

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.**

Appeal No. C/1084/2012

(Arising out of Order-in-Original No. 21/2012-13 dated 10.08.2012
passed by Commissioner of Customs (Export), Nhava Sheva)

Divine Impex

GIDC, Phase-II, Dared,
Jamnagar 361 004

Appellant

Vs.

Commissioner of Customs (E), NS

JNCH, Uran, Dt. Raigad,
Sheva 400 707

Respondent

WITH

Appeal No. C/1085/2012 (Yagnesh Trada)

(Arising out of Order-in-Original No. 21/2012-13 dated 10.08.2012
passed by Commissioner of Customs (Export), Nhava Sheva)

Appearance:

Shri N.D. George, Advocate for the Appellant

Shri Roopam Kapoor, Authorised Representative for the
Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. A/ **85725-85726/2019**

Date of Hearing: 14.12.2018

Date of Decision: 12.04.2019

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original
No 21/2012-13 dated 10.08.2012 of the Commissioner
Customs (Export) Nhava Sheva. By the said order
Commissioner has held as follows:

“i. I confiscate 17620 kgs of Brass Rods valued at Rs 87,48,710/- and attempted to be exported illicitly under S/B Nos 9355475 and 9355476 both dated 1.0.2011, and seized under Panchnama dated 25.02.2011, subsequently released on execution of Bond & BG under Section 113 (i) of the Customs Act, 1962. However, I give an option to M/s Divine Impex to redeem the same on payment of Redemption Fine of Rs 25,00,000/- (Rupees Twenty Five Lakhs only) under Section 125 of the Customs Act, 1962.

ii. I impose a Penalty of Rs 87,48,710/- (rupees Eighty Seven Lakhs Forty Eight Thousand Seven Hundred and Ten only) on M/s Divine Impex under Section 114 (iii) of the Customs Act, 1962.

iii. I impose a Penalty of Rs 87,48,710/- (rupees Eighty Seven Lakhs Forty Eight Thousand Seven Hundred and Ten only) on Shri Yagnesh Trada under Section 114 (iii) of the Customs Act, 1962.

iv. I impose a penalty of Rs 1,00,00,000/- (Rupees One Crore Only) on Shri Yagnesh Trada under Section 114AA of the Customs Act, 1962.”

2.1 Appellant 1 is an 100% Export Oriented Unit and Appellant 2 is partner in the said unit. They had filed two Shipping Bills 9355475 & 9355476 dated 11.02.2011 for export of the consignments of Brass Electrical Earthing Accessories.

2.2 After examination of goods and investigations carried the goods covered by the Shipping Bills were seized. The seized goods were subsequently provisionally released to Appellant on execution of a Bond and Bank Guarantee of Rs 20 lakhs.

2.3 A show cause notice dated 16.08.2011 was issued to the appellants alleging that they-

- a. Indulged in the act of fraudulently exporting “MS Earth Rods Copper Coated”, in the guise of Brass

Electrical Earthing Accessories, by illicitly procuring/ purchasing the same from other units namely M/s Swastik Enterprises Ahmedabad to fulfill the export obligation under EOU scheme.

- b. Willfully indulged in the act to fraudulently export Brass Rods, purchased illicitly from outside and mis-declaring the same as Electrical Earthing Accessories manufactured by M/s Divine Impex, in the export documents, knowing very well that such an act would render the export goods liable for confiscation under Section 113(i) of the Custom Act, 1962.
- c. Misrepresented the acts with regards to actual description of export goods in the export documents viz ARE-1 Nos 012/2011-12 and 13/2011-12 and shipping Bills No 9355475 & 9355476 dated 11.02.2011, knowing very well that such an act was illegal and would render the goods liable for confiscation.

Thus show cause notice asked appellants to show cause as to why:

- (i) 17620 kgs of Brass Rods valued at Rs. 87,48,710/- and attempted to be exported illicitly under S/B No 9355475 & 9355476 both dated 11.02.2011 and seized under Panchnama dated 23.02.2011 should not be confiscated under Section 113(i) of the Customs Act, 1962.
- (ii) Penalty under Section 114 (iii) of the Customs Act, 1962 should not be imposed.
- (iii) Penalty under Section 114AA of the Customs Act, 196 should not be imposed on Appellant 2 (partner in Company).

2.4 The show cause notice was adjudicated by the Commissioner as per his order referred in para 1, supra. Aggrieved appellants have filed this appeal before tribunal.

3.1 Appellants have in their appeal challenged the impugned order stating that-

(i) The case of revenue is not supported by any corroborative evidences hence the allegations made against them cannot be sustained. They rely on the following decisions

- a. Roll Tubes Ltd [2011 (265) ELT 414 (T-Del)]
- b. Rishi Packers Ltd [2003 (159) ELT 110 (T-Mum)]
- c. Metal Fitting (P) Ltd. [1997 (93) ELT 747 (T)]
- d. Prabhulal Ram Ratan Das (P) Ltd. [2011 (271) ELT 420 (T)]
- e. Fairfield Atlas LED [2009 (241) ELT 49 (T)]
- f. Shriram Tubes (P) Ltd [2008 (232) ELT 809 (T)]
- g. Shree Ganesh Rolling Mills [2009 (241) ELT 47 (T-Del)]
- h. Dilip Kumar [2008 (222) ELT 526 (T-Del)]

(ii) They are manufacturers of Brass Electrical Items. They received an order from foreign buyer M/s Al Saaha International Elect & Hardware LL (UAE), Order No ASEIH/112/10 dated 13.12.2010 an Order No ASIEH/104/10 dated 04.12.2010.

(iii) They have exported Electrical Earthing Accessories under the shipping Bill No 9355475 & 9355476 both dated 11.02.2011, ARE-1 No 012/2011-12 and 13/2011-12 both dated 31.01.2011 and Invoice No DI/Exp/12/2010-11 and DI/Exp/13/20101-11. Irrespective of the evidences produced by the revenue the said consignments had reached the port and were presented for export.

(iv) The challan No 164/01.02.2011 recovered from Shri Nilesh Chudasama driver of the truck along with the invoice No 19/01.02.2011 of M/s Shaan Cement do not do not appear to be genuine for following reasons-

- a. No reference of debit entry No of PLA or RG23A part II on the said invoice.
- b. No mention of truck no on the invoice.
- c. Consigner copy forwarded by M/s Shaan Cement is not signed by any of authorized person of transporter.
- d. These documents were never tallied with the original documents of M/s Shaan Cement P Ltd.

(v) Complete reliance has been placed on the Statement dated 18.07.2011 of Shri Duiyesh Rameshbhai Goswami, owner cum cleaner of the Truck No GJ10W 5540, stating that the brass rods arrived in the unit of appellants in 12 to 14 Chakras and offloaded and then loaded on the said truck in order to establish that goods were not manufactured in the factory of appellants. This statement is not supported by any corroborative evidence.

(vi) The case of revenue to the effect the brass rods were misdeclared by them as 'Electrical Earthing Accessories' on the shipping bill is also not corroborated by any independent evidence. These goods were supplied against the order received by them and referred in para (ii) above. The foreign buyer has accepted the goods without any demur and has also made the payments in foreign currency. Thus department should not object to the description of goods as declared by them. They rely on the following decisions:

- a. Wescon Sports Pvt Ltd. [2007 (209) ELT 371 (T-Mum)]
- b. Deccan Products (P) Ltd [1996 (81) ELT 361 (T)]

(vii) In the test report only specifications of the goods are mentioned and it no where mentions that the good were "*brass rods*". Actually the goods were

a part of "Puddle Flange" also known as "*Electrical Earthing Accessories*".

(viii) Appellant 2, partner of the Appellant 1, has not committed any fraud hence penalties imposed on him cannot be justified.

4.1 We have heard Shri N D George Advocate for the Appellant and Shri Roopam Kapoor Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellants, learned counsel submitted:

(i) After the provisional release of the goods the same were exported and the export proceeds realized against them vide BRC No UTIB000017500005803 dated 22.02.2016 and UTIB0000175000005798 dated 22.02.2016.

(ii) Cross examination was not allowed of the witness and such denial was not justified as the case was based on the oral evidences. Hence not allowing cross examination is enough reason for quashing the impugned order in view of following decisions:

- a. Andaman Timber Industries [2015 (324) ELT 641 (SC)]
- b. Mulchand M Zaveri [2016 (339) ELT 364 (Guj)]
- c. Saniul Abideen Neelam [2014 (300) ELT 342 (Mad)]

(iii) The test report only talks about testing of metallic constituent and the shape of sample. It does not show as to how the item tested was not an electrical accessory but only brass rod.

(iv) The goods cannot be held liable for confiscation under Section 113(i) as there is no mis-declaration in respect of the description of the goods. Further by incorrectly describing the goods the appellants do not get any pecuniary benefit and the export is

against a free shipping bill without claiming any export incentive.

(v) Since goods are not liable for confiscation, no penalty can be imposed.

4.3 Arguing for the revenue learned Authorized Representative supported the order of the Commissioner and stated-

(i) The goods have been held liable for confiscation, as they misdeclared to the extent, that they were not the same goods as described on the export documents. Also they were misdeclared vis a vis manufacture and clearance. These goods were not manufactured and cleared by the Appellant in their 100% EOU, but were procured from outside, (from M/s Swastik Enterprises Ahmedabad).

(ii) The allegations made in the Show Cause Notice are well corroborated with the other evidences recovered during the course of investigation, in form of statements recorded.

(iii) Gujarat High Court has in case of Jasmat Parshottam Ganesh [1995 (76) ELT 545 (Guj)] has held that *"statement of person concerned recorded under Section 108 of CA can be relied upon to lend assurance to other evidences"*.

(iv) Hon'ble Supreme Court has in case of Ilias {1983 (13) ELT 1427 (SC)} held that *"Confessions made before Customs Officers are admissible in evidence."*, and has in case of K I Pavunny [1997 (90) ELT 241 (SC)] held that *"Confessional statement of accused, if found to be voluntary, can form sole basis for conviction."*

(v) Tribunal has in case of Fortune Impex {2001 (138) ELT 556 (T-Kol)} held that *'Cross Examination not to be allowed of all witnesses if no specific reason given.'*

(vi) Claim of the appellants that items presented for export are “Electrical Earthing Accessories” is contrary to their own claim on the basis of Chartered Engineer Certificate stating that *“these goods are part of part of puddle flange”*. Puddle flanges as per published literature *“Puddle Flanges are used to seal around the outside of pipes that are required to pass through concrete structures. They are installed during construction. Ensures a watertight seal where pipes pass through the walls of any structure below groundwater level.”*

(vii) Thus order of Commissioner confiscating the goods should be upheld as the appellants have misdeclared the goods in all respect. Also by doing so they have rendered themselves liable for penalty under section 114 (iii) and 114AA.

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

5.2 Appellant 1 is an 100% Export Oriented Unit and Appellant 2 is partner in the said unit. When the factory premises of the appellant was visited by the officers it was found that another factory named M/s Patel Mech Engineering owned by Shri Nilesh Tarda was running from the same premises. Enquiries conducted revealed that two factories namely M/s Divine Impex and M/s Patel Mech Engineering were running from the same premises. M/s Patel Mech Engineering was manufacturing finished good i.e. earthing accessories from M/s Mech Divine Impex out of the imported raw materials. The finished goods manufactured by the M/s Patel Mech Engineering namely Brass Rods were sold in the local market against cash payments. The activities undertaken by the M/s Patel Mech Engineering were only to cover up the fact that M/s Divine Impex (Appellant 1) was undertaking manufacturing

operations in the said premises, whereas no manufacturing was done by them .

5.3 Statements were recorded of Shri Yagnesh Trada (Appellant 2) twice. His first statement recorded on 3.02.2011 exhibited the fact of them getting EOU and warehousing permissions. He admitted to the shortages noticed in the stock and the sale of raw material and finished goods in local market These statements were corroborated by the various documentary evidences. To specific question in respect of the consignments under consideration the response was as follows:

“Question 3. Why were unable to explain the location of export goods shown removed by you from your unit under Export Invoice Nos DI/EXP/012/2010-11 dated 31.01.2011 and DI/EXP/013/2010-11 dated 31.01.2011? You have failed to produce any evidence showing transportation of the goods from your unit to JNPT, Mumbai as covered under above said two export invoices. Do you admit to the fact that no such goods were dispatched from your unit?”

Answer 3. I admit that I am unable to present any transport documents and also failed to prove the transportation of goods from our unit to JNPT, Mumbai. However I have to say that the goods shown removed under the above said two export invoices for exports have been manufactured in our unit however the receipt thereof at JNOPT, Mumbai by our CHA will be confirmed within two days by me.”

5.4 The above statement is in respect of the consignments cleared on 31.01.2011 and the appellants is not in position to give the details of the transport documents. This fact is to be noted along with evidences recovered in further investigations carried which resulted in recovery of LR No 164/1.02.2011 along with the invoice number 19/01.02.2011 of the Shaan Cement for transporting cement. When same vehicle was engaged by

the appellant for transport of their goods to JNPT, how was it that on 01.02.2011 it was transporting cement, for Shaan Enterprises a fact that has been admitted by the driver of the said truck. These facts point out that appellants had just made the documents like ARE-1 and Invoices and have in actual not cleared any goods on 31.01.2011. After the statement was recorded, appellants in order to cover up they procured certain goods from the local market which were brought into the premises loaded in 12-13 chakras (autos) and were actually loaded in the truck and transported from their premises on 4.02.2011. These goods reached NHAVA Sheva on 07.02.2011. The CHA who was initially entrusted the job of filing the export documents and getting the consignment cleared for export on finding the goods not as per ARE-1 and the packing lists refused to file the shipping bills. Thereafter appellants approached another CHA (M/s Devchand Khatau and Co) for filling the shipping bills. The manner in which the consignment was manipulated has been admitted by the various persons concerned in their statements recorded under Section 108 of Customs Act, 1962.

5.5 When the consignment was examined, it was found that goods were “brass rods” and not “Electrical Earthing Accessories” as declared. This fact is also established by the test report obtained. When the Shri Yagnesh Trada was again confronted with the above facts of examination, on 14.03.2011, he responded to the same in his statement stating as follows:

“Question 1. *Please explain about the list of finished goods manufactured from the duty free imported Brass Scrap in your unit viz M/s Divine Impex.*

Answer 1. *The items manufactures in my unit M/s Divine Impex are Brass Scrap, Aluminium Scrap, M S Turning, Metal Slag, Rubber Scrap, M S Scrap, Dust, Brass Ingots, Brass Electrical Parts and Aluminium Cast. Details about*

the production of all the items in my unit are duly entered in the Finished Goods Register.

Question 2. *You are being asked about the stock of Brass Rods, which are not shown in any of your finished goods stock register, then how you showed exporting the same under S/B No 9355475/11.02.2011 and 9355476/11.02.2011 from JNPT Nhava Sheva? Where have you purchased the stock of Brass Rods which were sent to JNPT in Truck No GJ-10W 5540?*

Answer 2. *I agree that we do not manufacture Brass Rods, however the goods for export of which S/B No 9355475/11.02.2011 and 9355476/11.02.2011 filed by us are called Part of Puddle Flange which was produced by us.*

Question 3. *What you have declared in the S/B, ARE-1 and corresponding invoices?*

Answer 3. *We have declared Electrical Earthing Accessories in the export documents. Part of Puddle Flange is known as Electrical Earthing Accessory."*

5.6 From the facts as stated above it is the clear case of the misdeclaration and appellants have just went on manipulating the records and clearances to cover up. They had shown clearance of the export goods against the two invoices dated 31.01.2011 declaring the goods as "Earthing Electrical Accessories", without actually clearing anything. When they got confronted in respect of these clearances the manipulated the consignment through local procurements and transported the consignment to Nhava Sheva on 4th March 2011 which reached there on 7th March 2011. When appellant is confronted with the examination and test report, he is unable to make any positive and definite reply. He calls the goods as "Part of Puddle Flange" and declares them to Earthing Electrical Accessories. We have seen the technical literature produced by the learned Authorized Representative, which clearly states that Puddle Flange is "*an economical and reliable method of*

hydrostatic sealing." Thus the goods even if this submission of Appellant, supported by the Chartered Engineer Certificate is to be admitted then also the goods cannot be categorized as Electrical Earthing Accessories. They continue to remain the Brass Rods. Further appellants have not produced any literature to demonstrate the electrical characteristics of the goods produced for export in form of test reports vis a vis the electrical/ conductive properties of the goods. In fact no electrical goods/ accessories could have been cleared in this huge quantity without any proper certification.

5.7 Appellant have claimed in defence that when they exported the goods after provisional release, they have realized the foreign exchange. There is no dispute that goods have been actually exported. But the dispute was in respect of the declaration made on the Shipping Bills for export. But the proof of receipt of export realization is only certifying the factum of export and not the correctness of declaration made on export documents. The case relied upon by the appellants in this respect do not advance their case. The case of Wescon relied by them was in case where the issue was in respect of valuation for the purpose of Drawback. Similarly in case of Deccan, the issue was, where no adverse finding has been recorded in the order vis a vis the value and specifications. Both the cases are clearly distinguishable.

5.8 Appellants have relied upon a large number of case laws to argue that case of revenue is not supported by any corroborative evidences and hence cannot be sustained. We are not in agreement with the said argument. It is clear case of substitution of goods shown to manufactured be manufactured and cleared by the Appellant 1 for export, but were actually the goods procured clandestinely from market. There is enough corroboration of the facts, in form of the statements and documents recovered during

investigation. Even Apex Court has in case of D Bhoormal [1983 (13) ELT 1576 (SC)] held-

“31. *The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in Blatch v. Archar (1774) 1 Cowp. 63 at p. 65 “According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted”. Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.*

32. *Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned : and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in ‘Law of Evidence’ (12th Edn. Article 320, page 291), the “presumption of innocence is, no doubt, presumptio juris : but every day’s practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property,” though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However,*

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

34. *The propriety and legality of the Collector's impugned order had to be judged in the light of the above principles.*

35. *It is not correct to say that this is a case of no evidence. While it is true that no direct evidence of the illicit importation of the goods was adduced by the Department, it had made available to the Collector several circumstances of a determinative character which coupled with the inference arising from the dubious conduct of Baboothmull and Bhoormull, could reasonably lead to conclusion drawn by the Collector, that they were smuggled goods. These circumstances have been set out by us earlier in this judgment. We may recapitulate only the most salient among them.*

36. *The importation of such goods into India had been banned several years earlier, i.e. some of them in 1957 and of others in 1960. These goods, without exception, were all of foreign origin. They were of large value of over Rs. 12,000/-. They were all lying packed as if they had been freshly delivered, or were ready for despatch to a further destination. They were not lying exhibited for sale in the show cause of the shop. Baboothmull from whose apparent custody or physical possession, they were seized disclaimed not only their ownership but also all knowledge about the contents of the packages. He could not give a satisfactory account as to how those packages came into his shop. At first, he said that some next-door unknown broker had left them outside his shop. Some days later, he came out with another version viz. that one Bhoormull had left them there. Eight days after, one mysterious person*

who gave out his name as Bhoormull laid claim to these goods. Despite repeated requisitions Bhoormull did not furnish any information regarding the source of the alleged acquisition of the goods. He never appeared personally before the Collector. He remained behind the scenes. He did not give addresses or sufficient particulars of the brokers who had allegedly sold the goods to him on the 3rd June. Whatever cryptic information was given by him, was also conflicting. Despite two show-cause notices, Bhoormull intransigently refused to disclose any further information. Apart from making a bare claim, he did not furnish evidence of his ownership or even juridical possession of the goods. The totality of these circumstances reinforced by the inferences arising from the conduct of Baboothmull and Bhoormull could reasonably and judicially lead one to conclude that these goods had been illicitly imported into Madras, a sea port. Even if the Division Bench of the High Court felt that this circumstantial evidence was not adequate enough to establish the smuggled character of the goods, beyond doubt, then also, in our opinion, that was not a good ground to justify interference, with the Collector's order in the exercise of the writ jurisdiction under Article 226 of the Constitution. The function of weighing the evidence or considering its sufficiency was the business of the Collector or the appellate authority which was the final tribunal of fact. "For weighing evidence and drawing inferences from it", said Birch J. in Queen v. Madhub Chander, (1874) 21 WR Cr. 13 at P. 19 "there can be no cannon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited". It follows from this observation that so long as the Collector's appreciation of the circumstantial evidence before him was not illegal, perverse or devoid of common sense, or contrary to rules of natural justice there would

be no warrant for disturbing his finding under Article 226. The Collector's order was not of this kind.

37. *In the view that the initial onus of proof on the Department can be sufficiently discharged by circumstantial evidence, we are supported by the decision, of this Court in Issardas Daulat Ram's case, (1962) Supp. (1) SCR 358. There, on September 14, 1954, that is, long before insertion of Section 178A in the Act, a quantity of gold to a refinery in Bombay was sent for the purpose of melting. The Customs authorities seized this gold when it was being melted. The gold was found to be of foreign origin and had been imported into India in contravention of the Foreign Exchange Regulation Act, 1947. The Collector of Customs confiscated it under Section 167(8) of the Act. The legality of confiscation was challenged by a petition under Article 226 of the Constitution before the High Court, on the ground that there was no evidence before the Collector to show that the gold had been imported into India after restrictions had been imposed in March 1947 on its importation. The High Court rejected this contention and dismissed the petition. The same argument was advanced before his Court in appeal by special leave. This Court also negatived this contention. While conceding that there was no direct evidence that the gold had been smuggled after March 1947, it was held that a finding to that effect could be reached by referring to "the conduct of the appellant in connection with (a) the credibility of the story about the purchase of this gold from three parties, (b) the price at which the gold was stated to have been purchased which was less than the market price and (c) the hurry exhibited in trying to get the gold melted at the refinery with a small bit of silver added so as to reduce the fineness of the gold and thus approximate the resultant product to licit gold found in the market".*

5.9 This contention with regards the statements and documentary evidences raised by the Appellants have been considered by Commissioner in para 46 and 49 of his order wherein he observes as follows:

“46. Their contention was that the statement of Shri Jayantibhai Karia could not be relied upon, as there was no documentary evidence. I find that the contention has no basis. The facts narrated in the statement of Shri Jayantibhai Karia was corroborated by the statements of Shri Piyush Shah and Shri Karsanbhai. There were also documentary evidences (letter of M/s. Divine Impex) on record to prove that 40 wooden boxes were sent by M/s. Divine Impex.

49. Their version was that no single documentary evidence has been adduced by the investigating Agency to prove that the Noticees were indulged/habitual in exporting of any inferior quality of the goods or diverting their duty free imported materials into domestic market. This version is also not valid. Shri Yagnesh Trada in his statement dated 3.2.2011, which is inculpatory, admitted the above facts and the same facts were corroborated by Shri Nilesh Trada and partners of M/s. Swastik Enterprises. Moreover, there were numerous material evidences on record. In quasi-judicial proceedings what is important is to establish the case with pre-ponderance of probability. It is not necessary to prove the offence with pin point accuracy. (Santharam Vs. CCE&C, Madurai – 2 reported in 1995 (79) ELT 564 (Mad.) and Mahesh Kumar Goval V/s CCE, Calcutta-II reported in 2004 (177) ELT 561 (Tri. Kolkata). This has been done in the instance case.

5.10 Appellants have contended that they were denied the opportunity of cross examination. In our view it is not the right of the noticee to cross examine each and every witness. It is for the noticee to make a request for cross examination of witnesses supported by the reasons for

asking such cross examination. It is then for the adjudicating authority to decide whether such a request can be allowed or not. In para 50 of his order Commissioner have recorded rejecting the request for cross examination stating as follows:

“50. Their contention was that in case of relying upon the statements secured from various persons in this matter for confirming the confiscation and penalty, they should be allowed to cross-examine such persons before deciding the matter. I find that it is not necessary to allow cross-examination in each and every case. It all depend upon the merit of the case and in the subject case I do not find any merit for allowing cross-examination of others. In case of Fortune Impex Vs Commissioner of Customs, Calcutta reported in 2001 (138) ELT 556 (Tri.-Kolkata), it was observed by the tribunal that “It is not required that in each and every case cross-examination should necessarily be allowed. There is no absolute right of cross-examination provided in the Customs Act.” It was also held in that order that there is no violation of principles of natural justice when no specific reasons were given for cross-examination.”

5.11 It is settled law that statements recorded under section 108 of Customs Act, 1962 are admissible piece of evidence and need not be further corroborated. In case of K I Pavunny [1997 (90) ELT 241 (SC)], Hon'ble Apex Court laid down as follows:

“19. Next question for consideration is : whether such statement can form the sole basis for conviction? It is seen that, admittedly, the appellant made his statement in his own hand-writing giving wealth of details running into five typed pages. Some of the details which found place in the statement were specially within his knowledge, viz., concealment of the 200 biscuits in his earlier rented house till he constructed the present house and shifted his

residence and thereafter he brought to his house and concealed the same in his compound; and other details elaboration of which is not material. The question then is : whether it was influenced by threat of implicating his wife in the crime which is the sole basis for the claim that it was obtained by threat by PW-2 and PW-5? In that behalf, the High Court has held that it could not be considered to be induced by threat that his wife will be implicated in the crime and accordingly disbelieved his plea. It is seen that admittedly after the appellant gave his statement, he was produced before the Magistrate though no complaint was filed and was released on bail. He did not complain to the Magistrate that Ex. P-4 statement was given under inducement, threat or duress. It was raised only subsequently making accusations against PW-5, the Inspector of Customs. Therefore, obviously it was only an afterthought. The High Court, therefore, rightly has not given any weightage to the same. It is true that the Magistrate has given various reasons for disbelieving the evidence of PW-3, the panch witness who had also, at one point of time, indulged in smuggling. It is unlikely that PW-3 would bring 200 gold biscuits of foreign marking and conceal them in the compound of the appellant without appellant's knowledge for safe custody. It is not his case that he had facilitated PW-3 in concealing them in his compound. The place of concealment of the contraband is also significant at this juncture. It is just near and visible from the window of his bed-room through which he or family members could always watch anyone frequenting the place where the contraband was concealed. This fact becomes more relevant when we consider that after concealment of the contraband in the compound one would ensure that others having access to the compound may not indulge in digging and carrying away the same. As soon as the appellant and/or the members of his family had sight of such visitor or movement by others, they

would immediately catch hold of such person or would charge them. Obviously, therefore, it would be the appellant who had concealed 200 gold biscuits of foreign marking in his compound at a place always visible from his bed-room window. Therefore, the High Court was right in its conclusion, though for different reasons, that Ex. P-4 is a voluntary statement and was not influenced by threat, duress or inducement etc. Therefore, it is a voluntary statement given by the appellant and is a true one.

26. In *Naresh J. Sukhawani v. Union of India* - 1996 (83) E.L.T. 258 (S.C.) = 1995 Supp. 4 SCC 663 a two-Judge Bench [to which one of us, K. Ramaswamy, J., was a member] had held in para 4 that the statement recorded under Section 108 of the Act forms a substantive evidence inculcating the petitioner therein with the contravention of the provisions of the Customs Act as he had attempted to export foreign exchange out of India. The statement made by another person inculcating the petitioner therein could be used against him as substantive evidence. Of course, the proceedings therein were for confiscation of the contraband. In *Surjeet Singh Chhabra v. Union of India* - 1997 (89) E.L.T. 646, decided by a two-Judge Bench to which one of us, K. Ramaswamy, J., was a member the petitioner made a confession under Section 108. The proceedings on the basis thereof were taken for confiscation of the goods. He filed a writ petition to summon the panch (mediator) witnesses for cross-examination contending that reliance on the statements of those witnesses without opportunity to cross-examine them, was violative of the principle of natural justice. The High Court had dismissed the writ petition. In that context, it was held that his retracted confession within six days from the date of the confession was not before a Police Officer. The Custom Officers are not police officers. Therefore, it was held that "the confession, though retracted, is an admission and binds the petitioner. So

there is no need to call Panch witnesses for examination and cross-examination by the petitioner". As noted, the object of the Act is to prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc., separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act consists in the statement given or recorded under Section 108, the recovery panchnama (mediator's report) and the oral evidence of the witnesses in proof of recovery and in connection therewith. This Court, therefore, in evaluating the evidence for proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve."

5.12 In view of discussions as above we are inclined to agree with the order of the Commissioner, that goods were liable for confiscation under Section 113(i) and the exporter liable to penalty under Section 114 (iii) of the Customs Act, 1962. However in our view the ends of justice will be met if the penalty imposed on the exporter i.e. Appellant 1 is reduced to Rs 40,00,000/- (Rupees Forty Lakhs only).

5.12 Now coming the case of Appellant 2, who is partner in the Appellant 1. He is the person responsible for managing the affairs of Appellant 1, in fact he master minded the entire scheme of substitution and was present throughout. Commissioner has in para 43 of his order discussed the role of Appellant 2 as follows:

“43. Shri Yagnesh Rameshchandra Trada, the Partner of M/s. Divine Impex, was found responsible for all the acts and the omissions, as narrated in the foregoing paras. He was the mastermind behind this fraud and actively involved in the said fraud. In the Panchanama dated 03.02.2011 and in his statement dated 03.02.2011, he admitted to have illicitly sold the duty free imported brass scrap as well as finished goods viz. Brass Ingots prepared from the duty free imported raw materials. In his own version, Shri Yagnesh Trada vide his various statements admitted to have decided and executed all the transactions of the M/s. Divine Impex. Shri Yagnesh Trada has personally effected purchase and packing of 25 MT of “MS Earth Rods Copper Coated” (covering ARE-1 Nos. 012/10-11 & 013/10-11 both dated 31.01.2011 and 014/10-11 dated 02.02.2011) from M/s. Swastik Enterprises, Ahmedabad and for which he himself dispatched the 40 Wooden Crates to the premises of M/s. Swastik Enterprises, under cover of the letter dated 01.02.2011 issued by him. The all above act were done by him with malafide intention to cause illicit exports of Brass Rods in the guise of Electrical Earthing Accessories. Being working under EOU scheme and well aware about the related provisions under the Exim Policy, Customs Act, 1962 and the Central Excise Act, 1944 and the Rules framed thereunder and the relevant Notifications of Customs and Central Excise, as admitted by him in his statement, Shri Yagnesh Trada knowingly indulged himself in executing illegal exports of Brass Rods by misrepresenting the same as Electrical Earthing Accessories in the export documents

viz. Shipping Bills, ARE-1, Export Invoices, Packing List etc., and for which he had the reason to believe that the said goods were not the same as declared by him in the export documents and hence liable for confiscation under the provisions of the Customs Act, 1962 and thereby he rendered himself liable for penal action under Section 114AA and 114 (iii) of the Customs Act, 1962."

5.13 Commissioner has imposed penalty of Rs 87,48,710/- under Section 114(iii) and of Rs 1,00,00,000/- (Rupees One Crore) on Appellant 2, which in our view is quite excessive and we reduce both the penalties to 50 % of the penalties imposed by Commissioner.

5.14 Thus we uphold the order of Commissioner after modification as follows:

<i>i.I confiscate 17620 kgs of Brass Rods valued at Rs 87,48,710/- However, I give an option to M/s Divine Impex to redeem the same on payment of Redemption Fine of Rs 25,00,000/- (Rupees Twenty Five Lakhs only) under Section 125 of the Customs Act, 1962.</i>	Confiscation and redemption fine imposed is upheld.
<i>ii. I impose a Penalty of Rs 87,48,710/- (rupees Eighty Seven Lakhs Forty Eight Thousand Seven Hundred and Ten only) on M/s Divine Impex under Section 114 (iii) of the Customs Act, 1962.</i>	Penalty reduced to Rs 40,00,000/-
<i>iii. I impose a Penalty of Rs 87,48,710/- (rupees Eighty Seven Lakhs Forty Eight Thousand Seven Hundred and Ten only) on Shri Yagnesh Trada under Section 114 (iii) of the Customs Act, 1962.</i>	Penalty reduced to Rs 43,74,355/-
<i>iv.I impose a penalty of Rs 1,00,00,000/- (Rupees One Crore Only)</i>	Penalty reduced to Rs

<i>on Shri Yagnesh Trada under Section 114AA of the Customs Act, 1962.</i>	50,00,000/-
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6.1 In result the order of Commissioner is upheld to the extent indicated in para 5.14, and appeals filed by the Appellants are partially allowed. Appeals are disposed off accordingly.

(Order pronounced in the open court on 12.04.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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