that the Commissioner (Appeals) committed an error in allowing the appeals, it is not necessary to decide whether the appeals against the accepted transaction value were maintainable or not.

50. All the 36 orders passed by the Commissioner (Appeals) that have been impugned, therefore, deserve to be set aside and are, accordingly, set aside and the 36 Appeals filed by the Commissioner of Customs are allowed.

(Order pronounced in the open Court)

[Back](#)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. IV]

Shri C.L. Mahar, Member (T) and Ms. Rachna Gupta, Member (J)

RAJESH MAIKHURI

Versus

COMMISSIONER OF CUSTOMS (EXPORTS), NEW DELHI

Final Order No. C/A/51490/2019-CU(DB), dated 15-11-2019 in Appeal
Nos. C/50523 & 51595/2018

REPRESENTED BY :Shri B.L. Garg, Advocate, for the Appellant.

Shri Rakesh Kumar, AR (DR), for the Respondent.

[Order per : C.L. Mahar, Member (T)]. - The brief facts of the matter are that M/s. Ethan Sales & Services, the importer had filed a Bill of Entry No. 2924132, dated 6-8-2013 for certain Dietary supplements classifying the same under CTH 2106 10 00 through CHA M/s. R.U. Imports-Exports Pvt. Ltd. The consignment was examined by the Inspector on first check basis on the directions of the Superintendent "Please open and examine 10% of the total no. of packages subject to a minimum of 2 packages and check declaration. Please verify that the goods are as per invoice, packing list, B/E and the B/L. Please ensure compliance to CCR/Target Intervention instructions before o/c. Please check NOC from PHO/FSSAI or check previous 5 NOC as per DGFT Circular No. 25/2004 and 37/2004 for PHO waiver." The consignment was examined and cleared with examination report bearing "O/E 10% of the goods in presence of CHA representative and found to contain Dietary Supplements as per Inv/PL/BL. Five previous B/E att. for waiver of FSSAI.". The consignment was given out of charge on 14-8-2013 after enhancing the declared value. However, on the request of DRI, Lucknow, the said consignment was put on hold on 14-8-2013 by Deputy Commissioner of Customs, ICD, Tughlakabad for 100% examination in the presence of DRI. The said consignment was examined by DRI on 21-8-2013 under a panchnama dated 21-8-2013 and was detained vide DRI F. No DRI/NCO/EXAM/52/2013, dated 21-8-2013. During examination it was observed the MRP/RSP and other details regarding the importer, stipulated under Rule 6 and Rule 10 of the Legal Metrology (Packaged Commodity) Rules, 2011 have not been declared on the packages of the said goods. The representative samples were also drawn for testing. The test reports received from FSSAI Laboratory, Ghaziabad for 15 items stated. "The sample is thus unsafe under Section 3(1)(zz)(v) and misbranded under Section 3(1)(zf) of the FSS Act, 2006" and for other two items stated "The sample is misbranded under Section 3(1)(zf) of FSS Act, 2006."

2. Statements of several persons including appellants were recorded and the appellant was not aware of the actual value of the goods as the same were negotiated by their Consultant. The purchase and sale of the goods were completely arranged by their Consultant and the profit was to be shared between the importer and his Consultant. For payment of duty the appellant No. 2 took a loan of Rs. 10 lakhs from M/s. Ranbir Finance

Company and rest of the four lakhs were arranged by the CHA. He was not aware of the origin of the goods as no certificate of origin was available. That neither his firm was registered with FSSAI nor has obtained NOC prior to customs clearance of the goods. The appellant no. 2 voluntarily deposited Rs. 10 lakhs on account of anticipated adjudication levies. The appellant No. 1 is the Director of CHA firm who has undertaken the clearance work of the consignment that he was aware of requirement of NOC from FSSAI but he did not obtain and instead submitted five previous bills of entry in respect of same goods and same supplier for waiver; he has wrongly mentioned the country of origin as UAE instead of USA in B/E and also filled blank GATT declaration forms having signature of the party on forms only; he did not comply with the requirements of Legal Metrology (Packed Commodity) Rules, 2011, that he knows to Shri Sunny Gujral, the supplier of the consignment and he introduced appellant No. 2 to him for supply of dietary supplements.

3. Show Cause Notice dated 2-2-2014 was issued by Additional Director, Directorate of Revenue Intelligence, Lucknow Zonal Unit, Lucknow to the four Noticees for violation of the Section 25 of the FSS Act, 2006, procedure prescribed by C.B.E. & C. vide Circular No. 3/2011 and Rule 6 and Rule 10 of the Legal Metrology (Packaged Commodity) Rules, 2011 which prescribed that every package intended for retail sale, MRP/RSP, name and address etc. of the importer have to be declared. Inspector and Superintendent of Customs who were involved in examination of the goods were also issued show cause notice for their failure to draw samples in terms of C.B.E. & C. Circular No. 3/2011, dated 6-1-2011 and to ensure compliance with the Legal Metrology (Packaged Commodity) Rules, 2011. Penalties were proposed on all the Noticees under Section 112(a) of the Customs Act, 1962 for improper importation of the impugned consignment which appeared liable to confiscation under Section 111(d) of the Customs Act being prohibited for import not complying with the Section 25 of FSS Act, 2006 and also follow the prescribed procedure under Circular 3/2011 which read as

Section 25 of FSS Act, 2006

“25. All imports of articles of food to be subject to this Act. - (1) No person shall import into India —

- (i) any unsafe or misbranded or sub-standard food or food containing extraneous matter;
- (ii) any article of food for the import of which a licence is required under any Act or rules or regulations, except in accordance with the conditions of the licence; and
- (iii) any article of food in contravention of any other provision of this Act or of any rule or regulation made thereunder or any other Act.”

Para 7 of C.B.E. & C. Circular No. 03/2011-Cus.

(a) consignments of high risk food items, as listed in DGFT Policy Circular No. 39(RF-2003)/2002-2007, dated 14-6-2004 (as may be modified from time to time), shall be referred to Authorised Representative of FSSAI or PHOs, as the case may be, for testing and clearance shall be allowed only after receipt of the test report as per the instructions contained in the Customs Circular No. 58/2001-Cus., dated 25-10-2001.

(b) All consignments of perishable items like fruits, vegetables, meat, fish, cheese etc., will continue to be handled in terms of the guidelines contained in Para 2.3 of the Board's Circular No. 58/2001-Customs dated 25-10-2001.

(c) In respect of food items not covered under (a) and (b) above, the following procedure would be adopted in addition to the general checks prescribed under Para 2.1 of the Circular No. 58/2001-Cus., dated 25-10-2001 :

i. Samples would be drawn from the first five consecutive consignments of each food item, imported by a particular importer and referred to Authorised Representative of FSSAI or PHOs, as the case may be, for testing to ascertain the quality and health safety standards of the consignments.

ii. In the event of the samples conforming to the prescribed standards, the Customs would switch to a system of checking 5%-20% of the consignments of these food items on a random basis, for checking conformity to the prescribed standards. The selection of food items for random checking and testing would be done by the Customs taking into consideration factors like the nature of the food products, its source of origin as well as track record of the importers as well as information received from FSSAI from time to time.

iii. In case, a sample drawn from a food item in a particular consignment fails to meet the prescribed standards, the Customs would place the import of the said consignment on alert, discontinue random checking for import of such food items and revert to the procedure of compulsory checking. The system of random sampling for import of such food items would be restored only if the test results of the samples drawn from the 5 consecutive consignments re-establish that the food items are in conformity with the prescribed standards.”

4. Vide impugned order, the Learned Commissioner found that the conduct of the Inspector and Superintendent could not be considered sufficient to hold that they had abetted in the offence even though there may be some omissions by these officers and accordingly no penalty was imposed upon them. He imposed penalties equal to value of the seized goods Rs. 2,17,97,466/- on both the appellants. However, he ordered that “no penalty is imposed on Noticee No. 3, as the penalty has been imposed on Director of the CHA firm”. Against the impugned order present appeals No. C/51595/2018 and C/50523/2018 have been filed by the appellant No. 1 & 2 respectively, Appeal No. C/50196/2018 has been filed by the Revenue for not imposing any penalty against the CHA firm which has been dealt separately.

5. After hearing both the sides, we find that in the appeals filed by both the appellants, no evidence has been adduced which contradicts the facts that the import consignment were of the goods which did not conform to the standards laid down under Food Safety & Standards Act, 2006. The test report of the samples drawn from the import consignment has categorically mentioned that the samples are unsafe and misbranded as per the provisions of Section 3(1) of the FSS Act, 2006. The Commissioner in impugned order-in-original has categorically brought out the role of both the appellants very categorically in his findings given on Para 28.1 for Shri Anand Kadiyan, the Proprietor of the importing firm and Para 28.2 for Shri Rajesh Maikhuri, Director of the CHA firm. Both the appellants have not adduced any evidences to disapprove the findings of the Adjudicating Authority. It has been submitted by Shri Anand Kadiyan that the penalty under Section 112A of the Customs Act, 1962 should have been equivalent to the declared value of the import consignment rather than the market value of the import consignment. We find that the argument made by the appellant is not legally sustainable as the Customs Act under Section 112A provides that penalty under the Section should not exceed the value of the goods. Since, the import consignment falls under the category of the prohibited goods and it has also been found that the value declared by the importer is not correct. The seizure value of these goods have been taken as market value since as the goods are of prohibited nature, they are certainly to fetch high margin of profit in the domestic market. The Adjudicating Authority has accordingly taken the market value of such goods as prevailing in the local market for imposition of penalty, we are of the opinion that the amount of the penalty imposed on both the appellants is in accordance with the provisions of Section 112A (i) of Customs Act, 1962 and, therefore, we find no reason to interfere with the amount of penalty

imposed on both the appellants. We also take note of the fact that the dietary supplements imported by the importer and assisted by Director of the clearing firm namely Shri Rajesh Maikhuri in attempted clearance of the same [and] has not confirmed to the Food Safety & Standards Act and by their this Act, they have tried to put the health of several customers of the domestic market under danger only with a motive to earn profit. We are of the firm opinion that deterrent penalty need to be imposed on such importers and their accomplices and thus we do not find any reason to interfere with the amount of penalty imposed by the Adjudicating Authority in the impugned order-in-original.

6. In view of above, both the appeals are hereby dismissed.

(Order pronounced in open Court on 15-11-2019)

[Back](#)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. IV]

Ms. Archana Wadhwa, Member (J) and Shri V. Padmanabhan, Member (T)

INDUS CHEMITEX LTD.

Versus

COMMISSIONER OF C. EX., NEW DELHI (ICD TKD)

Final Order Nos. C/A/52244-52246/2017-CU(DB), dated 6-3-2017 in
Appeal Nos. C/56846-56848/2013-CU(DB)

REPRESENTED BY :Shri Rajesh Yadav, Advocate, for the Appellant.

Shri K. Poddar, DR, for the Respondent.

[Order per : Archana Wadhwa, Member (J)]. - After hearing both the sides duly represented by Shri Rajesh Yadav, Advocate for the appellant and Shri K. Poddar, DR for the respondent, we find that they filed shipping bills for export of fabrics on 18-8-2011 and on 13-9-2011. The same were detained and seized by the Customs Officers on 25/26-8-2011 and 30-9-2011 on the allegations of over valuation.

2. Inasmuch as the show cause notice under Section 124 was not possible to be issued within the period of six months, a show cause notices dated 9-2-2012 was issued to the appellant in terms of Section 110(2) of the Customs Act proposing extension of the period for issuance of the show cause notice under Section 124 upto 24-8-2012. The said show cause notice was adjudicated by the Commissioner vide his order dated 23-12-2012, extending the period for issuance of regular show cause notice under Section 124 by six months i.e. upto 24-8-2012.

3. The said order of the Commissioner was put to challenge by the appellant before Tribunal, who vide its order dated 19-6-2012 set aside the same and remanded the matter to Commissioner for fresh decision, after observing the principles of natural justice. The remand kept pending at the Commissioner level, who took up the matter only on 18-12-2012 and vide his present impugned order observed that the show cause notice has already been issued on 23-8-2012 and as such the present extension being granted by him would relate back to 23-2-2012 when the first extension order was passed. Being aggrieved with the said order of Commissioner, the appellant is in appeal.

4. The main grievance of the appellant is that when the show cause notices under Section 124 of the Customs Act was issued on 23-8-2012, there was no valid order of extension passed in terms of Section 110(2) of the Customs Act inasmuch as the same was already set aside by the Tribunal. As such reference to the earlier extension order in the show cause notice issued on 23-8-2012 was factually incorrect. Further, they have submitted that the present order of extension under Section 110(2) stands passed by the Commissioner on 18-12-2012 i.e. after expiry of one year from the actual date of seizure. By drawing our attention to the provisions of Section 110(2), ld. Advocate submits that the show cause notices under Section 124 is

required to be issued within six months of the seizure of the goods and on sufficient cause being shown, the Commissioner can extend the same by another six months. As such total period granted under the said section is one year from the date of the seizure and the present impugned order passed by the Commissioner, extending the period is even beyond the period of one year from the date of the seizure and as such cannot be upheld on that ground.

5. Ld. DR appearing for the Revenue submits that while remanding the matter to the Commissioner there was a direction to the appellant to appear before him on 2-7-2012. The appellant did not adhere to the said direction of the Tribunal and approached the Commissioner only on 24-7-2012 for the first time. It is in this scenario that the Commissioner could not pass the extension order well within time.

6. After appreciating the factual position as also the submissions made by both the sides as also the provisions of Section 110(2), we note that the said section provides for extension for issuance of show cause notice under Section 124 within a period of six months from the date of seizure of the goods. Admittedly, when the show cause notice in terms of Section 124 was issued on 23-8-2012 there was no valid order of extension inasmuch as the same was set aside by the Tribunal on 19-6-2012. The subsequent extension order was passed belatedly on 18-12-2012, and by that time the show cause notice had already been issued on 23-8-2012. As such it can be safely concluded that the show cause notice having been issued on 23-8-2012 was beyond the period of six months from the date of seizure.

7. On being questioned, ld. Advocate fairly agrees that the show cause notice issued on 23-8-2012 can be adjudicated by the Commissioner and the effect of belated issuance of the same would only be what the seized goods are required to be returned to the appellant. He also fairly agrees that if the adjudicating authority comes to a finding that the goods are liable to confiscation the same can also be confiscated.

8. In view of the above submission of the ld. Advocate and in view of the findings arrived at by us, in the preceding para, we direct the authorities to return the seized goods to the appellant. We make it clear that the adjudication proceedings shall continue in terms of the SCN dated 23-8-2012.

9. With the above observations, the appeals are disposed of.

(Dictated and pronounced in the open Court)

[Back](#)

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

PRINCIPAL BENCH,
COURT NO. IV

Customs Appeal No. 50196 of 2018

[Arising out of the Order-in-Original No. 18/2017 dated 29/09/2017 passed by The Commissioner of Customs (Exports), ICD, Tughlakabad, New Delhi.]

The Commissioner of Customs (Exports)

Appellant

Inland Container Depot,
Tughlakabad, New Delhi.

VERSUS

M/s R.U. Imports-Exports Pvt. Ltd.

Respondent

L-10, 2nd Floor, Mahipalpur
Extension, New Delhi – 110 037.

Appearance

Shri Rakesh Kumar, Authorized Representative (DR) – for the appellant

Shri B.L. Garg, Advocate – for the Respondent.

CORAM: **HON'BLE SHRI C.L. MAHAR, MEMBER (TECHNICAL)**
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER NO. 51492/2019

DATE OF HEARING : 21/05/2019.

DATE OF DECISION: 15/11/2019.

C.L. MAHAR :-

The brief facts of the matter are that M/s Ethan Sales and Services have imported a consignment of Dietary Supplements under the bill of entry No. 2924132 dated 06/08/2013 at ICD, Tughlakabad, New Delhi. The Department has received an intelligence that the subject consignment has been imported without required no objection certificate from Food Safety & Standards Authority of India (FSSAI). The consignment was put under 100% examination by the officers of the DRI. During course of examination of the consignment, it was observed by the officers in their examination report that the MRP/RSP and other details regarding importer, their addresses etc. as required under Rule 6 and Rule 10 of Legal Metrology (Packaged Commodity) Rules, 2011 have not been complied with as the required details have not been given on the packets of dietary supplements. The officers have also drawn representative samples from the consignment and same have been got

chemically tested from the FSSAI Laboratory, Ghaziabad. The FSSAI Laboratory vide their report dated 18/12/2013 has held as follows :-

Table	Sample wise Findings of FRSL		
Sl. No.	Description of Goods	Certificate No.	Finding
1.	ISO 100	M-2/13-FRSL	The sample is thus unsafe
2.	Elite (Berry Blast)	M-3/13-FRSL	
3.	Elite (Chocolate Rich)	M-4/13-FRSL	under Section
4.	Gold Standard 100% Whey	M-5/13-FRSL	3(1)(zz)(v) and mis-branded
5.	Xpand 2X	M-6/13-FRSL	
6.	Whey Protein	M-8/13-FRSL	under Section
7.	Gold Standard 100% Whey	M-9/13-FRSL	3(1)(zf) of FSS Act, 2006.
8.	Liquid Super Amino	M-10/13-FRSL	
9.	Huuper Shock	M-11/13-FRSL	
10.	Lipo 6 Black	M-12/13-FRSL	
11.	Lipo 6 Black Ultra Concentrate	M-13/13-FRSL	
12.	Assault	M-15/13-FRSL	
13.	Gold Standard 100% Whey Protein	M-16/13-FRSL	
14.	Serious Mass	M-17/13-FRSL	
15.	Elite (Smooth Banana)	M-18/13-FRSL	
16.	BCAA Complex 2200	M-14/13-FRSL	The sample is mis-branded under Section 3(1)(zf) of FSS Act, 2006.
17.	Creatine Powder	M-7/13-FRSL	

2. In view of above facts, the department was of the view that since the goods as tested by FSSAI have been declared as unsafe for human consumption, they become prohibited goods as per Section 25 of the Food Safety & Standards Act, 2006 and, therefore, a show cause notice was issued for confiscation of the imported consignment under Section 111D of the Customs Act, 1962, penal provisions of Section under 112A have also been invoked against the importing firm and its Proprietor Shri Anand Kadiyan, against Shri Rajesh Maikhuri, Director of the CHA firm M/s R.U. Imports-Exports Pvt. Ltd., against M/s R.U. Imports-Exports Pvt. Ltd., Shri Rajinder Madhok (Consultant) and Shri Ved Prakash Dhembula, Superintendent of Customs, ICD, Tughlakabad and Shri Ranjeet Singh Rana, Inspector, Customs, ICD, Tughlakabad. The matter got adjudicated vide order-in-original No. 18/2007 dated 29 September 2017 whereunder it has been held as under :-

“(i) seized goods (seizure value Rs. 2,17,97,466/-) are liable for confiscation under Section 111 (d) as they are prohibited goods

and are absolutely confiscated under Section 125 of the Customs Act, 1962 ;

(ii) penalty equivalent to seizure value i.e. Rs. 2,17,97,466/- (Rupees Two Crore Seventeen Lakhs Ninety Seven Thousand Four Hundred and Sixty Six) is imposed on Noticee 1 under Section 112

(a) of the Customs Act, 1962 ;

(iii) penalty equivalent to seizure value i.e. Rs. 2,17,97,466/- (Rupees Two Crore Seventeen Lakhs Ninety Seven Thousand Four Hundred and Sixty Six) is imposed on Noticee 2 under Section 112

(a) of the Customs Act, 1962 ;

(iv) No penalty is imposed on notice 3, as the penalty has been imposed on the Director of the said CHA firm ;

(v) Penalty equivalent to seizure value i.e. Rs. 2,17,97,466/- (Rupees Two Crore Seventeen Lakhs Ninety Seven Thousand Four Hundred and Sixty Six) is imposed on Noticee 4 under Section 112

(a) of the Customs Act, 1962 ;

(vi) No penalty is imposed on Noticee 5 and Noticee 6 under Section 112 of the Customs Act, 1962 ;

(vii) Show cause notice issued vide DRI F. No. DRI/NCO/exam/52/2013 dated 02/02/2014 has been issued by Additional Director Directorate of Revenue Intelligence, Lucknow Zonal Unit, Lucknow is disposed accordingly”.

3. The department is in appeal against the above-mentioned order-in-original on the ground that the CHA firm namely M/s R.U. Imports-Exports Pvt. Ltd. has played a crucial role in violation of the provision of the Foods Safety & Standards Act, 2006 as well as violation of provisions of the Customs Act, 1962, however, the Adjudicating Authority has failed to impose penalty on the respondent CHA firm and, therefore, the Adjudicating Authority has erred in not imposing penalty under Section 112A on the CHA firm namely M/s R.U. Imports-Exports Pvt. Ltd.

4. The learned Departmental Representative has mentioned that from the investigation it is very apparent that the Director of the CHA firm Shri Rajesh Maikhuri was fully aware that the subject consignment required NOC from FSSAI and still ignoring the statutory requirements of FSSA, 2006, the goods were cleared without necessary test report. He is also responsible of filing blank GATT declaration forms with only signature of the importing firm. From the investigation it has categorically emerged that previous consignment of Dietary supplements were also cleared without compliance of FSSA, 2006 and without submitting of the complete necessary documents at the time of the import. It has further been revealed that imposition of the penalty on the Director under Section 112A of the Customs Act, 1962 is not sufficient as the CHA firm is an

independent legal entity and thus CHA firm is responsible for compliance of all the legal requirements of the Customs Act, 1962 as well as the Food Safety & Standards Act, 2006. Since, the Customs house clearingagency has failed to ensure compliance of the requirements of the Customs Act as well as FSSA, 2006 and, therefore, the CHA firm should have been penalized as per the provision of Section 112A of the Customs Act, 1962 which the Commissioner has failed to do and, therefore, the order-in-original to that extent is bad in law and a penalty under Section 112A need to be imposed on the CHA firm.

5. Having heard both the sides, we find that the subject import consignment have been found to had been imported in violation of provision of Food Safety & Standards Act, 2006. It is a matter of record that the samples drawn from the importconsignment were got tested from the laboratory of FSSAI, Ghaziabad and it has been found that the imported goods have been found unsafe as per standards laid down under Section 3

(1) (zz) (v) and mis-branded under Section 3 (1) (zfs) of FSSA, 2006. Thus, there is no doubt that the import consignment was of the prohibited goods as same was not found fit for human consumption. The statement of various persons including the Director of the CHA firm reveals that the Director of the CHA firm was aware that the present import consignment as well as the consignment, which have been cleared previously were not meeting with the legal requirement of the FSS Act, 2006 and thereby the same had been imported and cleared in violation of the provision of the Customs Act, 1962. We also find that the Adjudicating Authority under para 28.3 of the order-in-original has categorically mentioned that the CHA firm is responsible for filing the documents for clearance of goods from the customs and the firm has failed to ensure compliance of the provisions of Food Safety & Standards Act, 2006 as well as the provision of the Customs Act, 1962, still the Adjudicating Authority did not impose any penalty under Section 112A of the Customs Act, 1962.

6. We are of the opinion that CHA firm being independent legal entity and responsible for ensuring compliance of the customs provisions. The CHA firm has been provided with a CHA license as per the provisions of the Customs Broker Regulations CBLR which mandate them to ensure compliance of provisions of the Customs Act and since they have failed in their duty and such act have rendered the subject consignment liable for confiscation as per provisions of Section 111 (d) of the Customs Act, 1962, a penalty under Section 112 (a) of Customs Act is required to be imposed.

7. In view of above discussions, we feel that the Adjudicating Authority after providing an opportunity hearing to the respondent CHA firm will adjudicate the matter afresh only with regard to issue of the imposition of the penalty under Section 112A of the Customs Act, 1962.

8. The appeal is therefore allowed with the way of remand to the original Adjudicating Authority to decide the issue afresh in view of the above discussions.

(Order pronounced in open court on 5/11/2019.)

(C.L. Mahar)
Member (Technical)

(Rachna Gupta)
Member (Judicial)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 50777 of 2019

Arising out of Order-in-Original No. VIII(H)13/38/85, Dated: 10.01.2019
Passed by the Commissioner of Customs (Airport & General), New Custom
House, New Delhi

**Date of Hearing: 24.05.2019
Date of Decision: 20.09.2019**

**M/s SKYTRAIN SERVICES
C-32, CONNAUGHT PLACE NEW DELHI**

Vs

**COMMISSIONER OF CUSTOMS (AIRPORT & GENERAL)
NEW DELHI, NEW CUSTOMS HOUSE
NEW DELHI**

Appellant Rep by: Mr Shaveer Ahmed & Ms B S Goyal, Advs.
Respondent Rep by: Mr Rakesh Kumar, AR

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 51252/2019

Per: Rachna Gupta:

Appellant herein is the holder of Customs Broker License valid upto 31.12.2026 issued by Commissioner of Customs (General), New Delhi. Department acting upon an intelligence noticed that through appellant as Custom Broker (CB/CHA), M/s. Arun Enterprises had imported consignment vide Bill of Entry No. 4470298 dated 19.12.2017 containing mobile accessories by way of mis-declaring the same in terms of value/quantity. On the basis thereof the said consignment was put on hold vide letter dated 20.12.2017. On examination, the quantity and description of goods were found mis-declared. The products i.e. mobile touch panel, mobile LCD, mobile bag housing, hands-free of Samsung brand were also found in the consignment which were registered with Customs under Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 (IPR Rules hereinafter). Thus, the goods infringing IPR Rules were also found in the consignment. The Authorised Representative of these brands i.e. M/s. React India Pvt. Ltd., Lajpat Nagar, New Delhi was called upon to verify the noticed IPR infringement about the aforesaid products. M/s. React India Pvt. Ltd. after necessary inspection submitted their Technical Analysis Report vide letter No. 180004IN dated 13.01.2018 certifying that the products of Samsung brand found in the consignment under the impugned Bill of Entry were counterfeited and necessary actions in accordance of IPR Rules was accordingly prayed. Accordingly, the goods of the impugned Bill of Entry were seized. However, those were handed over for the safe custody to Shri Chaman Kumar Verma, the Authorised Representative/ G-Card Holder of the appellant, the CB/CHA, who was present at the time of checking of goods, after drawing representative samples of each item for further investigation.

2. The proprietor of M/s. Arun Enterprises, Shri Mohan Kumar Jha vide letter dated 22.12.2017 requested for warehousing of the aforesaid goods under Section 49 of Customs Act, 1962 on the ground of bearing heavy demurrage charges. The Space Availability Certificate No. 072 dated 22.12.2017 issued by M/s. All-ways Logistics India Pvt. Ltd., the public bonded warehouse, was annexed with the said letter. Permission accordingly was granted by the Assistant Commissioner of Customs (Preventive) vide their letter No. 24150-

24153 dated 27.12.2017 to warehouse the seized goods in M/s. All-Ways Logistics Warehouse. The said warehouse was visited by officers of Customs Preventive on 16.04.2018 to physically verify the goods imported vide impugned Bill of Entry and it came to their notice that the goods imported by M/s. Arun Enterprises vide Bill of Entry No. 4470298 dated 19.12.2017 were never warehoused in the warehouse of M/s. All-ways Logistics India Pvt. Ltd. It was informed by the warehouse to the inspecting officers that despite issuance of the space certificate to the importer for warehousing the impugned goods none approached. Hence, they contacted the concerned person i.e., importer through e-mail. The copy of the said e-mail was also given to the visiting officers who submitted his report dated 16.04.2018. It was perused that the said e-mail was sent to Shri Aakash Sharma. The documents as were provided by the Assistant Commissioner, Import Shed vide letter dated 18.04.2018 including gate pass revealed that 99 packages having weight of 3178 Kgs. under the impugned Bill of Entry was issued on 28.12.2017 at 16:12:17. Signature of said Shri Aakash Sharma alongwith the vehicle number DL1LT2858 was found on gate pass at the place of consignee.

3. During further investigation, Department noticed, especially from the statement of Shri Niyaz Khan, the team leader of warehouse, M/s. All-ways Logistics India Pvt. Ltd. that though the aforesaid vehicle reached the warehouse on 04.01.2018 but since the vehicle was found to not to be sealed with the Customs seal, the goods were refused to be off loaded and warehoused. Shri Jatin Bakshi, the owner of vehicle No. DL1LT2858 by which the goods under impugned Bill of Entry were transported from Air Cargo Complex it revealed that the goods thereafter were taken to a godown at Mahipalpur behind Apra Automobiles owned by Mr. Ramu Chhetry. All the 99 packets were unloaded there and kept at that godown. Those packets were opened one by one and goods inside the cartons were transferred in gunny bags and thereafter the said 99 packets were filled with bricks and stones got packed in original packages. Those bags got again loaded in the same vehicle No. DL1LT2858 with the instruction to the driver for taking the same to M/s. All-ways Logistics India Pvt. Ltd. But after the subsequent refusal of Shri Niyaz Khan for taking those bags into the warehouse that all the bags were brought back to Mahipalpur godown of Shri Ramu Chhetry. The bricks and stones were removed and the bags/ packets got destroyed.

4. The office address of importer M/s. Arun Enterprises was verified alongwith the address of its proprietor Shri Manoj Kumar Jha. Both the addresses were found false. Statements of Shri Aakash Sharma, Shri Chaman Kumar Verma, Shri Rajesh Kumar—driver of vehicle No. DL1LT2858 in which were loaded the goods from the Customs area to be taken to M/s. All-ways Logistics India Pvt. Ltd. and of Shri Ramu Chhetry, the actual recipient of the imported goods having his godown at Mahipalpur, Delhi behind Apra Automobiles were recorded. Finally, the statement of Shri Rajnish Kumar, proprietor of M/s. Skytrain was also recorded. The Department concluded that Shri Raman Kumar Jha had taken IEC in the name of M/s. Arun Enterprises, the proprietor, Shri Manohar Kumar Jha whereof was his brother-in-law. He in connivance with Shri Chaman Kumar Verma, the Authorised Representative/ G-Card Holder of the appellant/ Custom Broker and Shri Aakash Sharma the associate of G-Card holder and Shri Rajnish Kumar, the proprietor of appellant/ Custom Broker had got cleared the goods of Shri Ramu Chhetry imported vide the impugned Bill of Entry but in the name of M/s. Arun Enterprises and on the pretext of the permission of warehousing the seized goods under Section 49 of the Customs Act and have committed the Act of mis-declaration as far as the quantity and the quality of goods are concerned and have also violated the IPR Rules. As such, the appellant has violated the provisions of CBLR, 2013/2018. Those seized goods could never reach the said warehouse rather were stolen from the carrier of goods in gross violation of Customs Act and by hatching a conspiracy with other persons.

5. Based thereupon the show cause notice No. 19/MK/2018 dated 23.07.2018 was served to the appellant. The enquiry report thereof was submitted on 16.10.2018 recommending revocation of licence, the forfeiture of part or whole of the security and the imposition of penalty upon the appellant. The said

entire proposal and the recommendation of the enquiry report were confirmed vide the Order of Commissioner of Customs (Airport & General) vide Order No. 01/MK dated 10.01.2019. Being aggrieved, the present Appeal has been filed.

6. We have heard Ms. B.S. Goyal & Mr. Shaveer Ahmed learned Advocates for the appellant and Mr. Rakesh Kumar, learned Authorised Representative for the Department.

7. It is submitted on behalf of the appellant that Mr. Rajnish Sharma is the proprietor of the appellant who is holding Custom Broker License since the year 1987 and that the license is valid upto 21.12.2026. There has been no single instance of blame on the impugned CB/CHA. The present case of Customs is based upon Bill of Entry No. 4470298 dated 19.12.2017 containing 99 packages of mobile accessories which was filed by importer M/s. Arun Enterprises, the proprietor whereof is Shri Manohar Kumar Jha. On the basis of allegations for the goods to be under-valued and infringement of IPR Rules that the entire consignment was seized under Section 110 of Customs Act, 1962 vide the Panchnama dated 20.12.2017. However, the copy of such Panchnama was never given to the appellant nor the customs Broker was ever informed about the alleged violation and even the seizure of the goods. It is alleged that in the gross violation of established norms and procedures, the Customs Authorities on the Application filed by the importer under Section 49 of Customs Act on 22.12.2017 granted permission for the seized goods to be warehoused at M/s. All-ways Logistics India Pvt. Ltd. and the authorities had handed over the goods under seizure to one Shri Aakash Sharma. It is impressed upon that he said Shri Aakash Sharma is neither the employee of the CHA nor is its agent. CHA was otherwise not to take care of seized goods. Apparently, no such authority was given to the appellant by the Customs Authority. It is suddenly after four months on 16.04.2018 that Shri Niyaz Khan from warehouse authority informed Customs (Preventive) about not receiving the goods from the importer despite issuance of Space Availability Certificate. But no enquiry was got conducted from said Shri Niyaz Khan about not informing the authorities concerned on 04.01.2018 itself. With respect to deviation and disappearance of goods after the seizure of the same by the Customs Authorities, the CHA had no role to play. Nothing has been attributed to the CHA/ appellant even in the enquiry report.

8. The valuation of the goods as far as the false declaration thereof is concerned, the appellant is impressed to have no knowledge especially in the absence of any material on record to that effect. Learned Counsel has emphasised sub-para 8 under 'Discussion and Finding' at page 53 of the Final Order where the inquiry officer has observed that there is no evidence to establish the role of Shri Rajnish Sharma, proprietor of CB/CHA in the above said violations. The involvement of Shri Aakash Sharma alongwith Shri Raman Kumar Jha, brother-in-law of the importer has clearly been observed by the inquiry officer. With respect to the confessional statement of his G-Card holder, Shri Chaman Kumar Verma as was recorded post his arrest on 24.05.2018, it is submitted that the statements were coerced, hence cannot be relied upon. It is further submitted that Customs Authorities have failed not only to inform the appellant/CHA about the mis-declaration of the goods or the seizure thereof or even about handing over of the seized goods to Shri Aakash Sharma and the manner in which the goods were released despite being seized under Section 110 of the Customs Act.

9. It is further been argued that there is no room for doubt that the Customs Authorities themselves connived and were hand-in-gloves with Shri Aakash Sharma and Shri Raman Kumar Jha. No doubt CHA had a responsibility of failing to monitor the whole transaction but once the goods were seized under Section 110 same became the property of the Customs which could not be handed over to any one not even to the CHA. Hence, the events post seizure cannot be attributed to CHA's failure to observe any of the obligations of CBLR Regulations. The appellant has relied upon *Flacon Air Cargo & Travels Pvt. Ltd. Vs. C.C., New Delhi* reported in 2002 (141) E.L.T. 284 and *Kunal Travels Vs. C.C. (I&G)* reported in 2017 (354) E.L.T. 447. Admittedly, appellant/CHA did not apply for release of goods. With these submissions the inferences drawn in

inquiry report as well as the Order under challenge are prayed to be set aside. Appeal is accordingly prayed to be allowed.

10. While rebutting these arguments it is submitted that apparently and admittedly at the time of examination of the goods imported vide the impugned Bill of Entry and the subsequent seizure, the G-Card holder of the appellant/CHA was present in person. In his statement dated 20.12.2017 he has acknowledged Shri Aakash Sharma to be his associate/employee. Said Shri Aakash Sharma in his statement dated 19.04.2018 and 24.04.2018 has acknowledged that he has been working in association with appellant/CB. The Department has impressed upon a letter of the appellant written to the Superintendent of Customs (Preventive), New Customs House, IGI Airport, New Delhi as was received by the Department on 18.04.2013 wherein the appellant has acknowledged that the consignment of M/s. Arun Enterprises against the Bill of Entry No. 4470298 dated 19.12.2017 was allowed to be sent to public bonded warehouse namely M/s. All-ways Logistics India Pvt. Ltd. Mr. Aakash Sharma is acknowledged to be the person authorised by the appellant and is mentioned to have been handed over with the shipment to be taken to the warehouse with Mr. Niyaz Khan as the concerned in-charge there. However, on checking the cargo in the warehouse, the shipment was not found. The intervention was requested by the appellant from the Customs Authorities. It is impressed upon that the said letter is sufficient to highlight the involvement of the CHA in the entire transaction and is also sufficient to prove that CHA had all the knowledge of alleged mis-declaration and the infringement of IPR Rules. He knowingly was the party for diversion of the seized goods to the godown of Shri Ramu Chhetry, the actual beneficiary instead the same being deposited to the public bonded warehouse as per the permission under Section 49 of the Customs Act. Finally, relying upon the decision of Supreme Court in the case of *Commissioner of Customs Vs. KM Ganatra and Co.* reported in the Authorised Representative has impressed upon no infirmity in the Order under challenge wherein the violation of the obligations on the part of CHA have duly been observed against the appellant. Order accordingly is prayed to be upheld Appeal is prayed to be dismissed.

11. After hearing both the parties and perusing the entire record we observe and opine as follows:

11.1 The admitted facts in the present case are:-

(i) Mobile accessories got imported by M/s. Arun Enterprises, the Proprietor thereof is Shri Manohar Kumar Jha, vide Bill of Entry No. 4470298 dated 19.12.2017.

(ii) The said Bill of entry and the consignment thereof was intercepted on the basis of information for the goods being mis-declared, under-valued and are infringing Intellectual Property Rights.

(iii) The goods were seized vide panchnama dated 20.12.2017.

(iv) At the time of examination of goods and the impugned panchnama, and the delivery thereof the G-Card holder of the appellant namely Shri Chaman Kumar Verma was present in person.

(v) On the request of the importer, the seized goods were allowed to be warehoused in public bonded warehouse, i.e. M/s. All-ways Logistics India Pvt. Ltd. on 22.12.2017.

(vi) The goods never got warehoused and this fact was not taken care of till the expiry of four months i.e. 16.04.2018, nor was ever got verified nor even was informed to the Customs by the appellant or his G-Card holder.

(vii) The appellant was granted license to act as Custom Broker in the year 1987 which is valid till 21.12.2026.

12. The question for adjudication is as to:

12.1 Whether the Custom Broker can be held responsible for the alleged mis-declaration and under valuation of goods, for infringement of Intellectual Property Rights due to the mobile accessories of Samsun brand to also be present in the consignment and also for the alleged diversion of the goods.

12.2 For the purpose, foremost, we need to first appreciate the obligations as have been imposed upon the Customs Brokers by the Customs Broker License Regulation 2013/2018. We observe that the same are mentioned under Regulation 14 thereof which reads as follows:

"14. Obligations of Customs House Agent. - A Customs House Agent shall :

- (a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as Customs House Agent and produce such authorisation whenever required by an Assistant Commissioner of Customs or Deputy Commissioner of Customs;*
- (b) transact business in the Customs Station either personally or through an employee duly approved by the Assistant Commissioner of Customs or Deputy Commissioner of Customs, designated by the Commissioner;*
- (c) not represent a client before an officer of Customs in any matter to which he, as officer of the Department of Customs gave personal consideration, or as to the facts of which he gained knowledge, while in Government service;*
- (d) advise his client to comply with the provisions of the Act and in case of non-compliance, shall bring the matter to the notice of the Assistant Commissioner of Customs or Deputy Commissioner of Customs;*
- (e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;*
- (f) not withhold information relating to clearance of cargo or baggage issued by the Commissioner of Customs from a client who is entitled to such information;*
- (g) promptly pay over to the Government, when due, sums received for payment of any duty, tax or other debt or obligations owing to the Government and promptly account to his client for funds received for him from the Government or received from him in excess of Governmental or other charges payable in respect of the clearance of cargo or baggage on behalf of the client;*
- (h) not procure or attempt to procure directly or indirectly, information from the Government records or other Government sources of any kind to which access is not granted by proper officer;*
- (i) not attempt to influence the conduct of any official of the Customs Station in any matter pending before such official or his subordinates by the use of threat, false accusation, duress or the offer of any special inducement or promise of advantage or by the bestowing of any gift or favour or other thing of value;*
- (j) not refuse access to, conceal, remove or destroy the whole or any part of any book, paper or other record, relating to his transactions as a Customs House Agent which is sought or may be sought by the Commissioner;*
- (k) maintain records and accounts in such form and manner as may be directed from time to time by an Assistant Commissioner of Customs or Deputy Commissioner of Customs and submit them for inspection to the said Assistant Commissioner of Customs or Deputy Commissioner of Customs or an officer authorised by him whenever required;*
- (l) ensure that all documents prepared or presented by him or on his behalf are strictly in accordance with orders relating thereto;*
- (m) ensure that all documents, such as bills of entry and shipping bills delivered in the Customs Station by him show the name of the importer or exporter, as the case may be, and the name of the Custom House Agent, prominently at the top of such documents;*
- (n) in the event of the licence granted to him being lost, immediately report the fact to the Commissioner;*
- (o) ensure that he discharges his duties as Customs House Agent with utmost speed and efficiency and without avoidable delay; and*
- (p) not charge for his services as Customs House Agent in excess of the rates approved by the Commissioner from time to time under Regulation 25."*

Regulation 19 provides for maintenance and inspection of accounts. We have referred to the said Regulation as it casts number of obligations on the Customs House Agent."

12.3 The perusal makes it clear that the CHA is created as a link between Customs Authorities and the importers with an object of facilitating the clearances at Customs as the Custom procedures are complicated. The CHA is thus supposed to safeguard the interests of both the Customs as well as the importers. Hon'ble Supreme Court in KM Ganatra and Co. (supra) case while relying upon the decision of Mumbai Tribunal in the case of *Noble Agency Vs. Commissioner of Customs, Mumbai reported in 2002 (142) E.L.T. 84* has held as follows:

"The CHA occupies a very important position in the Customs House. The Customs procedures are complicated. The importers have to deal with a multiplicity of agencies viz. carriers, custodians like BPT as well as the Customs. The importer would find it impossible to clear his goods through these agencies without wasting valuable energy and time. The CHA is supposed to safeguard the interests of both the importers and the Customs. A lot of trust is kept in CHA by the importers/exporters as well as by the Government Agencies. To ensure appropriate discharge of such trust, the relevant regulations are framed. Regulation 14 of the CHA Licensing Regulations lists out obligations of the CHA. Any contravention of such obligations even without intent would be sufficient to invite upon the CHA the punishment listed in the Regulations...."

12.4 It becomes clear from the above provisions and the decision of the Hon'ble Apex Court that CHA is not supposed to be a formal agent either of Custom House or of the importer. But the utmost due diligence in ascertaining the correctness of the information related to clearance of cargo is the CHA's duty. He not only is supposed to advise the importer/exporter about the relevant provisions of law and the mandate of true compliance thereof but is also responsible to inform the Department if any violation of the provisions of the Customs Act appears to or have been committed by his client at the time of the clearances. We have no difference of opinion from the case law as cited by the appellant that the revocation of license is a grave punishment and should not be imposed against the principle of proportionality. There is no dispute about the settled law that CHA is not an inspector to weigh the genuineness of the transaction. It is merely a processing agent of documents with respect to clearance of goods through the Custom House either himself or through his authorized personnel. Penalty as that of revocation of license cannot be imposed upon the CHA in absence of any active or passive facilitation by the appellant.

13. To appreciate the extent of due diligence on part of the CB/appellant or of any active or passive involvement of the appellant herein, so as to adjudicate the question as framed above, we hereby revert to the record of this case. Admittedly, the authorized representative of appellant i.e. his G-Card holder namely Shri Chaman Kumar Verma was present in the Customs House area at the time the goods were seized and the panchnama dated 20.12.2017 was prepared. The goods were handed over for safe custody to the CELEBI/ the authorized representative. The G-Card holder of the appellant, Shri Chaman Kumar Verma, in his statement, as was recorded on 20.12.2017 and even subsequently on 20.04.2018, acknowledged him to be working with the appellant since 2010 and looking after the filing of Bill of Entry for clearance of goods landed in ACC (Import), New Delhi. Shri Rajnish Kumar, proprietor of the appellant is stated to have the knowledge of Bill of Entry No. 4470298 dated 19.12.2017 and that the said Bill of Entry was filed after getting proper authorization from importer M/s. Arun Enterprises, Shri Manohar Kumar Jha, the proprietor thereof. The KYC of this importer was examined, not only that even the goods under said Bill of Entry are acknowledged to be examined in presence of said G-Card holder. He also acknowledged to have visited the office of importer several times. However, this acknowledgment about visiting the office stands contradicted from a report by the Department about M/s. Arun Enterprises to be dummy Company, found non-existent at the given address and the proprietor thereof Shri Manohar Kumar Jha as well as his residential address being also fake. This report, with no evidence to the contrary, is sufficient for us to form an opinion that the Custom Broker/ the appellant and

his G-Card holder had sufficient knowledge about the importer being fake. It stands established that the Custom Broker at least had failed in observing due diligence about verifying the antecedents as far as KYC of the importer. Same definitely amounts to violation of Regulation 11(e)/ 14(e) of CBLR 2013/2018.

14. No doubt, the request for warehousing the seized goods under Section 49 of Customs Act, 1962 was made by the importer but after the grant of the permission, since the goods were given in the safe custody of CELEBI/Shri Aakash Sharma in presence of G-Card Holder of the appellant the subsequent movement thereof is not possible without the knowledge and the consent of the said G-Card holder who was the authorized representative of the appellant and the appellant is bound by his acts and conducts. The said permission of warehousing was granted on the basis of Space Availability Certificate given by the public bonded warehouse namely M/s. All-ways Logistics India Pvt. Ltd. It is on record that the said certificate was submitted by G-Card holder of the appellant. It is also on record that on the physical examination of the said warehouse on 16.04.2018 specifically about the goods imported vide the impugned Bill of Entry filed by M/s. Arun Enterprises it was found that the goods had never reached the warehousing despite that the OTL seal No. 035263 was issued to the vehicle in which the said goods were loaded for warehousing. The in-charge of said warehouse is observed to have denied to off load the goods at warehouse due to said seal being doubtful.

15. The other document as was submitted by the Assistant Commissioner, Import Shed vide letter No. VIII(12)ACC dated 18.04.2018 was the gate pass as was issued on 28.12.2017 at 16.12 for release of 99 packages weighing 3178 Kgs of goods as were mentioned in the impugned Bill of Entry. The gate pass bears the signature of one Shri Aakash Sharma endorsed at the place of consignee. The said Shri Aakash Sharma is acknowledged to be the associate of Shri Chaman Kumar Verma. Though the appellant has taken the stand that he has no knowledge about any person known as Shri Aakash Sharma and any act done by Shri Aakash Sharma and that the liability cannot be fastened upon the appellant, but the appeal record is found to have a letter written by the appellant/ CHA to the Superintendent of Customs (Preventive) as was received by them on 18.04.2018 informing about the shipment of M/s. Arun Enterprises under the impugned Bill of Entry to the warehouse. It has specifically been mentioned in the said letter that the person of the CHA/appellant namely Shri Aakash Sharm handed over the shipment to the warehouse which was received by Shri Niyaz Khan. This acknowledgment about Shri Aakash Sharma is sufficient to falsify the contention of the appellant about having no knowledge of the issue involved but to corroborate the statement of Shri Niyaz Khan. The warehouse had contacted the concerned person through email. It was revealed from the record that those e-mails were sent to Shri Aakash Sharma at e-mail address: akashsharma21101991@gmail.com.

16. Further, this letter clarifies that since the date of seizure the facts were in the notice of the authorized representative of the appellant as well as the appellant himself but no efforts were taken by the appellant to either advise the importer about the safe and proper delivery of the goods permitted to be warehoused in the warehouse of M/s. All-ways Logistics India Pvt. Ltd. in time nor the violation thereof was brought to the notice of the Customs Department. The concealment of the fact that Shri Aakash Sharma was an associate of the appellant who was involved in the entire incident from the non deposition of seized consignment in the warehouse to diversion/ stealing of the seized good clearly amounts to breach of the duty burdened upon the CHA under 11(d) and 11(f) of CBLR, 2013. There is an apparent delay since December 2017 till April 2018 when appellant for the first time informed the Department vide the aforesaid letter. There is no explanation on the part of the appellant for remaining silent for a period of almost four months which amounts to the failure on his part to discharge his duty as custom agent without any avoidable delay.

17. Now coming to the statement of Shri Aakash Sharma who is acknowledged to be the associate of Shri Chaman Kumar Verma and the person of the

Custom Broker, as per Custom Broker himself. We observe the following admissions:

(i) He assisted Shri Chaman Kumar Verma in all proceedings including obtaining the permission from Assistant Commissioner, Import Shed for warehousing.

(ii) On 28.12.2017 he got the gate pass for delivery of said goods and got issued customs seal by seal issuing authority after making entry of seal No. in the register (this gate pass issuance and the delivery stands corroborated from the documents as was given by Commissioner, Import Shed vide letter No. VIII(12) dated 18.04.2018).

(iii) After he was allowed to take the delivery of goods he got loaded 99 packages of the consignment in a truck No. DL1LT2858 and got the truck sealed with the customs seal as was issued to him (This stands corroborated from the statement of Shri Jatin Bakshi, the owner of this truck and its driver, Shri Rajnish Kumar)

(iv) The consignment reached M/s. All-ways Logistics India Pvt. Ltd. at 12am on 28.12.2017 however, the team leader of warehouse Shri Niyaz Khan was contacted at 11:30 am on 29.12.2017 the next day and got the consignment unloaded and deposited to the warehouse but the records of the warehouse had no receipt of any such consignment on 29.12.2017.

18. However, we observe from record that:

(i) Shri Aakash Sharma admitted to have no such document/evidence as may prove that the consignment of impugned Bill of Entry was received by M/s. All-ways Logistics India Pvt. Warehouse. It is apparent from record that even Shri Chaman Kumar Verma could not produce any evidence for getting the goods warehoused despite he assured for producing the same. The factum of goods to have never reached to M/s. All-ways also gets corroborated from the statement of Shri Jatin Bakshi who was the owner of the truck No. DL1LT2858 by which the goods under impugned Bill of Entry were transported from Air Cargo Complex. He had acknowledged that his services were hired by Shri Aakash Sharma from ACC (Import) to M/s. All-ways Logistics warehouse at Dhoolsiras. However, the goods were not taken to the warehouse but were diverted to the parking space of transporter itself at Mahipalpur, behind Raddison Hotel. The truck remained parked with the loaded goods from 28.12.2017 to 30.12.2017 on which date the goods were diverted to godown behind Apra Automobiles at Mahipalpur and got unloaded there. The driver of the truck, Shri Rajnish Kumar corroborated the statement of Shri Jatin Bakshi. The statement of Shri Niyaz Khan, team leader of M/s. All-ways Logistic Pvt. Ltd. warehouse further corroborates non-receipt of the impugned goods at the said warehouse. He stated that goods reached the warehouse only on 04.01.2018 at 4:30 pm however, on the basis of doubt qua the seal that he refused to off-load the goods. The goods were again brought to the warehouse on 05.01.2018 at 12:30 pm. On inspection, Shri Niyaz Khan found bricks and stones packed in the cartons. Since he had seen the receipt in respect of the warehousing of the goods as was submitted by the G-Card holder of Custom Broker/appellant, he could identify the another receipt to be forged. Resultantly, he refused to warehouse the fake/bogus consignment.

(ii) Shri Aakash Sharma who was assisting the said G-Card holder of the appellant has acknowledged for the entire transaction, since the seizure of goods till those goods were diverted to a godown at Mahipalpur behind Apra Automobiles owned by Shri Ramu Chhetry who actually was the buyer of the impugned goods as were purchased from Shri Raman Jha a friend of Shri Chaman Kumar Verma.

(iii) Shri Raman Kumar Jha only had taken the IEC No. 0516959310 in the name of M/s. Arun Enterprises and inducted Shri Manohar Kumar Jha his brother-in-law as the fake proprietor of M/s. Arun Enterprises. He only used the services of M/s. Skytrain Services and provided all KYC to the CB/appellant. It is on his instruction only that the goods were diverted to the godown of Shri Ramu Chhetry.

19. Involvement of Shri Ramu Chhetry and Shri Raman Kumar Jha stands corroborated from the documents proving the transfer of Rs.10 Lakhs from the bank account of Shri Ramu Chhetry at Yes Bank to the bank account of Shri Raman Kumar Jha in Axis Bank on 22.05.2018. The said is an amount equivalent to the amount of duties and penalties in respect of current case. Shri Raman Kumar Jha acknowledged Shri Chaman Kumar Verma to be his friend assisting him in getting clearances of the goods. He corroborated that Shri Ramu Chhetry approached him for clearances of goods i.e. mobile accessories purchased by him in China. It is also stated that the entire fact of obtaining the fake IEC in the name of M/s. Arun Enterprises with his brother-in-law as the proprietor thereof, the goods in the consignment to be mis-declared and under-valued and to also have infringed the Intellectual Property Rights were in the notice of Shri Chaman Kumar Verma as well. Mr. Raman Jha also corroborated the factum of goods being diverted from the ACC (Import) to the godown of Shri Ramu Chhetry instead of M/s. All-ways Logistics India Pvt. Ltd. where the mobile accessories were removed from the 99 packages as were sent from the Customs to be warehoused and those packages being re-filled with stones and bricks to be transported to M/s. All-ways Logistics India Pvt. Ltd. and were subsequently being refused to be warehoused by the person in-charge thereof, i.e., Shri Niyaz Khan.

20. From the entire above discussion it stands clear that there is sufficient oral evidence in the form of statements of all concerned, that too in corroboration, about the consignment received vide the impugned Bill of Entry to contain mis-declared and under-valued mobile accessories and to also have the mobile accessories of Samsung brand infringing the Intellectual Property Rights which despite seizure and the permission of being warehoused under Section 49 of Customs Act, 1962 were diverted to the premises of the actual purchaser of the consignment, Mr. Ramu Chhetry with the connivance of the G-card holder of the appellant and his associate. The said oral evidence is receiving due corroboration from the documents as well, as were submitted by the Assistant Commissioner, Import Shed. The physical verification of M/s. All-ways Logistics India Pvt. Ltd. reveals that the consignment was not found warehoused in the premises on 16.04.2018. Nexus between Shri Chaman Kumar Verma, Shri Aakash Sharma, Shri Ramu Chhetry and Shri Raman Kumar Jha stands well established upon the record.

21. Admittedly, Shri Chaman Kumar Verma is the G-Card holder of the appellant who was physically and actually involved in the entire series of acts. Apparently and admittedly his activities had never been objected by the appellant nor ever had been questioned nor even been informed to the competent authorities. The appellant is otherwise bound by the act of his G-Card holder. Otherwise also, without the knowledge of the Custom Broker, the goods could not have been diverted. He is equally bound by the act of his authorised representative/agent. Keeping in view the same and the observation of Hon'ble Supreme Court in KM Ganatra & Co. (supra) case about the important duties of the CHA and the amount of due diligence as is required to be observed on their part, we are of the firm opinion that CHA has violated the obligations imposed upon him under CBLR, 2013/2018. The above observations are sufficient to hold that the violation of relevant Regulations is so grave that principle of proportionality is not opined to have been compromised as is impressed upon by the appellant. The failure thereof invites the penalty as that of revocation of license.

22. The facts and circumstances of the case as discussed above are sufficient to reflect the gravity of illegality committed which was not possible had the Custom Broker verified antecedent correctness of IEC Code no., identity of the importer herein and its functioning at the declared address by way of using reliable, independent, authentic documents, data or information. Thus, there is apparent violation of Regulation 11(n) of CBLR, 2013 as well as Regulation 79 of CBLR, 2013 holds the Custom Broker responsible for all acts or omissions of his employee during their employment as he is under the burdened duty to exercise such supervision as may be necessary to ensure the proper conduct of his employees in the transaction of the business. In view thereof, we are of the opinion that the Adjudicating Authority below has

committed no error while holding that the Custom Broker Firm/the appellant has failed in compliance to their responsibilities cast upon them as per the Regulations 10(d) (e) (n) and 13 and 12 of CBLR, 2018 and thereby revoking its license forfeiting the security deposit.

23. While arriving at the given conclusion we are further of the opinion that for the illegality committed in the present case though the mensrea was with the G-Card holder of the appellant binding the appellant as well, his friend Shri Aakash Sharma, the actual purchaser of the impugned consignment, Shri Ramu Chhetry but the way goods have been diverted from ACC (Import) Customs Area to the godown of said Shri Ramu Chhetry, the same was not possible without connivance or at least grave negligence of the seizing officer in dealing with the seized goods. We find that whenever the goods are seized for violation of any of the provisions of the Customs Act, ownership of such seized goods temporarily rests with the government and therefore it is sacred duty of the seizing officer to ensure safety and proper storage of seized goods. The Board has issued guidelines for handling and storage of valuable goods that are seized/confiscated by the Department from its *F. No. 394/97/2015-CUS(AS) dated 01.12.2015* and on many occasions we find that the officers concerned have behaved in handling such matters in violation of above mentioned institutions. Since the act committed is in sheer violation of Customs Act, 1962 and CBEC guidelines and instructions and is otherwise an act of grave illegality, we hereby order that an inquiry to be conducted by the Department so as to investigate, as to how the seized goods went out of the custody of the department and then to fix the responsibility of the officer/official who were on duty at the time of interception, seizure and clearances of the goods. The officer involved in granting the permission under Section 49 of the Customs Act be also enquired to check the element of connivance, if any, apparent on his part to facilitate the above observed illegal act.

24. The copy of this order to be sent to Chief Commissioner(Customs), concerned, for the purpose with the directions that the enquiry report be placed before us on or before the last day of the third month from the date of this Order.

25. With these findings and directions, as above, we uphold the order under challenge. The Appeal accordingly stands dismissed.

(Order pronounced in the open Court on 20.09.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 50796 of 2019

Arising out of Order-in-Original No. VIII/ICD/TKD/6/Adj./Imp./Pr.

Commr./07/2017/50524, Dated: 14.02.2019

Passed by the Principal Commissioner, Customs, New Delhi

Date of Hearing: 17.05.2019

Date of Decision: 01.08.2019

**M/s SILICONE CONCEPTS INTERNATIONAL PVT LTD
A-77, DDA SHEDS OKHLA INDUSTRIAL AREA PHASE - II
NEW DELHI**

Vs

**PRINCIPAL COMMISSIONER OF CUSTOMS
ICD, TKD (IMPORT), NEW DELHI**

Appellant Rep by: Shri A K Prasad, Adv.

Respondent Rep by: Shri Rakesh Kumar, AR

CORAM: C L Mahar, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NO. 50963/2019

Per: Rachna Gupta:

M/s. Silicone Concepts International Pvt. Ltd. (M/s. SCIPL, hereinafter)/the appellants are engaged in import and trading of various products as epoxy, stone cleaner, stone care, polyester, firelight, etc. imported from M/s. Akemi Chemisch Technische Spezialfabrik GMBH, Germany (hereinafter referred as M/s Akemi). The Department got an information about M/s. SCIPL to have mis-declared the value of the imported goods to the Customs and to have mis-classified goods to evade payment on MRP/RSP basis and to not to have included the amounts paid to the parent Company terming them as 'Royalty' in connection with import of goods treated by M/s. SCIPL in the assessable value. On the basis of said information, the search of the appellants premises seizing goods/documents/laptops, etc. was conducted on 10.12.2015. Seized goods, however, were given to the Directors of SCIPL namely Shri Vineet Saluja and Shri Pradeep Sharma for safe custody. The statement of Shri Vineet Saluja was recorded on 10.12.2015, 20.07.2016, 19.06.2016 and 15.11.2016. The statement of Shri Pradeep Sharma was recorded on 10.12.2015 and 16.05.2016 accepting that M/s. SCIPL have committed the above mentioned acts. From the entire investigation, Department observed that M/s. SCIPL has colluded with their overseas suppliers and has fabricated documents and created parallel set of documents i.e. invoices to be submitted to Customs with an intention of evading payment of applicable duty and invoices for the purposes of actual payments. While they have made payments on the basis of invoices showing actual transactional value, they have caused duplicate invoices showing lesser value to the Customs Authorities for the purpose of assessment. Both the afore-named Directors were observed to be the master mind for the entire fraud committed by M/s. SCIPL as they only aided the Company in suppressing the actual value paid for the imports to their suppliers i.e. M/s. Akemi. Department also observed that M/s. SCIPL have used the services of M/s. Dadson Global Cargo, New Delhi who facilitated clearance of cargo of M/s. SCIPL through 7 different CHAs. None of those CHAs were observed to have followed the KYC norms nor did they bother to ascertain the credentials of M/s. SCIPL. Resultantly, a show cause notice No. 03/2017 dated 22.02.2017 was served upon M/s. SCIPL, both its Directors, Proprietor of M/s. Dadson Global Cargo and all the CHAs as named in the said show cause notice proposing the re-determination of the assessable value, re-

classification of the goods, confiscation of the seized goods which were provisionally released and confiscation of the goods re-determined. Differential Customs duty was proposed to be recovered. Penalties were proposed to be imposed upon both the Directors as well as the Proprietor of M/s. Dadson Global Cargo. The penalties upon all the CHAs were also proposed to be imposed. During adjudication of the said show cause notice, the appellant made a request for cross examination of Shri Vineet Saluja, Shri Pradeep Sharma, Ms. N. Rashmi and Shri Amit Mallik. The said request was turned down vide the Order communicated to the appellant vide letter No. 07/2017 dated 13.02.2019. Being aggrieved of the said denial that the present Appeal has been preferred before this Tribunal.

2. We have heard Shri A.K. Prasad, learned Advocate for the appellant and Shri Rakesh Kumar, learned Authorised Representative for the Department.

3. It is submitted on behalf of the appellant that the show cause notice reveals that the same has been issued relying upon the statements of Shri Vineet Saluja, Shri Pradeep Sharma, Ms. N. Rashmi and Shri Amit Mallik. For the contents of the said statement to be relevant, the person making the statement have to be examined as a witness before the adjudicating authority prior the said statement is admitted in evidence and the person has to be cross examined by the assessee. It is impressed upon that said is the mandate as per the principles of natural justice. Otherwise also Section 9D of Central Excise Act, 1944 which is para materia with Section 138 of Customs Act, 1962 statutorily mandates the same. Learned Counsel has relied upon the Single Member Bench decision of this Tribunal bearing *Final Order No. 53409-53411/2016* dated 06.09.2016 wherein it has been held that the statements recorded during investigation are required to be examined in Chief and the right of cross examination cannot be denied merely because the deponents are either co-noticees/employees of the assessee. Learned Counsel has also relied upon the following case laws:

- *Elora Tobacco Co. Ltd. Vs. C.C.E., Indore reported in 2017 (347) ELT 614 (Tri.-Del.)*

- *Agarwal Round Rolling Mills Ltd. Vs. C.C.E. & S.T., Raipur reported in 2015 (317) ELT 145 (Tri.-Del.)*

- *J&K Cigarettes Ltd. Vs. Collector of Central Excise reported in 2009 (242) ELT 189 (Del.)*

- *Arya Abhushan Bhandar Vs. Union of India reported in 2002 (143) ELT 25 (S.C.)*

4. While rebutting these arguments it is submitted on behalf of the Department that the principles of natural justice do not require that in each and every matter the person who has given information should be examined in presence of the appellant/assessee or should be allowed to be cross examined by the person concerned in support of the statements made before the Customs Authorities. It is submitted that Section 9D as relied upon by the appellant is not applicable to the given circumstances because the person who are prayed to be cross examined are not any other persons but the Directors and the employees of the appellant/ assessee and their statements actually are the confessions on the part of the appellant that too to the Customs officers who are not the police officers, which bind the appellant with no opportunity to the appellant Company to cross examine the person making statement on appellant's own behalf. Thus, there is no infirmity in the Order under challenge. Learned Authorised Representative for the Department has relied upon *Surjeet Singh Chhabra Vs. Union of India reported in 1997 (89) E.L.T. 646 (S.C.)* and *Kanungo & Co. Vs. Collector of Customs, Calcutta and others reported in 1983 (13) E.L.T. 1486 (S.C.)*.

5. After hearing both the parties and perusing the record, our considered opinion is as follows:

5.1 The impugned Appeal has been filed against an interlocutory Order passed by the adjudicating authority below while adjudicating the impugned show cause notice vide which the request of cross examination of four persons whose statement were recorded during investigation i.e. prior issuance of the

impugned show cause notice was denied. Thus, the issue in controversy in the present Appeal is extremely limited in nature in the terms as to:

Whether denial of cross examination of the impugned witnesses amounts to violation of Section 9D of Central Excise Act, 1944/138 of Customs Act, 1962 and is violative of principles of natural justice.

Section 9D reads as follows:

"Section 9D – Relevancy of statements under certain circumstances.

(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub- section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

5.2 This Section deals expressly with the circumstances in which a statement recorded before a Gazette Officers can be treated as relevant for the purposes of proving the truth of contents thereof. What is categorically required by the Section is that the person whose statement was earlier recorded before Gazette Officer has to be examined as witness before the adjudicating authority who thereafter has to arrive at an opinion that having regard to the circumstances of the case the statement should be admitted in evidence in the interest of justice. It is only after both these steps are complied with that the statement would be eligible for being treated as relevant in the proceedings so that the assessee can if it so chooses exercise the option to test the evidence by way of cross examination. The said right is otherwise permitted under Section 138 of the Indian Evidence Act, 1932.

6. The entire case law relied upon by the appellant is based on Section 9D. Thus, it becomes important for us to adjudicate as to: Whether the statements of the persons as are prayed to be cross examined qualify to be called as statement simplicitor.

7. Admittedly Shri Vineet Saluja and Shri Pradeep Sharma are the Directors of the appellant Company. As per Company Act, a Company Director is appointed or elected Member of the Board of Directors of a Company who with other Directors as the responsibility for determining and implementing the Company's policy. A Company Director neither has to be a stock holder/ shareholder nor a employee of the firm. He is the one who acts on the basis of Resolution made at Director's meeting and derive its power from the corporate legislation and from the Company's Articles of Association. As such, Director of a Company is none but the Company's agent who can bind the Company for any Act of his conduct. Keeping in view the same, the statement of Shri Vineet Saluja, Shri Pradeep Sharma is opined to not to be a statement simplicitor but a statement as that of the appellant Company and as such these statements are actually the confessions on behalf of the appellant Company. Since these statements were made to the Customs officers, the statements are out of the ambit of Section 24 of Indian Evidence Act and are readily admissible into evidence. As it was held by three judge Bench of Hon'ble Apex Court in the case of *State of Punjab Vs. Barkat Ram reported in 1962 (3) SCR 338* where Court has gone to the extent of holding that the confessions made to the Customs officers if voluntarily made, can be the sole basis of the conviction.

8. Though the appellant have taken the plea that both the witnesses were compelled to give the initial statement of acknowledging the guilt but they had subsequently retracted. This controversy was cleared by Supreme Court *Bhagwan Singh Vs. State of Punjab* reported in AIR 1952 (S.C.) 214 holding that even if it is a retracted confession, it must first be tested whether confession is voluntary and trivial inculcating the accused in the Commission of the crime, if affirmative findings, even retracted confession can be recorded. The Apex Court clarified that to prove that the statement was not voluntary and was obtained by threat or duress the burden lies upon the accused. We observe that there is nothing on record till date to satisfy the adjudicating authorities that the statement/confessions of the Directors of the Company were however made under threat or duress. Therefore, we are of the opinion that statements even if retracted can form the basis of conviction without examination of the persons making confessions in the manner as mentioned under Section 9D of Excise Act/ 138 of the Indian Evidence Act.

9. It is also an apparent and admitted fact that Shri Vineet Saluja and Shri Pradeep Sharma are not merely the Directors/ agents of appellant Company but are the co-noticees as well. Hon'ble Apex Court in the case of *Haricharan Kurmi and Jogia Vs. State of Bihar* reported in 1964 Constitutional Bench of Supreme Court 1184 has considered the controversy as to:

When the confession of co-accused/ co-noticee can be used as evidence under Section 3 of the Evidence Act.

10. The Hon'ble Court held that though the confession of co-accused cannot be treated as substantive evidence but if the Court believed other evidence and felt the necessity of seeking an assurance in respect of its conclusion deducible from the said evidence the confession of the co-accused could be used. Seeing from this angle also, there appears no need for permitting cross-examination at least of Shri Vineet Saluja and Shri Pradeep Sharma.

11. Since the statement of the Directors of the Company are opined to be in the form of confessions, the Directors are none but those who have stepped into the shoes of the accused Company. Otherwise also, they themselves are co-noticees and the imposition of penalty has been proposed against them. To our opinion, the fundamental right as enshrined under Article 20(3) of the Constitution of India which prohibits self incrimination is applicable to both of them. This Tribunal in the case of *Mayamahal Industries Vs. Collector of Central Excise, Meerut* reported in 1995 (80) E.L.T. 118 has held that it would not be proper to put the co-noticee in a position where he might have to incriminate himself by giving evidence.

12. Coming to the aspect of violation of natural justice, it has way back been listed by Supreme Court in *Kanungo & Co. Vs. Collector of Customs, Calcutta and others* reported in 1983 (13) E.L.T. 1486 (S.C.) wherein it was held that principles of natural justice do not require that where the show cause notice set out of the material on which the Customs Authorities had relied and it was for the appellant to give a suitable explanation, persons who had given information should be examined in presence of the appellants or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. It was clarified that formal cross-examination was procedural justice and principles of natural justice did not require that there should be a kind of formal cross examination. It was held that natural justice certainly includes that any statement of person before it is accepted against somebody else that the person should have an opportunity of meeting it whether by way of interrogation or by way of comments and assailing as the party charged as a firm and reasonable opportunity to see comment and criticisms. The evidence, statement or recorded on which the charge is being made against him the demands and test of natural justice are satisfied. This Tribunal in the case of *Popular Carpet Industries Vs. Commissioner of Customs, Mumbai* reported in 1996 (84) E.L.T. 244 has held that where a co-noticee did not agree to be examined he cannot be compelled to come as a witness for cross-examination. The Hon'ble High Court of Calcutta in the case of *Tapan Kumar Biswas Vs. Union of India and others* reported in 1996 (63) E.C.R.

546 has held that where the proceedee would be entitled to intercept the relevant documents they would not be entitled to cross examine any witness.

13. From the above discussion it becomes clear that the confessional statements are out of the ambit of Section 9D as relied upon by the appellant and as has been considered in the various case laws relied upon by the appellant. The co-noticee, if his statement amounts to confession, cannot be compelled to be cross examined and there would be no violation of principles of natural justice in that case. Though ample opportunity with the proceedee/assessee has to be granted to put forth his defence, however, the assessee cannot be compelled to self-incriminate himself. In view of the said observations we are of the opinion that permission for cross examining Shri Vineet Saluja and Shri Pradeep Sharma has rightly been denied. As far as Ms. N. Rashmi and Shri Amit Mallik are concerned, since their statements as were given during the investigation do not amount to confession, they both can be allowed to cross-examine but not against their wish.

14. As a consequence of entire above discussion, we hereby partly allow the Appeal by way of remand directing adjudicating authority below to seek the consent of Ms. N. Rashmi and Shri Amit Mallik qua their willingness to be cross examined and to accordingly re-decide the issue of cross examination of said two witnesses, afresh. However, non cross examination of Shri Vineet Saluja and Shri Pradeep Sharma is held neither violative of Section 9D nor of principles of natural justice. The Order under challenge till that extent is hereby upheld.

(Order pronounced in the open Court on 01.08.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. II**

Custom Appeal No. 52214 of 2019

Arising out of order in appeal No. CC(A)CUS/D-II/PREV/NCH/258/2019-20,
Dated: 30.05.2019

Passed by the Commissioner of Customs (Appeals), New Customs House, Near
IGI Airport, New Delhi

Date of Hearing: 14.11.2019

Date of Decision: 17.08.2020

**M/s BURBERRY INTERNATIONAL
C-9/8, SECTOR-8, ROHINI NEW DELHI-110023**

Vs

**COMMISSIONER OF CUSTOMS
NEW CUSTOM HOUSE NEAR IGI AIRPORT, NEW DELHI**

Appellant Rep by: Shri M S Hasan, Adv.

Respondent Rep by: Shri Rakesh Kumar, AR

CORAM: Anil Choudhary, Member (J)

C L Mahar, Member (T)

FINAL ORDER NO. 50746/2020

Per: Anil Choudhary:

The issue in this appeal is whether order of rejection of the declared value as regards the import of 'Silicone Weather Proofing Sealant', 'Fast Track Acqua – tech very high bond foamed acrylic tape' imported from China have been rightly rejected and revalued alongwith order of confiscation with option to redeem on payment of fine and further demand of differential duty alongwith penalty under Section 114A of the Act and further penalty of Rs. 50,000/- under Section 114AA on the appellant is correct, as confirmed by the impugned order in appeal.

2. Brief fact of the case are that based on intelligence, the goods imported vide Bill of Entry No. 2140432 dated 04.08.2015 filed by the appellant was subjected to detailed examination by the officer of the Customs Preventive Commissionerate, on the reasonable belief that the same were undervalued. On examination, goods containing (i) Silicone Weather Proofing Sealant (ii) Foamed Acrylic Tape and (iii) Tape were found. The quantity of goods was found as per the declaration, however, the length of the each tape as mentioned at (iii) above was found 8.2 meters as compared to declared length of 6.5 meters in the BoE/Invoice and Packing List. No MRP/ RSP stickers were found affixed on any cartons/ items. As the MRP/ RSP stickers were not affixed on the cartons and goods, it appeared the value has been mis-declared in terms of description viz a viz unit price. Hence, the goods appeared liable for confiscation under Section 111 of the Customs Act, 1962. Accordingly, the same were put under seizure under Section 110 of the Customs Act, 1962 for further enquiry/ investigation in the matter and representative samples of the goods were drawn as per procedure for comparison of value of similar/identical goods as per NIDB data. Statement of Shri Sameer Mittal, Proprietor of the appellant was recorded under Section 108 of the Customs Act, 1962 on various occasions. He inter alia stated that he had been regularly importing silicon adhesives in his own brand name i.e. 'KORNING' and 'BARRBERRY' from supplier namely 'M/s Guandong Olivia Chemical Ind Co. Ltd.', and 'M/s Kam Yip silicon Sealant HK Co. Limited'. He was shown the NIDB data in respect of silicon adhesives and he signed the same, in token of having seen the same on which the import price of silicon adhesives was given, but did not accept the value of Rs. 24.1/- per piece. On being asked how he declared and justified the declared value of \$0.14 for sealant and \$0.04 for the

adhesive tape and whether he had any purchase order or any proof in support of the declared value, stated that the goods were purchased at the declared value but did not have any proof such as purchase order.

3. The importer vide letter dated 28.08.2015 submitted that there was a minor difference in length of 20 nos. of tapes, the consignment need not be detained. The provisional release of the consignment covered under Bill of Entry No. 2140432 dated 04.08.2015 was allowed by the competent authority under Section 110A of the Customs Act, 1962 with the conditions (i) 100% payment of differential duty amounting to Rs. 2,37,245/- (ii) furnishing of Bond for the entire value of the goods i.e. Rs. 11,58,275/- and (iii) furnishing of Bank Guarantee equal to 25% of the differential duty i.e. Rs.59,311/-. Provisional release was granted to the importer after fulfilling the conditions of the provisional release.

4. Since, Shri Sameer Mittal did not agree with the valuation of the imported goods as per NIDB data, the aspect of undervaluation was also examined by taking further recourse to price available on internet. It was found that minimum price for bulk quantity from China in respect of similar goods were US\$0.52/piece. Also retail price of similar product available on net was Rs. 80/- per piece (minimum price). On the assessable value of US\$0.52 taken from the net, the MRP worked out to Rs. 75/- per piece which appeared to be in consonance with the retail price of Rs. 80/- prevalent in India.

5. It appeared that the invoice value submitted at the time of clearance of the Bill of Entry No. 2140432 dated 04.08.2015 is liable for rejection under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods), Rule, 2007. The assessable value of the Silicon Sealant imported by the party appeared not be less than US\$0.52/pc. which was the minimum rate available for the identical/ similar products as per website. The price appeared in consonance with the retail price of Rs. 80/- per piece. However, in order to follow the principal of natural justice, lowest amount of all value of the identical / similar goods retrieved from NIDB data i.e. Rs. 24.10 per piece was taken for assessment. It was also observed that the importer imported most of their products from M/s Guangdong Oliva Chemical Industry which was giving a minimum rate of US\$0.6/pc for the imported goods, as obtained from the internet.

6. Accordingly, the importer firm M/s Burberry International were issued a show cause notice proposing therein for rejection of the declared value; re-determination of assessable value at the lowest price obtained as per NIDB data; demanding differential duty; confiscation of imported goods/ imposition of redemption fine; imposition of penalty under Section 114A and Section 114AA of the Customs Act, 1962.

7. The appellant contested the show cause notice by filing reply and also appeared at the time of personal hearing. The appellant contended that as per para 10 of the show cause notice, admittedly silicon Adhesive is complex and complicated product where percentage change in chemical composition of the ingredients can change the properties of the final product. There is no mention of the chemical composition of the product on the samples resumed during examination. The price also depends on the quality of the adhesive and tape, like curing at room temperature of silicon, length of life etc. It was further urged that declared value can be rejected only upon condition as mentioned in Rule 4(2) or in Rule 10A of the Customs Valuation Rules. Further, stated that the seller/ shipper is not a related person and price is the sole consideration. Further, as required under Section 14(1) of the Customs Act read with the Valuation Rules, transaction value can be rejected only for cogent reasons. Simply casting suspicion on the invoice / transaction value is not sufficient for rejection. It is further contended that the appellant's unit price is Rs.14/- for each 300 ml. bottle of the silicon sealant. Further, as per NIDB data there are other Bills of Entry mentioned therein, wherein the actual unit price per bottle is Rs. 9/- to Rs. 15/-. Reliance is placed upon the price from website of M/s Chander Glass House at Rs. 80/- per bottle and of Silchem Sales for 260 ml bottle Rs. 125/-, clearly shows wide variation in the prices which depend on number of factors. Further, reliance is placed on the price quotation on the

website of Alibaba which was minimum rate of GP Silicon Sealant at US\$0.52 per piece for bulk quantity manufactured in China. Thus, the Department have not given any basis for fixing the wholesale and retail margin. There is no proper scientific basis. Further, prices also vary as per the brand name. It was further urged that the Revenue adopting pick and choose method from the NIDB data relied upon, as they are ignoring the import price in respect of past Bill of Entry No. 9707166 dated 26.06.2015 and Bill of Entry No. 8648503 where value of 280 ml. and 300 ml Silicon Sealant has been accepted at Rs. 24/- per piece. Further, appellant contended that they are regular importers from M/s Olivia chemicals, China which is a ISO 9001 certified company. Thus, rejection of transaction value on the basis of one Sealant from different suppliers is not justified in view of difference in quality, quantity, period of time etc. Further, the appellant is a regular importer under his own brand name which are KORNING and BARRBERY. The appellant also produced contemporaneous data of import loaded from the website 'ZAUBA' wherein the transaction value is lower than the declared value as per appellant. Thus, as per rules when various import prices are available in respect of contemporaneous import, lowest of such prices is to be taken. Further, contended that the appellant imports directly from the manufacturer on better competitive rates. Vide order-in-original dated 15.03.2017 the Additional Commissioner (Prev.) passed the following order:-

(i) I reject the declared value of Rs. 4,69,906/- in respect of goods imported vide Bill of Entry No. 2140432 dated 04.08.2015 under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and re-determine the same at Rs.11,58,275/- (Rupees Eleven Lakhs Fifty Eight Thousand Two Hundred and Seventy Five only) under Rule 5 of the Rules *ibid.* (being the value of similar goods) as the actual transaction value of the goods.

(ii) I confiscate the seized goods valued at Rs. 11,58,275/- seized vide panchnama dated 07.08.2015 under Section 111(m) of the Customs Act, 1962. I give an option under Section 125 of the Customs Act, 1962 to the importer to redeem the seized goods, released provisionally, on payment of redemption fine of Rs. 50,000/- (Rupees Fifty Thousand only).

(iii) I confirm demand of differential duty of Rs. 2,37,245/- (Rupees Two Lakhs Thirty Seven Thousand Two Hundred forty Five only) under Section 28 of the Customs Act, 1962 and order recovery of the same from the importer along with interest under Section 28AA of the Act *ibid.* I appropriate the differential duty amount of Rs.2,37,250/- already deposited by the party vide TR-6 challan No. 70711 dated 04.09.2015 at the time of provisional release of the goods against the above confirmed demand of the differential duty.

(iv) I impose penalty of Rs. 2,37,245/- (Rupees Two Lakhs Thirty Seven Thousand Two Hundred forty Five only) under Section 114A of the Customs Act, 1962 and Rs.50,000/- (Rupees Fifty Thousand only) under Section 114AA of the Customs Act, 1962 on M/s Burberry International, C-9/7, Sector-8, Rohini, Delhi-110087 through its proprietor Shri Sameer Mittal for their wilful acts of omission and commission as discussed in the foregoing paras."

8. Being aggrieved, the appellant preferred the appeal before the learned Commissioner (Appeals) *inter alia* on the ground that the order in original was passed in a mechanical manner without application of mind. Further, the contention of the appellant were not considered. Further, the Adjudicating Authority failed to follow the Rule of law, as no cogent reason has been given for rejecting of transaction value, save and except suspicion.

9. Learned Commissioner (Appeals) observed that upon examination of the goods under Bill of Entry as required no sticker of MRP/RSP was found fixed. Further, the length of tapes was found to be longer than declared. Thus, it is a case of mis-declaration. Further, on comparison of the declared price with the NIDB price of identical / similar goods, the declared values appear to be very low and accordingly have been rightly rejected. Further, admittedly the price on internet for bulk quantity was found to be US\$0.52 per piece and retail price in India was found to be Rs. 80/- per piece. As per the internet quotation the MRP worked out at Rs. 75/- per piece which is in consonance with the

retail sale price of Rs. 80/-. Thus, the value as per NIDB data was taken at Rs. 24.10 per piece. The adjudicating authority have compared the price of the product under import 'Silicon sealant' is as follows:-

Description of goods	CIF	Ass. value	Duty cum price	Post importation charges (5%)	Price including importer margin (15%)	Price Including wholesaler margin (10%)	Price including retailer margin (30%)
Silicon sealant Black/ Clear	0.52	33.665	44	46	53	58	75

Further contemporaneous import price (NIDB data) of silicon adhesives at various ports in India (particularly at ICD, TKD, New Delhi) of same specification, from same place of origin, with almost same level of import and imported during the same period of time was shown to Sh. Sameet Mittal, prop. of M/s Burberry International (also supplied as RUD-3 to SCN dated 04.02.2016) wherein price was given as Rs. 24.1/- per piece."

10. Further, as per the price quoted by the shipper through website they were getting the minimum rate US\$ 0.6 per piece for the Silicon Sealant. Thus, the Commissioner (Appeals) found the re-determined value was reasonable and proximate value confirming to the general principles of valuation. It was further observed that the appellant has not produced any documentary evidence in support of their contention, in spite of being a regular importer as admitted by them, particularly documents like purchase agreement or purchase order nor the costing sheet of the shipper for the product under dispute. Accordingly, the appeal was dismissed.

11. Being aggrieved, the appellant is before this Tribunal on the ground which are more or less similar to the ground raised before the Commissioner (Appeals).

12. Learned Counsel Shri M. S. Hasan appearing for the appellant reiterated the grounds as per the appeal memo, which have been already taken notice herein above.

13. Learned Authorised Representative Shri Rakesh Kumar appearing for the Revenue relies on the impugned order.

14. Having considered the rival contentions, we find that the impugned order has been passed in accordance with law. Further, the appellant have failed to bring any cogent evidence on record, even before the Tribunal, inspite of being regular importer importing under their own brand name. Thus, apparently the appellant has not come with clean hands before this Tribunal. Accordingly, agreeing with the findings of the Commissioner (Appeals), we uphold the impugned order in appeal and dismiss the appeal in toto.

(Pronounced on 17.08.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. II**

Customs Appeal No. 50609 of 2019-[DB]

Arising out of Order-in-Appeal No. 395-420-SM-CUS-JPR-2018, Dated:
21.12.2018

Passed by the COMMISSIONER (APPEALS) CGST & CENTRAL EXCISE-JAIPUR-I

Customs Appeal No. 50611 of 2019-[DB]

Arising out of Order-in-Appeal No. 07-42(SM) CUS/JPR/2019, Dated: 21.01.2019
Passed by the COMMISSIONER (APPEALS) OF CGST & CENTRAL EXCISE-
JAIPUR-I

Customs Appeal No. 50457 OF 2019

Arising out of Order-in-Appeal No. 346-368(SM) CUS/JPR/2018, Dated:
30.10.2018

Passed by the COMMISSIONER (APPEALS) CGST & CENTRAL EXCISE-JAIPUR-I

Date of Hearing: 26.04.2019

Date of Decision: 18.10.2019

**CMR NIKKEI INDIA PVT LTD
PLOT NO. 65, SECTOR-15, PHASE-II
INDUSTRIAL GROWTH CENTRE, BAWAL, REWARI, HARYANA**

Vs

**COMMISSIONER OF CUSTOMS
NCRB, STATUE CIRCLE, JAIPUR-302005**

Customs Appeal No. 50610 of 2019-[DB]

Arising out of Order-in-Appeal No. 395-420-SM-CUS-JPR-2018, Dated:
21.12.2018

Passed by the COMMISSIONER (APPEALS) OF CGST & CENTRAL EXCISE-
JAIPUR-I

Customs Appeal No. 50612 of 2019

Arising out of Order-in-Appeal No. 07-42 (SM) CUS/JPR/2019, Dated:
21.01.2019

Passed by the COMMISSIONER(APPEALS) CGST & CENTRAL EXCISE-JAIPUR-I

Customs Appeal No. 50458 of 2019

Arising out of Order-in-Appeal No. 346-368(SM) CUS/JPR/2018, Dated:
30.10.2018

Passed by the COMMISSIONER (APPEALS) CGST & CENTRAL EXCISE-JAIPUR-I

**CENTURY METAL RECYCLING LTD
FORMERLY KNOWN AS M/s CENTURY METAL RECYCLING PVT LTD
802, SSR CORPORATE PARK, 13/6, DELHI-MATHURA ROAD, OPP
NHPC METRO STATION, FARIDABAD, HARIYANA**

Vs

**COMMISSIONER OF CUSTOMS
NCRB, STATUE CIRCLE, JAIPUR-302005**

Appellant Rep by: Shri Pradeep K Mittal & Shri Parveen K Mittal, Advs.

Respondent Rep by: Shri Rakesh Kumar, AR

CORAM: Anil Choudhary, Member (J)
Bijay Kumar, Member (T)

FINAL ORDER NOS. 51393-51398/2019

Per: Bijay Kumar:

1. The present appeals are filed against the Order dated 30/10/2018, 21/10/2019 and 21/12/2018 by which the order of the Adjudicating Authority has been set aside and has been remanded back for fresh decision.

2. Being aggrieved by the said order the Appellants, M/s CMR Nikkei India Pvt Ltd. and M/s Century Metal Recycling Ltd., filed these appeals on the following grounds;

- That the assessment order have been passed in complete defiance of the provisions of Section 14 of the Customs Act, 1962 and Customs Valuation(Determination of Value of Imported Goods Rules, 2011)

- That as per Section 2(41) of the Customs Act, "value" in relation to any goods means the value thereof determined in accordance with the provisions of sub-Section (1) or sub-Section (2) of Section 14 further as per Section 14 of the Customs Act and Rules 3(1) of Customs Valuation (Determination of value of imported goods) Rules, 2011 which mandates that the "value of imported goods shall be the "transaction value" which defined as price actually paid or payable for the goods, when sold for export to India for the delivery at the time and place of importation, where the buyers and sellers of the goods are not related and price is the sole consideration for sale.

- That the assessment orders which are under appeal has not specified as to how the Section 14(1) of Customs Act has not been followed so as to reject the transaction value.

- That the transaction value declared by the Appellant at the time of filing of bills of entry satisfied all the ingredients in Section 14(1) of Customs Act .

- That Id. Commissioner (Appeal) has failed to appreciate that once the ingredients as contemplated in Section 14(1) of the Customs Act are specified the transaction value cannot be discarded.

- That the appellant has paid the duty enhanced value as per assessment order, which was based on the NIDB data and in terms of guidelines issued by the DGOV in Alter Circular No. 14/2005 dated 16/12/2005 is not required to be followed, by the Commissioner (Appeal) being quasi judicial authority.

- That there is no ground to hold that the scrap consignments could be identical or similar because of specification, grade, metal recovery etc. However, Department has failed to appreciate that. Reliance was placed by the Department in case of *Atlas Casting and Metals Impregnation [2005(186) ELT 757]* cannot be relied upon considering facts and circumstances of the import of consignment. '

- That the Rule 9 of the Customs Valuation Rules cannot be invoked placing sole reliance on London Metal exchange price placing reliance on *Impex Steel & Bearing Co. vs. CC [2014 (302) ELT 464]*. The transaction value can be rejected only subject to Rule 12 of the Valuation Rules adjusted in accordance with the provisions of Rule 10 which has not been followed by the primary adjudicating authority. Reliance place on National Import data Bank (NIDB) data is also not relevant for the determination of price of the subject consignment on the ground that the data contained therein is only for the purpose of reference of price for the goods imported at the various customs stations, but does not indicate as to whether those are enhancement price or actual price declared by the importer.

- That Hon'ble CESTAT Allahabad vide *Final Order No. C/A/70132-70137-CUS-DB dated 17/01/2017* has set aside the order passed by the Commissioner (Appeal) affirming the value enhanced in case of *Sanjivani Non-Ferrous Trading Pvt Ltd. [2017 (7) GSTL. 82 (Tri-All)]*. Also Hon'ble CESTAT vide *Final Order NO. CF/A/70462-70501/2018 dated 05.01.2018 and Final Order NO. C/A/71417-71525-CUS-DB dated 06/07/2018* set aside the various orders passed by the Commissioner (Appeal) in case of Sanjivani Non-Ferrous Trading Pvt Ltd., Century Metal Recycling Pvt Ltd. and CMR Nikkei India Ltd. The last two being the same appellant company and hence the Id. Commissioner (Appeal) was bound to follow the decisions of Hon'ble Tribunal in similar case in respect of the same party. This has not be done in the impugned order.

- That the valuation is not determinable under Rule 12 of the Valuation Rules, 2007 on the ground that neither inquiry was conducted by the Department nor any information was sought from the Appellant, and hence incomplete violation of

provisions of Rule 12 of the Valuation Rules. Also that the assessment order is appealable order placing reliance in the case of *JM Industries vs. Commissioner of Customs, Jamnagar-2003(156) ELT 977(Tri.)*, *Ashok Leyland Ltd. vs Commissioner of Central Excise, Chennai-[2004(173) ELT 518(Tri.)]*

- That the reliance placed by Commissioner in case of *Jai Shiv Trading Co. and M/s Advance Scan Support Technology vs. CCE, Jodhpur* are not relevant in the facts and circumstances of present case.

3. Ld. Advocate on behalf of the appellant reiterated the grounds in the appeal memorandum and also place reliance on the various decisions passed by this Tribunal and also the decision of Hon'ble Supreme Court in case of *Commissioner of Central Excise and ST, Noida vs. Sanjivani Non-Ferrous Trading Ltd.* which sustained the order of Hon'ble CESTAT in case of *Sanjivani Non-Ferrous Trading Ltd.* These orders are as under;

(a) *Commissioner of Central Excise and Service Tax, Noida M/s Sanjivani Non-Ferrous Trading Pvt Ltd. Civil Appeal No. 18300-18305 of 2017*

(b) *Century Recycling Pvt Ltd. CESTAT, Allahabad Final Order, 70462-70501 of 2018 dated 05.01.2018*

(c) *Century Metal Recycling Pvt Ltd. and Ors. vs Commissioner of Customs C.E & ST Noida, CESTAT, Allahabad Final Order No. 71299-71300/2018*

(d) *CC(Import), TKD, New Delhi vs. AAA Impex, CESTAT, New Delhi, Final Order 50319 of 2019*

(e) *Hi Lex India Pvt Ltd. vs Commissioner of Customs, New Delhi, CESTAT, Delhi Final Order NO. 53049 of 2018*

(f) *Jaideep Ispat & Alloys Pvt Ltd. vs. CC Indore, CESTAT, Delhi, Final Order No. 52326 of 2018*

(g) *Eicher Tractor Ltd., Haryana vs. Commissioner of Customs, Mumbai, Supreme Court in Civil Appeal No. 6492 of 1998*

(h) *Laxmi Colour Lab vs. Collector of Customs, CESTAT, Delhi Final Order NO. 379/92-A*

(i) *SRR International vs. Commissioner of Customs, Mundra, CESTAT, Ahmedabad Final Order NO. A/12702/2018 dated 04.12.2018*

(j) *Modern Manufactures vs. Commissioner of Customs, New Delhi, CESTAT, Delhi Final Order NO. C/A/50778/2018 dated 11.01.2018*

4. Ld Departmental Representative, however, submitted that Commissioner (Appeal) has not committed any error as the matter is only remitted back to lower Adjudicating authority with a direction to decide the issue afresh considering the relevancy of transaction value arrived by the Department under the provisions of Customs Act and Valuation Rules.

5. We have examined the impugned order and also considered the submissions made by the ld. Advocate on behalf of the Appellant and ld. AR on behalf of the Department.

6. The issue involved in this appeal is regarding determination of assessable value of imported aluminium waste and scrap. The Assessing Officer has rejected the declared price, on the basis of Circular issued by Directorate General Valuation being Circular No. 14/2005 dated 16/12/2005. The appellant had imported various consignments of aluminium waste and scrap such as Twitch, Tread, Trump, Taint/Tabor, Talk, Tale etc., falling under Customs Tariff item 760220010 of the Custom Tariff Act, 1975 (Imported Schedule). The appellant filed Bills of Entry for each consignment along with purchase orders and invoices. The appellant self-assessed these imported goods vide the said Bills of Entry on the basis of transaction value which was rejected by the assessing officer placing reliance on the price indicated in the DGOY Circular. Aggrieved by the said order of assessment the appeals were filed before the ld. Commissioner (Appeal) who as remanded the matter back to ld. Adjudicating authority as mentioned above.

7. It is the contention of ld. Advocate on behalf of the appellant to set aside the impugned order and accept the price declared by the appellant before the original adjudicating authority and pass appropriate order. Having considered the impugned order, we find that the Commissioner (Appeal) has made open remand

to the lower Adjudicating authority to decide the valuation depending on the contemporary import price available with the Department within three months from passing of the impugned order. At this stage, we find that large number of cases which has been cited by the Id. Advocate, have been decided by this Tribunal rejecting the transaction value adopted by the Department having contrary to Section 14(1) of Customs Act and the Customs Valuation Rules. This should have been considered by the Commissioner (Appeals) in the impugned order which were agitated before him, however, placing reliance on the decisions of Hon'ble Madras High in case of *M/s Sanjivani Non-Ferrous Trading Pvt Ltd. vs Commissioner, Chennai [2005 (328) ELT 10(Mad.)]*. The case was remanded back.

8. The order passed by the Hon'ble Supreme Court in case of *Sanjivani Non-Ferrous Trading Ltd. in Civil Appeal No. 18300-18305 of 2017* was not available before the Commissioner (Appeals). In the circumstances, we do not find any infirmity in the impugned order. However, we expect that various decisions of this Tribunal and Hon'ble Supreme Court would have duly been considered by the Adjudicating Authority while passing fresh order in terms of remand direction in the impugned order.

9. Accordingly, we do not find any infirmity in the impugned order and sustain the same. Appeals are dismissed accordingly.

(Order pronounced in open court on 18.10.2019)

[Back](#)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

West Block No. 2,

R.K. Puram, New Delhi – 110 066.

Appeal No. C/52331, 52558/2018-DB

(Arising out of Order-in-Original No. 06-2018-RNS-COMMR-IMP-ICD-TKD dated 28/03/2018 passed by COMMISSIONER OF CGST & CENTRAL EXCISE-DELHI-I)

M/s Shubhlaxmi Textile

Appellants

Vs.

C.C.-NEW DELHI(ICD TKD)(IMPORT)

Respondent

Appearance

Shri B K Singh, Advocate
Shri Rakesh Kumar, DR

for the appellant
for the respondent

CORAM:Hon'ble Mr. ANIL CHOUDHARY, Member (Judicial)
Hon'ble Mr BIJAY KUMAR, Member (Technical)

Date of Hearing: 04/01/2019

Date of Pronouncement: 26/02/2019

Final Order No. 50293- 50294/2019

Per Bijay Kumar

1. The present appeal arises out of Order-in-Original No. 06-2018-RNS-COMMR-IMP-ICD-TKD dated 28/03/2018, wherein the Ld. Commissioner, as

Adjudicating Authority has confirmed the demand raised vide Show Cause Notice dated 21/01/2016. Being aggrieved by the impugned order the appellants are before this Tribunal in appeal.

2. Brief fact of the case is that on the basis of intelligence by the officers of DRI, New Delhi, the consignment of fabrics imported by the main appellant, namely, M/s Subhalakshmi Textile, Ludhiyana, from China, vide Bill of Entry No. 2293952 dated 31/05/2013 was asked to be examined in their presence. The consignment, which was being examined by the Customs officer at ICD, TKD, on 04/05/2013, were put on hold for further examination by the DRI. The consignment, which were opened by the Customs Officer at ICD Tuglakabad, New Delhi, contained in container No. TRLU5861009, were re-sealed after initial opening thereof. These consignments were again re-examined on 05/06/2013, by the DRI officer under Punchnama and the samples of the fabrics in the container were drawn for further investigation. The samples drawn were forwarded to Central Revenue Control Laboratory, New Delhi, (CRCL) for testing vide letter dated 06/06/2013. After the receipt of the reports from CRCL, New Delhi, were found as below mentioned against the declared imported goods (fabrics);

Table-1

Sl No.	Samples No.	Description of goods as per testreport received from CRCL	Description of goods as per declaration
1	A-1	Twill weave, width 58". Cotton yarn 56.8%; polyester texturised multifilament yarn 40.4 %; elastomeric yarn balance (2.8%) made of yarn of different colour. GSM 4117	
2	B-1	Twill weave. Width 58" Brown coloured cotton yarn 99.2 % , elastomeric yarn balance (0.8 %). Not made of yarn of different colours.GSM 208	
3	C-1	Twill weave. Width 58" Elastomeric Yarn 2.2 % Black coloured polyester texturised	

		multifilament yarn 26.9 %; blue coloured cotton yarn balance(70.9%). Made of yarns of different colours. GSM 358.7	Cotton Plain dyed fabrics (Width 58") GSM-260+/- 10%
4	D-1	Dark greenish blue coloured. Twill weave. Width 58". Viscose spun yarn 66.72%; cotton yarns 30.58%; elastomeric yarn balance (2.7%). Not made of yarns of different colours. GSM 201.3	
5	E-1	Twill weave. Width 58". Mustard yellow coloured cotton yarn 99.5 %; elastomeric yarn (05%). Not made of different colours. GSM 215.3.	
6	F-1	Twill weave. Width 58". Elastomeric yarn 1.84%; black coloured polyester texturised multifilament yarn 25.5 %; brown coloured cotton yarn balance (72.66%). Made of yarns of different colour. GSM 345	

3. Thereafter, the statements of Shri Suraj Mahindra Kumar Desai, partner of the appellant company was recorded on various dates, namely, 21/06/2013, 26/06/2013, 23/03/2015 and 08/05/2015 and 8/05/2015 by the officer of the DRI. In the statement Shri Desai agreed to the test report but stated that the order was placed for the import of cotton plain dyed fabrics (width 58 "inches, GSM/260+/-10 %) however, he agreed that but for the two samples at Sl. No. B 1 and E 1 of the table above, the others were found to be not made of the cotton plain dyed fabrics but of polyester texturised/ viscose texturised yarn fabric. He was shown copy of the test reports from the CRCL, in respect of these consignments. On being asked, he deposed that he had ordered only for cotton fabrics from various Chinese vendors and they were supposed to sell cotton fabrics only to the appellant and he was aware that there were some per cent of lycra in the fabric for making those fabrics stretchable. However, they were not aware of the fact that some fabrics were mixed with polyester/viscose. He further submitted another packing list, which was identical to one submitted at the time of filing of BS/E but also contained additional information regarding design number of the fabrics. He was to use this packing list for sorting of the various fabrics. He also agreed that in three cases (A1, C1 and F1), the cotton yarn (56.8 % to 72.66 %) was

mixed with Polyester texturised filament yarn (25.52 % to 40.4%) and also elastomeric yarn and that in one case, D1 contained the viscose spun yarn was in fact more than 66.72 (than cotton yarn 30.58%). However he has not admitted that description given at the time of filing of Bs/E were incorrect and incomplete, on the bonafide belief that goods contained in the consignment is as per declaration. He also agreed that as per his understanding the items on Sl. NO 1,3 and 6 (A1 C1 & F1) will be classified under heading 52 122 400 and item at Sl No. 4 (D1) will be classified under heading 55 164200 of Customs Tariff Act, 1975, and the differential duty as per changed classification would be around Rs.6.50 lacks and he also volunteered to deposit the same and accordingly the it was deposited by him vide two demand drafts of Rs. 3.50 lakhs and 6.50 lakhs, towards the differential duty as additional of the duty liability.

4. Shri Desai, in spite of repeated demand by the investigating officer, could not produce the manufacturers invoice in respect of imports made by the appellant. This was explained to be on account of the fact the consignments were pooled from different China based exporters who exported their goods through a merchant exporter, as they were small manufacturers based in China. Regarding the inquiry about the past clearance of the similar nature during period from 25/07/2011 to 19/07/2013, the various Bills of Entry were submitted to the investigating officer by him. Considering the above test reports, following chart was prepared as under;

Table 2

Sl. N	Bill of Entry	Container No	Declared DescriptionOf the goods	Qty of Goods	Total Declared C & F value (USD)
1	2	3	4	5	6
1	4164642 Dt 25.07.11	TRL U675 5228	Polyester wrap knitted fabrics width 58” (SPUN POLY)	18340 KGS	55020
2	4209277 Dt 28.07.11	HDMU 65460 06	Polyester Wrap Knitted fabrics 58”(SUPER POLY)	20995 KGS	62985.5
3	4178954 Dt 26.07.11	GESU 64226 88	Polyester Wrap Knitted Fabrics 58”(SUPER POLY)	17230 KGS	51690

4	4282197	WHL U	Polyester Knitted Bonded	5675 KGS	53473.78

In furtherance of the investigation, the DRI officer, obtained export declaration of past consignments of fabrics imported by the appellant from Chinese exporters through Shri Deepanker Aron, COIN officer, Hong Kong. The Export declaration with the Chinese customs vis-a-vis import declaration at ICD, TKD, was found tobe different. The difference ascertained was tabulated by COIN officer, as under;

Table-3

Sl N.	Description of goods	Qty of goods	Item wise FOB value (USD)	Ascertained Revised C & F Value(USD)	Difference of C & F value (USD) (10-6)
1	Polyester knitted Fabric,	28254 Mtr	37871.81		
	Knitted fabric	28486 Mtr	42729	98854.93	43834.93
	Nylon Knitted Fabric	15648 Mtr	17154.12		
2	Knitted fabric	59683 Mtr	80572.05	8001.99	24016.49
	Polyester Knitted Fabric,	4115 Mtr	5529.94		
3.	Polyester Knitted Fabric,	41785 Mtr	56152.7	92208.15	40518.15
	Knitted fabric	25967 Mtr	35055.45		
4.	Polyester Knitted	3770 Mtr	5066.31	55663.81	2190.03

- Even on the repeated inquiries by the Investigating Officer, Shri Desai could not produce the manufacturers invoice of imported goods, bank account statement of the appellant, contacts, details of the foreign supplier, evidence regarding the payment of freight pertaining to the import consignment. Based on these investigations, the Show Cause Notice was issued, to the appellants which culminated into the impugned order.
- Ld. Advocate on behalf of the appellant would submit that Ld. Adjudicating Authority has not decided the issue based on the various

submissions made by the appellant during the personal hearing in reply to the Show Cause Notice and adjudicated the case contrary to the provisions of Customs/Law and procedure.

7. Regarding the first issue in respect to live Bill of Entry No. 2293952, he would submit that the said Bill of Entry was filed declaring the goods as per the invoice having assessable value of Rs. 27,02,398/- and the duty payable thereon, after the self assessment, which was Rs. 7,79,692/-. The goods were examined on 04/06/2013, and the container was re-sealed the due to communication from DRI. **No panchanama was drawn at opening of container**, although the goods were examined and container was re-sealed and thereafter again re-examined on 05/06/2013 and punchanama was also drawn. The six samples, were drawn from the containers for test, however, samples were not provided to the main appellant. Thereafter, on the basis of the report from CRCL, the goods listed at Sl. No A, C, F (1), (3) and (6) were classified under CTH 52114390 (duty structure BCD 10 % or Rs. 32 per square meter whichever higher) in respect of declared CTH 52093290 (duty structure BCD 10%). Accordingly, the differential duty of the goods listed at Sl. No 1 ,3,6 of A, C, F were calculated to be Rs. 10,71,400, the goods were provisionally released on execution of a bond for Rs. 27,02,398/- backed by the bank guarantee Rs. 3.50 lakhs, as per Section 17(2) of the Customs Act, 1962. During the investigation, Shri Desai, partner of the firm, informed that the seized goods were collected from several vendors and hence it was not possible for them to produce manufacture"s invoice in such a situation. He also submitted that CHA informed the classification of goods based on the description of the goods in invoice and packing list. The CHA also agreed that some of the fabrics contained viscose yarn, therefore, the classification would be change to 52093290 of CTA, 1975, although the appellant had declared the description of goods as per declaration of the exporter in Hong Kong.
8. It was also submitted by him that in respect of live consignment, demand was limited only to the mis-declaration of imported goods and consequently mis-declaration of the Tariff Heading (CTH), and rate of duty ,but there was no **mis-declaration of value by the appellant**.
9. It was further submitted by Ld. Advocate that the Ld. Adjudicating Authority observed that the issue in this case of was not of the mis- declaration of the

value, but the description of the goods, which will require the re-classification of the goods and hence also payment of differential duty. He also submitted that there was an agreed mis-declaration regarding the nature and composition of goods. After the adjudication, Ld. Adjudicating Authority re-determined the assessable value to be Rs. 8,96,477/- and ordered the appellant to pay the differential duty of Rs. 10,71,414/- in respect of item Sl. No. 1, 3 and 6 of imported consignment vide Bill of Entry No. 229352 dated 31/05/2013 of the table. He also ordered confiscation of the said goods and imposed the redemption fine.

10. Ld. Advocate further submitted that the demand against the live consignment (as per Table-1 is based on the CRCL), test report was mentioned that punchanama was not drawn for re-sealing of container at the examining the same by the Customs Officer and also no samples were provided to the appellant after the examination of DRI, and therefore, they were deprived of the right of re-examination of the imported goods with respect to description of goods for the reclassification of goods. It was also argued that the declaration of the Bills of Entry was based on the documents supplied by the exporter which were not doubted and thus there is no scope of invocation of Section 111(m) of the Customs Act, 1962 (for short „Act“) hence the goods would not be liable for confiscation, relying on the decision of Hon“ble CESTAT in case of **Shri Ganesh International vs. CCE, Jaipur** [2004 (174) ELT 171(Tri-Del)], following the decision of Hon“ble Apex Court in case of **Northern Plastics vs. Collector**, [1198(101) ELT 549(SC)]. He would further submit that the present Show Cause Notice was issued after the lapse of 6 months from the seizure, the department should have returned the BG and money deposited at the time of provisional assessment as held in case of **M/s Jatin Ahuja vs Union of India** reported in 2013 (287) ELT 3(Del), by the Hon“ble Delhi High Court.

11. Regarding the second issue, pertaining to imports made under 18 Bills of Entry for period 2011-13, Ld. Advocate would submit that the consignment were re-assessed based on the report obtained from First Secretary (COIN) by the Department. The Report was based on the information collected from Anti Smuggling Board, General Administration of Chinese Customs. Shri Deepanker Aron, First Secretary (COIN) purportedly compiled the export price

of various consignment, provided by the Chinese Customs. The report was provided to the Indian Customs and thereafter DRI and accordingly the inference that the appellant undervalued goods to the extent of Rs. 10.3 crores for their past imports during year 2011-13, was inconclusive and also incomplete filled with contradiction and infirmities. In some of the cases such as at RUDs, the DRI allegedly annexed some „report“ received from the overseas Chinese Customs Administration, vide letter UOF/HOL/CUS/CH/08/2014 dated 25/02/2015, whereas, the perusal of the same indicates that it is an internally corresponding between the two DRI Officers, based in Hong Kong and New Delhi, which is perverse and without any basis. The DRI has annexed the letter purportedly issued by the General Administrative of Customs of PR of China with a translation thereof, in English and chart for 12 entries only, however, none of the documents have been signed or authenticated by the Chinese authority. The copy of this report thereof was also not enclosed along with the Show Cause Notice or even provided to the appellant thereafter. The Chinese Customs' Letter dated 20/10/2014, contained a categorical averment which reads as under;

“Accordingly to the declared import information, you have provided us, we have completed the investigating concerned and trade declared information at export in China including the export BL No, declaration, unit price, total price and other shipment, particulars of the commodity will be emailed to you @cgihk.gov.in,” however, this E-mail was not provided to the appellant with the Show Cause Notice or any time later thereafter, which suggested that the information obtained by the CION office at Hong Kong is not complete and hence not reliable. In fact, in four of the instances, the BL number provided by Chinese Customs were different from the Bill of lading filed with Bills of Entry at the time of import. The declaration made by the Chinese supplier also did not tally with the description of the goods appearing on the Bills of Entry as arrived by the Customs Officer at the time assessment of consignment. It was also submitted these 18 consignments were cleared, after physical examination thereof and in all these cases the proper officer has agreed to the declaration made and gave out of charge order, after their full satisfaction. At the time of examination goods imported were found to be as per declaration.

12.Ld. Advocate, therefore, submitted that the subject letter and report of COIN

has no evidentiary value and could not have been relied upon in the process of adjudication. The request of cross-examination of Shri Aron and the Officer of Chinese Customs, who had allegedly issued the report to DRI officer, and also who has prepared the chart annexed with the Show Cause Notice as RUD 12, was denied by the Ld. Adjudicating Authority, as is evident from the impugned order. The law relating to admissibility of evidence collected from foreign country in domestic inquiry is no more *re integra*, and has been settled by Hon'ble Supreme Court in the matter of **East Punjab Tractors** [1198 (089) ELT (11) (SC)] followed by subsequent judgments, including the judgment of No. A/3446/3470/15/CB dated 20/10/2015, rendered by Mumbai Bench of Hon'ble Tribunal in the matter of **Ajay export**. Thus Ld. Advocate submits that impugned order is not legal and proper thus not sustainable.

13.Ld. AR on behalf of the Revenue contended that in this case the appellant has mis-declared the consignment imported by them, as is obvious from the test report of the samples obtained from the CRCL by the Department, which was also not disputed by the appellant in his statement recorded under Section 108 of Customs Act. In statement appellant, Shri Suraj Mahindra Kumar Desai, has accepted the report of CRCL and also paid the differential duty, and therefore, mis-declaration in respect of live import consignment stands affirmed by the appellants. Regarding the demand for the past consignments, imported during **2005-13**, the appellants had imported similar consignments vide the 18 Bills of Entry from time to time. Even though the said Bill of Entry was assessed finally under Section 17 of the Customs Act, but as their alleged was mis-declared, the Department decided to issue the Show Cause Notice invoking the extending period under Section 28 of the Customs Act. The Department obtained the Report from the 1st Secretary officer (COIN) from Hong Kong from their counterpart from China regarding the export price of the past consignments. The officer (COIN) prepared a chart after the co-relating to the details of the various import made by the appellant and accordingly submitted the same information to the DRI which was made available to the appellant and accordingly the demands were confirmed in respect of past consignments by following the due process of law. He therefore argued that the impugned order is correct and legal and thus required to be upheld.

14. Heard Ld. AR and Advocate extensively and also perused the appeal records carefully.

15. The issue involved in this case is two-fold, first the seizure and adjudication of the live consignment imported vide Bill of Entry No 2293952 dated 31.05.2013. This consignment, was detained by the Customs officer on 04/05/2013 without any detention memo. It is not disputed that the Custom officer was in the process of examination of the container on 04.05.2013, after opening the container. Thereafter on receipt of the information that the DRI would be examining the consignment the container was sealed again. We find that for sealing of the container, there is no record. Ld. Advocate strenuously argued that the sealing of the consignment without punchnama was improper this ground itself is sufficient to hold that there is a complete disregard to Customs Act and the Rules made thereunder. This in itself is a sufficient ground to treat the process of examination to be illegal and not permissible under Customs Act. The seizure has been affected by the DRI on 02.07.2013, which was provisionally released on 16.07.2013 under Section 110 A of Customs Act by execution of the bond on full value of the detained consignment supported by security of 20 % of the value of goods (Rs. 3.50 Lakhs DO/ BG). It is undisputed input in this case. Show Cause Notice has been issued on 21.01.2016, as the seizure was made under Section 110A (2) of the Act and no extension was permitted by the Adjudicating Authority for issuance of Show Cause Notice under the proviso 2 the Section 110 of Customs Act. But as the goods stands provisionally released, the Department is not precluding issuing Show Cause Notice under Section 124(a) of Customs Act, as there is no time period fixed for issuance of such Show Cause Notice reliance is placed as under;

(i) Mohan Lal Devder Lal Choksy vs. M. P. Mandka [1988 (37) ELT 528]

(ii) Harbans Lal vs Collector of Customs and Central Excise [1993(67) ELT 20 (SC)]

16. Accordingly the confiscation of the goods and imposition of penalty as proposed in the Show Cause Notice is patently perverse and illegal as noticee declared the particular in the impugned Bill of Entry on the basis of

documents of overseas supplier, the proposed confiscation and imposition of penalty cannot be sustained following the judgment by Hon^{ble} Tribunal in the matter of **Shree Ganesh international [2004**

(174) ELT 171 (Tri.-Del).

Similar conclusions were arrived the Hon^{ble} Tribunal in the matter of Vaibhav Textile, [2007 (214) ELT 408 (Tri-Kol)] & Kirti Sales Corporation [2008 (232) ELT 151].

17. In these cases the appellant has declared the description of the imported goods and their classification based on the documents supplied by the overseas supplier. The CHA, who was authorised to effect Customs clearance made available those documents, and was asked by the appellant to classify imported goods as per the aforesaid documents considering the nature and description of the goods. Therefore, it cannot be held that there was a deliberate attempt on their behalf to mis-declare the imported consignment. In fact, in past the Customs itself has cleared similar consignments as per the declaration given by the appellant at the strength of the export invoice as per the description of the goods therein. Therefore, Ld. Advocate, was of the view, the appellant has not deliberately mis-declared the consignments but under the bona fide belief that the goods imported by them is cotton textile fabric and not mixed with any other material so as to change the classification. We find that the appellant has submitted another invoice to the DRI officer which contained more or less identical description of the goods, but more detailed one, meant for sorting of the imported consignment. Therefore, we hold that the appellant have not made any deliberate mis-declaration. In holding so we place reliance on the decision of **Shree Ganesh International vs. Commissioner of C. Ex. Jaipur, [2004 (174) ELT 171 (Tri-Del)]**. The finding is reproduced as under;

7. We have considered the submissions of both the sides. The Revenue has clearly established that polyester fabrics imported by the Appellants does not contain 85% or more by weight of non- texturised polyester filament by getting the test report from CRCL and Textile Committee; that once the non-texturised polyester filament is less than 85% the polyester fabrics imported by the Appellants is not classifiable under sub-heading 5407 61 20. The mere fact that there were wide variations between the test results arrived at by the Textile Committee and CRCL will not make any difference as much as there is nothing on record to show that the impugned goods contain 85% or more by weight of non-texturised polyester filament. The appellants have not brought on record any test report showing that the impugned goods contain non-texturised polyester filament 85% or more by weight. They have only referred to the Test Certificate given by the foreign supplier. The perusal of the said Test Certificate reveals that the supplier has only stated that the

goods are non-texturised fabrics without indicating the contents of the texturised polyester filament. In view of this, this Certificate is of no importance. On the other hand, the Revenue has brought on record, the test report given by CRCL. Accordingly, we hold that the impugned polyester fabric is classifiable under sub- heading 5407 69 00 of the Customs Tariff.

8. We, however, agree with the learned Advocate that the impugned goods are not liable for confiscation. It has not been denied by the Revenue that the appellants have made the declaration on the Bills of Entry on the basis of documents received by them from their foreign suppliers. The test report of the foreign supplier is dated 9-8-2003 which clearly mentions that the goods are non-texturised fabrics. They have also claimed that a similar consignment imported by them from the same supplier had earlier been cleared as non-texturised polyester fabrics which gave them the bona fide belief that the present consignment would also be of non-texturised variety. In similar situations, the Supreme Court has held in the case of Northern Plastics Ltd. (supra) that the declaration is in the nature of a claim made on the basis of belief entertained by the Appellants and therefore cannot be said to be misdeclaration under Section 111(m) of the Customs Act. It has also been held by the Tribunal in the case of Jay Kay Exports and Industries (supra) that finalisation of Tariff Heading under which the goods will fall is the ultimate job of the Customs authorities and if the Appellants have claimed wrong classification according to his limited understanding of the Customs Law, mens rea cannot be attributed to him. Accordingly, we hold that in the present matters, it cannot be claimed by the Revenue that the Appellants have deliberately misdeclared the goods with a view to avail the benefit of lesser rate of duty. We, therefore, set aside the confiscation and consequently the redemption fine imposed on them in both the appeals as well as the penalty.

18. Revenue has not been able to prove that the appellant has paid any extra amount to the overseas buyer other than whatever is mentioned in the export invoice through banking channel. Regarding the consignment which has been imported by the appellant in past, it was argued that those imports have been under section 17 of the Customs Act without resorting to any provisional assessment. The Department has also not challenged the assessment order, and which had become final under Section 17 of the Act during the relevant period. Revenue is not permitted to re-agitate the issue of classification and mis-declaration of the value based on the report received from the DRI officer (COIN), regarding export data supplied by him, which was obtained from Chinese Customs Officials, reliance is placed on the decision of Hon^{ble} Supreme Court in case of **CCE, Kanpur vs. Flock (India) Pvt. Ltd.** [2000 (120) ELT 285(SC)] & **Priya Blue Industries Ltd. vs. CC (Pre.)** [2004 (172) ELT 145(SC)]. We also find that the email which is received from the Chinese customs officials indicated that the further information would be supplied to them. However, there is no indication any such report by the

DRI. We also find that the appellant has asked the cross-examination of the COIN officer which was not permitted by the Ld. Adjudicating Authority on the ground that the entire facts have been made available to the appellant. Also we find there are certain other evidences which were supposed to come subsequently vide the email which was not provided to the appellant by the DRI. Further, we also find lot of force in the argument of Ld. Advocate that the documents supplied to them are un-authenticated copy of the report received from the Chinese customs. There could be various reasons for declaring the higher value to the Chinese customs, which may itself be a cause of inquiry by the concerned Chinese authority. It has been not shown to us that after having been made aware of the two export invoices, whether any investigation had been carried out by the Chinese authority so as to ascertain as to which one is genuine export invoice. The COIN officer had also not made any attempt to obtain any further Report from the Chinese customs so as to make the information provided to be more reliable and admissible in the adjudication proceeding. Mere simple reliance on those letters without giving the opportunity of cross examination of the concerned COIN officer who has compiled the report, more so would be in complete defiance of principle of natural justice and provisions of Sections 138 B of Customs Act.

19. We also find that the admissibility of report received from the COIN officer has been considered by the Apex Court in case of ***East Punjab Tractors [1994 (089) ELT 11(SC)]*** and subsequently followed in the catena of judgments including the judgment in Final Order No. A/3446-3470/2015/CB dated 20/10/2015 rendered by Mumbai Bench, Hon'ble Tribunal in the matter of ***Ajay Export and others***, wherein it held;

On considered by rival contentions and perusal of records, the following position emerges:

(a) The revenue has relied upon copies of export invoices and declaration submitted by the suppliers the exporters before the Turkish authorities. This is evident from the reading of paragraph 9.1.1.1 of the 2nd corrigendum issued and the revenue has relied upon 18(sic 16) bill of entry to charge undervaluation. A perusal of the letter dated 30.10.2009 addressed by first secretary, Moscow to the additional director general of DRI seems to suggest that information regarding 252 consignment in the form of comparative chart were given put of which 48 cases the declared value (at Turkish Port) match with the invoice value and in 204 cases there was significant difference. The letter further states that an exercise of segregation and co-relating such documents would be needed. It is also seen that the comparative statements set to have been filed awarded is blacked out and most of the entries have been redacted and cannot be read. The revenue has not been able to explain this satisfactorily. It is settled law that in order to be admissible as an evidence, the copies of the foreign documents are required to be tested and signed by the Turkish Customs authorities which they were not. Further it is settled law that the documents must bear the signature of the officers making the enquiries and be certified as true copies. It is to be noted that the originals have not been made available to the Tribunal and unauthenticated and unsigned documents were relied upon, which could not be used, even if they may have been forwarded by 'authorities' to the investigating agency through official channels. This law is settled by Apex Court in the case of East Punjab Traders (supra)

19. Further it is also seen from the record submitted by the appellant that the declared transaction value is in range of the value available for identical goods the NIDB/DOV data, which is vindication of appellant's claim for the declared import price. The Adjudicating Authority had to examine and consider the value indicated in NIDB/DOV, as has been held by Hon^{ble} Tribunal in the matter of **Techtronic India [2006(203) ELT 301] and A M Impex [2013(287) ELT 197(Kol)]**.

20. Ld. Advocate also submitted that the calculation of the duty itself is not appropriate by the DRI authority as the Report of the COIN is not matching with those of export documents during the relevant period. As in some of the cases the information collected was with container no. only. No invoices were submitted by the Chinese exporter which were complete in all respect through DRI. Accordingly credibility of such data is not accepted for assessment, as held in **American Almond vs. CCE Nhava Sheva. [2015(329) ELT 817(Tri-Mum)]** as there could be various other reasons for declaration of higher export

price domestically for various other reasons including to get higher export benefit.

21. We also find lot of force in the argument of the Ld. Advocate regarding the relevancy of the photo copy of the declaration in the adjudication procedure indicating the violation, relying on the decision of Hon^{ble} Tribunal in case of ***M/s Wings Electronic vs. CCE Mumbai [2006 (205) ELT]***, which was approved by the Hon^{ble} Apex Court in **[2015(323) ELT 450(SC)]**. As has been mentioned earlier that the Department could not produce evidence of any realization of extra remittance by the appellant to the supplier. The department did not bother to obtain any evidence regarding the extra remittances, if from their sources. And thus relying on the decision of Hon^{ble} Supreme Court in case of A.M. Impex (supra), we are of the view that there is no scope of opening of the assessment for the past period merely placing reliance on COIN that too which is not conclusive. The report received from the COIN would have been the starting point of the investigation but not the conclusive proof regarding the alleged mis-declaration resorted by the appellant and also implicating the Director of the appellant company.

22. We thus find that the demand pertaining to past period is not sustainable. We also find that the demand for the past clearance is proposed to be made against finally assessed bills of entry, which is not permissible without the same being reviewed as held by Hon^{ble} Supreme Court in case of Flock India & Priya Blue overseas. The invocation of Section 28 of Customs Act is not attracted as mis-declaration is not proved in these cases.

23. As far as demand pertaining to live consignment is concerned, the same has been accepted, we without going into further details uphold the same but without any penalty as there is no deliberate mis-declaration as part of the appellant. Reliance is placed on decision of **System and Components Pvt. Ltd. [2004(165) ELT 136(SC)]**.

24. We also do not find any deliberate attempt of mis-declaration on part of Director of the Company and set aside the penalty imposed on them.

25. We accordingly set aside the impugned order but for the demand relating to live consignment (B/E No. 2293952 Dated 31.05.2012) for differential value on account of change in classification of products. Interest and penalty imposed on the two appellants are also set aside.

(Pronounced in open court on 26/02/2019)

[Back](#)

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

PRINCIPAL BENCH,
COURT NO. I

Customs Appeal No. 52274 of 2019

[Arising out of the Order-in-Appeal No. IND-EXCUS-000-APP-054-19-20
dated 31/05/2019 passed by The Commissioner (Appeals), CGST &
Central Excise, Indore.]

(i) M/s B.L. Goyal

Appellant

VERSUS

**Commissioner (Appeals)
Customs, Central Goods &
Service Tax & Central Excise, Indore**

Respondent

**WITH
Customs Appeal No. 52779 of 2019**

[Arising out of the Order-in-Appeal No. IND-EXCUS-000-APP-054-19-20
dated 31/05/2019 passed by The Commissioner (Appeals), CGST &
Central Excise, Indore.]

**(ii) Shri Anil Kumar Tiwari,
Director M/s Bharati Freight Forwarders Pvt. Ltd.
A/76, Ashok Bohar, Ring Road
No. 2, Near Durga Petrol Pump,
Gondwara, Raipur – 493 221.**

Appellant

VERSUS

**Commissioner (Appeals)
Customs, Central Goods &
Service Tax & Central Excise,
Manik Bagh Palace, Post Box No.
10, Indore.**

Respondent

**AND
Customs Appeal No. 50065 of 2020**

[Arising out of the Order-in-Appeal No. IND-EXCUS-000-APP-054-19-20
dated 31/05/2019 passed by The Commissioner (Appeals), CGST &
Central Excise, Indore.]

**(iii) M/s Bharati Freight Forwarders Pvt. Ltd. Appellant Director
(Anil Kumar Tiwari)**

A/76, Ashok Bohar, Ring Road No. 2,
Near Durga Petrol Pump, Gondwara,
Raipur – 493 221.

VERSUS

Commissioner (Appeals)
Central Goods &
Service Tax & Central Excise,Manik
Bagh Palace, Pose Box No. 10, Indore.

Respondent Customs,

APPEARANCE

Ms. Aakriti Mathur, Advocate – for the appellants.

Shri Rakesh Kumar, Authorized Representative (DR) – for the
Respondent.

CORAM : **HON’BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT****HON’BLE SHRI**
C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50715/2020

DATE OF HEARING : 03/02/2020.DATE
OF DECISION : 14/07/2020.

C.L. MAHAR:

The appellant M/s B.L. Goyal in the First Customs Appeal No. 52274 of 2019 is engaged in import of natural gums of various kinds classifiable under the Customs Heading No. 1301. The appellant imported consignments of natural gum against 23 bills of entries during the period spanning between October 2011 to September 2014. The consignments imported by the appellant were described under bills of entry as natural gum sifting/natural gum reject/natural gum No. 3 reject. In the bills of entry the appellant claimed benefit of Notification No. 96/2008 – Customs dated 13 August 2008 under which basic customs duty is exempted treating it as “Gum Arabic” falling under Customs Tariff Chapter Heading No. 13012000. The appellant also sought exemption from Counter Veiling Duty (CVD), taking shelter of CBEC Circular dated 28 June 2007. At the time of import of the consignments, a representative sample was drawn and sent for chemical examination to the Central Revenue Chemical

Laboratory, Vizag for determination of the true nature and description of the import consignment. The chemical examiner in the examination reports dated 24 April 2016 and 28 October 2016 reported that “each of the samples under reference (U/R) does not meet the requirements for Gum Arabic as per standard specification of IS 6795-2007”.

2. Thus, on the basis of the above-mentioned chemical examination reports, two show cause notices came to be issued. The details are given below :-

Sl. No.	Show Cause Notice No. & Date	Amount involved CVD (including Ed. Cess & S&H Ed. Cess) (Rupees)	(in Rupees) SAD	Total (Rupees)

1.	VIII (6-a) Import – CUS/ BL/RPR/03/2014/254-59 dated 07/09/2016	2,66,659/-	96,964/-	3,63,623/-
2.	VIII (6-a) Import – CUS/ BL/RPR/06/2016/10368-72 dated 04/10/2017	26,51,592/-	8,17,864/-	34,69,456/-
	Total	29,18,251/-	9,14,828/-	38,33,079/-

3. The show cause notices takes note of the fact that the goods imported under 23 bills of entry were described Natural Gum – Others and were classified under Customs Chapter Tariff Heading 13012000. The Department’s contention is that the goods deserve to be classified under Heading 13019019 under the category of „Natural Gum – Others” and accordingly, the classification of goods claimed as Gum Arabic under Customs Tariff Heading 13012000 was wrong and the appellant was not entitled to the benefit of Notification dated 13 August 2008 or exemption of CVD and SAD as per CBEC Circular dated 28 June 2007.

4. The Appellant M/s B.L. Goyal also filed a Miscellaneous Application for consideration of certain additional import documents. The Miscellaneous Application was allowed and the documents submitted by the appellant have been taken on record.

5. The above-mentioned two show cause notices were adjudicated vide a common order dated 17 October 2018. The learned Adjudicating Authority accepted the contention of the importer - appellant that goods were classifiable under Customs Tariff Heading 13012000 and they were entitled for exemption Notification No. 96/2008 dated 13 August 2008. The impugned order-in-original dated 17 October 2018 was reviewed by the Department as per the provision of sub-Section (2) of Section 129D of the Customs Act, 1962 and an appeal was preferred by the Department against the above order-in-original before the Commissioner (Appeals). The learned Commissioner (Appeals) vide order dated 31 May 2019 allowed the appeal of the Department and the order is reproduced :-

“In respect of SCN F. No. VIII (6-a) Import-CUS/RPR/06/2016/ 10368-72 dated 4 October 2017 :

- (i) The impugned goods imported by the Respondent No. 1 are as classifiable under chapter sub-heading 13019019 of Customs Tariff as “Natural Gum – others”
- (ii) The demand of Customs duty of Rs. 34,69,456/- (Rupees Thirty Four Lacs Sixty Nine Thousand Four Hundred and Fifty Six only) is confirmed against the Respondent No. 1 in terms of Section 28 of the Customs Act, 1962 read with Section 18 (2) of the Customs Act, 1962 ;
- (iii) The interest on confirmed demand of Rs. 34,69,456/- (Rupees Thirty Four Lacs Sixty Nine Thousand Four Hundred and Fifty Six only) at Sr. No. 1 above is confirmed in terms of Section 18 (3) of the Customs Act, 1962 read with Section 28AB of the Customs Act, 1962 ;
- (iv) The penalty of Rs. 34,69,456/- (Rupees Thirty Four Lacs Sixty Nine Thousand Four Hundred and fifty Six only) is imposed upon the Respondent No. 1 in terms of under Section 114A of the Customs Act, 1962 ;
- (v) The penalty of Rs. 9,00,000/- (Rupees Nine Lacs only) is

- imposed upon the Respondent No. 2 in terms of Section 112 (b) (v) of the Customs Act, 1962 ;
- (vi) The penalty of Rs. 9,00,000/- (Rupees Nine Lacs only) is imposed upon the Respondent No. 3 in terms of Section 112 (b) (v) of the Customs Act, 1962 ;
- (vii) The imported goods valued at Rs. 2,13,22,787/- are confiscated under Section 111 (m) of Customs Act, 1962 and fine of Rs. 22,00,000/- (Rupees Twenty Two Lacs only) in lieu of confiscation is imposed upon Respondent No. 1 in terms of Section 125 of the Customs Act, 1962.

In respect of SCN F. No. VIII (6-a) Import-CUS/RPR/03/2014/2054-58 dated 07 September 2016 ;

- (i) The impugned goods imported by the Respondent No. 1 are held as classifiable under chapter sub-heading 13019019 of Customs Tariff as “Natural Gum – Others” ;
- (ii) The demand of Customs duty of Rs. 3,63,623/- (Rupees Three Lacs Sixty Three Thousand Six Hundred and Twenty Three only) is confirmed against the Respondent No. 1 in terms of Section 28 of the Customs Act, 1962 read with Section 18 (2) of the Customs Act, 1962 ;
- (iii) The interest on confirmed demand of Rs. 3,63,623/- (Rupees Three Lacs Sixty Three Thousand Six Hundred and Twenty Three only) at Sr. No. 1 above is confirmed in terms of Section 18 (3) of the Customs Act, 1962 read with Section 28AB of the Customs Act, 1962 ;
- (iv) The penalty of Rs. 3,63,623/- (Rupees Three Lacs Sixty Three Thousand Six Hundred and Twenty Three only) is imposed upon the Respondent No. 1 in terms of under Section 114A of the Customs Act, 1962;
- (v) The penalty of Rs. 1,00,000/- (Rupees One Lac only) is imposed upon the Respondent No. 2 in terms of Section 112 (b) (v) of the Customs Act, 1962 ;
- (vi) The penalty of Rs. 1,00,000/- (Rupees One Lac only) is imposed upon the Respondent No. 3 in terms of Section 112 (b) (v) of the Customs Act, 1962 ;
- (vii) The imported goods valued at Rs. 21,57,433/- are confiscated under Section 111 (m) of Customs Act, 1962 and fine of Rs. 2,00,000/- (Rupees Two Lacs only) in lieu of confiscation is imposed upon Respondent No. 1 in terms of Section 125 of the Customs Act, 1962”.

6. The appellants have filed the Appeals against the impugned order-in-appeal dated 31 May 2019. The main contention of the learned Counsel appearing on behalf of importer - appellant is that the import consignments reported were “Gum Arabic” and the Department is wrong in classifying the goods under Chapter Sub-Heading 13019019 on the basis of the examination report submitted by the chemical examiner because the product imported is in natural raw form and no manufacturing process takes place. It is vegetable sap and extracts and its classified plant exudates natural gum and the same satisfies the plant quarantine order 2003. The plant quarantine department had provided no objection in classification of the product under Chapter Tariff Heading 13012000 and they have given no objection certificate for clearance of the import consignment.

7. The Appellant has further stated that the examination report of the chemical examiner of the Central Revenue Chemical Laboratory only states that as per IS 6795-2007, the imported consignments do not comply with food grades – “Gum Arabic”. They have also stated that they have not imported food grade

“Gum Arabic”, but this does not disqualify them from availing the benefit of

Exemption Notification dated 13 August 2008 since for availing the exemption under the said notification, the consignment need only to be of “Gum Arabic” nature and not necessarily fit for human consumption.

8. It has further been contended that the Commissioner (Appeals) failed to appreciate that during the course of cross-examination, the learned chemical examiner was asked whether the Gum Arabic rejects and Arabic Gum had any defined chemical parameters or any chemical definition in the relevant literature. The examiner replied that though Gum Arabic is not chemically defined but as per the definition given under Indian Standards IS 6795-2007, Gum Arabic has been defined as : “the Arabic (Acacia) Gum shall be a dried gummy exudation obtained from the stems and branches of *Acacia Senegal* (L) Wild, *Acacia Seyal* (L) Wild or of related species of *Acacia* (Fam Laguminosae). *Acacia* Gum consists chiefly of a high molecular weight polysaccharides and their calcium, potassium and magnesium salts which hydrolysis yield arabinase, galactase, rhymmase and glycuronic acid. Item of commerce may contain extraneous matter like pieces of bark which shall be removed before use in foods.”

9. From the above, an attempt has been made by the learned Counsel to establish that Standards IS 6795-2007 are not applicable in the instant case as the imported goods were Natural Gum Arabic which required various technical and chemical processes for making the same fit for human consumption and to qualify for being classified as food grade under IS 6795-2007 standards.

10. It has further been submitted that the Commissioner (Appeals) failed to appreciate that the goods were of Natural Gum category and the Adjudicating Authority had made clear observations in the Order-in-Original that “During the proceedings of cross-examination dated 24/05/2018, Dr. Mistry, Chemical Examiner, in reply to question No. 5, 8 & 24 has categorically stated that all the samples tested by him were “NATURAL GUM”. He had also stated that the samples were not of food grade; the same were not adulterated and not chemically processed. As the samples were not of food grade; the same were not adulterant and not chemically processed. As the samples drawn from the consignments imported under the 23 Bills of Entry, in question, were not of the food grade, as stated by Dr. M. Mistry, Chemical Examiner, it is found that the same were not subject to test under IS 6795-2007”

11. It was also submitted that the Commissioner (Appeals) has based the order entirely on the chemical report, but, it is clear from the report that the goods were Natural Gum. Hence, the report is of no significance in the absence of any classification about the characteristic and properties of Gum Arabic. However, from the cross examination it is clear that the Chemical Examiner accepted that Gum Arabic reject is not defined anywhere. The Indian Institute, Natural Resins and Gums, Namkum Ranchi was requested to send their report on comprehensive chemical analysis of the goods to arrive at a conclusion whether the same were “GUM ARABIC” or “OTHER NATURAL GUM”. In response, Indian Institute, Natural Resins and Gums, Namkum Ranchi vide their letter dated 10/09/2018 informed that they were unable to ascertain that

the impugned goods are "GUM ARABIC". The content of the letter is : "It is further added that estimation of quality parameters here are not sufficient enough to ascertain that the given material is of Gum Arabic. Only testing of quality parameters related to Gum Arabic sample may be taken up on charge basis as per BIS standards but without affirming that the supplied material is "Gum Arabic".

12. The learned Counsel, therefore, submitted that it is wrong to conclude that subject goods were not Gum Arabic.

13. The learned Counsel appearing on behalf of the appellant Nos. 2 and 3, namely Anil Kumar Tiwari, Director and M/s Bharti Freight Forwarders Pvt. Ltd., which is a CHA firm, contended that the Commissioner (Appeals) has not gone into the details of the facts and without appreciation has imposed penalty on the clearing agent and its Director without establishing that the appellants were having knowledge or reason to believe about the mis-classification and wrong availment of the exemption notification.

14. It is further been submitted that in the instant case they have been provided with import consignment documentation as invoice, packing list, Bill of landing by the importer and all the import documents were prepared on the basis of such documents. The appellants have not changed or added any false description and/or classification in the matter and they have gone by the description given in the import shipment documents while preparing the Bill of entry and at the time of presentation of same for assessment. It has further been added that the consignment were provisionally assessed, subject to the confirmation of the description and classification from the chemical test of the import consignment. This itself proves that the appellants, namely M/s Bharti Freight Forwarders Pvt. Ltd. – clearing agent and its Director, had no role in wrong classification or wrong availment of exemption notification. In the entire proceedings it has also nowhere been reflected that the appellants did any omission or commission which resulted in evasion of duty conscientiously and therefore the Commissioner (Appeals) has grossly erred in imposing penalty on them under Section 112 (b) (v) of the Customs Act, 1962.

15. We have also heard learned Departmental Representative who has reiterated the findings given in the order-in-appeal.

16. After hearing both the sides and after perusal of the appeal papers in detail, we find that the importer - appellant has filed bills of entry describing the import consignment as Natural Gum/ Natural Gum No. 3/Natural Gum Sifting. The import consignments were classified under CTH 13012000 (which is for "Gum Arabic") and claimed exemption from payment of customs duty by availing benefit of Notification No. 96/2008 – Customs dated 13 August 2008. The import consignments were allowed clearance after provisional assessment of duty under Section 17 of Customs Act subject to confirmation of description of goods under CTH 13012000 by a test report.

17. Before proceeding further in the matter, it will be relevant to have a look

at the scheme of the classification under Chapter 13 as provided under the Customs Tariff Act, 1975. The relevant entries of Chapter 13 are reproduced here below :-

Tarif Item	Description of goods	Unit	Rate of Standard	Duty Preferenti alAreas
(1)	(2)	(3)	(4)	(5)
1301	Lac; natural gums, resins, gum-resins and oleoresins (for example, balsams)			
1301 20 00	Gum Arabic	Kg.	30%	20%
1301 90	Others Natural gums			
1301 90 11	Asian gum	Kg.	30%	--
1301 90 12	African gum	Kg.	30%	--
1301 90 13	Asafoetida	Kg.	30%	--
1301 90 14	Benjamin ras	Kg.	30%	--
1301 90 15	Benjamin cowrie	Kg.	30%	--
1301 90 16	Karaya gum (Indian tragacanth) hastab	Kg.	30%	--
1301 90 17	Tragacanth (adraganth)	Kg.	30%	--
1301 90 18	Storax	Kg.	30%	--
1301 90 19	Other	Kg.	30%	--

18. A perusal at the above scheme of classification makes it clear that only “Gum Arabic” is classifiable under Chapter sub-heading No. 13012000 and for other natural gums the classification are provided under the Chapter CTH 130190 and its sub-headings. The sub-classification under CTH 13019011 to 13019018 are for specific categories of natural gums such as Asian gum; Asafoetida (Hing), Karaya gum etc. and the other natural gums. Since, natural gum without any specific description is classifiable under 13019019, for which customs duty exemption is not available and accordingly the Department formed a view that since the consignment imported are not of the Gum Arabic but that other natural gums it classified the import consignment under CTH 13019019 and denied the benefit of exemption Notification No. 96/2008 – Customs dated 13 August 2008.

19. With regard to appellant No. (i) i.e. importer - appellant, the only issue before us for decision is whether the imported consignment are Gum Arabic or other Natural Gum. In this regard some of the import documents filed by the appellant with the relevant bills of entry have been perused. We find that the bills of entry alongwith bill of landing and relevant invoice describe the goods as natural gum only. For example, the bill of entry No. 21 dated 15 October 2015 describes the import consignment as Natural Gum/ Natural Gum No. 3 and goods have been classified under the Customs Tariff Heading 13012000 claiming the benefit of Notification No. 96/2008 – Customs dated 13 August 2008. We find that the corresponding bill of landing also describes the goods as Natural Gum. Some of the invoices which are available in the file also give the description of the goods as the Natural Gum No. 3. It can be seen that though all the import documents and the bills of entry described the goods as Natural Gum, except one or two bills of entry, where Gum Arabic has also been mentioned, but, the fact remains that none of the accompanying import

documents describe the subject import consignment as „Gum Arabic“ and, therefore, in a way the classification of Natural Gum under CTH 13012000 (which is specific to Gum Arabic) becomes arbitrary.

20. We find that the Department did not reject the claim of the appellant for classifying the subject consignment under the CTH 13012000 straight away at the time of filing of the bills of entry, though there is no document which may indicate that import consignments are Gum Arabic. The goods were assessed provisionally as per the importers claim and sent for chemical examination for determining the true nature of the import goods. The test report given by the chemical examiner is a detailed report and it is reproduced below :-

“As per the query raised by you, the detailed study done on the test results of the samples U/R and verified standard technical literature available in the laboratory. The following findings are submitted for your kind perusal.

- **Natural Gums** are polysaccharides of natural origin, capable of causing a large increase in a solution's viscosity, even at small concentrations. In the food industry they are used as thickening agents, gelling agents, emulsifying agents, and stabilizers. In other industries, they are also used as adhesives, binding agents, crystal inhibitors, clarifying agents, encapsulating agents, flocculating agents, swelling agents, foam stabilizers, etc. Most often these gums are found in the woody elements of plants or in seed coatings.
- Natural gums can be classified according to their origin. They can also be classified as uncharged or ionic polymers (polyelectrolytes).
- **Gum Combretum** is *Combretum nigricans* occurring throughout tropical West Africa, particularly in northern Nigeria, Mali and Niger, is the major source of combretum gum. Gum combretum is selling it under false names like „gum Niger“ or „Dark Nigerian gum arabic No. 2“ or actually mixing it with gum Arabic **as a adulterant**.
- **Gum Arabic** is having Bureau of Indian Standards IS 6795- 2007 and International specification published by Food and Agriculture Organization of the United Nations (FAO, 1990), defines gum Arabic as the “dried exudation obtained from the stems and branches of *Acacia Senegal* (L) Willdenow or closely related species”.
- **Gum Arabic is a Natural Gum but All Natural gums are not Gum Arabic**
- **Combretum gum is very different from Gum Arabic.** Vigilance is necessary to detect such misrepresentations because Combretum gums differ greatly from gum Arabic. (*Acacia Senegal* (L) Wild). Moreover, because there is no toxicological evidence for their safety in use, Combretum gums are not included in any of the international lists of permitted food additives”.

21. It can be seen from the above report that it specifically mentions that Gum Arabic is Natural Gum but all Natural Gums are not Gum Arabic. We take note of the fact that the supplier of the import consignment has only described the import consignment as Natural Gum. We are of opinion that if the importer – appellant had entered into purchase agreement with the foreign supplier for purchase of „Gum Arabic“, then in that case the purchase invoice would be for „Gum Arabic“ and the supplier cannot give a general description to the import consignment while finalizing purchase of specific goods. It is common sense and prudent trade practice that any purchase agreement has to be for a specific variety/category, quality of goods because such details only determine the nature and value of the import goods. It is an established trade practice that the goods negotiated need to be specifically described in the accompanying import

documents such as letter of credit, invoice, Bill of lading and packing list. This is a necessary and legal requirement in case of any dispute that may arise between parties in the course of business. The Natural Gums have several varieties, such as Asafoetida, Benjamin ras, Karaya gum as well as Gum Arabic. It is a common knowledge that market price of all these Natural Gum differ widely and, therefore, the import consignments have to be invoiced as per their actual nomenclature and not by a general name like "Natural Gum". Thus, we understand that by giving a general description to the import consignments, the importer had not made a true description of the import consignments. We, therefore, find that the appellant is not justified in claiming that consignment pertained to „Gum Arabic“ and accordingly claiming classification under CTH 13012000. The Appellant has also not adduced any evidence to claim that consignment is Gum Arabic. The import documents and the chemical examination report of the consignments establish that consignments were „other Natural Gum“. As the exemption Notification No. 96/2008 – Customs dated 13 August 2008 exempts only Gum Arabic, classifiable under CTH 13012000 from the levy of the customs duty and it is established that the consignments are not Gum Arabic but other Natural Gum, it has to be held that the imported consignment were classifiable under Chapter sub-heading 13019019 and are not entitled for exemption notification benefit under Notification No. 96/2008 – Customs dated 13 August 2008. Thus, we find no infirmity in the order of the Commissioner (Appeals) and, accordingly, we uphold the findings made in this regard.

22. Coming to the appeals filed by the Custom House Agentfirm and Anil Kumar Tiwari, the only allegation which has been levelled against the said appellants is that they presented import documents to the custom house which contained incorrect details and declarations regarding the description and classification under CTH 13012000 and thereby they colluded with the appellant – importer in an attempt to evade the customs duty by mis-declaration of the description and chapter heading of the import consignments.

23. We find from a perusal of the records that the custom house agent firm namely M/s Bharti Freight Forwarders Pvt. Ltd. and its Director Anil Kumar Tiwari only described the goods in the bills of entry as provided in the bills of landing and the invoices. It is also a matter of record that in the show cause notice no evidence has been brought forward to indicate that the clearing agent and its Director had conscientiously done anything to evade the customs duty. They have described the goods as given in the bill of landing and in the invoices as is the practice, though the classification was wrongly done under chapter sub-heading 13012000. No malafide can be attached to such a mistake, when the goods were provisionally assessed and samples were drawn from the import consignments to determine the true nature and identity of the import consignments. Thus, we find no substance that the clearing agent did any omission and commission consciously which led to evasion of customs duty.

24. Penalty on the CHA firm and its Director has been imposed under

Section 112 (b) which reads as follows :-

“Section 112 (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,

shall be liable, -

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

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher :

Provided that where such duty as determined under sub- section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;]

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]”

25. From the entire proceedings, we find that none of the requirements provided under Section 112 (b) have been established against the clearing agent. Since the importer - appellant himself has sought benefit of the exemption notification by classifying the goods under chapter sub-heading CTH13012000, which was allowed by provisionally assessing the Bills of entry subject to chemical test by the Department itself, the Department is not justified in alleging any malafide on the part of the CHA firm and its Director. Thus, there is no ground to levy any penalty on the appellant CHA firm – M/s Bharti Freight Forwarders Pvt. Ltd. and its Director – Anil Kumar Tiwari. The penalty which has been imposed by the impugned order-in- appeal is, accordingly, set aside.

26. As a result, there is no merit in the appeal filed by M/s B.L. Goyal and it deserves to be dismissed. However, the Appeals filed by M/s Bharti Freight Forwarders Pvt. Ltd. and its Director Anil Kumar Tiwari, deserve to be allowed.

27. Accordingly, Appeal No. Customs/52274 of 2019 filed by M/s B.L. Goyal

is dismissed. Appeal No. Customs/52779 of 2019 filed by Anil Kumar Tiwari and Appeal No. Customs/50065 of 2020 filed by M/s Bharti Freight Forwarders Pvt. Ltd. are allowed and the penalty imposed upon them are set aside.

(Order pronounced in open court on 14/07/2020.)

(Justice Dilip Gupta)
President

(C.L. Mahar)
Member (Technical)

[Back](#)

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

Customs Stay Application No. 50417 of 2019 in Appeal No.51076 of 2019.

[Arising out of Order-in-Appeal No.CC(A)Cus/D-II/ICD-TKD/IMPORT/3522-3526/2018-2019 dated 06.02.2019 passed by the Commissioner of Customs (Appeals), New Delhi.]

Commissioner of Customs (Import),

Appellant

Versus

M/s. A.R. Fabrics

Respondent

APPEARANCE:

Shri Rakesh Kumar, Authorised Representative for the appellant/Department.
Shri Prem Ranjan, Advocate for the respondent.

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO.51856/2019

DATE OF HEARING/DECISION:19.07.2019

ANIL CHOUDHARY:

The respondent filed 19 bills of entries (under Self-Assessment) for clearance of Polyester Knitted Fabrics and other similar goods falling under CTH 60064200 and 54076190 of CTH. Out of 19 bills of entries, 13 bills of entries (all filed during or about April, 2014) were finally assessed at higher value than the declared value. Out of 13 bills of entries, the respondent had made endorsement of acceptance in hand for enhanced values of the 7 bills of entries, being bills of entries having written endorsement of acceptance of enhanced values. Further, the Assessing Authority did not allow the benefit of Notification No.30/2004-CE dated 9.7.2014, which provides exemption from payment of CVD, subject to condition.

2. Being aggrieved, the respondent-importer preferred appeal before the Commissioner (Appeals).

3. The Commissioner (Appeals) observed that in the present case, the issues for discussion and determination were as follows:-

(i) Whether the assessing authority was right in rejecting the declared

values and re-assessment of the impugned bills of entries at enhanced values and;

(ii) Whether the assessing authority was right, while rejecting the benefit of Notification No.30/2004-Central Excise dated 09.07.2004 to the appellant, which provides exemption from payment of CVD.

4. The Commissioner (Appeals) had examined the fact that the importer had accepted the value enhanced in respect of 9 bills of entry; that as submitted by the importer, the acceptance of enhanced values was to save demurrages, and that this does not preclude them from challenging the enhancement by way of appeal. The Commissioner (Appeals) found considerable force in this contention of the appellant, observing that it is settled legal proposition that there is no estoppel in taxation matters while relying on the judgement of the Hon'ble Supreme Court in the case of **Dunlop India Limited Vs. UOI** reported in **1983 (13) ELT 1566 (SC)**, wherein it was laid down that even assuming that there is an acceptance it does not preclude the assessee from challenging by way of appeal, as there cannot be an estoppel against law. Similar view was held in [2015 (329) ELT307 (T)] and 2016 (343) ELT 963 (T)].

5. The Commissioner (Appeals) allowed the appeal of the respondent by setting aside the re-assessment of the goods covered under the impugned bills of entries and restored the assessment at the declared values.

6. Being aggrieved, the Revenue has filed the present appeal before this Tribunal on the ground, among others, that the respondent had given their consent with respect to enhancement of the assessable value, in respect of the several bills of entries and the Commissioner (Appeals) has erred in holding that still the respondent-importer can challenge the enhancement in appeal. It is provided in Section 17(5) of the Customs Act, 1962 that "importer may accept the assessment made by the Customs Officer by communicating his consent in writing, otherwise the Customs Officer will be obliged to pass a speaking order".

7. Further, reliance is placed on the ruling of the Apex Court in the case of **CCE, Madras Vs. Systems & Components Pvt. Ltd. – 2004 (165) ELT 136 (SC)**, wherein it has been held that – "it is the basic and settled law that what is admitted need not be proved". Reliance is also placed on the Final Order No.55379 of 2017 dated 20.07.2017 of this Tribunal in **M/s. Jai Shiv Trading Company Vs. CCE, New Delhi**, whereby the Tribunal upheld the redetermination of value, as the same was accepted by the assessee. As the assessee accepted the re-determination of the value, he cannot subsequently challenge the same. Reliance is also placed on the

ruling of the Coordinate Bench of this Tribunal in **M/s. Advanced Scan Support Technologies Vs. CC, Jodhpur - 2015 (326) ELT 185 (Tribunal-Delhi)**, wherein it was held that,” by consenting to enhancement of value and thereby voluntarily forgoing the need for a show cause notice, the importer made it unnecessary for Revenue to establish the valuation any further, as the consented value in effect becomes transaction value requiring no further investigation or justification to establish the consented value (enhanced suffers from fatal infirmity).

8. Reliance is also placed on the ruling of this Tribunal in **Vikas Spinners Vs. CC, Lucknow - 2001 (128) ELT 143 (Tribunal-Delhi)**, wherein it has been held that --

“ Having once accepted the loaded value of the goods and duties paid accordingly thereon without any protest or objection, importer is legally estopped from taking somersault and to deny the correctness of the same. There is nothing on record to suggest that the loaded value was accepted by them only for the purpose of clearance of the goods and that they reserved their right to challenge the same subsequently. They settled their duty liability once for all and paid the duty amount on the loaded value of the goods.”

9. Ld. Authorised Representative further urges that the Ld. Commissioner (Appeals) has erred in allowing the appeal of the respondent-importer by setting aside the re-assessment of the impugned goods and restoring the assessment at declared value in respect of the aforementioned 7 bills of entries.

10. Opposing the appeal, Ld. Advocate, Shri Prem Ranjan for the respondent-importer submits that the issue is no longer *res integra* under similar facts as per the decision of the Tribunal in the case of **M/s. Rainbow Fashion being Final Order No.50658-50659 of 2019 dated 06.05.2019**, whereby the issue was decided in favour of the importer.

11. Having considered the rival contentions, we find that judgements relied upon by the Revenue in this appeal, were not placed before the court below. Secondly, the court below has not appreciated the scope of Section 17(5) read with Section 17 (4) of the Customs Act. Importer cannot be allowed to play a cat & mouse game with the Revenue. Accordingly, we allow this appeal by way of remand to the Commissioner (Appeals) for re- appreciation of the facts in accordance with law and also considering the observations of this Tribunal. The Commissioner (Appeals) is expected to pass a denovo order in accordance with law, preferably within a period of 3 months from the date of receipt of the copy of this order. The respondent-assessee is

also directed to appear before the Commissioner (Appeals) with a copy of this order and seek hearing. The stay application also stands disposed of.

[Operative portion already pronounced in open court]

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

**Customs COD Application No.51149 of 2019
(On behalf of Appellant) in
Customs Appeal No. 52713 of 2019 [DB]**

Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/ICD/TKD/Export/365-
366/2019-20, Dated: 12.06.2019

Passed by the Commissioner of Customs (Appeals), New Delhi

Date of Hearing: 16.12.2019

Date of Decision: 16.12.2019

**M/s SUPER ECO AUTOMOTIVE COMPANY LLP
A-I SECTOR-A, INDUSTRIAL AREA MAHARAJPURA
GWALIOR - 474010**

Vs

**COMMISSIONER OF CUSTOMS (EXPORT)
INLAND CONTAINER DEPOT TUGHLAKABAD
NEW DELHI - 110044**

Appellant Rep by: Shri Alok Arora, Adv.

Respondent Rep by: Shri Rakesh Kumar, AR

CORAM: C L Mahar, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NO. 51802/2019

Per: Rachna Gupta:

Application praying for condonation of delay, heard.

2. It is submitted on behalf of the applicant that the order of Commissioner (Appeals) date 12th of June, 2019 was received by the appellant only on 21st June, 2019. It is thereafter that the employee of the applicant who was looking after the impugned matter has left the job. The resignation letter dated 9th July, 2019 is impressed upon in this respect. It is further submitted that in addition the family member of the applicant had passed away during the relevant period. The information in that respect as annexed herewith is also impressed upon. Delay is accordingly, prayed to be condoned. Same is heavily objected on part of the Department on the ground that none of the reason mentioned appears to be sufficient cause for condoning the impugned delay.

3. After hearing the parties and perusing the record, it is observed that the order as has been challenged vide the impugned appeal is acknowledged to have been received by the party within 10 days of the day it was announced. The officer, who is mentioned to have been responsible for the impugned matter, no doubt, had left appellant's job on 9th July, 2019, but applicant is silent about the date of joining of the person, who succeeded him. Otherwise also after the day the person left there still was sufficient time with the appellant to make necessary arrangements and to avoid the impugned delay. Thus, we are of the opinion that there is absence of due diligence on part of the applicant.

4. The another ground taken about the death in a family is also opined to not to be the sufficient cause for explaining the impugned delay as the death was post expiry of the period of limitation. Admittedly the order was received on 21st June, 2019. The period of limitation to file the impugned appeal, therefore, stands expired on 20th September, 2019. Hence, the same ground is also not opined sufficient cause for the relief sought vide the impugned application. Delay cannot be condoned in the given circumstances.

5. Application, resultantly, stands dismissed. As a consequent thereto, the impugned appeal also stands dismissed.

(Dictated and pronounced in the open Court)

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH, COURT NO. II

Customs Appeal No. 53282 of 2018

[Arising out of the Order-in-Appeal No. CC (A) CUS/D-II/ICD/TKD
IMP/967- 968/2018 dated 07/05/2018 passed by The Commissioner of
Customs (Appeals), New Customs House, New Delhi.]

**Shri Jeevan Jain, Proprietor of
M/s Om Udyog,**

Appellant

VERSUS

Commissioner of Customs (Appeals),

Respondent

APPEARANCE

None – for the appellant.

Shri Rakesh Kumar, Authorized Representative (DR) – for the
Respondent

**CORAM : HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI C.L. MAHAR, MEMBER (TECHNICAL)**

FINAL ORDER NO. 51842/2019

C.L. MAHAR :-

DATE OF HEARING : 23/09/2019.
DATE OF DECISION : 23/09/2019.

The appeal is dismissed. For order, see order of date in Customs
Appeal No. 53090 of 2018.

(Operative part of the order pronounced in open
court.)

(Anil Choudhary)
Member (Judicial)

(C.L. Mahar)
Member (Technical)

PK

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

Principal Bench, COURT NO. IV

Customs Appeal No. 52189 of 2018

[Arising out of the Order-in-Appeal No. CC (A)/CUS/D-II/ICD/TKD/Import/806/2018 dated 18/04/2018 passed by The Commissioner of Customs (Appeals), New Custom House, New Delhi.]

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

Appellant

Versus

M/s R.M. Impex
House No. 35, Block – 2,
Ramesh Nagar,
New Delhi 110 015.

Respondent

Appearance

Shri Rakesh Kumar, Authorized Representative (DR) – for the appellant.

None – for the Respondent.

CORAM: Hon'ble Shri C.L. Mahar, Member (Technical)
Hon'ble Mrs. Rachna Gupta, Member (Judicial)

Final Order No. 50609/2019
Dated : 29/04/2019

DATE OF HEARING/DECISION : 29/04/2019.

RACHNA GUPTA :-

None for respondent despite service of notice.

2. The present appeal has been restored to its original number vide the miscellaneous order No. 50070-50071 of 2019 dated 24/01/2019. It is submitted on behalf of the department/ appellant that the present case is the case of refund of 4% of Special Additional Duty of Customs (SAD) leviable under Section 3 (5) of Customs Tariff Act, 1975. The said refund claim was filed under Special Refund Mechanism as is provided under the exemption Notification No. 102/2007-Customs dated 14/09/2007 amended by Notification No. 93/2008-Customs dated 01/08/2008 for an amount of Rs. 7,36,824/-. The same was partly allowed vide the order-in-original dated 7 June 2017. An amount of Rs. 5,58,584/- was sanctioned, however, amount of Rs. 1,78,240/- was denied to be refunded being barred by time. An appeal thereof was filed being aggrieved of the said rejection. The same was allowed by Commissioner (Appeals) vide order-in-appeal No. 806 dated 18/04/2008. Thereafter there has been a review order No. 147 dated 2 May 2018 in furtherance wherein the impugned appeal has been preferred.

3. We have heard learned Departmental Representative for the department who has relied upon the final order No. 53157 of 2018 dated 25/10/2018 in an appeal titled as **Commissioner of Customs, New Delhi, ICD Tughlakabad (Import) versus**

J.G. Impex Pvt. Ltd. to impress upon that if the refund has not been filed within one year of SAD payment, the same cannot be sanctioned. Learned Departmental Representative has impressed upon the correctness of the order of original Adjudicating Authority.

4. There is none for the respondent, however, the submissions of respondent are very much the part of the record. After going through and perusing those submissions and after going through the final order, as relied upon by the department and also keeping in view the decision of Hon'ble Apex court in the case of **Balaji Steel Re-Rolling Mills versus Commissioner of Central Excise & Customs** reported in **2014 (310) E.L.T. 209 (S.C.)**, we are of the opinion, as follows :-

“The claim herein is with respect to special additional duty of Customs as leviable under Section 3(5) of Customs Tariff Act, 1975. It is important to look into the said provision which reads as follows:

“Section 3 Levy of additional duty equal to excise duty, sales tax, local taxes and other charges–

(1)

(2)

(3)

(4)

(5) *If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.*

Explanation – *In this sub-section, the expression “sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India” means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs and where such taxes, or, as the case may be, such charges are leviable at different rates the highest such tax or, as the case may be, such charge.”*

It is brought to our notice that the said SAD exemption has been granted vide Notification No. 102/2007 dated 14.09.2007 as issued in accordance of Section 25(1) of the Customs Act which provides power to the Central Government to grant exemption from duty by way of Notification. This Notification exempts the goods falling within the first schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale, from the whole of the additional duty of Customs leviable thereupon in accordance of the above mentioned Section 3(5) of Customs Tariff Act. However, subject to such conditions as mentioned in the

Notification itself in para 2 thereof, the first condition reads as follows:

- (a) The importer of the said goods shall pay all duties including the additional duty of Customs leviable thereon, as applicable at the time of importation of goods.

The other relevant condition is:

- (c) The importer shall file a claim for refund of said additional duty of Customs paid on the imported goods with the jurisdictional Customs officer.

This Notification stands amended vide Notification No. 93/2008 dated 01.08.2008 vide which a time period of one year from the date of payment for filing of refund claims by an importer under the aforesaid Notification was introduced. Commissioner (Appeals) has held that the amendment since introduced for the first time by a Notification but without a statutory amendment, the same cannot prevail.

6. In view of the above legal provisions, we are of the opinion that the moot question to be adjudicated in the present case is as to whether there is any time limit prescribed by law for filing the refund claim of additional duty of Customs as stands exempted vide the Notification No. 102/2007.

No doubt, the said Notification is silent about any time period for filing the said claim. But the Notification exempts the goods in first schedule of Customs Tariff Act from being leviable to the additional duty of Customs. However, the Notification itself mandates the deposit of the said additional duty at the time of importation of the goods and thereafter to get the refund. From this perusal, one thing becomes abundantly clear that the importer has the knowledge of his entitlement to file the refund of additional duty of Customs at the time of the payment of said duty itself i.e. at the time, the product being in first schedule (under the exempted category) is imported. Resultantly, we are of the opinion that for claiming the refund of additional duty nothing else has to happen or to be done by the assessee after the payment of said additional duty of Customs. To our opinion, this particular fact distinguishes the present case from the case of M/s Sony India Pvt. Ltd. (supra).

7. Also, the amending Notification No. 93/2008 is arising out of the statute, i.e. Section 25(2A) of the Customs Act, 1962 hence, the findings of the Commissioner (Appeals) that the amendment introducing one year from the date of payment of additional duty as a time to claim the refund thereof to be without statutory amendment, is not sustainable rather is opined to be legally erroneous. Otherwise also, the said amendment came into force 01.08.2008 that too in accordance of another statutory provision, i.e. Section 25(4) of the Customs Act. The refund in question was filed on 27.03.2017, i.e. much beyond the amended Notification and also the Customs Act itself contains a provision about claim of refund of duty in Section 27 thereof which reads as follows:-

- (i) Any person claiming refund of any duty or interest, paid by him or borne by him may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs before the expiry of one year from the date of payment of such duty or interest.

8. The words used in the provision makes it clear that statute has not distinguished the nature of duty or interest, the refund whereof is claimed. Hence, even if we do not look into the amended Notification No. 93/2008, the period of limitation as applicable for filing the refund claim under Notification 102/2008 will otherwise be a period of one year in accordance of the aforesaid Section 27 of Customs Act. Thus, we cannot rule out that the Notification No. 93/2008 came into existence to align the statutory provision with the Notification which was silent as far as the period of limitation for the purpose as mentioned therein is concerned. Otherwise also, on examination of relevant provision it appears that the provisions of limitation are excluded, it would nonetheless be still open to

the court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation. This Tribunal in the case of **Uttam Sucrotech International Pvt. Ltd. Vs. Union of India 2011 (264) E.L.T. 502 (Delhi)** has held that the applicability of the provisions of limitation Act therefore is to be judged not from the terms of limitation Act but by the provisions of the concerned act. The Tribunal has gone to the extent of appreciating that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions even of Section 5 of the Limitation Act. The Hon'ble Apex Court in the case **Naseeruddin Vs. Sitaram Aggarwal A.I.R. 2003 (S.C.) 1543** has held that in the absence of statutory provisions, no inherent powers of the court exists to condone the delay. It was also held that a statutory right has to be exercised in the mode, manner and limitation specified in the special statute itself. The Hon'ble Apex Court in an earlier decision in the case of **Titaghur Papermills Company Ltd. Vs. State of Orissa SCC PP 440-41** para 11 has held:

"11. it is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. Vs. Hawkesford in the following passage: (ER p. 495)

..... There are three classes of cases in which a liability may be established founded upon a statute. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

In still another case titled as **Munshiram Vs. Municipal Committee Chheharta SSC page 88 para 23**, the Hon'ble Apex Court held that when a Revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all other forums and modes of seeking said remedy are excluded. Except in the case where the statutory authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or has resorted to invoke the provisions which are repealed. Apparently and admittedly none is the fact of the present Appeal. It is also not the case that Notification 93/2008 has been repealed. In absence thereof also, as already discussed above, Section 27 of Customs Act prescribes a period during which refund of any type can be claimed. The Hon'ble Apex Court in a recent decision **Commissioner of Customs (Import Mumbai) Vs. M/s Dilip Kumar & Co. 2018 TIOL 302 (S.C.)-Cus-CB** has held that an exemption Notification has to be strictly construed, i.e. if the person claiming exemption does not fall strictly within the letter of Notification, he cannot claim the exemption. The Hon'ble Apex Court while relying upon its previous decision in the case **District Mining Officer Vs. Tata Iron & Steel Company 2001 (7) SCC 358** had noticed as follows:-

"... A statute is an edict of the Legislature and in construing a statute, it is necessary, to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the Court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. This task very often raises the difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances

that may emerge after enacting a statute where its application may be called for.

*Nonetheless, the function of the Courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed...” It was also held that the well settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In **Kanai Lal Sur v. Paramnidhi Sadhukhan**, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.*

In view of entire above discussion, we are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962. We therefore hold that the Commissioner (Appeals) has committed an error while giving an expanded interpretation qua limitation to favour assessee. We therefore set aside the said Order and allow the present Appeal rejecting the impugned refund claimed for the amount of Rs. 1,78,240/- being barred by time limit of one year as prescribed for the purpose”.

5. The appeal stands allowed.

(Dictated and pronounced in open court)

(C.L. Mahar)
Member (Technical)

(Rachna Gupta)
Member (Judicial)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

**Customs Condonation of Application No. 50741 of 2019
(on behalf of appellant) in
Appeal No. 52170 of 2019**

Arising out of the Order-in-Original No. SKS/COMMR/ACE/04/2019, Dated:
31.01.2019

Passed by The Commissioner of Customs, Air Cargo (Export), New Customs
House, New Delhi

**Date of Hearing: 08.01.2020
Date of Decision: 08.01.2020**

**SHRI AMANULLAH
3 B, 70/02, AHAN-E-ILLAH APARTMENTS
ZAKIR NAGAR (JAMIA NAGAR), NEW FRIENDS COLONY
NEW DELHI - 110025**

Vs

**COMMISSIONER OF CUSTOMS (GENERAL)
AIR CARGO (EXPORT), NEW CUSTOMS HOUSE
NEW DELHI - 110037**

Appellant Rep by: Shri V S Negi, Adv.

Respondent Rep by: Shri Rakesh Kumar and Chandan Kumar Jain, AR (DRs)

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 50148/2020

Per: Rachna Gupta:

Arguments upon application seeking condonation of delay of 110 days heard. Learned Counsel for the appellant/applicant has impressed upon para 3 of the application while submitting a sufficient cause for the aforesaid delay. The said para reads as follows :-

"that since the appellant was put to extra financial burden by the exporter due to their misfeasance, the appellant was pursuing with the exporter to get the appellant compensated in value. The supplier had filed Writ Petition No. 2826/2019 against the said order-in-original No. SKS/COMMR/ACE/04/2019 dated 10/05/2019 before Hon'ble Delhi High Court for re export/re sale of the goods which is still pending and finally the exporter has reached to amicable settlement with the appellant and has agreed to withdraw the said Writ Petition on 16/09/2019, the next date of hearing. The above events has resulted in delay of 110 days in filing the present appeal".

2. The reason mentioned therein is impressed upon to be sufficient cause of the delay. The learned Counsel also explained the extent of financial burden as has rather been caused due to said delay. The same is accordingly prayed to be condoned. Learned Departmental Representative while rebutting the said submission stated that the reason quoted is not at all sufficient to explain the delay of as many as 110 days. It is brought to the notice that the writ-petition which has been taken shelter for the purpose was not even the petition of the appellant nor of any of the co-noticees. The request of condonation of delay based on the said writ-petition is prayed to be rejected. The application is accordingly rejected.

3. After hearing both the parties, we are of the opinion as follows :-

"Admittedly the order which has been challenged in the impugned appeal was announced on 30 January 2019. Admittedly the same was received by the appellant on 10 February 2019. In view of said admission it is apparent that the period to file the impugned appeal stands expired on 11 May 2019. Now coming to the reason quoted as sufficient cause for the delay of 110 days in filing the appeal, we observe that the only reason quoted is pendency of writ-petition No. 2826/2019

being filed before Hon'ble High Court of Delhi. Apparently and admittedly the said writ-petition was filed on 10 May 2019 that is just one day prior the date of expiry of period of limitation available to the present applicant to file the impugned appeal. The subsequent period taken by the writ-petition before the Hon'ble High Court therefore cannot a criteria for holding the said reason to be a sufficient cause. The application is miserably silent about any other reason for huge delay of 110 days.

4. Otherwise also, we observe that the writ-petition was filed by one Shri Stanley Fernandes. The said petitioner though was consignor but apparently he is not appellant nor as is apparently the co-noticee of the appellant in the impugned show cause notice No. 3007 dated 07 February 2018. Also there is no order been passed against him as is apparent from the impugned order dated 30 January 2019. For this reason also the pendency of said writ-petition does not seem to extend any benefit to the present applicant who is none but the importer and the proposed allegation of mis-declaration on his part that too to the extent of importing 43020 pieces of memory card serve 4 GB and 8 GB quantity under the garb of three battery UPS, is not available to him.

5. In the given circumstances and the confirmation of the proposal of confiscation and the imposition of penalty upon the appellant, we are not inclined to accept the reason quoted to be a sufficient cause. More so, for the reason that the order under challenge also given the importer an opportunity for paying redemption fine. The applicant is miserably silent about seeking the said option. Seen from any angle, the reason mentioned by the applicant is held to not to be the sufficient cause to explain the 110 days delay. Accordingly, the Condonation of Delay is declined. Application therefore stand dismissed. Consequent thereto the appeal also stands dismissed.

(Dictated and pronounced in open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 52044 of 2018

Arising out of the Order-in-Original No. 11/2018, Dated: 11.06.2018
Passed by The Commissioner of Customs (Preventive), Jaipur

**Date of Hearing: 08.01.2020
Date of Decision: 08.01.2020**

**M/s VINAYAK CARGO
A-504, AMRIT KALASH, TONK ROAD, NEAR KAMAL & COMPANY
JAIPUR - 302015 (RAJASTHAN)**

Vs

**COMMISSIONER OF CUSTOMS (PREVENTIVE)
NCR BUILDING, STATUE CIRCLE, C-SCHEME
JAIPUR - 302005 (RAJASTHAN)**

Appellant Rep by: None

Respondent Rep by: Shri Rakesh Kumar, AR (DR)

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 50121/2020

Per: Rachna Gupta:

None is present for the appellant. At this stage, learned Departmental Representative has mentioned that appellant seems no more interested in pursuing the impugned matter as the matter is adjourned for more than 5 numbers of times and as on date also there is the absence on the part of the appellant with the similar request of adjournment as was on the earlier occasion.

It is also brought to our notice that in fact appeal stands already dismissed vide *final order No. 50372 of 2019 dated 5 March 2019* which was dictated in the open court itself. The said final order reveals that after dictating & pronouncing the order in court another decision bearing *final order No. 53242 of 2018 in appeal No. C/51178 of 2018 dated 06/11/2018* where the Hon'ble Member (Technical) Shri Bijay Kumar with Hon'ble Member (Judicial) Shri Anil Choudhary had taken a divergent view. Shri Bijay Kumar, who is the Hon'ble Member (Technical) for the present final order as well, with an intent to do away contradiction, if any, in the orders of coordinate bench that the opportunity was given to the parties to submit as to whether the two decisions are so contradictory that a reference need to be made to the Larger Bench.

2. In view of this submission, the record of the appeal is perused. The submissions of learned Departmental Representative are observed as correct. It is further observed that the several effective opportunities have been given to the appellant to submit as to whether there is any apparent contradiction between the decision as was pronounced in this case and the other decision pronounced by the another coordinate bench. But it is observed that the appellant is not marking appearance. Every time a stereo typed written request mentioning "the Counsel of the appellant is out of station" is being repeatedly filed. This bench made an observation vide order dated 21/06/2019, 01/08/2019, 06/08/2019, 30/08/2019, 26/09/2019 and 15/10/2019. Today also a written request for adjournment has been received by this bench from the Counsel of the appellant with the request as follows :-

"It is requested to kindly allow adjournment of the above matter which is listed for 08/01/2020 since I have to go out of station for an urgent piece of work. Therefore, I will be unable to appear before the Hon'ble Tribunal in the said matter".

There is no difference when compared with the earlier requests of adjournment.

3. This perusal is sufficient for us to hold that the appellant is not interested in giving any explanation about contradiction, if any, in the decision of two coordinate benches nor seems aggrieved thereof despite the opportunity was

given vide the final order dated 5 March 2019. Thus the absence of the appellant consecutively for almost five times since the impugned final order is sufficient to hold non-prosecution on the part of appellant. In addition, is sufficient to announce the finality of the decision as has already been taken in the aforesaid order in the following words :-

"11. In view of entire above discussions, we find no infirmity in the order. The same is thereby upheld, appeal stands dismissed".

4. Apparently the said order was not only pronounced in open court but was dictated as a whole in the open court. The recording in para 12 of the said decision is inter-se the Members presiding the said bench it is post pronouncement but before signing the said final order and it was in the interest of justice that the opportunity to both the parties was given to put-forth their stand about the acceptance or denial of those observations in para 12 of the impugned final order. Once the appellant opted to not to appear for the purpose, the final order of 5 March 2019 is definitely a judgment as was pronounced in the open court which should have been operated since the day of its pronouncement. Resultantly, we are of the opinion that no further finding is required for the disposal of the appeal which already stands dismissed on the same ground as being discussed in the final order. We draw our support from the decision of Apex court in the case of *Surender Singh and others versus The State of Uttar Pradesh [1954] 5 S.C.R. 330*, wherein the question of judgment to be a valid one in a situation where it was signed post being delivered in the open court came for consideration it was held by Hon'ble Apex court as follows :-

"In our opinion, a judgment within the meaning of these sections is the final decision of the court intimated to the parties and to the world at large by formal "pronouncement" or "delivery" in the open court. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest-the manner in which it is to be recorded, the way in which it is to be authenticated the signing and the sealing, all the rules designed to secure certainty about its content and matter - can be cured; but not the hard core, namely the formal intimation of the decision and its content formerly declared in a judicial way in open court. The exact way in which this is done does not matter. In some courts the judgment is delivered orally or read out, in some only the operative portion is pronounced, in pronounced, in some the judgment is merely signed after giving notice to the parties and laying the draft on the table for a given number of days for inspection."

"An important point, therefore, arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery, as that is not of the essence, except to say that it must be done in a judicial way in open court. But, however, it is done, it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing. Everything else until then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, not often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgment either, however, heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the judgment....."

"As soon as the judgment is delivered that becomes the operative pronouncement of the court. The law then provides for the manner in which it is to be authenticated and made certain. The rules regarding this differ but they do not form the essence of the matter and if there is irregularity in carrying them out it is curable. Thus if a judgment happens not to be signed and is inadvertently acted on and executed, the proceedings consequent on it would be valid because the judgment, if it can be shown to have been validly delivered, would stand good despite defects in the mode of its subsequent authentication".

"After the judgment has been delivered provision is made for review. One provision is that it can be freely altered or amended or even changed completely without further formality, except notice to the parties and a rehearing on the point of change should that be necessary, provided it has not been signed. Another is that after signature a review properly so-called would lie in civil cases but none in criminal; but the review, when it lies, is only permitted on very narrow grounds....."

5. The Hon'ble Apex court subsequently in another case title as *Vinod Kumar Singh versus Banaras Hindu University and others* reported as 1988 SCC (1) 80 has led reliance upon the decision of *Surender Singh* and held as follows :-

"The provisions of Order 20, rule 3 of the Code of Civil Procedure give power to the Court to make alterations/additions in a judgment so long as the judgment has not been signed, but that power should be exercised judicially, sparingly and for adequate reasons. When a judgment is pronounced in the open court, the parties act upon it and conduct their affairs on the basis that it is in judgment of the court and that the signing of the judgment is a formality to follow. A judgment to be operative does not await the signing thereof by the court. If what is pronounced in the court is not acted upon, the litigants would be prejudiced; their confidence in the judicial process would be shaken. A judgment pronounced in the open court should be acted upon unless there be some exceptional feature, like, soon after the judgment is declared in the open court, a feature, not placed for consideration before the court earlier, is brought to its notice by either party to the cause, or the court discovers some new facts from the record or the court notices a feature, which should be taken into account, or a review is asked for, which is granted. In such a situation the court may take up the matter again for further consideration, and it has to give good reasons if the judgment delivered by it is not to be operative.

Since the writ petition of the appellant had first been allowed by pronouncement of the judgment in the open court, and there is nothing on record to justify why it was not acted upon, the appeal succeeds.

Surender Singh and others versus The State of Uttar Pradesh, [1954] 5 S.C.R. 330, relied upon".

6. In view of the above discussion, we reaffirm the findings of the final order No. 50372 of 2019 dated 5 March 2019 which has already pronounced. The impugned appeal has been dismissed. The point of consideration as was subsequently raised accordingly stands disposed of against the appellant.

(Dictated and pronounced in open court.)

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH-COURT NO.1

DIARY NO. 54315 of 2018

M/s. Lloyd Insulation (I) Ltd

M-13, Connaught Place
New Delhi-110001

...Appellant

Versus

Commissioner of Customs

New Customs House Near I.G.I. Airport,
New Delhi-110037

..Respondent

APPEARANCE:

Mr. D.K. Nayyar & Mr. Ankur Puniya, Consultants for the Appellant

Mr. Rakesh Kumar, Authorised Representative for the Respondent

CORAM:HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/Decision :27.02.2019

JUSTICE DILIP GUPTA

It is against the Order passed by the Commissioner of Customs (Appeals) on 28 September, 2018 that this Appeal was filed before the Tribunal on 28 December, 2018 but the appellant did not comply with the requirement of Section 129E of the Customs Act, 1962 (herein after referred to as the Act), as substituted by Finance Act (No. 2) of 2014 w.e.f. 6 August,2014 regarding deposit of certain percentage of duty demanded or penalty imposed before filing the Appeal.

2. It is for this reason that a communication dated 04 January, 2019 was sent to the appellant to submit proof of deposit by 25 January, 2019 on which date the matter would be listed. In response to the afore said communication, the appellant sent a communication which was received in the Tribunal on 31 January, 2019 stating therein that it would be submitting an application for waiver of pre-deposit. The appellant did file an Application on 31 January, 2019 containing a prayer that the Tribunal may consider granting unconditional waiver of pre-deposit. Paragraphs 5 and 6 of the Application state the reasons as to why the Tribunal may grant an unconditional waiver of pre-deposit and the same are reproduced below:

5.Kind attention is drawn to the **Board's Circular No. 984/08/2014-CX dated**

16 September, 2014 which clarifies the amendment to the Appeal provisions in Customs, Central Excise and Service Tax made by the Finance Act, 2014. Para 1,2 clearly clarifies –The amended provisions apply to appeal filed after 6 August, 2014, Sections 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 contain specific saving clause to state that all pending appeals/ stay application filed till the enactment of the Finance Bill shall be governed by the erst while provisions.

6. That Hon'ble High Court of Andhra Pradesh also in the case of **M/s K. Rama Mohana Rao & Co. Vs. Union of India Ministry of Finance, New Delhi and 4 Others reported in 2015-TIOL-511-HC-AP-CX[2015 (321) E.L.T. 195 (A.P.)]** while dealing with the very same amendment, has held that on the date of initiation of proceedings, the aforesaid amendment was not in force, during pendency of the matter, the amendment was made. Hence, on the date of initiation of proceedings, the right to appeal also accrues on that date. Therefore, the Appeal is continuation of the original proceeding. Therefore, in the present case also the date of issue was much prior to the date of amendment, therefore not liable to pre-deposit.

3. It is vehemently submitted by Shri D.K. Nayyar, learned consultant for the appellant that since the show cause notice was issued to the appellant by the Foreign Trade Development Officer on 6 February, 2013, much prior to 6 August, 2014 when Section 129E of the Act was amended, the unamended provision of Section 129E would be applicable and, therefore, the Tribunal can examine the issue of waiver of pre-deposit as was the position that existed prior to the amendment made in Section 129E of the Act. In support of his contention, learned consultant has placed reliance upon a decision of a learned Judge of the Madras High Court in **Fifth Avenue Sourcing Private Limited Vs. Commissioner of Service Tax, Chennai** reported in **2015(40) S.T.R.71 (Madras)** and submitted that this is the position of law till date.

4. Shri Rakesh Kumar, learned representative for the Department has, however submitted that a plain reading of Section 129E of the Act as amended on 6 August, 2014 would indicate that the amended provisions would apply to all Appeals filed before the Tribunal on or after 6 August, 2014 and in support of his submission he has placed reliance upon a decision of the Division Bench of the Allahabad High Court in **Ganesh Yadav Vs. Union of India** reported in **2015(320) E.L.T. 711 (Allahabad)** as also Division Bench decision of the Delhi High Court in **Pioneer Corporation Vs. Union of India** reported in **2016 (340) E.L.T.63(Del.)**

5. We have considered the submissions advanced by learned consultant for the appellant and the learned representative of the Department.

6. In order to appreciate the contentions advanced by the learned consultant for the appellant and the learned representative of the Department, it

would be appropriate to reproduce the amended Section 129E of the Act that requires deposit of certain percentage of duty demanded or penalty imposed before filing the Appeal and it is as follows:

"129E. Deposits to ascertain percentage of duty demanded or penalty imposed before filing appeal. The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal,—

(i) under sub-section (1) of section 128, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are indisputable, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Commissioner of Customs;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 129E, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 129E, unless the appellant has deposited ten per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014."

7. A bare perusal of Section 129 E indicates that the Tribunal shall not entertain any Appeal unless the appellant has deposited 7½% of the duty, in case where duty or duty and penalty are in dispute, in pursuance of a decision or an Order appealed against. The second proviso stipulates that the provisions of this Section shall not apply to the stay Applications and Appeals pending before any Appellate Authority prior to the commencement of the Finance Act, 2014.

8. It needs to be noted that the Finance Act came into force on 6 August, 2014. It also needs to be noted that prior to 6 August, 2014 Section 129E of the Act required a person desirous of appealing, to deposit with the proper officer, the duty and interest demanded or penalty levied, but a discretion was vested with the Tribunal to dispense such deposit subject to such conditions as it may fit deem to impose so as to safe guard the interests of the Revenue if in the opinion of the Tribunal, the deposit of duty demanded or penalty levied would cause undue hardship to the person.

9. It is for this reason that it is sought to be contended by the learned consultant for the appellant that the Tribunal should, in the facts and circumstances of the case, grant complete waiver to the requirement of the pre-

deposit as according to the learned consultant, the provisions of Section 129E of the Act as they stood prior to 6 August, 2014 would be applicable. The submission is that since the show cause notice was issued on 6 February, 2013 prior to 6 August, 2014 when the amended provisions of Section 129E came into force, the amended provisions would not be applicable. We express our inability to accept this submission of the appellant.

10. The amended provision of Section 129E of the Act came into force on 6 August, 2014. It provides that Tribunal shall not entertain any Appeal unless the appellant has deposited 7½% of the duty, in case where duty or duty and penalty are in dispute, in pursuance of the decision appealed against. The second proviso makes the position absolutely clear as it provides that the provisions of Section 129E shall not apply to Stay Application and Appeals pending before any Appellant Authority prior to the commencement of the Finance Act 2014. In other words, only those Appeals and stay Application which are pending before the Tribunal before 6 August, 2014 would continue to be governed by the old provisions.

11. This is what was observed by a Division Bench of the Allahabad High Court in **Ganesh Yadav** in which the requirement of deposit of a certain percentage under the amended provisions of Section 35 of the Central Excise Act, 1944 which came into force w.e.f. 6 August, 2014 and which are *para material* to Section 129E of the Customs Act came up for interpretation. After upholding the constitutional validity of Section 35F of the Act, the High Court proceeded to examine whether the requirement to pre-deposit would apply to a situation when the show cause notice was issued on 19 September, 2013, prior to the coming into force of the amended provisions of Section 35F of the Central Excise Act on 6 August, 2014. The High Court referred to the Constitution Bench judgment of the Supreme Court in **Garikapatti Veeraya Vs. N Subbiah Choudhary** reported in **AIR 1957 SC 540**, wherein it was held that the vested right of an Appeal can be taken away only by a subsequent enactment if it so provided expressly or by necessary intendment but not otherwise. It is after consideration of this judgment and other judgments of the Supreme Court that the High Court in paragraph 17 observed that the right of Appeal is a vested right and the right to enter a superior Court accrues to a litigant on and from the date on which the lis commences though it may be actually exercised when the judgment is

pronounced. Such a right is governed by the law which prevails on the date of institution of the suit but the vested right of Appeal can be taken away by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise. In paragraph 19, the High Court observed that the words in Section 35F of the Act would indicate that on and after the enforcement of the provisions of Section 35F of the Act, amended, w.e.f. 6 August, 2014, an appellant has to deposit a certain percentage of the duty and penalty as stipulated and unless the appellant does so, the Tribunal shall not entertain any Appeal and, therefore, this provision would apply to all Appeals which filed on and from the date of enforcement of the amendment to Section 35F of the Act. The High Court noticed that the intendment of Section 35F of the Act was further clarified by the second proviso to the Section as it stipulates that the provisions of the Section shall not apply to stay Applications and Appeals which were pending before any Appellate Authority prior to the commencement of the Finance Act. Paragraphs 10, 17, 19, 20, 21 and 22 of the judgment of the Allahabad High Court pertaining to this issue are reproduced below:

—10. That leads the Court to the next aspect of the matter as to whether the requirement of pre-deposit would apply in a situation such as the present. The notice to show cause was issued on 19 September 2013. The case of the petitioner is that the amendment to Section 35F of the Act was brought in to force with effect from 6 August 2014 and cannot retrospectively abridge or curtail the right of appeal which vested in the petitioner upon the issuance of a notice to show cause on 19 September 2013. While considering the merits of this submission, the basic principle of law which was laid down in the Constitution Bench Judgment of the Supreme Court in *Garikapatti Veeraya vs. N. Subbiah Choudhury* would merit reference. Chief Justice Sudhi Ranjan Das speaking for the majority, after considering the law on the subject from the decision of the Privy Council in *Colonial Sugar Refining Company Ltd. vs. Irving*⁹ up to *Sawaldas Madhavdas vs. Arti Cotton Mills Ltd.*¹⁰ deduced the following principles of law:

"(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(i) The right of appeal is not a mere matter of procedure but is a substantive right.

(ii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved, to the parties thereto till the rest of the career of the suit.

(iii) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(iv) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

17. Thus, the principle of law which emerges is that the right of appeal is a vested right and the right to enter a superior Court or Tribunal accrues to a litigant as on

and from the date on which the lis commencesal though it may actually be exercised when the adverse judgment is pronounced. Such a right is governed by the law which prevails on the date of institution of the suit or proceeding and not by the law that prevails at the date of the decision or on the date of the filing of an appeal. Moreover, the vested right of an appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

19. Parliament while substituting the provisions of Section 35F of the Central Excise Act, 1944 by Finance Act (No.2) of 2014, has laid down that the Tribunal or the Commissioner (Appeals) "shall not entertain any appeal unless the appellant has deposited the duty or, as the case may be, a penalty to the stipulated extent. These words in Section 35F of the Act would indicate that on and after the enforcement of the provision of Section 35F of the Act, as amended, an appellant as to deposit the duty and penalty as stipulated and unless the appellant were to do so, the Tribunal shall not entertain any appeal. This provision would, therefore, indicate that it would apply to all appeals which would be filed on and from the date of the enforcement of Section 35F of the Act.

20. The intendment of Section 35F of the Act is further clarified by the second proviso which stipulates that the provisions of the section shall not apply to stay applications and appeals which were pending before any appellate authority prior to the commencement of Finance (No.2) Act 2014. The second proviso is a clear indicator that Parliament has exempted the requirement of complying with the pre-deposit as mandated by Section 35F (1) of the Act as amended only in the case of those stay applications and appeals which were pending before any appellate authority prior to the commencement of Finance (No.2) Act 2014. Consequently, both by virtue of the opening words of Section 35F(1) of the Act as well as by the second proviso to the provision, it is clear that appeals which are filed on and after the enforcement of the amended provision on 6 August 2014 shall be governed by the requirement of pre-deposit as stipulated therein. The only category to which the provision will not apply that would be those where the appeals or, as the case may be, stay applications were pending before the appellate authority prior to the commencement of Finance (No.2) Act 2014.

21. Our attention has been drawn to a judgment of the learned Single Judge of the Kerala High Court in Muthoot Finance Ltd. vs Union of India 24. The Kerala High Court has referred to an interim order passed by the Andhra Pradesh High Court in K Rama Mohan Rao vs. Union of India 25. The Kerala High Court while adverting to the interim order referred to these settled law that the institution of a suit carries with it an implication that all rights of appeal then in force are preserved to the parties. With great respect, the judgment of the learned Single Judge of the Kerala High Court has not considered the express language which has been used in the amended provisions of Section 35F(1) of the Act. The order of the Andhra Pradesh High Court which was relied upon in the judgment of the Kerala High Court is only an interim order.

22. For these reasons, we hold that the petitioner would not be justified in urging that the amended provisions of Section 35F(1) of the Act would not apply merely on the ground that the notice to show cause was issued prior to the enforcement of Finance (No.2) Act, 2014. We find no merit in the constitutional challenge. The petition shall accordingly stand dismissed for the aforesaid reasons.

(emphasis supplied)

12. The Delhi High Court in Pioneer Corporation relied upon the decision of the Allahabad High Court in Ganesh Yadav, after noticing that the decision of the Allahabad High Court was also followed by the Delhi High Court in Anjani Technoplast Ltd. Vs. Commissioner of Customs reported in 2015 (326) E.L.T. 472 (Del.) and in Suvidha Signs Studios Pvt. Ltd. Vs. Union of India reported in 2016 (336) E.L.T. 274 (Del.) The Delhi High Court noticed that the Appeal was filed before the Tribunal against the Order passed by the Principal Commissioner on 18 May, 2015. After the amendment

made in Section 35F of the Central Excise Act and, therefore, would be governed by the amended provision. Paragraphs 3, 4 and 5 of the judgment are reproduced below:

-3. Mr. Sachin Datta, learned Senior Counsel appearing for the petitioner, submitted that notwithstanding the decision of the Allahabad High Court in *Ganesh Yadav v. Union of India*-2015(320) E.L.T. 711 (All.), which has been followed by this Court in the decision dated 21st October, 2015 in Customs Appeal No. 19/2015 (*Anjani Technoplast Ltd. v. The Commissioner of Customs*)[2015(326)E.L.T.472(Del.)], the order dated 25th April, 2016 in W.P. (C) No.3380/2016 (*Suvidha Signs Studios Pvt. Ltd. v. Union of India*) [2016 (336) E.L.T. 274 (Del.)] and order dated 10th May, 2016 in W.P. (C) No. 927/2015 (*Rajdhani Flora & Infrastructure Developers Pvt. Ltd. v. Union of India*), this Court should re-visit the issue of the validity of the above circulars which have been issued pursuant to the changes made in Section 35F of the CE Act with effect from 6th August, 2014.

4. As far as the above pleas are concerned, the Court is not persuaded to reconsider its afore mentioned orders which followed the decision of the Allahabad High Court in *Ganesh Yadav* (supra). In other words, the Court is not prepared to reopen the question of the validity of Section 35F of the CE Act.

5. In terms of the amended Section 35F of the CE Act the CESTAT can insist on a mandatory pre-deposit of 7.5%/10% of the demand of duty in respect of all appeals pending as on that date. As far as the present case is concerned, although the initial adjudication order was passed on 23rd December, 2010, that order was set aside by the CESTAT on 13th December, 2011 and the matter remanded to the Commissioner of Customs for afresh adjudication. In the second round, a fresh adjudication order was passed by the Principal Commissioner on 18th May, 2015. An appeal was then filed by the petitioner before the CESTAT along with an application for stay/waiver of pre-deposit. The further appeal having been filed after the amendment to Section 35F of CE Act would be governed by the said amended provision.

13. Learned consultant for the appellant has, however placed reliance upon a decision of a learned Judge of the Madras High Court in *Fifth Avenue Sourcing Pvt. Ltd.* which referred to an interim order passed by the Kerala High Court in *Muthoot Finance Ltd. Vs. Union of India and others* reported in 2015(320)E.L.T.51(Kerala).

14. In fact the submission of learned consultant for the appellant is that the position of law as explained by the Madras High Court in *Fifth Avenue Sourcing Pvt. Ltd.* is being uniformly applied and therefore the Tribunal should examine as to whether the appellant has made out a case for waiver of pre-deposit.

15. We are disturbed by such a statement having been made by the

learned consultant for the appellant as reliance has been placed on a judgment that was reversed in the Appeal filed by the Department. In fact before the Division Bench of the Madras High Court two matters had come up for consideration. The first was the Appeal filed by the Department against the judgment rendered by a learned Judge of the Madras High Court in Fifth Avenue Sourcing Pvt. Ltd. And the second was Writ Petition bearing No. 1424 of 2015 filed by Dream Castle for a declaration that the amended Section 35F of the Central Excise Act, 1944 would apply only to show cause proceedings initiated on or after 6 August, 2014. The Appeal and Writ Petition were decided by a common judgment dated 18 April, 2016 and the judgment is reported in (2016)94VST 158 (Madras) [Dream Castle Vs. Commissioner of Service Tax-1, Anna Nagar, Chennai]. The Division Bench after referring to the judgments of the Supreme Court in N. Subbiah Choudhury and the judgment rendered by a Division Bench of the Allahabad High Court in Ganesh Yadav and certain other decision held that the amended provisions of Section 35F of the Central Excise Act shall be applicable to all Appeals filed on or after 6 August, 2014. Thus, the decision of the learned Judge in Fifth Avenue Sourcing Pvt. Ltd. Was reversed and the Writ Petition was also dismissed. It is not fair on the part of the learned consultant for the appellant to place reliance upon a decision of a learned Judge which had been reversed within ten months.

16. We, therefore, have no hesitation in holding that the requirements set out in Section 129E of the Act as amended on 6 August 2014 have to be satisfied in regard to Appeals filed on or after 6 August, 2014. The contention of the learned consultant for the appellant that the provisions of the amended provisions of Section 129E of the Act would apply to Appeals in which show cause notices were issued on or after 6 August, 2014 cannot, therefore, be accepted.

17. The appellant has not made the requisite pre-deposit and has made a plea that the un amended provision of Section 129E under which there was a discretion with the Tribunal to waive the requirement of pre-deposit on certain conditions, should be made applicable.

18. The Application, therefore, deserves to be rejected and is, accordingly, rejected.

19. At this stage, learned consultant for the appellant states that some time may be given to the appellant to satisfy the requirement of Section 129E of the Act. The Appeal was filed on 28 December, 2018 and therefore we grant two weeks time to the appellant to ensure the compliance of the provisions of Section 129E of the Act, failing which, the Appeal would stand dismissed. The Appeal may be listed on 15 March, 2019 with an office report about compliance of the direction.

(Dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER(TECHNICAL)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. I**

**Anti Dumping Revised Cod Application No. 50675/2019 &
Anti Dumping Cod Application No. 51292/2018
(on Behalf of Appellant) In
Anti Dumping Appeal No. 53873 of 2018**

Arising out of Order No. 14/49/2016-DGAD, Dated: 25.01.2018
Passed by the Designated Authority, Directorate General of Anti Dumping &
Allied Duties, New Delhi

**Date of Hearing: 26.08.2019
Date of Decision: 26.08.2019**

**ALOK INDUSTRIES LTD
TOWER B, 2ND & 3RD FLOOR, PENINSULA BUSINESS PARK
GANPATRAO KADAM MARG, LOWER PAREL MUMBAI-400013**

Vs

**DESIGNATED AUTHORITY, DIRECTORATE GENERAL
OF ANTIDUMPING AND ALLIED DUTIES
DEPARTMENT OF COMMERCE & INDUSTRY PARLIAMENT
STREET JEEVAN TARA BUILDING, 4TH FLOOR
NEW DELHI - 110001**

Appellant Rep by: Ms Reena Khair, Shri Rajesh Sharma, Ms. Rita Jha and Ms. Shreya Dahiya, Advs.

Respondent Rep by: Shri Ameet Singh, Adv. for Designated Authority Shri Amit Randev, DGTR Shri Rakesh Kumar, AR Ms. Tanay Bhushan & Ms. Nandita Chauhan, Advs. Shri Arpit Bhargava, CA & Ms. Radhika Sharma, Adv. Ms. Reena Khair and Ms. Rita Jha, Advs.

CORAM: Dilip Gupta, President
C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 51250/2019

Per: Dilip Gupta:

Alok Industries Limited the Appellant filed the appeal in the Registry on 05 December, 2018 to assail the Final Findings dated 25 January, 2018 of the Designated Authority.

2. The appeal has to be filed before the Tribunal within ninety days of the date of order under appeal as provided for in Section 9C of the Customs Tariff Act, 19752 the Act . The period of 90 days expired much earlier than the filing of the appeal on 05 December, 2018. The Appeal was accompanied by an application for condoning the delay in filing the appeal.

3. Subsequently, the Applicant filed another application for condoning the delay on 13 August, 2019. The reasons stated in the application to explain the delay are as follows :

"a. Pursuant to discussion between the constituent of the domestic industry before Respondent No. 1, it was decided to file writ petition before Bombay High Court as no appeal under Section 9C of the Customs Tariff Act is maintainable in case of negative recommendation as held by the Hon'ble CESTAT in the matter of M/s Panasonic Energy India Co. Ltd. & Ors. Vs Union of India (Anti Dumping Appeal No. 50452-50455 of 2017).

b. Thus, without having an alternate remedy and in bonafide believe one of the constituent of domestic industry i.e. Bombay Dyeing & Mfg. Co. Ltd. decided to file writ petition before Hon'ble Bombay High Court on 20.04.2018.

c. Thereafter having discussion with the other constituent of the domestic industry namely Indo Rama Synthetics (India) Ltd. who were under process to file writ petition before Delhi High Court.

d. The applicant came to know that there is matter pending before the Hon'ble High Court of Delhi on the issue of maintainability of writ against Designated Authority's recommendation not to impose anti-dumping duty.

e. The appellant was advised by their legal counsel to await the decision of the Delhi High Court.

f. On 20.09.2018, Hon'ble High Court of Delhi pronounced its Judgment in the matter of Jindal Polyfilm Ltd. vs Designated Authority wherein has held that statutory appeal under Section 9C of the Customs and Tariff Act is maintainable against the Designated Authority's recommendation not to impose anti-dumping duty/negative recommendation.

g. Thereafter, appellant again approached the legal counsel in first week of October, 2018, the appellant was told that Hon'ble Delhi High Court has already held that appeal is maintainable against negative recommendation. But again the legal counsel advised the applicant to await the decision of the Hon'ble Bombay High Court in the pending writ petition filed by the constituent of the domestic industry against the impugned final finding. Since the writ petition is already pending against the impugned final finding the Hon'ble CESTAT may not hear the appeal arising out of the same impugned Final Findings.

h. The Bombay High Court vide its order dated 02.11.2018 disposed of the writ petition filed by the one of the domestic industries against the impugned Final finding inter-alia stating as follows :

"5. However, we note that the petitioner had moved this Court under Article 226 of the Constitution of India within a period of 90 days from the impugned order on the basis of a bona fide understanding that no appeal is available under the Tariff Act. The time to file an appeal under Section 9C of the Act is 90 days from the date of the impugned order which is sought to be challenged. Therefore, in the above view, it would only be fair that in case the petitioner does file an appeal from the impugned order under Section 9C of the Tariff Act within a period of three weeks from today, then the Tribunal shall entertain the appeal on merits without raising any issue of limitation. This as we have condoning the delay, if the appeal is filed to the Tribunal from the impugned order dated 25th January, 2018 within three weeks from today".

Since the Hon'ble Bombay High Court granted three weeks time to the petitioner to file appeal. The applicant approached the concerned counsel on 15.11.2018 for obtaining their opinion on whether the impugned finding and consequent notification should now be challenged before CESTAT.

i. Thereafter relevant papers were also forwarded to the counsel for drafting the appeal on 17.11.2018.

j. Thereafter the first draft of appeal was received on 26.11.2018.

k. The applicant checked the factual aspect of the appeal on 30.11.2018 and requested the concerned counsel for finalization and filing of the appeal.

l. The Final draft of Appeal was sent on 01.12.2018 to the applicant. The applicant confirmed the same on 01.12.2018 and requested to file the same."

4. The learned Counsel for the Applicant/Appellant submitted that earlier, in view of the decision of this Tribunal in *M/s Panasonic Energy India Company Limited & Others vs Union of India 2017 (357) ELT 110*, the Appellant was under the impression that no appeal would lie against the negative determination by the Designated Authority. The issue as to whether a Writ Petition or an appeal can be filed against the negative determination by the Designated Authority was the subject matter of a Writ Petition filed by Jindal Polyfilm Ltd. before the Delhi High Court, which, ultimately, on 20 September, 2018 held that a statutory appeal under Section 9C of the Act is maintainable before the Tribunal even against a negative recommendation of the Designated Authority. Learned Counsel also pointed out that the judgment on the maintainability of the Writ Petition in Jindal Polyfilm Limited was reserved by the Delhi High Court on 06 March, 2018 and it was delivered only on 20 September, 2018. The learned

Counsel also pointed out that thereafter, one constituent of the domestic industry, namely, M/s Bombay Dyeing & Mfg. Co., filed a Writ Petition before the Bombay High Court which was disposed of on 02 November, 2018 granting liberty to the Petitioner therein to file an appeal before the Tribunal within three weeks from the date of the decision in the Writ Petition. It has, therefore, been submitted that since the Bombay High Court granted three weeks' time to the Petitioner therein to file an appeal before the Tribunal, the Appellant was also advised to file an appeal within three weeks. Accordingly, the present appeal was filed on 05 December, 2018 which would be beyond 12 days from the time granted by the Bombay High Court in M/s Bombay Dyeing & Mfg. Co. The submission, therefore, is that the delay should be condoned.

5. The learned Counsel appearing for the Respondents have objected to the application and submitted that the delay in filing the appeal is not bonafide as the Appellant deliberately kept quiet for a substantial period of time and it is only when the Bombay High Court granted liberty to the Petitioner therein, M/s Bombay Dyeing & Mfg. Co., to file an appeal before the Tribunal within three weeks, that the Appellant woke up and filed this appeal in the Tribunal. It has, therefore, been submitted that the application should be rejected.

6. We have given our thoughtful consideration to the submissions advanced by the learned Counsel for the Appellant and the learned Counsel for the Respondents.

7. It is true that this Tribunal in Panasonic Energy India Company Limited held that an appeal cannot be filed before the Tribunal against a negative determination by the Designated Authority, but in such a situation when the view of the Tribunal was very clear, nothing prevented the Appellant from filing a Writ Petition before the High Court to challenge the determination by the Designated Authority, if it felt aggrieved. However, the Appellant neither availed the remedy of filing a Writ Petition in the High Court nor did it file an appeal before this Tribunal within the stipulated time. According to the Appellant, it waited for a decision to be given by the Delhi High Court in a Writ Petition filed by Jindal Polyfilm Ltd. to challenge the negative determination by the Designated Authority. Learned Counsel also pointed out that the judgment was reserved by the Delhi High Court on 06 March, 2018 on the maintainability of the Writ Petition and was delivered only on 20 September, 2018. Mere filing of a Writ Petition by another party or its pendency, cannot be said to be a good reason for the Appellant to not to file a Writ Petition before the appropriate High Court or an Appeal before the Tribunal within the time provided for. The Appellant had to itself avail the remedy. There was no reason for the Appellant to await the decision of a Writ Petition filed by some other party and that too not against the determination made by the Designated Authority on 25 January, 2018. If the Appellant was really aggrieved by the negative determination by the Designated Authority, it could have also filed a Writ petition before appropriate High Court.

8. It is also sought to be contended that one of the constituent domestic industry, feeling aggrieved by the negative determination by the Designated Authority, filed a Writ Petition in the Bombay High Court directly without availing the remedy of filing an appeal before the Tribunal and it is only when the Bombay High Court permitted the said Petitioner to file an appeal before the Tribunal, in view of the decision of the Delhi High Court in Jindal Polyfilm Ltd., that the Appellant filed this appeal.

9. This contention of the learned Counsel for the Appellant cannot also be accepted. Bombay Dyeing & Mfg. Co. had filed a Writ Petition in the Bombay High Court in April, 2018. Likewise, the Appellant could also have filed a Writ Petition in the Delhi High Court. Any decision by the Bombay High Court would not have come to the aid of the Appellant for explaining the delay in filing an Appeal subsequently.

10. In any view of the matter, the present appeal was filed beyond 12 days from the time granted by the Bombay High Court in Writ Petition filed by another Domestic Industry.

11. We are, therefore, not satisfied by the explanation offered by the Appellant for condoning the delay. The application deserves to be rejected and is, accordingly, rejected. The appeal also stands dismissed.

(Dictated & pronounced in the open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. I**

**Anti Dumping Cod Application No. 50676 of 2019
(on Behalf of Appellant) In
Anti Dumping Appeal No. 53725 of 2018**

Arising out of Order No. 14/49/2016-DGAD, Dated: 25.01.2018
Passed by the Designated Authority, Directorate General of Anti Dumping &
Allied Duties, New Delhi

Date of Hearing: 26.08.2019

Date of Decision: 26.08.2019

**INDO RAMA SYNTHETICS INDIA LTD
20TH FLOOR, DLF SQUARE, DLF PHASE-2, NH-8
GURUGRAM - 122022**

Vs

**DESIGNATED AUTHORITY, DIRECTORATE
GENERAL OF ANTIDUMPING AND ALLIED DUTIES
DEPARTMENT OF COMMERCE & INDUSTRY PARLIAMENT STREET
JEEVAN TARA BUILDING, 4TH FLOOR NEW DELHI - 110001**

Appellant Rep by: Ms Reena Khair, Shri Rajesh Sharma, Ms Rita Jha and Ms. Shreya Dahiya, Advs.

Respondent Rep by: Shri Ameet Singh, Adv. for Designated Authority Shri Amit Randev, DGTR Shri Rakesh Kumar, AR Ms Tanay Bhushan & Ms. Nandita Chauhan, Advs. Shri Arpit Bhargava, CA & Ms. Radhika Sharma, Adv. Ms Reena Khair and Ms. Rita Jha, Advs.

CORAM: Dilip Gupta, President
C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 51251/2019

Per: Dilip Gupta:

Indo Rama Synthetics (India) Limited the Appellant filed the appeal in the Registry on 22 November, 2018 to assail the Final Findings dated 25 January, 2018 of the Designated Authority.

2. The appeal before the Tribunal has to be filed within ninety days of the date of order under appeal as provided for in Section 9C of the Customs Tariff Act, 1975 the Act. Though the period of 90 days expired much earlier than the filing of the appeal on 22 November, 2018, but the appeal was not accompanied by any application for condoning the delay in filing the appeal. The application for condoning the delay in filing the appeal was, in fact, filed before the Tribunal only on 13 August, 2019.

3. It has been stated in the application that since the last date for filing the appeal before the Tribunal was 25 April, 2018, the appeal was filed with a delay of 211 days. The reasons stated in the application to explain the delay are as follows :

"a. Pursuant to discussion between the constituent of the domestic industry before Respondent No. 1, it was decided to file writ petition before Bombay High Court as no appeal under Section 9C of the Customs Tariff Act is maintainable in case of negative recommendation as held by the Hon'ble CESTAT in the matter of M/s Panasonic Energy India Co. Ltd. & Ors. Vs Union of India (Anti Dumping Appeal No. 50452-50455 of 2017).

b. Thus, without having an alternate remedy and in bonafide believe one of the constituent of domestic industry i.e. Bombay Dyeing & Mfg. Co. Ltd. decided to file writ petition before Hon'ble Bombay High Court on 20.04.2018.

c. The applicant was also in discussion with their legal representative to file a writ petition before Delhi High Court as Bombay Dyeing & Mfg. Co. Ltd. had already filed writ petition before High Court of Bombay.

d. The applicant was advised that a writ petition is already pending before Hon'ble High Court of Delhi against negative recommendation of Designated Authority, wherein Hon'ble High Court of Delhi has already heard the matter with regard to maintainability of writ petition against negative recommendation of the Designated Authority and reserved the judgment.

e. Applicant was advised to await the decision of the Hon'ble High Court of Delhi.

f. On 20.09.2018, Hon'ble High Court of Delhi pronounced its Judgment in the matter of Jindal Polyfilm Ltd. vs Designated Authority wherein, it has held that statutory appeal under Section 9C of the Customs and Tariff Act is maintainable against the Designated Authority's recommendation not to impose anti-dumping duty/negative recommendation.

g. Thereafter, appellant again approached the legal counsel in first week of October, 2018, the appellant was told that Hon'ble Delhi High Court has already held that appeal is maintainable against negative recommendation. But again the legal counsel advised the applicant to await the decision of the Hon'ble Bombay High Court in the pending writ petition filed by the constituent of the domestic industry against the impugned final finding. Since the writ petition is already pending against the impugned final finding the Hon'ble CESTAT may not hear the appeal arising out of the same impugned Final Findings.

h. The Bombay High Court vide its order dated 02.11.2018 disposed of the writ petition filed by the one of the domestic industries against the impugned Final finding inter-alia stating as follows :

"5. However, we note that the petitioner had moved this Court under Article 226 of the Constitution of India within a period of 90 days from the impugned order on the basis of a bona fide understanding that no appeal is available under the Tariff Act. The time to file an appeal under Section 9C of the Act is 90 days from the date of the impugned order which is sought to be challenged. Therefore, in the above view, it would only be fair that in case the petitioner does file an appeal from the impugned order under Section 9C of the Tariff Act within a period of three weeks from today, then the Tribunal shall entertain the appeal on merits without raising any issue of limitation. This as we have condoning the delay, if the appeal is filed to the Tribunal from the impugned order dated 25th January, 2018 within three weeks from today".

i. Since the Hon'ble Bombay High Court granted three weeks time to the petitioner to file appeal. Appellant was also advised to file appeal within 3 weeks. The applicant on 22.11.2018 immediately filed the present appeal before the Hon'ble Tribunal challenging the same impugned Final Finding.

j. It is humbly submitted that, if the delay of 211 days is not condoned by this Hon'ble Tribunal, it would result in a meritorious matter being thrown out at the very threshold and the cause of justice would be defeated.

k. It is well established that where the delay is only a few days, as in this case, the Courts will not take a narrow and pedantic view in condoning delay especially where good cause is shown as in this case."

4. The learned Counsel for the Applicant/Appellant submitted that earlier, in view of the decision of this Tribunal in *M/s Panasonic Energy India Company Limited & Others vs Union of India 2017 (357) ELT 110*, the Appellant was under the impression that no appeal would lie against the negative determination by the Designated Authority. The issue as to whether a Writ Petition or an appeal can be filed against the negative determination by the Designated Authority was the subject matter of a Writ Petition filed by Jindal Polyfilm Ltd. before the Delhi High Court, which, ultimately, on 20 September, 2018 held that a statutory appeal under Section 9C of the Act is maintainable before the Tribunal even against a negative recommendation of the Designated Authority. Learned Counsel also pointed out that the judgment on the maintainability of the Writ

Petition in Jindal Polyfilm Limited was reserved by the Delhi High Court on 06 March, 2018 and it was delivered only on 20 September, 2018. The learned Counsel also pointed out that thereafter, one constituent of the domestic industry, namely, M/s Bombay Dyeing & Mfg. Co., filed a Writ Petition before the Bombay High Court which was disposed of on 02 November, 2018 granting liberty to the Petitioner therein to file an appeal before the Tribunal within three weeks from the date of the decision in the Writ Petition. It has, therefore, been submitted that since the Bombay High Court granted three weeks' time to the Petitioner therein to file an appeal before the Tribunal, the Appellant was also advised to file an appeal within three weeks. Accordingly, the present appeal was filed on 22 November, 2018 within the time granted by the Bombay High Court in M/s Bombay Dyeing & Mfg. Co. The submission, therefore, is that the delay should be condoned.

5. The learned Counsel appearing for the Respondents have objected to the application and submitted that the delay in filing the appeal is not bonafide as the Appellant deliberately kept quiet for a substantial period of time and it is only when the Bombay High Court granted liberty to the Petitioner therein, M/s Bombay Dyeing & Mfg. Co., to file an appeal before the Tribunal within three weeks, that the Appellant woke up and filed this appeal in the Tribunal. It has, therefore, been submitted that the application should be rejected.

6. We have given our thoughtful consideration to the submissions advanced by the learned Counsel for the Appellant and the learned Counsel for the Respondents.

7. It is true that this Tribunal in Panasonic Energy India Company Limited held that an appeal cannot be filed before the Tribunal against a negative determination by the Designated Authority, but in such a situation when the view of the Tribunal was very clear, nothing prevented the Appellant from filing a Writ Petition before the High Court to challenge the determination by the Designated Authority, if it felt aggrieved. However, the Appellant neither availed the remedy of filing a Writ Petition in the High Court nor did it file an appeal before this Tribunal within the stipulated time. According to the Appellant, it waited for a decision to be given by the Delhi High Court in a Writ Petition filed by Jindal Polyfilm Ltd. to challenge the negative determination by the Designated Authority. Learned Counsel also pointed out that the judgment was reserved by the Delhi High Court on 06 March, 2018 on the maintainability of the Writ Petition and was delivered only on 20 September, 2018. Mere filing of a Writ Petition by another party or its pendency, cannot be said to be a good reason for the Appellant to not to file a Writ Petition before the appropriate High Court or an Appeal before the Tribunal within the time provided for. The Appellant had to itself avail the remedy. There was no reason for the Appellant to await the decision of a Writ Petition filed by some other party and that too not against the determination made by the Designated Authority on 25 January, 2018. If the Appellant was really aggrieved by the negative determination by the Designated Authority, it could have also filed a Writ petition before appropriate High Court.

8. It is also sought to be contended that one of the constituent domestic industry, feeling aggrieved by the negative determination by the Designated Authority, filed a Writ Petition in the Bombay High Court directly without availing the remedy of filing an appeal before the Tribunal and it is only when the Bombay High Court permitted the said Petitioner to file an appeal before the Tribunal, in view of the decision of the Delhi High Court in Jindal Polyfilm Ltd., that the Appellant filed this appeal.

9. This contention of the learned Counsel for the Appellant cannot also be accepted. Bombay Dyeing & Mfg. Co. had filed a Writ Petition in the Bombay High Court in April, 2018. Likewise, the Appellant could also have filed a Writ Petition in the Delhi High Court. Any decision by the Bombay High Court would not have come to the aid of the Appellant for explaining the delay in filing an Appeal subsequently.

10. We are, therefore, not satisfied by the explanation offered by the Appellant for condoning the delay. The application deserves to be rejected and is, accordingly, rejected. The appeal also stands dismissed.

(Dictated & pronounced in the open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**Anti Dumping COD Application No. 50654 of 2018 and Miscellaneous Application
No. 50655 of 2018 in Appeal No. 51852 of 2018 (Arising out of the Notification No.
07/2017-Customs (ADD) dated 17/02/2017 based on Final Findings of the
Designated Authority, No. 14/2/2015-DGAD dated 09/12/2016)**

Decided On: 30.09.2019

Mita India Private Ltd.

Vs.

**Designated Authority, Directorate General of Antidumping and
Allied Duties**

Hon'ble Judges/Coram:

Dilip Gupta, J. (President), C.L. Mahar, Member (T) and Rachna Gupta, Member (J)

Counsels:

For Appellant/Petitioner/Plaintiff: Karnika Seth, Navya Singh and Sarvesh Roy,
Advocates

For Respondents/Defendant: Ameet Singh, Amar Anand, Reena Khair, Rajesh Sharma,
Rita Jha, Shreya Dahiya, Advocates and Sunil Kumar, Authorized Representative (DR)

ORDER

Dilip Gupta, J. (President)

1. The Anti Dumping Appeal was filed by the Appellant before the Tribunal on 23 April 2018 to assail the Notification dated 17 February 2017 that was published in the Gazette of India, Extraordinary Part II on 17 February 2017. The appellant also filed an application for condoning the delay as Section 9C (2) of the Customs Tariff Act, 1975 provides that every appeal under Section 9C (1) of the Act shall be filed within 90 days of the date of order under appeal but the Appellate Tribunal may entertain any appeal after the expiry of the said period of 90 days if it is satisfied that the Appellant was prevented by sufficient cause from filing the appeal in time.

2. The averments made in the delay condonation application are as follows :-

"1. The Appellant Mita India Pvt. Ltd. has preferred this appeal against the Final Findings Notification No. 14/2/2015-DGAD dated 09/12/2016, issued by the Respondent No. 2, Designated Authority, Directorate General of Anti Dumping and Allied Duties, Department of Commerce, Government of India, as notified by the Respondent No. 1, Ministry of Finance vide Notification No. 7/2017-Customs (ADD) : MANU/CUSA/0007/2017 dated 17/02/2017. The contents of the appeal are not being repeated herein for the same of brevity and the same may be read as part and parcel of the present application also.

2. The Appellant respectfully submits that there has been a delay in filing the appeal, which delay is neither willful nor deliberate. There is sufficient cause for the Appellant not being able to file the appeal on time. The Appellant became aware of the imposition of final duties in the second week of May 2017. Since the Appellant could not participate in the investigation, it was advised that it should first obtain the documents from the Respondent No. 2 to determine whether any case can be made out to challenge the imposition of definitive duties.

3. The Appellant's counsel contacted the office of the Designated Authority in the third week of May 2017 and requested for inspection of the public file. The office informed the counsel that they would check with the concerned officer and call back. Even the Appellant made a follow-up to the office of the Respondent No. 2.

4. Since the Appellant did not receive any reply from the office of the Respondent No. 2, it counsel formally wrote to them on 27/06/2017 requesting the inspection of the public file, the list of interested parties, and a copy of the disclosure statement.

5. The Additional Director General in the office of the Respondent No. 2, vide letter dated 10/07/2017, wrote to the Appellant's counsel refusing access to the public file. The Respondent chose not to even furnish the list of interested parties, which is necessary for purposes of filing an appeal before this Hon'ble Tribunal.

6. Aggrieved by the order dated 10/07/2017, the Appellant preferred a writ petition (W.P. (C) No. 7887 of 2017) before the Hon'ble High Court of Delhi praying inter alia, for a direction to the Respondent Designated Authority to provide documents and also to permit inspection of the public file. Vide order dated 06/09/2017, the Hon'ble High Court dismissed the writ petition.

7. The Appellant challenged the order dated 06/09/2017 by way of Special Leave Petition (C) No. 7690 of 2018 before the Hon'ble Supreme Court. Vide order dated 19/03/2018, the Hon'ble Supreme Court observed, even while dismissing the SLP, that it was open to the Appellant to approach the Appellate Authority alongwith a condonation of delay application, having spent this period of time before the High Court and Supreme Court.

8. It is in this background that the Appellant is filing this appeal in the month of April 2018 being aggrieved by the Final Findings of the Designated Authority and the anti dumping duties imposed by the Ministry of Finance in the Government of India.

9. It is in these circumstances that there has been a delay in filing the instant appeal. It is in the interest of justice that the present application is allowed. Accordingly, this Hon'ble Tribunal may be pleased to condone the delay to exercise of its powers under Section 9 C (2) of the Customs Tariff Act, 1975 (as amended)".

3. In order to appreciate the submission made by Dr. Karnika Seth, learned Counsel appearing for the Appellant/Applicant, Ms. Reena Khair, learned Counsel appearing for Domestic Industry, Shri Ameet Singh, learned Counsel appearing for Designated Authority and Shri Sunil Kumar, learned Counsel appearing for Union of India, it will be appropriate at this stage to examine certain facts leading to the issuance of the final notification that was published in the Gazette by the Ministry of Finance.

4. The anti dumping investigation concerning imports of seamless tubes, steel pipes and hollow profiles of iron alloy or non-alloy steel (other than cast iron and stainless steel), whether hot finished or cold drawn or cold rolled of an external diameter not exceeding 355.6 mm or 14" OD" originating in or exported from China PR was initiated by a Notification dated 8 July 2015 that was published in the Gazette of India. The preliminary findings were rendered on 31 March 2016 and on the basis of the preliminary findings, a provisional duty was imposed by Notification dated 17 May, 2016 that was published in the Gazette on the same date i.e. 17 May 2016. The final findings were rendered by the Designated Authority on 9 December 2016 which were also published in the Gazette on 9 December 2016. The decision was thereafter notified by the Ministry of Finance by a Notification dated 17 February 2017 that was published in the Gazette on 17 February 2017.

5. The second paragraph of the delay condonation application mentions that the appellant became aware of the imposition of final duties in the second week of May 2017. However, since the appellant could not participate in the investigation, it was advised to first obtain the documents from the Designated Authority. For this purpose, it has been stated in paragraph 3 of the application that the Counsel of the Appellant contacted the office of the Designated Authority in the third week of May, 2017 and requested for an inspection of the public file. Paragraph 4 mentions that a formal letter was written to the Designated Authority on 27 June, 2017, but this request was denied by the Additional Director General in the office of the Designated Authority on 10 July, 2017. This order dated 10 July 2017 was thereafter assailed by the appellant by filing a writ-petition in the Delhi High Court, being writ-petition No. 7887 of 2017. Paragraph 6 mentions that the prayer that was made before the Delhi High Court was to issue a direction to the Designated Authority to provide all documents and also permit inspection of the public file. Paragraph 6 further mentions that the Delhi High Court dismissed the writ-petition by judgment and order dated 6 September 2017. Subsequently the Appellant challenged the judgment and order dated 6 September 2017 of the Delhi High Court by filing a Special Leave Petition bearing No. 7690 of 2018 in the Supreme Court which Petition was dismissed on 19 March 2018 but it was left open to the Appellant to approach the Tribunal with a delay condonation application. Paragraph 8 mentions that the Appeal was thereafter filed before the Tribunal in the month of April 2018 with a delay condonation application.

6. As noted above, Section 9 C (2) of the Act requires that the Appeal can be filed before the Tribunal to assail an order passed by the Designated Authority within 90 days of the

date of the order under appeal. The date of order under appeal would be the date when the notification issued by the Ministry of Finance is published in the Gazette. The records indicate that the notification was published in the Gazette on 17 February 2017. The Appeal, therefore, should have been filed before the Tribunal within 90 days of this date.

7. According to the Appellant, it became aware of the imposition of final duties in the second week of May 2017 only. The plea of the Appellant is that it was not aware of the list of the interested parties or a copy of the disclosures statement. The Appellant, therefore, filed a writ-petition in the Delhi High Court.

8. It would be appropriate at this stage to reproduce the judgment dated 6 September 2017 of the Delhi High Court in the writ-petition filed by the Appellant and the same is as follows:-

"1. The Petitioner seeks a direction to the Designated Authority, Directorate General of Anti Dumping and Allied Duties, Department of Commerce, Ministry of Commerce & Industry ('DA') to permit inspection of the public file pertaining to the anti-dumping investigation concerning imports of "Seamless tubes, pipes and hollow profiles of iron, alloy or non-alloy steel" (other than cast iron and stainless steel) whether hot finished or cold drawn or cold rolled of an external diameter not exceeding 355.6 or 14" OD" from China PR.

2. It appears that the Initiation Notification was issued on 8 July, 2015. Thereafter the Final Finding was issued by the DA on 9 December 2016, followed by the Notification dated 17 February 2017.

3. It is not disputed that, against the Final Findings and Notification, there is remedy available to the Petitioner before the Customs Excise, Service Tax Appellate Tribunal ('CESTAT').

4. On 27 June 2017, the Petitioner addressed a letter to the DA stating that, for the purposes of filing an appeal before the CESTAT, it required the list of interested parties alongwith their complete addresses and a copy of the disclosure statement. The above request was made more than four months after the Notification dated 17 February 2017.

5. Learned counsel for the Petitioner claims that the Petitioner became aware of the Notification dated 17 February 2017 only in the second week of May, 2017 and therefore could not make the above request earlier. This explanation is not convincing. The Notification, having been Gazetted, is presumed to have been in the knowledge of the Petitioner. Further, the provisional duty during the period of investigation was already in force for more than a year and was to the knowledge of the Petitioner. It appears to the Court that, having missed its opportunity of filing its appeal in the CESTAT within time, the Petitioner was seeking to build an alibi to explain its delay and therefore applied for inspection of the DA's file.

6. Learned counsel for the Petitioner states that, without the address of the interested parties, it cannot file an appeal before the CESTAT. It is noticed that the names of the interested parties are set out in the Final Findings itself. With most of them being companies, it should not have been difficult for the Petitioner to ascertain their addresses. The Court is not satisfied about the bona fides of the Petitioner's request to the DA".

9. A perusal of the aforesaid judgment of the Delhi High Court clearly shows that the aforesaid prayer of the Appellant that it became aware of the Notification dated 17 February 2017 only in the second week of May, 2017 was also examined by the Delhi High Court. The High Court did not find this explanation to be convincing and the High Court observed that the notification having been Gazetted, it is presumed to have been in the knowledge of the Petitioner. The High Court also noticed that the provisional duty during the period of investigation was already in force for more than a year and was to the knowledge of the Petitioner. The High Court also observed that it appeared that having missed the opportunity of filing an Appeal before the Tribunal within time, the Petitioner was seeking to build an alibi to explain the delay and had, therefore, applied for inspection of the file of the Designated Authority. The plea of the Appellant that it could not file appeal in the absence of the addressee of the interested parties was also not found to be convincing as the High Court observed that most of them were big companies and so it should not have been difficult for the petitioner to ascertain the addresses.

10. This judgment of the Delhi High Court was assailed by the Appellant before the Supreme Court. The Supreme Court did not interfere with the judgment passed by the

Delhi High Court and, accordingly, dismissed the Special Leave Petition. However, the Supreme Court observed that it is always open to the petitioner to approach the Appellate Tribunal in accordance with the law with a delay condonation application. The judgment of the Supreme Court is reproduced here below:-

"Delay condoned.

We do not see any reason to interfere with the impugned order. The special leave petition is dismissed.

We may, however, observe that it is always open to the petitioner to approach the Appellate Authority in accordance with law with a condonation of delay application, having spent this period of time before the High Court and Supreme Court, in the inappropriate forums.

Pending application (s), if any, stand disposed of".

11. The judgment of the Delhi High Court dated 6 September 2017, therefore, attained finality. The observations of the Supreme Court regarding approaching the Tribunal for filing a delay condonation application is in the context of Section 14 of the Limitation Act, 1963. The Supreme Court observed that the time spent by the Appellant in the inappropriate forum namely High Court and the Supreme Court should be excluded while computing the period of limitation.

12. The Appeal should have been filed by the Appellant within 90 days from the date of the order i.e. within 90 days from 17 February 2017. The only reason given by the Appellant for not filing the Appeal within the stipulated period is that it was not aware of the addresses of the parties nor documents were made available to them. The request of the Appellant was specifically considered and rejected by the Delhi High Court and this order has attained finality on the dismissal of the Special Leave Petition by the Supreme Court. It is, therefore, not open to the Appellant to again raise the same plea before the Tribunal in the application filed for condoning the delay in filing the appeal. Even if the time spent by the Appellant in the Delhi High Court between 31 August 2017 and 6 September 2017 is excluded as also the time spent in the Supreme Court in filing the Special Leave Petition on 6 December 2017 and its dismissal on 19 March 2018 is excluded, only benefit of 103 days can be granted to the Appellant. However, the entire period of limitation expired even before the writ-petition was filed by the Appellant in the Delhi High Court.

13. Further, it needs to be noticed that the Appellant had been paying provisional duty in accordance with the preliminary findings that were published in the Gazette on 17 May 2016. The Appellant was, therefore, aware that the anti dumping duty investigation was in process. This was also observed by the Delhi High Court.

14. Though the Appellant claimed that it was in the second week of May 2017 that it approached the Designated Authority, but what is seen is that the formal application was filed by the Appellant only on 27 June, 2017. The Delhi High Court observed that the Appellant had approached to the Designated Authority for documents only to subsequently explain the delay in filing the Appeal before the Tribunal.

15. We are, therefore, not satisfied that the Appellant was prevented by sufficient cause from preferring the Appeal before the Tribunal within time. The delay application is, accordingly, rejected.

16. As the delay application has been rejected, the Appeal stands dismissed.

17. All other miscellaneous applications stand rejected.

(Dictated and pronounced in open court.)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Anti Dumping Appeal No. 50572 of 2019 (Arising out of Final Findings vide Notification No. 6/12/2018-DGAD dated 31 December, 2018 issued by the Designated Authority, Directorate General of Anti Dumping and Allied Duties, New Delhi) and Anti Dumping Appeal No. 50573 of 2019 (Arising out of Final Findings vide Notification No. 6/12/2018-DGAD dated 31 December, 2018 issued by the Designated Authority, Directorate General of Anti Dumping and Allied Duties, New Delhi)

Decided On: 20.12.2019

Nitro Chemical Industry Ltd. and Ors.

Vs.

**Designated Authority, Directorate General of Antidumping & Allied Duties,
Department of Commerce & Industry**

Hon'ble Judges/Coram:

Dilip Gupta, J. (President), Dr. D.M. Misra, Member (J) and C.L. Mahar, Member (T)

Counsels:

For Appellant/Petitioner/Plaintiff: Naresh Thacker, Sanjay Notani and Dhruv Khurana, Advocates

For Respondents/Defendant: Reena Khair, Rajesh Sharma, Rita Jha, Neha Pandey, Shreya Dahiya, Ameet Singh, Arun, Advocates and Rakesh Kumar, Authorised Representative

Dilip Gupta, J. (President)

1. The levy of definitive anti dumping duty on the import of "Non-Plasticized Industrial Grade Nitrocellulose excluding Nitrocellulose Damped in Ethanol and Waterwet1 originating in or exported from Brazil, Indonesia and Thailand has led to the filing of these two appeals by the two exporters from Thailand.

2. The Designated Authority, in its final findings dated 31 December, 2018, concluded that Nitrocellulose, which is the product under consideration, has been imported to India from the aforesaid three countries below normal value; the Domestic Industry has suffered material injury on account of its import from subject countries; and material injury has been caused by the dumped imports of subject goods from the subject countries. It, therefore, recommended imposition of definitive anti dumping duty on the import of subject goods in order to remove injury to the domestic industry. The Central Government, after taking into consideration the aforesaid final findings of the Designated Authority, imposed anti dumping duty by a Notification dated 07 February, 2019 that was published in the Gazette of India.

3. Two issues that have been raised by Shri Naresh Thacker, learned Senior Counsel appearing for the Appellant in the two appeals filed by M/s. Nitro Chemical Industry Ltd.2 and M/s. Nobel NC Co. Ltd.3 are non-consideration of the submissions advanced on behalf of the Appellants both on normal value and confidentiality.

4. Nitro Chemicals with its subsidiary company is the sole manufacturer of Nitrocellulose in Thailand. This product is a flammable compound produced by the reaction of cellulose and Nitric Acid and is used in the manufacture of paints, nail varnishes, printing inks and lacquers if the content of nitrogen is less than 12.2%.

5. M/s. Nitrex Chemicals India Limited4, a producer of subject goods in India, filed an application before the Designated Authority alleging dumping of the product under consideration originating in or exported from Brazil, Indonesia and Thailand. Pursuant to the aforesaid application, the Designated Authority issued a Public Notice by Notification dated 10 April, 2018 initiating investigation in terms of Rule 5 of the Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 19955. The Appellants filed their response to the exporter's questionnaire on 04 June, 2018. The Designated

Authority held an oral hearing on 06 June, 2018. On behalf of the Domestic Industry, a communication dated 07 August, 2018 was submitted before the Designated Authority pointing out that the responding exporters had resorted to excessive confidentiality claim which had prevented the Domestic Industry from offering comments. It was also stated that none of the exporters had even given an indexed version of their performance indicators, whereas the Domestic Industry had provided indexed figures of each parameter showing the trend of injury parameters. A request was, therefore, made to direct the exporters to sufficiently disclose information in the public version filed by them. All the interested parties filed their Written Submissions post public hearing held on 06 August, 2018. Pursuant to the communication dated 07 August, 2018 sent on behalf of the Domestic Industry, the Designated Authority sent an email to the exporters mentioning therein that at the time of oral hearing an issue was raised by the Domestic Industry regarding alleged excessive claims of confidentiality and that the Domestic Industry had submitted a letter, of which a copy was attached with the email. The exporters were, therefore, advised to either disclose the information adequately or provide sufficient reason as to why no further disclosure of information was feasible. The Appellants sent a communication dated 22 August, 2018 to the Designated Authority giving a response to the claim of confidentiality. The Appellants also sent a communication dated 27 August, 2018 to the Designated Authority questioning the excessive confidentiality claim made by the Domestic Industry. An onsite verification of the exporters' premises was conducted from 10 September, 2018 to 12 September, 2018. Thereafter, a disclosure statement dated 07 December, 2018 was published disclosing all the essential facts under consideration for the anti dumping investigation which would form the basis for final findings. The interested parties were asked to offer their comments, if any, latest by 14 December, 2018. Comments to the disclosure statement were received, whereafter final findings were notified on 31 December, 2018 recommending imposition of anti dumping duty equal to the lesser of the margin of dumping and the margin of injury, so that the injury caused to the Domestic Industry was removed. This was to be effective from the date of the Notification to be issued by the Central Government and would be for a period of five years.

6. Feeling aggrieved, both the Appellants filed Writ Petitions before the Delhi High Court being Writ Petition (Civil) No. 312 of 2019 and Writ Petition (Civil) No. 313 of 2019 for quashing the final findings dated 31 December, 2018 and the disclosure statement dated 07 December, 2018. A further prayer was made to direct the Respondent to refrain from giving effect to and/or take any action in furtherance to the final findings dated 31 December, 2018. The Petitioners had made a complaint that the verification report of the Designated Authority was not a part of the record. This apprehension of the Appellant was found not to be correct by the High Court, as the records produced before the High Court indicated that the verification report was a part of the record of the Designated Authority. Learned Counsel for the Petitioners then submitted that there were other grounds also dealing inter alia with the issue of confidentiality and the failure on the part of the Designated Authority to deal with its submissions and it was stated on their behalf that they would agitate these issues through a representation to the Central Government, so as to seek its intervention and appropriate action. Learned Counsel appearing for the Designated Authority stated that a copy of the verification report would be furnished to the Petitioner. In such circumstances, the High Court observed that a copy of the verification report shall be furnished to the Writ Petitioners within a week and it would be open to the Petitioners to represent to the Central Government in a suitable manner for appropriate directions, in accordance with law. Learned Senior Counsel for the Petitioner, in view of the aforesaid submissions, sought liberty to withdraw the Petitions. The Writ Petitions were, accordingly, dismissed as withdrawn on 6 February, 2019.

7. After the dismissal of the Writ Petitions, the Central Government issued the Notification dated 07 February, 2019 exercising powers conferred by sub-sections (1) and (5) of section 9A of the Customs Tariff Act, 1975 imposing anti dumping duty on Nitrocellulose originating in and exported from Brazil, Indonesia and Thailand for a period of five years.

8. The Designated Authority also provided a copy of the verification report to the Appellants on 08 February, 2019. On 15 February, 2019, the Appellants submitted a response before the Central Government on the verification report. The Central Government forwarded a copy of the aforesaid comments dated 15 February, 2019 to the Designated Authority.

9. The Central Government thereafter sent a letter dated 01 March, 2019 to the Appellants in connection with the comments dated 15 February, 2019 submitted by them. The letter informed the Appellants that after examination of the comments to the verification report, no change was called for in the final findings issued on 31 December, 2018.

10. These two appeals have been filed by the Appellants on 18 March, 2019 to assail the final findings dated 31 December, 2018 as also the Notification dated 07 February, 2019.

11. Shri Naresh Thacker, learned Senior Counsel for the Appellants made the following submissions on two aspects, namely, (a) non-consideration of the Appellants' submission on 'normal value'; and (b) non-consideration of the Appellants' submission on 'confidentiality'.

SUBMISSIONS ON 'NORMAL VALUE'

(i) The Designated Authority failed to consider the submissions advanced by the Appellants on 'normal value'. Elaborating this submission, learned Senior Counsel pointed out that the domestic selling price of the product under consideration in Thailand was distorted because of demand-supply crunch resulting from strict licensing requirements imposed by the Thailand Government and, therefore, the normal value should have been calculated on the basis of sales made by the Appellants to third countries or the cost incurred by the Appellants;

(ii) The export price to India is not comparable with the prices in the domestic market because the product under consideration was subject to domestic regulations enforced by the Defence Industrial Department under the Thailand Army on account of which there was a limited supply within the country leading to an increase in prices. There were also various additional expenses that the Appellants had to incur owing to the nature of the product. Further, additional services were also provided to its customers by the Appellants which were not provided to their customers in India. Thus, the export price was not directly comparable to the domestic sales price;

(iii) The Appellants had also reiterated the submissions of normal value when site verification took place from 10-12 September, 2018;

(iv) The verification report that was submitted was not shared with the Appellants by the Designated Authority;

(v) In the final findings, the Designated Authority failed to consider the submissions advanced on behalf of the Appellants regarding normal value and the Designated Authority merely reproduced what was stated in the disclosure statement, even though comments had been submitted in response to the disclosure statement;

(vi) The final findings have not appreciated the scope of the licensing regulations and it has been held that mere licensing procedure would not mean that domestic selling prices cannot be in the ordinary course of trade. In this connection, reliance has been placed on the decision of the Appellate Body in US - Anti Dumping measures on certain hot-rolled steel products from Japan;

(vii) In terms of the order passed by the Delhi High Court on 06 February, 2019 in the two Writ Petitions filed by the Appellants, the Central Government should have waited for the Appellants to file a representation to the Central Government so that the Central Government could take a decision but the Central Government issued the Notification on the very next date on 07 February, 2019. Thus, not only have the principles of natural justice been violated, but the Notification is also against the spirit of the order dated 06 February, 2019 passed by the Delhi High Court; and

(viii) The communication dated 01 March, 2019 sent by the Central Government in response to the comments submitted by the Appellant also does not deal with the submissions made by the Appellants.

SUBMISSIONS ON CONFIDENTIALITY

(i) The 1995 Rules provide that the Designated Authority has to disclose all the evidences provided by any of the parties to the opposing parties. In exceptional cases, if the information is confidential in nature, the interested party has still to submit a non-confidential summary of such information or give reasons why a summary cannot be provided. Pursuant to the letter dated 07 August, 2018 submitted by the Domestic Industry after the oral hearing took place on 06 August, 2018, the Designated Authority by a letter dated 16 August, 2018 directed the Appellants to provide reasons for the confidentiality claim or to provide a summary, which directions were duly complied with by the Appellants by letter dated 23 August, 2018;

(ii) The Appellants also sent a communication dated 27 August, 2018 objecting to the

claim of confidentiality of the Domestic Industry as being excessive. The Domestic Industry had also omitted to fill Forms 'A' to 'L' (barring 'G' & 'H') completely, but the Designated Authority did not address this issue;

(iii) Trade Notice dated 09 December, 2013 also provides that any submission made without a meaningful non-confidential version thereof or without a good cause statement on the confidentiality claim should not be taken on record by the Designated Authority;

(iv) Trade Notice dated 01 February, 2018 also provides the format to be submitted by the Domestic Industry;

(v) A conjoint reading of the Trade Notices would indicate that the data, which is non-confidential, should be made available without fail and where the data is confidential, parties must provide a non confidential version thereof. However, if it is not possible to provide a non-confidential version, the parties must provide a meaningful summary and/or an indexed version of the documents. However, the Designated Authority did not issue directions to the Domestic Industry;

(vi) The Central Government in the communication dated 01 March, 2019, has not appreciated the contention of the Appellants and has merely stated that the issue of confidentiality had been dealt with by the Designated Authority in paragraphs 22 and 23 of the final findings; and

(vii) The Designated Authority has unevenly treated the Appellants and the Domestic Industry.

12. Ms. Reena Khair and Shri Rajesh Sharma, learned Counsel appearing for the Domestic Industry have, however, supported the impugned notification and the final findings. Learned Counsel submitted that the Designated Authority has examined the contentions raised by the Appellants both on 'normal value' and 'confidentiality'.

SUBMISSIONS ON 'NORMAL VALUE'

(i) The submission of the Appellants that since imports are prevented from entering the Thailand market freely, the limited supply has led to distortion in the domestic market price of the subject goods in Thailand and so the normal value should not be fixed based on sale price in the domestic market, but on exports to other countries is not correct. In this connection, learned Counsel submitted that a license has to be obtained both for domestic and import procurement and, therefore, the transactions are at par and there is no distortion of price on account of the regulations;

(ii) The Arms Act is essentially an Act for public safety and law and order and is not a trade measure for restricting the quantum of import or for regulation of price in the market. The considerations for issuance of a license have no connection with the domestic procurement or import. The Act merely seeks to regulate the use of the product in Thailand so as to prevent misuse against public safety as well as law and order. Thus, a user will have to obtain a license irrespective of whether Nitrocellulose is imported or procured domestically. The license also covers production and possession of Nitrocellulose;

(iii) The Act is applicable to the article Nitrocellulose, other than non-explosive finished products. Nitrocellulose with Nitrogen below 12.3 percent is used for lacquers, coatings and inks and Nitrogen content above 12.6% is considered as explosive. In the present case, the product under consideration has a Nitrogen content in the range of 10.7% to 12.2%. Thus, it would not qualify as arms under the Arms Act, 1987 and the regulations would not be relevant to the investigation carried out;

(iv) The definition of 'normal value' contained in Explanation (c) to Section 9A(1) of the Tariff Act provides for different methodologies for fixation of normal value which has to be applied sequentially. The 'normal value' is the price for the like article when destined for consumption in the exporting country. In exceptional cases, when there are no sales of the like article in the ordinary course of trade, or when due to a particular market situation or low volume of sale in the domestic market, such sales do not permit a proper comparison, the normal value shall be determined either on the basis of the comparable representative price of the like article, when exported from Thailand to an appropriate third country, or the cost of production of the said article in the country of origin with reasonable addition for administrative, selling and general cost with profit. Thus, the domestic sale price can be rejected only when these two circumstances exist.

(v) Clause (2) of Annexure I to the 1995 Rules provides for circumstances under which

sale of the like product may be treated as not being in the ordinary course of trade by reason of price. The contention of the foreign exporter that the sales in the domestic market are not in the ordinary course of trade is fallacious since the regulations have no bearing on the terms and conditions of sales in the domestic Thailand market;

(vi) The verification process is only for verification of the information and is not a proper forum or stage for making any submissions. The final findings adequately deal with this issue;

(vii) After the issuance of the final findings on 31 December, 2018, the Appellants filed Writ Petitions in the Delhi High Court contending that the verification report did not form part of the record of the Designated Authority. The original records were produced before the High Court by the Designated Authority and the High Court found that the records included the verification report. The Designated Authority, however, agreed to provide the verification report to the foreign exporters within a period of one week and only liberty was given to the Writ Petitioners to represent to the Central Government for appropriate directions in accordance with law. No directions were issued to the Central Government not to issue the Notification under Section 9A of the Tariff Act. The final findings recommended imposition of anti dumping duty on imports of the subject good originating in or exported from Brazil, Indonesia and Thailand. Controversy was raised by only two exporters from Thailand. Thus, in the absence of any restraint by the High Court, the Central Government could have issued the Notification and the submission of the Appellants that issuance of the Notification prior to the filing of the representation by the Appellants before the Central Government was prejudicial to the foreign exporters is not correct. In any case, the Central Government was competent to amend the Notification, if so warranted, in terms of Section 9A of the Tariff Act read with Section 21 of the General Clauses Act, 1897.

SUBMISSIONS ON 'CONFIDENTIALITY'

(i) The Domestic Industry had claimed confidentiality in respect of detailed costing information since disclosure would adversely impact the ability of the Domestic Industry to compete with the foreign exporters in Indian and foreign markets. It has been consistently held that the cost of production and related data of Domestic Industry is of confidential nature and commercially sensitive and cannot be made available to others; and

(ii) Domestic Industry furnished complete information in the Forms to the Designated Authority on confidential basis. A meaningful summarization of this information was not possible without disclosure of sensitive information. A summary of the performance parameters was provided in Form 'H' and the Thailand exporters have also not provided meaningful summarization of cost information, except the performance parameters.

13. Shri Ameet Singh, learned Counsel appearing for the Designated Authority has supported the final findings and the Notification issued by the Central Government and made the following submissions:

(i) The investigation team conducted the verification after which it prepared a report for the Designated Authority. All the figures provided by the exporters were accepted by the verification team and as such there was no obligation on the part of the Designated Authority to supply the verification report to the exporters;

(ii) The verification report was a part of the records placed before the Designated Authority and this fact has also been recorded by the High Court in the judgment rendered in the two Writ Petitions filed by the Appellants;

(iii) The disclosure statement took into account all the information verified during verification conducted at the premises of the Appellants. All the figures reported by the exporters were adopted in entirety without any modification.

(iv) The claim regarding confidentiality has been duly considered by the Designated Authority and it is incorrect to assert that the Appellants have been discriminated in any manner; and

(v) The Designated Authority has correctly determined the 'normal value' since the Designated Authority had to first examine whether the domestic sales of the subject goods were representative and viable for permitting the determination of normal value. Both the Appellants had provided domestic sales price of the subject goods. During the period of investigation, Nitro Chemicals sold 4193 MT of the subject goods in the domestic market and all the sales were subjected to ordinary course of trade test. It was found that 99.96% of the sales in the domestic market were profitable.

14. Shri Rakesh Kumar, learned Authorised Representative appearing on behalf of the Central Government has submitted:

i. The Notification was issued by the Central Government after careful examination of the final findings of the Designated Authority; and

ii. While issuing the Notification, the Central Government did not violate any direction contained in the Judgment and Order dated 06 February, 2019 of the Delhi High Court. The two main prayers contained in the Writ Petitions were for quashing the final findings dated 31 December, 2018 and also for a direction refraining the Respondents from giving effect to and/or taking any action in furtherance to the final findings dated 31 December, 2018. These two prayers were not accepted and only an opportunity was given to the Appellants to file a representation to the Central Government, which representation was duly considered by the Central Government and in case the representation submitted by the Appellants had any merit, the Central Government would have made suitable amendments in the Notification.

15. The submissions advanced by the learned Counsel for the Appellants, learned Counsel for the Domestic Industry and the Designated Authority and the learned Authorized Representative appearing for the Central Government have been considered.

16. The Domestic Industry had submitted an application before the Designated Authority alleging dumping of "Non-Plasticized Industrial Grade Nitrocellulose excluding Nitrocellulose Damped in Ethanol and Waterwet", having nitrogen content in the range of 10.7% to 12.2%, originating in or exported from Brazil, Indonesia and Thailand", which article has been referred to as 'Nitrocellulose' in this order. The Designated Authority, after being satisfied from the evidence submitted in the application that it justified initiation of anti dumping investigation, issued a Public Notice by Notification dated 10 April, 2018 in terms of Rule 5 of the 1995 Rules to determine the existence, degree and effect of the alleged dumping on the subject goods. Four exporters/producers, including the two Appellants submitted questionnaire responses. Four importers and users of the subject goods also submitted questionnaire responses. The non-confidential version of the evidence presented by the various interested parties was made available for inspection in the form of a public file. Oral hearing was conducted on 06 August, 2018 and all the parties who presented their views in the oral hearing were requested to file written submissions as also rejoinder thereafter. The period of investigation was from April, 2016 to September, 2017. The examination of trends in the context of injury analysis covered the period from April, 2013 to March 2014, April, 2014 to March, 2015 April, 2015 to March, 2016 and the period of investigation.

17. It has been stated in the final findings that information provided by the interested parties on confidential basis was examined with regard to the sufficiency of the confidentiality claim and on being satisfied, the Authority accepted the confidentiality claims wherever warranted and such information has been considered as confidential and not disclosed to other interested parties. Wherever possible, parties providing information on a confidential basis were directed to provide sufficient non confidential version of the information filed on a confidential basis. The exporters were asked to file a revised non confidential version of the exporter questionnaire response and provide all necessary and relevant information. A revised non confidential version of the questionnaire was filed by the responding exporters.

18. A disclosure statement dated 07 December, 2018, as contemplated under Rule 16 of the 1995 Rules, was then published, informing all interested parties of the essential facts with a request to submit the comments by 14 December, 2018. The final findings were notified on 31 December, 2018 recommending imposition of anti dumping duty. The Central Government issued the Notification dated 07 February, 2019 imposing anti dumping duty on Nitrocellulose originating in or exported from Brazil, Indonesia and Thailand for a period of five years.

19. The export of Nitrocellulose by the two Appellants from Thailand is in issue in these Appeals. Broadly, two submissions have been made by the learned Counsel for the Appellants. They relate to non-consideration of the submissions made by the Appellants on 'Normal Value' and non-consideration of the submissions made by the Appellants on 'Confidentiality'.

20. It would be appropriate, before proceeding to examine the submissions made on behalf of the Appellants and the Respondents, to reproduce the relevant provisions of the Act and the 1995 Rules.

21. Section 9A of the Tariff Act deals with anti dumping duty on dumped articles. Sub-section (1) of Section 9A, without the Explanation is as follows:

"SECTION 9A(1). Anti-dumping duty on dumped articles-

(1) Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article."

22. The 'margin of dumping' has been defined in Explanation (a) to Section 9A(1) of the Tariff Act to mean the difference between the export price and the normal value.

23. 'Normal Value' has been defined in Explanation (c) to Section 9A(1) of the Tariff Act and it is as follows:

"normal value", in relation to an article, means-

(i) the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6);

or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either-

(a) comparable representative price of the like article when exported from the exporting country or territory to an appropriate third country as determined in accordance with the rules made under sub-section (6);

or

(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub-section (6):

Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transhipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin."

24. Annexure I to the 1995 Rules deals with the principles governing the 'determination of normal value, export price and margin of dumping'. Paragraph 2 of this Annexure deals with circumstances under which sales of the like product are not treated to be in the ordinary course of trade and the said paragraph is reproduced below:

"2. Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price. The designated authority may disregard these sales, in determining normal value, provided it has determined that-

(i) such sales are made within a reasonable period of time (not less than six months) in substantial quantities, i.e. when the weighted average selling price of the article is below the weighted average per unit costs or when the volume of the sales below per unit costs represents not less than twenty percent of the volume sold in transactions under consideration, and

(ii) such sales are at prices which do not provide for the recovery of all costs within a reasonable period of time. The said prices will be considered to provide for recovery of costs within a reasonable period of time if they are above weighted average per unit costs for the period of investigation, even though they might have been below per unit costs at the time of sale."

25. 'Designated Authority' is appointed under Rule 3 of the 1995 Rules and the duties of the Designated Authority have been enumerated in Rule 4. Rule 4(d) provides that it

shall be the duty of the Designated Authority to:

"4(d) - to recommend to the Central Government-

(i) the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, after considering the principles laid down in the Annexure III to these rules; and

(ii) the date of commencement of such duty;"

26. The investigation is initiated under Rule 5 and the principles governing investigations are contained in Rule 6. Rule 7 deals with 'confidential information' and is as follows:

"7. Confidential information-

(1) Notwithstanding anything contained in sub-rules (2), (3) and (7) of rule 6, sub-rule (2) of rule 12, sub-rule (4) of rule 15 and sub-rule (4) of rule 17, the copies of applications received under sub-rule (1) of rule 5, or any other information provided to the designated authority on a confidential basis by any party in the course of investigation, shall, upon the designated authority being satisfied as to its confidentiality, be treated as such by it and no such information shall be disclosed to any other party without specific authorization of the party providing such information.

(2) The designated authority may require the parties providing information on confidential basis to furnish non-confidential summary thereof and if, in the opinion of a party providing such information, such information is not susceptible of summary, such party may submit to the designated authority a statement of reasons why summarisation is not possible.

(3) Notwithstanding anything contained in sub-rule (2), if the designated authority is satisfied that the request for confidentiality is not warranted or the supplier of the information is either unwilling to make the information public or to authorize its disclosure in a generalized or summary form, it may disregard such information."

27. Rule 10 deals with 'determination of normal value, export price and margin of dumping' and is as follows:

"10. Determination of normal value, export price and margin of dumping. - An article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value and in such circumstances the designated authority shall determine the normal value, export price and the margin of dumping taking into account, inter alia, the principles laid down in Annexure I to these rules."

28. Rule 11 deals with determination of injury'. Rule 16 provides that, the Designated Authority shall, before giving its final findings, inform all interested parties of the essential facts under consideration which form the basis for its decision. Rule 17 deals with 'final findings' and the relevant portion is as follows:

"17. Final findings-

(1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding-

(a) as to,-

(i) the export price, normal value and the margin of dumping of the said article;

(ii) whether import of the said article into India, in the case of imports from specified countries, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;

(iii) a casual link, where applicable, between the dumped imports and injury;

(iv) whether a retrospective levy is called for and if so, the reasons therefor and date of commencement of such retrospective levy:

Provided xxxx

Provided xxxx

(b) Recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry after considering the principles laid down in the Annexure III to rules."

29. Rule 18 deals with 'levy of duty' and the relevant portion is as follows:

"18. Levy of duty-

(1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17."

30. It is keeping in mind the aforesaid factual position and the relevant provisions of the Act and the Rules that the two submissions advanced by the learned Counsel for the Appellants have to be considered.

SUBMISSIONS ON 'NORMAL VALUE'

31. The contention of the learned Senior Counsel for the Appellants is that the price of the product under consideration in the domestic market is distorted because of the strict licensing requirements imposed by the Thailand Government. 'Normal value' should, therefore, have been calculated on the basis of the sales to third countries or the cost of production.

32. To appreciate this contention, the definition of 'normal value' has to be examined. As noticed above, 'normal value' in relation to an article means the comparable price, in the ordinary course of trade, for the article when destined for consumption in the exporting country. It is only when there are no sales of the article, in the ordinary course of trade, in the domestic market of the exporting country or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country that the normal value shall be either a comparable representative price of the like article when exported from the exporting country to an appropriate third country or the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits.

33. The contention of the Appellants is that the export price to India is not comparable with the price in the domestic market because the product under consideration is subject to domestic regulations enforced by Defence Industrial Departments because of which there is a limited supply available within the country leading to an increase in the price.

34. The contention of the Domestic Industry is that the Appellants failed to substantiate that there was any distortion in the domestic selling price and mere existence of license regulations cannot lead to a conclusion that there is a distortion in price. The submission is that a licence has to be obtained, both for domestic and import procurement and, therefore, the transactions are at par and there is no distortion of price on account of the regulations imposed by the Thailand Government.

35. It would, therefore, be necessary to examine the provisions of the Arms Control Act, 1987 enacted by Thailand, which it is stated by the Appellants contains restrictions in obtaining a licence to sell the article, thereby causing distortion in the price. The preamble to the said Act states that it was considered expedient to revise the laws on arms control. Section 3 provides that all laws, rules and other regulations inconsistent with the provisions of the Act shall be replaced by the Act.

36. 'Arms' has been defined in Section 4 of the Arms Act and is as follows:

"Arms- means weapons, weapons accessories, chemical substances, biological substances, radioactive substances or devices or instruments which may be used in combat or warfare as notified by the Minister in the Government Gazette under section 7;"

37. Section 7 of the Arms Act deals with the notification to be used prescribing weapons, weapons accessories, chemical substances, biological substances, radioactive substance or devices or instruments which may be used in combat or warfare to be arms. It is as follows:

"Section 7 - The Minister with approval of the Council of Ministers shall have the power to publish in the Government Gazette the Notification prescribing weapons, weapon accessories, chemical substances, biological substances, radioactive substance or devices or instruments which may be used in combat or warfare to be arms."

38. Sections 15 and 17 of the Arms Act provides as follows:

"Section 15 - No person shall order, import, produce or possess arms without license granted by the Permanent Secretary for Defence. In granting of license under paragraph one, conditions may be imposed therewith. The application for and the grant of license shall be in accordance with the rules, procedure and conditions as prescribed in the Ministerial Regulation.

Section 17 - Licenses are, viz.: (1) order license; (2) import license; (3) produce license; (4) possession license. The order license shall extend to importer of arms under the order license."

39. Section 26 of the Arms Act provides as follows:

"Section 26 - A license issued under this Act shall be valid through the period specified therein, but not exceeding one year as from the date of its issuance or renewal. A licensee who desires to renew license shall apply for the renewal thereof prior to the expiry date specified therein. Upon submission of the application, such licensee may continue his or her business until the Permanent Secretary for Defence refuses to renew license. The application for, and the granting of, the renewal of license shall be in accordance with the rules, procedure and conditions as prescribed in the Ministerial Regulation."

40. In terms of section 7 of the Arms Act, a Notification was issued and with regard to 'Nitrocellulose' it is as follows:

41. It would be seen that the Arms Act merely seeks to regulate the use of the product in Thailand and has been enacted to ensure public safety as well as law and order. Section 15 of the Arms Act provides that no person shall order, import, produce or possess arms without a license granted by the Permanent Secretary for Defence. Section 16 bars issuance of a licence to any person convicted of an offence or to a person not of age or to a person of unsound mind. Thus, the consideration for issuance of a license has no connection with the domestic requirement or import of the article. Section 26 provides that the licence shall be valid through the period specified therein, but not exceeding one year from the date of its issuance or renewal. The restriction is, therefore, on the period and not on the quantity. There is no restriction on the quantity or value of import nor does it contain any mechanism for fixing of a selling price in the domestic market. A user has to obtain a license whether the article is imported or procured from domestic market. The contention of the Appellant that there is a distortion because of the regulations in the domestic market price as a result of which 'normal value' has not been correctly arrived at, cannot, therefore, be accepted.

42. This issue was examined by the Designated Authority in paragraph 101 (ix) of the final findings and it is reproduced below:

"101 (ix) With regard to the contention that the domestic prices of Nobel NC Co., Ltd. and Nitro Chemicals Industry Limited should not be considered for determination of normal value, it is noted that the selling price has been determined on the basis of the records Non-Confidential Page 43 of 46 kept by the producers, maintained as per GAAP in Thailand, and the same is found to be appropriate for evaluating whether the sales in domestic market have been made in the ordinary course of trade. In any case, the exporter themselves have admitted that the Thai Army is regulating only the storage and usage of the product concern and the suppliers are required to obtain license before supplying the product in Thai market. Licensing procedure is common in most of the countries where products is of or can be used for explosives or any other hazardous substance. Mere licensing procedure does not mean that the domestic selling prices cannot be in the ordinary course of trade."

43. It has, however, been submitted on behalf of the Appellant that the sales in the domestic market are not 'in the ordinary course of trade' because of the restrictions.

44. This contention cannot also be accepted. Clause (2) of Annexure 1 of the 1995 Rule provides that sales of the product in the domestic market of the exporting country may be treated as not being in the ordinary course of trade by reason of price and the Designated Authority may disregard these sales in determining the normal value, provided the factors enumerated therein exist. The Appellants have not been able to substantiate that these factors exist. The Designated Authority had, however, conducted the ordinary course of trade test in respect of sales made in Thailand. It found that Nitro Chemicals had sold 4193 MT of the subject goods in the domestic market and 99.96% of the sales were profitable.

45. The relevant portions of the findings of the Designated Authority are contained in

paragraphs 36 and 42 and are reproduced below:-

"36. Since the above mentioned producers/exporters have filed the questionnaire response, the Authority determines Normal Value and Export Price in respect of cooperative exporters. The general methodology adopted by the Authority for determination of Normal Value for these exporters is to first examine whether the domestic sales of the subject goods by the responding exporters in their home markets were representative and viable for permitting determination of Normal Values on the basis of domestic selling prices and whether the ordinary course of trade test was satisfied as per the data provided by the respondents.

42. The questionnaire response has been filed by Nitro Chemical Industry Limited and Nobel NC Co., Ltd., Thailand. Nitro Chemical Industry Ltd. is a producer of a subject goods and is the holding company. Nobel NC Co., Ltd. is also the producer of the subject good and is 100% owned by Nitro Chemical Industries. Both producers/exporters have provided domestic sales price details of the subject goods in Appendix-4 of their response. Nitro Chemical Industry Limited sells the subject goods to customers directly in the domestic market in Thailand. The adjustment of expenses such as inland freight, bank charges, credit cost, and other expenses has been made towards the determination of domestic sales price in the foreign producer's country. Nobel NC Co., Ltd., sell the subject goods in the domestic market 100% through the holding company Nitro Chemical Industry. The adjustment of expenses such as inland freight, bank charges, credit cost, storage cost, and other expenses has been made towards the determination of domestic sales price in the foreign producer's country. During the POI Nitro Chemical Industry Limited sold 4193Mt of the subject goods in the domestic market. All these sales were subjected to an ordinary course of trade test. It was found 99.96% of the sales in the domestic market were profitable. Accordingly, the normal value for the above producers/exporters work out on the basis of total sale is *** US\$ per MT."

46. The alternative methods for determination of the normal value as provided for in Clause (ii) of Explanation to Section 9A(1) of the Tariff Act can be resorted to only when there are no sales of the article in the ordinary course of trade in the domestic market. Thus, when substantial sales have been made by the exporter in the domestic market and in the absence of any good reason for reduction of the domestic sale price, the 'normal value' would be the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country.

47. Learned Senior Counsel for the Appellants has placed reliance upon the decision of Appellate Body in United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan. In particular, reliance has been placed on paragraph 145, which is reproduced below:

"145. In our view, the duties of investigating authorities, under Article 2.1 of the Anti-Dumping Agreement, are precisely the same, whether the sales price is higher or lower than the "ordinary course" price, and irrespective of the reason why the transaction is not "in the ordinary course of trade". Investigating authorities must exclude, from the calculation of normal value, all sales which are not made "in the ordinary course of trade". To include such sales in the calculation, whether the price is high or low, would distort what is defined as "normal value"."

48. The Panel was established to consider a complaint by Japan with respect to anti-dumping measures imposed by the United States on imports of certain hot-rolled flat-rolled carbon-quality steel products ("hot-rolled steel") from Japan. This decision of the US Appellate Body refers to Article 2.1 of the Anti-Dumping Agreement which provides that normal value must be established on the basis of sales made, "in the ordinary course of trade". Thus, sales not made "in the ordinary course of trade" must be excluded from the calculation of normal value. It is in this context that the Appellate Body observed as follows:

"141. We can envisage many reasons for which transactions might not be "in the ordinary course of trade". For instance, where the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically independent, transacted at market prices, the sale effectively involves a transfer of goods within a single economic enterprise. In that situation, there is reason to suppose that the sales price might be fixed according to criteria which are not those of the marketplace. The sales transaction might be used as a vehicle for transferring resources within the single economic enterprise. Thus, the sales price may be lower than the "ordinary course" price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price. Or, conversely, the sales price may be higher than the "ordinary course" price, if the purpose is to shift resources to the seller, who receives higher

revenues for the sale than would be the case in the marketplace. There are many reasons relating to corporate law and strategy, and to fiscal law, which may lead to resources being allocated, in these ways, within a single economic enterprise.

142. We note that determining whether a sales price is higher or lower than the "ordinary course" price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price."

49. In the present case, the contention of the Appellants that there was a distortion in the domestic selling price because of the licensing regulations has not been accepted. The Designated Authority had examined the volume of the sales transaction and found as a fact that the Nitro Chemicals sells the subject goods to the customers directly in the Domestic Market and the adjustment of expenses was made towards the determination of the domestic sales price. It also found that Nitro Chemicals had sold 4193 MT of the subject goods in the Domestic Market at profit. It cannot, therefore, be urged that any error was committed by the Designated Authority in determining the 'normal value' on the basis of the comparable price. The decision of the US Appellate Body, therefore, does not help the Appellants.

50. In view of the aforesaid discussion, it is not possible to accept the contention of learned Counsel for the Appellants that "normal value" should not have been fixed in relation to the comparable price for the like article when destined for consumption in the exporting country and should have been the comparable representative price of the like article when exported from the exporting country to an appropriate third country or should have been the cost of production of the said article in the country of origin.

51. Learned Counsel for the Domestic Industry has also made a submission that the licensing regulations for the product under consideration would not be applicable for the reason that it is only when Nitrogen content in 'Nitrocellulose' is above 12.6%, that it would be considered as explosive. The submission is that since the Nitrogen content in the product under consideration is between 10.7% to 12.2%, it would not be included in the definition of 'Arms' contained in section 4 of the Arms Act. Be that as it may, it is not necessary to examine this issue since this issue was not raised by the Domestic Industry before the Designated Authority.

52. The submission of learned Senior Counsel for the Appellants that non-furnishing of the verification report has caused great prejudice to the Appellants also, cannot be accepted. The verification is carried out to verify the factual information given in the exporter questionnaire. In the present case, all the factual information provided by the exporter was accepted by the Designated Authority and, therefore, there was no reason to seek any clarification or supply a copy of the verification report. It is only if there was any doubt at the time of carrying out the inspection or if the data supplied was not in accordance with the inspection, that the Appellants may have been called upon to explain. For the same reason, it is not possible to accept the contention of learned Senior Counsel for the Appellants that the legal submissions made for the exporters during the time of inspection should have been taken into consideration in the verification report.

53. It has also been submitted by learned Senior Counsel appearing for the Appellants that the impugned Notification issued by the Central Government is not only in violation of the principles of natural justice but is also against the spirit of the order passed by the Delhi High Court on 06 February, 2019 in the two Writ Petitions filed by the Appellants. In this connection, it has been submitted that the High Court had directed the Respondent to furnish a copy of the verification report within a week to the learned Counsel appearing for the Writ Petitioners and it would be open to the Petitioners to represent to the Central Government in a suitable manner for appropriate directions in accordance with law, but the impugned Notification was issued by the Central Government immediately on the next day on 07 February, 2019 without even giving an opportunity to the Appellants to make a representation to the Central Government after a copy of the verification report was furnished to it.

54. Learned Counsel appearing for the Central Government has, however, submitted that apart from the fact that the Appellants are two exporters from Thailand only, whereas the impugned Notification covers exporters from Brazil and Indonesia also the impugned Notification cannot be said to violate any of the directions contained in the order of the High Court. In this connection it has been pointed out that a copy of the

verification report was supplied to the Appellants and the representation filed by the Appellants to the Central Government was also duly considered.

55. The submissions advanced by the learned Counsel on this aspect as also the records have been examined.

56. The final findings were notified by the Designated Authority on 31 December, 2018. The Appellants had not filed any representation to the Central Government to assail the final findings. Writ Petitions were, however, filed by each of the two Appellants on 14 January, 2019 before the Delhi High Court. The main prayers contained in the Writ Petitions are:

"(i) To quash the final findings dated 31 December, 2018 and the disclosure statement dated 07 December, 2018;

(i) To refrain the Respondents from giving effect to and/or taking any action in furtherance to the final findings dated 31 December, 2018; and

(ii) To decide the matter afresh after taking into account the submissions made by the Petitioners."

57. It clearly transpires from the order dated 06 February, 2019 passed by the Delhi High Court that the main submission advanced by the Petitioners was that the verification report was not a part of the record placed before the Designated Authority when it gave the final findings on 31 December, 2018. It is for this reason that the records placed before the Designated Authority were directed to be produced by the High Court. The High Court found as a fact that the verification report with details of the verification carried out in the premises of the petitioners between 10 to 12 September, 2018 was a part of the records placed before the Designated Authority. The High Court thereafter noted the statement made by the learned Counsel appearing for the Designated Authority that a copy of the verification report shall be furnished to the Petitioners. It is at that stage that learned Senior Counsel appearing for the Petitioners made a submission that there were other grounds dealing with the issue of confidentiality and the failure on the part of the Designated Authority to deal with the submissions, which submissions the Petitioners would agitate through a representation to the Central Government for seeking its intervention and appropriate action. The High Court, therefore, directed the Respondents to furnish a copy of the verification report within a week to the learned Counsel for the Petitioners and left it open to the Petitioners to represent to the Central Government in a suitable manner for appropriate directions in accordance with law. The learned Senior Counsel for the Petitioners, sought liberty to withdraw the Writ Petitions, in the light of the submissions made. The Writ Petitions were ultimately dismissed as withdrawn.

58. A copy of the order dated 06 February, 2019 passed by the Delhi High Court in Writ Petition (C) No. 312/2019 and Writ Petition (C) No. 313/2019 filed by the two Appellants is reproduced below:

"Further to the previous order, the records considered by the Designated Authority (DA) were produced in Court; the records include the Verification Report carried out by the DA.

The petitioners had complained that this verification was not part of the record. The exporter's Verification Report is part of the record along with the details of verification carried out in the premises of the petitioners between 10th and 12th September 2018.

Learned counsel for the DA submits, on instructions, that a copy of the Verification Report will be furnished to the petitioners. Learned senior counsel for the petitioners submits that, besides, there are other grounds (dealing inter alia with the issue of confidentiality and the DA's failure to deal with its submission) which it would agitate through representation to the Central Government, seeking its intervention and appropriate action.

The respondents shall furnish a copy of the Verification Report within a week to the petitioners' counsel. It is open to the petitioners to represent to the Central Government in a suitable manner for appropriate directions in accordance with law.

Learned senior counsel for the petitioners seeks liberty to withdraw these petitions in the light of these submissions. The writ petitions are accordingly dismissed as withdrawn along with the pending applications."

59. The Central Government could have waited for a representation from the two Writ

Petitioners (the Appellants in this Appeal) after furnishing a copy of the verification report, but in the facts and circumstances of the case, it cannot be said that the issuance of the Notification by the Central Government on 07 February, 2019 is contrary to the directions issued by the High Court on 06 February, 2019. What needs to be noticed is that anti dumping duty was imposed on the import of Nitrocellulose originating in and exported from Brazil, Indonesia and Thailand. The Appellants are only two exporters from Thailand. The other exporters from Brazil and Indonesia had not assailed the final findings. A specific prayer had also been made in the Writ Petitions for quashing the final findings and to restrain the Respondent from giving effect and/or taking any action in furtherance to the final findings. This relief was not granted to the Writ Petitioners by the Delhi High Court. A submission was made by learned Senior Counsel for the Petitioners, once the main submission regarding the verification report not being a part of the records placed before the Designated Authority was found to be incorrect after examination of the records, that there were other submissions relating to confidentiality and failure on the part of the Designated Authority to deal with this submission, which would be agitated by filing a representation to the Central Government. It is for this reason that the High Court left it open to the Petitioners to file a representation to the Central Government. A verification report was furnished to the Writ Petitioners within a week and the Writ Petitioners had also filed a representation dated 15 February, 2019 before the Designated Authority as also to the Joint Secretary in the Government of India. These representations were received on 18 February, 2019. The Central Government issued an Office Memorandum dated 20 February, 2019 requiring the Designated Authority to take appropriate action. The comments submitted by the Petitioners were examined by the Central Government and a communication dated 01 March, 2019 was sent to the Appellants informing them that there was no change in the final findings issued on 31 December, 2018. The communication is reproduced below:

"Your comments on the verification report are examined and observations are as under:

1. In the Verification Report, an inadvertent error had crept in the Table indicating the quantity and invoice value for invoice number SIE1600450, No. SIE1600854, No. SIE1601105 and No. SIE1600980 but the same was detected and suitably rectified at the time of issuance of Disclosure and Final Findings. In view of that, there is no change in the disclosure statement or in the Final Finding issued dated 31.12.2018.

2. Regarding Normal Value, authority determined Normal Value and issues regarding the Normal Value, these have been addressed in para no. 42 and 43 of the Final Finding issued on 31.12.2018.

3. The issue of confidentiality has been dealt with by the Authority in para no. 22 and 23 of the Final Finding issued on 31.12.2018.

In view of the above, there is no change in the Final Finding issued on 31.12.2018.

This issues with the approval of the Authority."

60. It is not the case of the Central Government that the comments dated 15 February, 2019 submitted by the two Writ Petitioners were not considered because a Notification had earlier been issued on 07 February, 2019. On the other hand, the comments were duly examined by the Central Government.

61. Thus, the Appellants are not justified in asserting that the principles of natural justice have been violated or that the impugned Notification dated 07 February, 2019 issued by the Central Government has violated the order dated 06 February, 2019 passed by the Delhi High Court.

62. The fixation of 'normal value' in the final findings of the Designated Authority, therefore, does not suffer from any error.

63. The issue as to whether the submissions raised by the Appellants about 'confidentiality' have been correctly appreciated by the Central Government would be seen while dealing with the submissions relating to 'confidentiality' made by learned Senior Counsel for the Appellants.

CONFIDENTIALITY

64. The contention of the learned Senior Counsel for the Appellants is that the Designated Authority is required to make available all the evidences presented to it by one party to the other interested parties participating in the investigation, except in cases when information is considered confidential in nature, but even in such a case the

interested party should submit a non-confidential summary of such information or give adequate reasons as to why even a summary cannot be provided.

65. It has been pointed out that the Appellants had sent a communication dated 27 August, 2018 to the Designated Authority questioning the excessive confidentiality claimed by the Domestic Industry and also the fact that it had even omitted the formats A to L (barring G & H) completely, which it was required to submit, but this issue raised by the Appellants has not been addressed by the Designated Authority. It has been submitted that the information claimed as confidential by the Domestic Industry was critical for the determination of injury and in the absence of the said information, a meaningful analysis could not be made by the interested parties. To support this connection, reliance has been placed on the decisions of the Supreme Court in *Reliance Industries Ltd. vs Designated Authority and Others* MANU/SC/4106/2006 : 2006 (202)ELT 23 (SC) and *Union of India and Another Vs Meghmani Organics Limited and Others* MANU/SC/1283/2016 : 2016 (34) ELT 449 (SC) and the two Trade Notices dated 09 December, 2013 and 01 February, 2018. The submission in short is that the issue of confidentiality has not been properly appreciated either by the Designated Authority or by the Central Government.

66. Learned Counsel appearing for the Domestic Industry has, however, refuted the submissions advanced by learned Senior Counsel for the Appellants. It has been submitted that confidentiality was claimed by the Domestic Industry on the cost of production, which is commercially sensitive and a disclosure would adversely impact the interest of the Domestic Industry. It has also been submitted that the information was also not capable of summarization and wherever possible, a summary was provided. The Domestic Industry had given a non-confidential summary of performance parameters, which contained the relevant parameters for analysis on injury. Learned Counsel also pointed out that the issue of confidentiality has been properly appreciated by the Designated Authority in paragraphs 100(xii) and 101 (viii) of the final findings. In this connection, reliance has been placed upon a Division Bench decision of the Principal Bench at Delhi in *Anwar Jute Spinning Mills Ltd. vs Union of India* MANU/CE/0787/2017 : 2018 (363) ELT 724 (Tri.-Del). It has also been submitted that complete information in the Format was submitted by the Domestic Industry on confidential basis and that even the Appellants had not provided a meaningful summarization of cost production and had only provided the performance parameters.

67. Learned Authorized Representative of the Department appearing for the Central Government and the learned Counsel appearing for the Designated Authority have also submitted that the objections to the claim of confidentiality of the Domestic Industry have been properly appreciated, both by the Designated Authority and the Central Government.

68. Rule 7 of the 1995 Rules deals with confidential information. It provides that notwithstanding anything contained in sub-rules (2), (3) and (7) of Rule 6 or sub-rule (2) of Rule 12 or sub-rule (4) of Rule 15 or sub-rule (4) of Rule 17, the copies of applications received under sub-rule (1) of Rule 5, or any other information provided to the Designated Authority on a confidential basis by any party in the course of investigation, shall, upon the Designated Authority being satisfied as to its confidentiality, be treated as such by it and no such information shall be disclosed to any other party without specific authorization of the party providing such information. Sub-rule (2) of Rule 7 provides that the Designated Authority may require the parties providing information on confidential basis to furnish non-confidential summary thereof and if, in the opinion of a party providing such information, such information is not susceptible of summary, such party may submit to the Designated Authority a statement of reasons why summarization is not possible. Sub-rule (3) of Rule 7 provides that notwithstanding anything contained in sub-rule (2) of Rule 7, if the Designated Authority is satisfied that the request for confidentiality is not warranted or the supplier of the information is either unwilling to make the information public or to authorize its disclosure in a generalized or summary form, it may disregard such information.

69. The issue relating to confidentiality was noted by the Designated Authority in paragraphs 20, 21, 22 and 23 of the final findings. After reproducing Rule 7 of the 1995 Rules in paragraph 22 of the findings, the Designated Authority made the following observations in paragraph 23:

"23. Submissions made by the interested parties with regard to confidentiality and considered relevant by the Authority are examined and addressed accordingly. Information provided by the interested parties on confidential basis was examined with regard to the sufficiency of the confidentiality claim. The Authority notes that any information which is available in the public domain cannot be treated as confidential. The Authority directed the exporters to file a revised non-confidential version of

questionnaire response and provide a meaningful response. The responding exporters filed a revised response. On being satisfied, the Authority has accepted the confidentiality claims, wherever warranted and such information has been considered confidential and not disclosed to other interested parties. The Authority made available the non-confidential version of the evidence submitted by various interested parties in the form of a public file."

70. In the communication dated 01 March, 2019 sent by the Central Government to the Appellants in regard to the letter dated 15 February, 2019, it has been noted that the issue of confidentiality had been dealt with by the Designated Authority in paragraphs 22 and 23 of the final findings notified on 31 December, 2018.

71. As noted above, paragraph 22 of the final findings reproduces Rule 7 of the 1995 Rules and paragraph 23 states that on being satisfied the Authority has accepted the confidentiality claims, wherever warranted and such information has been considered confidential and not disclosed to the other parties. It also mentions that the Authority made available the non-confidential version of the evidence submitted by the various interested parties in the form of a public file.

72. Emphasis of learned Senior Counsel for the Appellants is on the observations made in paragraph 21 of the final findings that no submissions regarding confidentiality were made by the opposing interested parties and it has been submitted that the Designated Authority had not even cared to examine the submissions made by the opposing interested parties on the confidentiality claim.

73. The statement made in paragraph 21 of the final findings is apparently not correct since the exporters had made submissions, which submissions were noted by the Designated Authority in paragraph 100 (xii). These submissions have been considered in paragraph 100 (viii) of the final findings. Thus, the mistake that crept in paragraph 21 of the final findings has not caused any prejudice to the Appellants.

74. On merits, it has been submitted that the Domestic Industry omitted formats A to L (barring G & H) completely, which they were required to submit.

75. It is not possible to accept the contention of the learned Senior Counsel for the Appellants. The formats said to have been omitted contain the following information:

76. The Domestic Industry asserts that complete information in connection with these formats was submitted to the Designated Authority on a confidential basis and a meaningful summarization of this information was not possible without disclosure of sensitive information and information relating to cost of production and related data. The information relating to cost of production and related data of the Domestic Industry and exporters has always been treated as confidential. This is what was observed by the Tribunal in paragraph 25 of the decision rendered in Anwar Jute Spinning Mills Ltd. The same is reproduced below:

"25. The appellants also questioned the claim of confidentiality in respect of DGCIS data. It is claimed that the data should have been disclosed under Rule 7 of AD Rules. We note that the DA had placed the DGCIS data in the public file and there was adequate opportunity for the appellants to examine and provide their comments. The cost of production and related data of the DI are necessarily of confidential nature and commercially sensitive. The same cannot be made available to others."

77. It has also been stated on behalf of the Domestic Industry that a summary of the performance parameters was provided in format 'H' of the petition filed by the Domestic Industry before the Designated Authority and this contained the salient details for injury analysis and even the two Appellants had not provided a meaningful summarization of cost information except the performance parameters.

78. It is thus not possible to accept the contention of learned Senior Counsel for the Appellants that the Domestic Industry had wrongly claimed confidentiality with regard to the information required to be furnished in the aforesaid formats or that the Domestic Industry was not justified in not providing even a summarization of the information. The Appellants are, therefore, not justified in asserting that they have been unevenly treated by the Designated Authority.

79. Learned Senior Counsel for the Appellants has placed reliance on the judgment of the Supreme Court in Reliance Industries Ltd. The Supreme Court examined whether Rule 7 of the 1995 Rules contemplates any right in the Designated Authority to claim confidentiality and the observation is as follows:

"43. In our opinion, Rule 7 does not contemplate any right in the DA to claim

confidentiality. Rule 7 specifically provides that the right of confidentiality is restricted to the party who has supplied the information, and that party has also to satisfy the DA that the matter is really confidential. Nowhere in the rule has it been provided that the DA has the right to claim confidentiality, particularly regarding information which pertains to the party which has supplied the same. In the present case, the DA failed to provide the detailed costing information to the appellant on the basis of which it computed NIP, even though the appellant was the sole producer of the product under consideration, in the country. In our opinion this was clearly illegal, and not contemplated by Rule 7."

80. The aforesaid decision in Reliance Industries deals with a case where the Designated Authority had claimed confidentiality. The Court held that the Rules do not provide that the Designated Authority has a right to claim confidentiality, particularly regarding information which pertains to a party which has supplied the information.

81. The decision of the Supreme Court in Reliance Industries has placed reliance upon the decision of the Supreme Court in Sterlite Industries (India) Ltd. vs Designated Authority MANU/SC/1105/2003 : 2003 (158) ELT 673 (SC). It would, therefore, be appropriate to reproduce paragraph 3 of this judgment, which is as follows:

"3. In our view, it is not necessary for us to go into the merits of this matter as we propose to send the matter back to CEGAT after laying down certain guidelines. From what has been argued before us, it appears that in pursuance of Rule 7 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 the Designated Authority is treating all material submitted to it as confidential merely on a party asking that it be treated confidential. In our view, that is not the purport of Rule 7. Under Rule 7, the Designated Authority has to be satisfied as to the confidentiality of that material. Even if the material is confidential the Designated Authority has to ask the parties providing information, on confidential basis, to furnish a non- confidential summary thereof. If such a statement is not being furnished then that party should submit to the Designated Authority a statement of reasons why summarization is not possible. In any event, under Rule 7(3) the Designated Authority can come to the conclusion that confidentiality is not warranted and it may, in certain cases, disregard that information. It must be remembered that not making relevant material available to the other side affects the other side, as they get handicapped in filing an effective appeal. Therefore, confidentiality under Rule 7 is not something, which must be automatically assumed. Of course, in such cases there is need for confidentiality, as otherwise trade competitors would obtain confidential information, which they cannot otherwise get. But whether information supplied is required to be kept confidential has to be considered on a case-to-case basis. It is for the Designated Authority to decide whether a particular material is required to be kept confidential. Even where confidentiality is required, it will always be open for the appellate authority, namely, CEGAT to look into the relevant files".

[emphasis supplied]

82. The Supreme Court in the aforesaid decision in Sterlite Industries, which has been referred to in Reliance Industries, held that the Designated Authority has to satisfy itself about the confidentiality and even if the material is confidential, the Designated Authority has to ask the parties providing information on a confidential basis, to furnish a non-confidential summary thereof. If such statement has not been furnished, then the party should submit to the Designated Authority a statement of reasons why summarization was not possible. The Supreme Court also observed that there was a need for confidentiality, as otherwise trade competitors would obtain confidential information which they cannot otherwise get and that the Designated Authority has to consider, on a case to case basis, whether a particular material is required to be kept confidential.

83. In Meghmani Organics Limited, the Supreme Court also examined the provisions of Rule 7 of 1997 Rules relating to confidentiality and observed as follows:

"30. We may only explain here that while dealing with objections or the case of the concerned parties, the DA must not disclose the information which are already held by him to be confidential by duly accepting such a claim of any of the parties providing the information. While taking precautions not to disclose the sensitive confidential informations, the DA can, by adopting a sensible approach indicate reasons on major issues so that parties may in general terms have the knowledge as to why their case or objection has not been accepted in preference to a rival claim. But in the garb of unclaimed confidentiality, the DA cannot shirk from its responsibility to act fairly in its quasi-judicial role and refuse to indicate reasons for its findings. The DA will do well to remember not to treat any information as confidential unless a claim of confidentiality has been made by any of the parties supplying the information. In cases where it is not

possible to accept a claim of confidentiality, Rule 7 hardly leaves any option with the DA but to ignore such confidential information if it is of the view that the information is really not confidential and still the concerned party does not agree to its being made public. In such a situation the information cannot be made public but has to be simply ignored and treated as non est."

(emphasis supplied)

84. Learned Senior Counsel for the Appellants has also placed reliance upon the Trade Notice No. 1/2013 dated 09 December, 2013. The relevant portion on which reliance has been placed is reproduced below:

"2. In pursuance to the provision of Rule 7 of the above Rules, all interested parties to anti-dumping investigation are advised to comply with the following requirements while submitting "confidential information" before the Designated Authority in an anti-dumping investigation:

i. The parties making any submission (including Appendixes/Annexures attached thereto) before the authority including questionnaire response, are required to file the same in two separate sets, in case 'confidentiality' is claimed on any part thereof:-

(a) One set marked as Confidential (with title, number of pages, index, etc.) and

(b) The other set marked as Non-Confidential (with title, number of pages, index, etc.)

Any submission made without such marking shall be deemed as non-confidential. Soft copy of both the versions will also be required to be submitted, along with the hard copies, to the authority.

ii. The Confidential version shall contain all information which are by nature confidential and/or other information which the supplier of such information claims as confidential. For information which are claimed to be confidential by nature or the information of which confidentiality is claimed because of other reasons, the supplier of the information is required to provide a good cause statement along with the supplied information as to why such information cannot be disclosed.

iii. The non-confidential version is required to be a replica of the confidential version with the confidential information indexed or blanked out (in case indexation is not feasible) and summarized depending upon the information on which confidentiality is claimed. The non-confidential summary must be in sufficient detail to permit a reasonable understanding of the substance of the information furnished on confidential basis. However, in exceptional circumstances, party submitting the confidential information may indicate that such information is not susceptible of summary, a statement of reasons why summarization is not possible, must be provided to the satisfaction of the Designated Authority."

85. Annexure I to the aforesaid Trade Notice deals with guidelines on confidentiality on information/data contained in the petition, response, questionnaire or other submissions and paragraphs 2, 3 and 4(i) are reproduced below:

"2. The claim of confidentiality on any information/data should be submitted in the following format as a forwarding letter of the NCV:

3. The reason/justification should be on the basis of criteria laid down in Article 6.5 of the Anti-Dumping Agreement. The reason/justification should be specific clearly demonstrating/establishing that disadvantage would occur by disclosure of information.

4. The confidentiality claims and decision thereon are case-specific. Therefore, precedence of any previous cases would not be considered as justification for claiming confidentiality. In this regard attention is invited to the following:

(i) The following are examples of information which may be treated as confidential:

(a) Information of significant competitive advantage to a competitor, production costs, distribution costs, upstream and downstream pricing data, profit and loss margins, certain conditions of sale, research/investigation data, technical designs, business or trade secrets concerning the nature of a product or production process, specification of components, performance/profitability data, details of margin of dumping and adjustments claimed by the party etc. are some examples of such type of information. List is not exhaustive.

(b) Information, the disclosure of which would have a significant adverse effect upon the party who submitted the information or the party from whom the information was acquired by the party who submitted the information. Some examples are - customer and supplier lists, letters from buyers on price negotiations, details of technical collaboration."

86. A perusal of the aforesaid Annexure does indicate that the claims of confidentiality have to be decided on a case to case basis and examples have also been given as to when information can be treated as confidential. The records indicate that the Domestic Industry had filed the claim of confidentiality in the format provided above.

87. Learned Senior Counsel for the Appellants has also placed reliance upon the Trade Notice No. 02/2018 dated 01 February, 2018 relating to streamlining of the Anti Dumping Investigation Process. It provides that the Domestic Industry, in order to avoid delay, should submit information in the formats A to L. The relevant portion is reproduced below:

"Attention of Trade and Industry is invited to the existing domestic industry's questionnaire and to state that the following revised formats should be submitted by the domestic industry while filing the petition to avoid delays caused by subsequent requests for additional information:

88. This Trade Notice does not mention that information supplied in the aforesaid formats has to be disclosed and cannot be claimed as confidential. A party can claim confidentiality, which of course has to be examined by the Designated Authority.

89. Thus, what has to be seen is, whether the satisfaction of the Designated Authority regarding confidentiality was proper and whether the Domestic Industry was justified in not providing summarization under Rule 7 of the 1995 Rules. The Designated Authority, in the present case, on being satisfied about the claims of confidentiality made by the Domestic Industry, did not call upon the Domestic Industry to make any further disclosure. It has been found in the preceding paragraphs of this order that the claim of confidentiality made by the Domestic Industry was justified.

90. The finding of the Designated Authority in regard to 'confidentiality', therefore, does not suffer from any infirmity so as to call for any interference in this appeal.

91. Thus, for all the reasons stated above, there is no merit in the appeals. They are, accordingly, dismissed.

(Pronounced in the open Court on 20 December, 2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 53775 of 2018 [DB]

Arising out of Order-in-Original No. 08/2017-Commissioner Customs, Dated:
14.12.2017

Passed by the Commissioner of Customs (Prev), Jodhpur, Jaipur

Date of Hearing: 23.08.2019

Date of Decision: 23.08.2019

**M/s PAP FAST MOVERS INDIA LTD
B-163, VIDYUT NAGAR, QUEENS ROAD JAIPUR**

Vs

**COMMISSIONER OF CUSTOMS (PREV)
JODHPUR, HQRS AT NCR BUILDING STATUE CIRCLE
C-SCHEME, JAIPUR - 302005**

Appellant Rep by: None

Respondent Rep by: Mr Rakesh Kumar, DR

CORAM: C L Mahar, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NO. 51151/2019

Per: Rachna Gupta:

None is present for the Appellant. It is brought to the notice by learned Departmental Representative (Shri Rakesh Kumar) that:

1. The matter has been adjourned for more than eight numbers of times.
2. In fact, the issue involved herein stands already settled.
3. Present is the case of smuggling red sanders along with the consignment clearance whereof was got facilitated by the present Appellant as custom broker.
4. Penalty under Section 114(a) of Customs Act, 1962 as was imposed upon the appellant by the adjudicating authorities below stands confirmed even by this Tribunal vide the *final order Nos. 56122 and 56127 of 2017 dated 22.08.2017*.

It is finally impressed upon that due to the aforesaid reasons there remains no merits in this case. As a result, the appellant is just gaining time by seeking adjournments in the matter.

Keeping in view the said submissions and perusing the same as correct from the record, we are of the opinion that pendency of appeal cannot be allowed to be a ground for the appellant to avoid the illegality already noticed against him. Simultaneous absence of the Appellant for the day is sufficient for us to hold that he is not interested in pursuing the matter and is rather gaining time and the benefit of avoiding penalty already impressed upon him by keeping the appeal pending.

As a result, we hereby dismiss the impugned appeal for intentional non-prosecution and also for the reason that appeal otherwise has no merits issue being already settled against assessee.

(Dictated and pronounced in the open Court)

[Back](#)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. I]

Justice Dr. Satish Chandra, President and Shri V. Padmanabhan, Member (T)

R.N. METAL (INDIA) PVT. LIMITED

Versus

COMMR. OF C. EX. & GST, JAIPUR

Final Order Nos. C/A/51709-51710/2018-CU(DB), dated 8-5-2018 in Appeal
Nos. C/50529 & 50482/2018

REPRESENTED BY :Ms. Nupur Maheshwari, Advocate, for the Appellant.

Shri Rakesh Kumar, AR, for the Respondent.

[Order per : V. Padmanabhan, Member (T)]. - The present appeals are against the Order-in-Appeal Nos. 256 to 257(SM)CUS/JPR/2017, dated 15-11-2017.

2. The appellant imported certain goods and filed two Bills of Entry declaring the import of 'Alloy Steel Melting Scrap' falling under Tariff Item 7204 29 90 of the Customs Tariff. The Customs authorities opened and examined all the ten containers covered under the two Bills of Entries and found that seven containers were stuffed with the declared item but in respect of three containers the goods were found to be 'Grinding Media Balls' which appear to be new and unused and in perfect safe and size. Out of the total goods imported such goods were separated and proposed for classification as 'grinding media balls' under Customs Tariff Item 7325 91 00/7326 11 00 which attracted the higher rate of duty.

3. The Customs Department proceeded to investigate a case of alleged misdeclaration. Three samples were drawn of the goods said to be 'Grinding Media Balls' and the opinion of following experts were taken by Customs.

(i) Sh. P.C. Sanghi, Chartered Engineer.

(ii) Sh. Virendra Kumar Gupta, Production Manager M/s. Vaibhav Meta Cast Pvt. Ltd.

(iii) Sh. B.K. Sharma, Associate General Manager M/s. Hindustan Zinc Limited.

The experts opined that the samples were of 'Grinding Media Balls' - new and unused.

4. Examination of the samples by Chemical Examiner, CRCL, Government of India resulted in the opinion that the fact whether such goods were used or not cannot be ascertained by chemical test. Sample of the goods sent to National Test House, Government of India begot the opinion that the grinding balls imported were not as per IS Standard in terms of hardness and chemical composition.

5. Opinion of Shri I.P.S. Arora, Chemical Engineer was also obtained at the instance of the appellant who stated that the grinding media balls were found with deep cuts and varying dimensions.

6. In the above scenario, show cause notice dated 8-5-2014 was issued by the Customs Department which resulted in the Order-in-Original, dated 10-11-2014 in which the charge of misdeclaration was upheld; the 'Grinding Media Balls' were ordered for reclassification and differential duty was charged. Imported offending goods were ordered for confiscation and allowed for redemption. Penalties were also imposed on the appellant as well as Sh. R.N. Sharma, Managing Director.

7. When the issue was challenged by the appellant before the Commissioner (Appeals) he set aside the order of the Original Authority vide his order dated 18-2-2015, against which Revenue filed an appeal before this Tribunal, which was decided by this Tribunal vide Final Order No. 51995/2017, dated 28-2-2017 in which the issue was remanded to the Commissioner (Appeals) for *de novo* decision after allowing the cross-examination of the experts on whose reports Revenue was relying. The present impugned order was passed by the Commissioner (Appeals) in the *de novo* proceedings in which the Order-in-Original was restored. Aggrieved by the impugned order, the present appeals have been filed.

8. With the above background, we heard Ms. Nupur Maheshwari, Ld. Advocate for the appellant and Sh. Rakesh Kumar, Ld. AR representing Revenue.

9. The arguments advanced on behalf of the appellant are summarized below :

(i) The imported consignment was accompanied by Pre-inspection Report by an agency at the port of origin in which it stands certified that the imported goods are alloy steel melting scrap. Since the inspecting agency is approved by the DGFT, such certificate is to be accepted.

(ii) The report issued by the CRCL has stated that the fact whether the imported goods were new or old cannot be ascertained by chemical analysis but the test report from National Test House, which is a Government agency, has opined that the samples tested were of grinding balls but which did not satisfy the IS standards.

(iii) The certificate issued by the Chartered Engineer Sh. I.P.S. Arora has categorically stated that the grinding balls were found with deep cuts indicating that such goods were old and hence scrap.

In view of the above evidences in support of the appellant, the charge of misdeclaration cannot be sustained.

(iv) The appellant has also requested for allowing clearance of the goods after mutilation. This will ensure that the goods cannot be utilised for any purpose other than as scrap for melting but such request has been denied by the Department.

10. Ld. AR appearing for the Revenue justified the impugned order. He argues that the Commissioner (Appeals) has revised his order after allowing cross-examination of the various experts. He also argued that the expert Sh. I.P.S. Arora who has examined the goods at the instance of the appellant has also retracted his original statement and his cross-examination has confirmed that the samples were new and unused grinding balls.

11. Ld. AR further argued that the new grinding balls were concealed within the consignment of melting scrap. This evidently substantiates the charge of misdeclaration. Further, keeping in view the fact that the importer is also engaged in the manufacture of grinding balls, he argued that the impugned goods were new and meant to be sold in India.

12. We have heard both sides at length and carefully gone through the appeal record.

13. The allegation in the present case is that the appellant has declared the imported goods as 'Alloy Steel Melting Scrap'. But amidst the declared melting scrap, the examination by Customs Officers revealed that 'Grinding Media Balls' were found which were new and unused. Such balls can also be considered as scrap only if they were new and [not] old.

14. The proceedings before the lower authorities have taken twists and turns with contrary opinions expressed by different experts. The opinion given by CRCL as well as National Test House has been of little help in deciding the controversy one way or other. The three experts whose opinion was taken by the Customs Department took the view that the impugned goods were 'Grinding Media Balls' which were new and unused. During the cross-examination of these experts before the Commissioner (Appeals), they have stood by their opinion but the

other expert Sh. I.P.S. Arora, Chartered Engineer who has originally given the opinion that there were deep cuts and were of varying dimensions retracted his original view during cross-examination.

15. It has been emphasised again and again before us on behalf of the appellant that the Pre-inspection Certificate obtained at the load port has certified the goods as scrap. But we are of the view that for purposes of assessment of imported goods, the examination of goods at the port in India is more relevant. Hence, we are inclined to give more credence to the opinion of the experts obtained locally. The three experts commissioned by Customs has unanimously opined that the impugned goods were new 'Grinding Media Balls'. Sh. I.P.S. Arora, Chartered Engineer who has originally given a contrary opinion, has during cross-examination, retracted his original view. In the above scenario, we are of the view that the order passed by the lower authority, who has gone by the majority of the opinions, merits no interference. His views are quoted below with our approval.

"In light of the facts as mentioned above available on records as discussed in point Nos. (A) to (H) above I find that for classifying the goods under above heading there is no pre-condition of fulfilment of condition of specification as per IS standard. As well as in all the report of experts, every expert including National Test House, CRCL, independent expert, chartered engineer have accepted that goods in questions are Grinding Media Balls. As regards whether the imported grinding media balls are new or old one, in my opinion the same can be verified by visual inspection of all the three experts Sh. B.K. Sharma, Sh. P.C. Sanghi and Sh. V.K. Sanghi have opined that the goods imported were Grinding Media Balls. As regards National Test House reports it is provided that goods examined by them are grinding media balls having size as per packing slip and ball diameter within specified value, but not confirming to the IS specification in respect of hardness and chemical composition. Sh. Rakesh Saini, Scientist Incharge of National Test House in his statement has stated that as their test house is not technically equipped to test and make comments in respect of the condition of the Grinding Media Balls samples i.e. whether New or Old forwarded by appellant to their office. In the Customs Tariff Act, [1975], for classification of the goods under Chapter Headings 7325 and 7326, there is no pre-condition of fulfilment of condition of IS specification, end use of the goods, etc. In the panchnama dated 20-11-2013 it is also described that old and used grinding media balls which cannot be used as Grinding Media Balls already not included in the quality of seized goods. I therefore, uphold the findings of the Adjudicating Authority regarding classification of goods in question.

16. The appellant has declared the goods in their documents submitted to the department at the time of importation classified the same as Alloy Melting Scrap falling under Chapter 7204 29 90 of the Customs Tariff Act, 1975. As discussed in the previous para it is clear that the classification of the goods i.e. Grinding Media Balls 53.240 MT falling under Chapter 7325 of the Customs Tariff Act, 1975 as determined by the department after investigation of the case. Therefore, after investigation, the fact of the misdeclaration of classification of goods in question was detected. Once, the misdeclaration of classification of goods was sustained, the value declared by the appellant would automatically be required to be redetermined. Thus, the view taken by the Adjudicating Authority in the matter is correct, accordingly I uphold the same."

17. In view of the above discussions, we uphold the impugned order and reject the appeals.

(Pronounced on 8-5-2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-110066**

Appeal Nos. C/50697/2018-DB & C/50691/2018

Arising out of Order-in-Original No. 12/2017/VS/COMMR. (Import), Dated:
27.10.2017

Passed by Commissioner of Customs (ACC Import), New Delhi

Date of Hearing: 25.5.2018

Date of Decision: 8.11.2018

**HLPL GLOBAL LOGISTICS PVT LTD
ASHOK SHARMA**

Vs

**CC
NEW DELHI**

Appellant Rep by: Shri Priyadarshi Manish, Adv.

Respondent Rep by: Shri Rakesh Kumar, AR

CORAM: Bijay Kumar, Member (T)

Ajay Sharma, Member (J)

FINAL ORDER NOS. 53243-53244/2018

Per: Bijay Kumar:

These appeals are filed against the common adjudication order No. 12/2017 dated 27.10.2017 passed by the Commissioner, Customs, New Customs House, New Delhi. Vide the impugned order, the appellant No. 1 - M/s HLPL was imposed a penalty of Rs. 10 lakhs and appellant No. 2 – Shri Ashok Sharma was imposed penalty of Rs. 5 lakhs under the provisions of Section 114AA of Customs Act, 1962 (Act, for short).

2. The brief facts of the case are that the appellant, a CHA firm had been appointed by the importer viz. Newtex Exim Pvt. Ltd., 1077, Gandhi Gali, Fatehpuri, Delhi-110006 for clearance of their cargo. The appellant is a company having its Director Mr. Ashok Sharma and engaged in the business of Custom House Agent service for which licence has been issued to them by Commissioner (Import & General), New Delhi, under Regulation 9(1) of CHALR, 2004 Licensing Regulation having its validity till 9.10.2022. The appellant was engaged by importer M/s Newtex Exim Pvt. Ltd. for the clearance of their consignment of rough diamond. The appellant has taken the necessary documents required for the purpose of Customs clearance and KYC norms such as IEC certificate, address proof, identity proof, (PAN Card, Voter ID or passport), bank statement, bank attested signature of the proprietor/company of the importer firm. The appellant, after verifying and satisfying themselves all these documents, have filed the Bill of Entry No. 4314276 dated 10.1.2004 for clearance of rough diamond imported on behalf of their client, M/s Neotex Exim Pvt. Ltd. However, the consignment was detained by the Commissioner of Customs for the alleged undervaluation and subsequently the valuation of the imported consignment was determined by the jewellery appraiser on 10.2.2010. It was found, on examination, that the declared value of imported item i.e. rough diamond was highly inflated in the said Bill of Entry filed for the clearance of the goods. As per the jewellery appraiser, the actual value of the consignment was to the extent of USD 14,297 instead of the declared value of USD 88,641.40. After having a preliminary scrutiny of the documents, the case was transferred by the Commissionerate, to Department of Revenue, Intelligence (DRI), New Delhi for further investigation. During the course of enquiry by the DRI, it was alleged that the CHA company also was involved in the case of overvaluation of the import consignment, which was on the basis of report received from the Jewellery Expert. It was alleged that the CHA/Director failed to verify the KYC norms under the CHALR, 2004 and therefore, a Show Cause Notice bearing No. 33A/XI/32/2013-CI(NEO)/428 dated 29.1.2015 was issued to them asking as to why penalty should not be imposed on them under Section 112(a) & (b), (iii) and

(iv) and under Section 114AA of the Customs Act. The case was adjudicated by the impugned adjudication order and the appellants were imposed a penalty of Rs. 10 lakhs in case of the appellant No. 1 (HLPL) under Section 114AA of the Act and Rs. 5 lakhs on Appellant No. 2 (Shri Ashok Sharma) under the provisions of Section 114AA of the Act.

3. Ld. Advocate on behalf of the appellants submit that appellant No. 1 (M/s HLPL) was granted the permission to work as a Custom House Agent, vide Licence No. R-49/DEL/Cus/2012 on 10.10.2012 by the respondent Commissioner under Regulation 9(1) of CHALR, 2004 which was in vogue till 9.10.2022 and the appellant No. 1 was doing the work of customs clearance at different ports all over India by getting a requisite permission from the competent authority.

- That during the normal business activity in the beginning of 2014, some of the importer approached the appellant No. 1 for the clearance of their import consignment of rough diamond. Before the job of clearing was undertaken by the appellant NO. 1, they requested them to supply KYC norms from the importer such as IEC certificate, address proof, identity proof (PAN card, Voter ID or passport etc.) bank statement, bank attested signature of the proprietor/partners/Director of the company.

- That after getting the copy of all the document, the appellants cross checked the same with the original copy of the import document and thereafter verified the IEC code from the DGFT website. After getting satisfied with the relevant record provided for KYC norm, appellant accepted the import documents and filed the relevant bills of entry.

- That the appellant filed the Bill of entry for clearance of rough diamond on behalf of their client, Neotex Exim Pvt. Ltd. However, the said consignment was detained by the Commissioner of Customs and later on the valuation had been done by the Jewellery Appraiser on 10.2.2014, where he concluded that the declared value of the imported rough diamond, was much more than prevalent market price/import price. As per the Jewellery Appraiser report, the actual value of the consignment was arrived at USD 14,297 instead of declared value of USD 88,641/-.

- That, after the preliminary investigation the case was transferred to the DRI by New Custom House. That, in the course of enquiry that the statement of G card holder of the appellant company has been recorded on 17.6.2014 and thereafter the statement of appellant No. 2 - Shri Ashok Sharma, Director of the appellant company (Appellant No. 2) was recorded on 2.7.2014 where inter alia, stated that :-

- (i) That Shri Uday Bhagat has approached them in the first week of the January, 2014 for clearance of the aforesaid consignment and after verification of KYC documents they prepared the check list on the basis of documents supplied by the importer, which led to the filing of Bill of Entry. The Bill of entry was filed on the first check basis.

- That during the investigation it was found by the DRI that the import was routed through Axis Bank, who vide their letter dated 11.7.2014 informed the DRI that the amount has not been remitted to the foreign supplier and that the account was opened by one Shri Uday Bhagat. Thereafter, the consignment was seized by the DRI, on the reasonable belief that the goods imported are liable for confiscation under the provisions of Custom Act for the alleged violation as stated above.

- That during the course of enquiry, it was found by the DRI that the building which was declared in the KYC norm i.e. premises No. 1079-80, Gandhi Gali, Fatehpuri, New Delhi, was found locked. The statement of Shri Vivek Sharma, was recorded under Section 108 of the Customs Act who stated that:

- (a) He had gone to collect some import documents from Shri Uday Bhagat from his office premises at 1077, Gandhi Gali, Fatehpuri, Delhi and he had his mobile number Shri Uday Bhagat.

- (b) That after not getting their address conveniently he talked to Shri Uday Bhagat, who described the address, and then he went inside a building where Shri Uday Bhagat was present, although there was no signboard of any office.

After getting the show cause notice, the appellants vide their letter dated 4.1.2016 has raised the two objections before the adjudicating authority which is as under:

(i) As the CHALR, 2004 was superseded vide Notification dated 21.6.2013 and new Regulation called CBLR, 2013 hence alleging contravention of CHALR, 2004 is illegal and penalty cannot be imposed on them under the provision of old Act.

(ii) The show cause notice dated 29.1.2015 has been issued under Section 110(2) of the Customs Act, 1962 and, therefore, penalty should not be imposed unless the show cause notice is issued under Section 124 of the Customs Act, 1962.

- That the appellant vide letter dated 8.8.2016, addressed to the Assistant Commissioner of Customs (Adj.) informed that the allegation that the appellant has not filed the reply of show cause notice is incorrect as the appellant vide their letter dated 2.1.2016 has raised their objection on two grounds, first the alleged violation of CHALR, 2004 is not applicable in their case due to superseding the same by CBLR, 2013 and secondly the show cause notice has not been issued under Section 124 of the Act. It was also stated by the appellant that it is an established Rule that physical verification of premises or personal meeting the importer is not required for the verification of KYC norms as per CBLR Regulation 2013.

- That the appellant only came to know about the alleged mis-declaration of the imported goods after examination by Jewellery Appraiser and further by the government registered valuer. Thus, the value declared at the time of filing of Bill of Entry, they could not have known about the alleged mis-declaration by the importer. Finally, it was also argued for contravention of provisions of CBLR, 2013, penalty cannot be imposed under Section 112(a) (b) of the Customs Act, 1962 and proposed action under Section 114AA has not been explained /mentioned in the show cause notice. Considering the above submission it was argued that the show cause notice deserves to be dropped.

4. On the other hand, the Id. DR supported the impugned order and reiterated the grounds contained therein. He has thus argued that impugned order is not suffering from any infirmities and required to be upheld.

5. We have heard rival contentions and perused the case record. The issue before us is to decide as to whether the appellants has any role in the deliberate overvaluation of the imported goods by the importer and also whether they have failed to verify the KYC norm as per the CBLR, 2013. We find that the show cause notice has been issued under Section 110(2) of the Act and not under the Section 124 of the Customs Act. For the better appreciation of the fact, we hereby reproduce the provisions of Section 110 of the Act:

110. Seizure of goods, documents and things.-

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods: Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer. 1/(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1B) Where any goods, being goods specified under sub-section (1A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceeding under this Act and shall make an application to a Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.

(1C) Where an application is made under sub-section (1B), the Magistrate shall, as soon as may be, allow the application.]

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized: Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the 2[Commissioner of Customs] for a period not exceeding six months."

Section 110(2) of the Act deals with extension of time period for issuance of show cause notice within prescribed period of six months of the seizure of the goods".

6. It is obvious from the show cause notice that the same has not invoked the provisions of Section 124 of Customs Act in this case. The adjudicating authority has dealt with the above issue in the order at para 27.19 of the Act, wherein it is mentioned as under :

"27.19 I find that importer; its director and the CHA have submitted in their written submissions as well as during the course of PH that impugned Show Cause Notice has been issued under Section 110(2) of the Customs Act, 1962. In this regard they submitted that unless the SCN was issued under Section 124 of the Customs Act, 1962, penalty could not be imposed on the noticees. They relied upon the Karnataka High Court Judgement in Commissioner Vs. Kesar Marble & Granites as reported in 2012 (278) ELT 42 (Kar.). I find that the ratio of this case is not applicable in the present case in hand. In Kesar Marbles & Granites the SCN was mistakenly issued under Section 124 of the Customs Act, 1962 demanding duty of Rs. 1,43,45,371/- and proposing penalties. The assessee appeared and contended that the provisions of the Customs Act were not applicable to the present case. Realising the said mistake the revenue issued a letter dated 12.12.2000 for demand of duty under the provisions of the Central Excise Act, 1944. The circumstances of the present case are totally different. The goods under dispute were seized under Section 110 of the Customs Act, 1962 and SCN was rightly issued under Section 110(2) of the Customs Act, 1962 read with Section 124 *ibid*. Further the noticee had relied upon the CBEC Circular 65/2000-Cus. dated 27.7.2000. I find that prior to issue of the current SCN a Show Cause Notice DRI F. No. 33A/XI/32/2013-CI(NT) dated 7.7.2014 read with Addendum dated 10.7.2014, was issued for extension of time limit in respect of goods imported vide Bill of Entry No. 4314276 dated 10.1.2014. The Commissioner of Customs (I&G), New Customs House, New Delhi vide Order-in-Original No. 50/NLB/Commr./I&G/2014 dated 25.7.2014 extended the time limit for issue of Show Cause Notice under Section 124 of the Customs Act, 1962 in respect of the detained goods imported vide Bill of Entry No. 4314276 dated 10.1.2014 by six months i.e. up to 29.1.2015, under the proviso to sub section (2) of Section 110 of Customs Act, 1962. Consequently, SCN dated 29.1.2015 was issued under proviso to Section 110(2) of the Customs Act, 1962 read with Section 124 *ibid*."

7. From the aforesaid discussion of Id. Adjudicating authority, it is evident that the another show cause notice has been issued by the DRI dated 7.7.2014 (*supra*) read with Addendum dated 10.7.2014 and the Commissioner (I&G), New Customs House has extended the time limit for issue of show cause notice under Section 124 of the Customs Act in respect of detained goods vide Bill of Entry No. 4314276 dated 10.1.2014 by six months i.e. up to 29.1.2019 under the provisions of sub-section (2) of Section 110 of the Customs Act. From the above, it has been held that the present show cause notice is issued in continuation to the earlier show cause notice issued by the DRI where the provisions of Section 124 of the Act has been invoked. The appellant has not provided the copies of these orders before us so as to arrive at the conclusion as to whether the impugned show cause notice and adjudication order is the extension of the previous show cause notices along with addendum which has been clearly spelt out with adjudicating authority. Therefore, we have no option but to hold that the present show cause notice in effect has to be treated as having been issued under Section 124 of the Customs Act in effect has to be treated as proviso under 110(2) of the Act.

8. Regarding the following of the KYC norms by the appellant, we find that the statement of Shri Vivek Sharma letter dated 21.1.2015, the employee of M/s

HLPL, has stated that when he went to collect the documents, Shri Uday Bhagat asked him to come in a street at Fatehpuri, wherein he was standing before a building which did not have any sign board or bear a number. It is seen from the adjudication order that the declared residential premises of Shri Uday Bhagat and Shri Sunder Prakash Sharma, the Directors of M/s Neotex Exim Pvt. Ltd. that they were not residing at the declared premises. The adjudicating authority also found that the IEC of the importer revealed that no firm/business enterprises in the name of M/s Neotex Exim Pvt. Ltd. existed at the given address and the enquiries conducted at the declared residential premises revealed that the said address was incomplete or fictitious. Under the circumstances, we are in agreement with the finding of the Id. Adjudicating authority that CHA helps not properly verified the functioning of the client from at the declared address by using reliable independent and authenticate documents. This was a serious lapse on part of the CHA in verifying the KYC before taking up the Custom clearance of consignment of rough diamond imported by M/s Neotex Exim Pvt. Ltd. The appellants, considering the nature of the imported goods i.e. rough diamond, would have exercised more vigilant approach before taking up the consignment for Customs clearance after verification of KYC norms of the importer, which has not been done in this case. It is stated by the Id. Advocate that the order of the adjudicating authority has failed to discuss the various case law and their relevance in the case at hand. We find that the adjudicating authority has dealt with each and every case law cited by them at length and concluded that those are not relevant in the fact and circumstances of present case.

9. In view of above, we do not want to discuss the same again for sake of brevity in our order. In view of above, we hold that the impugned order is correct, legal and proper under the provisions of Customs Act and merits no interfere. Accordingly, we reject the appeals filed by the appellants.

(Pronounced in open Court on 8.11.2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO. 2, R K PURAM, NEW DELHI - 110066
PRINCIPAL BENCH, NEW DELHI
COURT NO. II**

Customs Appeal No. 50906 of 2018

Arising out of the Order-in-Original No. 70/KB/POLICY/2017M, Dated:
15.11.2017

Passed by The Commissioner of Customs (General), New Custom House, New
Delhi

Date of Hearing: 23.10.2018

Date of Decision: 18.04.2019

M/s MULTI WINGS CLEARING AND FORWARDING PVT LTD

Vs

**COMMISSIONER OF CUSTOMS (GENERAL)
NEW DELHI**

Appellant Rep by: Shri Prabhat Kumar, Adv.

Respondent Rep by: Shri Rakesh Kumar, AR (DR)

CORAM: Anil Choudhary, Member (J)

C L Mahar, Member (T)

FINAL ORDER NO. 50542/2019

Per: C L Mahar:

Briefly stated facts are that the appellant is holder of a Customs Broker Licence No. R-57/DEUCUS/2006 (PAN No. AAHCM8516H) valid upto 14/05/2022 issued by the Commissioner of Customs (I&G), New Delhi.

2. Officers of Directorate of Revenue Intelligence (Hqrs.), New Delhi vide Panchnama dated 28.02.2017/01.03.2017 drawn at the Air Cargo (Import-Shed), Delhi examined the Bill of Entry no. 8710782 dated 28/02/2017 and 8710323 dated 28/02/2017. One Shri Surender Kumar, Director of M/s K. R. Express Pvt. Ltd., claimed himself to be representative of the appellant. During examination, huge quantities of branded cosmetics; Kingston makes Pen Drives; Sandisk Flash drive; Panasonic High Definition Video Cameras; Phantom 4 pro DJI Drone; branded Wrist watches; Sony HDR CX405 Handy Cam/4K Handy Cam FDR; Samsung Galaxy S5/S6/Note 4/J-7; I-Phone 6/6S/ 6Plus/5s; 360 degree panoramic intelligent camera; branded 320 GB Internal Hard Disc; Branded Sports Shoes and Glass Chattons etc. were found, which were not declared before the Customs authorities at the time of clearance. Two more consignments covered under Bills of Entry No. 8709104 and 8707042, both dated 28/02/2017, imported by M/s Logitrade Impex Solutions Pvt. Ltd. and cleared by the appellants were presented by Shri Surender on 01/03/2017 on examination and on comparison of declared weight and the weight found during examination by DRI there was a difference of 268 Kgs. (in respect of 187 Pkts.) and 60 Kgs. (in respect of 115 Pkts.). In the case of 187 Pkts., comparison of marking present on said pkts., revealed non existence of certain packets which were not present in the Packing List. That the packing list for 115 Pkts. was not produced by the CB despite being demanded by the officers. On the basis of an enquiry conducted against the CB his CB licence has been revoked and his security deposit of Rs. 75,000/- has been forfeited vide the impugned order against which the appellant has filed the present appeal. On the basis of an enquiry conducted against the CB it has been held that the CB has violated the provisions of Regulations 11(a), 11(b), 11(d), 11(n) & 11(j) of the Custom Broker Licensing Regulations, 2013. Though the enquiry officer has found violations of Regulations 11(a), 11(b) and 11(n) and not of Regulations 11(d) and 11(j) but the Competent Authority in a disagreement note to the findings of the enquiry officer found that the appellant had violated the provisions of Regulation 11(d) and 11(j) also. The adjudicating authority upheld the charge of violation of all these

regulation i.e. Regulations 11(a), 11(b), 11(d), 11(n) & 11(j) of the Custom Broker Licensing Regulations, 2013. The relevant regulations reads as :

Regulation 11(a) - "A Custom Broker shall obtain an authorization from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorization whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;"

Regulation 11(b): "A Customs Broker shall transact business in the Customs Station either personally or through an employee duly approved by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be."

Regulation 11(d): "A Custom Broker shall advise his client to comply with the provisions of the Act and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;"

Regulation 11(j): "A Customs Broker shall not refuse access to, conceal, remove or destroy the whole or any part of any book, paper or other record, relating to his transactions as a Customs Broker which is sought or may be sought by the Commissioner of Customs."

Regulation 11(n): "A Custom Broker shall verify antecedent, correctness of Importer Exporter Code (IEC) number, identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information."

3. The learned Commissioner while upholding the charge of failure by the appellant to comply with the above requirements of law has observed that the appellant had filed Bills of Entry for imports made by M/s Excel Enterprises, M/s S.G. International, M/s Logitrade Impex Solutions Pvt. Ltd and Other importers through Delhi Air Cargo (Import). From various statements of IEC holders, it appeared that they (M/s Excel Enterprises, M/s S.G. international, M/s Logitrade Impex Solutions Pvt. Ltd and other importers) did not engage the appellant for Customs clearance related work and the appellant and their representatives failed to produce such authorization at the time of examination. The IEC holder of the other two import firms M/s Excel Enterprises and M/s S. G. International had even denied to be aware of these imports and admitted that their IECs were being misused by some other person i.e. Shri Amardeep by paying some monetary consideration to them. Further, during the search of the declared office premises i.e. L-74/284, Street No. 7, Pandit Jagannath Complex, Mahipalpur, Delhi-37, on 28/02/2017 (the office premises declared by Shri Surender Kumar claiming to authorized representative of the appellant), no relevant documents like KYC documents and file of earlier imports clearance made by the appellant were found. The adjudicating authority has further observed that the KYC documents of the importers not produced before the investigating agencies till 09/03/2017 despite having undertaken by Shri Surender Kumar to do so but same were produced belatedly before the Licence Issuing Authority only. Further, no authorized representative or 'G' or 'H' card holder of the appellant firms were found present at the time of examination of the seized consignments. Only Shri Surender Kumar and Shri Narender said to be representatives of Multi-Wings were present at the time of examination, but both failed to produce any document in support of their claim of being authorized representatives of the appellant. It was also observed that Shri Surender Singh and Shri Narender were neither any F card not 'G' card not 'H' card holders of the appellant firm. Although the appellant has a G card holder Sh. Ajesh Kumar on its rolls, but he was not present at the time of verification and examination of the cargo. That it was Shri Surender only, who was using the appellant's licence for clearing of the import consignments and was dealing with the importers for said imports. That the high value goods suspected to be concealed/mis-declared had been removed from the original consignments and the same had been replaced by Shri Surender which is evident from the fact that description of goods declared at the time of import and goods found during panchnama proceedings were different and there is also mis-matching of markings on the packets versus markings present in Packing list presented before the Customs. That the necessary documents such as KYC, Authorizations and even packing

list was not produced promptly to aid the DRI investigation. Submission of the requisite documents at later stage will not serve any purpose and that too to License Issuing Authority who has nothing to do with this packing list. Accordingly, the adjudicating authority in exercise of his powers under Regulation 18 and Regulation 20(7) of CBLR, 2013 passed the impugned order revoking the appellants Customs Broker Licence and also forfeited security deposit of Rs. 75,000/- furnished by the CB which is present matter of appeal before us.

4. The learned advocate appearing on behalf of the appellant has vehemently opposed the charges made in the impugned order. Refuting the charge of violation under Regulation 11(a) that the Appellant undertook the work relating to clearance of the impugned consignments without obtaining any authorization from the importers and that the director of the Appellant did not present himself before the investigation agency as well as did not submit the required authorization and KYC documents of the importers he argued that no authorization and KYC were demanded by DRI from Appellant at the time of investigation of the case. That as and when the appellant was asked to join investigation proceedings, he dutifully appeared before Investigating Team and tendered his true statement. That That on 08/03/2017, DRI informed the authorized person Shri Surinder Singh to remain 'present in his office at Mahipalpur with authorizations and KYC of importers concerned but DRI Officers neither visited the office premises of the authorized person nor ordered to submit the authorization and KYC documents to the respective office of DRI. They also did not visit the office of Appellant. That the allegation that the Appellant had not obtained any authorization from importers is not sustainable in the eyes of law as the authorizations and KYC documents were with the Appellant. Refuting the charge of violation under Regulation 11(d), argued that the goods covered under Bill of Entry Nos. 8710782 dated and 8710323, both dated 28/02/2017 were examined in the presence of one Sh. Surender, Director of M/s K.R. Express Pvt. Ltd.(itself a CB) who claimed himself to be a representative of the Appellant without having any G-Card / F-Card and without having any authority to do so in terms of regulation 11(b) of CBLR is not sustainable because the appellant filed the above mentioned bills of entry on the basis of documents supplied by the respective importer. That after filing the bills of entry, the representative of appellant Sh. Ajesh Kumar (G-Card holder) was present in Air Cargo Complex (Import) for examination and assessment of imported goods but he was ordered by the Shed Officer to move to the group in New Custom House regarding some paper work and when he came back, the Officers of DRI closed the main gate and did not allow anyone to enter in the complex including Sh. Ajesh Kumar (G-Card holder). That when the Officers of Customs started examination of the goods, under the aforesaid bills of entry, no representative of the appellant was present in Cargo Complex except Shri Surender, Director of M/s K.R. Express Pvt. Ltd. (a Customs Broker) who was known to the appellant and was allowed to represent him in cargo complex. Further, refuting the charge of violation of Regulation 11(d), he argued that the goods were declared as per import documents furnished by the importers and there is no way to ascertain the veracity or correctness of contents of these consignments without examination. That there is no evidence or allegation that the Appellant CB had any prior knowledge about the actual contents of the consignments. Hence, no mis-declaration is imputable to the Appellant CB. With regard to consignments imported through Bill of Entry Nos. 8700104 and 8707042, both dated 28/02/2017, he stated that no discrepancy was found with respect to number of packets and there was only difference in declared weight. He argued that the declared weight was on estimates only as the goods were assessable with respect to number only. He vehemently opposed the finding that there was any replacement of goods and argued that there was no evidence of any replacement Further refuting the charge of violation under Regulation 11(j) he again re-iterated his argument that no KYC was demanded by the DRI and not even a single packet was found short when examined by the DRI with respect to goods covered Bill of Entry Nos. 8700104 and 8707042 and that the Customs Duty assessed is on the basis of numbers and not weight. Further refuting the charge of violation of Regulation 11(n) that the Appellant failed to present KYC documents to the investigating agency; and that the Appellant has not verified that antecedents, correctness of IEC Number, identity of his client and

functioning' of his client at the declared address by using reliable, independent, authentic documents, data or information he argued that the findings are against facts as before filing respective bill of entry, the Appellant verified the documents supplied by the importers such as IEC, Pan Card, Voter Card, Vat Registration and obtained the authority letter from importers and being completely satisfied with the documents filed the bills of entry in question, that the Appellant verified the documents from the website of DGFT and other Departments and then only filed the concerned bills of entry and that it is also wrong to say that the companies were existing on paper only because Officers of DRI had investigated the office premises of the importers for whom the Appellant filed the Bills of Entry and no such companies were found existing on the given address, contrary to such claim, the fact is that all the three importers presented themselves before DRI as and when called upon to do so and have tendered their statements under section 108 of the Customs Act. They have also deposited certain amounts as desired by DRI. He relied upon the case law in *G.N.D. Cargo Movers vs. CC (General), New Delhi [2017 (357) E.L.T. 1184 (Tri-Del)]* wherein it has been held that charge of violation of Regulation 11(n) regarding failure to verify the antecedents, correctness of the IEC number, and identity of the client does not sustain when IEC number is found to be correct as also the address of the importer. Further all the importers have joined the investigations He further argued that there is no allegation of any pecuniary benefit to the Appellant nor there is any evidence that the Appellant had wrongly advised the importers. He cited certain case laws which suggested that the CHA cannot be penalized for the wrong declarations made by the importers. He lastly argued that the revocation of Licence is likely to affect the livelihood of many persons and hence the impugned order should not be allowed to sustain. On the other hand the Learned DR has reiterated the findings in the impugned order and has argued that the revocation and forfeiture of security deposit be sustained.

5. We have carefully gone through the facts of the case and arguments made by the Learned Advocate of the Appellant and the Learned DR. We find that the required KYC were produced by the Appellant to the Department at a later stage to the Licence Issuing Authority and not to the investigating Agency. This suggests that the necessary KYC documents were actually not present with the appellant when the investigating agency visited and asked them to produce the KYC documents of the importer firm. This very facts prove that the appellant had indeed not negotiated the clearance of the impugned consignments and have allowed his licence to be misused by other persons and have thus violated the provisions of Regulation 11 (a) of CBLR, 2013. We further find that the charge of replacement of goods against Bills of Entry no. 8700104 and 8707042 is also got substantiated as the investigation has proved that the high value goods suspected to be concealed/misdeclared were removed clandestinely from the import consignments however the complicity or direct involvement of the CB or his representative does not get substantiated. We also find that there is nothing on record to suggest that any mis-declaration with respect to the consignments examined under Bill of Entry no. 8710782 dated 28/02/2017 and 8710323 dated 28/02/2017 was in the knowledge of the CB or his authorized representative Mr. Ajesh Kumar, the G Card Holder or even Mr. Surender Kumar who represented before the Investigating Authorities on behalf of the CB. Thus the charge of failure to advise the client to comply with Regulation 11(d) or the charge of concealment of any document etc. as per regulation 11(j) does not hold good as these charges are not substantiated by any positive evidence with respect to knowledge of the CB or circumstantial evidence like extra pecuniary gain etc. However, we find that the learned advocate has failed to give any plausible explanation with respect to authorizing of Shri Surender Kumar who was not his employee and neither a G Card Holder or H card Holder to represent on him on his behalf or conduct a business through him. This facts establishes that the appellant has allowed some other persons to use his CB licence in violation of CBLR 2013.

6. There is nothing on record to also show that appellant was too prevented from being present personally or through his authorized G Card or H Card representative when called by the investigating agency for participating in the examination of impugned import consignments, the arguments adduced by them in their support are without valid evidences and thus we find that the appellant has violated the provisions of Regulation 11(b).

7. In view of above, we hold that the appellant has not complied with the provisions to regulations CBLR 2013 as discussed in the preceding paragraphs. Thus, we feel no need to interfere with the order-in-original dated 15/11/2017 and accordingly the appeal is dismissed.

(Order pronounced in open court on 18.04.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-110066**

Customs Appeal No.50390/2018 (DB)

Arising out of Order-in-Appeal No.CC(A)CUS/D-II/EXPORT/TDD/1041/17,
Dated: 12.10.2017

Passed by the Commissioner of Customs (Appeals), New Customs House, New
Delhi

Date of Hearing: 27.04.2018

Date of Decision: 15.05.2018

M/s BALAJI ACTION BUILDWELL

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI**

Appellant Rep by: Shri Jai Kumar Kartik Jindal Ajinkaya Tiwari, Advs.

Respondent Rep by: Shri Rakesh Kumar, DR

CORAM: S K Mohanty, Member (J)

V Padmanabhan, Member (T)

FINAL ORDER NO. 51834/2018

Per: V Padmanabhan:

The appeal is against Order-in-Appeal No.CC(A)CUS/D-II/EXPORT/TKD/1041/17 dated 12.10.2017. The appellant imported certain chemicals described as "Melamine" and filed bill of entry and enclosed certain DFIA licences and prayed for clearance of the goods with the benefit of DFIA licences. Both the authorities below took the view that such DFIA licences covered only chemicals described as "SYNTAN". The Customs Department disallowed the benefit of DFIA licences for "Melamine" for the reason that the goods specifically mentioned and allowed for import under such DFIA licences was "SYNTAN", which was different from the imported goods. The investigation was undertaken by the Department was for the purpose of ascertaining whether the goods imported and described as "Melamine" will be covered by the description "SYNTAN" appearing in the DFIA licences. In this connection, Customs Department obtained the opinion of the Central Leather Research Institute (CLRI), Chennai and on the said basis, it was concluded that the benefit of DFIA licences for import of "SYNTAN" cannot be extended to the goods imported i.e. "Melamine". Accordingly, the authorities below demanded the customs duty payable by denying the benefit of DFIA licence.

2. Aggrieved by the decision, the present appeal has been filed.

3. With the above background, we heard S/Shri Jai Kumar/Kartik Jindal/Ajinkaya Tiwari, Advocates and Shri Rakesh Kumar, Id. Departmental Representative for the Department.

4. The submission of the Id. Advocates are summarized as below:-

(i) The chemical "Syntan" is utilized in the Leather Processing Industry for tanning of such goods. He argued that the imported goods i.e. "Melamine" can be considered as "Syntan" and the appellant will be entitled to the benefit of DFIA licences. He specifically relied on the decision of the Tribunal in the case of *Commissioner of Customs, Nhava Sheva Vs. Dimple Overseas Ltd. – 2002 (147) ELT 1164 (Tribunal-Mumbai)* in which the similar question came up before the Tribunal and it was held that 'Melamine' has been generally understood as a tanning agent and the benefit of the Advance licence which permitted import of Syntan agent was extended to the Melamine. He submitted that by following the said decision of the Tribunal, the appellant will get the benefit of DFIA licence, which has been issued for clearance of the Melamine.

5. Id. DR supported the impugned order. His arguments are summarized below:-

(i) In the opinion of CLRI, which was obtained by the Customs Department, the two items – Melamine and Syntan are chemically different. These items are covered by different HS Codes. Melamine is covered under HS 29336.00, whereas Syntan is covered under HS Code 32021000.

(ii) He further submitted that the decision in the case of Dimple Overseas (supra) relied upon by the appellant is not applicable to the present case because that case dealt with import under Value Based Advance Licence issued under Notification No.203/12 and in respect of such Value Based Advance Licences, the specific items allowed for import were not mentioned. Accordingly, he submitted that the benefit of the DFIA licence, which was issued for Syntan cannot be extended for the import of Melamine.

(iii) He further submitted that the DFIA licences are issued under FTP para 41 and required submission to the Licensing Authority giving the details of items sought to be imported duty free along with their HS Codes. Accordingly, he submitted that the benefit of DFIA cannot be extended.

6. In the counter, Id. Advocate submitted that DFIA licences cover Syntan. He also relied on the ratio of the Tribunal's decision to the extent that Melamine has generally been understood to be a tanning agent. On the basis of such ratio, the benefit is to be extended to them even in the present import. He also argued that the Anti-dumping duty leviable on Melamine is applicable only for import from certain countries and cannot be used to justify denying the benefit of the DFIA licences.

7. Heard both sides and perused the appeal records.

8. After hearing both the sides and on perusal of the records, we note that the issue is whether the goods imported can be given the benefit of DFIA licences and allowed duty free clearances. The goods imported have been declared as 'Melamine' but the DFIA licences produced for clearance of such goods cover the items "Syntan". It is the claim of the appellant that the item "Syntan" refers to synthetic tanning agent and will cover the goods imported since the said goods are capable of being used as synthetic tanning agent.

9. The Customs Department sent samples of the imported goods to Central Leather Research Institute (CLRI), Chennai for their opinion. CLRI gave its opinion vide letter dated 20.02.2014 as follows:-

"Melamine cannot be used as such in leather processing as "SYNTAN". It is a monomer, which is processed further to produce polymeric melamine SYNTANS."

10. From the opinion expressed by the expert body, CLRI, it is easy to see that "Melamine" is different from Syntan. It is further seen that the HSN Code for Melamine as well as Syntan are different. Melamine is covered under HS Code 29336100 as organic chemical, whereas Syntan is covered under 3202 as Syntan Organic Tanning substance. HS codes clearly tell us that the two chemicals are entirely different and this fact has also been endorsed by the CLRI. From the opinion of the CLRI, it is evident that Melamine cannot be used as such, in leather processing as Syntan leading us to the inescapable conclusion that the benefit allowable under DFIA licence to Syntan cannot be extended to Melamine, which is imported by the appellant.

11. Id. DR has contended that in the application for DFIA licence, the applicant is required to give the details of items sought to be imported duty free under the authorization along with the HS Codes. Only on the basis of such application, DFIA is issued giving the details of the goods allowed to be imported. Since HS Codes for Syntan and Melamine are different, it is evident that the benefit is to be extended only to Syntan as per the DFIA is produced.

12. The appellant has relied on the ratio of the Tribunal's decision in the case of Dimple Overseas (supra). In the said decision, the Tribunal has observed that Melamine has been generally understood to be a tanning agent. In the light of the above observation, we are of the view that the benefit of the said Tribunal's decision cannot be extended to the imports in the present case, since that decision was delivered in the context of Value Based Advance Licence issued under the then Notification No.203/92, whereas in the present case, we are dealing with the DFIA licence and the terms of issue of both licenses are entirely different.

13. In view of the above discussions, we find no reason to interfere with the impugned order, which is sustained for the reasons mentioned therein. In the result, the appeal is rejected.

(Order pronounced on 15.05.2018)

[Back](#)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi

COURT-I

Date of hearing/Decision: 20.04.2018

**C/COD/50319/2018[DB]
Appeal No.C/50767/2018-DB**

Mauli World Vide Logistics

...

Appellant

Vs.

CC-New Delhi

...

Respondent

Appearance:

Present Shri Mohd. Faraz, Advocate for the appellant

Present Shri Rakesh Kumar, DR for the respondent

**Coram: Hon'ble Justice Dr. Satish Chandra, President Hon'ble
Mr.V.Padmanabhan, Member(Technical)**

FINAL ORDER No._51728/2018

Per: Justice Dr. Satish Chandra

1. The present appeal is filed against the Order-in-Original No. 79/2017 dated 29/11/2017.
2. Originally, the appellant, CHA was involved in the clearance of goods imported from China by **M/s Sanco Industries Pvt. Ltd.** through **M/s Sky Park India**, a logistic service provider. Necessary papers were given to the CHA and goods were cleared immediately. After that, it was found that there was mis-declaration of the goods. It was declared as "Calcium Carbonate" in the bill of entry relating to the consignment but inside the consignment, it was found "Fire Crackers and Telescopic Channels" in all the four containers. Finally, the authorities have revoked the appellant's CHA license along with forfeiture of the security amount.

3. the same was assailed before the Tribunal. The Tribunal vide its Final Order No. 56109/2017 dated 10/08/2017 remanded the matter to the Licensing Authority to levy maximum punishment other than the revocation of license. In compliance, the authority has restored the license of the CHA but imposed the penalty of Rs.50,000/- and also forfeited the security amount of Rs.75,000/-. Not being satisfied, the appellant has filed the preset appeal before the Tribunal.
4. With this background Shri Mohd. Faraz, Ld. Advocate for the appellant submits that the Regulation has not been mentioned in the impugned order. At the same time, Shri Rakesh Kumar, Ld. DR for the Revenue submits that in the order Regulation 22 read with CBLR, 2013 has already been mentioned.
5. By considering the totality of the facts, for the reasons mentioned in our earlier order (supra) we find no reasons to interfere with the impugned order. The present appeal is nothing but misuse of the judicial process.
6. In the result, appeal filed by the appellant is dismissed. The penalty and forfeited amount are hereby sustained.

[Order Dictated and Pronounced in the open court]

(V. Padmanabhan)
Member (Technical)

(Justice Dr. Satish Chandra)
President

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-
110066
COURT NO. I**

Customs Appeal No. 51061/2018

Arising out of Order-in-Appeal No. CC(A)CUS/D-II/ICD/TKD/Export/221/2018, Dated: 15.2.2018
Passed by the Commissioner of Customs (Appeals) New Delhi

Date of Hearing: 24.7.2018

Date of Decision: 24.7.2018

M/s OLYMPIC EXPORTS

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI**

Appellant Rep by: Shri Bipin Garg, Adv.

Respondent Rep by: Shri Rakesh Kumar, DR

CORAM: Anil Choudhary, Member (J)

C L Mahar, Member (T)

FINAL ORDER NO. 52630/2018

Per: C L Mahar:

The present appeal is filed by the Appellants against the Order-in-Appeal No. CC(A)CUS/D-II/ICD/TKD/Export/ 221/2018 dated 15.02.2018 passed by the Commissioner of Customs (Appeals) New Delhi.

2. The brief facts of the case are that, the Appellants imported 57 numbers of electrical tricycle without battery in CKD condition along with spare parts. They filed Bill of Entry on 27.12.2013 claiming classification under CTH No. 87039010 of the Customs Tariff Act, 1975. The assessing authority held that the said goods cannot be allowed to be cleared as importation is in violation of Import Export Policy applicable at relevant time. More specifically, it is held that new vehicle imported is not meeting the requirement of Centre Motor Vehicle Rules (CMVR), 1989. Type approval certificate is required to be used in India for any vehicle, which is a mandatory requirement which is not fulfilled in this case. Accordingly, the original authority ordered confiscation of the imported goods under section 111(d) of the Customs Act, 1962 and imposed penalty of Rs. 5 lakh on the Appellants under Section 112 (a) of the Customs Act, 1962. On appeal, the said order was upheld by the impugned order. Being aggrieved, the Appellants have filed the present appeal.

3. The learned Counsel appearing for the Appellants submitted that for customs purpose, the imported goods were declared as motor vehicle. This is because the consignment is in CKD condition which when assembled in India can make a functional motor vehicle. However, such classification of imported goods as 'motor vehicle' is not applicable to the Policy provisions. He drew our attention to the license notes under Chapter 87. Note 2 states that new motor vehicle for the purpose of said Chapter shall mean a vehicle that is not being manufactured/assembled in India. He submitted that in the present case, the components in CKD condition are to be assembled in India and as such, the import consignment are not new vehicles. As such, the provisions of Centre Motor Vehicle Rules are not violated and no violation of any other provision has been committed by the Appellants.

4. Shri Rakesh Kumar, learned DR for the Revenue, strongly contested the appeal. He submitted that vehicle(s) imported is considered as new vehicle

under Rule 2(a) of 'General Rules for the Interpretation' for customs classification. This position has been admitted. However, the Appellants had tried to make a distinction in Policy stating that the imported goods are not new vehicles. He submitted that such dual approach is not permissible. It is the case of the Revenue that vehicle which is imported in CKD condition is necessarily to be used in India only after registration with competent Motor Vehicle Authority. For such registration, requirement of CMVR are to be fulfilled. The assessing authority cannot ignore the policy condition and Motor Vehicle Regulations which are allied Act, provisions, which the Customs authorities are bound to enforce. Even if, the goods were allowed to be cleared now, the same cannot be registered, as admittedly, requirement of CMVR are not fulfilled.

5. We have heard both the sides and perused the material available on record. The only point of dispute is, whether the impugned goods under consideration were imported in violation of policy. There is no dispute of Customs duty liability. Considering the policy, as mentioned in licensing Notes under Chapter 87, we note that the new imported vehicle is defined as not manufactured or assembled in India.

6. View of the Appellants is that, present products will be assembled in India to make a vehicle. We find such narrow view of the issue will not lead to proper appreciation of the licensing condition. Admittedly, the goods imported are motor vehicle brought in CKD condition, for the ease of import and transport. Necessarily, these items are to be used as motor vehicle in India and are governed by Motor Vehicle Rules. There is no dispute on this aspect. When the Appellants intended to import 'motor vehicle', the requirement of Motor Vehicle Rules are to be complied. The Policy stipulations clearly make out that various conditions including Type Approval Certificate by the competent authority is a mandatory requirement for any vehicle imported into India. We also note that the present vehicle (in CKD condition) was imported having electric capacity of more than 250 watt which as per mandatory requirement is to be registered with the Motor Vehicle Authority.

7. Considering these stipulations of Policy and the conditions of CMVR, we are of the considered view that the imported goods are in violation of Import Policy Notes, applicable during the relevant time. Accordingly, we find no reason to interfere with the impugned order.

8. We note that counsel pleaded for consideration of reduction of penalty as goods have been completely confiscated by the Department. Considering the plea of the Appellants, we find it fit and proper to reduce the penalty from Rs. 5,00,000/- to Rs.1,00,000/- (Rupees One lakh only). Except for this modification of penalty, the impugned order is upheld.

9. In the result, the appeal filed by the Appellants is partly allowed.

(Dictated & pronounced in the open court)

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE
TAX APPELLATE TRIBUNAL, DELHI**

Appeal No. C/51856/2018-DB

(Arising out of Order-in-Appeal No. CC(A) Cus/D-I/Exp/95/2018 dated
22.3.2018 passed by the Commissioner of Customs (Appeals), New Delhi)

M/s Pioneer Embroidery Limited

Appell

ant Vs.

CC, New Delhi

Respondent

Appearance

Shri Avneet Singh, Advocate	-	for the appellant
Shri Rakesh Kumar, AR	-	for the respondent

CORAM: **Hon'ble Mr. Bijay Kumar, Member (Technical)**
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 52798/2018

Date of Hearing/Order: 3.8.2018

Rachna Gupta :

The present is an appeal against the Order-in-Appeal No.
95/2018 dated 22.3.2018 of Commissioner (Appeals).

2. The appellant was allowed to import various goods under EPCG licence dated 30.4.2002 under Custom Notification No. 49/2000-Cus. dated 27.4.2000 at the concessional rate of 5% of Custom duty subject to the condition of the notification. The department alleged that the appellant failed to submit the requisite documents regarding export obligation as well as the requisite certificate as required under said notification within the prescribed time limit. Resultantly, a show cause Notice dated 19.11.2010 was served upon the appellant demanding the differential duty. The demand is confirmed along with the imposition of penalty vide the order of original adjudicating authority dated 11th March 2014. Being aggrieved, the appeal was filed before Commissioner (Appeals) who vide the order under challenged has dismissed the appeal on the sole ground of it being time barred. Being aggrieved thereof, the

appellant has filed the present appeal.

3. We have heard Shri Avneet Singh, ld. Advocate for the appellant and Shri Rakesh Kumar, ld. AR for the department.

4. It is submitted on behalf of the appellant that they had never received the copy of order in original. For the purpose they also moved an RTI, the information is still awaited. Adjournment is initially requested. The same is heavily objected on the part of the department submitting that the date of communication has already been mentioned by the appellant itself in the appeal memo. Otherwise also the appeal before Commissioner (Appeals) was filed after a delay of almost two years. The adjudication of Hon'ble apex Court in the case of ***Singh Enterprises Vs. CCE, Jamshedpur*** - 2008

(221) ELT 163 is impressed upon. With the objection qua adjournment the appeal is rather prayed to be dismissed based on the submissions.

5. While rebutting, it is submitted by ld. Advocate for the appellant that date of communication of order, as apparent from appeal memo in 11.3.2014 which is the date of the O-I-O itself. It is impressed upon that there is no evidence on record about service of the said order by the department to the appellant. The order under challenge is therefore, prayed to be set aside.

6. After hearing both the parties and perusing the record, we are of the opinion that as per the appellant's own appeal before Commissioner (Appeals), the date of communication of order is mentioned. No doubt the date is the same as the date of O-I-A and apparently there is no document proving the service of the communication of said order but appellant did not raise this ground before the Commissioner (Appeals) nor pleaded the same as inadvertent mistake as is pleaded before us. There is no evidence on record as to when the said RTI, as impressed upon was filed. Thus, the reason cited doesn't appear to be the sufficient justifiable cause. There is an apparent delay in filing the appeal before Commissioner (Appeals) of two years. Law of limitation is settled that where there is no express time has been fixed for any purpose, 'Reasonable Time Principle' has to be looked into. As per Section 128 of Customs Act, there is prescribed time

limit of two months to file an appeal and the Commissioner (Appeals) has been vested with discretion to condone the delay for another a month only.

7. Keeping in view the said factual as well as the legal aspect, we are of the opinion that Commissioner (Appeals) has committed no error while dismissing the appeal on the ground of limitation for want of any sufficient cause or explanation thereto. We draw support from the decision in the case of ***Singh Enterprises*** (supra) wherein it has been held as under :

“10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps.”

It was also observed as :

“6. At this juncture, it is relevant to take note of Section 35 of the Act which reads as follows :

Appeals to “35. Commissioner (Appeals). - Any person aggrieved by any decision or order (1) passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) [hereafter in this Chapter referred to as the Commissioner (Appeals)] within sixty days from the date of the communication to him of such decision or order :

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.”

8. We follow the same ratio and hereby dismiss the appeal.

(Dictated & pronounced in open Court)

(Bijay Kumar)
Member (Technical)

(Rachna Gupta)
Member (Judicial)

[Back](#)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Custom Appeal No. 50361 of 2018

(Arising out of order-in-original No. 68/KB/Revocation/ Policy/2017 dated 10.11.2017 passed by the Commissioner of Customs, New Delhi).

Sadanand Chaudhary

Appell

antVs.

CC (G), New Delhi

Respondent

Appearance:

Sh. Vaibhav Singh, Advocate for the appellantSh.
Rakesh Kumar, AR for the
Respondent

Coram:

Hon“ble Mr. Justice (Dr.) Satish Chandra, President
Hon“ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 51545/2018 Per:

V. Padmanabhan:

Date of hearing/decision: 16.04.2018

The present appeal is filed against the order-in-original No. 68/KB/Revocation/ Policy/2017 dated 10.11.2017 passed by the Commissioner of Customs, New Delhi where the licence of the appellant, being CHA, has been revoked. Being aggrieved, the present appeal is filed by the appellant.

2. With this background, we heard Sh. Vaibhav Singh, Id. Advocate for the appellant who submits that the appellant is holding CHA licence at Delhi. According to the appellant M/s Ecolite Exim International Pvt. Ltd. had imported the goods vide Bill of Entry dated 20.01.2017 through the appellant. In the bill of entry the item was declared as “Vinyl coated paper clip (made of Iron)” . But the goods were imported found to be Measuring Tape of „Zebra“ brand. For measuring tape, the permission from Bureau of Indian Standards (BIS) is required which affects the measuring standard of India. The importer has not obtained the permission from the BIS and for filing the wrong declaration necessary action was taken. Id. Counsel also submits that the PAN card, VAT registration, KYC of the importer were

provided to him by Smt. Rambha Gupta who is also a freight forwarder. It is the submission of the appellant is that the appellant is innocent and prayed that the impugned order may be set aside.

3. On the other hand, Sh. Rakesh Kumar, Id. AR for the Revenue justified the impugned order. He submits that the imported items are Measuring Tape of "Zebra" brand is subjected to Anti-Dumping duty. The appellant being a CHA has failed to verify the genuineness of the goods. Hence, he made a request not to interfere with the impugned order.

4. It is seen from the record that the appellant had filed Bill of Entry dated 20.01.2017 declaring the goods as "Vinyl coated paper clip (Made of Iron)" but the same was found to be Measuring Tape of „Zebra“ brand. The adjudicating authority has held that the appellant is guilty of violations of Regulation 11(a),

(b) and (d) of the CBLR. From the record, we find that the appellant had filed import documents with the Custom Department without carrying out the verification of KYC, but on the basis of the documents obtained from Smt. Rambha Gupta who was not the importer of the said consignment. It is further seen that he has allowed the imported consignment to be cleared not by authorised agent but Smt. Rambha Gupta herself. He has also failed to advice his client about proper knowledge of customs act including the BIS certification import of the items i.e. Measuring Tape of „Zebra“ brand. Custom department has found serious mis-declaration on the part of the importer and the appellant has also facilitated such mis-declaration and attempted to clear the goods which has violated the provisions of the Customs Act, Foreign Trade Regulation Act and also the provision of Legal Metrology Act, 2009.

5. In the facts and circumstances of the case, we are of the view that for violation of CBLR, 2013 which stands established during the enquiry proceedings, the revocation of the Customs Broker Licence is too harsh a punishment and hence, revocation is set aside. We uphold the forfeiture of the security deposit as well as penalty of Rs. 50,000/- imposed by the adjudicating authority on Sh. Sadanand Chaudhary.

6. In the result, the impugned order is modified and appeal is partially

allowed.

(Dictated and pronounced in the open Court).

(V. Padmanabhan)
Chandra)Member (Technical)

(Justice (Dr.) Satish
President

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 50691 of 2019

Arising out of Order-in-Original No. 05/MK/Policy/2019, Dated:
04.02.2019

Passed by the Commissioner of Customs (Airport & General), New Delhi

Date of Hearing: 22.05.2019

Date of Decision: 01.10.2019

M/s LEO CARGO SERVICES PVT LTD

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI**

Appellant Rep by: Shri Akhil Krishan Maggu, Adv.

Respondent Rep by: Shri Rakesh Kumar, AR

CORAM: C L Mahar, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NO. 51292/2019

Per: Rachna Gupta:

The appellant, M/s. Leo Cargo Services Pvt. Ltd. is holding CB Licence and Shri Sanjeev Maggu is its Director. Department got an information about Shri Ramesh Wadhera and Shri Sanjeev Maggu both residents of Sushant Lok, Phase - I, Gurugram, Haryana to have been engaged in evasion of Customs duty by way of diverting the goods stored in Custom Bonded Warehouses into domestic market. For the purpose, they were forging/fabricating the documents to show the re-export of warehoused goods and following fictitious firms and IECs No. were used by both of them:

(i) M/s. Accturists Overseas (OPC) Pvt. Ltd. (IEC - 0517503581)

(ii) M/s. Sparx Exports (IEC - 0516517803)

(iii) M/s. Shree Shyam Enterprises (IEC - 0516966839)

(iv) M/s. Horrens Exim (IEC - 0516516299)

It was also noticed that though Shri Sanjeev Maggu himself was a Customs Broker but was utilising the services of other Customs Brokers namely M/s. D.S. Cargo Agency and M/s. R.P. Cargo Handling Services as the front Brokers for his clandestine operations. The input categorically stated that said Shri Ramesh Wadhera was the financier and Shri Sanjeev Maggu was the master mind behind the said activity of diverting the warehoused goods from public bonded warehouses M/s. Rider India & M/s. Prime Time Exports into the domestic markets without payment of Customs duty and creating forged/fabricated documents evidencing the re-export of warehoused goods.

Based on the said information, searches were conducted by the DRI officers on 14.07.2017 in the residential premises of both the above named people and also in their various official premises as well as in the premises of associated importing firms and the cargo agencies. Statements of all concerned were also recorded. It is thereafter that the show cause notice No. 16729 dated 10.08.2013 was served upon the appellants proposing that the appellant has contravened Regulations 10 (d) (g) and (q) of CBLR, 2013. The revocation of CB Licence, forfeiture of the amount of security (Rs. 75,000/-), submitted at the time of issue of the licence, was proposed alongwith the imposition of penalty. The said show cause notice for the sake of preparing the offence report was considered by Dy. Commissioner of

Customs, Air Cargo and Import (NCH), Delhi who submitted the enquiry report No. VIII/12 dated 06.12.2018 holding that Custom Broker/ the appellant has failed to fulfil his obligations as cast upon him in terms of the Regulations of CBLR, 2018 read with CBLR, 2013. It is against the said enquiry report that the appellant preferred an Appeal before Commissioner of Customs, Airport and General who vide its Order No. 05 dated 04.02.2019 had confirmed the findings of the enquiry report and thus revoked the CB Licence of the appellant ordering forfeiture of the entire amount of security deposit of Rs.75,000/-. Penalty of Rs.50,000/- was also imposed upon the appellant. Aggrieved of the said Order, the appellant is before this Tribunal.

2. We have heard Shri A.K. Maggu, learned advocate on behalf of the appellant and Shri Rakesh Kumar, learned Authorised Representative on behalf of the Department.

3. It is submitted that the grounds of defence of the appellant have not been considered by the adjudicating authorities below. It is impressed upon that the findings about violation of Regulations of CBLR 2018/2013 on the part of the appellant are liable to be set aside on the ground of limitation alone as the enquiry report was submitted after expiry of 90 days of the issuance of show cause notice and the same was not submitted as per the provisions carried out under Regulations 20(5) of CBLR, 2013. However, the said ground has not been considered by Commissioner. Thus, the Order is liable to be set aside on this score only.

With respect to merits, it is submitted that there is no evidence on record except mere statements of various people without any corroboration thereto. Those statement makers were never allowed to be cross-examined by the respondent. Hence, on merits also, the Order under challenge is liable to be set aside. Learned Counsel has relied upon the decision of the Hon'ble Supreme Court in the case of *Harish Charan Kurmi Vs. State of Bihar* reported in 1964 (6) SCR 623 and also on the decision of CESTAT, Mumbai reported in 2017 (357) E.L.T. 1017. The decision of CESTAT, Delhi in the case of *Ambika Enterprises Vs. Commissioner of Customs, New Delhi* reported in 2016 (343) E.L.T. 1022 (Tri.-Del.) has also been cited, praying for Appeal to be allowed.

4. Per contra, it is submitted on behalf of the Department that after receiving the information from Additional Directorate, DRI Headquarters, vide letter dated 10.05.2018, that a meticulous investigation in the form of conducting searches at various premises, in the form of recording of the statements of various people who were found the IEC Holders of the fictitious Companies as allegedly created by Shri Ramesh Wadhera and Shri Sanjeev Maggu, the Director of the appellant Company was called. It is impressed upon that the Director of the appellant was the master mind of diverting the warehoused goods to the domestic market. The statements being given to the Customs officers under Section 108 of the Customs Act are well admissible into evidence. Thus, there is sufficient evidence on record as a proof for the alleged illegal act on the part of the appellant. Hence, there is no infirmity in the Order under challenge.

It is impressed upon that the impugned show cause notice cannot even be held to be barred by time as alleged. It is impressed upon that the time limit under Regulation 20(5) of CBLR, 2013 is mere directory and not mandatory in nature. Learned AR has relied upon decision of Hon'ble Apex Court in the case of *Commissioner of Customs Vs. Candid Enterprises* reported in 2001 (130) E.L.T. 404 (S.C.) to emphasise that even if there is delay on the part of the public authorities the same is condonable when the element of fraud is involved. Learned AR has also impressed upon Section 17 of the Limitation Act, 1963. Appeal is accordingly prayed to be dismissed.

5. After hearing both the parties and perusing the entire record of the Appeal we are of the opinion as follows:

5.1 The appellant has objected the impugned order for no findings of Adjudicating Authority below on the limitation issue i.e. the proceedings against appellant are liable to be vitiated as the offence report was not submitted within 90 days of issuance of show cause notice. We observe that Commissioner in the Order under challenge has considered the plea of limitation in view of the observation that Mr. Sanjeev Maggu was deliberately buying time to disable the Directorate to unearth the modus operandi and to recover the Customs duty. Hence, the allegation that there is no finding on the issue of limitation are not sustainable. However, since the findings have been challenged on both grounds, merits as well as limitation, before touching the merits, we prefer to first adjudicate the legal issue of limitation.

For the purpose, Regulation 18-22 of CBLR 2013 are relevant as those talk about revocation of licence/ imposition of penalty (Regulation 18), Suspension of license (Regulation 19), Procedure for revoking licence/ imposition of penalty (Regulation 20) Sub- clause 5 of Regulation 20 [20(5)] talks about the time period the violation whereof is the grievance of the appellant. It reads as follows:

"At the conclusion of the inquiry, the Dy. Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall prepare a report of the inquiry and after recording his findings thereon submit the report within a period of ninety days from the date of issue of a notice under sub-regulation(1)."

6. Apparently, show cause notice was issued on 10.08.2013 and the offence report was got prepared on 06.12.2013. Thus, the issue involved at this stage is:

6.1 Whether the time frame prescribed in Regulation 20(5) is mandatory or directory i.e., whether the time therein be so strictly construed so as to result in declaring initiation of action itself invalid, if that is not adhered to.

7. CBLR Regulations aim at securing interest of the customs house agent and also of the revenue. The urgency and expediency of the action permits the authority to step in immediately or with promptitude. A balancing of interests is achieved by ensuring prompt action and avoiding undue delay in taking it to its logical conclusion. Though word used in Regulation 20(5) is "shall" but in view of above observed aim of CBLR, we are of the opinion that the question as framed above would depend on the intention of the legislature and not necessarily merely by looking at the language in which it is clothed with. We opine that it is mandatory for the Court to look into the nature of the statute and the consequences which would follow from construing it in one way or the other, the ambit of the other provisions, the necessity of compliance of the provisions in question. Above all, whether the object of the enactment is defeated by holding it to be directory and whether the object would be achieved by construing it to be mandatory has to be considered. We draw our support from a decision of Hon'ble Apex Court in the case of *Govindlal Chhaganlal Vs. Agriculture Produce Market Committee* reported in AIR 1976 SC 263, where Hon'ble Supreme Court has approvingly quoted the following passage from Crawford on statutory construction.

"The question as to whether the statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which it is clothed. The meaning and the intention of the legislature must govern and this is to be ascertained not only from the phraseology of the provision, but by considering its nature, design and the consequences of which would follow from construing it one way or other."

The Hon'ble Apex Court further observed:

"thus the governing factor is the manner and intent of the legislature which should be gathered not merely from the words used by legislature but from a variety of other circumstances in consideration. The circumstances that the legislature has used a language of compulsive force is always of great relevance in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as

peremptory. One of the fundamental rules of interpretation is that if the words of the statute are themselves precise and unambiguous, nothing more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declare the intention of the legislature"

8. For the object of time limit in Regulation 20 of CBLR, 2019/2018 we opine that said time limit is evolved so that the inquiry and proceedings are not delayed indefinitely as it hampers the brokerages of the customs broker. At the same time, the time limit should not be so strictly adhered to, even in cases of serious lapse on the part of the customs broker and where the inquiry involves certain complicated facts. Hon'ble Apex Court in *T.V. Usman Vs. Food Inspector, Tellicherry* reported in 1994 (1) S.C. 260 held that if the performance of a public duty is required to be discharged within a specific time which also confers a right on a person, the provision as to time limit will still have to be held as directory unless it is shown that a person on whom the right is conferred is prejudiced because of non performance of the duty within a specific time. Thus, cannot be permissible that the customs house agent is entitled to take benefit of his own wrong, on the ground that the process is not completed within the stipulated period. In such circumstances, if the provision is construed in such a rigid form and no flexibility is allowed, though it results into declaration of the entire action of the revenue as illegal, it would not ensure justice rather shall defeat it? Merely because the inquiry was not completed within a stipulated period, the customs broker may not be allowed to walk free, as his suspension cannot be continued beyond the period prescribed in the Regulation and his licences need not be restored. The Hon'ble Apex Court in the case of *Delhi Air take Services Pvt. Ltd. and another Vs. State of West Bengal and another* reported in 2011(a) SCC page 354 has clarified the above position by quoting an example of criminal law. It observed:

"where a statute imposes a public duty and proceeds to lay down the manner and time frame within which the duty shall be performed. The injustice or inconvenience resulting from a rigid adherence to the statutory prescriptions may not be relevant factor in holding such prescription to be only directory. For e.g., when dealing with provision relating to criminal law, legislative purpose is to be borne in mind for its proper interpretation. It is said that the purpose of criminal law is to permit everyone to go about the daily lives without fear of harm to person or property and it is in the interest of everyone that serious crime be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case, the Court is required to consider the triangulation of interests taking into consideration the position of the accused, the victim and his or her family or the public."

9. The circumstance for grant of license to Customs Broker is that the customs house agent has a direct access to the port, the revenue intended that there should be a regime of discipline governing such customs house agent and only a person who is qualified and in know-how of the business relating to the customs clearance would be entitled to be conferred with a licence to act as a customs house agent.

In order to continue the regime of discipline, the Commissioner of Customs is empowered to revoke a licence of the customs house agent and order forfeiture of his security if the customs house agent fails to comply with any of the conditions of the bond executed by him and he fails to comply with the provisions of the Regulation or indulge into an act which would amount to "misconduct".

Thus, we reaffirm that the purpose of prescription of the time limit by the CBLR Regulation, 2013 is to cast a duty on the Revenue Authorities to act within the time frame so that there remains no discretion to the revenue to continue the said action of suspension of licence for an indefinite period depriving and adversely affecting the interest of the licensee and simultaneously the purpose is that the licensee should not be permitted to take an advantage of some delay at the instance of the Revenue, which is beyond its control since the revenue administration needs to be granted

certain concessions which may be on account of administrative exigencies, and the department working at different levels through different persons.

10. The principles of fairness and equity demands a balancing situation that when there is deviation from the time schedule prescribed in the Regulation, on part of Revenue, the Revenue need to enumerate the reasons and attribute them to an officer dealing with it and also should account for every stage at which the delay occurs. Every endeavour should be made to adhere to the time schedule. In exceptional circumstances also, which are beyond the control of the revenue if the time schedule is not adhered to, an accountability be fastened on the Revenue, to cite reasons why the time schedule was not adhered to, and then if the explanation offered is reasonable and is not reflecting the casual attitude on behalf of the Revenue rather there is apparent malafide on part of the CB, in that case the time line has to be considered directory only. Thus, the non compliance thereof cannot be the ground to vitiate the show cause notice. We draw our support from the decision in the case of *Union of India Vs. R.S. Saini reported in 1999 (2) SCC 151* wherein Supreme Court held that the office memorandum fixing the time limit for completion of disciplinary proceedings is only a mid-line, non compliance of such office memorandum will not invalidate the punishment. The customs house agent, who is in a position of the delinquent and facing an inquiry is somehow similar to an inquiry in disciplinary proceedings on one hand and the revenue in the capacity of the administration on the other hand. CESTAT West Zonal Bench Mumbai also in *Unison Clearing Pvt. Ltd. Vs. Commissioner of Customs (Tribunal Mumbai)* held that if the time limits are construed as mandatory and the matter is put to an end, the purpose of Regulation would be defeated and so would be defeated the intention of legislature behind framing such a regulation. On the other hand, if there is no consequence stated in the regulation for non-adherence of time period for conducting the inquiry, the time line cannot be proved to be fatal to the outcome of the inquiry. Based on these observations the Tribunal had held that the Regulation is directory in nature.

11. Hon'ble Apex Court in *Topline Shoes Ltd. Vs. Corporation Bank reported in 2002 (6) SCC 33* held as follows:

The provision contained in a statute which is procedural in nature using the word "shall" be held to be mandatory, if it did not cause any prejudice else not. The emphasis, therefore, should not be upon the language employed in the provision, but the Court will have to examine whether the provision is intended to specify certain procedure or whether it confers certain rights in the individual and casts a corresponding duty on the officer concerned. The Court will have to examine as to what is the effect of such a provision and whether its non compliance would invalidate or render the proceedings void ab initio or it would result into imposition of lesser penalty or in issuance of directions to protect the individual against the action of the State. The language of the statute, the intention of the legislature would determine the impact of non compliance in facts and circumstance of a given case, before the Court construes a provision to be directory or mandatory.

In view of above discussed case law, we are of the opinion that the judgments on which reliance had been placed by the appellant taking a view that the revocation of a CHA license is bad in law since the time limit for completion of inquiry in terms of Regulation 20(5)/22(5) of CBLR, 2013/2018 has not been adhered to, are not applicable to the facts of the present case as most of these cases have dealt with the extraordinary delay caused at the instance of the revenue in conducting inquiry against the custom house agent, depriving them of their means of livelihood and it was observed that the purpose of prescribed time limit was to safeguard the interest of the custom broker and smooth import and export of goods. Whereas, present is the case of alleged fraud on part of the appellant. Adjudicating Authority has clearly observed the delaying strategy of the appellant's Director. Section 17 of Limitation Act while talking about effect

of fraud or mistake lays that the fraud vitiates the limitation prescribed. Thus, those are not applicable to the present case.

12. In the light of the entire above discussion, when facts of this case are looked into, we observe that after the show cause notice was served upon the appellant tried to delay investigation by not joining the investigation. It is also observed that vide his letter dated 30.10.2017, Shri Sanjeev Maggu had stated that no firm in the name of M/s. Leo Cargo Services ever existed at the address on which the hearing notices were served. Thus, the malafide intentions to not to enable the DRI officials to unearth the modus operandi of committing the alleged illegal act were very much apparent on the record. These reasons are sufficient to hold that the inquiry officer could not maintain the time line of 90 days for submitting the report. Accordingly, we are of opinion that the customs house agent cannot be permitted to take benefit of his own wrong, on the ground that the process is not completed within the stipulated period. In such circumstances, if the provision is construed in such a rigid form and no flexibility is allowed, though it results into declaration of the entire action of the revenue as illegal, it would not ensure justice rather shall defeat it? Thus, we answer the question framed, as above, as follows:

In view of the above noticed intention of CB to not to enable the Department to adhere to the impugned time limit despite that the illegal act of diverting the warehoused goods to domestic market was alleged against the said CB, the time line of Regulation 20(5) CBLR, 2013 is mere directory in nature and the non compliance thereof shall not vitiate the action taken against the defaulting CB.

13. Now coming to the merits of the case based on the documents/ loose papers as got recovered during the search of the residence of Shri Sanjeev Maggu and that of office premises of M/s. Riders India, M/s. Prime Time Exports, the public bonded warehouses, as were also got searched. The statements of Shri Sanjay Gahlot, warehouse keeper of M/s. Prime Time, statement of various others from the CHA Companies and the other companies/firms which were informed to be used by the appellants for committing the alleged act were recorded. All of them in corroboration have deposed that Shri Sanjeev Maggu despite himself being a Custom Broker but concealed his identity while dealing with the various companies and projecting himself as the owner of the fictitious companies to get the goods transferred from the customs warehouses to the domestic markets and that he only was providing all the documents relevant for the transfer of the goods without even submitting any re-warehousing certificates. The statement of the officers of Department were also recorded to the fact that during their visit to M/s. Rider India, Shri Sanjeev Maggu was found present. There has been admissions on record as is apparent from the statement of Raja Bhanskar alias Raja Bansal, proprietor of IEC Holder of M/s. Shree Shyam Enterprises that it was on Shri Sanjeev Maggu's instruction that he signed in a fake name as a witness for triple duty bond of a different firm M/s. Sparks Exports. Similarly, Shri Suresh Aggarwal, Chartered Accountant admitted that on the instruction of Shri Sanjeev Maggu and Shri Ramesh Wadhera that he got opened few firms based on the forged documents in the names of petty employees just for the purpose of evasion of Customs duty. There are many such admissions apparent on record. The statements recorded under Section 108 of the Customs Act are the statements given to the Customs officers who are not the police officers. Hence, the immunity against admissibility of these statements into evidence is not available to these statements. There is no apparent retraction by any of the witnesses for these statements nor there is any other document apparently on record produced by the appellant which may even prima facie rebut the said oral evidence and the said admissions on record. Thus, we are of the opinion that the adjudicating authorities have committed no error while denying the opportunity to cross-examine these witnesses and in holding the appellant to have hatched the alleged conspiracy for clandestine removal of warehoused goods from public bonded warehouses to domestic market without payment of customs duty by floating fictitious importer

firms. The Director of the appellant had committed forgery of documents for the purpose. Therefore, legal ground of the objection thereof is not sustainable due to the noticed mis-representation and fraud/ forgery. Hon'ble High Court of Punjab & Haryana in the case of *Shiv Shakti Steel Tube Vs. Comm. Reported as 2008(221)E.L.T. 166* has held that equity and compassion cannot be allowed to bend the arms of law in a case where the individual requires a status by practising fraud.

14. In view of above discussion, we are of opinion that there is no infirmity in the Order under challenge confirming the violation of the Regulation 10 (d) (g) and (q) of CBLR 2018/ Regulation 11 (d) (g) and (o) of CBLR, 2013 on part of the appellant. The cancellation of appellants licence with the forfeiture of the security deposit and the imposition of penalty upon the appellant is therefore, held to be sustainable. Appeal accordingly stands dismissed.

(Order pronounced in the open Court on 01.10.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 50858 of 2019 [DB]

Arising out of Order-in-Original No. 16/2017-18/VS/Commr(Import) C. No.
VIII (HQ)10/ACC-IMP/ADJ/ST/44/15, Dated: 29.03.2018
Passed by the Commissioner of Customs (Air Cargo Imports), New Delhi

**Date of Hearing: 24.06.2019
Date of Decision: 28.08.2019**

**M/s SMART TECHNOLOGIES
THROUGH ARVIND JAWA (PROPRIETOR) C-44, OKHLA
INDUSTRIAL AREA PHASE - I, NEW DELHI**

Vs

**COMMISSIONER OF CUSTOMS (AIR CARGO IMPORTS)
NEW CUSTOM HOUSE NEAR IGI AIRPORT NEW DELHI**

Appellant Rep by: Shri Somesh Arora, Adv.

Respondent Rep by: Shri Rakesh Kumar, AR

CORAM: Bijay Kumar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 51145/2019

Per: Bijay Kumar:

The appellants herein are the importers involved in the import of electronic items. They imported a consignment under Bill of Entry No. 9454459 dated 04.06.2015. The Department on the basis of indication by the officers of SIIB, ACC(Import) NCH, New Delhi for a 100% examination after they observed a substantial difference between the IGM and the said Bill of Entry filed by the notice, examined the goods. An envelope was found in the package showing the value of goods amounting to USD 6,890 which was the value as found mentioned in IGM as well. However, the declared value of the said consignment by the appellant was USD 890. On further examination of goods it was observed that the goods imported were five sets of standard transition as against one set declared in the Bill of Entry. During investigation, the statement of the proprietor of appellant alongwith that of all concerned including the CHA, M/s. Milap Logistics Pvt. Ltd. were recorded and the documents were collected from the airlines/carriers/banks, etc. On the basis thereof, the Department alleged under valuation as well as mis-declaration of the consignment under Bill of Entry No. 9454459 dated 04.06.2015. Resultantly, a show cause notice No. 92/2015 dated 20.08.2015 was served upon the appellant proposing the demand and recovery of differential customs duty amounting to Rs. 1,64,50,604/- alongwith the interest. The amount of Rs. 75Lakhs as already deposited by the appellant was proposed to be appropriated. The imposition of penalty under Section 114A and 114AA was also proposed. The said show cause notice was adjudicated vide the Order-in-Original No. 16/2017-18 dated 30.03.2018 confirming the aforesaid proposal with imposition of same amount of penalty as that of the aforesaid demand under both the Sections respectively. Being aggrieved, the appellant is before this Tribunal.

2. We have heard Shri Somesh Arora, Advocate for the Appellant and Shri Rakesh Kumar, Authorised Representative for the Respondent.

3. It is submitted on behalf of the appellant that the Order is liable to be set aside on the sole ground of violation of principles of natural justice as no opportunity was afforded to the appellant to either present the case or to be heard in the matter and the decision is as good as an ex-parte decision. It is

submitted that a request for keeping the adjudication in abeyance was made by the appellant seeking time to file an application in the Settlement Commission and also for Department to calculate the interest. It is submitted that personal hearing notices were never received by the appellant who was abroad from 13.01.2018 to 24.06.2018. Order is accordingly prayed to be set aside with the request for the opportunity of personal hearing being afforded to the appellant.

3.1 Learned Counsel has relied upon the case of *Surjit Singh and others Vs. State of Punjab reported at 1984 (18) E.L.T. 241 (S.C.)* impressing upon that the penalty cannot be imposed upon/enhanced without giving an opportunity of being heard. The decision of *Reji Kurian Vs. State Tax Officer, Goods & Services Tax, Mattancherry reported at 2018 (13) G.S.T.L. 260 (Ker.)* is also relied upon. It has been submitted that appellant was chronically sick who has been donated kidney by both of his parents and required treatment abroad for long intervals but, still in all its sincerity, the appellant has already paid duty and part interest. This fact was also brought to the notice of the Commissioner during the hearing dated 07.10.2016 and even prior to that the request was made to the Department to work out the figure of interest so that it could be deposited but there was no response to either of the requests of the appellant rather he confirmed the demand against him vide the Order under challenge, without appellant being heard.

3.2 It is also submitted that in the given circumstances, the Department was not even entitled to invoke extended period of limitation. The imposition of penalty under both the Sections i.e. 114A and 114AA of the Customs Act, 1962 has also been objected as both deal with the mis-declaration. It is submitted that penalty could be imposed under either of the said Sections to the discretion of the adjudicating authority but imposition of penalty under both these Section amounts to double jeopardy. With these submissions, the Order under challenge is prayed to be set aside and Appeal is prayed to be allowed.

4. While rebutting these arguments, learned Departmental Representative has submitted that it is not only the impugned Bill of Entry No. 9454459 dated 04.06.2015 but there has been as many as 190 Bill of Entries with respect to the prior imports by the appellant, as have been checked by the Department. In almost 98 cases, thereof the changes in invoices have been noticed. The noticed forgery has duly been acknowledged by the Proprietor of the appellant. His admission stands corroborated from the other respective documents as that of airways and even those as were received from banks. The appellant was intentionally under-valuing and mis-declaring his goods with the sole intention to evade the payment of Customs duty. The Department has committed no error while invoking the extended period of limitation. The observed guilt of the appellant stands well proved from the documents on record. Adjudicating Authority has committed no error while confirming the demand.

4.1 It is further submitted that scope of both the Sections i.e. 114A and 114AA of the Customs Act is different. There is no error when the penalty under both of them has been proposed and confirmed. Finally, submitted that the case laws as relied upon by the appellant is not applicable to the given facts and circumstances. The Appeal is prayed to be dismissed.

5. After hearing both the parties, we are of the opinion as follows:

5.1 The main ground praying for setting aside of the impugned Order-in-Original is the violation of principles of natural justice. But from the Order-in-Original we observe that the adjudicating authority below had afforded the personal hearing in the matter on 07.10.2016. The hearing was attended by the father of the Proprietor of the appellant. On the said date Shri KL Jawa had paid customs duty of Rs.1.64Cr. and revealed the desire to file an application in the Settlement Commission with the prayer to keep in abeyance the adjudication proceedings. Subsequent thereto several other opportunities of personal hearing were granted to the appellant. It is

observed that the adjudicating authority issued notices on 24.11.2017, 28.11.2017, 05.12.2017, 12.01.2017 and 31.01.2018 but neither there was an appearance on behalf of the appellant nor any proof was filed with respect of filing an application in the Settlement Commission as was mentioned on 07.10.2016 with the request for keeping the adjudication proceedings at abeyance. In the absence of the subsequent presence as well as the requested documents that too for a period of almost 11/2 Years the adjudicating authority below proceeded ahead with the Order under challenge. This perusal is sufficient for us to hold that the Order is not an ex-parte Order and it has been wrongly so alleged by the appellant. Sufficient opportunity seems to have been granted to the appellant by the Adjudicating Authority. Also, the absence of appellant from 13.01.2018 to 24.06.2018 due to being abroad for medical treatment for chronic illness is also not opined sufficient to explain as to what prevented his father who appeared on 07.10.2016 on his behalf, to further appear or to at least tender the requisite document. The appellant had otherwise been corresponding with the Department.

6. We observe that till date the appellant has not produced anything to show that they ever approached the Settlement Commission nor there is any other effort post 07.10.2016, the date of personal hearing when father of the appellant attended the same that any reminder for continued abeyance for calculation of interest was ever given to the Department. There is nothing on record to show as to why the interest could not have been calculated and deposited in full by the appellant. Also, there is nothing on record to show that the notices as issued post 07.10.2016 were given to the appellant at the wrong addresses. In the given circumstances, especially when the appellant had knowledge of pendency of proceedings before the adjudicating authority and had appeared once through his father but instead of submitting on merits had prayed abeyance of adjudication in view of the desire to appear before the Settlement Commission it was utmost required on the part of appellant to be diligent about the impugned adjudication. Absence of requisite due diligence on the part of the appellant cannot be a ground to extend any benefit in his favour. The ground of medical sickness of the Proprietor of appellant is already opined not relevant as the appellant had already marked his presence through the father of the Proprietor thereof. With these observations, we are of the firm opinion that neither the Order under challenge is an ex-parte Order as alleged nor there is violation of principles of natural justice as alleged. Rather sufficient efforts are apparent on the part of the adjudicating authority to serve repeated reminders to the appellant to appear and submit on merits. The appellant wilfully opted to not to avail the said opportunity. The Order under challenge cannot be set aside on the grounds of violation of principles of natural justice.

7. Coming to the merits of the case, we observe that Department after obtaining the documents from the respective banks of the importer and various airlines/carriers had observed that the appellant importer has systematically and with malafide intentions procured duplicate invoices or under-valued the consignment with express purpose of defrauding the Government Exchequer not only for the impugned Bill of Entry but also for the imports made during the period w.e.f. June 2010 to June, 2015. We observe that thrice the statements of Proprietor of appellant were recorded as on 11.06.2015, 25.06.2015 and 22.07.2015 under Section 108 of the Customs Act, 1962. There is the sufficient admission of the Proprietor of the appellant about the invoice dated 26.05.2015 issued by M/s. Patricia Hubbard Bomco Ind. Gloucester, USA retrieved from the consignment and also a copy obtained by the customs officers from the carrier M/s. UPS Jet Air Express showing the value of shipment covered under Bill of Entry No. 9454459 dated 04.06.2015 as USD 6890. It is also admitted that however, the total value thereof was declared at USD 890 FOB with the further admission that the said change in the value of the imported consignment was made keeping in view the cut throat competition in the market and in order to make some reasonable profits. The original invoices of value USD

6890 have been admitted to be intentionally replaced with the invoice having lesser value of USD890 to save the custom duty payable thereon which was done by the appellant by making a scanned copy thereof and by making the amendment therein. This admission is sufficient admission for alleged forgery on the part of the appellant to under-value the imported consignment with a clear intent to evade the customs duty.

8. Further, perusal of statement of Mr. Arvind Jawa (Proprietor of appellant) makes it clear that on earlier occasions also the appellant had similarly replaced the invoices showing the actual and higher value with the invoices showing lesser value and have thus repeatedly evaded the actual customs duty payable thereon. It is further observed that during the investigation the meticulous exercise with respect to comparing prior 192 Bills of Entry viz.-a-viz. the value reflected in the copy of 192 invoices, bills obtained from carrier/airlines and the bank statements of the appellant was done. The Department summarised that the appellant has resorted to similar replacement in as good as 130 cases thereof. Those were summarised in Annexure A to the show cause notice reflecting the short payment of customs duty amounting to Rs.1,23,05,963/- during the period w.e.f. August, 2010 to June, 2015. In 17 other cases for the period July and August, 2015 the differential customs duty has been observed as Rs.41,44,641/- where after the impugned demand of Rs.1,64,50,604/- being an evasion of customs duty has been proposed and has been confirmed vide the Order under challenge.

9. There is nothing on record produced by the appellant to contradict the said documents based whereupon the differential duty has been calculated and confirmed by the Department. Above all, there is no retraction of the statement of the Proprietor of appellant acknowledging the alleged guilt. Law has been settled by Hon'ble High Court of Punjab and Haryana in the case *Shiv Shakti Steel Tube Vs. Commissioner reported at 2008 (221) E.L.T. 166 (P&H)* wherein it was held that all statements made under Section 114 of Central Excise Act, 1944 by a witness or a party are exfacie admissible in evidence to sustain penalty. Section 14 of Central Excise Act, 1944 is par materia to Section 108 of Customs Act, 1962. We further draw our support from the decision of Hon'ble Apex Court in the case of *R.Vishwanatha Pillai Vs. State of Kerala reported at 2004 (2) SCC (105)* wherein it was held that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquires the status by practising fraud.

9.1 The fraud in the form of forgery is very much apparent in the present case not only from the non retracted confession of the Proprietor of appellant but stands corroborated from the various documents recovered during investigation pointing towards the alleged under valuation, as discussed above. We, therefore, hold that under valuation of goods has rightly been held by the adjudicating authority below. The demand of differential customs duty is, therefore, upheld.

10. Now coming to the issue of mis-declaration, we observe that admittedly, five sets of the impugned mechanical instruments were found in the impugned consignment at the time of examination, i.e. with respect to Bill of Entry No. 9454459 dated 04.06.2015 whereas the Bill of Entry was mentioning only one set. Apparently, there is the difference in description of the imported goods as mentioned in the invoices issued by the exporter to the one annexed with the Bill of Entry. Even the Bill of Entry mentions the import of one set only. There is no evidence to support that five sets is actually equal to one set. We, therefore, are of the opinion that the adjudicating authority has committed no error while confirming the proposed mis-declaration of the goods imported by the appellant.

11. Coming to the aspect of imposition of penalty under both the provisions i.e. 114A and 114AA of Customs Act, 1944 –

11.1 Section 114A prescribes penalty in case of short levy or non levy of duty, i.e. in a case where the duty or interest as determined under Sub-section 8 of Section 28 of the Act and the interest payable thereon under

Section 28AA of the Act has not been paid by the importer. Whereas, Section 114AA prescribes penalty for the use of false and incorrect material. No doubt, in case of use of false and incorrect material there would also be the short paid duty or interest but all cases of short paid duty or interest may not be the cases of use of false and incorrect material. Hence, the scope of both the Sections is out rightly distinct. We find no infirmity in the Order where, in the given facts and circumstances of admitted forgery duly corroborated by the documentary evidence, penalty under both the Sections have been imposed. The case law as relied upon by the appellant is not applicable to the facts because in the present case there is sufficient evidence about use of false and incorrect material.

12. The non calculation of interest (as alleged), if any, on the part of the adjudicating authority is also not relevant for extending any benefit to the appellant, in view of the fact that appellant out of his own volition has deposited the entire differential customs duty and even the part interest thereof that too beyond the period of 30 days from the date of the show cause notice.

13. In view of entire above discussion we are of the opinion that there is no infirmity noticed in the Order under challenge, same is hereby upheld and the Appeal is accordingly dismissed.

(Order pronounced in the open Court on 28.08.2019)

[Back](#)

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

PRINCIPAL BENCH - COURT NO. 1

Customs Appeal No. 50718 of 2018

(Arising out of Order-in-Appeal No. 07/2017 dated 05.12.2017
passed by the Commissioner of Customs, Jaipur)

DATE OF HEARING :
16.05.2018 DATE OF
DECISION : 16.05.2018

M/s Container Corporation of India Ltd Appellants
(Rep. by Sh. B.K. Singh,
Adv.)

VERSUS

CC, Jaipur-I Respondent
(Rep by Sh. Sanjay Jain,
DR)

CORAM : HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 51848/2018

PER JUSTICE (DR.) SATISH CHANDRA :

The present appeal is filed by the assessee-Appellants against the Order-in-Appeal No. 07/2017 dated 05.12.2017 passed by the Commissioner of Customs, Jaipur.

2. The brief facts of the case are that, the assessee-Appellants were appointed custodian of Inland Container Depot, Jodhpur, under Section 45(1) of the Customs Act, 1962 vide Public Notice dated 27.06.2001. It was expected that they have to fulfil the target of 7200 TEUs (20 meters length containers) and if there is a shortage in the target, then the assessee-Appellants will have to pay the Cost Recovery Charges as the Officers were appointed by the Department with them. It is the

submission of the learned counsel for the assessee-Appellants that, prior to 2009-10 the Cost Recovery Charges were waived, but in the year 2009-10, Rs. 96,00,000/- were paid by the assessee-Appellants to the Department. Since then, the recovery charges were raised and assessee-Appellants will have to pay. The same was assailed by the assessee-Appellants before this Tribunal and the Tribunal vide its Final Order No. 50679/2017 dated 08.02.2017 has remanded the matter to the competent authority to consider the exemption from the Cost Recovery Charges with the consent of the Board. The Board vide its letter dated 12.04.2017 has rejected the application for waiver of Cost Recovery Charges filed by the assessee-Appellants. So, the Cost Recovery Charges have been demanded. Being aggrieved, the assessee-Appellants have filed the present appeal.

3. With this background, we have heard Sh. B.K. Singh, learned counsel for the assessee-Appellants and Sh. Sanjay Jain, learned DR for the Revenue.

4. After hearing both sides at length and on perusal of the material available on record, it appears that as per the agreement, the assessee-Appellants will have to pay the Cost Recovery Charges of Customs Officers posted at ICD if failed to meet the target. In the past (2009-10), the assessee-Appellants have paid an amount of Rs. 96,00,000/- as Cost Recovery Charges. For waiver, the Board has rejected the application of the assessee-Appellants vide order dated 12.04.2017.

5. In the second round of litigation before the Tribunal, no new facts have emerged, as mentioned above. It is for the Department/Board either to waive or recover the Cost Recovery Charges. This is the discretion of the Department. It makes no difference if the Officers posted were from the cadre or out sourced by the Department.

6. In view of the above discussion and by considering the totality of the facts and circumstances of the case, we find no reason to interfere with the impugned order and the same is hereby sustained along with the reasons mentioned therein.

7. However, the assessee-Appellants may be at liberty to approach the Board to re-consider its decision, if advice so.

8. In the result, the appeal filed by the assessee-Appellants is dismissed.

(Dictated & pronounced in the open court)

(JUSTICE DR. SATISH CHANDRA)
PRESIDENT

(C.L.
MAHAR)MEMBER
(TECHNICAL)

Golay

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066**

BENCH-DB COURT - IV

Customs Stay Application No. C/Stay/50824/2018 in
Customs Appeal No. C/52393/2018 [DB]

[Arising out of Order-in-Appeal No. D-II-ICD-TKD-IMP-810-2018 dated 24/04/2018 passed by the Commissioner of CGST & Central Excise, Delhi-I]

C.C.-New Delhi(ICD TKD)(Import) ...Appellant
Vs.
J G Impex Pvt. Ltd. ...Respondent

Present for the Appellant : Mr. Rakesh Kumar, DR
Present for the Respondent: None

Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing : 17.09.2018
Pronounced on : 25.10.2018

FINAL ORDER NO. 53157/2018

PER: RACHNA GUPTA

Present is an Appeal against the Order of Commissioner of Customs (Appeals) bearing No. 180/17 dated 24.04.2018 as filed by the Department.

2 Facts relevant for the purpose are that the assessee, M/s J G Impex Pvt. Ltd. herein had filed a refund claim under special refund mechanism as provided for under the exemption C/Stay/50824/2018 in C/52393/2018 [DB] Notification No. 102/2007-Cus dated 14.09.2007 (herein referred to as the said Notification) for an amount of Rs. 3,48,624/-. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975 (herein after referred to as the Act) the details of refund are as follows:

S. No	FileNo.	UIDNO	D.O.A.	B/ENo.	B/EDated	TR-6 Dated	Amount of SAD paid	Amount of refund claimed	Amount of refund sanctioned
1.	3018	1613	27.03.17	3339232	23.11.15	24.11.15	139731.80	139731.80	Timebarred
				3393588	27.11.15	28.11.15	208892.70	208892.70	
Total							348624.50	348624.50	

The Assistant Commissioner vide order No. 5230 dated 08.09.2016 has rejected the said claim on the ground that the same has been filed after the prescribed time limit of one year from the date of payment and as such is rejected as being barred by time. Being aggrieved, the assessee approached the first appellate authority, i.e. the Commissioner of Customs (Appeals). He, vide the Order under challenge has held that upholding the limitation period starting from the date of payment of duty as prescribed in amended Notification No. 93/2008-Cus would amount to allowing commencement of limitation period for refund claimed before the right of refund has even accrued and that no period of limitation is prescribed under [Section 3\(5\)](#) of the Customs Tariff Act. Accordingly, the Appeal of assessee was allowed accepting the refund claimed. Department being aggrieved is in Appeal before us.

C/Stay/50824/2018 in C/52393/2018 [DB]

3. We have heard Shri Sunil Kumar, Ld. DR for the Department/ appellant. However none is present for the respondent. He therefore hereby proceed to decide the Appeal ex-parte considering defendant.

4. It is submitted that the Commissioner(Appeals) has based his Order on the decision of Hon'ble High Court of Delhi in the matter of M/s Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi 2014 (304) ELT 660 (Del.) and though the Appeal whereof even before Hon'ble Supreme Court has been dismissed but Hon'ble Apex Court has dismissed the Appeal only on the ground of limitation hence the question of law involved herein is still kept open. It is impressed upon that Notification No. 93/2008-Cus dated 01.08.2008 is the Notification amending the Notification No. 102/2007 vide which a time period of one year from the date of payment for the filing of refund claims by an importer has been introduced. Thus, the period for filing the impugned refund claim is clearly of one year. Since the refund claim in question was not filed within the said one year, the original Adjudicating Authority had rightly dismissed the same and the Commissioner(Appeals) has committed an error while allowing the assessee's claim. Order is accordingly prayed to be set aside and Appeal is prayed to be allowed.

5. After hearing, we are of the opinion as follows:-

C/Stay/50824/2018 in C/52393/2018 [DB] The claim herein is with respect to special additional duty of Customs as leviable under [Section 3\(5\)](#) of Customs Tariff Act, 1975. It is important to look into the said provision which reads as follows:

"Section 3 Levy of additional duty equal to excise duty, sales tax, local taxes and other charges-

- (1) -----
- (2) -----
- (3) -----
- (4) -----
- (5) If the Central Government is satisfied that it is

necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.

Explanation - In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs and where such taxes, or, as the case may be, such charges are C/Stay/50824/2018 in C/52393/2018 [DB] leviable at different rates the highest such tax or, as the case may be, such charge."

It is brought to our notice that the said SAD exemption has been granted vide Notification No. 102/2007 dated 14.09.2007 as issued in accordance of [Section 25\(1\)](#) of the Customs Act which provides power to the Central Government to grant exemption from duty by way of Notification. This Notification exempts the goods falling within the first schedule to the [Customs Tariff Act](#), 1975 when imported into India for subsequent sale, from the whole of the additional duty of Customs leviable thereupon in accordance of the above mentioned [Section 3\(5\)](#) of Customs Tariff Act. However, subject to such conditions as mentioned in the Notification itself in para 2 thereof, the first condition reads as follows:

(a) The importer of the said goods shall pay all duties including the additional duty of Customs leviable thereon, as applicable at the time of importation of goods.

The other relevant condition is:

(c) The importer shall file a claim for refund of said additional duty of Customs paid on the imported goods with the jurisdictional Customs officer. This Notification stands

amended vide Notification No. 93/2008 dated 01.08.2008 vide which a time period of one year from the date of payment for filing of refund claims by an importer under the aforesaid Notification was introduced.

C/Stay/50824/2018 in C/52393/2018 [DB] Commissioner (Appeals) has held that the amendment since introduced for the first time by a Notification but without a statutory amendment, the same cannot prevail.

6. In view of the above discussion, we are of the opinion that the moot question to be adjudicated in the present case is as to whether there is any time limit prescribed by law for filing the refund claim of additional duty of Customs as stands exempted vide the Notification No. 102/2007.

No doubt, the said Notification is silent about any time period for filing the said claim. But the Notification exempts the goods in first schedule of [Customs Tariff Act](#) from being leviable to the additional duty of Customs. However, the Notification itself mandates the deposit of the said additional duty at the time of importation of the goods and thereafter to get the refund. From this perusal, one thing becomes abundantly clear that the importer has the knowledge of his entitlement to file the refund of additional duty of Customs at the time of the payment of said duty itself i.e. at the time, the product being in first schedule (under the exempted category) is imported. Resultantly, we are of the opinion that for claiming the refund of additional duty nothing else has to happen or to be done by the assessee after the payment of said additional duty of C/Stay/50824/2018 in C/52393/2018 [DB] Customs. To our opinion, this particular fact distinguishes the present case from the case of M/s Sony India Pvt. Ltd. (supra).

7. Also, the amending Notification No. 93/2008 is arising out of the statute, i.e. [Section 25\(2A\)](#) of the Customs Act, 1962 hence, the findings of the Commissioner(Appeals) that the amendment introducing one year from the date of payment of additional duty as a time to claim the refund thereof is without statutory amendment, is not sustainable rather is opined to be legally erroneous. Otherwise also, the said amendment came into force w.e.f. 01.08.2008 that too in accordance of another statutory provision, i.e. [Section 25\(4\)](#) of the Customs Act. The refund in question was filed on 27.03.2017, i.e. much beyond the amended Notification and also the [Customs Act](#) itself contains a provision about claim of refund of duty in [Section 27](#) thereof which reads as follows:-

(i) Any person claiming refund of any duty or interest, paid by him or borne by him may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs before the expiry of one year from the date of payment of such duty or interest.

C/Stay/50824/2018 in C/52393/2018 [DB]

8. The words used in the provision makes it clear that statute has not distinguished the nature of duty or interest, the refund whereof is claimed. Hence, even if we do not look into the amended Notification No. 93/2008, the period of limitation as applicable for filing the refund claim under Notification 102/2008 will otherwise be a period of one year in accordance of the aforesaid [Section 27](#) of Customs Act. Thus, we cannot rule out that the Notification No. 93/2008 came into existence to align the statutory provision with the Notification which was silent as far as the period of limitation for the purpose as mentioned therein is concerned. Otherwise also, on examination of relevant provision it appears that the provisions of limitation are excluded, it would nonetheless be still open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation. This Tribunal in the case of Uttam Sucrotech International Pvt. Ltd. Vs. Union of India 2011 (264) E.L.T. 502 (Delhi) has held that the applicability of the provisions of limitation Act therefore is to be judged not from the terms of limitation Act but by the provisions of the concerned act. The Tribunal has gone to the extent of appreciating that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions even of [Section 5](#) of the Limitation Act. The Hon'ble Apex Court in the case Naseeruddin Vs. Sitaram Aggarwal C/Stay/50824/2018 in C/52393/2018 [DB] A.I.R. 2003 (S.C.)1543 has held that in the absence of statutory provisions, no inherent powers of the court exists to condone the delay. It was also held that a statutory right has to be exercised in the mode, manner and limitation specified in the special statute itself. The Hon'ble Apex Court in an earlier decision in

the case of Titaghur Papermills Company Ltd. Vs. State of Orissa SCC PP 440-41 para 11 has held:

"11. it is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. Vs. Hawkesford* in the following passage: (ER p. 495) There are three classes of cases in which a liability may be established founded upon a statute. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

In still another case titled as *Munshiram Vs. Municipal Committee Chheharta* SSC page 88 para 23, the Hon'ble Apex Court held that when a Revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum C/Stay/50824/2018 in C/52393/2018 [DB] and in that manner and all other forums and modes of seeking said remedy are excluded. Except in the case where the statutory authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or has resorted to invoke the provisions which are repealed. Apparently and admittedly none is the fact of the present Appeal. It is also not the case that Notification 93/2008 has been repealed. In absence thereof also, as already discussed above, [Section 27](#) of Customs Act prescribes a period during which refund of any type can be claimed. The Hon'ble Apex Court in a recent decision *Commissioner of Customs (Import Mumbai) Vs. M/s Dilip Kumar & Co.* 2018 TIOL 302 (S.C.)-Cus-CB has held that an exemption Notification has to be strictly construed, i.e. if the person claiming exemption does not fall strictly within the letter of Notification, he cannot claim the exemption. The Hon'ble Apex Court while relying upon its previous decision in the case *District Mining Officer Vs. Tata Iron & Steel Company* 2001 (7) SCC 358 had noticed as follows:-

"... A statute is an edict of the Legislature and in construing a statute, it is necessary, to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the Court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that C/Stay/50824/2018 in C/52393/2018 [DB] interpretation which represents the true intention of the Legislature. This task very often raises the difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for.

Nonetheless, the function of the Courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed..." It was also held that the well settled principle is that when the words in a statute are clear, C/Stay/50824/2018 in C/52393/2018 [DB] plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. [In Kanai Lal Sur v. Paramnidhi Sadhukhan](#), AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other

hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

In view of entire above discussion, we are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of [Section 27](#) of the Customs Act, 1962. We therefore hold that the Commissioner(Appeals) has committed an error while giving an expanded interpretation qua limitation to favour assessee. We therefore set aside the said Order and allow the present Appeal rejecting the impugned refund claimed.

[Pronounced in the open Court on 25.10.2018]

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-
110066
BENCH-DB
COURT NO. IV**

**Customs Stay Application No. C/Stay/50852/2018 in
Customs Appeal No. C/52435/2018[DB]**

Arising out of Order-in-Appeal No. CC-A-CC-A-CUS-D-II-ICD-TKD-EXP-
1022-1028-2018, Dated: 10.5.2018

Passed by the Commissioner of CGST and Central Excise, New Delhi (ICD
ITC)

**COMMISSIONER OF CUSTOMS
NEW DELHI
(ICD TKD) (IMPORT)**

Vs

INDU EXPORTERS

Appellant Rep by: Mr Rakesh Kumar, DR
Respondent Rep by: None

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 53156/2018

**Date of Hearing: 17.9.2018
Date of Decision: 25.10.2018**

Per: Rachna Gupta:

Present is an Appeal against the Order of Commissioner of Customs (Appeals) bearing No. 74/2016 dated 08.05.2018 as filed by the Department.

2. Facts relevant for the purpose are that the assessee, M/s Indu Exporters herein had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus dated 14.09.2007 (herein referred to as the said Notification) for an amount of Rs. 2,02,592/-. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975 (herein after referred to as the Act) the details of refund are as follows:

S. No.	File No.	D.O.A.	UID No.	B/E No.	B/E dated	TR-6 Dated	Amount of SAD paid	Amount of Refund Claimed
1	3828/15	08.03.16	1283/16	6601363	30.08.14	04.09.14	27855	27855
2				6672097	06.09.14	11.09.14	28388	28388
3				6819067	19.09.14	23.09.14	28197	28197
4				6908314	28.09.14	01.10.14	30233	30233
5				6908313	28.09.1	30.09.14	29540	29540
6				7265093	04.11.14	10.11.14	28681	28681
7				7272408	05.11.14	13.11.14	29698	29698
Total							2,02,592	2,02,592

The Assistant Commissioner vide order No. 5230 dated 08.09.2016 has rejected the said claim on the ground that the same has been filed after the prescribed time limit of one year from the date of payment and as such is rejected as being barred by time. Being aggrieved, the assessee approached the first appellate authority, i.e. the Commissioner of Customs (Appeals).

He, vide the Order under challenge has held that upholding the limitation period starting from the date of payment of duty as prescribed in amended Notification No. 93/2008-Cus would amount to allowing commencement of limitation period for refund claimed before the right of refund has even accrued and that no period of limitation is prescribed under Section 3(5) of the Customs Tariff Act. Accordingly, the Appeal of assessee was allowed accepting the refund claimed. Department being aggrieved is in Appeal before us.

3. We have heard Shri Rakesh Kumar, Ld. DR for the Department/appellant. However none is present for the respondent. He therefore hereby proceed to decide the Appeal ex-parte considering defendant.

4. It is submitted that the Commissioner(Appeals) has based his Order on the decision of Hon'ble High Court of Delhi in the matter of *M/s Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi 2014 (304) ELT 660 (Del.)* and though the Appeal whereof even before Hon'ble Supreme Court has been dismissed but Hon'ble Apex Court has dismissed the Appeal only on the ground of limitation hence the question of law involved herein is still kept open. It is impressed upon that Notification No. 93/2008-Cus dated 01.08.2008 is the Notification amending the Notification No. 102/2007 vide which a time period of one year from the date of payment for the filing of refund claims by an importer has been introduced. Thus, the period for filing the impugned refund claim is clearly of one year. Since the refund claim in question was not filed within the said one year, the original Adjudicating Authority had rightly dismissed the same and the Commissioner(Appeals) has committed an error while allowing the assessee's claim. Order is accordingly prayed to be set aside and Appeal is prayed to be allowed.

5. After hearing, we are of the opinion as follows:-

The claim herein is with respect to special additional duty of Customs as leviable under Section 3(5) of Customs Tariff Act, 1975. It is important to look into the said provision which reads as follows:

"Section 3 Levy of additional duty equal to excise duty, sales tax, local taxes and other charges—

(1) -----

(2) -----

(3) -----

(4) -----

(5) *If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.*

Explanation – *In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs and where such taxes, or, as the case may be, such charges are leviable at different rates the highest such tax or, as the case may be, such charge."*

It is brought to our notice that the said SAD exemption has been granted vide Notification No. 102/2007 dated 14.09.2007 as issued in accordance of

Section 25(1) of the Customs Act which provides power to the Central Government to grant exemption from duty by way of Notification. This Notification exempts the goods falling within the first schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale, from the whole of the additional duty of Customs leviable thereupon in accordance of the above mentioned Section 3(5) of Customs Tariff Act. However, subject to such conditions as mentioned in the Notification itself in para 2 thereof, the first condition reads as follows:

(a) The importer of the said goods shall pay all duties including the additional duty of Customs leviable thereon, as applicable at the time of importation of goods.

The other relevant condition is:

(c) The importer shall file a claim for refund of said additional duty of Customs paid on the imported goods with the jurisdictional Customs officer.

This Notification stands amended vide Notification No. 93/2008 dated 01.08.2008 vide which a time period of one year from the date of payment for filing of refund claims by an importer under the aforesaid Notification was introduced. Commissioner (Appeals) has held that the amendment since introduced for the first time by a Notification but without a statutory amendment, the same cannot prevail.

6. In view of the above discussion, we are of the opinion that the moot question to be adjudicated in the present case is as to whether there is any time limit prescribed by law for filing the refund claim of additional duty of Customs as stands exempted vide the Notification No. 102/2007.

No doubt, the said Notification is silent about any time period for filing the said claim. But the Notification exempts the goods in first schedule of Customs Tariff Act from being leviable to the additional duty of Customs. However, the Notification itself mandates the deposit of the said additional duty at the time of importation of the goods and thereafter to get the refund. From this perusal, one thing becomes abundantly clear that the importer has the knowledge of his entitlement to file the refund of additional duty of Customs at the time of the payment of said duty itself i.e. at the time, the product being in first schedule (under the exempted category) is imported. Resultantly, we are of the opinion that for claiming the refund of additional duty nothing else has to happen or to be done by the assessee after the payment of said additional duty of Customs. To our opinion, this particular fact distinguishes the present case from the case of M/s Sony India Pvt. Ltd. (supra).

7. Also, the amending Notification No. 93/2008 is arising out of the statute, i.e. Section 25(2A) of the Customs Act, 1962 hence, the findings of the Commissioner(Appeals) that the amendment introducing one year from the date of payment of additional duty as a time to claim the refund thereof is without statutory amendment, is not sustainable rather is opined to be legally erroneous. Otherwise also, the said amendment came into force w.e.f. 01.08.2008 that too in accordance of another statutory provision, i.e. Section 25(4) of the Customs Act. The refund in question was filed on 08.03.2016, i.e. much beyond the amended Notification and also the Customs Act itself contains a provision about claim of refund of duty in Section 27 thereof which reads as follows:-

(i) Any person claiming refund of any duty or interest, paid by him or borne by him may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs before the expiry of one year from the date of payment of such duty or interest.

8. The words used in the provision makes it clear that statute has not distinguished the nature of duty or interest, the refund whereof is claimed. Hence, even if we do not look into the amended Notification No. 93/2008, the period of limitation as applicable for filing the refund claim under

Notification 102/2008 will otherwise be a period of one year in accordance of the aforesaid Section 27 of Customs Act. Thus, we cannot rule out that the Notification No. 93/2008 came into existence to align the statutory provision with the Notification which was silent as far as the period of limitation for the purpose as mentioned therein is concerned. Otherwise also, on examination of relevant provision it appears that the provisions of limitation are excluded, it would nonetheless be still open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation. This Tribunal in the case of *Uttam Sucrotech International Pvt. Ltd. Vs. Union of India* 2011 (264) E.L.T. 502 (Delhi) has held that the applicability of the provisions of limitation Act therefore is to be judged not from the terms of limitation Act but by the provisions of the concerned act. The Tribunal has gone to the extent of appreciating that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions even of Section 5 of the Limitation Act. The Hon'ble Apex Court in the case *Naseeruddin Vs. Sitaram Aggarwal* A.I.R. 2003 (S.C.) 1543 has held that in the absence of statutory provisions, no inherent powers of the court exists to condone the delay. It was also held that a statutory right has to be exercised in the mode, manner and limitation specified in the special statute itself. The Hon'ble Apex Court in an earlier decision in the case of *Titaghur Papermills Company Ltd. Vs. State of Orissa* SCC PP 440-41 para 11 has held:

"11. it is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. Vs. Hawkesford in the following passage: (ER p. 495)

..... There are three classes of cases in which a liability may be established founded upon a statute. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

In still another case titled as *Munshiram Vs. Municipal Committee Chheharta* SSC page 88 para 23, the Hon'ble Apex Court held that when a Revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all other forums and modes of seeking said remedy are excluded. Except in the case where the statutory authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or has resorted to invoke the provisions which are repealed. Apparently and admittedly none is the fact of the present Appeal. It is also not the case that Notification 93/2008 has been repealed. In absence thereof also, as already discussed above, Section 27 of Customs Act prescribes a period during which refund of any type can be claimed. The Hon'ble Apex Court in a recent decision *Commissioner of Customs (Import Mumbai) Vs. M/s Dilip Kumar & Co.* has held that an exemption Notification has to be strictly construed, i.e. if the person claiming exemption does not fall strictly within the letter of Notification, he cannot claim the exemption. The Hon'ble Apex Court while relying upon its previous decision in the case *District Mining Officer Vs. Tata Iron & Steel Company* 2001 (7) SCC 358 had noticed as follows:-

"... A statute is an edict of the Legislature and in construing a statute, it is necessary, to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the Court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. This task very often raises the difficulties because of various reasons, inasmuch as the words

used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for.

Nonetheless, the function of the Courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed..." It was also held that the well settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

In view of entire above discussion, we are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962. We therefore hold that the Commissioner(Appeals) has committed an error while giving an expanded interpretation qua limitation to favour assessee. We therefore set aside the said Order and allow the present Appeal rejecting the impugned refund claimed.

(Pronounced in the open Court on 25.10.2018)

[Back](#)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

BENCH-DB COURT - IV

Customs Stay Application No. C/Stay/50851/2018 in
Customs Appeal No. C/52434/2018[DB]

[Arising out of Order-in-Appeal No. CC-A-CUS-D-II-ICD-TKD- IMPORT-1122-2018
dated 28/05/2018 passed by the Commissioner of CGST & Central Excise, Delhi-
I]

C.C.-New Delhi(ICD TKD)(Import)
Vs.

...Appellant

D K Impotrade

..Respondent

Present for the Appellant : Mr. Rakesh Kumar, DR
Present for the Respondent: None

Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing : 17.09.2018
Pronounced on : 25.10.2018

FINAL ORDER NO. _53155/2018

PER: RACHNA GUPTA

Present is an Appeal against the Order of Commissioner of Customs (Appeals)
bearing No. 133/17 dated 28.05.2018 as filed by the Department.

2. Facts relevant for the purpose are that the assessee, M/s D K Impotrade herein had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus dated 14.09.2007 (herein C/Stay/50851/2018 in C/52434/2018[DB] referred to as the said Notification) for an amount of Rs. 2,33,125/-. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975 (herein after referred to as the Act) the details of refund are as follows:

S. No	File No.	UID No.	D.O.A.	B/ENo.	B/ED ated	TR-6 Dated	Amount ofSADP aid	Amo unto f Refu ndCl aim ed	Amo unt ofRef undS ancti oned
1.	3758	1086	29.02.16	7465834	22.11.14	27.11.14	28922.50	28922	Time barred
2.				8008676	16.01.15	19.01.15	28781.60	28781	
3.				8008674	16.01.15	19.01.15	29077.60	29077	
4.				8194997	04.02.15	10.02.15	28714.00	28714	
5.				8155032	30.01.15	03.02.15	29520.80	29520	
6.				8155030	30.01.15	03.02.15	29118.20	29118	
7.				7767093	22.12.14	24.12.14	30123.10	30123	
8.				8279432	11.02.15	20.02.15	28870.70	28870	
Total							233128.50	2,33,125	

The Assistant Commissioner vide order No. 5230 dated 08.09.2016 has rejected the said claim on the ground that the same has been filed after the prescribed time limit of one year from the date of payment and as such is rejected as being barred by time. Being aggrieved, the assessee approached the first appellate authority, i.e. the Commissioner of Customs (Appeals). He, vide the Order under challenge has held that upholding the limitation period starting from the date of payment of duty as prescribed in amended Notification No. 93/2008-Cus would amount to allowing commencement of limitation period for refund claimed before the right of refund has even accrued and that no period of limitation is prescribed under [Section 3\(5\)](#) of the Customs Tariff Act. Accordingly, the C/Stay/50851/2018 in C/52434/2018[DB] Appeal of assessee was allowed accepting the refund claimed. Department being aggrieved is in Appeal before us.

3. We have heard Shri Rakesh Kumar, Ld. DR for the Department/ appellant. However none is present for the respondent. He therefore hereby proceed to decide the Appeal ex-parte considering defendant.

4. It is submitted that the Commissioner(Appeals) has based his Order on the decision of Hon'ble High Court of Delhi in the matter of M/s Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi 2014 (304) ELT 660 (Del.) and though the Appeal whereof even before Hon'ble Supreme Court has been dismissed but Hon'ble Apex Court has dismissed the Appeal only on the ground of limitation hence the question of law involved herein is still kept open. It is impressed upon that Notification No. 93/2008-Cus dated 01.08.2008 is the Notification amending the Notification No. 102/2007 vide which a time period of one year from the date of payment for the filing of refund claims by an importer has been introduced. Thus, the period for filing the impugned refund claim is clearly of one year. Since the refund claim in question was not filed within the said one year, the original Adjudicating Authority had rightly dismissed the same and the Commissioner(Appeals) has committed an error while allowing the assessee's claim. Order is accordingly prayed to be set aside and Appeal is prayed to be allowed.

5. After hearing, we are of the opinion as follows:-

The claim herein is with respect to special additional duty of Customs as leviable under [Section 3\(5\)](#) of Customs Tariff Act, 1975. It is important to look into the said provision which reads as follows:

"Section 3 Levy of additional duty equal to excise duty, sales tax, local taxes and other charges-

(1) -----

(2) -----

(3) -----

(4) -----

(5) If the Central Government is satisfied that it is

necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.

Explanation - In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs and where C/Stay/50851/2018 in

C/52434/2018[DB] such taxes, or, as the case may be, such charges are leviable at different rates the highest such tax or, as the case may be, such charge."

It is brought to our notice that the said SAD exemption has been granted vide Notification No. 102/2007 dated 14.09.2007 as issued in accordance of Section 25(1) of the Customs Act which provides power to the Central Government to grant exemption from duty by way of Notification. This Notification exempts the goods falling within the first schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale, from the whole of the additional duty of Customs leviable thereupon in accordance of the above mentioned Section 3(5) of Customs Tariff Act. However, subject to such conditions as mentioned in the Notification itself in para 2 thereof, the first condition reads as follows:

(a) The importer of the said goods shall pay all duties including the additional duty of Customs leviable thereon, as applicable at the time of importation of goods.

The other relevant condition is:

(c) The importer shall file a claim for refund of said additional duty of Customs paid on the imported goods with the jurisdictional Customs officer. This Notification stands amended vide Notification No. 93/2008 dated 01.08.2008 vide which a time period of one year from the date of payment for filing of refund claims by C/Stay/50851/2018 in C/52434/2018[DB] an importer under the aforesaid Notification was introduced. Commissioner (Appeals) has held that the amendment since introduced for the first time by a Notification but without a statutory amendment, the same cannot prevail.

6. In view of the above discussion, we are of the opinion that the moot question to be adjudicated in the present case is as to whether there is any time limit prescribed by law for filing the refund claim of additional duty of Customs as stands exempted vide the Notification No. 102/2007.

No doubt, the said Notification is silent about any time period for filing the said claim. But the Notification exempts the goods in first schedule of [Customs Tariff Act](#) from being leviable to the additional duty of Customs. However, the Notification itself mandates the deposit of the said additional duty at the time of importation of the goods and thereafter to get the refund. From this perusal, one thing becomes abundantly clear that the importer has the knowledge of his entitlement to file the refund of additional duty of Customs at the time of the payment of said duty itself i.e. at the time, the product being in first schedule (under the exempted category) is imported. Resultantly, we are of the opinion that for claiming the refund of additional duty nothing else has to happen or to be done by the assessee after the payment of said additional duty of C/Stay/50851/2018 in C/52434/2018[DB] Customs. To our opinion, this particular fact distinguishes the present case from the case of M/s Sony India Pvt. Ltd. (supra).

7. Also, the amending Notification No. 93/2008 is arising out of the statute, i.e. [Section 25\(2A\)](#) of the Customs Act, 1962 hence, the findings of the Commissioner(Appeals) that the amendment introducing one year from the date of payment of additional duty as a time to claim the refund thereof is without statutory amendment, is not sustainable rather is opined to be legally erroneous. Otherwise also, the said amendment came into force w.e.f. 01.08.2008 that too in accordance of another statutory provision, i.e. [Section 25\(4\)](#) of the Customs Act. The refund in question was filed on 29.02.2016, i.e. much beyond the amended Notification and also the [Customs Act](#) itself contains a provision about claim of refund of duty in [Section 27](#) thereof which reads as follows:-

(i) Any person claiming refund of any duty or interest, paid by him or borne by him may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs before the expiry of one year from the date of payment of such duty or

interest.

8. The words used in the provision makes it clear that statute has not distinguished the nature of duty or interest, the refund whereof is claimed. Hence, even if we do not look into the amended Notification No. 93/2008, the period of limitation as applicable for filing the refund claim under Notification 102/2008 will otherwise be a period of one year in accordance of the aforesaid [Section 27](#) of Customs Act. Thus, we cannot rule out that the Notification No. 93/2008 came into existence to align the statutory provision with the Notification which was silent as far as the period of limitation for the purpose as mentioned therein is concerned. Otherwise also, on examination of relevant provision it appears that the provisions of limitation are excluded, it would nonetheless be still open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation. This Tribunal in the case of Uttam Sucrotech International Pvt. Ltd. Vs. Union of India 2011 (264) E.L.T. 502 (Delhi) has held that the applicability of the provisions of limitation Act therefore is to be judged not from the terms of limitation Act but by the provisions of the concerned act. The Tribunal has gone to the extent of appreciating that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions even of [Section 5](#) of the Limitation Act. The Hon'ble Apex Court in the case Naseeruddin Vs. Sitaram Aggarwal C/Stay/50851/2018 in C/52434/2018[DB] A.I.R. 2003 (S.C.)1543 has held that in the absence of statutory provisions, no inherent powers of the court exists to condone the delay. It was also held that a statutory right has to be exercised in the mode, manner and limitation specified in the special statute itself. The Hon'ble Apex Court in an earlier decision in the case of Titaghur Papermills Company Ltd. Vs. State of Orissa SCC PP 440-41 para 11 has held:

"11. it is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. Vs. Hawkesford in the following passage: (ER p. 495) There are three classes of cases in which a liability may be established founded upon a statute. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

In still another case titled as Munshiram Vs. Municipal Committee Chheharta SSC page 88 para 23, the Hon'ble Apex Court held that when a Revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all other forums and modes of C/Stay/50851/2018 in C/52434/2018[DB] seeking said remedy are excluded. Except in the case where the statutory authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or has resorted to invoke the provisions which are repealed. Apparently and admittedly none is the fact of the present Appeal. It is also not the case that Notification 93/2008 has been repealed. In absence thereof also, as already discussed above, [Section 27](#) of Customs Act prescribes a period during which refund of any type can be claimed. The Hon'ble Apex Court in a recent decision Commissioner of Customs (Import Mumbai) Vs. M/s Dilip Kumar & Co. 2018 TIOL 302 (S.C.)-Cus-CB has held that an exemption Notification has to be strictly construed, i.e. if the person claiming exemption does not fall strictly within the letter of Notification, he cannot claim the exemption. The Hon'ble Apex Court while relying upon its previous decision in the case District Mining Officer Vs. Tata Iron & Steel Company 2001 (7) SCC 358 had noticed as follows:-

"... A statute is an edict of the Legislature and in construing a statute, it is necessary, to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the Court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the C/Stay/50851/2018 in C/52434/2018[DB] Legislature. This task very often raises the difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for.

Nonetheless, the function of the Courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed..." It was also held that the well settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be C/Stay/50851/2018 in C/52434/2018[DB] inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In *Kanai Lal Sur v. Paramnidhi Sadhukhan*, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

In view of entire above discussion, we are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962. We therefore hold that the Commissioner(Appeals) has committed an error while giving an expanded interpretation qua limitation to favour assessee. We therefore set aside the said Order and allow the present Appeal rejecting the impugned refund claimed.

[Pronounced in the open Court on 25.10.2018]

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-
110066
BENCH-DB
COURT NO. IV**

**Customs Stay Application No. C/Stay/50853/2018 in
Customs Appeal No. C/52436/2018 [DB]**

Arising out of Order-in-Appeal No. CC-A-CUS-D-II-ICD-TKD-IMPORT-969-
2018, Dated: 3.5.2018

Passed by the Commissioner of CGST and Central Excise, Delhi-I

**Date of Hearing: 17.9.2018
Date of Decision: 25.10.2018**

**COMMISSIONER OF CUSTOMS
NEW DELHI
(ICD TKD)(IMPORT)**

Vs

NAV BHARAT TRADING CORPORATION

Appellant Rep by: Mr Rakesh Kumar, DR

Respondent Rep by: None

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 53154/2018

Per: Rachna Gupta:

Present is an Appeal against the Order of Commissioner of Customs (Appeals) bearing No. 596/17 dated 03.05.2018 as filed by the Department.

2. Facts relevant for the purpose are that the assessee, M/s Nav Bharat Trading Corporation herein had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus dated 14.09.2007 (herein referred to as the said Notification) for an amount of Rs. 47,471/-. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975 (herein after referred to as the Act) the details of refund are as follows:

S. No	File No.	UID No.	D.O.A.	B/E No.	B/E Dated	TR-6 Dated	Amount of SAD Paid	Amount of Refund Claimed
1.	9788/16	6002	31.03.2017	4107213	01.02.16	09.02.16	47471.20	47471
Total							47471.20	47471

The Assistant Commissioner vide order No. 5230 dated 08.09.2016 has rejected the said claim on the ground that the same has been filed after the prescribed time limit of one year from the date of payment and as such is rejected as being barred by time. Being aggrieved, the assessee approached the first appellate authority, i.e. the Commissioner of Customs (Appeals). He, vide the Order under challenge has held that upholding the limitation period starting from the date of payment of duty as prescribed in amended Notification No. 93/2008-Cus would amount to allowing commencement of limitation period for refund claimed before the right of refund has even accrued and that no period of limitation is prescribed under Section 3(5) of the Customs Tariff Act. Accordingly, the Appeal of asseesse was allowed

accepting the refund claimed. Department being aggrieved is in Appeal before us.

3. We have heard Shri Rakesh Kumar, Ld. DR for the Department/appellant. However none is present for the respondent. He therefore hereby proceed to decide the Appeal ex-parte considering defendant.

4. It is submitted that the Commissioner(Appeals) has based his Order on the decision of Hon'ble High Court of Delhi in the matter of *M/s Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi 2014 (304) ELT 660 (Del.)* and though the Appeal whereof even before Hon'ble Supreme Court has been dismissed but Hon'ble Apex Court has dismissed the Appeal only on the ground of limitation hence the question of law involved herein is still kept open. It is impressed upon that Notification No. 93/2008-Cus dated 01.08.2008 is the Notification amending the Notification No. 102/2007 vide which a time period of one year from the date of payment for the filing of refund claims by an importer has been introduced. Thus, the period for filing the impugned refund claim is clearly of one year. Since the refund claim in question was not filed within the said one year, the original Adjudicating Authority had rightly dismissed the same and the Commissioner(Appeals) has committed an error while allowing the assessee's claim. Order is accordingly prayed to be set aside and Appeal is prayed to be allowed.

5. After hearing, we are of the opinion as follows:-

The claim herein is with respect to special additional duty of Customs as leviable under Section 3(5) of Customs Tariff Act, 1975. It is important to look into the said provision which reads as follows:

"Section 3 Levy of additional duty equal to excise duty, sales tax, local taxes and other charges—

(1) -----

(2) -----

(3) -----

(4) -----

(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.

Explanation – In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs and where such taxes, or, as the case may be, such charges are leviable at different rates the highest such tax or, as the case may be, such charge."

It is brought to our notice that the said SAD exemption has been granted vide Notification No. 102/2007 dated 14.09.2007 as issued in accordance of Section 25(1) of the Customs Act which provides power to the Central Government to grant exemption from duty by way of Notification. This Notification exempts the goods falling within the first schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale, from the whole of the additional duty of Customs leviable thereupon in accordance of the above mentioned Section 3(5) of Customs Tariff Act.

However, subject to such conditions as mentioned in the Notification itself in para 2 thereof, the first condition reads as follows:

(a) The importer of the said goods shall pay all duties including the additional duty of Customs leviable thereon, as applicable at the time of importation of goods.

The other relevant condition is:

(c) The importer shall file a claim for refund of said additional duty of Customs paid on the imported goods with the jurisdictional Customs officer.

This Notification stands amended vide Notification No. 93/2008 dated 01.08.2008 vide which a time period of one year from the date of payment for filing of refund claims by an importer under the aforesaid Notification was introduced. Commissioner (Appeals) has held that the amendment since introduced for the first time by a Notification but without a statutory amendment, the same cannot prevail.

6. In view of the above discussion, we are of the opinion that the moot question to be adjudicated in the present case is as to whether there is any time limit prescribed by law for filing the refund claim of additional duty of Customs as stands exempted vide the Notification No. 102/2007.

No doubt, the said Notification is silent about any time period for filing the said claim. But the Notification exempts the goods in first schedule of Customs Tariff Act from being leviable to the additional duty of Customs. However, the Notification itself mandates the deposit of the said additional duty at the time of importation of the goods and thereafter to get the refund. From this perusal, one thing becomes abundantly clear that the importer has the knowledge of his entitlement to file the refund of additional duty of Customs at the time of the payment of said duty itself i.e. at the time, the product being in first schedule (under the exempted category) is imported. Resultantly, we are of the opinion that for claiming the refund of additional duty nothing else has to happen or to be done by the assessee after the payment of said additional duty of Customs. To our opinion, this particular fact distinguishes the present case from the case of M/s Sony India Pvt. Ltd. (supra).

7. Also, the amending Notification No. 93/2008 is arising out of the statute, i.e. Section 25(2A) of the Customs Act, 1962 hence, the findings of the Commissioner(Appeals) that the amendment introducing one year from the date of payment of additional duty as a time to claim the refund thereof is without statutory amendment, is not sustainable rather is opined to be legally erroneous. Otherwise also, the said amendment came into force w.e.f. 01.08.2008 that too in accordance of another statutory provision, i.e. Section 25(4) of the Customs Act. The refund in question was filed on 31.03.2017, i.e. much beyond the amended Notification and also the Customs Act itself contains a provision about claim of refund of duty in Section 27 thereof which reads as follows:-

(i) Any person claiming refund of any duty or interest, paid by him or borne by him may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs before the expiry of one year from the date of payment of such duty or interest.

8. The words used in the provision makes it clear that statute has not distinguished the nature of duty or interest, the refund whereof is claimed. Hence, even if we do not look into the amended Notification No. 93/2008, the period of limitation as applicable for filing the refund claim under Notification 102/2008 will otherwise be a period of one year in accordance of the aforesaid Section 27 of Customs Act. Thus, we cannot rule out that the Notification No. 93/2008 came into existence to align the statutory provision with the Notification which was silent as far as the period of limitation for the purpose as mentioned therein is concerned. Otherwise also, on examination of relevant provision it appears that the provisions of

limitation are excluded, it would nonetheless be still open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation. This Tribunal in the case of *Uttam Sucrotech International Pvt. Ltd. Vs. Union of India* 2011 (264) E.L.T. 502 (Delhi) has held that the applicability of the provisions of limitation Act therefore is to be judged not from the terms of limitation Act but by the provisions of the concerned act. The Tribunal has gone to the extent of appreciating that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions even of Section 5 of the Limitation Act. The Hon'ble Apex Court in the case *Naseeruddin Vs. Sitaram Aggarwal* A.I.R. 2003 (S.C.)1543 has held that in the absence of statutory provisions, no inherent powers of the court exists to condone the delay. It was also held that a statutory right has to be exercised in the mode, manner and limitation specified in the special statute itself. The Hon'ble Apex Court in an earlier decision in the case of *Titaghur Papermills Company Ltd. Vs. State of Orissa* SCC PP 440-41 para 11 has held:

"11. it is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. Vs. Hawkesford in the following passage: (ER p. 495)

..... There are three classes of cases in which a liability may be established founded upon a statute. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

In still another case titled as *Munshiram Vs. Municipal Committee Chheharta* SSC page 88 para 23, the Hon'ble Apex Court held that when a Revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all other forums and modes of seeking said remedy are excluded. Except in the case where the statutory authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or has resorted to invoke the provisions which are repealed. Apparently and admittedly none is the fact of the present Appeal. It is also not the case that Notification 93/2008 has been repealed. In absence thereof also, as already discussed above, Section 27 of Customs Act prescribes a period during which refund of any type can be claimed. The Hon'ble Apex Court in a recent decision *Commissioner of Customs (Import Mumbai) Vs. M/s Dilip Kumar & Co.* has held that an exemption Notification has to be strictly construed, i.e. if the person claiming exemption does not fall strictly within the letter of Notification, he cannot claim the exemption. The Hon'ble Apex Court while relying upon its previous decision in the case *District Mining Officer Vs. Tata Iron & Steel Company* 2001 (7) SCC 358 had noticed as follows:-

"... A statute is an edict of the Legislature and in construing a statute, it is necessary, to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the Court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. This task very often raises the difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to forestall exhaustively situations

and circumstances that may emerge after enacting a statute where its application may be called for.

Nonetheless, the function of the Courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed..."

It was also held that the well settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In *Kanai Lal Sur v. Paramnidhi Sadhukhan*, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In view of entire above discussion, we are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962. We therefore hold that the Commissioner(Appeals) has committed an error while giving an expanded interpretation qua limitation to favour assessee. We therefore set aside the said Order and allow the present Appeal rejecting the impugned refund claimed.

(Pronounced in the open Court on 25.10.2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-
110066
BENCH-DB
COURT NO. IV**

**Customs Stay Application No. C/Stay/50823/2018 in
Customs Appeal No. C/52392/2018[DB]**

Arising out of Order-in-Appeal No. D-II/ICD/TKD/EX-P/811/2018, Dated:
24.4.2018

Passed by the Commissioner of CGST and Central Excise, Delhi-I

**Date of Hearing: 17.9.2018
Date of Decision: 25.10.2018**

**COMMISSIONER OF CUSTOMS
NEW DELHI (ICD TKD) (IMPORT)**

Vs

AGGARWAL TRADING COMAPANY

Appellant Rep by: Mr Rakesh Kumar, DR

Respondent Rep by: None

CORAM: C L Mahar, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NO. 53153/2018

Per: Rachna Gupta:

Present is an Appeal against the Order of Commissioner of Customs (Appeals) bearing No. 179/17 dated 24.04.2018 as filed by the Department.

2. Facts relevant for the purpose are that the assessee, M/s Aggarwal Trading Company herein had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus dated 14.09.2007 (herein referred to as the said Notification) for an amount of Rs. 38,057/-. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975 (herein after referred to as the Act) the details of refund are as follows:

S. No	Bill of entry No.	Date of Bill entry	Amount of SAD paid	Amount of refund claimed	Amount of refund sanctioned	Amount of refund rejected
1.	4355329	23.02.16	18,933.1	18,933.1	0	18,933
2.	4355329	23.02.16	19,124	19,124	0	19,124
		Total	38,057.1	38,057	0	38,057

The Assistant Commissioner vide order No. 5230 dated 08.09.2016 has rejected the said claim on the ground that the same has been filed after the prescribed time limit of one year from the date of payment and as such is rejected as being barred by time. Being aggrieved, the assessee approached the first appellate authority, i.e. the Commissioner of Customs (Appeals). He, vide the Order under challenge has held that upholding the limitation period starting from the date of payment of duty as prescribed in amended Notification No. 93/2008-Cus would amount to allowing commencement of limitation period for refund claimed before the right of refund has even accrued and that no period of limitation is prescribed under Section 3(5) of the Customs Tariff Act. Accordingly, the Appeal of asseesse was allowed accepting the refund claimed. Department being aggrieved is in Appeal before us.

3. We have heard Shri Rakesh Kumar, Ld. DR for the Department/appellant. However none is present for the respondent. He

therefore hereby proceed to decide the Appeal ex-parte considering defendant.

4. It is submitted that the Commissioner(Appeals) has based his Order on the decision of Hon'ble High Court of Delhi in the matter of *M/s Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi 2014 (304) ELT 660 (Del.)* and though the Appeal whereof even before Hon'ble Supreme Court has been dismissed but Hon'ble Apex Court has dismissed the Appeal only on the ground of limitation hence the question of law involved herein is still kept open. It is impressed upon that Notification No. 93/2008-Cus dated 01.08.2008 is the Notification amending the Notification No. 102/2007 vide which a time period of one year from the date of payment for the filing of refund claims by an importer has been introduced. Thus, the period for filing the impugned refund claim is clearly of one year. Since the refund claim in question was not filed within the said one year, the original Adjudicating Authority had rightly dismissed the same and the Commissioner(Appeals) has committed an error while allowing the assessee's claim. Order is accordingly prayed to be set aside and Appeal is prayed to be allowed.

5. After hearing, we are of the opinion as follows:-

The claim herein is with respect to special additional duty of Customs as leviable under Section 3(5) of Customs Tariff Act, 1975. It is important to look into the said provision which reads as follows:

"Section 3 Levy of additional duty equal to excise duty, sales tax, local taxes and other charges—

(1) -----

(2) -----

(3) -----

(4) -----

(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.

Explanation – In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs and where such taxes, or, as the case may be, such charges are leviable at different rates the highest such tax or, as the case may be, such charge."

It is brought to our notice that the said SAD exemption has been granted vide Notification No. 102/2007 dated 14.09.2007 as issued in accordance of Section 25(1) of the Customs Act which provides power to the Central Government to grant exemption from duty by way of Notification. This Notification exempts the goods falling within the first schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale, from the whole of the additional duty of Customs leviable thereupon in accordance of the above mentioned Section 3(5) of Customs Tariff Act. However, subject to such conditions as mentioned in the Notification itself in para 2 thereof, the first condition reads as follows:

(a) The importer of the said goods shall pay all duties including the additional duty of Customs leviable thereon, as applicable at the time of importation of goods.

The other relevant condition is:

(c) The importer shall file a claim for refund of said additional duty of Customs paid on the imported goods with the jurisdictional Customs officer.

This Notification stands amended vide Notification No. 93/2008 dated 01.08.2008 vide which a time period of one year from the date of payment for filing of refund claims by an importer under the aforesaid Notification was introduced. Commissioner (Appeals) has held that the amendment since introduced for the first time by a Notification but without a statutory amendment, the same cannot prevail.

6. In view of the above discussion, we are of the opinion that the moot question to be adjudicated in the present case is as to whether there is any time limit prescribed by law for filing the refund claim of additional duty of Customs as stands exempted vide the Notification No. 102/2007.

No doubt, the said Notification is silent about any time period for filing the said claim. But the Notification exempts the goods in first schedule of Customs Tariff Act from being leviable to the additional duty of Customs. However, the Notification itself mandates the deposit of the said additional duty at the time of importation of the goods and thereafter to get the refund. From this perusal, one thing becomes abundantly clear that the importer has the knowledge of his entitlement to file the refund of additional duty of Customs at the time of the payment of said duty itself i.e. at the time, the product being in first schedule (under the exempted category) is imported. Resultantly, we are of the opinion that for claiming the refund of additional duty nothing else has to happen or to be done by the assessee after the payment of said additional duty of Customs. To our opinion, this particular fact distinguishes the present case from the case of M/s Sony India Pvt. Ltd. (supra).

7. Also, the amending Notification No. 93/2008 is arising out of the statute, i.e. Section 25(2A) of the Customs Act, 1962 hence, the findings of the Commissioner(Appeals) that the amendment introducing one year from the date of payment of additional duty as a time to claim the refund thereof is without statutory amendment, is not sustainable rather is opined to be legally erroneous. Otherwise also, the said amendment came into force w.e.f. 01.08.2008 that too in accordance of another statutory provision, i.e. Section 25(4) of the Customs Act. The refund in question was filed on 31.05.2017, i.e. much beyond the amended Notification and also the Customs Act itself contains a provision about claim of refund of duty in Section 27 thereof which reads as follows:-

(i) Any person claiming refund of any duty or interest, paid by him or borne by him may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs before the expiry of one year from the date of payment of such duty or interest.

8. The words used in the provision makes it clear that statute has not distinguished the nature of duty or interest, the refund whereof is claimed. Hence, even if we do not look into the amended Notification No. 93/2008, the period of limitation as applicable for filing the refund claim under Notification 102/2008 will otherwise be a period of one year in accordance of the aforesaid Section 27 of Customs Act. Thus, we cannot rule out that the Notification No. 93/2008 came into existence to align the statutory provision with the Notification which was silent as far as the period of limitation for the purpose as mentioned therein is concerned. Otherwise also, on examination of relevant provision it appears that the provisions of limitation are excluded, it would nonetheless be still open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their

operation. This Tribunal in the case of *Uttam Sucrotech International Pvt. Ltd. Vs. Union of India 2011 (264) E.L.T. 502 (Delhi)* has held that the applicability of the provisions of limitation Act therefore is to be judged not from the terms of limitation Act but by the provisions of the concerned act. The Tribunal has gone to the extent of appreciating that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions even of Section 5 of the Limitation Act. The Hon'ble Apex Court in the case *Naseeruddin Vs. Sitaram Aggarwal A.I.R. 2003 (S.C.)1543* has held that in the absence of statutory provisions, no inherent powers of the court exists to condone the delay. It was also held that a statutory right has to be exercised in the mode, manner and limitation specified in the special statute itself. The Hon'ble Apex Court in an earlier decision in the case of *Titaghur Papermills Company Ltd. Vs. State of Orissa SCC PP 440-41 para 11* has held:

"11. it is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. Vs. Hawkesford in the following passage: (ER p. 495)

..... There are three classes of cases in which a liability may be established founded upon a statute. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

In still another case titled as *Munshiram Vs. Municipal Committee Chheharta SSC page 88 para 23*, the Hon'ble Apex Court held that when a Revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all other forums and modes of seeking said remedy are excluded. Except in the case where the statutory authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or has resorted to invoke the provisions which are repealed. Apparently and admittedly none is the fact of the present Appeal. It is also not the case that Notification 93/2008 has been repealed. In absence thereof also, as already discussed above, Section 27 of Customs Act prescribes a period during which refund of any type can be claimed. The Hon'ble Apex Court in a recent decision *Commissioner of Customs (Import Mumbai) Vs. M/s Dilip Kumar & Co* has held that an exemption Notification has to be strictly construed, i.e. if the person claiming exemption does not fall strictly within the letter of Notification, he cannot claim the exemption. The Hon'ble Apex Court while relying upon its previous decision in the case *District Mining Officer Vs. Tata Iron & Steel Company 2001 (7) SCC 358* had noticed as follows:-

"... A statute is an edict of the Legislature and in construing a statute, it is necessary, to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the Court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. This task very often raises the difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for.

Nonetheless, the function of the Courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed..." It was also held that the well settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

In view of entire above discussion, we are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962. We therefore hold that the Commissioner (Appeals) has committed an error while giving an expanded interpretation qua limitation to favour assessee. We therefore set aside the said Order and allow the present Appeal rejecting the impugned refund claimed.

(Pronounced in the open Court on 25.10.2018)

[Back](#)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

Justice Dr. Satish Chandra, President and Shri V. Padmanabhan, Member (T)

EXIM CARGO SERVICES

Versus

COMMISSIONER OF CUSTOMS, NEW DELHI

Final Order No. 51744/2018, dated 8-5-2018 in Application Nos. C/MISC/
50318/2018 & C/STAY/50317/2018 in Appeal No. C/50754/2018

REPRESENTED BY :Ms. Prabjyot K. Chadha, Advocate, for the Appellant.

Shri Rakesh Kumar, DR, for the Respondent.

[Order per : V. Padmanabhan, Member (T)]. - The present appeal is against the Order-in-Original No. 8/2018, dated 6-2-2018. The appellant is a Customs Broker licensed by the Commissioner, Customs, New Delhi. It was noticed by the Customs Department that the appellant had filed several bills of entry for the importer M/s. Pax Technology Private Limited. M/s. Pax Technnology Private Limited had been importing Point of Sale Devices and Mobile Point of Sale Devices (MPOS). For clearance of such import goods, the importer was obligated to produce the Equipment Type Approval (ETA) from Wireless Planning and Coordination (WPC) cell and import licences from respective licensing officers. The investigation undertaken by the Special Intelligence and Investigation Branch at Air Cargo Complex, New Delhi indicated that M/s. Pax Technology, in their bills of entry filed through the appellant, were found to have misdeclared goods in terms of description as well as undervaluation. Further, investigation into such import consignments revealed that the appellant had played a significant role in engineering the misdeclaration and undervaluation. Accordingly, after carrying out an enquiry against the appellant and issuance of show cause notice, the adjudicating authority has upheld the contravention of several Regulations of the Customs Broking Licensing Regulations, 2013. Finally, she has revoked the C.B. licence issued to the appellant. Further, the forfeiture of the whole amount of security deposit of Rs. 10,000 has been ordered along with blacklisting Shri Rajendra Prasad who was an employee of the appellant holding 'G-card'. Aggrieved by the impugned order, the present appeal has been filed.

2. With the above background, we heard Ms. Prabjyot K. Chadha and Shri Rakesh Kumar, DR.

3. Arguments advanced by the Learned Counsel for the appellant is summarized below :

(i) On behalf of M/s. Pax Technology, the bills of entry for 12 disputed consignments were filed by five different CHAS, but only 4 bills of entry were filed by the employee of the appellant.

(ii) The bills of entry have been filed by Shri Rajendra Singh ('G-card' holder) in the name of the appellant but there is no evidence on record regarding the involvement of the appellant in the import of the goods in question.

(iii) The appellant cannot be held responsible for the misdeclaration and undervaluation since the employee of the appellant had filed the bills of entry on the basis of the import documents given to them. There is no evidence available on record to prove the forgery against Shri Rajendra, alias Raju.

4. The Learned DR justified the impugned order. He submitted that Shri Rajendra, alias Raju, who was a 'G-card' holder, had filed the bills of entry in the name of the appellant on the basis of invoices which were forged by him using his own computer. Such forgery stands admitted by him in his statement. Further such forgery has resulted in misdeclaration of value and the nature of the import goods. The goods imported by M/s. Pax Technology required clearance from Wireless Planning and Coordination Wing, which they did not possess. But the appellant has facilitated such imports by forging the import documents with a view of getting the goods cleared without Customs examination under RMS.

5. We have heard both sides at length and gone through the appeal.

6. The appellant had filed several bills of entry on behalf of the importer M/s. Pax Technology. The investigation undertaken by SIIB into such imports has revealed that the goods in many cases were misdeclared and undervalued. The bills of entry have been filed by Shri Rajendra Prasad, alias Raju ('G-card' holder) by collecting documents from one Shri Randheer Singh. During the interrogation of Shri Rajendra, alias Raju, it stands admitted in the statements that he had carried out forgery of the import invoices using his computer and using such forged invoices, misdeclared the import goods in the bills of entry filed in terms of both valuation as well as description. It further stands admitted that such forgery was done to hoodwink the requirement of import licence from the Wireless Planning and Coordination Wing, and also to escape from the rigors of customs examination, so as to get the goods cleared under the Risk Management Scheme (RMS).

7. It stands established on record that neither Rajendra Prasad, alias Raju ('G-card' holder), nor Shri Kishan Singh ('F-card' holder) proprietor of the appellant, have bothered to properly guide the importer about the statutory obligations regarding import license. For monetary benefits, Shri Rajendra has acted to secure clearance of the goods without scrutiny by Customs by resorting to preparation forged copies of the invoices, thereby declaring lesser value and changing the description of the goods to "Paper-Rolls". All the above acts clearly establish the contravention of various Regulations under CBLR, 2013.

8. It has been submitted on behalf of the appellant that the appellant cannot be held liable for the errant behavior of one of their employees. In this connection, we are of the view that it was imperative for the Customs Broker to keep control and supervision over the conduct of their employees. The appellant cannot escape the vicarious liability for the action of their employees.

9. The detailed investigation undertaken by the SIIB into the affairs of the appellant leading to misdeclaration and undervaluation of Customs duty has established beyond doubt the contravention of various requirements under the CBLR, 2013. The Customs Broker is expected to function as an extended arm of the Customs Department and is required to act in such a manner that the provisions of Customs Act and enacted rules and regulations are implemented efficiently. For the acts of omission and commission which stand established against the appellant, we are of the view that the appellant is liable for penal consequences under the CBLR, 2013.

10. In the facts and circumstances of the present case, we find that the impugned order passed by the adjudicating authority is fully justified and is upheld. Consequently, the appeal filed is rejected.

(Pronounced in open Court on 8-5-2018)

[Back](#)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066**

BENCH-DB

COURT – IV

Customs Application No. C/COD/50693/2018 [DB] in

Customs Appeal No. C/52063/2018 [DB]

[Arising out of Order-in-Appeal No.
CC/A/CUS/D/1/EXPORT/NCH/57/2018 dated 28/02/2018 passed
by the Commissioner (Appeals), CGST & Central Excise, Delhi - I]

Kotsons Pvt. Ltd.

...Appellant

Vs.

C.C., New Delhi

... Respondent

Present for the Appellant : Mr. Abhishek Jaju, Advocate

Present for the Respondent : Mr. Rakesh Kumar, DR

**Coram: HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)**

Date of Hearing / Decision 24.08.2018 FINAL

ORDER NO. 52956/2018

PER: RACHNA GUPTA

Appellant's Application praying for Condonation of Delay heard.
Ld. Counsel for the applicant has mentioned that the export-import manager of the appellant was sick, therefore, the Appeal could not have been filed within time. It is impressed upon that there is a delay of merely 15 days, medical certificate as annexed with the Appeal is also impressed upon. Application is prayed to be allowed.

2. While rebutting these arguments, it is submitted by the Ld. DR that the reason quoted for the delay is neither convincing nor sufficient. Application therefore deserves dismissal.

3. After hearing both the parties, we observe that the present is an Appeal under the Customs Act. Involvement of export-import manager of the Company is opined important and relevant. It is mentioned by the applicant that the said manager had fallen sick which has caused delay. Medical document is also placed on record in this respect. Keeping in view that the delay is merely of 15 days, the reason so

mentioned supported by the document is opined adequate, sufficiently explaining delay of said 15 days. Otherwise also, it is the intention of law that the technicalities of law should be hand made for justice and should not be used to avoid decision on merits. Finally, keeping in view that no injustice shall be caused to the Department in case the Appeal in hand is disposed on merits, we hereby condone the delay of 15 days and accept the delay.

4. At this stage, both the parties reflected their consent for Appeal to be disposed of finally. Arguments heard. It is submitted on behalf of the appellant that the Ld. Commissioner has failed to appreciate the merits of Appeal in favour of the appellant rather has opted to dismiss his Appeal *in limini* on the sole ground of limitation. The Order is therefore alleged to be wrong, accordingly, the same is prayed to be set aside and Appeal is prayed to be allowed.

5. While rebutting these arguments, Ld. DR has relied upon the decision of Hon'ble Supreme Court in the case **Singh Enterprises Vs. C.C.E., Jamshedpur 2008 (221) E.L.T. 163 (S.C.)**.

6. After hearing both the parties and after perusing the said decision we are of the opinion that Appeals to Commissioner (Appeals) can be filed under Section 35 of Central Excise Act that too within 60 days from the date of communication of the decision/Order to the appellant. The provision gives a discretion to Commissioner (Appeals) for allowing the Appeal to be presented within a further period of 30 days provided a sufficient cause for not presenting the Appeal within the aforesaid period of 60 days is shown. In the present case, the Order-in-Original was announced on 11.03.2014. The Appeal was filed on 23.12.2015. It becomes clear that Appeal before Commissioner (Appeals) was filed after the delay of one year nine months (approx.). Hon'ble Apex Court in Singh Enterprises (supra) as held as follows:

“The language used makes the position clear that the legislature intended the appellate authority to entertain the Appeal by condoning delay only upto 30 days after

the expiry of 60 days which is the normal period for preferring Appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.”

Relying upon the said decision, we find no infirmity in the Order of Commissioner(Appeals) irrespective of the appellant’s pleading that he received the impugned order on 17.12.2015. Otherwise also, the appellant was apparently appearing in person before the original Adjudicating Authority. Plea of no knowledge is irrelevant specially when there is evidence on record that the Order-in-Original was sent to the appellant through registered post.

7. In view of this discussion and the case law above, we are of the opinion that the Commissioner (Appeals) has committed no error while dismissing the Appeal on the sole ground of limitation. He otherwise was statutorily bound. Order is accordingly upheld and Appeal is hereby dismissed.

[Dictated and pronounced in the open Court]

[Back](#)

**IN THE CUSTOMS, EXISE AND SERVICE TAX APPELLATE
TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI**

**Appeal No. C/50754/2018 (C/MISC/50318/2018 & C / STAY / 50317 /
2018)**

[Arising out of Order-in-Original No. CC(A) 08 / KB / Policy /
2018 dated 06.02.2018 passed by the Commissioner of
Customs, New Delhi]

Exim Cargo Services

...Appellant

Vs.

CC, New Delhi

...Respondent

Appearance:

Represented by Ms. Prabjyot K. Chadha, Advocates for the
appellant. Represented by Shri Rakesh Kumar, DR for the
respondent.

**Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)**

Final Order No. 51744/2018

Date of Hearing: 18.04.2018

Date of Pronouncement: 08.05.2018

Per V.P. Padmanabhan:

The present appeal is against the Order-in-Original No. 8/2018 dated 06.02.2018. The appellant is a customs broker licensed by the Commissioner, Customs, New Delhi. It was noticed by the Customs Department that the appellant had filed several bills of entry for the importer M/s Pax Technology Private Limited. M/s Pax Technology Private Limited had been importing Point of Sale Devices and Mobile Point of Sale Devices (MPOS). For clearance of such import goods, the importer was obligated to produce the Equipment Type Approval (ETA) from Wireless Planning and Coordination (WPC) cell and import licences from respective licensing officers. The investigation undertaken by the Special Intelligence and Investigation Branch at Air Cargo Complex, New Delhi indicated that M/s Pax Technology, in their bills of entry filed through the appellant, were found to have misdeclared goods in terms of description as well as undervaluation. Further, investigation into such import consignments revealed that the appellant had played a significant role in engineering the misdeclaration and undervaluation. Accordingly, after carrying out an enquiry against the appellant and issuance of show cause notice, the adjudicating authority has upheld the contravention of several Regulations of the Customs Broking Licensing Regulations, 2013. Finally, she has revoked the C.B. licence issued to the appellant. Further, the forfeiture of

the whole amount of security deposit of Rs. 10,000 has been ordered along with blacklisting Shri Rajendra Prasad who was an employee of the appellant holding „G-card“. Aggrieved by the impugned order, the present appeal has been filed.

2. With the above background, we heard Ms. Prabjyot K. Chadha and Shri Rakesh Kumar, DR.

3. Arguments advanced by the learned counsel for the appellant is summarized below:

(i) On behalf of M/s Pax Technology, the bills of entry for 12 disputed consignments were filed by five different CHAS, but only 4 bills of entry were filed by the employee of the appellant.

(ii) The bills of entry have been filed by Shri Rajendra Singh („G-card“ holder) in the name of the appellant but there is no evidence on record regarding the involvement of the appellant in the import of the goods in question.

(iii) The appellant cannot be held responsible for the misdeclaration and under valuation since the employee of the appellant had filed the bills of entry on the basis of the import documents given to them. There is no evidence available on record to prove the forgery against Shri Rajendra, alias Raju.

4. The learned DR justified the impugned order. He submitted that Shri Rajendra, alias Raju, who was a „G-card“ holder, had filed the bills of entry in the name of the appellant on the basis of invoices which were forged by him using his own computer. Such forgery stands admitted by him in his statement. Further such forgery has resulted in mis declaration of value and the nature of the import goods. The goods imported by M/s Pax Technology required clearance from Wireless Planning and Coordination Wing, which they did not possess. But the appellant has facilitated such imports by forging the import documents with a view of getting the goods cleared without customs examination under RMS.

5. We have heard both sides at length and gone through the appeal.

6. The appellant had filed several bills of entry on behalf of the importer M/s Pax Technology. The investigation undertaken by SIIB in to such imports has revealed that the goods in many cases were mis-declared and undervalued. The bills of entry have been filed by Shri Rajendra Prasad, alias Raju („G-card“ holder) by collecting documents from one Shri Randheer Singh. During the interrogation of Shri Rajendra, alias Raju, it stands admitted in the statements that he had

carried out forgery of the import invoices using his computer and using such forged invoices, mis-declared the import goods in the bills of entry filed in terms of both valuation as well as description. It further stands admitted that such forgery was done to hoodwink the requirement of import licence from the Wireless Planning and Coordination Wing, and also to escape from the rigors of customs examination, so as to get the goods cleared under the Risk Management Scheme(RMS).

7. It stands established on record that neither Rajendra Prasad, aliasRaju („G-card“ holder), nor Shri Kishan Singh („F-card“ holder) proprietor of the appellant, have bothered to properly guide the importer about the statutory obligations regarding import license. For monetary benefits, Shri Rajendra has acted to secure clearance of the goods without scrutiny by customs by resorting to preparation forged copies of the invoices, thereby declaring lesser value and changing the description of the goods to “Paper-Rolls”. All the above acts clearly establish the contravention of various Regulations under CBLR,2013.

8. It has been submitted on behalf of the appellant that the appellant cannot be held liable for the errant behavior of one of their employees. Inthis connection, we are of the view that it was imperative for the Customs Broker to keep control and supervision over the conduct of their employees. The appellant cannot escape the vicarious liability for the action of their employees.

9. The detailed investigation undertaken by the SIIB in to the affairs of the appellant leading to mis-declaration and undervaluation of customs duty has established beyond doubt the contravention of various requirements under the CBLR, 2013. The customs broker is expected to function as an extended arm of the Customs Department and is required to act in such a manner that the provisions of Customs Act and enacted rules and regulations are implemented efficiently. For the acts of omission and commission which stand established against the appellant, we are of the view that the appellant is liable for penal consequences under the CBLR,2013.

10. In the facts and circumstances of the present case, we find that the impugned order passed by the adjudicating authority is fully justified and is upheld. Consequently, the appeal filed is rejected.

[Pronounced in open court on 08.05.2018]

(Justice Dr. Satish Chandra) President
(V. Padmanabhan) Member (Technical)

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

PRINCIPAL BENCH, COURT NO. I

**Anti Dumping Condonation of Delay
Application No. 51061 of 2018 with Anti
Dumping Miscellaneous (Stay)
Application No. 51062 of 2018
(on behalf of the appellant)**

IN

Appeal No. 53094 of 2018

[Arising out of Notification No.22/2018 – Cus (Add) dated 18.04.2018 issued by the US, Ministry of Finance, Deptt of Revenue, New Delhi based on Final Findings of the Designated Authority No.14/45/2016-DGAD dated 5 March, 2018]

M/s. National Glass Emporium

Appellant

(Old 72 & 86) # 3 & 33,
Nyniappa Street, Park
Town, Chennai – 600
003.

VERSUS

**Designated Authority,
Directorate General of Antidumping
and Allied Duties**

Respondent

Ministry of Commerce, Udyog
Bhavan, Room No.240, New
Delhi -110 107

Appearance

None for the appellant.

Shri Rajesh Kumar, Advocate, Ms. Rita Jha, Advocate for the Domestic Industry.

S/Shri Ameet Singh with Amit Randev, Advocates for Designated Authority.

Shri Rakesh Kumar, Authorized Representative (DR) for the Revenue.

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)**

DATE OF HEARING : 23/10/2019

DATE OF DECISION: 23/10/2019

FINAL ORDER NO. 51403/2019

JUSTICE DILIP GUPTA

The appeal was filed on 30 July 2018 and as there was a delay, it was accompanied by an application seeking condonation of delay of 12 days. The application was last heard on 30 September, 2019 on which date, it was adjourned to 20 October, 2019 on a request made by learned Counsel for the appellant. The Anti- Dumping Bench has specially assembled to hear the

Delay Condonation Application and even though, the matter called out, no one has appeared to press the Delay Condonation Application. The hearing of the application was temporarily passed over, but even on the revised call, learned Counsel for the appellant has not appeared.

2. We have also perused the application, in the absence of learned Counsel of the appellant, and find that no good ground has been made out to condone the delay. This apart, even the interested parties have not been served, though all the addresses were supplied by Shri Ameet Singh, learned Counsel appearing for the Designated Authority to the learned Counsel for the appellant.

3. Thus, for all the reasons stated above, the Delay Condonation Application is rejected.

4. As the application filed for Condonation of delay has been rejected, the Appeal and Miscellaneous (Stay) Application stand rejected.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. IV**

Customs Appeal No. 50897 /2018

[Arising out of the Order-in-Original No. JAI-EXCUS-000-COM-19-17-18 dated
27.11.2017 passed by Commissioner, CGST & Central Excise, Jaipur].

**M/s. Vaibhav Global Limited
Vs.**

Appellants

Commissioner, CGST, Central Excise,

Respondent Jaipur

Appearance:

**Shri Rinky Arora, Advocate for the Appellants
Shri Rakesh Kumar, AR for the Respondent**

CORAM:

**Hon'ble Mr. V Padmanabhan, Member (Technical)
Hon'ble Ms. Rachna Gupta, Member (Judicial)**

Date of Hearing / Decision: 20.02.2019

FINAL ORDER No. 50446 /2019

Per Rachna Gupta:

The present appeal has been preferred against Order No. 19-17- 18 dated 27 November, 2017. The adjudication arose out of show cause notice No. 105/2012/1491 dated 03 September, 2012 issued to the appellant who are engaged in the manufacture of stone studded gold jewellery and silver jewellery and are availing the benefit of notification No. 53/1997-Customs dated 03 June 1997 and 52/ 2003- Cus dated 31 March 2003 as amended on re-import / import of goods. The department denying the availability of exemption provided under the said notification has alleged the appellant to have evaded payment of customs duty amounting to Rs.6,12,18,245/- which has been proposed to be recovered by the aforesaid show cause notice along with interest at the appropriate rate and the proportionate penalties.

2. We have heard Ms Rinky Arora, learned advocate appearing for the appellant and Shri Rakesh Kumar, learned Representative for the Department.

3. It is submitted on behalf of the appellant that this is third round of litigation before this Tribunal. Earlier vide Final Order No. C/A/52252-52254/2017 dated 09 March 2017, denovo adjudication was directed. Thereafter, the order under challenge has been passed still confirming the demand. It is

submitted that all the requisite documents confirming the demand of Rs. 8.55 lakh were submitted. It is submitted that requisite documents along with bank realisation certificate and the verification thereof were produced before the adjudicating authority, but all have been ignored. These documents are sufficient for doing away the said demand. Said demand ordered accordingly, is prayed to be waived.

4. Learned DR has also placed on record, the verification report of 4 bank realisation certificates mentioning all four of them to be verified and found to be in order. It is submitted that the duty amounting to Rs. 3,05,011/- is chargeable on re-imported jewellery not being under notification No. 158/1995, as rightly been confirmed. No infirmity is impressed upon in the order to said extent which otherwise has been considered by the assessee. Appeal is therefore, prayed to be dismissed.

5. After hearing both the parties and perusing the record, we observe and held as follows:

6. That the show cause notice of the year 2012 was initially adjudicated vide order No. 154/13-14 confirming the total proposed demand of Rs.6,12,18,245/- along with recovery of duty foregone of Rs. 30,08,337/- along with redemption fine and other penalties as mentioned in said order. The order was challenged before this Tribunal. The appeal was decided by Final Order No. C/A/54489-54491/2014 dated 18.11.2014 remanding the case with the observations as under:

‘Accordingly, we waive the requirement of pre-deposit and remand the case for de-novo adjudication with the direction that the adjudicating authority shall adjudicate the case de- novo after taking into account the additional documents allowed to be taken on record by Tribunal which the appellants will submit to the adjudicating authority within 2 weeks from the date of issue of this order. The appellants shall be given an opportunity of being heard before the de- novo adjudicating.’

7. The matter was re-adjudicated vide Order-in-Original No. 07- 15-16 dated 30 April, 2015 based on the documents submitted by the appellant wherein duty of Rs. 14,07,610/- was confirmed along with interest and penalty as mentioned therein. Confiscation of goods amounting to Rs. 94,65,943/- was also ordered.

8. Being aggrieved, the said order was again challenged before this

Tribunal . The appeal was decided vide Final Order No. C/A/52252-52254/2017 dated 09 March, 2017 wherein it was held that since the appellant could not produce the export documents in respect of four consignments, the demands of duty of Rs. 8,55,087/-, Rs.6,897/-, Rs.3,248/- and Rs.2,263/- were remanded for verification of the documents. The demand in respect of excess wastage of Rs. 2,35,104/- was set aside. However, the demand of Rs. 3,05,011/- in respect of re-import of jewellery was confirmed. The impugned order has been passed after verification as was directed by the aforesaid Final Order of this Tribunal. Common Redemption fine imposed in respect of all demands, was set aside and the penalties were also set aside.

9. The Commissioner in the order under challenge has still not considered the Bank realisation certificate for these being merely photocopies and the demand was again confirmed for Rs. 14,07,610/- itself.

10. Today, the documents produced by the appellant are bank realisation certificates from Punjab National Bank. Though the certificates are again the photocopies. However, the Department has also placed on record the verification report confirming all the requisite 4 certificates to be in order. Keeping in view the same and that earlier Final Order dated 09 March, 2017 which had dropped the entire demand except for confirming the demand of customs duty of Rs.3,05,011/-. However, remaining demand was made subject to verification with direction to the Commissioner to fix the redemption fine and penalty proportionate to the said demand after such verification. But the Commissioner is observed to have ignored the documents, the bank realisation certificates to arrive at proper verification. Said verifying documents are now also placed on record and are acknowledged to have been verified as correct by the department also. Hence the demand of Rs.8,55,087/-, Rs. 6897/- Rs. 3248/- and Rs. 2263 also stands set aside. Thus, we hold that the order under challenge has not complied the directions of remand properly.

11. The only demand stands confirmed against the appellant is that of Rs.3,05,011/- as the recovery of Customs duty forgone amount. The same has already been conceded by the appellant. The proportionate value of Redemption Fine is therefore, reduced to Rupee Three lakh and the proportionate penalty accordingly is reduced to Rupees One lakh only. As a result thereof, the present appeal stand partly allowed.

(dictated and pronounced in the Court)

(V Padmanabhan)
Member (Technical)

(Rachna Gupta)
Member(Judicial)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI - 110066
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

**Customs Applications No. 51186 and 51202 of 2018 in
Appeals No. 53528 and 53571 of 2018**

Arising out of the Order-in-Appeal No. IND-EXCUS-000-APP-386 & 387-17-18,
Dated: 30.11.2017

Passed by The Commissioner, Customs, Central Excise and Service Tax, Indore
(M.P.).

Date of Hearing: 07.01.2019

Date of Decision: 07.01.2019

**M/s NEO CORP INTERNATIONAL LTD
M/s PRISM FLEXIBLE SOLUTIONS PVT LTD**

Vs

**COMMISSIONER OF CUSTOMS
INDORE**

Appellant Rep by: None

Respondent Rep by: Shri Rakesh Kumar, AR (DR)

CORAM: C L Mahar, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NOS. 50126-50127/2019

Per: C L Mahar:

The brief facts of the matter are that the condonation of delay applications have been filed for condoning the delay of 227 days in appeal No. 53528 of 2018 and that of 195 days in appeal No. 53571 of 2018 in filing the appeal before this Tribunal. It is an admitted fact that a common order of Commissioner, Customs, Central Excise & Service Tax, Indore No. IND-EXCUS- 000-APP-386-387-17-18 dated 31st November, 2017 was received by the appellant on 11th December, 2017 and as per the provisions of Central Excise Act, the appeal should have been filed before this Tribunal on or before 10th March, 2018, however, the appeal in this case had been filed on 25/10/2018 and the appellant are before us for condonation of delay in filing appeal.

2. It is seen that the matter has been posted for hearing on two occasions earlier and nobody has appeared for hearing.

3. We have also perused the COD application and find that the application for condonation of delay is very vague and no concrete reason has been given for not filing the appeal within the prescribed time limit. The only explanation which has been given by the appellant is that the clerk of the Advocate who was handling the matter has left the job and, therefore, appeal could not be filed in time. We find that no details of as to who was the clerk who was actually handling the job of filing the appeal, when did he left the job of the Advocate and whether the Advocate did not have any other person to handle the urgent appeal matters. We find that the reason given by the appellant is no cogent explanation for condonation of delay of 227 days. We are not convinced with the explanation given by the appellant and thus find that the prayer of condonation lacks merit and same deserves to be rejected.

4. Accordingly, the COD applications are dismissed. Resultantly both appeals stand dismissed.

(Operative part of the order pronounced in open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 53554 of 2018 [DB]

Arising out of Order-in-Original No. 34/MK/Policy/2018, Dated: 06.07.2018
Passed by the Commissioner of Customs (Airport & General), New Delhi

**Date of Hearing: 03.05.2019
Date of Decision: 30.08.2019**

**M/s ADEPT LOGISTICS
THROUGH ITS PROPRIETOR YOGESH PANDEY 227/1, 2ND FLOOR
ADMN. BUILDING, CONCOR, ICD TUGHLAKABAD
NEW DELHI-110020**

Vs

**COMMISSIONER OF CUSTOMS (AIRPORT & GENERAL)
IGI AIRPORT, NEW DELHI**

Appellant Rep by: Shri M S Arora, Adv.

Respondent Rep by: Shri Rakesh Kumar & Sunil Kumar, AR (DRs)

CORAM: C L Mahar, Member (T)
Rachna Gupta, Member (J)

FINAL ORDER NO. 51161/2019

Per: Rachna Gupta:

The Appellant in the present case is the holder of Customs Broker License, as was issued under Customs Brokers Licensing Regulations (CBLR), 2013 on 31 March 2016 and is valid upto 18.12.2025. The Appellant had filed three bills of entry under the aforesaid license for clearance of toys imported from China. The details whereof are follows :

S. No.	Name of the Importer	Bill of Entry No. & Date	Bill of lading No. & Date
1.	M/s Goyal Enterprises (IEC No. 0510100376)	3413939 dated 27.09.2017	OOLU2592985508 dated 31.08.2017
2.	M/s Mahadev Enterprises (IEC No. BPVPG0667J)	3413748 dated 27.09.2017	OOLU2592985500 dated 31.08.2017
3.	M/s Mahadev Enterprises (IEC No. BPVPG0667J)	3413598 dated 27.09.2017	OOLU2592985509 dated 31.08.2017

2. On examination, department observed that Bill of lading dated 31.08.2017 was actually of 06.09.2017 (as per EDI system) and 06.09.2017 date also got confirmed from shipping line OOCL. Opining the change of date as forgery that the proprietor of the Appellant CB, namely, Shri Yogesh Kumar Pandey was interrogated where he acknowledged the aforesaid change about the date of Bill of lading to have been done with the intention to avoid requirement of BIC certificate made applicable from 01.09.2017 by of DGFT notification no. 26/2017 dated 1st September, 2017. Statement of an employee of Appellant, namely, Shri Praveen Kumar was also got recorded on 17.10.2017 itself acknowledging the aforesaid intention. It is thereafter that the incident report of Deputy Commissioner SIIB Import, ICD, Tughlakabad, New Delhi was forwarded alleging the noticed forgery in the Bill of lading and proposing an action under Regulation 18 read with Regulation 20 and 22 of the CBLR, 2013, including revocation of licence, forfeiture, security and imposition of penalty. The licence of the Appellant was

suspended by the Commissioner of Customs (General), New Custom House, New Delhi vide Order no. 67 dated 27/10/201/30/10/2017, in view of Regulation 19(1) of CBLR, 2013 which was later confirmed vide Order-in-Original No. 74 dated 17/11/2017 passed by Commissioner of Customs (General), New Delhi. It is thereafter that a show cause notice No. 02 dated 17/01/2018 was served upon the Appellant alleging the failure of custom broker to comply with Regulations 11(d), 11(g) and 79 of CBLR, 2013.

3. The said proposal has been confirmed vide the Order-in-Original No. 34 dated 06/07/2018 being aggrieved whereof the Appellant is before this Tribunal.

4. We have heard Shri M. S. Arora, learned Advocate for the Appellant, Shri Rakesh Kumar and Sunil Kumar, Authorised Representatives for the Department.

5. It is submitted on behalf of the Appellant that order is liable to be set aside on the sole ground of limitation as the show cause notice as envisaged under Regulation 20(1) of CBLR, 2013 was not issued within 90 days of receipt of the offence report. It is impressed upon that though the show cause notice was signed on 17/01/2018 but was dispatched on 01/02/2018 and was received by the Appellant on 07/02/2018 as such was issued beyond the stipulated time of 90 days. It is impressed upon that the order is liable to be set aside on this ground itself without even looking into the merits of the case. The order is accordingly prayed to be set aside and appeal is prayed to be allowed.

6. Learned D.R on the other hand has submitted that the appellant was observed to have forged the documents so as to circumvent the provisions of Foreign Trade Policy in respect of import of toys. Since the impugned order has held that Appellant/CB has contravened provisions of the CBLR, 2013, hence, have rendered themselves liable for revocation of licence, there is no infirmity in the order. The plea of limitation as taken by the Appellant has also been vehemently denied with the submissions that the offence report is admittedly dated 27/10/2017, 90 days whereof for issuing a show cause notice expired on 25/01/2018. The show cause notice was issued on 17/01/2018, hence was issued within the said period of 90 days. The argument of the Appellant that the same was posted on 01/02/2018 is being denied. The learned Departmental Representative has relied upon the extract of the dispatch register maintained in regular course of business by the department showing that the show cause notice to Appellant was dispatched on 17/01/2018 itself.

7. It is also impressed upon that the word "Issue" used in Regulation 21 of CBLR, 2013 does not mean "served". Justifying upon the order, learned Departmental Representative has prayed for the dismissal of the appeal.

8. After hearing both the Parties, we observe as follows :

The only line of argument on behalf of Appellant to set aside the impugned order is the ground of limitation that the impugned show cause notice is not issued by Commissioner of Customs within 90 days of the date of the receipt offence report as it was put in post after the expiry of 90 days irrespective it was signed by the issuing authorities during the period of limitation itself.

9. In view thereof, we confined our findings to the issue of limitation. For the purpose Regulation 20 (1) CBLR 2013 is perused. It reads as follows :

20. Procedure for revoking licence or imposing penalty:

(1) The Commissioner of Customs "shall issue" a notice in writing to the Customs Broker within a period of ninety days from the date of receipt of an offence report, stating the grounds on which it is proposed to revoke the licence or impose penalty requiring the said Customs Broker to submit within thirty days to the Deputy Commissioner of Customs or Assistant Commissioner of Customs nominated by him, a written statement of defense and also to specify in the said statement whether the Customs Broker desires to be heard in Date of Order 06-02-2018 W.P.No.15866/2016 M/s. Cargomar Vs. Union of India & Anr. person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs.

10. Admittedly, the incidence report was received by the Commissioner of Customs on 27/10/2017. Admittedly, show cause notice bears 17/01/2018 as the date, period of 90 days as required in the above provision expires on 27/01/2018. As per the department the show cause notice of 17/01/2018 was dispatched on 17/01/2018 itself whereas as per Appellant it was put to Speed Post on 01/04/2018 that is after the expiry of the said period of 90 days.

11. It is now to be adjudicated as to whether in view the aforementioned admitted as well as the disputed facts, the impugned show cause notice stands issued within the period of 90 days or not. Accordingly, the core issue that arises for consideration is as to when can the notice under Regulation 20 (1) of CBLR, 2013 is said to have been issued.

12. In this context, it would be necessary to examine the true import of the expression "shall issue" as employed in the said Regulation.

(15.1) In P. Ramanathan Aiyers's Law Lexicon the word "issue" has been defined as follows:

"Issue. As a noun, the act of sending or causing to go forth; a moving out of any enclosed place; egress; the act of passing out; exit; egress or passage out (Worcester Dict.); the ultimate result

or end. As a verb, "To issue" means to send out, to send out officially; to send forth; to put forth; to deliver, for use, or unauthoritatively; to put into circulation; to emit; to go out (Burrill); to go forth as a authoritative or binding, to proceed or arise from; to proceed as from a source (Century Dict.)

Issue of Process. Going out of the hands of the clerk, expressed or implied, to be delivered to the Sheriff for service. A writ or notice is issued when it is put in proper form and placed in an officer's hands for service, at the time it becomes a perfected process.

13. In the case of *Kanubhai M Patel HUF vs Hiren Bhatt OR His Successors to Office & 4 in SCA Nos. 5295 to 5297, decided on 13.07.2010*, the word "shall be issued" as used in Section 149 of the Income Tax Act were defined as follows:

"Any process may be considered "issued" if made out and placed in the hands of a person authorised to serve it, and with a bona fide intent to have it served."

16. *"Thus, the expression to issue in the context of issuance of notices, writs and process, has been attributed the meaning, to send out; to place in the hands of the proper officer for service. The expression "shall be issued" as used in section 149 would therefore have to be read in the aforesaid context. In the present case, the impugned notices have been signed on 31.03. 2010 whereas the same were sent to the speed post centre for booking only on 07.04.2010. Considering the definition of the word issue, it is apparent that merely signing the notices cannot be equated with issuance of notice as contemplated under section 149 of the Act. The date of issue would be the date on which the same were handed over for service to the proper officer."*

14. Thus, any notice is set to be issued when it is put in proper form and placed in the hands of a person authorised to serve it and with the bonafide intent to have it served.

15. In the present case, there is no dispute that the show cause notice was signed by Commissioner on 17/01/2018 i.e before the expiry of period of 90 days from the date of receipt of inquest report. No doubt, considering the above definition of word "issue" mere signing of notice cannot be equated with issuance of notice. As contemplated in the impugned regulation, the date relevant for issue would be the date on which the notice was handed over for service to the proper officer.

16. In the present case, the Appellant's submission is thereof the show cause notice of 17/01/2018 was received by them on 07/02/2018 after having been dispatched on 01/02/2018, the receipt of Speed Post is impressed upon as the evidence.

17. We are of the opinion that irrespective the Speed Post receipt has a date of 01/02/2018. The impugned notice shall be deemed to have been issued by the Commissioner Customs if after signing the same he has put it in the process of dispatch in such a way that it was out of its control on such date which falls within the stipulated period of limitation, such SCN cannot be held to be barred by limitation.

18. We observe that department has placed on record the copy of dispatch register maintained by the office of the Commissioner Customs in their regular course of business. Perusal thereof shows that the show cause notice of 17/01/2018 was dispatched for being put in process of post on 17/01/2018 itself. Once the notice was sent out of the office of issuing authority, it was definitely out of the control of

the said authority. Hence, the obligation of said authority for issuing the same stands discharged with the said dispatch.

19. In view of these observations, the case law as relied upon by the Appellant is held not applicable to the given facts and circumstances because in the present case it was on 17/01/2018 when Commissioner ceased to have any authority to alter/modify/re-sign or whatever the said show cause notice i.e. on 17/01/2018 itself, Commissioner ceased to have any locus paetentiae. Date of dispatch from the domain of Commissioner is held to be the date of issue of notice. The said date, therefore, is 17/01/2018. Since the same is within the period of 90 days of receipt of inquest report by the Commissioner, the impugned show cause notice cannot be held to be barred by limitations.

20. The fact that date of service of the show cause notice upon the Appellant that is 07/02/2018 is absolutely not relevant for the impugned controversy, as the same is confined to issuance of notice. Event of issuance has to precede the event of service of notice. Hence the service of notice cannot be covered under the word "shall issue".

21. In view of the entire above discussion, we are not convinced with the arguments put forth on behalf of Appellant about the impugned show cause notice to have been barred by in time.

22. We draw our support from the decision of Hon'ble High court of Gujarat at Ahmedabad in the case of Kanubhai M. Patel HUF (Supra) wherein issuance of notice is though held to be different from signing of notice but has no-where been equated to the service there.

23. As a result of entire above discussion, we don't find any infirmity in the order under challenge as far as the aspect of limitation is concered.

24. With respect to the merits of the case though learned Counsel for the Appellant not impressed thereupon, however, from the perusal of record, it is observed that the Appellant has been found to have forged the import documents so as to avoid the mandatory requirement of BIS certificate .The adjudicating authority below has relied upon the statement of proprietor of Appellant itself which is duly corroborated by an employee of the Appellant company. There is no retraction to the said statements. The alleged forgery i.e. the change in date of Bill of lading also stands confirmed from EDI system and also from shipping line OOCL. Otherwise also the notification for making BIS certificate mandatory is of 01/09/2017. The alleged forgery is the change in date from 06/09/2017 to 31/08/2017 which again corroborates the statement of Yogesh Kumar Pandey, proprietor of the Appellant as has been relied upon by the authority. Seen from that angle also, we do not find any infirmity in the order. Finally, relying upon the decision of Hon'ble Supreme court in the case of *R. Vishwanatha Pillai vs. State of Kerala & Ors. Pillai vs State of Kerala and other reported in 2004 (2) SCC 105*, the following findings;

"We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquires a status by practising fraud".

25. We hereby uphold the order under challenge. As a result thereof the appeal stands dismissed.

(Pronounced in the open Court on 30.08.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Customs Appeal No. 52084 of 2019 (Arising out of Order-in-Original No. SKS/COMMR/ACE/06/2019 dated 10/05/2019 passed by the Commissioner of Customs, ACC Export, New Custom House, New Delhi) and Customs Appeal No. 52121 of 2019 (Arising out of Order-in-Original No. SKS/COMMR/ACE/06/2019 dated 10/05/2019 passed by the Commissioner of Customs, Air Cargo (Export), New Custom House, New Delhi)

Decided On: 10.11.2020

**Commissioner of Customs
Vs.
Ashwini Kumar**

Hon'ble Judges/Coram:

Dilip Gupta, J. (President) and P.V. Subba Rao, Member (T)

Counsels:

For Appellant/Petitioner/Plaintiff: Sunil Kumar, Authorised Representative

For Respondents/Defendant: V.S. Negi, Advocate

ORDER

P.V. Subba Rao, Member (T)

1. Customs appeal No. C/52121 of 2019-CUS has been filed by Shri Ashwini Kumar alias Amanullah and Customs appeal No. C/52084 of 2019 has been filed by the Revenue assailing the same impugned order-in-original No. SKS/COMMR/ACE/06/2019 dated 10/05/2019. Hence both these appeals are being disposed of together.

2. Heard both sides and perused the records.

3. The facts of the case after filtering out unnecessary details are that a consignment was imported by Shri Ashwini Kumar alias Amanullah under Airway Bill no. 811609150526 through FedEx Courier at IGI Airport. As per the information provided by him a Courier bill of entry was filed by M/s. FedEx declaring the imported goods as uninterrupted power supply systems (UPS) for computers. The consignment was opened and examined by customs officers and they found six gold bars weighing 6 kg concealed in the UPS. Another consignment was also imported by Shri Ashwini kumar alias Amanullah through the same courier under Airway bill no. 811609150515 declaring the goods as UPS which on opening was found to contain another 6 bars of gold weighing 6 kg. In all, 12 kg of gold was recovered from the UPS in the two consignments both of which were seized by the officers after following due procedures. The courier company M/s. FedEx cooperated with the investigations and helped the officers locate the importer. The consignment was imported in the name of Shri Ashwini Kumar which was a pseudonym of Shri Amanullah as it came to light during investigation.

4. It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorised by the RBI or by others authorised by DGFT and to some extent by passengers. Gold cannot be imported through courier at all as per Regulation 2(2) (iv) of Courier Imports and Exports (Clearance) Regulations, 1998. Thus, the undisputed facts are that the gold was imported improperly:

1. Through courier which is not permissible;
 2. By Shri Amanullah who had no authorisation to import gold;
 3. Concealing it in UPS and without declaring that it was being imported; and
 4. Under a false name.
5. After recording statements and completing the investigations, a show cause notice was issued on 07/02/2018 by the Commissioner of Customs to Shri Amanullah as well as to

the courier company M/s. FedEx. Shri Amanullah was called upon to explain as to why:

a) the impugned seized Gold Bars weighing 12000 gms valued at Rs. 3,56,64,000/- (Three Crore Fifty Six Lakh Sixty Four Thousand only) found to be concealed in the consignments covered under AWB no. 811609150526 and 811609150515 imported by Shri Amanullah alias Ashwini Kumar, 30B, 70/02, Shan-e-ilahi Apartment, Zakir Nagar (Jamia Nagar), New Friends Colony, New Delhi - 110 025 should not be confiscated under Section 111 of the Customs Act, 1962.

b) the eight UPS and the packing material used to conceal the Gold Bars weighing 12000 grams should not be confiscated under Section 118 and Section 119 of the Customs Act, 1962.

c) penalty should not be imposed on the importer Shri Amanullah alias Ashwini Kumar under Section 112(a), 114A and Section 114AA of the Customs Act, 1962."

6. M/s. FedEx, the courier, was asked as to why penalty should not be imposed upon them under Section 117 of the Customs Act for their negligence.

7. Paragraph 25 of this show cause notice indicated that it was being issued under Section 28 and Section 124 of the Customs Act, 1962 without prejudice to any other action that may be taken against any person whether mentioned therein or not under the provisions of the Customs Act, 1962 or any other law for the time being in force. Section 28 of the Customs Act is the provision for demanding duty which has not been levied or not paid or short paid or short levied or erroneously refunded. Although Section 28 was invoked, the amount of duty was not quantified in the show cause notice. Section 124 of the Customs Act mandates that a show cause notice must be issued before ordering confiscation of any goods or imposing any penalty on any person. Thus, the show cause notice viewed the case as one not only of import in violation of law requiring confiscation of the goods but also one of evasion of duty.

8. Section 114A prescribes penalty for non-levy, short levy, non payment, short payment or erroneous refund arising out of a fraud, collusion, willful misstatement or suppression of facts. Section 114AA provides for penalty for use of incorrect or false information in connection with the business under the Act.

9. Section 111 provides for confiscation of goods which have been improperly imported under various clauses. Section 112 provides for penalty for improper importation of goods which rendered them liable for confiscation under section 111. Section 125 of the Act provides for redemption of the confiscated goods on payment of fine.

10. Penalties under Section 114A (for non levy short levy, nonpayment, short payment of duty due to certain reasons) and under Section 112 (for doing acts which render the goods liable to confiscation) are mutually exclusive. If a penalty is imposed under Section 114A, a penalty cannot also be imposed simultaneously under Section 112. Thus, if the importer mis-declared the goods resulting in short payment of duty, for instance, he will be liable for penalty under Section 114A. The goods so imported will also be liable for confiscation under Section 111 which will render the importer liable to penalty under Section 112. However, if a penalty is imposed under Section 114A, no penalty can also be imposed under Section 112.

11. The Commissioner, in the impugned order, held as follows:

"(i) I confiscate the impugned mis-declared goods namely "12000 gms. of gold" seized vide Panchnama dated 09-10/08/2017 covered under AWB No. 811609150526 and 811609150515 having the market value of Rs. 3,56,64,000/- under the provisions of Section 111 (i), (l) & (m) of the Customs Act, 1962. I order redemption of the impugned goods on payment of Rs. 50 lakhs (Rupees Fifty Lakhs only).

(ii) I order confiscation of the computer UPS and the packing material used to conceal the "12000 gms. of gold" under Section 118 and Section 119 of the Customs Act, 1962, however, I give an option to the importer Shri Ashwini Kumar Alias Amanullah to redeem the said confiscated goods i.e. eight UPS and the packing material on payment of redemption fine of Rs. 50,000/- (Rupees Fifty Thousand only) under Section 125 of the Customs Act, 1962, alongwith payment of appropriate Customs duty under Section 28 of the Customs Act, 1962 as well as applicable interest under Section 28AA of the Customs Act, 1962.

(iii) I do not impose a penalty on Shri Amanullah alias Ashwini Kumar, 3-B, 70/02, Shan-e-ilahi Apartment, Zakir Nagar (Jamia Nagar), New Friends Colony, New Delhi - 110 025 under Section 112(a) of the Customs Act, 1962.

(iv) I impose a penalty of Rs. 1,35,70,152/- (Rupees One Crore Thirty Five Lakhs and Seventy Thousand One Hundred Fifty Two only) upon Shri Ashwini Kumar alias Amanullah, 3-B, 70/02, Shan-e-ilahi Apartment, Zakir Nagar (Jamia Nagar), New Friends Colony, New Delhi - 110 025 under Section 114A of the Customs Act, 1962 for the reasons, discussed supra.

(v) I impose a penalty of Rs. 1,00,00,000/- (Rupees One Crore only) upon Shri Amanullah alias Ashwini Kumar, 3-B, 70/02, Shan-e-ilahi Apartment, Zakir Nagar (Jamia Nagar), New Friends Colony, New Delhi - 110 025 under Section 114AA of the Customs Act, 1962 considering the facts obtaining in the case.

(vi) I do not impose any penalty upon M/s. FedEx under Section 117 of the Customs Act, 1962 for the reasons, discussed supra."

12. Neither side is aggrieved by the fact that the Commissioner has not imposed any penalty on the courier M/s. FedEx under Section 117 of the Customs Act. Revenue is aggrieved by the fact that the Commissioner has confiscated the goods only under Section 111 (i), (l) & (m) and he should also have confiscated the goods under Section 111(d). Revenue is also aggrieved that the Commissioner allowed redemption of the gold under Section 125 after confiscation. It is their case that redemption should not have been allowed since gold is a prohibited good, it should have been absolutely confiscated. It is also the case of the Revenue that the Commissioner has not determined the duty payable under Section 28 and applicable interest in the impugned order and therefore the condition precedent for imposing a penalty under Section 114A has not been fulfilled. Therefore, he has wrongly imposed penalty under Section 114A. He should have instead imposed penalty under Section 112 of the Customs Act for improperly importing goods into India which rendered them liable for confiscation under Section 111. Thus, Revenue's prayer is for absolute confiscation of the gold (without an option of redemption) invoking an additional clause of section 111(d) and setting aside the penalty under Section 114A of the Customs Act on Shri Amanullah and imposition of penalty on him under Section 112.

13. In Shri Amanullah's appeal, the following prayers have been made:

(a) hold that the impugned goods are classifiable under Customs Tariff Heading 7108120071 and applicable duty on the goods payable is Rs. 48,53,514/-

(b) hold that the penalty payable under Section 114A is Rs. 48,53,514/- which is equal to duty.

(c) hold that once penalty is imposed under Section 114A no penalty should be imposed under Section 114AA

(d) allow him to exercise the option of payment of fine and penalty under Section 28(5) and 28(6) of the Act.

(e) alternatively quash the impugned order and remand the matter for re-adjudication including determination of the duty payable and penalty imposable.

14. Shri Amanullah had also filed Writ Petition (C) 8149/2019 in the Hon'ble High Court of Delhi mainly on the ground that the amount of Customs duty has not been prescribed in the impugned order-in-original and therefore no penalty can be imposed under Section 114A. The Hon'ble High Court was pleased to dispose of this writ petition on 29/07/2017 as follows:

"We have perused of order-in-original dated 10/05/2017 passed by the Commissioner of Customs (Air Cargo Custom, New Delhi). We see no reason to entertain this writ-petition mainly with the following reasons:

(a) the value of the goods narrated on more than one occasion in the order-in-original and the rate of duty is ad valorem. Hence, the customs duty can be arrived at without going into, any more details;

(b) the order-in-original is an appealable order

As efficacious alternative remedy is available to the petitioner, we find no reason to entertain this writ-petition. Hence, the same is hereby dismissed."

15. Learned Departmental Representative vehemently argued that gold is a prohibited good in terms of Section 2(33) of the Customs Act, 1962 and therefore it should have been absolutely confiscated without giving an option of redemption under Section 125 of the

Act. He relies on the following case laws to assert that the gold bars which were imported in violation of the restrictions on import are prohibited goods in terms of section 2(33) of the Customs Act, 1962.

(a) Bhargavraj Ramesh Kumar Mehta [MANU/GJ/0093/2018 : 2018 (361) ELT (260) Guj]

(b) Om Prakash Bhatiya [MANU/SC/0454/2003 : 2003 (155) ELT 423 (SC)]

(c) Sheikh Mod Omer [MANU/SC/0216/1970 : 1983(13) ELT 1439 (SC)]

16. The relevant sections read as follows:

Section 2(33)

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

Section 125

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

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

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

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

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

17. Learned Departmental Representative argued that since import of gold is prohibited under the Foreign Trade (Development and Regulation) Act, 1992 except by banks authorized by Reserve Bank of India or those organization who have been permitted by DGFT and Shri Amanullah is neither a bank nor has been permitted by DGFT to import gold, the imported gold squarely falls under the category of prohibited goods. Learned Departmental Representative further argued that the mode of import of gold was also clearly improper. Courier Imports and Exports (Clearance) Regulations, 1998 expressly prohibit import of gold through couriers. Had he declared the imported goods as gold, the courier agency could not have filed a bill of entry at all. Shri Amanullah concealed the gold bars in UPS and declared to the courier company that he was importing UPS. Accordingly, the courier filed the bill of entry based on his wrong declaration. Further, he concealed his real identity and filed the papers in fictitious name of Ashwini Kumar. Only detailed investigation with cooperation from the courier agency revealed the identity of Shri Amanullah is the person who had clandestinely imported gold bars without declaring them as such. None of these facts are in dispute. Therefore, the Commissioner should have also confiscated the goods under Section 111(d) also as the gold was imported contrary to the prohibition imposed under Foreign Trade Development and Regulation Act. He should have also imposed penalty under Section 112 of the Customs Act. He submits that the penalties under Section 112 and 114A are mutually exclusive by virtue of the fifth proviso to Section 114A which reads as follows:-

"Provided also that where any penalty has been levied under this Section, no penalty shall be levied under Section 112 or Section 114".

18. Learned Commissioner has imposed a penalty under Section 114A instead of imposing a penalty under Section 112. He submits that an essential condition for imposing a penalty under Section 114A is the determination of duty under Section 28

which has not been done in this case. He also argued that although Section 125 of the Customs Act empowers the officer adjudicating the case to give an option to the owner to pay fine in lieu of confiscation, this was not the fit case to invoke the clause because gold is a prohibited good under Section 2(33). He also argued that the decision of the adjudicating authority to allow redemption of confiscated goods on payment of fine was incorrect as Shri Amanullah had not claimed ownership of the gold and confiscated goods can be released on redemption only to the owner.

19. Having considered the rival submissions, we find that the following issues need to be decided:

- i. whether the Commissioner has erred in not confiscating the gold bars under Section 111(d) also in addition to Section 111 (i) (l) and (m) as asserted by the Revenue;
- ii. whether the Commissioner has erred in not imposing penalty under Section 112 as asserted by the Revenue;
- iii. whether the Commissioner has erred in imposing penalty under Section 114A without determining the amount of duty payable under Section 28 as asserted by both sides;
- iv. whether the Commissioner has committed an error in allowing the redemption of the confiscated gold under Section 125 on payment of redemption fine and applicable duty since gold is a prohibited item for import as per Section 2(33);
- v. whether the Commissioner has erred in allowing redemption of gold to Shri Amanullah in the absence of a claim of ownership as alleged by the Department;
- vi. Whether Shri Amanullah is entitled to the benefit of Section 28 (5) and 28 (6) as claimed by him; and
- vii. whether commissioner has erred in imposing penalty under both Section 114A and 114AA as asserted by Shri Amanulla.

20. Section 111(d) provides for confiscation of any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force. "Import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India [Section 2(23)]. Thus, bringing any goods into India is an import whether through legal channels or by smuggling. "Prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with [Section 2(33)]. Thus, it includes not only goods whose import is absolutely prohibited but also those whose import is 'restricted' subject to some conditions being fulfilled if such conditions are not fulfilled. It is undisputed that as per the Foreign Trade (Development and Regulation) Act, 1992 and the Foreign Trade Policy applicable during the period, only banks authorized by RBI, international passengers to a limited extent in baggage and others authorised by DGFT could have imported gold. Shri Amanullah did not fall under any of these categories and import of gold by him was prohibited and therefore the gold bars were prohibited goods in terms of section 2(33). Improperly imported goods are liable for confiscation under Section 111 which reads as follows:

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

- (a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;
- (b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;
- (c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;
- (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
- (e) any dutiable or prohibited goods found concealed in any manner in any conveyance;

(f) any dutiable or prohibited goods required to be mentioned under the regulations in an arrival manifest or import manifest] or import report which are not so mentioned;

(g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;

(h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;

(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;

(k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

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

(n) any dutiable or prohibited goods transited with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;

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

(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

21. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import is a prohibited good in terms of Section 2(33) and hence it was also liable for confiscation under Section 111(d) of the Customs Act as asserted by the Revenue. It is undisputed that Section 111 (i) (l) and (m) are also applicable in this case as the gold was found concealed in the package and it was not included in the declaration and the goods which were declared namely UPS do not correspond to goods which were imported namely UPS with gold bars inside them. Therefore, the smuggled gold bars are liable for confiscation under Section 111 (d) also although it will not make material difference because the gold was anyway confiscated under a same section invoking three other clauses.

22. Therefore, a penalty could have been imposed on Shri Amaanullah under Section 112. This section reads as follows:

112. Penalty for improper importation of goods, etc. -Any person,-

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

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable,-

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

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

23. A penalty has been imposed in the impugned order under Section 114A which reads as follows:

114A. Penalty for short-levy or non-levy of duty in certain cases.-Where the duty has not been levied or has not been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined:

Provided that where such duty or interest, as the case may be, as determined under sub-section (2) of section 28, and the interest payable thereon under section 28AB, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:

Provided also that where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AB, and twenty-five per cent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

24. Thus, a penalty under Section 112 cannot be imposed if a penalty is imposed under Section 114A. Both sides argued that section 114A cannot be applied without determining the amount of duty payable under Section 28. Section 114A provides for penalty or short levy or non-levy of duty in certain cases under Section 28. Section 28, which is section for demand of duty has been invoked in para 25 of the show cause notice but the amount of duty has not been quantified in it. The Show Cause Notice invoked both Section 114A and section 112. The argument of both the sides is that the amount of duty also should have been determined and specified in the order in original which without which no penalty could have been imposed under Section 114A. This was the exact argument taken by Shri Amanullah in the Writ Petition before the Hon'ble High Court of Delhi in this very case. The Hon'ble High Court of Delhi has dismissed the writ petition holding that the value of goods has been mentioned more than once in the order and the duty being on ad valorem basis it can easily be calculated. In view of the decision of the Hon'ble High Court of Delhi, we find that not calculating the amount of duty payable in this case cannot vitiate the

penalty under section 114A imposed by the Commissioner in the impugned order. Therefore, the penalty imposed under Section 114A is correct and calls for no interference. Consequently by virtue of the fifth proviso to Section 114A, no penalty can be imposed under Section 112. The Commissioner has correctly imposed penalty under Section 114A and consequently not imposed a penalty under section 112.

25. As far as redemption of the goods allowed by the Commissioner in the impugned order is concerned, Section 125 of the Act reads as follows:-

"SECTION 125. Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, no such fine shall be imposed:

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

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

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

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

26. A plain reading of the above section shows that the Adjudicating Authority has no discretion in respect of goods which are not prohibited goods and he is bound to give an option of redemption. In case of prohibited goods, such as, the gold in this case, the Adjudicating Authority may allow redemption or may not allow redemption. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. The reason for such discretion left to the adjudicating authority is evident. In case of prohibited goods, the nature of the goods and the nature of the prohibition vary and cases have to be dealt with exercising discretion. For instance, spurious drugs, arms, ammunition, food which does not meet the food safety standards, etc. are harmful to the society if released to the owner and they find their way into the market. On the other hand, there could be goods which, though prohibited, may not be harmful and releasing them to the owner on payment of fine may be an option. There is absolutely no bar in section 125 on the adjudicating authority releasing any goods whatsoever, which are prohibited or restricted on payment of redemption fine. The adjudicating authority can allow redemption under section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine but he is not bound to so release the goods.

27. CBIC's instructions to departmental officers in para 9.4 of Chapter 30 of the Customs Manual 2018 also confirms this legal position. It reads as follows:

9. Adjudication of confiscations and penalties:

9.4 Section 125 of the Customs Act, 1962 provides for option to pay fine in lieu of confiscation. The proviso to section 125 states that redemption fine shall not exceed the market price of the goods confiscated. This is the maximum penalty which can be levied. As per section 126 of the Customs Act, 1962 when any goods are confiscated, such goods shall thereupon vest in the Central Government. The officer adjudging confiscation shall take and hold possession of the confiscated goods.

Whenever the confiscation of goods is authorized as per the sub-section (1) of section 125, of the Customs Act, 1962, the adjudicating authority MAY in the case of any goods where the importation or exportation is prohibited under this Act or under any other law for the time being in force, and SHALL, in the case any other goods, give to the owner of the

goods (or from whose possession or custody such goods have been seized), an option to pay in lieu of confiscation such fine as the said officer/authority thinks fit.

28. Learned Departmental Representative argues that this was not a fit case for allowing redemption and the Learned Commissioner should not have exercised his discretion under section 125 to allow redemption even though there is no bar on he exercising this right. He relies on the following case laws in support:

(a) Abdul Razak [MANU/KE/2039/2011 : 2012 (275) ELT 300 (Ker)] affirmed in [2017 (350) ELT A 173 SC]

(b) Samaynathan Murugesan [2009 (247) ELT 21 (Mad)] affirmed in [2010 (254) ELT A15 (SC)]

29. Countering these submissions, Learned Counsel for Shri Amanullah relies on the following case laws.

(a) In RE: Ashok Kumar Verma [MANU/OT/0065/2018 : 2019 (369) ELT 1677 (GOI)]

(b) Atul Automations Pvt. Ltd. [MANU/SC/0067/2019 : 2019 (365) ELT 46 (SC)]

30. We have examined all these case laws. In the case of Abdul Razak (supra), the appellant claimed that he has a right to redemption of the seized gold whose import was subject to restrictions which he did not fulfill. Hon'ble High Court of Kerala held that the appellant had no such right and this position was upheld by the Hon'ble Supreme Court. Relevant paragraphs of the judgment are as follows:

5. Before us learned counsel for the appellant contended that Section 125 does not provide for confiscation of goods other than prohibited goods, and according to him, importers' conduct has no significance for considering whether the option exercised by importers to release the goods on payment of redemption fine and duty should be allowed or not. While the learned counsel for the appellant relied on the provisions of the Foreign Trade (Development and Regulation) Act, 1992, and Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 to contend that gold is not a prohibited goods which can be released on payment of redemption fine and duty, learned Standing Counsel appearing for the Department relied on the judgment of the Supreme Court in *Om Prakash Bhatia v. Commissioner of Customs, Delhi* reported in MANU/SC/0454/2003 : 2003 (155) E.L.T. 423, and contended that when import is permissible on satisfaction of certain conditions, the violation of the same will make the goods imported as prohibited goods within the meaning of Section 2(33) of the Act, which reads as follows:-

"2(33) 'Prohibited goods' means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

6. After hearing both sides and after considering the statutory provisions, we do not think the appellant, as a matter of right, can claim release of the goods on payment of redemption fine and duty. Even though gold as such is not a prohibited item and can be imported, such import is subject to lot of restrictions including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed. There is no need for us in this case to consider the conditions on which import is permissible and whether the conditions are satisfied because the appellant attempted to smuggle out the goods by concealing the same in emergency light, mixi, grinder and car horns etc. and hence the goods so brought is prohibitory goods as there is clear violation of the statutory provisions for the normal import of gold. Further, as per the statement given by the appellant under Section 108 of the Act, he is only a carrier i.e. professional smuggler smuggling goods on behalf of others for consideration. We, therefore, do not find any merit in the appellant's case that he has the right to get the confiscated gold released on payment of redemption fine and duty under Section 125 of the Act.

7. This Writ Appeal is therefore dismissed.

31. In the case of Samyanathan Murugesan (supra), the passenger imported gold in violation of the conditions and the gold was absolutely confiscated by the Additional Commissioner which decision was upheld by the Commissioner (Appeals). On appeal, CESTAT remanded the matter directing a reasonable opportunity be given to the passenger for redemption. This order of the CESTAT was challenged by the Revenue in the Hon'ble High Court of Madras who allowed Revenue's appeal and set aside the order of the CESTAT. The judgment of the Hon'ble High Court of Madras was upheld by the

Hon'ble Apex Court.

32. In the case of Ashok Kumar Verma (supra) relied upon by the Learned Counsel, the issue pertained to baggage decided in a Revision Application by the Additional Secretary, Department of Revenue. Matters pertaining to personal baggage, rebate on exports and drawback do not fall in the purview of CESTAT [by proviso to section 129A (1) of the Customs Act] and no appeal against the order of Commissioner (Appeals) in such cases lies with the CESTAT. Instead, a revision application can be filed before the Government of India to decide such an application. The passenger in this case had not only not declared the gold but had ingeniously concealed the gold by converting it into a wire and stuffing it in the beading of the stroller bag. The gold was absolutely confiscated by the Commissioner (Appeals). Holding that the unusual method of concealment of the gold does not make a difference, GOI set aside the absolute confiscation of gold and allowed its redemption. Relevant portion of this order is as follows:

3. From the revision application it is evident that the applicant does not dispute the Commissioner (Appeals)'s order regarding confiscation of the goods which were brought by him illegally from Dubai in violation of Customs Act and the Foreign Trade (Development and Regulation) Act, 1992 and his request is limited to a point that the confiscated gold may be released on payment of redemption fine and reasonable penalty.

4. Government has examined the matter and it is found that there is no dispute regarding the fact that the applicant had violated Section 77 of Customs Act, 1962 by not declaring gold bars to the Customs authorities on his arrival at Airport from Dubai. Accordingly, Commissioner (Appeals) has rightly upheld the Order-in-Original to the extent of confiscating the gold bars which were brought from Dubai with the intention to evade customs duty. However, the Commissioner (Appeals) has upheld Additional Commissioner's order of absolute confiscation of gold on the premise that the gold brought by the applicant had become prohibited when it was sought to be smuggled in by changing the form of gold into wire and by concealing the same in beading of his stroller bag. But he has not cited any legal provision under which the import of gold is expressly prohibited and has only stated that the applicant was not an eligible passenger to bring any quantity of gold as per Notification No. 12/2012-Cus. (N.T.) : MANU/EXNT/0018/2012, dated 17-3-2012 and thus an option for redemption of confiscated gold could not be given. But Government finds that the said notification is only a general exemption notification for several goods and gold is also one of many goods in respect of which concessional rate of duty is provided on fulfillment of condition Number 35. Thus, under this notification eligibility of the passenger is relevant only for determining the admissibility of concessional rate of duty and not for deciding the eligibility to import or not to import gold. The exemption from customs duty was never the issue in this case and it could not be given because the applicant did not declare the importation of gold at all and rather changed the form of gold into wire and by concealing the same in beading of his stroller bag with clear intention to evade customs duty. While the Government is fully convinced that unusual method of concealment of gold is a very relevant factor for determining the quantum of fine and penalty, it does not agree with the Commissioner (Appeals) that the gold had become prohibited only because of its unusual method of smuggling by changing the form of gold into wire and concealing the same in beading of his stroller bag even when the gold is not notified as prohibited goods under Section 11 of the Customs Act, 1962 or any other law. Prohibited goods is a distinct class of goods which can be notified by the Central Government only and the goods cannot be called as prohibited goods simply because it was brought by any person in violation of any legal provision with the intention to evade payment of customs duty. There is a clear difference between the prohibited goods and general regulatory restrictions imposed under the Customs Act or any other law with regard to importation of goods. While prohibited goods are to be notified with reference to specified goods only which are either not allowed at all or allowed to be imported on specified conditions only, regulatory restrictions with regard to importation of goods is generally applicable irrespective of the individual case like goods will not be imported without declaration to the Customs and without payment of duty leviable thereof, etc. Such restriction is clearly a general restriction/regulation, but it cannot be stated that the imported goods become prohibited goods if brought in contravention of such restriction. Apparently because such goods when imported in violation of specified legal provisions are also liable for confiscation under Section 111 of the Customs Act, 1962, the Apex Court in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi, MANU/SC/0454/2003 : 2003 (155) E.L.T. 423 (S.C.) has held that importation of such goods became prohibited in the event of contravention of legal provisions or conditions as such goods are also liable for confiscation under Section 111 of the Customs Act, 1962. If all the goods brought in India in contravention of any legal provision are also termed as prohibited goods, as envisaged in Section 11, Section 111(i) and Section 125 of Customs Act, then all such goods will become prohibited and other category of non-prohibited goods for which option of redemption is to be provided compulsorily under Section 125 of the Act will become redundant. Thus while any goods imported without payment of duty and in violation of

any provision of the Customs Act is also certainly liable for confiscation under Section 111 of the Customs Act, but confiscated goods is not necessarily to be always prohibited goods. While there is no dispute in this case that the gold brought by the applicant from Dubai is liable for confiscation because he did not follow the proper procedure for import thereof in India and attempted to smuggle it without payment of customs duties, it is beyond any doubt that the gold is not a prohibited item under Customs Act. The Hon'ble Madras High Court, in its decision in the case of T. Elavarasan v. CC (Airport), Chennai, MANU/TN/1037/2011 : 2011 (266) E.L.T. 167 (Mad.), has held that gold is not a prohibited goods and a mandatory option is available to the owner of the goods to redeem the confiscated gold on payment of fine under Section 125 of Customs Act, 1962. Even the Hon'ble High Court of Andhra Pradesh in the case of Shaikh Jamal Basha v. GOI, 1997 (91) E.L.T. 1277 (A.P.), has also held that as per Rule 9 of Baggage Rules, 1979 read with Appendix-B, gold in any form other than ornament could be imported on payment of customs duty only and if the same was imported unauthorisedly the option to owner of the gold is to be given for redemption of the confiscated gold on payment of fine. In fact the Commissioner (Appeals), Delhi and the Government of India have consistently held the same view in a large number of cases that gold is not prohibited goods as it is not specifically notified by the Government. For example, the Commissioner (Appeals) in his Order-in-Appeal No. CC(A)Cus/D-I/Air/629/2016, dated 4-7-2016 in the case of Mohd. Khalid Siddique has clearly held that gold is not prohibited as it is not notified by the Government as prohibited goods. Therefore, the Commissioner (Appeals) has taken a totally different stand by upholding absolute confiscation of gold in this case. Accordingly the Commissioner (Appeals) should have provide an option to the applicant under Section 125 of the Customs Act, 1962 to redeem the confiscated goods on payment of customs duties, redemption fine and penalty and because it was not done so earlier, the Government now allows the applicant to redeem the confiscated gold within 30 days from the date of issuance of this order on payment of customs duty, fine of Rs. 4,50,000/- and penalty of Rs. 1,75,000/- already imposed by the Additional Commissioner of Customs and upheld by the Commissioner (Appeals).

5. Accordingly, the revision application is disposed of and the Commissioner (Appeals)'s order is modified in above terms.

33. The Hon'ble Supreme Court in the case of Autul Automations Pvt. Ltd. (supra) while deciding on the question of allowing redemption of imported used Multi-Functional Digital Copiers, drew a distinction between goods whose import is completely prohibited and those whose import is restricted and the restrictions are not met and allowed redemption of MFDs. Relevant paragraphs of this judgment are as follows:

2. The respondents during October-November, 2016 imported certain consignments of Multi-Function Devices (Digital Photocopiers and Printers) (hereinafter referred to as "MFDs"). The Commissioner of Customs held that the imports were in violation of the Foreign Trade Policy framed under the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as the "Foreign Trade Act") and Rule 15(1)(2) of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 (hereinafter referred to as "Waste Management Rules"). Redemption fine was imposed under Section 125 of the Customs Act, 1962 and the consignment released for re-export only. Penalty was also imposed under Section 112(a) along with penalty under Section 114AA of the Customs Act as also penalty was imposed on the Directors.

3. In appeal before the Tribunal, the respondents did not contest that the import was in violation of the Foreign Trade Policy having been made without the necessary prior authorisation. The Tribunal held that the MFDs did not constitute "waste" under Rule 3(1)(23) of the Waste Management Rules and had a utility life of 5 to 7 years, as certified by the Chartered Engineer. Release of the consignment was directed under Section 125 of the Customs Act as the respondents were held to have substantially complied with the requirements of Rule 13 of the Waste Management Rules read with Schedule VIII Entry 4(j) except for the country of origin certificate. The Tribunal further noticed that earlier also, similar consignments of the respondent and others had been released at the Calcutta, Chennai and Cochin ports upon payment of redemption fine. The redemption fine was reduced as also the penalty under Section 112(a) of the Customs Act was reduced including that on the Director also. The penalty under Section 114AA was done away with.

4. In the appeal preferred by the Revenue, the High Court held that the MFDs correctly fell in the category of "other wastes" under Rule 3(1)(23) of the Waste Management Rules read with Part B and Part D of Schedule III Item B1110 dealing with used Multi-Function Printer and Copying Machines. Adverting to the provisions of the Foreign Trade Act and the Foreign Trade Policy framed thereunder, it was held that the MFDs were not prohibited but restricted items for import. Section 11(8) and (9) of the Foreign Trade Act provided for confiscation and redemption of goods imported without authorisation upon payment of market value. The order for release of the goods was upheld subject to

execution of a simple bond without sureties for 90% of the enhanced assessed value, with further liberty to the Director General of Foreign Trade (hereinafter referred to as "the DGFT"), along with directions.

5. Shri Maninder Singh, Learned Senior Counsel appearing for the appellant submitted that import of the MFDs without authorisation permit and in violation of the Foreign Trade Policy is not in dispute. The imported MFDs having been held to be "other wastes", documentation being incomplete under Part D of Schedule III of the Waste Management Rules, re-export was rightly ordered under Rule 15 of the Waste Management Rules while imposing redemption fine. Section 125 of the Customs Act could not have been relied upon, in the facts of the case, to hold that fine in lieu of confiscation would suffice for purpose of redemption permitting import. Even if the MFDs were a restricted and not prohibited item, absence of the necessary authorisation under the Foreign Trade Policy would give it the character of a prohibited item. The respondents had been habitual in the illegal import of similar consignments. Merely because on earlier occasions, similar consignments imported in violation of the law may have been released on payment of redemption fine, it did not vest a legal right in the respondent to claim similar relief always. The Customs authorities, in the facts of the case, cannot be said to have detained the consignment without justification.

6. Shri Mukul Rohatgi, Learned Senior Counsel appearing for the respondent submitted that MFDs were imported in October-November, 2016. The requirement of extended producer responsibility under the E-waste (Management) Rules, 2016 was deferred till 30-4-2017 by the Technical Committee under the Ministry of Environment and Forest. In any event, the respondent has obtained the same before release of the consignment. The question for disposal of the imported machine at this stage is premature as it has a utility life of 5 to 7 years. The consignment was not a prohibited but restricted item. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. The discretionary power has to be tampered with reason and has to be read along with the Foreign Trade Act and the policy framed under the same. The Customs Department has consistently in the past been permitting the release of MFDs on levy of redemption fine. The discriminatory treatment with regard to the present consignment is unjustified. The DGFT had declined to issue authorization certificate. There was substantial compliance with the requirements of Rule 13 of the Waste Management Rules read with Schedule VIII Entry 4(j).

7. We have considered the submissions on behalf of the parties. The MFDs were imported in October-November, 2016. They were detained by the customs authorities opining that the imports had been made in violation of the Foreign Trade Policy, 2015-2020 framed under Sections 3 and 5 of the Foreign Trade Act and the Wastes Management Rules.

8. Clause 2.01 of the Foreign Trade Policy provides for prohibition and restriction of imports and exports. The export or import of restricted goods can be made under Clause 2.08 only in accordance with an authorisation/permission to be obtained under Clause 2.11. Photocopier machines/Digital multifunction Print and Copying Machines are restricted items importable against authorisation under Clause 2.31. Indisputably, the respondents did not possess the necessary authorisation for their import. The Customs authorities therefore, prima facie cannot be said to be unjustified in detaining the consignment. Merely because earlier on more than one occasion, similar consignments of the respondent or others may have been cleared by the Customs authorities at the Calcutta, Chennai or Cochin ports on payment of redemption fine, cannot be a justification simpliciter to demand parity of treatment for the present consignment also. The defence that the DGFT had declined to issue such authorisation does not appeal to the Court.

9. Unfortunately, both the Commissioner and the Tribunal did not advert to the provisions of the Foreign Trade Act. The High Court dealing with the same has aptly noticed that Section 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 provides for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. Section 3(3) of the Foreign Trade Act provides that any order of prohibition made under the Act shall apply mutatis mutandis as deemed to have been made under Section 11 of the Customs Act also. Section 18A of the Foreign Trade Act reads that it is in addition to and not in derogation of other laws. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. The MFDs were not prohibited but restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value. There will exist a fundamental distinction between what is prohibited and what is restricted. We therefore, find no error with the conclusion of the Tribunal affirmed by the High Court that the respondent was entitled to redemption of the consignment on payment of the market price at the reassessed value by the

Customs authorities with fine under Section 112(a) of the Customs Act, 1962.

10. The Central Government had permitted the import of used MFDs with utility for at least five years keeping in mind that they were not being manufactured in the country. The Chartered Engineer commissioned by the Customs authorities had certified that the MFDs were capable of utility for the next 5 to 7 years without any major repairs. Considering that at import they had utility, the High Court rightly classified them as "other wastes" under Rule 3(1)(23) of the Waste Management Rules, which reads as follows:-

"Other wastes means wastes specified in Part B and Part D of Schedule III for import or export and includes all such waste generated indigenously within the country."

11. Rule 13(2) provides the procedure for import of other wastes listed in Part D Schedule III. Item B1110 of the Schedule mentions used Multifunction Print and Copying Machines (MFDs). Entry 4(j) lists out five documents required for import of used MFDs. The respondents have been found to be substantially compliant in this regard and the requirement for the country of origin certificate has been found to be vague by the High Court. Form 6 has rightly been held to be not applicable to the subject goods.

12. Rule 15 of the Waste Management Rules dealing with illegal traffic, provides that import of "other wastes" shall be deemed illegal if it is without permission from the Central Government under the Rules and is required to be re-exported. Significantly, the Customs Act does not provide for re-export. The Central Government under the Foreign Trade Policy has not prohibited but restricted the import subject to authorisation. The High Court, therefore, rightly held that the MFDs having a utility period, the Extended Producer Responsibility would arise only after the utility period was over. In any event, the E-waste Rules, 2016 certificate had since been issued to the respondents by the Central Pollution Control Board before the goods have been cleared.

13. We therefore find no reason to interfere with the impugned orders. In the statutory scheme of the Foreign Trade Act as discussed, we further find no error in the penultimate direction to the respondents for deposit of bond without sureties for 90% of the enhanced valuation of the goods leaving it to the DGFT to decide whether confiscation needs to be ordered or release be granted on redemption at the market value, in which event the respondents shall be entitled to set off.

14. The appeals are dismissed.

34. From Section 125, the Customs Manual, 2018 of the department and various case laws cited by both sides and discussed above, the following position is clear:

(a) Allowing redemption of goods which are not prohibited is mandatory and the adjudicating authority has to allow it under Section 125.

(b) Allowing redemption of goods whose import is prohibited is discretionary and the adjudicating authority may or may not allow it.

(c) Import of gold is not absolutely prohibited but is restricted.

(d) The owner or the person from who the goods are seized cannot claim as a matter of right that the prohibited goods must be allowed to be redeemed as held by Hon'ble High Court of Madras in the case of Samyanathan Murugesan and by Hon'ble High Court of Kerala in case of Abdul Razak. Both these judgments were upheld by the Hon'ble Supreme Court.

(e) Although, as per Section 2(33) of the Customs Act, 'prohibited goods' includes restricted goods in respect of which the conditions have not been fulfilled, a distinction was drawn by the Government of India in the case of Ashok Kumar Verma (supra) and redemption was allowed of the gold which was smuggled by the appellant passenger ingeniously concealing it in the stroller of the bag. It has also been indicated in this order that Government of India has consistently held the view in many cases that gold is not prohibited but restricted and allowed redemption of confiscated gold.

(f) The Apex Court has also drawn a distinction between goods whose import is absolutely prohibited and those whose import is restricted under the Foreign Trade (D&R) Act and redemption was allowed in the case of restricted goods.

(g) Thus, while Section 125 allows the adjudicating authority the discretion to allow or not to allow redemption of prohibited goods. As far as gold, which is smuggled, is concerned, there appears to have been a gradual change in the approach of the Government. In the case of Ashok Kumar, Government of India allowed redemption of gold that was not only

NOT Declared but ingeniously concealed in strolley bags. It has also been declared in this Revision order that GOI had consistently held the view that smuggled gold can be redeemed.

35. The amount of redemption fine under section 125 cannot be higher than the market value of the goods but no minimum amount is prescribed. In this case market value of the goods is Rs. 3,56,64,000/- and a redemption fine of Rs. 50 lakhs has been imposed in the impugned order.

36. Thus, we find that not only can the gold which is concealed in the consignment and not declared be allowed redemption under Section 125, the Government of India has now been consistently taking such a view allowing redemption of even gold which is concealed. We find that the impugned order of the Commissioner is consistent with the stand of the Government of India. We also find the amount of redemption fine imposed is reasonable and the Commissioner has not exceeded his mandate in allowing redemption of the gold.

37. An argument has also been made by the Revenue that redemption can be allowed only to the owner of the goods and Shri Amanullah has not claimed ownership. This argument is untenable being contrary to the assertions of the Department in the show cause notice. If Shri Amanullah was not the owner of the goods and Shri Ashwini Kumar is a fictitious identity, the gold should have been confiscated as unclaimed gold. No penalty could have been imposed on Shri Amanullah. Investigation by the Department with the help from the courier agency has shown that Shri Amanullah was the importer of the gold and therefore the show cause notice was issued to him asking why the gold should not be confiscated. Therefore, we find no infirmity in allowing redemption of the gold to Shri Amanullah.

38. In Shri Amanullah's appeal, a prayer has been that this Tribunal shall determine the amount of duty payable. This is not necessary. The Hon'ble High Court of Delhi has already decided that the value of the goods has been mentioned in the impugned order more than once and the rate of duty is ad valorem and the amount of duty can easily be calculated which can be done by the officers as it is a simple case of arithmetic calculation. An appeal has also been made to allow the appellant benefit of the provisions of Section 28(5) and 28(6). On a specific query from the bench whether they had paid duty within the time mentioned under Section 28(5) and 28(6), learned Counsel answered in the negative. Therefore, we find no reason to pass any order on this count.

39. The last contention of Shri Amanullah in his appeal is that since penalty has been imposed under Section 114A, no penalty should be imposed under Section 114AA also upon them. We find that the ingredients of Section 114A and Section 114AA are different. Section 114A provides for non-levy of duty or short levy of duty due to certain reasons. There is no dispute that no duty was levied or paid on the imported gold concealed in the UPS by mis-declaring the nature of goods. Therefore, Section 114A has been correctly invoked in this case and a penalty has been imposed.

40. The penalty under Section 114AA is for use of false or incorrect materials in the transaction of any business for the purposes of the Act. The name of the importer as well as the nature of goods were misdeclared by Shri Amanullah based on which the courier company FedEx filed the Bill of Entry. Shri Amanullah also used false identity documents in the name of Shri Ashwini Kumar. All these are matters of record and not disputed.

41. Learned Counsel argued that they had not made any declaration directly before the customs officers but had only submitted wrong information to the courier agency who, in turn, have filed a wrong declaration before the customs officers in the form of an incorrect courier bill of entry. Therefore, they are not covered by section 114AA.

42. We do not find any force in this argument. The penalty is for knowingly or intentionally making signing, using or causing to be made signed or used any declaration statement or document in the assessment of any business for the purposes of the Act. The section does not say that it has to be made directly before the customs officers. In this case, the courier agency has no means of declaring the nature of goods or the name of the importer except on the basis of information and material provided by the importer. Shri Amanullah provided wrong information in the course of business under the Act. Therefore, his action is squarely covered by Section 114AA. The penalty imposed under Section 114AA and the penalty imposed under Section 114A are not mutually exclusive and penalty cannot be imposed simultaneously under both these sections.

43. In view of the above, we find:

i. the gold bars should have been confiscated under Section 111(d) also in addition to Section 111 (i) (l) and (m) and we order so;

ii. the Commissioner has correctly not imposed a penalty under Section 112 since he imposed a penalty under Section 114A and the two penalties are mutually exclusive;

iii. the Commissioner has not erred in imposing penalty under Section 114A without determining the amount of duty payable under Section 28 as this issue has already been decided by the Hon'ble High Court of Delhi;

iv. the Commissioner has allowed redemption of the confiscated gold under Section 125 on payment of redemption fine and applicable duty which is not only permissible under Section 125 but is consistent with the current stand of the Government of India regarding smuggled gold;

v. there is no force in the argument of the revenue that the gold should not have been released to Shri Amanullah in the absence of a claim of ownership because the show cause notice itself arises from the premise that Shri Amanullah is the importer and penalties have also been imposed on him;

vi. Shri Amanullah is not entitled to the benefit of Section 28 (5) and 28 (6) as claimed by him because there is no evidence that he fulfilled the conditions for these sub-sections;

vii. the commissioner has not erred in imposing penalty under both Section 114A and 114AA as both sections are independent of each other;

44. The impugned order is, accordingly, upheld except that confiscation of the imported goods should also be under Section 111 (d) in addition to Section 111 (i) (l) and (m). The appeal filed by the Revenue is allowed to this extent and rest of the prayers are rejected. The appeal filed by Shri Amanullah is rejected.

(Order pronounced in open court on 10/11/2020.)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Customs Appeal No. 70210 of 2020

Arising out of Order-in-Appeal No. 110-CUS/APPL/LKO/2020, Dated: 10.06.2020
Passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow

Date of Hearing: 05.11.2020

Date of Decision: 10.11.2020

**COMMISSIONER OF CUSTOMS (PREVENTIVE)
5TH FLOOR KENDRIYA BHAWAN, SECTOR-H ALIGANJ LUCKNOW**

Vs

**BUSHRAH EXPORT HOUSE
4/19, VIKAS KHAND, GOMTI NAGAR, LUCKNOW**

Appellant Rep by: Shri Sunil Kumar, AR

Respondent Rep by: Shri Vishwajit Singh, Adv.

CORAM: Dilip Gupta, President
C L Mahar, Member (T)

FINAL ORDER NO. 51626/2020

Per: Dilip Gupta:

This Appeal has been filed by the Commissioner of Customs (Preventive), Lucknow the Appellant, to assail the order dated June 10, 2020 that was passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow the Commissioner (Appeals). The said order of the Commissioner (Appeals) sets aside the order dated June 03, 2020 passed by the Superintendent, Customs, ICD, Panki, Kanpur the Superintendent, seizing the goods under section 110(1) of the Customs Act, 1962 the Customs Act.

2. The Appeal was filed before a Bench of the Appellate Tribunal at Allahabad on June 22, 2020. It has been transferred to the Principal Bench of the Tribunal at Delhi by judgment and order dated October 15, 2020 of the Supreme Court. The operative portion of the judgment of the Supreme Court is reproduced below :

"The appeal which has been filed by the Chief Commissioner Customs [Appeal Diary No 70226/2020] is pending before the CESTAT, Prayagraj. Mr N Venkataraman, learned Additional Solicitor General appearing with Ms Nisha Bagchi, learned counsel on behalf of the respondents apprised the Court of the fact that presently the Bench of the Tribunal at Prayagraj is not functional due to the existence of vacancies.

2. There is a need for an early resolution of the appeal or, in any event, the application for stay that has been filed by the Customs Department. Hence, the ends of justice would be served if the appeal is transferred to the Principal Bench of the Tribunal at New Delhi so that the appeal or, as the case may be, the application for stay can be taken up expeditiously. Mr Vishwajit singh, learned counsel appearing on behalf of the petitioner has no objection to this course of action to facilitate an early resolution of the dispute.

3. We accordingly transfer Appeal Diary No 70226/2020 from the CESTAT, Prayagraj to the Principal Bench at New Delhi. We request the Chairperson of the CESTAT to take up the appeal upon transfer to New Delhi expeditiously and, in the event that it is not possible to dispose of the appeal in its entirety, to take up the application for stay on an expeditious basis. The Tribunal would endeavor to dispose of at least the application for stay within a period of two weeks of the receipt of the papers on transfer.

4. The Special Leave Petition is disposed of. Liberty is granted to the learned counsel appearing on behalf of the contesting parties to move this Court for further directions, should it become necessary.

5. Pending applications, if any, stand disposed of."

3. The papers of the Appeal were received at the Principal Bench of the Tribunal at Delhi on October 23, 2020 and after due intimation to the parties, the Appeal was listed on October 26, 2020. However, as learned Counsel for the Respondent stated that the Appeal may be listed after four days so as to enable the Respondent to file a reply, the Appeal was directed to be listed for final hearing on November 04, 2020.

4. The records indicate that the export cargo presented by M/s Bushrah Export House the export house through two shipping bills bearing numbers 2807972 and 2808169 dated May 23, 2020 were examined by the Officers of Customs at Kanpur on June 1, 2020 and on examination of the goods, it was noticed that there was a mis-match in the quantity declared in the invoice and the quantity actually found in the shipping bill bearing no. 2808169. Samples were also drawn for a market opinion regarding the value of the export goods and a panchnama was prepared on June 01, 2020.

5. On record is also a panchnama recovery memo dated June 03, 2020. It states that the panchas were called on June 03, 2020 at Indian Container Depot (ICD), Panki, Kanpur, to witness further proceedings required to be undertaken under the provisions of the Customs Act pursuant to the panchnama proceedings dated June 01, 2020. Shri Jai Prakash Yadav, 'H' Card Holder, was present as an authorised representative of the Appellant in the proceedings connected with the shipping bills. Thereafter, the panchas along with the Officers of the Customs and Shri Jai Prakash Yadav reached the Customs Bonded Warehouse, where the cargo covered by the two shipping bills was kept. The panchnama gives details of the two shipping bills. It mentions the product description, the number of pieces, the prevailing market value and the drawback percentage. The panchnama also mentions that the two shipping bills had been filed claiming the benefit of drawback (DBK), Rebate of State Levies (RoSL) and Merchandise Exports from India Scheme (MEIS). The DBK and RoSL involved in the two shipping bills has been stated to be as follows :

Sl. No.	SB No. & Date Inv. No. and date	DBK Involved	ROSL Involved
01	---	1286368	1946030
02	---	1671268	2161187

6. The panchnama records that there is a short quantity of 1872 pieces in the cargo covered by one shipping bill. It also records that the export cargo was grossly over-valued 8 to 9 times for claiming undue export benefits and excess duty drawback, otherwise not admissible. This statement was based on a local market enquiry from traders/dealers of such type of garments.

7. The panchnama further mentions that the officers formed a reasonable belief that the goods were liable to confiscation under section 113(i) of the Customs Act since the export consignment was deficient in quantity and grossly overvalued. Accordingly, the Officers seized the impugned goods under section 110(1) of the Customs Act and placed them in the Customs Bonded Warehouse of Customs ICD, Panki.

8. The relevant portion of the *'Inventory Cum Seizure Memo dated 03-06-2020 (Case No. 01/2020-21)'* is reproduced below :

"Inventory of goods seized

"Sl. No	SB No. & Date Inv. No. and date	Product Description	No. of pieces	Value (in Rs.)
01	---	Boys Barmuda	63048	47222952/-
		Kids Check Nikker		
		Kids Skirt Top		
02	---	Boys Bermuda	75288	68645850/-
		Kids Skirt Top		
		Kids Check Nikker		
		Mens 67 Bermuda		
		Mens Round Neck Tshirt		
Total			138336	115868802/-

The goods mentioned at serial no.1 & 2 of above table have been recovered during panchnama proceedings dated 03/06/2020 **are deficient in quantity by 1872 pieces** in respect of export invoice number BEH/06/2020 and both the **consignments appears to be grossly overvalued rendering the goods liable for confiscation under Section 113(i)** of Customs Act, 1962 for contravention of Sec.50(2), Sec.75 read with Rule 3 of Customs, Central Excise Drawback Rules, 2017 and Sec.14 of Customs Act, 1962 **are seized under Sec.110 of the Customs Act, 1962."**

(emphasis supplied)

9. It is against this aforesaid seizure memo dated June 03, 2020 issued by the Superintendent of Customs that the Respondent-M/s Bushrah Export House, Lucknow, filed an appeal before the Commissioner (Appeals) on June 08, 2020 and made a request that the Appeal should be decided on merits without personal hearing. The Commissioner (Appeals), by order dated June 10, 2020, set aside the seizure memo and allowed the Appeal. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below :

"5. I have gone through the case record. **The consignment was seized was seized on the ground of alleged shortage of 1872 pcs of the goods and overvaluation.** Regarding shortage, it is found that initially one cartoon was reported missing vide Panchnama dated 30.5.2020. However, when the appellant confronted and protested against the alleged shortage vide their letter dated 31.5.2020, the missing carton reappeared vide Panchnama dated 01.6.2020. It is also evident from record that the impugned consignment was partly examined on 30.5.2020 and partly on 01.6.2020. Thus, the impugned goods remained in the Customs warehouse in the intervening period and there is no affirmation in the Panchnama that proper arrangements were made to prevent unauthorized access to the said goods. **In these circumstances the alleged shortage of 1872 pcs itself is questionable. However, even if the said shortage is accepted, the quantum of shortage is so meagre (1.33%) that it would be ridiculous to believe that the same was intentionally done by the appellant.** In such situations, the CBEC's Customs Manual, vide Para 25 of Chapter 3, provides for amendment of Shipping Bill. The Assistant/Deputy Commissioner of the ICD was competent to permit such amendment.

6. (i) **Regarding allegation of overvaluation, it is found that the declared FOB price was straightaway compared with the local trade opinion which is grossly illegal.** As per section 14 of the said Act, the value of the export goods shall be the transaction value of such goods i.e. the price actually paid or payable for the goods when sold for export from India for delivery at the time and place of exportation. **Thus, the export price is negotiated/ determined in the course of international trade and the same cannot be directly compared with local trade opinion of Kanpur. Rule 3(1) of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 also provides that the value of export goods shall be the transaction value. Further, the transaction value can only be challenged in terms of the said Valuation Rules. It is apparent from the record that the declared transaction value has not been challenged in terms of the said Valuation Rules.**

(ii) Further, the appellant claims to have purchased the impugned goods under proper GST Invoice where the declared price of goods are in the range of Rs 620/= to Rs 950/= per piece. This value has also been disregarded without any reason.

(iii) **Hence, in presence of unchallenged transaction value and unchallenged GST paid purchase invoice value, rushing to the town for the so called "local market opinion" is arbitrary and unreasonable.**

7. Hon'ble CESTAT in the case of KANAK METAL INDUSTRIES, reported at 2012 (275) ELT 115 (Tri.-Del) has clearly held that the exporter is not bound to fix FOB value at present market value. This view has been confirmed by Hon'ble Supreme Court, reported at 2013 (293) ELT A25 (SC).

8. **Section 110 of the said Act, requires reasonable belief of confiscability, for seizure of any consignment. From the facts and circumstances of the case, the reasonable belief is not formable. Therefore, the impugned order of seizure is not legally sustainable and the same is set aside. The appeal is allowed."**

(emphasis supplied)

10. Shri Sunil Kumar, learned Authorized Representative of the Department, made the following submissions to assail the order passed by the Commissioner (Appeals) :-

- (i) The Commissioner (Appeals) committed an illegality in setting aside the seizure memo dated June 03, 2020;
- (ii) The proper officer had reason to believe that the goods were liable to confiscation under section 113(i) of the Customs Act and, therefore, the seizure of goods under section 110(1) of the Customs Act was justified;
- (iii) The Superintendent of Customs had noted in the seizure memo dated June 03, 2020 that the goods recovered were deficient in quantity by 1872 pieces and both the consignments appeared to be grossly over-valued so as to render them liable for confiscation under section 113(i) of the Customs Act for contravention of sections 50(2), 75 and rule 3 of Customs, and Central Excise Drawback Rules, 2017 and section 14 of the Customs Act;
- (iv) When any goods are seized under section 110(1) of the Customs Act, proceedings can be initiated by issuance of a show cause notice under section 124 of the Customs Act before the goods are confiscated. In the instant case, before such an exercise could be undertaken, the Respondent filed an Appeal before the Commissioner (Appeals) on June 08, 2020, which Appeal was allowed on June 10, 2020, without even giving any opportunity to the Department;
- (v) The goods became prohibited goods as a wrong declaration was made by the Respondent. In support of this contention, reliance has been placed upon the decision of the Supreme Court in *Om Prakash Bhatia vs Commissioner of Customs, Delhi 2003 (155) ELT 423 (SC)* ; and
- (vi) The Commissioner (Appeals) completely misdirected himself in examining, at the stage of seizure, whether the value of the export goods would be the transaction value and whether the provisions of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 the Export Valuation Rules were required to be followed.

11. Shri Vishwajit Singh, learned Counsel appearing for the Respondent supported the order passed by the Commissioner (Appeals) and made the following submissions :

- (i) The exercise of power under section 110(1) of the Customs Act was not justified in the present case as the Customs Officers have not been able to prima facie establish that the proper officer had reason to believe that the goods were liable to confiscation under the Customs Act. "Reason to believe" has to be based on the material available on record and cannot be arbitrary, capricious or whimsical. In support of this submission, reliance has been placed on certain decisions, to which reference shall be made at the appropriate stage;
- (ii) The allegation that the consignment appeared to be grossly over-valued, rendering the goods liable to confiscation is not correct. The Respondent had purchased the goods through proper GST invoice, where the declared price of the goods is between Rs. 620/- to Rs. 950/- and the declared price in the shipping bill is between Rs. 700/- to Rs. 1150/-. It cannot, therefore, be said that the consignment was grossly over-valued. The Customs officers have not challenged the transaction value of the goods nor made any effort to verify the GST invoices;
- (iii) The Customs Officers should have accepted the value of the export goods as the transaction value of such goods, as is contemplated under section 14(1) of the Customs Act and the value declared by the Respondent could not have been rejected, except in accordance with the procedure prescribed under section 14 of the Customs Act and the Export Valuation Rules;
- (iv) In any view of the matter, the determination of the transaction value through a local market survey could have been adopted only as a last resort when the value of the export goods could not be determined under rules 4 and 5 of the Export Valuation Rules;
- (v) The decision of the Supreme Court in *Om Prakash Bhatia* would not be applicable as it was in connection with the interpretation of section 14 of the Customs Act as it stood prior to its amendment on October 10, 2007; and
- (vi) Initially, the Department came out with a case that one carton of the export goods was missing, but later on they came out with a case that 1872 items were

missing. Actually, there was no shortage of any items and even assuming without admitting that there was a minor shortage of 1.6%, the exporter could have amended the shipping bills and the remaining items could have been cleared.

12. The submissions advanced by the learned Authorized Representative of the Department and the learned Counsel appearing for the Respondent have been considered.

13. The seizure memo dated June 03, 2020 mentions that in respect of one consignment the goods are deficient by 1872 pieces and that both the consignments appear to be grossly overvalued. The two shipping bills had been filed claiming the benefit of drawback, RoSL and MEIS, which are entirely dependent on the market price of the goods. It is for this reason that the seizure mentions that the goods have been seized under section 110(1) of the Customs Act as they were liable to confiscation under section 113(i) of the Customs Act for contravention of sections 50(2) and 75 of the Customs Act read with rule 3 of the Customs and Central Excise Duties Drawback Rules, 2017 Drawback Rules and section 14 of the Customs Act.

14. Section 110 of the Customs Act deals with seizure of goods, documents and things. Sub-sections (1) and (2) of section 110, which are relevant for the purposes of this appeal, are reproduced below :

"110. Seizure of goods, documents and things –

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods :

PROVIDED that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1A) xxx xxx xxx

(1B) xxx xxx xxx

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

PROVIDED that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified:

PROVIDED FURTHER that where any order for provisional release of the seized goods has been passed under section 110A, the specified period of six months shall not apply. "

15. A perusal of sub-section (1) of section 110 of the Customs Act reveals that if the proper officer has reason to believe that any goods are liable to confiscation under the Customs Act, he may seize such goods.

16. Section 113 of the Customs Act deals with confiscation of goods attempted to be improperly exported. Section 113(i), which is relevant, is reproduced below :

"113. Confiscation of goods attempted to be improperly exported, etc:

The following export goods shall be liable to confiscation:

(a) to (h) xxxx xxxx xxxx

(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77;"

17. The clearance of exported goods is dealt with in sections 50 and 51 of the Customs Act and the relevant portions are reproduced below :

"50. Entry of goods for exportation —

(1) The exporter of any goods shall make entry thereof by presenting electronically on the customs automated system to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in such form and manner as may be prescribed:

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 on the customs automated system, allow an entry to be presented in any other manner.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.

(3) The exporter who presents a shipping bill or bill of export under this section shall ensure the following, namely:—

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

51. Clearance of goods for exportation—

(1) Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the 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 and loading of the goods for exportation:"

Provided xxx xxxx xxx

Provided further xxxx xxx

(2) xxx xxxx xxx "

18. It would, therefore, be seen from the aforesaid provisions of the Customs Act that the exporter of any goods shall make entry thereof by presenting electronically on the customs automated system to the proper officer a shipping bill and while presenting the shipping bill, the exporter has to make and subscribe to a declaration as to the truth of its contents. The exporter has also to ensure that the information given therein is accurate and complete. The exporter has also to ensure about the authenticity and validity of any document supporting it and compliance with the restriction or prohibition, if any, relating to the goods under the Customs Act or under any other law for the time being in force. It is only where the proper officer is satisfied that the goods entered for export are not prohibited goods and the exporter has paid duty, that the proper officer may make an order permitting clearance and loading of the goods for exportation. Section 110(1) of the Customs Act provides that if the proper officer has reason to believe that any goods are liable to confiscation under the Customs Act, he may seize such goods. It is section 113 of the Customs Act that deals with confiscation of goods attempted to be improperly exported. Amongst others, it provides that any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under the Customs Act, shall be liable to confiscation.

19. In the present case, the proper officer seized the goods as he had reason to believe that the goods were liable to confiscation under the provisions of the Customs Act for the reason that the goods entered for exportation did not correspond with what was mentioned in the shipping bills. These facts have been stated in the seizure memo dated June 3, 2020. The case of the Department is that the goods had been over- valued as the two shipping bills had been filed claiming the benefit of drawback, ROSL and MEIS. The drawback involved in the two shipping bills, as is clear from the panchnama dated June 3, 2016, is Rs. 29,57,636/- while ROSL involved in the two shipping bills is to the extent of Rs. 41,07,217/-. Further, according to the Department, the goods were deficient in quantity by 1872 pieces and both the consignments appeared to have been grossly overvalued because the value declared by the appellant was in the range of Rs. 749 to Rs.1123 per piece, while the average price arrived at on the basis of opinion of the local dealers ranged from Rs. 32 to Rs. 87 per piece.

20. The Commissioner (Appeals) has set aside the seizure memo dated June 3, 2020 for the following reasons:

i. The alleged shortage of 1872 pieces is questionable and even if the said shortage is accepted, "the quantum of shortage is so meagre' (1.33%) that it would be ridiculous to believe that the same was intentionally done by the Appellant";

ii. As regards the allegation of overvaluation, the declared price was straightway compared with the local trade opinion, which is contrary to the provisions of section 14(1) of the Customs Act and rule 3(1) of the Export Valuation Rules;

iii. The transaction value can only be challenged in terms of the Export Valuation Rules. The Department has disregarded the price of the goods purchased under proper GST invoice; and

iv. The facts and circumstances of the case indicate that 'reasonable belief is not formable'.

21. The contention of learned Authorized Representative of the Department appearing for the appellant is that the facts and circumstances of the case clearly demonstrate that the proper officer had reason to believe that the goods were liable to confiscation and, therefore, the goods were seized. Elaborating this contention learned counsel pointed out that the goods could be confiscated under section 113(i) of the Customs Act as the export goods did not correspond in respect of the value or number with the entry made in the shipping bills. The phrase 'reason to believe' does not mean that confiscation would definitely result under section 113(i) of the Customs Act for that would be determined only when proceedings are initiated under section 124 of the Customs Act after issuance of a show cause notice and a proper opportunity is given to the exporter of making a representation in writing and of being heard in the matter, but the Commissioner (Appeals) completely misunderstood the provisions of section 110(1) of the Customs Act and proceeded to examine the seizure as if it was an order of confiscation under section 113(i) of the Customs Act.

22. Learned Counsel appearing for the respondent, however, submitted that the Department has not shown that a prima facie case existed for exercise of powers under section 110(1) of the Customs Act. The phrase 'reason to believe' means that even though formation of opinion may be subjective, but it must be based on materials on record and it cannot be arbitrary, capricious or whimsical. Learned Counsel also submitted that the Supreme Court has time and again explained the meaning of the phrase "reason to believe".

23. In *Sheo Nath Singh v/s CIT (1972) 3 SCC 234*, the Supreme Court observed that the belief must be that of an honest and reasonable person based upon reasonable grounds and the officer should act on direct or circumstantial evidence and not on mere suspicion, gossip or rumour. The relevant paragraph is reproduced below –

*"10.... **There can be no manner of doubt that the words 'reason to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour.** The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The Court can always examine this aspect though the declaration of sufficiency of the reasons for the belief cannot be investigated by the Court."*

(emphasis supplied)

24. In *Tata Chemicals Ltd. v/s Commissioner of Customs (Preventive), Jamnagar (2015) 11 SCC 628*, the Supreme Court observed as follows:-

"15. Statutes often use expressions such as "deems it necessary", reason to believe", etc. Suffice it to say that these expressions have been held not to mean the subjective satisfaction of the officer concerned. Such power given to the officer concerned is not an arbitrary power and has to be exercised in accordance with the restraints imposed by law. "

25. In *Worldline Tradex Pvt. Ltd v/s The Commissioner of Customs (Imports) & others (2016) 340 ELT 174 (Delhi High Court)*, the Delhi High Court observed as follows:-

*"23. The power of seizure under Section 110 of the Act has to obviously be exercised for valid reasons. The proper officer has to record his reasons to believe that the goods that he proposes to seize are liable to confiscation. **The said reasons for exercise of the power have to be recorded prior to the seizure. In the present case, as already noticed, apart from the panchnama, there is no separate order passed under Section 110(1) of the Act by the proper officer recording the reasons to believe that the goods are liable for***

confiscation. Since till date no other order exists and no such order has been communicated to the Petitioner, it is not possible to accept the plea of Mr. Agarwala, learned counsel for the DRI, that the 'detention' of the goods by the DRI was with the authority of law and in any event should be treated as a seizure in terms of Section 110(1) of the Act."

(emphasis supplied)

26. The Delhi High Court, in the above mentioned decision, referred to the decision of the Punjab and Haryana High Court rendered in *M/s Om Udyog v/s Union of India and Others* 2010 (254) ELT 547 (Punjab and Haryana High Court). The Punjab and Haryana High Court observed as follows:-

"10. We called upon learned counsel for the respondents to show the provision of law under which the goods were detained. **It is not the case of the respondents in the reply or otherwise that power of seizure had been invoked as formation of satisfaction under Section 110 of the Act, which is condition precedent for exercise of such power, has not been shown.** As held in *Mapsas Tapes*, exercise of power of seizure requires recording of reasons before exercise of such power. Only question is whether detention could be justified pending clearance under Chapter VII of the Act. Section 47 of the Act provides for clearance of goods on payment of duty, unless goods are prohibited goods. **It is not the case of the respondents that goods are prohibited goods.** It is also not their case that duty assessed under section 17 or 18 has not been paid. **In such a situation, non clearance of goods may be justified for minimum period required for assessment. In no case, non clearance of goods for months can be justified.** Non clearance seriously affects rights of lawful importer and fair procedure being constitutional mandate, no authority can plead unlimited power of non clearance for its own incompetence as a justification beyond reasonable period. Learned counsel for the respondents submitted that the petitioners could get the goods released on furnishing requisite bond under Section 110A of the Act. This contention is misconceived as Section 110A applies only when seizure is effected under Section 110.

11. We are of the view that while officers of Custom Department may have justification to verify whether goods were prohibited or were otherwise liable to confiscation or to assess and recover duty, they are not immune from accountability against abuse of power by detaining goods for indefinite period on the ground that they were in the process of checking the value or nature of goods. They are under legal obligation to do so promptly and if by reason of their incompetence they are unable to do so, detention of goods beyond reasonable time cannot be allowed."

(emphasis supplied)

27. None of these decisions, which have been relied upon by the learned counsel for the Respondent, advance the case of the Respondent.

28. The power of seizure, as was held in *Tata Chemicals*, has to be exercised in accordance with the restraints imposed by the law and as held in *Sheo Nath Singh*, it can be exercised on the basis of direct or circumstantial evidence and not on mere suspicion. In *Worldline Trade*, the Delhi High Court found that apart from the panchnama there was no separate order passed under section 110(1) of the Customs Act by the proper officer recording a reason that the goods were liable to confiscation. The contention of the Department that mere 'detention' of goods should be treated as the seizure in terms of 110(1) of the Customs Act was not accepted by the High Court. In *Om Udyog*, the Punjab and Haryana High Court found that it was not the case of the Department that the goods were prohibited goods and so non-clearance of the goods may be justified for a minimum period required for assessment. The High Court, therefore, held that while the officers of the Customs Department may be justified in verifying whether goods were prohibited or not or were otherwise liable to confiscation, but they are not immune from accountability against abuse of powers by detaining the goods for an indefinite period on the ground that they were in the process of checking the value or nature of the goods.

29. In the instant case, as noted above, the shipping bills are dated May 23, 2020. The panchnama recovery memo dated June 3, 2020 refers to the earlier panchnama proceedings June 1, 2020, wherein a shortage of 1872 pieces was detected and samples of the export product were also taken for conducting a market enquiry and obtaining opinion of traders/ dealers of such type of

garments. There is no illegality in conducting a local market survey to gather the valuation of the goods for the purpose of exercising power under section 110(1) of the Customs Act. The panchnama proceedings dated June 3, 2020 record that there was a shortage of 1872 pieces and the export goods were also grossly overvalued. The value declared and the average price arrived at on the basis of the opinion of the three dealers were also indicated in the panchnama. There is on record a separate inventory cum seizure memo dated June 3, 2020 bearing case number 01/2020-21, which contains the inventory of the goods seized and also gives reasons for seizure of the goods.

30. Once the officer had detected shortage of export goods and the market survey revealed that the goods were grossly overvalued, it cannot be said that the proper officer did not have 'reason to believe' that the goods were liable to confiscation under the provisions of section 113(i) of the Customs Act. Whether they are actually confiscated or not is a matter that can be determined only in accordance with the procedure prescribed under section 124 of the Customs Act by issuing a show cause notice to the exporter and also giving him a reasonable opportunity of making a representation in writing. All that was required to be considered for exercising power under section 110 (1) of the Customs Act was whether there was a reason to believe that the goods are liable to confiscation.

31. Learned counsel for the Respondent submitted that the allegation in the seizure memo about overvaluation of the goods in the shipping bills is not correct. In this connection learned counsel referred to the provisions of section 14 of the Customs Act as also the Export Valuation Rules. According to the learned counsel, the value of the exports goods should have been treated as the transaction value since the export price is negotiated /determined in the course of international trade and the same cannot be compared with the local trade opinion of the market. Learned Counsel pointed out that the seizure memo records that the consignment appeared to be grossly overvalued but this is merely on the basis of the market value of the goods in the local market. This inference is not correct, more particularly when the goods were purchased by the exporter under proper GST invoice. In this connection, the provisions of rule 3(1) of the Export Valuation Rules have also been referred to.

32. The Commissioner (Appeals) had also concluded that the proper officer straightway compared the declared price with the local trade opinion, which was illegal. The Commissioner (Appeals) also observed that the transaction value can be challenged only in accordance with the Export Valuation Rules but the procedure prescribed therein had not been followed.

33. The issue that arises for consideration is at what stage the provisions of section 14 of the Customs Act and the provisions of rule 3 of the Export Valuation Rules have to be applied. Section 110(1) of the Customs Act empowers the proper officer to seize the goods if he has reason to believe that goods are liable to confiscation. As noticed above, the goods attempted to be improperly exported are confiscated under section 113 of the Customs Act after providing an opportunity as contemplated under section 124 of the Customs Act. It is at that stage that it is determined whether the goods entered for exportation actually correspond in respect of value or in any material particular with the entry made in the shipping bill. The Commissioner (Appeals) completely failed to appreciate the provisions of section 110(1) of the Customs Act and proceeded to examine the matter as if he was examining an order of confiscation under section 113(i) of the Customs Act and not an order of seizure of goods under section 110(1) of the Customs Act, where the proper officer should only have reason to believe that the goods are liable to confiscation.

34. Thus, for both the issues relating to the valuation of the goods or shortage of 1872 pieces mentioned in the seizure memo, the exporter will get ample opportunity to put forth his case when proceedings are initiated under section 124 of the Customs Act and it is neither possible nor permissible at the stage of seizure to determine this issue.

35. The Commissioner (Appeals) therefore, committed an error in setting aside the seizure memo as a result of which the Appeal filed by the exporter was allowed.

36. It also needs to be noticed that the Appeal was filed by the exporter before the Commissioner (Appeals) on June 08, 2010 and the Appeal was allowed by the Commissioner (Appeals) on June 10, 2010. The issue as to whether the

Department was required to be heard when an Appeal is filed by any person aggrieved by any decision or order passed under the Customs Act by an officer of Customs lower in rank than a Principal Commissioner or Commissioner of Customs has not been addressed in this decision for the reason that both the parties made elaborate arguments on merits. The issue as to whether an Appeal could have been filed under section 128 of the Customs Act when there was a remedy available to the exporter for provisional release of goods under 110(A) of the Customs Act has also not been examined.

37. Thus, for all the reasons stated above, the order dated June 10, 2020 passed by the Commissioner (Appeals) is set aside and the Appeal is allowed.

(Order pronounced on 10.11.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. II**

Customs Appeal No. 50313 of 2019

Arising out of the Order-in-Original No. 32/2018/RNS/COMMR/IMP/ICD/TKD,
Dated: 23.10.2018

Passed by The Commissioner of Customs (Import), Inland Container Depot,
Tughlakabad, New Delhi

Date of Hearing: 17.06.2019

Date of Decision: 06.12.2019

**SHRI SANJEEV SINGH YADAV
11 FLOOR, PENTA HOUSE - 2, B-1 BLOCK, LOTUS POND
INDRAPURAM, GHAZIABAD (UP)**

Vs

**COMMISSIONER OF CUSTOMS (IMPORT)
INLAND CONTAINER DEPOT, TUGHLAKABAD
NEW DELHI**

WITH

Customs Appeal No. 50320 of 2019

Arising out of the Order-in-Original No. 32/2018/RNS/COMMR/IMP/ICD/TKD,
Dated: 23.10.2018

Passed by The Commissioner of Customs (Import), Inland Container Depot,
Tughlakabad, New Delhi

**M/s ROYAL DECOR INDIA PVT LTD
13 CHAWLA COMPLEX, A-2015, VIKAS MARG, SHAKURPUR
NEW DELHI - 110092**

Vs

**COMMISSIONER OF CUSTOMS (IMPORT)
INLAND CONTAINER DEPOT, TUGHLAKABAD
NEW DELHI**

AND

Customs Appeal No. 50321 of 2019

Arising out of the Order-in-Original No. 32/2018/RNS/COMMR/IMP/ICD/TKD,
Dated: 23.10.2018

Passed by The Commissioner of Customs (Import), Inland Container Depot,
Tughlakabad, New Delhi

**SHRI BHUPESH TYAGI
R/O B-1/401, LOTUS POND, INDRAPURAM
GHAZIABAD (UP)**

Vs

**COMMISSIONER OF CUSTOMS (IMPORT)
INLAND CONTAINER DEPOT, TUGHLAKABAD
NEW DELHI**

AND

Customs Appeal No. 50372 of 2019

Arising out of the Order-in-Original No. 32/2018/RNS/COMMR/IMP/ICD/TKD,
Dated: 23.10.2018

Passed by The Commissioner of Customs (Import), Inland Container Depot,
Tughlakabad, New Delhi

**SHRI SUNIL KUMAR CHA
M/s MOULI WORLDWIDE LOGISTICS
J-2/107 B, DDA FLATS, KALKAJI, NEW DELHI**

Vs
COMMISSIONER OF CUSTOMS (IMPORT)
INLAND CONTAINER DEPOT, TUGHLAKABAD
NEW DELHI

Appellant Rep by: Shri Piyush Kumar, A K Seth & Ms Reena Rawat, Advs.
Respondent Rep by: Shri Sunil Kumar, AR (DR)

CORAM: Anil Choudhary, Member (J)
C L Mahar, Member (T)

FINAL ORDER NO. 51607/2019

Per: C L Mahar:

All the four appeals, as mentioned above, arise from the same impugned order-in-original No. 32/2018 dated 23 October 2018.

2. The brief facts of the matter are that working on a specific intelligence the officers of the Department detained 4 containers having nos. BLJU 2750023, BLJU 2750050, BLJU 2751267 and BLJU 2751288 imported vide bill of entry No. 3132662 dated 2 November 2015 which was filed by M/s Samco Industries Ltd. for clearance of 104 M.T. of calcium carbonate. The officers of DRI examined all the 4 containers and it was detected that the item of import namely calcium carbonate was only used for concealment of other prohibited and undeclared items like firework and telescopic channels. The contents of all the 4 containers as found after examination are given here below :-

Sl.No.	Container No.	Description of items as per Panchnama dated 06/11/2015	Total quantity of items (in Kgs.)
		Calcium Carbonate	15000
		Gogo fireworks K0201 (made in China)	6248
1.	BLJU 2750023	Telescopic Channels 12 inch Vega Mark	1224.60
		Telescopic Channels 20 inch Vega Mark	1955.10
		Calcium Carbonate	11500
		Gogo fireworks K0201 (Made in China)	6710
		Telescopic Channels 10 Inch	700.70
2.	BLJU 2750050	Telescopic Channels 12 inch	1057.30
		Telescopic Channels 14 inch	1400.60
		Telescopic Channels 16 inch	1430.80
		Telescopic Channels 22 inch	500
		Calcium Carbonate	13750
		Gogo fireworks K0201 (Made in China)	7018
3.	BLJU 2751267	Telescopic Channels 20 inch, 1 Core Mark	3168
		Telescopic Channels 18 inch, 1 Core Mark	2415.60
		Calcium Carbonate	16250

4.	BLJU 2751288	Gogo fireworks K0201 (Made in China)	6512
		Telescopic Channels 18 inch, Vega Mark	3096

2. It can be seen from the above-mentioned table that imported cargo was mis-declared and an attempt was made to clandestinely import and clear firework, telescopic channels.

3. The Directorate of Revenue Intelligence has undertaken investigation into the matter and from the investigations it has revealed that a conspiracy was hatched by Shri Bhupesh Tyagi (one of the appellant) Proprietor of M/s Swastic Trading Company and Director of M/s Royal Décor India Pvt. Ltd. with Shri Sanjeev Singh Yadav for monetary benefits to illegally import and smuggle into the country restricted items namely firework from China by concealing the same in the container carrying calcium carbonate. For execution of their plan for smuggling of firework and other undeclared items they have approached and roped in Shri Sanjay Gupta, Director of M/s Sanco Industries Ltd. who is a regularly purchaser of calcium carbonate. As per design, the consignment of calcium carbonate alongwith firework and telescopic channels was ordered and imported by Shri Bhupesh Tyagi from China in the name of his firm namely M/s Swastic Trading Company, when the import consignments was on their way to India, a high sea sale agreement has been entered by these persons with Shri Sanjay Gupta, Director of M/s Sanco Industries Ltd. who is a bonafide user of calcium carbonate in manufacture of PVC compound, PVC pipes etc. The only purpose of entering into the high sea sale agreement with M/s Sanco Industries Ltd. by Shri Bhupesh Tyagi and Shri Sanjeev Singh Yadav was that since M/s Sanco Industries Ltd. being actual user of the calcium carbonate, they were entitled for high level of facilitation and thus there were lower chances of examination of the cargo by virtue of the importer being an actual user of the declared cargo namely calcium carbonate. In the modus-operandi planned by Shri Bhupesh Tyagi and Shri Sanjeev Singh Yadav, Shri Sunil Kumar of the CHA firm namely M/s Mouli Worldwide Logistics was also involved as he has to undertake clearance of the mis-declared cargo. During the course of investigation it has also been noticed that Shri Bhupesh Tyagi has also imported three more consignments which were covered under the bill of lading No. QSAY 6004442 dated 25 October 2015, SHZAD 1510371 dated 27 October 2015 and OOLU 2565964890 dated 20 October 2015 these goods were also to be cleared following the above-mentioned modus operandi, however, since no bill of entry was filed for clearance of same they remained pending for clearance. The examination of the cargo covered by these bills of lading also resulted in detection of mis-declaration by Shri Tyagi and his firms M/s Royal Décor India Pvt. Ltd. in as much as that though as per import general manifest the consignment has been declared to be of calcium carbonate however in two containers it was detected to container fireworks and telescopic channels (drawer sliders) and in third container spectacles (Roy Ban), buffing pads etc. were found.

4. After investigation, a detailed show cause notice dated 3 May 2016 was issued to all the appellants which was adjudicated by the Commissioner vide his order-in-original No. 32/2018 dated 23 October 2018 whereunder after examination of the role of all the individual appellants the learned Commissioner has passed the following order :

(1) (a) I hereby reject the declared assessable value of Rs. 6,85,829/- of the goods and re-determine the assessable value of Telescopic Channel and Calcium Carbonate in terms of Rule 5 of CVR, 2007 at Rs. 18,63,208/- (as mentioned in chart - A) and the assessable value of fireworks in terms of Rule 9 of CVR, 2007 at Rs. 2,88,96,000/- imported under Bill of Entry No. 3132662 dated 02/11/2015.

(b) I also determine the actual assessable value at Rs. 11,99,184/- (as mentioned in chart-B) and Rs. 20,21,102/- (as mentioned in chart - C) in terms of Rule 5 of CVR, 2007 for the goods excluding Fireworks and Rs. 2,71,55,200/- in terms of Rule 9 of CVR, 2007 for the Fireworks for which bill of entry was not filed ;

(2) The seized goods, i.e. Chinese made Fireworks (26.488 M.T. in 1204 cartons) seized from eight containers numbers BLJU 2750023, BLJU 2750050, BLJU 2751267, BLJU 2751288, and Containers No. HDMU 2619280, TRHU 2250224, SSTU 9002172, SSTU 9002188 which were not declared in the Bill of Entry No.

3132662 dated 02.11.2015/Import General Manifest & Bill of Lading and which were restricted and required a specific license from the Director General Foreign Trade (DGFT)/Chief Controller of Explosives in Form LE-8 having total market value of Rs. 5,60,51,200/- (Rs. 2,88,96,000/- and Rs. 2,71,55,200/-) taken together are confiscated absolutely under Sections 111 (d), 111 (f) & 111 (m) of the Customs Act, 1962 readwith the Provision of Explosives Rules, 2008 ;

(3) The seized goods i.e. mis-declared telescopic channel (16.948 M.T.) having determined value of Rs. 1,90,654/- as per Chart-A and Un-declared telescopic channel (11.900 M.T.) having determined value of Rs. 9,89,663/- as per Chart - B are confiscated absolutely under Section 111 (m) and Section 111 (f) respectively of the Customs Act ;

(4) The seized declared goods i.e., as Calcium Carbonate 56.500 M.T. as per Chart-A and 31.760 M.T. as per Chart-B having determined value of Rs. 3,72,554/- and Rs. 2,09,521/- respectively are confiscated absolutely under Section 119 of the Customs Act, 1962 ;

(5) The seized Un-declared goods i.e., Shoes (7116), Spectacles (Counterfeit Ray Ban - 23800 pcs.), Spectacles Cover(10232 pcs.), Buffing Pad (500 pcs.), Machine (Forobo 1 pc.) having determined total value of Rs. 20,21,102/- taken together as per Chart-C are confiscated absolutely under Section 111 (d) and Section 111 (f) of the Customs Act, 1962 ;

(6) Penalty of Rs. 50,00,000/- (Rupees Fifty Lakh only) is imposed on Shri Bhupesh Tyagi (Proprietor of M/s Swastic Trading Co. and Director of M/s Royal Décor India Pvt. Ltd.) under Sections 112 (a) of the Customs Act, 1962 ;

(7) Penalty of Rs. 25,00,00/- (Rupees twenty five lakh only) is imposed on Shri Sanjeev Singh Yadav (Proprietor of M/s Sky Park India) under Sections 112 (a) of the Customs Act, 1962;

(8) Penalty of Rs. 50,00,000/- (Rupees fifty lakh only) is imposed on Shri Bhupesh Tyagi under Section 114 AA of the Customs Act, 1962 ;

(9) Penalty of Rs. 10,00,000/- (Rupees ten lakh only) is imposed on Shri Sanjeev Singh Yadav under Section 114AA of the Customs Act, 1962 ;

(10) Penalty of Rs. 50,000/- (Rupees fifty thousand only) is imposed on Shri Sunil Kumar, Proprietor of M/s Mouli Worldwide Logistics (CHA) under Section 117 of the Customs Act, 1962 ;

(11) Penalty of Rs. 5,00,000/- (Rupees five lakh only) is imposed on M/s Royal Décor India Pvt. Ltd. under Section 112 (a) of the Customs Act, 1962 ;

(12) The amount of Rs. 5,00,000/- (Rupees five lakh only) deposited by the CHA on behalf of M/s Sanco Industries during investigation is appropriated and adjusted to the adjudication levies.

5. The learned Advocate appearing on behalf of Shri Bhupesh Tyagi (the appellant) has submitted that the Adjudicating Authority has erred in relying upon the statements of Shri Bhupesh Tyagi which has been retracted by him as same were taken by the Investigating officers under duress. It has further been contended that the Adjudicating Authority should not have taken cognizance of the statement given by Shri Sanjeev Singh Yadav and Sunil Kumar as same are contradictory to each other. The learned Advocate has pleaded that Shri Bhupesh Tyagi was made a scape-goat by Shri Sanjay Gupta of M/s Sanco Industries and Shri Sanjeev Yadav who were involved in bringing into India fireworks and other items by mis-declaring the same. It has further been contended that since M/s Sanco Industries on their own has deposited an amount of Rs. 5 lakhs towards the customs duty and therefore it becomes apparent that Shri Sanjay Gupta of M/s Sanco Industries was involved in the mis-declaration of the consignment.

6. The learned Advocate appearing for Shri Sanjeev Singh Yadav has also contended that the appellant Shri Sanjeev Singh Yadav was not involved into the mis-declaration of the goods as neither he is the owner of import consignments nor or of the mis-declared goods. It has further been added that Shri Yadav came to know about the mis-declaration of the import cargo from Shri Sunil Kumar - CHA after the import consignment was put for examination by the officers of DRI. It has further been added that it is wrong on the part of Shri Tyagi to allege that Shri Sanjeev Yadav had introduced Shri R.K. Agarwal (China based supplier of fireworks) to Shri Bhupesh Tyagi rather it was Shri Tyagi who introduced Shri

R.K. Agarwal (exporter of fireworks) to him. It has thus been impressed upon that neither prior to commission of offence nor at the time of the commission of the offence on 2 November 2015 Shri Sanjeev Yadav had any knowledge of the mis-declaration of the import cargo. It has further been added that the amount of Rs. 5 lakhs received from Shri Bhupesh Tyagi was for payment of customs duty/penalty liability and same was deposited to the custom authorities vide TR-6 challan No. 33998 dated 18 November 2015. It has further been added that Shri Sanjeev Singh Yadav is in nowhere concerned with mis-declaration made by M/s Royal Décor India Pvt. Ltd., wherein the consignment was found to contain spectacles fireworks, telescopic channels, shoes etc. because he has neither arranged for clearance of the same nor filed any bill of entry with regard to these consignments.

7. The learned Advocate appearing for Shri Sunil Kumar - Clearing Agent working with M/s Mouli Worldwide Logistics submitted that Shri Sunil Kumar came in contact with Shri Sanjeev Singh Yadav in the normal course of business and it was Shri Sanjeev Singh Yadav who has engaged him for clearance for import consignment which is the subject matter of this appeal. All the relevant documents pertaining to the bill of entry No. 3132662 dated 2 November 2015, such as, invoice, bill of lading, packing list etc. were handed over by Shri Sanjeev Singh Yadav for clearance of the calcium carbonate to him. When the officers have asked for physical examination of the import consignment covered by afore-said mentioned bill of entry he has informed Shri Sanjeev Singh Yadav who gave him the import documents. He has also added that Shri Bhupesh Tyagi has also informed that Department is going to undertake detailed examination of the cargo as Shri Bhupesh Tyagi was high sea sale seller of the import consignment. It has been the contention of the appellant Shri Sunil Kumar that he has not informed of the custom officers about the presence of the crackers as Shri Rashtra Bandu of the Department is present at the time of the opening of the containers and he has informed Shri Bhupesh Tyagi and Shri Sanjeev Singh Yadav that the consignment of the calcium carbonate is also containing certain prohibited items, such as, fireworks and telescopic channels. It has been impressed that the appellant Shri Sunil Kumar has taken necessary precautions and due diligence with regard to import consignment.

8. We have heard both the sides and have perused the record of the appeal in detail. It's a matter of record that the import consignment covered by bill of entry No. 3132662 dated 2 November 2015 was filed for clearance of calcium carbonate and on physical examination of the cargo it was found to have fireworks and telescopic channels (of various sizes). It is also a matter of record that in all the above-mentioned appeals, the physical recovery of prohibited and mis-declared goods have not been denied. It is also a matter of record that originally the import consignment of both bill of entry No. 3132662 dated 2 November 2015 as well as the containers which were lying in the internal container depot for which no bill of entry was filed consignments were detected to have branded counterfeit spectacles and some other goods were imported by Shri Bhupesh Tyagi of M/s Swastic Trading Company and Director of M/s Royal Décor India Pvt. Ltd. He has been helped in this work by one Shri Sanjeev Singh Yadav and the work relating to clearance of the cargo was undertaken by CHA namely Shri Sunil Kumar of M/s Mouli Worldwide Logistics.

9. It's also a matter of record that appellant Shri Bhupesh Tyagi and M/s Royal Décor India Pvt. Ltd. (a company having Shri Bhupesh Tyagi as one of the Director) did not participate in the adjudication proceedings in spite of the fact that more than a ten opportunities of personal hearing were accorded to them. We find that Shri Bhupesh Tyagi has confessed that he has hatch a conspiracy to illegally import fireworks by mis-declaring the same and by concealing the same in the consignment of calcium carbonate. It is also apparent from the proceedings and investigations that the consignment which were imported in the name of M/s Royal Décor India Pvt. Ltd. were lying pending for clearance in the Inland Container Depot were also containing the mis-declared cargo of fire crackers, telescopic channels, spectacles of various brands shoes etc. During investigation Shri Bhupesh Tyagi has failed to produce any authority for legitimate import of fireworks. We also find that he has devised a well thought and meticulous planed modus operandi to smuggle fireworks and other mis-declared goods into the country with a only motive of earning monetary benefits. We find that in this activity Shri Sanjeev Singh Yadav was also part and parcel of the whole

conspiracy. We find that it was Shri Sanjeev Singh Yadav who has made arrangements for clearance of the mis-declared import cargo and handed over invoice, packing list, bill of lading, delivery order etc. to the clearing agent Shri Sunil Kumar of M/s Mouli Worldwide Logistics. We also find that it was Shri Sanjeev Singh Yadav who has arranged for a meeting between Shri Bhupesh Tyagi and Shri R.K. Agarwal (China based supplier of fireworks). Shri Sanjeev Singh Yadav since very beginning was involved in this conspiracy as he was also responsible in getting the high sea sale arranged between M/s Swastic Trading Company and M/s Sanco Industries Ltd. He was also monitoring and overseeing the work of clearance of the mis-declared import cargo alongwith Shri Sunil Kumar - Custom House Agent. It also appears that Shri Sanjeev Singh Yadav and Shri Sunil Kumar also adopted illegally means for getting the clearance of mis-declared import cargo. We find that Shri Sunil Kumar - CHA Proprietor of M/s Mouli Worldwide Logistics (CHA), has not shown due diligence while accepting the clearance work of the import consignment as he has accepted the relevant import documents, such as, invoice, packing list, bill of lading etc. from a third party rather than meeting the importer himself. It appears from the record that Shri Sunil Kumar has never interacted with the high sea sale buyers of the goods namely Shri Sanjay Gupta - Director of M/s Sanco Industries Ltd. We find that when the consignment was undertaken for examination and it was detected that the import consignment has been mis-declared and contains prohibited items, such as, fireworks etc. he has informed Shri Sanjeev Singh Yadav and also spoke to Shri Bhupesh Tyagi, however, he did not inform the customs authorities regarding the mis-declaration of the cargo. We also find that all the above appellants in their various statements have confessed to their involvement or have confessed to their misdoings which is also corroborated with the facts of the case.

10. We find that Hon'ble Supreme Court in case of *Naresh J. Sukhawani versus Union of India* reported under 1996 (83) E.L.T. 258 (S.C.) has held as follows :-

"4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine".

11. Similarly the Apex court again in case of *Commissioner of Central Excise, Madras versus Systems & Components Pvt. Ltd.* reported under 2004 (165) E.L.T. 136 (S.C.) has held that:-

"5. 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".

12. In this case we find that all the statements of the relevant persons get corroborated by the statements of co-accused persons and with the physical facts as detected by the investigations.

13. In view of above, we find that no new facts or evidences have been adduced before us to impress that the amount of penalties imposed upon the above-mentioned appellants have been imposed in disproportionate to their role in attempted smuggling of prohibited and mis-declared goods into the country.

14. In view of above, we feel that we do not find any infirmity in the impugned order-in-original under challenge. We uphold the same and all the appeals are accordingly dismissed.

(Order pronounced in open court on 06.12.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. I**

Custom Appeal No. 52009 of 2018

Arising out of Order-in-Original No. 10/Commr./BBG/PPG/2018, Dated:
10.4.2018

Passed by the Commissioner of Customs ICD, Patparganj, Delhi

Date of Hearing: 27.09.2019

Date of Decision: 09.01.2020

**M/s MERCEDES BENZ INDIA PVT LTD
E-3, MIDC CHAKAN, PHASE-III, CHAKAN INDUSTRIAL AREA
KURULI & NIGHOJE TALUKA KHED, PUNE-410501**

Vs

**COMMISSIONER OF CUSTOMS
DELHI, INLAND CONTAINER DEPOT, PATPARGANJ
DELHI-110096**

Appellant Rep by: Shri Rachit Jain, & Shri Ashwani Bhatia, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 52197 of 2018

Arising out of Order-in-Original No. 04/NKU(04)ADG(Adj.)/DRI/N. Delhi-I/2018-
19, Dated: 10.5.2018

Passed by the Additional Director General (Adj.), New Delhi

**M/s O A ASSOCIATES
582A, KATRA ISHWAR BHAWAN, KHARI BAOLI
DELHI-110006**

Vs

**ADDITIONAL DIRECTOR GENERAL (ADJUDICATION)
NEW DELHI, DIRECTORATE OF REVENUE (INTELLIGENCE)
ROOM NO. 214, NEW CUSTOMS HOUSE, NEAR IGI AIRPORT
NEW DELHI - 110037**

Appellant Rep by: Ms Ekta Kapoor, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 52272 of 2018

Arising out of Order-in-Original No. 04/NKU(04)ADG(Adj.)/DRI/N. Delhi/2018-
19, Dated: 10.5.2018

Passed by the Additional Director General (Adjudication), New Delhi

**PASHUPATI ACRYLON LTD
M-14, CONNAUGHT CIRCUS (MIDDLE CIRCLE)
NEW DELHI-110001**

Vs

**ADDITIONAL DIRECTOR GENERAL (ADJUDICATION)
NEW DELHI, DIRECTORATE OF REVENUE (INTELLIGENCE)
ROOM NO. 214, NEW CUSTOMS HOUSE, NEAR IGI AIRPORT
NEW DELHI - 110037**

Appellant Rep by: Shri Vijai Kumar, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 52274 of 2018

Arising out of Order-in-Original No. 16/Commr./BBG/PPG/2018, Dated:
1.6.2018

Passed by the Commissioner of Customs, ICD, Patparganj, Delhi

**M/s WADHWANI COMMODITIES TRADING PVT LTD
FLAT NO. 3, BLOCK-A, PRITHVIVANDAN APARTMENTS
RAMDASPETH, NAGPUR-440010**

Vs

**COMMISSIONER OF CUSTOMS
DELHI, ICD, PATPARGANJ & OTHER ICD
DELHI-110096**

Appellant Rep by: Shri Vijai Kumar, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 52406 of 2018

Arising out of Order-in-Original No. 14/Commr./BBG/PPG/2018, Dated:
25.5.2018

Passed by the Commissioner of Customs, Inland Container Depot, Patparganj,
Delhi

**M/s RAMNIKLAL S GOSALIA AND COMPANY
608, B.J. MARG, JACOB CIRCLE, MUMBAI-400011**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, INLAND CONTAINER DEPOT
PATPARGANJ & OTHER, ICDS, PATPARGANJ, NEW DELHI**

Appellant Rep by: Shri H R Garg, Consultant

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 52430 of 2018

Arising out of Order-in-Original No. 04/NKU(04)ADG(Adj.)/DRI/N. Delhi/2018-
19, Dated: 10.5.2018

Passed by the Additional Director General (Adjn.), New Delhi

**JAQUAR AND COMPANY PVT LTD
SP-496(B), RIICO INDUSTRIAL AREA, BHIWADI, DISTT. ALWAR
RAJASTHAN - 301019**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ACC (IMPORT), NEW CUSTOM HOUSE
NEAR IGI AIRPORT, NEW DELHI-110037**

Appellant Rep by: Shri G K Sarkar, & Shri Prashant Shrivastava, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 52507 of 2018

Arising out of Order-in-Original No. 12/Commr./BBG/PPG/2018, Dated:
7.5.2018

Passed by the Commissioner of Customs, ICD, New Delhi

**M/s M JIJU SILK MILLS
71, ASHIRA AVENUE, JUMMA MASJID ROAD
BANGALORE - 560002**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD DELHI, NEW DELHI-110096**

Appellant Rep by: Shri Derrick Sam, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 52537 of 2018**

Arising out of Order-in-Original No. 11/Commr./BBG/PPG/2018, Dated:
16.4.2018

Passed by the Commissioner of Customs, ICD, Patparganj, Delhi

**M/s K J V ALLOYS CONDUCTORS PVT LTD
PLOT NO. 31, MIDC AREA, CENTRAL SERVICE ROAD
NAGPUR-440028 (MAH.)**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI ICD, PATPARGANJ, DELHI-110096**

Appellant Rep by: Shri Himanshu Kaushal, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 52667 of 2018**

Arising out of Order-in-Original No. 17/Commr./BBG/PPG/2018, Dated:
6.7.2018

Passed by the Commissioner of Customs, ICD, Patparganj, Delhi-110096

**M/s BNS IMPORT EXPORT
SHOP NO. 16, GREEN LAND CHS
PLOT NO. 20, SECTOR-40, NERUL SEAWOOD
NAVI MUMBAI-400706**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ DELHI-110096**

Appellant Rep by: Shri Sujay N Kantawala, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 52668 of 2018**

Arising out of Order-in-Original No. 16/Commr./BBG/PPG/2018, Dated: 1.6.2018

Passed by the Commissioner of Customs, International Container Depot,
Patparganj, Delhi-110096

**SHRI S J PATEL
PROPRIETOR OF M/s BNS IMPORT EXPORT
SHOP NO. 16, GREEN LAND CHS
PLOT NO. 20, SECTOR-40, NERUL SEAWOOD
NAVI MUMBAI-400 706**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, INTERNATIONAL CONTAINER DEPOT
PATPARGANJ, DELHI-110096**

Appellant Rep by: Shri Sujay N. Kantawala, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 52696 of 2018**

Arising out of Order-in-Original No. 19/Commr./BBG/PPG/2018, Dated:
25.7.2018

Passed by the Commissioner of Customs, Inland Container Depot, Patparganj, &
Other ICDs, Delhi

**M/s RAMNIKLAL S GOSALIA AND COMPANY
608, B.J. MARG, JACOB CIRCLE
MUMBAI-400011**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ & OTHER ICDS
NEW DELHI**

Appellant Rep by: Shri H R Garg, Consultant

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 52747 of 2018**

Arising out of Order-in-Original No. 15/Commr./BBG/PPG/2018, Dated:
29.5.2018

Passed by the Commissioner of Customs, ICD, Patparganj, Delhi

**M/s MERCEDES BENZ INDIA PVT LTD
E-3, MIDC CHAKAN, PHASE-III, CHAKAN INDUSTRIAL AREA
KURULI & NIGHOJE TALUKA, KHED, PUNE-410501**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI ICD, PATPARGANJ, DELHI**

Appellant Rep by: Shri Rachit Jain, & Shri Ashwani Bhatia, Advs.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 52748 of 2018**

Arising out of Order-in-Original No. 14/Commr./BBG/PPG/2018, Dated:
25.5.2018

Passed by the Commissioner of Customs, ICD, Patparganj, Delhi

**M/s MERCEDES BENZ INDIA PVT LTD
E-3, MIDC CHAKAN, PHASE-III, CHAKAN INDUSTRIAL AREA
KURULI & NIGHOJE TALUKA, KHED, PUNE-410501**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ, DELHI**

Appellant Rep by: Shri Rachit Jain, & Shri Ashwani Bhatia, Advs.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 53082 of 2018**

Arising out of Order-in-Original No. 02/NKU(02)ADG(Adj.)/DRI/N. Delhi/2018-
19, Dated: 1.5.2018

Passed by the Additional Director General (Adjudication), New Delhi

**SHRI PRABIR GHOSH
VILL-UTTAR CHATRA, P.O-DAKSIN CHATRA
P.S. - BADURIA, DISTT-NORTH 24 PARGANAS
PIN CODE - 743247**

Vs

**ADDITIONAL DIRECTOR GENERAL (ADJUDICATION)
DIRECTORATE OF REVENUE INTELLIGENCE, ROOM NO.-214
NEW CUSTOMS HOUSE, NEAR IGI AIRPORT, NEW DELHI-110037**

Appellant Rep by: Shri Sukendu Bhattacharya, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 53157 of 2018**

Arising out of Order-in-Original No. 13/Commr./BBG/PPG/2018, Dated:
15.5.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**M/s AROMA CHEMICAL AGENCIES INDIA PVT LTD
12, PENINSULA CENTRE, S.S. RAO ROAD
PAREL, MUMBAI-400012**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ, NEW DELHI-110096**

Appellant Rep by: Shri Ayush Agarwal, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 53159 of 2018

Arising out of Order-in-Original No. 14/Commr./BBG/PPG/2018, Dated:
25.5.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**M/s AROMA CHEMICAL AGENCIES INDIA PVT LTD
12, PENINSULA CENTRE, S.S. RAO ROAD
PAREL, MUMBAI-400012**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ, NEW DELHI-110096**

Appellant Rep by: Shri Ayush Agarwal, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 53238 of 2018

Arising out of Order-in-Original No. 03/NKU(03)ADG(Adj.)/DRI/N. Delhi/2018-
19, Dated: 3.5.2018

Passed by the Additional Director General (Adjudication), New Delhi

**SHRI PRABIR GHOSH
VILL-UTTAR CHATRA, P.O-DAKSIN CHATRA
P.S. - BADURIA, DISTT-NORTH 24 PARGANAS
PIN CODE - 743247**

Vs

**ADDITIONAL DIRECTOR GENERAL (ADJUDICATION)
DIRECTORATE OF REVENUE INTELLIGENCE, ROOM NO.-214
NEW CUSTOMS HOUSE, NEAR IGI AIRPORT, NEW DELHI-110037**

Appellant Rep by: Shri Sukendu Bhattacharya, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 53406 of 2018

Arising out of Order-in-Original No. 17/Commr./BBG/PPG/2018/14360, Dated:
6.7.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**VISAKHA WIRE ROPES LTD
D 15 & 16, AUTO NAGAR VISAKHAPATNAM-530012 (A.P.)**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI ICD, PATPARGANJ, NEW DELHI-110096**

Appellant Rep by: Shri Ashok Kumar, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 53423 of 2018

Arising out of Order-in-Original No. 16/Commr./BBG/PPG/2018, Dated:
1.6.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ & OTHER ICDS
DELHI-110096**

Vs

**SHRI S J PATEL
PROP. OF M/s BNS IMPORT EXPORT
SHOP NO. 16, GREEN LAND CHS, PLOT NO. 20
SECTOR 40, NERUL SEAWOOD, NAVI MUMBAI
MAHARASTRA-400706**

Appellant Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs
Respondent Rep by: Shri Sujay N Kantawala, Adv.

With

Custom Appeal No. 53424 of 2018

Arising out of Order-in-Original No. 16/Commr./BBG/PPG/2018, Dated:
1.6.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ & OTHER ICDS
DELHI-110096**

Vs

**SHRI PARESH K DAFTARY
10A, RABINDRA SARANI, KOLKATA (WB)-700001**

Appellant Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs
Respondent Rep by: None

With

**Custom Appeal No. 53425 of 2018 with
C/Cross/51310/2018**

Arising out of Order-in-Original No. 16/Commr./BBG/PPG/2018, Dated:
1.6.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ & OTHER ICDS
DELHI-110096**

Vs

**SHRI JYOTI BISWAS
2ND FLOOR, JYOTI CINEMA BUILDING COMPLEX
MASLANDPUR, 24 PARGANA (NORTH)
WEST BENGAL-743289**

Appellant Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs
Respondent Rep by: Shri Nitopal Choudhary, Adv.

With

Custom Appeal No. 53426 of 2018

Arising out of Order-in-Original No. 16/Commr./BBG/PPG/2018, Dated:
1.6.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ & OTHER ICDS
DELHI-110096**

Vs

**SHRI TUSHAR UMARSHI KOTHARI
127/155, HINDUSTAN CHOWK, MULUND COLONY
MULUND (W), MUMBAI, MAHARASTRA-440082**

Appellant Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs
Respondent Rep by: None

With

Custom Appeal No. 53427 of 2018

Arising out of Order-in-Original No. 16/Commr./BBG/PPG/2018, Dated:
1.6.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ & OTHER ICDS
DELHI-110096**

Vs

**SHRI WADHWANI COMMODITIES TRADING PVT LTD
FLAT NO. 3, BLOCK-A, PRITHVIVANDAN APARTMENT
RAMDASPETH, NAGPUR, MAHARASTRA-440010**

Appellant Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

Respondent Rep by: Shri Vijai Kumar, Adv.

With

Custom Appeal No. 53428 of 2018

Arising out of Order-in-Original No. 16/Commr./BBG/PPG/2018, Dated:
1.6.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ & OTHER ICDS
DELHI-110096**

Vs

**SHRI PRABIR GHOSH
VILL. UTTAR CHATRA, PO DAKSHIN CHATRA
P.S. BADURIA, DISTT. NORTH 24 PARGANAS
(WB)-743247**

Appellant Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

Respondent Rep by: Shri Faraz Khan, Adv.

With

Custom Appeal No. 53461 of 2018

Arising out of Order-in-Original No. 19/Commr./BBG/PPG/2018, Dated:
25.7.2018

Passed by the Commissioner of Customs, ICD, Patparganj, Delhi

**M/s K J INC.
661, 1ST FLOOR, GANDHI KATRA
CHANDNI CHOWK, DELHI-110006**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI ICD, PATPARGANJ, DELHI-110096**

Appellant Rep by: Shri Ajay Singh & Shri Gaurav Pathak, Advs.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

With

Custom Appeal No. 53462 of 2018

Arising out of Order-in-Original No. 19/Commr./BBG/PPG/2018, Dated:
25.7.2018

Passed by the Commissioner of Customs, ICD, Patparganj, Delhi

**M/s PARK IMPEX
16 A, SHREYAS BUILDING, SLEATER ROAD
GRANT ROAD, MUMBAI-400007**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ, DELHI-110096**

Appellant Rep by: Shri Ajay Singh & Shri Gaurav Pathak, Advs.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 53658 of 2018**

Arising out of Order-in-Original No. 19/Commr./BBG/PPG/2018, Dated:
25.7.2018

Passed by the Commissioner of Customs, Domestic Container Depot, Patparganj,
ICD, Delhi

**M/s ICON FIBERS AND FABRICS PVT LTD
513, KAKAD MARKET, 306, KALBADEVI ROAD
MUMBAI-400002**

Vs

**COMMISSIONER OF CUSTOMS
DELHI, DOMESTIC CONTAINER DEPOT, PATPARGANJ
ICD, DELHI-110096**

Appellant Rep by: Shri Wattan Sharma, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 53670 of 2018**

Arising out of Order-in-Original No. 17/Commr./BBG/PPG/2018, Dated:
6.7.2018

Passed by the Commissioner of Customs, ICD, Patparganj, Delhi

**M/s ADYA INCORPORATION
37 A/1, RAJPUR ROAD, CIVIL LINES
DELHI-110054**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ, DELHI-110096**

Appellant Rep by: Shri Ajay Singh, & Shri Gaurav Pathak, Advs.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**With
Custom Appeal No. 50459 of 2019**

Arising out of Order-in-Original No. 19/Commr./BBG/PPG/2018, Dated:
28.7.2018

Passed by the Commissioner of Customs, ICD, Patparganj, Delhi

**SHRI SHAMMI CHANANA
502, STONE ARCH, OPP. RIZVI COLLEGE
BANDRA WEST, MUMBAI-400050**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ, DELHI-110096**

Appellant Rep by: Shri V R Sethi, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

**And
Custom Appeal No. 52151 of 2019**

Arising out of Order-in-Original No. 13/Commr./BBG/PPG/2018, Dated:
15.5.2018

Passed by the Commissioner of Customs, ICD, Patparganj, New Delhi

**SHRI PRABIR GHOSH
VILL-UTTAR CHATRA, PO-DAKSIN CHATRA
PS-BADURIA, DIST.-NORTH 24 PARGANAS
PIN CODE - 743247**

Vs

**COMMISSIONER OF CUSTOMS
NEW DELHI, ICD, PATPARGANJ, DELHI-110096**

Appellant Rep by: Shri Faraz Khan, Adv.

Respondent Rep by: Shri Sunil Kumar, & Shri Rakesh Kumar, DRs

CORAM: Dilip Gupta, President

Bijay Kumar, Member (T)

FINAL ORDER NOS. 50031-50060/2020

Per: Bijay Kumar:

These 30 appeals have been preferred by importer - appellants, exporter appellants, Prabir Ghosh and also the Revenue against the adjudication orders detailed below;

1	2	3	4	5
Sr.No	Appeal No.	SCN Details	OIO Details	Period of Dispute
1	C/52009/2018 Mercedes Benz India Pvt Ltd vs C.C.,PATPARGA NJ	26.06.15 (Prime Enterprises)	10.04.18 (PPG)	2011-12
2	C/52197/2018O A Associates vs C.C.,NEW Delhi	21.11.2016 (Shidhivinayak)	10.05.2018(ADE)(ADJ -NKB)	2011
3	C/52272/2018 Pashupati Acrylon Ltd vs C.C.,NEW Delhi	21.11.2016 (Shidhivinayak)	10.05.2018 ADG (ADJ)	Dec-11
4	C/52406/2018 Ramnikal S Gosalia & Co vs C.C.,PATPARGA NJ	16.12.2015 (Satyam)	25.05.2018 (PPG)	Apr-may 2011
5	C/52430/2018 Jaquar & Company Pvt Ltd vs C.C New delhi	18.11.2016 (Shidhivinayak)	10.05.2018 (NKU)	Dec-11
6	C/52507/2018 M Jiju Silk Mills vs CC New Delhi (ICD TKD Export)	10.12.2015 (Manan International)	07.05.2018 (PPG)	26.04.2011 to 12.08.2011
7	C/52537/2018 K J V Alloys Conductors Pvt Ltd vs C.C PATPARGANJ	07.01.2016 (Elite Traders)	16.04.2018 (PPG)	Aug-Sept. 2011
8	C/52667/2018 BNS Import Export vs CC New Delhi (ICD TKD)	19.03.2015 (Perfect Export)	06.07.2018 (PPG)	Feb-Mar. 2010
9	C/52668/2018 S J Patel vs C C New Delhi (ICD TKD)	05.10.2015	01.06.2018 (PPG)	2009
10	C/52696/2018 Ramnikal S Gosalia & Co vs C. C PATPARGANJ	26.11.2015 (Royal International)	25.07.2018 (PPG)	Mar-May 2011
11	C/52747/2018 Mercedes Benz India Pvt Ltd vs C. C PATPARGANJ	30.10.2015 (Kabir Empex)	29.05.20128(PPG)	2011-12
12	C/52748/2018 Mercedes Benz India Pvt Ltd vs C.C PATPARGANJ	16.12.2015 (Satyam Overseas)	25.05.2018 (PPG)	2011-12
13	C/53082/2018 Prabhir Gosh C.C New delhi	16.11.2016 (Radhe Enterprises)	01.05.2018 (MKB)	
14	C/53157/2018	18.02.2016	15.05.2018 (PPG)	20th,22th

	Aroma Chemical Agencies Pvt Ltd Vs C.C.,PATPARGA NJ	(Indian International)		& 27th Jun 2011
15	C/53159/2018 Aroma Chemical Agencies Pvt Ltd vs C.C ,PATPARGA NJ	16.12.2015 (Satyam)	25.05.2018 (PPG)	16th,25th & 26th March 2011
16	C/53238/2018 Prabhvir Gosh vs FARAZ KHAN,ADVOCATE/DR	30.12.2016 (Balaji Enterprises)	03.05.2018 (NKV)	2011-12
17	C/53406/2018 Vishakhha Wire Ropes Ltd vs C.C.,PATPARGA NJ	19.03.2015 (Perfect Export)	06.07.2018 (PPG)	
18	C/53423/2018 C. C . Patparganj NJ vs Sh.S.J. Patel	05.10.2015 (BNS Import & Export)	01.06.2018 (PPG)	Sep2009 to September 2011
19	C/53424/2018 C. C . Patparganj NJ vs Sh. Paresh Daftary	05.10.2015 (BNS Import & Export)	01.06.2018 (PPG)	Sep2009 to September 2011
20	C/53425/2018 C. C . Patparganj NJ vs Sh. Jyoti Biswas	05.10.2015 (BNS Import & Export)	01.06.2018 (PPG)	Sep2009 to September 2011
21	C/53426/2018 C. C . Patparganj NJ vs Sh Tushar Umarshi kothari	05.10.2015 (BNS Import & Export)	01.06.2018 (PPG)	Sep2009 to September 2011
22	C/53427/2018 C. C . Patparganj NJ vs M/s Wadhwani Commodities Trading	05.10.2015 (BNS Import & Export)	01.06.2018 (PPG)	Sep2009 to September 2011
23	C/53428/2018 C. C . Patparganj NJ vs Sh.Prabir Ghosh	05.10.2015 (BNS Import & Export)	01.06.2018 (PPG)	Sep2009 to September 2011
24.	C/52151/2019 Sh. Prabir Ghosh vs C.C.,PATPARGA NJ	DRI Kolkata Zonal Unit(Indian International) dated 18/02/2016. corrigendum dated 08/03/2016 and addendum dated 22/06/2017	BBG/PPG dated 15/05/2018	2011-12

6	7	8	9	10	11
Custom Duty (Rs.)	Penalty (Rs.) under Section 114A/114AA	License utilized for import	Whether TRA or not	Port of Import	Remarks
21.88 L	21.88 L	DEPB(3)	Yes	Nhava Sheva	Appellants-Importers bought forged TRA alongwith DEPBs issued based on forged/fake export documents. Duty exemption against such TRAs and DEPB merits rejection as none can be permitted to capitalize gain out of fraudulent activity and fake/forged/fabricated documents
11.53 L	11.53 L	DEPB(1)	Yes	Nhava Sheva	
11.47 L	11.47 L	FPS(1)	No	Kandla	Appellants-Importers

55.69 L	55.69 L	UKGUY(1)+DEPB(7) = 8	Yes	Chennai Sea Port	bought FPS Scrips issued based on forged/fake export documents. They also managed to get changed Port of Registration contrary to FTP provisions. Duty exemption against such FPS Scrips merits rejection as none can be permitted to capitalize gain out of fraudulent activity and fake/forged/fabricated documents
28.66 L	28.66 L	FPS(2)	No	Air Cargo Delhi & Garhi	
40.81 L	40.81 L	DEPB(3)	Yes	Chennai Sea Port	Appellants-Importers bought forged TRA alongwith DEPBs issued based on forged/fake export documents. Duty exemption against such TRAs and DEPB merits rejection as none can be permitted to capitalize gain out of fraudulent activity and fake/forged/fabricated documents
29.14 L	29.14 L	DEPB(3)	Yes	Nagpur ICD	
4.52 L	4.52 L	DEPB(1)	Yes	Kandla	
	Penalty 67 L (under section 114AA)	NA	N.A.	N.A.	The Appellant is properitor of the firm namely M/s BNS Export Import in whose name DFIA was issued based on fake/forged/fabricated export documents. The DFIA has been cancelled ab initio by DGFT.
42.39 L	42.39 L	DEPB(9)	Yes	Nhava Sheva	Appellants-Importers bought forged TRA alongwith DEPBs issued based on forged/fake export documents. Duty exemption against such TRAs and DEPB merits rejection as none can be permitted to capitalize gain out of fraudulent activity and fake/forged/fabricated documents
68.28 L	68.28 L L	DEPB(7)	Yes	Nhava Sheva	
46.49 L	46.49 L	DEPB(6)	Yes	Nhava Sheva	
	Penlty 25 L (under section 114AA)	N.A.	N.A.	N.A.	Appellant is one of the three persons constituting the syndicate indulging in fraud/forgery/fabrication of export documents as well as TRA
4.83 L	4.83 L	DEPB (3)	Yes	Nhava Sheva	Appellants-Importers bought forged TRA alongwith DEPBs issued based on forged/fake export documents. Duty exemption against such TRAs and DEPB merits rejection as none can be permitted to capitalize gain out of fraudulent activity and
20.5 L	20.5 L	DEPB (3)	Yes	Nhava Sheva	

					fake/forged/fabricated documents
N.A.	40 L (under section 114AA)	N.A.	N.A.	N.A.	Appellant is one of the three persons constituting the syndicate indulging in fraud/forgery/fabrication of export documents as well as TRA
10.91 L	10.91 L	DEPB(2)	Yes	Vizag Sea Port	Appellants-Importers bought forged TRA alongwith DEPBs issued based on forged/fake export documents. Duty exemption against such TRAs and DEPB merits rejection as none can be permitted to capitalize gain out of fraudulent activity and fake/forged/fabricated documents
	Penalties u/s 114AA 67 lacs	NA	N.A	N.A	In these appeals, Revenue prayed for remand of the cases to weed out factual inadvertant errors. Some Paras of the Impugned Order mention use of TRAs for imprt clearnces whereas TRAs were not issued in these cases.
66.07L	Penalties u/s 114AA 67 lacs	NA			
	Penalties u/s 114AA 67 lacs	NA	No		
	Penalties u/s 114AA 67 lacs	NA	No		
	Penalties u/s 114AA 66.07 L	NA	No		
	Penalties u/s 114AA 67 lacs	NA	No		
Penalty 05 lacs imposed under 114AA of the CA 1962.	5 L				Appellant is one of the three persons constituting the syndicate indulging in fraud/forgery/fabrication of export documents as well as TRA

2. These orders have arisen out of the alleged use of false and fabricated Telegraphic Release Advice (TRA) by the importers to clear the good imported by them duty free under various export promotion schemes such as Duty Exemption Passbook (DEPB), Focus Product Scheme, (FPS) Vishesh Krishi and Gram Udyog Yojna (UKGUY) and Duty Free Import Authorization (DFIA) under Foreign Trade Policy. The exporters have undertaken the export through one of the Land Custom Station (LCS) namely, Ghoadanga which is under the jurisdiction of West Bengal Preventive Commissionerate. Also one of such exporter in this batch of appeal namely, *M/s S.J. Patel (Appeal No. 52668/2018)*, the proprietor of M/s B.N.S. Export who it is alleged to have caused huge loss of customs revenue. Various penalties have been imposed on the importers, exporters and Prabir Ghosh which have been stated in the table above.

3. In view of common investigation and issue involved, all these appeals were heard together and are being disposed of by this common order.

4. At the outset, it is desirable to enumerate the various export promotion schemes and TRA procedure, which are involved in these appeals. The Duty Entitlement Passbook (DEPB) and Telegraphic Release Advice (TRA), Duty Free Entitlement etc. are the schemes formulated by the Director General of Foreign

Trade and mentioned under paragraph 4.3 of the Foreign Trade Policy (FTP) 2009-2014 and Handbook of Procedure, (HBP) Vol.I (Para 4.37). The Export Import Policy (EXIM) Policy 2009-2014, and paragraph 4.37 of Handbook of Procedure have been formulated by the Government of India under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 in order to facilitate and augment foreign trade by the genuine importer/exporter. The neutralisation of the various duties suffered at the time of import are provided by way of grant of duty credit against the export products.

4.1 Duty Entitlement Passbook Scheme - Under DEPB scheme, the exporter can apply for duty credit from the office of the jurisdictional Director General of Foreign Trade (DGFT), for a particular port of export. The duty credit is available for exports at specified rate for raw material, intermediates, components, parts and packing material etc. In terms of the Policy, DEPB scrips/license are freely transferrable and such scrips are permitted to be utilised for duty free import at the specified port, which is the port of export. If the DEPB scrips are required to be utilised at other ports than the port of export, it is allowed under Telegraphic Release Advise (TRA) facility as per the Notification No. 97/2009-Cus. dated 11 September, 2009 as amended. In this scheme, the importers are entitled to discharge the duty liability through debits against the DEPB scrips, under the notification as referred above.

4.2 Focus Product Scheme (FPS): This scheme, in terms of Chapter 3.15.1 of FTP, 2009-2015, has been framed with an objective of promoting the export products which have high export intensity/employment potential. The scheme is contained at paragraph 3.15.2 of the EXIM policy for export products listed in Table (1) of Appendix-37D of Handbook of Procedures, Vol.I to all countries including Special Economic Zone units, who shall be entitled for duty credit scrip equivalent to 2% or 5% of FOB value of the export in free foreign exchange for export made from 27.8.2009 onwards, unless a specific date of exports/period is specified by a public notification,

4.3. In case of certain Focus Product(s), listed in Appendix-37D the benefit is granted by way of additional duty credit scrip equivalent to 2% of FOB value of exports. In terms of Handbook of Procedure, Vol.I, as per paragraph 3.11.3, the port of registration is specified for such import or export. The two conditions which govern such scheme are enumerated in para 3.11.3 of Handbook of Procedure, which are as under:

(a) Duty scrip including (splits) is issued with single port of registration which is port of export. After the issue of the duty scrip but before the registration with Customs, the applicant can request for change of port of registration from Regional Authority concerned.

(b) The applicant, however, may use such duty credit scrip for import from any other ports including ICD/LCS after obtaining Transfer Release Advice (TRA) from the Custom authorities at port of registration. But this procedure for issuance to TRA is restricted to Electronic Data Interchange (EDI) enabled ports. In the case of export through non-EDI port, the port of registration shall be port of export.

4.4 Vishesh Krishi and Gram Udyog Yojna (VKGUY): (Special Agricultural and Village Industry Scheme) This scheme is contained in paragraph 3.8.1 of the FTP 2009-2014 and has been framed with an objective of compensating high transport cost and other costs for promoting export of the following products:

- (a) Agricultural produce and their value at product;
- (b) Minor neutralised produce and their value at variants;
- (c) Gram Udyog Product
- (d) Neutralised based product; and
- (e) Other products as notified from time to time.

4.5 The entitlement of VKGUY in terms of paragraph 3.13.2 of the policy FTP is as under:

(a) Products listed in Appendix 37A of Handbook of Procedure, Vol-I shall be entitled for duty credit scrip equivalent to 5% of Foot on Board (FOB) value of export in free foreign exchange for exports made from 27.8.2009 for some agriculture products and fruits as listed in table of Appendix-37A of the HPB and shall be entitled to additional duty credit scrip equivalent to 2% of FOB value of

export; over and above the 5% or 3% reduced rate of VKGUY entitlement as per para 3.13.3;

(b) DGFT has issued Trade Notice No. 8/AM-12 dated 27.3.2012 for operationalisation of para 3.11.3 of HPB, Vol-I, 2009-2014 which is as under:

"Duty credit scrip including a split shall be issued with a single port of registration which shall be port of export. After the issue of duty credit scrip but before registration with customs, the applicant can change the port of registration from RA (Regional Authority) concerned. Before registration, authorities shall verify the genuineness of duty credit script from the RA concerned only EDI system of message exchange put in place".

4.6 However, an applicant may use duty credit scrip for imports from other ports including ICD/LCS etc. after obtaining Transfer Release Advice (TRA) from the authorities at the port of registration. The above procedure pertaining to change of registration is applicable only in respect of EDI enabled ports. In case of export through non-EDI ports, port of registration cannot be changed and shall be the port of export only. The RA/licensing authorities can only entertain a request for port for change import in terms of para 3.11.3 of HPB procedures, subject to following conditions:

- (i) The scrips should have been issued against shipment from EDI ports
- (ii) The duty credit scrips under Chapter 3 of FTP, 2009-2014 should not have been registered with Custom authorities before making request to RA/licensing authorities for changing the port of registration.

Telegraphic Release Advice

4.7 The license/scrip holders, if after registering their licence/scrip at a particular sea port, Inland Container Depot (ICD), Container Freight Station (CFS) etc. desire to import goods at ports other than the port of registration, are required to obtain release advice from the port of registration. The application is received by the licensing section of the Custom House/Group etc. There is a prescribed procedure for issue of the release advice in Customs Appraising Manual, (Volume-II). The Central Board of Excise and Customs has issued various circulars governing the issue of Telegraphic Release Advice for import under various export promotion schemes. These are; Circulars No. 12/1995-Cus. dated 20.2.1995, 51/1995-Cus. dated 24.5.1995, 117/1995-Cus. dated 17.11.1995, 28/1997-Cus. dated 29.7.1997, 5/1009-Cus. dated 23.1.1998, 19/1998-Cus, dated 23.3.1998, 16/1999-Cus. dated 7.4.1999, 38/1999-Cus. Dated 25.6.1999 , **66 / 2001 - Cus.** dated 6.11.2001, 67/2003-Cus. dated 28.7.2003 and 11/2007-Cus. dated 13.2.2007. They prescribe the guidelines and procedure to be followed in case of issuance of Transfer Release Advice. The purpose of these circulars is to expedite the process of release of the goods under the applicable scrips expeditiously without compromising the revenue interest. It is emphasised in these circulars that the port of registration, which issues Transfer Release Advice (TRA) against which goods are permitted to be imported at the ports other than port of registration, should indicate the details of description, value and quantity of goods, DEPB Serial Number, date and issue and the extent the duty entitlement in DEPB book/scrip shown, so as to facilitate the relevant DEPB scrips. The Custom House/Custom ICD/Custom Station which issues the TRA in respect of the DEPB scrip are also required to maintain a record of such TRAs issued for the purpose of monitoring and keeping check of the total imports being affected under the over all value limit of such license/scrip.

4.8 As far as the facility of issuing the TRA in respect of EDI enabled ports is concerned, it is computerised and through system controlled message exchange between the port of export and port of import. In case of non-EDI ports, TRA is issued manually as per the procedure prescribed in the various circulars referred to above. The holder of the DEPB scrip or other entitled scrips, is required to make an application before the competent authority at port of registration (which is the port of export) that is required to follow the guidelines for issue of the TRA to other Customs Stations/Ports/Airports. The TRA is required to be produced by the importer before the Assistant Commissioner/Deputy Commissioner of the Customs station/port etc who after verification and confirmation permits the utilisation of such scrip/licenses for duty free import.

4.9 The department of Revenue issued a Notification No. 97/2009-Cus. dated 11 September, 2009 to operationalise the duty free entitlement passbook scheme.

The notification has specified, at clause-IV, places of port of registration (port of export) in which Ghojadanga is also mentioned. The Notification authorises the Commissioner of Customs to permit export from other than the ports mentioned at Sr. No. (IV) of the notification, within his jurisdiction in case of exigency in order to facilitate the export. Similarly, Notification No. 95/2009-Cus. dated 11 September, 2009 has been issued by the Finance Ministry (Department of Revenue) to give effect of import under VKGUY scheme, similarly, Notification No. 92/2009-Cus. dated 11 September, 2009 has been issued by the Ministry of Finance, (Department of Revenue) to operationalise the import against duty credit scrip under Focus Product Scheme (FPS). The conditions mentioned in all these notifications are that the import is only through the port of export. The DEPB, FPS, KGUY are freely transferrable. However, the TRA facility is not applicable to the FPS scrip and KGUY scrip. The utilization of VKGUY/FPS credit for imports is as per following conditions:

1. Para 3.17.7 of the FTP provides TRA facility in respect of Duty Credit Scrips including VKGUY and FPS Scrips. In terms of this para, Utilization of Duty Credit Scrip for imports from a port other than port of registration shall be allowed under Telegraphic Release Advice (TRA) facility as per DoR notification.

2. Para 3.11.3 of the Handbook of Procedure Vol. 1 (HBP) for the relevant Period (2009-2014) deals with Port of Registration of Duty Credit Scrips including VKGUY and FPS scrips. The said para provides that,

a. Duty Credit scrip (including splits) shall be issued with a single port of registration which shall be the port of export. After issue of Duty Credit Scrip, but before registration with Customs, the Applicant can change the port of registration from RA concerned. Before registration, authorities shall verify genuineness of Duty Credit scrip, from RA concerned, until EDI system of message exchange is put in place.

b. However, applicant may use Duty Credit Scrip for imports from any other port (that includes ICD/LCS) after obtaining TRA from authorities at port of registration. **The above procedure shall be applicable only in respect of EDI enabled ports. In case of exports through non-EDI ports, the port of registration shall be the port of exports.**

3. DGFT, Mumbai vide Trade Notice No. 8/AM12 dated 27.03.2012 has issued clarification with regard to change of port of registration of Duty Credit Scrip. The DOR has also issued Customs Notification No. 95/2009 (duty exemption under VKGUY) and 92/2009 (duty exemption under FPS) both dated 11.09.2009 to that effect."

5. The Directorate of Revenue Intelligence, Kolkata, Zonal Unit (hereinafter referred to as "DRI KZU") received information about a syndicate of unscrupulous persons based in West Bengal who in association with some exporters/brokers of licenses/scrips from other parts of the country were involved in preparing fake export documents on the basis which they were getting various duty credit licenses, such as, DEPB/FPS/DFIA/VKGUY etc. from different offices of Director General of Foreign Trade (DGFT). The intelligence further indicated that in such fake export documents, exports were being shown through one of the non-EDI Land Customs Stations (LCS) namely, Ghojadanga LCS under the jurisdiction of the Commissionerate of Customs (Preventive), West Bengal, which was without the facility of Electronic Data Transfer (EDI) and followed manual customs processes. As per intelligence, two persons namely, Paresh Datary of Kolkata and Jyoti Biswas of Maslandpur (a place near Ghojadanga LCS) were the mastermind of these fraudulent exports and had illegally obtained duty credit licenses for various exporters involving customs duty exemptions amounting to over Rs. 20 crores. It was also gathered that these fraudulently obtained duty credit licenses were subsequently utilised for discharging customs duty on imported goods at the time of their clearance at various ports in different parts of the country.

6. The three persons named above, in association with other persons who are also appellants, not only forged export documents but also TRA in connivance with certain officials of the Telephone Department. The TRA verifications were forged by diverting the receipt of such TRAs and thereafter sending confirmation through a parallel fax line of the official fax number of the Customs department at some place near Ghojadana LCS. During the search of the office of Paresh Daftary, it was gathered that he operated the business through a shop namely, Zenith Shoppe, at Radha Bazar Street, Kolkata. A search was also conducted at the

"Zenith Shoppe" on 22.9.2011, wherein some electronic storage devices, other documents and forged rubber stamps of Customs officers were recovered and seized. The searches were also conducted at the residential premises of Jyoti Biswas, at Maslandpur, where other computer storage devices were recovered. During investigation relevant documents like shipping bills, invoices, packing lists, bank realisation certificates etc, which were submitted by the alleged exporters to different offices of DGFT for getting duty free licenses, were collected from concerned offices of DGFT. The DRI also obtained the 'DEPB Tendering Registers' from the office of Deputy Commissioner of Customs, Barasat Division, Kolkata for verification of the entries relating to DEPB shipping bills of various exporters. The DRI also collected documents from the Superintendent Ghojadanga, LCS, including registers pertaining to exports effected under schemes like DFIA, DEPB etc. for verification of physical exports made through the LCS. The verification revealed that none of these export documents had been ever tendered or registered at Barasat Custom Division, which indicated that all these documents, on the strength of which export had been stated to be made while obtaining the duty free license, were forged and fabricated.

7. Enquiry from the various banks also revealed that in nine out of ten cases, the BRCs were fake and fabricated. The BRC particulars in respect of export under other two licenses were not available and the foreign remittance was received only in one such export indicating the possibility of export proceed realisation through non-banking channel as no exports had actually taken place. These licenses, which were procured on fake and forged export documents, were utilised at various ports for the clearance of duty free import by the various importers. But in most of these cases the imports were made after availing the TRA facility, which were also forged as it emerged from the investigations by the DRI. In cases where TRA was not required, the port of export was got changed by the office of DGFT contrary to the Foreign Trade Policy and procedure.

8. The DRI also took up the matter with the concerned DGFT for cancellation of fraudulently obtained licenses. The licenses have been cancelled by the DGFT in most of the cases, ab initio, as per the documents filed by the learned Departmental Representative, copies of which were made available to the learned Advocates appearing on behalf of the parties.

9. Paresh K. Daftary in his statement dated 16.1.2012 stated that:

(i) He was aware of the search on 22.9.2011 conducted at his shop "Zenith Shoppe" and had also seen the copy of the seizure list which was received from through his elder brother Rajendra K. Daftary. He stated further that he deliberately did not attend the search proceedings;

(ii) All the four pen drives seized on 22.9.2011 belonged to him and were used by him. They contained files/folders pertaining to exports like shipping bills/bills of export, invoice, packing list, copy of the TRA confirmation letter, debit note, copy of licenses etc.

(iii) He was in direct contact with exporters/importers and utilised the name of Khodiar Exim (proprietor being one Hitendra Damani, a person known to him) for issuance of bill, debit notes, etc. at the time of sale and purchase of the licenses. The sale proceed of the licenses were deposited by the purchaser of the licenses in the bank account of Khodiar Exim in Dhanlaxmi bank, Sarat Bose Road Branch, Kolkata whose account number ended with '4740'. As per instruction of the exporter i.e. the license holder, the money was sent to them in their other accounts also. However, the trading of the licenses was done under his instruction and he was in actual control of account of Khodiar Exim September, 2010;

(iv) That he had used the bank account of Hitendra Damani as he did not want to disclose his name and identity so as to avoid detection for transferring of license, which he started from May, 2010.

(v) That he has gone through the documents seized and contained in various files resumed during the search. The documents pertained to non-utilisation certificate and documents containing original DEPB license of Kabir Impex bearing license No. 0510300394 dated 25.8.2011, 0510300399 dated, 25.8.2011, 05100294218 dated 21.6.2011, 0510294219 dated 21.6.2011, 0510300161 dated 24.8.2011, 0510294217 dated 31.6.2011 along with its related documents like TRA,

Annexure to DEPB scrips, authorisation forwarding letters etc from one Tushar Kothari of Mumbai;

(vi) That he knew Deshraj Gulati of Delhi as both of them dealt with trading of licenses. He was associated with Gulati and he arranged fake document including RA and TRA for exporters namely Satyam Overseas, Kabir Impex and Sai International under instructions of Kothari;

(vii) That he associated himself with illegal activities of arranging fake export documents for monetary gains. After arranging the fake export documents, he used to forward the same to various exporters/persons including D.R. Gulati through one Tushar Umarshi Kothari who used to obtain import licenses from DGFT on the basis of such fake export documents provided by him. Tushar Kothari was aware of the fact that such licenses were fraudulently obtained from DGFT on the basis of fake export documents through Md. Fahim Zada;

(viii) That he arranged the fake export document through his agent at Ghjojadanga LCS/Petrapole LCS through Jyoti Biswas, who used to prepare fake export documents including invoices, packing lists, bills of export etc and got them fraudulently stamped and signed as if by the Customs Officers of the Ghojadanga LCS. Thereafter, to use forged license verification/ endorsement and also release advices, he used to send these documents to Tushar Kothari, who arranged for the registration of the said licenses at the port of importation mostly Nhava Sheva, and Patparganj ICS. The letter for confirmation of TRA was being issued to Petropole LCS and then sent by Fax along with the confirmation copy of TRA. The confirmation letter of TRA Verification used to be prepared by Jyoti Biswas in fraudulent manner in the name of Customs Officer by using fake seal and signature and then sent to the port of import by Fax from STD booth. On being asked as how the Fax meant for Petrapole LCS has not been received by the Customs authority, he explained that telephone exchange authority assistance was taken to divert the Fax messages at the location other than the Customs Office at Petrapole LCS. Jyoti Biswas has arranged the diversion of Fax and delivery thereof with the local telephone exchange authority. He was not aware of the identity of such persons from the telephone exchange, but connived with Jyoti Biswas in some illegal activities. He also stated that the said Fax connection of Petrapole LCS was diverted not permanently but for a specific duration from time to time only when the required documents i.e. TRA for confirmation would be sent to Petrapole LCS from port of import.

10. During the examination of Paresh K. Daftary on 17.1.2012 under Section 108 of the Customs Act, 1962, it appeared that he has used the import export codes of various exporters as detailed below:

Sl. No.	Name of the exporter	Name of the person who provided the job and kept contact for the fraudulent export and to whom export documents were sent by him
1.	Kabir Impex, Noida	Mr. D.R. Gulati
2.	Satyam Overseas	Mr. D.R. Gulati
3.	Royal International, Mumbai	Mr. Sanjeev Arora
4.	Trupti Traders, Mumbai	Mr. Anil Mehta
5.	Perfect Exports, Surat	Mr. Fahim A. Zada
6.	Suman Enterprises, Ankleshwer	Mr. Fahim A. Zada
7.	Sai International, Noida	Mr. D.R. Gulati
8.	Balaji International, Noida	Mr. Sanjeev Arora
9.	Yashraj International, Noida	Mr. Sanjeev Arora
10.	B.N.S. Import Export, Mumbai	Mr. Sunil Jayantibhai Patel
11.	Wardhman International, Mumbai	Mr. Sanjeev Arora

12.	Aum Silk Mills, Mumbai	Mr. Sanjeev Arora
13.	Rudra Import-Export, Faridabad	Mr. Sanjeev Arora
14.	Zen Overseas, Surat	Mr. Fahim A. Zada

11. Paresh Daftary admitted that he had fraudulently prepared about 125 shipping bills which were used for obtaining approximately 62 DEPB license and 14 DFIA license and also a few other licenses. The estimated value of these fraudulently obtained duty free licenses was approximately Rs. 20 crores and he received Rs. 1 crore as his share from the profit so earned of this and he paid Rs. 60 lakhs to Jyoti Biswas.

12. Des Raj Gulati, in his statement dated 4.7.2013, accepted that he was known to Paresh Daftary since the last 15 years and used to facilitate his illegal activity of export/import through Ghosadanga/Petrapole LCS. He also accepted that he had dealt with various types of licenses, namely DEPB/DFIA etc. and also arranged exports of M/s Satyam Overseas (prop. Kamal Sharma), M/s Kabir Impex. (Prop Rajeev Moolchand Sharma) and M/s Sai international (prop. Devendra Sharma) and Paresh Daftary used to process the export document through his associates who also knew firm Khodiar Exim, which according to him, was raised by Paresh Daftary.

13. In his statement, Prabir Bhaduri, Authorised Signatory of CHA firm M/s KCPJ International Agency accepted that he used to handle the export documents on behalf of the various exporters at the Land Customs Stations in West Bengal and had handled the export related activity of M/s Kabir Impex also.

14. Thus, it was clear from the above narration that Paresh Daftary and Jyoti Biswas used to facilitate fraudulent export at Ghosadanga LCS so as to obtain licenses from the various offices of DGFT and traded the same which were utilised by the various importers as indicated above.

15. Against this backdrop, various show cause notices were issued to the importers and other persons including exporters and the representative of Custom House Agent under the provisions of Customs Act for contraventions, as mentioned in the respective show cause notice.

16. All the learned Counsel on behalf of the various appellants have submitted identical submissions which were led by *Shri Rachit Jain and Shri Ashwani Bhatia, learned Counsel in Appeal No. C/52747/2018.*

17. Learned Counsel made the following submissions:

(i) The DEPB scrips were valid on the date of import and were not cancelled by the DGFT even on reference being made by the DRI seeking ab initio cancellation of scrips.

(ii) The appellant purchased these scrips for a valuable consideration in a good faith which was sold on prevailing market price;

(iii) The brokers took all responsibilities against the actions, proceedings, claims, demands, monies, damages, liabilities and costs relating to the DEPB scrips purchased under the indemnity bond;

(iv) No evidence has been produced by the Department in the Show Cause Notice regarding the collusion of the appellants with the exporter, operator, brokers;

(v) Duty cannot be demanded from the appellants, who imported the goods under valid licence. Reliance has been on the following decisions:

(a) East India Commercial Co. Ltd. Vs. CC - 1983 (13) ELT 1342 (SC);

(b) Union of India Vs. Sampat Raj Dugar - 1992 (58) ELT 163 (SC)

(c) Collector of Customs, Bombay Vs. Sneha Sales Corporation - 2000 (121) ELT 577 (SC)

(d) Taparia Overseas (P) Ltd. 2003 (161) ELT 407 maintained by Hon'ble Hon'ble Supreme Court in Union of India Vs. Blue Blends & Textur. Mfg. Co. Ltd. - 2017 (349) ELT A93 (SC);

(e) Commissioner of Customs Vs. Leader Valves Ltd. - 2007 (218) ELT 349 (P&H) maintained by the Hon'ble Supreme Court in 2008 (227) ELT A29 (SC);

(f) *Sanjay Sanwarmal Agarwal Vs. Union of India* - 2004 (169) ELT 261 (Bom);

(g) *Hico Enterprises Vs. Commissioner of Customs, Mumbai* - 2005 (189) ELT 135 (Tri.-LB) affirmed by Hon'ble Supreme Court in *Commissioner of Customs, Bombay Vs. Hico Enterprises* - 2008 (228) ELT 161 (SC)

(h) *Commissioner of Customs, Amritsar, Vs. Ajay Kumar & Co.* - 2009 (238) ELT 387 (SC)

(i) *Sumit Woollen Processors*

(j) *Commissioner of Customs (Import) Vs. Coromandal Fertilizers Ltd.* - 2018 (12) TMI 734-Bombay High Court

(k) *TVS Motor Company Ltd. Vs. CC, Chennai* - 2018 (1) TMI 775-CESTAT-Chennai

(l) *CC, Visakhapatnam Vs. Acalmar Oils & Fats Ltd.* - 2018 (8) TMI 1533;

(m) *Unique Trading Company Vs. CC*

(vi) It is held by the Supreme Court/High Court/Tribunal that once the licence is validly issued by the DGFT, then the import cannot be rendered illegal even if the license has been subsequently cancelled, if there is no fraud or collusion on the part of the buyer of the license.

(vii) Duty cannot be demanded from the importers, even if the DEPB scrips are forged as that will not make entire transaction void ab initio as at best it would be voidable. The decision of Punjab & Haryana High Court in *Friends Trading Company Vs. Commissioner of Customs, Amritsar* - 2006 (202) ELT 611 (Tri.-Del.) would not be applicable to the facts and circumstances of the case. On the other hand, reliance was placed on the decision in *Pee Jay International Vs. Commissioner of Customs and M/s Khaas Textiles Pvt. Ltd. Vs. Additional Director General (Adj.), DRI, New Delhi* - 2019-VIL-290-CESTAT-DEL-CUS. Reliance was also placed on the decision in *Commissioner of Customs, Amritsar Vs. Patiala Casting Pvt. Ltd.* - 2012 (283) ELT 269 (Tri.-Del) and *Commissioner of Customs, Amritsar, Vs. Gopi Chand Krishan Kumar Bhatia* - 2013 (295) ELT 739 (Tri.-Del.)

(viii) The Foreign Trade Policy under which the DEPB scrips/license were issued allows importers to purchase license from open market and use them for importing the goods duty free. In order to prevent fraud and to ensure that the benefits arising from the purchase of DEPB scrips were given only on actual export performance, the custom authorities are supposed to verify and endorse such scrips before import is allowed. Therefore, the authenticity and genuineness of the DEPB scrips evidently flows from the verification and endorsement by the Customs authorities. Therefore, the appellants cannot be liable. For these reasons duty demands are liable to be discharged against the appellant. As the TRAs were accepted by the Customs authorities after due verification by them, it is not open for the Department to now contend now that DEPB has been obtained fraudulently;

(ix) Even in spite of letter from DRI, the DGFT has not cancelled the licenses, and hence the customs cannot determine the validity of the DEPB licenses. Therefore, the impugned orders are not sustainable and liable to be set aside on this ground alone. Reliance to this effect was placed on the following decisions:

(i) *Marmo Classic Vs. Commissioner of Customs* - 2002 (143) ELT 153 (Tri.-Mumbai) maintained by the Hon'ble Supreme Court in 2003 (152) ELT A85 (SC);

(ii) *Honda Cars India Ltd. Vs. CC, ICD, PPG, Delhi* - 2017 (12) TMI 245-CESTAT-New Delhi

(iii) *Blue Water Foods & Exports Ltd. Vs. Commissioner of Customs (Cochin)* - 2010 (251) ELT 305 (Tri.-Bang.).

(x) Section 29 of the Sales of Goods Act, 1933 provides that the DEPB license/scrips are 'goods' and subject to Sales Tax when brought and sold. The Supreme Court has held that REP and import licenses are transferable and have to be treated as 'goods' in *Vikas Sales Corporation Vs. CCT* - 1996 (4) SCC 433. Accordingly, the appellant importers have attained a good title to the scrips/license and the same would not be invalid in the hands of the importers who would be bona fide purchasers of the goods.

(xi) The appellants have received Telegraphic Release Advice (TRA) on a bona fide belief that they were genuine and they had not played any active role in procuring TRAs which was the responsibility of their brokers;

(xii) In Mercedes Benz Appeal the broker, SJ Impex was supposed to arrange for TRAs from the port of export in terms of the sales contract. Both the DEPB scrips and TRA were validly procured and handed over to them by the broker.

(xiii) The appellants, therefore had no reason to indulge in forgery of TRA as the DEPB scrips sold to them were valid and purchased on payment of valid consideration. Therefore, the appellants have not committed any forgery in purchasing the scrips on a belief that they had been issued by the DGFT. Further, TRAs were merely a procedural formality and the benefit of duty free import cannot be withdrawn by the DGFT or Customs Department. As per settled law, no substantive benefit can be denied failure to follow the procedural guidelines. Reliance was placed on the decision in *Mangalore Chemicals & Fertilisers Ltd. Vs. Deputy Commissioner - 1991 (55) ELT 437 (SC)*. The appellants who had purchased the DEPB license/scrips on valuable consideration cannot be asked to forego the benefit under DEPB scrips merely on account of forgery of TRA by the exporter/broker of the license. There is no finding in the impugned order against the appellant to that effect. The appellant fulfilled the conditions for availing the benefit of DEPB scrips as per Notification No. 97/2009-Cus. dated 11.9.2009. The requirement of TRA is not there as per the Notification No. 97/2009 and therefore, non-observance of such requirement cannot be made a ground for denial of substantive benefit of the notification;

(xiv) The demand is barred by limitation on account of the fact that there was no suppression, mis-representation, collusion or fraud involved in the transaction. The suppression or mis-representation, which has been done by certain other persons cannot be a sufficient ground for extending the larger period of limitation. The appellants have not paid any active role in procuring DEPB scrips/TRA and have purchased the same through brokers. Reliance was placed on the following decision for the aforesaid submission:

(i) *Indian Acrylics Ltd. Vs. Commissioner of Customs, Kandla - 2015 (325) ELT 753 (Tri.-Ahmd)* affirmed by *Commissioner of Customs, Kandla Vs. Indian Acrylics Ltd. - 2016 (336) ELT 474 (Guj.)*;

(ii) *Commissioner of Customs, Amrtisar Vs. Vallabh Design Products - 2007 (219) ELT 73 (P&H)* affirmed by *Commissioner Vs. Vallabh Design Products - 2016 (341) ELT A222 (SC)*

(iii) *Balarpur Industries Ltd. Vs. Commissioner of Central Excise (Adj.), New Delhi - 2012 (275) ELT 88 (Tri.-Del.)*

(iv) *CC, Kandla Vs. Mantora Agro Industries - 2018 (7) TMI 926-CESTAT-AHMEDABAD.*

(xv) DRI officer is not a proper officer and does not have the jurisdiction to issue show cause notice under Section 28 of the Customs Act. Reliance was placed on *M/s Mangali Impex Ltd. Vs. Union of India - 2016 (335) ELT 605 (Del.)*. Though, the said decision has been stayed, but it continues to be a binding precedent unless and until the order is reversed or set aside by the appropriate forum, for which the reliance has been placed on the following judgements;

(i) *Niranjan Chatterjee and Ors. Vs. State of West Bengal and Ors.- 2007 (3) CHN 683*;

(ii) *Abdul Rahiman Vs. The District Collector, Malappuram & Another - 2009 SCC Online Ker 4358.*

(xvi) As the duty demand is contested to be not sustainable, there is no question of levy of interest and imposition of penalty in view of decision of Supreme Court in *Prathibha Processors Vs. Union of India - 1996 (86) ELT 12 (SC)*;

(xvii) The penalty under Section 114A of the Act can be imposed in cases where duty has not been paid or short paid by reason of collusion or wilful mis-statement or suppression of fact, which is not the case in the present proceedings. Therefore, the demand against the appellant is not sustainable. This apart they were bona fide purchaser and had not indulged in any activity of manipulation of port of export/import.

18. Learned Departmental Representative on the other hand, has supported the impugned order on the basis of finding contained therein. In addition, the following decisions were relied upon in support of the impugned order:

- (1) *Eastern Silk Indus. Ltd. Vs. CC* - 2016 (336) ELT 141 (Tri.-Kolkata)
- (2) *Friends Trading Co. Vs. Union of India* - 2011 (267) ELT 33 (P&H);
- (3) *Friends Trading Co. Vs. Commissioner of Customs* - 2011 (267) ELT 67 (Tri.-Del.);
- (4) *Commissioner of Customs (Preventive) Vs. Aafloat Textiles (I) P. Ltd.* - 2009 (235) ELT 587 (SC)
- (5) *K.I. International Ltd. Vs. Commissioner of Customs, Chennai* - 2012 (282) ELT 67 (Tri.- Chennai)
- (6) *Commissioner of Customs, Hyderabad Vs. Pennar Industries Ltd.* - 2015 (322) ELT 402 (SC)
- (7) *Apar Ltd. Vs. Commissioner of Customs (Export), Mumbai* - 2012 (276) ELT 534 (Tri.-Mumbai);
- (8) *ICI India Limited Vs. Commissioner of Customs (Port), Calcutta* - 2005 (184) ELT 339 (Cal.);
- (9) *C. Pinto Vs. Commissioner of Customs (Export Promotion), Mumbai* - 2017 (352) ELT 194 (Tri.-Mumbai)
- (10) *Neptune Trade Links Pvt. Ltd. Vs. Commissioner of Custom, Cochin* - 2012 (284) ELT 29 (Ker.);
- (11) *Tata Iron And Steel Co. Ltd. Vs. Commissioner of Customs, Mumbai* - 2015 (319) ELT 546 (SC);
- (12) *Commissioner of Customs (Export), Mumbai Vs. Ashok Fashions Ltd.* - 2018 (362) ELT 362 (Tri.-Mumbai);
- (13) *Sheshank Sea Foods Pvt. Ltd. Vs. Union of India* - 1996 (88) ELT 626 (SC)
- (14) *Commissioner of Customs, Kandla Vs. Essar Oil Ltd.* - 2004 (172) ELT 433 (SC)
- (15) *Union of India Vs. Jain Shudh Vanaspati Ltd.* - 1996 (86) ELT 460 (SC)
- (16) *Commissioner of Customs, Amritsar Vs. Sona Castings* - 2010 (259) ELT 693 (Tri.-Del.)
- (17) *Singhal Udyog Vs. Deputy Commissioner of Central Excise, Delhi-I* - 2018 (362) ELT 760 (Del.)
- (18) *Dow Agrosciences India Pvt. Ltd. Vs. Commissioner of Custom, Mumbai* - 2012 (283) ELT 524 (Tri.-Mumbai);
- (19) *Neptune Trade Links Pvt. Ltd. Vs. Commissioner of Custom, Cochin* - 2012 (284) ELT 29 (Ker.);
- (20) *DIC India Ltd. Vs. Commissioner of Custom (Port), Kolkata* - 2008 (226) ELT 545 (Tri.-Kolkata)
- (21) *M/s Synotex Industries Vs. Commissioner of Customs (Port), Kolkata*
- (22) *Golden Tools International Vs. Joint DGFT, Ludhiana* - 2006 (199) ELT 213 (P&H);
- (23) *Commissioner of Customs Vs. Candid Enterprises* - 2001 (130) ELT 404 (SC);
- (24) *M/s Kamala Metachem Vs. Commissioner of Customs (Port), Kolkata*

19. In addition, learned Departmental Representative also submitted that in these cases, the exports have been made through non EDI port and licenses were made transferrable by the DGFT Control Trade Notice No. 8/AM/12 dated 27.3.2012, which restricts transferability of port of registration in the licenses to non EDI ports wherein the port of registration is only port of exports. It is, accordingly, impressed upon that the licenses, which have been transferred by the DGFT, are contrary to the Circular dated 27.3.2012.

20. These transferees of licenses have also knowingly circumvented the provisions of issue of Transfer Release Advise (TRA) in case of DEPB cases in terms of the various circulars issued by the Department and Prabir Ghosh has not only forged the export documents but had also forged TRA by forging the signatures of Custom officers posted at Ghojadanga LCS.

21. Reliance placed by learned Counsel for the appellants on M/s Khaas Textile Pvt. Ltd. (supra) is not correct as in the licenses which were utilized in that case were under the FPS, wherein there is no need of issuance TRA.

22. Learned Departmental Representative also submitted copy of letter dated 24.12.2019 addressed to Registrar, CESTAT, R.K. Puram, wherein it has been stated that out of 216 licenses involved in these cases, 201 have been cancelled by the various offices of DGFT and the remaining are in the process of being cancelled. As the licenses have been cancelled ab initio, the entire clearance effected on such licenses become void and, therefore, the appellant is required to pay the customs duty while clearing these consignments along with interest and penalty.

23. With regard to the Departmental Appeals, the contention of the learned Departmental Representative is that the adjudicating authority has erroneously held the TRA were involved in import clearance in those cases but factually the issue was regarding utilisation of FPS scheme, for which port of registration was changed by the DGFT.

23.1 We have considered the various submissions made by the parties.

24. The issue to be determined in these appeals is as to whether the appellants had validly imported the consignments duty free on the strength of the licenses involved in these appeals. It is not disputed by the appellant that these licenses were obtained in a fraudulent manner by the exporters or the importers/manipulators, but their contention is that they have purchased these licenses through various brokers on payment of consideration through banking channels and, therefore, they cannot be held responsible for any manipulation by the transferor of these licenses. As the transferee, they have taken enough precaution before purchasing these scrips from open market by verifying on the DGFT website. They have also made payment to the brokers of license through banking channel/account payee cheques. Regarding obtaining of TRA with the transfer license, the appellants admitted that the TRAs were also made available to them with the transfer licenses but they were not aware that these TRAs were also manipulated. In such circumstances, they pleaded that being bona fide purchasers of the licenses, they should not be penalized for any lapse committed by the exporter. On the other hand, it is contention of the Department that the entire activities of export and TRA has been manipulated by the exporters. As these licenses have been cancelled or are in the process of cancellation, the license are void ab initio and the duty liability with interest and penalty has been rightly imposed.

25. The bona fide of imports which were made under the various export promotion schemes under Chapter 3 and 4 of the Exim Policy has to be examined. The schemes have already been discussed in the preceding paragraphs. The importers purchased these licenses, which were transferrable from the license brokers. After the purchase of license, the importers did not apply for the issue to Telegraphic Release Advice (TRA) from the port of Registration (POR) as was required to be obtained the TRAs from the brokers. Not only that, they also failed to ascertain the veracity of such TRAs from the Port of Registration. Thus, the due diligent that was required to be exhibited by the importer was not carried out.

26. The entire racket has been carefully planned and executed by Paresh Daftary, Prabir Ghosh and Jyoti Biswas. These three persons circumvented all the laws, be it Customs, Foreign Trade or Exim Policy. They attempted to hoodwink all the government agencies and committed a fraud, which could only be detected, subsequently, in the investigation by the DRI. The appellants have not asserted that the exports had not been effect for they only contend that they were not a party to the fraudulent activities. The Adjudicating Authority has taken great pains to evaluate the entire sequence of events. We have very carefully examined the findings. They are based on evidence produced. We see no good reason to take a different view.

27. It is, therefore, necessary to examine the cases which have been advanced by the learned Counsel on behalf of the appellants.

28. In East India Commercial Co. Ltd., the Supreme Court noticed that the goods were imported under a valid license and, therefore, it was not possible to hold that the goods imported were prohibited or restricted under Customs Act. This case

pertained to Sea Customs Act, 1872, while the present case is under the Customs Act, 1962. The relevant paragraph of the judgement is reproduced as under :

" 35. Nor is there any legal basis for the contention that licence obtained by misrepresentation makes the licence non est, with the result that the goods should be deemed to have been imported without licence in contravention of the order issued under Section 3 of the Act so as to bring the case within Clause. (8) of Section 167 of the Sea Customs Act. Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence obtained by fraud is only voidable : it is good till avoided in the manner prescribed by law. On May 1, 1948, the Central Government issued an order in exercise of the power conferred on it by Section 3 of the Act to provide for licences obtained by misrepresentation, among others, and it reads :

"The authorities mentioned in the Schedule hereto annexed may under one or other of the following circumstances cancel licences issued by any officer authorised to do so under clauses (viii) to (xiv) of the notification of the Government of India in the late Department of Commerce, No. 23-ITC/43, dated July1, 1943, or take such action as is considered necessary to ensure that the same is made ineffective, namely :-

(i) When it is found subsequent to the issue of a licence that (i) the same had been issued inadvertently, irregularly or contrary to rules, fraudulently or through misleading statement on the part of the importer concerned; or

(ii) when it is found that the licensee has not complied with any (ii) one or more of the conditions subject to which the licence may have been issued.

(iii) SCHEDULE

Clauses	Licencing authority	Cancelling authority
Clause (xiii)	Any officer authorizes by	
the Central Government.	Chief Controller of Imports and/or Govt. of India."	

(iv) This order, therefore, authorised the Government of India or the Chief Controller of Imports to cancel such licences and make them ineffective. The specified authority has not cancelled the licence issued in this case on the ground that the condition has been infringed. We need not consider the question whether the Chief Controller of Imports or the Government of India, as the case may be, can cancel a licence after the term of the licence has expired, for no such cancellation has been made in this case. In the circumstances, we must hold that when the goods were imported, they were imported under a valid licence and therefore it is not possible to say that the goods imported were those prohibited or restricted by or under Chapter IV of the Act within the meaning of Clause (8) of Section 167 of the Sea Customs Act.

36.It follows that on the assumption that the allegations made in the notice are true, the tribunal has no jurisdiction to proceed with the inquiry under Section 167(8) of the Sea Customs Act.

29. It is manifestedly clear that the case at hand is distinguishable since there was no issue of TRA and the involvement of transferee had not been brought on record in the investigation. Thus, this case would not help the appellants.

30. In Sneha Sales Corporation, the matter was remanded to the Tribunal to decide whether the goods were liable for confiscation under Section 111(m) of the Act. Paragraph 7 of the judgement that is reproduced as under:

"7. Shri Choudhary has also urged that although the Collector had also ordered confiscation of the goods under Section 111(p) of the Act for the reason that there was violation of the provisions of Section 11C of the Act, the Tribunal, while allowing the appeal and setting aside the order of the Collector, has not dealt with the part of the order of the Collector. This submission finds support from the order of the Tribunal because the Tribunal while setting aside the order passed by the Collector has not dealt with the question whether the goods were liable to be confiscated under Section 111(p) on account of contravention of the requirement of Section 11C of the Act. In these circumstances, we are of the view that the matter is required to be remitted to the Tribunal for consideration of the question whether the goods are liable to be confiscated under Sections 111(m) on the ground of misdeclaration of the value of bobbins and under Section 111(p) on the ground of contravention of the provisions of Section 11C of the Act. The appeal is accordingly

allowed, the impugned judgment of the Tribunal is set aside and the matter is remitted to the Tribunal for consideration of the question whether the goods are liable to be confiscated under Sections 111(m) and (p) of the Act.

31. This is also a case where the purchaser had not indulged in any activity of manipulation of port of export/import and there was no case of issue of forged TRA.

32. In Taparia Overseas (P) Ltd., the original license was obtained by the transferee fraudulently which were subsequently transferred to the transferee. It was held that since the goods had been imported under a valid license, the duty liability would not accrue on the transferee. Paragraph 36 and 37 of the judgement are reproduced as under:

" 36. It is true that legal fraud vitiates everything even judgments and orders of the Court, but the question is: as to what extent this concept can be imported in commercial transactions, where question of transfer of properties is life and soul of trade. In a mercantile transactions, as well as in those connected with real properties, the general rule undoubtedly is, that a person cannot transfer to another a right which he does not himself possesses. The rule of caveat emptor spells out two exceptions to the rule, one in cases for encouragement of commerce such as sales in market overt, and other to the transfer of negotiable instruments. Take for example, if the seller has endorsed and delivered to the buyer the Bill of Lading or any other documents of title to the goods and the buyer has endorsed and delivered it to his sub buyer, then the sub buyer, provided he has taken the document in good faith, as well as for valuable consideration, is entitled to the goods free from any right in the original seller to stop them, and thus his position is better than that of the original buyer, same is a position of sales in market-overt.

Without attempting to enumerate the various rights which are assignable, either by the express act of the parties, or by the operation of law, we may observe, generally, the maxim assignatus utitur jure auctoris, i.e. an assignee is clothed with the rights of his assignor is subject to many restrictions, shortly enumerated hereinbelow. (See Broom's Legal Maxims, tenth Edition, p. 302)

Assignatus utitur jure auctoris (Hal. Max, p.14) - An Assignee is clothed with the rights of his assignor.

"This maxim applies generally to all property, real and personal, and refers to assigns by act of parties, as where the assignment is by deed; and to assigns by operation of law, as in the case of an executor. All rights of the assignor in the thing assigned must pass from him to the assignee by virtue of the assignment, for duo non possunt in solido unam rem possidere. It should be observed, also that the thing assigned takes with it all the liabilities attached to it in the hands of the assignor at the time of the assignment, except in cases for the encouragement of commerce, such as sales in market overt, negotiation of promissory notes, bills of exchange, etc., and, in the case of equities, where the assignee is a bona fide purchaser for value without notice."

[Emphasis supplied]

It is thus no doubt true that as a general rule, if a transaction has been originally founded on fraud, the original vice will continue to taint it, and not only is the person who has committed fraud is precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has been some consideration moving from himself. In the cases at hand, it is not in dispute that all the petitioners had obtained licences for valuable consideration without any notice of the fraud alleged to have been committed by the original licence holders while obtaining licences. If that be so, the concept that fraud vitiates everything would not be applicable to the cases where the transaction of transfer of licence is for value without notice arising out of mercantile transactions, governed by common law and not by provisions of any statute.

In this behalf, we are reminded of the observation of Kings Bench in the case of *Master v. Miller*. 4 T.R. 320. [See English Report Vol. 100 pg. 1042] made by Justice Buller, J. while dealing with the case arising out of contract :

"I hold that in this case there is no fraud either express or implied: and that, as the plaintiffs have proved that they gave a valuable consideration for the bill, and that it was endorsed to them by those through whose hands it passed, their case is open to no objection whatever.

But I will suppose for a moment, though the case does not warrant it, that Wilkinson and Cooke did mean a fraud; still I am of the opinion that would not affect the case between the plaintiffs and the defendants. It is a common saying in our law books, that fraud vitiates everything. I do not quarrel with the phrase, or mean in the smallest degree to impeach the various cases which have been founded on the proof of fraud. But still we must recollect that the principle which I have mentioned is always applied ad hominem.

He who is guilty of fraud shall never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that contract. I agree that as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and bona fide contract between two others. Even as between the parties themselves we must not forget figurative language of Lord Chief Justice Wilmot, who said that "that statute law is like a tyrant; where he comes he makes all void; but a common law is like a nursing father, and makes void only that part where the fault is, and preserves the rest."

On the above canvas, having examined the well settled, established and well recognised concept of law that the effect of fraud is not to render the transaction void ab initio but renders it voidable at the instance of the party defrauded and transaction continues valid until the party defrauded has decided to avoid it.

37. Alternatively, let us consider it from another angle assuming that licence comes to an end upon it is suspension and/or cancellation, in catena of cases, it is laid down that the date of import of goods would be the date on which the Bill of Entry was presented under section 46. This legal position is clear from the decision of the Apex Court as laid down in Union of India v. Apar Ltd. 1999 (112) E.L.T. 3 (S.C.) and Garden Silk Mills v. Union of India - 1999 (113) E.L.T. 358 (S.C.) . The same is the view taken by the Apex Court in Sampat Raj Durgar case (cited supra). Imports against replenishment Licences were permitted duty free if the importers produced an import Replenishment Licence the goods or the materials were imported into India. In the instant cases when the goods were imported into India, and even when the Bills of Entry were filed, neither were the licences suspended nor the same cancelled. In all these cases, Bills of Entry were filed by the petitioners well before the suspension and/or cancellation of the licences in question, thus the imports were made under valid licences, the goods could not be subjected to levy of customs duty in the peculiar facts and circumstances of the cases in hand.

In the circumstances, we hold that in all cases at hand, the goods were imported, under valid licences. The goods imported were neither prohibited nor restricted by or under the Customs Act, as such, it was not open for the Customs Authorities to withhold clearance thereof."

33. As the issue of forged TRA was not the issue before the Court, the case would have no application.

34. In Leader Valves Ltd., the issue was identical as the DEPB was issued by the DGFT on the basis of forged document, bank realization certificate. The appellant was not a party to the fraud and had purchased DEPB from open market under a bona fide belief that it was genuine. The appellant paid full prices and availed the benefit. Merely because at a later stage the DEPB has been found to be fabricated, the assessee could not have been deprived of the benefit. The relevant portion of the order is as under:

"9. After hearing learned Counsel for the parties, we are of the considered view that this appeal is devoid of any merit. The assessee-respondent admittedly is not a party to the fraud. There are categorical finding that they had purchased DEPB from the open market in the bona fide belief of its being genuine. They had paid full price and accordingly have availed the benefit. Merely because at a later stage, the DEPB has been found to be fabricated and fake on the basis of BCER the assessee-respondent could not be deprived of the benefits which were legitimately available to them. It is also worth noticing that the assessee-respondent was never issued any show cause notice before cancelling the DEPB which was obtained by M/s. Parker Industries and obviously the notice was also to be issued to them alone. We are further of the view that notice under Section 28 of the Customs Act could not be issued to the assessee-respondent because a period of six months stipulated by Section 28 of the Customs Act stood already expired and the rights of the parties

had been crystallized. The revenue cannot avail the extended period because the assessee-respondent could not be accused of mis-representation, collusion or suppression of facts within the meaning of proviso postulated by Section 28 of the Customs Act. Therefore, there is no merit in this appeal."

35. All other judgments which have been cited by the learned Counsel are on the issue that the transferee of the license will not be responsible for the payment of duty, if they had purchased the license on bonafide belief that they were genuine. The issue of forged TRA was not examined by the Court. These cases would not help the appellants.

36. In *Sumit Wool Processors & others*, the Tribunal held that as the appellants had bonafide purchased the concept of this fraud vitiates everything would not be applicable. The authority themselves had not checked the fraud committed at the at the time of export in cases where licenses/scrips were transferred to the importer who had no knowledge of the mis-representation by the exporters in obtaining Bill of Entries which were filed. Accordingly, it was held that the goods cannot be subjected to Customs duty in terms of paragraph 9 of the order which is as under:

"9. In view of the above, the confiscation of goods imported by the appellants who are transferees of the licenses/scrips does not arise. The demands of duty against them and penalties are set aside,"

37. Regarding the transfer of utilisation of FPS licenses by a few importers at the port other than port of export i.e Ghojadanga, it was submitted that office of DGFT has made these licenses transferrable and, therefore, they have rightly utilised these licenses for payment of Customs duty while importing the goods. Reliance was placed on the decision of this Tribunal in *Khaas Textile*. Learned Counsel also submitted that in these cases licenses have not been cancelled and, therefore, the customs cannot object to the utilisation of these licenses placing reliance on the decision in *Marmo Classic Vs. Commissioner of Customs - 2002 (143) ELT 153 (Tri.-Mumbai)*, which was maintained by the Supreme Court in *2003 (152) ELT A85(SC), Blue Water Foods & Exports Pvt. Ltd. Vs. Commissioner of Customs - 2010 (251) ELT 305 (Tri.-Bang.) and Honda Cars India Ltd. Vs. CC, ICD, PPG, Delhi - 2017 (12) TMI 245-CESTAT, New Delhi*.

38. In this regard, we find that learned Departmental Representative has submitted a letter received from DRI that most of these licenses except, a few, have been cancelled by various offices of the DGFT and, therefore the submission made by the learned Counsel by placing reliance on these decisions is no help. Further, it is apparent from the Exim Policy and also HBP, that these FPS cannot be utilized at other ports in case where the exports have been made through Non-EDI port. The change of port of Registration (Export-port) is thus contrary to the Exim Policy and HB of procedure by the DGFT office.

39. The Representative of the Department has relied upon in *Eastern Silk Industries*, wherein it was held that the State cannot be deprived of its share of duty if the same is claimed by fraudulent act of exports. The relevant paragraph of the order is reproduced as under:

"8. The ratio laid by the Apex Court in the above case law is squarely applicable to the facts involved in the present proceedings in as much as the conditions contained in exemption Notification No. 40/2006-Cus., dated 1-5-2006 have to be fulfilled to the satisfaction of the Customs authorities and if these conditions are not satisfied then action can be taken by the Customs authority for demanding duty even if Licensing authority has not taken any action with respect to DFIA Licenses. One of the conditions of the exemption Notification No. 40/2006-Cus., dated 1-5-2006, read with EXIM Policy, is that duty free yarn import is permissible only for those goods what were exported by the appellants. As the said exports were not 100% mulberry natural silk yarn, as prescribed under SION J-123, but Noil yarn and that too along with cotton, therefore, the import of goods other than the material exported cannot be held to be proper and action for demanding Customs duty against the appellants is justified even if no action is taken by DGFT for cancellation of impugned DFIA Licenses.

9. *Appellants who imported the goods against transferable DFIA Licenses have also taken an argument that they have purchased the DFIA Licenses under a bona fide belief that the same were genuine. It is thus their case that they cannot be held as party to the fraud and extended period cannot be made applicable for demanding duty. Transferee appellants have relied upon an order dated 31-8-2015 passed by*

the co-ordination bench, Mumbai in the case of *Incos ABS (India) Ltd. & Others v. C.C., Kandla*. In this order it has been held by CESTAT, Mumbai that transferees cannot be held responsible for duty and that extended period is not applicable while demanding duty. With due respect we differ with the view expressed orders passed by CESTAT, Mumbai as several case laws, including some recently decided by the Apex Court, were not brought to the notice of CESTAT, Mumbai. On this issue Delhi CESTAT in the case of *C.C., Amritsar v. Sona Castings* [2010 (259) E.L.T. 693 (Tri.-Del.)) held that fraud vitiates everything and transferee is also responsible to pay duty against such scripts obtained fraudulently. This conclusion drawn is based on several quoted case laws of Apex Court and High Courts of Kolkata & Punjab & Haryana. The ratio laid down by Calcutta High Court in the case of *ICI India Ltd. v. C.C. (Port)*, Calcutta [2005 (184) E.L.T. 334] is squarely applicable to the facts of the present appeal. This order of the Calcutta High Court has also been affirmed by Apex Court as reported at 2005 (187) E.L.T. A31 (S.C.) where invocation of extended period was also justified. Jurisdictional Calcutta High Court in the case of *ICI India Ltd. v. CC (Port)*, Calcutta (supra) held as follows :

"2. Relying on the judgment of the learned CEGAT in Appeal No. C/358/2000-NB(D), dated 26th September, 2002 [2003 (151) E.L.T. 336 (T)] Dr. Pal contends that there is a finding that there was no collusion on the part of the appellant. Therefore, according to him, if no fraud or collusion is found on the part of the appellant, in that event, the appellant would be entitled to the benefit of the DEPB licences/scripts. Relying on the decision in *United India Insurance Company v. Lehu*, (2003) 3 SCC 338, Dr. Pal contends that it is just not possible for the appellant to verify the DEPB licenses/scripts which is otherwise saleable, negotiable and available in the market and which the appellant had purchased bona fide for valuable consideration and utilized it for availing of the credit against its own import, stands in the same footing as a driving licence of the driver of the vehicle as it stood in the said case. Therefore, this is an important question of law that whether in the absence of any proof of collusion or fraud or absence of bona fide on the part of the appellant, the appellant could be deprived of the credit of the DEPB licences/scripts purchased by him bona fide for valuable consideration since found to be forged.

4. The DEPB licence/script is admittedly a negotiable one and is available in the market. Anyone can purchase it from the market and avail of the credit out of it. This was so done by the appellant. But ultimately it was found that the said DEPB licence/scripts were forged. These facts are not in dispute as we find from the finding of the learned CEGAT. The only question that has been put forward, on the basis of the finding of the facts without challenging the same, is about the effect of absence of collusion on the part of the appellant, as pointed out earlier, in relation to the availability of the credit under the forged DEPB scripts. But in the decision in *United India Insurance* (supra), the forgery related to the driving licence of the driver engaged by the insured, but the Insurance Policy was not found to be forged. The question would be different if the document itself, on the strength whereof credit is claimed is forged. In that event, the same cannot be equated with merely an irregularity in the licence of the driver driving the vehicle in relation to the liability of the insurer in relation to a valid insurance policy under the Motor Vehicles Act providing for compulsory insurance to secure third party interest. In this case, the document itself having been found to be forged whether there was collusion or fraud on the part of the appellant in the issue of the DEPB licences/scripts becomes absolutely immaterial and irrelevant since no credit can be derived from a forged DEPB. The credit is made available on the strength of a valid DEPB. If the DEPB is forged, then the same is non est and therefore, there is no valid DEPB. As such no credit can be derived thereunder. In such circumstances, one may defend his case that one may not be liable for collusion or fraud and exposed to other penalties therefor, but still then one would be liable to pay the duty and interest and for other statutory consequences which one cannot avoid."

9.1 A script obtained from the Licensing authority fraudulently cannot give licence to any transferee to avail any Customs duty exemption. Fraud in common parlance means dishonest dealing, deceit or cheating etc. It makes no difference whether fraud is committed by outrightly forging of documents or by willful misdeclaration/misrepresentation. A fraud is a fraud and there are no categories of mild frauds and severe frauds in taxation matters. Further in a recent case of *Tata Iron & Steel Co. Ltd. v. C.C., Mumbai* [2015 (319) E.L.T. 546 (S.C.)] on the issue of applicability of extended period in such cases it has been held by Apex Court as follows :

"[Order] - The only question in the present appeals is as to whether the customs authorities could invoke the provisions of proviso to Section 28 of the Customs Act, 1962, to avail the benefit of extended period of limitation.

2. In the facts of the present case we find that the original licence holder, namely, Indian Card, Clothings Company Limited had deliberately suppressed the fact of having availed Modvat credit under Rule 57A of the Central Excise Rules, 1944, and made willfully wrong declaration to the licensing authority to obtain the endorsement of transferability of the same while transferring the licenses to the appellant herein. In view thereof, the extended period of limitation would be available to the authorities for the purpose of claiming the duty even against the appellant herein, who is the transferee of the licence in question."

9.2 In view of the above observations and settled proposition of law, it is held that demands against the appellants are not time barred.

10. So far as the argument of Shri S.K. Mehta (Advocate), with respect to on Section 28AAA(1) of the Customs Act is concerned, it is relevant to reproduce this Section as follows :

"Section [28AAA. Recovery of duties in certain cases. - (1) Where an instrument issued to a person has been obtained by him by means of -

(a) Collusion; or

(b) Willful misstatement; or

(c) Suppression of facts,

For the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), by such person or his agent or employee and such instrument is utilized under the provisions of this Act or the rules made or notifications issued thereunder, by a person other than the person to whom the instrument was issued, the duty relatable to such utilization of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued.

Provided that the action relating to recovery of duty under this section against the person to whom the instrument was issued shall be without prejudice to an action against the importer under Section 28."

10.1 It is the argument of Learned Advocate that duty if any can only be demanded from the person in whose name DFIA Licenses were obtained fraudulently. It is observed that Section 28AAA of the Customs Act, 1962 has been made effective from 28-5-2012 and cannot be made applicable to the present proceedings for the periods prior to 28-5-2012. This provision has been made to give the department a tool also to recover Customs duty even from a person other than the importer of the goods. It is also observed that proviso to Section 28AAA(1) does not absolve the actual importer from payment of duty. Further Hon'ble Apex Court in the case of Tata Iron & Steel Co. Ltd. v. C.C., Mumbai (supra) has held that extended period is available to the Revenue for demanding duty from the transferres also. State cannot be deprived of its share of duty if the same is claimed exemption by fraudulent acts of the exporters in the present proceedings.

11. In view of the above observations duty demands and interest have been correctly confirmed by the Adjudicating authority against all the appellants. However, we are of the considered opinion that penalties are not imposable upon the transferee appellants as they have no knowledge of the nature of goods used and exported by the manufacturers/exporters. Accordingly, penalties imposed upon the transferee appellants are set aside. "

40. Further, reliance was placed on Friends Trading Co., wherein it was held that where DEPB was fraudulently procured by the predecessor of appellant, the duty demand from the appellant cannot be withdrawn, as the importers who utilised these licenses had placed before seller forged document and they cannot be allowed to retain the benefit that were obtained illegally. The order contained in paragraphs 2, 4 and 9 are reproduced as under:

" 2. The appellant imported goods and filed Bill of Entry dated 24-11-2000. It availed exemption from payment of Customs Duty under notification dated 7-4-1997 under Section 25 of the Customs Act, 1962 against DEPB Scrip dated 14-11-2000. Finding that the said Scrip was procured fraudulently by the predecessor of the appellant, Scrip obtained by the appellant was held to be void ab initio. Accordingly, demand of duty was raised against the appellant vide Order-in-Original dated 4-10-

2005. The said order was affirmed in appeal and has been further affirmed on second appeal by the Tribunal. The Tribunal rejected the contention that on the date of cancellation of DEPB Scrip i.e. 2-1-2003, the appellant having already taken the benefit, the same could not be withdrawn. Further contention that limitation for taking action under Section 28 of the Act had expired and the extended limitation under the proviso could not be invoked in absence of misstatement or suppression being attributed to the appellant was also rejected. The Tribunal followed the judgment of this Court in the case of the assessee itself in respect of different DEPB Scripts in *Friends Trading Co. and Another v. Union of India* - 2010 (254) E.L.T. 652, which in turn refers to earlier judgment of this Court dated 1-9-2007 in CUSAP No. 27 of 2008 *M/s. Munjal Showa Limited v. Commissioner of Customs and Central Excise (Delhi (IV), Faridabad* [2009 (246) E.L.T. 18 (P & H)]

4. With reference to proposed questions of law A to E, it was submitted that benefit taken on the basis of fabricated document, which is cancelled subsequently, could not be withdrawn since benefit was taken prior to the date of such cancellation. For this proposition, reliance has been placed on following judgments of the Hon'ble Supreme Court :-

(i) *East India Commercial Company Limited v. Collector*, 1983 (13) E.L.T. 1342 (S.C.) = AIR 1962 SC 1893;

(ii) *Collector of Customs, Bombay v. Sneha Sales Corporation*, 2000 (121) E.L.T. 577 (S.C.) and

(iii) *Sampat Raj Dugar*, 1992 (58) E.L.T. 163 (S.C.)

9. We are unable to accept the submission. **Finding recorded by the Tribunal, reproduced above, shows that action of the petitioner was not bona fide. In any case, the proviso is not limited to action of an importer who comes forward to take advantage on the basis of fraudulently obtained or forged DEPB, it also covers action of the predecessor of the importer. Importer who steps into the shoes of seller of forged document does not stand on better footing and cannot be allowed to retain benefit illegally obtained. Taint attaching to the document on the basis of which benefit is taken is not washed off. Fraud or suppression continues if document is not genuine. Any other interpretation will defeat the intendment of the proviso to Section 28 and will enable fraud to be perpetuated without any remedy.** Even if case of criminal liability or penalty may stand on different footing, purchaser or successor of fraudulently obtained DEPB stands in the same position as his predecessor. If the extended period of limitation could be invoked against the original holder of fraudulent or forged DEPB, the same could be invoked against successor or purchaser. The judgments relied upon on behalf of the petitioner are distinguishable. The matter is covered by view taken by this Court earlier which has been followed by the Tribunal. Thus, we are unable to hold that any substantial question of law arises."

(emphasis supplied)

41. Similar observations were made by the Supreme Court in *Aafloat Textiles (I) Pvt. Ltd.* and it was held as under:

"26. No one ought in ignorance to buy that which is the right of another. The buyer according to the maxim has to be cautious, as the risk is his and not that of the seller.

27. Whether the buyer had made any enquiry as to the genuineness of the license within his special knowledge. He has to establish that he made enquiry and took requisite precautions to find out about the genuineness of the SIL which he was purchasing. If he has not done that consequences have to follow. These aspects do not appear to have been considered by the CESTAT in coming to the abrupt conclusion that even if one or all the respondents had knowledge that the SIL was forged or fake that was not sufficient to hold that there was no omission of commission on his part so as to render silver or gold liable for confiscation.

28. As noted above, SILs were not genuine documents and were forged. Since fraud was involved, in the eye of law such documents had no existence. Since the documents have been established to be forged or fake, obviously fraud was involved and that was sufficient to extend the period of limitation."

42. The Supreme Court also held that in case forged license is purchased from the market, the burden of proof remains with the purchaser of the license following the principle of buyers be aware as observed in *Friends Trading*.

43. It is seen that an identical issue where not only DEPB scrips were forged but also the Telegraphic Release Advice for use of this DEPB scrips on port other than port of export was considered extensively in K.I. International. It was held that importer transferee would be liable to compensate the customs duty and also would be liable to penal provision and interest. The relevant portion of the order as contained in paragraphs 10.1, 10.2, 10.3, 10.4, 14.5 is reproduced as under:

"10.1 Evidence gathered by Revenue unambiguously and succinctly proved that the TRAs used by the importer appellants were fake, false, forged and fabricated for discharge of customs duty and caused prejudice to Revenue. Similarly, the traders, brokers and sub-brokers supplying such instruments were conduit and instrumentality in commitment of offence of causing loss to Revenue consciously and deliberately having intimate connection to each other. Neither the importer appellants nor the conduits could demolish the evidence gathered by Revenue making enquiry from DGFT Authority. Their ill-design was unearthed by investigation.

10.2 It is established principle of law that fraud and justice do not dwell together. An assessee acting in defiance of law has no right to claim innocence when he fails to exercise due care and diligence. Failing to cause enquiry with the issuing authority of DEPB scrips/TRAs crippled the importer appellants to claim bona fide. Findings of the learned Adjudicating Authority do not appear to have been made suspiciously or under surmise but seems to have been based on cogent evidence.

10.3 When the importer appellants acquired DEPB scrips from market without being acquired from original acquirer, as an abundant caution, to avoid evil consequence of fraudulently obtained scrips, could have safeguarded their interest causing enquiry from JDGFT as to genuineness of the scrips. But that was not done. Such appellants failed to acquire title over the scrips but became beneficiary of ill got scrips. Notificational benefit was availed at the cost of public exchequer which is required to be surrendered for the undue gain made. Bona fides were not established by the appellants for which they submitted themselves to the loss of duty caused to Revenue by their act of use of DEPB scrips not acquired legitimately.

10.4 The observations of the former Lord Chief Justice of England, Sir Edward Coke, more than three centuries ago, that "fraud avoids all judicial acts, ecclesiastical or temporal", noticed by the Supreme Court in S.P. Chengalvaraya Naidu v. Jagannath, AIR 1994 SC 853, are apt for the instant case. The Apex Court has also observed that an act of deliberate deception with the design of securing something by taking unfair advantage of another is a "fraud". "Fraud" is a cheating intended to get an advantage. A person whose case is based on falsehood has no right to seek relief in equity. In Commissioner of Customs v. Essar Oil Ltd., (2004) 11 SCC 364 = 2004 (172) E.L.T. 433 (S.C.) their Lordships of the Supreme Court have observed that it is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. Being the ultimate beneficiaries of the fake TRAs, the importer Appellants were not innocent. Claim at the threshold was based on fake TRAs. Therefore, Revenue has rightly invoked extended period under Section 28 of the Customs Act, 1962 to adjudicate the matter.

10.5 It has been held in ICI India Limited v. CC (Port), Calcutta - 2005 (184) E.L.T. 339 (Cal.) that the DEPB licence/scrip is admittedly a negotiable one and is available in the market. Anyone can purchase it from the market and avail of the credit out of it. But, ultimately if it is found that the said DEPB scrips were not acquired lawfully nor transferred by original owners thereof credit cannot be derived from forged TRA. The decision of Hon'ble Calcutta High Court was affirmed by Apex Court in appeal by ICI India Ltd. as reported in 2005 (187) E.L.T. A31 (S.C.). Thus invoking of extended period for adjudication was justified and importer appellants were liable to consequence under Customs law."

44. It would also be appropriate to refer to M/s Dow Agro Sciences India Pvt. Ltd. Vs. Commissioner of Customs, Mumbai - 2012 (283) ELT 524 (Tri.-Mumbai), which also dealt with a situation pertaining to fraudulently obtained DEPB and TRA's. The Tribunal held that in such a case, demand would be sustainable against the transferee under the Customs Act along with interest and penalty. The relevant paragraphs of the order are reproduced as under:

"9. Issue No. I : Whether, on account of ab initio cancellation of the DEPBs by the licensing authority, the appellant is liable to be deprived of the benefit of Notification

No. 34/97-Cus., dated 7-4-1997 and consequently to pay customs duty on the goods in question:

9.1 It is not in dispute that all the DEPBs in question were cancelled *ab initio* by the licensing authority on the ground that the documents (SBs and BCERs) on the basis of which the DEPBs had been issued were forged and fake. One of the contentions raised by De-Nocil is to the effect that as the cancellation of DEPB licences was without notice to them, it cannot affect their right *qua bona fide* purchaser. But they have not shown us any provision of law which obligates the licensing authority to put transferees of DEPB licence also to notice of a proposal for cancellation of the licence, nor has their counsel argued that the rule of natural justice requires the transferees also to be heard before cancellation of the licence. In any case, the fact remains that De-Nocil, who learnt at least from SCN dated 5-10-2001 that the DEPB licences had been cancelled *ab initio* by the licensing authority did not choose to challenge that authority's order.

9.2 We have also examined the evidence gathered by DRI, which includes (i) statements (recorded under Section 108 of the Customs Act) of the persons who played various roles in forging SBs and BCERs and obtaining DEPB licences mostly in the name of non-existent firms from DGFT's office on the basis of the forged documents, (ii) documents such as DEPBs, SBs, BCERs and application forms for DEPBs collected from DGFT's office, (iii) customs verification reports regarding SBs and banks' verification reports regarding BCERs, (iv) statements (under Section 108 *ibid*) of customs officers who disowned the signatures appearing purportedly as theirs on the SBs, (v) statement (under Section 108 *ibid*) of the Export Manager of M/s. APL India Pvt. Ltd. who stated that they had not handled the cargo mentioned in the SBs, and (vi) orders of the Deputy DGFT, Mumbai cancelling the DEPB licences *ab initio*. It is significant to note that the appellant has not assailed the above evidence. The appellant has virtually acquiesced in the factual position that the DEPB licences used for duty-free clearance of the goods imported by them had been obtained by the original licensees by producing forged and fake SBs and BCERs without export of any goods and that the licences were cancelled *ab initio* by the licensing authority later. Their only contention is that, as *bona fide* purchasers of the DEPBs with no notice of the tainted character of the licences, they cannot be adversely affected by the post-import cancellation of the licences. Their argument is that the DEPBs were valid when used for duty-free clearance of the goods imported by them and that the subsequent cancellation of the DEPBs by the DGFT cannot be any ground for the department to demand the duty from them. *Per contra*, the respondent has invoked the *caveat emptor* rule to argue that it was for the importer, before using the DEPBs for duty-free clearance of the imported goods, to ensure that the DEPBs were perfectly valid and did not suffer from any sort of taint or other infirmity. The DEPBs were obtained on the basis of forged documents and were, therefore, vitiated by fraud. On this ground, they were cancelled *ab initio* by the licensing authority. In the circumstances, according to the learned JCDR, it cannot be said that the appellant used valid DEPBs for clearing the goods duty-free. Numerous judgments have been cited before us in support of the rival arguments, which we shall proceed to discuss.

Case Law Cited on behalf of the appellant

9.24 All the DEPBs in question were issued, utilized and cancelled during the period of the Export & Import Policy (1-4-1997 to 31-3-2002) issued under the Foreign Trade (Development & Regulation) Act, 1992. Para 7.25 in Chapter 7 of the Policy described the DEPB scheme as follows :-

"The objective of Duty Entitlement Pass Book Scheme is to neutralize the incidence of basic customs duty on the import content of the export product. The neutralization shall be provided by way of grant of duty credit against the export product. The duty credit under the scheme shall be calculated by taking into account the deemed import content of the said export product as per Standard Input Output Norms and determine basic customs duty payable on such deemed imports. The value addition achieved by export of such product shall also be taken into account while determining the rate of duty credit under the scheme.

Under the Duty Entitlement Pass Book (DEPB) scheme, an exporter shall be eligible to claim credit as a specified percentage of f.o.b. value of exports made in freely convertible currency. The credit shall be available against such export products and at such rate as may be specified by the Director General of Foreign Trade by a Public Notice issued in this behalf.

Any item except those appearing in the Negative List of Imports shall be allowed for import without payment of basic customs duty, special duty of customs as well as additional duty of customs, against the credit under a Duty Entitlement Pass Book (DEPB). The holder of Duty Entitlement Pass Book (DEPB) shall have the option to pay additional customs duty, if any, in cash as well."

[underlining supplied]

Para 7.29 provided that "DEPB may be issued on (a) post-export basis and (b) pre-export basis". Para 7.30 explained that "DEPB on post-export basis shall be granted against exports already made". Para 7.32 provided as follows:-

"The DEPB on post-export basis and/or the items imported against it are freely transferable. The transfer of DEPB shall, however, be for import at the port specified in the DEPB which shall be the port from where exports have been made".

In the present case, "DEPBs on post-export basis" were obtained from the licensing authority under the FT (D&R) Act by racketeers (mostly in the name of non-existent and fictitious firms) by producing forged and fake Shipping Bills (SBs) without exporting any goods. "Transferability" was got endorsed on the DEPBs by the licensing authority, on the basis of forged and fake Bank Certificates of Export & Realisation (BCERs). These facts are not in dispute. In the absence of exports and realization of export proceeds, no credit of duty accrued "as a specified percentage of f.o.b. value of exports" to the allottees of the DEPBs and nothing rendered the DEPBs "transferable" in the eye of law. The DEPBs did not have any intrinsic value in the form of transferable credit of duty. The DEPBs and the transferability endorsed thereon ever stood vitiated by fraud. If the principle that no one can claim any benefit under a forged document is applicable to the original allottees, it should be held that they did not earn any credit of duty on the basis of the forged & fake SBs and BCERs. If that be so, when they transferred the tainted DEPBs to the appellant, no benefit in the form of credit of duty could have passed on to the latter.

9.25 The REP licences considered by the Hon'ble High Court in Taparia Overseas case did not require the licensing authority's endorsement for transferability under the Import & Export Policy (April 1985 - March 1988) issued under the FT (D&R) Act. We have perused Chapter XIV ("Import Policy for Registered Exporters") of the Policy; para 223 provided a scheme for duty-free import of raw materials against REP licences issued against exports of specified products, and also stated that REP licences issued under the scheme would be freely transferable and would not be subject to "actual user" condition. It was laid down in para 225 that, except for certain specified cases, a licence- holder could transfer the licence in full or part in favour of any other person. Para 226 provided as under:

"The transfer of the licence will not require any endorsement or permission from the licensing authority i.e., it will be governed by the ordinary law. Accordingly, clearance of the goods covered by an REP licence issued under this policy, will be allowed by the customs authorities on production, by the transferee, of only the document of transfer of the licence concerned in his name. Whenever an REP licence is transferred, the transferor should give a formal letter to the transferee, giving full particulars regarding number, date and value of the licence transferred and the name and address of the transferee, and complete description of the import items for which the licence is transferred"

[underlining supplied]

Now the relevant ruling of the Hon'ble High Court in Taparia Overseas is reproduced below :-

".....the concept that fraud vitiates everything would not be applicable to the cases where the transaction of transfer of licence is for value without notice arising out of mercantile transactions governed by common law and not by provisions of any statute".

[underlining added]

The transfer of REP licences in the case of Taparia Overseas was governed by common law as observed by the Hon'ble High Court and by ordinary law as per para 226 of the Import & Export Policy *ibid*. Indisputably, there is total harmony between the Policy provision and the court's ruling. A closer look at para 226 of the Policy would reveal as to why the transfer of REP licence was said to be "governed by the ordinary law" - the licence was freely transferable as in an ordinary mercantile transaction without any endorsement or permission from the licensing authority. As per the Hon'ble High Court's ruling as we comprehend it, the concept

of fraud vitiating everything is not applicable to such a transaction. But the concept is applicable where a transaction of transfer of licence is governed by provisions of any statute. This view, which is clearly discernible from the Hon'ble High Court's ruling, is applicable to the present case wherein admittedly the DEPBs were not transferable without the licensing authority's endorsement of transferability under the relevant provisions of the EXIM Policy (1997-2002) issued under the FT (D&R) Act, 1992. Where such endorsement was statutorily required to make the DEPB scrips/licences transferable, it could only be said that the transaction of transfer of the scrips was governed by provisions of the statute viz. the FT (D&R) Act and the EXIM Policy issued thereunder. The concept of fraud vitiating everything must, then, be applicable to such transaction. This concept was not applicable to the transfer of REP licences in the case of Taparia Overseas. The case of Sneha Sales Corporation is also similarly distinguishable.

9.28 The learned JCDR has argued that, as the SBs referred to in the Annexures to the DEPBs were forged, the DEPBs themselves were liable to be treated as forged. But there was no such allegation in the show-cause notices. The allegation was that the DEPBs were obtained by the original allottees by producing forged SBs and BCERs. Therefore, the Revenue cannot be heard to say that the DEPBs per se were forged. Whether a DEPB is forged is not a pure question of law to be allowed to be raised for the first time at this stage. This situation, however, cannot be decisive for the appellant. The learned counsel has contended that a DEPB issued on the basis of forged documents cannot be void ab initio but only voidable at the instance of the affected party and the same is valid till it is cancelled by the authority which issued it. He has also relied on case law on the point. But the question before us is significantly of a different hue and the same is whether any credit of duty can be said to have ever accrued to, or to have been earned by, the allottee of such DEPB which was obtained by producing forged SBs and BCERs. We repeat - there was no export, no f.o.b. value, no realization of proceeds in the present case; hence no credit of any duty had accrued to the allottees of the DEPBs. Even if it is assumed that the DEPBs, though issued without actual accrual of duty credit to the allottees, vested the benefit in them artificially, the appellant cannot legitimately claim the benefit after its retrospective cancellation by the licensing authority which, as per the High Court's ruling in *Golden Tools International*, has the power under Section 9(4) of the FT (D&R) Act to cancel DEPB "credit" already "utilized". In our view, the distinction drawn by the learned counsel between a forged DEPB and a DEPB issued on the basis of forged documents is of no significance where the DEPB of the latter category is cancelled with retrospective effect by the authority which issued it. Both are incapable of vesting any credit of duty in the DEPB-holder so as to be used for purposes of Notification No. 34/97-Cus.

9.31 The cases of *Hico Enterprises* and *Ajay Kumar & Co.* decided by the Supreme Court are also distinguishable. The relevant paragraphs of the two judgments are quoted below:

Hico Enterprises: -

"It is seen that in view of the fact that in the show cause notice issued on 4-3-1999, there was no reference to the alleged infraction of M/s. Amar Taran Exports, the transferor of the licence in question, the judgment of the CESTAT does not suffer from any infirmity to warrant interference. The appeal is dismissed."

[underlining supplied]

Ajay Kumar & Co.:-

"It is seen that in view of the fact in the show cause notices, there was no reference to the alleged infraction of M/s. Parker Industries, the transferor of the licence in question. The judgments of the CESTAT and the High Court do not suffer from any infirmity to warrant interference. It is to be noted that in *Commissioner of Customs (Import), Bombay v. M/s. HICO Enterprises* [2008 (11) SCC 720] similar view was taken. The appeal is dismissed."

[underlining supplied]

In *De-Nocil's* case, the show-cause dated 5-10-2001 clearly brought out the fraud committed by the transferors of DEPBs. It was clearly alleged in the show-cause notice that the Shipping Bills and Bank Certificates of Export & Realisation on the basis of which the DEPBs had been issued by Dy. DGFT, Mumbai were all forged. It was also alleged that most of the DEPBs had been obtained by the racketeers in the name of non-existent/fictitious firms. Even the transfer letters were also allegedly

fabricated. These and allied allegations were raised against the transferors of the DEPBs. The appellant would only say that they were bona fide transferees of the DEPBs without notice of the above fraud committed by the transferors. Therefore, in our view, the appellant cannot claim support from the above judgments of the Apex Court.

14.2 After considering the submissions, we have found no justification for the penalty imposed on the appellant. The show-cause notice dated 5-10-2001 had inter alia proposed a penalty on De-Nocil under Section 114A/Section 112 of the Customs Act. The adjudicating authority imposed penalty on them under Section 114A of the Act, which we have set aside. The fifth proviso to Section 114A reads thus: "provided also that where any penalty has been levied under this section, no penalty shall be levied under Section 112 or Section 114". Now that the penalty under Section 114A stands vacated, the question might arise as to whether Section 112 could be invoked against De-Nocil. In this connection, we must have a closer look at the relevant proposal in the show-cause notice dated 5-10-2001. The proposal was to impose a "suitable penalty on De-Nocil under Section 112 of the Customs Act in lieu of confiscation" as "the goods imported by De-Nocil were not available for confiscation". A penalty under Section 112 of the Customs Act in lieu of confiscation is unheard of in law though such penalty could be imposed on an importer who is found to have rendered the goods imported by him liable to confiscation under Section 111 of the Act. This is the reason why we refrain from imposing alternative penalty under Section 112 of the Customs Act on De-Nocil.

14.3 Where any penalty under Section 112 of the Customs Act is not imposed on De-Nocil regarded as the main offender by the department in this case, there can be no penalty under the same provision of law on P. K. Srinivas on the ground of abetment. In the result, the penalty on P.K. Srinivas is vacated and his appeal is allowed."

45. In Munjal Showa Ltd. Vs. Commissioner of Customs & Central Excise (Delhi-IV), Faridabad - 2009 (246) ELT 18 P&H also decided an issue regarding the liabilities of transferee towards Customs duty. Paragraphs 18, 19 and 21 are reproduced as under:

"18. Coming to the admitted facts of the present case, the appellant availed exemption from duty in May-June, 2003. Within three months, the appellant was informed about the forgery and the fact that the appellant was not entitled to the benefit of exemption. Even as per scheme of exemption, exemption was subject to export proceedings being realised within six months, which in the present case, were never realised. The appellant paid the duty under protest and has never denied that the documents were forged. Having come to know that the documents were forged and having been confronted with that fact, the appellant was under an obligation to disclose the true facts and by not doing so, the appellant was guilty of willful suppression of facts within the meaning of proviso to Section 28 and thus, extended period of limitation could certainly be availed in the present case.

19. It is settled principle of common law that a purchaser steps into the shoes of the seller and does not acquire better title than the seller. This principle has also been recognized under Section 27 of the Sales of Goods Act, 1932.

21. Even though the word 'fraud' and "with intent to evade payment of duty" are absent in Section 28(1) of the Act, willful suppression or misstatement do find mention in proviso to Section 28 of the Act, which is clearly attracted to the present case."

46. The appeals filed by Prabir Ghosh have also been examined. Learned Counsel had submitted that the appellant was H Card holder of CHA firm, M/s IMA and may have abetted Jyoti Biswas in his fraudulent activities contrary to CHA Licensing Regulation, 2004 but the appellant only allowed his bank account to be used by Jyoti Biswas for some duty payment as he was not having a local account. The appellant has voluntarily disclosed this fact about use of his bank account during January to April where an amount of Rs. 25 lakhs had been deposited through RTGS. This amount has been withdrawn immediately.

47. No good explanation has been offered that the amount was for the purpose of duty payment by other importers. The statement is without any proof and cannot be accepted.

48. In such circumstances, there is no reason to disagree with the findings of the adjudicating authority regarding the role played by him. The appellant Ghosh has

been found to be indulging in nefarious activities of manipulating the forged export as 'G' card holder of CHA firm on the basis of detailed investigation carried out by the DRI-KZU.

49. As far as the six appeals filed by the Department are concerned, it is seen that the adjudicating authority, in the impugned order, has wrongly held that the appellants have utilized forged TRA, although the issue pertained to the utilization of FPS licenses. Thus, the appeals filed by the department are allowed and they are remanded to the adjudicating authority for a fresh decision after granting a hearing to the appellants.

50. Accordingly, the appeals of the importers/exporters and Prabir Ghosh are dismissed. The impugned orders are upheld. The appeals filed by the Revenue are allowed by way of remand. Cross objection filed by the Revenue also stand disposed of.

(Pronounced in Court on 09.01.2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. I**

Customs Appeal No. 52445 of 2018

WITH

- (i) Customs Appeal No. 52446 of 2018 (Shri Rakesh Kumar)**
 - (ii) Customs Appeal No. 53272 of 2018 (Shri Rajender Prasad)**
 - (iii) Customs Appeal No. 53447 of 2018 (M/s Pax Technologies Pvt. Ltd.)**
 - (iv) Customs Appeal No. 53448 of 2018 (Latha Priyadarshini)**
 - (v) Customs Appeal No. 53482 of 2018 (Shri Sushil Kumar Mishra)**
 - (vi) Customs Appeal No. 53491 of 2018 (M/s Rubal Logistics Pvt. Ltd.)**
 - (vii) Customs Appeal No. 53492 of 2018 (Shri Kamal Nath Roy)**
 - (viii) Customs Appeal No. 53493 of 2018 (Shri Hari Kishan)**
 - (ix) Customs Appeal No. 53494 of 2018 (Shri Rajiv Kumar Sharma)**
 - (x) Customs Appeal No. 53495 of 2018 (Shri Kuldeep Singh)**
 - (xi) Customs Appeal No. 53688 of 2018 (M/s Prompt Air & Sea Cargo Pvt. Ltd.)**
 - (xii) Customs Appeal No. 53689 of 2018 (Shri Kamal Kumar Sukhramani [CB])**
 - (xiii) Customs Appeal No. 54011 of 2018 (Shri Rajinder Madhok)**
 - (xiv) Customs Appeal No. 54040 of 2018 (Shri Kishan Singh Dhapa)**
 - (xv) Customs Appeal No. 54041 of 2018 (M/s Exim Cargo Services)**
 - (xvi) Customs Appeal No. 50548 of 2019 (M/s R.U. Imports Exports P. Ltd.);**
- and**
- (xvii) Customs Appeal No. 50563 of 2019 (Shri Rajesh Maikhuri).**

Arising out of the Order-in-Original No. 03/2018-19/VS/COMMR. (IMPORT),
Dated: 28.06.2018, 20.07.2018 and 26.10.2018
Passed by The Commissioner of Customs (Import), Air Cargo Complex (Import),
New Delhi

**Date of Hearing: 13.09.2019
Date of Decision: 12.03.2020**

**SHRI CHINTA HARAN OJHA CHA
RZT-76, OLD ROSHAN PURA, NAJAFGARH
NEW DELHI - 110043**

Vs

**PRINCIPAL COMMISSIONER OF CUSTOMS
AIR CARGO COMPLEX (IMPORT), NEW CUSTOM HOUSE
NEAR IGI AIRPORT, NEW DELHI - 110037**

Appellant Rep by: Shri Vaibhav Singh, Virender Kumar, Jitender Kumar, Ms Reena Rawat, Ms Vibha Narang, Shri Kartik Jindal, Bolloju Venugopal, Ms Stuti Karwal & Shri B L Garg, Advs.

Respondent Rep by: Shri Sunil Kumar & Rakesh Kumar, AR (DRs)

CORAM: Dilip Gupta, President
C L Mahar, Member (T)

FINAL ORDER NO. 50571/2020

Per: C L Mahar:

This batch of 18 appeals preferred by appellants falling broadly in category of importer, CHA representative, Freight Forwarder, consultant, and individuals unauthorizedly engaged in customs clearance work. These appeals have arisen out of a common order-in-original No. 03/2017-18/V.S./COMMR (IMPORT) read with Corrigendum dated 20/07/2018 passed the Commissioner of Customs, ACC (Import), New Custom House, New Delhi. The status of the Appellants and the corresponding duty or/and penal liability confirmed against them by the impugned order has been tabulated hereunder:-

No.	Appeal No.	Appellant	Status	Duty (Rs.)	Penalty (Rs.)
1.	C/53447/2018	Pax Technologies Pvt Ltd	Importer	1,85,09,843/-	3,76,49,777/-
2.	C/53448/2018	Latha Priyadarshini	Importer	NIL	2,39,00,000/-
3.	C/52445/2018	Chinta Haran Ojha	CHA Representative	NIL	5,05,000/-
4.	C/52446/2018	Rakesh Kumar	CHA Representative	NIL	5,05,000/-
5.	C/53272/2018	Rajender Prasad	CHA Representative	NIL	6,30,000/-
6.	C/53482/2018	Sushil Kumar Mishra	Individual	NIL	32,00,000/-
7.	C/53491/2018	Rubal Logistics Pvt Ltd	CHA firm	NIL	5,28,000/-
8.	C/53492/2018	Kamal Nath Roy	CHA Representative	NIL	5,28,000/-
9.	C/53493/2018	Hari Kishan	CHA Representative	NIL	5,28,000/-
10.	C/53494/2018	Rajiv Kumar Sharma	CHA Representative	NIL	5,28,000/-
11.	C/53495/2018	Kuldeep Singh	Freight Forwarder	NIL	5,28,000/-
12.	C/53688/2018	Prompt Air & Sea Cargo Pvt Ltd	CHA firm	NIL	28,46,000/-
13.	C/53689/2018	Kamal Kumar Sukhramani	CHA Representative	NIL	10,46,000/-
14.	C/54011/2018	Shri Rajinder Madhok	Consultant	NIL	7,00,000/-
15.	C/54040/2018	Kishan Singh Dhapa	CHA Representative	NIL	6,30,000/-
16.	C/54041/2018	Exim Cargo Services	CHA firm	NIL	6,30,000/-
17.	C/50548/2019	R U Imports Exports Pvt Ltd	CHA firm	NIL	5,14,000/-
18.	C/50563/2019	Rajesh Maikhuri	CHA Representative	NIL	5,14,000/-

2. As all the appeals arose from the same impugned order, the appeals were heard together with the consent of all the appellants and are being disposed of by this common order.

3. The brief facts of the matter are that the Appellant- Importer namely M/s Pax Technologies were engaged in import of goods namely Point of Sale Devices (POS) and Mobile Point of Sale Devices (MPOS). Based on an intelligence that the goods were being imported by suppressing actual value of goods, the department

intercepted the consignments imported against two Bills of Entry Nos. 3851878 dated 08/01/2016 and 3851698 dated 08/01/2016. On examination, it was found that the goods were not only undervalued, but were mis-classified and imported in violation of relevant Foreign Trade Policy (FTP) provisions too. The scope of investigations was expanded to the previous consignments cleared by M/s Pax Technologies Pvt. Ltd. and it was detected by the Department that :

(a) The correct import price of the hardware was not declared in respect of various import consignments;

(b) The amount paid or payable to the overseas supplier on account of Licence Fee for use of software was not included in the assessable value in the Bills of Entry filed with the Customs resulting in evasion of Customs Duty;

(c) The point of sale Terminals/ mobile point of sale Terminals i.e. the hardware imported by Appellant importer were Bluetooth/wi-fi/GPRS enabled and hence their import required no objection certificate from WPC Wing of Department of telecommunication, ETA Type Approval Certificate and also BIS certification, but no compliance in respect of these policy provisions were made.

(d) The imported consignments were grossly mis-declared with regard to description and were also mis-classified under different Customs Tariff Heading. The importer - Appellant wrongly described the 'dummy' or 'parts of debit/credit device' with intent to undervalue the goods and to avoid BIS certification and ETA from WPC.

4. The Bill of Entry-wise violations i.e. undervaluation, non-inclusion of transfer/licence fee and non-submission of BIS and ETA/WPC licence in respect of all the 14 Bill of Entry are summarized in the table below:

S. No.	B/E No.	B/E Date	Name of CHA	Violations in terms of non submission of BIS certification/ETA Certificate from WPC/undervaluation/using forged invoices/mi-classification/mis-declaration
1	5994463	02.07.14	Chinta Haran Ojha	Non submission of BIS/ETA from WPC
2	5994464	02.07.14	Chinta Haran Ojha	Non submission of BIS/ETA from WPC
3	6221058	24.07.14	Chinta Haran Ojha	Non submission of BIS/ETA from WPC
4	7817932	26.12.14	R U Imports Exports Pvt. Ltd.	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as dummy, undervaluation and non-inclusion of the value of software in the assessable value of goods.
5	2094937	31.07.15	Exim Cargo Service	Non submission of BIS/ETA from WPC, mis-classification, undervaluation and non-inclusion of the value of software in the assessable value of goods.
6	2121203	03.08.15	Exim Cargo Service	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as paper roll and Terminal (parts of payment debit/credit device), forgery of invoice, undervaluation and non-inclusion of the value of software in the assessable value of goods.
7	2763917	30.09.15	Exim Cargo Service	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as paper roll and barcode reader,

				forgery of invoice, undervaluation and non-inclusion of the value of software in the assessable value of goods.
8	3141261	03.11.15	Exim Cargo Service	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as paper roll and Terminal (parts of payment debit/credit device), forgery of invoice, undervaluation and non-inclusion of the value of software in the assessable value of goods.
9	3239991	13.11.15	Rubal Logistics Pvt. Ltd.	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as "D 180 (D 180 pinpad is used to connect with the laptop to do the transaction - connectivity via USB port only)" and non-inclusion of the value of software in the assessable value of goods.
10	3346966	23.11.15	Exim Cargo Service	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as paper for printing in payment debit/credit device and Terminal (parts of payment debit/credit device), forgery of invoice, undervaluation and non-inclusion of the value of software in the assessable value of goods.
11	3526607	09.12.15	Prompt Air & Sea Cargo	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as paper for printing in payment debit/credit device and Terminal (parts of payment debit/credit device), forgery of invoice, undervaluation and non-inclusion of the value of software in the assessable value of goods.
12	3650483	19.12.15	Prompt Air & Sea Cargo	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as paper for printing in payment debit/credit device and Terminal (parts of payment debit/credit device), forgery of invoice, undervaluation and non-inclusion of the value of software in the assessable value of goods.
13	3851878	08.01.16	Prompt Air & Sea Cargo	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as D-180 Terminal (parts of payment debit/credit device), undervaluation and non-inclusion of the value of software in the assessable value of goods.
14	3851698	08.01.16	Prompt Air & Sea Cargo	Non submission of BIS/ETA from WPC, mis-classification, mis-declaration of goods as D-180 Terminal (parts of payment debit/credit device), undervaluation and non-inclusion of the value of software in the assessable value of goods.

5. The investigation has brought forth a fact that though the goods were supplied by a supplier namely M/s Pax Technology Ltd., Hong Kong but to circumvent the registration of import in Special Valuation Branch (SVB) and examination by SVB

branch of whether the buyer and supplier were 'related', and if so, whether the relationship influenced the transaction value, the appellant - importer mis-declared the facts. It has also been indicated that Ms Latha Priyadarshini, Director of the Importer-Appellant firm actively connived with Shri Kuldeep Singh, Director of the Freight Forwarder firm M/s VSG Shipping and Logistics Pvt. Ltd., Shri Rajinder Madhok, Consultant and CHA M/s Rubal Logistics Pvt. Ltd. in resorting to mis-declaration of value and description as well as other facts of the imports.

6. The Department has alleged that importer appellant indulged in duty evasion by fraud and forgery. Syndicate of S/Shri Randhir Singh, Sanjay Kataria, Sushil Kumar Mishra and Rajendar alias Raju has un-authorizedly handled import documents and in the process has indulged in using/preparing forged/fake documents based on which goods were cleared without payment of appropriate duty.

7. The authorized CHAs (firms and their representatives) failed to verify the genuineness of the importer, correctness of the documents on the basis of which clearances were sought and also to guide the importer about the statutory requirements especially certification from BIS and WPC (in this case). In order to get more business of clearance of import consignments they undermined the provisions of law. Some of the CHAs and their representatives deposited assessed customs duty from their own account and charged the same amount or more from the importer. In some of the cases it has been found by the Department that the CHAs were aware that the fake/forged documents were submitted for clearance of import consignment and thus as per department they became party to the violation of customs procedures as well as duty evasion.

8. After detailed investigation, the Department issued a show cause notice dated 12 July 2016 to all the appellants which got adjudicated by impugned order-in-original No. 3/2017-18/V.S./COMMR./IMPORT dated 28 June 2018 which was subsequently modified by issuing a corrigendum dated 20 July, 2018. The summary of confirmation of the duty and imposition of penalty under various sections which has already been summarized in the preceding para of this order.

9. The arguments submitted by various Advocates appearing on behalf of the appellants are summarized here below :-

(A) Appellant- Importer, namely M/s Pax Technologies Pvt. Ltd.

(i) **Mis-declaration of description of goods:** That mis-declaration of description of goods could not be attributed to them as they provided all the documents as received from the oversea supplier to the syndicate comprising Shri Sanjay Kataria and associates; that the manipulations in the import documents and Bill of Entry were handiwork of the syndicate; that they were not party to the mis-declaration which was perpetrated by Sanjay Kataria, Sushil Kumar Mishra and Rajendar alias Raju, and in fact they became victim of nefarious designs of the aforesaid persons. It has further been added that had they been a party to the mis-declaration they would not have filed criminal complaints against Sanjay Kataria and others in police station.

(ii) **Undervaluation of goods:** That they were not a 'Related Party' to the supplier M/s Pax Technologies Ltd. Hongkong but dealt with the supplier on Principal to Principal basis in as much as they did not ever considered themselves as 'Related Parties' and hence SVB registration and provisional assessment was not required in their case; that in the Master Distributor Agreement with the Supplier it is nowhere prescribed that purchase of software was a condition of sale of the hardware; that goods covered by initial three consignments only were in operating condition loaded with software and hence the per piece value was declared @ USD 60 and duty was discharged accordingly; that goods covered by subsequent consignments were not loaded with software; that clients were supposed to download the software depending on the operative window they were using for their computers; that except first three consignment, goods imported were hardware only and the value after volume discount was declared as transaction value in the invoice for duty payment; that Sanjay Kataria and his associates mis-declared the transaction value lesser than the invoice value without any knowledge or approval of the Appellants; and finally that they remitted the price at the values indicated in the respective invoices issued by overseas supplier and paid duty to Sanjay Kataria and associates calculated at the actual invoice value .

(iii) **Mis-classification of goods:** That though the classification entered in the Bills of Entry by the respective CHAs was also not applicable to the goods, the Learned Commissioner also erred in confirming classification of subject goods under CTH 8471 holding the devices are Automatic Data Processing Machines and that classification adopted by the Learned Commissioner was not in conformity with the classification adopted by other customs formations in respect of identical goods; and finally that the impugned goods are classifiable under CTI 84705010 as cash register for which they relied upon the catalogue of D180 MPOS which was submitted during hearing.

(iv) **Confiscation and Penalty:** That the impugned goods do not require ETA and WPC Certificates for clearance and hence interpretation adopted by the Learned Commissioner for holding that the goods in absence of production of aforesaid certificates were liable to confiscation under Section 111(d) is misconceived; that the finding of the Learned Commissioner is also contrary to uniform practice prevalent at all custom houses of clearance of identical goods without insisting upon BIS, ETA or WPC; that finding of the Learned Commissioner that the goods are liable for confiscation under Section 111(m) for non-submission of SVB orders is incorrect in so far as though supplier and Appellants have identical names, they cannot be construed as related party in terms of provisions of Rule 2 (2) of Customs Valuation Rules (CVR) 2007; that the goods cannot be held liable for confiscation under Section 111(m) of the Customs Act for mis-declaration in the Bills of entry as the description of the goods in Bills of entry was wrongly depicted by the CHAs without their knowledge. Thus, they are not liable for penalty under Section 114A and 114AA as the fraud was perpetrated not by them but by other persons/noticees; that in absence of collusion, willful mis-statement or suppression of facts on their behalf, imposition of penalty under Section 114A was contrary to the language of the provision; that in the facts and circumstances of the instant case imposition of penalty was contrary to settled law that penalty being quasi-criminal is attracted only in cases of contumacious conduct or willful infringement of the statutory provisions which are conspicuously absent on their part; that they rely on the judgment in cases of *Hindustan Steel [1978 (2) E.L.T. (J 159) (S.C.)]* , *Prashray Overseas [2009 (237) E.L.T. 720 (Tri. Chennai)]*, *Suryakiran International [2010 (259) E.L.T. 745 (Tri. B'lore)]* and *Vaz Forwarding [2011 (266) E.L.T. 39 (Guj.)]*; and finally that the penalty imposed was highly excessive and does not commensurate with the gravity of offence, if any.

(B) Appellant- CHA against imposition of penalty: That the impugned goods having been assessed by the proper officer under Section 17 after rejecting self-assessment and therefore same cannot be adjudicated/assessed again without filing appeal; that there is no evidence on record to establish that the Appellants had prior knowledge that the impugned goods were mis-declared/undervalued; that the true declaration with regard to description and value of the imported goods has to be given by the importer and not by the CHA; that the bills of entry were prepared and filed by them based on the documents supplied by the importers; that there was no positive evidence on record to show any mala fide intention on the part of them or that they were an accomplice or abettor in the offence of mis-declaration, mis-classification and under invoicing of the goods with an intent to evade customs duty; that in the instant case there is not any evidence to indicate that they had any prior knowledge about the violation of any provisions of the law, which would have rendered the goods liable to confiscation; that the importer did not implicate them in statement; that they scrupulously followed the KYC norms and other requirements as expected of them; Invocation of Section 112, 114A or 114AA is not legally sustainable; that no separate penalty is imposable on them when penalty has already been imposed on the proprietor; that they have already faced proceedings under CBLR 2013; and finally that they rely upon plethora of judgments holding that CHA cannot be penalized for wrongdoings of importers in absence of mens rea on behalf of CHA. (No one appeared and no oral submissions made in respect to Appeal filed by Shri Rajender Prasad figuring at serial no. 5 in table above).

(C) Appellant- Shri Sushit Kumar Mishra against imposition of penalty: The investigations have indicated that Shri Mishra was working as one of the members of the syndicate manipulating the import documents and forging certain documents for obtaining the clearance of import consignments. It is contended on his behalf that he was not physically involved in forging/faking of import documents, no penalty can be imposed on him. He relied upon certain judgments

to impress that no penalty can be imposed on Middle man/Facilitator/Coordinator invoking Sections 112,114A or 114AA.

(D) Appellant- Shri Kuldeep Singh - a Freight Forwarder against imposition of penalty: That the Appellant had a very limited role of moving the goods from the Air Cargo Area to the importer's place for a limited period as an authorized representative of the importer; that he didn't have authority either to verify genuineness of the import documents or competency to deal with customs procedure; that he acted on the declaration, information and documents provided by the importer; that he didn't receive any consideration except agency fee; that neither he was involved in any manipulations of the documents nor defaulted in forwarding a revised invoice to the CHA for clearance of impugned goods; that he was not competent to verify or know the technicalities pertaining to the requirements of BIS/ETA certificates, classification or valuation of impugned goods; that no mens rea has been proved against him for invoking Section 112 and 114AA of the Customs Act; and finally that he seeks support from judgments in the case of *Sneha Sales Corporation [2000(121) E.L.T. 577 (S.C.)]* , Sampat Raj Dugar, Taparia Overseas, K. Uttamlal to advance his cause.

(E) Appellant- Shri Rajinder Madhok - a Consultant against imposition of penalty: That the Appellant did not commit/omit that led to confiscation of impugned goods; that only importer can be penalized for rendering goods liable for confiscation; that he cannot be penalized for wrongdoings of importers in absence of mens rea on his behalf; that he tendered only his opinion in capacity of a consultant; that no positive evidence was adduced against him by the Department on the issue of abetment/collusion; and finally that no penalty can be imposed on Middle man/Facilitator/ Coordinator invoking Sections 112,114A or 114AA.

10. Summary of arguments on behalf of the Revenue: The Departmental Representative (DR), at the outset, contended that this is a case wherein forgery/fraud has been perpetrated on revenue by the importer, its executive, clearing agents and some other persons with an intent to evade customs duty. The learned Departmental Representative impressed upon as follows :-

(i) It is contended that it is a fraud in law if a party makes a presentations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. It is also well settled that misrepresentation itself amounts to fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. Of course, innocent misrepresentation may give reason to claim relief against fraud.

(ii) An act of fraud on Revenue is always viewed seriously. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter.

(iii) It has been held by Apex Court in the case of *Commissioner of Customs, Kandla v. Essar Oil Ltd. - 2004 (172) E.L.T. 433 (S.C.)* that by "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the deceived. Undue advantage obtained by the deceiver, will almost always cause loss or detriment to the deceived. Similarly a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage as held in *S.P. Chengalvaraya Naidu v. Jagannath [1994 (1) SCC 1]*.

(iv) In a leading English case i.e. *Derry and Ors. v. Peek (1886-90)* All ER-1 what constitutes "fraud" was described thus : (All ER p. 22 B-C) "fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, carelessly whether it be true or false". This aspect of the matter has been considered by Apex Court in *Roshan Deen v. Preeti Lal [(2002) 1 SCC 100]*, *Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education [(2003) 8 SCC 311]*, *Ram Chandra Singh's case (supra)* and *Ashok Leyland Ltd. v. State of T.N. and Another [(2004) 3 SCC 1]* . Suppression of a material document would also amount to a fraud on the court, as held in *Gourishankar v. Joshi Amha Shankar Family Trust, [(1996) 3 SCC 310]* and *S.P. Chengalvaraya Naidu's case (AIR 1994 SC 853)*. No judgment of a Court can be

allowed to stand if it has been obtained by fraud. Fraud unravels everything and fraud vitiates all transactions known to the law of however high a degree of solemnity.

11. Thus it has been contended by learned Departmental Representative that all the appeals in this case merit dismissal in view of the proven fact that all the relevant persons/firms mis-declared the description and value of the goods with an intention to evade customs duty and to circumvent the provisions of import - export policy of India and therefore the impugned order-in-original does not deserve any interference. The learned Departmental Representative has made following submission on the individual role played by various persons/firms.

(A) On the Appellant- Importer

(i) **Mis-declaration of description of goods:** The goods covered by 2 live Bill of Entry were attempted to be cleared on the strength of forged invoices shown to be issued by M/s Wang Technologies Limited, whereas the two consignments were shipped by M/s Pax Technology Limited, Hong Kong; that mis-declaration about supplier of the goods was resorted to circumvent registration of import in Special Valuation Branch (SVB) and avoid verification to the effect whether the buyer and supplier were 'related' party, and if so, whether the relationship influenced the transaction value; that the impugned goods were Point of Sale (POS) Terminals/devices and required certification from BIS for their clearance and this fact was in the knowledge of the importer, however, to circumvent this requirement, the impugned goods in some of the Bills of entry were mis-declared as 'Paper Rolls', 'Paper for printing in payment Debit/Credit Device', Dummy and 'D 180 Terminal (Part of Payment Debit/Credit Device)'; that during the examination of goods covered by live Bills of entry, they had also tried to deceive the investigating officers by purposefully stating that the two shipments containing D-180 Terminal did not have necessary software as well as GPRS and that those were not operatable on wi-fi/GPRS/Bluetooth, that D-180 Terminal could be connected via USB cable to Laptop/Desktop and hence neither NOC from WPC was required nor any ETA type approval certificate was required for the two consignments. It is a matter of record that when the goods were put to test by the investigating officers that bluetooth was installed in the goods and those goods were bluetooth enabled, then only the appellant-Importer accepted that the device D-180 was Bluetooth enabled, the import of which required NOC from WPC and ETA Type Approval Certificate. This fact establishes an attempt of wilful mis-declaration of description of goods and mens rea on behalf of appellants to evade duty and circumvent Foreign Trade Policy provisions applicable to impugned goods. It is also a matter of fact that even the Master Distribution Agreement mentioned 'transfer prices offered by the Company to the Master Distributor for the main POS models. Inbuilt contactless is included on models where available', despite this the appellant chose not to declare this fact and rather attempted to suppress the actual description for obvious reasons.

(ii) **Undervaluation of goods:** That the Master Distribution Agreement prescribed that the appellant-importer was required to pay an amount of USD 15 towards Transfer Price of Hardware (D 180) per unit plus USD 45 per unit on account of Licence Fee; that similarly in respect to terminals S-90, SP-30 and D 200 terminals, the importer was required to pay an amount of USD 39, USD 75 and USD 25 respectively towards Transfer Price of Hardware per unit plus USD 60 for S Series and USD 45 for D Series respectively on account of Licence Fee; that the director of the appellant firm categorically admitted that the Software Licence was an integral part of these devices without which POS machines could not be operated; that she had also agreed that she paid the Licence Fee to M/s PAX, Hongkong once the customer/bank injected the licence key into the device and that that the value of those devices was a total of the value of devices plus the value of software licence fee; that it was also admitted fact that the Software Licence Fee was an integral part of the hardware imported by the Appellant and they were mandatorily required to pay the Licence Fee to the overseas supplier; that it was categorically admitted that the licence fee was required to be paid to the overseas supplier to have Euro Master Visa encryption, which was mandatory for the devices; that the Software Licence was an integral part of the devices, without which the MPOS machines could not be operated; that according to Agreement the software was not present at the time of import of goods and the key was injected by the end customer/banks but the Appellant were paying the licence fee to M/s Pax Technology Ltd., Hongkong once the customer/bank

injected the licence key into the device; the licence fee was required to be paid to the overseas supplier to have Euro Master Visa encryption so as to make the hardware under import operational and that the licence fee was required to be paid to the overseas supplier only and not to any other person or entity; that hence the payment of licence fee to M/s Pax Technology Ltd., Hongkong was an essential element of the hardware under import and also the condition of sale of the hardware as per Master Distribution Agreement and hence the element of licence fee paid or payable to the overseas supplier was required to be included in the assessable value of the import of hardware for the purpose of determination of true assessable value of the goods under import and payment of duty of Customs thereon in terms of provisions of Rule 10(1)(c) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 for the imports made by the Appellant-Importer .

(iii) Mis-classification of goods: That MPOS specially D-180 is undisputably a wireless Automatic Data Processing Machines (ADPM) which facilitate payments and hence the same merit classification under Chapter Heading No. 84713090; that even the catalogue of D180 MPOS produced during the argument mentions in the specifications that that machine incorporates, inter alia, Memory, Processor, Display, Keypad, Magnetic Card reader and Smart Card reader; that Memory and, Processor forms Central Processing Unit(CPU), Display forms the Output device and Keypad/Magnetic Card reader/Smart Card reader forms the input device and hence the Machine has the configuration of a full fledged ADPM; that the principle function of the device is automatic data processing and hence despite having some other alternative/complimentary functions like facilitating payments, the goods merit classification under Customs Tariff Heading 84713090 as ADPM in terms of Note 3 of Section XVI of Schedule I appended to Customs Tariff Act 1975; that the identical goods have been classified under Customs Tariff Heading 8471 holding the devices as Automatic Data Processing Machine in US Ruling NY E81686 dated 10.05.1999 an internet downloaded copy of which was submitted; that the said Ruling has persuasive value in view of the fact that India and USA are signatory to WTO and both countries follow HSN for Tariff classification .

(iv) Confiscation and Penalty: That the goods in question were Mobile Point of Sale Devices (MPOS), and the clearance of which was subject to production of Registration Certificate from the Bureau of Indian Standards (BIS) and Equipment Type Approval (ETA) from Wireless Planning & Coordination (WPC), which the Appellant-Importer neither submitted at the time of filing Bill of Entry, nor have applied to the same with the concerned Departments and did not possess the same at the time of Import. That as per evidences placed on record, it is proven that the Appellants were well aware about the mandatory requirements of WPC and BIS certification as early as in July, 2014 when one consignment covered under Bill of Entry No. 6221058 dated 24.07.2014 pertaining to M/s Pax Technologies Pvt. Ltd. was not allowed clearance by the Deputy Commissioner for want of WPC and SVB order; That rather than obtaining the mandatory statutory certification from WPC and BIS, the Appellants indulged themselves to seek clearance of consignments through unscrupulous persons, who not only forged the documents but also resorted to mis-declaration before Customs to secure clearance of the goods; Though the Appellants pleaded wrong supply of goods on behalf of supplier, they failed to provide any written communication from the supplier on this aspect and only argued that they went to China and gave verbal directions for the modifications to be made in the devices; that Shri Randhir Singh in his statements has categorically admitted that the Appellant - importer themselves handed over to him the documents for filing Bills of Entry Nos. 3851878 and 3851698, both dated 08.01.2016, in respect of which the invoices submitted were issued by M/s Wang Technologies Limited, whereas the fact remained that the said two live consignments were shipped by M/s Pax Technology Limited, Hong Kong, because, they knew that filing of the said Bills of Entry on the basis of invoices issued by M/s Pax Technology Limited, Hong Kong would have attracted special valuation provisions; that consignment covered under Bill of Entry No. 6221058 dated 24.07.2014 was also stopped clearance for want of WPC and SVB Order; that the Appellant-Importers were not in possession of any such ETA from WPC at the time of filing the said two Bills of Entry and hence the imports were in contravention of the provisions of EXIM Policy to this effect; that as provisioned under Para 2.2 of the Foreign Trade Policy, all imported goods were also be subject to domestic laws, acts, rules, orders, regulations,

technical specifications, environmental and safety norms as applicable to domestically produced goods; that according to General Notes to the Import Policy, the import of Point of Sale devices were subject to BIS certification, however, the Appellant-importers did not have the mandatory BIS certification for the goods imported; that the BIS subsequently produced were not relevant for the goods; that their various acts of omission and commission rendered the impugned goods liable for confiscation under Sections 111(d) and 111(m) of the Customs Act, 1962 and they rendered themselves liable to penalty under Section 112(a)/114A of the Customs Act, 1962; that, though the Deputy Commissioner, Import Shed instructed them to produce the catalogue, clarification and evidence to prove that the product declared as Dummy devices were indeed so and not Point of Sale devices, the appellants brought the catalogue and informed the Deputy Commissioner, Import Shed that the goods were meant for exhibition purpose only and also gave an undertaking on Rs. 50 Indian Non-Judicial stamp paper duly notarized that the same would be re-exported within thirty days and a sample each of D-200 and SP-30 would be submitted for BIS & WPC for certification/ type approval, however, afterwards the clearance of this consignment covered under Bill of Entry No. 7817932 dated 26.12.2014 was secured by mis-representing the facts as during the course of investigation the Appellants did not submit anything to the effect that the goods cleared under Bill of Entry No. 7817932 dated 26.12.2014 had been re-exported or that BIS & WPC certification for the imported goods were obtained by them; that this way the Appellants also violated the undertaking executed by them; that the goods covered by many Bills of Entry were allowed clearance by the EDI System under RMS where the consignments were neither subjected to assessment nor any examination thereof was conducted by the Customs; that the Appellants had also rendered themselves liable to penalty under Section 114AA of the Customs Act, 1962 to the extent that they did not pay appropriate Customs duty and they knowingly and consciously made and used incorrect and fabricated invoices, declarations and other documents/records before the concerned customs authorities in order to secure the clearance of the impugned goods; that the Appellant Ms. Latha Priyadarshini failed to establish that she was unaware of the unlawful activities being carried out on her behest; that it is established that she was the architect of the mis-declaration of value as well as the description of the goods under import in as much as she in her statement dated 18.01.2016 categorically admitted that she and her mother-in-law were the two Directors of M/s Pax Technologies Pvt. Ltd. but she was the one who was managing the operations and all other activities of the company and her mother-in-law Ms. Dhanamma was a sleeping Director holding only 10% shares; that from the records, it is clearly evident that she had mis-led the investigations and to hoodwink her role in the whole conspiracy and hence she was the brain behind the conspiracy and therefore, was liable for penal action under Sections 112, 114A and 114AA of the Customs Act, 1962. .

(B) Appellant- CHAs : It is mandated on the part of the CHAs to verify the genuineness of the importer, correctness of the documents on the basis of which clearances were sought and also to guide the importer about the statutory requirements especially certification from BIS and WPC; that they filed the Bills of Entry on the basis of documents handed over not by importer but by an unauthorised person Shri Randhir Singh; that they did not take the catalogue from the importer and filed the Bills of Entry on the basis of information provided by Shri Randhir Singh classifying the goods under wrong classification; In case of live Bills of Entry the Appellant-CHA stated that they received the documents from Shri Randhir Singh and filed the documents on the basis of invoice submitted by him and regarding the chapter heading 39269099 under which the goods had been classified in two live Bills of Entry, they stated that they had done it by mistake as they thought that the goods were plastic parts of the device; that in case of the two live Bill of Entry item description was declared as 'Paper for printing in payment Debit/Credit Device'and'D-180 MPOS Terminal (Part of payment Debit/Credit Device)' whereas the actual goods under import in these two consignments were complete D 180 Terminals; that they didn't guide/advise the importer about the mandatory requirement for importation of the impugned goods of which name and description could have alerted them to seek more information for the purpose of classification, importability and duty incidence ; that the documentary description of impugned goods itself suggested to be operatable on GPRS, they could have asked the details/specification of the goods and in case of any difficulty, they had option to bring about the matter to the

knowledge of department; they chose otherwise and secured clearance of the subject consignment without BIS and WPC certification; that they were supposed to be well aware about the statutory obligations required to be fulfilled for the imported goods; that in respect of some consignment the Appellant- CHA were well aware about the fact and had admitted during the investigations that the original invoice of the consignment showed that the supplier was M/s Pax Technology Ltd., Hongkong and buyer was M/s Pax Technologies Pvt. Ltd. whereas the Bills of Entry were filed against the revised invoice on the basis of High Sea Sale agreement to circumvent the related party issue in consultation with Shri Rajinder Madhok; that in respect of one consignment the CHA along with importer had undertaken before the Deputy Commissioner, Import Shed that the goods were not Dummy and were imported for exhibition purpose only, they further undertook that the impugned goods would be re-exported within 30 days and a sample of each of D-200 and SP-30 would be submitted for BIS & WPC Certification and on the basis of the undertaking/declaration made by them, goods under import in the Bill of Entry No. 7817932 dated 26.12.2014 were got cleared, however, they failed to produce any evidence to prove that the said goods got the required certification or that they were re-exported.; that in case of impugned Bill of Entry No. 3239991 dated 13.11.2015 for the goods declared as D-180 Terminal MPOS, the CHA filed the Bill of Entry on the basis of documents from Shri Kuldeep Singh, Director of M/s VSG Shipping and Logistics Pvt. Ltd.; that they filed Bill of Entry without going through the veracity of the documents and statutory requirement for importation of goods. Thus they acted upon the advice of Shri Kuldeep Singh (Who was working on the direction of Ms. Latha Priyadarshini) without applying their mind and mandatory obligation required for CHA/CB; that it was imperative on their part to guide the importer about the statutory obligation, however, instead of fulfilling the statutory certification for the goods handled by them, they secured clearance thereof; that they acted to help the importer to secure clearance of the impugned goods without statutory WPC and BIS certification for monetary benefits; that by their above-mentioned act of omission and commission, the Appellants-CHAs have rendered the impugned goods liable for confiscation under Sections 111(d) & (m) of the Customs Act, 1962 and thereby they have rendered themselves liable to penalty under Sections 112 and Section 114AA of the Customs Act, 1962; that all the Appellant-CHAs instead of handling the documents/goods/duty payment themselves have knowingly allowed unauthorized persons namely Shri Randhir Singh ,Shri Sanjay Kataria, Shri Sushil Kumar Mishra and Shri Rajender alias Raju to deal with consignments for monetary benefit; that such being the fact, the case is squarely covered by the decision of Hon'ble Madras High Court in the case of *K.V.Prabhakaran 2019 (365) E.L.T. 877 (Mad.)* wherein the penalty imposed on CHA in similar circumstances was upheld. Further, DR placed reliance on the decision in *Noble Agency v. Commissioner of Customs, Mumbai [2002 (142) E.L.T. 84 (Tri. -Mumbai)]* wherein a Division Bench of the CEGAT, West Zonal Bench, and Mumbai has observed:-

"The CHA occupies a very important position in the Customs House. The Customs procedures are complicated. The importers have to deal with a multiplicity of agencies viz. carriers, custodians like BPT as well as the Customs. The importer would find it impossible to clear his goods through these agencies without wasting valuable energy and time. The CHA is supposed to safeguard the interests of both the importers and the Customs. A lot of trust is kept in CHA by the importers/exporters as well as by the Government Agencies. To ensure appropriate discharge of such trust, the relevant regulations are framed. Regulation 14 of the CHA Licensing Regulations lists out obligations of the CHA. Any contravention of such obligations even without intent would be sufficient to invite upon the CHA the punishment listed in the Regulations...."

It would be pertinent to mention that the aforesaid observations of the CEGAT, West Zonal Bench, Mumbai was approved by Hon'ble Apex Court in the case of *K.M. Ganatra & Co [2016(332) E.L.T. 15 (S.C.)]* and it was held that misconduct on behalf of CHA had to be viewed seriously.

(C) Appellant- Individual: that the Appellant Shri Sushil Kumar Mishra actively participated with Shri Sanjay kataria and Shri Rajender alias Raju in forging/faking of import documents for monetary gain; that though he pleaded that he himself was not involved in forging/faking documents, he admittedly played active role in the clearance of goods of M/s Pax in co-ordination with different people viz. Sanjay Kataria, Rajender alias Raju or Randhir and also one

Shri Sandeep for pecuniary gains; that he not only associated himself in creation of forged invoices and other documents for the erroneous import of the impugned goods on the behest of the director of the import firm, but also personally concerned himself in the clearance of the said goods ; that the Appellants' working partner Shri Rajinder admitted of having generated the forged copies of invoices where he not only lowered the value of the goods under import but also changed the description of the goods in as much as 'Paper Rolls' were added as description in Bills of Entry No. 3526607 dated 09.12.2015, 3346966 dated 23.11.2015, 3141261 dated 03.11.2015, 2763917 dated 30.09.2015, 2121203 dated 03.08.2015 and 2094937 dated 31.07.2015, with an intention that the EDI System would facilitate clearance of the consignments under RMS, where no assessment or examination is generally required by Customs; that the Appellant was aware that even though lesser duty was paid to be paid/and to be deposited with the Department, he with his accomplice-partners charged normal duty amount from the importer by creating forged documents and the extra money earned was distributed by the three - the Appellant , Shri Sanjay Kataria and Shri Rajender alias Raju; that he intentionally and maliciously associated himself with the impugned goods, which he knew were liable for confiscation under Section 111 of the Customs Act, 1962; that he was very much aware about the act of forging the invoices and other documents. He aggressively assisted the director of import firm to secure clearance of the impugned goods dodging inspection/examination of the said consignments by the Department. There are enough evidences to establish that the Appellant was intentionally and purposely associated himself with the impugned goods in the greed of financial benefits, which he knew were liable for confiscation under Section 111 of the Customs Act, 1962; that by his above-mentioned act of omission and commission, the Appellant have rendered the impugned goods liable for confiscation under Sections 111(d) & (m) of the Customs Act, 1962 and also rendered himself liable to penalty under Sections 112 and Section 114AA of the Customs Act, 1962.

(D) Appellant- Freight Forwarder : That the Appellant Shri Kuldeep Singh was a freight forwarder and he took the work related to consignment covered under Bill of Entry No. 3239991 dated 13.11.2015 on turnkey basis and assigned the work of the customs clearance to the CHA firm M/s Rubal Logistics on the basis of the documents provided by the appellant - importer; that the Appellant forwarded all the documents related to the import of the goods viz. D 180 Terminals to the CHA firm M/s Rubal Logistic Pvt. Ltd. as per the direction of Ms. Latha without going through the veracity and genuineness of the import documents on the basis of which clearance was sought; that the said documents were sent through e-mail to the said firm as received from Ms. Latha; that he came across two invoices bearing same reference 'IN15-10857 dated 04.11.2015' and duplicacy of the invoice was very much evident, he did not bring this fact to the notice of the customs authorities; that not only he forwarded the revised invoice (wherein the name of foreign supplier was manipulated as M/s Wang Technology to circumvent SVB investigation) to the CHA firm for clearance of goods, but he also toed the line of unscrupulous importer that the previous invoice (which mentioned correct name of foreign supplier M/s Pax Technology , Hongkong) was sent by mistake and thus, the Appellant played the role of facilitator between the importing firm and the CHA firm M/s Rubal Logistics Pvt. Ltd. and secured clearance of the goods which were grossly undervalued, mis-declared to its description and circumvented the mandatory certification from BIS and WPC; that by his above-mentioned act of omission and commission, Appellant Shri Kuldeep Singh rendered the impugned goods liable for confiscation under Sections 111(d) & (m) of the Customs Act, 1962 and rendered himself liable to penalty under Sections 112 and Section 114AA of the Customs Act, 1962.

(E) Appellant- Consultant: That the Appellant Shri Rajinder Madhok is a consultant by his experience in the field and he advises the importer/exporter on the issue of related party transaction and SVB matters; that he facilitated the clearance of goods imported vide Bill of Entry No. 7817932 dated 26.12.2014 wherein the goods were mis-declared as 'dummy units'. He admitted that he guided Ms. Latha Priyadarshini to circumvent the issue of 'related party' transactions and SVB registration by suggesting her to show imports on High Sea Sale basis and as he had large cliental, he offered to arrange High Sea Sale of the aforesaid goods; that the importer had agreed to pay Rs. 34,000/- for his services in respect of advising her on executing a High Sea Sale agreement with an Indian Firm, however, Ms. Latha did not pay the said amount till date because she

approached Shri Sanjay Kataria for clearance of the impugned goods imported by the said Bill of Entry. It has been established categorically that Appellant played a vital role by advising Ms. Latha Priyadarshini to circumvent related party transaction valuation of the impugned goods imported vide Bill of Entry No. 7817932 dated 26.12.2014. The consignment was thus mis-declared to its value, and the requirement BIS and WPC certification. He used his expertise to circumvent the provisions related to assessment and clearance of imported goods ; that by his above-mentioned act of omission and commission, the Appellant rendered the impugned goods liable for confiscation under Sections 111(d) & (m) of the Customs Act, 1962 and rendered himself liable to penalty under Section 112 and Section 114AA of the Customs Act, 1962.

12. We have considered rival submissions in detail as well as the record of the appeal. It is a matter of record that the appellant namely M/s Pax Technologies Pvt. Ltd. has imported consignments of Mobile Point of Sale (MPOS) Devices under various Bills of entry, the detail of 12 Bills of Entries are given below :-

S. No.	B/E No.	B/E Date	% of exam prescribed	Description of goods as per B/E	Chapter Heading as per B/E	Qty. Imported	Declared value (USD) per unit	Name of CHA/ CB (M/s)
1.	5994463	02/07/2014	100	S-90 GPRS + ID barcode Terminal	84700010	25	97	Chinta Haran Ojha
				S-90 software licence	84732900	1	4075	
2.	5994464	02/07/2014	100	S-90 Model + GPRS + ID barcode Terminal	84709010	5	97	Chinta Haran Ojha
				S-900 GPRS + RF Terminal	84709010	3	97	
				Software licence of S90 + S900	84732900	3	1235	
3.	6221058	24/07/2014 (Still lying uncleared as the importer has not given reply to the query raised by the department till date)	100	S-90 GPRS Terminal (Barcode Terninal)	84709010	3	97	Chinta Haran Ojha
				D-180 BTH Terminal	84709010	3	60	
				D-210 GPRS Terminal	84709010	3	97	
				S-58 Dial + IP Terminal	84709010	3	60	
				S-900 GPRS Terminal	84709010	3	100	
				Software licence kit	84732900	1	1503	
4.	7817932	26/12/2014	10	D-200 Terminal (Mobile payment terminal dummy) sample	90230090	4	20	R.U. Imports Exports Pvt. Ltd.
				SP-30 Terminal (Mobile payment terminal dummy)	90230090	2	15	

				sample				
5.	2094937	31/07/2015	RMS	S-90	48237090	200	8.5	Exim Cargo Service
6.	2121203	03/08/2015	RMS	Paper Roll	48237090	1000 Rolls	.25	Exim Cargo Service
				D-180 MPOS Terminal (Parts of payment Debit/ Credit Device)	48237090	1000 Rolls	2.25	
7.	2763917	30/09/2015	RMS	Paper Roll	48237090	80	.25	Exim Cargo Service
				Barcode Reader S-90	48237090	40	8.25	
8.	3346966	23/11/2015	RMS	Paper for printing in payment Debit/ Credit device	48237090	50	42	Exim Cargo Service
				D-180 Terminal (Part of payment Debit/ Credit Device)	48237090	42	4.5	
9.	3141261	03/11/2015	10	Paper Roll D-180 MPOS Terminal (Part of payment Debit/ Credit Device)	48237090	200	.25	Exim Cargo Service
10.	3239991	13/11/2015	10	D-180 (D-180 Pin pad is used to connect with the laptop to do the transaction - connectivity via USB port only)	84702900	457	15	Rubal Logistics Pvt. Ltd.
11.	3526607	09/12/2015	RMS	Paper for printing in payment Debit/ Credit Device	48237090	1000 Rolls	.25	Prompt Air & Sea Cargo Pvt. Ltd.
				D-180 Terminal (Part of payment Debit/ Credit Device)	48237090	2000 pcs.	1.5	
12.	3650483	19/12/2015	RMS	Paper for printing in payment Debit/	48237090	1000 Rolls	.23	Prompt Air & Sea Cargo

				Credit Device				Pvt. Ltd.
				D-180 Terminal (Part of payment Debit/ Credit Device)	48237090	4600 pcs.	1.45	

Apart from these 12 Bills of entry the appellant has imported two more consignments covered by Bill of Entry No. 3851878 dated 8 January 2016 and Bill of Entry No. 3851698 also dated 08 January 2016.

13. It is also a matter of record that two Bills of Entry both dated 8 January 2016 are live Bills of Entry which are pending for clearance. It is an admitted fact that M/s Pax Technologies Pvt. Ltd. appellant - importer has been appointed sole distributors of MPOS (Mobile Point of Sale) devices and POS (Point of Sale) devices by Pax Technology Ltd., Hongkong in India. Ms. Latha Priyadarshini one of the appellant in these appeals, is an active director of M/s Pax Technologies India and looks after the entire work of importation, marketing of the imported products, etc. It has come out very categorically from the investigations conducted by the Department that Ms. Latha Priyadarshini was fully aware about the nature of the goods being imported by her in the name of her company. She was also well aware as to how much was the value of the hardware of the machine and how much was the value of the software required for the purpose of successful operation and functioning of these machines. She was also aware that the type of the equipments imported by their company required ETA (Equipment Type Approval) from Wireless Planning and Coordination Wing of Ministry of Communication and Information Technology's as per the prevailing Import Export Policy. These machines/equipments also needed approval and registration from Bureau of Indian Standards (BIS). The appellant namely Ms. Latha Priyadarshini was also aware that since the imports are being made from their related company based in Hongkong, the imports needed registration/clearance from Special Valuation Branch of Customs Department for their legitimate importation. Ms. Latha Priyadarshini with the help of certain other persons made plan to circumvent the provisions of Import Export Policy requirements as well as scrutiny from Special Valuation Branch of the Customs by resorting to mis-declaration of the import consignment of MPOS/POS in connivance of the various persons. These persons are also appellant before us in this matter. We have taken note of the fact that Shri Rajinder Madhok in his statement has categorically mentioned that Ms. Latha Priyadarshini alongwith Shri Sanjeev Sharma has met him and made certain enquiries with regard to formalities pertaining to Special Valuation Branch and in the discussion she has also asked as to how the provisions of Special Valuation Branch can be bye-passed. Thereafter with connivance of several other persons she has mis-declared the basic details of the import consignments including the description of the import consignments.

14. A glance at the table mentioned in the preceding para No. 11 reveals that the MPOS machines were mis-declared as paper rolls/bar code reader and in some of the Bills of Entry the description of import consignment has been given as "S-90 model and paper with printing and payment debit/credit device". We find that a Master Distributor Agreement has been signed between M/s Pax Technologies, Hongkong and M/s Pax Technologies, India which makes the Indian arm a sole master distributor of Hongkong based companies products namely various models of 'Mobile Point of Sale/Point of Sale devices'. The master distributor agreement has an Appendix I which provides the transfer prices of various models of MPOS alongwith the prices of software, which is essential component for functioning of the MPOS devices. When the prices as given in the Appendix A to the master distributor agreement are compared with the declared import prices of the import consignments, we find that the declared prices of imported consignments of the various models of MPOS/POS have drastically been mis-declared. The only defence which has been taken by the appellant - importer and its director Ms. Latha Priyadarshini is that they have been cheated by various Customs House Agents and for which a First Information Report (FIR) has been lodged by the importing company in a Police Station. We do not find any leg to this defence as it has come out very categorically that she was fully aware about the statutory requirements of the Customs Act, Import Export Policy for legitimate import of

MPOS consignments as well as the price structure (various models of the MPOS/POS). She was aware about the correct prices of MPOS/POS imported by her and her company as the agreement of distribution between the company and the foreign supplier has been signed by her. We find that the appellant - importer has given varied description for the import item namely Mobile Point of Sale (MPOS)/Point of Sale (POS). The descriptions of the import goods which we find in the Bills of Entry are actually in utter disregard to the provisions of Customs Act and indicate that the import consignments were being described to the whim and fancy as well as convenience of the appellant - importer, its active Director and clearing agents. It can be seen from the table given in the preceding para that in some of the Bills of Entry the consignment has been described as "S-90 GPRS + ID BAR CODE TERMINAL" classified under 84709010 of the Customs Tariff Act, 1975; in two Bills of Entry the consignment has been described as D-200 Terminal (Mobile payment terminal - Dummy sample) classified under Customs Tariff Heading 90230050; in one Bills of Entry No. 2094937 dated 31/07/2015 goods have been described only as "S-90" and classified under Customs Tariff Heading 48237090 (which pertains to articles of paper). In the other Bills of Entry also goods have similarly been mis-declared as "paper for printing in payment debit/credit device, paper rolls, parts of plastic (the description given in the live Bills of Entry).

15. The appellant - importer and its Executive Director Ms. Latha Priyadarshini cannot pretend ignorance of such a blatant wrong description of the import consignments of MPOS/POS. We find that the consignments of MPOS were not described correctly even in a single Bill of Entry filed by this importer. Of course the wrong description was adopted as a modus operandi to bye-pass the provisions of the Customs Act, 1962 read with import-export policy of relevant time which required that consignment of MPOS/POS a No Objection Certificate in the form of ETA (Equipment Type Approval) from the WPC Wing of Department of Telecommunication and registration with Bureau of Indian Standards (BIS) and above all to evade customs duty.

16. Now, we undertake to analyze the findings given in the impugned order-in-original regarding mis-classification of import consignment under the Customs Tariff Act 1975 with an intend to evade the customs duty. We find that the import consignments of MPOS/POS have been classified as follows :

In 3 Bills of Entry having No. 5994463 dated 02/07/2014, 5994464 dated 04/07/2014 and 6221058 dated 24/07/2014, the import consignments of MPOS have been described and classified as follows :

"S-90 GPRS + ID BARCODE TERMINAL CTH 84709010" We find that Customs Tariff Heading 8470 primarily covers goods such as calculating machines and pocket size data recording device, cash registers etc., while the classification of the subject MPOS machines have been confirmed by the Adjudicating Authority under Customs Tariff Heading 84713090. The Customs Tariff Heading 8471 primarily covers the products such as "Portable Automatic Data processing machines, weighing not more than 10 kg. consisting of at least a central processing unit, a keyboard and display". The impugned goods namely MPOS are admittedly Automatic Data processing machines which facilitate payments. We have perused the catalogue of D-180 Model of MPOS and find that it had Memory, CPU, display, keypad, magnetic card reader and smart card reader. It is a matter of fact that the device has a Central Processing Unit (CPU), display serum as an output device and keypad/card reader constitute as input device, hence we can safely conclude that the device is a full fledged ADPM (Automatic Data Processing Machine). Thus, we hold that the import consignments of MPOS/POS merit classification under Customs Tariff Heading 84713090. We also find that US Ruling NY3 81686 dated 10/05/1999, a downloaded copy of which was placed on record by the Departmental Representative, also supports classification of subject goods under Chapter Heading 84713090.

17. We find that the consignments of MPOS/POS in the other Bills of Entry had been mis-classified as follows :

(i) In two Bills of Entry Customs Tariff Heading 90230090 which pertains to instruments; apparatus and Models etc. for demonstrational purpose ;

(ii) In the six Bills of Entry under Customs Tariff Heading 48237090 which pertains to "other paper, paper board cellulose wadding etc."

(iii) Other live Bills of Entry have been classified under Customs Tariff Heading 39269099 which pertains to "other articles of plastic".

18. Thus, we find that the importer/appellant and its Executive Director Ms. Latha Priyadarshini were mis-classifying MPOS/POS consignments in utter disregard to the provisions of Customs Tariff Act and at their own free will and thus they have certainly resorted to mis-declaration and mis-classification of the import consignments with an intent to evade duty and to avoid compliance of other allied Acts as mentioned in preceding paras and thereby making all the import consignments liable for confiscation on this count under Section 111 of the Customs Act, 1962.

19. With regard to the valuation of the import consignments of MPOS/POS, the per unit price declared under various Bills of Entry have varied between U.S. \$ 97 per unit to as low as U.S. \$ 1.45 per unit for D-180 Model of MPOS. It has been established by the investigations that a 'Master Distribution Agreement' has been signed by the appellant - importer and its Executive Director Ms. Latha Priyadarshini with Pax Technology Ltd. Hongkong on 1 November 2014. Some of the relevant paras of agreement read as follow :

"Appendix A shows current transfer prices agreed between the company and the master distributor of the company main products. The transfer prices may change with time in line with specific business deals or due to situation of the competitive nature. The commission due to the master distributor is defined as the % specified in Appendix A, calculated on the difference between the price paid to the company by the customers and the transfer price applied by the company to the master distributor".

20. On perusal of Appendix A of the master distributor agreement it reflects that the price of hardware of various models of the MPOS and POS have been provided by the Hongkong based company and it has very specially been provided that apart from the hardware price the licence fee for software for D series equipments of MPOS will be U.S. \$ 45 per unit, for S series the licence fee was fixed at U.S. \$ 60 per unit and for R series it was fixed at U.S. \$ 40 per unit. This very fact indicates that the importing firm and its Executive Director were fully aware about the import value of the imported equipments. However, in a blatant violation of the customs provisions and with sole motive of evading customs duty they chose to mis-declare the import price of the consignment of MPOS which sometimes was as low as U.S. \$ 0.25 per unit. We are in agreement with the finding in the impugned order-in-original that since the import prices declared by the appellant - importer are not the actual transaction value of the import consignments and the value declared in the Bills of Entry was on the basis of forged/fake invoices, the same needed to be rejected as per the provisions of Rule 12 readwith Rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and readwith Section 14 of the Customs Act, 1962. It is also an admitted fact that the Mobile Point of Sale (MPOS) device and Point of Sale (POS) device imported by the importer - appellant needed a certification from the Bureau of Indian Standards. They also needed a No Objection Certificate from the WP&C Wing of Department of Tele-communication for their legitimate importation. These requirements have been circumvented by the importing company and its Executive Director by hatching a conspiracy with various other persons and therefore have violated the provisions of Customs Act, 1962 as well as provisions of Import Export Policy prevalent at the relevant time. The arguments advanced by Ms. Latha Priyadarshini and the company are not acceptable in the facts and circumstances as well as legally as per the provision of Section 46 of the Customs Act, 1962 of sub-Section (iv) the importer presenting the Bill of Entry is required to subscribe to a declaration as to the truth and contents of Bills of Entry. Since the declarations made by the importer - appellant and its director have been found grossly mis-declared on the counts of description, classification and value of the consignments. Ms. Latha Priyadarshini in her statement dated 19/01/2016 and other statement has admitted the facts of mis-declaration.

21. Thus, we do not find any illegality in the conclusions reached in the impugned order-in-original regarding confiscation of the import consignments, confiscation of customs duty and with regard to imposition of penalty under various Sections of the Customs Act on the appellant importer and its Director Mrs. Latha Priyadarshini.

22. Coming to the role of various Customs House Clearing Agents, we find it appropriate to mention before analyzing the role of individual CHA firms and persons, that every Customs House Agent plays a crucial role in ensuring compliance of provisions of Customs Act as well as various other allied laws of the country with regard to import/export of goods. They are also required to advise and assist the importers and exporters so that correct compliance of the provisions of statutes as well as correct payment of customs duty is ensured. In the present case, we find that the customs house agents (clearing agents) have not done their work in the spirit in which they have been appointed to work as the Customs House Agents. We find that appellants M/s Chinta Haran Ojha - Customs House Agent and Shri Rakesh Kumar - G Card Holder of same firm have filed two Bills of Entries having No. 5994463 and 5994464 both dated 2 July 2014 and Bill of Entry No. 6221058 dated 24/07/2014 where the consignments of Mobile Point of Sale (MPOS) equipments of S-90 model have been mis-declared as GPRS + ID Barcode Terminal. We also find that the consignment have also been mis-classified (as discussed in preceding para) and by resorting to mis-declaration and mis-classification of impugned goods, the provision pertaining registration and certification requirements from the Bureau of Indian Standards as well as the ETA from the WPC Wing of Department of Telecommunication have been by-passed. We find that it is the duty of the Customs House Agents that wherever it is found that the description given in the invoice does not explain and facilitate the correct classification of the import consignment, Custom House Agent should ask for the product catalogue/treatment literature for reaching at the right classification of the import goods and also to ensure the compliance of provisions of other allied statutes such as Import Export Policy, Bureau of Indian Standards Act etc. We find a complacency on the part of the CHA to have made classification of the import consignment without getting the veracity of the nature of the import goods verified from the technical literature etc. and to resort to a classification which resulted in evasion of the customs duty and violation of other provisions regarding compliance of Bureau of Indian Standards and WPC Wing of the Department of tele-communication as was the requirement under Import Export Policy and therefore we agree with the findings of the Adjudicating Authority with regard to their role in rendering the import goods liable for confiscation and thereby attracting the penal provisions of Section 112 and Section 114AA of the Customs Act, 1962.

23. With regard to the appellant Shri Rajesh Kumar Maikhuri - Managing Director of M/s R.U. Imports Exports Pvt. Ltd. and M/s R.U. Imports Exports Pvt. Ltd., a Customs House Agent (CB firm), it is a matter of record that they have filed one Bill of Entry No. 7817932 dated 26 December 2014 wherein the description of the goods was given as D-200 Terminal (Mobile payment terminal dummy), sample and SP-30 terminal (Mobile payment terminal dummy). The classification of the goods have been done under Chapter 90230090 which covers instruments, apparatus and model designated for demonstration purposes or exhibition, education purpose and unsuitable for its other uses. It is matter of record that during course of examination of subject consignment, the goods were found as not dummy or samples but the same were fully functional MPOS. It is therefore clear that goods were classified by Shri Maikhuri and the importing firm without going into detail about their true nature by referring to the relevant catalogue or product literature and without any documentary evidences. The CHA classified the goods as of dummy nature for exhibition/demonstration purpose to evade customs duty and other provisions of import-export policy. It has also come out from the investigations that the CHA firm and its Director have not interacted with the importer while taking the work of clearance work of the import consignment but all the documents such as invoice, airway bill etc. were taken from Shri Rajinder Madhok and thus have not shown due diligence in undertaking the work of clearance and have become part of the conspiracy to get the MPOS devices cleared without following the due requirements of Customs Act and Import-export policy. The investigation has also revealed that the clearing agent has filed the bill of entry showing the name of supplier as M/s VXCESS Solutions on the basis of some high-sea sale agreement though the invoice covering the import consignment was from M/s Pax Technology Ltd., Hongkong to M/s Pax Technology Pvt. Ltd., India and no local invoice was presented to him after entering into the high-sea sale agreement between Pax Technologies Pvt. Ltd., India and M/s VXCESS Solutions. It has also emerged that when certain objections were raised by the customs officer at the time of clearance of the goods,

the importer - appellant has given an undertaking to export back the goods after demonstration however the undertaking was never honoured and CHA was fully aware that the undertaking was being given only to get the clearance of the import consignment these omissions and commissions on the part of the CHA and its Director convince us that no due diligence has been exercised while classifying the goods and entering other details at the time of the import of the consignment. In view of these facts, we agree with the findings of the Original Adjudicating Authority and refrain from interfering with the same.

24. Coming to the appeals filed by the appellant Shri Kishan Singh Dhapa, Shri Rajender Prasad and M/s Exim Cargo Services - Customs House Agent (Customs broker), the records indicate that Shri Kishan Singh Dhapa is working as a Proprietor of CHA firm namely M/s Exim Cargo Services having F Card No. 169/96 issued by the Customs House and Shri Rajender Prasad has been working as a G Card Holder for this CHA firm namely M/s Exim Cargo Services. The CHA firm and its Executive namely Shri Kishan Singh Dhapa and Shri Rajender Prasad has filed following 4 Bills of Entries for clearance of MPOS on behalf of the main appellant namely M/s Pax Technologies Pvt. Ltd. The details of the description of the import consignment, their classification and per unit price, as declared in the respective Bills of Entries are given here below :-

S. No.	B/E No.	B/E Date	% of exam prescribed	Description of goods as per B/E	Chapter Heading as per B/E	Qty. Imported	Declared value (USD) per unit	Name of CHA/ CB (M/s)
1.	2094937	31/07/2015	RMS	S-90	48237090	200	8.5	Exim Cargo Service
2.	2121203	03/08/2015	RMS	Paper Roll	48237090	1000 Rolls	.25	Exim Cargo Service
				D-180 MPOS Terminal (Parts of payment Debit/ Credit Device)	48237090	1000 Rolls	2.25	
3.	2763917	30/09/2015	RMS	Paper Roll	48237090	80	.25	Exim Cargo Service
				Barcode Reader S-90	48237090	40	8.25	
4.	3346966	23/11/2015	RMS	Paper for printing in payment Debit/ Credit device	48237090	50	.42	Exim Cargo Service
				D-180 Terminal (Part of payment Debit/ Credit Device)	48237090	42	4.5	

25. A glance at the details given above, makes a revelation of the extent of the mis-declaration which have been resorted to by the importer and its clearing agent M/s Exim Cargo. We are at pains to note that a sophisticated electronic equipments such as Mobile Point of Sale (MPOS) are being described only as S-90, paper rolls, D-180 (parts of payment debit/credit device), bar code reader etc. and has been classified under Customs Tariff Heading 48237090 which pertains to "other paper/paper board" cellulose wedding and webs of cellulose fibers, cut to size for sale, other articles of paper pulp, paper, paper board etc." It appears from the description given for clearance of consignment of the MPOS equipments declaring them as the products of the paper by the importer, its Executive Director, and especially the clearing agent namely M/s Exim Cargo Services and its Executive Shri Kishan Singh Dhapa and Shri Rajender Prasad that they have blatantly made mockery of customs provisions. As stated in the preceding paras

that it is a sacred duty of clearing agent to ensure compliance of the provisions of customs law and advice the importer for correct compliance of Customs Act as well as other Allied Acts and their provisions while undertaking clearance of the import cargo. However here we find that in utter disregard to the provisions of the relevant statues the description, classification thereof and valuation has been done as per their own whims and fancies. For example for the Bill of Entry No. 209437 dated 31 July 2015, the only description of the goods in the Bill of Entry has been given as S-90 classifying the same under Chapter sub-Heading 48237090 of the Customs Tariff Act, 1986. It is beyond our imagination that any prudent person can decide the classification of an imported item only on the description as "S-90". This clearly indicates that the clearing firm and its proprietor Shri Kishan Singh Dhapa and G Card Holder Shri Rajender Prasad have acted with ulterior motives and have misclassified the sophisticated electronic equipments, such as, MPOS under the product classification of the paper and paper products and the value of such sophisticated items has surprisingly been mis-declared as low as U.S. \$ 0.25 per unit under Bill of Entry No. 2121203 dated 03/08/2015. This could not have been done without CHA firms and its workers being part of a conspiracy to evade the customs duty but also to circumvent the provisions of the Export Import Policy which included the BIS and WP&C certification.

26. We are in full agreement with the findings of the Original Adjudicating Authority and, therefore, uphold the imposition of penalty under various sections of the Customs Act on CHA firm M/s Exim Cargo services, Shri Kishan Singh Dhapa and Rajindra Prasad. We also recommend to the Commissioner of Customs (Licencing Authority) to take appropriate action against all the three above-mentioned appellants under the Customs Broker Licence Regulations.

27. Coming to the appellants Shri Rajiv Kumar Sharma, Shri Hari Kishan, Shri Kamal Nath Roy and M/s Rubal Logistics Pvt. Ltd. - Customs House Agent (Customs broker), it is a matter of record that M/s Rubal Logistics Pvt. Ltd. has filed a Bill of Entry No. 3239991 dated 13 November 2015 wherein the description of the goods has been declared as D-180 (D-180 pinpad is used to connect with the laptop to do the transaction - connectivity via USB port only). The value of the goods has been declared as U.S. \$ 15 per unit. The investigations revealed that under the Bill of Entry No. 3239991 dated 13 November 2015 a consignment of D-180 MPOS was imported by the importer - appellant and the description of the same has been mis-declared as 'pinpad used to connect with the laptop' via USB port and the transaction value has also been suppressed to a large extent. Here also, we find that the clearing agent had not taken any pain in verifying the true nature of the import item by asking for any catalogue or technical literature. The goods have been mis-classified under Chapter 84702900 in utter disregard to the provisions of the Customs Tariff Act. In the clearance of this particular consignment we find that the clearing agent never interacted directly with the importer, but accepted the import document from one freight forwarder namely Shri Kuldeep Singh of M/s VSG Shipping and Logistics Pvt. Ltd. Here also we find that the clearing agent and his executives/workers, namely G Card Holder has not bothered to see the catalogue of the imported goods for reaching at the correct classification and to determine whether the requirement of BIS and WPC were needed or not. They have just gone and filed the Bill of Entry on the basis of documents provided by Shri Kuldeep Singh which had resulted in mis-declaring, misclassifying the description and value and thereby becoming instrumental in evasion of customs duty and in circumventing the provisions of the Import Export Policy with regard to requirement of the BIS and WPC certification. We find that the order-in-original has brought out their role very specifically and the conclusion reached by the Adjudicating Authority does not suffer from illegality. Therefore, it is not necessary to interfere with the findings of the Authority.

28. Now, coming to the appellant namely Shri Kamal Kumar Sukhramani and M/s Prompt Air & Sea Cargo Pvt. Ltd. a Customs House Agent (Customs broker), we find that following two Bills of Entries have been filed by appellant M/s Prompt Air & Sea Cargo Pvt. Ltd. :-

S. No.	B/E No.	B/E Date	% of exam prescribed	Description of goods as per B/E	Chapter Heading as per B/E	Qty. Imported	Declared value (USD) per	Name of CHA/ CB (M/s)

							unit	
11.	3526607	09/12/2015	RMS	Paper for printing in payment Debit/ Credit Device	48237090	1000 Rolls	.25	Prompt Air & Sea Cargo Pvt. Ltd.
				D-180 Terminal (Part of payment Debit/ Credit Device)	48237090	2000 pcs.	1.5	
12.	3650483	19/12/2015	RMS	Paper for printing in payment Debit/ Credit Device	48237090	1000 Rolls	.23	Prompt Air & Sea Cargo Pvt. Ltd.
				D-180 Terminal (Part of payment Debit/ Credit Device)	48237090	4600 pcs.	1.45	

29. A perusal of the above-mentioned details makes an interesting revelation that the D-180 Model of Mobile Point of Sale (MPOS) equipment has been classified as a product of paper by classifying the same under sub-heading 48237090 of the Customs Tariff Act and declaring the value as U.S. \$ 1.5 per unit and U.S. \$ 1.45 per unit. We are of the opinion that this has been done deliberately for ulterior motives. The facts here are also same that the Customs House Agent and its Executive Shri Kamal Kumar Sukhramani had filed the Bills of Entry without referring to the necessary product catalogue and technical literature. It has also been admitted by Shri Kamal Kumar Sukhramani, a F Card Holder of Customs Clearing firm M/s Prompt Air & Sea Cargo Pvt. Ltd., in his statement dated 26 February 2016 that he has not referred to any catalogue or produced literature and he never met the importer and filed the Bill of Entry on the basis of documents handed over to him by Shri Randhir Singh. We find that the classification and valuation of the products have been mis-declared blatantly by the importer in connivance with the CHA firm namely M/s Prompt Air & Sea Cargo Pvt. Ltd. and its Executive Shri Kamal Kumar Sukhramani. It pains to note that sophisticated electronic goods namely MPOS equipment have been declared as a product of paper and the value declared is low as U.S. \$ 1.5 per unit with utter disregard to the provisions of the Customs law. We are not impressed with the arguments advanced for taking a lenient view in this matter. We feel that CHA and its executive Shri K.K. Sukhramani knowingly have connived with the importer and its Director for resorting to such mis-declaration of description and value of the import consignments of MPOS and have thus evaded customs duty and violated the provisions of Allied Acts. Here also, we are in agreement with the findings of the learned Adjudicating Authority and refrain from interfering with the same.

30. Now coming to appeals filed by Shri Rajinder Madhok - Consultant, Shri Kuldeep Singh and Shri Sushil Kumar Mishra, it is an admitted fact that Shri Rajinder Madhok worked as a consultant on the issues pertaining to special valuation branch. He was fully aware that the goods were being imported by the importer - appellant from their related firm based in Hongkong and only for the monetary gains he had advised Ms. Latha Priyadarshini as to how to circumvent the provisions of Customs and Allied Acts with regard to Bill of Entry No. 7817932 dated 26/12/2014. He played a crucial role in mis-declaring the goods as the dummy equipments just to bye-pass the provisions of certification required under BIS and WPC. Thus here also, we do not find any legal infirmity in the findings of the Adjudicating Authority. So far as the appellant Shri Kuldeep Singh Director of M/s VSG Shipping and Logistics Pvt. Ltd. with regard to Bill of Entry No. 3239991 dated 13 November 2015, he arranged clearance of the consignment through CHA M/s Rubal Logistics Pvt. Ltd. and Shri Rajeev Sharma where he was instrumental in providing two sets of invoices for the same consignment to the clearing agent and ensured the clearances of the consignment on behalf of importer - appellant by mis-declaring the value and without submitting the certification from BIS and

WPC. The Adjudicating Authority has rightly found him liable for penalty and as per the provisions of the Customs Act under Section 112 and 114AA and we are in agreement with the findings of the Adjudicating Authority also.

31. So far as the role of Shri Sushil Kumar Mishra is concerned, it is an admitted fact that he associated himself in creation of forged documents, such as, invoices etc. and was involved in arranging the clearance of the goods on the basis of the mis-declared facts. Shri Sushil Kumar Mishra in his statement dated 16 January 2016 has admitted that he was fully aware about lot of manipulations with regard to clearance of consignment of M/s Pax Technologies as generally the customs clearance agency charges are in the range of 2000 to 2500 per consignment, however, in case of M/s Pax Technology an amount of Rs. 60,000/- to Rs. 70,000/- was being paid to them. He was working in connivance with Shri Sanjay Kataria and one Shri Raju and all of them were forging invoice and other documents. The investigations have brought out the categorical role played by Shri Sushil Kumar Mishra that he was aware and participated in mis-declaration of description as well as the value of import consignment for and on behalf of the importer - appellant. We do not find any ground to take a lenient view so far as imposition of penalty on him under the provisions of Customs Act is concerned.

32. We have also considered the case laws cited by learned Counsels. We find that the case laws relied by the appellants may be having some relevance in normal cases of mis-declaration where either the importer has made an inadvertent mistake in providing description and classification of the product under import or where the clearing agent in such mis-declarations is not found involved. In the facts and circumstances of the case at hand, as it has come out in the preceding paras, that the importer - appellant and various clearing agent - appellants and persons were consciously part of the entire conspiracy of willful mis-declarations of the import consignments. These decisions would not help the appellant.

33. In view of the entire above discussions, we also find it appropriate to ask the Chief Commissioner of Customs to enquire about the systemic failure with regard to clearances of Mobile Point of Sale equipments under various Bills of Entry, as mentioned in the preceding paras. We find that the clearing agents were aware as to the description that was to be given to a consignment to avoid examination of the cargo from the Risk Management Module (RMS). We are also surprised to note that in some of the Bills of Entry, the Risk Management Module (RMS) gave examination of the package of the cargo, but still in these cases also the consignment were cleared in spite of the huge mis-declaration with regard to its description, classification as well as the value of imported items. This indicates that there exists a deep malaise in the system of examination and clearance of the cargo. We advise the Chief Commissioner to revisit the standard operating procedure in this regard to ensure that the system is enabled to take care of the instances where a blatant mis-declaration is avoided by the importers to by-pass the Risk Management Module. We also direct the Chief Commissioner of Customs to consider whether it should be necessary to cause a vigilance enquiry to determine how the consignments were cleared when there were so many mis-declarations in description as well as classification of the imported Mobile Point of Sale equipments.

34. In view of the entire above discussions, there is no infirmity in the order-in-original. Accordingly, all the appeals are dismissed.

(Order pronounced in open court on 12.03.2020)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. IV]

S/Shri Ashok Jindal, Member (J) and C.L. Mahar, Member (T)

INGRAM MICRO INDIA P. LTD.

Versus

C.C., AIR CARGO COMPLEX (I), NEW DELHI

Final Order No. C/A/51067/2019-CU(DB), dated 8-8-2019 in Appeal No.
C/50259/2019

REPRESENTED BY :Shri Amit Jain, Advocate, for the Appellant.

Shri Sunil Kumar, Authorized Representative (DR), for the Respondent.

[Order per : C.L. Mahar, Member (T)]. - Briefly stated facts are that the appellant had filed a Bill of Entry No. 4780276, dated 4-4-2016 in the Customs, Air Cargo (Imports), New Delhi for clearance of wireless fitness watch/wireless fitness tracker having declared as Fitbit Alta having model number FB-406, ETA-730/2015/ERLO through their Customs broker M/s. Express Global Logistics Private Limited. The goods were of Chinese origin and imported from M/s. Fitbit International Limited, China. As the goods were wireless in nature, the importer was asked to produce the Equipment Type Approval (ETA) certificates in terms of Notification No. GSR. 45(E), dated 28-1-2005 of WPC Wing, Department of Telecom, Ministry of Communications and Information Technology as this product operates in the licence free band width ranges between 2400-2483.5 MHz. The importer submitted ETA No. 730/ERLO, dated 1-12-2015 purportedly issued by Joint Wireless Advisor to the Government of India, Head of Office, Department of Telecommunications, Regional Licensing Office (East), Kolkata. It was observed that ETA certificate was issued for the goods manufactured in USA whereas the imported goods were manufactured in China. Suspecting that the goods were not genuine, investigations were initiated by SIIB against the importer. During the course of proceedings, it was noticed that 12 ETA were for the import of Fitbit fitness tracker/smart fitness watch/body motion pattern measuring tracker of different models under 30 bills of entry. In a search conducted at the Delhi warehouse of the importer on 20-7-2016, 3294 pieces of the subject goods were seized all of which were manufactured in China whereas the ETAs were for the USA manufacture. In a clarification issued to the importer, by the Department of Telecommunications, New Delhi. It was made clear that if the manufacturer and the supplier were different, fresh ETA was required to be issued. Further, in an enquiry made from the Department of Telecommunication, Regional Licensing Office (East), New Delhi for verification of the ETA produced by the importer for bill of Entry Number 4780276, dated 4-4-2016, they vide their letter dated 18-5-2016 informed that the said ETA was not issued from their office. Accordingly, 2250 pieces of the goods covered in the bill of Entry Number 4780276, dated 4-4-2016 were seized vide panchnama dated 4-8-2016 under Section 110 of the Customs Act. Thus in total 5544 pieces of Fitbit wireless devices having a cumulative assessable value of Rs. 3,15,45,401/- were seized. On the request of the appellant, the seized goods were permitted to be shifted to bonded warehouse under Section 49 of the Customs Act, 1962. The importer vide their letter dated 28-9-2017, requested for permission to re-export the seized goods and prayed for waiver of show cause notice. A personal hearing was granted on 28-2-2018 by the Commissioner on the request of the appellant. During the course of personal hearing and vide their letter dated 1-3-2018, the appellant explained to the Commissioner that the responsibility of arranging the ETA was on Fitbit Inc. USA which availed the services of M/s. T.P.C., a third party consultant. They pleaded that the third party consultant had provided them the forged ETAs for which they initiated legal action against them. The appellant again requested for re-export of the seized goods vide their letters dated 5-4-2018 and 5-10-2018, the Commissioner vide impugned order dated 25-10-2018, imposed a penalty of Rs. 31,54,540/- under Section 112(a) of the Customs Act, 1962 holding that the goods were liable to confiscation under Section 111(d) of the Act as the appellant had filed fake/invalid ETA as a part of import documents. He allowed re-export of the seized goods as requested by the appellant.

2. Vide corrigendum dated 26-10-2018 to the impugned order dated 25-10-2018, the Commissioner further imposed a penalty of Rs. 9,00,000/- under Section 114AA of the

Customs Act, 1962. The appellant is before us against the impugned order dated 25-10-2018 and corrigendum dated 26-10-2018.

3. The Learned Counsel appearing on behalf of the appellant has vehemently argued that there is no requirement under the IT Act for declaring the place of manufacture/country of origin when applying for ETA. He has argued that it did not matter whether the goods were manufactured in USA or in China, so long as the wireless devices operate in the frequency band 2400-2483.5 MHz, the ETA is valid. That the place of manufacture/country of origin is not a parameter on the basis of which ETA is granted. That for all intents and purposes, it is Fitbit Inc. USA, the owner of the brand 'Fitbit' that was the manufacturer and there was no misdeclaration in the ETAs. It is further argued that a fresh ETA certificate in favour of import was not required as long as the goods satisfy the technical specifications mentioned in the ETA. He further argued that no ETA was required in respect of accessories amounting to Rs. 7,11,137/- and hence the impugned order to the extent imposes penalty on accessories of Fitbit devices is not sustainable. Further argued that the appellant is in no way responsible or involved with the procurement of fake ETAs and as soon as the appellant came to know that the ETAs procured by the consultant of Fitbit Inc. USA were not genuine, they immediately requested Fitbit USA to obtain fresh ETAs which were duly obtained and submitted by the appellant before the Department and the Learned Commissioner after considering fresh ETAs has held that the goods were not liable to confiscation under Section 111(d) of the Customs Act as those were not imported contrary to any prohibition imposed under the Customs Act or any other law for the time being in force inasmuch as it is procured by the appellant from WPC authorities are valid since there exists no requirement to obtain different ETAs for identical goods manufactured in different countries under the same brand name. It has further been argued that there was no *mens rea* as it was a third party fault and they were under the *bona fide* belief that the ETAs given to them on behalf of supplier were genuine. He further argued that corrigendum has attempted to review its own impugned order and thus additional penalty imposed on the appellant under Section 114AA of the Customs Act, 1962 is liable to be set aside. The appellant has further contested the imposition of penalty under Section 114AA of the Customs Act as they had not knowingly or intentionally used any document, which were false or materially incorrect. They were under the *bona fide* belief that the ETA obtained by the third party was valid and true.

4. On the other hand the Learned DR has argued that the goods were liable to confiscation, after the ETA certificates have been found to be fake and element of *mens rea* is not an essential ingredient for confiscation and imposition of penalty for contravention of provisions of a civil act. He also argued that as per Foreign Trade Policy 2015-2020 para 2.03, all the domestic Laws/Rules/ Orders/Regulations/Technical specifications/environmental/ safety and health norms applicable to domestically produced goods shall apply, *mutatis mutandis*, to imports unless specifically exempt. It is argued that the corrigendum was validly issued as the Adjudicating Authority had only rectified the unintended mistake by imposing penalty under Section 114AA of the Customs Act, as the appellants could not have escaped wrath of penal action under Section 114AA having produced fake/forged ETA. He relied upon the case law in *Sanjay Bahadur v. Commissioner of Central Excise, Belapur* reported in [2009 \(240\) E.L.T. 282](#) (Tri. - Mumbai).

5. Having heard both sides and on perusal of appeal record, we find that it is an admitted fact that ETAs produced by the importer were found to be fake on verification. Once the ETAs is found fake, the argument put forth by the Learned Counsel of the appellants that country of manufacture was not relevant and not required to be mentioned on ETA holds no ground. The argument could have some validity only when the ETA had been genuine and there was only dispute of country of manufacture or origin. Here country of manufacture is not in the dispute but there is a violation of relevant notification issued by the Ministry of Telecommunication No. GSR 45(E), dated 28-1-2005 which requires the importer to produce a valid ETA issued by the Ministry of Telecommunications. Once it is on record that the ETA was not issued by the Ministry of Telecommunications and was fake, all other arguments that country of origin was not required on ETA, etc., become meaningless.

6. The other argument advanced by the Learned Counsel is that they were not personally involved in the forgery of the ETAs and it was the third party who had given them fake ETAs and thus no *mens rea* was involved on their part and hence they had not violated the provisions of Section 111(d) of Customs Act with respect to imports. In this regard we find that in view of the fact that the Hon'ble Apex Court has held in a number of cases that *mens rea* is not necessary for contravention of a civil act. The Hon'ble High Court of Madras in the case of *Commissioner of Customs (Export), Chennai-I v. Bansal Industries* reported in [2007 \(207\) E.L.T. 346](#) (Mad.) has upheld an imposition of penalty under Section 112 of the Customs Act without involving any *mens rea* in the case by

placing reliance upon the Hon'ble Apex Court's decision in *Chairman, SEBI v. Shriram Mutual Fund* - [(2006) 5 SCC 361] where it has been held as under :-

"In our opinion, *mens rea* is not an essential ingredient for contravention of the provisions of a civil act. In our view, the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not".

7. Once the ETA was found to be fake, the importer could not escape the liability to contravention of Section 111(d) which states that goods imported in contravention of the Customs Act or any other law for the time being in force would be liable to confiscation. We also find that the compliance of statutory requirements with regard to valid importation of the goods, was primary responsibility of the appellant being importer and therefore he cannot escape from this responsibility and thus become liable for penalty under Section 112(a) of the Customs Act, 1962.

8. However, we are of the considered view that the corrigendum issued for imposing of penalty under Section 114AA of the Customs Act, 1962 which had no reference in the original order is not sustainable as it amounts to review of the original order. There is no reference that the original order had considered imposition of any penalty under Section 114AA of the Customs Act. We are in agreement with the Learned Counsel of the appellants that once the order is passed by the Adjudicating Authority, he becomes a *functus officio* and he cannot reopen the case. Only clerical mistakes, which are apparent on record can be rectified by a corrigendum. We find that case law in *Sanjay Bahadur v. Commissioner of Central Excise, Belapur* reported in [2009 \(240\) E.L.T. 282](#) (Tri. - Mumbai) is distinguishable because in that case penalty under Section 11AC of the Central Excise Act was imposed but only the quantum was not mentioned. As penalty under Section 11AC is mandatory penalty such mistake could be rectified. Further, penalty was proposed on the director in the show cause notice but no order was passed in the original order with respect to penalty either for vacating or imposing the penalty. Thus mistake was apparent on record which was rectified by the corrigendum. In this case no show cause [notice] having been issued and no penalty in the impugned original order been imposed, we cannot consider that the original order envisaged any imposition of penalty under Section 114AA. Even on merits we find that penalty under Section 114AA involves *mens rea* on the part of the person who is held liable to penalty under section *ibid* as the section is applicable to persons who "knowingly or intentionally" makes use of the false document. The appellants have always taken this stand that the procurement of valid ETA was the responsibility of Fitbit Inc. USA and they had only produced ETAs procured by Fitbit Inc. USA through a third person. There is nothing on record that the appellant had knowingly or intentionally produced the false ETAs. Hence penalty under Section 114AA is not sustainable. We also hold that the accessories valued Rs. 7,11,137/- are also not liable to confiscation as those did not attract the requirement notified under Ministry of Telecommunications letter dated 28-1-2005 mentioned above.

9. In view of the above discussions penalty of Rs. 9,00,000/- imposed under Section 114AA of the Customs Act, 1962 is set aside.

10. In view of above discussions, we feel that the appellant are liable to penalty under Section 112(a)(ii) of the Customs Act, 1962 and thus we find no infirmity in the order-in-original on this count, however, considering all the facts and circumstances of the matter the quantum of penalty under Section 112(a) is reduced to Rs. 10,00,000/- (Rupees ten lakhs only).

11. The appeal is partly allowed in above terms.

(Order pronounced in the open Court on 8-8-2019)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH-COURT NO.-IV

Customs Appeal No.52328 of 2018 [DB]

[Arising out of Order-in-Original No. 118/ADC/ZR/2015 dated 04.09.2015 passed by the Additional Commissioner of Customs (Preventive), New Custom House, New Delhi]

M/s. N. R. International

...Appellant

Vs.

**Additional Commissioner of
Customs (Preventive), New Delhi**

...Respondent

APPEARANCE:

Shri Sunil Kumar, Authorised Representative for the Respondent

**Coram: HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)**

DATE OF HEARING/DECISION: 21.08.2019

FINAL ORDER No. 51159/2019

RACHNA GUPTA

None is present for the appellant. Perusal of file shows that the appellant is repeatedly seeking adjournments since September, 2018. It is also observed that vide Order dated 03.07.2019 appellant was directed to provide the legible copies of the documents particularly Order-in-Original. But the appellant failed even to provide the said legible copies on the adjourned date i.e.25.07.2019. Rather had again sought an adjournment.It becomes clear that more than a dozen adjournments have been sought by the appellant in the present case. The said conduct of the appellant is sufficient for us to form an opinion that the appellant is not interested in pursuing the impugned matter.

2. Perusal of Order of adjudicating authority below reveals that the Department observed mis-declaration as far as the number of cartons/packages imported and the weight thereof is concerned, as were imported by the appellant vide Bill of Entry No. 8472911 dated 03.03.2015. Department also observed the under-valuation of the consignments. Based upon the acknowledgment of the partner of appellant Shri Umesh Mittal as in his statement dated 11.03.2015 and 20.03.2015 as were recorded under Section 108 of the Customs Act, 1962 that the differential duty of Rs.3,57,973/- was confirmed. We also observe that the same stands deposited vide TR6 Challan No. 22082 dated 20.03.2015. Thus, seeing from the merits as well we do not find any justification in the impugned Appeal.

3. As a result of entire above discussion, the Appeal in hand is dismissed not only for want of the compliance and non-prosecution on part of the appellant but also for his absence as on date and for no merits in this Appeal to his favour.

[Dictated and pronounced in the open Court]

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. IV**

Customs Appeal No. 51106 of 2018 [DB]

Arising out of Order-in-Original No. 04/KB/POLICY/2018, Dated: 05.02.2018
Passed by the Commissioner of Customs (General), New Delhi

Date of Hearing: 14.02.2019

Date of Decision: 24.06.2019

**M/s RUBAL LOGISTICS PVT LTD
1/10930, STREET NO 7A, SUBHASH PARK
NAVEEN SHAHDARA, NEW DELHI - 110032**

Vs

**COMMISSIONER OF CUSTOMS (GENERAL)
NEW CUSTOM HOUSE, NEAR IGI AIRPORT
NEW DELHI - 110037**

Appellant Rep by: Ms. Vibha Narang, Adv.

Respondent Rep by: Mr Sunil Kumar, AR

CORAM: Bijay Kumar, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NO. 50797/2019

Per: Rachna Gupta:

Present is an appeal preferred against the Order-in-Original No.04/KB/2018 dated 05.02.2018 vide which penalty of Rs.40,000/- has been imposed upon the appellant M/s. Rubal Logistics Pvt. Ltd. under the provisions of Regulations 22 of CBLR, 2013.

2. The relevant factual matrix to adjudicate the same is that M/s.Pax Technologies Pvt. Ltd., the importer, was engaged in importing Point of Sale Devices (POS) and Mobile Point of Sale Devices (MPOS) from China. Pursuant to an intelligence as developed by Special Intelligence and Investigation Branch (SIIB) Air Cargo Complex (ACC), Import, New Customs House, New Delhi against said M/s. Pax Technologies, it was observed that the importer has already got cleared one consignment under Bill of Entry No.3650483 dated 19.12.2016 for 4600 Units of D-180 Terminals with the declared transaction value at the rate of 1.5 USD per piece (total value USD 6900). However, the invoice for the said consignments as was procured from M/s. DHL, the Carrier suggested that the actual value of said consignment was USD 69000 i.e USD 15 per Unit. Resultantly, a watch was kept on the subsequent consignments of the importer. Two consignments with respect to bill of entry No.3851878 dated 08.01.2016 and 3851698 dated 08.01.2016 for 4700 and 4649 pieces respectively of D-180 Terminals were intercepted. Preventive check was applied by SIIB on the said shipments and the goods were examined in presence of representative of CHA and the Director of the importer Ms. Latha Priyadarshini. The goods were found to be misdeclared. Accordingly, were seized under Section 110 of the Customs Act, 1962 vide Panchnama dated 13.01.2016. These investigations culminated into the show cause notice No.11558 dated 28.08.2017 proposing the revocation of Customs Broker License of the appellant alongwith the forfeiture of the security submitted and the appropriate penalty was proposed to be imposed upon the CHA, the appellant herein. The said show cause notice was adjudicated vide the above mentioned order under challenge vide which proposal as far as the revocation of the license and the forfeiture of the security amount was rejected. However, the proposal of imposition of penalty under Regulation 22 of CBLR was accepted and a penalty of Rs.40,000/- was imposed upon CHA. Being aggrieved of the said order, the appellant is before this Tribunal.

3. We have heard Ms. Vibha Narang, ld. Counsel for the appellant and Shri. Sunil Kumar, ld. D. R. for the Department.

4. It is submitted on behalf of the appellant that the appellant CHA had no role in facilitation of the alleged import. His role was limited to the filing of the documents, complying with the paper work, producing the goods for examination, resolving the queries of Customs Authorities so raised and then upon satisfaction of the doubts of Customs Authorities, getting the assessment completed upon the payment of Customs Duty facilitating the goods for clearance from the Customs area. All these duties have fully been complied with by the CHA, appellant herein. However, the knowledge of CHA as far as valuation and quality of goods is concerned was very very limited, who has otherwise fulfilled all KYC norms and had also satisfied that importer was having valid IECE No. it is alleged that the penalty has wrongly been imposed, wrongly alleging violation of provisions of Regulations 11 (d), (e) and (m) of CBLR, 2013. Order under challenge is prayed to be set aside. Appeal is prayed to be allowed.

5. While rebutting these arguments, it is submitted that the adjudicating authority below has in detailed considered role of importer as well as that of the CHA while adjudicating the alleged evasion of Customs duty and mis-declaration of goods under import and the contraventions, if any, committed by them. Statements of all concerned have been discussed in details. Thereafter the adjudicating authority has held that irrespective CHA got a mail from the Director of importer itself about WPC to not to be required on these items to have the bonafide belief, however, CHA has failed to observe his mandatory duty of Regulation 11. The Adjudicating Authority has been reasonable while rejecting the revocation of appellant's license. There is no infirmity as far as the imposition of penalty upon the Customs Broker is concerned. Appeal is prayed to be dismissed.

6. After hearing both the parties and perusing the entire record, we are of the opinion as follows:-

Present is apparently a case of misdeclaration, misclassification and under valuation of import of wireless Point of Sale Devices (POS) and Mobile Point of Sale Device (MPOS). Department is of the opinion that the product (MPOS) has been imported by M/s. Pax Technology India Pvt. Ltd. and cleared through the Customs broker, M/s. Rubal Logistics Pvt. Ltd. i.e. the present appellant, who initially filed the Bill of Entry on the basis of invoices raised by M/s. Wang Technologies Ltd. by replacing earlier invoice raised by M/s. Pax Technology Ltd., Hong Kong to M/s. Pax Technology India Pvt. Ltd. itself. From the Order-in-Original, it is observed that the adjudicating authority has gone into the details of the statements of all concerned recorded at the stage of investigation. Not only this, the authority has perused the Master Distribution Agreement of M/s. Pax Technology India Pvt. Ltd. and has observed that the soft-ware license was an integral part of the devices without which the impugned devices could not be operated and that the value of soft ware license fee has to be included in the total value of the devices. Based on these observations that the impugned goods were held to be misclassified and misvalued/ misdeclared. However, as far as the role of the appellant is concerned, it is observed by the adjudicating authority that he bonafidely believed about the changed invoice to be the correct one. The CHA is rather observed to have complied with the formalities as that of KYC documentation. It is in view whereof that his license has not been revoked. However, the penalty has been imposed under 11 (d), (e) & (m) of CBLR, 2013. These read as follows:-

31.4.1 Whereas Regulation 11 (d) of CBLR, 2013 states that:

"A Custom broker shall advise his client to comply with the provisions of the Act and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs of Assistant Commissioner of Customs, as the case may be"

31.4.2 Whereas, Regulation: 11(e) prescribes that:

"A Customs Broker shall exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage"

31.4.3 Whereas Regulation 11(m) of CBLR

"A Customs Broker shall discharge his duties as a Customs Broker with utmost speed and efficiency and without any delay"

6.1 These provisions require the Customs Broker to exercise due diligence to ascertain the correctness of any information and to advice the client accordingly. Though the CHA was accepted as having no mensrea of the noticed mis-

declaration /under- valuation or mis-quantification but from his own statement acknowledging the negligence on his part to properly ensure the same, we are of the opinion that CH definitely has committed violation of the above mentioned Regulations. These Regulations caused a mandatory duty upon the CHA, who is an important link between the Customs Authorities and the importer/exporter. Any dereliction/lack of due diligence since has caused the Exchequer loss in terms of evasion of Customs Duty, the original adjudicating authority has rightly imposed the penalty upon the appellant herein.

7. As a result, we do not find any infirmity in the order under challenge, same is hereby upheld. Appeal stands dismissed.

(Order pronounced in the open Court on 24.06.2019)

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

PRINCIPAL BENCH-COURT NO.II

Customs Appeal No. 50093 of 2019

(Arising out of order-in-original No. 29/2018/RNS/COMMR./IMP/ ICD/ TKD
dated 22.10.2018 passed by the Commissioner of Customs, ICD, Tughlakabad,
New Delhi).

Commissioner of Customs

VERSUS

Appellant

M/s Saraswati Impex

Respondent

APPEARANCE:

Shri Sunil Kumar, Authorised Representative for the appellant
None for the respondent

CORAM:

**HON'BLE MR. ANIL CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

FINAL ORDER No.51853/2019

**DATE OF
HEARING/DECISION:17.10.2019**

ANIL CHOUDHARY:

This appeal is filed by Revenue against the impugned order-in-original dated 22.10.2018.

2. As notice could not be served on the respondent in the ordinary course, upon direction of this Tribunal dated 04.07.2019. Notice has been served by affixing vide panchnama dated 18.09.2019 at the known address of the respondent, as per the report received from the Deputy Director (CI), DRI, New Delhi. Attempt was also made to serve notice by e-mail dated 09.09.2019 by Revenue to the address on record of the respondent. However, due to some error in the address, the e-mail could not be delivered. The substituted notice has been served, but the respondent has failed to appear, hence the appeal is taken up for hearing with the assistance of learned Authorised Representative for the Revenue.

3. Heard the learned Authorised Representative for the Revenue and perused the records.

4. On the basis of intelligence received by Revenue, Container No. MSKU

9987950 being goods imported by respondent under Bill of Entry No. 2404237 dated 13.06.2013 was put on hold for examination. The said container was examined on 21.06.2013 and confirmed to be containing fabrics. Three representative samples measuring 1.5 meter (approx) of white and off white wrapping was drawn on random basis for analysis/ testing purpose, due to fading light, complete examination could not be completed and examination was continued on the next day on 24.06.2013. During examination, the number and rolls and meterage were found as per detailed packing list. However, the width of the rolls in respect of items mentioned in the packing list marked as D-1 was found to be 44 inches, whereas, as per the Bill of Entry width was declared as 58 inches. The DRI officers selected 15 (fifteen) numbers of representative rolls and from each roll, three samples were drawn and marked as A1, A2, A3 and B1, B2 and B3 respectively to 01, 02 and 03. Since the goods appeared to be different from the declared description, the goods were detained for further investigation. On representative samples each was washed and edover to Shri Jitendra Purohit, Importer. As per the test report received from CRCL and the invoice submitted by Shri Chhagan Raj Purohit revealed that several rolls of fabrics were made entirely of polyester and viscose yarns, which indicated mis-declaration in description of the goods that were declared in the bill of entry.

5. Statement of Shri Chhagan Raj Purohit, de facto importer was recorded on 25.06.2013, who inter alia admitted the possibility of the mis-declaration. The actual commercial invoice No. 232013A dated 10.06.2013 issued in the name of M/s Saraswati Impex pertaining to bill of entry No. 2404237 was submitted by Shri Chhagan Raj Purohit as per which quantity of different type of fabric was 69358.9 meters and actual value at USD 90266.90 FOB, as against the declared quantity and value of 43713.3 meters and USD 30599.31 CIF respectively. As the goods were found to be mis-declared, the same were put under seizure under Section 110 of the Act vide seizure memo dated 16.07.2013.

6. For ascertaining the actual value of the goods, assistance of Overseas Customs Authority, to conduct necessary enquiry at their end and to furnish export declaration etc. filed by the shipper/supplier. In response to which export declarations filed at the port of shipment, wherein information like Bill of Lading No., booking No., container No., quantity, description & quantity of the goods relating to six consignments imported by M/s Saraswati Impex and 13 consignments imported by M/s Rajhans Export were received from the Overseas

Customs Administration. On comparison of import value declared by M/s Saraswati Impex and M/s Rajhans Export in the bill of entry before Indian Customs and the actual value as per the export declaration, it was found that lower value were declared by the respondent-importers for evading customs duty. Shri Chhagan Raj Purohit was the Prop. of M/s Rajhans Export and defacto Prop. of M/s Saraswati Impex. Shri Jitender Purohit was Prop. of M/s Saraswati Impex as per records.

7. Pursuant to the facts from investigation and the statement recorded, It appeared that –

(i) M/s Saraswati Impex and M/s Rajhans Export mis-declared the description as well as value imported by them from China, which is evident on the basis of panchnama, test report and also the evidences received from Overseas Customs Administration.

(ii) M/s Saraswati Impex deposited differential amount of Rs. 35 lakhs voluntarily as regards mis-declaration found in the bill of entry No.2404237, Container No.MSKU9987950.

(iii) In spite of ample opportunities the respondent did not submit supporting documents like manufacturing invoice, contract, indicating dubious nature of declaration made.

(iv) Shri Ashok Sharma, Director of CHA company M/s HLPL Global Logistics Pvt. Ltd., stated that they have filed the bill of entry as per the documents provided by the importer. It also appeared that the respondent were importing the fabrics in their own name and selling them without issuing any invoices. Further, it appeared that the respondent was remitting the differential value through other non banking channels in illicit manner.

(v) Accordingly, the declared value appeared to be fit to be rejected in accordance with the Customs Valuation Rules, 2007. Further, the goods appeared to be liable for confiscation.

8. The respondent M/s Saraswati Impex was required to show cause vide show cause notice dated 14.01.2016 as to why the goods mentioned in table 5 to the show cause notice imported vide Bill of Entry No.2404237 be not re-classified under CTH55151190, 54077300, 52083290, 52084290, 520931990, 58013720 and 53110013 instead of CTH 52093190. It was further proposed to reject the declared value of the goods amounting to Rs.52,77,989/- with proposal to confiscate the goods under Section 111(m) of the Act with further proposal to

demand differential duty of Rs.30,24,833/-.

9. It was also proposed to reject the declared value with respect to other bill, of entry as detailed in chart 'A'(of show cause notice) in terms of Rule 12 of the CVR, 2007. The declared value of Rs.1,15,35,086/-be not rejected and re-assessed at Rs.6,17,92,567/- under Rule 9 of CVR, 2007 with further proposal to confiscate the goods and demand differential duty of Rs. 1,53,15,706/- with further proposal to impose penalty. There was also proposal to appropriate the amount of Rs.35 lakhs deposited during investigation along with proposal to appropriate the Bank Guarantee of Rs. 5 lakhs submitted for provisional release.

10. Similarly, M/s Rajhans Export were required to show cause as to why not the assessable value of Rs.2,90,85,000/-in respect of 13 import consignments as detailed in chart 'B' of the show cause notice, be not rejected and re-valued at Rs. 11,12,20,815/- under Rule 9 of CVR, 2007 with proposal for confiscation and demand of differential duty of Rs.2,54,30,137/-,with proposal to impose penalty under Section 114A of the Customs Act, 1962. Personal penalty was also proposed under Section 114AA of the Act on Shri Chhagan Raj Purohit and Shri JitenderPurohit-proprietor and penalty was also proposed on shipping line - M/s Maersk Line India Pvt. Limited, under Section117 of the Customs Act, 1962.

11. Only the shipping line M/s Maersk Line India Pvt. Limited filed reply to show cause notice being written submission dated 15.02.2016, where in the y inter-alia stated that the shipper has booked the full container. In respect of full container load, it is the Universal Shipping Practice that such containers are taken by the shipper from the container line in empty goods condition to their warehouse, where the export car go loaded/stored by shipper them selves under supervision of the customs authority and are closed and sealed by the Customs authority. Thus, the shipping line has got no role with respect to stuffing of the container, preparation of export documents and filing of declaration by the shipper.

12. With respect to the consignment in Container No. MSKU9987950 stated to contain textile piece goods, was loaded stowed and stuffed inside factory by the shipper at China namely -M/s Shaoxing County Roxton Import & Export Co. Limited. The container was sealed with Seal No.CN6178482, thus the shipping line has no occasion to know the goods, only they deal like bill of lading and other particulars furnished by the shipper. There is no case against the shipping line of

the Customs seal having been tempered during transit. It is further urged that neither any provision of the act is violated, nor there is any case of abetment made out against them. Accordingly, they prayed for dropping the show cause notice.

13. Shri Chhagan Raj Purohit, the owner of M/s Rajhans Export and defacto owner of M/s Saraswati Impex vide letter dated 08.02.2016 and 29.03.2016 requested for supply of RUDs through speed post. The documents were dispatched by Revenue vide speed post vide letter dated 23.01.2018. Opportunity of personal hearing was fixed on 15.03.2018 and 16.04.2018 but no one appeared. It is further observed in para 33.2 of the impugned order that the notices for personal hearing were received back undelivered with the postal remark 'not known and left'. All the notices for personal hearing was also pasted on the notice board in the office of the adjudicating authority.

14. Accordingly, vide impugned ex-parte order against the respondent, proposals in show cause notice was confirmed along with order of confiscation. Redemption fine was imposed amounting to Rs. 5 lakhs and for goods imported under Bill of Entry No. 2404237, differential custom duty was confirmed along with equal amount of penalty under Section 114A. Further, order for appropriation of the amount of Rs. 35 lakhs deposited during investigation. Similarly, the proposal in respect of M/s Rajhans Exports was also confirmed along with penalty of equal amount. Further, personal penalty of Rs.1 crore and Rs. 10 lakhs on Shri Chhagan Raj Purohit and Shri Jitender Purohit was imposed respectively under Section 114AA of the Customs Act, 1962, and penalty of Rs. 1 lakhs imposed on M/s Maersk Line India Pvt. Limited under Section 117 of the Customs Act, 1962.

15. Revenue has filed the present appeal. Being aggrieved due to non imposition of penalty on respondent M/s Saraswati Impex under Section 114A in relation to import vide Bill of Entry No. 2404237.

16. Learned Authorised Representative Shri Sunil Kumar appearing for the Revenue states that learned Commissioner has erred by not imposing penalty under Section 114A inspite of clear finding of mis-declaration with respect to quantity and value, and under the facts and circumstances, he prayed that it is a fit case for imposition of penalty.

17. Having considered the submissions made by learned AR for the Revenue and on perusal of record, we find that there is error in the impugned order, so far as penalty not imposed under Section 114A with respect to good simport under Bill of Entry No. 2404237. Accordingly, we impose the penalty of Rs. 30,24,833/- under Section 114A of the Customs Act with respect to goods imported under Bill of Entry No.2404237.

18. Accordingly, this appeal is allowed and impugned order stands modified to the above extent.

(Operative part of order pronounced in open Court).

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. IV]

Shri C.L. Mahar, Member (T) and Ms. Rachna Gupta, Member (J)

SRIAANSHU LOGISTICS

Versus

COMMISSIONER OF CUSTOMS, NEW DELHI

Final Order No. C/A/53398/2018-CU(DB), dated 17-12-2018 in Appeal No.
C/51429/2018-EX(DB)

REPRESENTED BY :Shri G.S. Arora, Advocate, for the Appellant.

Shri Sunil Kumar, DR, for the Respondent.

[Order per : Rachna Gupta, Member (J)]. - The appellant herein is a holder of CB License valid up to 30-4-2020 issued by Commissioner of Customs (I & G), New Delhi. Directorate of Revenue Intelligence received information about silver jewellery being smuggled into India in the guise of Mobile Phones and accessories in the consignments landed at Air Cargo, Delhi from Hong Kong on 18th & 19th September, 2016. Accordingly, an alert dated 19-9-2016 was issued by DRI to stop clearances of the consignments declared to contain mobile phones and accessories. Resultantly, two consignments were examined by DRI Officers. One is with respect to bill of entry No. 6767709, dated 19-9-2016 pertaining to M/s. Yogi Enterprises, New Delhi and another under Bill of Entry No. 6768517, dated 19-9-2016 pertaining to M/s. DSK Enterprises, New Delhi declared to contain Mobile phones and accessories. The consignments pertaining to M/s. Yogi Enterprises was filed through CB M/s. Sriaanshu Logistic New Delhi that is the appellant and was cleared on 21-9-2016. However, M/s. Yogi Enterprises vide their letter dated 3rd February, 2017 submitted the revised commercial invoice dated 16-9-2016 declaring assessable value of undeclared goods of Rs. 1,92,93,300/-. Similarly on physical examination of consignment covered under the later bill pertaining to M/s. DSK Enterprises, it was found to contain silver jewellery along with PCB for DTH Mobile phones and accessories, etc.

2. The CB i.e. the appellant on being examined, accepted that he was not in touch with the importer and had allowed Shri Narender Narula and Shri Rupan Barua to use his CB license for clearance of consignment of the said importers. It was accordingly alleged by the Department that present case is related to mis-declaration of imported goods with intent to evade duty and appellant has failed to advise his clients to comply with the provisions of the Act and has failed to bring the matter to the notice of the Department. Thus, has contravened his duties under Regulations 10, 11(a)(b)(d)(e) & 11(m) of CBLR, 2013. Resultantly, an offence report was received in the office of DRI based whereupon the appellant was called to explain as to why his CB License may not be revoked and whole of security amount of Rs. 75,000/- may not be forfeited, in terms of Regulation 18 read with Regulation 20 of CBLR, 2013 with the imposition of penalty. The said proposal has been confirmed vide the impugned order No. 80, dated 4th December, 2017. Being aggrieved the appeal is before this Tribunal.

3. It is submitted on behalf of appellant that all the allegations of Department are based on presumptions and surmises. There is sufficient evidence and also the statement of the proprietor of appellant to the effect that all the KYC documents of importers were duly E-mailed to the Customs Broker Shri Sanjeev Saxena thereby evidencing that the CB only who was exercising control over the operation of verifying/facilitating the import documents of the intended importers. These evidences are sufficient to falsifying the allegations of the Department that appellant was not ensuring compliance of the customs law. The adjudicating authority below has outrightly ignored the said evidence. It is also impressed upon that appellant was rather coerced by DRI to admit that he has lent his licence to Shri Narula and Shri Barua. No evidence at all could be produced by

the Department to prove the said allegation of transfer of CB licence of appellant or sale thereof by him to Mr. Narender Narula or Mr. Rupen Burua. The order under challenge is alleged as against the evidence. The appellant has relied upon *Dakor Clearing and Shipping Pvt. Ltd.* - 2015 (326) E.L.T. 178 (Tri. - Mumbai). Accordingly the order is prayed to be set aside. Appeal is prayed to be allowed.

4. Ld. DR while rebutting these arguments has submitted that the adjudicating authority below has meticulously examined the entire evidence available on record including the statements recorded during the investigation and the documents recovered during the search of the premises of the appellant. The order is reasonably a speaking order and hence is liable to sustain. Appeal is accordingly prayed to be dismissed.

5. After hearing both the parties, we are of the opinion as follows:-

The customs broker license of the appellant has been revoked conforming the contravention on his part of Regulations 10, 11(a)(b)(d)(e) & 11(m) of CBLR, 2013. In accordance of these regulations customs broker is duty bound to -

- (1) Ensure that his license shall not be sold or otherwise transferred [Regulation 10]
- (2) Obtain an authorization from each of the companies, firm or individuals by whom he is for the time being employed as customs broker [Regulation 11(a)]
- (3) Transact business in customs station either personally or through an employee duly approved [Regulation 11(b)]
- (4) Advise his client to comply with the provisions of the Act and in case of non-compliance shall bring the matter to the notice of competent authority [Regulation 11(d)]
- (5) Exercise due diligence to ascertain the correctness of any information being imparted to a client [Regulation 11(e)]
- (6) Verify antecedence, correctness of importer-exporter code No., identity of its client and functioning of its client at the declared address by using reliable independent authentic documents, data or information [Regulation 11(n) of CBLR, 2013]

6. It is apparent that statement of proprietor of appellant i.e. Shri Sanjeev Saxena has been recorded on several dates. Perusal of all those statements shows that there is an apparent admission that he filed the bill of entry in respect of both the impugned consignments but had never met the IEC Holder/proprietor/Director/owner of these importing firms. In his statement dated 26-9-2016 he has admitted that both these firms were the clients of Shri Narula and Shri Rupan Barua. It is also the acknowledgement on part of Shri Sanjeev Saxena that he had sub-let the work of clearance of import consignment to both of them. This acknowledgement is very much against the Regulation 10 of CBLR, 2013. He has gone to the extent of admitting that the import documents for clearance of the impugned goods were received by said Shri Narula and all the documents provided to the appellant were digitally signed by his employee and holder of G Card Shri Rajveer Singh Patel for the clearance of the imported goods. He had not obtained any authorization in respect of these companies, they being the clients of Mr. Narula and Mr. Burua to whom the appellant had sub-let his licence against the commission charges. Resultantly, they both only were concerned with the actual clearance work of the said companies. This acknowledgement on behalf of appellant is sufficient evidence to hold violation of Regulation 11(b).

7. Mr. Saxena has admitted that because of him being not in touch with both these importers, he had no knowledge of the consignment declaring mobile phones and accessories to also contain silver jewellery. Once he had no such knowledge and he was not actually processing the papers, but had just received the KYC on E-mail, the possibility of said E-mail to be a mere formality cannot be ruled out and it became apparent on record that there was no connection between

the appellant and both the impugned importing firms to be advised by the appellant thereby resulting into violation of Regulation 11(d). Nor there arises any occasion for the appellant in the given circumstances to exercise due diligence for ascertaining the correctness of any information. Thereby confirming the violation of Regulation 11(e) on part of the appellant.

8. Mr. Sanjeev Saxena has specifically stated that Shri Narula or Shri Barua used to log in into ICEGTA Website using log in ID and Password given by him and it were they who fed the particulars on the basis of invoice available with them and they only used the digital signature of Shri Ranveer Singh Patel, his 'G' Card holder to upload the data and that they presented themselves on behalf of the appellant/CB. The question of any verification by the appellant as required under Regulation 11(n) does not at all arise.

9. Though it is the appellant's case that his entire statement is the result of coercive exercises upon him by DRI officials at the stage of investigation but apparently and admittedly there is no retraction to the said statement. There is nothing on record that the appellant ever expressed his grievance before the senior authorities of the alleged coercion. In absence thereof and in absence of any evidence proving the statement to be incorrect, it stands established that the appellant had failed to observe his duties as custom broker as he was burdened with statutorily. The appellant has relied upon *Dakor Clearing and Shipping Pvt. Ltd.* (supra), but to our opinion that decision is not applicable to the facts and circumstances of the present case. In that case there was an enquiry report holding that the charges against the CHA are not proved. It is not the fact for the present case. Also there was no evidence of any illegal sale or transfer of CHA licence for monitory benefit.

10. *Per contra*, in the present case, it is appellant's own admission that he had allowed Mr. Narula and Mr. Barua to use his licence for their own clients against monthly commission to be paid to the appellant. As already mentioned above, the appellant has not produced any evidence contrary to the said statement. The only emphasis about KYC documents being mailed to him by Mr. Narula is not sufficient to satisfy that appellant was otherwise observing his statutory duties. The Hon'ble Apex Court in the case of *Commissioner of Customs v. K.M. Ganatra and Co.* - 2016-TIOL-13-S.C. = [2016 \(332\) E.L.T. 15](#) (S.C.) has held that CHA occupies a very important position in custom house. The customs procedures are complicated. The importers have to deal with a multiplicity of agencies i.e. carriers, custodians like BPT as well as the customs. The importer would find it impossible to clear his goods through these agencies without wasting valuable energy and time. The CHA is therefore, supported to safeguard the interest of both the importers and the customs. A lot of trust is pose in CHA by the importers/exporters as well as by the Govt. Agencies. To ensure appropriate discharge of such trust the relevant regulations are found. The Hon'ble Apex Court has clarified that any contravention of such obligations even without intent would be sufficient to invite upon the CHA the punishment listed in the regulation. Delegation of its function by CHA has been held as a ground for CHA to be responsible for fraudulent activity of the third parties as was also clarified by the High Court of Madras in the case of *Kamakshy Agency v. Commissioner of Customs, Madras* - [2001 \(129\) E.L.T. 29](#) (Mad.).

11. In view of the entire above discussion, we find no infirmity in the order under challenge. The same is hereby upheld. Appeal stands dismissed.

(Pronounced in the open Court on 17-12-2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. I**

**Customs Miscellaneous Application No. 51140 of 2019
(on behalf of Commissioner of Customs IN
CUSTOMS APPEAL No. 52388 of 2019**

Arising out of Order-in-Appeal No. CC(A)Cus/D-I/ACC-Export/Refund/
NCH/250-251/2019-20, Dated: 14.06.2019
Passed by Commissioner of Customs (Appeals), New Delhi

**AND
CUSTOMS MISCELLANEOUS APPLICATION No. 51141 of 2019
(on behalf of Commissioner of Customs IN
CUSTOMS APPEAL No. 52389 of 2019**

Arising out of Order-in-Appeal No. CC(A)Cus/D-I/ACC-Export/Refund/
NCH/250-251/2019-20, Dated: 14.06.2019
Passed by Commissioner of Customs (Appeals), New Delhi

**Date of Hearing: 05.02.2020
Date of Decision: 08.06.2020**

**PRINCIPAL COMMISSIONER OF CUSTOMS
NEW DELHI (IMPORT) ACC IMPORT COMMISSIONERATE
NEW CUSTOM HOUSE, NEW DELHI-110037**

Vs

**M/s VIVO MOBILE INDIA PVT LTD
3RD FLOOR, DELTA TOWER, PLOT NO. 54, SECTOR-44
GURUGRAM, HARYANA**

Appellant Rep by: Mr Sunil Kumar, AR

Respondent Rep by: Mr Tarun Gulati, & Mr Kishore Kunal, Advs.

CORAM: Dilip Gupta, President
C L Mahar, Member (T)

MISCELLANEOUS ORDER NOS. 50178-50179/2020

Per: Dilip Gupta:

The Department has filed applications for raising an additional ground in the aforesaid two Appeals filed by the Department to assail the common order dated 14 June 2019 passed by the Commissioner of Customs (Appeals) The Commissioner(Appeals) by which the two appeals filed by M/s. Vivo Mobile India Pvt Ltd Vivo Mobile have been allowed and the two orders, both dated 23 January 2017, passed by the Deputy Commissioner (Refund) Deputy Commissioner have been set aside. The Commissioner (Appeals) has further allowed the two Applications filed by Vivo Mobile under section 27 of the Customs Act 1962 Customs Act for refund of Additional Customs Duty Additional Duty and has directed that Vivo Mobile would be entitled to a refund of Rs.3,01,49,633/- and Rs.2,92,96,394/- respectively. It needs to be noted that though the Deputy Commissioner had by said order dated 23 January, 2017 sanctioned the aforesaid refund amount but a direction was given that this amount should be credited to the Consumer Welfare Fund in terms of section 27(2) of the Customs Act.

2. To appreciate the reasons as to why applications have been filed by the Department to add a ground in the Appeals to the effect that the refund claims could not have been entertained unless the Assessment Orders were modified in accordance with law, it would be necessary to state the relevant facts.

3. Vivo Mobile, which is a respondent in both the appeals, was during the relevant period engaged in import and distribution of mobile phones and its accessories in India. It paid the Additional Duty of Customs at the rate of 6% up to February 2015 and thereafter, at the rate of 12.5% under section 3(1) of the Customs Tariff Act 1975 Tariff Act on the 12 bills of entry. However, in terms of a notification dated 17 March 2012, the Additional Duty was leviable at 1% under the entry at serial 263A for importing mobile phones provided condition no. 16 was satisfied. Condition no. 16 provides that for an assessee to claim lesser 1% Additional Duty,

it should not have taken credit under rule 3 or rule 13 of the CENVAT Credit Rules 2004 CENVAT Rules in respect of the inputs or capital goods used in the manufacturer of these goods.

4. The Supreme Court, in the context of the import of Nylon Filament Yarn of 210 deniers, examined a similar condition no. 20 in *SRF Ltd. vs Commissioner of Customs, Chennai 2015(318) ELT 607(SC)*. The Appellant had claimed nil rate of Additional Duty by relying upon a notification dated 1 March 2002. The Deputy Commissioner of Customs held that SRF Ltd. would not be entitled to exemption from payment of Additional Duty since it did not fulfill condition no. 20 of the said notification, which is to the effect that the importer should not have availed credit under rule 3 or rule 11 of the CENVAT Rules in respect of the capital goods used for the manufacture of these goods. The admitted position was that such CENVAT Credit was not availed by SRF Ltd. The Tribunal held that when the credit under CENVAT Rules was not admissible, the question of fulfilling the aforesaid condition did not arise and, therefore, as condition no. 20 was not satisfied SRF Ltd could not claim nil rate of Additional Duty. This reasoning of the Tribunal was found to be not correct by the Supreme Court in view of the judgments of the Supreme Court, wherein it was held that for the purpose of attracting Additional Duty of customs under section 3 of the Customs Tariff Act on the import of a manufactured or produced article, the actual manufacture or production of a like article in India was not necessary and that for quantification of Additional Duty in such a case, it has to be imagined that the article imported was manufactured or produced in India and then to see what amount of excise duty was leviable thereon. SRF Ltd was, therefore, held entitled to exemption from payment of Additional Duty.

5. Vivo Mobile, on the same reasoning, claimed that it would have to pay the reduced Additional Duty at the rate of 1% in terms of condition no. 16 of the notification dated 17 March 2012, which is identical to condition no. 20 of the notification dated 1 March 2002 that was examined by the Supreme Court in SRF Ltd. It had, however, paid Additional Duty at the rate of 6% up to February 2015 and at the rate of 12.5% thereafter and, therefore, filed applications for refund of the excess Additional Duty of customs that was paid by it.

6. On scrutiny of the documents submitted by Vivo Mobile with the refund claims, it was found by the Department that various documents, including re-assessment of bills of entry in respect of the aforesaid refund amount had not been filed. Accordingly, a deficiency memorandum dated 28 January 2016 was issued to clarify the position. Vivo Mobile responded to the deficiency memo and pointed out that the refund applications filed by it be considered as a request for re-assessment of the bills of entry since "the filing of the refund application ipso facto means and implies that they are seeking re-assessment of all the impugned bills of entry". It was further stated that when the goods were allowed to be cleared, the valuation aspect was examined by the proper officer and the officer competent to decide the refund application has a concurrent jurisdiction. Thus, it was pleaded that the refund claim itself should be treated as a request for re-assessment of the bills of entry, in view of the decision of the Supreme Court in *Karnataka Power Ltd vs Commissioner of Customs (Appeals) 2002 (142) ELT 482 (SC)*.

7. The Deputy Commissioner framed two questions to be decided and they are as follows:

- i) Whether the importer was eligible for the benefit of notification dated 17 March 2012 in terms of condition no. 16 in the light of judgement passed by the Supreme Court in SRF; and
- ii) Whether the importer was eligible for refund claim, if the answer to the aforesaid question is in the affirmative.

8. The Deputy Commissioner, in view of the decision of the Supreme Court in SRF Ltd, held that Vivo Mobile in terms of condition no. 16 of the notification dated 17 March 2012, would be required to pay Additional Duty at the reduced rate of 1%. The Deputy Commissioner then examined whether it was necessary for Vivo Mobile to get re-assessment of the bills of entry and for this purpose examined the decision of the Delhi High Court in *M/s. Micromax Informatics Ltd. vs. Union of India 2016 (335) ELT 446 (Del.)* that had been placed by Vivo Mobile to contend that it was not necessary to seek re-assessment of the bills of entry. The Delhi High Court had held that an authority would not be justified in refusing to

entertain an application for refund only because no appeal was filed against the assessment order, even if there was one. The Deputy Commissioner, accordingly, held that there was no necessity of seeking modification in the Bills of Entry. The relevant portion of the order is reproduced below:

*"In any event, after 8th April, 2011, as noticed hereinbefore, as long as customs duty or interest has been paid or borne by a person, a claim for refund made by such person under section 27(1) of the Act as it now stands, will have to be entertained and an order passed thereon by the authority concerned even where an order of assessment may not have reviewed or modified in appeal. **Hence, again, following judicial discipline, the refund claim of the claimants, needs to been entertained on the basis of their self-assessed Bills of Entry, though there is no modifying order for those Bills of Entry**"*

[emphasis supplied]

9. After having so held, the Deputy Commissioner examined whether the refund claim was barred by limitation and whether the incidence of Additional Duty had not been passed on to the buyer, in which event it would be a case of unjust enrichment. The Deputy Commissioner found that though the refund Application had been filed in time, but the claimant had failed to prove that the claim was not hit by unjust enrichment. Accordingly, even though the refund claim was sanctioned, the Deputy Commissioner directed that the amount be credited in the account of the Consumer Welfare Fund in terms of section 27(2) of the Customs Act.

10. Feeling aggrieved, Vivo Mobile filed two appeals before the Commissioner (Appeals) against that part of the orders of the Deputy Commissioner that held that since it was a case of unjust enrichment, the sanctioned amount would not be payable to Vivo Mobile and would be required to be deposited in the Consumer Welfare Fund. The appeals filed by Vivo Mobile were allowed by the Commissioner (Appeals) for the reason that the incidence of Additional Duty had not been passed on to the buyers. The Commissioner (Appeals), therefore, directed that the amount be refunded to Vivo Mobile. The observations are as follows:

"5.4 The period for which the impugned refund claim was filed pertains to the period of 15.12.2014 to 05.06.2015. I find that in respect of a similar case of M/s YU Televentures Pvt. ltd., wherein refund claim was filed for the period January, 2015 to February, 2015, while disposing of Writ Petition No. W.P. (c) 6750/2016, the Hon'ble Court of Delhi vide Order dated 03.08.2016 set aside the OIO dated 07.06.2016 passed by the Adjudicating authority, wherein the refund claim was rejected by the Adjudicating authority on the similar grounds. The relevant portion of the said Hon'ble High Court Order is re-produced below:

"16. With the Petitioner having already placed all the relevant documents on record and with the only reason for rejection of the refund application being the untenable ground of alleged failure by the Petitioner to submit reassessed B/Es, the Court sees no reason why the Respondents should be permitted to deny the Petitioner the grant of refund any longer.

17. Accordingly, the refund claim filed by the Petitioner on 28th December 2015 is allowed. The Respondents will now pay to the Petitioner the amount of refund as claimed together with interest due thereon up to the date of refund not later than two weeks from today."

5.5. I also find from the records, submitted by the Appellant that in respect of the Appellant's own similar cases, refund claims of Rs. 8,05,06,281/- covering the period 15.06.2015 to 14.07.2015 have been sanctioned to the Appellant by the same Adjudicating Authority vide Order-in-Original No. 381/AT/2018 dated 28.05.2018, holding that the appellant was entitled to get the refund and the said amount was refunded to the Appellant.

5.6. Similarly, I find that the Respondent Commissionerate itself has sanctioned various refund claims to another importers of similar goods, post SRF Ltd. judgement, viz. Order-in-Original No. 2828/VKJ/2016 dated 23.01.2017 etc.

In view of the above discussions and findings, practices adopted in different Customs Houses while sanctioning refund to the importer on identical matter and strongly relying upon the ratio of the judgements passed by Hon'ble High Court of Delhi, Madras and Bombay, supra, I find that the impugned orders of the

Adjudicating authority to credit the refund amounts of Rs. 3,01,49,636/- and Rs. 2,92,96,394/- to the Consumer Welfare Fund in terms of Section 27(2) read with Section 28D of the Customs Act, 1962 is not legally sustainable and accordingly set aside."

11. It is against the orders of the Commissioner (Appeals) that the present appeals were filed by the Department on 30 September 2019 in view of the directions issued by the Committee of Commissioners under section 129A(2) of the Customs Act. The Committee of Commissioners had observed that the Commissioner (Appeals) was not justified in placing reliance upon the decision of the Delhi High Court in *M/s. YU Televentures Pvt. Ltd. vs. Union of India 2016 (340) ELT 88 (Del.)* since in that case the issue involved was whether refund could be granted without re-assessment of the bills of entry, whereas in the present case the issue involved was whether there was unjust enrichment and the issue relating to re-assessment of bills of entry was not involved. The Committee of Commissioners also observed that the Commissioner (Appeals) had not dealt with the reasons given by the Deputy Commissioner relating to unjust enrichment. The grounds taken in the Appeals that were filed on 30 September 2019 are reproduction of the grounds indicated by the Committee of Commissioners for filing the appeal and they are reproduced below:

"B. It is also observed that the case of M/s YU Televentures Pvt. Ltd. [2016(340) ELT 88(Del.)] relied upon by the Commissioner (Appeals) to apply it to the present case is erroneous one as much as in the case of M/s YU Televentures Pvt. Ltd. the issue involved was whether refund can be granted without re-assessment of the B/Es. The relevant para no- 15 to 17 are reproduced below:

"15. The impugned order dated 07th June 2016 passed by the respondent No-04 rejecting the petitioner's refund claim is accordingly set aside.

16. With the petitioner having already placed all the relevant documents on record and with the only reason for rejection of the refund application being the untenable ground of alleged failure by the petitioner to submit re-assessed B/Es. the Court sees no reason why the respondents should be permitted to deny the petitioner the grant of refund any longer.

17. Accordingly, the refund claim filed by the petitioner on 28th December, 2015 is allowed². The respondents will now pay to the petitioner the amount of refund as claimed together with interest due thereon up to the date of refund not later than two weeks from today"

Whereas, in the present case the issue involved is whether or not the refund claimant has passed the test of unjust enrichment and not grant of refund without re-assessment of the B/Es. Thus it appears that the Commissioner (Appeals) has incorrectly applied the order of the Hon'ble High Court of Delhi.

C. Further, going on the merits of the case the first appellate authority has also not touched upon the reason given by the Adjudicating authority to decide that why the claim is hit by unjust enrichment."

12. It transpires that against various orders passed by the High Courts and the Tribunal at Kolkata, Civil Appeals came to be decided by the Supreme Court on 18 September 2019. The leading matter is *ITC Ltd. Vs Commissioner of Customs Kolkata-IV*. The issue involved in all the Civil Appeals was whether, in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty can be entertained. The Bench of the Tribunal at Kolkata had opined that unless the order of assessment is appealed, no refund application against the assessed duty can be entertained. On the other hand, the Delhi High Court had opined that when there is no assessment order for being challenged in appeal, because there is no contest or lis and hence no adversarial adjudication, a refund application can be maintained even if appeals are not filed against the assessed bills of entry. The Madras High Court had also similarly opined. The first question that arose for consideration before the Supreme Court was whether a self-assessment, when there is no speaking order, can be termed to be an order of self-assessment. It was urged on behalf of the assesses that there is no application of mind in such a situation and merely an endorsement is made by the authorities concerned on the bills of entry which endorsement cannot be said to be an order, much less a speaking order. This contention of the assesses was not accepted by the Supreme Court and it was held that the endorsement made on the bills of entry would be an order of assessment and that when there is no lis, a speaking order is not required to be

passed in "across the counter affair". The Supreme Court then examined the provisions of sections 17 and 27 of the Customs Act, both prior to the amendments made by Finance Act 2011 and after the amendments, and observed that there is no difference even after the amendments as self-assessment is also an assessment. The observations of the Supreme Court are as follows:

"38. No doubt about it that the expression which was earlier used in Section 27(1)(i) that "in pursuance of an order of assessment" has been deleted from the amended provision of Section 27 due to introduction of provision as to self-assessment. However, as self-assessment is nonetheless an order of assessment, no difference is made by deletion of aforesaid expression as no separate reasoned assessment order is required to be passed in the case of self-assessment as observed by this Court in Escorts Ltd. v. Union of India & Ors ."

13. It needs to be noted that in Escort Ltd., the issue that had arisen for consideration before the Supreme Court was regarding the bills of entry classifying the imported goods under a particular tariff item and payment of duty thereon. The Supreme Court held that in such a case signing the bills of entry itself amounted to passing an order of assessment and, therefore, an application seeking refund on the ground that the imported goods fell under a different tariff item attracting lower rate of duty, should be filed within six months after the payment of duty. The Supreme Court, therefore, held that the signature made in the bills of entry was an order of assessment of the assessing officer.

14. The Supreme Court, thereafter, observed that the provisions relating to refund were more or less in the nature of execution proceedings and it would not be open to an authority, while processing a refund application, to make a fresh assessment on merits and to correct any assessment on the basis of a mistake or otherwise. The relevant portions of the judgment of the Supreme Court are reproduced below:

"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.

47. When we consider the overall effect of the provisions prior to amendment and post amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of section 27 to set aside the order of self assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self assessment, he has to get the order modified under section 128 or under other relevant provisions of the Act.

48. Resultantly, we find that the order(s) passed by the Customs, Excise and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are hereby set aside. We order accordingly. We hold that the application for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred."

15. The applications that have been filed by the Department on 8 November 2019 for raising an additional ground contain five paragraph and they are reproduced below:

1. The aforementioned appeal is pending for disposal and listed for hearing on 27.01.2019.

2. Revenue would like to raise Additional Legal Ground in the light of ratio of laid down in the case of *ITC Ltd. Vs CCE Kolkata IV & Others/ 2019(368) ELT-246-SC*.

3. Hon'ble Supreme Court, in the aforementioned case has ruled that the claim for refund cannot be entertained unless the Assessment Order or Self assessment gets modified in accordance with law.

4. The observation of Hon'ble Supreme Court in Para 47 and 48 of the judgment is as follows:-

xxxx xxxx xxxx

5. Revenue would like to humbly submit that aforesaid ratio laid down by Hon'ble Supreme court may be considered by Hon'ble Tribunal and adverted to before the disposal of appeal.

16. Shri Sunil Kumar learned Authorised Representative of the Department has contended that the application filed by the Department should be allowed and the Appellant should be permitted to raise an additional ground in the two appeals. For this purpose, learned Authorised Representative has placed reliance upon rule 10 of the Customs, Excise and Service Tax Appellate Tribunal (procedure) Rules 1982 1982 Rules which deals with grounds which may be taken in appeal as also a decision of this Tribunal in *M/s. Gannon Dunkerley & Co. Ltd. Vs Commissioner of Central Excise and Service Tax (ADJ), New Delhi ST/MISC/50035/2020 in ST/55125/2014 decided on 27.01.2020*.

17. Shri Tarun Gulati, learned Senior Counsel appearing for the respondent in the two appeals has, however, contended that the additional ground taken in the miscellaneous applications is not only contrary to the grounds taken in the appeal but even the finding recorded by the Deputy Commissioner quantifying and sanctioning the refund claim has attained finality as the Department did not file any appeal or cross objection against the order passed by the Deputy Commissioner.

18. The submissions advanced by learned Authorised representative of the Department and the learned Senior Counsel appearing for the Appellant have been considered.

19. In order to appreciate the contention, it is necessary to examine the relevant provisions of the Customs Act and the 1982 Rules.

20. Section 129 of the Customs Act deals with 'Appellate Tribunal' and section 129A deals with 'Appeals to the Appellate Tribunal'. Sub-section (1) of section 129A provides that any person aggrieved by any of the orders enumerated in the sub-section may appeal to the Appellate Tribunal against such order.

21. Sub-sections (4) and (5) of section 129A which deal with cross-objections are reproduced below:

"(4) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period."

22. Sub-section (6) of section 129A provides that an Appeal to the Appellate Tribunal shall be in such form and shall be verified in such manner as may be specified by the rules made in his behalf.

23. It will also appropriate to reproduce section 129B of the Customs Act which deals with 'Orders of the Appellate Tribunal' and it is as follows:

"SECTION 129B- Orders of Appellate Tribunal-

(1) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary."

24. Section 129C of the Customs Act deals with 'Procedure of Appellate Tribunal'. Sub-section (6) of section 129C, which deals with the power of the Appellate Tribunal to regulate its own procedure, is reproduced below:

"SECTION 129C. Procedure of Appellate Tribunal. —

(1) xxxxxx

(2) xxxxxx

(3) xxxxxx

(4) xxxxxx

(5) xxxxxx

(6) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

(7) xxxxxx

(8) xxxxxx"

25. The 1982 Rules have been framed in exercise of the powers conferred by sub-section (6) of section 129C of the Customs Act read with the provisions of section 35D of the Excise Act. Rule 10 deals with the grounds which may be taken in the appeal and it is reproduced below:

"Rule 10. Grounds which may be taken in appeal. –

The appellant shall not, except by leave of the Tribunal urge or be heard in support of any grounds not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or those taken by leave of the Tribunal under these rules:

Provided *that the Tribunal shall not rest its decision on any other grounds unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground."*

26. It would be seen that under rule 10 of the 1982 Rules, the appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or those taken by leave of the Tribunal under the Rules. The first part of this rule restricts the power of the appellant to urge any ground not set forth in the memorandum of appeal, while the second part deals with the power of the Tribunal in deciding the appeal even on grounds not set forth in the memorandum of appeal. The proviso, however, stipulates that the Tribunal shall not rest its decision on any other ground, unless the party who may be affected thereby has had sufficient opportunity of being heard on that ground.

27. It, therefore, follows that if the appellant has to urge any ground that has not been set forth in the memorandum of appeal, the appellant has to take leave of the Tribunal to urge or be heard on such additional ground. However, the Tribunal in deciding the appeal shall not be confined to the grounds set forth in the memorandum of appeal or those taken by leave of the Tribunal but it would be necessary for the Tribunal, in such a situation, to afford an opportunity to the party who may be affected, to be heard on that ground.

28. As noted above, Vivo Mobile had filed applications for refund of the excess additional duty paid by it. An issue was raised by the Department in the deficiency memo that Vivo Mobile had not filed any document showing re-assessment of bills of entry in respect of the refund amount claimed by it. Vivo Mobile pointed out that in view of the decisions of the Delhi High Court in Micromax Informatics Ltd., it was not necessary for it to seek re-assessment of the bills of entry. The Deputy Commissioner, in view of the aforesaid decision of the

Delhi High Court held that there was no necessity of seeking modification in the bills of entry. Earlier, the Deputy Commissioner had examined and found that the Vivo Mobile was entitled to refund of excess additional duty paid by it in view of the decision of the Supreme Court in SRF Ltd. It is only on account of unjust enrichment that the Deputy Commissioner, even though he had sanctioned the refund claim filed by Vivo Mobile, directed that it should be deposited in the Consumer Welfare Fund under section 27(2) of the Customs Act. Vivo Mobile then filed two appeals before the Commissioner (Appeals) to assail that part of the order of the Deputy Commissioner that directed that the sanctioned amount of refund should be credited to the Consumer Welfare Fund instead of being paid to Vivo Mobile. The Commissioner (Appeals) accepted the contentions raised on behalf of Vivo Mobile that it was not a case of unjust enrichment and therefore, directed for refund of the Additional Duty of customs to Vivo Mobile instead of the said amount being deposited in the Consumer Welfare Fund.

29. The contention of the learned Senior Counsel appearing for Vivo Mobile is that neither an appeal or cross-objections were filed by the Department before the Commissioner (Appeals) to assail that part of the order of the Deputy Commissioner that sanctioned the refund amount and, therefore, once this part of the order of the Deputy Commissioner had attained finality, it is not open to the Department to raise this issue in this Appeal before the Tribunal, and that too subsequently by moving an application seeking permission to add a ground to the grounds already taken in the memorandum of appeal.

30. The issue, therefore, that arises for consideration is whether the Department could have filed any appeal or cross-objections before the Commissioner (Appeals) against that part of the order of the Deputy Commissioner that sanctioned the refund amount. For this purpose, it would be necessary to examine the provisions of the Customs Act dealing with Appeals before the Commissioner (Appeals).

31. Section 128 of the Customs Act deals with Appeal to Commissioner (Appeals) and is as follows:

"SECTION 128. Appeal to Commissioner (Appeals)-

(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner of Customs or Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section, shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

32. Section 128A of the Customs Act deals with "Procedure in Appeal" before the Commissioner (Appeals) and is as follows:

"SECTION 128A. Procedure in appeal. –

(1) The Commissioner (Appeals) shall give an opportunity to the appellant to be heard if he so desires.

(2) The Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not willful or unreasonable.

(3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against:

Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be

passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order :

Provided further that where the Commissioner (Appeals) is of opinion that any duty has not been levied or has been short-levied or erroneously refunded, no order requiring the appellant to pay any duty not levied, short-levied or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 28 to show cause against the proposed order.

(4) The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.

(4A) The Commissioner (Appeals) shall, where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed.

(5) On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority, the Principal Chief Commissioner of Customs or Chief Commissioner of Customs and the Principal Commissioner of Customs or Commissioner of Customs."

33. A perusal of section 128 of the Customs Act shows that any person aggrieved by any decision or order passed under the Act by an officer of customs lower in rank than a Principal Commissioner or Commissioner may appeal to the Commissioner (Appeals). This section does not provide for filing of cross-objections, unlike sub-section of (4) of section 129A of the Customs Act which, in regard to Appeals to the Appellate Tribunal, provides for filing a memorandum of cross-objections against any part of the order appealed against and also provides that such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified.

34. A bare reading of section 128 of the Customs Act leaves no manner of doubt that whereas an appeal to the Commissioner (Appeals) can be filed by any person aggrieved by any decision or order passed under the Act by an officer of customs lower in rank than Principal Commissioner or a Commissioner of Customs, but no cross-objection can be filed against any part of the order passed by the officer of customs. On the other hand, section 129A(4) of the Customs Act which deals with Appeal before the Appellate Tribunal does provide for filing of cross-objections against any part of the order. Section 128 of the Customs Act dealing with Appeal to Commissioner (Appeals) provides that any person aggrieved by any decision or order may appeal to the Commissioner (Appeals). The right to file cross-objection is a substantive right conferred by a statute and can be exercised only in accordance with the provisions of the statute. Thus, neither could the Department have filed any appeal against the order of the Deputy Commissioner as it could not have considered itself to be aggrieved by the order since the Deputy Commissioner had not directed for the amount to be paid to Vivo Mobile but had directed to be credited in the Consumer Welfare Fund, nor was it permissible in law for the Department to have filed cross-objections in the appeal filed by the Vivo Mobile before the Commissioner (Appeals) since cross-objections cannot be filed before the Commissioner (Appeals).

35. At this stage, it will also be appropriate to reproduce Order 41 Rule 22 of the Code of Civil Procedure 1908 which deals with cross-objection and it is reproduced below:

"Rule 22. Upon hearing, respondent may object to decree as if he had preferred a separate appeal.- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal:

Provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Explanation.- A respondent aggrieved by a finding of the Court in the Judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding

which is sufficient for the decision of the suit the decree, is, wholly or in part, in favour of that respondent.

Form of objection and provisions applicable thereto.- (2) Form of objection and provisions applicable thereto- Such cross-objection shall be in the form of a memorandum, and The provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) xxxx xxxx xxxx

4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule."

36. It is also pertinent to refer to the Customs (Appeals) Rule 1982. Chapter-II deals with 'Appeals to Commissioner (Appeals)', while Chapter-III deals with 'Appeals to Appellate Tribunal'. Rule 3 contained in Chapter-II deals with Form of Appeal to Commissioner (Appeals), while rule 4 deals with Form of Application to the Commissioner (Appeals). Rule 5 deals with production of additional evidence before the Commissioner (Appeals). Rule 6 contained in Chapter-III deals with Form of Appeal to Appellate Tribunal as also memorandum of cross-objections to the Appellate Tribunal under section 129A(4) of the Customs Act. Form Number 82 relates to Appeal before the Commissioner (Appeals) under section 128 of the Customs Act, while Form Number 84 relates to Appeal before Appellate Tribunal under section 129A of the Customs Act. While there is no Form prescribed for filing cross-objection before Commissioner (Appeals), form No. 85 prescribes for filing memorandum of cross-objection to the Appellate Tribunal under sub-section (4) of Section 129A of the Customs Act. This also supports the view that cross-objections cannot be filed before the Commissioner (Appeals).

37. It also needs to be noted that the 1982 Rules deal with the procedure to be followed before the Appellate Tribunal. Rule 15 deals with filing of memorandum of cross-objection and is reproduced below:

"RULE 15. Filing of memorandum of cross-objections, applications or replies to appeals/applications. — Every memorandum of cross-objections filed, and every application made, under the provisions of the Acts, shall be registered and numbered, and the provisions of these rules, relating to appeals shall, so far as may be, apply to such memorandum or application."

38. It is, therefore, more than apparent that the Department could neither have filed an appeal before the Commissioner (Appeals) against a part of the order passed by the Deputy Commissioner nor it could have filed cross-objections in the appeal filed by the Vivo Mobile before the Commissioner (Appeals) against that part of the order sanctioning the refund amount since the right to file cross-objection has not been conferred under section 128 of the Customs Act, which deals with appeal to the Commissioner (Appeals).

39. The decisions relied upon by learned Senior counsel for Vivo Mobile in connection with the non-filing of cross-objections by the Department in the appeal filed by Vivo Mobile, therefore, have no relevance in the present case.

40. In Gannon Dunkerley, this Bench of the Tribunal had examined at length the relevant statutory provisions to determine whether an additional ground can be taken up under rule 10 of the 1982 Rules in an Appeal before the Tribunal. Though it is correct, as has been contended by learned Senior Counsel appearing for Vivo Mobile, that the ground that is sought to be added is contrary to a ground already taken in the Appeal since initially a ground was taken in the Appeal that the decision relied upon by the Deputy Commissioner was in connection with re-assessment of bills of entry and not unjust enrichment, but still in view of the decision of the Supreme Court in ITC limited, it is considered appropriate, in the facts and circumstances of the case, to permit the Appellant to raise an additional ground in the two Appeals in view of the principles of law laid down by this Bench in Gannon Dunkerley. The judgment of the Delhi High Court in Micromax Informatics, that was relied upon by the Deputy Commissioner, has been reversed by the Supreme Court in ITC Ltd and it is in view of the aforesaid judgment of the Supreme Court that the additional ground is sought to be added.

41. The leave sought by the Appellant to add an additional ground in the memo of the two appeals is granted. However, this would not mean that the issue raised in the additional ground has been decided in favour of the Appellant. This issue would be decided on merits at the time of hearing of the appeal and it will be open to the parties to make submissions. At this stage, only the applications filed by the Department for addition of an additional ground have been considered and allowed.

42. The appeals may now be listed for hearing on 06 July, 2020.

(Pronounced in open Court on 08.06.2020)

[Back](#)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. I]

Justice Dilip Gupta, President and Shri C.L. Mahar, Member (T)

JAI SHIV TRADING CO.

Versus

COMMISSIONER OF CUSTOMS, NEW DELHI

Final Order No. C/A/50425/2019-CU(DB), dated 23-1-2019 in Appeal No.
C/50426/2018

REPRESENTED BY :Shri Priyanshu Uppadhyaya, Advocate, for the Appellant.

Shri Sunil Kumar, AR, for the Respondent.

[Order per : Justice Dilip Gupta, President]. - This appeal has been filed to assail that part of the order dated 27 December 2016 passed by Commissioner of Customs (Appeals) by which the request made by the appellant to re-export parts of calculators found in Semi-Knocked Down (herein after referred to as SKD) condition was rejected.

2. It transpires from the records that appellant had imported consignment of goods including calculators, regzine cover for calculators, button for calculators, plastic body for calculators, mounted PCB, paper box for calculators through Bill of Entry dated 11 January, 2016 and declared the value of the goods in the invoice to be USD 12386.19. The declared assessable value was Rs. 13,38,318.75 and duty assessed on the goods was mentioned as Rs. 11,57,672/- including the Anti-Dumping Duty on 9800 pieces of calculators mentioned in the Bill of Entry.

3. The goods were initially detained and subsequently examined on 13 January, 2016. On examination by SIIB, the goods were found to be packed in 921 cartons and woven bags containing parts of calculators of two models. These parts included front and back side plastic cover, rubberized key pad, mounted PCB with display and battery, packing material like polythene cover, paper boxes, tin boxes, rexine cover of wrist watches and calculators. A panchnama of the seized goods was prepared and the goods were stored in Bonded Warehouse.

4. On a market enquiry having been conducted, the valuation cum duty calculation chart was prepared by the Department on the basis of which the revised assessable value of the consignment was worked out to be Rs. 61,75,750/- against the declared value of Rs. 13,38,319/- and the revised Customs duty at the rate of 29.44 % was worked out to Rs.18,18,202/- against the declared Customs duty of Rs. 3,51,240/- . It was found that parts of calculators/calculators in SKD condition were also imported and on a simple assembly of these parts in the presence of the importer, 54000 pieces of functional calculators came into existence, which attracted Anti-Dumping Duty of Rs. 44,43,606/- at the rate of 1.22 USD per piece. The valuation of the parts of calculators was done on the basis of best judgment. It needs to be noted that in the Bill of Entry, the appellant had declared 9800 pieces of complete calculators and paid Anti-Dumping Duty of Rs. 8,06,432/- but on physical examination, only 8100 pieces of calculators were found attracting Anti-Dumping Duty of Rs. 6,66,541/-. Thus, the actual amount of Anti-dumping Duty, that was required to be paid by the appellant was worked out to be Rs. 43,03,715/-.

5. The appellant, by a letter dated 22 February, 2016 informed the department that it was not in a position to pay Anti-Dumping Duty on calculators in SKD conditions because if it was paid, the cost of the product would be higher than the sale price of the said product. It therefore, made a request to release the balance consignment except the calculator parts in SKD condition and stated that it was ready to pay the differential duty on the enhanced value and any redemption fine

or personal penalty. The proprietor of the appellant firm also gave a statement under Section 108 of the Customs Act, 1962 that he did not desire that any show cause notice be issued or personal hearing to be granted and insisted that the case may be decided at the earliest.

6. The appellant on 13 April, 2016 requested the department for re-export of the calculators in SKD condition as it was not in a position to pay the Anti-Dumping Duty. The Adjudication Authority rejected the request of the appellant for re-export for the reason that there was clear and deliberate mis-declaration of description, value and quantity of goods imported. The Adjudicating Authority observed that the appellants were well aware that calculators attracted Anti-Dumping Duty since it had declared some quantity of calculators for which it assessed Anti-Dumping Duty. The Adjudicating Authority found that the appellant had brought huge quantity of calculators by splitting them in parts with a view to evade payment of duty since a simple assembling of the parts resulted in a fully functional calculator without the use of any tool/equipment. The Adjudicating Authority also noted that the parts were assembled in the presence of the proprietor appellant and he admitted that fully functional calculators came into existence. The Adjudicating Authority also noticed that the identity of the supplier was suspect since no remittance was made though a period of six months period had elapsed from the date of shipment. The Adjudicating Authority also noticed that the appellant in his voluntary statement suppressed the fact that one more consignment was lying in ICD Tughlakabad Delhi in which the false statement stands established. It is for this reason that the Adjudicating Authority had preferred to reject the request made by the appellant for re-export of goods. The reasons for rejecting the re-export of the goods is contained in paragraphs 14 and 15 of the Order-in-Original passed on 10 June, 2016 and the same are reproduced below :-

“14 For the sake of brevity, I will not repeat the facts of the case which have already been detailed in the preceding paras. The misdeclaration in the description and quantity of goods stand accepted by the importer in his various statements. It is also an admitted fact that the Importer had imported 54000 pcs of calculators in SKD condition by declaring them as parts of calculators with a view to evade anti-dumping duty. The undervaluation of goods under import is also an admitted fact. Since only generic description of items was found in the NIDB data which could not be directly related to goods under import, recourse to market inquiry was made. In fact, the importer himself requested for market enquiry for ascertaining the true value of the goods under import. He himself associated in the market enquiries. The assessable value derived on the basis of market enquiries was accepted by him. The differential duty worked out on the basis of revised assessable values as well as anti-dumping duty also stands accepted by the importer. It has also emerged that the importer had not stated truthfully about his other import consignment in his voluntary statement dated 21-1-2016. He had a container of similar items lying in ICD, Tughlakabad, Delhi for which he subsequently filed Bill of Entry Number No. 4432821 dated 2-3-2016 for which he had furnished two sets of invoices to DZU, DRI, Delhi. No remittance for the import consignment has been paid although more than six months have elapsed from the date of shipment of consignment. The importer is essentially a small time watch maker as could be made out from his Income Tax Return which shows an Income of Rs. 2.50 lakhs per annum in the past. It is incomprehensible that a man of meager means could import a consignment worth Rs. 67 lakh having market value of over 1.50 crores that too on credit basis. Further, there is no urgency from the supplier for his dues, which raises doubts about the *bona fides* of the importer and consignments imported by him. In view of foregoing discussions, I find that the value declared in the Bill of Entry filed for Home Consumption does not represent the correct value of the imported goods and the same is thus, liable to be rejected under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and the same is required to be re-determined as per Rule 7 of the Rules *ibid*. I also find that the declaration of quantity and description of goods in the Bill of Entry No. 3871379 dated 11-1-2016 was not correct. The quantity of some goods found in excess in comparison to the declared quantity and some goods are also not declared in the Bill of Entry. Therefore, all the goods contained in Container No. NYKU0798672 covered under Bill of Entry No. 3871379 dated 11-1-2016 are liable to confiscation under Section 111(l) and (m) of the Customs Act, 1962. I also find that the goods i.e. calculator parts imported under the subject consignment, on simple assembling functioned as complete calculator and therefore, are covered by Notification No. 24/2015-Cus. (ADD), dated 29-5-2015 and attract anti-dumping duty. I find that the actual value and its respective duty and the anti-dumping duty of goods covered under the Bill of Entry is as under :

(in Rs.)								
S. No.	Declared value	Re-determined	Declared Custom	Re-determined	Diff of Customs Duty	ADD paid	ADD payable	Diff of ADD

		d value	s Duty	d Customs Duty				
1	133831 9	6175750	351240	1818202	146696 2	80643 2	511014 7	430371 5

15. I find that the importer vide his various statements given from time to time have agreed with the content of the examination report and have also agreed to pay the differential duty, fine and penalty as may be imposed upon them under the provisions of Customs Act, 1962. There is no retraction of any of the statement of the importer. The guilt of the importer is admitted and established in view of foregoing discussions and findings. It would, thus, not be fair and proper to allow selective clearance of goods and permit re-export of goods attracting antidumping which the importer is now finding difficult to pay.”

7. Accordingly, the following order was passed by the Adjudicating Authority :

“17(i) I reject the declared value amounting to Rs. 13,38,318.75/- of the goods covered under Bill of Entry No. 3871379 dated 11-1-2016 under Rule 12 of the CVR, 2007 read with Section 14 of Customs Act, 1962.

(ii) I order for re-assessment of the goods covered under Bill of Entry No. 3871379 dated 11-1-2016 on re-determined assessable value as Rs. 61,75,750/- by sequential application under the provisions of Rule 7 of CVR, 2007, read with Section 14 of the Customs Act, 1962. I confirm the duty of Rs. 18,18,202/- on re-determined assessable value of Rs. 61,75,750/-. Thus, the duty amounting to Rs. 3,51,240/- already paid against the above said Bill of Entry is adjusted against the said demanded amount and the differential amount of Rs. 14,66,962/- is required to be paid forthwith under Section 28(1) of the Customs Act, 1962 along with interest at the appropriate rate before clearance of the goods.

(iii) I also confirm the demand of differential anti-dumping duty of Rs. 43,03,715/- on the calculators imported as calculator parts under the subject consignment in accordance with the Notification No. 24/2015-Cus. (ADD) dated 29-5-2015.

(iv) I also order for confiscation of the goods totally valued at Rs. 61,75,750/- under Section 111 of the Customs Act, 1962, however, I give an option to the importer to redeem the goods on payment of appropriate customs duty Redemption Fine of Rs. 12 lakhs (Rupees Twelve lakhs only) under Section 125(1) of the Customs Act, 1962.

(v) I impose a penalty of Rs. 4 lakh (Rupees Four lakh only) on the importer M/s. Jai Shiv Trading Co. under Section 112(a) and a penalty of Rs. 4 lakh (Rupees Four lakh only) under 114AA of the Customs Act, 1962 for its various acts of omission and which have rendered the goods liable to confiscation. I refrain from imposing penalty separately on Shri Jai Prakash Sharma as Jai Shiv Trading Company is a Proprietorship firm.”

8. It is against this order dated 10 June 2016 that the appellant filed an appeal before Commissioner of Customs (Appeals). The Commissioner of Customs (Appeals) accepted the contention of the appellant that there was no valid reason for enhancement of the value of the goods but did not accept the plea of the appellant for re-export of the calculators in SKD condition. Regarding the issue as to whether the calculators in SKD condition can be said to be functional as calculators attracting Anti-Dumping Duty, the Commissioner found that the appellant had actually imported functional calculators in the garb of calculators in SKD condition and the relevant paragraphs are given below :

“8. As regards the calculator parts/calculator in SKD condition, imported by the Appellant, I find that the proprietor of the Appellant firm, in his referred statements recorded under Section 108 of the Customs Act, 1962, has categorically admitted to the fact that parts of calculator declared in the Bill of Entry i.e. button for calculator plastic button for calculator, mounted PCB with display screen and battery, rexine cover, paper boxes for calculator, etc. when assembled together, formed a complete functional calculator, which was made in front of him only during the course of examination/investigations. Further, he has also accepted that such complete calculator and calculators in SKD form, attract payment of Anti-dumping duty.

8.1 Hence, from the abovesaid statements of the proprietor of the Appellant firm, which have remained unrebutted in the entirety of the present case and have not been retracted at any juncture, it is evident that they had actually imported functional calculators in the garb of parts.

8.2

8.3 Hence, applying the ratio of the above-said judgment to the facts and circumstances of the instant case as well as on the basis of unimpeachable evidences on record, I find that the calculator parts imported by the Appellant, which could be assembled as 54000 Pcs. Of calculators, are nothing but a functional calculator in itself. In the matter of anti-dumping duty on parts/components of CFL from China and Hongkong Board vide Circular No. 43/2010-Cus., dated 6-12-2010 from F.No. 528/53/2007-Cus (TU) clarified that ".....Thus, when any article such as CFL is imported in CKD/SKD condition, its classification for purpose of assessment would be done as complete or finished article in terms of Rule 2(a) of the General Interpretation Rules. Accordingly, when anti-dumping duty is attracted on any article then it is also to be levied if the said article is imported in CKD/SKD condition either together in one lot or part shipments. All pending assessments, if any, may be finalized accordingly.

Board's Circular is squarely applicable to the impugned case of import of parts of calculators which when assembled together, make a complete, functional calculator. Thus parts of calculators imported in CKD/SKD conditions will be treated as a complete, finished article for the purpose of assessment as per Rule 2a) *ibid*. Accordingly, the same attracts the levy of anti-dumping duty @ 1.22 USD per piece as per Notification No. 24/2015-Cus. (ADD), dated 29-5-2015, which works out to Rs. 51,10,147/- and after adjusting the amount already paid of Rs. 8,06,432/-, the differential ADD is now worked out to Rs. 43,03,715/-. Since the levy of ADD is per piece, the issue of valuation on the basis of best judgment for the levy of ADD is legally correct and proper."

9. It is for this reason that the Commissioner of Customs (Appeals) directed the Adjudicating Authority to split out the value of parts of calculators in SKD condition and that of the remaining goods and rework the Customs duty leviable on each category to enable the appellant to exercise his option for redemption fine under Section 125 of the Act. The relevant paragraphs are reproduced :

"9.9 Thus, from the factual position already noted, it is clear that there is no valid reason for enhancement of value in the present case. It is well-settled that the imported goods are required to be assessed at the transaction value unless the transaction value is required to be rejected for the reasons mentioned in Rule 4. When there is no evidence of contemporaneous imports at a higher price the invoice price is liable to be accepted. Under the given circumstances, I find that the increase in value is more of arbitrary rather than on the legal provisions. Since it is materially evident that the reason for enhancement is not substantiated in any manner, such enhancement of the declared value is set aside and I further hold that the declared value is to be treated as appropriate value under Section 14 of the Act *ibid* for assessment and for the payment of appropriate Customs duty accordingly. In view of the above said discussions, the learned Adjudicating authority is directed to separate out the "value of parts of calculators in SKD condition" and that of "the remaining goods" and re-work the Customs duty liability on each category for enabling the appellant to exercise his option for redemption under Section 125 of the Act *ibid*.

10. I further find that the Appellant had sought re-export of parts of calculators, found in SKD condition. In this context, I find that Para 11 and para 14 of the impugned Order-in-Original, categorically provide the specific reason as to why such request for re-export is rejected. On analyzing the same, I am of the view that the said request has been rightly rejected, hence, needs no further interference.

11. Having regard to the totality of the facts and circumstances as discussed above, I am inclined to reduce the redemption fine to Rs. 3 lakh (Rupees Three lakhs only) and reduce the penalty to Rs. 1 Lakh (Rs. One Lakh only) under each Section 112(a) & Section 114AA of the Customs Act, 1962 separately.

12. Further, the Appellant herein shall be given release of the said confiscated goods to the extent of option being given subject to the payment of tax and dues along with Redemption Fine and penalty as held above."

13. It is against this order dated 27 December 2016 that both the appellant and the Department filed appeals before this Tribunal. The appeal filed by the Department insofar as it related to the value of the goods, was dismissed by the Tribunal by order dated 4 September, 2017.

14. Learned Counsel for the appellant submitted that there was no good reason as to why the request of the appellant for re-export of the calculators in SKD condition should have been rejected by the Adjudicating Authority. It is his submission that if the appellant is not permitted to re-export the goods, the cost of the calculators would be more than the market price, and the appellant would suffer enormous loss. It is his submission that in the facts and circumstances of the case, the Adjudicating Authority should have exercised its discretion in favour of the appellant. In support of his contention, learned Counsel has relied upon certain judgments to which we shall refer to.

15. Learned representative of the Department has, however, supported the impugned order and has submitted that the appellant was well aware that Anti-Dumping Duty was required to be paid on calculators that were imported and that is why in addition to the calculators that he had imported, he also imported calculators in SKD condition and when they were assembled, even according to the appellant, they resulted in a functional calculator. His submission is that it was the intention of the appellant to import computers in SKD condition with a view to evade payment of Anti-Dumping Duty and since this fact came to the knowledge of the Department, he has now made a request for re-export of the calculators in SKD condition.

16. We have considered the submissions advanced by the learned Counsel for the appellant and the learned representative of the Department.

17. It is not in dispute that the appellant had imported calculators in SKD condition of two models with other materials, including calculators. It is also not in dispute that the appellant had paid Anti-Dumping Duty on the calculators that were imported. The issue is only about the calculators in SKD condition as according to the Department, on assembling, they resulted in fully functional calculators. The calculators in SKD condition were assembled in the presence of the Proprietor of the appellant and it was admitted by him that after assembly fully functional calculators came into existence. It is, therefore, clear that the appellant had imported calculators in SKD condition with a view to evade Anti-Dumping Duty since Anti-Dumping Duty is levied on finished calculators. However, when this fact was detected by the Department, the Appellant made a request for re-export of the goods. This request was rejected by the Adjudicating Authority and the Appellate Authority and in our considered view for good and valid reasons.

18. The decisions relied upon by the learned Counsel of the appellants do not come to his aid.

19. In *Mahi Enterprises v. CC, Chennai III* reported in [2018 (360) E.L.T. 443 (Mad)] the Madras High Court disposed of the writ petition by merely directing the appellant to seek re-export of the items. In *Commissioner of Customs (Sea-Import) Chennai v. Haunt Sales Corporation* reported in [2015 (327) E.L.T. 300 (Tri.-Chennai)], a Bench of this Tribunal at Chennai allowed the re-export of the impugned goods for the reason that there was a doubt as to whether the goods originated from Malaysia or China. In *Cosmos Trading Co. v. Commissioner of Customs, Kandla* reported in [2006 (205) E.L.T. 234 (Tri.-Mumbai)], the request made by the appellant for re-export of the goods was accepted by the Mumbai Bench of the Tribunal for the reason that the goods had not been correctly supplied. In *Commissioner of Customs Chennai v. Sharda Impex* reported in [2006 (195) E.L.T. 85 (Tri.-Del)], the Principal Bench dismissed the appeal filed by the Department against the directions that had been issued for re-export of the goods for the reason that the respondent therein had placed an order for supply of lamps of Malaysian origin but the goods that were supplied were of Chinese origin.

20. The factual position in the present case is entirely different. As noted above, the Appellant had imported calculators in SKD condition with a view to assemble them as fully functional calculators to avoid Anti-Dumping Duty. It cannot, therefore, be permitted to re-export the calculators in SKD condition when the Department detained the goods and after examination concluded that after assembly, fully functional calculators came into existence.

21. There is, therefore, no error in the order passed by the Commissioner of Customs. The Appeal is, therefore, liable to be dismissed and is, accordingly, dismissed.

(Dictated and pronounced in the open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**ANTI DUMPING CONDONATION OF DELAY APPLICATION No. 50308 of 2020
(on behalf of the appellant) IN
ANTI - DUMPING APPEAL No. 51217 OF 2020**

Arising out of Second Corrigendum Notification, Dated 25.04.2018; Customs
Notification Number 29/2018-Customs (ADD) dated 25.05.2018
Passed by The Designated Authority Directorate General of Trade Remedies,
Department of Commerce, Ministry of Commerce & Industry

Date of Hearing: 08.02.2021

Date of Decision: 17.02.2021

**NEVINNOMYSSKY AZOT
357107, STAVROPOL TERRITORY RUSSIAN FEDERATION
NEVINNOMYSSK, 1 NIZYAEVA STREET**

Vs

**DESIGNATED AUTHORITY DIRECTORATE
GENERAL OF ANTI-DUMPING AND ALLIED DUTIES
DEPARTMENT OF COMMERCE & INDUSTRY, PARLIAMENT STREET
JEEVAN TARA BUILDING, 4TH FLOOR, NEW DELHI-110001**

AND

OTHERS

Appellant Rep by: Mr Sandeep Sethi and Mr Ashish Chandra, Advs.

Respondent Rep by: Ms Reena Khair and Mr Rajesh Sharma, Advs.

Mr Ameet Singh, Adv. for Designated Authority

Mr Sunil Kumar, Authorised Representative

CORAM: Dilip Gupta, President

Raju, Member (T)

Rachna Gupta, Member (J)

FINAL ORDER NO. 51042/2021

Per: Dilip Gupta:

Nevinnomyssky Azot The appellant has filed an application for condonation of delay in filing this Anti-Dumping Appeal that has been filed under section 9C of the Customs Tariff Act 1975 Tariff Act. Sub-section (1) of section 9C of the Tariff Act provides that an appeal against the order of determination regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the Tribunal. Sub-section (2) provides that every appeal under this section shall be filed within 90 days of the date of order under appeal, but the Appellate Tribunal may entertain any appeal after the expiry of the said period of 90 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

2. This appeal was filed in the office on December 01, 2020 with the following principle reliefs:

"a) Hold that the Respondent No. 1 (The Designated Authority) incorrectly did not include the appellant in the duty table and did not recommend 'NIL' rate of duty thereof and declare the impugned corrigendum dated April 25, 2018 issued by Respondent No, 1 as issued contrary to the applicable law and well-established principles of natural justice and fairness;

b) Issue an order or direction to call for, examine the records in relation to and quash the impugned corrigendum dated April 25, 2018 issued by Respondent No. 1 to the extent it affects the Appellant; and

c) Issue an order or directions, directing the Respondent No. 2 (The Union of India) to issue customs notification giving effect to or acting upon the first corrigendum dated December 19, 2017 issued by Respondent No. 1."

3. To appreciate the aforesaid reliefs claimed in the appeal, it would be necessary to state certain relevant facts. It is on the basis of the recommendations made in the final findings by the Designated Authority that the Central Government issued a Customs Notification dated September 12, 2017 imposing anti-dumping duties and so far as the appellant is concerned, it was subjected to a residual rate of duty. In the first corrigendum dated December 19, 2017 issued by Designated Authority, the duty for the appellant was specified as 'NIL', but this corrigendum was withdrawn by the second corrigendum dated April 25, 2018 issued by the Designated Authority. The second corrigendum was notified by the Central Government by a Notification dated May 25, 2018 but this was not in connection with the duty specified for the appellant.

4. It would be seen from the aforesaid reliefs that have been claimed by the appellant in the appeal that no reliefs have been claimed for setting aside the Customs Notification dated September 12, 2017 issued by the Central Government or the final findings dated August 1, 2017 issued by the Designated Authority. The reliefs that have been sought are for quashing the second corrigendum dated April 25, 2018 and for issuance of a Customs Notification to give effect to the first corrigendum dated December 19, 2017.

5. Thus, if the period of limitation is counted from September 12, 2017, which is the date when the Central Government issued the Customs Notification imposing anti-dumping duty, there would be a delay of about three years in filing the appeal since the appeal has to be filed, as contemplated under section 9C of the Tariff Act, within 90 days of the date of the order and the appeal was actually filed on December 1, 2020. However, if the limitation is to be calculated in terms of the third relief claimed by the appellant which is for acting on the first corrigendum dated December 19, 2017, then there would be a delay of about two years and nine months. If the limitation is to be calculated from the second relief, namely for quashing the second corrigendum dated April 25, 2018, then the delay would be of about two years and five months.

6. To explain the delay, the appellant has stated the following facts in the delay condonation application:

"4. *** Meanwhile the recommended anti-dumping duty in the final findings was given effect to by the Respondent No. 2 vide Notification No. 44/2017-Customs (ADD) dt. 12.09.2017. Pursuant to the representations made to the Respondent No. 1, first corrigendum notification dt. 19.12.2017 was issued by the Respondent No. 1 including the Applicant in the duty table and providing "NIL rate of anti-dumping duty.**

5. However, the Respondent No. 2 did not give effect to the first corrigendum notification dt. 19. 12.2017; and on 25.04.2018, the Respondent No. 1 issued the impugned (second) corrigendum notification withdrawing the first corrigendum notification dated 19.12.2017, amongst other amendments to the final findings, without providing any reason. This impugned corrigendum was given effect to vide Notification No. 29/2018-Customs (ADD) dt. 25.04.2018 (should be 25.05.2018) issued by the Respondent No. 2. Thus, the Applicant continued being subjected to the residual rate of anti-dumping duty.

6. That pursuant to the issuance of customs notification giving effect to the send corrigendum notification, the Applicant's parent group, EuroChem Group AG on 26.06.2018 approached the Trade Representative of Russian Federation in India to obtain comments from the Respondent No. 1, with respect to the reasons for withdrawal of the first corrigendum notification dt. 19.12.2017 which provided the relief sought by the Applicant. The Respondent No. 1 replied to the letter from the Trade Representative of Russian Federation in India on 10.07.2018, However, it did not address the concern regarding such withdrawal. Instead, the Respondent No. 1 simply mentioned that the same has been addressed in the final findings dt. 01.08.2017. The last dated of filing an appeal before this Hon'ble Tribunal under Section 9C of the Customs Tariff Act, 1975 was 23.08.2020. (should, be 23.08.2018 if the limitation is calculated from the date of issue of second corrigendum on 25.5.2018.)

7. As the reply from the Respondent No. 1 was received not long before the expiry of the statutory time period of filing the appeal pursuant to which the Applicant internally assessed its options, the same had resulted in the lapse of the statutory period for filing an appeal under Section 9C of the Act.

8. **That after a year of refusal of EuroChem Group AG's request to provide single dumping margin to the Applicant and NAK Azot and several internal deliberations, the fact that the Applicant maintains its plans to export the PUC to India; the Applicant pursued this issue again with the Respondent No. 1 vide its letter dt. 07.11.2019** (filed on 11.11.2019) which highlighted that the non-issuance of a single dumping margin for NAK Azot and Nevinka- the Applicant, is inconsistent with the India's obligations provided under the WTO Agreement on Anti-Dumping ("ADA"), the Indian Anti-dumping laws, the Respondent No.1's Manual of Operating practices for Trade Remedy Investigations as well as the established past practices.

9. **The Applicant filed another letter with the Respondent No. 1 dt. 20.01.2020. a reminder letter dt. 28.02.2020 and two reminder emails dt. 24.04.2020 and 10.07.2020 seeking a response to the request filed by the Applicant through its parent group on 11.11.2019.** However, the no response has been received from the Respondent No. 1 till date.

10. **That since the Applicant has not received any response from the Respondent No. 1 to the repeated requests filed by its parent group with respect to granting single dumping margin and individual rate of anti-dumping duty for the Applicant or the reasons for not granting such request, the Applicant has preferred the instant appeal with a delay of 2 years.** Such delay was caused as the Applicant believed that its requests will be heard appropriately and responded by the Respondent No. 1 adequately; and the same was purely bona fide and in good faith."

(emphasis supplied)

7. In short, the applicant has stated that after the issue of the Customs Notification dated September 12, 2017 specifying residual duty for the appellant, a representation was submitted by the appellant which resulted in the issue of the first corrigendum dated December 19, 2017 by the Designated Authority specifying that the appellant would be subjected to 'Nil' rate of duty. However, the Central Government did not issue any Customs Notification to give effect to the said recommendation made by the Designated Authority and in fact by a second corrigendum dated April 25, 2018, the Designated Authority withdrew the first corrigendum. This resulted in the filing of another representation before the Designated Authority but the Designated Authority, by letter dated July 10, 2018, informed the appellant that the issue raised that it should be granted the same treatment as the related producer had been addressed in the final findings of the Designated Authority. Various representations were again submitted for the same relief but since no decision was taken, the appellant preferred this appeal.

8. To be able to appreciate the grounds taken in the delay condonation applications, it would be necessary to narrate the relevant facts.

9. The records indicate that the Domestic Industry, which has been impleaded as Respondents in this appeal, had jointly filed an application before the Designated Authority for initiation of anti-dumping investigation concerning imports of "Ammonium Nitrate" originating in or exported from Russia, Indonesia, Georgia and Iran. The investigation was initiated by a Notification dated August 05, 2016 and the final findings of the Designated Authority were notified by a Notification dated August 01, 2017. Residual duty was specified for the appellant. The request made by the appellant for determination of individual dumping margin was not accepted for the reason that it had not exported the product under consideration during the period of investigation as a result of which individual dumping margin could not be assessed in the absence of export price. It needs to be sated that the appellant had made a request that it should have the same dumping margin (Nil) as was assessed for the related producer namely Novomoskovskaya (NakAzot).

10. The recommendation made by the Designated Authority for imposition of definitive anti-dumping duty on the imports of subject goods was considered by the Central Government and a Customs Notification dated September 12, 2017 was issued imposing anti-dumping duty at the rate specified in the corresponding

entry in Column No. 8. The portion of the Notification relevant for the purpose of this appeal is reproduced below:-

S.N o	Tariff Item	Descripti on of goods	Count of origin	Country of exports	Producer	Export er	Duty amou nt	Unit
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1.	3102 30 00	"Ammoni um nitrate" whether prilled, granular, or in other solid form, with or without additives or coating, and having bulk density in excess of 0.83 g/cc	Russia	Switzerla nd	Novomoskovsk aya (NakAzot)	Euro Chem Trading GMBH Throug h Rawfert Offshor e Sal	NIL	US Dollar/Met ric Ton

11. The appellant made a representation before the Designated Authority that the appellant should not have been subjected to a residual rate of duty and 'NIL' rate of anti-dumping duty, as was fixed for its related producer, should have been specified for the appellant.

12. On record is a corrigendum dated December 19, 2017 issued by the Designated Authority including the appellant in the duty table and specifying 'NIL' rate of duty for the appellant. The relevant portion of the said corrigendum dated December 19, 2017 is reproduced below:-

Ministry of Commerce and Industry
(Department of Commerce)
(Directorate General of Anti-Dumping and Allied Duties)
CORRIGENDUM
New Delhi, the 19th December, 2017
(Final Findings Notification)

2. In partial modification of the above mentioned Notification Sl. No. 1 in the Duty Table is modified and shall be read as under:

DUTY TABLE

S.N o.	Sub- Headi ng	Descripti on of Goods	Count of origin	Country of Export	Producer	Export er	Duty Amou nt	Unit
1.	3102	Ammoniu m Nitrate Having density above 0.83 g/cc*	Russia	Switzerla nd	Novomoskov sky Azot JSC Nevinnomys sky Azot, JSC	Euro Chem Trading GMBH through Rawfert Offshor e Sal, Lebano n Euro Chem Trading	NIL	US Dollar/Met ric Ton

						GMBH		

13. There is nothing on record to indicate that this corrigendum was considered by the Central Government since Customs Notification was not issued by the Central Government in the Official Gazette imposing 'NIL' rate of duty for the Appellant.

14. At this stage it needs to be noted that four appeals were filed before the Tribunal against the Customs Notification dated September 12, 2017 issued by the Central Government and the final findings dated August 01, 2017 of the Designated Authority. Three appeals were filed by the partners/ user of the subject goods, while the fourth appeal was filed by the exporter of such goods. All the four appeals were dismissed by the Tribunal by order dated March 16, 2018. The Special Leave to Appeal against the order of the Tribunal was also dismissed by the Supreme Court.

15. It also transpires from the record that the Designated Authority issued a second corrigendum dated April 25, 2018 withdrawing the first corrigendum dated December 19, 2017 and also correcting certain typographical errors in the final findings. The Central Government, being satisfied that it was necessary in the public interest to do so, made an amendment in the Customs Notification dated September 12, 2017 to the following effect:-

"In the said notification, in the TABLE, against serial number 1, in column (7), the entry "Euro Chem Trading GMBH through Rawfert Offshore Sal, Lebanon" shall be substituted."

16. Thus, the appellant continued to be subjected to the residual rate of anti-dumping duty. It is stated that the parent group of the Appellant, namely Euro Chem Group, thereafter approached the Trade Representative of the Russian Federation in India. After pointing out the aforesaid facts, it was stated in the aforesaid letter that Euro Chem would be forced to approach Courts to eliminate the imposition of anti-dumping duty and to seek reason from the Designated Authority for cancellation of the first corrigendum dated December 19, 2017. The Trade Representative of the Russian Federation in India, accordingly, sent a letter dated July 02, 2018 to the Designated Authority. In response to the said letter, the Designated Authority sent a communication dated July 10, 2018 to the Trade Representative of the Russian Federation in India informing them that based on the final findings dated August 01, 2017, the Central Government had issued the Customs Notification dated September 12, 2017 and the issue raised had been addressed in the final findings dated August 01, 2017.

17. The appellant claims that thereafter further representations were sent by Euro Chem on November 07, 2019, January 20, 2020, February 20, 2020, and April 24, 2020. The relief claimed in all these representations was for re-issuance of corrigendum dated December 19, 2017 and to provide a single dumping margin for the appellant as was for its related producer but as no decision was taken, this appeal was filed under section 9C of the Tariff Act on December 1, 2020 with a prayer that it should be held that the Designated Authority should have recommended 'NIL' rate of duty for the appellant and the second corrigendum dated April 25, 2018 issued by the Designated Authority to the extent it affects the appellant should be set aside. A further prayer was made that a direction should be issued to the Union of India to issue a Customs Notification "giving effect to or acting upon the first corrigendum dated 19/12/2017" issued by the Designated Authority."

18. The relevant facts have been stated and so the submissions advanced on behalf of the parties can be now considered.

19. Shri Sandeep Sethi, learned Counsel for the Appellant made the following submissions:-

(i) The Designated Authority had realised its mistake in not including the appellant in the duty table with its related company for imposition of 'NIL' rate of duty and, therefore, issued the first corrigendum dated December 19, 2017, but without issuing any notice to the appellant it withdrew the first corrigendum by a second corrigendum dated April 25, 2018. The second corrigendum had, therefore, been issued in violation of principles of natural justice as no opportunity was provided to the appellant;

(ii) The parent company of the appellant had represented against the issue of second corrigendum but the Designated Authority informed the parent company, by letter dated July 10, 2018, that the issues raised by the Trade Representatives of the Russian Federation had already been addressed in the final finding dated August 01, 2017. Thereafter, various representations were submitted on behalf of the appellant before the Designated Authority for re-issue of the first corrigendum and for acting upon it. The delay in filing this appeal has occurred because the appellant genuinely believed that the prayer made in the representations would be accepted and a corrigendum would be issued by the Designated Authority, followed by a Customs Notification by the Central Government. In such circumstances the delay is not deliberate and deserves to be condoned; and

(iii) The appellant has a good case on merits and if the delay is not condoned, great prejudice would be caused to the appellant as it would have to pay the residual duty as against 'NIL' duty. In support of this submission learned counsel placed reliance upon a decision of the Tribunal in *M/s Greenply Industries Ltd. v/s Union of India and others Anti-Dumping Appeal No. 52357 of 2016 decided on September 15, 2016*.

20. Mrs. Reena Khair, learned Counsel for the Domestic Industry opposed the Delay Condonation Application and made the following submissions:

(i) The only course open to the appellant was to have assailed the Customs Notification dated September 12, 2017 issued by the Central Government after considering the final findings dated August 01, 2017 of the Designated Authority and so this appeal has been filed with inordinate delay of more than three years as the time prescribed for filing an appeal under section 9C of the Traffic Act is only 90 days. In support of this contention learned counsel placed reliance upon a decision of the Supreme Court in *Balwant Singh v/s Jagdish Singh and Others (2010) 8 Supreme Court Cases 685*;

(ii) In fact four appeals were filed to assail the Notification dated September 12, 2017 and the final findings dated August 01, 2017 in which the appellant was also impleaded as a respondent. All these appeals were dismissed by the Tribunal and the *Special Leave to Appeal (Civil Appeal No. 19899 of 2018)* filed to assail the order passed by the Tribunal was also dismissed by the Supreme Court; and

(iii) No satisfactory explanation has been offered by the appellant for the inordinate delay in filing the appeal.

21. Shri Ameet Singh, learned counsel appearing for the Designated Authority also submitted that the appellant has failed to furnish any satisfactory explanation for the inordinate delay in filing the appeal. Learned counsel submitted that the appellant was well aware of the remedies available to it for challenging the Customs Notification dated September 12, 2017 and the final findings dated August 01, 2017 of the Designated Authority but still it waited for over three years to file this appeal.

22. Shri Sunil Kumar, learned Authorized Representative appearing for the Department also urged that the Delay Condonation Application should be dismissed as it has been filed with inordinate delay. Reliance has been placed upon a decision of Supreme Court in *Esha Bhattacharjee v/s Managing Committee of Raghunathpur Nafar Academy and Ors. (2013) 12 SCC 649*

23. The submissions advanced by learned counsel for the parties and the learned Authorized Representative of the Department have been considered.

24. The appellant is actually aggrieved by the Customs Notification dated September 12, 2017 as the appellant was subjected to a residual rate of duty even though according to the appellant it should have been subjected to 'NIL' rate of anti-dumping duty like its related producer. The appellant clearly had a remedy available under section 9C of the Tariff Act of filing an appeal within a period of 90 days from the date of the Customs Notification. The appellant did not file the appeal within the aforesaid period of 90 days even though four appeals were filed before the Tribunal by different parties against the aforesaid final findings and the Customs Notification. It needs to be noted that the appellant was impleaded as a Respondent in the appeals. All the four appeals were ultimately dismissed by the Tribunal on March 16, 2018 and the Special Leave to Appeal was dismissed by the Supreme Court.

25. The appellant has concealed essential material facts in this application filed for condonation of delay in as much as no statement has been made that four

appeals were filed by other interested parties before the Tribunal to challenge the Customs Notification dated September 12, 2017 issued by the Central Government imposing anti-dumping duty on the basis of the recommendation dated August 01, 2017 made by the Designated Authority, particularly when the appellant was impleaded as a Respondent in the said appeals. This fact alone disentitles the appellant to seek any discretion in a matter where there is a delay of about three years in filing the appeal. The fact regarding filing of four appeals was brought to the notice of the Bench only by the learned counsel appearing for the Domestic Industry.

26. The appellant did pursue the matter with the Designated Authority and a corrigendum dated December 19, 2017 was issued by the Designated Authority modifying the duty table in the final findings by specifying individual rate for the appellant, namely 'NIL' rate of duty which was the rate of duty specified for the related producer.

27. It is doubtful whether the Designated Authority could have modified the duty for the appellant specified in its final findings, because it was not a typographical mistake as a categorical finding had been recorded by the Designated Authority in the final findings that the request made by the appellant for determination of individual dumping margin could not be accepted for the reason that it had not exported the product under consideration during the period of investigation as a result of which the export price could not be assessed. The Designated Authority also held that it was not desirable to consider the request of the appellant that the same dumping margin should be specified as was assessed for the related producer. Even otherwise, the Central Government did not issue a Customs Notification in the Official Gazette accepting the recommendations of the Designated Authority. Thus, for all the practical purposes, the first corrigendum issued by the Designated Authority did not result in any benefit to the appellant, and it should have continued to pay the residual duty that was notified in the Customs Notification dated September 09, 2017 issued by the Central Government.

28. The appellant, however, still kept quiet and did not, at the appropriate time, take recourse to proceedings contemplated in law for either setting aside the Customs Notification dated September 12, 2017 or for implementation of the recommendation made by the Designated Authority in the first corrigendum by issuance of a Customs Notification by the Central Government. It is only in this appeal filed on December 1, 2020 that a prayer has now been made that the Central Government may issue such a Customs Notification.

29. The Designated Authority ultimately, withdrew the first corrigendum dated December 19, 2017 by a subsequent corrigendum dated April 25, 2018.

30. On behalf of the appellant a representation was thereafter made to the Designated Authority for specifying an individual rate for the appellant but the Designated Authority made it clear to the appellant, by a letter dated July 10, 2018, that such a request cannot be accepted for the reason that this issue had already been addressed by the Designated Authority in the final findings.

31. Though, as stated above, the cause of action actually arose when the Central Government issued the Customs Notification dated September 12, 2017 specifying the duty on the basis of the final findings recommended by the Designated Authority and even if it is assumed that the appellant believed that its grievance would be addressed by the Central Government when the first corrigendum dated December 19, 2017 was issued by the Designated Authority, but still the appellant could not have waited endlessly and should have immediately taken recourse to legal proceeding when the recommendations made by the Designated Authority in the first corrigendum were not considered by the Central Government nor any Customs Notification was issued by the Central Government for accepting such a recommendation made by the Designated Authority.

32. However, the appellant did not approach the Tribunal or took recourse to any other proceedings and continued to make several representations, even though the Designated Authority had specifically informed the appellant that it would not consider the issue raised on behalf of the appellant since it had been decided in the final findings of the Designated Authority. These representations, therefore, cannot enure to the benefit of the appellant for explaining this long delay in filing the appeal on December 01, 2020.

33. Learned Counsel for the appellant has placed reliance upon a decision of this Tribunal in Greenply Industries Ltd., which is also in connection with anti-dumping appeal. The Bench noted that though the grounds mentioned for explaining the delay were not substantial, but considering the larger issue on the merits of the case, if any, the delay was condoned. This cannot mean that in all cases where merit is to be considered, the delay should be condoned. Each case has to be examined on its own facts. In fact the Bench itself was conscious of this fact and treated the views to have been expressed by it 'as a special case'.

34. Learned counsel for the Domestic Industry has, however, placed reliance on a decision of the Supreme Court in Balwant Singh. While examining the provisions of order 22 rule 9(2) and (3) of the Code of Civil Procedure 1908 in a case when there was a delay of 778 days in filing an application for bringing on record the legal representative of the deceased appellant, the Supreme Court observed:-

25. **We may state that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party.** The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation.

26. **The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise.** These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. **Once a valuable right, has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party.** Justice must be done to both parties equally. Then alone the ends of justice can be achieved. **If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.**

27. *The application filed by the applicants lack in details. Even the averments made are not correct and ex-facie lack bona fide. **The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant.** If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. **On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant.** Liberal construction cannot be equated with doing injustice to the other party.*

28. xxxxxxxx

35. *The expression 'sufficient cause' implies the presence of legal and adequate reasons. The word 'sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.*

38. *Above are the principles which should control the exercise of judicial discretion vested in the Court under these provisions. **The explained delay should be clearly understood in contradistinction to inordinate unexplained delay.** Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for*

condonation of delay. The larger benches as well as equi-benches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to condone the delay in the filing of such applications."

(emphasis supplied)

35. It would also be necessary to refer to the decision of the Supreme Court in *Ramlal v. Rewa Coalfields Ltd.* AIR 1962 SC 361 The observation are as follows:-

"7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna v. Chathappan*, ILR 13 Mad 269.

12. It is, however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. **The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay.** This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;"

(emphasis supplied)

36. In *Esha Bhattacharjee*, which decision has been relied upon by the learned Authorized Representative of the Department, reference has been made to the decision of the Supreme Court in *Balwant Singh*. The Supreme court culled out the following principles:-

"From the aforesaid authorities the principles that can broadly be culled out are:

i) There should be a liberal, pragmatic, justice-oriented, non- pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.

iii) **Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.**

iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

v) **Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.**

vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it

may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

*ix) **The conduct, behavior and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration.** It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

*xii) **The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.***

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."

(emphasis supplied)

37. The following principles follow from the aforesaid decisions of the Supreme Court:-

(i) The law of limitation is a substantive law and once a valuable right has accrued to a party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away this right on the mere asking of the applicant, particularly when the delay is directly as a result of negligence, default or inaction of that party;

(ii) The explanation has to be reasonable or plausible so as to persuade the Court to believe that the explanation rendered is not only true but is worthy of exercising judicial discretion in favour of the applicant;

(iii) If the explanation is bona fide and also reflects the normal behaviour of a common prudent person, the judicial discretion would tilt in the favour of such an applicant;

(iv) The explained delay should be clearly understood in contradistinction to inordinate unexplained delay;

(v) Substantial justice being paramount and pivotal, the technical consideration should not be given undue and uncalled for emphasis; and

(vi) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration.

38. The factual position has been narrated above. It clearly demonstrates that the appellant, for no justifiable reason, did not challenge the Customs Notification dated September 12, 2017 within the time stipulated in section 9C of the Tariff Act nor did the appellant take immediate steps for implementation for the first corrigendum issued by the Designated Authority on December 19, 2017. This does not reflect the normal behaviour of a person having all the resources to take recourse to legal proceedings. In fact, Euro Chem group, which is the parent group of the appellant, in beginning of 2018 had threatened going to Court for elimination of the anti-dumping duty, but still for a long period of two years, the appellant kept quiet. The appellant has been thoroughly negligent and there is no good reason as to why the delay should be condoned on the mere asking the appellant. It needs to be noted that even after having been informed by the Designated Authority that the representation filed on behalf of the appellant for specifying 'Nil' rate of duty could be accepted for the reason that the final findings had dealt with the issue, the appellant repeatedly filed representations. These representations were for the same relief which had been denied to the appellant by the Designated Authority and, therefore, the said explanation offered for the delay cannot be accepted. Above all, the appellant concealed material relevant facts from the Tribunal since the appellant has not stated that four Anti-Dumping Appeals had been filed to assail the Customs Notification. The appellant was impleaded as a respondent and these appeals had been dismissed by the Tribunal and the Special Leave to Appeal filed before the Supreme Court was also dismissed.

39. The facts stated above leave no manner of doubt that the appellant has not been able to satisfy the Tribunal that the appellant was prevented by sufficient cause from filing the appeal in time. The Delay Condonation Application, therefore, deserves to be rejected and is rejected.

40. As the delay condonation application has been rejected, the appeal stands dismissed.

(Order pronounced on 17.02.2021)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Customs Appeal No. 382 of 2009-DB

Arising out of OIA-284/2009/Cus/Commr(A)/KDL
Passed by Commissioner of CUSTOMS-Kandla

Date of Hearing: 13.05.2019

Date of Decision: 16.07.2019

**M/s CHINTAN ALUMINIUM PVT LTD
137, ADARSH INDUSTRIAL ESTATE, NEAR CHAKUDIA MAHADEV
RAKHIAL, AHMEDABAD**

Vs

**COMMISSIONER OF CUSTOMS
KANDLA, CUSTOM HOUSE, NEAR BALAJI TEMPLE
KANDLA, GUJARAT**

Appellant Rep by: Shri S J Vyas, Adv.

Respondent Rep by: Shri S.K. Shukla, AR

CORAM: Ramesh Nair, Member (J)

Raju, Member (T)

FINAL ORDER NO. A/11131/2019

Per: Raju:

This appeal has been filed by M/s Chintan Aluminum Pvt. Ltd. against order of Commissioner (Appeals) upholding revision of assessable value and consequent demand of Customs duty against appellant.

2. Ld. Counsel pointed out that the appellant had imported Aluminum foil scrap as per ISRI Specification three bill of entry No. 105345 dated 15.05.2006, 105750 dated 31.05.2006 and 105752 dated 31.05.2006 declaring assessable value on the strength of bill of entry no. 106096 dated 15.06.2006. the appellant challenged the said enhancement of value before the Commissioner (Appeals) who dismissed their appeal for failure to make the pre-deposit as directed by Commissioner (Appeals). However when the appellant approached the Tribunal, the matter was remanded back to the Commissioner (Appeals) for order on merits vide Tribunal order No. A/1128/WZB/AHD/2008 dated 28.05.2008. In remand proceedings, Commissioner (Appeals) confirmed the order in original and hence this appeal.

2.1 Ld. Counsel pointed out that none of the exceptions laid down in Rule 4(2) of the Customs Valuation Rules, 1988 exist in the facts and circumstances of the case and hence the transaction value cannot be rejected. He argued that rejection of transaction value of relying on guidelines and LME prices are without authority. He further pointed out that the order in original has enhanced the value beyond the value earlier enhanced at the time of assessment of bill of entry. He pointed out that while assessment was done,

Bills of Entry No. (USD)	Declared Value(USD)	Enhanced Value
105345 dated 15.05.2006	600 PMT	1500
105750 dated 31.05.2006	700 PMT	1782
105752 dated 31.05.2006	700 PMT	1782

After in the final order the value for the bill of entry 105345 dated 15.05.2006 has been further enhanced from USD 1500 PMT to USD 1780 PMT.

2.2 Ld. Counsel pointed out that no SCN was issued in the instant case.

3. Ld. AR relied on the impugned order.

4. We have gone through rival submissions. We find that that the appellant had declared the price of imported Aluminum foil scrap of 'TESTY' grade at 600

PMT/700 PMT. Order in original pointed out that during some period there were contemporaneous imports made at following rates.

Sr. No	BE No.	Date	Contemporaneous Value/Assessed (USD/MT)	Import Value
01	105502	22.05.2006	2045	
02	106096	15.06.2006	1780	
03	106404	28.06.2006	2045	

4.1 It is seen that the value declared by the appellant is to the range of 30% to the value of the contemporaneous import. It is seen that sub-rule 2 of rule 4 clearly prescribes the exception when the sale involves any abnormal discount or revision from ordinary competitive price. In the instant case it is seen that the sale involves almost 70% discount from the ordinary competitive price of contemporaneous imports. In view of above, we find that the there was a jurisdiction in rejection of the declared invoice value.

5. We however found that the original assessment in the case of bill of entry no. 105345 dated 15.05.2006 was done at USD 1500 PMT but after issuance of SCN the same was revised upwards to USD 1780 PMT. Both these orders were passed by the Deputy Commissioner of Customs. We do not find that permissible. In view of above, the value in bill of entry No. 105345 dated 15.05.2006 is fixed at 1500 USD PMT as was done in the original assessment. We find that Revenue has produced contemporaneous import data. Revenue has chosen to rely on value of the contemporaneous import and thus fixing of the assessable value at 1780 PMT in respect of bill of entry no. 105750 and 105752. Revision of value in these cases is upheld. Appeal is partly allowed in above terms.

(Order pronounced in the open court on 16.07.2019)

[COURT NO. III]

Shri Ramesh Nair, Member (J)

VARSHA PLASTICS PVT. LTD.

2. Versus

COMMISSIONER OF CUSTOMS, KANDLA

Final Order No. A/11459/2019-WZB/AHD, dated 24-7-2019 in Appeal No. C/186/2012

REPRESENTED BY :Shri Amal Dave, Advocate, for the Appellant.

Shri G. Jha, Authorised Representative, for the Respondent.

[Order]. - The appellant's refund claim was rejected on the ground of unjust-enrichment by the adjudicating authority, the said rejection was upheld by the Commissioner. It was observed by the lower authorities that though the appellant had submitted CA certificate but the books of account were not submitted. Against the impugned order passed by the Commissioner (Appeals) the appellant filed the present appeal.

2. Sh. Amal Dave, Ld. Counsel appearing on behalf of the appellant submits that they have submitted the CA certificate wherein it was certified that the incidence of the duty for which the appellant is seeking refund has not been passed on to any other person. He submits that even though the books of account could not be submitted but on the basis of CA certificate it is established that there is no unjust-enrichment on the part of the appellant. Accordingly, refund should not be rejected on the ground of unjust-enrichment. In support, he placed reliance on the following judgments :-

- *Mangal Textile Mills Pvt. Ltd.* - [2004 \(171\) E.L.T. 160](#) (Guj.)
- *Birla Corporation Ltd.* - [2008 \(231\) E.L.T. 482](#) (Tri. - Mumbai)
- *Shyam Textile Mills.* - [2015 \(328\) E.L.T. 390](#) (Tri. - Ahmd.)
- *Eastern Shipping Agency* - [2013 \(32\) S.T.R. 630](#) (Tri. - Ahmd.)
- *Supreme Industries Ltd.* - [2017 \(358\) E.L.T. 877](#) (Tri. - Mumbai)
- *Madhucon Bina Puri* - [2015 \(320\) E.L.T. 458](#) (Tri. - Mumbai)
- *Shrinathji DYG* - [2011 \(24\) S.T.R. 108](#) (Tri. - Ahmd.)

3. Sh. G. Jha, Ld. Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order. He submits that merely on the basis of CA certificate, it cannot be established that incidence was not passed on. Since, the CA certificate is based on the books of account, the said books of account should be submitted by the appellant. Even after giving an opportunity the appellant is not able to submit any books of accounts. He placed reliance on the following judgments :-

- *Shoppers Stop Ltd.* - [2018 \(8\) G.S.T.L. 47](#) (Mad.)
- *BPL Ltd.* - [2010 \(259\) E.L.T. 526](#) (Mad.)
- *Crompton Greaves Ltd.* - [2011 \(22\) S.T.R. 380](#) (Tri. - Mum.)
- *BE Office Automation P Ltd.* - [2009 \(235\) E.L.T. 838](#) (Tri. - Mum)
- *Hanil Era Textiles Ltd.* - [2008 \(225\) E.L.T. 117](#) (Tri. - Mum)

4. I have carefully considered the submission made by both the sides and perused the records. I find that the limited issue to be decided by me is whether the refund of the appellant is hit by unjust-enrichment or otherwise. It is observed from the records and also from both the orders of the lower authorities that the appellant have already submitted CA certificate, however, at no point of time they have submitted the books of account. Even the CA certificates are also one dated 13-8-2010 and another one is 19-1-2004. The unjust-enrichment has to be examined only at the time of release of the refund even as on today it is to be ascertained that whether the incidence of duty has been passed on and otherwise. The appellant is not able to submit any books of account from which it cannot be ascertained that the amount for which the refund has been shown as receivable which can establish that the incidence of duty has not been passed on.

5. As regards, the CA certificate is not a concluding document that shows the incidence was not passed on but it is based on the books of account. In absence of any books of account for the current period, the CA certificate cannot alone help the appellant to overcome the aspect of unjust-enrichment. Therefore, in absence of providing books of account by the appellant, the aspect of unjust-enrichment is not established. Accordingly, I am of the view that both the orders passed by the lower authorities are correct and legal which do not require any interference. As regards, the judgments submitted by the appellant even though the CA certificate can be taken support for establishing unjust-enrichment but in the present case both the CA certificates are of very old period and for the purpose of unjust-enrichment the present position is relevant for which neither any CA certificate was produced nor any books of account. Therefore, the judgments relied by the Ld. Counsel is not helpful for the case.

6. Accordingly, I uphold the impugned order and dismiss the appeal.

(Dictated & Pronounced in the open Court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Customs Appeal No. 368 of 2010

Arising out of Order-in-Original No OIO-KDL/COMMR/05/10-11, Dated:
30.06.2010

Passed by Commissioner of Customs, Kandla

Date of Hearing: 26.08.2019

Date of Decision: 18.09.2019

**AJANTA LTD
ORPAT INDUSTRIAL ESTATE, RAJKOT
MORBI HIGHWAY, MORBI GUJARAT-363641**

Vs

**COMMISSIONER OF CUSTOMS
KANDLA, CUSTOM HOUSE, NEAR BALAJI TEMPLE
KANDALA, GUJARAT**

AND

Customs Appeal No. 369 of 2010

Arising out of Order-in-Original No OIO-KDL/COMMR/05/10-11, Dated:
30.06.2010

Passed by Commissioner of Customs, Kandla

**MANOJ KUMAR
C/o ORPAT INDUSTRIAL ESTATE, RAJKOT MORBI HIGHWAY
MORBI GUJARAT - 363641**

Vs

**COMMISSIONER OF CUSTOMS
KANDLA, CUSTOM HOUSE, NEAR BALAJI TEMPLE
KANDALA, GUJARAT**

WITH

Customs Appeal No. 370 of 2010

Arising out of Order-in-Original No OIO-KDL/COMMR/05/10-11, Dated:
30.06.2010

Passed by Commissioner of Customs, Kandla

**LILADHAR PASOO FORWARDERS PVT LTD
PLOT NO. 4, MARSHALLING YARD, SEC-1, KSEZ, GANDHIDHAM
KUTCH, GUJARAT-370230**

Vs

**COMMISSIONER OF CUSTOMS
KANDLA, CUSTOM HOUSE, NEAR BALAJI TEMPLE
KANDALA, GUJARAT**

Appellant Rep by: Shri Anand Nainawati, Adv.

Respondent Rep by: Shri S K Shukla, Superintendent (AR)

CORAM: Ramesh Nair, Member (J)

Raju, Member (T)

FINAL ORDER NOS. A/11783-11785/2019

Per: Raju:

These appeals have been filed M/s. Ajanta Limited against the confirmation of demand of duty, confiscation and imposition of redemption fine and penalties imposed on authorized representative of the appellant CHA.

2. Ld. Counsel for the appellant argued that they are manufacturers electric fans. They imported goods namely rotors, stator, down case, top case and down rod of motor and classified the same under tariff Chapter heading 8503 00 90 as parts of electric motor. The Commissioner vide impugned order changed the classification of the said goods under Chapter heading 8414 90 30 as parts of electric fan. The Revenue relied on the examination report which showed that the packing material as well as individual packs containing aforesaid items clearly mentioned the description as "parts of electric fans". The statement of Shri Manok Kumar, Authorised Representative was also recorded wherein he submitted that the said imported goods were intended for use in the ceiling fan but he also submitted that as they are parts of the ceiling fan motor classification under heading 8503 was adopted by them. However, vide his letter dated 14.03.2009, he agreed to the liability and to pay duty. In his further statement dated 19.03.2009, Shri Manoj Kumar stated that they had imported the same goods earlier also and had filed bills of entry for rotor and stator under CTH 8503 and for the remaining items under 8414 but the Revenue changed the classification of all the goods under heading 8414. The statement of Shri Surojit Chakraborty, representative of CHA was also recorded wherein he submits that appellant were earlier also importing the parts of ceiling fan and classifying under heading 8414 however, in the present consignment only five parts of electric motor have been imported therefore, the goods did not merit classification under heading 8414.

2.1 Ld. Counsel pointed out that goods in the instant case merits classification under 8503 and not under heading 8414. He argued that the imported items were to be used for assembly of electric motor which can be used in the manufacture of ceiling fans. He argued that the classification has to be determined according to the terms of the headings. He pointed out that heading 8501 covers electric motors and generators excluding generating sets and heading 8503 covers parts suitable for use solely and principally with the machines of heading 8501 and 8502. He argued that since the items imported are to be solely and principally to be used in electric motor, they merits classification under heading 8501. He relied on the HSN explanatory notes of Chapter heading 8503 which reads as under :-

"85.03 - Parts suitable for use solely or principally with the machines of heading 85.01 or 85.02.

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI) this heading covers parts of the machines of the two preceding headings. The very wide range of parts classified here includes:

(1) Shells and cases, stators, rotors, collector rings, collectors, brushholders, excitation coils.

(2) Electrical sheets and plates in shapes other than square or rectangular."

He pointed out that stator and rotor are specifically covered in the said explanatory notes as part of motors. He relied on the decision of Hon'ble Apex Court in the case of *Collector of Central Excise vs. Wood Craft Products Limited – (1995) 3 SCC 454* wherein it has been held that a specific heading has to be preferred over the general heading. He also relied on the decision of the Tribunal in the case of *CCE vs. Jyoti Electricals Motor Limited – 2003 (162) ELT 1117 (Tri.)* wherein it has been held that rotor and stators before being used in mono block pump, classifiable as parts of electric motors as parts of mono block pump and the products being marketable commodity, to be classified under heading 8503 and not under heading 8413. Ld. Counsel also relied on the decision in the case of *CCE vs. Chitra Industries – 1997 (92) ELT 571 (Tri.)* wherein relying on the decision in the case of *Jyoti Electricals Motor Limited (supra)* it was held that parts namely rotors and stators used in the manufacture of monoblock power driven pumps classifiable under heading 85.03.

2.2 Ld. Counsel further submits that the classification has to be made on the basis of the condition of the goods at the time of import and not based on subsequent use. He relied on the decision of Hon'ble Apex Court in the case of *Commissioner of Customs, New Delhi vs. Sonly India Limited – 2008 (231) ELT 385 (SC)*. Ld. Counsel further argued that specific heading should prevail over the

general heading and he relied on the decision of Hon'ble Apex Court in the case of *Speedway Rubber Company vs. CCE, Chandigarh – 2002 (143) ELT 8 (SC)*. He also relied on Rule 3(a) of General Rules for the interpretation of Import Tariff wherein it is stated that most specific description shall be preferred to headings providing a more general description. Rule 3(b) provides that mixtures, composite goods consisting of different materials and goods put up in sets, cannot be classified by reference to Rule 3(a), should be classified as if they consisted to the material which gives them their essential character. He submits that Rule 3(c) provides that when goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order.

2.3 He further argued that the imported goods are not liable to confiscation under Section 111(m) of the Customs Act. He relied on the decision of the Tribunal in the case of *Universal Chemical (India) vs. Collector of CCE, Bombay – 1999 (105) ELT 379 (Tri.)* wherein the Tribunal observed that claiming classification of the goods under a particular heading is a matter of belief and not amounting to mis-declaration in terms of Section 111(m) of Customs Act.

3. Ld. AR relies on the impugned order. He pointed out that the CHA had, earlier also filed checklists for rotors and stators classifying the same under heading 8414 as parts of electric fans. The check lists suggesting the classification under heading 8414 but the importer directed them to file bills of entry under heading 8503. He pointed out that earlier also they had filed bills of entry for import of these items under heading 8503 however, the final assessment in that case was made under heading 8414. He pointed out that the appellants were aware that the correct classification of the items is under heading 8414 and not under heading 8503. He pointed out that in the present case, they had filed bills of entry under heading 8503 for some items while the boxes in which the said goods were imported were of the goods as of the same parts.

4. We have gone through the rival submissions. We find that the present case relates to classification of imported goods namely rotors, stator, down case, top case and down rod etc. imported together. The appellant is seeking the classification under heading 85.03 whereas the Revenue seeks to classify the items under tariff heading 84.14. The earlier imports of similar goods were assessed by the Revenue under heading 84.14 whereas the appellant had sought classification under 85.03. Revenue argued that the items imported by them are fans in unassembled condition. While Revenue has relied on the Rule 2(a) of the General Rules for the interpretation of the schedule of the Customs Tariff states that:-

"2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled. "

The appellants are relying on HSN explanatory notes wherein the rotors and stators specifically mentioned as part of electric motor. However, the said HSN explanatory notes are classified by word "subject to general provisions regarding classification of parts (see the General Explanatory Note to Section XVI). Thus the said explanatory notes, in conjunction with General Provisions regarding classification of parts appearing in Section XVI.

5. Section XVI, Note-2 reads as follows:-

"2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules :

(a) parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;

(b) other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517;

(c) all other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8487 or 8548." Rule 2(a) of the Section XVI applies to parts which are included or taken to include under heading 84 or 85. It is seen that no heading under Chapter 84 or 85 specifically covers the items like down case, upper case, down rod, stators and rotors in the heading. The Chapter Note 2(b) covers parts which are suitable solely and principally with the machines of heading 8501 and 8502 and the said parts are to be classified in the same heading as the machine. The order-in-original describes the examination report as under:-

The markings on the corrugated boxes are as follows:-

"ORPAT CEILING FAN MODEL: ALL? KING CEILING FAN ITEM: FAN MOTOR QTY: 6PCS. N.W.: 15KG G.W: 17.3 KG

"ORPAT CEILING FAN MODEL: AIR QUEEN CEILING FAN ITEM: FAN MOTOR QTY.: 6PCS N.W.: 15KG G.W.: 17.3 KG

"ORPAT CEILING FAN MODEL: AIR MASTER CEILING FAN ITEM: FAN MOTOR QTY.: 6PCS N.W.: 17.65 KG G.W: 19.95KG"

The markings in smaller boxes contained in corrugated boxes are as under:

1. AIR QUEEN MODEL ORPAT CEILING FAN 2 YEARS GUARANTEE ISO 9001-2000 Certified Company. AIR QUEEN/ MC ZZ SLEEVE TYPE BALL BEARING FEATURES 1200 MMSWEEP PRECISION BALANCED BLADE SET LONG LIFE POWDER COATED BODY ZZ SLEEVE TYPE BALL BEARING POWER FULL MOTOR STRONG AIR DELIVERY MULTI COLOUR AVAILABLE HI SPEED CEILING FAN ASSEMBLY INSTRUCTIONS FOR CEILING FAN (Explained with 14 diagrams). ASSEMBLY INSTRUCTIONS FOR CEILING FAN REGULATION (Explained with 8 diagrams) SCHEMATIC CIRCUIT DIAGRAM OF CEILING FAN & REGULATION CONNECTION IMPORTED & MARKETING BY: AJANTA LIMITED ORPAT INDUSTRIAL ESTATE, RAJOT-MORBI HIGHWAY, MORBI- 363 641 (INDIA). ACCESSORIES: FAN MOTOR, PAIR OF CANOPIES SHACKLE ASSEMBLY DOWN ROD, BLADE TRIMS. "

From the above, it is seen that whatever was imported by the appellant was specifically designed for ceiling fan. The marking on the corrugated box in which the said goods were imported is "Orpat Ceiling Fan" with "Air Queen Model" also mentioned. In this regard the Rules of interpretation of schedule are relevant. Rule 2 and 3 of the said Rules are as follows:-

"2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows :

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

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

It is seen that Customs tariff headings include within purview the items incomplete, unfinished where presented unassembled or disassembled, if the said have the essential character of finished goods. In the instant case, from the observations given by the original adjudicating authority, it is seen that all parts of the fan except the fan blades as a set. The packing also describes the goods as electric fan. The rotors and stators, down case, top case and down rod of motor are also designed specifically to be a part of the fan. In these circumstances, following Rule 2(a), the goods are classifiable under heading 84.14 as unassembled, incomplete fan.

5. The appellant relied on the decision in the case of Jyoti Electricals Motor Limited (supra). It is seen that the said decision relates to product namely 'monoblock pump'. The monoblock pump consists of a block on which a motor and a pump, separately manufactured, are fixed and combined. In monoblock pump, motor need not be specifically designed and only motor with same diameter can be used. The motor comes into existence as a separate entity fixed at the block with mechanical pump. In the instant case, there is no separate motor which comes into existence. An unassembled and incomplete fan with a rod, top case, down case and rotating part comes into existence. It is an incomplete fan as only a fan blade needs to be fixed to make a complete fan.

6. Ld. Counsel also relied on the case of Chitra Industries (supra) relating to monoblock pump sets which are different from this specifically designed parts of fan. In view of the above, we find that correct classification of the product would be under tariff heading 84.14 and not under heading 85.03. duty demand on this count is upheld.

7. As regards the imposition of penalty, redemption fine and confiscation, we find merits in the argument of the appellant. The appellant had earlier sought classification under heading 85.03 and the matter can be a subject matter of opinion and therefore, in these circumstances, imposition of penalty and confiscation is not justified as held by Tribunal in the case of Universal Chemical (India) vs. Collector of Central Excise, Bombay (supra). The confiscation and redemption fine are therefore, set-aside and penalties are also set-aside.

8. Appeals are partly allowed in the above terms.

(Order pronounced in the open court on 18.09.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Customs Appeal No. 474 of 2011-DB

Arising out of OIA No.- 216-2011-CUS-COMMR-A-KDL, Dated: 12.07.2011
Passed by Commissioner of CUSTOMS-KANDLA

Date of Hearing: 06.08.2019

Date of Decision: 06.09.2019

**NAYARA ENERGY LTD
P O BOX NO. 24, P O KHAMBHALIA
JAMNAGAR GUJARAT - 361305**

Vs

**COMMISSIONER OF CUSTOMS
KANDLA, CUSTOM HOUSE, NEAR BALAJI TEMPLE
KANDALA GUJARAT**

Appellant Rep by: Shri Vipin K Jain, Shri Aqeel Sheerazi & Ms Dimple Gohil,
Advs.

Respondent Rep by: Shri K J Kinariwala, AC (AR)

CORAM: Ramesh Nair, Member (J)
Raju, Member (T)

FINAL ORDER NO. A/11702/2019

Per: Ramesh Nair:

The brief facts of the case are that the appellants vide Bill of entry no. 005122 dated 12/10/2010 had imported a catalyst called "Petromax-MD" for use in the production of other final product manufactured in FCC unit of its refinery. They claimed benefit of concessional rate of duty available in Sr. No. 228 of notification 21/02-Cus dated 01/03/2002, available to all goods specified in entry no. 45 of List 17. The Adjudicating Authority denied the exemption on the ground that as per the entry of the notification, the goods specified in list 17 required for setting up of Crude Petroleum Refinery is only exempted, whereas the goods in question is a catalyst and the same is not required for setting up of petroleum refinery and the exemption notification is not applicable.

2. Shri Vipin Jain, Ld. Counsel appearing on behalf of the appellant, submits that during the relevant period its production capacity has enhanced from 10MMTPA to 16MMTPA and thereafter 220MMTPA. He submits that as law laid down by this Tribunal in the case of *MRPL vs CC 2005 (187) ELT 466 (Tribunal)* the benefit of Sno. 228 of notification 21/2000-Cus would be available even during the phase where additional units were being installed in an existing refinery. The ration laid down in the said judgment applies in all fours to the facts of the present case, as imports in the present case have been made while their refinery was installing units so as to increase its capacity from 10MMTPA to 16MMTPA and thereafter 220MMTPA. He further submits that as per notification 21/02 list no. 17, which contains various entries from Sno. 1-45, wherein the goods covered under S. no. 1-43 are required to set up for a crude oil refinery and item S. no. 44-45 and those which are required for running, repair and maintenance, both during and after the completion of setting up of the refinery. He submits that the goods imported by them is covered under Sno. 45. He submits that it is a settled law laid down in a catena of decisions that a notification should be read as a whole and the provisions of notifications must be harmonized in a way that no provision is rendered absurd or redundant. In this regard he placed reliance on the following decisions:

(i) *British Airways v/s Union of India 2002 (139) ELT 6 (SC)*

(ii) *Raymond Ltd. v/s Union of India 2009 (240) ELT 180 (Bom.)*

(iii) *Sultana Begum v/s Prem Chand (1977) 1 SCC 737.*

(iv) *Madurai Power Corporation Pvt. Ltd. Dy. Commr. 2008 (229) ELT 521.*

He also placed reliance on the Board’s circular no. 354/34/2008-TRU dated 14/03/2008 which interprets the expression "required for setting up" as not confined to initial setting up, but also to cover pipes required for replacement of worn out/damaged pipes. He submits that identical entry of the notification has been considered by this Tribunal in the case of *Reliance Industries v/s Commissioner of Customs 2012 (285) ELT 562 (Tri. - Ahd.)* He submits that with this decision of the Tribunal the entire issue came to rest and now it is no more res integra. Further on the above, he submits that the catalysts namely "Petromax-HD", imported by the appellant was required for use in its crude oil refinery and is covered by Sno. 45 of List 17 of notification 21/02-Cus dated 01.03.2002 as the imported catalyst is consumable. He also placed reliance on the decision of this Tribunal in the case of *Lanco Industries ltd. vs Central Excise, Tirupathi 2010 (253) E.L.T 70 (Tri.- Bang.)*.

3. Shri K.J. Kinariwala, Ld. Asst. Commr. (AR) appearing on behalf of the Revenue, reiterates the findings of the impugned order. He further submits that the entry no. 45 of list 17 of Sno. 228 of notification no. 21/2002-Cus is unambiguous, according to which, only those goods are exempted which are used for setting up of "Crude Petroleum Refinery". It is beyond doubt that catalyst which is used for production of final products is not used for setting up of refinery. He further submits that even under the entry no. 45 only those goods which are used for running, repair or maintenance of the plant are covered. The catalyst imported by the appellant is not used either for running, repair or maintenance of the plant. Therefore, on both the counts, the goods are not covered under the notification.

4. We have considered submissions made by both the sides and perused the records. We find that the appellant have claimed the exemptions under exemption of goods falling under entry no. 45 of List 17 of Sno. 228 of Notification no. 21/2002-Cus. dated 01.03.2002 which is reproduced below:

Sr. No.	Chapter or Heading No. or sub-heading No.	Description of goods	Standard Rate	Additional Duty Rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
228	84 or any other Chapter	Goods specified in list 17 required for setting up of Crude Petroleum Refinery	5%	10%	

List 17 (See S. no. 228 of the Table)

45. *Sub-assemblies, tools, accessories, protective coating/paint materials, stores, spares, materials, supplies, consumables for running, repairing or maintenance of the goods specified in this List.*

4.1 As per the plain reading of the above exemption entries, we find that there are criteria for the goods to be covered under this exemption notification:

(1) The product should be used for setting up petroleum refinery.

(2) The goods should be used for running, repair and maintenance of plant.

The goods imported is Petromax-HD which is a catalyst and the same is used in the manufacture of final product during the production process. Therefore, it is clear that the said good is not used for setting up of oil refinery. Ld. Counsel had heavily relied upon the case of *Reliance Industries v/s CCE(supra)*. On going through the said judgment, we find that the case involved in the same case is mobile crawler cranes. From the nature of this goods, it is absolutely clear that mobile crawler cranes is used for carrying out Fluidized Catalytic Cracking Unit (FCC)in their refinery. However, in the said judgment, it was held that even if imported goods used after setting up of refinery, the same will be covered by the exemption notification under entry no. 45 of List 17 or S.no. 228 of notification no. 21/2002-Cus. In this judgment, decision was drawn from Board’s circular no. 354/34/2008-TRU dated 14/03/2008. Wherein it was clarified that with reference to exemption granted to the goods used for setting of water treatment plant, even if the pipes are replaced after wear and tear, the same will also be exempted under the notification wherein the term "setting up" was used. As regard the issue that whether the goods are used for setting up of the refinery or thereafter, it was settled in the case of *Reliance Industries (supra)*. However, now it is to be examined that whether the goods are covered under entry no 45 of List 17 in the notification. By reading of the entry, we find that it is a case of the

appellant that the goods is used as consumable for running, repair or maintenance of the goods specified in list. We are of the view that the use of goods for running, repair or maintenance of the goods specified in the list denotes that the same should be used in the setting up for crude petroleum refinery whereas the product in question, i.e. "Petromax-MD" is not used for running, repair and maintenance of the plant. But it is used as input consumable in the production of final product. Therefore, in our view, the goods in question is not covered under entry no. 45 of List 17 of S. no. 228 of notification no. 21/2002-Cus. dated 01/03/2002. We are therefore, of the view that the lower authority has rightly denied the exemption. Hence, the impugned order is upheld. Appeal is dismissed.

(Pronounced in the open court on 06.09.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Customs Appeal No. 12 of 2010

Arising out of Order-in-Appeal No OIO-KDL/COMMR/19/09-10
Passed by Commissioner of CUSTOMS-KANDLA

Date of Hearing: 16.09.2019

Date of Decision: 17.10.2019

**M/s ASIA MOTOR WORKS
34 KM MILESTONE, BHUJ-BHACHAU ROAD
VILLAGE KANAIYABLE, KUTCH, GUJARAT-370020**

Vs

**COMMISSIONER OF CUSTOMS
KANDLA, CUSTOM HOUSE, NEAR BALAJI TEMPLE
KANDALA-GUJARAT**

**Customs Appeal No. 72 of 2010
C/CO/102/2010**

Arising out of Order-in-Appeal No OIO-KDL/COMMR/19/09-10
Passed by Commissioner of CUSTOMS-KANDLA

**COMMISSIONER OF CUSTOMS
KANDLA, CUSTOM HOUSE, NEAR BALAJI TEMPLE
KANDALA-GUJARAT**

Vs

**M/s ASIA MOTOR WORKS
34 KM MILESTONE, BHUJ-BHACHAU ROAD
VILLAGE KANAIYABLE, KUTCH, GUJARAT-370020**

Appellant Rep by: Shri A Sheeraji, Ms Dimple Gohil & Shri Roshil Nichani, Advs.
Respondent Rep by: Shri K J Kinariwala (AR)

CORAM: Ramesh Nair, Member (J)
Raju, Member (T)

FINAL ORDER NOS. A/11945-11946/2019

Per: Raju:

This appeal has been filed by M/s. Asia Motor Works against demand of Customs Duty, imposition of penalty and denial of Notification No. 97/2004- Customs. The Revenue has also filed appeal against the order for failing to confiscate the goods and failure to impose the redemption fine. M/s. Asia Motor Works has filed Cross Objections against said appeal filed by the Revenue.

2. Ld. Counsel for Asia Motor works (AMW) pointed out that they had imported certain capital goods under EPCG Scheme claiming Notification No. 97/2004- Customs claiming concessional rate of @ 5% duty. He pointed out that the appellant had purchased a Paint-Shop from the Foreign Party. In terms of the agreement with the seller the Asia Motor Work was required to do as follows:

"2.4 Cost of freight for shipment, loading of the ship and the shipment to Indian harbor will be paid for by the Purchaser. Port of discharge will be Kandla of Mundra.

2.5 The purchaser shall be responsible for all costs and actions subsequent thereto which will include payment of all local Indian taxes and/or import duties, etc.

2.6 All shipping, insurance and customs costs to be incurred, as well as risk of damage and loss to the Assets during transportation shall be borne by the Purchaser."

Consequently AMW appointed a freight forwarder namely Pro Logistics (I) Limited (PLIL) offered following terms for the said transport of goods from Argentina to India.

*"Proposal For Ex Works In Argentina.
We are pleased to detail below our indicative prices for cutoms clearances at Buenos Airs Port, Argentina for the forth coming movement of approx. 50 FEU's*

(1) Inland Freight + Ocean Freight per Container

Liner:

USD 2150.00/ 40'GB and HC

Buenos Airs Charges:

CAF:	Variable	cost	to	be	charged	at	actual
BAF:	Varibale	cost	to	be	charged	at	actual
THC:	Fixed	Cost	USD	140.00	Per	Container	Toll:
	Fixed	Cost	USD	90.00	Per	Container	

B/L Fee: Fixed Cost USD 42.35 Per B/L

(2) Ocean Freight: US\$ 4900 – All In for 40'OT (MOL)

Ocean Freight: US\$ 3900 – All In for 40'OT (CMA)

Buenos Airs Charges:

THC:US\$ 140,-per Cont.

Toll:US\$ 90,-per Cont.

B/L US\$ 42,35 per B/L Handling: US\$ 35, -per Cont.

Log. Fee: US\$ 25,-per Cont. Sim: US\$ 15,- per cont.

(3)Inland Haulage & Ocean Fright Break Bulk Cargo

USD 225.00 W/M (Full Liner Terms)

Destination Charges will remain as agreed

(4)Service Tax as applicable

(5)Exchange Rate will be charged with the bank support."

2.1 Ld. Counsel pointed out that AMW filed 15 Bills of Entry. Out of 15 Bills of Entries, in case of 10 B/E the freight charges were claimed to have been included on actual basis and in 5 B/E the freight charges were included @ 20% of the FOB Value in terms of Proviso to rule 9 of the Custom Valuation Rules. He argued that the rule 9 of the Custom Valuation Rule, 1998 prescribes as follows.

"(2) For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include -

(a) the cost of transport of the imported goods to the place of importation;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the cost of insurance :

[Provided that -

(i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c);

(iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods;

Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods :

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above].

[Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container freight Station shall not be included in the cost of transport referred to in clause (a).]"

He argued that at the time of filing of Bill of Entry the Freight element was not known to the appellant in respect of 5 Bills of Entries and therefore, in terms of aforesaid proviso to rule 9(2) of the Custom Valuation Rules, Freight @ 20% of FOB Value was included for the purpose of Assessment. He argued that the computation of freight depended on the CAF & BAF which are variable cost depending on the exchange rates. He pointed out that since these amounts were not available at the time of the assessment benefit of the proviso to rule 9 (2) of Custom Valuation rules was availed.

2.2 He argued that even if the argument of revenue that the extra freight paid by them to the freight forwarder is to be included in the assessable value, then also they are entitled to benefit of Notification No. 97/2004-Customs, as they had significant amount of value was available in the said license. He argued that even if the assessable value is revised by including the extra freight paid by them to the freight forwarder, they are entitled to benefit of Notification No. 97/2004-Customs to the extent of the amount available in their EPCG license for concessional rate of duty of 5%. He further argued that the demand is barred by limitation. He pointed out that both these kind of bills of entry, i.e one with freight bills as well as others were 20% of the FOB value was taken for assessment and Rule 9(2) of the CVR was considered. He argued that in these circumstances extended period of limitation cannot be invoked. He relied on the decision of Tribunal in case of *Dr. Reddy's Laboratories Ltd. V. CC, 2012 (284) ELT 545 (T)*.

2.3 Ld. Counsel for AMW also argued that the Revenue has not challenged the assessment done in case of this 15 bill of entries and therefore no demand under section 28 can be raised.

2.4 Ld. Counsel for AMW argued that the Show Cause Notice did not propose confiscation but only propose why the said goods should not be held as liable to confiscation. He argued that the adjudicating authority cannot traverse beyond the SCN. He further argued that since the goods have already been cleared and are unavailable for confiscation and were never seized no confiscation can be ordered. He relied on the decision of Hon'ble High Court of Punjab and Haryana in case of *Raja Impex-2009 (229) ELT 185 (P & H)* and the decision of larger bench of Tribunal in case of *shivkrupa Ispat Pvt.Ltd. 2009 (235) ELT 623 (LB)*. He argued that the decision of Apex court in case of *Western Components Ltd.* is applicable only when goods are seized and subsequently allowed to be cleared to the assessee on execution of bond. He argued that the bond in the instant case is not the kind of bond referred in the decision of Hon'ble Apex Court in case of *Western Components (Supra)*.

3. The Ld. AR relied on the impugned order. He pointed out that the Rs. 4,50,15,398/- was demanded by the Freight forwarder from the AMW and Rs. 4,32,98,915/- was actually paid by the AMW to the freight forwarder. They had included only an amount of Rs. 1,60,69,376/- in the assessable value of all 15 bills of entry. He pointed out that in first 10 bill of entries they had included freight, on the basis of some documents, an amount that they claimed was the actual cost of transport and in balance five B/E, they had claimed benefit of proviso to Rule 9 (2) of CVR 1988. He pointed out that the bills of entries were filed over a period from 10.05.2007 to 29.06.2007 a period of almost 50 days. While in case of bill of entries filed from 10.05.2007 to 12.06.2007 actual transport freight was claimed to be available with the AMW and claimed to have been included in the assessable value, but in respect of bill of entries filed from 12.06.2007 to 29.06.2007 the freight amount was not known to them at the time of filing bill of entry. He pointed out that out of total amount of Rs. 4,32,98,915/-, the appellant have included only Rs. 1,60,69,376/- in the assessable value. They have failed to include an amount of Rs. 2,92,35,480/- in the assessable value and consequently, they have undervalued the goods.

3.1 Ld. AR pointed out that under valuation of goods amounts to an offence under section 111 (m) of the customs Act, 1962 and consequently the goods imported by them become liable to confiscation under section 111 (m) of the Customs Act. He argued that the impugned order fails to order confiscation of goods on the

grounds that the same are not available for confiscation. He argued that the goods imported by the appellant were released on bond subject to the condition for import prescribed in notification No. 97/2004- Customs Act, which prescribes execution of bond as follow.

"(2) That the importer executes a bond in such form and for such sum and with such surety or security as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs binding himself to fulfil export obligation on FOB basis equivalent to eight times the duty saved on the goods imported as may be specified on the licence, or for such higher sum as may be fixed by the Licensing Authority, within a period of eight years from the date of issue of licence, in the following proportions, namely :-

S. No.	Period from the date of issue of licence	Proportion of total export obligation
(1)	(2)	(3)
1.	Block of 1st to 6th year	50%
2.	Block of 7th to 8th year	50%; "

3.2 He relied on the decision of Hon'ble Supreme Court in case of *Weston Components Ltd. Vs. CC 2000 (115) ELT 278 (SC)* wherein Hon'ble Court has observed as follows:

"It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent-authority. It is an admitted fact that the goods were released to the appellant on an application made by it and on the appellant executing a bond. Under these circumstances if subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine."

He argued that in the instant case the clearance has been made against a bond. He argued that in these circumstances the impugned order should have ordered confiscation of goods and imposed redemption fine.

3.3 Ld. AR pointed out that the demand under section 28 can be raised even if the assessment is not revised or challenged in view of the decision of Hon'ble supreme court in case of *Jain Shudh Vanaspati Ltd., 1996 (86) ELT 460 (SC)* .

4. We have gone through rival submissions. We find that AMW had purchased a paint shop in Argentina. The obligation of seller was just to dismantle the plant and thereafter it was the responsibility of AMW to bring the said goods from Argentina to India. AMW engaged freight forwarder namely Prologistics I Ltd. (PLIL) who offered them their services on the following terms.

"Proposal For Ex Works In Argentina.

We are pleased to detail below our indicative prices for cutoms clearances at Buenos Airs Port, Argentina for the forth coming movement of approx. 50 FEU's

(1) Inland Freight + Ocean Freight per Container

Liner:

USD 2150.00/ 40'GB and HC

Buenos Airs Charges:

CAF:	Variable	cost	to	be	charged	at	actual
BAF:	Varibale	cost	to	be	charged	at	actual
THC:	Fixed	Cost	USD	140.00	Per		Container
Toll:	Fixed	Cost	USD	90.00	Per		Container

B/L Fee: Fixed Cost USD 42.35 Per B/L

(2)Ocean Freight: US\$ 4900 – All In for 40'OT (MOL)

Ocean Freight: US\$ 3900 – All In for 40'OT (CMA)

Buenos Airs Charges:

THC:US\$		140,-per		Cont.
Toll:	US\$	90,-per		Cont.
B/L	US\$	42,35	per	B/L
Handling:	US\$	35,	-per	Cont.
Log.				
Fee: US\$ 25,-per Cont.	Sim:	US\$ 15,- per cont.		

(3)Inland Haulage & Ocean Fright Break Bulk Cargo

USD 225.00 W/M (Full Liner Terms)

Destination Charges will remain as agreed

(4)Service Tax as applicable

(5)Exchange Rate will be charged with the bank support."

4.1 The Paint shop was imported in 15 different consignments. The AMW paid the Freight forwarder an amount of Rs. 4,32,98,915/- where as in the 15 Bills of entries they included freight amounting to Rs. 1,60,69,376/- only. As a result an amount of Rs. 2,92,35,480/- escaped inclusion in the assessable value. The reason given by AMW is that at the time of filing bill of entry in first 10 cases they were aware of the actual freight charged by the freight forwarder whereas in last 5 Bills of entries they were not aware of the actual freight payable to the freight forwarder. The reason cited was that the variable cost based on CAF/BAF was not known. The method of calculating freight agreed by AMW with PLIL was very clear as can be seen from the terms in para 4 above.

It can be seen that the only variable in the cost is the currency adjustments which simply converts all cost payable in US Dollar terms into Rupees. Thus it won't be correct for AMW to say that the cost of transport was not immediately available to them. The currency price are available directly on minute to minute basis every day. More over it is seen that out of total cost of Rs. 4.32 Crores paid to the freight forwarder. The appellant had included only Rs. 1.6 crores, in 15 consignments. Even if the actual freight of first 10 consignments was known on actual basis it could not have been its 40% of the total freight for 66% of the total consignments. The documents on the basis of which they had included freight on actual basis were however not available with AMW.

4.2 Rule 9 (2) of the Custom valuation rules reads as follows.

"(2) For the purposes of sub-section (1) and sub-section (1A) of Section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include -

(a) the cost of transport of the imported goods to the place of importation;

(b) loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation; and

(c) the cost of insurance :

[Provided that -

(i) where the cost of transport referred to in clause (a) is not ascertainable, such cost shall be twenty per cent of the free on board value of the goods;

(ii) the charges referred to in clause (b) shall be one per cent of the free on board value of the goods plus the cost of transport referred to in clause (a) plus the cost of insurance referred to in clause (c);

(iii) where the cost referred to in clause (c) is not ascertainable, such cost shall be 1.125% of free on board value of the goods;

Provided further that in the case of goods imported by air, where the cost referred to in clause (a) is ascertainable, such cost shall not exceed twenty per cent of free on board value of the goods :

Provided also that where the free on board value of the goods is not ascertainable, the costs referred to in clause (a) shall be twenty per cent of the free on board value of the goods plus cost of insurance for clause (i) above and the cost referred to in clause (c) shall be 1.125% of the free on board value of the goods plus cost of transport for clause (iii) above].

[Provided also that in case of goods imported by sea stuffed in a container for clearance at an Inland Container Depot or Container Freight Station, the cost of freight incurred in the movement of container from the port of entry to the Inland Container Depot or Container freight Station shall not be included in the cost of transport referred to in clause (a).]"

It is seen that the proviso can only be invoked where the cost is not 'ascertainable'. The proviso cannot be invoked just because the importer has not received the actual freight element at the time of filling bill of entry. In the instant

case, the cost very much ascertainable and the importer have also claimed that they have ascertained the cost in respect of 10 out of 15 bills of entry at the time of import. The intention to evade becomes obvious as AMW has avoided inclusion of amounts of Rs. 2.92 Crores of Freight element, actually paid by them, in the assessable value by adopting this modus operandi.

5. Ld. Counsel for the AMW has claimed that the benefit of EPCG Scheme cannot be denied on the enhanced value of the imports. The impugned order denies the benefit of the EPCG scheme on the ground that the Chapter 5 of the Foreign Trade Policy requires the importer to produce license for debit by the proper officer of customs at the time of clearance. It has been argued in the impugned order that since the said amount was not declared at the time of import the benefit of scheme cannot be extended to the appellant. We do not find any merit in this argument. It is a fact that the appellant have EPCG License containing a specific amount. Therefore, if the value is enhanced then AMW is entitled for benefit to the extent the enhanced value is covered in the EPCG License.

6. It has been argued by the Ld. Counsel for AMW that since the assessment has not been challenged, demand under section 28 cannot be raised. In this regard Ld. AR had relied on decision of Ld. Apex Court in case of Jain Shudh Vanaspati Ltd. (Supra) wherein it has been held that the demand can be raised under section 28 even if challenging assessment. Consequently this argument of Ld. Counsel for AMW is rejected.

7. The next issue relates to invocation of extended period of limitation. We find that the appellant have paid significantly higher amount to the freight forwarder as freight. However, in 15 Bills of entry filed by AMW only 40% of the freight has been included in the assessable value. When the agreement and terms of payment are crystal clear the actions of importer are clearly intended to evade taxes. When documents on actual freight paid were demanded, Ld. Counsel failed to produce the same. In these circumstances, we find that it was a specific modus operandi devised by AMW to defraud the Government and therefore, extended period of limitation is rightly invoked in the instant case.

8. The next issue relates to confiscation of the goods already cleared by the AMW. The impugned order does not order confiscation and does not impose any redemption fine. Revenue has filed appeal against the said order for failure to confiscation the goods, AMW has also filed cross objection. Both sides relied on the decision of Hon'ble Apex Court in case of *Weston Components Ltd. 2000 (115) ELT 278 (SC)*. In the said case the goods were released against a bond and therefore, the Hon'ble Apex Court held that confiscation can be ordered. In the instant case the goods have been cleared in regular course. The bond executed by the AMW is not for production of goods but for fulfillment of export obligation and to pay duty in case of failure to fulfill export obligation. Therefore, the ratio of decision in case of *Weston Components Ltd. (Supra)* is not applicable to the instant case. The goods cannot be confiscated, even if, the same are liable for confiscation.

9. The appeal of AMW is partly allowed in above terms. The appeal of Revenue is rejected. Cross objections filed by AMW are disposed of.

(Pronounced in the open court on 17.10.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Customs Appeal No. 295 of 2011

Arising out of Order-in-Original No. OIO-21-22-MP-2010
Passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I

- 1. Customs Appeal No. 296 of 2011 (Haroon Razak Chhaya)**
- 2. Customs Appeal No. 297 of 2011 (Irfan Gulam Rasool Saiyed)**
- 3. Customs Appeal No. 298 of 2011 (Sunshine Overseas)**
- 4. Customs Appeal No. 299 of 2011 (Rashid Ahmed Sadat Ali Saiyed)**
- 5. Customs Appeal No. 304 of 2011 (Singh Overseas)**
- 6. Customs Appeal No. 305 of 2011 (Ravindra K Arya)**
- 7. Customs Appeal No. 306 of 2011 (Laurel Apparels Pvt. Ltd.)**
- 8. Customs Appeal No. 307 of 2011 (Bindal Silk Mills Pvt. Ltd.)**
- 9. Customs Appeal No. 308 of 2011 (Mahendra Kumar Sancheti)**
- 10. Customs Appeal No. 309 of 2011 (Arya Dyeing & Printing Mills)**
- 11. Excise Appeal No. 876 of 2011 (Bindal Silk Mills Pvt. Ltd.)**
- 12. Excise Appeal No. 877 of 2011 (Mahendra Kumar Sancheti)**
- 13. Excise Appeal No. 878 of 2011 (Ravindra K Arya)**
- 14. Excise Appeal No. 879 of 2011 (Laurel Apparels Pvt. Ltd.)**
- 15. Excise Appeal No. 1147 of 2011 (C.C.E. & S.T. Surat-i)**
- 16. Excise Appeal No. 1148 of 2011 (C.C.E. & S.T. Surat-i)**

Arising out of Order-in-Original No. OIO-21-22-MP-2010
Passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I

**Date of Hearing: 09.07.2019
Date of Decision: 04.11.2019**

**M/s AL AMIN EXPORTS
M/S. SUNSHINE OVERSEAS, 98-99, RANG AVDHUT SOCIETY
NO. 2, RANDER ROAD, SURAT, GUJARAT-395005**

Vs

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX
SURAT-I NEW BUILDING...OPP. GANDHI BAUG
CHOWK BAZAR, SURAT, GUJARAT - 395001**

Appellant Rep by: Shri Willingdon Christian, Adv.
Respondent Rep by: Shri Sameer Chitkara, AC (AR)

CORAM: Ramesh Nair, Member (J)
Raju, Member (T)

FINAL ORDER NOS. A/12093-12109/2019

Per: Ramesh Nair:

The present appeals have been filed against Order-in-Original No. 21-22/MP/2010 dt. 31.03.2011 passed by the Commissioner, Customs & Central Excise, Surat - I by M/s Laurel Apparels and other co-appellants as well as by the revenue. In terms of said order demand of Customs and Central excise duty pertaining to two show cause notices dt. 28.02.2005 and 24.10.2007 were confirmed against Appellant M/s Laurel Apparels Pvt. Ltd. Also penalties were imposed upon M/s Laurel Apparels and Co-appellants. The revenue has also filed two appeals being aggrieved to the extent that while imposing the penalty u/s 112/114A, the adjudicating authority has erroneously given the option to pay reduced penalty of the first proviso of Section 114A of the Customs Act, 1962 to the assessee without any authority of statute.

1.1 The brief facts of the case are that the show cause notices dt. 28.02.2005 and 24.10.07 issued on the allegation that the Appellant Unit has illegally diverted duty free imported and indigenous raw materials i.e Transfer Print paper, Grey Fabrics and Knitted Fabrics etc. as such which was procured by them subject to condition of use of same in manufacture and export of finished goods. That the

raw materials were shown to have been received on papers only. Also the finished goods were shown to have supplied to M/s Al-Amin Exports and M/s Sunshine Exports both 100 % EOUs who were showing procurement of goods i.e Dyed fabrics/Transfer Print Fabrics from Appellant assessee Unit under the cover of invoices/AR-3s against CT -3 Certificate issued to them. However the consignee EOU Units instead did not receive any finished goods of M/s Laurel but were showing manufacturing activities so as to fulfil the export obligations and were exporting cheaper quality bought out items like scarves, dupattas etc. procured from the domestic market through Shri Bilal Latif Memon, proprietor of M/s Lazio Exports. It was found that no goods were received by Sunshine Overseas, Navsari and M/s Al- Amin Exports but they were receiving premium of Rs. 4 - 5 per meter from Shri Mahendra Sancheti, executive director of Laurel Apparel on account of showing receipt of processed goods from M/s Laurel. It was alleged in show cause notice that raw materials procured against CT-3s from EOUs and DTA/imported against Annexures under the EOU Scheme by the Unit was infact diverted into local market for sale in cash by resorting to manipulation of records by showing the production of Transfer Print Fabrics and clearance thereof to Al-Amin and Sunshine during the period 27.02.2003 to 07.06.2003. It was therefore proposed to demand customs duty amounting to Rs. 13,68,930 foregone on 581222.21 Mtrs of imported heat Transfer Print Paper and Customs duty amounting to 56,41,484/- foregone on 377502.21 Mtrs of Imported Polyester Knitted/Woven Fabrics u/s 72 readwith proviso to Section 28 of the Customs Act, 1962 alongwith interest from M/s Laurel Apparels Pvt. Ltd.; to enforce the Bond furnished by them towards the duty liability; to impose penalty u/s 112/114A of the Customs Act. It was also proposed to confiscate the duty free raw material which was not available for confiscation in terms of Section 111 (d), 111 (j) and 111 (o) of Customs Act, 1962. In respect of indigenous raw materials, it was proposed to demand central excise duty of Rs. 20,94,717/- on 203720 mtrs of indigenously procured knitted/woven Grey Fabrics in terms of proviso to section 11A (1) of Central Excise Act alongwith interest and to confiscate the goods so procured ; to impose penalty u/r 25 of the Central Excise Rules, 2002 and to enforce the B17 bond and to appropriate the security towards the duty liability. Penalty was also proposed on M/s Al-Amin Exports and M/s Sunshine Overseas u/s 112 of the Customs Act readwith Rule 25 of the Central Excise Rules, 2002; penalty was proposed on Shri Mahendra Kumar Sancheti and Shri Ravindra Arya, directors of M/s Laurel Apparels, M/s Bindal Silk Mills Pvt. Ltd., Shri Haroon R Chhaya, Shri Irfaan Rasool Saiyed, Partners of M/s Al-Amin Exports and defacto owners of M/s Sunshine Overseas and Shri Rashid R Saiyed, Partner of M/s Sunshine Overseas u/s 112 of the Customs ACT, 1962 read with Rule 26 of the Central Excise Rules, 2002.

1.2 Another show cause notice dt. 24.10.2007 for the period July' 2001 to February' 2003 based upon same investigation was issued proposing to demand of customs duty amounting to Rs. 80,80,985/- foregone on 1453175 Mtrs of imported heat Transfer Print Paper and Customs duty amounting to 1,27,50,177/- foregone on 722130.52 Mtrs of Imported Polyester Knitted/Woven Fabrics u/s 72 read with proviso to Section 28 of the Customs Act, 1962 along with interest from M/s Laurel Apparels Pvt. Ltd.; to impose penalty u/s 112/114A of the Customs Act. It was also proposed to confiscate the duty free raw material which was not available for confiscation in terms of Section 111 (d), 111 (j) and 111 (o) of Customs Act, 1962. In respect of indigenous raw materials, it was proposed to demand central excise duty of Rs. 2,35,49,645/- on 1494194.50 mtrs. of indigenously procured knitted/woven Grey Fabrics in terms of proviso to section 11A (1) of Central Excise Act along with interest and to confiscate the goods so procured ; to impose penalty u/r 25 of the Central Excise Rules, 2002. Penalty was also proposed on M/s Al-Amin Exports M/s Singh Overseas, M/s Arya Dyeing and Printing Mills, M/s Pinkline and M/s Shivshakti Industries u/s 112 of the Customs Act, 1962 read with Rule 25 of Central Excise Rules, 2002 on ground that they have shown receipt of polyester printed fabrics, transfer print fabrics and embroidered fabrics from M/s Laurel Apparel without actual receipt. It was also proposed to impose penalty on Shri Mahendra Kumar Sancheti, Shri Ravindra Arya, director of Laurel Apparels u/s 112 of Customs Act read with Rule 26 of Central Excise Rules, 2002.

1.3 The demands and penalties as proposed in show cause notices were confirmed by the adjudicating authority. In respect of show cause notice No. v (Ch.54) 3-26/Dem/2007 dt. 24.10.2007 the Order-in-Original No.

1521/Dem/2008 dt. 29.02.2008 was passed which was remanded back by the Tribunal vide Order No. A/1250-1261/WZB/AHD/2009 dt. 22.06.2009 with a direction to furnish the relevant documents and annexures to show cause notice and then to pass fresh adjudication order. In reference to Show Cause Notice No. DRI/SRU/INV-9/2003 dt. 28.02.2005, the Order-in-Original No. 05/MP/2006 dt. 31.03.2006 was passed which was remanded back by the tribunal vide Order No. A/349-358/WZB/2010 DT. 22.04.2010 with the observation that the Id. Commissioner had not done what was required as per Tribunal precedent judgment in case of *Defiance Clothing Co. 2008 (87) RLT 743 (Cestat)* wherein it was held that the Commissioner must first refer the matter to the Development Commissioner before adjudication. That the Id. Commissioner has made cryptic remark about applicability of extended time limit.

1.4 Vide impugned orders, the demands and penalties as proposed were confirmed against M/s Laurel and co-appellants.

1.5 Aggrieved, the present appeals have been filed by the Appellant assessee and co-appellants. The revenue has also filed two appeals being aggrieved to the extent that while imposing the penalty u/s 112/114A, the adjudicating authority has erroneously given the option to pay reduced penalty of the first proviso of Section 114A of the Customs Act, 1962 to the assessee without any authority of statute.

2. Ld. Counsel Shri W. Christian appearing for the assessee Appellants submits that the impugned order has been wrongly passed. The adjudicating authority has placed reliance upon the statements of the Appellant's Partners and other outside persons on the one hand and on the other hand denied cross examination of the witnesses without justification. It was necessary to allow cross examination. He relies upon the judgments in case of *J & K Cigarettes Ltd. 2009 (242) ELT 189 (DEL)*. He submits that the adjudicating authority has also disobeyed the direction of the Tribunal directing him to undertake the adjudication of the SCNs after obtaining consent of the Development Commissioner under whose jurisdiction of EOUs fall. He also submits that even after filing of ROM application the Tribunal while disposing of the same has again given direction that the adjudicating authority is bound by the decision of the tribunal or other judicial forums. In spite of the specific order of the tribunal and accepting the applicability of its precedent judgment- in case of *Defiance clothing Co. 2008 (87) RLT 743*, the adjudicating authority has unjustly entered into discussion and by relying upon some other judgment and inapplicable circular of the Board and has held that there is no need to have prior approval from the Development Commissioner. That the re-warehousing certificates were received by the Appellant duly countersigned by the Range Superintendents having jurisdiction over the receiving EOUs and when the SCN & Adjudication order are issued to the 100% EOUs on the basis of receipt of the finished goods manufactured and cleared by the Appellant, the revenue cannot push aside the strong and statutory evidence. The Circular No. 579/16/2001-CX dt. 26.06.2001 specifies the particular procedure and fulfilment of same cannot be wished away without cogent reason. He relies upon order in case of *National Impex Vs. CCE 2007 (213) ELT 429 (TRI)*. He takes us through the Invoices, CT-3, ARE-1s, D-3s etc annexed as documentary evidence of genuineness of clearance of goods. He submits that no reliance can be placed upon the statements since no cross examination was granted. The same should have been granted when the Appellant has brought on record the retraction affidavits. He further submits that adjudicating authority has erred in considering the recorded statements as more authentic than the various show cause notice/Orders-in-Original issued to various consignee EOUs wherein they were alleged to have received the goods from the Appellant but the same were allegedly diverted by them. Most of these SCNs /Order-in-Original has emanated from Surat Commissionerate only. Thus on the one hand the Appellants are alleged to have not supplied goods to consignee EOUs and on the other hand the consignee EOUs are alleged to have diverted the goods consigned by the Appellant. Thus the relied upon statements are at the most one piece of evidence subject to scrutiny by the quasi judicial or judicial authorities but the SCNs/adjudication order are the statutory documents and they are result of several piece of evidence of different nature, hence the single piece of evidence is not reliable when pitted against such SCNs/Order. He cites following orders passed against EOUs which show that the goods of Appellant EOU were received by different consignee EOUs:

(i) Order No. 10/MP/Daman/2006 dt. 20.11.2006 passed by CCE, Daman against M/s Sunshine Overseas & Othrs.

(ii) Order No. 09/MP/Daman/2006 dt. 20.11.2006 passed by CCE, Daman in case of M/s Al-Amin Exports & Others.

(iii) SCN F. No. V (CH.54)3-22/Dem/2003 dt. 01.05.2003 issued by CCE, Surat- I to Pooja Tex Prints Pvt. Ltd. On goods supplied by Appellant and later sold by M/s Pooja in DTA.

(iv) OIO No. ANK-I/TK/07/OA/Shiv Shakti/07-07 dt. 22.06.2007 issued by Assistant Commissioner, Central Excise-Ankleshwar whereby it is proved that goods supplied by the Appellant were undoubtedly Inbonded in their factory premises as found during the visit of the Central Excise officer on 4/5 Dec' 2002.

(v) OIO No. 10/04/Adj./JPR/2003/3722 DT. 29.03.04 issued by CCE, Jaipur in case of M/s Pink line Exim Pvt. Ltd.(100% EOU)

(vi) OIO No. 02/Commr/SU/08/Cus dt. 18.01.2008 and SCN No. V (Prev.) Misc/Enq./6/2002 dt. 06.06.2006 issued by CCE, Rohtak to M/s Singh Overseas (100% EOU)

2.1 He submits that the buyers/brokers have categorically deposed that they had purchased the goods from Shri Mahendrakumar Sancheti. Their contention is not supported by any evidence that the material infact were supplied by M/s Bindal as claimed by them. The adjudicating authority did not consider that from the recorded statements of buyers it is apparent that none of them has stated that they have purchased goods from Appellant Company. They gave the name of Shri Mahendra Bhai Sancheti who is also the director in M/s Bindal who was the seller and who acted through its director Shri Mahendra bhai. This fact was supported by the evidence of sales invoice, goods inventory and payment details etc. in records of M/s Bindal. The adjudicating authority has erred by rejecting the Appellant's submission that out of 20 vehicles, only two vehicles were reported to be incapable of carrying the load and that even the two impugned vehicles were alleged to be incapable because of some writing error with regard to registration number of these two vehicles. The adjudicating authority has held that Unit did not have bleaching facility which is required for manufacture of transfer print fabric. He failed to appreciate that the goods were got bleached on jobwork basis from M/s Bindal Silk Mills P. Ltd. who has sufficient plant and machinery. That in affidavits dt. 29.06.2003, 24.12.2003 of Shri Mahendra Kumar Sancheti, Director and affidavit dt. 29.06.2003 of Shri Ravindra Arya Director and affidavit dt. 02.07.2003 of Shri Bhoopsingh Beniwal, authorised signatory, the said persons denied their statements. The buyers have accepted that they have purchased goods from Shri Mahendra Sancheti. He also submits that the demands are time barred as show cause notice dt. 28.02.2005 was covering the period Feb to June' 03 and SCN dt. 24.10.2007 covered the period July' 2001 to Feb' 2003 since there is no suppression and wilful statement. The demands based on confessional statements without any documentary evidence is not sustainable. He also submits that the duty demand should have been calculated by considering the prices as cum-duty. That since the goods were manufactured hence the demand of customs duty is not sustainable nor the central excise duty at the customs tariff rate is sustainable. He thus prays to set aside the impugned order.

3. Per Contra Shri Sameer Chitkara, Learned Authorized Representative appearing for the revenue supports the impugned order.

4. We have heard both the sides and gone through the case records. We find that pursuant to investigation undertaken by the revenue, it was found that the Appellant Unit had been showing the receipt of raw material i.e. transfer print paper, fabric etc in their factory and its use in manufacture of export goods which was shown to have been cleared to M/s Sunshine and Al-Amin Exports. The investigation at M/s Al-Amin and Sunshine showed that infact they did not receive any goods from the Appellant Unit but received a premium of Rs. 4 to 5 from Shri Mahendra Sancheti, director of Appellant Unit in whose favour the CT-3 certificates were issued. Shri Rashid Sayyed, the partner of M/s Al-Amin in his statement stated that one Shri Bilal Latif Memon used to supply readymade cheap goods after purchasing from open market to M/s Sunshine and M/s Al- Amin through the tempos of Shri Akbar Tempowala. No goods were received from M/s Laurel. The EOUs used to do minor jobs of sewing and packing and export the goods. It was found that all the goods were brought by these firms from market. During visit to the factory of M/s Al-Amin it was found that the machines were not capable of being run except one sewing machine and one pleating machine

and 65000 pcs of dyed and printed scarf were supplied by Shri Bilal Latif Memon after purchasing from open market. No legal document was found to show the purchase of such goods. Shri Rashid Sayyed, Partner of M/s Sunshine also stated that entire operation of M/s Sunshine was looked after by Shri Irfan Rasul Gulam and Haroon Razak Chhaya. In factory there was small stock of chindis and cut-pieces sent by Shri Bilal Latif Memon which had no relation with CT-3 issued by them. Shri Rashid in his statement dt. 21.06.2003 also stated that fabrics was purchased by them from Surat and after cutting and stitching the dupattas and scarves were exported. Shri Kaushik Majumdar, authorised signatory of M/s Sunshine in his statement dt, 21.06.2003 stated that the partners of unit were for name sake and the work was looked after by Shri Irfan Rasul Sayyed and Shri Haroon Razaak Chhaya. Shri Irfan Rasul Sayyed and Shri Haroon Razaak Chhaya in their statement dt. 21.06.2003 stated that no raw materials was received against CT-3 from EOUs and they were paid premium of Rs. 4.50 to 5.00 per meter as a premium from the units to whom CT-3 were issued. They have never received any sale proceeds except the premium amount. They were regularly exporting the goods for which the raw material was received from Shri Bilal Latif Memon who used to arrange tempo for same. The search conducted at M/s Laurel revealed that all the machines in factory were non operational since long time. Shri Mahendra Sancheti, the executive director in his statement dt. 28.06.2003 stated that the clearances to M/s Al-Amin and Sunshine was on paper only and no goods were physically removed; that they had shown clearance of transfer print fabrics on paper only to the said units; they had sold the imported fabric in market and paid premium of Rs. 4 to Shri Haroon R Chhaya, owner of the said two units; the number of vehicles written on deemed export invoices were taken from M/s Ravi transport and were never used for transportation. During the search at office premises of Laurel Apparels situated at Bindal House, the computer printouts in presence of Shri Ravindra Arya, director was obtained which showed paper transactions. Though Shri Rashid Sayyed and Shri Majumdar had retracted their statements but the DRI sent them letters rebutting the retractions. Shri Mahendra Kumar Sancheti in his statement dt. 28.06.03 again stated that no goods were supplied physically to M/s Al-Amin and Sunshine and it was only paper transaction. Shri Ravindra Arya, director of Unit in his statement dt. 29.06.2003 also stated that he agreed with the statements of Shri Mahendra Sancheti, Executive Director. He also agreed to pay duty in respect of unauthorised removal of goods from M/s Laurel. In respect of clearance of grey fabrics to M/s Bindal Silk Mills Pvt. Ltd. on jobwork challans for bleaching, Shri Bhoop Singh Beniwal, authorised signatory of M/s Bindal in his statement dt. 30.06.2003 stated that no fabric was received for bleaching and only challans were prepared. Statement of Shri Satish R. Desai, Manager cum authorised signatory of M/s Ravi Transport was recorded on 28.06.2003 who stated that the vehicles mentioned in invoices showing clearance of goods to M/s Al-Amin and M/s Sunshine from M/s Laurel did not belong to his firm and he never sent any vehicle to M/s Laurel. Statement of Shri Latif Memon of Lazio Export was also recorded wherein he stated that he had given export orders for M/s Al-Amin and M/s Sunshine and bought made ups and readymade garments for them for enabling third party exports. The statement of tempo driver who transported goods from Surat godown of Shri Latif to factory of M/s M/s Al-Amin and M/s Sunshine was recorded wherein he stated that he has transported goods three times during the month of June, 2003. Shri Rashid Ahmed Sayyed, Partner of M/s Sunshine Overseas in his statement dt. 30.07.2003 also stated that the contents of his and Kaushik Majumdar retraction affidavits were wrong and were filed on direction of Shri Haroon Razzak Chhaya and Shri Irfan R. Saiyed. Shri Haroon Razak Chhaya in his statement dt. 30.07.2003 also stated that the retraction affidavits were wrongly filed and were false. In his statement dt. 20.08.2003, Shri Bilal Latif Memon stated that the goods seized from M/s Al-Amin were 65000 pcs of printed scarves were supplied by him and he was supplying such goods earlier also. The goods contained in the said container were made out of cheaper quality of fabrics namely cut pieces and were not of uniform sizes; that these goods were not made out of regular fabrics but were purchased as cut piece lots which were end cuts of fabrics lot i.e saris and dress materials.; the value of goods in container were highly inflated; he sold these goods to M/s Al- Amin and M/s Sunshine at the rates ranging between Rs. 17/- and Rs. 25/-. The goods were scarves of .90 to 1.85 mtrs and were wrongly described as dupattas in documents by M/s Al-Amin and M/s Sunshine. The payments were received by him in cash. We find that statements on various occasions of the

above persons has been recorded and the fact revealed that no goods were received by the consignee units which were shown to have been consigned by M/s Laurel to M/s Sunshine and M/s Al-Amin or other EOUs but instead cheap quality fabrics purchased from M/s Bilal Latif Memon were cleared by M/s Al-Amin and M/s Sunshine after undertaking minor work showing the same to have been manufactured from fabric received from M/s Laurel. Shri Mahendra Sancheti in his statement dt. 17.01.2005 also stated that the goods procured by them were sold in open market without being used in manufacture of export goods. The visit to factory of M/s Sunshine and M/s Al-Amin clearly showed that they did not have set up to manufacture the export goods. The visit to the factory of M/s Laurel clearly showed that one Paper Print Machine was in rusted condition. 30 sewing machines and 4 interlocking machines were lying on which no manufacturing activity took place for long time. No embroidery machine installed or uninstalled was found. No dyeing and printing facilities were available. Shri Mahendra Kumar Sancheti, the executive director who was present also stated that no manufacturing activity took place. He also stated that they never made any embroidered fabric, scarves, saree etc in factory. He admitted that the bleaching of fabric, the one of precondition for manufacture of transfer fabric shown to have been carried out at sister concern namely M/s Bindal Silk Mills on jobwork was mere paper transaction. This fact was confirmed by authorised signatory of Shri Bindal Silk, Shri Bhoop Singh. Further the brokers viz. Shri Keshrichand Bachhawal of M/s Raj Tex, Shri Rajendra Prasad Kabra, Shri Jethmal and Shri Ramdev Choudhary in their statements admitted selling imported grey fabrics and knitted fabrics and heat transfer print of M/s LAPL on brokerage basis. No physical evidence of transportation of finished goods could be shown by M/s Laurel. This clearly shows that M/s Laurel instead of use of duty free raw material in manufacture of finished goods to be exported, has sold the raw material in open market.

5. As regard the contention of the Appellant that the adjudication proceedings should have been initiated only after receiving clearance from the Development Commissioner as per the earlier Tribunal remand Order based upon judgment in case of *Defiance Clothing Co. 2008 (87) RLT 743 (CESTAT)*, we find that the adjudicating authority has elaborately dealt with the above aspect. We are in agreement with his view that the reference to the Development Commissioner is required to be made only where any interpretation of policy/procedure is required. However the present case pertains to illegal diversion of duty free imported and indigenously procured goods which has got no concern with the Development Commissioner. Hence in such case the impugned order passed by the adjudicating authority is absolutely correct.

6. The Appellant has challenged the impugned order also on ground that no cross examination of panch witnesses and other witnesses was provided. We find that the repeated statements of the concerned persons clearly shows that the raw material was cleared by the Unit in open market and false receipt of goods was shown by the consignee unit. Even the goods seized from consignee M/s Al-Amin could not have been manufactured from goods supplied by M/s Laurel as the same were different in GSM and Denier. It leaves no doubt that M/s Laurel did not use the duty free raw material in manufacture of export goods and instead cleared the same in open market. The Appellant has also pleaded that the factory was under control and supervision of the Central Excise officers. However we find that the case against the Appellant unit is based upon documentary evidence and not only statements and hence the cross examination cannot be made sole criteria for setting aside the demands. The contention of the Appellant that the demands are time barred is also not sustainable in the light of fact that the present cases are not on subject of technical breach of policy/procedure or interpretation but wilful evasion of duty which was unearthed by the revenue after detailed investigation and recording of statements of various persons. Hence in such case the extended period of limitation is clearly applicable. There has been continuous confessional statements of director which clearly shows the extent of evasion by diverting the duty free raw material. Further each of the co - appellant who are in appeal before us has played important role in falsifying the records and evasion of duty as apparent from their statements. Their acts have been amply recorded in the show cause notice and the impugned order. Hence in such case we are of the view that the impugned order deserves no interference and the appeals filed by M/s Laurel and other co-appellants are required to be dismissed and we hold so. As regard appeal filed by the revenue that the adjudicating authority has wrongly

given option to pay reduced penalty under Section 114A, we consider it appropriate to send the matter back to the adjudicating authority to look into the contentions raised by the revenue and to decide the quantum of penalty.

7. All the appeals are disposed off as above.

(Pronounced in the open court on 04.11.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Customs Appeal No. 10749 of 2017

Arising out of Order-in-Original No OIO-AHM-CUSTM-000-COM-009-16-17,
Dated: 04.11.2016

Passed by Principal Commissioner of Central Excise, Customs & ST, Ahmedabad

Date of Hearing: 03.10.2019

Date of Decision: 05.12.2019

**M/s MULCHAND M ZAVERI
KOI NA PADA, CHAWK, KHAMBHAT
GUJARAT -388620**

Vs

**COMMISSIONER OF CUSTOMS
AHMEDABAD, CUSTOM HOUSE, NEAR ALL INDIA RADIO
NAVRANGPURA, AHMEDABAD, GUJARAT**

WITH

Customs Appeal No. 10750 of 2017

Arising out of Order-in-Original No OIO-AHM-CUSTM-000-COM-009-16-17,
Dated: 04.11.2016

Passed by Principal Commissioner of Central Excise, Customs & ST, Ahmedabad

**SHRI SANJAY KUMAR MULCHANDBHAI PATEL
KOI NA PADA, CHAWK, KHAMBHAT
GUJARAT -388620**

Vs

**COMMISSIONER OF CUSTOMS
AHMEDABAD, CUSTOM HOUSE, NEAR ALL INDIA RADIO
NAVRANGPURA, AHMEDABAD, GUJARAT**

Appellant Rep by: Shri P M Dave, Adv.

Respondent Rep by: Shri L Patra, AC (AR)

CORAM: Dilip Gupta, President
Raju, Member (T)

FINAL ORDER NOS. A/12330-12331/2019

Per: Raju:

These appeals have been filed by M/s. Mulchand M. Zaveri (hereinafter referred to as M/s. MMZ) and its partner Shri Sanjay kumar Mulchandbhai Patel (hereinafter referred to as Shri Sanjay Patel) against confirmation of demand of Customs duty, imposition of penalty and confiscation of goods.

2 The appellants had imported certain goods declaring the same as 'Natural Gold Ore Concentrate'. The appellants have been importing goods with the said description of 'natural gold ore concentrate' for some time. After fifteen consignments (one imported through Mumbai and not subject matter of this notice) of the said product having been cleared by Customs, the 16th consignment was stopped. The bill of entry No. 4434128 for the 16th consignment was submitted to Ahmedabad Customs for assessment. The goods were sought to be classified under Customs Tariff Heading 26169010 claiming basic Customs duty (BCD) at the rate 2.5% and nil CVD by virtue of Notification No. 12/2012-CE dated 17 March 2012 (Serial No. 56). All import documents like purchase orders, Dubai customs clearance declaration, packing list, testing report etc. were submitted with bill of entry. The said consignment was seized by Directorate of Revenue Intelligence (DRI) on the basis of intelligence to the effect that the appellants were importing by mis-declaring the goods as 'Natural Gold Ore Concentrate' and wrongly claiming the benefit of notification. The goods were

examined under Panchanama. Thereafter, statements of Shri Rohit Harishrao Jadav, Senior Executive of M/s. C.N. Gandevia Clearing and Forwarding Agent was recorded. M/s. MMZ were declaring the imported goods as Gold Ore Concentrate since December, 2013. Shri Rohit Harishrao Jadav in his statement dated 24 January, 2014 stated that the imports made earlier were similar to the one imported vide bill of entry No. 4434128 dated 23 January, 2014 and examined under Panchanama dated 24 January, 2014. Regarding the physical appearance of the earlier consignments, he stated that the same were "reddish coloured lumps of mud containing yellow coloured metal particles. During investigations certain Whatsapp messages were recovered from the mobile phone of Shri Sanjay Patel. Certain other incriminating documents were also recovered from the premises of appellant. Statement of Sh Sanjay Patel was also recorded. Statement of Shri Mohanlal S. Jadia, whose shop was used to process the material imported by the appellant, was also recorded. Based on these evidences a SCN was issued alleging that the appellants had not imported the 'Natural Gold Ore Concentrate' but had artificially mixed gold and various materials like mud, cement etc to artificially create something that could be camouflaged as 'Natural Gold Ore Concentrate'. The demand of duty, confiscation and penalties were confirmed against the appellants. Aggrieved by the said order the appellants are before the Tribunal.

2.1 Learned Counsel pointed out that during January 2014 to July 2014, statement of various persons including that of Shri Sanjay Mulchandbhai Patel was recorded by DRI authorities. A sample of the product was examined by a expert from IIT Mumbai. Learned counsel pointed out that a show cause notice was issued by ADG, DRI, Ahmedabad alleging that the goods covered under bill of entry 4434128 were not "Gold Ore/ Gold Ore Concentrate" classifiable under CTH 26169010 but the goods were "Gold" classifiable under CTH 71081300 and hence not eligible for exemption and also liable for confiscation. The same allegations were made in respect of imports made in the past, under different 14 consignments made during July 2013 to January 2014. Duty in respect of previous consignments imported through Ahmedabad Customs was also demanded. In the notice, Revenue also relied on the role of Shri Mohanlal S. Jadia whose shop was used to process the material imported by the appellant. Learned counsel pointed out that Shri Shailesh Kumar H Patel, Director of CHA firm and clarified that he had never seen the goods imported earlier. However, Shri Rohit Harishrao Jadav, Senior Executive of CHA, during cross-examination confirmed that he had seen the goods in the past; that Customs officers used to permit to opening of package for the purpose of control of samples for valuation by the government approved valuer. Shri Rohit Harishrao Jadav also stated that his observation that past imports were similar to the current import was based on physical appearance only and he cannot be 100 per cent certain in this regard.

2.2 Learned Counsel pointed that Revenue had relied on the report of Dr. George Mathew, Associate Professor at Indian Institute of Technology (IIT for short), Bombay. He pointed out that there were a lot of error in the report made by the Professor and for that purpose he relied on the record of the cross-examination of Dr. George Mathew. Learned Counsel pointed out that the demand, penalties and confiscation was upheld by the Commissioner despite the fact that they had pointed out various lacunas' in the report of the Professor of IIT, Mumbai. In this background of facts, learned Counsel argued that the report of Dr Mathew that the sample tested by them was 'not naturally occurring', is incorrect and cannot be relied on. He pointed out that while the report of IIT Professor stated that in native gold, the gold content should be 90 per cent and during cross-examination, he stated that gold content in the native gold varied from 70 per cent to 90 per cent. Learned Counsel pointed out that in the sample tested by IIT Bombay, the gold content found to 79 per cent which falls within the range of the native gold i.e. 70 per cent to 90 per cent. Learned Counsel pointed out that the report of IIT Bombay extracts the meaning of 'Natural Gold Nuggets' from Wikipedia. He argued that report of IIT Bombay does not rely on an authentic material or literature. Learned Counsel further pointed out that while the impugned order suggests that

(i) Natural Gold Nuggets had a wax like yellow colour,

(ii) that the sample of gold metal in question did not show pits or cavities/ craters and had smooth surface,

(iii) that trapped minerals and regular spiked features were usually absent in Natural Gold Nuggets,

but had failed to cite any authentic literature in support of this observation.

2.3 Learned Counsel further pointed out that Dr. Mathew had given his observation about the 'wax like yellow color' merely an eye examination observation. No equipment/ machinery was used to arrive at this observation regarding the testing of the samples.

2.4 He further pointed out that the report of IIT Bombay was inconclusive about presence of cement in the sample. The report stated that while presence of the cement was not detected, use of some form of cement was not ruled out. He pointed out that the nature of report creates doubt that when no cement was present still the Professor observed the use of cement cannot be ruled out.

2.4 Learned Counsel pointed that while Revenue has taken sample of the import made vide bill of entry No. 4434128, the same cannot be applied to past imports made by the appellant. Learned Counsel clarified the present demand relates to only 14 bills of entry as one import was made through Mumbai. Learned Counsel argued that Revenue had earlier taken samples in the past and therefore, it is not open to Revenue to rely on the report received on the basis of sample taken in the consignment which was seized. He argued that the report of Professor IIT at best can be applied to bill of entry No. 4434128 only. He argued that in this background, attempt to reclassify the goods, covered in the past imports is illegal and without jurisdiction.

2.5 Learned Counsel pointed out that Revenue has heavily relied on WhatsApp messages recovered from the mobile phone of Shri Sanjay Patel. He argued that the said messages are not admissible as evidence and the messages do not establish that the partner of the appellant firm had instructed any person to prepare the goods for import in such a manner that they appeared like Natural Gold Ore Concentrates. Learned Counsel argued that there is no evidence showing that the instructions, advices appearing in the WhatsApp message were for the goods imported by the appellant and covered under bills of entry listed at Annexure-A to the show cause notice. He further argued that there is no evidence on record that advices and instructions allegedly given by Shri Sanjay Patel to Shri Sachin, the supplier abroad were actually carried out or implemented. He argued that mere presence of Whatsapp messages does not prove that supplier had actually carried out all the activities mentioned in the Whatsapp. Learned Counsel argued that while Whatsapp messages indicate that Shri Sachin was required to mix silver, zinc, cadmium, copper etc. but cadmium and zinc were not found in the metal portion of the sample tested by IIT, Bombay. He argued that alleged instructions were not followed.

2.6 Learned Counsel further pointed out that demand of differential duty is barred by limitation. He argued that the past consignments were assessed as "Natural Gold Ore Concentrate" and concessional rate of Customs duty, by classifying under CTH 26169020 was allowed by proper officer. They had submitted all requisite documents like purchase invoices, packing lists/air way bills, certificate of country of origin etc. and the goods were available before the customs officers and they could have ascertain the composition of the goods. He argued that samples were also taken by the Customs Officers. Learned Counsel submitted that classification and admissibility of exemption are questions of law involving interpretation therefore, no malafide can be attributed to the assessee in such case.

2.7 Learned Counsel argued that earlier a similar issue was raised before the Customs and the Commissioner (Appeals) decided in appellant's favour in the said consignment, the goods were classified under CTH 26169010 and full exemption from CVD was granted by virtue of Serial No. 5 of Notification No. 4/2006-CE. He argued that the said order-in-appeal has bearing on issues like the bonafide nature of our imports, assessment of consignments of gold ore concentrate by proper Customs Officers upon proper scrutiny and verification, irrelevance of Whatsapp messages and thus, wrong invocation of longer period of limitation in these proceedings.

2.8 Learned Counsel pointed out that CTH 26129010 covers "Gold Ores and Concentrates". He pointed out that, for Ores of tariff heading 2601 to 2617 are eligible for the benefit of reduced rate of CVD by virtue of Notification No.

12/2012-CE. He pointed out that term "Ores" is statutorily defined under Note No.2 of Chapter 26 to mean - "Minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of Heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes." He argued that this definition indicates that any mineralogical specie actually used for extraction of metals including gold, is "Ore" as defined by the Parliament even though such goods were intended for non-metallurgical purposes. He pointed out that the goods in question have been imported for extracting gold there from and therefore, they are 'Ore' as per Note 2 of Chapter 26 of the Customs Tariff.

2.9 He further pointed out that there is no violation of any nature committed by the appellant and there is no question of imposition of penalty. He also argued that penalty has been imposed on the firm as well as on the partner. He relied on the decision of Hon'ble Gujarat High Court in the case of *Jaiprakash Motwani - 2010 (258) ELT 204 (Guj.)*. He further argued that no penalty can be imposed on the firm as there was no malafide. Learned Counsel further argued that the penalty imposed is very high. He also argued that redemption fine of Rs. 60 Lakh is too high as the duty involved is only Rs. 18 Lakhs.

3. Learned Authorised Representative for the Department relied upon the impugned order. He took us through the show cause notice where the product imported by the appellant and the evidence in support of revenue claim is described. He further relied on the statements of partner Shri Sanjay Patel. He pointed out that everything was admitted and the statement was never retracted. He further relied on the documents at page 31 and 33 of [relied upon document No.12] contained in the file seized from the appellant's premises under Panchanama dated 24 January 2014 which showed detailed calculation of the cost and material involved in production of goods in Dubai. Learned Authorised Representative also relied on the decision of Hon'ble Apex Court in the case of *UOI vs. Jain Shudh Vanaspati Limited - 1996 (86) ELT 460 (SC)* to assert that no reassessment is needed to demand duty in respect of past clearances.

4. We have gone through the rival submissions. We find that the dispute essentially relates to admissibility of benefit of Notification No. 12/2012-CE dated 17 March 2012. The said notification exempts the excisable goods of the description specified in column (3) of the Table below read with relevant list appended hereto and falling within the Chapter heading or sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986). Serial No. 56 of the tariff, notification reads as follows:

Sl. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
1	2	3	4	5
1 to 55				
56.	2601 to 2617	Ores	Nil	

It is seen that the above notification exempts from Central Excise duty "Ores" falling under Chapter 2601 to 2617 from whole of excise duty.

4.1 **Examination of Definition of Ore in HSN, chapter notes and other dictionaries** Note 2 to Chapter 26 of the Tariff reads as follows:-

"2. For the purposes of headings 2601 to 2617, the term "ores" means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes. Headings 2601 to 2617 do not, however, include minerals which have been submitted to processes not normal to the metallurgical industry."

From the above facts, it is seen that the appellants are claiming benefit of Notification No. 12/2012-CE and the notification exempts 'Ores' falling under heading 2601 to 2617 from Central Excise duty. Note-2 of the Chapter 26 defines the scope of the term 'ore' for the purpose of this chapter. This definition of 'ore' as applicable to Chapter heading 2601 to 2617 is elaborated in the HSN notes in following words:-

"Headings 26.01 to 26.17 are limited to metallic ores and concentrates which:

(A) Are of mineralogical species actually used in the metallurgical industry for the extraction of the metals of Section XIV or XV, of mercury or of the metals of heading 28.44, even if they are intended for non-metallurgical purposes, and

(B) Have not been submitted to processes not normal to the metallurgical industry.

The term "ores" applies to metalliferous minerals associated with the substances in which they occur and with which they are extracted from the mine; it also applies to native metals in their gangue (e.g., metalliferous sands).

Ores are seldom marketed before "preparation" for subsequent metallurgical operations. The most important preparatory processes are those aimed at concentrating the ores.

For the purposes of headings 26.01 to 26.17, the term "concentrates" applies to ores which have had part or all of the foreign matter removed by special treatments, either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport.

Processes to which products of headings 26.01 to 26.17 may have been submitted include physical, physico-chemical or chemical operations, provided they are normal to the preparation of the ores for the extraction of metal. With the exception of changes resulting from calcination, roasting or firing (with or without agglomeration), such operations must not alter the chemical composition of the basic compound which furnishes the desired metal.

The physical or physico-chemical operations include crushing, grinding, magnetic separation, gravimetric separation, flotation, screening, grading, agglomeration of powders (e.g., by sintering or pelleting) into grains, balls or briquettes (whether or not with the addition of small quantities of binders), drying, calcination, roasting to oxidise, reduce or magnetise the ore, etc. (but not roasting for purposes of sulphating, chloridating, etc.).

The chemical processes are aimed at eliminating the unwanted matter (e.g., dissolution).

Concentrates of ores obtained by treatments, other than calcining or roasting, which alter the chemical composition or crystallographic structure of the basic ore are excluded (generally Chapter 28). Also excluded are more or less pure products obtained by repeated physical changes (fractional crystallisation, sublimation, etc.), even if there has been no change in the chemical composition of the basic ore."

4.1 From the above it is seen that as per HSN the term 'ore' applies only to 'metalliferous minerals' which are 'extracted from mines' or to 'native metals in their gangue (e.g. metalliferous sands)'. The website <http://kolibri.teacherinabox.org.au/> describes 'native metal' as follows

"Any metal that is found in its metallic form, either pure or as an alloy, in nature."
Website <https://www.azomining.com/> describes 'native metal' as

"Native metal is the uncombined form of metal that occurs in nature. It is the pure, metallic form that does not occur in combination with other elements. Native metals are either found as native deposits singly or as alloys."

Dictionery.com defines 'Gangue' as

"rock or mineral matter of no value occurring with the metallic ore in a vein or deposit."

Merriam Webster dictionary defines 'Gangue' as

"the worthless rock or vein matter in which valuable metals or minerals occur"

As per the definition, to be an ore the material has to qualify to the description 'minerals of mineralogical species'. The term "mineral" has been defined in Wikipedia is

"A mineral is, broadly speaking, a solid chemical compound that occurs naturally in pure form."

Then, the Encyclopedia Britanica defines 'mineral' as follow:-

1. Formed by a natural process (anthropogenic compounds are excluded).

2. Stable or metastable at room temperature (25 °C). In the simplest sense, this means the mineral must be solid. Classical examples of exceptions to this rule include native mercury, which crystallizes at -39 °C, and water ice, which is solid only below 0 °C; because these two minerals were described before 1959, they

were grandfathered by the International Mineralogical Association (IMA). Modern advances have included extensive study of liquid crystals, which also extensively involve mineralogy."

Collins' Dictionary defines the 'mineral' as under:-

"A mineral is a substance such as tin, salt, or sulphur that is formed naturally in rocks and in the earth. Minerals are also found in small quantities in food and drink."

In Cambridge Dictionary the term 'mineralogical' is defined as follows

relating to mineralogy (= the scientific study of minerals):

From the above reading of definition of "Ores" appearing in Note-2 of Chapter 26 and definition of the term 'minerals' in various dictionaries appearing above, it is seen that only Naturally occurring substances are termed as 'minerals' and therefore "Ores". Like HSN, Encyclopedia Britannica excludes 'anthropogenic compounds' from the term 'Ore'. 'Anthropogenic' is defined as follows in Merriam Webster Dictionary

'of, relating to, or resulting from the influence of human beings on nature'

Cambridge Dictionary defines 'anthropogenic' as follows

'caused by humans or their activities:'

4.2 Furthermore the HSN clarifies that the term 'ore' applies only to goods that are not subjected to processes which are 'not normal to Metallurgical Industry'. Thus goods which are produced by subjecting pure gold, sand and other materials to various processes to appear like ore cannot by any stretch of imagination be called ore as these processes, of mixing gold with sand and other substances to create an ore like product, are not normal to Metallurgical Industry. Moreover it is not normal Metallurgical Industry Process to convert Pure metal (like Gold ornaments/biscuits) into Impure gold mixture with sand with some physical/chemical characteristics of 'ore'.

4.3 Thus as per chapter notes and HSN only the naturally occurring material can qualify as 'ore'. The artificially made substances cannot therefore be called as "Ore" in terms of the definition of the term 'Ore' appearing in the Chapter notes and explanations in HSN.

4.4 **Goods do not answer to the term Concentrate** The goods imported by the appellant were produced in a workshop by mixing sand and gold and various materials cannot be called concentrate. As per HSN explanatory notes the term 'concentrate' applies only to 'ores which have had part or all of the foreign matter removed.....'. Thus only goods derived from 'ores' can be called concentrate. It is seen that Revenue is seeking classification of the product under chapter 71 therefore is the correct classification of the product. In any case the goods do not fall under chapter heading 2601 to 2617 even under description of 'Concentrate'.

5 **Benefit of Notification.** The heading 26169010 covers both Gold Ore and Concentrates. Thus it is seen that the tariff distinguishes between Ores and Concentrates. While the notification grants exemption to 'Ores' falling under heading 2601 to 2617, it does not grant any exemption to 'Concentrates' falling in the same headings. Thus, to claim the benefit of exemption notification, the appellants are required to establish that the goods imported by the appellant are only 'Ores'. In the instant case, the appellants are claiming benefit of Notification No. 12/2012-CE and the notification exempts 'Ores' falling in the specified headings. Since appellants are claiming the benefit of the notification the onus to establish that they are entitled to the benefit of the notification is on the appellants. Revenue has placed on record sufficient evidence, discussed in following paras, to suggest that the goods are not of natural origin and therefore not 'Ores'.

5.1 The basic question that needs to be answered at the outset is if the benefit of exemption to 'ores' be extended to anything that has been artificially produced to resemble naturally occurring 'ores'. In other words, if it is established that the goods imported by the appellants were produced in by them in a workshop, and are not naturally occurring substances extracted from Mines or sand, can they be called 'ores' even if they resemble naturally occurring 'ores' in certain physical/chemical parameters? The answer is no. Only the naturally occurring materials can qualify as ore and artificially produced material cannot qualify as ores even if they correspond to the the physical/chemical parameters of 'ores'.

5.2 The evidence with the revenue is in the shape of

- (i) Test report of the professor at IIT Mumbai
- (ii) Whatsapp messages recovered from the mobile phone of the Shri Sanjay Patel
- (iii) Statements of other persons recorded during investigation
- (iv) Documents recovered from the premises of appellant

5.3 Investigations have revealed that there were frequent exchange of messages between the appellant's partner Shri Sanjay Patel and foreign supplier Shri Sachin. The print-outs of WhatsApp messages were taken under Panchanama from the mobile phone recovered of Shri Sanjay Patel. During investigation, mobile phone of Shri Sanjay Patel was seized under Panchanama and the printout of WhatsApp messages exchanged between Shri Sanjay Patel and Shri Sachin, No. 971-52727299 of M/s. Gstar Jewellers, Dubai, UAE were taken. The said WhatsApp messages indicated that Shri Sanjay Patel was directing Shri Sachin to mix gold with various substances and create a product roughly answering to the physical/chemical description of "Ore". The messages exchanged during 13 November 2013 to 14 November 2014 shows that Shri Sanjay Patel giving minute by minute instructions to Shri Sachin to prepare fake gold ore concentrate. The messages and the implications of the Messages were specifically admitted by Shri Sanjay Patel. No cross examination of Shri Sanjay Patel was sought nor was his statement retracted. During this period the appellants approached Hon High Court for cross examination of a few witnesses. But the statement of Sanjay Patel was not retracted except in the reply filed after the cross examination of all witnesses. The WhatsApp messages were recovered under a Panchnama from a mobile recovered under a Panchnama. The recovery of phone or messages was not challenged as the Panchnama was not challenged. Furthermore the WhatsApp messages are corroborated by the recovery of cost sheet from appellants premises as well as the action/documentation (as detailed in following paras) pursuant to the said messages as detailed in OIO.

5.4 The Show Cause notice gives the summary of the messages in following words :

"38.2 The printouts of the Whatsapp messages relevant to the investigation, contained in the Mobile phone of Shri Sanjay Patel were taken under Panchnama. The messages exchanged between Shri Sanjay Patel and one Shri Sachin No. 971-527247299 of M/s. GStar Jewellers LLC, Dubai, UAE clearly bring out the modus operandi of melting the gold of 995 purity mixed with silver, cadmium, zinc, copper etc., preparing grains/flakes of the mixture of these metals, preparing a wet base of red soil, mixing the metal with the wet soil base and thereafter heating and drying of the composite mixture. The resultant preparation in the form of lumps of red soil containing grains/flakes of gold were imported into India by declaring the same as natural gold ore concentrate. The Whatsapp messages from PK No.6585 to 7264 clearly establish the above fact. These messages pertain to first consignment of gold imported by MIs. MMZ from M/s. Gstar Jewellers LLC, Dubai in the guise of fake gold ore concentrate. In these series of messages during 13/11/2013 to 14/11/2013 Shri Sanjay Patel is giving minute by minute instructions to Shri Sachin for preparing the fake gold ore concentrate. At PK No. 6586 and 6587 Shri Sanjay Patel is asking Shri Sachin whether he is preparing grains/flakes or preparing dough of Red Geru (red Indian soil). In response Shri Sachin at PK No. 6588 informs Shri Sanjay Patel that he is preparing grains/flake At PK No. 6593 Shri Sachin asks about the size of the grains/flakes and in response Shri Sanjay Patel informs at PK No.6596, 6598 and 6599 that it should be above 3mm but below 11mm and at the most it should not be more than 12-13mm. At PK No. 6611 and 6612 Shri Sachin informs that the metals are being melted and that he would send a photo after preparing grains/flakes. Shri Sanjay asks about the temperature at PK No. 6613 to which Shri Sachin informs that it is at 856 and at PK No. 6616 to 6618 he informs that he has added zinc and copper, he would add cadmium before 900, add silver at 900 and thereafter add gold at 1000.

38.3 In the messages at PK No. 6874 to 7002 Shri Sanjay Patel gives instructions for preparing the soil base. He asks Shri Sachin to use 50 gms liquid Sodium Silicate, 400gms of geru (red Indian soil) and half a litre of water, mix them and heat (stir) properly to make them smooth. He also instructs Shri Sachin simultaneously to boil 3.2 kgs of fine sand in 1 litre of water and add water as is needed. At PK No. 6892 Shri Sanjay Patel advices Shri Sachin to use 100gms

Caustic Soda if Sodium Silicate is not available. At PK No. 6900 to 6903 Shri Sanjay informs that the preparation would be very good and a Perfect Duplicate of the African original. At PK No.7006 to 7025 Shri Sanjay Patel instructs Shri Sachin to add slowly the grains/flakes and water (prepared as above at Para 39.2) to the wet soil base and keep stirring the same. At PK No.7230 Shri Sanjay informs the detailed break-up of the costing of the above preparation and its CIF value at Ahmedabad. As per this the above preparation containing 1 Kg gold of 995 purity has a CIF Ahmedabad value 26,98,317/-. Shri Sachin of M/s. Gstar Jewellers LLC, Dubai informs Shri Sanjay Patel at PK No. 7475 that Customs (Dubai) would apply only (HS) Code 71081100. The said consignment was imported by M/s. MMZ through ACC, Ahmedabad by filing bill of entry No.3820322 dated 16/11/2013 wherein the goods were declared to be Natural Gold Ore Concentrate and claiming classification under CTH 26169010. The import under the said bill of Entry No.3820322 dated 16/11/ 2013 is communicated by Shri Sanjay Patel to Shri Sachin at PK No.8139.

38.4 For the subsequent consignments Shri Sanjay Patel advises use of Cement and Geru (red Indian soil). These communications are at PK No.7944 to 9007. Shri Sachin informs Shri Sanjay Patel at PK No. 9017 and 9018 that using geru would be expensive and for 2 kg geru of 400 Dirhams would be used. In response Shri Sanjay Patel informs him at PK No. 9019 to 9023 that he would send 100kg Geru. Shri Sanjay Patel subsequently informs him at PK No.9090 to 9099 that he is sending Geru and asks Shri Sachin for the name and address of the consignee. Shri Sachin at PK No.9106 and 9110 communicates the consignee name and address as :- No.+ 971 52247299, To- Jasmine Patel, Gallops Trading LLC, Khalid bin-al -walid Road, Opp. Askot Hotel, Bur Dubai, Dubai, UAE. At PK No.9213 and 9215 Shri Sanjay Patel informs Shri Sachin that they have to do another shipment of 2200gms immediately.

38.5 The conversations from PK No.11619 to 12491 between Shri Sanjay Patel and his Dubai based counterpart pertain to the preparation of the fake gold ore concentrate for importing 2.2 kgs of pure gold -995 purity, its cost in Dubai, the ingredients and the proportion in which they are to be used and preparation of the documents for export from Dubai to India. These communication messages clearly indicate that Shri Sanjay Patel is giving instructions to his Dubai based counterpart on every aspect from preparation of the fake gold ore concentrate as well as preparation of the documents for export from Dubai. The weight of the said consignment arrived was 6.2 kgs and the same was mentioned in the Invoice and Packing List and declared before Customs, Air Cargo Complex, Ahmedabad at the time import for which bill of entry No.3986187 dtd.04/12/2013 was filed by declaring the goods as Natural Gold Ore Concentrate.

38.6 The instances narrated above leading to the import of pure gold of 995 purity in the guise of the fake natural gold ore concentrate are pertaining to the first two consignments imported at ACC, Ahmedabad vide bill of entry No. 3820322 dated 16/11/2013 and 3986187 dated 04/12/2013. Similar modus was adopted for import of the other consignments of pure gold of 995 purity through ACC, Ahmedabad under bills of entry as detailed in Annexure-A to this notice.

38.7 That the declared country of origin is also fake is evidenced from the message of Shri Sanjay Patel at PK No, 10439 and 10440 wherein he informs his Dubai counterpart that editing of Ghana, West Africa is remaining in the documents and that they mention Ethiopia."

5.5 After examining the messages the impugned order gives following findings on the issue of corroboration :-

20.3 From the Whatsapp messages exchanged between Sanjay Patel and Shri Sachin the following emerges:

i) In the messages exchanged on 09.11.13 (PK 5806 onwards) it appears that some proforma invoice was sent by Sachin to Sanjay Patel for his approval. Certain corrections were suggested by him such as writing some details in capital words and keep proper space above name for signature on the proforma invoice.

ii) It also appears that images of some material were forwarded by Sachin to Sanjay Patel and he in turn tells that the finish of the material was too smooth and it should be of natural form (matt finish).

iii) On 10.11.2013 the messages (PK 5816 to 6016) are relating to fixing the price of the gold Sanjay Patel asks about fixing of the gold price to which Sachin replies that

it will cost 1300 with premium Sanjay Patel asks Sachin whether the rate is per ounce or what He then again asks about the price in grams Sachin replies that it will cost 1300 with premium He further tells that if it is fixed at 1300 then cost in USD will be 41.80 per gram.

iv) That proforma invoice as approved by Sachin and an amount of 80,000 AED was transferred by Sanjay Patel to Sachin for this purpose.

v) From one stage onwards the messages are relating to actual preparation of mixture by Sachin at Dubai under the guidance of Sanjay Patel from Ahmedabad. During the course of this exchange Sanjay Patel has asks Sachin whether he is ready to prepare the mixture and he replies that he is already on the point. Sanjay Patel has explained to Sachin various activities which are required to be done.

vi) WhatsApp message dated 13.11.2013 between Sanjay Patel and Sachin are relating to preparation of mixture containing gold and other metals, soil and chemicals. During the course of these messages method of preparation, the material to be used and the quantity used, temperature to be maintained, etc. have been explained. In addition, there is also an exchange regarding documents to be prepared and payment to be made etc. These are explained below separately.

Consignment No. 3 - B/E No. 3820322 dated 16.11.2013

21.1 This consignment is mentioned at Sl. No.3 of Annexure 'A' to the SCN. (hereinafter it is referred to as the 3rd consignment). The relevant messages are from PK 5806 onwards (dated 09.11.2013) exchanged between Sanjay and Sachin. The messages are with regard to:

21.2

i) Melting of gold of 995 purity with silver, cadmium, zinc, copper etc.

ii) Preparing grains/flakes of the mixture of these metals.

iii) Preparing of wet base of red soil.

iv) Mixing the metal with wet soil.

v) Heating and drying of the composite mixture.

21.3 In these messages, first they start with preparing the gold flakes (chilkas). Sachin informs that he has procured 1 kg of pure gold having size 11 to 12 mm. Sanjay Patel informs him that the size should be around 12 to

13 mm. Further he informs him to take various materials Zinc, Copper, Silver, Cadmium. He asks for the preparation of the mixture.

21.4 At one stage Sachin informs that the temperature is 856 and that he has already mixed Zinc and Copper with the gold (PK 6616) that he will mix cadmium before 900 and thereafter silver after 990 and at 1000 gold.

21.5 Sanjay Patel informs Sachin to keep the kolater ready and gives him directions regarding safety measure to be taken for pouring this mixture in the water. Sachin informs that the size of the final mixture is about the size of gram (chana). He sends image of the gold flakes. To get an idea of real size Sanjay asks Sachin to put a scale, pencil or pen and send image back to him, which he does.(PK 6709 to 6727) Further Sanjay informs that small and medium size flakes will be acceptable. The larger size being very small in quantity, they should be able to manage at this time. (PK 6736)

Preparation of soil mixture. (message No. PK 6802)

21.6 Sachin informs Sanjay Patel that the soil with him is little bit sandy and slips out of hand. Then he tells that he will use the finest sieve which will be as fine as to sieve Maida floor. Sachin asks him and say that the soil is very fine and it will automatically get sticky. He also advices him to mix Geru with it.

21.7 Sanjay Patel guides Sachin how to prepare soil mixture. He asks Sachin to get 50 grams of sodium silicate + 400 grams of Geru + ½ liter of water, mix all these materials in ½ liter of water and stir it till it gets sticky. In addition, he asks to get 3.2 kg of fine sand + 1 liter of water and boil it. Meanwhile Sanjay asks about the availability of water glass (sodium silicate). He suggests that if the same is not readily available, caustic soda can also be used (PK 6874 to 6892).

Preparation of soil mixture with gold

21.8 At one stage, while sand. mixture is being prepared Sanjay Patel asks Sachin to keep gold flakes ready by the side. He inquires whether the color of sand mixture has changed from red to brown because of the effect of the caustic soda. At this stage, Sanjay Patel asks him to mix gold flakes in the sand mixture and put water in the same. He has also advised to lower the temperature. After seeing the image, Sanjay Patel comments that the sand is very sticky. During the course of preparation, Sachin informs that he has used 200 grams of caustic soda, to which Sanjay informs that the total weight of the mixture will be 5100 grams and asks him to remove 200 grams of mixture from this 200 grams of mixture was separated, gold flakes are again removed and mixed with the main mixture. At repeated intervals, he enquires about the color of the mixture and on number of occasions the photos are sent by Sachin to Sanjay Patel of various materials so that he can check as to whether the process is going in right direction. According to WhatsApp messages, the process is completed at 1.00 o'clock at night. (IST).

Money transactions:

21.9 During the course of this exchange of messages, Sanjay Patel informs Sachin about the transfers to the latter's account by Swift Transfer an amount of 21750 USD.(message no. PK 6231) Sanjay Patel also forwards to Sachin the message which he received from his bank "Your CD A/c*****23035 is debited by Rs. 13,88,231/- on 12.11.2013 by Transfer = US\$21,750/-" (message no. PK 6450)

KALOTI (PK 6837 TO 6842):

21.10 During this period, there is also an exchange regarding sending the gold flakes for Kaloti certification. Sanjay Patel, on the basis of his own calculations informs Sachin that the purity of this gold flakes would be 74.5%.

Documentation.

21.11 Another set of message exchanged is regarding the origin to be mentioned on the invoice pertaining to the consignment to be imported. Sanjay Patel suggests that it should be either Ethiopian or African origin to which Sachin informs that he will write "Ethiopia". Yet another set of WhatsApp message reveal that Sanjay Patel directs Sachin to mention CTH 2616.90. Then he tells Sachin that duty under this heading is lower as compared to CTH 70 and 71081, which is 10%.(message no. P1K 6445 onwards) Besides, Shri Sanjay has also explained that the import under CTH 7108 was regulated by RBI and that they wanted to clear the goods @ 2.5% and the same 'can happen only if this one proves to be 26169010'. (PK 6562 to 6572)

Calculation Sheet:

21.12 Sanjay Patel has also forwarded the calculation sheet of the total expense of preparing this mixture which includes elements towards expense on gold, forwarding through Trans Guard Express, insurance and Kaloti test report. (PK 7230). A similar calculation sheet appears to be made for consignment No. 5 which was recovered from his premises during the search and being relied upon in the SCN (para no. 13.4 of SCN). The material was sent via Emirates Airlines through Transguard Express. At this stage, Sachin again forwards images of the mixture, which is found satisfactory by Sanjay Patel. After inquiring the gross weight of the mixture, Sanjay prepares the commercial invoice and sends to Sachin. Sachin indicates the gross weight of the consignment and net weight.

21.13 In message nos. P1K 7313 to 7365 Sanjay Patel asks Sachin to check the invoice and further asks him to prepare covering letter, packing list, commercial invoice on his letterhead, stamp and sign it and after scanning it send all three documents to him.

21.14 According to WhatsApp messages, the consignment is submitted to the Dubai Customs. Next day on 15th evening, Sanjay Patel confirms arrival of consignment at Air Cargo, Ahmedabad. Next day on 16th Sanjay Patel informs that he has filed BE No. 3820322 dated 16.11.2013.

21.15 In messages exchanged on 22.11.2013, he informs Sachin that the goods have been cleared from the Customs and he is already in the process of cleaning the mixture of gold.

Relevance of WhatsApp message

21.16 From the above discussion, I find that the aforesaid exchange through WhatsApp messages corroborates with the import consignment mentioned at sl. no. 3 of Annexure 'A' to the SCN, i.e. B/E No. 3820322 dated 16.11.2013 filed by M/s MMZ owing to the following reasons:

i) Bill of Entry filed by M/s MM Zaveri and appearing at Sl.No.3 of the Annexure 'A' to the SCN is the same which was conveyed through WhatsApp messages PK 8139, 9119 & 9120;

ii) M/s GStar Jewellers LLC, Dubai had issued invoice dated 14.11.2013 for USD 42,300 towards supply of 5.00 kgs of Natural Gold Ore Concentrates unrefined Gold, wherein advance payment \$ 21,750/- is mentioned and balance amount of \$ 20,550/- was to be paid within 7 working days (messages at PK 6231,6371,6450, 7230 & 11090 also indicate the same)

iii) the quantity mentioned in the aforesaid invoice of M/s GStar and in the B/E was 5 Kgs. which were also found in the messages more particularly at P1K 6949, 7068, 7076, 7083, 7089, 7101, 7230, etc.

iv) In the messages at PK 6857, 6860 it was insisted that country of origin to be written as 'Ethiopia'. In the invoice and aforesaid B/E the country of origin is also 'Ethiopia'

v) the goods were described as Natural Gold Ore ras under CTH 26159010 in the B/E. I find the same as very much in line with the messages at PK 6445, 6541, 6546, 6550, 6560, 6566, 6572, etc. whereby Shri Sanjay Patel had insisted to Shri Sachin to mention so;

vi) The purity of goods as per Kaloti report conveyed through the message PK 6823 and 6826 was 74.5% whereas in the packing list dated 14.11.2013 of M/s GStar and furnished alongwith the aforesaid BE the purity mentioned was 74.51% and subsequently Shri Kartikey Vasanthbhaj Soni in his report dated 20.11.2013 had also confirmed the purity as 17.9 Kt. (74.9%);

vii) the said consignment was shipped via Emirates Airlines through M/s Transguard and the same were mentioned in the messages at PK 6124, 6296, 6205,6497,6798, 7230, etc.

21.17 Therefore, it is clearly established that the aforesaid messages were exchanged between Shri Sanjay Patel and Shri Sachin of GStar, Dubai; that goods were prepared by him as per the instruction of Shri Sanjay Patel through these WhatsApp messages and imported by M/s MMZ vide B/E No. 3820322 and all these descriptions are matching with each other in messages as well as B/ E. It is also clearly established beyond doubt that the aforesaid consignment of fake 'gold ore concentrate' was sent by M/s Gstar, Dubai. The reasons for preparing the 'gold ore concentrate' was clarified by Shri Sanjay Patel vide PK 6541 to 6572 i.e. the misdeclaration was done with intent not only to circumvent the RBI regulations but also to evade payment of appropriate customs duty. Therefore, I find that there is no basis to 'disown' these messages and the same is overwhelmingly corroborated.

21.18 Therefore, I hold that the consignment no. 3 imported vide B/E No. 3820322 dated 16.11.2013 is not naturally occurring "Gold Ore Concentrate" but 'man made gold nuggets' mixed with other metals, soil, cement, etc. classifiable under CTH 7108.

Consignment No. 4- B/E No. 3986187 dated 04.12.2013

22.1 This Bill of Entry is mentioned at sl. No. 4 of Annexure-A to the SCN. (hereinafter referred to as consignment no. 4)

22.2 Relevant messages are from PK 7941 dated 16 11 2013 onwards Regarding an enquiry by Shri Sachin, Sanjay Patel informed that the same was discussed over phone earlier but again repeated the formula viz, 'Gem + Red Cement + water + gold = gold ore concentrates' and for drying the same very low heat is required. Shri Sanjay Patel vide subsequent messages advised Shri Sachin to meticulously follow his instructions regarding selection of ingredients, its ratio and asked for trial of very small quantities so as to avoid last moment nervousness that would end up in derailment of entire plan, which ultimately may invite doubts' in the minds of Customs. He further cautioned that if they leave any weak point, they might be caught at any moment and would lose two three years to solve a problem with Customs and hence it was advised to make perfectly the same kind of material at all times. Shri Sachin had informed that his friend had gone for collecting red colour

cement and if the same was received, he would prepare demo by next day (17.11.2013). I find that Shri Sanjay Patel had repeatedly reminded not to waste time that would delay next shipment and further instructed the method of mixing geru+cement+water and its ratio and also to ensure that the gold purity is fixed at 75% approximately, so that the gold value would also be fixed; that thereafter he could steadily increase the quantity and could solve the problems on his own without calling Shri Sanjay Patel again and again (PK 8385 to 8390).

22.3 While referring to messages dated 17.11.2013 onwards, I find that Shri Sachin had started the 'preparation' of goods for next consignment; that upon seeing the images, Shri Sanjay Patel asked him to pour 25 ml water more in the small vessel and prepare the paste and also advised him to follow the instructions strictly. In between they had exchanged certain images as well. For evaporation, he had given option of different method viz., focus bulb of 100-200V, fan, keeping outside if it is sunny day or use of vacuum. To a suggestion, Shri Sanjay Patel told that since the hair drier was instantly available, it could be tried and he appreciated giving such idea (PK 8926). Further, while observing the images, Shri Sanjay Patel had advised to observe the changes after giving mild heat through gas burner (PK 8998 to 9004). Since the aforesaid experiment appeared to be satisfactory, Shri Sachin informed that next day he would continue with the same test and for that purpose, he would gather all the required materials viz., night lamp, big hair dryer, 3-4 big steel bowl, steel bucket, geru, etc. (PK 9013 to 9016). Regarding proposal to obtain geru from Kerala (PK 9016), Shri Sanjay Patel replied that he would arrange the same and accordingly sent 100 kg. geru (PK 9110). Subsequently, on 19.11.2013 Shri Sachin had sent the images and informed that the goods were ready and its weight was 500 gms.

22.4 Shri Sanjay Patel on 20.11.2013 had asked Shri Sachin to immediately make another shipment of 2200 gms. (PK 9213 onwards) Subsequently, they had shared the information/documents required for submission in Bank for preparations of advance payment towards next consignment. On 26.11.2013, Shri Sachin asked to check the mail as he had already sent the proforma in letter pad and after making certain modifications Shri Sanjay Patel sent it back and further asked him to write Ethiopia as country of origin instead of Ghana, West Africa. On 29.11.2013, it was informed that an amount of Rs. 29,17,593 i.e. USD 46,500/- had been debited from the account. On 30.11.2013 Shri Sachin had sent an image and subsequently mentioned the ratio of different ingredients viz., Zinc 100gm, Copper 200gm, cadmium 5 gm, silver 30 gm. per kg. gold, for which Shri Sanjay Patel suggested to reduce the silver 1mg and instead advised to put palladium 1mg. I find he has repeated the final ratio once again; that for 2.2 kgs it was advised to calculate the ratio accordingly. Subsequently, certain images/messages were exchanged and advised to reduce copper, to which Shri Sachin replied in positive. On 01.12.2013, Shri Sanjay Patel suggested to add 'gold Ore Concentrate Grains' and in the bottom 'Alloy' in the Kaloti Certificate. In between they had again exchanged images of 'grains' and in order to gauge the size, he was asked to keep a pen beside to it and click the photo. Subsequently, after seeing the photo, Shri Sanjay Patel opined that it would have been better if little bigger size is available, however advised him to act fast and start working. It was further reminded that the goods required to be prepared were of 2200 gms and not of 2 kgs. and the bill should be prepared as per the material content, otherwise difficulties would arise at Customs. It was further informed that they should keep the total weight at 6200gms. instead of 6.250 kgs. but purity would remain 75.94% i.e. 18.23 Kt. Subsequently, they had exchanged the images of packing list, export covering letter, commercial invoice, etc. Shri Sachin had further informed that total metal weight was 2620 gms. Therefore, upon calculating the same, Shri Sanjay Patel informed that total purity would become 7.68kt. On 03.12.2013, Shri Sanjay Patel informed that he had mailed the documents and the import file was getting ready at. CHA's Office and was waiting for airw' bill. In the midnight of 03/04.12.2013, it was confirmed that the goods have been cleared by Dubai Customs and the Transguard would deliver Airway Bill in the morning. On 06.12.2013 it was informed that the goods have been released and the same reached Indore.

Corroboration of consignment No.4 with above WhatsApp messages:

22.5 At this juncture, I would like to refer the Bill of Entry No 3986187 dated 04.12.2013 appearing at Sl. No 4 of Annexure to the SCN and find that the description mentioned therein is matching with description. For brevity, the same are discussed hereinbelow:

i) the quantity mentioned in the aforesaid Bill of Entry is the same which was conveyed through WhatsApp messages PK 9213 & 9215 whereby it was informed that he should prepare goods weighing 2200mg;

ii) In the invoice dated 02.12.2013 country of origin is mentioned as Ethiopia and advance payment received as US\$ 46,500 and balance US \$ 35030 to be paid within 7 working days which is matching with the messages Vide PK 11251 whereby it was informed that an amount of Rs. 29,17,593 i.e. USD 46,500/- was debited. Further vide PK 15168, it was confirmed that balance amount of US\$35030 received.

iii) The total weight mentioned in the invoice was 6200gms. which is matching with the message at PK 12334 to 12337

iv) Similarly, purity was mentioned in the Kaloti report 75.94% i.e. 18.23 Kt. which is matching with the messages at PK 12340, 12342

v) BE was filed on 04.12.20 13 which is matching with messages at PK 12504, 12561, etc.

vi) The said goods were sent via Emirates Airline, through Transguard which is matching with many messages at PK 12606, 12617, 12655, 12701, 12763

22.6 In view thereof, it is established by way of corroborative evidences like in the case of consignment No. 3 that the goods prepared by M/s GStar as per the instruction of Shri Sanjay Patel through these WhatsApp messages and imported by M/s MM Zaveri vide B/E No. 3986187 dated 04.12.20 13 were the same and all these descriptions are perfectly matching to each other.

22.7 I, therefore, hold that the goods in question are man made gold nuggets and not the gold ore concentrates as declared by the importer.

Consignment No. 1 & 2 - B/E No. 2723043 dated 16.07.2013 and B/E No. 3330689 and 20.09.2013.

23.1 These Bills of Entry are mentioned at si. No. 1 and 2 of Annexure-A to the SCN. (hereinafter referred to as consignment nos. 1 & 2).

23.2 Further, I find that at WhatsApp messages PK 6539 & 6540 dated 12.11.2013 Shri Sanjay Patel had mentioned that he had cleared last three shipments in the same manner and a total 14 consignments during 2008 to 2013. More particularly, at message PK 6544 he has informed that the last consignment of 2500 gms. was cleared by him declaring it under OTH 26169010. While referring to the Annexure A Sl.No.2 of SCN, I find that M/s MMZ had cleared a consignment of 2500 gms. of 'Gold Ore Concentrate' vide Bill of Entry No.3330689 dated 20.09.20 13 through Air Cargo Complex, Ahmedabad. The same was corroborated with the admission of different witnesses in their respective statements. It is pertinent to mention here that none of them retracted their statements and therefore, the same can be corroborated with each other and accordingly substantiate the allegations made in the SCN. Therefore, it is established beyond doubt that M/s MMZ had misdeclared the aforesaid consignment of 2500 gms gold appearing at sl. No. 2 of the Annexure to the SCN and evaded payment of higher rate of duty and also violated the RBI regulations. Similar i the case of consignment appearing at sl. No. 1 covered under Bill of Entry No. 2723043 dated 16.07.20 13. Besides, Shri Sanjay Patel in his statement dated 28/29.01.2014 had also specifically stated the import of two consignments in the months of July, 2013 and September, 2013 from Shri Hardik Patel of M/s. Shreeman Diamond and Jewellery PiE at Dubai by declaring it as Gold ore concentrate. Therefore, it is clearly established that these two consignments were pred' by M/s Shreeman Diamond and Jewellery FZE Dubai and exported to M/s. MMZ.

23.3 Therefore, I hold that the goods imported vide B/E No. 2723043 dated 16.07.2013 and B/E No. 3330689 and 20.09.2013 were also man-made gold nuggets mixed with other metals and soil, cement, etc. and not the gold ore concentrates.

Other consignments

24.1 The noticees have argued that the WhatsApp messages pertaining to consignment no. 3 and 4 even if considered true, cannot be made applicable to consignment at sl. no. 5 to 15.

24.2 The WhatsApp messages pertaining to consignment no. 3 and 4, as discussed above, clearly indicate that the goods imported were not gold ore concentrate but an artificial mixture of gold with other metals in soil, sand etc. The process of preparing such artificial mixture has already been elaborated and discussed in above paras. The subsequent WhatsApp messages therefore, do not cover the process of manufacture elaborately again and again. However, in the subsequent messages there are clear indications that the same process has been used to prepare subsequent consignments. I may mention that next 11 consignments have been imported into India during a short span of roughly about 40 days (from 14.12.13 to 23.01.14). Some of relevant messages are mentioned below:

Consignment No. 5 - B/E No. 4080363 dated 14.12.2013

24.3 The messages exchanged from 4.12.2013 onwards indicate that draft purchase order and draft proforma invoice is sent by Sanjay Patel to Sachin. On 7.12.13 Sachin informs that he has 2500 grns. of pure gold of 82.5 touch and Sanjay Patel advices him to prepare gold mixture of 75% purity. (PK 13429 to 13433) After exchanging further messages, on 12.12.13 Sanjay Patel informs Sachin that he has sent some money through Swift on 12.12.2013. These details match with the consignment no. 5 covered by BE No.4080363 dated 14.12.2013. The corresponding invoice dated 10.12.2013 indicates an advance remittance of USD 75,000. This matches with the message dated 10.12.13, where there is mention about some amount being sent through Swift as advance. The fact that it was clearly mentioned that the goods of 75% purity are to be prepared and that some quantity of gold was available with Sachin, clearly indicates that this consignment was also prepared in similar fashion as consignment no. 3 and 4.

Consignment no. 6 - B/E No. 4137896 dated 20. 12.2013

24.4 In messages dated 15.12.2013, it is mentioned that for getting 4 kgs. of pure gold, the consignment should be of about 11 to 12 kgs.(PK 14299 to 14302). Further an amount of USD 75,000 was transferred to Sachin on 16.12.13, which is duly acknowledged by him. Sanjay Patel also asks Sachin to confirm to the bank that he was to get USD161144 towards the export business and show the swift copy so that bank would release the payment. Certain documents are approved by Sanjay Patel after making changes on 18.12.13. On 18.12.13, In WhatsApp message PK 14776, Sachin informs Sanjay Patel that process on material is still going on. These details match with consignment no. 6, covered by B/E No. 4137896 dated 20.12.2013. This B/E has been filed on 20.12.13 and quantity declared is 11.875 kgs., which is between 11 to 12 kgs. as mentioned in the messages. Further, corresponding invoice no. MMZ/GSJ/CI-04 dated 18.12.2013 clearly indicates receipt of an advance payment of USD 75,000 against the total amount of USD 161144 for a quantity of 11.875 kgs.

We agree with the above arguments specifically corroborating the WhatsApp messages with these imports. The impugned order corroborates the said messages with other evidence and documents. The grounds of appeal do not challenge the detailed, almost message wise, corroboration reached by the impugned order. The challenge is very general. The appeal memorandum claimed that there were no such messages or there is no evidence that the said messages were acted upon. We find that the appellants have not challenged the recovery of cell phone under a panchnama and the recovery of messages under panchnama. Even otherwise the statement of Sanjay Patel also supports it. The appellants have not sough cross examination of Sanjay Patel. Cross examination of all persons whom they wanted to cross examine was granted under directions of Hon High Court. We find that the whatsapp messages are sufficiently corroborated and therefore relevant and admissible. The analysis of the messages shows that the messages were not only exchanged but the instructions were also executed.

5.6 The messages are further corroborated by the recovery of a cost sheet during search of the appellant's premises. The said cost sheet contains details as follows:

Sr. No.	Detail	Amount \$
1	Pure gold Bar (995) 1237 \$ = \$ 126619/FOR 0.995 KG 3.200 PURE GOLD	126619
2	Transguard \$ 430 (5KGS) + 1 (over weight 5kg) \$490	490
3	Kaloti Test Report \$18	18
4	Silver Metal (for mixing) = \$28	28

5	Melting charges & other metals used like zinc cadmium and copper = \$ 140	140
6	Packing material = \$15	15
7	Cement + color = \$ 2	2
8	RedSoil=\$28	28
9	Total of Above=\$ 126616 Gross	127340
10	Exporters Commission (0.5% of above) \$ 633	637
11	Total = = \$ 1272249	127977
12	Insurance (Door to Airport) = \$ 19	19
13	Grand Total = 127268 \$	127996
14	Rounded to = \$ 127270 / 9,555 gms Ores & Concentrates	128000

The said cost sheet shows the various materials that go into preparation of the fake gold ore. It was recovered from the appellants premises. This sheet clearly shows that fake gold ore was being manufactured. Thus the said cost sheet also corroborates the facts detailed in the WhatsApp messages.

5.7 Even before the Hon'ble High Court the appellants did not seek cross examination of Shri Sanjay Patel. After the directions of Hon High Court to cross examine the persons they wanted to cross examine, Shri Sanjay Patel denied the statement and the messages. No argument or evidence or reason was given in support of denial of statement or WhatsApp messages. It is not denied that the mobile phone and the whatsapp messages were recovered under a Panchnama. The appellants have not challenged the Panchnama at any stage nor have sought any cross examination of Panch witnesses. In these circumstances their challenge to the recovery of mobile phone and the WhatsApp messages is dismissed.

6. Revenue has placed reliance on the report of the Professor of IIT, Bombay. The appellants have sought to discredit the said report during cross examination of the author of the report. We find that the comparison of the parameters of the imported material with the parameters of 'ores' do not influence the outcome of the case in any significant manner. Even if the goods imported by appellants answer to all physical/chemical parameters of 'ore' can they still be called 'Ore'. From the discussion above it is apparent that if the goods are not extracted from mines but are produced artificially the same cannot be classified or described as 'ores'.

6.1 The Principal Commissioner has relied on the test report. It needs to be noted that even if the test report showed that the samples answered to all the physical and chemical parameters of the 'ore', the sample cannot be called 'Ore' if it is not of natural origin. The report reads as follows:-

(I) Chemical Analysis of Gold Metal

(a) A real gold nugget has a wax like yellow color, however, the present samples do not show waxy luster and show brighter yellow with pale pinkish shade.

(b) Real gold nugget usually posses pitted surface and signs of abrasive polishing. If the nugget is man-made from melted scrap gold pits and larger craters are usually, not seen and the surface would appear smooth with no pits/crater. The present sample of gold metal do not show pits or cavities/craters and have smooth surface.

(c) Natural gold nuggets posses a regular shape rather than highly irregular or varied shapes ranging from pear, round, elongated, flat and dendritic etc. Careful observation of the plate-1 of the present sample reveal that gold metals are mostly bulbed, tear drop or highly irregular very sharp edged, or elongated needle shaped features. The tear and bulbed shaped nuggets clearly show sharp pointed features indicating extracting out from melted concentrate, as high specific gravity of gold develops into tear drop with sharp pointed end on opposite side. Sharp pointed features are never observed in Natural Gold Nuggets.

(II) Soil Analysis

(A) The soil along with gold metals seems to be bind together using some cement. The type of cement used is not very clear at present.

(B) The chemical analysis and X-ray diffraction do not show presence of sulphide or arsenic minerals or oxide of these elements as they are commonly associated with gold.

(C) Surprising the present soil sample show absence of any clay minerals less than 0.5%. The soil seemed to have been partially heated or baked.

During the cross-examination of Shri George Mathew, certain facts emerged. Learned Counsel for the appellant particularly relied on the question Nos. - 5, 12, 21, 24, 29, 30, 33 and 34 of the cross-examination, as follows:-

"q.5. Are you doing research in regard to gold, or about other metals and minerals?"

Ans. I do research on minerals, but not on gold.

q.12. Did you conduct all required tests and analysis personally, or any other persons were also involved in this work?

Ans. The chemical analysis and X-ray diffraction is done by the technical superintendent. The interpretation is done by me.

q.21 In this para-1 on page 1, you have reported that native gold usually contains more than 90% Au. But in the book titled "The Chemistry of gold extraction" by John O. Marsden and C. Iain House and also in a paper published by SGS Minerals, it is reported that Au in native gold is more than 75%. So, therefore, is it correct to state that native gold must contain more than 90% Au.

Ans. The Au in native gold varies from 70% to 90%.

q.24. You have referred to LOI values and error percentage in "Chemical Analysis". Are these standards specified in any literature?

Ans. No LOI value is detected, and the error associated with trace elements is plus or minus 5%, and 2% in the case major elements.

q.29. All the five metal elements are usually found in naturally occurring gold ore or gold concentrate?

Ans. Not always all these elements may or may not be present.

q.30. In "soil sample" various chemicals and compounds have been mentioned. Are these chemicals/compounds found in the soil associated with the gold ore/concentrate?

Ans. The chemicals /compounds found in a soil depend upon the source from where the soil is derived.

q.33 In this case, Au is reported as 79.73. If we apply the above formula then it would be 19.135 carat. Is this right?

Ans. Yes.

q.34 On page-5 of your report in para-2 contain observations about colour of gold nugget are recorded. Did you conduct any test like Spectrophotometer, and did you use an equipment like spectrometer for colour?

Ans. No. It is only physical observation."

6.2 Learned Counsel argued that the report of Shri George Mathew cannot be relied on as Shri Mathew is not expert of gold. He relied on question No. 5 of the cross-examination which indicates that Shri Mathew has research in minerals and not in gold. We do not find any merit in the argument of the learned counsel as the term 'Mineral' covers gold ores also. Gold is a metal and gold ore is a mineral.

6.3 Learned Counsel also seeks to draw support from the fact that chemical examination was not done personally by the Professor but by the technical Superintendent. It is not necessary for the Professor to do the actual lab work by himself. He is only required to interpret the result of the tests done in the labs. Thus, we do not find merit in the argument of the learned Counsel to do lab test personally and discredit the report in any manner.

6.4 Learned counsel has produced evidence before the Professor which indicate that gold content in native gold is 70% to 90% to which the professor has agreed. This would indicate that the report of the Professor that "Native gold usually contains more than 90% Au" is discredited. In the cross-examination he has agreed that Au content in the native gold varies from 70% to 90%. The chemical analysis of the sample showed gold content 79.93% thus, it falls within the range in which the gold ore also falls. However, just because the sample contains gold in 70% to 90% it does not become "ore". If the same is produced in a workshop the

same cannot be called an 'Ore' in terms of the HSN. Learned Counsel also relied on to the question Nos. 24, 29 and 30 to the cross-examination but they are not of much significance.

6.5 From the above, it is apparent that there is no minimum or maximum percentage specified for gold content in gold ore. Different literature may suggest different values, however, this fact has no significance in the present proceedings as term 'Ore' is defined in the tariff itself. The said definition does not contain any maximum or minimum value of metal or nonmetal. Learned Counsel further raised the issue regarding use of word 'usually' at various places in the report of Professor at IIT, Bombay. It needs to be appreciated that 'Ore' is naturally occurring substance and therefore cannot be any specific parameter for 'Ore'. The composition of ore and contents of various materials in gold ore may vary from place to place and content to content. Therefore, the term 'usually' appearing in the report of the Professor of IIT is not incorrect and we need to appreciate that variation in the proportions of contents is noticed in naturally occurring minerals from place to place. The quality of composition of Ores cannot be standardized as they are naturally occurring substances. Moreover the tariff/HSN does not prescribe any minimum or maximum limit in the definition of 'Ore'.

6.6 Learned Counsel has also relied on the fact that observations regarding general appearance of colour of the sample was not made on the basis of any equipment but just by physical observation. Learned Counsel has sought to discredit the observations on that basis. It needs to be appreciated that Professor at IIT is the expert in minerals and can be expected to know the characteristics by which the minerals are generally described.

6.7 The impugned order relies on the observations regarding the absence of pits or cavities/craters and have smooth surface of the gold metal found in the sample. It is seen that in the cross-examination the said observations regarding presence or absence of cavities/pits and regarding the smoothness of surface has not been challenged. Learned Counsel has pointed out the use of word usually in the report and it would indicate that such smoothness of surface can be found in the naturally obtained substance also. The report/result of report is as follows:-

1. Chemical Analysis of Gold Metal:

The chemical analysis as shown in the table indicates that the gold metal contains 79 % Au, 17% CU and 0.11% Ag. This composition of the gold alloy indicates it to be 18 carat gold variety. About -1.6 wt% are non-soluble residues.

2. Gold metal morphology

- A real gold nugget has a wax-like yellow color, however, the present samples do not show waxy luster and show brighter yellow with pale pinkish shade (plate I) .

- Natural gold nuggets typically contain plenty of quartz and other mineral and dirt trapped within. Real gold nugget usually possess pitted surface and signs of abrasive polishing. If the nugget is man-made from melted scrap gold pits and larger craters are usually not seen and the surface would appear smooth with no pits/craters. The present sample of gold metal do not show pits or cavities/craters and have a smooth surface. Since it does not have pits and cavities that usually natural gold nuggets possess, also do not contain other minerals trapped in it. SEM image at high resolution (plate 3) indicates absence of trapped minerals and show regular spoked (plate 4) features that are usually absent natural gold nuggets, as abrasion removes it.

Natural gold nuggets possess a regular shape rather than highly irregular or varied shapes ranging from pear, round, elongated, flat and dendritic etc. As the highly malleable gold in the nature during the process of erosion after removal from the host rock gets tumbled along with hard minerals. This makes the surface pitted and loses all its shape angularity. Careful observation of the Plate-I of the present sample reveal that gold metals are mostly bulbed, tear drop or highly irregular very sharp edged, or elongated needle shaped features. The tear and bulbed shaped nuggets clearly show sharp pointed loam arcs indicating extracted out from melted concentrate, as high specific gravity of gold develops into tear drop with sharp pointed end on opposite side. Sharp pointed features are never observed in Natural Gold Nuggets.

4. Soil Analysis

Chemical analysis of the soil as shown in the above table indicates that the soil is dominantly quartz bearing. The colour of the soil is largely due to iron. The soil is a silty (0.05—0.002 mm) variety of equal grain, size and less clayey. Seem to have been derived due to weathering of old crystalline rocks in the areas of low rainfall. The soil along with gold metals seems to be bind together using some cement. The type of cement used is not very clear at present.

The chemical analysis and X-ray diffraction do not show presence of sulphide or arsenic minerals or oxide of these elements as they are commonly associated with gold. Erosion of the gold source area usually brings these minerals and elements enriched in the soil too.

The powder X-ray diffraction indicates the soil contain kaolinite clay together with quartz and dolomite (MgCO_3). Minor amount of hematite is also observed. Surprising the present soil sample show absence of any clay minerals less than 10 Å d-spacing. The soil seemed to have been partially heated or baked,

Based on above results and observation the sample given for analysis is not NATURALLY OCCURRING. It contains man-made 18 carat GOLD NUGGETS mixed in red soil in the form of lumps.

Presence of the cement variety is not detected. However, the use of some form of cement is not ruled out.

The soil is reddish brown coloured soil, however, it cannot be concluded whether it is the Red-Indian soil (GERU).

Natural native gold nuggets usually have > 90 wt% Au. Presence of ~18% Cu in the sample seems to have been added or 18 carat gold or gold jewellery has been melted produce gold nuggets to show it as gold ore placer deposits.

It is seen that in the above report of IIT Professor clearly states that Sharp pointed features are never observed in Natural Gold Nuggets. He has also pointed out that gold metal are bulbed, tear drop or highly irregular very sharp edged, or elongated needle shaped features. He also observed that the tear and bulbed shaped nuggets clearly shows sharp pointed features indicating extracted out from melted concentrate as high specific gravity of gold develops into tear drop with sharp pointed end on opposite side. This observation of the IIT Professor has not been challenged in the crossexamination by any question. It is seen that there is no use of word usually in the said observation and the word used is 'never'. This in fact corroborates the allegation that the goods were not of natural origin.

6.8 Moreover even if the goods imported correspond to all the defined physical/chemical parameters of 'Ores', the same cannot be called 'ore' if they are not naturally occurring material but are produced in a workshop.

7. The next issue relates to the Confiscation and imposition of Redemption fine. The confiscation has been ordered under section 111(d) and (m) of the Customs Act 1962. We uphold the confiscation. We find that Redemption fine of Rs 60 lakhs has been imposed on the goods of declared value of Rs 1.32 Crores. Considering the facts and circumstances of the case and the fact that duty evaded in this consignment is approximately 18 lakhs, we reduce the said fine to Rs 15 lakhs. The penalty of Rs 10 lakhs, imposed under 112(a) in respect of the confiscated consignment is also upheld

8. It has been argued that demand of differential duty is barred by limitation. He argued that the past consignments were assessed as "Natural Gold Ore Concentrate" and concessional rate of Customs duty, by classifying under CTH 26169020 was allowed by proper officer. They had submitted all requisite documents like purchase invoices, packing lists/air way bills, certificate of country of origin etc. and the goods were available before the customs officers and they could have ascertain the composition of the goods. He argued that samples were also taken by the Customs Officers. Learned Counsel submitted that classification and admissibility of exemption are questions of law involving interpretation therefore, no malafide can be attributed to the assessee in such case. It was also argued that earlier a similar issue was raised before the Customs and the Commissioner (Appeals) decided in appellant's favour in the said consignment, the goods were classified under CTH 26169010 and full exemption from CVD was granted by virtue of Serial No. 5 of Notification No. 4/2006-CE. He argued that the said order-in-appeal has bearing on issues like the bonafide nature of our imports, assessment of consignments of gold ore concentrate by

proper Customs Officers upon proper scrutiny and verification, irrelevance of WhatsApp messages and thus, wrong invocation of longer period of limitation in these proceedings.

8.1 We find that the WhatsApp messages clearly show that the previous consignments were produced in the workshop. It has been corroborated by the detailed analysis in the impugned order. It has also been corroborated by the recovery of document from appellants premises and also from the sample tested. The appellants had contended that the assessment of previous consignments was done after drawl of sample and therefore the assessment cannot be reopened by issue of this notice. While there is no clear evidence of drawl of samples in earlier consignments, we find that the same will not have any impact on the present proceedings. Samples may be drawn for testing or valuation. The actual composition of the sample has no relevance to the facts of the present case. Even if the samples answered to all physical and chemical parameter of 'Ore', the same does not qualify to be 'ore' for the purpose of the Tariff or the notification. As provided in HSN/Chapter notes and as discussed in Para 5 above, unless the material is of natural origin, and not subjected to any processes not normal to metallurgical industry the same cannot be called 'ore'. Taking of samples of previous consignment, if any, for chemical/physical testing or valuation purposes, does not help the case of the appellant, if the fact that the said goods were produced in a workshop by mixing gold, sand and other materials is suppressed. Thus the fact that samples were taken of earlier consignments or not, does not affect the outcome of this case. Even if those samples were taken and tested it might not have been possible to detect that the same were produced in a workshop and were not of natural origin. In view of the fact that an elaborate mechanism for hoodwinking Customs was devised by the appellant the intention to evade the customs duty cannot be doubted. Moreover we find that the issue in the said order of Commissioner (Appeals) referred in Para 8 above is very different and only technical in nature. It has no bearing on this case. This is a case involving fraudulent intentions and actions. In view of above the demand of duty and interest on past consignments is also upheld. The penalty under section 114A, of the Customs Act 1962, in respect of past consignments is also upheld.

9. A separate penalty of Rs 50 lakhs under section 114A, of the Customs Act 1962, has been imposed on Shri Sanjay Patel. Hon'ble High Court of Gujarat, in the case of *Jai Prakash Motwani - 2010(258) ELT 204 (Guj)*, has held that when penalty has been imposed on the firm, separate penalty on partner cannot be imposed. Respectfully following the decision of Hon'ble High Court, the appeal of Shri Sanjay Patel is allowed.

10. The appeal of M/s Mulchand M Zaveri is partly allowed. The appeal of Sanjay Patel is allowed.

(Pronounced in the court on 05.12.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Custom Appeal No.185 of 2011

Arising out of OIA-36/2011/COMMR-A-/KDL
Passed by Commissioner of CUSTOMS-KANDLA

Date of Hearing: 12.12.2019

Date of Decision: 24.01.2020

**FLEXI TUFF INTERNATIONAL LTD
PLOT NO. 94, INDUSTRIAL AREA NO. 1, PITHAMPUR
DHAR, MADHYA PRADESH**

Vs

**COMMISSIONER OF CUSTOMS
KANDLA CUSTOM HOUSE, NEAR BALAJI TEMPLE
KANDALA, GUJARAT**

Appellant Rep by: None

Respondent Rep by: Shri Sanjiv Kinker, Superintendent (AR)

CORAM: Ramesh Nair, Member (J)

Raju, Member (T)

FINAL ORDER NO. A/10245/2020

Per: Raju:

This appeal has been filed by M/s. Flexi Tuff International Ltd., numerous opportunities of hearing were given on 13.5.2019, 27.06.2019, 23.09.2019, 15.10.2019, 07.11.2019, 29.11.2019 & 12.12.2019 but no one appeared therefore the appeal is being taken up for decision without hearing the appellant and on the basis of the grounds of appeal.

2. The dispute in the instant case relates to demand of Additional duty of Customs (High Speed Diesel Oil) under section 116 of the Finance Act, 1999 with effect from 1.3.1999. The said duty was demanded from the appellant vide Show Cause Notice dated 07.10.2004 and the same was confirmed vide Order-In-Original dated 17.3.2010. The said Order-In-Original were upheld by the Commissioner (Appeals) Order No. 36/2011/COMMR-A-/KDL.

3. The appellants are engaged in manufacture of HDPE/PP Woven Sack. The appellants claimed that Notification 43/2002-Cus dated 19.04.02 which exempts material imported into India against the Advance license issued in terms of Para 4.1.1 of EXIM policy. It has been argued that the said notification also exempts the appellant from Additional Duty of Customs (High Speed Diesel Oil) leviable under section 116 of the Finance Act, 1999.

4. Learned Authorized Representative pointed out that the issue is squarely covered by the decision of tribunal in case of *S J L T Textiles P Ltd Vs. CC, 2013 (297) ELT 144 (Tri-Bang)* wherein it has been held that notification no. 43/2002 does not grant exemption from levy under section 116 of the Finance Act, 1999.

5. We find that the issue is squarely covered by decision of coordinate bench in case of *S J L T Textiles P Ltd* in Para 2 & 3 following decision has been stated :

"2. The appellant claimed the benefit of Notification No. 43/2002-Cus., dated 19-4-2002 while clearing the said consignments for home consumption. The said Notification which was issued under the DEEC Scheme exempted an importer of the above goods from payment of Basic Customs Duty (BCD), additional duty of Customs leviable under Section 3 of the Customs Tariff Act as also safeguard duty and anti-dumping duty leviable, respectively, under Sections 8 and 9A of the Custom Tariff Act, subject to certain conditions. The original and appellate authorities refused to extend the benefit of exemption to additional duty of Customs imposed under Section 116 of the Finance Act, 1999 in respect of the above consignments of HSD oil. Hence the present appeal of the assessee.

3. On a perusal of Notification No. 43/2002-Cus., we find that it did not grant exemption from payment of additional duty of Customs leviable under the Finance Act, 1999 as rightly held by the authorities below. As an exemption notification has to be strictly construed, the grounds raised in this appeal are untenable. The appeal is dismissed."

6. Relying on the said decision, We dismiss the appeal.

(Pronounced in the open court on 24.01.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Customs Appeal No. 11953 of 2019

Arising out of Order-in-Appeal No OIA-VIII-48-09-ADJ-ADC-MCH-2019-
20-1179, Dated: 13.05.2019

Passed by Commissioner (Appeal) Customs, Jamnagar

Date of Hearing: 03.02.2020

Date of Decision: 24.02.2020

**SHREYANSH MARBLE TILES PVT LTD
B-63, AMBAJI INDUSTRIAL AREA ABU ROAD
SIROHI, AJASTHAN**

Vs

**COMMISSIONER OF CUSTOMS
JAMNAGAR, SHARDA HOUSE, BEDI BANDAR ROAD
OPP. PANCHAVATI, JAMNAGAR, GUJARAT**

Appellant Rep by: Shri Ritaj Kacher, Adv.

Respondent Rep by: Shri Sharad Airan, AC (AR)

CORAM: Ramesh Nair, Member (J)
Raju, Member (T)

FINAL ORDER NO. A/10522/2020

Per: Raju:

This appeal has been filed by M/s. Shreyansh Marble Tiles Pvt. Limited against the order of Commissioner extending time limit for issuance of show cause notice under Section 110(2) of Customs Act, 1962.

2. Learned Counsel for the appellant pointed out that DRI officers on 09 December, 2018 searched the residential premises of the Appellant's Director and the factory premises of the Appellant company at B-63, Ambaji Industrial Area, Palapur, Ahmedabad Highway Road, Abu Road, Sirohi, Rajasthan. That, at the factory premises the officers found huge stocks of marble and granites in the open premises of the factory. That the crystallized glass panels were stored in another premises adjacent to the above factory premises and the Appellant informed the officers that they had imported another eight containers of crystallized glass panels. The imports were through Mundra Port (four containers) and ICD, Tughlakabad (Port of discharge Pipavav) (four containers) and the same was yet to be cleared from the port or under process of clearance. That thereafter the officers along with the Appellant entered the godown premises situated at B-61A, Ambaji Industrial Area, Palanpur, Ahmedabad Highway Road, Abu Road, Sirohi. That DRI officers resumed the high sea sales, import purchase file, import file, sales bill file. Further, the goods imported at the Appellant factory premises were stated to be imported by bill of entry and in this regard eight bills of entry mentioned was given. That, further the aforementioned goods were detained through separate detention memo dated 09 December 2018 and the goods were handed over to the Director of the Appellant Company for safe custody. That the Appellant's Director was also issued summons dated 09 December 2018 to appear on 10 December 2018 at 10:00 AM before the DRI, Ahmedabad Zonal Unit with reference to mis-declaration/undervaluation in respect of crystallized glass panel and rough marble blocks by the Appellant company.

2.1. Learned Counsel stated that on 20 December 2018, the goods of the Appellant company imported against Bill of Entry No. 9298407 dated 17

December 2018 were examined at Saurashtra - CFS, AP & SEZ, Mundra which were declared as "Crystallized Glass Panel B Grade" of different size (2800x1500x17mm) and (2800x1200 x17mm) which were imported from Hong Kong. The said consignment of containers lying in the premises of Saurashtra - CFS, Mundra, were detained for further investigation. That, by letter dated 20.12.2018 the Inspector, (SIIB Import), LCD, TKD directed the Senior Manager, CONCOR, LCD, TKD, New Delhi to shift the containers covered under bills of entry No.9244913 dated 13 December 2018 filed by the Appellant Company and the said seal should be cut in presence of SIIB officials.

2.2. Thereafter, vide Panchnama dated 21 December 2018, the officers of SIIB Import examined the goods imported vide bill of entry No.9244913 dated 13 December 2018 imported by the Appellant's company. That the Customs officers informed that as inquiry was being conducted by the DRI officers, Ahmedabad Zonal Unit, it may take some more time and accordingly, the goods may be warehoused in terms of Section 49 of the Customs Act, 1962. That on 26 December 2018 the Appellant's Director was issued another summons for appearing on 03 January 2019 before the DRI office. That by letter dated 28 December 2018, the Appellant company requested Deputy/Assistant Commissioner of Customs, Customs House, Mundra, Mundra Port, for provisional assessment with regard to bill of entry No.9436001 dated 27 December 2018 and stated that two containers had arrived on 23 December 2018 and were lying uncleared on account of SIIB alerts. The SIIB detained the shipments in connection with the DRI alert at Mundra port. That the Appellant Company requested permission so that the goods may be provisionally assessed. That the Appellant Company by letter dated 28 December 2018 requested the Assistant Director, DRI, Ahmedabad that the goods i.e. Crystallized Glass Panel B Grade, imported vide bill of entry No. 9244913 dated 13 December 2019 and 9298407 dated 17 December 2019, which were seized vide seizure memos dated 13 December 2018 and 21 December 2018, were correctly classified under CTSN 70169000 and there is no mis-declaration in terms of description as well as the value. It was further requested that since verification was pending by the DRI and Customs authorities, the clearance of the goods may be allowed under bond or bank guarantee or both, so that the goods imported by the Appellant might not suffer additional costs for storage at the ports/CFS. That, on 28 December 2018, the appellant requested Customs to issue NOC at the earliest to the Customs authorities at the port of Mundra MPSEZ and LCD, Tughlakabad, respectively to allow the Appellant to clear the goods on payment of appropriate differential duties, if any, reserving their rights to contest the same in future. That by letter dated 30 December 2018, addressed to Deputy Director, DRI, Ahmedabad Zonal Unit appellant stated that the goods detained at LCD, TKD, Delhi were dreadfully fragile and liable to be completely destroyed in shifting to warehouse. Therefore, in the interest of justice and prevention of any loss they requested to immediately release the goods on provisional assessment basis and to prevent further loss of the goods and demurrage they were ready to bear the bond and bank guarantee of whatever amount be desired from the office. Thereafter, on 31 December 2018 the Appellant deposited amount of Rs.20 Lacs in respect of consignment already cleared by the Customs and sold in local market, other than detained goods. That by letter dated 02 January 2019 the Appellant's Director addressed a letter to the DRI officer that a very high fever had gripped him and doctors had advised medical rest for a week.

2.3 Learned Counsel further pointed out that on 03.01.20 19 the officers had examined the goods at Saurashtra Freight Pvt. Limited, CFS, AP & SEZ, Mundra pertaining to bills of entry No.9436001 dated 27 December 2018 which was declared as crystallized glass panel - B- Grade. That these goods were also detained by detention memo dated 03 January 2019 on allegation of suspected undervaluation and mis-declaration. That the Senior Intelligence Officer vide their letter dated 07 January 2019, directed the Appellant's Director to supply original bill of entry along with all

supporting documents such as commercial invoice packing list, bill of lading, freight and insurance paid document etc. from 2016 till date other than documents withdrawn under Panchnama dated 09 December 2018 at the earliest.

2.4. Learned Counsel pointed out that, on 08 January 2019 the Appellant's Director went to DRI Ahmedabad office at 15:50 hours to request for NOC for releasing goods detained by DRI Ahmedabad at Mundra and TKD Port. He pointed out that although the summons issued to the Appellant for appearance on 11 January 2019, at around 16:30 hours DRI started taking statement and continued till 7:00 AM and the Appellant was not allowed to sleep the whole night. That the Appellant was completely under stress mentally and physically and further appellant's signatures were taken on various papers. That on the next day i.e. on 09 January 2019, the Appellant was summoned again and the complete statement was prepared on the computer in his absence and in the DRI office. That at approximately 13 hours on 09 January 2019 the DRI officers made him sign the statement and some papers. That even statements of Shri Rakesh Patni and Kaushik Thakkar was also got signed by him forcefully. Then subsequently the Appellant was arrested on 09 January 2019 at 16:30 hours. That the Appellant was produced on 09 January 2019 before the Additional Chief Metropolitan Magistrate at Ahmedabad and in the application for judicial remand stated that the Appellant had allegedly done undervaluation of a goods with regard to import of crystallized glass panel. That on 10 January 2019 the Appellant was in jail and he made deposit Rs.60 Lacs vide demand drafts with regard to the imports of crystallized glass panel already made by M/s. Shreyansh Marble Tiles Pvt. Limited. That on 12 January 2019 by seizure memo cum no objection for provisional release, the SIO, DRI, Ahmedabad Zonal Unit seized the goods which were detained by Panchnama on various dates. That SIIB vide letter dated 23.01.2019 had accorded permission of provisional release of the said goods pertaining to bill of entry No.92449 13 dated 13.12.2018, 3772283 dated 27.10.2017 and 4282641 dated 06.12.2017 on submitting bond of re-determined value of goods of Rs.33,84,917/-, bank guarantee equal to differential duty of Rs.2,98,917/- and additional bank guarantee of Rs. 1 Lac. 2.26 That by letter dated 28 January 2019 SIO, DRI, Ahmedabad Zonal Unit had rebutted the allegations made by the Appellant's Director on 13 January 2019. That by communication dated 13 May 2019 the Appellant's company was informed that goods imported by him pertaining to bill of entry No.7756415 date 08.12.2016 filed with Customs House, Gujarat, Port Limited, Pipavav, which was detained vide seizure memo dated 09 December 2018 and seized vide seizure memo dated 12 January 2019 which was actually valued at Rs.61,188/- instead of Rs.50,478/- as declared in the bill of entry thereby evading differential duty of "Rs. 3,153/-". That the Commissioner of Customs (Preventive), Jamnagar, in exercise of powers vested with him under first proviso of Section 110(2) of the Customs Act, 1962 has extended the time limit for issuance of Show Cause Notice for goods.

3 Being aggrieved by the impugned order dated 13 May 2019, the Appellant preferred the present appeal mainly on the following grounds :-

(a) That the impugned order/communication has been passed without issuing the Show cause notice and giving opportunity to be heard to the appellant before extending the time limit for issuance of Show cause notice under the provisions of Section 110(2) of the Customs Act, 1962;

(b) That even the amendment to the provisions of Section 110(2) of the Customs Act, 1962 by Finance Act, 2018 will not alter the situation as for grant of personal hearing the extension of Show cause notice;

(c) That the amendment to the provisions of Section 110(2) of the Customs Act, 1962 by Finance Act, 2018 will not alter the situation as for grant of personal hearing before extending the time limit for issuance of Show cause notice;

(d) That the Commissioner has totally ignored the law laid down by the Hon'ble Supreme Court of India in the case of *I.J. Rao, Assistant Collector of Customs vs. Bibhuti Bhushan Bagh - 1989 (42) ELT 338 (SC)* wherein it has been held that extension of six months period for issuance of Show Cause Notice cannot be done by the Commissioner without hearing the appellants;

(e) That the Apex Court had also in the case of *Harbans Lal vs. Collector of Customs reported as 1993 (67) ELT 20 (SC)* has held that by extending the time limit under Section 110(2) of the Customs Act, 1962 owner of seized goods is entitled to notice because the seized goods on the expiry of six months are required to be returned to him and if that period was to be extended, he has vested right to be heard;

(f) Learned Counsel further relied on the case of *Assistant Collector of Customs vs. Charan Das Malhotra - 1983 (13) ELT 1477 (SC)*, *Sardar Kulwant Singh vs. CCE & Cus and Ors - 1981 (8) ELT 3 (Del.)* and Tribunal decision of Delhi Bench in the case of *Swees Gems & Jewellery & Aardhya Impex vs. CGST & CE, Jaipur-I, Final Order No. 50283-50284/2019 dated 21.02.2019*.

4. Learned Authorised Representative relies on the impugned order. He pointed out that after the amendment to Section 110 of the Customs Act, 1962 the law is substantially changed. He pointed out that the said provisions, after amendment, have been examined by the Hon'ble Rajasthan High Court in their judgment in the case of *CC (Preventive) Jodhpur vs. Swees Gems and Jewellery - 2019 (368) ELT 455 (Raj.)*. He pointed out that the decision of Ahmedabad bench in the case of *M/s. Gastrade International (Order No. A/10956/2019 dated 03 June 2019)* passed by relying on the decision of Delhi Bench in the case of *Swees Gems & Jewellery vide Final Order No. 50283-50284/2019*, has been set-aside by the Hon'ble Rajasthan High Court and therefore, no reliance can be placed on the decision of Ahmedabad Bench in the case of *Gastrade International (supra)*.

5. We have gone through the rival submissions. We find that the primary issue is if the Commissioner of Customs can exercise powers granted to him under Section 110(2) of the Customs Act, 1962 without issuance of show cause notice and without granting hearing to the appellant. The appellants have essentially relied upon the decision of the Tribunal in the case of *Swees Gems and Jewellery* which in turn relied on various decisions of High Courts and Supreme Court. It is seen that those decisions of High Courts and Supreme Court which have been relied on by the Tribunal in the case *Swees Gems and Jewellery* pertains to unamended Section 110(2). We find that the said decision of Tribunal in the case of *Swees Gems and Jewellery* has been set-aside by the Hon'ble Rajasthan High Court with following observations:-

11. Before proceeding to analyze the parties' rival submissions, it would be useful to extract the pre-amended law, and the provision of Section 110(2) after the amendment. They are set out, in a tabular manner, as follows:

Provisions prior to amendment of proviso to Section 110(2)	Provisions subsequent to amendment of proviso to Section 110(2)
(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.	(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:
Provided that the aforesaid period	"Provided that the Principal

of six months may, on sufficient cause being shown, be extended by the Principal Commissioner of Customs or Commissioner of Customs for a period not exceeding six months.	Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified: Provided further that where any order for provisional release of the seized goods has been passed under Section 110A, the specified period of six months shall not apply".

12. The Supreme Court in the *Asstt. Collector of Customs and Ors. v. Charan Das Malhotra*, AIR 1972 SC 689 1983 (13) E.L.T. 1477 (S.C.) considered the interplay between Sections 110 and 124 of the Customs Act and held as follows:-

"Section 124 provides that no order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty. The Section does not lay down any period within which the notice required by it has to be given. The period laid down in Section 110(2) affects only the seizure of the goods and not the validity of the notice."

13. This view was again applied and followed in *J.K. Bardolia Mills v. Dy. Collector and Ors.*, 1994 (5) SCC 332 = 1994 (72) E.L.T. 813 (S.C.). Thus, there is no time limit for issuing a show cause notice, under Section 124 of the Customs Act. However, in case a show cause notice is not issued, for some reason, Section 110 would operate. Section 110(2) states that goods cannot be detained for more than six months, unless a show cause notice (i.e. under Section 124) is issued; the proviso clothes the Revenue with the power of extending the period by another six months. Under the pre-amended law, the power under the proviso could be exercised, "for sufficient cause". This was the subject of interpretation in *I.J. Rao* (supra). The Supreme Court, held, in that decision, that:

"There is no doubt that the words "on sufficient cause being shown" in the proviso to Section 110(2) of the Act indicates that the Collector of Customs must apply his mind to the point whether a case for extending the period of six months is made out. What is envisaged is an objective consideration of the case and a decision to be rendered after considering the material placed before him to justify the request for extension. The Customs Officer concerned who seeks the extension must show good reason for seeking the extension, and in this behalf he would probably want to establish that the investigation is not complete and it cannot yet be said whether a final order confiscating the goods should be made or not. As more time is required for investigation, he applies for extension of time. The Collector must be satisfied that the investigation is being pursued seriously and that there is need for more time for taking it to its conclusion. The question is whether the person claiming restoration of goods is entitled to notice before time is extended. The right to notice flows not from the mere circumstance that there is a proceeding of a judicial nature, but indeed it goes beyond to the basic reason which gives to the proceeding its character, and that reason is that a right of a person may be effected and there may be prejudice to that right if he is not accorded an opportunity to put forward his case in the proceeding. In the other words, the issue is whether there is a right in a person from whose possession goods are seized and which right may be prejudiced or placed in jeopardy unless he is heard in the matter. It cannot be disputed that Section 110 sub-section (2) contemplates either notice (within six months from the date of seizure) to the person from whose possession the goods have been seized in order to determine whether the goods should be confiscated or the restoration of the goods to such person on the expiry of

that period. If the notice is not issued in the confiscation proceedings within six months from the date of seizure the person from whose possession the goods have been seized becomes immediately entitled to the return of the goods. It is that right to the immediate restoration of the goods upon the expiry of six months from the date of seizure that is defeated by the extension of time under the proviso to Section 110(2). When we speak of the right of the person being prejudiced or placed in jeopardy we necessarily envisage some damage or injury or hardship to that right and it becomes necessary to inquire into the nature of such damage or injury or hardship for any case to be set up by such person must indicate the damage or injury or hardship apprehended by such person.

In the present case, one possibility is that the person from whose possession the goods have been seized may want to establish the need for immediate possession, having regard to the nature of the goods and the critical conditions then prevailing in the market or that the goods are such as are required urgently to meet an emergency in relation to a vocational or private need, and that any delay in restoration would cause material damage or injury or hardship either by reason of some circumstance special to the person or of market conditions or of any particular quality of requirement for the preservation of the goods. But it will not be open to him to question whether the stage of the investigation, and the need for further investigation, call for an extension of time. It is impossible to conceive that a person from whose possession the goods have been seized with a view to confiscation should be entitled to know and to monitor, how the investigation against him is proceeding, the material collected against him at that stage, and what is the utility of pursuing the investigation further. These are matters of a confidential nature, knowledge of which such person is entitled to only upon the investigation being completed and a decision being taken to issue notice to show cause why the goods should not be confiscated. There can be no right in any person to be informed midway, during an investigation, of the material collected in the case against him. Consequently, while notice may be necessary to such person to show why time should not be extended he is not entitled to information as to the investigation which is in process. In such circumstances, the right of a person, from whose possession the goods have been seized, to notice of the proposed extension must be conceded, but the opportunity open to him on such notice cannot extend to information concerning the nature and course of the investigation. In that sense, the opportunity which the law can contemplate upon notice to him of the application for extension must be limited by the pragmatic necessities of the case. If these considerations are kept in mind, we have no doubt that notice must issue to the person from whose possession the goods have been seized of the proposal to extend the period of six months. In the normal course, notice must go to such person before the expiry of the original period of six months.

It is true that the further period of six months contemplated as the maximum period of extension is a short period, but Parliament has contemplated an original period of six months only and when it has fixed upon such period it must be assumed to have taken into consideration that the further detention of the goods can produce damage or injury or hardship to the person from whose possession the goods are seized. We have said that notice must go to the person, from whose possession the goods have been seized, before the expiry of the original period of six months. It is possible that while notice is issued before the expiry of that period, service of such notice may not be affected on the person concerned in sufficient time to enable the Collector to make the order of extension before that period expires. Service of the notice may be postponed or delayed or rendered ineffective by reason of the person sought to be served attempting to avoid service of notice or for any other reason beyond the control of the Customs authorities. In that event, it would be open to the Collector, if he finds that sufficient cause has been made out before him in that behalf to extend the time beyond the original period of six months, and thereafter, after notice has been served on the person concerned, to afford a post decisional hearing to him in order to

determine whether the order of extension should be cancelled or not. Having regard to the seriousness and the magnitude of injury to the public interest in the case of the illicit importation of goods, and having regard to considerations of the damage to economic policy underlying the formulation of import and export planning, it seems necessary to reconcile the need to afford an opportunity to the person effected with the larger considerations of public interest."

14. The reasoning of the Supreme Court was primarily based on the fact that issuance of a show cause notice (i.e. under Section 124) is part of a quasi-judicial or judicial act and consequently, the delay in its issue can at times, be prejudicial to the interests of the party or importer, who has an interest in the goods. The observations of the Court are pointed, with respect to the nature of the goods and the information about their condition, which the party likely to be affected might possess. This Court is also alive to the fact that Section 110 confers a general power of detention of goods: thus, all classes of articles, including perishables, such as foodstuffs, pharmaceuticals and other goods having limited shelf life can be implicated. Yet, the Court has to also be alive to the fact that I.J. Rao (supra) was premised upon the phraseology of Section 110(2), and the power of extension being conditioned "on sufficient cause being shown" which was the subject matter of the Court's discussion. Now, the amendment has done away with that expression; the power to extend (the period of detention) after amendment states that, "if the Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform the person from whom such goods were seized before the expiry of the period so specified."

15. The change in the statute, in the opinion of this Court, is a significant one. The previous provision required the Commissioner to show sufficient cause, which meant that such cause had to be based on objective considerations. However, the amended provision merely requires the Commissioner to record the reasons in writing and "inform the person from whom such goods were seized before the expiry of the period so specified". In this Court's considered view, the amended provision deliberately sought to overbear the previous view that a notice before extension was necessary. Now two conditions are to be satisfied : one, the Commissioner has to record his reasons in writing, why the extension is necessary, and two, inform the person from whom such goods were seized before the expiry of the period so specified. The latter condition is equally important, in the opinion of this court, because it is a pre-requisite for the exercise of the power of extension. The pre-amended provision was silent on this aspect.

16. There are other reasons for this Court to hold that the amendment brought about a radical change in the law. Parliament had knowledge - or is deemed to have knowledge of the existing state of law, which required notice, before extension. Therefore, the change of terminology is significant; the amendment has resulted in only two conditions, being insisted upon-primarily that the Commissioner should record his reasons, before the expiry of the period of limitation and should inform those reasons to the party concerned.

17. Besides, this Court also notices that Parliament, aware of difficulties that might be faced by importers of goods, which might be seized, also provided, through an amendment in 2006, the facility of provisional release. Section 110A, enacted for this purpose, reads as follows:

"110A. Provisional release of goods, documents and things seized pending adjudication. - Any goods, documents or things seized under section 110, may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require."

18. These developments, in the opinion of the Court, resulted in a complete change of law, on the aspect. Section 110(2) too has not remained unaffected; a second proviso has been added, which states that :-

"Provided further that where any order for provisional release of the seized goods has been passed under Section 110A, the specified period of six months shall not apply".

19. The effect of these amendments, is that the rigour of unamended Section 110(2) has been softened. Now, a person, whose goods are detained, can claim provisional release. At the time when I.J. Rao was decided, that facility was not available. Seen in the context of these facts, it is apparent that a textual reading of Section 110(2) would lead one to conclude that no separate notice is necessary, before extending the period of limitation by a further six months (for issuance of show cause notice); the authority has to record reasons in writing, which of course, should be based on materials and inform the concerned party about the extension before the expiry of the first period of six months. At this stage, it is necessary to also notice that even in I.J. Rao (supra) the Court recognized that not all reasons can be disclosed, because investigative processes and information gathering can be confidential.

20. In view of the foregoing discussion, this Court is of opinion that the impugned order cannot be sustained. The answer to the question of law framed, is in the affirmative; the impugned order of CESTAT is hereby set aside and the appeals are allowed. All pending applications are disposed of.

6. We find that all the arguments raised by the appellant have been considered by the Hon'ble Rajasthan High Court and duly answered in the observations above. Therefore, we find no merit in the arguments of the appellants.

7. It is also seen that the decision of Ahmedabad Bench in the case of Gastrade International (supra) was essentially based on the Delhi Bench of Tribunal decision in the case of Swees Gems and Jewellery (supra) which has been upset by the Hon'ble Rajasthan High Court. Thus, the decision of the Tribunal in the case of *Gastrade International (Customs Appeal No. 10497 of 2019)* is no longer a valid precedence on this issue.

8. In view of the above discussion, relying on the decision of Hon'ble Rajasthan High Court in the case of Swees Gems and Jewellery (supra), the appeal is dismissed.

(Order pronounced in the open court on 24.02.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
REGIONAL BENCH
COURT NO. III**

Customs Appeal No.13152 of 2018-SM

Arising out of OIA-AHD-CUSTM-000-APP-116-18-19 08.10.2018
Passed by Commissioner (Appeals) Commissioner of Central Excise,
Customs and Service Tax-AHMEDABAD-i(Appeal)

**Date of Hearing: 14.02.2020
Date of Decision: 10.06.2020**

**SHRI BATRA JAY
M/164, KHATIWALA TANK SHALIMAR APARTMENT
FLAT NO. 1, INDORE, MADHYA PRADESH**

Vs

**COMMISSIONER OF CUSTOMS
AHMEDABAD CUSTOM HOUSE, NEAR ALL INDIA RADIO
NAVRANGPURA, AHMEDABAD, GUJARAT**

Appellant Rep by: Shri Hardik Modh, Adv.

Respondent Rep by: Shri R B Bhashkar, Superintendent (AR)

CORAM: Ramesh Nair, Member (J)

FINAL ORDER NO. A/11112/2020

Per: Ramesh Nair:

The brief facts of the case are that the appellant Shri. Batra Jay is an Indian Citizen is holding Passport No. 9766015 and had arrived from Dubai at Sardar Vallabhbhai Patel International AirPort (SVPI airport) at Ahmedabad on 19.03.2015 by Spice Jet Flight No. SG-16. The appellant was carrying two gold bars which were purchased by him from M/s. Lakhoo Jewellery Trading Company L.L.C by paying the amount of DHS, 32,330. The appellant strapped the gold bars under the socks with tape. He was also carrying purchase invoice of the said Gold Bars. The appellant on arrival crossed the green channel, thereafter, the Customs Officer apprehended some suspicion and checked the appellant. Thus, the gold bars concealed by strapping at his left leg were found, thereafter, the Customs Officers recorded his statement on 20.03.2015 and further the panchanama was drawn on 20.03.2015. The Gold Bars weighing 233.028 grams valued at Rs. 5,49,374/- (Tariff Value) and Rs. 6,13,526/- (Local markets price) was subsequently seized by the Custom Officers. A show cause notice dated 29.07.2015 was issued by the Additional Commissioner of Customs, Ahmedabad whereby the appellant was called upon to show cause as to why the two gold bars weighing 233.280 grams having purity of 999% which were alleged to be duly concealed by the appellant in his sock should not be confiscated under Sections 111 (d), 111 (l) 111(m) of the Customs Act, 1962 and as to why penalties should not be imposed on the appellant under Section 112 (a) and (b) and Section 114AA of the Act. The Said show cause notice was adjudicated vide Order-In-Original No. 19/ADCAK/ SVPIA/O&A/2016 dated 27.04.2016 by the Additional Commissioner of Customs wherein it was held that two gold bars has acquired nature of "prohibited goods" because of the manner in which it was attempted to be cleared by the appellant.

2. Accordingly, it was ordered for absolute confiscation of two gold bars under Section 111(b), 111(l), 111(m), of the act and imposed penalty of Rs. 1,00,000/- under Section 112 and Rs. 50,000/- under Section 114AA of the Act on the appellant. Being aggrieved with the Order-In-Original dated 27.04,2016 appellant preferred an appeal before the Learned Commissioner (Appeals) of Customs, Ahmedabad. The Learned

Commissioner (Appeals) vide Order-In-Appeals No. AHM-CUSTOM-000-APP-109-16/17 dated 22.03.2017 rejected the appeal on the ground of time bar. The appellant preferred an appeal before this Tribunal, the Tribunal remanded the matter to Commissioner (Appeal) by order dated 13.10.2017 for deciding the matter on merit up to following the principles of Natural Justice. Thereafter, the Learned Commissioner (Appeals) passed the impugned order whereby the appeal was rejected and Order-In-Original as a whole was upheld. Therefore, the present appeal.

3. Shri. Hardik Modh, Learned Counsel appearing on behalf of the appellant submits that the Learned Commissioner (Appeals) fail to appreciate that the gold bars were confiscated on the premise that the gold bars are "prohibited goods" not on the account of definition of "prohibited goods" provided under Customs Act but due to the manner in which it was attempted to be cleared by the appellant with the intention to evade payment of Customs duty. He submits that as per definition of "prohibited goods" under Section 2 (33) of the Customs Act that the nature by which of goods attains the status of "prohibited goods" is not due to the manner of clearing of the goods but by the inclusion of goods under the list of "prohibited items" under Custom law or any other law in force. In the present case, the gold bars is bearing manufactures or refiners engraved Serial No and weight given in metric unit imposes of Custom duty on 10% the Customs duty @ 10% as per Serial No 323 of Notification No. 12/2012-Cus dated 17.02.2012. Hence, gold bars is not a "prohibited" goods as per the definition provided under Customs law. He further submits that the Order-In-Original dated 27.04.2016 has been passed beyond the scope of show cause notice. The show cause notice alleged that two gold bars were prohibited on account of violation of provisions of Section 7 of the Foreign Trade (Development and Regulation) Act, 1992. Whereas, Learned Additional Commissioner of Customs in the Order-In-Original dated 27.04.2016 held that the gold bars of the prohibited goods on account of the manner in which it was imported.

4. Thus, the Commissioner (Appeals) have not considered the fact that the show cause notice referred to Section 7 of the Foreign Trade (Development and Regulation) Act, 1992. and has not given any finding in regard to the allegation under Section 7, therefore, the impugned order is required to be quashed. He submits that Section 7 of Foreign Trade (Development and Regulation) Act, 1992 is not attracted as the appellant brought gold bars for his own personal use. He submits that as per para 2.07 of Hand Book procedure prescribe exemption categories for which import or export can be made without IEC. One of the exemption categories under para 2.07 is for a person who imports or exports goods for his personal use. In the present case, the appellant brought two gold bars for his personal use for making jewellery for himself and his family members and therefore, the action of the Revenue to hold goods in dispute as "Prohibited goods" is contrary to policy of Foreign Trade Policy. He submits that the appellant imported 233 grams of gold bars for his own use. The same cannot be decided that such a small quantity has been procured for commercial purpose. He also submits that the statement of the appellant was recorded under coercion and duress to look of the case smuggling. The appellant retracted his statement subsequently. Therefore, the basis of retracted statement the appellant cannot be punished without corroborative independent evidence. The said retracted statement cannot be considered to be a substantial piece of evidence when it has been pointed out that the statement was taken under coercion and duress. He further submits that the appellant had no intention to evade the customs duty. In fact the appellant crossed the green channel, since, there was no one present at the customs desk at the SVIP Airport at the Ahmedabad. One of the persons standing near the desk told the appellant that the appellant can make any inquiry in relation to the declaration from or taxability of the gold bars from the Customs Officers who were standing at the other side of green channel gate, therefore, the appellant crossed the green channels to make adequate inquiry and filing the proper declaration but without

listening to the reasoning of the appellant the Customs Officers seized the gold and alleged that he was smuggling the gold into India. More over the appellant had shown the invoice of the purchase of the gold bars to the Customs Officer thereby showing the valuation of the gold. Therefore, from the course of event it can be seen that there was no intention for misdeclaration of valuation of the gold bars and the gold bars are not liable to for confiscation. The intention of the appellant was to inquire about the process how to declare the gold in the disembarkment slip and not to conceal the same but such opportunity for explanation was not provided to the appellant, therefore, there was no actual misdeclaration of a dutiable goods which was not prohibited and further there was no intention of the appellant for such evasion of Customs duty. He submits that the Learned Commissioner (Appeals) failed to appreciate the appellant produced the purchase receipts of the gold bars. In this support, he place reliance on the judgment in the case of *Nand Kishore Somani Vs. CST reported in 2016 (33) ELT 448*.

5. He further submits that the appellant imported gold bars which are not prohibited goods. As the gold bars can be imported into Indian on payment of Customs duty which the appellant intended to pay duty before he was wrongly accused of smuggling by the Customs Officer. He further submits that since the goods i.e. gold bars correspond in respect of value or in any other particular with the entry made under the Customs Act or in the case of baggage with the declaration made under Section 77 of the Customs Act the goods cannot be confiscated. Without prejudice he submits that the request of the appellant to release the confiscated gold bars on payment of redemption fine as per the provision of Section 125 of Customs Act, 1962 ought to have been allowed on the ground that restrictions have been imposed under section 10 (4) and 11 (1) of Foreign Exchange Management Act (FEMA), 1999 and instructions/circulars issued by the Reserve Bank of India from time to time but import of gold is not prohibited. He submits that the Learned Commissioner has erred in invoking provisions of section 10 (4), section 11 (1) FEMA Act, the instruction provided in such that is appealable. In relation to gold imported for commercial purpose but in the present case it has already been shown that gold imported of small quantity and for personal use i.e. in making jewellery for the appellant and his mother, therefore, application of RBI circular of FEMA is not applicable. He place reliance on following judgments:-

- *Karnil Singh Vs. CCE, Amritsar*

- *Rajaram Bohra Versus Union of India 2015 (322) E.L.T. 337 (Cal)*

6. He further submits that the penalty is not liable to impose under section 112 of the Customs Act as the show cause notice does not mention the details as to why the penalty is imposable under clause (a) (b) of section 112 Customs Act, 1962. He relied upon the judgment of *P.P. Dutta Wing CDR (RETD) v. CCE, 2013 (293) ELT 127 (Tri.-Del.)*. He further submits that the penalty under Section 112 (a) of the Customs Act, 1962 cannot be imposed. In the present case it has been shown that the appellant followed all the rules and gold is not liable for confiscation, therefore, above provision is not applicable and no penalty ought to have been imposed. The penalty under section 112 of Customs Act also cannot be imposed. The appellant did not mis-declare the facts in the disembarkment slip and had crossed the green channel with the intention to enquire from the Customs Officer in regards to the gold bars which were purchased by the appellant from Dubai for personal use. Since there was no misdeclaration of fact and the goods were not liable for confiscation, therefore, the provision to section 112 (b) is not applicable. As regard the penalty imposed under section 114 (AA), he submits that since the appellant has not signed or used any false documents, therefore, the penalty under section 114 (AA) cannot be imposed.

7. Without prejudice he further submits that when the goods are not liable to be confiscated, no penalty can be imposed under section 114AA of the Customs Act. He placed reliance on the judgment in the case of *Deekay*

Shipping Services Vs. Commissioner of Customs, Mumbai-2011 (264) ELT 269. Without prejudice he further submits that there is no mala fide on the part of the appellant. He submitted that mens rea is an essential requirement for imposing penalty under section 114AA of Customs Act. He placed reliance on the following judgment:-

- *Suryakiran International Limited Vs C.C, Hyderabad-2010 (259) ELT 745 (Tri-Bag)*

- In support of this above submissions, he placed reliance on the following judgments:-

- *D.Jewel Vs. Commr. Of Ex. & Service Tax, Surat-I- 2019 (369) ELT 1244 (Tri.-Ahmd)*

- *D. Jewel Vs. Commissioner Of Customs, Surat-2019 (366) ELT 106 (Guj.)*

- *Commissioner of Central Excise Customs and Service tax, Surat-II V/s. Dharmesh Pansuriya-2018 (363) ELT 555 (Tri.-Ahmd)*

- *Commissioner of Customs (AP), Mumbai Vs. Alfred Menezes-2009 (244) ELT 334 (Bom).*

8. On the other hand, the R B Bhasker Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order. He placed reliance on the following judgments:-

- *2003 (155) ELT 423 (S.C). Om Prakash Bhatia Vs. CC, Delhi*

- *2014 (309) ELT 671 (Ker.)-V.s K.P. Abdul Majeed Vs. CC*

- *1997 (89) ELT 646 (S.C.) -Surjeet Singh Chabra Vs. Union O India*

- *2009 (247) ELT 21 (Mad)-CC (AIR), Chennai-I Vs. Samynathan Murugesan*

9. I have carefully considered the submissions made by both the sides and perused the record. There is no dispute about the fact that the appellant concealed gold bars in his sock arriving from the Dubai At Airport. Though the appellant has made the submission that the appellant was about to declare the gold carried by him but as per the facts the appellant without informing to the Custom Officer crossed the Green channel. Only those persons who do not carry any goods which is supposed to be declared before the customs can pass through green channel. The appellant firstly concealed the gold bars in his Socks and also not declared to the Customs. This clearly shows the intention of the appellant to avoid declaration as well as evasion of duty. There is no evidence to show that the appellant had bona-fide belief and intend to declare the gold bars and pay the Customs duty. In this circumstances the gold bars brought by him from Dubai is clearly liable for confiscation.

10. As regard the submission of the appellant that the statement was retracted and the appellant was about to declare the gold bars. I find that even if the statement recorded under 108 is not considered the fact of smuggling of gold by the intercepting by the Customs Officer is not in dispute, therefore, the act of smuggling of gold is not in doubt. As per the Indian Customs Declaration Form enclosed as per Annexure: C in the appeal, the appellant has made wrong declaration that he has not bringing prohibited Articles gold, Gold jewellery (over Free Allowance), Gold Bullion despite concealing the gold bars. The appellant had made wrong declaration, therefore, it is clear that the appellant had a malafide intention to escape with the smuggled gold without payment of duty. Considering the entire circumstances, I am of the view that the adjudicating authority has rightly exercised his discretion to absolute confiscate of gold bars. The judgments relied upon by the rival need not to be gone into details. In the case of misdeclaration of imported goods the fact varies from case to case. Therefore, in view of the event and circumstances of illegal import of gold bars, I am of the view that absolute confiscation of gold bars ordered by the adjudicating authority is proper and legal. For the same reason, the penalty imposed by the adjudicating authority needs no interference.

11. Accordingly, I uphold the Order-In-Original and dismiss the appeal.

(Pronounced in the open court on 10.06.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, BANGALORE**

**C/585/2008-DB (Arising out of No. Order-in-Appeal No. 132/2008 dated
31/03/2008 passed by the Commissioner of Customs (Appeals), Cochin)**

Decided On: 28.11.2019

**Miracle Food Processors International Ltd.
Vs.
The Commissioner of Customs**

Hon'ble Judges/Coram:

S.S. Garg, Member (J) and P. Anjani Kumar, Member (T)

Counsels:

For Appellant/Petitioner/Plaintiff: Kuriyan Thomas, Advocate

For Respondents/Defendant: D.S. Sangeetha, Joint Commissioner (AR)

ORDER

P. Anjani Kumar, Member (T)

1. Brief Facts of the case is that the appellants are manufacturers of fruit concentrates/coconut water concentrates etc.; the appellants obtained an EPCG license, 2134281 dated 24.05.1995, for the export of fruit concentrates as per which the appellant was entitled to import a Fruit Dehydration Plant (Spray Evaporation Machine - SPV 10) from Germany at a concessional rate of duty @15% (Under Notification No. 110/95 Cus : MANU/CUST/0005/1995 dated 05.06.1995) subject to the condition that it achieved an export obligation of Rs. 7,37,34,784 (US\$ 21,34,960) within a period of five years from 1996; export obligation and the duty concession were calculated on the basis of that the CIF value of the machine imported was Rs. 1,84,33,696/- (US\$ 5,31,330); Bill of entry 2169 dated 6.5.1996 was filed by the appellants, on the basis of the above referred Invoice Rs. 1,82,51,186; Total Concessional Duty Paid was Rs. 27,65,055 and a Bank Guarantee for Rs. 41,47,582 was submitted.

2. The Assistant Commissioner of Customs, Cochin, by letters dated 20.11.1998 and 14.12.1998 sought evidence from the appellant to establish the fulfillment by the appellant of the pro-rata export obligation for the 2nd and 3rd Year; the Assistant Commissioner vide, 010 No. : EPCG 4/96 GR VII dated 3.5.1999 confirmed the demand to the extent of Rs. 12,44,275 along with interest; appellants filed an appeal before the Commissioner (Appeals); during the pendency of the appeal, the appellants made a representation dated 18.01.2001 and 09.02.2001, to the Commissioner of Customs for reassessment of the Bill of Entry owing to the inflated price reckoned in the same; the same was declined vide communication dated 15.03.2001, stating that no reassessment can be done after issuance of out of charge; the appellant approached the Hon'ble High Court, vide W.P. 20897 of 1999, who directed the Appellate Commissioner to consider the issue of valuation also while considering the appeal. Appellate Commissioner allowed the appeal by way of remand, directing the original authority to re-determine the value of goods imported and for reassessment; Tribunal dismissed the appeal filed by Revenue against the order challenging the power of the Appellate Commissioner to remand; no further challenge was preferred by the revenue.

2.1. The original authority, without following the directions of the Appellate Commissioner, vide OIO No. : 1/2007 dated 25.1.2007, rejected the claim of re-determination stating that no re-determination could be done as goods are given out of charge by Customs; the order was challenged before the Appellate Commissioner, who, vide Order in appeal No. : 132/08 dated 31.03.2008,

confirmed the order of the original authority. Hence, the present appeal is filed.

2.2. The Assistant Commissioner of Customs issued SCN dated 16.7.2001 for Rs. 29,03,307 for the rest of the Pro-rata EO pertaining to 3rd and 4th years to the importer, the issue is pending with Comr. (A); while the appeal was pending before the appellate Commissioner, appellants filed application before Settlement Commission against the above referred OIO: EPCG 4/96 GR VII dated 3.5.1999 and the above referred 2nd SCN dated 16.7.2001 by claiming that the initial Assessment was Provisional Assessment. Settlement Commission rejected the application vide Order No. : 6/02-Cus dated 26.4.2002, stating that the initial Assessment was not provisional. Commission observed that the initial application as well as the petition filed before the admission hearing, did not exhibit disclosure of additional duty liability which had not been disclosed in the B/E filed at the time of clearance of the impugned goods; the duty liability disclosed even under the concessional Customs Notification No. 110/95 : MANU/CUST/0005/1995 on the B/E was Rs. 27,65,055, whereas the duty disclosed in the present application even on merit rate (37.5%) was only Rs. 20,14,647, which was revised in the petition before the hearing to Rs. 25,80,717, by seeking re-determination of Assessable Value; during the hearing, the applicant sought for Bench's permission to seek further re-determination of assessable value and consequential duty liability and has accordingly filed a Petition dated 12.4.2002 admitting a liability of Rs. 32,25,896; by seeking re-determination of Assessable Value, during the hearing, the applicant sought Bench's permission to seek further re-determination of assessable value and consequential duty liability and has accordingly filed a Petition dated 12.4.2002 admitting a liability of Rs. 32,25,896; it is very clear from the manner of revision of assessable value and duty liability repeatedly just to get their application admitted, that the bona fide of their very acceptance/admission of additional duty liability of Rs. 32,25,896 is questionable and hence the very basis of "full and true disclosure "claimed to have been made by the applicant becomes doubtful (Para 10)

3. The learned counsel for the appellant claims that they paid only US\$ 4,31,330 to the German Supplier; the appellant imported the machine in 1996 and paid an amount of Rs. 27,65,055 towards duty (@ 15%) and submitted a Bank Guarantee for Rs. 41,47,582 (total duty liability Rs. 69,12,637); it was subsequently learned by the appellant that the machine was not worth so much as it did not achieve even 50% of the assured capacity; the matter was taken up with the manufacturers of the machine at Germany - M/s. Winter Umwelttechnik, Germany; who were convinced of the fraud played by the supplier of the machine and paid compensation to the appellant to the tune of Rs. 21,27,922; as per the agreement with the said manufacturer (approved by the Government of India) they supplied the appellant an identical machine for the correct value of US\$ 1,70,244 (Rs. 53,72,392); the appellant paid an amount of Rs. 55,55,330; the appellant offered shares for the value of Rs. 88,00,000 to M/s. Winter Umwelttechnik, Germany; the appellants arrived at the value of Rs. 21,27,922, by considering the total of the amounts received from M/s. Winter Umwelttechnik, Germany and the value of the machinery supplied free and deducting the value of the shares offered to the said company.

3.1. The learned counsel for the appellant states that it is the case of the appellant that once the value of the imported machine is reckoned on the basis of the value actually paid by the appellant to the foreign supplier (US\$ 4,31,330) as reduced by the amount received by the appellant from the German manufacturer (Rs. 21,27,722) then it becomes clear that the appellant had to pay only about Rs. 48 Lakhs towards duty liability, at the full rate under the Customs Tariff; against this, the appellant has paid an amount of Rs. 69,12,637 (by cash + Bank Guarantee); appellant, therefore, paid duty on the machine imported, more than the full rate of duty that would have been payable had the value been correctly taken; consequently, the appellant cannot be said to be a person who has availed the benefit of concessional rate of duty applicable for EPCG License holders and hence, it is not required to fulfill any export obligation as per the provisions of the EXIM Policy, 1992-97.

3.2. The learned counsel for the appellants contends that the Assistant Commissioner confirmed a duty demand on the assumption that the appellant had availed of a concessional rate of duty while clearing the goods at the time of their import in 1996; this assumption is factually wrong as the appellant got back a part of the amount paid for the machine that was imported; considering

the reduced value of the machine, the appellant has already paid more amounts than the applicable duty at the tariff rate; it follows that the appellant had not availed of the benefit of the concessional rate of duty applicable to EPCG license holders; corresponding requirement of fulfilling an export obligation too did not apply and hence there was no basis for confirming a differential duty;

3.3. The learned counsel for the appellants contends that they produced before the Department the entire set of documents which would establish that the payment made by it towards the import of the machinery in question is only an amount of Rs. 1,26,88,264; The tariff rate of duty applicable to the imported machine at the relevant point of time was 37.5% ad valorem; Thus the duty payable at the tariff rate was Rs. 47,58,099; as against this the appellant has already paid an amount of Rs. 69,12,637-00 towards duty (Rs. 27,65,055/- + Bank Guarantee for Rs. 41,47,582.00); on payment of this amount the appellant must be deemed to be a person who has not availed the benefit of the EPCG Scheme and hence there cannot be any further insistence on fulfillment of any export obligation by the appellant.

3.4. The learned counsel for the appellants further contends that the Appellate Commissioner vide order dated 18.06.2004 directed redetermination of the value of the imported goods based on the subsequent events; the said direction had become final as the revenue did not challenge the direction as regards re-determination of value; even the limited challenge before Tribunal on the aspect of the power of the Appellate Commissioner to remand was dismissed; therefore, it was not open for the original authority and the Appellate Commissioner not to comply with the order of the Appellate Commissioner to re-value the goods; duty of customs is on the value of goods actually imported and it being not disputed that the value of goods imported was less than what was actually assessed, no duty could be demanded based on the wrong valuation.

3.5. The learned counsel for the appellants contends that the directions of commissioner appeals on revaluation of goods having become final, judicial propriety mandates that it is followed and was binding on the original authority; refusal for revaluation by the Original Authority and reiterating the communication dated 15.03.2001 of the Jurisdictional Commissioner is judicial impropriety; Appellate Commissioner remanded the case and so order-in-original demanding duty and interest got set-aside; Order-in-original passed after the remand by the Appellate Commissioner, did not raise any demand of duty or interest on the appellant; therefore, there is no valid demand for invocation of the bank guarantee of Rs. 41,47,582/- which is kept alive by the appellant pursuant to the order dated 21.12.2009 of this Hon'ble Tribunal need to be released. He relies upon the decision rendered in the case of Reiter India Pvt. Ltd. vs. CC (Import), Nhava Sheva: MANU/CM/0252/2014 : 2014 (309) ELT 277 (Tri.-Mum.).

4. Learned AR for the Department, submits a detailed written submission made Commissioner (AR), per contra submits that the original subject matter of the issue is relating to Recovery Action by issuing SCN on the failure of prescribed Export Obligation in time; the impugned Assessable Value has already been accepted by the EPCG Committee and DGFT after perusal of the declaration and documents submitted by the importer and accordingly the Export Obligation has been fixed; hence, the Assessable value and consequential Export obligation is to be revised by the EPCG Committee after due examination of the plea and supportive documents produced by the importer; in the instant issue, the EPCG Committee/DGFT has rejected the request & grounds raised by the importer on 5.2.2001 after due scrutiny of the records; under the background, the importer should not be allowed to revise the AV on his own disregarding the background to the issuance of an EPCG Licence and its decision by the Committee consisting of a team of experts and experienced persons in the field. Hon'ble High Court of Bombay, in the case of Bhilwara Spinners Ltd. MANU/MH/0352/2011 : 2011 (267) ELT 49 (Bom) observed that Since the decision to convert the Licence was taken by the DGFT with the approval of the EPCG Committee (which includes customs authorities), the Commissioner of Customs/Commissioner of Central Excise were bound by the decision of the EPCG committee and could not have challenged the decision; CBEC Circular: 46/2004 : MANU/CUCR/0048/2004 dated 26.07.2004 also instructed the Customs Authorities not to take unilateral action on the matter of Valuation pertaining to EPCG; in the instant case, as the EPCG Committee has consciously rejected the request of the appellant for revision of the Assessable Value, Customs Authorities cannot take different stand on the same facts & circumstances.

4.1. Learned AR further submits that there is no legal provisions for reassessment after five years of issuing 'Out Of Charge' under Customs Act, 1962; the initial assessment of the Bill of Entry was made on 6.5.1996, which is an appealable quasi-judicial order; the assessable Value was not challenged at all within the stipulated time limit; the importer has come up with the request for re-determination of assessable Value and re-assessment after a lapse of 5 years from the date of assessment of Bill of Entry; initial assessment was not made under provisional assessment and the importer has not paid the duty for the initial assessment under protest; appellant's claim of provisional assessment was rejected by Settlement Commission. He relies upon the following cases.

(i). CCE, Kanpur Vs. Flock (India) Pvt. Ltd. [MANU/SC/0484/2000 : 2000 (120) ELT (285)]

(ii). Priya Blue Industries Ltd. Vs. C (P) MANU/SC/0767/2004 : 2004 (172) ELT 145 (SC).

(iii). UOI Vs. Kirloskar Pneumatic Co. MANU/SC/0881/1996 : 1996 (84) ELT 401 (it was held that writ cannot be invoked for directing the authorities to act contrary to law).

4.2. Learned AR, further submits that the SCNs have been issued to the Appellant based on the contravention of the conditions of the EPCG Notification No. 110/95 : MANU/CUST/0005/1995 dated 05.06.1995 and the terms and conditions are documented in the form of Bond specifying the terms and conditions for both the parties; therefore, the subject matter is nothing but the subject of Contract; the appellant having entered into a contract, cannot be allowed to wriggle out of his promise made voluntarily, in the absence of any statutory illegality committed by the other party to the contract. The Hon'ble Supreme Court, in the case of State of M.P. v. M.V. Vyavsaaya & Co. MANU/SC/2146/1996 : AIR 1997 SC 993, ruled that a person who solemnly enters into a contract cannot be allowed to wriggle out of it by resorting to Article 226; in the case of Bareilly Development Authority Vs. Ajai Pal Singh MANU/SC/0058/1989 : 1989 AIR 1076, the Hon'ble SC ruled that there is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual rights are governed only by the terms of the contract, not writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy breach of contract pure and simple. He also relies on:

(i). Radhakrishna Agarwal & Others Vs. State of Bihar & Others MANU/SC/0053/1977 : 1977 3 SCR 249

(ii). Premji Bhai Parmar & Others etc Vs. Delhi Development Authority & Others MANU/SC/0422/1979 : 1980 2 SCR 704

(iii). DFO Vs. Biswanath Tea Company Ltd. MANU/SC/0045/1981 : 1981 3 SCR 662.

4.3. Learned AR, also submits that when the subject matter is exclusively dealing with Recovery Action on the failure of the Export obligation, the subject of re-assessment which was not at all dealt in the recovery action Notice is beyond the scope of SCN and not to be entertained; Hon'ble Supreme Court, in the case of Hindustan Polymers Co. Ltd. 1999 (106) ELT 12 (SC), held that the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants.

4.4. Learned AR, submits that the case law cited by the appellants is irrelevant; case of RBF RIG Corporation, Mumbai MANU/SC/0099/2011 : (2011) SCC 573 is not applicable, as in the referred case, the importer is entitled to get "Essentiality Certificates" from the DGH (Director General of Hydrocarbons) on the basis of the "Recommendatory letters" of ONGC that the impugned import goods are required for the Petroleum Operations; as both the DGH and ONGC delayed to issue the due Certificates and letters, the Importer paid full Customs Duty and approached HC; HC vide Interim order directed ONGC AND DGH to issue the due Certificates on 30.7.2002; both the authorities issued the due certificates/letters; subsequently HC in the Final Order directed the Customs Authorities to dispose of the Refund claim of the Importer by considering the

"Essentiality Certificates" issued by the DGH; thus, after analyzing the merit of the issue (Delay on the part of DGH & ONGC in issuing Certificate/Letter in the absence of any fault on the part of importer), there was a Specific Direction from HC to consider the "essentiality certificates" while disposing the refund claim, in the instant case on hand, the importer failed to fulfill EO, and reasons put forth for non-fulfilment of EO & revising the AV also have not been considered by DGFT; hence, the High Court of Kerala has not issued any direction to the DGFT to issue EODC or to revise Assessable Value; instead, directions have been issued to Customs Authorities to consider the plea of additional grounds on Valuation; at the same time, the HC categorically made it clear that it has not considered the merits of the contentions taken by the respective parties in the Original Petition; under the circumstances, the direction of "Consideration" cannot be equated with "Positive consideration"; consideration of the direction definitely is subject to concerned statutory provisions; Commissioner (A) also referred the matter to Original adjudicating authority, who is the proper officer to deal with Assessment, for appropriate legal decision "if necessary"; therefore, the question of Judicial indiscipline does not arise at all.

4.5. Learned AR, moreover, submits that various Authorities have decided as follows on the request of the appellant:

- (i). High Court of Ernakulum did not consider the merit of the contentions of the parties concerned.
- (ii). Settlement Commission held that the bona fide of the Appellants' disclosure is Questionable, Doubtful & under Cloud
- (iii). EPCG Committee of DGFT rejected the request of revising the Assessable Value declared by the importer for the capital goods.
- (iv). Secretary, Ministry of Commerce, on an Appeal filed against the decision of EPCG, did not consider the request of revising the Value of the impugned machinery.
- (v). Commissioner (A) dated 18.6.2004 referred the valuation matter to the Proper officer for redetermination of AV with remarks "if necessary".
- (vi). Adjudicating Authority and the Appellate Authority, vide impugned order, rejected the submission of the importer for revising the Assessable Value.

He submits lastly that the Revenue has taken a stand as per Law and in consonance with various departments; under the facts and circumstances and taking into account of the legal position on the issue, the Appeal preferred by the importer is liable for rejection in the absence of any merits.

5. Heard both sides and perused the records of the case.

6. The main arguments of the appellant are that:

- (i) The value of the machines imported by them under EPCG should be valued as per the actual value of the machine imported again and not the original machine.
- (ii) Learned Commissioner (A)'s order was remanded to the original authority for reconsideration of the value and as the department has not appealed against this issue, the order attains finality.
- (iii) once the value of the machine is redetermined the amount already paid by them is more than the normal applicable duty payable on the impugned goods even if the concessional under EPCG Scheme is not availed and therefore, the import should be treated as having not availed the benefit of concessional rate of duty under EPCG scheme.

7. We find that learned AR forcefully rebutted all the claims of appellants on the following grounds.

- (i) There is no provision under law to consider the appellant's claim for redetermination or reassessment of the Bill of Entry after a considerable period of more than 5 years. More so, due to the fact that the assessment was not

provisional.

(ii) In the scheme of EPCG, customs alone cannot revise the value of the impugned goods and thus, the export obligation. The EPCG Committee which also contains a Member from Customs has gone into the request of the appellant and concluded that the appellant has not made any case for reconsider the value. The appeal filed by the appellant, against the decision of EPCG Committee, before the Joint Secretary was also rejected.

(iii) The appellant's contention that Hon'ble High Court at Ernakulam, vide Order in Writ Petition No. 20897/1999, has directed the authorities that they shall consider the request of revaluation by the appellants. The appellant's contention that the Commissioner (A), in his order No. 121/2004 dated 18.6.2004, has only referred to the lower authority for redetermining the value and for reassessment of goods. The lower authority again passes an order No. 1/2007 dated 25.1.2007 after considering the submissions of the appellant and rejecting the claim of determination of assessable value for assessment. The same was upheld by Commissioner (A) vide Order-in-Appeal No. 132/2008.

(iv) The appellants meanwhile approached the Settlement Commission in respect of subsequent show-cause notice dated 16.7.2001 and the Settlement Commission have not only rejected the application but also passed remarks that the appellants have not established the bona fides of the claims.

7.1. We find that the appellants have failed to fulfill the export obligation and accordingly, Customs Department has issued a show-cause notice to recover the applicable duty on the imported goods. We find that the representation of the appellants could not succeed before the EPCG Committee and the appellate authority. This being the fact of the case, we find that Customs Authorities, as submitted by the Commissioner (AR), cannot take an independent decision. We further find that the Bill of Entry is dated 6.5.1996 and the appellants sought to revalue the goods and approached the Commissioner with a request dated 18.1.2001 and 9.2.2001 for re-assessment of the Bill of Entry. Commissioner has rejected the request vide letter dated 15.3.2001. We find that the appellants sought to rely on the case of Reiter India Pvt. Ltd. (supra). We find that the facts of the case discussed therein are quite different from those in the instant case. In the case of M/s. Reiter India Pvt. Ltd. (supra), the import was on 25.5.2011 and refund was filed in September 2011 i.e., within a period of six months. In the instant case, it is beyond 5 years. Moreover, in the case of Reiter India Pvt. Ltd. (supra), the imports were not under EPCG as is in the present case. We find merit in the argument of the Commissioner (AR) that the Bill of Entry was not provisionally assessed and the appellants have not appealed against the Bill of Entry. We find that on this count the legal position on reassessment is enunciated in the cases of CCE Kanpur vs. Flock India Pvt. Ltd. (supra) and Priya Blue Industries Ltd. (supra). We find that Hon'ble Apex Court of India has recently enunciated the same principle in the case of ITC Ltd. in Civil Appeal No. 293-294/2009. The Hon'ble Apex Court observed that:

"47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the Ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act."

7.2. We also find that the appellants have submitted a Bond at the time of import binding themselves to the conditions envisaged in the Notification No. 110/95 : MANU/CUST/0005/1995 dated 5.6.1995. We find that the Department was within its rights to impose the conditions of the Bond for violation of the provisions therein. We find that the impugned show-cause notice is about the recovery of duty foregone in terms of the conditions of the Notification. The appellants having not appealed against the assessment of the Bill of Entry and having not requested for provisional assessment, cannot demand the same while replying to the show-cause notice. Such a request, is beyond the scope of the provisions of Customs Act. We find that nothing could have stopped the appellants from appealing against the Bill of Entry within the limitation. Moreover, the appellants have also lost the case with the EPCG Committee. Once

a machine is imported in terms of the EPCG license wherein certain export obligation has been fixed by the DGFT authorities and particularly, in the case when the EPCG Committee has rejected the appeal made by the appellant, Customs cannot revalue the goods and reduce the export obligation accordingly. We find that the appellants have shown no case for redetermination of the value of the imported goods in terms of the provisions of Customs Act either. On either count, the appellants submissions are weak.

7.3. Further, we find that the appellants have submitted that Hon'ble High Court at Ernakulam has directed that the valuation as requested by the appellants may be considered. However, we find that the Hon'ble High Court has given a clear finding that they were not going into the merit of the issue. In such circumstances, the direction of the Hon'ble High Court has to be read to mean that such consideration by the competent authority shall be subject to the provisions of law. Moreover, a direction given for consideration does not necessarily mean that the request of the appellant should be accepted. A direction is only to the extent that the request shall be considered as far as the law permits for the same. Therefore, we do not find any infirmity in the lower authorities coming to a conclusion that the redetermination, of the value because of the reasons discussed above, was not possible in the facts and circumstances of the case and under the provisions of law.

8. In view of the above, we find that the appeal is devoid of any merit and is liable to be rejected.

(Order was pronounced in Open Court on 28/11/2019.)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, BANGALORE**

**C/21393/2018-SM (Arising out of Order-in-Appeal No. 214/2018 dated
30/05/2018 passed by the Commissioner of Customs, Bangalore-I
(Appeals))**

Decided On: 25.11.2019

**Ravi Kumar R.M.
Vs.
C.C., Bangalore**

Hon'ble Judges/Coram:
S.S. Garg, Member (J)

Counsels:
For Appellant/Petitioner/Plaintiff: M.S. Nagaraja, Advocate

For Respondents/Defendant: P. Gopakumar, Jt. Commr. AR

ORDER

S.S. Garg, Member (J)

1. The present appeal is directed against the impugned order dated 30/05/2018 passed by the Commissioner of Customs (Appeals) whereby the Commissioner has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that DRI, Bangalore gathered specific intelligence that a huge quantity of unaccounted cash in demonetized currency and some 'foreign' marked smuggled gold were secreted by a person, viz: Shri. Ravi Kumar R.M. a private real estate financier and partner of M/s. Aishwarya Investments in his office/residential premises situated at #54, Kogilu Road, Maruthinagar, Yelahanka, Bangalore - 560 064. Officers of DRI, Bangalore along with officers of DGIT (Income Tax Investigation) conducted search at the said premises and unearthed and unaccounted cash in demonetized currency to the tune of Rs. 3.5 Crores and 17 gold biscuits weighing 1578.35 grams (inclusive of 15 gold biscuits with foreign markings) valued at Rs. 47 lakhs. The unaccounted cash and gold biscuits were seized as per the provisions of Income Tax Act, 1961.

2.1. Shri. Ravi Kumar R.M. in his statement recorded on 22/11/2016 under the provisions of Section 108 of Customs Act, 1962 stated that he and his father Shri. Mallikarjunappa were partners of the said firm, which was into the business of lending money on short term basis to landlords, farmers, small business people and small contractors. Further, he agreed with the seizure of unaccounted cash in demonetized currency and 17 gold biscuits and that he was neither in possession of any valid purchase invoice/documents nor of any customs duty paid challan for the 15 gold biscuits with foreign markings. He also stated that the said foreign marked gold biscuits were purchased from a person referred by M/s. Davanam Jeweller's to convert the huge demonetized cash available with them. Hence, a show-cause notice dated 11/05/2017 was issued to Shri. Ravi Kumar R.M. as to why, the 17 gold biscuit seized from his possession should not be confiscated under Section 111(d) of Customs Act, 1962 and penalty should not be imposed on him under Section 112 of Customs Act, 1962. Shri. Ravi Kumar R.M. in the reply to the show-cause notice has stated that the allegations are contrary to the facts and denied the same as baseless and the proposals to confiscate the seized gold and impose penalty as not sustainable and that he and his family members had purchased the said gold biscuits and he had purchased bills in respect of 15 gold biscuits weighing 1500 grams. He has also stated that he was coerced into giving the statements which were not voluntary and that he has retracted the same by executing a sworn affidavit.

2.2. After following the due process, the adjudicating authority passed Order-in-Original dated 30/11/2017 whereby the gold biscuits of foreign markings totally weighing 1028.35 grams valued at Rs. 30.62 lakhs were confiscated under Section 111(d) of the Customs Act, 1962 and imposed a penalty of Rs. 9,00,000/- (Rupees Nine Lakhs only) under Section 112(a) of the Customs Act, 1962 on Shri. Ravi Kumar R.M. Aggrieved by the said order, appellant filed appeal before the Commissioner by raising various grounds against the Order-in-Original and the Commissioner after considering the submissions of the appellants, rejected the appeal. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that in the present case Income Tax officers carried out search of the appellant's residential premises on 15/11/2016, found unaccounted cash in demonetized currency to the tune of Rs. 3.5 Crores and 17 gold biscuits weighing 1578.35 grams valued at about 47 lakhs. The Income Tax officers seized the cash and gold biscuits under Section 132 of the Income Tax Act, 1961 and the same continued to be in their custody as confirmed in para 8 of the impugned show-cause notice. He further submitted that the appellant's statement recorded by the Customs Officer on 22/11/2016 and 15/12/2016 were retracted by the appellant through Sworn Affidavit executed on 16/12/2016 and submitted the same along with reply to the show-cause notice. He further submitted that the appellant has also submitted purchase invoices in respect of 15 gold biscuits from SI. No. 1 to 15 of the Annexure 'A' to the show-cause notice. The copies of invoices issued by M/s. Adya Jewellers and Sai Thirumala Jewellers, Bangalore have also been enclosed to the reply to the show-cause notice submitted to the adjudicating authority. He also submitted that the remaining 2 gold biscuits listed under SI. No. 16 & 17 in Annexure 'A' to the show-cause notice were procured from (i) HDFC Bank 50 grams Fine Gold, and (ii) Credit Suisse One Ounce Fine Gold. The appellant has submitted that these two gold biscuits were purchased by the appellant's father more than 8 years ago and the relevant invoices could not be traced. He also submitted that the Jewellers who have sold 15 gold biscuits have issued valid tax invoices in the name of the appellant and on payment of applicable VAT on the sale of the gold. Accordingly, the appellants have proved licit purchase of gold from the gold jewellers by producing purchase invoices. Further the said jewellers have furnished certificate dated 11/01/2018 and 20/01/2018 respectively confirming the details of sale of gold biscuits to the appellant and copies of those certificates have also been placed in the memorandum of appeal. He further argued that neither the appellant nor his family members have brought gold from abroad or procured the same from any other source other than the jewellers who are local authorized dealers and they have issued the certificate regarding the sale. He further submitted that the Additional Commissioner in the Order-in-Original has held that 6 gold biscuits having markings of MMTC, PAMP and HDFC bearing Indian Markings are not liable for confiscation and ordered release of the same subject to any action that the Income Tax authorities may take and the balance 11 gold biscuits totally weighing 1028.35 grams approximately valued at 30.62 lakhs were confiscated under Section 111(d) of the Customs Act. He further submitted that both the authorities have wrongly invoked Section 123 of the Customs Act, for the proposition that burden of proof that the gold biscuits seized under Section 132 of the Income Tax Act on 16/1/2016 were not smuggled goods, they were imported and Customs Duty has been paid on them, in on the appellant. He referred to the provision of Section 123 providing burden of proof and submitted that Section 123 of the Customs Act applies only to the goods seized under the Customs Act, 1962 whereas in the present case the goods have been seized under Section 132 of the Income Tax Act, 1961 and therefore Section 123 of the Customs Act is not applicable in the present case. Moreover, the appellant has produced VAT invoices issued by M/s. Adya Jewellers and Sai Thirumala Jewellers and their certificates confirming the sale/purchase of seized biscuits within the country and therefore the licit transaction of sale of gold biscuits within the country have been clearly established. He also submitted that it is a settled legal position that when the goods are not seized under the Customs Act, 1962, the provisions of Section 123 of the Customs Act, 1962 are not attracted. The burden of proof of licit import cannot be shifted to the person from whose possession the goods were seized. The burden of proof that the goods were

smuggled goods and the Customs duty has not been paid on them lies on the Department. For this submission, he relied upon the following decisions:

a. Gian Chand and others Vs. State of Punjab - MANU/SC/0366/1961 : 1983 (13) E.L.J. 1365 (SC)

b. Suresh Kumar Singh & Ors. Vs. CC (Prev), Patna-I - 2019-TIOL-1352-CESTA T-KOL

c. Naveed Ahmed Khan Vs. CC, Bangalore - MANU/CB/0380/2004 : 2005 (182) E.L.T. 494 (Tri.-Bang.)

d. E Eswara Reddy Vs. Commr. of Customs, Hyd.-II - MANU/CB/0024/2006 : 2006 (196) E.L.T. 410 (Tri.-Bang.)

e. Mahesh B Mali Vs. Commr. of Central Excise, Pune - MANU/CM/0157/2012 : 2012 (286) E.L.T. 375 (T)

f. Kamal Kumar Vs. Commr. of Central Excise, Ghaziabad - MANU/CE/1131/2004 : 2005 (186) E.L.T. 506 (T)

g. Ram Lubhaya Vs. Commr. of Customs, New Delhi - 2002 (147) E.L.T. 807 (T)

h. Jitendra Pawar Vs. Commr. of Customs, Raipur - MANU/CE/0314/2003 : 2003 (156) E.L.T. 622 (T)

i. Manoj Kumar Vs. Commr. of Customs - 2004 (176) E.L.T. 811 (T)

4.1. It is his further submission that once the appellants have submitted the copies of purchase invoices for purchase of gold biscuits from the local jewellers and also furnished certificate confirming the sale of gold biscuits on payment of VAT, then there cannot be any doubt or dispute with regard to bona fide transaction of purchase of gold from the authorized dealers. For this submission, he relied upon the following decisions:

a. Commr. of Customs (Prev.), Kolkata Vs. Ashok Kumar Agarwal - MANU/CK/0180/2016 : 2017 (348) E.L.T. 555 (T)

b. S.K. Chains Vs. CC (Prev.), Mumbai - MANU/CM/0361/2000 : 2001 (127) E.L.T. 415 (T)

c. Nand Kishore Modi Vs. CC (Prev.), West Bengal - MANU/CK/0042/2015 : 2015 (325) E.L.T. 781 (T)

d. Nand Kishore Sumani Vs. Commr. of CE, Cus. & ST - MANU/CK/0045/2015 : 2016 (333) E.L.T. 448 (Tri.-Kol.) [confirmed by High Court of Kolkata in the case of Commr. of Cus., CE & ST Vs. Nanda Kishore Somani - MANU/WB/0547/2016 : 2016 (337) E.L.T. 10 (Cal)]

5. On the other hand, learned AR defended the impugned order and submitted that in the present case gold was seized under joint operation by the Income Tax Investigation Wing and the Directorate of Revenue Intelligence. The gold was seized under the Income Tax Act along with demonetized currency. The Income Tax authorities had officially communicated the seizure of the gold to the DRI for further necessary action and thereafter the statement of the person from whose possession the gold was seized was recorded under Section 108 of the Customs Act, 1962 and after following the due process under the Customs Act only the show-cause notice was issued. He further submitted that in the case-laws relied upon by the appellant, the gold was seized by the Police under the State Government and handed over to the Customs under the Central Government and therefore the decisions relied upon by the appellant are not applicable in the present case. He relied upon the decision in the case of Gopaldas Udhavadas Ahuja Vs. Union of India reported in MANU/SC/0530/2004 : 2004 (176) E.L.T. 3 (S.C.) wherein the Apex Court has distinguished the case of Gian Chand and others relied upon by the appellant and has held that invocation of Section 123 of the Customs Act is valid. The second contention of the learned AR is that the invoices for purchase of gold biscuits produced by the appellant along with the reply to the show-cause notice are not valid invoices and the same were never produced during

investigation and they are an afterthought. Moreover, the bills are not correlating with the gold seized as there are no identifying marks in the bills relating to the gold seized. He further submitted that the seized gold bearing foreign markings cannot be established as not smuggled. For this submission, he relied upon the decision in the case of ASA Kabeer Vs. CC, Chennai - 2001 (137) E.L.T. 55 (Mad.) wherein the Hon'ble High Court in para 12 to 14 has observed as under:

"12. It is the duty of the person, who is importing the duty payable goods to see to it that the correct description of the goods is entered into the receipt for the payment of custom duty and the same is very much wanting in this case and in the absence of the same, we find it difficult to accept the case of the Petitioner that the gold, that has been imported by Shamsudeen and the gold seized from the Petitioner were one and the same. Hence, we reject the contention of the Petitioner.

13. With regard to the Silver bars seized, it has been well established that the total weights noted in the three baggage receipts do not tally with the ingots and on that score alone, the contention of the Petitioner that the silver bars were duly imported and duty paid cannot be accepted. The Petitioner has failed to discharge the burden cast upon him and the argument advanced on behalf of the Petitioner that the silver bars were duly imported and duty paid cannot be accepted.

14. From the abovesaid discussions, we hold that the petitioner is disentitled to sustain his claim and the petitioner has not given a proper account of his possession of the gold bars and silver and the receipt produced do not relate to the goods seized and the petitioner has failed to prove the licit import of gold and silver and all these aspects were taken note of by the authorities concerned and hence, we answer both the questions in favour of the Revenue and against the Petitioner.

5.1. He also relied upon the decision of the Tribunal in the case of Raj a ram Johra Vs. CC (Airport & Cargo), Chennai - 2016 (5) TMI 554 - CESTAT Chennai wherein said Chennai CESTAT has observed as under:

"11.2. The gold as stated above were found to be contraband goods and Customs believed that to be smuggled one when that carried foreign marking and no evidence of lawful import thereof was adduced before investigation, adjudicating authority as well as the Trial court. Appellant along with the accomplices miserably failed before the Trial Court to succeed and their trial ended in conviction with no return of the gold to them. The MO-1, 2 & 3 in that case which were the offending gold in the present appeal were ordered by the Magistrate to be returned to Customs. When cogent and credible evidence came to the surface demonstrating that the appellant was in possession of the contraband gold with foreign marking thereon and such goods were not lawfully imported, there is no scope at all for him to go out of the purview of Section 123 of the Customs Act, 1962. Therefore, all the 12 gold bars and 10 gold biscuits were lawfully seized by Customs and were liable to absolute confiscation."

5.2. He also relied upon the decision of this Tribunal in the case of Baburaya Narayan Nayak Vs. CC, Bangalore - MANU/CB/0005/2018 : 2018 (364) E.L.T. 811 (Tri.-Bang.). He further submitted that in all the three case-laws cited, it has been held that the person possessing the gold with foreign markings shall prove its licit possession through proper documents whereas in the present case, the appellant could not produce any proof of the licit possession through proper documents and the documents sought to be produced were produced during adjudication and not during investigation.

6. The appellant has also filed rejoinder to the argument raised by the AR wherein he has reiterated the earlier submissions.

7. After considering the submissions of both the parties and perusal of the material on record, I find that during the joint search operation by DRI and Income Tax official at the residence of the appellant, 17 gold biscuits were seized and out of 17 gold biscuits, 6 biscuits have markings of MMTC, PAMP and HDFC Bank on them. As per the RBI guidelines, the said organizations are authorized to import and sell gold. Therefore, the adjudicating authority has rightly held that the 6 gold biscuits were legally possessed and has not

confiscated the same. As far as remaining gold biscuits are concerned, they have the foreign markings and the appellant while making statement to the DRI officer under Section 108 of the Customs Act has stated that they have purchased the said biscuits from M/s. Davanam Jewellers but the same has been refuted by the Davanam Jewellers when the Department made enquiry from them. Further I find that in his statement made twice before the DRI officer, he has not stated anything regarding the purchase of these biscuits from M/s. Sai Thirumala Jewellers and M/s. Adya Jewellers. He has not even named the jewellers in his statement at all. The invoices issued by these jewellers were brought on record for the first time while replying to the show-cause notice and therefore the Department could not investigate from the said jewellers regarding the authenticity of these invoices. Further I find that the retraction of the statement by a Sworn Affidavit is not valid because the said alleged affidavit was not produced before any authority and it was only executed before a Notary. Further I find that Hon'ble Kerala High Court in the case of Commr. of Customs, Cochin Vs. Om Prakash Khatri reported in MANU/KE/0670/2019 : 2019 (366) E.L.T. 402 (Ker.) has considered the scope of Section 123 of the Customs act and has held in para 18 as under:

"18. We have considered the decisions relied on by both sides and are of the opinion that in case of seizure of gold, even without markings, the burden is upon the person, who has custody of the gold, under Section 123 of the Act, to prove that the gold was legally acquired. The statement recorded under Section 108 of the Act could be safely relied upon in the proceedings against respondents. In K.I. Pavunny v. Assistant Collector, MANU/SC/2070/1997 : (1997) 3 SCC 721 : 1997 (90) E.L.T. 241 (S.C.) the Hon'ble Supreme Court has held that a person summoned under Section 108 of the Act is "not the person accused of an offence" for the purpose of Section 24 of the Evidence Act. The primary question for consideration in that case was whether the retracted confession statement of the appellant is inadmissible in evidence under Section 24 of the Evidence Act. It is observed that even though the Customs officers have been invested with many of the powers, which an officer-in-charge of a police station exercises, while investigating a cognizable offence, they do not, thereby become police officers within the meaning of Section 25 of the Evidence Act and so the confessional statement by the admissible in evidence against them and it was ultimately held by the Hon'ble Supreme Court that the prosecution has proved the case based on the confession of the appellant given in Ext. P4 under Section 108 of the Evidence Act."

7.1. Further I find that the case-laws relied upon by the appellant are not applicable in the facts and circumstances of this case because the appellant has stated in his statement that he has purchased the said gold biscuits from M/s. Davanam Jewellers and the said Jewellers has refuted the said statement. The purchase invoices from the local jewellers were not produced during the investigation. Therefore, the Department could not verify the authenticity of those invoices.

8. By taking into consideration the facts and circumstances and the various decisions relied upon by both the parties, I am of the considered view that there is no infirmity in the impugned order which I upheld by dismissing the appeal of the appellant.

(Order Pronounced in Open Court on 25/11/2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, BANGALORE
COURT NO. I**

Customs Appeal No. 25625 of 2013

Arising out of Order-in-Original No. 10/2012, Dated: 30.11.2012
Passed by Commissioner of CUSTOMS, BANGALORE

Date of Hearing: 29.11.2019

Date of Decision: 20.03.2020

**3M INDIA LTD
CONCORDE BLOCK, UB CITY, 24, VITTAL MALLYA ROAD
BANGALORE DIST KARNATAKA 560001**

Vs

**COMMISSIONER OF CUSTOMS
BANGALORE-I, POST BOX NO 5400...CR BUILDINGS
BANGALORE, KARNATAKA- 560001**

AND

Customs Appeal No. 25676 of 2013

Arising out of Order-in-Original No. 10/2012, Dated: 30.11.2012
Passed by Commissioner of CUSTOMS , BANGALORE

**SHRI KULVEEN SING BALI
3M INDIA LTD
CONCORDE BLOCK, UB CITY, 24, VITTAL MALLYA ROAD
BANGALORE DIST KARNATAKA -560001**

Vs

**COMMISSIONER OF CUSTOMS
BANGALORE-I, POST BOX NO 5400...CR BUILDINGS
BANGALORE, KARNATAKA - 560001**

WITH

Customs Appeal No. 25677 of 2013

Arising out of Order-in-Original No. 10/2012, Dated: 30.11.2012
Passed by Commissioner of CUSTOMS , BANGALORE

**SHRI M S SWAMINATHAN
3M INDIA LTD
CONCORDE BLOCK, UB CITY, 24, VITTAL MALLYA ROAD
BANGALORE DIST KARNATAKA - 560001**

Vs

**COMMISSIONER OF CUSTOMS
BANGALORE-I, POST BOX NO 5400...CR BUILDINGS
BANGALORE, KARNATAKA - 560001**

Appellant Rep by: Shri G Shivadass, Sr. Adv

Respondent Rep by: Dr J Harish, Jt. Commissioner(AR)

CORAM: S S Garg, Member (J)

P Anjani Kumar, Member (T)

FINAL ORDER NOS. 20343-20345/2020

Per: P Anjani Kumar:

Briefly stated the facts of the case are that M/s 3M India Ltd, the appellants, a subsidiary of 3M, USA, are engaged in the import of more than 1000 types of adhesive products including Surgical Tape Rolls since 1992, from their parent company and its associates/subsidiaries. The Surgical Tape Rolls with brand names viz., Micropore, Transpore and

Tegaderm Wound Dressings were cleared as 'skin barriers micropore surgical tapes' availing benefit of exemption under Sl.No.22 of List 37 as mentioned in Sl.No.363A of Notification No.21/2002-Cus dated 01.03.2002. The Directorate of Revenue Intelligence, initiated investigations into the imports by the Appellant and statements of Shri M.S. Swaminathan, Authorised Signatory of the Appellant and Shri Kulveen Singh Bali, Head, Regulatory Affairs and Quality Assurance of the Appellants were recorded. A Show Cause Notice dated 30.09.2011, demanding differential duty of Rs. 9,33,25,582, on imported Micropore, Transpore and Tegaderm, cleared during the period from October 2006 to February 2010. It was alleged that 'Hypoallergenic Surgical Adhesive Tapes' (under the brand name micropore, Transpore and Tegaderm), sold as general purpose medical adhesive tapes, are not 'ostomy appliances' for managing the four types of ostomy; in terms of the exemption Notification concessional rate of 5% BCD and Nil rate of CVD are available only for 'Skin barrier micropore surgical tapes' used as an Ostomy product (appliance) for managing Colostomy, Ileostomy, Ureterostomy, Heal Conduit Urostomy Stoma cases. Learned Commissioner passed the impugned Order-in-Original, 10/2012 dated 14.12.2012, confirming duty of Rs. 9,33,25,582 on the appellants along with equal penalty under Section 114A of Customs Act, 1962; imposing penalties of Rs 55,00,000 on Shri M.S. Swaminathan and Rs 40,00,000 on Shri Kulveen Singh Bali; Hence, the present appeals C/25625/2013, C/25676/2013 & C/25677/2013.

2. Shri Shivdass, Senior Counsel, appearing for the appellants, traces the history of the exemption for surgical tapes and submits that the Appellants earlier claimed exemption under Sl. No. 22B of Heading B of Notification No. 208/1981-Cus dated 22.09.1981, on the strength of certificates dated 15.9.1992 by the Directorate General of Health Services to the effect that they were Lifesaving items covered under Sl.No.22B of Part B of Customs Notification No.208/1981; after rescission of Notification No. 208/1981-Cus, the Ostomy products (Appliances) for managing Colostomy, Ileostomy, Ureterostomy, Ileal Conduit Urostomy Stoma, including skin barriers micropore surgical tapes continued to be exempted under various Notifications; the Notifications also exempted from duty other medical equipment certified by the Director General of Health Services to be lifesaving equipment; the Appellants continued to claim concessional rate of duty in respect of the imported Micropore. Transpore and Tegaderm, under Sl. No. 363 of Notification No. 21/2002 dated 01.03.2002, as mentioned at Sl. No. 22 of List 37 of the Notification; the Notification also provided, at Sl. No. 365, exemption to Life Saving Equipment subject to production of a certificate from DGHS to the effect that the imported goods are a lifesaving medical equipment; vide Notification No.21/2010-Cus dated 27.02.2010, Sl.No.363 in Notification No.21/2002-Cus along with List 37, was omitted; subsequently, Notification No.41/2010-Cus dated 1.4.2010 inserted, Sl.No.357A and S.No.35713, providing concessional rate of duty of 5% for Goods required for medical, surgical, dental or veterinary use falling under Ch.9018, 9019, 9020, 9021 or 9022 and for parts /accessories of the above goods falling under 90 or any other Chapter respectively; vide Notification No.54/2010-Cus dated 29.4.2010 exemption to Ostomy products (Appliances), accessories thereof and parts required for the manufacture, of the Ostomy products was reintroduced. However, from the inclusive list of the products, 'skin barriers micropore surgical tapes' was removed; Appellant is not availing exemption under Notification No.21/2002-Cus from 27.02.2010.

3. Learned senior Counsel submits that the issue is settled by the tribunal by the decision in the case of Sutures India Pvt Ltd 2019-VIL-221-CHE-CU; Tribunal examined the issue whether "Micropore surgical tape", classifiable under CTH 3005 90 60, are entitled to exemption Sl. 363(A) of Notification No. 21/2002 dated 01.03.2002; Tribunal held that the Notification apart from covering specific Ostomy products also covers the

general purpose products; therefore, the impugned order is liable to be set aside.

4. Learned senior counsel further submits that surgical tapes imported by the appellants are an appliance used in managing ostomy cases and hence the exemption has been rightly claimed; Sl. No. 363(A) of Notification No.21/2002-Cus dated 1.3.2002 as amended from time to time, exempted goods specified in List 37 therein from so much of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the Table; correspondingly, Sl.No.61 of Notification No.6/2006-CE exempted goods covered under Sl.No.363 of Notification No.21/2002-Cus and mentioned in List 37 of the Customs Notification from the whole of excise duty leviable thereon; Medical Equipment and other goods, specified in List 37 and their accessories were thus subjected to effective rate of Basic Customs Duty of 5% and wholly exempted from additional duty of customs leviable under Sec.3(1) of the Customs Tariff Act. List 37 of the Customs Notification No.21/2002 had 111 entries out of which Sl.No.22 reads as under:

"Ostomy products (Appliances) for managing Colostomy, Ileostomy, Ureterostomy, Ileal Conduit Urostomy Stoma crises such as bags, belts, adhesives seals or discs or rolls adhesive remover, skin barriers micropore surgical tapes, bag closing clamps karaya seals paste or powder, irrigation sets, plastic or rubber faceplates, flanges, male or female Urinary incontinence sets, skin gels in parts or sets"

Sl.No.22 of List 37 may be broken up as under:

- Ostomy products (appliances)
- Such as bags, belts, adhesives seal or discs or rolls adhesive remover, skin barriers micropore surgical tapes, bag closing damns karaya seals paste or powder, irrigation sets, plastic or rubber faceplates, flanges, male or female urinary incontinence sets, skin gels, in parts or sets.
- for managing
- Colostomy, Ileostomy, Urostomy and Ureterostomy stoma cases

5. Learned senior Counsel further submits that their products namely 'surgical tapes' qualify as 'ostomy products (appliances) being products used in ostomy care and is therefore exempted vide Sl.No.363 of Notification No.21/2202-Cus. The normal procedure for fixing/changing the pouching system may be explained as under:

- Cleaning the peristomal area with wet paper towel;
- Drying the peristomal skin;
- Tracing the stoma shape and size;
- Making a template of the stoma;
- Tracing the template on the base plate;
- Cutting out the stoma pattern and smoothen the edges in the plate;
- Applying strip paste around the stoma;
- Applying powder if necessary;
- Applying base plate on patient (after removing the backing) maintaining pressure for a few seconds;
- Fixing the bag on the flange and locking the bag;
- Fixing belt for extra support around the abdomen and
- Fixing the adhesive tape as a picture frame to hold the entire system securely to the patient.

6. Learned senior Counsel submits that the above procedure shows that the tapes are used for securing the ostomy pouches to the abdomen as a window frame and act as an additional support to the whole pouching

system; the efficacy of the pouching system, both in collecting the body waste as well as in protecting the peristomal skin by preventing leakages depends heavily on its secure adherence to the body of the ostomate; thus, the impugned imported tapes are actually used as an appliance for ostomy management and care; the appellants have produced the following documents evidencing use of imported goods for the purposes of ostomy

(i). Copies of the letters issued by the hospitals and letter from Ostomy Association of India certifying the use of Micropore tapes for managing ostomy cases.

(ii). Illustrative copies of purchase orders placed by various hospitals for purchase of Micropore tapes, the dealers' invoice evidencing sale of Micropore tapes and the certificates issued by the Max Super Specialty Hospital, New Delhi and HCG Cancer Centre, Ahmedabad certifying the use of Micropore tapes in ostomy care.

(iii). Certificates dated 15.9.1992 issued by the Directorate General of Health Services to the effect that Transpore and also Tegaderm is a 'Skin Barriers Micropore Surgical Tape and are Lifesaving items covered under Sl.No.22B of Part B of - Customs Notification No.208/1981.

(iv). Extracts of literature wherein use of 3M tapes in managing ostomy is discussed.

(v). Copy of purchase orders, sale invoices and certificates from the hospitals and the letter from Ostomy Association of India.

B.10 it can be seen there from that the products have in fact been used for managing ostomy cases and therefore, the products qualify as 'ostomy products (appliances)' eligible for exemption.

7. Learned senior Counsel submits that without prejudice to the above submission that the imported tapes are actually used for ostomy care, the Notification provides exemption to all 'Ostomy products (appliances) for managing stoma cases' and nothing can be read into it to grant exemption only on proving that the products have actually been used for managing stoma; the expression 'ostomy products for managing ostomy' is to be interpreted as an item intended for use or capable for use as an ostomy appliance and the exemption would be extended. Once it is established that the products are 'Ostomy appliances' capable of being used in managing the stoma cases (including the four types mentioned), there is no requirement to show that the goods have been actually used for such purpose; he places reliance on the following wherein the expression "for use" was interpreted as an item intended for use or capable for use as an ostomy appliance.

(i). *State of Haryana Vs Dalmia Dadri Cement Ltd reported in 2004 (178) ELT 13 (SC)*

(ii). *Ramsons Garments Fishing Equipment Pvt Ltd v CCE, Ban galore reported in 2007 (211) ELT44 (Ti-Bang)*

(iv). *West Dinajpur Spinning Mills Ltd. v. CCE reported in 2006 (203) EL T 474 (Tri-Kolkata)*

(v). Board Circular No. **1/2005** dated 11.01.2005 which clarified that Notification No. 21/2002 allows the import of general -purpose machinery also so long as they are capable of use in textile industry.

8. Learned senior Counsel submits that the expression 'for use' contained in Sl. No. 22 of List 37 shall be read as 'capable of use' and the exemption shall be extended as the imported goods are capable of being used and have been used for managing ostomy cases; appellants have produced several documents evidencing use of imported goods for the purposes of ostomy; department has not produced any evidence to establish that the impugned goods imported by the Appellant is not necessary in ostomy procedure.

(i). Special Court for Economic Offences held, vide order dated 11.02.2019, that based on the literature and patents downloaded from the website, it

cannot be held that the imported surgical tape is not usable in ostomy procedure;

(ii). Shri K.K Ghosh, SIO, DRI admitted during Cross- Examination that the relied upon document does not state that the tape is not used for Ostomy purpose.

9. He submits that the use of the impugned goods for ostomy is undisputed and the impugned goods are therefore entitled to exemption. 'Skin barrier' and 'micropore surgical tapes' are two distinct products and there is no product corresponding to the description 'Skin barrier micropore surgical tapes' as averred in the impugned order; certain products in List 37 have not been separated by appropriate commas; list mentions bag closing clamps karaya seals paste or powder; a plain reading of the sentence would indicate that it is one product, whereas the actual usage as described above, would show that the bag closing clamps have an entirely different function and the karaya seal' has its own distinct function; there can be no product called as -bag closing clamps karaya seal paste or powder'; It makes sense only if the expression is read as bag closing clamps', 'karaya seal, paste or powder; similar is the case of 'skin barriers' and 'micropore surgical tapes. Literal meaning of a 'skin barrier' is that the product acts as a 'barrier' to the skin i.e. it does not allow anything to come in contact with the skin; whereas, 'micropore' means having pores'; surgical tapes are manufactured with minute pores so that the skin can breathe through it; thus, the entry should aptly read as 'skin barriers' and 'micropore surgical tapes; in the product description of I-IOL- 3722 the words 'skin barrier' and 'porous paper tape' are separated by a comma; this evidences that there is no product answering to the description 'skin barrier micropore surgical tape'; this further supports the claim of the Appellants that the expression skin barrier micropore surgical tape' used in the Notification ought to be separated by a comma and exemption should be granted to both 'skin barrier' and 'micropore tapes'; further, the document for the product I-IOL-3722 is dated 25.11.2008 whereas the expression for 'skin barrier micropore surgical tapes' was available in the Notification from 22.09.1981 itself; if the observation of the Commissioner that the exemption is applicable only to products such as HOL-3722 implies that the Notification was issued with a foresight that such a product would be developed; alternately, it could also mean that the product was developed based on the entry in the Notification; both the above views would lead to absurdity.

9.1. Learned senior Counsel submits that as explained elsewhere, skin barriers and microporous tapes are normally different; though the notification has mentioned the same as a single entry; in fact in the Customs Tariff, a specific heading is available for micropores surgical tapes'; Tariff had not used the expression 'skin barrier'; in 2007, Heading 30069100 was inserted in the Tariff with the description 'Appliances identifiable for ostomy use'; clause (k) under Note 4 in Chapter 30 states heading 3006 applies to 'appliances identifiable for ostomy use, that is, colostomy, Ileostomy and urostomy pouches cut to shape and their adhesive wafers or faceplates'; thus, even after amendment in 2007, the Tariff does not describe the product as 'skin barrier micropores surgical tapes' but as adhesive wafers of 'pouches'; therefore it is submitted that if the expression 'skin barriers micropore surgical tapes' in Sl.No.22 of List 37 is taken to denote a single product, read with the description in the Tariff, it can only apply to the 'surgical tapes' as imported by the Appellants; he places reliance on the decision of the Tribunal in the case of *Equipment Sales Corporation reported in 1989 (39) 421* wherein the benefit of erstwhile Notification No. 208/81-Cus, dated 22.09.1981 was extended to Micropore Surgical Tapes.

10. Learned senior Counsel submits that alternatively, the imported goods are entitled to exemption under Sl.No. 363(B) of the Notification. It is submitted that Sl.No.363 in the Notification exempts (i) Medical Equipment and other goods and (B) Accessories of medical equipment mentioned in (A); the tapes imported by the Appellants are used as an

accessory to the pouch inasmuch as it is used to secure the pouch and other goods securely to the body of the patient; therefore the Appellant would anyway be entitled to the exemption under Sl.No.363 (B); as held in the impugned Order, the impugned tapes are used to additionally secure the ostomy appliances such as bags, clamps etc. in place; thus the impugned tapes are accessories to various appliances listed in List 37; being accessory to medical equipment mentioned in Sl. No. 363(A) are entitled to exemption under Sl.No. 363(B). Learned counsel submits that alternatively, Sl. No. 365 of the Notification No. 21/2002 provides exemption to 'Life saving medical equipment including accessories or spare parts or both of such equipment' subject to production of certificate from the DGHS that the products imported are 'Lifesaving goods'; DGHS have given necessary certificates to the appellants; it is settled law that the benefit of exemption can be claimed at any stage as held in *Share Medical Care Vs UOI 2007 (209) ELT 321 (SC)*

11. Learned senior Counsel submits that extended period is not invocable in the case; Show Cause Notice is issued on 30.09.2011 demanding duty for the period October 2006 to February 2010; packing material of the products clearly shows the various applications to which the products can be put to use. The packing material describes the material not only as meant for general purpose/use' but also as meant for securing ostomy pouches/devices/appliances etc; over the past several years the consignments have been subjected to physical examination by officers of the customs department before allowing clearances of the same; no objection whatsoever had been raised the claim of subject exemption under Notification No.21/2002-Cus at any time in the past; the fact that Hon'ble Tribunal in the case of Sutures India Pvt Ltd (supra) has extended exemption under Sl.No. 363(A) of Notification No. 21/2002 dated 01.03.2002 to similar products proves that the Appellant was justified in entertaining a bona fide belief that the impugned goods are entitled to exemption; in any case claiming incorrect classification and exemption Notification does not amount to mis-declaration warranting invocation of longer period and imposition of penalty; appellants have neither suppressed the facts nor had any intention to evade payment of duty and therefore penalty is not imposable under Section 114A of the Customs Act.

12. Dr. J. Harish, Joint Commissioner, Authorised Representative, appearing for the department reiterated the findings of OIO and submitted written submissions. He submitted inter alia that the appellant claimed exemption Notification 21/2002-Cus; Sl. No 363 A (List 37, Sl. No 22) under the category of Ostomy Products; appellants sought clearance of the products under the category of 'micropore surgical tapes' claiming that the items have microporous properties and are used in Ostomy procedures though they are being commonly used for other purposes also like fixing IV Cannulas, Bandage fixation and to hold tubes and other general purpose applications; the stated application in Ostomy cases is for giving Additional support/for affixing the Ostomy Bags or pouches; the claim is based on the premise that the said entry was also available under the earlier Customs Notification 208/1981-Cus under which also these products had been cleared as lifesaving equipment based on the DGHS certification as was required under the conditions of the notification.

13. He submits that the claim under the present entry is to be read as for "Skin barriers micropore surgical tapes "and not only as 'micropore tapes' as is sought by the appellant; the sine-qua-non for the item to be considered under this category is as to whether these goods are having the prerequisite characteristics of a Skin barrier along with the microporous properties, as the primary objective of the products brought under the category of Ostomy appliances are products which are used to create the OSTOMY POUCH or for the special Care of the Skin around the Ostomy area; skin care in such surgeries is of utmost importance as the fecal and urinary content that empty into the pouches are to be prevented from affecting the skin around the pouches or Ostomy area so as to not cause any irritation or excoriation; skin Barriers are essentially coverings which

have the property of not allowing Microbes or External agents from reaching the Skin and by way of this characteristic would not allow the Ostomy exudates to reach the skin surrounding the Ostomy area and thus maintain the integrity and quality of the skin as explained by OIO at Para 5.1.

13.1. He further submits that while Micropore Tapes might have been developed by the Appellant, their primary use or application is to act as adhesive tapes, but being hypoallergenic (less prone for allergic reactions) and without causing the painful peeling off sensation like the earlier cloth-based tapes; thus the products as marketed and as being practically being used are for these purposes i.e to hold bandages/ dressings and tubes or even the colostomy bags as an additional reinforcement or affixation aid; micropore is a paper based tape, whereas Transpore is a Polymer based tape with micro porous properties which allows the tape to breathe, but do not act as Skin Barriers; it is only when combined with Skin Barriers that such tapes would fall within the ambit of the entry in the Exemption Notification.

13.2. The appellant has placed his reliance on the decision of the Chennai Bench of the Hon'ble Tribunal in the case of M/s Sutures India Pvt Ltd (supra); it is noteworthy to point out that the said decision has been rendered after the 3rd Member reference on the premise that the said goods and other items like adhesive seals, adhesive remover, skin gels are items used for general purposes but find use also in ostomy procedures; there is no end use condition/exclusive use condition that such products need to be used only for ostomy applications and it is enough if they are used in relation to ostomy procedure and that the department has not been able to show any product which fits into the category of surgical tapes meant for Ostomy only. He submits that the said decisions have been taken by the bench without taking note of the fact that the item eligible for the benefit is a combination product of Skin Barrier Micropore Surgical Tape which combines the dual properties of preventing the seepage of the ostomy discharge onto the surrounding skin thus preventing harm to the skin as well as having the microporous breathing characteristics; the bench has not been made aware of the existence of such products and hence the bench has arrived at the conclusion that such products are not available.

13.3. He submits that however, in the impugned order the Commissioner and the investigating authority have shown that there are products which fit into the category as envisaged in the entry; such a product, HOL-3722 from MEDEX SUPPLY (Para 5.1) and the product Literature of the said product is placed as RUD; the said product is described as "Cut to fit Flex wear Flat Skin barrier, Porous paper tape 1-3/4"; also products known as " Coloplast" one piece – 5600 (at Page 398)and "Coloplast one piece -5801" which also are described as " flexible skin barrier and tear proof microporous tape for double security " are mentioned; it is such products which have the aforesaid properties of "Skin Barrier Micropore Surgical Tape' and the same were not brought to the notice of the Chennai Bench; It is these tapes and such similar products which have a primary application in the management of Ostomy that can be considered for the exemption; the usage of such products elsewhere also should not hamper the eligibility and to this extent the view of the Chennai bench would be correct, but when the products under consideration are merely micropore tapes without the skin barrier property they would fall outside the purview of the exemption; the products viz Micropore and Transpore under consideration cannot even prevent water from soaking them and can come off the skin easily if exposed to water whereas the essential characteristic of all the Ostomy products in the list are products which have the special property of absorbing or soaking up the water or discharge of the ostomy contents; this is evident from the explanation of items such as Adhesive seals in the Product information(at Para 5.1 of the OIO) wherein the said product is described as "Many ostomy bags in current use make use of hydrocolloid adhesives; one form of hydrocolloid adhesive comprises

powdered gelatin, pectin and cellulose in a polyisobutylene (PIE) matrix; the powdered gelatin, pectin and cellulose absorb moisture and gel within the matrix; an adhesive flange of this type can be formed by mixing together PIB and powder components for a period of 45 mins at 60 to 75 C and then extruding the mixture for further processing; Hydrocolloid adhesives have proved to be very effective for use with colostomy patients; the hydrocolloid forms a good bond to the skin for the period over which the colostomy bag is in place, and is very skin friendly, causing negligible adverse skin reactions"; the product information goes on to further explain as to how by increasing the thickness of such hydrocolloid layer ostomies like ileostomy and urostomy which have a predominant liquid discharge the seals can be made efficient to handle the extra outflow; even the Skin Gels are not of regular application quality and ought to have Hydrocolloid properties for ensuring the skin care; products like Karaya paste, powder are also products which have these water absorbent properties and are used specially for Ostomy purposes; thus the conclusion by the bench that some of the products in the entry at Sl. No 22 of the Notification are General purpose products is factually incorrect; the whole entry is to be seen as genre of products from the perspective of being Ostomy Products and special skin care products and not products which are being used incidentally to just support/affix the ostomy pouches or tubing(as discussed in Paras 8.2.4; 8.2.5 and 8.2.6 of the OIO).

14. He submits that 3M Brochures themselves describe as follows.

(i). Micropore Surgical Tape to be a non-woven rayon backed medical adhesive tape; this "paper tape" is latex free, hypoallergenic and gentle to the skin; thus, Micropore is an all-purpose tape for general use;

(ii). 3M Transpore Surgical Tape to be a transparent, perforated, medical adhesive tape; the plastic tape is latex free and hypoallergenic; thus Transpore is an all-purpose tape with strong adhesion, for general use.

(iii). Tegaderm is a waterproof, absorbent dressing with the following applications.

-Post surgical dressing- protects closed, clean surgical wounds and donor sites

-Lacerations, abrasions and burns, small incisions and excisions especially in areas are difficult to dress

-Superficial and partial thickness wounds

-Light to moderate draining wounds

-Catheter site cover

Though the said product has absorbent properties and protective properties, it is submitted that the benefit is denied due to nonmention of the application for ostomy purposes in the product; thus it can be seen that the first two products do not have any skin barrier or absorbent properties and cannot definitely fall within the entry claimed as "Skin Barrier Micropore Surgical Tapes" but are only porous tapes; M/S 3M, USA principals of the appellants described the products as Non- Sterile Adhesive Tapes and not as Skin barriers as declared in the Form 40 for obtaining the clearance for import; it was so certified by the Drug Controller General of India (DCGI).

15. He submits that the certificates from DGHS submitted by the appellant in support of their claim are certificates issued under Notification 208/81 and as lifesaving items and would have no relevance to the Notification 21/2002-Cus Sl. No 363 A and the claim has to be considered only as per the current notification; also, the alternative plea for eligibility under Sl. No. 365 of Notification 21/2002 is without any basis as the requisite certification by DGHS under the current Notification is not produced; the appellant has chosen not to press for the issue of jurisdiction and has sought for the case to be decided based on merits and as per the decision of the Chennai Bench.

16. On the contention raised that the SCN issued on 30-09-2011 for the period October 2006 to February 2010 is beyond the normal time period, Learned Authorised Representative submits that the goods have mostly been cleared under the Self-Assessment procedure and as recorded by the adjudicating authority (Paras 50 to 54 of the OIO), the extended period would be invokable; the said demand is justified and the consequential proceedings of Confiscation, Redemption fines and penalties are liable to be upheld.

17. Heard both sides and perused the records of the case. The brief issue involved in this case is as to whether Micropore, Transpore and Tegaderm imported by the appellants are eligible for exemption contained in notification No. 21/2002-Customs dated 01/03/2002 as amended from time to time. The contention of the appellants is that their products are rightfully eligible for the exemption contained in the notification under the description "Skin Barriers Micropore Surgical Tapes"; otherwise also they are covered under Ostomy Products (appliances) for managing Colostomy, Illostomy, Ureterostomy, Ileal Conduit Urostomy Stoma cases such as bags, belts, adhesives seals or discs or rolls adhesive remover; alternatively they claimed that they are eligible for exemption as per Sl.No. 365 which provides exemption to lifesaving equipment subject to the condition that the importer at the time of import produces the certificate to the effect that the imported goods are a lifesaving medical equipment; there is no product which suits the description "Skin Barriers Micropore Surgical Tapes" and that there should have been a comma after skin barriers. On per contra the Department contends that there exists a product which suits the description "Skin Barriers Micropore Surgical Tapes" and the notification should not be read as per convenience.

18. For a proper appreciation of the issue in question, we find it is useful to have a look at the notification No. 21/2002 dated 01/03/2002. The relevant headings of the notification are as follows:

Sl. No. 363A	90 or any Chapter	The following goods namely: (A) Medical equipment (excluding Foley Balloon Catheters) and other goods, specified in List 37.
List 37	S. No.22	Ostomy products (Appliances) for managing Colostomy, Illostomy, Ureterostomy, Ileal Conduit Urostomy Stoma cases such as bags, belts, adhesives seals or discs or rolls adhesive remover, 'Skin Barriers Micropore Surgical Tapes', bag closing clamps karaya seals paste or powder, irrigation sets, plastic or rubber faceplates, flanges, male or female urinary incontinence sets, skin gels, in parts or sets.

On going to the above notification it is seen that "Skin Barriers Micropore Surgical Tapes" is mentioned as a single heading whereas, the appellants would like to read it as "Skin Barriers", "Micropore Surgical Tapes" holding that there is no product known as "Skin Barriers Micropore Surgical Tapes"; the expression was similar in the earlier forms of the notification; another heading "bag closing clamps karaya seals paste or powder", is also mentioned in notification as a single entry and there are no such products known in the market; therefore "Skin Barriers Micropore Surgical Tapes" should be read as "Skin Barriers", "Micropore Surgical Tapes".

19. We find that the OIO has dealt this issue at length to establish the existence of products known as "Skin Barriers Micropore Surgical Tapes". Relevant paras of the OIO are as follows.

"27. From the facts of the case above, it is undisputed that the noticee claimed the benefit of exemption in respect of three types of Surgical Tapes imported by them known under the brand names Micropore, Transpore and Tegaderm, as "Skin Barriers Micropore Surgical Tapes". It is alleged that the goods imported are not skin barrier micropore surgical tapes but are all purpose 'surgical adhesive tapes', Noticee does not deny this fact. But the averment is that these can be used as ostomy appliances. In fact the noticee has gone one step ahead. The contention is that there is no medical item

which is "Skin Barriers Micropore Surgical Tap" and that comma is missing in the description in the notification and that the said entry should be read as two different items, namely, 'skin barriers' and 'micropore surgical tape'. It is claimed that the items imported by them are 'micropore surgical tape'. It is averred that the surgical tapes imported by them can be used in ostomy management. It is also the case of the noticee that it is enough if the goods are capable of being used as Ostomy Products/Appliances to claim the benefit of notification and that there is no condition that the imported goods are to be used as ostomy appliances only.

28. DRI, on the other hand, has shown that there is a product which is called "Skin Barriers Micropore Surgical Tapes" as shown in RUD No.12 which refers to Medex Supply product "HOL-3723 Cut-to-fit Flex wear Flat Skin Barrier, Porous Paper Tape, 2-1/4", manufactured by M/s. Hollister. It is also seen that M/s. Coloplast also make another similar product, the details of which are given in RUD 13 "Brand/Description: "Closed Cut-to-fit – Non Convex, Transparent 5/8-2 3/8" (15- 60MM) w/Curagard Barrier 8 long 600 ml latex free. Flexible Skin Barrier and tear-proof microporous tape for double security w/filter for odor control, soft backing for comfort, order proof film". Further, it is observed from various patents detailed in the SCH that medical requirement of protecting the peristomal region from right around the stoma to the nearby surrounding skin from stomal exudates has been addressed by the products with pre-attached adhesive microporous tapes with the pouches/bags. In response, the noticee has contended that the new invention which is claimed by the manufacturer as capable of acting both as skin barrier and as porous paper tape and the claim that it protects peristomal skin does not mean that the adhesive tapes need not be used for securing the pouch. They have also stated that there is no evidence that whole world of ostomates have stopped using other products or that the earlier products have lost their relevance and use. I find that there is a contradiction inherent in the submission of the noticee-tape' and on the other hand it is their contention that even if it is a new invention, it does not mean that the earlier products have lost their usage/relevance. Further, the patent applied for the so called new product dates back to 1997 and was, therefore, in existence for about 10 years before the imports in question. In view of this, I am unable to agree with the noticee that the description in notification is a typographical error and that the notification is, therefore, available to 'skin barriers' and 'surgical tapes' as two distinct goods.

20. We find that the SCN establishes the existence of a product known as "Skin Barriers Micropore Surgical Tapes". The learned authorised representative has demonstrated both the items and presented the pictorial representations of the same. He avers that MICROPORE is a paper based tape, whereas Transpore is a Polymer based tape with micro porous properties which allows the tape to breathe; but do not act as Skin Barriers; it is only when combined with Skin Barriers that such tapes would fall within the ambit of the entry in the Exemption Notification. He also submits that while Micropore Tapes might have been developed by the Appellant, their primary use or application is to act as adhesive tapes; being hypoallergenic (less prone for allergic reactions) and causing no painful peeling off sensation like the earlier cloth based tapes, the products are marketed and are being practically used for these purposes of holding bandages/ dressings and tubes or even the colostomy bags as an additional reinforcement or affixation aid. He submits that the tapes which are imported by appellants can easily come off and cannot act as skin barriers. We find that there is visible and perceptible difference between the items as shown below.

(i). Items imported by the appellants are as follows.



Micropore Tape



Transpore

(ii). the items demonstrated by AR are as follows



Skin Barrier- Micropore Tapes

21. We find that the department has established that a product named and known as "Skin Barriers Micropore Surgical Tapes" exists. We find that evidence of the same has been supplied as RUD to the appellants. Under such circumstances, we find that the appellants contention that no product known as "Skin Barriers Micropore Surgical Tapes" exists and there should have been a comma (,) in between doesn't hold water. When such products are sold and used as such, it cannot be inferred that the notification was wrongly worded and therefore, it is to be interpreted to mean Skin Barriers, Micropore Surgical Tapes is not acceptable.

22. We find that the impugned order has discussed the issue. Learned Commissioner observes that

29. *I find that even if there were to be a comma missing in the description "Skin Barriers Micropore Surgical Tapes", it is not open to me to supply the same. In the case of The Commissioner of Sales Tax, Uttar Pradesh Vs. M/s. Parson Tools and Plants, Kanpur [(1975) 4 SCC 22], the Hon'ble Supreme Court has held as under:*

"Even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it..."

In this regard, the judgement of Hon'ble High Court of Guwahati in the case of Sankar Tea Co. Ltd. and Others Vs. Collector of Central Excise, Shillong and others [1985 (21) ELT 679 (Guwahati)] also provides useful guidance. In the said case, the Hon'ble Court was dealing with the issue of rate of Central Excise duty chargeable on the tea produced in District of Dibrugarh in the State of Assam. Briefly stated, the Central Government by a notification dated 1.5.1970 divided the tea growing areas into Zones and fixed the rate of duty on tea produced in the said areas. At the relevant time, Dibrugarh was a sub-division in the District of Lakhimpur in Zone V. As per notification dated 22.9.1971, the Assam Government made the sub-division of Dibrugarh as a separate district with effect from 2.10.1971. Subsequently, the Central Government by superseding the earlier notification of 1970, made several zones in place of 5 Zones by a notification dated 5.11.1981 but the District of Dibrugarh was not shown separately. This was done subsequently by a notification dated 28.01.1982. The issue before the Hon'ble High Court was whether the duty should be charged on the Tea produced in District of Dibrugarh during 5.11.1981 to 28.1.1982, as per rates applicable in the Zone V, viz., District of Lakhimpur or residuary Zone VII. In this contest, the Hon'ble Court examined the issue whether there was an omission to include the word Dibrugarh in the Central Government notification of 5.11.1981 and whether the omission could be supplied. The Hon'ble High Court held as under:

"The basic rule is that the Court should not take upon itself to supply the omission as this is to assume the function of legislature. This is not a case, where the Court is entitled to rewrite the notification. The language of

Notification being plain and unambiguous, it is not open to read into it a word which is not there based on a prior reasoning as to the probable intention of the notification. In a Court of Law, what is unexpressed has the same value as which is unintended. This is a Rule of construction. It is the duty of the Court to give without engrafting, adding or implying anything which is not congenial to or consistent with such express intent of the law giver. More so, it a Statute is a taxing Statute. It must be assumed that the Rule making authorities do no commit mistake or make any omission. (Emphasis supplied). Therefore, the contention of the Respondent to supply the word 'Dibrugarh' in the Notification of 1981 is not permissible."

In the present case, as already held, there is no omission in the notification as the products corresponding to generic description "Skin Barriers Micropore Surgical Tapes" exist. Even if it were to be so, such omission could not have been supplied in accordance with the law settled as above".

23. We find that in view of the above, there is no ambiguity in the notification and there is no need to interpret the notification by supplying what is assumed to be missing in the notification. We find that Hon'ble Apex Court has held in *Dilip Kumar & Company 2018 (361) ELT 577 (SC)* that

22. At the outset, we must clarify the position of 'plain meaning rule or clear and unambiguous rule' with respect of tax law. 'The plain meaning rule' suggests that when the language in the statute is plain and unambiguous, the Court has to read and understand the plain language as such and there is no scope for any interpretation. This salutary maxim flows from the phrase "cum inverbis nulla ambiguitas est, non debet admitti voluntatis quaestio". Following such maxim, the Courts sometimes have made strict interpretation subordinate to the plain meaning rule [Mangalore Chemicals case (Infra para 37).], though strict interpretation is used in the precise sense. To say that strict interpretation involves plain reading of the statute and to say that one has to utilize strict interpretation in the event of ambiguity is self-contradictory.

In view of the above, we find that the impugned order is correct as far as it holds that the items imported by the appellants are not eligible for the exemption contained in the notification No.21/2002-Cus dated 01.03.2002. The appellants argue that another part of the notification mentions 'bag closing clamps karaya seals paste or powder' whereas no such products are available and therefore, it need to be understood that notification misses out on certain symbols like(,). We find that as the items described therein are not under discussion, we need not turn our attention to the same.

24. The appellants have argued that alternatively, the impugned items are eligible for exemption as they are covered by the other part of the list under 'Ostomy products (Appliances) for managing Colostomy, Illostomy, Ureterostomy, Ileal Conduit Urostomy Stoma cases such as bags, belts, adhesives seals or discs or rolls adhesive remover; we find that the impugned goods cannot be called appliances by any stretch of imagination. We will go in to find the meaning of appliance. Merriam Webster dictionary defines appliance as (<https://www.merriam-webster.com/dictionary/appliance>)

1:an act of applying

2. a:a piece of equipment for adapting a tool or machine to a special purpose:attachment

b:an instrument or device designed for a particular use or function an orthodontic appliance specifically :a household or office device (such as a stove, fan, or refrigerator) operated by gas or electric current

c:British : fire engine

d: an artificial part or mask that is worn as part of an actor's makeup or costume ... more grown-ups are shelling out for scary facial appliances—wounds, snouts and horns—to create the creepy characters they've dreamed up on their own.—Dana Coffield

e:computing : information appliance A growing number of companies are coming up with ways [in 2000] to turn ordinary phones into Internet appliances.— Sharon Cleary

3.obsolete:compliance

Cambridge dictionary defines appliances as follows (<https://dictionary.cambridge.org/dictionary/english/appliance>) a device, machine, or piece of equipment, especially an electrical one that is used in the house, such as a cooker or washingmachine: Going by the above definition or any other definition one can find that the meaning attached with an appliance is closer to equipment. Therefore, we are not inclined to accept the contention of the appellants. The impugned goods at best can be held to be disposables used in surgery or other medical procedures.

25. Learned counsel for the appellants also argued that the Notification also provided, at Sl. No. Sl. No.363 A, exemption to Life Saving Equipment subject to production of a certificate from DGHS to the effect that the imported goods are lifesaving medical equipment; he submitted that the appellants have produced such certificates and have a right to claim the same even though the same was not claimed at the time of filing bills of entry. We find that per contra the learned Authorised Representative submits that the certificates from DGHS submitted by the appellant in support of their claim, are certificates which have been issued under Notification 208/81 and would have no relevance to the Notification 21/2002-Cus Sl. No.363 A and the claim has to be considered only as per the current notification as the requisite certification by DGHS under the current Notification is not produced. We find that the certificates are issued in 1990s and have no mention of the impugned imports.

26. The appellants have relied upon the decision of coordinate bench, at Chennai in the case of Sutures India Pvt Ltd (Supra), stating that the tribunal has gone into the imports of similar products and decided that the applicability of notification has been decided in appellants favour. Per contra, the Learned Authorised Representative submits that the coordinate Bench has arrived at the said decision on the premise that the said goods and other items like adhesive seals, adhesive remover, skin gels are items used for general purposes but find use also in ostomy procedures; there is no end use condition/exclusive use condition that such products need to be used only for ostomy applications; it is enough if the impugned goods are capable of being used in relation to ostomy procedure; department has not been able to show any product which fits into the category of surgical tapes meant for Ostomy only. He further distinguishes the decision of the coordinate Bench stating that the Bench did not consider the fact that the item eligible for the benefit is a combination product of Skin Barrier Micropore Surgical Tape which combines the dual properties of preventing the seepage of the ostomy discharge onto the surrounding skin thus preventing harm to the skin as well as having the microporous breathing characteristics; it was not convincingly demonstrated before the Chennai bench that a product having dual use and fitting the description as mentioned in the Notification exists and thus, the Bench arrived at the conclusion that such product known as 'Skin Barrier Micropore Surgical Tape' do not exist. On the basis of the facts and circumstances of the present case and as demonstrated before us, we find that products known as 'Skin Barrier Micropore Surgical Tape' exist and that the impugned goods do not match the description given in the notification so as to be eligible for the exemption. While we are in agreement with the coordinate bench that there is no specific mention in the Notification that Skin Barrier Micropore Surgical Tapes have to be exclusively used for ostomy procedures and it is enough if they are capable of being used, we find that to be eligible for exemption the impugned goods need to match the description as given in the notification and only then the question of their actual use or capability of being used would come into play. We also find in the instant case that the department could produce evidence to show that products known as "Skin Barriers Micropore Surgical Tapes" exist. We find in our considered opinion that the real issue is whether the impugned

goods can be categorised as "Skin Barriers Micropore Surgical Tapes" to be eligible to the exemption. As per our discussion above, the distinction between the impugned products and the items eligible for exemption has been clearly established. It was also established that products which can be described as "Skin Barriers Micropore Surgical Tapes" exist. Therefore, having considered the facts of the case, we find that the department could satisfactorily demonstrate the twin points that the impugned goods do not satisfy the description given in the Notification and that the products mentioned in the Notification exist in reality. We find that there is no ambiguity as far as the description of the items in the notification and that the impugned goods do not satisfy such description so as to be eligible for exemption. As the wordings of the notification give meaning which is not ambiguous, we find that the Apex Court's judgment in Dilip Kumar case (supra) is binding and needs to be followed.

27. We also find that Apex Court in the case of *Srikumar Agencies Civil Appeal Nos. 4872-4892 of 2000, decided on 27-11-2008* observed that

5. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

*** **

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

28. We also find that Hon'ble Apex Court has held, in the case of *Swaraj Mazda Ltd 1995 (77) ELT 505 (SC)* that the Tribunal is not precluded from deciding the question on merits because of its earlier decision regarding the earlier period. This judgment was followed by coordinate bench in the case of *A.B. Mauri India Pvt Ltd 2010 (260) ELT 424 (T)*.

29. Coming to the issue of limitation, we find that learned counsel for the appellants submits that Show Cause Notice is issued on 30.09.2011 demanding duty for the period October 2006 to February 2010; they have described the products clearly showing various applications for general purpose and for securing ostomy pouches/devices/appliances etc; over the past several years the consignments have been subjected to physical examination by officers of the customs department before allowing clearances of the same; no objection whatsoever had been raised the claim of subject exemption under Notification No.21/2002-Cus at any time in the past. On the other hand learned Authorised Representative submits that the goods have mostly been cleared under the Self- Assessment procedure. We find merit in the contention of the learned Counsel. The fact that the appellants are importing from a long period is not disputed. It is not the case of the department that all the consignments were cleared under self-assessment procedure. It is not the contention of the Revenue that the impugned products were not subjected to examination or assessment any time. Moreover, the decision in the case of *Sutures India Pvt Ltd (Supra)* is sufficient to believe that the appellants had a bona fide belief about the availability of exemption. Therefore, we are of the considered opinion that the extended period is not invokable and penalties are not imposable.

30. In the result, appeal C/25625/2013 is partly allowed confirming demand of duty for normal period only and by setting aside penalties. Appeal Nos. C/25676/2013 & C/25677/2013 are allowed.

(Order was pronounced in Open Court on 20.03.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, BANGALORE
COURT NO. I**

Customs Appeal No. 20876 of 2019

Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-09/2019-
20, Dated: 23.07.2019

Passed by Commissioner of CUSTOMS, COCHIN

Date of Hearing: 13.03.2020

Date of Decision: 03.06.2020

**M/s ARBEE BIOMARINE EXTRACTS PVT LTD
IX-405 KARIPPADOM PO THALAYOLAPARAMBU
KOTTAYAM - 686605 KERALA**

Vs

**COMMISSIONER OF CUSTOMS
CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN - 682009 KERALA**

Appellant Rep by: Mr Leejoy Mathew V, Adv.

Respondent Rep by: Mr P Rama Holla, Superintendent (AR)

CORAM: S S Garg, Member (J)

P Anjani Kumar, Member (T)

FINAL ORDER NO. 20352/2020

Per: P Anjani Kumar:

Brief facts of the case are that the appellants imported Squalene 80% under Advance Authorisation on 6-3-2018, with a pre-condition to Export Squalene 99% within a period of 18 months. Appellants claim that Squalene is used for manufacturing medicines especially in cancer treatment as a supplementary drug for increasing the efficiency of the Chemotherapy drug and to reduce the side effects and toxicity of the Chemo drugs. On a reference made by Customs as to whether the goods fall under the Category of Fats & Oils, Central Institute of Fisheries Technology (CIFT), vide their Test Certificate dated 6/4/2018, opined that the Consignment has to be classified under HS code 15042090, as against declared classification of 29012990. The consignment was seized by Customs and original Show Cause Notice was issued and confirmed by the Commissioner vide OIO dated 24-7- 2018, where in the impugned goods were confiscated for violation of conditions of Exim Policy. On an appeal preferred by the appellants, CESTAT, vide *Final Order No.21933-21934/2018 dated 27/12/2018*, remanded the issue back to the adjudicating authority for getting the goods retested at an institution having expertise in oceanography. However, on a similar order passed in respect of similarly placed importer i.e., M/s. Asha Biochem, department has filed a ROM in *appeal No. C/21347/2018-DB. This Bench vide Final Order No.21933-21934/201 dated 27/12/2018* has accepted the ROM and modified the order to get the test undertaken at such institution that has expertise. As no institute was available for testing the goods, as per oceanographic parameters, the samples were again sent to CIFT who re-confirmed the test results indicated by them earlier. Customs Department in order to re-confirm the findings, of CIFT, sent the samples to Customs House Laboratory, an NABL accredited laboratory, who also confirmed the findings of the CIFT. Consequently, Commissioner passed the OIO 09/2019-20 dated 23/7/2019, in de novo confirming the classification of imported goods under CTH 1504 2090. Hence, this appeal No. 20876/2019.

2. Learned counsel for the appellants submits that Squalene is Hydro Carbon, an Organic Compound, containing carbon and Hydrogen only. The chemical definition is C301450 with CAS No. 111-02-04. It belongs to a class of Organic Compounds called acyclic unsaturated hydrocarbons as per Journal of Squalene. Classifying Goods under Chapter 29,14S Code 29012990, the following test needs to be satisfied

- a. It has to be an Organic Compound
- b. It must require a separate chemical definition whether or not containing impurities.
- c. It has to be a Hydro Carbon
- d. It has to be Acyclic

e. It has to be unsaturated Being an Organic Compound, across the world, Squalene is traded under tariff HS code 29012990. He produced Exim data of Squalene and Tariff Classification by US national Commodity.

3. Learned counsel submits that HS code 15042090, deals with Fats and Oils (Journal on Fats & Oils) and their fractions, of fish other than liver oils. This HS code exclusively deals with crude Fats and Oils, which means the percentage of Fat, would be more than 90% and Oil must be in crude nature. On a perusal of HS code 2901 2990, it can be noticed that it deals with separate chemically defined acyclic hydrocarbon unsaturated. So to classify under HS Code 29012990 the Cargo needs to be a Hydro Carbon having high purity.

4. Learned counsel also submits that CESTAT vide order dated 24-7-2018, observed that the classification claimed by the Appellant is not contradicted so far and therefore the onus of disproving the same is on the Customs; Customs conceded that there is no dispute over the applicability of the claimed heading to the goods emerging for export; as per Advance authorization, the Appellant is required to Export is Squalene 99% and for the same Customs conceded that the required classification is 29012990; dominance of "Squalene" in the cargo imported is found beyond doubt; Department failed to prove conclusively the coverage under the heading they proposed; Since the Department failed to substantiate their claim, the heading/chapter proposed by the Importer /Appellant has to be allowed; Since the expiry date of the Cargo has not elapsed, the Department is allowed to have an analysis to find out whether the cargo is sourced from the marine origin; Appellant is at liberty to obtain a clarification from the licensing authorities of the eligibility to import Squalene oil even if of marine origin.

5. Learned counsel also submits that Customs issued a letter dated 15-3-2019 stating that they are unable to find any Institutions to do the required analysis. Container Freight Station (CFS) where the Customs detained the Cargo, vide letter dated 8-4-2019, reported that they were going to close down the unit and therefore the Appellant was directed to remove the Cargo without further delay. Customs notified the appellant on 28-5-2019 that they had conducted the analysis. In the said report, it is clearly indicated that the unsaponifiable matter in the impugned goods is 85.82%; Bureau of Indian Standards stipulates that for fish oil the Saponification value has to be in between 185-200 and the percentage of unsaponifiable matter percentage has to be 4%. From this, it is revealed that the Cargo is not Marine oil and it does not have the characteristics of the same.

6. Learned counsel also submits that the Appellant preferred Writ Petition No. 16986/2019 for compliance of Hon'ble Tribunal Order. Hon'ble High Court, vide interim order dated 15-7-2019, directed the Customs to pass an order within 3 days. Commissioner passed the impugned order on 23-7-2019. Commissioner passed the very same order which was already been interfered with by this Tribunal. High Court, vide order 1-8-2019, disposed of the Writ Petition, directing the DGFT to pass an order on the Application submitted by the Appellant and relegated the Appellant to

approach this Tribunal challenging the Order of the Commissioner. DGFT passed an order on 5-9-2019, specifying that Squalene Oil derived from any source needs to be classified under HS Code 2901.

7. Learned counsel further submits that Chapter 15 deals with Animal or Vegetable Fats and Oils and their Cleavage Products. Squalene being a Hydro Carbon cannot be classified under the said chapter. The Cargo imported is 82% Squalene which means the predominant elements available are only carbon and Hydrogen; therefore it cannot be classified under the heads of Oils and fats. As per the present analysis, it is reconfirmed that the Cargo is not oil and the parameters do not match with the requirements of oil and are matching with that of Squalene only. It can also be revealed by Indian Standards for fish oil the percentage of unsaponifiable has to be only 4% whereas in the present analysis it can be noticed that the same is 85.82% which itself categorically confirmed that the same is not Oil. Learned counsel submits that in view of the above, the impugned order may be set aside.

8. Learned Authorised Representative, appearing for the revenue, reiterates the findings of OIO and submits that the Letter, from DGFT dated 5/9/2019, submitted by the appellants during hearing, was addressed to M/s Asha Biochem (not the appellant). DGFT clarification about the HS code of Squalene is not supported with any technical or legal grounds. Further, it contradicts appellant's claim that the imported item is not "oil", as the said letter itself mentions the item as "Squalene oil". The classification arrived by Customs department is based on the physical examination of the product at the time of import and subsequent test report issued by a Government approved accredit laboratory viz. CIFT (Central Institute of Fisheries Technology), Cochin.

9. Learned Authorised Representative submits that the importer has declared the goods as "Acyclic Hydrocarbon Unsaturated Squalene 80%" and classified the same under CTH 2901 29 90 while filing import documents (under Advance Authorisation License); when the goods were examined by officers of Customs, in the presence of Customs brokers, it was observed that the content is light yellow liquid, of bad fishy smell packed in metal drums; samples were drawn from the consignment and sent to the CIFT (Central Institute of Fisheries Technology), Cochin, who vide Certificate dated 6/4/2018, stated that the oil received for inspection falls under the category of "Fats and Oil and their fractions, of fish or marine mammals, whether or not refined, but not chemically modified"; based on the said test report, the goods under import were held to be classifiable under CTH 1504 20 90; However, when the importer did not agree with the said test report, a reference was made again to CIFT, who vide letter dated 4/5/2018, clarified that the sample analysis was done using Perkin Elmer Gas chromatograph FID equipped with a column specific for the analysis of fatty acids and hydrocarbons present in oils.

10. Learned Authorised Representative submits that consequent to CESTAT, vide *final Order, No.21933-21934/2018 dated 27/12/2018*, directed for re-testing the item in an institution having expertise in oceanography; as no institute was available for testing the goods as per oceanographic parameters, the samples were sent again to CIFT, who confirmed the test results indicated by them earlier; the said report was reconfirmed by Customs laboratory; Consequently, the impugned order was passed classifying the of imported goods under CTH 1504 2090; Commissioner gave valid reasons for the same at Paras 25 and 26.

11. Learned Authorised Representative submits that in terms of ITC (HS), 2017 SCHEDULE 1 – Import Policy the goods falling under Exim Code (corresponding to CTH) 1504 20 90 are categorised under "prohibited" goods for import. Notes to ITC (HS), 2017 Schedule -1, Import policy, in respect of Chapter 29 (Organic chemicals), at para 2 (a) specify that the Chapter does not cover Goods of heading 1504 or crude glycerol of heading 1520; Therefore, under Heading 29, there is a specific exclusion of goods covered under heading 1504; hence it appears that the appellant's attempt

to classify the goods of heading 1504 under chapter 29 is just to avoid the prohibition clause specified in the import policy. As per Para 4.18 of Foreign Trade Policy 2015-20, no export or import of an item shall be allowed under Advance Authorisation / DFIA if the item is prohibited for exports or imports respectively. DGFT, vide Policy Circular No. 22 (RE-2008)/2004-2009 dated 18th July'2008, clarified to the effect that the ITC HS code indicated in DGFT license or any correspondence is always subject to the outcome of the examination of cargo/shipping documents by the proper officers of Customs department. Hence, Customs department is the final authority to decide on the classification of imported goods.

12. Learned Authorised Representative submits that since the CIFT and Customs Laboratory, which are an accredited lab recognised by Government, confirmed the reports, the report will have to form the basis for determination of classification of imported goods as held in

(i) *CCE vs. BHEL reported vide 2018(10) GSTL 3 (SC)*

(ii) *SKOL Breweries Ltd vs. CCE, Mumbai-II: 2017 (7) GSTL 102 (Tri-Mumbai)*

13. Heard both sides and perused the records of the case. The dispute that requires to be resolved in the instant case is the classification of squalene imported by the appellants whether under CTSN 15042090 (as claimed by the Department) or CTSN 29012990 (as claimed by the appellants). A look at the competing headings would throw some light on the issue. Chapter 15 of the Customs Tariff deals with animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes. Heading 150420 is as follows:

1504	FATS AND OILS AND THEIR FRACTIONS, OF FISH OR MARINE MAMMALS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED
1504 10	- Fish liver oils and their fractions
1504 10 10	--- Cod liver oil --- Other
1504 10 91	---- Squid liver oil
1504 10 99	---- Other
1504 20	-Fats and oils and their fractions of fish, other than liver oils
1504 20 10	--- Fish body oil
1504 20 20	--- Fish lipid oil
1504 20 30	--- Sperm oil
1504 20 90	--- Other
1504 30 00	-Fats and oils and their fractions, of marine mammals

As per ITC (HS), 2017 SCHEDULE 1 – IMPORT POLICY the goods falling under Exim Code (corresponding to CTH) 1504 20 90 are categorised under "prohibited" goods for import.

13.1. Chapter 29 of Customs Tariff covers organic chemicals; Note 1 (a) to the Chapter envisages that except where the context otherwise requires, the headings of this chapter applies only to (a) separate chemically refined organic compounds, whether or not containing impurities. Heading 2901 covers goods as follows:

	I.-HYDROCARBONS AND THEIR HALOGENATED, SULPHONATED, NITRATED OR NITROSATED DERIVATIVES
2901	ACYCLIC HYDROCARBONS
2901 10 00	-saturated -Unsaturated

2901 21 00	--Ethylene
2901 22 00	--Propene (propylene)
2901 23 00	--Butene (butylene) and isomers thereof
2901 24 00	--Buta-1,3-diene and isoprene
2901 29	--Other
2901 29 10	---Acetylene, whether or not in dissolved condition
2901 29 20	---Heptene (Heptylene)
2901 29 90	---Other

As per Chapter Note 2 (a) goods of heading 1504 or crude glycerol of heading 1520 is not covered in this chapter. Ongoing through the relevant Notes under Chapter 29, it appears that Chapter covers organic chemicals. The appellants claimed classification under 29012990 as applicable to acyclic hydrocarbons.

14. Regarding the claim of the appellants that CESTAT vide Orders cited above has observed as follows:

"8. It cannot but be noticed that the classification claimed by the appellants under the heading of 'unsaturated acyclic hydrocarbon other than ethylene, propylene, butylene, butadiene, acetylene or heptene', is of too broad a spectrum to gain approval without reference to the General Interpretative Rules. It appears to have stemmed from the chapter title, molecular composition and the principle of dominating constituent. It is clear from rule 1 of General Interpretative Rules, which discards titles as irrelevant to classification that every organic chemical need not necessarily find placement in the said chapter unless in conformity with the appropriate heading and sub-heading. As the specific descriptions within the heading 'acyclic hydrocarbon', admittedly, do not find direct fitment for the imported goods, the dominance principle is resorted to by Learned Counsel for appellants. The dominance principle in rule of General Interpretative Rules applies appropriately to classification of mixtures and, in the light of assertion of Learned Counsel that the content, other than 'squalene', in the imported goods are impurities, the claim for application thereof is self-defeating. Even if the claim of the composition is to be considered on its own, the scheme of the First Schedule will have to be examined.

9. Other than with reference to specified headings or descriptions in note 1(e), which need not necessarily be chemically defined, and goods specifically excluded, the headings in chapter 29 of First Schedule to Customs Tariff Act, 1975 are intended for 'separately defined organic compounds', whether or not containing impurities. Correspondingly, there are contra exclusions of 'separately defined organic compounds' in other chapters implying that conflict of choice between a specific heading in another chapter and in this chapter, the goods are, inevitably, to be classified in chapter 29. On the other hand, notes in chapter 15 of First Schedule to Customs Tariff Act, 1975, which Revenue considers to be more apt, is devoid of such a restrictive condition. Hence, a conflict between a specific heading in chapter 15 and chapter 29 would be resolved by classifying under the more specific heading of the two. Therein lies the dilemma for the claim of the appellant for coverage is under a residual entry that is handicapped thus"

15. Going by the above order of CESTAT, the conflict between a specific heading in Chapter 15 and Chapter 29 would be resolved by classifying the same under more specific heading of the two. We find that Learned AR for the Revenue contends that in view of the specific exclusion of goods under heading 1504, the goods cannot be classified under Chapter 29. To

arrive at a proper classification of the goods, one needs to consider the characteristics of the product; technical literature available with the product and the test reports.

15.1 Learned Commissioner has observed in his OIO that the Product Data Sheet available in the Importer's website i.e. arbeefishoil.com shows that the importers were pioneer in the business of fish oil; squalene is one of their products and that the source of squalene was deep sea Shark liver oil. The chemical reports issued by CIFT and Customs Laboratory indicated the impugned product to be of marine origin. It is also confirmed by CIFT that the sample analysis was done using Perkin Elmer Gas Chromatograph FID equipped with a column specific for the analysis of fatty acids and hydrocarbons in oils. Therefore, it was confirmed that the sample was of marine origin and rich in Squalene. We find that whereas heading 1504 covers fats and oils of fish or marine mammals 2901 covers acyclic hydrocarbons. We find that 2901 refers to saturated and unsaturated acyclic hydrocarbons like ethylene, propene, butene, acetylene, heptane etc. which are organic compounds. Going by the literature available and the chemical reports, the impugned products is of marine origin and therefore can appropriately be classified under 1504 rather than 2901.

15.2 The appellants have taken a plea that their product contains unsaponifiable matter in the range of 85% and therefore, it cannot be classified under 1504 as oil. The Learned Adjudicating Authority observed that the dispute is about the classification and origin of goods that are imported and not export goods. CIFT reported that the impugned goods fish oil rich in Squalene and therefore, goods cannot be considered as Squalene. We find that there is no reference to the percentage of unsaponifiable matter with respect to the classification under heading 1504. Even going by the principles of 'ejusdem generis' or 'Noscitur a sociis', the impugned goods being of animal origin are rightly classifiable under Chapter 1504.

16. It has been also pointed out that the classification of the goods should not be based on the test reports. Though, we accept this in principle, we find that the test reports give a fair idea of the nature and characteristics of the product. In the instant case, CIFT and Customs Laboratories have reported that the impugned product is fish oil. Therefore, we find that it cannot be classified under Chapter 2901 as saturated or unsaturated acyclic hydrocarbons along with ethylene, propene, butene, acetylene, heptene etc. It is of a great common sense that any organic matter would contain hydrocarbons and for that very reason, it cannot be classified under the heading applicable to hydrocarbons. If such an approach is taken entire Customs Tariff as far as it deals with living beings, goods or plant or animal origin would become redundant. Moreover, there is no reason as to why a report given by a professional institute such as CIFT and accredited laboratory such as Customs Laboratory. We find that the learned Adjudicating Authority has relied upon the case of *SKOL Breweries Ltd. 2017 (7) GSTL 102 (Tri. Mum)* wherein it was held that expert opinion of independent body regarding the nature of the goods cannot be ignored. Therefore, we find that the report given by CIFT and Customs Laboratory cannot be ignored. The importers, on the other hand, did not produce any test report in their favour.

17. The importers argued that DGFT vide Letter dated 05.09.2019 addressed to M/s. Asha Biochem have clarified that the matter has been examined and it is informed that Squalene oil derived from any origin falls under HS Code 2901. The Learned Authorized Representative argues that DGFT vide Policy Circular No. 22(RE-2008)/2004-2009 dated 18th July 2008 clarified that during examination of cargo/shipping documents, Customs can determine the correct ITC (HS) code number of the items of the import and allow clearance of assessment or ask the importer to get the ITS (HS) code number corrected from the concerned regional authority of DGFT. We find that classification of imported goods is the prerogative of

the assessing officer or say Customs who are duty-bound to arrive at the correct classification of the goods depending on the Customs Tariff Act and the HSN. The same has been held in *Pheonix International Ltd. vs. CC, Nhava Sheva: 1999 (114) ELT 500 (Tribunal)*. Tribunal observed that "In the matters of classification, it should not be doubted that the last word is with the Customs. This preposition is well set out in the Delhi High Court judgment in the case of *Export Apparels Products Ltd. vs. UOI: 1997 (91) ELT 307*." We find that in the case of *Exports Apparel Group Ltd. vs. UOI: 1997 (91) ELT 307 (Del.)*, the Tribunal held that "After examining all these provisions, we are of the view that the stand taken by the respondents is correct. It is for the Customs Authorities to examine if the goods had been imported in terms of the licence, and what duty of Customs, if any, is leviable thereon. If aggrieved, the petitioner has remedy under the Act by way of appeal. In this view of the matter also, we do not wish to go into the merit of the controversy as any observation made by us may prejudice the case of either of the parties. We will, therefore, dismiss the petition." In view of the above, we find that the clarification issued by DGFT is of no consequence. Moreover, in the present issue, the clarification is not even issued in the case of the appellants.

18. We also find that the appellants have taken the plea that they have been importing the impugned products over the years and the classification of the same was being accepted by the Customs authorities. We find that there is no estoppel in revenue matters and Customs are not bound by any contradiction taken in the past owing to different set of circumstances and facts of the case. More so, as observed by this Tribunal in the order referred to above, it behooves the administration of India, as a responsible constituent of the polity of nations comprising of responsible humanity, not to be a willing accessory in the reprehensible slaughter of endangered species. In the context of this prohibition, the geographical origin, or the ultimate destination, of the goods is not relevant; irrespective of the source and consumption, the taint of inhumanity, and so promulgated by law, should not be allowed stain the public record of the country. Neither can the precedence of the past justify the continuance of a statutorily criminalized deed. We find, however, that based on the submissions of established practice penalty cannot be imposed just because Customs authorities have taken steps to correct the classification. During the course of arguments, learned counsel for the appellants, have requested that in case it is held that the goods are not permissible to be imported, the same may be allowed to be re-exported. We find that such a request needs to be made before the proper authority who will take a decision in accordance with law and facts of the case.

19. In view of the above, the appeal is allowed to the extent of setting aside the penalty. The impugned order is upheld in all other respects.

(Order was pronounced in Open Court on 03.06.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, BANGALORE**

Appeal No. C/452/2009-DB

Arising out of Order-in-Original No. 41/09, Dated: 03.04.2009
Passed by Commissioner of Customs, Cochin

C/453/2009-DB

Arising out of Order-in-Original No. 42/09, Dated: 03.04.2009
Passed by Commissioner of Customs, Cochin

Date of Hearing: 26.07.2019

Date of Decision: 04.11.2019

**M/s PARISONS AGROTECH PVT LTD
6/1183, CHEROOTTY ROAD, CALICUT**

**M/s PARISONS FOODS PVT LTD
6/1183, CHEROOTTY ROAD, CALICUT**

Vs

**COMMISSIONER OF CUSTOMS, COCHIN-CUS
CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN KERALA - 682009**

Appeal No. C/446/2009-DB

Arising out of Order-in-Original No. 41/09, Dated: 03.04.2009
Passed by Commissioner of Customs, Cochin

C/447/2009-DB

Arising out of Order-in-Original No. 42/09, Dated: 03.04.2009
Passed by Commissioner of Customs, Cochin

**COMMISSIONER OF CUSTOMS, COCHIN-CUS
CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN KERALA - 682009**

Vs

**M/s PARISONS AGROTECH PVT LTD
6/1183, CHEROOTTY ROAD, CALICUT**

**M/s PARISONS FOODS PVT LTD
6/1183, CHEROOTTY ROAD, CALICUT**

Appellant Rep by: Mr Kuriyan Thomas, Adv.

Respondent Rep by: Mr S Chandramohan, Commissioner (AR)

CORAM: S S Garg, Member (J)

P Anjani Kumar, Member (T)

FINAL ORDER NOS. 20969-20972/2019

Per: P Anjani Kumar:

DGFT vide Notification No 39 (RE-2007) /2004-2009 dated 16-10-2007 imposed a condition to the effect that import of palm oil and its fractions, whether or not refined, but not chemically modified, would not be imported at the port of Cochin. The appellants challenged the constitutional validity of the Notification before Hon'ble High Court of Kerala; vide Writ Petition No 31397/2007. Hon'ble High Court vide interim order dated 25-10-2007 stayed the operation of the Notification; vide order dated 20-11-2007, permitted the discharge of one consignment of appellant at Cochin Port. And vide order dated 01-12-2007 ordered that the benefit of order 25-10-2007 would be available to all vessels from

which cargo was being discharged on or before 20-11-2007. Hon'ble High Court However, dismissed the writ petition vide order dated 15-2-2008. Meanwhile, one of the appellants, M/s Parisons Agrotech imported 2999.804 MT of RBD palmolein, which house warehoused under 3 bills of entry and cleared provisionally later under various ex-bond bills of entry. The other appellant M/s Parisons Foods P Ltd imported 1000 MT of BD Palmolein and 2969.522 MT of crude palm oil, warehoused the same and later cleared provisionally under various ex-bond bills of entry. The appellants were issued Show Cause Notices dated 17-12-2008 and 6-11-2008 respectively seeking to confiscate the imported cargo under section 111(d) of the Customs Act, 1962 and seeking to impose penalty under Section 112(a) *ibid*. Commissioner of Customs, Cochin vide order No 41/2009 dated 27-03-2009 and 42/2009 dated 3.4.2009. Commissioner has imposed a penalty of Rs 1.40 Cr and 1.75 Cr respectively on the appellants. However, the Commissioner has not imposed any fine in lieu of confiscation on the grounds that the goods were not physically available for confiscation. M/s Parisons Agrotech, vide appeal C/452/2007 and M/s Parisons Foods P Ltd, vide appeal C/453/2007, are against the imposition of penalty under Section 112(a) of Customs Act, 1962. Revenue are in appeal, vide appeals C/446/2007 and C/447/2007, against non-imposition of fine in lieu of confiscation.

2. The learned counsel for appellants submits that the imports were effected when the stay granted by Hon'ble High Court of Kerala was in operation; the Notification was not in force; further the High Court has specifically permitted the appellants to discharge cargo; as long as the stay was in operation it cannot be deemed the appellants have imported in contravention of any prohibition; penalty should be used for deterrence but not for retribution. He submits that the appellants have entered in to agreements with buyers prior to the coming in force of the prohibition. The goods were originally procured by the sister concerns like M/s Parisons Roller Flour Mills Pvt Ltd, M/s Parisons Exports Inc and M/s Parisons Estates and Industries Pvt Ltd. Before sale of goods to the appellants, the sale of goods was an issue between their sister concerns and M/s Intercontinental Oils & Fats Ltd and M/s Adani Wilmar Trading Pvt Ltd. All the contacts being in transition period before the prohibition came in to effect; the appellants cannot be accused of contravention of any provisions. As per Exim Policy, Paragraph 1.5, import of goods which are 'free' is subsequently changed to 'Prohibited' or 'Restricted', the cases where the import has already commenced would be considered to be 'free'; evidence of commencement would be ascertained by evidence such as opening of irrevocable letter of credit. In the instant case, facts go on to suggest that the import had already commenced and thus consignments are saved by the provisions of Para 1.5 of FTP. Learned Counsel submits that the bona fide conduct of the importer needs to be considered before imposing penalty under Section 112 of the Customs Act; when goods are freely importable no confiscation and penalty are justified. He relies upon the following cases.

(i). *the order of Kerala High Court in WP 31397/2007 filed by the appellants and affirmation of the same by Apex Court (2015) 9 SCC 657*

(ii). *M/s Beopar Sahayak (P) Ltd Vs Vishwanath & Others (1987) 3 SCC 693*

(iii). *O.T.Enasu Vs UOI 2012(27) STR 206 (Ker)*

(iii). *1990 (47) ELT 213 (SC)*

(iv). *Akbar Badruddin Jiواني Vs CC 1990(47) ELT 161 (SC)*

3. Learned Commissioner AR, appearing on behalf of Revenue presented a detailed argument and submitted that under the legal background, the impugned goods were provisionally cleared through Cochin Port with the support of Bond executed by the Appellants. As the Hon'ble High Court dismissed the Writ petition of the Appellants on 15.02.2008, Department initiated action to confiscate the impugned goods and Adjudicating Authority imposed penalties on the importers after observing the

Principles of Natural justice. The claim of the appellants is that Hon'ble High Court of Kerala issued Interim Stay Order (with modification & clarification) dated 25.10.2007, 20.11.2007 & 01.12.2007 and as such the Notification would be deemed to be not in operation during the relevant period and that when the Stay was in force, it cannot be stated that the imports made by them were contrary to the prohibition imposed under Customs Act, 1962. He submits that in case the Hon'ble High Court quashed the DGFT Notification, Appellants can very well claim that the DGFT Notification is not in force; when the impugned Notification is Stayed by issuing "Interim Stay Order", it only meant that "due actions to be taken", under Sections 111(d), 125, 112(a) under Customs Act, 1962, are only suspended/withheld temporarily till the core issue in the Writ is decided on merit. He submits that stay of operation of any Notification does not wipe out the very existence such statutory Notification; Hon'ble Supreme Court in the case of *Shree Chamundi Mopeds Ltd Vs Church of South India Trust Association, Madras 1992 (3) S.C.C.1*, held that

"While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence."

3.1. He further submits that Hon'ble Apex Court, in the case of *Indian Council for Enviro-Legal Action V UOI (2011)8 SCC 161*, summarised (in para 223) the legal position on undeserved advantage by observing that

"The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party. "

3.2. He also submits that Hon'ble Apex Court in the case of *Kalabharati Advertising Vs Hemant Vimalnath Narichania & others (2010) 9 SCC 437*, observed (Para 15) as under:

"No litigant can derive any benefit from the mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the court."

He submits that by applying the ratio of the above judgement the instant Interim Stay Order was merged with the final Writ Order and thereby the Interim Order was nullified. Consequently, the impugned "Interim Stay Order" was non est in the eyes of law by applying the 'Doctrine of Merger' Principle.

3.3. Learned Commissioner, AR further submits that in case of *M/s Kanoria Chemicals Vs U.P. State Electricity Board* (1997) 5 SCC 772, Hon'ble Apex Court observed that

"It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim order of the court. Any other view would result in the act or order of the court prejudicing a party [Board in this case] for no fault of its and would also mean rewarding a writ petitioner in spite of his failure."

Learned Commissioner, AR, submits that when the Interim Stay was in operation, no SCNs or OIOs have been issued to the Appellant referring the "Port Prohibition" on the impugned import; the due action has been initiated only after the final disposal of the subject Writ Petition; therefore, the claim of the Appellant that the impugned DGFT Notification cannot be enforced on the subject import is legally not sustainable.

3.4. Placing reliance on the Principle of Estoppel, Learned AR submits that in the instant case, during the stay impugned imported goods are provisionally cleared on the basis of the undertaking of the Appellant, to produce the judgement of HC in their Writ and the consequent compliance. Under the circumstances, the 'principle of estoppel' also prevents the appellant to contest the legal action taken by the Customs Department subsequent to the final disposal of their Writ Petition. The appellant has taken contradictory Stand in as much as on the one hand they argue that the interim Stay Order was in operation and on the other they have cleared the goods provisionally by furnishing a Bond. The appellants executed Bonds for suitable value and agreed for provisional assessment pending production of final Orders from Hon'ble High Court and to pay any Penalty and fine that may be adjudged in lieu of confiscation of the said goods. As per the Doctrine of Promissory Estoppel, once a party, by his words or conduct makes a legally binding promise to another party, if the other party has acted upon these words or conduct, the one who made the promise or gave assurance cannot revert back to his previous position. Hon'ble Supreme Court in the case of *Rajasthan State Industrial Development and Investment Corporation & Anr Vs Diamond and Gem Development Corporation Ltd & Anr.*, AIR 2013 SC 1241 observed that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order.

He submits that in this background of provisional clearance of the impugned "palm oil" under bond and the ratio of cases cited above, the plea of non-existence of the impugned Notification is liable for dismissal.

3.5. Learned Commissioner, AR submits that in the instant case, the impugned Palm Oil were imported by the importer through the prohibited PORT against the DGFT Notification and thus it is established that the impugned Palm Oil were liable for confiscation. Hence, the plea of the importer that penalty should be confined only to willful acts of omission and commission in contravention of the provisions of an enactment cannot be accepted. Penalty must be imposed on a person who acts in conscious disregard of statutory obligations and suppresses material facts. Though existence of "mens rea" is essential with reference to penal provisions of Section 112(b) (knows or reason to believe), 114A (willful misstatement) & 114AA (knowingly or intentionally) of the Customs Act, 1962, there is no such requirement of the element of "Mens Rea" / "Mala fide" for imposition of penalty under Section 112(a) of the Customs Act, 1962. Penalty can be imposed, only when it is established that the goods imported are "liable to confiscation" under Section 111 of Customs Act, 1962. He relies upon

(i). *M/s Oceanic Shipping Agency P Ltd Vs CC* 1996 (82) ELT 57 (Para.10)

(ii). *M/s Panorama V CC* 2001 (130) ELT 877 (Para 5)

3.6. Learned Commissioner, AR submits further that the Adjudicating Authority has taken a stand that the impugned goods were 'not available' and hence could not be confiscated, though they are liable to confiscation. This stand is totally against the legal position laid by Hon'ble Supreme Court, High Courts and Tribunal; the impugned goods were cleared under bond and therefore, can be confiscated even in the absence their physical availability. He relies upon the following cases.

(i). *Weston Components Ltd Vs CC 2000(115) ELT 278(SC)*

(ii). *CCE Vs Raja Impex 2009 (229) ELT 185 (HC-DB, P&J)*

(iii). *Shiv Kripa Ispat P Ltd Vs CCE 2009 (235) ELT 623 (T-LB)* (iv). *CCE Vs Mithran 2017 (347) ELT 603 (HC-DB, Madras)*

(v). *CCE Vs Shilpa Trading Company 2014 (309) ELT 641 (HC-DB, Kar)* (it was held that redemption fine was imposable even if Bond/ BG not in force).

(vi). *CCE Vs Kay Bee Tax Spin Ltd 2017 (349) ELT 451 (HC-DB, Guj)*

(vii). *Jain Exports Ltd Vs UOI 1993(66) ELT 537 (SC)*

(it was held that no waiver of RF even importer acted in good faith).

3.7. With regards to the claim of the appellants that the agreements/contracts for sale or High sea sale were entered in to before the prohibition came in to force, the learned Commissioner, AR submits that As per FTP 1.5 , and DGFT Circular, Irrevocable Commercial Letter of Credit is the evidence to avail the Transitional Arrangements; DGFT Notification and circular 20/RE-2007)/2004-2009 dated 13th August 2007 and DGFT Policy Circular No:**4(RE-2007)/2004-2009** dated 16th August 2007 to confirm the greater sanctity and assurance regarding the contract and to avoid back dated contracted documents under Transitional Arrangements. He further submits that there are discrepancies and infirmities in the contracts/ letters submitted by them as under.

- Port was mentioned Cochin / Beypore

- There were no signatures of either of the parties

- The referred HSS Contract dt 7.6.2004 between MMTC & M/s Parisons Foods for the import of 1, 20,000 Tonnes of RBD was valid for One year (Extended up to 6th June 2007). This cannot be relied upon. "Indent for Import" containing Quantity, Delivery Schedule, Port of Discharge etc of Parisons not produced before the Adjudicating Authority

- Concluding Part of "Sales Contract" ..."Please confirm that this sales contract correctly set forth the terms of the agreement by returning an executed copy by facsimile"...." Indicates that "Sales contract are not concluded at this stage, in the absence of any further documentary proof

- They are not in the nature of sales contract.

- Addressee is mentioned as M/s Parisons Exports Inc, India, Indonesia

- Sl No.7 of HSS : Open General License under Import Export Policy 1997-2002 (Non-Existing Policy) It should be FTP : 2004-2009 considering B/L date 2.11.2007; Date of Purchase of Stamp Paper is not available in the Copy produced

- As per this Sales Terms of Annex J, the Shipment is to be effected during 1st October to 31st October 2007. Whereas, the impugned Bill of Lading referred in the HSS is dated 2.11.2007

- As per condition 8 of Sl. No. 18 of Annex J, the Discharge Port is actually meant for Beypore Port (10 km from Calicut, 195 km from Kochi), where no ban is imposed by the DGFT Notification during the material period.

(*Different discrepancies in different documents; summarised for ease of reference)

He submits that in view of the submissions and legal position, the appeals of the appellants are liable to be rejected and the appeals filed by Revenue are liable to be allowed.

4. Heard both sides and perused the records of the case. The brief issue that requires consideration in this case is as to whether the appellants have violated the prohibition imposed by DGFT Notification No. 39/RE2007 dated 06.10.2007; as to whether, they are liable for penalty and as to whether the Commissioner should have imposed redemption fine on the goods imported by them and cleared provisionally. Brief facts of the case are given in detail as above. Therefore, we are not repeating the same. The main contention of the appellants is two-fold. The appellants contended that in view of the Stay granted, by the Hon'ble High Court of Kerala, on the operation of Notification cited above, they have not violated any prohibition and that the agreements for sale of RBD Palm Oil or Palmolein have taken place when the prohibition was not even notified and therefore, in terms of Para 1.5 of the provisions of Foreign Trade Policy, they have not violated any prohibition imposed on the import of impugned goods. The defence of Department is that the Final Order of the Hon'ble High Court of Kerala dismissed the Writ Petition filed by the appellants thereby the position existing before the grant of Stay stands and thus it should be held that the appellants have imported impugned goods contrary to the prohibition in place. The Department also contends that the appellants have not submitted any concrete proof that the conditions of Para 1.5 of the FTP have been satisfied so as to be eligible for the imports despite the prohibitions.

5. We find that that the appellants filed a Writ Petition before the Hon'ble High Court of Kerala challenging the constitutional validity of the Notification No. 39(RE-2007)/2004-2009 Dated 16.10.2007. Hon'ble High Court was pleased to grant an Interim Stay vide Order dated 25.10.2007. Later vide dated 20.11.2017. Hon'ble High Court was pleased to modify the Interim Order and to permit one consignment of the appellants to be discharged at Kochi Port. Hon'ble High Court further ordered vide Order dated 01.12.2007 that the benefit of the order dated 25.10.2007 will be applicable to all vessels from which the goods were being discharged on or before 20.11.2007. Finally, the Hon'ble High Court of Kerala dismissed the Writ Petition filed by the appellants vide its Order dated 15.02.2008. Meanwhile, M/s Parisons Foods Pvt. Ltd. have imported RBD Palmolein and crude Palm oil totally valued at Rs.13.41 crore (Tariff Value Rs.7.41 crores) and M/s Parison Agrotech imported RBD Palmolein valued at Rs.10.43 crores (Tariff Value Rs.5.78 crores).

6. Learned Commissioner AR submits that the appellants have misconceived the legal position on Interim Stay Order; Hon'ble High Court of Kerala has only stayed the operation but have not set aside the Notification. That means that Hon'ble High Court has stayed only the due action to be taken by the Department in respect of the impugned goods. Relying on Hon'ble Supreme Court decision in the case of Sh. Chamundi Mopeds (Supra). He submits that quashing of an order results in the restoration of position as it stood on the date of the passing of the order which has been quashed; the stay of operation of an order does not, however lead to such a result; it only means that the order which has been stayed would not be operative from the date of the passing of the Stay Order and it does mean that the said order has been wiped out from existence. He also submits that Hon'ble Supreme Court in the case of Indian Counsel for Enviro Legal Action (Supra) observed that when a party applies and gets a stay or injunction from the Court, it is always at the risk and responsibility of the party applying. Learned Commissioner arguing on the principle of merger and unjust enrichment submits threat the case is ultimately dismissed, the Interim Order stands nullified automatically; a Party cannot be allowed to take any benefit of his wrongs by getting an Interim Order and later blame it on the Court.

7. We find that Hon'ble Apex Court in the case of M/s Kanoria Chemicals (Supra) observed that:

"It is equally well settled that an Order of Stay granted pending disposal of a Writ Petition of Suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and it is the duty of the Court in such a case to put the parties in the same position they would have been put but for the Interim Order of the Court."

We find that the Hon'ble Apex Court has made the position very clear in the matter. With the Hon'ble Court of Kerala quashing the Writ Petition vide Order dated 15.02.2008, the position that was existing before the Interim Order dated 25.10.2007 prevails. That means to say that the prohibition imposed vide Notification cited above exists. Therefore, we have to hold that the appellants have imported the impugned goods contrary to the DGFT Notification thereby rendered the goods liable for confiscation. We also find that the appellants have submitted a bond at the time of provisional release inter alia stating that the proper officer has agreed to allow clearance of the goods subject to the importer production within 6 months from the date hereof a valid license to cover the import of the goods mentioned in the Schedule and the Final Orders from the Hon'ble High Court of Kerala regarding importability of the item through Cochin Port. This being the position the appellants cannot claim that the imports have taken place during the period when prohibition was not in place, in view of the Interim Order. We find that as submitted by the Learned Commissioner AR, bond executed by the appellants at the time of provisional release provides for payment of any penalty and fine in lieu of the confiscation. Having bound themselves in such a manner, the appellants cannot take shelter under the High Court's Interim Order, where the Hon'ble High Court has dismissed the Writ Petition.

8. The second contention of the appellants was that the consignments were contracted before the imposition of prohibition and in terms of Para 1.5 of the Foreign Trade Policy the impugned imports are excluded by the restriction imposed by the Notification cited supra. We find that Para 1.5 of Foreign Trade Policy reads as under:

"1.5 In case an export or import that is permitted freely under this Policy is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted notwithstanding such restriction or regulation, unless otherwise stipulated, provided that the shipment of the export or import is made within the original validity of an irrevocable letter of credit established before the date of imposition of such restriction."

Ongoing through the records of the case, we find that the appellants have submitted a few disconnected documents which look like sale deeds, contracts, agreements etc., however as pointed out by the Learned Commissioner AR, the documents are full of inadequacies making the authenticity of the documents subject to doubt. It is also not coming forth as to which of these documents pertain to the impugned imports. Moreover, we do not find any conclusive agreements indicating that an irrevocable letter of credit has been opened or has been enforced at the time of shipment. We find that Learned Commissioner has also observed in the impugned OIO that the appellants failed to produce the relevant letters of credit and that the transitional arrangements under Para 1.5 of Foreign Trade Policy 2004-09 will be applicable only if the irrevocable letters of credit are established before the date of issue of Notification imposing restrictions. Therefore, we find that the appellant's argument fails on both counts and we find that they have imported the impugned goods in violation of the prohibition imposed by DGFT Notification cited supra and thus, they have rendered the impugned goods liable for confiscation and rendered themselves liable for penalty.

9. The appellants pleaded that they have imported the impugned goods during the operation of Stay in view of the Hon'ble High Court of Kerala and therefore no mens rea can be imputed and consequently, no penalty can be imposed on them. We find that the Revenue has successfully

demonstrated that unlike penalty under Sections 112(b), 114A and 114AA of Customs Act, 1962, mens rea is not essential criteria for imposing penalty under Section 112(a) of the Customs Act. We find that the appellants have not only imported the impugned goods in violation of the prohibition imposed but also have attempted to misuse the legal provisions available under the Writ jurisdiction of Hon'ble High Court. With the dismissal of the Writ Petition, the Hon'ble High Court has restored the position which was existed before. Moreover, in view of the bond submitted by the appellants as the time of provisional release, they have bound themselves to produce a proper order from the Hon'ble High Court failing which they have bound themselves to pay fine and penalties as applicable. In view of the above, we find that the imposition of penalties in the impugned order is legal, proper and justified. Therefore, the appeals of the appellants do not survive and are liable for rejection.

10. Coming to the departmental appeals, the appeals are made for imposition of redemption fine. As per our discussion above, the goods are liable for confiscation under Section 111(d) of the Customs Act, 1962. The goods were released on a bond provisionally. Therefore, Learned Commissioner cannot opine that the goods are not available for confiscation. Going by the ratio of the case laws submitted by the Learned AR, we find that Learned Commissioner has erred in not imposing redemption fine. Accordingly, we find that the appeals filed by Revenue are maintainable and suitable redemption fine in lieu of confiscation is imposable on the appellants. Looking into the circumstances of the case and the long litigation undergone by the appellants, we find that redemption fine could be limited to around 10% of the Tariff Value of the imports.

11. In the result, we dismiss the appeals No. C/452/2009 & C/453/2009 filed by the appellants. We allow the appeals of Revenue and impose redemption fine of Rs.70 Lakhs on M/s Parison Foods Pvt. Ltd. and Rs.50 Lakhs on M/s Parison Agrotech.

(Order was pronounced in Open Court on 04.11.2019)

IN THE CESTAT, SOUTH ZONAL BENCH, BANGALORE

[COURT NO. I]

Shri S.S. Garg, Member (J) and P. Anjani Kumar, Member (T)

LIBERTY OIL MILLS LTD.

Versus

COMMISSIONER OF CUSTOMS, COCHIN

Final Order Nos. A/20349-20350/2020, dated 3-6-2020 in Appeal
Nos. C/362 & 392/2009

REPRESENTED BY :Shri Jitendra Motwani, Advocate, for the
Appellant.

Shri S. Chandramohan, Commissioner (AR), for the Respondent.

[Order per : P. Anjani Kumar, Member (T)]. - M/s. Liberty Oils Ltd., Thane have imported about 2000 MTs of RBD Palmolein and filed various Bills of Entry at the Port of Cochin. In terms of Notification No. 39(RE-2007)/2004-09, dated 16th October, 2007 import of Palm oil and its fractions was not permitted through Kochi Port. Hon'ble High Court of Kerala in Writ Petition No. 32705/2007 stayed the operation of the said Notification vide Order dated 5-11-2007. The Hon'ble High Court, however, vide judgment dated 15-2-2008 dismissed the writ petition. During the interregnum, Bills of Entry were provisionally assessed and the imported Palm oil was cleared for home consumption. A SCN was issued to M/s. Liberty Oils Ltd. seeking to confiscate 1999.695 MTs of RBD Palmolein and to impose penalty under Section 112 of Customs Act, 1962. The SCN was adjudicated wherein, vide Order dated 12-2-2009, Commissioner imposed a penalty of Rs 80 Lakhs and however, refrained from imposing redemption fine as the goods were already released. M/s. Liberty Oil filed Appeal No. C/362/2009 against the imposing of penalty and Revenue filed an Appeal C/392/2009 against non-imposition of redemption fine.

2. Learned Counsel for M/s. Liberty Oils Ltd. submits that a firm contract was established on 29-9-2007 whereas the import restriction was placed on 16-10-2007 and therefore, provisions relating to transition period are applicable and penalty cannot be imposed on them. He relies upon the following cases :

- *Viraj Impex Ltd.*, 2017 (346) E.L.T. 188 (Bom.) and 2004 (177) E.L.T. 960 (Tri.-Mumbai)
- *P.T. Impex*, 2015 (321) E.L.T. 38 (P&H) and 2014 (302) E.L.T. 154 (Tri.-Del.)
- *Shri Shakti Iron & Steel Berolling Mill v. CC, Kandla*, 2014 (304) E.L.T. 279 (Tri.-Ahmd.).

3. Commissioner, Authorized Representative argued at length touching several issues involved in the case. He argues that the observation, of the High Court in the *Viraj Impex* case that irrevocable letter of credit was not established by the petitioners but that by itself cannot be a ground to say that concluded contract which was entered into by the petitioners was not a genuine

contract, is not *ratio decidendi* as there is a statutory requirement by the Notification and the Notification was not set aside. He relies upon the observation of Hon'ble Supreme Court, in the case of *Oriental Insurance Company*, Civil Appeal No. 5209/2007, on the issue of applicability of precedent. The Apex Court observed as follows :

13. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.

14. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

15. The following words of Lord Denning in the matter of applying precedents have become *locus classicus* :

3.1 He submits that in the case of *Viraz Impex*, the contract was entered on 26-11-1998 and the restriction Notification No. 34 was issued on 10-12-1998 regarding the floor price of defective/secondary HR coils; the importer has requested the supplier on 15-12-1998 to cancel the contract, however, the supplier insisted the performance as they have in turn placed an order for purchase with another firm and went to the extent of threatening the importer with damages. Therefore, the *force majeure* of circumstances imports were affected. The facts of the case are different in the instant case and as per the contract; the importer could cancel the contract or move the contract to any other Port. Factually also, the very same importer was importing from other Ports like Goa, JNPT, Mumbai and Kandla. Therefore, Learned Commissioner argues that the ratio of the Hon'ble High Court decision in *Viraz Impex* is not applicable. Moreover, the instant case is after the pronouncement of the case under a different Notification and different set of circumstances. He submits that the law should be purposively and strictly construed as held by the Apex Court in the following cases :

- *Mafatlal Industries v. UOI*, [1997 \(89\) E.L.T. 247](#) (S.C.)
- *State of Jharkhand v. Ambay Cement*, (2005) 1 SCC 368 = [2004 \(178\) E.L.T. 55](#) (S.C.)
- *Kedarnath Jute Manufacturing Co. v. CTO, Calcutta*, (1965) 3 SCR 626.
- He submits that as there is no confusion in Notification No. 39 (RE-2007)/2004-09, dated 16-10-2007 and as the importer did not open an irrevocable commercial letter of credit, the import cannot be permitted.

4. Learned Commissioner further submits that with the pronouncement of Final Order by the Hon'ble High Court of Kerala in the subject writ petition, the Interim Stay granted by the Hon'ble Court is rendered *non est*. Moreover, Hon'ble High Court did not quash the Notification. Relying on the Apex Court decision in the case of *Shri Chamundi Moped Ltd. v. Church of South India Trust Association, Madras*, (1992) 3 SCC 1, he submits that *a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in restoration of the position as its stood on the date of passing of the order which has been quashed. The stay operation of an order does not, however, lead to such a*

result. It only means that the order which has been stayed would not operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. Learned Commissioner has also touched upon the principles of doctrine of merger and unjust enrichment and submits that with the issuance of Final Order by High Court, the stay is automatically vacated and the position before the issuance of the stay order is restored. Relying on the principle of promissory estoppel, he submits that the importer is bound by the conditions of the bond, he submitted a provisional release. One such condition was that Clause (C) that the importer pays to the President penalty and fine that may be adjusted in lieu of the confiscation of said goods mentioned in the Schedule for importation of goods. Relying upon the following case laws, Learned Commissioner submits that the adjudicating authority erred in finding that as the goods were not physically available, no redemption fine could be levied :

- *Weston Components Ltd. v. CC*, [2000 \(115\) E.L.T. 278](#) (S.C.)
- *CCE v. Raja Impex*, [2008 \(229\) E.L.T. 185](#)
- *Shiv Kripa Ispat P. Ltd. v. CCE*, [2009 \(235\) E.L.T. 623](#) (T-LB)
- *CCE v. Mithran*, [2017 \(347\) E.L.T. 603](#) (HC-DB, Madras)
- *CCE v. Shilpa Trading Company*, [2014 \(309\) E.L.T. 641](#) (HC-DB, Kar.)
- *CCE v. Kay Bee Tax Spin Ltd.*, [2017 \(349\) E.L.T. 451](#) (HC-DB, Guj.).

5. On hearing rival contentions, we find that the facts of the case are certainly different from the case referred by the importer. We find that the importer has not made out any case to show the compelling circumstances under which they could not either cancel the Contract or alter the Port of discharge. The Hon'ble High Court of Kerala has restored the position existing as on the date of import by quashing the writ petition. Therefore, we find that the importer was required to comply with the Notification dated 16-10-2007, inasmuch as they could not produce an irrevocable commercial letter of credit as required by the Notification. Therefore, we find that the impugned goods are liable for confiscation in terms of Section 111(d) of Customs Act, 1962. However, looking into the long legal process undergone by the appellants and looking into the circumstances of the case, we are inclined to reduce the penalty to Rs. 38 Lakhs from Rs. 80 Lakhs. Appeal No. C/362/2009 is disposed of accordingly. In respect of Departmental Appeal No. C/392/2009, we find that there is force in the argument of the department. Accordingly, we find that Learned Commissioner erred in holding that no redemption fine could be levied as the goods were not physically available. We find that the goods were provisionally released in terms of a bond submitted by the importers. Therefore, in view of the Apex Court decision in the case of *Weston Components Ltd.*, we find that redemption fine is liable to be imposed. Accordingly, we modify the OIO to that extent and impose redemption fine of Rs. 5 Lakhs.

6. Accordingly, the impugned order is modified to the extent of reducing penalty from Rs. 80,00,000/- to Rs. 38,00,000/- (Rupees Thirty Eight Lakhs Only). Accordingly, Appeal No. C/362/2009 is disposed. Appeal No. C/392/2009 is allowed and redemption fine of Rs. 5,00,000/- (Rupees Five Lakh Only) is imposed.

(Order pronounced in the open Court on 3-6-2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, BANGALORE**

Appeal Nos. C/20929/2018-SM; C/CO/21276/2018

Arising out of Order-in-Appeal No. 1019/2017, Dated: 15.12.2017

Passed by Commissioner of CUSTOMS, BANGALORE-I(Appeal)

Date of Hearing: 01.08.2019

Date of Decision: 26.11.2019

**SHAMSHEENA MOHAMMED SHIHAVUDHEEN
W/o MOHAMMED SHIHAVUDHEEN CHYEKKARAN
RASHIDA MANZIL XXII/24 AJANUR GRAMA
PANCHAYAT NORTH CHITTARI KASARGOD KERALA-671316**

Vs

**COMMISSIONER OF CUSTOMS
MANGALORE-CUS, NEW CUSTOMS HOUSE
PANAMBUR MANGALORE KARNATAKA-575010**

Appellant Rep by: Shri Rohit R/Srinath S Subramanian, Advs.

Respondent Rep by: Shri P Gopakumar, Jt. Commissioner(AR)

CORAM: S S Garg, Member (J)

FINAL ORDER NO. 21055/2019

Per: S S Garg:

The present appeal is directed against the impugned order dt. 15/12/2017 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that the appellant, an Indian citizen holding passport bearing No.K6695721, while arriving into India at Mangalore International Airport from Dubai (Air India Express flight No.IX814) on 03/02/2016 was found to be in possession of two small chains, one big chain and two bangles, all secreted in her person inside clothes worn by the appellant. All the impugned goods were yellow metal in colour and in crude form. They were confirmed as Gold of 24 carat totally weighing 583.180 grams and totally valued at Rs.15,74,586/- (at the market rate). The said Gold was undeclared and was attempted to be smuggled into India by the appellant for her unjust and illicit gain. The impugned Gold was seized under Section 110 of Customs Act, 1962 (the Act, for short) after being approved by approved Gold appraiser/valuer, under a report dated 03/02/2016 read with statement of the appellant also dt. 03/02/2016 wherein the appellant admitted the guilt and factum of concealment. The appellant has admitted that she smuggled such Gold for her elder brother's daughter as a wedding gift. The original authority culminated the proceeding vide OIO No.02/2017 – ADC dt. 08/02/2017 wherein the smuggled gold valued at Rs.15,74,586/- was absolutely confiscated under Section 111(d), 111(i), 111(l) and 111(m) of the Act and imposed a penalty of Rs.4,50,000/- under Section 112(a) and Rs.2,00,000/- under Section 114AA of the Act on the appellant for contravention of Section 2(33), Section 2(39), Section 77, Section 123 and Section 123(2) of the Act and Notification No.12/2012-Cus dt. 16/03/2012 read with Notification No.26/2012 dt. 18/04/2012 and Board Circular No.06/2014 dt. 06/02/2014, Para 3(3) of the Foreign Trade (Development of Regulations) Act, 1992 coupled with Foreign Trade (Regulation) Rules, 1993. Aggrieved by the Order-in-Original, appellant filed appeal before the Commissioner(Appeals) who rejected the same. Hence the present appeal. The Revenue has also filed Cross-objections before this Tribunal.

3. Heard both sides and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and the binding judicial precedent. He further submitted that the only objection raised by the respondent in their Cross-objections is that the appeal is not maintainable under Section 129(A) of the Act because the confiscated goods have been recovered from the baggage of passenger. It is further the contention of the respondent that the remedy available to the appellant is not under Section 129(A)(1) but under Section 129DD by way of revision. He further submitted that this objection of the Revenue is not sustainable in law in view of the fact recorded by the original authority that the appellant was not in possession of no checked-in baggage but was found to be carrying a brown coloured hand bag and one duty free polythene cover as accompanied baggage. Further on examination of said baggage, it was found to contain nothing objectionable but only personal effects. Therefore, the contention raised by the respondent that the confiscated goods are recovered as baggage is factually incorrect. In support of his submission, he relied upon the decision of Kerala High Court in the case of *Vigneswaran Sethuraman Vs. UOI & another* [2014(2) KHC 448] wherein the Hon'ble High Court has held that gold ornaments worn by a person is not a baggage and it does not require declaration under Section 77 of the Act. He further submitted that as per Section 77, the owner of any baggage shall for the purpose of clearing it make a declaration of its contents to the proper officer. He further submitted that it was the duty of the Customs to make aware of the public regarding the prohibitions for bringing the gold and human body cannot be considered as a baggage. He further submitted that the appellant was wearing gold ornaments inside her burka and as per their religious customs and belief, the appellant does not believe in showing of the ornaments to the public. He also submitted that appellant has already paid the amount of Rs.2,25,000/- and thereafter the passport of the appellant was released.

5. On the other hand, the learned AR defended the impugned order and submitted that the appellant was wearing the gold and the same was not declared and on her personal search, it was found that she was wearing (a) two numbers of small chain shaped gold objects in crude unfinished form – 117.530 grams; (b) two numbers of bangle shaped gold objects in crude unfinished form – 115.730 grams; and (c) one number of big chain shaped gold object in crude unfinished form – 349.920 grams. He further submitted that she tried to pass through the Green Channel and on her personal search, it was detected and the same was valued at Rs.15,74,586/-. He further submitted that the appellant did not produce any documents evidencing the purchase of the aforesaid gold ornaments of the shape of crude chains and bangle in unfinished form recovered from her possession. He further submitted that in her statement made under Section 108 of the Act, she admitted that the gold objects purchased by her did not have any sign or mark. She also admitted that she did not possess any document justifying the purchasing of the said ornaments which is of 24 carat purity. She also admitted that she had concealed the said gold ornaments on her person underneath the burka worn by her with intention to evade duty. The learned AR further submitted that the case of the appellant is not covered by the Notification No.12/2012-Cus. dt. 17/03/2012. He further submitted that the gold objects were smuggled into India by the appellant by way of concealment on her person which clearly proves the non-bona fide nature of her baggage. He further submitted that the goods are smuggled as per Section 2(39) of the Act and it is prohibited in terms of Section 2(33) of the Act and the original authority had discussed in detail the entire evidence and the circumstances leading to the detention of the gold ornaments. He also relied upon the following decisions:-

i. *Om Prakash Bhatia Vs. CC, Delhi* [2003(155) ELT 423 (SC)] ii. *Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta & others* [1983(13) ELT 1439 (SC)]

iii. *Samayanathan Murugesan Vs. Commissioner* [2010(254) ELT A15 (SC)]

iv. *CC(AIR), Chennai Vs. Samayanathan Murugesan* [2009(247) ELT 21 (Mad.)]

6.1. After considering the submissions of both the parties and perusal of the material on record, I find that the appellant was wearing two numbers of small chain and 2 bangles of gold and one big chain totally weighing 583.18 grams valued at Rs.15,74,586/- of 24 carat purity gold which she did not declare on arrival at Mangalore Airport. On suspicion, she was searched and then it was found that she was wearing these gold chains and bangles concealed under the burka which she was wearing. In her statement, she has confessed that she was not aware that she was supposed to declare the gold and the ornaments. Further I find that the original authority has discussed in detail the facts of the case and has arrived at a finding that the appellant has indulged in smuggling and has confiscated the unfinished gold, totally weighing 583.18 grams seized from the possession of the appellant under 111(d), 111(i), 111(l) and 111(m) of the Act and also imposed penalty of Rs.4,50,000/- on the appellant under Section 112(a) of the Act for her omission and acts rendering the goods liable for confiscation under Section 111 of the Act and also imposed penalty of Rs.2 lakhs in terms of Section 114AA for having made false declaration under Section 77 of the Act. Further I find that the Commissioner(Appeals) has also discussed the defence of the appellant and upheld the Order-in-Original. It is pertinent to reproduce para 9 and 12 of the impugned order, which are as under:-

9. Further, it is seen that the appellant has not retracted her statement. By looking into the overall facts and proceedings deliberate upon, it is fully established without an iota of doubt that the appellant attempted to smuggle the impugned gold without declaring it to the Customs authorities, which is of 24 carat and in form of small and big chains and bangles transacted for illicit gain by way of ingenious concealment. The appellant's intention to defraud the exchequer and evade payment of duty for her illegitimate gain is explicit and the same could not have surfaced but for Departmental intervention. The defense of ignorance of law or quantum has no bearing in mitigating the offence committed by the appellant. Further, the impugned goods attempted to be smuggled into India is liable for confiscation under Sections 111(d), 111(i), 111(l) and 111(m) of the Customs Act, 1962 read with Section 3(3) of Foreign Trade (Development and Regulation) Act, 1992 and rules made there under. The appellant has also rendered herself to penal action under Section 112 and Section 114AA of the Act for his illicit act of omission and commission. The defense made by the appellant is an afterthought and untrue.

12. I find that in view of overall circumstances of the case and considering the nature of concealment, purity of gold, status/antecedent of appellant, mode of carriage etc., her culpable statement admitting the guilt. The intent to smuggle gold to defraud the exchequer from its legitimate claim is clearly established and appellant is liable for the penal consequences along with absolute confiscation of gold for alleged contravention of Customs Act, 1962, Foreign Trade (Development and Regulation) Act, 1992. The defense put forth by appellant now is an afterthought without any basis.

6.2. As far as imposition of penalty under Section 112 and Section 114AA of the Act, I find that imposition of penalty under Section 77 is not sustainable in law because Section 77 is applicable only when passenger fails to declare in his baggage any goods which is liable to confiscation whereas in the present case, it is on record that nothing objectionable was found in her baggage and it is only on a person gold ornaments were secreted. Therefore I set aside the penalty imposed under Section 114AA. As far as penalty under Section 112(a) of the Act is concerned, I uphold the penalty but reduce the same to Rs.2,25,000/-.

7. In view of my discussion above, I find no infirmity in the impugned order regarding the absolute confiscation of the smuggled goods but

reduce the penalty to Rs.2,25,000/- (Rupees two lakhs and twenty five thousand only) under Section 112(a) of the Customs Act 1962 and drop the penalty of Rs.2,00,000/- under Section 77 of the Act. Appeal is accordingly disposed of. Cross-objections also get disposed of.

(Order was pronounced in Open Court on 26.11.2019)

[Back](#)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHANDIGARH

~~~~~

REGIONAL BENCH-COURT NO.1

**Appeal No.C/60013/2019**

[Arising out of LUD-EXCUS-001-1738-1739-18 dated 17.09.2018 passed by the  
Commissioner(Appeals) of Customs & Central Excise, Ludhiana]

**Rajnish Kansal**

M/s K M Trading Co  
Khadial Road Sunam  
Sunam, Punjab-148028

**:Appellant(s)**

Vs

**C.C.-Ludhiana**

ICDGRFL.G.T.Road, Sahnewal  
Ludhiana, Punjab-141001

**:Respondent(s)**

**WITH**

**Appeal No. C/60014/2019**

[Arising out of LUD-EXCUS-001-1738-1739-18 dated 17.09.2018 passed by the  
Commissioner(Appeals) of Customs & Central Excise, Ludhiana]

**Rinku Kansal**

M/s K M Trading Co  
Khadial Road Sunam  
Sunam, Punjab-148028

**:Appellant(s)**

Vs

**C.C.-Ludhiana**

ICDGRFL.G.T.Road, Sahnewal  
Ludhiana, Punjab-141001

**:Respondent(s)**

APPEARANCE:

Shri Naveen Bindal, Advocate for the Appellant  
Shri Bhasha Ram, Authorised Representative for the Respondent

**CORAM: HON'BLE Mr. ASHOK JINDAL, MEMBER(JINDAL)**

**FINAL ORDER No. 60530-60531/2019**

Date of Hearing: 17.05.2019

Date of Decision: 17.05.2019

**Per: Mr. Ashok Jindal**

The appellants are in appeals against the impugned order seeking leniency for the quantum of penalty imposed on them under Section 114 and 114AA of the Customs Act, 1962.

2. The facts of the case are that the appellants declared nut and bolts to be exported while filing the shipping bill. On examination of the container, the goods were found Muriate of Potash (MOP) which is restricted/prohibited item. Therefore, the goods were held liable for confiscation and penalty on both the appellants were imposed under Section 114 and 114AA of the Act. Against the said order, the appellants are before me seeking reduction in the penalty imposed on them on the ground that the value of the consignment is Rs. 30 Lakhs.

3. Heard the parties.

4. Considering the fact that it is a case of the clear cut misdeclaration of goods and in the guise of nut and bolts, the appellant sought to export MOP for which licence is required and it was also found that during the investigation, all the documents were fake. In these circumstances, I hold that the goods were rightly held liable for confiscation.

5. Now, coming to the penalty imposed on the appellants, I find that Shri Rajnish Kansal is the main person who fabricated the documents and misdeclared the goods, therefore, the penalty of Shri Rajnish Kansal is rightly imposed and no leniency is required.

6. With regard to Shri Rinku Kansal who is the employee of Shri Rajnish Kansal and is not going to get any benefit from the act of Shri Rajnish Kansal, in that circumstances, the leniency is required for imposition of penalty under Section 114 of the Customs Act, 1962. Therefore, the penalty of Rs.1,50,000/- is reduced to Rs.50,000/-.

7. In these terms, the appeals are disposed.

*(Dictated & pronounced in the Court)*

**(Ashok Jindal)**  
Member (Judicial)

[Back](#)

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
CHANDIGARH**

REGIONAL BENCH-COURT NO.I

**Customs Appeal No.57176 of 2013**

(Arising out of Order-in-Appeal No. 203/Customs/Appeal/DLH-IV/2012  
dated 30.11.2012 passed by the Commissioner (Appeals), Faridabad)

**M/s Sun International**

(B-4/47C, DDA Flats, Ashok Vihar, Phase-II  
Delhi-110052)

**.....Appellant**

*VERSUS*

**C.C.E.Delhi-iv**

(Delhi-IV, New CGO Complex,  
NH-IV Faridabad)

**.....Respondent**

**APPEARANCE:**

None, Advocate for the Appellant

Shri Bhasha Ram, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)**

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 60141 of 2020**

DATE OF HEARING: 22.01.2020

DATE OF DECISION: 22.01.2020

**PER ASHOK JINDAL:**

None appeared on behalf of the appellant nor any request for adjournment has been received. Records have been perused.

2. On perusal of the records, we find that the matter has come up for several times for the hearing, but all the occasions none appeared on behalf of the appellant. Therefore, it is concluded that the appellant has nothing to say in defense of their appeal.

3. The facts of the case are that the appellant imported consignment of mixed goods i.e. branded, unbranded, mis-declared, Excess, branded counterfeit. The goods were examined. On examination, it was found that some of the goods were branded goods which are restricted, therefore confiscated absolutely. The appellant in their appeal itself has stated that they do not want to clear the absolutely confiscated goods but sought clearance of the remaining consignment.

4. Heard the Ld.AR and perused the record.

5. On perusal of the record, we find that as the appellant has mis-declared the goods and the same have been absolutely confiscated as the goods found to be branded goods and mis-declared. In these circumstances, we do not find any merit in the appeal filed by the appellant, therefore, the appeal filed by the appellant is dismissed.

(Dictated and pronounced in the open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, CHANDIGARH  
COURT NO. I**

**Customs Appeal No. 3145 of 2012**

Arising out of Order-in-Appeal No. 89/CUS/APPL/DLH-IV/2012, Dated:  
09.08.2012

Passed by the Commissioner of CE, (Appeals), Delhi-IV, Faridabad

**Date of Hearing: 18.02.2020**

**Date of Decision: 20.02.2020**

**TOUCHWOOD INDUSTRIES  
487/18, PEERA GARHI, ROHTAK ROAD  
NEW DELHI**

**Vs**

**COMMISSIONER OF CUSTOMS  
DELHI-IV, INLAND CONTAINER DEPOT, TUGHLAKABAD  
NEW DELHI**

**Appellant Rep by:** None

**Respondent Rep by:** Mr Bhasha Ram & Mr Amandeep Kumar, ARs

**CORAM:** S S Garg, Member (J)

Sanjiv Srivastava, Member (T)

**FINAL ORDER NO. 60214/2020**

**Per: Sanjiv Srivastava:**

This appeal is directed against Order-in-Appeal No. 89/CUS/APPL/DLH-IV/2012 dated 09.08.2012 of Commissioner of Central Excise (Appeals) Delhi-IV, Faridabad. By the impugned order, the Commissioner (Appeals) upheld the Order-in-Original No. 557/DC/ICD/MS/2011 dated 11.02.2011 holding as follows:

*"I order the goods be assessed to duty by classifying the same under Customs Tariff heading 49119990."*

2.1 The appellant had filed Bill of Entry No. 4921487 dated 14.10.2011 for clearance of goods by describing them as "Educational Charts" and classification under Custom Tariff Heading 49059990 and attracting duty at "Nil" rate. They declared the value of the goods as Rs. 32,89,200/-.

2.2 The goods were subjected to 1st Check examination. The shed recorded the following examination report:

*"O/E 100% of the goods in the presence of representative of CHA and found to contain Educational Charts as per Invoice, P/L and B/L. Description and Quantity checked. As far as nature of goods is concerned, Historical and Elementary Educational charts were found during the examination. Samples put up to group for perusal ..."*

2.3 After considering the written submissions made by the appellant vide his letter dated 04.11.2011, the Deputy Commissioner adjudicated the matter as per order referred in para 1, supra.

2.4 Aggrieved the appellant filed the appeal before the Commissioner (Appeals), which has been dismissed by the Commissioner (Appeals) as per the impugned order.

2.5 Aggrieved the appellant have filed this appeal before CESTAT.

3.1 In their appeal, the appellant has assailed the orders of the lower authorities stating as follows:

- The goods imported are educational charts as they impart knowledge in respect of elementary learning such as language, grammar, numerals,

mathematical tables, basic hygiene etc. They are in form of single sheet with colour printing on plastic bearing the name of publisher. Thus these are printed material for educational purposes. Examination report recorded by the shed also says so.

- Since the goods are in form of chart containing "Educational Material" in printed form the same as per their understanding merits classification under heading 49059990. The classification made by the lower authorities under Heading 49119990 is not correct as heading 4911 is residuary heading.

- Alternatively the goods imported by them merit classification as 'Printed Books' under CTH 4901 and exempt from payment of duty under Notification No 21/2002-Cus dated 01.03.2002 (Sl No 160), since they contain valuable information and material for children in printed form having publisher's name and satisfy the essential attributes of "printed book" such as (i) these are available to public at large; (ii) sold at book stores; (iii) recognized internationally as Book and assigned ISBN (International Standard Book Number)

- The decision of *Wilco International [1992 (61) ELT 713 (T)]* is squarely holding that the goods imported are nothing but Books.

4.1 Matter was listed for hearing on 18.02.2020. Appellant's advocates "Piyush Kumar & Associates" have vide their letter dated 17.02.2020 received in the Registry on 17.02.2020, submitted as follows:

*"In this regard it is respectfully submitted that the above mentioned Appellant is hereby submitting written brief of arguments for kind perusal of the Hon'ble Tribunal and therefore prays Your Honour for disposal of the matter on the basis of Memorandum of Appeal as well as brief of arguments, for which act of kindness, the appellant shall ever be indebted."*

4.2 Thus on we have heard Shri Amandeep Kumar, Authorized Representative for the Revenue in the matter. We have also examined the sample of the goods imported by the appellant which were produced by the Authorized Representative.

4.3 In the written arguments filed by the Advocates for the appellant, they have reiterated the same grounds as have been stated by them in the Appeal Memorandum.

4.4 Learned Authorized Representative while reiterating the findings recorded by the lower authorities submitted that:-

- The classification of the goods as per the Custom Tariff is to be determined as per the terms of the heading. He referred to the terms of headings, 4901, 4905 & 4911 to argue that the goods are appropriately classifiable under heading 4911 as has been held by the authorities below;

- He also referred to HSN Explanatory Notes for Chapter Heading 4905 and 4911 and argued that as per the HSN explanatory notes for these chapters the goods have been held to be appropriately classifiable under CTH 4911. He relied on the decision of the Hon'ble Apex Court in the case of *Wood Craft Products Ltd [1995 (77) ELT 23 (SC)]* and the decision of the *Mumbai Bench of CESTAT in case of Camlin Ltd [2002 (144) ELT 638 (T-Mum)]* to establish that reliance placed by him on the HSN Explanatory Notes, for the determination of the classification of goods under Custom Tariff is justified.

- The exemption claimed by the Appellant under Notification No 21/2002-Cus is not admissible to them as the goods do not satisfy to the basic criteria to be called as goods. The decision of tribunal in case of *Wilco* referred by the Appellant in their appeal and submissions is distinguishable and not applicable. In case of *Wilco* the goods imported were in fact the books as is evident from para 4 and 5 of the said decision.

- In case of *Dilip Kumar & Co [2018 (361) ELT 577 (SC)]*, Hon'ble Supreme Court (Five Member Bench) has clearly laid down that the fiscal statute need to be interpreted strictly as per the words used in the statute and there is no room for purposive or other manner of construction of statute.

- He thus submits that appeal filed merits rejection.

5.1 We have considered the impugned order along with the submissions made in the appeal, written submissions filed, and the arguments advanced by the Authorized Representative at the time of hearing of the appeal.

5.2 The competitive tariff entries under which the Classification has been claimed by the appellant and determined by the Revenue are reproduced below:

4901 PRINTED BOOKS, BROCHURES, LEAFLETS AND SIMILAR PRINTED MATTER, WHETHER OR NOT IN SINGLE SHEETS

4901 10 - In single sheets, whether or not folded :

4901 10 10 --- Printed books

4901 10 20 --- Pamphlets, booklets, brochures, leaflets and similar printed matter - Other

4901 91 00 -- Dictionaries and encyclopaedias, and serial instalments thereof

4901 99 00 -- Other

4905 MAPS AND HYDROGRAPHIC OR SIMILAR CHARTS OF ALL KINDS, INCLUDING ATLASES, WALL MAPS, TOPOGRAPHICAL PLANS AND GLOBES, PRINTED

4905 10 00 - Globes

- Other

4905 91 00 -- In Book form

4905 99 -- Other

4905 99 10 --- Geographical, hydrological, astronomical maps or charts

4905 99 90 --- Other

4911 OTHER PRINTED MATTER, INCLUDING PRINTED PICTURES AND PHOTOGRAPHS

4911 10 - Trade advertising material, commercial catalogues and the like :

4911 10 10 --- Posters, printed

4911 10 20 --- Commercial catalogues

4911 10 30 --- Printed inlay cards

4911 10 90 --- Other

- Other

4911 91 00 -- Pictures, designs and photographs

4911 99 - Other

4911 99 10 --- Hard copy (printed) of computer software

4911 99 20 --- Plan and drawings for architectural engineering, industrial, commercial, topographical or similar purposes reproduced with the aid of computer or any other devices

4911 99 90 --- Other

5.3 The appellant while filing the Bill of Entry have claimed the classification of the goods under heading 4905 99 90. From the terms of the entry, it is very clear that heading 4905 is in respect of the maps and globes and not in respect of the educational charts of any other type. This is further very clear from the HSN Explanatory Notes for the heading 4905 which reads as under:

*"This heading covers all printed globes (for example, terrestrial, lunar or celestial), maps, charts and plans designed to represent the natural or artificial features of countries, town seas, the heavens, etc., conventional signs being used to indicate contours etc. Maps and charts incorporating advertising matter*

*remain classified in this heading. This heading includes, inter alia: Geographical maps (including sectors for globes), road maps, wall maps, atlases, hydrographic, geographical and astronomical charts, geological surveys, topographical plans (e.g. plans of town or districts) It also covers printed globes with internal lighting, provided they are not merely toys"*

5.4 It is very clear from the examination report and the sample charts produced before us that these charts are not in nature of maps or depicting the terrestrial features. Even appellant on the Bill of Entry have not claimed that these goods are maps of any kind. When it is not even the case of the importers that the imported goods are maps, then they are definitely not justified in claiming the classification under heading 4905. Hence their claim for classification under heading 4905 99 90 has been rightly rejected by the lower authorities. While rejecting the claim of classification under 4905 99 90, the Commissioner (Appeals) in para 8 of the impugned order observed as follows:

*"8. I find that it is an admitted fact on record that the impugned imported goods were educational charts which imparted knowledge in respect of elementary learning such as language, grammar, mathematical, botanical, zoological, basic hygiene etc., and the said charts were printed single sheets and were not in bound form or with a binder. So far as appellants plea for classification of the above educational charts under Custom Tariff Heading 4905 (Sub-Heading 4905 99 90), is concerned, I find that Customs Tariff Heading 4905 covers maps and hydrographic or similar charts of all kinds, including atlases wall maps, topographical plans and globes, printed and as per HSN Explanatory Notes, Chapter Heading 4905 covers all printed globes (for example, terrestrial, lunar or celestial), maps, charts and plans designed to represent the natural or artificial features of countries, town seas, the heavens, etc. conventional signs being used to indicate contours etc, therefore the basic purpose of maps, chart, plans as covered under above Chapter 4905, is to represent the natural or artificial feature of countries, town, seas, the heavens etc., and I agree with the Adjudicating Authority that the classification of the impugned educational charts under Customs Chapter Heading 4905 Heading is not proper."*

5.5 The alternative claim of the appellant that the goods in question should be classified under heading 4901 as printed books and the benefit of exemption and the benefit of exemption at S No 160 of Notification No. 21/2002-Cus dated 01.03.2002 should be allowed to them has been rejected by the Commissioner (Appeals) stating as follows:

*"9. So far as classification of the impugned educational charts under Customs Tariff Heading 4901 as "Printed Books" as claimed by the Appellants, is concerned, I find that as per HSN Explanatory Notes, Chapter Heading 4901 cover Books and Booklets consisting essentially of textual matter of any kind, and printed in any language or characters, including, Braille or shorthand but in the instant case the subject goods printed educational charts contained pictures etc being the main material instead of text. Further the benefit of Notification No 21/2002- Cus dated 01.03.2002 as amended, is available to the printed books and printed manuals in bound form or in loose leaf form with a binder and I agree with the Adjudicating authority that the benefit of above Notification No 21/2002-Cus dated 01.03.2002 is not available to the impugned goods as the said goods were simply printed single sheets and were not in bound form or with a binder. Therefore the classification of the impugned goods as "printed Books" is not at all justified as rightly held in the impugned Order in Original. The judgement of the Hon'ble CESTAT in the case of Wilco International reported as 1992 (61) ELT 713 (T) as relied upon by the appellants has already been discussed by in the impugned Order in Original and I agree with the Adjudicating Authority that the above judgement is not applicable to the present case."*

The decision of the Tribunal in case of *Wilco International* - 1992 (61) ELT 713 (Tribunal) is not an authority where the classification of the goods under Custom Tariff was the issue. In the said case, the goods imported were actually in the form of Books as is evident from para 3, 4 and 5 of the said decision reproduced below:



"3. Shri J C Patel, the Ld. Advocate on behalf of appellants, at the outset, indicated that he is not challenging the order passed by the Additional Collector with regard to the classification under Customs Tariff Act for the purpose of assessment of duty. He is only challenging that part of the order holding that the goods imported are toys and is a consumer item hit by Serial No. 172 of Appendix 2B. In other words he stated that his challenge in the appeal is only against the order of confiscation for ITC violation and imposition of penalty. He also stated that he would seek for permission only to re-ship the goods without fine an penalty.

4. Thereupon he argued on the merit of the appeal with regard to the ITC angle. His arguments can be summed up as below:

5. The item imported is Robert Dunken's Jungle Book which contains board pages of "press out models" which are to be taken out as per the instructions contained in the books. They are to be assembled into the models by the children. He showed us the sample of the disputed item"

It is settled authority that any decision passed by the statutory authority, is limited to the issue considered and decided by us. When the issue of classification of the goods in dispute was not an issue before the bench then this decision cannot be an authority on the subject.

5.6 Hon'ble Supreme Court in case of *Dilip Kumar & Company – 2018 (361) ELT 577 (S.C.)* has laid down the principles of interpretation of fiscal statutes and notifications issued under these statutes as follows:

"25. We are not suggesting that literal rule de hors the strict interpretation nor one should ignore to ascertain the interplay between 'strict interpretation' and 'literal interpretation'. We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.

-----

52. To sum up, we answer the reference holding as under-

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in *Sun Export case (supra)* is not correct and all the decisions which took similar view as in *Sun Export Case (supra)* stands overruled."

By applying the principles of interpretation laid down by the Hon'ble Apex Court as stated above, we are not in position to uphold the contention of the appellant in respect of admissibility of exemption under Notification No. 21/2002-Cus dated 01.03.2002.

5.7 While upholding the classification of the impugned goods under Heading 4911 99 90, the Commissioner (Appeals) in para 10 of her order has observed as follows:

"10. So far as classification of the impugned goods under Customs Tariff Heading 4911 as ordered in the impugned Order in Original is concerned, I find that Chapter Heading 4911 covers "other printed matter, including printed pictures and photographs"" and as per HSN explanatory Notes, Chapter 4911

*covers Anatomical, Botanical etc, instrumental charts and diagrams. In the instant case also the impugned educational charts contained pictures for imparting knowledge in respect of elementary learning such as language,. Grammar, mathematical botanical, zoological, basic hygiene etc. and hence the said goods are rightly classifiable under Chapter Heading 4911 99 90 as ordered in the impugned Order in Original. Conclusively, I do not see any legal infirmity in the impugned Order in Original which I legally sustainable and does not call to any interference."*

5.8 We do not find any infirmity in the impugned order determining the classification of the impugned goods under Heading 4911 99 90, which is based on the terms of headings in Customs Tariff and HSN Explanatory Notes for the said heading. However to determine the practice of assessment elsewhere a bit of research undertaken by us made us lay hand on the import data available in respect of the same goods at "zuaba. com" which were cleared from the ICD Tughlakabad and Nhava Sheva Port classifying the said goods in same manner. The data downloaded is reproduced in table below:

| Date    | CTH      | Port        | Description                                             | COO   | NO's   | Unit Price | Total Price |
|---------|----------|-------------|---------------------------------------------------------|-------|--------|------------|-------------|
| 16.2.15 | 49119990 |             | Educational Charts (Big)                                | China | 161000 | 8.64       | 1390725.39  |
| 16.2.15 | 49119990 |             | Educational Charts (Small)                              | China | 126000 | 4.32       | 544196.89   |
| 16.2.15 | 49119990 | ICDTKD      | Educational Charts (Small)                              | China | 1000   | 4.32       | 4319.02     |
| 29.2.16 | 49119990 | Nhava Sheva | Equivalent Fractions Chart (Grade 4) (School Supplies)  | USA   | 10     | 35         | 348         |
| 29.2.16 | 49119990 |             | Fish Chart (Grade 3) (School Supplies)                  | USA   | 93     | 42         | 3,886       |
| 29.2.16 | 49119990 |             | Wipe Off Venn Diagram Chart (Grade 4) (School Supplies) | USA   | 10     | 59         | 592         |
| 29.2.16 | 49119990 |             | Angles Chart (Grade 6 ) (School Supplies)               | USA   | 7      | 35         | 244         |
| 29.2.16 | 49119990 |             | Construction Chart (Grade 2) (School Supplies)          | USA   | 107    | 35         | 3,726       |
| 29.2.16 | 49119990 |             | Dictionary Learning Chart (Grade 4) (School Supplies)   | USA   | 10     | 35         | 348         |
| 29.2.16 | 49119990 |             | Exploring Reptiles Chart (Grade 4) (School Supplies)    | USA   | 10     | 42         | 418         |
| 29.2.16 | 49119990 |             | Healthy Habits Chart (Grade 3)                          | USA   | 93     | 348        | 32,382      |
|         |          |             |                                                         |       |        |            |             |

|         |          |  |                                                             |     |     |    |       |
|---------|----------|--|-------------------------------------------------------------|-----|-----|----|-------|
|         |          |  | (School Supplies)                                           |     |     |    |       |
| 29.2.16 | 49119990 |  | Parts Of A Story Chart (Grade 4) (School Supplies)          | USA | 10  | 35 | 348   |
| 29.2.16 | 49119990 |  | Writing A Research Report Chart (Grade 5) (School Supplies) | USA | 42  | 35 | 1,462 |
| 29.2.16 | 49119990 |  | Birds Chart (Grade 3) (School Supplies)                     | USA | 93  | 42 | 3,886 |
| 29.2.16 | 49119990 |  | Elements Of Friction Chart (Grade 4) (School Supplies)      | USA | 10  | 77 | 766   |
| 29.2.16 | 49119990 |  | Insects Chart (Grade 2) (School Supplies)                   | USA | 107 | 35 | 3,726 |
| 29.2.16 | 49119990 |  | Mammals Chart (Grade 2) (School Supplies)                   | USA | 107 | 35 | 3,726 |
| 29.2.16 | 49119990 |  | Preposition Chart (Grade 5) (School Supplies)               | USA | 42  | 35 | 1,462 |
| 29.2.16 | 49119990 |  | Proofreading Chart (Grade 5) (School Supplies)              | USA | 42  | 35 | 1,462 |
| 29.2.16 | 49119990 |  | Wipe Off Venn Diagram Chart (Grade 7) (School Supplies)     | USA | 16  | 59 | 947   |
| 29.2.16 | 49119990 |  | Exploring Amphibians Chart (Grade 4) (School Supplies)      | USA | 10  | 42 | 418   |
| 29.2.16 | 49119990 |  | Hieroglyphics Chart (Grade 5) (School Supplies)             | USA | 42  | 35 | 1,462 |

|         |          |  |                                                               |     |   |     |       |
|---------|----------|--|---------------------------------------------------------------|-----|---|-----|-------|
|         |          |  | Supplies)                                                     |     |   |     |       |
| 29.2.16 | 49119990 |  | Literary<br>Genres Chart<br>(Grade 6)<br>(School<br>Supplies) | USA | 7 | 268 | 1,877 |

5.9 Hence we do not find merits in the appeal filed by the appellants.

6.1 The appeal is dismissed.

(Order pronounced in the court on 20.02.2020)

[Back](#)

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
CHANDIGARH**

REGIONAL BENCH-COURT NO.I

**Custom Appeal No 120 of 2012**

[Arising out of Order-in-Appeal No.532-533/BK/GGN/2011 dated 05.1.2012  
passed by the Commissioner (Appeals), Central Excise, Delhi-III, Vanijya Kunj,  
Udyog Vihar,Phase-V,Gurgaon)

**M/s. Beryl Infosol Pvt.Ltd**

(House No.226,Sector 27,Gurgaon-122001)

**Appellant**

*VERSUS*

**Respondent**

**Commissioner of Central Excise, Delhi-III**

(Vanijya Kunj,Udyog Vihar,Phase-V,Gurgaon)

**And**

**Custom Appeal No 122 of 2012**

[Arising out of Order-in-Appeal No.532-533/BK/GGN/2011dated 05.1.2012  
passedby the Commissioner (Appeals), Central Excise, Delhi-III, Vanijya Kunj,  
Udyog Vihar,Phase-V,Gurgaon)

**Shri Rohit Kohar**

(House No. 226,Sector 27,Gurgaon-122001)

**Appellant**

*VERSUS*

**Respondent**

**Commissioner of Central Excise, Delhi-III**

(Vanijya Kunj,Udyog Vihar,Phase-V,Gurgaon)

**APPEARANCE:**

Present for the Appellant: None

Present for the Respondent: Shri A.K.Saini, AR

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

**FINAL ORDER NO. 60128-60129/2020**

DATE OF HEARING/DECISION: 21.01.2020

**PER ASHOK JINDAL**

We have perused the records.

2. On perusal of the records,we find that the date of hearing was fixed for 18.9.2013 with the direction to appear before this Tribunal

to argue the matter. Since then, no one appear in this case to argue the matter.

3. We find that it is a case of import of machinery to set up computer software under STP scheme. The appellant imported machinery without payment of Customs duty and the same was remained without discharging export obligation and without intimating to the department/without paying duty thereof. Therefore, a case was booked against them and customs duty was demanded from them and penalty was also imposed on them.

4. As the appellant has failed to produce any evidence for discharging export obligation, the demand of customs duty and the penalty was rightly imposed. In that circumstance, we find no merits in the appeal, therefore the same is dismissed.

(Dictated and pronounced in the open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, CHENNAI  
COURT NO. III**

**Customs Appeal No. 119 of 2012**

Arising out of Order-in-Appeal C.Cus. No.261/2012, Dated: 18.04.2012  
Passed by the Commissioner of Customs (Appeals), Chennai

- (i) Customs Appeal No. 120 of 2012  
(ii) Customs Appeal No. 121 of 2012  
(iii) Customs Appeal No. 122 of 2012  
(iv) Customs Appeal No. 123 of 2012  
(v) Customs Appeal No. 124 of 2012  
(vi) Customs Appeal No. 125 of 2012 (Zeus Biotech Ltd.)**

Arising out of Order-in-Appeal No.239-244, Dated: 30.03.2012  
Passed by the Commissioner of Customs (Appeals), Chennai

**Date of Hearing: 18.11.2019  
Date of Decision: 26.11.2019**

**M/s ZYMONUTRIENTS PVT LTD  
A-14, INDUSTRIAL ESTATE, HEBBAL  
MYSORE - 570016**

**Vs**

**COMMISSIONER OF CUSTOMS  
CUSTOM HOUSE, 60, RAJAJI SALAI  
CHENNAI - 600001**

**Appellant Rep by:** Shri S Loknath, Consultant

**Respondent Rep by:** Ms T Usha Devi, DC (AR)

**CORAM:** Sulekha Beevi C S, Member (J)  
P Anjani Kumar, Member (T)

**FINAL ORDER NOS. 41574-41580/2019**

**Per: P Anjani Kumar:**

The appellants M/s.Zymonutrients Pvt.Ltd. and M/s Zeus Biotech Ltd. had imported "inactive dried yeast - animal feed supplement" and classified the same under CTH 23099020 claiming the same to be "preparations of a kind used in animal feeding". However, the department reclassified the same under CTH 21022000. The appellants have paid the duty under protest and cleared under test bond. Test report confirmed the goods are either not fit for human consumption or to be "inactive dried yeast". The department has subsequently finalized the Bills of Entry rejecting the classification claimed by the appellant. The appellants have appealed against this orders before the Ld. Commissioner (Appeals) contending that though provision assessment was made order under Section 17 (5) of Customs Act, 1962 was not issued and therefore all the appeal were filed in time. Commissioner (Appeals) has dismissed the appeal of the appellant on merits and though holding that it was mandatory for the department under Section 17 (5) of Customs Act, 1962 to issue its speaking order, rejecting some appeals, stating that they are time-barred being filed beyond the condonable period from the date of Bill of Entry. Hence, these appeals.

2. Learned Counsel for the appellants submits that the lower adjudicating authority has not applied his mind and arrived at an erroneous decision based on a circular issued by the Ministry of Finance which is not condonable under law; the material purchased and used by the appellants for poultry feed supplement; they have rightly classified under CTH 23, They relied upon the following cases:

(i) *Sun Export Corporation Vs CC 1997 (93) ELT 641 (SC)* wherein it was held that supplements of animal feeds which are generally added to the animal feed were also covered by the generic term 'animal feed'.

(ii) *CCE Vs Surendra Cotton Oil Mills & Fert. Co. - 2001 (127) ELT 3 (SC)* wherein it was held that animal feed includes animal supplements also.

(iii) *Tetrogon Chemie (P) Ltd. Vs CCE - 2001 (138) ELT 414 (Tri.-LB)* wherein it was held that vitamin sued for mixing in animal feed will be classified under chapter 23 of CET.

(iv) *CC Vs Lal Chand Bhimraj 2007 (220) ELT 189 (Tri.-Chennai)* wherein it was held that vitamins mixed with dilutants which are used as an additives to the main feed for livestock are to be considered under Chapter 23.

(v) *CCE Vs 2002 (142) ELT 18 (SC)* wherein it was held that HSN Explanatory Notes are not only persuasive but are entitled for greater consideration in the classification of the goods.

3. Appellants further contended that Ld. Commissioner (Appeals) though accepted that the issue of speaking order vide Section 17 (5) of the Customs Act, 1962 was mandatory, held some appeals to be barred by time. They relied upon the following cases :

(i) *Woods struck Furniture Pvt. Ltd. Vs UOI - 2011 (269) ELT 327 (SC)*

(ii) *HMT Ltd Vs CC Chennai 2009 (239) ELT 239 (Kar.)*

(iii) *HDFC Bank Ltd. Vs UOI 2011 (271) ELT 175 (Kar.)*

4.1 Learned AR, for the department, reiterates the issues considered while finalizing the provisional assessment and submits that as per general rules of interpretation, when the goods are prima facie classifiable under two or more headings, classification has to be done according to the heading which provides the most specific description than to headings providing a more general description. The case of Tetrogon Chemie (supra) does not refer to yeast and other cases referred by the appellants are not relevant to the present facts of the case. She relies upon the following cases to support that classification of the goods is correct under 2102000:

(i) *Kastri Foods and Chemicals Vs CCE 1995 (77) ELT 584 (Tri.-Del.)*

(ii) *Kasturi Foods and Chemicals Vs CCE 1995 (80) ELT 169 (T)*

(iii) *Marco India Vs CC Maras 1994 (74) ELT 5 (SC)*

4.2 Ld. A.R submits that as per the appellants, the goods cannot be consumed by human beings and merit classification under preparations of a kind used for animal feed and the appellant dependent on the letter issued dt.12.7.2011 by the Central Food Laboratory; the test reports received in the instant case, from CRCL, described the product to be inactive yeast; appellants cannot rely on rejection of sample by CFL stating that the same was not fit for human consumption. She further submits that as in the present case provisional assessment was in terms of Section 18 (1) (b) of Customs Act, 1962 and thus, speaking order in terms of Section 17 (5) of Customs Act, 1962 is not required to be issued; further, in terms of Section 128 (1) of Customs Act, 1962 any decision or order passed by officers of Customs can be appealed before the Commissioner (Appeals).

5. Heard both sides and perused the records of the case.

6. The issues that require consideration in this case are (i) Whether in the facts and circumstances of the case, the lower adjudicating authority was required to issue a speaking order in terms of Section 17 (5) of the Customs Act, 1962

(ii) in the absence of such speaking order what could be the relevant date for appeal in terms of Section 128 of Customs Act, 1962.

(iii) what is the correct classification of the impugned goods whether under Chapter 21 as contended by the department or under Chapter 23 as contended by the appellant.

7. Coming to the issue of speaking order under Section 17 (5) of the Customs Act, 1962, we find that initial classification claimed by the appellants was



rejected by the department and the appellants have also protested the payment of duty. We find that in terms of Section 17 (5) where any reassessment 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.

8. On perusal of this provision, it is crystal clear that in cases where the reassessment is done contrary to the assessment done by the importer and where the assessee does not accept such reassessment in writing, the proper officer shall pass a speaking order under reassessment; in the instant case, the appellants have claimed classification under CTH 23099090 whereas the department has assessed under CTH 21022000; therefore, it is evident that the assessment has been done contrary to the claim of the appellant; the appellants have registered protest also; it is not the case of the department that the appellants have accepted the reassessment in writing; therefore, in terms of Section 17 (5) of Customs Act, 1962, the department was under obligation to issue a speaking order. To this extent, we find that the appellant's submissions are sustainable. We also find that Ld. Commissioner (Appeals) has also accepted in principle that the order under Section 17 (5) of the Customs Act, 1962 was mandatory. Therefore, we find that the Ld. Commissioner was not correct in rejecting some of the appeals on the basis of time bar. However, a question arises, under the circumstances, as to what should be the relevant date for the purpose of filing an appeal under Section 128 (1) of Customs Act, 1962, in cases bills of entry assessments have been finalized contrary to the claims of the appellant and without issue of a speaking order. It could not be the intention of the legislature that the aggrieved party wait indefinitely for such order to be issued before proceeding to appeal. In such cases, the provision of Section 128 (1) themselves take care and by virtue of the provisions, the mere finalization of a Bill of Entry itself becomes an order or communication of the order. Therefore, the appeals are required to be filed in such circumstances within a time period from the date of such reassessment / finalization.

9. Coming to the issue of classification of Enzymes imported by the appellant as to whether the same would be merited classification under heading 21 or under heading 23. We find that headings 2102 and 2309 read as follows:

| Tariff Item | Description of goods                                                   | Unit | Rate of duty€# |                    |
|-------------|------------------------------------------------------------------------|------|----------------|--------------------|
|             |                                                                        |      | Standard       | Preferential Areas |
| (1)         | (2)                                                                    | (3)  | (4)            | (5)                |
| <b>2102</b> | <b>Yeasts (active or inactive); other</b>                              | kg.  | 30%            | -                  |
| 2102 10     | <b>single cell micro-organisms, dead</b>                               | kg.  | 30%            | -                  |
| 2102 10     | <b>(but not including vaccines if</b>                                  | kg.  | 30%            | -                  |
| 2102 10     | <b>heading 3002); prepared baking</b>                                  | kg.  | 30%            | -                  |
| 2102 10     | <b>powders</b>                                                         | kg.  | 30%            | -                  |
| 2102 20     | - Active yeasts:                                                       | kg.  | 30%            | -                  |
| 2102 90     | --- Culture yeast . . . . .                                            |      |                |                    |
| 2102 00     | --- Baker's yeast . . . . .                                            |      |                |                    |
| 2102 00     | --- Other . . . . .                                                    |      |                |                    |
|             | --- Inactive yeasts, other single-cell micro-organisms, dead . . . . . |      |                |                    |

|  |                                                                  |  |  |  |
|--|------------------------------------------------------------------|--|--|--|
|  | <p>.....</p> <p>- Prepared baking powders .....</p> <p>.....</p> |  |  |  |
|--|------------------------------------------------------------------|--|--|--|

| Tariff Item | Description of goods                                 | Unit | Rate of duty€# |                    |
|-------------|------------------------------------------------------|------|----------------|--------------------|
|             |                                                      |      | Standard       | Preferential Areas |
| (1)         | (2)                                                  | (3)  | (4)            | (5)                |
| <b>2309</b> | <b>Preparations of a kind used in animal feeding</b> | kg.  | 30%            | -                  |
| 2309 10 00  |                                                      | kg.  | 30%            | -                  |
| 2309 90     | -Dog or cat food, put up for retail sale. ....       | kg.  | 30%            | -                  |
| 2309 90 10  | - Other :                                            | kg.  | 30%            | -                  |
| 2309 90 20  | ---Compounded animal feed. ....                      | kg.  | 30%            | -                  |
| 2309 90     | .....                                                | kg.  | 30%            | -                  |
| 31 2309 90  | ---Concentrates for compound animal feed. ....       | kg.  | 30%            | -                  |
| 32 2309 90  | ---Feeds for fish (prawn, etc.):                     |      |                |                    |
| 39 2309 90  | ----Prawn and shrimps feed. ....                     |      |                |                    |
| 90          | ..... ----Fish meal in powdered form. ....           |      |                |                    |
|             | ----Other .....                                      |      |                |                    |
|             | ..... ----Other .....                                |      |                |                    |
|             | .....                                                |      |                |                    |

On going through the above classification, we find that CTH 2102 covers yeasts (active or inactive); other single cell micro organisms, dead (but not including vaccines of Heading 3002); prepared baking powders and under 8 digit heading 21022000 inactive yeasts, other single-cell micro-organisms dead.

10. Going by the test reports of CRCL, impugned goods are inactive yeast; in view of the explanatory notes to chapter 21 dried yeast is also known as inactive yeast and for that reason inactive yeast is to be considered as dried yeast. We find that appellants have tried to argue that the impugned goods are not fit for human consumption on the basis of CFTRI report and hence do not fall under 2102. However, we find that under chapter sub heading 2102, there is no condition stating that it should be fit for human consumption. Either under 2102 or 21022000, one single dash covers yeasts; other single micro-organisms, dead; prepared baking powders; inactive yeast, other single cell micro organisms, dead. We find that there is no exclusion for yeast which are declared not to fit for human consumption. On the contrary, we find that heading 23.09 has got only two single dashes. One single dash contains dog or cat food, put up for retail sale and the second single dash contains "others" and the various foods and concentrates for animals are listed subsequently. It is clear that the entire heading 2309 talks of preparations of a kind used in animal feeding. By no stretch of imagination the impugned products imported by the appellants are preparations of a kind animal feeding. At the best, they may be used for preparation of animal feeds that is to say that they are raw material used for preparation of animal feed. Therefore, they cannot be classified along with animal feed merely by virtue of the inclusive definition given in the explanatory notes for the heading 2309 CETA.

11. The appellants have greatly relied upon the decision of the Larger Bench in the case of Tetrogone Chemie (supra) wherein the vitamins used for mixing in the animal feed was held to be classified under chapter 23 of CETA. However, we find that this judgment is in respect of Central Excise Tariff Act, 1985; the issue before the Bench was the assessments of Vitamins manufactured by the

manufacturers of Animal feed/ supplements; it was rendered in the context of Tariff existing at that time. The present case is about the imports which are to be classified under Customs Tariff Act. Therefore no inference can be drawn from the case cited above. Moreover, we find that note to chapter 23 specifically says that "heading 2309 includes products of a kind used in animal feed, not elsewhere specified or included, obtained by processing vegetable or animal materials to such extent that they have lost the essential characteristics of the original material, other than vegetable waste, vegetable residues and by-products of such processing". Therefore, it is clear that the chapter 23 shall include products of a kind used in animal feed. However, the emphasis that they are not elsewhere included. As submitted by the Ld. A.R and as held by the Commissioner (Appeals) heading 21022000 specifically mentions yeast active or inactive. Therefore, when yeast has a specific mention under heading 2102, that cannot be classified under any other heading under chapter 23 in view of the chapter note mentioned above. Therefore, we find that the classification arrived by the department and upheld by the Ld. Commissioner (Appeals) is consistent with the relevant chapter heading and notes and also general interpretative rules for classification wherein it is specified under rule 3 (a) of Interpretative Rules that the heading which provides most specific description shall be preferred to heading providing a more general description. We find that issue of import of Vitamin "E" 40% to 50% and claimed to be animal feed came before the Tribunal for discussion and that Tribunal in the case of *CC Vs Sonam International - 2012 (275) ELT 326 (All.)* has come to the conclusion that vitamins imported by the appellants therein are to be classified under 293600 and not under 2302 as 'animal feed supplement' as claimed by the appellants. We further find that in the above case of Sonam International Tribunal has discussed and distinguished the case of Tetragon Chemie (supra) and moreover, it is the later judgment on the issue and directly on the subject of import of similar items. In view of the above, we uphold the classification of impugned goods under CTH 21022000 as assessed by the department and as upheld by the Commissioner (Appeals).

12. In view of the above, we find that to extent of classification of the impugned goods is concerned; the order of the Ld. Commissioner (Appeals) does not require to be interfered with. In the result, we uphold the impugned order in so far as the classification of the impugned goods is concerned. We hold that classification of impugned goods i.e. yeast is correctly arrived by the Revenue under CTH 21022000. Under such circumstances, the appellant's submissions on the issue of time bar lose relevance in the instant case.

13. In the result the appeals are dismissed in terms of the above discussion.

(Order pronounced in open court on 26.11.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, CHENNAI  
COURT NO. IV**

**Customs Appeal No. 41027 of 2019**

Arising out of Order-in-Appeal AIR C.Cus. I No. 83/2019, Dated: 26.03.2019  
Passed by the Commissioner of Customs (Appeals-I), No. 60, Rajaji Salai, Custom  
House, Chennai-600001

**Date of Hearing: 11.12.2019  
Date of Decision: 06.02.2020**

**M/s COMPUAGE INFOCOM LTD  
ANNAI AUXILUM WAREHOUSE, NO. 87, GNT ROAD  
PONNIAMMANMEDU, MADHAVARAM, CHENNAI-600110**

**Vs**

**THE PRINCIPAL COMMISSIONER OF CUSTOMS  
CHENNAI VII COMMISSIONERATE  
NEW CUSTOM HOUSE, AIR CARGO COMPLEX  
MEENAMBAKKAM, CHENNAI - 600027**

**Appellant Rep by:** Shri Hari Radhakrishnan, Adv.

**Respondent Rep by:** Ms Sridevi Taritla, AR

**CORAM:** C J Mathew, Member (T)  
P Dinesha, Member (J)

**FINAL ORDER NO. 40071/2020**

**Per: P Dinesha:**

Brief facts are that the appellant filed a Bill-of-Entry No. 6280158 dated 07.05.2018 for the clearance of 'Closed Circuit Television (CCTV) Cameras' and since the goods were of Korean origin, the appellant, under the self-assessment scheme, assessed the same at 'Nil' rate of Basic Customs Duty (BCD) in terms of Notification No. 152/2009-Cus. (Sl. No. 833) dated 31.12.2009.

1.2 The Assistant Commissioner of Customs/Adjudicating Authority did not accept the nil rate of BCD and hence, charged BCD at the rate of 15% vide Speaking Order issued in F.No.S.Misc.506/2018-Gr.5A- ACC dated 29.06.2018, against which the appellant preferred an appeal before the Commissioner of Customs (Appeals), Chennai and who vide impugned Order-in-Appeal AIR C.Cus I No. 83/2019 dated 26.03.2019 having rejected the appeal, the present appeal has been filed against the same before this forum.

2. When the matter was taken up for hearing, Shri. Hari Radhakrishnan, Learned Advocate, appeared for the assessee-appellant and Ms. Sridevi Taritla, Learned Departmental Representative, appeared for the Revenue-respondent.

3.1 Learned Advocate for the appellant, taking us through the statement of facts, grounds-of-appeal and also documents like the impugned Bill-of-Entry placed in the appeal folder, would inter alia submit that the Adjudicating Authority should have accepted the classification of the CCTV under CTH 8525 8010 itself without re-classifying the same under CTH 8525 8090; that similar goods, imported by another importer under Bill-of-Entry No. 6450438 dated 19.05.2018, were classified under CTH 8525 8010 by the Customs at New Delhi; that the Republic of Korea followed a Harmonized Commodity Description and coding system and the supplier issued the certificate of origin classifying the imported goods under CTH 8525 8010 only, etc.

3.2 Learned Advocate would inter alia further submit that CTH 8525 specifically covered transmission apparatus for radio broadcasting or television, including television camera, digital camera and video camera recorder; that CCTV cameras are neither transmission apparatus nor digital cameras nor video camera recorders and hence, the only item remaining and covered by the tariff heading

being television cameras, the impugned CCTV cameras are required to be classified as television cameras only; that there is nothing in the Customs tariff or even the HSN classifying CCTV cameras; that as settled by various decisions cited before the Commissioner (Appeals), the burden of proof was always on the taxing authorities and a mere assertion was of no use, etc.

3.3 Learned Advocate concluded his arguments by submitting that as long as there was no denial that the goods in question was television cameras, either open circuit or closed circuit, it remains as television camera and hence, even the CCTV cameras are required to be classified as television cameras only; and hence, the appellant rightly claimed the classification under CTH 8525 8010 which is a specific entry for television camera, which was also supported by the certificate of country of origin and also a similar classification by the Delhi Customs.

4. Per contra, Learned Departmental Representative appearing for the Revenue supported the findings of the lower authorities. She also submitted that the basic functionality of a CCTV camera is for the purposes of surveillance whereas a television camera is used as a transmission apparatus for radio broadcasting or television; that subject to the typical functioning of each apparatus, classification has been provided and that CCTV cameras not figuring anywhere in the specific categories, has been rightly brought under "Other" under CTH 8525 8090.

5. We have heard both sides, perused the impugned Bill-of-Entry No. 6280158 dated 07.05.2018 placed on record and have also gone through the relevant HSN Explanatory Note and Notification No. 152/2009-Cus. (supra). During the hearing, Learned Advocate for the appellant also placed on record the certificate of origin issued by the exporter which is dated 19.11.2019.

6.1 The impugned Bill-of-Entry No. 6280158 dated 07.05.2018 filed by the appellant itself contains the CTH as 8525 8090. The appellant has also placed on record various other Bills-of-Entry like Bill-of-Entry No. 6450438 dated 19.05.2018 which were classified under CTH 8525 8010. The descriptions of the goods given under

Bill-of-Entry No. 6280158 are "KAP-CCTV CAMERA-CCTV SYSTEM EQUIPMENTS", "KAP-NETWORK VIDEO RECORDER-CCTV SYSTEM EQUIPMENTS", "AJ-CCTV CAMERA-CCTV SYSTEM EQUIPMENTS" and "AJ-DIGITAL VIDEO RECORDER-CCTV SYSTEM EQUIPMENTS" and the descriptions of the goods under Bill-of-Entry No. 6450438 are "KAP-CCTV CAMERA-(CCTV SYSTEM EQUIPMENTS)", "AJ DIGITAL RECORDER-(CCTV SYSTEM EQUIPMENTS)", "AJ DIGITAL VIDEO RECORDER-(CCTV SYSTEM EQUIPMENTS)", "AJ CCTV CAMERA-(CCTV SYSTEM EQUIPMENTS)", "KAP NETWORK VIDEO RECORDER-(CCTV SYSTEM EQUIPMENTS)". The appellant has also placed on record the Bills-of-Entry of the other importer viz. M/s. Honeywell International India Pvt. Ltd. at pages 39 to 46 of the Appeal Memorandum and the descriptions of the goods are "AJ (CCTV CAMERA) (WIRED)", "AJ (DIGITAL VIDEO RECORDER) (VIDEO DUPLICATING SYSTEM WITH MASTER AND SLAVE CONTROL)" and "AJ (DIGITAL VIDEO RECORDER) (NETWORK DUPLICATING SYSTEM WITH MASTER AND SLAVE CONTROL)"

6.2 A close look at the above Bills-of-Entry reveals that there are differences as regards the descriptions of the imported goods are concerned. In any case, there is no dispute that the appellant itself had classified under CTH 8525 8090 in its Bill-of-Entry under dispute and thereby effectively prevented the Revenue from questioning further.

7. From the HSN Note read with the Customs Tariff Heading 8525, we find that there is no entry specifically for CCTV cameras and it is nowhere even hinted that CCTV cameras, which according to the appellant are neither digital cameras nor video camera recorders, would fall under the category of television cameras itself and hence, this argument of the assessee cannot be accepted. For these reasons, they cannot be classified under television camera, but rightly under "Others" for the period in dispute, since we cannot add or substitute our views/opinions, to negate Revenue's classification, just to go with appellant's claim which is based only on arguments.

8. Therefore, we do not see any merit in the appeal and hence the same is rejected.

(Order pronounced in the open court on 06.02.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, CHENNAI  
COURT NO. III**

**Customs Appeal No.42343 of 2014**

Arising out of Order-in-Appeal C.Cus.No.1311/2014, Dated: 30.07.2014  
Passed by the Commissioner of Customs (Appeals), Chennai

**WITH**

**(i) Customs Appeal No. 42344 of 2014**

Arising out of Order-in-Appeal C.Cus.No.1313/2014, Dated: 30.07.2014  
Passed by the Commissioner of Customs (Appeals), Chennai

**(ii) Customs Appeal No. 42345 of 2014**

Arising out of Order-in-Appeal C.Cus.No.1702/2014, Dated: 18.09.2014  
Passed by the Commissioner of Customs (Appeals), Chennai

**(iii) Customs Appeal No. 40688 of 2015**

Arising out of Order-in-Appeal C.Cus. II No.287/2014, Dated: 24.12.2014  
Passed by the Commissioner of Customs (Appeals-II) Chennai

**Date of Hearing: 29.07.2019**

**Date of Decision: 26.09.2019**

**M/s HONDA SIEL POWER PRODUCTS LTD  
PLOT NO.5, SECTOR-41 (KANSA) GREATER NOIDA  
INDL. DEV. AREA, DIST.GAUTAM BUDH NAGAR U.P. 201310**

**Vs**

**COMMISSIONER OF CUSTOMS (PORT- EXPORTS)  
60, RAJAJI SALAI, CUSTOM HOUSE, CHENNAI - 600001**

**Appellant Rep by:** Shri S Murugappan, Adv.

**Respondent Rep by:** Shri B Balamurugan, AC (AR)

**CORAM:** P Venkata Subba Rao, Member (T)  
P Dinesha, Member (J)

**FINAL ORDER NOS. 41140-41143/2019**

**Per: P Venkata Subba Rao:**

Heard both sides and perused the records. All these appeals involve the same issue and hence are being disposed of together.

2. The appellants herein had imported goods and paid Special Additional Duty @ 4% as applicable to the goods. In terms of Notification No.102/2007-Cus. dt. 14.09.2007 read with Notification No.93/2008 dt. 01.08.2008, the assessee is entitled to refund of Special Additional Duty (SAD) paid if the imported goods are thereafter sold by them on payment of VAT subject to the conditions mentioned in the notification. One of the conditions mentioned in the notification as applicable during the relevant time was that the refund claim must be filed within one year. Undisputedly, the appellants have filed all these refund claims after the period of one year. Therefore, all the refund claims were rejected by the original authorities and such rejections were upheld by the first appellate authority vide the impugned orders. Hence these appeals.

3. It is the case of the appellants that once they are entitled to benefit of refund of SAD, they should not be denied the same on the ground that they have filed the refund claim after the period of one year indicated in the exemption notification. They rely upon the judgement of the Hon'ble High Court of Delhi in the case of *Sony India Pvt. Ltd. Vs CC reported in 2014 (304) ELT 660 (Del.)* in which the Hon'ble High Court has held that the limitation of one year should not apply in case of SAD refunds. The same ratio was followed by the Hon'ble High Court of Delhi in 2017 in the case of *Gulati Sales Corporation reported in 2018*

(360) *ELT 277* in a case dealing with imports after the amendment to the notification.

4. Per contra, the Ld. D.R reiterates the findings of the lower authorities and asserts that if the exemption is claimed, all the conditions therein must apply in full force and therefore if the application is filed after one year, the appellants are not entitled to refund. Therefore, there is no force in the appeals and therefore they may be rejected. Ld. D.R relies on the judgment of Hon'ble High Court of Bombay with respect to *SAD refunds in W.P. No.388 of 2016* in the case of *CMS INFO Systems Ltd. Vs Union of India - 2017 (349) ELT 236 (Bom.)* in which the Hon'ble High Court of Bombay has held that the importer has no vested right of refund and it flows only from the exemption notification and therefore all conditions of the exemption notification apply. Hence a refund claim filed after the period of one year is not admissible.

5. Both sides fairly submit that there is no decision of the jurisdictional High Court of this Bench. Both the aforesaid judgments have been appealed against before the Supreme Court. Revenue challenged the judgment of the High Court of Delhi in the case of *Sony India Pvt. Ltd. (supra)* and the Hon'ble Supreme Court has dismissed the appeal on grounds of delay leaving the question of law open. The importer appealed against the judgment of the Hon'ble High Court of Bombay in the case of *CMS INFO Systems Ltd. (supra)* which has been admitted by the Hon'ble Apex Court but not stayed.

6. Before proceeding to decide the matter, it would be profitable to examine the relevant legal provisions. Duties of Customs are levied under Section 12 of the Customs Act, 1962 at such rates as may be specified under the Customs Tariff Act, 1975 on the goods imported into or exported from India. Such levy can be based on quantity of the goods (specific rate of duty) or their value (advalorem) as indicated in the tariff. The Customs Tariff Act, 1975 itself provides for levy of various types of customs duties such as Basic Customs Duty, Additional Duty of Customs, Countervailing Duty as well as Special Additional Duty which is the duty in dispute. The duty so leviable under the Customs Tariff must be read along with any exemption notifications which are issued under Section 25 of the Customs Act, 1962. This section empowers the Central Government to grant exemption notifications either fully or partially and either conditionally or unconditionally. Thus, if goods are imported into India or exported from it, Customs duties are leviable as per the Schedules to the Customs Tariff Act, 1975 read with any applicable exemption notifications.

7. Exemption notifications, either full or partial, will apply to all imports/exports, if they are unconditional. If the exemption notification is conditional it applies to such imports/exports where the conditions for exemptions are fulfilled and not otherwise. Usually, the fulfillment of conditions of the exemption notification can be ascertained at the time of imports itself. There are other notifications where the conditions may have to be fulfilled post-importation. Wherever the conditions have to be fulfilled post-importation, some mechanism is laid down in the notification itself to ensure that the conditions are fulfilled such as execution of a bond, production of end-user certificates, verification by the Central Excise officers, etc. In this particular exemption notification No.102/97 (as amended), the mechanism which has been laid down is that after importing the goods on payment of applicable duties including the Special Additional Duty of Customs, if the importer sells the goods after paying appropriate amount of VAT to the State Government, they are entitled to refund of SAD. For the period 14.09.2007 upto 01.08.2008 no time limit within which an application for refund can be filed was prescribed. An amendment was made vide Notification 93/2008 dt. 1.8.2008 introducing a time limit of one year from the payment of Special Additional Duty of Customs to file refund claims. The relevant exemption notifications before and after this period are as below :

*{Notification No. 102/2007-Cus., dated 14-9-2007}*

**"Exemption from special CVD to all goods imported for subsequent sale when VAT/Sales Tax paid by importer.** - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do,



hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled :

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods.

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim :

- (i) document evidencing payment of the said additional duty;
- (ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;
- (iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled.

{Notification No. 102/2007-Cus., dated 14-9-2007}

{Notification No. 102/2007-Cus., dated 14-9-2007 as amended by Notification No. 93/2008-Cus., dated 1-8-2008}

"Exemption from special CVD to all goods imported for subsequent sale when VAT/Sales Tax paid by importer. - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled :

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of the said additional duty of customs;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim :

- (i) document evidencing payment of the said additional duty;
- (ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;
- (iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled.

{Notification No. 102/2007-Cus., dated 14-9-2007 as amended by Notification No. 93/2008-Cus., dated 1-8-2008}."

8. The Customs Act, 1962 itself also provides for a mechanism for refund of Customs duties paid in excess. Any person who claims refund of duty of customs will have to follow the procedure prescribed under Section 27 of the Customs Act, 1962 which also has a time limit of one year for claiming refund of customs duties.

9. In the case of Sony India Pvt. Ltd. (supra), the Hon'ble High Court of Delhi framed the question of law as follows :

*"The question of law that arises for determination in this appeal is can the period of limitation for preferring refund claims specified in the amending notification No.93/2008-Cus. be made applicable with retrospective effect, in absence of a limitation period in the original Notification No.102/2007-Cus. in respect of the goods imported prior to the issue of the amending notification".*

10. After examining the question of law framed the Hon'ble High Court of Delhi answered it in favour of the assessee and against the Revenue and allowed the appeal. Though the question of law framed was only with respect to such consignments which were imported prior to the amending Notification No.93/2008-Cus. and sold after that date and refund claims filed, the Hon'ble High Court of Delhi has also held that provisions of Section 27 (including limitation therein) of the Customs Act, in relation to refund do not apply to SAD cases. Further, the Hon'ble High Court of Delhi has also observed that w.e.f. 1.8.2008, the amending notification has introduced a time limit for claiming refund and that limitation cannot be inserted through a subordinate legislation because it is question of substantive rights of the importer and a statutory amendment is required for that purpose.

11. The Hon'ble High Court of Bombay in the case of CMS INFO Systems Ltd. (supra) considered the above judgment of the Hon'ble High Court of Delhi and differed from it. The Hon'ble High Court of Bombay observed that in terms of Section 3 (5) of the Customs Tariff Act, the provisions of Customs Act and the rules and mechanisms for refund apply to any claim of refund of SAD. Therefore, Section 27 of the Customs Act, 1962 including the time limit of one year applies. Further, the amended notification has also introduced a limitation for seeking refund. Particularly, the Hon'ble Bombay High Court also held that this is an exemption granted and it is conditional. The exemption being conditional, it is not permissible to pick and choose the convenient conditions of the exemption notification and leave out those which are onerous and excessive. The Hon'ble High Court further held that but for the exemption notification, there is no right of refund vested with the importer. Para-33 of this judgment is reproduced below :

*"33. It is submitted that the Hon'ble High Court of Delhi has clearly opined and held that the provisions of the Customs Act on the rules and mechanism for refund are incorporated by reference in Section 3(5) of the CTA only "so far as may be" applicable. Since SADC is levied under Section 3(5) and that is refundable only on subsequent sale, then, no limitation period can possibly be imposed for advancing a refund claim. We have carefully perused the above observations and in the light of the analysis of the statutory provisions and the scheme of refund by us, with greatest respect, we are unable to agree with the High Court of Delhi on this point. The Rules and Regulations under the provisions of the Customs Act, 1962, including those relating to drawback, refund and exemption shall so far as may be*

applied and this reveals that for the purposes of making an application seeking refund, its consideration, that Customs Act and its provisions are made applicable even to the Tariff Act and the duties mentioned thereunder. Therefore, a provision for drawback, refund and exemption from such duties can be made by relying on the Customs Act, 1962. The power to refund is to be found in Section 27 of the Customs Act, 1962, and that was always there. The amendment to the notification introducing a limitation for seeking refund apart, Section 27 with its condition of a limitation period was throughout on the statute book. That is the only provision enabling granting refund of any duty is undisputed. The notification granting exemption and under consideration in the case, enables claiming a refund of duty (SAD) but the power to grant it is in the substantive law. Precisely, that is the case herein. Further, we find that there is an exemption granted and which is conditional. The exemption being conditional, it is not permissible to pick and choose convenient conditions of the exemption notification and leave out those which to parties like the petitioners, appear to be onerous and excessive. We do not see how in the teeth of a clear provision in the exemption notification can the assessee/petitioners before us contend that the exemption notification is valid for everything else but when it comes to period of limitation therein, that is excessive or unfair, unjust and arbitrary. Once the exemption is conditional, then, all the conditions therein have to be complied with. If that provides for refund, but the application in that behalf is to be made within a specified period, then, that cannot be said to be excessive and arbitrary, far from being unfair, unjust and unreasonable. It cannot be termed illegal as well for the simple reason that subsection (1) of Section 27 of the Customs Act, 1962, which enables claiming of refund by making an application itself speaks of one year outer limit. That is never challenged, including in the present proceedings. That the period of one year commences from the payment of the duty. If that is how Section 27 is worded and every duty is included in its ambit and scope, then, an application seeking refund of the same has to abide by it, including the bar of limitation contained therein. That is how consistent with that provision even the special exemption notification carries the same stipulation or condition. We do not see how insistence on complying with it can be said to be imposing an unreasonable, unfair and unjust restriction. Once the nature of the right is considered, then, all the more we are unable to agree with Mr. Patil. There is no vested, much less absolute right in the petitioners to seek refund. Even a refund must be within the framework of the statute and admissible on the terms thereof. We are not inclined to agree with him that compliance with this period is calling upon the petitioner to do or perform something which is impossible. The exemption notification does not impose any new condition as has been read into it. It grants the exemption from payment of duty conditionally. The exemption can be availed of provided the goods which are imported are subject to payment of duties which include all the duties that are referred to in both the enactment and the notification. If the import is for subsequent sale, then, that invoice must carry a stipulation that no credit for the additional duty of customs shall be admissible. The importer thereafter can file a claim for refund of the additional duty of customs paid on the imported goods before the expiry of one year from the date of payment of additional duty of customs."

At this stage, it may also be pointed that the Hon'ble High Court of Bombay was dealing in the aforesaid case with imports post-amendment vide Notification No.93/2008-Cus. as opposed to the case of Sony India dealt with by Hon'ble High Court of Delhi in which imports were made prior to the amendment.

12. In view of the above legal position and factual matrix, Ld. Counsel for the appellants submits that the position of law enunciated by the Hon'ble High Court of Delhi in the case of Sony India Pvt. Ltd. (supra) is correct and proper and must be applied and therefore they are entitled to refund of SAD paid by them even though they filed the refund claims after limitation period of one year and all these cases pertain to post-amendment to the notification. He asserts that the legal position enunciated by the Hon'ble High Court of Bombay is not correct. He also points out that in the case of *Gulati Sales Corporation* [2018 (360) ELT 277 (Del.)], the Hon'ble High Court of Delhi dealt with a case of importation post amendment of Notification No.102/2007-Cus. and still held that the limitation of time of one year for filing the refunds does not apply.

13. Per contra, Ld. D.R asserts that an exemption notification must be read as it has been drafted with no intendments or modifications. He further submits that in the case of Sony India (supra), the Hon'ble High Court of Delhi was dealing with a case, as may be seen from the question of law framed, whether the goods were imported prior to introduction of the limitation for refund but the refund claim was filed after introduction of the limitations. The present cases are similar to the cases dealt with by the Hon'ble High Court of Bombay in CMS INFO Systems Ltd. (supra) as all imports were done after the introduction of the limitation period. He further asserts that even if the limitation of one year under the amended notification is read down as held by the Hon'ble High Court of Delhi then in terms of Section 3 (5) of the Customs Tariff Act, 1975 all provisions of Customs Act will apply including provisions of refund under Section 27. Therefore, no refund can be sanctioned beyond the period of one year. Lastly, he argued that the entire question is one of interpretation and application of the exemption notification with respect to the imported goods. In this particular exemption notification, the exemption is made available by way of refund after ensuring that the required conditions are met. Hence it is one of interpreting the exemption notification. The Hon'ble High Court of Delhi has taken a more liberal, purposive interpretation of the exemption notification and held that its benefit cannot be denied simply because the importer is not able to complete his subsequent sale and avail the exemption notification within the time period prescribed. On the other hand, the Hon'ble High Court of Bombay has constructed the exemption notification strictly and held that a conditional exemption notification must be viewed along with all the conditions therein and it is not open for the importer to pick and choose which conditions they would fulfill and which they would not. So the root of the case is one of interpretation of an exemption notification.

14. He fairly submits that a large number of decisions by various judicial fora including the Hon'ble Apex Court taking both liberal and strict interpretation in different judgments. In view of the conflicting judgments, the matter was referred to a Five-Judge Constitutional Bench of the Supreme Court in the case of *Commissioner of Customs (Import) Mumbai Vs Dilip Kumar & Company reported in 2018 (361) ELT 577 (SC)*. Para 52 & 53 of the this judgement were as follows :

*"52. To sum up, we answer the reference holding as under -*

*(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*

*(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.*

*(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled.*

*53. The instant civil appeal may now be placed before appropriate Bench for considering the case on merits after obtaining orders from the Hon'ble Chief Justice of India."*

15. He would assert that the Hon'ble Apex Court has finally put to rest the question of interpretation of exemption notification. It is now the law of the land that exemption notifications should be interpreted strictly and the burden of proving applicability would be on the assessee to show that his goods comes within the parameters of the exemption notification and in case of any ambiguity, the matter must be decided in favour of the Revenue and against the assessee. He would further draw the attention of the Bench that the judgment of Hon'ble High Court of Delhi in the case of Sony India Pvt. Ltd. (supra) was delivered on 16.04.2014 while the judgment of Hon'ble High Court of Mumbai was delivered on 19.12.2016. The judgment of the Constitutional Bench of the Hon'ble Apex Court in the case of Dilip Kumar & Company (supra) finally laying down the law was passed on 30.07.2018. Therefore, this judgment prevails over earlier decisions of the Hon'ble High Court of Delhi.

16. We have considered the arguments on both sides and perused the records. The provisions for refund of Customs duty available under the Customs Act is

under Section 27. The Hon'ble High Court of Delhi in the case of Sony India Pvt. Ltd. (supra) held that this section should not apply to refund of SAD because the refund is as per the Notification. The Hon'ble High Court of Delhi was dealing with a situation where there was no limitation in the exemption notifications for filing the refund claim at the time of import but which was introduced by the time refund claim was filed. The Hon'ble High Court of Bombay, on the other hand, was dealing with a case such as the present one, where the imports have taken place after the amending notification. The Hon'ble High Court of Bombay also held that the limitation under Section 27 also applies. We find that the Hon'ble High Court of Delhi framed the question of law only with respect to retrospective application of the amendment but also held that the amending notification must be read down to the extent it imposes a time limit for filing the refund claim. Evidently, if an importer resells the goods and files the refund claim within the period, they will be put to loss as he will be bearing both the burden of SAD and the VAT which he would pay while selling the goods. The Hon'ble High Court of Bombay on the other hand held that it is not open for the importer to pick and choose parts of the exemption notification that suits while ignoring those that don't. The Hon'ble High Court of Bombay also held that Special Additional Duty of Customs is also in the nature of customs duty and it is not a duty on sale of goods. It further held that the importer does not have any vested, let alone absolute right, for refund of the SAD. We also note that the Hon'ble High Court of Bombay has considered the judgment of the Hon'ble Delhi High Court in the case of Sony India Pvt. Ltd. (supra) and differed from it. Further, in the case of *Gulati Sales Corporation [2018 (360) ELT 277 (Del.)]* decided by the Hon'ble High Court of Delhi on 07.11.2017, the ratio of Sony India (supra) was followed even when the imports were made after amendment to the notification. Nevertheless the undisputed position is that this is a case of a refund arising out of a conditional notification.

17. To sum up, we find that the Hon'ble High Court of Delhi has taken a liberal view on interpreting the exemption notification and held that since the purpose of availing the SAD is to provide level playing field between the imported goods and the domestic goods, when the imported goods are resold on payment of VAT to the State Government, the exemption notification provides for refund of SAD. It may or may not be always possible for the importer to resell the goods and file the refund claim within time depending on his market conditions. Taking a liberal view, the Hon'ble High Court held that refund is available without the limitation of one year indicated in the exemption Notification 102/97 after amendment. On the other hand, the Hon'ble Bombay High Court has constructed the exemption notification strictly and held that all conditions including the time limit within which the refund claim has to be filed must be fulfilled. We also find that there is no order of the jurisdictional High Court of Madras. However, the question of strict versus liberal interpretations of the exemption notifications has now finally been settled by the judgment of the Constitutional Bench of the Hon'ble Apex Court on 30th July 2018 in the case of Dilip Kumar & Company (supra), any exemption notification must be strictly interpreted and any benefit of doubt must go in favour of the Revenue and against the assessee. Contrary decisions such as those in the case of *Sun Export Corporation VS Collector [1997 (93) ELT 641 (SC)]* have been overruled by the aforesaid Five-Judge Constitutional Bench. Judicial discipline requires us to follow the judgment of the Apex Court and interpret the exemption notification strictly as it has been drafted including the time limit within which refund applications have to be filed. We find that the judgment of the Hon'ble High Court of Bombay in the case of CMS INFO System (supra) is consistent and appropriate, syncs well with the ratio of Dilip Kumar's case (supra), which is required to be followed.

18. Consequently, the refund applications of the importer beyond the time limit have been correctly rejected by the lower authorities. The impugned orders rejecting such refund claims are correct in law and call for no interference. The appeals are rejected and impugned orders are upheld.

(Order pronounced in open court on 26.09.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, CHENNAI  
COURT NO. III**

**Customs Appeal No.41798 of 2016-SM**

Arising out of Order-in-Appeal No.134/2016-TRY (Cus.), Dated: 23.06.2016  
Passed by the Commissioner of Customs & Central Excise (Appeals-2),  
Tiruchirapalli

**Date of Hearing: 18.10.2019**  
**Date of Decision: 18.10.2019**

**GAURAV AGARWAL, PROPRIETOR  
M/S. GURAV PAYAL BHANDAR, NO.58, KALAKUNCH COLONY  
BUTESHWAR ROAD, MATHURA - 281001**

**Vs**

**COMMISSIONER OF CUSTOMS  
NO.1, WILLIAMS ROAD, CANTONMENT  
TIRUCHIRAPALLI - 620001**

**Appellant Rep by:** Shri B Satish Sundar, Adv.  
**Respondent Rep by:** Ms T Ushadevi, AR

**CORAM:** Sulekha Beevi C S, Member (J)

**FINAL ORDER NO. 41733/2019**

**Per: Sulekha Beevi:**

Brief facts are that based on intelligence, the officers of Customs Preventive Unit, Salem intercepted one load Auto near railway station, Salem and found to carry five parcels packed in plastic sacks amidst other parcels. Consignment name was mentioned as "VENKATESH SLM with the Phone Number". On suspicion, the parcel along with the vehicle was brought to the office of Customs Preventive Unit, Salem. The driver of the auto Shri Rajasekaran stated that the parcels were meant to be delivered to Shri Venkatesh of Salem. The said Venkatesh, courier agent, was asked to appear before the officers. He appeared with four other persons to whom the parcels were intended to be delivered , namely, S/Shri Indarchand, K. Srinivasan, Hariganesan and Mahendran. These 5 parcels were opened in the presence of independent witnesses and found to contain 101.36 kgs. of silver granules/bars/leg chains etc., along with airway bills of M/s. Green Dart Courier, Chennai. Out of 101.36 kgs of silver found in the parcels, 60 kgs. was in the nature of silver granules and intended to be delivered to Shri M. Mahendran. The present dispute is confined to the said 60 kgs. of silver granules only relating to airway bill no.323030/26.06.2013 on which sender s name is shown as ' PJ' and recipient address as Mahendran.

1.1 The parcel consigned to Mahendran had three boxes. These three boxes had two carton boxes in each box. Hence there were totally six carton boxes and these carton boxes which contained silver granules had markings with serial numbers as Made in Korea '999.9',along with lot numbers .Each carton box was found to contain 10 kg of silver granules and thus there was total quantity of 60 kg of silver granules. The description is as under:

| <b>Carton Box No.</b> | <b>Particulars of the materials available in the parcel</b>                                                     | <b>Weight (in Kgs.)</b> | <b>Sender</b> | <b>Receiver</b> |
|-----------------------|-----------------------------------------------------------------------------------------------------------------|-------------------------|---------------|-----------------|
| <b>(1)</b>            | <b>(2)</b>                                                                                                      | <b>(3)</b>              | <b>(4)</b>    | <b>(5)</b>      |
| III                   | One carton box contains silver granules (Lot No.BEA1313 AL 57) 999.9 Made in Korea, LS-Nikko Copper, 2013-03-28 | 10.000                  | PJ            | Mahendran       |
|                       | One carton box contains silver granules (Lot No.BEA1313 AL 94) 999.9 Made in Korea, LS-Nikko                    | 10.000                  |               |                 |

|  |                                                                                                                 |        |  |  |
|--|-----------------------------------------------------------------------------------------------------------------|--------|--|--|
|  | Copper, 2013-03-28                                                                                              |        |  |  |
|  | One carton box contains silver granules (Lot No.BEA1313 AL 56) 999.9 Made in Korea, LS-Nikko Copper, 2013-03-28 | 10.000 |  |  |
|  | One carton box contains silver granules (Lot No.BEA1313 AL 79) 999.9 Made in Korea, LS-Nikko Copper, 2013-03-28 | 10.000 |  |  |
|  | One carton box contains silver granules (Lot No.BEA1313 AL 50) 999.9 Made in Korea, LS-Nikko Copper, 2013-03-28 | 10.000 |  |  |
|  | One carton box contains silver granules (Lot No.BEA1313 AL 76) 999.9 Made in Korea, LS-Nikko Copper, 2013-03-28 | 10.000 |  |  |
|  | Total Weight                                                                                                    | 60.000 |  |  |

1.2 The purity of the silver granules was assayed and found to be 99.8/99.7. the officers on belief that the silver granules were of foreign origin and as there was no documents to support the payment of duty or legal import, detained the silver granules and initiated investigations. The appellant herein Sri Gaurav Agarwal, claimed the ownership of the silver granules and stated that he sent the silver granules to Shri Mahendran, who is the Proprietor of M/s. Vignesh Payal, Salem for making leg chains. Though, the appellant Shri Gaurav Agarwal furnished documents and also gave statement claiming the silver, the department was of the view that the silver being foreign origin and that the appellant not been able to establish the duty paid on the said silver or legal import, is smuggled in nature. Show-cause notice was issued to the appellant proposing confiscation of the silver as well as for imposing penalties under various provisions of the Customs Act, 1962. After due process of law, the original authority confirmed the confiscation and imposed penalty of Rs.5 lakhs on the appellant under section 112(a) of the Customs Act, 1962. In appeal, Commissioner (Appeals) upheld the same. Hence this appeal.

2.0 On behalf of the appellant, the learned counsel Shri B. Satish Sundar appeared and argued the matter. He explained the facts of the case and furnished chart giving the dates and narration of incidents as under:

| Date      | Event                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 27.6.2013 | Based on intelligence, Customs Preventive Unit intercepts one load auto bearing registration No.TN30M0013 near Salem Junction and recover 5 parcels packed in plastic sacks. The recipient's name in the said parcels is mentioned as "Venkatesh SLM 9344664811". On the same date, Venkatesh of Salem is identified and asked to appear before the investigation authorities. Venkatesh appears along with four other persons to whom the parcels were to be delivered namely Inder Chand, Srinivasan, Hari Ganesan and Mahendran and statements were recorded from each other. Examination of the parcels reveal that they contain 101.361' Kgs. of silver granules / bars/ leg chains etc. of which 60 kgs. of silver granules are meant for Mahendran. |
| 27.6.2013 | Statement of Mahendran is recorded. He states that he is in the business of making silver leg chains and used to receive silver bars / granules from Gaurav of Mathura and used to convert the same into silver leg chains and send them back for which he would receive Rs.400/- per kg. as making charges. He also states that the 60 Kgs. of silver granules were purchased by Gaurav from Chennai and send to him.                                                                                                                                                                                                                                                                                                                                     |
| 28.6.2013 | Goods were seized and deposited in customs warehouse, Trichy.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 5.7.2013  | Statement was recorded from Venkatesh, the courier                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 10.7.2013 | Mahendran writes a letter to AC, Trichy claiming that the seizure of the silver granules / bars is not legal and cites Board circular                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |



|                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|--------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                | dated 11.6.1990 to aver that provisions of section 123 cannot be invoked.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 20.7.2013                      | Further letter on the above said lines from Mahendran                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 17.8.2013                      | Letter from the appellant Gaurav Agarwal enclosing copies of work order / bills for purchase of the silver granules as also sales tax registration certificate and extracts of books of accounts.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 14.8.2013                      | Seized silver granules are taken up for inventorisation and found to be of purity 99.80 and 99.77                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 19.8.2013                      | Seizure of the same is effected by the office of the Assistant Commissioner of Customs, Trichy in terms of the Board circular above referred.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 23.8.2013                      | Statement recorded from Venkatesh, courier                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 23.8.2013                      | Further statement recorded from Mahendran, who submits the books of accounts of Gaurav Agarwal to show licit acquisition accountal of the silver under seizure.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 30.8.2013                      | Statement of Gangadharan of Green Dart Courier, Chennai. He talks about transport of the silver bars / granules from Chennai to Salem                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 11.9.2013                      | Search of the residential and business premises of Mahendran resulting in nil recovery                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 12.9.2013                      | Statement of Gaurav Agarwal, the appellant. He states that he is in the business of silver bullion and leg chains for last ten years. He further submits that he had purchased 112.430 kgs. of silver bullion by 8 transactions from SB Ornaments Pvt. Ltd. Agra from May 2012 to March 2013 and 13.199 Kgs. from M/s.Nishant Handicrafts, Mathura and 4.926 Kgs. from M/s.Prashant Silver Handicrafts, Mathura from December 2012 to January 2013. That out of the stock of silver bullion he has sent the 60 kgs of remnant particles of silver bullion in 6 polythene bags each of 1-Kgs. through his employee Rakesh on 24.6.2013 from Mathura to Chennai by train which was handed over to Green Dart courier, Chennai for sending it to Mahendran. |
| 23.9.2013<br>and<br>15.10.2013 | Letters of SB Ornaments confirming sale of silver bullion to the appellant                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 5.11.2013                      | Confirmation letter of Prashant Silver Handicrafts                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 5.11.2013                      | Further, confirmation letter of Nishant Silver Handicrafts to the appellant                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 20.1.2014                      | Statement of Gaurav Agarawal, appellant before the Deputy Commissioner of Central Excise, Aligarh, wherein the details of transaction and also submits the entire books of accounts including cash book, sales tax return, income tax statement and ledger accounts for purchase and sale / trade in silver.                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 13.2.2014                      | Show cause notice is issued by the department proposing confiscation and penalty.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 1.4.2014                       | Reply to show cause notice filed contesting the proposal for confiscation and penalty./                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 9.9.2015                       | O-I-O No.45/2015 (JC) passed by the original authority absolutely confiscating the silver granules and imposing penalty of Rs.5 lakhs on the ground that the burden under sec.23 had not been discharged and that the packings of the polythene bags indicate that the silver might have been of Korea origin and smuggled.                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 6.11.2015                      | Appellant deposits 7.5% of the penalty amount and filed appeal to the Commissioner of Customs (Appeals), Trichy                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 9.12.2015                      | Appeal filed before the appellate authority                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 23.6.2016                      | The appellate authority namely the Commissioner of Customs (Appeals), Trichy rejects the appeal.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 29.9.2016                      | Appellant deposits balance 2.5% of the penalty amount and prefers appeal to this Hon'ble Tribunal.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

## 2.1 Contentions :-



1. The consistent stand of the appellant is that the silver under seizure are not of foreign origin, which is reflected in his first statement dated 17.8.2013. Further, on assayment, the purity of the silver is shown to be 99.80 and 99.77. Therefore, even on the face of the records, there is no material to show that the silver bars / granules under seizure were smuggled so as to warrant absolute confiscation.

2. The only finding of the original authority as confirmed by the appellate authority is that the packings had markings "made in Korea" with lot numbers and appear to be company packed having high purity and uniform dimension besides shiny finish. The original authority further finds that L.S.NIKKO is a reputed manufacturer of silver bullion. So on the basis of these materials which are merely in the nature of suspicion, the authorities below without making any inquiry finds that the silver seized is of foreign origin and therefore smuggled.

3. The aforesaid findings are presumptive and on mere assumption and presumptions. The authorities below have not given any credence to the accounts books like ledgers, vouchers, sales bills besides confirmation from the sellers produced by the appellant and also his initial statement to the effect that the silver seized were stock in trade which was sent from Mathura to Salem for making silver leg chains. In light of the extensive defence and materials produced by the appellant to show that the silver in question was part of stock in trade which was sent for job work, the burden if any under section 123 stands discharged, and cannot be invoked. Therefore, the findings of the original authority as confirmed by the appellate authority that original packings had foreign markings, silver granules and prohibited goods and no evidence has been produced to show it is not smuggled, differing stands and books of accounts which cannot be correlated require to be rejected at the hands of this Hon'ble Tribunal for the reason that burden under section 123 is rebuttable and enough and more materials have been placed by the appellant to show that the silver granules under seizure were part of stock in trade which has been acquired in his business and sent for job work.

4. The larger question which arises is whether the authorities below are right in invoking section 123 of the Customs Act, 1962. This issue which relates to silver bullion of quantities less than 100 kgs. having no foreign markings and not in the form of 30 Kgs. bar has been considered by the CBEC vide Circular dated 11.6.1990 in which if seizure is of silver bullion, meets the above criteria, then section 123 should not be invoked. Admittedly, in the present case, the seized quantity is only 60 kgs. and the silver bars do not have any foreign markings and are not of 30 kgs bars and therefore the burden cannot be cast on the appellant in terms of section 123. The very same issue has come up for consideration before this Hon'ble Tribunal in a number of cases of which the following is relied:-

*a. 2001 (131) ELT 198 (Tri. Chennai)*

*b. 2001 (132) ELT 192 (Tri. Chennai) affirmed in 2009 (238) ELT A 166 (SC)*

*c. 2005 (191) ELT 1103 (Tri. Kol.)*

*d. 2005 (179) ELT 110 (Tri. Chennai)*

*e. 2009 (239) ELT 427 (Tri. All.)*

*f. 2009 (243) ELT 74 (Tri. Chennai)*

*g. 2001 (133) ELT 668 (Tri. Kol.) affirmed in 2014 (312) ELT 17 (SC)*

*h. 2017 (354) ELT 666 (Tri. Chennai)*

5. Mere lustre and markings on the packings cannot be a criteria to hold that the seized silver is of foreign origin and smuggled. The appellant relies on judgment of the Hon'ble Tribunal in *2015 (324) ELT 162 (Tri.)*. Thus, in light of the afforested facts and the contentions raised by the appellant, including the ratio of the case laws cited above, it has to be held that the seized silver bars are not confiscable.

6. The appellant therefore prays that this Hon'ble Tribunal may be pleased to accept the appeal by allowing the same setting aside the order of confiscation.

7. The main argument put forth by the learned counsel is that the seizure of the silver is against the Board Circular, dated 11.06.1990. According to him, on 08.06.1990 silver was notified under section 123 of the Customs Act, 1962. The Board has issued circular stating that the seizure cannot be effected of silver which is less than 100 kgs. So also, only such silver, which has foreign markings, when the said quantity is of 30kgs in nature of bar. The present silver seized by the department is in the nature of granules, which is less than 100 kgs. It does not bear any foreign markings. The markings seen on the packings/cartons has been explained by the appellant Shri Gaurav Agarwal. He had purchased the said cartons/packings from street in Chennai and used the same for packing and sending the silver for job work. The silver granules was purchased by the appellant from various silver dealers in Mathura. The bills showing the purchase from the said silver dealers have also been produced. The books of accounts of the appellants show the purchases, which was also shown before the authorities. None of the documents was given any weightage by the department.

2.2 The learned counsel relied upon various judgments as discussed below:

(1) *N.S. Allaudeen Vs Commissioner of Customs, Trichy reported in 2001 (13a) E.L.T.198 (Tri.-Chennai)*.

The learned counsel submitted that the fact of the case is that the silver seized was in the nature of bars and though had foreign markings weighing less than 30 kgs. The Tribunal had applied the Board's Circular and held that confiscation and seizure cannot sustain.

(2) *K.N. Easwaran Vs Commissioner of Customs, Trichy reported in 2001 (132) E.L.T.192 (Tri.-Chennai)*

This case was relied upon by the learned counsel to argue that when seizure of silver was 69 kgs. and in the nature of bars, which did not have foreign markings, the Tribunal held Board's Circular would apply and confiscation set aside. The said decision was accepted by the Hon'ble High Court of Madras and the appeal filed by the department was withdrawn.

(3) *Ganesh Prosad Vs Commissioner of Customs, Patna reported in 2009 (191) E.L.T.1103 (Tri. -Kolkata)*.

The learned counsel relied upon the above decision to argue that the circular was given effect to when the seizure of the silver was less than 100 kgs. without foreign markings.

(4) *Murarilal Agarwal Vs Commissioner of Central Excise, Trichy reported in 2005 (179) E.L.T.110 (Tri. -Chennai)*.

The learned counsel relied upon the decision of the Larger Bench of the Tribunal wherein the applicability of the Board's circular was also discussed. The said order was affirmed by the Hon'ble High Court of Allahabad as reported in 2009 (239) E.L.T. 427 (All.).

(5) *Naqsood Alam Vs Commissioner of Customs, Lucknow reported in 2015 (324) E.L.T.162 (Tri.-Del.)*

The learned counsel stressed that even though the cartons /packing has foreign markings this cannot be the criteria to decide whether the goods inside the cartons are of foreign origin.

3.0 The learned Authorized Representative for the Revenue Ms. T. Ushadevi, DC (AR) appeared and argued on behalf of the department. She first referred to the circular relied upon by the learned counsel for the appellant. It is submitted by her that in the said circular, it is mentioned that if the silver bullion is found to be in the form of bar weighting 30 kgs and bears foreign markings, the same can be subject to seizure by officers. In the present case, the silver granules packed in cartons had foreign markings and, therefore, the circular does not apply to the appellant. She submitted that the circular does not say that it should be a single bar weighing 30 kgs with foreign markings. Seizure can be affected if it weighs 30 kgs. and also if bullion is with foreign markings. In the present case, the silver was not in the nature of bars but it was in the nature of bullion. Further, packing materials also showed that the silver was manufactured in Korea. She

referred to the scanned copy of the packings/carton boxes, to point out that the name of manufacturer, date of the manufacture, the lot nos. as well as the purity is mentioned on the packing boxes. Further, the boxes were factory sealed. The appellant states that he has purchased the boxes from roadside at Chennai and had handed over the boxes for packing to M/s. Green Dart Courier. This is false and unbelievable. Further, Shri Raju, Proprietor of M/s. Green Dart Courier stated that the sender is Shri. Muralidhran , M/s. BBT and M/s. PJ and the goods in parcels were declared as automobile spare parts. The sender or the consignee is not the appellant herein. The parcel was addressed to Shri Venkatesh and therefore the claim of the appellant that he send the silver for job work cannot be true. The statement of Shri Raju read along with the fact that the cartons were bearing foreign markings along with seal and details of the manufacture would establish that the silver is of foreign origin. Apart from this, the assayer has certified that it has 99.8/99.7 % purity. The purity noted on the packings is 99.9%. The minor difference of 0.1-0.2% per carot is of no consequence. The quantity mentioned on the carton boxes is 10 Kgs., and the very same quantity of silver was found in polythene bags, kept inside these carton boxes.

3.1 The foreign company mentioned on these carton boxes is a manufacturer of silver bullion including granules. She adverted to para 30 of the show-cause notice, wherein, the department has referred to another case, of which the facts show that, on 02.02.2013, the officers of CPU had intercepted vehicle carrying 15 kgs. Silver of granules each weighing 10 Kgs. The said silver granules were of identical brand, Country of Origin and weighing 10 Kgs. In the said case, the purchaser Shri .Shiv Sahai of Salem produced the documents including airway bill in support of the imported silver granules. This would go to show that the said manufacturer in Korea is engaged in manufacturing and dealing of silver granules which are imported to India. The packing /carton boxes seized in the present case, should therefore be considered as foreign markings of the silver granules. The circular, therefore, does not apply.

3.2 Further the appellants have not been able to show that they have obtained the silver by legitimate import. Though they have produced invoices of several silver dealers, the department had obtained letters from such silver dealers, wherein, it was stated that they have not supplied granules but sold only silver bars . The said letters are part of the relied upon documents. The judgments relied by learned counsel are not applicable to the facts of the present case. The decision of Maqsood Alam (supra) will not apply to the facts of the case since the goods involved there in is betel nuts and not notified goods under the Customs Act. The department has established that the goods seized are illegally imported and not subject to Customs duty and, therefore, the confiscation and penalty imposed are legal and proper.

4.0 Heard both sides.

5.0 The learned counsel for the appellant has placed the arguments mainly relying upon the Circular of the Board dated 11.06.1990. For better appreciation, the said Circular is reproduced as under:--

*"Silver bullion (excluding silver coins, jewelry and utensils) have since been notified under section 123 of the Customs Act, 1962 vide Notification No. 28 (Customs), dated 08.06.1990 thereby shifting the burden of proving whether the seized silver is smuggled or not, by the persons from whom silver bullion is seized. In order to prevent the possibility of undue harassment to law abiding persons possessing small quantities of silver bullion of Indian origin, it has been decided that normally the provisions of the section 123 of Customs Act, 1962 should not be invoked against persons, who are found to be in possession of silver bullion of less than hundred kilograms. However, if the silver bullion is found to be the form of bars weighting 30 kilograms (approx.), which are being smuggled into the country and also where silver bullion is found to bear foreign markings, the question of seizure may be considered even when the quantity is less than hundred kilograms by an officer not lower in rank than of an Assistant Collector of Customs. Also keeping in view that now there is no incentive for the illegal export of silver bullion and coins, Notification No. 29 (customs), dated 8th June, 1990 has been issued*

*removing silver bullion and coins from the purview of Chapter IV- B or the Customs Act, 1962. Detailed instructions are being issued separately."*

From the above circular, it is seen that the Govt. has made clear that the provisions of section 123 of Customs Act, 1962 should not be invoked, when persons are found possession of silver bullion less than 100 kgs. Further that when silver bullion is in the form of bars of 30 kgs. each and also silver bullion which bear foreign markings even though less than 100 kgs. can be subject to seizure for which proceedings can be initiated.

6.0 In the present case, the silver is not in the nature of bars or coins. It is in the form silver granules. As per the circular, when silver bullion is found in possession with foreign markings the same can be subject to seizure, if it is less than 100 kgs. In the present case, the quantity of silver bullion is 60 kgs. Then the question arises, whether silver granules would fall within the definition of silver bullion. The Commissioner (Appeals) in para 8 of his order has explained the meaning of bullion as seen in Wikipedia. Ordinary meaning of bullion given as per the dictionary is "Platinum, Gold or Silver, which is in bulk quantities". The meaning of bullion thus does not take away platinum, gold or silver in the form of grains/granules. Thus, granules also fall within the definition of bullion. This would lead to the consequence that if the silver granules has foreign markings even though less than 100 kgs. would not be covered by the above Board circular. The next question then is whether silver granules in the present case has foreign markings. Needless to say that marking cannot be endorsed on silver granules as in case of silver coins or silver bars. The only practical way to endorse a marking on silver in the form of granules is to mention the markings on the packing /boxes which holds the silver granules. In the present case, the silver granules were found in carton boxes on which there was specific mention of the name of foreign manufacturer, lot nos., the date of manufacture etc. The scanned copy of the markings on the boxes has been placed as part of the record, which is reproduced under and would help for better appreciation.

Thus, it can be seen that the markings on the boxes clearly indicated the silver granules was of foreign origin. Then the burden shifts on to the appellant to show how the markings do not relate to the silver contained inside the boxes.

6.1 The appellant Shri Gaurav Agarwal has explained that he came to Chennai on 20.06.2013 and purchased plywood boxes and carton boxes from the road side shop at Sowcarpet, Chennai and handed over the same to M/s Green Dart Courier Ltd., who has packed the silver in the boxes and sealed it. This explanation seems to be unbelievable and acceptable. The boxes contained the exact quantity of silver granules mentioned on them. How is it possible for the appellant to purchase 6 carton boxes exactly mentioning 10 kgs of silver granules from road side shop in Sowcarpet. Further, the boxes also show the date of manufacture, purity as also lots nos. The details given by department in another case(silver granules imported by Sh. Shiv Sahni) establishes that the manufacturer mentioned on the carton boxes is a manufacturer/supplier of silver granules. These facts would sufficiently prove that the case set up by the appellant that the carton boxes were purchased from roadside to be false and unacceptable. From the discussions made above, I am of the view that the foreign markings on the carton boxes/packings relate to the silver granules contained in them and, therefore, the circular dated 11.06.1990 cannot apply.

6.2 The appellant also relies upon ledger extracts/ accounts to tentend that silver was purchased by him. Shri Gaurav Agarwal has deposed that he had purchased silver granules vide eight transactions from M/s. S.B. Ornaments Pvt. Ltd., Agra, M/s. Nishant Silver Handicraft, Mathura and M/s. Prasanth Silver Handicraft, Mathura. Appellant has produced some invoices and accounts to support this. However all these sellers have issued letters to department stating that the silver sold by them was in the nature of bar, and not granules. Learned counsel has made a frail effort to counter this by stating that though bars might have been supplied by the silver dealers, the appellant could have processed the same into silver granules and then sent for job work to M/s. Vignesh Payals. There is no evidence substantiate that processing charges were paid for converting the bar into granules which is a bulk quantity of 60 kgs. The statement of Shri Gaurav Agarwal is totally silent on this aspect. At the cost of

repetition it has to be mentioned that the carton boxes which contained the silver granules correctly mentioned the quantity in each box to be 10kgs, the name of manufacturer, the lot no. year of manufacture, purity etc. Further, it is a question to be answered by the appellant as to whether the silver granules after being processed out of a bar by the appellant retain such high purity. Thue the documents/accounts produced by appellant do not help the appellant to establish that the goods are not of smuggled nature.

7.0 The decisions relied upon by the learned counsel for the appellant are cases in which there wwere no foreign markings and, therefore, distinguishable. The decision in M/s. Murarilal Agarwal (supra) relied upon by the learned counsel, is a case of silver bars of foreign origin weighing less than 46.7 kgs and therefore is of no assistance to appellant. The appellant therein had produced bills of entry to show that the silver bars were licitly imported. The appellant here, has not been able to establish that the goods were licitly imported into India. In the case of M/s. Shambunath (supra) the Larger Bench was dealing with silver which was not in the form of granules. The said case relates to 101 slabs silver which varied in weight and purity, and entirely on different set of facts. .

7.1 From the foregoing, I am of the view that the appellant has not been able to establish that the silver was legally imported and suffered Customs duty. In such circumstances, I find the confiscation of goods and penalties imposed are legal and proper. The impugned order requires no interference. The appeal filed by the appellant is, dismissed.

(Dictated and pronounced in the open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, CHENNAI  
COURT NO. III**

**Customs Appeal No.40133 of 2013**

Arising out of Order-in-Appeal C.Cus.No.1352/2012, Dated: 29.11.2012  
Passed by Commissioner of Customs (Appeals), Chennai

**Date of Hearing: 01.11.2019**

**Date of Decision: 01.11.2019**

**M/s VAS NOORULLAH AND COMPANY  
NO.47, WUTHUCATTAN STREET, PERIAMET  
CHENNAI-600003**

**Vs**

**COMMISSIONER OF CUSTOMS (AIR)  
NEW CUSTOMS HOUSE, AIRPORT & AIR CARGO  
MEENAMBAKKAM, CHENNAI - 600027**

**Appellant Rep by:** Shri G Derricksam, Adv.

**Respondent Rep by:** Shri M Jagan Babu, AC (AR)

**CORAM:** Sulekha Beevi C S, Member (J)

P Venkata Subba Rao, Member (T)

**FINAL ORDER NO. 41246/2019**

**Per: P Venkata Subba Rao:**

This appeal is filed against OIA No. C.Cus.No.1352/2012 dt. 29.11.2012.

2. The facts of the case are that the appellant exported leather vide Shipping Bill No.3921088 dated 22.7.2009 describing it as "Sheep Nubuck (Snuffed) Finished Leather". The officers of customs doubted the description of the goods. However, the export was allowed without waiting for the test report based on an undertaking given by the exporter. Sample of the export consignment was sent by Customs officers to Central Leather Research Institute (CLRI) for testing who confirmed that the consignment does not conform to the description. Export of leather is restricted unless it conforms to the Public Notice No.92-97 dt. 27.5.1992 issued by DGFT. Accordingly, the original authority vide his order dt. 09.09.2009 held that the goods are liable for confiscation under Section 113 (i) & (ii) of the Customs Act, 1962 and imposed a redemption fine under Section 125 of Rs.10,000/- as the goods have already been exported. He further imposed a penalty of Rs.5000/- upon the exporter under Section 114 (ii) of the Customs Act, 1962 and demanded export duty applicable to the goods of Rs.1,56,457/-. He further ordered that the export to repay drawback, if any, availed with applicable rate of interest to the department. Aggrieved, the appellant appealed before the first appellate authority. An interim order dt. 19.5.2010 was passed by the first appellate authority observing as follows :

*"On a perusal of the case, it is seen that CLRI has certified that the sample does not conform to the norms and conditions lay down in the said Public notice. The lower authority has passed the impugned order on the strength of the said certificate. But on the other hand, the appellants vehemently argues that the said entry in the PN does not cover goods made from sheep leather. The appellants sought to retest of the sample. Accordingly, I direct the lower authority to send the second sample that is available with the department to CLRI for retest and submit report before this forum. Thereafter, the issue will be decided on merits. The impugned order is stayed until then."*

Accordingly, the department has sent the sample for retesting to check if the goods matched description. The second test report described the goods as follows :

*"3. With reference to the above, we give below our technical opinion on the leather sample submitted on 27.07.09 by you and retested the same as follows.*

*"The leather sample which was submitted by you through your Letter No:S.Misc.50/2009-Exp.Exam dated 27.07.2009 (declared as Sheep Nubuck (Snuffed) finished leather) was tested as per the public notice that was in force that time 3-ETC-PN (1992-97) dated 27.05.1992 and the certificate issued as not a finished leather under the category of sheep nubuck leather (as per declaration) due the absence of snuffing to produce velvety nap. Since there was no nubuck leather listed under the sheep skin leathers, the leather was assessed as (VI) (1) (L) which is the cow nubuck leather. Irrespective of the substrate, the snuffing to produce velvety nap is the critical norm for deciding if a given leather is nubuck leather or not. No if the exporter feels it is not a nubuck leather but a finished leather under some other category, kindly arrange to declare the finished leather clearly to enable us to assess the same and give out certificate".*

Thereafter, the appeal of the appellant was taken up by the first appellate authority and rejected. Hence the present appeal.

3. Ld. counsel for the appellant would submit that in the first round, the sample was tested for "Nubuck Leather of Cows" whose description was given in Public Notice No.3.ETC/27.05.1992 issued under EXIM Policy 1992-97 at Sl.No.1 (L). He would submit that their Nubuck Leather was made from goat/sheep skins and hence is not covered specifically by the public notice. Therefore, its export is not specifically permitted without a licence. However, he would draw the attention of the Bench to the public notice reads as follows :

*"Any new type of finished leather not covered above may be permitted for export, subject to testing and certificate by the Central leather Research Institute."*

He would therefore argue that any leather even if it is not covered by public notice can still be exported subject to testing by CLRI which was done in their case. Therefore, there is no restriction on export of the goods which they exported. In view of the above, the order of the first appellate authority upholding the order of the lower authority is incorrect and needs to be set aside.

4. Ld. A.R reiterates the findings of the lower authorities and asserts that the impugned order is correct and calls for no interference.

5. We have considered the arguments on both sides and perused the records. As is evident from the second test report of CLRI dt. 27.12.2010 reproduced above, the sample was tested by CLRI to see if it matches the description in the shipping bill. In the first test report, it was tested on the specifications for "Nubuck Leather of cows or buffaloes" while the description of the goods by the appellant was "Sheep Nubuck leather". The second sample was ordered to be tested which was tested and it was again confirmed that it is not Nubuck Leather at all as the process of snuffing essential for making nubuck leather has not been undertaken. From the above, it is clear that there was misdeclaration of the goods in the shipping bill by the appellant. The confiscation of the goods for improper export is provided for on various grounds under Section 113 of the Customs Act. Clause (d) of Section 113 provides for confiscation of any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force. Confiscation of goods where the description does not match with the declaration is provided for under Section 113 (i) and (ii). These are reproduced below :

*"(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77;*

*(ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;"*

6. In this case, as per the usual practice, the exports were not held up but were allowed after taking an undertaking from the appellant. After the testing, it was found that the nature of the goods exported did not match with the description given in the shipping bill. Therefore, they have been confiscated under Section

113 (i) and (ii) of the Customs Act, 1962. We also find that there is no confiscation under Section 113 (d) for export or attempted export in violation of the prohibitions under Foreign Trade Policy or any other law. We, therefore, find that the argument of the Ld. counsel that their goods were not prohibited from export under Foreign Trade Policy and the Public Notice issued therein does not come to their rescue because there is no confiscation on this count at all. The only confiscation was on the ground that the appellant has described the goods wrongly. We find that the second test report confirms that the goods were not which were described in the shipping bill. For this reason, we find that confiscation of the goods under Section 113 and imposition of redemption fine of Rs.10,000/- under Section 125 in lieu of confiscation (as the goods have already been exported after the appellant gave an undertaking) calls for no interference. Consequently, we also find that the imposition of penalty of Rs.5000/- under Section 114 is liable to be upheld and we do so. The applicable export duty and recovery of drawback, if any, availed also call for no interference.

7. In view of the above, we find that the appeal is liable to be rejected and we do so. The appeal is rejected and impugned order is upheld.

(Operative part of the order pronounced in court)



[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, CHENNAI  
COURT NO. IV**

**Customs Appeal No. 42206 of 2017**

Arising out of Order-in-Appeal Airport C.Cus.I. No. 168/2017, Dated: 11.09.2017  
Passed by the Commissioner of Customs (Appeals-I), No. 60, Rajaji Salai, Custom  
House, Chennai-600001

**Date of Hearing: 12.12.2019**

**Date of Decision: 06.02.2020**

**LIEUTENANT COLONEL S GANESAN (RETD.)  
FLAT NO. 7, CITADEL APARTMENTS NO. 1A  
CENOTAPH 2ND LANE, ALWARPET  
CHENNAI - 600018**

**Vs**

**COMMISSIONER OF CUSTOMS  
CUSTOM HOUSE, NO. 60, RAJAJI SALAI  
CHENNAI - 600001**

**Appellant Rep by:** Mr Hari Radhakrishnan, Adv.

**Respondent Rep by:** Ms K Komathi, AR

**CORAM:** C J Mathew, Member (T)

P Dinesha, Member (J)

**FINAL ORDER NO. 40083/2020**

**Per: P Dinesha:**

This appeal is filed by the assessee against the Order-in-Appeal Airport C.Cus.I. No. 168/2017 dated 11.09.2017 passed by the Commissioner of Customs (Appeals-I), Chennai, and the only grievance of the appellant is against the levy of penalty under Section 112 (a) of the Customs Act, 1962.

2. When the matter was taken up for hearing, Mr. Hari Radhakrishnan, Learned Advocate, appeared for the assessee-appellant and Ms. K. Komathi, Learned Joint Commissioner (Authorized Representative), appeared for the Revenue-respondent.

3.1 The submissions of the Learned Advocate for the appellant are summarized as below :

- The only allegation against the appellant is that he, along with other co-noticees namely, M/s. Solai Exports & Importers (Represented by its proprietor Mr. V.S. Mathiarasu), Mr. Khaja Mohideen, Mr. Shahul Hameed, Mr. K. Francis and Mr. P. Karunanithi, was involved in the act of smuggling of gold bars;

- The Revenue has relied on the statements of co-noticees/co-accused namely, Mr. Francis and Mr. Karunanithi and the affidavit of Mr. Mathiarasu and that the denial by Mr. R.S. Sridhar and Mr. R. Vijayakumar has not at all been considered;

- The other evidences like the forensic analysis of mobile phones, etc., do not lead to any wrongdoing by this appellant;

- The co-accused namely, Mr. Francis and Mr. Karunanithi have at the first available opportunity, on being produced before the Hon'ble Magistrate, clearly stated that their statements were obtained under coercion;

- The statement of IEC holder i.e., Mr. Mathiarasu, does not implicate this appellant and that by itself does not suggest any active role of the appellant in abatement of illegal export;

- The call records only indicate the calls made/received, which by itself do not lead to any inference as to the appellant's culpability;

- The Revenue has neither apprehended the so-called mastermind i.e., Mr. Khaja nor have they taken any steps in this regard and nor has the Revenue placed any evidence on record to suggest that the mobile number 8056898851 was belonging to Mr. Khaja;

- The Letter issued by the service provider i.e., M/s. Airtel is only a covering letter giving the list of calls made and is not a certificate issued under Section 138C of the Customs Act, 1962 to be relied upon;

- In the Order-in-Original, the Adjudicating Authority has traversed beyond the Show Cause Notice by relying upon additional documents which were not at all part of the Show Cause Notice;

- The so-called forensic analysis does not lead to any conclusion as to the involvement of the appellant since the appellant's mobile phone was not at all subjected to the forensic analysis, etc.

3.2 Learned Advocate would conclude his submissions by contending that the confiscated gold biscuits were lying in the cold storage of the Air Cargo Complex and none of the employees of the appellant's security agency were anywhere near it; that one Mr. Karunanithi who, according to the DRI, was clandestinely removing the gold biscuits, was not at all on duty on that particular day. He relied on the following decisions :

(i) *D.V. Kishore v. C.C. (Seaports-Imports), Chennai [2017 (350) E.L.T. 527 (Mad.)]*

(ii) *DRI v. Mahendra Kumar Singhal [2016 (333) E.L.T. 250 (Del.)]*

(iii) *Shafeek P.K. v. C.C., Cochin [2015 (325) E.L.T. 199 (Tri. - Bang.)]*

(iv) *Anil Gadodia v. C.C., Mundra [2016 (343) E.L.T. 983 (Tri. - Ahmd.)];*

(v) *S.M. Agrotech v. C.C., New Delhi [2018 (361) E.L.T. 761 (Tri. - Del.)]*

4.1 Per contra, Learned Authorized Representative for the Revenue while supporting the findings of the lower authorities, also vehemently contended that the Adjudicating Authority has placed on record the threadbare analysis of the entire modus operandi and the involvement of the noticees/accused and therefore, it is a fit case for confirming the penalty imposed for an anti-national activity.

4.2 She would further submit, from the call records, that there have been calls to and from the appellant's mobile phone from 4:18 a.m. on the eventful day i.e., 10.04.2015 from Mr. Francis, who was apprehended at the Air Cargo Complex and it was this Francis who was in touch with the main accused i.e., Mr. Shahul Hameed and Mr. Khaja Mohideen; that Mr. Karunanithi and Mr. Francis worked for the security agency run by the appellant and it is their statements that the appellant knew about the gold being brought in which was to be illegally exported.

5.1 In rejoinder, Learned Advocate for the appellant would submit that the penalty has been levied solely based on the statements of the co-accused and that those very statements were later on retracted. Moreover, when the appellant's statement was recorded, the appellant has categorically denied as to his involvement in any way by stating that he was not aware of any gold smuggling and that he had not given any instructions in this regard to either Mr. Francis or Mr. Karunanithi.

5.2 He further contended that, according to the DRI, the main persons involved in the smuggling were Mr. Thameen of Singapore, Mr. Khajabhai and Mr. Shahul Hameed, who were never apprehended, who alone perhaps could have spoken about the involvement or otherwise of the appellant; that in the absence of their statements, the levy of penalty is not correct.

6. Heard both sides, perused the documents placed on record and also the decisions submitted during the course of arguments. From the documents filed/placed on record, we do not have the benefit of the statements of Mr. Francis, Mr. Karunanithi, Mr. Shahul Hameed, etc., recorded by the authorities. Further, the so-called retracted statement is also not there on record, but for the mention of coercion before the Hon'ble Magistrate.

7. The seizure at the Air Cargo Complex happened on 10.04.2015 followed by a search operation in the residence of this appellant and thereafter, the Show Cause Notice dated 07.10.2015 came to be issued accusing all the accused including the appellant herein, proposing confiscation under Sections 111 (d), 111 (i) and 111 (l) of the gold bars of foreign origin seized, apart from imposition of penalties under Section 112 and Section 114AA, separately, of the Customs Act, 1962. From the reply furnished by this appellant vide letter dated 02.12.2015, the appellant has inter alia explained that he was not involved in any way in any of the activities of the other accused in smuggling the gold biscuits.

8. The Revenue has fastened the appellant with penalty based on the statements of the co-accused and the call records. This appellant has explained that there are more than 120 employees in his firm and that, as the head of the firm, he used to get calls even during odd hours informing about the security scenario and manpower deployment at the Air Cargo Complex and that he would also make calls in turn, to ascertain further details. From this, it is perhaps routine that the appellant would get or make calls even during odd hours and hence, the calls recorded may not be significant enough to point out that the appellant was actively involved, as an abettor, in the conspiracy unless the recordings are in the form of conversations, which is not the case here. But a close look at the call records which speak otherwise, requires a lot of explanation.

9. Further, evidence in the form of statements of the co-accused namely, Mr. Francis, Mr. Karunanithi and Mr. Shahul Hameed, are not available before us and therefore, in the absence, we are unable to judge as to its contents, veracity and its incriminatory nature. All the accused including the appellant were produced before the Learned Magistrate along with remand application on 13.04.2015 before whom the accused have stated that their statements were obtained by threat and coercion. The relevant portion of the recording of the Learned Magistrate reads as under :

*"A1 to A4 - are produced before me at my residence. Grounds of arrest is revealed to the Ad. Ad. have stated that their statements are obtained by threat and coercion..."*

Though there is mention about threat and coercion, there is no specific denial as to their involvement since the Learned Magistrate has categorically recorded as to the revealing of the grounds of arrest which would only mean and which is relevant for our limited purposes, is that only the statements were obtained by using threat and coercion.

10. In the Order-in-Original, the Adjudicating Authority has, no doubt, explained very succinctly the modus operandi of the main accused and the involvement to some extent of Mr. Francis and Mr. Karunanithi, from where the role of the appellant kicks in, and as the Adjudicating Authority has extracted, both appear to have stated that the appellant knew about the gold smuggling. Their statements assume relevance since both of them have inter alia stated that they are working in the appellant's service agency which fact has not been denied.

11.1 Now, the appellant's explanation regarding the call records coupled with the extracts of statements of persons apprehended on the early hours of the eventful day lead us to understand that considering the gravity and nature of the offence/activity alleged, the explanation offered in the form of reply is not at all sufficient to conclude as to the innocence of this appellant, as pleaded. This assumes relevance in this case because the accused/appellant is a retired military personnel who has served the nation and has pleaded that he was not even aware of what his own employees were doing, while working for him.

11.2 Further, a close look at the call records inter se the appellant, Mr. Khaja and Mr. Mathiarasu reveals that right from the beginning of March 2015 all these persons were in touch. There has been call records of Mr. Khaja and the appellant on 04.03.2015 for about 93 seconds, again on 09.03.2015 for about 65 seconds with Mr. Khaja, also simultaneously with Mr. Mathiarasu. There have been further calls between the appellant and Mr. Khaja with a duration of 302 seconds on 11.03.2015, again on 10.03.2015 for about 4803 seconds and 32533 seconds at 11:13 a.m. and 12:59 p.m. and further calls again at 16:30 p.m. and

16:35 p.m. for 9812 seconds and 55441 seconds, for which there is no explanation. Considering these calls on record, the appellant cannot wash off his responsibility with a total denial that he did not know Mr. Khaja at all and that there was only a wrong call for about 6 seconds, etc. There has been some calls as well on 10.03.2015 between Mr. Khaja and the appellant, the appellant and Mr. Mathiarasu and again, the appellant and Mr. Khaja, which clearly leads to suspicion for which the appellant could only answer.

12. On an overall analysis, we are of the prima facie view that the Revenue has made out a case by linking the chain of events, phone calls, etc., towards the scheme planned well in advance for executing anti-national activity by defrauding the Revenue, as brought on record very succinctly by the Adjudicating Authority in the form of unchallenged statements and the call records and for these reasons, we do not see any reason to interfere with the impugned order.

13. Accordingly, the appeal stands dismissed.

(Order pronounced in the open court on 06.02.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, CHENNAI  
COURT NO. III**

**Customs Misc. Application (COD) No. 40659/2019 and  
Customs Appeal No. 41776/2019**

Arising out of Order-in-Original No. 58964/2017, Dated: 12.10.2017  
Passed by the Commissioner of Customs, Chennai – VIII

**Date of Hearing: 26.02.2020  
Date of Decision: 26.02.2020**

**M/s SEA SWAN SHIPPING AND LOGISTICS  
65/31, 3RD FLOOR, SMJ MOORE PLAZA  
MOORE STREET, MUTHIALPET CHENNAI - 600013**

**Vs**

**COMMISSIONER OF CUSTOMS  
CHENNAI VIII COMMISSIONERATE  
CUSTOM HOUSE 60, RAJAJI SALAI  
CHENNAI - 600001**

**Appellant Rep by:** Shri N Viswanathan, Adv.

**Respondent Rep by:** Ms T Usha Devi, DC (AR)

**CORAM:** Sulekha Beevi C S, Member (J)

**FINAL ORDER NO. 40545/2020**

**Per: Sulekha Beevi:**

The above application for condonation of delay is filed by the appellant seeking to condone the delay of 764 days in filing the appeal.

2. The ld. counsel for appellant Shri N. Viswanathan appeared for the appellant. That proceedings were initiated against the applicant/appellant who is a Customs Broker alleging violation of Regulation 11(a) and (n) of CBLR, 2013. The proceedings culminated in passing Order-in-Original dated 12.10.2017, whereby penalty of Rs.50,000/- was imposed. The appellant then opted to pay the penalty and not to take up the matter in appeal. However, later the appellant wanted to extend his business to other ports. He apprehended that he would not receive a no objection certificate due to the penalty imposed. On obtaining legal advice, the appellant has thereafter preferred the present appeal. It is argued by the learned counsel that no penalty can be imposed when the inquiry report is in favour of the Customs Broker. That the issue as to whether penalty can be imposed when the inquiry report is in favour of the Customs broker is decided by the Hon'ble High Court of Delhi in the case of *HM Logistics Pvt. Ltd. Vs. Commissioner of Customs (General) - 2016 (334) ELT 262 (Del.)*. It is submitted by him that in the present case as the inquiry report is in favour of the appellant, the penalty ought not to have been imposed. That appellant has a good case on merits. Therefore, the appellant ought to be given a chance to contest the case.

3. The ld. counsel relied upon the decision of the Hon'ble Supreme Court in the case of *N. Balakrishnan Vs. M. Krishnamurthy - 2008 (228) ELT 162 (SC)* to argue that the length of delay is immaterial and if the applicant has given plausible explanation for the delay, the same has to be accepted. It is also emphasized by the counsel that when there is no deliberate act on the part of applicant for not availing the remedy of appeal, the delay ought to be condoned. In the present case, the delay was not caused due to any dilatory tactics on the part of the appellant. He prayed that a liberal view may be taken so as to condone the delay. It is also prayed that the application may be considered by imposing cost on the appellant.

4. The ld. AR Ms. T. Usha Devi opposed the application. She submitted that the appellant has not opted to file the appeal during the period prescribed as per the

statute for filing appeal. The delay caused can be condoned only if sufficient cause is made out. In the present case, no sufficient cause is established by the appellant. The decision of the Hon'ble Supreme Court in the case of N. Balakrishnan Vs. M. Krishnamurthy (supra) cannot be relied upon in the present case since the facts in the said appeal are different. The delay occurred as counsel failed to appear and to inform the party. In the present case, appellant has opted not to file the appeal and paid the penalty. He cannot then contend that there is delay to file appeal.

5. It is also argued by her that it cannot be said that the livelihood of the appellant is affected by the imposition of penalty. The appellant has not adduced any evidence to show that any request for extending business to other ports were made or has been rejected. Even if such request is rejected, the appellant has remedy by way of filing appeal to the higher authorities. The appellant has not availed the remedy of filing appeal during the prescribed time limit and admittedly opted not to avail the remedy, there is no cause made out to condone such huge delay. She prayed that the COD application may be dismissed.

6. Heard both sides.

7. The appellant has filed this application seeking condonation of 764 days in filing the appeal. The impugned order is passed on 12.10.2017 imposing penalty of Rs.50,000/- on the appellant. The finding made in the order is that the appellant violated Regulation 11(a) and (n) of CBLR, 2013. It is submitted by the counsel that the appellant initially had opted to file appeal since he did not want to pursue the matter in litigation. Later, when he intended to expand his business to other ports, he apprehends that he would not be able to get no objection certificate for obtaining extension of license to other ports. Though it is stated that the appellant apprehends that he would not be able to obtain NOC, there is no evidence brought forth before me that he made any request and the same was rejected. It is merely his apprehension. He is still working as a Customs Broker. Further, as rightly pointed out by Id. AR, that if any order is passed rejecting the request for extension of license, the appellant has a remedy to file an appeal against such order. This ground raised by the appellant does not find favour with me.

8. The main contention put forward by the learned counsel is that the decision of the Hon'ble High Court of Delhi in the case of HM Logistics Pvt. Ltd. (supra) is in favour of the Customs Broker and would be applicable to the impugned order and for this reason the penalty imposed is not sustainable. It is settled position of law that merely because a decision which is in favour come to the notice, it cannot be a ground to seek condonation of delay. The appellant has failed to promptly avail the appeal remedy. Though law of limitation is not meant to destroy the right of parties, it cannot favour those who are sleeping. In the present case, the appellant has deliberately opted not to file appeal initially. Thereafter, this appeal is filed only on the advice given that the penalty can be set aside as per the decision of the Hon'ble High Court of Delhi. As discussed earlier, there is no evidence to show that the livelihood of appellant is affected or his intention to expand business is interrupted.

9. I find that the appellant has not been able to put forward sufficient cause to condone the delay. Further, the delay is more than two years. I find that the application for condonation of delay is without merits. The same is dismissed. Consequently, the appeal also gets dismissed.

(Dictated and pronounced in open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
SOUTH ZONAL BENCH, CHENNAI  
REGIONAL BENCH-SM 3 B3**

**Customs Appeal No. C/41815/2019**

Arising out of Order-in-Appeal No. 192/2019, Dated: 06.09.2019

Passed by the Commissioner of Customs (Appeals-I), Chennai

**Date of Hearing: 13.02.2020**

**Date of Decision: 08.09.2020**

**Mr SURESH RAJARAM  
NO. 5, SEKILAR STREET, NETAJI AVENU  
NERKUNDRAM, CHENNNAI-600107**

**Vs**

**THE COMMISSIONER OF CUSTOMS (APPEALS-I)  
NO. 60, RAJAJISALAI, CHENNAI-600001**

**Appellant Rep by:** Shri K P Padmanabhan, Learned Adv.

**Respondent Rep by:** Shri M Jagan Babu, AC, Learned DR

**CORAM:** P Dinesha, Member (J)

**FINAL ORDER NO. 40781/2020**

**Per: P Dinesha:**

The appellant has by this appeal questioned the rejection of his first appeal vide impugned order-in- Appeal No. 192/2019 dated 06.09.2019, whereby learned Commissioner of Customs (Appeals-I) has upheld the absolute confiscation of six gold bars.

2. When the matter was called out, Shri K.P. Padmanabhan, Learned Advocate appeared for the appellant and reiterated the grounds urged before the lower authorities. He also contended that the so-called voluntary statement of the appellant relied upon by the Revenue was under threat; that the appellant was the only bread winner who had saved some money out of his salary and purchased gold bars in question and that all the supporting bills were produced before the authorities.

3. Per contra, Shri M. Jagan Babu, Assistant Commissioner (AR) appearing for the Revenue supported the findings of the lower authorities. He would also contend that at least two of the invoices issued by GMT Jewellers Pvt. Ltd, Singapore, carried different dates ie., 29/11/2017 and 7/12/2017, which would indicate that two gold bards of 300 gms were purchased after a gap of about 8/9 days. But most interestingly, the invoice numbers are 2017-0122 and 2017-00123 and by this it is very difficult to believe that the seller did not make any sales between 29/11/2017 and 7/12/2017, which fact has not at all been explained anywhere. He would also submit that the appellant upon landing in Chennai Airport, himself opted for green channel and on suspicion he was questioned/searched, which resulted in the detection of smuggled gold bars and the appellant explained that he was carrying the above goods for somebody else. On a later date, the appellant explained that the above explanation was given out of fear and ignorance and that he had purchased the above gold for the members of his family. By this, the appellant has kept on changing his stand and that too,

without any supporting evidence, and hence the orders of the Lower Authorities may be upheld.

4. I have heard both sides and have also carefully considered the rival contentions and documents placed on record.

5. There is no dispute that the appellant tried to smuggle the gold, ie., he tried to bring the above gold bars from Singapore into India without payment of applicable duties and without even declaring the same when he was duty bound to do so. The purchase of the same and the final destination/usage may not be of any significance when such an act of smuggling is carried out, since what is important is primarily the declaration, followed by the payment of applicable duties/taxes. Even though the appellant has pleaded ignorance and co-operation, the same would at best be a mitigating factor which ipso facto would not take away the guilt of trying to bring in the goods without payment of duty. Further, the appellant has also pleaded that he was a law abiding citizen but when the law mandates a minimum declaration which has not been complied with here in the case on hand, the above plea of the appellant would also not going to help the appellant. Moreover, the serious dispute as to the dates on invoices with consecutive numbers is alone an incriminating factor not at all explained by the appellant.

6. In view of the above, I do not find any merit in the appeal and therefore, the appeal is rejected being devoid of merits.

(Order pronounced in the Open Court on 08.09.2020)



[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, CHENNAI  
COURT NO. I**

**Customs Appeal No. 40237 of 2017**

Arising out of Order-in-Appeal No. 50 & 51/2016, Dated: 19.04.2016  
Passed by the Commissioner of Customs & Central Excise (Appeals-II), No.1,  
Williams Road, Cantonment, Tiruchirappalli - 620001

**Date of Hearing: 07.01.2020**

**Date of Decision: 30.01.2020**

**SHRI RAVI SADANAND  
S/o SHRI LATE SADANAND  
NO. 510, 14TH MAIN, IV BLOCK, NANDHINI LAYOUT  
BANGALORE - 627424**

**Vs**

**THE COMMISSIONER OF CUSTOMS  
CUSTOM HOUSE, NEW HARBOUR ESTATE  
TUTICORIN - 628004**

**WITH**

**Customs Appeal No. 40238 of 2017**

Arising out of Order-in-Appeal No. 50 & 51/2016, Dated: 19.04.2016  
Passed by the Commissioner of Customs & Central Excise (Appeals-II), No.1,  
Williams Road, Cantonment, Tiruchirappalli - 620001

**SHRI KARUPIAH @ MANOHARAN  
S/o SHRI V SUBBIAH  
OLD NO. 2/256, NEW NO. 2/732  
THIRUVALLUVAR STREET, M.A. NAGAR, RED HILLS  
CHENNAI - 600052**

**Vs**

**THE COMMISSIONER OF CUSTOMS  
CUSTOM HOUSE, NEW HARBOUR ESTATE  
TUTICORIN - 628004**

**Appellant Rep by:** Shri A Thiagarajan, Ld. Senior Adv.

**Respondent Rep by:** Shri M Jagan Babu, Ld. AR

**CORAM:** P Dinesha, Member (J)

**FINAL ORDER NOS. 40028-40029/2020**

**Per: P Dinesha:**

These appeals are filed against the common order of the Commissioner of Customs and Central Excise (Appeals-II), Tiruchirappalli dated 19.04.2016 in Orders-in-Appeal No. 50 & 51/2016.

2. It is the case of the Department that based on the specific intelligence that persons travelling in a black colour 'PULSE' car bearing Registration No. TN18 M 8059 were attempting to smuggle 'Red Sanders Logs' out of India and on enquiry after interception of the said car, persons travelling in the car identified themselves as S/Shri S. Karupiah @ Manoharan, Ravi K. Sadanand, M.J. Girish, D. Seena and P. Ravi. The interception resulted in unearthing transportation of the contraband i.e., red sanders logs worth Rs. 4,33,35,000/- (9.63 MTs), which were loaded in a lorry/truck bearing Registration No. TN 63 AB 7825 along with bags of cabbage worth Rs. 10,000/-. There was no document for transportation of the entire goods nor was there any claim as to the ownership of either the lorry or the goods and therefore, the lorry/truck was seized along with the goods. The Revenue got the goods examined by the Forest Range Officer, Thoothukudi Range, who certified that the same was red sanders logs which is a prohibited item for export. All the seized goods i.e., the truck, the

red sanders logs and the cabbage bags were handed over to the Customs House, Tuticorin on 10.10.2013.

3. The Senior Intelligence Officer, Directorate of Revenue Intelligence, Tuticorin, summoned all the five above persons, who were travelling in the car at the time of interception and their statements were recorded under Section 108 of the Customs Act, 1962. It appears that Revenue tried to ascertain the ownership of the aforesaid truck, with the Registration No. TN 63 AB 7825, which carried the contraband, but the Adjudicating Authority in the Order-in-Original has given a clear finding that it was a fake registration number fitted on the seized lorry/truck to avoid detection and thereby mislead the investigators. Based on the information thus gathered as also the statements of various persons, the Revenue issued a Show Cause Notice to the appellants as to why:-

- i) the seized 9.63 MTs of Red sanders, valued at Rs.4,33,35,000/- should not be confiscated under Section 113 (d) of the Customs Act, 1962.
- ii) the seized 2.910 MT of Cabbage, valued at Rs.10,000/- should not be confiscated under Section 119 of the Customs Act, 1962.
- iii) the said 2.910 MT of cabbage found to be rotten and unfit for consumption which was destroyed, should not be held as properly disposed off; and
- iv) penalty should not be imposed on them under Section 114 of the Customs Act, 1962.

4. After due process of law, the Adjudicating Authority vide Order-in-Original No. 60/2015 dated 29.05.2015, after considering the statements, Mahazars, reply to the Show Cause Notice and arguments during the personal hearing, has :-

- i) Ordered confiscation of 9.63 MT of red sanders valued at Rs.4,33,35,000/- under Section 113 (d) of the Customs Act, 1962;
- ii) Ordered confiscation of 2.910 MT of Cabbage, valued at Rs.10,000/- used for concealing red sanders, under Section 119 of the Customs Act, 1962;
- iii) Held that the said 2.910 MT of cabbage found to be rotten and unfit for consumption which was destroyed, as properly disposed off;
- iv) Ordered confiscation of Ashok Leyland Truck bearing fake registration No. TN 63 AB 6825 (actual registration no. being AP 03 U 7977), valued at Rs. 6,40,000/-, under Section 115(2) of the Customs Act, 1962;
- v) Imposed penalty on the following persons including appellants herein, under Section 114 of the Act *ibid* as follows:-

| Name S/Shri.          | Amount of Penalty (in Rupees)                    |
|-----------------------|--------------------------------------------------|
| Karuppiah @ Manoharan | 25,00,000/- (Rupees Twenty five lakh only)       |
| Ravi K. Sadanand      | 10,00,000/- (Rupees Ten lakh only)               |
| Senthil Ram           | 2,00,000/- (Rupees Two lakhs only)               |
| Subba Reddy           | 5,00,000/- (Rupees Five lakhs only)              |
| Ramesh                | 2,50,000/- (Rupees Two lakh fifty thousand only) |
| Mohamed Saleem        | 5,00,000/- (Rs. Five lakhs only)                 |

5. Aggrieved by the said Order-in-Original, the present appellants filed appeal before the Commissioner of Central Excise (Appeals-II), Tiruchirappalli, contending inter alia that the order imposing penalty under Section 114 of the Customs Act was bad. The Commissioner (Appeals), however, vide the impugned Order-in-Appeal dated 19.04.2016 rejected the appeals thereby upholding the order of the Adjudicating Authority. Seriously aggrieved by the Order-in-Appeal of the Commissioner (Appeals), the present appellants viz., Shri. Karuppiah @ Manoharan and Shri. Ravi. K. Sadanand are before this forum by these appeals.

6. Heard Shri. A. Thiyagarajan, Learned Senior Advocate appearing for the appellants and Shri. M. Jagan Babu, Learned Assistant Commissioner (Authorized Representative) appearing for the Revenue and perused the documents placed in the appeal paper book and also gone through the documents referred to by both the parties, during the course of hearing.

7. The only issue to be decided is whether the Revenue was justified in levying penalty on the appellants under Section 114 of the Customs Act, 1962.

8. During the course of hearing, the Ld. Sr. Advocate appearing for the appellants submitted that primarily the penalty has been levied based solely on the inculpatory statements. The other submissions of the Ld. Advocate could be summarized as under:-

- (i) The appellants never claimed themselves to be the owner of the goods that was seized;
- (ii) The appellants are not the owners of the truck/lorry seized or even the landed property where the truck was stranded;
- (iii) One of the appellants namely Shri. Karuppiah was not present during the seizure;
- (iv) The appellants had no financial capacity or having no means to arrange for transportation of the goods worth over Rs. 4.5 crores;
- (v) The inculpatory statements alone is not sufficient without there are being any corroboratory evidence;
- (vi) The penalty being quasi-criminal in nature, the burden is on the Department;
- (vii) The seller or the purchaser of the contraband were not known even to the Department nor were they identified, etc.

9. Per contra, Ld. Authorized Representative for the Revenue argued that the weight of the contraband article found in the truck tallied with the voluntary statements given by the appellant. His further submissions can be summarized as under:-

- (i) They have not denied their presence at the time and spot on the eventful day;
- (ii) The appellant Shri. Karuppiah @ Manoharan was the mastermind behind the operation since he had purchased the red sanders logs on earlier occasions also, illegally;
- (iii) That the appellants jointly contributed to the attempted export of 1.6MTs of red sanders by illicit means;
- (iv) The entire scheme/modus operandi has been very succinctly recorded at paragraphs 31, 32, 33, 34 and 36 of the Order-in-Original as also at paragraphs 7 and 8 of the Order-in-Appeal which have not at all been questioned;
- (v) Voluntary statements of all the persons stand against them so also the chain of events narrated by each of them speaks of the scheme to smuggle contraband in which they almost succeeded but for timely interception, which would have resulted in the revenue loss to the Nation;
- (vi) Irrespective of whether the appellants are the buyers or sellers, they having abetted in the commission of the offence of attempting to smuggle the contraband, penalty has rightly been imposed.
- (vii) Statements are not retracted and therefore, there was no chance for the Revenue to suspect their motive;

He therefore pleads that the appeals are required to be dismissed.

10.1 I have considered the rival contentions and have also meticulously gone through the record. The statement of the appellant Shri. Karuppiah recorded on 09.10.2013 under Section 108 of the Customs Act reveals the modus operandi and this appellant has very clearly explained not only the whole transaction but also named various persons involved, in the smuggling activity and has also clearly identified the destination i.e., foreign buyer M/s. Haiphong Petro Trading

JSC, No. 782, Chua Ve, Doana, 2nd Street, Dong Hai, 1 Ward, Hai An Dist. HP, Vietnam.

10.2 Shri Karuppiah, the second appellant, also explains the involvement of one Shri. Subba Reddy, one of the brokers, one Shri. Saleem of Tirunelveli whose mobile Nos. were 7299508440 & 9786860485, who arranged the overseas buyer for a commission of Rs. 3,00,000/- per MT; Mr. Ravi of Bangalore, who was into the red sanders business, who according to the appellant, had agreed to store 8 MTs of red sanders in Bangalore; Shri. Senthil Ram of Chennai, Lorry broker who was to transport red sanders logs to Bangalore, who also sent lorry bearing Registration No. TN 63 7825 to Bangalore, etc. Further, this appellant has also explained that Shri. Ravi having loaded the logs of red sanders in the lorry was called by Shri. Saleem to get the logs of red sanders near the District Collector's office in Virudhunagar etc.

10.3 The above statement of this appellant matches with that of the first appellant Shri Ravi Sadanand and their statements lead to a plausible conclusion that it was a pre-planned move to smuggle red sander logs out of India. For this, I completely rely on the findings of the Original Authority who has very succinctly extracted the whole scheme of the attempt to smuggle red sanders by the appellant in connivance, though in a small way, with the other occupants of the car. These findings have not at all been challenged. There is also nothing on record to even suggest that the statements of the appellants have been retracted and nor is there any attempt to deny their presence at the eventual spot on the eventful day.

10.5 The Adjudicating Authority has also traced the owner of the truck/lorry that was carrying the contraband and arrived at the conclusion that the same was with a fake registration number to mislead the investigation. This also stands unchallenged.

10.6 The appellants having accepted in their voluntary statements about their involvements, have not brought anything on record to doubt the veracity of the findings or conclusions drawn by the Adjudicating Authority. Even though it has all along been argued that they did not claim ownership of either the truck or the contraband that was seized, they have not submitted any documentary evidence about their role/activity at the time, date and place when the interception took place. Having accepted in their voluntary statements as to their role, they prevented further investigations into the issue and therefore, on a much later date they cannot turn around to say that their statements were not voluntary. Moreover, it is not a case where the penalty was levied based only on their statements; Revenue has linked each and every chain in the whole loop of the master plan to smuggle the contraband by identifying the involvement and role of each and every person whereas nothing is brought on record by the appellants to dislodge even a small link in the above chain. Their contention that they did not claim ownership nor did they have wherewithal, etc., would not help them since in an activity of the nature involved in the present case, the recipient/buyer would be least interested in knowing this. Because, otherwise, the buyer would have right royally bought from the open market after paying all necessary/applicable duties rather than choosing a shortcut of smuggling.

10.7 I, therefore, do not see any reasons to interfere with the meticulous findings of the Original Authority as upheld vide impugned Order-in-Appeal by the Commissioner of Central Excise (Appeals-II), Tiruchirappalli. In this connection, I find that the decision of the Hon'ble High Court of Madras in the case of *CC, Trichy Vs. S. Janarthanan* [2015 (325) E.L.T. 510 (Mad.)] is useful in this regard, wherein it has been held as under:-

*"12. Admittedly, the goods attempted to be exported are prohibited under the Customs Act, the Foreign Trade (D&R) Act and the EXIM Policy 1997-02. Since Sandalwood was attempted to be exported in the guise of roofing tiles, the provisions made under Section 113 of the Customs Act gets attracted. Similarly, the goods entered for exportation did not correspond in respect of value or in any material particulars with the entry made under the Act. On this admitted fact, the only question arises for consideration is whether the respondent is liable for penalty under Section 114 of the Customs Act.*

13. The wording in Section 114 of the Customs Act is clear that any person who, in relation to any goods does or omits to do any act which act or omission would render the goods liable for confiscation under Section 113, or abets the doing or commission of such an act shall be liable for penalty. For better clarity, it is apposite to refer Section 114 of the Customs Act, which reads as follows :

"SECTION 114. Penalty for attempt to export goods improperly, etc. - Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded or five thousand rupees, whichever is the greater;

(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater."

14. In this case, the evidence on record and the statements of various persons clearly goes to show the complicity of the respondent in the act, which render the goods liable for confiscation under Section 113 of the Customs Act. He also abetted in doing such acts, which render the goods liable for confiscation. That finding of the Commissioner is not in dispute. The Tribunal on an erroneous interpretation of Section 113 read with 114 of the Customs Act has come to hold that no penalty is leviable.

15. Here is a case where the findings of the Commissioner, on fact, supported by documents and the statement of individuals, clearly established the act of the respondent, which render the goods liable for confiscation under Section 113. The respondent is one among the culprits, who attempted to export sandalwood in the guise of roofing tiles. Since the respondent had knowledge about the sandalwood being part of the consignment of roofing tiles, but did not intimate the same to the Customs Authorities, he is liable for penalty.

16. On a reading of the evidence and the findings of the Commissioner, we find that the Tribunal has come to the erroneous conclusion that the act of the respondent in not disclosing the information is not liable for confiscation. Accordingly, the issue is answered in favour of the Department and against the assessee. The order of the Tribunal stands set aside and the adjudication order restored. This Civil Miscellaneous Appeal stands allowed. No costs. Consequently, M.P. No. 1 of 2009 is closed."

11. In the result, both the appeals are dismissed being devoid of any merit.

(Order pronounced in the open court on 30.01.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, HYDERABAD**

**Customs Appeal No. 30495 of 2019 (Arising out of Order-in-Appeal No. VIZ-CUSTM-000-APP-088-18-19 dated 13.03.2019 passed by Commissioner of Central Tax & Customs (Appeals), Guntur)**

**Decided On: 06.12.2019**

**T.R.L. Krosaki Refractories Ltd.**

**Vs.**

**Commissioner of Customs & Service Tax, Visakhapatnam - Cus**

Hon'ble Judges/Coram:

P. Venkata Subba Rao, Member (T)

Counsels:

For Appellant/Petitioner/Plaintiff: Satyaprem Majumder, Advocate

For Respondents/Defendant: L.V. Rao, Addl. Commissioner

**ORDER**

P. Venkata Subba Rao, Member (T)

1. This appeal is filed against Order-in-Appeal No. VIZ-CUSTM-000-APP-088-18-19 dated 13.03.2019.

2. The appellant herein filed four bills of entry for import of Magnesia Carbon Brick between May 2017 and June 2017 classifying them under 6902 10 40 in the Bills of Entry and claiming the benefit of exemption Notification No. 12/2012-Cus : MANU/CUST/0068/2012 dated 17.03.2012 (Sl. No. 304). The bills of entry were assessed by the Revenue re-classifying the goods under 6815 99 90 which attracts a higher rate of customs duty. The appellant paid customs duty at the higher rate as assessed by the Revenue and thereafter filed letters requesting for speaking orders giving justification for revision of the classification and denial of the benefit of their exemption notification sought by them. The revenue has not issued any speaking order in respect of any of the bills of entry. The appellant had not filed any appeal against the assessed bills of entry. Thereafter, they filed refund claims seeking refund of the differential duty under section 27 of the Customs Act, 1962. These claims were rejected by the Lower Authority and on appeal such rejection was upheld by the First Appellate Authority by the impugned order. Hence this appeal. The First Appellate Authority relied on the case law of Priya Blue Industries Vs. Commissioner of Customs, Ahmedabad [MANU/SC/0767/2004 : 2004 (172) ELT 145 (SC)] in which it was held as follows:

6. ....Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order...

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

Similar decision was also taken by the Hon'ble Apex Court in the case of Flock India [MANU/SC/0484/2000 : 2000 (120) ELT 285 (SC)]. Learned Counsel for the appellant submits that there was a difference between section 27 prior to 08.04.2011 and post 08.04.2011. Prior to 08.04.2011 Section 27 read as follows:

27. Claim for Refund of Duty.-

(1) Any person claiming refund of any duty and interest, if any, paid on such duty -

(a) paid by him in pursuance of an order of assessment; or

(b) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

After 08.04.2011 only the assessment procedure has been changed under section 17 and self assessment procedure has been introduced, the words "in pursuance of an order of assessment" in section 27(1)(a) have been deleted. He would therefore, submit that their case pertains post 08.04.2011 and they were entitled to file a claim for refund without challenging the order of assessment. He relied on the case law of Aman Medical Products [MANU/DE/2578/2009 : 2010 (250) ELT 30 (DEL)] and Micromax Informatics Ltd., [MANU/DE/0452/2016 : 2016 (335) ELT 466 (DEL)] in which it was held that where there is no order of assessment, refund claim can be filed without challenging the assessment. He fairly submits that the aforesaid two judgments of the Hon'ble High Court of Delhi were also under challenge before the Larger Bench of the Hon'ble Apex Court in the case of ITC Ltd., in civil appeal No. 293-294/2019. It has been held by the Hon'ble Apex Court that even in a case where a refund is filed after self-assessment such refund cannot be sanctioned unless the self-assessment itself has been appealed against and modified. In other words, even in case of self assessment post 08.04.2011, if the person who has made an assessment feels that he made a mistake, he must appeal to the Commissioner (Appeals) to get his own self assessment modified before he can file a refund claim. The officer processing the refund claims cannot, by sanctioning refund, sit in judgment over the assessment done by the officer who assessed the bills of entry in the first place.

3. However, he submits that justice has been denied to them because they have not been given speaking orders when they actually requested for them. Therefore, they are still not aware of the reasons as to why their bills of entries were re-assessed and therefore they are unable to appeal before the First Appellate Authority. He also relied upon the judgment of High Court of Andhra Pradesh in the case of Fairway Trading Company [MANU/CB/0256/2013 : 2014 (304) ELT 286 (Tri-Bang)] upheld by the Andhra Pradesh High Court as reported in [2015 (319) ELT A243 (AP)].

4. Learned DR submits that the issue is now settled by the Larger Bench of the Hon'ble Apex Court in the case of ITC Ltd., (supra) which judgment is binding on all courts in the country including this Bench and no refund can be sanctioned unless the underlying assessment (including self assessment) has been appealed against and therefore there is no infirmity in the impugned order of the First Appellate Authority passed relying on the cases of Priya Blue Industries (supra) and Flock India (supra).

5. I have considered the arguments on both sides and perused the records. The issue of refund has been under examination at various judicial fora. In the case of Priya Blue Industries (supra) and Flock India (supra) the Hon'ble Apex Court had held that where a refund raises out of an order of assessment such refund cannot be sanctioned unless the underlying order of assessment itself has been appealed against and modified by the appellate forum. The reason for this is the officer sanctioning refund cannot sit in judgment over the officer who has done the assessment. Subsequently, in the case of Aman Medical Products Ltd. (supra), the Hon'ble High Court of Delhi has distinguished the claim for refund in that case from the case of Priya Blue Industries (supra). This case pertained to a period when although Section 17 of the Customs Act (as unamended) required the officer to do the assessment, the computer system of the customs EDI cleared the goods automatically based on the declarations made by the importer. Therefore, the officer had no chance of assessing the bills of entries at all. The question which arose was whether, in such cases, where there was no assessment order at all, the bills of entries needs to be challenged or can a refund be claimed directly. The Hon'ble High Court of Delhi held in a case where there is no order of assessment at all there is nothing to be challenged therefore, refund claim can be claimed and the same can be sanctioned. Subsequently, the case of Micromax Informatics Ltd., (supra) came

up before the High court of Delhi. This pertained to the period when the Section 17 was amended introducing the concept of self assessment by the importers. In this case the Hon'ble High Court has held that in the case of self assessment since there is no assessment order by the officer the refund can be challenged without assessment by the officer. Both these cases as well as other cases before the Larger Bench of Hon'ble Apex Court in the case of ITC Ltd., (supra). It is now settled by the Hon'ble Apex Court that the refund cannot be sanctioned in any case including in case of self assessment unless the assessment is itself is challenged.

31. It is apparent from the aforesaid discussion that the endorsement made on the bill of entry is an order of assessment. It cannot be said that there is no order of assessment passed in such a case. When there is no lis, speaking order is not required to be passed in "across the counter affair".

38. No doubt about it that the expression which was earlier used in Section 27(1)(i) that "in pursuance of an order of assessment" has been deleted from the amended provision of Section 27 due to introduction of provision as to self assessment. However, as self-assessment is nonetheless an order of assessment, no difference is made by deletion of aforesaid expression as no separate reasoned assessment order is required to be passed in the case of self assessment as observed by this Court in Escorts Ltd. v. Union of India & Ors. (supra).

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.

48. Resultantly, we find that the order(s) passed by Customs, Excise, and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are hereby set aside. We order accordingly. We hold that the applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred.

As the present appeal is only against the rejection of refund claim by the Commissioner (Appeals) on the ground that the bills of entries has not been challenged, I find that in view of the ratio of the judgment of Hon'ble Larger Bench of the Apex Court in the case of ITC Ltd., the appeal is liable to be rejected and the impugned order is liable to be upheld and I do so. If the appellant's bills of entries have been reassessed and they sought speaking orders which have not been issued to them or the request for issue of speaking orders is rejected by the lower authority that itself becomes a decision by the lower authority which can be appealed against to the Commissioner before the Commissioner (Appeals). However, by not issuing the speaking orders or giving any reply to their requests for speaking order, the officer has denied the appellant their legitimate right to challenge the reassessments. In the interest of justice, I find this a fit case to exercise my powers under Rule 41 of the CESTAT (Procedure) Rules, 1982 and direct the assessing officer to issue speaking orders as sought by the appellant in cases where the Bills of Entry were re-assessed. This will enable the appellants to understand the reasons for re-assessment and if aggrieved, challenge such re-assessments.

6. In view of the above, impugned order is upheld and the appeal is rejected. The assessing officer who re-assessed the bills of entry must issue speaking orders within four weeks from the date on which he receives a copy of this order from the appellant or from the Registry.



[Back](#)

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE  
TRIBUNAL  
REGIONAL BENCH AT HYDERABAD**  
Single Member Bench

**Customs Appeal No 30280 of 2019**

(Arising out of **Order-in-Appeal** No.VJD-CUSTM-PRV-APP-166-18-19, dated 23.01.2019  
passed by Principal Commissioner of Central Tax & Customs (Appeals), Guntur)

|                                                                                                                           |    |           |
|---------------------------------------------------------------------------------------------------------------------------|----|-----------|
| Coromandel International Ltd.,<br>No. 1-2-10, Sardar Patel<br>Road,Coromandel<br>House,Secunderabad,<br>Telangana-500003. | .. | APPELLANT |
|---------------------------------------------------------------------------------------------------------------------------|----|-----------|

VERSUS

|                                                                                                                                                                 |    |            |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----|------------|
| Commissioner of Customs,<br>Central Excise & Service Tax,<br><b>Guntur</b><br>P.B.No. 331,<br>C.R.Building,<br>Kannavarithota, Guntur,<br>AndhraPradesh-522004. | .. | RESPONDENT |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----|------------|

**WITH**

Customs Appeal No 30281 of 2019

(Arising out of **Order-in-Appeal** No.VJD-CUSTM-PRV-APP-153-18-19, dated 31.12.2018  
passed by Commissioner of Central Tax & Customs (Appeals),Guntur)

|                                                                                                                           |    |           |
|---------------------------------------------------------------------------------------------------------------------------|----|-----------|
| Coromandel International Ltd.,<br>No. 1-2-10, Sardar Patel<br>Road,Coromandel<br>House,Secunderabad,<br>Telangana-500003. | .. | APPELLANT |
|---------------------------------------------------------------------------------------------------------------------------|----|-----------|

VERSUS

|                                                                                                                                                                  |    |            |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|------------|
| Commissioner of Customs,<br>Central Excise & Service Tax,<br><b>Guntur</b><br>P.B.No. 331,<br>C.R.Building,Kannavarit<br>hota, Guntur,<br>Andhra Pradesh-522004. | .. | RESPONDENT |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|------------|

**WITH**

Customs Appeal No 30284 of 2019

(Arising out of **Order-in-Appeal** No.VJD-CUSTM-PRV-APP-167-18-19, dated 23.01.2019  
passed by Principal Commissioner of Central Tax & Customs(Appeals),Guntur)

|                                                                                                                           |    |           |
|---------------------------------------------------------------------------------------------------------------------------|----|-----------|
| Coromandel International Ltd.,<br>No. 1-2-10, Sardar Patel<br>Road,Coromandel<br>House,Secunderabad,<br>Telangana-500003. | .. | APPELLANT |
|---------------------------------------------------------------------------------------------------------------------------|----|-----------|

VERSUS

|                                                                                            |    |            |
|--------------------------------------------------------------------------------------------|----|------------|
| Commissioner of Customs,<br>Central Excise & Service Tax,<br><b>Guntur</b><br>P.B.No. 331, | .. | RESPONDENT |
|--------------------------------------------------------------------------------------------|----|------------|

C.R.Building,  
Kannavarithota, Guntur,  
Andhra Pradesh-522004.

---

AND  
**Customs Appeal No 30286 of 2019**

(Arising out of **Order-in-Appeal** No.VJD-CUSTM-PRV-APP-168-18-19, dated 23.01.2019  
passed by Principal Commissioner of Central Tax & Customs(Appeals),Guntur)

|                                                                                                                            |    |           |
|----------------------------------------------------------------------------------------------------------------------------|----|-----------|
| Coromandel International Ltd.,<br>No. 1-2-10, Sardar Patel<br>Road,Coromandel<br>House,Secunderabad,<br>Telangana –500003. | .. | APPELLANT |
|----------------------------------------------------------------------------------------------------------------------------|----|-----------|

*VERSUS*

|                                                                                                                                                                 |    |            |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----|------------|
| Commissioner of Customs,<br>Central Excise & Service Tax,<br><b>Guntur</b><br>P.B.No. 331,<br>C.R.Building,Kannavarithot<br>a, Guntur,<br>Andhra Pradesh–522004 | .. | RESPONDENT |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----|------------|

**Appearance**

Shri Praveen Nair,Advocate for the Appellant.  
Shri N.Bhanu Kiran,Assistant Commissioner for the Respondent.

**Coram: HON'BLE Mr.P.V.SUBBARAO,MEMBER(TECHNICAL)**

**FINAL ORDER No.A/30797-30800/2019**

Date of Hearing:16.10.2019  
Date of Decision:16.10.2019

[Order per:P.V.SUBBARAO]

1. All these appeals are filed by the appellant on the same issue and hence are being disposed of together. The appellant is a manufacturer of fertilisers and imports inputs in bulk for manufacture of fertilisers. If they clear the goods within time and thereby not making the ship wait for too long they get a discount from their overseas suppliers called as “dispatch earnings”. The amount of dispatch earnings is not known when they file the bill of entry because the goods are not yet cleared and the ship released. They come to know of this discount much later. The appellant has paid customs duty as applicable on their entire value at the time of clearance of the goods. Subsequently, when they earned the “dispatch earnings” from their overseas suppliers for clearing the goods well in time and thereby freeing vessel, they filed refund applications seeking the refund of the differential customs duty by revising the transaction value reckoning the dispatch earnings.

2. Their applications for refund were rejected by the original authority and such rejection was upheld by the First Appellate Authority on the ground that once BoE has been assessed and such assessment has not been challenged before the First Appellate Authority no application for refund can be filed as held by the Hon'ble apex court in the case of Priya Blue Industries Ltd., [2004 (172) ELT 145 – SC]. Aggrieved by these orders, the present appeals have been filed on the following grounds:

- a) The impugned order is unfair and unjust and erroneous
- b) under self assessment for refund no appeal can be filed as there is no order of assessment to be appealed against.
- c) under section 17 of the Customs Act, 1962 (as amended) assessment is done by the

assessee themselves under the self assessment scheme and there is no mechanism to challenge such self assessment before the Commissioner (Appeals). Therefore the ratio of the Hon'ble Apex Court in the case of Priya Blue Industries (supra) which was passed in the context of the earlier legal position where an assessment had to be done by the officer does not hold good in their case. They relied on the judgments of the Hon'ble High Court of Delhi in the case of Aman Medical Products Vs Commissioner [2010(250)ELT30] and Micromax Informatics Ltd., [2016(375)ELT446-Del] in which the Hon'ble High Court distinguished the judgment of the Hon'ble Apex Court in the case of Priya Blue Industries (supra) in view of the revised legal provision for assessment. Learned Counsel also submits that this Bench, in the case of Hindustan Petroleum Corporation Ltd., in customs appeal no. 30274/2019 decided vide Final Order no. A/30740/2019 held that the judgments of the Hon'ble Apex Court in the case of Priya Blue Industries (supra) and Flock India Pvt Ltd., [2000(120) ELT 285 (SC)] do not apply in the light of the amendments to the customs act and the judgments of the Hon'ble High Court of Delhi in the case of Aman Medical Products (supra) and Micromax Industries Ltd., (supra) prevail.

3. Learned DR reiterates the findings of the lower authorities. He also submits that in the case of ITC Ltd., as reported in [2019-TIOL-418-SC-CUS], the Larger Bench of the Supreme Court has held that an assessment under Section 17 of the Customs Act or under the Central Excise Act must be challenged before a refund application must be filed without which no refund can be sanctioned. The Hon'ble Larger Bench of the Supreme Court has upheld the judgments of Priya Blue (supra) and Flock India (supra) even after self assessment has been introduced under Section 17. It has been held that the self assessment order is also an assessment order and can be appealed against before the Commissioner (Appeals) and in the absence of any such appeal no refund application can be entertained. Paras 43, 47 and 48 of this judgment are reproduced below:

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).

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and

~~in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.~~

48. Resultantly, we find that the order(s) passed by Customs, Excise, and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are here by set aside. We order accordingly. We hold that the applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred.

4. I have considered the arguments from both sides and perused the records. As it is now settled by the Larger Bench of the Hon'ble Apex Court in the case of ITC Ltd., (supra) that no refund can be sanctioned without challenging the assessment order whether such assessment is done prior to the amendment to Section 17 of the Customs Act where the assessment had to be done by the officers post such amendment where the assessment is done under self assessment scheme, I have no option but to hold that the appeals are not sustainable and need to be rejected.

5. The impugned orders are upheld and the appeals are rejected.

(Order dictated and pronounced in open court)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, HYDERABAD  
DIVISION BENCH  
COURT NO I**

**Customs Appeal No. 662 of 2007**

Arising out of Order-in-Appeal No. 32/2007 (H-II) CUS, Dated: 12.07.2007  
Passed by Commissioner of Customs, Central Excise (Appeals), Hyderabad

**Date of Hearing: 12.04.2019**

**Date of Decision: 08.07.2019**

**COMMISSIONER OF CUSTOMS CENTRAL EXCISE AND SERVICE TAX  
HYDERABAD-II, KENDRIYA SHULK BHAVAN, L B STADIUM  
BASHEERBAGH, HYDERABAD, TELANGANA-500004**

**Vs**

**S V TECHNOLOGIES PVT LTD  
18-1-589/B, BHAVANI NAGAR, TIRUPATHI-517501**

**Appellant Rep by:** Shri P.S Reddy, Deputy Commissioner

**Respondent Rep by:** None

**CORAM:** Anil Choudhary, Member (J)

P V Subba Rao, Member (T)

**FINAL ORDER NO. A/30606/2019**

**Per: P V Subba Rao:**

1. This appeal is filed against Order-in-Appeal No. 32/2007 (H-II) CUS, dated 12.07.2007 by the Revenue.

2. None appeared on behalf of respondent despite notice. Heard Learned DR and perused the records.

3. The facts of the case in brief are that the respondent herein imported 'Computer Radiography System' and filed Bill of Entry No. 135166 dated 03.01.2006 classifying the product under 90189099. After assessment, the respondent were allowed clearance of goods for home consumption under Section 47 after payment of custom duty of Rs. 3,12,337/-. Later, it was noticed by the Assistant Commissioner that identical goods were being imported at other customs stations after classifying them under Customs Tariff Heading 90229099. A show cause notice was issued to the respondent on 14.02.2006 seeking to reclassify the goods under 90229099 and demand differential duty of Rs. 1,20,201/-. The respondent filed replies and attended personal hearing requesting the demand be dropped. After examination of the submissions of the respondent, Assistant Commissioner held that the goods in question deserve to be classified under custom tariff heading 90229090 and consequently they were not eligible for exemption under Notification No. 10/2003-CE and confirmed the demand of differential duty of Rs. 1,20,201/- along with interest.

4. Aggrieved, the appellant appealed before the First Appellate Authority who, on merits, agreed with the department's classification of the subject goods. He however, held that the assessment order in the subject bill of entry was not challenged by the department before the appropriate forum and therefore no demand under Section 28 of the Customs Act, 1962 is maintainable. He relied on the judgment of the Hon'ble Apex Court in the case of *Flock India Ltd.*, [2000 (120) ELT 285 SC] and *Priya Blue* [2004 (172) ELT 145 SC]. Relying on these two judgments he held that the order of the lower authority is not sustainable and set his order aside.

5. Revenue is aggrieved by the impugned order of the First Appellate Authority and submits that the demand for short levy was raised under Section 28 of Customs Act, 1962 which is the provision to raise a demand after notice to the party. After issue of the notice and following due process of law the Deputy Commissioner had confirmed the demand. The Commissioner (Appeals) had not disagreed with the re-classification by the Deputy Commissioner and has only set aside his order relying

upon the judgment of the Hon'ble Apex Court in the case of Flock India Ltd., (supra) and Priya Blue (supra). Both these cases pertain to the issues of refund and not the issue of demand under Section 28 and therefore the ratio of these case laws does not apply at all and the First Appellate Authority was wrong in relying on these cases. Learned DR would further submit that in the case of *Karnataka Power Corporation [2002 (143) ELT 482 SC]* the Hon'ble Apex Court remanded the matter of re-classification back to the Assistant Collector to decide the matter afresh and therefore it is not incorrect for Assistant Commissioner to decide the issue of classification while deciding a demand under Section 28. Learned Departmental Representative submits that the case of *Jain Shudh Vanaspati Ltd., [1996 (86) ELT 460 (S.C.)]* is on identical issue. The question before the Hon'ble Apex Court was whether a demand can be raised under Section 28 of the Customs Act for demanding differential duty subsequent to the passing of the order of clearance of goods under Section 47 of the Customs Act. Clearance under Section 47 subsumes classification, valuation, payment of duty and other issues. The Hon'ble Apex Court held that the demand can be raised under Section 28 after issue of order of clearance under Section 47. The provisions for demand under Section 28 of the customs act and for refund under Section 27 are quite different and the procedure to be followed with respect to each is also different. The case laws of Priya Blue (supra) and Flock India (supra) apply to refunds under Section 27 while the case law of Jain Shudh Vanaspati Ltd., (supra) applies to demand under Section 28. He would further submit that the order of the Hon'ble Apex Court in the case of Jain Shudh Vanaspati Ltd., has been followed in a series of judgments by the Tribunals and Courts and it is a well settled matter that a demand can be raised for not levied, not paid, short levied or short paid duty under Section 28 after clearance of the goods under Section 47 (which also means issues of classification, valuation, payment of duty have been completed).

6. We have considered the arguments by Learned DR and perused the records. The short point to be decided is whether the First Appellate Authority was correct in holding that the lower authority cannot raise a demand under Section 28 of the Customs Act without first challenging the assessment done in the bill of entry relying on the judgment of Priya Blue (supra) and Flock India (supra). We find that the judgment of Priya Blue and Flock India of the Hon'ble Apex Court are on the point of refund claim by the assessee without challenging the assessment order in the bill of entry. The present case is different. It is a case where after assessment and clearance of the goods is completed by issue of order under Section 47 of the Customs Act, 1962, within the normal period of limitation, the Deputy Commissioner has raised a demand under Section 28. While raising the demand he issued a show cause notice proposing re-classification of the imported goods and gave an opportunity to the respondent to present their case and considered their submissions. Thereafter, he confirmed the demand. The First Appellate Authority also agrees with the re-classification done by the Deputy Commissioner on merits. He, however, held that the Deputy Commissioner again raised the demand without first challenging or asking the Commissioner to review his own assessment of the bill of entry. This is not the ratio laid down by the Hon'ble Apex Court in the case of Priya Blue (supra) or Flock India (supra). Cases pertaining to issue of demand under Section 28 after clearance of the case under Section 47 are covered by the judgment of the Hon'ble Apex Court in the case of Jain Shudh Vanaspati Ltd., (supra) which clearly held that a demand can be raised under Section 28 even after clearance of the case under Section 47. Accordingly, we find that the impugned order is not correct and deserves to be set aside and we do so. The appeal is allowed and the impugned order is set aside.

(Order pronounced in the open court on 08.07.2019)

IN THE CESTAT, EASTERN BENCH, KOLKATA

[COURT NO. II]

S/Shri P.K. Choudhary, Member (J) and P. Venkata Subba Rao, Member (T)

COMMISSIONER OF CUSTOMS (PORT), KOLKATA

Versus

CHIRAG CORPORATION

Final Order No. 75299/KOL/2020, dated 25-2-2020 and Misc. Order No. 76513/2015, dated 16-12-2015 in Appeal No. C/76038/2015

REPRESENTED BY :Shri S. Guha, Authorised Representative, for the Appellant.

Shri B.N. Pal, Advocate, for the Respondent.

**[Order per : P. Venkata Subba Rao, Member (T)].** - This appeal is filed by the Revenue against Order-in-Appeal No. Kol/Cus(Port)/AM/054/2015, dated 18-8-2015 passed by Commr. (Appeals) of Customs, Kolkata.

2. Heard both sides and perused the records.

3. The respondent herein had filed Bills of Entry Nos. 5690325 & 5690326 both dated 3-6-2014 and self-assessed them under Section 17 of the Customs Act, 1962, declaring the goods, which they have imported as Rotary Tillers. The Bills of Entry were cleared by Customs Risk Management System. No assessment was done by the Officer. When the goods were examined, it was found that what was imported, were Power Tillers and not Rotary Tillers. The respondent had claimed the benefit of Notification No. 12/2012-Cus., dated 17-3-2012 under Sl. No. 399(A) which is available to Rotary Tiller/Weeder. As the examining Officer affirmed what was imported were Power Tiller and not Rotary Tiller as discussed in the Bills of Entry, the Bills of Entry were reassessed denying the benefit of exemption Notification No. 12/2012-Cus. Further, the goods were held to be liable for confiscation under Section 111(m) of the Customs Act, 1962. It was also held that the importer (respondent) was also liable for penalty under Section 112(a) and 114A of the Customs Act, 1962. Thus concluding, the Joint Commissioner of Customs, confiscated the goods under Section 111(m) of the Act and allowed their redemption fine of Rs. 5 lakhs. He also imposed a penalty upon the importer under Section 114A of the Customs Act, 1962, amounting to Rs. 8,56,380/-.

4. Aggrieved, the respondent appealed to the first appellate authority, who, by the impugned order, allowed the appeal giving benefit of the exemption Notification to the imported goods holding that they are eligible for exemption under Sl. No. 399(A) of the exemption Notification No. 12/2012-Cus., dated 17-3-2012. He also set aside the order of confiscation, imposition of fine and penalty under the Customs Act, 1962.

5. Aggrieved by this order, the Revenue has filed the present appeal on the following grounds :

(i) That the Learned Commissioner of Customs (Appeals), Kolkata grossly erred in his observation and ignoring the fact that "Power Tillers" are pedestrian driven machine having wheels which used mainly for agricultural purpose where they can be used for tilling of farms with the help of implements like Rotary Tiller, Weeder, disc plough, disc horrows, ridger, etc. These 'Power Tiller' can also be used for carrying fodder goods, etc. from one place to another by way attaching a cart behind them. Whereas, 'Rotary Tiller' are implements and are used in the field/farm for tilling of soil or breaking up of soil having blades. Power Tillers has 'driven' feature by an engine but Rotary Tiller has 'rotate' feature of tiller. A tiller may rotary or non-rotary depends on 'rotation' or 'straight' movement. On the other hand, a tiller may be driven by a bullock or horse or poer. A Rotary Tiller may be driven with



power and without power and a power tiller may with rotary tiller or without rotary feature tiller and therefore in terms of customs Notification No. 12/2012-Cus., dated 17-3-2012 under Sl. No. 399(A), the item 'Rotary Tiller' has been specifically given the benefit under the notification, and not 'Power Tiller'.

(ii) That the Commissioner of Customs (Appeals), Kolkata has failed to appreciate the fact that Power Tillers and Rotary Tillers are two different items. Rotary Tiller is appliance/implement which can be used manually with the help of Bullock or Horses, etc. or with any power driven machines like tractors, Power Tillers, etc. Therefore it cannot be said that both items are same.

(iii) That the Learned Commissioner of Customs (Appeals), Kolkata grossly erred in his observation at para 6(ii) that the onus to deny the benefit lies with the Department and as such, the benefit of doubt goes in favour of the appellant. The goods are found to be 'Power Tiller' and hence not covered under Sl. No. 399A of the Customs Notification No. 12/2012-Cus., dated 17-3-2012. It is for importer, to satisfy the condition and not for the department to prove it otherwise.

(iv) That the Central Board of Excise & Customs vide their Circular No. 45/2001-Cus., dated 7-8-2001 has clarified that "Rotary Tillers/cultivators are reported to be an implement/attachment with blades or tines mounted on a power driven shaft. These equipments classifiable under CTH 84.32 are fitted as an attachment to tractor. Power Tillers are on the other hand, prime movers in which the direction of travel and control for field operations is performed by the operator walking behind it. Hence, it is clear that power tillers/pedestrian controlled tractors/walking tractors are different from rotary tillers.

(v) That in an identical issue Commissioner of Customs (Appeals), Custom House, Kolkata in his Order-in-Appeal No. 416-422/Cus(Apprg)/KOL(P)/2014 dated 11-9-2014 has held that "Power Tillers" and "Rotary Tillers" are two different items and by any stretch of imagination both cannot be understood as same. A tiller may rotary or non-rotary depend on 'rotation' or 'straight' movement. On the other hand, a tiller may be driven by a bullock or horse or power. A Rotary Tiller may be driven with power and without power and a power tiller may with rotary tiller or without rotary feature tiller. The Customs Notification No. 12/2012-Cus., dated 17-3-2012 [Sl. No. 399(A)] grants concessional rate of duty benefit to the item 'Rotary Tiller' and not 'Power Tiller'.

(vi) That the Learned Commissioner of Customs (Appeals), Kolkata has miserably failed in not appreciating the fact that the Bills of Entry were facilitated by the RMS of the EDI System and under the 'Self-Assessment Rules, 2011', it is the sole responsibility of the importer to declare correct declaration/entry or claim of any duty exemption benefit in the Bill of Entry under Section 46 of the Customs Act, 1962. In the instant case, the provision of Self-Assessment Rules, 2011 has been violated by way of misdeclaration in declaring their goods as 'Rotary Tiller', whereas the declared goods actually, were found to be "Power Tillers". Further, the Customs Notification No. 12/2012-Cus., dated 17-3-2012 [Sl. No. 399(A)] grants concessional rate of duty benefit to the item 'Rotary Tiller' and not 'Power Tiller'. Once misdeclaration is established, it attracts provision of Section 111(m) and Section 112(a) of Customs Act, 1962. Hence, the finding of Ld. Commissioner of Customs (Appeals), Kolkata, is subjective and needs to be retarded.

6. When this matter was heard, the Ld. Counsel for the respondent, had, at the outset, pointed out that the duty involved in this case is less than Rs. 10 lakhs and therefore, the Revenue's appeal is governed by National Litigation Policy and, therefore, needs to be rejected on this ground itself without going into the merits of the case. He submitted that this Bench in the case of *Sunrise International* in Customs Appeal Nos. C/76455076457 of 2018, had, by the order dated 25-11-2019, dismissed the similar appeals under Litigation Policy without examining the merits of the case.

7. Ld. DR for the Revenue, submits that the National Litigation Policy sets a monetary limit of Rs. 10 lakhs insofar as the Customs Appeals are concerned. However, this limit is subject to some conditions. Issues involving classification, valuation and having substantive question of law, do not get covered. This appeal is one of those exceptions as the question of classification of the imported goods as well as the benefit of exemption notification are involved in this case, even though

the amount of duty involved is less than Rs. 10 lakhs. Therefore, the Department does not wish to withdraw this appeal as the case is not covered by the Litigation Policy and insists that an order may be passed. As the Revenue is not withdrawing the appeal and asserts that is not covered by the Litigation Policy, we proceed to examine and decide the matter on merits.

8. Since times immemorial men learned that the soil needs to be loosened in order to grow crops. This has been done using a variety of implements and machines starting with spades, bullock drawn ploughs, tractor drawn ploughs and other instruments. There are basically three types of instruments, which loosen soils. Ploughs, which loosen the soil, harrows and hoes, which pulverize the soil breaking large clods of soil into finer particles and rotary tillers, which rotate and plough the soil. Tractor is a vehicle constructed essentially for hauling or pushing another vehicle, appliance/implement, whether or not with subsidiary provision for transport. There are tractors, which are used mainly for lifting and handling goods in warehouse, factory, railway platform, etc. There are also other tractors, which are primarily used for agriculture and related works. Tractors used for agriculture, can be either pedestrian controlled tractors, which move with the load but are controlled by the operator walking behind it or tractors in which the driver is seated on it. In both types, the tractor by itself does not plough the soil or loosen it. These activities are done by attachment to the tractor. The tractor itself can be put to many uses depending upon, which attachment is used. The pedestrian controlled tractors are also known as Power Tillers or walking tractors.

9. The exemption Notification No. 12/2012-Cus., dated 17-3-2012, Sl. No. 399(A) in question is reproduced below :

| Sl. No. | Chapter or Heading or sub-heading or tariff item | Description of goods                                                                                                                                                                                                                                                                          | Standard rate | Additional duty rate | Duty rate condition No. |
|---------|--------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|----------------------|-------------------------|
| 1       | 2                                                | 3                                                                                                                                                                                                                                                                                             | 4             | 5                    | 6                       |
| 399     | 84 or any Chapter                                | (A) The following goods, namely :<br><br>(i) Paddy transplanter;<br><br>(ii) Laser land leveler;<br><br>(iii) Reaper-Cus-Binder;<br><br>(iv) Sugarcane harvester;<br><br>(v) Straw or fodder balers;<br><br>(vi) Cotton picker;<br><br>(vii) Track used for manufacture of track type combine | 2.5%          | -                    | -                       |

|  |  |                                                                             |  |  |  |
|--|--|-----------------------------------------------------------------------------|--|--|--|
|  |  | harvesters                                                                  |  |  |  |
|  |  | (viii) Sugar cane planter                                                   |  |  |  |
|  |  | (ix) Root or tuber crop harvesting machines;                                |  |  |  |
|  |  | (x) Rotary tiller/weeder                                                    |  |  |  |
|  |  | (B) Parts and components required for manufacture of goods specified at (A) |  |  |  |

In the Bills of Entry in this case, the description of goods is Rotary Tiller. On examination, however, the goods were found to be Power Tillers. Since the Power Tillers, which are also known as pedestrian controlled tractors are different from Rotary tillers, the original authority denied the benefit of exemption notification to the respondent. He also ordered confiscation of the goods and imposed fine and penalty upon the respondents. The First Appellate Authority observed that no expert opinion was sought by the Department regarding nature of the goods. He also relied upon a “clarification” issued by Ministry of Agriculture, Department of Agriculture & Cooperation vide F. No. 9-I/2014-M&T (I & P), dated 27th October, 2014, to conclude that the benefit of exemption Notification was available to the power tillers as well. Relying upon this so-called clarification, he held that the benefit of exemption notification, is available and accordingly, set aside the order of the lower authorities.

10. The Ld. DR for the Revenue, submits that the first appellate authority has erred relying upon the so-called clarification, which is nothing but a letter/memo from the Deputy Commissioner (M&T) of the Department of Agriculture & Cooperation to the Under Secretary (Policy) of the same Department essentially dealing with the representations of different associations and requesting that the Under Secretary to examine the matter and take up the matter with the Finance Ministry to extend the benefit of concessional rate of duty to Power Tiller.

11. The Ld. Counsel for the respondent, supports the impugned order.

12. We have considered the arguments of both sides and the issue to be decided :

(a) the benefit of exemption Notification 12/2012-Cus., dated 17-3-2012, Sl. No. 399(A) available to Rotary Tiller/Weeder is also available to Power Tiller, which were imported by the respondent.

(b) whether the imported goods were liable for confiscation under Section 111(m) of the Customs Act, 1962 and the fine and penalty are liable to be upheld.

13. In so far as the first point of law is concerned, it has been discussed at length about the distinction between the Power Tiller, which in the form of pedestrian controlled tractor, and the Rotary Tiller, which are equipment to till the soil. Tractors including pedestrian controlled tractors or power tiller are classifiable under Customs Tariff Heading 8701. Rotary tillers are classifiable under Chapter Heading 84 as agriculture equipment. The Rotary tiller is specifically covered under Customs Tariff Heading 8432. As there was a confusion among the some field formations, this matter was discussed at length in C.B.E. & C.’s Circular. No. 45/2001-Customs dated 7th August, 2001, in which, it was clarified as follows :

“F. No. 528/4/2001-CUS(TU)

Government of India

---

Ministry of Finance

Department of Revenue

Central Board of Excise & Customs

*Subject : Classification of pedestrian controlled tractors/power tillers as rotary tillers under Heading 84.32. - Regarding.*

I am directed to refer to the subject mentioned above and to say that a representation has been received in Board's office stating that pedestrian controlled tractors/power tillers classifiable under CTH 87.01 are being cleared as rotary tillers under CTH 84.32 and that the incorrect classification has adversely affected the interests of the domestic industry.

2. The matter has been examined. In this connection, comments on classification and assessment practice followed were called for. The Custom Houses were also requested to forward copies of brochure/technical literature of the equipment in question. From the reports received, it appears that the customs House are following the decision of the Conference of Commissioners of Customs on Tariff and Allied Matters held at Cochin (Oct. 95) wherein it had been decided that few models of power tillers would merit classification under CTH 84.32 as agricultural machinery for soil preparation or soil cultivation.

3. HS Explanatory Notes to Heading 87.01 state that the heading covers tractors of various types. Such tractors may also be equipped with a tool box, with a provision for raising and lowering agricultural implements, with couling devices for trailers or semi-trailers or with a power take off for driving machines such as threshers and circular saws. It is further stated that this heading also covers 'pedestrian controlled tractors' or 'Walking tractors'. These tractors are small agricultural tractors equipped with a single driving axle carried on one or two wheels, and like normal tractors, they are designed for use with interchangeable implements which they may operate by means of a general purpose power take off. Such tractors are not usually fitted with a seat and the steering is effected by means of two handles.

4. Rotary tillers/cultivators are reported to be an implement/attachment with blades or tines mounted on a power driven shaft. These equipment classifiable under CTH 84.32 are fitted as an attachment to tractor, Power tillers are, on the other hand, prime movers in which the direction of travel and control for field operations is performed by the operator walking behind it. Hence, it is clear that power tillers/pedestrian controlled tractors/walking tractors are different from rotary tillers.

5. The Explanatory Notes make it clear that 'pedestrian tractors' are to be classified under CTH 87.01 as tractors and not as 'rotary tillers' under Heading 84.31. The Custom House may, therefore, kindly ensure that 'pedestrian controlled tractors' or walking tractors are not cleared in the guise of rotary tillers. Difficulties, if any, faced in the implementation of above instructions may be brought to the notice of the Board.

Please acknowledge receipt of this circular."

14. We have gone through the letter/memo of the Ministry of Agriculture relied upon by the first appellate authority in the impugned order. This only mentions that the benefit of Notification No. 12/2012-Cus. (supra) available to Rotary Tiller, may also be extended to power tiller and requested the Under Secretary of their own Department, to take up the matter with the Finance Ministry in regard to eligibility of exemption notification or classification. We also note that the Ministry of Agriculture is not expert in classification of goods under the Customs Act, valuation, determination of duty or availability of benefit of exemption notification. They have rightly applied their mind from their point of view and felt that the exemption notification must be available to power tiller also. This view of the Ministry of Agriculture, cannot determine the eligibility or otherwise of the exemption notification to power tiller. It must be determined solely based on the

way exemption notification as it is drafted. A bare perusal of the exemption notification, shows that it is available, *inter alia*, to rotary tiller/weeder. It does not suggest directly or indirectly that it is available to power tillers also. Therefore, in our considered view, the benefit of exemption notification is not available to the power tillers imported by the appellant.

15. However, considering that the importers could have entertained the wrong belief that the exemption Notification is available to them and made an ineligible claim, we do not find sufficient grounds to uphold the confiscation of the goods under Section 111(m) or imposition of penalty, fine upon the respondent.

16. In view of the above, the impugned order is modified to the extent of setting aside the benefit of exemption Notification No. 12/2012-Cus. (supra) extended by it, but upholding the setting aside of fine and penalty.

17. The appeal filed by the Revenue is partly allowed as above.

(Pronounced in the open Court on 25-2-2020)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
EASTERN ZONAL BENCH, KOLKATA  
REGIONAL BENCH  
COURT NO. II**

**Customs Appeal No.77302 of 2019**

Arising out of Order-in-Original No.16/CUS/CC(P)/WB/2019-20, Dated:  
30.10.2019

Passed by Principal Commissioner of Customs(Preventive), W.B.

**Date of Hearing: 25.12.2019  
Date of Decision: 12.12.2019**

**SHRI BIKASH SAHA  
PROPRIETOR, M/s BISHAL EXPORT  
(NO.35A, SUDHIR BOSE ROAD  
P.O.KHIDERPORE, KOLKATA-700023.)**

**Vs**

**PRINCIPAL COMMISSIONER OF CUSTOMS (PREVENTIVE)  
KOLKATA, (CUSTOMS HOUSE, 3RD FLOOR, 15/1, STRAND ROAD  
KOLKATA-700001**

**WITH  
Customs Appeal No.77314 of 2019**

Arising out of Order-in-Original No.15/CUS/CC(P)/WB/2019-20, Dated:  
30.10.2019

Passed by Principal Commissioner of Customs(Preventive), W.B.

**SHRI JHUNU DUTTA  
PROPRIETOR, M/s DUTTA ENTERPRISE  
(OJHA MANSION, 1ST FLOOR, HILL CART ROAD  
SILIGURI-734001)**

**Vs**

**PRINCIPAL COMMISSIONER OF CUSTOMS (PREVENTIVE)  
KOLKATA, (CUSTOMS HOUSE, 3RD FLOOR, 15/1, STRAND ROAD  
KOLKATA-700001**

**Appellant Rep by:** Shri Arijit Chakraborty, Adv.

**Respondent Rep by:** Shri A K Singh, AR

**CORAM:** P K Choudhary, Member (J)  
P V Subba Rao, Member (T)

**FINAL ORDER NOS. 76874-76875/2019**

**Per: P V Subba Rao:**

Heard both sides and perused the records.

2. The appellants in these cases are importers of readymade garments from Bangladesh. After importing, they have filed Bills of Entry with the Customs authorities at the Petrapol Land Customs Station. The Bills of Entry were assessed and during examination it was found that the appellants had imported goods in excess of what were declared in the Bills of Entry and other documents. The goods imported from Bangladesh are exempted from payment of duty as per the South Asia Free Trade Agreement (SAFTA) by Notification No.99/2011-CUS dated 09.11.2011. The details of the goods which were declared and actually found in respect of M/s. Bishal Exports are as follows:-

| Considering 1 US\$ = Rs.69.65 |                          |                 |                     |                     |                                         |
|-------------------------------|--------------------------|-----------------|---------------------|---------------------|-----------------------------------------|
| Sl. No.                       | Description of Goods/CTH | Quantity in pcs | Declared Value/Pcs. | Enhanced value/Pcs. | Total Value in Rs.                      |
| 01                            | Men's trousers Cotton    | 7560            | 0.80 US\$           | 1.85 US\$           | 7560 X 1.85 X 69.65 =<br>Rs.9,74,124.90 |

|    |                                      |                                                      |                              |           |                                            |
|----|--------------------------------------|------------------------------------------------------|------------------------------|-----------|--------------------------------------------|
|    | [62034200]                           |                                                      |                              |           |                                            |
| 02 | Trouser kids<br>Cotton<br>[62034200] | 7120                                                 | 0.50 US\$                    | 0.95 US\$ | 7120 X 0.95 X<br>69.65 =<br>Rs.4,71,112.60 |
| 03 | Men's Short<br>Cotton<br>[62034200]  | 26060<br>[declared] +<br>3133<br>[excess]=<br>29,193 | 0.40 US\$                    | 0.73 US\$ | 29,193x0.73 x<br>69.65=<br>Rs.14,84,303.49 |
|    | Grand Total                          | 43,843 Pcs.                                          | Rs.29,29,541/- (Rounded off) |           |                                            |

3. Similarly the quantity of the goods declared and actually found in respect of M/s.Dutta Enterprises are as follows:-

| <b>Considering 1 US\$ = Rs.69.65</b> |                                       |                                                     |                              |                            |                                                                 |
|--------------------------------------|---------------------------------------|-----------------------------------------------------|------------------------------|----------------------------|-----------------------------------------------------------------|
| <b>Sl. No.</b>                       | <b>Description of Goods/CTH</b>       | <b>Quantity in pcs</b>                              | <b>Declared Value/Pcs.</b>   | <b>Enhanced value/Pcs.</b> | <b>Total Value in Rs.</b>                                       |
| 01                                   | Men's T Shirt<br>Cotton<br>[61099090] | 4559<br>[declared] +<br>6240<br>[excess] =<br>10799 | 0.30 US \$                   | 0.82 US \$                 | 8855.18<br>US\$=Rs.69,65 X<br>8855.18 =<br>Rs.6,16,763.29       |
| 02                                   | Men's<br>Trouser<br>[62034990]        | 9165                                                | 0.50 US\$                    | 1.85 US\$                  | 46955.25 US \$ =<br>Rs. 69.65 X<br>16955.25 =<br>Rs.8,99,540.89 |
| 03                                   | Short Pant<br>(Mens)<br>[62034990]    | 15728<br>[declared] +<br>1964<br>[excess]=<br>17692 | 0.25 US\$                    | 0.73 US\$                  | 12915.16 US \$ =<br>Rs. 69.65 X<br>12915.16 =<br>Rs.8,99,540.89 |
| 04                                   | Jacket (Mens)<br>[62033990]           | 2428                                                | 0.60 US\$                    | 2.60 US \$                 | 6312.80 us \$ =<br>Rs. 69.65 X<br>6312.80 =<br>Rs.4,39,686.52   |
|                                      | Grand Total                           | 40,084 Pcs.                                         | Rs.31,36,924/- (Rounded off) |                            |                                                                 |

4. After following due process, the learned adjudicating authority by the impugned orders, has held the entire goods imported by the aforesaid consignments were liable for confiscation and confiscated the same under Section 111 (e) and 111(l) of the Customs Act, 1962. He also gave the appellants an option to redeem the goods on payment of redemption fine under section 125 of the Customs Act. He demanded Customs duty on the entire amount of quantity of goods which were imported along with the appropriate interest. Further, he has imposed penalties under section 112 of the Customs Act. Further he also imposed a penalty upon the Customs broker for not performing his responsibilities under section 117 of the Customs Act, 1962.

5. Aggrieved by the impugned orders, the present appeals have been filed.

6. Learned Counsel for the appellants would argue that the goods which they have imported were covered by the SAFTA Certificate which they have produced before the learned adjudicating authority. Only a few goods were found to be in excess of what was declared. For instance in respect of M/s.*Bishal Exports (Customs Appeal No.77302 of 2019)* what was declared was 7560 Trousers, 7120 Kids Trousers and 26060 Men's Shorts. In addition to what was declared, what was found during examination was an excess of 3133 Men's Shorts. Similarly in case of M/s.Dutta Enterprises what was declared in the Bill of Entry and documents was 45519 Men's T-Shirts, 9165 Men's Trousers and 15,728 Men's Shorts and 2428 men's jackets. In addition what was declared, during examination Customs has found there were excess T-Shirts 6240 pieces and shorts 1964 pieces. It is only these excess pieces which were not covered by the SAFTA Certificate which would entitle them to the benefit of exemption Notification. It is only these excess pieces, which have not been declared in the Bills of Entry and other documents.

7. However, the learned adjudicating authority has ordered confiscation of the entire consignment including those goods which have been correctly declared in their Bills of Entry. Further, he has demanded and confirmed Customs duty on the entire consignment completely denying the benefit of exemption even with respect to those goods which are covered by the SAFTA certificate which they have produced.

8. He would submit that these facts are not in dispute. In fact, these are recorded in the impugned orders themselves. He would therefore argue that if at all any action has to be taken it can be taken only in respect of the excess goods. On the remaining goods which conformed to the SAFTA certificate, they are entitled to the benefit of exemption Notification. Such goods which are covered by their declarations are also not liable for confiscation and no redemption fine can be imposed on those goods. Similarly penalties, if any imposed have to be reckoned only on such quantity of goods as are in excess.

9. He would further argue that the excess quantity which has been discovered during examination by the Customs is a small fraction of the total quantity imported amounting for less than 10% in terms of the total number of pieces. As the excess quantity is very small, the same may also be condoned and the entire confiscation proceedings as well as confirmation of demands may be set aside.

10. In view of the above, he would pray for setting aside the impugned order and allowing their appeals.

11. Per contra, learned Authorized Representative for the department supports the impugned order.

12. We have considered the arguments of both sides and perused the records.

13. It is not in dispute and is evident from the records as well as the impugned order that the appellant had mis-declared the quantity of goods and had imported goods in excess of what was declared in the Bills of Entry and the other documents. Country of origin certificate from Bangladesh (SAFTA certificate) which would entitle them to import goods under an exemption also covered such quantity of the goods as was declared in their Bills of Entry. What is in violation of the Customs Act is only the excess quantity of the goods which have been imported by them without declaring in any of the documents. These goods are also not covered by the SAFTA certificate. As per section 111 of the Customs Act, 1962 several types of goods brought in the place outside India are liable for confiscation. Clause (l) of this section reads as follows:-

*"Any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this act, or in the case of baggage in the declaration made under section 77."*

Clause (e) of section 111 reads as follows:-

*"Any dutiable or prohibited goods found concealed in any manner in any conveyance."*

14. Learned adjudicating authority has found that the goods in question do not conform to the declarations made in the entry made under the Customs Act, i.e. the Bill of Entry and hence held the goods liable for confiscation under section 111(e) and under section 111(l) of the Customs Act, 1962.

15. A plain reading of section 111 (e) and (l) shows that these apply to such goods only which have been concealed and have not been declared and not the entire quantity of goods. In fact section 111(l) is very categorical that it applies to goods found in excess of what have been declared. Therefore, we find that excess goods are liable for confiscation and not the entire consignment imported by the appellant. We therefore find that only the following goods are liable for confiscation:-

*(1) Customs Appeal No.77302 of 2019 of M/s.Bishal Exports – 3133 pieces of men's shorts.*

*(2) Customs Appeal No.77314 of 2019 of M/s.Dutta Enterprises – 6240 pieces of men's T-Shirts and 1964 pieces of men's shorts.*

16. We find that the confiscation of the remaining goods is not supported by law and accordingly needs to be set aside and we do so.

17. We also find that the denial of the exemption Notification for the entire quantity of goods when the bulk of the goods are already covered by the SAFTA certificate is



not supported by any legal provision. Therefore, the demands need to be set aside to that extent and we do so. The amount of redemption fine imposed by the impugned order as well as the penalties imposed upon the appellants need to be proportionately reduced.

18. In view of the above, we allow the appeals partly upholding the confiscation of the excess quantity of goods found in the consignment over and above what was declared and duty on such quantity of pieces. The remaining part of the demand and the confiscation of the remaining goods is set aside. Consequently the redemption fine as well as penalty upon the appellants needs to be reduced in proportion to the value of the excess goods to the total value of goods.

Appeals are partly allowed and the matters are remanded to the original authority for the limited purpose of calculation of the amount of duty, fine and penalty as above.

(Order pronounced in the open Court on 12.12.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
EASTERN ZONAL BENCH, KOLKATA  
REGIONAL BENCH  
COURT NO. II**

**Customs Miscellaneous Application No.76814 of 2018 (COD)  
(On behalf of Appellant) AND  
Customs Appeal No.78100 of 2018**

Arising out of Order-in-Appeal No.07/CUS/CCP/2017, Dated: 28.02.2017  
Passed by Commissioner(Appeals), Central Excise, Customs & Service Tax,  
Bhubaneswar

**WITH**

**(i) Customs Miscellaneous Application No.76815 of 2018(COD) and  
Customs Appeal No.78101 of 2018 (M/s.Indian Farmers Fertilizer Cooperative  
Limited)**

**(ii) Customs Miscellaneous Application No.76816 of 2018(COD) and  
Customs Appeal No.78102 of 2018**

**(M/s.Indian Farmers Fertilizer Co-operative Limited)**

**(iii) Customs Miscellaneous Application No.76817 of 2018(COD)  
and Customs Appeal No.78103 of 2018**

**(M/s.Indian Farmers Fertilizer Co-operative Limited)**

(i) (Arising out of Order-in-Appeal No.08/CUS/CCP/2017, Dated: 28.02.2017  
Passed by Commissioner(Appeals), Central Excise, Customs & Service Tax,  
Bhubaneswar

(ii) (Arising out of Order-in-Appeal No.09/CUS/CCP/2017, Dated: 28.02.2017  
Passed by Commissioner(Appeals), Central Excise, Customs & Service Tax,  
Bhubaneswar

(iii) (Arising out of Order-in-Appeal No.06/CUS/CCP/2017, Dated: 28.02.2017  
Passed by Commissioner(Appeals), Central Excise, Customs & Service Tax,  
Bhubaneswar

**Date of Hearing: 27.11.2019  
Date of Decision: 27.11.2019**

**M/s INDIAN FARMERS FERTILIZER COOPERATIVE LTD  
(PARADEEP, 754142 (ODISHA)**

**Vs**

**COMMISSIONER OF CUSTOMS(PREVENTIVE)  
BHUBANESWAR, (BHUBANESWAR, ODISHA)**

**Appellant Rep by:** Shri H K Pandey, Adv.

**Respondent Rep by:** Shri S Guha, AR

**CORAM:** P K Choudhary, Member (J)

P V Subba Rao, Member (T)

**MISCELLANEOUS ORDER NOS. 77597-77600/2019  
FINAL ORDER NOS. 76702-76705/2019**

**Per: P V Subba Rao:**

The learned Advocate appearing on behalf of the Appellant has filed an affidavit signed by the Joint General Manager (F & A) of the appellant company stating the reasons for the inordinate delay in filing the appeals. It has been further submitted that they have a strong case on merits and the delay is unintentional. They have also relied upon the judgement of the Hon'ble Apex Court in the case of *Land Acquisition Anantrnag and Another vs. M.S.T. Katiji & Others* [1987 (28) ELT 185 (SC)

2. In view of the submissions as made by the learned Advocate and the reasons as explained in the affidavit and the Miscellaneous Applications, the prayer for condoning the delay in filing the appeal before the Tribunal is allowed.

3. With the consent of both the sides, appeals itself are taken up for disposal.

4. In these cases appellant had filed refund claim with respect to fertilizers which have been imported on which they have paid excess Customs duty taking the wrong

value for the purpose of calculation. Initially, the assessments were done provisionally and subsequently they were finalized by the Assistant Commissioner of Customs. Thereafter, the appellant filed a refund claim which was rejected by the lower authority and such rejection was upheld by the first appellate authority by the impugned orders on the ground that the assessments which were done by the adjudicating authority were not challenged by the assessee. He relied on the case law - *Flock (I) Pvt.Ltd. [2000 (120) E.L.T. 285 (SC)]* and *Priya Blue Industries Ltd. [2004 (172) ELT 145(SC)]* to reject the refund applications.

5. Aggrieved by this rejection by the first appellate authority, present appeals have been filed.

6. Learned Authorized Representative for the Revenue points out that the issue is now settled by the larger of the Supreme Court in the case of *ITC Ltd. v. Commissioner of Central Excise, Kolkata-IV (Civil Appeal No.293294 of 2009)* as reported in It is now settled by this judgement that no refund claim can be allowed arising out of an assessment unless the assessment itself has been challenged.

7. Learned Counsel for the Appellant submits that they were also denied the principles of natural justice while finalizing the assessment inasmuch as they were not given a personal hearing before finalizing the assessment.

8. We have considered the arguments of both the sides and perused the records. The short question which falls for consideration in these appeals is whether the first appellate authority was correct in rejecting the appeals of the appellant and upholding the rejection of their refund claims by the lower authority; merely on the ground that they have not challenged the assessment orders from which such refund arises.

9. We find that this issue has gone through several judicial decisions. In the case of *Priya Blue Industries (supra)* and *Flock India Ltd.(supra)*, the Hon'ble Apex Court had held that where a refund arises out of the assessment such refund cannot be sanctioned unless the assessment itself has been challenged and modified. The reason for this is officers sanctioning the refund cannot sit in judgement over the assessment which in itself is an adjudication process. Therefore the assessment must be challenged before the Commissioner(Appeals) before refund claim can be filed. Sanction of refund is mere a mechanical process which arises out of such re-assessment or modification of assessment at the appellate stage. Subsequently, in the case of *Aman Medical Products Limited and Micromax Informatics Ltd* the Hon'ble High Court of Delhi has distinguished the cases of *Priya Blue Industries* and *Flock India Ltd.* and held that where there is no assessment order itself there is nothing for the assessee to challenge and in such cases the refund can be sanctioned without challenging the assessment. The case of *Aman Medical Products* pertained to a Customs case where the department introduced a system of Risk Management System(RMS). Although section 17 of Customs Act required the assessing officer to assess the Bills of Entry, the officer had no way of carrying out the assessment as the RMS used to automatically clear the goods based on the declarations filed by the assessee. The question was whether in such a case, the assessment of Bill of Entry done by the RMS based on the declaration by the importer has to be challenged before seeking a refund. The case of *Micromax Informatics Ltd. (supra)* pertained to the period when self-assessment procedure has been introduced under section 17 of the Customs Act, 1962. In this case, assessee had self-assessed duty at the higher rate and thereafter sought refund. The Hon'ble High Court had held that it being a self-assessment there is no order by any officer and hence nothing to be challenged and refund can be processed and sanctioned accordingly.

10. Both these cases and many similar appeals have come up before the Hon'ble Supreme Court in the case of *I.T.C. Ltd. (supra)*. The Hon'ble Apex Court has held that in all cases including cases of selfassessment, the assessment must be challenged before refund can be sanctioned. Paras 44-48 of this judgement are reproduced below:-

*"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).*

*45. Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in Central Office Mewar Palace Org. v. Union of India - 2008 (12) S.T.R. 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the Customs Act.*

*46. The decision in Intex Technologies (India) Ltd. v. Union of India has followed Micromax (supra). The reasoning employed by the High Courts of Delhi and Madras does not appear to be sound. The scope of the provisions of refund under Section 27 cannot be enlarged. It has to be read with the provisions of Sections 17, 18, 28 and 128.*

*47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of selfassessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.*

*48. Resultantly, we find that the order (s) passed by Customs, Excise, and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are hereby set aside. We order accordingly. We hold that the applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred."*

*11. As the issue has now been settled by the larger Bench of the Hon'ble Apex Court, we hold that the appellant was not entitled to the refund without having first challenged the assessment order itself and therefore the impugned order denying such refund is correct.*

*12. We have considered the arguments of the learned Counsel for the appellant that they were not given an opportunity of being heard before finalizing the assessment. Nevertheless, the fact remains that such assessment has not been challenged at all by the appellant. This appeal is not with respect to finalization of provisional assessment but with respect to refund. Respectfully following the ratio of the decision of the larger Bench of the Hon'ble Supreme Court, we find that the rejection of the refund by the impugned orders of the first appellate authority are correct and call for no interference.*

*The impugned orders are upheld and the appeals are rejected.*

*(Dictated and pronounced in the open Court)*

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
EAST REGIONAL BENCH, KOLKATA**

**Customs Appeal No. 248 of 2009**

Arising out of Order-in-Original No.08/Cus/CC(P)/WB/2009, Dated: 06.03.2009  
Passed by Commr. of Customs (Preventive), Kolkata

**Date of Hearing: 26.08.2019**

**Date of Decision: 26.08.2019**

**SHRI BIKASH SAHA  
PROP. OF M/s MOLY EXPORTS, STATION PARA  
NEAR SITALA MANDIR, BETHUADAHARI, DIST.-NADIA  
WEST BENGAL, PIN-741126**

**Vs**

**COMMISSIONER OF CUSTOMS (PREVENTIVE)  
KOLKATA, 15/1 STRAND ROAD, KOLKATA-700001**

**Appellant Rep by:** Shri R N Bandapadhyay, Consultant

**Respondent Rep by:** Shri S K Naskar, AR

**CORAM:** P Anjani Kumar, Member (T)

P Dinesha, Member (J)

**FINAL ORDER NO. 76159/2019**

**Per: P Anjani Kumar:**

The appellants have imported two consignments of ready-made garments and filed Bills of Entry No.868/08 dated 21.07.2008 and 836/08 dated 09.07.2008. The consignments were intercepted by the Officer of Head Quarters P & I Branch; it was found that there was mis-declaration, in the consignments consisting 229 bales, to the extent of 81 bales;81 bales were found to contain full pants and trousers in place of declared payjamas. Accordingly, the Department has seized the materials and issued a show-cause notice to the appellant proposing confiscation and imposition of penalties. Showcause notice was adjudicated by the Commissioner vide Order-in- Original No.08/Cus/CC(P)/WB/2009 dated 06.03.2009, vide which, Commissioner confiscated the goods totally revaluated Rs.38,09,430 and allowed redemption on payment of fine of Rs.45,00,000; imposed penalty of Rs.41,86,625/- on Shri Bikash Kumar Saha, Proprietor of the Appellant Company under Section 112(b)(ii) of the Customs Act, 1962 and penalty of Rs.1,00,000 On Shri Bimal Roy, Authorized Employee of CHA Firm.

2. The Learned Counsel for the appellant submits that the importer was not aware of any misdeclaration and has submitted a Fax Message received from their foreign supplier stating that it was a mistake on their part in loading the goods, which was not indented by the Indian Importer. The Learned Counsel submits that the Department has not accepted their submissions and proceeded with the confiscation of the goods and imposition of penalties; Commissioner has attempted to revalue the goods on the basis of report, by the Chairman, Chamber of Textile, Trade & Industry, Kolkata, given at the behest of the Department. Counsel also alleges that the sample sent for testing to CRCL was too small and not at all representative. The Learned Counsel further submits that as there was no misdeclaration on their part, no penalty can be levied on them; the revised value of the goods was arrived in an arbitrary manner and the same should be set aside. Learned Counsel submits that they are willing to take the consignment released at the value declared by them.

3. The Learned Authorised Representative, for the Department, reiterates the findings of the Order-in-Original and submits that the Commissioner has given the detailed reasoning for adopting differential value by passing the impugned order.

4. Heard both sides and perused the records.

5. We find that the appellants have imported 229 bales of Pajamas, Shorts and Head Gears. However, 81 bales consisted of full pants in place of Pajamas. The Learned Counsel has submitted a letter purported to have been sent by Fax from M/s Chandra Export, Kalampur, Bangladesh. The said letter dated 22.07.2008

mentions that due to electricity shut off, the goods were loaded under candle light and by mistake, some old and used garments have loaded. It does not mention that pants were loaded in place of pajamas. After perusing this letter, we find that the reason put forth by the Learned Counsel for the appellant, for importing full pants in place of indented pajamas, is not at all forthcoming from the said letter. The said letter does give any reason for the misdeclaration of 81 bales of cargo. Therefore, it is difficult to believe the submissions of the appellant that they had no Knowledge of the misdeclaration of the cargo. We find that Learned Commissioner has found that the goods are misdeclared; the appellants having filed bill of entry have misdeclared the goods. We find that mens rea is not an essential ingredient either for the purposes of confiscation under Section 111 or for levy of penalty under 112(a) of the Customs Act, 1962. Therefore, we hold that the fact or otherwise of the appellant having intention or knowledge has no bearing on confiscation of the goods. To that extent, we find that the impugned order is acceptable. We therefore, uphold that confiscation. We however, hold that the redemption fine should be commensurate with the extent of misdeclaration and the margin of profit.

6. However, we find that the valuation adopted in the impugned order is arbitrary. The Learned Commissioner has not recorded any reason for rejecting the declared value in respect of 148 bales. He proceeded to redetermine the value of all the goods when the misdeclaration was only in respect of 81 bales. Commissioner proceeded to redetermine the entire quantity of goods without giving any reasons for rejecting the value of the goods. The impugned order does not refer to any Valuation Rules and it does not make it clear if the CVR, 2007 have been followed sequentially. Under the circumstances, we find that it is difficult to sustain such un-reasoned order to the extent of value of 148 bales declared by the appellant. We find that the valuation declared by the appellant is to be accepted. However, it is required to redetermine the value of 81 bales in dispute, which were misdeclared. We find that the issue needs to go back to the adjudicating authority for proper appreciation of the Customs Valuation Rules and to redetermine the value accordingly. We find that the Learned Commissioner has imposed penalty on the appellant keeping in view the revised value of the entire goods, which are partly misdeclared. Such imposition of penalty has no basis of law. Therefore, we are inclined to reduce the penalty, imposable on the appellant, to be equivalent to the applicable duty payable on such redetermination of the value of 81 bales in question. Accordingly, we set aside the impugned order and remand back the same to the adjudicating authority with a direction to accept the declared value in respect of 148 bales and redetermine the value of 81 bales in accordance with law. The penalty imposable on the appellant will be equal to the duty that may be applicable on the 81 bales of garments misdeclared, subject to condition laid down in Section 112 (b) of the Customs Act, 1962. Looking in to the fact that the goods were lying with customs for a long time and have lost substantial value, we restrict the fine, in lieu of confiscation, to Rs.10, 000(Rupees ten thousand only). We direct that so far as practicable, the Learned Commissioner shall pass a suitable order within 12 weeks from the date of receipt of this order.

7. The appeal is disposed off in the above terms.

(Dictated and pronounced in the open court)



**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, MUMBAI**

**Customs Appeal No. 681 of 2012**

Arising out of Order-in-Appeal No. 253/MCH/AC/Gr.VB/2012, Dated: 20.04.2012  
Passed by Commissioner of Customs (Appeals), Mumbai-I

**Date of Hearing: 24.07.2019**

**Date of Decision: 01.11.2019**

**M/s ADVANI PLEASURE CRUISE COMPANY PVT LTD  
109, BAYSIDE MALL, 1ST FLOOR, OPP. SOBO CENTRAL MALL  
TARDEO ROAD, HAJI ALI, MUMBAI - 400034**

**Vs**

**COMMISSIONER OF CUSTOMS (I)  
NHAVA SHEVA, JAWAHARLAL NEHRU CUSTOM HOUSE  
POST URAN, DIST. RAIGAD, SHEVA - 400707**

**Appellant Rep by:** Shri Chirag Shetty, Adv.

**Respondent Rep by:** Shri R K Dwivedy, AC (AR)

**CORAM:** S K Mohanty, Member (J)

Sanjiv Srivastava, Member (T)

**FINAL ORDER NO. A/86982/2019**

**Per: Sanjiv Srivastava:**

This appeal is directed against order in appeal No 253/MCH/AC/Gr-VB/2012 dated 20.04.2012 of the Commissioner Customs (Appeals), Mumbai Zone I. By the impugned order, the Commissioner (Appeals) has upheld the order of Assistant Commissioner of Customs (Import), Gr VB NCH Mumbai holdings as follows:

*"I hold that the said vessel, M V majesty, is classifiable under chapter sub heading 89039990 and not under Chapter 89011010. I further order that importer is liable to pay the applicable duty leviable under CTH 89039990 and accordingly, I order that amount of Rs 22994015/- paid by the importer be appropriated towards applicable duty.*

*This order is issued without prejudice to any other action that may be taken in respect of the goods in question and/or against the person concerned under the provisions of the Customs Act, 196 and/or any law for the time being in force in the Republic of India"*

2.1 Appellants imported second hand/used Casino Ship M V Majesty vide Bill of Entry 886357 dated 17.05.2009. The declared assessable value of the Ship was TRs 7.99 crores and classification claimed was under 8901. The B?E was order for examination on first check basis.

2.2 The ship was examined on first check basis. As per the examination report the value of the vessel excluding game equipments was proposed in the range of US\$ 1,125,000 to US\$ 1,400,000 by the docks. The value of game equipment was proposed around US\$ 117,500 and the value of chair and stool around US\$ 15,430. It was also suggested vessel would more appropriately be classifiable under heading 8903 as against 8901 claimed by the importer. It was also stated that casino games/chairs/stools are old and used and fitted in the vessel may be classified separately under Chapter 94/95 and may also attract ITC violation.

2.3 B/E was assessed under CTH 89039990 as the vessel imported was a complete 'casino vessel' and it was to be used exclusively for gaming and the same was not a passenger vessel absolutely for any excursion as the vessel did not had any regular seating plan, and the chairs in the vessel were around the gaming table and not for any excursion trips. The value as suggested by the docks on the basis of Chartered Engineer Certificate (produced by the importer) was adopted for assessment. No ITC violation was found as the casino games/chairs/stools though old and used were fitted with the vessel and could not have been treated differently. Importer paid the duty assessed vide TR 6 Challan No 20639109 dated 18.05.2009.

2.4 Against the assessment order they filed writ in High Court of Bombay and subsequently withdrew it. They filed the appeal before Commissioner (Appeal) which

was allowed (Order in Appeal No 279/2009/MCH/AC/Gr VB/2009 dated 27.10.2009) and Assistant Commissioner directed to pass a speaking order under Section 17(5) of the Customs Act, 1962.

2.5 As directed by the Commissioner (Appeals), Assistant Commissioner has vide his order in original No 668/AC/Gr VB/RCC/2010 dated 10.03.2010 decided the issue by a speaking order. Appellants filed the appeal against this order before Commissioner (Appeals).

2.6 Commissioner (Appeals) has vide the impugned order referred in para 1, supra dismissed the appeal filed by the appellants.

2.7 Aggrieved by the impugned order, appellants have filed this appeal.

3.1 We have heard Shri Chirag Shetty, Advocate for the Appellants and Shri R K Dwivedi, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant, learned counsel submitted that-

- Impugned order admits that the vessel was designed as passenger ship and was subsequently modified to be casino ship. In terms of decision in case of *Urmila & Co Pvt Ltd [1998 (104) ELT 97 (T)]* subsequent modifications cannot have impacted the classification.

- In case of *Vipul Shipyard [1996 (88) ELT 640 (SC)]* Supreme Court negated the contention that classification is to be based on end use. Hence the end use of vessel is irrelevant factor for determining classification.

- The vessel was manufactured in 1997 with a passenger including crew carrying capacity of 475. The vessel was subsequently modified as casino vessel. Just by placing casino games on board the vessel will not cease to be cruise ship or an excursion vessel.

- The terms used in the tariff should have been interpreted as per the definitions incorporated in other relevant statutes and there judicial exposition. Certificate of survey dated 21.05.2009 granted by the Ship Survey cum Deputy DH (Tech) of the Mercantile Marine Department under Section 27 of the Merchant Shipping Act, 1958 also describes the vessel as a Passenger Vessel. It is therefore abundantly clear from the aforesaid provisions as well as the aforesaid certificates and the Final certificate of the Indian Registry that the vessel has to be considered as a passenger vessel.

- Reliance placed by the Commissioner on the decision of tribunal in case of *Waterways Shipyard Pvt Ltd* is irrelevant as the said ship was built as casino ship.

- The issue is squarely covered by the decision of tribunal in case of *Ashok Khetrapal [2014 (304) ELT 408 (T-Ahd)]*

3.3 Arguing for the revenue learned authorized representative while re-iterating the findings recorded in the impugned order submitted that-

- It is clear that both the sub heading 801 and 8903 covers the vessels but of different types-

- Heading 8901 is for Cruise ships, excursion boats and similar vessels principally designed for the transport of persons; ferry boats of all kinds;

- Heading 8903 is for yachts and other vessels for pleasure or sports, rowing Boats and canoes;

- The difference between the two headings is that while the heading 8901 is applicable to vessels that are principally designed for the transport of persons, heading 8903 is for the vessels meant for pleasure.

- The dock examination report specifically gives the salient features of the vessel and states that the subject vessel is having several casino pleasure games like slot machines/table games etc. The entire layout of all the three decks is occupied by these casino games. The chairs are laid to these games. These games are exclusively meant for pleasure.

- The old certificate of inspection dated 22.05.2000 describing the vessel as passenger vessel cannot be accepted for the present controversy as the vessel has been suitably modified subsequently to incorporate various pleasure games on all the three decks and throughout the decks.



- The decision of Commissioner (Order in original No 3/Commr Goa/CX/2003 dated 27.02.2003) relied upon by the appellants has already been set aside, by the Tribunal as reported at *Waterways Shipyard Pvt Ltd [2013 (297) ELT 77 (T-Mum)]*,
- Since the vessel in the form which it has been imported is exclusively meant for use as casino/pleasure vessel it is appropriately classifiable under heading 8903 and not under 8901 as claimed by the appellants.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments of appeal.

4.2 It is settled law that imported goods are to be assessed in the form and manner in which they are imported and presented for assessment/clearance to the Customs authority at the port of importation for the clearance. Reference in this regards is made to the following para of decision of the Hon'ble Apex Court in case of Sony India wherein it has been held that-

*11. Again the meaning of terms "as presented" in Rule 2(a) would clearly imply that the same refers to presentation of the incomplete or unfinished or unassembled or dis-assembled articles to the customs for assessment and classification purpose. It is also a settled position in law that the goods would have to be assessed in the form in which they are imported and presented to the customs and not on the basis of the finished goods manufactured after subjecting them to some process after the import is made. In the reported decision in Vareli Weaves Pvt. Ltd. v. Union of India [1996 (83) E.L.T. 255 (S.C.)] the question was as to whether the countervailing duty was liable to be left on the imports made by the assessee at a stage they would reach subsequent to their import after undergoing a process. It was contended that such goods could be subjected to duty only in the State in which they were imported. It was held that the countervailing duty must be levied on goods in the State in which they are when they are imported. This was on the basis of Section 3 of the Customs Tariff Act. Though there is no reference to Rule 2(a), in our opinion, the same Rule should apply subject of course to the applicability of the Rule. We have already held that the Rule is not applicable. Similar view was taken in Dunlop India and Madras Rubber Factory Ltd. v. UOI [1983 (13) E.L.T. 1566 (S.C.)].*

Hence the classification of the imported goods needs to be determined in accordance with the form in which they were presented for assessment to the customs authority, and not in the form they were designed and in the form they earlier existed.

4.3 Undisputedly the goods were examined by the Customs on first check basis. The text of examination report as recorded by the Assistant Commissioner in his order is reproduced below:

*"1. Inspected the vessel. Examined 100% under DC (Docks) Supervision. Checked description and quantity wrt import document, C E Certificates issued by International Bluewater Marine Se4rvic Inc dated 29.10.2008 and by Dhiraj Offshore Surveyors & Adjusters Pvt dated 30.03.2009. Verified old and used YOM as per CE Certificate.*

*2. vessel is having several casino pleasure games like slot machines/table games as per attached list. Annexure. Layout of main deck, second deck and third deck is occupied by these casino games. Chairs are laid to play these casino (table games, slot machines) games. These games are exclusively for the purpose of pleasure and games of chance which may attract other statutory regulation. On the basis of condition of the vessel and examination thereof at the time and place of importation, the vessel is appropriately classifiable under CTH 89039990 as "other vessel for pleasure." The declared CTH8901 is not correct as vessel is not be classified passenger/cruise types based on the fixtures (i.e. casino games) occupying the whole area of decks at the time and place of importation. Subsequent intended modifications cannot be considered for the purpose of classification and duty liability. Old Certificate of Inspection dated 22.05.2000 describing vessel as passenger for the purpose of sea voyage cannot be accepted at present for the classification purpose, when the imported vessel is tailor made for pleasure activity, classifiable under 89039990.*

*3. As per CE dated 29.10.2008, value of vessel excluding gaming equipment lies in the range of US\$ 1,125,000 and US\$ 1,400,000.*

*4 As per CE dtd 30.03.2009, value of total gaming equipments is US\$ 33,950 and chairs & stools at US\$ 2,980. Value of total gaming equipment is low and fair value on the basis of condition seems to be US\$ 117,500. Similar Fair Value of Chairs & Stools seems to be US\$ 10,430*

5. Since casino games/chairs/stools are old and used and fitted in the vessel, these are separately classifiable under respective Chapter 95/94. These attract ITC violation. The matter may be decided by the appropriate adjudicating authority."

4.4 From the examination report reproduced above it is quite evident that casino games have been fitted on all the three decks of the vessel, and the layout of the decks including those of chairs and stools on the deck was to facilitate the playing of those casino games. Once the vessel is fitted with such casino games across the entire three decks with no regular seating plan etc., the same cannot be called a passenger ship. It is also not case of appellant that there is a fare charged by the appellant for the voyages that can be undertaken on the vessel imported. In the above background we need to examine the decisions referred to by both the sides during the course of argument of appeal.

4.5 After taking the note of above entries in the HSN and also the definition of "Pleasure Vessel" in Merchant Shipping Act, Mumbai Bench of Tribunal has in case of *Waterways Shipyards Pvt Ltd [2013 (297) ELT 77 (TMum)]* held as follows:

12. In the show cause notice Revenue relying on the Supreme Court judgment in the case of *C.C.E., Shillong v. Wood Craft Products Ltd.* contends that the HSN can be relied upon for the purpose of classification under the Central Excise Tariff. Therefore, the Revenue submits that the Entry 8901 of the HSN covers the vessels, which are principally designed for the transport of persons or to the transport of the goods. Since, the vessel *M/s. M.V. Caravela* is not principally designed and manufactured for the purpose of transport of persons or goods it cannot be classified under Heading 8901. We find that Entry 8901 of the HSN is as under :-

8901 Cruise Ships Excursion Boats, Ferry Boats, Cargo Ships and Similar Vessels for transport of Person or Goods.

890110 Cruise ships, excursion boats and similar vessels principally designed for the transport of persons; ferry-boats of all kinds

890120 Tanker

890130 Refrigerated vessels, other than those of subheading No 890120

890190 Other vessels for the transport of goods and other vessels for the transport of both persons and goods.

The heading covers all vessels for the transport of persons or goods, other than vessels of heading 8903 and life boats (other than rowing boats), troop ships and hospital ships (heading 8906); they may be for sea navigation or inland navigation (eg on lakes, rivers, estuaries)

The heading includes

1. Cruise Ships and excursion boats

2. Ferry boats of all kinds, including train ferries, car ferries and small river ferries.

3. ..

4. ....

5. ....

6. ....

7. ....

From the entry in HSN it is noticed that Heading 8901.10 covers Cruise ships, excursion boats and similar vessels principally designed for the transport of persons and the Entry 8901.90 covers other vessels for the transport of goods or both persons and goods. Since present vessel is not used and manufactured for the purpose of transport of goods it will not be qualifying for its classification under Heading 8901.90. Only sub-Heading where the vessel can be classified under Heading 8901 is 8901.10 where the Cruise ships, excursion boats and similar vessels principally designed for the transport of persons are classifiable. Therefore, it is an important to know whether the vessel was principally designed for transport of persons or the vessel falls under the category of cruise ships or excursion boats. After going through the advertising material published, we find that vessel is shown as advertised cruise ship which forms the India first gaming casino . Cruise is defined in New Shorter Oxford Dictionary as :

*"Cruise - A voyage in which a ship sails to and fro over a particular region, esp. for the protection of shipping or for pleasure; a sail for pleasure making for no particular place or calling at a series of place."*

*The vessel as a cruise ship is classifiable under Heading 8901 of Central Excise Tariff.*

*13. It is also noticed from the explanation below the subheading 8901 as HSN Explanatory Notes states that "this Heading covers all vessels for the transport of persons or goods, other than vessels of Heading 89.03....." From this explanation it is also inferred that some vessels of transport of persons or goods are also classifiable under Heading 8903 because of the use of the words "other than vessels of Heading 8903" in this explanation. Entry 8903 of the HSN reads as under :-*

*8903 Yatch and Other Vessels for Pleasure or Sports; Rowing Boats and Canoes*

*8031 Inflatable Other*

*890391 Sailboats, with or without auxiliary motor*

*890392 Moto boats, other than outboard motorboats*

*890399 Other*

*This heading covers all vessels for pleasure or sport and all rowing boat and canoes*

*This heading includes yachts, marine jets and other sailboats and motorboats, Dinglies, kayaks, sculls, skiffs, pedals (a type of pedal-operated float), sports fishing vessels, inflatable craft and boats which can be folded or disassembled.*

*The Heading also covers lifeboats propelled by cars (other lifeboats fall in Heading 89.06).*

*Sailboards are, however, excluded (Heading 95.06).*

*Heading 8903 is meant for yachts and other vessels for pleasure or sports and rowing boats and canoes. As per HSN explanation under the Heading, this Heading covers all vessels for pleasure or sports and all rowing boats and canoes, which means that all vessels which are used for pleasure or sports are to be classified under Heading 8903 and similarly all rowing boats and canoes are to be classified under Heading 8903. The use of word all before 'vessels' in the 'all vessels for pleasure or sports' means that all vessels which are used for pleasure or sports are to be classified under Heading 8903 even if these vessels are used for transport of persons or goods in view of their exclusion from 8901 as per HSN explanation under Heading 8901.*

*14. Under the Merchant Shipping Act, 1958 'passenger' and the 'passenger ships' have defined under Section 3(24) & 3(25) which are as under :-*

*3(24) "passenger" means any person carried on board a ship except -*

*(a) a person employed or engaged in any capacity on board the ship on this business of the ship;*

*(b) a person on board the ship either in pursuance of the obligations laid upon the master to carry shipwrecked, distressed or other persons or by reason of any circumstances which neither the master nor the character, if any, could have prevented or forestalled;*

*(c) a child under one year of age;*

*3(25) "passenger ship" means a ship carrying more than twelve passengers;*

*Similarly, 'special trade', 'special trade passenger' and 'special trade passenger ship' have been defined under Section 3(47A) (47B) & (47C). The ship in question has been categorized by the Mercantile Marine Department as 'a special trade passenger ship'. Special trade means the conveyance of large number of passengers by sea within prescribed sea areas. Special trade passenger ship has been specifically defined as to mean a mechanically propelled ship carrying more than thirty special trade passengers. This is a fact that of the vessel M/s. M. V. Caravela carries more than thirty passengers and this vessel can go to a limited area in the sea. Therefore, this special trade passenger ship is defined under Section 3(47C) is different from the normal passenger ship as defined under Section 3(25).*

*15. Now we have to see whether this special trade passenger ship can be classified under Heading 8901 in the category of the vessel used for transport of passengers. The passenger and special trade passenger have been separately defined under the Merchant Shipping Act. The special trade passenger ship can be taken a vessel meant*

for transport of the passenger as the special trade ship are meant for special trade as defined under Section 3(47A) of the Act and by virtue of words 'other than the vessels under Heading 8903' in HSN Explanatory Notes of Heading 8901 [this Heading covers all vessels for transport of persons or goods other than vessels of Heading 8903] it is classifiable under Heading 8903.

16. The contention of the respondent is that their vessel cannot be categorized as a vessel meant for pleasure or sports as internationally known vessels of pleasure or sports as defined in U.K., Australia and Canada are only those vessels which are owned privately by the owners or body corporate for their personal use or use for their family and the employees of the body corporate. Since the vessel does not fall under this category this cannot be classified as vessel for pleasure or sports. We find that definition of the vessel for pleasure or sports has not been incorporated in the Indian Merchant Shipping Act, which governs the registration and movement of the vessels in India. On the other hand, the Merchant Shipping Act specially defines Special Trade Passenger Ship and present vessel in question has been categorized as special trade passenger ship. The present vessel is used for casino games for people who are transported by the ferry to the vessel by the owner/lessee of the vessel. These activities fall under the category of special trade as defined under the Indian Merchant Shipping Act and would therefore be taken as a activities for the purpose of casino games, which are meant for pleasure of the people. Therefore, this would bring the vessel more appropriately under the Heading 8903 of the Central Excise Tariff.

17. Another argument taken by the respondent is that on the basis of noscitur a sociis the Commissioner has rightly held classification under Heading 8901 as articles in the Heading 8903 have to be identified by the company they keep and only a small sports vessels appear to qualify for classification under Heading 8903. We find that the first explanation in the Heading 8903 clearly states that this Heading covers all vessels for pleasure or sports. The word 'all' is sufficient enough to cover the vessels for pleasure whether small or big. Therefore, the principle of noscitur a sociis will apply only to the second explanation and not to the first explanation.

18. In the case of *Urmila & Co. Pvt. Ltd. v. Collector of Customs, Bombay* reported in 1998 (104) E.L.T. 97 (Tribunal) it was held by the Tribunal that it is the basic design of the vessel that determines its classification. The para 18 of the said decision is reproduced as under :

"We have already referred to above that the vessel in question was designed and registered as a vessel for pleasure. Its fittings, fixtures and equipment indicated that it was usable not for carrying cargoes or passengers for commercial purposes but was for vacation, enjoyment etc. The items for survey which were not part of the basic design of the vessel could not change the character and classification of the vessel." In the instant case the vessel M/s. M.V. Caravela is designed for the purpose of casino games therefore by applying the ratio of the said decision it should more appropriately be classifiable under Heading 8903 as vessel for pleasure or sports.

19. It is seen from the above that the vessel in question on one hand Is classifiable as a cruise ship under Heading 8901 and on the other hand it is classifiable as a vessel for pleasure under Heading 8903. In such a situation the Rules for interpretation of the classification come into play Rule 1, 2 & 3 of the Rule for Interpretation of the Schedule are reproduced as under :

1. The titles of Sections and Chapters are provided for case of reference only; for legal purposes, classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes and provided such Headings or Notes do not otherwise require, according to the provisions hereinafter contained.

2. (a) Any reference in a Heading to goods shall be taken to include a reference to those goods incomplete or unfinished, provided that the incomplete or unfinished goods have the essential character of the complete or finished goods. It shall also be taken to include a reference to those goods complete or finished (or falling to be classified as completed or finished by virtue of this rule), removed unassembled or disassembled.

(b) Any reference in a Heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partially of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles contained in Rule 3.

3. When by application of sub-rule (b) or Rule 2 or for any other reason, goods are, *prima facie*, classifiable under two or more Headings, classification shall be effected as follows :

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

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

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

Since the Rule 1, 2, & 3-(a) or (b) are not applicable in the present situation, we find that under Rule 3(c) when the goods cannot be classified by reference to Rule 3(a) & (b) they shall be classified under Heading which occurs last in the numerical order among those which equally merit consideration. Therefore, following this Rule of Interpretation the vessel in question is more appropriately classifiable under Heading 8903 of the Central Excise Tariff. We hold accordingly."

4.6 Appellants have relied upon the decision of Tribunal Ahmedabad bench in the case of *Ashok Khetrpal* [2014 (304) ELT 408 (T-Ahd)] wherein it has been held as follows:

"5.1 On the issue of classification of the vessel POG, the adjudicating authority has mainly relied upon the fact that the vessel is a Casino vessel and is intended to be made stationary for use as a casino even if it is capable of making voyages in the open sea. On the other hand, importer has come out with the argument that the end use of the vessel should not be made as the basis for classifying a vessel under the Customs Tariff Act. This issue, whether end use of imported goods should be made the basis of classification was decided by Hon'ble Apex Court in the case of *UOI v. V.M. Salegaoncar & Brs (P) Ltd.* (supra). In that case, appellants imported transshippers which were vessels used for carrying cargo loaded from the harbour and carry the same for unloading cargo into the large vessels. The issue before the Apex Court was whether such transshippers should be considered as ocean going vessels when they were not actually meant to be going to high seas/oceans. While holding the transshippers to be ocean going vessels and eligible to exemption under Customs Notification dated 11-10-1958, the following observations were made by the Apex Court in Para 20 :-

"20. We do not think that, in the present case, the question whether a transshipping vessel is an ocean going vessel, can solely rest on the test of its dominant use to which their owners put them at times. Use may vary from season to season, port to port and also managers to managers. So, in this area of understanding use of article stands down staged, and the Court must look at to know what actually the commodity is."

5.2 In the light of above law laid down by Apex Court and the conflicting judgment of CESTAT Mumbai in the case of *CCE v. Waterways Shipyard Pvt. Ltd.* (supra), *CGU Logistics Ltd. v. CC (I), Mumbai* (supra) and *Hal Offshore Ltd v. CC, Mumbai* (supra), it has to be seen as to what is the nature of vessel POG. Whether it is a 'Passenger Ship' or a 'Pleasure vessel'. The words 'Passenger', 'Passenger Ship' and 'Pleasure Vessel' have neither been defined under the Customs Tariff Act nor in the HSN explanatory notes. The words 'Passenger' and 'Passenger Ship' 'Special Trade Passenger' and 'Special Trade Passenger Ship' have been defined under Section 3(24) and 3(25), 3(47B) and 3(47C) of the Merchant Shipping Act, 1958 as follows :-

"3. Definitions. - In this Act, unless the context otherwise requires, -

(24) "Passenger" means any person carried on board a ship except -

(a) a person employed or engaged in any capacity on board the ship on the business of the ship;

(b) a person on board the ship either in pursuance of the obligations laid upon the master to carry shipwrecked, distressed or other persons or by reason of any

circumstances which neither the master nor the character, if any, could have prevented or forestalled;

(c) a child under one year of age;

(25) "Passenger ship" means a ship carrying more than twelve passengers;"

(47B) "Special trade passenger" means a passenger carried in special trade passenger ship in spaces on the weather deck or upper deck or between decks which accommodate more than eight passengers and includes a pilgrim or a person accompanying a pilgrim;

(47C) "Special trade passenger ship" means a mechanically propelled ship carrying more than thirty special trade passengers."

From the above definitions, it is not necessary, as contended by the Revenue that a passenger has to be carried from one place to another in a ship in order to hold that a vessel is a "passenger ship". A person taken on board a vessel will also be considered as a passenger as per the above definitions. Various certificates issued by the competent authorities in favour of POG, as per Section 3(38) of the Merchant Shipping Act, 1958, also convey that POG is a passenger ship. It is observed from Para 3 of the order passed by CESTAT Mumbai in the case of CGU Logistics Ltd v. CC (I), Mumbai [2011 (274) E.L.T. 75 (Tri- Mum)] that similar certificates were considered for classifying a vessel as cargo ship of CTH 8901 when special equipments were fitting on it for doing special tasks and Revenue was claiming the classification under CTH 8905.

5.3 It is further observed from the HSN explanatory notes under Heading 89.03 that the notes talk of all vessels for pleasure or sport. However, while specifying the inclusions mainly the notes talk of small boats like rowing boats, canoes, sail boats, motor boats, dinghies, sports fishing vessels, inflatable craft and boats, lifeboats propelled by oars, Yachts, etc. At the same time, neither the Customs Tariff Act nor the HSN Explanatory Notes say that all Casino vessels are vessels for pleasure or sport.

5.4 A definition of 'Pleasure vessel' appears in The Merchant Shipping (Vessels in Commercial Use for Sports or Pleasure) Regulations, 1988, issued as per the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17-5-1993. As per these Regulations,

"Pleasure Vessel" means -

(a) any vessel which at the time it is being used is :

(i) (aa) in the case of a vessel wholly owned by an individual or individuals; used only for the sport or pleasure of the owner or the immediate family or friends of the owner; or

(bb) in the case of a vessel owned by a body corporate, used only for sport or pleasure and on which the persons on board are employees or officers of the body corporate, or their immediate family or friends; and

(ii) on a voyage or excursion which is one for which the 'owner does not receive money for or in connection with operating the vessel or carrying any person, other than as a contribution to the direct expenses of the operation of the vessel incurred during the voyage or excursion; or

(b) any vessel wholly owned by or on behalf of a members' club formed for the purpose of sport or pleasure which, at the time it is being used, it used only for the sport or pleasure of members of that club or their immediate family, and for the use of which any charges levied are paid into club funds and applied for the general use of the club; and

(c) in the case of any vessel referred to in paragraphs

(a) or (b) above no other payments are made by or on behalf of users of the vessel, other than by the owner."

5.5 Above definition of a pleasure vessel gives support to the argument made by the Advocate of the importer that a vessel for pleasure or sport should be meant for personal consumption/use of the person/owner of a vessel. It is evident from the facts on record that the vessel POG imported by the importer is not used for personal use of the owner for pleasure or sport but is used for commercial purposes as a 'Casino vessel'. There is thus force in the argument of the importer that when the appropriate authorities under Section 3(38) of the Merchant Shipping Act, 1958, by issuing required certificates, have opined POG to be a passenger ship or Special

Trade Passenger Ship then there is no ground for the adjudicating authority to hold that POG is not a passenger ship designed to carry passengers when no contrary opinion of another competent authority is brought on record saying that POG is a vessel for pleasure or sport.

5.6 Temporary use of POG in a stationary position will not change the classification of POG when the same is capable of moving across the seas/oceans but has to be mostly made stationary due to the restrictions imposed by the local laws. It will be a strange situation to classify a vessel under CTH 8901 if used for making trips to open sea, with a night halt arrangement in the sea, but classify the same vessel under CTH 8903 if used in a predominantly stationary position. In view of the above observations, we are of the opinion that Casino vessel POG imported by the importer is principally designed to carry passengers and has been correctly assessed under CTH 8901.

4.7 The Mumbai bench has again in case of *Drishti Adventures Pvt Ltd* [2017 (357 ELT 877 (T-Mum)] stated the law as follows:

7. We have considered the competing entries and find that the said chapter headings are as under :-

.....

It can be seen from the above reproduced headings, it is the appellant's claim that boats fall in the category of Heading 8901 as excursion boats, ferry boats by virtue of the various applications made by them to the Government of Goa for granting them permission for ferrying the passengers and tourists between two places in the river. We find that the claim of the appellant is unacceptable as the declaration of conformity filed by the manufacturer of the boats before the authorities in United States indicates that the boats which are imported by the appellant, are recreational craft. This particular declaration is annexed at Page 24 of the appeal memoranda. The said declaration of conformity also states that the craft is powerboat. In addition to that, we find that the certificate of registration as issued by the Port officer, Government of Goa, specifically registered these boats as "motor boats - mars, mercury" etc. and relies upon the declaration filed by the manufacturer i.e. Regal Marine Industries, Florida, though the description of the boat has been stated as excursion boats. We find that the adjudicating authority in order-in-original has reproduced the photographs of the boats which are imported. On casual perusal of the said reproduction of the photographs, we find that the boats which are imported by the appellant would merit classification only under Heading 8903 as motor boats, other than outboard motor boats which is a specific entry indicated in the Customs Tariff Act.

8. Again, we find that the HSN Explanatory Notes to Chapter 8901 specifically excludes the vessels of Heading 8903. It would mean that Heading 8901 would exclude vessels which are specifically listed in the said Heading of 8903. In 8903, motor boat is mentioned as specific vessel under specific heading. In view of this, we have to hold that the impugned order is correct.

4.8 In case of *Kingsway Travel Agencies Pvt Ltd* [2018 (366) ELT 360 (T-Bang)] , Bangalore bench stated as follows:

7. We find that the impugned boat imported by the respondents is equipped with modern amenities like swiveling helm seat, Stove, Stainless steel sink, microwave, fridge, coffeemaker and solid surface counter tops; it also contains arrangement for shower, sleep and relaxation; it is no important as to the manner in which the impugned boat is used, it is rather important as to how the boat is built which should be a guideline for determining the classification of boat; in fact, we find that the catalogue describes the impugned boat as "Bayliner 325 Cruiser" and the Bayliner have claimed themselves to be manufacturers and marketers of recreation boats and Cruisers; there is a prima facie evidence that the boat is intended for the luxury uses; we find that the case of *Urmila & Company Pvt. Ltd.* cited supra is similar to the impugned case; we find that Heading 8901 covers the vessels for transport of persons or goods that vessels design primarily for the conveyance of persons or goods are covered by this Heading; it is not the case of the respondents that it was for the conveyance of persons or goods and looking into the fittings available in the boat and the amenities it offers, there is no doubt to believe that the boat is intended to a "pleasure boat". Therefore, whatever be the actual use of the said boat, it is required to classify as per the making of the vessel; it is seen that the impugned boat is not principally designed and manufactured for the purpose of transport of persons and goods, it cannot be classify under Heading 8901; we find considerable force in the



argument of the Learned AR and find relevance in the ratio of the cases cited by them.

7.1 Regarding the refund application, the Learned advocate for the respondents has claimed that the refund claim filed by their CHA is valid as per the ratio of *Jayant B. Shah v. Collector of Customs, Bombay - 1996 (81) E.L.T. 669*; the Learned AR submitted that as per the ratio of Hon'ble Supreme Court in the case of *Collector of Customs, Cochin v. Trivandrum Rubber Works Limited, 1999 (106) E.L.T. 9 (S.C.)* clearing agent's dues under Customs Act ordinarily come to an end with the clearance of imported goods and delivery to the importer/owner and therefore, we find claim filed by M/s. National Trading Agency, Cochin; the CHA for M/s. Kingsway Travel Agency is not a proper refund claim.

7.2 We find that we have decided the classification of the impugned boat under Heading 8903 of CTH, the refund claim does not sustain on merits. Therefore, there is no need to go into the other aspects of the refund claim.

This decision of Tribunal has been affirmed by the Hon'ble Apex Court as reported at [2019 (367) ELT A14 (SC)]. In this decision, the Tribunal has held that the fitments made to vessel are determinant of classification.

4.9 It is settled law that classification of goods under the Customs tariff is to be determined by the Custom Authorities and for determining the classification the Custom Authorities are bound by the Terms of Entries in the Tariff, Rules of Interpretation and decisions rendered by the competent courts in relation to the interpretation of tariff. The view taken by other authorities acting under other Acts and Legislation may have persuasive value for determining the classification under the Customs Tariff but cannot be termed as in any case binding on the Customs Authority for determining the classification. In case of *Atul Glass Industries [1986 (25) ELT 0473 (SC)]*, Hon'ble Supreme Court held as follows:

"10. Our attention has been drawn on behalf of the Revenue to the circumstance that glass mirrors have been classified as 'glass and glassware' in Chapter 70 of the Brussels Tariff Nomenclature. It seems to us that this circumstance can hardly advance the case of the Revenue, because the First Schedule to the Central Excises and Salt Act does not appear to have been modelled on the Brussels Tariff Nomenclature. There is nothing to show that the Tariff Items were classified in the Schedule on the basis of the Brussels Tariff Nomenclature. It was when the Customs Tariff Act, 1975 was enacted that the First Schedule to that Act was framed in accordance with the Brussels Tariff Nomenclature, evidently because the progress made in industrial growth and economic development, and the substantial changes in the composition and pattern of India's external trade called for the need to modernise and rationalise the nomenclature of India's Tariff in line with contemporary conditions (introductory comments on the Customs Tariff Act, 1975). The glass mirrors were still not specifically mentioned under the Customs Tariff Act, 1975. They are now being brought in as such by the Customs Tariff Bill, 1985."

Thus the decision of Ahmedabad Bench which solely applied the meaning as assigned to "Pleasure Vessel" in The Merchant Shipping (Vessels in Commercial Use for Sports or Pleasure) Regulations, 1988, for determining the classification under the Customs Tariff, is contrary to the principles of law as laid down by the Apex Court in this case.

4.11 Hon'ble Supreme Court has clearly stated in case of *Wood Polymers Ltd [1998 (97) ELT 193 (SC)]* as follows:

"11. We are unable to accept the said contention of the learned Counsel. In view of the rules regarding Interpretation which are contained in the New Tariff the matter of classification has to be considered in the light of the said rules. As indicated earlier, Rule 3 of the said rules contains the principles to be applied for classification of goods which are prima facie classifiable under two or more headings. Since decorative laminates are composite goods made from different components, namely, paper and chemical solutions with which it is impregnated, the classification of decorative laminates has to be determined in the light of Rule 3(b). ...."

Applying the above ratio, Mumbai bench has in case of Waterways determined the classification by applying the Rule 3 of Rules of Interpretation.

4.11 Hon'ble Supreme Court applied the usage test to be good guide for determining the classification of the goods under the Customs Tariff. In case of *Deena Jee Sansthan [2019 (365) ELT 353 (SC)]*

"4. In the present case, the finding of fact recorded by the Commissioner in its order dated 27-11-1997, after evaluating the material on record was that the product in



question was not used as ayurvedic medicine but was a "shampoo". This finding can be discerned from paragraph 8 of the judgment of the Commissioner, which reads as under:

"8. In their defence reply, M/s. DJS had contended that all the ingredients of the product manufactured by them appear in the authorities books on ayurveda listed in the first schedule of Drugs and Cosmetic Act. However, I am not inclined to accept the party's plea that since ingredients are listed in the medicine should be considered as a whole and not only on the basis of its ingredients, however important they may be moreover, I find that some of the ingredients like amla, ritha, shikakai, etc. are not understood as 'medicines' in common parlance though they might have been mentioned in the ayurvedic reference books. Even if such products are being sold/advertised as ayurvedic medicines, it is not sufficient to establish that the product is noticee party have failed to produce any evidence, document or otherwise that the product shampoo being sold by them is known as ayurvedic medicine in common parlance and not as a toilet preparation. In interpreting tariff hearing of a commodity, resort should not be made to the scientific and technical meaning of the terms and expression used but to their popular meaning in medical practitioner for a specific disease. Further, I find in his statement dated 16-9-96 recorded under sec. 14 of the Central Excise Act, 1944, Shri Ajay Kumar Gupta, Manager referred to their product as "shampoo" thereby indicating its actual identity as known in common trade parlance. Consequently, I find no reason to agree with views of the defence that their product is ayurvedic medicine and not shampoo as understood in common trade parlance."

4.12 Further elaborating the above principle Hon'ble Apex Court has in case G S Auto International Ltd [2003 (152) ELT 3 (SC)] held as follows:

"15.The question that needs to be adverted to is: whether the goods in question can appropriately be classified under Tariff Item 52 or not having been specified elsewhere, they fall under Tariff Item 68. In construing these items, what is the proper test to be applied? Is it the functional test or is it commercial identity test which would determine the issue. It seems to us that this question is no longer res integra. It fell for consideration of this Court earlier and it was laid down that the true test for classification was the test of commercial identity and not the functional test. It needs to be ascertained as to how the goods in question are referred to in the market by those who deal with them, be it for the purposes of selling, purchasing or otherwise."

4.13 We are of opinion the relevant question in terms of the said decision for determining the classification of the imported vessel will be as to what would be the usage of such vessel. If this question is put to the person who goes to the vessel and his response is that he visits the vessel for playing casino games and not for cruise/voyage then the vessel is definitely a pleasure vessel for the purpose of classification under Custom Tariff. In the present case examination report clearly suggests that on all the three decks of vessel are fitted casino games and the entire layout was to facilitate the playing of such games without any regular arrangement/seating plan for carriage of passengers.

4.14 The relevant and competent tariff entries are reproduced below:

| Tariff Item | Description of goods                                                                                                              |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------|
| 8901        | Cruise Ships, Excursion Boats, Ferry-Boats, Cargo Ships, Barges And Similar Vessels For The Transport Of Persons Or Goods         |
| 8901 10     | - Cruise ships, excursion boats and similar vessels principally designed for the transport of persons; ferry-boats of all kinds : |
| 8901 10 10  | --- Ships                                                                                                                         |
| 8901 10 20  | --- Launches                                                                                                                      |
| 8901 10 30  | --- Boats                                                                                                                         |
| 8901 10 40  | --- Barges                                                                                                                        |
| 8901 10 90  | --- Other                                                                                                                         |
| 8901 20 00  | - Tankers                                                                                                                         |
| 8901 30 00  | - Refrigerated vessels, other than those of Sub-heading 8901 20                                                                   |
| 8901 90 00  | - Other vessels for transport of the goods and other vessels for the transport of both persons and goods                          |
| 8903        | Yachts And Other Vessels For Pleasure Or Sports; Rowing Boats And Canoes                                                          |

|            |                                                |
|------------|------------------------------------------------|
| 8903 10 00 | - Inflatable                                   |
|            | - Other :                                      |
| 8903 91 00 | -- Sail boats, with or without auxiliary motor |
| 8903 92 00 | -- Motorboats, other than outboard motorboats  |
| 8903 99    | -- Other :                                     |
| 8903 99 10 | --- Canoes                                     |
| 8903 99 90 | --- Other                                      |

From the scheme of Chapter 89 of the Customs Tariff it is clearly evident that the Chapter has been totally aligned with HSN upto six digit level. The HSN explanatory notes along with the relevant tariff have been analyzed by the bench of tribunal in case of Waterways Shipyard Pvt Ltd, and the classification determined by application of Rules of Interpretation under heading 8903. Tribunal has in the said decision determined classification in line with the principles of classifications as enunciated by the Apex Court in the above referred decisions. Following the decision of tribunal in case of Waterways Shipyard Pvt Ltd we hold the classification of imported vessel under heading 8903 as determined by the impugned order.

5.1 In view of discussions as above, the appeal is dismissed.

(Order pronounced in the open court on 01.11.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
WEST ZONAL BENCH, MUMBAI**

**Customs Appeal No. 86231 of 2013**

Arising out of Order-in-Appeal No. 747 (GR.I)2012 (JNCH)/IMP-619, Dated:  
18.12.2012

Passed by Commissioner of Customs (Appeals), Raigad

**Date of Hearing: 23.07.2019**

**Date of Decision: 23.07.2019**

**COMMISSIONER OF CUSTOMS (IMPORT)  
NHAVA SHEVA, JAWAHARLAL NEHRU CUSTOM HOUSE  
POST URAN, DT. RAIGAD, SHEVA-400707**

**Vs**

**M/s STAR INDUSTRIES  
IGC, PHASE-II, SAMBA, JAMMU - 184121**

**Appellant Rep by:** Shri Manoj Kumar, AR

**Respondent Rep by:** None

**CORAM:** S K Mohanty, Member (J)  
Sanjiv Srivastava, Member (T)

**FINAL ORDER NO. A/86334/2019**

**Per: S K Mohanty:**

Heard the learned AR for Revenue. None appeared for the respondent, despite notice.

2. Whether the process of roasting of ores into concentrate should be considered as manufacture activity under Chapter Note 4 of Chapter 26 of the Central Excise Tariff Act, 1985 is the subject matter of present dispute. The issue arising out of the present case is no more res integra in view of the judgment of the Hon'ble Supreme Court in the case of the respondent itself, reported in 2015 (324) ELT 656 (SC) . The Hon'ble Apex Court have held that in view of Chapter Note 4 appended to Chapter 26 of the Tariff Act, the process of roasting of ores into concentrate shall be considered as manufacture and thus, the benefit of duty exemption provided under Notification No.4/2006-C.E. should not be available. The relevant paragraphs in the said judgment are extracted herein below:-

*"26. Before we discuss these arguments and arrive at a particular conclusion, we would like to recapitulate the salient features of the case about which there is no dispute :*

*(a) The assessee is seeking benefit of Notification No. 4/2006-C.E. and relies upon Sl. No. 4 thereof which totally exempts goods described therein from payment of excise duty. The goods which are otherwise excisable are, thus, exempted from payment of duty. Description of these goods in Sl. No. 4 is 'Ores'.*

*(b) The goods imported by the assessee fall in Chapter 26 of Central Excise Tariff Act. Particular Tariff Item is 2613 against which the description of goods given under the said Tariff Item is 'Molybdenum Ores and Concentrate'.*

*(c) The goods imported by the assessee were not Molybdenum Ores in original form as mined. They had admittedly undergone the process of roasting and after the roasting, they are known as 'concentrates'. Even the assessee has described these goods as 'Roasted Molybdenum Ore Concentrate.'*

*(d) Chapter Note 4 treats the aforesaid process of roasting Ores into Concentrate as 'manufacture'.*

27. On the aforesaid facts, case of the assessee was that since ores include concentrates, assessee had claimed exemption from payment of CVD under Notification No. 4/2006-C.E. In support of this claim that even after roasting, concentrates remain ores only on the plea that ores is genus and concentrates is specie thereof, the assessee refer to literature on chemical technology and also its earlier judgment in M/s. Hindustan Gas and Industries Ltd. case which, in turn, relied upon the judgment of this Court in MMTC case. We have already analysed the

decision in *M/s. Hindustan Gas and Industries Ltd.* case. The entire decision proceeds on the basis that roasting of an ore to obtain concentrate does not amount to manufacture specially when roasting is a process by which impurities in the ore are removed and the recoverable content of metal oxide is enhanced. In support, reference was made to *Kirk-Othmer's Encyclopedia of Chemical Technology*. Likewise, in *MMTC* case as well, which was relied upon by the Tribunal, this Court had held that *Wolfram Concentrate* which was having minimum 65% Tungsten Oxide was still an ore and classifiable under Item 26. Thus, the decision in *Hindustan Gas* primarily rested on the reasoning that roasting of an ore to obtain concentrate would not amount to manufacture and ore and concentrate are one and the same inasmuch as concentrate remains ore and only impurities are removed therefrom. On this premise, it was held that ore is genus and concentrate is a specie thereof.

28. According to us, it is very clear from the reading of the judgment in *Hindustan Gas* case that basic and the common thread which runs throughout the decision is that subjecting ore to the process of roasting does not amount to manufacture. This very basis gets knocked off with the amendment carried out in the year 2011 with the insertion of Note 4. Note 4 now categorically mentions that the process of converting ores into concentrates would amount to 'manufacture'. Therefore, it cannot now be argued that roasting of ores and converting the same into concentrates would not be manufacture. For the same reason, the judgment in *MMTC* becomes inapplicable and reliance upon *Kirk-Othmer's Encyclopedia* becomes irrelevant. With the addition of Note 4, a legal fiction is created treating the process of converting ores into concentrates as manufacture. Once this is treated as manufacture, all the consequences thereof, as intended for creating such a legal fiction, would automatically follow. Following shall be the inevitable implications :

(a) It is to be treated that Molybdenum Ore is different from concentrate. That is inherent in treating the process as 'manufacture' inasmuch as manufacture results in a different commodity from the earlier one. Section 2(f) defines this term as under :

"manufacture" includes any process, -

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or

(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer."

(b) The purpose of treating concentrate as manufactured product out of ores is to make concentrates as liable for excise duty. Otherwise, there was no reason to deem the process of converting ores into concentrates as manufacture.

29. Once the aforesaid legal repercussions are taken note of, as a fortiori, it becomes obvious that Notification No. 4/2006- C.E. which exempts only ores would not include within itself 'concentrates' also because of the reason that after the insertion of Note 4, concentrate is to be treated as a different product than ores, in law for the purposes of products of Chapter 26.

30. This brings us to the effect of Chapter Note 2 which is retained even after insertion of Chapter Note 4. No doubt, as per Chapter Note 2, 'ores' means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of Heading 2844 or of the metals of Section XIV or XV, even if they are intended for nonmetallurgical purposes. As per this note, metals of Section XV would be included in the term 'ores'. However, after the insertion of Chapter Note 4, these two Notes, namely, Note 2 and Note 4 have to be read harmoniously. If we accept the submission of the learned counsel for the assessee predicated on Note 2, then Note 4 even after its conscious inclusion, would be rendered otiose which cannot be countenanced. Therefore, Note 2, when seen along with Note 4, has to govern itself in limited territory. On the basis of deeming fiction created by Note 4, once we arrive at the conclusion that process of roasting of Ore amounts to manufacture and it creates a different product known as Concentrate, for the purpose of exemption notification, which exempts only 'Ores' it is not possible to hold that Concentrate will still be covered by the exemption notification. Therefore, harmonious construction of Note 2 and Note 4 would lead us to hold that in those cases when Note 4 applies and Ores becomes a different product, it ceases to be Ores.

31. We, thus, are of the opinion that in the impugned judgment, the Tribunal has rightly arrived at the conclusion that by virtue of Note 4, concentrate has to be necessarily treated as different from ores which is deemed as manufactured product after Molybdenum Ores underwent the process of roasting. Once we keep in mind that conversion of ores into concentrate is considered as manufacture and, therefore, becomes liable for central excise levy, exemption Notification No. 4/2006-C.E. is to be interpreted in this light as the Legislature has intended to treat ores and concentrates as two distinct items and Notification No. 4/2006-C.E. exempts only 'ores', concentrates automatically falls outside the purview of said notification. It is rightly argued by the learned senior counsel for the Revenue that exemption notifications are to be construed strictly and even if there is some doubt, benefit thereof shall not enure to the assessee but would be given to the Revenue. This principle of strict construction of exemption notification is now deeply ingrained in various judgments of this Court taking this view consistently."

3. In view of the above settled position of law, we do not find any merits in the impugned order passed by the learned Commissioner (Appeals). Accordingly, the appeal filed by Revenue is allowed.

(Dictated and pronounced in the open court)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, MUMBAI**

**Customs Appeal No. 86101 of 2013**

Arising out of Order-in-Appeal No. 944/MCH/ADC/VIIB/2012, Dated: 27.11.2012  
Passed by Commissioner of Customs (Appeals), Mumbai-I

**Date of Hearing: 22.07.2019**

**Date of Decision: 01.11.2019**

**M/s GMR INFRASTRUCTURE LTD  
SKIP HOUSE, 25/1, MUSEUM ROAD  
BENGALURU - 560025**

**Vs**

**COMMISSIONER OF CUSTOMS (EXP.)  
MUMBAI, NEW CUSTOM HOUSE, BALLARD ESTATE  
MUMBAI - 400001**

**Appellant Rep by:** Shri Nand Kishore, Adv.

**Respondent Rep by:** Shri Bhushan Kamble, AC (AR)

**CORAM:** S K Mohanty, Member (J)

Sanjiv Srivastava, Member (T)

**FINAL ORDER NO. A/86983/2019**

**Per: Sanjiv Srivastava:**

This appeal is directed against order n appeal No 944/MCH/ADC/VIIB/ 2012 dated 27.11.2012 of the Commissioner Customs (Appeal)Mumbai Zone -I. By the impugned order Commissioner has upheld the assessment order of the Bill of Entry No 9566214 dated 06.07.2010.

2.1 Appellants have filed Bill Of Entry No 956214 dated 06.07.2010 for the clearance of goods described by them as "Electronic Sensor Paver Vogel Model 1800-2 with AB 600-2-TV for laying bituminous pavement upto 9 meters along with multiplex big SKJ and its accessories", and declared value was Euro 3,60,000/- (Rs 2,11,25,160/-). They claimed classification under CTH 84306100 and benefit of exemption under notification No 621/2002-Cus dated 01.03.2002 as amended (Sr No 230, Item Sr No of List 18 & condition 40)

2.2 Assessing/ Adjudicating Authority denied the benefit of exemption claimed for the reason as follows:

- Appellant name being the subcontractor, did not figure in the main contract between GHVPL and NHAI.

- Goods imported by the appellant is Electronic Paver (with Sensor device) for laying bituminous pavement upto 9 mtr whereas the exemption was in respect of Electronic Paver Finisher (with sensor device) for laying Bituminous pavement 7 mtr size and above.

2.3 Aggrieved by the assessment order appellants filed the appeal before the Commissioner (Appeal). By the impugned order referred in para 1, supra Commissioner (Appeal) has dismissed the appeal.

2.4 Aggrieved by the impugned order appellant have preferred this appeal.

3.1 We have heard Shri Nand Kishore, Advocate for the Appellants and Shri Bhushan Kamble, Assistant Commissioner, Authorized Representative for the revenue.

3.1 Arguing for the Appellant learned Counsel, submitted that-

- Joint Secretary (Tax Research Unit), has vide his D O F No 334/15/2014-TRU dated 10th July, 2014 clarified the issue in respect of admissibility of the exemption to sub contractors as follows:

*"A doubt has been raised as to whether road construction machinery imported under Notification No 12/2012-Customs dated 17.03.2012 (Sr No 368) can be sold within 5*

*years of importation on payment of custom duty on depreciated value and whether individual constituent of the consortium whose names appear in the contract may import goods under the notification. It is reiterated that the road construction machinery imported duty free can be sold within 5 years of importation subject to payment of customs duty on depreciated value subject to the conditions specified therein and that individual constituent of consortium whose names appear in the contract can import goods under the said notification."*

- Taking note of the said clarification issued, Tribunal has in their own case vide order No A/85813/2018 dated 03.05.2019 held that they were eligible to the benefit of exemption notification.

- Since the issue is squarely covered by the said decision of the tribunal appeal needs to be allowed.

3.3 Arguing for the revenue learned authorized representative submitted that-

- The finding of the assessing authority and the appellate authority to the effect that the name of appellant do not figure in the main contract, is not in dispute.

- The issue in respect of the same exemption notification and the condition, has been settled by the Apex Court in case of *Gammon India Ltd [2011 (269) ELT 289 (SC)]*;

- The clarification referred to by the advocate, has been issued by JS (TRU) in respect of subsequent notification and not in respect of the same notification.

- The decision of the tribunal in appellants own case relying on the clarification issued subsequently cannot be said to be good law, for the reason that Apex Court has in case of *Ratan Melting & Wires Industries [2008 (231) ELT 22 (SC)]* has clearly held to the contrary.

- In view of the decisions of the Hon'ble Apex Court in case of *Gammon India Ltd*, the appeal filed needs to be dismissed.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments-

4.2 The issue in the present case is squarely covered by the decision of the Hon'ble Apex Court in case of *Gammon India Ltd* referred to by the authorized representative. In that decision Hon'ble Apex Court has clearly laid down the law as follows:

*"12. The short question for determination is whether import of the specified machine by Gammon can be considered to be an import "by a person who has been awarded a contract for construction of the roads in India", so as to fulfill Condition No. 38, laid down in Exemption Notification No. 17/2001-Cus., dated 1st March, 2001 ?*

*13. In order to appreciate the contentions advanced on behalf of the parties on the question in issue, it would be expedient and useful to once again notice the salient features of agreement dated 18th September, 2000 entered between Gammon and Atlanta.*

*14. Agreement dated 18th September, 2000 provided that : financial responsibilities of each of the parties to be shared equally in the form of guarantees, securities, etc. of the joint venture would be 50% of the project value; the Management of the joint venture would be subject to the overall control of the Management Board, consisting of a Chairman, to be nominated by Gammon, a Joint Chairman to be nominated by Atlanta and one Director each to be appointed by both of them; joint venture bank account would be operated under joint signatures of the authorized representatives of Gammon and Atlanta and neither party would be entitled to borrow for or on behalf of the joint venture or to acknowledge any liability without express prior consent in writing of the other party except to the extent of its share of work; Gammon being most experienced party would be the lead partner of the joint venture for the performance of the contract; the partner-in-charge would be authorized to incur liabilities and to receive instructions for and on behalf of the partners of the joint venture, whether jointly or severally, and entire execution of the contract including receiving payment would be carried out exclusively through the partner-in-charge but any financial commitment required by the lead partner, on behalf of the joint venture, would always be previously discussed and agreed upon by the parties. As stated above, though under agreement dated 18th September, 2000, Gammon was notified as the lead partner but agreement dated 20th December, 2000 executed between NHAI as the "employer" and Gammon- Atlanta JV as "contractor" was signed by the representatives of both the companies viz. Gammon and Atlanta, meaning thereby*



that so far as NHAI was concerned, for them the contractor was Gammon-Atlanta JV and not Gammon or Atlanta individually.

15. According to the adjudicating authority, it was clear from both of the said agreements that the contract of construction of roads in India was awarded to the joint venture and, therefore, Gammon was not entitled to avail of the benefit of the Exemption Notification as an independent entity. On the contrary, the Commissioner (Appeals) allowed the benefit of the Exemption Notification to the appellant on the ground that the Exemption Notification should be given a liberal interpretation and that the revenue should not try to take advantage of ignorance of law and procedure on the part of Gammon. It is the Tribunal which has dealt with the issue in detail by taking into consideration certain factual aspects pertaining to the import of machine like placement of the supply orders by Gammon and not by the joint venture and its payment by Gammon from its own account and not from the joint venture account provided for in the joint venture agreement. Rejecting the plea of the appellant that in light of the decision of this Court in *New Horizons* (supra) wherein it has been held that a joint venture is a legal entity in the nature of a partnership, the import of the machinery by Gammon is to be considered as having been done on behalf of the joint venture, the Tribunal has allowed revenue's appeal.

16. Since the stand of the appellant is that the issue arising in the present appeal stands concluded in their favour by the decision of this Court in *New Horizons* (supra) and a subsequent decision of this Court as also of the Tribunal, in which the said decision has been relied upon, it would be necessary to discern the ratio of the decision in *New Horizons* (supra).

17. In *New Horizons* (supra), a joint venture company, consisting of a few Indian companies (with 60% share capital) and a Singapore based company (with 40% share capital), had participated in tender proceedings floated by the Department of Telecommunications for printing and binding of telephone directories of Delhi and Bombay. The tender submitted by *New Horizons Ltd.*; (for short "NHL") was not accepted by the tender evaluation committee, apparently, on the basis of the fact that the successful party had more technical experience than any one of the constituent companies of NHL. Aggrieved by the said decision, NHL filed a writ petition in the Delhi High Court against the decision of the Department of Telecommunications. The said writ petition was dismissed rejecting the plea of the NHL that the technical experience of the constituents of the joint venture was liable to be treated as that of the joint venture. NHL brought the matter to this Court. Explaining the concept of joint venture in detail, it was held that a joint venture is a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contributed assets and shared risks. It was observed that a joint venture could take the form of a Corporation wherein two or more persons or companies might join together. Accordingly, the appeal of NHL was allowed and it was held that it was a joint venture company in the nature of a partnership between the Indian group of companies and Singapore based company which had jointly undertaken the commercial venture by contributing assets and sharing risks. Applying the principle of "lifting the corporate veil", it was held that the joint venture companies' technical experience could only be the experience of the partnering companies and the technical experience of all constituents of NHL was liable to be cumulatively reckoned in the tender proceedings and any one of the constituents was competent to act on behalf of the joint venture company. Highlighting the concept of joint venture, the Court observed thus :

"24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342) ....."



18. In short. *New Horizons (supra)* recognises a joint venture to be a legal entity in the nature of a partnership of the constituent companies. Thus, the necessary corollary flowing from the decision in *New Horizons (supra)*, wherein the partnership concept in relation to a joint venture has been accepted, would be that M/s. Gammon-Atlanta JV, the joint venture could be treated as a 'legal entity', with the character of a partnership in which Gammon was one of the constituents. In that view of the matter, the next question for consideration is whether being a legal entity i.e. a juridical person, the joint venture is also a "person" for the purpose of Condition No. 38 of the Exemption Notification, stipulating that the goods should be imported by "a person" who had been awarded a contract for construction of goods in India by NHAI?

19. In support of his submission that the joint venture is a "person" as contemplated in the Exemption notification, learned counsel for Gammon had relied on the definition of the word "person" as given in para 3.37 of the Export and Import Policy for the year 1997- 2002. It reads thus :

"3.37 - "Person" includes an individual, firm, society, company, corporation or any other legal person".

20. The argument was that since a joint venture has been declared to be a legal entity in *New Horizons (supra)*, it squarely falls within the ambit of the said definition of the word "person". We are of the opinion that even if the stated stand on behalf of the appellant is accepted, mercifully, on stark facts at hand, it does not carry their case any further. Neither was it the case of the appellant either before the Adjudicating Authority or before the Appellate Authority or before us, nor is it suggested by the documents viz. the supply order or the bill of entry, that the import of the machine was by or on behalf of the joint venture. On the contrary, the Tribunal has recorded in its order that when questioned, learned counsel for the appellant clarified that correspondence with the supplier of goods and placement of order had been done by Gammon and not by the joint venture or on their behalf. He also admitted that payment for the machine had not been made from the joint venture account, which had been provided for the contract but from the funds of Gammon.

21. Thus, the inevitable conclusion is that import of "Concrete batching plant 56 cum/hr" by Gammon cannot be considered as an import by M/s. Gammon-Atlanta JV, "a person" who had been awarded contract for construction of the roads in India and therefore, neither Gammon Atlanta JV nor Gammon fulfill the requisite requirement stipulated in Condition No. 38 of the Exemption Notification No. 17/2001-Cus., dated 1st March, 2001.

22. As regards the plea of the appellant that the Exemption Notification should receive a liberal construction to further the object underlying it, it is well settled that a provision providing for an exemption has to be construed strictly. In *Novopan India Ltd. (supra)*, dealing with the same issue in relation to an exemption notification, a three-Judge Bench of this Court, stated the principle as follows :

"16. We are, however, of the opinion that, on principle, the decision of this Court in *Mangalore Chemicals* — and in *Union of India v. Wood Papers* referred to therein — represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee — assuming that the said principle is good and sound - does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in *Mangalore Chemicals* and other decisions, viz., each such exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this Court in *Hansraj Gordhandas v. H.H. Dave* that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption."

4.3 We also find that the principle of strict construction of notification and also that in case of ambiguity, ambiguity has to be construed in favour of the revenue has been reiterated and stated by the five member Bench of the Apex Court in the case of *Dilip Kumar & Co [2018 (361) ELT 577 (SC)]*

"52. To sum up, we answer the reference holding as under -

(1) *Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*

(2) *When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.*

(3) *The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."*

4.4 In view of the decisions as above we are of the view that issue is squarely covered against the appellants. However appellants do not dispute the same but have relied upon subsequent clarification issued by the Joint Secretary (TRU) clarifying that benefit of similar exemption notification would be admissible to the constituents of the consortium. It is their case that on the basis of the said clarification tribunal has vide order dated 03.05.2019 extended the benefit of exemption notification to them stating as follows:

*"The first order of the Tribunal in re Gammon India Ltd that was ultimately decided by the Hon'ble Supreme Court, and the subsequent decision of the Tribunal re Gammon India Ltd, referred to by the Learned Authorised Representative, predate the clarification issued by the Central Government on 10th July 2014. The clarification is unambiguously clear: award of eligible works is preceded by shortlisting of the eligible bidders to be furthered on award by formalising the relationship of two or more of bid-partners as a joint venture. The procedure following the award in the impugned project required establishment of 'a special purpose vehicle' and it is that 'special purpose vehicle' which takes the bid process to its logical conclusion by entering into an agreement with the awarding agency. Restricting the eligibility to the subsequently created artificial person, emerging from the contractual compulsion to fulfil a structuring requirement, would incapacitate the execution of the work and the original intent of the extent of the notification was thus amplified, and articulated, in the referred clarification. The adjudicating authority who authored impugned order did not have the benefit of this clarification. The earlier decisions were rendered in the absence of such declaration of intent and the intent, having been declared subsequently despite contrary judicial decision, would have to be acknowledged in the implementation; disregard of that intent, as declared, would be tantamount to foray into policy formulation."*

4.5 We cannot agree with the submissions made. Hon'ble Supreme Court (five member bench) has clearly in the case of Ratan Wire & Melting, referred by the Authorized Representative clearly laid down the law in respect of applicability of circulars/ clarification as follows:

*"5. Learned counsel for the assessee on the other hand submitted that once the circular has been issued it is binding on the revenue authorities and even if it runs counter to the decision of this Court, the revenue authorities cannot say that they are not bound by it. The circulars issued by the Board are not binding on the assessee but are binding on revenue authorities. It was submitted that once the Board issues a circular, the revenue authorities cannot take advantage of a decision of the Supreme Court. The consequences of issuing a circular are that the authorities cannot act contrary to the circular. Once the circular is brought to the notice of the Court, the challenge by the revenue should be turned out and the revenue cannot lodge an appeal taking the ground which is contrary to the circular.*

*6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.*

*7. As noted in the order of reference the correct position vis-a-vis the observations in para 11 of Dhiren Chemical's case (supra) has been stated in Kalyani's case (supra). If the submissions of learned counsel for the assessee are accepted, it would mean that there is no scope for filing an appeal. In that case, there is no question of a decision of this Court on the point being rendered. Obviously, the assessee will not*

*file an appeal questioning the view expressed vis-a-vis the circular. It has to be the revenue authority who has to question that. To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution."*

4.6 In view of the decision of Apex Court referred above we are not in position to agree with decision of the coordinate bench on the issue, which is per-incuriam, and could not be binding precedent.

5.1 In view of the discussions as above the appeal is dismissed.

(Order pronounced in the open court on 01.11.2019)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, MUMBAI  
COURT NO. I**

**Customs Appeal No. 1341 of 2006**

Arising out of Order-in-Appeal No. GOA.CUS/BBP/29/2006, Dated: 29.09.2006  
Passed by the Commissioner of Central Excise & Customs (Appeals), Goa

**Date of Hearing: 17.12.2019**

**Date of Decision: 12.06.2020**

**M/s HINDUSTAN PETROLEUM CORPORATION LTD  
TALEGAONCHAKAN ROAD, VILL - MAHALUNGE INGALE  
CHAKAN, PUNE - 410501**

**Vs**

**COMMISSIONER OF CENTRAL EXCISE  
PUNE-I, ICE HOUSE, 41/A, SASOON ROAD  
OPP. WADIA COLLEGE, PUNE - 411001**

**Appellant Rep by:** Shri M H Patil, Adv.

**Respondent Rep by:** Shri Ramesh Kumar, AC, (AR)

**CORAM:** D M Misra, Member (J)

Sanjiv Srivastava, Member (T)

**FINAL ORDER NO. A/85651/2020**

**Per: D M Misra:**

This is an appeal filed against the Order-in-Appeal No. GOA.CUS/BBP/29/2006 dated 29.09.2006 passed by the Commissioner of Central Excise & Customs (Appeals), Goa.

2. Briefly stated the facts of the case are that the appellants are importer of Liquefied Petroleum Gas (LPG). During the period September, 2004 to April, 2005, the appellant had imported commercial butane (Liquefied Petroleum Gas) and cleared the same on payment of appropriate customs duty total amounting to Rs.11,60,61,990/-. The Notification No. 37/05-Cus dated 2.5.2005 was issued exempting Liquefied Petroleum Gases for supply to household domestic consumers at subsidized prices from whole of customs duty. Consequently, the appellant had filed a refund claim on 18.4.2005 seeking refund of Rs.11,60,61,990/- paid during the aforesaid period. Since the refund claim was not maintainable, the appellant was issued with a letter on 11.10.2005 directing them to file written reply and clarification on the issue. In the written submissions dated 21.10.2005, the appellant submitted that the basic customs duty on the Liquefied Petroleum Gas under the Customs Tariff Heading 2711.19 was reduced to Nil vide Notification No. 11/05- Cus dated 1.3.2005. Since the oil companies are not importing Liquefied Petroleum Gas per se and instead such imports are only in the form of commercial butane (Customs Tariff Heading 2711.13) or propane (Customs Tariff Heading 2711.12), they made representation to the Ministry of Petroleum and as a consequence Notification No. 35/05-Cus dated 2.5.2005 was issued. Therefore, they claimed that the duty paid on import of commercial butane during the said period amounting to Rs.11,60,61,990/- is refundable to them. On adjudication, the said refund claim was rejected observing that Notification No. 37/05-Cus dated 2.5.2005 cannot be assumed to have retrospective effect and as a result various representations made. Aggrieved by the said rejection of the refund claim, the appellant filed an appeal before the learned Commissioner (Appeals), who in turn, rejected the appeal. Hence, the present appeal.

3. Learned Advocate Shri M.H. Patil for the appellant has submitted that during the relevant period i.e. Sept, 04 to April, 2005, the appellant had imported commercial butane (Liquefied Petroleum Gas) falling under Chapter Tariff heading 2711.1300. The appellant cleared the said commercial butane (Liquefied Petroleum Gas) on payment of normal customs duty of 10% instead of concessional rate of duty applicable to them under Notification No. 82/04-Cus dated 18.8.2004 and 11/05-Cus dated 1.3.2005. It is his contention that since the concessional rate exemption was available to the said commercial butane (Liquefied Petroleum Gas), the appellant filed refund claim of Rs.11,60,61,990/-. He has submitted that heading

2711 covers petroleum gases and other gaseous hydrocarbons. The said heading has been divided by two parts. The first part covers Liquefied Petroleum Gas and the second part petroleum gas in gaseous stream. First part i.e. LPG has been divided in five parts – Natural Gas, Propane, Butanes, Ethylene, propylene, butylenes and butadiene and residual nature, which is not covered in any of the precedent entry. Therefore, it is clear from the above entries, the same are covers Liquefied Petroleum Gas only in different states and kind. Therefore, the disputed item i.e. commercial butane (CHS 2711.1300) is also covers Liquefied Petroleum Gas. He has submitted that heading 2711 used the expression 'petroleum gases' and not 'petroleum gas'; therefore, the said heading covers various petroleum gases. Referring to Indian Standard Specification – IS 4576:1999, he has submitted that commercial butane is also mentioned as one of the covers Liquefied Petroleum Gas. Also referring to the Book 'Modern petroleum Refining Processes' by Shri Bhaskara Rao, Dept. of Chemical Engineering, IIT, the learned Advocate submitted that inter alia pre-dominantly butane as well as butane –propane mixtures, is considered as LPG. Further, referring to the judgment of this Tribunal in the case of *Commissioner of Customs Vs. Aegis Logistics – 2014 (308) ELT 135 (T)*, the learned Advocate submitted that in para 9 to 15 of the said judgment, it is held that butane, propane, butane-propane mixture are kinds of the Liquefied Petroleum Gases only. The said judgment was followed by this Tribunal subsequently in the case of *Reliance Industries Ltd. Vs. Commissioner of Customs*, wherein also it is held that commercial propane classified under Tariff Item 2711.1200 would be eligible for concessional rate and Department's claim that exemption was available only to the goods 'Liquefied Petroleum Gases', which is a mixture of hydrocarbon gases i.e. propane, propylene, butane, butylenes and isobutene was not accepted. Further, he has submitted that in the Order-in-Appeal, it has been mentioned that the imported product is a mixture of butane and propane (98% butane and 2% propane), therefore, the same be considered as classifiable under Tariff Item 2711.1900 and eligible for exemption under the aforesaid Notifications. Further, he has submitted that similar dispute was decided in their favour vide Order-in-Original dated 26.09.2006. It is his contention that commercial butane or commercial propane or mixtures of both are known internationally as Liquefied Petroleum Gas. He has further submitted that the entry 75E substituted w.e.f. 2.5.2005 would have retrospective effect and in support he has referred to the judgment of the Hon'ble Supreme Court in the case of –

(i) *Indian Tobacco Association – (2005) 7 SCC 396*

(ii) *Zile Singh – (2004) 8 SCC 1*

(iii) *Ramkanali Colliery of BCCL - (2001) 4 SCC 236.*

4. Learned AR for the Revenue has submitted that the present issue relates to admissibility of refund relating to the exemption Notification, which was not claimed at the time of import of goods. It is his contention that M/s HPCL imported butane and propane classifying the same under Customs Tariff Heading 2711.1200 and 2711.1300 respectively. The Bills of Entry were assessed and accordingly duties were paid by the appellant. No appeals have been filed by the appellant against the said assessed Bills of Entry. The exemption subsequently claimed by the appellant relates to goods namely, Liquefied Petroleum Gas covered under Customs Tariff heading 2711.1900 and not applicable to "propane and butane" per se. Referring to the judgment of constitutional Bench of the Hon'ble Supreme Court in the case of *Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar & Co. – 2018 (361) ELT 577 (SC)*, submitted that the exemption is to be strictly interpreted and in case of ambiguity, benefit of such ambiguity cannot be claimed by the assessee and it must be interpreted in favour of the Revenue.

5. Further, he has submitted that in view of the ratio laid down, in the judgment of Hon'ble Supreme Court in the case of *Priya Blue Industries Ltd. Vs. Commissioner of Central Excise – 2004 (1q72) ELT 145 (SC)* and *Commissioner of Customs Vs. BPL Telecom Ltd. – 2015 (325) ELT 467 (SC)*, held that there can be no claim of refund of duty paid unless importer successfully challenges the assessment of the Bill of Entry under which duties were paid. The said principles has not been reaffirmed in the recent judgment of *ITC Ltd. Vs. Commissioner of Central Excise, Kolkata – 2019 (368) ELT 216 (SC)*. Further, he has submitted that in the case of *CEAT Ltd. Vs. Commissioner of Customs – 2016 (335) ELT 693 (T)*, this Tribunal has relied upon the decision of Hon'ble Supreme Court in Priya Blue's case and held that the Bills of Entry presented by the importer and signed by the assessing officer is itself an order of assessment. Unless such assessment is successfully challenged, there can be no refund of duty paid.

6. The learned AR for the Revenue further submitted that after insertion of sub-section (2A) and (4) in Section 25, cannot be given retrospective effect unless such a specific explanation is inserted in the notification. Referring to the Larger Bench's decision of CESTAT in *Arvind Products Ltd. – 2014 (310) ELT 515 (Tri-LB)*, the notification cannot be have retrospective effect unless it is specifically mentioned in the said notification. Further, referring to clause (b) and (c) of Section 159A of the Customs Act, 1962, he has submitted that amendment to a notification shall not affect the previous operation of the un amended notification or anything duly done or suffered thereunder and that such amendment shall not affect any obligation or liability incurred under the un-amended notification. Therefore, the notification No. 37/05-Cus cannot operate retrospectively. The liability incurred to pay duty on imported butane and propane before 2.5.2005 cannot be undone by giving such retrospective effect.

7. Heard both sides and perused the records.

8. The short issue involved for determination in the present appeal is whether the appellants are entitled to refund the customs duty of Rs.11,60,61,990/- paid during September, 2004 to April, 2005. The undisputed facts are that the appellants had imported commercial butane (Liquefied Petroleum Gases) classifying it under Chapter heading 2711.1300 of Customs Tariff Act, 1975 on payment of applicable Basic Customs Duty (BCD) of 10%. Two amended notifications of the basic notification No. 21/02-Cus dated 1.3.2002 were in force during the period namely, Notification No. 82/04-Cus dated 18.8.2004 and 11/05- Cus dated 1.3.2005. The said notifications are reproduced below:-

***"Kerosene, Motor spirit, High Speed Diesel and Liquefied Petroleum Gases — Effective rate of duty — Amendment to Notification No. 21/2002-Cus.***

*In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, makes the following further amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002, namely :-*

*In the said notification, in the Table, -*

- (i) against S. No. 73, for the entry in column (4), the entry " 5% " shall be substituted;*
- (ii) after S. No. 75A and the entries relating thereto, the following S. Nos. and entries shall be inserted, namely :-*

| (1)   | (2)        | (3)                             | (4) | (5) | (6) |
|-------|------------|---------------------------------|-----|-----|-----|
| "75B. | 2710 11    | Motor Spirit                    | 15% | -   | -   |
| 75C.  | 2710 19 30 | High Speed Diesel (HSD)         | 15% | -   | -   |
| 75D.  | 2711 19 00 | Liquefied Petroleum Gases (LPG) | 15% | -   | -". |

*[Notification No. 82/2004-Cus., dated 18-8-2004]*

- (ix)after S.No. 75D, and the entries relating thereto, the following shall be inserted, namely :-*

| (1)  | (2)        | (3)                                                                                | (4) | (5) | (6) |
|------|------------|------------------------------------------------------------------------------------|-----|-----|-----|
| "75E | 2711 19 00 | Liquefied Petroleum Gases (LPG) imported for supply to household domestic consumer |     |     |     |

*[Notification No. 11/2005-Cus., dated 1-3-2005]*

9. Under Notification No. 82/04-Cus dated 18.8.2004, Liquefied Petroleum Gases (LPG) falling under Chapter subheading 2711 1900 attracted concessional duty @ 5%, whereas the amending notification No. 11/05-Cus prescribed exemption to Liquefied Petroleum Gases for supply to household domestic customs falling under the same chapter heading 2711.1900. It is the contention of the appellant that after the issuance of first amending notification No. 82/04-Cus dated 18.8.2004, they have represented to the Government that oil marketing company did not import Liquefied Petroleum Gases as such, but commercial butane or propane of mixture of commercial butane and propane. It is their argument that taking into note the objections of the oil marketing company alternatively the Notification No. 37/05-Cus dated 2.5.2005 was issued whereby the exemption extended to Liquefied Petroleum Gases was streamlined. For ease of reference, the said notification is reproduced below: -

***"Liquefied Propane and Butane and their mixture imported for supply through PDS and Monofilament long line system for tuna fishing — Effective rate of duty — Amendment to Notification No. 21/2002-Cus.***

*In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 21/2002-Customs, dated the 1st March, 2002 which was published in the Gazette of India, Extraordinary vide number G.S.R.118 (E), dated the 1st March, 2002, namely :-*

*In the said notification, -*

*(A) in the Table, -*

*(i) for S. No. 75E and the entries relating thereto, the following shall be substituted, namely :-*

| <b>(1)</b> | <b>(2)</b>  | <b>(3)</b>                                                                                                                                                                                                                                                                                                                          | <b>(4)</b> | <b>(5)</b> | <b>(6)</b> |
|------------|-------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|------------|------------|
| "75E .     | 2711 12 00, | Liquefied Propane and Butane mixture, Liquefied Propane, Liquefied Butane                                                                                                                                                                                                                                                           | Nil -      | -          | " ;        |
|            | 2711 13 00, | and Liquefied Petroleum Gases (LPG) imported for supply to household domestic consumers at subsidized prices under the public distribution system (PDS) Kerosene and Domestic LPG Subsidy Scheme, 2002, as notified by the Ministry of Petroleum and Natural Gas vide notification No. P-20029/18/2001-PP. dated 28th January, 2003 |            |            |            |
|            | 2711 19 00  |                                                                                                                                                                                                                                                                                                                                     |            |            |            |

10. It is the argument that under the Notification No. 37/05- Cus dated 2.5.2005, commercial liquefied butane and liquefied propane mixture had been mentioned in the said notification along with Liquefied Petroleum Gases. Thus, it is their contention that the same notification was issued consequent to their representation, hence the duty paid during the September, 2004 to 02.05.2005 without availing exemption is refundable to them. Further, it is the contention that even though in the respective Bills of Entry, it is mentioned as commercial butane (LPG), but in fact the import said Liquefied Petroleum Gas was in mixture of butane (98%) and propane (2%), hence satisfied the criteria of Liquefied Petroleum Gases. In explaining the mentioning of Liquefied Petroleum Gases, the appellant had referred to the Bureau of Indian Standards and also the literature on the subject.

11. The Revenue's contention, on the other hand, is that the exemption Notification No. 37/05-Cus dated 2.5.2005 cannot be given retrospective effect as no such notification is provided in the amending notification. They have argued vehemently that the exemption notification has to be construed strictly and in support referred to the judgment of the Hon'ble Supreme Court in Dilip Kumar's case (supra). Also, they have submitted that the appellant vehemently discharged duty classifying the commercial duty under Customs Tariff sub-heading 2711.1300 and at no point of time the classification was contested. In the notification, the exemption was specifically allowed to Liquefied Petroleum Gases falling under Chapter sub-heading 2711.1900. Therefore, in absence of change of classification by filing necessary appeal against the assessment order, benefit of exemption notification cannot be extended to commercial butane (Liquefied Petroleum Gases).

12. We find force in the Revenue's contention inasmuch as principles governing interpretation notification as has been laid down by the Constitutional Bench of the Hon'ble Supreme Court in the case of Dilip Kumar & Co. (supra). Their Lordships analyzing the principles laid down earlier held that exemption notification should be interpreted strictly; the burden to prove applicability would be on the assessee to show that his case comes within the parameter of exemption clause or exemption notification. The relevant para 52 is reproduced as under: -

*"52. To sum up, we answer the reference holding as under -*

*(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*

*(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/ assessee and it must be interpreted in favour of the revenue.*

*(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."*



13. In the present case, in both amending exemption notifications No. 82/04-Cus and 11/05-Cus, concessional rate of duty + Nil rate of duty as the case may be the prescribed to be applicable only to Liquefied Petroleum Gases falling under Chapter 2811.1900. There was no mention of Chapter heading 2711.1300 as declared by the appellant while importing commercial butane (Liquefied Petroleum Gas). Applying the principles of strict interpretation, the exemption notification cannot be made applicable to the clearances of commercial butane(Liquefied Petroleum Gas) during the said period. Besides, we also agree with the contention of the learned AR for the Revenue that in absence of successfully challenging the assessment order, correcting the classification of commercial butane to that of Liquefied Petroleum Gases by filing necessary appeal before higher forum, the methodology followed by filing the refund claim is contrary to the principles of law laid down by the Hon'ble Supreme Court in Priya Blue Industries' case (supra), which has been recently upheld in the ITC case.

14. Learned Advocate for the appellant has heavily relied upon the judgment of this Tribunal in the case of Aegis Logistics Ltd. (supra), in support of his contention that exemption to Commercial Butane (LPG) is admissible under relevant Notifications are admissible. In our considered opinion, the said judgment is not applicable to the facts of the present case inasmuch as the issue before the Tribunal was whether concessional rate of 8% under Entry 27 of Notification No. 4/2006-CE dated 1.3.2006 is applicable to commercial propane imported by the assessee. The Tribunal examining the relevant tariff entries under Chapter 2711 and analyzing the scope of serial no. 27 of the said notification which specifies Tariff subheadings 27111200, 27111300 and 27111900 the description of the goods as Liquefied Petroleum Gases held that the imported commercial propane also could also be called as LPG hence eligible to exemption being covered under the scope of the said sr. no 27 of the Notification No. 4/2006-CE dated 1.3.2006. In the present case, we are concerned with the period prior to 2.5.2005 where under the notifications did not contain all the three chapter sub-headings like Entry No. 75E of Notification 37/2005Cus. dated 02.5.2005, both notifications 82/2004 Cus and 11/2005 Cus. mentioned the Chapter sub-heading 27111900 only and the description of goods as Liquefied Petroleum Gas only. Besides, the principle of interpretation of an exemption notification is now well settled by the Hon'ble Supreme Court in Dilip Kumar & Company's case (supra); it needs to be construed strictly. In these circumstances, we do not find relevance of the said judgment of the Tribunal in deciding the present dispute.

15. In the result, the impugned order rejecting the refund claim is sustained and the appeal being devoid of merit, accordingly rejected.

(Pronounced in open court on 12.06.2020)



**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, MUMBAI  
COURT NO. I**

**Miscellaneous Application No.C/MISC/86004/2018  
(on behalf of Appellant)  
in Customs Appeal No.681 of 2011**

Arising out of Order-in-Appeal No.153/MCH/DC/Refund(Exp.)/2011, Dated:  
22.07.2011

Passed by the CC (Appeals), Mumbai Zone-I

**Date of Hearing: 26.04.2019**

**Date of Decision: 24.10.2019**

**M/s HONDA SIEL CARS INDIA LTD  
PLOT NO.A-1, SECTOR 40/41, SURAJPUR-KASNA ROAD  
GREATER NOIDA INDUSTRIAL DEVELOPMENT AREA  
DIST: GAUTAM BUDH NAGAR (U.P.) PIN: 201306**

**Vs**

**COMMISSIONER OF CUSTOMS (EXPORT PROMOTION)  
MUMBAI-I, NEW CUSTOMS HOUSE, BALLARD ESTATE  
MUMBAI - 400001**

**Appellant Rep by:** Laxmi Menon, T Viswanathan, & Madhura Khandekar Advs.

**Respondent Rep by:** Shri R K Dwivedy, ADC (AR)

**CORAM:** D M Misra, Member (J)

P Anjani Kumar, Member (T)

**FINAL ORDER NO. A/86917/2019**

**Per: D M Misra:**

Heard both sides.

2. The Miscellaneous Application has been filed seeking change of cause title from "M/s Honda Siel Cars India Ltd." to "M/s Honda Cars India Ltd." pursuant to the fresh certificate of incorporation issued by the Registrar of Companies, Delhi & Haryana. Revenue has no objection. Consequently, the cause title is allowed to be changed and will read as: "M/s Honda Cars India Ltd.". MA allowed.

3. The appeal is filed against Order-in-Appeal No.153/MCH/DC/Refund(Exp.)/2011, dt.22.07.2011, passed by the CC (Appeals), Mumbai Zone-I.

4. Briefly stated the facts of the case are that the Appellants had imported cars (CBU i.e. Completely Built Units) and cleared the same on payment of duty by way of debiting the duty under DEPB scheme. At the time of import, they had paid 4% SAD through TR-6 challan dt.25.10.2007. Subsequently, on sale of the imported cars, they have filed refund of the said 4% SAD amount on 05.11.2008, in accordance with the Notification No.102/07-Cus, dt.14.09.2007. On adjudication, the refund claim was rejected by the Adjudicating authority, observing that the demand, inter alia, barred by limitation. Aggrieved by the said order, they filed appeal before the learned Commissioner (Appeals), who in turn, rejected their appeal, hence, the present appeal.

5. The learned Advocate for the Appellant Shri T. Viswanathan submitted that they have imported 197 nos. CBU Cars against Bill of Entry No.801128, dt.25.10.2007. They have paid the applicable duty including 4% SAD leviable in terms of Section 3(5) of Customs Tariff Act, 1975. It is his contention that as on the date of importation of the said goods, in the relevant Bills of Entry Notification No.102/07-Cus, was applied to effect SAD payment. This notification allows exemption from SAD by way of refund of the same. At the time of import and making payment of SAD, the said Notification did not prescribe any time limit for filing of refund claim. It is his contention that the said notification No.102/07-Cus. was amended subsequently vide Notification No.93/2008-Cus, dt.01.08.2008. By virtue of the said amendment as per Condition (c), it introduced a time limit of one year for filing of refund of 4% SAD paid by the importer at the time of importation of the goods. In the present case, the date of payment of duty was 25.10.2007 and the refund claim to the tune of Rs.1,02,32,335/- was filed on 05.11.2008.

6. He has submitted that it is an established principle of law that the imports are subject to conditions of a notification existing as on the date of importation. In the present case, when the goods in question were imported, there was no time limit prescribed in the Notification No.102/07-Cus for claiming refund. Thus, amendment to the said notification, after importation cannot be applied. In support, they have placed reliance on the Judgment in the case of *CC Bangalore Vs Spice Telecom – 2006 (203) ELT 538 (SC)*. Further, the Ld. Advocate referring to the judgment of Hon'ble Delhi High Court in the case of *Sony India Pvt. Ltd VS CC – 2014 (304) ELT 660 (Del.)*, submitted that in the said case it has been held that the amending Notification No.93/08-Cus, cannot be made applicable retrospectively to the imports made earlier. He has submitted that SLP filed by the Department before Hon'ble Supreme Court against the said decision of Hon'ble Delhi High Court was dismissed on the ground of limitation. He has further submitted that the said judgment has been followed by the Tribunal subsequently in series of judgments. It is his contention that the time limit of one year cannot be made applicable to the imports made to un-amended Notification No. 102/2007 Cus. is also evident from the Circular No.6/2008 dt.28.04.2008 issued by the Board. It is his contention that imposition of a condition by way of a circular cannot whittle down the benefit of Notification in view of the principle of law laid down the Hon'ble Supreme Court in the case of *Tata Teleservices Ltd Vs CC- 2006 (194) ELT 11 (SC)*. Further, he has submitted that the Notification No.102/07-Cus, issued under Section 25 of Customs Act, 1962, prescribed effective rate of duty. In terms of Section 15(1)(a) the condition to be applied to the imported goods is as had been prevailing at the time of importation. It is his contention that any amendment to such notification after import, cannot be applied prior to the amendment. Further, he has submitted that the judgment of Bombay High Court in the case of *CMS Info Systems Pvt. Ltd Vs UoI – 2017 (349) ELT 236* will not be applicable to the present case. He has submitted that in the said case, the Writ Petition was filed challenging the vires of the amending Notification No.93/08-Cus. In that context, the Hon'ble High Court held that the amendment was valid and disposed the Writ Petition accordingly.

7. Per contra, the learned A.R. for the Revenue has submitted that Hon'ble Bombay High Court in *CMS Info Systems Pvt. Ltd.'s* case, expressing an opinion different from that of Hon'ble Delhi High Court in the *Sony India Pvt. Ltd's* case, referring to Section 27 of Customs Act, 1962, observed that the period of one year prescribed under Section 27(1) of Customs Act, 1962 cannot be made applicable to all refund claims arising out of and under the Act. It is his contention that in case of conflicting view of different High Courts the judgment of jurisdictional High Court is binding on the Bench in view of the principle of law laid down by the Larger Bench of Tribunal in the case of *J.K. Tyre & Industries Ltd Vs Asstt. Commr, of C.E, Mysore – 2016 (340) ELT 193 (Tri-LB)*. It is his further contention that the said judgment was later followed by another Division Bench of Bombay High Court in the case of *CC, NS-III Vs DSM Sinochem Pharmaceuticals (I) Pvt. Ltd – 2018 (359) ELT 509 (Bom.)* 8. Heard both sides and perused the records.

9. The short issue involved in the present appeal for determination is: whether refund of 4% SAD paid at the time of import of CBU cars on 25.10.2007 is barred by limitation when the refund claim was filed on 05.11.2008 under Notification No.102/2007Cus. Dt.14.9.2007. It is not in dispute that prior to the amending Notification No.93/2008-Cus dt.01.08.2008, no time limit has been stipulated under the base of Notification No.102/07-Cus. dt.14.9.2007 for filing of refund claim of 4% SAD paid at the time of import. It is the contention of the Appellant that since at the time of import, there is no condition in the notification specifying time limit to file refund claim, accordingly, the period of one year introduced subsequently by Notification No.93/08-Cus, dt.01.08.2008 cannot be made applicable to the refund claim filed on 05.11.2008. The contention of the Revenue, on the other hand, is that the period of limitation for refund of Customs duty has been present under the statute at Sec. 27 of CA,1962 all along and also when the refund of 4% SAD paid at the time of import was filed on 05.11.2008, the amending Notification No.93/08-Cus, dt.01.08.2008 has been in force. The Revenue, strenuously relied upon the principle of law laid down by jurisdictional Bombay High Court in the case of *CMS Info Systems Pvt Ltd's* case (Supra).

10. The Hon'ble Bombay High Court, while dealing with the vires of amending Notification No.93/08-Cus, dt.01.08.2008, and differing with the observation of Hon'ble Delhi High Court in *Sony India Pvt. Ltd* case on the issue of applicability of period of limitation to the un-amended Notification No.102/07-Cus. dt.14.9.2007, observed as follows:-

"30. The very argument which was canvassed before us, namely, that the original exemption notification neither stipulated a time period within which the refund was to be claimed, nor it makes Section 27 of the Customs Act applicable to such claims. Secondly, since imports and payments of relevant customs duty were made when the original notification was in force and the amended notification had no retrospective effect, the appellant before the High Court of Delhi was entitled to refund of special additional customs duty.

31. It is in dealing with the first argument that the observations in Paras 10, 11, 12, 13 and 14 have been relied upon. Then in Para 17, the said High Court holds thus:-

"17. Plainly, therefore, Section 27 was understood as not applying to SAD cases, even though it was in the statute book for many years. Yet, with the introduction of the circular and then the notification (No. 93), the Customs authorities started insisting that such limitation period which was prescribed with effect from 1-8- 2008 (by notification) became applicable. There is a body of law that essential legislative policy aspects (period of limitation being one such aspect) cannot be formulated or prescribed by subordinate legislation. *Khemka and Co. (Agencies) Private Ltd. v. State of Maharashtra*, (1975) 35 STC 571 and other decisions are authority on the question that in matters which deal with substantive rights, such as imposition of penalties and other provisions that adversely affect statutory rights, the parent enactment must clearly impose such obligations; subordinate legislation or rules cannot prevail or be made, in such cases. The imposition of a period of limitation for the first time, without statutory amendment, through a notification, therefore could not prevail."

32. On a perusal of these observations, it is apparent that the intent of the additional duties is to counter-balance the local taxes or other charges leviable on a like article. Then comes the aspect of exemption in relation to which the Hon'ble High Court observes that the intent is to allow a refund of the special additional customs duty because the importer has suffered the incidence of SADC on import. That was meant to counter-balance the sales tax/VAT leviable on a like article in India. These very articles have been sold and the importer then has to bear the burden even of the sales tax/VAT on sale of these goods.

33. It is submitted that the Hon'ble High Court of Delhi has clearly opined and held that the provisions of the Customs Act on the rules and mechanism for refund are incorporated by reference in Section 3(5) of the CTA only "so far as may be" applicable. Since SADC is levied under Section 3(5) and that is refundable only on subsequent sale, then, no limitation period can possibly be imposed for advancing a refund claim. We have carefully perused the above observations and in the light of the analysis of the statutory provisions and the scheme of refund by us, with greatest respect, we are unable to agree with the High Court of Delhi on this point. The Rules and Regulations under the provisions of the Customs Act, 1962, including those relating to drawback, refund and exemption shall so far as may be applied and this reveals that for the purposes of making an application seeking refund, its consideration, that Customs Act and its provisions are made applicable even to the Tariff Act and the duties mentioned thereunder. Therefore, a provision for drawback, refund and exemption from such duties can be made by relying on the Customs Act, 1962. The power to refund is to be found in Section 27 of the Customs Act, 1962, and that was always there. The amendment to the notification introducing a limitation for seeking refund apart, Section 27 with its condition of a limitation period was throughout on the statute book. That is the only provision enabling granting refund of any duty is undisputed. The notification granting exemption and under consideration in the case, enables claiming a refund of duty (SAD) but the power to grant it is in the substantive law. Precisely, that is the case herein. Further, we find that there is an exemption granted and which is conditional. The exemption being conditional, it is not permissible to pick and choose convenient conditions of the exemption notification and leave out those which to parties like the petitioners, appear to be onerous and excessive. We do not see how in the teeth of a clear provision in the exemption notification can the assessee/petitioners before us contend that the exemption notification is valid for everything else but when it comes to period of limitation therein, that is excessive or unfair, unjust and arbitrary. Once the exemption is conditional, then, all the conditions therein have to be complied with. If that provides for refund, but the application in that behalf is to be made within a specified period, then, that cannot be said to be excessive and arbitrary, far from being unfair, unjust and unreasonable. It cannot be termed illegal as well for the simple reason that sub-section (1) of Section 27 of the Customs Act, 1962, which enables claiming of refund by making an application itself speaks of one year outer limit. That is never challenged, including in the present proceedings. That the period of one year

*commences from the payment of the duty. If that is how Section 27 is worded and every duty is included in its ambit and scope, then, an application seeking refund of the same has to abide by it, including the bar of limitation contained therein. That is how consistent with that provision even the special exemption notification carries the same stipulation or condition. We do not see how insistence on complying with it can be said to be imposing an unreasonable, unfair and unjust restriction. Once the nature of the right is considered, then, all the more we are unable to agree with Mr. Patil. There is no vested, much less absolute right in the petitioners to seek refund. Even a refund must be within the framework of the statute and admissible on the terms thereof. We are not inclined to agree with him that compliance with this period is calling upon the petitioner to do or perform something which is impossible. The exemption notification does not impose any new condition as has been read into it. It grants the exemption from payment of duty conditionally. The exemption can be availed of provided the goods which are imported are subject to payment of duties which include all the duties that are referred to in both the enactment and the notification. If the import is for subsequent sale, then, that invoice must carry a stipulation that no credit for the additional duty of customs shall be admissible. The importer thereafter can file a claim for refund of the additional duty of customs paid on the imported goods before the expiry of one year from the date of payment of additional duty of customs."*

11. A simple reading of the aforesaid ratio makes it crystal clear that the period of limitation even if specifically not mentioned under the Notification No.102/07-Cus. dt.14.9.2007, before its amendment by the amending Notification No.93/08-Cus, dt.01.08.2008, all refund of customs duty being governed by Sec.27 of Customs Act, 1962, therefore, the time limit of one year from the date of payment of 4% SAD would be applicable. In the present case, since the refund claim filed by the Appellant on 05.11.2008 i.e. after one year from the payment of 4% SAD on 25.10.2007, is barred by limitation. We do not find merit in the contention of the learned Advocate for the Appellant that the principle of law laid down by Hon'ble Bombay High Court would not be applicable to the facts of the present case as the same was in the context of testing vires of the notification. The principle laid down by Hon'ble Bombay High Court and subsequently followed in DSM Sinochem Pharmaceuticals (I) Pvt. Ltd.'s case is squarely applicable to the facts of the present case and being the jurisdictional High Court, binding on the Tribunal situated in Mumbai, in view of the principle of law laid down by the Larger Bench of the Tribunal in the case of *J.K. Tyre & Industries Ltd Vs Astt. Commr of C.E, Mysore – 2016 (340) ELT 193 (Tri-LB)* . Since we have held that the refund is barred by limitation and hence not admissible, consequently other issues raised became academic and hence not considered.

12. In the result, the impugned order is upheld and the appeal is dismissed.

(Order pronounced in the open court on 24.10.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
WEST ZONAL BENCH, MUMBAI**

**Customs Appeal No.89693 of 2018**

Arising out of Order-in-Original No. 11/2018-19, Dated: 23.8.2018

Passed by the Commissioner of Customs (Import-II), Mumbai

**Date of Hearing: 25.09.2019**

**Date of Decision: 22.01.2020**

**Ms PRERNA SINGH, CEO  
M/s SEVILLE PRODUCTS LTD  
P.O. BOX NO. 5176 SHARJAH, U.A.E**

**INDIAN AUTHORISED REPRESENTATIVE:  
V LAKHSMIKUMARAN, 2ND FLOOR, B&C BUILDING  
CNERGY IT PARK APPA SAHEB MARATHE MARG  
PRABHADEVI, MUMBAI-400025**

**Vs**

**COMMISSIONER OF CUSTOMS (IMPORT-II)  
MUMBAI, NEW CUSTOM HOUSE BALLARD ESTATE  
MUMBAI - 400001**

**WITH**

**Customs Appeal No.89695 of 2018**

Arising out of Order-in-Original No. 11/2018-19, Dated: 23.8.2018

Passed by the Commissioner of Customs (Import-II), Mumbai

**M/s SEVILLE PRODUCTS LTD  
P.O. BOX NO. 5176 SHARJAH, U.A.E**

**INDIAN AUTHORISED REPRESENTATIVE:  
V LAKHSMIKUMARAN, 2ND FLOOR, B&C BUILDING  
CNERGY IT PARK APPA SAHEB MARATHE MARG  
PRABHADEVI, MUMBAI-400025**

**Vs**

**COMMISSIONER OF CUSTOMS (IMPORT-II)  
MUMBAI, NEW CUSTOM HOUSE BALLARD ESTATE  
MUMBAI - 400001**

**Appellant Rep by:** Shri Akhilesh Kangsia, Adv.

**Respondent Rep by:** Shri Manoj Kumar, AC (AR)

**CORAM:** Suvendu Kumar Pati, Member (J)

**FINAL ORDER NOS. A/85065-85066/2020**

**Per: Suvendu Kumar Pati:**

Imposition of penalty under Section 112(a) of the Customs Act on appellants M/s. Seville Product and Ms. Prerna Singh, CEO, both based in Dubai, by the Ld. Commissioner of Customs (Import-II), Mumbai is assailed in both the appeals.

2. Facts of the appellants case, in a nut-shell, is that DRI Mumbai Zonal Unit through investigation found appellants and three others were resorting to large scale under invoicing and consequently by mis-declaring transaction value as well as retail sales price (RSP) of confectionary items like wafers, cookies and toffees etc. they were evading Customs duty during importation of these goods. Statement of Prerna Sing (CEO) was recorded after she was summoned from Dubai who admitted about issuing of two different invoices with different price structures to the importer on regular basis for production of invoices having lesser price before the Customs authority to avoid payment of tax and the other one with proper price for business transactions. Statement of other connected persons including importer named Prakesh Menon i.e. Indian representative of Appellant company were also recorded during investigation and ultimately they were issued with show cause notices.

Three of them settled the matter before the settlement Commissioner and both the appellants challenged the application of Indian Customs Act to impose penalty on overseas company and person unsuccessfully before the Commissioner Customs (Import-II) who confirmed penalty of Rs. 2,50,000/- on the appellant company and penalty of Rs. 50,000/- on Prerna Sing, its CEO under Section 112(a) of the Customs Act. Both the Appellants are before this Tribunal challenging legality of the said order passed by the Commissioner (Customs).

3. In the memo of appeal and during the course of hearing of appeal, Learned Counsel Mr. Akhilesh Kangsia for the appellant argued that prior to amendment to the Customs Act 1962 introduced on 29-03-2018, the same was extended only to the whole of India and not beyond India for which operation of the Act beyond the territory of India cannot be made applicable to the overseas suppliers of Dubai, UAE and its NRI CEO and subject them to penalty under Section 112(a) of the Customs Act. With reference to the Hon'ble Supreme Court's decision in *British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Indus* – 1990 (3) SCC 481 he argued that Indian statute are ineffective against foreign property and foreigners. Further, with reference to the decision reported in 2017 (348) E.L.T. 168 (Tri. Mumbai) in the case of *Narendra Lodaya v. Commissioner of Customs, Nhava Sheva* HI Lingos Co. Vs Collector of Customs decision delivered on 20th September 1993 and decision of *Customs Appeal no. 70148 of 2019 in the case of M/s. Shakti Jewellers Pvt. Ltd. v. Commissioner of Customs*, he also argued that appellants, being company and NRI based in Dubai having no permanent establishment in India and having no place of business in India, cannot be penalised under the provision of Customs Act which extends to the whole of the Indian territory and not all over the world beyond India and responsibility as well as obligation of the importer commences with filing of declaration under section 46 of Customs Act for which incident occurred prior to that cannot be brought into the purview of the Customs Act. Placing reliance in the case law reported in 2015 (325) ELT 199 (Tri. Bang) in the case of *Shafeek P. K Vs. CC, Cochin*, Learned Counsel for the Appellants argued that in Foreign Exchange Regulation Act, 1973 and in IPC under Section 3 as well as 4, specific provision exists for trial of citizens of India residing outside India and branches of company or agencies located outside India but no such provision exists in Customs Act and therefore in the absence of an identical provision in the Customs Act, the same cannot be invoked against resident of foreign country even though he/she was an Indian for which he prays to set aside the order passed by the Commissioner of Customs.

4. In response to such submissions, Learned Authorised Representative for the respondent department Mr Manoj Kumar argued in support of the reasoning and rationality found in the order passed by the Commissioner of Customs but conceded that the Commissioner had not dealt with the jurisdictional issue while confirming penalties under section 112 of the Customs Act on the appellants.

5. I had heard the arguments at length on the other day and perused the case record.

6. The issue of jurisdiction of Customs Act and its application to the appellant is primarily challenged in the present appeal, besides the legality of the Order of the Commissioner. Though the issue appears to be small it has wide ramifications. No Municipal law can ever be extended beyond the territorial boundaries of a country including its continental self and exclusive economic zone, whether or not there is express provision in the Act or statute to stretch the same beyond the country's territory since the same would amount to encroachment upon the territorial authority of other State. It is therefore, defined in the Statute of the country that the said Act has its application within the territorial limits of the country. Likewise in case of penal statute, it is clearly defined that the "act or its violation" should have its effect and consequence within the territorial limit of the said country. If violation of provision of statute is committed within the said country, then the consequence in conformity to the legal provision of the country would ensue, no matter the violator is a resident of the country or an alien. It is, therefore, necessary to determine if the "act or its omission" committed is in violation of law and accordingly to punish the violator and not to determine if such violation has been committed by a legal person based in the Country or not.

7. Sovereign country asserts extra territorial jurisdiction in criminal laws though the principal basis of jurisdiction over crime is the territorial principle which permits a State in control of its territory to prescribe, adjudicate and enforce its law in the territory. The crime is said to be committed even partly in a state's territory



when any essential constituent element itself is consummated there. Therefore, when an offence's adverse effect endangers a State's security or Government's function, extra territorial jurisdiction is enforced. Customs law from an international Criminal law prospective requires a consideration of the classification between Crime law and administrative law and the same is required to be placed under the administrative penal law though in a legal sense it is not penal but nevertheless retributive (Gist has been borrowed from the article titled "Criminal and Quasi-Criminal Customs Enforcement among the U.S., Canada and Mexico" written by Bruce Zagaris and David R. Stepp.)

8. In a nut-shell, the discussion above would reflect the principle that whether violation of an act has an adverse effect to the State's interest, the same violation is to be dealt by the State itself and the violator is to be penalised irrespective of his/her nationality or place of residence. It is in this prospective, the jurisdiction of sovereign State is to be understood though the general understanding of jurisdiction is based on the nationality of the perpetrator since nationals of a State remained under the sovereignty and owe their allegiance to it even though they are free to travel and reside outside its territory. It is in this contest that Foreign Exchange Regulation Act 1973 prescribing application of it to all citizens of India residing outside India and to branches, agencies situated outside India is to be understood and also application of section 4 of IPC in the cited judgements of the above referred case laws. However, a comparison is required to be made between Section 3 & Section 4 of the Indian Penal Code concerning its application beyond the territorial jurisdiction of sovereign India. While Section 4 deals with application of IPC to extra territorial offences, Section 3 provides judicial power of punishment to any person for violation of any Indian law. Such primary distinction is not noticeable in the judgement of *Shafeek P.K. v. CC, Cochin-2015 (325)ELT 199* cited Supra.

9. It has also been argued by Learned Counsel for the appellant that judgement of the Tribunal in the *Hi Lingos Co. v. Collector of Customs* case has been confirmed by Hon'ble Supreme Court (*reported at 1997 (95) E.L.T. A147 (SC)*) and it was the first decision on the jurisdiction issue apart from *C.K Kunhammed V. Collector of Central Excise & Customs – 1992 (62) E.L.T. 146* judgement which had dealt with application of Private International law on foreign nationals. However, going by the findings in *Hi Lingos'* case, it can be noticed that penalty under Section 112 was set aside not on the ground of jurisdiction and there was a specific finding made by one of the members in the said judgement at Para 4 (8) that such mis-declaration of description of goods was within the mischief of Section 112 Customs Act even though the importers were in foreign country. Hon'ble Supreme Court had not dealt with any of the aspects on merit, since the appeal was dismissed for non-prosecution. Moreover no finding is forthcoming from the judgement reported in *2017 (348) E.L.T. 168 (Tri. – Mumbai) in the case of Narendra Lodaya v. Commissioner of Customs, Nhava Sheva* as to why settlement Commissioner had not dealt with the cases of foreign nationals therein to make the said judgement a binding precedent for the subsequent decisions of the Tribunal, besides the fact that stage from which Customs Act is applicable was determined therein.

10. In the instant case appellants have subjected themselves to the jurisdiction of Customs Act upon notice sent to them under Section 108 of the said Act which would have otherwise ensured through extra diction process Appellant Prerna Singh had also confessed during regarding of her statement as CEO of her company that appellant Seville Products Ltd. used to raise two invoices for same import having low value and high value recorded in those invoices which were despatched through a computer of third party named Prakesh Menon for presentation of the invoices having lower value before the Customs for payment of customs duty and clearance and that the commercial invoice against which payment was received was not shown to the customs. Meaning of word abetment is "to help someone in wrong doing'. In the instant case such wrong doing had its effect in the Mumbai Customs jurisdiction and appellants had aided the importer in such wrong doing. Therefore, penalty under Section 112 was rightly involved. Further Appellant Prerna had never rescinded from her statement and in view of Section 56 of the Indian Evidence Act, such admission needs no further proof to hold appellants guilty of violation of the Section 112(a) of Customs Act. Hence the order.

## **ORDER**

11. Both the appeals are dismissed and order no. 11/2018-19 dated 23-8-2018 of the Commissioner of Customs (Import-II), Mumbai is hereby confirmed.

(Order pronounced in the court on 22.01.2020)



**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, MUMBAI**

**Customs Appeal No. 89376 of 2018  
C/Cross 85055 of 2019**

Arising out of Order-in-Original No. 121/2016-17/CC/NS-I/JNCH, Dated:  
31.01.2017

Passed by Commissioner of Customs, JNCH, Nhava Sheva

**Date of Hearing: 17.06.2019**

**Date of Decision: 10.10.2019**

**M/s SAKAR INDUSTRIES PVT LTD  
H/10, MADHAVPUR MARKET, SHAHBAUG ROAD  
AHMEDABAD - 380004**

**Vs**

**COMMISSIONER OF CUSTOMS  
NHAVA SHEVA-I, JNPT, CUSTOM HOUSE  
NHAVA SHEVA, RAIGAD - 400707**

**Appellant Rep by:** Shri H K Hirani, Consultant

**Respondent Rep by:** Shri A P Kothari, AR

**CORAM:** S K Mohanty, Member (J)  
Sanjiv Srivastava, Member (T)

**FINAL ORDER NO. A/86792/2019**

**Per: Sanjiv Srivastava:**

This appeal and cross objections are directed against order in original No 121/2016/17/ CC/NS-I/JNCH dated 31.01.2017 of Commissioner Customs NS-I, JNCH, Nhava Sheva. By the impugned order Commissioner has held as follows:

*"i. I order that goods totally valued at Rs 8,41,44,815/- (Rupees Eight Crore Forty One Lakhs Forty Four Thousand Eight Hundred and Fifteen Only) in respect of 4 Bill of Entry's No 780187 dated 24.03.11, 3145027 dated 07.04.11, 3156426 dated 08.04.11, 4674399 dated 18.09.11 are liable for confiscation under the provisions of Section 111(d), (m) of the Customs Act, 1962. However as the good are not available for confiscation, I do not impose any redemption fine in lieu of confiscation.*

*ii. I order that total differential Customs duties of Rs 91,50,097/- (Rupees Ninety One Lakhs Fifty Thousand Ninety Seven Only) in respect of 4 Bill of Entry's No 780187 dated 24.03.11, 3145027 dated 07.04.11, 3156426 dated 08.04.11, 4674399 dated 18.09.11 be demanded and recovered from M/s Sarkar Ferro Alloys Pvt Ltd., in terms of provisions of proviso to erstwhile Section 28(1) of the Customs Act, 1962.*

*iii. I order that interest on the aforesaid differential Customs duties (as in clause ii above) be recovered from M/s Sarkar Ferro Alloys Pvt Ltd., under the provisions of Section 28AA, as may be applicable, of the Customs Act, 1962.*

*iv. I impose Penalty of Rs 10,00,000/- (Rupees Ten Lakhs Only) on M/s Sarkar Ferro Alloys Pvt Ltd., under Section 112(a), , of the Customs Act, 1962.*

*v. I impose Penalty of Rs 1,00,000/- (Rupees One Lakhs Only) on Shri Ramesh Shah, Director of M/s Sarkar Ferro Alloys Pvt Ltd., under Section 112(a), , of the Customs Act, 1962.*

*vi. The final assessment of Bills of Entry No 778026 dated 22.03.2011, 316405 dated 07.04.2011 and 4432424 dated 23.08.2011 is ordered to be done as per provisions of section 18 of the Customs Act, 1962."*

2.1 Appellants had imported Molybdenum Ore Concentrate declaring the same as Molybdenum Ore and claiming exemption from Countervailing Duty (CVD) as per notification No 04/2006-CE dated 01.03.2006 on seven Bill of Entries as detailed in table below:

| Bill of Entry |          | Description                   | Assessable Value 'Rs | Duty Paid 'Rs    | Assessme Number Date |
|---------------|----------|-------------------------------|----------------------|------------------|----------------------|
| Number        | Date     |                               |                      |                  |                      |
| 778026        | 22.03.11 | Roasted Molybdenum Ore 62.9%  | 4,37,66,536          | 11,26,988        | Provisional          |
| 316405        | 07.04.11 | Roasted Molybdenum Ore 60.58% | 2,16,42,241          | 5,57,288         |                      |
| 4432424       | 23.08.11 | Roasted Molybdenum Ore 59.46% | 1,75,94,626          | 4,53,062         |                      |
| 3145027       | 07.04.11 | Roasted Molybdenum Ore 62.43% | 2,13,40,834          | 5,49,527         | Final (RMS)          |
| 3156426       | 08.04.11 | Roasted Molybdenum Ore 59.32% | 2,23,05,668          | 5,74,371         |                      |
| 4674399       | 18.09.11 | Roasted Molybdenum Ore 59.65% | 1,85,48,402          | 4,77,621         |                      |
| 780187        | 24.03.11 | Roasted Molybdenum Ore 59.65% | 2,19,49,910          | 5,65,210         |                      |
| <b>Total</b>  |          |                               | <b>16,71,48,217</b>  | <b>43,04,067</b> |                      |

2.2 In view of the investigations undertaken by the Director General Revenue Intelligence, it was found that item imported was not Molybdenum Ore but was Molybdenum Ore Concentrate, and hence the exemption from CVD claimed by the Appellants was not admissible to them.

2.3 A Show cause notice dated 12.03.2012 was issued to them asking them to show cause as to why-

- Goods imported vide the seven Bill of Entries be not confiscated under Section 111(d) & (m) of the Customs Act, 1962. Since the goods are not available for confiscation, why redemption fine be not imposed;
- Differential Customs Duty amounting to Rs 1,86,16,220/- in respect of the seven B/E be not demanded and recovered from them in terms of proviso to Section 28(1) *ibid*;
- Interest should not be demanded and recovered under Section 28AA *ibid*;
- Penalties should not be imposed on them under Section 112(a) and Section 114A *ibid*.

2.4 Show cause notice has been adjudicated by the Commissioner as per the impugned order referred in para 1, *supra*.

2.5 Aggrieved appellants have filed this appeal.

2.6 Revenue has also filed cross objections in the matter

3.1 We have heard Shri H K Hirani, Consultant for the Appellant and Shri A P Kothari, Additional Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the Appellants, learned Consultant submitted that-

- Since the Bill of Entries have been verified, examined and assessed by the proper officer before the clearance of the goods they cannot be guilty for misdeclaration with intention to evade payment of duty, hence extended period could not have been invoked.
- There was confusion with regards to applicability Chapter Note 4 to Chapter 26 in Excise Tariff, (as admitted by the Circular of 2012). It is settled position in law that laying claim to some exemption, whether admissible or not is a matter of belief and not amount to mis-declaration;
- In view of the decision of the Apex Court in case of Star Industries relied upon by the revenue, the goods could not have been held liable for confiscation;

- Denial of exemption in respect of the Bill of Entries filed prior to date of receipt of Presidential Assent for Finance Act, 2011 is completely unsustainable. It would only after the publication of the Finance Act, 2011, that the amendments made in Tariff will become applicable as has been held by the Apex Court in case of *Param Industries* [2015 (321) ELT 192 (SC)]

- The imported goods are ores and not ore concentrate and hence the benefit of exemption claimed will be admissible to them.

- For the goods to be liable for confiscation under Section 111, mis-declaration is required to be proved and, if there is no case of mis-declaration, confiscation cannot be madeo

- *Sony Impex* [2007 (215) ELT A49(SC)];

- *Kapil International* [2008 (228) ELT 139 (T)]

- *Pdm Impex* [2005 (191) ELT 1121 (T-Kol)]

- *Acti Technologies* [2005 (189) ELT 121 TMum)]

- *Northern Plastics* [1998 (101) ELT 549 (SC)]

- No interest can be demanded when demand itself is not payable

- *Pratibha Processors* [1996 (88) ELT 12 (SC)]

- *Jayathi Krishna & Co* [2000 (119) ELT 4 (SC)]

- No penalty should have been imposed as has been held in the following cases.

- *Kuresh Laila* [2005 (189) ELT 45 (T-Chennai)]

- *Polynova Chemical Industries* [2005 (179) ELT 173 (T-Mum)]

- *Jupiter Exports* [2002 (145) ELT 608 (TChennai)]

- *Pawan Goel* [2001 (135) ELT 1425 (T-Del)]

3.3 Arguing for the revenue learned Authorized Representative while reiterating the findings in the impugned order submitted that-

- Issue involved in present case is squarely covered by the decision of the Apex Court in case of *Star Industries* [2015 (324) ELT 656 (SC)]

- The issue raised by the Appellant in respect of the applicability of the amendments made by Finance Act, 2011 to the imports made prior to the Presidential Assent to the Act, and its publication are irrelevant in view of the Specific declaration made in terms of Provisional Collection of Tax Act, 1931 in Finance Bill, 2011 making these amendments applicable from the date of introduction of the Bill.

- As per the amended Section 28, vide Finance Act, 2011 the normal period for making the demand of the duty short paid was one year from the relevant date. Since in this case the show cause notice has been issued on 12.03.2012 in respect of the bill of entries filed during the period 22.03.2011 to 18.09.2011, the arguments made by the Appellant in respect of mis-declaration etc are irrelevant as the show cause notice has been issued within period of one year, i.e. normal period of limitation and hence the for making the demand the issue of misdeclaration will become irrelevant.

- However it is fact that appellants have misdeclared the goods imported by them by declaring them as Molybdenum Ore instead of Molybdenum Ore Concentrate to avail the benefit of exemption from CVD under Notification No 4/2006-CE, and hence the goods have been rightly held to be confiscable under Section 111(d) and (m) of the Customs Act, 1962. However since the goods were not available for confiscation, Commissioner has not confiscated nor imposed any redemption fine;

- Appellants have short paid the duty at the time of clearance of goods, and hence the demand of interest under Section 28AA is justified;

- For the act of mis-declaration Commissioner has imposed penalty under Section 112(a) which is neither excessive nor unjustified looking into the quantum of duty sought to be evaded.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 The issue on merits has been settled by the Hon'ble Apex Court in case of *Star Industries* [2015 (324) ELT 656 (SC)] holding as follows:

"26. Before we discuss these arguments and arrive at a particular conclusion, we would like to recapitulate the salient features of the case about which there is no dispute :

(a) The assessee is seeking benefit of Notification No. 4/2006-C.E. and relies upon Sl. No. 4 thereof which totally exempts goods described therein from payment of excise duty. The goods which are otherwise excisable are, thus, exempted from payment of duty. Description of these goods in Sl. No. 4 is 'Ores'.

(b) The goods imported by the assessee fall in Chapter 26 of Central Excise Tariff Act. Particular Tariff Item is 2613 against which the description of goods given under the said Tariff Item is 'Molybdenum Ores and Concentrate'.

(c) The goods imported by the assessee were not Molybdenum Ores in original form as mined. They had admittedly undergone the process of roasting and after the roasting, they are known as 'concentrates'. Even the assessee has described these goods as 'Roasted Molybdenum Ore Concentrate.'

(d) Chapter Note 4 treats the aforesaid process of roasting Ores into Concentrate as 'manufacture'.

27. On the aforesaid facts, case of the assessee was that since ores include concentrates, assessee had claimed exemption from payment of CVD under Notification No. 4/2006-C.E. In support of this claim that even after roasting, concentrates remain ores only on the plea that ores is genus and concentrates is specie thereof, the assessee refer to literature on chemical technology and also its earlier judgment in M/s. Hindustan Gas and Industries Ltd. case which, in turn, relied upon the judgment of this Court in MMTC case. We have already analysed the decision in M/s. Hindustan Gas and Industries Ltd. case. The entire decision proceeds on the basis that roasting of an ore to obtain concentrate does not amount to manufacture specially when roasting is a process by which impurities in the ore are removed and the recoverable content of metal oxide is enhanced. In support, reference was made to Kirk-Othmer's Encyclopedia of Chemical Technology. Likewise, in MMTC case as well, which was relied upon by the Tribunal, this Court had held that Wolfram Concentrate which was having minimum 65% Tungsten Oxide was still an ore and classifiable under Item 26. Thus, the decision in Hindustan Gas primarily rested on the reasoning that roasting of an ore to obtain concentrate would not amount to manufacture and ore and concentrate are one and the same inasmuch as concentrate remains ore and only impurities are removed therefrom. On this premise, it was held that ore is genus and concentrate is a specie thereof.

28. According to us, it is very clear from the reading of the judgment in Hindustan Gas case that basic and the common thread which runs throughout the decision is that subjecting ore to the process of roasting does not amount to manufacture. This very basis gets knocked off with the amendment carried out in the year 2011 with the insertion of Note 4. Note 4 now categorically mentions that the process of converting ores into concentrates would amount to 'manufacture'. Therefore, it cannot now be argued that roasting of ores and converting the same into concentrates would not be manufacture. For the same reason, the judgment in MMTC becomes inapplicable and reliance upon Kirk-Othmer's Encyclopedia becomes irrelevant. With the addition of Note 4, a legal friction is created treating the process of converting ores into concentrates as manufacture. Once this is treated as manufacture, all the consequences thereof, as intended for creating such a legal friction, would automatically follow. Following shall be the inevitable implications :

(a) It is to be treated that Molybdenum Ore is different from concentrate. That is inherent in treating the process as 'manufacture' inasmuch as manufacture results in a different commodity from the earlier one. Section 2(f) defines this term as under : "manufacture" includes any process, -

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or

(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer."

(b) The purpose of treating concentrate as manufactured product out of ores is to make concentrates as liable for excise duty. Otherwise, there was no reason to deem the process of converting ores into concentrates as manufacture.

29. Once the aforesaid legal repercussions are taken note of, as a fortiori, it becomes obvious that Notification No. 4/2006-C.E. which exempts only ores would not include within itself 'concentrates' also because of the reason that after the insertion of Note 4, concentrate is to be treated as a different product than ores, in law for the purposes of products of Chapter 26.

30. This brings us to the effect of Chapter Note 2 which is retained even after insertion of Chapter Note 4. No doubt, as per Chapter Note 2, 'ores' means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of Heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes. As per this note, metals of Section XV would be included in the term 'ores'. However, after the insertion of Chapter Note 4, these two Notes, namely, Note 2 and Note 4 have to be read harmoniously. If we accept the submission of the learned counsel for the assessee predicated on Note 2, then Note 4 even after its conscious inclusion, would be rendered otiose which cannot be countenanced. Therefore, Note 2, when seen along with Note 4, has to govern itself in limited territory. On the basis of deeming fiction created by Note 4, once we arrive at the conclusion that process of roasting of Ore amounts to manufacture and it creates a different product known as Concentrate, for the purpose of exemption notification, which exempts only 'Ores' it is not possible to hold that Concentrate will still be covered by the exemption notification. Therefore, harmonious construction of Note 2 and Note 4 would lead us to hold that in those cases when Note 4 applies and Ores becomes a different product, it ceases to be Ores.

31. We, thus, are of the opinion that in the impugned judgment, the Tribunal has rightly arrived at the conclusion that by virtue of Note 4, concentrate has to be necessarily treated as different from ores which is deemed as manufactured product after Molybdenum Ores underwent the process of roasting. Once we keep in mind that conversion of ores into concentrate is considered as manufacture and, therefore, becomes liable for central excise levy, exemption Notification No. 4/2006-C.E. is to be interpreted in this light as the Legislature has intended to treat ores and concentrates as two distinct items and Notification No. 4/2006-C.E. exempts only 'ores', concentrates automatically falls outside the purview of said notification. It is rightly argued by the learned senior counsel for the Revenue that exemption notifications are to be construed strictly and even if there is some doubt, benefit thereof shall not ensure to the assessee but would be given to the Revenue. This principle of strict construction of exemption notification is now deeply ingrained in various judgments of this Court taking this view consistently."

4.3 The arguments made by the Appellant with regards to applicability of the Chapter Note 4 inserted vide Finance Act, 2011, in respect of the import made prior to the date of assent and publication of the Finance Act, 2011 have been rejected by the Hon'ble Apex Court in case of *Bengal Shraichi Housing Development Limited* {2017 (6) GSTL 356 (SC)}

"20. In *Chhotabhai Jethabhai Patel and Co. v. The Union of India and Anr.*, 1962 Supp. (2) SCR 1 at 20-21 = 1999 (110) E.L.T. 118 (S.C.), this Court was faced with the challenge of the levy of a retrospective excise duty. One of the arguments made against the levy of such duty is that excise duty being indirect, which is that it is ultimately to be passed on to the consumer, a retrospective levy would be ultra vires the legislative competence of Parliament as it could not possibly be passed on. This argument was repelled in the following terms :

"There is no doubt that excise duties have been referred to by the economists and in the judgments of the Privy Council as well as in the Australian decisions as an instance of an "indirect tax", but in construing the expression "duty of Excise" as it occurs in Entry 84 we are not concerned so much with whether the tax is "direct" or "indirect" as upon the transaction or activity on which it is imposed. In this context one has to bear in mind the fact that the challenge to the legislative competence of the tax - levy is not directed to the imposition as a whole but to a very limited and restricted part of it. This challenge is confined (a) to the operation of the tax between the period March 1, 1951, and April 28, 1951, and (b) even in regard to this limited period, it is restricted to the imposition of the additional duty of six annas per lb. which was levied, beyond the eight annas per lb. collected from the appellants by virtue of the Finance Bill under the provisions of the Provisional Collection of Taxes Act, 1931. It would seem to be rather a strange result to achieve that the tax imposed satisfies every requirement of a "duty of Excise" in so far as the tax operates from and

after April 28, 1951, but is not a "duty of Excise" for the duration of two months before that date.

Learned Counsel conceded, as he had to, that even on the decision relied upon by him, the fact that owing to the operation of economic forces it was not possible for the taxpayer to pass on the burden of the tax, did not alter the nature of the imposition and detract from its being a "duty of Excise". For instance, the state of the market might be such that the duty imposed upon and collected from the producer or manufacture might not be capable of being passed on to buyers from him. Learned Counsel urged that this would not matter, as one had to have regard to "the general tendency of the tax" and "the expectation of the taxing authority" and to the possibility of its being passed on and not to the facts of any particular case which impeded the operation of natural economic forces.

The impediment to the duty being passed on might be due not merely to private bargains between the parties or abnormal economic situations such as the market for a commodity being a buyers' market. Such impediments may be brought about by the operation of other laws which Parliament might enact, such for instance, as control over prices. If in such a situation where the price which the producer might charge his buyer is fixed by the statute, say under the Essential Supplies Act, and a "duty of Excise" is later imposed on the manufacturer, it could not be said that the duty imposed would not answer the description of an "excise duty". Learned Counsel had really no answer to the situation created by such a control of economy except to say that it would be an abnormal economic situation. It could hardly be open to argument that a tax levied on a manufacturer could be stated not to be a "duty of Excise", merely because by reason of the operation of other laws the taxpayer was not permitted to pass on the tax-levy. The retrospective levy of a tax would be one further instance of such inability to pass on, which does not alter the real nature or true character of the duty."

4.4 Section 28 of the Customs Act, 1962 was amended by the Finance Act, 2011 to prescribe normal period of limitation as one year from the relevant date. The relevant provisions of amended section are reproduced below:

"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 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 one year 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 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) .....

Explanation 1:- For the purpose of this section, "relevant date" means –

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

(b) in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after 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."

In our view show cause notice issued within one year from the date of filing of Bill of Entry, is definitely within the normal period of limitation and demand made therein cannot be held to be hit by limitation under Section 28 of the Customs Act, 1962. Rejecting arguments similar to those advanced by advanced the appellants in respect of erstwhile Section 28, Hon'ble Apex Court has in case of *Jain Shuddh Vanaspati* [1996 (86) ELT 460 (SC)] held as follows:

"5. 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."*

4.5 It is a fact that the goods imported are nothing but Molybdenum Concentrate and appellants have declare the same as Molybdenum Ore on the Bill of Entries and the documents relating to import clearance. In view of the mis-declaration made the goods have been held liable for confiscation under Section 111(m) of the Customs Act, 1962, but not confiscated as they were not available for confiscation. Commissioner has also not imposed any redemption fine on the appellant hence we do not discuss this aspect any further as this issue of confiscation has become irrelevant. However for the acts of omission and commission leading to misdeclaration of the goods for which they had become liable for confiscation under Section 111, Commissioner has imposed penalty under Section 112(a) and we uphold the same.

4.6 The reliance placed by the Appellants on the Hon'ble Apex Court in case of Pratibha Processors and Jayathi Krishna & Co is not of any significance as we are upholding the demand of duty hence demand for interest will be sustained. For upholding the demand of interest we rely upon the following decisions.

*i. P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)]*

*ii. Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]*

*iii. TCP Limited [2006 (1) STR 134 (T-Ahd)]*

*iv. Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]*

*v. Ballarpur Industries Limited [2007 (5) STR 197 (TMum)]*

4.7 Since cross objections are only in support of the impugned order, they are not being considered further.

5.1 In view of discussions as above, appeal is dismissed and cross objections disposed off accordingly.

(Order pronounced in the open court on 10.10.2019)



**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
REGIONAL BENCH, MUMBAI**

**Customs Appeal No. 85040 of 2018**

Arising out of Order-in-Original No. 16/2017-18/Commr/NSV/CAC/JNCH, Dated:  
06.06.2017

Passed by Commissioner of Customs (NS-V), Nhava Sheva

**Date of Hearing: 26.06.2019**

**Date of Decision: 24.09.2019**

**M/s UNITED TRADERS  
C/O. PRADEEP JAIN, 370-371/2, 1ST FLOOR  
SAHI HOSPITAL ROAD, JANGPURA (BHOGAL)  
NEW DELHI - 110014**

**Vs**

**COMMISSIONER OF CUSTOMS  
NHAVA SHEVA-V JNPT, CUSTOM HOUSE  
NHAVA SHEVA, RAIGAD - 400707**

**Appellant Rep by:** Shri Vikas Sareen, Adv.

**Respondent Rep by:** Shri A P Kothari, AR

**CORAM:** S K Mohanty, Member (J)  
Sanjiv Srivastava, Member (T)

**FINAL ORDER NO. A/86702/2019**

**Per: Sanjiv Srivastava:**

This appeal is directed against order in original No 16/2017-18/Commr/ NS-V/CAC/JNCH dated 06.06.2017, of Commissioner Customs (NS-V) Nhava Sheva. By the impugned order, Commissioner has held as follow:

*"(i) I hold that the value of the goods imported by: (a)M/s United Traders (as detailed in Annexure A1), (b) M/s Blue Bird Sales(as detailed in Annexure A2), (c) M/s R S Enterprises(as detailed in Annexure A3), and (d) M/s Simplex Enterprises(as detailed in Annexure A4) are liable for rejection and re-determination as per the provisions of Customs ct, 1962 and Customs Valuation Rules, 2007. However, since the goods have already been re-exported, I do not proceed to re-determine the values. I do however, hold that for the said mis declaration of value, the impugned goods are liable for confiscation under Section 111(m) of the Customs Act, 1962.*

*(ii) The imported impugned goods by: (a) M/s United Traders (as detailed in Annexure A1), (b) M/s Blue Bird Sales(as detailed in Annexure A2), (c) M/s R S Enterprises(as detailed in Annexure A3), and (d) M/s Simplex Enterprises(as detailed in Annexure A4) are also held liable for confiscation under Section 111(d) on the ground that they were attempted to be imported in violation of the provisions of the Electronics & Information Technology Goods (requirement for compulsory registration) Order, 2012*

*(iii) The goods, other than those held liable for confiscation under Section 111(d) and 111(m) as mentioned above, and imported in the said four containers and by the aforesaid four firms, are held liable for confiscation under Section 119 of the Customs Act, 1962, which provides that any goods used for concealing smuggled goods shall also be liable for confiscation.*

*(iv) Since the goods held liable for confiscation have been released provisionally for re-export and are not available for confiscation per se, I order imposition of the following fine in lieu of confiscation under Section 125 to be appropriated from voluntary deposits made during investigation or at the time of provisional release.*

*(a) M/s United Traders: Rs 10,00,000/- (Rs Ten Lakh Only)*

*(b) M/s Blue Bird Sales: Rs 10,00,000/- (Rs Ten Lakh Only)*

*(c) M/s R S Enterprises: Rs 8,00,000/- (Rs Eight Lakh Only)*

*(d) M/s Simplex Enterprises: Rs 12,00,000/- (Rs Twelve Lakh Only)*

*The aforesaid redemption fine amount has been decided broadly keeping in mind the declared assessable value/ revised assessable value of the impugned goods sought to be illegally brought into India.*



*(v) I order imposition of following penalty on the four firms under Section 112(a) of Customs Act, 1962:*

*(a) M/s United Traders: Rs 5,00,000/- (Rs Five Lakh Only)*

*(b) M/s Blue Bird Sales: Rs 5,00,000/- (Rs Five Lakh Only)*

*(c) M/s R S Enterprises: Rs 4,00,000/- (Rs Four Lakh Only)*

*(d) M/s Simplex Enterprises: Rs 6,00,000/- (Rs Six Lakh Only)*

*The aforesaid penalty amount has been decided broadly keeping in mind the declared assessable value/ revised assessable value of the impugned goods sought to be illegally brought into India.*

*(vi) I order imposition of penalty under Section 114AA of Customs Act, 1962 for use of false and incorrect material on the said four importers:*

*(a) M/s United Traders: Rs 2,00,000/- (Rs Two Lakh Only)*

*(b) M/s Blue Bird Sales: Rs 2,00,000/- (Rs Two Lakh Only)*

*(c) M/s R S Enterprises: Rs 2,00,000/- (Rs Two Lakh Only)*

*(d) M/s Simplex Enterprises: Rs 2,00,000/- (Rs Two Lakh Only)*

*(vii) I do not impose any penalty either under Section 112(a) or 114AA on Shri Abhishek Jain, Shri Mukesh Indora, Shri Rahul Sharma and Shri Raja Ram Sahu, the proprietors of the aforesaid four importing firms on which I have already impose penalty under Section 112(a) and 114AA of Customs Act, 1962.*

*(viii) I impose penalty on the following persons under Section 112(a) for their specific acts as discussed above which have rendered the impugned goods liable for confiscation under Section 111(d) & 111(m) of the Customs Act 1962:*

*(a) Shri Jitendra Aggarwal: Rs 30,00,000/- (Rs Thirty Lakh Only)*

*(b) Shri Rajeev Singh: Rs 10,00,000/- (Rs Ten Lakh Only)*

*(c) Shri Vijay Goel: Rs 10,00,000/- (Rs Ten Lakh Only)*

*(ix) I impose penalty on the following persons under Section 114AA for their specific acts as discussed above relating to misuse of BIS certificate No R67000086 issued to Samsung India for import of impugned goods which was evidently not permissible, which have rendered the impugned goods liable for confiscation under Section 111(d) & 111(m) of the Customs Act 1962:*

*(a) Shri Jitendra Aggarwal: Rs 10,00,000/- (Rs Ten Lakh Only)*

*(b) Shri Rajeev Singh: Rs 2,00,000/- (Rs Two Lakh Only)*

*(c) Shri Vijay Goel: Rs 2,00,000/- (Rs Two Lakh Only)*

*(x) I drop the proceedings in respect of M/s Sai Dutta Shipping Agency (P) Ltd and M/s Winstar Shipping Services in so far as they relate to imposition of penalty under Section 112(a), 112(b) and 114AA of the Customs Act, 1962. However, I direct that the copy of the Show Cause Notice and this Order in Original be forwarded to the Competent Authority for action as deemed appropriate under CHALR, 2004. I drop the proceedings against Shri L Satish Mudaliar and Shri Raju Chandrakant Zinjad."*

1.2 Out of the number of persons/ parties impacted by the impugned order at present we are concerned with the appeal filed by M/s United Traders through its proprietor Mr Abhishek Jain. Appellant had filed application for early hearing on the medical grounds, which has been allowed and matter was listed for out of turn hearing for the present appellant.

2.1 We have heard Shri Vikas Sareen, Advocate and Shri A P Kothari, Additional Commissioner, Authorized Representative for the revenue.

2.2 arguing for the appellant, learned counsel submitted that-

- He was not at all involved in any of the alleged activity and it was Shri Jitender Aggarwal who had mis used their firm while keeping them under the belief and impression that genuine imports were being made. For this reason they fell into trap and invested money and allowed his firm for the purpose of import of goods.

- He was not in position to follow up with the imports made due to precarious medical condition of his father who in fact expired on 18.12.2016.

- There was no illegality attached with the imported goods. There has been true and correct declaration made in respect of the description, quantity, quality and value.

This fact is supported by the custom authority wherein it has been stated that goods were examined and found to be as per the declaration in the Bill of Entry.

- The dispute in the matter was only in respect of BIS Certificate, which allegedly did not accompany the imported goods and rather some other BIS Certificate relating to some other goods was submitted. It was for this reason that goods have been held liable for confiscation. In fact they were not aware of the requirement of production of BIS Certificate. It was Shri Jitender Aggarwal who was handling the imports and was also in touch with the foreign supplier.

- The role of the appellants in the imports was limited to that of financier and it was Jitender Aggarwal who had to see the import of goods. Jitender Aggarwal has in his statement admitted that BIS Certificate was misused by him and there has been no role of the present appellants. The appellants were themselves kept in dark about this requirement and they had acted on bonafide belief that genuine imports are being made and the profit out of the import shall be duly share with them. It came to their knowledge subsequently that Jitender Aggarwal had cheated them of their lawful money.

- During the relevant time i.e. the time of import there was confusion amongst the importers in respect of the requirement of production of BIS Certificate at the time of import. Thus the strict action by way of imposition of redemption fine and penalties is uncalled for.

- They would like to rely on the following decisions in their support

- *HBL Power Systems Ltd [2018 (362) ELT 856 (THyd)]*

- *Orion Enterprises [2019 (21) GSTL 397 (TChennai)]*

- *Kothari Foods & Fragrances Pvt Ltd [2018 (364) ELT 368 9T-Del]*

- *Varalakshmi Exports [2014 (314) ELT 257 (TChennai)]*

- On account of the acts of Shri Jitender Aggarwal, they had suffered huge losses and so much so the goods imported had to be re-exported;

- At the instance of Jitender Aggarwal they had deposited the following amounts with the custom authorities:

- Duty deposited against B/E No 4155971 date 23.12.2013 of Rs 12,47,176/-

- Demand Draft No 4729 dated 04.03.2014 for Rs 34,00,000/-.

- Demand Draft No 2321 dated 07.03.2014 for Rs 31,00,000/-.

- Bank Guarantee dated 11.12.2014 of IDBI Bank Delhi for Rs 13,96,525/- at time of re-export of goods.

- As the demand drafts were deposited through Jitender Aggarwal, the amounts so deposited by them have not been clarified to be deposited by them but have been shown to be deposited by Jitender Aggarwal.

- They had approached the custom authority seeking the refund of the amount deposited by them through Jitender Aggarwal, but the same has been denied stating that the appeal is pending before tribunal and any action will be taken as per the order of Tribunal.

- They had filed the bank accounts statement in support of their contention and also the certificate issued by the bank issuing the demand drafts, wherein it has been specifically stated that "the above mentioned Demand Drafts are made from the Account of United Traders in IDBI Bank". (Certificate dated 06.07.2019)

- In case the appeal is found sustainable on merits tribunal should in terms of Rule 40 and 41 of CESTAT Procedure Rules direct the Customs Authority for returning the amounts so deposited by them through Jitender Aggarwal as a consequential relief.

2.3 Learned Authorized Representative reiterated the findings in the impugned order.

3.1 We have considered impugned order along with the submissions made in appeal along with submissions made during the course of argument of appeal and in written submissions filed.

3.2 Undisputedly in the name of Appellants having IEC No 0513006800, Bill of Entry No 4155971 dated 23.12.2013 was filed for clearance of goods imported in Container No CRXU3427669. The goods were examined 30.12.2013 in the presence

of independent witnesses and representative of importer and proper panchnama drawn. The undisputed fact is that the goods declared by the appellants were undervalued. Table below gives the details of the goods and the value declared.

| Brand<br>Samsung | Model               | Origin   | Unit | Price | 'US\$ | Declared Value 'Rs |
|------------------|---------------------|----------|------|-------|-------|--------------------|
|                  |                     |          |      | Unit  | Total |                    |
| LED              | UA23F4003A          | Thailand | 200  | 90    | 1800  | 11,43,522          |
| LED              | UA32F4000<br>ARLXL  | Malaysia | 75   | 160   | 12000 | 8,57,641           |
| LED              | UA40F5000<br>ARLXL  | Malaysia | 100  | 240   | 24000 | 17,15,283          |
| Plasma           | PS43F 4000<br>ARLXL | Malaysia | 33   | 180   | 5940  | 4,61,220           |

The importer and the CHA representative were unable to produce the BIS Certificate in respect of the said goods. Instead of producing the certificate appellants tried to manipulate the certificate and produced some other certificate, to cover up the imports. All the irregularities in the imports were accepted by Shri Abhishek Jain, Proprietor of M/s United Traders (Appellant).

3.3 Appellants have neither in the appeal or during the course of argument contested in respect of the irregularities noticed in the imports made. They have specifically stated that they were not personally responsible for irregularities. These irregularities were caused and committed by one Shri Jitender Aggarwal. They were simply the innocent victims of the misdeeds of Shri Jitender Aggarwal and have suffered huge losses on that account. Once the fact that the goods were imported contrary to provisions of Customs Act, 1962, they become liable for confiscation under the provisions of Section 111 of the Customs Act, 1962 and the person importing such goods is liable to penalty under Section 112 of the Custom Act, 1962. Tribunal has in case *HBL Power Systems Ltd [2018 (362) ELT 856 (T-Hyd)]* laid down the law in case were goods are imported without proper BIS Certification as follows:

*"4. Considered arguments on both sides and perused the records. It is not disputed that the steel wires which were imported did not have the BIS certification required as per the Steel and Steel Products (Quality Control) Order, 2016. It is also not in dispute that in view of the general Note 2(a) of Schedule-I of the import policy framed under Foreign Trade and Development Regulations Act, 1992, mandatory BIS standards prescribed for products manufactured in India also apply to imported goods. In other words, goods which do not meet the mandatory BIS requirements cannot be imported into India. Therefore, imported goods are liable for confiscation. As per Section 125 of the Customs Act, whenever goods are confiscated the adjudicating authority has to give an option of redemption to the importer in all cases except in respect of prohibited goods where the adjudicating authority may or may not give the option of redemption. In this case, the adjudicating authority has given the option of redemption with an additional condition that the goods after redemption should be re-exported. Now the question which arises is whether after giving option of redemption, the adjudicating authority can also add an extra condition that the goods should be re-exported. It is argued on behalf of the appellant that no such condition can be imposed, while respondent argued that such condition can be imposed as per the existing case laws. The appellant relied on the case of *Amba Lal v. Union of India* to support his case. The relevant para no. 12 of this judgment is reproduced as follows :*

*"12. It is then contended that the Collector of Central Excise had no jurisdiction to impose conditions for the release of the confiscated goods. The Collector of Central Excise in his order says, "In addition the import duty leviable on all these items together with other charges, if any payable, should be paid and necessary formalities gone through before the goods can be passed out of Customs Control." In *Shewpujanrai Indrasanrai Ltd. v. Collector of Customs*, 1959 SCR 821, a similar question arose for consideration of this Court. There by an impugned order the Collector of Customs imposed two conditions for the release of the confiscated goods, namely, (1) the production of a permit from the Reserve Bank of India in respect of the gold within four months from the date of despatch of the impugned order, and (2) the payment of proper customs duties and other charges leviable in respect of the gold within the same period of four months. This Court held, agreeing with the High Court, that the Collector of Customs had no jurisdiction to impose the said two conditions. The learned Additional Solicitor General concedes that the said decision applies to the present case. We do not, therefore, express any view whether that decision can be distinguished in its application to the facts of the present case. On the basis of the*

*concession we hold that the conditions extracted above, being severable from the rest of the order, should be deleted from the said order of the Collector of Central Excise."*

3.4 The decisions relied upon by the appellants do not advance their case. In the present case the goods were seized and then provisionally released. After provisional release of the goods they have been re-exported. In such a situation the goods are liable for confiscation as has been held by the Apex Court in case of *Weston Components Ltd [2000 (115) ELT 278 (SC)]* wherein following law laid down:

*"It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent authority. It is an admitted fact that the goods were released to the appellant on an application made by it and on the appellant executing a bond. Under these circumstances if subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine."*

3.5 Appellants have in their appeal and submissions contended that they have made certain deposits during the course of investigation of the case through Shri Jitender Aggarwal. They have claimed that department should be directed to refund the amount deposited by them. We are not in position to pass any order on this request by the appellants, as the issue sought to be raised by the appellant is not the issue decided by the impugned order. Secondly it is for the appellants to establish their claim to the money deposited and subsequent refunds if any due before the Custom authorities and seek refund from them.

4.1 In view of discussions as above, appeal filed by the appellants is dismissed.

(Order pronounced in the open court on 24.09.2019)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
WEST ZONAL BENCH, MUMBAI  
REGIONAL BENCH  
COURT NO. II**

**Customs Appeal No. 87305 of 2013**

Arising out of Order-in-Appeal No. 82(Gr.IV)/2013 (JNCH)/IMP-78, Dated:  
31.01.2013

Passed by Commissioner of Customs (Appeals), Mumbai-II

**Date of Hearing: 10.02.2020**

**Date of Decision: 10.02.2020**

**M/s VIJAYSHREE ALLOYS PUNE PVT LTD  
PLOT NO. 39, B.U. BHANDARI INDUSTRIAL ESTATE  
A/P. SANASWADI, TAL. SHIRUR, DIST. PUNE - 412208**

**Vs**

**COMMISSIONER OF CUSTOMS (IMPORT), NHAVA SHEVA  
JAWAHARLAL NEHRU CUSTOM HOUSE, POST URAN, DISTRICT-RAIGAD  
NHAVA SHEVA - 400707**

**Appellant Rep by:** Shri Stebin Matthew, Adv.

**Respondent Rep by:** Ms Trupti Chavan, AR

**CORAM:** S K Mohanty, Member (J)  
Sanjiv Srivastava, Member (T)

**FINAL ORDER NO. A/85689/2020**

**Per: S K Mohanty:**

Briefly stated, the facts of the case are that the appellant had filed the Bill of Entry No. 4693153 dated 20.09.2011 for clearance of "Aluminium Scrap Tread" under CTH 76020010. The value declared for the subject goods was Rs.27,20,834/- and duty leviable was assessed to be Rs.4,09,033/-. The said Bill of Entry was ordered for 2nd check basis appraisalment and during physical examination, the department found that 50% of the goods (weighing 13.5 MT) were aluminium pipes (old and used) of 6 feet length and were serviceable. The said pipes fall under the restricted category of goods provided under para 2.17 of FTP, 2009, which requires Special Import License (SIL). Admittedly, the appellant did not submit such license at the time of importation of the goods. The matter was adjudicated vide order dated 24.10.2011, wherein the impugned goods were ordered to be confiscated under Section 111 (m) of the Customs Act, 1962 and option to redeem the same was provided on payment of redemption fine of Rs.4,50,000/-. Besides, the said order also imposed penalty of Rs.1,00,000/- on the appellant under Section 112 (a) ibid. Differential duty amount of Rs.2,05,207/- was also demanded from the importer/appellant. On appeal, the learned Commissioner (Appeals) vide the impugned order dated 31.01.2013 has upheld the assessment order and rejected the appeal filed by the appellant. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Heard both sides and perused the records.

3. The case of the department is that the declaration made in respect of the goods as per the Bill of Entry was different than the goods actually imported by the appellant inasmuch as, out of the total quantity of goods imported by the appellant, goods weighing 13.5 MT were found to be old and used pipes, classifiable under CTH 7608 with 10% BCD. Since, correct information was not furnished in the import documents, the transaction value was appropriately rejected under Rule 12 of the Customs Valuation Rules, 2007 and the value was redetermined considering the same as serviceable goods. We find that the appellant had not submitted any plausible evidence either before the authorities below or the Tribunal that the goods in question were corresponding to the declaration made in the Bill of Entry. Thus, we are of the considered view that the appellant is exposed to the consequences provided under the statute for payment of differential duty, fine and penalty.

Therefore, the orders passed by the authorities below are sustainable and cannot be interfered with at this juncture.

4. In view of above, we do not find any merits in the appeal filed by the appellant. Accordingly, same is dismissed.

(Operative part of the order pronounced in the open court)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI  
COURT NO. IV**

**Customs Appeal No. 361 of 2010**

Arising out of Order in Appeal No. 10/D-I/2010, Dated: 30.04.2010  
Passed by Commissioner (Appeals), Central Excise & Central Goods and Service  
Tax, New Delhi

**Date of Hearing: 07.10.2019  
Date of Decision: 15.01.2020**

**M/s A V AGRO PRODUCTS LTD  
51/58A, SHAKKAR PATTI, KANPUR UP**

**Vs**

**COMMISSIONER OF CUSTOMS  
CENTRAL EXCISE & CENTRAL GST, NEW DELHI  
C R BUILDING, I P ESTATE, NEW DELHI - 110002**

**and**

**Customs Appeal No. 362 of 2010**

Arising out of Order in Appeal No. 10/D-I/2010, Dated: 30.04.2010  
Passed by Commissioner (Appeals), Central Excise & Central Goods and Service  
Tax, New Delhi

**M/s GENEX FOODS PVT LTD  
INDUSTRIAL AREA, BULANDSHAHR ROAD  
GHAZIABAD (UP)**

**Vs**

**COMMISSIONER OF CUSTOMS  
CENTRAL EXCISE & CENTRAL GST, NEW DELHI  
C R BUILDING, I P ESTATE, NEW DELHI - 110002**

**With**

**Customs Appeal No. 363 of 2010**

Arising out of Order in Appeal No. 10/D-I/2010, Dated: 30.04.2010  
Passed by Commissioner (Appeals), Central Excise & Central Goods and Service  
Tax, New Delhi

**SHRI ROHIT AGGARWAL  
DIRECTOR, INDUSTRIAL AREA, BULANDSHAHR ROAD  
GHAZIABAD (UP)**

**Vs**

**COMMISSIONER OF CUSTOMS  
CENTRAL EXCISE & CENTRAL GST, NEW DELHI  
C R BUILDING, I P ESTATE, NEW DELHI - 110002**

**Appellant Rep by:** Mr R Santhanam, Adv.

**Respondent Rep by:** Mr K Poddar, AR

**CORAM:** Rachna Gupta, Member (J)

**FINAL ORDER NOS. 50155-50157/2020**

**Per: Rachna Gupta:**

1. This order disposes off three appeals, order under challenge being commo. The present appeal was earlier disposed of as rejected vide *final order no. 52153-52155/2018 dated 5.6.2018*. An application praying for restoration of appeal as filed by the appellant was also dismissed vide order of this Tribunal dated 21 February 2019. However, Hon'ble High Court of Delhi vide order dated 22.5.2019, has set aside both the said orders restoring the impugned appeal and directing this Tribunal for a fresh decision in accordance with law. The appeal is accordingly heard.

2. Relevant factual matrix for the disposal of the appeal is as follows:

That the appellant herein is involved in import of Crude Palm Oil (hereinafter called as CPO) at concessional rate of Customs Duty while availing the benefit of Sl. No. 30 of Notification no. 21/2002-Cus dated 1.3.2002 as amended by notification no. 20/2004-Cus dated 16.1.2004. The said notification extends the concessional rate of customs duty of 20% ad valorem provided the imported CPO is meant for use in manufacture of soap. The Department, however, gathered an intelligence that M/s. Pioneer Soap and Chemicals are misusing the exemption extended vide the said notification by violating the condition thereof as they are diverting the CPO to the open market instead of using the same for the given purpose. During investigation, Department observed that the appellant obtained the Central Excise Registration on 28.12.2004 and thereafter under six BOEs imported 1371.878 MTs of CPO from January 2005 to August 2005 against concessional rate of duty of 20% ad valorem availing thereby total exemption of customs duty of Rs.1,27,72,140/-. However, the said imported CPO was never used by them for manufacturing soaps as was prescribed under the said notification but was sold in the open market. Thus alleging the evasion of the aforesaid amount of customs duty that a show cause notice no. 1061/24 dated 24.4.2007 was served upon the appellant firm i.e. M/s. Pioneer Soap & Chemical, proposing the recovery of the aforesaid amount of duty along with interest at appropriate rate and the proportionate penalty. The show cause notice was also served upon the proprietor of aforesaid firm, Sh. Lalit Goyal, alleging that he has fabricated various other documents by making false entries therein. Those fabricated documents are alleged to have been submitted to the Assistant Commissioner for obtaining the order of release of imported CPO. Alleging that the order of release after furnishing bonds and security as obtained by way of fraud, suppression and wilful misstatement that the penalty was proposed upon Mr. Lalit Goyal. The show cause notice was also served upon M/s. Genex Consultant Pvt. Ltd., M/s. A V Agro Products Pvt. Ltd. and M/s. HG Oil Carriers for knowingly and willingly dealing with imported CPO in violation of the condition of the impugned notification thereby causing the evasion of the impugned customs duty. The show cause notice also proposed the entire amount of imported CPO to be confiscated. The said proposal was confirmed vide the order in original no. 10/D-I/2010 dated 30.4.2010. Being aggrieved thereof that the impugned appeal has been filed.

3. Learned counsel for the appellant made following submissions:

i. The allegations against the main assessee i.e. Pioneer Soap & Chemicals was that it had imported CPO and paid concessional rate of duty of 20% ad valorem as per Notification no. 21/2002-Cus dated 1.3.2002 as amended by Notification no. 20/2004-Cus dated 16.1.2004 and that the goods had been diverted for manufacture of soaps, detergents etc. instead of edible oil by Shri Lalit Goyal due to which he was called upon to pay differential duty on the imported CPO. Shri Lalit Goyal was arrested and was forced to pay the differential duty of Rs. 1,27,72,140/- after which he approached the Settlement Commission and got the case settled by the Settlement Commission Principle Bench, New Delhi vide a *final order No. F-829/830/Cus/09/SC(PB) dt. 24.2.2009*. The Settlement Commission also imposed a penalty of Rs. 8 lacs on Shri Lali Goyal and Rs. 10,000/- each on Shri Mahesh Kumar, Shri Sunil Goyal, Shri Brij Mohan, H.G. Oil Carriers, Shri Harjinder Singh and Lokpriya Traders and closed the case. Therefore, the question of the Commissioner of Excise in Delhi conducting parallel or other proceedings in regard to the same case which is already settled by the Settlement Commission does not arise as he has no jurisdiction whatsoever against A.V. Agro Products in Kanpur and Genex Foods Pvt. Ltd. in Ghaziabad and Shri Rohit Agarwal, Director of Genex Foods Pvt. Ltd. in Ghaziabad. The excise Commissioner Delhi is denied to be proper officer in terms of Section 2(34) of Customs Act and as such is denied to have any jurisdiction to issue the show cause notice. The impugned show cause notice is therefore prayed to be barred by jurisdiction. Learned counsel has laid emphasis upon the decision of the Supreme Court in case of *CC Vs. Sayed Ali 2011 (265) ELT 17 (SC)* which was subsequently followed by this Tribunal in the case of *Teracom Ltd. Vs. CCE (2016) 339 ELT 272 (Del)*

ii. The law is well settled that when once the case of the main assessee is settled by the Settlement Commission or other competent authority under the KVSS, the co-noticees do not even have to make an application and the case of every co-noticee stands automatically closed as held by the Supreme Court in *Union of India Vs. Omkar S. Kanwar (2002) 145 ELT 266 (SC)* and further emphasised by the Delhi



High Court in *Lesag HBB (I) Ltd. & Others. Vs. CC* (2017) 346 ELT 549 decided on 3.11.2016 in W.P. (C) No. 4819/1999 which are binding.

iii. While submitting on merits it is mentioned that there are no statements given by three of the appellants and they have been proceeded against only on the basis of alleged statements of driver/transporter of the CPO that too were taken under coercion. It is further submitted that owner of Pioneer soap & Chemicals had not stated that he had supplied quoted goods to the appellant nor there is any other evidence on record. These witnesses were prayed to be cross examined but the request of the appellant was not considered. It is submitted that failure to grant cross examination to the appellants has resulted in denial of natural justice to the appellants and the alleged statements of the driver/transporter/the proprietor of the main noticee cannot be relied upon to draw the adverse inference against the appellant. Above all, there is no compliance of section 9D of the Central Excise Act and section 138B of the Customs Act. Following case laws has been relied upon:

a. *Jindal Drugs Pvt. Ltd. Vs. Union of India* (2016) 340 ELT 67 (P&H) b. *Arya Abhushan Bhandar Vs. Union of India* (2002) 143 ELT 25 (SC);

c. *CCE Vs. Parmarth Iron Pvt. Ltd.* (2010) 260 ELT 514 (All.);

d. *Swadeshi Polytex Ltd. Vs. Collector* (2000) 122 ELT 641 (SC);

e. *JK Cigarette Ltd. Vs. Collector* (2009) 242 ELT 189 (Del.)

iv. The learned counsel has further justified the stand on merits by submitting that the appellant have not in any manner dealt with alleged offending goods nor had done anything as importer or exporter or buyer or seller of offending goods so as to attract section 112 (B) of the Customs Act. The decision in the case of *Him Logistics Pvt. Ltd. Vs. Principal Commissioner* (2016) 336 ELT 15 (Del.) of this Tribunal has been impressed upon. With these submissions the order under challenge is alleged to have ignored the submissions and the fact that there is no evidence to proceed against the appellants. Order is accordingly prayed to be set aside and appeals are prayed to be allowed.

4. While rebutting the respective arguments the Department has submitted as follows:

i. As far as jurisdiction of Excise Commissioner as has been objected, learned DR has submitted that when imported goods are not used as per the Certificate of Registration given under Rule 3(2) of Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules 1996, Assistant Commissioner having jurisdiction over the factory shall have jurisdiction to issue notice for recovery of differential duty under Rule 8 *ibid* and not the Assistant Commissioner of Customs at the port of importers under Rule 5 *ibid*. Decision of this Tribunal in the case of *Samtel Colour Ltd. Vs. Collector of Central Excise reported in 2000 (126) ELT 1256 (Tri)* has been impressed upon with the mention that the said judgment has been upheld by the Hon'ble Supreme Court of India *vide* its judgement in the case of *Samtel Colour Ltd. Vs. Collector 2006 (196) ELT A 145 (SC)*. The said decision has subsequently been reaffirmed in the case of *Cosmo Ferrites Ltd. Vs. Commissioner of Central Excise reported in 2015 (318) ELT A157 (SC)*.

ii. The proceedings against the co-noticees who do not prefer any application before Hon'ble Settlement Commission cannot come to a suo moto halt. The immunity which got available to the applicant before Settlement Commissioner including the main noticee cannot be extended to the appellants herein. The learned DR has relied upon the decision in the case of *Mamta Garg Vs. CCE Noida 2018 (359) ELT 77 (Tri-Del)* and on another decision in the case of *Shri Naklank Ltd. Vs. CESTAT Ahmedabad 2019 (365) ELT 407 (Guj.)* this sole argument of automatic immunity in their favour due to the decision of Settlement Commission in favour of main noticee and seven other co-noticees. Despite that the Settlement Commission, itself has given liberty to the Department to proceed against the remaining co-noticees.

iii. The allegation of no opportunity of being heard, as raised by the appellants and that the denial of cross examination of the witness is denied to be the violative of principles of natural justice, as is alleged. It is submitted that many opportunities of hearing were given to the appellants. They were duly informed about the impugned evidence documentary as well as oral as obtained against them but they did not opt to avail the said opportunity. The argument of any such opportunity being denied is therefore not sustainable. With respect to the grievance about any opportunity not being given for cross examination, the decision in the case of *Silicone Concepts International Pvt. Ltd. Vs. Principle Commissioner ICD TKD New*

*Delhi vide final order no. 50963/2019-CESTAT*, New Delhi has been relied upon. With respect to the scope of Section 9 D it is submitted that it has already been settled that confessional statements are out of the ambit of section 9D. Otherwise also when noticee's statement amounts to confessions, he cannot be compelled to be cross examined and thus no violation of principle of natural justice can be alleged. It is submitted by the Department that there has been ample evidence against the appellant to have sufficient knowledge about no washing soap to ever being manufactured from this imported CPO by M/s. Pioneer Soap & Chemicals, nor there has been any purchase by the present appellant of the soap. All documents of transport have been proved to be forged. Hence, the penalties have rightly been imposed upon the appellants. Justifying the order under challenge the appeal in hand is prayed to be dismissed.

5. After hearing parties and perusal of entire records my opinion to the respective arguments is as follows:

**A. Immunity to the appellants due to the order of Settlement Commissioner in favour of the main noticee:**

Show cause notice bearing No.15.10.50 1062 dated 24th April, 2007 was issued to 13 Noticees alleging the misuse of the exemption extended vide Sl. No.30 of Notification No.21/2002-CU by importing the crude palm oil at concessional rate at Customs duty and diverting the same to open market instead of using the same for the given purpose.

The main beneficiary was the first applicant M/s. Pioneer Soap & Chemicals. No doubt vide order dated 24.02.2009 the application of Noticee. Sl.No.1,6,5,8,10 & 13 of the show cause notice under Section 127 B of the Customs Act, 1962 was disposed of thereby imposing penalty upon 6 of the said applicants to the extent as mentioned in the said order. The argument put forth by the Revenue with respect to para 14 of the said order is perused as correct. A perusal of that order dated 24th February, 2009 shows that penalty was imposed upon six of the applicants and the Settlement Commission has given liberty to the Revenue to take action as deemed fit in respect of the other co-Noticees of the impugned show cause notice. Further, perusal also shows that Noticees No.7, 9, 11 & 12 of the show cause notice were also found to be fake persons existing in the fake documents prepared at the instance of the main Noticee. The remaining three Noticees i.e. at Sl.No.2, 3 and 4 are the appellant herein. It is observed that three of them have not merely been found to be a better or conspirator for the illegal act adjudicated against the other Noticees but they were found committing the offence of unauthorized transportation of the impugned crude oil with the sole intention of getting illegal benefit of Sl.No.30 of Notification No. 21/2002-CU.

No doubt the case law relied upon by the appellants holds good that once the immunity from penalty has been issued against the main Noticee by the Settlement Commission, the co-noticees enjoy the blanket immunity if the matter is settled under KVS Scheme. But this is also a settled principle of jurisprudence that merits of the case against the co-Noticees have to be examined separately and if and only if the co-Noticees are found to commit the same offence as that committed by the main Noticee, the Settlement mechanism provides for settlement of entire case as a whole. Tribunal, Delhi has clarified the situation further in Mamta Garg (Supra) case that where the act of Noticees is separately and distinctly liable for penal consequences, the co-Noticee are not to automatically get penalty set aside on the ground that the case of main Noticee has been settled by the Settlement Commission.

As already observed above, the act committed by three of the present appellants is an act in addition to that as were committed by the remaining Noticees the appellants cannot be entitled for the blanket immunity. Otherwise also the immunity from prosecution has not been granted even to Mr. Lalit Goyal, the Proprietor of main Noticee M/s. Pioneer Soap and Chemicals. The penalty has simultaneously been imposed upon the remaining Noticees/ applicants of 127 B Customs Act. In addition, the Settlement Commissioner has granted liberty to the Revenue to take the appropriate action against the remaining Noticees i.e. the appellants herein. Hence, the benefit of KVS Scheme cannot suo moto be extended to the appellants. I draw my support from the decision of Hon'ble High Court of Gujarat in the case of Shri Naklank Ltd. (Supra). It was held that it is the assessee who applies for settlement alone whose application would be considered and either granted or rejected in the terms of settlement, fulfilment of such terms by the applicant and the resultant grant of immunity would be only in relation to assessee,

who applied for the settlement. There is no warrant under the statutory provision that upon one assessee applying for settlement, such settlement being granted and terms of settlement being fulfilled. Any other assessee even if he hopes to be co-noticee can avoid further adjudication of this case. It was clarified that Department can still proceed against co noticee who was facing only notice on penalty.

### **B. Jurisdiction of Central Commissioner:**

The basic allegation of the Department is that the importer of crude palm oil at concessional rate of customs duty of 20% ad velorem has misused the exemption extended vide Sl. No. 30 of notification no. 20/2004-Cus as amended vide 20/2004-cus dated 16.1.2004 by diverting the same to open market instead of using the same for the purpose mentioned in the notification i.e. for manufacturing soap. This allegation clarifies that the verification of the compliance of the impugned notification involves customs as well as the excise, as it is the case of import as well as diversion of the imported goods in the local market. Samtel Colour Ltd. (Supra) has already clarified the impugned situation by holding that imported goods or not use as per certificate of registration under Rule 3(2) of Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules 1996, Assistant Commissioner having jurisdiction over his factory shall have jurisdiction to issue notice for recovery of differential duty and the Assistant Commissioner of Customs at port of importation shall have no role at the import stage. In the present case also under Rule 3 of Customs Rule, the importer intending to avail Cenvat Credit Rule and duty was required to have acquired registration from Assistant Commissioner/Department Commissioner Central Excise having jurisdiction over his factory. All details indicated the quantity of goods to be imported the applicable notification the port of importation and giving an undertaking have to be furnished along with application before the Assistant Commissioner/Deputy Commissioner of excise only as is required under Rule 4 of Customs Rule. It is thereafter that the Assistant Commissioner or Deputy Commissioner of Customs can allow the benefit of exemption notification on the basis of the Certificate to be given by Assistant Commissioner/Deputy Commissioner Excise as stand clarified from Rule 5 of Customs Rule. Rule 7 thereof in addition require the importer to maintain the simple account of imported goods and consumption thereof for the information purpose for use as and when required by the officer of Central Excise. These Rules makes it abundantly clear that Commissioner Central Excise is a competent officer to issue invoices.

### **C. Personal hearing/cross examination:**

It is apparent from the order under challenge that personal hearing was given to these appellants initially on 23.04.2007. However, none of these appellants appeared. It is on 28.05.2008 that appellant Sh. Rohit Aggarwal and M/s. Genex Food Pvt. Ltd. that too vide their letter dated 27.5.2008 made their submissions denying the allegations of the show cause notice and requesting for the relied upon documents as well as the cross examination of the witnesses. By that time i.e. on 27.5.2008 M/s. HG Oil Carriers noticee no. 5 (there were 13 noticees in the present case and 7 noticee of them i.e. main noticee along with no. 5, 6, 8, 10, 12 & 13 have already applied to the settlement commission, penalty against noticee no. 7, 9 & 11 was already dropped observing them to be fictitious firms).

M/s. Genex Consultant Pvt. Ltd. & Sh. Rohit Agarwal, Director thereof, were being duly heard by the Adjudicating authority below on 26.10.2009 and appellant M/s. A V Agro Products chose to put forth the defence vide their letter dated 20.10.2009. It is quite apparent from the order under challenge that despite ample effective opportunities of personal hearing being given, the appellants have not properly put forth their defence. They had rather adopted a strategy of seeking adjournments and therefore were noticed absolutely non cooperative by the adjudicating authority below. It is thereafter that the matter was decided based on the facts on record and the written reply received by the respective noticee. These observations are sufficient to hold that there is no denial of opportunity of being heard. The grievance of violation of principle of natural justice on this account is therefore not sustainable. As far as the plea of denial for cross examining the witnesses is concerned as already observed there was rather non cooperation on part of the appellant. Irrespective that cross examination is the key for fair trial so as to dug out the actual truth but the same cannot be claimed as a matter of right or as a statutory mandate specifically when appellant were not even keen to submit their defence. Hence, their grievance on this aspect is also hereby rejected.

As far as applicability of section 9D of Excise Act/138B of Customs Act as rightly observed by the adjudicating authority that the statement recorded were more in the nature of confession. The same cannot be the scope applicability of section 9D. I draw support from Silicone concept (supra) as is emphasised by the Department.

**D. Merits of the present case:**

Lastly, coming to the merits, I observe from the record, that there were reports proving that M/s. Pioneer Soap and Chemicals, the main noticee/noticee no. 1 have issued fake invoices in the name of fictitious firms, such as M/s. Ashtuosh Traders, noticee no. 7, M/s. Kamakhya, noticee no. 9, M/s. N.K. Enterprises, noticee no. 11 showing manufacture and clearances of the soap from CPO imported by them illegally for taking exemption under impugned notification and diverting the impugned CPO to noticee no. 2 to 4 without using the said imported goods in manufacture of soap i.e. for the declared intended use. Otherwise also the said main noticee has already acknowledged the guilt by approaching before the Settlement Commission. Statement of Shri Harinder Singh, Partner of M/s. HG Oil and carriers, (noticee no. 5) has extended sufficient corroboration to the evidence against the present appellants as was deposed by the main noticee and as is apparent from the various documents recovered during the investigation as follows:

i. That, out of 53 tankers used in all, 25-26 tankers were diverted to M/s. Genex Consultant Pvt. Ltd. of Ghaziabad 7-8 tankers were off loaded in the factory of the noticee no. 1 and the CPO from the remaining tankers was shifted by the noticee No. 1 to other tankers of lesser capacity as he declined the request of the noticee to transport the CPO of those tankers to Punjab since his tankers did not have the road permit for Punjab;

ii. That, for transporting the CPO to Ghaziabad and Kanpur, the noticee's employer usually came with Form ST-31, a Bill of some concern and mis-describing the CPO as "Rice Bran Oil" and GR of some other concern. The said employer used to travel in the tanker and facilitate the Sale Tax clearance at the UP Border;

iii. On the basis of registration numbers of tankers used for transporting the CPO from the ports of importation and the date of arrival thereof reflected by the noticee no. 1 in their receipt register, copies of Forms ST31 issued by M/s. Genex Consultant Pvt. Ltd. were collected from the Sales Tax Authorities of Ghaziabad. A scrutiny of Forms ST-31 so collected and the Noticee's CPO receipt register.

This evidence proves that the various tankers which arrived at the factory of noticee no. 1 at different dates during the relevant period had transported some or the other quantity of CPO under respective GRs and form ST 31 of M/s. Genex Foods. This receipts and ST 3 returns are corroborating the statement of Shr. Harjinder Singh of M/s. H.G. Oil Carriers against 3 of the appeals. Despite this evidence, the Director of M/s. Genex Foods Pvt. Ltd., Sh. Rohit Agarwal (one of the appellant) opted to not to appear for rebutting the said evidence but to send a simple letter alleging the show cause notice to be illegal. The statements on record are in due corroboration of the documents which sufficiently establishes that appellants were knowingly dealing with CPO imported by M/s. Pioneer Soap and Chemicals in a clandestine and illegal manner, thereby making the said imported CPO liable for confiscation. As far as M/s. A.V. Agro Products (noticee no. 4 of one of the appellant herein) is concerned, they also opted to reply vide letter dated 11.7.2007 instead of joining the personal hearing. The tankers containing CPO as were diverted to M/s. Genex Food Ltd. similarly were diverted to M/s. A V Agro. The receipt register along with respective ST 31 form are available highlighting the involvement of M/s. A V Agro as well as in similar manner as that of M/s. Genex Food Ltd.

It was observed that for transporting CPO to Delhi the bills of M/s. Venkuth Sales Corporation, Trinagar Delhi as well as of GRS of M/s. Jaspreet Road Lines of Punjabi Bagh, New Delhi were used and that of M/s. NC Traders, Mayur Vihar, Delhi were used. The investigation revealed that no such firm was found existing at the given address. Except that address of M/s. Jaspreet Road Lines were found to be that of M/s. HG Oil carriers. This finding again when read in light of Sh. Harinder Singh that GR 3 were handed over to him by Sh. Lalit Goyal, proprietor of M/s. Pioneer Soap and Chemical establishes the clear nexus between all the co-noticees for the alleged violation of the impugned notification including the appellant herein.

6. In view of the entire above discussion, I do not find any infirmity in the order under challenge when a penalty has been imposed upon three of the appellants herein under section 112 B of the Customs Act. The order under challenge is therefore upheld. Three of the appeals accordingly stand dismissed.

(Order pronounced in the open court on 15.01.2020)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
WEST BLOCK NO.2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-110066  
COURT NO.IV**

**Customs Appeal No.53498 of 2014**

Arising out of the Order-in-Appeal No. CC (A)/CUS/ICD/73/2014, Dated: 17.2.2014  
Passed by The Commissioner of Customs (Appeals), New Custom House, New Delhi

**Date of Hearing: 10.1.2018**

**Date of Decision: 10.1.2018**

**COMMISSIONER OF CUSTOMS  
NEW DELHI (ICD, TKD)**

**Vs**

**M/s DAXEN AGRITECH INDIA PVT LTD**

**Appellant Rep by:** Shri R K Majhi, Authorized Representative (DR)

**Respondent Rep by:** Shri B B Sharma, Adv.

**CORAM:** S K Mohanty, Member (J)

B Ravichandran, Member (T)

**FINAL ORDER NO.50102/2018**

**Per: B Ravichandran:**

The Revenue is in appeal against order dated 09/04/2014 of Commissioner (Appeals), New Custom House, New Delhi. The dispute in the present case is regarding correct classification of bulk Reishi Gano Powder, bulk Ganocelium Powder imported by the respondent. The claim of the respondent is to classify the product as Ayurvedic Proprietary Medicine under heading 30039011 claiming the benefit of Notification 53/2011 (Sl. No. 363). The Revenue did not agree with the same and intended to classify the product as food supplement under CTH 21069099. The Original Authority held against the respondent. On appeal, by the impugned order, the Commissioner (Appeals) held that the classification will be as claimed by the respondent under Heading 30039011. Aggrieved by this, the Revenue is in appeal.

2. The learned AR elaborating the grounds of appeal submitted that the very same products now in dispute were examined for classification by the Tribunal, Chennai in the case of DXN Manufacturing (India) Pvt. Ltd. The Tribunal held that the product should be classified as miscellaneous food supplement under heading 2108 of the Central Excise Tariff, as it was existing during the relevant time. The assessee took the matter to the Hon'ble Supreme Court. The Apex court vide order dated 07/08/2015 in CA No. 1215 of 2006 directed the Tribunal to examine the matter afresh. A direction was given for fresh examination after considering all the evidences that are to be submitted by the assessee. Thereafter, the Tribunal again decided the matter issuing a final order No. 42811-42821 of 2017 dated 08/11/2017. All the evidences and submissions made by both the sides have been examined in detail and it was concluded that the products, which are identical to the one now in dispute in Delhi, were to be classifiable under CETH 2108.99. This is a miscellaneous heading under edible preparation, not elsewhere specified or included. The learned AR drew our attention to specific finding and the ratio adopted by the Tribunal in the said order with reference to identical product of Ganoderma, Reishi Gano, Ganocelium. He further submitted that the Tribunal followed the principles laid down by the Hon'ble Apex Court dealing with dispute of classification between competing entries of either Ayurvedic Proprietary Medicine or food supplement. A detailed examination as made by the Tribunal, Chennai is squarely applicable to the present dispute. He further submitted that the recognition of the respondent/assessee for the product now in question by the Ayush Authorities and Drugs and Cosmetics Authorities by itself will not be the guiding principle by classifying under Custom Tariff. He submitted that the classification under Custom Tariff should be guided by the statutory entries and the explanatory notes including HSN notes. The parameters as laid down in other legal authority can be persuasive value only.

3. The learned Counsel appearing for the respondent strongly contested the appeal by the Revenue. He submitted that though the products examined by the Tribunal, Chennai are identical to the one now under dispute, certain crucial supporting evidence have not been submitted/examined before arriving at the said decision. He strongly pleaded that they have the evidences to make the distinction from the findings recorded by the Tribunal,

Chennai on the similar product. It is his submission that the product under import are recognised by the State Authorities/ Ayush Authorities and were duly licenced for manufacture and distribution. Further the ingredients of the product under import were indicated in the authoritative text/granth as explained by the Drug Authorities. Further he relied on the HSN Note 16 which he submitted has not been fully reproduced by the Tribunal in Chennai. In other words, it is the submission of the learned Counsel for the respondent that in para 13.2 of the order of the Chennai Tribunal, the full HSN note has not been reproduced. It is submitted that the crucial aspect is that "similar preparations, however, intended for prevention or treatment of diseases or ailments are excluded (Heading 30.30 or 30.04)". He submits the products under import are for prevention of identified disease and are accordingly labelled. These products are in the market as Ayurvedic medicaments and as such the impugned order is correct in classification as Ayurvedic Medicaments. He also submitted that case laws relied upon by the Tribunal, Chennai did not fully support the case of the Revenue. In fact, the principle that the product as identified in the market should form basis for classification is not fully appreciated by the Revenue.

4. The learned Counsel further submitted that they have the product certified as drug after due clinical trial. The learned Counsel for the respondent pleaded that the ratio of the order of Chennai Tribunal should not be applied to them.

5. We have heard both the sides and perused the appeal record. The first point both the sides agree, the products under examination before us are the same as before the Tribunal, Chennai. As per direction of Hon'ble Apex Court such detailed order has been issued on 08/11/2017. Now the only serious contention of the respondent is that the ratio of the decision by the Tribunal, Chennai will have no application to the present case. Towards this end, the learned Counsel for the respondent submitted various points narrated above. We have carefully considered the appeal records as well as the decision of the Tribunal in DXN Manufacturing (India) Pvt. Ltd. (supra). The relevant portions of the order of the Tribunal is reproduced below for better appreciation :-

*"9.4 Accordingly, on the lines directed by Hon'ble Apex Court, we intend to analyze issues relating to these appeals. The main thrust of the appellant's contention is that the product Reishi Gano (referred to as RG) and Ganocelium (referred to as GL) are Ayurvedic Medicaments as accepted by Drug Controller and that they satisfy the twin tests laid down in the decision of Richardson Hindustan Ltd. Vs CCE Hyderabad - 1988 (35) ELT 424 (Tribunal) (maintained by Hon'ble Supreme Court in 1989 (42) ELT A100 (SC), namely, (1) product should be known as medicament in the common parlance (2) ingredients should be mentioned in Ayurvedic text books. Various documents have been submitted by appellant to justify their stand that the impugned goods are classifiable as Ayurvedic medicaments and Ayurvedic text books mention mushrooms in generic category of Bhuchatra. According to appellants, these documents would establish that the products are Ayurvedic medicaments which merit classification under Chapter 3003.39.*

*10. The twin test laid down by the Hon'ble Apex Court in the Richardson Hindustan case judgment cited by the Ld. Advocate for the appellant has indeed laid down the following tests to justify classification as product under Ayurvedic Medicament under Chapter Heading 3003 :*

*(i) that the product should be known as medicament in the common parlance and,*

*(ii) the ingredients should be mentioned in Ayurvedic text books.*

*We therefore intend to subject the impugned products to these two tests. Whether the product is known as APM, a medicament or for that matter, in any common parlance.*

*11.1 Though strong arguments and reliance on above discussed documents are advanced by the Learned Counsel to contend that the products are Ayurvedic Proprietary Medicines, on perusal of the label of the product we cannot find anything suggesting so. Bottles of the products GL were placed before us by Ld. Sr. Advocate. For ready reference, a scanned copy of the bottle label is reproduced below:*

*This space is purposely put blank.*

*The label indicates the product to be an Ayurvedic Proprietary Medicine. It is shown that each capsule contains Chatrakh and Shiitake. The dosage is mentioned as one capsule three times daily. The label however does not indicate that it would cure any particular disease. The label also does not indicate that the capsule is to be taken for any particular symptom. Label on a product is the basis which has to satisfy the first test of common parlance, since, it is the label which conveys to the customer the disease that can be cured using the medicament.*



Merely by mentioning it as APM or by stating that the product contains some quantities of Chatrakh & Shiitake the appellant cannot contend that it is a medicament. The only inference that can be drawn from the indications in the label is that the product is only meant for general well being. As stated earlier, it is also a fact that the products were originally sold as food supplements. Though the Learned Sr. Counsel Sh. Lakshmi Kumaran took assistance of various literature, reports of clinical studies and other documents, which we have analyzed herein above, to canvass the argument that these products cure many an ailment and has therapeutic properties, however on the labels there is nothing to indicate that they cure any specific disease. Even the pamphlets accompanying the product does not claim to cure any disease, but in fact suggests that prevention is better than cure. The Learned Sr. Counsel has laid much thrust on the factum that dosage is indicated, and therefore the product would have therapeutic value. Nonetheless what are the diseases the products intend to cure by taking such measured doses, is not conveyed through the label or the pamphlet to satisfy the common parlance test. What is important is how the consumer looks at the product, and what is his perception in respect of the product.

11.2 The goods which were imported earlier from Malaysia were marketed as "food supplements". In fact, from the record it emerges that they were then called as "The Miraculous King of Herbs".

11.3 While marketing the said products, appellant had issued an advisory "What all DXN distributors should know", which made the following caution :

"Do not make any claims. Herbal food supplements are strictly classified as foods and regulated as such. Extra care must be done to avoid making specific claim about what the products can do to the body. Any food may be categorized as a drug, if it is claimed that the product is for treatment, cure prevention and mitigation of a disease. The important word is disease. When a product is offered as a specific treatment for a disease, it becomes a drug.... It is very important to bear in mind that you are recommending a food supplement and that you do not intend to be misconstrued as recommending a drug."

From the investigations conducted with distributors and stockists, it is seen that a number of stockists / distributors from whom statements were taken categorically stated that the RG and GL are not used to prevent any specific diseases but are only used to improve general health; that the company had informed them to promote the product as food supplement only; that these capsules basically are used as food supplement and are non-prescription drugs; that RG and GL capsules which had come as food supplement till December 2001, had started to market as APMs only from 2002; that however there is no change in composition or quality of RG and GL.

11.4 Earlier, while marketing the said products, the accompanying pamphlets for both RG & GL highlighted a common tag line An ounce prevention is better than a pound of cure . In respect of RG, the claim was made that the commodity contains more than 200 active elements divided into three categories consisting 30% water soluble elements, 65% organic soluble elements and 5% volatile elements . The contents were indicated as Polysaccharides, Organic germanium, Adenosine, Triterpenoids, Ganoderic Essence, Protein, Fibre . Nowhere in these pamphlets was a claim made that they were ayurvedic medicines, or for that matter that they had any ayurvedic preparations. The pamphlets also do not make any claim that the items are Ayurvedic preparations. On the other hand, it was only claimed that in respect of RG the contents were Ganoderma Lucidum harvested exactly the 100th day of growth and in case of GL that the product was Mycelium of Ganoderma Lucidum harvested after 21 days of growth . Scanned copies of these relevant pamphlets are reproduced below :

This space is purposely put blank.

12.1 No doubt, the appellants have claimed that the ingredients in respect of RG are Ganoderma (Chatrakh) and Shiitake (Bhuchatra) and in respect of GL also, ingredient Shiitake (Bhuchatra) has been shown and another ingredient Ganomycelium has also been indicated as Chatrakh . To counter this, Revenue have obtained a statement from Dr. D.Athisayaraj, Head of Section of Siddha/Ayurveda, Aringnar Anna Hospital of Indian Medicine who has deposed that Bhuchatra does not mean Shiitake and he does not know botanical name for Ganoderma Lucidum and Ganoderma Mycelium. In cross examination, Dr. Athisayaraj stated he has read the original text of Ayurvedic medicine and the name of Chatrakh and Bhuchatra are available in olden times as well as modern times. Although the appellants have produced an articulation on the issue by Dr. K.S.Viswanatha Sharma as already found herein above, that write up do not categorically state that the impugned products are Ayurvedic medicines.



12.2 It is also not disputed that Dr. D. Athisaya Raj, Head of Siddha, Ayurvedic Department, Arignar Anna Hospitals of Indian Medicine who had earlier recommended classification of RG and GL capsules as ayurvedic proprietary medicines but later had admitted that his recommendation was incorrect since it was based on bogus clinical reports. It further appears that Dr. D. Athisaya Raj was cross examined before the adjudicating authority, on which occasion also, he deposed that he did not consider 'Ganoderma' and 'Shiitake' as ayurvedic medicines. It also emerges that in response to a letter from the Director of Drugs Control, Tamil Nadu, the said HOD, Ayurveda had opined as under :

"These items (Chatraka & Buchatra) are basically food supplements may be used to give therapeutic value with some other drug to be given for identified diseases and that these items cannot be used independently to cure any disease"

12.10 The Drug Licence by itself cannot be the basis for classification. The classification for the purpose of collection of revenue is to be on the basis of Excise / Customs legislations. The primary object of Excise Act being to raise revenue, the classification of the product so as to determine the rate of duty has to be considered independent from the Drugs and Cosmetics Act, 1940 and like legislations. The Hon ble Apex Court in the case of Shree Baidyanath Ayurved Bhawan Ltd. (supra) opined in para 41 as under :

"41. True it is that Section 3(a) of the Drugs and Cosmetics Act, 1940 defines Ayurvedic, Sidha or Unani Drug but that definition is not necessary to be imported in New Tariff Act. The definition of one statute having different object, purpose and scheme cannot be applied mechanically to another statute. As stated above, the object of Excise Act is to raise revenue for which various products are differently classified in New Tariff Act." Based on the discussions herein above, we are therefore of the considered opinion that the impugned goods in question cannot be claimed to be Ayurvedic Proprietary Medicines for the purpose of classification in the Central Excise Tariff Act"

6. We have given close consideration to the submissions of the learned Counsel for the respondent for a distinction to be made from the ratio of the above decision of the Tribunal, Chennai. We note that the whole thrust is on the recognition of the product by the Drug Control Authorities. This aspect has been dealt with by the Tribunal, Chennai. It was categorically recorded that a drug licence by itself cannot be the basis for classification. The second important aspect emphasised by the learned Counsel for the respondent is that the product ingredient has been recognised and listed in the authoritative granth by Ayurvedic. This aspect also has been examined by the Tribunal, Chennai. We note that the product is based on specific species of mushroom. The text relied by the respondent is for mushroom in general. It is a common understanding that mention of mushroom in general will not make all of them as ayurvedic medicine. This aspect has also been considered by the Tribunal, Chennai in detail.

7. On careful consideration of the impugned order, we note that impugned order distinguished the decision of the Tribunal, Chennai passed in the first round of litigation. We note that based on the direction of the Apex Court, the Tribunal, Chennai went into the dispute in much more elaborate manner with all the evidences placed before them and we have no reason to differ from the ratio and finding arrived by the Tribunal, Chennai. Accordingly, following the same, we hold that the impugned order has erred in classifying the product as Ayurvedic medicine and it should have been correctly classified as food supplement as pleaded by the Revenue. Accordingly, impugned order is set aside. Appeal by the Revenue is allowed.

(Order dictated and pronounced in the open court.)

[Back](#)

IN THE CESTAT, WEST ZONAL BENCH, MUMBAI  
[COURT NO. I]  
**S/Shri M.V. Ravindran, Member (J) and Raju, Member (T)**

**M/S WARNER BROS. (F.E.) INC.**

**Versus**

**COMMISSIONER OF CUSTOMS (I), MUMBAI**

Final Order Nos. A/85694-85696/2017-WZB/CB, dated 7-2-2017 in Appeal Nos. C/705,  
729 & 743/2004-Mum

REPRESENTED BY :S/Shri M.I. Sethna, Sr. Advocate with Advait M. Sethna, Ms. Ruju R. Thakkar and Kayomars K. Kerawalla, Advocates, for the Appellant.

Shri M.K. Sarangi, Jt. Commissioner (AR), for the Respondent.

**[Order per : Raju, Member (T)].** - The appellants, Warner Bros. (F.E.) Inc. Paramount Films of India Ltd. and Twentieth Century Fox India Inc., imported cineprints and were appointed as sole distributor with exclusive license to distribute, exploit and exhibit motion pictures and trailers throughout the assigned territory including India. The said imports are made under franchise agreement with an entity abroad. The impugned order deals with the specific facts of the agreement and transaction between Warner Bros. (F.E.) and Warner Bros. Pictures International Corporation (WPIL) and applies the same ratio to others on the ground that the agreements and transactions among other two are same except for the ratio in which the revenue is shared. There has been no objection to this finding and therefore we also deal with this agreement and apply the same ratio to other appellants. Warner Bros. (F.E.) (The appellant) is appointed by WPIL as the sole distributor for territory of India. The declared value of the imports made by the appellants was challenged by the Revenue. The appellants sought valuation under Rule 8 as per earlier orders dated 12-12-80 and 6-1-88, whereas the Revenue sought to apply the Customs Valuation Rules and loaded the declared value furnished by the appellants. Aggrieved by the said order of the lower authorities, the appellants are before the Tribunal.

**2** Learned . Counsel for the appellants explained the provisions of license and the franchise agreement. It categorically grants exclusive license to the appellant for exploitation, exhibition and distribution of the motion pictures in a specified territory including India. There is no sale involved under the said agreement. He argued that the appellants are approved by the Reserve Bank of India and imports of such cineprints, free of charge. He argued that the ownership of such films rest always with the foreign suppliers and there is no sale taking place under the agreement or otherwise. The appellants sought reliance on clause 1(b) and clause 2(b) of the said agreement to support the proposition that there is no sale of such films in India. Clauses 1(b) and 2(b) read as follows :-

Such additional feature motion pictures, “1(b). the trailers in connection with each thereof and such short subjects as International may designate and for which International shall control the sole and exclusive rights or distribution, exploitation and exhibition for the said territory.

The term of license with respect to each 2(b). motion picture delivered from and after the date hereof, shall be three (3) years from the date of delivery of the negative or first positive print of each motion picture, subject, however, to the provisions of this agreement.”

**2.1** Clause 3 of the said agreement sets out the consideration for the rights granted to the appellants. In terms of the said clause, the appellants were required to remit 65% of the gross proceeds collected from the distribution, exploitation and exhibition of the motion pictures in India to the foreign supplier. He argued that this does not amount to sale. Clause 3 of the agreement reads as follows :-

As consideration for the rights herein—“3. granted to Distributor, Distributor shall pay to International in the manner hereinafter specified, the following :

Sixty-five per cent (65%) of all gross proceeds derived and collected from the distribution, exploitation and exhibition in the territory of the feature motion pictures, trailers and short subject during each yearly period of the term hereof commencing August 30, 1959.

The percentages or shares of the gross proceeds shall be paid by Distributor to International at the expiration of each and every week throughout the term of this agreement at such place or places and in such manner as International shall, from time to time, in writing direct.”

**2.2** Clause 7 of the said agreement to assert that there is no transfer of beneficial ownership from the foreign supplier to the appellants and therefore it does not amount to sale. He further pointed out that clause 7 of the said agreement requires the appellants to return or destroy the films. The said clause reads as under :-

Legal title to all negatives and positive “7. prints delivered or manufactured hereunder shall at all times remain in International or in the party or parties designated by the contracts, pursuant to which International has obtained the rights herein granted with respect to said motion pictures.

Distributor agrees that upon the expiration or sooner termination of this agreement or the license herein granted with respect to any motion picture, the prints delivered or manufactured hereunder, shall at International’s option, be returned, at Distributor’s expense, to International at its office in New York City, or destroyed, in which latter event, Distributor shall deliver to International affidavits setting forth the facts and circumstances of such destruction.

All prints shall be distributed and exhibited in their original continuity without change, interpolation or elimination except insofar as necessary to conform to the laws and customs of said territory and no changes shall be made without the consent of International and if made shall be solely at the distributor’s expense. Distributor agrees to disclose to International immediately upon demand, the whereabouts of each and every print delivered or manufactured hereunder.”

**2.3** Clause 11 of the said agreement to assert that the copyright in respect of the motion pictures, negatives and positive prints furnished viz. in the name of the producer or the foreign supplier. He pointed out that as per clause 11 of the said agreement, the appellants had no right to sell the said motion pictures in India. The said clause reads as follows :-

Distributor agrees to pay any and all fees “11. necessary or required to obtain and keep in force licenses from copyright and patent proprietors or any society of authors, composers or publishers, to permit the motion pictures licensed hereunder to be publicly performed.

Distributor shall protect the motion pictures, negatives and positive prints furnished it hereunder by copyright in the said territory, such copyright to be taken in the name of the producer thereof, or International, or Distributor, as International shall determine. Distributor shall promptly notify International of any infringement of any such copyright or of any trade mark of the producer or International in the territory and shall take any and all proceedings in the name of Distributor or International or such other person at the option of International to prevent and restrain any such infringement.”

**2.4** The said agreement prohibits the appellant from selling, assigning or subletting the appellants’ interest in the motion pictures or negatives or positive prints without the prior consent of the foreign supplier. He referred to Clause 18 of the said agreement which reads as follows :-

Distributor shall not sell, assign or “18. sublet in its entirety Distributor’s interest in this agreement or in any one or all of the motion pictures or negatives and positive prints, without the prior written consent of International, but nothing contained herein shall prevent International from assigning or otherwise dealing with this agreement without the consent of Distributor.”

**2.5** The rights — of the appellant are restricted only to distribution and do not extend to the sale of the imported motion pictures/prints/trailers in India.

**2.6** Clause 19 of the said agreement clearly mandates that the said agreement does not constitute a partnership between the foreign supplier and the appellants. He pointed out that the said clause clearly prescribes that distributor is not the representative or the agent of the foreign supplier.

**2.7** Learned Counsel pointed out that the appellants, through the branch office in India, are importing the cineprints supplied by the foreign principal free of charge, he argued that the intrinsic value of the cineprints is actually the cost incurred to make the same. He pointed out that such cost varies from US 6 cents to US 13 cents as has been held by the earlier orders of revenue.

**2.8** He argued that vide Circular dated 11-12-1980, the Special Valuation Branch of Mumbai Customs, had clarified as follows :-

“The Indian Firm, Warner Bros., is a fully owned subsidiary of the foreign principals viz. Warner Bros. International U.S.A. The Indian firm imports exposed cine films from the said foreign principals. All positive exposed cine films are supplied free of charge. The ownership of the film rests with the suppliers. In terms of the agreement the Indian firm shall pay a fixed percentage of the gross receipts which the distributors (Indian firm) derive by exploitation/exhibition of the cine films.

The intrinsic value of the exposed cinefilms is actually the cost incurred by the laboratories which process the films, and the same includes the cost of materials, processing charges etc. The cost varies from country to country and on the number of prints ordered. The rejuvenating charges of old negatives, out of which the prints are processed, also add to the cost of the prints. At present the cost varies from U.S. Cents 6 to U.S. Cents 13 per foot.

On the basis of the documents/information furnished by the party, it has been decided to accept the invoice value of the exposed cine films imported from the said suppliers under Rule 8 after usual check and scrutiny. The pending P.D. assessments may be accordingly finalized.”

He argued that the Revenue had accordingly accepted the invoice value and the films imported by them vide order dated 12-12-1980. He pointed out that the manner of valuation was reviewed again in 1988 and vide letter dated 6-1-1988, the Special Valuation Branch had decided to continue with the earlier decision dated 12-12-1980.

**2.9** The CBEC issued Circular No. 11/2001-Cus., dated 23-2-2001 and reviewed the instructions regarding cases handled by Special Valuation Branch. He argued that their case of valuation was reopened as a result of this amendment. He pointed out that item No. 2 of the said circular prescribes as follows :-

Apart from investigation of special “2. relationship case, SVB will also handle more complicated cases of additions to declared transaction value as stipulated under Rule 9 of the Valuation Rules. No reference to SVB would be necessary where any additions are sought to be made under Clauses (a) and (b) of Rule 9(1). Where, however, the additions sought to be made are considered to be in the nature of ‘royalty and licence fee’ under Rule 9(1)(c), or where the value of any part of proceeds of any subsequent resale, disposal or use of imported goods accrues to the seller [i.e. Rule 9(1)(d)] or where any other payments are made or are contemplated to be made in future by buyer to seller as a condition of sale of imported goods etc. [i.e. Rule 9(1)(e)], the case may be referred to the SVB after following the provisional assessment procedure.”

Learned Counsel argued that the said provision did not apply to the appellants under the present facts and circumstances, and for the period prior to issue of this circular. Learned Counsel pointed out that despite the above, the GATT Valuation Cell vide letter dated 2-8-2001 asked the appellants to file written submissions as per Board’s Circular No. 11/2001-Cus., dated 23-2-2001 and Public Notice No. 52/2001-Cus., dated 12-4-2001. Learned Counsel argued that the said public notice does not apply to the facts and circumstances of the case as Rule 9(1)(c) and Rule 9(1)(d) do not apply to the facts and circumstances of these cases at all. By their reply to the said notice, the appellants had clearly stated that

there is no element of sale involved and therefore they were not covered by the said circular. However, the Deputy Commissioner of Customs, Special Valuation Cell, passed an adjudication order dated 11-3-2002. Vide the said order, he declined to accept the value furnished by the appellants and applied Rule 7 and ordered to load the declared value. The matter was agitated by the appellant before the Commissioner (Appeals). However, the Commissioner (Appeals) upheld the impugned order and rejected the appeals. Aggrieved by the said order, the appellants are before the Tribunal.

**2.10** Learned Counsel argued that the impugned order has wrongly relied on CBEC Circular No. 86/2002, dated 12-12-2002 as the same does not apply to the appellants' case as no royalty/license fee is payable as a condition of sale.

**2.11** Learned Counsel argued that Notification No. 205/77-Cus., dated 24-9-1977 exempted Customs duty leviable on cinematographic film, exposed, falling under Heading 37.06 when imported into India from so much of duty as is leviable on that part of value which does not include the cost of the printing of the cinematographic film and the freight and insurance charge in respect of the said print. The said Notification 205/77-Cus. was rescinded vide Notification 47/96, dated 23-7-1996. He further pointed out that vide Notification 33/2003-Cus., dated 1-3-2003, exemption was granted from basic custom duty, additional custom duty and special additional duty to the said goods from so much of duties as is in excess, which would be leviable if the value of the said goods was equal to the cost of the prints and the cinematographic film and the freight and insurance charges incurred in respect of such prints. Learned Counsel pointed out that in effect, the status as it existed prior to 23-7-1996 when Notification 205/77, dated 24-9-1977 was restored. Learned Counsel argued that these changes in notification cannot have an overriding effect on the CBEC circular which is limited in application so far as the revenue is concerned. He pointed out that the Board Circular of 2002 cannot be made retrospectively applicable to the period in dispute which is 1-4-1997 to 31-3-2000. Learned Counsel argued that there is no reason to depart from the value approved when the Notification 205/77 was in vogue, after the same is rescinded. He argued that the method adopted then was the method of valuation furnished by the appellants under Rule 8 of the Valuation Rules and there was no material for the department to resort to the valuation under Rule 7.

**2.12** Learned Counsel argued that the Interpretative Notes to Rule 4(c) and Rule 4(3) indicate that there is no basis to reject the value furnished by the appellants as there was no sale involved. Learned Counsel pointed out that there are no grounds to reject the value furnished by the appellants in terms of Rule 4(2) of the Customs Valuation Rules, 1988. He pointed out that the appellants and the foreign supplier are not related in terms of Rule 4(3) of the Customs Valuation Rules. Learned Counsel pointed out that Rule 7 will apply only in the case of goods sold in the greatest aggregate quantity. In the instant case as there is no sale, Rule 7 will not apply. He particularly highlighted the Interpretative Note to Rule 9(1)(c) which reads as follows :-

The royalties and licence fees referred to "1. in rule 9(1)(c) may include among other things, payments in respect to patents, trademarks and copyrights. However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value.

Payments made by the buyer for the right to 2. distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the country of importation of the imported goods."

**2.13** Learned Counsel further argued that the Revenue has chosen not to apply Rule 4 nor has given any justification for application of Rule 5 or 6 of the Valuation Rules. He further argued that the Revenue has wrongly applied Rule 7 which applies only to a case of sale.

**2.14** Learned Counsel relied on the following decisions :-

- (i) *Hoerbiger v. CC*, 2003(156) E.L.T. 62
- (ii) *CC v. Ferredo India Pvt. Ltd.*

- (iii) — *Peri India Pvt. Ltd. v. CC, Mumbai*, [2014 \(314\) E.L.T. 316](#) —
- (iv) *Maruti Udyog v. CC, Mumbai*, [2013 \(295\) E.L.T. 628](#)
- (v) *CCE v. Mahindra and Mahindra Ltd.*, [2016 \(334\) E.L.T. 193](#)
- (vi) *Multiscreen Media Pvt. Ltd. v. CC, Mumbai*, [2015 \(317\) E.L.T. 770](#)
- (vii) *Syngenta India Ltd. v. CC (I), Mumbai*, [2014 \(314\) E.L.T. 473](#).

Two written submissions, both dated 12-10-2016, were also submitted.

**3.** Learned AR relies on the impugned order.

**4.** We have gone through the rival submissions. The appellants seek to apply Rule 8 of the Customs Valuation Rules, 1988. Rule 8 of the said Rules reads as follows :-

**“8. Residual method.** - (1) Subject to the provisions of Rule 3 of these rules, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) and on the basis of data available in India.

(2) No value shall be determined under the provisions of this rule on the basis of -

- (i) the selling price in India of the goods produced in India;
- (ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;
- (iii) the price of the goods on the domestic market of the country of exportation;
- (iiia) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 7A.
- (iv) the price of the goods for the export to a country other than India;
- (v) minimum customs values; or
- (vi) arbitrary or fictitious values.”

The fact that the appellants seek to apply Rule 8 of the Customs Valuation Rules implies that they agree that there is no transaction value or sale value available in terms of Section 14 of the Customs Act and Rule 4 to 7A of the Customs Valuation Rules, 1988 are not applicable to the facts of the said case. The impugned order holds that even if the argument of the appellant that Rule 8 needs to be applied is accepted, under Rule 8, in exercise of the best judgment method Rule 7 (with suitable modifications) can be applied in exercise of application of Rule 8.

**4.1** The appellants are seeking assessment of the goods imported by them on the value as determined by the order dated 12-12-1980 which was issued following the order dated 11-12-1980. In both these orders, the following was held :-

“The Indian Firm, Warner Bros., is a fully owned subsidiary of the foreign principals viz. Warner Bros. International U.S.A. The Indian firm imports exposed cine films from the said foreign principals. All positive exposed cine films are supplied free of charge. The ownership of the film rests with the suppliers. In terms of the agreement the Indian firm shall pay a fixed percentage of the gross receipts which the distributors (Indian firm) derive by exploitation/exhibition of the cine films.

The intrinsic value of the exposed cinefilms is actually the cost incurred by the laboratories which process the films, and the same includes the cost of materials, processing charges etc. The cost varies from country to country and on the number of prints ordered. The rejuvenating charges of old negatives, out of which the prints are processed, also add to the cost of the prints. At present the cost varies from U.S. Cents 6 to U.S. Cents 13 per foot.

On the basis of the documents/information furnished by the party, it has been decided to accept the invoice value of the exposed cine films imported from the said suppliers under Rule 8 after usual check and scrutiny. The pending P.D. assessments may be accordingly finalized.”

The manner of assessment was reaffirmed by Revenue vide its order dated 6-1-1988. It is seen that both these orders dated 12-12-80 and 6-1-88 have been issued during the currency of the Notification 205/77 which granted exemption by way of a special manner of valuation. The said notification exempted

“every cinematograph film, exposed, falling under Heading 37.06 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from so much of the duties of customs leviable thereon as is equal to such duties leviable on that part of the value thereof which does not include

- (a) the cost of the print of the cinematograph film; and
- (b) the freight and insurance charges incurred in respect of the print of such cinematograph film.”

It is seen that for the purpose of charging duty, the relevant value as per the notification was the cost of the print of the cinematograph film and the freight and insurance charges incurred in respect of such prints. The orders dated 12-12-1980 and 6-1-1988 have been issued during the currency of this notification and both of them held the value of such films to be the cost incurred by the laboratories which process the films which consists of cost of material, processing charges, etc. It is seen that while both these orders do not record that the valuation has been done with reference to the Notification 205/77, it is apparent that the valuation has been done to arrive at the value chargeable to duty in terms of the said notification. The said notification restricts the value for the purpose of assessment to be sum total of

- (a) the cost of the print of the cinematograph film; and
- (b) the freight and insurance charges incurred in respect of the print of such cinematograph film.

The valuation was therefore done under Rule 8 to arrive at this value, under the residuary rule. It is obvious that other rules do not apply to the case as the value for the purpose of assessment was based on special provisions built in the notification. Thus the appellants’ reliance on the order of 1980 and 1988 does not hold much weight and is rejected. Notification 205/77 was withdrawn on 23-7-1996 vide Notification 47/96. Prior to the said date the valuation was done to arrive at the value for assessment to be determined in terms of the notification. It is apparent that for the period after the notification was rescinded, the valuation needs to be done in terms of Section 14 of the Customs Act read with the Rules.

**5** It is clear . from the agreement that the appellants are receiving the said goods just on payment of ‘Transportation, insurance and other related costs (excluding cost of print materials)’ in terms of clause 3(a) of the agreement. They do not become the owners of the goods by virtue of this payment as the imports are conditional, not only with reference to the use the imported goods can be put to, but also the manner they have to be disposed of after use. As a condition of import the appellants are also required to pay the foreign entity amounts as specified in Clause 3 thereof. It is apparent from the Clause 3 of the agreement that the appellants are obliged to pay the foreign entity, as follows :-

As consideration for the rights herein “3. granted to Distributor, Distributor shall pay to International in the manner hereinafter specified, the following :

Sixty-five per cent (65%) of all gross proceeds derived and collected from the distribution, exploitation and exhibition in the territory of the feature motion pictures, trailers and short subject during each yearly period of the term hereof commencing August 30, 1959.

The percentages or shares of the gross proceeds shall be paid by Distributor to International at the expiration of each and every week throughout the term of this



agreement at such place or places and in such manner as International shall, from time to time, in writing direct.”

Clause 7 of the agreement reproduced above in para 2.2 clearly shows that legal title to all negatives and positive prints delivered or manufactured hereunder shall at all times remain with the foreign entity. Clause 18 of the said agreement prohibits them from selling, assigning or subletting in its entirety, the appellant’s interest. In these circumstances it is apparent that though an amount is paid at the time of import, it is not the sale price of imports. The amount paid by the appellant at the time of import excludes from it the entire ‘cost of print material’s. The price paid by the appellant does not constitute the transaction or sale value. Since sale value is not available, to qualify as assessable value under Section 14(1) of the Customs Act, the value has to be arrived at in terms of the Customs Valuation Rules, 1988 (CVR).

**6.** To arrive at the transaction value it is needed to calculate the cost of print materials which has been excluded from the price paid at the time of the import of the film. In the context of this transaction and the terms of the agreement, the term ‘cost of print materials’ would not mean the cost making of print materials (i.e. the cost of producing the film), but the cost of the print material to the appellant. The cost that the appellants are required to pay, at the time of import or otherwise. The film is distributed internationally to various countries/territories and the revenue is generated from the licensees in all the territories. The revenue of the principal from each territory will be the cost to the licensee in that territory. The total revenue of the principal worldwide from all the territories would be measured against the total cost of making the film. The excess of revenue over cost or otherwise and will yield profit or loss to the principal. Thus the term ‘cost of print materials’ in the context of the agreement only means the cost of print materials to the appellant, and not the cost of producing the film. In this context we examine the terms of the contract between the appellants and the foreign supplier. It is seen that the agreement has been entered into between the two parties located abroad viz. Warner Bros. Pictures International Corporation, New York (first party) and Warner Bros. (F.E.) International Pictures, Inc., Delaware (second party). The first party grants the sole and exclusive license to distribute and to license theatres to exhibit for the terms and conditions specified in the contract, in the territory of India, Nepal, Ceylon and Afghanistan (referred to as ‘Territory’). It can be seen that the agreement is between the two foreign entities wherein one entity grants the other entity the sole and exclusive right to distribute license theatres to exhibit throughout the territory consisting of 4 countries. From the said clause of the agreement, it is obvious that the said rights are granted subject to the terms of the agreement. In other words, if the terms of the agreement are not agreed and adhered to, the said imports cannot be made or the said rights cannot be exercised. The Hon High Court of Madras in the case of *Indo Overseas Films*, [2007 \(210\) E.L.T. 348](#) has observed as under :-

The value of the imported goods for the “5. purposes of determination of the duty has to be arrived at in terms of Section 14 of the Customs Act, which in turn provides for determination of value in terms of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. Rule 3 of the 1988 Rules provides for (i) the value of the imported goods shall be the transaction value; (ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these Rules. Rule 4 provides that the transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with the provisions of Rule 9 of these Rules. Rule 9 refers to the charges incurred for various types of services and stipulates addition in respect of the same whether actually paid or not. Rule 9(1)(c) provides that in determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, - royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable. Rules have interpretative note and the interpretative note to Rule 9(1) is to the effect that royalties and licence fees referred to in Rule 9(1)(c) may include among other things, payments in respect to patents, trademarks and copyrights. However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value. It further provides that payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments



are not a condition of the sale for export to the country of importation of the imported goods.

It could be seen from the invoice made 6. available at page No. 3 of the typed set of papers that the petitioner has imported the feature film - "Web of Silence - AIDS". The cost of the materials, i.e., one 35 mm (2569 meters length) is valued at 1000 US \$ and in 35 mm of trailer (35 mm length) of the said film is 20 US \$. So, the value of the imported goods, i.e., feature film is 1020 US \$. Apart from that royalty including one new print and one trailer with the right of reproduction and distribution of public performance for the territories of India had been valued at 12500 US \$. The payment of 1020 US \$ for the print and trailer and 12500 US \$ towards royalty for exploitation of the film is condition precedent in the importation. Though the value has been splitted out as royalty and the cost of materials, as per the agreement, the petitioner imported the feature film for exploitation only and without exploitation there is no purpose for importing the feature film. On the other hand, the purpose of importation of the film is only for exploitation. For the purpose of exploitation the charges is stated to 12500 US \$. As per Rule 9(1)(c) the royalty and licence fee relating to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable.

In the case on hand, the petitioner had to 7. pay not only the cost of movie materials, but also the royalty and the rights specified in the distribution agreement as a condition of sale, as without the right of exploitation the print or trailer could not be of any use to the petitioner to enjoy theatrical or video right conferred on the petitioner. In the light of the statutory provisions and peculiar facts and circumstances of the present case and in the light of the reasoning above stated, I do not find any substance in the argument of the Learned Counsel to the effect that 12500 US \$ referable to as royalty cannot be included in the valuation of the imported goods."

In view of above, the said amounts remitted to foreign supplier are includible in the assessable value.

**7.**The following provisions of law need to be kept in sight while applying the residuary Rule 8 to the instant case.

- (i) Rule 9(1)(c) of the CVR
- (ii) Proviso (a) to Rule 4(2) of the CVR
- (iii) Proviso (c) to Rule 4(2) of the CVR

The said rules provide the context for the application of the Rule 8 of the valuation rules in the facts of this case of valuation of imports. Residuary rule can draw strength from these provisions to decide the inclusion or exclusion of any value/consideration. Each of these provisions are examined below individually

**7.1**Rule 9(1)(c) prescribes as follows :-

**Cost and services. - "9.** In determining the transaction value, there shall be added to the (1) price actually paid or payable for the imported goods, - (c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable."

It is seen that any amount of royalty or license fee paid during a transaction of sale, as a condition of such sale, would be includible in the transaction value. In the instant case there is no sale involved. The cine prints are imported for a nominal consideration, however as a condition of such import, the appellants are required to pay a percentage of the gross revenue earned by them by use of such cine prints. If the same is considered as the license fee then the same needs to form part of the assessable value, as the same is paid as a condition of import.

**7.2**Proviso (a) to Rule 4(2) of the CVR reads as follows :

The transaction value of imported goods under sub-rule (1) above shall be accepted :  
Provided

- (a) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which -
  - (i) are imposed or required by law or by the public authorities in India;  
or
  - (ii) limit the geographical area in which the goods may be resold; or
  - (iii) do not substantially affect the value of the goods;”

It prescribes that any import where there are restrictions on use of goods the price paid cannot be the assessable value. In the instant case there are restrictions on the use of goods which travel beyond the exclusions provided in the proviso. For instance the appellants cannot continue to use the goods after a certain period. The appellants cannot dispose of the goods in the manner they want. The appellants cannot use the goods in any medium other than cine theatres, like television etc. they cannot sell, assign or sublet their rights in respect of these goods.

**7.3** Proviso (c) (later renumbered as (g)) to Rule 4(2) of the CVR reads as follows :

The transaction value of imported goods “(2) under sub-rule (1) above shall be accepted :  
Provided

no part of the proceeds of any subsequent (c) resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Rule 9 of these rules;”

It clearly shows that if the goods are imported with the condition that any part of the proceeds of the subsequent use of the imported goods goes to the seller the said transaction value needs to be rejected. In this regard the Section 14 also prescribes that the assessable value would include the ‘price paid or payable’ for the goods. In the instant case the amounts paid as license fee though not paid at the time of import, is clearly known at the time of import, to be payable at the latter date in terms of the agreement, and the same is the condition of import.

**7.4** Applying Rule 8 with guidance from the aforesaid rules makes it logical to include the said amounts remitted to foreign supplier in the Assessable value.

**8** The appellants had argued that the valuation needs to be done under Rule 8 of CVR, before the original adjudicating authority. The matter was argued by the appellants seeking assessment under Rule 8 as done in earlier orders dated 12-12-80 and 6-1-88. The dispute before the original adjudicating authority was if the amount of license fee remitted by the appellant to the supplier of cine prints needs to be included in the Assessable Value. The Original adjudicating authority has included in the Assessable Value the amount of license fee remitted by the appellant to the supplier of cine prints. For the purpose of determining assessable value the original adjudication authority has adopted Rule 7 of CVR, rejecting the contention of the appellant that Rule 8 of CVR should be applied.

**8.1** The dispute before the Commissioner (Appeals) was if the amount of license fee remitted by the appellant to the supplier of cine prints needs to be included in the Assessable Value. The original adjudicating authority has included in the Assessable Value the amount of license fee remitted by the appellant to the supplier of cine prints. The Commissioner (Appeals) applied Rule 8 and thereafter under the best judgment rule, he upheld the method adopted by the original adjudicating authority applying Rule 7 in the modified manner.

**8.2** Thus in both the stages the sole dispute has been if the amount of license fee remitted by the appellant to the supplier of cine prints needs to be included in the Assessable Value. The Original adjudicating authority as well as the Commissioner (Appeals) both included in the Assessable Value the amount of license fee remitted by the

appellant to the supplier of cine prints. In doing so one relied on Rule 7 of CVR while other relied on Rule 7 read with Rule 8 of CVR. The revenue has relied on the decision of Hon'ble Apex Court in the case of *Pradyumna Steel Ltd.* [1996 (82) E.L.T. 441 (S.C.)] to assert that mere mention of wrong rule does not vitiate the proceedings. Hon'ble Apex Court in the said case has observed as follows :-

It is settled that mere mention of a wrong "3. provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power. Thus, there is a clear error apparent on the face of the Tribunal's order dated 23-6-1987. Rejection of the application for rectification by the Tribunal was, therefore, contrary to law.

It is apparent that the sole dispute in all these cases is if the amounts paid by appellants in connection with imports made by them are includible in the assessable value or not in terms of the CVR. The nature of dispute was known to the appellants and the amounts sought to be included and the grounds were known to the appellants. The fact is that in terms of Rule 8 the said amounts need to be included in the assessable value as discussed in Paras 6 and 7 above. In these circumstances quoting Rule 7 or 8 by the lower authorities has not compromised the defense of the appellants or vitiated the proceedings in any way.

**9**The . appellants have relied on the following case law :-

(i) *J.D. Orgochem*, 2008 (226) E.L.T. 9 (S.C.) for the assertion that declared value cannot be rejected arbitrarily. We find that the declared value in the instant case is admittedly not the transaction or sale value. Furthermore as is apparent from the Clauses 3, 7 and 18, and numerous other clauses of the agreement the import are subjected to a lot of restrictions. Thus the declared value has been rightly rejected and the facts are different from the cited case.

(ii) *Hoerbiger India Pvt. Ltd.*, 2003 (156) E.L.T. 62, *Ferodo India Ltd.*, *Syngenta India Ltd.*, 2014 (314) E.L.T. 473 and *Maruti Udyog v. CC, Mumbai*, 2013 (295) E.L.T. 628. The basic fact is different in these cases. In all these cases it was held that the payment of royalty is not a condition of import of goods. In the instant case it is otherwise.

(iii) *Multiscreen Media Pvt. Ltd.*, 2015 (317) E.L.T. 770. The facts in the said case are different. Moreover the decision of Hon'ble HC of Madras in the case of *Indo Overseas Ltd.* (supra) was not cited before Tribunal in the said case.

(iv) *Peri India Pvt. Ltd. v. CC, Mumbai*, 2014 (314) E.L.T. 316 and *Mahindra and Mahindra Ltd.*, 2016 (334) E.L.T. 193 are on a different issue and not relevant.

**10**In view of . above the appeals are dismissed.

(Pronounced in Court on 7-2-2017)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-110066  
BENCH-DB  
COURT NO. IV**

**Customs Misc Application No. C/MISC/50849/2018 in  
Customs Appeal No. C/524292018 [DB]**

Arising out of Order-in-Appeal No. CUS-D-II-ICD-TKD-Import-1029-1030-2018, Dated:  
8.5.2018

Passed by the Commissioner OF CGST and Central Excise-New Delhi (ICD-ITC)

**Date of Hearing: 17.9.2018  
Date of Decision: 25.10.2018**

**COMMISSIONER OF CUSTOMS  
NEW DELHI (ICD TKD) (IMPORT)**

**Vs**

**BHARAT FOILS LTD**

**Appellant Rep by:** Mr Sunil Kumar, DR

**Respondent Rep by:** None

**CORAM:** C L Mahar, Member (T)  
Rachna Gupta, Member (J)

**FINAL ORDER NO. 53152/2018**

**Per: Rachna Gupta:**

Present is an Appeal against the Order of Commissioner of Customs (Appeals) bearing No. 330/16 dated 08.05.2018 as filed by the Department.

2. Facts relevant for the purpose are that the assessee, M/s Bharat Foils Ltd. herein had filed a refund claim under special refund mechanism as provided for under the exemption Notification No. 102/2007-Cus dated 14.09.2007 (herein referred to as the said Notification) for an amount of Rs. 2,87,322/-. The claim is with respect to special additional duty of Customs (SAD) leviable under sub-section 5 of Section 3 of Custom Tariff Act, 1975 (herein after referred to as the Act) the details of refund are as follows:

| S. No        | File No. | UID NO.  | D.O.A.   | B/E No. | B/E Dated | TR-6 Dated | Amount of SAD paid | Amount of refund claimed |
|--------------|----------|----------|----------|---------|-----------|------------|--------------------|--------------------------|
| 1.           | 4542/16  | 10385/16 | 08.09.16 | 2457678 | 02.09.15  | 04.09.15   | 124349.30          | 124349                   |
|              |          |          |          | 2458824 | 02.09.15  | 04.09.15   | 162972.50          | 162973                   |
| <b>Total</b> |          |          |          |         |           |            | <b>287321.80</b>   | <b>2,87,322/-</b>        |

The Assistant Commissioner vide order No. 5230 dated 08.09.2016 has rejected the said claim on the ground that the same has been filed after the prescribed time limit of one year from the date of payment and as such is rejected as being barred by time. Being aggrieved, the assessee approached the first appellate authority, i.e. the Commissioner of Customs (Appeals). He, vide the Order under challenge has held that upholding the limitation period starting from the date of payment of duty as prescribed in amended Notification No. 93/2008-Cus would amount to allowing commencement of limitation period for refund claimed before the right of refund has even accrued and that no period of limitation is prescribed under Section 3(5) of the Customs Tariff Act. Accordingly, the Appeal of asseesse was allowed accepting the refund claimed. Department being aggrieved is in Appeal before us.

3. We have heard Shri Rakesh Kumar, Ld. DR for the Department/appellant. However none is present for the respondent. He therefore hereby proceed to decide the Appeal ex-parte considering defendant.

4. It is submitted that the Commissioner(Appeals) has based his Order on the decision of Hon'ble High Court of Delhi in the matter of *M/s Sony India Pvt. Ltd. Vs. Commissioner of Customs, New Delhi 2014 (304) ELT 660 (Del.)* and though the Appeal whereof even before Hon'ble Supreme Court has been dismissed but Hon'ble Apex Court has dismissed the

Appeal only on the ground of limitation hence the question of law involved herein is still kept open. It is impressed upon that Notification No. 93/2008-Cus dated 01.08.2008 is the Notification amending the Notification No. 102/2007 vide which a time period of one year from the date of payment for the filing of refund claims by an importer has been introduced. Thus, the period for filing the impugned refund claim is clearly of one year. Since the refund claim in question was not filed within the said one year, the original Adjudicating Authority had rightly dismissed the same and the Commissioner(Appeals) has committed an error while allowing the assessee's claim. Order is accordingly prayed to be set aside and Appeal is prayed to be allowed.

5. After hearing, we are of the opinion as follows:-

The claim herein is with respect to special additional duty of Customs as leviable under Section 3(5) of Customs Tariff Act, 1975. It is important to look into the said provision which reads as follows:

*"Section 3 Levy of additional duty equal to excise duty, sales tax, local taxes and other charges—*

*(1) -----*

*(2) -----*

*(3) -----*

*(4) -----*

*(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.*

*Explanation – In this sub-section, the expression "sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India" means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not so sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs and where such taxes, or, as the case may be, such charges are leviable at different rates the highest such tax or, as the case may be, such charge."*

It is brought to our notice that the said SAD exemption has been granted vide Notification No. 102/2007 dated 14.09.2007 as issued in accordance of Section 25(1) of the Customs Act which provides power to the Central Government to grant exemption from duty by way of Notification. This Notification exempts the goods falling within the first schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale, from the whole of the additional duty of Customs leviable thereupon in accordance of the above mentioned Section 3(5) of Customs Tariff Act. However, subject to such conditions as mentioned in the Notification itself in para 2 thereof, the first condition reads as follows:

(a) The importer of the said goods shall pay all duties including the additional duty of Customs leviable thereon, as applicable at the time of importation of goods.

The other relevant condition is:

(c) The importer shall file a claim for refund of said additional duty of Customs paid on the imported goods with the jurisdictional Customs officer.

This Notification stands amended vide Notification No. 93/2008 dated 01.08.2008 vide which a time period of one year from the date of payment for filing of refund claims by an importer under the aforesaid Notification was introduced. Commissioner (Appeals) has held that the amendment since introduced for the first time by a Notification but without a statutory amendment, the same cannot prevail.

6. In view of the above discussion, we are of the opinion that the moot question to be adjudicated in the present case is as to whether there is any time limit prescribed by law for filing the refund claim of additional duty of Customs as stands exempted vide the Notification No. 102/2007.

No doubt, the said Notification is silent about any time period for filing the said claim. But the Notification exempts the goods in first schedule of Customs Tariff Act from being

leviable to the additional duty of Customs. However, the Notification itself mandates the deposit of the said additional duty at the time of importation of the goods and thereafter to get the refund. From this perusal, one thing becomes abundantly clear that the importer has the knowledge of his entitlement to file the refund of additional duty of Customs at the time of the payment of said duty itself i.e. at the time, the product being in first schedule (under the exempted category) is imported. Resultantly, we are of the opinion that for claiming the refund of additional duty nothing else has to happen or to be done by the assessee after the payment of said additional duty of Customs. To our opinion, this particular fact distinguishes the present case from the case of M/s Sony India Pvt. Ltd. (supra).

7. Also, the amending Notification No. 93/2008 is arising out of the statute, i.e. Section 25(2A) of the Customs Act, 1962 hence, the findings of the Commissioner(Appeals) that the amendment introducing one year from the date of payment of additional duty as a time to claim the refund thereof is without statutory amendment, is not sustainable rather is opined to be legally erroneous. Otherwise also, the said amendment came into force w.e.f. 01.08.2008 that too in accordance of another statutory provision, i.e. Section 25(4) of the Customs Act. The refund in question was filed on 31.05.2017, i.e. much beyond the amended Notification and also the Customs Act itself contains a provision about claim of refund of duty in Section 27 thereof which reads as follows:-

(i) Any person claiming refund of any duty or interest, paid by him or borne by him may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs before the expiry of one year from the date of payment of such duty or interest.

8. The words used in the provision makes it clear that statute has not distinguished the nature of duty or interest, the refund whereof is claimed. Hence, even if we do not look into the amended Notification No. 93/2008, the period of limitation as applicable for filing the refund claim under Notification 102/2008 will otherwise be a period of one year in accordance of the aforesaid Section 27 of Customs Act. Thus, we cannot rule out that the Notification No. 93/2008 came into existence to align the statutory provision with the Notification which was silent as far as the period of limitation for the purpose as mentioned therein is concerned. Otherwise also, on examination of relevant provision it appears that the provisions of limitation are excluded, it would nonetheless be still open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation. This Tribunal in the case of *Uttam Sucrotech International Pvt. Ltd. Vs. Union of India 2011 (264) E.L.T. 502 (Delhi)* has held that the applicability of the provisions of limitation Act therefore is to be judged not from the terms of limitation Act but by the provisions of the concerned act. The Tribunal has gone to the extent of appreciating that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions even of Section 5 of the Limitation Act. The Hon'ble Apex Court in the case *Naseeruddin Vs. Sitaram Aggarwal A.I.R. 2003 (S.C.)1543* has held that in the absence of statutory provisions, no inherent powers of the court exists to condone the delay. It was also held that a statutory right has to be exercised in the mode, manner and limitation specified in the special statute itself. The Hon'ble Apex Court in an earlier decision in the case of *Titaghur Papermills Company Ltd. Vs. State of Orissa SCC PP 440-41 para 11* has held:

*"11. .... it is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. Vs. Hawkesford in the following passage: (ER p. 495)*

*..... There are three classes of cases in which a liability may be established founded upon a statute. .... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. .... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."*

In still another case titled as *Munshiram Vs. Municipal Committee Chheharta SSC page 88 para 23*, the Hon'ble Apex Court held that when a Revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all other forums and modes of seeking said remedy are excluded. Except in the case where the statutory authority has not acted in accordance with the provisions of the enactment in

question or in defiance of the fundamental principles of judicial procedure or has resorted to invoke the provisions which are repealed. Apparently and admittedly none is the fact of the present Appeal. It is also not the case that Notification 93/2008 has been repealed. In absence thereof also, as already discussed above, Section 27 of Customs Act prescribes a period during which refund of any type can be claimed. The Hon'ble Apex Court in a recent decision *Commissioner of Customs (Import Mumbai) Vs. M/s Dilip Kumar & Co.* has held that an exemption Notification has to be strictly construed, i.e. if the person claiming exemption does not fall strictly within the letter of Notification, he cannot claim the exemption. The Hon'ble Apex Court while relying upon its previous decision in the case *District Mining Officer Vs. Tata Iron & Steel Company 2001 (7) SCC 358* had noticed as follows:-

*"... A statute is an edict of the Legislature and in construing a statute, it is necessary, to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the Court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. This task very often raises the difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for.*

*Nonetheless, the function of the Courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed..."* It was also held that the well settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In *Kanai Lal Sur v. Paramnidhi Sadhukhan*, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

In view of entire above discussion, we are of the opinion that the refund claim of additional duty due to the exemption flowing out of Notification No. 102/2007 has to be filed within one year in view of the subsequent Notification No. 93/2008-Cus which still holds good and also in view of Section 27 of the Customs Act, 1962. We therefore hold that the Commissioner(Appeals) has committed an error while giving an expanded interpretation qua limitation to favour assessee. We therefore set aside the said Order and allow the present Appeal rejecting the impugned refund claimed.

(Pronounced in the open Court on 25.10.2018)



[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
WEST ZONAL BENCH, AHMEDABAD**

**Appeal Nos.C/453-454/2010-DB**

Arising out of OIA-163-164/COMMR-A-/JMN/2010, Dated: 25.10.2010

Passed by the Commissioner Of Customs (prev) Jamnagar

**Date of Hearing: 7.6.2018**

**Date of Decision: 22.6.2018**

**M/s SAURASHTRA CEMENT LTD**

**Vs**

**COMMISSIONER OF CUSTOMS  
JAMNAGAR (PREV)**

**Appellant Rep by:** Mr S R Dixit, Adv.

**Respondent Rep by:** Mr S N Gohil, AR

**CORAM:** Ramesh Nair, Member (J)

Raju, Member (T)

**FINAL ORDER NOS. A/11253-11254/2018**

**Per: Ramesh Nair:**

The brief facts of the case are that the appellant had imported total 49874.000 MTs of 'Steam (Non-Coking) Coal' collectively against 7 bills of entry out of which 46933.950 MTs were cleared availing duty exemption under Duty Free Import Authorization (DFIA) Scheme. The bills of entry were finally assessed to duty. Upon subsequent verification from the jurisdictional Central Excise Authorities, it came to light that the export obligation was fulfilled by exporting the resultant goods manufactured availing cenvat credit facilities thereby, violating condition 5 of Notification 40/2006-Cus rendering so much quantity of goods ineligible for exemption in terms of that Notification. Out of the said quantity, the appellant – importer could not produce the Certificate regarding use of quantity of 997.340 MTs for manufacture of dutiable goods since so much quantity was not at all received in the factory of the appellant. Since it appeared that the appellant had availed double benefit of DFIA Scheme rendered the quantity of 997.340 MTs of imported goods ineligible for exemption from import duty under Notification No. 40/2006-Cus, two SCNs both dated 08.09.2009 were issued to the appellant which culminated into order in original wherein the adjudicating authority has confirmed the total duty liability of Rs. 2,63,834/- along with interest under Section 28(2) and 28AB respectively of Customs Act, 1962. A penalty of equal amount of duty under Section 114A of the Customs Act was also imposed. Being aggrieved by the order in original, appellant filed appeals before the Commissioner (Appeals) who considering the facts that a quantity of 997.340 MTs was not at all received, upheld the demand of customs duty. However, the penalty imposed under Section 114A of the Act was set aside. Accordingly, the order in original was modified. Being aggrieved by the impugned order, the present appeals were filed by the appellant.

2. Sh. S.R. Dixit, Ld. Counsel appearing on behalf of the appellant submits that the very meagre quantity of 997.340 MTs against the total import quantity of 46933.950 MTs was found short. This shortage is not due to diversion of goods, the goods being a coal, there is some transit loss, therefore, it cannot be said that there is short receipt of the imported goods. This minor quantity of shortage is permissible. He submits that in the present case, the goods were imported claiming Notification 40/2006-Cus. In the identical Notification No. 13/1997-Cus dated 1.3.1997, the Hon'ble Supreme Court dealing with the identical issue in the case of *BPL Display Devices Ltd. 2004 (174) ELT 5 (SC)* held that the exemption cannot be denied on the ground that the goods imported is notified 'for use' and there is no dispute that in the present case also the goods imported were notified 'for use' in the manufacture, therefore, the judgment of Hon'ble Supreme Court directly applies. He further submits that the issue has been considered in various judgment which are cited below:

- *Jhoonjhunwala Vanaspati Ltd. 2004 (166) ELT 369 (Tri.Del)*
- *Jhoonjhunwala Vanaspati Ltd. 2015 (323) ELT 681 (All.)*
- *Suraj Industries Ltd. 2006 (198) ELT 199 (Tri. Del.)*
- *Suraj Industries Ltd. 2010 (254) ELT 72 (H.P.)*



- *Shree Gopal Vanaspati 2009 (234) ELT 274 (Tri. Del.)*

- *India Metals & Ferro Alloys Ltd. 2010 (249) ELT 548 (Tri. Kol.)*

- *Partap Steels Ltd. 2001 (135) ELT 168 (Tri. Chennai)*

- *JSW Steels Ltd. 2010 (250) ELT 366 (Tri. Mum)*

- *Sarda Energy & Minerals Ltd. 2016 (337) ELT 143 (Tri. Del.)*

3. Sh. S.N. Gohil, Ld. Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records.

5. We find that there is no dispute that there is a shortage of 997.340 MT of coal. The appellant claimed the exemption Notification with the condition that the entire goods imported shall be used in the manufacture of final product in terms of Notification No. 40/2006-Cus. The only defense of the appellant is that though there is shortage of being a small quantity which is due to transit loss the exemption in respect of such shortage could not be denied. The Ld. Counsel has heavily relied upon the Hon'ble Supreme Court judgment in the case of BPL Display Devices Ltd. (supra) and Hon'ble Allahabad High Court judgment in the case of Jhoonjhunwala Vanaspati Ltd. (supra). On perusal of all the judgments and relevant Notification, we find that in the present case, the Notification 40/2006-Cus stipulates the following condition:

### **General Exemption No. 132**

**Exemption to imports against Duty Free Import Authorization-** In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India against a Duty Free Import Authorisation issued in terms of paragraph 4.2.1 and 4.2.2 of the Foreign Trade Policy (hereinafter referred to as the said authorisation) from the whole of the duty of Customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty, safeguard duty and anti-dumping duty leviable thereon, respectively, under sections 3, 8B and 9A of the said Customs Tariff Act, subject to the following conditions namely :-

(i) that the description, value and quantity of materials imported are covered by the said authorisation and the said authorisation is produced before the proper officer of customs at the time of clearance for debit:

Provided that in respect of resultant product specified in paragraph 4.32.3 of the Hand Book of Procedures (Vol.I) of the Foreign Trade Policy, the materials permitted in the said authorisation or a duty free import authorisation for intermediate supply, as the case may be, shall be of the same quality, technical characteristics and specifications as the materials used in the said resultant product:

Provided further that in respect of the said resultant product the exporter shall give declaration with regard to the quality, technical characteristic and specifications of materials used in the shipping bill;

(ii) that where import takes place after fulfilment of export obligation, the shipping bill number(s) and date(s) and quantity and Free on Board value of the resultant product are endorsed on the said authorisation:

Provided that where import takes place before fulfilment of export obligation, the quantity and Free on Board value of the resultant product to be exported are endorsed on the said authorisation;

(iii) that in respect of imports made before the discharge of export obligation in full, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen per cent. per annum from the date of clearance of the said materials;

(iv) that in respect of imports made after the discharge of export obligation in full, if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant

product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or CENVAT Credit under CENVAT Credit Rules, 2004 has been availed, then the importer shall, at the time of clearance of the imported materials furnish a bond to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself, to use the imported materials in his factory or in the factory of his supporting manufacturer for the manufacture of dutiable goods and to submit a certificate, from the jurisdictional Central Excise officer within six months from the date of clearance of the said materials, that the imported materials have been so used:

Provided that, in case,

(a) materials are imported against an authorisation transferred by the Regional Authority, or

(b) the imported materials are transferred with the permission of Regional Authority, then the importer shall pay an amount equal to the additional duty of customs leviable on the materials so imported or transferred, but for the exemption contained herein, together with interest at the rate of fifteen per cent. per annum from the date of clearance of the said materials:

Provided also that if the importer pays additional duty of customs leviable on the imported materials but for the exemption contained herein, then the imported materials may be cleared without furnishing a bond specified in this condition and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules, 2004;

(iiib) that in respect of imports made after the discharge of export obligation in full, and if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule 2 of rule 19 of the Central Excise Rules, 2002 or CENVAT credit under CENVAT Credit Rules, 2004 has not been availed and the importer furnishes proof to this effect to the satisfaction of the Deputy Commissioner of Customs or the Assistant Commissioner of Customs as the case may be, then the imported materials may be cleared without furnishing a bond specified in condition (iiia);

(iv) that the imports and exports are undertaken through seaports at Bedi (including Rozi-Jamnagar), Chennai, Cochin, Dahej, Dharamtar, Haldia (Haldia Dock complex of Kolkata port) Kakinada, Kandla, Kolkata, Krishnapatnam, Magdalla, Mangalore, Marmagoa, Muldwarka, Mumbai, Mundhra, Nagapattinam, Nhava Sheva, Okha, Paradeep, Pipavav, Porbander, Sikka, Tuticorin, Visakhapatnam and Vadinar or through any of the airports at Ahmedabad, Bangalore, Bhubaneswar, Chennai, Cochin, Coimbatore, Dabolim (Goa), Delhi, Hyderabad, Indore, Jaipur, Kolkata, Lucknow (Amausi), Mumbai, Nagpur, Rajasansi (Amritsar), Srinagar, Trivandrum and Varanasi or through any of the Inland Container Depots at Agra, Ahmedabad, Anaparthi (Andhra Pradesh), Babarpur, Bangalore, Bhadohi, Bhatinda, Bhilwara, Bhiwadi, Bhusawal, Chheharata (Amritsar), Coimbatore, Dadri, Dappar (Dera Bassi), Daulatabad (Wanjarwadi and Maliwada), Delhi, Dighi (Pune), Durgapur (Export Promotion Industrial Park), Faridabad, Garhi Harsaru, Gauhati, Guntur, Hyderabad, Jaipur, Jalandhar, Jamshedpur, Jodhpur, Kanpur, Karur, Kota, Kundli, Loni (District Ghaziabad), Ludhiana, Madurai, Malanpur, Mandideep (District Raisen), Miraj, Moradabad, Nagpur, Nasik, Pimpri (Pune), Pitampur (Indore), Pondicherry, Raipur, Rewari, Rudrapur (Nainital), Salem, Singanalur, Surat, Surajpur, Tirupur, Tuticorin, Udaipur, Vadodara, Varanasi, , Waluj (Aurangabad) or through the Land Customs Station at Agartala, Amritsar Rail Cargo, Attari Road, Changrabandha, Dawki, Ghojadanga, Hilli, Jogbani, Mahadipur, Nepalganj Road, Nautanva (Sonauli), Petrapole, Ranaghat, Raxaul, Singhabad and Sutarkhandi or a Special Economic Zone notified under section 4 of the Special Economic Zones Act, 2005 (28 of 2005):

Provided that the Commissioner of Customs may, by special order, or by a Public Notice, and subject to such conditions as may be specified by him, permits import and export from any other seaport or airport or inland container depot or through any land customs station;

(v) that the export obligation as specified in the said authorization (both in value and quantity terms) is discharged within the period specified in the said authorization or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorization:

Provided that an Advance Intermediate authorization holder shall discharge export obligation by supplying the resultant products to the exporter in terms of paragraph 4.1.3 (ii) of the Foreign Trade Policy;

(vi) that the importer produces evidence of discharge of export obligation to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within a period of sixty days of the expiry of period allowed for fulfilment of export obligation, or within such extended period as the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may allow;

(vii) that exempt materials shall not be disposed of or utilised in any manner, except for utilisation in discharge of export obligation, before the export obligation under the said authorisation has been discharged in full:

(viii) that where the Bond filed under condition (iii) against the said authorisation has not been redeemed by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, the unutilised material may be transferred to any other manufacturer for processing under actual user condition after complying the central excise procedure relating to Job work;

(ix) that in relation to the said authorisation issued to a merchant exporter,-

(a) the name and address of the supporting manufacturer is specified in the said authorisation and the bond required to be executed by the importer in terms of condition numbers (iii) or (iv) as the case may be shall be executed jointly by the merchant exporter and the supporting manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification; and

(b) exempt materials are utilised in the factory of such supporting manufacturer for discharge of export obligation and the same shall not be transferred or sold or used for any other purpose by the said merchant exporter until the export obligation specified in condition (vii) has been discharged in full.

6. In the judgment relied upon by the Ld. Counsel, the relevant Notification is 13/1997-Cus, the Hon'ble Supreme Court interpreting the terms of the Notification 13/1997 held that the terms mentioned in the Notification 13/1997-Cus is 'for use' which was clarified that 'for use' means intended for use, therefore, even if certain quantity was not put to use, the exemption cannot be denied. However in the present case, the Notification prescribes various condition unlike in the Notification 13/1997-Cus. As per the conditions, the importer is duty bound to execute a bond binding himself to use the imported materials in his factory and not only that, he has to submit a Certificate of the jurisdictional Excise Officer regarding enduse of the goods. Since the appellant could not use quantity of 997.340 MTs, the Jurisdictional Officer also did not issue enduse Certificate. All these conditions are mandatory in case of Notification 40/2006-Cus. In failure to comply with this substantive condition, the appellant is not eligible for exemption Notification. This ruling has been given by the Hon'ble Supreme Court in the case of *Mangalore Chemicals & Fertilizers Ltd. vs Deputy Commissioner 1991 (55) ELT 437 (SC)*. According to which the Hon'ble Supreme Court held that when substantive conditions prescribed for extending the benefit of exemption notification, should be scrupulously followed and in failure to follow the condition, the benefit of exemption cannot be allowed. Therefore, it is clear that all the conditions prescribed in the Notification 40/2006-Cus are not identical in the case of Notification No. 13/1997-Cus. Therefore, the case of Hon'ble Supreme Court in the case of BPL Display Devices (supra) stands distinguished. As regards, the judgment of Hon'ble Allahabad High Court in *Jhoonjhunwala Vanaspati Ltd. (supra)*, the different notification No. 16/2007-Cus was involved and the quantity of shortage was .07% whereas in the present case the short quantity is substantial which is more than 1.5%, for these reasons the ratio of Jhoonjhunwala case does not apply. Moreover, all these judgments are based on the Hon'ble Supreme Court's case in BPL Display Devices (supra) which has already been distinguished by us in the above discussion.

7. We, therefore, find that there is a clear violation of the condition of the Notification 40/2006-Cus, therefore, the appellant is not entitled for the benefit of said Notification. Accordingly, the demand confirmed in respect of the short receipt quantity is sustainable. Accordingly, we uphold the impugned order and dismiss the appeals.

(Pronounced in the open court on 22.6.2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
WEST BLOCK NO 2, R K PURAM, PRINCIPAL BENCH, NEW DELHI-110066  
COURT NO. I**

**Appeal No.C/51536/2017**

Arising out of Order-in-Original No.DLI/Custom/Pre/MKV/PR.Commr/14/2017, Dated:  
14.06.2017

Passed by Principal Commissioner of Customs, (Prev.), New Delhi

**Date of Hearing: 30.01.2018**

**Date of Decision: 05.02.2018**

**M/s LAXMI ENTERPRISES**

**Vs**

**COMMISSIONER OF CUSTOMS  
PREV. NEW DELHI**

**Appellant Rep by:** Shri Prabhat Kumar, Adv.

**Respondent Rep by:** Shri R K Manjhi, DR

**CORAM:** Dr Satish Chandra, President

V Padmanabhan, Member (T)

**FINAL ORDER NO.50544/2018**

**Per: V Padmanabhan:**

The present appeal is filed against Order-in-Original No.14/2017 dated 14.06.2017. The appellant imported certain goods described as Reflective Sheeting and Luminescent Film and filed bill of entry No.9962802 dated 20.07.2015. After examining the consignment, the Customs Authorities were of the opinion that there was mis-declaration in the quantity of goods since 578 rolls of the material were found as against 577 rolls, declared the Bill of Entry. It further appeared that the goods were mis-declared in terms of value also. To probe the matter further, searches were conducted on 20.08.2015 at the business premises of the importer, residence of the proprietor as well as other connected premises. During the search, one laptop as well as mobile phone found was recovered and the data contained therein was retrieved and printed through panchnanma proceedings on 24.08.2015 and 27.08.2015 in the presence of witnesses as well as S/Shri Sumit Chawla and Rajiv Chawla, the concerned persons of the importer. The data retrieved included proforma invoices, price list, commercial invoices, etc. of various goods imported by the appellant in the past. Shri Sumit Chawla, authorized representative and son of the proprietor of M/s Lakshmi Enterprises, was interrogated and his statements were recorded in relation to the documents recovered from the laptop and mobile phone. In his statement dated 17.09.2015, he confirmed that the documents like invoices, proforma invoices related to consignments imported by him for which the real value of the goods was hidden from the Customs Authorities. In his further statement dated 19.01.2017, towards conclusion of the investigation, he confirmed that the grade and specification of goods imported by them in the past were not cleared in the Bill of Entry; the invoices/commercial invoices recovered could be taken for re-assessment for past import; he further accepted the duty liability for the past consignments on the basis of invoice/commercial invoice found in the electronic devices, as per the following table:

| SN | Description of goods                           | Rates found (USD) per Roll | Ref. Invoice/ Commercial Invoice No. | Corresponding Bill of Entry |
|----|------------------------------------------------|----------------------------|--------------------------------------|-----------------------------|
| 1  | Glitter Film (Size-90 cm 50 cm)                | 51.50 FOB                  | HY121213 dated 13.12.2013            | 5303180                     |
| 2  | Multi Lens Film (Size 90*100 CM)               | 103                        | HY121213 dated 13.12.2013            |                             |
| 3  | Reflective Sheeting (Size 1.24*45.7 m) Grade A | 70.835                     | YGM1306035 dated 11.12.2013          | 4466023 dated 27.01.2014    |
|    | Reflective Sheeting (Size 1.24*45.7 m) Grade B | 66,9048                    |                                      |                             |
|    | Reflective Sheeting (Size                      | 64.171                     |                                      |                             |

|   |                                                           |       |                        |                          |
|---|-----------------------------------------------------------|-------|------------------------|--------------------------|
|   | 665*91.4 m) Grade B                                       |       |                        |                          |
| 4 | PVC Self Adhesive Tape with pet release (size 45.7m*1.27) | 32.70 | 1207X dated 17.02.2013 | 8513918 dated 08.03.2013 |

2. Shri Sumit Chawla further admitted in his statement dated 19.01.2016 that the differential amount, over and above declared in the bills of entry, was remitted in Indian currency to the representative of supplier through un-official channels.

3. The goods covered by the current bill of entry were provisionally released to the appellant and on conclusion of investigation, SCN dated 11.08.2016 was issued to the appellant demanding the differential customs duty for past consignments. This SCN was finalized by issue of impugned order as follows :-

i) Declared Customs value in respect of past clearances made under 32 bills of entry was rejected and re-determined on the basis of the documents recovered during investigation.

ii) Differential customs duty amounting to Rs.1,10,86,061/- was demanded along with interest.

iii) Goods seized in various places were ordered for confiscation and redemption fine imposed.

iv) Penalty equal to the customs department demanded was imposed on the appellant.

4. Aggrieved by the impugned order, the present appeal has been filed mainly on the following grounds:

i) The case has been made based upon the relied upon documents in the form of prints-out from laptop and mobile phone. These documents are not permissible evidence under Section 138C of the Customs Act, 1963, since there is nothing on record to show that the conditions specified in relation to the data have been satisfied.

ii) The adjudicating authority has not followed the Customs Valuation Rules sequentially in arriving at the valuation for demand of duty.

iii) He has failed to cite the value of contemporaneous import of the same kind and quality of goods and hence the transaction value cannot be rejected.

iv) The adjudicating authority has ignored the evidence produced by the appellant regarding contemporaneous import of identical/similar goods.

v) The alleged invoices/commercial invoices cannot be applied to past imports. In particular, the 32 import consignments are spread-over a period of two years and four months which have been re-valued on the basis of evidence of December, 2013. This is improper since these invoices cannot be used to recover a period of more than 90 days

vi) They also relied on various case laws, to the effect that transaction value is required to be accepted.

5. With the above background, we heard Shri Prabhat Kumar, Id Advocate, representing the appellant. He explained the facts of the case as well as various grounds of appeal, in detail.

6. We also heard Shri R.K. Manjhi, Id DR on behalf of the Revenue. He submitted that the original invoices/commercial invoices pertain to the past imports were found in the laptop and mobile phone recovered during the search proceedings of 20.08.2015. Shri Sumit Chawla, in his statements, has admitted the under-valuation of the past consignments and has given his consent for re-determining the value of past consignments on the basis of the above invoices. He specifically pointed-out that none of the statements has ever been retracted. He submitted that the impugned order is fully justified and may be sustained.

7. We have heard both sides and perused the record. The appellant has imported certain goods described as "Self Adhesive Reflective Sheeting" and filed bill of entry dated 20.07.2015 at ICD Tughlakabad, New Delhi. While examining the goods imported under the above bill of entry, the department was of the view that the value declared by the appellant was incorrect and the goods were under valued. There was also mis-declaration in the total quantity of goods imported. As part of the investigation against under-valuation, the department searched the business premises of the importer and other connected premises on 20.08.2015. During the search, along with various documents, electronic media, in the form of laptop and mobile phone, was recovered and the data contained therein was printed-out under panchnama proceedings. These devices were found to contain invoices/commercial invoices, price list, etc. in respect of the same goods imported in the past. In the statements recorded from Shri Sumit Chawla son of proprietor, he admitted

that many of the past consignments were under valued and that the documents recovered from the electronic devices pertain to the consignments imported earlier by the appellant. Accordingly, the department proceeded to demand differential duty in respect of goods imported earlier by the appellant and covered by 32 bills of entry. The present appeal challenges the demand for differential duty and imposition of penalties, levied by the impugned order.

8. In the main grounds of the present appeal, it has been argued that transaction value was required to be accepted in the absence of evidence produced by Revenue of contemporaneous import of identical/similar goods. The appellant has argued that the documents printed-out from the electronic media are not admissible for non-compliance of specified conditions specified in the Section 138C of the Customs Act.

9. The valuation of imported goods is required to be done in terms of Section 14 of the Customs Act, 1962, read with the Customs Valuation Rules, 2007. The transaction value of imported goods can be rejected only as per the provisions of Rule 12 of the Customs Valuation Rules. In the present case, in respect of 32 Bills of Entry pertaining to imports, certain documents were recovered during the course of search from the laptop and mobile phones. From among the documents recovered from the laptop and mobile phone, the department has recovered the invoices/commercial invoices pertaining to the goods imported under these Bills of Entry. Such invoices indicate that the goods were procured by the appellant from the foreign supplier at significantly higher prices than what has been declared to the department at the time of filing Bills of Entry. It further has been admitted by Shri Sumit Chawla, son of the proprietor, that these invoices, printed-out from laptop/mobile phone, reflect the correct value of imports. He has even admitted that the differential amount, over and above the invoice originally declared, have been paid to the foreign supplier through means other than the banking channels.

10. In the light of the evidence, as above, we are of the view that the adjudicating authority has rightly rejected the transaction value of goods imported under the 32 Bills of Entry, in terms of Rule 12 of the Customs Valuation Rules, 2007. In fact, Explanation (f) to Rule 12 *ibid* specifically provides for rejection of the transaction value in the case of fraud or manipulated documents as in the present case.

11. The appellant has raised objections to the admissibility of the documents recovered from the laptop. They have cited the provisions of Section 138C of the Customs Act. We find such objections without basis in as much as the truth of the documents printed-out from the laptop has been admitted by Shri Sumit Chawla son of the proprietor in clear terms. Further, their clear admission by him that these invoices recovered, reflect the correct valuation at which the transaction was concluded with the valuation supplier. Further the appellant was given an opportunity to prove the correct transaction value of the goods imported under 32 bills of entry by providing bank attested genuine invoices but Shri Sumit Chawla did not make same available. On the other hand, in his statement dated 19.01.2016, that the prices indicated in the invoices/commercial invoices could be taken for assessment of all past imports as the rate of product did not change much during period of imports. We are of the view that there is no infirmity on the part of the adjudicating authority in re-determining the value of the past imported goods on the basis of such invoices. In the peculiar facts and circumstances of the present case, there is no need for the Revenue to collect evidence in the form of contemporaneous imports.

12. In view of above discussions, we find no infirmity in the impugned order, which is upheld and the appeal dismissed.

(Pronounced in Court on 05.02.2018)

[Back](#)

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017  
SINGLE MEMBER BENCH  
COURT I**

**C/Stay/51557-51566/2014  
Appeal Nos. C/51319-51328/2014**

Arising out of Order-in-Appeal Nos. 118 to 122/13-14, Dated: 25.10.2013 And  
Order-in-Appeal Nos. 113 to 117/13-14, Dated: 23.10.2013

Passed by the Commissioner of Central Excise (Appeals), Delhi, Chandigarh

**Date of Hearing: 31.8.2016  
Date of Decision: 31.8.2016**

**UNISONS PVT LTD  
PALL SINGH LOHIA, DIRECTOR**

**Vs**

**COMMISSIONER OF CUSTOMS, AMRITSAR**

**Appellant Rep by:** Shri Saurabh Kapoor, Adv.

**Respondent Rep by:** Shri Satyapal, AR

**CORAM:** Ashok Jindal, Member (J)

**FINAL ORDER NOS. A/61280-61288 AND 61312/2016**

**Per: Ashok Jindal:**

The appellants have filed these appeals as well as stay applications against the impugned order. As the issue involved is in a narrow compass, therefore, the appeals are taken up alongwith stay applications and are being decided by a common order.

2. All the appeals are being disposed of by a common order as the issue involved is identical and penalty has been imposed in each case in terms of the provisions of Section 112 of Customs Act.

3. Without going into the details of the matters involved in the imports, I reproduce the relevant Para of the impugned order of the original adjudicating authority wherein while dealing with the issue of imposition of penalty upon the present appeal, he has observed as under:-

*Role of Notice No. 2 i.e. M/s. Unison Clearing Agency-"58.*

*The issue also concerned the role of the M/s. Unison Clearing Pvt Ltd. and Shri Pall Singh Lohia. I find that Shri Pall Singh Lohia was stationed in the Mumbai office and had employed two persons namely Shri Pushpinder Singh and Shri Karnail Singh who were looking after his work at Ludhiana. I find that Shri Pall Singh Lohia has clearly stated in respect of Bills of Entries referred in Table 11, supra that the signatures on these Bills of Entries appeared to have been forged by Shri Pushpinder Singh; that they had no association with Shri Ankush Khullar or Shri Kapil Oberoi or of the companies/firms floated by the above named two persons and that it appeared that Shri Pushpinder Singh had committed the fraud by forging Sh. Pall Singh Lohia's signature and that their said employee might have liaison with the above named Sh. Ankush Khullar and Shri Kapil Oberoi in the fraud. He has denied allegations of connivance by stating that their company had not connived with Shri Ankush Khullar and Shri Kapil Oberoi merely in view of the fact that Bill of Entry No. 1959, dated 23-9-03 involved in the fraud find mentioned in the Books of Accounts of the M/s. Unison Clearing Pvt. Ltd. He stated that some had apparently been signed by his employee Shri Pushpinder Singh and the payment had been entered in their records on the basis of the Invoices issued by their Ludhiana Office, It was also stated that as a routine matter the bills were raised by the Ludhiana Office and the payments so received was credited to their account. He further stated that their employee Sh. Pushpinder Singh committed all the fraud. The aforesaid fact is very well corroborative with statement of Shri Pall Singh who in his statement has categorically stated that he had never met any person of the noticee company and had not appointed Sh. Ankush Khullar and Kapil Oberoi as his agents and the payments were made to M/s. Jai Bhole Overseas on the advice of Sh. Ankush Khullar and Sh. Kapil Oberoi.*



Thus, it is clear from the statements of Sh. Pall Singh Lohia that in cases of Bills of Entry at S. No. 8 to 13 of Table-III supra and Bills of Entry mentioned in Table -II supra (refer para 18) though the signatures of Shri Pall Singh Lohia were forged, still the Bills of Entry were with the Noticee No. 2. Though no fraud with revenue was committed in respect of these Bills of Entry, but the fact remains that the signatures on these Bills of Entry were forged by his employee Sh. Pushpinder Singh. The aforesaid fact has not been contradicted by the Noticee Sh. Pushpinder Singh during the time of the investigation till the adjudication against him and the allegations of forgery had been levied.

The aforesaid fact is corroborative to the fact that none of 59. the other Noticees had named the Noticee's involvement in the commission or omission of the offence. Moreover Shri Pall Singh Lohia has categorically stated that Sh. Anjush Khullar and Sh. Kapil Oberoi were not the agents of the Noticee and they were not in any manner dealt with C.H.A. Company or its employees. Further, I find that when the fact of misutilisation of the License was brought to his knowledge in July, 2004 the Noticee had immediately terminated the services of his employee i.e. Sh. Pushpinder Singh.

I find that the Noticee has stated in his statement recorded 60. u/s 108 of the Customs Act, 1962 that he has not signed any of the Bill of Entries moreover none of the Bills of Entries had been signed or handed over to any other person who are party to the fraud. Moreover the signatures of the Director of the company have been forged by other person, which has not been controverted by the Co-Noticee Shri Pushpinder Singh. I find that the Importer in his statement has stated that he had not known and have not dealt with M/s Unison Clearing Pvt. Ltd. or any of the employees of the C.H.A. Company. Also the Noticee Sh. Ankush Khullar and Kapil Oberoi in their statements have stated that they never knew the Director of the C.H.A. Company and have not dealt with Sh. Pall Singh Lohia.

61 As regards the agency commission shown to have been reflected in the Books of Accounts the Noticee has stated that the same has been deposited by the employees of the company in the routine manner and the suspicion of the fraud came to the knowledge of the Director of the company only after it was reported by its another employee i.e. Sh. Karnail Singh. Further the statements of Sh. Ankush Khullar and Sh. Kapil Oberoi reveal that they were not the employees of the Noticee C.H.A. and were not in any way known to the Directors of the C.H.A. Company. However the employee of the company i.e. Sh. Pushpinder Singh appears to have helped the aforesaid Noticees i.e. Sh. Ankush Khullar and Sh. Kapil Oberoi by handing over the Blank Bills of Entries after forging the signatures on the same. Since the Noticee Sh. Pushpinder Singh never appeared before the Customs during investigation the aforesaid facts remain uncontroverted. I find that since the Noticee Sh. Pall Singh Lohia was based in Mumbai and all the acts had been done by his employees behind his back. There is no evidence on record in support of the fact that the Noticee had directly or indirectly benefited from the illegal proceeds obtained in the commission of fraud. Since Sh. Pushpinder Singh was the real beneficiary to the transactions and the Noticee had failed to exercise proper control over his employee and hence his negligence is noticeable.

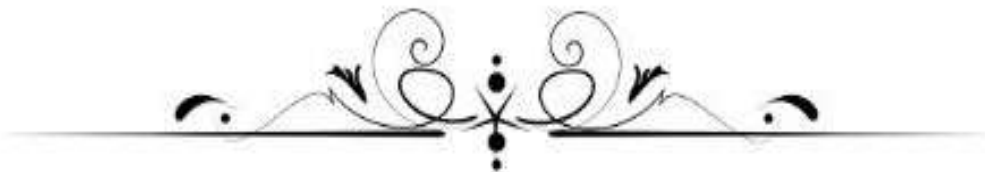
Having regard to the facts and circumstances of the case and 62. also keeping in mind the role played by the employees of the Noticee, and also keeping in mind the negligence. I am of the view that the Noticees have failed to exercise greater vigilance on its employees, the conduct of both the Noticees ipso facto in my view would attract levy of penalty commensurate to the role as per facts and circumstances of the case."

4. As is clear from the above there is no direct evidence on record showing that Unisons Clearing Pvt. Ltd. which is a CHA firm, was directly involved in the fraudulently activity of importers. The adjudicating authority has observed that neither importer knew the appellant nor the appellant has signed any document and it was only their employees who were creating the problem and the mischief. In the absence of any direct involvement of the appellant, showing that they were aiding and abetting and associated with the importer, the imposition of penalty upon by them cannot be sustained. For the above proposition, I refer to the Tribunal's decision in the case of M/s. Saini Consultants, Final order Nos. C/54-55/2008, dated 28-2-2008. Accordingly, I set aside the imposition of penalties upon the appellant in each case and allow all the appeals with consequential relief to the appellant.

5. In the result, the appeals as well as stay applications are allowed.

(Dictated and Pronounced in the Court)





OFFICE OF THE PR. CHIEF COMMISSIONER (AR)  
CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
WEST BLOCK NO. 2, WING NO. 2, 1<sup>ST</sup> FLOOR, R.K. PURAM  
NEW DELHI – 110 066  
Email: [cdrcestat123@gmail.com](mailto:cdrcestat123@gmail.com)