



**OFFICE OF THE PRINCIPAL COMMISSIONER
CUSTOMS COMMISSIONERATE KUTCH
CUSTOM HOUSE KANDLA
NEAR BALAJI TEMPLE, NEW KANDLA
Phone : 02836-271468/469 Fax: 02836-271467**

A	File No.	S/10-02/Adj-JC/BTT/14-15
B	Order-in-Original No.	KDL-CUSTM-000-COM-018-17-18
C	Passed by	SHRI P.V.R. REDDY Principal Commissioner, Custom House, Kandla.
D	Date of order	27.04.2017
E	Date of issue	09.05.2017
F	Show Cause Notices No. & Date	DRI/HZU/VRU/26/ENQ-01(INT-NIL)2015 Dated 17.03.2015
G	Noticee(s)/Co- Noticee(s)	1. M/s Batra Timber Traders (P) Ltd., VII/558, Imambara, Sadar Bazar, Karnal, Haryana-132001 2. Shri Rajesh Kumar Batra Director of M/s Batra Timber Traders, VII/558, Imambara, Sadar Bazar, Karnal, Haryana-132001 3. Shri AvinashJindal, Bungalow No.12, Plat-No,2-91/292, Near-Gurukul, Gandhidham-370201

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 FACT OF THE CASE:

1.1 M/s Batra Timber Traders (P) Ltd, VII/558, Imambara, Sadar Bazar, Karnal, Haryana-132001 (hereinafter referred to as "the importer"), holders of IEC No. 3311001605, are the importers of various types of timber at the ports of Kandla and Mundra. The timber imported is in log, rough square and sawn forms and classified under Chapter Heading 44 of Customs Tariff Act (CTA), 1975. Timber in logs and rough square forms falling under Chapter Sub-heading 4403 of CTA, 1975 are charged Basic Customs Duty (BCD) at the rate of 5% Adv and the timber in sawn form falling under Chapter Sub-heading 4407 of CTA, 1975 attracts BCD of 10% Adv. The Countervailing Duty (CVD) is nil in respect of all these types of timber.

1.2 During the course of investigation of cases against various importers for undervaluation of timber imported from various countries, evidences of undervaluation in timber imports made by the importer were found in the emails of India based middleman/supplier Shri Avinash Jindal. Based on the above evidences, searches were conducted at the office premises of the importer on 19.12.2013 and certain relevant records were recovered under Panchanama.

1.3 Shri Avinash Jindal during his statement dated 05.09.2011, intra-alia deposed that as regards to raising the invoices in the name of his purchasers and had an arrangement with Amitabh Saboo of Dubai for raising the bills on the letter head of latter's company M/s Vinayak Impex FZE, Dubai; that sometimes the invoices were directly raised by his suppliers such as M/s Janki Exports on the parties; Noticee No.3 admitted that the invoices submitted to Customs contains values lesser than actual for the purpose of avoiding paying more duties which is true both in case of imports made in the name of his firm M/s A.K. International and in the name of other importers; that the invoices for the suppressed rates are prepared based on the instructions of the importers and the same are sometimes made in his office at Gandhidham on the letterhead of Amitabh Saboo's company M/s Vinayak Impex FZE, Dubai; that the money to the suppliers is sent through Amitabh or through the parties in whose name the import bill will be raised; that Letter of Credit (LC) or Document against Payment (DP) will be raised to the extent of the amount reflected in the invoice and the balance amount is transferred by the party through other sources to M/s Vinayak Impex FZE, Dubai or to Bhavik Rathod in Sudan as per his instructions; that in the copies of mails submitted by him there are mails sent to various importers with account details of material supplied and dues pending; that there are also mails sent to importers with offers of various materials; that in his sent emails there are details of containers along with actual rate of material sold to M/s Batra Timber.

1.4 Scrutiny of the copies of sent emails submitted by Shri Avinash Jindal revealed as under:

1.4.1 Page No. 594 (Annexure-A.3 of the Show Cause Notice,) the attachments to the email dated 25.6.2011, seen at page No. 601, contains a packing list of 5 containers of timber with quantities, type of material and rate and total value (both appearing to be in US dollars) mentioned therein. There is a column with heading "AVG" which may be indicating the quality of timber.

1.4.2 Page No. 595 (Annexure-A.4 of the Show Cause Notice) the attachments to the email dated 25.6.2011, seen at page No.601, also contains a packing list of 5 containers of timber with quantities, type of material and rates and total values (both appearing to be in US dollars) mentioned therein. There is a column with heading "AVG" which may be indicating the quality of timber.

1.4.3 Shri Avinash Jindal further, on 12.12.2013, *inter-alia*, deposed that page No. 594, 595, & 601 of copies of his sent emails are all the emails with attachments sent to importer Batra Timber for sale of Sudan timber at the actual rates/values (USD) indicated therein with details of container numbers, quantities etc also shown; that the rates declared to Customs at the time of import are much lower which was done to avoid paying higher duties; that as regards to the qualities of timber of countries other than Tanzania are identified, in respect of timber of countries such as Sudan, Ghana etc the quality is broadly identified by the average cubic feet yield of the timber per log/piece; that the container wise details of the packing lists received from the suppliers show a separate column with heading - Average cft/avgcft/Avg, which is the indicator of the quality of timber; that the higher the average cubic feet (cft) the better the quality; that in the absence of the details of the average cft, the same is arrived at on the basis of a formula which is as follows: the total quantity in CBM is multiplied by the number 35.315 and the resultant answer is then divided by the total number of pieces/logs of the container; that on an average there is a difference of \$10 for variation of 0.2 to 0.3 cubic feet in the timber.

1.5 Scrutiny of the import documents submitted by the importer revealed that the importer trades in various types of imported timber of countries such as Ivory Coast, Ghana, Sudan, Tanzania etc. The unit of measurement is Cubic Meters (CBM) and the currency of purchase is US Dollars (USD). The imports are mostly on C&F basis with the average rate per CBM being \$400 to \$500. There are a few high sea purchases. All the imports were at the ports of Kandla and Mundra.

1.6 Shri Rajesh Kumar Batra, Director of the importer, during his statement dated 16.02.2015 *inter alia*, deposed that in the year 1987 he started proprietary concern in the name M/s Batra Timber Traders which was closed in the year 2011 and started a company in the name of M/s Batra Timber Traders (P) Ltd with himself and his brother as directors; that they have their own saw mill at Karnal they also do the sizing of the timber bought before selling to their customers; that he looks after the entire business including purchase and sale of timber as well as he also takes care of the documentation part of the business including the accounts and matters relating to statutory obligations and he does all the negotiations with the suppliers for purchase of imported timber and payments made to them; that their major suppliers are Vinayak Impex FZE, Dubai, Alkema, Singapore, Suryadeep International etc. They had also bought timber on high seas on occasions especially from A.K. International, proprietary concern of supplier Shri Avinash Jindal; that he does all the negotiations with the suppliers for imported timber which are made over phone and sometimes through emails; that as there are a number of high sea purchases the same are negotiated over phone or across the table and sometimes, they also do the negotiations with the suppliers' representatives based in India; that qualities of Tanzanian timber are many with the best quality timber

being that of 8 inch and above width timber with followed by the quality of general silli (Majority below 8 inch width), tuckda/tukda (also shown as 3'-6') recognised by length of below 6 feet, 1.5" & 2" quality identified by its thickness, OT or outgrows (also called as commercial), 1", 0.5", repla, a type of material also sometimes referred to as tukda but similar to the lower quality material of 1" and 0.5". In the absence of the mention of the quality, the material quality is identified by the number of pieces that fit into a container. The 8" and above timber comes to about 400 to 600 pieces in a container, general silli comes to about 600 to 1200 pieces, tuckda of about 1500 to 2000 pieces, OT of about 1200 to 1500 pieces, 1.5" & 2" is about 2000 to 3500 pieces and the 1" and 0.5" timber is more than 3500 pieces in a container. The qualities of timber of other countries are identified by the average cubic feet (CFT) yield of the pieces/logs of a container. The higher the average cft the better the quality; that the copies of sent emails of Shri Avinash Jindal are all the emails with attachments sent to them by supplier Shri Avinash Jindal for sale of Sudan timber at the rates/values (USD) indicated therein with details of container numbers, quantities etc also shown. As regards to the email at page nos. 593 to 601, he wishes to submit that the material shown only at page nos. 594 and 595 were imported by them with the material at other pages been bought and imported by other parties; that he admits that the rates/values shown in these emails are the actual rates/values and the rates/values declared to Customs at the time of import were much lower which was done in order to avoid paying higher duties; that they have done undervaluation in the import of timber made by them, however, the undervaluation was made mostly in respect of import of Sudan timber with a few from Tanzania; that in respect of imports of timber of Ghana the imports were made more or less at actual rates with the material been mostly of average quality. Imports from other countries were made at actual rates. In Sudan timber the imports were mostly made at rates ranging from about \$600 to \$700 per CBM based on the quality of timber. The percentage of suppression being in the range of about 20% to 30% of the actual value. As for the Tanzanian timber which was imported on very few occasions there is value suppression of about 20% to 40% depending upon the quality of timber; that the amounts relating to the suppressed part of the transactions are transferred to the suppliers by cash to their persons locally in India when they visited their office from time to time. He promises to discharge the differential duty liabilities for imports made in respect of both of his entities; that they are a small trader in timber business and due to market compulsions they had suppressed the rates and values of material imported by them in respect of timber of Sudan and Tanzania; that he has admitted their mistake and has fully cooperated in the investigation and he promises to discharge the differential duty liabilities in respect of Sudan and Tanzanian timber imports at the earliest and request to take a lenient view in the matter and condone.

1.7 From the analysis of the documents submitted and the statements of the supplier and the importer, it is revealed as under:

1.7.1 The importer bought timber of various countries from a number of suppliers. The timber bought from supplier Shri Avinash Jindal was that of African countries and the same was bought at rates higher than the rates declared at the time of import in order to avoid paying more duties.

1.7.2 The details of 5 containers of material as seen in page no. 594 of the copies of sent emails of Shri Avinash Jindal (referred to as Annexure-A.3 of Show Cause Notice) was cross-checked with the import documents wherein it was found that this material was imported by the importer vide Bill of Entry No.4568171 dated 06.09.2011 at Mundra port (discussed in the duty calculation worksheets to the notice) as the container numbers, quantity and other details were matching. Here, the rate declared at \$505 per CBM in the invoice submitted at the time of import was found to be much lower than the actual rates as seen in the above copies of emails. The importer and the supplier in their depositions had admitted to the suppression of the values at the time of import for avoiding paying more duties.

1.7.3 The details seen in page no. 595 of the copies of sent emails of Shri Avinash Jindal (referred to as Annexure-A.4 of Show Cause Notice) is also a packing list of 5 containers of timber of Sudan origin which was imported by the importer vide Bill of Entry No.4076465 dated 14.07.2011 at Mundra port as the container numbers, quantities and other details were matching with details of the import documents (discussed in the duty calculation worksheets to the notice). However, the rate declared in the import bills were found to be much lower than the actual rates which are seen in the above email copy. The importer and the supplier admitted to the suppression of values for the purpose of paying lesser duties.

1.7.4 In respect of Tanzanian timber which comes in sawn form, the qualities are determined on the basis of width, thickness and length of the timber. The best quality timber is 8 inch and above width piece which has a thickness of 3 inch to 4 inch and length of 6 feet and above. The next best quality known as silli/general silli is mostly of below 8 inch width piece with same thickness of 3 inch and 4 inch and length of 6 and above feet. The timber with length of 3 to 6 feet but with the same thickness of 3 and 4 inches and width below 8 inch is known as tukda which is sometimes shown as 3 '-6' or 3 '-5'.9" material in the packing lists. Other grades are known by their thickness such as 1.5" and 2", 1" and 0.5" and the lengths of these grades consists both below and above 6 feet with no reference to width. As seen from the packing lists and as deposed by the supplier, a 20 foot container load of 8" and above width material contains about 400 to 500 pieces, the next quality of silli/general silli (also shown in the packing lists and discussed above as A, B etc) has about 700 to 1200 pieces in a container, tukda quality is about 1500 to 2000 pieces in a container, 1.5" & 2" thickness quality material identified by their thickness will be about 2000 to 3200 pieces in a container. The lesser quality timber known by their thickness of 1" and 0.5" come in excess of 3000 pieces in a container. Similar to this lower quality timber is timber known as repla. In the absence of mention of qualities in the packing lists, the type of material can be identified by the number of pieces of the container. Based on the details seen in the packing lists discussed and the statements of the supplier and importer, a table to understand and identify the major qualities of Tanzanian timber is shown below:

Sr No	Material type	Width	Thickness	Length	No. of Pieces
1	8" & UP (Silli)	8" & above	3" & 4"	6' & above	400 to 500
2	General Silli (H, G, I etc)	below 8"	3" & 4"	6' & above	700 to 1200
3	Tukda (also 3'-6' & 3'-5'.9")	below 8"	3" & 4"	Below 6'	1500 to 2000
4	1.5" & 2"	-	1.5" & 2"	Mix length	2000 to 3200
5	1" & 0.5"	-	1" & 0.5"	-	Above 3000

1.7.5 The qualities of timber of countries other than Tanzania which come in logs or rough square forms are broadly determined either by their girth or on the basis of the average cubic feet (CFT) yield from a log. In a number of documents seen in the files recovered/submitted, apart from the details of container numbers, quantity and no. of pieces, there is a column showing the average CFT. In the absence of the details of average CFT, as stated by supplier Shri Avinash Jindal and importer Shri Rajesh Kumar Batra, the same can be ascertained on the basis of a formula if the details of quantity in CBM and the number of pieces/logs are given. The formula for arriving at the average cubic feet of a log is as discussed above. This could be seen in the evidences found and some of which have been discussed above in respect of the imports made by the importer. This formula is used for the timber imported from Sudan. For ascertaining the quality of timber imported (in cases where the same were not mentioned in the packing lists) by the importer from these countries for the purpose of determining the rates, this formula has been adopted. It was also observed in the evidences that the variation in the average CFT by about 0.2 cft to 0.3 cft results in the rate change by \$10.

1.8 The importer has imported timber from the African countries of Sudan and Tanzania at grossly undervalued rates in order to escape from paying higher duties of Customs. Various evidences in the form of hard copies of sent emails submitted by Shri Avinash Jindal and the oral admissions of the importer, clearly establish the fact that the timber imported by the importer was not on true transaction value basis. The fact of undervaluation was also admitted by Shri Rajesh Kumar Batra, Director of the importing company in his statement referred above and the same was also corroborated by supplier Shri Avinash Jindal. Shri Rajesh Kumar Batra, Director, has admitted to undervaluation in respect of imports from Sudan and Tanzania of a percentage between 20% and 40% depending upon the quality. Taking advantage of the fact that it is difficult for a non-technical person to identify the different qualities of timber since it is a natural product coming in various sizes and forms, it appears that the importer has resorted to gross undervaluation in order to evade payment of appropriate duties of Customs. The documents submitted show cash payments of amounts pertaining to the unofficial part of the transactions. The importer also admitted to the unofficial part of the transactions having been settled through cash payments.

1.9 As per Section 14(1) of the Customs Act, 1962 read with Rule 3(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the value of the imported goods shall be the transaction value of such goods, that is the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Here, in the instant case, it is seen that the value declared at the time of importation is not the true transaction value as the documents and the depositions referred to in the foregoing paragraphs indicate that the actual transaction value of the timber imported is much higher than that declared. Hence, the value declared in the import documents is liable for rejection as per Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as that value does not constitute the correct transaction value of the goods. The values as found in the documents submitted and as arrived at on the basis of the depositions made by the persons concerned, as discussed above, are the true values and constitute the correct transaction value of the timber

imported from time to time and the same is to be adopted for the purpose of payment of necessary Customs duties.

1.10 In all the cases of imports of timber from Sudan and Tanzania, evidence of the actual value is available (as per Annexures-C.1 & D.1 in respect of imports at the ports of Mundra and Kandla respectively) and the same can be considered as true transactional values as required under Section 14(1) read with Rule 3(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 as the case may be. The evidences of undervaluation in the import of timber were found in the copies of sent emails submitted by supplier Shri Avinash Jindal. The evidences were linked to the respective Bills of Entry on the basis of the container numbers, quantities, sometimes, also the number of pieces in a container. On the basis of the deposition of Shri Rajesh Kumar Batra, that they have undervalued the timber imported from Sudan and Tanzania between 20% and 40% of the actual value depending upon the quality of timber with the timber from Sudan mostly imported at rates between \$600 and \$700 per CBM, the actual values of the imports other than where documentary evidences were found, were arrived at. The values arrived at on the basis of the oral evidences were found to be consistent with the values of the documentary evidences. The importer is liable to pay the duties of Customs short paid on the import of timber from African countries. As per the evidences found in various documents as well as the oral submissions of the importer, the differential duty calculations have been made as per worksheet in Annexures-C.1 & D.1 with the mention of the evidences in the Evidence column of the worksheet.

1.11 The importer has deliberately undervalued the timber imported from various African countries in order to evade payment of Customs Duties to the tune of Rs.7,95,909/- and Rs.1,52,890/- in respect of imports made at the ports of Mundra and Kandla respectively. The importer has willfully and fraudulently suppressed the values of the timber imported by them in order to evade the payment of duties. The fact of values of the timber imported having been suppressed has come to light only upon search, seizure and investigation by the department. Hence, this appears to be a fit case for invoking the provisions under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962 for demanding the differential duties amounting to Rs.9,48,799/- for the extended period. Further, they also appear to be liable to pay interest under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962. The timber imported is also liable for confiscation under Section 111(m) of the Customs Act, 1962 in as much as the value declared in the import documents is not true and correct. For their acts of omissions and commissions in the matter of suppression of values for evading customs duties, the importer is also liable for penalties under Section 112(a) and under section 114A of the Customs Act, 1962. Shri Rajesh Kumar Batra is the main person in this whole episode of undervaluation as he was the one who has negotiated the price with the suppliers over phone and by email, who was involved in the making of the invoices at suppressed rates and also in the transfer of cash pertaining to the unofficial portion of the transactions to the suppliers. Shri Rajesh Kumar Batra has also admitted to his role in the fraud committed. Therefore, Shri Rajesh Kumar Batra is liable for penalty under Section 112(a)/114AA of Customs Act, 1962. Shri Avinash Jindal is liable for personal penalty under Section 112(a)/114AA of Customs Act, 1962 in as much as he has connived with the importer in suppressing the values of

the timber supplied by making the invoices at lowervalues and collecting the suppressed part of the transactions in cash. Shri Avinash Jindal and Shri Rajesh Kumar Batra have also admitted to wrong doing in his depositions.

1.12 Therefore, Show Cause Notice No. DRI/HZU/VRU/26/ENQ-01/(INT-NIL)/2015 dated 17.03.2015 was issued accordingly,

1.12.1 M/s Batra Timber Traders (P) Ltd., Karnal was called upon, in respect of imports at Mundra port, to show cause as to why,

(i) The assessable values declared in the Bills of Entry at the time of import of timber at the port of Mundra (as detailed in the Annexure-C.1 to the notice) should not be rejected under Rule 12 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Section 14(1) of the Customs Act, 1962 for the imports that were made during the period from July 2011 to October 2014;

(ii) The assessable values should not be re-determined as per the values found in the various documents and as arrived at based on depositions as detailed in the Annexure-C.1 to the notice, as per Section 14(1) of the Customs Act, 1962 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, for the imports that were made during the period from July 2011 onwards;

(iii) The differential duties of Rs.7,95,909/- (detailed in Annexure-C.1 to the notice) should not be demanded from them under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962;

(iv) Interest on the differential duties should not be demanded from them under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962;

(v) The goods of a value of Rs.5,37,52,672/- imported against the various Bills of Entry as detailed in Annexure-C.1 to the notice should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962 ;

(vi) Penalties should not be imposed on them under Section 112(a)/114A of the Customs Act, 1962;

1.12.2 Shri Rajesh Kumar Batra and Shri Avinash Jindal was also called upon to Show Cause, in respect of import at Mundra, as to why penalties under 112(a) and Section 114AA of the Customs Act, 1962 should not be imposed on him.

1.12.3 M/s Batra Timber Traders (P) Ltd., Karnal was called upon, in respect of imports at Kandla port, to show cause as to why,

(i) The assessable values declared in the Bills of Entry at the time of import of timber at the port of Kandla (as detailed in the Annexure-D.1 to the notice) should not be rejected under Rule 12 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Section 14(1) of the Customs Act, 1962 for the imports that were made during the period from June 2012 onwards;

(ii) The assessable values should not be re-determined as per the values found in the various documents/records and as arrived at based on depositions, as detailed in the Annexure-D.1 to the notice, as per Section 14(1) of the Customs Act, 1962 read with Rule 3(1) for the imports that were made during the period from June 2012 onwards;

(iii) The differential duties of s.1,52,890/-)as detailed in Annexure-D.1 to thenotice should not be demanded-from them under Section 28(4) [erstwhileproviso to Section 28(1)] of the Customs Act, 1962;

(iv) Interest on the differential duties should not be demanded from them underSection 28AA [erstwhile Section 28AB] of the Customs Act, 1962;

(v) The goods of a value of Rs 30,84,648/- imported against the Bills of Entry asdetailed in Annexure-D.1 to the notice should not be held liable forconfiscation under Section 111(m) of the Customs Act, 1962 ;

(vi) Penalties should not be imposed on them under Section 112(a)/114A of theCustoms Act, 1962.

1.12.4 Shri Rajesh Kumar Batra and Shri Avinash Jindal was also called upon to Show Cause, in respect of import at Kandla, as to why penalties under 112(a) and Section 114AA of the Customs Act,1962 should not be imposed on him.

1.13 The SCN was answerable to the Additional/Joint Commissioner of Kandla in respect of import made at Kandla port and to the Additional/Joint Commissioner of Mundra in respect of import made at Mundra port. The CBEC Vide Notification No. 129/2016-Customs (NT) dated 25.10.2016, has appointed the Principal Commissioner/Commissioner of Customs, Custom House, Kandla as Common Adjudicating Authority to adjudicate the present Show Cause Noticee.

DEFENCE:

2.1 Shri Amit Ladda appeared on behalf of the importer on 31.01.2017 appeared for personal hearing. He filed many case laws at the to me of PH and requested 15 days time to file rely. He requested for cross examination of Avinash Jindal. In view of Mangli Impex decision of Delhi High Court he contended that DRI has no power to issue SCN for the demand prior to 2011. NO incriminating documents were found in their premises. Even now the valuation of timber remained same as it was assessed by the customs during relevant time. Statements were recorded under duress and without showing any evidence to the person from whom they have recorded the statements. email of Avinash Jindal and other have no evidentiary value and they are not aware why he referred to some of the importers name in mails and these mails were never marked to them. He has reiterated all the submission made in their reply to SCN as there is no evidence of undervaluation in any of these cases. He requested to drop the proceedings.

2.2 The importer submitted final submissions on 13.02.2017, wherein they submitted as under:

(i) The statements of Shri Rajesh Kumar Batra were recorded under duress and under coercion and there are no cogent and tangible evidences to substantiate the allegations of the Revenue that they have declared the lower value of the imported goods for evasion of customs duty, except statements and e-mails.

(ii) The e-mails alleged to be found were addressed to the importer by Shri Avinash Jindal however, no emails were found to be sent in response to the incoming emails, which proves that the alleged emails do not pertain to the

importer and cannot lead to the conclusion that the importer were involved, in any manner, with the alleged undervaluation of the imported timber.

(iii) There are no incriminating documents were found during the course of investigation except note book that was recovered during the search and contents of the note book has no relevance with the import of the goods under dispute.

(iv) Emails retrieved from the email ID of the importer do not find any objectionable contents leading to the conclusion that the importer was involved in undervaluation of the timber.

(v) The charges framed in the Show Cause Notice are based purely on assumptions and presumptions, without corroborating the same with any concrete evidence. Reliance placed on citations of Vijay Leather Stores Vs. C.C.- reported in 2007 (215) ELT 304 (T); Adani Exports Ltd. Vs. C.C. reported in 1999(111) ELT 143(T) maintained by the Hon'ble Supreme Court in 2004 (167) ELT 131 (SC); C.C. Vs. Blue Star International reported in 1996 (81) ELT 287 (T)

(vi) The Directorate of Revenue Intelligence has initiated investigations against some other importers also in connection with undervaluation and therefore reliance placed by the investigating authority for enhancement of the value in respect of the disputed consignments is pre-mature and cannot be relied upon at this point of time.

(vii) The Show Cause Notice refers to their own imports for enhancement in value of the disputed consignments; the Noticee stated that they have not accepted the allegations and charges. The value declared by the noticee is true and correct transaction.

(viii) There is not even an iota of evidence except oral statements on record to show that the Noticee transferred the alleged differential value of the imported goods to the suppliers of the goods or their agents.

(ix) It is submitted that the importer never made payments for the imported goods to Shri Avinash Jindal on behalf of the suppliers.

(x) The Show Cause Notice referred to the statement dated 05.09.2011 of Shri Avinash Jindal and alleged that print out of packing list and account statements retrieved from the hard disk recovered from of premises were sent to various importers and such documents show higher price at which the imported goods were sold to various importers. The importer is not concerned with such printouts as the same were never sent to the importer.

(xi) Their sales price in the domestic market is a comparable price with the value of imported goods at which other importer sold the goods.

(xii) Where documentary evidence are available, the same being primary forum of evidence shall be preferred over oral testimony. Reliance placed on citation of Philip Fernandes vs. CE 2002 (146) ELT 180 (T).

(xiii) It is settled law that the burden is upon the revenue to show that value declared is not true and correct value. The burden has to be discharged with cogent and tangible evidence. Reliance placed on citation of CC Vs. Initiating Explosives (I) Ltd. 2008(224) ELT 343.

(xiv) Where there is evidence of contemporaneous import, the transaction value cannot be determined on any other basis. Reliance placed on citation of Truwoods P Ltd vs. CCE Vishakhapatnam 2006(204) ELT 288.

(xv) The statements of Shri Avinash Jindal, without corroborating the same with tangible & cogent evidences cannot form the basis for alleging undervaluation in respect of the values declared by us for clearance of the goods in dispute imported under Bills of Entry. Reliance placed on citation in the case of Akshay Exports vs Commissioner reported in 2003 (156) ELT

268 and Galaxy Funworld Pvt. Ltd. -vs- Commissioner reported in 2006 (206) ELT 890.

(xvi) If the value of goods has not been accepted as declared in the Bills of Entry, value of the imported goods needs to be determined in terms of Section 14 of the said Act read with the provisions of the said Rules instead of value proposed to be enhanced, based on price allegedly agreed by Shri Avinash Jindal and Shri Rajendra Kumar Agarwal and related e-mails retrieved from their email ids. Rule 3 of the said Rules provides that the value of the imported goods shall be the transaction value. Rule 3(1) defines transaction value to be the price actually paid or payable for the goods when sold for export to India. The transaction value for the imported goods is required to be accepted, unless the transaction in question falls under the exceptions carved out under Rule 3(3).

(xvii) The DRI authorities, after discarding the value declared, proposes to enhance the value at the price allegedly agreed with by the importer in his statements and statements of Shri Avinash Jindal. The DRI ought to have appreciated that the import price varies from time to time and from person to person. The price variation is real and the variation is in a wide range, and a particular transaction can be rejected only if there is information that the transaction in question was not a commercial transaction or that the price charged was lower on account of reasons or circumstances which have been set out under Rule 4(2) of the Customs Valuation Rules. Simple replacement of transaction value with the highest price of comparable goods is not permitted by Section 14 or the said Rules. This is contrary to market reality which is that prices vary from seller to seller and from sale to sale. In the present case, there is no specific evidence on record which brings out that transaction value between us and the foreign supplier has been influenced by non-commercial consideration and that invoice price does not reflect or reveal the real transaction value. They relied upon *Oswal Fats & Oil Vs. C.C. 2007 (220) ELT 795 (T)*.

(xviii) The price at which goods are sold at the time and place of importation and there are number of such instances and evidences of contemporaneous imports available with the Revenue on record, including the latest clearances which have occurred after the investigation started in their case. Each of the said products continue to be imported in the country at or around the same price as declared by the importer. The importer have not received any abnormal discounts/special discounts and/or reduction in price from the ordinary competitive price as well as the parties are not related to each other and therefore, none of the conditions of Rule 3(3) of the said Rules are applicable when the price is the sole consideration and there is no payment over and above the invoice price. We have not made any payments to any of our suppliers over and above the invoice values mentioned in the invoices raised by them. Once, all the conditions of Rule 3(1) are satisfied, the value is to be accepted, being the transaction value. They relied upon citations of *Eicher Tractors Limited V/s Commissioner - [2000 (122) ELT 322(SC)]*, *CCCE V/s Jai Bharat Steel Industry - [2005 (192) ELT 792]*, *Commr of Customs V/s Bureau Veritas [2005 (181) ELT 3 (SC)]*, *Bansal Industries V/s Commr. of Customs [2002 (147) ELT 967]* and *Aryan Chemicals Order dated 19.02.2013 Commissioner(Appeals)*.

(xix) The value is to be determined based on the transaction value, which is defined in Rule 3 to mean the price actually paid or payable for the goods when sold for export to India. This is also the underlying principle that Section 14 of said Act which provides that the value shall be the price at

which the goods are sold for delivery at the time and place of importation in course of event either buyer and seller have no interest in the business of each other and the price is the sole consideration.

(xx) Despite the fact that statements of importer were recorded but there is no reference therein to any excess payments made to any of suppliers, the mode of such payments, the manner in which it was made, the person through whom the payments were sent etc. There is no evidence or material available to trace the route through which the unaccounted money, if any, is said to have been delivered to our suppliers. In the complete absence of any evidence or material on the above front, it cannot at all be alleged that the importer have undervalued the imported goods.

(xxi) The various types of timber of the same country of origin as imported by the importer into the country are also imported by many other importers across India. Each of the said quality of timber was imported in each of the years for which demand has been raised by various other importers across the country. The Revenue has not challenged the valuation of other imports at all. The importer provided data in Compact Disc (CD) obtained from M/s. Info Drive and contended that each of the quality of timber is being regularly imported into the country at or about the same prices at which the importer have imported the same. Therefore the proposed re-determination of the value is unlawful and unauthorized, whereas the above data fully supports the value declared by the importer, and therefore, the question of rejecting the transaction value does not arise at all.

(xxii) As against evidence submitted by the importer in the form of contemporaneous imports, the Revenue has not led any such evidence to substantiate the allegation of undervaluation in the Show Cause Notice, except for relying upon statements of the proprietor, Shri Avinash Jindal. In terms of settled law as held by the Hon'ble Supreme Court in Eicher Tractors (Supra) and Varsha Plastics Pvt. Ltd. (Supra), it is only when evidence i.e. contemporaneous imports is led that declared value can be rejected. They also relied upon citation of Commissioner of Customs, Calcutta V/s South India Television (P) Ltd. 2007 (214) E.L.T. 3 (S.C.).

(xxiii) In respect of some Bills of Entry impugned in the captioned Show Cause Notice, the value declared by the importer was initially rejected by the Revenue and enhanced the same by comparing with value of the contemporaneous imports after inspecting contents of the containers physically and examining the goods. Since the above referred Bills of Entry were already re-assessed, the same cannot be again re-opened for enhancement of value. The importer relied upon the details of Bills of Entry which were re-assessed by the Customs Revenue when produced and provided sample copies of invoice and assessed Bills of Entry show that the bills of entry were re-assessed

(xxiv) The importer have been importing the identical goods by declaring more or less the same price at which imported the consignments before the initiation of the investigation. If the importer indulged in mal-practice as alleged in the captioned Show Cause Notice, the importer would have stopped importing the goods after investigation and declared higher price, which shows that the value declared in the disputed period is true and correct value.

(xxv) The demand for duty under the captioned show cause notice in respect of the Bills of Entry under the provisions of Section 28 of the said Act is not sustainable. The demand in the above notice has been raised under Section 28(4) of the Act (Erstwhile 1st proviso to Section 28(1) of the said Act) by

invoking the larger period of limitation. There was no mis declaration and/or suppression of facts and/or fraud played by the importer with an intention to evade payment of correct duty leviable on the said products. Moreover, when the revenue itself has been accepting the values declared by the importer, there is no question of alleging any under-valuation at all, much less can the revenue allege mis-declaration and/or suppression of facts to invoke the larger period of limitation. The importer has declared the correct assessable values in respect of the said products in the Bills of Entry filed for clearance of the same. There is no reason whatsoever for issuing the notice demanding differential duty under the larger period of limitation under the Act. Therefore, the demand of differential duty in respect of Bills of Entry filed during the disputed period is not sustainable at all.

(xxvi) Since no duty under the provisions of Section 28 of the said Act is payable at all, there is no question of payment of interest under Section 28AB thereof.

(xxvii) The values and quantities declared in the Bills of Entry have been correctly stated and reflects the transaction value of the goods in question in terms of Section 14 of the said Act read with Rule 3 of the said Rules, the charge of mis-declaration of value is unsustainable and accordingly the provisions of Sections 111(m) and 111(l) of the said Act cannot be invoked and/or pressed for confiscation of the goods and therefore, no penalty under Section 112 can be imposed upon us and/or the undersigned.

(xxviii) Since no duty can be demanded under the provisions of Section 28(4) (Erstwhile 1st proviso to Section 28 (1)) of the said Act, no penalty under Section 112/114A thereof can be imposed.

(xxix) The goods were cleared without furnishing any bond or security, redemption fine cannot be imposed in view of decision of Shiv Kripa Ispat Ltd reported in 2009 (235) ELT 629 (Tri.L.B) and CCE Vs. Raja Impex (P) Ltd. reported in 2008 (229) ELT 185 (P&H).

(xxx) There is no contumacious conduct and/or deliberate defiance of law with an intention to evade payment of duty and/or to defraud the ex-chequer of its legitimate dues and, therefore, no penalty at all can be imposed.

(xxxi) The importer sought cross examination of Shri Avinash Jindal and requested to drop the proceedings.

2.3 Shri Sanjiv Kumar and Shri Rahul Joshi of M/s. LA Tax Associated, appeared for personal hearing on behalf of Shri Avinash Jindal on 19.01.2017. He has submitted written submission and reiterated the same. Bill of Entry and calculation of duty mentioned in the SCN was not provided to them they deny that they are the supplier of the goods. They are neither importer or exporter. Sale price is finalized between the importer and exporter only. He gets only commission from the overseas supplier only. No financial dealing are there with the importer. There is no violation of the provisions of the Customs Act, 1962 to attract penal action under Section 112(a) and 114AA of the Customs Act, 1962. DRI is not empowered to challenge the assessment made by the customs authorities, after due assessment and examination and after clearance of the goods.

2.4 Shri Sanjiv Kumar and Shri Rahul Joshi of M/s. LA Tax Associated, filed defence reply dated 19.01.2017 on behalf of Shri Avinash Jindal, wherein submitted as under:

(i) The allegations made in the Show Cause Notice are absolutely false, baseless and is based on presumptions and wrong application of mind on facts & legal provisions.

(ii) The present case is based on the untrue appreciation of the facts and evidences, resultant into the issuance of the present SCN. The present case is purely based on the false impressions about the data and records perused and non appreciation and lack of proper understanding about the accuracy and correctness of the records, data, facts, circumstances and other evidences already on the record with the Department.

(iii) Shri Avinash Jindal is in the business of trade of timber through his friends in African countries. He acts as an agent of the overseas suppliers and for which he receives remuneration/ margin of profit from the overseas suppliers. Shri Avinash Jindal had never taken any remuneration for any purpose from the importer.

(iv) There was no instance of alleged abetment in the instant case with the importer in any manner. There is nothing on record resumed by the department or in the given circumstances that the Noticee had abetted in undervaluation or otherwise *w.r.t.* the import in any manner. The Noticee, merely acted as the agent of the foreign based suppliers in India who procures the order for their product in India and forwards the same to them.

(v) It is also not the case as per Show Cause Notice that Shri Avinash Jindal had contravened any provision of this Act or abetted any such contravention or failed to comply with any provision of this Act with which it was his duty to comply to attract the provisions of Section 112(a) & 114(AA) upon them.

(vi) It is evident on record that the impugned SCN is barred by time since the same has been issued on 19.11.2014 i.e. about 41 months after initiation of enquiry i.e. searches at the office & residential premise of all the Noticee no. 2 were conducted on 27.06.2011 wherein the alleged records were resumed. It is apparent from the records that the same is purposefully delayed. Therefore, it is time barred and is not sustainable. It is settled principle of law that Notices issued after such a long gap of time are not sustainable on the anvil of limitation. Placed reliance on the citation Collector v. Mopeds India Ltd. 1991 (53) E.L.T. A79 (S.C).

(vii) Noticee requested to refer to the Column No. 2 & 3 of Annexure C.1& D.1 to the SCN i.e. *"worksheets of differential duty calculation for values arrived at on the basis of evidences found"*, bearing numbers of alleged Bills of Entry on the basis of which differential duty is calculated. As a matter of fact, neither the concerned Bills of Entry are made RUDs nor any alleged Bill of Entry is provided to the Noticee. Entire case of the Investigating Agency is undervaluation of imported goods *w.r.t.* value declared in the concerned Bills of Entry at the time of import of goods.

(viii) Various Panchnamas were drawn at various places & several documents were resumed/seized from the said premises and subsequently statements were recorded. However, only some of the resumed documents & statements were relied upon in the SCNs, which were specifically mentioned as "Relied upon Documents (RUDs)". CBEC vide circular No. 42/88 -CX dated 24.05.1988 and No.48/88-CX, dated 10.06.1988 reiterated in Letter F. No. 207/09/2006-CX.6, dated 08.09.2006, has provided that the seized documents should not be retained beyond sixty days, if they are not being relied upon in the departmental proceedings. Reliance placed on citation in case of Avery India Ltd. vs. Union of India, 2011 (268) E.L.T. 64 (Cal.).

(ix) A long distance between 'May Be True' and 'Must Be True' which must be covered by legal and impeachable evidence, which is absent in the entire Show Cause Notice and the evidences relied upon therein. To invoke such harsh penalty provisions based upon such flimsy evidences would have been

nothing but presumptive. The allegations made against Noticee no. 2 are not specific to determine the role of the Noticee no. 2 in the violation of the provision of the Customs Act, 1962 or in connivance to the importer, as to how Noticee no. 2 has contributed in the evasion of the Customs Duty which attracts the penalty under Section 112 or Section 114AA of the Act.

(x) The evidences/documents relied upon also suffers with major defects which render the authenticity of the said documents/ evidence doubtful.

(xi) The Noticee had always co-operated in all manners and at all times by providing requisite information/documents and by appearing before the concerned officers. Placed reliance on the case of *CCE, Chandigarh Vs Punjab Laminates Pvt. Ltd. 2006 (202) ELT 578 (SC)*.

(xii) The DRI, Zonal Unit, Hyderabad has no legal authority to review the case or re-open the assessment when the assessment had been already finalized and no appeal had been filed by the concerned authorities before the jurisdictional Appellate Authority. As per factual legal position no appeal was preferred by the concerned Customs Authorities in case of non-acceptance of the assessment of the Bills of Entry.

(xiii) The DRI has not appreciated the fact before issuing the SCN that for the purpose of carrying out any investigation proceedings as the same cannot take the role of the Assessing Officer appointed at the concerned ports for the imports. Relied upon citation in the case of *Mangali Impex Ltd. Vs. Union of India & others W.P.(C) 441/2013, C.C. v. Sayed Ali [2011 (3) SCC 537 = 2011 (265) E.L.T. 17 (S.C.)]* and *Chandna Impex Pvt. Ltd. v. C.C. [2011 (7) SCC 289 = 2011 (269) E.L.T. 433]*, in the case of *Commissioner of Customs v. Sayed Ali 2011 (265) E.L.T. 17 (S.C.)*.

(xiv) Based on citation in the case of *Raza Textiles Ltd.v. Income-Tax Officer, Rampur* reported in (1973) 87 ITR 539 contended that when the jurisdictional fact is lacking the action of the authority of issuing notice and assuming jurisdiction would be rendered invalid. In case of *Union of India v. Ram Narain Bishwanath* reported in 1997 (96) E.L.T. 224, the Apex Court was held that it is only the Customs Authority where the goods are imported would have jurisdiction to issue and adjudicate on the issues connected thereof.

(xv) Noticee further rely on the decisions reported in *Nylex Traders v. CC (Preventive), Mumbai [2011 (274) E.L.T. 71 (Tri.-Mumbai)]*, *Deepak Agro Foods v. State of Rajasthan [2008 (228) E.L.T. 510 (S.C.) = 2009 (16) S.T.R. 518 (S.C.)]* *Kiran Singh & Others v. Chaman Paswan & Others [AIR 1954 SC 340]*, *Jagmittar Sain Bagat & Others v. Director, Health Services, Haryana [2013 (10) SCC 136]* and *Shree Subhalaxmi Fabrics Pvt. Ltd. v. Chandmal Baradia & Others [2005 (10) SCC 704]* and submitted that the DRI has no power to reassess the imported goods, where jurisdiction is exercisable by the "customs officers" only, who has already assessed the said Bill of Entry.

(xvi) Imposition of penalty on the basis of email correspondence is not sustainable. The present SCN has not specified the exact role of the Noticee. The allegations are imposed are very general in nature which are merely based upon assumption. The SCN is vague in respect to the exact role in the said alleged imports. Noticee kept at the same footing on the basis of the documents resumed from their premises. The documents resumed from the possession of the importer cannot be used against the Noticee without any corroboration.

(xvii) The root and the basis of the present SCN is erroneous, inasmuch as that it refers the Noticee as "Supplier" whereas, the Noticee, in the instantaneous case, is purely an agent of the foreign based suppliers, i.e., the exporters.

(xviii) As an agent of the exporters, the Noticee has a limited role that the Noticee is merely responsible to procure orders for the foreign suppliers from the Indian customers against which he is paid remuneration/margins as profit by the exporters.

(xix) The emails have been misconstrued and misconceived by the investigating agency to mean as “undervaluation” being resorted to by the Noticee in connivance with the importer, the transaction value of goods to be imported or so imported always remained the subject matter of decision between the foreign suppliers and the Importer. The Department has not proved that the Noticee has been benefited in alleged helping/ conniving with the Importer in the said alleged mis-declaration of the value in as much as that there is no such evidence on record that the Noticee earned anything in money or in kind for the said transaction.

(xx) The penalty upon the Noticee has been proposed by the DRI solely on the basis of unrealistic data i.e. emails and statement of the alleged Director of the co-Noticee importer without any corroborative evidences on record to prove their case. The stand of the DRI/ Department as to non-compliance of the law laid down by the Act is *void-ab-initio* in as much as that there is no evidence to prove that the Noticee is in any case linked with the said import firm or the amount other than that declared value was received or routed through the Noticee in respect of import transactions at or about the time of Import.

(xxi) The investigating agency has neither collected any evidence pertaining to the rates from the foreign suppliers nor called the said suppliers for the purposes of recording their statement so as to get the actual sale particulars from them, the investigating agency has failed to adduce any evidence itself and moreover, they have also failed to give due consideration and weightage to the material evidences which were already available on record like the trail of cash for alleged transfer of amounts etc.

(xxii) In absence of any corroborated evidences, the mere statement of the Noticee or co-Noticee cannot be used, unless the same has been corroborated with the other evidences. Reliance is placed on citations in the case of *Noor Aga v. State of Punjab & Anr.* [2008 (9) SCALE 681], *Shanti Prasad Jain v. The Director of Enforcement* [(1963) 2 SCR 297], *Mirah Exports Pvt. Ltd. v. Collector of Customs* [(1998) 3 SCC 292], *E. Kesavan vs. Assistant Collector of Customs (Prosecution), Preventive Department, Customs House, Madras* : 1987 (27) E.L.T. 640 (Mad.), *East End Dwelling Co. Ltd. v. Finsbury Borough Council* - (1951) 2 All ER 587.

(xxiii) The investigating officers of DRI have failed to correlate the alleged documents/records with the Noticee and thus, they have grossly erred in alleging the Noticee responsible for all the said documents and treating the India based supplier without any cogent evidence

(xxiii) The comparison of price data for determination of value of the particular timber cannot be made due to variations in aspects like quantity, quality, grade, size etc. of the timber imported every time. As a matter of fact the timber imported is a natural resource, and the same cannot be uniform; that the same were being imported in containers in bulk which contains the timber of various sizes, shapes, forms etc. hence, an average rate is determined upon which the Customs Duty is assessed by Customs Authorities.

(xxiv) The fact about the quantity, weight, sizes etc. imported in the instant case are well within the knowledge of the Customs Authorities and upon complete satisfaction of the said authorities, the Customs Duty was

calculated, paid and subsequently, the said goods were released. Hence, the question of undervaluation, especially at this juncture, does not arise at all.

(xxv) The value declared by the importer is a price upon which the said goods are still being imported in the ports. There exist various contemporaneous imports wherein the timbers from respective countries were being imported at approximately same values as declared by the importer at the time of import of the said goods. The said fact is a verifiable fact and can be easily verified by the present authorities concerned.

(xxvi) The DRI has erred in proposing penalty under Section 112(a) & Section 114AA of the Customs Act, 1962 against the Noticee for the alleged imports at Kandla & Mundra Ports by portraying him responsible for mis-declaration in respect to valuation, without substantiating it with cogent evidences on record, hence, the non acceptance of the documentary evidences presented by the Noticee in their defense devolves the burden of proof upon the department to support their allegations. Hence, the department cannot impose penalties upon the Noticee as the onus of proof is upon the department and the Noticee has not contravened any provisions of the Customs Act, 1962 to attract penalties.

(xxvii) The Show Cause Notice has not alleged that any part of the duty so evaded has been passed on to the Noticee or the Noticee has connived in the entire operation for pecuniary consideration. There being no allegation of any financial gain, the imposition of penalty cannot be sustained in the eyes of law. Places reliance upon the citation in the case of Impex Enterprises vs. Commissioner of Customs (Mumbai) 2007-TIOL-452-CESTAT-MUM.

(xxviii) The association of the Noticees was limited only to the extent of facilitating the purchase and sale of timber amongst the buyers and sellers in India and is in no way concerned with the undervaluation of goods imported. The Noticee places reliance upon the citation in the case of Shri Sanjay Dave vs. Commissioner of Customs, Kandla 2009-TIOL-549-CESTAT-AHM.

(xxix) The Noticee being an agent cannot be said to be involved in the undervaluation of imported goods by the importer. The innocent association of the Noticee with the importer cannot be construed as an offence defined under section 112 of the Act and hence, the imposition of penalty on the Noticee cannot be countenanced.

(xxx) The rates and other details mentioned therein have neither been verified from the actual figures nor the details as to names and agreement made by the importer with Overseas Suppliers have been corroborated.

(xxxi) The DRI has not collected any corroborative evidence likewise written acceptance of offer and has not evidenced by flow of money from the Noticee to Suppliers to establish the allegation of Import of goods on higher values as compared to the rates so declared by the Noticee. There is no role of Noticee in such financial transactions between importer and suppliers. Therefore, imposition of penalty on the basis of such unlawfully retrieved data is bad in law as Shri Avinash Jindal has no role in the alleged undervaluation.

(xxxii) The DRI has failed to produce proper evidences in this regard to substantiate their claim to impose penalty under Section 112(a) & Section 114AA of the Customs Act, 1962.

(xxxiii) Invoking the penal provisions under Section 112(a) of the Customs Act, 1962 against Shri Avinash Jindal, clearly shows that they have not followed the principle of natural justice and arbitrarily invoked penalty provisions under Section 112(a) of the Customs Act, 1962 without substantiating the basis for the same with appropriate evidences and documentary proof.

(xxxiv) The provisions of Section 114 AA of the Act *ibid* are primarily related for use of false and incorrect material in the transaction of business for the purposes of the Act. There is nothing on record that the Noticee had used any false and incorrect material for transaction of any business *vide* the provisions of Customs Act, 1962. Thus, invoking penalty provision under said Section as it is not applicable to the Noticee.

(xxxv) Consolidation of penalties under different provisions for the same acts is held to be not legally permissible. Further, there is no such allegation *vis-à-vis* the relevance of Section 114 AA of the Act *ibid* in the instant case even for such consolidation and even individually. There is no justification of separate penalty under Section 112 when there is a penalty imposed under Section 114AA. Reliance placed on citation reported at 2011(268)ELT 94(Tri).

(xxxvi) There exists no reasonable justification of the imposition of penalty under Section 112(a) & Section 114AA of the Customs Act, 1962 against the Noticee no. 2 as there exist no *mens rea* on the part of the Noticee to violate the provisions of the Customs Act, 1962.

(xxxvii) The allegation that the Noticee has collecting the suppressed part of the transaction in cash is absolutely wrong and baseless as the Noticee is not the supplier of goods; the said goods are being directly imported by the importer from the supplier overseas; the Noticee has no bank account in the name of supplier in India or abroad; or the beneficiary of the transaction of the sale; as the goods are being supplied from abroad and the payment is directly being made to the supplier. There exists no transaction or exchange of money in between the importer or Shri Avinash Jindal; that there is no evidence with the department to substantiate the allegation that there is any cash transaction in respect to the goods imported under the specified Bills of Entry; that nothing specified in the impugned SCN as to how much the Noticee has allegedly connived in each transaction, who paid, what was the declared value or where and how value above the declared value received, how it was handed over to the overseas supplier etc.

(xxxviii) No contravention of the provisions of the Customs Act 1962 can be ruled against the Noticee, thus, no penal provisions are attracted.

(xxxix) Noticee requested to drop the proceedings with respect to the Show Cause Notice.

FINDINGS:

3.1 I have carefully gone through the records of the case, Show Cause Notice, submissions made by the importer, Shri Avinash Jindal, record of cross examination as well as submissions made at the time of Personal Hearing.

3.2 The issue in the present proceeding to decide as to whether:

- (i) the value declared by the importer, in respect of import of timber made July 2011 onward, is liable to be rejected in terms of the provision of Section 14(1) of the Customs Act, 1962 read with Rule 12 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and required to be re-determined in terms of Section 14(1) of the Customs Act, 1962 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- (ii) consequent to re-determination of value of imported timber, the differential duties of Rs. 7,95,909/- (Mundra Port) and Rs. 1,52,890/- (Kandla Port) is liable to be confirmed and demanded under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962,

along with interest under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962 and with consequential penal action under Section 112/114A of the Customs Act, 1962;

- (iii) the goods imported by resorting undervaluation and mis-declaration of quantity are liable to be held liable for confiscation under Section 111 (m) of the Customs Act, 1962;
- (iv) Shri Avinash Jindal is liable for penalty under 112(a) and Section 114AA of the Customs Act, 1962.
- (v) the DRI Hyderabad have jurisdiction to investigate the cases for the import made at Kandla & Mundra

3.3 The importer had imported timber in log, rough square and swan form from various countries viz. Ivory Coast, Ghana, Tanzania and Sudan. The importer sought clearances of said timber by filing Bills of entry at Kandla and Mundra port, wherein unit of measurement of imported timber was mentioned as Cubic Meter (CBM) and declared value of imported goods between USD 400 and USD 500 per CBM.

3.4.1 Based on intelligence that the importer evaded duty of Customs by resorting undervaluation of timber imported in form log, rough square and swan form from various countries with aid of Shri Avinash Jindal, officers of Directorate of Revenue Intelligence, initiate investigation with the importer, and Shri Avinash Jindal. During investigation, searches at various premises of the importer and Shri Avinash Jindal were conducted and recovered incriminating documents and computer hard discs.

3.4. The evidences which were brought on record to ascertain undervaluation are as under:

3.4.1 Relevant copies of sent emails submitted by Shri Avinash Jindal are as under:

- (i) Page numbers 593 to 596 of sent emails are the details of containers along with actual rates of material sold to the importer.
- (ii) Page No. 594 (Annexure-A.3 of the Show Cause Notice,) the attachments to the email dated 25.6.2011, seen at page No. 601, contains a packing list of 5 containers of timber with quantities, type of material and rate and total value (both appearing to be in US dollars) mentioned therein. There is a column with heading "AVG" which may be indicating the quality of timber.
- (iii) Page No. 595 (Annexure-A.4 of the Show Cause Notice) the attachments to the email dated 25.6.2011, seen at page No.601, also contains a packing list of 5 containers of timber with quantities, type of material and rates and total values (both appearing to be in US dollars) mentioned therein. There is a column with heading "AVG" which may be indicating the quality of timber.

3.5.1 From the evidences, supra, collected in respect of import of timbers by the importer such as the recovered/retrieved documents and submitted emails communications, when cross-checked, on the basis of the container numbers, quantities, the details of import of timber mentioned therein, with the import documents of the importer mentioned under various Bills of Entry filed at ports of Kandla and Mundra, revealed that value of imported timber, which was declared by the importer in the B/Es were found less than the value as mentioned in the private records.

3.5.2 I have gone through all the evidences which were gathered by recovery of documents, submitted by the all Noticees and oral evidences recorded during the investigations, examination and analysis of these evidences, and these documents mainly demonstrate as under:

- (i) The importer imported timber of various countries from a number of suppliers.
- (ii) The timber imported from African countries through supplier Shri Avinash Jindal was imported by resorting gross undervaluation with an intent to avoid paying more duties.
- (iii) The importer has admitted to importing timber from Sudan at rates 20% to 30% lower than the actual rates and timber from Tanzania at rates 20% to 40% lower than the actual rates.
- (iv) Page No. 594 (Annexure-A.3 of the Show Cause Notice,) the attachments to the email dated 25.6.2011, seen at page No. 601, contains a packing list of 5 containers of timber with quantities, type of material and rate and total value (both appearing to be in US dollars) mentioned therein. There is a column with heading "AVG" which may be indicating the quality of timber.
- (v) Page No. 595 (Annexure-A.4 of the Show Cause Notice) the attachments to the email dated 25.6.2011, seen at page No. 601, also contains a packing list of 5 containers of timber with quantities, type of material and rates and total values (both appearing to be in US dollars) mentioned therein. There is a column with heading "AVG" which may be indicating the quality of timber.
- (vi) The qualities of Tanzanian timber are as under:
 - (a) best quality timber being that of 8 inch and above width timber;
 - (b) The quality of general silly (majority below 8 inch width);
 - (c) tukda/tukda (also shown as 3'-6') recognized by length of below 6 feet;
 - (d) 1.5" & 2" quality identified by its thickness;
 - (e) OT or outgrows (also called as commercial);
 - (f) 1", 0.5";
 - (g) repla, a type of material also sometimes referred to as tukda but similar to the lower quality material of 1" and 0.5".
- (vii) In the absence of the mention of the quality, the material quality is identified by the number of pieces that fit into a container. The 8" and above timber comes to about 400 to 600 pieces in a container, general silly comes to about 600 to 1200 pieces, tukda of about 1500 to 2000 pieces, OT of about 1200 to 1500 pieces, 1.5" & 2" is about 2000 to 3500 pieces and the 1" and 0.5" timber is more than 3500 pieces in a container, as under:

Material type	Width	Thick ness	Length	No. of pieces
8" & UP (<i>Silli</i>)	8" & above	3" & 4"	6' & above	400 to 500
<i>General Silli</i> (seen in packing lists as H,G,I)	Below 8"	3" & 4"	6' & above	700 to 1200
<i>Tukda</i> (also seen as 3'-6' & 3'-5'.9")	Below 8"	3" & 4"	Below 6'	1500 to 2000
1.5" & 2"	-	1.5" & 2"	Mix length	2000 to 3500
1" & 0.5"	-	1" & 0.5"	-	Above 3000

(vii) The qualities of timber of countries other than Tanzania which come in logs or rough square forms are broadly determined either by their girth or on the basis of the average cubic feet (CFT) yield of a log. In a number of documents as seen in the files recovered/submitted, apart from the details of

containernumbers, quantity and no. of pieces, there is a column showing the averageCFT. In the absence of the details of average CFT, as explained by Shri Avinash Jindal and proprietor of importer Shri Rajesh Kumar Batra, the same can be ascertained on the basis of a formula based on quantity in CBM and number of pieces/logs. The formula for arriving at the average cubic feet of a log [CFT= Total quantity in CBM multiplied by 35.315 and divided by total number of pieces]. On cross-checking the CFT of some packing lists with the help of the formula also indicated that this method is right. The higher CFT denotes better quality and consequently higher price. This formula is used for the timber imported from Sudan, and Ivory Coast. For ascertaining thequality of timber imported (in cases where the same were not mentioned in thepacking lists) by the importer from Ivory Coast and Sudan for the purpose of determining the rates, this formula has been adopted. It was also observed inthe evidences that the variation in the average CFT by about 0.2 cft to 0.3 cft results in the rate change by \$10 in case of timber of Sudan. The importerdeposed that there would be a \$10 difference in rate for every 1 cft change in quality in respect of timber of Ivory Coast.

3.6.1 The importer has imported timber from various countries such as Tanzania, Sudan, Ivory Coast, by resorting gross undervaluation with intention to evade payment of duties of Customs.

3.6.2 The evidences are on record in the form of documents, which were recovered, submitted clearly reveal the fact that value of imported timber declared by the importer in B/Es were not true and correct transaction value. It is observed that the importer resorted to undervaluation in respect of imported timber of Tanzanian and Sudan origin. The undervaluation is also supported by evidence of cash payment particulars, which transpires from the documents as well as admitted, for the differential amount of valuation, inasmuch as, difference of amount declared as against the actual value of the imported goods.

3.6.3 As per Section 14(1) of the Customs Act, 1962 read with Rule 3(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the value of the imported goods shall be the transaction value of such goods, that the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. Whereas, in the instant case, the value declared at the time of importation is not true & correct transaction value as against the actual transaction value of the imported timber. Therefore, the value declared, by the importer, in the import documents (Bills of Entry) are liable for rejection as per Rule 12 of the Customs valuation (Determination of Value of Imported Goods) Rules, 2007. The values as reflected the documents/records recovered and those submitted at the time of the depositions are required to be considered as true values and liable to be constitute the correct transaction value of the imported timber for the purpose of payment of Customs duties.

3.6.4.1 The situation which has arisen, where in some cases, direct evidence of the actual transaction value is available as against the declared value and the actual transaction value is to be considered as true transactional value as per Section 14(1) read with Rule 3(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

3.6.4.2 The evidence in private records are correlated with the import document filed by the importer for clearance of these imported goods. I discuss an instance that a consignment consisting quantity of 76.162 CBM

of Teak Logs was imported by the importer in 5 containers and sought clearances vide Bill of Entry No. 4076465 dated 14.07.2011 by declaring rate of timber as USD 445. The import details are matched with the details mentioned in page No. 594 which is copy of sent email of Shri Avinash Jindal sent to the importer. The details mentioned in the said sent email showing actual value of import consignment as USD 48820, accordingly rate at which the timber was imported comes to USD 641 C&F per CBM. Accordingly, for the purpose to arrive at correct transaction value for the purpose of calculating appropriate amount of duties of Customs payable by the importer as against the short amount of duty paid by resorting undervaluation, corresponding admitted evidences are considered as detailed in Annexure C.1 for import at Mundra and Annexure D.1 for import at Kandla to SCN and differential duty payable arose on account of undervaluation and mis declaration of quantity of imported timber, is worked out.

3.6.5 It is worth mentioning here that during investigation evidence regarding huge cash payments by the importer are unearthed. There are clear admission regarding payment and receipt of cash towards suppressed quantity of timber. The cash payment by the importer to Shri Avinash Jindal are explained by them during deposition as differential amount of value of imported timber which were less shown in their invoices and collected over and above the invoice price. Shri Rajesh Kumar Batra, Director of the importer also admitted to made cash payment toward suppressed value of imported timber.

3.6.7 In view of the above, the undervaluation of the imported timber by the importer in import documents as against the actual value is further substantiated by the evidence of cash payment to the extent of undervaluation as well as mis declaration of quantity of the imported timber. It is a water tight case detected by DRI and proved the undervaluation beyond doubt.

3.6.8 I find that in the present case, DRI investigated the case and based on evidence proved undervaluation of timber imported by the importer. The method adopted to establish undervaluation in the present case is reasonable and appropriate to the available law in force. I find that what is revealing from the evidences are sufficient to prove undervaluation as there is no requirement to prove the case with mathematical precision. Here I would like to refer the case of Collector of Customs, Madras and Others Vs D. Bhoormull reported at 1983 (13) ELT 1546 (S.C.), wherein the Apex Court has held that this is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, or universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it-"all exactness is a fake". El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.

3.6.10.1 In the present case, I find all the Director of importer, Shri Rajesh Kumar Batra and Shri Avinash Jindal have given confessional statement recorded under Section 108 of the Customs Act, 1962, whereby categorically admitted incorrect declaration of value as well as manipulation of invoice/packing lists. In view of these confessional statements, it is established that the importer in connivance with Shri Avinash Jindal have admittedly resorted to undervaluation in import of timber with sole intention to evade payment of Customs Duty. These confessional statements recorded under Section 108 of the Customs Act, 1962 are in the nature of substantive evidence, and culpability of the concerned persons can be based on the same.

3.6.10.2 Hon'ble Supreme Court in the case of Bhana Khalpa Bhai Patel vs. Asstt. Collector of Customs, Bulsar 1997 (96) ELT 211(S.C.), has pronounced that:

"7. An attempt was made to contest the admissibility of the said statements in evidence. It is well settled that statements recorded under Section 108 of the Customs Act are admissible in evidence vide Ramesh Chandra v. State of West Bengal, AIR 1970 SC 940, and K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin, 1997 (90) ELT 241 (S.C.) = (1997) 3 SCC 721."

3.6.10.3 The Supreme Court has observed as follows in the case of Naresh J. Sukhwani vs. Union of India 1996 (83) ELT 258

"4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine."

3.6.10.4 The present proceeding is based on documentary evidences corroborated by confessional statements by the director of the importer and Shri Avinash Jindal recorded under Section 108 of the Customs Act, 1962. In these statements recorded under Section 108 of the Customs Act, 1962, there are clear and repeated admissions of the importer and Shri Avinash Jindal. I find that it is settled law that statements made to an officer of Customs are admissible in evidence under Section 108 of the Customs Act, 1962. Further the admitted facts need not to be proved as held by Hon'ble High Court of Madras in the case of Govindasamy Raghupati reported in 1998 (98) ELT 50 (Mad.).

3.6.10.5 Hon'ble Supreme Court in the case of Surjeet Singh Chhabra Vs UOI reported in 1997 (89) ELT 646 (SC) has also pronounced that confession statement made before Customs officer under Section 108 of the Customs Act, 1962 though retracted is an admission and binding since Customs Officers are not Police Officers.

3.6.10.6 In view of the above, the confessional statements under the present proceeding are material piece of evidence to establish the case for Revenue. Apex Court in the case of K.I. Pavunny Vs AC Chochin reported at

1970 (90) ELT 241 (SC) has held that when the material evidence establish fraud against the revenue, white collar crimes committed under absolute secrecy shall not be exonerated from penal consequence of law. Enactment like Customs Act, 1962 are not merely taxing statute but are also potent instruments in the hands of the Government to safeguard interest of the economy. One of its measure is to prevent deceptive of undue claim of fiscal incentives. Preponderance of probability comes to rescue of Revenue and revenue is not required to prove its case by mathematical precision. The Supreme Court has observed in *Kanhaiyalal vs. Union of India*(2008) 4 SCC 668, that specialized enactments like Narcotic Drugs and Psychotropic Substances Act, and the Customs Act, are meant to deal with the special situations and circumstances.

3.6.10.7 Hon'ble Tribunal in the case of *Chandan Steel Ltd. Vs Commissioner Central Excise & ST, Vapi* reported at 2014 (312) ELT 479 (Tri.-Ahmd.) has held that with regard to standard of proof in the departmental proceedings, revenue need not to establish an offence case with mathematical precision as required in a criminal case, instead preponderance of probability is also sufficient in Revenue's case. Further Hon'ble Tribunal in the case of *Carpenter Classic Exim Pvt. Ltd. Vs Commissioner of Customs, Bangalore* reported at 2006 (200) ELT 593 (Tri.-Bang.) has also held that in a quasi-judicial like this, we are concerned more with a pre-ponderance of probability rather than proof beyond reasonable doubt, as held by various judicial fora. Hon'ble Tribunal in the case of *Lark Chemicals Pvt. Ltd. Vs Commissioner of Customs., CSI Airport, Mumbai* reported at 2014 (301) ELT 138 (Tri.-Mumbai) has also held that It is a settled law that admitted facts not be proved and no further evidence required.

3.7.1 The importer contended undervaluation by arguing that their sales price in the domestic market is comparable with value of imported goods. The CIF price of imported goods plus expenses up to sale of the said goods and their profit margin is just near to sale value of the goods in local market. In this regard, I find that local sales indicating that the importer resorted undervaluation in local sales too, inasmuch as, the importer raising bills in correspondence to the undervalued import value and balance amount collected in cash. Thus, actual value of sale of goods in local market was also correspondingly suppressed in order to avoid other Central and State Tax.

3.7.2 Further it is submitted by the importer that in many cases, insurance policy for voyage from foreign loading port to the destination port was obtained based on the actual price and that a prudent businessman would never take a risk to insure the value of imported goods at a lesser value. I find that insurance in these cases were obtained as per the invoice value and the invoice value are disputed in this case, therefore, value shown in insurance cover note cannot be a basis to demonstrate the correctness of value of invoices.

3.7.3 The importer brought value chain description and analysis report made by Forestry and Beekeeping Division of Ministry of Natural Resources and Tourism of United Republic Tanzania to shows the sale price of sawn timber in the same country was approximately of US\$ 130 PMT as against proposed enhancement of value. In this regard, I find that before the swan timber is exported from Tanzania, there are many level of marketing channels, which

cause value addition. Therefore, the basic price of timber from Tanzania cannot be compared to CIF value of goods imported into India.

3.7.4 It is also argued by the importer that the various types of timber of the same origin were imported by many other importers across India. The Suppliers of timber had filed Export Declaration along with Release Orders in their country for clearance of goods to India. The imported based on data obtained from M/s. Info Drive contended that all qualities of timber are being regularly imported at or about the same prices at which the importer have imported the same. Since the valuation of other imports has not been challenged and accepted, the department should have accepted the price declared by the importer. In this regard, I find that in the present proceeding evidences are available on record showing actual price of imported goods as against the declared price in Bills of Entry, therefore such argument of the importer does not substantiate.

3.7.5.1 The importer drawn attention towards some Bills of Entry out of the 30 Bills of Entry, covered in the present proceeding, wherein the value declared by the importer was initially rejected by the Revenue and enhanced the same by comparing with value of the contemporaneous imports after inspecting contents of the containers physically and examining the goods. Since the above referred Bills of Entry were already re-assessed, the same cannot be again re-opened for enhancement of value. In this regard, I find that when it is found that the actual value was deliberate by suppressed and actual value is brought on record by investigation process, the actual value which is now available on record is liable to be adopted as transaction value.

3.7.5.2 Hon'ble Supreme Court in the case of Jain Shudh Vanaspati Ltd. 1996 (86) E.L.T. 460 (S.C.) has settled the issue relating reopening of order of assessment not appealed against, by issue of show cause notice under Section 28 *ibid*, in favour of Revenue and proceedings initiated by Department under Section 28 *ibid* cannot be faulted on ground that assessment not challenged or sought to be revised under Section 130 of the Customs Act, 1962. Similar view has been taken by the Hon'ble Tribunal in the case of Rahul Ramanbhai Patel Vs Commissioner of Customs. (Import), Mumbai 2010 (256) ELT 424.

3.7.6 It is also contended that investigation(s) was initiated against other importers for undervaluation of imported timber and in some of the cases, the Show Cause Notices have already been issued to them for enhancement of the value. Since the transactions referred are sub-judice, reliance placed for enhancement of the value in respect of the disputed consignments is premature and cannot be relied upon. I find that these Bs/E are cited for the purpose of cross-reference only and value sought to be enhanced are on the basis of evidence unearthed during investigation.

3.7.7 The importer claimed that the Customs Department physically inspected the imported goods and examined the goods and after examination, the imported goods were allowed for clearance, where there was no query on mis-declaration of value and quantity of goods. The process of initial clearances was on the basis of document and circumstances available at the relevant time. Now, when actual value and quantity of imported goods are on record, which was deliberately suppressed, accordingly I find that the earlier clearance cannot debar the revenue to initiate action with regard to correct

the valuation and quantity of import to actual which unearthed during investigation.

3.7.8 The importer argued that depositions of Shri Rajesh Kumar Batra was recorded under duress and coercion. I find that the statements of Shri Rajesh Kumar Batra was recorded under Section 108 of the Customs act, 1962, wherein he deposed voluntarily. However, if anything was recorded against his wish, he had legal option to retract the same in proper manner and intimate to investigating authority and offer his true version in the matter, for which he failed, therefore, argument of recording statement under duress is considered as an exercise of an afterthought. I refer and rely settled position by judgments in the case of Anil Kumar Gokuladas Kandar V/s Commissioner reported at 2007 (215) ELT A48 (SC) and in the case of Vinod Solanki V/s Union of India reported at 2009 (233) ELT 157 (SC)

3.7.9 Based on citations, the importer placed further argument that the charges framed in the Show Cause Notice are based purely on assumptions and presumptions, without corroborating with any concrete evidence. I find that from the facts on record that it is clear that number of documentary evidences indicating under-valuation and under-quantification of goods imported by the importer were recovered and the same were testified as well as corroborated through depositions of the importer and suppliers as well as other persons. These evidences are also corroborated by other evidences of contemporaneous import. From the evidences, it transpires that undervaluation were resorted to by the importer knowingly in connivance with Shri Avinash Jindal and appropriate evidence are available on record, also corroborated by depositions made by the importer and supplier. I therefore do not find any substance in argument and citation quoted are not applicable in the present case.

3.7.10 The importer sought cross examination of Shri Avinash Jindal. In this regard, I find that Shri Avinash Jindal is perpetrator of the same crime with vested interest to defraud the government revenue and cross examination of Shri Avinash Jindal is only to distort the facts and hence not allowed.

3.7.11 The contention of the Importer that DRI, Chennai have no jurisdiction to issue Show Cause Notice, I find that the Board vide Notification No.17/2002-Cus(N.T.) dated 7.3.2002 have appointed various officers of the Directorate of Revenue Intelligence having all India jurisdiction. Further the Board vide Notification No.44/2011-Cus(N.T.) dated 06.07.2011 as amended, have designated various officers as proper officers including ADG, DRI. The reliance placed by the importer on the case law was delivered on 18.02.2011 and therefore, the same is not applicable in this case in view of the Notification dated 06.07.2011. I find that CESTAT, South Zonal Bench, Bangalore in case of MRPL. Vs CC. Magalore [2014(313) ELT. 353(Tri. Bang.)] had dealt with this issue, in detail, in its final order Nos.536-537/2012 dated 8.8.2012 in Appeal Nos. C/525 and 496/2007, and decided the issue in favour of the Department. Therefore, the argument of the Noticee on this count is without any merit.

3.8.1 In light of the facts and circumstances mentioned herein above, I find that the importer has imported timber and sought clearances by resorting gross undervaluation in the Bills of Entry which resulted into short payment of Duty of Customs.

3.8.2 The evidences available on record in the form of documents recovered from Shri Avinash Jindal as well as submitted during investigation, account statements and other documents retrieved from hard disk recovered from Shri Avinash Jindal and the importer, establish that the value declared by the importer were not correct transaction value. I conclude that the investigating agency has proved their case with precision leaving no doubt about the undervaluation of the subject goods.

3.8.3 In view of the facts and circumstances of the case, the value declared by the importer in the Bills of Entry are not true and correct and the same are liable to be rejected in terms of Rule 12 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Section 14(1) of the Customs Act, 1962 and based on available evidence on record the value of imported timber is required to be re-determined, and consequential amount of duty short paid by the Noticee are required to be ascertained, as under:

(i). The Noticee imported timbers of various origin and got clearances under total 30 Bills of Entry. Out of which in respect of 29 of Bills of Entry file at Mundra and I Bill of Entry filed at Kandla, there are clear evidences, available on record, showing the actual transaction value of the imported timber as against the value declared by the importer. These evidence also reflect the actual quantity imported as against the declared quantity in the Bills of Entry. Each container, covered under these Bills of Entry, is examined in light of the evidence(s) and actual value and actual quantity as available in the evidence(s) is considered and arrived at correct value Section 14(1) of the Customs Act, 1962 read with Rule 3(1) of CVR, 2007 and also correct quantity of imported timber is considered as (as detailed in Annexure C1& D1 to the SCN), Consequent to application of correct value and quantity, short payment of customs duty, in respect of 29 of Bills of Entry filed at Mundra, is workout to Rs. 7,95,909/- and in respect of 1 of Bill of Entry filed at Kandla, is workout to Rs. 1,52,890/-.

(ii) In view of the above, Duty of Customs short paid by the importer in respect of imports made from Kandla and Mundra is summerised as under:

Sr. No.	Valuation	No. of B/E Kandla	Short Paid Cus. duty	No. of B/E Mundra	Short Paid Cus. Duty
	Actual transaction value	1	152890	29	795909
	Rule 9 of the CVR, 2007	0		0	
	Total	1	152890	29	795909

3.9.1 In the light of facts and circumstances as discussed herein above, I find that the importer has deliberately undervalued the timber imported from various African and other countries in order to evade payment of Customs duties which workout to Rs. 1,52,890/- and Rs. 7,95,909/- in respect of imports at Custom House, Kandla and Custom House, Mundra, respectively. The importer has wilfully and fraudulently suppressed the value as well as quantity of the timber imported with sole intention to evade payment of duty of Customs. The fact of undervaluation and under-quantification of the timber imported have come to light only upon search, seizure and investigation. Therefore, present case is a fit case to invoke Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962 for recovery of the duties of Customs for the extended period of limitation.

3.9.2 The importer by resorting to the above mentioned wilful misstatement has rendered themselves liable to pay differential duty to the tune of Rs. 7,95,909/- and Rs. 1,52,890/- (as detailed in Annexures- C.1 and D.1 to the notice) which is recoverable under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962. Apart from paying the differential duty under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962, the importer is also liable to pay interest under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962.

3.9.3 For the acts of omissions and commissions on the part of importer, as discussed hereinabove, in the matter of suppression of values and quantities for evading Customs duties, the importer is liable for penalties under Section 114A of the Customs Act, 1962. However, as the importer has committed omissions and commissions leading to evasion of customs duty through its proprietor and as the importer and its proprietor is one and the same in the eyes of law, I find that imposition of penalty separately on the proprietor is not warranted.

3.9.4 The importer imported timber by wilful resorting undervaluation as well as mis declaration of quantity, therefore the imported timbers are liable for confiscation under Section 111(m) of the Customs Act, 1962, *inasmuch as*, the value declared in the Bills of Entry were not true and correct as well as the quantities declared were less than that were actually imported (as detailed in Annexures-C.1& D.1) with an intention to evade Duty of Customs. Since these imported goods were not placed in seizure and also not physically available for confiscation, I refrain from imposition of redemption fine as the goods are not physically available for confiscation nor released under any bond and in view of the settled legal position in the case of Shiv Kripa Ispat Pvt. Ltd. vs CCE Nasik reported at 2009 (235) ELT 623 (Tri.-LB) wherein it held that redemption fine could not be imposed in the absence of the goods which had already been released by the Customs authorities to the importer without execution of any bond/undertaking by the latter. Conversely, where the goods are released under bond/undertaking, they could be confiscated as if the goods were available and consequently redemption fine in lieu of confiscation could also be imposed. The issue has been settled in the case of Commissioner of Customs, Amritsar Vs. Raja Impex (P) Ltd. (2008TIOL280HCP& HCUS) when the High Court, after considering the Apex Court's judgment in Weston Components case (2002TIOL176SCCUS) held as above. A similar view taken by the Tribunal in the case of Chinku Exports also stands upheld by the Supreme Court 2005 (184) ELT A36 (SC) as Revenue appeal was dismissed. Further since the omission and commission on the part of the importer made the imported goods liable for confiscation under Section, 111(m) of the Customs Act, 1962, the importer rendered himself liable for penalty under Section 112(a) of the Customs Act, 1962.

3.10 Shri Rajesh Kumar Batra was doing business of timber trading in the name of M/s Batra Timber Traders (P) Ltd. Karnal was the persons dealing in the importer of timber and played main role in whole episode of undervaluation as he had negotiated the price with the suppliers, who were involved in the making of the invoices at suppressed rates and also in the transfer of cash pertaining to the unofficial portion of the transactions to the suppliers in India. He has admitted to be solely responsible for all matters relating to the firm's business. He explained the modus operandi adopted by

them for undervaluation of timber and evasion of Customs Duty. Explaining modus operandi of undervaluation in detail and excusing the same as a need in order to sustain in the market where the competition was severe with thin margins as well as promise to discharge differential duty liabilities on all these imports is also an admission of offence. Omission of commissions, supra, rendered imported timber liable for confiscation and thereby Shri Rajesh Kumar Batra rendered himself liable for penalty under Section 112(a) of Customs Act, 1962. Also he fabricated import documents like invoice packing list etc. and presented before the Customs Authority with intention to evade duty of Customs, thereby Shri Rajesh Kumar Batra rendered himself liable for penalty under Section 114AA of Customs Act, 1962.

3.11.1 Shri Avinash Jindal is the persons who in connivance of the importer resorted undervaluation of imported timber as well as mis declaration of quantity with an intention to evade payment of Duty of Customs.

3.11.2 The evidence unearthed during the investigation in the form documents, data retrieved from hard disks of computer, statement of the co-noticee it is evident that they acted as a commission agent between purchaser and seller. Shri Avinash Jindal caused to supply undervalued imported goods to the importer and collected additional consideration in cash. Further, from the evidences recovered from the hard Disc, the Shri Avinash Jindal issued undervalued invoices of foreign supplier of goods as well as supplied blank copy of invoices of the foreign suppliers to the importer for preparing the invoice and to submit before Customs, thereby the Shri Avinash Jindal and abetted in creation of fake documents (invoice, packing lists) presented before the Customs Authority with an intention to evade payment of duty of Customs.

3.11.3 Regarding contention of Shri Avinash Jindal that his role was misconstrued. I find that in connection with import transactions carried out by the importer, evidences of under valuation were brought on record by conducting search of the premises of Shri Avinash Jindal and such evidences were corroborated through the depositions/admissions by Shri Avinash Jindal. Shri Avinash Jindal was India based supplier and acted as an agent or mediator to co-ordinate import transactions made between the importer and foreign supplier. In an offence case leading to indicate evasion and short-payment of duty, investigation has to perform its duty to substantiate the allegation and bring on record corroborative evidences and once this primary onus is performed, onus to disprove and discard the allegations shift on Noticee. In the instant case, I find that by the investigative findings placed on record, investigating officers have clearly discharged its onus to allege evasion and other contravention in light of documentary evidences placed on record as well as depositions made by the Noticees and therefore, the onus to disprove and discard the same was shifted upon the Noticees. Further, arguments of manipulation of data recovered, use of threat or duress while recording statements are viewed to be an afterthought as no retraction whatsoever was made and placed on record at the material time as settled position by judgments in the case of Anil Kumar Gokuladas Kandar V/s Commissioner reported at 2007 (215) ELT A48 (SC) and in the case of Vinod Solanki V/s Union of India reported at 2009 (233) ELT 157 (SC).

3.11.4 Based on citations, the Shri Avinash Jindal argued that no penalty under Section 112(a) of the Custom Act, 1962 is imposable upon them. I find that in the instant case, the omission and commission on the part of Shri Avinash Jindal as they were instrumental with regard to undervaluation and mis-declaration of quantity of the imported goods, thereby the imported goods became liable for confiscation under Section 111(m) of the Customs Act, 1962, therefore The Shri Avinash Jindal is liable for penalty under Section 112(a) of the Custom Act, 1962.

3.11.5 The Shri Avinash Jindal also contended that no penalty under Section 114AA is leviable upon them. I find that in the present case, the Shri Avinash Jindal have created fake documents (invoice, packing lists) which were presented before the Customs Authority with an intention to evade payment of duty of Customs and therefore, Shri Avinash Jindal rendered himself liable for penalty under Section 114AA of the Customs Act, 1962.

3.10.6 In view of the foregoing discussion, I find that Shri Avinash Jindal is liable for penalty under Section 112(a) of Customs Act, 1962, *inasmuch*, as he was indulged with the importer in undervaluing the imported goods by issuing or causing to issue the invoice which enabled the importer to evade the Customs duty, *supra*, as admitted by Shri Avinash Jindal in his statements. He had also facilitated the importer by collecting the suppressed part of the transactions in cash and sending it to the appropriate destination. All these act of the suppliers made the imported goods liable for confiscation under Section 111(m) of the Customs Act, 1962 and therefore, Shri Avinash Jindal is liable for penalty as provided under Section 112(a) of the Customs Act, 1962. The invoice showing undervalued and under quantified goods were either prepared by Shri Avinash Jindal themselves or by issuing blank invoices to the importer and caused it to be made by the importer, thus by such acts the suppliers made themselves liable for penal action as provided under Section 114AA of Customs Act, 1962.

4.0 In view of the above, I pass the following order:

ORDER

4.1 PART-I : MUNDRA PORT

(i) I hereby reject the assessable values declared in the Bills of Entry at the time of import of timber, as detailed in the Annexures C1 under Rule 12 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Section 14(1) of the Customs Act, 1962;

(ii) I order to re-determine the assessable value as detailed in the Annexures C1 to the SCN, in terms of Section 14(1) of the Customs Act, 1962 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

(iii) I confirm and order to recover differential duties of Rs. 7,95,909/- (Rupees Seven Lakhs Ninety Five Thousand Nine Hundred and Nine Only) from M/s Batra Timber Traders (P) Ltd., Karnal under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962

(iv) I order to charge and recover interest from M/s Batra Timber Traders (P) Ltd., Karnal under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962.

(v) I impose a penalty of Rs. 7,95,909/- plus an amount equivalent to interest payable on confirmed duty upon M/s Batra Timber Traders (P) Ltd., Karnal under Section 114A of the Customs Act, 1962.

(vi) I order to confiscate the goods valued at Rs. 5,37,52,672/- imported under Bills of Entry as detailed in Annexure C.1 to the SCN, under Section 111(m) of the Customs Act, 1962. However, I refrain from imposing redemption fine in lieu of confiscation, as the goods are physically not available for confiscation nor released under any bond or legal instruments.

(vii) I impose a penalty of Rs 75,000/- (Rupees Seventy Five Thousand Only) upon M/s Batra Timber Traders (P) Ltd., Karnal under Section 112(a) of the Customs Act, 1962.

(viii) I impose a penalty of Rs 75,000/- (Rupees Seventy Five Thousand Only) upon Shri Rajesh Kumar Batra under Section 112(a) of the Customs Act, 1962.

(ix) I impose penalty of Rs 50,000/- (Rupees Fifty Thousand only) upon Shri Rajesh Kumar Batra under Section 114AA of the Customs Act, 1962.

(x) I impose a penalty of Rs 50,000/- (Rupees Fifty Thousand only) upon Shri Avinash Jindal under Section 112(a) of the Customs Act, 1962.

(xi) I impose penalty of Rs 50,000/- (Rupees Fifty Thousand only) upon Shri Avinash Jindal under Section 114AA of the Customs Act, 1962.

4.2 PART-I :KANDLA PORT

(i) I hereby reject the assessable values declared in the Bills of Entry at the time of import of timber, as detailed in the Annexures D.1 under Rule 12 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Section 14(1) of the Customs Act, 1962;

(ii) I order to re-determine the assessable value as detailed in the Annexures D.1 to the SCN, in terms of Section 14(1) of the Customs Act, 1962 read with Rule 3(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

(iii) I confirm and order to recover differential duties of Rs. 1,52,890/- (Rupees One Lakh Fifty Two Thousand Eight Hundred and Ninety Only) from M/s Batra Timber Traders (P) Ltd., Karnal under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962

(iv) I order to charge and recover interest from M/s Batra Timber Traders (P) Ltd., Karnal under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962.

(v) I impose a penalty of Rs. 1,52,890/- plus an amount equivalent to interest payable on confirmed duty upon M/s Batra Timber Traders (P) Ltd., Karnal under Section 114A of the Customs Act, 1962.

(vi) I order to confiscate the goods valued at Rs. 30,84,648/- imported under Bills of Entry as detailed in Annexure D.1 to the SCN, under Section 111(m) of the Customs Act, 1962. However, I refrain from imposing redemption fine in lieu of confiscation, as the goods are physically not available for confiscation nor released under any bond or legal instruments.

(vii) I impose a penalty of Rs 15,000/- (Rupees Fifteen Thousand Only) upon M/s Batra Timber Traders, Karnal under Section 112(a) of the Customs Act, 1962.

(viii) I impose a penalty of Rs 15,000/- (Rupees Fifteen Thousand Only) upon Shri Rajesh Kumar Batra under Section 112(a) of the Customs Act, 1962.

(ix) I impose penalty of Rs 10,000/- (Rupees Ten Thousand only) upon Shri Rajesh Kumar Batra under Section 114AA of the Customs Act, 1962.

(x) I impose a penalty of Rs 15,000/- (Rupees Fifteen Thousand Only) upon Shri Avinash Jindal under Section 112(a) of the Customs Act, 1962.

(xi) I impose penalty of Rs 15,000/- (Rupees Fifteen Thousand Only) upon Shri Avinash Jindal under Section 114AA of the Customs Act, 1962.



[P.V.R.REDDY]

PRINCIPAL COMMISSIONER

BY RPAD/SPEED POST TO:

1. M/s Batra Timber Traders (P) Ltd.,
VII/558, Imambara, Sadar Bazar,
Karnal, Haryana-132001
2. Shri Rajesh Kumar Batra
Director of M/s Batra Timber Traders,
VII/558, Imambara, Sadar Bazar,
Karnal, Haryana-132001
3. Shri Avinash Jindal,
Bungalow No.12, Plat-No,2-91/292,
Near-Gurukul,
Gandhidham-370201

COPY TO:

1. The Chief Commissioner of Customs, Ahmedabad Zone, Ahmedabad along with a copy of SCN.
2. The Principal Commissioner of Customs, CH., Mundra with a request to account for the duty, penalty etc. pertaining to CH, Mundra.
3. The Additional Director, Directorate of Revenue Intelligence Zonal Unit, DRI, Hyderabad.
4. The Assistant/Deputy Director, Regional Unit, DRI, Visakhapatnam
5. The Dy/Asstt Commissioner of Customs (Recovery), CH., Kandla.
6. The Dy/Asstt Commissioner of Customs (Gr-I), CH., Kandla.
7. Guard File.