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

Appeal No. C/S/1535, 1624, 1639-1644, 2530-2533/2011 IN C/258 /2011,274 /2011,276 /2011-281 /2011,482 /2011-485 /2011 - CU[DB]   Date **26/03/2012**

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

To :
(*) M/S VIKRAM BISHT, 144/24, DDA FLATS,
DAKSHINPURI, NEW DELHI.

**M/S VIKRAM BISHT,** Appellant

Vs

**C.C.E. GHAZIABAD** **STAY ORDER NO.C/S/70-81/2012** Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/A/74-85/ 2012 CU[DB]** dated 22.03.2012 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

**Copy to :**

1. Respondent
**C.C.E. GHAZIABAD**
C.G. O. COMPLEX-II, KAMLA
NEHRU NAGAR, GHAZIABAD
201302

2. Adv. / Consult
**MR.KAMALJEET SINGH**
J-144, PATEL NAGAR -I,
GHAZIABAD.

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

(*) Please see rest of the addresses at back.

**SH. PRABHAKAR MISRHA, PROPRIETOR, OF**
M/S KALKA INC, 841, GALI NO. 39H,
BLOCK E-1, MOLARBAND EXTENSION,
BADARPUR, NEW DELHI. 110044

**M/S BACHU INTERNATIONAL**
DOOR NO: 34/1695/B-23, NATIONAL RESIDENCY
SHOPPING COMPLEX, EDAPPALLY,
KOCHI, KERALA.

**M/S HARI SHELLAC INDUSTRIES,**
(PO BOX NO. 43) VIJAY NAGAR, BALAGHAT
ROAD, GONDIA, MAHARASHTRA.

**SHRI K.D. AGRAWAL, PARTNER OF,**
M/S HARI SHELLAC INDUSTRIES,
(PO BOX NO. 43) VIJAY NAGAR, BALAGHAT
ROAD, GONDIA, MAHARASHTRA.

**SH. DIWAKAR MISRHA, PROPRIETOR, OF**
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BLOCK E-1, MOLARBAND EXTENSION,
BADARPUR, NEW DELHI. 110044

**M/S CENTRAL WAREHOUSING CORPORATION,**
BANTHLA CHIRORI ROAD, NEAR LONI,
RAILWAY STATION, LONI GHAZIABAD (U.P.)

**M/S SAYA OVERSEAS,**
VIJAY NAGAR, BALAGHAT ROAD,
GONDA, MAHARASHTRA. 441614

**SHRI VISHAL AGRAWAL, PROPRIETOR OF,**
M/S SAYA OVERSEAS,
VIJAY NAGAR, BALAGHAT ROAD,
GONDA, MAHARASHTRA. 441614

**M/S JAI BAMLESHWARI RICE SORTEX,**
RAMDEO SADAN, MANOHAR CHOWK,
GONDIA, MAHARASHTRA.

**SHRI PRAKASH RAMDEO JAISWAL, DIRECTOR,OF,**
M/S JAI BAMLESHWARI RICE SORTEX,
RAMDEO SADAN, MANOHAR CHOWK,
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MR. V.V.GAUTAM,ADVOCATE
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MR. PIYUSH KUMAR,ADV
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MASJID MODE, G.K.-III, NEW DELHI.

# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
BENCH-DB

**Customs Stay Application No.C/S/1535/2011 in &**
**Customs Appeal No.C/258/2011**

Mr. Vikram Bisht ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant :Shri Kamljeet, Advocate
Present for the Respondent:Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/1624/20111 in &**
**Customs Appeal No.C/274/2011**

M/s.Central Warehousing Corporation Ltd. ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Rep. of CWC
Present for the Respondent: Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/1639/2011**
**Customs Appeal No.C/276/2011**

M/s.Hari Shellac Industries ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Mr. B.L. Narasimhan, Advocate
Present for the Respondent:Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/1640/2011 in &**
**Customs Appeal No.C/277/2011**

Mr. K.D. Agarwal ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Shri B.L. Narasimhan, Advocate
Present for the Respondent:Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/1641/2011 in &**
**Customs Appeal No.C/278/2011**

M/s.Jai Bamleshwari Rice Sortex ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Shri B.L.Narasimhan, Advocate
Present for the Respondent:Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/1642/2011 in &**
**Customs Appeal No.C/279/2011**

Mr. Prakash Ramdeo Jaisal ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Shri B.L. Narasimhan, Advocate
Present for the Respondent:Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/1643/2011 in &**
**Customs Appeal No.C/280/2011**

M/s.Saya Overseas ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Shri B.L. Narasimhan, Advocate
Present for the Respondent:Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/1644/2011 in &**
**Customs Appeal No.C/281/2011**

Mr.Vishal Agarwal ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant :Shri B.L. Narasimhan, Advocate
Present for the Respondent:Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/2530/2011 In &**
**Customs Appeal No.C/482/2011**

M/s. Kalka Inc. ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Ms. Shikha Sipre, Advocate
Present for the Respondent:Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/2531/2011 in &**
**Customs Appeal No.C/485/2011**

M/s. Bachu International ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Shri Harsad, V. Hameed, Advocate
Present for the Respondent:Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/2532/2011 in &**
**Customs Appeal No.C/483/2011**

Mr. Diwakar Mishra ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Ms. Shikha Sipra, Advocate
Present for the Respondent: Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Customs Stay Application No.C/S/2533/2011 in &**
**Customs Appeal No.C/484/2011**

**[Arising out of Common Order-in-Original No.39-40/Cus/Commr/GZB/2011 dated 15.2.2011 issued on 23.2.2011 passed by the Commissioner, Customs & Central Excise, Ghaziabad].**

Mr. Prabhakar Mishra ...Appellant

Vs.

CCE, Ghaziabad ... Respondent

Present for the Appellant : Ms. Shikha Sipra, Advocate
Present for the Respondent: Shri.Shri Amrish Jain, SDR &
Shri.Sheo Narayan Singh, Jt.CDR

**Coram: HON'BLE MR.D.N.PANDA, JUDICIAL MEMBER**
**HON'BLE MR. RAKESH KUMAR, TECHNICAL MEMBER**

**Date of Hearing: 10.01.2012**

**Pronounced on:** 22/03/2012

Stay order No. C/S/70-81/12-Cus
Final **ORDER** No. C/A/74-85/12-Cus.

PER D N PANDA

**Stay applications**

Appeals as detailed below were listed for hearing of the stay application appearing under each such appeal. At the outset it was brought to our notice that there is no dispute about the nature and quality of goods involved in different containers which were non-basmati rice and were subject matter of attempt to export. The only dispute raised by them was against the redemption fine and penalties imposed as mentioned against each such appellant in the Table – 1 below on the ground of un-reasonability:

**TABLE -1**

| Sl. No. | Appellants | Customs Appeal No. & Stay application No. | Quantity of rice with declared value and Market Value (MV) confiscated under SCN dated 18.11.2009 | Quantity of rice with declared value and Market value (MV) confiscated under SCN dated 3.9.2010 | Redemption fine (RF) & Penalty Imposed under different sections Customs Act, 1962. |
|---|---|---|---|---|---|
| 1. | Hari Shellac Indus. | SP - C/S/1639/2011 in 276/2011 | 8,76,100 Kgs Declared Value: Rs. 4,90,61,600 MV: Rs.1,62,51,655 | 1,03,560 Kgs Declared Value: Rs. 57,99,360 MV: Rs.19,21,038 | RF: Rs.1,81,72,693 And Penalty of Rs.1,81,00,000/- u/s 114(i) |
| 2. | K.D. Agarwal | SP – C/S/1640/2011 In 277/2011 | | | Penalty of Rs. 90,00,000/- U/s 114AA & 114(i) |
| 3. | Jai Bamleshwari Rice Sortex | SP - C/S/1641/2011 in 278/2011 | 6,96,990 Kgs Declared Value: Rs. 3,90,31,440 MV: Rs.1,29,29,165 | 52,210 Kgs Declared Value: Rs. 29,23,760 MV: Rs.9,68,496 | RF: Rs.1,38,97,661 And Penalty of Rs.1,38,00,000/- u/s 114(i) |
| 4. | Shri Prakash Ramdeo Jaisal | SP - C/S/1642/2011 in 279/2011 | | | Penalty of Rs. 69,00,000/- u/s 114(i) & 114 AA and |

| | | | | | |
|---|---|---|---|---|---|
| | | | | | Rs.1,00,000/-u/s 117 |
| 5. | M/s. Saya Overseas | SP - C/S/1643/2011 in 280/2011 | 2,27,263 Kgs Declared Value: Rs. 1,27,26,728 MV: Rs.42,15,729 | 49,660 Kgs Declared Value: Rs. 27,80,960 MV: Rs.9,21,193 | RF: Rs.51,36,922/- And Penalty of Rs. 51,00,000/- u/s 114(i) |
| 6. | Vishal Agarwal | SP – C/S/1644/2011 In 281/2011 | | | Penalty of Rs. 25,50,000/- u/s 114AA and Rs. 1,00,000 u/s 117 |
| 7. | Kalka Inc. | SP - C/S/2530/211 in 482/2011 | 1,53,295 Kgs Declared Value: Rs. 85,84,520 MV: Rs.28,43,622 | 74850 Kgs Declared Value: Rs. 41,91,600 MV: Rs.13,88,468 | RF: Rs.42,32,090/- And Penalty of Rs. 42,00,000/- u/s 114 (i) |
| 8. | Bachu International Prop. Mohd. Basheer | SP - C/S/2531/2011 **in** 485/2011 | 23,055 Kgs Declared Value: Rs. 14,06,355 MV: Rs.4,27,670/- | 23,845 Kgs Declared Value: Rs. 14,54,545 MV: 4,42,325 And 7,75,720 Kgs MV: Rs.14,37,996 | RF: Rs.8,69,995/- and Penalty of Rs. 8,00,000 u/s 114 (i) and Penalty of Rs. 4,00,000/- on Mohd. Baseer u/s 117 |
| 9. | Prabhakar Mishra Prop: Kalka Inc. | SP - C/S/2533/2011 in 484/2011 | | | Penalty of Rs. 21,00,000/- u/s 114(i) and 114AA and Rs. 1,00,000/- u/s 117 |
| 10 | Diwakar Mishra ProP: Kalka Logistics | SP – C/S/2532/2011 in 483/2011 | | | Penalty of Rs. 4,37,000/- u/s 114(i) and 114AA |
| 11 | Vikram Bisht 'H' Card holder of ACT clearing & forwarding Prop: Satish Kumar Mallik | SP- C/S/1535/2011 in 258/2011 | | | Penalty of Rs. 1,00,000/- U/S 117 |
| 12 | Central Ware House Corporation Ltd. | SP - C/S/1624/2011 in 274/2011 | | | Penalty of Rs. 5,00,000/- U/S 114(i) |

2. Dispute in the aforesaid appeals having been reduced to the limited point as aforesaid, dispensing requirement of pre-deposit, those were taken up for analogous hearing with the consent of both sides condoning delay in case of COD No. 289/11 filed by the appellant Bachu International in Appeal No. C/485/2011

**APPEALS**

**FACTUAL MATRIX**

3. All the appeals tabulated in **Table -1** hereinbefore involve common cause of attempt to export non-basmati rice misdeclaring the same to be basmati rice. The appellants appearing at sl. No. 1 to 8 of the said table were exporters of the impugned goods in different containers following different modus operandi and other appellants appearing in that Table were connected to such export. Common Adjudication order dated 23.2.11 was passed by the learned Adjudicating Authority adjudicating Show Cause Notice (in short "SCN") dated 18.11.2009 and 3.9.2010. That resulted in various consequences against all the appellants aforesaid under different provisions of the customs Act 1962 (hereinafter referred to as "the Act") as tabulated hereinbefore on the basis of evidence unearthed during investigation demonstrating misdeclaration of nonbasmati rice as basmati rice attempted to be exported.

4. While SCN dated 18.11.2009 proposed various consequences against the appellants at Sl.No.1 to 11 of the table aforesaid for misdeclaration of goods as basmati rice which were attempted to be exported in 77 containers and seized in ICD, Loni, the second SCN dated 03.09.2010 related to 15 containers which left ICD, Loni to Mumbai for export containing non-basmati rice misdeclared as

basmati rice. Those were called back from exporting port. All the Appellants appearing in the Table aforesaid were found to be involved and connected with these containers.

5. Non-basmati rice is prohibited goods and not exportable. The exporters declared contents of the all containers aforesaid as basmati rice as was alleged in both the SCNS. Both show cause notices being related to misdeclaration of goods and all the appellants being common, common adjudication was made by order dated 27.2.2011. Apart from the number of containers seized as above as alleged in both the SCNs, 11 containers carrying misdeclared goods had already exported carrying misdeclared goods and such containers were not covered by above 2 SCNs.

6. It was held in adjudication that contents of the 92 containers (77+15) involved in both the show cause notices were proved to be non-basmati rice by laboratory test. The test reports revealed that the goods in question did not possess the size and quality of basmati rice for which those were held to be prohibited goods. Subsequently provisional release of the impugned goods were allowed on deposit of redemption fine as mentioned against respective appellants in the **Table -1** aforesaid.

7. The authority found role of each of the parties in his detailed discussion and finding made in the impugned order against them in the adjudication order in different sub-para of para 4 covered by page No.56 to 84 thereof. Adjudication not only brought exporters to the fold of law but those who were connected with the goods and played their role in abetment of attempt to export were brought to

charge and penalties were imposed on them as mentioned against each in **Table – 1** depicted hereinbefore.

**ARGUMENT ON BEHALF OF APPELLANTS**

8. Ld. Counsel Shri B.L. Narasimhan appearing on behalf of the appellants M/s. Hari Shellac Indus., K.D. Agarwal, Jai Baleshwari Rice Sortex, Shri Prakash Ramdeo Jaisal, M/s. Saya Overseas & Shri Vishal Agarwal submitted that no doubt redemption of the goods were made on payment of fine but that does not mean that redemption fine shall be automatically imposable baselessly. Penalty was not liable to be levied disproportionately. The appellant Shri Prakash Ramdeo Jaisal and Shri Vishal Agarwal were never uncooperative to the authorities. Accordingly, imposition of penalty on them alleging non-compliance to summon was unwarranted.

9. Ms. Sikha Shipra, ld. Counsel appearing on behalf of M/s. Kalka Inc submitted that redemption fine was unreasonably imposed. So also penalties imposed were disproportionate when there was no contravention of law. She relied on the decision of the Tribunal in the case of Phonix Traders Vs. CCE, Kandla reported in 2011 – TIOL 1551-CESTAT- Ahm. It was also submitted on behalf of Shri Diwakar Mishra, Proprietor of Kalka Logistics that penalty of Rs.4,37,000/- imposed on him was unwarranted for no role of him or connection to the alleged attempted exports. She also submitted that the penalty levied on Shri Prabhakar Mishra Proprietor of Kalka Inc. was unjustified for the reason that there was penalty of Rs.42,00,000/- imposed on Kalka Inc. itself. When the appellant was not directly involved in mis-declaration, there was no need of imposing penalty. So also, when

there was no failure on the part of the appellant to cooperate with the investigating authority as well as adjudicating authority in submitting information no penalty was imposable.

10. Ld. Counsel Shri Harshid V. Hameed appearing on behalf of M/s.Bachu International has also similar submission that the goods made liable to confiscation were without any basis and unreasonable redemption fine was imposed with disproportionate penalty. The appellant Mohd. Basheer, proprietor of Bachu International was never uncooperative to the authorities. Accordingly, imposition of penalty alleging non-compliance to summon was unwarranted.

11. Shri Kamal Jeet Singh appearing on behalf of Shri Vikram Bisht 'H' Card holder of ACT clearing & forwarding (Proprietor Satish Kumar Mallik) argued that imposition of penalty of Rs.1.00 Lakh on him under section 117 was uncalled for when the appellant not only cooperated to the investigation but also he cooperated with adjudicating authority and did not involve himself personally to perpetuate attempted export.

12. Ld. Representative appearing for M/s. Central Warehousing Corporation submitted that the corporation is a Public Sector Undertaking. It has no malafide but storage of the goods was allowed to the parties for making export without knowing contents in the containers brought to ware house. Neither the parties had ever revealed to Corporation about their modus operandi of acting against Customs Authorities nor had appellant occasion to know the methodology adopted by them to send non-basmati rice out of India. Although it is a fact that Central Warehousing Corporation was custodian of the goods but it was not at all involved actively or in

defiance of the law to cause loss of Revenue through the mis-declaration by the exporters of the goods in question.

**ARGUMENTS OF REVENUE**

13. Learned representative for Revenue supports order of Adjudication and submits that entire attempt for export in these appeals were with a well designed modus operandi with malafide intention to export of prohibited goods for which the appellants deserve appropriate dose of penalty and redemption fine without any leniency in view of their active involvement.

**FINDING AND CONCLUSION OF TRIBUNAL**

14. Heard the respective parties and also perused the records.

**ATTEMPT TO EXPORT**

15. If a person intimately attaches himself to certain acts and omissions questionable under law and also establishes his active involvement, his conscious knowledge to such act or omission is proved and when he is not a stranger to the questionable act or omission, he also fails to prove his innocence. Broadly speaking, all offences which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the offender first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the offender takes deliberate overt steps to commit the offence. Such overt act or step need not be the penultimate act towards the commission of the offence in order to be `offender'. It is sufficient if such an act or acts were deliberately done, and manifest a clear

intention to commit the offence aimed, being reasonably proximate to the consummation of the offence. As pointed out in Abhayanand Mishra v. State of Bihar, (1962) 2 SCR 241, there is a distinction between `preparation' and `attempt'. Attempt begins where preparation ends. In sum, a person commits the offence of "attempt to commit a particular offence" when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

16. Penal provisions are enacted to suppress the evil of smuggling which is an anti-social activity adversely affecting the public revenues, the earning of foreign exchange, the financial stability and the economy of the country. Such provisions should be construed in manner which would suppress the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. Thus construed, the expression "attempt" within the meaning of these penal provisions is wide enough to take in its fold any one or series of acts committed, beyond the stage of preparation in moving the contraband goods deliberately to the place of embarkation, such act or acts being reasonably proximate to the completion of the unlawful export.

17. Evidence Act does not insist on absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence Act, a fact is said to be

`proved' when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This definition of `proof' does not draw any distinction between circumstantial and other evidence. Thus, if the circumstances listed above establish such a high degree of probability that a prudent man ought to act on the supposition that there was abetment to the offence attempting to export the impugned goods in contravention of the law that will be sufficient proof of that fact in issue.

**CONFISCATION OF PROHIBITED GOODS U/S 113 (d) AND (i) OF CUSTOMS ACT, 1962.**

18. Section 113 (d) of the Act has mandate for confiscation of any gods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under the Act or any other law for the time being in force. Similarly clause (i) has mandate for confiscation of any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under the Act.

19. Contents of the alleged containers attempted to be exported remained un-contradicted and that was proved to be non-basmati rice as per unassailed test reports. Misdeclaration of the same as to description and value made by M/s. Hari Shellac Indus., Jai Bamleshwari Rice Sortex, M/s. Saya Overseas, Kalka Inc. and Bachu

International was proved for which confiscation of such goods was rightly done in the adjudication.

**IMPOSITION OF REDEMPTION FINE**

20. According to section 125 of the Act, whenever confiscation of any goods is authorised by the Act, the Officer adjudging it may, in the case of any goods, the exportation whereof is prohibited under the Act or under any other law for the time being in force, gives to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit. However such fine shall not exceed the market price of the goods confiscated. Thus in the present batch of appeals, learned Adjudicating Authority holding the prohibited goods confiscable granted option to pay redemption fine to redeem the goods seized. It is noticed that the parties have taken delivery of the goods back from customs when mis-declaration was proved and remained uncontroverted. However, in the present batch of appeals, the redemption fines imposed in adjudication which is equal to the market value of the goods confiscated appears to be in higher side when such fine is normally imposed to deter the erring exporter from making undue profit by mis-declaration of value and description of goods sought to be exported. Both misdeclaration of value and description of the goods having been established against the aforesaid five exporting concerns, keeping in view the margin of profit earned on the mis-declared goods, the redemption fine in the respective cases shall be

restricted to **10%** of the market value of goods confiscated by the adjudication order.

**IMPOSITION OF PENALTY U/S 114(i) AND U/S 114AA OF CUSTOMS ACT 1962**

21.1. Penalty is imposable on any person charged of the offence committed u/s 114(i) of the Act who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation u/s 113 of the Act, or abets the doing or omission of such an act. In the case of goods in respect of which any prohibition is in force under the Act or any law for the time being in force, shall be liable to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under the Act whichever is greater.

21.2. Section 114AA of the Act is enacted to impose penalty on a person if such person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purpose of the Act. The quantum of penalty leviable shall not exceed five times the value of the goods.

21.3. Perusal of the evidence recorded by investigation and evaluation thereof followed by appreciation threof in adjudication indicates that well designed attempt to export impugned goods was made by aforesaid 5 exporting concerns as well as by the persons manning such concern with the aid and abetment by other persons dealt by this order. The statement recorded under section 108 of Customs Act, 1962 from Shri K.D. Agarwal, Partner of M/s. Hari Shellac Indus brought out that Shri Diwakar Mishra, Proprietor of Kalka Logistics was instrumental to make all efforts and arrangements for attempting to export the non-basmati rice by M/s. Hari Shellac Indus and such concern agreed to that which remained uncontroverted. Similarly, the evidence gathered from Shri Prakash Ramdeo Jaisal, Director of M/s. Jai Bamleshwari Rice Sortex revealed that Shri Diwakar Mishra was instrumental to cause attempted export through misdeclaration and also he established his relationship with Shri K.D. Agarwal of M/s.Hari Shellac Indus. Statement recorded from Shri Vishal Agarwal, Proprietor of M/s. Saya Overseas revealed that contents of the containers proved to be non-basmati rice and he did not contradict the test report.

21.4. It also came to the notice of the authority that one M/s. Lucky Enterprises was found to be fake concern belonged to Shri K.D. Agarwal of M/s.Hari Shellac Indus. IEC Code was managed for M/s. Lucky Enterprises by Shri Diwakar Mishra to export non-basmati rice fraudulently. Therefore, all that was attempted to be exported was brought to the account of M/s. Hari Shellac in the adjudication for consideration while imposing penalty.

21.5. Statement recorded from one Shri Mohd. Basheer, Proprietor of M/s. Bachu International revealed his admission that exports done by M/s. Bachu International was also handled by Shri Diwakar Mishra who was Proprietor of M/s. Kalka Logistic. There was no contradiction of the contents and also the test reports.

21.6. Statement recorded from Shri Vishal Agarwal, Proprietor of M/s.Saya Overseas admitted the contents in the alleged containers to be non-basmati rice and the test report remained uncontroverted.

21.7. The inference arising out of the facts and circumstances established by Customs Authority, unerringly pointed to the conclusion, that without abetment of the offence of attempting to export the impugned goods, in contravention of law, the containers could not have contained the misdeclared goods. In the cases in hand, the appellant exporters and owners of the exporting concerns could not prove that they were stranger to the offence committed but proved to be familiar and intimately connected to facts and circumstances of the case. Their design and nexus proved their deliberate intention to make attempted export of prohibited goods i.e., nonbasmati rice. That brought out their contumacious conduct proving deliberate breach of law made for which they were bound to be subjected to penal consequence under the law. Their involvement in committing the offence alleged became so glaring, that they failed to isolated themselves committing office.

21.8. Cogent evidence came to record establishing that the contents of the impugned containers remained uncontroverted and test report was not found faulty. Misdeclaration as well as abetment was proved for which penalties shall be imposable under section 114(i) and section 114AA of the Act when confiscation of the goods attempted to be exported sustained. Only quantum aspect of penalties called for consideration. Making an over all consideration of the facts and circumstances of the case and also considering the fact that non-basmati rice in the aforesaid 99 containers did not go out of India as well as taking into consideration the magnitude of their involvement and strength of evidence as well as the role played by them, penalties to the extent indicated in the **Table -2** hereunder called for imposition and we order accordingly.

## LEVY OF PEANLTY FOR FAILURE TO COMPLY TO SUMMON

22. In so far as imposition of penalty for non-compliance to summon is concerned, it is found that the appellants against whom such allegation was made they did not cooperate to investigation as well as adjudication. However looking to the gravity and magnitude of commitment, penalty imposed on them under section 117 is reduced to the extent indicated in the **Table-2** depicted hereunder.

## APPEAL OF DIWAKAR MISHRA

23. So far as the appeal of Shri Diwakar Mishra who facted penalty u/s 114(i) and 114AA of the Act is concerned it is found that his name was uttered by Shri K.D. Agarwal (Partner of M/s.Hari Shellac Indus.), Shri Prakash Ramdeo Jaisal (Director of M/s. Jai Bamleshwari Rice Sortex), Mohd. Basheer (Proprietor of M/s. Bachu International) and Shri Vishal Agarwal (Proprietor of M/s. Saya Overseas). His role was found to be prominent in perpetuating attempt to export of non-basmati rice. He was providing service of booking of containers through shipping lines, stuffing of containers, transportation thereof and preparation of document through CHA as an experienced person from 2008 and was well aware of export procedure. In his statements recorded under section 108 of the Act 1962, he revealed that he had

knowledge about the goods meant for exports from the time of purchase thereof. He also revealed that on consultation, Shri Vikram Bisht who was 'H' Card holder stated to him that he would manage the export on some extra expenses. The methodology followed for dispatch of the impugned containers from time to time was also stated by him. He disclosed questionable conduct of Shri K.D. Agarwal of M/s. Hari Shellac Indus. as to the attempted export of the non-basmati rice through benami firms which were M/s. Lucky Enterprises created by Shri Agarwal and M/s. Kosma Impex createdby Shri Prakash Ramdeo Jaisal. The authorities found his active involvement with the shipping agency to stream line the impugned export. He proved his connection with the exporters and Shri Vikram Bisht who was an employee of Shri Satish Kumar Mullick, CHA. Stuffing of the goods was well known to both. They submitted themselves very actively to the attempted export. Consequently he is liable to penalty. Considering his role and gravity of offence, the penalty that shall be imposable is depicted in the **Table-2** hereunder.

**APPEAL OF PRABHAKAR MISHRA**

24. So far as the appeal of Shri Prabhakar Mishra, Proprietor of Kalka Inc., who faced penalties u/s 114(i) and 114AA and 117 is concerned, statement recorded from him revealed that he was actively involved in the alleged attempt to export having claimed 9 containers misdeclared both in respect of description of goods and value thereof to be released on payment of redemption fine. He did not controvert the contents to be non-basmati rice and also agreed with the test report. Nothing came from him in defence to suggest that M/s. Kalka Inc. had

not made attempt to export non-basmati rice. Therefore, he was bound to be penalised. But the extent of penalty that shall be imposed on him is depicted in the **Table-2** herein below.

**APPEAL OF VIKRAM BISHT**

25. So far as the appeal of Shri Vikram Bisht who faced penalty u/s 117 of the Act is concerned his role in managing attempted export came to record when he admitted his involvement in his statement recorded by the investigating authority. He did not rule out his active role, but provided indispensable service to occasion the attempted exports. Being an associate of Shri Diwakar Mishra and being an 'H' card holder fostered the impugned goods to move from ICD to Nhava sheva for the attempted export. When his association could be established and he failed to appear against summon issued, he was rightly penalised. The quantum of penalty as considered proper is depicted in the **Table-2** here-in-below.

**APPEAL OF CENTRAL WARE HOUSING CORPORATION**

26. So far as the appeal of Central Warehousing Corporation is concerned, ld. Authority found it to be custodian of goods attempted to be exported. The Corporation Officers admitted that they did not follow the procedure laid down in Public Notice No.03/Cus-2007 dated 18.05.2007 and factory stuffed containers were allowed entry without retaining the copies of the shipping bills. Failure to check the sealing of the container by the Corporation was noticed by the investigating authority as well as Adjudicating Authority and that was established. The Corporation official did not make effort to verify the contents of

the impugned containers at any time. However Adjudicating Authority concluded that Corporation was not directly involved in the attempted export. But it allowed prohibited goods to enter into the stream of export and without any legitimate document it processed copies of shipping bill without waiting for the permission of the Officer In-charge of ICD, Loni to allow the entry of the goods. Such a failure brought them to penal action u/s 114(i) of the Act. However, taking lenient view, the adjudicating authority imposed minor dose of penalty on the Corporation. At the stage of appeal hearing there was no evidence was led to show innocence of corporation's officers except claiming leniency. But failure to follow custom procedure having resulted in attempted export of the alleged goods and Revenue was prejudiced, the corporation is also liable to penalty. Considering its involvement, penalty is imposed to the extent indicated in the **Table-2** herein below.

**TABLE -2**

| **Sl. No.** | **Appellants** | **Customs Appeal No.** | **Penalties imposed** | | |
|---|---|---|---|---|---|
| | | | **u/s 114(i)** | **u/s 114 AA** | **u/s 117** |
| 1. | Hari Shellac Indus. | 276/2011 | Rs. 18,00,000 | -- | -- |
| 2. | K.D. Agarwal | 277/2011 | Rs. 9,00,000 | | -- |
| 3. | Jai Bamleshwari Rice Sortex | 278/2011 | Rs. 13,80,000 | -- | -- |
| 4. | Shri Prakash Ramdeo Jaisal | 279/2011 | Rs. 6,90,000 | -- | Rs. 10,000 |
| 5. | M/s. Saya Overseas | 280/2011 | Rs. 5,10,000 | -- | -- |
| 6. | Vishal Agarwal | 281/2011 | Rs. 2,55,000 | -- | Rs. 10,000 |

| | | | | | |
|---|---|---|---|---|---|
| 7. | Kalka Inc. | 482/2011 | Rs. 4,20,000 | -- | -- |
| 8. | Bachu International Prop. Mohd. Basheer | 485/2011 | Rs. 80,000 | -- | Rs. 50,000 |
| 9. | Prabhakar Mishra Prop: Kalka Inc. | 484/2011 | Rs. 2,10,000 | -- | Rs. 10,000 |
| 10 | Diwakar Mishra ProP: Kalka Logistics | 483/2011 | Rs. 5,ooo | | |
| 11 | Vikram Bisht | 258/2011 | -- | -- | Rs. 20,000 |
| 12 | Central Ware House Corporation Ltd. | 274/2011 | -- | -- | Rs. 50,000 |

All the appeals are partly allowed limiting redemption fine and penalties to the extent aforesaid.

(Pronounced in the open Court on 22.03.2012)

(D N PANDA)
JUDICIAL MEMBER

(RAKESH KUMAR)
TECHNICAL MEMBER