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**CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066**
**EXCISE APPEAL BRANCH**

Appeal No. E/1410/2008-1412/2008, E/S/367-369/08 & E/1 573/08 Date 27/08/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S APEX RECYCLING PVT. LTD.
B-7, BADLI INDUSTRIAL AREA, NEW DELHI.
M/S APEX RECYCLING PVT. LTD. Appellant
Vs
C.C.E. DELHI I M.O.NO.760/08-EX Respondent

I am directed to transmit herewith a certified copy of **Final order No.**635-637/08, S.O.NO.849-51/08-EX dated 26-8-08 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

**Copy to :**
1. Respondent
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   C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002
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4. ~~J.D.R.~~
5. Bar association, CESTAT, New Delhi
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7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
15. Office Copy
16. Guard file

P.T.O.-2

Assistant Registrar
(Excise Appeal Branch)

1 SHRI R.K.MAHESHWARI,
APEX RECYCLING PVT. LTD.
B-7, BADLI,
INDUSTRIAL AREA,
NEW DELHI.
2 SHRI SEBASTIAN A.C,
APEX RECYCLING PVT. LTD.
B-7, BADLI,
INDUSTRIAL AREA,
NEW DELHI.

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**West Block No. 2, R.K. Puram, New Delhi – 110 066.**

**COURT NO. II**
**Excise Stay Application No. 367-369 of 2008 in Appeal No. 1410-1412 of 2008 with Misc. Application No. 573 of 08**

[Arising out of the Order-in-Original No. 19/2008 dated 21/05/2008 passed by The Commissioner of Central Excise, New Delhi. ]

For Approval and signature :
**Hon'ble Shri S.S. Kang, Vice President**
**Hon'ble Shri Rakesh Kumar, Member (Technical)**

| | | |
|---|---|---|
| 1. | Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : |
| 2. | Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : |
| 3. | Whether their Lordships wish to see the fair copy of the order? | : |
| 4. | Whether order is to be circulated to the Department Authorities? | : |

M/s Apex Recycling Pvt. Ltd. & Ors. — Appellant

Versus

CCE, Delhi – I — Respondent

**Appearance**

S/Shri Joseph Vellapally, Sr. Advocate, Hari Shankar and Sunil Kumar, Advocates – for the appellant.

Shri M.M. Singh, Authorized Representative (DR) – for the Respondent.

CORAM:**Hon'ble Shri S.S. Kang, Vice President**
**Hon'ble Sh. Rakesh Kumar, Member (Technical)**

**DATE OF HEARING : 04/08/2008.**
**DATE OF DECISION :** 26-08-2008

MISC Order No 760 / 08 – Ex
FINAL Order No. 635 – 637 / 08 – Ex Dated : ____________
STAY ORDER NO. 849 – 51 / 08 . – Ex

**Per. Rakesh Kumar :-**

These are the applications for waiving the requirement of pre-deposit of penalties imposed by the Respondent on the Appellants by the impugned order in-original and also staying the operation of the impugned order and recovery of penalties from the Appellants pending disposal of the appeals.

1.1 The main Appellant – M/s Apex Recycling Pvt. Ltd., B-7, Badli Industrial Area, New Delhi (hereinafter referred to as ARPL) is a 100% EOU. The second Appellant – Shri Raj Kumar Maheshwari is Managing Director of ARPL and the third Appellant – Shri A.C. Sebastian is the authorized signatory of ARPL. ARPL were issued an LOP dated 05/9/01 by the Development Commissioner, Noida Export Processing Zone for recycling of ferrous and non-ferrous scrap – while the item permitted for import are various types of ferrous and non-ferrous scrap, their finished products for export are segregated ferrous and non-ferrous metal scrap, ingots, metal granules, slag (byproduct), zinc oxide, lead oxide and Iron (byproduct). They are operating as an EOU since November 2001. They import only the metal scrap. They don't have any imported capital goods. Vide letter dated 15/2/08, of the Development Commissioner, the bonding period of the unit was extended for one year for 2008-09. The Appellant Company was importing metal scrap free of Customs duty under Notification 53/97-CUS dated 03/06/97 and subsequently under its successor Notification No. 52/03-CUS dated 31/3/03. Under both these exemption Notifications, the duty exemption is subject to the condition that the goods imported free of duty are used for production or manufacture of goods for export out of India and unit achieves Positive Net Foreign Exchange earning (NFEP). NFE is calculated cumulatively for a period of five years from the commencement of production by the following formula :-

$$NFE = \frac{A-B}{A} \times 100, \text{ where}$$

A = FOB value of exports and

B = Value of imported inputs + amortized value of imported capital goods + payments made in foreign exchange by the way of commission, royalty, fees, etc.

1.2 As per the condition of the Notification 52/03-CUS, in case of failure to achieve positive NFE, the EOU will have to pay the duty equal in an amount to the portion of duty leviable on the said goods, but for the exemption and the duty so payable shall bear the same proportion as the – unachieved portion of NFE bears to the positive NFE to be achieved, and in addition to this duty, interest on it at the applicable rate as per the provisions of Section 28AB shall also be paid. The NFE, as per the provisions of the EXIM policy, is regularly monitored by the Development Commissioner and if the unit is not able to achieve positive NFE, it is liable to penal action under Foreign Trade (D&R) Act, 1992, the proceedings for which are initiated by the Development Commissioner.

1.3 In January 2006, officers of the Directorate of Revenue Intelligence, on receipt of an information that the Appellants, in order to achieve positive NFE, are under invoicing the imports of metal scrap and if actual import values of metal scrap is taken into account, the NFE will be negative and the

EOU will not be eligible for duty exemption under Notification 52/03-CUS, initiated inquiries into the import of metal scrap by ARPL - the Appellant company. In course of inquiry, 1338.07MTs of mixed metal scrap imported under 40B/Es during period from 09/12/05 to 19/1/06 and lying in the factory premises, and 50.40 MTs of metal scrap imported under B/E No. 481200 & 481211 dated 19/1/06 from cypress and lying in the factory was seized and besides this, 104.08 MTs of metal scrap covered under B/E No. 480394 and 408396 dated 16/1/06, lying at ICD, Tughlakabad, was seized. From the factory premises, two files containing documents in respect of the goods imported under B/E no 481200 and 481211 dated 19.01.06 were seized. Those files contained an inspection certificate NO-N020038 dated 10.11.05 issued by M/s Alex Stewart(Assayers), England, as per the requirement of para 2.32(1) of the EXIM policy for the import of metal scrap from war affected countries and the certificate showed the net quantity as 25.44MT and the value as US$66144. Besides inquiry with the MD and employees of the Appellant Company, inquiry was conducted overseas with the customs authorities of USA and Italy from where a number of consignments of metal scrap had came, On completion of inquiry, the Additional Director General, DRI issued a show cause notice dated 17/1/07 to the three Appellants asking them to show cause to the Commissioner of Central Excise, Delhi – I as to why –

(i) 1338.507 MTs of imported scrap seized from factory premises on 20/1/06 and 50.40 MTs of metal scrap covered under B/E/ No. 481200 and 481211 dated 19/1/06, seized from factory premises on 03/2/06 and 104.08 MTs of metal scrap covered under B/E/ No. 480394 and 480396 dated 16/1/06 seized at ICD Tughlakabad on 21/1/06 and 21/4/06 should not be confiscated under Section 111 (d), (m) & (o) of the Customs Act, 1962 ;

(ii) Benefit of Notification 52/03-CUS should not be denied in respect of the seized goods mentioned in para (i) and Customs duty at the applicable rate and calculated on the value of the goods as per the tariff rate in force , on the date of cancellation of warehouse licence, should not be demanded under Section 28 of the Act ;

(iii) the private landed warehousing licence issued to the Appellant company under Section 58 of the Act should not be cancelled for misdeclaration of value and description of the imported goods ;

(iv) penalty under Section 114A of the Customs Act, 1962 and Rule 25 of the Central Excise Rules, 1944 read with Section 11AC of the Central Excise Act, 1944 should not be imposed on the Appellant Company ;

(v) penalty under Section 112 (a)/114 A of the Customs Act, 1962 and Rule 26 of the Central Excise Rules, 1944 should not be imposed on Shri R.K. Maheshwari, M.D. of ARPL and Shri A.C. Sebastian, authorized signatory of the company, and

(vi) Conditions of Bond in respect of 104.08 MT of goods seized at ICD, Tughlakabad and subsequently provisionally released to ARPL should not be enforced.

1.3 The Appellant company approached the Commissioner for provisional release of the seized goods and the Commissioner vide order dated 17/8/07 permitted provisional release of the goods on execution of a bond for full value of the goods with bank guarantee for 25% of the bond amount and payment of full duty. Against this order the Appellant company filed a writ petition No. 5858/07 before Delhi High Court praying for release of the goods so that the Appellant can process the same and export the resultant product. Hon'ble High Court vide its order dated 22/11/07, observing that duty demand against the Appellant company is linked with calculation of NFE and calculation of NFE is not possible till the imported goods are processed and the resultant products are exported out of India, directed the Commissioner to –

(i) lift the seizure of the goods and allow the goods to be processed under supervision of Central Excise officers specially posted at the factory premises for this purpose and ensure that the resultant products are exported ;

(ii) the Appellant company will inform the Commissioner about the export value of the goods ;

(iii) the Commissioner, on that basis shall calculate the NFE and if there is shortfall in NFE on the basis of undervaluation, the Commissioner is entitled to take action in accordance with the law ;

(iv) the Commissioner shall adjudicate the matter within a period of six months from the date of the order.

1.4 The case was adjudicated by the Commissioner vide order-in-original dated 21/05/08. But this is only part adjudication. By this order the Commissioner –

(a) upheld the allegations of under invoicing and misdeclaration of grade of the scrap and also denied the benefit of duty exemption under Notification 52/03-CUS in respect of the seized goods ;

(b) ordered the confiscation of the goods under seizure under Section 111 (d), (m) & (o) of the Customs Act for misdeclaration of value & description and violation of post importation condition and imposed redemption fine of Rs. five crore in lieu of confiscation ;

(c) ordered cancellation of the private bonded warehouse licence issued to the Appellant company ;

(d) imposed penalty of Rs. two crore on Shri R.K. Maheshwari and penalty of Rs. 50,000,00/- on Shri A.C. Sebastian under Section 112 (a)/114A of the Customs Act and Rule 26 of the Central Excise Rules ;

(e) ordered enforcement of bond in respect of 104.08 MT of seized goods at ICD which had been provisionally released, and

(f) ordered recovery of duty from the Appellants company in respect of the seized goods, on account of denial of the benefit of Notification 52/03-CUS, but directed that the duty would be quantified by the jurisdictional Assistant Commissioner, and also ordered imposition of penalty on the Appellant company under Section 114A of the Act, in an amount equal to the quantum of duty, as determined by the AC.

1.4.1 The duty amount was subsequently determined by the AC vide order in original dated 29/07/08, as Rs. 5,52,35,978/. The AC vide this order also imposed penalty of Rs. 5,52,35,978/- on the Appellant company under Section 114A.

1.5 The present appeals and the stay application are against the Commissioner's order dated 21/5/08, referred to in para 1.4 above.

2. Heard both the sides.

2.1 Shri Joseph Vellapally, Advocate, the learned senior counsel on behalf of the Appellants made the following submissions :-

(i) The allegation against the Appellants is that they, in order to show positive NFE, have under declared the value of the imported Metal scrap by resorting to under invoicing and misdeclaring the description of the goods.

The allegation that "Brass scrap – honey" has been imported by misdeclaring the same as "mixed metal scrap" is not supported by the CRCL's reports of the test of the samples drawn from the import consignments.

(ii) The reports of US Customs or Customs officers of Italy, on which reliance has been placed by the Revenue in support of its allegation of under invoicing and misdeclaration of description of the goods, have never been supplied to the Appellants in spite of their specific requests to the Commissioner in this regard. The export declarations relied upon by the Revenue do not contain anything to vouch as to their genuineness – they neither bear any signature nor any seal of any customs officer of the exporting country, nor the stamp of the consulate. There is nothing to indicate that the export declarations were obtained from any place outside India by any Indian Governmental authority.

(iii) None of the export declarations referred to in the adjudication order pertain to the goods under seizure in respect of which duty has been demanded. This point has not been addressed ~~it~~ at all in the impugned order.

(iv) The findings of the Commissioner on the point that the Appellant company did not attain positive NFE are totally erroneous on facts and perverse. Neither the exports effected by the Appellant company have been valued nor there is any finding that the value thereof would not result in achieving positive NFE, as required by the EXIM policy and the exemption notification.

(v) It is not permissible to cancel private bonded warehouse licence of a 100% EOU, when its LOP is still valid.

(vi) The duty demand on the seized goods is linked with the issue of achieving positive NFE and if there is shortfall, the recovery of duty has to be in proportion to the shortfall in achieving positive NFE. The exercise of determining whether an EOU has achieved positive NFE involves determining the value of Exports and the value of imports and payments made in foreign exchange towards commission, royalty etc. But no such exercise has been done in the adjudication order passed by the Commissioner and without any such calculation, he has given a finding that the Appellant company has failed to achieve positive NFE. Having done so, instead of quantifying the duty demand, the job of quantification of duty demand has been passed on the Divisional AC who has quantified the duty demand and also imposed penalty under Section 114A vide order in original dated 29/7/08. This order was passed by the AC without giving any opportunity of hearing to the Appellants. Moreover the AC has quantified the duty demand as if the seized goods have become liable to duty on debonding – the quantum of duty liability in respect of seized goods is not in proportion to the shortfall in achieving NFEP. The AC's order is not only without jurisdiction, but also totally wrong on merits and has been passed in gross violation of the principles of natural justice.

2.2 Shri M.M. Singh, the learned Departmental Representative pleaded that from the inquiry conducted by the DRI with the Customs authorities of USA and Italy it is clear that the Appellant Company has been systematically under declaring the value of the imported metal scrap in order to show positive NFE, that if actual value of the imported scrap is taken into account, the NFE can never be positive and that for this reason, the Commissioner's order is correct.

3. We have carefully considered the submission from both the sides and have gone through the records of the case. We are of the view that while the matter has been listed for hearing of the stay petition, there is no point in confining ourselves to stay, as, as discussed below, there are so many serious irregularities in the adjudication proceedings and defects in the adjudication order that the impugned order itself has to be set aside and remanded for de-novo adjudication.

3.1 The duty demand in respect of the seized goods is linked with whether or not the Appellant company achieved positive NFE during the block of five years since commencement of production in November 2001 and if it did not achieve the positive NFE, what was the extent of shortfall as, as per the provisions of Notification 52/03-CUS dated 31/3/03, the duty exemption is subject to the condition that the EOU achieves positive NFE as per the provisions of the EXIM policy and – "in case of failure to achieve the said positive NFE, the unit has to pay the duty equal in amount to the portion of duty leviable on the said goods but for exemption contained in this notification and the duty so payable shall bear the same proportion as the unachieved portion of NFE earning bears to the positive NFE to be achieved ; alongwith interest at the rate specified in the notification of Government of India, Ministry of Finance, Department of Revenue, issued under Section 28AB of the Customs Act, 1962 on the said duty, from the date of importation or procurement till the date of payment of nil duty". Thus if for example the shortfall in achieving positive NFE is 50%, only 50% of the total duty chargeable on the imported inputs will be payable. In this case, the show cause notice does not quantify the duty chargeable. From the Commissioner's letter dated 21/07/08 to ADG, DRI it appears that a corrigendum to the Show cause notice dated 17/1/07 was to be issued by the DRI. But when no corrigendum was issued by the DRI and six month's time limit given by the Hon'ble Delhi High Court vide its order dated 22/11/07 in this case was going to expire, the Commissioner, instead of approaching the Hon'ble High Court for extension of the time limit, adjudicated the incomplete show cause notice. The order does not discuss at all as to how the NFE achieved, after taking into account the export of the resultant products obtained by processing of the seized scrap as per the Hon'ble High Court's order dated 22/11/07 and exports made earlier, is negative and if it is negative, what is the proportion of unachieved portion of NFE to the positive NFE to be achieved, which is relevant for quantification of the duty to be recovered. The Commissioner, without any discussion, whatsoever, has simply given a finding that the Appellant company has failed to achieve positive NFE and on this basis has concluded that they are not eligible for duty exemption under Notification 52/03-CUS in respect of the seized goods and having given such a finding, the job of quantification was given to this jurisdictional AC, who vide order dated 29/7/08, without even hearing the Appellants, quantified the duty demand on the basis that the unit has been debonded, while no such order in this regard has been issued by the Development Commissioner, and beside this has also imposed penalty of equal amount on the Appellant company under Section 114A of the Customs Act, for which he was not competent.

3.1.1 If a show cause notice is answerable to a Commissioner, it is the Commissioner who has to adjudicate on all the points of dispute in it. It is not open to him to decide some points and thereafter leave the quantification of duty demand to some officer under him. Tribunal in cases of **LML Ltd. vs. CCE, Kanpur** reported in **1995 (77) E.L.T. 154; Popular Rubber Industries vs. CCE, New Delhi** reported in **2000 (117) E.L.T. 65; Diamond Cotton Industries vs. CCE, Calcutta – II** reported in **1999 (114) E.L.T. 464; and Suraj Steel Rolling Mills vs. CCE, Ahmedabad** reported in **2000 (121) E.L.T. 353** has held that Commissioner, while adjudicating some matter, can not delegate the quantification of duty demand to Assistant Commissioner. But this is what has been done in this case.

3.2 As per para 6.12.1 of the EXIM policy 2004-09 (Handbook of procedures), notified under sec5 of the Foreign Trade (Development & Regulation) Act , the performance of a 100% EOU is monitored by the Units Approval Committee as per guidelines given in Appendix 14IG and as per para 6.12.2, failure to ensure positive NFE or to abide by any of the terms and conditions of the LOP shall render the unit liable to penal action under the provisions of the Foreign Trade (Development & Regulation) Act, 1992 and the Rules made thereunder, without prejudice to action taken under any other laws and also cancellation or revocation of the LOP. As per para 6.34 of the Handbook of procedures, the Development Commissioner has powers to cancel the LOP of an EOU wherever warranted and shall exercise powers of adjudication under Section 13 read with Section 11 of the Foreign Trade (Development & Regulation) Act, 1992 in respect of EOUs. As per Appendix 14-IG annual performance review of each 100% EOU has to be done by the Development Commissioner and after completion of five years, if it is noted that a 100% EOU has not achieved positive NFE, the Development Commissioner shall initiate penal action under Foreign Trade (Development & Regulation) Act, 1992.

3.2.1 From the above provisions of the EXIM policy it is clear that it is the Development Commissioner who is responsible for monitoring the performance of a 100% EOU in meeting the export obligation and achieving positive NFE, and determining for each five year block from the date of commence of production of the unit ,whether it has achieved positive NFE, and it is the Development Commissioner who is empowered to take penal action and even cancel the LOP of a unit, which fails to comply with the conditions of the LOP. It is only when the LOP has been cancelled by the Development Commissioner that the unit has to be debonded. In this case there is no evidence that the DRI's investigation report was sent to the Development Commissioner. In fact, the Development Commissioner, vide letter dated 15/2/08 has extended the LOP for one year i.e. for 2008-09. Tribunal in case of Vishal Footwear Ltd. vs. CC, New Delhi reported in 1999 (114) E.L.T. 60, relying upon the Board's circular No.

29/95-CUS dated 10/3/95 has held that it is only when the Board of Approval or Development Commissioner arrives at a finding that the EOU has failed to fulfill export obligation ,that duty demand can be confirmed by the Customs authorities and that when no such conclusion has been arrived at by the Development Commissioner, the Customs Commissioner's order confirming the duty demand on the capital goods is not sustainable. When LOP of the Appellant company is still valid and, in fact, has been extended for 2008-09 in February 2008, cancelling the private bonded warehousing licence, which amounts to stopping the operation of the unit, without any reference to the Development Commissioner, is totally wrong. Similarly, when the designated authority for monitoring the NFE of an EOU and deciding at the end of five years' operation as to whether the unit has achieved positive NFE or not, is the Development Commissioner, the Commissioner's order holding that the Appellant company has not been able to achieve positive NFE, without any reference to the Development Commissioner, and that too without any detailed calculation in this regard, is totally wrong.

3.3 The dispute as to whether the NFE achieved by the Appellant company is positive or negative, is linked with the dispute as to whether the declared CIF value of the metal scrap imported by the Appellant company is correct or it has been under-declared. The evidence which has been relied upon by the Revenue in this regard is some export declarations filed by the suppliers, with the respective customs authorities in the exporting countries, in which much ~~such~~ higher CIF value have been declared. The export declarations pertain to period from July 03 to March 05, sixty eight of which are mentioned in para 15 & 18 of the adjudication order. These export declarations have been obtained from the Customs authorities of USA and Italy. But none of these declarations have any signature or the seal of the customs authorities and no documents have been produced to show that these export declarations have, indeed, been obtained from the US Customs or Customs authorities of Italy through Indian counselate/High commission in those countries. Hon’ble Supreme Court in case of Commissioner of Customs, Calcultta vs. South India Television (P) Ltd. reported in 2007 (214) E.L.T. 3 (S.C.) has held that when for proving undervaluation, the Department relies on declaration made by the supplier in the exporting country, it has to show as to how such declaration was procured. In this case, the copies of the reports received from the Customs authorities of the exporting countries have not been given to the Appellants in spite of their request for the same. In respect of 50.40 MTs of Scrap covered by B/E/ No. 481200 & 481211 dated 19/1/06, the only evidence of under invoicing, relied upon by the Revenue is the inspection certificate issued by M/s Alex Stewart, England, the assayers, as per the requirement of para 2.32(1) of the EXIM Policy for import of metal scrap originating from war affected countries, for certification that scrap does not contain any arms, ammunition, mines, shells etc. There no discussion in the commissioner's order as to how value of the goods mentioned in this pre –shipment inspection certificate is the actual price of the goods for export to India and why the invoice price does not represent the true transaction value. For determining the assessable value of any imported goods under sec 14(1) of the Customs Act, what is relevant is their price for export to India, not their value in the exporting country.

3.3.1 On going through the impugned order we also find that so far as the goods under seizure i.e. 1338.7 M.T. of imported scrap covered under 40 bills of entry ,imported during period from 09/12/05 to 19/12/06 and 104.08 M.T. of scrap imported under bills of entry No. 480394 dated 16/1/06 and 480394 dated 16/1/06 are concerned, neither any evidence in form of contemporaneous imports of identical or similar goods at higher prices in comparable quantity nor any evidence in form of higher value being mentioned in the export declarations filed by the suppliers in the exporting country has been produced and the export declarations filed before the Customs Authorities of U.S.A., Italy referred to para 3.3 above, pertain to the consignments imported during period from June 2003 to May 2005 and the adjudication order does not discuss as to how those export declarations are applicable to the seized goods. Thus, from the impugned order, it is not at all clear as to on what basis, the Commissioner has given a finding that CIF value in respect of the seized goods has been mis-declared.

3.4 The issue with regard to description of the goods to be decided by the Commissioner was as to whether the goods under seizure imported by the Appellant's company conform to ISRI grade – honey of brass scrap and in para 44 of his order the Commissioner has given the finding that he finds that altogether 45 samples were drawn in June and July 2007 from the seized goods lying in the Appellant's factory premises and none of the test reports out of the said samples confirm the goods to be brass scrap of grade – Honey ,though quite a few test reports show the pre-dominance of brass (even to the extent of more than 95% in two cases) and that in view of this, he does not find allegation that the imported goods are brass scrap-honey, to be true on the basis of CRCL reports. However, in para 47 of the order, the Commissioner has given the finding that going by the chemical analysis report of CRCL, he is convinced that the appellant's company has mis-declared the imported goods both in terms of description as well as value.

4. From the above discussion, it is clear that not only there are serious irregularities in the adjudication proceedings, like delegating the quantification of duty demand in respect of seized goods to the Assistant Commissioner ,who quantified the duty demand without hearing the Appellants, the

adjudication order itself suffers from a number of serious defects. We fail to understand as to how the Commissioner in para 48 of the order has arrived at the finding that – "the allegation of not attaining NFEP because of undervaluation is sustainable" without quantifying the total value of exports and total actual value of imports during the entire period of operation of the EOU. In this regard even the directions of Hon'ble Delhi High Court in its order dated 22/11/07 have been disregarded. Similarly it is not understood that when in para 44 of the order the Commissioner gives the finding that he does not find the allegation of import of 'Brass Scrap Honey' to be true on the basis of CRCL reports received out of 45 samples drawn, how in para 47 of the order he gives the finding that – "going by the chemical analysis reports of CRCL now received, he is convinced that the noticee company has misdeclared the goods both in term of description and value". The order does not discuss as to what is the evidence of under-invoicing in respect of 1338.507 MTs of imported scrap seized from the factory premises and 104.08 MTs of scrap covered under B/E No. 480394 & 408396 dated 16/1/06 seized at ICD, Tughlakabad. Para 45 &

46 of the order simply refer to Assayer's certificate mentioning higher value of the goods is in respect of the goods covered by B/E No. 481200 & 481211 dated 19/1/06 which had been seized from the factory premises and the overseas inquiry from the Customs authorities of USA and Italy, which was in respect of imports of scrap from these countries during the period from July 2003 to May 2005, as the evidence of underinvoicing in respect of the seized goods. We are, therefore, constrained to observe that in spite of serious allegation of fraud against the Appellant company, which were serious enough to warrant arrest of its Managing Director and in spite of huge revenue involved in this case, the adjudication has been done by the Commissioner in a most caseless and irresponsible manner. We, therefore, set aside the impugned order and remand this matter to the Commissioner with the following directions :-

(1) The de-novo adjudication proceedings shall be done in two stages. First the Commissioner shall decide the issue of misdeclaration of value and description (grade) of the metal scrap imported and the linked issue of liability of confiscation of

the seized goods under Section 111 (d) & (m) of the Customs Act and liability of the Appellants to penalty under Section 112 (a) of the Act on this Count. For this purpose, the Commissioner shall provide to the Appellants, all the relied upon documents in support of the allegation of under invoicing and misdeclaration of the description of the goods, including the reports, if any, received from the Customs authorities of USA and Italy. Cross examination of the officers of DRI who had conducted inquiry with the Customs authorities of USA and Italy shall also be allowed, if asked for by the Appellants.

(2) If the allegations of misdeclaration of value and description of the goods are upheld by the Commissioner, a copy of the adjudication order shall be sent to the Development Commissioner for calculation of the cumulative NFE and his directions for debonding. The issue of cancellation of the private bonded warehouse licence of the EOU, quantification and confirmation of the duty

demand in respect of the seized goods and imposition of equal penalty under Section 114A of the Act shall be adjudicated by the commissioner in the light of the Development Commissioner's findings on the issue of NFE and debonding.

(3) In view of huge revenue involved, the entire exercise of adjudication shall be completed within a period of three months from the date of this order.

(Pronounced in the open court on 26.8.08.)

**(S.S. Kang)**
**Vice President**

**(Rakesh Kumar)**
**Member (Technical)**

PK