CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
AHMEDABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.6 of 2012

(Arising out of Order-in-Original No.KDL/COMMR/12/2011-12 dated 11/11/2011 passed by Commissioner of Customs, Kachchh)

M/s Sameer Industries, **.....Appellant**
(Plot No.204-207, Sector-4,
Kandla Special Economic Zone,
Gandhidham, Kachchh-370230)

VERSUS

Commissioner of Customs, Kandla **....Respondent**

(Customs House, Near Balaji Temple, Kandla)

WITH

- **(i) Customs Appeal No.7 of 2012 (Shri Ramesh Jain Partner of M/s Sameer Industries);**
- **(ii) Central Excise Appeal No.50 of 2012 (M/s Sameer Industries);**
- **(iii) Central Excise Appeal No.51 of 2012 (Shri Ramesh Jain Partner of M/s Sameer Industries);**

(Arising out of Order-in-Original No.KDL/COMMR/12/2011-12 dated 11/11/2011 passed by Commissioner of Customs, Kachchh)

APPEARANCE:

None, for the Appellants

Shri A R Kanani, Authorised Representative for the Respondent

CORAM:
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE Dr. AJAYA KRISHNA VISHVESHA, MEMBER (JUDICIAL)

FINAL ORDER Nos . 10407-10410/2026

DATE OF HEARING : 10 March, 2026
DATE OF PRONOUNCEMENT : 10.07.2026

SANJIV SRIVASTAVA:

These appeals are directed against the Order-in-Original No.KDL/COMMR/12/2011-12 dated 11/11/2011 passed by

Commissioner of Customs, Kachchh. By the impugned order following has been held:-

"ORDER

(1) I order confiscation of goods namely 1228.848 MT copper scrap/brass scrap totally valued at Rs.6,41,60,739/- under rule 25 of Central Excise Rules, 2002. Since the same are not physically available for confiscation, I refrain from imposing any fine in lieu of confiscation thereof.

(2) I confirm the demand for Central Excise duty totally amounting to Rs.3,14,05,482/- against M/s. Sameer Industries, under the proviso to section 11A of Central Excise Act, 1944 read with proviso to section 3 (1) ibid along with interest at applicable rates in terms of section 11AB ibid.

(3) I impose penalty of Rs.3,14,05,482/- on M/s. Sameer Industries, under section 11AC of the Central Excise Act, 1944.

(4) I impose penalty of Rs.50 Lakh on Shri Ramesh Jain, Partner of M/s. Sameer Industries, under rule 26 of the Central Excise Rules, 2002.

(5) I order confiscation of goods namely 270 MT of Brass Scrap totally valued at Rs. 1,80,51,379/- under section 111(0) of the Customs Act, 1962. Since the same are not physically available for confiscation, I refrain from imposing any fine in lieu of confiscation thereof.

(6) I confirm the demand for Custom duty totally amounting to Rs.70,76,139/- against M/s. Sameer Industries, under the proviso to section 28 of Customs Act, 1962 along with interest at applicable rate in terms of section 28AB ibid.

(7) I impose penalty of Rs.70,76,139/- on M/s. Sameer Industries, under section 114A of the Customs Act, 1962.

(8) I impose penalty of Rs.15 Lakh on Shri Ramesh Jain, Partner of M/s. Sameer Industries, under section 112 (a) of the Customs Act, 1962."

2.1 The appellant is a unit in Kandla Special Economic Zone for import of waste and scrap of steel, copper, brass etc and is engaged in segregation and re-cycling of the same. They made certain supplies to DTA unit without payment of duty against advance licenses/ advance release orders. Investigations conducted by the Revenue revealed that

- the buyers namely (i) M/s Lord Empire International, Delhi (ii) M/s Laxmi Enterprises, Delhi and (iii) M/s Moradabad Import Export Corporation, Moradabad (MIEC) are either fictitious; or
- did not receive the goods at all; or
- the advance licenses/ advance release orders, when produced by them, were either cancelled or not legal.

2.2 On verification by DRI Delhi/ Mumbai, of the addresses given in the Advance Licenses issued to M/s Lord Empire International and M/s Laxmi Enterprises, respectively, it was reported that no such firms were in existence at the declared addresses.

2.3 Shri Riazul Hasan, CEO of M/s Moradabad Import Export Corporation (MIEC) in his statement dated 09.07.2004 has stated that their firm had received two advance licenses, out of which the Advance License No.2910004059 was of Cochin Port but the said license was not registered and they had not received any material against the said license.

2.4 Report dated 18.11.2004 received from Central Excise, Meerut-II revealed that during the course of verification, the premises at the given address was found to be a residential one and no firm in the name and style of M/s MIEC existed at the given address.

2.5 As per the details of payments received by the appellant for supplies to the aforesaid 3 parties, the payments were received at the account of Citi Bank, Mumbai.

2.6 The payments from

- M/s Lord Empire International and M/s Laxmi Enterprises. were remitted from:-
    - Lord Krishna Bank Ltd., Noida Branch
    - Lord Krishna Bank Ltd., Connaught Circus Branch, Delhi
    - Citizen Co-operative Bank Ltd., Noida Branch
    - ABN AMRO Bank, Fort, Mumbai Branch

It was revealed that cash was deposited in the accounts in the name of M/s Laxmi Enterprises maintained at the said banks and

Demand Drafts/Pay Orders were issued in favour of the appellants. It was revealed that the accounts stand closed since then.

2.7 The payments from M/s MIEC were remitted from Jammu & Kashmir Bank Ltd. The Central Excise, Meerut-II collected the details of payments remitted from the above said branch and it was revealed that the remittances into their account in Jammu & Kashmir Bank Ltd. were in cash. However, Demand Drafts were issued in favour of the appellant.

2.8 On enquiry with DGFT, Mumbai, it was revealed that

- total four Advance Licenses were issued in favour of Lord Empire International, Delhi. These licenses were cancelled ab-initio by the Joint Director, DGFT, Mumbai vide Cancellation Order dt.24.7.2003.
- five Advance Licenses were issued in the name of M/s Laxmi Enterprises. The Joint Director, DGFT had also suspended the Advance Licenses issued to M/s Laxmi Enterprises vide order dated 03.03.2003.

2.9 Scrutiny of Advance Licenses issued to M/s Lord Empire and M/s Laxmi Enterprises revealed that they had submitted Chartered different Chartered Accountants' certificates issued by Accountants, viz.:

- Shri Jagmohan Singh Rawat of Rajwat Jagmohan Singh & Co.
- Shri V.K. Kalra of Vinod Kumar Kalra & Co.
- Shri Sanjay Garg of Ricki Sanjay & Co.

Two summons dt.3.11.04 were issued to Shri Sanjay Garg, and Shri V.K. Kalra appeared on 18.11.04. But, they were returned back as left. Summon dt.3.11.04 was issued to Shri Jagmohan Singh, who vide his letter dt.8.11.04 had intimated that the certificate was totally bogus, false, illegal and under no circumstances, he was connected with the said certification. He also submitted an affidavit vide his letter dt.16.11.2004.

2.10 Shri Narendra Singh, Production Manager of the appellant in his statement dated 21.1.2005 and 18.11.2004 stated that

- he was not told the name of M/s Lord Empire international and M/s Laxmi Enterprises;

- he did not remember to have loaded any goods either for M/s Lord Empire or for M/s Laxmi Enterprises.

2.11 Shri Ratan Gadhavi of M/s Sonal Road Carriers, who had arranged for transportation and issued transport documents, in his statement dated 03.02.2005 had stated that he had prepared the bilties as per the information given by the appellant and that he could not confirm that the goods have been received at the addresses mentioned in the bilties.

2.12 The three transporters, namely,-

- Shri Ashok Mathur, Proprietor of Sonepat Guana Freight Carriers, Gandhidham vide his statement dt. 22.12.04,
- Shri Hawa Singh, Proprietor of Delhi Kandla Road Lines, Gandhidham, vide his statement dt.27.12.04 and
- Shri Ramesh Yadav, Proprietor of Alwar Kotputli Transport, Gandhidham

have stated that they could not confirm that the goods transported by them from the appellant have reached the addresses shown in the documents.

2.13 After incorporation of Chapter XA in the Customs Act, 1962, i.e. after 11.04.2004, the clearances from KASEZ should have been treated as imports and TRA/RA should have been insisted upon from the port of registration of license. However, as per statement of Shri Riaz Ul Hasan, the subject Advance License No.2910004059 was of Cochin Port, but the said license was not registered and therefore there was no way that the TRA could be obtained. All clearances after 11.05.2004 were illegal.

2.14 The case against the appellant, is therefore, that they hatched a conspiracy with an intention to evade payment of duty. They suppressed material fact of non-existence of the buyers at the addresses mentioned in the licenses before the Customs authorities. They cleared goods under Advance Release Orders issued under various Advance Licenses by resorting to mis-representation with an intention to evade payment of Customs/Excise duty.

2.15 Show cause notice dated 19.04.2005 was issued to the appellant asking them to show cause as to why:-

"(a) 1228.848 MT of Copper and Brass Scrap valued at Rs. 6,41,60,739/-, removed by M/s. Sameer Industries are liable to confiscation under rule 25 of the Central Excise Rules, 2002 and 270 MT of Brass scrap valued at Rs. 1,80,51,379/-are liable to confiscation under section 111(0) of the Customs Act, 1962.

(b) Central excise duty of Rs.3,14,05,482/- is recoverable from them under the proviso to section 11A of the Central Excise Act, 1944 read with proviso to section 3 of the Central Excise Act, 1944.

(c) Customs Duty of Rs. 70,76,139/- is recoverable from them under the proviso to section 28 of Customs Act, 1962; and

(d) M/s. Sameer Industries and other noticees are liable to penalties under the relevant provisions of the Central Excise Act, 1944/the Customs Act, 1962."

2.16 The said show cause notice was adjudicated as per the Order-in-Original No.KDL/COMMR/05/2008 dated 29.01.2008 holding as follows:-

"Order

(i) I hold goods namely 1228.848 MT copper scrap/brass scrap totally valued at Rs. 6,41,60,739/- as liable for confiscation under Rule 25 of Central Excise Rules, 2002. However, orders for its actual confiscation is not passed considering that goods are not available having been removed at the material time.

(ii) I confirm the demand for Central Excise duty totally amounting to Rs. 3, 14, 05, 482/-(Rupees Three Crores Fourteen Lakh Five Thousand Four Hundred Eighty Two only) against M/s. Sameer Industries, Plot No. 204-207, Sector-4, KASEZ, Gandhidham under proviso to section 11 A of Central Excise Act, 1944 read with proviso to section 3 (1) ibid along with interest at applicable rates in terms of section 11 AB ibid and order for its recovery from the said noticee.

(iii) I impose penalty of Rs. 3, 14, 05, 482/- (Rupees Three Crores Fourteen Lakh Five Thousand Four Hundred Eighty Two only) against M/s. Sameer Industries Plot No.204-207, Sector-4, KASEZ, Gandhidham under section 11 AC of Central Excise Act, 1944, read with Rule 25 of Central Excise Rules, 2004.

(iv) I impose penalty under Rule 26 of Central Excise Rules, 2002 against the following noticees:-

SI	Noticee (S/Shri)	Penalty	Penalty
1.	Ramesh Jain, Partner of Sameer Industries	Rs. 50,00,000/-	Rupees Fifty Lakh only.
2.	S. K. Gupta @ S. K. Agarwal of M/s Lord Empire International	Rs. 25,00,000/-	Rupees Twenty Five Lakh only.
3.	Dinesh Kumar Jain, Partner of M/s. Laxmi Enterprises.	Rs. 25,00,000/-	Rupees Twenty Five Lakh only.
4.	Shri Riaz-ul-Hasan of M/s. Moradabad Import Export Corporation	Rs. 25,00,000/-	Rupees Twenty Five Lakh only.

(v) I hold goods namely 270 MT Brass scrap totally valued at Rs. 1, 80, 51, 379/- as liable for confiscation under Section 111 (o) of Customs Act, 1962. However, orders for its actual confiscation is not passed considering that goods are not available having been removed at the material time.

(vi) I confirm the demand for Custom duty totally amounting to Rs. 70, 76, 139/- (Rupees Seventy Lakh Seventy Six Thousand One Hundred Thirty Nine only) against M/s. Sameer Industries, Plot No. 204-207, Sector-4, KASEZ, Gandhidham under proviso to section 28 of Customs Act, 1962 along with interest at applicable rates in terms of section 28 AB ibid and order for its recovery from the said noticee.

(vi) I impose penalty of Rs. 70, 76, 139/- (Rupees Seventy Lakh Seventy Six Thousand One Hundred Thirty Nine only) against M/s. Sameer Industries, Plot No. 204-207, Sector-4, KASEZ, Gandhidham under section 114 A of Customs Act, 1962.

(vii) I impose penalty under section 112 (a) of Customs Act, 1962 against the following noticees:-

SI	*Noticee (S/Shri)*	*Penalty*	*Penalty*
1.	*Ramesh Jain, Partner of Sameer Industries*	*Rs.15,00,000/-*	*Rupees Fifteen Lakh only.*
2.	*Shri Riaz-ul-Hasan of M/s. Moradabad Import Export Corporation*	*Rs.10,00,000/-*	*Rupees Ten Lakh only.*

(viii) I drop the proceedings against Shri U. S. Kushwaha, Inspector of Central Excise, Indore (who served as Appraiser in KASEZ, Gandhidham at the material time).

Show cause notice No. DRI/GRU/INV-08/2004 dated 19.4.2005 issued by DRI, Gandhidham is disposed of in above terms."

2.17 Aggrieved appellants have filed appeal before this Tribunal raising following grounds:-

- The demand of Excise duty (Rs.3,14,05,482/-) is not sustainable, because the process carried out by the appellant, viz., segregation of imported mixed waste and scrap (recycling of scrap) does not amount to 'manufacture'.
- The demand of Central Excise duty (Rs.3,14,05,482/-) has been confirmed by the Commissioner of Customs. It is only the Commissioner of Central Excise or a Central Excise Officer, who is appointed under rule 3 of the Central Excise Rules, 2002 who can pass an order confirming demand of Central Excise duty. Not only that but as per rule 3(2), a Commissioner of Central Excise can exercise his powers only within the jurisdiction as may be specified by the Board by a Notification under rule 3(2). Therefore, the impugned order is without jurisdiction exemption. The subject AROs were declared void and invalid only on 03.03.2003 (whereas the clearances were made in October, 2002) in case of M/s. Laxmi Enterprises and on 24.07.2003 (whereas the clearances were made in February, 2003) in case of M/s. Lord Empire. Therefore, the clearances made at the time when the concerned Advance Licenses and AROS were valid cannot be denied the exemption. As a matter of fact, as per the statements

of Customs Appraisers, they had also obtained verification from the Office of the DGFT before allowing clearances. Thus, there is no doubt that subject Advance Licences and AROS were valid and not declared void at the time of clearance of the goods.

- The Commissioner had passed the impugned order on 29.01.2008. The order, inter alia, involves confirmation of demand of Central Excise duty under section 11A and consequential interest and penalty. However, since the appellant was situated in SEZ, it was beyond the purview of the Central Excise Act, 1944 after 11.05.2004 vide Notification No.58/03-CE(NT), dated 22.07.2003. This is because the charging section 3 of the Central Excise Act, 1944 was amended with effect from 11.05.2004 so as to exclude from the levy of Excise, the excisable goods produced and manufactured in the SEZ. As a matter of fact, side by side with the aforesaid amendment, another amendment was also made in the Customs Act, 1962 by introducing Chapter XA containing special provisions relating to SEZ. According to this new provision under the Customs Act, the goods removed from a Special Economic Zone (SEZ) for home consumption shall be chargeable to duties of Customs vide Section 76F. Thus, when there was no provision of levy of Central Excise duty in the Act, when the show cause notice was issued or when the impugned order was passed, the demand of duty and consequential interest, penalty, etc. cannot be legally raised or confirmed. This is more; so because there is no saving clause and moreover Section 38A also does not apply to amendment, etc., of an Act.
- The clearances were made after passing proper Bills of Entry In respect of all the consignments. As per the statement of the Customs Appraisers, they had themselves verified the Advance Licences and AROs and had also obtained verification reports about those documents being genuine from the DGFT. Thereafter only, they had passed

the assessment orders on the respective Bills of Entry, allowing clearance of the goods from the SEZ. Consequently, in the absence of any appeal against such assessed Bills of Entry, the present demand of duty being contrary to such assessment orders becoming final is not sustainable. Reliance is placed on various judgments.

- The show cause notice dated 19.04.2005 is time barred. This is because the appellants had maintained proper registers in Part I, II, III and IV entering the details of receipt, issue, production and balance inventory of the scrap receive and cleared from time to time. The goods were also cleared on the basis of proper Central Excise invoices and after submitting the relevant Advance Licences and AROS. The Customs Officers have gone on record to affirm that they had also obtained verification report from the DGFT before passing Assessment Orders for allowing clearance of the goods from SEZ.
- The payments were received through Bank and the goods were also transported through renowned transporters under their official MTRs. Consequently, there is no element of suppression of facts, willful mis-statement, fraud, etc. This is also not a case of collusion between the Appellant and the Customs Officers. Consequently, the longer limitation period is not applicable and so, the entire demand of duty is barred by limitation under section 11A of the Central Excise Act, 1944 and section 28 of the Customs Act, 1962.
- Both the demands of Excise duty of Rs.2,31,77,227/- and Customs Duty of Rs. 70,76,139/- in respect of goods supplied to M/s. Moradabad Import-Export Corporation, Moradabad, are not sustainable, as all the allegations of non-existence of the said unit, etc., stand disproved by the factual submissions made by them along with documentary evidence.
- The Commissioner has himself imposed separate penalties on all the three buyers, viz., M/s. Lord Empire, M/s. Laxmi

Enterprises and M/s. Moradabad Import-Export Corporation; This means that the allegation of non-existence of these three units is self-contradicted by the Commissioner and so the allegation and the concomitant adverse final conclusion is not sustainable.

- The demand, if at all sustainable, should have been confirmed against the buyers of the goods who had purchased the same and not the appellant, inasmuch as under section 3 of the Central Excise Act, 1944 or Chapter XA of the Customs Act, 1962, the levy and liability for duty arises on arrival of the goods into India from the unit in SEZ, which is a foreign territory.
- As regards the Customs duty demand of Rs.70,76,139/- it is contended by the Department that the Advance Licence should have been registered at the Port of Import and that the Advance Licence was not registered at any port. This argument is not significant or of any material importance because it was transitional period; Chapter XA was incorporated on 11.05.2004 and the Bills of Entry Nos. 758 to 768 (for supplies to M/s. Moradabad Import-Export Corporation) were all dated 08.06.2004. Even the Customs Officers at Kandla Customs House were unaware of the provisions of the new incorporated Chapter XA on 11.05.2004. This is also borne out from the statement of the Customs Appraiser.
- The show cause notice dated 19.04.2005 is without jurisdiction since it has been issue by the DRI who does not have such power and authority, in terms of the Board's Circular No. 16/04-Cus dated 16.02.2004 and the following judgments.
    - CCE V/s Paras Fab International 2009 (237) ELT711 (T)
    - Fero Alloys Corpon. Ltd Vs. CCE 1995 (8) RLT 352 (CEGAT)

2.18 The Tribunal, vide Final Order No. A/1413-1416/WZB/AHD/2010 dated 26.08.2010 set aside the impugned order and remanded the matter for de novo adjudication with direction that the appellant shall be at a liberty to raise the above grounds before Commissioner, who shall pass fresh order after considering the same.

2.19 In the remand proceedings matter has been adjudicated as per the impugned Order-in-Original referred in para 1 above.

2.20 Aggrieved appellant have filed these appeals.

3.1 Appellant is absent on call. We have heard Shri A R Kanani learned Authorized Representative appearing for the revenue.

3.2 On perusal of case records, we observe that on 28.01.2020, a Bench of this Tribunal had referred to the directions of Hon'ble Gujarat High Court and ordered as follows:-

> *"The Hon'ble Gujarat High Court vide order dated 23 July 2018, in Criminal Miscellaneous Application No. 10266/2018 directed this Tribunal to decide the appeals pending before this Bench at the earliest but outer limits shall be eight months from the date of the order. Accordingly, Registry is directed to list the appeals on 10 February, 2020."*

3.3 Thereafter, the matter has been constantly listed and adjourned as is evidence from the order sheets dated 10.02.2020, 30.07.2021, 07.10.2021, 31.01.2022, 14.02.2022, 12.04.2022, 01.07.2022, 21.09.2022, 21.11.2022, 10.10.2025, 01.12.2025, 22.12.2025 & 10.03.2026 i.e. today. On 01.12.2025 while adjudicating the matter, Bench of the Tribunal has observed as follows:-

> *"Adjournment request on behalf of the learned Counsel for the appellant on the ground that the learned Counsel is busy in Hon'ble Gujarat High Court and therefore the matters be adjourned.*
>
> *2. The learned AR for the department vehemently opposed the adjournment application and requested that Hon'ble Gujarat High Court has mentioned in the order dated 23rd July, 2018 in Misc. Application No. 10266 of 2018 Ramesh Hamerlal Jain vs. State of Gujarat that the appeal before*

> *the CESTAT Ahmedabad shall be decided at the earliest but outer limit shall be eight months.*
>
> *3. In these circumstances, last opportunity is being given to the learned Counsel for the appellant to present his case on the date fixed otherwise suitable order shall be passed in accordance with law. List on 22nd December, 2025."*

3.4 Thereafter, when the matter was firstly listed for final hearing showing as last opportunity it was again adjourned on 22.12.2025 with the following observations:-

> *"Adjournment request has been received from Shri Hasit Dave, Advocate on the ground that he is busy before Hon'ble High Court. However, we find that he has not filed his Vakalatnama. Therefore, learned Counsel is directed to file his Vakalatnama within a week. Matter is adjourned. List on February 25, 2026."*

3.5 On 25.02.2026, matter is adjourned for today with following observations by the Bench:-

> *"None appeared from the appellant side even though as per learned AR, the matter was remanded by Hon'ble Gujarat High Court for decision by the Tribunal within eight months. Learned AR mentioned that while disposing Misc. Application filed by the appellant in 2018, Hon'ble Court directed that the Tribunal decide the matter within period of eight months. We find that the appellant has not been appearing on various dates fixed by the Tribunal. In the interest of justice, as a chance, the matter is adjourned to 10th March, 2026 failing which the matter will be considered on merit. The notice may be issued to the appellant to be served through the department."*

3.6 As we find from the above that despite specific direction from the Hon'ble High Court that the appeals to be decided within maximum 8 months the matter has been adjourned for 8 years. We did not find any reason to adjourn the matter any further.

3.7 On completion of hearing, we find that a letter dated 06.03.2026 seeking adjournment has been placed within the file with a written submission dated 18.03.2026. The said written submission was filed in the registry, though there is no liberty was given to file written submission at the time of hearing.

3.8 In the interest of justice, the said written submission has been taken on record. In their written submission appellant has stated as follows:-

- In respect of demand of Rs.2,31,77,227/- and Rs.70,76,139/- for supply of Brass Scrap made to M/s MIEC, the findings recorded in the order that M/s MIEC are liable to pay the applicable duty as the appellant's defence is not supported by the documentary evidences.
- Further, the appellant being a SEZ unit supply of Brass Scrap to M/s MIEC being a DTA unit would be a case of import, therefore, liable to pay applicable duty on the entire quantity procured by them. Even otherwise, as an advance License holder, it is M/s MIEC who are mandated to fulfill actual user's condition, and who are liable to pay the applicable duty, if the Department's case is about diversion of the duty free goods. It is on record that after verification of the Advance Release Orders issued, the Custom Officers having jurisdiction over the appellant-I had allowed the clearances of the goods duty-free by allowing the exemption. Therefore, it cannot be concluded that the Appellant had any point of time, diverted the goods and cleared them improperly. Moreover, it is not the responsibility of the supplier (Appellant) to ensure whether the addresses given in the Advance Licenses and Advance Release Orders and accepted by the Licensing Authority are correct or otherwise. The statements of the transporters and others cannot be treated as the relevant and reliable evidence cannot be treated as relied upon documents unless the statements are put to the test of their veracity and correctness in terms of Section 9D of the Central Excise Act, 1944.
- The clearance made after filing of proper Bills of Entry in respect of all the consignments and customs appraisers

having their statements they had themselves verified the Advance Licences and AROs and had also obtained verification reports about those documents from DGFT. Thereafter, the Bills of entry were issued from the SEZ. No appeal has been filed by the revenue against the such assessed Bills of Entry, hence the demand made contrary to the assessed Bills of Entry, as without an appeal the assessment order becoming final is not sustainable. Reliance is placed on the following decisions:-

- M/s Priya Blue Inds. Vs CC 2004 (172) ELT 145 (SC);
- CC (Imp.) Vs Eurotex Indus. & Exports Ltd. 2007 (81) RLT 962 (CESTAT-LB);
- ITC Ltd. Vs CCE 2019 (368) ELT 216 (SC);

➢ Demand of Rs.50,06,365/- and Rs.32,21,890/- for Copper Scrap supplied to M/s Lord Empire International and M/s Laxmi Enterprises. These two demands are also not sustainable as the subject Advance Licenses were valid at the time of clearance of the goods from the appellant's SEZ unit and they were not reported to be cancelled or suspended only after the relevant period of customs clearances and the goods has been cleared at the time when such licenses were valid and not declared void at the time of clearance of the goods cannot be denied. Reliance is placed on the following decisions:-

- 1983 (13) ELT 1342 (SC) East India Commercial Co. Ltd. Vs. CC
- 1992 (58) ELT 163 (SC) UOI Vs. Sampat Raj Dugar
- 2014 (306) ELT 592 (Guj.) CC Vs. Rajnarayan Jwalaprasad
- 2012 (283) ELT 269 (T) CC Vs. Patiala Castings Pvt. Ltd.
- 2003 (161) ELT 47 (Bom.) 2017 (349) ELT A93 (SC) Taparia Overseas (P) Ltd. Vs. UOI
- 2013 (295) ELT 739 (T) CC Vs. Gopi Chand Krishan Kumar Bhatia

  - 2016 (342) ELT 176 (P & H) Supreme Castings Ltd. Vs Jt. Dir. General of Foreign Trade;
- These demands are also barred by limitation.
- Demand is also unsustainable because the appellant have not carried out any process amounting to manufacture but a simple process of segregating Brass Scrap and Copper Scrap from the mixed scrap by manual or mechanical processes without resulting into any chemical change in the quality or characteristics of original products and without resulting into any new commercial commodity other than metal scrap already in existence as such alongwith other metal scrap. In the following decisions, it has been held that segregation of waste and scrap items does not amount to manufacture. Reliance is placed on the following decisions:-
  - M/s Tirumalla Impex Vs CCE 2010 (251) ELT 240 (T);
  - Malu Electrodes Pvt Ltd. Vs CC 2018 (364) ELT 1023 (T);
  - CC Vs IM Kemex India Ltd. 1996 (86) ELT 95 (T);
  - Hyderabad Industries Ltd. Vs UOI 1995 (78) ELT 641 (SC);
  - Gem Spinners (India) Ltd. Vs CCE 2008 (226) ELT 233 (T);
  - C.T. Cotton Yarn Ltd. Vs CCE 2007 (218) ELT 233 (T);
  - Chowgule & Co. Pvt. Ltd. Vs UOI 1993 (67) ELT 34 (SC);
- The case of the department that the supply made to these two buyers against Advance License in contraventions of the conditions in Notification No.28/2001-CE dated 16.05.2001. However, it is on record that appellant had in point of time claimed the benefit of exemption under the said notification and cleared the scrap. Therefore, the scrap cleared against Advance License in terms of Notification No.30/97-Cus dated 01.04.1997.

- As regards penalties of Rs.50 lakhs imposed under Rule 26 of Central Excise Rules, 2002 and Rs.50 lakhs imposed under Section 112A of the Customs Act on the appellant cannot be sustained because when the penalties imposed on the partnership firm, separate penalty cannot be imposed on the partner as has been held in the following cases:-
  - CCE Vs Jai Prakash Motwani 2010 (258) ELT 204 (Guj.);
  - CCE Vs Mahendra Kumar 2010 (260) ELT 51 (Guj.);
  - Mohammed Farookh Mohammed Ghani 2010 (259) ELT 179 (Guj.);

3.9 Learned Authorized Representative reiterates the findings recorded in the impugned order of the lower authority.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 The issue of jurisdiction of DRI officers and the issuance of show cause notice has been finally adjudicated by the Hon'ble Supreme Court in Review Petition filed in the case of M/s Canon India holding that the DRI Officers had sufficient jurisdiction to issue the show cause notice. Hence, we are not going into this issue any further following the above decision while deciding these appeals.

4.3 Impugned order records the findings as follows:-

"9.1 I have examined the contentions of M/s. Sameer Industries and Shri Ramesh Jain on each of the aforesaid grounds. Before I deal with these grounds, I find that none of the persons whose statements recorded under section 108 of the Customs Act, 1962 and relied upon in the show cause notice, has retracted their statements. There is also no challenge by M/s. Sameer Industries and Shri Ramesh Jain to any of the material evidences brought on record, as discussed in the show cause notice.

10. I now proceed to discuss the various new issues raised by M/s. Sameer Industries and Shri Ramesh Jain, Partner *of M/s. Sameer Industries, enumerated above. The first ground is whether the process of sorting of mixed scrap carried out by M/s. Sameer amounted to 'manufacture.' The basic concept of SEZ is that the goods imported by a unit located therein for use in the authorized operations are exempt from customs duties. Anything that is removed from the SEZ whether manufactured or the imported goods as such central excise duty or customs duty, as the case may be, is recoverable. Notification No. 137/2000-Customs, dated 19.10.2000, as existed at the material time, exempted goods when imported into India, for the purposes of manufacture of goods, services, production, processing, assembling, trading, repair, reconditioning, re-engineering, packaging or in connection therewith and export thereof by a unit within a Special Economic Zone, from the whole of the duty of customs leviable thereon, subject to the certain conditions. One of the conditions is that the importer executes a bond in the form specified by the Assistant Commissioner of Customs or Deputy Commissioner of Customs, binding himself (i) to bring the said goods into the said unit in the Zone and use them for the said purpose and (ii) in case of failure to utilise the said goods for the said purpose within the stipulated period, to pay an amount equal to the duty as leviable on the said unutilized goods along with interest at the rate of 24% per annum on the said duty from the date of importation or procurement of the said unutilized goods till the payment of such duty. When customs duty is payable on the imported goods not utilized for the specified purposes but still lying in the SEZ, it is obvious that duty is payable on the said goods when removed as such into DTA. Thus the question whether the process of sorting of mixed scrap amounted to 'manufacture' for purposes of levy of central excise duty, is irrelevant. Consequently, the case laws relied upon by M/s. Sameer Industries are also not relevant.*

11. The second ground is that the Commissioner of Customs, Kandla lacked jurisdiction for demanding central excise duty from M/s. Sameer Industries. It is argued that it is only the Commissioner of Central Excise or a Central Excise Officer, who is appointed under rule 3 of the Central Excise Rules, 2002 who can pass an order confirming demand of Central Excise duty. Not only that, but as per rule 3(2), a Commissioner of Central Excise can exercise his powers only within the jurisdiction as may be specified by the Board by a Notification under rule 3(2).

11.1 By virtue of Notification No. 15/2002-Cus (NT) dated 07.03.2002, the Commissioner of Customs, Kandla has jurisdiction over Kandla SEZ. Notification No. 38/2001-CE (NT) dated 26.06.2001 also appointed the officers of customs in EPZ, FTZ and SEZ as officers of Central Excise Therefore, by virtue of these two notifications, the Commissioner of Customs, Kandla is also Commissioner of Central Excise for the purpose of Kandla SEZ

11.2 The question of jurisdiction of the Commissioner of Customs, Kandla also stands decided by the CESTAT in their own cases, viz., Sameer Industries vs. Commissioner of Customs, Kandla, reported as 2009 (246) E.L.T. 515 (Tri. Ahmd.). In paragraph 6 of the order, the CESTAT held that the Commissioner of Customs, Kandla situated in Kandla Special Economic Zone can exercise the powers of Commissioner of Central Excise in Kandla Special Economic Zone. Therefore, the impugned order is within the jurisdiction of Commissioner.

11.3 Further, the question regarding jurisdiction over EOU/EHTP/STP/SEZ Units, particularly in connection with investigation and adjudication of cases was examined by the Board. In paragraph 3 and 4 of Circular No. 16/2004-Customs, dated 16.02.2004, the Board clarified as under:

> *"3....it is hereby clarified that in all cases of short levy or Evasion of either Customs or Central Excise duties, or both, it is the Commissioner of Customs or*

> *Central Excise, as a case may be, who has administrative control over the EOU/EHTP/STP/SEZ Unit, who will be the proper officer for investigation, issue of show cause notice and adjudication. For administrative control over EOUS/EHTP/STP units please refer to Board's Circular No. 31/2003-Cus., dated 7-4-2003.*
>
> *4. This will not affect the investigations conducted by organizations like the DGRI, DGCEI etc. who have all-India jurisdiction."*

I accordingly hold that the Commissioner of Customs, Kandla had and continues to have jurisdiction to adjudicate the impugned show cause notice.

12. Yet another ground of challenge is that the charging section 3 of the Central Excise Act, 1944 was amended with effect from 11.05.2004 so as to exclude from the levy of excise, the excisable goods produced and manufactured in the SEZ. Thus, when there is no provision for levy of Central Excise duty in the Act when the Show Cause Notice dated 19.04.2005 was issued or when the impugned Order dated 29.01.2008 was passed, the demand of duty and consequential interest, penalty, etc. cannot be legally raised or confirmed, especially because there is no saving clause and moreover, section 38A of the Central Excise Act, 1944 also does not apply to amendment, etc., of an Act.

12.1 I have examined this aspect. In the case of Surana Metals & Steels (1) Ltd., vs. Commissioner of Central Excise, Chennai, reported as 2007 (216) E.L.T. 24 (Tri. LB), a Larger Bench of the CESTAT considered the following question referred to it:

> *"Whether Section 3A of the Central Excise Act, which was omitted with effect from 11.05.2001, could be considered to have been 'repealed within the meaning of this expression used under Section 6 of the General Clauses Act, 1897."*

In paragraph 8.1 of the Order, the CESTAT observed that "... Therefore, there is no substance in the contention that Section 3A was 'omitted' and not 'repealed' making Section 6 of the General Clauses Act inapplicable, thereby abrogating the liabilities arising under the rules though protected by Section 38A. Section 38A, in our opinion, clearly governs the field and saves the obligations and liabilities that had already arisen while these rules were in operation so that they could be enforced and implemented as contemplated by Section 38A. It is therefore unnecessary to enter into the controversy surrounding the provisions of Section 6 of the General Clauses Act as to the meaning of the word 'repeal' on which diverse views have been expressed by the Courts. Section 11A of the Central Excise Act, 1944 provides for issue of notice for recovery of duty not levied, short levied etc. Central excise duty for the period prior to 11.05.2004 which was not levied but for the exemption claimed by M/s. Sameer Industries, is in the nature of "duty not levied which can be demanded and recovered under section 11A.

13. The next ground is that the Additional Director General, DRI, Ahmedabad, who issued the show cause notice in this case, did not have the jurisdiction to issue the same. Vide notification No. 38/2001-CE (NT) dated 26.06.2001, issued under section 2(b) of the Central Excise Act, 1944 and rule 3(1) of the CER, 2001, the officers of DRI have been appointed as officers of Central Excise (Sr. No. 3 of the said notification). Therefore, the subject SCN has been issued well within the statutory powers. As clarified in the aforesaid Circular No. 16/2004-Customs, dated 16.02.2004, the DRI has all-India jurisdiction, Further, by amending section 28 of the Customs Act, 1962 by the Customs (Amendment and Validation) Act, 2011 with effect from 16.09.2011, Show Cause Notices issued prior to 06.07.2011 by officers of Customs, which would include officers of

Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence and similarly placed officers stand validated since these officers are retrospectively recognized as 'proper officers for the purpose of Sections 17 and 28 of the said Act. I, therefore, hold that this ground of challenge is without merit.

14. The next ground of challenge is that the proceedings emanating from the impugned show cause notice were illegal and invalid inasmuch as the assessments made on the bills of entry became final unless appealed against. Section 28 provides for demanding duty not levied, short levied etc., within the time limit specified therein. In the instant case, evidence gathered during investigation revealed that the persons to whom the goods were shown to have been cleared by M/s. Sameer Industries from their unit in the SEZ were found to be non-existent. Further, the advance licences/advance release orders were found to have been cancelled. Duty can, therefore, be demanded under section 28 ibid. Further, as per section 2(2) of the Customs Act, 1962, "assessment includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil. The mere fact that before assessing the bills of entry the assessing officers had obtained verification reports about the advance licences/advance release orders being genuine, from DGFT, would not preclude the authority superior to him from demanding duty on the basis of facts contrary to those existed at the time of assessment emerged after investigation. I further find that the citations on which M/s. Sameer Industries has placed reliance in this regard were rendered in the context of application for refunds under section 27 filed without first reviewing the assessment under section 28 or challenging the same in appeal. The provisions of section 28 of the Customs Act, 1962 do not envisage that for demanding duty not levied, short levied *etc., the assessment already made shall be reviewed or challenged in appeal. This ground also is without merit.*

15. The next ground of challenge is that the SCN is time barred in view of the fact that the customs officers had obtained verification reports of advance licences/release orders, before passing assessment orders allowing clearances. Further, there was no element of suppression of facts, willful misstatement, fraud, etc. This was also not a case of collusion between M/s. Sameer Industries and the Customs Officers. Consequently, the longer limitation period was not applicable and so, the entire demand of duty was barred by limitation under section 11A of the Central Excise Act, 1944 and section 28 of the Customs Act, 1962.

15.1 This issue has been examined. M/s. Sameer Industries have submitted photocopies of two letters dated 17.10.2002 and 11.12.2003 from the office of the Zonal Joint DGFT, Mumbai, addressed to the Deputy Commissioner of Customs, KASEZ, Gandhidham, regarding confirmation of advance licences issued to M/s. Laxmi Enterprises and M/s. Moradabad Import-Export Corporation and contended that the assessments were made only after obtaining confirmation of genuineness of licences from the concerned DGFT authorities. I find that photocopies of these letters do not bear any stamp or signature of the customs authorities at KASEZ, Gandhidham indicating receipt thereof. These are also not certified true copies. Such uncertified documents are not admissible in evidence. As a result of investigation conducted which revealed that the units were non-existen., the DGFT, Mumbai cancelled, inter alia, advance licence No.0310156347 dated 03.09.2002 issued to M/s. Lord Empire International vide order dated 24.07.2003 and suspended advance licence No.0310143243 dated 21.06.2002 vide order dated 03.03.2003. These facts have not been controverted by M/s. Sameer Industries.

Therefore, the mere fact that the assessing officers had obtained confirmation from the licensing authorities as to genuineness of the advance licences before allowing clearances, would not nullify the legal admissibility of the cancellation/suspension orders or otherwise vitiate the proceedings.

15.2 In this case, M/s. Sameer Industries had imported goods in their SEZ units and had availed the Customs duty exemption under Notification No. 137/2000-Customs dated 19.2.2000. Instead of exporting the goods after specified processes, they cleared these goods into Domestic Tariff Area (DTA) without payment of any duties, against Advance Release Orders These clearances were made against Notification No.28/2001-CE dated 16.05.2001 which permitted clearances to a domestic unit for further manufacture and export. Since M/s. Sameer Industries had taken benefit of these two notifications, it was their responsibility to explain to the department during investigations that the goods imported duty-free by them in the SEZ unit were exported by them (after specified processes as mentioned in Notification No. 137/2000-Customs) or given by them to bonafide persons who then exported goods manufactured out of them. The onus of proving clearances to bonafide persons was clearly on M/s. Sameer Industries. During investigations, it was revealed that the persons to whom these goods were cleared were non-existent. One, therefore, cannot help, but conclude that M/s. Sameer Industries mis-used provisions of law to divert goods imported by them duty-free to the Domestic Tariff Area without payment of appropriate duties.

15.3 The Hon'ble Supreme Court in its judgment in the case of Mihir Textiles vs. Collector of Customs, Bombay reported at 1997 (92) ELT 9 (SC) held that exemption/benefit dependent upon satisfaction of certain conditions cannot be granted unless such conditions are complied with, even if such conditions are only directory. It *is a settled position in law that the burden to prove fulfillment of conditions of the notification lies on M/s. Sameer Industries. This legal position has been propounded by the CESTAT in its decision in the case of Indofil Chemical Co. vs. Commissioner of Central Excise, Mumbai, reported at 2003 (159) E.L.T. 443 (Tri. Mumbai), wherein it has been observed in paragraph 5 as under:*

> *"...The Central Government, under delegated legislation, makes rules and issues notifications granting exemption from such levy in suitable cases, and in the public interest, subject to such conditions and procedural safeguards as are deemed appropriate in each case. These need to be followed by tax officials as well as the assessees for ensuring orderly tax collection and grant of exemption. It cannot be left to the whims and fancies of individual tax officials to determine in each case which are essential conditions and which are not. Similarly it cannot be left to the choice of the assessees as to which conditions they can ignore and yet get the exemption. Such a state of affairs, if allowed by this Tribunal, would lead to a state of chaos in tax administration. Once the Govt. in its wisdom lays down certain conditions for availing an exemption, the same must be satisfied in toto to get that exemption. The assessee has a choice not to follow the conditions, in which case he must pay the full levy as authorised under the law without claiming the exemption......"*

15.4 Investigation has revealed that the recipient firms were non-existent. Verification reports received from DRI, Delhi, Mumbai and Lucknow, as discussed in paragraph 4 and 5 of the show cause indicate that both M/s. Lord Empire International and M/s. Laxmi Enterprises were not in existence at the declared addresses. Similarly, in the case of M/s. Moradabad Import-Export Corporation, report *received from the Central Excise Commissionerate, Meerut-ll, as discussed in paragraph 6 and 24 of the show cause notice, no firm in the name and style of M/s. Moradabad Import-Export Corporation existed at the given address and the occupants of the premises informed that the firm did not exist at the said address and that they had shifted to another place five years ago. Further, Shri Riaz ul Hasan, CEO of M/s. Moradabad Import-Export Corporation stated in his statement dated 09.07.2004 recorded under section 108 of the Customs Act, 1962 that their firm had received advance licence No.2910004059 which was to be registered at Cochin Port but the said licence was not registered and that they had not received any material against the same. Thus, simply arguing that there is no positive evidence to indicate that the goods were never delivered at the factories of their buyers, does not absolve them of their liability to discharge the burden of disproving the department's case. Records of the case indicate that goods totally valued at Rs.8.22 Crore were removed by M/s. Sameer Industries between the period October, 2002 and July, 2004 to three units, viz., M/s. Laxmi Enterprises, New Delhi, M/s. Lord Empire International, New Delhi and M/s. Moradabad Import-Export Corporation, Moradabad, all of which were found to be non-existent.*

15.5 Exemption from customs/central excise duties under the advance licence scheme is available only if the exempt materials are used in the manufacture of resultant products and export thereof. The fact that the advance licences issued to the three buyers in the instant case were cancelled/suspended by the licensing authorities eminently vindicates the stand that they were non-existent entities and that they had not utilized the exempt material in the manufacture of any resultant product or fulfilled the export obligation by export of resultant products. M/s. Sameer Industries have not brought on record any evidence to *establish that these firms had utilized the exempt material purchased from them in the manufacture of resultant products and exported the same in fulfillment of export obligation cast on them under the respective advance licences. The element of conscious fraud perpetuated right from the beginning is conspicuous by the dubious method by which payments for the transactions were arranged, viz., that cash amounts were deposited in the bank accounts and demand drafts/pay orders were issued in favour of M/s. Sameer Industries and thereafter the accounts were closed. Cancellation or suspension of these licences by the licensing authorities, at a later stage, will not by itself alter the legal position that the goods supplied against the so-called advance release orders were not received and utilized by the three buyers in the manufacture of resultant products for export, in fulfillment of the conditions thereof. The case laws cited by M/s. Sameer Industries are, therefore, distinguishable on facts. It is a well settled position in law that fraud vitiates everything.*

15.6 In the instant case, true facts about non-existence of the recipient units at the given addresses, diversion of goods in the market and cancellation/suspension of advance licences as well as the modus operandi adopted for arranging payment towards sale of the goods, viz., by obtaining demand drafts in the name of M/s. Sameer Industries after depositing cash in the bank accounts at Delhi and Jammu & Kashmir, as discussed in detail in the show cause notice, came to light only during investigation. Limitation for issue of demand for duty would start from the date of knowledge of such facts. Extended period of limitation is, therefore, invocable in this case.

16. In so far as the next ground of challenge, viz., exemption cannot be denied to them on the ground that the advance licences were declared void and invalid subsequently but were valid when the clearances were *made, it is the contention of M/s. Sameer Industries that the Advance Licences and AROs were all valid at the time of and also much after the dates of clearance of the subject goods under exemption. The subject AROs were declared void and invalid only on 03.03.2003 (whereas the clearances were made in October, 2002) in case of M/s. Laxmi Enterprises and on 24.07.2003 (whereas the clearances were made in February, 2003) in case of M/s. Lord Empire International. Therefore, the clearances made at the time when the concerned Advance Licences and AROs were valid cannot be denied the exemption. They also placed strong reliance on various case laws.*

16.1 As already stated above, the department's case is that the three buyers to whom M/s. Sameer Industries sold the goods against advance licences/advance release orders were found non-existent and consequently the goods could not have been used by them in the manufacture of any resultant products for export. I have also found that the burden to establish that the advance release orders issued to the said firms were genuine and that they existed at the declared addresses and that the exempt material were to be used in their factory in the manufacture of resultant products for export, has not been discharged by M/s. Sameer Industries. When the advance licences were obtained by the aforesaid three entities way of fraud, it is irrelevant whether the same were valid on the date of clearance.

17. The next ground of challenge is that strong and positive evidence existed regarding existence of the three buyers. It was submitted that the Commissioner ought to have accepted the following evidence which collectively established the fact of the three units being in existence and they being in possession of valid Advance Licences ad AROs at the time of clearance of the goods from the premises of M/s. Sameer Industries:

[a] Form No. 31 was being issued by the States Sales Tax Authority in respect of M/s. Moradabad Import-Export Corporation for the entire quantity purchased by them

[b] Full payment of Rs. 8.22 crore was duly received by M/s. Sameer Industries through Bank cheques and/or demand drafts from all the three Buyers. Letters enclosing cheques/DDs may be referred.

[c] Lorry Receipts of M/s. Shree Sonal Freight Carriers with copies of invoices, both commercial and statutory.

[d] Sales contract and Proforma Invoice both dated 28.01.2003 in respect of goods supplied to Lord Empire International.

[e] Copy of letter dated 17.02.2003 from M/s. Lord to Shree Sonal Freight Carriers, authorizing them to lift the material from M/s. Sameer Industries.

[f] Copy of letter dated 17.02.2003 from M/s. Lord informing that the goods be sent through Shree Sonal Freight Carriers, whom they had authorized.

[g] A copy of Importer Exporter Code of M/s. Lord Empire International

[h] A copy of the sales contract dated 16.10.2002 with M/s. Laxmi Enterprises.

[i] A copy of letter dated 16.10.2002 from M/s. Laxmi communicating that Shree Sonal Freight Carriers were authorized to lift the contract duty free material.

[j] Copies of Lorry receipts and commercial and statutory invoices for the goods supplied to M/s. Laxmi Enterprises.

[k] A copy of Sales Contract dated 24.06.2003 & Proforma Invoice in respect of supplies made to M/s. Moradabad Import-Export Corporation.

[l] A copy of letter of authority from M/s. Moradabad Import-Export Corporation to Shree Sonal Freight Carriers.

[m] Copies of Lorry receipts and commercial and statutory invoices for the goods supplied to M/s. Moradabad Import-Export Corporation.

[n] A copy of letter dated 27.3.2003 indicating that Shri Dinesh Jain, Proprietor of Laxmi Enterprises was produced before the Superintendent of Customs (Prev), M&P Wing, Mumbai on 07.04.2003

[o] A copy of letter dated 29.11.2004 from M/s. Moradabad Import-Export Corporation addressed to SIO, DRI, Gandhidham, signifying the proof of existence of the said Unit.

[p] Documents showing imports of Copper Scrap by M/s. Lord Empire International in an independent transaction, as obtained by M/s. Sameer Industries from their CHA, M/s. Nikhil Shopping Agency, viz., CHA's Bill No.418, LR No.222 dtd.27.3.2003, Bill of Entry No.7635 dtd.4.3.03, etc.

[q] Affidavit dated 09.03.2005 of Shri Gulbir Singh Anand of M/s. Apollo Roadways.

[r] Affidavit dated 23.4.2009 of Shri Riazul Hasan of M/s. Moradabad Import-Export Corporation.

17.1 In this case the overwhelming evidence gathered during investigations, coupled with the fact that the licensing authorities had cancelled/suspended the advance licenses, substantiates that the three buyers were non-existent at the given address. On the face of such evidences, copies of the aforesaid documents, brought on record, do not help M/s. Sameer Industries in establishing existence of these units. The letters, contracts, etc., do not indicate the date and place of dispatch and evidence as to receipt of the same by the addressee. Similarly, the transport receipts indicate the freight amount as "to be billed." No evidence has been brought on record by M/s.

Sameer Industries as to who footed the freight bill whether by the buyers or by the seller. Unless authenticity and veracity of the aforesaid documents are established by way of cogent evidence, no evidential value can be attached to the same. In the case of M/s. Moradabad Import-Export Corporation, report of the jurisdictional Central Excise authorities, as discussed in paragraph 24 of the show cause notice, clearly establishes that the premises were found to be a residential one and no firm in the name and style of M/s. Moradabad Import-Export Corporation existed and that the occupants of the premises told that the firm did not exist at the said address and that they had shifted to another place five years ago. In the case of M/s. Laxmi Enterprises and M/s. Lord Empire International also, reports received from DRI, Delhi, Mumbai and Lucknow indicated that the said firms did not exist at the given addresses. Shri Ramesh Jain in his statement dated 13.08.2004 deposed that Shri S.K. Gupta of M/s. Lord Empire International and the company was not contactable at the given addresses and the telephone numbers. On being further asked about M/s. Laxmi Enterprises, Delhi, Shri Ramesh Jain had stated that Shri S.K. Gupta was introduced to him as owner of M/s. lord Empire International and Shri S.K. Gupta had informed him that M/s. Laxmi Enterprises, Delhi was his group company. Further in respect of all the three firms mentioned above, the transporters had stated that they had prepared documents on the basis of details given by M/s. Sameer Industries but they were not sure that the goods were delivered at the addresses mentioned in the documents. Thus the investigation carried out by the department clearly revealed non-existence of the above said firms. What is found on physical verification of the premises has to be preferred over the documents showing existence. It is not uncommon that in cases involving economic offences, the firms are found to be existent only on paper.

None of these documents is, therefore, capable of establishing existence of the three buyers, as contended by M/s. Sameer Industries on the face of overwhelming evidence gathered during investigation that the firms did not exist at the given addresses.

17.2 It is a well settled position in law that in case of clandestine removals, the department is not required to prove its case by mathematical precision. It is also well settled that strict rules of evidence are not applicable in quasi judicial proceedings and the case can be established by preponderance of probability supported by circumstantial evidence. Viewed in the light of this settled position law, the department's case is well established and stray evidences in the form of letters, etc., produced by M/s. Sameer Industries cannot negate the overwhelming evidence gathered during the course of investigation and appear to be afterthoughts.

18. The last ground of challenge is that the duty liability is on the buyers of the goods and not on M/s. Sameer Industries. It was submitted that the demand, if at all sustainable, should have been confirmed against the buyers of the goods who had purchased the same and not M/s. Sameer Industries, inasmuch as under section 3 of the CEA 1944 or Chapter XA of Customs Act, 1962, the levy and liability for duty arises on arrival of the goods into India from the unit in SEZ, which is a foreign territory.

18.1 I find that goods cleared by a unit in SEZ into DTA are chargeable to duty. In the instant case, M/s. Sameer Industries had claimed exemption under notification No.28/2001-CE dated 16.05.2001 in respect of clearances effected upto 11.05.2004. This notification exempted excisable goods produced or manufactured in a hundred per cent export oriented undertaking or a free trade zone or a special economic zone and cleared to a person holding an advance release order issued by the licensing authority against an advance licence in terms of paragraph 7.7 of *the Export & Import Policy, from the whole of the duty of excise. They also claimed exemption from customs duty under notification No.43/2002-Customs, dated 19.04.2002 in respect of goods cleared under bills of entry after 11.05.2004. If the conditions of the exemption notifications are found to be not fulfilled, duty is recoverable from the person who claimed and availed such exemption. This position is same even under the Special Economic Zones Act, 2005. Section 30(a) of the Special Economic Zones Act, 2005 provides that subject to the conditions specified in the rules made by the Central Government in this behalf, any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported. Chapter V of the Special Economic Rules, 2006, lays down the conditions subject to which goods may be removed from a Special Economic Zone to the Domestic Tariff Area. Secondly, the liability of M/s. Sameer Industries is also very much there because the buyers were found to be non-existent and the case is basically of diversion of goods in the guise of DTA clearances. The argument that the liability gets shifted to the person receiving the goods in the DTA is wrong."*

4.4 Appellant have contended that the clearances were effected following the prescribed procedure and after the assessment of the Bills of Entry in respect of all the consignments. As per the statement of the Customs Appraisers, they had themselves verified the Advance Licenses and AROS and had also obtained verification reports about those documents being genuine from DGFT. Thereafter only, the assessment orders on the respective Bills of Entry, allowing clearance of the goods from the SEZ. Consequently, in the absence of any appeal against such assessed Bills of Entry, the present demand of duty being contrary to such assessment orders becoming final is not sustainable. Reliance is placed on the following judgments.

- Priya Blue Industries [2004 (172) ELT 145 (SC)]
- Eurotex Inds & Export Ltd [2007(81) RLT 962 (CESTAT-LB)]

Both the decisions relied upon by the appellant are in case of Refund Claims made under the provisions of the statute (Custom Act, 1962 and Central Excise Act, 1944). The principle laid down in the said decisions which is in respect of refund if applied to provisions relating to demand under Section 28 will render the entire section redundant. Hon'ble Supreme Court has in case Canon India Pvt. Ltd. [2021 (376) E.L.T. 3 (S.C.)] observed as follows:

> *"8. It is significant to note that while the decision to clear the goods for import because they were exempted from customs duties under Notification No. 15/2012, was taken by Deputy Commissioner, Appraisal Group, Delhi Air Cargo, the show cause notice was issued by the Additional Director General, Directorate of Revenue Intelligence.*
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> *9. The question that arises is whether the Directorate of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted. It is necessary that the answer must flow from the power conferred by the statute i.e. under Section 28(4) of the Act. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in Consolidated Coffee Ltd. and Another v. Coffee Board, Bangalore [(1980) 3 SCC 358] has held :-*
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> *"14. ...Secondly, and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our*

view, very significant. Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."

In Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd. [(2001) 3 SCC 609] has held :-

"9. ...'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person."

10. There are only two articles 'a (or an)' and 'the'. 'A (or an)' is known as the Indefinite Article because it does not specifically refer to a particular person or thing. On the other hand, 'the' is called the Definite Article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word 'any'.

11. Parliament has employed the article "the" not accidently but with the intention to designate the proper officer who had assessed the goods at the time of clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2(2)(c) of the Customs Act, 1962[3].

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

13. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.

14. It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorized to make the assessment. The nature of the power conferred by Section 28(4) to recover *duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake reassessment [which is involved in Section 28(4)].*

15. It is obvious that the reassessment and recovery of duties i.e. contemplated by Section 28(4) is by the same authority and not by any superior authority such as Appellate or Revisional Authority. It is, therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside."

4.5 Further explaining the scheme of Section 17 and Section 28 of Customs Act, 1962 , Hon'ble Supreme Court has in case of Canon India Pvt. Ltd. [2024 () ELT (SC)] again observed as follows:

"95. Section 17 read with Sections 46 and 47 of the Act, 1962 deals with the assessment and re-assessment at the first instance that is, upon entry of the consignments and clearance of bill(s) of entry. The amendment to Section 17 introduces the process of self-assessment and subsequent re-assessment upon verification by the proper officer, if so required, for undertaking a check at the first instance.

96. The proceedings under Section 28 are subsequent to the completion of the process set out in Section 17 of the Act, 1962. The procedure envisaged under Section 28 is in the nature of a quasi-judicial proceeding with the issuance of the show cause notice by the proper officer followed by adjudication of such notices by the field customs officers. It is also worth noting that in the case of DRI, the proceedings under Section 28 start only after an

> *investigation has been undertaken by DRI. This is reaffirmed by Circular No. 4/99-Cus., dated 15-2-1999 and Circular No. 44/2011-Cus., dated 23-11-2011. Therefore, the nature of review under section 28 is significantly different from the nature of assessment and re-assessment under section 17. The ambit of Section 28 has also been restricted to the review of assessments and re-assessments done under Section 17 for ascertaining if there has been a short-levy, non-levy, part-payment, non-payment or erroneous refund."*

Thus, we do not find any merits in the submissions made by the appellant that as the goods were cleared after due assessment by proper officer then this demand could not have been made without setting aside the order of assessment made at the time of clearance of the goods by appropriate appellate authority.

4.6 We also do not find any merits in the submission of the appellant to effect that ADG DRI lacked jurisdiction to issue the show cause notice and Commissioner Customs Kandla lacked the jurisdiction to adjudicate the same. This issue has now been settled by the Hon'ble Supreme Court in the case of Canon India Pvt. Ltd., supra wherein following has been observed:

> *"153. We were apprised by the Learned Additional Solicitor General during the course of the hearing that the Customs department has been following the protocol suggested in Mangali Impex (supra) since 1999. Further, no substantial empirical evidence of the misuse of Section 28(11) which was enacted over a decade ago, was presented by the parties. Therefore, we are inclined to accept the policy of the Customs department that once a show cause notice is issued, the jurisdiction of other empowered proper officers shall be excluded for such notice. We find that such policy acts as a sufficient safeguard against the apprehension of chaos or confusion or misuse.*
>
> *154. Thus, we are of the considered view that the enactment of sub-section (11) of Section 28 cures the*

defect pointed out in Sayed Ali (supra) and the judgment in Mangali Impex (supra) deserves to be set aside.

155. It follows from the above discussion that sub-section (11) of Section 28 is constitutionally valid, and its application is not limited to the period between 8-4-2011 and 16-9-2011.

156. For the reasons in the foregoing paragraphs, we hold that the Bombay High Court judgment in Sunil Gupta (supra) lays down the correct position of law, whereas the Delhi High Court decision in Mangali Impex (supra) is incorrect and is consequently set aside."

4.7 The facts have been recorded in sufficient details in the previous paras. Appellant had cleared the goods in name of three firms namely, (i) M/s Lord Empire International, Delhi (ii) M/s Laxmi Enterprises, Delhi and (iii) M/s Moradabad Import Export Corporation, Moradabad (MIEC). The paragraphs of the show cause notice summarizing the clearances and facts of verification under taken are reproduced below:

"2. Scrutiny of records withdrawn and records received from DGCEI revealed that M/s Sameer Industries, KASEZ had claimed to supply 140 MT of Copper Scrap to M/s Lord Empire International, New Delhi, 100 MT of Copper Scrap to M/s Laxmi Enterprises, New Delhi, 1258.84 MT of Brass Scrap to M/s Moradabad Import Export Corporation, Moradabad (MIEC). The details (placed at Sl. No 5 and Sl. No 18 of the documents relied upon) of dispatches are given below:

(i) Dispatches claimed to M/s. Lord Empire International, Delhi (under Advance Release Order No. 03/84/072/AM-03/ALS-V dated 27.09.2002 issue against Advance License No. 0310156347 dated 03.09.2002).

Sr.	*Invoice No & date*	*Qty MT*	*Value (Rs.)*	*Truck No.*	*Builty No. & date*
1	*918/13.02.2003*	*20*	*1407865*	*HR-55-9839*	*2361/20.02.03*
2	*919/13.02.2003*	*20*	*1407865*	*HR-55F-1395*	*2364/21.02.03*
3	*920/13.02.2003*	*20*	*1407865*	*HR-47-2429*	*2365/22.02.03*
4	*921/13.02.2003*	*20*	*1407865*	*HR-47-2429*	*2376/03.03.03*
5	*922/13.02.2003*	*20*	*1407865*	*HR-38A-4476*	*2381/10.03.03*
6	*923/13.02.2003*	*20*	*1407865*	*HR-55B-4814*	*2385/24.03.03*
7	*924/13.02.2003*	*20*	*1407865*	*HR-55A-5596*	*2390/12.04.03*
	Total	*140*	*9855055*		

(ii) Dispatches claimed to M/S. Laxmi Enterprises, New Delhi (un-Advance Release Order No. 03/83/021/AM-03/ALS-V dated 27.09.2002 issue against Advance License No. 0310143243 dated 21.06.2002).

Sr.	Invoice No & date	Qty MT	Value (Rs.)	Truck No.	Builty No. & date
1	779/21.10.2002	20	1268460	HR-47B-1361	2146/21.10.02
2	780/21.10.2002	20	1268460	RJ-32-G-0653	2147/22.10.02
3	781/21.10.2002	20	1268460	RJ-32-G 0120	2148/23.10.02
4	782/21.10.2002	20	1268460	HR-46-7813	2149/26.10.02
5	783/21.10.2002	20	1268460	HR-55V-6430	2151/28.10.02
	Total	100	6342300		

(iii) Dispatches claimed to M/S. Moradabad Import Export Corporation, Moradabad against Advance Licence No. 2910004059/4/03/00 dated 13.01.2003.

(a) Dispatches claimed against ARO No.29/0001 dated 04.07.2003

Sr.	Invoice No./& date	Qty MT	Value (Rs.)	Truck No.	Builty No. & date
1	200/23.07.03	25	1221745	HR-46C-1697	2421/23.07.03
2	201/23.07.03	25	1221745	HR-55A-3122	2423/28.07.03
3	202/23.07.03	25	1221745	HR-63-2865	2431/08.08.03
4	203/23.07.03	25	1221745	HR-558-2528	2433/13.08.03
5	323/23.09.03	25	1198300	HR-38D-7721	2446/23.09.03
6	324/23.09.03	25	1198300	HR-46B-0371	2447/25.09.03
7	325/23.09.03	25	1198300	HR-46B-7634	2448/23.09.03
8	326/23.09.03	25	1198300	HR-46B-5225	2450/03.10.03
9	380/06.10.03	20	958640	HR-55-5976	2572/14.11.03
10	381/06.10.03	20	958640	RJ-14G-4568	2583/24.11.03
11	382/06.10.03	20	958640	RJ-32G-0622	2595/13.12.03
12	383/06.10.03	20	958640	HR-38G-3934	2661/31.12.03
13	384/06.10.03	20	958640	HR-38H-2581	2664/06.01.04
14	385/06.10.03	25	1198300	HR-46B-7634	2553/06.10.03
15	386/06.10.03	25	1198300	HR-38F-7148	2555/07.10.03
16	387/06.10.03	25	1198300	HR-38F-7148	2558/18.10.03
17	388/06.10.03	25	1198300	HR-46B-7634	2566/8.11.03
18	389/06.10.03	25	1198300	HR-46B-7634	2578/18.11.03
19	390/06.10.03	25	1198300	HR-46A-6745	2567/10.11.03
20	391/06.10.03	25	1198300	HR-47-2000	2592/08.12.03
21	392/06.10.03	25	1198300	HR-38B-6603	2596/15.12.03
22	580/19.12.03	25	1198300	HR-47-3504	2597/19.12.03
23	581/19.12.03	25	1198300	HR-46B-4725	2598/20.12.03
24	582/19.12.03	25	1198300	HR-38B-6603	2600/22.12.03
25	583/19.12.03	25	1198300	RJ-1G-3006	2652/23.12.03
26	584/19.12.03	20	958640	HR-38M-6147	2702/22.01.04
27	585/19.12.03	20	958640	HR-38E-5587	2701/22.01.02
28	586/19.12.03	20	958640	HR-38D-8672	2705/29.01.04
29	589/24.12.03	25	1198300	HR-47-2000	2654/26.12.03
30	590/24.12.03	25	1198300	HR-55-0825	2655/27.1203
31	591/24.12.03	25	1198300	HR-38S-3934	2656/29.12.03
32	592/24.12.03	25	1198300	HR-55-2366	2657/29.12.03
33	593/24.12.03	25	1198300	HR-38G-7535	2659/30.12.03
34	633/30.01.04	20	1005585	HR-38D-6366	2707/31.01.04
35	634/30.01.04	20	1005585	HR-38H-2581	2710/10.02.04
36	635/30.01.04	20	1005585	HR-47-2000	2711/12.02.04
37	636/30.01.04	20	1005585	HR-38D-9737	2717/20.02.04
38	637/30.01.04	20	1005585	HR-38G-8652	2716/20.02.04
39	638/30.01.04	25	1256981	HR-46B-4725	2706/30.01.04
40	639/30.01.04	25	1256981	HR-38J-7566	2731/28.02.04
41	640/30.01.04	25	1256981	HR-38K-1983	2741/10.03.04
42	665/03.02.04	14.424	722058	HR-38T-2581	2802/17.03.04
43	665/03.02.04	14.424	722058	HR-38D-7721	2803/20.03.04

		988.848	*47963384*		

(b). Dispatches claimed against ARO No. 29/AM03 dated 04.06.2004

Sr.	*Bill of Entry No. & date*	*QTY MT*	*Value (Rs)*	*Truck No.*	*Builty No. & date*
01	*758/08.06.04*	*20*	*1337139*	*HR-38A-8937*	*2848/05.07.04*
02	*759/08.06.04*	*25*	*1671424*	*HR-38N-8074*	*2825/09.06.04*
03	*760/08.06.04*	*25*	*1671424*	*HR-38J-7281*	*2826/10.06.04*
04	*761/08.06.04*	*25*	*1671424*	*HR-38K-1811*	*2830/12.06.04*
05	*762/08.06.04*	*25*	*1671424*	*HR-38J-7282*	*2833/17.06.04*
06	*763/08.06.04*	*25*	*1671424*	*HR-38H-9134*	*2835/22.06.04*
07	*764/08.06.04*	*25*	*1671424*	*HR-69A-1977*	*2843/25.06.04*
08	*765/08.06.04*	*25*	*1671424*	*HR-38H-5531*	*2844/28.06.04*
09	*766/08.06.04*	*25*	*1671424*	*HR-69-2182*	*2951/09.07.04*
10	*767/08.06.04*	*25*	*1671424*	*HR-46B-4235*	*2952/10.07.04*
11	*768/08.06.04*	*25*	*1671424*	*HR-46-3625*	*2953/12.07.04*
	Total	*270*	*18051379*		

Summarizing Appellant has claimed removals to above as detailed below

Name of the party	*Advance licence No. & Date*	*A.R.O. Number &date*	*Qty (MT)*	*Value (Rs)*	*Duty foregone (Rs)*	*Notification claimed*
M/s Lord Empire International, New Delhi	*0310156347 03.09.2002*	*3/84/72/AM-03/ALS-V 6.02.2003*	*140*	*98,55,055*	*50,06,365*	*30/97 dated 01.04.97*
M/s Laxmi Enterprises, New Delhi	*0310143243 21.06.2002*	*3/83/21/AM-03/ALS-V 27.09.2003*	*100*	*63,42,300*	*32,21,890*	
M/s MEIC Moradabad	*2910004059 13.01.2003*	*29/0001 04.07.2003*	*988.848*	*4,79,63,384*	*2,31,77,227*	*28/2001-CE 16.05.2001 dated*
	2910004059 13.01.2003	*29/AM 03 04.06.2004*	*270*	*1,80,51,379*	*70,76,139*	*53/2003 CUS -NT dated 22.07.2003 62/2004 CUS -NT dated 11.05.2004*
Total			*1498.848*	*8,22,12,118*	*3,84,81,621*	

4. The addresses of M/S. Lord Empire International was declared as: Head Office: Bristro Building Complexes, No.12, 2nd Floor, Hauzkhas Village, New Delhi-16 and Branch Office: Room No.5, Ground floor, Bhagwan Bhawan, 196-198, Samuel Street, Mumbai-09. On verification by the DRI Delhi & Mumbai at the respective places, it was revealed that no such firm in the name & style of M/S. Lord Empire International was in existence at the *declared addresses. Reports received are placed at Sl. No 3 of the documents relied upon.*

5. The addresses of M/S. Laxmi Enterprises were declared as: Head Office: A-44, Friends Colony East, New Delhi 110 065, Branch Office: 34, Bhagwan Bhawan, 3rd Floor, 196, Samuel Street, Mumbai-09 and supporting manufacturer's address was declared as Bhagawant Nagar Industrial Area, Unaao, UP. On verification by the DRI Delhi, Mumbai & Lucknow, it was revealed that no such firm in the name & style of M/S. Laxmi Enterprises was in existence at the declared addresses. Reports are placed at Sl. No.4 of the documents relied upon.

6. The address of M/S. MIEC was declared in the Advance Release Orders and Advance Licence as "M/S. Moradabad Import Export Corporation, Hasan House, Mughal Pura, 1st Khari Kuan, Moradabad PIN 244 001" and no supporting manufacturers addresses were mentioned therein in the license. All the consignments were claimed to have been cleared from M/S. Sameer Industries, KASEZ on the basis of Invoices/ Bills of entry filed with the Customs KASEZ declaring the same address. The same were dispatched vide Builties issued by M/S. Sonal Freight Carriers, Gandhidham, Transporter showing the same address. However verification conducted by the officers of Central Excise, Meerut-II Commissionerate (placed at Sl.No. 17 of the documents relied upon), revealed that the premises was a residential one. No firm in the name & style of M/S. MIEC existed at the declared address. Shri Riazul Hasan, CEO, of M/S. MIEC, Moradabad in his statement dated 09.07.2004 recorded under Section 108 of the Customs Act, 1962 before the Officer of Central Excise, Meerut-II (placed at SL.No. 21 of the documents relied upon) stated inter alia that their firm had obtained two Advance licenses, out of which Advance license No. 2910004059 was to be registered at Cochin Port but the said licence was not registered; they had not received any material against the said licence."

4.8 From the above it is evident that appellant had cleared certain goods received by them in huge quantities without payment of due custom/ central excise duties against certain ARO issued by DGFT against Advance Licenses. However on verification of the facts about the clearance to the said persons the addresses as mentioned in the documents did not tally with the premises in respect of which these document were said to be issued. Thus the appellant has in garb of clearances made under these ARO had diverted these goods elsewhere in DTA by adopting this modus operandi.

4.9 During the course of investigation statements of concerned person were recorded and also the factum of payment received by the appellant against the supply of the goods against ARO was verified from the concerned banks. The relevant paragraphs from the show cause notice which establish that the appellant was diverting these goods cleared against ARO else where are reproduced below:

> *"8. Statements (Placed at Sl. No. 7 of the relied upon documents) of Shri Narendra Singh Rathore, Manager of M/S. Sameer Industries, KASEZ was recorded under Section 108 of the Customs Act, 1962 on 11.08.2004, 24.01.2005 & 03.02.2005.*
>
> *In his statement dated 11.08.2004 he stated, interalia, that:*
>
> - *he was working with M/S. Sameer Industries, KASEZ since last Syears; Shri Ramesh Jain was the owner of M/S. Sameer Industries, KASEZ and was staying in Mumbai; besides him, he knew Shri Naresh Jain, son of Shri Ramesh Jain and Shri Sanjay Dave who were other partners; Shri Ramesh Jain operated the factory from Mumbai and as per requirement he visited Gandhidham 2 to 3 times in a month; sometimes his son visited Gandhidham; he did not know any other partners of the company;*
> - *the main work of M/S. Sameer Industries, KASEZ was recycling of imported scrap which was segregated as cable scarp, motor scrap, copper scrap, mix metal scrap, brass*

dross, copper scrap, iron scrap, aluminum scrap etc; after segregation different material were packed in bags; after that as per the order the goods were dispatched to different parties;

- *he was attending to the work of segregation (with the help of laborers, packing and loading the same in to truck as per the orders; as per the instructions from Shri Ramesh Jain he was loading the goods in trucks,*
- *for dispatching the goods to different parties sometimes he and some times Shri Ramesh Jain talked to the transporter; the freight was decided by Shri Ramesh Jain and the payments were made by Mumbai office (by Shri Ramesh Jain) or the buyer; however he did not pay any freight; Shri Ramesh Jain was instructing him on phone regarding the name of the party and as to how many trucks to be loaded;*
- *on being asked as to who were their main buyers/parties he stated that there were no fixed parties however he remembered some of the parties as Metal Link, Daman, Jaidev Alloy, Rajkot, Moradabad Import Export etc;*
- *Shri Sunil Milak was attending to the work pertaining to issuance of Invoices for sale of goods from the factory and was also attending to their Customs related work of the factory;*
- *the work of M/S. Sameer Industries, KASEZ was undertaken in two plots one plot 204-207 and second 224-227; in a month approximately 20 to 25 containers were imported in M/S. Sarneer Industries, KASEZ however it was not fixed; depending on the metal and labour it took 12 to 15 days to segregate one container load scrap; there was no fixed place where goods were segregated; as per the availability of space he was directing the laborers;*
- *on being asked as to how he was keeping record of segregated goods he stated that he was allotting one container to one supervisor under which 10 -15 labour were working; after segregation of the full container load he was taking a report from the supervisor; they were giving that report to Shri Ghanshyam Rathod, Accountant for making entry into Part-1 & ll and related registers; after that he used to tear off the kachchha Chithi given by the supervisor;*

- *he was not aware of any other records maintained as the same was looked after by Shri Ghanshyam Rathod;*
- *Shri Ramesh Jain was calling him daily and he was reporting to Shri Jain day to day position of goods; goods were also being exported from their unit and as per the direction of Shri Ramesh Jain he was attending loading of the container; Shri Sunil Milak was attending customs documentation;*
- *on being asked as to how the payments of goods dispatched in India or exported were received he stated that the payments were received in their head office at Mumbai and Shri Ramesh Jain was looking after that;*
- *on being asked whether he had loaded any goods in the name of M/S. Lord Empire International he stated that he did not reinember any such party to whom they had loaded goods.*

In his statement dated 24-1-2005 (placed at S. No 7 of the relied upon documents) he stated, interalia, that:

- *he confirmed his statement dated 11-8-2004; he did not know the names of parties in Delhi; Shri Ramesh Jain used to instruct him to load trucks for Delhi; at times Ramesh bhai used to instruct him, to load trucks for one Gopalbhai in Delhi; since Shri Ramesh Jain was his owner, he neither enquired about the details and nor was given any details;*
- *in respect of trucks loaded to Delhi the kacha chithis about weighment slips were destroyed by him;*
- *he never received information whether the tucks reached Delhi hence he could not conclusively say that the goods had reached Delhi; Shri Ramesh Jain only knew about the same;*
- *on being asked whether he loaded goods on trucks for dispatch to M/S. Lord International and M/S. Laxmi Enterprises he stated that Shri Ramesh Jain had never instructed him to load for these two parties; he had no information about these parties;*
- *on being asked to name the main parties to whom M/S. Sameer industries supplied the goods he stated that M/S. Metal link Daman, M/S. Metal United Nashik and M/S. Jaidev of Rajkot were the main parties; he remembered these names as M/S. Sameer industries regularly supplied goods to them;*

- *he did not know Shri S.K. Gupta or Shri Surendra Kumar Agarwal; he never disclosed the names of M/S. Lord International and M/S. Laxmi Enterprises to M/S. Sonal transport; he only used to tell about the quantity to be loaded and the name of the city, he did not take any details of these companies either from Shri Sunil Milak the CHA or Shri Ghanshyam Rathod the accountant*

In his statement dated 03-02-2005 (placed at S. No. 7 of the relied upon documents) he stated, interalia, that:

- *he confirmed the facts stated by him vide his statements dated 11.08.2004 and 24.01.2005;*
- *he was not aware of the name of the parties to which the goods were being dispatched from M/S. Sameer Industries, KASEZ as he was never told the name of the parties; he was asked by Shri Ramesh bhai that truck for Moradabad was to be loaded and he in turn loading the truck contacting M/S. Sonal Freight Carriers;*
- *on being asked whether he had supplied phone/mobile number or any other means to the truck driver for contacting party at Moradabad he stated that he had not given phone number to the truck driver as he was not aware of the same.*

9. Statements (placed at Sl. No. 8 of the relied upon documents) of Shri Sunil Milak, Partner of M/S. Sonal Enterprises, Gandhidham were recorded under Section 108 of the Customs Act, 1962 on 12.08.2004 & 03.02.2005. In his statement dated 12.08.2004 he stated, interalia, that:

- *he started his business of customs-KASEZ liaison since 1998 in the name & style of M/S. Sonal Enterprises; Shri Ramesh Gadhavi was his partner; he looked after the general day to day work through his staff; Shri Ramesh Gadhavi looked after liaison with KASEZ authorities; they did not have any CHA Licence; however they were attending to the day to day work of their clients with KASEZ authorities; they were attending to the work of following companies: 1. M/S. Sameer Industries, KASEZ (2) M/S. U.S. Clothing (1) Pvt. Ltd., KASEZ (3) M/S. Blaze International, KASEZ & (4) M/S. Tulip EXIM, KASEZ;*

- *they were attending to work of M/S. Sameer Industries, KASEZ since 1998; they did not enter into any written contract with them; Shri Ramesh Kumar Jain, Shri Sohanlal Bohra, Shri Naresh Jain, Smt. Pooja Jain (wife of Shri Naresh Jain) and Shri Sanjay Dave were the partners in M/s. Sameer Industries, KASEZ; Shri Ramesh Jain was handling the day-to-day work of the firm and other partners were not active; Shri Ramesh Jain was stationed at Mumbai and was visiting the factory as and when required;*
- *they were looking after day to day work pertaining to Import, DTA clearance and other miscellaneous work pertaining to KASEZ Customs/Administration of M/s. Sameer Industries, KASEZ; Shri Narendra Singh was the production Manager of M/S. Sameer Industries, KASEZ; they were receiving instructions either directly from Shri Ramesh Jain or through Shri Narendra Singh and accordingly they attend their work;*
- *Shri Ratan Gadhavi of M/S. Sonal Freight Carriers, Gandhidham was normally attending the transportation for M/S. Sameer Industries, KASEZ; M/s. Prime Forwarders, Gandhidham were attending the work pertaining to imports from Kandla port of M/s. Sameer Industries, KASEZ; they were delivering the loaded containers outside the KASEZ check post; thereafter they were attending for taking the containers in to KASEZ, the work pertaining to verification of seal by the KASEZ Customs preventive officers and weighment under his supervision; the loaded container was then sent to the factory premises where employees of M/S. Sameer Industries, KASEZ take over and carry out further process as de-stuffing;*
- *as and when the finished goods namely copper scrap, brass scrap, brass dross etc were to be cleared in DTA, they were receiving instruction either from Shri Ramesh Jain or Shri Narendra Singh; on receiving instructions they were preparing documents namely Bill of Entry and taking signature of Shri Ramesh Jain or Shri Narendra*

Singh and in some cases of Shri Dave and filing the same with Customs KASEZ;

- *when such DTA clearance was under payment of duty they prepared the TR-6 challan and deposited the duty demand draft collected from M/s. Sameer Industries, KASEZ in State Bank of India, KASEZ and in case of DTA clearance was under Advance Licence they were receiving the Advance Licence with relevant documents which they submitted to KASEZ Customs for necessary verification; they were keeping liaison with customs, KASEZ and after receipt of verification of Advance licence/ ARO, they were filing Bill of Entry with customs; they used to get the Bill of entry assessed by Appraiser, KASEZ Customs and after completion of formalities of taking posting of preventive officer, taking truck inside KASEZ, weighment of empty truck etc the documents were handed over to M/s. Sameer Industries, KASEZ; the truck was loaded by the employees of M/S. Sameer Industries, KASEZ and after loading they were attending the work pertaining to weighment and clearing of the same from KASEZ check post;*
- *they also attended to the work pertaining to maintenance of records like Part-I, III & B-17 registers and miscellaneous correspondence with KASEZ Customs/Administration; they were not maintaining any records of M/S. Sameer Industries, KASEZ at their premises; they handed over the documents as soon as the job was over; they were receiving charges per container basis @ Rs. 1180/- per 20 feet container and Rs. 2000/- per 40 feet container as per bills raised by them;*
- *on 19.01.2004 officers of DGCEI, Ahmedabad had searched the premises of M/S. Sameer Industries, KASEZ and had taken over the documents and records; he had witnessed the proceedings as a Panch witness;*
- *they had not been given authorization to sign documents on behalf of M/S. Sameer Industries, KASEZ; they were attending all the work at the instructions of Shri Ramesh Jain directly or through Shri Narendra Singh and had*

taken signature on the documents from them or from Shri Sanjay Dave.

Shri Sunil Milak in his statement dated 03.02.2005 (placed at Sl. No. 8 of the relied upon documents) had stated, interalia, that:

- *he confirmed the facts stated by him vide his statement dated 12.08.2004;*
- *they were looking after day to day work pertaining to import, DTA clearance and other miscellaneous work pertaining to KASEZ Customs/administration of M/S. Sameer Industries; they received instructions either directly from Shri Ramesh Jain or through Shri Narendra Singh, production manager of M/S. Sameer Industries, KASEZ and accordingly they attended their work; they had not been given authorization to sign documents on behalf of M/S. Sameer Industries; they were attending to all the work as per the instructions of Shri Ramesh Jain directly or through Shri Narendra Singh; after preparation of documents they obtained signatures of the employees or of Shri Sanjay Dave other partner of M/S. Sameer Industries, KASEZ;*
- *on being asked whether he prepared the documents pertaining to clearance of brass scrap cleared duty free against Advance release Order no.29/0001 dated 04.07.2003 issued against Advance Licence No. 2910004059 dated 13.01.2003 in the name of M/S. Moradabad Import Export Corporation, Moradabad (M/S.MIEC) he answered in the affirmative; as stated by him earlier they had prepared all the documents pertaining to the clearance made from M/S. Sameer Industries, KASEZ and had taken signature of Shri Ramesh Jain or Shri Sanjay Dave, partners or their employees viz. Shri Jitendra Kothari or Shri Narendra Singh Rathore and submitted the same to the Customs KASEZ;*
- *the address of M/S. MIEC was shown as Hasan House, Mughal Pura, 1st Khari Kuan, Moradabad-244 001 in the invoices/ Bill of entry filed with the Customs KASEZ*
- *he was shown a letter dated 18.11.2004 from C.Ex. Meerut-II wherein it had been informed that during the course of verification the premises mentioned above was found to be a residential one; no firm in the name and style of M/S.*

Moradabad Import Export Corporation existed at the given address; the occupants of the premises informed that the firm did not exist at the said address; the firm had shifted to another place five years ago. On being asked how he was showing the address of the firm in Invoices / bill of entry he stated that as stated earlier by him, on the basis of the documents given by Shri Ramesh Jain or the employees of M/S. Sameer Industries, KASEZ they were preparing the documents like CE Invoices/ Bill of entry; as the address of M/S. MIEC was mentioned in the ARO/ Advance licence as "Hasan House, Mughal Pura, 1st Khari Kuan, Moradabad-244 001" they were mentioning the same on the CE Invoices/ Bill of entry;

- *they were attending the work pertaining to documentation only and the transportation was arranged by Shri Ramesh Jain or employees of M/S. Sameer Industries, KASEZ and as such they were not aware of where the goods had actually gone.*

10. Statement (placed at Sl. No. 9 of the relied upon documents) of Shri Jitendra Kothari, Manager, M/S. Sameer Industries, KASEZ was recorded under Section 108 of the Customs Act, 1962 on 22.09.2004. He stated, interalia, that

- *he joined M/s. Sameer Industries, KASEZ May/June'1999 as a manager; he was drawing salary Rs. 7000/- per month; he was attending day to day work of M/S. Sameer Industries, KASEZ in the capacity of manager during May/June '99 to April'2004 then he was working as manager at their Mumbai office; Shri Ramesh Jain and Shri Sanjay Dave were the partners of M/S. Sameer Industries, KASEZ; Shri Ramesh Jain was his uncle;*
- *as manager at M/S. Sameer Industries, KASEZ he was attending day to day work related to the factory as per the instructions of Shri Ramesh Jain; Shri Ramesh Jain used to give instructions twice in a day in the morning and in the evening; Shri Ramesh Jain was staying in Mumbai and was visiting factory as and when required;*

- *he was given authority to sign the documents on behalf of M/S. Sameer Industries, KASEZ however he was not given authority to sign Bank cheques the same were signed by Shri Ramesh Jain and in his absence by Shri Sanjay Dave; all the customs related work was handled by Shri Sunil Milak of M/S. Sonal Enterprises, Gandhidham; all the work related to duty payment and debiting in advance licence etc was handled by Shri Sunil Milak;*
- *he was looking after overall work of M/S. Sameer Industries, KASEZ; office work was looked after by Shri Ghanshyam Rathod, accountant and day to day production work and transportation work was attended by Shri Narendra Rathore; Shri Sunil Milak was handling work of documentation/clearance/ liaison with customs KASEZ;*
- *he did not have any knowledge of Central Excise or Customs laws & procedures; at the instructions of Shri Ramesh Jain the documents were prepared by Shri Sunil Milak and as per the instructions of Shri Ramesh Jain, he used to sign the documents on behalf of M/S. Sameer Industries, KASEZ; Shri Ghanshyam Rathod and Shri Sunil Milak were attending the work pertaining to maintenance statutory records at their factory; they were maintaining Sales Invoice register and Part-I,II,III & IV registers at M/S. Sameer Industries, KASEZ as statutory;*
- *he used to sign the correspondence with the Customs KASEZ and the sales invoices, import bills of entry and returns of professional tax of employees of M/s. Sameer Industries, KASEZ; he was not verifying the genuineness/existence of the party before signing documents like sales invoices etc; he was attending the work as per instructions of Shri Ramesh Jain; on 19.01.2004 the officers of DGCEI, Ahmedabad had visited their factory and had withdrawn all records pertaining to their factory.*

11. Statements (placed at Sl.No. 10 of the relied upon documents) of Shri Ramesh Jain, Partner of M/S. Sameer Industries, KASEZ was recorded under Section 108 of the

Customs Act, 1962 on 13.08.2004, 21.09.2004, 13.12.2004 and 22-2-2005

In his statement dated 13.08.2004 he stated, interalia, that:

- *he joined his father's company M/s. Ramesh Kumar Hamerlal Jain, Mumbai a metal merchant & commission agent company in 1971; he was proprietor of M/S. Dhakad Metal Corporation, Nani Daman since last 10 to 12 years; he was working as Managing Director of M/S. Dhakad Metals Pvt. Ltd., Nani Daman and Managing Director of M/S. Raja Zinc Pvt Ltd., Nani Daman; he was partner of M/S. Sameer Industries, KASEZ since 1998 wherein besides him Shri Sanjay Dave, Shri Sohanlal Bohra, Shri Naresh @ Nilesh Jain and Smt. Pooja Jain were the other partners; however only he was the active partner of the firm and all others were sleeping partners;*
- *he was attending day to day work pertaining to M/S. Sameer Industries, KASEZ; he was visiting the factory as and when required and otherwise attending work through his employees; earlier Shri Jitendra Kothari was looking after the day to day work under his instructions since April'2004 he had been working at their Mumbai office; Shri Narendra Singh was working as production manager and Shri Ghanshyam Rathod was working as accountant of M/S. Sameer Industries, KASEZ; Shri Narendra Singh was working as per his direction and attending day to day work of M/S. Sameer Industries, KASEZ;*
- *they had engaged M/S. Sonal Enterprise, KASEZ for attending day to day work of M/S. Sameer Industries, KASEZ for which they were raising bill per container basis;*
- *they were importing all kind of metal scrap viz. mix copper cable scrap, mix aluminum cable scrap, transformer scrap. compressor scrap, MS-Aluminum scrap, mix metal scrap etc and manufacturing copper scrap, aluminum scrap, brass scrap, lead scrap etc and various kinds of ferrous scrap and recycled rubber by segregating from the imported scrap consignments; the manufactured finished goods were physically exported and cleared in DTA; DTA clearance were*

being made on payment of duty as well as against Advance Licence/ ARO; all the past records had been seized and taken over by the officers of DGCEI, Ahmedabad from their factory on 19.01.2004;

- *they had cleared goods in DTA against Advance licence/ARO to the following companies: 1. M/s. Metals United, Nashik, 2. M/s. Moradabad Import Export Corporation, Moradabad, 3. M/s. Metal Link Alloys Ltd., Bhimpore, Daman, 4. M/s. Lord Empire International, New Delhi;*
- *on being asked how he had established contacts with above said parties he stated that he was in contact with Shri Mishra and Shri Subhalkar of M/S. Metals United, Nashik since 8 to 10 years due to their business of other companies; he was in contact with Shri Riazbhai of M/S. Moradabad Import Export Corporation, Moradabad since 3 to 4 years through business relations; he was in contact with Shri Bhawarlal Mangilal Jain of M/S. Metal Link Alloys Ltd., Daman since his childhood; he was not in contact with M/S. Lord Empire International, Delhi which was introduced to him by their transporter;*
- *on being asked as how the goods were supplied to M/s. Lord Empire International, Delhi he stated that: he knew Shri Sardar and his son Shri Raja of M/S. Apollo Transporters, Vashi Mumbai since last 15 years who were attending transportation work of their Mumbai & Daman based companies; he would submit full name & address with phone numbers of them within two days; Shri Sardar had introduced him to one Shri S.K.Gupta, as owner of M/s. Lord Empire International, Delhi and told that they were attending their transport work since long and they were genuine and he my supply the goods to them; accordingly they had entered into contract to supply the goods to them; Shri S.K.Gupta, had informed him that he would supply them Advance Release Order (ARO) against which the goods were to be supplied; accordingly he had sent ARO; they had supplied total 140 MT of Copper Scrap to them;*
- *as the records were with the DGCEI, Ahmedabad he was not able to answer what were the Bills of entry numbers vide which the goods were supplied to M/S. Lord Empire International; the documents pertaining to dispatches were*

prepared by either by Shri Ghanshyam Rathod, Accountant or Shri Jitendra Kothari, Manager of M/S. Sameer Industries, KASEZ;

- *on being asked how the payments were received he stated that the payments came through Demand drafts/ Banker Cheques however he did not remember the name of the bank;*
- *on being asked who had arranged the transportation for the goods supplied to M/S. Lord Empire International, New Delhi, he stated that Shri S.K.Gupta of M/S. Lord Empire International, New Delhi had asked him whether he knew any reliable transporter for transporting their goods from KASEZ to Delhi; he had suggested the name of M/S. Sonal Freight Carriers, Gandhidham who was attending their transportation regularly; accordingly they had appointed M/S. Sonal Freight Carriers, Gandhidham as transporter and had intimated them; they had issued a letter to M/S. Sonal Freight Carriers, Gandhidham; they accordingly delivered the goods from M/S. Sameer Industries, KASEZ against ARO to them for delivery to M/S. Lord Empire International, Delhi;*
- *on being asked whether he was still in contact with Shri S.K.Gupta or any person of M/S. Lord Empire International he stated that he was introduced to Shri S.K.Gupta of M/S. Lord Empire International, Delhi by their transporter, as on date Shri S.K.Gupta and the company were not contactable at the given addresses and telephone numbers; he tried to contact them at the telephone number which was found to be of Tabela in Bhaikhala area; at the address Bhagwan Bhavan, Samuel Street, room no.5, some other company was existing;*
- *he was shown statement dated 16.02.2004 of Shri Bajaranglal Gupta, care taker, Science Kits Products, S-82, Badli Indl. Estate, Delhi-110 042 stating that no such firm known as M/S. Lord Empire International was functioning from that premises and to his knowledge neither any portion of the premises had ever been rented to nor used by M/S. Lord Empire International and no correspondence nor any goods had ever been received in said premises. From the above it was proved beyond doubt that the firm M/S. Lord Empire International was a fictitious firm and not in existence.*

- *on being asked as to how did they claim to have supplied 140 MT of copper scrap, cleared duty free against advance release order, to the said firm he stated that they had received ARO from M/S. Lord Empire International, Delhi and they had duly submitted the same to the KASEZ authorities for verification from the issuing DGFT authorities; after verification obtained from the concerned authorities, they were allowed clearances of the goods from the KASEZ; he had personally met Shri S.K.Gupta of M/S. Lord Empire International and had received payments for the goods supplied to them; they had supplied the goods in the reasonable belief that the firm was genuine; however on being shown statement of Shri Bajaranglal Gupta and enquiries made by him it was revealed that the said firm was fictitious;*
- *he assured that he would try to locate Shri S.K.Gupta and make him pay the duty failing which he undertook to pay the duty within one month.*

Shri Ramesh Jain in his statement dated 21.09.2004 stated, interalia, that:

- *he confirmed the facts stated by him in his statement dated 13.08.2004; M/S. Apollo Roadways, Mumbai were attending transportation work of their Daman and Mumbai based companies since last 15 years; their full name and address was: M/S. Apollo Roadways, 313-319, Samuel Street, Harish Chambers, 1st floor, Mumbai -03. Telephone 022-32518021; Shri G.S.Anand was Proprietor of M/S. Apollo Roadways, who had introduced him to Shri S.K.Gupta of M/S. Lord Empire International, New Delhi.*
- *on being reminded that in his statement dated 13.08.2004, he had assured that he would locate Shri S.K.Gupta, proprietor of M/S. Lord Empire International, New Delhi and make him pay the duties and also that he had undertaken to pay the duties within one month in case he failed to do so, he stated that as assured by him he had tried to locate Shri S.K.Gupta, Proprietor of M/S. Lord Empire International, Delhi; he had met Shri S.K. Gupta and his son in Delhi in the first week of September 2004 along with Shri G.S.Anand; they had come in Maruti Alto Car bearing Registration Number DL 6C-5880; he had also ascertained his residential*

Address from the Telecom department; his new residential address was: C/O Shri Pramod Gupta, 1055 A, Ward 8, Mehrauli, Delhi; his new phone No. was 011-2664 4315 and mobile no. was 011-3882 2748; he assured that Shri S.K.Gupta would be appearing before DRI, within one month.

- *on being asked whether he had supplied any goods to any other company introduced by Shri G.S. Anand of M/S. Apollo Roadways he stated that they had supplied 100 MTs of Copper Scrap to one M/S. Laxmi Enterprises, Delhi of same group of M/S. Lord Empire International, owned by Shri S.K.Gupta, introduced by Shri G.S.Anand of M/S. Apollo Roadways.*
- *on being asked as to whether Shri G.S. Anand was any broker for introducing Advance Licence holders he stated that Shri G.S. Anand was proprietor of M/S. Apollo Roadways who were attending their transportation work since last 15 years; they had also attended work of transportation of the firms owned by Shri S.K.Gupta of M/S. Lord Empire International, Delhi however as per his knowledge he was not a broker for Advance Licence holders;*
- *on being asked how much commission had he paid to Shri G.S. Anand for the job he stated that they had not paid any commission to Shri G.S. Anand for introducing with M/S. Lord Empire International and M/S. Laxmi Enterprises Delhi; he had introduced Shri S.K.Gupta owner of the group in good faith and due to their old business relations.*
- *as per the records M/S. Sameer Industries, KASEZ had supplied 100 MT of Copper Scrap Birch to M/S. Laxmi Enterprises, Delhi against Advance release Order No. 03/84/021/AM-03/ALS.V dated 27.09.2002 issued against Advance Licence No. 0310143243/4/03/00 dated 21.06.2002.*
- *on being asked as to how he established contacts with M/S. Laxmi Enterprises, Delhi he stated that Shri G.S.Anand of M/S. Apollo Roadways, their transporter had introduced him to Shri S.K.Gupta, as owner of M/S. Lord Empire International, Delhi and told that they were attending to their transport work since long and they were genuine and he may supply goods to them; Shri S.K.Gupta had informed him that M/S. Laxmi Enterprises, Delhi was their group company;*

accordingly they had entered in to contract to supply the goods to them; Shri S.K.Gupta, had informed him that he would supply them Advance Release Order (ARO) against which the goods were to be supplied; accordingly he had sent ARO mentioned above, for supply of 100 MTs of copper scrap which they had supplied from M/S. Sameer Industries, KASEZ during October 2002.

- *on being asked whether he was still in contact with Shri S.K.Gupta of M/S. Laxmi Enterprises, Delhi he stated that his old addresses were fictitious however he had tried to locate him in Delhi and had met him in the first week of September 2004; he had given his new residential address and telephone numbers;*
- *on being asked whether they had supplied copies of the said Advance Licence and Advance Release Order to the KASEZ Customs authorities for verification he stated that they had submitted the copy of Advance licence and Advance Release order to the Customs authorities of KASEZ for verification; and only after receiving the report from the ARO/ Advance Licence issuing authorities, they were allowed clearance by the Customs*
- *KASEZ authorities; on being asked as to who had arranged the transportation for the goods supplied to M/S. Laxmi Enterprises, Delhi he stated that: Shri S.K. Gupta*
- *their goods from KASEZ to Delhi; he had suggested name of M/S. Sonal Freight Carriers, Gandhidham who was attending their transportation regularly; accordingly they had appointed M/S. Sonal Freight Carriers, Gandhidham as transporter and intimated them; they accordingly delivered the goods from M/S. Sameer Industries, KASEZ against ARO to them for delivery to M/S. Laxmi Enterprises, Delhi;*
- *on being asked how the payments were received and through which Bank he stated that the payments from M/S. Laxmi Enterprises, Delhi was received through Cheque or Demand Draft payable at Mumbai; he did not remember the name of the Bank, however the same were deposited in their account at CITI Bank, Fort Branch:*
- *on being informed that as per the verification by the Directorate of Revenue Intelligence Mumbai, Delhi and*

Lucknow no firm in the name of M/S. Laxmi Enterprises was in existence at the given addresses and on being told that it meant M/S. Laxmi Enterprises was a fictitious firm and on being asked as to how he could claim to have supplied 100 MT of Copper Scrap cleared duty free against Advance Licence/Advance Release Order to the said firm he stated that they had received ARO from M/S. Laxmi Enterprises, Delhi and they had submitted the same to the KASEZ authorities for verification from the issuing DGFT authorities; after verification obtained from the concerned authorities, they were allowed the clearances of the goods from the KASEZ; earlier he had personally met Shri S.K.Gupta of M/S. Laxmi Enterprises, Delhi and had received payments for the goods supplied to them; they had supplied the goods in reasonable belief that the firm was genuine; however on enquiries made by the department and him, it was revealed that the said firm was fictitious; he had already tried to locate Shri S.K.Gupta in Delhi and provided his new address and telephone numbers; he assured that he would try to make him pay the duty failing which he undertook to pay the duty if they were liable to pay the same.

Shri Ramesh Jain in his statement dated 13.12.2004 stated, interalia, that:

- *he confirmed the facts stated by him in his statements dated 13.08.2004 and 21.09.2004;*
- *he was shown a letter dated 15.08.2004 from Assistant Director, DRI, Mumbai, stating that on verification of the premises Bhagwan Bhawan at Samuels Street, Masjid Bunder, Mumbai, M/S. Lord Empire International was found not existing. He was also shown a letter dated 14.09.2004 from Assistant Director, DRI, Mumbai, regarding the non-existence of M/S. Laxmi Enterprises, at 34, Bhagwan Bhawan, 3rd Floor, 196, Samuels Street, Mumbai. He agreed that the above-mentioned addresses of M/S. Lord Empire International, Mumbai and M/S. Laxmi Enterprises, Mumbai did not exist as on today also in the past; he had not verified correctness of the above stated addresses.*
- *he had given address of Shri S. K. Gupta as C/o Pramod Gupta, 1055-A, Ward No. 8, Mehrauli, Delhi, which he had*

procured from Telephone Exchange for the phone No. 011-26644315; he had not verified the correctness of the address and therefore he could not confirm the address; he was shown a letter from Assistant Director, DRI, New Delhi dated 10.11.2004, indicating that Shri S. K. Gupta was not found at this address.

- *on being told that from the above the address given by him of Shri S. K. Gupta had turned to be fake; he stated that he agreed that he had not confirmed the address of Shri S. K. Gupta;*
- *on being reminded that in his earlier statements, he had undertaken to produce Shri S. K. Gupta, or to pay-up the dues payable and that he had not done both, he stated that he still maintained to pay-up the dues law-fully applicable to him; however, he would again make efforts to produce Shri S. K. Gupta;*
- *on being asked how much quantity they had supplied to M/S. Moradabad Import Export Corporation he stated that he did not have the figures readily available, however, he remembered having supplied the goods to them during the period of 1 and half year and he would produce the records by instructing his Accountant to submit the same within a week's time.*
- *on being asked as to why he had not obtained the address of Shri S.K. Gupta from him and why he made subsequent inquiries about his residential address through Telephone Department he stated that, he met Shri S. K. Gupta at Delhi and also asked him for his residential address, in case required in any emergency, but Shri S.K.Gupta had refused to give and in turn desired to know the reason for the same since he (S.K.Gupta) was contacting him on telephone as and when required;*
- *on being shown the statement of Shri Riyaj-Ul-Hasan, C.E.O M/S. Moradabad Import Export Corporation, Moradabad, dated 09.07.2004 and after going through the statement dated 09.07.2004, he stated that he had no comments to offer on the same.*
- *he was also shown the statement of Shri Riyai-Ul-Hasan, C.E.O, M/S. Moradabad Import Export Corporation,*

Moradabad recorded on 18.08.2004, he stated that after going through the statement he had understood that Shri Riyaj-Ul-Hasan stated to have received 645 MTs. of Scrap from them i.e. M/S. Sameer Industries, KASEZ, Gandhidham, but he said that they had sent more than what he had stated in his statement and exact figures of quantity supplied by them would be submitted within one week as the person (Shri G. Rathod, Accountant) who was handling this matter was reported to be sick and was not attending the office since last two months; moreover the details of goods transported could also be verified from the records of the transporters M/S. Sonal Freight Carriers, Gandhidham; he wanted to clarify that they had also received the payment for most of the transactions, and the payment of approximately Rs. 30-40 lakhs was yet to be received.

Shri Ramesh Jain in his statement dated 22.2.2005 stated, interalia, that:

- *he had been shown his earlier statements dt.13.08.04, 21.09.04 and 13.12.04; having seen and in confirmation he put his dated signature on the same*
- *he was shown the statements dt.24.01.2005 & 03.02.2005 of Shri Narendra Singh Rathod, Production Manager, M/S. Sameer Industries, KASEZ wherein Shri Rathod stated that Shri Jain had not informed Shri Rathod about dispatches to be made in the name of M/S. Lord Empire International & Laxmi Enterprise, Delhi; Shri Jain had only informed Shri Rathod to load trucks for Delhi; he knew some other companies for which he was loading trucks; he could not confirm whether the goods reached the destination or not; on being asked as to what he had to say Shri Ramesh Jain stated that Mr. Narendra Singh Rathod was mainly looking after the work of production related activity; the work relating to preparation of invoices/challans etc was looked after by another person i.e. Ghanshyamm Rathod; Mr. Narendra Singh Rathod was normally instructed to load sc many trucks only; since he was related to production related work, he dic not know the destination of trucks or the names of the buyers; all these details were known only to Mr. Ghanshyam Rathod.*

- *on being told that Shri Ratan M. Gadhavi, Proprietor of M/S. Sonal Freigh Carriers, Gandhidham in his statement dt. 03.02.05, on showing that M/S Lord Empire International, M/S. Laxmi Enterprises & M/S. Moradabad Import & Export Corporation were not found at the address given in the invoices & Bilties, had stated that the goods might not have reached the destination shown in the invoice/builty, Shri Jain stated that they prepared the invoices on the basis of address given in the Advance Release Order; al the buyers had authorised M/S. Sonal Freight Carriers to transport the material from KASEZ to their units; he had not received any call from M/S Sonal Freight Carriers about non-availability of firm shown in the addres given by them; he had not received any call from buyers about the non receipt of the material dispatched by them.*
- *on being told that the Central Excise invoices and Bills of Entry vide which the goods were supplied to M/S. Lord Empire International, Delhi, M/S. Laxmi Enterprise, Delhi and M/S. Moradabad Import & Export Corporation, Moradabad against Advance Release Orders/Advance Licences were signed by the authorised signatory of M/S. Sameer Industries, KASEZ and on being asked whether they had been authorised to file Central Excise Invoices/Bills of Entry on behalf of the said parties he stated that the same were prepared as per the practice followed in the Zone; Invoices were prepared by the seller of the goods only; however, in relation to Bills of Entry filed on behalf of M/S. MIEC, they were authorised by them to file the Bills of Entry on their behalf because they (M/S. MIEC) could not come over for each and every consignment to sign the bill of entry; he was submitting a copy of letter of MIEC, Moradabad in this regard.*
- *on being asked as to how he came in to contact with Shri Riaz Hasan of M/S. Moradabad Import Export Corporation, Moradabad Shri Jain stated that they had been supplying scrap to various manufacturers/traders/exporters to Moradabad for the last ten years; during the course of one marriage function at Moradabad he came across Shri Riaz Hasan of M/S. MIEC; afterwards they met in Mumbai also.*

- *on being told that all the consignments were claimed to have been cleared from M/S. Sameer Industries, KASEZ on the basis of the Central Excise invoices vide which 988.848 MT of brass scrap had been cleared duty free against ARO No.29/001 dated 04.07.2003 and the Bills of Entry vide which 270 MT of brass scrap had been cleared duty free against ARO No.29/AM03 dated 04.06.2004 issued against Advance Licence No.2910004059/4/03/00 dated 13.01.2003 issued to M/S. MIEC the address was shown as M/S. Moradabad Import Export Corporation, Hasan House, Mughal Pura, 1st Khari Kuan, Moradabad PIN 244 001; the same were dispatched vide Builties issued by M/S. Sonal freight Carriers, Gandhidham, Transporter showing the same address; verification conducted by the officers of Central Excise, Meerut-II Commissionerate revealed that the premise was a residential one and that no firm in the name & style of M/S. MIEC existed at the declared address; Shri Riazul Hasan, CEO of M/S. MIEC, Moradabad in his statement dated 09.07.2004 recorded under Section 108 of the Customs Act, 1962 before the officer of Central Excise, Meerut II had stated that Advance Licence No.2910004059 was to be registered at Cochin Port but the said licence was not registered; they had not received any material against the said licence and on being asked that therefore their claim of supplying 1258.848 MT of brass scrap to M/S. MIEC, Moradabad wrong; the transporter also in his statement dated 03.02.2005 after seeing the verification report stated that goods must have not reached the address Shri Jain stated that they supplied 1258.848 MT of scrap to the address shown in the Advance Release Order issued by DGFT, Moradabad; he never visited the said premises; M/S. MIEC also never complained about the non-receipt of the goods; he had produced details of dispatches made from M/S. Sameer Industries, KASEZ to M/S. Moradabad Import Export Corporation, Moradabad against ARO No.29/001 dt.04.07.2003 and ARO No.29/AM03 dated 04.06.04 issued against Advance Licence No.2910004059/4/03/00 dated 13.01.2003 issued in their name by the DGFT, Moradabad; they had supplied total 1258.848 MT of Brass Scrap to M/S.*

MIEC, Moradabad against the said two ARO (988.948 MT & 270 MT respectively). was

- *on being asked as to who had arranged the transporter for the goods supplied to M/S. MIEC, Moradabad from M/S. Sameer Industries, KASEZ, Shri Jain stated that Shri Riazbhai had asked him to suggest a good transporter for transportation of goods from KASEZ to Moradabad; he suggested the name of M/S. Sonal Transport, Gandhidham; accordingly M/S. MIEC had appointed M/S. Sonal Transport.*
- *on being told that as per the verification report the factory did not exist in the premises and that Shri Riaz ul Hasan in his statement dated 09.07.04 stated that he had not registered the licence No 2910004059 and had not imported any goods on the same; the transporter also in his statement*
- *dated 03.02.05 after seeing the verification report stated that goods must have not reached the address and thus his claim was wrong Shri Jain stated that he did not know whether M/S. MIEC registered the Advance Licence or not; they supplied the goods based on the Advance Release Order No. 29/001 dt.04.07.2003 & 29/AM03 dt.04.06.04 issued by Jt DGFT, Moradabad; the genuineness of said AROs were verified by KASEZ Customs authorities and then only clearances were made; they dispatched the goods to the address shown in the Advance Release Order; they had also received Form 31 issued by Government of U.P. evidencing the transportation to Moradabad.*
- *on being told that goods claimed to have dispatched to M/S. Lord Empire International & M/S. Laxmi Enterprise, Delhi could not have reached the address shown on the licence as it turned out to be a residential premises and no firm in the names of above existed Shri Jain stated that they had loaded the trucks arrived from M/S. Sonal Freight Carriers, Gandhidham, who were authorised by M/S. Lord Empire International & M/S. Laxmi Enterprise to transport the material from KASEZ to Delhi; neither the transporter nor the buyer complained about non-receipt of the goods.*
- *on being told that all the advance licences ie. under which they had claimed to have supplied 1498.848 MT of*

Brass/copper scrap were for manufacturer exporters; there was no mention of supporting manufacturer in the licence; it was seen from the verification reports the firms/factories did not exist at the addresses mentioned therein and therefore their claim of supply to these firms was wrong Shri Jain stated that he had no idea about the supporting manufacturer; they dispatched the material to the address shown in the Advance Release Order; they dispatched the material shown in the ARO and received payments; the buyers never complained about non-receipt; that their claim of supplying the material to ARO holders was correct;

- *on being told that it was seen that he had conspired/colluded with advance licence holders to evade Central Excise / Customs duty of Rs 3, 84, 81,621 on 1498.848 MT of Brass/copper scrap by showing clearances under advance release orders he stated that he completely denied the above question; he had done all the things as per rules and regulations prescribed by Government; there was no malafide intention on their part; all the transactions were made as per rules and regulations.*
- *on being shown verification report dt.18.11.04 issued by Customs & Central Excise Commissionerate, Meerut II, letter dt.23.09.04 issued vide F.No.23/47/2004-DZU by DRI, New Delhi & letter dt.06.04.2004 issued vide F.No.23/12/2004-DZU by DRI, New Delhi which showed that M/S. Moradabad Import Export Corporation, Moradabad, M/S. Laxmi Enterprises, New Delhi and M/S. Lord Empire International, New Delhi were not situated at the address given and were residential premises and on being asked as to where the goods dispatched by them were delivered Shri Ramesh Jain stated that having seen the above reports he put his dated signature on the same; if the addresses given in the Advance Release Orders were of residential premises, the goods could not have been unloaded and used therein; they might have been unloaded the goods somewhere else; he had no idea.*
- *on being shown the cancellation/suspension orders issued by DGFT Mumbai and on being asked as to how he could say that they were genuine and correct he stated that the*

Advance Release Orders received by them were submitted to KASEZ Custom Authorities; after verification of the genuineness of the AROs only they allowed them to clear the goods;

- *on being told that in his earlier statements he had undertaken to produce Shri S.K.Gupta or to pay up the dues payable; till date he could not make Shri S.K.Gupta to appear before this Directorate; Shri S.K.Gupta was not found at the address supplied by him vide his statement dated 21.09.2004 and on being asked if he was ready to pay up the duties involved as assured by him in his earlier statements Shri Jain replied that he tried his level best to locate and to bring Shri S.K.Gupta to this office;*
- *he had given the details of residential address and telephone numbers he gathered, he requested personally Shri S.K.Gupta to appear before the directorate when he last met him at Delhi; in spite of his best efforts and repeated requests, Shri S.K.Gupta did not appear before this directorate; even though it was not his duty to bring him, he tried his best to prove his bonafides; he understood that the Advance Licence holder was responsible for duty payment in case of any misuse; however, if the burden was on the supplier lawfully, he was ready to pay the duty;*

12. Statements (placed at Sl. No. 11 of the documents relied upon) of Shri Ratan Gadhavi, Proprietor of M/S. Sonal Freight Carrier, Gandhidham Transporter for M/S. Sameer Industries, KASEZ was recorded under Section 108 of the Customs Act, 1962 on 12.08.2004, 14.10.2004,16.12.2004 & 03.02.2005.

In his statement dated 12.08.2004, he stated, interalia, that:

- *he was proprietor of a transporter company in the name & style of M/s. Sonal Freight Carriers, Gandhidham since 5 years; in his transport company he was arranging trucks on commission basis for the parties and taking his commission; he was getting Rs. 700 to Rs. 800 per truck as commission; whenever any party contacted him for truck he was arranging the truck on commission basis after talking to truck owners at*

Gandhidham and sending the truck to party for loading; on the basis of Invoice issued by the party they used to issue their Builty in quadruplicate out of that two copies were given with the truck and one copy was given to the party and they kept one copy; the responsibility of loading the goods was of the party i.e. of the consignor; the responsibility of loaded goods by the party was of truck owner and the driver;

- *on being asked as to how he knew M/s. Sameer Industries, KASEZ he stated that as he was running a transport company and was attending transportation of many companies in KASEZ and in that background he knew M/s. Sameer Industries, KASEZ; he knew Shri Ghanshyam Rathod, Shri Narendra, Rathore and Shri Ramesh Jain of M/s. Sameer Industries, KASEZ; Shri Narendra Rathore was instructing him for arranging truck for particular city and accordingly he was sending the truck; Shri Ramesh Jain had never asked him to send truck; the freight of the loaded truck was decided either by Shri Ramesh Jain or the receiving party on phone; he had never negotiated freight with Shri Narendra Rathore;*
- *on being asked regarding the number of days required for the trucks arranged for Delhi & Moradabad for reaching at the destination places, he stated that it took minimum 4 days to reach the truck at Moradabad and it took 3 to 4 days to reach the truck at Delhi;*
- *on being asked whether he knew M/s. Lord Empire International having offices at Mumbai and Delhi he stated that he did not know M/s. Lord Empire International but he had received one contract letter, through courier, for loading goods from M/S. Sameer Industries, KASEZ which was sent on being asked by M/S. Sameer Industries, KASEZ; he had produced the same;*
- *the records pertaining to transportation for M/S. Sameer Industries, KASEZ was taken over by the officers of DGCEI, Ahmedabad under Panchnama in January 2004; he produced 05 Builty books for transportation after January 2004 and one register showing details of loaded truck maintained by them for their personal records;*
- *on being asked how they receive payments from the party for the loading of trucks he stated that they were raising their bill*

and sent it by courier to the concerned party and were receiving the payments through DD in case the party paid in cash the payments were received through the party from where the goods were loaded or through angadia;

- *on being asked how they received the payments for the goods loaded for M/S. Lord Empire International he stated that he was not able to state how they had received the payments from M/S. Lord Empire International as he did not have the copy of the Bill which was taken over by the officers of DGCEI, Ahmedabad; he produced one file containing bills raised by them to different parties and showing endorsement of "received payment" on the face of the bills;*
- *they were receiving copy of Customs invoice from the party from where the goods were loaded wherein address of consignee i.e. receiving party was mentioned; they were sending their bill on that address of the consignee and were writing the same on the Builty;*
- *as he or his employee was not accompanying the trucks they could not say where the goods were actually gone which was loaded from M/s. Sameer Industries, KASEZ for Delhi or Moradabad; the details of the same could only be given by the drivers and he would make efforts to produce the concerned drivers before DRI;*

Shri Ratan Gadhavi in his statement dated 14.10.2004 stated, interalia, that:

- *he confirmed the facts stated by him vide his statement dated 12.08.2004; he was having bank account with Bank of Baroda, A/C No. 10092 which was closed since two months and he was then having bank Account with Gandhidham Mercantile Bank having A/C No. 5349;*
- *as he was arranging trucks on commission basis form the other transporters he could not produce concerned drivers however he had enquired from the concerned transporters and he would produce them as soon as he found them; the trucks sent for M/s. Lord Empire International were arranged from M/s. BHTC;*
- *on being asked whether they had loaded any goods besides M/S. Lord Empire International from M/S. Sameer Industries, KASEZ he stated that they had loaded goods from M/S.*

Sameer Industries, KASEZ for various parties including one at Moradabad however he did not remember the name and M/S. Laxmi Enterprise, Delhi and he could not recollect the names of other parties;

- *on being asked as to how he knew M/S. Laxmi Enterprise, Delhi also had an office in Mumbai he stated that he did not know M/S. Laxmi Enterprise, Delhi/Mumbai but they had received one contract letter through courier for loading the goods from M/S. Sameer Industries, KASEZ which was sent to them on being asked by M/S. Sameer Industries, KASEZ; he had not received any letter from M/S. Sameer Industries, KASEZ after receiving letter from M/S. Laxmi Enterprise but Shri Narendra Rathore of M/S. Sameer Industries, KASEZ had instructed him on phone that the goods were ready and to send trucks in factory;*
- *he did not know M/S. Laxmi Enterprise however he was attending transportation regularly from M/s. Sameer Industries, KASEZ as such his address was given by M/s. Sameer Industries, KASEZ and he had received phone call from M/S. Laxmi Enterprise and freight etc was negotiated over phone however he did not remember the name of the person of M/S. Laxmi Enterprise to whom he talked;*
- *they had loaded 05 trucks for M/S. Laxmi Enterprises, A-44, Friends Colony East, New Delhi on being asked how they had received the payments for the same and from which transport the trucks were arranged and who had paid the payments to the drivers he stated that he did not remember how he had received payments for the said trucks however after seeing the Bank details he would be able to state whether he had received in cash or through DD; he had arranged the said 5 trucks from M/S. DKR, M/s. Sonipat Transport and M/s. Alwar Kotputli transport, Gandhidham; he had paid the freight to the concerned transporters in advance and the drivers were paid by the owner of the transporters;*
- *as he was attending work of M/S. Sameer Industries, KASEZ having confidence in M/S. Sameer Industries, KASEZ he had paid the freight in advance;*

Shri Ratan Gadhavi in his statement dated 16.12.2004 stated, interalia, that:

- *he confirmed the facts stated by him vide his statements dated 12.08.2004 & 14.10.2004; he produced details of trucks arranged from M/S. Sameer Industries, KASEZ for M/S. Moradabad Import Export Corporation, Moradabad, M/S. Lord Empire International, Delhi and M/S. Laxmi Enterprise, Delhi,*
- *he was receiving instructions over phone from Shri Narendra Singh who was manager of M/S. Sameer Industries, KASEZ for sending trucks for loading for Moradabad and Lord Empire International, Delhi and M/S. Laxmi Enterprise, Delhi; accordingly he was arranging the trucks and sending the same to M/S. Sameer Industries, KASEZ;*
- *after loading the goods from M/S. Sameer Industries, KASEZ, the driver or transporter were coming to his office alongwith the invoice and weighment slip only without bringing the truck and on the basis of those documents he was preparing Builty in quadruplicate; two copies duplicate & triplicate copies alongwith Invoice were given to the driver or the transporter, he clarified that loaded trucks were not coming to their office; in case the truck was for Moradabad UP then driver used to come to collect Form-31; he himself spoke to the transporters for arranging the trucks; he himself was negotiating with the transporters or driver for the freight and sending the trucks; he himself was making the negotiated payment to the transporter or driver, he had never asked nor received Advance payment from M/S. Sameer Industries, KASEZ or the party; the whole procedure had been opted due to confidence in M/S. Sameer Industries, KASEZ as he did not personally know the said parties at Moradabad & Delhi; he wrote the addresses on the LR as per the invoice issued by M/S. Sameer Industries, KASEZ and asked the drivers to dispatch the goods at the said addresses, he also wrote the phone numbers of the party on the Builty for the driver to talk to the party on reaching there; they had no contact with the party they were only instructed by M/S. Sameer Industries, KASEZ and on that basis he was arranging trucks and Builties;*
- *on being asked whether he could say through which transporter he had arranged the trucks he stated that they*

were maintaining one register and noting the details, e.g. Challan No.6236 dated 22.12.2003, Truck No. HR-55-9839 he had arranged that truck for Delhi from (BHTC) Baba Haridas Transport Co., Gandhidham; in this way they were maintaining the register;

- *on being asked how they received the payments he stated that they had received payment for transportation through DD or cash through angadia, for which they had raised their bill and had dispatched at the addresses same as in the Builty, he had received payments through DD or cash and the same was noted against the bill in their account,*
- *on being asked whether he knew who had made the payments or recognize them he answered in negative;*
- *on being asked whether he was getting any intimation for reaching of trucks at destination and if yes then how and whether he was confirming the same from the receiving party he stated that they were receiving receipt from driver or transporter as they were giving the Builty's received copy, he had never confirmed the receipt from the party;*
- *he was shown the verification reports of M/S. Lord Empire International, Delhi and M/S. Laxmi Enterprise, Delhi stating that the firms did not exist at the declared addresses and was asked as to how he had transported 140 MT and 100 MT of scrap respectively at the said addresses he stated that they had received written instructions from the M/S. Sameer Industries, KASEZ and the receiving party according to which they had to deliver the goods from M/S. Sameer Industries, KASEZ to Delhi, as and when they had received instructions from M/S. Sameer Industries, KASEZ they had arranged the trucks on talking to the transporters, they were preparing and handing over the Builty to the transporter on the basis of Invoice issued by M/S. Sameer Industries, KASEZ; on the basis of that documents they presumed that the trucks had reached the destination; they could not confirm where the goods were actually unloaded at Delhi; they were receiving the payments, as negotiated, through DD from Delhi; they were noting the details of DD on the bill; the file containing bills was taken over by the officers of DGCEI;*

- *he had account No. 10092 & 2269 with Bank of Baroda, Gandhidham besides that he was having account no. 5349 with Gandhidham Mercantile Bank; he had produced bank statements issued by the banks;*
- *their commission was not fixed, they were getting average Rs. 700 to 800 per truck;*
- *on being asked why it should not be concluded that he had not transported the goods to Delhi and Moradabad from M/S. Sameer Industries, KASEZ and only issued Builties or challan he stated that as stated earlier he had issued Builties on the basis of invoices issued by M/S. Sameer Industries, KASEZ and he had received payments for the transportation but as stated earlier he could not confirm whether the goods were unloaded at the addresses in the said cities or otherwise.*

Shri Ratan Gadhavi in his statement dated 03.02.2005 (placed at Sl. No. 11 of the relied upon documents) stated, interalia, that:

- *he confirmed his statements dated 12.08.2004, 14.10.2004, 16.12.2004;*
- *he was arranging trucks from Sonal Freight Carriers for transportation of goods from M/S. Sameer Industries, KASEZ; Shri Ramesh Jain, owner of M/S. Sameer Industries, KASEZ negotiating freight on phone depending on details like, quantity, destination city and party; he used to tell him the freight per MT basis; after fixation of freight with Shri Ramesh Jain, Shri Narendra Rathore, employee of M/S. Sameer Industries, KASEZ, used to tell him in which city how much goods were to be sent; on that basis he was arranging trucks for M/S. Sameer Industries, KASEZ; after loading of the trucks he was issuing Builty to the drivers of the trucks;*
- *on being asked whether he had any talk with the parties in Delhi or Moradabad to whom goods were dispatched from M/S. Sameer Industries, KASEZ he stated that he did not talk to any party because they had fixed the freight with Shri Ramesh Jain and relying on him were sending the trucks; sometimes receiving parties did call them on phone; however he did not remember their names at that time; in*

some cases, if the truck did not reach in time receiving party called them to know the position of truck;

- *on being asked as to who was responsible for ensuring the delivery of the goods loaded by them at destination and as to how they were getting confirmation of the same he stated that the business of transport depended on trust and as he talked to Shri Ramesh Jain, it was his responsibility; however as he was taking the truck on commission basis from the other transporter the responsibility of delivering the goods to the destination was of original transporter; there was no written contract but it was an understanding; when they sent goods from KASEZ they were keeping a part of payment with them which was paid to the driver/transporter after acknowledgement was received; the receipt was however destroyed so that the same should not be used again;*
- *on being asked as to how they had received the freight for the goods transported to M/S. Moradabad Import Export Corporation and if any payment was pending he stated that generally they got their payments through demand drafts and they did not have any outstanding payments from M/S. MIEC;*
- *on being asked what documents they were delivering to the drivers after loading of goods from M/s. Sameer Industries, KASEZ and whether they were giving any phone or Mobile number for contacting the receiving party he stated that after loading of goods they were issuing builty in which address of the receiving party was mentioned based on the address mentioned in the Customs invoice which they received from M/S. Sameer Industries, KASEZ; they were giving phone number of the receiving party as mentioned in the contract letter to the truck driver;*
- *on being asked whether he had a copy of contract with the receiving party he stated that as the records were taken over by the officers of DGCEI and he did not have any copy at that time; however he would trace and produce photocopy if traced;*
- *on being asked where the goods loaded by them from M/S. Sameer Industries, KASEZ were delivered he stated that as*

stated earlier they gave the truck driver builty prepared on the basis of Customs Invoice on which address of the receiving party was mentioned and they also gave phone number of the receiving party on which the driver had to contact after reaching at the city; as he or his employee did not accompany the truck, only driver of the truck or the receiving party could say where the goods had been unloaded;

- *the goods for M/S. Lord Empire International and M/S. Laxmi Enterprise were loaded for to Delhi and the goods for M/s. Moradabad Import Export Corporation were loaded for Moradabad from M/s. Sameer Industries, KASEZ for which builty was issued by him as such the responsibility for delivering the goods at the address shown in builty was his;*
- *he was shown a letter dated 18.11.2004 of Central Excise, Meerut-II according to which no company in the name & style of M/S. MIEC existed at "Hasan House, Mughal Pura, 1st Khari Kuan, Moradabad". Also as per letter dated 23.09.2004 no company in the name of M/s. Laxmi Enterprises was existing at A-44, Friends Colony East, New Delhi and address of M/S. Lord Empire International at Bristro Building Complex No.12, second floor, Hauz Khas, New Delhi was also wrong. On being asked as to how he could claim that the goods dispatched from M/S. Sameer Industries, KASEZ had reached the addresses as all these addresses were found to be wrong he stated that: as he stated earlier he had issued builty on the basis of the Customs Invoice and addresses were also written based on the same and accepted that it was his responsibility to send the goods at the said addresses however on being shown the reports he stated that he could say that the goods would not have reached the addresses shown in the Builties prepared by him;*
- *on being asked to tell as to where the goods had gone, as the responsibility to deliver the goods was on him, he stated that he was giving phone number he got from the contract letter to the driver along with the builty; the driver had to contact on that number after reaching in that city; receiving party or Shri Ramesh Jain of M/S. Sameer Industries, KASEZ*

could only say where the goods had been unloaded and gone.

13. Statement (placed at Sl. No.12 of the documents relied upon) of Shri Umesh Dagar, Proprietor of M/S. Baba Haridas Transport Company, Gandhidham Transporter (who had arranged trucks for M/S. Sonal Freight Carrier, Gandhidham for transporting goods from M/S. Sameer Industries, KASEZ) was recorded under Section 108 of the Customs Act, 1962 on 23.12.2004 wherein he stated, interalia, that:

- *he was the owner of M/S. Baba Haridas Transport Company (BHTC) Gandhidham and he was running that company since last 5 years;*
- *he was arranging trucks on commission basis; he was arranging trucks directly or through some transporters; when he arranged the truck directly they issued their builty and when he arranged truck through another transporter, that transporter issued their own builty; for that they were taking Rs. 300/- towards commission which they got from the owner of the truck; they kept kacha record for the same; he produced original copy of the same;*
- *on being asked how he knew M/S. Sameer Industries, KASEZ he stated that he did not know M/S. Sameer Industries, KASEZ;*
- *on being asked on whose instruction he had arranged the trucks to M/S Sameer Industries, KASEZ he stated that; he had sent trucks to M/S Sameer Industries, KASEZ on the instructions of Shri Ratan bhai & Karan bhai of M/s. Sonal Freight Carriers and the builty were also issued by M/s Sonal Freight Carriers as they were the owners;*
- *on being asked whether he knew what was loaded in the trucks and where the goods went he stated that; as per Shri Ratan bhai told him the trucks were loaded with scrap and the trucks were sent to Delhi;*
- *on being asked whether he was confident that the trucks arranged for M/S. Sameer Industries, KASEZ had reached Delhi he stated that he could not say confidently and the truck drivers could only provide the information however*

they were not in Gandhidham and he would send the drivers when they come to Gandhidham;

- *on being asked who were the owners of the trucks: HR-47-2429, HR-38A-4476, HR-55A-5596, HR-55B-4814, HR-55F-1395 and HR-55-9839 he stated that he did not know the owners of those trucks as he arranged the trucks on commission basis; the owners were staying at Delhi and Haryana.*

14. Statement (placed at Sl. No. 13 of the documents relied upon) of Shri Ashok Mathur, Proprietor of M/S. Sonipat Gana Freight Carriers, Gandhidham (transporter who had arranged trucks for M/S. Sonal Freight Carrier, Gandhidham for transporting goods from M/S. Sameer Industries, KASEZ) was recorded under Section 108 of the Customs Act, 1962 on 22.12.2004, wherein he stated, interalia, that:

- *he was running transport company in the name & style of M/S. Sonipat Gana Freight Carriers, Gandhidham since the last 5/6 years; he arranged trucks on commission basis i.e. he was making trucks available to the transporters on commission basis and was taking Rs. 300/- towards commission from the owners of the trucks; for that they were not issuing any builty which was being issued by the main transporter; they were keeping records of the work attended by them in register/copy and destroying the same after one year;*
- *on being asked how they knew M/S. Sameer Industries, KASEZ he stated that: he did not know M/S. Sameer Industries, KASEZ;*
- *on being asked on whose instructions he had sent truck no. HR-46B-0371 on 25.09.2003 and HR-46-7813 ON 26.10.2002 to M/S. Sameer Industries, KASEZ he stated that he had sent the said trucks to M/S. Sameer Industries, KASEZ at the instructions of Shri Ratan bhai & Shri Karan bhai of M/S. Sonal Freight Carriers and had taken commission of Rs. 300/- and had sent the same to the said company the builty were also issued by M/S. Sonal Freight Carriers;*

- *on being asked whether he knew what was loaded in the trucks and where the trucks were sent he stated that as per information given by Shri Ratan bhai the truck was loaded with copper scrap and truck No. HR-46B-0371 was arranged for Moradabad and HR-46-7813 was arranged for Bhajanpura (Delhi);*
- *on being asked whether he was confident that the trucks went to Moradabad & Delhi he stated that he could not state confidently as he did not accompany the truck; the truck driver could give more information about the same; he would find the drivers and produce them;*
- *on being asked who were the owners of the said trucks he stated that Shri Ranbeer Singh, village Roah, Dist. Rohtak, Haryana was the owner of HR-46B-0371 and was also the driver of that truck; Shri Ramveer Singh, village Madanai, Dist Jajjar, Haryana was the owner of truck No. HR-46-7813 he was also the driver of that truck.*

15. Statement (placed at Sl. No.14 of the documents relied upon) of Shr Hawa Singh @ Rajveer Proprietor of M/S. Delhi Kandla Roadlines (DKR Gandhidham (Transporter who had arranged one truck for M/S. Sonal Freigh Carrier, Gandhidham for transporting goods from M/S. Sameer Industries KASEZ) was recorded under Section 108 of the Customs Act, 1962 0 27.12.2004 wherein he stated, interalia, that:

- *he was running transport company in the name & style of M/S. Delh Kandla Roadlines (DKR) since last 6 years; he was arranging trucks on commission basis to different transporters; the builty were issued by that transporter only and not by him he took their commission of Rs. 300/-; for the work attended by them he maintained one register in his office which he destroyed after some time; on being asked how they knew M/S. Sameer Industries, KASEZ he stated that he did not know M/S. Sameer Industries, KASEZ;*
- *on being asked then how he had sent truck to M/S. Sameer Industries, KASEZ he stated that on being asked by Shri Ratan Gadhavi owner of M/S Sonal Freight Carrier he had*

supplied the truck to Shri Ratan Gadhavi and had taken Rs. 300/- towards his commission from the truck owner;

- *on being asked whether he could state where the truck arranged for M/S. Sameer Industries, KASEZ had gone and what goods were loaded he stated that he had sent the truck to M/S. Sameer Industries, KASEZ on being asked by Shri Ratan Gadhavi and he was not aware what goods were loaded and where the truck had gone;*

16. Statement (placed at Sl. No.15 of the documents relied upon) of Shri Ramesh Yadav Proprietor of M/S. Alwar Kotputli Transport, Gandhidham, (Transporter who had arranged trucks for M/S. Sonal Freight Carrier, Gandhidham for transporting goods from M/S. Sameer Industries, KASEZ) was recorded under Section 108 of the Customs Act; 1962 on 27.12.2004 wherein he stated, interalia, that:

- *he was running transport company in the name & style of M/S. Alwar Kotputli Transport, Gandhidham since last 4 years; he was arranging trucks on commission basis to different transporters; he was not issuing builty for the truck arranged by him the same was issued by that transporter; he only took commission of Rs. 300/-;*
- *on being asked how they knew M/S. Sameer Industries, KASEZ he stated that he did not know M/S. Sameer Industries, KASEZ;*
- *on being asked how he had sent trucks to M/S. Sameer Industries, KASEZ he stated that on being asked by Shri Ratan Gadhavi owner of M/S. Sonal Freight Carrier he had sent the trucks to M/S. Sameer Industries, KASEZ and had taken Rs. 300/- towards his commission from the truck owner;*
- *on being asked what goods were loaded and in which city the trucks had gone which were arranged by him he stated that as he had stated earlier, he worked on commission basis and he had given the trucks to Shri Ratan Gadhavi who had also issued builty for the trucks; he was not aware as to what goods were loaded from M/S. Sameer Industries, KASEZ and where the trucks had gone.*

17. Statement (placed at Sl. No.19 of the documents relied upon) of Shri Rajkumar son of Shri Gulshan Kumar, Proprietor of M/S. Green Transport Company, Gandhidham, (Transporter who had arranged trucks for M/S. Sonal Freight Carrier, Gandhidham for transporting goods from M/S. Sameer Industries, KASEZ) was recorded under Section 108 of the Customs Act, 1962 on 23.12.2004 wherein he stated, interalia, that:

- *his father Shri Gulshan Kumar was running transport company in the name & style of M/S. Alwar Kotputli Transport, Gandhidham since last 10 to 12 years and he joined him since last 1 year; he was arranging trucks or commission basis to different transporters for which he was getting commission of Rs. 300/-; which was given to him by the owner of the truck they were not issuing builty as the same was being issued by the transporter some times they sent the truck directly for loading of timber a that time they issued builty; they were maintaining kachchha record in register while arranging trucks on commission basis;*
- *on being asked how they knew M/S. Sameer Industries, KASEZ he state-that he did not know M/S. Sameer Industries, KASEZ;*
- *on being asked how he had sent trucks to M/S. Sameer Industries, KASEZ they had received he stated that on being asked by Shri Ratan bhai and Karan bhai he had sent the trucks to M/S. Sameer Industries, KASEZ; commission from the truck owner; the Builties for these trucks were issued by Sonal Freight;*
- *on being asked that what cargo was loaded and where the trucks had gone which they had arranged for M/S. Sameer Industries, KASEZ during September 03 to July 2004, he stated that the trucks were sent to M/S. Sameer Industries, KASEZ on being asked by Shri Ratan bhai of Sonal Freight Carrier and according to Shri Ratan bhai the trucks were arranged for Moradabad however he could not say confidently whether the trucks had actually gone there or not and truck driver could only say the facts and he would produce the drivers when they come to Gandhidham;*

18. Statement (placed at Sl. No.20 of the documents relied upon) of Shri Devendra Singh, son of Shri Raja Ram, Manager of M/S. Haryana Public Roadways (HPR Transport Company), Gandhidham, (transporter who had arranged trucks for M/S. Sonal Freight Carrier, Gandhidham for transporting goods from M/S. Sameer Industries, KASEZ) was recorded under Section 108 of the Customs Act, 1962 on 24.12.2004 wherein he stated, interalia, that:

- *he was working as manager in transport company named and style as Haryana Public Roadways since last 3 years and the owner of company residing in Haryana; he was arranging trucks on commission basis to different transporters for which they had not issued builty as the builty was issued by the respective transporter; some times they supplied the truck directly to the party at that time they issued builty; he produced one*
- *register in which they were maintaining kachchha record; on being asked how they knew M/S. Sameer Industries, KASEZ he stated that he did not know M/S. Sameer Industries, KA SEZ;*
- *on being asked how he had sent trucks to M/S. Sameer Industries, KASEZ he stated that on being asked by Shri Ratan Gadhavi of Sonal Freight Carrier they had sent the trucks to M/S. Sameer Industries, KASEZ and had received Rs. 200/- towards commission from the owner of the truck the Builties for these trucks were issued by Sonal Freight;*
- *on being asked what goods were loaded and where the trucks had gone which they had arranged for M/S. Sameer Industries, KASEZ, he stated that: he was not aware as to where the trucks had gone which they had arranged for M/S. Sameer Industries, KASEZ also he was not aware about what goods were loaded and to which city the trucks had gone as they had arranged the trucks on commission basis for Sonal Freight Carrier;*

21. M/s. Sameer Industries, KASEZ, a unit in Special Economic Zone was engaged in manufacturing of various types of ferrous & non-ferrous scrap by way of segregating imported scrap. Shri Ramesh Jain was the active partner of

M/S. Sameer Industries, KASEZ and all others were sleeping partners. ***Shri Ramesh Jain was looking after the day-to-day activity of the unit from Mumbai and was visiting the unit as per requirement.*** *M/S. Sameer Industries, KASEZ were exporting the goods as well as selling the goods in Domestic Tariff Area (DTA). They had sold the goods in DTA on payment of duty as well as supplied the goods duty free against Advance Release Order/ Advance Licences. Their claim of having supplied copper/brass scrap to different advance licence holders on the strength of advance release orders is discussed in foregoing Paras.*

22. As per the Advance Release Order No. 03/84/072/AM-03/ALS-V dated 06.02.2003 issued against Advance Licence No. 0310156347 dated 03.09.2002 issued in the name of M/S. Lord Empire International, New Delhi the addresses of M/S. Lord Empire International were declared as: Head Office: Bristro Building Complexes, No. 12, 2nd Floor, Hauzkhas Village, New Delhi-16 and Branch Office: Room No.5, Ground floor, Bhagwan Bhawan, 196-198, Samuel Street, Mumbai-09. On verification by the DRI Delhi & Mumbai, it was revealed that no such firm in the name & style of M/s. Lord Empire International was in existence at the declared addresses. Shri Ramesh Jain in his statement dated 21.09.2004 had stated that he had visited Delhi and had met Shri S.K.Gupta; he (Ramesh Jain) had submitted telephone number of Shri S.K.Gupta as 011-38822748(Mob.) & 011-26644315 and address of Shri S.K.Gupta as: Shri S.K.Gupta, 1055 A, Ward 8, Mehrauli, Delhi. However Summons no. CA-26/1251 dated 20.10.2004 issued in the name of Shri S. K. Gupta (Surinder Kumar Gupta) at that address, to appear on 02.11.2004, was received by one Shri Shiv Kumar Gupta (since he had same initials S.K.Gupta) and was returned by him vide his letter dated 1.11.2004.

23. As per Advance Release Order No. 3/83/021/AM-03/ALS-V dated 27.09.2002 issued against Advance Licence No. 0310143243 dated 21.06.2002 issued in the name of M/S. Laxmi Enterprises, New Delhi the addresses of M/S. Laxmi Enterprises were declared as: Head Office: A-44, Friends Colony East, New Delhi 110 065, Branch Office: 34, Bhagwan Bhawan, 3rd Floor, 196, Samuel Street, Mumbai-09 and supporting manufacturer's address was declared as: Bhagawant Nagar Industrial Area, Unaao, UP. On verification by the DRI Delhi, Mumbai & Lucknow it was revealed that no such firm in the name & style of M/S. Laxmi Enterprises was in existence at the declared addresses. Summons No. CA-26/1267 dated 17.11.2004 was issued to Shri Dinesh Kumar Jain at the address given in the profile of exporter/importer submitted to the advance license issuing authority by M/S. Laxmi Enterprises, Mumbai at: Shri Dinesh Kumar Jain, S/O Shri Jai Prakash Jain, RZ-132, Gali No.4, Sadhnagar, Palam Colony, New Delhi-110 045 to appear before DRI, Gandhidham on 03.12.2004, had returned back.

24. Shri. Riazul Hasan, CEO, of M/S. MIEC, Moradabad in his statement dated 09.07.2004 recorded under Section 108 of the Customs Act, 1962 before the Officer of Central Excise, Meerut-II (placed at Sl.No. 21 of the documents relied upon) had stated, interalia that their firm had received two Advance licences out of which Advance Licence No. 2910004059 was of Cochin Port but the said licence was not registered and they had not received any material against the said licence. Summons No. CA-20/1271 dated 18.11.2004 was issued to Shri Riazul Hasan, CEO of M/S.MIEC to appear before DRI Gandhidham on 03.12.2004. Shri Riazul Hasan vide his letter dated 29.11.2004 intimated that proceedings in respect of Advance Licence/ Advance Release Order bearing No. 2910004059 had been stayed by the Hon'ble High Court of Allahabad in a writ petition filed by him and *in which Commissioner of Central Excise Meerut was a respondent. In compliance to summons copies of documents pertaining to receipt of goods from M/S. Sameer Industries, KASEZ were submitted. Report dated 18.11.2004 received from Central Excise Meerut-II, informed that during the course of verification the premises mentioned above were found to be a residential one; no firm in the name and style of M/S. Moradabad Import Export Corporation existed at the given address; the occupants of the premises told that the firm did not exist at the said address, the firm had shifted to another place five years ago.*

25. Details of payments received by M/S. Sameer Industries, KASEZ for supply of 140 MT of copper scrap to M/S. Lord Empire International, Delhi, 100 MT of copper scrap to M/S. Laxmi Enterprises, Delhi and 1258.848 MT of Brass scrap to M/S. MIEC were collected from M/S. Sameer Industries, KASEZ. The payments were received at the account in CITI Bank, Mumbai. Details of payments received from M/S. Lord Empire International, Delhi, M/S. Laxmi Enterprises, Delhi and M/S. MIEC, Moradabad by M/S. Sameer Industries, KASEZ was called for from the CITI Bank, Mumbai. It was noticed that the payments had remitted from (1) Lord Krishna Bank Ltd., Noida Branch (2) Lord Krishna Bank Ltd., Connought circus Branch, Delhi (3) Citizen Co-operative Bank Ltd., NOIDA branch & (4) ABN AMRO Bank, Fort, Mumbai branch for M/S. Lord Empire International and M/S. Laxmi Enterprise. It was revealed that cash was deposited in the accounts in the name of M/S. Lord Empire International, M/S. Laxmi Enterprises maintained at the said banks, and Demand Drafts/Pay Orders were issued in favour of M/S. Sameer Industries, KASEZ. It was revealed that the accounts stands closed since then. Payments received from M/S. MIEC were remitted from Jammu & Kashmir Bank Ltd., Moradabad. The Central Excise, Meerut-II, collected details *of payments remitted from the above said branch. It was revealed that remittances in to their account, in Jammu & Kashmir Bank Ltd., Moradabad were in cash. However, Demand drafts were issued in favour of M/S. Sameer Industries.*

26. Details of the Advance Licences issued in the name of M/S. Lord Empire International, Mumbai and M/S. Laxmi Enterprises, Mumbai were called for from the Director General of Foreign Trade, Mumbai. It was revealed that total 05 Advance licences were issued in the name of M/S. Laxmi Enterprises, (IEC No. 0598020217) and 04 Licences were issued in the name of M/S. Lord Empire International, (IEC No.0595022006) as detailed below:

Details of Advance Licence issued to M/S. Lord Empire International.

Sr. No.	*Advance Licence No.*	*Date*	*Qty & Description*	*Value*
01	*0310156347*	*03.09.2002*	*729 MT Copper Scrap*	*4,97,35,000*
02	*0310151958*	*06.08.2002*	*42452 Kg Titanium Dioxide*	*48,10,869*
03	*0310177834*	*13.01.2003*	*722 MT Brass Scrap*	*3,89,23,670*
04	*0310168439*	*22.11.2002*	*447MT Base Metal Copper Cathode/Wire bar/CC Rod/Wire*	*2,99,63,304*

Details of Advance Licence issued to M/S. Laxmi Enterprises,

Sr.No	*Advance Licence No.*	*Date*	*Qty & Description*	*Value*
01	*0310157872*	*11.09.2002*	*884 MT Brass ingots/Billets*	*4,91,56,800*
02	*0310164502*	*25.10.2002*	*990 MT Brass Scrap*	*4,98,68,280*
03	*0310142613*	*18.06.2002*	*71.400 Copper Scrap*	*48,98,040*
04	*0310145389*	*03.07.2002*	*911MT Brass Scrap*	*4,83,88,676*
05	*0310143243*	*21.06.2002*	*714 MT Copper Scrap*	*4,89,80,400*

On the basis of investigations conducted by the office of DGFT as well as DRI/Central Excise the address of the firm was found to be fictitious, the 04 Advance Licences referred above issued in the name of M/S. Lord Empire International were cancelled abinitio by the Joint Director, DGFT, Mumbai vide Cancellation Order dated 24.07.2003 *issued from F.No. F-3/14/AM03/ECA-II/MUM. The Joint Director, DGFT has also suspended the advance licences issued to M/s Laxmi Enterprises vide order dated 3.03.2003 issued from F.No. F-40/AM.03/ECA-II/MUM."*

27. Scrutiny of the Advance Licence issued to M/S. Lord Empire International and M/S. Laxmi Enterprises revealed that they had submitted Chartered Accountants Certificates issued by different Chartered Accountants viz. Shri Jagmohan Singh Rawat of Rawat Jagmohan Singh & Co., Shri V.K.Kalra of Vinod Kumar Kalra & Co. & Shri Sanjay Garg of Ricky Sanjay & Co. Summons No. CA-26/1255, CA/1256 both dated 03.11.2004 were issued to Shri Sanjay Garg, Shri V.K.Kalra, Chartered accountants, to appear on 18.11.2004 had returned back as left. Summons No. CA-26/1257 dated 03.11.2004 issued to Shri Rawat Jagmohan Singh, Chartered Accountant on 18.11.2004. Shri. Jagmohan Singh Rawat vide his letter dated 8.11.2004 (placed at Sl. No.16 of the list of documents relied upon) had intimated that the certificate was totally bogus, false, illegal and he was under no circumstances connected with the said certification. He was practicing as a partner in the firm in the name styled Devinder Jagmohan & Co Chartered Accountants since 1990 and he had never registered his firm in the name styled Rawat Jagmohan Singh & Co. He also submitted an affidavit vide his letter dated 16.11.2004. From the said letters of Shri Jagmohan Singh Rawat and returning of summons issued to the other Chartered Accountants it is evident that the Certificates of Chartered Accountant submitted to the Advance Licence issuing authority were also bogus, forged and were not genuine."

4.10 From the above it is quite evident that appellant had manipulated, conspired and cleared the goods in the DTA from their unit in KASEZ without payment of duty, in garb of making clearances against the ARO issued against the Advanced Licenses which were issued in the name of the three buyers as detailed earlier. From para 27 of the show cause notice it is quite evident that during the course of investigations the Chartered Accountants who have issued certificates in respect of the Advance Licenses issued to the M/s Lord Empire International and M/s Laxmi Enterprises, were called for giving the evidence and summons were issued to them. However summons issued to the two of such chartered accountant were returned back with the remark left. In response to the summon issued to third chartered accountant namely Shri Rawat Jagmohan Singh, by letter dated 08.11.2004 stated that the certificate shown and submitted to the Advance License issuing authority is completely fake and bogus and he is not concerned with the certificate. He also filed an affidavit to that effect.

4.11 In respect of the advance licenses issued to M/s Moradabad Import Export Corporation it is interesting to note that the issue of suspension/ cancellation of advanced license by the DGFT was taken up before the Hon'ble High Court of Allahabad. Order in Original dated 29.01.2008/ 08.02.2008 (in first round of litigation) records as follows:

> *"2.3 Vide his letter dated 21.11.2006, Shri Amit Awasthi, Advocate for MIEL & Shr Riaz-ul- Hasan, its CEO has further submitted that in the same issue, a writ petiotion No 1304 of 2004 was filed before the Hon. High Court of Judicature of Allahabad relating to Advance License No 2910004059 and by an order dated 22.09.2004 (copy submitted), Hon. High Court had stayed further proceedings with regard to the subject adavance license and further by order dated 13.12.2004 (copy submitted), the stay has been extended staying the proceedings till further order, that since the proceedings before Hon. High Court are sub judice, it would be appropriate to keep the matter in abeyance pending outcome of decision by the Hon. High Court and subject to a proper enquiry with Central Excise authorities, Meerut, DGFT, Moradabad and Uttar Pradesh Trade Tax Department in connection with*

> *Form 31 issued for procurement of material from Sameer Industries."*

Following is further recorded in the said order

> "4.2 The remaining noticees did not avail the opportunity of personal hearing. The communication addressed to M/s Lord Empire International, M/s laxmi Enterprises, Shri S K Gupta @ S K Agarwal (Proprietor of Lord Empire International) and Shri Dinesh Kumar Jain (Proprietor of Laxmi Enterprises) were returned undelivered by the Department of Posts with remarks "left", "No such person/ firms" etc. Consequently the letter addressed to them was served through Notice Board of the Custom House."

4.12 From the statements of Shri Ramesh Jain, Partner (Appellant 2 and 4) it is quite evident that he had undertaken number of times to make available Shri S K Gupta @ S K Agarwal (Proprietor of Lord Empire International) and Shri Dinesh Kumar Jain (Proprietor of Laxmi Enterprises) before the investigating officer on number of occasions to establish that these firms were not fictitious and were existing. However they never appeared. From the facts as recorded in para 4.2 above it is also evident that they never appeared before the adjudicating authority also. It is also evident that by the order dated 29.01.2008/ 08.02.2008 penalty of Rs 25,00,000/- was imposed on each Shri S K Gupta @ S K Agarwal (Proprietor of Lord Empire International) and Shri Dinesh Kumar Jain (Proprietor of Laxmi Enterprises), but they did not file any appeal against the said order. Thus the findings recorded in that order to the effect that the these buyer firms were bogus or nonexistent has acquired finality and cannot be disputed. The claim of the appellant that they have supplied the goods against the ARO's issued to the said firms against advance licenses held by those firms is without any merits and cannot be substantiated.

4.13 We also note that though the statement of Shri Riaz Ul Hasan of M/s Moradabad Import Export Corporation was recorded, and he had also file reply to the show cause notice through his counsel Shri Amit Awasthi, they didn't participated in the adjudication proceedings thereafter and did not attend the personal hearings allowed. They also did not file appeal against the penalty of Rs 35,00,000/- imposed on Shri Riaz Ul Hasan. Thus the findings recorded in the order dated 29.01.2008/ 08.02.2008 have also acquired finality and cannot be challenged at this stage. The findings recorded in respect of the supplies made to M/s MIEC are reproduced below:

> *"5.12 With regard to clearances made by SI to MIEC against ARO Nos. 29/0001 dated 4.7.2003 and 29/AM 03 dated 4.6.2004 (corresponding to Advance Licence No. 2910004059 dated 13.01.2003), Shri Riaz-ul-Hasan, CEO of MIEC in his statement-dated 9.7.2004 has stated that this licence was not registered by them and they had not received any material against the said licence. The fact that licence was not at all registered has not been disputed by SI. Consequently, it can be said that SI cleared the goods and availed exemption from duty payment without cover of a licence. Moreover, considering the statements of various bover of invorce bill of persons/transporters stating that goods were dispatched by SI under cover entry and lorry receipts on the name and address of SI as declared in the ARO and as stated by Shri Ramesh Jain, Partner of SI that no complaint was received about the non-receipt of goods and that SI also received payment through banking channel (which was nothing but an eyewash, as deliberated above) clearly reveals the malicious and contumacious design of evading duty by clearing goods from Zone into DTA against non-existing firm (given that address declared by MIEC in the ARO/Advance Licence was of a residential premise) and against a licence which was not registered. Ipso facto, the proceedings initiated against SI to recover duty on goods cleared by them to MIEC are found sustainable. Moreover, it is also observed from the record that the Writ Petition No. 1304 of 2004 (involving Advance Licence No: 2910004059 dated 13.1.2003) filed by MIEC before Hon. High Court of Allahabad has been*

dismissed by the Hon. High Court vide its order-dated 12.10.2007."

4.14 Appellant has during its earlier appeal, before the adjudicating authority in the remand proceedings have relied upon plethora of documents to establish that they have bonafidely and genuinely supplied the goods against the ARO's issued to the buyers against the Advance Licenses. They have also relied upon certain decisions to buttress their arguments. However we do not find any merits in the arguments as we observe that entire scheme of clearance of the goods by the Appellant, to the non-existent units against the advance licenses obtained by the production of fake/ forged certificates/ documents is nothing but fraud played by the appellant to evade the payment of due custom and central excise duties. In case of Munjal Showa Ltd. [2022 (382) E.L.T. 145 (S.C.)] Hon'ble Supreme Court has observed as follows:

"8.*From the judgment and order passed by the Tribunal and even from the findings recorded by the Department, it has been found that the DEPB licenses/Scrips, on which the exemption benefit was availed of by the appellant(s) (as buyers of the forged/ fake DEPB licenses/Scrips) were found to be forged one and it was found that the DEPB licenses/Scrips were not issued at all. A fraud was played and the exemption benefit was availed on such forged/fake DEPB licenses/Scripps.*

9.*In that view of the matter and on the principle that fraud vitiates everything and such forged/fake DEPB licenses/Scrips are void ab initio, it cannot be said that the Department acted illegally in invoking the extended period of limitation. In the facts and circumstances, the Department was absolutely justified in invoking the extended period of limitation.*

10.*It is also required to be noted that the moment, the appellant(s) was/were informed about the fake DEPB licenses, immediately they paid the Customs Duty, may be* *under protest. The Customs Duty was paid under protest to avoid any further coercive action. Be that as it may, the fact remains that the DEPB licenses/Scrips on which the exemption was availed by the appellant(s) was/were found to be forged one and, therefore, there shall be a duty liability and the same has been rightly confirmed by the Department, which has been rightly confirmed by the Tribunal as well as the High Court.*

11.*Now, so far as the submission on behalf of the buyer(s) – appellant(s) relying upon the decision of this Court in the case of Aafloat Textiles India Private Limited and Ors. (supra) is concerned, whether the buyer(s) had a knowledge about the fraud or the forged/fake DEPB licenses/Scrips and whether the appellant(s) – buyer(s) was/were to take requisite precautions to find out about the genuineness of the DEPB licenses/Scrips which they purchased, would have a bearing on the imposition of the penalty, and has nothing to do with the duty liability. It is to be noted that in the present case so far as the penalty proceedings are concerned, the matter is remanded by the Tribunal to the adjudicating authority, which is reported to be pending."*

4.15 The argument similar to the one taken by the appellant on the basis of the same/ similar decisions was considered by the Delhi Bench in the case of Mercedes Benz India Ltd. [2022 (1) CENTAX 328 (T-Del)]. After considering the arguments and the decisions relied upon bench observed as follow:

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. v. CC 1983 (13) E.L.T. 1342 (S.C.);

(b) Union of India v. Sampat Raj Dugar 1992 (58) E.L.T. 163 (S.C.);

(c) Collector of Customs, Bombay v. Sneha Sales Corporation 2000 (121) E.L.T. 577 (S.C.);

(d) Taparia Overseas (P) Ltd. 2003 (161) E.L.T. 47 maintained by Hon'ble Supreme Court in Union of India v. Blue Blends & Textur. Mfg. Co. Ltd. 2017 (349) E.L.T. A93 (S.C.);

(e) Commissioner of Customs v. Leader Valves Ltd. 2007 (218) E.L.T. 349 (P & H) maintained by the Hon'ble Supreme Court in 2008 (227) E.L.T. A29 (S.C.);

(f) Sanjay Sanwarmal Agarwal v. Union of India 2004 (169) E.L.T. 261 (Bom.);

(g) Hico Enterprises v. Commissioner of Customs, Mumbai 2005 (189) E.L.T. 135 (Tri. - LB) affirmed by Hon'ble Supreme Court in Commissioner of Customs, Bombay v. Hico Enterprises 2008 (228) E.L.T. 161 (S.C.);

(h) Commissioner of Customs, Amritsar v. Ajay Kumar & Co. 2009 (238) E.L.T. 387 (S.C.);

(i) Sumit Woollen Processors 2015-TIOL-2090-CESTAT-MUM = 2015 (324) E.L.T. A127 (Tribunal);

(j) Commissioner of Customs (Import) v. Coromandal Fertilizers Ltd. 2018 (12) TMI 734-Bombay High Court;

(k) TVS Motor Company Ltd. v. CC, Chennai 2018 (1) TMI 775-CESTAT-Chennai;

(l) CC, Visakhapatnam v. Acalmar Oils & Fats Ltd. 2018 (8) TMI 1533;

(m) Unique Trading Company v. CC 2018-TIOL-3772-CESTAT-MUM.

(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 intitio as at best it would be voidable. The decision of Punjab & Haryana High Court in Friends Trading Company v. Commissioner of Customs, Amritsar 2006 (202) E.L.T. 611 (Tri. - Del.) would not be applicable to the facts and circumstances of the case. On the other hand, reliance was placed on the decisions in Pee Jay International v. Commissioner of Customs 2016-TIOL-2136-HC-P&H-CUS = 2016 (340) E.L.T. 625 (P & H) and M/s. Khaas Textiles Pvt. Ltd. v. Additional Director General (Adj.), DRI, New Delhi 2019-VIL-290-CESTAT-DEL-CU. Reliance was also placed on the decisions in Commissioner of Customs, Amritsar v. Patiala Casting Pvt. Ltd. 2012 (283) E.L.T. 269 (Tri. - Del.) and Commissioner of Customs, Amritsar v. Gopi Chand Krishan Kumar Bhatia 2013 (295) E.L.T. 739 (Tri. - Del.);

………

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. [1983 (13) E.L.T. 1342 (S.C.)], 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, 1878, while the present case is under the Customs Act, 1962. The relevant paragraph of the judgment 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 July 1, 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 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 judgment 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. Paragraphs 36 and 37 of the judgment 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 possess. 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 Maxiims, 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 Dugar 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 misrepresentation, 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 bona fide 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 bona fide purchased the concept of this fraud vitiates everything would not be applicable. The authority themselves had not checked the fraud committed at the time of export in cases where licenses/scrips were transferred to the importer who had no knowledge of the misrepresentation 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 transferable 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 v. Commissioner of Customs 2002 (143) E.L.T. 153 (Tri. - Mumbai), which was maintained by the

Supreme Court in 2003 (152) E.L.T. A85 (S.C.), Blue Water Foods & Exports Pvt. Ltd. v. Commissioner of Customs 2010 (251) E.L.T. 305 (Tri. - Bang.) and Honda Cars India Ltd. v. 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 inasmuch 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 in 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 scrips obtained fraudutantly. This conclusion drawn is based on several quoted case laws of Apex Court and High Courts of Calcutta & 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/scrips. Relying on the decision in United India Insurance Company v. Lehru, (2003) 3 SCC 338, Dr. Pal contends that it is just not possible for the appellant to verify the DEPB licenses/scrips 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/scrips purchased by him bona fide for valuable consideration since found to be forged.

4. 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. This was so done by the appellant. But ultimately it was found that the said DEPB licence/scrips 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 scrips. 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/scrips 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 scrip 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 wilful 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 wilfully 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) wilful 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 transferees 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 Scrips 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 of. 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 penality 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 or 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. v. Commissioner of Customs, Mumbai 2012 (283) E.L.T. 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 Passbook 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 authoritiy'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. v. Commissioner of Customs & Central Excise (Delhi-IV), Faridabad 2009 (246) E.L.T. 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 wilful 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, 1930.

21. Even though the words 'fraud' and "with intent to evade payment of duty" are absent in Section 28(1) of the Act, wilful suppression or misstatement do find mention in proviso to Section 28 of the Act, which is clearly attracted to the present case."

This decision has been affirmed by the Hon'ble Supreme Court as reported at [2024 (14) CENTAX 375 (SC)]. Thus we find that the decisions relied upon by the appellant to argue that they had supplied the goods against validly issue ARO which were duly verified by the authorities at the time of clearance, and hence duty cannot be demanded from them in view of the referred decisions cannot be upheld. These cases do not apply to the case where the Advance License and ARO are found to be bogus, fake and fraudulently obtained. In case of Sampat Raj Duggar, relied upon by the appellant, Hon'ble Supreme Court itself has observed as follows:

> *"**24.** It is also significant to notice that it is not the case of the appellants that the first respondent was a party to any conspiracy or other fraudulent plan hatched or sought to be implemented by the second respondent. If that were the case, different considerations would have arisen."*

4.16 Thus, we do not find any merits in the submissions made by the appellant in respect of the clearances made by them against the ARO's. We also observe that on verification of the payments which appellant have received it is observed that the amounts used for preparing the demand draft was deposited in cash in the accounts opened in the name of the fictitious firms and immediately after preparation of the draft the account was closed. This fact highlighted by para 25 of the show cause notice is not disputed. Thus when the entire transaction of the receipt of money by the appellant itself has been found to be sham, something to launder money, we find that the appellant was indeed conspiring with the others to fraudulently defraud the department of the due revenue. As we find that the appellant has acted by perpetuating this fraud, we find the argument advanced by the appellant on limitation have to fail. Extended period of limitation as provided by Section 28 of The Customs Act, 1962 and Section 11A of the Central Excise Act, 1994 are invokable for making these demand.

4.17 Appellant has relying on certain decisions argued that process of segregation of scrap undertaken by them do not amount to manufacture hence the demand could not have been made upon them under the Central Excise Act, 1944. We find that none of the decisions relied upon by the appellant has dealt with the specific issue in hand i.e. whether the segregation of scrap would amount to manufacture or not. This issue has been considered by jurisdictional high court, in the case of Mitesh Impex [[2014] 46 taxmann.com 30 (Gujarat)]. Hon'ble Gujarat High Court has held as follows:

> *"1. This group of appeals involves similar questions of law in substantially similar factual background. Since these appeals were admitted at different points of time, it is*

possible that questions framed in some of the appeals may have been slightly differently worded. In order to achieve uniformity for the purpose of all these appeals to answer common questions of law, we adopt following questions of law, which were framed in Tax Appeal No.2562 of 2009 while admitting the appeal. For the purpose of all the appeals, therefore such questions shall be answered which are as follows:-

(1) Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal erred in treating the processes employed by the assessee in segregating the metal scrap from cable scrap as 'Manufacture or produce' within the meaning of section 10B of the Income-tax Act?

(2) Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal erred grievously in setting aside he issue relating to DEEMED EXPORT (DTA sales) to the file of the Assessing Officer and thereby not confirming the concurrent findings of the Assessing Officer and the CIT(A)?

(3) Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal is right in allowing deduction u/s.80IB of the Income tax Act, 1961?

(4) Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal is right in confirming the order of the CIT (A) in allowing deduction u/s. 80HHC without adjudicating on the ground of appeal taken by the revenue?”

3. The respondent assessee is a 100% EOU and is engaged in the activity of segregation and processing of metal scrap of various natures. Out of such separate segregated scrap, part of it would be used by the assessee for manufacture of iron ingots. Some parts of the scrap would be reprocessed and resold. With respect to the details of such *processing activities carried on by the assessee in order to ascertain whether such activity would amount to manufacture, we would advert at a later stage. The assessing officer, however, believed that such activity would not amount to manufacture barring the process by which the assessee produced ingots. To that extent, the assessing officer granted deduction under section 10B of the Act, since admittedly the assessee complied with other conditions for grant of the claim. However for the rest of the profit the assessing officer rejected the assessee's claim by his order of assessment dated 31.3.2006 for the assessment year 2003-04. He also held that the assessee's sales to DTA areas are not export sale. Deduction under section 80IB of the Act would not be available on such sales.*

5. The assessee carried the matter in further appeal before the Tribunal. The Tribunal by the impugned judgment noted at length the assessee's process and referred to the decision of Supreme Court in case of Vijay Ship Breaking Corporation and others vs. Commissioner of Income-tax reported in [2009] 314 ITR 309(SC) to hold that the same amounted to manufacturing activity.

6. With respect to the assessee's claim for deduction on its DTA sales, the Tribunal placed the matter back before the assessing officer in following terms:-

> *"13. Regarding claim u/s. 10B on deemed exports we have already set aside this issue to the file of assessing officer in case of M/s. Siyaram Metals P. Ltd in ITA No.377/RJT/2006 for the assessment year 2002-03.*

11. This left us with ground of assessee's appeals regarding claim u/s 10B of deemed exports. Before us, Learned AR has placed written submission pressing for allowance of deduction on deemed export u/s 10B of the Act. Learned DR relied up on Para no.2.9 the order of

CIT(A). Ld. AO has dealt with the written submission made by assessee vide letter dated 20/10/2004 pressing for the deduction u/s.10B of the Act. He has rejected this submission that deduction u/s 10B is allowed only in case goods are exported out of India. He held that deemed export is not mentioned u/s. 10B therefore, deduction is not allowable u/s.10B on these sales. Learned CIT(A) has also disallowed the claim of the assessee on this ground. In the grounds of appeal assessee has stated that sales consideration is received in foreign currency relating to deemed exports whereas Ld CIT(A) has held that sales consideration is received in Indian currency. However, before us neither party has put that how deemed exports are defined under Export and Import policies vis a vis condition of deduction u/s 10B. No facts are also put before us by either party about receipt of sale proceeds vis a vis conditions envisaged u/s. 10B(3) of the IT Act. It is also not clear whether it is third party export or not. These facts are also not clear from the assessment order as well as appellate order of CIT(A). Therefore we set aside claim, of the assessee regarding deduction u/s.10B on deemed exports to the file of assessing officer to examine in detail about claim of the assessee of deduction u/s. 10B of the Act on this sales and decide issue afresh in accordance with law."

7. On the basis of the material on record learned counsel Mr. Pranav Desai for the Revenue submitted that the assessee did not carry out any manufacturing activity. Deduction under section 10B of the Act is available only if the assessee manufactures a new article or a thing. Mere segregation of scrap would not amount to manufacturing an article or a thing. With respect to assessee's DTA sales, counsel contended that such sales do not amount to export and, therefore, the assessing officer rightly declined the claim of deduction.

10. The process undertaken by the assessees was explained before the authorities as under:-

"a) Mix Cable Scrap

Principle raw material being mix metal copper cable scrap is imported. This material when received in factory is sorted and segregated in different diameters and of various lengths. This process is done manually or most of the times mechanically to remove jackets, upper layer and paper and for making them suitable for feeding in different cable cutting machines and stripping machines. After a process various strips in the cables are removed, the sorted cable scraps put in to cable cutting machine for cutting and stripping. Out of this process, several types of copper wire are generated. This process also generates several types of impurities such as plastic, dust and other metals. Clean copper material emerges out of this process, which is different and distinct from the cable wire scrap. The pure copper obtained from this process is then bailed in bailing machine. This makes this metal in different sizes and weights as required. Then this material is packed and exported.

a) Mix Metal Scrap

Mix metal scrap is imported from various countries. This scrap is consisting of several substances such as stones, rubber, steel, metal-ferrous as well as non-ferrous etc. It is generally the scrap generated from dismantling of buildings or other structures and plants etc. after importing them several processes are being carried out manually and mechanically through various machines and Metal is derived from the whole process. The scrap on which manufacturing process is carried out is of no use but subject to this manufacturing process. The mix metal was used as a raw material and a further manufacturing process was carried out namely segregation, removal of attachments and sorting of various metals is various *grade/categories. In the entire process of manufacturing the raw material was mix material, which has not any direct commercial usage for other industries. In the course of manufacturing process metals having different identity and usability are generated from the mix metal. The mix metal loses its identity and results in production of non-ferrous metal, ferrous metal, other non-metallic parts, slag or ingots by using such manufacturing metals.*

b) Old/Used Transformer

The firm has imported old & used machinery. Gadgets etc. after the completion of their useful life. The nature of the raw material was machinery, gadgets etc, distinct and identifiable articles. The machinery, gadgets etc. were used as raw material and a further manufacturing process was carried out namely opening of gadgets for removal of clean metal by machine or hand for manufacturing different metals. In the entire process of manufacturing the raw material was old and used, discarded machinery, gadgets and in the course of manufacturing process of nonferrous metal, ferrous metal, non-metallic material or ingots by using such manufactured metals."

12. The term "manufacture" was not defined in the Act till the year 2009. Currently under section 2(29BA) introduced with effect from 1.4.2009, the term "manufacture" is defined as under:-

> *"2(29BA)"manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing,-*
>
> *(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or*
>
> *(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure;"*

13. The Central Excise Act, 1944 contains definition of the term "manufacture" in section 2(f) as under:-

> *"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 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;*
>
> *and the word " manufacture" 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;*

14. The Special Economic Zones Act,2005 also defines the term 'manufacture' but in a slightly different manner. Such definition contained in section 2(r) reads as under:-

> *"2(r) "manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining;*

15. Though the three Acts mentioned above contain definitions of the term "manufacture", which definitions are worded slightly differently, the Courts have accepted the principle of fairly universal application that where the change or series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the process, it would amount to manufacture of an article or thing. Reference in this respect may be made to the decision of the Supreme Court in the case of M/s. Ujagar Prints and others (II) vs. Union of India and others reported in (1989) 3 SCC 488.

16. At the same time, it is also well settled that the word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinct name, character or use. Reference may be made in this respect to the decision of the Supreme Court in the case of M/s. Tungabhadra Industries Ltd., Kurnool vs. The Commercial Tax Officer, Kurnool reported in AIR 1961 SC 412.

17. In the present case, as pointed out by the counsel for the assessee, in case of mix cable scrap the material would be sorted and segregated in the factory in different diameters of various lengths. Thereafter, jackets and upper layers would be removed mechanically in order to make them suitable for feeding in different cable cutting machines and stripping machines. Thereafter various strips in the cables are removed and sorted cable scrap would be put in cable cutting machines for cutting and stripping. In the process, several types of copper wires would be generated. Impurities such as plastic, dust and other metals would be separated through this detailed process *and clean copper material would be sold after baling them on the baling machines and packing for export sale.*

18. Likewise, mix metal scrap would consist of several substances such as stones, rubber, steel, ferrous as well as non-ferrous metals. This would be derived mostly from dismantling of buildings and other structures and plants. Scrap as such would have no other use or marketability before subjecting to manufacturing process. Assessees would segregate and remove attachments, sorting out various metals in categories from the mix metals. This process would derive ferrous metal, other non-metallic parts etc.

19. In the case of old/used transformers the assessees would import used old gadgets and machines once their useful life is over. From such used machines and gadgets the assessees would remove metal and other parts and ultimately segregate non-ferrous and ferrous metals, non-metallic material or ingots by using such metals extracted from the gadgets.

20. It can thus be seen that in all three cases the assessees would put the imported material to series of manual and mechanical processes and through such exercise so undertaken, bring into existence entirely new, distinct and different commodities which are marketable. Thus, the Tribunal, in our opinion, correctly came to the conclusion that this process amounted to manufacturing. In the case of Vijay Ship Breaking Corporation and others vs. Commissioner of Income-tax (supra), the Supreme Court considered a question where activity of ship breaking amounted to manufacture and observed as under:-

> *"8.Firstly, in the case of Ship Scrap Traders Vs. Commissioner of Income Tax, reported in 251 ITR 807, the Bombay High Court has analysed the entire ship breaking activity, the articles which emerged*

> *from that activity, the various steps which are required to be undertaken for ship breaking activity and, consequently, after placing reliance on the judgment of this Court in Budharaja's case [1993] 204 ITR 412, it has held that the ship breaking activity resulted in production of articles which emerged when the ship breaking activity stood undertaken. In our view, the important test which distinguishes the word 'production' from 'manufacture' is that the word 'production' is wider than the word 'manufacture' as held in Budharaja's case. Further, it is true that in Budharaja's case, the Division Bench has used the word 'new article'. However, what the Division Bench meant was that a distinct article emerges when the process of ship breaking is undertaken. Further, the Legislature has used the words 'manufacture' or 'production'. Therefore, the word 'production' cannot derive its colour from the word 'manufacture'. Further, even according to the dictionary meaning of word 'production', the word 'produce' is defined as something which is brought forth or yielded either naturally or as a result of effort and work (see Webster's new international dictionary). It is important to note that the word 'new' is not used in the definition of the word 'produce'."*

21. In the case of Income-tax officer vs. Arihant Tiles and Marbles P. Ltd. reported in [2010] 320 ITR 79 (SC) in the context of the assessee's claim for deduction under section 80IA of the Act on its activity of cutting and polishing marbles, the Apex Court held and observed as under:-

> *"22. Applying the above tests laid down by this Court in Budharaja's case [1993] 204 ITR 412(SC)to the facts of the present cases, we are of the view that blocks converted into polished slabs and tiles after undergoing the process indicated above certainly*

> *results in emergence of a new and distinct commodity. The original block does not remain the marble block, it becomes a slab or tile. In the circumstances, not only is there manufacture but also an activity which is something beyond manufacture and which brings a new product into existence and, therefore, on the facts of these cases, we are of the view that the High Court was right in coming to the conclusion that the activity undertaken by the respondents assessees did constitute manufacture or production in terms of Section 80IA of the Income Tax Act, 1961."*

22. Additionally we also notice that the assessee, as an EOU is required to carry out manufacturing activity and on its DTA sales is also required to pay excise duty which admittedly, the assessee paid and excise department collected. It would be a dichotomy if on the same activity the assessees were to pay excise duty on the ground that the same amounted to manufacturing activity but would be declined deduction under the Income Tax Act on the ground that the same did not. In this context, in the case of Income-tax officer vs. Arihant Tiles and Marbles P.Ltd.(supra) the Supreme Court had observed as under:-

> *"23.Before concluding, we would like to make one observation. If the contention of the Department is to be accepted, namely that the activity undertaken by the respondents herein is not a manufacture, then, it would have serious revenue consequences. As stated above, each of the respondents is paying excise duty, some of the respondents are job workers and the activity undertaken by them has been recognised by various Government Authorities as manufacture. To say that the activity will not amount to manufacture or production under Section 80IA will have disastrous consequences, particularly in view of the fact that the assessees in all the cases*

would plead that they were not liable to pay excise duty, sales tax etc. because the activity did not constitute manufacture. Keeping in mind the above factors, we are of the view that in the present cases, the activity undertaken by each of the respondents constitutes manufacture or production and, therefore, they would be entitled to the benefit of Section 80IA of the Income Tax Act, 1961."

23. Under the circumstances Question No.(1) is answered in favour of the assessee and against the Revenue. Insofar as second question is concerned, ……."

From the above judgement it is evident that Hon'ble High Court has after considering the definition of manufacture under Income Tax Act, 1961, Central Excise Act, 1944 and SEZ Act, 2005 concluded that the processes under taken by the appellant in segregation of the scrap amounts to manufacture. In view of the above definition of the jurisdictional High Court we do not find any merits in this submission made by the appellant.

4.18 As we have upheld the invocation of the extended period of limitation as per Section 28 of the Customs Act, 1962 and Section 11A of The Central Excise Act, 1944, the penalties imposed upon the appellant 1 and appellant 3 under Section 11$A of the Customs Act, 1962 and Section 11AC of Central Excise Act, 1944 cannot be faulted with. Hon'ble Supreme Court has in the case of Rajasthan Spinning and Weaving Mills Ltd. [2009 (238) ELT 3 (SC)] held as follows:

"17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful mis-statement 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,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.*

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."

4.19 Appellant 2 and Appellant 4 has challenged simultaneous imposition of penalty upon the partnership firm and the partner. To advance this preposition they have relied upon the decisions in the following cases:

- Jai Prakash Motwani [2010 (258) ELT 204 (Guj.)];
- Mahendra Kumar [2010 (260) ELT 51 (Guj.)];

- Mohammed Farookh Mohammed Ghani [2010 (259) ELT 179 (Guj.)];

4.20 However we observe by relying upon the various decisions of Hon'ble Supreme Court a larger bench of Hon'ble Bombay High Court in case of Amritlakshmi Machine Works [2016 (335) E.L.T. 225 (Bom.)] has held as follows:

> *"89. It is thus clear from the principles of law as enunciated in the above decisions of the Supreme Court, it would not be appropriate to read that only when the partners knowingly do certain acts or omissions or when only they have the prior knowledge, that their acts amount to contravention of the provisions of Section 111 of the Act which would lead to confiscation of goods, only in that case they can be held liable for penalty under Section 112(a) of the Act. Such an interpretation would lead to reading something in Section 112(a) which is expressly kept away by the legislature. The legislature has intended exclusion of mens rea into Section 112(a) of the Act in dealing with contravention of Section 111 of the Act. This is clear as the legislature does not use the words 'knowingly' or 'wilfuly' or 'intentionally' in Section 112(a) which can be noted in other provisions, and this is certainly not accidental. If such words which can be considered to be deliberately avoided to be used by the legislature, if read into the provisions of Section 112(a), it would render Section 112(a) nugatory resulting in defeating what is intended by the legislature. The firm and the partners thus can in a given case be subjected to a simultaneous penalties for the contravention of Section 111 of the Act resulting into confiscation of the goods, however the same would be subject to the either of the parties proving that the contravention has taken place without their knowledge or despite exercise of all due diligence to prevent such contravention, which is a safeguard inherently provided by the Act. Thus as regards use of the word "abets" in Section 112(a) of the Act, it may be observed that same would not*

attract the rule of mens rea. Further it is well settled that a penalty is imposed under the Act for such acts which are in the nature of breach of a civil obligation and by an adjudicatory proceeding, different from criminal proceedings before a Criminal Court and thus would not attract the Rule of mens rea.

90. In regard to the main issue relating to the levy of simultaneous penalties a useful reference can also be made to a decision of the Division Bench of Kerala High Court in "India Sea Foods v. Collector of Customs and Central Excise, Cochin" reported in "1984 (16) E.L.T. 243 (DB)" (Writ Appeal No. 321 of 1975, dated 25 May, 1978). In dealing with the case of imposition of penalty on the firm as well as the managing partners it was held to be legal and valid. The Division Bench has made the following observations :-

> *"We do not see, and are unable to understand, why the firm and the partners thereof cannot both be adjudged guilty of contravention, or be subjected to a penalty, under the provisions of the Act. It is possible to find, as in this case, the firm guilty of an act or omission which renders the goods liable to confiscation, and at the same time to find the partners thereof guilty of abetment in the doing or omission of such act. It seems possible again to find the legal entity of a partnership liable for the act or contravention, and at the same time to hold the human agency through which it acts, also responsible for the same."*

91. As regards the issue of application of Section 135(i)(a) of the Act to adjudication proceedings under Section 112(a) of the Act and more particularly to the partnership firm and its partners, pertinently, neither of the parties have urged that Section 135 can be read while applying Section 112(a) of the Act. Moreover as noted in paragraph 47(viii) above, the appellants have urged to the *contrary. I am of the opinion that the legislature in its wisdom has worded Section 112(a) to include the firm and its partners as persons who would be liable for penalty to be levied, depending on the facts of the case. As noted above a conjoint reading of the provisions as contained in Chapter XIV shows that simultaneous penalty can be imposed on the firm and its partners, where the authorities on materials available to them are clear of the direct or indirect involvement of the partners in contravening the provisions of the Act. It is not in every case, penalty is required to be imposed simultaneously on the firm and its partners. It would obviously depend on facts and circumstances of each case. Before an order imposing a penalty is made, the authority is required to adopt a procedure as contemplated in the provisions wherein full opportunity can be availed by the person to prove that a penalty need not be imposed under Section 112(a) of the Act. The principle of mensrea is not attracted under Section 112(a) of the Act to impose penalty on those who can be said to abet the contravention. Section 112(a) is an independent provision. Section 135(i) (a) is a provision dealing with a criminal offence and thus, cannot have a relevance in penalty proceedings adopted under Section 112(a) of the Act, as the essential ingredient in respect of a criminal offence is mens rea. This is how Section 135(i)(a) specifically refers to a prior knowledge. Reading Section 135(i)(a) even remotely in the implementation of Section 112(a) would result into a legal absurdity and a violence to the provisions of Section 112(a) and defeat the clear intention of the legislature, as it would amount to incorporating a foreign ingredient or something which the legislature never intended. In the entire scheme of Chapter XIV of the Act which deals with "Confiscation of Goods and Conveyances and Imposition of Penalties", in the matter of imposing of penalties, the legislature has clearly left it to the wisdom of the executing agencies of course subject to* *the appropriate safeguards, and evaluation. In my opinion, a judicial interpretation which would further the intention of the legislature is to be adopted, if so, then an interpretation to read Section 135(i)(a) in Section 112(a) can never be contemplated as these are independent provisions having different objects. The former speaks of a criminal offence requiring the offence to be proved beyond reasonable doubt and the latter deals with a monetary penalty, to be imposed in departmental adjudication proceedings.*

92. The sequel to the above discussion is that the first question is required to be answered in the affirmative, that is simultaneous penalties can be imposed on the firm and the partners under the Act and more particularly under Section 112(a) of the Act. However as the Act itself stipulates, the same would be subject to the parties proving that the contravention has taken placed without their knowledge or despite exercise of all due diligence to prevent such contravention.

93. As regards the second question, the decision of the Division Bench of this Court in "Textoplast Industries v. Additional Commissioner of Customs" reported in 2011 (272) E.L.T. 513 (Bom.) lays down the correct law in holding that it is permissible to impose penalty separately on partnership firm and the partners in adjudication proceedings under the Customs Act."

Relying upon this decision, Hon'ble Madras High Court has in the case of N. Chittaranjan [2017 (350) E.L.T. 78 (Mad.)] held as follows:

"8. The question of law raised in this appeal has already been answered in the above cited two judgments rendered by a Division Bench as well as Full Bench of Bombay High Court. In 2011 (272) E.L.T. 513 (Bom.) (DB), it has been held that for the purpose of imposing penalty, the adjudicating authority under Customs Act, 1962 may in an appropriate case impose a penalty both upon a partnership

Firm as well as on the partners and whether the facts and circumstances of a case warrant imposition of penalty both on the Firm and its partners should be decided on the facts of each case. A perusal of the order-in-original dated 22-11-2010 would indicate that the factual finding has been recorded as to the evasion of law and after giving fair and reasonable opportunity to the concerned parties only, imposition of penalty was done. As rightly pointed out by the learned Standing Counsel appearing for the respondents, what was canvassed before the Appellate authority as well as the CESTAT was only with regard to the quantum of penalty and taking note of the said submission, it has been reduced.

9. In the considered opinion of the Court, in the light of the above cited judgments, penalty on the partner as well as the partnership Firm can be simultaneously imposed and of course, imposition of penalty both on the Firm and its partners, depends upon the facts of each case."

4.21 In view of the decisions as above, it is clear that there is no bar on simultaneous imposition of penalty on the partnership firm and partner. The only thing that needs to be established for imposition of penalty upon the partner is that he was actively in knowledge and involved in acts of omission and commission leading to contravention of the provisions of the statute and leading to evasion of duty and goods becoming liable for confiscation. Show cause notice in para 37 while recording the role of Shri Ramesh Jain, Partner (Appellant 2 & 4) has recorded as follows:

"37. Shri Ramesh Jain of M/S. Sameer Industries, KASEZ has conspired with Shri S. K. Agarwal @ S.K. Gupta of M/S. Lord Empire International, Shri Dinesh Kumar Jain of M/S. Laxmi Enterprises and Shri Riaz ul Hasan of M/S. MIEC to clear dutiable goods from a unit in KASEZ under the guise of clearance to advance licence holders and to divert the same in to open market. Shri Ramesh Jain claimed to have come in to contact with Shri S.K.Gupta @

S.K.Agarwal, Shri Dinesh Kumar Jain through a transporter friend namely G.S.Anand in Mumbai. Shri S.K. Gupta @ S.K.Agarwal had Advance Licence in the name of M/S. Lord Empire International and Shri Dinesh Kumar Jain had an advance licence obtained in the name of M/S. Laxmi Enterprises. He had also obtained the advance release orders from Shri Riaz ul Hasan. Shri Ramesh Jain had a unit engaged in segregation of copper scrap in KASEZ. They had exploited the conditions of advance Licences for pecuniary gains that were not due to them. They have managed Advance Release Orders against Advance Licences from the DGFT for procurement of copper scrap/Brass scrap form M/S. Sameer Industries, KASEZ as indigenous supplier. As a part of well-hatched conspiracy, Shri Ramesh Jain had suggested the name of M/S. Sonal Freight Carriers, Gandhidham to Shri S.K.Gupta for transportation of the goods from M/S. Sameer Industries, KASEZ to M/S. Lord Empire International, Delhi, M/S. Laxmi Enterprises Delhi and M/S. MIEC Moradabad. Accordingly, M/S. Sonal Freight Carriers, Gandhidham, arranged for the transportation so claimed. As part of the conspiracy, M/S. Sameer Industries, KASEZ fabricated records to show that they have supplied 140 MT Copper scrap to M/S. Lord Empire International Delhi under Advance Release Order No. 03/84/072/AM-03/ALS-V dated 06.02.2003 issued against Advance Licence No. 0310156347 dated 03.09.2002; 100 MT of copper scrap to M/S. Laxmi Enterprises, Delhi against Advance Release Order No. 03/83/021/AM-03/ALS-V dated 27.09.2002 issued against Advance Licence No. 0310143243 dated 21.06.2002; 1258.848 MT Brass Scrap to M/S. MIEC, Moradabad against Advance Release Order No. No.29/0001 dated 04.07.2003 and ARO No. 29/AM03 dated 04.06.2004 issued against Advance Licence No. 2910004059/4/03/00 dated 13.01.2003. The copper scrap/brass scrap was claimed to have been transported to *non-existent addresses. Shri Ramesh Jain claimed to have met Shri S.K.Gupta in Delhi and had even supplied their address. However, Summons No. CA-26/1251 dated 20.10.2004 issued to Shri S.K.Gupta on the address supplied by Shri Jain was received by one Shri Shiv Kumar Gupta, which was returned back. Shri Ramesh Jain in his statement dated 13-12-2004 stated that their claim of transportation can be verified from the records of M/S. Sonal Freight Carriers. Shri Ratan M. Gadhavi, proprietor of Shri Sonal Freight carriers, the transporter for the above transaction in his statement dated 03.02.2005 had stated that he had prepared the Builties as per the information given by M/S. Sameer Industries; he could not say that the goods have been received by the company for which they were claimed to have been consigned. This falsifies the claim of Shri Ramesh Jain and M/S. Sameer Industries. In his various statements he undertook to contact Shri S.K.Gupta@ S.K.Agarwal of M/S. Lord Empire International and make him pay the duty revaded. Even tough he claims to have met Shri S.K.Gupta@ S.K.Agarwal but hedid not to produce him and did not volunteer to pay up the duty evaded. It is be concluded under these circumstances that Shri Ramesh Jain was making claims only to avoid payment of duty evaded and consequent punitive action. It has to be concluded that Shri Ramesh Kumar Jain of M/S. Sameer Industries KASEZ had hatched the conspiracy. The amounts stated to have been received in the form of DD/Cheque by M/S. Sameer Industries from different parties are to be seen as part of well-organized conspiracy. It is seen that Shri S.K.Gupta @S.K.Agarwal of M/S. Lord Empire International and Shri Dinesh Kumar Jain of M/S. Laxmi Enterprises and Shri Riaz ul Hasan have actively cooperated in deft execution of the conspiracy hatched to clear copper scrap/brass scrap duty free from a unit situated in KASEZ and to divert the same in to open market. All the conspirators have rendered themselves to* *pay penalty under Rule 26 of the Central Excise Rules 2002 and Section 112 of the Customs Act 1962. Shri Ramesh Jain was arrested on 22.02.2005 by DRI, Gandhidham and was produced before the Chief Judicial Magistrate Bhuj, Kutch on 22.02.2005. The Hon'ble Sessions Judge vide order dated 14.03.2005 had granted conditional bail to Shri. Ramesh Jain."*

Thus when it is specifically alleged and found that Shri Ramesh Jain was actively conniving and conspiring with the buyers for clandestinely diverting the imported goods in DTA without payment of duty, we do not find any reason to differ with the findings recorded in the impugned order for imposition of penalties upon him.

4.22 Thus, we do not find any merits in these appeals.

5.1 Appeals are dismissed.

(Order pronounced in open court on- 10.07.2026)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

(Dr. AJAYA KRISHNA VISHVESHA)
MEMBER (JUDICIAL)

Akp