



**slma xuLk AayuKt ka kayaRly,
nvn slma xuLk wvn, nya ka.Dla I**

**OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA-370 210 (GUJARAT)
Phone No: 02836-271468/469, Fax No. : 02836-271467.**

| | | |
|---|------------------------|--|
| | File No. | F. No. S/10-43/Adj/COMMR/2014-15 |
| B | Order-in-Original No. | KDL/COMMR/PVRR/16/2015-16 |
| C | Passed by | SHRI P.V.R.REDDY , PRINCIPAL COMMISSIONER OF CUSTOMS, KANDLA. |
| D | Date of order | 27.11.2015 |
| E | Date of issue | 27.11.2015 |
| F | SCN No. & Date | F. No. VIII/48/04/2011-DRI-HRU dated 16.01.2015 |
| G | Noticee/Party/Exporter | M/s. Balgopal Shipping & Logistics, Gandhidham and Others. |

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 paisa 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. Balgopal Shipping & Logistics, holders of IEC No.3709000726, located at Plot No.123/126, Sector 10A, GIDC, Gandhidham, Kutch, (hereinafter referred to as 'M/s. BSL') are merchant exporters engaged in the export of rice and importing ferrous and non-ferrous metal scrap through Custom House, Kandla. M/s BSL is a partnership firm and the partners of the firm are Shri G.R Dwivedi and his son Shri Ashish Dwivedi. The day-to-day business of the firm are being looked after by Shri G.R Dwivedi with the help of his staff.

2. Specific Intelligence developed by officers of Directorate of Revenue Intelligence revealed that M/s BSL was trying to export non-basmati rice (which was prohibited for export during the relevant period) in the guise of basmati rice through the Custom House, Kandla. The consignments were about to be exported out of India after completion of Customs examination at CONCOR CFS, Gandhidham; that Shri Aitha Rajesh of Hyderabad colluded with Shri G.R Dwivedi, Partner of M/s BSL in procuring of non-basmati rice from Andhra Pradesh, Karnataka and other states for purpose of export; that Shri A.Rajesh was also exporting non-basmati rice in the guise of basmati rice by using the IEC Number of M/s BSL to the firms/companies floated by him in Singapore and other countries. In the past M/s BSL had exported non-basmati rice in the guise of basmati rice vide 35 Shipping Bills totalling to 3,061.36 Mts having declared value of Rs.12,82,64,172/- apart from the seven (7) live consignments which were attempted to be exported.

3. In pursuance of the above intelligence, the officers of DRI, Hyderabad / Gandhidham conducted simultaneous searches on 18.02.2011 at the business premises of M/s BSL at Plot No.123/126, Sector-10A, GIDC, Gandhidham, Gujarat; office premises of M/s Bharath Exports at Flat No.309, Taj Enclave, Besides Sensation Theatre, Khairtabad, Hyderabad and residential premises of Shri Aitha Rajesh at Flat No.506, Shantiniketan Apartments, Street No.2, Lane No.10, Barkatpura, Lingampally, Hyderabad.

4. Search conducted at the business premises of M/s BSL resulted in the recovery of certain incriminating records relating to procurement of non-basmati rice and its export; three Hard Disk Drives (HDDs); and one Laptop used by the staff of M/s BSL, under Panchanama dated 18/02/2011 (**Annexure A1**).

5. Search conducted at the office premises of M/s Bharath Exports at above said premises resulted in the seizure of a made up file under panchanama dated 18/02/2011. Search of residential premises of Shri Aitha Rajesh at above said premises (**Annexure A.2**) resulted in recovery of one HDD; one Laptop; and records under panchanama dated 18/02/2011.

6. On the same day, the officers of DRI, Hyderabad / Gandhidham also examined the goods i.e. non-basmati rice, which were attempted to be exported by M/s BSL, by declaring the description of the goods as 'Indian Basmati 1121 Rice' in the Shipping Bills Nos.2429321 dated 04.02.2011 and 2429323 dated 04.02.2011 filed with the Customs, at CONCOR,

Kharirohar-Machhunagar, Gandhidham, in the presence of independent witnesses, staff of CONCOR, Superintendent of Customs - in-charge of CONCOR CFS, Preventive Officer (Dock Preventive) - M/s CONCOR CFS, which revealed that the goods were of non-basmati variety and that the descriptions found on the packages of the goods clearly indicated as 'Non-Basmati Rice'. During the Panchanama proceedings at CONCOR CFS, Gandhidham, Shri Vivek Shukla, Office Assistant of M/s. BSL and M. Santosh Kumar, a rice trader representing Shri A. Rajesh who was looking after the exports of M/s BSL confirmed that they were exporting non-basmati Rice such as Sona Masuri Rice or Idli Rice packed in PP bags. The details recorded in the panchanamas dated 18/02/2011 are as under:-

(i) In Container No.MSKU4371113 (Shipping Bill No.2429321) stuffed with 1100 number of bags, the description of goods on the PP bags were printed as 'Vatan' 'Idli Rice' in four languages. In the container number MSKU2813577 for the same shipping bill, the description of the goods packed in 1100 number of bags were printed as "Vatan Sona Masoori Rice".

(ii) In the container number MSKU2680710 (Shipping Bill no.2429323) stuffed with 960 PP bags, the description of goods on the PP bags were printed as "Lotus", "Premium", "Sortex cleaned Super Fine Rice".

The description of goods "Indian Basmati 1121 White Rice" mentioned in the above Shipping Bills was contrary to the actual description of the goods described on the pp bags and representative samples of rice were drawn from each variety of rice available in the PP bags from the said three containers and detained the containers which contain the Non-Basmati Rice under panchanama dated 18/02/2011 (**Annexure A3**).

7. Preliminary scrutiny of the records recovered from the business premises of M/s BSL revealed that File No.182, 183 & 184 (**Annexure-C.2**)_inter alia contain purchase bills, letters/correspondence, lorry receipts, weightment slips etc. and bills issued by the rice millers and the brokers. Generally the bills are issued by the millers in the name of some rice traders of Naya Bazar area of New Delhi. This rice appears to have been arranged directly to M/s BSL through a rice broker, namely, Shri A.Rajesh and other traders viz., M/s Sree Skanda Food Processing India Pvt. Ltd., M/s D.K Sortex, etc. The bills contain clear description of the goods as "Rice", "Sona Steam Rice", "BPT Rice", "NLR34449" rice. The price of each Kilo Gram of rice is varying between Rs.17/- per KG to Rs.22/- per KG. All the bills available in these files contained the description of the goods in different name / varieties of non-basmati rice. As per the bills and the lorry receipts, the rice bags were delivered at M/s BSL, Gandhidham though they were issued on some traders' name and address. Further on the flip side of the bills endorsement made by the staff of M/s BSL, on receipt the goods, regarding verification of the goods with the bills, for shortages, if any and the description of the goods received and in most of the bills they made an endorsement of the description as "Rice", "Sona Steam Rice", "BPT Rice", "NLR34449" rice. The bills clearly contain the description of the goods as "Rice", "Sona Steam Rice", "BPT Rice", "NLR34449" rice. None of

the bills contained the description of the goods as “Basmati” or “Indian Basmati 1121 Rice”, except on the bills issued by M/s. D.K Sortex in the name of M/s. Bholenath Enterprises and delivered at M/s. BSL. In this case the Authorized signatory of M/s. Bholenath stated that actually they have supplied only non-basmati rice, as they deal only in non-basmati rice. Further, he stated that, as per M/s BSL request, the bills were issued with different description from what they actually supplied. Further the rate in the bills also confirms that they supplied non-basmati rice.

8. On scrutiny of the purchase bills, which were received by M/s BSL on procurement of Non-Basmati Rice, the officers of DRI identified other consignments pertaining to 5 shipping bills of 19 containers of rice to be exported by M/s BSL and lying at Kandla Port and called back the said consignments to CONCOR, Gandhidham and the examination of goods revealed that the goods were of non-basmati nature and that the descriptions found on the packages of export goods clearly indicated the goods to be ‘Non-Basmati Rice’.

9. During the Panchanama proceedings, Sri Vivek Shukla, Office Assistant of M/s BSL confirmed that they were exporting non-basmati Rice such as Sona Masuri Rice or Idli Rice packed in PP bags. The description mentioned in the five Shipping Bills was “Indian Basmati 1121 White rice”. However, the actual goods were other than the description mentioned in the Shipping Bills. The details of the same as under:

| Sl. No. | Shipping Bill No. and date | Description declared in the Shipping Bill/ Export Invoice | Actual description found on the packing of goods |
|---------|----------------------------|---|---|
| 1 | 2429353/4.2.11 | Indian Basmati 1121 White Rice | “Par Boiled Basmati Rice” “Par Boiled Ponni Rice” |
| 2 | 2429324/4.2.11 | -- do -- | “Uncle Cook Brand” and “Palace Brand Sortex Premium Rice” |
| 3 | 2429340/4.2.11 | -- do -- | “House Brand Par Boiled White Ponni”, “Parboiled Ponni Rice”, “Par Boiled Basmati Rice” |
| 4 | 2429341 | -- do -- | “House Brand Par Boiled White Ponni” |
| 5 | 2384142 | -- do -- | “House Brand Indian Basmati Rice”. |

The officers drew representative samples from each variety of rice available in all the containers for the purpose of ascertaining the exact variety of rice under Panchanama dated 20/02/2011. Totally 459.500 MTs of non-basmati rice having declared value of Rs.1,95,14,083/- in respect of the five shipping bills stored in 19 containers were detained vide Panchanama dated 20.02.2011 (**Annexure A.4**) pending further enquiry.

10. The (3) HDDs and (1) one Laptop which were seized under panchanamas dated 18/02/2011 from the business premises of M/s BSL and the residential premises of Shri A. Rajesh were handed over to the Director, Central Forensic Science Laboratory, Ramanthapur, Hyderabad for examination and analysis. CFSL, Hyderabad furnished their

report in Q2 and Q6 in file No.13/CFSL(H)EE/2011/17148/4170 dated 14.09.2011 (**Annexure C.10**).

11. Thus, M/s. BSL in the manner stated above, concealed and attempted export of "Non-Basmati Rice" wrongly declaring the same as "Indian Basmati 1121 White Rice". The non-basmati rice being prohibited goods for export was liable for confiscation under the provisions of the Customs Act, 1962. As there was smuggling (export of prohibited goods) by mis-declaring non-basmati rice as Basmati Rice, the 22 containers of rice specified in the 7 shipping bills detained under panchanamas dated 18/02/2011 and 20/02/2011 at CONCOR CFS, Gandhidham were seized vide seizure memo dated 25.02.2011 (**Annexure-A5**) pending further investigation. The total quantity of goods seized was 520.926 MTs having declared value of Rs.2,24,68,017/-.

12. The samples drawn from the above said 22 containers were sent to the Basmati Export Development Federation (BEDF for short) vide DRI letter dated 28.03.2011 for DNA Analysis Test and also to verify the quality/grade of rice as to whether they were meeting the specifications of Basmati Rice specified in the DGFT Notification No.57/2009-2014 dt.17.08.2010.

13. Basmati Export Development Federation (BEDF for short) conducted DNA analysis (**Annexure-D1**) and other required analysis and stated that all the rice samples are Non-Basmati Rice. Further with regard to meeting the specifications of Basmati Rice mentioned in the DGFT Ntn.No.57/2009-2014 dt.17.08.2010 (Grain of rice shall be more than 6.61 mm of length and the ratio of length to breadth (L/B) of the grain shall be more than 3.5), they confirmed that samples did not meet the specifications of the Basmati Rice as prescribed by DGFT in the Notification, for Export.

14. In respect of the above seized 22 containers, a show cause notice was issued vide F. No. VIII/48/04/2011-DRI-HRU dated 29.06.2011 to M/s. Balagopal Shipping & Logistics, Gandhidham by the Additional Director General, DRI, Zonal Unit, Chennai proposing confiscation of the goods attempted / cleared for export along with fine & penalties and the same was made answerable to the Commissioner of Customs, Kandla which was adjudicated vide Order-in-Original No.KDL/COMMR/13/2011-12 dated 26/12/2011 upholding the proposals made in the show cause notice.

15. Scrutiny of the exports made by M/s BSL in the past show that they have purportedly exported basmati rice under thirty five (35) shipping bills totalling to 3,061.38 MTs (130 containers), having declared FOB value of Rs.12,82,64,172/-. However, the records recovered during the investigation show that the goods actually exported is 'non-basmati rice' in the guise of 'basmati rice' and the same is in violation of the provisions of DGFT Policy and the Customs Act, 1962. By doing so, the thirty five consignments were liable for confiscation

and the sale proceeds earned against the said exports also liable for confiscation under Section 121 of the Customs Act, 1962.

16. The details of investigations pertaining to live/past consignments, i.e. statements recorded from the persons concerned, documents resumed during the investigations etc, are brought out herein as part of this notice also, as they are relevant to the present case i.e. exports of non-basmati rice in the guise of basmati rice made by M/s.BSL in the past in respect of the said thirty five shipping bills in respect of the said thirty five (35) Shipping Bills.

17. As per the rice purchase bills recovered from the office premises of M/s BSL on 18.02.2011, it was found that they have procured non-basmati rice for the purpose of export. For example, page no.809 of file no.183 recovered from the office of M/s. BSL shows the description of the goods in the bill/invoice as "Rice". However, while counting the number of bags at the time of unloading the goods at M/s. BSL, the staff of M/s. BSL made an endorsement on the flip side of the bill as "Idli", which is nothing but a variety of non-basmati rice. Shri Manish Parekh, Proprietor of M/s Malay Trading Company, who is a major supplier of rice (about 1200 MTs) to M/s BSL admitted that he had never dealt in Basmati Rice and that all the rice supplied to M/s. BSL were of different varieties of non-basmati rice.

18. All the bills available in the file numbers 182, 183 and 184 are tabulated with the columns viz. quantity, description and the supplier and annexed herewith as evidentiary chart **(Annexure-D2)**. The total quantity of rice tabulated is 2929.622 Tons. However, to know the exact quantity of rice procured/purchased by M/s. BSL, the other purchase bills and also the ledger accounts were requisitioned. In reply, M/s. BSL stated in its letter dated 02/05/2011 **(Annexure-C4)** that they do not possess any documents with them as all details were maintained in the computers seized by the department. As per the shipping bills filed by M/s. BSL, (which were seized by the DRI officers **(Annexure-C3)** on 18/02/2011 under panchanamas **(Annexure-A3)**, the total quantity of rice exported is tabulated to be 3061.38 Tonnes **(Annexure-D3)** in the past.

19. In these files, certain stock statements were maintained by M/s. BSL. containing details such as date on which M/s. BSL received the rice, truck number under which the rice was received, the supplier who had supplied the rice, number of bags and the total weight of the quantity received. M/s. BSL maintained these sheets immediately on receipt of the rice from the traders which contain a reference to the bills issued by the traders as mentioned in para 17 and 18. The details available in these sheets are also tabulated as an evidentiary chart **(Annexure-D4)** which shows that M/s. BSL had received only non-basmati variety of rice and not Basmati Rice as mentioned in their shipping bills. It was also confirmed by the traders and suppliers. Thus, it is clearly evident that M/s.BSL had mis-declared the variety of rice in shipping Bills and exported the same in violation of the Foreign Trade Policy 2009-2014 [FTP] and Customs Act, 1962.

20. Bill of Lading No.IXYSIN110002 in file No.184 at page no.53 shows 171.500 MTs were stuffed in a container No.CRXU-3456651 intended for export vide the Shipping Bill No.2429353 dated 04.02.2011 (**Annexure-C8**) by showing the description as "Indian Basmati 1121 White Rice" whereas the description on physical availability of the rice in the said container which was detained on 18/02/2011 and seized on 25/02/2011 is mentioned on the PP bags packing as "Par Boiled Ponni Rice" (which is a non-Basmati Rice). DNA analysis test report No. BEDF10411498033003.1 dated 20.04.2011 in respect of the above consignments indicates that the rice is "Non-Basmati Rice - 99.4%" (**Annexure-C9**). Hence, it is further proved beyond doubt that M/s. BSL were procuring non-basmati rice and exporting the same in the guise of Indian Basmati 1121 White rice. In their statements the suppliers of rice to M/s. BSL and the personnel of M/s. BSL, including Shri Dwivedi Director of M/s. BSL, who have received the rice at Gandhidham have accepted to have received only non-basmati rice from the suppliers. The test reports of the samples have also confirmed the same.

21. The relevant notifications with regard to prohibition/ban/restrictions for export of non-basmati rice, were issued by Director General of Foreign Trade, Ministry of Commerce, Government of India from time to time. The Notification No.38(RE-2007)/2004-09 dated 15.10.2007 of DGFT, prohibited export of Non-Basmati Rice, which was amended by Ntfn.No.58(RE-2007)/2004-09 dated 26.11.2007 to the extent that the prohibition of export imposed was relaxed to the extent of export of 1,000 MTs of rice to Republic of Mauritius through STC. The Notification No. 93 (RE-2007)/2004-2009, dated 01/04/2008 was issued amending the Notification No.38(RE-2007)/2004-2009. Under sl.no.45A of this notification, export of Non-Basmati Rice was prohibited. However, subject to the certain conditions, the export of non-basmati Rice was allowed. The conditions under which export of non-basmati rice was allowed, was not applicable to M/s. Balagopal Shipping & Logistics, as the exports of M/s. BSL were contrary to the conditions of the above notifications. The Sl.No.45A of Ntfn.No.93(RE-2007)/2004-2009 dated 1st April, 2008, was amended by notification no.37/2008 dated 03.09.2008, (effective/applicable from 15.10.2008) with regard to allowing export of Pussa-1121 variety of Non-basmati Rice subject to the certain conditions. The sl.no.45A of Ntfn. No.37(RE-2007)/2004-2009 dated 1st April, 2008 was further amended vide Ntfn.No.38/2008, dt.05.09.2008 by including Rice of seed quality, for export with certain conditions imposed vide Ntfn.No.32 dated 19.08.2008. The Government of India again issued Ntfn.No.39/2008 dated 16.09.2008 making certain further amendments to Notification No.93(RE-2007)/2004-2009 dated 01.04.2008 read with Ntfn.No.37(RE-2008)/2004-2009 dt.03.09.2008 and Ntfn.No.38(RE-2008)/2004-2009 dated 05.09.2008. Vide Ntfn.No.55/2008 dated 05.11.2008 under Sl.No.45A Govt. of India prohibited export of non-basmati rice. However, in respect of Basmati Rice, under Sl.No.45AA, the first condition with regard to length decreased from 7mm to 6.61 mm and ratio of length to breadth from 3.6mm to 3.5mm. All other conditions in respect of Sl.No.45AA were unchanged. The notification no.55/2008 dated 05.11.2008 was further amended by notification no.57/2009 dated 17.08.2010 and the condition number of Ntfn.no.55/2008 dt.05.11.2008 was required to be read as it is, i.e.

“Grain of rice to be exported shall be more than 6.61 mm of length and ratio of length to breadth of the grain shall be more than 3.5”.

21.1 On summarizing the notifications issued from time to time referred to above, export of non-basmati rice was prohibited under the Foreign Trade Policy and not permitted to be exported. Even for certain period, i.e. during from 16.9.2008 to 05.11.2008, where certain conditions viz., length to be more than 7 or 6.61mm and ratio of length to breadth 3.5 or 3.6 as the case may be, were imposed for export of non-basmati rice, M/s.BSL had undertaken export of non-basmati rice during the period from September, 2010 to Feb.2011, which was prohibited during this period. Even assuming that M/s. BSL had exported Basmati Rice, it could not do so, as the restrictions, with regard to size, permission from APEDA, New Delhi, and the FOB price, were not fulfilled. The thirty three samples drawn from 22 containers and the test results given by BEDF thereof proved testimony to the fact beyond doubt that the rice was of non-basmati variety.

22. As per the definition under Section 2(39) of the Customs Act, 1962, “smuggling” means any act or omission which will render such goods liable to confiscation under section 111 or section 113.

23. As per the section 113 of the Customs Act, any goods attempted to be exported or brought within the limits of Customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act, or any other law for the time being in force, shall be liable to confiscation.

24. On the basis of documentary and the material evidences in the investigations, the statements of personnel, who had involved themselves in the supply, procurement, receipt and export of non-basmati rice were recorded under the Section 108 of the Customs Act, 1962. The details of these depositions are as hereunder: -

a. Statement of Shri Madishetty Santosh Kumar, Rice Trader and representative of Shri A. Rajesh was recorded on 19/02/2011 (**Annexure-B1**) under which he, *inter alia*, stated that Shri Rajesh used to procure only non-basmati rice from different places from Karnataka and Andhra Pradesh States, for the purpose of sending abroad from Kandla/Gandhidham; that all the times, the rice procured by Shri A. Rajesh were of the quality of Sona Masoori Rice, Steam Rice/Boiled rice for Idly, Dosa and the same were supplied to M/s. BSL for export out of India; that he was present on 18/02/2011 during the course of search/examination of the goods; that he agreed with the contents of the panchanamas.

b. Shri A. Rajesh, in his Statement dated 09.03.2011 stated, *inter alia* that he used to procure rice from different parties, who used to supply Sona Masoori rice; that the goods were delivered at Gandhidham; that the goods i.e. rice of variety ‘Sona masoori’ was exported to M/s Suriya Trading Company, Singapore; M/s. Mustafa, Singapore; M/s V Sai, Singapore, Vatan International, USA; Loftus, Australia; that as he was not having any certificate of IEC issued by DGFT, he approached M/s Balgopal Shipping & Logistics, Gandhidham represented by Shri Gangadhar R.Dwivedi to undertake the export of ‘Sona masoori’ rice; that he used to get his commission of Rs.20,000/- to Rs. 30,000/- per container

depending on the margin received by M/s Balgopal Shipping & Logistics and that he was yet to receive his commission; that he entered into an oral agreement for the export of non-basmati rice; that to take care of his interests at M/s Balgopal Shipping & Logistics, Gandhidham, he sent his wife's brother Sri M.Santosh Kumar to Gandhidham about a month back to ensure receipt of non-basmati rice and to look after and learn the documentation work; that export of non-basmati rice was prohibited under the Foreign Trade Policy and that due to his financial position and to take care of his family, he was forced to take up export of non-basmati rice in violation of Foreign Trade Policy.

c. In his further statement dated 10.03.2011, Shri Rajesh stated, *inter alia*, that he used to procure non-basmati rice from Rice Millers in Karnataka state and Nizamabad which were supplied to domestic traders as well as to exporters; that he used to supply non-basmati rice to M/s Balgopal Shipping & Logistics, Gandhidham for onward export; that he had supplied about 1000 MTs of non-basmati rice for export to overseas buyers over a period of nearly 5 (five) months; that the invoices were raised in the names of M/s Shublabh Agencies, M/s Vardhaman International and M/s Sparsh all located in New Delhi, but the consignments were delivered at Gandhidham; that Sri Lalith and Sri Vivek Shukla working in M/s Balgopal Shipping & Logistics used to receive the non-basmati rice at the godowns in Gandhidham; that he was the director of M/s V. Sai Pte. Ltd., Singapore which was floated by him along with Mr. Madishetty Ramu who was also a Director; that he sent various brands of Non-Basmati Rice like Vatan Brand, Lucky Gold, Lotus etc., to M/s V. Sai Pte. Ltd. through different exporters; that he also exported Basmati Rice to M/s V. Sai Pte. Ltd., Singapore; that he exported about 5 to 12 containers per month to M/s V. Sai Pte. Ltd., Singapore during the last 18 months; that the profit and commission was received by him in cash through non-banking channels; that as per Shri Dwivedi's requisition he had been to Gandhidham; that Shri Dwivedi asked him to supply "Andhra Rice", i.e. Sona Masuri rice and used to give Rs.25,000/- to Rs.30,000/- per each export container; that taking advantage of the same, he asked Dwivedi to supply certain quantities of Sona Masuri rice on his behalf from M/s Balagopal Shipping and Logistics using its IEC code; that Shri Dwivedi accepted and stated that he would give double the commission for the exports made by him (Rajesh) through M/s BSL by using its IEC code; that the purchase/procurement price of Non-Basmati rice (i.e. Sona Masoori, Ponni rice, Idly rice etc.) ranged between Rs.20/- to Rs.30/- per KG; that the purchase/procurement price of Basmati Rice ranged between Rs.35/- to Rs.70/- per KG depending on the smell and quality; that the length of Basmati Rice would be around 6.5 mm to 8.5 mm; that as regards Sona Masoori rice, the length ranged from 4 mm. to 6 mm; that the export proceeds would be received by the exporter by way of TT from abroad and that the exports of Non-Basmati rice in the guise of Basmati rice were done by M/s.BSL, Gandhidham, to his overseas company i.e. M/s.V. Sai Pte. Ltd, Singapore.

d. Shri Gangadhar Ramsumer Dwivedi, Partner of M/s. Balgopal Shipping and Logistics, Gandhidham, Gujarat, in his statement dated 18.03.2011, stated, *inter alia*, that his firm's IEC code No..3709000726; that he was mainly assisted by his three employees, viz; Shri Vipul Sharma, who looked after the liaison work and customs related documents,

Shri Vivek Shukla who looked after the entire office work and documentation work and Shri Lalith used to look after the loading and unloading activities at the port; that Shri Rajesh approached him and requested to export non-basmati rice, i.e. BPT/Sona Masuri by using IEC code of his company i.e. M/s. BSL and he allowed the same; that export proceedings were received into the account of their company; that M/s.BSL used to pay the amounts to the rice traders from whom the procurement was made by Shri A. Rajesh; that the difference of the proceeds (i.e. procurement price and export price), which was Rs.20,000/- and above was used to be paid to Shri A. Rajesh, towards commission; that he fully agreed with the contents of the panchanamas and the seizure memo referred to above; that the export of non-basmati rice was prohibited under the Foreign Trade Policy and that as the exports were made under his firm's name by using his IEC code, he took up the responsibility.

In his further statement dated 25.03.2011 he stated, *inter alia*, that the files Nos.182, 183 & 184 contained the purchase bills of different types of rice (other than basmati rice) such as Sona Steam Rice, Rice, Sharbati Rice, LRs and weighment slips, way bills etc; that the bills contained in these files were of various companies, who supplied Rice (Other than Basmathi rice) to different parties, such as Vardhaman International, Bholenath Enterprises, Subhlabh Agencies, Sree Shanmuga Modern Rice Mills Pvt. Ltd., Malay Trading Company, M/s Sparsh International, who in turn supplied the said rice to M/s BSL which exported these rice to different parties of Singapore, USA, Dubai and Australia; that the descriptions mostly contained Rice Other than Basmati Rice; that sheets were maintained for the purpose of verification whether the quantity mentioned on the bills were correctly received or not and also for making freight payments containing the day-wise incoming truck details for the supply of rice and the description of the material was mentioned on the bills which were prepared by his employees, mostly by Shri Vivek Shukla containing the details such as vehicle numbers, party name, supplier name, bill no., weight, received date, bags, received bags and remarks; he had received number of varieties of rice viz; "Sona Steam Rice" "Sharbati Rice" "Rice" "NLR34449 Rice" "RMC paid Rice" and exported the same to different countries. Shri Dwivedi categorically stated that he had never exported any Indian Basmati rice or Basmati Rice and that he had resorted to this activity as rice other than basmati rice was prohibited for export.

e. In his further statement dated 08.04.2011 he stated, *inter alia*, that he met Shri Bhushan Jain of New Delhi and told that one Shri Rajesh of Hyderabad would contact him and supply different varieties of rice (other than Basmati Rice) from the different millers directly to him (M/s BSL) on account of M/s Subh Labh Agencies and M/s Vardhman International; that after taking consent of his owners, Shri Bushan Jain agreed to facilitate his firms' names for routing the rice arranged by Shri Rajesh of Hyderabad purchased from different millers; that he fully agreed with the depositions made by Shri Bhushan Jain in his statement dtd.07.04.2011; that one Shri Sanjay of New Delhi had written the bills of M/s Subh Labh Agencies at his behest, in the empty bill book supplied by Shri Bhushan Jain; that this was done to show as if Basmati Rice purchased by him was exported; that in fact even

M/s. Subh Labh Agencies and M/s Vardhman International, did not know the actual suppliers, since the same were procured by Shri Rajesh and delivered directly to Gandhidham; that his M/s BSL staff members, mostly Shri Lalith used to check the consignments sent by Shri Rajesh on account of M/s Shubh Labh Agencies and put the rubber stamp of M/s Subh Labh Agencies at his place, on the back of bills/letters.

f. Shri Vipul Sharma, Clerk of M/s. Balgopal Shipping & Logistics, Gandhidham in his statement dated 23.03.2011 stated, *inter alia*, that the examination of the consignments was attended by him and Shri Lalith, another employee of M/s. BSL; that Shri Dwivedi told him to prepare the documents for export of non-basmati rice, showing the documents as Indian Basmati Rice; that he used to file Shipping Bills through online from their office only; that the assessment of the bills was done online by the officers of customs; that the export goods were loaded at CONCOR CFS, Gandhidham generally after office hours (i.e. after 8.00 PM); that no customs officer was physically present during the course of loading of export goods into the containers at CONCOR, CFS, Gandhidham for the exports made by M/s. BSL, as there was no regular Customs officer posted at CONCOR, CFS; he used to procure genuine Basmati Rice from local market and used to deliver the said basmati rice samples; that sometimes, the customs officers used to visit the said godowns for verification and at that time they (M/s BSL) used to show the genuine basmati rice stored in the godowns pertaining to other exporters as theirs; that non-basmati rice was loaded into the containers covered under the shipping bill Nos. 2384142 dated 01.02.2011; 2429321, 2429323, 2429353, 2429324, 2429340, 2429341 all dated 04.02.2011 and that he acted as per the instructions of Shri G.R Dwivedi.

g Shri Vivek Shukla, Office Assistant of M/s. Balgopal Shipping and Logistics, Gandhidham (Kutch) in his statement dated 24.03.2011 stated, *inter alia*, that he prepared invoice, packing list, shipping bills, bills of entries, etc., and handed over the file to Shri Vipul Sharma, who attended to further processing of file and attended to examination of the goods; that his owner Shri Dwivedi gave instructions in preparation of documents for the products to be exported by M/s. BSL; that Shri G.R Dwivedi directed him to prepare the shipping bills showing the description of the product as Indian Basmati 1121 White Rice and accordingly he obeyed Shri Dwivedi's instructions; that in reality, non-basmati rice was exported in the guise of Indian Basmati Rice; that all shipping bills were filed in EDI only and no manual filing of bills was made; that Shri Rajesh used to call him and also used to give emails to him for sending of non-basmati rice to Gandhidham for onward export to Mr. Rajesh's firm M/s. V.Sai Pte. Ltd and that Shri A. Rajesh used to send him the purchase orders, rate to be mentioned in the invoices.

25. To know the actual details of the transactions, based on the bills recovered from the office of M/s. BSL, Gandhidham, the following persons on account of whose firms, the rice were received by M/s. BSL, were examined and their depositions were recorded.

25.1 Shri Bhushan Jain, Manager of M/s Subh Labh Agencies and also Manager in M/s Vardhman International, 2745, 1st Floor, Naya Bazar, New Delhi, under the authorization of Proprietors of these firms, was examined on 07.04.2011, wherein he stated, *inter alia*, that

Shri Dwivedi of M/s. BSL told him that he wanted supply of rice from these two firms; that for this purpose Shri Rajesh of Hyderabad would arrange the rice through millers and bills had to be raised in these two firms' names; that Shri Rajesh procured different varieties of non-basmati rice such as "Sona Steam Rice", "NLR34449", "BPT Rice" etc., and sent directly to M/s. BSL on their account; that they had not issued any bills to M/s. BSL; that the empty bill book of M/s. Subh Labh Agencies was given by them to M/s. BSL and M/s. BSL used to prepare the bills as if they supplied Basmati Rice to M/s. BSL; that to look the transaction genuine in the eyes of law, they used to receive cheque payments from M/s BSL for the invoices raised and the same was squared up by paying amounts to actual rice suppliers by them from their account and that the above transactions were done by them with consent of his Managements at the behest of Shri Dwivedi and that in these transactions only bills were issued but not supplied any Basmati Rice to M/s. BSL; that in respect of M/s Vardhman International, they had not issued any bills to M/s. BSL nor the empty bill books were given to M/s.BSL.

25.2 Shri Ajit Prasad Garg, Broker in Rice trade in New Delhi, in his statement dated 11.04.2011 stated, *inter alia*, that Shri Rajesh came to him and told that he (Shri Rajesh) would supply rice and asked him to show some trading firms to whom he (Rajesh) could send the rice; that in this connection he talked to Shri Mahender (Mahender Bhai) of M/s. Sparsh International, whose firm was situated at Nayabazar, New Delhi and informed him that the rice procured from Shri Rajesh would be sent to one M/s. Balgopal Shipping and Logistics, situated at Gandhidham, under the firm name of M/s. Sparsh International; that he informed Shri Mahender that out of the commission received by him, certain portion of commission would be given to him (Mahender) for using the bills of his firm, i.e. M/s. Sparsh International; that M/s. Sparsh International had not issued/raised any bills to M/s Balgopal of Gandhidham, as the transactions had to be routed through him by M/s. Sparsh International.

Based on the deposition of Shri Ajit, summons dated 25/04/2011 were issued to Shri Mahender of M/s Sparsh International. However, the summons returned undelivered with remark in Hindi "insufficient address".

25.3 Shri Ashish Champalal Bhuthada, Manager and Authorised Signatory of M/s.Bholenath Enterprises in his statement dated 01.04.2011 stated, *inter alia*, that Shri Dwivedi approached him and asked to supply rice to his firm, viz.M/s. BSL for the purpose of export; that they dealt in different varieties of rice other than Basmati rice; that they purchased the same and they in-turn supplied the same to M/s.BSL; that in fact the load would go directly from their supplier to M/s.BSL and they in turn issued their bill; that the pages shown to him of Box File No.182 contained the purchase of rice made by them and delivered directly to M/s.BSL at Gandhidham on their account; that the description in the freight letters mentioned only as "Rice", however the miller bill enclosed to this freight letters mentioned in Hindi as "Amrit Poni Brand", which meant small variety of sona-Masoori Rice; that the reason why the material supplied by M/s. DK Sortex was not Basmati Rice, was that if really Basmati Rice was supplied, the description would be mentioned as "Basmati Rice",

however all the bills showed Rice Basmati.

25.4 Shri Sunny Kumar Jain, Proprietor of M/s.Vardhaman International, and also Authorised Person of M/s.Subh Labh Agencies, in his statement dated 18.04.2011 stated, *inter alia*, that M/s.Vardhaman International and M/s.Subh Labh Agencies dealt in the procurement and sale of non Basmati rice, such as BPT Rice, Sona Masoori Rice, etc; that Shri Dwivedi of M/s.BSL knew his employee Shri Bhushan Jain; that Shri Dwivedi approached him through Bhushan and requested him that he (Dwivedi) would do the rice business by using both the firms of theirs, viz M/s.SLA and M/s.VI; that for using these two firms, Shri Dwivedi would give them some amount towards brokerage; that Shri Dwivedi further stated that Shri Rajesh of Hyderabad would arrange the non-basmati rice through rice millers and the bills had to be raised in their firms' names; that Shri Rajesh used to talk with his employee Shri Bhushan Jain and take the TIN numbers and postal address of their firms; that different varieties of non-basmati rice had been supplied by Shri Rajesh to M/s.BSL on their account; that Shri Dwivedi used to confirm the receipt of non-basmati rice on their account, for the purpose of brokerage commission; that due to the case made against Shri Dwivedi by DRI, till date he had not received any brokerage commission; that nobody, viz; himself, his father or any of their employees or people known to him, had issued any of the bills; that the empty bill book of M/s.SLA was taken from them by M/s.BSL and filled up the details as per their requirement; that they had not issued any bills of M/s.VI and also they had not supplied any empty bill books to M/s.BSL; that the statement dated 07/04/2011 given by Shri Bhushan Jain was correct and factual and that he totally agreed with the statement given by Shri Bhushan Jain on behalf of M/s.VI and M/s.SLA.

25.5 Shri Manish Praveen Chandra Parekh, Proprietor of M/s.Malay Trading Company [MTC], in his statement dated 02.05.2011 stated, *inter alia*, that he never dealt in Basmati Rice; that his main customer was M/s.Balgopal Shipping & Logistics, Gandhidham; that Shri Dwivedi approached and requested him that he wanted to purchase rice from his firm for the purpose of export by his firm; that page numbers 67 to 819 of File No.183 recovered from M/s.BSL, as shown to him, contained the bills issued by his firm, under his signature along with the relevant weighment slips and the Lorry Receipts, for the supply of rice supplied by M/s.MTC to M/s.BSL; that all the consignments of rice sent by him were of sona masoori, idli rice or BPT rice etc, which were all of non-basmati variety; that he dealt only different varieties of non-basmati rice and at no point of time he supplied basmati rice to M/s.BSL or to any party and that till date he had supplied about 1200 tonnes of non-basmati rice totally valued at about Rs.3.92 Crores, out of which about Rs.1.87 Crores was received by him and the balance was yet to be received.

26. In view of the system of the trade that the material was supplied by some millers, organized by some person on account of other firms and the material delivered to some other persons, enquiries with the original millers were made. Their depositions are as under:-

26.1 Shri Boddu Sreenivas, Executive Director of M/s.Sree Skandha Food Processing (India) Pvt. Ltd., in his statement dt.21.04.2011, stated, *inter alia*, that he did not know anybody in Subh Labh Agency; that Shri Rajesh required some rice for the purpose of export; that since they were the rice millers and dealt in the Sona Masoori/BPT Rice, they had agreed to supply these varieties of rice to Shri Rajesh; that Shri Rajesh told that the bills had to be raised in the name of M/s.Subh Labh Agency, New Delhi, and, the rice should be delivered at Kandla, Gandhidham, Kutch; that till date they had never purchased or dealt in Basmati Rice; that he did not know any details about M/s.BSL or any person representing this company; that they had supplied about 260 MTs on account of Shri Rajesh and made delivery at Gandhidham, as per the details furnished by Shri Rajesh; that they had received an amount of Rs.10 lakhs (Rs.9,99,950/-) on 29.09.2010 by RTGS payment and that they had yet to receive some more amount; that they never dealt in Basmati Rice and also that they had never supplied Basmati Rice to any trader.

26.2 Shri Kodulur Venkatesh, Partner of M/s Sri Srinivas Agro Foods, Koppal in his statement dated 21.04.2011 stated, *inter alia*, that he was not aware of any firm by name Subh Labh Agency and also did not know any person in this firm; that Shri Rajesh approached him and wanted to purchase the Sona masoori rice from them; that Shri Rajesh further told them that though he purchased the rice, he wanted the bills to be raised in the name of M/s.Subh Labh Agency, New Delhi and the rice should be delivered at Kandla, Gandhidham, Kutch, Gujarath; that Shri Rajesh was responsible for the payments for their supplies; that till date they dealt only in Sona-Masoori or BPT quality of rice and that they never traded, sold or dealt in Basmati Rice; that he did not know any details about M/s.BSL or any person representing this company; that they had supplied about 64 MTs of Sona Steam Rice to Shri Rajesh on account of M/s.Subh Labh Agency and made delivery at Gandhidham; that no payments were made to them by Shri Rajesh, on the pretext of quality of rice and that they never dealt in Basmati rice.

27. In view of the documentary evidence, physical stock of the goods and its analysis reports of BEDF and the depositions of the above personnel concerned, the officers of Custom House, Kandla port, who had examined the goods under seven shipping bills referred to above were examined and their depositions were recorded.

27.1 Shri Parthiv Chavda, Inspector, Custom House, Kandla, in his statement dated 31.05.2011 stated, *inter alia*, that after going through the seven shipping bills he had to state that after inspecting the rice by him, covered under the above seven shipping bills, the same was forwarded to the Superintendent in the System for further action; that he drew the samples from the consignments of the above (7) shipping bills, however the samples could not be sent for analysis; that he attended to the clearance of Cargo with regard to the examination of the Cargo at CONCOR CFS, and prepared examination report in the system and forwarded online to the Superintendent for further action at his end; that the person representing the exporter identified the consignment of goods as his consignment in CONCOR CFS covered by the above shipping bills; that the consignments were verified visually and it was noticed that on the rice bags the declaration was as that mentioned in the

Shipping Bills; that apart from the above 7 Shipping Bills, no other goods pertaining to this exporter was found; that one Shri Vipul Sharma of M/s.BSL used to remain present at the time of the examination of the goods; that after going through the examination reports pertaining to S/B Nos. 2429340, 2429353, 2429321, 2429324 and 2429341 he had to state that these were system generated examination reports prepared by him and sent to the Superintendent online; that the examination report was generated and it displayed in the system but not in the print out of shipping bill; that the examination reports did not show all the details of the examination report fed by him in the system and that all the details could be obtained by taking prints of screen shots; that after preparing the examination report, the data was transferred online to the Superintendent; that the examination report signed by the Superintendent was being sent physically to the Importer, who in turn approached to the Dock Preventive Officer for stuffing and sealing and that Inspector or Superintendent, who was involved in the inspection of goods and preparation of examination report, would not supervise the loading of the goods and sealing of the container; that he was on leave from 16th February 2011 to 23rd February, 2011 and as such he was not present at the time of panchanama proceedings dated 18.02.2011 and 20.02.2011 and drawal of samples.

27.2 Shri Manoj Kumar Sharma, Superintendent of Customs, Custom House, Kandla, in his statement dated 31.05.2011 stated, *inter alia*, that after going through the shipping bills viz; i.2429321 dated 04.02.2011; ii.2429323 dated 04.02.2011; iii.2429353 dated 04.02.2011; iv.2429324 dt. 04.02.2011; v. 2429340 dated 04.02.2011; vi.2429341 dated 04.02.2011; and vii.2384142 dated 01.02.2011, he had to state that after the LET export orders given by him, the stuffing of the goods under the above shipping bills, was permitted by the Inspector of Dock Preventive, Kandla Customs; that his job ended with the giving of LET export order and sending the Shipping Bill for stuffing purpose; that the samples were drawn by the Inspector; that the samples for the above (7) shipping bills were not sent for analysis, these samples might be available in Dock Examination Section of Custom House, Kandla; that the samples were randomly drawn and since the rice bags did not contain specific marks and numbers, the same were not mentioned in the examination report; that he had attended to the clearance of Cargo only with regard to the examination of the cargo at CONCOR CFS; that when Inspector filed the examination report in the system, he perused the same and on being satisfied gave LEO for the concerned Shipping Bills; that the signature in the examination report under Superintendent column pertained to him; that the exporter showed the cargo at the place inside the CFS where the goods were stacked; that he visually saw the cargo and verified marks and numbers, if any mentioned in the SBs, verified the cargo w.r.t invoice and packing list randomly; that this was the normal procedure; that the representative of exporter showed him the consignment declaring as his consignment in CONCOR CFS covered by the above shipping bills; that the same were verified visually and it was noticed that on the rice bags the declaration was as that mentioned in the shipping bills; that as regards examination reports pertaining to Shipping Bills 2429340, 2429353, 2429321, 2429324 and 2429341 available in the files recovered

from M/s.BSL he had to state that after examination of the consignments by the Customs Officers, i.e. Inspectors and Superintendents, a report would be fed in the system by the Inspector; that then the system generated an examination report in brief, which appeared in the print out of shipping bill; that in the print out of examination report, all the details of examination done by the officer would not be displayed; that this could be obtained by taking screen shots of each page of shipping bill as displayed in the system; that after the examination was over, the process of stuffing was transferred to the Dock Preventive Officer and the seals would be affixed by him only; that once LEO was given the print out of shipping bill was obtained by the exporter and Superintendent giving such LEO put his signature at the appropriate place in the shipping bill and handed it over to the exporter; that the role of examining officers ended with LEO.

28. From the foregoing paras, the following facts appear to emerge:

(i) Non-Basmati Rice was prohibited for exports during the relevant period vide DGFT Notification 93/08 dated 01.04.2008, as amended from time to time.

(ii) It appears that Shri G.R Dwivedi, Partner of M/s Balgopal Shipping and Logistics, Gandhidham, was exporting Non-Basmati Rice in the guise of Basmati Rice from September 2010 to February 2011 being aware of the prohibition of export of non-basmati rice.

(iii) They were about to export (7) consignments of non-basmati rice in the guise of basmati rice, contrary to the prohibition imposed under DGFT policy. The consignments under these (7) shipping bills, totalling 520.926 MTs having declared FOB value of 2,24,68,017/- were seized and a show cause notice was issued, proposing confiscation and imposing of penalties. The said show cause notice was adjudicated by the Commissioner of Customs, Kandla, vide Order in Original No.KDL/COMMR/13/2011-12 dated 26/12/2011 issued from File No.S/10-21/Adjn/ 2011-12, upholding the proposals made in the show cause notice.

(iv) All the rice samples drawn from the live consignments have been found to be non-basmati rice as per the report of Basmati Export Development Federation. The report holds that the rice samples do not meet the specification of basmati rice as per DGFT Notification No. 57/2009-14 dated 17-08-2010 for export of basmati rice.

(v) It appears that the prohibited goods i.e. non-basmati rice already exported in 130 containers under 35 Shipping Bills as detailed in Annexure D3, having a declared value (FOB Value) of Rs.12,82,64,172/- (Rupees Twelve Crores Eighty Two Lakhs Sixty Four Thousand One Hundred and Seventy Two only) should be held liable for confiscation under Section 113(d), 113 (e), 113 (h) and 113(i) of the Customs Act, 1962 read with Section 3 the of Foreign Trade (Development & Regulation) Act, 1992. The sale proceeds earned against the export of the said non-basmati appears to be liable for confiscation in terms of provisions of Section 121 of the Customs Act, 1962.

(vi) M/s Balgopal Shipping and Logistics, Gandhidham, Shri G.R.Dwivedi, Partner of M/s BSL and Shri A. Rajesh, broker/procurer for M/s BSL, Shri Vipul Sharma, Clerk of M/s BSL, Sri Vivek Shukla, office Assistant of M/s BSL, Shri Santosh Kumar, Brother-in-law of Sri A. Rajesh and M/s Subh Labh Agencies, represented by Shri Sunny Kumar Jain are liable to penalty under Section 114 (i) and 114AA of the Customs Act, 1962 for their wilful acts of commission and omission on their part, as discussed in the paragraphs supra.

29. Accordingly, an SCN bearing No.VIII//48/04/2011-DRI-HRU dated 16.01.2015 was issued to M/s. Balgopal Shipping & Logistic, Plot No.123/126, Sector 10A, GIDC, Gandhidham, Kutch, S/Shri G.R Dwivedi, Partner of M/s BSL and Shri A. Rajesh, procurer/broker for M/s. BSL, Flat No.506, Shantiniketan Apartment, Street No.2, Lane No.10, Barkatpura, Lingampally, Hyderabad, to show cause to the Commissioner of Customs, Kandla, within 30 days from the date of issue of SCN as to why:-

(i) A quantity of **3,061.38 MTs** of Non-basmati rice having declared FOB value of Rs.12,82,64,172/- (Rupees Twelve Crores Eighty Two Lakhs Sixty Four Thousand One Hundred and Seventy Two only) being prohibited goods exported in the past by mis-declaration under thirty five (35) Shipping Bills as listed in **Annexure-D3** appended to the show cause notice should not be held liable for confiscation under Section 113(d), 113(e), 113(h) and 113(i) of the Customs Act, 1962.

30. M/s. Balgopal Shipping & Logistic, S/Shri G.R. Dwivedi, A. Rajesh, Vipul Sharma, Vivek Shukla, Santosh Kumar and M/s Subh Labh Agencies, represented by Shri Sunny Kumar Jain, are required to show cause to the Commissioner of Customs, Kandla, within 30 days of receipt of the notice as to why penalty should not be imposed on them under Section 114AA and 114 (i) of the Customs Act 1962.

DEFENCE REPLY AND PERSONAL HEARING :

31. Personal hearing in the case was fixed first on 31.07.2015, second on 21.08.2015 which was postponed to 24.09.2015, third on 08.10.2015, fourth on 29.10.2015 which was postponed to 02.11.2015 as per the request of the Noticee vide his letter/fax dated 28.10.2015 but nobody appeared on these dates.

31.1 The Noticee M/s BSL vide their letter dated 16.01.2015 have submitted their defence reply under which inter alia, they have contended that 'the investigation carried out by the DRI officials does not apply to the past exports and in absence of proof of export of prohibited goods, the past exports cannot be held liable to confiscation' as this SCN has been issued only on the basis of investigation carried in respect of SCN dated 29.06.2011 in respect of 22 containers of rice specified in seven S/Bs dated 01.02.2011 & 04.02.2011; the allegation that the exported goods were not basmati rice and hence prohibited is not sustainable as they have exported the goods in question by following the procedure

prescribed by law; that DRI Hyderabad unit had recorded statements of Shri Partiv Chawda, Inspector of Customs and Shri Manoj K Sharma, Superintendent of Customs who were in charge of operations; that they permitted the subject exports only after satisfying the cargo were not prohibited goods and therefore, in absence of any concrete proof it cannot be held that the exported goods were prohibited one.

31.2 It is contended that Show Cause Notice regarding the actual exporter being vague, is liable to be dropped. Para 2 of this SCN states that M/s BSL had exported non-basmati rice vide 35 S/Bs. Para 1 states that A.Rajesh was also exporting non-basmati rice using IEC of M/s BSL and therefore, SCN states that both M/s BSL and A. Rajesh has exported the goods thus SCN is vague in respect of the exporter who had exported the goods.

31.3 Sale proceeds of the goods exported in the present case are not liable for confiscation under Section 121 of the Customs Act, 1962 in as much as the present goods were exported by following proper procedure and therefore, the case of Department canvassing definition given under Section 2(3) of the Customs Act, 1962 is not sustainable. It is further argued that sale proceeds once mingled with and becomes part of the Indian currency otherwise available in the country the same cannot be held liable to confiscation and placed reliance upon the case of Wall Street Finance Ltd., Vs CC(Prev) Mumbai-2007(ELT 427(Tri-Mumbai).

31.4 It is further contended that It is for the authorities to correctly classify and assess the goods presented for export, exporter not to be penalized for not correctly classifying the commodity. The exported consignments were examined by the Customs officers and satisfied by the goods in question and therefore, allowed the export and even if it is assumed that the exported goods was non-basmati rice then it was the duty of the Customs authority to classify and assess the goods properly and for their failure exporter cannot be penalized .

31.5 No penalty is impossible under Section 114(i) of the Customs Act, 1962 since the goods in question were not prohibited. The consignments were exported by following due procedure of law, the cargo, after examination by the Customs officers were allowed export, therefore, they have not done any act or omission attracting penal provisions of Section 113of the Customs Act, 1962 and consequently the question of imposing penalty under Section 114(i) does not arise.

31.6 No separate penalty under Section 114AA of the Customs Act, 1962 is impossible. Since the exports were made with due process of law and therefore, no penalty under Section 114AA of the Customs Act, 1962 is attracted in this case. Without prejudice to the above it is argued that where penalty under Section 114 (i) of the Customs Act, 1962 is proposed no penalty under 114AA) of the Customs Act, 1962 is impossible and relied upon the case of Phonix Traders Vs. CC., Kandla as reported in 2011(4) TMI 216-CESTAT, Ahmedabad.

31.7 Penalty cannot be imposed both on the partnership firm and its partners separately. It is a settled law that in a partnership firm the partner and partnership firm do not have an independent existence and therefore penalty cannot be imposed both on firm and its partner simultaneously and relied upon the decisions: (a) Vinodkumar Gupta Vs. Commissioner of C.Excise 2013(287) ELT 54 P&H (b) Amritlakshmi Machine Works Vs. Commissioner of Customs(Port) 2014 (303) ELT 161(Bom).

31.8 Mr. G.R. Dwivedi has submitted his defence reply vide his letter, which was received by this office on 15.05.2015, which are identical to that of Ms/ BSL and therefore, not repeated here.

31.9 Mr. A. Rajesh has submitted his defence reply vide his letter, which was received by this office on 15.05.2015, which are identical to that of Ms/ BSL from point No. 31.1 to 31.6 and therefore, not repeated here.

31.10 Mr. Vipul Sharma submitted his defence reply vide his letter, which was received by this office on 15.05.2015, which are identical to that of Ms/ BSL from point No 31.1, 31.4, 31.5 & 31.6 and therefore, not repeated here. He further added that in any case penalty cannot be imposed on an employee who has performed the activity as per the direction of the employer, carried out the work without any personal monetary gain. Therefore, he cannot be penalized and placed reliance on some citations.

31.11 Mr. Vivek Shukla submitted his defence reply, vide his letter, which was received by this office on 15.05.2015, which are identical to that of Ms/ BSL from point No 31.1, 31.4, 31.5 & 31.6 and therefore, not repeated here. He further added that in any case penalty cannot be imposed on an employee who has performed the activity as per the direction of the employer without any personal monetary gain. Therefore, he cannot be penalized and placed reliance on some citations.

31.12 Mr. M. Santosh Kumar submitted his defence reply, vide his letter, which was received by this office on 15.05.2015, which are identical to that of Ms/ BSL from point No 31.1, 31.4, 31.5 & 31.6 and therefore, not repeated here. He further added that in any case penalty cannot be imposed on an employee who has performed the activity as per the direction of the employer and carried out the work without any personal monetary gain. Therefore, he cannot be penalized and placed reliance on some citations.

All have, in view of the above submissions, prayed to drop the SCN and further prayed to give an opportunity to personal hearing before deciding the case.

DISCUSSION & FINDINGS :

32. I have gone through the facts of the case carefully. I find that this SCN has been issued as a sequel to the SCN No. VIII/48/04/2011-DRI-HRU dated 29.06.2011 under which DRI had seized 520.926 MTs of Rice which was declared as Basmati Rice by M/s. BSL with a declared value of Rs.2.24 Crores approximately on the ground that the rice appeared

to be Non-basmati Rice which was prohibited for export. The above SCN was adjudicated vide OIO No. KDL/COMMR/13/2011-12 dated 26.12.2011 by confiscating 520.926 MT of Non-basmati rice and imposing fine and penalty on the Noticees.

33. I find that the present SCN has been issued proposing confiscation of **3,061.38 MTs** of Non-basmati rice having declared FOB value of Rs.12,82,64,172/- (Rupees Twelve Crores Eighty Two Lakhs Sixty Four Thousand One Hundred and Seventy Two only) being prohibited goods exported in the past by mis-declaration under thirty five (35) Shipping Bills as listed in **Annexure-D3** to the show cause notice, under Section 113(d), 113(e), 113(h) & 113(i) of the Customs Act, 1962 and proposing to impose penalty under Section 114AA and 114 (i) of the Customs Act 1962 upon M/s. Balgopal Shipping & Logistic, S/Shri G.R. Dwivedi, A. Rajesh, Vipul Sharma, Vivek Shukla, Santosh Kumar and M/s Subh Labh Agencies, represented by Shri Sunny Kumar Jain.

I find that personal hearings were fixed on various dates as mentioned in para supra on four occasions. The PH granted on 31.07.2015 was postponed to 21.08.2015 as requested by the Noticee vide their fax/letter dated 31.07.2015, PH given on 24.09.2015 was postponed to 08.10.2015 as requested by them vide their fax/letter dated 24.09.2015 and PH of 08.10.2015 was postponed to 29.10.2015 on request of the Noticee vide their fax/letter dated 08.10.2015 and last PH was adjourned to 02.11.2015, again, on their request vide their fax/letter dated 28.10.2015, which was confirmed by this office on the same date through e-mail but nobody attended on any of the above dates. Section 122 A of the Customs Act, 1962 do not permit granting more than three opportunities which were already granted and therefore, there is due and sufficient compliance of natural justice and I proceed to adjudicate the case as no more hearings can be granted in view of the legal bar.

34 I find that, as pointed out above, this SCN is sequel to earlier SCN which was adjudicated on 26.12.2011. Therefore, the details of investigations pertaining to live/past consignments, i.e. statements recorded from the persons concerned, documents resumed during the investigations etc, are relevant to the present case i.e. exports of non-basmati rice in the guise of basmati rice made by M/s.BSL in the past in respect of the said thirty five (35) Shipping Bills. I find from the Annexure D3 attached to this SCN that the Noticee had exported 3061.38 MTs of Non-basmati rice through the port of Kandla during the period from September 2010 to February 2011. Scrutiny of the records i.e. File No.182, 183 & 184 recovered from the business premises of M/s BSL under Panchnama dated 18.02.2011 revealed that these three files, interalia, contain the purchase bills, letters/correspondence, Lorry Receipts, Weighment Slips, etc. issued either by rice millers or the brokers. Though the purchase bills were issued by the millers on account of some other rice traders, mostly situated at Naya Bazar area of New Delhi the rice have been transported directly to M/s BSL through a rice broker viz., Shri A. Rajesh and the other traders viz., M/s Sree Skanda Food Processing India Pvt. Ltd., M/s D.K Sortex, etc. These bills clearly contain the description of the goods as **“Rice”, “Sona Steam Rice”, “BPT Rice”, “NLR34449” rice**. The price of each Kilo Gram of rice was varying between Rs.17/- per KG to Rs.22/- per KG which indicate

that the rice procured were only non-basmati rice. All the bills available in these files contain the description of goods procured by M/s BSL as **other than Basmati Rice**.

34.1 Statement of Shri Manish Parekh, Proprietor of M/s Malay Trading Company, was recorded under Section 108 of Customs Act, 1962 on 02.05.2011, who was the major supplier of rice (about 1200 MTs) to M/s BSL, admitted that he had never dealt with in Basmati Rice and that all the rice supplied to M/s. BSL was of different varieties of non-basmati rice.

34.2 Statement of Shri Madishetty Santosh Kumar, Rice Trader and representative of Shri A. Rajesh was recorded on 19/02/2011 under which he, *inter alia*, stated that Shri Rajesh used to procure only non-basmati rice from different places from Karnataka and Andhra Pradesh States, for the purpose of sending abroad from Kandla/Gandhidham; that all the times, the rice procured by Shri A. Rajesh were of the quality of Sona Masoori Rice, Steam Rice/Boiled rice for Idly, Dosa and the same were supplied to M/s. BSL for export out of India; that he was present on 18/02/2011 during the course of search/examination of the goods; that he agreed with the contents of the panchanamas.

34.3 Shri A. Rajesh, in his Statement dated 09.03.2011 stated, *inter alia* that he used to procure Sona Masoori rice from different parties; that the goods were delivered at Gandhidham and exported to M/s Suriya Trading Company, Singapore; M/s. Mustafa, Singapore; M/s V Sai, Singapore, Vatan International, USA; Loftus, Australia; that as he was not having any certificate of IEC issued by DGFT, he entered into an oral agreement with M/s Balgopal Shipping & Logistics, Gandhidham for the export of non-basmati rice; that to take care of his interests at M/s Balgopal Shipping & Logistics, Gandhidham, he sent his wife's brother Sri M.Santosh Kumar to Gandhidham; that export of non-basmati rice was prohibited under the Foreign Trade Policy and that due to his financial position and to take care of his family, he was forced to take up export of non-basmati rice in violation of Foreign Trade Policy.

In his further statement dated 10.03.2011, Shri Rajesh, *inter alia*, stated that he used to procure non-basmati rice from Rice Millers in Karnataka state and Nizamabad which were supplied to domestic traders as well as to exporters; that he mainly used to supply non-basmati rice to M/s Balgopal Shipping & Logistics, Gandhidham for onward export; that he had supplied about 1000 MTs of non-basmati rice for export to overseas buyers over a period of nearly 5 (five) months.

34.4 Shri Gangadhar Ramsumer Dwivedi, Partner of M/s. Balgopal Shipping and Logistics, Gandhidham, Gujarat, in his statement dated 18.03.2011, stated, *inter alia*, that Shri Rajesh requested him to carry out Mr. Rajesh's business of exporting non-basmati rice, i.e. BPT/Sona Masuri varieties of rice by using IEC code of his company i.e. M/s. BSL; that he allowed Mr. Rajesh for the export of non-basmati rice on his (Mr. Dwivedi) firm's name by using the IEC code.

34.5 Shri Vipul Sharma, Clerk of M/s. Balgopal Shipping & Logistics, Gandhidham in his statement dated 23.03.2011 stated, *inter alia*, that as per Shri Dwivedi's direction he and Shri Lilith, another employee of M/s. BSL attended the examination of the consignments and ensured that samples of non-basmati rice were substituted with basmati rice; that he attended the documentation of filing shipping bill on line for export of non-basmati rice, showing the documents as Indian Basmati Rice.

34.6 Shri Vivek Shukla, Office Assistant of M/s. Balgopal Shipping and Logistics, Gandhidham (Kutch) in his statement dated 24.03.2011 stated, *inter alia*, that he prepared invoice, packing list, shipping bills, bills of entries, etc., and handed over the file to Shri Vipul Sharma, who attended to further processing of file and attended to examination of the goods; that his owner Shri Dwivedi directed him to prepare the shipping bills showing the description of the product as Indian Basmati 1121 White Rice, and accordingly he obeyed Shri Dwivedi's instructions; that in reality, non-basmati rice was exported in the guise of Indian Basmati Rice.

34.7. The following persons who had supplied the rice to M/s. BSL, were examined and their depositions were recorded, to know the details of the transactions on the basis of the bills recovered from the office of M/s. BSL, Gandhidham, which *inter alia*, reveal as under:-

34.7.1 I find that Shri Bhushan Jain, Manager of M/s Subh Labh Agencies and also Manager in M/s Vardhman International, 2745, 1st Floor, Naya Bazar, New Delhi, under the authorization of Proprietors of these firms, was examined on 07.04.2011, wherein he stated, *inter alia*, that Shri Dwivedi of M/s. BSL told him that he wanted supply of rice from these two firms; that for this purpose Shri Rajesh of Hyderabad would arrange the rice through millers and bills had to be raised in these two firms' names; that Shri Rajesh procured different varieties of non-basmati rice such as "Sona Steam Rice", "NLR34449", "BPT Rice" etc., and sent directly to M/s. BSL on their account; that all the bills were issued by different parties for purchase of different varieties of Rice other than Basmati Rice, procured by Shri Rajesh of Hyderabad from different rice millers and sent to M/s. BSL on their (M/s Shubhlabh Agencies and M/s Vardhaman International) account and directly delivered at M/s. BSL, Gandhidham, for the purpose of export; that they had not issued any bills to M/s. BSL; that the empty bill book of M/s. Subh Labh Agencies was given by them to M/s. BSL and M/s. BSL used to prepare the bills as if they supplied Basmati Rice to M/s. BSL; that they received a commission of Rs.50/- per MT for providing bills indicating the supply of Basmati Rice.

34.7.2 Shri Ashish Champalal Bhuthada, Manager and Authorised Signatory of M/s. Bholenath Enterprises in his statement dated 01.04.2011 stated, *inter alia*, that Shri Dwivedi approached him and asked to supply rice to his firm, viz. M/s. BSL for the purpose of export; that they dealt in different varieties of rice other than Basmati rice; that they purchased the same and they in-turn supplied the same to M/s. BSL; that in fact the load would go directly from their supplier to M/s. BSL and they in turn issued their bill; that the

pages shown to him of Box File No.182 contained the purchase of rice made by them and delivered directly to M/s.BSL at Gandhidham on their account; that the description in the freight letters mentioned only as "Rice", however the miller bill enclosed to this freight letters mentioned in Hindi as "Amrit Poni Brand", which meant small variety of sona-Masoori Rice; that the reason why the material supplied by M/s. DK Sortex was not Basmati Rice, was that if really Basmati Rice was supplied, the description would be mentioned as "Basmati Rice", however all the bills showed Rice Basmati.

34.7.3. Shri Sunny Kumar Jain, Proprietor of M/s.Vardhaman International, and also Authorised Person of M/s.Subh Labh Agencies, in his statement dated 18.04.2011 stated, *inter alia*, that M/s.Vardhaman International and M/s.Subh Labh Agencies dealt in the procurement and sale of non Basmati rice, such as BPT Rice, Sona Masoori Rice, etc; that Shri Dwivedi of M/s.BSL knew his employee Shri Bhushan Jain; that Shri Dwivedi approached him through Bhushan and requested him that he (Dwivedi) would do the rice business by using both the firms of theirs, viz M/s.SLA and M/s.VI; that for using these two firms, Shri Dwivedi would give them some amount towards brokerage; that Shri Dwivedi further stated that Shri Rajesh of Hyderabad would arrange the non-basmati rice through rice millers and the bills had to be raised in their firms' names; that Shri Rajesh used to talk with his employee Shri Bhushan Jain and take the TIN numbers and postal address of their firms; that different varieties of non-basmati rice had been supplied by Shri Rajesh to M/s.BSL on their account.

34.7.4 In view of the system of the trade that the material was supplied by some millers, organized by some person on account of other firms and the material delivered to some other persons, enquiries with the original millers were made. Their depositions are as under:-

Shri Boddu Sreenivas, Executive Director of M/s. Sree Skandha Food Processing (India) Pvt. Ltd., in his statement dt.21.04.2011, stated, *inter alia*, that Shri Rajesh required some rice for the purpose of export; that since they were the rice millers and dealt in the Sona Masoori/BPT Rice, they had agreed to supply these varieties of rice to Shri Rajesh; that Shri Rajesh told that the bills had to be raised in the name of M/s.Subh Labh Agency, New Delhi and the rice should be delivered at Kandla, Gandhidham, Kutch; that till date they had never purchased or dealt in Basmati Rice; that they had supplied about 260 MTs on account of Shri Rajesh and delivery at Gandhidham, as per the details furnished by Shri Rajesh; that they never dealt in Basmati Rice and also that they had never supplied Basmati Rice to any trader.

34.7.5 Shri Kodulur Venkatesh, Partner of M/s Sri Srinivas Agro Foods, Koppal in his statement dated 21.04.2011 stated, *inter alia*, that Shri Rajesh approached him and wanted to purchase the Sona masoori rice from them; that he wanted the bills to be raised in the name of M/s.Subh Labh Agency, New Delhi and the rice should be delivered at Kandla, Gandhidham, Kutch, Gujarat; that till date they dealt only in Sona-Masoori or BPT quality of

rice and that they never traded, sold or dealt in Basmati Rice; that they had supplied about 64 MTs of Sona Steam Rice to Shri Rajesh on account of M/s.Subh Labh Agency and made delivery at Gandhidham; that they never dealt in Basmati rice.

35. Further, all the rice samples drawn from the live consignments have been found to be non-basmati rice as per the report of Basmati Export Development Federation as the rice samples did not meet the specification of basmati rice as per DGFT Notification No. 57/2009-14 dated 17-08-2010 for export of basmati rice. Non-Basmati Rice was prohibited for exports during the relevant period vide DGFT Notification 93/08 dated 01.04.2008, as amended from time to time.

36. Thus, I find from the records recovered from the business premises of M/s BSL containing the purchase bills, letters/correspondence, Lorry Receipts, Weighment Slips which show the description of the goods purchased as “Rice”, “Sona Steam Rice”, “BPT Rice”, “NLR34449” rice. The price of each Kilo Gram of rice was varying between Rs.17/- per KG to Rs.22/- per KG indicating value of non-basmati rice. Also from the statements recorded from various persons connected with this case, the extracts of which are given above unambiguously indicate that M/s BSL had procured and exported non-basmati rice only. Also Shri Dwivedi categorically stated that he had never exported any Indian Basmati rice or Basmati Rice. The staff of M/s BSL recorded on flip side of the purchase bills having received non-basmati variety of rice only. Further test result of live consignments seized while attempted to be exported, the samples of which were tested by BEDF indicated that those goods were only non-basmati rice. Therefore, from all the evidences as stated above, it is clear that M/s BSL had dealt with and exported only non-basmati rice and therefore, I hold that the rice already exported in 130 containers under 35 Shipping Bills, as detailed in Annexure D3, to the SCN, having a declared value (FOB Value) of Rs.12,82,64,172/- (Rupees Twelve Crores Eighty Two Lakhs Sixty Four Thousand One Hundred and Seventy Two only) was non-basmati rice only, which was prohibited for export at the material time and thus, liable for confiscation under Section 113(d), 113 (e), 113 (h) and 113(i) of the Customs Act, 1962 read with Section 3 the of Foreign Trade (Development & Regulation) Act, 1992. However, the above goods are physically not available for confiscation nor cleared under any bond or legal instrument I refrain from imposing any redemption fine on Noticee.

37. The Noticee, under defence reply has submitted that the allegation that the exported goods were not Basmati rice and hence prohibited is not sustainable in absence of any material evidence and goods were exported after following due procedure as prescribed by law. The goods were duly examined by the concerned Inspector of Customs and certified by the concerned Superintendent of Customs as is evident from the statements recorded by DRI, Hyderabad unit on 31.05.2011 of the concerned officers. I find that argument of the Noticee on this aspect is not sustainable because Shri Vipul Sharma, Clerk of M/s.Balgopal Shipping & Logistics in his statement dated 23.03.2011 *inter alia*, stated that the examination of the consignments was attended by him and also Shri Lalith another employee of M/s. BSL;

that the export goods were loaded at CONCOR CFS, Gandhidham generally after office hours (i.e. after 8.00 PM); that no customs officer was physically present during the course of loading of export goods into the containers at CONCOR, CFS, Gandhidham for the exports made by M/s. BSL, as there was no regular Customs officer posted at CONCOR, CFS; he used to procure genuine Basmati Rice from local market and used to deliver the said basmati rice samples; that sometimes, the customs officers used to visit the said godowns for verification and at that time they (M/s BSL) used to show the genuine basmati rice stored in the godowns pertaining to other exporters as theirs. Thus, it is clear how they have hoodwinked the Customs Officers and exported non-basmati rice.

37.1 The argument that show cause notice is vague as regards actual exporter is concerned is just an attempt to create confusion because show cause notice clearly indicate that A. Rajesh was also exporting goods using IEC of M/ s BSL, thus the exporter as per S/Bs are M/s BSL only.

37.2 Another argument is that sale proceeds are not liable for confiscation under Section 121 of C.A, 1962 by relying upon the citation Wall Street Finance Ltd Vs CC(Prev.), Mumbai-2007 and other cases. I find that Hon'ble High Court of Madras in case of J. Shivkumar Vs. A.D.G. of Revenue Intelligence, Chennai [Writ Petition No.22355 and 22700 of 2014 and M.P. Nos. 1 and 1 of 2014 decided on 18.10.2015(316) ELT 382(Mad)] had laid down the condition for confiscating sale proceeds of smuggled goods as under:- *“Section 121 of the Act makes even the sale proceeds of smuggled goods, liable for confiscation. The pre-condition for invoking Section 121of the Act are (i) that the sale proceeds should relate to the smuggled goods and (ii) that the sale should have been made by a person having knowledge or reason to believe that the goods are smuggled goods”*

It now established that the goods covered under this SCN are smuggled goods and this act had been done by the perpetrators with full knowledge that these goods are prohibited for export and therefore, liable for confiscation under Section 113 of C.A. 1962. Therefore, the argument of the Noticee do not merit consideration and reliance placed on various citations are misplaced. However, I refrain from further discussion on this aspect as the SCN charging section is silent on this aspect.

37.3 It is further argued that it is for the authorities to correctly classify and asses the goods presented for export and in their case Inspector and Superintendent were satisfied with the goods in question and issued let export order and that even if the exporter had exported non- basmati rice it was due to failure on part of Customs Officers for which exporter cannot to be penalised. I find that as discussed in para supra the customs officers were hoodwinked by the exporter in the manner as stated above and as such their claim do not have any substance.

37.4 The argument that no separate penalty under Section 114AA of C.A.1962 is impossible and placed reliance on a case of 2011 where as I find that in case of Mr. Pradeep

Dhond Vs. Commissioner of Customs(Exports), Mumbai [Final Order No.A/300/2013-WZB/C-1/CSTB) dted 8.3.2013 in Appeal No.C/533/2012-Mum] CESTAT has held that:-

“6. To sum up we uphold the confiscation of the goods seized at the Air Cargo Complex, Mumbai on 12-6-2008 under Sections 113(d) and (i) of the Customs Act and the imposition of fine and penalty under Section 125 and Sections 114 and 114AA of the Customs Act. We set aside the confiscation of the goods seized at the premises of the transporter Mr. Ajay P. Singh and the office premises of Sri Pradeep Dhond and consequential imposition of fine and penalty as unsustainable in law.”

Therefore, I do not find any inconsistency in imposing penalty under both the Sections when the situation so warrant.

37.5 The argument that penalty cannot be imposed on both partnership firm and its partner separately by relying upon the decision in respect of Vinod Kumar Gupta Vs. Commissioner of C. Excise 2013(287) ELT 54(P&H) and Amritiakshmi Machine Works Vs. Commissioner of Custom(Port)-2014(303) ELT 161.(BOM) I find that the argument of the Noticee is out of place as there are a number cases under which it is held that penalty can very well be imposed, both on firm and its partner, where if specific role is attributed to the partner. I would like to rely on decision of CESTAT, Principal Bench, New Delhi [Court II] in case of Prince International Vs. Commissioner of Central Excise, Noida. [2014 (310) ELT 545 (Tri-Del)] [Final Order Nos. C/A/53645-53647/2014-CU(DB), dated 18-9-2014 in Appeal Nos. C/665-666/2009-CU(DB) and C/29/2010-CU(DB)] under which CESTAT refused to interfere with the imposition of penalty of Rs. 10 lakh on M/s. Prince International and penalty of Rs. 2.5 lakh imposed on its partner Shri Gyan Chand.

In another such case Hon'ble High Court of Madras in case of C. Eswaran Vs. Commissioner of Customs, Coimbatore [2014 (306) ELT 264 (Mad)][final Order C.M.A. Nos. 811 & 812 of 2012 and M.P. Nos. 1 of 2012 (2 Nos.), decided on 19-7-2012] held that the Appellant in his capacity as partner abetted the firm to commit the offence - Statutory authority fully justified in imposing fine on firm as well as partner. Thus the argument put forth by the Noticee do not hold any water and I propose to impose penalty on both firm and its active partner who was instrumental for the whole episode.

38.1 As regards penalty on the partner of the firm, Shri Gangadhar Ramsamer Dwivedi, I find that he has directed his employee Shri Vipul Sharma to substitute basmati rice in the samples drawn and deliver the substituted samples of basmati rice to Customs for the purpose of test/sampling and further hoodwinked the Customs Officers who visited the godowns of CONCOR for verification by showing the genuine basmati rice stored in the godown pertaining to other exporters as theirs and Shri Vivek Shukla, Office Assistant to prepare invoice, packing list, shipping bills, bills of entries, etc., showing the description of the product as Indian Basmati 1121 White Rice. He knew that the export of non-basmati rice was prohibited under the Foreign Trade Policy and even then allowed Mr. Rajesh to export various non-basmati rice, i.e. BPT/Sona Masuri varieties of rice by using IEC code of his company. He through Shri Bhushan Jain, manager of M/s Subh Labh Agencies and M/s Vardhman International, facilitated Shri Rajesh to purchase different variety of non-basmati rice on their account and Mr. Rajesh routed the same directly to Gandhidham; that one

Shri Sanjay of New Delhi had written the bills of M/s Subh Labh Agencies at his behest, in the empty bill book supplied by Shri Bhushan Jain; that this fake invoices were got prepared to show as if Basmati Rice was purchased by him and exported. He is the active partner of the exporter firm. I therefore find that he is liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962. In his defence reply he has contended certain points which are already discussed under paras supra and therefore, not separately discussed here.

38.2 As regards Shri A. Rajesh, I find that he was instrumental in devising the scheme of fraud and also in procuring non-basmati rice from various rice millers / traders / brokers in the name of third parties and ensured that the non-basmati rice was delivered at Gandhidham for eventual export in the guise of basmati rice. He also procured orders from overseas buyers for supply of non-basmati rice. He arranged to export non-basmati rice through M/s.BSL. to M/s. V. Sai Pte. Ltd, Singapore (one of the overseas buyer), a company floated by himself to export non-basmati rice. Shri A. Rajesh being aware that the rice being exported by him did not satisfy the conditions laid down for export of basmati rice in the DGFT notification, entered into a criminal conspiracy with Shri G.R Dwivedi to illegally export non-basmati rice. I therefore, find that for his act and omission on his part render the goods liable for confiscation and he is liable for penalty under Section 114(i). Further he was instrumental in preparing documents mentioning 'basmati rice' in place of 'non-basmati rice' i.e. forging of invoices and thus liable for penal action in terms of Section 114AA of the Customs Act, 1962. He has contended certain points in his defence reply which are identical and already discussed under paras supra and therefore, not separately discussed here.

38.3 I find that Shri Vipul Sharma, Clerk of M/s.BSL attended the documentation work and had filed Shipping Bills online from the office of M/s.BSL, for the export of non-basmati rice by declaring the same as basmati rice despite knowing that he was doing illegal activities which were not permissible under the Law. He also substituted basmati rice in the samples drawn and delivered the substituted samples of basmati rice to Customs for the purpose of test/sampling. He also admitted that whenever the Customs Officers visited the godowns of CONCOR for verification, they used to show the genuine basmati rice stored in the godown pertaining to other exporters as theirs. For his active participation in illegal export of non-basmati rice, I find him liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962. He in his defence reply has contended certain points which are identical and already discussed under paras supra and therefore, not separately discussed here. He has further added that he being an employee has acted on direction of his employer and no penalty can therefore, be imposed upon him. It is noteworthy that he has acted under the direction, with full knowledge that he is doing an act which is not permitted by law and no law permit anybody, even under the direction of his employer, to do any illegal act and therefore, his argument do not have any substance at all.

38.4 I find that Sri Vivek Shukla, Office Assistant of M/s.BSL, prepared the invoice, packing list, shipping bills to show that the goods were basmati rice despite being aware that

the goods to be exported was non basmati rice and handed over the same to Shri Vipul Sharma for processing the same for eventual export by M/s.BSL and thus abetted the illegal export of non-basmati rice. I therefore hold him liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962. He has also contended certain points in his defence reply which are identical and are already discussed under paras supra and therefore, not separately discussed here. It is noteworthy that he has acted under the direction, with full knowledge that he is doing an act which is not permitted by law and no law permit anybody, even under the direction of his employer, to do any illegal act and therefore, his argument do not have any substance at all.

38.5 As regards Shri Santosh Kumar, I find that he participated in the illegal export of non-basmati rice by receiving non-basmati rice sent by Shri A. Rajesh at Gandhidham and assisting M/s.BSL in preparation of documents for export of non-basmati rice in the guise of basmati rice despite being aware of the prohibition of export of non-basmati rice. I therefore hold that he is liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962. He has submitted certain points in his defence reply which are identical and are already discussed under paras supra and therefore, not separately discussed here. It is noteworthy that he has acted under the direction, with full knowledge that he is doing an act which is not permitted by law and no law permit anybody, even under the direction of his employer, to do any illegal act and therefore, his argument do not have any substance at all.

38.6 I find that Shri Sunny Kumar Jain, Authorised Person of M/s.Subh Labh Agencies, admitted that he gave permission to Shri G.R Dwivedi to procure non-basmati rice in his name, provided his TIN number and address to Shri A. Rajesh to procure non basmati rice from various rice millers / traders / brokers. Shri Sunny Kumar Jain supplied empty bill books of M/s.Subh Labh Agencies to M/s.BSL, to enable them to prepare the bills as if they supplied Basmati Rice to M/s.BSL. I find that M/s.Subh Labh Agencies have till the date of passing of this order, not filed their defence submissions nor have they appeared for personal hearing fixed on various dates nor have they sought adjournment of personal hearing granted to them. I find that M/s.Subh Labh Agencies had abetted in the smuggling of non basmati rice in the guise of basmati rice. I therefore hold them liable for penalty under Section 114(i) of the Customs Act, 1962. I find that they have supplied empty bill books to M/s BSL to enable them to prepare fake bills and I therefore, hold them liable for penalty under Section 114AA of the Customs Act, 1962.

39. In view of the above, I pass the following order:

::ORDER::

- (1) I order confiscation of 3061.36 Metric Tons of Non-basmati Rice having declared valued at Rs.12,82,64,172/- under section 113(d), 113(e), 113(h) and 113(h) 113(i) of the Customs Act, 1962. However, the goods are physically not available for confiscation and exported without any bond or legal instrument I refrain from imposing any redemption fine on the exporter.

- (2) I impose a penalty of Rs.1,00,00,000/- (Rupees One Crore only) on M/s.Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under Section 114(i) of the Customs Act, 1962.
- (3) I impose a penalty of Rs.20,00,000/- (Rupees Twenty Lakh only) on M/s.Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under Section 114AA of the Customs Act, 1962.
- (4) I impose a penalty of Rs.20,00,000/- (Rupees Twenty Lakh only) on Shri G.R. Dwivedi, Partner of M/s.Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under Section 114(i) of the Customs Act, 1962.
- (5) I impose a penalty of Rs.10,00,000 /- (Rupees Ten Lakh only) on Shri G.R. Dwivedi, Partner of M/s.Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under Section 114AA of the Customs Act, 1962.
- (6) I impose a penalty of Rs.20,00,000 /- (Rupees Twenty Lakh only) on Shri A. Rajesh, Procurer / Broker for M/s.BSL, Flat No.506, Shantiniketan Apartment, Street No.2, Lane No.10, Barkatpura, Lingampally, Hyderabad, under Section 114(i) of the Customs Act, 1962.
- (7) I impose a penalty of Rs.10,00,000/- (Rupees Ten Lakh only) on Shri A. Rajesh, Procurer / Broker for M/s.BSL, Flat No.506, Shantiniketan Apartment, Street No.2, Lane No.10, Barkatpura, Lingampally, Hyderabad, under Section 114AA of the Customs Act, 1962.
- (8) I impose a penalty of Rs.10,00,000 /- (Rupees Ten Lakh only) on Shri Vipul Sharma, Clerk of M/s.BSL, 168 & 169, Sara Nagar, Galpadar, Gandhidham, under Section 114(i) of the Customs Act, 1962.
- (9) I impose a penalty of Rs.5,00,000/- (Rupees Five Lakh only) on Shri Vipul Sharma, Clerk of M/s.BSL, 168 & 169, Sara Nagar, Galpadar, Gandhidham, under Section 114AA of the Customs Act, 1962.
- (10) I impose a penalty of Rs.10,00,000 /- (Rupees Ten Lakh only) on Shri Vivek Shukla, Office Assistant of M/s.BSL, B-508, Sapna Nagar, Gandhidham, under Section 114(i) of the Customs Act, 1962.
- (11) I impose a penalty of Rs.5,00,000/- (Rupees Five Lakh only) on Shri Vivek Shukla, Office Assistant of M/s.BSL, B-508, Sapna Nagar, Gandhidham, under Section 114AA of the Customs Act, 1962.
- (12) I impose a penalty of Rs5,00,000/- (Rupees Five Lakh only) on Shri Santosh Kumar, 8-4-310, Ganesh Nagar, Karimnagar, A.P., under Section 114(i) of the Customs Act, 1962.
- (13) I impose a penalty of Rs.2,50,000 /- (Rupees Two Lakh Fifty Thousand only) on Shri Santosh Kumar, 8-4-310, Ganesh Nagar, Karimnagar, A.P., under Section 114AA of the Customs Act, 1962.
- (14) I impose a penalty of Rs.5,00,000/- (Rupees Five Lakh only) on M/s.Subh Labh Agencies, represented by Shri Sunny Kumar Jain, 2745/2, 1st Floor, Naya Bazar, New Delhi, under Section 114(i) of the Customs Act, 1962.

- (15) I impose a penalty of Rs.2,50,000 /- (Rupees Two Lakh Fifty Thousand only) on M/s.Subh Labh Agencies, represented by Shri Sunny Kumar Jain, 2745/2, 1st Floor, Naya Bazar, New Delhi, under Section 114AA of the Customs Act, 1962.

This order is issued without prejudice to any other action that may be taken against the importer or any other person under the provisions of Customs Act, 1962 and rules framed thereunder or under any other law for the time being in force.

(P.V.R.REDDY)
PRINCIPAL COMMISSIONER

By REGD. POST A.D/Hand Delivery

F. No. S/10-43/Adj/COMMR/2014-15

Dated: 27/11/2015.

To,

1. M/s.Balgopal Shipping & Logistics,
Plot No.123/126, Sector 10A,
GIDC, Gandhidham, Kutch,
2. Shri G.R Dwivedi,
Partner of M/s.Balgopal Shipping & Logistics,
Plot No.123/126, Sector 10A,
GIDC, Gandhidham, Kutch.
3. A. Rajesh, procurer/broker for M/s.BSL,
Flat No.506, Shantiniketan Apartment,
Street No.2, Lane No.10, Barkatpura,
Lingampally, Hyderabad,
4. Shri Vipul Sharma, Clerk of M/s.BSL,
168 and 169, Sara Nagar,
Galpadar, Gandhidham
5. Shri Vivek Shukla, Office Assistant of M/s.BSL,
B-508, Sapna Nagar, Gandhidham
6. Shri Santosh Kumar,
8-4-310, Ganesh Nagar,
Karimnagar, A.P.
7. M/s Subh Labh Agencies,
represented by Shri Sunny Kumar Jain
2745/2, 1st Floor, Naya Bazar,
New Delhi-110006

Copy to:

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad.
2. The Additional Director, DRI, Regional Unit, Hyderabad
3. The Additional Director, DRI, Gandhidham.
4. The Assistant Commissioner of Customs (Recovery) CH., Kandla
5. Guard File.