

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10001 of 2024 - DB

(Arising out of Order in Original AHM-CUSTM-000-COM-17-23-24 dated 03/10/2023 passed by Commissioner of Customs, Ahmedabad)

**Commissioner of CUSTOMS –
Customs Ahmedabad**

1st Floor, Customs House,
Ashram Road, Navrangpura,
Ahmedabad- 380009

.....Appellant

VERSUS

**ADANI ENTERPRISES LTD.
(Formerly known as Adani Exports Ltd.)**

Adani House, Nr. Mithakhali Circle,
Navrangpura, Ahmedabad-380009

.....Respondent

WITH

Customs Appeal No. 10002 of 2024 – DB

(Arising out of Order in Original AHM-CUSTM-000-COM-17-23-24 dated 03/10/2023 passed by passed by Commissioner of Customs, Ahmedabad))

**Commissioner of CUSTOMS –
Customs Ahmedabad**

1st Floor, Customs House,
Ashram Road, Navrangpura,
Ahmedabad- 380009

.....Appellant

VERSUS

**Shri Rajesh Adani
(Managing Director Of Adani Enterprises Ltd.)**

Adani House, Nr. Mithakhali Circle,
Navrangpura, Ahmedabad-380009

.....Respondent

AND

Customs Appeal No. 10003 of 2024 – DB

(Arising out of Order in Original AHM-CUSTM-000-COM-17-23-24 dated 03/10/2023 passed by passed by Commissioner of Customs, Ahmedabad))

**Commissioner of CUSTOMS –
Customs Ahmedabad**

1st Floor, Customs House,
Ashram Road, Navrangpura,
Ahmedabad- 380009

.....Appellant

VERSUS

**Shri Samir Vora
(Vice President of Adani Enterprises Ltd.)**

Adani House, Nr. Mithakhali Circle,
Navrangpura, Ahmedabad-380009

.....Respondent

APPEARANCE:

Shri Girish Nair, Assistant Commissioner (AR) for the Appellant
Shri Hardik Modh, Advocate for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. 12977-12979/2024

DATE OF HEARING: 21.11.2024
DATE OF DECISION: 03.12.2024

RAMESH NAIR

All these Appeals are preferred by the revenue challenging Order-In-Original No. AHD-CUSTOM-000-COM-17-23-24 dated 03.10.2023 passed by the Principal Commissioner of Customs, Ahmedabad. Since issues involved in these appeals are common and arise from same investigation, hence taken up together for disposal.

1.1 Brief facts of the case are that intelligence was gathered that M/s Adani Enterprises Ltd. (formerly known as M/s. Adani Exports Ltd.), had fraudulently obtained Duty Free Credit Entitlement Certificates from DGFT, Ahmedabad and utilized the same for import of gold and silver without payment of duty under the erstwhile incremental Export Promotion Scheme. developed by the officers of DRI that various companies had overvalued their exports of CD ROMS with the intention of fraudulently obtaining excess DEBP/DEEC Credits, which were subsequently utilized for duty free import thereby causing loss of the Customs Duty. Based on the said intelligence, investigations were initiated into the exports of CD ROMS and goods exported by respondents and other exporters. The Investigations revealed that exports had been overvalued to claim undue export benefits.

1.2 Based on the above intelligence, a consignment of 250 Gold bars (250 pieces of gold bars of 1Kg. each) imported by M/s AEL under Air Way Bill and Bill of Entry, without payment of duty claiming exemption under Notification No. 53/2003-Cus, dated 01.04.2003 against the DFCE License dated 08.01.2008 issued by DGFT was detained on 19.02.2010, for further investigation. On request of M/s AEL, Commissioner of Customs, Ahmedabad ordered for provisional release of seized goods.

1.3 In 2003-04 DGFT introduced a scheme titled 'Incremental Export Promotion Scheme" for the benefit of the Star Trading House/ Status Holders. As per this scheme, the exporters were entitled to credit of duty to the extent of 10% of the total incremental exports made by them in the year 2003-04, over their exports in 2002-03, provided the incremental growth was at least 25%. The said benefit was granted by way of DFCE licences for duty free import. CBIC vide Notification No. 53/2003-Cus dated 01.04.2003 exempted

the goods from Duty when imported into India against Duty Free Credit Entitlement ('DFCE') licences. Sensing large scale misuse of the above scheme, the DGFT made some amendments, vide various notifications. Being aggrieved by the above amendments Notifications, M/s AEL approached the Hon'ble High Court of Gujarat and vide judgment dated 23.07.2004, partly allowed the petition filed by M/s AEL. Consequent to the above judgment, M/s AEL and others and also DGFT have filed appeals before the Hon'ble Supreme Court. Among other appeals, the Supreme Courts has finally decided this issue vide Judgement dated 27.10.2015 in the case titled as Director General of Foreign Trade Vs. Kanak Exports and Others [2015(326)ELT (SC)]. Thus as per the revenue validity of amendments made in EXIM Policy to the extent it related to the present case, attained finality.

1.4 So far as the present case is concerned M/s AEL had thus obtained 21 DFCE licences against the exports of various commodities during the period 2003-2004. M/s. AEL have imported a total qty. of 31219.791 Kgs. of Silver and 25432.838 Kgs. of Gold Bars, without payment of duty under DFCE licences and the total duty forgone on the same is of Rs. 49,77,65,367/- during the period 2008-2010. As per the DGFTs Public Notice No. 40(RE-2003)/2002-2007 dated 28.01,2004, read with Notification No. 38/(RE 2003)/2002-2007 dated 21.04.2004, the goods imported under DFCE Scheme shall have a nexus with the products exported. Therefore, for the export of CPD, the input can only be rough, uncut or semi polished diamonds which after processing can be exported. Hence, M/s AEL were not eligible for import of Golds and Silver Bars without payment of duty under DFCE scheme which does not have any nexus for the exported product CPD. It was alleged that M/s AEL have imported the CPD and exported CPD in the same form of CPD; and not in the form of jewellery items. Gold and Silver bars cannot be treated as input and cannot be permitted for imports as replenishment for exports of Cut and Polished Diamonds ['CPD for Short] exported by M/s AEL. The investigation conducted revealed that M/s. AEL had during the year 2003-2004 imported CPD from various overseas buyers and exported the same in the same form as CPD, which cannot be counted towards incremental export benefits provided under DFCE scheme. As per Note 1 inserted after subparagraphs (vii) in para 3.7.2.1 under Chapter 3, vide Notification No. 28/(RE2003)/2002-2007 dated 28.01.2004, the re-export of imported goods shall not be taken into account for the purpose of calculating the value of exports. As per the revenue, it is revealed from the investigation conducted, statements recorded and scrutiny of documents submitted by M/s AEL that they have imported CPD from various overseas suppliers under Bond and

exported the same set of CPD in the same form from the private bonded premises.

1.5 The above investigation culminated into the issuance of show cause notice dated 19.12.2012 and demanding customs duty under Section 28 of the Customs Act, 1962 along with interest. The said Show Cause Notices also proposed to confiscation of goods and impose Penalties under the Act and proposed to enforce Bank Guarantee. In adjudication, Ld. Adjudicating authority vide impugned orders dropped the proceedings initiated against respondents. Aggrieved by the said order, revenue preferred these appeal.

2. Shri Girish Nair, Ld. Assistant Commissioner appearing on behalf of the revenue reiterated the grounds of appeals and submits that Ld. Adjudicating authority has erred in placing reliance on the Final Order No. A/2733-44/2015-WZB/CB dated 26.08.2015 passed by the Mumbai Tribunal, which has been upheld by Hon'ble Supreme Court vide order dated 22.07.2016. The said case was regarding Target Plus Scheme, whereas the present case is regarding mis-use of provisions of incremental Export Promotion Scheme under which Duty Free Credit Entitlement Licences have been issued subject to observance of applicable provisions and conditions.

2.1 He further submits that the DGFT on being brought to notice about the large scale misuse of the scheme promulgated Notifications clarifying about the disentitlement of exports of various goods for counting towards FOB entitlement under the Scheme. By Notification No. 28/(RE 2003/2002-2007 dated 28.01.2004 amongst others, re-exports of imported goods was not permitted for calculating the value of exports for the benefit under DFCE Scheme.

2.2 He also submitted that the Hon'ble Apex Court in the appeals filed in DGFT Vs. AEL, Kanak Exports and Others relying on the affidavit & counter affidavits filed by DGFT vide judgment dated 27.10.2015 upheld the appeals filed by the DGFT & the Union of India and dismissed the appeals of various petitioners including M/s AEL. The Hon'ble Supreme Court categorically observed that M/s AEL & others have fraudulently achieved the so called target of exports for benefits under DFCE by way of re-exports of cut and polished diamonds, under bond, and therefore, no benefit accrued to them.

2.3 He further submits that DFCE benefits are not available on re-exports of cut & polished diamonds. The impugned show cause notice has highlighted that Shri Lumesh Sanghvi in his statement dtd. 12.03.2012 stated he was not aware about the magnification power of the magnifying glass nor of the

technical specification of the best available magnifying glasses used for sorting diamonds.

2.4 He also submits that the office of the Additional Director General, DRI, Ahmedabad has sent a letter dtd. 09.10.2023 to the DGFT, HQ., New Delhi, requesting to review the order F.No. 08/F-3/04/AM13/ECA dtd. 26.07.2023 passed by the Additional Director General of Foreign Trade, Ahmedabad, under the provisions of Section 16 of the Foreign Trade (Development and Regulation) Act, 1992. The said proposal of DRI/Customs department is pending at the level of DGFT, HQ., New Delhi. Therefore he prayed to adjourn the proceedings in the matter till the Review Order is passed by the Director General of Foreign Trade, HQ., New Delhi in the interest of natural justice.

3. Shri Hardik Modh, Learned Counsel appearing on behalf of the respondents submits that the present show cause notice refers to the earlier show cause notice dated 30.03.2007 which alleged circular trading of CPD and the present show cause notice refers and relies on the same investigations based on which the earlier show cause notice dated 30.03.2007 was issued. The allegations of circular trading have been set aside and transactions were held to be genuine by the CESTAT by its decision CC Vs. Samir Vora-2015(330)ELT 609, duly affirmed by Hon'ble Supreme Court by dismissing the revenue's appeal reported in Commissioner Vs. Adani Enterprises Ltd. - 2016(342)ELT A50(SC) and further, review petition filed by revenue was also dismissed by Hon'ble Supreme Court vide order dated 30.03.2017. Since the show cause notice in the present case refers to the said earlier Notice dated 30.03.2007 which has attained finality in the Respondent's favour, the present appeal filed by revenue is also liable to be dismissed in terms of settled law that when foundation is removed superstructure falls.

3.1 He also submits that there is no circular trading, respondent has exported processed sorted CPD whereas the imported goods were unassorted CPD. Since, the goods undergone change due to processing like sieving, boiling, sorting etc., the exported goods are different from the goods alleged to be imported and therefore, the basic premise of circular trading fails.

3.2 He argued that the supplier and the buyer of CPD are different and distinct entities. Further, there is no allegation that there has been inter-se trading/transfer of CPD from one overseas entity to another. Therefore, the allegation of Circular trading is totally frivolous. 'Circular Trading' means selling a commodity or security at one end and buying the same commodity or security at other end through a series of transaction. The department has

completely failed to bring the case of Circular Trading and there is no iota of evidence to corroborate the allegations of circular trading.

3.3 He further argued that each consignment of CPD was duly examined by the proper officer and Bills of Entry and shipping bills are duly assessed. The proper officer made out of charge order and/or let export order under Section 47 and Section 51 of the said Act respectively. In the teeth of these examination reports and statutory orders passed by the proper officer, it is not open to the department to allege circular trading.

3.4 He also submits that similar charge of circular trading were alleged in earlier show cause notice No. DRI/AZU/INQ-15/2005 dtd. 30.03.2007 where by the Hon'ble Mumbai Tribunal has set aside the decision of the adjudicating authority and said Tribunal decision was affirmed by the Hon'ble Supreme Court by dismissing the Revenue's Appeals as reported in Commissioner Vs. Adani Enterprises Ltd. -2016(342)ELT A50(SC) and further review petition was also dismissed.

3.5 He further submits that it is alleged that there was interrelationship between the overseas seller/buyer with AEL and it was alleged that M/s PNJ Trading, Hong Kong and M/s Little Hearts Creations, Hong Kong were either controlled by M/s AEL or were acting at the behest of M/s AEL. The word "interrelationship" has been judicially interpreted and means 'mutuality of interest'. The expression 'mutuality of interest' is found to Section 14 of the said Act, which contains the expression "interest in the business of each other". In the present case, no mutuality of interest is proved by the mere fact of buying and selling of goods and therefore, the fact that the overseas company sold CPD to AEL or other bought CPD in its transactions with AEL and others does not establish any form or kind of "interrelationship". Further, there is no common shareholding or directors or any other factors which shall establish control of any form or degree by AEL over the overseas companies and the department has failed to establish that M/s AEL had the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreement or voting agreements or in any other manner. Therefore, it cannot be said that M/s. PNJ Trading, Hong kong and M/s. Little Hearts Creations, Hong Kong were controlled by M/s AEL.

3.6 He also submits that M/s AEL has obtained licenses for bonded warehouse in which processing is also permitted as clarified by the CBEC vide circular No. 40/1999 dated 28.06.1999. M/s AEL undertook the process of

boiling, sieving and sorting in the bonded warehouse in relation to the consignments of unassorted CPDs imported by the company and exported the processed & assorted CPDs thereafter with value addition. Further, the allegation that the imported and exported goods were same or substantially the same, is incorrect, because the company has exported the goods duly processed in terms of Circular No. 40/1999 dtd. 28.06.1999 by achieving under the paragraphs 4.4.17 of the Policy. This aspect has been also confirmed by the proper officer during their cross examination in respect of earlier SCN dated 30.03.2007.

3.7 He also submits that the activities like boiling, sieving and sorting were carried out by the company and their payment has also been accounted for in the books of the company. Since the activity boiling, sieving and sorting was carried out and the minimum value addition of 5% was achieved, the exports under Para 4.4.17 of the said policy would therefore qualify for calculation of incremental growth in export for the purpose of the DFCE in terms of para 4.7.2 of the Handbook of Procedure.

3.8 He further submits that each consignment of processed & assorted CPDs were physically examined by the Customs Officer at the time of export. This shows that unasorted CPDs were not exported. The Proper officer under the Customs Act verified that the consignments corresponding to the declaration in respect of description, value and quantity made in each shipping bill. Therefore, the allegation of no value addition is completely baseless.

3.9 He also submits that based on DRI recommendation, DGFT, Ahmedabad also issued SCN for cancellation of DFCE Scrips obtained against export of CPD under DFCE Scheme. However, Additional DGFT, Ahmedabad vide order dtd. 26.07.2023 dropped the SCN & Specifically held that there was no re-export of imported CPD as alleged by DRI.

3.10 He further submits that import of gold and silver bars were permitted against export of cut and polished diamond. M/s AEL imported gold & silver Bars in terms of DFCE Scrips issued to them under the Exim Policy RE 2003 for status holders scheme (under para 3.7.2.1 (VI) of Exim Policy RE 2003) on incremental exports under various products groups. Further in terms of para 3 (b) of DGFT's Policy Circular No. 27(RE-2005)/2004-2009 dtd. 05.10.2005 with respect to Gems and Jewellery sector falling under Miscellaneous products group, import permissibility is allowed under chapter 4A of the Policy /procedures Vol.1, for the sector. Accordingly, respondent has

rightly imported Gold & Silver Bars under the miscellaneous product group in conformity with the Exim Policy. In such case, since both items which has been exported as well as imported fall under the same "product group", the test of broad nexus as provided in para 3.4.5 of the Handbook of Procedures (HBP) has been satisfied.

3.11 He also submits that DGFT, Policy interpretation Committee (PIC) in its Minutes of Meeting No. 01/AM 11 dated 30.04.2010 specifically clarified that while utilizing the benefit under the scheme, inputs that have nexus with the product group are permitted.

3.12 He also argued that DFCE Scrips has not been cancelled by Licensing Authority. Therefore, it was confirmed that the company has not misrepresented before the DGFT/Licensing Authority for grant of DFCE Scrips. Thus, when the competent authority, i.e DGFT has given clean chit to the company then the customs authority has no jurisdiction to deny the benefit accrued to AEL. He placed reliance on the following decisions:-

- Tital Medical Systems Pvt. Ltd. Vs. CC, 2003(151)ELT 254 (SC);
- Zuari Industries Ltd. Vs. Commissioner of C.Ex. & Customs, 2007(210)ELT 648 (SC).
- Vadilal Chemicals Ltd. Vs. State of Andhra Pradesh, 2005(192)ELT 33 (SC)

3.13 On limitation he also submits that the entire demand is barred by limitation. The Customs authorities who have fully aware of the exports of CPD from the Bonded Warehouse and import of Gold and Silver bars against DECE scrips issued in relation to such exports. The respondent had received previous show cause notice in the year 2007 in relation to exports of CPD from Bonded warehouse during the year 2004-05 and 2005-06 and therefore, there is no suppression of facts or mis-statement by the respondent. Hence, duty demand is barred by limitation. He placed reliance on the following decisions:-

- Graphite India Ltd. Vs. CC- 2015(325)ELT 777.
- Orbit Fabrics Ltd. Vs. CCE- 2009(248)ELT 359 (Tri. Ahmd.)
- Simplex Infrastructures Ltd. Vs. Commissioner of Service tax, Kolkata - 2016-TIOL-779-HC-KOL-ST
- Delhi International Airport Ltd. Vs. Commissioner of CGST - 2019(24)GSTL-403(T)
- Binjrajika Steel Tubes Ltd. Vs. Commissioner of C.Ex., 2016(342)ELT 302(T)

- Roma Henny Security Services Pvt. Ltd. Vs. Commissioner of Service Tax, Delhi, 2018(8) GSTL 239 (Del.)
- Anand Nishikawa Co. Ltd. Vs. CCE, Meerut – 2005(188)ELT 149 (SC).

4. Heard both the sides at length and perused the available records of the case. We have also considered the detailed written submissions filed by them. The issue to be determined in these appeals is as to whether the respondents had validly imported the goods against the DFCE Licences and whether respondent had resorted to Circular trading of CPDs and thereby mis-used the DFCE scheme by way of wrongly obtaining the licences. We find that earlier department has also issued show cause notice bearing F.No. DRI/AZU/INQ-15/2005 dated 30.03.2007 in relation to similar disputed transactions in imports of unassorted CPD & Export of processed and sorted CPD for subsequent period i.e. during 2004-05 to 2005-06 under Target Plus Scheme. We find that the allegations and charges levelled under the said show cause notice dated 30.03.2007 as well as in the present disputed show cause notice dtd.19.12.2012 are similar in nature. The adjudication order passed in respect of the SCN dated 30.03.2008 was carried in Appeal to the CESTAT and decided in respondent's favour vide Final order No. A/2733-2744/2015-WZB/CB dated 26.08.2015 by holding that there was neither any mis-declaration of value /product nor there was circular trading. The CESTAT inter-alia held that all the transaction of Cut and Polished Diamonds (CPD) were genuine and there was no circular trading. The CESTAT in the said matter observed as under :-

"17. We have considered the lengthy arguments made by both sides and gone through the detailed written submissions filed by them. We have also perused the record and find that essentially the issues raised are questions of fact which we need to decide based on voluminous documents which each side has taken us through. We therefore first frame the issues for our decision. The issues framed are as under :

(I) Whether FOB value declared in the shipping bills for export of cut and polished diamonds by appellant companies is liable to be rejected on the ground that no processing activity to achieve value addition of 5% or 10%, was undertaken by the Indian companies in the bonded warehouses?

(II) Whether the Indian companies artificially inflated the export turnover to take benefit under the Target Plus Scheme (TPS) by resorting to circular trading/movement of the same set of diamonds between Indian companies and overseas entities which are allegedly inter related?

(III) What is the effect of the Commissions paid by the Indian entities for exports and the arrangement of buyers credit by the Indian entities on either the FOB value declared in the shipping bills or on the charge of circular trading referred to above?

(IV) Whether the export goods can be held liable for confiscation under Section 113(i) of the Act and consequently whether the amounts of

penalties imposed by the Commissioner are justified or are the same to be increased?

18. We shall now deal with each of the above issues -

Issue No. I

A. There are two parts to this issue. We have to see whether, firstly, any processing activity at all was carried out by the Indian companies in the bonded warehouse, and if so, to what extent and secondly, the relationship between such processing activity and the value addition, on one hand, and the relationship between the FOB value and the value addition, on the other hand.

B. The Commissioner finds that no processing was carried out by any of the six Indian companies to achieve value addition of 5% or 10%. He finds, the fact that no processing was undertaken is evident from the fact that invariably all exports took place within 3-4 days of their imports and sometimes, on the 2nd or 3rd day itself. The fact that some processing activity was carried out in the bonded warehouse cannot be denied as even Lumesh Sanghavi, whose statements have been heavily relied upon by the department, has also admitted to the processing activity being conducted in the bonded warehouse. It would be useful to reproduce the portions from the statements of Lumesh Sanghavi. In his statement dated 7-2-2006, Lumesh Sanghavi has stated as under :

"(vi) The assorter first checks the correctness of the lot wise weight declared in each of the import packets. Then he will start the process of actual assortment. Assortment would therefore include sieving, boiling and segregation.

The process of sieving on a sieve, which is a round apparatus which consists of perforated metal sheet of various sizes. The process of sieving for an average lot would normally take around 30 minutes. However, according to my experience, in the bonded warehouse activity, only about 25% consignments were put for sieving. The rest of the consignments did not go through this process at all.

The process of boiling involves boiling of the diamonds in a small glass like see through beaker (machine) which operates on electricity. The diamonds are normally boiled for about 20 minutes to remove dust/impurities. Again according to my experience of bonded warehouse, only 50% consignments were subjected to boiling.

After the process of sieving and boiling, if at all done, the next process was assortment, i.e., segregating the diamonds on purity basis. (vii) Lot wise assorting of received consignments of CPD in the respective bonded warehouses of the aforesaid companies/firms by way of boiling for cleaning, sieving for separating diamonds size wise, size wise weightment of diamonds using weighing machine, further assortment with regard to quality required."

(viii) Repacking of the assorted CPD for exports by the office staff."

C. In the same statement, Lumesh Sanghavi has further stated as under :

"Qn.5 : Please state whether 3 activities, i.e., sieving, boiling and quality assessment were done in respect of all the lots? Also, explain each process in detail?

Ans.5 : No, in all cases all the above said 3 steps are not followed, as in some cases boiling may not be warranted and in some cases quality assessment may not be essential. The process of boiling of CPD is basically required to clean the diamonds. It is not done in all cases. For carrying out the process of sieving, the diamonds have to be placed on different sizes of metal sheets having perforations/holes and when the diamonds are placed on said metal sheets they pass through the holes

and diamonds of one particular size gets eliminated from the lot. Thus, diamonds of different size are assorted by the process of sieving. Sometimes, the quality is assessed for ascertaining the impurity and thereby value of the CPD. This process is also not carried out 100%."

D. In his statement dated 28-2-2006, Lumesh Sanghavi once again deposed as under :

"On receipt of the imported consignment in the bonded warehouse, the process of assortment which included sieving, boiling and segregation would be undertaken for each lot (packet) separately, as detailed in reply to question No. 3 of my statement dated 7-2-2006. As stated in my statement dated 7-2-2006, all the above processes of sieving, boiling and segregation would not be undertaken on all the consignments. Sometimes, only sieving and boiling would be undertaken and no segregation would be done. Similarly, some consignment would not be subjected to boiling. Thereafter, the diamonds would be packed in different lots for export and lot Nos. and weight in carats would be marked on each packet as was done in import consignments. The entire process of assortment would take 3 to 4 hours and the imported diamonds would be exported within 3 to 4 days of their imports. Sometimes the exports would also takes place on the second or third day of imports. On being asked, I state that the imported diamonds and the exported diamonds were in the same form i.e. cut and polished diamonds were imported and cut and polished diamonds were exported without carrying out any process except sieving, boiling and segregation."

E. On this issue of whether processing at all was carried out or not, Kamaraj Bodal, who reported to Lumesh Sanghavi in his statement dated 30-1-2006 stated as under :

"Qn. 7 : Who used to physically receive the diamonds and what activities were carried out in the office of M/s. Adani Exports Ltd. after receiving the diamonds?

Ans. 7 : I used to physically receive the diamonds brought by our Security Agency and I used make an entry of the same in bond register. Shri Lumesh Sanghavi used to bring sorters along with him and they used to assort the diamonds by sieving and boiling. They used to segregate the diamonds as per quality and they used to pack the same for exports. I have never participated in said assorting of diamonds. As per the instructions of Shri Lumesh Sanghavi, I used to prepare export invoices by typing the same on the computer installed in our office and I used to fax the same to our CHA and the Security Agency who used to transport the same from our office to Custom Office."

F. To the same effect is also the statement of Kaushal Pandya recorded on 6-2-2006 and the relevant portion reads as under :

"The imported diamonds were packed in transparent plastic bags inside the wrapper of plain white paper. On receipts of the parcel of diamonds we put it into the safe meant for the custody of diamonds in the office of Aditya Corpex Pvt. Ltd. Thereafter, on the same day, Mr. Lumesh Sanghavi came to the office of Aditya Corpex Pvt. Ltd., he checked the parcel and packets contained in it. Thereafter, as per the requirement, Mr. Lumesh used to take out the packets of certain lots from the parcel of imported diamonds for sorting into various size, by the sorters, in the office of Aditya Corpex Pvt. Ltd. Sometimes, when Lumesh Sanghavi could not come to the office Aditya Corpex Pvt. Ltd., he used to tell me on phone to take out packets of certain lots from the parcels (Aluminum Box) of imported diamonds and give them for sorting. On being asked I state that sorters used to separate the size of the different lot of

imported diamonds with the help sieve of different size, as per instruction of Lumesh Sanghavi and this activity was supervised by myself. Upon sorting the imported diamonds into different sizes, two to four lots of different size group were made from the one lot and these lots were packed separately in plastic bags which were weighed in our presence, I tallied the total weight of the imported diamonds after separating into different sizes, with the total weight of diamonds imported lot wise. Thereafter, myself and mostly Rahul kept the diamonds in transparent plastic bags and wrapped these diamonds in a plain white paper and put lot No. and carats with pencil as per the details shown for these diamonds in the export invoice."

G. It is contended that Lumesh Sanghavi retracted his statements but the DRI denies having received the affidavits of retraction which are claimed to have been sent by Lumesh Sanghavi vide 'UCP'. No acknowledgement of receipt of affidavit of retraction have been produced before us to uphold such a contention. Be that as it may, it is not as if retracted statements cannot be looked into at all in law. The Hon'ble Supreme Court in Vinod Solanki v. Union of India, Laws (SC)-2008-12-139 = [2009 \(233\) E.L.T. 157](#) (S.C.) = [2009 \(13\) S.T.R. 337](#) (S.C.), has administered a word of caution in evaluating retracted statements. We have therefore closely examined not only the statements of Lumesh Sanghavi but two others who were also involved in the activities of import and export of diamonds from bonded warehouse. After careful consideration we find that there is no manner of doubt that processes such as sieving, boiling and sorting were carried out by the Indian companies in the bonded warehouse. It is therefore not possible to hold no process at all was carried out by the Indian companies in the bonded warehouse.

18.1 *This takes us to the next question as to whether processes of boiling, sieving and sorting carried out in the bonded warehouse resulted in value addition of 5% or more in the years 2004-05 and 2005-06. These percentages of value addition flow from provisions of Para 4A.18 of FTP which was amended in 2005-06 to increase the value addition from 5% to 10%. Para 4A.18 as it stood in 2004-05 reads as under :*
"4A.18 Private/Public Bonded Warehouses may be set up in SEZ/DTA for import and re-export of cut and Polished diamonds, cut & polished coloured gemstones, uncut & unset precious & semi-precious stones, Import & re-export of cut & polished diamonds & cut & polished coloured gemstones will be subject to achievement of minimum value addition of 5%"

18.2 *Save and except increase in the percentage of value addition there is no other charge in para 4A.18 in 2005-06. A plain reading of para 4A.18 shows that it does not contain any condition, that the value addition must be as a result of any kind of manufacturing or specific processing activity in the bonded warehouse. In fact, it refers to import of cut and polished diamonds and to the export also of cut and polished diamonds. It is implied that para 4A.18 does not necessarily envisage any kind of manufacturing or processing activity to achieve value addition, because it does not refer to any new article at the time of export, different from the goods at the time of import. The sole objective is to earn foreign exchange by value addition, and subject to achieving this object, import and re-export out of bonded warehouse of the same item, namely; cut and polished diamonds is permitted. The Id. Senior Advocates submitted that there is no bar in achieving value addition to satisfy the condition of 4A.18 simply as a result of trading, i.e. buying and selling cut and polished diamonds from the bonded warehouse.*

While this may appear to be the intention because para 4A.18 does not prescribe any conditions as to how to achieve the value addition, we need not test the scope of para 4A.18 by this argument alone, having accepted the first contention that processes of sieving, boiling and sorting were carried out.

18.3 *Having regard to the plain language of para 4A.18 we are not persuaded to agree with the Commissioner that the simple processes carried out by the Indian companies cannot result in the value addition of 5% or more. No such co-relation between value addition and processing activity in the bonded warehouse is required under para 4A.18. Sieving, boiling and assorting of diamonds is a recognised activity of the diamond industry, as can be seen from the clarification contained in Circular No. 40/1999, dated 28-6-1999 issued by C.B.E. & C. which was issued in the context of para 8.13 of the Import and Export Policy 1997-2002, which is pari materia to para 4A.18 of FTP 2004-09, para 2 thereof is reproduced herein :*

"2. The issue has been examined in consultation with the Ministry of Commerce and they have clarified that the activities of mixing, sieving, assortment and cleaning, etc. are allowed in respect of imported cut and polished diamonds and cut & polished coloured gemstones in the private/public bonded warehouses set up under paragraph 8.13 of the Exim Policy. However, the activities of mixing, sieving, assortment and cleaning would be restricted to individual consignment only and mixing of different consignments for the purpose of carrying out the activities of assortment, sieving and cleaning shall not be permitted."

18.4 *Besides, we find that the Commissioner has not relied upon any evidence to show that minimum value addition of 5% or more cannot be achieved by such processes. The show cause notice also does not refer to any evidence on this point. The question whether these simple processes can result in value addition of 5% or more is a matter of fact. If the Commissioner wants to read such a condition in para 4A.18, even though the same does not exist on the literal reading thereof, the burden lies on the department/Commissioner to lead evidence to show that these simple processes cannot result in achieving the value addition as required under para 4A.18, even if one were to presume that para 4A.18 has an inbuilt condition of achieving value addition out of processing activity in the bonded warehouse. Both sides agree and therefore, we take note, that value of a diamond depends on "4 Cs" which are colour, clarity, cut and carat. Therefore, if diamonds are segregated into a homogenous lot based on their size and quality, the value shall change even by employing simple labour intensive processes like sieving, boiling and assorting. The only piece of evidence we find on the relationship between the value addition and the process is in the form of representation made by Gem and Jewellery Export Promotion Council vide letter dated 23-10-2006 which relies on the same Circular of the C.B.E. & C. while dealing with the various schemes in the Policy affecting the business of gem and jewellery including diamond industry. We are informed that the Customs Officers in charge of the bonded warehouse on being satisfied, have also cancelled the bonds, which aspect has been completely overlooked by the Commissioner.*

18.5 *It is true that Lumesh Sanghavi has not been able to say which of these processes were carried out in respect of how many consignments of imported diamonds before export, which (we are informed) aggregate to about 3000 consignments or whether all the processes were carried out for all the consignments, except making a general statement on 7-2-2006 which has been referred to above. It is*

equally true that Lumesh Sanghavi in each of his statements mentioned that the FOB value, in the invoices prepared by them for export, was shown as instructed by Samir Vora or Saurin Shah. But the question is, does such FOB value become liable for rejection merely because these two persons superior to Lumesh Sanghavi in the organisation instructed him to do so. Once we hold that there is no basis to support the finding of the Commissioner, that minimum value addition under para 4A.18 cannot be achieved by simple process, both as a point of law on interpretation of para 4A.18 and as a question of fact, in the absence of any expert evidence holding the same, we go back to the question whether the FOB value as declared in the shipping bill is correct.

18.6 For this purpose, we have to bear in mind the distinction between FOB value and the value addition. Section 14 of the Act provides that where duty is chargeable on ad valorem basis, the value shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation or exportation as the case may be in the course of international trade. There is no dispute about the CIF value declared by the Indian companies in the bills of entry. Rather such CIF value has been adopted by the Commissioner, to be the correct FOB value. We shall deal with this aspect later in detail when dealing with circular trading. Value addition is a concept under the Foreign Trade Policy (FTP). The formula for determining value addition is given in para 4A.6 of the FTP for 2004-09 which is reproduced herein :

"4A.6 The value addition for the purpose of gem and jewellery sector shall be as per paragraph 4A.2.1 of Handbook (Vol. 1)

$$\text{V.A.} = \frac{(A - B)}{B} \times 100, \text{ where}$$

V.A. Value Addition
=

A = FOB value of the export realised/FOR value of supply received.

B = The Value of inputs such as gold/silver/platinum content in the export product plus the admissible wastage along with the value of the other items such as gemstone, etc. 'Value' for this purpose includes both imported as well as domestically procured inputs. Wherever gold has been obtained on loan basis, the value shall also include interest paid in free foreign exchange to the foreign supplier."

18.7 FOB value is therefore only one of the components for determining the value addition. Determination of value addition is a function of DGFT/licensing authorities. We are here not concerned with the determination of value addition. We are informed that the applications by the appellant companies under TPS are pending with the offices of Jt. DGFT. It will be for the licensing authority to determine the value addition at the appropriate stage. We are here concerned with the correctness of the FOB value as declared in the shipping bills which is within the jurisdiction of the Customs officer and for that the powers are derived from Section 14 of Act, which deals with determination of assessable value read with Section 17 of the Act which confer the power of assessment on consignments of exports, in respect of which shipping bills are filed under Section 50 of the Act. We shall first examine the law on this point.

(a) In *Frost International v. Commissioner*, [2006 \(206\) E.L.T. 451 \(Tri.\)](#) the selling price of the manufacturer of garments was taken to be the correct Present Market Value (PMV) and on that basis, the Commissioner rejected the higher FOB value declared by the exporter. This Tribunal held that the concept of PMV cannot be equated with the FOB value of the goods which represents the price in the international market. The same view was also taken in the second case of *Frost International v. Commissioner*. The Tribunal also did not accept the evidence of clearance by the foreign buyer at a lower price received on overseas inquiry. Both these decisions in *Frost International* were upheld by Apex Court and appeals filed by the department were dismissed as reported at [2007 \(216\) E.L.T. A55](#).

(b) In *Akshay Exports v. Collector* [[2003 \(156\) E.L.T. 268](#)], the Tribunal held that in the absence of market inquiry of goods exported from India, the FOB value cannot be discarded.

(c) In *Siddachalam Exports Pvt. Ltd. v. CC* [[2011 \(267\) E.L.T. 3](#)], the Hon'ble Supreme Court observed that although the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 applied only to goods imported into India, the principles thereof were also applicable to goods exported from India.

18.8 The 'transaction value' in the present case is established by the fact that sale proceeds in foreign exchange have been fully realised. There is also no evidence on record as required under Section 14, to show that the price of such or like goods for delivery at the time and place of exportation is lower. On the other hand the appellant companies have shown that the contemporaneous imports are at comparable prices, something which the Commissioner does not accept, because according to the Commissioner "in case of diamonds, it is not possible to have evidence of identical or similar goods since each lot of diamonds varies from the other and valuation of diamonds, which is based on carat, colour, cut and clarity cannot be compared." May be the Commissioner is right. But that be so, we have no option but to go with the examination reports recorded at the time of assessment of the export consignments on the shipping bill, on the basis of which let export orders were passed by the proper officer of Customs under Section 51 of the Act, in each case. A few photocopies of the duplicate copy of the shipping bills have been produced before us. We have also perused the record of cross-examination of 5 Customs Officers, who examined the goods. All of them have unambiguously stated that they strictly followed the procedure prescribed by law as contained in Public Notice No. 11/1998, dated 4-8-1998. The Commissioner confirms that these officers "..... only verified that the goods confirmed to the description, quantity and value as declared in the shipping bill." The confirmation of the value by these Customs officers in our opinion is a clinching evidence and there is nothing in the show-cause notice to rebut this primary evidence as to the correctness of FOB value. At no stage of the assessment of thousands of consignments, exported by the appellant companies, was any doubt raised as to the truth or accuracy of the declared FOB value. The confirmation by the Customs officers, and the admission by the Commissioner that they verified inter alia the value of the goods, is direct evidence of the correctness of the value on physical examination of the goods. In these circumstances, we do not see how the Commissioner can reject the declared FOB value.

18.9 Yet the Commissioner did so. And the only reason for the Commissioner to do so is because neither the Customs officers who examined the goods nor the appellant companies have been able to

show how simple process of boiling, sieving and assortment can result in value addition of 5% or more. This is a fundamental fallacy, which the order of the Commissioner suffers from in not maintaining the distinction between FOB value, which is required to be determined under Section 14 and various tests laid down in the many precedents, and value addition, of which FOB value is only one of the components and which need not arise only out of processing and indeed may have nothing to do with the processing under para 4A.18 of FTP. It would be unfair to reject the FOB value on a criteria which is not prescribed by law. As we have held, processing has been undertaken in respect of the export consignments. When neither Section 14 of the Act nor para 4A.18 of FTP requires the exporter to establish a relationship between processing and the FOB value declared in the shipping bill, which is to be independently determined, applying the tests under Section 14, the question of verification of the value addition, by the Customs officers at the time of export does not arise at all. This is more so since determination of value addition is within the jurisdiction of licensing authorities and not the Customs authorities under the provisions of FTP to which we have already adverted. We therefore find that the sole ground of the Commissioner to reject the FOB value, is that the value addition of 5% or more cannot be achieved only by carrying out simple processes, is not sustainable. We therefore, hold that the FOB value declared is correct.

18.10 *On the question of valuation, the Commissioner also records that evidences disclosed in the show cause notice, there is an allegation that the FOB value declared is not genuine on account of control by AEL over all the overseas parties involved in the transactions as buyers or sellers of diamonds. Having recorded this objection, the Commissioner does not give any categorical finding thereon but instead treads into the question of circular trading. We however prefer to deal with this issue in the context of valuation and circular trading as the department has also heavily relied upon the allegations in the show cause notice on the inter relationship between AEL and other Indian companies as well as AEL and overseas entities.*

18.11 *We shall first deal with the relationship between AEL and Indian companies. There is no definition either in the Customs Act or the FTP of such a relationship. Obviously in such a case, one will have to go by the provisions of Companies Act, 1956 to see whether one company controls the other and broadly, the two tests to establish "control" of one over the other is either 'voting power' or control over the appointment of Board of Directors. The relationship in the context of determination of FOB value is the relationship between the buyer and the seller in the course of international trade. Hence, the issue of inter se relationship between AEL and Indian companies is not relevant for the purposes of Section 14. The show cause notice dwells on this issue only to show that AEL connived with the 5 other Indian entities to take advantage of benefits under TPS by showing higher incremental exports to derive maximum benefit under TPS. We do not see the relevance of the issue in this case. At the risk of repetition, we hold that since the application for grant of duty free scrips made by the Indian companies including AEL for the year 2004-05 is pending before the Licensing authority, it is for the licensing authority to consider whether the export turnover of each individual Indian company is to be reckoned or whether export turnover of all Indian companies to be clubbed for the purposes of calculating the benefits under TPS. We say no more than this so as not to prejudice the disposal of the application pending before the*

licensing authority. We remind ourselves that there is a concept and definition of "group company" in the FTP which we are sure shall be considered by the Licensing authority in determining the benefits under the TPS scheme.

18.12 As far as inter relationship between AEL and overseas entities is concerned, it is alleged that AEL controls the overseas entities. The basis for this allegation, as found in the impugned order, is as under :

(a) As per report received from Indian High Commission, Singapore, several entities in Hongkong and Singapore were incorporated or started business in or around the period when TPS was announced and stopped the business soon after the TPS was over;

(b) Registered office of some of the entities in Singapore like M/s. Planica Exports Pte Ltd. and M/s. Emperor Exports Pte Ltd. is common;

(c) The registered address in some cases is residence of individual Directors;

(d) Ms. Mary Joseph who is an employee of Adani Global Pte Ltd. has also signed all contracts as Director of M/s. Gudami International and Mr. Chang Chung Ling - a Director of Gudami is shareholder/Director of M/s. Adani Global Mauritius and Adani Global Pte Ltd., Singapore;

(e) Rajendra Prasad Nair, Manoj Chandrasekharan Nair and Sudhkar Kannadiga who are Managers/Partners/Directors of Gold Star FZE, Shine Jewellery and Queen Jewellery, all UAE entities, respectively are employees of Adani Global FZE, while Vinod Shantilal Shah who is Director of Adani Global FZE and GA International is the brother in law of the Chairman and Managing Director of AEL.

18.13 The fact that some of the overseas entities were started around time of introduction of TPS or closed business simultaneously with closure of TPS does not establish these entities in Singapore and Hongkong were controlled by AEL. We find that out of 45 overseas entities, six have started business between September and December, 2004 and two of them in May and August, 2005. Again out of 45 overseas entities, only 4 closed down and that too, between September and November, 2005 which is well before the deletion of diamonds from TPS on 20-2-2006 or the closure of TPS on 31-3-2006. No adverse inference can be drawn on this aspect. The fact that some of the companies have common registered offices or that registered office happened to be the residential premises of their Directors is again something which cannot be faulted in law and by no stretch of imagination shows control by AEL over them on this account. Common Directors or Directors who are employees of AEL or its subsidiaries also does not establish mutuality of interest. So also merely because Vinod Shantilal Shah is brother-in-law of the Chairman and Managing Director of AEL, it does not establish the relationship particularly when it is now shown that the Vinod Shantilal Shah is also Director in AEL or holds significant shares to exercise control over AEL and vice versa AEL has any shareholding or common Directors in GA International. Section 14 of the Act requires the interest of the buyer and the seller in the business of each other. There is no allegation of common shareholding except for the subsidiaries. It is also not shown that AEL has the power to appoint Directors or control the composition of Board of Directors of companies in which its employees or its Directors are also partners or Directors. It is not shown that AEL holds sufficient shares or voting power to control the decisions of the entities in which its Directors are also Directors or in which its employees are also Directors or Partners. Mutuality of interest must be proved both ways. It is interest in the business of each other which proves that the parties are related. The inquiries made

through the Indian High Commission, Singapore or Indian Consulate in Dubai have not brought out any such factual position on either shareholding pattern or control over the composition of the Board of Directors of the overseas entities except the two subsidiaries.

18.14 Assuming that the relationship is established in those limited cases where the Directors or partners of overseas entities are also Directors or employees in AEL's subsidiaries, as per the details set out on Pages 49 to 52 of the show cause notice, that by itself cannot be a ground to reject the declared FOB value. If the relationship has not influenced the price, then such export price must be accepted. Out of all the overseas buyers to whom the cut and polished diamonds were exported from bonded warehouse by Indian companies, only two such buyers namely; GA International and Gudami International, Singapore are part of the list of alleged related parties, but the total exports to them in 2004-05 constitutes only about 22.45% which means that the remaining 77.55% of exports at or about the same price has been made to independent buyers. In 2005-06, exports to independent buyers is about 28.21% assuming all the buyers in Singapore are related. We have arrived at this finding based on the information given on page 46 of the show cause notice. As long as price of exports to independent parties in respect of whom there is no allegation of relationship is available, the same would apply to all other exports including those made to related persons. This is notwithstanding the fact that the department has failed to discharge the onus of proving relationship between AEL and overseas entities, as concluded above.

18.15 We have noted that Lumesh Sanghavi has in his statement said that the diamonds were over-invoiced. This statement by itself does not prove the case of the department. There are many reasons for the same. He himself admitted that he examined only a few consignments when the sorters were absent. Besides the price was decided by Sameer Vora or Saurin Shah based in Ahmedabad. This has also been admitted by Lumesh himself. Likewise, though Lumesh Sanghvi, admits to circular trading, on being shown during cross-examination the same examples referred to in his statements, which show the difference in quality, size and weight of each consignment, he has deposed to the contrary. We have independently also examined the evidence on record particularly Annexures 'H' and "I" to the SCN and have found that the charge of the circular trading is not sustainable. Considering the overall facts and circumstances, this part of the statement of Lumesh Sanghvi cannot be seen as conclusive to the charge of, either over-valuation or circular trading.

18.16 In the above factual backdrop, we shall now deal with the case-law cited by the department. In the case of Omprakash Bhatia v. CC, [2003 \(155\) E.L.T. 423](#) (S.C.), the exporter did not lead any evidence to show that the export value mentioned in the shipping bill was the true sale consideration, and accepted the lower value ascertained on market inquiry even at the time of hearing, while giving up the claim of drawback. It is in these facts that the Court was called upon to decide whether Section 113(d) was applicable or not. In the instant case neither any market inquiry has been conducted, nor the appellant has accepted the value suggested by the department.

18.17 In CC v. Pankaj V. Sheth, [1997 \(90\) E.L.T. 31](#) (Cal.), the question was whether pending inquiry, the Court could direct the Customs Authorities to endorse the fact of exports in the DEEC book issued under the Advance Licensing Scheme. The Customs Authorities resisted on the ground that the enquiry in respect of export of plastic

flat jet nozzles was pending since the goods were suspected to be over-invoiced and had been provisionally allowed exports. The High Court held that the Customs Authorities had the power to examine the correctness of the value of the goods under the DEEC scheme. Firstly, this case is not at the interim stage, and secondly, in the present case investigations have been completed and detailed show cause notice issued relying on the documents & statements, which we have examined as above.

18.18 *The judgment in Bussa Overseas v. C.L. Mahar, [2004 \(163\) E.L.T. 304](#) (Bom.) deals with a case where the goods were cleared under a Bond and therefore the argument that the proceedings could not have been commenced under Section 112 was not accepted. The Bonds in the present case were for the warehousing under Section 58 of the Act. These Bonds have been cancelled by the Bond Officer. In any case we have held the declared value to be correct. Hence, the question of confiscation does not arise at all.*

18.19 *The issue involved in the judgment in Euresian Equipment and Chemicals Ltd. and Others v. CC, [1980 \(6\) E.L.T. 38](#) (Cal.) does not arise for consideration in the facts of the instant case, as it is not the claim of the appellants that liability if any is wiped out or extinguished with the exportation of goods.*

18.20 *In CC v. D. Bhoormull, [1983 \(13\) E.L.T. 1546](#) (S.C.), the Hon'ble Apex Court held that a case need not be proved with a mathematical precision in the context of smuggled goods seized from the shop where the claimant sought to justify the purchase with the help of documents which were not found to be credible. The Apex Court observed that -*

"30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case."

"32..... However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice."

18.21 *In the present case, we find that the department has failed in discharging the burden cast upon it to produce any tangible evidence in respect of the charge of over-valuation or circular trading. For the same reason, the judgment in Steel India Company v. CCE, [2014 \(310\) E.L.T. 184](#) (Tri.) is of no assistance to the department.*

18.22 *For reasons aforesaid, the declared FOB value is accepted to be the correct FOB value under Section 14 of the Act and to that extent the order of the Commissioner is set aside.*

19. Issue No. II

19.1 *The allegations relating to circular trading are essentially set out in paras 9.1 to 9.13 of the show cause notice. The Commissioner, as stated, did not confirm the allegation of circular trading and held that the defence to show that circular trading is not possible appears to be plausible. The department is aggrieved by this finding and has come in appeal.*

19.2 Before examining the material marshalled in the show cause notice to show circular trading, we must record that it is admitted by the department that consignments of diamonds physically came into India and were also sent outside India, and further it is also admitted by the department that in all cases the FOB value as shown in the export invoices have been duly realised. In other words, it is not alleged that these were paper transactions. We find that the allegation of circular trading of diamond is based on same lot of diamonds being imported and exported over a number of times during different periods as detailed in the two tables on pages 81 to 83 of the show cause notice. We have therefore looked at import and export invoices to see how the individual lots referred to at pages 81 to 83 have been imported and exported. On examination of the invoices relating to import as well as export of cut and polished diamonds it is seen that each consignment consists of various lots of different descriptions, weight, value and quality. It is not the case of the department that all the lots referred to at pages 81 to 83 have been imported under one invoice. We have found each invoice to cover number of lots ranging from 8 to 23 in number. Identifying one or two lots from a consignment consisting of 8 to 23 different lots being the same which have been allegedly circulated more than once is a method which is unknown to law. The subject matter of assessment is a consignment as a whole. The Bill of entry under Section 46 or the shipping bill under Section 50 contains a declaration of the goods covered by the total quantity and value of the goods supported by the invoice, which covers the totality of all the lots constituting the consignment. Singling out one or two lots from a consignments to say that the same set of diamonds have been traded again and again is a misnomer. The Commissioner also admits in the impugned order that the value of each diamond varies on account of non-comparability of carat, colour, cut and clarity (4 C's). It is therefore not possible to come to the conclusion that the appellant companies indulged in circular trading merely with reference to single lots (out of a consignment) which are said to be imported and exported during different periods. Curiously, the show cause notice itself admits in para 9.2 that even these single lots which are said to be involved in circular trading varied in weight and clarity. It however describes such variation to be marginal or slight variations. We are not impressed by the use of such adjectives particularly when the Commissioner also admits the value of each lot varies on account of variation in the 4 Cs. Whether such variation is marginal so as not to affect price is not for us to say. This perhaps required expert evidence who can only do so after examining each lot. We find this is missing. We cannot indulge in conjecture whether the variation in weight or clarity is marginal so as not to affect the value or identity of the lots. Weight is directly related to the size of diamonds. If the size of the diamonds is small, a small variation in weight can substantially increase the pieces of diamonds and similarly, if the size of the diamonds is bigger, the price thereof may increase manifold even with a small variation in weight.

19.3 Based on the details of the lots allegedly involved in circular trading, Annexure-H & I to the show-cause notice, contain details of these lots, bill of entry wise, and shipping bill wise, to allege circular trading. AEL in its reply to the show cause notice sought to demolish Annexures-H & I by reference to Exhibit-D to the reply. We have perused the Annexures-H & I to the show cause notice and Exhibit-D to the reply. In Exhibit-D we find that AEL has given several examples where the export of the lot on first import has taken place after the second import

of the same alleged lot, which belies the allegation of circular trading, which if true, means that the export of the lot on first import should have taken place before the second import of the same alleged lot and not thereafter. These several examples establish that the sequence in the movement of same alleged lot to prove circular trading does not exist. AEL also submits with reference to Exhibit-D, there is no explanation how the same alleged lot exported to Singapore or Hong Kong has been re-imported from Dubai the next day keeping in mind the locational difference in three countries and the time involved in transporting the goods from India to Singapore or Hong Kong and from there to Dubai and Dubai to India, suggesting thereby the whole theory of circular trading is bogus and impossible. We find no answers to this point in the contentions raised by the department.

19.4 *To prove circular trading show cause notice also relies upon the statement of Lumesh Sanghavi. In his statement dated 28-2-2006, he has admitted to circular trading in relation to documents shown to him in respect of imports and exports by and to the Indian companies in July, 2005 as recorded on pages 4 to 6 of the said statement. To the same effect, he has also admitted to lots of diamonds being imported and exported over and over again in the transaction which were shown to him and recorded by him on pages 4 to 8 of his statement dated 3-1-2007. We have already dealt with the aspect of retraction of the statements of Lumesh Sanghavi. We have also gone through the record of cross-examination of Lumesh Sanghavi which has been set out by the Commissioner in extenso. We find that when confronting with the same documents such as invoice relating to the transactions which he has deposed in statement dated 28-2-2006 and 3-1-2007, he accepted that there was a variation in the weight and quality of diamonds. On re-examination by DRI officer, Lumesh Sanghavi maintained the variation in the specifications of the lots covered by two different invoices. Besides the documents speaks for themselves, oral evidence if contrary to documents has no value since documentary evidence shall prevail over oral statements. At the time of hearing before us the Id. Counsels also produced a typed statement analysing the transactions of July, 2005 shown to Lumesh Sanghavi as recorded in his statement dated 28-2-2006, to illustrate that on facts, the allegation of circular trading cannot be maintained. From the typed statements, it is seen that while exporting D-Cut white diamonds under invoice dated 21-7-2005, the weight of PK 4 variety was 486.57 carats and that of PK 5 variety was 733.67 carats and if the same set (lot) of diamonds were allegedly imported on 26-7-2005 from Spectrum Trading, UAE, then the weight of each variety at the time of second export ought to have been the same, but as seen from the export invoice dated 28-7-2005, the weight of PK 4 variety was 725.63 carats which is much more than 486.57 carats in the previous exports and so also in case of PK 5, the weight in the second export was significantly lower at 512.61 carats as compared 733.67 carats. This difference in the weight (carats) of the two different variety of diamonds - PK4 and PK 5 show that there is no circular trading, otherwise in the two export consignments of two similar variety of diamonds, weight should have been identical. The fact that the weight in carats of PK4 was much more in the second export and that of PK5 was substantially lower, it is evident that there is no circular trading. The second illustration in the typed statement, not only shows variation in carats but also sizes between the first and second round of diamonds which as submitted by the Id. Senior Counsels fortifies their case that there is no circular trading, even if we go by the statement of Lumesh*

Sanghavi, who did not correctly appreciate the facts as flowing from the same documents which were shown to him. We find force in these submissions and hold that not only is the defence to circular trading plausible but incontrovertible.

19.5 *The third piece of evidence referred to in the show cause notice, to support the allegation of circular trading are the 3 charts reproduced on Pages 86 to 88. These charts have been recovered from the desktop (computer) of Vipul Desai who in his statement dated 19-2-2007 said that these were prepared by Sudhakar Nair, Junior Assistant in the Banking department. No statement of Sudhakar Nair has been recorded. We have however, independently considered these charts without the benefit of the statement of the author thereof. We find that the Chart by themselves do not prove circular trading. AEL has explained these charts to depict the business plan and a pattern of transactions. This in fact appears to be so, these charts appeared to be graphic representation of information which have been tabulated by DRI in the show cause notice covering the names and identities of overseas entities and the classification of overseas entities into buyer and seller as can be seen from pages 40, 41 and 45 to 48 of the show cause notice. The Indian companies have also not disputed the fact that they were importing cut and polished diamonds from some of the overseas entities and exporting the cut and polished diamonds to other overseas entities. We do not find anything incriminating in the 3 charts except a pictorial representation admitted by the parties.*

20. *On the contrary, AEL has sought to justify what they call as the business plan and the pattern of transactions on the basis of MOU dated 19-3-2003 between its' subsidiary in Dubai, Daboul and Gudami whereby the UAE subsidiary agreed to arrange for and organise processing of unassorted diamonds in India through AEL or its nominees and Daboul agreed to procure unassorted diamonds directly or through its nominees for export to India and thereafter, purchase the same after processing in India through its intermediaries in Hongkong or Singapore for its European buyers. Shri Singh, Id. Special Counsel, as has the Commissioner strongly objected to the reliance on this MOU. He submits that this MOU was never produced during investigations. On the other hand, AEL submits that, although a copy of this MOU was not produced during investigations there are enough references to the arrangement and understanding mentioned in the MOU in the statements of various persons recorded during investigations. Our attention has been drawn to the statement dated 24-1-2006 of Samir Vora in which he has, inter alia, stated that AEL's overseas agents Daboul sent them proposal for unassorted diamonds and Daboul gives them the range of existing international value and after discussions, AEL sends its own proposal and that the value is decided after negotiation, if necessary. Bhavik Shah is the other person who makes reference to Daboul in his statement recorded on 31-1-2006 wherein he refers to Rakesh Shah an employee of Adani Global FZE to be the coordinator for import and export of gold, gold jewellery and articles and cut and polished diamonds with Daboul. No doubt, there is no specific reference to MOU in these statements, but nonetheless these statements prove the existence of business relationship with Daboul which is dealing in cut and polished diamonds. Moreover, AEL had disclosed a copy of the said MOU along with its reply to the show cause notice filed on 29-10-2007, against which DRI had ample opportunity to ascertain the veracity of the documents before filing its written comments to reply filed by AEL. The DRI made general and sweeping remarks about the genuineness of said*

MOU in its written comments filed before the Commissioner. The Commissioner could have caused necessary inquiry through DRI or otherwise to ascertain the genuineness of the said MOU. After all, as an adjudicating authority, the Commissioner must undertake fact finding especially when it is not as if AEL had adverted to business relationship with Daboul for the first time in its reply to show cause notice. We cannot help but noticing that the reply disclosing the MOU with Daboul was filed on 29-10-2007 and the adjudication order has been passed after more than 5 years, which gave ample opportunity to inquire into the genuineness of the said MOU.

21. The most significant material relied upon in the show cause notice are the number of e-mails sent mainly by Ms. Mary and others. Some of the e-mails have been extracted in the show cause notice, as for instance at pages 59 to 64, again from pages 67 to 69 and thereafter from 70 to 79. All the e-mails have been compiled in Annexure-M to the show cause notice. Although these e-mails have been relied upon in the show cause notice to support the allegation of control of overseas entities by AEL, in view of the overlapping submissions made by Id. Special Counsel of the department, here while dealing with the issue of circular trading. According to the department, these e-mails reveal that AEL controlled all the overseas entities because there is reference to the bank accounts of different overseas entities in these mails and also to transfer of funds from account of one overseas entity to another. These e-mails are sent by Ms. Mary who is an employee/Director of Adani Global Pte Ltd., Singapore and these e-mails are sent internally to all persons connected with AEL based in either India or Singapore or Dubai. It is alleged that if AEL does not control overseas entities there was no reasons for Ms. Mary to pass on information relating to bank accounts and its details including password to other persons within the Adani group and likewise there was no need for Ms. Mary to report the transfer of funds with reference to certain specified transaction from one overseas entity to another or from Indian company to overseas entity or by an overseas entity to an Indian company. We find that except for agreeing to what has been stated in these e-mails, none of the persons like Bhavik Shah, Vipul Desai or C.E. Mahadevan have admitted to these e-mails being evidence of either control by AEL of the overseas entities or to circular trading. Unfortunately, hereto the statement of Ms. Mary Joseph, author of almost all these mails have not been recorded, we are left to imagination why she was writing such mails and on whose instructions. These gaps are extremely vital to the issues at hand and fatal to the case of the department. AEL submits that she was doing so on account of the agreement between the parties as recorded in Clause 6 of the MOU which is reproduced herein :

"In order to facilitate the movement of goods, Adani Global FZE has identified its business associate, M/s. Gudami International Pte Ltd. as one of the parties who may be nominated as an intermediary where Daboul requires the transaction to be routed through an intermediary. Gudami shall arrange for funds wherever necessary to finance such imports, but Daboul shall assure AGFZE that funds will be available for the onward import from Gudami and for this purpose Gudami shall be entitled to call for and maintain and monitor financial information and records. In order to coordinate the working of these transactions, including movement of funds wherever necessary, Daboul, AGFZE and Gudami may nominate a common person to act as a representative of all the parties who is acceptable to all the parties."

For want of better explanation from the department, we have no option but to accept that the reason why Ms. Mary Joseph wrote e-mails was because of the understanding recorded in the said MOU.

21.1 *We have independently gone through the set of e-mails which have been extracted in the show cause notice on the pages referred to above. We observe as under :*

(a) The e-mails pertain to large number of transaction like iron ore exports and coal transactions apart from the transactions of cut and polished diamonds;

(b) The e-mails referred to transactions with parties other than the 45 overseas entities, as for example, Aramex International Exchange, Radya Baqer Trading LLC, Navy Impex LLC and White Monitor General Trading LLC to name a few.

(c) The e-mails provide no explanation on the transfer of funds from one overseas entity to another. In many cases where there is no reference to corresponding invoice related to either import or export of cut and polished diamonds which are the subject matter of the present case. For instance against Sr. No. 4 at page 71 of the show cause notice, why have GA International, Gold Star and Labdhi transferred funds to Al Shahad considering that Labdhi is not even one of the 45 overseas entities in this case or are these entries representing settlement of accounts of some other independent transactions which has nothing to do with the transactions of cut and polished diamonds.

(d) None of the e-mails show fund flow corresponding to the circular trading of the lots as alleged in the show cause notice, meaning thereby the allegation of circular trading is unsupported by evidence of corresponding financial trail.

21.2 *As has been stated in the show cause notice, the e-mails referred to in Annexure-M to the show cause notice show control by AEL of the overseas entities. We have already held what tests and conditions need to be satisfied in law to establish "control". It seems Ms. Mary Joseph has merely collated the information into e-mails which is otherwise available from the documents relating to the respective transaction which documents show the name of the buyer, name of the seller, serial number and date of the invoice, the amount and the bank in which the payment is to be remitted. These e-mails do not reveal the possibility of these e-mails being sent as a result of said MOU cannot be ruled out. We find nothing incriminating in these e-mails or anything to draw an inference of control of overseas entities by AEL.*

21.3 *Even if we were not to consider the said MOU, the e-mails can at best give rise to suspicion that AEL controlled the overseas entities. This, however, will remain a suspicion because statement of Ms. Mary has not been recorded. Suspicion howsoever strong cannot take the place of evidence.*

21.4 *On behalf of the Indian companies, it was also submitted that the allegation of circular trading is absurd and illogical because the CIF value of all the imported consignments has been accepted and in fact, proposed to be adopted as the correct value of the goods exported instead of the declared FOB value as stated in para 21.1(viii) and corresponding para in respect of each Indian company in the show cause notice. The argument is that, if it is alleged that the same lot was circulated number of times as tabulated from pages 81 to 83 of the show cause notice, then the CIF value of the lots repeatedly circulated ought not to have been accepted, whereas the CIF value of all the consignments of imported diamonds has been accepted to be true and correct value, meaning thereby each consignment is a fresh and a new*

transaction, independent of each other and not of the same goods repeatedly circulated. We do see force in this argument. We find the stand of the department in the show cause notice to be self-contradictory. If the same lot is circulated into India a number of times, it is only rational to take the CIF value only once for the same lot to support the allegation of circular trading. By not doing so, and by accepting the CIF value of each individual consignments of imported diamonds, the department has admitted each consignment to be different from the other, and not of the same goods, thereby militating against their own case of circular trading. The Indian companies contend and rightly so, that the implications of acceptance of CIF value means each time a new consignment has been imported unrelated to any other in the past or future, duly corroborated by remittance of foreign exchange through banks or authorised dealers equal to the value of the goods received in India. Correspondingly in relation to exports, receipt of foreign exchange through banks and authorised dealers as proceeds of exports in compliance with the provisions of Foreign Exchange Management Act, 1999.

We, therefore, hold that the charge of circular trading fails.

22. Issue No. III

The Issue relating to payment of commission and fund flow through mechanisms such as buyers credit or LC discounting are connected to the charge of circular trading and to support the allegation of control by AEL. We have for reasons recorded above, found both these charges to be unsustainable. On behalf of the Indian companies it was submitted that payment of commission in fact proves that the transactions of import and export of diamonds were genuine and on principal-to-principal basis since otherwise there was no need for them to pay commission if the transactions were bogus or involved mere circular trading. So also in relation to LC discount and buyers credit, it is submitted that these transactions were entered into because of interest arbitrage, since there is wide variation in the rates of interest between international markets and India. It is submitted that they have acted like any other prudent business men would do in the like circumstances. The department however, contends that AEL was strictly monitoring the number of days involved in the fund flow and its banking team in India took all decisions in relation to payments for all imports and exports. Suffice for us to state that when we have held the declared FOB value to be correct and there is no circular trading, we need not go into these issues, more so, when in query from the Bench whether the payment of commission or LC discounts or availing buyers credit violated any law of India, both sides submitted that none of these actions are in breach of any of the laws for the time being force in India. The Id. Senior Counsels submitted that on the contrary the Circular No. 12, dated 9-9-2000 issued by RBI and relied upon in the show cause notice supports the case of Indian companies that payment of commission is permissible and that it is not mandatory to disclose the same in the shipping bill as long as the agreement for payment thereof is produced to the authorised dealer at the time of remittance, which they have duly done so. There is according to them, no violation of the provisions of Foreign Exchange Management Act in the payment of commission or discounting of LC or availing buyers credit. We are unable to find any such allegation about these actions being in breach of the law in the show cause notice or any finding to this effect in the impugned order. Besides, the payment of commission would be relevant for calculating the value addition if and

when the pending applications for grant of duty free scrip under TPS is taken up by the competent authority.

23. Issue No. IV

Having held that the declared FOB value is correct, we set aside the confiscation of the exports goods under Section 113(i) of the Act, consequently, we also set aside the penalties imposed by the Commissioner in the impugned order under Section 114 of the Act.

23.1 *Before parting, on behalf of some of the individuals on whom the penalties have been imposed it has been submitted that penalties have been mechanically imposed without ascertaining the role played by each of them. It was submitted that the penalty on Rajesh Adani has been imposed simply because he is Managing Director. Lumesh Sanghavi, who was in day to day in charge of the bonded warehouses into and from where all transaction of import and export took place, has not implicated Rajesh Adani. Samir Vora and Saurin Shah have stated that Rajesh Adani was only involved on Policy matters. We find that the same is the position in relation to Deven Mehta, Omi Bagadiya, Vithaldas Udeshi and Narottam Somani on whom penalties have been imposed only because they "have allowed themselves to act at the behest of AEL and have performed acts which have rendered the export goods liable to confiscation." without ascribing acts of omission or commission under the Act to levy penalty on them. Section 114 of the Act does not create vicarious liability. It is an action in personam. It is therefore necessary to show how each of these individuals acted in a manner which resulted in misdeclaration of FOB value to render the goods liable to confiscation under Section 113(i). We find no justification has been provided by the Commissioner in the order. The statement of these individuals are exculpatory, besides not being adversely implicated by others. In any case, we have set aside penalties on all concerned as aforesaid.*

24. *In the circumstances, we set aside the impugned order passed by the Commissioner and allow the appeals filed by all the parties and dismiss the appeals filed by the Department. Consequential reliefs if any are allowed"*

4.1 We also find that the above order of the CESTAT was also upheld by the Hon'ble Supreme Court as reported in Commissioner Vs. Adani Enterprises Ltd. - 2016(342)ELT A50(SC) and review petition filed by Revenue was also dismissed by Hon'ble Supreme Court vide order dated 30.03.2017

4.3 We find that the disputed matter is well settled in favour of the respondents by the above decisions. Since the issue is no longer *res integra*, the instant demand cannot be sustained.

4.4 We also find that based on the same investigations, the show cause notice F.No. DRI/AZU/INV-04/2010 dated 19.12.2012 was issued by DRI to respondent and other wherein referring to the SCN dated 30.03.2007 it was alleged that the respondent was engaged in Circular Trading of Cut and Polished Diamonds (CPD) and thereby they mis-used the DFCE Scheme by way of wrongly obtaining the DFCE scrips. It was also alleged that the CPD

were re-exported without subjecting the same to any processes. Based on show cause notice dated 19.12.2012 Additional DGFT, Ahmedabad also issued show cause notice dated 08.10.2021 proposing to cancel the DFCE Scrips. However, Additional DGFT, Ahmedabad after considering the facts of the case and evidences on record vide Order dated 26.07.2023 dropped the preceding initiated vide SCN dated 08.10.2021. By the said order of Licence issuing authority it was confirmed that the respondent has not obtained the DFCE Licenses fraudulently.

4.5 We also find that in the present matter the department's appeal does not allege that the licences had been cancelled by the DGFT in the instant case. Clearly, the facts are on record that the DGFT has not cancelled the DFCE Licence issued to the respondent and same were valid in the eyes of law. The DGFT has still not cancelled or modified the DFCE licences already granted. So it is clear that DGFT does not agree with the contention of the department. We are unable to agree with the allegation of the revenue that the exports have been misdeclared and DFCE licenses have been sought for and obtained fraudulently and imports have been made using invalid DFCE licenses. We find that the Hon'ble Bombay High Court in the case of *Pradip Polyfils Pvt. Ltd.* [2004 \(173\) E.L.T. 3](#) (Bom.) considered the scope of jurisdiction of the customs authorities to question the validity of DEPB licences and held as under :

"We have heard Counsel on both the sides. In this case, it is not in dispute that pursuant to the application made by the petitioners seeking benefit of DEPB Schemes in respect of exports of filter plates and accessories made of polypropylene, two DEPB licences were issued by the DGFT in favour of the petitioners. The endorsement made on the licences clearly show that the DEPB licences have been issued against the export of Polypropylene filters Plates and accessories as contained in the shipping bills furnished by the petitioners. The said DEPB licences were required to be forwarded to the Customs for verification of the particulars set out in the shipping bills and necessary endorsement thereon. Under Circular No. 15/97 dated 3-6-1997 the verification by the Customs authorities was restricted to the description, quantity and FOB value of the export product set out in the Shipping Bill. it is not the case of the Customs authorities that there is any discrepancy, quantity and FOB value of the export product. Under the circumstances, when the DEPB licence is issued by the Licensing authorities specifically holding that the Petitioners are entitled to avail the benefit of the DEPB Scheme in respect of Polypropylene filter plates and accessories, the Customs authorities were not justified in rejecting the claim of the Petitioners on the ground that the Articles exported by the Petitioners were not covered under Chapter 39 ITC (HS) classification. Whether an item falls under Chapter 39 of ITC classification or not is for the licensing authorities to consider before issuing the licence. Even after the issuance of the licences, the licensing authorities have not taken any steps to declare that the said licences were wrongly issued. Once the

licensing authorities have held that the export product is covered under the DEPB Scheme and have issued the DEPB licence, it is not open to the Customs authorities to hold that the said export product is not covered under the DEPB Scheme and have issued the DEPB licence, it is not open to the Customs authorities to hold that the said export product is not covered under the DEPB Scheme."

4.6 In this circumstance, we do not agree with the contention of the department that the DFCE licences are invalid. As valid DFCE licences have been used for import of the goods by the respondents, hence, we do not find any reason for demand of duty or confiscation of the goods, or imposition of penalties. In the light of this, we hold that no valid grounds have been brought out to interfere with findings of the Ld. Adjudicating authority.

5. In view of the above, we find that there is no infirmity in the impugned orders and they need to be upheld and we do so. The appeals filed by the Revenue are dismissed.

(Pronounced in the open court on 03.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)