

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Customs Appeal No. 1187 of 2012

(Arising out of Order-in-Original No. 99/2012 dated 27.08.2012 passed by Commissioner of Customs (Import), Nhava Sheva)

M/s. I.G. International

Appellant

SCF-12, Subji Mandi,
Sector-26,
Chandigarh 160 026.

Vs.

Commr. of Customs (I), Nhava Sheva Respondent

Jawaharlal Nehru Custom House,
Post Uran, Sheva 400 707,
Dist. Raigad.

WITH

Customs Appeal No. 1188 of 2012

(Arising out of Order-in-Original No. 99/2012 dated 27.08.2012 passed by Commissioner of Customs (Import), Nhava Sheva)

Shri Gian Chand Arora

Appellant

SCF-12, Subji Mandi,
Sector-26,
Chandigarh 160 026.

Vs.

Commr. of Customs (I), Nhava Sheva Respondent

Jawaharlal Nehru Custom House,
Post Uran, Sheva 400 707,
Dist. Raigad.

Appearance:

MS. Pooja Reddy, Advocate, for the Appellant
MS. P. Vinitha Sekhar, Additional Commissioner, 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/ **86910-86911 / 2019**

Date of Hearing: 03.06.2019

Date of Decision: 25.10.2019

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No. 99/2012 dated 27.08.2012 of Commissioner Customs (Import), Nhava Sheva. By the impugned order Commissioner has held as follows:

"6.1 On the basis of the foregoing findings, I pass the following orders:

6.2 In the case of imports and clearance at Jawaharlal Nehru Port, Nhava Sheva:

6.2.1 I reject the declared values of impugned goods imported from M/s Dovex Export Co, USA, amounting to Rs 23,05,904/- and those imported from M/s Oneonta Trading Corporation, USA and amounting to Rs 91,33,765/- under rule 10A of the CVR, 1988 and re-determine the value at Rs 40,15,137/- (Rupees Forty Lakh Fifteen Thousand One Hundred and Thirty Seven Only) and Rs 1,59,15,685/- (Rupees One Crore Fifty Nine Lakh Fifteen Thousand Six Hundred Eighty only), respectively, being the true transaction value under rule 4 of CVR, 1988 r/w section 14 of the Customs Act, 1962;

6.2.2 I confiscate the impugned imported goods having aggregate declared value of Rs 23,05,904/- and re-determine value of Rs 40,15,137/- (Rupees Forty Lakh Fifteen Thousand One Hundred and Thirty Seven Only) and Rs 91,33,765/- and re-determine value of Rs 1,59,15,685/- (Rupees One Crore Fifty Nine Lakh Fifteen Thousand Six Hundred Eighty only), respectively, under section 111(d) & 111(m) of the Customs Act, 1962;

6.2.3 I confirm the demand of customs duty amounting to (Rs 33,44,793/- + Rs 8,54,717/- =) Rs 41,99,410/- (Rupees forty one lakh ninety nine thousand four hundred and ten only) on M/s I G International under the proviso to

section 28(1) of the Customs Act, 1962 and order recovery forthwith;

6.2.4 I confirm the demand of interest of customs duty confirmed at para 6.2.3, on M/s I G International under the proviso to section 28A of the Customs Act, 1962 at the appropriate rates upto the date of payment of the said duty and order recovery forthwith;

6.2.5 I impose a penalty equal to an aggregate amount of the duty as shown in para 6.2.3 above and interest calculated on it at the appropriate rates upto the date of payment of said duty on M/s I G International under section 114A of the Customs Act, 1962;

6.2.6 I impose a penalty of Rs 4,00,000/- (Rupees Four Lakhs Only) on Shri Gian Chand Arora under section 112(a) of the Customs Act, 1962.

6.2.7 I impose a penalty of Rs 4,00,000/- (Rupees Four Lakhs Only) each on M/s I G International and Shri Gian Chand Arora under section 114AA of the Customs Act, 1962; and

6.2.8 I do not impose any penalty under Section 112 of the Customs Act, 1962 on M/s I G International as Section 114A clearly precluded imposition of penalty under both the sections 112 and 114A of Customs Act, 1962.

6.3 In the case of imports and clearance at Chennai Port, Chennai:

6.3.1 I reject the declared values of impugned goods imported from M/s Oneonta Trading Corporation, USA and amounting to Rs 37,71,491/- under rule 10A of the CVR, 1988 and re-determine the value at Rs 51,31,105/- (Rupees Fifty One Lakh Thirty One Thousand One Hundred and Five Only) being the true transaction value under rule 4 of CVR, 1988 r/w section 14 of the Customs Act, 1962;

6.3.2 I confiscate the impugned imported goods having aggregate declared value of Rs 37,71,491/- and re-

determined value of Rs 51,31,105/- (Rupees Fifty One Lakh Thirty One Thousand One Hundred and Five Only), respectively, under section 111(d) & 111(m) of the Customs Act, 1962;

6.3.3 I confirm the demand of customs duty amounting to Rs 9,79,807/- (Rupees Nine lakh Seventy Nine thousand Eight hundred and Seven only) on M/s I G International under the proviso to section 28(1) of the Customs Act, 1962 and order recovery forthwith;

6.3.4 I confirm the demand of interest of customs duty confirmed at para 6.3.3, on M/s I G International under the proviso to section 28A of the Customs Act, 1962 at the appropriate rates upto the date of payment of the said duty and order recovery forthwith;

6.3.5 I impose a penalty equal to an aggregate amount of the duty as shown in para 6.3.3 above and interest calculated on it at the appropriate rates upto the date of payment of said duty on M/s I G International under section 114A of the Customs Act, 1962;

6.3.6 I impose a penalty of Rs 1,00,000/- (Rupees One Lakhs Only) on Shri Gian Chand Arora under section 112(a) of the Customs Act, 1962.

6.3.7 I impose a penalty of Rs 1,00,000/- (Rupees One Lakhs Only) each on M/s I G International and Shri Gian Chand Arora under section 114AA of the Customs Act, 1962; and

6.3.8 I do not impose any penalty under Section 112 of the Customs Act, 1962 on M/s I G International as Section 114A clearly precluded imposition of penalty under both the sections 112 and 114A of Customs Act, 1962.

6.4 I further order appropriation of the amount of Rs 60,00,000/- deposited by M/s I G International voluntarily towards their liabilities of duty interest,, fine and/or

penalty for the clearances effected at Nhava Sheva Port and/ or Chennai Port.

6.5 This order is without prejudice to any other action and/ or further action, on the aforesaid noticees/ companies/ firms and/or on other individuals/ persons under the provisions of the Customs Act, 1962 or any other Law for the time being in force.”

2.1 Appellant had imported Apples from M/s Dovex Export Co & M/s Oneonta Trading Corporation through JNCH Nhava Sheva and Chennai Port, Chennai. Based on intelligence investigations were conducted by Director General Revenue Intelligence in India and USA. These investigations revealed that they had misdeclared the value of imported goods as indicated in the table below:

Bill Of Lading		Bill of Entry		Invoice Value Declared 'US\$ to Customs		Duty Evaded 'Rs
Number	Date	Numbe r	Date	Indian	US	
HDMUNSENS1955395	02.12.06	628689	16.01.07	11687	22305	10348
HDMUNSENS1961129	13.01.07	654812	17.02.07	12964	21523	8559
APLU098234833	01.02.07	669151	26.02.07	26647	45753	19106
HDMUNSENS1956990	30.12.06	628687	16.01.07	27636	47922	20286
APLU098228818	03.02.07	668922	24.02.07	41552	71368	29816
APLU098221789	11.02.07	669309	26.02.07	25759	46782	21023
HDMUNSENS1948547	02.12.06	605012	26.12.06	13892	23153	9261
HDMUNSENS1958883	06.01.07	634142	22.01.07	13594	23839	10245
HDMUNSENS1960714	13.01.07	648425	06.02.07	13726	23037	9311
APLU098233196	20.01.07	648422	06.02.07	13377	23153	9776
APLU098216877	20.01.07	649762	06.02.07	12814	23545	10731
APLU098235424	17.02.07	683919	09.03.07	40502	71052	30550
HDMUNSENS1976028	03.03.07	433729	09.04.09	48210	70025	21815
APLU098235424	17.02.07	420567	19.03.07	11176	22152	10976
APLU098218121	11.02.07	417140	13.03.07	11258	22117	10859
Total				324794	557726	232662

2.2 During the investigations searches were conducted at the premises of importer and incriminating documents recovered. Shipping Documents such as BLs, actual invoices, invoices with lesser values, packing lists, certificates of origin, insurance certificate, etc in respect of these imports were also collected from US Customs through the Consulate General of India, New York (letter dated 13.10.2008). After recording the statements of importer and related persons in respect of these imports, a

Show Cause Notice dated 31.03.2009 was issued to the importer asking them to show cause as to why,

- the declared value in respect of the imported goods be not rejected and the goods valued on the basis of actual transaction value declared to U S Customs;
- differential duty on the imported goods be not demanded and recovered from them by invoking extended period as per proviso to section 28(1) of the Customs Act, 1962;
- interest on the differential duty demanded should not be demanded in terms of Section 28AB of the Customs Act, 1962;
- the imported goods should be held liable for confiscation under Section 111(d) and 111(m) of the Customs Act, 1962;
- penalty under section 112, 114A and 114AA be not imposed on them.

2.3 Appellants had during the course of investigations deposited a sum of Rs 60,00,000/- as a part of their differential duty liability.

2.4 Commissioner Customs (Import), Nhava Sheva was appointed as common adjudicating authority vide notification No 60/2009 Customs (NT) dated 08.06.2009, for adjudicating the cases in respect of imports made by the appellant through Chennai Port, Chennai and JNCH, Nhava Sheva.

2.5 The show cause notice has been adjudicated by the Commissioner as per the impugned order referred in para 1, supra.

2.6 Aggrieved by the impugned order, appellants have filed these appeals.

3.1 In their appeal, appellants have challenged the impugned order stating-

- i. the documents, in the form of second set of invoices relied upon for making the demand of duty have not been authenticated by the exporters and therefore such documents cannot be taken as evidence against them;
- ii. the invoices submitted by them at the time of clearance of the goods were duly authenticated and signed by the exporters. In the show cause notice there is no averment these documents are forged/ fabricated or manipulated and at the same time the invoices and documents relied for making the demand are unsigned and unauthenticated;
- iii. At the material time they have been importing the same/ similar goods from the same/ different suppliers, however the allegation of undervaluation has been made only in respect of the goods imported by them against fifteen consignments imported from two suppliers;
- iv. Commissioner have in impugned order stated that instead of rebutting the charges of undervaluation appellants have sought to point to the deficiencies in investigation. Since revenue has alleged undervaluation and evasion of duty, it is for the revenue to establish their case with legally acceptable evidences.
- v. Commissioner has referred to the involuntary statements of the partner (Shri Gian Chand Arora) and stated that the documents are further corroborated by the statement. The statement was not voluntary even if not retracted. Once other evidences which clearly show that the statements could not have been true or voluntary, further certain other evidences indicate that what has been recorded in the statements is not correct, it is essential that corroboration is sought from other sources. Their contention that statements are

neither true nor voluntary has been rejected only on the ground appellants had not placed the copy of retraction on record which is not true and needs to be set aside.

- vi. The finding of the Commissioner that the evidence brought on record by the department in the form of the provisions made by the shipper and the actual invoices filed with the US Authorities is impeccable and show that the imports have been made by mis-declaring the value is erroneous as the documents relied upon by the department, are unsigned and unauthenticated documents.
- vii. In view of the submissions as above the contention that there has been any violation on their in the import of any of the consignments. Hence the order holding that these goods are liable to confiscation, redetermination of value and duty payable, demand for interest and penalty imposed needs to be set aside.

4.1 We have heard Ms Pooja Reddy, Advocate for the Appellants and Ms P Vinita Sekhar, Additional Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellants while reiterating the submissions made in appeal, learned counsel submitted that –

- The case has been made against them on the basis of unauthenticated and unsigned documents. Such unsigned and unauthenticated documents cannot have much evidentiary value as has been held by the Apex Court in case of East Punjab Trader [1997 (89) ELT 11 (SC)]. She would also rely upon the decisions as follows:
 - o Adani Exports Ltd [2009 (243) ELT 115 (T-Bang)];

- o Ramkrishna Sales Pvt Ltd [2008 (230) ELT 431 (T-Ahmd)];
 - o Truwoods Pvt Ltd [2005 (186) ELT 135 (T-Del)];
 - o Truwoods Pvt Ltd [2006 (204) ELT 28 (T-Del)];
 - o V K Impex [2002 (141) ELT 564 (T-Kol)].
- The statement recorded of partner, is neither voluntary nor correct. It is on record that they have retracted the statement. Commissioner has not recorded any findings in respect of any of these submissions, and have proceeded to rely upon the same against them.
 - Department has miserably failed to establish a case of undervaluation against them on the basis of legally admissible evidences' and hence the charge of undervaluation cannot be sustained.
 - Commissioner has confiscated the goods which were not available for confiscation contrary to settled law on the subject. The goods were never seized and hence never released provisionally against bond and bank guarantee hence order of confiscation and imposition of redemption fine cannot be sustained.
 - In any case the demand is barred by limitation and the penalties imposed under section 112(a), 114A & 114AA cannot be sustained.

4.3 Arguing for the revenue, learned Authorized Representative while reiterating the findings in the impugned order submitted that-

- case of undervaluation against the appellant is based on the documents received from U S Customs, through Consulate General. From the documents so received it is quite evident supplier of the goods had issued two invoices, for the supply of the same goods. One of the invoice was submitted to U S Customs and the invoice depicting lower value was

used for filing the Bill of Entry for clearance of the same goods in India.

- The objections raised by the appellant in respect of admissibility of such documents in evidence, has been considered and rejected by the tribunal in decisions as follows:
 - o Ram Khazana Electronics [2003 (156) ELT 122 (T-Del)];
 - o Best & Co [2009 (239) ELT 294 (T-Del)];
 - o Konia Trading Co [2006 (199) ELT 644 (T-Del)];
 - o Orson Electronics Pvt Ltd [1996 (820) ELT 499 (T)];
 - o Ramesh Dalmia and Others [Final Order No 85502-85509/18 dated 01.03.2018];
 - o Bhatti Impex Final Order No A/85722-85723/2019 dated 12.04.2019;
- Partner (Appellant 2) of Appellant, has in his statement recorded under Section 108 of Customs Act, 1962 has admitted about existence of two sets of invoice and also the fact two set of invoices were issued at their instance. He also admitted the fact about making the payment of total amount as per the invoice. All the documents collected through Consulate General were seen and admitted by him.
- It is now settled law that the statements recorded under Section 108 of Custom Act are substantial piece of evidence and need not be proved again. She relies upon following decisions in this respect.
 - o K I Pavunny [1997 (90) ELT 241 (SC)]
 - o Govindasamy Ragupathy [1998 (98) ELT 50 (Mad)]
 - o Chandra Impex Pvt Ltd [2008 (224) ELT 583 (T-Del)]
 - o Sidharth Shankar Roy {2013 (291) ELT 244 (T-Mum)]

- On issue of retraction she would rely upon the decision of tribunal in case of
 - o Pradeep Master Batches Pvt Ltd [2017 (348) ELT 692 (T-Mum)].
 - o D M Mehta & Bros [2017 (346) ELT 477 (T—Mum)]
- On burden of proof she would rely upon the decision of Apex Court in case of Kanungo Co [1983 (13) ELT 1486 (SC)].

Accordingly she requested that the appeals be dismissed.

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

5.2 The documents received from U S Custom through Consulate General in U S A were scrutinized and scrutiny done revealed that appellants had misdeclared the value of the goods (apples) imported by the. On sample basis one set of documents in respect of one import consignments are reproduced below:

14

SEABIRD MA
E.D.I. Service Cent

Triplicate (Exchange Control Copy)
Indian Customs EDI System - Imports (ICES/I)
JNPT, Nhava Sheva, Mumbai - 400 707.

130

BILL OF ENTRY FOR HOME CONSUMPTION

From Stn: INNSA11 CHA: AADFC1547RCH001 (CROWN SHIPPING AGENCY)
Dt./cc/Typ: 634142 / 22/01/2007/N/H DDC No./Dt/Officer: 1216464/13-02-2007/SPR

Letter Details: 2299002405 PAN: AAFFI7829R
INTERNATIONAL,
S.C.F. 12, SUBJI MANDI,

STOR 26,
ANDIGARH.

160026

SM No: 16225/2007 11/02/2007 Port Of Loading: Seattle
Ctry Of Orgn: UNITED STATES Cntry Of Consign:
No: HDMUSENS1958883 H/BL No:
Date: 06/01/2007
Of Pkgs: 3234 CTN Gross Wt.: 43521.000 KGS
Pks: AS PER B/L

No & Dt: E-17643 BB 11/01/2007 ONEONTA TRADING CORPORATION
Val: 12048.75 USD TOI: CIF P.O. BOX NO 549,
Flight: 0.00 WENATCHEE, WASHINGTON 98807-0549
Insurance: 0.00
Load(Ass): Cust. House: U.S.A.
Load(Dty): HSS Load Rate: 0.00% Amount: 0.00
Charges: 0.00 Discount Rate: 0.00 Discount Amount: 0.00
Item Details: Exchange Rate: 65.00 USD = 44.7000 INR

Description	Unit Price	CTH	CTNS	RSP	Cus Dty Rt	Load	PROV
Ass Val	CETH	E. Nemo	E. Nemo	Exc Dty Rt	CVD ant(Rs)	CVD ant(Rs)	

08082000 FRESH PEARS SIZE 50 PER CTN 10KG PER CTN IMPORT PE							
CT NO: 24300							
5.750000	08082000	021/2002	16	30.00 %	122658.80		
408862.52	08082000			0.00 %	0.00		
Educational Cess on CVD				2.00 %	0.00		
Customs Educational Cess				2.00 %	2453.20		
Addl Duty - (Imports)		020/2006	28	0.00 %	0.00		
08082000 FRESH PEARS SIZE 55 PER CTN 10KG PER CTN							
4.750000	08082000	021/2002	16	30.00 %	40530.70		
135102.40	08082000			0.00 %	0.00		
Educational Cess on CVD				2.00 %	0.00		
Customs Educational Cess				2.00 %	810.60		
Addl Duty - (Imports)		020/2006	28	0.00 %	0.00		

543964.92	Page Total	Rs.	166453.30
Rs. 543964.92	BE Gross Total	Rs.	166453.30
Rs. 163189.50	NCD Duty	Rs.	0.00
Rs. 0.00	SAFEGUARD Duty	Rs.	0.00
Rs. 0.00	Sch 2 Spl Excise Duty	Rs.	0.00
Rs. 0.00	GSIA	Rs.	0.00
Rs. 0.00	Customs Edu. Cess	Rs.	3253.80
Rs. 0.00	Addl Duty - (Imports)	Rs.	0.00

Declaration
We Certify that the above entries are correct.

Thomas L. Lorne
21/3/07

Indian Customs EDI System - Imports (ICES/I)
JNPT, Nhava Sheva, Mumbai - 400 707.

SEABIRD MAIL
E.D.I. Service Centre

BILL OF ENTRY FOR HOME CONSUMPTION

130

CHA : AADFC1547RCH001 [CROWN SHIPPING AGENCY]
DD No. Vdt/Officer: 1216464/13-02-2007/SRPAI

Details : 2299002405 PAN : AAAFI7829R

INTERNATIONAL,
D & Dt. : E-17652 RB 11/01/2007 ONEONTA TRADING CORPORATION,
Al. : 13769.00 USD TOI: CIF P.O. BOX NO 549,
Sht : 0.00 WENATCHEE, WASHINGTON 98807-0549

Charge : 0.00 Cust. House: U.S.A
Load(Ass): HSS Load Rate: 0.00% Amount: 0.00
Load(Dty): 0.00
Charges: 0.00 Discount Rate: 0.00 Discount Amount: 0.00

Item Details Exchange rate: 1.00 USD = 44.7000 INR

CTH	Description	Unit Price	Ass Val	CTH	C.NoIn	C.NSMO	RSP	Cus Dty Rt	Exc Dty Rt	Load	PROV
				CETH	E.NoIn	E.NSMO				BCD ant(Rs)	CVD ant(Rs)

	543964.92									163189.50	0.00
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08081000 FRESH APPLES SIZE-113 PER CTN 20 KG IMPORT PERMIT

13.500000	08081000						50.00 %			149323.70	
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298647.40	08081000						0.00 %			0.00	
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Lakh Seventy Seven Thousand Two Hundred and Sixty Eight only Rs. 477268

Container Details

1 16225 F HDMU5931590 2 16225 F HDMU5945573 1 97-02 IEP 5.1

I/We Certify that the above entries are correct.
I/We further declare that whenever the RSP is applicable same has been
truthfully declared

CROWN SHIPPING AGENCY

Importer
I.G. INTERNATIONAL,

Signature

Signature

Given By: (S V PRAKASH)

Examined By: (S V PRAKASH)
(Appraising Officer)

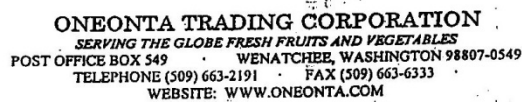
2/ 2

Signature
21/3/09



WORLDWIDE BOOKS, INC.

This document is used as an intermodal transport Bill of Lading
 Carmichael
 21/3/04

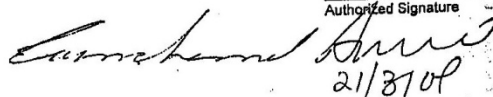
**COMMERCIAL INVOICE**

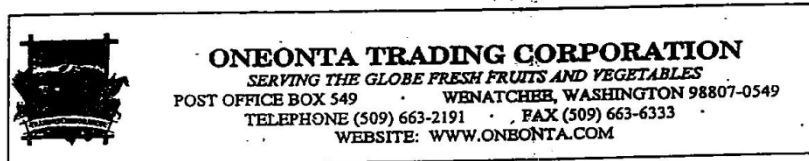
Date:	January 11, 2007	Invoice No:	E-17643 / E-17652BB	
Sold to:	1.G. International SCF 12, Subji Mandi Sec-26, Chandigarh India			
Vessel:	President Truman 194W	On Board:	January 6, 2007	
Ports:	Seattle / Nhava Sheva	B/L No:	HDMUSENS1958883	
Quantity	Description of Goods	Size	Unit Price	Amount
	Container # HDMU5931690 Seal # 0045204 Duckwall Label			
1575 ctns	US#1 Green CA D'Anjou Pears Half Ctn	50	\$	15.25 \$ 24,018.75
630 ctns	US#1 Red CA D'Anjou Pears Half Ctn	55	\$	14.25 \$ 8,977.50
	Container # HDMU5945573 Seal # 43285			
	Chelan Starr Label			
326 ctns	WAXF Stripe CA Red Delicious Apples HP Starr Ranch Label	113	\$	23.50 \$ 7,661.00
188 ctns	WAXF Stripe CA Red Delicious Apples HP	100	\$	23.50 \$ 4,418.00
172 ctns	WAXF Stripe CA Red Delicious Apples HP	113	\$	23.50 \$ 4,042.00
245 ctns	WAXF Stripe CA Red Delicious Apples HP	138	\$	22.50 \$ 5,512.50
98 ctns	WAXF Stripe CA Red Delicious Apples HP	150	\$	22.50 \$ 2,205.00
3234 ctns	Total CIF Nhava Sheva		USD	\$ 56,834.75
	Less Payment due on arrival			\$ 25,642.25
	Balance due 30 days after arrival			\$ 31,192.50

These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law prohibited.

Oneonta Trading Corporation
Certified Correct

Authorized Signature



**COMMERCIAL INVOICE**

Date: January 11, 2007

Invoice No: E-17652 BB

Sold to: I.G. International
 SCF 12, Subji Mandi
 Sec-26, Chandigarh
 India

Vessel: President Truman 194W
 Ports: Seattle / Nhava Sheva

On Board: January 6, 2007
 B/L No: HDMUSENS1958883

Quantity	Description of Goods	Size	Unit Price	Amount
	Container # HDMU5945573			
	Seal # 43285			
	Chelan Starr Label			
326 ctns	WAXF Stripe CA Red Delicious Apples HP	113	\$ 13.50	\$ 4,401.00
	Starr Ranch Label			
188 ctns	WAXF Stripe CA Red Delicious Apples HP	100	\$ 14.00	\$ 2,632.00
172 ctns	WAXF Stripe CA Red Delicious Apples HP	113	\$ 13.50	\$ 2,322.00
245 ctns	WAXF Stripe CA Red Delicious Apples HP	138	\$ 12.50	\$ 3,062.50
98 ctns	WAXF Stripe CA Red Delicious Apples HP	150	\$ 12.00	\$ 1,176.00
1029 ctns	Total CIF Nhava Sheva			\$ 13,593.50

These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law prohibited.

Oneonta Trading Corporation
 Certified Correct

Authorized Signature

Carrolland
 21/3/07

**COMMERCIAL INVOICE**

Date: January 11, 2007

Invoice No: E-17643 BB

Sold to: I.G. International
 SCF 12, Subji Mandi
 Sec-26, Chandigarh
 India

Vessel: President Truman 194W
 Ports: Seattle / Nhava Sheva

On Board: January 6, 2007
 B/L No: HDMUSENS1958883

Quantity	Description of Goods	Size	Unit Price	Amount
	Container # HDMU5931590			
	Seal # 0045204			
	Duckwall Label			
1575 ctns	US#1 Green CA D'Anjou Pear Half Ctn	50	\$ 5.75	\$ 9,056.25
630 ctns	US#1 Red CA D'Anjou Pear Half Ctn	55	\$ 4.75	\$ 2,982.50
2205 ctns	Total CIF Nhava Sheva			\$ 12,048.75

These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law prohibited.

Oneonta Trading Corporation
 Certified Correct

Authorized Signature

Carrolland
 21/3/07

Perusal of the above documents show that the Bill of Entry No 634142 dated 22.01.2007 has been filed with reference to Bill of Lading No HDMUSENS 1958883 dated 06.01.2007, invoices issued by Oneonta Trading Corporation USA, bearing S No 17643 BB dated 11.01.2007 declaring CIF value Nhava Sheva of US\$ 12048.75 and S No 17652 BB dated 11.01.2007 declaring CIF value Nhava Sheva of US\$ 13769.00. Bill of entry also shows that the total weight of the consignment imported is 43521 Kgs, which is also mentioned on the Bill of Lading No HDMUSENS1958883. Bill of Lading shows the Shipper's Ref No E-17643/ 176552 dated 11.01.2007. The invoice no E-17643/ E-17652BB dated January 11, 2007 of M/s Oneonta Trading Corporation, Shows the total CIF value Nhava Sheva of the goods covered by the said Invoice as US\$ 56834.75 which is further broken in two components i.e. Less Payment due on Arrival US\$ 25,642 and Balance due 30 days after arrival US\$31,192. Parallel to this invoice, two invoices used for filing the Bill of entry are issued the values as indicated in these two invoices is as follows:

- a. Invoice No 17643 BB dated January 11, 2007: US\$ 12,048.75
- b. Invoice No 17652 BB dated January 11, 2007: US\$ 13,593.50

Total: US\$ 25,642.25

Above analysis clearly shows that the total value declared by the appellants on the Bill of Entry based on the said two invoices, is only a part of the total transaction value for the supply of said goods. Further from the item wise price of the goods shown on the actual invoice filed with U S Customs and those used for filing Bill of Entry in India also show as follows:

Invoic ce No	E-17643/E-17652BB			E-17643 BB			E-17652BB		
	Cart ons	Uni t Pri ce	Total	Cart ons	Un it Pri ce	Total	Cart ons	Uni t Pri ce	Total
Container # HDMU5931590 Seal # 0045204									
US# 1 Gree n CA D' Anjo u Pears Half Ctn	157 5	15. 25	2401 8.75	157 5	5. 75	9056. 25			
US# 1 Red CA D' Anjo u Pears Half Ctn	630	14. 25	8977. 50	630	4. 75	2992. 50			
Container # HDMU5945573 Seal # 0043285									
Chelan Starr Label									
WAX F Strip e CA Red Delici ous Appl es HP	326	23. 50	7661. 00				326	13. 50	4401. 00
Starr Ranch Label									
WAX F Strip e CA Red Delici ous Appl es HP	188	23. 50	4418. 00				188	14. 00	2632. 00
WAX F Strip e CA Red Delici ous	172	23. 50	4042. 00				172	13. 50	2322. 00

Appl es HP									
WAX F Strip e CA Red Delici ous Appl es HP	245	22. 50	5512. 50				245	12. 50	3062. 50
WAX F Strip e CA Red Delici ous Appl es HP	98	22. 50	2205. 00				98	12. 00	1176. 00
CIF Nhav a Shev a	323 4		5683 4.75	220 5		1204 8.75	102 9		1359 3.50

The above table clearly shows that the invoices and the documents received from the U S Customs through Consulate General, are in respect of the same goods as it tallies with all the material facts mentioned on the invoices an Bill of Entries filed by the appellant for clearance of the said goods.

5.3 The above facts have been admitted by Shri Gian Chand Arora (Appellant 2) partner in Appellant firm in his statement recorded under Section 108 of Customs Act, 1962, in following words:

"Today I am shown one letter No. CGNY/Trade/301/37/2007 dated 12.03.2008 from the Consul (Trade), Consulate General of India, New York. The details of declarations made before US Customs by three suppliers i.e. M/s. Stimilt Growers, Oneonta Trading Corporation and Dovex Export Co are enclosed with the said letter. I state that M/s. I.G. International had imported fresh apples from M/s. Dovex Export Co & M/s.

Oneonta Trading Corporation only. The said declarations mention name of the exporter, ultimate consignee, description, HSUSA Code, total weight, total value, carrier, vessel, filing date, export date, country, filter reference, filter ID, Exporter ID, ultimate consignee ID, line count and port. I have put my dated signature on the said letter and declaration enclosed to the letter, in token of having seen and gone through the same today.

The said declarations mention the above details in respect of exports to my firm M/s. I.G. International. I state that my firm had been importing fresh apples from M/s. Dovex Export Co. During the last years i.e. 2006 and 2007. I am shown copies of bills of entry filed by my firm for the clearance of fresh apples through Nhava Sheva port from the said supplier, which were identified on the basis of the filter reference number mentioned. The said filter reference numbers are mentioned on the right side top of the bills of lading along with the invoice numbers. On the basis of these filter reference number and invoice number on the bills of entry could be identified. After perusing the bills of entry mentioned in the annexure to this statement, I state that these three bills of entry were filed by my firm M/s. I.G. International for the consignments shipped by M/s. Dovex Export Co. The details of import i.e. bill of lading, weight, name of the shipper, vessel name, voyage number, description and value are mentioned in the documents filed before Customs by my firm M/s. I.G. International. The bills of lading filed by us mention the filter reference number at the right hand top below the bill of lading number. The bills of lading also mention the invoice number, vessel, voyage number, shipper name, weight and date. I have compared these details and correlated with the details in the declaration made by the exporter in USA. I state that the filter reference numbers tallied with other details i.e. vessel, voyage and weight. The bills of entry also mention the bill of lading and

weight. Thus the details mentioned in the declarations made by the exporter in USA could be tallied with the import documents filed by my firm.

On being asked about the value mentioned in the bills of entry and in the declarations made by the supplier i.e. M/s. Dovex Export Co., I admit that the value declared by the supplier are the actual value for the consignments and the value declared by our firm in the bills of entry are not the actual values for said consignments. The values are suppressed owing to a huge increase in international demand of US apples creating extreme short supply situation causing the prices to jump to high levels i.e. US\$ 16-17 to US\$ 21-22. The retail consumer in the India markets as well as wholesale markets were not ready to absorb this price hike, which forced us to cut corners by resorting to declaring under stated values. As our company had been importing apples from the said supplier over a period of time we used get some concessions in the value. After perusing the documents shown to me today, I admit that we had declared the USD51297 whereas the actual value was USD89311 and thus we had not declared the actual value of the consignment by USD 38014 and thereby not paid appropriate duty amounting to Rs.8,54,614/-.

Today I am also shown another letter No. CGNY/Trade/301/37/2007 dated 13.10.08 from the Consulate General of India, New York. The letter stated that the Immigration and Customs Enforcement (ICE) have forwarded various shipping documents in respect of fresh apples exported by M/s. Oneonta Trading Corporation, WS, USA to M/s. I.G. International, Chandigarh. The letter further stated that the shipping documents include copies of bills of lading, commercial invoices, packing list, certificate of origin, insurance certificate, phytosanitary certificate etc. It also stated that from the documents

enclosed, it was evident that the exporter had raised two invoices, one for the actual commercial transaction and the other one for much lesser amount for customs purpose obviously at the request of the importer. In the actual commercial invoice, the amount shown in the other invoice is reduced as payment due on arrival and the balance (undervalued amount) shown as due 30 days after arrival. It further stated that the forwarders passing document also shows the actual invoice amount. I have put my dated signature on the letter in token of having seen and perused the same.

On being asked about the contents of the above said letter, I state that we had requested the supplier M/s. Oneonta Trading Corporation to raise two sets of invoices to combat the price war that was on between various importers in India. They had agreed to our request and prepared two sets of invoices which they used to mail to us directly. Our company had been importing water cole apples (higher sweet content leading to lower shelf life) over the years in order to be more competitive in the market than others. These types of apples are in demand in Indian market due to their sweet content and they are also slightly cheaper in value. Our company used to submit the invoices showing lower value to Indian Customs and get our consignments assessed and cleared based on the same invoices.

Today I am shown documents pertaining to twelve consignments shown in the annexure to this statement. All the consignments were shipped by M/s. Oneonta Trading Corporation. I have perused all the twelve documents i.e. bill of lading, original commercial invoice showing the actual value, suppressed value and also balance to be paid, packing list, certificate of origin, insurance certificate and phytosanitary certificates. I have put my dated signature on all the documents perused by

me. After perusing the documents in respect of the twelve consignments shown in the Annexure to this statement, which were shipped by M/s. Oneonta Trading Corporation, I admit that the actual value of the twelve consignments was USD 468142 whereas the value declared in the bills of entry filed by us was USD 273494. I admit that M/s. I.G. International had not declared the actual value of the consignments by USD 194648 and had not paid customs duty amounting to Rs.43,24,600/- in respect of the said twelve consignments. Thus in all our company had understated the value of the said fifteen (15) consignments imported from M/s. Dovex Export Co. and M/s. Oneonta Trading Corporation to the extent of USD 232662 which resulted in the evasion of customs duty liability voluntarily and request the same be adjusted against the above said amount of Rs.51,79,217/- plus interest as applicable under law. I also accept the actual invoice value mentioned in the annexure as the correct transacted value for the said fifteen consignments.

On being asked as to how the suppressed amount of USD 232662 was paid, I state that it was agreed with the suppliers M/s. Dovex Export Co and M/s. Oneonta Trading Corporation, that they would inform when their representative would come to collect the amount. Accordingly, their representative Mr. Steve from Dovex Export Co and Mr. Dalton came and collected the said suppressed amount in Indian currency from our office on various occasions on the dates informed by the suppliers over telephone.”

5.4 It has been constantly held by the tribunal in following decisions that the evidences gathered through the Consulate General from the foreign suppliers/ Customs, are the documents recovered in terms of international agreements and treaties, and could be relied upon for determination of the value of imported goods.

Ram Kahazana Electronic [2003 (156) ELT 122 (T-Del)]

4. It is contended on behalf of the appellant that the adjudicating authority could not have accepted the value alleged to have been shown in the export declarations made by M/s. Alam Trading Co. The document does not bear any signature or official seal of Customs Department, Hong Kong. The authenticity of the document is questionable. Quantity and description shown in the export declaration do not tally with the quantity actually imported and cleared through Customs and that the commodity code mentioned in the export declaration is different from the one shown in the Bill of Entry cleared through Customs. It is also contended that the price paid through Bank was only to the extent of invoice price and that value of the individual items are not shown in the export declaration. Since the show cause notice was issued after a long period of 4 years the appellant is not in a position to produce manufacturer's invoice as per the direction of the department.

5. We do not find any merit in the above contentions raised by the appellant. The Commissioner has specifically considered these objections in his order and the view taken by him is not liable to be interfered with. The export declaration given by M/s. Alam Trading Co. was obtained by DRI from their counterpart through legal and diplomatic channel. Entries in these declarations would tally with the name of the party, airway bill number and description of the goods. The declaration bears the official markings of the Customs and Excise Department in the space marked as "official use only" at the top right hand side of the export declaration which is a computer generated official stamping. The Commissioner is also correct in the finding that the broad heading of the goods "Component Parts of Electronic Modules for Digital Electronic Watches"

mentioned in the export declaration as well as in the invoice No. 1-1090-8-96, dated 7-8-96 and Bill of Entry No. 1207, dated 27-8-96 tallies with each other. In the Bill of Entry all the individual component parts have been given while in the export declaration the total number of Digital Modules in CKD condition have been shown and not individual component part separately. The difference in tariff classification and the Bill of Entry is not much relevant. Under these circumstances, we find that the Commissioner was fully justified in enhancing the assessable value on the basis of the export declaration. We, therefore, uphold the duty demand of Rs. 1,57,511/- in addition to the duty already paid by the party.

Best & Co [2009 (239) ELT 294 (T-Del)]

“6.5 A submission has been made that unsigned and unattested photocopy of a report of Italian Customs have been relied. Documents have been obtained through Govt. Agencies of other Countries in pursuance of mutual arrangements for assistance in investigation and the documents have been received through diplomatic channel. Such documents, even if they are in the form of a message cannot be ignored and can be admitted as evidence. These evidences can be taken into consideration along with other evidences in the matter and the evidentiary value of the same can be evaluated.”

Konia Trading Co [2006 (199) ELT 644 (T-Del)]

“8. The report dated 24-7-1999 was written by an officer of the Customs & Excise Department of Hong Kong in response to a request for investigative assistance, as noted therein, made through the Consulate General of India. It refers to the name of the importer, M/s. Zaptron (HK) Ltd. It is stated in the said letter that the Customs and Excise Department of Hong Kong had completed their verification of the invoice values of two consignments of assorted toys

exported to India by Zaptron (HK) Ltd. The letter clearly refers to Invoice KT-1298-97 and Invoice No. KT-1071-98 and states that the CIF values stated therein were false because the actual CIF values of the goods in the export declaration were US \$ 28,901.06 and US \$ 37,562.56 respectively. It is also stated that when the said company lodged the export declarations before the Customs & Excise Department of Hong Kong, it declared incorrect FOB value of goods and they would prosecute the company for lodging inaccurate export declarations. It was also mentioned that the company had issued the false invoices at the request of the Indian importer and the amounts were settled on D/P terms while the balances were paid by cheque or telegraphic transfer. The Commissioner had proceeded to determine the value under Rule 5, but could not find any transaction value in respect of identical goods at or about the same time, nor was he able to determine it by resorting to Rules 6 and 7. It is in this background that he placed reliance on the said report. The said report constituted a valid piece of material because from the official enquiries, it transpired that the export declarations made before the Customs & Excise Department, Hong Kong in respect of these two invoices by M/s. Zaptron (HK) Ltd. were inaccurate declarations. The discrepancy in respect of these two invoices was detected by the Customs & Excise Department, Hong Kong, as communicated in the said report dated 24-7-99 and there was no reason for the Commissioner to suspect the accuracy of the statements made therein, because the Customs & Excise Department of Hong Kong was the authority who had conic to know about the inaccurate export declarations made by the said exporter before it and could, on comparison of the CIF values declared by the exporter before them and the CIF values mentioned in the two invoices, authentically inform the Customs authorities here about such discrepancy. The document dated 24-7-99, which was an official report

submitted in pursuance of the enquiries made by the department carried its own evidentiary value without resorting to any presumption. The contents of the said document were sufficient to establish the fact that the appellant had under-valued the goods covered by these two invoices, since the correct valuation declared before the Customs authorities of Hong Kong in respect of these two invoices as per their official record was now authentically communicated in this report."

Orson Electronics Pvt Ltd [1996 (820) ELT 499 (T)]

"4. The Collector, it is seen, has adopted the export declaration of value by the supplier before Japanese Customs along with the related ten invoices submitted along with the export declaration in arriving at the assessable value of the imported goods under Section 14 of Customs Act, 1962. It has been argued that no reliance can be placed thereon as it has not been disclosed as to what are the Japanese legal requirements regarding the declaration and even out of 10 invoices, 2 Japanese invoices showed prices lower than those found in the invoices submitted to the Indian Customs. As against this, it is found that the export declaration and connected invoices have been obtained by the Indian Directorate of Revenue Intelligence through appropriate governmental channels. The Japanese Government caused investigations to be carried out by the International Investigation Section of the Metropolitan Police. The documents in question, presented to the Japanese Customs at the time of export of the goods in dispute, were seized from the Special Examiner, Yokohama Customs Supervisory Department. These documents had further been forwarded with the investigation of Japanese authorities which has all been narrated in the show cause notice. There is thus no force in the arguments doubting the authenticity of the documents. Further, Shri M.R. Chhabria one of the

appellants herein said in his statement dated 8-3-1990 on perusal of these documents, "I state that the discrepancies are obvious and both the invoices appear genuine. I identify and confirm that the signature on invoice No. D-86-2482/2485, dated 14-4-1986 are of Shri V.B. Rupani, Managing Director of Supra (Japan) Ltd., Japan." Shri Chhabria is admittedly the Chairman of the Importing Company and a 51% share holder along with Rupani of the supplier firm Supra in Japan. The statement of such a person then would lend sufficient credibility to the documents. It is further significant that Shri Chhabria had never at any stage furnished any explanation for the price difference detected. Therefore the reliance placed by Collector on the Japanese invoices for determining the assessable value is well-founded. The appellants have not put forth any convincing defence against the Collector's findings that in the two sets of invoices items carrying higher rate of duty, or which were in the restricted category for purposes of import licencing, were given lower value compared to the value of those items which carried lower rate of duty and which could be easily imported against OGL, and that their value was inflated to accommodate value of items carrying higher rate of duty. The Collector had found that while the overall difference in the invoice price declared for different items to the Indian Customs was only ranging from 3% to 16%, the itemwise difference in valuation was quite substantial. There is also no infirmity in the Collector adopting the price in the 10 Japanese invoices in arriving at the assessable value of 14,000 kits for which no corresponding Japanese invoices are available, because these goods had been compared with those in the Japanese invoices and the part numbers were found to tally. The goods are from the same manufacturer through a supplier having a common chairman with the importer. There is also no substance in the argument that the Collector erred in adding flat

11.15% for freight and insurance as it has been brought out that the freight and insurance actual percentage in the other invoices were unrealistically low. Further, the Collector had also adopted a reasonable mean percentage based on appellants invoices, much below the notional 21% proposed in the show cause notice. It is also futile to argue, in the face of Japanese investigation reports on method of pricing and the documents seized on search of appellants' premises, that there has been no suppression of facts by the appellants and that hence there is no ground for invoking the longer period under proviso to Section 28 of Customs Act, 1962 for demanding duty. The Collector's order on determination of assessable value, therefore, calls for no interference."

Bhitti Impex Final Order No A/85722-85723/2019 dated 12.04.2019

5.11 Two set of invoices have been recovered during the investigation from foreign supplier, through Consulate General of India ((Trade), Brussels. Also in the export of documents filed by the filed by the foreign shipper, the value declared is as per the invoice showing the higher value. Importer namely Shri Dilip Dugar admitted about mis declaration of value He also admitted that value as per 2nd Set of invoices received from German Customs through Consulate General of India ((Trade), Brussels was higher than value declared as per 1st Set of invoices used for filing the Bill of Entries.

5.12 There is sufficient corroboration to the charge of undervaluation of goods made in the show cause notice. Further we also find that tribunal has in case of similar nature vide Final Order No 85502-85509/18 dated 01.03.2018, in case of Ramesh Dalmia and Others, held as follows:

"6. The issue to be decided by us is that whether the documentary evidence produced by the High Commission

of India, U.K. which was obtained from Italian Customs can be relied upon. If it can be relied upon, whether the value should be enhanced or otherwise. We find that the appellant declared the value as per the invoice shown to have been issued by M/s Delbi Fibres. However, on enquiry from the Italian Customs, documents were obtained from supplier M/s Delbi Fibres. Those documents are invoices, bill of exports, bill of lading and M/s Delbi Fibres in the said enquiry also submitted co-relation chart. On close scrutiny of these documents, we find that the invoice no. and date are matching with those invoices. Bill of export, bill of lading etc produced by M/s Delbi Fibres to Italian Customs authorities showing the higher value.

6.1 As regard authenticity of these documents, there cannot be any doubt for the reason that Italian Customs authority has obtained these documents directly from the supplier M/s Delbi Fibres and the same was obtained by the High Commission of India, U.K. From perusal of these documents, it cannot be said that these documents are authentic.

6.2 As regard the issue raised by the learned Counsel that the invoices was unsigned, we do not find much force in the arguments of the learned Counsel for the reason that other corroborative evidence of bill of lading, bill of export etc which are duly signed and showing the corresponding invoice details and the higher value. As per the chart prepared and submitted by M/s Delbi Fibres, it is clearly shown that even the total payment of value shown in the invoices provided by Italian Customs were made in two parts. Therefore, it is further established that the actual value shown in the invoice and documents submitted by M/s Delbi Fibres to the Italian Customs authorities is authentic and valid documents which cannot be questioned. On going through the reports submitted by the

High Commission, the supplier of goods M/s Delbi Fibres in their statement have stated as follows:-

“(d) The supplier of the goods, M/s. Delbi Fibres SRL in their statement to Italian Customs authorities have stated as follows:-

“I confirm that among the clients for whom you have requested for the documentation,.....for the period requested, I held the relations ascertained by you only with individuals. Therefore, I would like to specify that I have never held any relations with “CANNON INDUSTRIES PRIVATE LTD’, Ludhiana (India) and for the period requested, not even with ‘VIJAY CHEMICAL WORKS’.

With regard to the cash collections, the money is directly delivered at my firm by the representative DALMIA di JAIPUR and / or by the clients themselves.

With regard to all of my Indian clients, I would like to specify that in the quality description of the product, I have been obliged to always use the same wording ‘Synthetic Waste’, whilst actually, in the transport document and in the Bill of Entry, the correct kind of the product sold was indicated.

For business reasons, and as directed by Mr. DALMIA di Jaipur (India), at times, a weight lower than the real one has been indicated. I have nothing else to declare.”””

Details on the identity of Mr. Dalmia of Jaipur has not been ascertained from the Italian supplier.”

6.3 From the above statement of M/s Delbi Fibres given by the Italian Customs authorities, it clearly reveals that all the documents submitted by the supplier are genuine and correct and considered as valid evidence. Therefore the same cannot be doubted.

6.4 Taking into consideration of the documents produced as evidence, we are of the view that all these documents are authentic and cannot be doubted. If it is so, it is

established 23 that the appellant had under-valued the goods. Accordingly, enhancement of the value and confirmation of differential duty demand and penalty related to such demand are correct and legal. Hence the same are upheld. As regard the redemption fine, we find that though the redemption fine was imposed but the goods were not available for confiscation. In the case of Shiv Krupa Ispat Pvt. Ltd. (supra) wherein it was held that in case the goods are not available and if the goods are not released provisionally, redemption fine cannot be imposed. Therefore, in the present case neither the goods were available nor the same were released on provisional basis therefore, redemption fine imposed by the adjudicating authority is not legal and proper. Hence we set aside the redemption fine."

5.5 In view of the decisions referred above and in the facts and circumstances of the case, we do not find any merit in the submission of the Appellants that enhancement of value done on the basis of the documents received from the U S Customs through Consulate General, is not warranted. The decision of East Punjab Traders referred to by the Appellants to is distinguishable, as in the para 5 of the judgment, it is specifically recorded that the documents were not recovered through the officially prescribed channel and were not collected from the Customs of the concerned countries. The said para of Hon'ble Apex Court Decision is reproduced below:

"5. The single Technical Member, who wrote the minority judgment, however, held the view that it was not essential on the part of the Customs Officer to strictly prove the documents as required by the Evidence Act and that the authenticity of the documents, though copies, could not be doubted as they had been collected by the Collector from foreign sources and could be admitted in evidence by virtue of Section 139(ii) of the Customs Act, 1962 which

*permits the raising of a presumption in respect of documents received from any place outside India in the course of investigation of any offence alleged to have been committed by any person under the Act. **The majority points out that these documents, which are photocopies, do not bear the signature either of the exporter, the forwarding agent, the stevedore or the Customs Officer. In fact, they do not bear any signature whatsoever and, therefore, the authenticity of these documents is suspect and it is not possible to presume that the originals are duly signed. It is for this reason that the majority did not consider it safe to place reliance on photocopies of copies of the documents recovered by the Customs Officer not from the Customs Department in Japan but from the agencies which are stated to have exported the material in question. It is also found that one of these copies of the alleged declarations bears the seal of the Customs at Kobe and the name of the vessel is shown to be 'Raya Fortune' but the itinerary of that vessel collected at the instance of the Indian Customs shows that the said vessel had never touched Kobe which raises a serious doubt as to how far this document is authentic. The majority raises the question as to how the declaration at Kobe and shipment from Osaka are reconcilable noting that there is no explanation coming forth. The majority feels that the authenticity of the documents itself is suspect. In these circumstances, the presumption to be raised under Section 139(ii) of the Customs Act could not be raised because the document did not bear any signature, did not come from proper custody and it is difficult to understand why the Indian Customs did not interact with the Japan Customs and obtain authentic copies of the document from the latter. Merely because the Department offered cross-examination***

of the steamer agent from whom the export declaration had been obtained and the respondents chose not to avail of that opportunity is no ground for holding that the requirements of Section 139 are satisfied for the purpose of raising the presumption. In order to raise the presumption under the said provision, the basic facts had to be laid. Even though they bear a serial number and stamp of Japan Customs, the fact remains that they are copies of copies and indisputably bear no signature of the exporter, the forwarding agent, the stevedore or the Customs Officer; no signature at all of any of them. The discrepancy in regard to copies bearing the seal of customs at Kobe also raises a serious doubt whether the copies relate to any of the consignments in question. In these circumstances, if the majority was disinclined to place reliance on these documents we find it difficult to hold that it was in error in doing so.”

5.6 Issue in respect of reliance placed by the Commissioner on the statement of Shri Gian Chand Arora (Appellant 2), is also well settled by the various decisions of the Hon'ble Apex Court and various other Courts as follows:

K I Pavunny [1997 (90) ELT 241 (SC)]

“25. It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. The practice and prudence require that the Court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The Court is required to examine whether the confessional statement is

voluntary; in other words, whether it was not obtained by threat, duress or promise. If the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the Court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base conviction. However, the prudence and practice require that Court would seek assurance getting corroboration from other evidence adduced by the prosecution.

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."

Govindasamy Ragupathy [1998 (98) ELT 50 (Mad)]

"18. Coming to the retracted confession alleged on the part of the respondent and heavily relied upon by the first appellate court to interfere with, the convincing judgment of the trial court even barely dealing with this aspect of law, a confession once made by the accused it has to be viewed with enormous evidentiary value. It is only

confession made before the Police or in custody in the presence of Police which cannot be relied upon within the meaning of Sections 25 and 26 of the Evidence Act excepting for the specific purposes of Sections 27 and 32 of the Evidence Act. Barring the above circumstances under which a confession statement has been given with the Police Officer or in the presence of the Police Officer in custody, no other confession made before any authority or prosecuting officials could be viewed with suspicion and they have enormous evidentiary value and conviction could be based on the evidence of such confession statement alone as pronounced in various decisions of the Apex Court. Even law does not admit a refractory version of the confession made before the Customs Officer. In Surjeet Singh Chhabra v. Union of India & Others reported in 1997 (89) E.L.T. 646 (S.C.) = Judgment Today 1996 (10) S.C. 239, it is held that in an unauthorised import of gold - confession by accused before the Customs Officers that though retracted is admissible and hinders the accused since Customs Officers are not Police Officers and there is also no contravention of the principles of natural justice. It is further held that the 'confession before the Customs Officer is admission and retraction cannot be accepted.' 'Where there is confession no need to allow cross-examination of Panch witnesses in view of confession.'

19. *In K.I. Pavunny v. Assistant Collector (Head Quarter), Central Excise, Collectorate, Cochin [Judgments Today 1997 (2) S.C. 120 = 1997 (90) E.L.T. 241 (S.C.)], it is reiterated holding that the appellant therein when he gave confessional statement under Section 108 of the Customs Act was not a person accused of an offence. It is further contemplated therein that 'the appellant while giving statement under Section 108 of the Customs Act, was bound to speak the truth with the added risk of being prosecuted if he gave false evidence.' Threat emanates from the statute and officers merely enforce the law. Held*

further that 'the officer exercising powers under the Customs Act is an authority within the meaning of Section 24 of the Evidence Act.'

20. It is further held in the same judgment that 'the confession statement under Section 108 even though later retracted is a voluntary statement and was not influenced by threat, duress or inducement etc., and is true one' - 'Confession when retracted has to be tested under Sections 24 to 30 of Evidence Act - Burden is on the accused to prove that confession was made under threat and only if accused is able to prove that it was not voluntary then onus shifts to prove that it was made voluntary.'

21. While such being the position of law, the lower court wasting much of its time in trying to establish that since there is evidence for early retraction of the confession by the accused in his application itself it decided to discard the veracity of the confession statements made by the accused in Exhibits P-6 to P-8 would go to show only its miserable misconception of law since early or delayed retraction is not at all the criterion to decide the evidentiary value of the confession statement made before a Customs Official such as one in the case in hand, especially in the light of the above decisions of the Apex Court.

22. Regarding the defence plea that under Sections 107 and 108 of the Customs Act only by a general or Special order by the Collector of Customs any other Officer may be empowered to record the statement during enquiry, but no such order has been filed by P.Ws 1 to 3 as posed by the respondent is to be decided next.

23. The answer to the above question is that the officers who involved in the whole affair in the above case i.e. P.Ws. 1 to 3 are permanent Officers assigned with such duties as they have indulged in and they are bound to

carry out their duties in which there is no special or general order need be necessary in recording the statements during enquiry, the powers now-a-days are delegated to the subordinate officials and the law permits them to act accordingly. Moreover to the allegation the prosecuting officials, P.Ws. 1 to 3 have not been empowered with such investigating powers, no iota of evidence has been produced by the respondent. From the very sanction accorded by the Assistant Collector, Customs, who is fully empowered to deal with such affairs and whose authority to accord sanction is not questioned is patent to the effect that P.Ws. 1 to 3 acted only within their powers given by law. It is also much lamented by the defence that some irregularities have been committed on the part of the Trial Court in framing of the questions under Section 313 of the Code of Criminal Procedure and they were all omnibus in nature. A cursory glance of the questioning under Section 313 would reveal that they have been, to the extent required segregated for each and every deposition of the respective witnesses and the accused questioned with regard to the same. Moreover, such minor irregularities are not going to be the factors to decide the case of the nature i.e. one in hand.

24. In the above case it is not event the version of the defence that the confession statement had been obtained under threat or duress or inducement etc, so as to cast serious doubts on the contents of Exhibits P-6 to P-8. It is not the case of the defence that Exhibits P-6 to P-8 were not given by him at the place, time and in the manner alleged. The only objection was that they were given by the accused according to the dictation of the customs officials.

25. The only plea that was taken in the form of suggesting to the prosecution witnesses is that to the dictation of the Customs Officials the respondent gave

statement and it was not voluntary. In view that the confession statement had been allowed to be marked, the burden to prove that it was not voluntarily given by the accused but had been made to the dictation of the prosecuting officials is heavily on the accused to prove with regard to which there is not a single attempt made on the part of the accused and hence the version of the prosecution has to be relied upon in toto."

D M Mehta & Bros [2017 (346) ELT 477 (T-Mum)]

"5.3 Shri Bhavesh Mehta, in his statement recorded under Section 108 of the Customs Act, 1962 has clearly admitted that he has merely signed the documents on behalf of M/s. D.M. Mehta & Bros. and all the work relating to documentation, examination and clearance of the imported goods were undertaken by Shri Prashant Popat. There is no reason to disbelieve the statements of Shri Bhavesh Mehta even though he had subsequently retracted the same. Further, this retraction was done by means of an affidavit before a Notary and not addressed to the officer who had recorded the statement. There is no evidence brought before us that the said retraction was ever made known to the department at all. Therefore, the so-called retraction of Shri Bhavesh Mehta is clearly an afterthought as it has not been made before the officer who recorded the statement and it has not been informed to the department that the statement is being retracted. Further, in his statement Shri Bhavesh Mehta has admitted to having undertaken the transactions on the strength of documents submitted by Shri Prashant Popat and the documents were brought by Shri Prashant Popat from one Shri Narendra Dhomse, who was representative of Shri Amarjeet Singh. Shri Bhavesh Mehta had never met Mr. Amarjeet Singh or Mr. Narendra Dhomse. He has admitted to signing the import documents on behalf of the CHA and handed over the documents to Shri Prashant Popat, who

had, thereafter, undertaken documentation, examination and clearance of the goods under importation. The goods after clearance were handed over by Shri Prashant Popat to the transporter, Ambala-Bombay Roadways and the goods were diverted and did not go to the destined warehouses. Fake re-warehousing certificates were sent to Shri Prashant Popat, who, in turn, submitted the same to the Customs department, thereby allowing mis-use of CHA licence of M/s. D.M. Mehta & Bros. The above statement of Shri Bhavesh Mehta is also corroborated by the statement of Shri Prashant Popat who is said to be an employee of M/s. P.H. Mehta, whose proprietor is related to the appellant-CHA. In his statement Shri Prashant Popat has also admitted to knowing that the goods were diverted and the warehouses where the goods were declared to be warehoused were not in existence and the re-warehousing certificates received were fabricated and the consideration for the transactions were received in cash on per container basis. The transporter who was present during the enquiry proceedings and who was examined by the inquiry officer has also confirmed that the goods after clearance from the Customs were diverted and were never sent to the declared destinations. The facts contained in the statements of Shri Bhavesh Mehta and Shri Prashant Popat were also corroborated in the examination proceedings of Mr. D.M. Mehta, and Mr. H.D. Mehta, partners of the appellant-CHA. Thus, if we look at the whole transactions, it is clear that the CHA did not exercise any control, whatsoever and everything was done by Shri Prashant Popat with the active connivance of Shri Bhavesh Mehta, for a consideration. The subsequent retraction of their statements by these two persons do not reduce the evidentiary value of their original statements for the reason that the retractions were made after a lapse of time and it was not done before the officer who had recorded the statement. The facts narrated therein were also

corroborated by the partners of the CHA firm who were examined during the inquiry proceedings. The decision of the Hon'ble Allahabad High Court in the case of Zaki Ishrati [2013 (291) E.L.T. 161 (All.)] is relevant and applicable in the facts of the present case. The argument of the Id. Counsel that the reliance cannot be placed on the statement recorded under Section 108 of the Customs Act in a proceeding under CHALR is clearly not tenable as in the Jasjeet Singh Marwaha case (supra), the Hon'ble Apex Court in Para 15 of the judgment clearly held that - "in our view a statement recorded under Section 108 of the Customs Act, 1962 by the Customs authorities is admissible in evidence and can form the sole basis for suspending CHA's licence, however, subject to the usual safeguards that is voluntary and truthful. Where the statement under Section 108 is retracted it can only be relied upon if on examination of evidence one arrives at a conclusion, that the retracted statement is true and voluntary." Since in the present case we have held that the retraction made is not valid and the facts recorded in the statements have been corroborated by others involved in the transaction, the said statements can be taken as a valid piece of evidence in a proceeding under CHALR also and we hold accordingly."

In view of the decisions as above we reject the submissions made by the appellants in respect of the reliance placed in the impugned order on the statement of Shri Gian Chand Arora (Appellant 2) for determining the undervaluation. In fact the statement of Shri Arora is based on the documents forwarded by the Consulate General and he has seen and admitted those documents by putting his dated signature. In his statement he has also explained the manner in which instructions were given to the foreign supplier for preparing two sets of invoice and also the manner of making the differential amounts. He has given the names of the persons to whom he has made

the payments for the supplies received under the cover of the said invoices.

5.6 In view of the discussions as above we are of the view that by mis-declaring and filing the Bill of Entry on the basis of manipulated invoices, appellants have definitely suppressed the value of the goods imported. Or their act of suppression with intent to evade payment of duty extended period of limitation as per the proviso to sub-section (1) of Section 28 of Customs Act, 1962 has been correctly invoked in the present case. For this reason the penalties imposed under Section 114A of the Customs Act, 1962 are justified in view of the Apex Court decision in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)]

“18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : “....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...”. In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and

11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. *From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.*

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."*

5.7 From the facts as stated above it is also evident that appellants have filed/ caused to file the Bill of Entry on the basis of false or manipulated invoice for mis-declaring the value hence in our view the provision of Section 114AA to get attracted in the present case.

5.8 It is true that for the act of misdeclaration the goods became liable for confiscation under section 111 (m) of the Customs Act, 1962. Further for their act of misdeclaration making the goods liable for confiscation, Appellants are liable to penalty under Section 112(a). In view of the fact that proviso in Section 114A specifically provides that if the penalty has been imposed under that section, penalty cannot be imposed under Section 112, Commissioner has not imposed any penalty on Appellant 1 on whom penalty

under Section 114A has been imposed. He has imposed penalty on Appellant 2, which is justifiable in view of the decision of tribunal in case of Pradeep Master Batches Pvt Ltd [2017 (348) ELT 692 (T-Mum) holding as follows:

9. Learned counsel for the appellants has also asserted that penalty cannot be imposed on both the company and the director. For this assertion, he relied on the decision of the Tribunal in the case of Jagannath Plastipacks (P) Ltd. (supra). It is seen that in the said case the Tribunal has observed as follows :-

“7. I find that the Original Authority has imposed a penalty of Rs. 50,000.00 on the appellant assessee, which under the circumstances, requires to be reduced, and I accordingly reduce the same to Rs. 5,000.00 (Rupees Five Thousand) only, considering all facts and circumstances. I find that separately, penalties have been imposed both on the appellant Managing Director and appellant Executive Director of the appellant company, which are not warranted in view of the foregoing. Hence, the same are set aside. As regards the demand of duty and interest, the same are also set aside in view of the cited Larger Bench decision and cited decision of the Hon’ble Bombay High Court holding that payment by Cenvat credit is as good as by cash.”

It can be seen that no ratio has been laid down by the Tribunal that separate penalties cannot be imposed on the company and the director. In the special facts of the said case, no penalties have been imposed on the managing director and executive director of the appellant company.

9.1 *Learned counsel has also relied on the decision of the Tribunal in the case of Sanghi Industries Ltd. v. CC (EP), Mumbai - 2012 (277) E.L.T. 365. In the said decision, the Tribunal has observed as follows :-*

“6.11 Coming to the penalty, we notice that a penalty of Rs. 1 crore has been imposed on the importer M/s. Sanghi Industries Ltd. and penalties of Rs. 20 lakhs each have been imposed on the Managing Director and Director of the appellant firm. We are of the view that separate penalties - one on the importing firm and the other on the Directors of the company - are not warranted in the facts and circumstances of the instant case. Considering the totality of the facts and circumstances, we reduce the penalty on the appellant firm to Rs. Fifty lakhs (Rs. 50,00,000/-) and set aside the penalties on the Managing Director and Director of the appellant firm. Needless to say that the appellant is liable to discharge interest liability @ 24% starting from 15-11-1993 till the date on which the differential duty was discharged by the appellant firm.”

It can be seen from the above that the facts of the case are significantly different from the instant case. There is no bar on the imposition of separate penalty on the company and the director. In the case cited by the appellant, no penalty was imposed on the managing director and the director of the appellant firm in view of the facts and circumstances of the case. In the instant case, the director has played significant role and therefore penalty has been rightly imposed.”

5.9 However since the goods were not available for confiscation nor released provisionally after seizure to appellants against bond and bank guarantee, the order for confiscation of goods and imposition of redemption fine cannot be sustained in view of the decision of Larger Bench of Tribunal in case of *Shiv Kripa Ispat Pvt. Ltd. [2009 (235) ELT 623 (Tri.-LB)]*, wherein following has been held:

“9. We have given careful consideration to the submissions. As rightly pointed by the learned counsel, the Hon’ble High Court of Punjab & Haryana, in Raja Impex case (supra), has rendered decision on identical issue. One

of the substantial questions of law placed before the High Court by the department was whether redemption fine under Section 125 of the Customs Act could be imposed where the goods were neither available for confiscation nor cleared under bond/undertaking. The Hon'ble High Court followed the ratio of the Apex Court's judgment in Weston Components case and held that, as the goods in question had been allowed to be cleared without execution of any bond/undertaking by the importer, no redemption fine could be imposed under Section 125 of the Customs Act in lieu of confiscation. Reproduced below is the relevant part of the High Court's judgment.

"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.” (emphasis supplied.)

10. We have also particularly noted a decision of the Tribunal (cited by the learned advocate) which stands upheld by the Supreme Court. In Chinku Exports case, the Tribunal had held the redemption-fine-related issue against the Revenue in para (10) of its order, reproduced below :

“10. In view of the aforesaid findings and analysis, we are of the considered opinion that none of these charges upheld in the order impugned are in fact sustained by our analysis. In this connection we are also surprised to find that the redemption fine of Rs. 2.89 lakhs has been imposed when the goods were not available for confiscation, the same having been exported many years ago. Neither was any bond with a security in any format available with the Department to be enforced. In view of this it is clear that the redemption fine imposed was totally outside the purview of legal provisions in this regard. Therefore, we set aside the order impugned and allow the appeal with consequential relief as per law.” (emphasis supplied).

Dismissing the department's Civil Appeal filed against the above order of the Tribunal, the Apex Court ordered vide 2005 (184) E.L.T. A36 (S.C.) as under:

"We see no reason to interfere with the impugned order. The appeal is dismissed." (emphasis supplied)

In the result, the view taken by the Tribunal in Chinku Exports case stands affirmed by the Apex Court and consequently the similar view taken by the P & H High Court in Raja Impex case is a binding precedent while the contra decision of the Madras High Court in Venus Enterprises case ceases to be good law on the point. It may be noted contextually that the dismissal, by the apex Court, of the SLP filed by M/s. Venus Enterprises did not have the effect of enhancing the precedent value of the High Court's decision in that case.

11. It is nobody's case that a binding judicial authority on the question of imposability of fine under Section 125 of the Customs Act in lieu of confiscation of goods not available for confiscation would not be applicable where the similar question arises as to whether a fine could be imposed under Rule 25 of the Central Excise Rules, 2002 (read with Section 34 of the Central Excise Act) in lieu of confiscation of excisable goods not available for confiscation."

5.9 Since appellants have short paid the duty at the time of clearance the demand for interest under Section 28AB to is justified. In case of P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)] Hon'ble Bombay High Court has stated as follows:

"10. So far as interest u/s. 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate

not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the Official Gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable u/s. 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s. 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied/short paid/non-levied/unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of sub-section (1) of Section 11, which runs thus :

“Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under sub-section (2) or has paid the duty under sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate”

The terminal part in the quotation above, which is couched with the words “shall” and “be liable” clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional.”

Thus we uphold the demand of interest under Section 75 of the Finance Act, 1994. For upholding the demand of interest we also rely on the following decisions

- i. Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]
- ii. TCP Limited [2006 (1) STR 134 (T-Ahd)]
- iii. Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]
- iv. Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]

5.10 We are not in agreement with the submissions of the Appellant that because they have deposited the duty prior to issuance of the show cause notice, no penalties could have been imposed on them in view of the decision of Bombay High Court in case of PadamShri V V Patil SSK [2007 (215) ELT 23 (Bom)]

“8.The ratio laid down in the matter of Rashtriya Ispat Nigam Ltd. v. Commissioner of Central Excise, Visakhapatnam - 2003 (161) E.L.T. 285 (Tri.-Bang.), relied upon by learned Counsel for assessee, which view was confirmed by the Hon’ble the Apex Court while dismissing the appeal of the department, that in case the duty is paid before issuance of show cause notice, no penalty u/s. 11AC is imposable, was a decision of the Tribunal at Bangalore dated 13-11-2002. Taking into consideration the hierarchy of authorities under the Central Excise Act, 1944 i.e. Assessment Officer conducting enquiry and determining the duty evaded or short paid, Commissioner (Appeals) and thereafter CESTAT, it can safely be said that this was a decision regarding the non-payment of duty of the period prior to insertions by Amendment Act No. 14/2001 with effect from 11-5-2001 by which sub-sections (2A), (2B) and (2C) are inserted in the main Act. Naturally, the Explanation (1) to sub-section (2B), reproduced hereinabove, was neither on the statute book nor was under consideration before the Tribunal or before the Hon’ble the Supreme Court. If the effect of Explanation is taken into consideration, the liberty to pay evaded excise duty as may be ascertained by Central Excise Officer u/s. 11A(2) or on the basis of duty ascertained by himself, was

not available to the assessee prior to 11-5-2001. We must say that by insertion of sub-sections (2A) to (2C) and more particularly Explanation (1) to sub-section (2B), the position stands drastically changed. Since there is no liberty to the assessee, who has evaded the duty intentionally, by exercising fraud, collusion etc. for the purpose, the liberty to pay the evaded duty under sub-section (2B) is not available and the terminal portion of sub-section (2B)

“.....and inform the Central Excise Officer of such payment in writing, who on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid;”

cannot render any assistance to such an assessee. In other words, the proceedings of ascertainment of evaded duty, imposition of interest and penalty cannot be dropped by virtue of above terminal clause of sub-section (2B) in the cases of assessee, who had intentionally evaded payment of duty by use of fraud, collusion etc. as contemplated by Section 11AC.

In the cases where the finding of fact regarding existence of fraud, collusion, wilful mis-statement/suppression of facts or contravention of any provisions of the Act or Rules with intent to evade the payment of duty is confirmed, it may not be open to the assessee to claim that no penalty is imposable upon him u/s. 11AC, because of payment of evaded duty before issuance of show cause notice, after amendment as inserted by Act No. 14/2001 with effect from 11-5-2001.

As already discussed hereinabove, there is no discretion with the authorities to impose any lesser penalty than 100% and 25% in case duty after being determined u/s. 11A(2), the assessee pays it within 30 days. This answers both the substantial questions of law on which appeal is

admitted, so far as penalty imposable u/s. 11AC is concerned."

6.1 In view of discussions as above we uphold the impugned order except for setting aside the order in respect of confiscation of goods and imposition of redemption fine. Thus appeals filed are disposed off as follows:

- i. Appeal No C/1187/2012 filed by I G International is partially allowed to the extent of setting aside the order confiscating the goods and imposing redemption fine.
- ii. Appeal No C/1188/2012 filed by Shri Gian Chand Arora is dismissed.

(Order pronounced in the open court on 25.10.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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