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::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/184,185,189/RAJ/2016	46/ADC/PV/2015-16	31.03.2016

ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-089-TO-91-2017-18

आदेश का दिनांक / Date of Order: **09.10.2017** जारी करने की तारीख / Date of issue: **10.10.2017**

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/संयुक्त आयुक्त/उपायुक्त/सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, राजकोट / जामनगर / गांधीधाम द्वारा उपरलिखित जारी मूल आदेश से सृजित /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता /Name&Address of the **Appellants &** Respondent :-

1.M/s. Amardeep Export, Plot No. 414 & 415, GIDC, Phase - II, Dared, Jamnagar
2. Shri Dinesh Bhimjbhai Changani, Partner of M/s Amardeep Export
3. Shri Ankit Bhimjbhai Changani, Partner of M/s Amardeep Export

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way

(A) सीमा शुल्क केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं. 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिमी क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावी अहमदाबाद- 380016 को की जानी चाहिए ।
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग ,ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की पर्ची संलग्न करें। निर्धारित शुल्क का भुगतान संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इसमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग ,ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की पर्ची संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-

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(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम

(ii) सेनवैट जमा की ली गई गलत राशि

(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2) 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि पर या बाद में पारित किए गए है।
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । /
In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

ORDERS in APPEAL

M/s. Amardeep Export, Plot No.414&415, GIDC, Phase-II, Dared, Jamnagar (hereinafter referred to as "**Appellant no.**1"), Shri Dinesh Bhimjibhai Changani, Partner of Appellant no.1 *(hereinafter referred to as* "**Appellantno.2)** Shri Ankit Dineshbhai Changani, Partner of Appellant No.1 (*hereinafter referred to as* "**Appellant No.**3") and have filed appeals against Order in Original no.46/ADC/PV/2015-16 dated 31.03.2016 (*hereinafter referred to as the* "**impugned order**") passed by the Additional Commissioner, Central Excise, Rajkot (*hereinafter referred to as* "**the lower adjudicating authority**").

2. The brief facts of the case are that Appellant No.1 is an 100% EOU engaged in manufacturing of brass ingots/billets, parts and accessories from imported duty free Brass scrap under Notification no. 52/2003-Cus dated 31.03.2003. The finished goods after being manufactured, are exported (Physical Export & Deemed Export) as well as cleared into DTA on payment of duty after obtaining permission from KASEZ. Acting upon an intelligence officers of DRI, Jamnagar & Gandhidham searched the factory premises of Appellant no. 1 on 08-02-2010 and recovered incriminating documents and electronic gadgets viz., Computer, Hard disks and data storage pen drive and CDs and placed the same under seizure under panchnama. Search was also conducted at the residential premises of Shri Ankit Dineshbhai Changani (Appellant No. 2) on 08.02.2010 and a computer hard disk was seized under panchnama. Contents from these gadgets were retrieved and obtained from the Directorate of Forensic Science, Gandhinagar ("DFS" for brevity). Investigation revealed that Appellant no.1 has exported five consignments totally weighing at 30271.135 kgs declaring value of the goods as USD 2,70,771.32 in five shipping bills whereas actual value of the consignment was found to be at USD 79,653/-. It was also revealed that Appellant no. 3 was a partner in one of the foreign buyer M/s. Darpan General Trading LLC, Dubai. It was also revealed that Appellant no.1 had mis declared the export value by issuing parallel invoices and exported the goods at inflated price to achieve the positive NFE (Net foreign exchange) under the Foreign Trade Policy. It was also revealed that Appellant no.1 had diverted the duty free imported brass scrap in DTA during the period from March, 2008to December, 2008 and violated the provisions of Notification no. 52/2003-Cus. A show cause notice dated 02.01.2012 was issued proposing (a) confiscation of exported goods totally valued at Rs.1,17,18,575/- under Section 113(i) of Customs Act,1962 (hereinafter refer to as "**the Act**") (b) penalty on Appellant No.1 under Section 114A of the Act and appropriation of Rs.10,75,878/-

paid by Appellant No.1 towards the customs duty liability (c) to restrict NFE at USD79,653 (d) confiscation of imported brass scrap valued at Rs.2,16,00513/- under Section111(o) of the Act (e) demanding Customs Duty of Rs.44,81,076/- under Section 28(4) of the Act read with Section 72 of the of Act (f) interest under Section 28AA of the Act (g) penalty on Appellant No.1 under Section 114(iii) of the Act (h) penalty on Appellant No.2 under Section 112(a) and 114 (iii) of the Act (i) penalty on Appellant No.3under Section 114 (iii) of the Act was proposed on Appellant No.3.

2.1 The Show Cause Notice was adjudicated by the adjudicating authority vide impugned order wherein he confirmed the proposals made in the show cause notice and ordered as under:-

Appellant No.1-

(i) confiscation of Export goods imposing redemption fine of Rs.30,00,000/-

(ii) penalty of Rs.20,00,000/- on Appellant no.1 under section 114(iii) of the Act,

(iii) confiscation of imported goods valued at Rs.2,16,00513/- and imposing redemption fine of Rs.55,00,000/- in lieu of confiscation

(iv) demand of Rs.44,81,076/- of customs duty confirmed on Appellant No.1

(v) Rs.10,75,878/- paid by Appellant no.1 was appropriated

(vi) interest on duty amount of Rs.44,81,076/- ordered

(vii) penalty of Rs.44,81,076/- imposed on Appellant no.1

(viii) NFE was restricted to USD 79,653.

Appellant No.2

(i) Penalty of Rs.20,00,000/- on Appellant No.2 under Section 112(a) read with Section 112(ii) of the Act,

(ii) Penalty of Rs.10,00,000/- under Section 114(iii) of the Act,

(iii) Penalty of Rs.50,00,000/- under Section 114AA of the Act

Appellant No.3

(i) Penalty of Rs.5,00,000/- under Section 114(iii) of the Act.

3. Being aggrieved with the impugned order, Appellants filed appeals against the impugned order, inter-alia, mainly on the following grounds:-

Appellant No.1

(i) Appellant relying on the decision of Hon'ble Delhi High Court in the case of M/s. Manglai Impex reported as 2016-TIOL-877-DEL-CUS argued that Joint Director, DRI has no jurisdiction to issue show cause notices under Section28 (11) of the Customs Act, 1962 for the period prior to 08.04.2011.

(ii) The show cause notice is time barred as it pertains to import made during the period from March,2008 to Novemeber,2008, and exports made during the period from December, 2006 to January,2007; that all the details relating to imports and exports were available with the customs department, the development commissioner and the central excise department at the time of imports/exports at the relevant point of time; that the show cause notice issued on 02.01.2012 is time barred and nothing is brought on record to show that Appellant had made any attempt to suppress any information from the department.

(iii) Investigation failed to prove that overseas buyers had remitted an amount equal to that mentioned in invoice having lower value and differential payment equal to higher value minus lower value was arranged by Appellant no. 2 in USD in the account of Appellant and hence allegation of export of brass parts at inflated value is not justified. Only evidence to support contention of investigation is inform of data retrieved by DFS, Gandhinagar; that the partner of Appellant in his statement dated 11.08.2010 has categorically clarified in answers to questions no. 2to 6, that invoices showing lower value was issued at the request of overseas customers vis. M/s.DGTL and M/s. Kalat Trading Company, LLC, Dubai; that Appellant has nowhere confessed that lower value of the goods shown in unsigned invoice was the real price of export goods or that higher value shown in five invoices and declared in export documents was actually inflated one; that out of five consignments were exported to M/s. DGTL and Appellant No.3 in his statements not admitted or indicate that M/s. DGTL used to import goods from Appellant no.1 at inflated price or that they had remitted an amount equal to the lower value declared in another invoices; that it is evident from statement dated 11.08.2010 of Appellant no.2 that the DRI has suspected the export of goods at inflated value on the basis of report No.DFS-EE-2010-CF-31 dated 29.07.2010 of Directorate of Forensic Science; it is on record that the disputed data was maintained by Appellant No.3 and investigation has not examined the author of the data about authenticity of the data retrieved by DFS and hence data is not supported by corroborative evidence.in his statement dated 11.08.2010; that no evidence is produce confirming that overseas buyers had declared lower value of the consignments in Dubai; that documents relied are not admissible as evidence in terms of section 34 of the Evidence Act, 1872.

(iv) It is not alleged that (a) there was significant variation in value at which goods of like kind and quality exported at or about the same time or (b) that value was significant higher as compared to the market of value of like kind and quantity at the time of export or (c) that there was misdeclaration of goods in parameters such as

description, quantity, quality, year of manufacture etc.; that Customs Valuation (Determination of Value of Export goods) Rules, 2007mandates a procedure for rejection of declared value and a method to revise the same; that so called transaction value has been re-ascertained arbitrarily without affording any cogent grounds and only on the basis of so called retrieved data by DFS; that even show cause notice does not propose to reject the value of exports goods though mandatorily required; that the subject goods were exported by M/s. Amardeep by filing proper ARE-Is, shipping bills and other documents with the jurisdictional Central Excise authorities as well as concerned Custom House; that. the goods were allowed to be exported at declared value. Appellant relied upon following case laws:-

(1) Frost International Ltd. [2006 (206) E.L.T. 451 ('rri. - Mumbai)]

(2) Veeyam Exports [2011 (265) E.L.T. 379 (Tri. - Bang.)]

(3) Polynova Chemical Industries [2005 (179) E.L.T. 173 (TH. - Mumbai)]

(v) Accusations made at para 10.2 of SCN and mentioned at Para 10 of the impugned order are not supported by any credible evidence and are merely based on assumption and presumption; that as per chart appended under para 10.1 on page 18 of the notice, declared (inflated) value of five consignments exported by Appellant No.1 was USD 270771.32 and actual value was USD 79653.80; that though the notice does not specify exact quantum of payment (in USD) arranged by Appellant No.2, from mathematical calculation it appears that the same works out to be USD 191117.52 (USD 79653.80 minus USD 270771.32;that no evidence is adduced either in the form of documents from bank or from documents seized from Appellant No.1 or from seized gadgets in justifying the allegation that since Appellant no.3 was a partner of overseas buyer of M/s. DGTL it was easy for Appellant no. 1 to manage payment of export consignment at inflated price; that investigation also does not subscribe details and mode of payment managed by Appellant no.2; that when it is on record that entire sale proceeds declared in respective shipping bills was received though official banking channel in the account of Appellant No.1 from the exporter's account of Dubai duly supported by Bank Realization Certificates it can not be said that Appellant no. 1 has managed export realisation. This apart, Appellant No.2 and Appellant No.3 were interrogated for several times by the investigating agency and they could have asked them to account for receipt of payment from overseas buyers to remove any doubt, if existed. However no such exercise was undertaken; that neither any documentary evidence nor any oral evidence behind allegation of managing payment in foreign exchange is available.

(vi) Proposal to confiscate brass sanitary fittings weighing 30271.135 Kgs. contained in the said five consignments under Section 113(i) of the Customs Act, 1962 does not

arise as it is not established that export was made at inflated price; that even otherwise, said goods do not fall within purview of Section 113 of the Customs Act, 1962; that Section 113 deals with confiscation of goods attempted to be improperly exported and not the goods already exported. It may kindly be noted that every clause of Section 113 justifies the above caption. For instance, Clause (a) reads "any goods attempted to be exported by sea or air". Clause (b) reads: "any goods attempted to be exported by land on inland water". The rest of the clauses also read likewise. Contrary to this, a significant contrast is noticeable in Section 111 which empowers confiscation of imported goods. The caption for Section 111 reads: "confiscation of improperly imported goods..." Every clause of this Section uses the word "imported" and not the expression "attempted to be imported". In other words, Section 113 does not cover goods which have been already exported or say that it covers only goods which have been entered into customs barriers and are yet to be exported. This is further evident from definition of the word "export goods" under Section 2(19) of the Act. It defines that "export goods" means any goods which are to be taken out of India to a place outside India and not the goods which are already taken out of India. Hence, the subject goods exported by Appellant No.1 cannot be confiscated under Section 113(i) of the Customs Act, 1962. They relied upon the following decisions in support of their above submissions (i) THOMAS DUFF AND CO. (INDIA) PVT. um. [2000 (123) E.L.T. 330 (Cal.)! and (ii) K. KAMALA BAI [2005 (186) E.L.T. 459 (Tri. - Chennai)].

(vii) It is further submitted that since goods already exported cannot be confiscated as such goods are not available in India. It is settled principle of law that when the goods are not seized and not available, confiscation of the same cannot be ordered, as option to redeem the goods on payment of fine under Section 125 of the Act can be offered only when the goods are physically available either with the department or with Appellant and relied upon in the decision of the Larger Bench of Hon'ble Tribunal in the case of SHFV KRIPAISPAT PVT. LTD. (2009 (235) E.L.T. 623 (Tri. - LB): 2009 (235) E.L.T. 623 (Tri. - L13)}. Option to pay fine in lieu of confiscation is governed under Section 125 of the Act and according to it, order for confiscation can only be passed when the same is authorized by the Act. However, in this case, there is no power to confiscate the goods already exported under relevant Section 113. Therefore, such fine is not imposable by the authority under Section 125 of the Customs Act, 1962.

(viii) Imposing penalty under Section 114 (iii), like confiscation of already exported goods under Section 113 of the Act, is also against the law; that Section 114 stipulates penalty for attempt to export goods improperly. It does not empower adjudicating authority to impose penalty on exporter for the goods already exported. Particularly because, goods already exported are not liable to confiscation under

Section 113. Under the circumstances any of the act or omission on part of Appellant no.1 although not admitted but even if considered to be true for sake of argument, would not render them liable to penalty under Section 114 of the Act as it is outside the jurisdiction of adjudicating authority; that even otherwise, when accusation of inflated value of export goods is arbitrary, for the reasons discussed in foregoing paras, no penalty can be imposed on Appellant No.1, as held in the case of Polynova Chemical Industries; that as such neither the exported goods can be confiscated nor can penalty be imposed on Appellant under provisions of Section 113(i) and 114(iii) respectively.

(ix) There is no violation of any of the conditions laid down under the Customs Act, 1962 and rules framed there under or instructions issued by the CBEC for export of goods by Appellant no.1 in the capacity of 100% EOU. The consignments were legally exported and sale proceeds were duly accounted for through appropriate banking channel. Therefore, question of restricting NFE to the extent is not justified and illegitimate; that even otherwise, there is no provision either in the Customs Act, 1962 or the Central Excise Act, 1944 which may empower the adjudicating authority to adjudge or restrict the NFE. It is within power of the Development Commissioner, KASEZ, Gandhidham in this case, who is functioning under the Ministry of Commerce and who have vested powers to monitor NFE of EOUs. It is also submitted that they have filed all periodical reports and returns regularly with the said authority from time to time and it has not objected to valuation of the goods exported or achievement of NFE. In any case, NFE is worked out year wise and not consignment wise. It is not alleged by investigation that NFE during the period under reference falls short if revised value proposed in the notice is taken into consideration. Hence, proposal of restricting NFE is not only outside the jurisdiction of the notice but also legally unwarranted.

(x) There is no evidence in support of allegation that imported brass scrap was diverted in open market finished goods purchased from job workers; that proposal to confiscate brass scrap weighing 123.595 MT valued at Rs. 21600513/- imported under Section 111 (o) of the Customs Act, 1962 which is used by the job worker itself proves that the imported scrap was used in the manufacture of exported finished goods.; therefore, confiscation of goods and order confirming duty amounting to Rs. 44,81,076/- along with interest under Section 28(4) and 28 A is not sustainable; that there are contradictory views in the allegations; that on one side it is alleged that they made huge cash payments to the job workers, which means that the notice admits that job workers were paid job charges by them for the job work undertaken by them; that on the other hand, it says that they could not produce any Challan/ Invoice for movements of goods to job workers hence it is concluded that they had malafide intention to divert the duty free raw materials in the open market; that when the investigation itself has

recorded that they have paid job charges in cash to the job workers, how can it be claimed or presumed that raw materials were intentionally sold/ diverted? Similarly, at one place it is alleged that they have purchased finished goods from job workers. However, there is no evidence in support of the same. It appears that the investigation either failed to understand the term and meaning of job worker, though defined under the law or deliberately overlooked it. It is an established business practice that job workers charge labour (job) charges for the work undertaken by them on the raw materials supplied to them. They do not sell the Finished goods and if they sale it, they are traders and not job workers. There can be persons doing both, i.e. trading and job work, but. when they sale the goods, it is always in the capacity of traders and not as job worker. In any case when job charges were paid by them, as admitted in the notice itself, be it in cash, it cannot be suspected that imported brass scrap was sold or diverted in open market; that Appellant No.2, had categorically submitted in his statement dated 11.08.2010 that during the period from March, 2008 to October, 2008 he had engaged different seven job workers (as named in the statement) for job work and final products were obtained from the said job workers; that he had paid in cash the job charges. He had also deposed that wherever quantity of final products was in excess of the quantity supplied to the job workers, differential amount of such material was also paid to the job worker. Not only this, it is also evident from heading of column no. 3 of each table appended on page 3 to 6 of his statement (referred as Annexure-C of DFS) that it reflects "Qty. of Brass scrap given for job work in Kgs." Similarly, column no. 4 reflects amount paid as job charges. Therefore, it is absolutely erroneous to conclude that no goods were sent for job work or that finished goods were purchased from job workers or that imported brass scrap was sold/ diverted in open market. On the contrary, it is evident from the notice that Appellant No.1 had obtained more quantity from job workers by paying differential amount for the raw materials used. In other words, it had utilized more quantity of raw materials then imported duty free and had exported the same in accordance with the law.

(xi) The investigation failed to produce any evidence to prove that imported brass scarp was diverted by Appellant No.1; that purchasing finished goods for export from job workers is purely and surely based on presumption; that only one such job worker viz. M/s. Bhagirath Brass Industries, Jamnagar was examined during investigation. The statement of a job worker confirms in no uncertain terms that semi processed brass parts were sent to them for further processing by Appellant No.1 on job work basis. It does not even remotely say that brass scrap was purchased by them or finished goods were sold to Appellant No.1. Even the figures of job work deposed by him in his statement almost tally with the table appended under answer no. 23 of Appellant No.2's statement dated 11.08.2010. Therefore, there is no reason to

disbelieve the same. As regards other job workers named in the statement, it is submitted that they had processed some other small parts of brass building hardware/ bathroom fittings required to be assembled with final products manufactured by Appellant No.1; that no investigation was carried out in respect of all other; that they further wish to clarify that it had always sent semi-processed (casted) brass parts to all job workers and not the scrap; that this apart, goods received from job workers were further put to process of fitment/ assembling, finishing, quality testing, packing etc. before the same were exported; that it is not alleged that they did not have the required manufacturing facility. It is undisputed that the unit was visited by the officers of DR1 during search on 08.02.2010 and they had seen the plant and machinery. Similarly, Appellant No.2 had also given details of plant and machinery- in answer to question no. 15 of his statement dated 09.02.2010, as such there was no question of purchasing finished goods from open market for export by them. They further submit that services of job workers were taken only in few cases due to either specific requirement of the overseas buyers or in cases when some machines of our plant were out of order/ under repairs, but that does not mean that entire products were got manufactured from job workers. Appellant No.1 submit that that Section 111 (o) stipulates that any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of condition was sanctioned by the proper officer, are liable for confiscation. To justify confiscation under Section 111 (o) it has been alleged that they have violated conditions of Notification No. 52/2003-Cus dated 31.03.2003 and of B-17 Bond. Appellant has not violated any of the main conditions of the subject notification. There are mainly three conditions viz.

(1) The importer has been authorized by the Development Commissioner to establish the unit for the purposes specified in clauses (a) to (e) of the opening paragraph of this notification;

(2) The unit carries out the manufacture, production, packaging or job-work or service in Customs bond and subject to such other condition as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs or Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, (hereinafter referred as the said officer) in this behalf;

(3) The unit executes a bond in such form and for such sum and with such authority, as may be specified by the said officer.

(xii) All the above conditions have been satisfied in as much as the unit is authorized by the Development Commissioner. KASEZ, Gandhidham, the unit carries out manufacture, packaging etc. in bonded premises and it had executed B-17 bond with the jurisdictional central excise authority. They have also achieved positive NFE during entire period since beginning. This apart, it is undisputed that finished products made out of imported brass scrap were exported in due discharge of obligation by them and as the post importation condition is duly fulfilled by them and therefore the brass scrap under reference cannot be confiscated under Section 111(o) of the Customs Act, 1962. Further submitted that it is not a case that job work is not permitted under the 100% EOU Scheme or under notification No. 52/2003-Cus. On the contrary, the same is liberally allowed under the scheme in EXIM Policy.

(xiii) CBEC has also formulated guidelines in accordance with the EXIM Policy as could be seen from relevant notification and also from CBEC Circular No. 65/2002-Cus., dated 7-10-2002 (F. No. 305/53/2002-1'1'1') as amended vide Circular No. 26/2003-Cus., dated 1-4-2003 and Circular No. 93/2002-Cus., dated 20-12-2002. Therefore, at the most, it can be said that services of job workers were obtained for certain process that too for some time by Appellant No.1 without following prescribed procedure of obtaining permission from the jurisdictional central excise authority as envisaged in the notification and CBEC Circular No. 65/2002-Cus., dated 7-10-2002 issued from F. No. 305/53/2002-FTT as amended vide Circular No. 26/2003-Cus., dated 1-4-2003, but that by stretch of any imagination cannot mean that the imported scrap was sold in open market and the goods exported by them were purchased from job workers. The error committed by them, therefore, can be termed as a technical breach and bonafide mistake. However, for such bona fide lapse, the imported scrap does not become liable to confiscation under section 111(o); that considering the above aspects, the duty demand of Rs. 44,81,076/- under section 28(4) of the Customs Act,1962 read with Section 72 of the Customs Act,1962 in the notice is not at all justified in as much as it has not been established by investigation that brass scrap imported under 100% EOU scheme by them was diverted in open market or that it was not used for intended purpose. On the other side, it is fairly proved by them that imported brass scrap was utilized for intended purpose i.e. in manufacture of the products exported by them and the same was never sold or diverted in the market. Therefore, question of demanding import duty, either under Section 28 or under Section 72 of the Customs Act, 1962 does not arise; that the demand of customs duty amounting to Rs.44,81,076/- has been made under the provisions of Section 28(4) of the Customs Act,1962 read with Section 72 of the Customs Act; that when there is no short levy or non levy of import duty and when duty demanded is not sustainable, demand of interest under Section 28 M does not survive; that the Show Cause Notice is badly time barred.

(xiv) Section 28(1) of the Act stipulates to issue notice for payment of duty, interest etc. within a period of six months from the relevant date. Section 28(4) for invoking extended period, referred in the notice, is applicable only if there is collusion or willful mis-statement or suppression of facts by importer. As discussed herein above, none of the above elements is present in this case hence extended period of five years cannot be legally invoked to demand so called short payment of duty. There is no discussion in the notice as to how the extended period is invocable in the present case. However, the department has fastened this charge without any evidence. Hence impugned notice is not sustainable being time barred; that no penalty can be imposed on them under Section 114A of the Customs Act, 1962, as no duty or interest is short levied in the present case for the reasons discussed supra. They submit that unless it is proved with cogent documentary evidence that they have sold the imported brass scrap in open market and the same was not used for intended purpose, duty under Section 28(4) or interest under Section 28AA cannot be demanded nor can penalty under Section 1 14A be imposed.

(xv) Appellant being an 100% EOU are required to fulfil various conditions are follows :-(a) The unit shall export its entire production excluding rejects and sales in the DTA as per provisions of Exim Policy for a period of five years.

(b) The unit would be under obligation to achieve the minimum stipulated level of NEPF as prescribed in Appx-1 of the Exim Policy.

(c) The unit shall be Customs bonded and execute a general bond in form B-17 (with surety/security) binding themselves, *inter alia* -

(i) to observe all the provisions of Customs Act, 1962, Central Excise Act, 1944 and the rules regulations made thereunder;

(ii) pay on demand all duties and rent and charges claimable on account of the said goods under Customs Act, Central Excise Act and Rules/Regulations made thereunder;

(iii) to observe and comply with all the provisions of the manufacture and other operations in a Warehouse Regulation, 1966, Warehoused Goods (Removal) Regulation, 1964;

(iv) to maintain detailed accounts of all imported and indigenous goods used in the manufacturing processes and in operation in proper form including of those remaining stocks and those sent outside.

(xvi) Appellant submitted that there was also pre-condition that the unit shall comply with such other terms and conditions as imposed by the jurisdictional Customs and Central Excise authorities and the substantial activity of manufacture shall be

carried out within the bonded premises in terms of C.B.E. & C. Circular No. 65/2002-Cus., dated 7-10-2002. Appellant submitted that they were granted all facilities and privileges of EOU scheme. The EXIM Policy provided for duty free imported/indigenous procurement of raw-materials, capital goods etc. for the manufacture of export goods.

(xvii) The manufacturing of brass articles and the allied products is basically a labour intensive manufacturing process carried out in various aspects of manufacturing such as casting, polishing, etc. and due to this nature of operations, an inventory control system and issue, receipt system to job workers have been devised which is prevalent in most of the manufacturing units at Jamnagar. The allegation of abating diversion of duty free goods were not correct and their allegation that Appellant had colluded with job workers in diversion of duty free goods was not tenable and they had not misused any provisions of aforesaid circulars, rules and regulations.

(xviii) Main charge against Appellant that they had diverted the imported/legally procured duty free raw material and had not utilized in manufacture and export of product and had diverted duty free material to local market and had substituted the same with legally procured material is also unsustainable specially on the ground that no evidence, whatsoever, of sale of duty free raw material or any clandestine procurement of local raw material could be established by the Revenue and further the allegation of violation of EXIM Policy, notification and guidelines stipulated in the circulars, Appellant had complied with substantive provisions and used the material in accordance with the purposes of the scheme for manufacture of articles/products, which were eventually exported under the physical supervision of authorities and if there is any minor lapses, the same was only procedural in nature.

(xix) It is not denied that there might be some lapses in the observance of said notification, however, from the record there is no glaring averment which could establish that there was some deliberate deviation/disposal of material or any other loss to Revenue, but imported/duty free procured material were utilized in accordance with the notifications, for the manufacture of export products which were exported under physical supervision of Central Excise officers. They relied the decision of the Hon'ble Apex Court in the case of *Mangalore Chemicals & Fertilizers* reported as 1991 (55) E.L.T. 437 (S.C.).

(xx) It is further submitted that conditions may be substantive, mandatory based on considerations of policy, and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all

conditions irrespective of the purposes they were intended to serve. It is now a trite law that the procedural infraction of notifications/circulars etc. are to be condoned if exports have really taken place and the law is settled now that substantive benefit cannot be denied for procedural lapses. Procedure has been prescribed to facilitate verification of substantive requirements. The core aspect or fundamental requirement for debate is its manufacture and subsequent export. As long as this requirement is met, other procedural deviations can be condoned. They relied following case laws:-

(a) *Udai Shankar Triyar* - 2005 AIR SCW 5851,
(b) *M/s.Mulji Mehta & Sons Private Limited* - 2006 (206) E.L.T. 463 (T),
(c) *M/s. Malwa Industries Ltd.*-2009 (235) E.L.T. 214 (S.C.)
(d) M/s.*Kartar Rolling Mills* -2006 (197) E.L.T. 151
(e) *M/s.Eagle Flask Industries Ltd.* -2004 (171) E.L.T. 296)
(f) M/s. *Tata Oil Mills Co. Ltd.* (1989) 4 SCC 541

(xxi) Appellant submitted that they had been regularly achieving the positive NFE as an 100% EOU, during the said period as below:

Year	Outflow : CIF value of imports of raw material & capital goods (Rs. in lakhs)	Inflow FOB value of exports (Rs. in lakhs)	NFE (Rs. in lakhs)	NFE in times with reference to outflow
2006-2007	38586019	49340432.2	10754413.2	1.28
2007-2008	43414682	69354022.7	25939340.7	1.60
2008-2009	60455102	63609590.5	3154488.5	1.05

Appellant No.2 and Appellant No.3

Appellant no. 2 in his grounds of appeal, while discussing the facts and grounds as narrated by Appellant No.1 as above, further relied upon the case laws in the case of M/s.Thomas Duff & Co (India) Pvt Ltd reported as 2000(123) ELT 330 (Cal) and in the case of K. Kamla Bai reported as 2005(186) ELT 459(Tri-Chennai). It is also contended by Appellant no.3 that since the goods are already exported, penalty cannot be imposed under Section 114 as penalty can be imposed for attempt to export goods improperly; that Customs Act no where provides to enlarge its applicability

to the area beyond the territory of India; that provisions of the Act cannot be invoked against any partner of the firms who are operating their business from a place outside India.

4. Personal hearing in the matter was attended by Shri R. Subramanya, Advocate on behalf of all the three Appellants who reiterated grounds of appeal and details mentioned in their letter dated 03.08.2017. It is contended that they have followed all rules and regulations; that they have achieved positive NFE as certified by Deputy Commissioner, Kandla SEZ; that they have explained these facts to the adjudicating authority but he ignored to look into these facts; that the goods are not available for confiscation and hence can't be confiscated as held by Hon'ble CESTAT/ courts in many cases' that the goods have not been diverted by them in local market and to the department has no evidence to this effect even after detailed investigation; that they must not be penalized for achieving positive NFE; that their appeal should be allowed in view of these facts. Appellant in their written submission dated 03.08.2017 provided details relating to Job work and submitted that excess materials used by the job worker for processing of goods had been reimbursed separately and job work charges were also paid to them. No one appeared from the department despite P.H. notices issued to them.

FINDINGS

5. I have gone through the impugned order, appeal memorandum filed by Appellants and records of personal hearing. I find that issues to be decided in the present appeals are

(i) whether Appellant has exported the goods at inflated value or not? and whether such goods were liable to confiscation and redemption fine under the Customs Act, 1962 or not?

(ii) whether adjudicating authority has rightly confirmed the demand of import duty to the tune of Rs.44,81,076/- on the imported brass scrap under exemption notification 52/2003-Cus dated 31.03.2003 by Appellant no.1 or not? and whether such goods were liable to confiscation and redemption fine or not?

(iii) whether Appellant no. 1 is liable to Penalty under Section 114 (iii) and Section 114(A) of the Customs Act, 1962 or not

(iv) Whether penalties were correctly imposed on Appellant no.2 under Section 112(a), 112(ii), 114(iii) and 114AA or not?

(v) Whether penalty is correctly imposed under Section 114(iii) on Appellant no.3 or not?

6. At the very outset, I would like to take up the issue of challenging constitutional validity of provisions of Section 28(11) of the Customs Act, 1962 by Appellant No.1 where they relied upon Hon'ble High Court, Delhi's decision in the case of M/s. Mangali Impex Ltd reported as 2016 (335) ELT (605) (Del). In this regard, I find that the department has filed Special leave petition

in the Supreme Court reported as 2017(349) ELT A 98(SC) wherein Hon'ble Supreme Court has granted Stay of operation of impugned order of Hon'ble High Court, Delhi. Also, CBEC vide instruction from F No. 276/104/-Cx-8A (pt.) dated 03.01.2017 clarified as under:-

> *"Subject : Inclusion of Show Cause Notice issued in relation to sub-section (11) of Section 28 of the Customs Act, 1962 on the competency of officers of DGDRI, DGCEI and Customs (Prev.) in the Call Book - Regarding.*
>
> *I am directed to refer to Board Instructions of even no. dated 29-6-2016 [2016 (337) E.L.T. (T11)] & 28-12-2016 [2017 (345) E.L.T. (T7)] (copy available on CBEC website) on the above subject.*
>
> *2. In this regard, I am directed to say that the Board inter alia, had referred the issue of pending adjudications of cases covered by the above said Board Instruction to the Ld. Solicitor General of India. The Ld. Solicitor General has opined, inter alia, that in view of the unconditional stay in force, granted by the Hon'ble Supreme Court, the Department could continue with adjudication of the Show Cause Notices hitherto covered by the Mangali Impex judgment.*
>
> *3. Thus in view of the opinion of the Ld. Solicitor General, the Board Instruction of even no. dated 29-6-2016 & 28-12-2016 on the above subject are hereby withdrawn. Consequently, the Show Cause Notices, which were kept in the Call Book in view of the above said Board Instructions, needs to be taken out of the Call Book immediately and the adjudication of such Show Cause Notices are to be proceeded with in accordance with law."*

6.1 In view of the above legal status and CBEC's clarification, I find that the argument made by Appellant that Joint Director of DRI has no jurisdiction to issue the show cause notice for the period prior to 08.04.2011 is not tenable and legal at all.

7. I find that Appellant No.1 has contested the confiscation of export goods on the ground that the there is no corroborating evidence that the export was at higher valuations. I find that the fact of issuance of parallel invoices by Appellant no.1 remains undisputed. It is also not in dispute that details of parallel invoices were retrieved and obtained through Directorate of Forensic Science, Gandhinagar, which implies that Appellant no.1 through Appellant no.2 and Appellant no.3 had concealed the details and kept the department in dark by suppressing the facts. Appellants failed to justify their bona fide in issuing parallel invoices and logic behind removing the details from their records. I also find that Appellants have not produced any evidence to justify the requirement of invoices having lower value by the foreign buyer especially when Appellant no.3 son of Appellant no.2 is one of the partners in the foreign buyer, namely, M/s. DGTL. In spite of being partner of the foreign buyer, Appellant no. 3, son of Appellant no.2, a partner of Appellant no.1, failed to explain the end use of such undervalued invoicing. Reasoning given by Appellants that the invoices showing lower value was to please the foreign buyers is a convenient but not convincing answer at all. I find that while challenging the allegation and raising the issue of corroborating evidence, Appellant no.1 has not challenged the facts discussed hereinabove. Appellant has not produced any evidence like details of cost of production, market price in domestic market and in foreign market, contemporary value

and character of goods in export market in terms of their specific product to justify the valuation of exported goods adopted by them invalidating the parallel invoices issued by them. I find that no positive argument has been put forth by the Appellants and, therefore, I am not inclined to believe that the parallel invoices were issued to please the buyers. In absence of any proper and positive reply from Appellants, I am inclined to uphold the demand confirmed by the adjudicating authority.

8. Appellant No.1 has argued that the goods not available for confiscation can not be ordered for confiscation. I find that the Appellant is 100% EOU and imported duty free Brass Scrap under Exemption Notification 52/2003-Cus dated 31.03.2003 for the purpose of manufacture of excisable goods and its subsequent exportation and on execution of general bond. Relevant portion of Notification 52/2003-Cus reads as under:-

> "In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the said Customs Act), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts,-
>
> (a) all goods as specified in the Annexure–I to this notification, when imported or procured from a Public Warehouse or a Private Warehouse appointed or licensed, as the case may be, under section 57 or section 58 of the said Customs Act or from international exhibition held in India for the purposes of -
>
> (i) manufacture of articles for export or for being used in connection with the production or packaging or job work for export of goods or services by export-oriented undertaking (hereinafter referred to as the unit) other than those referred to in clauses (b), (c) and (e), or
>
> (b)..
> (c)..
> (d)..
> (e)...
>
> from the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty, if any, leviable thereon under section 3 of the said Customs Tariff Act, subject to the following conditions, namely :-
>
> (1) The importer has been authorised by the Development Commissioner to establish the unit for the purposes specified in clauses (a) to (e) of the opening paragraph of this notification;
>
> (2) The unit carries out the manufacture, production, packaging or job-work or service in Customs bond and subject to such other condition as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs or Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, (hereinafter referred as the said officer) in this behalf;
>
> (3) The unit executes a bond in such form and for such sum and with such authority, as may be specified by the said officer, binding himself,–
>
> (a) to bring the said goods into the unit or and use them for the specified purpose mentioned in clauses (a) to (e) in the opening paragraph of this notification;
>
> (b) to maintain proper account of the receipt, storage and utilization of the goods;

(c) to dispose of the goods or services, the articles produced, manufactured, processed and packaged in the unit, or the waste, scrap and remnants arising out of such production, manufacture, processing or packaging in the manner as provided in the Export and Import Policy and in this notification;

(d) to pay on demand-

(I) an amount equal to duty leviable on the goods and interest at a rate as specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued under section 28AB of the said Customs Act on the said duty from the date of duty free import of the said goods till the date of payment of such duty, if -

(i) in the case of capital goods, such goods are not proved to the satisfaction of the said officer to have been installed or otherwise used within the unit, within a period of one year from the date of import or procurement thereof or within such extended period not exceeding five years as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;

(ii) in the case of goods other than capital goods, such goods as are not proved to the satisfaction of the said officer to have been used in connection with the production or packaging of goods for export out of India or cleared for home consumption within a period of three years from the date of import or procurement thereof or within such extended period as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;

(iii) in the case of,-

(a) goods produced or packaged, such goods have not been exported out of India, and

(b) unused goods (including empty cones, bobbins or containers, if any, suitable for repeated use) as have not been exported or cleared for home consumption,

within a period of one year from the date of import or procurement of such goods or within such extended period as the said officer, as the case may be, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;

(II) in case of failure to achieve the said positive Net Foreign Exchange Earning, the duty equal in amount to the portion of the duty leviable on the said goods but for the exemption contained in this notification and the duty so payable shall bear the same proportion as the unachieved portion of Net Foreign Exchange Earning bears to the positive Net Foreign Exchange Earning to be achieved along with interest at the rate as specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued under section 28AB of the said Customs Act, on the said duty to be paid on demand from the date of importation or procurement of the said goods till the payment of such duty.".

8.1 Appellant has obtained warehousing License no.03/2005-06 dated 03.11.2005 from the Jurisdictional Assistant Commissioner of Central Excise, Jamangar (hereinafter referred to as "JAC") for warehousing of duty free imported raw materials and to manufacture under bond under the provisions of Section 58 and Section 65 of the Customs Act, 1962. Appellant has executed General Bond B-17 in terms of Para 3 of Notification No.52/2003-Cus dated 31.03.2003 for Rs.1,10,00,000/- before the JAC on 03.11.2005 because of which Appellant was bound to observe the conditions which are discussed at opening para of the impugned order and reproduced below for ease of reference:-

(i) They shall observe all the provisions of the Customs Act, 1962, Central Excise Act, 1944 and the Rules and Regulations made there under in respect of the said goods. (Condition No. 1 of B-17 Bond)

(ii) They shall pay on or before a date specified in a notice of demand all duties, and rent and charges claimable on account of the said goods under the Customs Act, 1962, Central Excise Act, 1944 and the Rules and Regulations made thereafter together with

interest on the same from the date so specified at the rate applicable. (Condition No. 2 of B-17 Bond)
They shall discharge all duties and penalties imposed for violation of the provisions of the Customs Act, 1962 Central Excise Act, 1944 Rules and Regulations in the respect of said goods not removed within one year or 05 years as the case may be from the date of the order permitting the deposit of the said goods at the said warehouse/EOU, or within such further time as may be extended. (Condition No. 3 of B-17 Bond)

(iv) They shall fulfill the export obligation and condition stipulated in Customs and Central Excise Notifications, as amended under which the specified goods have been imported/sourced, as well as the Import-Export Policy for April 2002-2007, as amended from time to time and to pay on demand an amount equal to the Customs and Central Excise Duties leviable on the goods as are not proved to the satisfaction of Deputy Commissioner of Central Excise & Customs to have been used in the manufacture of the articles for export and any penalty imposed under Customs Act, 1962 or Central Excise Act, 1944 rules or regulations made there under as the case may be. (Condition No. 10 of the B-17 Bond)

8.2 Thus, Appellant no.1 imported duty free raw material binding themselves to the conditions stipulated in the said notification and on undertaking given in B-17 Bond. Therefore, the activities carried out by Appellant i.e. import of material, manufacture and export of finished goods are provisional till the bond is duly discharged by them upon fulfillment of all obligations casted upon them under the law. I find that Appellant were duty bound to operate under Scheme of 100% export oriented unit under Foreign Trade Policy where every condition stipulated in the scheme is secured by way of B-17 bond executed by them and any violation by Appellant would lead to enforcement of bond. Therefore, once Appellant has cleared the goods at inflated price resulting in improper exportation of goods as held in foregoing para, exported goods become liable to confiscation under Section 113 of the Act and Appellant becomes liable to penalty under Section 114 of the Act. The written bond supported by the bank guarantee continues to be in force even after removal of the goods from the factory, when exportation of goods is found improper. Appellant no.1 is permitted to warehouse the duty free imported goods for manufacture of finished goods and its proper exportation as per the terms and conditions stipulated in the provisions of Customs Act,1962 and Foreign Trade Policy. Section 125 of the act would be applicable in a case where confiscation any goods is authorized under the Customs Act, 1962. Therefore, though the goods were not available for confiscation on the date of adjudication, Section 125 of the Act could be validly invoked in cases like this since exportation of goods is subject to bond executed by Appellant No.1.

8.3 In this regard, I would like to rely on the judgment of the Hon'ble Supreme Court in the case of M/s. Weston Components Ltd reported as 2000(115) ELT 278 (SC) wherein it has been held that :-

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

8.4 The Hon'ble Gujarat High Court in the case of M/s. KayBee Tax Spin Ltd (100% EOU) reported as 2017(349) ELT 451 (Guj) has also held that redemption fine in lieu of confiscation is imposable even if goods are not available for confiscation where goods are permitted to be warehoused without payment of duty on furnishing of bond. Relevant Paras of the said judgment is reproduced below:-

***"5.1** In the said form, the respondent-Unit had also declared that the said written bond shall continue to be in force, notwithstanding the transfer of goods to any other person or removal of goods from one warehouse to another. The said bond was also backed by an undertaking. On execution of such bond and the conditions mentioned in the bond, the respondent-Unit was permitted to warehouse the goods without payment of any duty.*

***5.2** It is an admitted position that thereafter, the respondent-Unit clandestinely removed the goods and thereby committed breach of condition by diverting the goods illicitly into the open market and the raw materials which were procured by foregoing Customs duty have not been used for the purpose for which they were imported, and therefore, the goods were liable to be confiscated.*

***5.3** Section 125 of the Customs Act, 1962 provides that whenever confiscation of any goods is authorized by the Act, the Officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under the Customs Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods, an option to pay in lieu of confiscation such fine, as the said officer thinks fit.*

***5.4** As observed hereinabove, on the respondent-Unit diverting the goods illicitly into the open market and the raw materials which were procured by foregoing the Customs duty were not used for the purpose for which they were imported, the Customs authorities were authorized to confiscate such goods which are illicitly diverted. It is required to be noted that the respondent-Unit was permitted to deposit the goods in a bonded warehouse without making payment of the Customs duty, on certain terms and conditions and one of the condition was that the finished product was required to be exported, meaning thereby the goods which were permitted to be imported and thereafter deposited in a warehouse without payment of Customs duty, were not required to be sold in the open market in India. Thus, once the confiscation of such goods was authorized, Section 125 of the Customs Act shall be applicable. However, as the goods were not available for confiscation at the time of adjudication, as the same were already released on bond and/or permitted to be warehoused without payment of duty on furnishing the bond and undertaking, redemption fine in lieu of confiscation was imposable.*

***5.5** Under the circumstances, considering the decision of Apex Court rendered in case of Weston Components Limited (supra) and the decision of Karnataka High Court in the case of Shilpa Trading Company (supra), the Tribunal ought to have held that the Adjudicating Authority ought to have imposed redemption fine in lieu of confiscation of the goods which were illicitly diverted in the open market, which were permitted to be warehoused on certain terms and conditions; including without making payment of Customs duty.*

***5.6** Now, so far as reliance placed upon a decision of Bombay High Court rendered in case of Finesse Creation Inc. (supra) and the subsequent decision of*

the said High Court in the case of National Leather Cloth Mfg. Company (supra) are concerned, on facts, the same shall not be applicable to the facts of the case on hand, since in the matters before the Bombay High Court, there was no bond/legal undertaking executed. The submission made on behalf of the respondent-Unit that unless and until the goods are first seized, there is no question of confiscation and consequently, there is no question of imposing the redemption fine in lieu of confiscation is concerned, considering the language used in Section 125 of the Customs Act, we do not agree with the same. As observed hereinabove, Section 125 of the Act shall be applicable in a case where confiscation of any goods is authorized by the Customs Act. If it is found that there is breach of any of the provisions of the Customs Act and/or even the Export/Import Policy, and/or there is a breach of any of the terms and conditions on which goods were permitted to be imported without payment of duty and permitted to be deposited in the warehouse, confiscation of such goods can be said to be authorized thereafter, when it is found that the goods are not available for confiscation as the same were illicitly diverted to the open market, and the purpose for which the goods were permitted to be imported without payment of duty is frustrated, in lieu of such goods, redemption fine is imposable.

6. *For the reasons stated above, as the goods were not available for confiscation, as the goods were already diverted/permitted to be warehoused without payment of duty, on furnishing the bond and the undertaking and thereafter, the respondent-Unit clandestinely and illicitly diverted the goods to the open market, the goods which otherwise were liable to be confiscated, in lieu of confiscation, redemption fine was imposable."*

(Emphasis supplied)

8.5 The Hon'ble High Court of Karnataka in the case of M/s. Shilpa Trading Co reported as 2014 (309) ELT 641 (Kar) has also held as under:-

"From the reading of the aforesaid order, it is clear that when goods are liable for confiscation, and confiscated and released to the assessee on his executing a bond or bank guarantee, the proceedings are concluded holding that if there is a violation of the provisions of the Act, then the order of confiscation has to follow as a matter of course. As the goods are already released in favour of the assessee instead of again taking possession of the confiscated goods, the law provides for payment of fine in lieu of confiscation which is popularly known as redemption fine. Therefore, whether the bond executed by the assessee is in force; whether the bank guarantee executed for due compliance of the bond is in force or not; whether goods are in possession of the authority or not; whether the goods in existence or not on the day when order was passed is totally irrelevant. The question for consideration is whether the assessee has contravened the law and the goods are liable for confiscation? Once, that finding is recorded in lieu of confiscation of the goods and option is given to the assessee to pay confiscation fine i.e., redemption fine to retain the goods. In that view of the matter, the finding recorded by the Tribunal relying on its earlier judgment is erroneous, runs counter to the judgment and law laid down by the Apex Court in the case of Weston Components Ltd. v. Commissioner of Customs, New Delhi reported in 2000 (115) E.L.T. 278 (S.C.), as such impugned order cannot be sustained. Accordingly, we pass the following"

8.6 In light of the above judgments of the Hon'ble Apex Court and Hon'ble High Courts, I find no infirmity in the impugned order confiscating exported goods even though not available and imposing redemption fine in lieu of confiscation of goods. Since goods are liable to confiscation, penalty under Section 114(iii) is also imposable as discussed hereinabove. I find no infirmity in order of the adjudicating authority confiscating 123.595 MT of imported Brass Scrap valued at Rs.2,16,00513/-, and imposition of redemption fine of Rs. 55,00,000/- under Section 111(o) and Section 125 of the Act.

9. Appellant has contended that there is no evidence of diversion of imported duty free goods and it was merely a procedural lapse in non obtaining permission for sending imported brass scrap for job work. I find that following facts emerges which is not disputed by Appellant

(i) imported brass scrap was removed by Appellant from their factory premises without any valid documents

(ii) no records in respect of movement of imported goods are produced by Appellant

(iii) Appellant has not intimated the department about duty free imported brass scrap removed by them

(iv) the fact remains that imported duty free brass scrap is removed by Appellant without payment of duty and accounted for in records.

(v) payments made by Appellants to so called job workers are in cash and kept out of purview of recorded transactions through banks

9.1 I find that above facts indicate against Appellant no.1's argument that it was a mere procedural lapse on their part in not obtaining permission for job work of goods. I find that Appellant no. 1 has not come up with any evidence showing that there was genuine removal of duty free imported goods and receipt of the finished goods properly. It was not a case that day to day challans were being prepared by them showing removal of goods in the registers maintained in respect of removal and receipt of goods, job work invoices raised by the job worker, status of work in progress in respect of raw material etc. Therefore, the transactions of Appellant no.1 are not recorded transactions to claim their bona fide. Appellant failed to justify receipt of higher quantity of finished goods as against the quantity of inputs removed by them. It is not explained as to why details of so called job workers were kept only in form of data in the computer and was only available when retrieved by the DFS, Gandhinagar. All these facts lead to a conclusion that Appellant no.1 failed to prove the genuineness of removal of duty free imported brass scrap from their factory. I am not convinced with the argument that goods cleared for job work and returned back are bona-fide removal by Appellant no.1 in absence of evidences to this effect. Therefore, the appeal filed by Appellant no.1 does not sustain and I hold so. Accordingly, I reject the appeal filed by Appellant No.1 against order of confirming demand of Rs.44,81,076/- under Section 28 of the Act.

10. Appellant No.1 has argued that the adjudicating authority has no jurisdiction to restrict the Net Foreign Exchange against the said Five consignments exported improperly. I find that it would be appropriate to refer condition 3 (d) (II) of Notification 52/2003-cus dated 31.03.2017 which is re-produced below :-

"3) The unit executes a bond in such form and for such sum and with such authority, as may be specified by the said officer, binding himself,–

(a) to bring the said goods into the unit or and use them for the specified purpose mentioned in clauses (a) to (e) in the opening paragraph of this notification;

(b) to maintain proper account of the receipt, storage and utilization of the goods;

(c) to dispose of the goods or services, the articles produced, manufactured, processed and packaged in the unit, or the waste, scrap and remnants arising out of such production, manufacture, processing or packaging in the manner as provided in the Export and Import Policy and in this notification;

(d) to pay on demand-

(I) an amount equal to duty leviable on the goods and interest at a rate as specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued under section 28AB of the said Customs Act on the said duty from the date of duty free import of the said goods till the date of payment of such duty, if -

.....

.....

(II) in case of failure to achieve the said positive Net Foreign Exchange Earning, the duty equal in amount to the portion of the duty leviable on the said goods but for the exemption contained in this notification and the duty so payable shall bear the same proportion as the unachieved portion of Net Foreign Exchange Earning bears to the positive Net Foreign Exchange Earning to be achieved along with interest at the rate as specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued under section 28AB of the said Customs Act, on the said duty to be paid on demand from the date of importation or procurement of the said goods till the payment of such duty".

10.1 I find that above condition stipulates to demand customs duty in case of failure to achieve positive Net Foreign Exchange, which inherently empowers adjudicating authority to decide on NFE as he is to demand customs duty on account of violation of the provisions of the notification. I therefore find no merit in pleas of Appellant no.1'on this count.

11. I find that Appellant no.2 is partner of Appellant no.1 and he is the conoerned person for entire business activity of Appellant no.1. In his statement dated 11.08.2010, Appellant no.2 has accepted that the details retrieved from the Hard Disc, Pen drive etc recovered from the office premises of Appellant no.1 were generated by his son Shri Ankit D Chngani, Appellant no.3, who used to sit in the office of the Appellant No.1 and was helping to run the company in un authorized way. Appellant No.3 in his statement dated 12.02.2010 accepted that he was a partner of one of their foreign buyers namely M/s. Darpan General Trading LLC, Dubai and he used to get orders for Appellant no.1 if the items required by M/s. DGTL were available with Appellant no. 1. Thus, I find that Appellant no. 2 and Appellant no.3 have acted jointly for improper export and diversion of duty free imported goods as discussed in foregoing paras and hence they Appellant No.2 has rendered himself liable to penalty under Section 112(ii), Section 114(iii) and Section 114AA of the Act and AppellantNo.3 has rendered himself liable to penalty under Section114(iii) of the Act. various provisions of the Act. I, therefore, find no infirmity in impugned order for imposing penalty on Appellant no.2 under Section 112(ii), Section114(iii) andSection114AA of the Act and

penalty on Appellant no.2 under Section 114 (iii) of the Act for the quantum as decided in the impugned order.

12. As regards simultaneous penalty on the Partnership firm and the partner, I find that it is not the case that penalty has been imposed on all the partners of the firm in addition to the business firm. I find that the Hon'ble Bombay High court in the case of M/s. Amritlaskhmi Machine Works reported as 2016(335) 225 (Bom.) has held as under:-

> *"**92.** The sequel to the above discussion is that the first question is required to be answered in the affirmative, that is simultaneous penalties can be imposed on the firm and the partners under the Act and more particularly under Section 112(a) of the Act. However as the Act itself stipulates, the same would be subject to the parties proving that the contravention has taken placed without their knowledge or despite exercise of all due diligence to prevent such contravention.*
> ***93.** As regards the second question, the decision of the Division Bench of this Court in "Textoplast Industries v. Additional Commissioner of Customs" reported in 2011 (272) E.L.T. 513 (Bom.) lays down the correct law in holding that it is permissible to impose penalty separately on partnership firm and the partners in adjudication proceedings under the Customs Act."*
>
> ***(Emphasis supplied)***

12.1 I also find that Hon'ble Madras High Court in the case of N. Chittaranjan reported as 2017 (350) ELT 78 (Mad) has held that,

> *"**9.** In the considered opinion of the Court, in the light of the above cited judgments, penalty on the partner as well as the partnership Firm can be simultaneously imposed and of course, imposition of penalty both on the Firm and its partners, depends upon the facts of each case."*
>
> ***(Emphasis supplied)***

13. Appellant no.3 has relied upon a decision of the Hon'ble Calcutta High Court reported as 2000 (123) ELT 330(Cal) to say that no penalty was imposable on him under section 114(iii) of the Act when the goods are not available for confiscation. I find that the order for confiscation of goods and imposition of fine even when the goods are not available has already been discussed in foregoing paras. I further find that Hon'ble Bombay High Court in the case of M/s. Bussa Overseas & Properties P Ltd reported as 2004 (163) ELT 304 (Bom) dissented with the above decision and held as under:-

> *"**7**.....*
> *.....*
> *.....The mere fact that the importers secured such clearance and disposed of the goods and thereafter goods are not available for confiscation cannot divest the Customs Authorities of the powers to levy penalty under Section 112 of the Act. Shri Chagla relied upon the decision of Calcutta High Court reported in 2000 (123) E.L.T. 330 (Cal.) = 1976 Tax. L.R. 1567 (Thomas Duff and Co. (India) Ltd. v. Collector of Customs and others). The Calcutta High Court took the view in a case of export where a show-cause notice was issued as to why penal action should not be taken, that once the goods were exported and/or not available for confiscation, then the Customs Authority had no jurisdiction to initiate the proceedings by issuance of show-cause notice for levy of penalty. It is not possible to share the view taken by the Calcutta High Court. The power to levy penalty is not dependant upon availability of the goods imported or exported. The power to levy penalty arises because the importer or exporter has done or omitted an act in relation to*

goods and which renders such goods liable for confiscation. The power, in our judgment, to levy penalty is available once the Customs Authorities come to the conclusion that the goods imported or exported were liable to confiscation because of act or omission on the part of the importer or exporter as the case may be. The power is not dependant upon the availability of the goods. It is therefore not possible to accede to the submission of Shri Chagla that as the goods covered by 45 consignments were not available for confiscation under Section 111 of the Act, the Customs Department could not have commenced proceedings under Section 112 of the Act for levy of penalty."

(Emphasis supplied)

14. In light of the above discussion I hold that the appeals filed by Appellant no.1, Appellant no.2 and Appellant no.3 are not tenable and are required to be rejected. I, therefore, reject all three appeals filed by them.

१४.१ अपीलकर्ताओ द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

14.1 The appeals filed by Appellants stand disposed off in above terms.

9/10/2017

(कुमार संतोष)
आयुक्त (अपील्स)

By Speed Post
To

1.	M/s. Amardeep Export, Plot No.414&415, GIDC, Phase-ll, Dared, Jamnagar	मेसर्स अमरदीप एक्स्पोर्ट्स , प्लॉट नं ४१४ & ४१५, जीआईडीसी फेज -II, दरेड , जामनगर
2	Shri Dinesh Bhimjibhai Changani, Partner M/s. Amardeep Export, Plot No.414&415, GIDC, Phase-ll, Dared, Jamnagar	श्री दिनेश भीमजिभाइ चांगानी पार्टनर, मेसर्स अमरदीप एक्स्पोर्ट्स , प्लॉट नं ४१४ & ४१५, जीआईडीसी फेज -II, दरेड , जामनगर
3.	Shri Ankit Dineshbhai Changani, Partner M/s. Amardeep Export, Plot No.414&415, GIDC, Phase-ll, Dared, Jamnagar	श्री अंकित दिनेशभाई चांगानी मेसर्स अमरदीप एक्स्पोर्ट्स , प्लॉट नं ४१४ & ४१५, जीआईडीसी फेज -II, दरेड , जामनगर

Copy to:

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2) The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3) The Additional Commissioner, GST & Central Excise, Jamnagar Sub-Commisionerate, Jamnagar.
4) Guard File.
5) F No.V2/185/RAJ/2016
6) F No.V2/189/Raj/2016