CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. I

1. Customs Appeal No. 40192 of 2019

(Arising out of Order-in-Original No. 54992/2017 dated 28.02.2017 passed by the Commissioner of Customs, No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

M/s. Chessman Impex Private Limited **...Appellant**
P-17, Kalakar Street,
Kolkata – 700 007.

Versus

Commissioner of Customs **...Respondent**
Chennai II Commissionerate,
No. 60, Rajaji Salai,
Custom House,
Chennai – 600 001.

With

2. Customs Appeal No. 42083/2018 (Mr. Surendra Kumar Gangwal)
3. Customs Appeal No. 42084/2018 (Mr. Rajib Upadhyaya)
4. Customs Appeal No. 42284/2018 (Mr. Samir Saha Baid Organisation Pvt. Ltd. CHA)
5. Customs Appeal No. 42285/2018 (Mr. Vikas Kumar Jain Carriers)
6. Customs Appeal No. 42286/2018 (M/s. Baid Organisation Pvt. Ltd. CHA)
7. Customs Appeal No. 42287/2018 (Mr. Mahendra Kumar Patni)

APPEARANCE:

For the Appellants : Mr. Indranil Banerjee, Advocate
For the Respondent : Ms. Rajini Menon, Authorised Representative
Mr. Sanjay Kakkar, Authorised Representative

CORAM:
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAYAN T.V., MEMBER (JUDICIAL)

FINAL ORDER Nos. 40955-40961 / 2026

DATE OF HEARING : 27.05.2026
DATE OF DECISION : 21.08.2026

Per Mr. VASA SESHAGIRI RAO

These seven appeals, namely Customs Appeal Nos. C/42083/2018, C/42084/2018, C/42284/2018, C/42285/2018, C/42286/2018, C/42287/2018 and C/40192/2019, arise out of Order-in-Original No. 54992/2017 dated 28.02.2017 passed by the Commissioner of Customs, Chennai-IV and involve common questions of fact and law. Since the impugned order emanates from a common Show Cause Notice and the issues involved are interconnected, all the appeals are taken up together and disposed of by this common order.

2. Briefly stated, Chessman Impex Pvt. Ltd./Noticee No.1 was issued a DEEC Licence dated 14.08.2000 by the Joint DGFT, Calcutta under the Exim Policy 1997-2002, permitting duty-free import of 5350 MTs of non-alloy re-rollable scrap cuttings, against an export obligation of 5000 MTs of non-alloy steel bars and rods of 5.5 mm–12 mm, which was subsequently amended to 5.5 mm–25 mm. The licence was utilised for imports under three Bills of Entry dated 25.08.2000, 05.03.2001 and 30.03.2001. The material covered by Bill of Entry No.25448 dated 25.08.2000, measuring 2480.640 MTs, was dispatched to the declared supporting manufacturer, Goyal Ispat Ltd., Chennai, and utilised for manufacture of 2353.760 MTs of CTD bars, which were exported to Bangladesh through Ghojadanga Land Customs Station under AR-4s/ARE-1s. In respect of the other two Bills of Entry, the foreign buyer, George Waller Overseas

Limited, Dubai, permitted segregation and export of the unmanufactured raw material in view of the delay in completion of exports. After excluding wastage of 223.130 MTs, 2646.230 MTs were exported through Ghojadanga LCS. The exports were consigned to M/s Noor Islam, Bangladesh, pursuant to special permission granted by the Chief Commissioner of Customs (Preventive), West Bengal. Export proceeds in respect of all 73 Bills of Export were realised and an Export Obligation Discharge Certificate was subsequently issued.

3. In February 2002, DRI, Kolkata commenced investigation into the said exports on the allegation that they were fraudulent. Records were seized and statements of several persons were recorded, some of which were subsequently retracted. The DRI also verified the position with Goyal Ispat Ltd., the Public Vehicles Department and the office of the First Secretary, Indian Embassy at Kathmandu. A Show Cause Notice dated 31.08.2004 was thereafter issued to eight noticees alleging, inter alia, diversion of the duty-free imported scrap in contravention of Notification Nos.30 and 31/1997-Cus. dated 01.04.1997, failure to fulfil the export obligation and fraudulent export of maize to Bangladesh in place of the stipulated non-alloy steel bars and rods. It was further alleged that the exports were

mis-declared with the connivance of the other noticees and that the goods were liable to confiscation under Sections 111(o), 113(d) and 113(i) of the Customs Act, 1962, besides recovery of customs duty forgone of Rs.2,16,93,068.34, interest and penalties under Sections 112(a) and 114(i).

3.1 In the meanwhile, the CBI/ACB, Kolkata, on the self-same allegations relating to the exports, registered an FIR dated 22.06.2004 against, inter alia, Shri Prabhas Chandra Biswas, Superintendent of Customs, Chessman Impex Pvt. Ltd. and Baid Organization Pvt. Ltd. After detailed investigation, the CBI filed a final report dated 08.06.2005 before the competent Criminal Court, recording, inter alia, that the available evidence indicated that the disputed exports to Bangladesh had in fact taken place. The report also referred to the particulars of the vehicles carrying the export goods as recorded in the Immigration Check Post and DEEC registers and to the realisation of export proceeds. The said final report was accepted by the competent Criminal Court.

3.2 During adjudication, the noticees filed detailed replies and written submissions and attended personal hearings. By the impugned Order-in-Original dated 28.02.2017, the Commissioner confirmed against Chessman

Impex Pvt. Ltd. recovery of customs duty forgone of Rs.2,16,93,068/-, together with interest and penalties of Rs.20,00,000/- each under Sections 112(a) and 114(i) of the Act, besides imposing penalties upon the co-noticees. It is pertinent that Shri Prabhas Chandra Biswas has since expired. The present appeals challenge the said common order.

Submissions of the Appellant

3.3 The Ld. Advocate Shri Indranil Banerjee submitted that the allegations in the impugned order are not supported by reliable and corroborative evidence and that the findings of the CBI, which investigated the very same alleged fraudulent exports and whose final report was accepted by the competent Criminal Court, could not have been brushed aside without proper consideration. It was submitted that the CBI investigation had specifically examined the movement of the vehicles through the Immigration Check Post, the DEEC records and the realisation of export proceeds and had found material supporting the actual export of non-alloy steel bars and rods to Bangladesh. Reliance was placed on *Commissioner of Customs, Trichy v. Duraiappa, 2019 (367) E.L.T. 628 (Mad.), Control Print Ltd. v. Narcotics Control Bureau, 2017 (50)*

S.T.R. 114 (S.C.) and *CIT v. Bhupen Champak Lal Dalal, [2001] 248 ITR 830 (S.C.).*

3.4 The Ld. Counsel further submitted that several contemporaneous documents independently supported the appellant's case, including the special permission granted by the Chief Commissioner of Customs (Preventive), West Bengal; examination and certification of the export consignments by the Customs authorities at Ghojadanga; certification of the AR-4s/ARE-1s by the jurisdictional Central Excise authorities; the foreign buyer's letter dated 20.04.2001 permitting segregation and export of unprocessed material; the statement of the CHA's clerk, Shri Samir Saha; and the subsequent realisation of export proceeds. It was emphasised that no adverse action had been taken by the Foreign Trade or FEMA authorities and that the Export Obligation Discharge Certificate issued by the competent DGFT authority remained unchallenged.

3.5 The Ld. Counsel contended that the adjudicating authority had travelled beyond the allegations in the Show Cause Notice while questioning the classification of CTD bars, the availability of 16 mm bars with the supporting manufacturer and the amendment dated 24.05.2001 to the DEEC licence. The appellant's explanation regarding Item

Code C513 of SION, which recognised CTD bars as a subset of non-alloy steel bars and rods, was not properly considered. The findings in the impugned order were also stated to be internally inconsistent, particularly where, at one place, the adjudicating authority observed that the specified export goods were either not manufactured or were manufactured but diverted, while elsewhere it recorded that the goods had not been manufactured at all. The adverse observations regarding the Bank Realisation Certificates and receipt of foreign exchange were also challenged as being unsupported by the allegations in the Show Cause Notice.

3.6 It was further submitted that the Show Cause Notice was fundamentally defective insofar as the supporting manufacturer, Goyal Ispat Ltd., was not made a noticee. The entire quantity covered by Bill of Entry No.25448 dated 25.08.2000 had been received and utilised by Goyal Ispat Ltd. for manufacture of 2353.760 MTs of CTD bars, which were cleared for export under AR-4s/ARE-1s bearing the certification of the Central Excise authorities. The representative of Goyal Ispat Ltd. had confirmed the manufacture and export in his statement dated 04.03.2002 and DRI, Chennai had also confirmed the position by letter dated 25.03.2002. In these circumstances, there was no basis for the adjudicating authority to conclude that the corresponding export goods had either not been manufactured or had been diverted to the domestic market.

3.7 The Ld. Counsel submitted that there was no independent evidence whatsoever to establish either diversion of the duty-free imported scrap into the domestic market or procurement and export of maize to Bangladesh. No buyers of the alleged diverted goods were examined; there was no cash trail, evidence of procurement or transportation of the alleged maize consignments, evidence of domestic disposal, seizure of the offending goods or any other material linking the appellant with the alleged diversion. Reliance was placed on *Namdev Exports v. Commissioner of Customs (Port), Kolkata, (2024) 18 Centax 341 (T),* the departmental appeal against which was dismissed in (*2024) 18 Centax 368 (Cal.),* and on the Final Order dated 06.06.2022 of the Ahmedabad Bench of the Tribunal in Rajhans Impex Pvt. Ltd. v. CC-Mundra & connected appeals.

3.8 The Ld. Counsel also challenged the reliance placed by the adjudicating authority on the letter dated 26.01.2004 from the Commissioner of Customs, Benapole, Bangladesh. It was submitted that the said communication did not establish that Chessman Impex had exported maize to M/s Noor Islam and did not refer to the relevant period, movement of the vehicles from India to Bangladesh or any official border record. The covering letter dated 28.01.2004 from the Indian Embassy at Kathmandu also did not corroborate the Department's allegation.

3.9 The Ld. Counsel further submitted that the impugned order placed substantial reliance on the statements of Shri Surendra Kumar Gangwal, Shri Vikas Kumar Jain and Shri Samir Saha, despite the fact that several statements had been retracted and the manner of investigation and interrogation had been challenged before the Hon'ble Calcutta High Court. Shri Surendra Kumar Gangwal had specifically retracted his statement on 13.02.2002. It was contended that such retracted statements could not constitute the substantive basis of the allegations in the absence of independent corroboration. Reliance was placed on *Priya v. Commissioner of Customs, 2019 (370) E.L.T. 1668 (T), Vinod Solanki v. Union of India, 2009 (233) E.L.T. 157 (S.C.)* and *Mohtesham Mohd. Ismail v. Special Director, 2007 (220) E.L.T. 3 (S.C.).*

3.10 The Ld. Counsel pointed out material inconsistencies in the statements relied upon by Revenue. Shri Surendra Kumar Gangwal, in his statement dated

11.02.2002, initially stated that both maize and wire rods had been exported during December 2001 to January 2002, but in his subsequent statement dated 12.02.2002 stated that only maize had been sent to Bangladesh. Shri Vikas Kumar Jain, on the other hand, stated that about 280 trucks had carried 5 MTs of maize each, which would account for only about 1400 MTs, whereas the Department's case involved the entire quantity. He also stated that Shri Satyendra Nath Mishra had arranged the trucks, but the said person was never examined. The statement of the alleged truck owner, Shri Satish Tripathy, dated 21.03.2002 was also challenged as unreliable and inadequately considered by the adjudicating authority.

4. In relation to the co-noticees, The Ld. Counsel submitted that the penalties under Sections 112(a) and 114(i) were equally unsustainable in the absence of proof of connivance or abetment. In particular, Shri Mahendra Kumar Patni had no connection with the affairs of Chessman Impex Pvt. Ltd., although the impugned order incorrectly described him as its Managing Director, and no statement of his was available on record. It was further submitted that there was nothing incriminating in the statements of Noticee No.8, Shri Samir Saha, which were, in fact, consistent with the version of Shri Prabhas Chandra Biswas. The transporter, Customs

House Agent and its employee had also been penalised without any reliable evidence establishing their involvement in the alleged fraudulent exports.

5. On behalf of the Revenue, the Ld. Authorized Representatives, Ms. Rajini Menon and Shri Sanjay Kakkar supported the findings recorded in the impugned order and sought dismissal of all the appeals. It was submitted that Shri Mahendra Kumar Patni had acted as the mastermind behind the alleged fraudulent exports and was therefore rightly penalised. Revenue also contended that the CBI closure report did not preclude the adjudicating authority from independently examining the evidence and that the exporter could not rely merely upon the subsequent grant of export obligation discharge. Reliance was placed on *Sheshank Sea Foods Pvt. Ltd. v. Union of India, 1996 (11) TMI 67-Supreme Court*. It was further submitted that the retractions were subsequent in nature and that the statements recorded during investigation were rightly relied upon by the adjudicating authority.

6. We have carefully considered the records of the case, the written submissions and the compilation placed on record, and have also heard the submissions made by both sides. On a comprehensive examination of the material

available on record, we find that the findings recorded in the impugned Order-in-Original dated 28.02.2017 cannot be sustained for the following reasons recorded as below.

7. The Show Cause Notice dated 31.08.2004 alleges that Noticee No.1 disposed of duty-free scrap imported under the DEEC licence in the domestic market and, in lieu of the stipulated export of non-alloy steel bars and rods, maize was exported to Bangladesh under 73 allegedly fraudulent Bills of Export. The notice alleges contravention of clause 3(3) of the Export Control Order, 1988 read with Sections 3 and 11 of the Foreign Trade (Development & Regulation) Act, 1992, Rule 11 of the Foreign Trade (Regulation) Rules, 1993, Notification Nos.30 and 31/1997-Cus. dated 01.04.1997 and Sections 111(o), 112(a), 113(d), 113(i) and 114(i) of the Customs Act, 1962. Now it is imperative to examine the evidence relied upon by the Department in support of these allegations.

8. We find considerable force in the submission of learned Counsel that the findings recorded by the CBI and the acceptance of its closure report by the competent Criminal Court were material circumstances which required due consideration by the adjudicating authority. The relevant legal position is laid down in *Commissioner of Customs,*

Trichy v. Duraiappa, 2019 (367) E.L.T. 628 (Mad.), the relevant portions of which are extracted below: -

> "…………….
> 2. The reason assigned by the Learned Tribunal for setting aside the penalty as discussed in paragraphs 10.1 to 10.3, are quoted below for ready reference :
>
> > "10.1 The question now arising to be considered is whether the present proceedings should be wound up in the light of the criminal court's judgment. This question has been agitated before us on the strength of a plethora of decisions. In the case of Capt. M. Paul Anthony (supra), the appellant was a security officer in the respondent-company, a government undertaking. He was placed under suspension and disciplinary as well as criminal proceedings were initiated against him on the ground that, in a police raid, mining sponge gold ball weighing 4.5 grams and 1276 grams of gold-bearing sand were recovered from his house. The raid was conducted at the appellant's residence on 2-6-85. He was placed under suspension on 3-6-85. Disciplinary proceedings were initiated against him by issuing a charge sheet on 4-6-85. On 3-2-87, the appellant was acquitted in the criminal case with a categorical finding that the prosecution had failed to establish that "raid and recovery" were made at the appellant's residence. In the meantime, the appellant had already been dismissed from service on the basis of disciplinary proceedings initiated against him. On 12-2-1987, the appellant requested for his reinstatement in service in view of his acquittal in the criminal court. This request was turned down by the respondents. The appeal filed against the respondent's decision was rejected by the appellate authority. The appellant then approached the High Court with a writ petition challenging the validity of the order of dismissal on various grounds. In that writ petition, he, inter alia, contended that the departmental proceedings and the criminal case against him were based on the same set of facts. The departmental proceedings should have been stayed till the outcome of the criminal case. The writ petition was allowed by a single Judge of the High Court directing the respondents to reinstate the appellant. The High Court, however, gave the liberty to the respondents to initiate fresh proceedings against the appellant after perusing the judgment passed in the criminal case. The judgment passed by a Learned Single Judge was set aside by a Division Bench of the High Court in a letters patent appeal filed by the respondents. The judgment of the Division Bench was taken in appeal to the Supreme

Court. The Apex Court found that the appellant had been acquitted in the criminal case on the same set of facts and evidence as used in the disciplinary proceedings and accordingly, the Court held that it would be unjust, unfair and oppressive to allow the departmental proceedings to stand after the order of acquittal passed by the criminal Court.

10.2 In Gopaldas’ case, the Apex Court was considering the question whether the order of confiscation of gold passed by the adjudicating authority under the Gold (Control) Act, 1968 should be allowed to stand against an order of acquittal of the appellant passed by a criminal court. It was held that mere acquittal by a Magistrate could not in every case result in setting aside of order of confiscation passed by the competent authority. However, where the accused rebutted the statutory presumption under Section 98B of the Gold (Control) Act, the order of confiscation could not stand against the acquittal. The provisions of Section 138A of the Customs Act, referred to by ld. Senior Advocate, are pari materia with those of Section 98B of the Gold (Control) Act, (since repealed). The provisions enabled the court to presume the existence of mens rea if it was a necessary ingredient of the offence charged. They also enabled the accused to rebut the presumption by proving beyond reasonable doubt that he had no culpable mental state with respect to the offence charged against him. The evidence adduced by the accused should be enough to make the court believe beyond reasonable doubt that he had no such culpable mental state. What the Apex Court held in the Gopaldas’ case was that, where the presumption under Section 98B of the Gold (Control) Act was rebutted by the accused, the order of confiscation of gold by the adjudicating authority under the said Act could not be allowed to stand against the order passed by the criminal court acquitting the accused after considering the same set of facts and evidences. But, at what stage was the accused to rebut the presumption? This question was also answered by the court in Gopaldas' case following its earlier decision in Inder Sain v. State of Punjab, (1973) 2 SCC 372. It was held (vide paras 18 & 19 of Gopaldas), on the facts of that case, that, once the prosecution adduced evidence of the accused having been in possession of primary gold, it was upto the accused to rebut the presumption of mens rea by proving that he did not knowingly possess the forbidden goods. In the instant case, the Criminal Court has held that the prosecution could not prove the charge framed against the appellants by the customs authorities in terms of Section 135(1)(b), i.e., they failed to show that the *appellants had physically dealt with the ball bearings with the knowledge or belief that these goods were liable to confiscation under Section 111. The court doubted the veracity of the prosecution plea that the accused had physically dealt with 1,31,076 ball bearings recovered from the ship. After examining files relating to auction sale of the confiscated ball bearings, the court found that over 21,000 ball bearings in excess of the confiscated ball bearings (1,31,076) had been auctioned by the Department, which could not be explained by the prosecution witnesses. The Court pointed out many other defects of investigation and flaws of prosecution and came to the conclusion that the charge against the accused had not been proved beyond doubt. Thus, it is discernible from the criminal Court's judgment that the prosecution could not even prove the alleged fact that the accused physically dealt with 1,31,076 ball bearings. Hence the Court had no occasion to presume anything against the accused in terms of Section 138A(1) and therefore, the accused had no liability to rebut any presumption under the said provision. This is because, as ruled by the Apex Court in GopaIdas' case, it is only after the prosecution has adduced clear evidence of the accused having physically dealt with the offending goods that the accused would assume the burden of proving that they so dealt with the goods without mens rea i.e, without the knowledge or belief that the said goods were liable to confiscation under Section 111. Thus, for the appellants, the present case stands on a stronger footing than Gopaldas' case wherein the prosecution could prove the fact that the accused was in possession of gold but the presumption of mens rea in relation to the said fact was rebutted by the accused.*

10.3 We have found that the offence charged against the appellants in both the adjudication and prosecution proceedings is substantially the same. Both the cases are based on the same set of facts. The evidence considered by the adjudicating authority and the criminal Court is, by and large, the same. After appreciating the evidence, the criminal Court acquitted the accused after finding that the charge against them had not been proved. In the circumstances, we are of the view that the judicial approach taken in Paul Anthony's and Gopaldas' cases can be applied to this case and, accordingly, the order passed by the adjudicating authority imposing penalties on the appellants cannot stand in the face of their acquittal by the criminal Court."

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10. The Hon'ble Supreme Court in the case of Capt. M. Paul Anthony v. Bharat Gold Mines Ltd., 1999 (3) SCC 679, dealing with the similar situation in service law held that where the criminal case as also the departmental disciplinary proceedings were based on identical set of facts and evidence viz., the raid conducted at the appellant's residence and recovery of incriminating articles therefrom, the same set of evidence in the form of the police officers and panch witnesses, who had raided the appellant's house and effected recovery and they were the only witnesses examined by the Enquiry Officer in the departmental enquiry also. In such circumstances, once the Criminal Court had acquitted the appellant, there was no basis to sustain the punishment imposed on the appellant in consequence of the departmental proceedings.

…….

13. The initial part of the provisions under Section 135 of the Act, which provides for prosecution under the Customs Act, 1962 viz., "without prejudice to any action that may be taken under this Act..." also further fortifies that even though without prejudice to the penal action, which the Authorities under the Act, may take under Section 112 of the Act, the Department can proceed for prosecution, but a similar "without prejudice" or non obstante clause is not provided for in Section 112 of the Act. The sequences of these two provisions viz., penalty provision in Section 112 of the Act and then prosecution under Section 135 of the Act coming after that also has a chronological meaning arising out of that. While two proceedings can be undertaken one after the another or even simultaneously but nonetheless, there is no provision in the Act, which permits the Authorities to impose and sustain the penalty under Section 112 of the Act, notwithstanding the acquittal in the prosecution proceedings under Section 135 of the Act. The purpose, as stated above is clear; to avoid the double jeopardy or double whammy of the accused persons or assessees on the same set of facts and evidences. Therefore, unless the prosecution or the Revenue can point out the different set of facts or evidence available with them to sustain and segregate one proceedings on the another, the law laid down by the Hon'ble Supreme Court in Capt. M. Paul Anthony's case will squarely apply to the facts of the present case also.
……….……"

9. The ratio laid down in *Control Print Limited v. Narcotics Control Bureau,* reported in *2017 (50) STR 114*

(SC) and *CIT v. Bhupen Champaklal Dalal,* reported in *(2001) 248 ITR 830 (SC)* are also in favour of the appellant.

10. The Ld. Authorized Representatives sought to distinguish the above decisions on the ground that the standard of proof in criminal proceedings is higher than that applicable in adjudication proceedings under the Customs Act and that there is no legal bar to simultaneous continuation of criminal and departmental proceedings. Even if these submissions are accepted, the factual position in the present case remains that the CBI is a premier investigating agency, its closure report was accepted by the competent Criminal Court, and the adjudicating authority, while differing from that conclusion, did not identify any additional material or specific evidence which had not been considered by the CBI.

11. We have also examined the other evidence and circumstances available on record. The material referred to below supports the appellant's case regarding utilisation of the imported materials under the DEEC licence and export of the resultant goods to Bangladesh.

i. Special permission granted in favour of Chessman Impex Pvt. Ltd by the Chief Commissioner of Customs (Preventive), West Bengal, as regards whereto there was appropriate endorsement on each Bill of Export;

ii. Examination of export consignments by the then Superintendent of Customs (Prev.), Sri Prabhas Chandra Biswas and selective appraisement by the Inspector of Customs, Central Appraisement Unit, West Bengal;

iii. Certification on AR-4s/ARE-1s by the Chennai Central Excise authorities as well as the confirmation by DRI, Chennai vide letter dated 25.03.2002, insofar as manufacture of export products by the supporting manufacturer, Goyal Ispat Limited was concerned;

iv. Written permission dated 20.04.2001 by the foreign buyer, George Waller Overseas Company Limited, Dubai for segregation and export of unprocessed scrap;

v. Absence of evidence establishing diversion of duty free materials imported under the 3 Bills of Entry dated 25.08.2000, 05.03.2001 and 30.03.2001;

vi. Undisputed realization of export proceeds and grant of export obligation discharge by the appropriate Foreign Trade Authority, Ministry of Commerce & Industries.

The special permission granted by the Chief Commissioner of Customs (Preventive), West Bengal for export through the Ghojadanga LCS, coupled with the examination and appraisement of export consignments by Customs officers, lends material support to the appellant's contention that the consignments and connected documents were subjected to official scrutiny before their movement across the border.

12. Further, the certifications of Shri Prabhas Chandra Biswas may require a degree of caution if to be assumed, the other evidence available on record cannot be disregarded. The manufacture of finished goods from the imported scrap covered by Bill of Entry No.25448 dated 25.08.2000 and their subsequent export under AR-4s/ARE-1s duly certified by the jurisdictional Central Excise authorities remain substantially uncontroverted. Shri T. Balaji of Goyal Ispat Ltd. also confirmed the manufacture and export of CTD bars in his statement dated 04.03.2002, which position was further confirmed by DRI, Chennai, vide letter dated 25.03.2002.

13. As regards the allegation concerning segregation and export of unprocessed scrap, we are not persuaded to accept every aspect of the defence put forth by the principal noticee. Nevertheless, the Export Obligation Discharge Certificate issued by the competent DGFT authority, which has neither been shown to have been cancelled nor subjected to any adverse proceedings, is a material piece of evidence and cannot be brushed aside in the absence of credible evidence to the contrary. Having regard also to the

extended definition of "manufacture" under the then applicable EXIM Policy, 1997-2002, we find no sufficient basis to sustain the finding that the appellant had misutilised the DEEC benefit or failed to fulfil the export obligation.

14. We have considered the decision of the Hon'ble Supreme Court in *Sheshank Sea Foods Pvt. Ltd. v. Union of India,* reported in *1996 (11) TMI 67 (S.C.),* relied upon by Revenue. The said decision recognises the jurisdiction of the Customs authorities to examine the utilisation of raw materials imported under an advance licence and to take appropriate action under Section 111(o) of the Customs Act. The said decision, however, does not advance the case of Revenue in the facts before us. The controversy in the present case is not merely whether the Customs authorities could examine the alleged violation of the DEEC conditions, but whether the Department has established, on the basis of reliable and corroborative evidence, that the appellant had in fact diverted the duty-free imported material and had substituted maize for the resultant products required to be exported. As already discussed, the very transaction had been investigated by the CBI as well as the DRI and the material relied upon by Revenue does not satisfactorily establish the alleged fraudulent exports. The ratio of Sheshank Sea Foods, therefore, is distinguishable on facts.

15. Revenue has also alleged violation of the conditions of the DEEC licence and Notifications Nos. 30/1997-Cus. and 31/1997-Cus. dated 01.04.1997 on the ground that the CTD bars manufactured by M/s. Goyal Ispat Ltd. and exported under ARE-1s/AR-4s did not conform to the description of the goods required to be exported. We find that, while examining this aspect, the adjudicating authority has entered into issues relating to the classification of CTD bars, availability of 16 mm bars and the subsequent amendment of the DEEC licence, which were not the specific allegations contained in the Show Cause Notice. It is settled that the adjudicating authority cannot travel beyond the allegations made in the Show Cause Notice and confirm a demand on a ground which was not proposed therein. The appellant had also specifically explained the relevance of Item Code C513 of SION and its contention that CTD bars constitute a form of non-alloy steel bars and rods. The said explanation could not have been rejected by introducing a new basis of adjudication. We also find that the adverse observations made in the impugned order with regard to bank realisation certificates and receipt of foreign exchange are not supported by sufficient material on record.

16. The reference in the impugned order to certain “grey areas”, even if taken at its highest, may give rise to a

doubt regarding fulfilment of the export obligation; it cannot, however, take the place of evidence establishing the alleged contravention. The burden was upon Revenue to establish the alleged diversion and fraudulent export by reliable evidence. The provisions of Sections 112 and 114 of the Customs Act being penal in nature, the ingredients necessary for invoking the said provisions must be established by cogent evidence. In the present case, we do not find any independent evidence in the form of statements of the alleged buyers of the diverted material, any money or cash trail, evidence regarding procurement or transportation of the alleged maize consignments, proof of domestic disposal, seizure of the offending goods or any other material directly connecting the appellant with the alleged diversion. In the absence of such corroborative evidence, the allegation of diversion or clandestine disposal of the imported material cannot be sustained.

17. Our above conclusion also finds support from the decision of the Ahmedabad Bench of this Tribunal in Rajhans Impex Pvt. Ltd. v. CC-Mundra and connected appeals, Final Order dated 06.06.2022, relied upon by the appellants. The relevant observations of the said decision, which have a bearing on the controversy before us, are extracted below: -

> "*……….*.
> *1.2 Briefly stated facts of the case are that the appellant are engaged in the manufacture of Brass Rods. Based on the*

intelligence that Appellant had indulged in gross misuse of Advance Authorisation scheme, the factory premises of Appellant was searched by the officers of DRI, Jamnagar and documents were recovered. The scrutiny of the documents revealed that, besides physical exports, Appellant also cleared Brass and Copper Alloys Rods to 100% EOUs and SEZ and availed the benefit of Deemed Exports thereon and subsequently they claimed Advance Authorization from the DGFT, Rajkot for duty free import of raw materials i.e. Brass/Copper Scrap/Zinc Scrap; that they had done physical exports under claim of Rebate and also clearances were made to 100% EOU and SEZs on payment of Central Excise Duty which was later claimed back through refund from the DGFT (in case of EOU units) and their Jurisdictional Central Excise Division (in case of SEZ units); that they have availed the Cenvat Credit of CVD and SAD on imports of Brass scrap after payment of duty and same was later shown as utilized for payment of duty on clearances made for domestic sales as well as exports and deemed exports; that the clearances were mostly done to 100% EOUs without any CT-3 and on payment Central Excise Duty which was later claimed back through refund of Terminal Excise Duty (TED) from the DGFT, Rajkot and in a few cases the clearances were made to 100% EOUs under CT-3 and similarly where clearances of Brass Rods and Copper Alloys Ingot were shown to have made to 100% EOUs on payment of duty without cover of any CT-3, they post of such clearances claimed Advance Authorisation from DGFT Rajkot and also refund of TED from DGFT. Investigation were carried out in cases where Appellant had shown the deemed export clearances to the various 100% EOUs in terms of Para 8.3 of the FTP incorporating verification of these clearances and also recording of the statements of the concerned persons of the recipient EOUs. Letters were also written to the Jurisdictional Central Excise officers of recipient EOUs to ascertain the facts with regard to actual clearance of the Brass Rods and Copper Alloys Ingots. The investigation also include statements of some of the vehicle owners which were also recorded to ascertain the actual transportation whether made or not as shown by Appellant. Investigation revealed the fact that, the deemed exports clearances shown to the 100% EOUs were not genuine and were on paper only. It appear that Appellant is not eligible for advance authorization for duty free imports of Brass/Copper/Zinc Scraps against the deemed export clearances shown to the 100% EOUs namely M/s Shrijkrupa Exports, M/s Apple International, M/s Jakap Metind Pvt. Ltd. and M/s Srijan Exports. Appellant showed deemed export clearance of total 248204 Kgs. of Brass Rods /Brass Hollow Rods /Copper Alloys Ingots to said four 100% EOUs which were fictitious and only on records. By doing this Appellant have grossly misused the provisions of the Advance Authorization scheme effective in the instant case under Notification No. 98/2009-Customs dated 11.09.2009 ibid read with provisions of para 4.1.5, 4.2.1 & 4.2.2 of the FTP 2009-14. By above acts Appellant showed the fictitious clearance of

248204 Kgs. of Brass Rods/ Brass Hollow Rods/ Copper Alloys Ingots on records i.e. ARE-3 and invoices, however actually cleared the same into open market clandestinely. Against these fictitious clearances not only Appellant secured 11 nos. of Advance Authorisation from the DGFT Rajkot but they have also wrongfully availed Refund of Rs. 90,59,957/ - as TED from DGFT.

1.3 On the basis of above investigation, Appellants were issued show cause notice dated 10.04.2015 proposing confiscation of goods under Section 111(o) of the Customs Act, 1962 and under Rule 25 of the Central Excise Rules, 2002, in addition to the recovery of custom duty on imported material as also Central Excise Duty on the material cleared with payment of duty under valid duty paying documents to the tune of Rs. 1,26,99,092/- and Rs. 90,59,957/- along with interest and penalty. The said show cause notice was also proposed penalty on the Director as well as respective EOUs. The show cause notice was adjudicated by the Principal Commissioner vide impugned order dated 31.03.3017, wherein he passed order as under:

(i) Hold that goods of 261009 Kgs. of Brass Scrap imported is liable for confiscation under the provision of Section 111(o) of the Customs Act, 1962. Since the goods are not available either physically or released after seizure through bonds, refrain from the imposing any redemption fines under the provisions of 125 of the customs Act, 1962.

(ii) confirmed the demand of Customs duty amounting to Rs. 1,26,99,092/- leviable on import of total 261009 Kgs. of Brass Scrap imported under the provisions of Section 28(4) of the Customs Act, 1962.

(iii) recover interest at the appropriate rate on above amount of Custom Duty under the provisions of Section 28AA of the Customs Act, 1962.

(iv) Impose penalty of Rs. 1,26,99,092/- and an amount equivalent to interest payable under Section 114A of the Customs Act, 1962.

(v) Impose penalty of Rs. 50,00,000/- under Section 112(a) of the Customs Act, 1962

(vi) Hold that the goods of 248204 Kgs. Brass Roads /Brass Hollow Rods/ Copper Alloys Ingots is liable for confiscation under Rule 25 of the Central Excise Rules 25 of the Central Excise Rules, 2002. Since the goods are not available either physically or released under bonds, refrain from the imposing any redemption fines under the provisions of Section 34 of the Central Excise Act, 1944.

(vii) Confirmed the demand of Central Excise Duty amounting to Rs.90,59,957/- payable on 248204 Kgs. of Brass Rods/Brass Hollow Rods/ Copper Alloys Ingots under Section 11A(4) of Central Excise Act, 1944.

(viii) recover interest at the appropriate rate, in respect of above Central Excise Duty under Section 11AA of the Central Excise Act, 1944.

(xi) Impose penalty of Rs. 90,59,957/- under Section 11AC of the Central Excise Act, 1944.

(x) Impose penalty of Rs. 10,00,000/- under Rule 26 of the Central Excise Rules,2002

In addition, he also imposed the penalties on co-notices under Section 112 (a) of the Customs Act 1962 and separate penalties under Rule 26 of Central Excise Rules, 2002. Hence, the appellants filed the present appeals before this Tribunal.

….

….

4.9 As regard the demand of Central Excise duty, we find that the case of the department is on the ground that deemed export clearance were not genuine and were shown only on paper and finished goods were clandestine cleared in the open market. We find that during the investigation, the department has sought verification report from the Jurisdictional Authority of EOUs units. It also appears that all the Concerned Officers have certified that EOUs have received the goods. In the said verification reports, officers, no-where pointed out that the EOUs have not received the materials form the Appellant. Further Authorized persons of EOUs units accepted the facts of receipts of materials and transporters and truck owners also accepted the transportation of goods from the factory of Appellant to EOU units. We also find that in the present matter Appellant had received payment for the said transaction by cheque and the said transaction were recorded in statutory books & accounts of the Appellant. We, further find that in support of their contention department nowhere produced any corroborative evidence to show that the Appellant have cleared alleged finished goods in open market. No statement of any buyer recorded to whom clearance was allegedly made, no transportation details provided, no evidence of any receipts of payment from open market buyers produced. Therefore, in the given set of facts and in absence of any adverse evidence, it cannot be said that finished goods were clandestinely cleared in open market. There are several judicial pronouncements of the Hon'ble Apex Court, High Courts and Tribunal wherein it has been consistently held that in the case of clandestine manufacture and removal of goods, Revenue has to prove it beyond doubt. We rely on the Hon'ble High Court judgment in the case of Commissioner of Central Excise v. Brims Products - 2011 (271) E.L.T. 184 (Pat.) wherein it was held that:-

"8. Facts emanating from the records, disclose that the Central Excise authority itself has held with regard to two consignments out of four, that the investigation is incomplete and has been carried out only at the transporters end, thus, does not reveal actual purchase by the buyers. The authorities with regard to the aforesaid two consignments have also extended benefit of doubt to the respondent. We are of the opinion that there could not have any reason for arriving at different conclusion with regard to the remaining two consignments.

9. In our opinion, since the charge was for clandestine manufacture and surreptitious removal of finished final product, the same is required to be proved beyond doubt by the

> *Revenue. One has to keep in mind that, though being the main ingredient, betel-nut is not the only raw material which is used in manufacture of Pan Masala. That apart, since the investigation has been carried only at the transporters end, no presumption could be drawn with regard to manufacture and removal of the final product. Presumptions and assumptions cannot take place of positive legal evidence, which are required for proving the charge. Even if, it is assumed that some raw materials were received at the factory of the respondent during the said period, the same cannot become conclusive proof of production and clandestine sale to different parties. Due to lack of positive evidence, benefit of doubt will always go in favour of the assessee.*
>
> *10. Accordingly, we answer the reference against the Revenue and in favour of the assessee and it is held that the receipt of one of the raw materials, does not conclusively prove clandestine manufacture and surreptitious removal of finished final product. Further, since the charge is regarding clandestine manufacture and removal of finished product for evading excise duty, the same cannot be held to be proved on the basis of principle of preponderance of probabilities and the Revenue has to prove the same beyond doubt. The reference is answered accordingly."*

4.10 In the matter of M/s. Sakeen Alloys Pvt. Ltd. v. C.C.Ex. 2013 (296) E.L.T. 392 (Tri.) which was upheld by the Gujarat High Court [2014 (308) E.L.T. 655 (Guj.) and subsequently by the Hon'ble Supreme Court reported at [2015 (319) E.L.T. A-117 (S.C.)], the Tribunal held that:

> *"5. We have carefully gone through the rival submissions and perused the records. In this case, the case of clandestine removal has been made out against the appellant M/s. Sakeen Alloys Pvt. Limited on the basis of records/pen-drive recovered from the business premises of M/s. Sunrise Enterprises. In the statements of Managing Director and the Excise persons of M/s. Sakeen Alloys Pvt. Limited and Shri Mukeshbhai V. Patel of M/s. Sunrise Enterprises it has been admitted that they have clandestinely manufactured and cleared CTD/round bars but they have retracted their statements immediately after recording the statements. It is the case of the appellants that request for cross-examination of the persons whose statements were recorded has not been made available to them by the adjudicating authority. In view of the various judgments relied upon, it was also argued that no investigation has been extended to the suppliers of raw materials or purchasers of finished goods to establish whether such clandestine removal of excisable goods have actually been undertaken by the appellants or not. It was emphasized that cross-examination of the persons whose statements have relied upon is obligatory to be provided especially when the statements are retracted by the appellants.*
>
> *6. It is observed from Para 3.1 of the show cause notice dated 1-5-2009 issued to the appellants that stock yard of*

M/s. Sunrise Enterprise, Mehsana was searched by the departmental officers and during such checks it was found by the officers that TMT Bars lying in the stock were embossed with „VARSANA" on each bar which was explained by Shri Mukeshbhai Virabhai Patel of M/s. Sunrise Enterprise have been manufactured by M/s. Varsana Ispat Limited, Kutch. Further, this paragraph also states that the stock lying in the stock yard of M/s. Sunrise Enterprise also had the stock received from M/s. Sakeen Alloys Pvt. Limited, but on verification of the stock with the invoices, the stock was found to have tallied with the documents available with M/s. Sunrise Enterprise. When the stock lying in the stockyard of M/s. Sunrise Enterprise was found to have tallied with the invoices available with M/s. Sunrise Enterprise then the request of the appellants for crossexamination of Shri Mukeshbhai V. Patel of M/s. Sunrise Enterprise was necessary to bring out the truth whether the records/pen-drive maintained by M/s. Sunrise Enterprise pertained to same stock which is received under duty paid invoices or otherwise.

7. It is also observed from Para 14.4 of the show cause notice that names and address of M/s. Siddhi Industries Pvt. Limited and M/s. Mahavir Alloys, Dabhol, Nani Daman are manufactured who were alleged to have supplied the excess raw materials to the appellants from which clandestinely removed goods were manufactured. Their addresses were made available to the department but no enquiry was conducted at the supplier"s end to establish that excess materials in fact were supplied to the appellants. Similarly, no investigation has been extended to the buyers of the finished goods whose names are in the records/pen-drive of M/s. Sunrise Enterprise. This part of the investigation was necessary to establish that clandestinely removed goods have reached to the buyers and they have confirmed to have received such goods. Appellants herein have filed affidavits from some of such buyers which the adjudicating authority has not accepted. It would have been in the interest of justice to call some of these purchasers for cross-examination so that true picture of the entire activities undertaken by the appellants was made clear. Appellants also requested for cross-examination of the Chartered Engineer who gave them the certificate regarding manufacturing capacity and consumption of electricity.

8. In the cases relating to clandestine removal of excisable goods, following are the indicators of clandestine removal activities by a manufacturer :- (i) Excess stock of raw materials found in the factory premises. (ii) Shortage of raw materials in the records of manufacturer. (iii) Excess/shortage of manufactured goods found in the factory premises. (iv) Excess consumption of electricity/power used in the manufacture of finished goods. (v) Any transit seizure of clandestinely removed goods made by the investigating authority. (vi) Any cash amounts seized from the factory premises or dealer"s *premises or residential premises searched during investigation. (vii) Confessionary statements of the persons concerned with the clandestine manufacture/ removal of excisable goods.*

9. It is observed from the case records that in the present proceedings, there are few confessional statements of the persons which were later retracted by the persons concerned. The confessional statements subsequently retracted can be argued to be an afterthought under a proper legal advice but to observe the principles of natural justice, it becomes necessary to provide cross-examination of such witnesses, as held by various judicial courts including the Hon"ble Supreme Court relied upon by the appellants. In the case of CCE v. Omkar Textiles - 2010 (259) E.L.T. 687 (Guj.), it was held by the Jurisdictional Gujarat High Court that onus is on the Revenue to furnish the evidence to prove the charges of clandestine removal and it is not sufficient if some confessional statements have been given by the Director of the Company. Similarly, in the case of CCE v. Arsh Casting Pvt. Limited [2010 (252) E.L.T. 191 (H.P.)], the Hon"ble High Court of Himachal Pradesh held that the private records maintained by the staff of the company cannot be made as the sole evidence to hold that clandestine removal of the goods is established and accordingly, the following point of law was decided in favour of the assessee:-

"Whether on the basis of private records, the Central Excise duty can be demanded or not when these private records show higher production than that reflected in the statutory records resulting into removal of the excess stock clandestinely i.e. without issue of invoice and without making entries of production and clearance in the statutory records?"

10. Similarly, in the case of CCE, Chandigarh-1 v. Shingar Lamps Pvt. Limited [2010 (255) E.L.T. 221 (P&H)], the Hon"ble High Court held that the private records which have been discovered during the raid may not be sufficient for holding clandestine production and removal but there should be some positive evidence suggesting clandestine production and removal. The Hon"ble Supreme Court in the case of Shalimar Rubber Industries v. Collector of Central Excise, Cochin [2002 (146) E.L.T. 248(S.C.)] has also held that once the statement is retracted and the assessee asked for cross-examination then if such cross-examination is denied, the department cannot make such statements as the basis for concluding that there was clandestine removal. It is further observed that the Hon"ble CESTAT in the case of Rama Shyama Papers Limited v. CCE, Lucknow [2004 (160) E.L.T. 494 (Tri.-Del.)] came to the following conclusion in Paras 9 and 10 of the judgment which are reproduced below:-

> *"9. We have considered the submissions of both the sides. The Revenue has charged the Appellants with clandestine*

manufacture and removal of paper mainly on the basis of documents seized from the premises of Chitra Traders and Transporters and the various statements recorded from the Proprietor of Chitra Traders, transporters and labourers working in the factory of the Appellants and also the driver or cleaner of the Truck which was in the process of loading on 22-6-2001 when the Central Excise Officers visited their factory premises. The Appellants, on the other hand, have contended that most of the persons whose statements have been relied upon have not been produced for cross-examination and the documents seized from third parties" premises have not been corroborated by adducing evidence of any of the customers though the enquiries were conducted at different places as deposed by Shri Anurag Sharma, Inspector, in his cross-examination on 4-3-2002. Out of 19 consignments said to have been cleared by the Appellant No. 1 without payment of duty on the basis of five transporter, we observe that in respect of two consignments, it has been mentioned by the Revenue that the same may not pertain to the Appellants. Further, only one transporter Shri Sanjay Garg of M/s. Balaji Transporter Co. was produced for cross-examination which accounts for only two consignments out of 19 consignments in question. Shri Garg, it is observed from the record of cross-examination, has deposed that they generally work as commission agent and provide transport to Appellant No. 1; the payment is used to be received directly by the drivers after delivery of the goods at the consignee"s end and in case the driver did not report back for the next 3-4 days, it was presumed that the goods had reached the consignees end. Further, the name of the Applicant No. 1 on one GR No. 34 had been written not by Shri Sanjay Garg, but by his brother, whose statement has not been recorded and on GR 187, there is no mention of the name of the Appellant No. 1 at all. No statement of the drivers concerned has been recorded by the Revenue to establish that the finished goods manufactured by the Appellants were removed without payment of duty. The other transporters have not been produced for the purpose of cross-examination nor the statements of drivers who might have actually carried the goods, had been recorded. Moreover no statement of any of the recipients of the goods had been brought on record. Thus the statements of the transporters have remained uncorroborated and also suffers from the shortcoming of being not being cross-examined by the Appellants. It has been the settled law that the liability cannot be fastened on an assessee on the strength of documents seized from the possession of third party. There should be some corroborative evidence/material. The Tribunal has in the case of Emmtex Synthetics Ltd., supra, when the charge of clandestine removal was made against the Appellants therein out of yarn received from a third party based on the diary, loose documents and packing slips allegedly recovered from Shri B.M. Gupta, Vice President of the Supplier Company, held that "no presumption on the basis of uncorroborated, uncross-examined evidence of B.M. Gupta and the alleged entries made by him in the private diary, loose sheets, charts, packing slips could be drawn about the receipt of polyester yarn by the Appellants from the company, M/s. HPL, in a clandestine manner during the period in question. Similarly, no inference could be legally *drawn against the Appellants of having manufactured texturised yarn out of the said polyester yarn and the clearance thereof, in a clandestine manner without the payment of duty." The Tribunal had also referred to the decision in Oudh Sugar Mills Ltd. v. Union of India, 1978 (2) E.LT. (J172) wherein "the Apex Court has observed that no show cause notice or an order can be based on assumptions and presumptions. The findings based on such assumptions and presumptions without any tangible evidence will be vitiated by an error of law". The Tribunal also took note of the decision in Kamal Biri Factory and Shri Khushnuden Rehman Khan v. CCE, Meerut - 2003 (161) E.L.T. 1197 (T) = 1997 (23) RLT 609 (CEGAT) wherein view has been taken that the allegations of clandestine removal of the goods will not stand established when based on the entries made by the assessee"s employee in a diary or on the basis of third party"s record in the absence of any corroborative evidence. It has also been the consistent view of the Tribunal that the statements of the witnesses, without allowing the assessee to test the correctness of the same by cross-examining those witnesses; cannot be made the basis for holding the allegation against the assessee. (Takshila Spinners v. CCE, supra). Similar views have been expressed by the Tribunal in the case of Haryana Petrochemicals Ltd., supra wherein the Tribunal has held that reliance cannot be placed on the documents maintained by a third party "who did not have the courage to come forward for crossexamination in order to test the veracity and correctness of the private record maintained by him." It has also been held by the Tribunal in the case of Kothari Synthetics Industries v. CCE, Jaipur - 2002 (141) E.L.T. 558 (T) that entries made in the transport Register of the transport company could not be accepted as a conclusive proof of clandestine receipt of goods from that transport company for want of corroboration from any tangible evidence. Following the ratio of these decision, the duty demand cannot be upheld solely on the basis of uncorroborated statements and records of transporter. The statements tendered by the labourers can also not be relied upon by the Revenue as these persons were not produced for being cross-examined. Moreover, there is no corroboration of their statements with regard to the Trucks by which the goods were allegedly removed or the persons who received the goods. The Truck driver Shri Shiv Bahadur Yadav has also not been cross-examined and cleaner Shri Rakesh Kumar had deposed that the Bills/Invoices are supposed to be with the Driver and he being cleaner had no knowledge.*

10. The confirmation of duty in respect of 149 consignments is also based on the records seized from the premises of M/s. Chitra Traders and not on the basis of any record seized from the premises of the Appellant-company. The Revenue has not been able to adduce any corroborative evidence to show the movement of goods from the premises of the Appellant-company to the premises of M/s. Chitra Traders or the Customers whom the goods were sent directly to as per the direction of Chitra Traders. No inquiry has also been made into these Customers who ultimately received the goods. There is no substance in the reasoning given by the Commissioner in the impugned order to the effect that "as the party did not challenge the fact of their business

> *association with M/s. Chitra Traders, Delhi, the enquiry further down the line was not considered necessary." The onus of proof that the goods were removed by the Appellants without payment of duty and without entering the same in their records is upon the Revenue which cannot be discharged merely on the strength of the entries made in the records of a third party without linking the removal of goods from the premises of the Appellant-company. The mere fact that the Appellant-company had business relation with Chitra Traders, does not mean that they will be liable to each and every entry made by Chitra Traders in their books of account. It is also noted that none of the transporters and none of the labourers whose statements have been relied upon by Revenue have mentioned that the goods in question were delivered to Chitra Traders from the premises of the Appellants. The material brought on record may at the most create a doubt only. But doubt cannot take the place of evidence. The Revenue has, thus, not proved its case against the Appellants in respect of 149 consignments. We, therefore, set aside the demand of duty and penalty imposed on Appellant-company and consequently the demand of interest."*

11. From the above settled law, it is clear that in a clandestine removal case, the facts of clandestine removal of excisable goods cannot be established only on the basis of certain statements which are retracted later but there has to be positive evidences like purchase of excess raw materials, shortage/excess of raw materials/finished goods found in the stock/factory premises of the appellant, excess consumption of power like electricity, any seizure of cash during the investigation when huge transactions are made in cash. In the present case also, it is observed, from the annexures to the show cause notice dated 1-5-2009 issued to the appellants, that there were huge cash transactions to the tune of Rs. 11.23 Crores. When such large number of transactions involving huge amounts are being undertaken in clandestine removal activities, it is very likely that some cash would have been seized. There is not a single instance where either seizure of cash is made or any clandestinely removed goods are seized or raw materials/finished goods were found either short or in excess in the factory premises of the appellant or at any other place. As per the Panchnama drawn at the factory premises it is shown that there was no excess/shortage of the raw materials or finished goods found. The documentary evidences collected from the business premises of M/s. Sunrise Enterprise and the statements recorded by investigation, can at the most raise a reasonable doubt that some clandestine removal activities are undertaken by the appellant. However, such a suspicion or doubt has to be strengthened by positive evidences which seem to be lacking in this case. Any suspicion whosoever cannot take the place of evidence regarding clandestine removal of excisable goods. Moreover, after having positive evidences, quantification of

> *duty on clandestinely removed goods also becomes essential. As already mentioned above, the stock lying in the stock yard of M/s. Sunrise Enterprise, Mehsana was found containing the goods received from M/s. Sakeen Alloys Pvt. Limited under proper invoices. When the goods received under proper invoices are found in the stock yard of M/s. Sunrise Enterprise, then it is possible that out of such goods certain quantities were sold to various customers by accepting payment in cash. In such a situation, the quantification undertaken by the investigation becomes doubtful and incorrect. For this purpose cross-examination of the person Incharge looking after the records of M/s. Sunrise Enterprise was must, which was not allowed by the adjudicating authority. In view of the above observations, the demand of duty of Rs. 1,85,10,861/- is not sustainable and is required to be set aside."*

In the light of the ratio of law declared in the above judgments, we find that the entire case of the Revenue is based upon the surmises and conjectures. No concrete, positive and tangible evidence appears on record. The evidences brought into the record by the department are incomplete, inconsistent and not a reliable piece of evidence to prove charges of clandestine removal. Relying on these judgments, we also hold that the charges of clandestine removal of the alleged goods not sustainable in the present matter.

4.11 By following the ratio of above decisions, we hold that the central excise duty liability cannot be fastened upon the appellant.
…………"

18. The decisions in *M/s. Bharat Udyog and Ors. v. Commissioner of Customs, Noida, 2019 (6) TMI 1033 (CESTAT Allahabad)* and *Dhaval Agri Exports LLP and Anr. v. CC-Mundra & other appeals, 2024 (10) TMI 335 (CESTAT Ahmedabad),* also support the appellant's defence. The principles laid down therein reinforce the requirement of positive and corroborative evidence where serious allegations of clandestine diversion or fraudulent transactions are made.

19. The adjudicating authority has placed reliance on the letter dated 26.01.2004 issued by the Commissioner of Customs, Benapole, Bangladesh, to hold that the exports made through Ghojadanga LCS were not genuine, on the ground that the declared consignee, M/s. Noor Islam, had reportedly not imported the goods. We have gone through the said communication as well as the covering letter dated 28.01.2004 from the First Secretary (ECO), Embassy of India, Kathmandu. We find that neither of these communications establishes that the appellant had exported maize to M/s. Noor Islam. They also do not relate to the relevant period or establish, with reference to any official border record, that the vehicles declared in the export documents had not crossed over to Bangladesh. On the contrary, the CBI investigation had examined the movement of the declared vehicles through the Immigration Check Post and had not found anything suspicious. We also find that, though the Show Cause Notice refers to a communication purportedly issued by the Deputy Commandant/Adjutant, 44 BN BSF regarding non-movement of certain vehicles, the said communication has neither been placed on record nor included among the relied-upon documents. In the absence of such primary evidence, the allegation regarding non-

crossing of the declared vehicles cannot be accepted merely on the basis of inference.

20. We now proceed to examine the statements relied upon by the adjudicating authority. The statements of Shri Surendra Kumar Gangwal, Shri Vikas Kumar Jain and Shri Samir Saha constitute an important part of the Revenue's case. We find, however, that some of these statements were subsequently retracted and that the manner in which the investigation and interrogation were conducted was also questioned before the Hon'ble Calcutta High Court. In particular, the retraction dated 13.02.2002 submitted by Shri Surendra Kumar Gangwal is available on record. In such circumstances, the evidentiary value of the statements has to be examined with due caution and in the light of the surrounding circumstances and the availability of independent corroborative evidence. A retracted statement cannot, without examining the circumstances in which it was recorded and retracted and without considering the corroborative material on record, be treated as conclusive evidence of the alleged fraud. The evidentiary value of these statements is therefore required to be examined in the light of the settled legal position discussed hereunder.

i. *Priya v. Commissioner of Customs, reported in 2019 (370) ELT 1668 (T)* --- appeal thereagainst dismissed as non-maintainable in *(2025) 27 Centax 324 (Bom.);*

ii. Union of India v. Kisan Ratan Singh, reported in 2020 (372) ELT 714 (Bom.);

iii. *Vinod Solanki v. Union of India, reported in 2009 (233) ELT 157 (SC);*
iv. *Mohtesham Mohd. Ismail v. Spl. Director, reported in 2007 (220) ELT 3 (SC).*

In the preceding paragraphs, we have already found that there is no sufficient corroborative evidence on record to establish diversion of the duty-free imports made under the DEEC licence, procurement of maize or export of maize under the 73 Bills of Export. In the absence of such corroborative evidence, the reliance placed by the adjudicating authority on the alleged incriminating statements, particularly after the retractions were brought on record, cannot be sustained. We also find that the adjudicating authority has relied upon the statements recorded under Section 108 of the Customs Act without examining the statutory requirements under Section 138B.

21. The Ld. Counsel has further contended that the statements relied upon by the adjudicating authority suffer from material discrepancies, inconsistencies and lack of reliability. We have perused the statements of Shri Manoj Baid dated 07.02.2002; Shri Surendra Kumar Gangwal dated 11.02.2002, 12.02.2002, 13.05.2003 and 30.06.2003; Shri Vikas Kumar Jain dated 11.02.2002 and 12.02.2002; Shri Samir Saha dated 11.02.2002 and 12.02.2002; and Shri Satish Tripathi dated 21.03.2002. The discrepancies and inconsistencies pointed out by the appellants are material in

nature and have not been satisfactorily explained or reconciled by the Revenue.

i. Towards the end of his statement dated 11.02.2002, Sri Surendra Kumar Gangwal had said that the particulars given earlier were factually incorrect inasmuch as they had undertaken exports of both maize and wire rods during December, 2001 to January, 2002 under DEEC Scheme. But, in his next statement dated 12.02.2002 Sri Gangwal mentioned that he had been unaware as to the day to day work of the company and yet, in the same breath, he confirmed that only maize had been sent to Bangladesh.

ii. The aforesaid statements were ex-facie contrary to the answers to question Nos. 2 and 10 given by Sri Vikas Kumar Jain on 11.02.2002, wherein Sri Jain confirmed having dealt with Sri Surendra Kumar Gangwal on behalf of Chessman Impex Pvt. Ltd. and having received instructions to arrange truck for carrying goods to Bangladesh.

iii. In his further statement dated 12.02.2002 Sri Vikas Kumar Jain confirmed that each of the 208 trucks had carried 5 MT of maize and that he had received instructions from Sri Surendra Kumar Gangwal as well as Sri Mahendra Kumar Patni regarding supply and loading of trucks. If the said statement was correct then

Chessman Impex Pvt. Ltd. had only exported about 1400 MTs of mis-declared goods, which was never the Revenue's case;

iv. In the aforesaid statement dated 12.02.2002 Sri Vikas Kumar Jain also mentioned that an employee, Sri Satyendra Nath Mishra had actually arranged truck for carrying goods to Bangladesh following his instructions. However, both Mahendra Kumar Patni and Satyendra Nath Mishra remained unexamined.

v. In both his statements dated 11.02.2002 and 12.02.2002, Sri Samir Saha affirmed that the customs authorities had physically examined some of the export goods loaded in the vehicles, to which he had been a witness. The said statements confirmed the version of Sri Prabhas Chandra Biswas, since deceased, given during the course of recording of his statement on 21.05.2004.

vi. The appellants' counsel also submitted that the alleged statement dated 21.03.2002 of the truck owner, Sri Satish Tripathi was doubtful and appeared unreliable due to the reasons mentioned in page No. 27 of the appeal at ground S. He has contended that it was indeed surprising that the said truck owner could correctly recall as to the movement of his truck on a particular day after lapse of several months from the date of export without referring to any document. It was equally surprising that the drivers of the trucks owned by the said Satish Kumar Tripathi remained unexamined and that no other statement from another truck owner or driver at all could be obtained by the investigating agencies. It does not appear that such objections on part of Chessman Impex Pvt. Ltd. had been adequately considered or dealt with in the order under challenge.

22. In view of the foregoing discussion and findings, we hold that the demand of customs duty forgone, together with the consequential interest and penalties imposed upon Chessman Impex Pvt. Ltd., is not sustainable and is liable to be set aside.

23. Once the allegations against the principal noticee fail for want of reliable and corroborative evidence, the allegations of connivance or abetment against the co-appellants cannot independently survive. Consequently, the penalties and personal penalties imposed upon the co-appellants are also liable to be set aside. In particular, we find no sufficient basis to hold that Shri Prabhas Chandra Biswas, the then Superintendent, furnished misleading information in his statement dated 21.05.2004 or that the said statement was inherently unreliable. As regards Shri

Mahendra Kumar Patni, the finding of the adjudicating authority that he was the "MD of the company" responsible for the alleged fraudulent activities has been specifically contested before us. His written submission dated 20.08.2015, placed as Annexure C to the Paper Book, has also not been properly considered in the impugned order. In the absence of reliable and corroborative evidence establishing the alleged fraud, the principle that fraud vitiates everything cannot be invoked to sustain the penalties. The findings recorded at pages 91 to 102 of the impugned Order-in-Original, therefore, cannot be sustained.

24. In the result, all the appeals are allowed with consequential relief, if any, in accordance with law. The impugned Order-in-Original No.54992/2017 dated 28.02.2017 is set aside.

(Order pronounced in open court on 21.08.2026)

Sd/-
(AJAYAN T.V.)
MEMBER (JUDICIAL)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

MK