

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

Excise Appeal No. 2054 of 2010

(Arising out of Order-in-Original No. 08/CSP(08)/COMMR/RGD/10-11 dated 31.08.2010 passed by the Commissioner of Central Excise, Customs & Service Tax, Raigad)

Riyaz Rafiq Padela

803, Royal Residency, Gorat,
Adajan Patia, Surat 395 009.

Appellant

Vs.

Commissioner of Central Excise & ST, Raigad Respondent

Utpad Shulk Bhavan, Plot No.1, Sector 17,
Khandeshwar, Navi Mumbai 410 206.

AND

Excise Appeal No. 89344 of 2014

(Arising out of Order-in-Original No. 08/CSP(08)/COMMR/RGD/10-11 dated 31.08.2010 passed by the Commissioner of Central Excise, Customs & Service Tax, Raigad)

Mangaldas K. Patel

B-201, Siddhi Tower, Ravi Compound,
B.M. Road, Thane (W) 400 602.

Appellant

Vs.

Commissioner of Central Excise & ST, Raigad Respondent

Utpad Shulk Bhavan, Plot No.1, Sector 17,
Khandeshwar, Navi Mumbai 410 206.

Appearance:

Shri Jitendra Motwani with Shri Chirag Shetty, Advocates for
Appellant 1

Shri Pravin Singh with Shri Ashok Singh, Advocates for Appellant
2

Shri Deepak Bhilegaonkar, Additional Commissioner, Authorised
Representative for the Respondent

CORAM:

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

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 11.11.2022

Date of Decision: 24.01.2023

FINAL ORDER NO. A/85045-85046/2023

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No 08/CSP(08)COMMR/ RGD/10-11 dated 31st August 2010 of the Commissioner of Customs, C.Ex. & S.T., Raigad. In respect of the two appellant namely Shri M K Patel (Appellant 1) and Shri Riyaz Padela (Appellant 2) the impugned order held as follows:

"8. (i) *The amount of Rs. 1,01,35,000/- (Rupees One Crore One Lakh Thirty Five Thousand Only) paid by Shri M K Patel is ordered to be adjusted against the amount of demands confirmed against M/s Xian Organics, M/s Swift Trading (India) and M/s New Life Organics.*

(ii) Penalty of Rs. 90,00,000/- (Rupees Ninety Lacs Only) is imposed under Rule 26 of Central Excise Rules, 2002 on Shri M K Patel (Noticee No 9).

9. (i) *The amount of Rs. 6,00,000/- (Rupees Six Lakh Only) paid by Shri Riyaz Padela is ordered to be adjusted against the amount of demands confirmed against M/s Xian Organics, M/s Swift Trading (India) and M/s New Life Organics.*

(ii) Penalty of Rs. 50,00,000/- (Rupees Fifty Lacs Only) is imposed under Rule 26 of Central Excise Rules, 2002 on Shri Riyaz Padela (Noticee No 10)."

2.1 During the period from 19.07.2005 to 24.03.2006, eighty five claim of rebate were filed by five entities namely M/s. New Life Organics, Ankleshwar, Gujarat, M/s. Xian Organics, Valsad, Gujarat, M/s. Swift Trading (I), Masjid, Mumbai, M/s. Real Business House, Valsad, Gujarat, M/s. J.D. Trading House, Ankleshwar, Gujarat, claiming themselves to be the merchant exporter with valid IEC number. After causing verification of Central Excise duty paid status of the goods from the Central Excise Range where the goods were manufactured and from JNCH from where the goods were exported, 19 rebate claims filed by M/s. New Life Organics, M/s. Xian Organics and M/s. Swift Trading (I), Masjid, Mumbai amounting to Rs. 1,59,07,687/- rebate claims were sanctioned.

2.2 Based upon the intelligence and on subsequent investigations it was found that the goods were neither manufactured nor were exported and rebate claims were

filed on the basis of fake documents. Thus it was alleged that five merchant exporters along with various other co-noticees had defrauded the government exchequer. It was also found that the three merchant exporters whose rebate claims were sanctioned did not exist at all and were only created to defraud the government exchequer.

2.3 On completion of investigations a Show Cause Notice dated 09.06.2008 was issued to the various noticees including the two appellants for:

- i. Demand and recovery of amount of Rs 1,59,07,687/- erroneously sanctioned and paid as rebate of Central Excise Duty, under Rule 18 of Central Excise Rules, 2002 read with proviso to Section 11 A (1) of the Central excise Act, 1944 from the noticees identified (including the appellants) jointly or severally.
- ii. Appropriation of the amount of Rs 1,59,07,687/- deposited during the investigation against the amount of rebate erroneously paid.
- iii. Imposition of penalty under Section 11 AC on the Noticee No 1 to 3 and 6 to 12.
- iv. Rejection of the remaining 66 (85-19) rebate claims.
- v. Imposition of penalty under Rule 26 &/ or 27 of the Central excise Rules, 2002 on all the noticees (including the two appellants) for their acts of aiding the act of commission of the claim to fraudulent rebate.

2.4 The show cause notice has been adjudicated as per the impugned order referred to in para 1 above

2.5 Registry has confirmed that against the impugned order three more appeals viz E/2118, 2119 and 2135/2010-Ex [DB] were filed. However these three appeals have been dismissed and only these two appeals are now pending for consideration.

3.1 We have heard Shri Jitendra Motwani along with Shri Chirag Shetty, Advocates for appellant 1 and Shri Ashok Singh along with Shri Pravin Singh, Advocates and for appellant no 2. We have also heard Shri Bhilegaonkar Deepak, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the Appellant 1, his counsels submitted as follows:

- The Appellant is ex superintendent of Central Excise. Since the investigations had raised question mark over manufacturing and export of the goods, Appellant deposited Rs. 1,01,35,000/- under protest.
- The Appellant was not aware about the forged and fabricated nature of the documents. It came to the knowledge of the Appellant only after the investigation by the department.
- The role of the Appellant was limited to introduction of Mr. Riyaz Padela with Mr. Deepak Jare. In so far as Mr. Bansode is concerned, the Appellant had only introduced Mr. Jare with Mr. Bansode in case of any difficulty in filing the rebate claim he could have sought Mr. Bansode's help.
- Appellant has only introduced Mr. Padela with Mr. Jare and Mr. Bhansode without any knowledge of document been forged and fabricated documents.
- It is submitted that the Appellant has not forged or fabricated any documents. The allegation regarding making some entry in the seal covers is totally incorrect and without any basis. The Appellant has not made any entry in any of the documents as alleged.
- The statements of the Appellant are not voluntary statements and were taken under duress and coercion.
- The Appellant after the show cause notice was issued requested for relied upon documents through their counsel letter dated 18.01.2010, 18.03.2010 and 09.04.2010 however till date no relied upon documents has been provided to the Appellant. [(para 67 of the impugned order)].
- The so-called hand writing expert report is concerned which is made basis for confirmation of penalty upon the Appellant has yet not been provided to the Appellant despite of repeated request to the Adjudicating Authority.

- The Appellant submits that Rule 26 of the Central Excise Rule, 2002 cannot be imposed upon the Appellant for mere introduction of Mr. Padela with Mr. Jare and for passing of the documents on two three occasions from Mr. Padela to the employee of CHA and vice versa without physical possession, delivery and transportation of the goods.
- The Hon'ble Bombay High Court has in case of Bansal Steel Corporation & Ors [Central Excise Appeal No. 108 of 2007 order dated 16.08.2017] has categorically held in para 9 to 12 that Rule 209A of the Central Excise Rule, 2002 is attracted only when the person has physically dealt with the excisable goods with the knowledge or belief that the goods were liable for confiscation. In the said judgment the Hon'ble High Court has relied upon the previous two judgments of the Hon'ble Bombay High Court in the matter of Commissioner of Central Excise Vs M/s. Ramesh Kumar Rajendra Kumar and Co & Anr decided on 14.09.2010 and Jayantilal Thakkar & Co.
- there is no allegation that the Appellant has physically dealt with the goods so as to imposed penalty under Rule, 26.
- This Hon'ble Tribunal in the matter of Nalwa Metals & Alloys Ltd & Ors Vs Commissioner of Central Excise, Mumbai – III in Appeal No. E/1628/97-Mum has categorically held in para 5 that Appellant in that case was not involved in transporting, removing, depositing, keeping, concealing etc of any excisable goods which are liable for confiscation. It was further held that Rule 209A of the Central Excise Rule cannot be imposed upon the Appellant. It is also held that in the new Central Excise Rule 2002, Rule 26 is pari materia to Rule 209A, when it was realized by the government that offence of similar nature is also occurring for extending the fraudulent benefit by way of fake documents, the legislature have consciously inserted sub-rule 2 in Rule 26 to bring such offences under the ambit of penal provision. Since the provision of sub-rule 2 of Rule 26 was neither existing in Rule 26 (1) nor in Rule 209A of the Central Excise Rule,

the provision of sub rule (2) cannot be made applicable prior to 01.03.2007 when sub-rule (2) was inserted.

- In the present case also the allegations pertains to prior to 01.03.2007 and there is no allegation of physically dealing with the goods by the Appellant and as such Rule 26 (2) cannot be given a retrospective effect. Hence, the penalty of Rs. 90,00,000/- imposed upon the Appellant is not sustainable.
- In view of the aforesaid submission the penalty imposed upon the Appellant may be quashed and set aside.

3.3 Arguing for the appellant 2, his counsels submitted as follows:

- From para 94.1 and 109.2 of the impugned order, it is very clear that the whole case of the Department made out against the Appellant is that he used to deal with the fabricated documents which were further used to claim rebates. Accordingly, the entire allegation on the Appellant is solely about handling of the said fabricated papers.
- Penalty has been imposed upon the appellant under Rule 26 of the Central Excise Rules, 2002.
- It is relevant to note that Rule 26 at the relevant point in time provided for the penalty only if the person physically dealt with the goods. Reliance is placed on the decision of Hon'ble Bombay High Court in M/s Bansal Steel Corporation and Ors. etc., [Order dated 12.09.2017 in CEA No. 108 of 2007] para 11.
- The provisions of the Rule 26 of the Excise Rules are not attracted in the present case as sole allegation against the Appellant is with respect to the handling of documents for claiming the rebate. However, as stated above, mere handling of documents without the other ingredients as specified in the Rule 26 viz. physically dealing with the excisable goods with the knowledge or belief that the goods are liable for confiscation, will not attract the penal provision under said Rule. Therefore, no penalty is liable to be imposed on the Appellant under Rule 26 of the Excise Rules.

- Rule 26 was amended in the year 2007 vide which a sub-clause (2) was added in the said Rule to penalize a person even for handling of documents without actual supply of materials or any other documents on the basis of which the user of said document is likely to take any ineligible benefit. The said sub-rule was brought in effect from 01.03.2007. However, it is submitted that the period of dispute in the present case is July 2005 to March 2006 i.e. which is before the insertion of the said penal provision under Rule 26. Therefore, it is relevant to submit that the very fact that an amendment was categorically introduced to the effect to make such persons who are not even dealing with the goods liable to penalty, makes it amply clear that there was no intention of the legislation to impose such a penalty on mere handling of documents prior to the said amendment. This amendment is prospective in nature, Reliance is placed on the following decisions
 - Balaji Enterprises [1997 (92) ELT 3 SC]
 - Indian National Shipowners Association [2009 (13) S.T.R. 235 (Bom.)]
 - Mini Steel Traders, [2014 (309) E.L.T. 404 (P & H)]
 - Steel India Company [2014 (310) E.L.T. 184 (Tri. - Mumbai)]
- The ratio of the above decisions applies squarely on the present matter, hence no penalty under Rule 26 (2) of the Excise Rules can be imposed on the Appellant. In any case, it is a trite law that no penalty can be imposed on such an offence which was committed before the said offence was penalized. Reliance in this regard is also placed on the decision of Hon'ble Supreme Court in the case of Commissioner of Central Excise v/s Elgi Equipments Ltd, wherein it is categorically held that illegality committed prior to insertion of section 11AC of the Central Excise Act, 1944 cannot be subject matter of penalty under the said provision.
- The case laws relied upon by the Learned Departmental Representative during the course of hearing cannot be applied to the present case as none of the decisions deal

with penalty for handling the documents during the relevant period in terms of Rule 26 of the Excise Rules.

- Without prejudice to the above, the Appellant in the present case has paid Rs. 2,00,000/- during the stay and Rs. 6,00,000/- during the investigation, which is more than the amount that the Appellant has earned for handling of the said documents. Therefore, it is most humbly submitted before this Hon'ble Bench to kindly consider the same while deciding the present appeal.

3.4 Arguing for the revenue learned authorized representative submits that:-

- Appellants were instrumental in filing the fake documents with an intention to obtain rebate from the department and they have also succeeded in obtaining a considerable amount of Rs.1.59 Crores from such fake rebate claims, on the basis of forged and fabricated Central Excise documents.
- Admittedly to attract penalty under Rule 26, a person has to (i) acquire possession of, or (ii) in any way to be concerned in their transportation, removal, deposition, keep, sell or purchase, or (iii) in any other manner deal with the excisable goods and he should have knowledge or reason to believe that such goods are liable to confiscation, Rule 25 inter-alia provides the confiscation of the goods in respect of which contravention of any of the provisions of the Central Excise Rules or Notifications issued thereunder has been done. Here the terms dealing in any other manner in Rule 26 and 'contravention of any of the provisions of the rules or notification issued there under in Rule 25 is relevant to the subject issue.
- The contention of the appellants that Rule 26 as it existed prior to the amendments made in 2007, is applicable only in the case where the person has dealt with the goods liable for confiscation has been rejected by the Tribunal in the case of Babul Jain [A/3314-3329/15/EB dated 16.07.2015]. Appellants have relied on the decision of Hon'ble Bombay High Court in the case of Bansal Steel Corporation [2017-TIOL-1883-HC-MUM-CX]

- The expression "in any other manner deal with the excisable goods" in Rule 26 is separated by "or and "" from the expression "acquire possession of" excisable goods. Being separated by "or and "" both expressions stand on equal footings and are independent of each other. Thus, the acts of Creation of alleged Central Excise documents viz. invoices, ARE-1's, alleged duty payment documents, alleged proof of exports, are activities which perfectly fit the expression "in any other manner deal with the excisable goods" in Rule 26.
- As the investigation could not trace the manufacturer of goods, it does not necessarily lead to conclusion that there was no existence of excisable goods per se. Even otherwise, the expression "Excisable Goods" in Rule 26 if read standalone (as the expression "in any other manner deal with the excisable goods" is duly separated by expression "or" and "," from the expression "acquire possession of" means goods liable to excise duty i.e. it has no relationship with physical existence of goods. According to Section 2 (d) of Central Excise Act 1944: "Excisable goods" means goods specified in the first schedule and the second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt". Thus, any goods mentioned in the first schedule of the said Central Excise Tariff Act will also be excisable goods. In *M/s. Hiralal Ratanlal vs. STO*, (AIR 1973 SC 1034), the apex Court observed as follows: *"In construing a statutory provision the first and foremost rule of construction is the literal construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear."*
- Rule 26 of the Central Excise Rule, 2002 as existing at point of time in instant case, that the expression "in any other manner deal with the excisable goods" is duly separated by expression "or and "," from the expression

"acquire possession of". The expression "acquire possession of" provides a meaning of physical existence of goods, whereas, the expression "Excisable goods" as defined under the Central Excise Act, 1944 is having a definite meaning, a description mentioned in the schedules of the Central Excise Tariff Act, 1985 bereft of its physical existence. There is no ambiguity in the fact that product description in alleged fabricated documents is duly covered by the first schedule of the Central Excise Tariff Act, 1985, thereby specifically establishing that product description mentioned in forged document was excisable goods as stated in Rule 26 of the Central Excise Rule, 2002.

- The appellant's have argued that the amendments carried out vide notification 8/2007-Central Excise (N.T.) 01.03.2007 are prospective and cannot be applied to their case where the offence for which the penalty has been imposed is prior to 01.03.2007. For this purpose they have relied upon certain decisions
- Rule 26 of Central Excise Rules, 2002 as it existed derived its power from Section 37(5) of the Central Excise Act, 1944. The Central Government by notification No. 8/2007 - Central Excise (N.T.) 01.03.2007 in exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944), carried out certain amendments in Rule 26 of the Central Excise Rules, 2002, namely:-

"6. Rule 26 of the said rules, shall be re-numbered as sub-rule (1) thereof, and in sub-rule (1), as so re-numbered,-

(a) with effect from the date on which the Finance Bill, 2007 receives assent of the President, for the words, "rupees ten thousand", the words, "two thousand rupees" shall be substituted;

(b) after sub-rule(1) as so re-numbered, the following sub-rule shall be inserted, namely:-

"(2) Any person, who issues-

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater". "

- It is worthwhile to note that the said amendment to Rule 26 has been carried out without any corresponding amendment in the Section 37(5) and thus derives its power from the said section and is only clarificatory in nature. The amendments carried out through notification No. 8/2007- Central Excise (N.T.) 01.03.2007 therefore, are, equally applicable to cases prior to issuance of this notification read with provisions of Section 37(5) of the Central Excise Act, 1944.
- In any case, each issue has to be dealt with separately, in the instant case detailed investigations have been carried out and it was comprehensively established that a conspiracy was hatched, fake documents viz. ARE-1, invoice etc were fabricated, proof of exports was also fabricated, and claims submitted to Maritime Commissioner and even ineligible rebate of Rs1,59,07,687/-was obtained by defrauding the Revenue. Thus, the entire scheme was nothing but a well thought out fraud. The main perpetrators of the fraud viz. Shri M.K.Patel and Shri Riyaz Padela have accepted the fraud and refunded the amount covering rebate sanctioned during the course of investigation.
- Reliance is also placed on the decisions in the case of Samsung India Electronics Ltd. vs. Commissioner of Customs, New Delhi-2014 (307) ELT 160 (Tri.-Del.) and ICI India Limited [2003 (151) ELT 336 (Tri.Del.)]
- Appellants have allegedly procured allegedly manufactured excisable goods, allegedly managed to transport these goods to port of export, allegedly managed to obtain proof of export for alleged exports, filed claims of rebate of

excise duty on exports on the strength of alleged exports and managed to obtain rebate of purported excise duty paid on alleged exports to the tune of Rs 1,59,07,687/-. The appellants have thus played an elaborate fraud on revenue and are now claiming amnesty by pleading a right in law. The plea by appellants that, they are not liable to penalty is not tenable and should be rejected .

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

4.2 From the facts as stated in the impugned order it is evident that five merchant exporters had filed the rebate claims as detailed in table below:

S.No.	Merchant Exporter	Number of Rebate Claim	Total Rebate Claimed (Rs.)
1	M/s. Xian Organics (Noticee No. 1), Valsad, Gujarat	33	2,57,40,821/-
2	M/s. Swift Trading(India) (Noticee No. 2). Ankleshwar, Gujarat	9	86,08,887/-
3	M/s. New Life Organics (Noticee No. 3). Valsad, Gujarat	13	1,32,13,580/-
4	M/s. Real Business House (Noticee No. 4), Valsad, Gujarat	15	1,14,67,021/-
5	M/s. J.D. Trading House (Noticee No.5)	15	2,41,70,349/-
	Total	85	8,32,00,658/-

4.3 Rebate claims as detailed in table below, after causing due verification rebate claims as detailed below were sanctioned in the favour of claimant merchant exporters

	Merchant Exporter	Number of Rebate Claims	Total Rebate Claimed (Rs.)
1	M/s. Xian Organics (Noticee No. 1), Valsad, Gujrat	11	82,07,736/ -
2	M/s. Swift Trading (India) (Noticee No. 2). Ankleshwar, Gujarat	6	57,39,258/-

3	M/s. New Life Organics (Noticee No. 3). Valsad, Gujarat	2	19,60,693/-
		19	1,59,07,687/-

4.4 Investigations made in respect of the rebate claims filed by the five merchant exporters revealed that they had neither paid any Central Excise duty or they have exported any goods. The investigations revealed following facts:

- The manufacturers M/s. India Nippon Electrical Ltd. and M/s. Neuland Laboratories, Ankleshwar, Gujarat, whose goods were claimed to have been exported, were not in existence.
- The jurisdictional Excise officers have confirmed that they have not supervised the stuffing of export consignments and no Central Excise duty was paid by the said units.
- The Customs authorities of JNCH, Nhava Sheva, have confirmed that no such goods as claimed by the exporters, were actually exported from the said port.
- The office addresses of the said merchant exporters were found fake and their proprietors, directors had also provided fake addresses and identity.
- The export documents viz. ARE-1s, shipping bills, mate receipts etc. were found to be fake and fabricated.
- Shri Sushil Ishwarbhai Patel), Proprietor of New Life Organics, Shri Anil Himmatbhai Patel, Proprietor of M/s. Xian Organics and Shri Harish Sushil Patel, Proprietor of M/s Trading (India) could not be traced, as their identity and addresses were found to be fake and non-existent.

4.5 As the five merchant exporters and the declared manufacturers of export goods were found non-existent, investigations were made to trace out the beneficiaries of the rebate amount sanctioned and then it transpired that Shri M.K. Patel and Shri Riyaz Padela had willfully conspired with Shri Dilkumar and his associate Shri Rakesh for filing the fraudulent and fake rebate claims and they were the beneficiaries of the amount sanctioned. The amount of rebate obtained was deposited in the accounts of the respective firms and was transferred/ siphoned off and then encashed through the dummy accounts opened in Memon Co-operative Bank, Surat Shri Afraz

Abdul Razak Bachau and Shri Javed Abdul Quadir Shaikh had done the work of transfer and encashment of the amount with the help of Shri Quadir Amin Dangra a clerk in the said Bank. For this purpose, the accounts of Shri Pinakin Muljibhai Rajawala and Shri Ketan Dhansukhbhai Gotawala were used to deposit the amount transferred from the accounts of the merchants and to withdraw the amount by cash. The cash withdrawn and collected by Shri Afroz Bachau and/or Shri Javed Shaikh was delivered to Shri Riyaz Padela. After receipt of the cash from Shri Afroz Bachau and/or Shri Javed Shaikh, Shri Riyaz Padela distributed the amount in the ratio of **60% to Shri M.K. Patel, 30% to Shri Dilkumar and Shri Rakesh and 10% to Shri Riyaz Padela himself, as agreed upon by them.** Shri Ashvin Virani had transferred the share of Shri M. K.Patel from Surat to Mumbai Thane, through the courier account of his courier.

4.6 During the course of investigations, the noticee have returned the amount of Rs. 1,59,26,000/ which covers rebate which was fraudulently availed as per the following details: -

Sr No	Person	Amount (Rs)
1	Amount transferred from the a/c of Shri Pinakin Rajwala with the Memon Co-op Bank, Mumbai branch	22,15,000
2	DD issued by Memon Co-op Bank, Surat from A/c of Shri Ketan Gotawala	29,76,000
3	Amount paid by Riyaz Padela	6,00,000
4	Amount paid by Shri Venkat Chari on behalf of Shri M.K.Patel	1,01,35,000
		1,59,26,000

4.8 For imposition of the penalties on the two appellant impugned order records as follows:

"88. The investigations revealed that Shri M.K. Patel (Noticee No. 9), Superintendent of Central Excise, Mumbai, had played crucial role in presentations o! fabricated/fake rebate claims to the Maritime Commissioner, Raigad and had earned considerable monetary benefit out of the amount of rebate received in the name of the merchant exporters. The evidence collected during investigations is summerised as under:

88.1 It was revealed that (i) M/s. Xian Organics, Valsad, (ii) M/s. Swift Trading (India) Mumbai and (iii) M/s. New Life Organics, Ankleshwar, had issued authority letters authorizing Shri Bhaskar Tate to submit the rebate claims on their behalf to the Maritime Commissioner and to receive the cheques pertaining to the sanctioned rebate amount, from the said authority.

88.2 Shri Bhaskar Gulabrao Tate had deposed that Shri Deepak Jare, had introduced him to Shri M. K. Patel and instructed him to work for him as Shri M. K. Patel was an Exporter. As he did not have any work he had associated himself with Shri M. K. Patel, who paid him small amounts to cover his travelling expenses. Shri M. K. Patel used to instruct him to do the follow-up of the subject rebate claims at the Rebate Section, Raigad and also at the Customs, JNPT, Nhava Sheva. Shri Bhaskar Tate further stated that, in all, he had submitted more than 40 Rebate Claims to the office of the Maritime Commissioner, Raigad for (i) M/s. Xian Organics, Valsad, (ii) M/s. Swift Trading (India) Mumbai and (iii) M/s. New Life Organics, Ankleshwar, which were handed over to him by Shri M K Patel, for their onward submission. He had collected following four cheques from the rebate section which were handed over to Shri M K Patel. He gave the details as under:

S. No.	Name of the Party	Amount (Rs.)
1	M/s. Xian Organics	82,07,735/-
2	M/s. Swift Trading (India)	57,39,258/-
3	M/s. New Life Organics	9,70,640/-
4	M/s. New Life Organics	9,90,053/-

88.3 Shri Deepak Sharad Jare was in the business of Clearing and Forwarding. In 2004, he met Shri M K Patel at Bhiwandi, while dealing with certain export consignments, stuffed under the supervision of Shri M. K. Patel. Later on Shri M K Patel introduced him with Shri Riyaz Padela from Surat. Shri M.K. Patel and Shri Riyaz Padela had requested him to help them in processing of several Central Excise rebate claims which were to be filed with the Maritime Commissioner, Raigad. As Shri M K Patel was known to him, he had instructed his cousin, Shri

Bhaskar Tate to assist them in the work related to processing of the said rebate claims. Thereafter, Shri Riyaz Padela had handed over the 'Authority Letters' of above named firms, which authorized Shri Bhaskar Tate to act on behalf of the firms. As per the directions of Shri M K Patel, Shri Bhaskar Tate collected the rebate claims from the residence of Shri M. K. Patel situated at B-201, Siddhi Towers, Bhakti Mandir Marg, Thane(W) and submitted to the office of the Maritime Commissionerate, Raigad, when the rebate claims were sanctioned, Shri Bhaskar Tate collected the cheques and handed over the same to Shri M. K. Patel, at his residence, at Thane. Shri Bhaskar Tate used to co-ordinate the whole exercise of filing, processing and collecting cheques pertaining to sanction of the rebate claims, under the directions of Shri M K Patel and he (Deepak Jare) was not actively involved in the said exercise nor has he received any remuneration for the same. Shri Deepak Jare further stated that he had visited the office of the Maritime Commissionerate, Raigad, in the said connection on couple of occasions, on the instructions of Shri M K Patel to handle some technical clarifications required by the Rebate Section which Shri Bhaskar Tate was unable to handle. During his such visits he had seen the rebate claims of the said firms in question for the first time and he suspected about the genuineness of the same. He brought the same to the notice of Shri M K Patel, who assured that there would not be any problem and in any such event, Shri M. K. Patel would manage such problem. Since he was not satisfied with the reply, he started avoiding going to office of the Maritime Commissionerate, Raigad and he had even instructed Shri Bhaskar Tate to stop assisting Shri M K Patel in the processing of such rebate claims. On 7th June 2006, he was informed by Shri A. S. Bansode that, the manufacturers and merchants Involved in the said claims were bogus and as such, requested him to attend the office of the Maritime Commissionerate for satisfying their queries. However, Shri M. K. Patel had advised him not to respond to the summons issued to him to attend the office of the Central Excise department. In his further statement dated 27.07.06, Shri Deepak Sharad Jare has, Inter- alia, stated that he had received a phone/call from Shri Riyaz Padela, asking him not to respond to the

communications to attend the office of Central Excise department for the purpose of the investigation, since the entire matter was being sorted out by him. Shri M K Patel and Shri Riyaz Padela were in regular contact with him over phone and both of them had advised him to avoid going to the office of the Central Excise department and stay at home. He further stated that he has not received any monetary benefit and he had worked for Shri M K Patel & Shri Riyaz Padela because Shri M. K. Patel had promised to introduce him to his friends who were in the business of export.

88.4 Shri A.S. Bansode, Inspector, Central Excise, Raigad in his statement dated 26.06.06, stated that he has not played any active role in filing rebate claims of the above mentioned firms. He was not aware of any of the merchant exporters. In November/December, 2005 Shri M.K. Patel told him that, some of his friends wanted to file rebate claims with the Maritime Commissioner, Raigad. He sent their agent Shri Deepak Jare to him with a request to introduce Shri Deepak Jare to the officers in rebate section of Raigad, for the said purpose. Accordingly, as per the request of his senior colleague, Shri M K Patel, he had introduced the said person to the Rebate Section on the assumption that the rebate claims were correct and genuine. In June 2006 he had learnt that investigations were going on in the matter of the above mentioned rebate claims. He immediately contacted Shri M. K. Patel and had confronted him, but Shri M. K. Patel had assured him that everything was above board. He had called up Shri Deepak Jare and Shri M K Patel and requested them to come clean on the issue and also asked Shri M.K. Patel to advice Shri Deepak Jare to appear before the investigating officials and co-operate in the investigations. Every time Shri M. K. Patel used to assure him that there was nothing wrong in the rebate claims.

88.5 Shri Qadir Amin Dangra clerk of M/s. Memon Co-op. Bank, Surat in his statement dated 24.07.06 deposed that an amount of Rs.1,75,00,000/- was withdrawn from the account of Shri Pinakin Rajawala (holder of dummy account in his bank), by him and was given to Shri Javed Shaikh. The entire transactions were carried out by Shri Riyaz Padela & Shri M.K. Patel, who had

approached him for his help to open accounts in different names and to deposit certain cheques in such accounts and en-cash the amount. According to their instructions he had opened the dummy accounts.

88.6 The investigations thus revealed that Shri M. K. Patel, Superintendent of the Central Excise had actively involved himself in de-frauding the Government revenue by filing false claims of rebate with the office of the Maritime Commissioner, Raigad. He could not be located at his known addresses in the meantime anticipatory bail by Panvel court was granted to him with the directions to co-operate in the investigations. In his said statement dated 28.09.2006, Shri M.K. Patel has, inter-alia, stated that he was posted as Superintendent, Central Excise (Statistics), Thane-I in 2004 and on 07.10.2005, he was placed under suspension in connection with a case involving misuse of CENVAT facility. He knew Shri Riyaz Padela since the middle of 2003. Shri M.K. Patel, in his statement dated 05.10.2006 stated that he met Shri Deepak Jare who was a clearing agent during his tenure at Bhiwandi during 2003-04 and thereafter, they were in contact. Somewhere in the later part of 2005, he had received a request from Shri Riyaz Padela for the services of a clearing agent for his work related to export from Mumbai and he introduced Shri Riyaz Padela to Shri Deepak Jare. Once he had accompanied Shri Riyaz Padela to Shri Deepak Jare's office and during the said meeting he had learnt that Shri Riyaz Padela had completed export with the help of some other clearing agent and he sought the help of Shri Deepak Jare for processing of the rebate claims at Raigad Maritime Commissionerate. To this Shri Deepak Jare agreed and directed his employee, Shri Bhaskar Tate to take care of the said work. Somewhere at the end of 2005, Shri Deepak Jare informed him that the rebate claims of Shri Riyaz Padela were processed in the office of the Maritime Commissioner, Raigad and requested him to receive the cheque of rebate sanction amount from Shri Bhaskar Tate, who would be collecting the same personally from the department. Accordingly, Shri Bhaskar Tate brought the envelope containing the cheque to his residence, which was collected from him on the same day by Shri Riyaz Padela in person. Similarly on two/three occasions the

exchange of documents between Shri Bhaskar Tate and Shri Riyaz Padela had taken place through him.

88.7 Shri Riyaz Padela in his said statement dated 15.12.06 deposed that-

(i) he knew Shri M.K. Patel from the time when he was Superintendent at Bhiwandi in the year 2004. Somewhere in March-April, 2005, Shri M. K. Patel offered him help as he was in a position to facilitate the rebate claims, with the officers in Central Excise Raigad Rebate Department. Thereafter, he had offered one Shri Dilkumar to carry out the work of encashing the cheques with his friend, Shri Afroz Bachau, which Shri Dilkumar accepted. Shri Dilkumar had informed him that he indeed had some claims of Excise Rebate and in case any person could help him to process the same, he would be interested. Accordingly, he gave a positive reply to Shri M. K. Patel of his said proposal. He requested Shri Dilkumar to give him few sets of the exports documents and showed the same to Shri M. K. Patel on his visit to Surat. After going through the said documents, Shri M. K. Patel informed him that, he could claim the rebate on the basis of the said documents and Shri M. K. Patel would have to be paid 60% of the total rebate amount claimed towards the work done through him. Shri Dilkumar accepted the offer and introduced him to Shri Rakesh and informed that from then onwards he was required to contact Shri Rakesh for obtaining all the sets of rebate claims,

(ii) In terms of the above understanding reached by him and Shri M. K. Patel with Shri Dilkumar, Shri M. K. Patel had provided him with a list of the documents which were required for claiming rebate. The documents prepared for rebate claims were checked and scrutinized by Shri M.K. Patel and changes suggested by him were carried out by Shri Rakesh. The liaison work relating to documents between Shri M.K. Patel and Shri Rakesh was done by him. The documents were forwarded to Shri M. K. Patel, either through the courier agency M/s. Shree Maruti Couriers or by handing over the same personally. The amount which was required to be handed over to Shri M. K. Patel out of the sanctioned rebate claims (which amounted to 60% of the total amount of rebate sanctioned), was given to Shri M. K. Patel

through M/s. Patel Natwarlal Chinubhai & Co., (a private courier agency), situated at Surat.

(iii) He has given Shri M. K. Patel, about Rs. 95 lakh towards his share of payment calculated @ 60% of the rebate amount, for facilitating the processing and sanction of rebate claims. Thereafter, 3 cheques of rebate sanctioned amount were deposited in Thane, two of the said cheques were deposited by him at the HDFC Bank and one through Shri M.K.Patel at IndusInd Bank, in the Current Accounts held by the merchant exporters concerned in the said banks. He received cross bearer cheques issued from these accounts of the said merchant exporters from Shri Rakesh, on which, the name of the drawee was left blank. He gave those blank cross bearer cheques to Shri Afroze Bachau for encashment, on commission basis. After cheques were cleared, he received the money from Shri Afroz Bachau, out of which, he sent to Shri M.K. Patel, his share of 60% of the rebate amount. Shri Riyaz Padela further stated that he did not have any knowledge about the merchant exporters in respect of whom the rebate claims had been filed. Shri Riyaz Padela in his statement dated 19.12.2006 admitted that the complete set of rebate claim documents were sent by his friend Shri Afroz Mansoori, on his instructions to Shri M.K. Patel, for processing and sanction. The documents sent to Shri M.K.Patel were provided to him by Shri Rakesh, who was introduced to him by Shri Dilkumar.

(iv) Further Shri Riyaz Padela in his statement recorded on 26.12.2006 stated that Shri Rakesh had contacted him on several occasions with regard to written references/queries from Central Excise Raigad Commissionerate in relation to the rebate claims. He used to prepare a draft reply as per the guidance of Shri M.K. Patel and give it to Shri Rakesh, who in turn, used to bring back the said reply duly typed over the concerned company's letter- heads and duly signed by the authorized persons, which he then, forwarded to Shri M. K. Patel for submission to the excise authority. The documents of rebate claims received from Shri Rakesh and forwarded to Shri M.K. Patel pertained to the following firms viz., (I) M/s. Xian Organics, Valsad (ii) M/s. Real business House, Valsad (iii) M/s. New Life

Organics, Ankleshwar (iv) M/s. J.D. Trading, Ankleshwar & (v) M/s. Swift Trading India, Mumbai.

88.8 *Shri M. K. Patel in his statement dated 15.01.07 and dated 26.02.07 admitted that in all 11 parcels were received by him and 1 parcel was received on his behalf, which were sent by Shri Ralyaz Padela from Surat. The parcels contained documents related to claims of rebate which were handed over by him to Shri Bhasker Tate, the employee of Shri Deepak Jare, the CHA. During the recording of his statement dated 28.02.07, Shri M. K. Patel was shown copies of the documents pertaining to the claims of rebate made by the said 5 merchant exporters with the Maritime Commissioner. He was asked to state whether any of the documents have been prepared by him, particularly, the sealed covers received from the JNCH, Nhava Sheva, containing certificate of exports of goods and the report of the Central Excise Range office, certifying the Central Excise duty payment by the manufacturing units concerned. Shri M. K. Patel stated that the handwriting on the sealed envelopes merely appeared similar to his own handwriting. When he was further shown one more set of the rebate claim No. 35736/24.03.06 filed by M/s. J.D. Trading House, and the ARE-1 No. 504/02.09.05 and the Shipping Bill No. 3697581 dated 05.09.05 filed alongwith the same, he stated that even in respect of said set of papers, the handwriting of the words and figures found over the sealed cover, appeared to be similar to his own handwriting.*

88.9 *In course of his examination, Shri M.K. Patel during his statement dated 04.05.2007 was shown a letter bearing F.No.516-Gen./Mis-252/2006/451 addressed to the Assistant Commissioner (Rebate), Central Excise, Raigad, wherein the digits '451' was the outward number of the said letter and the same was written by hand. He was also shown the envelope, which indicated the address of the said authority, also written by him. The*

contents of the said letter indicated that the JNCH authorities had certified the export of the goods, on which the rebate was claimed by the merchant exporter concerned. Investigation, revealed that the said certificates were not at all issued by the JNCH authorities and were Fabricated. Shri M.K. Patel was asked

to state whether the outward number '451' appearing on the letter and the address on the envelope were in his handwriting. Shri M.K. Patel stated that both the writings appeared to be similar to his handwriting and avoided giving a categorical reply.

88.9 Investigations also revealed that the documents certifying duty payment and the proof of export submitted by the exporters, were in fact fabricated documents. No such certificates were actually issued by the said authorities in respect of the said goods as confirmed by the Commissioner of Customs (Export), JNCH, Sheva, vide his letter F.No. SG/MISC-254/06 SIIB (X)JNCH dated 09.05.07. It was observed that handwriting on the sealed covers and on the letters placed inside, apparently matched the with the handwriting of Shri M. K. Patel, who merely stated that the handwriting on the said documents only appeared to be similar to his own.

88.10 In order to confirm the identity of the person who fabricated the documents in question, specimen original copies of the questionable documents (along with specimen handwriting of Shri M.K. Patel, were forwarded to the Government Examiner of Questioned Documents, Hyderabad, for comparison of the handwritings. The report sent by Government Examiner of Questioned Documents, Hyderabad, vide letter C4-238/2007/3132 dated 01.10.2007 confirmed that the handwriting on the fabricated ARE-1s submitted alongwith the rebate claims, was that of Shri M.K. Patel. The said report further confirmed that even the envelopes addressed to the rebate sanctioning authority purportedly sent by the office of JNCH authorities containing typed letters certifying the exports of goods in question and similar such envelopes supposedly addressed to the Maritime Commissioner by the jurisdictional Range Superintendent of the alleged fictitious manufacturers containing letters certifying the duty paying nature of the said goods, were also prepared by Shri M.K. Patel, all in his own handwriting.

88.11 During investigations Shri Venkat Chari under his letter dated 13.03.2007 submitted two copies of TR-6 challans whereunder amount of Rs.70,00,000/- (Rs. 30,00,000/- plus Rs.40,00,000/-) was deposited in the Govt. treasury, under

protest, by the said person. He also stated that the said payment was made towards erroneously refunded rebate amount to the said merchant exporters by the Maritime Commissioner. Shri Venkat Chari, in his statement dated 21.03.2007 stated that he was a family friend of Shri M.K. Patel and he had no business or commercial relationship with Shri M.K. Patel. Shri M.K. Patel had told him that he was having some monetary problem to settle some dues of the Central Excise Department as his name had figured in the investigations relating to sanction of irregular rebate and he was required to pay an amount of Rs.70,00,000/- approximately to the Central Excise Department. For the sake of his friendship with Shri M.K. Patel, he had taken out two pay orders of Rs.30,00,000/- and Rs.40,00,000/- and tendered the payments under TR-6 Challans in the State Bank of India, Konkan Bhavan Branch at Navi Mumbai. As instructed by Shri M. K. Patel he had made the payment "under protest" and the money paid by him was in the nature of loan to Shri M. K Patel, Shri Venkat R. Chari, in his further statement dated 04.05.2007 stated that on the request of Shri M.K. Patel he has further deposited an amount of Rs.31,35,000/- (Rs.30,00,000/- by cheques drawn on his personal account with Standard Chartered Bank and Rs.1,35,000/- by way of cash). He submitted copies of the TR6 challans in the said regard. He has further stated that like the earlier payments made by him on behalf of Shri M.K: Patel, he has drawn the cheques directly in the name of the Excise Department to avoid delay in the payments as requested by Shri M. K. Patel. Thus, Shri Venkat Chari had paid an aggregate amount of Rs. 101.35 lakh, on behalf of Shri M. K. Patel, towards the re-payment against erroneously sanctioned and paid rebate to the 3 merchant exporters.

89. The investigations revealed that Shri Riyaz Rafiq Padela (Noticee No.10) had actively involved in procurement and submission of fabricated rebate documents with the office of the Maritime Commissioner, Raigad and he was one of the beneficiaries of the amount of rebate obtained. The evidence collected during investigations is as under:

89.1 Shri Qadir Amin Dangra clerk in the Memon Co-op. Bank, Surat in his deposition recorded on 09.06.2006 stated that, Shri

Javed Shaikh who later on was found to be associate of Shri Riyaz Rafiq Padela, had contacted him to open accounts in the Memon Co-op. Bank, in the names of some other persons. Pursuant to the said proposal of Shri Javed Shaikh, he had introduced him to Shri Pinakin Muljibhai Rajawala who agreed to open the bank account in his name, for consideration of Rs.4000/- to Rs.5,000/- per month. The amount deposited in the account of Shri Pinakin Mulji Rajawala, through certain cheques, was withdrawn, in cash, by Shri Javed Shaikh. On 05.06.2006, a cheque issued from HDFC Bank was deposited in the said account of Shri Pinakin Mulji Rajawala, for an amount of around Rs.10 lakh, which had been withdrawn by Shri Javed Shaikh. Shri Qadir Amin Dangra in his deposition recorded on 10.07.2006, stated that besides the account of Shri Pinakin Mulji Rajawala, he had also managed the accounts opened In the Memon Co-Op. -Bank, Surat in the names of (1) Rakesh Kumar Madhubhai More, (2) Shri Ketan Ghansubhai Gotawala, (3) Shri Sikandar Mithani, (4) Kalandar Textile, (5) M.N. Traders & (6) Faijal Dib. In all the accounts, various types of cheques were deposited and on their clearance, full amount was withdrawn in cash and for that purpose, he used to keep the pre-signed blank cheques of all the said account holders with him. All the aforesaid account holders were given Rs.15,000/- to Rs.20,000/- for the use of their accounts. In all the bank accounts as stated above, the cheques were deposited by Shri Riyaz Padela or Shri Javed Shaikh who used to work for Shri Riyaz Padela. Shri Riyaz Padela and Shri Javed Shaikh deposited the cheques issued by M/s. Xian Organics, M/s. Swift Trading and M/s. New Life Organics in the aforesaid accounts and the entire amount was withdrawn in cash. The operation of the aforesaid accounts was looked after by him personally on the instructions from Shri Riyaz Padela or Shri Javed Shaikh. Shri Javed Shaikh and Shri Riyaz Padela decided about deposit and withdrawal from the each of the accounts and he was not aware as to wherefrom these persons procured the concerned cheques and to whom the amount so withdrawn was being handed over to. In his further statement dated 24.07.06, Shri Qadir Amin Dangra deposed that, on 07.06.06 an amount of Rs.1,75,00,000/- was withdrawn from the account of Shri Pinakin Rajawala by him and was given

to Shri Javed Shaikh. He stated that, the entire transactions were carried out by Shri Riyaz Padela & his friend Shri M.K. Patel. These two persons had come and met him at the Bank and requested for his help to open accounts in different names to deposit certain cheques in such accounts and encash the full amount. According to their instructions he had opened the aforesaid accounts. Shri Riyaz Padela and Shri Javed Shaikh operated the cheque discounting accounts and the account holders viz. i) Shri Rakesh Kumar Madhubhai More ii) Shri Ketan Dhansukhbhai Gotawala iii) Shri Pinakin Muljibhai Rajawala iv) Shri Sikandar Mithani v) M/s. Kulandar Textiles vi) M/s. M.N.Traders & vii) Shri Faisal Dhib, never personally operated their accounts. All the cheques pertaining to the above mentioned accounts were deposited by Shri Javed Shaikh and the cash was also collected by him,

89.2 Shri Deepak Sharad Jare in his statement dated 26.07.2006 stated that Shri MK Patel had introduced him to Shri Riyaz Padela from Surat and had informed him that Shri Riyaz Padela was in the business of export. They requested for his help in processing of several Central Excise rebate claims which were to be filed with the Maritime Commissionerate, Raigad. As Shri M K Patel was known to him, he had instructed his cousin, Shri Bhaskar Tate to assist them in the work related to the processing of the said rebate claims. Thereafter, Shri Riyaz Padela had hand over the 'Authority Letters' in the name of Shri Bhaskar Tate, which authorized him to act on behalf of the firms namely M/s. Swift Trading (India), Mumbai, M/s. Xian Organics, Valsad and M/s. New Life Organics, Ankleshwar. Alongwith the said 'Authority Letters', Shri Bhaskar Tate was also handed over certain documents pertaining to the rebate claims of the above mentioned three firms by Shri M K Patel for submission and processing at the office of the Maritime Commissionerate, Raigad. In his further statement dated 27.07.06, Shri Deepak Sharad Jare has inter-alia, stated that when investigations were initiated, Shri Riyaz Padela had told him not to respond to the communications and not to attend the office of Central Excise department for the purpose of the investigation, as the entire matter was being sorted out by him. He further stated that he

has not received any monetary benefit and he had worked for Shri M K Patel & Shri Riyaz Padela merely because Shri M. K. Patel had assured to help in the process of help him in getting the business of export. Shri M.K. Patel, in his statement dated 05.10.2006 stated that somewhere in the later part of 2005, he had received a request from Shri Riyaz Padela for the services of a clearing agent to undertake the work related to export from Mumbai and then he had introduced Shri Riyaz Padela to Shri Deepak Jare. Shri Deepak Jare agreed and directed his employee, Shri Bhaskar Tate to take care of the said work. Somewhere at the end of 2005, Shri Deepak Jare informed him to receive the cheque of rebate sanctioned amount from Shri Bhaskar Tate, who would be collecting the same personally from the department. Accordingly, Shri Bhaskar Tate had delivered the envelope containing the cheque to his residence, which was collected on the same night by Shri Riyaz Padela in person. Similarly on two/three occasions the exchange of documents between Shri Bhaskar Tate and Shri Riyaz Padela had taken place through him. Shri Bhaskar Tate had subsequently also delivered the envelope containing the cheque to him and on the request of Shri Riyaz Padela, he had deposited the said cheques in the HDFC Bank Ltd., in the respective bank accounts of the merchant exporters, in whose names the rebate cheques were issued.

89.3 Shri Riyaz Padela in his statement dated 15.12.2006 stated that, he had offered to Shri Dilkumar to carry out the work of encashing the cheques with the help of his friend Shri Afroz Bachau, which Shri Dilkumar accepted. He knew Shri M.K. Patel since 2004 and somewhere In March-April, 2005, Shri M.K.Patel had offered him that, he was in a position to facilitate the export documents for rebate claims, with the officers. In Raigad Rebate Department and further ensured that all the claims would be processed smoothly and speedily. Thereafter, he contacted Shri Dilkumar who gave him few sets of the export documents which were shown to Shri M. K. Patel on his visit to Surat. Shri Patel approved the documents and agreed to process the rebate claims on the basis of the said documents for payment of 60% of the total rebate amount claimed, towards the work done through

him. He in turn had called up Shri Dilkumar and informed him that the work related to claiming of rebate on the basis of documents given by him could only be undertaken against an expense of 70% which included his share of 10% of the total rebate amount claimed, to which Shri Dilkumar agreed. Shri Dilkumar introduced him to Shri Rakesh and said that from then onwards he was required to contact Shri Rakesh for obtaining all the sets of rebate claims. The liaison work relating to documents between Shri M.K. Patel and Shri Rakesh was done by him. The documents were forwarded to Shri M. K. Patel, either through the courier agency or by handing over the same personally. The amount of 60% of the total amount of rebate sanctioned, was given to Shri M, K. Patel through M/s. Patel Natwarlal Chinubhai & Co., (Angadia) (a private courier agency), Surat, He had given Shri M. K. Patel about Rs. 95 lakh towards his share of payment calculated @ 60% of the rebate amount, for facilitating the processing and sanction of rebate claims. On receipt of the cheques of rebate sanctioned amounts through Shri M.K. Patel, he had given the first cheque to Shri Rakesh and he was not aware where the cheque was deposited by Shri Rakesh. Thereafter, 3 more such cheques of rebate sanctioned amount were deposited in Thane, two of the said cheques were deposited by him at the HDFC Bank and one through Shri M.K.Patel at IndusInd Bank, in the Current Account held by the merchant exporter concerned, in the said banks. He had received cross bearer cheques from Shri Rakesh which were given to Shri Afroze Bachau, on commission basis, for encashment through certain accounts in the Memom Co-op Bank, Surat. After these cheques were cleared, he received the money from Shri Afroz Bachau, out of which, he sent to Shri M.K. Patel, his share of 60% of the rebate amount. Shri Riyaz Padela further stated that he did not have any knowledge about the merchant exporters in respect of whom the rebate claims had been filed. Shri Riyaz Padela in his statement recorded on 19.12.2006, admitted that documents consisting of Central Excise invoices, Shipping bill copies, ARE-1s, rebate application forms etc. i.e. complete set of rebate claims and some other related documents, required to be submitted to the Maritime Commissionerate, Raigad, were addressed and sent through courier to Shri M.K. Patel. The

documents for claiming rebate, so sent to Shri M.K.Patel were provided to him by Shri Rakesh, an associate of Shri Dilkumar.

89.4 Shri Afroz Bachau in his statement dated 22.12.2006, deposed that he had assisted Shri Riyaz Padela in discounting of cheques for a commission. The crossed bearer cheques of the clients, were encashed from the Memon-op. Bank, with the help of Shri Qadir Amin Dangra. Shri Riyaz Padela or his employees. cheques. On 07.06.2006 Shri Riyaz Padela had given him a cheque for Rs. 10 lakh for to hand him over the concerned discounting, which he gave to Shri Qadir Amin Dangra and the amount was pending realization.

89.5 Shri Javed Abdul Quadir Shaikh Dhobi, in his statement dated 26.09.2007, interalia stated that Shri Riyaz Padela used to give the cross bearer cheques for discounting to him either directly or through Shri Afroz Bachau. Such cheques were given to Shri Quadir Amin Dangra and cash received was given to Shri Riyaz Padela, against the cheques given by him for discounting. He had so far handed over around Rs.20 lakh to Shri Riyaz Padela.

89.6 Shri Riyaz Padela in his statement recorded on 26.12.2006 inter-alia, stated that Shri Rakesh an associate of Shri Dilkumar had contacted him on several occasions with regard to queries in relation to discrepancies found in the rebate claims and at such times, he used to contact Shri M.K. Patel to get suitable reply furnished for such queries. He used to prepare a draft reply as per the guidance of Shri M.K. Patel and give it to Shri Rakesh, who in turn, used to bring back the said reply duly typed over the concerned company's letter-heads and duly signed by the authorized signatory, which he then, used to forward to Shri M. K. Patel for submission to the authority. He availed the services of M/s. Shree Maruti Courier, Surat for sending all the concerned documents to Shri M.K. Patel. The documents of rebate claims received from Shri Rakesh and forwarded to Shri M.K. Patel pertained to the following firms viz., (i) M/s. Xian Organics, Valsad (ii) M/s. Real business House, Valsad (iii) M/s. New Life Organics, Ankleshwar (iv) M/s. J.D. Trading, Ankleshwar & (v) M/s. Swift Trading India, Mumbai. Shri Riyaz Padela. All the documents and cheques relating to the above firms were

exchanged between him and Shri Rakesh. In further statement dated 28.12.06, Shri Riyaz Padela stated that he did not know the present whereabouts of Shri Dilkumar and Shri Rakesh. Shri Riyaz Padela further informed that he had voluntarily deposited an amount Rs.6,00,000/- (Rs.5 lakh on 21.12.2006 and Rs. 1 lakh on 28.12.2006) towards his share of the amount received and encashed, out of the total rebate sanctioned by the Maritime Commissioner, Raigad, to the said merchant exporters.

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103. As regards the charges of recovery of erroneous rebate paid, rejection of pending rebate claims and imposition of penalty under Section 11AC on Shri M.K. Patel (Noticee No. 9), Shri Riyaz Padela (Noticee No. 10), Shri Dilkumar (Noticee No. 11) and Shri Rakesh (Noticee No. 12), I find that the said charges have been upheld against respective merchants/noticees in whose names the claims have been filed and to whom the rebate amounts were paid. The provisions of Section 11A provide for demand from a person to whom the refund has erroneously been paid. The amounts of rebate have been paid in the names of Noticees No. 1, 2 & 3 but actual recipients were Noticees No. 9 to 12. Also, the evidence on record reveals that the three merchant exporters and their proprietors were dummy entities created with an intention to obtain rebate from Government on the basis of fake/fabricated documents. The persons involved in creation of such dummy entities are found to be Shri M.K. Pate, Shri Riayz Padela, Shri Dil Kumar and Shri Rakesh. They have managed the entire operation of creation of fake rebate claims and fake certificate showing duty payment and export of excisable goods. On receipt of the rebate amount, the benefits were shared by these four persons. The rebate claims were therefore filed and rebate amount was in reality received by them from the Government. Therefore, the Noticees No. 9, 10, 11 & 12 are found to be actual beneficiaries of the refund amount and the charges of demand/recovery and penalty against them are liable to be confirmed.

104. In the subject notice the charges for imposition of penalty under Rule 26 and/or Rule 27 of Central Excise Rules, 2002 are also levelled against all the noticees No. 01 to 21.

It is on record that noticees No. 01 to 05 have filed fake documents with an intention to obtain rebate from the department and they have also succeeded in obtaining considerable amount of Rs.1.59 Crores from such fake rebate claims, on the basis of forged and fabricated Central Excise documents. They are therefore liable for penalty under Rule 26 and Rule 27 of Central Excise Rules, 2002. Noticees No. 6, 7 & 8 being proprietors of Noticees No. 1, 2 & 3, they are not separately liable for penalty. The liability of Noticees No. 09 to 21 is to be examined and determined in the light of the provisions of Rule 26 and Rule 27 of Central Excise Rules, 2002, and defence replies of the noticees.

105. The provisions of Rule 26 and Rule 27 of Central Excise Rules, 2002 are that:

.....

To attract penalty under Rule 26, a person has to (i) acquire possession of, or (ii) in any way to be concerned in their transportation, removal, deposition, keep, sell or purchase, or (iii) in any other manner deal with the excisable goods and he should have knowledge or reason to believe that such goods are liable to confiscation. Rule 25 inter-alia provides the confiscation of the goods in respect of which contravention of any of the provisions of the Central Excise Rules or Notifications issued thereunder has been done. Here the terms 'dealing in any other manner' in Rule 26 and 'contravention of any of the provisions of the rules or notification issued thereunder' in Rule 25 are relevant to the subject issue.

106. Noticees No. 10, 14, 15, 17, 18, 20 & 21 have filed their defence relating to the charges of penalty under Rule 26 & Rule 27. The gist of their submissions is as under:

106.1 The notice does not specify any act on their part to render them liable to penalty. The notice proposed to impose penalty under Rule 26 and or Rule 27 of Central Excise Rules, 2002 without the mention of any specific provision/clause of Rule 26 and or Rule 27 and without any evidence to show their involvement in the issue. They quoted the provisions of Rule 26 and Rule 27 of Central Excise Rules, 2002 and submitted that

they have not violated any of the provisions of the said rules to attract penalty,

106.2 The charges for imposition of penalty are not justifiable as they have not dealt with excisable goods in any manner, to attract penalty under Rule 26 or Rule 27 of Central Excise Rules, 2002. The notice does not allege that they had any role in preparing the rebate claims or fabricating the documents. Since no confiscation of any goods is involved and they were not involved in any activity covered under Rule 26 of Central Excise Rules, 2002 no penalty can be imposed.

106.3 Shri Riyaz Padela specifically pleaded that his name does not appear in any of the records of the merchants, who have claimed the rebate and charges are framed against him only on the basis of oral evidence of Shri Quadir Amin Dangra and others, without any supportive evidence. Such charges based on confessional statements of co-accused without any supportive evidence are not sufficient to uphold the charges against him.

107. It is relevant and appropriate to discuss the case laws cited by the noticees in support of their arguments.

- (i) In the case of M/s. Amrit Foods-2005(190) ELT-433-SC, the apex court with reference to penalty under Rule 173Q of Central Excise Rules, 1944 has held that it is necessary for the assessee to be put on notice as to the exact nature of contravention for which penalty is proposed to be imposed upon. The ratio of this judgment was followed in the case of M/s. Madhur Hosiery Industries 2006(200)ELT-147 Tribunal and in the case of Nakoda Textile Industries 2009(240)ELT-199-BOM-HC. In the case of B. Lakshmidhand Vs. GOI 1993(12)ELT-322 Hon'ble Madras High Court has held that for imposition of penalty (Section 112 of Customs Act), charges against the accused should be clear and not ambiguous. If specific clause of the penal section is not quoted penalty is not sustainable. Onus of proof is on the department to prove essential Ingredients of an offence.*
- (ii) In the case of Vijay Transport Co. Ltd. Vs. Commissioner of C.EX. 2008(230)ELT-154-Tri-Ahm. on the issue of*

imposition of penalty on the transporter the tribunal has held that in the absence of any evidence to show involvement of the transporters in aiding and abetting the clandestine activity of a manufacturer penalty under Rule 209A/Rule 26 of Central Excise Rules cannot be imposed. In the case of ZU Alvi -2000(36) RLT-721-Trib, the issue Involved was imposition of penalty under Rule 209A on an employee of the manufacturer (BHEL).

- (iii) In the case of Dayashankar Tiwari Vs. CCE Hyderabad - 2008(85)RLT-15 the tribunal has held that if the department is not raising a proposal to confiscate the goods and no goods are confiscated the penalty under Rule 26 cannot be imposed. In the case of Steel Tubes of India Ltd. 2007(217)ELT-506-Trib.-LB the tribunal(LB) has held that to attract personal penalty under Rule 209 A of the Central Excise Rules, 1944, the person must have dealt with the excisable goods with the knowledge that they are liable for confiscation. When he is Involved in Issuing of invoices and there is no movement of the goods penalty is not imposable. The ratio of this case was followed by the tribunal in the case of Nasik Strips Pvt. Ltd. 2008(86) RLT(481).*
- (iv) In the case of E Keshwan Vs. A.C. Customs-1987(27)ELT-640 the tribunal has held that the confessional statement retracted by the accused cannot be said to be voluntary and cannot be relied upon. Mere confessional statement will not be sufficient to convict the person unless it is corroborated by other evidence. In the case of Bachha Prasad Vs. Collector of Customs-1988(37)ELT-269-Trib. the tribunal has held that circumstantial evidence must be compatible with the guilt of the accused.*

The case laws cited for non-mention of specific provisions at 9i) above are not relevant. Rule 173Q of erstwhile Central Excise Rules, 1944 and Section 112 of the Customs Act, 1962 contained many clauses and it was in view of this fact it was held that specific penal provision of a Section or Rule of this fact it was held that specific penal provision of a Section or Rule must be invoked to charge a person for penal action. The unamended

Rule 26 & Rule 27 do not contain many clauses and therefore the question of mentioning specific provision does not arise.

The case laws relating to non-invocation of the provisions of confiscation are also not relevant as it is not the requirement of the law that confiscation of the goods must be invoked to impose personal penalty.

The case laws on the issue of confessional statements of co-accused and circumstantial evidence are also not relevant as in this case each of the noticee has clearly admitted his involvement and none of them has retracted the statements. The statements are also corroborated with documentary evidence and hence the ratio of the cases cited by the noticees is not applicable to the subject case.

108. In addition to the case laws cited by the noticees it is also appropriate to discuss the following cases In which the provisions of Rule 26 & Rule 27 of Central Excise Rules, 2002 have been dealt with in detail and therefore are relevant for deciding the subject issue.

In the case of Sachindananda Banerjee, A.C.C. Calcutta Vs. Sitaram Agarwal 1999 (110) ELT-292-SC, the apex court has discussed the scope of the term in any way concerned or 'In any manner dealing with the goods'. Though the issue involved is that case was related to smuggled goods and penalty under Section 167 of the Sea and Customs Act, the ratio laid down by the apex court is relevant. The court has held that the words 'concerned' and 'deal' have a wide connotation. The word means 'interested in, involved in, mixed up with,' while the words 'deal with' means 'to have something to do with, to concern oneself, to treat, to make arrangement, to negotiate with respect to something'. Therefore when a person enters into some kind of transaction or attempts to enter into some kind of transaction with respect to prohibited goods and it is clear that the act is done with some kind of prior arrangement or agreement, it must be held that such a person is concerned in dealing with prohibited goods.

In the case of Dr. Writer's Food Products Vs. Commissioner of Central Excise, Pune-II 2009(ELT)381-Trib. the issue involved

was clandestine clearance of goods without payment of Central Excise duty. The tribunal on the Issue of penalty under Rule 26, has relied upon the Supreme Court's judgment in the case of Sachidananda Banerjee Vs. Sitaram Agarwal 1999 (110) ELT-292-SC, for interpretations of the expression 'in any way concerned/in any manner dealing with goods' and held that the provisions of Section 167(81) of the Old Sea Customs Act, 1878 are pari material with Section 112(b) of the New Customs Act, 1962, which in turn are pari materia with Rule 209A of the Central Excise Rules 1944 and Rule 26 of the Central Excise Rules, 2002.

In the case of V.K. Enterprises Vs. Commissioner of C.Ex.-2010(ELT)462. The issue was passing on of cenvat credit by issuing Invoices only without actual supply of any goods with such invoices. The tribunal has upheld the order of denial of Cenvat credit by the lower authority. On the issue of penalty under Rule 26 of the Central Excise Rules, 2002 in respect of the dealer (who had issued Invoices) and the brokers (middlemen), the tribunal has held that when only invoices are issued, the intention to evade duty is evident and it is a case of looting the treasury and sharing the booty by the beneficiaries. When the goods are dealt with, then the provisions under unamended Rule 26 shall have application even before amendment with effect from 01.03.2007. Penalty under Rule 26 before amendment is sustainable and it is not a case of retrospective application of penal provision.

It is evident from the above juridical analysis that, the ratio laid down by the Hon'ble Supreme Court in the case of Sachidananda Banerjee Vs. Sitaram Agarwal for imposition of personal penalty is applicable to the like provisions of Central Excise Rules, 2002.

109. *In view of the above, I find that -*

109.1 *It is clearly revealed that Shri M.K. Patel (Noticee No. 9) was the main conspirator in fraudulently obtaining rebate of Rs.1,59,07,686/- from the Maritime Commissioner, Raigad. The role of Shri M.K. Patel was fully underlined by Shri Deepak Jare, Shri Bhaskar Tate and Shri Riyaz Padela in their statements. Shri Riyaz Padela used to courier the documents related to the said claims of rebate at the residence of Shri M.K.*

Patel, which after scrutiny and corrections were handed over to Shri Bhaskar Tate for onward submission to the office of the Maritime Commissioner. The cheques pertaining to the rebate sanctioned amount were delivered to Shri M.K. Patel by Shri Bhaskar Tate. Shri Riyaz Padela or on his instructions Shri M.K. Patel deposited the cheques in the accounts of the merchant exporters concerned. Shri M.K. Patel had offered his services to get rebate claims processed and sanctioned from the office of the Maritime Commissioner. The deal was struck between Shri M.K. Patel, Shri Dil Kumar & Shri Riyaz Padela and it was decided that out of the amount of sanctioned rebate claims, 60% of the total amount was to be received by Shri M.K. Patel, 30% by Shri Dil Kumar and the remaining amount of 10% was received by Shri Riyaz Padela. On sanction of the rebate claims, encashment of the cheques was done by Shri Riyaz Padela through cheque discounting method with the help of Shri Afroz Bachau. As agreed Shri Riyaz Padela himself had delivered the amount forming the share of 60 % to Shri M.K. Patel. The investigations also revealed that crucial documents on the basis of which the rebate was claimed contained were in the handwriting of Shri M.K. Patel. It has been confirmed by the Government Examiner of Questioned Documents) Hyderabad that Shri M.K. Patel had written the particular words and figures found on the fake documents filed for claiming rebate from the Maritime Commissioner. It is therefore established that Shri M.K. Patel has played pivotal role in fabrication of documents of rebate claims, facilitation of filing such rebate claims with the office of the Maritime Commissioner, Raigad, and was the major beneficiary of the amount so obtained as rebate of duty on the basis of forged/fake documents. The amount of rebate paid to merchants is liable to be recovered from him, and other beneficiaries. Shri M.K. Patel has also made himself liable to penalty under Rule 26/Rule 27 of Central Excise Rules, 2002.

109.2 *Shri Riyaz Padela (Noticee No.10) was a crucial link in the chain. The fake documents of rebate claims prepared by Shri Dil Kumar and Shri Rakesh were forwarded by him to Shri M.K. Patel, for onward submission to the office of the Maritime Commissioner through Shri Bhaskar Tate. The cheques*

pertaining to the rebate sanctioned amount were delivered to Shri M.K. Patel by Shri Bhaskar Tate. Shri Riyaz Padela or Shri M.K. Patel deposited the cheques in the account of the merchant exporter concerned. The deal was struck between Shri M.K. Patel, Shri Dil Kumar & Shri Riyaz Padela and it was decided that the amount of sanctioned rebate claims to the tune of 60% of the total amount would be kept by Shri M.K. Patel, 30% by Shri Dil Kumar and the remaining amount of 10% was to be retained by Shri Riyaz Padela himself. On sanction of the rebate claims, encashment of the cheques was done from the bank accounts of the merchant exporters, by him with the help of Shri Afroz Bachau and Shri Qadir Amin Dangra. He had received 70% of the rebate amount so sanctioned and after retaining his share of 10%, the balance 60% amount was handed over to Shri M.K. Patel. Shri Riyaz Padela has also voluntarily deposited an amount of Rs.6,00,000/-, vide TR-6 Challans dated 21.12.06 (for Rs.5,00,000/-) and dated 28.12.06 (for Rs.1,00,000/-), towards the erroneously sanctioned rebate to the said merchant exporters, which was kept by him as his share. All the above facts have also been accepted by Shri Riyaz Padela in his written submission dated 18.03.2010. However, his claim for refund of the amount of Rs.6,00,000/- paid by him on the grounds that the said amount was recovered under stress/duress, is not maintainable, in view of the fact that there is no evidence on record to show that he had retracted any of his statements given before the investigating officers. It is therefore evident that, it is an afterthought on the part of Shri Riyaz Padela. Therefore, the amount of Rs.6,00,000/- recovered from Shri Riyaz Padela is liable to be adjusted against the demand. Shri Riyaz Padela had directly involved himself in processing and obtaining the fraudulent rebate claims to the tune of Rs.1,59,07,686/- from the office of the Maritime Commissioner, Raigad. The amount of rebate sanctioned and paid to the merchant exporters is liable to be recovered from Shri Riyaz Padela and other beneficiaries jointly or severally, under Section 11A of the Central Excise Act, 1944. He is also liable for penalty, under Rule 26/Rule 27 of Central Excise Rules, 2002."

4.8 Appellant do not seriously dispute the findings recorded by the Commissioner in the impugned order against them except for the Appellant 1 stating that he was not supplied with the copy of the report of the hand writing expert, in respect of their alleged involvement in the alleged fraudulent claim of the rebate. However we do not find any merit in the submissions made on behalf appellant for the reason that impugned order do not base its finding entirely on the that report but have discussed the plethora of evidence to come to the conclusion of his involvement in fraud. Further Hon'ble Kerala High Court has in case of Kollatar Abbas Haji [1984 (15) ELT 129 (Ker)] held as follows:

"6. Section 138B of the Customs Act, 1962 reads :

"138B. Relevancy of statements under certain circumstances.

(1) A statement made and signed by a person before any Gazetted officer of Customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains;

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when he person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

The respondents' Counsel, Shri P. Santhalingam submits that the fact that a statement made and signed by a person is relevant for the purpose of clause (b) makes it equally relevant for the

purpose of confronting a person when examined under Section 107. The petitioner was confronted, counsel points out, with the statements of the co-accused and those statements are relevant material in the light of Section 138B. Counsel further points out that clause (b) says that statement has to be admitted in evidence when the maker of the statement is examined as a witness. Counsel then refers to Section 139 which reads :

"139. Presumption as to documents in certain cases.—Where any document -

(i) is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India in the course of investigation of any offence alleged to have been committed by any person under this Act,

and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the court shall -

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document."

This shows, that the Court shall presume, unless the contrary is proved, that the signature and every other part of the document referred to in the Section is genuine. There is much force in Counsel's submission. Section 138B makes it clear that in proceedings before an administrator, as in the case of a proceeding in a court of law, a statement made and signed by a

person is material and it has to be admitted in evidence in the interest of justice. Section 139 places the burden upon the maker of the statement to deny the genuineness of his signature or any statement contained in the document. It is not disputed by the petitioner's counsel that the expression 'document' would include the statements signed by the co-accused. Section 139 leaves no doubt that a court shall presume, unless the contrary is proved, that the signature of the maker is genuine and every other part of the document is equally genuine. This is the principle on which the court must act. Section 139 does not exclude the applicability of this principle in proceedings before an administrator. If it is open to a court to draw the statutory presumption, it is equally open to an administrator in proceedings of this kind to draw a like presumption and conclude, in the absence of evidence to the contrary, that every word contained in the statement and the signature appearing on the face of it are those of the maker. This being the position in law, the respondents were entitled to rely upon every word in the statements signed by the witnesses, notwithstanding their attempt to retract therefrom, especially when there is no evidence of threat. As stated earlier, counsel for the petitioner made no attempt to elicit any such information from the officers or from the co-accused themselves. In R.S. Kalyanaraman v. Collector of Customs, Madras (1978 Tax L.R. 1735) the Madras High Court repelled the contention that the confession of a co-accused was not evidence on the basis of which a person could be found guilty in departmental proceedings. The Court stated :

"..... The fact that the criminal Court had acquitted the petitioner would be of no consequence since the acquittal was on the footing that the confession of a co-accused could not be used against the petitioner. In departmental proceedings, there is no bar to use such statements....."

They dispute the penalty imposed on them under Rule 26 of the Central Excise Rules, 2002. They rely on the decision of the Hon'ble Bombay High Court in case of Bansal Steel Corporation [2017-TIOL-1883-HC-MUM-CX] holding as follows:

"11. From the above judgment, it is clear that Rule 209A can be invoked and the penalty imposed only when the person has

physically dealt with the excisable goods with the knowledge or belief that the goods are liable for confiscation. In the present case, the allegation was of unused gate passbooks being misused by the Respondents for the purpose of issuing fake/forged gate passes to assist M/s. Singhal Swaroop Ispat Ltd. There was no case of the Respondents having physically dealt with the excisable goods with the knowledge or belief that such goods were liable to confiscation. We are thus, of the view that Rule 209A cannot be invoked in the present case. We follow the view taken by the Division Bench of this Court in Judgment dated 14 September 2010 (supra) whilst interpreting Rule 209A of the said Rules. The question of law framed, thus, stands answered in favour of the Respondents and against the Appellant."

Appellants have also contended that the amendments made in the Rule 26 by Notification No 08/2007-CE (NT) dated 01.03.2007 are prospective and cannot be applied in the case where the offence was committed prior to that date. They have relied upon certain decisions in this respect.

4.9 From the facts as stated in the impugned order we are very clear in our mind that the appellants had conspired and perpetuated the alleged fraud by filing these rebate claims to defraud the exchequer of the amount claimed by them as rebate without payment of any central excise duty and without exporting any goods. It is settled principle in law and The legal maxim "fraud vitiates everything" is very relevant to the facts herein. In Bhaurao Dagdu Paralkar vs. State of Maharashtra, (2005) 7 SCC 605, Supreme Court dealt with the expression 'fraud' and its impact. It was held as under: -

"By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to

the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied....

A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage.

"Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

4.10 In Samsung India Electronics Ltd. [2014 (307) ELT 160 (Tri.-Del.)] Delhi bench observed as follows:

"16. Suppression of a material fact would also amount to a fraud on the court [(see Gowrishankar v. Joshi Amha Shankar Family Trust, (1996) 3 SCC 310 and S.P. Chengalvaraya Naidu s case (AIR 1994 S.C. 853)]. No judgment of a Court can be allowed to stand if it has been obtained by fraud. Fraud unravels everything and fraud vitiates all transactions known to the law of however high a degree of solemnity. When fraud is established that

unravels all. [Ref: UOI v. Jain Shudh Vanaspati Ltd. - 1996 (86) E.L.T. 460 (S.C.) and in Delhi Development Authority v. Skipper Construction Company (P) Ltd. - AIR 1996 SC 2005]. Any undue gain made at the cost of Revenue is to be restored back to the treasury since fraud committed against Revenue voids all judicial acts, ecclesiastical or temporal and DEP scrip obtained playing fraud against the public authorities are non-est. So also no Court in this country can allow any benefit of fraud to be enjoyed by anybody as is held by Apex Court in the case of Chengalvaraya Naidu reported in (1994) 1 SCC 1: AIR 1994 SC 853. Ram Preeti Yadav v. U.P. Board High School and Inter Mediate Education (2003) 8 SCC 311."

Fraud and justice do not dwell together for which penal provisions are enacted to eradicate evils of defrauding Revenue which is anti- social activity adversely affecting public revenue. Such provisions are construed in the manner which curbs the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. Thus construed, the term fraud within the meaning of these penal provisions is wide enough to take in its fold any one or series of unlawful acts committed or omissions made. An act of fraud on Revenue is always viewed seriously. Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter."

4.11 It is also settled principle in law that the economic offenders/ white collared criminals need to be dealt in the strictest manner so as maintain uniformity and well being in the society and not endanger the economy of the country as such for the said preposition reliance is placed on the decisions of the Apex Court in the following cases.

Balkrishna Chhaganlal Soni [1983 (13) ELT 1527 (SC)]

"17. Guilt being established, the fifth act of the tragedy is reached. Social and economic offences stand on a graver footing in respect of punishment. The appellant's advocate pleads in elimination of the imprisonment that gold of considerable value

has been confiscated, that his client has gone out of business (his licence having been cancelled) and the possibility of further mischief is absent, seven years of criminal proceedings have been a long ordeal deterrent enough to inhibit future anti-social adventures, and some jail term he has already undergone. Counsel submits that his client will now turn a new leaf if he is not returned to prison. We decline to be moved by this dubious prospect.

18. The new horizons in penal treatment with hopeful hues of correction and rehabilitation are statutorily embodied in India in some special enactments; but crimes professionally committed by deceptively respectable members of the community by inflicting severe trauma on the health and wealth of the nation—and the numbers of this neo-criminal tribe are rapidly escalating—form a deterrent exemption to humane softness in sentencing.

19. The penal strategy must be formed by social circumstances, individual factors and the character of the crime. India has been facing an economic crisis and gold smuggling has had a disastrous impact on the State's efforts to stabilize the country's economy. Smugglers, hoarders, adulterators and others of their ilk have been busy in their under-world because the legal hardware has not been able to halt the invisible economic aggressor inside. The ineffectiveness of prosecutions in arresting the wave of white-collar crime must disturb the judges' conscience. While we agree that penal treatment should be tailored to the individual, in the extreme category of professional economic offenders, incarceration is peculiarly potent. When all is said and done, the offences for which the appellant has been convicted are typical of respectable racketeers who, tempted by the heavy pay-off face the perils of the law and hope that they could smuggle on a large scale and even if struck by the court they could get away with a light blow.

20. Mr. Justice Abhyankar observed in a Bombay case (State v. Drupd AIR 1965 Bom. 6 Para 11 under Section 5, Imports and Exports Control Act :

"A serious view must therefore be taken of such offences which show a distressingly growing tendency. The argument that the

accused comes from a respectable or high family rather emphasises the seriousness of the malady. If members belonging to high status in life should show scant regard for the laws of this country which are for public good, for protecting our foreign trade or exchange position of currency difficulties, the consequential punishment for the violation of such laws must be equally deterrent. The offences against export and import restrictions and customs are of the species of 'economic' crimes which must be curbed effectively."

21. We endorse this approach. It may not be out of place to notice in this context the observations of the Central Law Commission Forty-Seventh Report on "The Trial and Punishment of Social and Economic Offences" against light sentences on the score that : (i) the case is one of first conviction; (ii) that the matter has been already dealt with by severe departmental penalty; (iii) that the convicted person is a young man. To the extent to which gold smugglers and other anti-social operators in the field of crime can be given an unhappy holiday in jail, the courts must help the process on conviction, if judicial institutions are not to be cynically viewed by the community. We confirm the sentence. The appeal fails and is dismissed."

Champalal Punaji Shah [1983 (13) ELT 1661 (SC)]

"6. Shri Jethmalani also urged that the trial of the respondent was considerably delayed, that there was thus a violation of the fundamental right to life and liberty guaranteed under Article 21 of the Constitution and that was a sufficient ground to entitle the accused to a dismissal of the complaint against him. We have earlier discussed the relevant principles which should guide us in such situations. In this case the accused himself was responsible for a fair part of the delay. He has also not been able to show cause how he was prejudiced in the conduct of his defence by reason of the delay. Shri Jethmalani when suggested that the long lapse of time since the commission of the offence should be taken into account by us and we should refuse to interfere with the order of acquittal or at any rate we should not send the accused back to prison particularly in view of the fact that the accused was preventively detained for over two and nearly three years on the basis of the very acts complained of in this

particular case. We are afraid we are unable to agree with Shri Jethmalani. The offence is one which jeopardises the economy of the country and it is impossible to take a casual or a light view of the offence. It is true that where the offence is of a trivial nature such as a simple assault or the theft of a trifling amount, we may hesitate to send an accused person back to jail as it would not be in the public interest or in the interest of anyone to do so. But the offences with which we are concerned and the stakes involved clearly show that sympathy in this case would be misplaced. We, therefore, set aside the judgment of the High Court and restore that of the learned Additional Chief Presidency Magistrate, 8th Court, Esplanade, Bombay. The respondent will surrender forthwith. The gold slabs will stand confiscated to the Central Government. The appeal is allowed."

Rohit Tandon [2017 (356) ELT 3 (SC)]

"18. *The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the Act of 2002."*

4.12 We also take note of the observations made by Hon'ble Justice O Chinappa Reddy in the case of **Mcdowell & Co Ltd. [1985 SCR (3) 791]**

"The shortest definition of tax avoidance that I have come across is "the art of dodging tax without breaking the law." Much legal sophistry and judicial exposition have gone into the attempt to differentiate the concepts of tax evasion and tax avoidance and to discover the invisible line supposed to exist which distinguishes one from the other. Tax avoidance, it seems, is legal, tax evasion is illegal.

....

In Commissioner of Income tax, Gujarat v. A. Raman & Co.,[[1968]1 S.C.R 10] JC Shah, JJ. speaking for himself and Sikri and Ramaswami, JJ repeating almost verbatim the observations in Westminister and Fishers Executors observed:

"Avoidance of tax liability by 80 arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the Legislative injunction in taking statutes may not, except on period of penalty, be violated, but it may lawfully be circumvented."

The same Judge, speaking for himself, Ramaswami and Grover JJ in Commissioner of Income tax, Gujarat v. Kharwar [72 ITR 603] expressly followed Westminister and observed:

"The taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of relationship. But the legal effect of a transaction cannot be displaced by probing into the "substance of the transaction".

We think that time has come for us to depart from the Westminister principle as emphatically as the British Courts have done and to dissociate ourselves from the observations of Shah, J. and similar observations made elsewhere. The evil consequences of tax avoidance are manifold. First there is substantial loss of much needed public revenue, particularly in a welfare state like ours. Next there is the serious disturbance caused to the economy of the country by the piling up of mountains of blackmoney, directly causing inflation. Then there is "the large hidden loss" to the community (as pointed out by Master Sheatcraft in 18 Modern Law Review 209) by some of the best brains in the country being involved in the perpetual war waged between the tax-avoider and his expert team of advisers, lawyers and accountants on one side and the tax-gatherer and his perhaps not so skilful, advisers on the other side. Then again there is the 'sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or

unable to profit by it'. Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guideless good citizens from those of the 'artful dodgers'. It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr. Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization." But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance. We now live in a welfare state whose financial needs, if backed by the law, have to be respected and met. We must recognise that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally, or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai, J. in Wood Polymer Ltd. v. Bengal Hotels Limited [40 Company Cases, 597] where the learned judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax.

It is neither fair nor desirable to expect the legislature to intervene and take care of every device and scheme to avoid taxation. It is upto the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of 'emerging' techniques of interpretation as was done in Ramsay, Burma Oil and Dawson, to expose the devices for what they really are and to refuse to give judicial benediction."

Agreeing with above view Hon'ble Justice Rangnath Mishra and other Justices in the bench observed as follows:

"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

On this aspect one of us, Chinnappa Reddy, J. has proposed separate and detailed opinion with which we agree."

4.13 Now we examine the provisions of the Rule 26 & 27 of the Central excise Rules, 2002 which were examined in the impugned order while imposing penalty in terms of Rule 26. For ease of reference we reproduce the said rule as it existed prior to its amendment in 2007:

Rule 26 Penalty for certain offences -

Any person who acquire possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these Rules, shall be liable to a penalty not exceeding a duty on such goods or Rs.10,000/-, whichever is greater.

Rule 27 General Penalty -

A breach of these rules shall, where no other penalty is provided herein or in the Act, be punishable with a penalty which may extent to Rs.5,000/- and with confiscation of the goods in respect of which the offence is committed.

Section 112 (b) of the Custom Act, 1962 and Section 9 of the Opium Act, 1988 which are pari materia with the said rule are reproduced below:

Custom Act, 1962

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

Any person, -

(a)

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

shall be liable, -

Opium Act, 1878

9. Penalty for illegal cultivation of poppy, etc. - Any person who, in contravention of this Act, or of rules made and notified under Section 5 or Section 8-

(a) possesses opium, or

(b) transports opium, or

(c) imports or exports opium, or

(d) sells opium, or

(e) omits to warehouse opium or removes or does any act in respect of warehouse opium;

and any person who otherwise contravenes any such rule, shall,

...

4.14 Interpreting Section 112 (b) of the Customs Act, 1962 tribunal has in the case of **Bhimraj Misrilal Jain [1986 (23) ELT 499 (T)]**, observed as follows:

6. "..... We do not also agree with the submissions of the appellant that acquisition is conditioned by physical possession. Such a concept of possession is opposed to well accepted principles of jurisprudence and a person without being in physical possession of an article can always be in law in constructive possession of the same. In the instant case, in respect of the penalty imposed on the appellant under Section 112(b)(i) of the Act the question that would fall for determination is whether on the basis of evidence available on record it could be found that the appellant had acquired possession or was in any way concerned in the carrying, removing of the goods under seizure or has in any other manner dealt with the goods under seizure knowing or having reason to believe that the same are liable to confiscation under Section

111 of the Customs Act, 1962. We have gone through the statement recorded from G.A. Hava on 2-10-1983, the date of seizure. Hava has clearly stated that the wrist watches were not purchased by him but were handed over to him by the agent of the appellant. He has further stated that the appellant himself introduced to Hava his agent in Bombay previously on 29-9-1983 at 7.00 P.M. and that he was carrying the watches under seizure for purposes of delivering them over to the appellant for a consideration of Rs. 3/- per watch. The statement also further reveals about the telephonic conversation between the appellant and Hava. It is not as if the appellant is a total stranger to the said Hava who claims to know the appellant since 1979 and had been habitually delivering consignments of watches to the appellant. Since the statement of the said Hava revealed that the watches were being taken to the appellant, the officers accompanied Hava to Bangalore and asked him to contact the appellant over the telephone No. 40467. The evidence reveals that the appellant was contacted on phone by the said Hava and Hava was directed by the appellant to go over to Murdha Steel Centre, opposite Vanivilas Hospital near Kamat Hotel at Bangalore-where the appellant is stated to have promised to turn up at 4.30 P.M. to receive the watches. The appellant arrived at the appointed place at about 5.00 P.M. by a Bajaj Scooter No. CAH 6331 and while he was conversing with the said Hava, at or about that time the appellant was nabbed by the authorities. The appellant when he was being interrogated by the authorities suddenly tried to make good an escape when he was again caught. The statement of Hava is well corroborated by certain clinching circumstances viz., the appellant being contacted on his telephone by Hava in the presence of the officers, the appellant meeting Hava at a particular place as agreed to on the telephone and the conduct of the appellant trying to run away from the authorities. One important factor that has to be taken note of in this context is the plea of the appellant that the said Hava is unknown to him and a total stranger and if it really so, it does not stand to reason as to how the appellant could meet Hava at an appointed place pursuant to a telephonic conversation. We are therefore, inclined to place reliance on the statement of Hava which clearly implicates the

appellant and we hold the statement of Hava as voluntary and true. This statement of Hava has been well corroborated by certain clinching circumstances like the appellant meeting the said Hava at the appointed time at a specified place and conversing with him. The appellant has also not chosen to cross-examine the said Hava. Therefore, we are convinced that the appellant is concerned with the watches under seizure. We are not going into the acceptability or otherwise of the alleged unsigned statement of the appellant dated 3-10-1983 since dehors the statement we find from the materials on record that the charge has been proved against the appellant. Having regard to the value of the watches, the quantum of penalty imposed on the appellant cannot be said to be either harsh or excessive. We therefore, dismiss the appeal."

4.15 In our view it has been settled by various authorities as follows that the word "possession" or similar phrases used in the statute do not imply physical possession of the goods but would imply possession in law. Some of significant decisions on the subject are reproduced below:

Mangal Singh & Ors [1967 AIR 1786]

Stroud in his Judicial Dictionary of Words and Phrases, Vol. 3, at p. 2238, has brought out this aspect when defining the scope of the words "possess" and "Possessed". When dealing with the meaning of the word "possession", Stroud defines "possession" as being in two ways, either actual possession or possession in law. He goes on to say that "actual possession is when a man enters in deed into lands or tenements to him descended, or otherwise. Possession in law is when lands or tenements are descended to a man, and he has not as yet really, actually, and in deed, entered into them." In Wharton's Law Lexicon, 14th Edn., at p. 777, the word "possession" is defined as being equivalent to 'the state of owning or having a thing in one's own hands or power.' Thus, three different meanings are given; one is the state of owning, the second is having a thing in one's own hands, and the third is having a thing in one's own power. In case where property is in actual physical possession, obviously it would be in one's own hands. If it is in constructive possession,

it would be in one's own power. Then, there is the third case where there may not be actual, physical or constructive possession and, yet, the person still possesses the right to recover actual physical possession or constructive possession; that would be a case covered by the expression "the state of owning". In fact, elaborating further the meaning of the word "possession", Wharton goes on to say that "it is either actual, where a person enters into lands or tenements descended or conveyed to him; apparent, which is a species of presumptive title where land descended to the heir of an abator, intruder, or disseisor, who died seised; in law, when lands, etc., have descended to a man, and he has not actually entered into them, or naked, that is, mere possession, without colour of right.""

Interpreting the provisions of the Section 9 of Opium Act, 1978, and Section 18 of NDPS Act, 1985 Hon'ble Supreme Court has in the case of Mohan Lal [(2015) 6 SCC 222] observed as follows:

6. First, we shall deal with the issue of possession. The principal submission of Ms. Bhati, learned counsel for the appellant is that the appellant cannot be convicted and punished under the NDPS Act when admittedly the theft of contraband substance was prior to coming into force of the NDPS Act, for the FIR was lodged prior to coming into force of the NDPS Act. Learned counsel would submit that offence of possession of contraband substance also commenced prior to coming into force of NDPS Act as the FIR would clearly reveal that the theft was committed on the intervening night of 12th/13th November, 1985, whereas the NDPS Act came into force on 14.11.1985. Learned counsel would submit that the recovery of opium was done on 16.1.1986 pursuant to the disclosure statement made by the accused-appellant who was already under arrest in a different matter and under such circumstances, the appellant could not have been convicted under Section 18 of the NDPS Act, but should have been convicted under Section 9 of the Opium Act. Elaborating the said submission, the learned counsel has contended that the offence of possession of contraband substance was punishable under both the laws but there is a huge difference in the sentence prescribed. Under Section 9 of the Opium Act, the

sentence was extendable to one year whereas under Section 18 of the NDPS Act, the prescribed punishment is minimum 10 years apart from imposition of huge fine. Learned counsel would submit that it is the settled principle of criminal jurisprudence that the accused cannot be subject to an offence under a new Act which was not in force on the date of theft and the possession of contraband articles, as a matter of fact, had taken place prior to coming into force of the NDPS Act. She has commended us to the decision in Harjit Singh v. State of Punjab[1]. Learned counsel would also contend that there can be rationalization of structure of punishment, which is an ameliorative provision, for it reduces the punishment and the same can be made applicable to category of accused persons. In that regard, she has drawn inspiration from Rattan Lal v. State of Punjab[2], T. Barai v. Henry Ah Hoe[3], Basheer v. State of Kerala[4] and Pratap Singh v. State of Jharkhand[5]. Pyramiding the said facet, it is urged by Ms. Bhati that in the instant case, the sentence being higher for the offence of possession under the NDPS Act, such a provision cannot be made retrospectively applicable to him. To appreciate the said submission, it is appropriate to refer to Section 9 of the Opium Act. It reads as follows:-

"9. Penalty for illegal cultivation poppy, etc. Any person who, in contravention of this Act, or of rules made and notified under section 5 or Section 8,-

(a) possesses opium, or

(b) transports opium, or

(c) imports or exports opium, or

(d) sells opium, or

(e) omits to warehouse opium, or removes or does any act in respect of warehoused opium, And any person who otherwise contravenes any such rule, shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both;

And, where a fine is imposed, the convicting Magistrate shall direct the offender to be imprisoned in default of payment of the fine for a term which may extend to six months, and such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced."

7. On a perusal of the aforesaid provision, the possession of opium is an offence and the sentence is imprisonment for a term which may extend to one year or with fine which may extend to Rs.1,000/- or both. Section 18 of the NDPS Act provides for punishment for contravention in relation to opium poppy and opium. The provision as it stood at the relevant time read as follows:

"18. Punishment for contravention in relation to opium poppy and opium.- Whoever, in contravention of any provision of this Act, or any rule or order made or condition of licence granted thereunder cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty-years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees :

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

8. When one conceives of possession, it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody". Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word possession. The classical theory of English law on the term "possession" is fundamentally dominated by Savigny-ian "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between "corporeal possession" and "possession of right" which is called "incorporeal

possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word possession can be usefully defined and understood with reference to the contextual purpose for the said expression. The word possession may have one meaning in one connection and another meaning in another.

9. The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. One of the definitions of possession given in Black's Law dictionary is as follows: "Having control over a thing with the intent to have and to exercise such control. Oswald v. Weigel[6]. The detention and control or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint."

In the said dictionary, the term "possess" in the context of narcotic drug law means:-

"Term "possess." Under narcotic drug laws, means actual control, care and management of the drug. Collini v. State[7]. Defendant 'possesses' controlled substance when defendant knows of substance's presence, substance is immediately

accessible, and defendant exercises "dominion or control" over substance. State v. Hornaday[8]."

And again "Possession as necessary for conviction of offense of possession of controlled substances with intent to distribute may be constructive as well as actual, U.S. v. Craig[9]; as well as joint or exclusive, Garvey v. State[10]. The defendants must have had dominion and control over the contraband with knowledge of its presence and character. U.S, v. Morando-Alvarez[11].

Possession, as an element of offense of stolen goods, is not limited to actual manual control upon or about the person, but extends to things under one's power and dominion. McConnell v. State[12].

Possession as used in indictment charging possession of stolen mail may mean actual possession or constructive possession. U.S. v. Ellison[13].

To constitute "possession" of a concealable weapon under statute proscribing possession of a concealable weapon by a felon, it is sufficient that defendant have constructive possession and immediate access to the weapon. State v. Kelley[14]."

10. In Stroud's dictionary, the term possession has been defined as follows:

""Possession" (Drugs (Prevention of Misuse) Act 1964 (c. 64), s.1 (1)). A person does not lose "possession" of an article which is mislaid or thought erroneously to have been destroyed or disposed of, if, in fact, it remains in his care and control (R. v. Buswell[15]).

11. Dr. Harris, in his essay titled "The Concept of Possession in English Law[16]" while discussing the various rules relating to possession has stated that "possession" is a functional and relative concept, which gives the Judges some discretion in applying abstract rule to a concrete set of facts. The learned author has suggested certain factors which have been held to be relevant to conclude whether a person has acquired possession

for the purposes of a particular rule of law. Some of the factors enlisted by him are; (a) degree of physical control exercised by person over a thing, (b) knowledge of the person claiming possessory rights over a thing, about the attributes and qualities of the thing, (c) the persons' intention in regard to the thing, that is, 'animus possessionis' and 'animus domini',

(d) possession of land on which the thing is claimed is lying; also the relevant intention of the occupier of a premises on which the thing is lying thereon to exclude others from enjoying the land and anything which happens to be lying there; and Judges' concept of the social purpose of the particular rule relied upon by the plaintiff. The learned author has further proceeded to state that quite naturally the policies behind different possessory rules will vary and it would justify the courts giving varying weight to different factors relevant to possession according to the particular rule in question. According to Harris, the Judges have at the back of their mind a perfect pattern in which the possessor has complete, exclusive and unchallenged physical control over the subject; full knowledge of its existence; attributes and location, and a manifest intention to act as its owner and exclude all others from it. As a further statement he elucidates that courts realise that justice and expediency compel constant modification of the ideal pattern. The person claiming possessory rights over a thing may have a very limited degree of physical control over the object or he may have no intention in regard to an object of whose existence he is unaware of, though he exercises control over the same or he may have clear intention to exclude other people from the object, though he has no physical control over the same. In all this variegated situation, states Harris, the person concerned may still be conferred the possessory rights. The purpose of referring to the aforesaid principles and passages is that over the years, it has been seen that courts have refrained from adopting a doctrinaire approach towards defining possession. A functional and flexible approach in defining and understanding the possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy. Thus, the word "possession" in the

context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object.

Tribunal has in case of **Kader babu [1988 (33) E.L.T. 741 (Tribunal)]** on explaining the terms possession used in Section 8 of Gold Control Act, 1968 observed as follows:

"5..... In such a situation, it would not be correct to contend that the appellant has neither abetted nor agreed to acquire possession, custody or control within the meaning of Section 8(1)(2) of the Act. The concept of possession as understood in law need not necessarily be physical possession and the possession, custody or control contemplated under Section 8(1)(2) of the Act would take within its ambit not only physical possession but also constructive possession as well. Therefore, on a factual consideration of the evidence on record, I have no hesitation to hold that the charge of contravention under Section 8(1)(2) has been brought home against the appellant who is proved by evidence on record to have abetted the commission of an offence in respect of the gold in question and in such a situation, in my opinion, the order of the original authority is correct and is sustainable in law."

Corniche Holdings Inc [1999 (106) ELT 547 (T)]

"8. In Salmond on Jurisprudence 12th edition by PJ Fitzgerald Sweet & Maxwell, London 1966, the following statements are made with regard to possession :

"The test then for determining whether a man is in possession of anything is whether he is in general control of it. Unless he is actually holding or using it - in which event he clearly has possession - we have to ask whether the facts are such that we can expect him to be able to enjoy the use of it without interference on the part of others."

9. This view finds expression in judicial pronouncements. The Supreme Court in Mangal Singh and Others v. Smt. Ratno (dead) by her legal representative, A.I.R. 1967 S.C. 1786 said :

"It is commonly known in English language that the property is said to be possessed by a person if he is its owner even though he may for the time being be out of actual possession or even constructive possession.

The Court in Bhagchand v. Emperor A.I.R. 1934 Bom 200 said that the word "possess" indicates possession with a power to disposal. The Supreme Court has also said that possession is not necessarily the same in his occupation or actual user (Bishambhar Nath v. Nisar Ali A.I.R. 1932 Outh 51) and that possession means also physical possibility of a person dealing with a property as he likes and not mere physical possession. (Bahadur Chand v. Naina Mal 133 P.W.R. 1914)."

4.16 From the above authorities it is established the phrases like **"Any person who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any good.."** used in the statute, need not be restricted to their literary meanings or imply actual physical possession or handling of the contraband goods, but these phrases refer to possession and handling of the contraband goods in law. This view has been expressed by the Hon'ble Apex Court in the case of Mohan Lal, supra and any contrary view cannot be upheld. The Mumbai bench in case of Babulal Jain [Final Order No A/3314-3329/15/EB dated 29.09.2015] interpreted the provisions of the Rule 26 in similar manner holding as follows:

"8. One of the common contentions by various learned counsels for the appellants was that penalty under Rule 26 cannot be imposed on the appellants, many of them are merchant exporters or Rule 12B manufacturers. It was the contention of the learned counsels that as per the department's case Muni Group of Companies have only supplied duty-paying invoices and the goods have come from some other sources and these goods along with the invoices of the Muni Group of Companies were exported and rebate was claimed. It was the contention of the learned counsels that Commissioner has not indicated as to how

and under which provisions of law the goods allegedly procured from the market and exported are liable to confiscation.

"8.1. We have given considerable thought to the submission. We reproduce Rule 25 and 26 of the Central Excise Rules, 2002 as under:

...

8.2 In the present case, there is no doubt or confusion that penalties have been imposed under Rule 26 ibid. Rule 26 as reproduced above would indicate that any person, who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to penalty. There is no doubt that the so called merchant exporters or Rule 12B manufacturers have dealt with the goods inasmuch as they purchased the goods from market and in order to claim the rebate/or avail CENVAT credit they approached Muni Group of Companies and purchased certain invoices from them so as to fraudulently show as if the goods were purchased from Muni Group of Companies on the invoices of Muni Group and thereafter exported or used in processing. Thus, there are excisable goods which are purported to be cleared on the invoice of Muni Group. In all cases, the investigations have indicated that the goods were never transported from Muni Group of Companies to the appellants or to the port of export. Investigations revealed that the goods were lifted from some dealers in Surat, etc. Further, investigations indicate that some payments were made to Muni Group of Companies through account payee cheques. However, immediately, thereafter, Muni Group of Companies have issued cheques in the name of some other entities. These cheques were, in torn got discounted by the merchant exporter/appellants. In some ass, the amounts were paid by crossed bearer cheques to Muni Group of Companies. However, these cheques were, in reality, not deposited in the accounts of Muni Group of Companies, but were deposited either in the name of certain dealers or got discounted from various bill

discounters/shroffs. In nutshell, the money which was purported to have been paid to Muni Group of Companies for purchase of material was not paid to them but either was taken back. by the appellants-merchant exporters, or in some cases, some amount was paid to certain dealers in fabric. (Perhaps, some fabrics might have been purchased from them.) Thus, it is evident that the invoices of Muni Group of Companies and the goods purported to be covered by such invoices were dealt by the merchant exporter-appellants. There can be no doubt, that these goods are liable to confiscation under Rule 25(1)(d) of the Central Excise Act, 1994. In view of the above said position, there can be no doubt that penalty is imposable under Rule 26 on the merchant exporter/manufacturer under Rule 12B

8.3. We also like to add the very fact that the appellants have procured invoices from a source other than the actual manufacturers of the goods would indicate that these goods were in reality not duty- paid goods. If these goods were duty-paid then there was no reason for the appellants-merchant exporters/manufacturers under Rule 12B to undertake the above mentioned fraudulent activity of approaching Muni Group of Companies and getting the invoices from them so as to create a fraudulent cover that the goods are duty-paid and are manufactured by Muni Group of Companies. In fact, the whole purpose of this exercise was to finally encash duty purported to have been paid (which in reality was never paid to the Government) on the goods through the invoices of Muni Group of Companies and share such booty between Muni Group of Companies and the appellants. In our considered view, there can be no doubt that penalty under Rule 26 is imposable in the facts of the case.

8.4. Even in respect of Rule 12B manufacturers, they have procured the invoices from Muni Group of Companies and the goods from some other source. Here again, goods procured from some other sources would be non-duty paid goods otherwise, there was no need for them to get the invoices from Muni Group of Companies. The findings recorded above in respect of merchant exporters equally be applicable in the case of Rule 12B

manufacturers and, therefore, penalty is imposable. Thus, these are the cases of fraud wherein the appellants as also Muni Group of Companies were equally involved and would be equally benefitted by getting the money from the government exchequer, in the name of rebate even though in reality, no duty was paid in the scheme of the above fraud, it was fraudulently shown that the duty was paid and the appellants or Muni of Group of Companies would be able to get refund of the duty in the form of rebate which thereafter will be distributed among themselves.

8.5. The reasoning adopted by the hon'ble Gujarat High Court in the case of Sanjay Vimalbhai Deora (supra) which in turn has been upheld by the hon'ble Supreme Court is equally applicable. Similarly, the judgment of the Punjab and Haryana High Court in the case of Veekay Enterprises and M S Metals (supra) are equally applicable.

8.6. The learned counsel for the appellant has also submitted certain judgments wherein hon'ble Supreme Court and other courts have held that the goods purchased from the market are deemed to be duty-paid. We have gone through the said judgments. We find the facts in the present case are very different. In fact, if the goods were duty paid, there was no reason for the appellants to approach Muni Group of Companies and procure the fraudulent invoices. In that situation, the appellants could have got the invoices from the seller of the goods and could have claimed the rebate. The very fact that this fraudulent exercise has been done indicates that the goods which were exported and procured from the market were non-duty paid goods. In case of some appellants, the goods were produced in their own unit and if in their own unit they would have paid duty, there was no reason for them to procure the invoices from Muni Group of Companies.

8.7. Various counsels have submitted that Rule 26 was amended thus, prior to 01/03/2007 no penalty could have been imposed on the dealers. We have considered this submission. While Rule 26(2) is prospective in nature, we find that in this case almost all appellants are Rule 12B manufacturers or merchant exporters.

In the case of 12B manufacturers even though they may not have the manufacturing facility themselves, but they were treated as manufacturer under the Central Excise law and hence penalty under Rule 26 as it was existing prior to 01/03/2007 can be imposed. Even in respect of merchant exporter they were not the dealer in the normal sense i.e., who were passing on the CENVAT credit along with the invoices. In fact all such dealers are required to get themselves registered with the excise department and thereafter only they could issue cenvatable invoices. The merchant exporter were not that type of registered dealer with the excise department but they were the person who were party to the fraudulent claim of rebate with the connivance of the Muni Group of Companies either claiming the rebate in their name or giving the right to claim rebate to Muni Group of Companies. Hence the position is different and the penalty under old Rule 26 can be imposed on them.

8.8. Some of the learned counsels have submitted about the one adjudication order passed by the Commissioner, Mumbai wherein he has taken a view that penalty under Rule 26 cannot be imposed. In our view this is not the correct position in law as there are goods which are purported to covered by certain invoices. One has to deal with such invoices along with the goods and a holistic view of the two has to be taken. One cannot segregate invoices from the goods for the simple reason that both are submitted together for excise purpose. The interpretation taken by the Commissioner is therefore as per his understanding of the law and we do not agree with such an understanding. Such an interpretation of law will make minor violators of the procedure as liable to penalty under Rule 26 while the outright law violators or fraudsters will go scot free. We therefore take no cognizance of the order passed by the Commissioner and the fact that such order has been accepted by the department is of no consequence.”

This decision was followed by the tribunal in the case of Cannon Industries Pvt. Ltd. & Mangaldas K. Patel [Final Order No A/85656-85657/2019 dated 02.04.2019]. In case of Dr Writers

Food Products [2009 (242) ELT 381 (T)] relied upon in the impugned order, following has been observed:

"30. The learned counsel for the 2nd appellant has also argued that since Mr. Ketkar had not physically dealt with the goods, which had been allegedly cleared without payment of duty, penalty could not be imposed on him in view of the Larger Bench decision of the Tribunal in the case of Steel Tubes of India Ltd. v. CCE, Indore, reported in 2007 (217) E.L.T. 506(Tri.-LB). We have examined this contention also. In the said case, no goods were involved and only the invoices had moved.[We find that the Government has already reacted to this decision by inserting sub-rule (2) in Rule 26 of the Central Excise Rules, 2002, w.e.f. 1-3-2007, by providing a penal clause even for those persons, who issue excise invoices without actual delivery of any goods]. The present case is not one of issue of the invoices without delivery of goods. Hence, the case of Steel Tubes (supra) is distinguishable. Further, a similar issue had come up before the Hon'ble Supreme Court in the case of Sachindananda Banerjee, A.C.C., Calcutta v. Sitaram Agarwala reported in 1999 (110) E.L.T. 292 (S.C.), which was deliberating over the expression "in any way concerned in any manner dealing with prohibited goods" appearing in Section 167(81) of the old Sea Customs Act, 1878, which is para materia with Section 112(b) of the new Customs Act, 1962, which in turn is para materia with Rule 209A of the Central Excise Rules, 1944 and Rule 26 of the Central Excise Rules, 2002. The Supreme Court held as under :

"13. The main contention of the respondents which has found favour with the High Court was that Section 167(81) when it deals with persons and subjects them to imprisonment and fine on conviction by a Magistrate is also concerned with persons who are in some way or other actually concerned in the import and has no application to third persons who had nothing to do with the actual import but might have come in possession of smuggled goods even knowingly after they had been smuggled. Before however we consider this contention which has found favour with the High Court we should like to dispose of the other contention which was raised on behalf of Sitaram Agarwala and

which also found favour with the High Court. It will be seen that Section 167(81) deals with persons who do certain things with the knowledge and intent therein specified and one such person with whom that provision deals is a person who is in any way concerned in any manner dealing with any goods with respect to importation of which any prohibition or restriction is for the time being in force. The High Court has held on the facts in this case that Sitaram Agarwala cannot be said to have been concerned in any manner dealing with prohibited goods inasmuch as he was merely negotiating with the Chinese accused for their purchase but the deal had not been concluded. The view which found favour with the High Court thus was that if the deal had been completed, Sitaram Agarwala could be said to have been concerned in dealing with the prohibited goods but as the deal was not completed and he was merely attempting to purchase the goods it could not be said that he was in any way concerned in any manner dealing with them. We are of opinion that the view taken by the High Court is not correct. The words "in any way concerned in any manner dealing with prohibited goods" are of very wide import. It is neither desirable nor necessary to define all manner of connection with the prohibited goods which might come within the meaning of the words "in any way concerned in any manner dealing with such goods ". It will depend on the facts found in each case whether it can be said that any person was concerned in dealing with such goods. We shall therefore confine ourselves to the facts of the present case and see whether on these facts it can be said that Sitaram was in any way concerned in any manner dealing with the goods. Now the evidence which has been accepted by both the courts is that Sitaram had gone with a large sum of money to purchase the gold which was known to be smuggled and to have been imported into India against the restrictions imposed on the import of gold. It has also been proved that Sitaram did so after previous arrangement with the Chinese accused. If the constable who was following Sitaram had not interfered the deal would have gone through and Sitaram would have paid the money and purchased the smuggled gold. This was a case therefore where by means of previous arrangement with a person in possession of a smuggled article, the intending purchaser had gone to

purchase it and the deal did not go through only because the police intervened. In such circumstances whereby previous agreement or arrangement a person goes to purchase an article which he knows to be smuggled it would in our opinion be a case where such a person must be held to be concerned in dealing with the prohibited goods. Where a person does any overt act in relation to prohibited goods which he knows to be such and the act is done in consequence of a previous arrangement or agreement it would in our opinion be a case where the person doing the act is concerned in dealing with the prohibited goods. In other words any transaction relating to prohibited goods which is done or attempted to be done after some kind of prior arrangement or agreement would in our opinion clearly amount to the person being concerned in dealing with the prohibited goods. Both the words "concerned" and "deal" have a wide connotation. The words "concerned in " mean "interested in, involved in, mixed up with " while the words "deal with " mean "to have something to do with, to concerned one-self, to treat, to make arrangement, to negotiate with respect to something". Therefore when a person enters into some kind of transaction or attempts to enter into some kind of transaction with respect to prohibited goods and it is clear that the act is done with some kind of prior arrangement or agreement, it must be held that such a person is concerned in dealing with prohibited goods. The fact that the act stopped at an attempt to purchase as in the present case when the police intervened does not in any way mean that Sitaram was not concerned in dealing with the smuggled gold. The evidence shows that there must have been a previous arrangement with the Chinese accused to purchase the smuggled gold. Sitaram went to the appointed place and met the Chinese accused surreptitiously and had a large sum of money with him to pay for the gold. He had sat down with the Chinese accused in the taxi and there is no doubt that if the taxi had not been stopped, the transaction for the purchase of the smuggled gold would have gone through. In these circumstances even though Sitaram had not come into actual possession of the smuggled gold before the police intervened, there is no doubt that he was concerned in dealing with prohibited goods. We are therefore of opinion that the High Court was in error in holding

simply because the purchase was not complete that Sitaram was not concerned in dealing with the smuggled gold which was found with the Chinese accused. The acquittal of Sitaram on this ground must therefore be set aside. "

31. Thus, we are of the firm view that Mr. Ketkar cannot be given relief from penalty merely because he did not physically deal with the goods removed clandestinely, without payment of duties. It is noted that the Supreme Court decision in the case of Sitaram Agarwala (supra) was not brought to the notice of the Tribunal while deciding the case of Steel Tubes (supra).

32. However, we find that the original authority has imposed equal penalties of Rs. 5,00,000/- each on both Mr. Hebalkar and Mr. Ketkar, though, admittedly the actual manipulations were done by Mr. Hebalkar. There is, therefore, a case for reducing the penalty imposed on Mr. Ketkar. Accordingly, we reduce the penalty to Rs. 3,00,000/- (Rupees Three Lakhs only) on Mr. Ketkar to meet the ends of justice."

Hon'ble Punjab and Haryana High Court has in the case of Vee Kay Enterprises [2011 (266) ELT 436 (P & H)] held as follows:

"8. *Question for consideration is whether penalty could be levied on the person who did not actually deliver the goods and merely issued a fake invoice which enabled wrong availing of cenvat credit and the extent of penalty which could be levied.*

9. *As regards applicability of provisions introduced on 1-3-2007 to alleged acts committed prior to the said date, the matter is covered by orders of this Court referred to above which are not shown to be distinguishable. Accordingly, we hold that the amended provisions will not apply to the acts committed prior thereto.*

10. *Inspite of non-applicability of Rule 26(2), penalty could be levied as the appellant was concerned in selling or dealing with the goods which were liable to confiscation inasmuch as the appellant claimed to have sold the goods in respect of which the cenvat credit was taken. In such a case, Rule 25(1)(d) and 26(1) are also applicable. The person who purports to sell goods cannot say that he was not a person concerned with the selling*

of goods and merely issued invoice or that he did not contravene a provision relating to evasion of duty. The appellant issued invoices without delivery of goods with intent to enable evasion of duty to which effect a finding has been recorded and which finding has not been challenged. We are, thus, unable to hold that appellant was not liable to pay any penalty."

This decision of Hon'ble Punjab & Haryana High Court has been followed in the case of Shripal Aggarwal [2013 (289) ELT 302 (T)] observing as follows:

Hon'ble Punjab and Haryana High Court has in the case of M S Metals [2014 (309) E.L.T. 241 (P & H)] held as follows:

"6.From the above, it emerges that the appellant was a registered dealer who was involved in issuing bogus invoice without selling any goods to M/s. Sonia Overseas on the basis of which the said firm took the Cenvat credit. It was in those circumstances that the penalty of ` 1 lac was imposed under Rule 25(1)(d) and 26(1) of the Rules."

In case of Kay Iron Works (Jorion) Pvt Ltd. [2018 (359) E.L.T. 110 (P & H)], Hon'ble Punjab & Haryana High Court held as follows:

"5. A perusal of the order passed by the Tribunal shows that it was conceded by the assessee before the authorities below that the invoices were issued without even supplying any goods. It was also recorded that the Settlement Commission did not admit the case of the appellant and also that Settlement Commission nowhere had held that their order would be extended in the case of the appellant as well. With regard to the contention that the penalty under Rule 25 of the Rules could not be imposed as there were no goods involved, the Tribunal relying upon the judgment of this Court in V.K. Enterprises v. CCE, 2011 (266) E.L.T. 436, had held that the person purporting to sell goods could not say that he was not concerned with selling of goods and had not contravened the provisions of Rule 25 of the Rules. In such cases, the penalty was held to be imposable. The relevant findings recorded by the Tribunal in this regard read thus :-

"5. I have considered the facts and submissions of both sides. At the outset, it is to be mentioned that the appellants have conceded that the invoices were issued without ever supplying any goods. As regards their contention that the order of Settlement Commission in respect of M/s. Talbros would cover them too, it is seen that the settlement Commission itself did not admit their case and such non-admission was not on the ground that they would be covered by the main order in case of Talbros. The judgment in the case in K.I. International Limited (*supra*) takes note of the judgment in the case of S.K. Colombowala (*supra*) and holds that the benefit of the Settlement Commission's order cannot be extended to those who never approached the Settlement Commission. The learned Advocate stated that the order in case of K.I. International Limited has been stayed by the High Court, but I find that the stay is an interim stay on condition of 50% deposit and bank guarantee for the remaining amount which obviously means that what has been stayed is the consequential recoveries in terms of that order. As stated earlier, the Settlement Commission itself did not consider that the appellants would be covered by their order in case Talbros. As such, the contention of the appellants in this regard is not sustainable. The other contention of the appellants is that the penalty under Rule 25 cannot be imposed as there were no goods involved. It is seen that the Hon'ble Punjab and Haryana High Court in the case of Vee Kay Enterprises (*supra*) has discussed this very issue and has come to a finding that even in such cases, penalty can be imposed. The Hon'ble High Court observed that the person purporting to sell goods cannot say that he is not concerned with selling of goods and has not contravened the provisions of Rule 25 *ibid*. Relevant paras (9&10) of the said judgment are quoted below :

....

In the light of the foregoing, the appellants' contention that they are not liable to penalty under Rule 25 is untenable."

4.16 In view of the fact that appellants were not only responsible for creating the fabricated documents but also responsible for producing the fabricated documents in respect of

verification of the payment of duty and export of the goods from the port, cannot claim that they had not handled the goods in law in the manner as stated in Rule 26 of the Central Excise Rules, 2002, taking note of the facts of the present case we find the said decision of the Hon'ble Bombay High Court relied by the appellant distinguishable on facts.

4.17 Appellants have argued that provisions of Rule 26 (2) cannot be invoked in their case as the offence committed by them was committed by them was prior to introduction of the said Rule. Though when we hold that penalty has been rightly imposed under Rule 26 (1) this argument will not survive but for completion of the issue we examine the said argument as well. It is evident that the offences under the Central Excise Act have been created under the Section 9 of the Act *ibid* which is reproduced below:

Section 9. Offences and penalties. -

(1) Whoever commits any of the following offences, namely: -

(a) contravenes any of the provisions of section 8 or of a rule made under clause (iii) or clause (xxvii) of sub-section (2) of section 37;

(b) evades the payment of any duty payable under this Act;

(bb) removes any excisable goods in contravention of any of the provisions of this Act or any rules made thereunder or in any way concerns himself with such removal;

(bbb) acquires possession of, or in any way concerns himself in transporting, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or any rule made thereunder;

(bbbb) Contravenes any of the provisions of this Act or the rules made thereunder in relation to credit of any duty allowed to be utilised towards payment of excise duty on final products;

(c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information;

Section 9C. Presumption of culpable mental state. -

(1) *In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

Explanation. - *In this section, "culpable mental state" includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact.*

(2) *For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.*

This section provides for the punishments that can be there for the above mentioned offences. Further Section 37 provides for the Rule making power. Relevant excerpts of the said section are reproduced below:

"SECTION 37. Power of Central Government to make rules. —

(1) *The Central Government may make rules to carry into effect the purposes of this Act.*

(2) *In particular, and without prejudice to the generality of the foregoing power, such rules may —*

(i)

(ia)

(ib) *the duties shall be payable, and the recovery of duty not paid;*

(ibb)

(ic)'....:

(3) *In making rules under this section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding five thousand rupees.*

(4) *Notwithstanding anything contained in sub-Section(3), and without prejudice to the provisions of Section 9, in making rules*

under this Section, the Central Government may provide that if any manufacturer, producer or licensee of a warehouse -

- a) ..*
- b) ..*
- c) ...*
- d) contravenes the provisions of any such rule with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding the duty leviable on such goods or two thousand rupees, whichever is greater;*

(5) Notwithstanding anything contained in sub-section (3), the Central Government may make rules to provide for the imposition upon any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or the rules made thereunder, a penalty [not exceeding the duty leviable on such goods or [five thousand rupees,] whichever is greater].

From the above it is quite evident that Rule 25, 26 and 27 of the Central Excise Rules, 2002 have been framed in terms of the Rule to provide for the penalties that may be imposed for the offences as have been provided in terms of the Central Excise Act, 1944. Rule 26 either before the amendment nor after the amendment has created any offence which was not an offence as per the provisions of Section 9 of the Act. In our view the fraudulent refund claim filed by the appellant would fall within the category of offence specified under sub section 1 (bbb) and 1 (c) of the Section 9 of the Act. For which penal provisions as per Rule 26 applies. The amendment made in 2007, do not create a new offence for which a separate penal provision has been provided but only enumerates the one more of the offence, which was even otherwise an offence as per Section 9. In case of *Vijay Madanlal Choudhary vs Union Of India*, Hon'ble Supreme Court has vide order dated 27 July, 2022 in Special Leave Petition (Criminal) No. 4634 OF 2014, held as follows:

"40. The Explanation as inserted in 2019, therefore, does not entail in expanding the purport of Section 3 as it stood prior to 2019, but is only clarificatory in nature. Inasmuch as Section 3 is widely worded with a view to not only investigate the offence of money laundering but also to prevent and regulate that offence. This provision plainly indicates that any (every) process or activity connected with the proceeds of crime results in offence of moneylaundering. Projecting or claiming the proceeds of crime as untainted property, in itself, is an attempt to indulge in or being involved in money-laundering, just as knowingly concealing, possessing, acquiring or using of proceeds of crime, directly or indirectly. This is reinforced by the statement presented along with the Finance Bill, 2019 before the Parliament on 18.7.2019 as noted above⁴⁶⁸.

41. Independent of the above, we have no hesitation in construing the expression "and" in Section 3 as "or", to give full play to the said provision so as to include "every" process or activity indulged into by anyone, including projecting or claiming the property as untainted property to constitute an offence of money-laundering on its own. The act of projecting or claiming proceeds of crime to be untainted property presupposes that the person is in possession of or is using the same (proceeds of crime), also an independent activity constituting offence of money-laundering. In other words, it is not open to read the different activities conjunctively because of the word "and". If that interpretation is accepted, the effectiveness of Section 3 of the 2002 Act can be easily frustrated by the simple device of one person possessing proceeds of crime and his accomplice would
⁴⁶⁸ See paragraph 36 of this judgment indulge in projecting or claiming it to be untainted property so that neither is covered under Section 3 of the 2002 Act.

42. From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The process or activity can be in any form —

be it one of concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so. Thus, involvement in any one of such process or activity connected with the proceeds of crime would constitute offence of money-laundering. This offence otherwise has nothing to do with the criminal activity relating to a scheduled offence — except the proceeds of crime derived or obtained as a result of that crime.

43. Needless to mention that such process or activity can be indulged in only after the property is derived or obtained as a result of criminal activity (a scheduled offence). It would be an offence of money-laundering to indulge in or to assist or being party to the process or activity connected with the proceeds of crime; and such process or activity in a given fact situation may be a continuing offence, irrespective of the date and time of commission of the scheduled offence. In other words, the criminal activity may have been committed before the same had been notified as scheduled offence for the purpose of the 2002 Act, but if a person has indulged in or continues to indulge directly or indirectly in dealing with proceeds of crime, derived or obtained from such criminal activity even after it has been notified as scheduled offence, may be liable to be prosecuted for offence of money-laundering under the 2002 Act — for continuing to possess or conceal the proceeds of crime (fully or in part) or retaining possession thereof or uses it in trenches until fully exhausted. The offence of money-laundering is not dependent on or linked to the date on which the scheduled offence or if we may say so the predicate offence has been committed. The relevant date is the date on which the person indulges in the process or activity connected with such proceeds of crime. These ingredients are intrinsic in the original provision (Section 3, as amended until 2013 and were in force till 31.7.2019); and the same has been merely explained and clarified by way of Explanation vide Finance (No.2) 287 Act, 2019. Thus understood, inclusion of Clause (ii) in Explanation inserted in 2019 is of no consequence as it does not alter or enlarge the scope of Section 3 at all.”

4.18 In case of Mohan Lal [(2015) 6 SCC 222] Hon'ble Supreme Court has observed as follows:

"12. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. The said provision reads as follows:-

"35. Presumption of culpable mental state. - (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. - In this section "culpable mental state" includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

On a perusal of the aforesaid provision, it is plain as day that it includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression "possess or possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act.

15. Having noted the approach in the aforesaid two cases, we may take note of the decision in Dharampal Singh v. State of Punjab[19], when the Court was referring to the expression "possession" in the context of Section 18 of the NDPS Act. In the said case opium was found in the dicky of the car when the appellant was driving himself and the contention was canvassed

that the said act would not establish conscious possession. In support of the said submission, reliance was placed on Avtar Singh v. State of Punjab[20] and Sorabkhan Gandhkhan Pathan v. State of Gujarat[21]. The Court, repelling the argument, opined thus:-

"12. We do not find any substance in this submission of the learned counsel. The appellant Dharampal Singh was found driving the car whereas [pic] appellant Major Singh was travelling with him and from the dicky of the car 65 kg of opium was recovered. The vehicle driven by the appellant Dharampal Singh and occupied by the appellant Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused.

13. It needs no emphasis that the expression "possession" is not capable of precise and completely logical definition of universal application in the context of all the statutes. "Possession" is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge.

xxx xxx xxx xxx

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental

state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium. [pic]

16. Once possession is established the court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in Madan Lal v. State of H.P.[22], wherein it has been held as follows: (SCC p. 472, paras 26-27)

"26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

16. From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified, for the intention is to exercise right over the substance

or the chattel and to act as the owner to the exclusion of others. In the case at hand, the appellant, we hold, had the requisite degree of control when, even if the said narcotic substance was not within his physical control at that moment. To give an example, a person can conceal prohibited narcotic substance in a property and move out thereafter. The said person because of necessary animus would be in possession of the said substance even if he is not, at the moment, in physical control. The situation cannot be viewed differently when a person conceals and hides the prohibited narcotic substance in a public space. In the second category of cases, the person would be in possession because he has the necessary animus and the intention to retain control and dominion. As the factual matrix would exposit, the accused-appellant was in possession of the prohibited or contraband substance which was an offence when the NDPS Act came into force. Hence, he remained in possession of the prohibited substance and as such offence under Section 18 of the NDPS Act is made out. The possessory right would continue unless there is something to show that he had been divested of it. On the contrary, as we find, he led to discovery of the substance which was within his special knowledge, and, therefore, there can be no scintilla of doubt that he was in possession of the contraband article when the NDPS Act came into force. To clarify the situation, we may give an example. A person had stored 100 bags of opium prior to the NDPS Act coming into force and after coming into force, the recovery of the possessed article takes place. Certainly, on the date of recovery, he is in possession of the contraband article and possession itself is an offence. In such a situation, the accused-appellant cannot take the plea that he had committed an offence under Section 9 of the Opium Act and not under Section 18 of the NDPS Act.

17. After dealing with the concept of possession, we think it apt to address the issue raised by the learned counsel for the appellant that he could have convicted and sentenced under the Opium Act, as that was the law in force at the time of commission of an offence and if he is convicted under Section 18 of the NDPS Act, it would tantamount to retrospective operation

of law imposing penalty which is prohibited under Article 20(1) of the Constitution of India. Article 20(1) gets attracted only when any penal law penalises with retrospective effect i.e. when an act was not an offence when it was committed and additionally the persons cannot be subjected to penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. The Article prohibits application of ex post facto law. In Rao Shiv Bahadur Singh and Anr. v. State of Vindhya Pradesh[23], while dealing with the import under Article 20(1) of the Constitution of India, the Court stated what has been prohibited under the said Article is the conviction and sentence in a criminal proceeding under ex post facto law and not the trial thereof. The Constitution Bench has held that:-

".... what is prohibited under Article 20 is only conviction or sentence under an 'ex post facto' law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a Court different from that which had competence at the time cannot 'ipso facto' be held to be unconstitutional. A person accused of the commission of a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."

In the instant case, Article 20(1) would have no application. The actus of possession is not punishable with retrospective affect. No offence is created under Section 18 of the NDPS Act with retrospective effect. What is punishable is possession of the prohibited article on or after a particular date when the statute was enacted, creating the offence or enhancing the punishment. Therefore, if a person is in possession of the banned substance on the date when the NDPS Act was enforced, he would commit the offence, for on the said date he would have both the 'corpus' and 'animus' necessary in law.

18. We would be failing in our duty, if we do not analyse the decision in Harjit Singh (supra). In the said case the Court was dealing with the Notification dated 18.11.2009 that has replaced

the part of the Notification dated 19.10.2001. Dealing with the said aspect, the Court held:-

"13. Notification dated 18-11-2009 has replaced the part of the Notification dated 19-10-2001 and reads as under:

"In the Table at the end after Note 3, the following Note shall be inserted, namely:

(4) The quantities shown in Column 5 and Column 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

14. Thus, it is evident that under the aforesaid notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18-11-2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned."

The present fact situation is absolutely different and, therefore, the said decision has no applicability to the case at hand.

19. Learned counsel for the State has contended that the offence in question is a continuing offence, for the offence is basically a possession of the contraband articles. He has commended us to the authority in State of Bihar v. Deokaran Nenshi & Anr.[24], wherein it has been held that:-

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and

for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

20. Mr. Shiv Mangal Sharma, learned AAG for the State has also drawn inspiration from Udai Shankar Awasthi v. State of Uttar Pradesh and Anr.[25] In the said case, while dealing with the concept of continuing offence, after referring to Section 472 of Criminal Procedure Code, 1973, (CrPC) the Court has stated that the expression "continuing offence" has not been defined in CrPC because it is one of those expressions which does not have a fixed connotation and, therefore, the formula of universal application cannot be formulated in this respect. The court referred to Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan[26], Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath [27] and eventually held thus:

"Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the ingredients of the offence continue i.e. endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue."

21. In this context, it would be fruitful to refer to a three-Judge Bench decision in Maya Rani Punj v. Commissioner of Income Tax, Delhi [28]. In the said case, the Court approved what has

been said by the High Court of Bombay in State v. A.H. Bhiwandhiwalia [29]. For the sake of completeness, we reproduce the relevant paragraph:-

"In State v. A.H. Bhiwandiwalla (a decision referred to in CWT v. Suresh Seth[30]), Gajendragadkar, J. (as he then was), after quoting the observations of Beaumont, C.J. in an earlier Full Bench decision of that Court observed:

"Even so, this expression has acquired a well-recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then from day to day a fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course an offence is committed only once. But we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences."

22. We have dwelled upon the said submission, as the learned counsel for the State has seriously addressed that it is a continuing offence. We have already opined that on the date the NDPS Act came into force, the accused- appellant was still in possession of the contraband article. Thus, it was possession in continuum and hence, the principle with regard to continuing offence gets attracted."

4.18 In view of the discussions as above we do not find merits in the submissions made by the appellant. We are also not inclined to accept the plea of leniency in the case.

(i) It is on record and we have referred to our earlier order in case of Appellant 1, who was the departmental officer earlier, wherein in case of similar fraud, committed by Munni Group of companies, the penalty of Rs 10,00,000/- was upheld by the tribunal. It transpires that Appellant 1 is habitual offender and has been making use of his official position to perpetuate such rebate frauds. He deserves no leniency.

(ii) It is not the case that Appellant had perpetuated the fraud of Rs 1,59,07,687/- but they had filed 85 rebate claims, claiming

rebate of Rs 8,32,00,658/- the fraud committed cannot be restricted to the amount claimed as rebates, as the fake documents which were prepared would be in respect of the value of goods which would be many times the amount claimed as rebate, might be in neighborhood of Rs 100 crores. The person preparing fake documents showing the export worth Rs 100 crores, without exporting any goods do not deserve any leniency. The misuse of the fake documents prepared cannot be limited to just claiming of the rebate, but these documents can be used for transporting the illegal or criminal wealth amassed by the fraudster elsewhere in the world to India through normal channels which can be used for laundering the money in India or perpetuating more criminal activities including the financing of the terror activities. In our considered view the fraudsters need to be dealt taking into account the possible damage that their acts would have caused to the economy of country. In case of Vijay Madanlal Choudhary referred earlier by us Hon'ble Supreme Court echoing the observations made earlier in their decisions referred by us again reiterated that such acts be dealt in strictest manner. Observations made by the Hon'ble Apex Court are reproduced below:

*"129 Further, we do not agree with the observations suggestive of that the offence of money laundering is less heinous offence than the offence of terrorism sought to be tackled under TADA Act or that there is no compelling State interest in tackling offence of money-laundering. The international bodies have been discussing the menace of moneylaundering on regular basis for quite some time; and strongly recommended enactment of stringent legislation for prevention of money-laundering and combating with the menace thereof including to prosecute the offenders and for attachment and confiscation of the proceeds of crime having direct impact on the financial systems and sovereignty and integrity of the countries. That concern has been duly noted even in the opening part of the introduction and Statement of Objects and Reasons, for which the 2002 Act came into being. **This declaration by the Parliament itself is testimony of compelling necessity to have stringent regime (enactment) for prevention and***

control of the menace of money-laundering. Be it noted that under Article 38 of the Constitution of India, it is the duty of the State to secure social, economic and political justice and minimize income inequalities. Article 39 of the Constitution mandates the State to prevent concentration of wealth, thus, to realize its socialist goal, it becomes imperative for the State to make such laws, which not only ensure that the unaccounted money is infused back in the economic system of the country, but also prevent any activity which damages the economic fabric of the nation. It cannot be gainsaid that social and economic offences stand on a graver footing as they not only involve an individual direct victim, but harm the society as a whole. Thus, the Law Commission also in its 47th report recommended an increase in punishment for most of the offences considered therein. Further, the quantum of punishment for money-laundering offence, being only seven years, cannot be the basis to undermine the seriousness and gravity of this offence. The quantum of sentence is a matter of legislative policy. The punishment provided for the offence is certainly one of the principles in deciding the gravity of the offence, however, it cannot be said that it is the sole factor in deciding the severity of offence as contended by the petitioners. Money-laundering is one of the heinous crimes, which not only affects the social and economic fabric of the nation, but also tends to promote other heinous offences, such as terrorism, offences related to NDPS Act, etc. It is a proven fact that international criminal network that support home grown extremist groups relies on transfer of unaccounted money across nation States, thus, by any stretch of imagination, it cannot be said that there is no compelling State interest in providing stringent conditions of bail for the offence of money-laundering. In Ram Jethmalani & Ors. vs. Union of India & Ors. [(2011) 8 SCC 1], the Court expounded the theory of "soft state" which is used to describe a nation which is not capable of preventing the offence of money laundering. The Court held thus:

"13. The concept of a "soft state" was famously articulated by the Nobel Laureate, Gunnar Myrdal. It is a broad-based assessment of the degree to which the State, and its machinery, is equipped to deal with its responsibilities of governance. The more soft the State is, greater the likelihood that there is an unholy nexus between the law maker, the law keeper, and the law breaker." (emphasis supplied)

In Mohanlal Jitmalji Porwal [(1987) 2 SCC 364], while explaining the impact of economic offences on the community, the Court observed that usually the community view the economic offender with a permissive eye, although the impact of the offence is way greater than that of offence of murder. The Court held thus:

"5.....The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest."
(emphasis supplied)

In Rohit Tandon, this Court observed as follows:-

"21. The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the

accused persons under Section 24 of the 2002 Act.”(emphasis supplied)

*Thus, it is well settled by the various decisions of this Court and policy of the State as also the view of international community that the offence of money-laundering is committed by an individual with a deliberate design with the motive to enhance his gains, disregarding the interests of nation and society as a whole and which by no stretch of imagination can be termed as offence of trivial nature. Thus, it is in the interest of the State that law enforcement agencies should be provided with a proportionate effective mechanism so as to deal with these types of offences as the wealth of the nation is to be safeguarded from these dreaded criminals. As discussed above, **the conspiracy of money-laundering, which is a three-staged process, is hatched in secrecy and executed in darkness, thus, it becomes imperative for the State to frame such a stringent law, which not only punishes the offender proportionately, but also helps in preventing the offence and creating a deterrent effect.”***

4.19 Thus we do not find any merits in the appeals filed.

5.1 Appeals are dismissed.

(Order pronounced in the open court on 24.01.2023)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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