

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

Customs Appeal No. 1177 of 2012

(Arising out of Order-in-Original No. 96/2012 dated 10.08.2012 passed by Commissioner of Customs (Import), Nhava Sheva)

Sanjay Chemicals (I) Pvt. Ltd. **Appellant**
507, Matru Chhaya,
378/380, Narshi Natha Street,
Masjid, Mumbai 400 009.

Vs.

Commissioner of Customs (Import), **Respondent**
Nhava Sheva
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad, Sheva 400 707

WITH

Customs Appeal No. 1178 of 2012

(Arising out of Order-in-Original No. 96/2012 dated 10.08.2012 passed by Commissioner of Customs (Import), Nhava Sheva)

Sanjay Parmar **Appellant**
507, Matru Chhaya,
378/380, Narshi Natha Street,
Masjid, Mumbai 400 009.

Vs.

Commissioner of Customs (Import), **Respondent**
Nhava Sheva
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad, Sheva 400 707

WITH

Customs Appeal No. 1179 of 2012

(Arising out of Order-in-Original No. 96/2012 dated 10.08.2012 passed by Commissioner of Customs (Import), Nhava Sheva)

Dilip Parmar **Appellant**
507, Matru Chhaya,
378/380, Narshi Natha Street,
Masjid, Mumbai 400 009.

Vs.

Commissioner of Customs (Import), **Respondent**
Nhava Sheva
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad, Sheva 400 707

AND

Customs Appeal No. 1180 of 2012

(Arising out of Order-in-Original No. 96/2012 dated 10.08.2012 passed by Commissioner of Customs (Import), Nhava Sheva)

Far-N-Par (I) Pvt. Ltd.
4th floor, 'A' Wing,
Shiv Chamber, Plot No.21,
Sector-11, CBD Belapur,
Navi Mumbai 400 614.

Appellant

Vs.

**Commissioner of Customs (Import),
Nhava Sheva**
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad,
Sheva 400 707

Respondent

Appearance:

Shri A.D. Ray, Advocate for the Appellants 1, 2 & 3
Shri N.S. Patel, Advocate for the Appellant 4
Shri Ramesh Kumar, 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/**86254-86257 / 2019**

Date of Hearing: 09.04.2019
Date of Decision: 18.07.2019

PER: SANJIV SRIVASTAVA

The appeals detailed below are directed against order in original No 96/2012 dated 10/08/2012 of Commissioner Customs (Imports) Nhava Sheva.

Appeal No	Appellant	
C/1177/2012	M/s Sanjay Chemical (I) Pvt Ltd.	Appellant 1
C/1178/2012	Sanjay Parmar	Appellant 2
C/1179/2012	Dilip Parmar	Appellant 3
C/1180/2012	M/s Far N Par (I) Pvt Ltd.	Appellant 4

1.2 By the said order Commissioner has held as follows:

“5.1 On the basis of the foregoing findings, I pass the following order:

5.1.1 I reject the declared assessable values aggregating to US\$ 2,59,140 equivalent to Rs 1,27,54,375/- (Rupees One Crore Twenty Seven Lakh Fifty Four Thousand Three Hundred Seventy Five only) under rule 12 of the CVR, 2007 r/w section 14(1) of the Customs Act, 1962.

5.1.2 I re-determine the assessable value of the impugned goods in accordance with rule 4 of the CVR, 2007 r/w section 14(1) of the Customs Act, 1962 to US\$ 4 per Kg aggregating to Rs 2,55,08,750/- (Rupees Two Crore Fifty Five Lakhs Eight Thousand Seven Hundred Fifty Only).

*5.1.3 I confirm the demand of differential duty amounting to Rs 27,45,081.90/- (Rupees Twenty Seven Lakhs Forty Five Thousand Eighty One and Paise Ninety Only) under proviso to section 28(1) of the Customs Act, 1962 along with interest at appropriate rates under section 28AB of the Act *ibid* and order recovery forthwith. I order appropriation of Rs 21,00,000/- (Rupees Twenty One Lakhs only) deposited voluntarily by SCPL towards duty.*

*5.1.4 I confiscate the impugned goods having declared value of US\$ 2591.40 equivalent to Rs 1,27,54,375/- (Rupees One Crore Twenty Seven Lakh Fifty Four Thousand Three Hundred Seventy Five only) and ascertained Rs 2,55,08,750/- (Rupees Two Crore Fifty Five Lakhs Eight Thousand Seven Hundred Fifty Only) including the goods seized and provisionally released, under section 111(d) and 111(m) of the Customs Act, 1962. However under the provisions of section 125 (1) of the *ibid* Act, I extend an option to redeem the goods on payment of fine Rs 25,00,000/- (Rupees Twenty Five Lakhs only) in lieu of confiscation which shall be exercised within 30 days from the receipt of this order.*

5.1.5 I impose a personal penalty equal to an aggregate amount of the duty as shown in para 5.1.3 above and interest calculated on it at the appropriate rates upto the date of payment of the said duty on M/s Sanjay Chemicals (I) Pvt Ltd., under section 114A of the Customs Act, 1962.

5.1.6 I impose a penalty of Rs 5,00,000/- (Rupees Five Lakhs only) each on S/ Shri Dilip Parmar and Sanjay Parmar, Directors of M/s Sanjay Chemicals (I) Pvt Ltd. under section 112(a) of the Customs Act, 1962.

5.1.7 I impose a penalty of Rs 27,50,000/- (Rupees Twenty Seven Lakhs Fifty Thousand only) each on S/ Shri Dilip Parmar and Sanjay Parmar, Directors under section 114AA of the Customs Act, 1962.

5.1.8 I order appropriation of the amount of Rs 21,00,000/- (Rupees Twenty One Lakhs only), deposited voluntarily by M/s Sanjay Chemicals (I) Pvt Ltd. against differential duty, fine and penalty.

5.1.9 I order enforcement of the bank guarantee for Rs 10,00,000/- (Rupees Ten Lakhs only) and corresponding bond for Rs 55,12,000/- (Rupees Fifty Five Lakhs Twelve Thousand only) executed by M/s Sanjay Chemicals (I) Pvt Ltd., with the dept, against differential duty, fine and penalty.

5.1.10 I do not impose any penalty under section 112 of Customs Act, 1962 on M/s Sanjay Chemicals (I) Pvt Ltd., as section 114A clearly precluded imposition of penalty under both the section 112 and 114A of the Customs Act, 1962, and

5.1.11 I impose a penalty of Rs 2,00,000/- (Rupees Two Lakhs Only) on the M/s Far N Par (I) Pvt Ltd., CHA under section 112(b) of the Customs Act, 1962.”

2.1 Acting on a specific information that Appellant 1 was evading customs duty by resorting to undervaluation of Acetonitrile, imported by them from M/s Merck Sharp and

Dohme Ltd., UK (MDL), premises of the Appellant 1 was searched.

2.2 Appellant 1 had imported the said goods against a declared value of US\$ 2 per kgs (vide Bill of Entry No 704506 dtd 3.10.2009 & 702642 dtd 1.10.2009) whereas they had exported the same goods earlier to MSDL @ US\$ 12 to 27 per kgs.

2.3 After completion of the investigations a Show Cause Notice dated 24.12.2010 was issued to the Appellants asking them to show cause as to why-

- a) *"The invoice value of US\$ 2,59,140/- equivalent to Rs 1,27,54,375/- (Rupees One Crore Twenty Seven Lakh Fifty Four Thousand Three Hundred Seventy Five only) as mentioned in Annexure A (covered under B/Es mentioned in Ann A to this SCN) should not be rejected under Rule 12 of the Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988 read with the provisions of Section 14(1) of the Customs Act, 1962.*
- b) *The assessable value should not be revised/ reassessed in respect of Bill of Entries Nos mentioned in Ann A under Rule 12, Rule 8 and Rule 10 of the Customs Valuation Rules, 2007 in terms of the value of same goods ascertained as mentioned in Annx B to this Show Cause Notice, to Rs 12,75,02,717/-*
- c) *Differential duty amounting to Rs 2,46,96,887/- (Rupees Two Crore Forty Six Lakhs Ninety Six Thousand Eight Hundred and Eighty Seven) should not be demanded and recovered under Section 28(1) of the Customs Act, 1962, read with Section 20 of the Customs Act, 1962 and interest be charged under Section 28AB of the Customs Act, 1962.*
- d) *The goods (mentioned in Ann A) of declared value of US\$ 2,59,140/- equivalent to Rs 1,27,54,375/- (Rupees One Crore Twenty Seven Lakh Fifty Four*

Thousand Three Hundred Seventy Five only) (ascertained value of Rs 12,75,02,717/-) (including goods seized on 12.10.09 and provisionally released on 20.11.09) should not be held liable to confiscation under Section 111(d) and 111(m) of Customs Act, 1962, read with Rules 11 and 14(1) of the Foreign Trade Regulation Rules 1993, as the goods were misdeclared for value and since the goods are not physically available for confiscation why a fine in lieu of confiscation should not be imposed on them.

- e) Penalty should not be imposed on M/s Sanjay Chemicals under Section 112 and Section 114A of the Customs Act, 1962.*
- f) Penalty should not be imposed on Shri Dilip Parmar of M/s Sanjay Chemicals under Section 112 of the Customs Act, 1962.*
- g) Penalty should not be imposed on Shri Sanjay Parmar of M/s Sanjay Chemicals under Section 112 of the Customs Act, 1962.*
- h) Penalty should not be imposed under Section 114AA of the Customs Act, 1962, on Shri Dilip Parmar and Sanjay Parmar, Director for having knowingly or intentionally made, signed or used or cause / to be made, signed or used the declaration statement or documents such as invoice, which were false and or incorrect in material; particulars pertaining to the valuation particulars in the transaction of business for the purpose of this Act.*
- i) The bank guarantee bearing No INBG01909000024 for Rs 10,00,000/- and corresponding bond for Rs 55,12,000/- executed by M/s Sanjay Chemicals (I) Pvt Ltd., with the dept, should not be enforced against differential duty, fine and penalty.*
- j) Penalty should not be imposed on M/s Far N Par (I) Pvt Ltd., (CHA No 11/197) under Section 112 (b) of the Customs Act, 1962, since they have abetted the importer for mis-declaring the value and origin of the*

goods and its re-export nature while filing the bills of entry."

2.4 The show cause notice was adjudicated by the Commissioner by the impugned order, referred in para 1, supra. Aggrieved by the order of Commissioner, Appellants are in appeal before by the tribunal.

3.1 In their Appeal, Appellants have assailed the order of Commissioner stating that-

- a) They had exported 139.2 MT of impugned goods during 20.11.2008 to 20.01.2009 out of which 114.97 MT were locally procured and 49.8 MT were re-exported under Bond, no export incentive was claimed by them as the export were made of free shipping bills. Out of the above exported goods, MSDL sought to sell 129.57 MT of impugned goods but were not able to do so due to sharp slump in the European Market in view of wide spread recession.
- b) The entire quantity for which these proceedings have been initiated are in respect of these goods only on re-import. Since this is case of re-import of the goods they are eligible to benefit under Notification No 94/96-Cus (NT). This benefit should have been extended to them, even if the same was not claimed by them at the time of filing of Bill of Entry.[HGI Industries Ltd [2007 (209) ELT 18 (T-Ahd)]. This benefit was not allowed by the Commissioner, for the reason that the re-imports were not made in the same packing contrary to the decision in case of Pansari Gems International [2005 (179) ELT 253 (T-Del)]
- c) If the benefit of Notification No 94/96-Cus is extended to them then would be entitled to Refund of Rs 17,99,548.60/- being the excess amount paid by them towards the import duty. {Aegis Chemical Indus Ltd [2006 (196) ELT 441 (T-Mum)]. Further

amount of Rs 21,00,000/- paid by them during investigation also needs to be refunded.

- d) Commissioner has in the impugned order held that they had suppressed the value for the reason that as per the documents recovered during the search, GBP 9067.5 equivalent to Rs 15,60,000/- was borne by MSDL towards handling and storage charges and also the price of US\$ 2 per kg was not the final price as they had agreed to revise the same as per the market condition after import. The documents recovered are of negotiation stage and were not part of the actual transaction documents. The price of US\$ 2 per kg was not revised by them. All the documents recovered during course of investigation only suggest that the transactions between them and MSDL were at arm's length on principal to principal basis. Without any malafide intentions.
- e) No evidence has been adduced in support of any additional payments made by them to MSDL and in absence of any supporting evidence the oral statements made by Directors lose significance.
- f) There were other overseas exporters who were offering even a price as low as US\$ 1.7 per kg on a 90 days credit facility. There had not been any significantly higher value noticed in respect of identical goods during the material time. At the material time identical goods were being imported even at the rates as low as US\$ 1.7 per kg.
- g) There was no misdeclaration of the goods in parameters such as description, quality, quantity etc. Fabrication or manipulation of documents is also not established. Value declared cannot be rejected on hypothetical and presumed assumptions. {Agrawal Industries Ltd [2011 (272) ELT 641 (SC)], Eicher Tractors Ltd [2000 (122) ELT 321 (SC)], Basant Industries [1996 (98) ELT 195 (SC)], Rashesh & Co

[2008 (227) ELT 573 (T-Mum)], Devika Trading Pvt Ltd [2004 (167) ELT 175 (T-Mum)]}

- h) Not claiming any benefit of re-import at the time of filling the Bill of Entries cannot be ground for invoking charge of suppression against them.
- i) Contemporaneous imports were allowed by Mumbai Customs at rates even less than at which they had paid the import duty. The agreement of price with MSDL was on principal to principal basis and the payments were made through banking channels and no further payments towards demurrage charge was made to MSDL against impugned goods. Thus inclusion of these charges on the basis of the statements that MSDL had demanded these charges cannot be sustained.
- j) They had sold the impugned goods in domestic market at rates varying from Rs 85 to Rs 158 per Kg (average Rs 121 per kg). Taking average conversion factor of US\$ to Rupee as Rs 48.6. Thus the costing would come as follow:
 Import Price = US\$ 2 per kg = Rs 97.2 per kg
 Custom Duties @ 7.5% = Rs 7.29 per kg
 Total = Rs 104.49 per kg.
 (without adding any post clearance expenses like transportation, commission, storage, profit etc.)
 Thus if total returns against entire quantity of import is taken it can be safely be said that the market price of imported goods was in the vicinity of the price which they paid to MSDL.
- k) Explanation (iii) to Rule 12 of CVR clearly lays down the situations in which the declared transaction value could be doubted or rejected. The order of Commissioner travels beyond the said explanation and hence is bad in law.
- l) Since the charge of suppression could not be sustained, extended period cannot be invoked, and hence the demand notice issued on 24.12.2010 in

respect of the goods imported between 13.08.2009 to 3.10.2009 is barred by limitation.

- m) The goods covered by the Bill of Entry No 704506 dated 3.10.2009 and No 702642 dtd 1.10.2010 were seized on 12.10.2009, and hence the show cause notice for the confiscation of the said goods should have been issued within one year from the date of seizure. Show cause Notice dated 24.12.2010 issued beyond the period of one year is bad in law and cannot be sustained.
- n) The goods which are imported prior to these Bill of Entries could not have been confiscated as they are neither available for confiscation nor are covered by the provisional release bond. {Raja Impex (P) Ltd [2008 (229) ELT 185 (P&H)], Chinku Exports [1999 (112) ELT 400 (T)] affirmed at 2005 (184) ELT A36 (SC)], Ramkhazaa Electronic [2003 (156) ELT 122 (T-Del)], Miltech Industries Pvt Ltd [2010 (261) ELT 1088 (T-Mum)], Shiv Kripa Ispat Pvt Ltd [2009 (235) ELT 623 (T-LB)], Citizen Synthetics [2010 (261) ELT 843 9T-Ahd)], New Wave Industries [2010 (260) ELT 473 (T-Del)]
- o) Section 111 (d) & (m) are not applicable in the present case as the goods are neither prohibited nor mis declared. For the same reason no contravention Section 11(1) of Foreign Trade Development and Regulation Act, 1992 read with Rule 11 and 14(1) of Foreign Trade (Development and Regulation) Rules, 1993 has taken place.
- p) Since there is no evasion of duty no penalty should have been imposed on them.

4.1 We have heard Shri A D Ray, Advocate for the Appellant 1, 2 & 3, Shri N S Patel Advocate for Appellant 4 and Shri Ramesh Kumar, Assistant Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the Appellants 1,2 & 3, Learned Counsel submitted that-

- a) Assessment of the two B/E i.e. No 702642 dated 1.10.09 and 704506 dtd 3.10.09 is provisional as is evident from the Provisional duty bond taken in terms of Sub section 2 of Section 18. Since the assessment were provisional the show cause notice in respect of these two B/E could not have been issued under Section 28. {1989 (43) ELT 225, 1991 (56) ELT 31, 2000 (123) ELT 909, 2001 (133) ELT 698 and 2006 (203) ELT 532}
- b) It is admitted in the impugned order that case is of re-import of goods, and hence the benefit of Notification No 94/96-Cus should be extended to the Appellant. The benefit should have been extended to them even if they did not claimed the same at time of filing the B/E {2007 (209) ELT 321 and 2007 (22) ELT 166}
- c) Since the demand of duty is not tenable in law question of penalties, question of imposing penalty what so ever, under any provision of Custom Act, 1962 also is frivolous and bad in law.

4.3 Arguing for Appellant 4, his counsel submitted that CHA has no knowledge about misdeclaration or any irregularity being committed by the importer hence penalty imposed by the Commissioner on him is not justified. {Buhariwala Logistics [2015 (236) ELT 170 (T-Del)] & Deepak Kumar [2017 (358) ELT 854 (T-Del)]}.

4.4 Arguing for the revenue learned authorized representative submitted that-

- a) During the course of search some email messages were traced out relevant to the transaction of imported Acetonitrile. In one of the message, overseas supplier stated that-
"please raise Purchase Order for ICC material @2 USD/Ltr plus reimbursement of following charges

Demurrage for ICC Material - GBP 4905

Bulk Operation Expenses - GBP 120/PMT X 120 MT

SRM Storage, Testing, handling - GBP 1230"

- b) In another message Shri Sanjay Parmar, Director informed Shri Raju Verma of MSDL, UK that-

"we can finalize the price at the time of arriving the consignment in India, you can ship material as per the price given to you I.e. US\$ 2 per Kilogram."

- c) Shri Dilip Parmar Director with the Appellant 1 admitted in his statement recoded under Section 108 admitted that the price quoted in the invoice B/E was not the final price, which would be finalized later once the goods reach India and are sold.
- d) Shri Dilip Parmar Director with the Appellant 1 admitted in his statement recoded under Section 108 admitted that they had received email from MSDL wherein it was informed that they had to pay demurrage charges, bulk operation charges, SRM Storage, handling charges etc., at the rate mentioned in the said email which came to Rs 15,60,000/- which is over and above the finalized price after sale of imported material in India.
- e) Two live consignments imported were placed under seizure under seizure and later released provisionally on execution of Bond and Bank Guarantee.
- f) Four more consignments had been imported by the Appellant 1. The details of all the consignments is a indicated in table below:

B/E No	Date	Quantity MT	Rate US\$/MT	Total value Rs	Duty Paid Rs
702642	1.10.09	24.35	2000	23,90,488	514497
704506	3.10.09	3.72	2000	3,65,200	78,600
630593	13.08.09	34.18	2000	33,62,423	723684
644575	22.08.09	35.26	2000	34,68,667	7,46,550
665599	05.09.09	15.38	2000	15,30,079	3,29,314
704534	3.10.09	16.68	2000	16,37,509	3,52,436
Total		129.57		1,27,54,366	27,45,081

g) Importers have claimed that they had exported 139.2 MT of Acetonitrile to MSDL under cover of seven Shipping Bills detailed in table below:

S/B No	Date	Qty MT	Rate \$/MT	Total FOB Value' Rs	Warehouse No B/E & Date	Qty MT	Rate \$/MT	Assessable Value in Rs	Country of Origin
300005128	31.1.09	12.0	20000	11376000	765098/29.1.09	12.0	16000	9540863	Taiwan
300005225	5.2.09	12.8	27000	16727040	769554/2.2.09	12.8	16000	10176921	Taiwan
300005226	6.2.09	12.8	27000	16727040	769593/2.2.09	12.8	16000	10176921	Taiwan
300005351	10.2.09	12.0	20000	11616000	776757/9.2.09	12.0	16900	10077537	China
6946178	24.12.08	38.4	Procured from the local market						
7017210	21.1.09	38.4							
7055103	2.2.09	12.8							

h) Importer has claimed that benefit of exemption under notification No 94/96-Cus should be admissible to him as he had earlier exported the goods from India. However no details of such exports in respect of the goods procured locally from India has been produced. Further Commissioner has observed in the order that since the goods are not in the same packing the benefit of exemption could not have been extended.

i) Issue involved is not for extending the benefit of exemption under Notification No 94/96-Cus but the issue is in respect of misdeclaration of value. During the course of search certain documents have been recovered from the premises of the appellant 1. Appellants have in their statements admitted the fact about the said documents and also to the undervaluation which has been alleged on the basis of these documents. It the case of the revenue that the value of the goods needs to be determined in accordance with the Custom Valuation Rules, which provide for the addition of cost and services while determining the assessable value. The value as per

the 4.4 of the impugned order has been determined on the basis of contemporaneous imports.

- j) Since the appellants were fully aware of value of cost and services that needs to be added for determining the assessable value and had deliberately suppressed the same while filing the bill of entry, charge of suppression is established against them and hence extended period of limitation has been rightly invoked.
- k) Since appellants have misdeclared the value of the goods imported they become liable for confiscation under Section 111 (d) and (m) of Customs Act, 1962 and have been confiscated by the Commissioner and the option to redeem the goods given to the appellants.
- l) Since the goods have been held liable for confiscation and also the goods have been found to be misdeclared in terms of value Commissioner was justified in imposing the penalties on the appellants and also the directors who were responsible for day to day operations of the company.
- m) Since CHA had filed the documents for the importation of the goods mis-declaring the value he too is liable for penalty for abetting the act of mis-declaration of the appellant 1.

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

5.2 Appellants have raised the issue in respect of two bill of entries i.e. B/E No 702642 dated 1.10.2009 and 704506 dated 3.10.2009 the assessments are provisional and hence the proceedings for seizure, confiscation and demand of duty premature. We are not able to appreciate the argument advanced by the appellant. The Bond executed by the appellant on 20.11.2009 is titled ***“Bond With Security to be executed by the person seeking***

release of goods seized pending investigation.”

Further para 2 to 5 of the bond executed reads as follows:

“2. Whereas, a consignment as detailed in the schedule belonging to the Obligor’s is seized by the Superintendent of Customs (P), HQIU, R & I Wing, Mumbai (hereinafter called the said officer) from the premises at All Cargo Logistic J N P T.

3. And Whereas the Commissioner of Customs (P), R & I Wing, Mumbai has required the obligator’s to deposit as Guarantee an amount of Rs 10,00,000/- (Rs ten lacs only) by way of Bank Guarantee No INBG01909000024 dt 19.11.2009 issued by Development Credit Bank Ltd.

The Bond Security for a face value of Rs 55,12,000.00 (Rs Fifty Five Lacs Twelve thousand only) endorsed in the favour of President of India and accepted on this behalf by the Assistant Commissioner of Customs (P), R & I Wing, Mumbai.

4. And whereas pending investigation of the case by the competent officer, the Commissioner of Customs (Preventive), R & I Wing, Mumbai has agreed to release the said seized goods to the obligator’s exceeding the bond in the manner aforesaid.

5. The Commissioner of Customs (Preventive), R & I Wing, Mumbai has agreed to allow provisional release of the goods described in the schedule below. The proper officer, pending further enquiries clarification or investigation, has agreed to allow provisional release of the goods, subject to the obligator’s providing to the satisfaction of the proper officer Bank Guarantee for the sum of Rs 10,00,000/- (Rs Ten Lacs) to cover the entire goods as mentioned in the Schedule below.”

Thus the case in hand is of provisional release of seized goods and not the case of provisional assessment as claimed by the appellants. Since the case is not the case of provisional assessment the decisions {1989 (43) ELT 225,

1991 (56) ELT 31, 2000 (123) ELT 909, 2001 (133) ELT 698 and 2006 (203) ELT 532} relied upon by the appellant in this respect are distinguishable and are not applicable in the facts of present case.

5.3 Appellants have contended that in the present case in respect of the two consignments under seizure the show cause notice was not issued within period of six months as prescribed by section 110 of the Customs Act, 1962, hence is bad in law. Provisions of section 110 as they existed then are reproduced below:

“SECTION 110. Seizure of goods, documents and things. –

(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification in the Official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.]

(1B) Where any goods, being goods specified under sub-section (1A), have been seized by a proper officer under sub-section (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and

other particulars as the proper officer may consider relevant to the identity of the goods in any proceedings under this Act and shall make an application to a Magistrate for the purpose of –

- (a) certifying the correctness of the inventory so prepared; or*
- (b) taking, in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or*
- (c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.*

(1C) Where an application is made under sub-section (1B), the Magistrate shall, as soon as may be, allow the application.

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months.:

Provided further that where any order for provisional release of the seized goods has been passed under section 110A, the specified period of six months shall not apply.

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of customs.

SECTION 110A. Provisional release of goods, documents and things seized pending adjudication. - Any goods, documents or things seized under section 110, may, pending the order of the adjudicating officer, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require."

Admittedly and undisputedly in the present case, the order for provisional release of the seized goods have been issued and the goods released provisionally to the appellants within the prescribed time, hence as per the second proviso to sub-section (2) to Section 110, the time limit of six months for issuance of the show cause notice will not be applicable. Hence the arguments advanced by the appellants in this respect to are not tenable and are contrary to the expressed provisions in the section itself and hence need to be rejected.

5.4 Appellants have contended that goods covered by the B/E's other than B/E No 702642 and B/E No 704506 were never seized and there is no question for the release of the same against Bond or Bank Guarantee. Since these goods are not available for seizure or confiscation, the order of Commissioner the goods imported against these Bill of Entries is bad in law and contrary to the decisions rendered in the cases Raja Impex 2008 (229) ELT 185 (P&H)], Chinku Exports [1999 (112) ELT 400 (T)] affirmed at 2005 (184) ELT A36 (SC)], Ramkhazaa Electronic [2003 (156) ELT 122 (T-Del)], Miltech Industries Pvt Ltd [2010 (261) ELT 1088 (T-Mum)], Shiv Kripa Ispat Pvt Ltd [2009 (235) ELT 623 (T-LB)], Citizen Synthetics [2010 (261) ELT 843 (T-Ahd)], New Wave Industries [2010 (260) ELT 473 (T-Del)]. Learned AR opposes this plea of the appellant and places reliance on the decision of the Apex Court in case of Weston Components Ltd [2000 (115) ELT 278 (SC)]. The decision of the Apex Court relied upon by the learned AR is reproduced below:

“It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent-authority. It is an admitted fact that the goods were released to the appellant on an application made by it and on the appellant executing a bond. Under these circumstances if subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine.”

From the text of the decision itself it is quite evident in the case before the Apex Court, the goods were allowed to be released to the appellant on an application made by it on the appellant executing a bond. Thus the case before Apex Court was case of provisional release of goods it was not the case where the goods were never available for seizure and confiscation. In case of Raja Impex relied upon by the Appellants, Hon'ble Punjab and Haryana High Court has after taking note of Weston Components held as follows:

“11. *The respondent in the present case took clearance of imported machinery under Bill of Entry No. 1546 dated 4-12-2004. The show cause notice was issued subsequently on 31-3-2005 and the Adjudicating Authority ordered confiscation of machinery under Section 111 of the Act and imposed redemption fine and penalty. Since the goods had been released unconditionally and were not available, those could not be confiscated. The Commissioner of Customs found that proceedings for the confiscation of goods were invalid as they had been initiated by issuing show cause notice after clearance of the goods and there is no averment in the show cause notice, which may show that the appellants were the owners of the goods at the time of issuing of the show cause notice. The Commissioner of Customs also found*

that the goods were not available and no undertaking had been obtained by the department at the time of release of goods and therefore, confiscation of the goods, cannot be maintained and no fine in lieu of confiscation can be imposed especially where the goods were neither seized nor cleared on undertaking. While passing the said order, the Commissioner of Customs has relied upon the observations of Hon'ble Apex Court in the case of M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra), Ram Khazana Electronic v. CC (AIR Cargo) Jaipur reported as 2003 (156) E.L.T. 122 (Indel) and Chinku Exports v. CC, Calcutta reported as 1999 (112) E.L.T. 400 (Tri.). Before the Tribunal, the contention of the revenue was that even in cases where the goods are not available, order of confiscation can be passed. However, the Tribunal vide impugned order, relied upon the observation of the Hon'ble Apex Court in the case of M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra) and the judgment of the Tribunal in the case of Ram Khazana Electronic v. CC (Air Cargo), Jaipur (supra) and held that there is no error in the impugned orders, which are based upon the judgment of the Hon'ble Apex Court.

12. *It may also be noticed here that in the case of M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra), the goods were released to the assessee on an application made by it and on the execution of a bond by the assessee and in those circumstances, the Hon'ble Apex Court held that the mere fact that the goods were released on the bond being executed would not take away the power of custom authority to levy redemption fine. A reading of the judgment/order of the Hon'ble Apex Court in M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra), would show that the Apex Court has taken the view that redemption fine can be imposed even in the*

absence of the goods as the goods were released to the appellant on an application made by it and on the appellant executing a bond. Since the goods were released on a bond the position is as if the goods were available. The ratio of the above decision cannot be understood that in all cases the goods were permitted to be cleared initially and later proceedings were taken for under-valuation or other irregularity, even then redemption fine could be imposed. We are, therefore, not inclined to accept the contention raised by the appellant on this issue and set aside the redemption fine.

13. *The reliance of learned counsel for the revenue upon the provisions of Section 125 of the Act is also misconceived. Section 125 of the Act is applicable only in those cases which have been cleared by the concerned authorities subject to furnishing undertaking/bond etc. However, in the present case, admittedly, the goods were cleared by the respondent-authorities without execution of any bond/undertaking by the assessee. Thus, in view of the fact and circumstances of the case, we find no error in the impugned orders. No substantial question of law arises for our determination in the present appeal and the same is hereby dismissed."*

Hence we do not find any merits in the submissions of the AR to the effect that goods which were released by the Custom Authorities after assessment and were not available for confiscation, could still have been confiscated as has been done by the impugned order. Accordingly we hold that only those goods which were seized and provisionally released to the appellants could have been held liable for confiscation and confiscated. Since the total value of the goods covered by two Bill of entries as above which were seized is only Rs 27, 55,688/- (B/E No 702642 (Rs 23,90,488/- and B/E 704506 (Rs 3,65,200/-)] against the total value of goods held liable for confiscation as held by Commissioner of Rs 1,27,54,366/- (Covered by six bill

of entries), the redemption fine even if the same yardstick as adopted by Commissioner is applied would be Rs 5,40,146/- (Rupees Five Lakhs Forty Thousand One Hundred and Forty Six only). However Commissioner has not given basis for adopting the said yard stick. In our view end of justice will be met if the redemption fine imposed in respect of the goods covered by the said two Bill of entries and held liable for confiscation is reduced to Rs 1,00,000/- (Rupees One Lakhs only) after taking into account the recession in the international market and sharp decline in the price of acetonitrile during the said period.

5.5 On the issue of misdeclaration of value and admissibility of exemption under notification No 94/96-Cus it is observed from the statement of Shri Dilip Parmar (Appellant 2) dated 02.02.2010 wherein he has deposed as follows:

“On your question whether we have received acetonitrile supplied by M/s. Merck Sharp & Dohme, U.K. are the same which have exported by us only I say that it is a fact that the acetonitrile imported under all 6 Bill of Entries are the same goods which we had exported to them under different Shipping Bills mentioned in our statements dated 28.10.09 except 10 MT i.e. to say that we have exported 139.2 MT acetonitrile to M/s. Merck Sharp & Dohme, U.K. and 25.6 MT to M/s. Sandrine Corporation USA during the period 2008-09 out of which we have received back 129 MT (approx., from M/s. Merck Sharp & Dohme, U.K. against the above said Bills of Entries. I say that M/s. Merck Sharp & Dohme, U.K. had returned the goods after 7 months because of recession and that the said goods supplied by us were no longer required and could not be sold by them in UK. Therefore they offered us to take it back. Since during the June 09 onwards because of recession and world market price of acetonitrile were very low we had offered them a price of USD 2 per kg. packed

in ISO tanks and said price is for the purpose of customs and that the final price will be decided after sale of the goods in Indian market.

On your question whether the exported goods of acetonitrile has been manufactured by Imperial Chemical Corporation only and how CO certified at time of export I say that we had exported acetonitrile to M/s. Merck Sharp & Dohme, U.K. in year 2008-09 which we had procured these materials from foreign supplier viz. Saler Door Enterprises Ltd. (Taiwan), Hainan Zhongxin Chemical, (China), Imperial Chemical Corporation (Taiwan) and the remaining quantity have been procured from local traders. From these local traders viz. M/s. Jaskon International, M/s. Ketul Chem P. Ltd., etc. and these local traders supplied acetonitrile of foreign origin to us which we had exported to M/s. Merck Sharp & Dohme, U.K. I say that we had exported these goods under various Shipping Bills to M/s. Merck Sharp & Dohme, U.K. and no export incentive including rebate has been claimed against these Shipping Bills.

On your question, in view of the fact that the exported goods had come back from M/s. Merck Sharp & Dohme, U.K. and therefore the said exported value has to be taken as a transaction value at the time of import, I do say that the goods imported under above said B/Es are same goods exported by us and it is a fact that the transaction value of the export was much more higher than the present declared import value but since it was an import taken place after 7 months and that the said goods has been taken delivery by the supplier and delivered us back in ISO tank instead of sealed intact drums under which we had exported, and as the price in the international market was low during the said period we had offered a uniform price of USD 2 per kg. subject to final sale of the product in India. However I do say that the price declared by us to Customs is not the actual price in the international market, as the normal international price/contemporary import are

in the range of 3 USD to 5 USD at the material time. Therefore I say that I had deposed in my earlier statements that the normal price of the said acetonitrile is not as we had declared to customs and therefore we deposited an amount of Rs.21 lakhs towards the duty liability to be demanded in SCN to show our bonafide. I also say that since contemporary imports are having unit price more than 2 USD per kg., imported by various parties I also say that I am also ready to pay the duty as per the contemporary imports value, as our declared price was not final price.

On your question since our goods are re-imported goods how the Bills of Entry is to be assessed on contemporary import instead of actual value at the time of export, I say that it is a fact that goods were reimported so the original value of the goods at the time of its export was more than what is declared at the time of import and the export value was the transaction value of the said goods exported to M/s. Merck Sharp & Dohme, U.K. but we had received the goods back from the buyer in a refilled ISO tanks so it is not sure whether they had mixed the goods with receipts from some other parties to them. However on your question regarding the transaction value for imports to be taken at par with the exports value, I say that no comments to offer on this and I had already detailed our position in afore said statement."

5.6 From the said statement and the findings recorded in the impugned order it is quite evident that:

- Appellants themselves are not in position to certify that the goods imported by them were the same goods as exported by them or were mixed of the goods exported and other goods.
- The goods imported were not in the same packing in which they had been exported by them.
- The case of the appellant is not of the return of the goods by the foreign buyer on account of rejection but is

the case of purchase of the goods from the from the foreign supplier at the prevailing market rate. If it had been the case for re-import of the same goods as exported by the appellant then the value of the goods as declared by the importers on the Bill of Entry could not have been the value as declared by them but would have been the value as per the shipping bills filed by them for export of the said goods and accordingly the benefit of exemption under Notification 94/96-Cus would have been determined. Since the goods have been supplied by the foreign supplier against his own invoices we are not in position to agree with the contention of the appellants that the benefit of exemption under Notification No 94/96-Cus could be extended to the appellants. Tribunal has in case of Sundaram Finance Ltd [2012 (279) ELT 220 (T-Chennai)] held as follows:

“7. Section 20 of the Customs Act, 1962 is the appropriate provision to deal with such goods. It reads as follows :-

Re-importation of goods. - *If goods are imported into India after exportation therefrom, such goods shall be liable to duty and be subject to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subject, on the importation thereof.*

It is clear from the provisions of Section 20 that when goods are imported into India after exportation such goods are liable to duty to which goods of the like kind and value are liable. Hence, the duty that is recoverable for the impugned goods has to be equal to the duty as would be applicable on goods of like value if imported, and not on the basis of misdeclared and inflated value.

8. *It is worthwhile to note in this regard that prior to amendment of Section 20, the Section itself provided that the duty on such re-imported goods would be equal to the drawback/rebate taken at the time of export, or equal to excise duty if the goods were exported without payment of*

*excise duty under bond. Though such provisions have been omitted from Section 20 but similar provisions are available under separate notifications such as Notification No. 94/96-Customs, dated 16-12-1996. The logic all along has been that if Indian goods have been exported, on importation of the same goods, they will be subject to a duty equal to export benefits availed at the time of initial exportation and when exported under bond, on such goods coming back for home consumption, excise duty not paid on the same would be leviable. **Since, import duty on the impugned goods would be leviable as on goods of like value under Section 20, the actual value at which the goods were initially exported is a good measure of like value, being the value of the very same goods.***

➤ Appellants have themselves admitted to the fact that the normal international price/ contemporary import are in range of US\$ 3 to US\$ 5.

➤ The relied upon document at SI No 15, annexed with the Show Cause Notice dated 24.12.2010, **“Computer printout of imports during the period Jan’09 to Dec’09”** gives the value of contemporaneous imports made of the same goods during the period from January 2009 to December 2009. As per this document the value of contemporaneous imports come in the range of US\$ 3 to 6 per kg. Commissioner has in para 4.4 of his order dealt with the issue in relation to valuation of goods and has observed as follows:

“4.4 S/Shri Dilip Parmar and Sanjay Parmar, Directors of SCPL have categorically admitted that the goods were exported by them earlier that the value declare was not final, that the normal value was in the range of US\$ 3 to 6 per kg. The goods were repacked in ISO tanks as per the directions of SCPL and demurrage charges, bulk operation expenses, storage of goods at UK testing and handling charges etc amounting to Rs 15,60,000/- (approx) were

*borne by MSDL on behalf of SCPL which were also required to be included in the assessable value. However the fact was not declared as required under rule 10(e) of the CVR, 2007. As such, I find that SCPL obviously violated the provisions under Section 14 r/w section 46 of the Customs Act, 1962, in as much as they have misdeclared the value of the impugned goods with clear knowledge and intention to evade customs duty leviable on the impugned goods thus rendering them liable to confiscation under section and 111(m) of the Customs Act, 1962 and rendering themselves to penalty under section 112 of the Act, *ibid*. Further I also find that misdeclaration of value and other particulars of the goods in the import documents are in gross violation to the provisions of rule 11 and 14 the Foreign Trade (Regulation) Rules, 1993 r/w section 11 of the Foreign Trade (Development and Regulation) Act, 1992 thereby making the goods "Prohibited Goods" as defined under section 2(33) of The Customs Act, 1962 and thus rendering the said goods liable to confiscation under section 111(d) of the Act and as a direct consequence rendering the importer liable to penalty under section 112 of the Act *ibid*."*

In view of the above facts, we do not find any merits in the submissions of the Appellant's in respect of admissibility of exemption under Notification No 94/96-Cus. Also we do not find any merits in the submissions of the Appellant in respect of the value of the goods, which has been determined on the basis of value of contemporaneous imports of the same goods. Hon'ble Supreme Court has in case of Radhey Shyam Ratan Lal [2009 (238) ELT 14 (SC)] held as follows:

"20. *Further, Rule 4 deals with the transaction value which is required to be determined under aforesaid rule. Under Rule 4 of the Valuation Rules, the transaction value of imported goods shall be the price actually paid or payable for the goods when sold for export to India. In*

accordance with the provisions of Rule 9, such transaction value is required to be accepted subject to the proviso to sub-Rule (2). But the expression used in Section 14 and Rule 4 clearly indicates that the transaction value of imported goods would be accepted as provided by sub-Rule (2) of Rule 4 but such value is always subject to the provision of sub-Section (1) of Section 14 in view of the opening expression used in sub-Section (1A) of Section 14 which opens with the expression "subject to the provisions of sub-Section (1) of Section 14." Therefore, the provisions of sub-Section (1) of Section 14 would prevail when the transaction value required to be determined under Rule 4 does not reflect the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation. There cannot be any dispute with regard to said interpretation that it is the provision which will always prevail. In other words the deemed value contemplated under Section 14(1) would prevail when the price declared does not reflect the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation. Under Rule 5, it is inter alia provided that the value of imported goods shall be the transaction value of identical goods sold for export to India and imported on or about the same time, good being valued subject to provisions of Rule 3. It is also provided in the said Rule that in applying the said rule the transaction value of identical goods and sale at the same commercial level and substantially of the same quantity, would be used to determine the value of the imported goods."

5.7 Appellants have in their appeal disputed the admitted facts in their statement and have questioned the impugned order stating that demands could not have been made on the basis of the facts admitted by them during the statement. The issue in respect of admissibility of the statement recorded under Section 108 of the

Customs Act, 1962 is no longer res integra. In case of K I Pavunny [1997 (90) ELT 241 (SC)] Hon'ble Apex Court has laid down the law stating as follows:

“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."

In case of System & Component Pvt Ltd [2004 (165) ELT 136 (SC)] Hon'ble Apex Court stated-

"5..... We are unable to understand this reasoning. Once it is an admitted position by the party itself, that these are parts of a Chilling Plant and the concerned party does not even dispute that they have no independent use there is no need for the Department to prove the same. It is a basic and settled law that what is admitted need not be proved."

Thus in our view in light of the law laid down by the Apex Court, the fact about undervaluation of the goods need not be again established as the same has been admitted by the Appellant themselves in their statements recorded under Section 108. However the fact of undervaluation is further corroborated by the value of contemporaneous

imports made by the other importers at or about the same time. Hence we hold that appellants have misdeclared the value of the imported goods with intention to evade payment of duty. In view of this extended period of limitation as provided by proviso to sub section (1) section 28 of Customs Act, 1962 is applicable for making the demands. Since we are upholding the demand of duty as determined by the Commissioner, demand of interest under Section 28AB is also upheld. Hon'ble Bombay High Court has in case of Padmashree V V K Patil SSK [2007(215) ELT 231(Bom)] held as follows:

“11. The question then arises whether payment of duty before issuance of show cause notice exempts the assessee from liability to pay interest u/s. 11AB. Learned Counsel Shri Kolte had placed reliance upon concluding para in the judgment of CESTAT Bangalore in the matter of Rashtriya Ispat Nigam Ltd. v. Commissioner of Central Excise, Visakhapatnam, which reads thus :

“In these circumstances, there is no justification on the part of the department to impose penalty u/s. 11AC as well as under Rule 173Q of the Central Excise Rules, 1944. Consequentially, no interest also is payable.”

In the matter, penalty u/s. 11AC is held non-imposable because the amount of duty was paid before issuance of show cause notice. The observation “consequentially no interest is also payable”, according to Advocate Shri Kolte, was confirmed by the Hon'ble the Supreme Court while dismissing the appeal of the department. First of all, with due respect, it must be said that on going through the entire judgment of the Tribunal at Bangalore, there does not appear any submissions advanced regarding the issue of interest. The stray reference to interest has come in the judgment of the Tribunal unsupported by any reasons except that it has treated the interest chargeable u/s. 11AB at par with the penalty imposable u/s. 11AC. We have sufficiently distinguished the nature of liability of

interest u/s. 11AB and penalty u/s. 11AC in the discussion hereinabove. The first one is civil liability whereas second is penal, if not criminal, liability. This is because u/s. 11AC, existence of mens rea is a must, whereas u/s. 11AB, it may be innocent evasion or omission to pay the duty. The judgment of the Supreme Court is brief and it is not possible to judge whether issue regarding interest was also agitated by the department before the Hon'ble Apex Court. Otherwise also, we have already pointed out that this is a judgment, which can safely be presumed to be regarding the duty payable for a period prior to insertion of amendments by Act No. 14/2001 with effect from 11-5-2001, which have clarified the distinction between Sections 11AB and 11AC by virtue of sub-section (2B) and Explanations below the same. Second explanation below sub-section (2B) reads thus :

“Explanation (2) : For the removal of doubts, it is hereby declared that the interest u/s. 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of duty if any as may be determined by the Central Excise Officer, but for this sub-section.”

It is evident that explanation has taken care to charge the interest on the difference amount if the amount of duty payable as ascertained by the assessee and the amount of duty payable as ascertained by the Central Excise Officer, is different. Thus, even if the assessee pays the short duty by virtue of liberty granted by sub-section (2B) of Section 11A, he is liable to pay interest, on the same even if the amount is paid, and he is liable to further interest also on the amount of short duty as ascertained by the department if that exceeds the self-assessment and to that extent. By this explanation, we are convinced that even if no notice is issued by the department because it agrees with the amount of short duty paid by the assessee as ascertained by the assessee himself under sub-section

(2B), still the assessee shall be liable to pay interest over the same even without going through the process of determination as contemplated by Section 11A(1) and (2) commencing with a show cause notice and culminating with an order of the Central Excise Officer. The show cause notice and determination can go on if the short duty is not paid, but even if short duty is paid by taking liberty under sub-section (2B), we are afraid, that does not absolve the assessee from the liability to pay interest thereon. In case by proceeding with the show cause notice, if the Central Excise Officer determines short duty payable higher than as ascertained and paid by the assessee himself, the assessee would be liable to pay interest u/s. 11AB upon the same.

Emphasis by Advocate Shri Kolte was on the tail piece of sub-section (2B). According to him, once the short duty is paid before issuance of show cause notice, the department is prohibited from issuing show cause notice and, therefore, there cannot be any adjudication u/s. 11A(1) and (2) and, therefore, there cannot be any imposition of either interest u/s. 11AB or penalty u/s. 11AC. We quote the tail piece, relied upon by Advocate Shri Kolte :

“.....On receipt of such information (regarding payment under sub-section (2B) shall not serve any notice under sub-section (1) in respect of duty so paid.”

We are afraid, the proceedings starting with the show cause notice u/s. 11A(1) are prohibited so far as duty paid. It does not make any reference, much less prohibits issuance of show cause notice for the purpose of according an opportunity to the assessee to show cause as to why interest may not be charged or penalty may not be imposed. The department would be justified in issuing show cause notice pertaining to duty as well if the duty as ascertained by the assessee himself and paid is less than duty as prima facie ascertained by the officer of Central Excise. In any case, we are unable to agree with the

submission by learned Counsel Shri Kolte that on payment of short duty as under sub-section (2B), before issuance of show cause notice, no interest u/s. 11AB can be charged, by virtue of portion of Section 11AB (2B) reproduced hereinabove.”

5.8 Penalties: Commissioner has vide the impugned order imposed penalties as detailed in table below on the Appellants.

Appellant	Penalty Under Section				
	112 (a)	112(b)	114A	114AA	Total
1	-	-	2745081.90+ Interest	-	
2	500000	-	-	2750000	3250000
3	500000	-	-	2750000	3250000
4	-	200000	-	-	200000

A. Appellant 1

From the table above it is quite evident that on Appellant 1, Commissioner has imposed penalty under Section 114A, as equivalent to the aggregate duty demanded and interest on the duty demanded. The order of Commissioner imposing penalty equivalent to the aggregate of duty and interest on the duty demanded cannot be sustained in view of decision of Tribunal in case of Sundaram Finance Ltd [2012 (279) ELT 220 (T-Chennai)], wherein following has been held:

“17. The above issue as to whether penalty under Section 114A should be imposed equivalent to the “duty demanded plus the corresponding interest accrued under Section 28AB of the said Act” instead of penalty equivalent to the “duty demanded” stands decided by this Bench in the case of Bharti Airtel & Others. The relevant findings are reproduced below :

“21.2 At this stage, the appeals by the department on the quantum of penalties imposed on the appellant-assesseees can be considered. In the said appeals, the prayer is for imposition of penalties equivalent to the “duty demanded

plus the corresponding interest accrued under Section 28AB of the Act” instead of restricting the penalties to “duty demanded”. Section 114A reads as under :

“SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined :

.....

Section 114A of the Customs Act envisages that the penalty thereunder should be “equal to the duty or interest so determined”. Section 28 requires the proper officer to “determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice”. It is to be noted that the demand of duty to be confirmed has to be either below or equal to the duty demanded in the show cause notices. Section 114A refers to cases where “the person who is liable to pay the duty or interest, as the case may be, as determined” It appears that Section 114A deals with penalty on the person who is liable to pay duty or the person who is liable to pay interest.

21.3 We find that the show cause notices specifically indicated only amounts of duty proposed to be demanded but did not (and could not) indicate the quantum of interest proposed to be demanded. Apparently, the duty demand itself was to be determined subject to the outer limit of amounts mentioned in the show cause notices. The interest payable depends not only on the duty so determined but also the actual date of payment of the duty so determined. Only then, the actual interest payable will

be ascertainable. Obviously, in the present cases, the Commissioner at the time of adjudication of the case could not have determined the actual amounts of interest to be included in penalties under Section 114A. Further Section 114A envisages penalty “on the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of Section 28”. The Commissioner was not in a position to determine the interest amount at the time of passing the impugned order. Therefore, his imposing penalties equal to the duty determined is in order.”

Hence we are not in position to uphold the order of the Commissioner imposing penalty equivalent to aggregate of duty and interest, hence the order of Commissioner, is modified to hold that penalty imposed under Section 114A, to be equivalent to the duty demanded. It is settled law that in case where duty demand has been determined by invoking the proviso to Section 28(1) of Customs Act, 1962 penalty under Section 114A will get attracted. Hon'ble Supreme Court has in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] stated the position in law as follows:

“23. *The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.”*

Similarly in case of Vandana Art Prints [2015 () ELT (SC)], Hon'ble Apex Court reiterated the law on subject stating-

“6. *On the basis of the aforesaid language in the Section, the submission of Mr. Radhakrishnan is meritorious. Thus, while the penalty as demanded in respect of one Show*

Cause Notice had been quashed, the Tribunal could not reduce it for an amount lesser than the duty which has been upheld. The duty in respect of two demands comes to Rs. 40,44,720/-. Therefore, going by the provisions of Section 11AC of the Act, the penalty should also have been Rs. 40,44,720/- and not Rs. 20 lakhs."

Similar View has been expressed by the Apex Court in case of Sunil Silk Mills [2011 (267) ELT 438 (SC)] in following words:

"6. In the present case also, we are directly concerned with the provisions of Rule 96-ZQ. So far. Section 11-AC of the Act is concerned, the scope of the said Section was considered by this Court in Union of India v. Rajasthan Spinning and Weaving Mills - (2009) 13 SCC 448 = 2009 (238) E.L.T. 3 (S.C.). That decision was rendered in the context of the said provision of Section 11-AC. Although, in the said decision reference was made to the decision in Union of India and Others v. Dharamendra Textile Processors and Others (supra) but the facts remain that in the said decision, particularly in paragraph 34, this Court held that the decision in Dharamendra Textile Processors's case must, therefore, be understood to mean that though the application of Section 11-AC would depend upon the existence or otherwise of the conditions expressly stated in the section, but once the section is applicable in a case, the Authority concerned would have no discretion- in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. Here is a case where Rule 96-ZQ is directly applicable and, therefore, the three-Judges Bench squarely covers this case."

B. Appellant 2 and Appellant 3

On Appellant 2 and 3 identical penalties have been imposed under Section 114AA and Section 112 (a) of the Customs Act, 1962. Commissioner has while imposing

penalties under the said section, observed in his order as follows:

"4.11 Next let me take up the penalty provisions invoked against the noticees in the SCN. I find that S/Shri Dilip Parmar and Sanjay Parmar, the Director of SCPL were handling the day to day affairs of the company and have actively participated in the import of the subject goods, made correspondence with MSDL, the overseas supplier for re-importation of the subject goods. They had sent fax messages for the storage charges, price to be declared for import purpose, etc., with the foreign supplier. They have also personally dealt with the clearance of formalities of the subject goods from the port including mis declaration and undervaluation. By their acts of omission and commission these two directors have rendered the goods liable for confiscation while rendering themselves liable to penalty under the provisions of section 112(a) of the Customs Act, 1962. Further S/ Shri Dilip Parmar and Sanjay Parmar, for having knowingly and intentionally made, signed and used declarations, statements and documents which were false and incorrect in material particulars, in the clearance of the goods, are also liable to a penalty under Section 114AA of the Customs Act, 1962. Since the directors of the company have committed the offence mentioned hereinabove, SCPL also is liable to penalty under Section 112(a) of Customs Act, 1962."

- a. Penalties imposed on the Appellant 2 and 3 under Section 112 (a) need to be examined in terms of the provisions of the said section, which is reproduced below:

"SECTION 112. Penalty for improper importation of goods, etc.- Any person, -

who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or"

Commissioner has in his order not even mentioned a single act of the Appellant 2 or 3 which by omission or commission has rendered the goods liable for confiscation. In our view in course of performance of the business of any company the directors function to look into the affairs of the Company. Further there can be no offence committed if they had been negotiating the price and terms of sale of the goods with the foreign supplier. It is not the case of the department that the Directors had undertaken any activity which was not in accordance with the prudent business practices of the company. It has also not been established that they had made or got to make any false declaration in respect of the transaction value between them and the foreign supplier. Not even an iota of evidence has been produced in the entire proceedings that Directors were responsible any act of omission or commission making the goods liable for confiscation. Order of Commissioner only makes general observations and proceeds to invoke the provisions of Section 112(a) against both the Directors. In our view such an approach is not contemplated by the Section 112 (a). Also in case of *Rajhoo Barot* [2017 (348) ELT 562 (T-Mum)], bench held as follows:

“6.5 *As regards the penalties imposed under Section 114A equal to the duty sought to be evaded, this is quite harsh considering the fact that the goods were used for construction of roads even though by others and not by the appellant. In the facts and circumstances of the case, therefore, penalty under Section 112 would suffice. Accordingly, we impose a penalty of ` 58 lakhs on the appellant M/s. AIL under the provisions of Section 112(a) of the Customs Act, 1962, instead of the mandatory penalty under Section 114A equal to the duty. Inasmuch as the appellant-importer has been imposed with a penalty, we are of the considered view that penalty on the*

Director is not warranted. Accordingly, we set aside the same.”

Since we uphold the penalties imposed on the Appellant Company (Appellant 1) under Section 114A, we are not inclined to uphold the penalties imposed on the Directors (Appellant 2 and 3) under Section 112 (a)

b. Section 114AA of the Customs Act, 1962 read as follows:

“SECTION 114AA. Penalty for use of false and incorrect material. - If a 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 purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.”

From the wording of the section itself it is evident that the said section can be invoked only on establishment of the fact that the declaration, statement or document made/ submitted in transaction of any business for the purpose of the Act, is false or incorrect. Without establishing that the document, statement or declaration made is false or incorrect in any material particular this section cannot have been invoked. In our view it is not even the case of department that the transaction value as declared by the Appellant in the Bill of Entry or the invoices of the foreign supplier was false or incorrect. The value has been determined on the basis of contemporaneous imports. It is also not established by way of investigation that Appellant 2 or 3 had obtained these documents which are false or incorrect in any manner. These documents may not satisfy the requirement of Section 14 of the Customs Act, 1962 for determining the value under that section but cannot be termed as false or incorrect merely for that reason. Hence invoking penal provisions under Section 114AA for imposition of penalty on Appellant 2 and Appellant 3 is contrary to the scheme of the said section and also the

investigations undertaken by the department. Hence the penalties imposed under Section 114AA need to be set aside. In case of Sameer Santosh Kumar Jaiswal [2018 (362) ELT 348 (T-Mum)] tribunal has held as follows:

“4.1 As regards penalty imposed on Shri Sameer Santosh Kumar Jaiswal, Director of the appellant company under Section 114AA, which reads as under :-

“If a 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 purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.”

From the reading of the above Section 114AA, it is observed that if the person knowingly makes the false declaration or signs any such document then only he will be liable to penalty under Section 114AA. In the present case, there is no case that the Directory of company has done any act which specified under Section 114AA. Even the enhancement of value was done on the basis of contemporaneous import, it cannot be said that the Director has done anything to mis-declare the value. Moreover, as discussed above, since there is no case of short payment or non-payment of Customs duty, the show cause notice itself was not warranted. Consequently, neither the penalty on the appellant company nor on the Director was imposable.”

Hon'ble Andhra Pradesh High Court has in case of Jai Balaji Industries [2018 (361) ELT 429 (AP)] held as follows:

“6.In the aforementioned admitted facts of the case and provision of law, we are of the opinion that Section 114AA does not get attracted as sine qua non for invoking the said provision is that it must be established that a 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 purposes of the Act. As noted herein before, when the Act itself has envisaged provisional assessment, it cannot be said that incorrect value of the imported goods per se amounts to any of the acts referred to in the said provision.”

Thus following the above decisions penalties imposed upon the Appellant 2 and 3 under Section 114AA are set aside.

C. Appellant 4

For imposing penalty on Appellant 4, who is CHA handling the clearance of goods for the Appellant 1, Commissioner has observed:

“4.12 M/s Far-N-Far (I) Pvt Ltd., (CHA No 11/1197) were the clearing agents who had filed the import documents on behalf of the importer before the customs. They have also attended and facilitated the assessment and examination formalities. They have failed to inform the customs that the goods were re-exported goods and the value was liable to be enhanced. They also failed to advice the party that the goods imported were returned goods so the details of export value, freight, insurance etc., shown in the respective SBs were to be declared in the BE submitted to the customs. Since the impugned goods are already held liable to confiscation they are also liable to penalty under Section 112(b) of the Customs Act, 1962.”

Section 112(b) of the Customs Act, 1962 is applicable in respect of the acts specified in the said section. The said clause of section 112 is reproduced below:

“(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,”

Commissioner has in the order not pointed out to what was nature of act undertaken by the Appellant 4, from amongst those mentioned in (b) above, and how he knew or had the reason to believe that the goods were liable for confiscation under Section 111 of the Customs Act, 1962. He was performing his duties as per Custom House Agent Licensing Regulation, 2004 in terms of the License granted to him. Without imputing the knowledge or reason to believe that the goods in respect of which he has undertaken the custom clearance process were liable for confiscation, penalties imposed on him under Section 112(b) cannot be justified. Tribunal has in case of Buhariwala Logistics [2015 (336) ELT 170 (T-Del)] held as follows:

“Thereafter the penalty on the appellant has been dropped but the penalty on Shri G.S. Prince was imposed. Further we find that in the case of CC v. Vaz Forwarding Ltd. (supra), wherein the penalty was dropped on the CHA in absence of evidence of the knowledge of the CHA. Further, in the case of S.Y Ranade (supra), it was held that there is no evidence to prove the involvement of the CHA and an employee has suo motu acted for his personal greed and beyond the scope of his duty, therefore the employer, i.e., CHA cannot be penalised. In this case also, it is not in the knowledge of the appellant that Shri G.S. Prince is involved in illegal importer and Shri G.S. Prince acted in his personal capacity for monetary gains. We also find that in subsequent proceedings Shri G.S. Prince no penalty has been imposed on the appellant. Therefore, we hold that no penalty is imposable on the appellant consequently, we set aside the penalty imposed on the appellant.”

Similarly in case of Deepak Kumar [2017 (358) ELT 854 (T-Del)] following was held

“5. Similarly, Tribunal in the case of Prime Forwarders v. Commr. of Customs, Kandla [2008 (222) E.L.T. 137 (Tri-Ahmd.)] has observed that when the CHA acted on the

basis of documents given to them and there is nothing to show that he was aware of containers being stuffed with uncalled for material, the penal action cannot be taken against them under Section 112 of the Act. Further, the Tribunal in the case of Safe C & F Agency P Ltd. v. CCE [2007 (210) E.L.T. 225 (Tri.-Mum.)] has held that where CHA issued NOC for two containers for customs examination, he cannot be held guilty of any failure to perform his duties as per the regulation.

6. Similarly, Tribunal in the case of Parekh & Sons v. Commissioner of Customs (P), Mumbai [2002 (150) E.L.T. 1274 (Tri.-Mum.)] has observed to the same effect that merely acting as CHA, in the absence of any reasons to record that he was having knowledge about the illegal activities of the importer, is not sufficient ground for imposition of penalty under Section 112(d) of the Customs Act.

7. We note that the adjudicating authority in the case of present impugned order has not advanced any reasonable ground for showing that CHA or his employees Shri Naveen Kumar Singh, was having any knowledge about the contravened goods stuffed in the container for which they filed the Bill of Entry. Admittedly, after having come to know about the alert and after having persuading the importer, CHA filed NOC. Commissioner has objected to such NOC filed with a delay of 37 days for which the CHA has not given any reasonable explanation. The appellant in their reply to the show cause notice had taken a categorical stand that they were trying to persuade the importer to assist in 100% examination of the goods and it is only when they were not responding that NOC was filed. We note that such delay in filing NOC cannot be adopted as a ground for imposition of penalty under Section 112(b) of the Customs Act. Similarly the fact that appellant did not bring the matter to the Customs about their doubt regarding the consignment also cannot be adopted as a

reason for imposition of penalty inasmuch as it was the Customs own alert about the Bill of Entry which created the doubt in mind of the CHA and not vice versa. As such, bringing the matter again to the notice of Customs authority would be an empty formality.”

In view of the decisions as above we are not in position to uphold the penalties imposed on appellant 4.

5.8 Summarizing our findings in light of discussion as above-

- a) Goods covered by B/E No 702642 dated 1.10.2009 and 704506 dated 3.10.2009 held to be liable for confiscation under section 111 of the Customs Act, 1962. However the redemption fine imposed reduced to Rs 1,00,000/- (Rupees One Lakhs Only).
- b) The value of the goods imported by Appellant 1, held to be US\$ 4 per kgs as determined by the Commissioner on the basis of contemporaneous imports.
- c) Proviso to sub section 1 to Section 28 of Customs Act, 1962 applicable for demanding the duty short paid by the appellant.
- d) Demand of duty to the tune of Rs 27,45,081.90/- as determined by the Commissioner upheld.
- e) Demand of interest in respect of the duty short paid by the appellants too is upheld under Section 28AB of the Customs Act, 1962.
- f) Penalty imposed under Section 114A of the Customs Act, 1962 to the tune of duty demanded i.e. Rs 27,45,081.90/- is upheld.
- g) Penalties imposed on Appellant 2, 3 and 4 are dropped.

6.1 In result the appeal filed by the Appellant 1 is partly allowed to the extent indicated in para 5.8 above.

6.2 Appeals filed by the Appellant 2, 3 and 4 are allowed.

(Order pronounced in the open court on 18.07.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

tvu