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

Customs Appeal No. 1627 of 2005

(Arising out of Order-in-Original No. 128/2005/CAC/CC(I)/AKP dated 30.11.2005 passed by the Commissioner of Customs (Import), Mumbai)

M/s. Rashtriya Chemicals & Fertilizers Ltd. **Appellant**
Priyadarshini, Easter Express Highway,
Sion, Mumbai 400 022.

Vs.

Commissioner of Customs (Import), Mumbai **Respondent**
New Custom House, Ballard Estate,
Mumbai 400 001.

WITH

Customs Appeal No. 66 of 2006

(Arising out of Order-in-Original No. 128/2005/CAC/CC(I)/AKP dated 30.11.2005 passed by the Commissioner of Customs (Import), Mumbai)

M/s. ICICI Bank Ltd. **Appellant**
ICICI Bank Towers,
Bandra-Kurla Complex,
Mumbai 400 051.

Vs.

Commissioner of Customs (Import), Mumbai **Respondent**
New Custom House, Ballard Estate,
Mumbai 400 001.

Appearance:

Shri D.B. Shroff, Sr. Advocate, with Shri M.S. Bodhanwala and Ms. Sakshi, Advocates, for the Appellants
Shri R.K. Dwivedy, 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/86681-86682/2021**

Date of Hearing: 01.07.2019
Date of Decision: 01.07.2019

PER: SANJIV SRIVASTAVA

These appeals are directed against the order in original C.A.O No. 128/2005/CAC/CC(I)/ AKP dated 30.11.2005 of the Commissioner of Customs (Imports), New Custom House, Ballard Estate, Mumbai. By the impugned order, the Commissioner has held as follows:

"61. Customs duty amounting to Rs.9,26,89,304 in respect of B/E No.480059 dtd 22.7.2004 relating to imports through Mumbai Sea Port, is hereby confirmed u/s 18 of the Customs Act 1962 and is appropriated from the deposit of Rs.9,26,89,304 made by M/s Uhde India Ltd on 19.8.2005 [refer para 20(v) above].

62. Customs duty amounting to Rs. 6,49,640 in respect of B/E931881 dt 26.7.2004 in respect of imports through Air Cargo Complex, Sahar, is hereby confirmed u/s 18 of the Customs Act, 1962, and is appropriated from the amount of Rs 6,49,640 deposited by M/s Uhde India Ltd on 7.8.2004 [refer para 22(v) above].

63. The two Bills of Entry are treated as finalized accordingly.

64. The goods having CIF value of Rs 22,95,67,164 covered by B/E No. 480059 dtd. 22.7.2004, imported through Mumbai Sea Port, are confiscated u/s 111(o) of the Customs Act 1962. ***I, however, allow the goods to be redeemed on payment of a fine of Rs. 5.75 Crores.*** *Since the goods have been released provisionally on execution of Bond and B/G and are no longer available for confiscation, I appropriate the redemption fine from the revenue deposit of Rs 5.75 crores of M/s Uhde India Ltd but later replaced by the B/G of M/s RCF as per the order of the Mumbai High Court.*

65. The goods having CIF Value of Rs.15,93,058 imported vide B/E No.931881 dt 26.7.2004 imported through ACC, Sahar, Mumbai, are confiscated u/s 111(o) of the Customs Act 1962. ***I however, allow the goods to be redeemed on payment of a fine of Rs.4 lakhs.*** *Since the goods have been released provisionally on execution of Bond and B/G and are no longer available for confiscation, I appropriate the redemption fine* *from the Bank Guarantee dt 11.10.2004 of Rs 31,86,117 executed by M/s RCF [refer para 22(v) above].*

66. Keeping the role of each noticee in mind I impose the following penalties on them. As discussed in para 51 above penalty on M/s Udhe is imposed under section 114A of the Customs Act, 1962, equal to the duty evaded. While imposing penalty on Shri Rakesh Yadav, who was a Govt. Servant at the time of commission of the offence, the fact has been kept in mind that he has undergone detention under COFEPOSA and he would also be liable for action under departmental proceedings including possible prosecution by the CBI.

S No	***Name and Designation***	***Amount of Penalty***
1	*M/s Uhde India Ltd.*	*9,33,38,944* *(9,26,89,304 + 6,49,640)*
2	*M/s Rashtriya Chemicals & Fertilizers Ltd.*	*1 crore*
3	*M/s ICICI Bank Ltd.*	*50 lakhs*
4	*Shri M Sunderraman, Director (Finance), M/s RCF*	*10 lakhs*
5	*Shri Ravindra Prakash Srivastava Chief Manager, Liaison, M/s RCF*	*10 lakhs*
6	*Shri Rakesh Yadav*	*4 lakhs*
7	*Shri Anand T Kusre, Gen.Manager, ICICI Bank Ltd.*	*5 Lakhs*
8	*Shri Zarasp Irani, Manager, ICICI Bank Ltd*	*4 lakhs*
	Total -	***11,16,38,944***

67. I appropriate the penalty imposed on M/s Uhde India Ltd, M/s Rashtriya Chemicals & Fertilizers, Shri M. Sunderraman and Shri R.P. Srivastava (total Rs 10,53,38,944) from the B/G of Rs

23 crores executed by M/s RCF as per the orders of the Mumbai High Court.”

1.2 Though the appeals of all the noticees/appellants were tagged and listed for hearing we directed for de-tagging/de-linking the appeals of all other Appellants except for the two appellants i.e. M/s Rashtriya Chemical and Fertilizers Ltd. (Appellant 1) and M/s ICICI Bank Ltd (Appellant 2). So we are in present order dealing with the appeals filed by these two appellants.

2.1 Appellant 1 took up a project for upgradation of their High Pressure Nitrate plant in Trombay. The contract was awarded to M/s Uhde Ltd (Contractor). This project was approved by the Ministry of Chemical and Fertilizers, Government of India. For execution of this project a term loan of US Dollars 5.5 Million from Appellant 2, who was the project implementing authority. The project was financed by the Asian Development Bank.

2.2 To implement the project contractor imported the impugned goods at Mumbai by claiming the benefit of exemption under Notification No 84/97-Cus.,dated11.11.97, as amended by Notification No. 85/99-Cus., dated 6.7.99, No.119/99-Cus., dated 2.11.99,No.75/2001-Cus., dated 6.7.2001 and 107/2001-Cus., dated 12.102001. The benefit under this Notification was admissible to all the goods imported into India and intended to be used in a project financed by the World Bank, the Asian Development Bank etc, subject to condition that the importer produces a certificate from the executive head of the Project Implementing Authority and counter signed by an officer not below the rank of Joint Secretary to the Government of India in the concerned Line Ministry, stating that the said goods are required for the execution of the said project and that this project has duly been approved by the Government of India.

2.3 Directorate of Revenue Intelligence, New Delhi ("DRI") gathered the information that Appellant 1was claiming the benefit of this exemption from Customs duties based on forged certificates issued by Project Implementing Authority

Certificates. Therefore an inquiry and investigation was instituted in the matter.

2.4 The officers of Commissionerate of Customs (Import), Mumbai seized 26 packages claimed to be containing Air Compressor, Expander Train & Steam Turbine Package System including accessories and spares meant for up-gradation of HP Nitric Acid Plant of *Appellant 1* for which **Bill of Entry No: 480059 dated 22.7.2004 was** filed by ***contractor*** claiming exemption under Notification No.84/97-Cus.,dated 11.11.97, as amended on the basis of forged PIAC, under panchnamas on **28.7.2004.** The declared CIF value of the consignment was Rs.22,95,67,164/-.

2.5 The office premises of M/s. Rashtriya Chemicals& Fertilizers Limited (Appellant 1) situated at H-9, Green Park Extension, New Delhi were searched by the officers of DRI on 29.07.2004 and documents relevant for investigations were resumed under Panchnama. Thereafter statements of various persons related with the filing of this Bill of Entry along with the forged documents was recorded.

2.6 Thereafter contractor deposited a sum of Rs.9,26,89,303/- towards custom duty in respect of the imports covered by this bill of entry vide TR6 Challan No.20315915 dated 19.08.2004. The seized goods were provisionally released on execution of a Bond of Rs. 22,95,67,164/- along with a revenue deposit of Rs.5.75 crores by contractor.

2.7 Appellant 1 got another **Bill of Entry No: 931881 dated 26.7.2004,** House Air Way Bill No:71066109 dated 27.5.2004 claiming exemption under Notification No.84/97-Cus., dated 11.11.97, as amended on the basis of forged/ fabricated Project Implementing Authority Certificate for clearance Vibration Monitoring System along with spares at Air Cargo Complex Sahar. This consignment was placed under seizure on3.8.2004 under Section 110 of Customs Act, 1962. The declared CIF value of the above mentioned goods was Rs.15,93,058.25. These goods were subsequently released provisionally on execution of

Bond of Rs 31,86,117 along with a B/G of equal amount. Contractor also deposited Customs duty amounting to Rs. 6,49,640/- vide TR6 Challan No. 139 dated 07.08.2004.

2.8 After completion of investigations in the matter Contractor and Appellant 1 were, vide **DRI F.No:S0D/71/2004-C.I dated 9.3.2005,** jointly and severally called upon to show cause, in writing, to the **Commissioner of Customs (Import), New Custom House,** Mumbai in respect of the goods sought to be cleared through Mumbai Port, Mumbai under **Bill of Entry No 480059 dated 22.07.2004** as to why:

(i) the benefit of Notification No. 84/97-Cus.dated 11.11.97 as amended should not be denied in respect of goods mentioned under Bill of Entry No 480059 dated 22.07.2004 which were assessed provisionally and the assessment should not be finalized accordingly;

(ii) the said goods having declared CIF value of Rs.22,95,67,164/- and released provisionally should not be confiscated under Section 111(o) of the Customs Act,1962;

(iii) Customs duty amounting to Rs.9,26,89,304/-should not be demanded and recovered from them under proviso to Section 28 (1) read with Section 18 of the Customs Act,1962;

(iv) penalty under Section 112(a)/114A of the Customs Act, 1962 should not be imposed upon them for their acts of omission and Commission as aforesaid;

(v) the amount of Rs.15,01,89,303/- deposited during investigation should not be appropriated towards payment of duty and penalty.

2.9 Contractor and Appellant 1 were jointly and severally called upon, vide the same show cause notice, to show cause, in writing, to the **Commissioner of Customs (Air Cargo-Import), Air Cargo Complex, Sahar, Mumbai** in respect of the goods sought to be cleared through Mumbai AirPort, Mumbai, under **Bill of Entry No:931881 dated 26.07.2004** as to why:

(i) the benefit of Notification No. 84/97-Cus. dated 11.11.97 as amended should not be denied in respect of goods mentioned under Bill of Entry No **931881 dated 26.07.2004** which were assessed provisionally and the assessment should not be finalized accordingly;

(ii) the said goods having declared CIF value of Rs.15,93,058/-released provisionally should not be held liable for confiscation under Section 111(o) of the Customs Act,1962;

(iii) Customs duty amounting to Rs.6,49,640/- should not be demanded and recovered from them under proviso to Section 28 (1) read with Section 18 of the Customs Act,1962;

(iv) penalty under Section112(a)/ 114A of the Customs Act, 1962 should not be imposed upon them for their acts of omission and Commission as aforesaid;

(v) the amount of Rs.6,49,640/-deposited and bank guarantee of Rs.31,86,117/- submitted during investigation should not be appropriated towards payment of duty and penalty;

2.10 The notices mentioned in para 2.8 & 2.9 also called upon Appellant 2, and other co-noticees to show cause in respect of these goods sought to be cleared claiming exemption under Notification No. 84/97-Cus. dated 11.11.97 as amended, as to why penalty under Section 112 (a) of the Customs Act, 1962 should not be imposed upon them for their acts of omission and commission as aforesaid.

2.11 Vide Notification No.64/2005-Cus (NT) dated 20.07.2005, the CBEC appointed the Commissioner of Customs (Import), NCH Mumbai, as the **Common Adjudicating Authority** for adjudicating these Show Cause Notices.

2.12 After considering the submissions made by the Appellant 1 & 2 and other co-noticees, also after following the principles of natural justice Commissioner adjudicated both the show cause notices by the impugned order as stated in para 1, supra.

2.13 Aggrieved by the impugned order Appellant 1, Appellant 2 and other co-noticees have preferred these appeals.

3.1 We have heard Shri D B Shroff, Sr. Advocate along with Shri M.S Bodhanwala & MS. Sakshi for the appellants and Shri R K Dwivedy, Additional Commissioner, Authorized Representative for the respondent, revenue.

3.2 Arguing for the appellant learned counsel submits that,-

- Appellant 1 is a Public Sector Undertaking with 92.5% equity participation by the Government of India. They had taken up a project for upgradation of their High Pressure Nitrate plant, as per the approval granted by Ministry of Chemical and Fertilizers. The project was financed by a loan of USD 5.5 million from Appellant 2 after approval from Asian Development Bank. Appellant 2 was the project implementation authority.

- For execution of the project Appellant 1, imported certain goods for which the Bill of Entries were filed by the contractor claiming exemption under notification No 84/97-Cus dated 11.11.1997 as amended from time to time. The benefit of exemption under this notification was admissible, subject to production of a certificate from the Project Implementation Authority (Appellant 2) countersigned by an officer not below the rank of joint secretary in the Line Ministry so notified by the Department of Economic Affairs in the Ministry of Finance.

- Appellant 1 was genuinely under the impression that the LINE Ministry was the Finance Ministry, which is borne out by the fact that Appellant 2, the project implementing authority, asked them to approach the Ministry of Finance to obtain the counter signature of the Joint Secretary. Appellant 2, under cover of two letters dated 11.6.2004 addressed to the Joint Secretary Ministry of Finance requesting for counter signature, handed over the two certificates to Appellant 1 representatives for pursuing the matter.

- Appellant 1 representative submitted the certificate in the office of Joint Secretary in the last week of June 2004 they requested the Under Secretary to issue the said certificates duly countersigned by the Joint Secretary. The Under Secretary in the DEA Ministry of Finance later informed Appellant 2 that the certificate had to be signed by an officer not below the rank of Joint Secretary in the GOI in the concerned LINE Ministry without specifying which the appropriate Ministry was.

- Appellant 1 returned the original certificates to Appellant 2 and requested them to issue a fresh certificate for counter signature by the Joint Secretary (Fertilizers, Department. Of Fertilizers, Ministry of Chemicals and Fertilizer, GOI). Request made by the Appellant 1 was not acceded to by the Appellant 2 as for them being a Bank the appropriate LINE Ministry was the Ministry of Finance.
- As the goods had already sailed from the Karachi port, Appellant 1 was under pressure to get the counter signature on the certificates to be produced for the clearance of these goods claiming exemption under Notification No 84/97-Cus. In the process, they came across Shri Rakesh Yadav, who was a Junior Finance Officer in the Ministry of Finance, who assured them of help in getting these certificates countersigned.
- Shri Yadav provided them with certificates countersigned by the Shri R Banerjee, Joint Secretary in the Ministry of Finance Along with covering letters purportedly signed by the Director (ADB) addressed to the Commissioner of Customs.
- Appellant 1 produced these certificates through the Contractor who had filed the Bills of Entries for the clearance of the imported goods. The counter signature on the certificates was in subsequent investigations made by DRI/ Customs found to be forged leading to the seizure of the imported goods and subsequent proceedings.
- Commissioner has himself in the impugned order recorded that the conditions of the notification were substantially

complied when he states that there is no dispute,-

- that the project has been approved by the Government of India;
- goods imported were to be used in a project financed by the Asian Development Bank;
- project implementing authority was Appellant 2 and they had issued these certificates;

- Commissioner has stated that the only dispute was in respect of the countersignature of the certificates.
- Since the Commissioner had found that the conditions of notification had been substantially complied with, he should have allowed the benefit under the notification. Reliance is placed on the decisions in the case of,-
  - Bombay Chemical Pvt Ltd [1995 (77) ELT 3 (SC)}
  - Diwaliben Mohanlal Mehta Charitable Trust [2003 (162) ELT 796 (Comm Appl)]
  - Thermax Pvt Ltd. [1992 (61) ELT 352 (SC)}
  - Associated Cement Cos Ltd. [1999 (111) ELT 257 (T)]
- Impugned order is based on conjectures as stated in para 48 of the order. The order based on such conjectures and not on the basis of evidence, cannot be sustained in view of the decision of the Hon'ble Apex Court in the case of Rukumanand Bairaliya [1971 (3) SCC 167].
- Reliance placed by the Commissioner on the decision of Hon'ble Apex Court in case of Eagle Flask Industries [2004 (171) ELT 296 (SC)], is totally uncalled for as they have substantially complied with the conditions of notification and what has not been complied with is the merely a procedural condition. It was incumbent on the Government to notify and clarify as to which ministry was line ministry, for counter signing these certificates. Appellant 1 had throughout sought clarification and guidance from the

concerned ministries without any success.

- The Commissioner failed to appreciate that it was the bureaucratic approach of the Ministry in driving genuine importers like Appellant 1 from pillar to post, which compelled them to seek the assistance of Junior Finance Officer, in the Ministry of Finance to get the certificates countersigned.
- Appellant 1 had no reason to doubt or believe that the counter signature on the certificates, forwarded along with the letter signed by the Director (ADB) in the Ministry of Finance was forged. If they would have known about it they would have not produced the certificate to Customs and would have approached the Ministry for proper counter signature.
- From the various correspondences it can be shown that no Ministry was nominated as Line Ministry by the Department of Economic Affairs and it was only after the direction given by the Hon'ble High Court of Allahabad in Writ Petition No 578/2005, to this effect that Ministry of Urban Development was nominated as Line Ministry.
- Even Custom was not aware as to which Ministry was the Line Ministry and could not guide the Appellant 1 to appropriate "Line Ministry" for the countersignature on the certificates.
- When they were informed by the Department of Economic Affairs that the Ministry of Urban Development was the concerned "Line Ministry" for counter signature of the Project Implementation Authority Certificates, they approached them. However, the Ministry informed them about their inability to counter sign these certificates.
- They took up the matter with the Ministry of Chemical and Fertilizers and Department of Economic Affairs. Department of Economic Affairs has vide their letter dated 8th October 2010 again informed them that Ministry of

Urban Development, is the concerned Line Ministry for counter signing these certificates as required under the Notification No 84/97-Cus.

- Thereafter they continuously kept pursuing the matter, however vide letter dated 18th January 2016, Ministry of Urban Development expressed its inability to counter sign these certificates. Matter was discussed in the Meeting taken by the Secretary, Ministry of Chemical and Fertilizers, on 27th July 2016, wherein the Secretary directed for early resolution of this long pending issue.
- Vide letter dated 29th March 2017, Line Ministry, informed them that they have decided to engage Quality Council of India (QCI) for causing third party verification of the imported goods. The cost of engagement of QCI was to be borne by the Appellant 1. The financial proposal for the engagement of QCI was obtained by the Appellant 1 and forwarded to Line Ministry, and Line Ministry had vide its O M dated 7th July 2017, informed about engagement of QCI.
- Appellants also approached Hon'ble Bombay High Court in W P (L) No 737 of 2017.
- Vide letter dated 16th July 2018, Ministry of Chemical and Fertilizers, informed about the approval given by the competent authority to verification report given by QCI and asked them to furnish all the documents in original for counter signature of Project Implementation Authority Certificate.
- Thereafter vide their letter dated 23rd August 2018, Ministry of Chemical and Fertilizers, forwarded the counter signed certificates.
- Appellant 1 sought leave from the Hon'ble Bombay High Court, for permitting them to allow filing of these additional documents before this tribunal. On the basis of leave granted by the Hon'ble High Court, they filed the Miscellaneous Application for production of these additional

documents before this tribunal which was allowed.

- In view of the fact that the counter signed certificate has now been provided, the demand for duty made and the confiscation of the goods should be set aside.
- From the facts as narrated no ill intention can be attributed to them and they had throughout acted bonafidely complying with the provisions of law and notification, no penalty as imposed by Commissioner can be sustained.

3.3 Arguing for revenue learned Authorized representative submitted that-

- Following are the Questions to be decided by the Hon'ble Tribunal in these appeals
    - Whether in view of Hon'ble High Court Order and the documents produced by the appellants to claim the notification benefit, which was claimed on a forged certificate can be extended, whereas the notification clearly states that the certificate has to produce to the jurisdictional Assistant/Deputy Commissioner at the time of Importations.
    - Whether the issued fresh certificate will undo the events of fraud, omission and commission leading to imposition of penalty on RCF & others under the Customs Act 1962?
    - What will be the locus standi of other Appeals with respect to imposition of penalty?
- For availing the benefit under the notification 84/97 CUS dated 11.11.1997 and amended by 85/99 CUS dtd 06.07.1999 following condition was to be satisfied

    Provided that the importer, at the time of clearance the goods produces before the assistant commissioner of customs or deputy commissioner customs as case may be, having jurisdiction,

    (ii) in case the said goods are intended to be used in a project financed (whether by a loan or a grant) by the Word Bank or any other international organization, and the said project has been approval by the Government of India, a certificate from the executive head of the Project Implementing Authority and countersigned by an officer not below the rank of Joint secretary to the government of India, in the concerned Line Ministry in the Govt. of India, that the said goods are required for the execution of the said project & that the said project has duly been approved by the Government of India."

- He refers extensively to para 37 onwards in the impugned order and submits that at the time of importation, and along with the Bill of Entries, the Project Implementation Authority Certificates, with forged counter signature of the Joint Secretary of the Line Ministry was produced.

- The Appellant plea on substantial compliance of the notification is not acceptable so far as the notification is concerned, wherein the pre-import condition of producing PIA certificate is categorically stated. Hon'ble SC judgment in case of Commissioner of Custom (Import), Mumbai Vs M/s Dilip Kumar and Company & others reported in 2018-TOIL-302-SC-CUS-CB and Eagle Flask Industries {2004 (171) ELT 296 (SC)] laid down that exemption notification should be interpreted strictly, and the conditions laid down for availing the benefit of notification is to be strictly complied with, and such conditions cannot be held to be merely procedural.

- Appellant 1 their CFO, GM Liaison & officials of Appellant 2 and others are aware of the facts of the fraud and they even abated in its happening.

- Appellant's plea that order passed by the learned Commissioner is on the basis of conjecture is not correct as the order discussed in length the evidence of committing/abating fraud in obtaining forged signature of Joint Secretary on PIA certificate.

- Appellants' plea that they are not aware of the forgery is also not correct.
- These facts have been discussed in the SCN and order in original which led to imposition of penalty under the Customs Act 1962. There is no change in this fact by submitting a new certificate. In view of this no penalty can be waived.
- Appeals be dismissed

4.1 We have considered the impugned order along with the submissions made in appeal and during arguments.

4.2 In the present case we are concerned with **Notification No. 84**/97-Customs dated 11.11.1997. The text of Notification as amended from time to time till the date of importation is reproduced below:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), read with sub-section (4) ***of*** *section 68 of the Finance (No. 2) Act, 1996 (33 of 1996), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all the* ***goods imported into India for execution of projects financed by the United Nations or an International Organisation*** *and approved by the Government of India, from the* ***whole of the duty of customs*** *leviable thereon under First Schedule to the Customs Tariff Act, 1975 (51 of 1975), the* ***whole of the additional duty of customs*** *leviable thereon under section 3 of the said Customs Tariff Act and the* ***whole of the special duty of customs*** *leviable under section 68 of the Finance(No. 2) Act 1996 (33 of 1996):*

Provided that the importer, at the time of clearance of the goods, produces before the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, having jurisdiction, -

(i) in case the said goods are -

(a) Imported by an international organisation listed in the Annexure appended to this notification and intended to be used in a project that has been approved by the Government of India and financed (whether by a loan or a grant) by such an organisation, a certificate from such organisation that the said goods are required for the execution of the said project and that the said project has duly been approved by the Government of India; or

(b) imported for use in a project that has been approved by the Government of India and financed (whether by a loan or a grant) by an international organisation listed in the said Annexure, a certificate from an officer not below the rank of Deputy Secretary to the Government of India, in the Ministry of Finance (Department of Economic Affairs) that the said goods are required for the execution of the said project and that the said project has duly been approved by the Government of India;

(ii) in case the said goods are intended to be used in a project financed (whether by a loan or a grant) by the World Bank, the Asian Development Bank or any other international organisation other than those listed in the Annexure, and the said project has been approved by the Government of India, a certificate from the executive head of the Project Implementing Authority and countersigned by an officer not below the rank of a Joint Secretary to the Government of India, in the concerned Line Ministry in the Government of India, that the said goods are required for the execution of the said project and that the said project has duly been approved by the Government of India, *and*

(iii) in case the said goods are intended to be used in a project financed (whether by a loan or a grant) by the World Bank, the Asian Development Bank or any other international organisation, other than those listed in the Annexure and the said project has been approved by the Government of India for

implementation by the Government of a State or a Union Territory, a certificate from the executive head of the Project Implementing Authority and countersigned by the Principal Secretary or the Secretary (Finance), as the case may be, in the concerned State Government or the Union Territory, that the said goods are required for the execution of the said project, and that the said project has duly been approved by the Government of India for implementation by the concerned State Government.

Explanation. - For the purposes of this notification, -

(a) "international organisation" means an international organisation to which the Central Government has declared, in pursuance of section 3 of the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), that the provisions of the Schedule to the said Act shall apply;

(b) "Line Ministry" means a Ministry in the Government of India, which has been so nominated with respect to a project, by the Government of India, in the Ministry of Finance (Department of Economic Affairs).

ANNEXURE

1. United Nations Development Programme,

2. United Nations International Children's" Fund,

3. Food and Agricultural Organisation,

4. International Labour Organisation,

5. World Health Organisation,

6. United Nations Population Fund.

7. United Nations World Food Programme.

8. United Nations Industrial Development Organisation.

Notification No. 84/97-Cus.,dated 11-11-1997 as amended by Notification No. 85/99-Cus.,dated 6-7-1999 and No.119/99-Cus.,dated 2-11-1999.and Notification No.75/2001 dt. 8-07-01 and Notification No. 107/2001-Cus.,dated 12.10.2001."

4.3 Appellant 1 had for execution of his project to modernize the HP Nitric Acid Plant at Trombay, imported the subject goods for which he had filed the Bill of Entries through the contractor appointed by him for this purpose. He claimed the exemption under this notification. As per proviso (ii), he produced the certificate from the Executive Head of Project Implementation Authority (Appellant 2). This certificate was duly countersigned by one Shri R Banerjee, Joint Secretary (FB) in the Ministry of Finance, Department of Economic Affairs. However, investigations carried out by the Directorate of Revenue Intelligence, on the basis of information available with them revealed that the countersignatures of the Joint Secretary on the certificates produced were forged. It was also alleged that the Joint Secretary (FB) was not the proper Joint Secretary of the nominated ***"Line Ministry"*** for counter signing the certificate issued by Project Implementation authority. In view of the investigations carried out, these goods were placed under seizure and subsequently confiscated by the Commissioner as per the impugned order.

4.4 Commissioner has in para 37 to 44 of the impugned order, observed as follows:-

38. "There is no dispute regarding the fact that the impugned goods were intended to be used in a project financed by the Asian Development Bank. There is also no dispute regarding the fact that the said project has been approved by the Govt of India. There is also no dispute on the issue that the project implementation authority in this case was the ICICI Bank and they had accordingly issued two such certificate, one covering the imports through Mumbai Sea Port and the other for import through Air Cargo Complex, Sahar, Mumbai. The dispute relates only to the identification of the correct LINE Ministry in the GOI whose officer (not below the rank of Joint Secretary) was required to counter-sign the project implementing authority certificate. All the noticees have contended that since they *were so advised by ICICI Bank they genuinely believed that the LINE ministry was the Ministry of Finance.*

39. *To appreciate this defence point it is necessary to examine the definition of LINE Ministry as given in the Notification. It clearly says that the Line Ministry would be a Ministry in the Govt. of India which has been so nominated with respect to a project by Govt of India in Ministry of Finance (Deptt. Of economic Affairs). In this case none of the noticees have been able to show any letter, order or notification from the Deptt. Of Economic Affairs, GOI, nominating the concerned Ministry as LINE Ministry for the instant project. It is clear that the line Ministry had to be nominated with respect of each project. There is also no evidence in the form of correspondences or otherwise to show that any of the notices, particularly ICICI Bank, the project Implementation authority, at any stage sought to know from the deptt of the economic affairs the name of the appropriate Line Ministry for the project for which they were releasing the funds. ICICI Bank have mentioned that they presumed, bonafidely - which has been chorused by other noticees --- that the appropriate line ministry was the Ministry of Finance. This not only reflects ignorance on the part of the noticees but also a total lack of basic common sense as well as ignorance of law. They cannot then claim innocence in an offence or crime committed as a direct result of their lapse, negligence & ignorance. In case of negligence of this type strict liability has to be imposed . When companies and financial institutions of this stature make such careless blunders it can only be concluded that this was done with a particular design and motive. The attendant circumstances support this conclusion.*

40. *The certificate in this case has been given by the ICICI bank and it was their responsibility to get the certificate countersigned by the appropriate officer in the Line Ministry. That ICICI bank were aware of this responsibility*

is evident from the letter addressed by them to the Jt.Sec. Ministry of Finance forwarding a copy of the certificate for countersignature. The letter from ICICI bank could have been sent by post, courier or by their representative directly to the Ministry of Finance. In their wisdom they chose to send it through the representative of the project owner, M/s RCF, who in turn used the "good offices'; of their contractor, M/s Uhde Ltd, to get the countersignature. In fact M/s ICICI bank, in their written submission, have confirmed that the certificate duly countersigned by the proper officer of the MOF though forged in this case, was received back by them under a forwarding letter from the Director(ADB) of the Deptt of Economic Affairs. Thereafter, the certificate carrying the countersignature of the appropriate officer was handed over to RCF for effecting the clearance of the imported goods.

41. It is also to be noted that in response to the initial letter 11.6.2004 to the MOF, the MOF wrote back to ICICI, vide Ministry letter dated 5.7.2004, that they were not the appropriate Line Ministry and they should approach the relevant LINE ministry for the countersignature. Thus all correspondence of the Project Implementing Authority (PIA) took place with the Ministry directly and vice-a-versa, which goes to confirm that the responsibility of getting the countersignature was that of the PIA, ICICI Bank in this case. If they handed over these letters to some other agency (RCF/Uhde in this case) they did so at their own peril and they cannot now come back and say that they were under a bonafide belief that the forged signatures were genuine. This can be best illustrated by taking the example of the issue of a passport. A citizen is required to apply for the passport directly to the passport office. If for his own convenience or otherwise, he hands over the application to another person or tout and later on *the passport is found to be forged, he cannot claim ignorance/innocence.*

42. *It is also not the case of ICICI Bank that M/s RCF or Uhde India were authorized agents of MOF and they were therefore well within their rights to hand over the certificates to these agents.*

43. *Another interesting point to note is that when the under secretary for MOF informed ICICI Bank vide letter dated 5.7.2004 that MOF was not the LINE Ministry for the Project, it is not understood how and on what basis did they allow/authorize M/s RCF to go back to the Ministry of Finance and try to obtain the countersignature from the same Ministry which had already gone on record to say that it was not the appropriate line Ministry. Thus when ICICI bank got back the certificates purportedly countersigned by the officers of the MOF it should have aroused their suspicion as the forwarding letter of the Director(ADB) (under a forged signature) was in direct contradiction to the earlier letter dated 5.7.2004 from the same Ministry saying that it was not the appropriate Line Ministry. Further, this letter did not make any reference to the Ministry's earlier letter and as to why the Ministry had reversed its stand. None of these inconsistencies aroused the suspicion of the offices of ICICI !*

44. *The other point raised by the noticees is that since the certificate of the PIA is genuine, the exemption should be granted to the imports as the requirement of countersignature is merely an attestation and in fact is only a procedural requirement. Nothing could be farther from the truth. This arguments implies that the requirement of the countersignature by an officer of the level of Joint Secretary and above to the Govt of India, is redundant and at most a mere formality. The wordings of the exemption notification clearly imply that the certificate of the PIA is worthless unless it is countersigned by the appropriate officers of the LINE ministry. It cannot even*

be said that once the PIA has issued a certificate the countersignature by the proper officer of the Line Ministry is a mere formality and the officer has no option but to sign it. This again pre-supposes that the appropriate line Ministry to the GOI is a mere rubber stamp and that no application of mind is involved in countersigning the certificate. If that be so, why require the signature of such a senior office of the Govt of India and not let it be signed by a much junior gazetted officer like the Under Secretary. One cannot anticipate or presume the internal checks or guidelines which are necessary before the proper officer signs the certificates. One reason could be that since the line of credit of the ADB as well as the particular project under which the imports are proposed to have been effected, have been approved by the GOI it is only appropriate that the GOI be the final authority to decide whether the particular project is actually covered for the line of credit or not and also whether the equipments proposed to be procured /imported are necessary for the said project. In any case this is only an assumption and it is not necessary for DRI to indicate the significance of the signature by a Joint Secretary. This burden was cast on the notices which they have not discharged.

45. Further the Hon'ble Supreme Court of India in the matter of Eagle Flask Industries Ltd. Vs. Commissioner of Central Excise, Pune in Civil Appeal No.4647 of 1998 decided on 02.09.04 [2004 (171) ELT 296(SC)] held that condition of exemption notification has to be strictly complied with for availing its benefit and condition of filing declaration/ undertaking under exemption notification is not merely procedural. Hence exemption to be denied for non-observance of said conditions

46. Another point made by the noticees is that they had nothing to gain by trying to get forged signatures of the officers of the MOF. This is too simplistic an assertion. It is on record that Mr Rakesh Yadav who forged the signatures *was paid a bribe of Rs.1.5 lakhs and that this money was arranged by M/s Uhde India Ltd. the contractor/importer and it was in the knowledge of M/s RCF Ltd. Every gain or loss cannot be gauged in terms of direct monetary terms. Getting something done quickly which in normal course would take some time has also financial implications for all parties concerned. Thus M/s RCF had lots to gain if the certificates were countersigned urgently and for this they were willing to go to any lengths. M/s Uhde India Ltd would also gain because they were the . contractors and earlier the work got completed the earlier would they get their payments. Similarly, in the case of ICICI bank they would have got the payments released from ADB early.*

None of the noticees were involved with the project only for social service or altruistic reasons. They are all commercial entities and they were all associated with the Project for commercial gain. Everyone had something to gain from it, some immediately, some subsequently. If M/s Uhde India had nothing to gain, why did they pay a bribe of Rs.1.5 lakhs to Mr Rakesh Yadav and why did M/s RCF facilitate this ? Why did they not talk to the Joint Secretary of MOF directly to get his countersignature?"

4.5 Supporting these findings, of the Commissioner learned Authorized representative, who appeared for revenue, argued that the issue on law of interpretation of the exemption notification has been settled by the constitutional bench of the Apex Court in the case of Dilip Kumar & Other [2018 () ELT (SC)]. As per the law laid down by the Hon'ble Apex Court the exemption notification needs to be interpreted strictly and even if there is any ambiguity in interpretation the same should be interpreted in the favour of revenue.

4.6 There is no dispute about the interpretation of the conditions prescribed by the exemption notification. This notification was issued on 11.11.1997 and thereafter amended twice before the date of importation of the goods. Notification clearly defines the “Line Ministry” as the Ministry to be nominated by the Ministry of Finance, Department of Economic Affairs. However, the Department of Economic Affairs failed to nominate any Ministry as Line Ministry for the purpose of this notification. Appellants had approached the Department of Economic Affairs for counter signature of the Project Implementation Authority Certificate, well in advance prior to importation of goods. Department of Economic Affairs have vide their letter dated 05.07.2004 responded stating as follows:

“Please refer your letter no UEIF/2854 dated June 11, 2004 regarding countersigning of Project Implementing Authority Certificate for availing of the customs duty exemption against the procurement of goods under the ADB – Urban & Environment Infrastructure Facility Project (Ln No 1720-IND) by M/s Rashtriya Chemicals and Fertilizer Ltd.

As per DOR’s order no 84/97-Cus dt 11..11.1997, as amended by 85/99-Cus dt 2.11.1999, 75/2001-Cus dt 8.7.2001 and 107/2001_Cus dt 12.10.2001, the above certificate has to be issued by an officer not below the rank of a Joint Secretary to the GOI in the concerned Line Ministry in the GOI.

With regards.”

This letter of the Under Secretary (ADB) in the Department of Economic Affairs, speaks a lot of the bureaucratic attitude of the officers in the Ministry while handling the requests made by the citizen. As per Notification No 84/97-Cus as amended from time to time, it was the Department of Economic Affairs which had to nominate the Line Ministry for countersignature of project implementation authority certificate. However, from this letter, it is not difficult to infer that said Ministry and Department was totally unaware of this and have not nominated any Ministry as “Line Ministry” for the purpose of this notification. Nothing moved and the Department of Economic Affairs still failed to respond by nominating the Line Ministry, which it was required to do in the year 1997. i.e. even after seven years, the

Department of Economic Affairs is unaware of the responsibility cast on it by the said notification.

4.7 This fact has been noted by Hon'ble Allahabad High Court, and it was only after the directions given by Hon'ble High Court that the Ministry of Urban Development was nominated as "Line Ministry". The decision of the Hon'ble High Court in Writ Petition (Tax) No 1516 of 2006 dated 05.10.2006 is reproduced below:

"Certain exemptions under the Central Excise Act and the Customs Act have been granted to certain projects on the condition that the financing institution, which in this case is the ICICI Bank, issues certificate and the certificate is counter signed by an officer of the rank of not less than Joint Secretary in the "Line Ministry".

"Line Ministry" has been defined as the ministry in the Government of India, which has been so nominated with respect to a project by the Department of Economic Affairs in the Ministry of Finance, Government of India.

According to the petitioner, it is entitled to the exemption and the certificates for the above purpose have been issued by the ICICI Bank. Pursuant to a direction issued by this Court by the order dated 6.4.2005 passed in an earlier writ petition being Writ Petition No. 578 of 2005, the Department of Economic Affairs aforesaid nominated the Ministry of Urban Development as the "Line Ministry". *However, when the certificates were submitted in the 'Line Ministry" for counter signatures, the said "Line Ministry" by letter dated 29.8.2006 intimated the petitioner that the said ministry is not in a position to sign the documents with regard to the project.* ***A copy of that order dated 20.8.2006 has been enclosed with this writ petition as Annexure 16. The letter does not mention any reason as to why the ministry is not in a position to sign or counter sign the certificates but the letter says that this decision has already been communicated to the aforesaid Department of Economic***

Affairs by the Ministry of Urban Development. That communication may contain reasons. However, at present it is not necessary to go into that aspect.

After receiving this letter dated 29.8.2006, the petitioner has approached the Department of Economic Affairs again but the grievance of the petitioner is that no action has been taken by the said Department of Economic Affairs. The immediate difficulty being faced by the petitioner is on account of notices issued by the department of Central Excise and the department of Customs on the ground that the counter signed certificates have not been submitted to the said department by the petitioner.

Although the learned counsel for Union of India has prayed for time for instructions, but we are of the opinion that considering the immediate problem being faced by the petitioner, it would be appropriate in the interest of both parties to dispose of this writ petition with the following directions.

Within two weeks of the date on which certified copy of this order is presented before the Finance Secretary by the petitioner, the Department of Economic Affairs will nominate another "Line Ministry" after consulting the said "Line Ministry" so that the said ministry does not express the inability expressed by the Ministry of Urban Development. The nomination of the "Line Ministry" will be intimated to the petitioner immediately and upon submission of the certificates by the petitioner for counter signature, the "Line Ministry" so nominated after consultation, will either get the certificates counter signed by the proper officer and returned to the petitioner within one month of the date on which the certificates are received by the "Line Ministry" along with a certified copy of this order, or the "Line Ministry" or the proper officer of the "Line Ministry", not below the rank of Joint Secretary, will pass a reasoned order for refusing to countersign all the certificates or any of the certificates.

For a period of three months from today, proceedings pursuant to the impugned notices issued by the Central Excise Department and Customs Department in this regard will remain stayed.

With the aforesaid directions, this writ petition is disposed of."

4.8 Interestingly, even after the nomination of "Line Ministry", the Joint Secretary in the Ministry of Urban Development was not countersigning the Project Implementing Authority Certificates. As is seen from the order of Hon'ble High Court of Allahabad, supra, court was compelled to direct for nomination of another line ministry whose Joint Secretary would counter sign the Project Implementing Authority Certificates. Matter was again taken up with the Department of Economic Affairs, who vide their letter dated 8th October 2010, informed as follows:

"Subject: Issue of Project Implementation Authority Certificate (PIAC) for availing customs duty exemption for goods imported under ADB loan reg.

Sir,

This is with reference to Meeting chaired by Dr Anup K Pujari, the then Joint Secretary (MI) on 6th August 2010 wherein it was agreed that the Ministry of Urban Development (MoUD) would continue to be the Line Ministry. would forward requests for PIAC to the appropriate expert Ministry for verification/ authentication with a copy to ICICI Bank and DEA. ICICI Bank in its role as the Project Implementation Authority would facilitate such cross verification from the concerned expert Ministry, for further submission to MoUD countersigning the PIAC. The minutes of meeting is attached. M/s Triveni Engineering and M/s Rashtriya Chemicals and Fertilizers (RCF) have approached for facilitating the countersigning of PIAC.

2. It is requested that the duly certified PIAC may be prepared as per the format prescribed, if any, and send the original to MoUD with following, for further action as agreed:

(a) Details of project/ sub-project,

(b) List of items imported, cost, date of import etc, and reasons why implementation of project required import of these specific Item(s),

(c) Whether PIAC was issued earlier in r/o same items(s), if so, whether PIAC was one of those found to be forged one and where case is under investigation.

3. A copy may also be endorsed to DEA."

4.9 The matter did not rest with this order of the Hon'ble High Court. Hon'ble High Court passed yet another order dated 29.4.2016 in Writ Petition No 1055 of 2012 stating as follows:

"Triveni Engineering & Industries Limited having its registered office at Deoband and Corporate Office at NOIDA has filed this petition for quashing the order dated 13 August 2012 passed by the Joint Secretary in the Ministry of Urban and Development, Government of India refusing to countersign the Project Implementing Authority Certificates and for a direction to the said officer to countersign the PIA Certificates.

It transpires from the records of the writ petition that the Government of India issued two exemption notifications. One notification dated 28 August 1995 was under Section 5-A of the Central Excise Act, 1944 read with Section 3(3) of the Additional Duties of Excise Act while the other dated 11 November 1997 was under Section 25 of the Customs Act. The goods intended to be supplied to a project financed by the World Bank or Asian Development Bank or any International Organization other than those listed in the Annexure to the notification have been exempted from Central Excise Duty / Customs Duty / Additional Duty subject to the fulfillment of the following conditions:-

"(i) if the said project is approved by Government of India, a certificate from the executive head of the Project Implementing Authority and countersigned by an officer not below the rank of a Joint Secretary to the Government of India, in the concerned Line Ministry in the Government of India, that the said goods are required for the execution of the said project and that the said

project has duly been approved by the Government of India" is produced."

In 2003, the petitioner planned to set up a 22 MW Bagasse based co-generation Power Plant 2 at its Sugar Unit at Deoband in district Saharanpur. The petitioner approached the ICICI Bank for funding the Project to the extent of US 250 million dollars through its Asian Development Bank Line of Credit under the Urban Environment and Infrastructure Facility Project which was duly approved by the Government of India and qualified for exemption under the aforesaid two notifications dated 28 August 1995 and 11 November 1997. The Asian Development Bank also agreed to fund the Project and accordingly granted its approval by letter dated 9 December 2003.

It is stated that after receiving the approval from the Asian Development Bank, the petitioner placed purchase orders on different manufacturers / vendors for supply of the goods required for setting up the Project at Deoband. The details of such supplies along with the Excise Duty and Custom Duty implications were provided to the ICICI Bank which in the capacity of a Project Implementing Authority was required to issue necessary certificates. It is stated that the necessary 43 PIA certificates were issued by the ICICI Bank to the petitioner. According to the petitioner, various goods / equipment / machinery detailed in the PIA certificates were procured and the said Project was commissioned. However, after the receipt of goods it transpired that the counter-signatures of the Joint Secretary in Ministry of Finance on the PIA certificates were forged. Information was thereafter given by the petitioner to the Central Board of Excise and Customs. The petitioner, accordingly, not only deposited Rs.2.85 crores under project, being the full amount of excise duty and customs duty exemptions availed, but made a request to the ICICI Bank to issue true copies of the PIA certificates so that the same could be re-submitted to the "Line Ministry" for counter-signatures of the Joint Secretary. The ICICI Bank by letter dated 2 December

2004 provided true copies of the 43 PIA certificates to the petitioner.

According to the petitioner, these 43 PIA certificates were sent to the Ministry of Urban Development which was the "Line Ministry" for the counter-signatures of the Joint Secretary.

However, as no action was being taken, the petitioner filed Writ Petition No. 1516 of 2006 which was disposed of on 5 October 2006 with a direction that the nomination of the "Line Ministry" will be intimated to the petitioner and upon submission of certificates by the petitioner for counter signatures, the "Line Ministry" so nominated will either get the certificates counter-signed by the Appropriate Officer and return the same to the petitioner or pass a reasoned order for refusing to countersign the certificates.

It is stated that the Ministry of Urban Development sent a letter dated 21 September 2011 to the Uttar Pradesh Power Corporation Limited with a request to certify that the imported equipments purchased by the petitioner were installed at the Sugar Unit and that they were being used for the required purpose. The Power Corporation was also asked to enquire as to what was the co-generation at the unit and supplied to the grid by the petitioner. According to the petitioner, the Power Corporation by letter dated 12 January 2012 expressed its inability to supply information relating to the installation of the equipments at the Sugar Unit. A communication dated 7 April 2012 was also sent by the Power Corporation clarifying that the matter related to the utilization certificate for imported goods for which neither the Corporation had issued the essentiality certificates nor it was aware of the Project Sponsoring Authority that gave the permission.

The records of the writ petition indicate that thereafter various correspondence took place between the Ministry of Urban Development and the Power Corporation. According to the petitioner, in order to remove all doubts, a communication dated 17 May 2012 was sent by the petitioner to the Ministry of Urban

Development with a copy to the Power Corporation pointing out that the ICICI Bank as the Project Implementing Authority had signed the Certificates after carrying out due diligence and, therefore, it may be asked to provide the necessary details. The petitioner also made a request that they were also agreeable to the appointment of a third party agency at the cost of the petitioner for verification of the installation of such equipments.

An application was accordingly moved by the petitioner for modification of the order dated 5 October 2006 passed by the High Court in Writ Petition No. 1516 of 2006 and the order was modified on 2 March 2012 to the extent that the "Line Ministry", if it had not yet considered the matter for counter signatures of the certificates, will take a decision after verification in accordance with law within two months.

The Joint Secretary in the Ministry of Urban and Development, however, declined to countersign the signatures on the PIA Certificates on the ground mentioned in paragraph 25 which are reproduced below:-

"Hence, in the above case no Government approval of the said sub-project has been furnished to the Ministry of Urban Development. The Ministry of Urban Development was not provided an opportunity to examine and approve the case at the time of extension of loan for the sub-project or the import of the said equipment and presently the TEIL refuses to co-operate with the Government to facilitate inspection of their site and thus the Ministry is unable to obtain a certificate from the Government of Uttar Pradesh that the equipment has been installed and used for the sub-project for which financing had been obtained through ADB.

In view of the above stated facts the Ministry of Urban Development is not in a position to countersign the PIACs."

When the matter was taken up on 25 August 2015, the Court directed the Ministry of Finance as well as ICICI Bank Limited to file their counter affidavits. A ground that was taken in the impugned order is that Government approval of the subject was *not furnished to the Ministry of Urban Development. The Court, accordingly, directed the Ministry of Finance and the ICICI Bank Limited to file their counter affidavits within four weeks as to whether any approval was required to be given by the Ministry of Finance and whether "Line Ministry" was required to examine the said Project.*

A short counter affidavit has been filed by the Ministry of Finance. In paragraph 4 of the short counter affidavit it has been categorically stated that there was no requirement of giving any approval by the Ministry of Finance, Department of Economic Affairs with regard to the loan of US 80 million dollars by the Asian Development Bank for the Urban Environmental and Infrastructural Project to ICICI Bank and that the "Line Ministry", namely the Ministry of Urban and Development, has no specific role with regard to the Project and the loan that was granted by the ICICI Bank to the petitioner. It has also been stated that the sub-project loan agreement between ICICI Bank and the petitioner did not require the approval of the Department of Economic Affairs.

A short counter affidavit has also been filed by the ICICI Bank. Paragraphs 7, 8 and 9 are reproduced below:-

"7. That the Triveni Engineering and Industries Ltd. (hereinafter referred as Petitioner Company) approached the ICICI Bank for the funding of a 22 MW Bagasse based co-generation power plant at its sugar unit situated at Deoband, Saharanpur. ICICI Bank after scrutinizing the Loan application of the petitioner company approved a sub-loan of Rs. 250 million and have forwarded the sub-project application of the petitioner company to Asian Development Bank vide its letter dated September 2, 2003 for its approval; Photocopy of the letter is being filed herewith as Annexure-SCA-'4'. That Asian Development Bank vide its letter dated December 9, 2003 has approved the sub-project application for the petitioner company of Rs. 250 million under UEIF; Photocopy of the said letter is being filed herewith as Annexure-SCA-'5'.

8. That the ICICI Bank fairly replied to the query of the petitioner company on the basis of the letter issued by the Government of India dated 21.02.2000 that the ICICI Bank had executed an agreement dated 19.05.2000 with the Asian Development Bank for implementing UEIF Project (Urban and Environmental Infrastructure Facility Project) and the agreement provided for a US$ 80 Million Line of Credit for financing various projects of the borrowers who meet the eligibility requirement stipulated by Asian Development Bank according to the agreement.

9. That for the execution of the agreement the ICICI had received a letter dated 21.02.2000 from the Department of Economic Affairs, Ministry of Finance, Government of India, an in principle approval for the entire ADB-UEIF Project. Each project of the borrower has to be approved by the ADB as stipulated in the Agreement between ADB and ICICI."

A counter affidavit has also been filed by the Ministry of Urban and Development. The main issue that has been raised in the counter affidavit is that though the Government of Uttar Pradesh was requested on 20 January 2012 to furnish complete information regarding the equipment installed on the site but complete information was not sent. In this connection, the request made to the Uttar Pradesh Power Corporation Limited to furnish certain details has been emphasized upon and a copy of the letter dated 25 May 2012 sent by the Government of Uttar Pradesh to the petitioner stating that despite several requests, the petitioner instead of provided the information was requesting the Government of India to get the details from the ICICI Bank, has also been referred to.

Paragraph 9 of the counter affidavit is reproduced below:-

"That in reply to the contents of Para 43 of the writ petition it is stated that as the Ministry of Urban Development has no expertise with regard to the kind of equipment that is required for setting up a bagasse base plant, therefore it must depend on others to verify that the equipment imported / fabricated for the

TIEL are actually meant for the stated purpose. It must also rely on another government agency to verify that the said equipment has been installed and is being used for the said sub-project. Hence, evidently the Ministry has to rely on others to verify the equipment. The certification for intended use is relevant only when the equipment is being imported for the purpose of setting up the plant. Once, the plant has already been set up and has been functional for a long period of time, the counter signature required to be done, should be done only if the equipment has been actually used for the project because actual use is what makes the project eligible for the Asian Development Bank funding which in turn makes it eligible for exemption and the same could not have been carried out without verification as above for reasons of lack of expertise of the Ministry of Urban development, since having been nominated as Line Ministry.

In order for the subproject to be eligible for duty exemption benefit the materials procured have to be used for the project funded under the UEIF loan. The loan was taken by the Triveni Engineering & Industries Ltd., for the co-generation plant to be set up in their sugar mill at Deoband in Saharanpur District. In order to verify the said equipment in respect of which exemption is being sought by the TIEL was meant for the power project, the MoUD approached the Ministry of Power to certify the usage of the goods for the bagasse based power plant. The Ministry of Urban Development has approached the Govt. of U.P. in whose territory the plant lay, to verify the installation of the said equipment and was in actual use for the bagasse based power plant of TIEL at Deoband for which the sub loan had been provided by the borrower to the TIEL vide letter no. K-14011/112/2004-UD-II (Vol.II) dated 21.07.11 which was followed by several reminders dated 20.01.12, 19.03.12, 27.03.12, 03.04.12, 20.04.12 and 07.06.12.

The Govt. of U.P. approached TIEL for information vide their letter no. 80 CE/PPA dated 30/04/12. The TIEL instead of providing the Govt. of U.P., the information sought for, wrote to *the MoUD vide letter dated 17.05.12 demanding, the Ministry rely on the borrower to provide the necessary information. A copy of this letter was also endorsed to the Govt. of U.P. As the TIEL had not provided the necessary information the Govt. of U.P. Has been unable to take any further action on the subject.*

In view of the stand taken by the respondents in the counter affidavits, it is clear that there was no requirement of approval by the Ministry of Finance with regard to the loan taken from Asian Development Bank for the said Project. The main dispute, however, is with regard to the inspection and certain clarifications that have been raised by the Ministry of Urban and Development, which is the "Line Ministry". According to the respondents, the petitioner is not cooperating with the inspections as a result of which it was not possible for the Officer to countersign the PIA certificates. However, according to the petitioner it has no objection if an inspection is carried out and it is the Uttar Pradesh Power Corporation Limited which is not cooperating in the matter for which the petitioner has even made a request for the appointment of a third party agency. This limited issue can appropriately be resolved as the petitioner has no objection to any inspection being carried out for the purpose of satisfying the "Line Ministry" about the equipments that have been installed by the petitioner at its sugar unit, Deoband in district Saharanpur and other related queries.

We would, therefore, order that the State Government and the Uttar Pradesh Power Corporation shall take immediate steps to furnish the information that has been sought by the "Line Ministry" and in case they are not in a position to furnish the information then to consider the feasibility of getting the information by appointing a third agency at the cost of the petitioner, as has been suggested by the learned counsel for the petitioner. This process should be undertaken and concluded at the earliest and not later than three months from the date a certified copy of the order is filed by the petitioner before the Joint Secretary in the Ministry of Urban and Development, New

Delhi. Upon such receipt of information the Joint Secretary shall pass a fresh order. The order impugned in the present petition shall abide by the order to be passed.

The petition is, accordingly, disposed of."

4.10 On 18th January, 2016, Ministry of Urban Development issued another office memorandum stating as follows:

"Subject: Issue of Project Implementation Authority Certificate (PIAC) for availing customs duty exemption for goods imported under ADB loan.

The undersigned is directed refer to Ministry of Chemical & Fertilizers' D O letter No. 18016/4/2015-FCA dated 15.12.2015 on the above subject and to state that Ministry of Urban Development has no expertise to certify the import of such goods from the necessity point of view. Further, MoUD was also not consulted at the time of loan negotiation. Therefore, MoUD is not in position to sign PIACs. We are forwarding herewith all related documents to take decision at your end.

2. This issues with the approval of Competent Authority."

4.11 On 8th May 2016, Ministry of Chemical and Fertilizer informed this to Department of Economic Affairs stating as follows:

"*Sub: Issue of Project Implementation Authority Certificate (PIAC) for availing customs duty exemption for goods imported under ADB loan reg.*

This has reference to DEA's OM No 9/15/2004-ADB-I dated 08.10.2010 informing that PIAC for availing custom duty benefit would be countersigned by Ministry of Urban Development (MoUD) who would continue to be the Line Ministry. RCF approached to the MoUD for countersigning the Project Implementation Authority Certificate (PIAC) issued by ICICI (the Project Implementation Authority). However, MoUD refused to countersign the PIAC stating that MoUD have no expertise to certify the import of such goods from the necessity point of view. MoUD has also informed that they were not consulted by RCF at *the time of loan negotiation. Therefore, they are not in position to sign on PIACs.*

2. A detail status note is enclosed as per Annexure-I

3. Department of Economic Affairs is requested to suggest the way forward in the matter.

3. This issues with the approval of Secretary (Fertilizers)."

4.12 Secretary, Ministry of Chemical and Fertilizers thereafter took a meeting on 27th July 2016, which was attended by the representative of Department of Economic Affairs, and the representatives of Appellant 1. Minutes of the said meeting are reproduced below:

"MINUTES OF THE MEETING HELD UNDER CHAIRMANSHIP OF SECRETARY (FERTILIZERS) ON 27TH JULY, 2016 AT 11.30 A.M. IN CHAMBER NO.217, A-WING, SHASTRI BHAWAN, NEW DELHI REGARDING ISSUE OF PROJECT IMPLEMENTATION AUTHORITY CERTIFICATE (PIAC) TO RCF FOR AVAILING CUSTOM DUTY EXEMPTION:

List of participants enclosed.

At the outset, Secretary (Fertilizers) welcomed all the participants and desired to know the status of issuance of Project Implementation Authority Certificate (PIAC) for availing Custom Duty Exemption for Goods imported in 2003 04 under Asian Development Bank (ADB) loan by Rashtriya Chemicals and Fertilizers Limited in respect of modernization of HP Nitric Acid Plant at Trombay.

2. Director (Finance) RCF made a presentation on the subject giving a brief history of the matter:

a) Rashtriya Chemicals and Fertilizers Limited (RCM) had taken up the modernization of its HP Nitric Acid Plant at Trombay at an approximate cost of Rs.85 Crore and accordingly imported certain equipment for Technology up gradation of 320 MTPD HP Nitric Acid Plant at Trombay. The Company had awarded the project to M/s Uhde India Ltd. (Uhde), after following the International Competitive Bidding Procedures and the contract *was finalized with NIL Custom duty under Notification No.84/97 - Cus. dated 11.11.1997 as amended by Notification No.85/99 dated 6.7.1999.*

b) These equipment's were imported by RCF in terms of Notification No.84/97 - Cus. dated 11.11.1997 as amended by Notification No.85/99 dated 6.7.1999 which exempts the goods imported into India for execution of the Project financed by, World Bank, Asian Development Bank or any other international organization subject to the condition that:

1. *The project has been approved by the Government of India;*
2. *Such equipment's are intended to be used in a project financed by World Bank, Asian Development Bank or any other international organization;*
3. *A certificate is issued by the Executive Head of the Project Implementing Authority (i.e. ICICI Bank in this case) that the said goods are required for the execution of the said project and the said project has duly been approved by the Government of India;*
4. *The above certificate of ICICI Bank is required to be countersigned by an officer not below the rank of the Joint Secretary in the concerned Line Ministry, in the Government of India.*

c) RCF had complied with all these conditions including the countersignature of Joint Secretary (M& FI) in the Dept. of Economic Affairs, Ministry of Finance on the PIAC and were forwarded to Commissioner of Customs.

d) However, Commissioner of Customs (Import) seized all 26 imported packages on the ground that countersignatures of the Joint Secretary on the PIAC were forged. Goods were finally cleared through Mumbai Port after provisional assessment pending investigation of PIAC's and upon execution of Bond of Rs.22,95,67,164/- with revenue deposit of Rs. 5,75,00,000/- and payment of custom duty of Rs.9,26,89,304/- Similarly, Goods imported through Air Cargo Complex, Sahar were seized and RCF got it cleared through Air Cargo Complex after *provisional assessment, pending investigation of PIAC's and upon execution of a Bank Guarantee of Rs. 31,86,117/- and payment of custom duty of Rs.6,49,640/-.*

e) RCF was served with a Show Cause Notice dated 09.03.2005 by Additional Director General, DRI, as to why benefit of the Notification as amended should not be denied, why goods should not be confiscated, why penalties should not be imposed on all the Notices and why the amounts deposited should not be appropriated. Show Cause Notice was confirmed by the Commissioner of Customs. Appeal was filed by RCF before the Customs Excise and Service Tax Appellate Tribunal against the order dated 30/11/2005.

f) The above matter is pending before CESTAT since 2006 and we have been seeking adjournment in the matter from time to time on the plea that the issue of PIAC is pending for consideration before the line ministry. In the hearing before the Tribunal held on 17.2.2016, the Tribunal had taken a stand that since the matter is pending from 2005-06, they are required to dispose of the matter without any further delay. The next date of hearing in the above matter is fixed on 2nd August 2016. In case of non-.production of PIAC certificate at the hearing, our appeal may be rejected by CESTAT causing us unnecessary loss.

g) The matter was taken up with ***Department of Economic Affairs, Ministry of Finance, Government of India, who vide their letter no. 7. 9/15/2004-ADB dated 29th September 2007 advised RCF to approach Ministry of Urban Development (MOUD) who have been nominated as the line ministry for the purpose of PIACs.*** *However, the MOUD requested Ministry of Finance to withdraw the order nominating them as the line ministry as it is inconsistent with the mandate of their ministry.*

h) Ministry of Finance vide its letter dated 9/15/2004-ADB.I dated 8.10.2010 Ministry of addressed to ICICI Bank and a copy to MOUD, RCF Ltd. and Directorate General of Central Excise Intelligence, had informed that

the Ministry of Urban Development (MOUD), would continue to be the line ministry.

i) Based on this communication, ICICI bank vide its letter TFG/ADB/445 dated 20th January 2011 had sent the said certificate to the MOUD for countersignature.

j) The matter was followed up regularly for the countersignature by JS, MOUD on PIAC. The Ministry of Urban Development vide its letter no. K 14011/30/2014 -UD-II dated 24th April 2014 has asked RCF to submit the relevant detail to Ministry of Chemicals & Fertilizers for their verification before countersigning the PIAC. The relevant details were forwarded by RCF to Department of Fertilizers.

k) The Department of Fertilizers vide their O.M .No. 18016/4/2015- FCA dated 13.04.2015 had recommended to MOUD to issue requisite certificate as requested by RCF.

l) The MOUD vide its OM. No. K-14011 /130/2014 -UD-II dated 18.01.2016 addressed to Department of Fertilizers has turned down the request for countersignature on PIAC on the ground that they did not have an expertise to certify the import of such goods from the necessity point of view. They have further stated that MOUD was also not consulted at the time of loan negotiation and therefore, MOUD is not in a position to sign on PIACS.

m) It is informed that there was no such stipulation in the relevant notification about obtaining prior approval/confirmation/consultation from MOUD. In fact, RCF was not even aware that the line Ministry in this case was MOUD until it was informed by the Ministry of Finance vide letter dt. 08.10.2010. Hence no prior consultation with MOUD was possible,

n) It was further informed that in an identical case pertaining to M/s. Triveni Engineering and Industries Limited wherein MOUD was the "Line Ministry and refused to countersign the PIAC, the party had approached Hon'ble Allahabad High Court by filing Writ Petition. While

disposing of the said petition, Hon'ble Allahabad High Court in its judgment dated 29th April, 2016, inter-alia, ordered that the state Government of U.P. and the Uttar Pradesh Power Corporation(The parties who were requested by MOUD to certify that the equipment's purchased by Triveni Engg. were installed at their sugar unit and that they were being used for the required purpose) to tale immediate step to furnish the information sought by MOUD and in case they are not in a position to furnish then to consider the feasibility of getting the information by appointing a third agency at the cost of petitioner. This is required to be done within a period of 3 months from the date of certified copy of this order is served on MOUD by the petitioner.

3. Secretary (Fertilizers). expressing his concern over the delay in countersignature on PIAC suggested that in the light of the above judgment of Hon'ble Allahabad High Court, MOUD as "Line Ministry" can consider, if required, to appoint third party/agency i.e. independent government agencies such as PDIL, EIL, RITES, FEDO or any other agency of their choice to carry out the inspection of the concerned imported equipment installed at RCF's plant while certifying that the said machinery has in fact been installed and is being used for the purpose for which it was imported. Payment for the cost incurred for above exercise to be borne by RCF. This needs to be done in a time bound manner as the case is coming up for hearing very shortly. A communication to this effect should be conveyed to 1 MOUD to sort out the long pending issue to meet the end of justice."

4.13 As seen from the above minutes Appellants had also approached the Ministry of Urban Development, for counter signature of the Project Implementation Authority Certificates. However the concerned Joint Secretary, in the nominated Line Ministry refused to counter sign these certificates. Matter was also taken up with the Secretary Ministry of Chemical and Fertilizers. Thereafter Appellant approached Hon'ble Bombay High Court by way of writ. In para 15, of the Writ Petition 1534 of 2017 filed by the Appellant making **Union of India through Secretary Department of Economic Affairs, Secretary Ministry of Urban Development, Secretary Ministry of Chemicals and Fertilizers, Secretary Ministry of Finance, Chairman Central Board of Excise and Customs and Commissioner Customs (Import) Mumbai II as joint respondents,** stated these facts as follows:

"15. As stated above, the 2nd Respondent has been appointed as the Line Ministry. The 2nd Respondent however refused to sign the certificates and requested the Ministry of Finance to withdraw the order nominating them as the Line Ministry on the alleged ground that it was inconsistent with the mandate of their Ministry. Despite the same, the Ministry of Finance informed the 2nd Respondent that it would have to continue as the Line Ministry. This was as far back as 8 October 2010. Based on this communication the ICICI bank sent the certificates to the 2nd Respondent for its countersignature. The matter was regularly followed up for countersignature on the 2nd Respondent. Nearly 4 years later the 2nd Respondent directed the 1st Petitioner to submit all relevant details to the 3rd Respondent Ministry of their verification before countersigning the certificates. The 1st Petitioner submitted the relevant details to the Department of Fertilizers, who by their letter dated 13th April 2015 recommended to the 2nd Respondent to issue the said certificates as requested for by the 1st Petitioner. The 2nd Respondent vide his communication dated 18 January 2016 addressed to the Department of Fertilizers turned down the request on the ground that they did not have expertise to certify the import of such goods from the necessity point of view. They further stated that the 2nd Respondent was also not consulted at the time of loan negotiation and therefore the 2nd Respondent was not in a position to sign the certificates. The 2nd Respondent was also requested by the Department of

Fertilizers that they could appoint a 3rd Party/Agency, i.e., an independent government agency of their choice to carry out inspection of the imported equipment installed at the 1st Petitioner's plant to enable the 2nd Respondent to issue the certificate. Despite the fact that the 2nd Respondent was categorically informed that the matter was adjourned in view of the pending appeal before the CESTAT no action has been taken by the 2nd Respondent."

Thereafter in para 26, made following prayer,-

"*26. The Petitioners therefore pray:*

(a) For a Writ of Mandamus or a writ, direction or order in the nature of mandamus or any other appropriate writ, direction or order under Article 226 of the Constitution of India directing the Respondents:

(i) That the 2nd Respondent should forthwith countersign the certificates issued by the ICICI bank;

(ii) That in the alternative the Respondents should appoint the Ministry of Fertilizers, the 3rd Respondent herein as the Line Ministry and the 3rd Respondent should be directed to forthwith countersign the said certificates."

4.14 Ministry of Urban Development, vide their letter dated 29th March 2017 asked Quality Council of India, for conducting third party verification of the imported goods, stating as follows:

"Subject: Issue of Project Implementation Authority Certificate (PIAC) for availing customs duty exemption for goods imported under ADB loan, Rashtriya Chemicals & Fertilizers Limited (RCFL)- proposal for third party verification –reg.

Sir,

Rashtriya Chemicals and Fertilizers Limited (RCM) had taken up the modernization of its HP Nitric Acid Plant at Trombay at an approximate cost of Rs.85 Crore and accordingly imported certain equipment for Technology up gradation of 320 MTPD HP

Nitric Acid Plant at Trombay. The Company had awarded the project to M/s Uhde India Ltd. (Uhde).

2. The above equipments were imported by RCF in terms of Notification No.84/97 - Cus. dated 11.11.1997 as amended by Notification No.85/99 dated 6.7.1999 which exempts the goods imported into India for execution of the Project financed by, World Bank, Asian Development Bank or any other international organization subject to the condition that:

- *I. The project has been approved by the Government of India;*
- *II. Such equipment's are intended to be used in a project financed by World Bank, Asian Development Bank or any other international organization;*
- *III. A certificate is issued by the Executive Head of the Project Implementing Authority (i.e. ICICI Bank in this case) that the said goods are required for the execution of the said project and the said project has duly been approved by the Government of India;*
- *IV. The above certificate of ICICI Bank is required to be countersigned by an officer not below the rank of the Joint Secretary in the concerned Line Ministry, in the Government of India.*

3. In this context, I am directed to say that it has been decided to engage Quality Council of India (QCI) for a third party verification of the goods imported by RCFL for the said project including the same are required for execution of the project and are being used for the said purpose. QCI is requested that a financial proposal in this regard may be prepared and forward to this Ministry on priority."

4.15 Vide their letter dated 7th July 2017, they informed Ministry of Chemical and Fertilizers, about the said decision for engaging QCI, and sought for necessary funds . The text of this letter is reproduced below:

"Subject: Issue of Project Implementation Authority Certificate (PIAC) for availing customs duty exemption for goods imported

under ADB loan, Rashtriya Chemicals & Fertilizers Limited (RCFL)- proposal for third party verification –reg

The undersigned is directed to refer to Ministry of Chemical and Fertilizers Department of Fertilizer O. M. No 18016/4/2015-FCA dated 07.02.2017 on the subject mentioned above and to convey that it has been decided by the competent authority to engage Quality Council of India (QCI) for third party verification of the goods imported by RCFL for the said project including the same are required for execution of the project and are being used for the said purpose.

2. In this context, a financial proposal has been obtained from QCI and the same is enclosed herewith. Department of Fertilizers is requested to provide necessary funding support as per the proposal from QCI for carrying out the said verification of the equipment. It is also requested that QCI may be contacted for any further query or verification and this Ministry may be intimated accordingly."

4.16 Vide their letter dated 18th July 2018, Ministry of Chemicals and Fertilizers, informed Appellant 1, stating as follows:

"Subject: Issue of Project Implementation Authority Certificate (PIAC) to RCF for availing Project custom Implementation Authority Certificate (PIAC) to RCF for availing customs duty exemption.

Sir,

I am directed to inform that the verification report submitted by QCI vide their letter dated 30.4.2018 has duly been approved by the Competent authority and before signing the PIAC certificate towards the imported goods by RCF under ADB loan, the original documents required for the purpose.

2. In view of the above, you are requested to kindly provide the relevant original documents to DoF at the earliest, so that the same may be got signed by the authorized signatory in DoF."

4.17 Thereafter along with their letter dated 23rd August 2018, forwarded the countersigned Project Implementing Authority Certificates. In their letter they stated as follows:

"Sub: Issue of Project Implementing Authority Certificate (PIAC) for availing Custom Duty Exemption for goods Imported under ADB Loan.

Sir,

With reference to your letter No Nil dated 8th August 2018 on the subject noted above and to say that DoF has initiate the action to engage Quality Council of India (QCI) for carrying out third party verification of the goods imported by RCFL, after obtaining the approval of Ministry of Urban Development and Department of Economic Affairs vide their OMs No !4011/30/2014-UD-II dated 8.9.2017 and No. 9/11/2017-ADB-I dated 20.12.2017 respectively (copy enclosed). QCI was engaged vide Dof letter No 18016/4/2015-FCA (vol.II) dated 5/7.1.2018 to carry out the third party verification of goods imported by RCFL.

2. On the basis of the report submitted by QCI, I am directed to convey the approval of the competent authority on issue of Project Implementing Authority Certificate (PIAC) for availing Custom Duty Exemption for goods Imported under ADB Loan. The true copy of the Project Implementation Authority Certificate (PIAC) counter signed by ICICI Bank limited has duly been signed by the Additional Secretary (Fertilizers) on behalf of Ministry of Finance (Copy enclosed).

3. You are requested to submit the PIAC certificate with the concerned authorities and also appraise the same status before Hon'ble Bombay High Court vide WP No 1534/2017 earlier No WP (L) No 737/2017."

4.18 Thereafter Appellant 1, moved to Hon'ble Bombay High Court in their writ petition No 1534 of 2017, seeking their leave and permission to file these additional documents before the tribunal in the pending appeal. Hon'ble Bombay High Court while deposing the writ, passed the following order:

"... the request of the petitioners are, therefore, that these documents be allowed to be produced before the Tribunal and the tribunal may be requested to proceed further with the pending appeal.

3. Leave is granted to the petitioners to produce the documents before the Tribunal along with application. The Tribunal may thereafter proceed further with the pending appeal in accordance with law. We are sure if the documents and the materials which petitioners wish to produce before the Tribunal are in the nature of developments which are relevant to the issues arising in the appeal before the Tribunal, the Tribunal would examine the same, of course, after giving an opportunity to the respondents to meet with such materials."

4.19 As directed by the Hon'ble High Court of Mumbai, Appellant 1 had moved a Miscellaneous Application for production of additional documents. This application was allowed by the tribunal vide M/sc Order No M/85139-85140/2019. While allowing the Miscellaneous Applications, tribunal observed as follows:

"2. The applicant has filed these Miscellaneous applications, seeking for consideration of additional documents / evidences in context with the appeal being No. C/1627/2005 filed before this Tribunal. Appeal No. ST/86353/2018.

3. On perusal of the documents annexed to the Miscellaneous applications, we find that those evidences are required for deciding the issue whether the benefit of exemption Notification No. 84/1997-Cus dated 11.11.1997 should be extended to the applicant or not. We do not appreciate the submissions made by the learned D.R. for Revenue that those additional evidences were not in context with post clearance of the goods, which are evident from the records. Therefore, the Miscellaneous applications filed by the applicant are allowed and the additional documents were taken into record for consideration and deciding the appeal filed by the applicant."

4.20 From the facts as narrated above we find that the Commissioner has in his order in para 38, acknowledged that the Appellants fulfill all the conditions as laid down by the Notification No 84/97-Cus as amended from time to time and there is no dispute in this respect. The only dispute which is there is the manner in which the project implementing authority certificate, which is the basis for claiming and allowing the benefit of exemption, has been countersigned. Investigations conducted by DRI, establish beyond an iota of doubt that the signatures on the certificates submitted by the importer at the time of importation were forged. The Commissioner found these signatures as forged and has proceeded against the importers and all others concerned with importation.

4.21 There is no dispute about the finding recorded by the Commissioner that the certificates produced before the Customs Authority for clearance of the goods at time of importation were having counter signatures which were forged. Commissioner has strongly relied upon the decision of the Apex Court in the case of Eagle Flask Industries Limited wherein Hon'ble Apex Court has observed as follows:

"6. *We find that Notification 11/88 deals with exemption from operation of Rule 174 to exempted goods. The Notification has been issued in exercise of powers conferred by Rule 174A of the Rules. Inter alia it is stated therein that, where the goods are chargeable to nil rate of duty or exempted from the whole of duty of excise leviable thereon, the goods are exempted from the operation of Rule 174 of the Rules. The goods are specified in the Schedule to the Central Excise Tariff Act, 1985 (in short 'the Tariff Act'). The proviso makes it clear that where goods are chargeable to nil rate of duty or where the exemption from the whole of the duty of excise leviable is granted on any of the six categories enumerated, the manufacturer is required to make a declaration and give an undertaking, as specified in the Form annexed while claiming exemption for the first time under this Notification and thereafter before the 15th day of April of each* *financial year. As found by the forums below, including CEGAT, factually, the declaration and the undertaking were not submitted by the appellants. This is not an empty formality. It is the foundation for availing the benefits under the Notification.* ***It cannot be said that they are mere procedural requirements, with no consequences attached for non-observance.*** *The consequences are denial of benefits under the Notification. For availing benefits under an exemption Notification, the conditions have to be strictly complied with. Therefore, CEGAT endorsed the view that the exemption from operation of Rule 174, was not available to the appellants. On the facts found, the view is on terra firma. We find no merit in this appeal, which is, accordingly, dismissed."*

4.22 From the reading of the above para of the decision in the case of Eagle Flask Industries, it is evident that the condition of notification which was not complied with, was found to be substantial and not a procedural condition. Holding the condition to be substantial, the Apex Court has denied the benefit of exemption claimed. In case of Dilip Kumar & Co, relied upon by the Authorized Representative, Hon'ble Apex Court has referred to the decision rendered in the case Hari Chand Shri Gopal [2010 (260) ELT 3 (SC)] and has observed as follows:

"38. We will now consider another Constitution Bench decision in Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal, (2011) 1 SCC 236 = 2010 (260) E.L.T. 3 (S.C.) [hereinafter referred as 'Hari Chand case' for brevity]. We need not refer to the facts of the case which gave rise to the questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question, viz., whether manufacturer of a specified final product falling under Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of Excise duty on specified intermediate goods as per the Central Government Notification dated 11-8-1994, if captively consumed for the manufacture of

final product on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with procedure set out in Chapter 10 of the Central Excise Rules, 1944, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in Hansraj Gordhandas case (supra), to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows-

> *"The law is well-settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption."*

39. The Constitution Bench then considered the doctrine of substantial compliance and "intended use". The relevant portions of the observations in paras 31 to 34 are in the following terms -

> *"31. Of course, some of the provisions of an exemption notification may be directory in nature and some are mandatory in nature. A distinction between the provisions of a statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished...*
>
> *Doctrine of substantial compliance and "intended use"*
>
> *32. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleased if a clear statutory pre-requisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the Court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed.*

33. A fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance with an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the non-compliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted.

34. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance with those factors which are considered as essential."

51. In Hari Chand case (supra), as already discussed, the question was whether a person claiming exemption is

required to comply with the procedure strictly to avail the benefit. The question posed and decided was indeed different. The said decision, which we have already discussed supra, however, indicates that while construing an exemption notification, the Court has to distinguish the conditions which require strict compliance, the non-compliance of which would render the assessee ineligible to claim exemption and those which require substantial compliance to be entitled for exemption. We are pointing out this aspect to dispel any doubt about the legal position as explored in this decision. As already concluded in para 50 above, we may reiterate that we are only concerned in this case with a situation where there is ambiguity in an exemption notification or exemption clause, in which event the benefit of such ambiguity cannot be extended to the subject/assessee by applying the principle that an obscure and/or ambiguity or doubtful fiscal statute must receive a construction favouring the assessee. Both the situations are different and while considering an exemption notification, the distinction cannot be ignored."

4.23 From both the decisions being relied upon by the revenue, it is quite evident that the law as laid down by the Hon'ble Apex Court, requires making the distinction between the substantial conditions and procedural conditions prescribed by the exemption notification. The substantial conditions need to be strictly interpreted and no latitude is available for interpreting the same, to allow the benefit of exemption in case of the non compliance with these conditions. However Hon'ble Apex Court clearly holds that non compliance with the procedural conditions should be viewed liberally and substantial benefit of exemption otherwise available should not be denied.

4.22 With the above understanding of the law as declared by the Hon'ble Apex Court, we examine the provision of notification, which leads to present controversy. For ease of reference we reproduce the same again though it has been referred to earlier also in this order.

"Provided that the importer, at the time of clearance of the goods, produces before the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, having jurisdiction, -

(i) ……

(ii) in case the said goods are intended to be used in a project financed (whether by a loan or a grant) by the World Bank, the Asian Development Bank or any other international organisation other than those listed in the Annexure, and the said project has been approved by the Government of India, a certificate from the executive head of the Project Implementing Authority and countersigned by an officer not below the rank of a Joint Secretary to the Government of India, in the concerned Line Ministry in the Government of India, that the said goods are required for the execution of the said project and that the said project has duly been approved by the Government of India, *and"*

From the plain reading of the above, it is quite evident that for the purpose of allowing exemption under this notification, the substantial requirement is production of ***"a certificate from the executive head of the Project Implementing Authority",*** before the Assistant/ Deputy Commissioner of Customs at the time of clearance of the goods stating that "***the said goods are intended to be used in a project financed (whether by a loan or a grant) by the World Bank, the Asian Development Bank or any other international organization other than those listed in the Annexure, and the said project has been approved by the Government of India."*** The requirement of countersignature by the Officer not below the rank of a Joint Secretary in the concerned Line Ministry, is only to certify the correctness of the assertions made by the executive head of Project Implementing Authority. Even in very old circular No 55/98/70-Cus IV dated 25.08.1970, Board after taking the opinion of law Ministry has clarified in respect of counter signature done by the Assistant Commissioner on the Bill of Entry stating as follows:

"***Check of assessment on bills of entry by Asst. Collectors, Position regarding, Assessment Order***

Under the existing instructions, Asstt. Collectors have to check assessments on Bill of Entry and Shipping Bills up to a certain percentage. After assessment by the Appraisers, the Bill of Entry and Shipping Bills are required to be put up to the Asstt. Collectors for check and counter signature as prescribed. The question whether in such cases where assessments are countersigned by the Asstt. Collectors, the refund procedure under Section 27 of the Customs Act, 1962 would be appropriate, has been examined by the Board in Consultation with the Ministry of Law.

*The Ministry of Law have opined that if the Asstt. Collector while he countersigns the Bills of Entry checks the relevant entries and applies his mind to determine the duty leviable under the Act and passes an order accordingly (whether such an order is passed separately or on the Bill of Entry itself so long as the duty liability is determined thereby), then an appeal lies under Section 128 of the Customs Act, against such order**. As the Appraisers make the assessment and the counter signature of the Asstt. Collector is merely a token of a check exercised by him, it cannot be said that this check makes the assessment order that of the Asstt. Collector.** If, however, the Asstt. Collector changes the assessment in any manner whether by way of revised classification, valuation or rate of duty, then the order of assessment will be that of the Asstt. Collector. In the latter case, recourse to Section 27, Customs Act is ruled out and the Appellate procedure will only be appropriate. In the latter type of cases, the assessing officers concerned shall endorse the importer's copy of the Bill of Entry* *suitably to indicate the fact of decision being taken by an Asstt. Collector."*

In Black's Law Dictionary, the term ***"countersign",*** is explained as follows:

"COUNTERSIGN. As a noun, the signature of a secretary or other subordinate officer to any writing signed by the principal or superior to vouch for the authenticity of it. Fifth Ave. Bank v. Railroad Co., 137 N.Y. 231, 33 N.E. 378, 19 L.R.A. 331; Gurnee v. Chicago, 40 Ill. 167. As a verb, to sign in addition to the signature of another in order to attest the authenticity. Winsor v. Hunt, 29 Ariz. 504, 243 P. 407, 411; Henning v. American Ins. Co., 108 Kan. 194, 194 P. 647, 648; Waldo Bros. Co. v. Downing, 131 Me. 410, 163 A. 787, 789"

(Blacks Law Dictionary, Revised Fourth Edition, page 421, St Paul Minn West Publishing Co.)

From the wording of the Notification, it is abundantly clear that the Joint Secretary, countersigning the certificate certifies the same thing which has been stated by the executive head. The certificate produced, continues to be the one which has been given by the executive head of Project Implementing Authority. Hence even after countersignature by the Joint Secretary, it cannot be said to be the certificate issued by him, but is only certifying the authenticity of the certificate issued.

4.23 Black Law Dictionary has explained the word ***"Procedure"****, stating as follows:*

PROCEDURE. .The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court Is to administer; the machinery, as distinguished from its product. Per Lush, L. J., in 7 Q. B. Div, 333. That which regulates the formal steps in an, action or other judicial proceeding; a form, manner, and order of conducting suits or prosecutions. Mahoning Valley Ry. Co. v. Santoro, 93 Ohio St. 53, 112 N.E. 190, 191. The judicial process for enforcing rights and duties recognized by *substantive law and for justly administering redress for infraction of them. Sims v. United Pacific Ins. Co., D.C.Idaho, 51 F.Supp. 433, 435.*

(Blacks Law Dictionary, Revised Fourth Edition, page 1367, St Paul Minn West Publishing Co.)

4.24 Merriam-Webster.com Legal Dictionary, defines the "Procedural Law", as follows:

"Procedural law: law that prescribes the procedures and methods for enforcing rights and duties and for obtaining redress (as in a suit) and that is distinguished from law that creates, defines, or regulates rights"

***Merriam-Webster.com Legal Dictionary*, Merriam-Webster, https://www.merriam-webster.com/legal/procedural%20law. Accessed 3rd August 2021.**

4.25 From the definition of Procedure and Procedural Law, as referred to in the above dictionaries, it is quite evident that the manner in which the certificate needs to be produced is nothing but the matter of procedure and procedural law. The manner in which the certificate is signed and countersigned is a matter of procedural law, while the contents of the certificate is substantive law. In this case Commissioner, do not find any discrepancy in the contents of certificate produced by the importer at the time of clearance of the imported goods before the jurisdictional Assistant/ Deputy Commissioner. Since we find that the requirement of counter signature by the Joint Secretary of the concerned Line Ministry is nothing but a matter of procedure, we are not in position, to agree with the findings recorded by Commissioner while disallowing the benefit of exemption, by placing reliance on the decision of Hon'ble Apex Court in case of Eagle Flask Industry Ltd.

4.26 It is very interesting to note that this Notification was issued in the year 1997 and thereafter amended in the year 1999 and 2001. While the notification provided the condition for countersignature by the Joint Secretary in the concerned Line Ministry and Notification defined "Line Ministry" ***means a Ministry in the Government of India, which has been so nominated with respect to a project, by the Government of India, in the Ministry of Finance (Department of Economic Affairs).*** When the notification has defined line ministry to be one that has been so nominated by the Government of India, in the Ministry of Finance (Department of Economic Affairs), we have noted in our discussions earlier, that Department of Economic Affairs had failed to nominate any ministry as the Line Ministry for the purpose of this project. When no Ministry had been nominated as Line Ministry at the time of importation, a fact which had been noted by the Hon'ble Allahabad in its decision dated 15.10.2006 how can this condition of countersignature by the Joint Secretary of Line Ministry have been implemented. It is not the case that the appellant did not make an effort to get the certificate countersigned. However in absence of proper nomination of the Ministry as line ministry, even the Department of Economic Affairs was unable to guide them properly.

4.27 It is more interesting to note that while notification 84/97-Cus as amended provides the condition of countersignature by the Joint Secretary in the Line Ministry, nominated by the Department of Economic Affairs, Ministry of Finance and in para 44 of the impugned order, Commissioner holds that this conditions is substantial and mandatory by recording reasons which are not prescribed by the notification or by way of any instruction, circular issued. We do not find any **procedure and manner** of such countersignature prescribed anywhere. In absence of any such prescription of procedure and manner of countersignature, what value can be assigned to such a countersignature. Further what is the manner for verification of the countersignature by the assessing officer, notification is totally silent in this respect. In our considered opinion, such countersignatures can be obtained for a bribe, wine or women. This exactly is what happens in this case, a Junior Finance

Officer, in the Department of Economic Affairs, Ministry of Finance finds the gold mine in this notification and makes use of the same by assuring the representatives of Appellant 1, who desperately were pursuing their cause for the countersignature on the Project Implementation Authority Certificate genuinely and properly issued by the Appellant 2, that he is in position to arrange for the countersignature against gratification he demands. Such sharks have their eyes wide open searching for such opportunities, which occur and reoccur on account of bureaucratic red tapism and vague conditions as this one in the exemption notification.

4.28 We observe from plain reading of notification, that the intention of the notification is to exempt the goods imported for a project approved by Government of India and funded by the loan from an international organization. India has embarked on the path of liberalization of economy in the year 1991 with rationalization of tariff etc, to increase foreign investments in the country. This notification seeks to carry forward this spirit and promote foreign investments for the development and evolution of Indian economy. The condition of production of a certificate from the Executive Head of the Project Implementation Authority suffices the purpose of notification in all such cases where the line ministry was not nominated by the Department of Economic Affairs, prior to the importation of goods. The condition of countersignature by the Joint Secretary of Line Ministry, (which was never nominated and notified) without prescription of any procedure and manner of countersignature and manner of verification of such countersignature by the assessing officers to whom such countersigned certificate is produced, makes this condition vague. Such vague conditions need to be read down, so that the purpose for which this notification has been issued can be achieved. Explaining the Principle of Reading down, Hon’ble Supreme Court has in the case of Indian Social Action Forum [Civil Appeal No 1510 of 2020 order dated March 6, 2020] held as follows:

"20. Where the provisions of a statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provisions occur and purpose for which it is made, the doctrine of "reading down" can be applied. To save Rule 3(v) from being declared as unconstitutional, the Court can apply the doctrine of "reading down"."

4.29 In case of JSW Dharamtar Port Pvt Ltd [2019 (20) GSTL 721 (Bom)], Hon'ble Bombay High Court by adopting the principle of reading down, held as follows:

14. From the perusal of this provision, one thing becomes clear that the respondents cannot link the requirement of refund application being made within the period of limitation envisaged in sub-section (3) of Section 103, with the condition of production of certificate from the Ministry that the contract had been entered into before 1-3-2015. ***Both these conditions namely; production of certificate as well as making the applications within the period of limitation have to be fulfilled, but the assessee cannot be expected to fulfill the condition of making the refund application within limitation, at the same time, produce a certificate of the Ministry within the time envisaged under the section. In other words, if the concerned Ministry consumes substantial time in issuing certificate, the assessee cannot be non-suited on the ground that the refund application was not filed within the period of limitation. Any other view would expose this provision to the vice of arbitrariness. Thus read, we need not hold the provision unconstitutional. Reading down a statutory provision in order to save it from the vice of unconstitutionality, is a well known interpretative technique often times employed by the Court. Even otherwise, the interpretation that we have adopted is reasonable. No person can be expected to perform a task beyond his control. On one hand, the statute requires the certificate of the concerned Ministry***

before exemption from duty can be claimed, at the same time, the statute mandates that the refund application must be made within a certain time frame. *We are, therefore, of the opinion that the time consumed by the ministry in processing and granting certificate, as referred to in sub-section (1) of Section 103, must be ignored for the purpose of computing the limitation for making refund application under sub-section (3) of Section 103 of the Finance Act, 1994.*

4.30 In case Wipro Ltd [2015 (319) ELT 177 (SC)], applying the principle of "reading down" Hon'ble Apex Court observed as follow:

"36. *We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 5-7-1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable."*

4.31 Thus the condition of countersignature as prescribed in the proviso (ii) to the Notification 84/97-Cus dated 11.11.1997 as amended, has to be read down to mean that this condition applies only when a "Line Ministry" as per Explanation 2 to the said notification has been nominated by the Department of Economic Affairs, prior to importation of goods.

4.32 In view of the discussion as above we are not in position to uphold the demand of Custom Duty made jointly and severally from the Appellant 1 and Contractor, since Commissioner has in his order clearly observed that except for the requirement of countersignature on the Project Implementation Authority Certificate, all other conditions prescribed for claiming the benefit of exemption under this notification are fulfilled and satisfied.

4.33 It is also fact available on the record that the Project Implement Authority Certificate which was produced by the importer's at the time of clearance of imported goods, before the jurisdictional Assistant/ Deputy Commissioner was bearing the countersignature, which investigations show was forged. However it is not even the case of the revenue that Appellant 1 had himself forged this countersignature. Appellant 1 and Appellant 2, had approached the concerned officers in the Department of Economic Affairs, for getting the Project Implementation Authority Certificate countersigned. However, the Department of Economic Affairs vide their letter dated 05.07.2004, responded not by pointing/ directing them to the concerned line ministry, (that was to be nominated by them), instead they reiterated the condition of Notification. When Appellant, again approached the Department of Economic Affairs, the certificate with forged countersignature was arranged by Mr Rakesh Yadav, Junior Finance Officer. Interestingly this certificate with forged countersignature was forwarded under the cover of forged letter directly to the Commissioner of Customs and not to the Appellant 1 or Appellant 2.

4.34 Appellant 1 has in his appeal challenged the order of confiscation under Section 111 (o) of the Customs Act, 1962 and penalty imposed under Section 112 (a), ibid. These sections read as follows:

SECTION 111. Confiscation of improperly imported goods, etc. - *The following goods brought from a place outside India shall be liable to confiscation: -*

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

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

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

4.35 Since we have as stated earlier delinked/detagged the appeals filed by co-noticees against whom the charge has been made for imposition of penalty, for their acts of omission and commission, which led to production of the certificate with forged countersignature, we would limit our order on the offence part as it relates to the Appellant 1 and Appellant. Prerequisite for invoking the provisions of Section 112 (a) of the Customs Act, 1962 is that the goods should be held liable for confiscation. Section 111 (o) clearly states that in case of exempted goods subject to any condition, and if the non observance of this condition is not sanctioned by the proper officer then the goods should be held liable for confiscation. Commissioner has in para 51, 53 and 55 of his order while holding the goods liable for confiscation and justifying the imposition of penalty under Section 112 (a) of the Customs Act, 1962 observed as follows:

"51. In view of the above M/s Uhde India Ltd, who were also the importers in this case, are clearly responsible for producing a forged certificate to claim the exemption and evade duties amount Rs. 9,26,89,304 (at Mumbai sea port) and Rs.6,49,640 (at ACC, Sahar) They were also directly involved in paying bribe to Shri Rakesh Yadav Jr. Finance Officer in the Deptt. Of Economic Affairs. Instead of reporting this matter to the Police or to the Sr. officers of Shri Yadav they choose to be a party to this crime going to the extent of even negotiating the amount. ***Because of their actions the goods became liable for confiscation u/s 111(o) of the Customs Act, 1962, since the goods were exempted subject to production of certificate countersigned by the Joint Secretary from the LINE Ministry, which they did not possess. This condition of the notification was not satisfied since they produced forged certificates.*** *Since the goods are liable for confiscation they themselves become liable for penal action u/s 114A of the Customs Act 1962. Section 114A is invoked wherein any duty is not levied or short levied by reason of collusion of willful Misstatement or suppression of facts. In this case it is very clear that M/s Uhde India colluded with RCF and Mr Rakesh Yadav (all*

were privy to the act of bribe giving/taking) to obtain forged certificates. M/s Uhde India also suppressed the fact that these certificates had been procured only after paying bribe. Mere suppression of fact resulting in short levy or non levy is sufficient to invoke section 114A and this suppression need not be "willful" since the word 'willful' qualifies 'misstatement' only and not 'suppression of facts'.

53. As regards M/s RCF though they were not the importers - in the sense that they did not file the B/E-but they were the direct beneficiaries of the exemption notification. As per the terms of the agreement between M/s Uhde India Ltd and M/s RCF the burden of customs duty, if imposed, was to be passed on to RCF. Therefore, M/s RCF had as much interest in getting the consignment cleared expeditiously without payment of duty as did M/s Uhde India Ltd , if not more. They were also a party to giving of bribe to Shri Rakesh Yadav to get the forged/fabricated certificates. But not being the direct importers their role becomes secondary compared to that of M/s Uhde India Ltd. They are clearly abettors in this case liable for penal action u/s 112 (a) of the Customs Act 1962.

55. As regards the role of M/s ICICI bank Ltd. though they might not have been directly involved in the act of bribe giving, their acts of omission and commission have been discussed in para 19(viii) above and their gross negligence resulted in forged certificates being produced for seeking exemptions from Customs. Had they taken their responsibilities properly and acted with due diligence, as was expected of a PIA, this fraud would not have been effectuated. They are therefore liable for penal action 112(a) of the Customs Act,1962, for abetment as their acts of commission and omission resulted in making the imported goods liable for confiscation u/s 111(o) of the Customs Act, 1962. Further it has been held in the case of Airport Authority of India Ltd vs CC, New Delhi [2003(158)ELT33(Tri-Del)] that penalty can be imposed under section 112(a) for abetment on account of negligence also."

4.36 Indeed, for the reason of production of the Project Implementation Authority Certificate with forged countersignature, to claim the benefit of exemption under notification No 84/97-Cus dated 11.11.1997 as amended, the imported goods have become liable for confiscation. It is not even the case of the Appellant, that they sought sanction of the proper officer for their inability to comply with the condition of the exemption for the reason that no Ministry has been nominated as line ministry for the project. In view of this reason we do not find any fault in the order of the Commissioner holding the goods liable for confiscation. However, since Commissioner has in the impugned order, as is evident from para 51, not determined the quantum of redemption fine, by determining the market value of goods as provided by Section 125 of the Customs Act, 1962. The relevant provision is reproduced below:

"SECTION 125. Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, ***such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.****"*

In the case where the goods have been imported for the project approved by the Government of India, against a funding from an international organization, by the Appellant 1 who is an Central Government Undertaking, the fine equivalent to 25 % of CIF value of the imported goods cannot be justified.

4.37 As discussed earlier, Appellant 1 had approached the Department of Economic Affairs for getting countersignature on the Project Implementation Authority Certificate. It is not even the case against them that they had themselves forged the countersignatures on the certificate. They were given assurance by the officers in the Ministry of Finance, Department of Economic Affairs, that the countersignatures on these certificates will be arranged. Thereafter the countersignatures were forged in the Department of Economic Affairs, with the Appellant 1 and Appellant 2 having no means to find out about the forgery done. Further after the impugned order was passed by the Commissioner, a lot of correspondence has been placed on record by the Appellant 1, through their miscellaneous application. All this correspondence has been discussed by us in the preceding paras. This correspondence indicates the bonafide efforts being made by the Appellant 1, for obtaining the countersignature of Joint Secretary of Line Ministry nominated by Department of Economic Affairs. In this process the complete inspection of goods and their use in project approved by the Government of India was carried through third party namely Quality Council of India as per the directives of the Line Ministry i.e. Ministry of Urban Development. Even the Secretary in the Ministry of Chemical and Fertilizers has expressed his concerns in the matter, whereby he specifically directed for early resolution of the issue. After all the efforts put in over fourteen long years, Appellant 1 was able to get the Project Implementation Authority Certificates, countersigned by Shri Dharampal Additional Secretary in the Ministry of Chemical and Fertilizers. While forwarding the countersigned certificate, Ministry specifically stated as follows:

"2. On the basis of the report submitted by QCI, I am directed to convey the approval of the competent authority on issue of Project Implementing Authority Certificate (PIAC) for availing Custom Duty Exemption for goods Imported under ADB Loan. The true copy of the Project Implementation Authority Certificate (PIAC) counter signed by ICICI Bank limited has duly been signed by the Additional Secretary (Fertilizers) on behalf of Ministry of Finance (Copy enclosed)"

If the Department of Economic Affairs, who had to nominate the Line Ministry, had acted fairly and nominated the Line Ministry in time the fraud committed by their own officers could have been checked and all the inconvenience and project overrun costs in the case of this project approved by Government of India could have been avoided. The project overrun costs already incurred by the Appellant 1, are sufficient and imposition of any further redemption fine will only add to the same. All these project overrun costs in some way or other get reflected back on the government exchequer only. Thus while we hold that the imported goods are liable for confiscation, and have been rightly confiscated by the Commissioner in terms of Section 111 (o) of the Customs Act, 1962, we reduce the redemption fine imposed to **Rupees Zero**.

4.38 Commissioner observation that the Appellant 1 was direct beneficiary of the Acts of contractor and Shri Rakesh Yadav, forging the countersignature, cannot be the reason for imposition of penalty under Section 112 (a). Section 112 (a) as worded requires leading more positive evidence to establish the act of omission or commission or abetment on the part of the person which made goods liable for confiscation, for imposition of penalty. In this case where we find that Appellant 1, have acted bonafidely throughout and made all efforts to comply with conditions of notification, the penalty under Section 112 (a) cannot be justified. So we set aside the penalty imposed on Appellant 1 under Section 112 (a).

4.39 As evident from para 55 of impugned order, the Commissioner has imposed a penalty under Section 112 (a) on the Appellant 2, by charging him for “negligence”. As discussed earlier, the forged signatures on the Project Implementation Authority Certificate were done by the officer in the Department of Economic Affairs. In absence of any nomination of line ministry by the Department of Economic Affairs, the Appellants were left with no other option but to approach them for getting the countersignature on the Certificates issued by them. Commissioner holds Appellant 2, responsible for negligence, as he had handed over the Certificates issued by him to officers of Appellant 1 for getting them countersigned by the Joint Secretary in the nominated Line Ministry. Appellant 2, was under bonafide belief that the Department of Economic Affairs, Ministry of Finance was the nominated line ministry, for the reason that similar certificates issued by him in past were also countersigned by officers not below the rank of Joint Secretary in that Ministry. Having entertained such bonafide belief, he handed over these Certificates for getting countersignature, with direction to approach the Department of Economic Affairs. But for the bureaucratic approach of the said Department, the forgery committed could have been averted. Department of Economic Affairs could have at time of production of these certificates nominate the Line Ministry for the project, or could have by itself authorized some Joint Secretary in Ministry of Finance Department of Economic Affairs for countersigning, by nominating themselves as line ministry as mandated by the notification No 84/97-Cus dated 11.11.1997 as amended. Failure on the part of the Department of Economic Affairs was noted by the Hon'ble Allahabad High Court, and it was only on the direction of the High Court that the Department of Economic Affairs nominated the Ministry of Urban Development as line ministry, much after these imports were made. The failure on the part of the Department of Economic Affairs to nominate the Line Ministry in time, cannot be negligence of anyone else except them. Notification No 84/97-Cus, was amended twice before the imports in the present case. Definitely at time of amending the notification the Ministry of Finance, Department of Revenue, responsible for issuing this notification and its amendments would have reviewed the notification. However even while undertaking such a review this thing escaped their knowledge. For all these failures, can Appellant 2, who has acted bonafidely as per his belief, be made guilty of negligence for imposition of penalty under Section 112 (a)?

4.40 The Commissioner has relied upon the decision in case of Airport Authority of India Ltd [2003 (158) ELT 33 (T-Del)] to hold that a penalty under Section 112 (a) can be imposed for the act of negligence.

"7. *The argument of the learned Counsel that only duty on the missing goods could be demanded from the appellants and no penalty could be imposed, cannot be accepted. Since the goods, in our view, were liable to be confiscated and the appellants had abetted in the removal of those goods without payment of duty, the provisions of* ***Sections 112 (a) and (b) are also fully attracted, apart from their liability to pay the duty under Section 45 of the Act (with which we are not concerned in the present appeal). The appellants had been rightly penalized under the said provisions. The ratio of the law laid down in the above referred cases, relied upon by the learned Counsel, in our view, is not attracted to the facts of the present case. In the case of P.K. Abraham, supra, it has been only observed that inefficiency of the port trust or negligence in the functioning of the system, could not justify penalty under Section 112 of the Act and this very view has been expressed in the case of Air India, supra. Similarly, the law laid down in the case of Central Warehousing Corpn., supra, is not of much avail to the appellants, as in that case the deliberate negligence on the part of the appellants was not proved. But in the instant case, as observed above, the deliberate negligence does stand proved on the part of the appellants. In the case of Killick Air Courier & Forwarders Ltd., supra, the appellants therein were held to be nowhere directly involved in the importation or Customs clearance. They were only the couriers and for that reason, the penalty under Section 112 of the Act was not imposed on them.*** *But such is not the situation in the instant case. The law laid down in the case of Gian Mahtani, supra, that no one could be convicted for the smuggling of something which was not known, is not attracted to the facts of the present case.* ***The appellants very well knew the purpose for which the consignments***

were kept in their custody. *On the other hand, the ratio of the law laid down in the cases relied upon by the learned SDR (referred above) i.e. Badaku Joti Svant; Wilco & Company; and Board of Trustees of Madras Port Trust, supra, is fully applicable to the facts of the present case. In those cases, it has been observed that irrespective of the fact that the goods were dutiable or not, the custodian of the goods is liable for penalty in case of loss."*

This decision do not support the case for imposition of penalty under Section 112 (a) on account of negligence if any. This case is

4.41 Tribunal has in case of Air Freight Ltd [2004 (172) ELLT 229 (T)], held as follows:

"13. Besides, the levelled allegations can at best be termed as an act of negligence for which no penalty can be imposed under Section 112(a). Provisions of Section 112(a) require that the person must have a knowledge or reason to believe that his acts of commission or omission would lead to confiscation of imported goods. It is nobody's case that the appellants had prior knowledge, that the goods imported through missing diplomatic bags would be liable to confiscation. It is not even established that the appellants had any knowledge of the arrival of such bags. The question of knowledge of the contents can arise only thereafter. In the absence of any such findings by the lower authorities, the penalty imposed on the appellants cannot be sustained."

4.42 Since we hold that Appellant 2, had acted under a bonafide belief, and the charge of negligence cannot be upheld this decision of tribunal cannot be applied to the facts of present case. Thus, we are unable to sustain the penalty imposed on Appellant 2 under Section 112 (a).

4.43 While considering this case we have been guided by what David Osborne and Ted Gaebler have in their book '**Reinventing**

Government: How the Entrepreneurial Spirit is Transforming the Public Sector' stated, shunning the bureaucratic institutions and have spoken about citizen centric/ client centric approach toward handling governance. They state, modern government should express more confidence in market rules and procedures than bureaucratic rules and procedures. The bureaucratic rules and procedure lead to more rent seeking behaviour on the part of the officers responsible for implementing those bureaucratic rules and procedures. This is something which we observe in the present case. However we would be happy if the Czars of bureaucracy and polity, Czars of bonds and filed formation challenge this order before the Apex Court and then Apex Court pronounces on what is best for liberalized economy in this country. Whether bureaucratic chains and shackles which provide for half hearted approach to liberalization, in form of the condition of countersignature by the un-nominated line ministry or market regulation which shuns this approach?

4.44 Certain officers of Appellant 1 and Appellant 2 and the officers of Department of Economic Affairs have been charged for getting forged signatures on the Project Implementation Authority Certificate. Our order in respect of the Appellant 1 and Appellant 2, should not be treated as giving relief to them in their appeals, which as stated earlier were delinked from these two appeals. Hon'ble Supreme Court has in case of Essar Oil Ltd [2004 (172) ELT 433 (SC)] held as follows:

"43. *So far the respondents 2 to 4 are concerned, the Commissioner's findings were as follows :*

(1) Respondent No. 2 - Sri S.R. Agarwal gave instructions from time to time for clearance of all imported goods before pronouncement of Union Budget, 1999. There was no requisition from Essar Projects Ltd. (in short EPL) or the contractors for such goods. In charge of finance portfolio was fully aware of the financial status of the assessee. In spite of his personal

knowledge he instructed respondent No. 3 (Sri P.R. Ashok) to complete the formalities. The intention to defraud is apparent from his fax message dated 24-2-1999 instructing to clear the goods at the current duty rate and not to expose to any change in the budget. His mala fide intents is apparent from the letters addressed by him to the Chief Commissioner and DRI authorities wherein he had significantly suppressed the fact that cheque had been tendered on the basis of a false declaration regarding availability of funds. All along he stuck to the plea that mere late realization was of no consequence and since cheque was not dishonored duty at post-budget rates cannot be levied.

(2) Respondent No. 3 - Shri P.R. Ashok was fully aware of the fact about non-availability of funds. But he made a false declaration about sufficiency of funds. The cheque was not on a Bank at Jamnagar but at Rajkot. This was a part of a well planned plan to perpetuate frauds.

(3) Respondent No. 4 - Shri Nitin Bhat was in charge of Customs clearance related work. In his letters to the Customs authorities he clearly stated about availability of funds when moving for cancellation of warehouse licence. He also played active part in ensuring that the Bank does not return the cheque.

***44.** In view of the aforesaid, it was concluded by the Commissioner that in respect of the imported goods the aforesaid three persons have done or omitted to do acts which acts or omissions have rendered such goods liable for confiscation and they had also abetted in acts which they knew or had reasons to believe that the goods are liable to confiscation under Section 112(i) of the Act and rendered themselves liable to action under Section 112(a) of the Act. Accordingly penalties as noted above were levied on respondents 2, 3 and 4.*

***45.** As. regards the Departmental Officials (respondents 5 to 7) the Commissioner took note of several factors.*

(1) As regards Sri S.P. Chaudhuri it was noted that notwithstanding specific direction of Superintendent (Tech). Jamnagar to the effect that date of cancellation should be taken to be the date of "actual removal of goods from warehouse". It was concluded that Sri Chaudhuri failed to ensure "actual removal" for the purpose of cancellation of warehouse licence. All the three officers failed to take note that physical removal of approximately 20.000 Mts. Cargo covered under 84 Bills of Entry from the bonded warehouse could not have been possible in a short span of one day. The officers acted in undue haste and resorted to backdating as accepted by them in their statements. It was noted that the three officers were located far apart from each other. Therefore, processing the files at various stages and/or places on the same day is not practicable. The sequence of processing files confirmed the backdating of documents which was admitted by the officers. The prime responsibility for scrutinizing the relevant documents was on Sri A.C. Sharma who failed to do that. The other officers committed acts of omission under the overall guidance and supervision of Sri Sharma. The plea for protection under Section 155 of the Act was rejected. Penalty under Section 112(a) in respect of each of the officers was levied.

46. *CEGAT did not consider the aberrations highlighted by the Commissioner and in a very cryptic manner dealt with the issues. No plausible reason has been indicated as to why the allegations which are quite serious in nature and the conclusions in relation thereto recorded by the Commissioner were not to be maintained. Only an abrupt conclusion was reached that Shri Thakur and Sri Chaudhuri had absolutely no connection with the acceptance of cheques. There was not even any reference to the allegations regarding accepted backdating or acting contrary to specific directions. Sri Sharma was given a clean chit in view of the finding recorded about the date on which receipt of payment has to be taken. Here again the allegations were not considered in the proper perspective. The findings regarding deemed* *removal are really inconsequential in the present dispute as the very foundation for removal was based on established fraud. Therefore, it is not necessary in the present dispute to go into the question regarding effect of deemed removal.*

47. *The manipulative roles of respondents 2 to 7 have been clearly established. They were clearly active participants in the well-planned deception and fraudulent acts leading to evasion of duty. They had played major roles in the whole game of fraud and deception. There was clearly wilful disregard and deliberate defiance of statutory provisions. Levy of penalty is clearly warranted. Impugned order of CEGAT is set aside and order of Commissioner is restored."*

4.45 In view of the above the appeals filed by the other co-noticees need to be considered separately on the basis of their roles played in the act of getting forged signatures on the Project Implementing Authority Certificates. Their appeals need to be decided on the merits of their case after hearing them. For this reason we have delinked those appeals from the present two appeals.

5.0 In view of our discussions as above, we allow the appeals filed by Appellant 1 and Appellant 2 against the impugned order.

(Order pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

tvu