



સિમા યુલ્ક આયુક્ટ કા કાયારી,
નવન સિમા યુલ્ક વવન, ન્યા કા.ડિા I
OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA-370 210 (GUJARAT)
Phone No: 02836-271468/469, Fax No. : 02836-271467.

A	File No.	S/10-111/Adjn/Commr/2013-14
B	Order-in-Original No.	KDL/P.COMMR/PVRR/07/2015-16
C	Passed by	SHRI P.V.R. REDDY, Principal Commissioner of Customs, Kandla.
D	Date of order	30.06.2015
E	Date of issue	03.07.2015
F	SCN No. & Date	F. No. S/43-63/SIIB/2011-12 dated 24.01.2014
G	Noticee/Party/Exporter	M/s. Vestas Wind Technology India (P) Ltd.

1. This Order - in - Original is granted to the concerned free of charge.
2. Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

“Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench,
O-20, Meghaninagar, New Mental Hospital Compound, Ahmedabad-380
016.”
3. Appeal shall be filed within three months from the date of communication of this order.
4. Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty Lakhs) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 Lakhs (Rupees Fifty Lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.
5. The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paise only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.
6. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
7. While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

BRIEF FACTS OF THE CASE

M/s Vestas Wind Technology India Pvt. Ltd, 298, Rajiv Gandhi Salai, Sholinganallur, Chennai-600119 (hereinafter referred to as "M/s. Vestas") had imported various components / parts of wind mill i.e. wind towers, blades, frames, hubs and packing materials (for the purpose of safe transport of towers, blades and frames) viz. Barge frames, Low Hub Frame, Tower Foot, Tower Frapping Brackets, Double stacker frames, SOC containers etc. These packing materials were in the nature of specialized frames designed exclusively for the purpose of transporting the imported wind mill parts namely towers, blades etc.

2. Intelligence was gathered by the officers of SIIB, Custom House, Kandla that M/s. Vestas while importing the goods had deliberately not declared the packing materials for components / parts of wind mill / SOC containers with a view to evade custom duty. It was also gathered that the specialized packing materials were not in the nature of optional equipment but it was a part of the goods being imported and that the same had commercial value. Preliminary Intelligence also suggested that M/s. Vestas had paid for these equipments along with the imported goods and that the transaction was also reflected in their commercial invoices. Intelligence further suggested that Importer had indulged in concealing the actual transaction value with a view to avoid the applicable custom duty and thus, manipulated the various documents submitted to the Customs.

3. It was found that during the period from January, 2011 to February, 2012, packing materials viz. Tower Foot, Tower Frapping Brackets, Low Hub Frame, Double stacker frames etc, were imported but these were not declared to the customs by M/s. Vestas in the Bills of Entry. **The details of such goods are mentioned in Annexure-B attached to the Show Cause Notice.** The value of these goods is Rs.10,98,12,887/- involving duty amounting to Rs.2,67,06,548/-. The said undeclared goods were placed under seizure vide seizure memo dated 07.11.2013 valued at Rs.10,98,12,887/-. The said seized goods were handed over to M/s. Vestas under a Supratnama dated 07.11.2013 for safe custody duly acknowledged by Shri R. Kannan, Manager Logistics of M/s. Vestas. The said goods were provisionally released as requested by M/s. Vestas on furnishing Bond of 100% value of the seized goods and 25% BG of the value of the seized goods. This was communicated to M/s. Vestas vide letter dated 07.11.2013. M/s. Vestas vide letter dated 06.01.2014, furnished a provisional release bond for the 100% value of the said seized goods, Bank

Guarantee dated 20.12.2013 for Rs.2,74,53,222/- & amendment to B.G. dated 07.01.2014, which were forwarded to Group Assistant Commissioner for necessary action. Meanwhile, M/s. Vestas vide their letter dated 03.01.2014 informed that there was a theft attempt by a gang at their Bhachau Yard, wherein the seized goods were kept inside the containers; that they had registered this case with local police through Yard In-charge for necessary security arrangement; that the police was investigating the case, however advised them to immediately move the containers with materials available at the yard to safer place to avoid further attempts / thefts as the present yard was not safe enough and was located in a very remote place; that they were shifting the entire material available at the present yard to the new yard near Anjar. They requested for permission to shift the seized materials from Bhachau to Anjar, which was considered vide letter dated 07.01.2014.

3.2 M/s. Vestas vide letter dated 02.01.2014, enclosed as Annexure-A to Show Cause Notice, showing the details of imported goods, wherein benefit of Noti.No.104/94-Cus dated 16.03.1994 was availed but duty was not paid. The value of the said goods was Rs.23,71,41,010/- and duty involved was Rs.5,82,34,253/-. They informed that as regards all the goods other than SOC containers as mentioned in the Annexure-A to Show Cause Notice, they confirmed that the same had been re-exported by M/s. Vestas under different shipping bills; that as regards SOC containers, they enclosed an Appendix - I showing the latest detailed position of these containers; that on perusal of this Appendix I it can be seen that there were 15 such containers which were surrendered by them to the Leasing Company and later on shipped out of country by them; that the details of their shipping bills in case of 10 containers were also mentioned therein; that for the remaining 5 containers, the Leasing Company M/s. DSV Air & Sea A/S, Denmark had given a letter dated 23.12.2013 certifying that these containers had been shipped out and re-exported from India to various countries.

In view of the above, they made the following prayers :

- (i) that the containers lying at Bachau Yard mentioned in the Appendix I may be seized in terms of Section 110 of the Customs Act, 1962 and the same may be permitted to be provisionally released for re-export in terms of Section 110A of the Customs Act, 1962;
- (ii) that towards the undeclared packing materials, they had paid the differential duty along with interest totally amounting to Rs.2,89,57,316 + Rs.46,02,074/- vide TR6 Challan Nos. Nil

dated 04.07.2012 and as per the facts available in the Seizure Memo, for the undeclared packing materials, the differential duty and interest works out to Rs.2,67,06,548/-. As such, an excess duty amount of Rs.28,13,286/- (principal Rs.24,25,983/- and interest Rs.3,87,303/-) was paid at the earlier instance.

- (iii) that the total liability towards the above containers may be adjusted towards the excess differential duty and interest for these containers.
- (iv) that these containers may be permitted for provisional release without imposing any penalty towards the adjudication liabilities,
- (v) that all the containers may be permitted for re-export as per Section 74 of the Customs Act, 1962 read along with the Re-Export of Imported Goods (Drawback of Customs Duties) Rules, 1995 and on re-export, they may be permitted to avail the benefit of Drawback of Customs Duties;

On perusal of the Appendix-I submitted by M/s. Vestas, it was found that there were total 63 SOC containers valued at Rs.70,18,643/- in respect of which benefit of Noti.No.104/94-Cus dated 16.03.1994 was availed and duty was not paid. Out of these 63 containers, 31 containers valued at Rs.34,79,519/- were re-exported by M/s. Vestas under different shipping bills as detailed in the Appendix-I. 15 containers valued at Rs.16,40,158/- were surrendered by them to the Leasing Company and later on shipped out of country by the Leasing Company. 17 containers valued at Rs.18,98,966/- were lying at their Bhachau Yard as per their letter dated 02.01.2014 and later on shifted to their Anjar Yard as per permission granted vide letter dated 07.01.2014. Since the 17 containers were physically available, a seizure memo dated 09.01.2014 was issued in respect of the aforesaid 17 containers valued at Rs.18,98,966/-. The said seized goods were handed over to M/s. Vestas under a Supratnama dated 09.01.2014 for safe custody duly acknowledged by Shri R. Kannan, Sr. Manager Logistics of M/s. Vestas Wind Technology India Pvt. Ltd. In view of the request made by M/s. Vestas vide their letter dated 02.01.2014 for release of the seized goods (empty marine containers), the Commissioner of Customs, Kandla considered their request and ordered for provisional release of the seized goods on execution of Bond of full value of the seized goods and Bank Guarantee of Rs.5 lacs. This was communicated to M/s. Vestas vide letter dated 15.01.2014. M/s. Vestas vide their e-mail dated 22.01.2014 sent a copy of BG for Rs.5 lacs against provisional release of these containers stating that original BG was being sent through courier for submission along with the Bond.

4. In 4 Bills of Entry, M/s. Vestas paid the applicable duties for the packing materials viz. Tower Foot, Tower Frapping Brackets, Low Hub Frame, Double stacker frames etc, which were imported and declared in the import documents.

5. In 20 Bills of Entry, **details mentioned in Annexure-A attached to Show cause Notice**, these goods were mentioned in the Bills of Entry as having imported and having commercial value. M/s. Vestas had claimed benefit of Notification No.104/94-Cus dated 16.03.1994 for these imports and thereby claiming exemption of 'NIL' duty. The value of these goods is Rs.23,71,41,010/-. It is observed that most of these Bills of Entry have been assessed provisionally for SVB (Special Valuation Branch) purpose as M/s. Vestas and the supplier appeared to be related. These Bills of Entry shall be finalized as and when the SVB matter is finalized. Out of these goods, as informed by M/s. Vestas vide their letter dated 02.01.2014, all the goods other than SOC containers valued at Rs.23,01,22,367/- had been re-exported by M/s. Vestas under different Shipping Bills. As regards, SOC containers, there were total 63 SOC containers valued at Rs.70,18,643/- in respect of which benefit of Noti.No.104/94-Cus dated 16.03.1994 was availed and duty was not paid. Out of these 63 containers, 31 containers valued at Rs.34,79,519/- were re-exported by M/s. Vestas under different shipping bills as detailed in the Appendix-I. 15 containers valued at Rs.16,40,158/- were surrendered by them to the Leasing Company and later on shipped out of country by the Leasing Company. 17 containers valued at Rs.18,98,966/- were lying at their Bhachau Yard as per their letter dated 02.01.2014 and later on shifted to their Anjar Yard as per permission granted vide letter dated 07.01.2014.

5.1 The Notification No.104/94-Cus dated 16.03.1994 as amended by Notification No.101/95-Cus dated 26.05.1995 reads as under:

*"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, **hereby exempts container of a durable nature falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from,***

*(a) the **whole of the duty of customs** leviable thereon under the said First Schedule; and*

*(b) the **whole of the additional duty** leviable thereon under section 3 of the said Customs Tariff Act:*

*Provided that the importer, by execution of a bond in such form and for such sum as may be specified by the Assistant Commissioner of Customs or Deputy Commissioner of Customs **binds himself to re-export the said containers within six months from the date of their importation and to furnish documentary evidence thereof to the satisfaction** of the said Assistant Commissioner and to pay the duty leviable thereon in the event of the importer's failure to do so :*

Provided further that in any particular case, the aforesaid period of six months may, on sufficient cause being shown, be extended by the said Assistant Commissioner for such further period, as he may deem fit.”

5.2 M/s. Vestas had executed re-export bonds, in terms of the notification 104/94-Cus at the time of import, binding themselves to re-export these goods along with SOC containers within 6 months of their import. During investigations, it was revealed that the goods imported by them claiming benefit of Noti.No.104/94-Cus and as mentioned in Annexure-A to the notice were not re-exported by them within the prescribed time limit or within extended period. M/s Vestas not only failed to comply with the condition of the bonds executed but also did not seek any further extension of the time of re-export in terms of the conditions of the notification. M/s Vestas applied for the extension for a period of 6 months, but could not produce the permission granted to them. They did not apply for further extension for the same assuming that re-export would happen / take place in January 2012 itself. Thus, M/s. Vestas neither re-exported the said packing materials within the prescribed time limit or within extended period nor applied for further extension.

5.3 During investigations, it was further revealed that the imported specialized equipment was not in the nature of 'durable container'. These are custom-made equipment made for the transport of only the specialized goods namely wind mill towers and blades. Further some of these equipments were purchased by M/s. Vestas and the transaction formed part of the import invoices. In the case of import of 'durable containers' the same will not be part of the commercial invoice and the supplier would be supplying the same on re-export basis, which is not the case in the subject imports. Having paid for the import of the equipments, it appeared to be a modus followed by M/s. Vestas to declare the same as 'Durable containers' to claim duty exemption under notification 104/94-cus.

6.1 During the course of investigation, statements of Shri R Kannan, Manager Logistics of M/s Vestas Wind Technology India Pvt. Ltd, Chennai were recorded on 12.04.2012 and on 22.08.2012 under Section 108 of the Customs Act, 1962, wherein he inter-alia stated that:

- i. at the time of import of WOEK components, those re-exportable Barge frames were classified as 'durable containers' vide Notification No.104/94-Cus which exempted containers of durable nature from the whole of the Customs duty and Additional duty;
- ii. the Board Circular No.69/2002-Cus dtd 25th October 2002 clarified that "As per the meaning assigned to the words 'durable' and 'container' in various dictionaries, it appears that any goods (containers) used for packaging or transporting other goods, and capable of being used several times, would fall in the category of 'containers of durable nature';
- iii. the terms of import invoices would be in Ex-Works, FOB and CIF in general and their supplier M/s. Vestas Bulgaria EOOD, Bulgaria raised commercial invoice in their name for the whole cargo supplied by them and accordingly, they made the payment to the supplier as per commercial invoice; that they also made "purchase contract/order" with overseas supplier;
- iv. for those frames, they had made the payment to the supplier inadvertently and they had already initiated process to get back the money from the supplier as per RBI regulations; that they had received back the entire foreign exchange from the overseas supplier in respect of declared packing materials which were part of commercial invoices raised by overseas supplier.
- v. the subject goods under investigation, were used as packing material for safe ocean transport, storage at ports/intermediate storages, handling and domestic transportation and storage at project site purposes etc. Hence, these goods were imported and there was no mentioning in commercial invoice for export;
- vi. that they imported the goods which were durable and reusable containers, however, they did not put to use till date as it cannot be used for any other purpose except re-export the same to their manufacturing unit for re-use;
- vii. that because of delay in erection at project site due to rains and site readiness, the re-export could not be done within prescribed time limit (6 months); that they had already applied for the extension for a

period of 6 months; that he was not in position to produce the permission granted to them for the extension of further six month; that since the material was ready for shipment, they had not applied for further extension for the same assuming that re-export would happen / take place in January 2012 itself;

- viii. they had neither re-exported the goods nor applied for the further extension; that they could not re-export these goods;
- ix. that he was aware of provision of this section to some extent, however, their company had started imports from January 2011, and at the material time they had not availed the benefit of the said provisions.

6.2 The statement was verified with the facts available and various documentary evidences collected during the course of investigations. It is revealed that M/s. Vestas had not declared the actual commercial transaction with respect to the specialized packing equipments. Only in some cases, where these goods were declared, they claimed the benefit of notification 104/94-cus. Further, all these components were not only had commercial value but M/s. Vestas had made payments to the overseas supplier.

6.3 The total foreign exchange payments made for the specialized equipment i.e. packing materials by M/s. Vestas is more than Rs.34 Crores approximately. The claim of M/s. Vestas's representative that these payments were inadvertently made appears to be false and a poor 'after-thought' defense. No correspondences with the supplier have been put forward in their defense during investigations.

6.4 M/s. Vestas also failed to produce any evidence with regard to the statement made by them that they had received back the entire foreign exchange from the overseas supplier in respect of declared packing materials which were part of commercial invoices raised by overseas supplier.

7. In the wake of the claim of M/s. Vestas that part of the specialized equipment which was imported against payment of import duty is being exported, the SIIB examined the export consignment covered under Shipping Bill No. F 003 dated 14.06.2012 filed by M/s Vestas Wind Technology India P. Ltd in presence of Shri G Sudarshan, Senior Manager & Shri G Krishna Rao, Executive Operation of CHA M/s NTC Shipping

Services Pvt. Ltd. on 20.07.2012. During the examination, it was noticed that the description of the goods were V 100 Barge Frames and in the shipping they had mentioned that the goods were for re-export under Section 74 of the Customs Act, 1962. While examining the export goods with respect to import documents with a view to establish their identity, it was noticed that no such marks, numbers etc. were declared in the import documents presented at the time of imports namely Bills of Entry, Invoice, packing list etc. Hence, in view of the above, the goods currently being exported were not identifiable with import documents and thus their identity (the goods) cannot be established.

8.1 During the course of investigations, M/s. Vestas agreed to the facts that they had cleared some of the specialized packing materials without declaring the same in the Bills of Entry. They agreed to the duty liability of Rs.2,89,57,316/- which is the duty calculated on the commercial value of these goods. The details of the value and the duty calculation is shown in **Annexure-C** to Show Cause Notice as worked out by M/s. Vestas. During the course of investigation, M/s. Vestas have made voluntary payment of Rs.2,89,57,316/- vide Challan No.735 dated 04.07.2012 towards Customs duties on the packing materials imported by them from Kandla port which were not declared. They have also paid a total amount of Rs.46,02,074/- vide Challan No.1529 dated 04.10.2012 towards interest for delayed payment of Customs duties.

8.2 The specialized equipment claimed as packing materials imported by M/s. Vestas during the period 2010-11 to 2011-12 and for which bonds were executed under 104/94-Cus, were not re-exported within the prescribed time limit nor the extended period, if any. These facts have also been admitted by Shri R Kannan, Manager Logistics of M/s Vestas Wind Technology India Pvt. Ltd., Chennai in his statements recorded on 12.04.2012 and 22.08.2012 under Section 108 of the Customs Act, 1962. Thus, these goods are also liable for the applicable custom duty. The differential duty calculation is summarized as below :

Annexure	Particulars	Value (Rs)	Duty Amount (Rs)
A	Imported goods wherein benefit of Notification No.104/94-Cus dated 16.3.94 availed and duty not paid	23,71,41,010/-	5,82,34,253/-
B	Imported Goods Which Were Not Declared	10,98,12,887/-	2,67,06,548/-
Total duty liability = A+B		34,69,53,897/-	8,49,40,801/-
C	Duty Amount Deposited During Investigation In Respect Of Non-Declared Packing Materials as	10,91,60,287/-	2,89,57,316/-

	worked out by M/s. Vestas		
Differential duty recoverable = A+B-C		23,77,93,610/-	5,59,83,485/-

The seizures effected are also summarized as under :

SUMMARY OF GOODS SEIZED PERTAINING TO ANNEXURE-A I.E. DECLARED GOODS

Annexure	Particulars	Value (Rs)
A (i.e. total a + b below)	Imported goods wherein benefit of Notification No.104/94-Cus dated 16.3.94 availed and duty not paid	23,71,41,010/-
a	Goods other than SOC containers and re-exported by Vestas	23,01,22,367/-
b	63 SOC containers	70,18,643/-
BREAK UP OF ABOVE		
(i)	31 SOC containers re-exported by M/s.Vestas under different Shipping Bills	34,79,519/-
(ii)	15 SOC containers surrendered by M/s.Vestas to Leasing Company and later on shipped out of country by the Leasing Company	16,40,158/-
(iii)	17 SOC containers physically available and seized under Seizure Memo dated 09.01.2014	18,98,966/-

SUMMARY OF GOODS SEIZED PERTAINING TO ANNEXURE-B I.E. UNDECLARED GOODS

Annexure	Particulars	Value (Rs)
B	Packing materials imported, but not declared to the Customs by M/s. Vestas in the bills of entry	10,98,12,887/-
Seized	All the goods of Annexure-B seized being physically available	10,98,12,887/-

9. RELEVANT LEGAL PROVISIONS:

Notification No.104/94-Cus dated 16.03.1994 as amended by Notification No.101/95-Cus dated 26.05.1995 :

*“In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, **hereby exempts container of a durable nature falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from,***

*(a) the **whole of the duty of customs** leviable thereon under the said First Schedule; and*

*(b) the **whole of the additional duty** leviable thereon under section 3 of the said Customs Tariff Act:*

Provided that the importer, by execution of a bond in such form and for such sum as may be specified by the Assistant Commissioner of

Customs or Deputy Commissioner of Customs binds himself to re-export the said containers within six months from the date of their importation and to furnish documentary evidence thereof to the satisfaction of the said Assistant Commissioner and to pay the duty leviable thereon in the event of the importer's failure to do so :

Provided further that in any particular case, the aforesaid period of six months may, on sufficient cause being shown, be extended by the said Assistant Commissioner for such further period, as he may deem fit.”

The Customs Act, 1962

i) SECTION 28 - Recovery of duties not levied or short-levied or erroneously refunded – Section 28(4): (w.e.f.08.04.2011)

(4) Where any duty has not been levied or has been short-levied or erroneously refunded or interest payable has not been paid, part-paid or erroneously refunded, by reason of,—

- (a) collusion; or
- (b) any wilful mis-statement; or
- (c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

ii) SECTION 28 – Notice for payment of duties, interest etc - Section 28(1): (upto 07.04.2011)

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,

- (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;
- (b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has

been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.

iii) SECTION 28AA (w.e.f. 08.04.2011) - Interest on delayed payment of duty:

(1) Notwithstanding anything contained in any judgement, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made there under, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(2) Interest at such rate not below ten per cent and not exceeding thirty six per cent per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which they duty ought to have been paid or from the date of such erroneous refund, as the case may be, upto the date of payment of such duty.

iv) SECTION 28AB (upto 07.04.2011) - Interest on delayed payment of duty in special cases:

(1) Where any duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of section 28, shall, in addition to the duty, be liable to pay interest at such rate not below ten per cent, and not exceeding thirty-six per cent, per

annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first day of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section 2B, of section 28, till the date of payment of such duty:

v) SECTION 111. Confiscation of improperly imported goods, etc. –

The following goods brought from a place outside India shall be liable to confiscation: –

- (l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act
- (m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act.....;
- (n)
- (o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

vi) SECTION 112. Penalty for improper importation of goods, etc. –

Any person,-

- a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing omission of such an act, or
- b), shall be liable to
 - (i)
 - (ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;

vii) SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases. -

Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has [xxx] been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person

who is liable to pay the duty or interest, as the case may be, as determined under [sub-section (8) of section 28] shall also be liable to pay a penalty equal to the duty or interest so determined :

DISCUSSION OF EVIDENCES :

10.1 M/s. Vestas imported specialized equipment & packing materials viz. Tower Foot, Tower Frapping Brackets, Low Hub Frame, Double stacker frames, SOC containers etc (As detailed in Annexure-B attached) during the period from January, 2011 to February, 2012, which they did not declare at the time of import. During the course of investigations, M/s. Vestas agreed to the facts that they had cleared some of the specialized packing materials without declaring the same in the Bills of Entry. They agreed to the duty liability of Rs.2,89,57,316/- which is the duty calculated on the commercial value of these goods. During the course of investigation, M/s. Vestas have made voluntary payment of Rs.2,89,57,316/- vide Challan No.735 dated 04.07.2012 towards Customs duties on the packing materials imported by them from Kandla port which were not declared. They have also paid a total amount of Rs.46,02,074/- vide Challan No.1529 dated 04.10.2012 towards interest for delayed payment of Customs duties. The said undeclared imported packing materials totally valued at Rs.10,98,12,887/- were under seizure. The said goods under seizure and later on provisionally released, as detailed in Annexure-B to this notice, are liable for confiscation under Section 111(l) of the Customs Act, 1962. The Bond and Bank Guarantee furnished at the time of provisional release of the said goods are liable to be enforced for recovery of duty / interest / fine / penalty etc. Further, the customs duty along with interest is liable to be demanded from them on the said undeclared packing materials. The duty & interest already paid is required to be appropriated towards the duty demand.

10.2 From the evidences gathered during investigations and the legal provisions, as discussed above, it appears that M/s.Vestas imported specialized equipment & packing materials viz. Barge frames, Low Hub Frame, Tower Foot, Tower Frapping Brackets, Double stacker frames, SOC containers etc valued at Rs.23,71,41,010/- (As detailed in Annexure-A attached to this notice), wherein they claimed the benefit of Notification No.104/94-Cus dated 16.03.1994.

10.2.1 Some of these equipments were purchased by M/s. Vestas and the transaction formed part of the import invoices. Noti.No.104/94-Cus dated 16.03.1994 provides for exemption from duty in respect of containers which

are of durable nature. CBEC vide Circular No.69/2002-Customs dated 25.10.2002 clarified that “as per the meanings assigned to the words ‘durable’ and ‘container’ in various dictionaries, it would appear that any goods (containers) used for packaging or transporting other goods, and capable of being used several times, would fall in the category of ‘containers of durable nature’. It is not necessary that the “container” must be enclosed from all sides or capable of being locked or sealed. In the instant case, if the containers are durable for supplier, then the cost of the containers (packing materials) could not have been recovered from M/s. Vestas. In case of containers which are used several times, the supplier require the said containers to be returned back to them urgently for rotating them further. In this case, the packing materials were not re-exported for a substantial period. In the case of import of “durable containers” the same will not be part of the commercial invoice and the supplier would be supplying the same on re-export basis, which is not the case in the subject imports. In such cases, supplier is charging only rent and not the full cost of containers. M/s. Vestas has accepted this position. Having paid for the import of some of the equipments, it appeared to be a modus followed by M/s. Vestas to declare the same as “durable containers” to claim duty exemption under notification 104/94-cus, while the same are not in the nature of ‘durable container’ as mentioned in the subject notification. Thus, the said imported specialized equipment & packing materials do not appear to qualify for the exemption claimed under the notification no.104/94-Cus.

10.2.2 It is also seen that **all these packing materials** were not re-exported by them within 6 months in terms of Noti.No.104/94-Cus dated 16.03.1994. M/s. Vestas had executed re-export bonds, in terms of the notification 104/94-Cus at the time of import, binding themselves to re-export these goods along with SOC containers within 6 months of their import. During investigations, it is revealed that the goods imported by them claiming benefit of Noti.No.104/94-Cus and as mentioned in Annexure-A to this notice were not re-exported by them within the prescribed time limit or within extended period. M/s. Vestas not only failed to comply with the condition of the bonds executed but also did not seek any further extension of the time of re-export in terms of the conditions of the notification. M/s. Vestas applied for the extension for a period of 6 months, but could not produce the permission granted to them. They did not apply for further extension for the same assuming that re-export would happen / take place in January 2012 itself. Thus, M/s. Vestas neither re-exported the said packing materials within the prescribed time limit or within extended period nor applied for further extension. Further, it is also

noticed that as informed by M/s. Vestas vide their letter dated 02.01.2014 15 containers were surrendered by them to the Leasing Company and later on shipped out of country by them. It appears that this was done by M/s. Vestas without the knowledge of the Customs Department. The export of said 15 containers made by the Leasing Company cannot be reckoned to be re-export made by M/s. Vestas in terms of Noti.No.104/94-Cus. Thus, it appears that the benefit of Notification No.104/94-Cus dated 16.03.1994 on all the packing materials valued at Rs.23,71,41,010/- involving duty amount of Rs.5,82,34,253/- (As detailed in Annexure-A attached to Show Cause Notice) is required to be denied to them firstly on the aspect of eligibility of the notification benefit claimed and secondly for violating the condition of the notification No.104/94-Cus prescribing the time limit for re-export, and duty is required to be demanded on these goods. Further the said imported packing materials valued at Rs.23,71,41,010/- are liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962. Hence, the customs duty of Rs.5,82,34,253/- is required to be recovered from them along with interest at the applicable rate. Out of these goods, as informed by M/s. Vestas vide their letter dated 02.01.2014, all the goods other than SOC containers valued at Rs.23,01,22,367/- had been re-exported by M/s. Vestas under different shipping bills after the expiry of stipulated time. As regards SOC containers, there were total 63 SOC containers valued at Rs.70,18,643/- in respect of which benefit of Noti.No.104/94-Cus dated 16.03.1994 was availed and duty was not paid. Out of these 63 containers, 31 containers valued at Rs.34,79,519/- were re-exported by M/s. Vestas under different shipping bills after the expiry of stipulated time. 15 containers valued at Rs.16,40,158/- were surrendered by them to the Leasing Company and later on shipped out of country by the Leasing Company. 17 containers valued at Rs.18,98,966/- were lying at their Bhachau Yard as per their letter dated 02.01.2014 and later on shifted to their Anjar Yard as per permission granted vide letter dated 07.01.2014. Since the 17 containers were physically available, a seizure memo dated 09.01.2014 was issued in respect of the aforesaid 17 containers valued at Rs.18,98,966/-. The said seized goods were handed over to M/s. Vestas under a Supratnama dated 09.01.2014 for safe custody. In view of the request made by M/s. Vestas for release of the seized goods (empty marine containers), the Commissioner of Customs, Kandla considered their request and ordered for provisional release of the seized goods on execution of Bond of full value of the seized goods and Bank Guarantee of Rs.5 lacs. This was communicated to M/s. Vestas vide letter dated 15.01.2014. M/s. Vestas vide their E-Mail dated 22.01.2014 sent a copy of BG for Rs.5 lacs against provisional release of these

containers stating that original BG was being sent through courier for submission along with the Bond. The Bond and Bank Guarantee furnished at the time of provisional release of the said goods are liable to be enforced for recovery of duty / interest / fine / penalty etc.

10.3 It appeared that M/s. Vestas indulged in willful mis-statement of facts with an intention to evade customs duty inasmuch as the declared goods are not in the nature of 'durable container' as mentioned in the subject notification; that some of these goods have been procured by them on the basis of commercial transaction with the supplier, which has been accepted by M/s. Vestas. Thus, the very claim of the exemption under Notification No.104/94-Cus dated 16.03.1994 (mentioned in Annexure A) was a willful mis-statement to avail duty exemption. In addition to this, it appears that M/s. Vestas have surrendered 15 containers to Leasing Company, who later shipped them out (exported). This was done by M/s. Vestas without the knowledge of the Customs Department and thereby suppressing the material facts from the Department.

10.4 As regards the packing materials which were not declared, it further appears that they intentionally did not declare the said packing materials (mentioned in Annexure B to this notice) at the time of import to evade payment of duty. Thus, they resorted to suppression of facts with intention to evade payment of customs duty.

10.5 The duty along with interest is therefore liable to be recovered from them under proviso to Section 28(1) (till 07.04.2011) / Section 28(4) (w.e.f.08.04.2011) of the Customs Act, 1962 and Section 28AB (till 07.04.2011) / 28AA (from 08.04.2011) of the Customs Act, 1962 respectively read with bonds furnished by them under Noti.No.104/94-Cus at the time of import. The packing materials (mentioned in Annexure - A to the Show Cause Notice) were allowed to have been imported without payment of duty in terms of bonds furnished by them under Noti.No.104/94-Cus dated 16.03.1994 but subsequently the conditions stipulated therein were contravened by M/s. Vestas by way of mis-statement of facts as discussed in the foregoing paras. Therefore all such bonds appeared to be enforceable. Hence by above acts and omission M/s. Vestas have rendered themselves liable for penal action under Section 112(a) and / or 114A of the Customs Act, 1962.

11. In view of the above, M/s. Vestas Wind Technology India Pvt. Ltd, 298, Rajiv Gandhi Salai, Sholinganallur, Chennai – 600119 were called upon to show cause to the Commissioner of Customs, Kandla, as to why:

- a. The benefit of duty exemption as claimed under Notification No.104/94-Cus dated 16.03.1994 in respect of goods mentioned in Annexure-A to the Show Cause Notice, should not be denied to them and Customs duty amounting to Rs.8,49,40,801/- [Rs.5,82,34,253/- as per Annexure-A on account of wrong availment of benefit of exemption under Noti.No.104/94-Cus dated 16.03.1994 (+) Rs.2,67,06,548/- as per Annexure-B to the Show Cause Notice, on the goods which were not declared], should not be demanded under proviso to Section 28(1) (till 07.04.2011) / Section 28(4) (w.e.f.08.04.2011) read with bonds furnished by them under Noti.No.104/94-Cus at the time of import. The amount of Rs.2,89,57,316/- (As per Annexure-C) deposited by M/s. Vestas vide Challan No.735 dated 04.07.2012 during investigation should not be appropriated against the demand of the Customs duty.
- b. The interest under section 28AB (till 07/04/2011) and 28AA (from 08.04.2011) of the Customs Act, 1962 should not be demanded and recovered at the appropriate rate. The amount of Rs.46,02,074/- deposited towards interest by M/s. Vestas vide Challan No.1529 dated 04.10.2012 during investigation should not be appropriated against the demand of interest.
- c. The goods declared as packing materials i.e. Barge frames, Low Hub Frame, Tower Foot, Tower Frapping Brackets, Double stacker frames, SOC containers etc. on returnable basis (re-export) valued at Rs.23,71,41,010/- should not be confiscated under Section 111(m) and/or 111(o) of the Customs Act, 1962. Some of these declared imported packing materials i.e. SOC containers totally valued at Rs.18,98,966/- were under seizure as detailed in Annexure-A to the Seizure Memo dated 09.01.2014. Since the Commissioner of Customs, Kandla considered their request and ordered for provisional release of the said seized goods on execution of Bond of full value of the seized goods and Bank Guarantee of Rs.5 lacs, why fine in lieu of confiscation should not be imposed upon them under Section 125 of the Customs Act, 1962 and why the Bond executed by them should not be enforced and Bank Guarantee furnished by them at the time of provisional release of said seized goods should not be encashed against their above liabilities towards duty, interest, fine and penalty etc.

- d. The undeclared packing materials i.e. Tower Foot, Tower Frapping Brackets, Low Hub Frame, Double stacker frames & SOC containers etc valued at Rs.10,98,12,887/-, which were under seizure, should not be confiscated under Section 111(l) of the Customs Act, 1962. Since the seized goods have been provisionally released to M/s. Vestas, why fine in lieu of confiscation should not be imposed upon them under Section 125 of the Customs Act, 1962 and why the Bond executed by them should not be enforced and Bank Guarantee furnished by them at the time of provisional release of seized goods should not be encashed against their above liabilities towards duty, interest, fine and penalty etc.
- e. Penalty should not be imposed on them for their willful acts and omissions as discussed above under Section 112(a) and/or 114A of the Customs Act, 1962.
- f. The Bonds furnished by them under Noti.No.104/94-Cus dated 16.03.1994 and Bonds and Bank Guarantees furnished at the time of provisional release of the goods are liable to be enforced for recovery of duty / interest / fine / penalty etc.

12 DEFENCE SUBMISSION :

12.1 M/s. Vesta in their written submission dated 06.08.2014 to the Show Cause Notice, had denied and disputed the allegations leveled against them in the present Show Cause Notice. Further they have, *inter alia*, submitted that the documents on record would substantiate and establish the fact that there was a genuine reason for delay in re-export of the goods; that there was no *malafide* intention either to circumvent the provisions of law or to disobey the conditions stipulated under Notification No.104/1994; that the show cause Notice has been issued under the premise that the department has initiated *suomoto investigation*; that most of the disclosure of facts and payment of duty for the undeclared items were in the nature of voluntary disclosure of information by them to the department. In order to establish that they are bonafide and their transaction are correct they submitted following:-

- a) On 12.3.2012, and subsequently at various periodical intervals, many representations were submitted to the department *inter alia* informing the particulars of import of packing materials, execution of Bond, delay in re-export, non-declaration of the imported packing materials and payment of duty along with interest towards the undeclared packing materials; that packing materials valued at

Rs.23,71,41,010/- were imported in accordance with the provisions of the Customs Act, 1962 and availed the benefit of exemption of Notification 104/1994. The packing materials valued at Rs.23,71,41,010/- were imported vide 20 Bills of Entry, and all the packing materials were re-exported after the expiry of the extended period, however, the reasons for the delay was beyond the control of theirs, therefore, those genuine reasons should be taken into account for proper appreciation of facts and rendering justice;

- b) As per the Customs Act, 1962, more specifically, as per Section 15, Section 17, Section 46 and Section 47 of the Customs Act, 1962, the Government is entitled to collect duty on the imported goods which are cleared for home consumption. Goods cleared for home consumption means clearance of the goods from the customs control, the imported goods mix along with the masses of the country for consumers for consumption either in the industry or by the human being or otherwise. It emphasizes that customs duty can be collected only on the goods which are imported and cleared for home consumption and not for goods which are re-exported; that it was evident that packing materials valued at Rs.23,71,41,010/- were re-exported by filing a shipping bills in accordance with Section 50 of the Customs Act, 1962 and hence, no duty can be demanded for the packing materials which were re-exported;
- c) It may be appreciated that since 12.03.2012, various letters and submissions were made to the Proper Officer of Customs *inter alia* explaining the non-declaration of packing materials imported and therefore, duty was paid along with the interest towards the undeclared imported packing materials. It was informed to the department that the undeclared packing materials would be re-exported to the overseas consignor and they will avail the benefit of drawback in terms of Section 74 of the Customs Act, 1962 read along with Drawback for (Import of re-exported goods) Rules, 1995. In order to avail the benefit of drawback under Section 74 of the Customs 1962, they made a prayer for issuance of 2 separate Show Cause Notices, one for the packing materials valued Rs.23,71,41,010/- which were declared and cleared as per Notification No.104/94 and another one for the packing materials which were not declared valued at Rs.10,98,12,887/-. The request was not considered by the department and the Commissioner of Customs has issued a Single show cause Notice. On account of the

reason that the packing materials valued at Rs.10,98,12,887/- were re-exported, no duty can be demanded. Moreover, as per Section 74 of the Customs Act, 1962, they were eligible for drawback to the extent of 98% of the total duty paid. i.e. on Rs.2,67,06,548/-;

- d) The text of notification 104/1994 states that the imported packing materials should be re-exported within 6 months from the date of import or within another 6 months as extended or within the “such extended period of time”. The Notification 104/1994 prescribes a reasonable period of time which means that considering the facts and circumstances of the case and the reasons and justifications offered by the importer, the time can be extended by the Proper Officer of Customs. In the instant case, in the year 2011-2012, there was a flood and cyclonic storm at the Western Coast of Gujarat, India, which resulted in submerging of the imported packing materials into water and due to the said natural calamity the business operations of us were completely paralyzed and there was a considerable delay in execution of the project. In order to establish and corroborate the fact that there was heavy rain fall and flood, along with this reply, the data provided by the Regulatory authorities are enclosed herewith **(Annexure-I)** which would establish the fact that the delay was beyond the control of the importer. In simple terms the delay was due to “Act of God”, and this aspect needs to be noted and appreciated for fair decision. Therefore, it is submitted that there was no *malafide* intention on the part of the importer.
- e) that confiscation is intended at two basic instances, firstly that when there is a substantive violation of the provisions of the Customs Act, 1962 and secondly that the goods are physically available for confiscation in India. In the impugned case, the imported packing materials were re-exported to the foreign country, hence, as per the settled position of law, the goods were not liable for confiscation and thus no redemption fine also can be imposed in lieu of confiscation under Section 125 of the Customs Act,1962; and
- f) that delay in re-export was mere a procedural violation and not a substantive violation and more over, the delay was due to the reasons which are beyond the control of the importer and due to “Act of God”, thus, we have not violated the provisions of the Customs Act 1962 hence, no penalty needs to be imposed on them

12.2 PACKING MATERIALS IMPORTED, DECLARED, BOND EXECUTED AND RE-EXPORTED, HENCE NO DUTY NEEDS TO BE PAID.

- (a) that they submitted a summary which would establish the facts of the packing materials imported and re-exported; that the packing materials, valued at Rs. **23,71,41,010/-**, duty has been demanded along with applicable interest. For payment of duty, there should be an import of goods. In this context, they quoted the relevant Sections of the Customs Act, 1962, Section 2(23), Section 2(26) Section 12, Section 15, Section 16, Section 17, Section 28, Section 45, Section 46 and Section 47; that these provisions of the Customs Act, 1962, clearly state the following propositions:

In the instant case, there is no bill of entry was filed for home consumption for the imported packing materials. Though, bills of entry were filed, and the benefit of Notification was availed as per the exemption Notification No.104/1994 issued in accordance with Section 25 (1) of the Customs Act, 1962, there was no bill of entry for home consumption. Once it is an admitted fact that the goods were re-exported and no bill of entry was filed for home consumption the issuance of Show Cause Notice for short levy or non-levy does not arise.

That the above referred provisions of law have been consistently analysed and interpreted by the Supreme Court of India, and High Courts in the case of :

- a) *In the case of GARDEN SILK MILLS LTD Versus UNION OF INDIA; 1999 (113) E.L.T. 358 (S.C.)*
- b) *In the case of SHEWBUXRAI ONKARMALL Versus ASSTT. COLLECTOR OF CUSTOMS & OTHERS; 1981 (8) E.L.T. 298 (Cal.)*
- c) *In the case of ALUMINIUM INDUSTRIES LTD Versus UNION OF INDIA; 1984 (16) E.L.T. 183(Kar.)*

That they have filed the Bills of Entry not for home consumption but for re-exportation of the goods and availed the benefit of exemption as per Notification 104/1994, the imported goods were re-exported to the overseas supplier and the particulars of re-export and connected shipping documents are enclosed as **ANNEXURE II**.

that the provisions of Customs Act, 1962, the judicial decisions relating to the impugned issue and the facts of re-export of packing materials, clearly demonstrate that the imported materials were not cleared for home consumption and not mixed in the land masses of the country for consumption either by consumer or by indemnity and therefore, the question of levy and payment of duty do not arise. Moreover, as per Section 28 of the Customs Act, 1962 the question of short levy or non-levy would arise only with respect to the goods which are cleared for home consumption; that the goods were re-exported and therefore, there was no short levy or non-levy.

that the goods were cleared in accordance with Notification 104/1994; that the basic business model of the importer is importation of Wind Operated Electricity Generating Equipments in assembly and sub-assembly conditions and those assembly and sub-assemblies were imported along with the packing materials. The assemblies and sub-assemblies, include towers, nacelles, hubs and blades, etc., which are technically sensitive and sophisticated equipments. For importation of these technically sensitive and sophisticated equipments they are to be transported to the remote locations in India, wherein the wind pattern is

conducive enough for generation of wind energy. Predominantly the goods covered under the referred Bills of entry were transported to a remote location, which is located at the State of Gujarat. Basically, these assemblies and sub-assemblies were imported from January 2011 onwards for installation, erection, and commissioning at *Vandhiya* and *Jhangi* villages of *Bachau* Taluka in Kutch District, Gujarat; that they have entered into a commercial agreement with GP Windforms, Powerica Ltd. Gujarat, and agreed to install, erect, and commission the project on or before August 2011. However, due to heavy rainfall at *Bachau* area, there was a complete immobility of materials in the work site and therefore, they could not complete the project in time. Basically, rainfall is an Act of God, which is beyond their control and due to the heavy rain many of the trucks, imported materials and packing materials were submerged into the water as well as in the soil. In order to substantiate that these information are true and correct, we have enclosed **(Annexure-I)** the actual Photographs taken during the flood time along with the date of rainfall as certified by the Meteorological department. It is only because of the rainfall there was a considerably delay which lead to series of delay in execution of their project. Therefore, the delay is genuine and bonafide.

It is submitted that import and re-export are dealt under two customs notifications i.e., 104/1994 and 158/1995. As per the Notification 104/1994, flexibility is envisaged wherein more than 1 year period, a reasonable time can be given by the AC/DC, whereas, as per 158/1995 the extension can be granted maximum upto 1 year. A differential and favourable treatment is accorded under Notification 104/1994, since, packing materials are pre-dominantly used for carrying goods for projects and industrial applications and there is no intention for the importer either to use the material in India or to delay without any sufficient reasons; in the impugned show cause notice without appreciating the basic facts, in an arbitrary and mechanical manner penal provisions are invoked. The action contemplated in the impugned show cause notice is not in accordance with the spirit of the notification No.104/1994 and therefore, all the allegations need to be dropped since the imported packing materials were re-exported to the overseas consignor.

12.3 PACKING MATERIALS IMPORTED, NOT DECLARED, DUTY PAID AND RE-EXPORTED, HENCE, ENTITLED FOR DRAWBACK UNDER SECTION 74 OF THE CUSTOMS ACT ,1962.

That they produced all the correspondences **(ANNEXURE III)** to which would establish that they had voluntarily disclosed the particulars of undeclared items and paid duty; that vide the various correspondences, they have categorically and firmly submitted to the Officers of SIIB about the non-declaration of the imported packing materials. On reconciliation of the documents and realization of the mistake, the duty amount was paid voluntarily along with the interest.

that though duty was paid and necessary explanations or clarifications were offered in the course of investigation in an appropriate manner, as if a great fraud was detected by the department the un-declared packing materials were seized. Though Section 110 of the Customs Act, 1962 empowers the department to seize the goods but, the officer of the Customs is expected to exercise due care and caution before exercising the discretionary powers; that, there was a voluntary disclosure of facts about non-declaration of the particulars of import of the packing materials and another vital element is that these packing materials were required to be re-exported to the overseas consignor; that the undeclared packing

materials were required to be re-exported and this vital and important element was not taken into account prior to seizure of the goods.

that the goods which are intended and likely to be consumed in India alone attract payment of Customs duty. Knowing well that the goods were likely to be re-exported, as a *bonafide* disclosure of facts, they have voluntarily disclosed all the information to the department. In this background, the seizure of the goods is illegal and not warranted as per Section 110 of the Customs Act, 1962; that after the seizure of the goods and prior to the seizure of the goods, they have submitted and informed to the officers of Customs, (SIIB) that once the goods are re-exported, drawback has to be granted in accordance with Section 74 of the Customs Act, 1962 and the rules made thereunder; that they had submitted a detailed letter in this context, and sought for filing of Shipping Bill in accordance with Section 74 of the Customs Act, 1962 and the Rules made thereunder which was denied by the competent authority, however, permitted provisional release of goods in terms of Section 110A of the Customs Act, 1962 for re-export.

that Section 74 of the Customs Act, 1962 and the Drawback Rules, clearly state that the imported goods which suffered duty and re-exported should be allowed for re-export with drawback benefit. In this context, the decision in the case of *M/s Siemens Ltd, Versus Collector of Customs, 1999 (113) E.L.T. 776 (S.C.)* is more relevant and applicable ; that in the said case, 2 basic issues were discussed and decided, firstly that one relates to entitlement of duty drawback once the goods are re-exported after payment of duty and secondly that whether redemption fine can be imposed once the goods are re-exported. The Hon'ble Supreme Court of India, has categorically held that drawback has to be granted once goods are re-exported after payment of duty and also held that no redemption fine can be imposed. The ratio in the above referred decision is applicable to the impugned case since the material facts are identical. Accordingly, the action of the department in denying permission to file the shipping bill under section 74 is illegal and unjustified. Therefore, it is prayed that the goods re-exported vide 20 shipping bills may be treated as exported under section 74 of the Customs Act, 1962 and drawback to the extent of 98 % of the duty paid amount towards the goods re-exported may be granted at the earliest.

that as per the Seizure Memo total quantity of packing materials seized were 2799. However, out of the 2799 packing materials, we have re-exported only 1354 nos which represent the total value of Rs. 6,53,54,424/- for which we have already paid duty of with interest voluntarily. Balance packing materials are not re-exported due to various reasons, such as, 667 numbers are stolen and 778 numbers are not in useable condition. These particulars are described in **Annexure-IV (i) and (ii)**.

That in the case of *Collector of Customs Versus Madura Coats, 1993 (68) E.L.T. 270 (GOI)* it is evident that the drawback has to be granted to the exporter and more specifically the Government of India has held that the Appellants are eligible for drawback claimed by them. The Order of the Government of India is applicable to the impugned case also, thus, the drawback under Section 74 may be directed to be granted at the earliest.

that as per the judgement in the case of *Star Wire (India) Ltd, 2011 (272)E.L.T. 448 (GOI)*, and the Rules of 1995, it has to be established by them that the same imported packing materials were re-exported on payment of duty. Primary evidence in the form of documents were submitted and also enclosed along with this reply which clearly establish the fact that the packing materials imported and re-exported are one and

the same and for such import duty was paid by them. Therefore, on reliance of the above referred Order of the Government of India, Drawback under Section 74 may be ordered to be granted.

12.4 NO REDEMPTION FINE AND PENALTY NEED TO BE IMPOSED SINCE THE IMPORTED PACKING MATERIALS WERE RE-EXPORTED.

that the packing materials imported and cleared with benefit of exemption notification No.104/1994 were re-exported. Since the goods were re-exported and reasons for delay of such re-export was substantiated with documentary evidence, no penalty and fine need to be imposed. Moreover, the goods were re-exported and the Hon'ble Supreme Court of India, in the case of M/s.Siemens Ltd, (1999) has held that no redemption fine was required to be imposed since the goods were to be re-exported.

that a certain portion of the goods were undeclared however, they were re-exported. Though the imported packing materials were not disclosed due to oversight, there was no malafide intention on the part of us, either to circumvent the law or to make undue gain for such non-declaration of import of packing materials. Hence, it is prayed that neither penalty can be imposed nor redemption fine can be imposed; that they relied upon the case of M/s.Siemens Public Commn. Networks Ltd, Versus Commr. Of Cus, Calcutta, 2001 (135) E.L.T. 330 (Tri. – Kolkatta); that no penalty and fine can be imposed when there is no need to impose penalty. In the said decision, the following decisions are relied.

- a) *G.V.International v. CC – 2000 (118) E.L.T. 517 (Tribunal) = 2000 (39) RLT 272 (Tribunal);*
- b) *Siemens Ltd. v. CC – 1999 (113) E.L.T. 776 (S.C.);*
- c) *CC v. M/s.J.B.Pvt. Ltd. – Order No.A -209-Cal-2000, dated 13th March ,2000 (T);*
- d) *HCL Hewlett Packard v. CC – 1997 (92) E.L.T. 367 (Tribunal);*
- e) *Skantrons (P) Ltd, v. CC – 1994 (70) E.L.T. 3675 (Tribunal); and*
- f) *Padia Sales Corporation v. CC – 1992 (61) E.L.T. 90 (Tribunal)*

that from the above referred Tribunal decisions, and the decisions relied therein, the legal position has been clarified by the judicial and quasi-judicial authorities that once goods are re-exported no penalty and redemption fine can be imposed. Identical to the above referred decision, and on reliance of the case of M/s. Siemens Ltd., of the Supreme Court, the Hon'ble High Court of Madras, in the case of *M/s.Sankar Pandi Versus Union of India, 2002 (141) E.L.T. 635 (Mad.);* In a subsequent decision in the case of *M/s.ABP Pvt. Ltd, Versus Commissioner of Customs (Port), Kolkata, 2003 (151) E.L.T. 705 (Tri. – Kolkata),* that in the said case the Hon'ble Tribunal has set aside the imposition of Redemption fine and the said decision is applicable to the impugned case also. Therefore, it is prayed that the charges levelled in the Show Cause Notice *inter alia* proposing redemption and fine penalty may be quashed and set aside.

13 PERSONAL HEARING:

The hearing was held on 12.05.2015, which was attended by Shri R. Kannan Senior Manager-Transport on behalf of M/s. Vestas. During the course of Personal Hearing, he has reiterated the submissions made in the reply to the Show Cause Notice. They have requested time to file additional reply. They had filed their additional reply on 22.06.2015 wherein they inter alia submitted by quoting the CBEC Circular no. 69/2002-Cus dated 25.10.2002:

13.1 that the specialized equipments and materials such as bridge frame, low hub frame, tower foot, tower frapping brackets, double stacker frames, SOC containers etc. that are used for transportation of blades and which are being used several times and which cannot be used for any other transportation materials, and which are specifically designed for transportation of frames by Vestas Wind Turbines only must be considered as falling within the meaning of the word 'durable containers' used in the notification 104/94-Cus dated 16.09.1994.

13.2 The terms on which durable containers are supplied is entirely a matter between the parties to the transaction. Moreover, it is wholly irrelevant for the purpose of grant of exemption under the notification no. 104/94-Cus dated 16.0.1994. It makes no mention about any commercial conditions. It does not say that the durable containers must be supplied on rent or free of charge. So long as the item imported is 'durable container', the exemption is available and the exemption cannot be denied on the basis of the commercial terms governing the imports. So any conclusion on whether the item imported is 'durable container' based on the commercial terms is wholly unsustainable.

13.3 that they relied upon the case *Intermark Shipping Agencies Pvt. Ltd. Vs. Central Ex., Cus., (A), Kandla* [2014 (314) E.L.T. 557 (Tri. - Ahmd.)]; that they had sought and obtained the permission of the Customs for re-export and re-exported the imported goods. Therefore, based on the above judgement, in their case also, it must be understood that the period up to the date of export has been extended by the appropriate authority and that once the imported containers have been allowed export there is no point in demanding duty. Therefore, the duty demands of Rs.5,82,34,253/- and Rs. 2,89,57,316/- are not at all sustainable. Consequently, no interest is due and no penalty is imposable.

13.4 that in respect of the goods where duty demanded is Rs. 2,89,57,316/-, under compelling circumstances, they opted to pay duty on the imported durable containers. In the letter dated 13.12.2012 from Customs, Kandla Port, It has been said, the M/s. Vestas India has voluntarily disclosed the details and paid the duty along with interest. As already mentioned, they have also obtained the permission of the Customs and re-exported the durable containers thus fulfilling the condition of the notification. Hence, the Bond and Bank Guarantee furnished at the time of provisional release of the said goods are not to be enforced for recovery of duty/interest/fine/penalty etc.

13.5 that the terms of the transaction such as free of charge, loan basis, temporary supply etc. have no bearing on whether the imported item is durable containers. The benefit of the notification cannot be denied on the basis of the commercial terms. There is no such requirement in the notification. Once the goods fall within the meaning of the words 'durable container', the exemption cannot be denied.

13.6 there is no suppression of facts with intention to evade payment of customs duty rather it was voluntarily declaration by us to comply with rules and regulation of India Customs.

13.7 that they paid the duty and interest for the goods which were undeclared at the time of importation even before a demand was made by way of a show cause notice. For that they relied upon the case of *C.C.E., Hyderabad Vs. Anjani Portland Cement Indus. Ltd* [2011(266) ELT.343 (Tri-Bang)], that based on the said judgment, no penalty is imposable in their case; that all the bonds are not enforceable and also, since duty was paid voluntarily before issue of SCN, no penal action can be taken either

under Section 112(a) of the Customs Act, 1962 and/or 114A of the Customs Act, 1962.

14. DISCUSSIONS & FINDINGS:

14.1 I have carefully gone through the records of the case, including the Show Cause Notice dated 06.08.2014, the written submissions, as well as the oral submissions made during the course of Personal Hearing.

14.2 I find that the following main issues are involved in the subject Show Cause Notice, which is required to be decided are:-

- a. Whether the benefit of duty exemption as claimed under Notification No.104/94-Cus dated 16.03.1994 in respect of goods mentioned in Annexure-A should be denied to M/s. Vestas and Customs duty amounting to Rs.8,49,40,801/- [Rs.5,82,34,253/- as per Annexure-A to Show Cause Notice, on account of wrong availment of benefit of exemption under Noti.No.104/94-Cus dated 16.03.1994 (+) Rs.2,67,06,548/- as per Annexure-B on the goods which were not declared], is required be demanded under proviso to Section 28(1) (till 07.04.2011) / Section 28(4) (w.e.f.08.04.2011) read with bonds furnished by them under Noti.No.104/94-Cus at the time of import. The amount of Rs.2,89,57,316/- (As per Annexure-C to Show Cause Notice) deposited by M/s. Vestas vide Challan No.735 dated 04.07.2012 during investigation is to be appropriated against the demand of the Customs duty.
- b. Whether the interest under section 28AB (till 07/04/2011) and 28AA (from 08.04.2011) of the Customs Act, 1962 is required to be demanded and recovered at the appropriate rate. The amount of Rs.46,02,074/- deposited towards interest by M/s. Vestas vide Challan No.1529 dated 04.10.2012 during investigation is to be appropriated against the demand of interest.
- c. Whether the goods declared as packing materials i.e. Barge frames, Low Hub Frame, Tower Foot, Tower Frapping Brackets, Double stacker frames, SOC containers etc. on returnable basis (re-export) valued at Rs.23,71,41,010/- is required to be confiscated under Section 111(m) and/or 111(o) of the Customs Act, 1962. Some of these declared imported packing materials i.e. SOC containers totally valued at

Rs.18,98,966/- which were seized and ordered for provisional release of the said seized goods on execution of Bond of full value of the seized goods and Bank Guarantee of Rs.5 lacs, whether fine in lieu of confiscation is required to be imposed upon them under Section 125 of the Customs Act, 1962 and the Bond executed by them is required to be enforced and Bank Guarantee furnished by them at the time of provisional release of said seized goods is required to be encashed against their above liabilities towards duty, interest, fine and penalty etc.

- d. Whether the undeclared packing materials i.e. Tower Foot, Tower Frapping Brackets, Low Hub Frame, Double stacker frames & SOC containers etc valued at Rs.10,98,12,887/-, which were under seizure, is required to be confiscated under Section 111(l) of the Customs Act, 1962. Since the seized goods have been provisionally released to M/s. Vestas, whether fine in lieu of confiscation is required to be imposed upon them under Section 125 of the Customs Act, 1962 and the Bond executed by them is to be enforced and Bank Guarantee furnished by them at the time of provisional release of seized goods is required to be encashed against their above liabilities towards duty, interest, fine and penalty etc.
- e. Whether penalty is required to be imposed on M/s. Vestas for their willful acts and omissions as discussed above under Section 112(a) and/or 114A of the Customs Act, 1962.
- f. Whether the Bonds furnished by M/s. Vestas under Noti.No.104/94-Cus dated 16.03.1994 and Bonds and Bank Guarantees furnished at the time of provisional release of the goods are required to be enforced for recovery of duty / interest / fine / penalty etc.

15.1 The core issue in this case, around which all the above issues are involved which I am required to decide, is whether the benefit of duty exemption as claimed under Notification No.104/94-Cus dated 16.03.1994 in respect of goods mentioned in Annexure-A and Annexure-B attached to the notice is required to be denied to M/s. Vestas and Customs duty amounting to Rs.8,49,40,801/- is required be demanded under proviso to Section 28(1) (till 07.04.2011) / Section 28(4) (w.e.f. 08.04.2011) read with bonds furnished by them under Noti.No.104/94-Cus at the time of import.

15.2 Now coming to the above said aspect, it is absolutely essential to go through the Notification No. 104/94-Cus dated 16.03.1994. The Notification No.104/94-Cus dated 16.03.1994 as amended by Notification No.101/95-Cus dated 26.05.1995 reads as under:

*“In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, **hereby exempts container of a durable nature falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from,***

*(a) the **whole of the duty of customs** leviable thereon under the said First Schedule; and*

*(b) the **whole of the additional duty** leviable thereon under section 3 of the said Customs Tariff Act:*

*Provided that the importer, by execution of a bond in such form and for such sum as may be specified by the Assistant Commissioner of Customs or Deputy Commissioner of Customs **binds himself to re-export the said containers within six months from the date of their importation and to furnish documentary evidence thereof to the satisfaction** of the said Assistant Commissioner and to pay the duty leviable thereon in the event of the importer's failure to do so :*

Provided further that in any particular case, the aforesaid period of six months may, on sufficient cause being shown, be extended by the said Assistant Commissioner for such further period, as he may deem fit.”

15.3 I find that M/s.Vestas had imported specialized equipment & packing materials viz. Barge frames, Low Hub Frame, Tower Foot, Tower Frapping Brackets, Double stacker frames, SOC containers etc. valued at Rs.23,71,41,010/- involving duty amount to the tune of Rs.5,82,34,253/- (As detailed in Annexure-A attached to the notice), wherein they claimed the benefit of Notification No.104/94-Cus dated 16.03.1994. I find that during the period from January, 2011 to February, 2012, packing materials viz. Tower Foot, Tower Frapping Brackets, Low Hub Frame, Double stacker frames etc, were imported but these were not declared to the Customs by M/s. Vestas in the Bills of Entry as mentioned in Annexure-B attached to the notice. The value of these goods is Rs.10,98,12,887/- involving duty amounting to Rs.2,67,06,548/-.

15.4. I find that M/s. Vestas had imported these specialized packing materials which were not in the nature of optional equipment but it was a part of the goods being imported and that the same had commercial value. I find that M/s Vestas had paid for these equipments along with the imported goods and that the transaction was also reflected in their commercial invoices. I find that M/s. Vestas while importing the said goods had deliberately not declared the packing materials for components / parts of wind mill / SOC containers with an intention to evade custom duty. I find that the aforesaid undeclared goods valued at Rs.10,98,12,887/- were placed under seizure and the said goods were provisionally released on furnishing Bond of 100% value of the seized goods and 25% BG i.e. Rs.2,74,53,222/- of the value of the seized goods.

15.5 As regards, M/s. Vestas had also agreed to the above facts that they had cleared some of the specialized packing materials without declaring the same in the Bills of Entry and therefore had made payment of Customs duties to the tune of Rs.2,89,57,316/- along with interest of Rs.46,02,074/- at the time of investigation.

15.6 From the above facts and circumstances of the case, I find that the M/s. Vestas had in fact cleared some of the specialized packing materials without declaring the same in the Bills of Entry, thus, wrongly claiming benefit of the Notification No. 104/94-Cus, dated 16-3-1994. I also find that M/s. Vestas had never disclosed this facts to the customs authority and had cleared the goods without payment of proper customs duty by wrongly availing the benefit of Notification no. 104/94-Cus dated 16.03.1994. Further, I also find that part of the specialized equipment which was imported against payment of import duty is being exported, were examined by the investigating team in presence of the representatives of M/s. Vestas wherein, it was noticed that the description of the goods were V 100 Barge Frames and in the shipping they had mentioned that the goods were for re-export under Section 74 of the Customs Act, 1962. While examining the export goods with respect to import documents with a view to establish their identity, it was noticed that no such marks, numbers etc. were declared in the import documents presented at the time of imports namely Bills of Entry, Invoice, packing list etc. Hence, in view of the above, the goods currently being exported were not identifiable with import documents and thus their identity (the goods) cannot be established.

15.7 In view of the above, I find that by agreeing to the facts by M/s. Vestas regarding not declaring the packing materials in the Bills of

Entry at the time of import and wrongly claiming benefit of the Notification No. 104/94-Cus, dated 16-3-1994 and also having paid the Customs duty during investigation, I am of the opinion that the said imported specialized equipment and packing materials do not appear to qualify for the exemption claimed under Notification No.104.94-Cus.

16 M/s. Vestas in their written submissions as well as during the course of personal hearing has contended that the documents on record would substantiate and establish the fact that there was a genuine reason for delay in re-export of the goods. There was no *malafide* intention either to circumvent the provisions of law or to disobey the conditions stipulated under Notification No.104/1994. The Show Cause Notice has been issued under the premise that the department has initiated *suomoto investigation*. However, most of the disclosure of facts and payment of duty for the undeclared items were in the nature of voluntary disclosure of information by them to the department.

16.1 I find that the M/s. Vestas have opted to import duty-free under Notification No. 104/94 dated 16-3-1994. As per Notification, which deals with the exemption of containers of durable nature, the assessee can import containers duty-free by executing a bond as per satisfaction of the Asst. Collector of the Customs, binds himself to re-export the said container within six months from the date of importation. However, if he failed to re-export the container, the importer has to pay duty leviable on the said container. The contention of the Notification is as under:

“Provided that the importer, by execution of a bond in such form and for such sum as may be specified by the Asst. Collector of Customs binds himself to re-export the said containers within six months from the date of their importation and to furnish documentary evidence thereof to the satisfaction of the said Asst. Collector and to pay the duty leviable thereon in the event of the importer’s failure to do so :”

As per 2nd proviso of the Notification, there is a provision to extend the period of re-export on sufficient cause being shown, be extended by the Asst. Collector for such further period. The main reliance of the learned DR is only on this proviso of the Notification wherein the allegation against the respondents is that the respondents have failed to obtain necessary extension from the Asst. Collector.

16.2. I have gone through the Notification and as per the proviso, I find that this part is applicable where M/s. Vestas had failed to re-export within six months and when not applied for extension of time to re-export. Further, I find from the records that the case was detected in March/ April 2012 and the import had taken place during the period from January 2011 to February 2012 on furnishing re-export bond. The terms of bond

furnished stands violated in this case as much as the said goods were not re-exported within the permissible time limit of six months. I also find that in some cases payment was made to the supplier and M/s Vestas were not able to produce the evidence that they have received back the foreign exchange. The importer not only failed to comply with the condition of the bonds executed but also did not seek any further extension of the time of re-export in terms of the conditions of the notification. The importer applied for the extension for a period of 6 months, but could not produce the permission granted to them. They did not apply for further extension for the same assuming that re-export would happen / take place in January, 2012 itself. Thus, the importer neither re-exported the said packing materials within the prescribed time limit or within extended period nor applied for further extension.

16.3 Further, the contention regarding voluntary payment of duty, I find that the investigation started in April 2012 and the said undeclared packing materials were imported by M/s. Vestas from the period during January 2011 to February, 2012. I also find from records that during investigation, while reconciling their imports M/s. Vestas came to know about their discrepancy regarding non-declaration of certain packing materials in the Bills of Entry. Therefore their claim that they have paid duty along with interest on their internal verification and realizing their lacunae, does not hold good. In fact, the said liability were discharged only after department had initiated investigation and reconciliation of the impugned goods by them during the process. Nevertheless, but for a thorough investigation by the Customs, the matter would have gone unnoticed.

16.4 In view of the above, I find that the importer while importing the impugned goods had deliberately not declared the packing materials for components / parts of wind mill / SOC containers with a view to evade custom duty. Accordingly, it is amply clear that M/s. Vestas has wrongly claimed benefit of the Notification No. 104/94-Cus, dated 16-3-1994.

16.5 M/s. Vestas further contended that the packing materials valued at Rs.23,71,41,010/- were imported vide 20 Bills of Entry, and all the packing materials were re-exported after the expiry of the extended period, however, the reasons for the delay was beyond the control of theirs, therefore, those genuine reasons should be taken into account for proper appreciation of facts and rendering justice.

16.6 I find that in 20 Bills of Entry, detailed in Annexure-A attached to the Show Cause Notice, these goods were mentioned in the Bill of Entry as having imported and having commercial value. The Importer, had claimed benefit of Notification No.104/94-Cus dated 16.03.1994 for these imports and thereby claiming exemption of 'NIL' duty. The value of these goods is Rs.23,71,41,010/-. I find that most of these Bills of Entry have been assessed provisionally for SVB (Special Valuation Branch) purpose as the importer and the supplier appeared to be related. These Bills of Entry shall be finalized as and when the SVB matter is finalized. However, regarding re-exported after the expiry of the extended period of the subject packing materials I find M/s. Vestas had contended that in the year 2011-2012, there was a flood and cyclonic storm at the Western Coast of Gujarat, India, which resulted in submerging of the imported packing materials into water and due to the said natural calamity the business operations of theirs were completely paralyzed and there was a considerable delay in execution of the project. I find that these are lame excuses and nothing but an afterthought to cover up their deliberate and intentional obfuscatory action. On one hand they had already agreed to the facts that they have imported undeclared packing materials and on another hand they are giving such excuse like 'Act of God'.

16.7 In view of the above, I find that this above plea is contradictory and cannot be accepted. I have already held in para supra that they have wrongly claimed benefit of the Notification No. 104/94-Cus, dated 16-3-1994.

17. M/s. Vestas further contended that it was informed to the department that the undeclared packing materials would be re-exported to the overseas consignor and they will avail the benefit of drawback in terms of Section 74 of the Customs Act, 1962 read with Drawback for (Import of re-exported goods) Rules, 1995. On account of the reason that the packing materials valued at Rs.10,98,12,887/- were re-exported, no duty can be demanded. Moreover, as per Section 74 of the Customs Act, 1962, they are eligible for drawback to the extent of 98% of the total duty paid. i.e. on Rs.2,67,06,548/-

17.1 I find that Section 74 of the Customs Act, 1962 provide for Drawback when any goods capable of being easily identified which have been imported into India and upon any duty has been paid on importation and re-exported within two years. I find from the records that in the instant case, the duty has been paid by M/s. Vestas not on importation, but only

after a long period in July 2012 for the Bills of Entry of the period January 2011 to January 2012 and that too, only after initiation of investigation by the Department. I find that it is a case where duty has not been paid in normal course and their attempt is to get back the major chunk of the said amount by way of drawback even after a case was initiated and the said payment of duty is consequent to detection of evasion of duty .

18. M/s. Vestas contended that so long as the item imported is 'durable container', the exemption is available and the exemption cannot be denied on the basis of the commercial terms governing the imports. So any conclusion on whether the item imported is 'durable container' based on the commercial terms is wholly unsustainable.

18.1 I find that some of these equipments were purchased by the importer and the transaction formed part of the import invoices. Noti.No.104/94-Cus dated 16.03.1994 provides for exemption from duty in respect of containers which are of durable nature. CBEC vide Circular No.69/2002-Customs dated 25.10.2002 clarified that "as per the meanings assigned to the words 'durable' and 'container' in various dictionaries, it would appear that any goods (containers) used for packaging or transporting other goods, and capable of being used several times, would fall in the category of 'containers of durable nature'. It is not necessary that the "container" must be enclosed from all sides or capable of being locked or sealed.

18.2 I find in the instant case that, if the containers are durable for supplier, then the cost of the containers (packing materials) could not have been recovered from the importer. In case of containers which are used several times, the supplier require the said containers to be returned back to them urgently for rotating them further. In this case, the packing materials were not re-exported for a substantial period. In the case of import of "durable containers" the same will not be part of the commercial invoice and the supplier would be supplying the same on re-export basis, which is not the case in the subject imports. In such cases, supplier is charging only rent and not the full cost of containers. I also find that the key person of M/s. Vestas had deposed that they had not declared the actual commercial transaction with respect to the specialized packing equipments and has accepted this position. Having paid for the import of some of the equipments, it clearly exhibits to be a modus followed by the Importer to declare the same as "durable containers" to claim duty exemption under notification 104/94-cus.

18.3. I further find that M/s. Vestas have indulged in willful mis-statement of facts with an intention to evade customs duty inasmuch as the declared goods are not in the nature of 'durable container' as mentioned in the subject notification; that some of these goods have been procured by them on the basis of commercial transaction with the supplier, which has been accepted by the importer. Thus, the very claim of the exemption under Notification No.104/94-Cus dated 16.03.1994 (mentioned in Annexure A) was a willful mis-statement to avail duty exemption. In addition to this, I find that M/s. Vestas have surrendered 15 containers to Leasing Company, who later shipped them out (exported). This was done by M/s. Vestas without the knowledge of the Customs Department and thereby suppressing the material facts from the Department.

18.4 As regards the packing materials which were not declared, I find that they intentionally did not declare the said packing materials (mentioned in Annexure B to this notice) at the time of import to evade payment of duty. Thus, they resorted to suppression of facts with intention to evade payment of customs duty. Thus, I find that the said imported specialized equipment & packing materials do not qualify for the exemption claimed under the Notification No.104/94-Cus. and their contention is rejected.

19. In view of the above, I hold that the imported specialized equipment & packing materials viz. Tower Foot, Tower Frapping Brackets, Low Hub Frame, Double stacker frames, SOC containers etc (As detailed in Annexure-B attached) are liable for confiscation under Section 111(l) of the Customs Act, 1962. The Bond and Bank Guarantee furnished at the time for provisional release of the said goods are liable to be enforced for recovery of duty / interest / fine / penalty etc. Further, the customs duty along with interest is liable to be demanded from them on the said undeclared packing materials for the period from January, 2011 to February, 2012, which M/s. Vestas had not declared at the time of import but they agreed to the duty liability of Rs.2,89,57,316/- paid the same along with interest of Rs.46,02,074/-. The duty & interest already paid is required to be appropriated towards the duty demand.

19. Therefore, I hold that the benefit of Notification No.104/94-Cus dated 16.03.1994 on all the packing materials valued at Rs.23,71,41,010/- involving duty amount of Rs.5,82,34,253/- (As detailed

in Annexure-A attached to the Show Cause Notice) is required to be denied to them firstly on the aspect of eligibility of the notification benefit claimed and secondly for violating the condition of the notification No.104/94-Cus prescribing the time limit for re-export, and duty is required to be demanded on these goods. Further the said imported packing materials valued at Rs.23,71,41,010/- are liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962 as the assessments are done only on provisional basis .

20. Hence, the customs duty of Rs.5,82,34,253/- is required to be recovered from them along with interest at the applicable rate. The duty along with interest is therefore liable to be recovered from them under proviso to Section 28(1) (till 07.04.2011) / Section 28(4) (w.e.f. 08.04.2011) of the Customs Act, 1962 and Section 28AB (till 07.04.2011) / 28AA (from 08.04.2011) of the Customs Act, 1962 respectively read with bonds furnished by them under Noti.No.104/94-Cus at the time of import. The packing materials (mentioned in Annexure A) were allowed to have been imported without payment of duty in terms of bonds furnished by them under Noti.No.104/94-Cus dated 16.03.1994 but subsequently the conditions stipulated therein were contravened by the importer by way of mis-statement of facts as discussed in the para supra. As regards, all such bonds are required to be enforced.

21. In this case, the imported goods were cleared on execution of Provisional Bond and the goods are not physically available for confiscation. It is now a well settled position of law that the mere fact that the goods were released on bond being executed would not take away the power of the customs authorities to levy redemption fine. Further, since the goods were released on bond, the position remains that the goods can be held liable for confiscation as if they are still available. In this regard, I rely on the judgement/decisions in the case of Weston Components Ltd. – 2000 (115) ELT 278 (SC); M/s. Raja Impex – 2008 (229) ELT 185 (P&H); Pregna International Ltd. – 2010 (262) ELT 391; R.D. Metal & Co. – 2008 (232) ELT 464 (Tri-Ahmd) and Amartexinds Ltd. – 2009 (240) ELT 391, which are squarely applicable to the facts of the case.

22. Consequently, by above acts and omission the M/s. Vestas have rendered themselves liable for penal action under Section 112(a) and / or 114A of the Customs Act, 1962. Further, I find that M/s. Vestas have made themselves liable to penalty under Section 112(a) as well as under Section 114A of the Customs Act, 1962. However, since I propose to impose

penalty under Section 114A of the Customs Act, 1962, I do not impose any penalty on them under Section 112(a) of the Customs Act, 1962 as provided in proviso to Section 114A.

ORDER

23. In view of the forgoing discussions and findings, I pass the following order:

(a) I deny the benefit of duty exemption as claimed under Notification No.104/94-Cus dated 16.03.1994 in respect of goods mentioned in Annexure-A to M/s. Vestas and Customs duty amounting to Rs.8,49,40,801/- [Rs.5,82,34,253/- as per Annexure-A to the Show Cause Notice, on account of wrong availment of benefit of exemption under Noti.No.104/94-Cus dated 16.03.1994 (+) Rs.2,67,06,548/- as per Annexure-B on the goods which were not declared], and confirm the demand of Rs.8,49,40,801/- under proviso to Section 28(1) (till 07.04.2011) / Section 28(4) (w.e.f.08.04.2011) read with bonds furnished by them under Noti.No.104/94-Cus at the time of import. The amount of Rs.2,89,57,316/- (As per Annexure-C to the Show Cause Notice) deposited by the importer vide Challan No.735 dated 04.07.2012 during investigation is hereby appropriated against the demand of the Customs duty.

(b) I order to pay the interest under section 28AB (till 07/04/2011) and 28AA (from 08.04.2011) of the Customs Act, 1962 at the appropriate rate. The amount of Rs.46,02,074/- deposited towards interest by M/s. Vestas vide Challan No.1529 dated 04.10.2012 during investigation is hereby appropriated against the demand of interest.

(c) I confiscate the goods declared as packing materials i.e. Barge frames, Low Hub Frame, Tower Foot, Tower Frapping Brackets, Double stacker frames, SOC containers etc. on returnable basis (re-export) valued at Rs.23,71,41,010/- under Section 111(m) and/or 111(o) of the Customs Act, 1962. Further, I impose redemption fine of Rs. Rs. 5,00,00,000 /-(Rs. Five crores only) under Section 125 of the Customs Act, 1962, in lieu of the confiscation as the goods were only provisionally assessed and cleared under Bond. I also enforce the Bond

executed by M/s. Vestas and I also order to encash the Bank Guarantee furnished by M/s. Vestas at the time of provisional release of said seized goods against their above liabilities towards duty, interest, fine and penalty etc.

(d) I confiscate the undeclared packing materials i.e. Tower Foot, Tower Frapping Brackets, Low Hub Frame, Double stacker frames & SOC containers etc valued at Rs.10,98,12,887/-, under Section 111(l) of the Customs Act, 1962. Further, I impose redemption fine of Rs. 2,00,00,000/- (Rs. Two crores only) under Section 125 of the Customs Act, 1962, in lieu of the confiscation for the goods provisionally assessed and cleared under Bond. I also enforce the Bond executed by M/s. Vestas and I also order to encash the Bank Guarantee furnished by M/s. Vestas at the time of provisional release of said seized goods against their above liabilities towards duty, interest, fine and penalty etc..

(e) I impose penalty of Rs. Rs.8,49,40,801/- (Rupees Eight Crores Forty Nine Lacs Forty Thousand Eight Hundred and one only) on M/s. Vestas for their willful acts and omissions as discussed above under Section 114A of the Customs Act, 1962.

(P.V.R. REDDY)
PRINCIPAL COMMISSIONER

BY REGD. POST A.D.

F. No. S/10-111/Adjn/2013-14.

Date : 30.06.2015.

To,

M/s Vestas Wind Technology India Pvt. Ltd,
298, Rajiv Gandhi Salai, Sholinganallur,
Chennai – 600 119.

Copy to :

1. The Chief Commissioner of Customs, Gujarat Zone, Customs House, Navrangpura, Ahmedabad for information along with the copy of Show Cause Notice.
2. The Deputy/Assistant Commissioner, GR-I, Kandla,
3. The Deputy/Assistant Commissioner (Recovery), Customs House, Kandla,
4. Guard file.