



सीमा शुल्क आयुक्त का कार्यालय,
नवीन सीमा शुल्क भवन, नया कांडला - 370 210 (गुजरात)
OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA - 370 210 (GUJARAT)

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| A | फाइल संख्या/ File No. | S/10-177/ADJ/ADC/UMA/2016-17 |
| B | मूल आदेश सं./ Order-in-Original No. | KDL/ADC/UBR/10/2017-18 |
| C | पारित कर्ता/ Passed by | SHRI U. B. RAKHE, ADDITIONAL COMMISSIONER |
| D | आदेश की दिनांक/Date of order | 15/09/2017 |
| E | जारी करने की दिनांक/Date of issue | 15/09/2017 |
| F | एस.सी.एन. सं. एवं दिनांक/SCN No. & Date | S/20-30/Misc/Gr I/13-14/Uma dated 19.11.2013 |
| G | नोटिसी/को-नोटिसी Noticee/Co-Noticee | (i) M/s. Uma Exports Limited, 28/1, Shakespeare Sarani, 1st Floor, Flat No. 15 & 16, Ganga Jamna Apartment, Kolkata, W.B. PIN - 700017 (ii) M/s. Damji Dhiraoo & Sons, 41, 42, G. M. Asso. Bulg., Plot No. 297, Ward No. 12B, Gandhidham (Kutch) - 370 201 |

- यह मूल आदेश संबंधित को निःशुल्क प्रदान किया जाता है ।
This Order - in - Original is granted to the concerned free of charge.
- यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A (1) के अंतर्गत प्रपत्र सीए- 3 में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A (1) (a) of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to :
"सीमा शुल्क आयुक्त (अपील), कांडला
वीं मंजिल 7, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़
अहमदाबाद 380 009"
"THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
7th Floor, Mridul Tower, Behind Times of India, Ashram Road
Ahmedabad - 380 009"
- उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए ।
Appeal shall be filed within sixty days from the date of communication of this order.
- उक्त अपील के ऊपर न्यायालय शुल्क अधिनियम के तहत 2/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 2/- under Court Fee Act it must accompanied by -
(i) उक्त अपील की एक प्रति और
A copy of the appeal, and
(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं.-6 में निर्धारित 2/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए ।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 2/- (Rupees Two only) as prescribed under Schedule - I, Item 6 of the Court Fees Act, 1870.
- अपील ज्ञापन के साथ इयूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये ।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.
- अपील प्रस्तुत करते समय, सीमा शुल्क नियम (अपील), और सीमा शुल्क 1982 अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए ।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.
- इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का 10% भुगतान करना होगा ।
An appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

1. BRIEF FACTS OF THE CASE

1.1. M/s. Uma Exports Limited, 28/1, Shakespeare Sarani, 1st Floor, Flat No. 15 & 16, Ganga Jamnna Apartment, Kolkata, W.B. PIN - 700017 (**hereinafter referred to as the "Importer"**) holding IEC number 0290005175, filed one Bill of Entry for home consumption for clearance of White Sugar falling under CTH 1701 in bulk and claimed Nil rate of duty for Additional Duty of Customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act as per Sr. No. 12 of Notification NO. 21/2012-Cus dtd. 17.03.2012. The importer imported the said goods through their authorized CHA M/s. Damji Dhirao & sons.

1.2. The Notification No. 21/2012-Cus dated 17.03.2012 as amended reads as under:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notifications of the Government of India, in the Ministry of Finance (Department of Revenue), No. 20/2006-Customs, dated the 1st March, 2006, published in the Gazette of India, Extraordinary, part II, Section 3, Sub-section (i), vide number G.S.R. 92 (E), dated the 1st March, 2006, and No. 29/2010-Customs, dated the 27th February, 2010, published in the Gazette of India, Extraordinary, Para II, Section 3, Sub-section (i), vide number G.S.R. 92 (E), dated the 27th February, 2010, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the table below, falling within the chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, from so much of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act, as is in excess of the amount calculated at the standard rate specified in the corresponding entry in column (4) of the Table aforesaid".

The Sr. No. 12 of the Notification No. 21/2012-Cus dtd.17.03.2012 reads as under:

| S. NO. | Chapter, heading, sub-heading or tariff item of the First Schedule | Description of goods | Standard rate |
|--------|--|---|---------------|
| [1] | [2] | [3] | [4] |
| 12 | Any Chapter | All goods specified in the First Schedule to the Additional Duty of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) | Nil |

Thus, the exemption in excess of Nil rate of Additional duty of customs leviable under sub-section (5) of Section (3) of the Customs Tariff Act is available only to the goods specified in the First Schedule to the Additional Duty of Excise (Goods of Special Importance) Act, 1957 (58 of 1957).

In the First Schedule to the Additional Duty of Excise (Goods of Special Importance) Act, 1957 [Appendix IV], the tariff item 1701 has Been omitted w.e.f. 08.04.2011 from the First Schedule by Section 78 read with the Thirteenth Schedule to the Finance Act, 2011 (8 of 2011).

The Section 78 of the Finance Act, 2011 reads as under:

“78. Amendment of First Schedule to Act 58 of 1957. - The First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957 shall be amended in the manner specified in the Thirteenth Schedule.”

"THE THIRTEENTH SCHEDULE

[See section 78]

In the First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957, -

- (a) heading 1701 and all sub-headings and tariff items thereof and the entries relating thereto shall be omitted ;
- (b) Tariff item 1702 90 10 and the entries relating thereto shall be omitted;
- (c)

It therefore appears that w.e.f. 08.04.2011, the tariff item 1701 did not exist in the First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957. As such, the Sr. No. 12 of Notification No. 21/2012-Cus dtd.17.03.2012 is not applicable to the tariff item 1701 for sugar for the purpose of availment of exemption from Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act of Customs.

1.3 An intelligence was received by the Officers of Docks Examination that some importers were clearing raw sugar / white sugar without payment of Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act by mis-declaring the Sr. No. of the Exemption Notification. The Bills of entry for warehousing / home Consumption / Ex-bond bills of entry for clearance of Brazilian Cane Raw Sugar / white sugar filed by various importers were examined in detail by the Officers of Docks Examination. The preliminary inquiry revealed that these importers had while seeking clearance under Bills of entry for warehousing / home consumption / Ex-bond bills of entry wrongly claimed benefit of Sr. No. 12 of Notification NO. 21/2012-Cus dtd.17.03.2012.

1.4. The detailed inquiry was assigned to SIIB.

1.5. During the course of investigation, summons were issued to Authorized Representative of M/s. Uma Exports Ltd and Authorized Representative of their CHA

M/s. Damji Dhirao & Sons summoning them on 27.06.2013 & 03.07.2013. But the importer M/s. Uma Exports Limited vide their letter dtd. 05.07.2013 requested for waiver of summons and show cause notice. They also requested for waiver of personal hearing on merit basis. M/s. Damji Dhirao & Sons vide their letter dtd.13.09.2013 informed that the B/E No. 8392326 dtd. 02.11.2012 was filed by them on behalf of M/s. Uma Exports Ltd claiming exemption of payment of Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act under Noti. No. 21/2012-Cus dtd. 17.03.2012 on white sugar; that they did not Examine minutely the provisions at the time of filling bills of entry; that later on they studied the provisions and they agreed that additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act was payable on white sugar w.e f. 08.04.2011; that they agreed that it was their mistake that they did not study the matter at the material time deeply, but later on when they came to know from the Department that Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act was payable, they pursued the matter with the importer for making payment of said duty; that on their persuasion, M/s. Uma Exports Limited made the payment of said duty amounting to Rs.1,85,385/- vide Challan dtd.16.08.2013 along with interest of Rs.27,084/- vide challan dtd. 29.08.2013 in respect of 130 MTs of white sugar covered by Bill of Entry for home consumption No. 8392326 dtd. 02.11.2012; that there was no deliberate attempt on their part to evade the payment of duty; that the payment of duty along with interest had been discharged even before issuance of the show cause notice; that they waived the summons, show cause notice and personal hearing in this case and that they requested that they may not be penalized for the genuine mistake committed by them when duty with interest having been deposited and paid by the importer on their persuasion even before issuance of show cause notice.

1.6. M/s. Uma Exports Limited made the payment of Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act amounting to Rs.1,85,385/- vide Challan dtd.16.08.2013 along with interest of Rs.27,084/- vide challan dtd. 29.08.2013 in respect of 130 MTs of white sugar covered by Bill of Entry for home Consumption No. 8392326 dtd. 02.11.2012.

1.7. Since prior to 08.04.2011, the sugar was covered under first schedule to the Additional Duties of Excise (Goods of special importance) Act, 1957, the 4% of Additional Customs Duty was exempt in terms of Notification No. 20/2006-Cus Sr. No. 50. Now the Notification No. 20/2006 has been superseded vide Notification No. 21/2012-Cus dtd.17.03.2012. As per Sr. No. 12 of this notification all goods covered under first schedule to the Additional Duties of Excise (Goods of special importance) Act, 1957, are exempt from Additional Customs Duty. The goods cleared by M/s. Uma Exports Ltd are falling under CTH 1701. CTH 1701 has been omitted from the first schedule w.e.f. 08.04.2011 i.e. the date on which Finance Act, 2011 got assent of the President of India. Since the white sugar falling under CTH 1701 is now not in first schedule to the Additional duty of Excise (Goods of special importance) Act, exemption under Sr. No. 12 of Notification No. 21/2012-Cus dated 17.03.2012 is not available on the clearance of white sugar falling under CTH 1701. It therefore appears that the 4%

Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act paid by M/s. Uma Exports Ltd in respect of white sugar imported by them at Kandla port is liable to be appropriated towards the duty demand.

1.7.1. M/s. Uma Exports Limited indulged in wilful mis-statement of facts with the sole intention to evade customs duty inasmuch as the benefit of exemption from Additional duty of Customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act under Notification NO. 21/2012-Cus dtd.17.03.2012 was not available to the said imported white sugar. Thus, the very claim of the exemption under Notification No. 21/2012-Cus dtd. 17.03.2012 (mentioned in Annexure A & B) was a wilful mis-statement to avail duty exemption.

1.7.2. As per Section 17(1) of the Customs Act, 1962, an importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods. The importer / exporter is responsible for Self-Assessment of duty on imported / export goods and for filing all declarations and related documents and confirming these are true, correct and complete. However, in the instant case, the importer has not made correct declarations and self-assessed the duty wrongly. Thus, the element of wilful mis-statement cannot be ruled out in the instant case.

1.7.3. From the evidences gathered during investigations and the legal Provisions, as discussed aforesaid, it appears that M/s. Uma Exports Ltd filed one Bill of Entry for home consumption No.8392326 dtd.02.11.2012 for clearance of imported white sugar against payment of duty during the period from 08.04.2011 to 30.06.2013, wherein they claimed the benefit of exemption from Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act under Notification No. 21/2012-Cus dtd. 17.03.2012. The benefit of exemption from Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act under Notification NO. 21/2012-Cus dtd.17.03.2012 was not available to the said Imported white sugar having assessable value of Rs.40,41,590/- involving Additional duty of Customs leviable under sub section (5) of Section 3 of the Customs Tariff Act of Rs.1,85,385/- and is required to be denied to them and duty is required to be demanded with interest. It appears that the importer wrongly claimed the benefit of exemption at the time of import under Notification No. 21/2012-Cus dtd.17.03.2012, which they were not entitled to resulting in evasion of payment of duty. The Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act of Rs.1,85,385/- along with interest is therefore liable to be recovered from them under Section 28(4) of the Customs Act, 1962 and Section 28AA of the Customs Act, 1962 respectively. M/s. Uma Exports Ltd have made the payment of Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act amounting to Rs.1,85,385/- vide Challan dtd.16.08.2013 along with interest of Rs.27,084/- vide challan dtd. 29.08.2013 in respect of 130 MTs of white sugar covered by Bill of Entry for home consumption NO. 8392326 dtd. 02.11.2012, which is required to be appropriated towards the demand of duty and interest respectively. Further the said imported white sugar valued at Rs.40,41,590/- are liable for confiscation under Section 111(m) and

111(o) of the Customs Act, 1962 for wrongly entering the claim of exemption in Bill of Entry and violating the condition stipulated under the said notification.

1.7.3.1. Further, for the above acts and omission, M/s. Uma Exports Limited have rendered themselves liable for penal action under Section 112(a) and / or 114A of the Customs Act, 1962.

1.8. The CHA M/s. Damji Dhirao & Sons did not exercise due diligence to ascertain the correctness of the information which they imparted to their client with reference to the work related to clearance of cargo, They were required to advise their client to comply with the provisions of the Act and in case of non-compliance they were required to bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs. They have agreed to the omission of tariff item 1701 in the Act of 1957 w.e.f. 08.04.2011 and that Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act @ 4% was leviable in this case w.e.f. 08.04.2011. They also agreed that it was their mistake that they did not study the matter at the material time deeply, but later on when they came to know from the Department that Additional duty of Customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act was payable, they were regularly pursuing the matter with them for making payment of Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act and they accordingly paid the same. The CHA M/s. Damji Dhirao & Sons are also therefore liable for penalty for the misdeeds on their part under Section 112(b) of the Customs Act, 1962.

1.9. M/s. Uma Exports Limited, vide Show Cause Notice No. S/20-30/Misc/Gr I/13-14/Uma dated 19.11.2013, was called upon to show cause in writing to the Assistant Commissioner of Customs (Gr.I), CH, Kandla having his office situated at New Custom House, Near Balaji Temple, Kandla within thirty days from the date of receipt of this notice, as to why:

a. The benefit of duty exemption as claimed under Notification No. 21/2012-Cus dated 17.03.2012 should not be denied to them and Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act amounting to Rs.1,85,385/-, should not be demanded under Section 28(4) of the Customs Act, 1962. The amount of Rs.1,85,385/- already paid / deposited by the importer during investigation should not be appropriated against the demand of the Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act.

b. The interest should not be demanded and recovered at the appropriate rate under section 28AA of the Customs Act, 1962. The amount of Rs.27,084/- paid / deposited towards interest by the importer during investigation should not be appropriated against the demand of interest.

c. The imported white sugar 130 MTs valued at Rs.40,41,590/- should not be confiscated under Section 111(m) and 111(o) of the Customs Act, 1962.

d. Penalty should not be imposed on them under Section 112(a) and / or 114A of the Customs Act, 1962.

1.10. M/s. Damji Dhirao & Sons, 41, 42, G.M. Asso. Building, Plot No. 297, Ward No.12-8, Gandhidham (Kutch), vide Show Cause Notice No. S/20-30/Misc/Gr I/13-14/Uma dated 19.11.2013, was also called upon to show cause in writing to the Assistant Commissioner of Customs (Gr.I), CH, Kandla having his office situated at New Custom House, Near Balaji Temple, Kandla within thirty days from the date of receipt of this notice, as to why penalty should not be imposed on them under Section 112(b) of the Customs Act, 1962.

1.11. Further, a Corrigendum dated 14.12.2016 was issued vide F. No. S/20-30/Misc/Gr I/13-14/Uma for changing the adjudicating authority from the Assistant Commissioner of Customs (Gr.I), CH, Kandla to the Additional Commissioner of Customs, CH, Kandla.

2. PERSONAL HEARING & DEFENCE REPLY:

2.1. Personal hearing in the matter was granted to the Noticee on dated 12/01/2017, 10/02/2017 & 29/06/2017. Shri Kantilal Laljibhai Chotara, Representative of M/s. Damji Dhirao & Sons, Gandhidham (Kutch) remained present during personal hearing dated 29/06/2017 and reiterated the detailed submissions made vide their letter dated 09.12.2013 and requested to drop the proceedings as initiated in the SCN as the entire duty along with the applicable interest have been paid. Further, M/s. Uma Exports Limited, vide their letter dated 29.06.2017, have requested to waive the personal hearing and any penal charges, if applicable, as they have paid the additional duty along with the applicable interest.

2.2. The Noticee i.e. M/s. Uma Exports Limited has submitted their defence reply vide letter dated 09.12.2013 wherein they submitted as under:

2.2.1. Show Cause Notice is not to be issued as per the provision of section 28(1)(b) of the Customs Act since duty and interest had already been paid on 16.08.2013 i.e. before issuance of the Show Cause Notice:

In terms of provision of section 28 of the Customs Act, 1962 when the duty and interest had been paid before the issuance of the show cause notice, then the show cause Notice not to be issued to the person. The provisions of the section 28 are reads as under:

28. Recovery of duties not levied or short levied or erroneously refunded:

1) *Where any duty has not been levied or has been short-levied or erroneously refunded, or any Interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts –*

(a) *The proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*

(b) *The person chargeable with the duty or Interest, may pay before service of notice under clause (a) on the basis of,-*

- (i) his own ascertainment of such duty; or*
- (ii) the duty ascertained by the proper officer,*

the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

2) *The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made there under in respect of such duty or interest.*

3) *Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).*

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

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

by the Importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so

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

(5) *Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty-five per cent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.*

In the present case of Notice, the differential duty along with interest had been paid before the issuance of the Show Cause Notice therefore the provision of the section 28(1)(b) are applicable in the case and therefore as per the section 28(2), the proper officer shall not issue Show Cause Notice under 28(1)(a) in respect of the duty or interest so paid or any penalty leviable under the provision of this Act or the rules made there-under in respect of such duty and interest.

The amendment in the exemption was very tedious in nature. It is not a case where the exemption notification had been amended while it is a case wherein the amendment was made in the reference of tariff or another Act. Due to amendment in the tariff of another Act, the exemption is also not available however for a common man it is very difficult to understand.

The claim was sought as per the general trade practice and therefore the mistake was arisen. However, when the Noticee was informed for the mistake so happen he had paid the differential duties along with the interest and thereby shows their Bona-fide and also shows that there was not a malafide intention.

The Noticee had filed a bill of entry for home consumption for clearance of imported white Sugar on payment of duty. It is to submit that the demand of Rs.1,85,385/- had already been paid by the Noticee when it was informed by the CHA that the exemption claimed are not available to them. The Noticee had paid the differential duty amount of Rs.1,85,385/- along with interest amount of Rs.27,084/- payable in this amount. Therefore the Noticee had shown their bona fide by making the payment of differential customs duties along with the applicable interest. Therefore the Noticee had paid the differential duty even before the date of issuance of the Show Cause Notice.

Since the importer had paid the differential duty along with interest in the instance of CHA as well as Customs officer, therefore the demand of differential duty along with interest should be appropriated against the amount already deposited by the Noticee. It is to submit that the payment of the exemption amount during the

inquiry stage must be considered as bona fide of the Importer and therefore the Show Cause Notice may be dropped in term of the section 28(2) of the Customs Act, 1962.

2.2.2. Importer cannot be penalized by Confiscation since the claim of exemption is neither wrong declaration of value & other particular nor any condition of the exemption notification had been breach:

2.2.2.1. The confiscation is proposed to be made under section 111(m) and 111(o) of the Customs Act,1962. It is to submit that the section 111(m) applicable for cases where the imported goods are not corresponding in respect of value or any other particular with entry or declaration of content of baggage or declaration of transhipments.

Further the confiscation under section 111(o) can be made when the imported goods were exempt from duty subject to some condition of prohibition and those conditions were not fulfilled unless non observation of condition was sanctioned by the proper officer.

Confiscation cannot be done under section 111(m):

The exemption were claimed at the time of filing of bills of entry as per the existing practice. It was even accepted by the proper officer of the customs that the notification is applicable for the goods in question therefore after assessment they have granted the out of charge to the Imported goods and assessee had cleared the same on payment of applicable duties. Therefore it is not a case where the goods are not corresponding in respect of value or any other particular with entry or other declaration for baggage or transhipments.

Furthermore since the amount of exemption had been paid by the Noticee therefore the exemption was not availed at all by the Noticee and therefore there is no mis-declaration remain on the parts of the Noticee.

Therefore, the confiscation under section 111(m) of the Customs Act, 1962 cannot be made applicable under this section.

In the case of LEXMARK INTERNATIONAL (I) P. LTD Vs C.C. (IMPORTS), NHAVA SEHVA reported at 2011(274)ELT 566 (Tri-Mumbai), it was held that Claiming exemption from MRP based assessment not a misdeclaration. Impugned goods correctly classified by appellant under relevant tariff entries which was accepted by Customs; Transaction value declared in the bill of entry for determination of basic Customs duty also accepted by Customs; Merely because Department was of view of MRP based assessment of CVD whereas appellant sought an exemption from MRP based assessment in respect of CVD, not amount to any misdeclaration on part of appellant and therefore section 111(m) of Customs Act,1962 not attracted. Accordingly penalty and fine also set aside under section 112(a) and 125 ibid. [paras 6,7].

Confiscation cannot be done under section 111(o):

It is also not a case of Customs where any of the condition or prohibition of the exemption had not been fulfilled. It is to submit that *once the differential duty is paid, the appellant goes out of Exemption scheme. In that view of things, there is no question of fulfillment of any condition or prohibition of exemption Notification.* Earlier the exemption were claimed under the notification 21/2012-Cus and the proper officer had allowed the same and gave the out of charge to the imported goods after due assessment of imported goods and after being objected, the importer had paid the same along with interest therefore, the exemption have not effected by the notice and the breach thereof or any condition thereof does not arise and therefore confiscation cannot be done under section 111(o) of the Customs Act, 1962.

In the case of RAJYALAKSHMI LABS. LTD Vs COMMR. OF CUS. & C. EX., HYDERABAD-II reported at 2007(208) ELT 398(Trl-Bang), it was clearly held that Once full duty Is demanded, appellant cannot be penalized by confiscation of goods. Confiscation not sustainable under Section 111(0) of Customs Act, 1962. *Once the differential duty is paid, the appellant goes out of scheme. In that view of things, there is no question of fulfillment of any condition of Notification.* [pare 6.2]

Further in the case of BEEKAY ENGINEERING CORPN Vs COMMR. OF CUS. (ACC & IMPORT), MUMBAI reported at 2010 (262) E.L.T. 1126 (Tri. - Mumbai), it was clearly held that the wrongly claim of the exemption cannot be considered as misdeclaration. Exemption claim always subjected to scrutiny, cannot be equated with avaliment and termed as misdeclaration merely because benefit claimed. Therefore the confiscation under section 111(o) not sustainable in law.

2.2.2.2. With regards to the Confiscation of the material White Sugar of 130 MTs, in this regards it is to submit that it is settled legal position that when the goods are not available for the confiscation, there cannot be imposed a fine for redemption of goods Itself. Therefore the Confiscation is not possible when the imported goods are cleared on payment of duty and which are not available for the confiscation Itself.

Imported goods are cleared on payment of duties which are also assessed by the Customs authorities . As on date, the imported goods are not available since the same are already cleared by the Noticee on payment of customs duties which are even assessed by the Customs authorities. Therefore the confiscation of those goods which are already cleared is not possible whether under section 111(m) or section 111(o) of the Customs Act, 1962.

Further in the case of M/s DUPONT SYNTHETICS PVT. LTD Vs COMMISSIONER OF C. EX., SURAT reported at 2010 (259) E.L.T. 408 (Tri. - Ahmd.), it was held that the redemption fine is imposed in lieu of confiscation with an option to the concerned person for getting the goods redeemed on payment of fine. It is in the nature of concession, leaving the option to the assessee to use the concession or not. In case of shortage of goods, the goods are not available physically and as such, concerned person can never use option for redeeming the goods. He cannot be compelled to exercise the option in such a case and to pay the redemption fine. **Commissioner (Appeals) has correctly observed that as the goods are not available for seizure, the question of confiscation of the same does not arise** and consequently, the question of making available of option will not arise. In such a case, no redemption fine can be imposed. Accordingly, Revenue's appeal challenging the above part of impugned order is rejected.

{emphasis supplied}

Other relied upon cases are as follows:

M/s SHIWALYA SPINNING & WEAVING MILLS (P) LTD Vs CCE, Amritsar reported at 2011 (274) E.L.T. 306 (Tri. - Del.); S. S. WATCH INDUSTRIES Vs COMMISSIONER OF CUSTOMS (I), NEW DELHI reported at 2011 (274) E.L.T. 369 (Tri. - Del.); COMMISSIONER OF C. EX. & CUS., SURAT Vs PREMIER POLYSPIN PRIVATE LTD reported at 2010 (257) E.L.T. 447 (Tri. - Ahmd.); CCE, Ludhiana Vs B. K. COATED BOARD LTD reported at 2011 (273) E.L.T. 560 (Tri. - Del.).

In all these cases the various benches of the Tribunal commonly held that when the goods are not available then the question of the confiscation does not arise.

2.2.2.3. In view of the above submission it can be said and submit that the Noticee had made an interpretational error and even the Proper officer of Customs and the EDI system had allowed the said Interpretational error at the material time and therefore the same cannot be equated with the condition as provided in the section 111(m) and the Section 111(o) of the Customs Act, 1962. Further the differential duty had also been paid by the Noticee therefore he must be considered as out of the exemption notification so claimed. Moreover the goods in question are also not available for the confiscation since the goods was cleared by the Noticee after due assessment by the proper officer of the Customs and sold in the open market. Therefore the goods are not available at the time of issuance of the show cause notice.

In view of the above, the imported goods are not liable for confiscation in terms of the section 111(m) and section 111(o) of the Customs Act, 1962.

2.2.3. Penalties are not imposable when the duty and interest had been paid before the issuance of the show cause notice:

2.2.3.1. As per the provision of section 28(1)(b) and section 28(2) of the Customs Act, 1962, when the duty and interest had been paid on own and the same was informed to the Customs officer then the proper officer will not issue any notice in respect of the duty and interest and any penalty leviabale under this act or the rule made there under in respect of such duty and interest.

In the present case of Noticee, since the duty and interest had already been paid even before the issuance of the SCN therefore the Show Cause Notice so issued may be treated as redundant as per the provision of section 28(2) of the Customs Act, 1962 and therefore the penalty so proposed are also liable for dropped in the interest of natural justice.

2.2.3.2. Penalty not imposable under section 112(a):

Without prejudice to the submission above, it can be say and submit that the goods are not liable for confiscation under section 111 of the Customs Act, 1962. When the goods are not liable for confiscation, the penalty under section 112(a) is also not imposable.

For better appreciation, the section 112(a) and section 114A are reads as under:

“SECTION 112”.

Any person, -

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

.....”

Therefore when the goods are not liable for confiscation under section 111 of the Customs Act, 1962 then the penalty is also not imposable under section 112a of the Customs Act, 1962.

2.2.4. Penalty not imposable under section 114A:

For the sake of brevity the provision of the section 114A are reproduced as:

SECTION 114A

Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded **by reason of collusion or any wilful mis-statement or suppression of facts**, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall also be liable to pay a penalty. Equal to the duty or Interest so determined:

Provided that where such duty or interest, as the case may be, as determined under sub-section (2) of section 28, and the interest payable thereon of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined.

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso.

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28 AB, and twenty-five per cent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effects:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

It can be viewed from the simple reading of this section that for imposition of penalty under section 114A, mens-rea for evasion of duty had to be proved. Mere claiming of the wrong exemption neither can be considered as misdeclaration nor can be considered as intentional duty evasion by way of collusion, fraud, or wilful mis-statement or suppression of facts. The claim of the exemption must be scrutinized by the proper officer and then the benefits of the exemption are granted to the assessee.

In the case of BEEKAY ENGINEERING CORPN Vs COMMR. OF CUS. (ACC & IMPORT), MUMBAI reported at 2010 (262) E.L.T. 1126(Tri. - Mumbai), it was clearly held that the wrongly claim of the exemption cannot be considered as

misdeclaration. Exemption claim always subjected to scrutiny, cannot be equated with availment and termed as misdeclaration merely because benefit claimed.

In the case P. A. FOOTWEAR PVT. LTD Vs COMMISSIONER OF CUS. (EXPORT), CHENNAI reported at 2009 (245) E.L.T. 310 (Tri. - Chennai), the summary of the case are:

Stay/Dispensation of pre-deposit - Confiscation and penalty - Misdeclaration of goods check list filed at service centre of Customs House contained an inadmissible claim for assessment of impugned goods to Additional Duty of Customs at 'NIL' rate, Description relevant and adequate for assessment was 'sewing machines with inbuilt motor' - With the description entered in the bill of entry it was impossible in EDI system to detect whether the assessment of goods at Nil rate of CVD claimed in terms of Notification No. 6/06-C.E. was correct - As per public notice, the goods assessed under second check system also gets examined by Shed Appraiser when the commercial invoice and packing list also referred to verify the description - No deliberate misdeclaration of goods to avail an undue benefit - Prima facie case made out against confiscation and penalty - Complete waiver of per-deposit and stay of recovery of penalty ordered - Section 129E of Customs Act, 1962. [Para 4]

2.2.5. The present Show Cause Notice is hit by limitation since the extended period is not invocable in the present case:

The issue involved is the admissibility of the particular exemption. Since it is settled that the issue of admissibility of exemption cannot be considered as mis declaration and also settled that mere claiming does not involved any question of Fraud, wilful misstatement or suppression of facts for evasion of duty; therefore the extended period is not invocable in the present case.

The Bill of entry was assessed on the 02.11.2012 and also the payment of duty had been made on the same day. Therefore the last date for issuance of the Show Cause Notice will be 01.11.2013; however the Show Cause Notice was issued on 19.11.2013 therefore the proceeding initiated under this Show Cause Notice is hit by limitation. Therefore the present Show Cause Notice is liable to be dropped on this singly ground.

2.2.6. In view of the above, the Noticee herewith humbly prays that:

01. The Show Cause Notice may be considered as redundant and liable for dropped since the duty and interest had already been paid by the Noticee before issuance of the Show Cause Notice.

02. The confiscation should not be made since there is neither any mis declaration nor any condition of exemption were breached therefore the provision of section 111 are not applicable and;

03. Penalties are not applicable to the present case of Notice and therefore the same may be dropped in the interest of Natural Justice.

04. The Show Cause Notice it hit by limitation therefore the same may be dropped.

05. The Notice will be please to be heard if the opportunity is granted before adjudicating the matter.

2.3. The Co-Noticee i.e. M/s. Damji Dhirao & Sons, Gandhidham has also submitted their defence reply vide letter dated 09.12.2013 wherein they submitted as under:

2.3.1. Claim of benefit of exemption notification is an interpretation matter and any difference thereof cannot be considered and compared with the situations mentioned in the section 112(b). The mistake was bona fide and the same had been cured by making good the differential amount of duty along with interest.

The noticee had filed a bill of entry No. 8392326 dated 02.11.2012 for import of white sugar on behalf of his principal M/s. Uma Exports. As per the regular trade practice, the noticee had also filed the above said Bill of Entry under the exemption notification 21/2012-Cus dated 17.03.2012. Earlier the date 17.03.2012, the exemption was granted by the notification 20/2006-Cus dated 01.03.2006. Therefore the product White Sugar was remains exempted for a long period of time until the Finance Act, 2011 had amended the provision of the Additional Duty of Excise (Goods of special Importance) Act, 1957 by virtue of this, the imported goods were no more exempted after 08.04.2011.

Since the amendment made by the Finance Act, 2011 not directly in the exemption Notification instead amend the tariff of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and these amendments have the effect on the exemption Notification by virtue of this the product falls under chapter 1701 and 1702 were not exempted any more w.e.f. 08.04.2011. It can be seen that the amendment was very tedious in nature and even the proper officer of the Customs have also allowed the said exemption after scrutiny of the claim of exemption. Basically they are also relying on the long practice existed in the market and have belief that the imported goods White Sugar is Exempted from additional duties of customs.

It is to submit that the amendment in the exemption was very tedious in nature. It is not a case where the exemption notification had been directly amended

while it is a case wherein the amendment was made in the reference of tariff of another Act. Due to amendment in the tariff of another Act, the exemption is also not available however for a CHA being a man who can understand the normal amendment of law but cannot be expected to interpret such typical amendment man since it is very difficult to understand.

It is also to submit that all the other particular viz. Classification of goods, valuation of Goods were found correct by the proper officer of the customs. Therefore, it cannot be said that the noticee CHA had not exercise the due diligence in clearance of the cargo. Only he had not understand the impact of the amendment made by the finance bill, 2011 in the tariff of the Additional Duty of Excise (Goods of Special Importance) Act, 1957. Therefore only the interpretation mistake was made by the CHA while clearing the cargo. Further there is no evidences had been advanced by the impugned Show Cause Notice with regards to that by claiming the exemption, the noticee CHA are personally become wealthier and could get away with the benefits in case the same would have been extended and gone un-noticed. Therefore the condition of the provision of section 112(b) had not been fulfilled and therefore no penalty can be imposed on the noticee CHA for interpretational mistakes under section 112(b) of the Custom Act, 1962.

It is to submit that the claim of benefit of exemption was a bona fide mistake and the mistake was not an intentional one and no mens-rea can be said to involved in claiming of this exemption notification. It is settled legal position that mere claiming of the exemption notification does not amount to gross mis-declaration or dose not rendered the imported goods liable for confiscation under section 111 of the Customs Act, 1962. Even when it was come to the knowledge of the noticee CHA that the duty escaped from being charged due to this mistake, he pursue with the importer after lapse of almost One Year and arrange to paid the differential amount of duty along with interest. This shows the bona fide of the noticee CHA and therefore it cannot be established by the impugned Show Cause Notice that the due diligence was not exercised by the noticee CHA.

So far as the present contention of the department is concerned that it was a deliberate attempt on the part of the importer to evade payment of duty is not supported with any evidence. It is clear from the above submission that there is no misdeclaration of description of goods. The claim is always subject to scrutiny, therefore, it cannot be equated with the availment and in turn it cannot be termed as misdeclaration merely on the premise that they have claimed the benefit. The Tribunal in the case of J. K. Industries Ltd., held that as there was no mis-declaration of the goods. Therefore, since the confiscation of the goods in question is not sustainable in law, accordingly the penalty under section 112(b) is also not sustainable in law.

The claim was sought as per the general trade practice and therefore the mistake was arisen. However, when the noticee CHA was informed for the mistake so happen he had pursued the importer for payment of differential duties along with the

interest and also paid the challan for this differential amount thereby shows their bona-fide and also shows that there was not a malafide intention and also shows that they are not involved in the claiming of the benefit in malafide way.

Since the department has not brought out anything to show that the noticee CHA was working for availing the benefits of the exemption notification solely for his own interest and could get away with the benefits in case the same would have been extended and gone un-noticed. Therefore, the penalty on the noticee CHA must be dropped.

In the case of the BEEKAY ENGINEERING CORPN Vs COMMR. OF CUS. (ACC & IMPORT), MUMBAI reported at 2010 (262) E.L.T. 1126 (Tri. - Mumbai), it was held that no penalty is imposable on the CHA when the benefit of exemption notification had been wrongly claimed by the importer. Further there is no proof that the CHA working for availing the benefit solely for own interest.

2.3.2. Show Cause Notice should not be issued since the duty and interest had already been paid before issuance of the Show Cause Notice and informed to the proper officer of customs. Therefore the penalty under section 112(b) is not impossible.

2.3.2.1. Show Cause Notice is not to be issued as per the provision of section 28(1)(b) of the Customs Act since duty and interest had already been paid on 16.08.2013 i.e. before issuance of the Show Cause Notice.

In terms of provision of section 28 of the Customs Act, 1962 when the duty and interest had been paid before the issuance of the show cause notice, then the Show Cause Notice not to be issued to the person. The provisions of the section 28 are reads as under:

28. Recovery of duties not levied or short levied or erroneously refunded:

1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any Interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts -

(a) The proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) The person chargeable with the duty or Interest, may pay before service of notice under clause (a) on the basis of,-

(i) his own ascertainment of such duty; or

(ii) *the duty ascertained by the proper officer,*

the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

2) *The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made there under in respect of such duty or interest.*

3) *Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).*

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

(a) *collusion; or*

(b) *any wilful mis-statement; or*

(c) *suppression of facts,*

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

(5) *Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty-five per cent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.*

In the present case of noticee CHA, the differential duty along with interest had been paid before the issuance of the Show Cause Notice therefore the provision of the section 28(1)(b) are applicable in the case and therefore as per the section 28(2),

the proper officer shall not issue Show Cause Notice under 28(1)(a) in respect of the duty or interest so paid or any penalty leviable under the provision of this Act or the rules made there-under in respect of such duty and interest.

It is to submit that the noticee had files a bill of entry for home consumption for clearance of Imported White Sugar on payment of duty. It is to submit that the demand of Rs.1,85,385/- had already been paid by the noticee when it was informed by the CHA that the exemption claimed are not available to them. The noticee had paid the differential duty amount of Rs.1,85,385/- along with interest amount of Rs.27,084/- payable in this amount. Therefore the noticee had shows their bona fide by making the payment of differential customs duties along with the applicable interest. Therefore, the importer had paid the differential duty even before the date of issuance of the Show Cause Notice.

Since the Importer had paid the differential duty along with interest in the instance of CHA as well as Customs officer, therefore the demand of differential duty along with interest should be appropriated against the amount already deposited by the noticee. It is to submit that the payment of the exemption amount during the inquiry stage must be considered as Bona fide of the Importer and therefore the Show Cause Notice may be dropped in term of the section 28(2) of the Customs Act, 1962. Therefore the penalty proposed under section 112(b) of the Customs Act, 1962 are also liable for set aside and must be dropped in the interest of natural justice.

2.3.3. The present Show Cause Notice is hit by limitation since the extended period is not invocable in the present case:

It is to submit that the issue involved is the admissibility of the particular exemption. Since it is settled that the issue of admissibility of exemption cannot be considered as mis-declaration and also settled that mere claiming does not involved any question of Fraud, willful misstatement or suppression of facts for evasion of duty; therefore the extended period is not invocable in the present case.

The Bill of entry was assessed on the 02.11.2012 and also the payment of duty had been made on the same day. Therefore the last date for issuance of the Show Cause Notice will be 01.11.2013; however the Show Cause Notice was issued on 19.11.2013 therefore the proceeding initiated under this Show Cause Notice is hit by limitation. Therefore the present Show Cause Notice is liable to be dropped on this singly ground.

2.3.4. In view of the above, noticee CHA herewith humbly submit and prays that:

a) The above defence submission may kindly be accepted and the penalty should not be imposed being not legal in the eyes of law.

b) The noticee CHA would like to be heard in person before passing any order in the matter.

3. DISCUSSION AND FINDINGS:

I have carefully gone through the records of the case, including the Show Cause Notice dated 19.11.2013 and the written submissions dated 09.12.2013 filed by M/s. Uma Exports Limited and written submissions dated 09.12.2013 filed by M/s. Damji Dhiraoo & Sons as well as their oral submissions made during the course of Personal Hearing.

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

- a. Whether the benefit of duty exemption as claimed under Notification No. 21/2012-Cus dated 17.03.2012 is required to be denied to the importer and Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act amounting to Rs.1,85,385/- is required to be demanded under Section 28(4) of the Customs Act, 1962. The amount of Rs.1,85,385/- already paid / deposited by the importer during investigation is required to be appropriated against the demand of the Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act.
- b. Whether the importer is required to pay the interest at the appropriate rate under section 28AA of the Customs Act, 1962. Whether the amount of Rs.27,084/- already paid / deposited towards interest by the importer during investigation is required to be appropriated against the demand of interest.
- c. Whether the imported white sugar 130 MTs valued at Rs.40,41,590/- is required to be confiscated under Section 111(m) and 111(o) of the Customs Act, 1962.
- d. Whether the importer is liable for penal action under Section 112(a) and / or 114A of the Customs Act, 1962.
- e. Whether M/s. Damji Dhiraoo & Sons, Custom House Agent is liable for penalty under Section 112(b) of the Customs Act, 1962.

3.2. The main crux of the issue in this case, around which all the above issues are involved, which I am required to decide, is whether the benefit of duty exemption as claimed under Sr.No.12 of Notification No.21/2012-Cus dated 17.03.2012 for the item under import i.e. White Sugar covered under CTH 1701 is required to be denied to the importer and whether Additional duty of customs is leviable under sub-section (5) of Section 3 of the Customs Tariff Act, 1975.

3.3. For clear depiction, the Notification No. 21/2012-Cus dated 17.03.2012 as amended reads as under:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notifications of the Government of India, in the Ministry of Finance (Department of Revenue), No. 20/2006-Customs, dated the 1st March, 2006, published in the Gazette of India, Extraordinary, part II, Section 3, Sub-section (i), vide number G.S.R. 92 (E), dated the 1st March, 2006, and No. 29/2010-Customs, dated the 27th February, 2010, published in the Gazette of India, Extraordinary, Para II, Section 3, Sub-section (i), vide number G.S.R. 92 (E), dated the 27th February, 2010, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the table below, falling within the chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, from so much of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act, as is in excess of the amount calculated at the standard rate specified in the corresponding entry in column (4) of the Table aforesaid".

The Sr. No. 12 of the Notification No. 21/2012-Cus dtd.17.03.2012 reads as under:

| S. NO. | Chapter, heading, sub-heading or tariff item of the First Schedule | Description of goods | Standard rate |
|--------|--|---|---------------|
| [1] | [2] | [3] | [4] |
| 12 | Any Chapter | All goods specified in the First Schedule to the Additional Duty of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) | Nil |

Thus, the exemption in excess of Nil rate of Additional duty of customs leviable under sub-section (5) of Section (3) of the Customs Tariff Act is available only to the goods specified in the First Schedule to the Additional Duty of Excise (Goods of Special Importance) Act, 1957 (58 of 1957).

In the First Schedule to the Additional Duty of Excise (Goods of Special Importance) Act, 1957 [Appendix IV], the tariff item 1701 has Been omitted w.e.f. 08.04.2011 from the First Schedule by Section 78 read with the Thirteenth Schedule to the Finance Act, 2011 (8 of 2011).

The Section 78 of the Finance Act, 2011 reads as under:

“78. Amendment of First Schedule to Act 58 of 1957. - The First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957 shall be amended in the manner specified in the Thirteenth Schedule.”

"THE THIRTEENTH SCHEDULE

[See section 78]

In the First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957, -

- (a) heading 1701 and all sub-headings and tariff items thereof and the entries relating thereto shall be omitted ;
- (b) Tariff item 1702 90 10 and the entries relating thereto shall be omitted;
- (c)

3.4. In view of the above, I find that w.e.f. 08.04.2011, the CTH 1701 did not exist in the First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957. As such, the Sr. No.12 of Notification No. 21/2012-Cus dtd.17.03.2012 is not applicable to the CTH 1701 for white sugar for the purpose of availment of exemption from Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act, 1975. Thus, I find that the importer had while seeking clearance under Bill of entry for home consumption wrongly claimed benefit of Sr. No.12 of Notification No. 21/2012-Cus dtd.17.03.2012 for the item under import.

3.5. In view of the fact that prior to 08.04.2011, the sugar was covered under first schedule to the Additional Duties of Excise (Goods of special importance) Act, 1957 and 4% of Additional Customs Duty was exempted in terms of Notification No. 20/2006-Cus (Sr. No. 50). As the Notification No. 20/2006 has been superseded vide Notification No. 21/2012-Cus dtd.17.03.2012 and Sr. No. 12 of this notification says that all goods covered under first schedule to the Additional Duties of Excise (Goods of special importance) Act, 1957 are exempted from Additional Customs Duty. On the other hand the CTH 1701 was omitted w.e.f. 08.04.2011 from the First Schedule by Section 78 read with the Thirteenth Schedule to the Finance Act, 2011 (8 of 2011). I find that the goods cleared by the importer are falling under CTH 1701 and in view of the para supra exemption under Sr. No. 12 of Notification No. 21/2012-Cus dtd.17.03.2012 is not available on the clearance of White Sugar falling under CTH 1701. I, therefore, I find that the 4% Additional duty of Customs is leviable under sub-section (5) of Section 3 of the Customs Tariff Act, in the instant case.

3.6. From the above discussions, it is amply clear that exemption is not applicable as the item under import was already omitted from the First Schedule to the Additional Duty of Excise (Goods of Special Importance) Act, 1957 w.e.f. 08.04.2011. Consequently, Sr. No.12 of Notification No. 21/2012-Cus dtd.17.03.2012 is not applicable to the CTH 1701 for the purpose of availment of exemption from Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs

Tariff Act, 1975. Therefore, I find that the importer had wrongly claimed benefit of Sr. No. 12 of Notification No. 21/2012-Cus dtd.17.03.2012 for clearance under Bill of Entry for home consumption.

4.1. I find that the importer filed home consumption Bill of Entry No. 8392326 dated 02.11.2012 for clearance of 130 MTs white sugar against payment of duty, wherein they claimed benefit of exemption from Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act under Sr. No.12 of Notification No. 21/2012~Cus dtd.17.03.2012. As per the above discussions, the importer had wrongly claimed the benefit of exemption from Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act under Sr. No.12 of Notification No. 21/2012-Cus dtd.17.03.2012 on the said imported white sugar, which in turn led to evasion of Additional duty of Customs to the tune of Rs.1,85,385/- leviable under sub-section (5) of Section 3 of the Customs Tariff Act. Without the detailed investigation by the Customs, the issue would have gone unnoticed. Hence, I find that they have wilfully suppressed this vital materialistic information and caused deliberate mis-declaration to avail the exemption under the notifications. Thus, Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act is liable to be recovered from them under Section 28(4) of the Customs Act, 1962 alongwith interest under Section 28AA of the Customs Act, 1962. I also find that the amount of Rs.1,85,385/- had already been paid / deposited by the importer during investigation and the said amount is hereby appropriated against the demand of the Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act, 1975.

4.2. The importer has raised issues that extended period of demand is not invocable in the present case and that the SCN is hit by limitation. As discussed aforesaid, it is a case of wilful mis-declaration to avail undue exemption and thus extended period of demand, provided under Section 28(4) of the Customs Act, 1962 is attracted in this case. Date of issuance of the subject SCN is well within the extended period. Therefore, I find that the subject contentions of the importer are not tenable.

4.3. From the aforesaid discussions, I find that by wrongly entering the claim of exemption in Bill of Entry the noticee has violated the conditions stipulated under the said notification. I find that they have wilfully suppressed these vital materialistic information and caused deliberate mis-declaration to avail the exemption under the notifications. Accordingly, the 130 MTs of imported white sugar valued at Rs.40,41,590/- is liable for confiscation, under Section 111(m) and 111(o) of the Customs Act, 1962.

5. As regards, imposition of penalty on the importer under Section 112(a)/114A of the Customs Act, 1962 as already held in the foregoing para that the impugned White Sugar is liable for confiscation under Section 111(m) and 111(o) ibid of the Customs Act, 1962. I also find from the written submission dated 09.12.2013 of the importer that they were not aware of the provisions of omission of Tariff item 1701

and when they were informed by their CHA, they had paid the differential duties along with the interest. Nevertheless, but for a thorough investigation by the Customs, the matter would have gone overlooked. I find that the duty difference in question is in Lakh and not a small amount. The aforesaid acts of wilful misstatement and suppression of facts by the importer has rendered the subject goods liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962 and has also led to wilful evasion of Additional duty of Customs which constitutes an offence of the nature described in Section 112(a)/114A of the Customs Act, 1962. Though the importer is liable to penalty under Section 112(a) as well as under Section 114A of the Customs Act, 1962, however, since I propose to impose penalty under Section 114A of the Customs Act, 1962, I do not impose any penalty on them under Section 112(a) of the Customs Act, 1962 as provided in proviso to Section 114A.

6. I find that the importer has cited various decisions/judgments in support of their contention in respect of confiscation under section 111(m) & 111(o) and penalty under section 112(a) & 114A of the Customs Act, 1962. I am of the view that the conclusions arrived may be true in those cases but the same cannot be extended to other case(s) without looking to the hard realities and specific facts of each case. Those decisions/ judgments were delivered in a different context and under different facts and circumstances, which cannot be made applicable, in the facts and circumstances, to this case.

ROLE OF M/S. DAMJI DHIRAOO & SONS, CUSTOM HOUSE AGENT:

7. I find from the written submission of the CHA M/s. Damji Dhirao & Sons that they were aware of these provisions but at the material time they did not deeply examine these provisions. Further, they agreed that the CTH 1701 had been omitted from the First Schedule to the Additional Duty of Excise (Goods of Special importance) Act, 1957 w.e.f. 08.04.2011 but they were not aware of the provisions of omission of CTH 1701.

7.1 I find that the CHA M/s. Damji Dhirao & Sons did not exercise due diligence to ascertain the correctness of the information which they imparted to their client with reference to the work related to clearance of cargo. They were required to advise their client to comply with the provisions of the Act and in case of non-compliance they were required to bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs. I also find that they have agreed to the omission of CTH 1701 in the Act of 1957 w.e.f. 08.04.2011 and that Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act @ 4% was leviable in this case w.e.f. 08.04.2011. They also agreed that it was their mistake that they did not study the matter at the material time.

7.2 CHA M/s. Damji Dhirao & Sons has also contended that penalty under section 112(a) & 114A of the Customs Act, 1962 is not imposable on them. They have also cited the decisions/ judgments in this regard, which have been cited by the

importer. Their contentions are in respect of confiscation under section 111(m) & 111(o) and penalty under section 112(a) & 114A of the Customs Act, 1962. As discussed above in Para 6, I am of the view that the conclusions arrived may be true in the cited cases but the same cannot be extended to other case(s) without looking to the hard realities and specific facts of each case. Since those decisions/ judgments were delivered in different contexts and under different facts and circumstances, the same cannot be made applicable, in the facts and circumstances, to this case.

7.3 In view of the above, I find that CHA M/s. Damji Dhirao & Sons are also therefore liable for penalty for the misdeeds on their part under Section 112(b) of the Customs Act, 1962.

8. As discussed above, I have already held that the benefit of exemption from Additional duty of customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act under Sr. No. 12 of Notification No. 21/2012-Cus dtd.17.03.2012 is not available to the said imported white sugar, and as a consequence the importer is not eligible for the benefit of said exemption.

9. In view of the foregoing discussions and findings, I, accordingly, pass the following order:

ORDER

a. I deny the benefit of duty exemption as claimed under Sr. No. 12 of Notification No. 21/2012-Cus dated 17.03.2012 by M/s. Uma Exports Limited, 28/1, Shakespeare Sarani, 1st Floor, Flat No. 15 & 16, Ganga Jamna Apartment, Kolkata, W.B. PIN - 700017 and order to confirm the demand and recover the Additional Duty of Customs leviable under sub-section (5) of Section 3 of the Customs Tariff Act amounting to Rs.1,85,385/- under Section 28(4) of the Customs Act, 1962. As the duty of Rs.1,85,385/- was already paid / deposited by them, the same is hereby appropriated towards their duty liability.

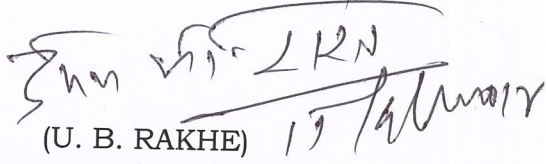
b. I confirm the demand of interest and order for recovery of the interest from M/s. Uma Exports Limited at the appropriate rate under section 28AA of the Customs Act, 1962 on the duty demand at (a) above. As the interest of Rs.27,084/- had already been paid / deposited by M/s. Uma Exports Limited, the same is hereby appropriated towards their interest liability.

c. I hold that white sugar 130 MTs valued at Rs.40,41,590/-, imported vide Bill of Entry for home consumption No. 8392326 dated 02.11.2012, by M/s. Uma Exports Limited is liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962. However, since the

impugned goods are not available for confiscation, I refrain from imposing any redemption fine in lieu of confiscation.

d. I impose penalty of Rs.2,12,469/- (Rupees Two Lakh Twelve Thousand Four Hundred Sixty Nine only) on M/s. Uma Exports Limited under Section 114A of the Customs Act, 1962. However, the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined is paid within the period of thirty days referred to in that proviso of Section 114A.

e. I impose penalty of Rs.5,000/- (Rupees Five Thousand Only) on M/s. Damji Dhirao & Sons, Custom House Agent under Section 112(b) of the Customs Act, 1962.


(U. B. RAKHE) 19 February
ADDITIONAL COMMISSIONER

By RPAD/ Hand Delivery

To.

- (i) M/s. Uma Exports Limited,
28/1, Shakespeare Sarani, 1st Floor,
Flat No. 15 & 16, Ganga Jamna Apartment,
Kolkata (W. B.) - 700 017
- (ii) M/s. Damji Dhirao & Sons,
41, 42, G. M. Asso. Bulg., Plot No. 297,
Ward No. 12B, Gandhidham (Kutch) - 370 201

Copy to:

- (i) The Deputy/Assistant Commissioner of Customs (RRA), CH, Kandla.
- (ii) The Deputy/Assistant Commissioner of Customs (Recovery), CH, Kandla.
- (iii) The Deputy/Assistant Commissioner of Customs (Gr. VII), CH, Kandla.
- (iv) Guard File.