

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I**

Excise Appeal No. 1166 of 2010

(Arising out of Order-in-Original No. 21/BR-21/Th-I/2010 dated 06.04.2010
passed by Commissioner of Central Excise & Customs, Thane-I)

M/s. Parental Creations Pvt. Ltd.

Appellant

103, Shyam Chambers,
Opp. Sub-Jail, Ring Road, Surat

Vs.

Commissioner of Central Excise, Thane-I

Respondent

4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

WITH

Excise Appeal No. 1172 of 2010

(Arising out of Order-in-Original No. 21/BR-21/Th-I/2010 dated 06.04.2010
passed by Commissioner of Central Excise & Customs, Thane-I)

Shri Dinesh Hariprasad Agarwal

Appellant

Director, Parental Creations Pvt. Ltd.
103, Shyam Chambers,
Opp. Sub-Jail, Ring Road, Surat

Vs.

Commissioner of Central Excise, Thane-I

Respondent

4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

WITH

Excise Appeal No. 1196 of 2010

(Arising out of Order-in-Original No. 21/BR-21/Th-I/2010 dated 06.04.2010
passed by Commissioner of Central Excise & Customs, Thane-I)

M/s. Vrindavan Dyeing Mills Pvt. Ltd.

Appellant

Plot No.283, Road No.2, GIDC,
Sachin, Surat 394 520.

Vs.

Commissioner of Central Excise, Thane-I

Respondent

4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

WITH

Excise Appeal No. 1206 of 2010

(Arising out of Order-in-Original No. 21/BR-21/Th-I/2010 dated 06.04.2010 passed by Commissioner of Central Excise & Customs, Thane-I)

M/s. Olympia Creation Unlimited

Appellant

M/17-19, Maharaja Arcade,
City Light Area, Surat 395 001.

Vs.

Commissioner of Central Excise, Thane-I

Respondent

4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

WITH

Excise Appeal No. 1225 of 2010

(Arising out of Order-in-Original No. 21/BR-21/Th-I/2010 dated 06.04.2010 passed by Commissioner of Central Excise & Customs, Thane-I)

M/s. CUSP International

Appellant

216/18, Basement,
East Patel Nagar, New Delhi.

Vs.

Commissioner of Central Excise, Thane-I

Respondent

4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

WITH

Excise Appeal No. 1226 of 2010

(Arising out of Order-in-Original No. 21/BR-21/Th-I/2010 dated 06.04.2010 passed by Commissioner of Central Excise & Customs, Thane-I)

M/s. Aryan's

Appellant

7E, Gopala Towers,
25 Rajendra Palace,
New Delhi.

Vs.

Commissioner of Central Excise, Thane-I

Respondent

4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

AND

Excise Appeal No. 1726 of 2010

(Arising out of Order-in-Original No. 21/BR-21/Th-I/2010 dated 06.04.2010 passed by Commissioner of Central Excise & Customs, Thane-I)

M/s. Kabir Exports

73/37,38, Ishwar Market,
Dandi Galli, Fatehpuri,
New Delhi 110 006.

Appellant

Vs.

Commissioner of Central Excise, Thane-I

4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

Respondent

Appearance:

Shri Piyush Chhajed, C.A., for the Appellants in E/1166, 1172 & 1206/10

Shri Mukund Chouhan, Advocate, for the Appellant in E/1196/10

None for other Appellants

Shri Anil Choudhary, Deputy Commissioner and Shri N.N. Prabhudesai, Superintendent, Authorised Representatives for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/**85107-85113 / 2020**

Date of Hearing: 16.12.2019

Date of Decision: 31.01.2020

PER: SANJIV SRIVASTAVA

These appeals are directed against the Order in Original No 21/BR-21/TH-I/2010 dated 06.04.2010 of the Commissioner Central Excise Thane-I. By the impugned order Commissioner has held as follows:

"104. In the light of these findings I pass the order as follows-

ORDER

(I) I confirm the demand for the Cenvat credit amounting to Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) fraudulently availed during the period between September 2004 to February 2005 as detailed in Annexure I to the notice, made under the Rule 14 of the Cenvat

Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944, and order its recovery from M/s. Parental Creations Private Limited.

(II) I order for recovery of interest at appropriate rate from M/s. Parental Creations Private Limited, under Section 11AB of the Central Excise Act, 1944, on the demand amount confirmed at (I) above.

(III) I impose a penalty of Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) on M/s. Parental Creations Private Limited under Section 11AC of the Central Excise Act, 1944 read with Rule 15 of the Cenvat Credit Rules, 2004 & Rule 27 of the Central Excise Rules, 2002.

(IV) I hold the 13 (thirteen) number of rebate claims filed by them (as detailed in Annexure-II to the notice) on the strength of no objection certificate obtained by them from their claimed exporters, totally amounting to Rs.48,72,328/- (Rupees forty eight lakhs seventy two thousand three hundred and twenty eighty only) as not admissible.

(V) I do not order confiscation of the 794798 sq.mtrs of processed fabrics valued at Rs.8,45,04,443/- (Rupees eight crores forty five lakhs four thousand four hundred and forty three only) as detailed in Annexure II to the notice, exported by the merchant exporters, claimed to have been procured from M/s. Parental Creations Private Limited which are not under any seizure or detention under Rule 25 of the Central Excise Rules, 2002 read with Rule 15 of the Cenvat Credit Rules, 2004.

(VI) I impose a penalty of Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) on Shri Dinesh Agarwal, under Rule 26 of the Central Excise Rules, 2002. I do not impose any penalty on him under Rule 27 of the Central Excise Rules, 2002.

(VII) I impose penalty of Rs.18,00,000/- (Rupees forty lakhs only) on M/s. Kabir Exports, New Delhi under Rule 26 of the Central Excise Rules, 2002.

(VIII) I impose penalty of Rs.8,00,000/- (Rupees eight lakhs only) on M/s. Cusp International under Rule 26 of the Central Excise Rules, 2002.

(IX) I impose penalty of Rs.40,00,000/- (Rupees forty lakhs only) on M/s. Aryan's under Rule 26 of the Central Excise Rules, 2002.

(X) I impose penalty of Rs.8,00,000/- (Rupees eight lakhs only) on M/s. Kalinga Exports under Rule 26 of the Central Excise Rules, 2002.

(XI) I impose penalty of Rs.40,00,000/- (Rupees forty lakhs only) on M/s. Vrindavan Mills Pvt. Ltd. under Rule 26 of the Central Excise Rules, 2002.

(XII) I impose penalty of Rs.20,00,000/- (Rupees twenty lakhs only) on M/s. Olympia Creations Unlimited under Rule 26 of the Central Excise Rules, 2002.

(XIII) I impose penalty of Rs.14,00,000/- (Rupees fourteen lakhs only) on M/s. Shreeman Textiles under Rule 26 of the Central Excise Rules, 2002.

(XIV) I impose penalty of Rs.1,00,000/- (Rupees one lakh only) on M/s. Sajjan Textiles, under Rule 26 of the Central Excise Rules, 2002.

(XV) I do not impose penalty under Rule 27 of the Central Excise Rules, 2002 on the noticees, viz. M/s. Kabir Exports, M/s. Cusp International, M/s. Aryan's & M/s. Kalinga Exports, all of New Delhi, M/s. Vrindavan Mills Pvt. Ltd., M/s. Olympia Creations Unlimited of Surat, M/s. Shreeman Textiles and M/s. Sajjan Textiles, Bhiwandi, above, by the noticee under Section 11AC of Central Excise Act, 1944 shall be 25% of the demand confirmed at Sr.No. (I) above. The benefit of reduced penalty shall be available only if the amount of penalty so imposed is paid within the period of 30 (thirty) days from the date of communication of this order."

2.1 Appellant 1 (M/s Parental Creations Pvt Ltd), had taken the credit on the strength of the invoices/ documents issued by M/s

Sajjan Textiles, M/s Shreeman Textiles, Appellant 3 (M/s Vrindavan Dyeing Mills P Ltd and Appellant 4 (M/s Olympia Creations Unlimited). They have cleared the goods for export to various merchant exporters namely Appellant 5 (M/s CUSP International Ltd), Appellant 6 (M/s Aryans), Appellant 7 (M/s Kabir Exports), M/s Kalinga and M/s Vibrant Exports. Appellant 2 (Shri Dinesh Hariprasad Agarwal) is Director of Appellant 1. Appellant 1 had after obtaining no objection from the merchant exporter filed rebate claim for claiming the refund of duty paid by them making debit from their CENVAT Credit account.

2.2 Appellant 1 was at relevant time having two units one operating at Amrut Industrial Estate Mira Road Thane falling in the jurisdiction of Thane II Commissionerate and the second one operating at Gauri Pada, Dhobi Tala , Bhiwandi, District Thane, falling in the jurisdiction of Thane I Commissionerate. Bhiwandi unit was registered on 14.09.2004 for manufacture of process MMF. When Range officer visited the premises of Bhiwandi Unit on 25.04.2005, he found that the registered premises was used for manufacture of made up articles with sewing machine, this change in activities was intimated vide letter dated 31.01.2005 addressed to Kalyan - I Division.

2.3 Unit at Bhiwandi was claiming the CENVAT credit in respect of the inputs received and was clearing the finished goods after debiting the duty payable, from their CENVAT account. They had issued ARE-1 Nos 1/04-05 to 18/04-05 and corresponding invoices No 1/27.09.04 to 18/09.01.05 showing clearance for exports to four Merchant exporters namely M/s Kabir Exports, M/s Aryan Exports, M/s Cusp International and M/s Kalinga Exports. Further vide invoice no 25 & 26 both dated 11.02.2005 and invoice No 27 & 28 both dated 28.02.2005 they showed clearance of 1,85,149.35 L Mtrs of fabrics claimed to be lying in their stock to their unit at Mira Road Thane.

2.4 Bhiwandi unit had vide its letter dated 16.06.2005 received in range office surrendered the registration and informed that they had stopped their activities in the said unit from 01.03.2005

and that they had filed all their returns for the period upto 15.06.2005.

2.5 Based on the reference received from the Central Excise Commissionerate Thane-II vide letter dated 22.07.2005 to the effect that Appellant 1 unit at Mira Road Thane, was generating bogus ARE-1s by showing itself as supporting manufacture for the manufacture of "dyed and/ or printed fabrics" and the said bogus ARE-1s were issued to various Merchant Exporters for claiming the fraudulent rebate. It was also stated that Shri Dinesh Aggarwal, Director has in his statement recorded, admitted he had also obtained registration in the name of M/s Parental Creation Pvt Ltd in Kalyan I Division Thane I Commissionerate for his Bhiwandi unit and Bhiwandi unit is also indulging in the similar activity of issuing bogus ARE-1s. Also Bhiwandi unit had issued CENVAT Invoices from their Bhiwandi unit to Mira Road unit.

2.6 Based upon the information received investigations were undertaken at the Bhiwandi unit in jurisdiction of Thane – I Commissionerate. Investigations undertaken revealed that Appellant-1 had not received any goods and had taken the CENVAT credit on the basis of bogus invoices/ duty paying documents. Further as they had not received any goods as inputs the documents for the clearance of the goods viz ARE-1s and invoices issued by them to were fraudulently issued without actual removal of goods. On the basis of such fraudulent documents they had filed the rebate claims and also passed on the remaining credit to their own unit located at Mira Road in the jurisdiction of Central Excise Commissionerate, Thane – II.

2.7 A show cause notice dated 9th October 2009 was issued to the Appellants herein and others asking them to show cause as to why-

- Parental Creations (Appellant 1),
 - o The CENVAT credit amounting to Rs 82,91,790/- (Rupees Eighty Two Lakhs Ninety One Thousand Seven Hundred and Ninety Only) fraudulently availed

during the period September 2004 to February 2005 as detailed in Annexure I to this notice, should not be demanded and recovered from them under the Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944;

- o A penalty should not be imposed on them under Section 11AC of the Central Excise Act, 1944 read with Rule 15(2) of the CENVAT Credit Rules 2004 & Rule 26 of Central Excise Rules, 2002;
 - o An interest at appropriate rate under Section 11AB of the Central Excise Act, 1944 read with Rule 14 of the CENVAT Credit Rules, 2004, should not be charged and recovered from them;
 - o The 13 (thirteen) number of rebate claims by them (as detailed in Annexure-II to this notice on the strength of no objection certificates obtained by them from their claimed exporter totally amounting to Rs 48,72,328/- (Rupees Forty Eight Lakhs Seventy Two Thousand Three Hundred and Twenty Eight only) which does not represent 'duty' shown paid on clearances shown should not be rejected;
 - o 794798 L Mtrs of processed fabric valued at Rs 8,45,04,443/- as detailed in Annexure II to this notice; exported by the merchant exporters, claimed to have been procured from M/s Parental not available for seizure should not be confiscated under Rule 25 of the Central Excise Rules, 2002 read with Rule 15 of the CENVAT Credit Rules 2004;
 - o Since the goods are not available for confiscation, fine in lieu of confiscation should not be imposed on them.
- Shri Dinesh Agarwal, Director of Parental Creations (Appellant 2), penalty should not be imposed on him under Rule 26 of Central Excise Rules, 2002;

- M/s Cusp International Delhi (Appellant 5), M/s Aryan Delhi (Appellant 6), M/s Kalinga Exports Delhi (Appellant 7), M/s Kabir Exports Delhi, penalty should not be imposed on him under Rule 26 & Rule 27 of Central Excise Rules, 2002;
- M/ Vrindavan Mill Pvt Ltd., Surat (Appellant 3) Olympia Creations Unlimited, Surat (Appellant 4), M/s Shreeman Textiles Bhiwandi and M/s Sajjan Textiles Bhiwandi, penalty should not be imposed on him under Rule 26 & Rule 27 of Central Excise Rules, 2002;

2.7 The show cause notice was adjudicated by Commissioner as per the impugned order referred in para 1, supra.

2.8 Aggrieved by the impugned order appellants have filed these appeals.

3.1 We have heard Shri Piyush Chhajed, Chartered Accountant for Appellant 1, 2 and 4, Shri Mukund Chouhan Advocate for Appellant 3. None appeared for appellants 5, 6 & 7. We have heard Shri Anil Choudhary, Deputy Commissioner and Shri N N Prabhudesai, Superintendent, Authorized Representatives for the revenue.

3.2 Arguing for the Appellant 1, learned Chartered Accountant submitted-

- Issue is in respect of denial of CENVAT Credit taken by them against the purchases made by them from (a) Vrindavan Dyeing Mills Pvt Ltd (Rs 44,90,609/-), (b) Olympiad Creation Unlimited (Rs 22,05,688/-) (c) Shreeman Textile (Rs 14,32,360/-) and (d) Sajjan Textile (Rs 1,67,133/-).
- They are engaged in exporting the goods procured from third party after getting them processed by third party manufacturers. The exports are done through merchant exporter;
- Department has proceeded against them merely on the basis of contradictory statements recorded behind their back and concluded that there was no movement of the

goods hence the entire chain of transactions from the suppliers to the Merchant Exporters was bogus.;

- These contradictory statements on which reliance has been placed by the revenue have no evidentiary value, as the persons who had made the statements were never cross examined by them;
- No evidence has been recovered and placed on the record to show that documents produced by them namely invoices, transport receipts, ARE forms, Shipping Bill, Bank realization certificate (BRC) etc were fraudulent;
- In case of their MIRA Road unit in similar circumstances, departmental enquiry was initiated against the conduct of concerned departmental officers for helping them. The said enquiry has been concluded holding that the export were genuine:
- Department has in the present case confirmed the demand of CENVAT Credit and also denied the rebate claims made by them, thereby demanding the tax twice. This is clear indication of the biased mind against the appellant;
- They have filed extensive documentation in total 21 Volumes of paper books to show that the transactions undertaken by them were genuine;
- Demand has been made by invoking extended period of limitation. In similar circumstances, Hon'ble Gujarat High Court has in case of Prayagraj Dyeing Mills Pvt Ltd [2013 (290) ELT 61 (GUJ)] has held that extended period could not have been invoked;
- Various suppliers had supplied the goods to them against the invoices and duty paying documents against which they had claimed the CENVAT Credit. These documents or the documents filed by them for claiming the rebate have not been held to be forged;
- Penalty has been imposed on them under Section 11AC of the Central Excise Act, 1944 read with Rule 15 of CENVAT Credit Rules, 2004 and Rule 27 of the Central Excise Rules. There was no proposal to impose penalty under Rule 27

hence to that extent order in original has gone beyond the scope of show cause notice;

3.3 Arguing for the Appellant 2 and 4, learned Chartered Accountant submitted that, the penalty imposed on him under Rule 26 cannot be sustained as it is the case of the department that there were no goods involved and all the transactions were merely paper transactions. Since Appellant 2 and 4 had not dealt with any goods liable for confiscation the penalty imposed under Rule 22 is bad in law;

3.4 Arguing for Appellant 3, learned advocate submitted that-

- Penalty has been imposed upon him under Rule 26. Undisputedly they are "*Body Corporate*" and it has been held in the following decisions that penalty under Rule 26 is not impossible on "*Body Corporate*"
 - o Woodmen Industries [2004 (170) ELT A 307 (SC)]
 - o Apple Sponge and Power Ltd [2018 (362) ELT 894 (T-Mum)]
 - o Homag India Pvt Ltd [2017 (357) ELT 1194 (T)]
- During the course of personal hearing before the adjudicating authority they had submitted copy of all the statutory records like RG 23A Part-I and Part –II, RG-1, Lot Register, PLA, Excise Invoice, Rt-12 return, challan for payment of duty etc. etc. Thus it is crystal clear that they had followed all the statutory provisions;
- During the month of January 2005, they had paid certain amounts towards the Central Excise Duty from their PLA account also, thereby leaving no doubt that they had received inputs in their factory and finished goods were cleared on payment of duty;
- They would relying on the following decisions that in these circumstances penalty could not have been imposed on them:
 - o Shree Shiv Vijay Processors Pvt Ltd. [2011 (264) ELT 540 (T-Ahmd)]
 - o S K Foils Ltd [2015 (315) ELT 258 (T)]

3.5 Arguing for the revenue learned Authorized Representative submitted that-

- In Appeal No 1166, 1172, 1208, 1225 & 1226/2010-Mum, he reiterates the findings recorded by Commissioner in the impugned order. Further all the documents relied upon in the Show Cause Notice were supplied to the appellant as is clearly pointed out in para 85 of the impugned order. In para 87, 88 & 89, Commissioner has considered the request in relation to the cross examination and has recorded the reasons for not allowing the same, in case were the appellant sought cross examination.
- In Appeal No E/1196/2010 – Mum, Appellant 3, the only reason for objecting the penalty imposed under Rule 26, is that being “Body Corporate” penalty could not have been imposed under this rule upon him. The decision of Woodmen Industries relied upon by the Appellant is clearly distinguishable as it was in the case of firm and not in case of limited Company. On the contrary in case of Madhumilan Syntex Ltd [2007 (210) ELT 484 (SC)] it has been held that as company is not a natural person it cannot be imprisoned, but being a legal or juristic person can suffer payment of fine etc. To similar effect are the decisions of Apex Court in case of Iridium India Telecom Ltd [Appeal No 688 of 2005 Order dated 20.10.2010)], Mohanlal Jitamalji Porwal [AIR 1987 SC 1321], Standard Chartered Bank [2006 (197) ELT 18 (SC)]
- In Appeal No E/1726/10-Mum, Appellant 7, the points urged by the Appellant have been discussed and discarded in the following decisions:
 - o Everest Metal Works [2009 (239) ELT 79 (T-Del)]
 - o Ranjeev Alloys Ltd [2009 (236) ELT 124 (T-Del)] & [2009 (247) ELT 27 (P & H)];
 - o Vee Kay Enterprises [2011 (266) ELT 436 (P &H)];
 - o M S Metal [2014 (309) ELT 241 (P &H)];

- o Ajay Kumar G Baheti [2017 (348) ELT 115 (T-Mum)]
- o Navneet Agarwal [2012 (276 ELT 515 (T-Ahmd)]
- o Sanjay Vimalbhai Deora [2014 (306) ELT 533 (P &H)];
- o Amx Alloys Pvt Ltd [2013 (296) ELT 229 (P &H)];
- o Wipro td [2006 (196) ELT 226 (T-Mum)];
- o Patel Engineering Ltd [2014 (307) ELT 862 (Bom)];
- o Shreewood Products (P) Ltd Enterprises [2008 (231) ELT 671 (T-Del))];
- o P K Brothers [1993 (64) ELT 439 (T)]

4.1 We have considered the impugned order along with submissions made in appeal, during the course of arguments and in the written submissions filed by the appellants and revenue.

4.2 Show Cause Notice dated 9th October 2009 and the impugned order is in respect of 10 persons as indicated in table below:

S No.	Noticee	Appeal No
1	Parental Creations Pvt Ltd, Surat. Unit at Bhiwandi, Thane	E/1166/2010
2	Shri Dinesh Agarwal, Director Parental Creations	E/1172/2010
3	M/s Vrindavan Mills Pvt Ltd Surat	E/1196/2010
4	M/s Olympia Creations Unlimited, Surat	E/1206/2010
5	M/s Sajjan Textiles, Thane	---
6	M/s Shreeman Textiles Thane	---
7	M/s Kalinga Exports, New Delhi	---
8	M/s Kabir Exports New Delhi	E/1726/2010
9	M/s Cusp International, New Delhi	E/1225/2010
10	M/s Aryan, New Delhi	E/1226/2010

4.3 As is evident from the table above three Noticees namely M/s Sajjan Textiles, Thane, M/s Shreeman Textiles, Thane and M/s Kalinga Exports New Delhi are not in appeal before us.

4.4 Appellants had argued that they had not received the documents in respect of the show cause notice issued to them. However in para 85 of the impugned order, Commissioner has categorically recorded as follows:

“85. FINDINGS; - I have carefully gone through the entire case records including written and oral submissions made by the noticees during the hearings and the provisions of law relating to the issue. It is clear from the, records that the service of the subject notice was carried out along with the relied upon documents listed in the relevant Annexure of the notice in pursuance of the provisions of Section 37 C of the Central Excise Act, 1944, by way of service at their registered premises under a regular panchanama and delivery by registered post in the first fortnight of October, 2009, itself. The notice is signed by the issuing authority, with designation indicated below it, and is within its power of demand set by the Board. Calling such a valid and legal notice, an illegal one because all its pages are not signed by the officer is a ridiculous argument. The acknowledgement of a heavy parcel is on record indicating that a complete set of photocopies of the relied upon documents was received by the main two notices also. However, none of the noticees and especially, the main two noticees, file any reply to the notice even after lapse of around two months time. They did not, till then, felt it necessary to go through the notice and the documents supplied therewith. As late as in December, 2009 when the case was posted for hearing, for the first time, the main two noticees came up with a plea dated 05.12.09, that the notice received by them was a big one and that they needed 5-7 weeks time to analyze the same. After the case was posted for second hearing, the main two noticees filed their so called first part-submission dated 09.12.09, similarly seeking five to seven weeks time to file their reply and that they may require some additional documents/ information. In spite of this letter they did not come up with any requisition for the documents till the third hearing was granted and till a specific request was made to them to come up with details of the documents required by them. Upon this letter of the third hearing they came up with a list of host of documents required for their defense, followed by another such requirement from the jurisdictional Division office. The requests were

.accommodated and the investigating section was directed to provide them with the documents 'needed by them. The investigation, after verifying their request reported that most of the documents sought for were nothing but the relied upon documents of the notice itself, which were already provided to them at the time of the service of the notice itself. The two noticees have not denied the receipt of these sets as apparent from their correspondence with the Preventive (Section) of Central Excise directly, where while acknowledging the receipt of the notice with the said documents, they had stated that a few pages of the notice were illegible. Still, the documents, other than those relied upon mentioned in their two requests; one made to the adjudicating authority and the other to the divisional DC, were provided to them by the investigating, Preventive (Section) of Central Excise under letter dated 20.01.10, making the above position clear. Apparently, upon receipt of these documents they came up with the contention that the show cause notice was not a true/legal show cause notice as it's all the pages were not authenticated and also that the documents supplied to them were also not attested and so were not reliable. The entire episode indicates that against the claim made by them every now and then about cooperating with the department and seeing justice, they were more interested in raking up trivial issues to falter the adjudication process. The two noticees requesting for certain relied upon documents, who have reportedly received the requisite documents, were at least expected after that, to come out with some evidence glaring from these documents, or even by stating the circumstances for the adjudicating authority to ponder over, to show that the transactions carried out by them were genuine and there were records, such as transportation, payments which could establish their innocence with regard to alleged acts against them. However, this has not happened. When they filed reply it was simple denial of charges not substantiated with any material evidence against the allegation in the notice, and request for 'attested' documents already supplied. There was also an unnecessary haggling over the issue of the authentication of the photocopies, without bringing out a single case that the copies were not genuine or that, they had reason to believe that fake copies could have been supplied to them. Thus, in the end there is only denial of charges by them on the

record, which will be dealt later. However, the entire course from the beginning indicates that all out attempts to impart natural justice have been made by the adjudication process, the main two noticees have also availed it, but have, on the contrary, appeared to have used the same as a tool to delay the proceedings. Thus, observing that the requirements of principles of natural justice have been amply followed, by way of proper service of the notice, supply of copies of documents; even additionally asked for, opportunity to take additional copies required or to inspect the records, and granting a number of hearings spread over a period of four months to put forth the effective defense, the case has to be taken up for decision even if the main noticees till end have chosen not to appear for the hearing. The whole episode clearly indicates that since the main noticees, do not have any proper defense for the case against them, they have chosen to ignore the proceedings of adjudication and yet grumble without any basis that the justice to this end is not imparted to them. This clearly looks like stretching of principles of natural justice beyond limits to suit their ends. The case law, in the case of M/s. Sanghi Textile Processors 1993(65) ELT 357(SC) clearly lays down the principles of natural justice for adjudicating authority in such circumstances, which guides that simple steps of supplying photocopies of relied documents and extending the opportunity of inspection after service of the notice would meet the justice. This has been done in this case from the beginning of the process itself; therefore the requirements of principles of natural justice are complied with."

Chartered Accountant appearing for the Appellant 1 had submitted that they had not received some of the documents relied upon in the show cause notice. Considering the submissions made, bench had on 4.12.2019 made the following order:

"The learned C.A. for the appellants submits that the certain documents mentioned in the SCN though requested by them have not been received. He requests time to prepare list of documents which was not supplied and also the correspondence from the Department time to time during the course of

adjudication and request of cross-examination of the witnesses. He seeks time to furnish the details of these documents on the next date of hearing. Adjourned to 16/12/2019.”

On 16.12.2019, instead of filing the details of the documents not received by him along with the request for cross examination etc, learned Chartered Accountant admitted that they had received all the documents and matter may be taken up. Accordingly the matters were taken up for arguments and consideration.

4.5 Appellant 3 i.e. M/s Vrindavan Dyeing Mills Pvt Ltd Surat had requested for cross examination of Shri Dinesh Agarwal (Appellant 2), Shri Mahesh Agarwal (employee of Appellant 1) and Shri Ravi Sharma, Broker. However his request has been turned down by the Commissioner as per para 87, 88 & 89 of the impugned order. In his appeal or during the course of arguments or in the written submissions filed Appellant 3 has not pressed that denial of cross examination has caused any prejudice to him in making his submissions.

4.6 In their appeal and arguments Appellant 1, have submitted that the revenue has proceeded to the book this case against them, alleging that they had not received any material against the invoices received by them and against which they had taken the CENVAT Credit. They submit that on the contrary they have all the records to show the receipt of the goods against which they had taken the CENVAT Credit. It is also not correct, to say that the suppliers of the input materials were bogus as these suppliers are in existence and M/s Vrindavan Mills Pvt Ltd, Surat (Appellant 3) and M/s Olympia Creations Unlimited, Surat (Appellant 4) are even before tribunal. The other two suppliers namely M/s Sajjan Textiles, Thane and Shreeman Textiles, Thane two existed and were filing regular returns to the concerned jurisdictional officers.

4.7 After the receipt of inputs they had cleared the processed fabrics to various merchant exporters namely M/s Kalinga Exports, New Delhi, M/s Kabir Exports, New Delhi (Appellant 5),

M/s Cusp International, New Delhi (Appellant 6) and M/s Aryan New Delhi (Appellant 7). These goods cleared to Merchant Exporter, were actually exported by them through various ports in Delhi. Not only the fact of export has been confirmed by the concerned authorities at port of exportation, in the enquiries made from them. Against the exports made Foreign Exchange remittances have also been received. The goods which were not cleared for exports were transferred by them to their unit at MIRA Road after payment of the duty equivalent to the CENVAT Credit taken

4.6 However on the basis of the investigations made and allegations levelled, Commissioner has put on hold the rebate claims filed by them and has also sought to deny the CENVAT Credit taken/ availed by them. If the case of revenue is that they had not received any goods and consequently not cleared anything for exportation, then all the entries made in their CENVAT account are nothing but the book entries. It should also be noted since as alleged they had not cleared the goods for exportation the reversal made by them in their CENVAT Credit account, for the clearance of goods itself was not required as nothing was actually being cleared.

4.8 Annexure 1 to Show Cause notice reproduced below, gives the detail of the documents against which the Appellant 1 claim to have received the inputs have availed the CENVAT Credit.

S N	Invoice		Quantity	Value	Duty in Rs		Vehicle No
	No	Date			CENVAT	EDU Cess	
Supplier: Olympia Creations Unlimited						Goods: Fabrics	
1	133	16.09.04	25417	2338364	187069	3741	GJ1TT9888
2	134	17.09.04	25457	2342044	187364	3747	MH15AG2155
3	135	18.09.04	30620	2817040	225363	4507	MCY2960
4	136	19.09.04	17006	1564552	125164	2503	MTT9068
5	137	20.09.04	25190	2317480	185398	3708	MH15AG2155
6	138	21.09.04	20200	1858400	148672	2973	GJ1TT9888
7	139	22.09.04	26650	2451800	196144	3923	MCY2960
8	140	23.09.04	28008	2576736	206139	4123	MTT9068
9	141	24.09.04	28050	2580600	206448	4129	GJ1TT9888

10	142	25.09.04	20838	1917096	153368	8067	MH15AG2155
11	143	26.09.04	25004	2300368	184029	3681	GJ1TT9888
12	144	27.09.04	20704	1904768	152381	3047	MTT9068
Total			293144	26969248	2157539	48149	
Supplier: Vrindavan Dyeing Mills Pvt Ltd					Goods: Dyed Polyester		
13	217	06.12.04	43774	4183480	334678	6694	--
14	218	07.12.04	42794	4090057	327205	6544	--
15	219	13.12.04	44556	4375563	350045	7001	--
16	220	14.12.04	52847	5190023	415202	8304	--
17	227	01.01.05	40448	3971408	317718	6354	--
18	228	01.01.05	24331	2389060	191125	3822	--
19	229	01.01.05	28299	2778615	222289	4446	--
20	230	01.01.05	28145	2764043	221123	4422	--
21	231	01.01.05	36591	3593165	287453	5749	--
22	232	05.01.05	48481	4705312	376425	7528	--
23	233	06.01.05	25033	2429642	194371	3887	--
24	234	07.01.05	27412	2659594	212767	4255	--
25	235	13.01.05	39475	3831516	306521	6130	--
26	236	14.01.05	27812	2707976	216638	4332	--
27	237	15.01.05	55265	5362520	429001	8580	--
Total			565263	55031974	4402561	88048	
Supplier: Shreeman Textiles					Goods: Grey Fabrics		
28	986	31.12.04	41930	3270540	261643	5233	EFD
29	987	31.12.04	42050	3279900	262392	5248	EFD
30	988	31.12.04	46160	3600480	288038	5761	EFD
31	989	31.12.04	25070	1955460	156437	3129	EFD
32	990	31.12.04	30111	2348658	187893	2758	EFD
33	995	31.12.04	39880	3110640	248851	4977	EFD
Total			225201	17565678	1405254	27106	
Supplier: Sajjan Textiles					Goods: Grey Fabrics		
33	247	17.12.04	26259	2048202	163856	3277	EFD
Grand Total			1109867	101615102	8129210	1656580	
Total CENVAT Credit in Dispute					Rs 8295790		

4.9 Similarly Annexure 2 to the Show Cause Notice records the details of purported clearances claimed to have been made by the Appellant 1. The relevant extracts from the said Annexure are reproduced below:

S N	Merchant Exporter	ARE-1/ Invoice		Bill/ lading or AWB		Vehicle	Quantity	FOB Value	Port/ Shipping
		No	Date	No	Date				
1	M/s Kabir Exports	1	27.09.04	54200477 235	4.10.04	MH04 F9592	50874	6866082	IGI Airport
2		2	27.09.04	54200477 245	4.10.04		47262	6427724	IGI Airport
3		3	29.09.04	DEL-KAR- 2447		GJ1TT 9888	45390	6125948	ICD, TKD
4		4	29.09.04	54200477 256	4.10.04		54658	7376780	IGI Airport
5		5	29.09.04	DEL-KAR- 2447		MH15 AG21 56	48888	6598046	ICD, TKD
6		6	2.10.04	54200477 875	5.10.04	MTT9 068	45708	6168866	IGI Airport
7	M/s Aryans	7	31.12.04	SS/DEL/04 /ISL/D051 41		MCY2 960	47581	6128588	ICD, TKD
8	M/s Cusp International	8	31.12.04	SS/DEL/04 /ISL/D051		MH15 BG25	28737	7585436	ICD, TKD
9		9	31.12.04	37		56	30171		ICD, TKD
10	M/s Kalinga Exports	10	01.01.05	DEL/2005/ 4475		MH04 F9598	44502	5730475	ICD, TKD
11		11	01.01.05				52940	6816951	ICD, TKD
12	M/s Cusp International	12	01.01.05	SS/DEL/04 /ISL/D054		MH04 F6678	42402	10560609	ICD, TKD
13		13	01.01.05	45			39611		ICD, TKD
							578724	76385505	

4.10 Commissioner has in para 92 of impugned order recorded as follows:

“92. On supply/supplier of inputs side, M/s. Parental have shown receipt of their inputs; grey fabrics, from principally, M/s. Sajjan Textiles, M/s. Shreeman Textiles, M/s. Olympia Creations

Unlimited and further, have shown processing got done on grey fabrics purportedly bought from M/s. Shreeman and M/s. Sajjan Textiles at M/s. Vrindavan Dyeing, Surat. Of these, Shri Manoj Agrawal, proprietor, of M/s. Olympia, incidentally brother of Shri Dinesh, was examined and his records were taken up. This has revealed that:-

A(i) Although, M/s. Olympia seem to have shown supply of goods to M/s. Parental worth nearly Rs.2.70 crores in merely 12 days (from 16.09.04 to 27.09.04), they have not substantiated it with private records viz. commercial invoices, lorry receipts, octroi receipts, purchase orders, documents showing payments, etc. which can establish purchase of fabrics, their processing and movement of finished processed fabrics from Surat to Bhiwandi.

(ii) M/s. Olympia, Surat have not been able to name any one other person to whom they have supplied their fabrics. They have supplied the fabrics to M/s. Parental. For these supplies M/s. Olympia Creations Unlimited have purchased processed fabrics from M/s. Parental Creations Pvt. Ltd., Bhayander, itself and without carrying out any process, have sold the same to M/s. Parental Creations Pvt. Ltd., Bhiwandi, both firms owned by Shri Dinesh Agarwal (his brother). The circumstantial evidence shows as to why the processed fabrics will be transported from Bhayander to Surat, and then again brought back to Bhiwandi, without carrying out any process as stated by Shri Manoj Kumar in his statement dated 30.09.05, and sold back to M/s. Parental. This shows that the transaction is nothing but an eye-wash to mislead the department and to enable M/s. Parental to avail Cenvat credit on the invoices of a seemingly unrelated party. This fact is further confirmed by the fact that Shri Manoj Agarwal is unable to produce any evidence such as LRS, Octroi receipt, escort receipts etc. for the transportation of the processed fabrics from Bhayander to Surat & from Surat to Bhiwandi.

(iii) Further, the claimed suppliers of M/s. Olympia Creations Unlimited have been declared bogus/non-existent as per the Alert Circular issued by Surat-I Commissionerate, hence M/s. Olympia Creations Unlimited, could not have received the inputs,

was not eligible for any Cenvat credit accordingly is ineligible to issue any invoice for passing on the said bogus Cenvat credit.

(iv) Thane-II Commissionerate investigating the affairs of M/s. Parental Creations, Bhayander (dealer) with M/s. Olympia Creations Unlimited, Surat, on the basis of whose invoices Cenvat credit was availed.

(v) M/s. Olympia itself has been declared bogus/fake by the jurisdictional Surat-I Commissionerate.

(vi) M/s. Olympia Creations, who is also one of the noticees of this notice have not come forward with any defense against these allegations, substantiated by the circumstantial evidences.

B. Summonses were issued to Shri Suresh Purohit, Proprietor of M/s. Sajjan Textiles and M/s. Shreeman Textiles. However, the same were returned by the postal authorities. M/s. Shreeman Textiles and M/s. Sajjan Textiles have been declared bogus unit vide alert Circular No.08/2006 dated 19.06.06 of Thane-I Commissionerate. The two units are also noticees of this notice but have not participated in the proceedings from the beginning. In fact, there is also a separate notice issued to these units for the alleged issuance of invoices without supply of any material for which the alert circular is issued against them. Therefore, the supplies of the two units cannot be genuine.

C. M/s. Parental have availed Cenvat credit of nearly Rs.45 lakhs on the invoices issued by M/s. Vrindavan Dyeing Mills Pvt. Ltd., Surat. However as per record these invoices were for the processed fabrics for which the grey fabrics was shown supplied from the units of M/s. Sajjan and M/s. Shreeman. Since, these two units itself are declared fake, there could not be any supply of grey to M/s. Vrindavan from them and so the credit, it turn, coming from them to M/s. Parental also could not be practically possible. Further, transactions of M/s. Vrindavan against the claim of Shri Dinesh Agrawal have been examined and the same has revealed that there are serious contradictions in their statements such as:-

i) Shri Dinesh Agarwal in his statement dated 25.08.05 had stated that the transportation as well as payment for

transportation of the grey fabrics from M/s. Parental to M/s. Vrindavan was arranged by M/s. Vrindavan whereas Shri Navdiwala, Excise Clerk of M/s. Vrindavan in his statement dated 16.05.06 & 28.09.06, had categorically stated (which has been confirmed by Shri Harishchandra Udaynarayan Singh, Director of M/s. Vrindavan) that the transportation was arranged by Shri Mahesh Agarwal of M/s. Parental and the transportation charges has also been paid by M/s. Parental.

ii) Shri Dinesh Agarwal, in his statement dated 25.08.05, had stated that there was no broker involved in the transaction between them and M/s. Vrindavan, whereas Shri Navdiwala has contradicted this and stated that Shri Ravi Sharma was the broker in the deal. This fact has also been corroborated by Shri Ravi Sharma, the Broker, in his statement.

iii) Shri Dinesh Agarwal has stated that Shri Mahesh Agarwal was the person responsible for most of his work, which has enabled him to take credit of nearly Rs.61 lakhs from M/s. Vrindavan, M/s. Shreeman & M/s. Sajjan. However, his failures to give any address, etc. of such an employee raised suspicion that he has avoided this to prevent the facts from coming out in the open.

iv) Shri Mahesh Agarwal in his statement dated 16.06.09 has categorically denied all the activities claimed by Shri Dinesh Agarwal as been done by him. He has specifically stated that he has never visited Parental, Bhiwandi premises, its purchasers or suppliers.

Hence, it is indicated that all the transaction involving M/s. Vrindavan, M/s. Sajjan & M/s. Shreeman, the suppliers and the supply transactions are all proven bogus. M/s. Parental have been unable to produce any evidence to counter these facts.”

4.11 The fact that even the so called payments made by the Appellant to the supplier of the raw material have been found to be bogus. Commissioner has in para 96 observed as follows:

“With regards to the second aspect, cheques shown issued to the claimed suppliers of the inputs were found to have gone into the accounts of third parties, discounted in a number of banks at

Surat and none of the payments are gone to the claimed buyers. These, findings on the main four aspect of the operations, the allegation of paper transactions without dealing in any goods is cemented.”

4.12 Apart from the above observation made by the Commissioner we also do not find the submissions made by the Appellant in respect of the goods cleared for export as having any merits because of the time lag between the date of clearance of the goods from the premises of the Appellant and the date of “let export order” indicated on the ARE-1. It is also not understood as to why the goods which were exported were transported from Thane, Mumbai to Delhi for exportation from ICD Tughlakabad and IGI Airport New Delhi, when the gateway port for ICD Tughlakabad is Jahawar Custom House, Nhava Sheva. The act of incurring the expense on transportation of goods from Thane Mumbai to New Delhi and then back to Nhava Sheva, could not be explained by the Appellants or the merchant exporters. Table below indicates the purported date of clearance extracted from ARE-1’s and the date of Let Export Order, after actual examination and stuffing of the goods in container at the port of exportation.

S N	ARE-1		S/Bill		Let Export Order date
	No	Date	No	Date	
1	1	27.09.2004	5324717	4.10. 2004	04.10. 2004
2	2	27.09.2004	5324724	4.10. 2004	04.10. 2004
3	3	29.09.2004	1420481	1.10. 2004	07.10. 2004
4	4	29.09.2004	5324720	4.10. 2004	04.10. 2004
5	5	29.09.2004	1420482	1.10. 2004	07.10. 2004
6	6	02.10.2004	5324725	4.10. 2004	05.10. 2004
7	7	31.12.2004	1449711	3.01. 2005	06.01.2005
8	8	31.12.2004	1449721	3.01. 2005	06.01. 2005
9	9	31.12.2004	1449721	3.01. 2005	06.01. 2005
10	10	01.01.2005	1450794	6.01. 2005	10.01. 2005
11	11	01.01.2005	1450653	6.01. 2005	10.01. 2005
12	12	01.01.2005	1449719	3.01. 2005	06.01. 2005
13	13	01.01.2005	1449719	3.01. 2005	06.01. 2005

Above table above it is quite evident that goods which are cleared from the premises of Appellant premises have been allowed let export from the port located in Delhi within a week time which is highly improbable as the normal travel time of the cargo from Thane-II to Delhi is much higher than that. Also it is noted that the goods as per the consignment notes were consigned and delivered at the premises of the merchant exporter and not directly to the port of exportation. This also would have added some time delay and most likely these goods were not the same goods which were exported by the merchant exporter under the cover of these shipping bills. Appellants have also not produced copies of any documents evidencing the payment of toll/octroi at any of toll/ octroi naka that would have been crossed in course of transporting the goods from Thane to Delhi.

4.13 The facts about non receipt of the inputs/ goods against which the Appellant 1 have availed the CENVAT Credit of Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) has been admitted by the Shri Dinesh Agarwal (Appellant 2) Director of Appellant in various statements recorded. The gist of the statements to this effect is reproduced below:

- i) In his statements dated 18/7/2005 and 21/7/2005 Shri Dinesh Agarwal, Director of M/s Parental Creations Pvt. Ltd., recorded before Supdt. C. Ex. Thane II stated that they had issued 18 ARE1s without actually delivering any goods and followed the same modus operandi in his premises at Bhiwandi, which was registered earlier.
- ii) Shri Dinesh Agarwal on 8/8/2005, 9/8/2005 and 23/8/2005 inter alia stated that their premises at Bhiwandi was procured on rental basis from Shri Asgar Ali, Company's Bank accounts are at UTI Bank and Indian Overseas Bank, both at Surat, that they had never paid any electricity charges nor there was any 3-phase connection to the said premises, that the premises did not have any water connection, he gave details of equipment as were in the gala (which he changed in subsequent statement),

that one Shri Mahesh Agarwal (having Mobile no.9376814151) was employed in their Company who was looking after all operations of the company, that they authorized Pawan Singhal C.A. for obtaining C. Ex. Registration, that the address of Shri Mahesh Agarwal was not known to him, that his unit received grey fabrics from M/s Shriman Textiles and M/s Sajjan Textiles both of Bhiwandi, that the grey fabrics were directly delivered to the premises of M/s Vrindavan Dyeing Mills Pvt. Ltd., Surat and as per the arrangement the said processor was lifting the fabrics from Supplier's premises and transported to Surat., that after processing the said fabrics were delivered to his unit at Bhiwandi by the processor under C. Ex. invoices, thereafter the processed fabrics were subjected to cutting and packing, that they availed credit based on the invoices and used the same for payment of duty, that in a few case where the grey fabrics were lifted by his unit and brought to their premises and the same were subjected to bleaching and dyeing without aid of power.

iii) On 25/8/2005, Shri Dinesh Agarwal stated that one Shri Singh is a Director of M/s Vrindavan Dyeing Mills Pvt. Ltd. (Textile Processors) (para 10 and 12 of SCN) and their employee Bharatbhai was dealing with them, the job charges were inclusive of transportation, that the transportation was arranged by M/s Vrindavan Dyeing Mills P Ltd., that no broker was involved in these dealings, transportation was arranged by M/s Vrindavan Dyeing Mills P Ltd., and he did not know the name and address of transporters, processed fabrics were transported to his factory in trucks and Shri Mahesh Agarwal used to receive the goods in the factory, that material received were cut and packed and cleared to Delhi, that transportation was arranged by merchant exporters, that normally a representative of the buyer used to visit his premises to inspect the fabrics before they are packed, the representative of the merchant exporter comes to his factory to prepare ARE1 and packing list, that goods were transported by road to Delhi, that Approx. Rs.10 Lakhs was paid to Vrindavan as job charges. (charge Rs.8 to 10 per Liner mtr.), that his unit availed Cenvat credit on grey fabrics as well as on

processed fabrics. He did not produce any transportation documents produced. He also stated that his brother Manoj Agarwal was proprietor of M/s Olympia Creations Unlimited.

4.14 All the facts as stated above along with the findings recorded by the Commissioner abundantly make it clear that the appellant 1 had not received any goods against which they had availed the CENVAT Credit and have not cleared the same for exportation or any other purpose. In our view Appellant 1 have fraudulent availed the CENVAT Credit of Rs 82,91,790/- (Rupees Eighty Two Lakhs Ninety One Thousand Seven Hundred and Ninety Only), without receiving any inputs. We are also of the opinion that since the Appellant 1 has not received any goods the clearance of the same by him for exportation or any other purpose also was fraudulent, so that they could have converted the fraudulent credit to cash by claiming the rebate of the duty paid by them by debiting from the fraudulent credit availed by them.

4.15 The evidences in the case in the case clearly suggest that Shri Dinesh Agarwal (Appellant 2), Director of Appellant 1 has in connived with the various suppliers namely M/s Shreeman Textiles, M/s Sajjan Textiles, M/s Olympia Creations Unlimited & M/s Vrindavan Dyeing Mills Pvt Ltd and merchant exporters namely M/s Kalinga Exports, M/s Kabir Export, M/s Aryans & M/s Cusp International to hatch the scheme/ plot for availing the fraudulent credit and then converting the same to cash. The scheme hatched was meant to defraud the exchequer by claiming inadmissible rebate by way of refund of duty paid from the inadmissible credit. To a specific query made counsel for Appellant 1, admitted that they had not been paying any duty for which the rebate claims have been filed in cash and the entire amounts were paid by them from the CENVAT account only. The Appellants in the case before us were part and parcel of the scheme hatched by Appellant 1 through its Director (Appellant 2), to manipulate the documents fraudulently.

4.16 Appellant 1 have argued heavily relying on the decision of Hon'ble Gujarat High Court in case of Prayagraj Dyeing &

Printing Mills Pvt Ltd [2013 (290) ELT 61 (Guj)] that extended period of limitation cannot be invoked for denying the CENVAT Credit taken by him. In the said decision Hon'ble High Court held as follows:

“8. Therefore, the question that falls for determination is whether the department can escape its liability to find out a person who was registered with them and to pursue him for payment of duty. There is also no dispute in these cases that the goods were purchased by the merchant manufacturer officially and they have suffered the duty thereon and the amounts have been paid through cheques.

9. It is also not a case where the invoices are manufactured documents not signed by the original manufacturer. The invoices which are accounted for in the Return of the person, were the invoices accounted for in the Return of the persons registered with the Central Excise. Thus, merely because the manufacturer cannot be found at the present, such fact cannot make the invoices fake or fraudulent documents in the eye of law. These are actual invoices issued by the manufacturer who is duly registered under the Central Excise Act and, therefore, those cannot be said to be forged documents. In our opinion, merely because today, the original manufacturer, who is registered with the Revenue, is not traceable, it does not mean that he did not exist at the relevant point of time. If today, a manufacturer is not available for various reasons that does not mean that at the relevant point of time, such manufacturer who was registered with the Central Excise, did not exist. In our opinion, once receipt of goods is not disputed by a person taking credit and necessary invoices are issued, he is entitled to take credit provided however that he took reasonable steps to ensure that the inputs or the capital goods in respect of which he had taken CENVAT credit are the goods on which appropriate duty of excise as indicated in the documents accompanying the goods, has been paid.

10. In this connection, we find substance in the contention of Mr. Parikh, the learned senior advocate appearing on behalf of

the appellants, that there is a marked distinction between a forged document and a document issued by practising fraud. If it appears that a document is a forged one or a manufactured one, it is concocted or a created one in the eye of law and it is in the eye of law a non-existent document. On the other hand, a document issued in the context of a fraud or misrepresentation, is by itself a genuine document and according to settled law, such document is, at the most, voidable and is valid till it is set aside. A transaction that takes place on the basis of such document is good one and can even give a good title to the holder in due course for valuable consideration. At this juncture, we may profitably refer to the observations of the Supreme Court made in the case of CCE v. Decent Dyeing Co., reported in 1990 (45) E.L.T. 201 = (1990) 1 SCC 180 wherein, the Supreme Court held that it would be intolerable if the purchasers were required to ascertain whether excise duty had already been paid as they had no means of knowing it. It was further pointed out that duty of excise is primarily a duty levied on a manufacturer or purchaser in respect of a commodity manufactured or produced. As pointed out by a Division Bench of this Court in the case of Commissioner of Central Excise v. D.P. Singh reported in 2011 (270) E.L.T. 321, the judgment of the Supreme Court in the case of New India Assurance Company (supra), was distinguished, being one relating to a forged document which renders a document null and void, and as such, has no application to this type of cases. Similarly, reliance over the judgment of the Supreme Court in the case of Commissioner of Customs (Preventive) v. Aafloat Textiles (I) P. Ltd. reported in 2009 (235) E.L.T. 587, cannot be supported as Afloat case is one pertaining to a forged document but not in respect to a document otherwise genuine, issued by practising fraud. The facts stated in the case of Afloat indicated that the same was a case of a forged invoice and thus, the principles laid down therein cannot have any application to an invoice which is, otherwise, genuinely issued by a manufacturer registered with the Revenue. Justice Arijit Pasayat who delivered the judgment

of the Supreme Court in the case of Afloat (supra), in a subsequent case of Commissioner of Customs v. Ajay Kumar & Company, reported in 2009 (238) E.L.T. 387, clearly indicated that the same being not a case of forged document but one of issue of license by practising fraud, the Tribunal was right in holding that the transferee of the license should not be made liable. It may not be out of place to mention here that the Tribunal, in its judgment, reported in 2006 (205) E.L.T. 747 indicated in paragraph-7 as follows :

“if that be so, the concept that a fraud vitiates everything would not be applicable to cases where a transaction of transfer of license is for value consideration without notice, arising out of mercantile transactions, governed by common law and not provisions of any statute.”

11. We, therefore, find no substance in the contention of the learned counsel for the Revenue that simply because the original manufacturer is now not traceable, is sufficient for reversal of cenvat credit already taken by the appellants by virtue of the original invoices. However, at the same time, we find substance in the contention of Mr. Oza and Mr. Champaneri, the learned counsel appearing on behalf of the Revenue, that in order to get the credit of CENVAT, Rule 7(2) cast a further duty upon the appellants to take all reasonable steps to ensure that the inputs or the capital goods in respect of which the Appellants had taken the credit of CENVAT are the goods on which appropriate duty of excise as indicated in the documents accompanying the goods, has been paid. The Explanation added to Rule 7(2) even describes the instances which are the reasonable steps. The Appellants in these cases, however, not having taken those steps, cannot get the benefit of the credit even though he is not party to fraud. In this connection, we fully agree with the views taken in the case of Sheela Dyeing (supra), and hold that the said decision supports the case of the Revenue and taking of all reasonable steps as provided in Rule 7(2) is an essential condition of availing the credit. The distinction sought to be made by Mr. Parikh that the period involved therein related to

June, 2003 is not tenable because sub-rule (e) of Rule 7 was introduced even earlier with effect from April 1, 2003.

12. The next question is whether demand of reversal is barred by the period of limitation. In our opinion, in view of our above finding that if the original document is issued even by practising fraud, a holder in due course for valuable consideration unless shown to be a party to a fraud, cannot be proceeded with by taking aid of a larger period of limitation as indicated in Section 11A(1) of the Act. It is now settled law that Section 11A(1) is applicable when there is positive evasion of duty and mere failure to pay duty does not render larger period applicable. In the case before us, it is not the case of the Revenue that the transferees were party to any fraud and therefore, the Revenue cannot rely upon a larger period of limitation. Our aforesaid view finds support from the following decisions of the Supreme Court :

(i) CCE v. Chemphar Drugs & Liniments, reported in 1989 (40) E.L.T. 276.

(ii) Padmini Products v. Collector of Central Excise, reported in 1989 (43) E.L.T. 195.

(iii) Lubrichem Industries Limited v. CCE, Bombay, reported in 1994 (73) E.L.T. 257.

(iv) Nestle (India) Limited v. CCE, Chandigarh, reported in 2009 (235) E.L.T. 577.

13. We thus find substance in the contention of Mr. Parikh that in the case before us, in the absence of any allegation that the appellants were parties to the fraud, the larger period of limitation cannot be applied, and thus, even if the original document was assumed to be issued by practising fraud, the appellants being holders in due course for valuable consideration without notice, the larger period of limitation cannot be extended in the case before us. In this connection, we may profitably refer to the decision of the Supreme Court in the case of Commissioner of Central Excise, Belapur v. E. Merck India Ltd. reported in 2009 (238) E.L.T. 386 (S.C.) where the Supreme

Court took a view that in the absence of a willful misdeclaration on the part of the respondent-assessee, there was no scope of invoking Section 11A of the Act.”

4.14 This decision of High Court was distinguished by the CESTAT Ahmedabad Bench in case of Shri Labdhi Prints [2014 (308) ELT 178 (T-Ahmd)] stating as follows:

“5. Heard both sides and perused the case records. So far as admissibility of Cenvat credit on invoices of grey fabrics is concerned, it is evident from the evidences on record, especially statement dated 20-4-2005 of Shri Biren H. Vakharia, Partner of the main appellant, that only invoices were received by the appellant without receipt of grey fabrics covering those invoices. The supplier of the grey fabrics have been found to be non-existent hence the invoices on the basis of which credit has been taken are to be considered as forged. Shri Vakharia in his statement, inter alia, admitted that the whole transactions are sham being mere paper transactions. He explained that the impugned invoices of grey fabrics were made available to him by one Shri Girdharilal Dadhich. In his statement, Shri Dadhich admitted that he in conspiracy with one Shri Yogesh Vashi fraudulently obtained registration in the name of M/s. Inder Silk Mills and M/s. I.G. Fabrics and made fraudulent declaration of stock to avail deemed credit. The evidence in the form of Panchnama and alert circulars have not been challenged nor there is any retractment of statements.

5.1 Hon'ble High Court of Gujarat in the case of Prayagraj Dyeing and Printing Mills Pvt. Limited v. UOI (supra) made following observations in Paras 9 and 12, reproduced below :-

“9.

10.

11.

12.”

5.2 It is evident from the above observations that the facts before the Hon'ble High Court were different then the facts of

this case. In the present proceedings appellant was a party to the fraud committed in availing Cenvat credit on grey fabrics which was never received. Accordingly, Cenvat credit has been correctly denied by the lower authorities by invoking extended period."

4.17 In view of above we are of the view that the CENVAT Credit availed by the appellants fraudulently without receiving the corresponding inputs covered by the duty paying documents/ invoices needs to be denied to the Appellant 1 by invoking extended period of limitation as per Rule 14 of CENVAT Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944. Since no inputs were received by the Appellant 1 the clearance of the goods by him by debiting the duty against such fraudulent clearances from the CENVAT Account is also not sustainable. In fact as no goods were received they have also not been cleared and hence the debits made from the CENVAT accounts which is subject matter of thirteen rebate claims filed by the Appellant after taking no objection from the merchant exporters is also not sustainable. Accordingly all the rebate claims filed by the Appellant 1 and subject matter of these proceedings need to be disallowed as have been done by the Commissioner by withholding the same. However since we hold the credit itself as fraudulent the debits made from the CENVAT account to are fraudulent. Thus in absence of the clearance of the goods by the appellant, if the duty is sought to be demanded from appellant 1 against the goods which were never cleared by them for export would amount to double jeopardy. In case of the goods cleared by the appellants to their sister concerned by debiting the fraudulent CENVAT Credit availed by them, the appellants have fraudulently transferred this CENVAT Credit to their sister concern who would have utilized the same. Hence these amounts need to be recovered from the Appellant 1, whereas in case of exports under the claim of rebate, the denial of rebate claim will amount to recovery of the fraudulent CENVAT Credit.

4.18 In view of discussions as above we uphold the order of Commissioner denying the CENVAT Credit to the tune of Rs 82,91,790/- (Rupees Eighty Two Lakhs Ninety One Thousand Seven Hundred and Ninety Only) in terms of Rule 14 of CENVAT Credit Rules, 2004 read with proviso to Section 11A(1) of Central Excise Act, 1944. However the part of the credit denied which is covered by the thirteen rebate claims [Rs.48,72,328/- (Rupees forty eight lakhs seventy two thousand three hundred and twenty eighty only)] filed by the Appellant and withheld by the Commissioner will be recovered by denying the rebate claims. Remaining amount which is not covered by these claims needs to be recovered in cash from appellant 1.

4.19 In para 4.12 supra, we have held that all the appellants have connived with appellant 1 and 2 in their nefarious design to defraud the exchequer by hatching the scheme of availing the fraudulent credit having held so we hold that the penalties imposed on the appellants to be justified. In view of the Apex Court decision in case Madhumilan Syntex Ltd [2007 (210) ELT 484 (SC)], Iridium India Telecom Ltd [Appeal No 688 of 2005 Order dated 20.10.2010)], Mohanlal Jitmalji Porwal [AIR 1987 SC 1321], Standard Chartered Bank [2006 (197) ELT 18 (SC)] we are not in position to accept the arguments advanced by the appellants to effect that penalty under Rule 26 could not have been imposed on body corporate. Hon'ble Apex Court has clearly laid down as follows:

"23. It is no doubt true that company is not a natural person but 'legal' or 'juristic' person. That, however, does not mean that company is not liable to prosecution under the Act. 'Corporate criminal liability' is not unknown to law. The law is well settled on the point and it is not necessary to discuss it in detail. We may only refer to a recent decision of the Constitution Bench of this Court in Standard Chartered Bank & Ors. v. Directorate of Enforcement & Ors., (2005) 4 SCC 530 : JT (2005) 5 SC 267. In Standard Chartered Bank, it was contended on behalf of the company that when a statute fixes criminal liability on corporate bodies and also provides for imposition of substantive sentence,

it could not apply to persons other than natural persons and Companies and Corporations cannot be covered by the Act. The majority, however, repelled the contention holding that juristic person is also subject to criminal liability under the relevant law. Only thing is that in case of substantive sentence, the order is not enforceable and juristic person cannot be ordered to suffer imprisonment. Other consequences, however, would ensue, e.g. payment of fine etc.

24. *K.G. Balakrishnan, J. (as His Lordship then was), speaking for the majority, summarized the law thus :*

“As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.”

25. In our opinion, therefore, it cannot be successfully contended that prosecution could not have been ordered against the company and no charge could have been framed.

26. So far as Directors are concerned, it is alleged in the show-cause notice as well as in the complaint that they were 'principal officers' of the company. In the show-cause notice, it was asserted that the appellants were considered as principal officers under Section 2(35) of the Act. In the complaint also, it was stated that the other accused were associated with the business of the company and were treated as principal officers under Section 2(35) of the Act and hence they could be prosecuted. Dealing with an application for discharge, the trial Court observed that accused No. 1 was company whereas other accused were Directors. Whether they could be said to be principal officers or not would require evidence and it could be considered at the stage of trial and the application was rejected. In Revision, the First Additional Sessions Judge took similar view.

27. The learned Counsel contended that the Courts committed an error of law in ordering prosecution against the Directors. The counsel, in this connection, invited our attention to certain decisions. In *Municipal Corporation of Delhi v. Ram Kishan Rohtagi & Ors.*, AIR 1983 SC 67, the accused invoked the jurisdiction of the High Court under Section 482 of the Code praying for quashing of criminal proceedings initiated against them under the Prevention of Food Adulteration Act, 1947. Whereas accused No. 1 was Manager of the company, accused Nos. 2-5 were Directors. A complaint was filed by the Food Inspector of the Municipal Corporation, inter alia, alleging that 'Morton toffees' sold by the accused did not conform to the standards prescribed for the commodity. The Metropolitan Magistrate issued summons to all the accused for violating the provisions of the Act. It was contended on behalf of the accused that proceedings were liable to be quashed as it was not shown that accused persons were in-charge of and responsible for the conduct of business. The High Court allowed the petition and

quashed the proceedings. Aggrieved Municipal Corporation challenged the decision. This Court was called upon to consider as to whether the High Court was right in quashing the proceedings against the accused.

28. The Court reproduced clause (5) of the complaint which read thus —

“That the accused No. 3 is the Manager, of accused No. 2 and accused Nos. 4 to 7 are the Directors of accused No. 2 and as such they were in charge of and responsible for the conduct of business of accused No. 2 at the time of sampling.” (emphasis supplied)

29. Considering the above clause, this Court held that as far as the Manager was concerned “it was not and could not be reasonably argued that no case is made out against him because from the very nature of his duties, it is manifest that he must be in the knowledge about the affairs of the sale and manufacture of the disputed sample”. But so far as accused Nos. 4 to 7 were concerned, it was alleged that they were Directors. Interpreting the words ‘as such’ the Court observed that there was no clear averment that the Directors were in charge of and responsible for the conduct of business and the complainant has merely presumed that the Directors of the company must be guilty because they were holding a particular office.

30. This Court, in the circumstances, observed :

“So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence, vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore we find ourselves in complete agreement with the argument of the High Court that no case

against the Directors (accused Nos. 4 to 7) has been made out ex facie on the allegations made in the complaint and the proceedings against them were rightly quashed.”

31. *A similar question came up for consideration before the Court in Municipal Corporation of Delhi v. Purshotam Dass Jhunjunwala & Ors., AIR 1983 SC 158. There also, a complaint was filed under the Prevention of Food Adulteration Act, 1947 against the Directors of the company.*

32. *In Para 5 of the complaint, it was stated :*

“That accused Ram Kishan Bajaj is the Chairman, accused R.P. Neyatia is the Managing Director and accused Nos. 7 to 12 are the Directors of the Hindustan Sugar Mills Ltd. and were in charge of and responsible to it for the conduct of its business at the time of commission of offence.”

(emphasis supplied)

33. *Setting aside the order of the High Court quashing the proceedings against the Directors and distinguishing Ram Kishan Rohtagi, the Court held that there was a clear averment as to the active role played by the accused and the extent of their liability. A prima facie case for summoning of accused was, therefore, made out and the High Court was wrong in holding that allegations were vague. Further details could be given only in evidence.*

34. *In Puran Devi & Ors. v. Z.S. Klar, Income Tax Officer, (1988) 169 ITR 608, the High Court of Punjab & Haryana held that a person or a partner of a firm prosecuted for false verification of return must have been in charge of and responsible to the firm for the conduct of its business. Necessary allegations, therefore, must be made in the complaint.*

35. *In K. Subramanyam v. Income Tax Officer, (1993) 199 ITR 723, the High Court of Madras held that before prosecuting a person under the Act, it must be proved that the person was ‘in charge’ of and ‘responsible to’ the Firm or Company for the*

conduct of business. The Court observed that the word used is 'and' and not 'or'. Both the ingredients, therefore, have to be pleaded and proved by the prosecution and the burden is on the prosecution that the accused was 'in charge of' and 'responsible to' the Firm or Company.

36. In *Jamshedpur Engineering & Machine Manufacturing Company Ltd. & Ors. v. Union of India & Ors.*, (1995) 214 ITR 556, the High Court of Patna (Ranchi Bench) held that no vicarious liability can be fastened on all Directors of a company. If there are no averments in the complaint that any Director was 'in charge of' or 'responsible for' conduct of business, prosecution against those Directors cannot be sustained.

37. In *M.A. University & Ors. v. Deputy Commissioner of Income Tax (Assessment)*, (1996) 218 ITR 606, the High Court of Kerala held that when there was failure to deduct tax at the source by a firm, prosecution can be launched for violating the provisions of the Act against the Firm. But if the complaint is filed against partners also, there must be specific allegation that such partners were responsible for conduct of business of firm. In absence of such allegation, proceedings against the partners cannot continue.

38. Attention of the Court was also invited to a decision of this Court in *Sham Sunder v. State of Haryana*, (1989) 4 SCC 630. In *Sham Sunder*, this Court indicated that it is not uncommon that some of the partners of a firm may not even be knowing what is going on day to day in the firm. There may be partners known as 'sleeping partners' who are not required to take any part in the business of the firm. Then there may be ladies and minors who are admitted to the partnership firm only for the benefit of business. They also may not be aware about the business of the firm. It would be a travesty of justice to prosecute all the partners and ask them to prove that the offence was committed without their knowledge. The requisite condition, according to this Court, was that it is for the prosecution to prove that the partner was responsible for

carrying on business and was, during the relevant time, in charge of the business.

39. Reference was also made to *State of Karnataka v. Pratap Chand & Ors.*, (1981) 2 SCC 335. In that case, this Court held that 'person in charge' would mean a person in overall control of day to day business. A person who is not in overall control of such business cannot be held liable and convicted for the act of firm.

40. In *Monaben Ketanbhai Shah & Anr. v. State of Gujarat & Ors.*, (2004) 7 SCC 15 : JT (2004) 6 S.C. 309, dealing with the provisions of Sections 138 and 141 of the Negotiable Instruments Act, 1881, this Court observed that when a complaint is filed against a firm, it must be alleged in the complaint that the partners were in active business. Filing of the partnership deed would be of no consequence for determining the question. Criminal liability can be fastened only on those who at the time of commission of offence were in charge of and responsible for the conduct of business of the firm. The Court proceeded to observe that it was because of the fact that there may be sleeping partners who were not required to take any part in the business of the firm; there may be ladies and others who may not be knowing anything about such business. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. "For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and established that fact."

41. Finally, the counsel referred to *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.*, (2005) 8 SCC 89 : JT (2005) 8 S.C. 450, wherein this Court held that essential averments must be made in the complaint that the person against whom complaint is made was in charge of and responsible for the conduct of

business of the company. Without such averment, no criminal liability would arise.

42. From the statutory provisions, it is clear that to hold a person responsible under the Act, it must be shown that he/she is a 'principal officer' under Section 2(35) of the Act or is 'in charge of' and 'responsible for' the business of the Company or Firm. It is also clear from the cases referred to above that where necessary averments have been made in the complaint, initiation of criminal proceedings, issuance of summons or framing of charge, cannot be held illegal and the Court would not inquire into or decide correctness or otherwise of the allegations levelled or averments made by the complainant. It is a matter of evidence and an appropriate order can be passed at the trial."

In view of the above decision of the Apex Court we are not impressed by the arguments advanced relying on certain decisions of tribunal (which if contrary to principles laid down by the Apex Court are per-incuriam) to effect that penalty under Rule 27 could have not been imposed on the body corporate.

4.20 Thus we summarize our findings in all the seven appeals under consideration as follows:

- CENVAT Credit of Rs.82,95,790/- (Rupees eighty two lakhs ninety five thousand seven hundred and ninety only) availed by the Appellant 1, fraudulently without receiving the goods is disallowed in terms of Rule 14 of CENVAT Credit Rules, 2004 read with proviso to Section 11A(1) of Central Excise Act, 1944.
- The amount of CENVAT Credit so disallowed, shall be recovered after allowing the adjustment of the amounts of Rs.48,72,328/- (Rupees forty eight lakhs seventy two thousand three hundred and twenty eighty only) involved in the 13 rebate claims filed by the Appellant 1 and which have been held to be inadmissible.
- Interest on the CENVAT Credit taken fraudulently is demandable under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944.

- Penalty under Section 11AC imposed on Appellant 1 is justified.
- Penalties imposed on other appellants under Rule 26 too are justified.

5.1 Thus we dispose of the appeals as follows:

- i. Appeal No E/1166/2010 is partially allowed to the extent of restricting the recovery of CENVAT Credit amount disallowed, to the amount of credit disallowed reduced by the amount involved in 13 rebate claims filed by the Appellant. With the above modification the impugned order is upheld.
- ii. Appeal No E/1172/2010, E/1196/2010, E/1206/2010, E/1225/2010, E/1226/2010 & E/1726/2010 are dismissed.

(Order pronounced in the open court on 31.01.2020)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)