



**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/10-15/Adj-JC/Jindal/14-15
B	Order-in-Original No.	KDL-CUSTM-000-COM-020-17-18
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-5(INT-NIL)/2014 Dated 18.02.2015
G	Noticee(s)/Co- Noticee(s)	1. M/s Jindal Wood Industries, Plot No.3 5, Survey No.29, Meghpur Borichi, Anjar Road, Gandhidham-370110 2. Shri Avinash Jindal, Bungalow No.12, Plot No.291/292, Near Gurukul, Gandhidham-370201 3. Shri Rajendra Agarwal, No.33, NRI Colony, Mandakini, GK-IV, New Delhi-110019

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 Jindal Wood Industries, Plot No.35, Survey No.29, Meghpar Borichi, Anjar Road, Gandhidham (hereinafter referred to as "the importer"), proprietary concern of Shri Ajay Sumerchand Jindal and holders of IEC No.3709001102, are the importers of various types of timber at the ports of Kandla and Mundra. The timber imported were in log and sawn forms classified under Chapter Heading 44 of Customs Tariff Act (CTA), 1975. Timber in logs form falling under Chapter Sub-heading 4403 of CTA, 1975 is charged to Basic Customs Duty (BCD) at the rate of 5% Adv and the timber in sawn form falling under Chapter Subheading 4407 of CTA, 1975 attracts BCD of 10% Adv.

1.2 Based on intelligence that the importer is undervaluing the timber being imported from African countries, officers of Directorate of Revenue Intelligence, Gandhidham conducted raids at the office well as the residential premises of Shri Ajay Jindal on 27.06.2011 and recovered certain documents/records along with hard disks under different Panchanama.

1.3 Scrutiny of the documents recovered from the premises of the importer revealed the following:

1.3.1 The importer is a trader of timber imported from various countries such as Tanzania, Myanmar etc. at the ports of Kandla and Mundra. The timber imported from Tanzania is solely in sawn form. Timber of other countries is imported in logs form. There are a number of high sea purchases of timber of Tanzanian origin. The imports are made in containers mostly of 20 feet length.

The unit of measurement is Cubic Meters (CBM) and the currency in which the rates are negotiated is US Dollars (USD). The rates at which the imports are made ranged mostly between \$250 and \$350 per CBM. The suppliers of timber include M/s Vinayak Impex FZE, Dubai and M/s Janki Exports of Tanzania. The terms of payment to the suppliers are either on Letter of Credit (LC) or on Documents against Payment (DP) basis.

1.4 The documents retrieved from hard disk of a supplier by name Shri Rajendra Agrawal of Delhi which was also raided for having supplied timber at undervalued rates to various importers in India, revealed as under:

1.4.1 File path "17-12-2009(16x20 Contns Repla Packing list Sandeep Barad-Janki Exports)" (Annexure-A.3) is a document showing the container wise list of probably Tanzanian timber which is being imported at Mundra port.

1.4.2 File path "live data/01/Accounts/Prakash Timber(23.12.2009)" (Annexure A.4) an account statement of material traded with details of rates, values etc.

1.4.3 File path "live data/01/03-03-2010(67x20 Contns packing list (Narendra Patel/S-2(Details))" (Annexure-A.5) contains' details of various containers.

1.5 Shri Avinash Jindal, a India based supplier and brother of the proprietor of the importing concern, was importing timber at suppressed rates as well as supplying timber to various importers in India at suppressed

rates. During his statement on 5.9.2011, he submitted copies of his sent and received emails pertaining to the timber business. Scrutiny of the copies of the sent emails submitted by Shri Avinash Jindal revealed that an email sent to one Sunil Gupta with attachment of container wise account of Tanzanian timber and a few containers of Sudan timber sold and profits made could be seen at page nos. 522 to 527 of sent mails. Shri Avinash Jindal further on 12.12.2013 being authorized by the proprietor of the importing concern Shri Ajay Jindal to depose on his behalf, *interalia*, stated that an email sent to his partner Sunil Gupta with attachment of container wise account of Tanzanian timber and a few containers of Sudan timber (in page no. 526) sold and profits made could be seen at page nos. 522 to 527 of sent mails; that the material seen in this email was sold to various importers including some to co-supplier Shri Rajendra Agarwal and a few containers were also imported by him and also by his brother in the name of his proprietary concern M/s Jindal Wood Industries; that there is mention of purchase rates as well as sale rates in this document; that as admitted, the rates seen here are far higher than the rates declared at the time of import both in respect of imports made by him as well as in the name of other importers; that about the qualities of Tanzanian timber as seen in the containers referred to in page nos. 522 to 527 of the copies of his sent mails, the details as seen in the column with heading "SIZE" reflects the quality of the timber of the respective containers; that the quality shown as 8" & up/silly 8" is the best quality timber with the rates in excess of \$900; that the number of pieces in each of these containers ranged approximately between 400 and 600; that the timber in containers with mention of 3" & 4"/silly in the column "SIZE" is the next best quality timber known as general silly with the rates per CBM are shown to be about \$800 to \$850 per CBM; that the number of pieces per container in this quality range roughly between 700 and 1000; that the quality shown as 2" and 1.5" are sold for around \$600 per CBM with the number of pieces in each container ranging between 2000 and 3200; that quality shown as tukda silly/tukda (sometimes also referred to as 3-6') is sold at about \$575 per CBM with the number of pieces in each container being about 1500 to 2000 and the quantity being about 20 CBM; that material also shown as tukda but for lesser values of about \$3500 per container with quantity of about 15 CBM is similar to the qualities of 1", 0.5" and repla which are also available between \$4500 and \$6000 per container; that outgrows/OT type of material also known as commercial (material is white in colour) is priced around \$500 per CBM with the number of pieces per container being about 1000 to 1500; that few inaccuracies of details of number of pieces, quality description etc are also seen in the above statement as, for example, at Sr. No. 54 of the statement, the 8" & up quality material are shown as silly; that rates, description, number of pieces and quantities as seen in the above statement of Tanzanian timber are a near accurate reflection of the rates of various qualities of Tanzanian timber prevalent during the period and these details can be adopted for arriving at the rates of similar consignments; that range of rates he had mentioned in his earlier statement for the Tanzanian timber are the range for the entire lot of material known as silly; that all the types of timber of 8" & above, general silly and tukda are silly only but are treated as different qualities (for the purpose of rate determination) on the basis of their length, width and thickness; that material of quality shown as 0.5", 1", 1.5" and 2" are the thicknesses of the timber by which they are identified; that rates are fixed on the basis of the predominant nature of the quality of material loaded in a container which is also broadly identified by

the number of pieces which fit in a container; that as regards to the imports made by the importer, he has been authorised to depose on his behalf as regards to imports made; that the business of his brother is mostly retail in nature with the imports being very few only mostly done in the year 2010; that among these imports, there is suppression of values only in respect of timber of Tanzania; that other imports have been made at actual rates; that he made commitment on behalf of his brother to pay the differential duties of customs arising out of the imports of Tanzanian timber made at suppressed rates; that they shall calculate the differential duties and make the payment at the earliest.

1.6.1 A hard disk is recovered from another India based supplier/middleman Shri Rajendra Agarwal of Delhi and retrieved documents; Certain account statements in the name of various parties/persons containing the details of material sold at various rates/values and the amounts received (some in cash), could be seen. One such account statement is the relating to importer Parekh Timber.

1.6.2 Shri Rajendra Agarwal on 4.1.2012, inter-alia, deposed that the printouts of account statements containing the names of various parties including Parekh Timber, all retrieved from the hard disk recovered from his premises, are statement of accounts of material sold to various parties.

1.7 From the analysis of the documents recovered, the emails submitted, the data retrieved from hard disks and the statements of the proprietor's authorized representative and the supplier, revealed as under:

(i) The importer has imported timber mostly from Tanzania with a few from Myanmar and Costa Rica. A few of the imports of Tanzanian timber were bought on high sea from other importers.

(ii) The document File path "live data/01/Accounts/Prakash Timber(23.12.2009)" contains the details of container numbers of Tanzanian timber imported by different parties including the importer. As per the details of the import documents filed by the importer, 11 containers mentioned in the list were purchased by the importer on high seas from another importer M/s Parekh Timber of Gandhidham and imported vide Bill of Entry No.148992 dated 3.3.2010 at Mundra port. These 11 containers appear to be part of the first lot of the material seen in account statement of M/s Parekh Timber, as the quality mentioned in the container list matches with those seen in the above account statement. The account statement of M/s Parekh Timber contains the material bought by them from Shri Rajendra Agarwal at the rates and values indicated therein. The rates and values mentioned in the account statement when compared with the rates/values declared at the time of import are found to be much higher. The rate/value suppression appears to have been done in order to avoid paying more duties. The fact of undervaluation in the imports from Tanzania was also admitted by the importer's brother and representative Shri Avinash Jindal with a promise to discharge the differential duty liability.

(iii) The page nos. 522 to 527 of the sent emails of Shri Avinash Jindal is an email sent to one Sunil Gupta with attachment of container wise account of probably Tanzanian timber and a few containers of Sudan timber sold and profits made. Shri Avinash Jindal stated that few of these containers have

been imported by him in the name of his proprietary concern with the majority having been sold to various importers in India. He further stated that the rates/values seen in USD here are actual ones which are much higher than the rates/values declared at the time of import solely done to avoid paying more duties. On cross checking of the above account statement with the import documents of the importer on the basis of the container numbers, number of pieces, invoice value etc a few containers of Tanzanian timber were matched with the details of Bill of Entry No.352563 dated 24.6.2010 filed at Kandla port (discussed in the duty calculation worksheets enclosed to the notice). The rates as seen in the above document was found to be much higher than the rates declared in the import documents which was done in order to avoid paying higher duties.

(iv) 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 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 documents recovered/submitted/retrieved from hard disks and as deposed by the importer, a 20 foot container load of 8" and above width material contains about 400 to 600 pieces, the next quality of general sail has about 600 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 3500 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 quality of material can be identified by the number of pieces of the container. As seen in the sent emails of Avinash Jindal in page nos. 522 to 527, the general silli is also identified sometimes by the quality shown as 3" & 4".

1.8 The importer has imported timber from Tanzania at grossly undervalued rates in order to escape paying higher duties of Customs. Various evidences in the form of documents retrieved from the hard disk of supplier Shri Rajendra Agarwal and hard copies of sent emails of importer's brother and authorised representative Shri Avinash Jindal, all clearly establish the fact that the timber imported by the importer were not on true transaction value basis. The fact of undervaluation of imports of Tanzanian timber was admitted by the importer's brother and representative Shri Avinash Jindal in his statement referred above. Taking advantage of the fact that it is difficult for a non-technical person to identify the different qualities of timber since it being 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.

1.9.1 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 paras 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/records/hard disks recovered during search operations and those submitted at the time 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.

1.9.2 In a number of cases, direct evidence of the actual value is available, as detailed in Annexures-C.1 & D.1 in respect of imports at the ports of Kandla and Mundra respectively and the same can be considered as true transaction value 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 sent emails of Shri Avinash Jindal and in the account statement of M/s Parekh Timber found in the hard disk of supplier Shri Rajendra Agarwal. In his statement as discussed above, importer's brother and representative Shri Avinash Jindal has admitted the fact of undervaluation in imports of Tanzanian timber. 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 as well as the quality of material.

1.10.1 In other cases, in respect of those Bills of Entry other than those where the direct evidences are available as discussed above, the values are to be arrived at by resorting to the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Rule 3 cannot be considered in the absence of true Transaction value as in the present case, the values that were declared by the importer are suppressed values. Hence, as required under Rule 3(ii) of the above mentioned Rules the valuation of the imported goods is being determined proceeding sequentially through Rules 4 to 9.

1.10.2 In respect of the Bills of Entry as shown in the worksheets of Annexure-C.2, in respect of imports at Kandla port and Annexure-D.2 in respect of imports at Mundra port for differential duty calculations, recourse to Rule 9 of Valuation Rules, 2007 may be taken in view of the non-applicability of the other rules for the reasons discussed for each rule. Since the comparison of the price data for determination of value could not be made due to the variations in aspects like quality, quantity, grade, etc, of the timber imported, determination of value of the subject imported goods cannot be done under Rule 4 & 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Similarly, in absence of details relating to

the prices at which the goods were sold in the highest aggregate quantity and details of cost structure, the value of the goods cannot be determined under Rule 7 & 8 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. By adopting Rule 9 of the aforesaid Rules, the value as available in the documents corroborated by the averments of the importer, can be taken as the price determined using the reasonable means consistent with the principles of general provisions of these rules and based on the data available in India read with sub section (1) of 14 of Customs Act, 1962. Further, this determination is not based on any of the provisions mentioned in the Rule 9(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. In case of Tanzanian imports, the values of the same quality material of the contemporaneous imports (where evidences were found) of the importer as well as others were adopted. The rates of Tanzanian timber were determined based on the quality which is identified on the basis of the width, length and thickness of the material. The qualities are matched based either on the qualities mentioned in the form of 8" & UP, *Silli, Tukda*, 1.5" etc. or on the basis of the number of pieces in a container. A combination of both the forms are adopted in case of mention of only the distinct quality like 8" & UP in one BE and the no. of pieces in the other. In case of only the no. of pieces are mentioned in both the BEs they are considered similar if falling in the range broadly identified for each quality.

1.11 The importer is liable to pay the duties of Customs short paid on the import of timber from Tanzania. As the importer has made all their imports from the ports of Kandla and Mundra separate duty calculation worksheets have been made for each port. As per the evidences found in various documents, the differential duty calculations in respect of those Bills of Entry with which the evidences are relatable have been made as per worksheets in Annexure-C.1 (in respect of imports at Kandla port) and Annexure D.1 (in respect of imports at Mundra port) with the mention of the evidences in the Evidence column of the worksheets. For other imports, the rates were determined on the basis of contemporaneous imports of the importer (imports for which the evidences were found and related to various Bills of Entry as discussed in Annexures- C. I. & D.1 referred above as well as other importers of evidences found in the records/hard disks of Shri Avinash Jindal and co-supplier Shri Rajendra Agarwal which were also corroborated by them by taking recourse to the provisions of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

1.12.1 In view of the above, the duties short paid are calculated Bill of Entry wise for each port as per Annexures-C.1 and D.1 for Bills where the true transaction values were determined as per evidences available and Annexures-C.2 and D.2 for duty payable for values determined as per Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

1.12.2 The contemporaneous values adopted for determining the values as per Rule 9 of the Valuation Rules were based on the evidences found in the case of the importer as well as others. The evidences are available quality wise either for one container or for a group of containers. Hence, the contemporary values/rates of these evidences have been adopted quality wise for those imports where the transaction values are determined as per the Valuation Rules. The contemporary values/rates adopted quality wise, from the evidences found in respect of imports of the importer as well as others,

for determining the transaction values as per Rule 9 of the Valuation Rules of 2007 (as detailed in the worksheets of duty calculations referred above), have been found to be consistent throughout the period of demand with no abnormal fluctuations, tending to reinforce the authenticity of the evidences. In contrast, the values/rates declared at the time of import have been found to be standardized values/rates mostly declared at \$250 to \$350 per CBM irrespective of the type/quality of timber. This indicates that the rates/values declared are not the true transaction values which were done solely for the purpose of escaping from payment of higher Customs duties.

1.13.1 The importer has deliberately undervalued the timber imported from Tanzania in order to evade payment of Customs duties to the tune of Rs. 4,00,552/- and Rs. 2,11,391/- in respect of imports at Custom House, Kandla and Custom House, Mundra, respectively. The importer has willfully and fraudulently suppressed the values and in a few cases, the quantities, of the timber imported by them in order to evade the payment of duties. The fact of values and quantities as well, 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 to invoke the provisions under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962 for demanding the duties 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.

1.13.2 The timber imported by resorting undervaluation valued at Rs. 1,11,43,212/- already cleared vide Bills of Entry mentioned in the Annexures C1, C2, D1 and D2 to notice are liable for confiscation under Section 111(m) of the Customs Act, 1962.

1.13.3 For their acts of omissions and commissions in the matter of suppression of values and quantities for evading customs duties, the importer is also liable for penalties under Section 112(a) and under section 114A of the Customs Act, 1962.

1.13.4 Shri Rajendra Agarwal and Shri Avinash Jindal are also liable for personal penalty under Section 112(a)/114AA of Customs Act, 1962 inasmuch as they have connived with the importer in suppressing the values of the timber supplied by making the invoices at lower values and collecting the suppressed part of the transactions in cash as discussed supra. Shri Rajendra Agarwal and Shri Avinash Jindal have also admitted to wrong doing in their depositions.

1.14 Therefore, Show Cause Notice No. DRI/HZU/VRU/26/ENQ-5(INT-NIL)/2014 dated 18.02.2015 was issued accordingly,

1.14.1 M/s Jindal Wood Industries, Gandhidham 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 (as detailed in the Annexures-C.1 & C.2 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 March 2010 to October 2011;

- (ii) The assessable values should not be re-determined as per the values found in the various documents / records and as arrived at, as detailed in the Annexures-C.1 & C.2 to the notice, as per Section 14(1) of the Customs Act, 1962 read with Rule 3(1) and Rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, as the case maybe, for the imports that were made during the period from March 2010 onwards;
- (iii) The actual quantities of goods imported and arrived at on the basis of various documents/records (as detailed in the Annexures-C.1 & C.2 to this notice) should not be adopted for the purpose of calculation of differential duties as proposed against para b above;
- (iv) The differential duties of Rs. 4,00,552/- as detailed in Annexures-C.1 & C.2 to the notice should not be demanded from them under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962;
- (v) Interest on the differential duties should not be demanded from them under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962;
- (vi) The goods of a value of Rs. 57,91,278/- imported against the various Bills of Entry as detailed in Annexures-C.1 & C.2 to the notice should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962;
- (vii) Penalties should not be imposed on them under Section 112/114A of the Customs Act, 1962; and

1.14.2 Shri Avinash Jindal was also called upon to show cause as to why penalties under Section 112(a) and Section 114AA of the Customs Act, 1962 should not be imposed on him for his omissions and commissions.

1.14.3 M/s Jindal Wood Industries, Gandhidham 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 (as detailed in the Annexures-D.1 & D.2 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 March 2010 to November 2011;
- (ii) The assessable values should not be re-determined as per the values found in the various documents/records and as arrived at, as detailed in the Annexures-D.1 & D.2 to the notice, as per Section 14(1) of the Customs Act, 1962 read with Rule 3(1) and Rule 9 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, as the case maybe, for the imports that were made during the period from March 2010 onwards;
- (iii) The actual quantities of goods imported and arrived at on the basis of various documents/records (as detailed in the Annexures-D.1 & D.2 to this notice) should not be adopted for the purpose of calculation of differential duties as proposed against para b above;

- (iv) The differential duties of Rs. 2,11,391/- as detailed in Annexures-D.1 & D.2 to the notice should not be demanded from them under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962;
- (v) Interest on the differential duties should not be demanded from them under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962;
- (vi) The goods of a value of Rs. 53,51,934/- imported against the various Bills of Entry as detailed in Annexures-D.1 & D.2 to the notice should not be held liable for confiscation under Section 111(m) of the Customs Act, 1962 ;
- (vii) Penalties should not be imposed on them under Section 112/114A of the Customs Act, 1962; and

1.14.4 Shri Rajendra Agarwal was also called upon to show cause as to why penalties under Section 112(a) and Section 114AA of the Customs Act, 1962 should not be imposed on him for his omissions and commissions.

1.15 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 Personal hearing in the matter was fixed on 22.11.2016, 29.11.2016, 22.12.2017, but no one appeared for personal hearing. Further personal hearing was fixed on 12.01.2017, which was postponed and held on 19.01.2017, Shri Sanjiv Kumar and Shri Rahul Joshi of M/s LA Tax Association, Delhi appeared for personal hearing during the personal hearing he has requested two weeks time to file a reply in respect of Jindal Wood Industries and Shri Rajendra Agarwal. He has filed written submission in respect of Shri Avinash Jindal. He stated that there is no power to DRI to question the assessment made by Customs officer and the assessment orders were not reviewed. Shri Avinash Jindal and Shri Rajendra Agarwal are not the supplier of the goods and they are only agents. The same goods are being cleared ever now at the same price in many ports. The allegation of under valuation is incorrect. They are getting commission from supplier only and there is no financial dealing with the buyers. As far as Shri Avinash Jindal and Rajendra Agarwal are concerned there is no violation of provisions of Customs Act, 1962 and penalty cannot be imposed on them. As far as the importer is concerned they have declared true transaction value and after assessment and examination goods have been cleared by the Customs officers. DRI have not recorded any statement from the importer or any of his employees.

2.2 Shri Sanjeev Kumar of La Tax Associates submitted defence reply on behalf the importer submitted defence reply wherein they submitted as under:

- (i) As per the settled legal position 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. Hence, the issuance of the impugned SCN is not proper recourse for the same and hence, in this way, the DRI, Hyderabad opted to review or reassess the Bills of Entry as mentioned in the Annexure-C.1, C.2, D.1 & D.2 to the present impugned SCN without any authority of law, thus, the impugned SCN dated 18.02.2015 is bad *ab initio*.

(ii) DRI, Zonal Unit Hyderabad has not appreciated the fact before issuing the present 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. They relied judgment of Hon'ble High Court of Delhi in the matter of *Mangali Impex Ltd. Vs. Union of India & others W.P.(C) 441/2013*.

(iii) Further, reliance is placed to the legal verdict of the Hon'ble Supreme Court made in case of *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* reported in 2011 (265) E.L.T. 17 (S.C.), wherein in the context of the definition of proper officer under Section 2(34) of the Customs Act, the Apex Court held and observed that it is only such a Customs Officer, who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been effected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act would be competent to issue notice under Section 28. It was observed that any other reading of Section 28 would render the provisions of Section 2(34) of Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions. Revenue's contention that once territorial jurisdiction was conferred, Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act was rejected observing that it would lead to a situation of utter chaos and confusion as all officers of customs, in a particular area would be treated as "proper officers".

(iv) Based on citation of Apex Court, 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 another case the Apex Court in the case of *Union of India v. Ram Narain Bishwanath* reported in 1997 (96) E.L.T. 224, it 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.

(v) 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. 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].

(vi) DRI Hyderabad has no legal authority as well as territorial jurisdiction to issue SCN under Section 28 of the Customs Act, 1962 for the imports

caused at Kandla and Mundra. Ghandhidham comes under the territorial jurisdiction of the DRI Ahmadabad regional unit which is the proper authority to conduct the investigations and issue SCN for the goods which were imported at Kandla or Mundra Ports.

(vii) It is absolutely wrong to observe that the importer has willfully misstated the facts in the proper documents filed for the effective clearances of the imported goods with the intention to evade the payment of Customs Duty, attracting provisions of Section 28(4) of the Custom Act, 1962, resultantly the extended period of limitation for raising demand of Customs Duty from the relevant date is wrongly made applicable in the instant case.

(viii) Five years period of limitation under the impugned SCN can be invoked only when there is an incidence of collusion; willful mis-statement; suppression of facts, as against the provisions of the Custom Act, 1962 with intent to evade payment of Customs Duty. It is well settled law that 'omission/suppression or willfully misstatement of the facts does not mean not disclosing the information which the person is not legally required to disclose. It only means not providing the information which a person is legally required to declare but is intentionally or deliberately not disclosing.

(ix) In respect of the Valuation, the Noticee submitted true and correct valuation and duly supported by the proper documents and the same were under the knowledge of the department. It was during the investigation proceedings of the concerned Bill of Entry, the customs authorities have raised the objection about the classification but no dispute was ever raised in the clearance of the earlier Bill of Entry. There exist no element of collusion, mis-statement or suppression of facts which renders the customs authorities to invoke extended period against the Noticee. In the present case also, Noticee has declared the true transactional value which were duly supported by the invoices, Bill of lading etc. there has been no excess payment to the supplier and the price was the sole consideration. The said submission is duly supported by the bank remittances against the invoices. There is no suppression of any fact which he was under a legal obligation to declare or there was any conscious/ deliberate withholding of any information from the department which amounts to evasion of the Customs Duty. Every facts was before the Department and the goods was subjected for examination before the clearance. Relied upon citation of *Padmini Products vs. CCE, 1989 (43)ELT 195 (SC)*, the Supreme Court observing their own judgment in case of *Collector of Central Excise, Hyderabad v. M/s. Chemphar Drugs and Liniments, Hyderabad - 1989 (40) E.L.T. 276 (S.C.) = 1989 (2) SCC 127, CCE Vs Surat Textiles Mills Ltd (2004-167-ELT-379 SC)*, *Nexcus Computers (P) Ltd. Vs. (CCE-2008-9-STR-34-Tri.)*, *Bharat Aluminum Co. Ltd Vs. CCE, (2007-8-STR-27-Tri.)*.

(x) During December 2008 onwards, the importer has imported timber, in log and sawn form, from various countries during relevant period upon payment of applicable Customs duties. The price as declared for the Imports made by the importer under the Bills of Entry covered under the present impugned SCN was subjected to loading at the time of clearance of the goods. The said value was accepted in order to buy peace with the Department and also the Department has accepted the same as final and granted out of charge. DRI, Regional Unit Hyderabad has vide the present impugned SCN has again proposed to enhance the re-assessed value of the goods imported which is not permissible under law. Relied upon citation of *Commissioner of Customs (Prev.), Mumbai vs. Paras Electronics 2009 (246) E.L.T. 231 (Tri. - Mumbai)*.

Hence, the stand of the department in the present impugned SCN amounts to re-questioning its own assessment made earlier which is in every respect is not legal and proper.

(xi) The importer has declared its true transactional value at the time of the import of goods. The allegations made in the present impugned are absolutely wrong. The same are merely assumptions and have no evidentiary value. The DRI has not corroborated the said allegations and able to establish the same beyond doubts, hence, proceeded on assumption which is not a proper method of valuation. The basis of present impugned SCN is the documents found at the premises of the Noticee which were merely a negotiation price. There has been no evidences that the prices as alleged to the value of the imported goods were actually been exchanged by the parties or the parties were related. In other words, the transactional value is not denies as per the provisions of the Section 14 of the Custom Act, 1962, hence the allegations are only assumptions and cannot be held against the Noticee in absence of any cogent evidences.

(xii) The goods impugned under the alleged Bills of Entry were subjected to physical examination at the said ports by the Customs Authorities and the value has been re-assessed by the customs authorities at the time of clearance of the goods. Since, the goods have been physically examined, there is no scope for alleging under valuation after such physical examination and report thereof where under there is no anomaly pointed out then.

(xiii) The Department had not opted for the modification in the assessment order of the department by filing any Appeal. Thus, the said assessment order of the Customs Duty and the classification cannot be disputed at the present stage. Relied upon citation of *Priya Blue Industries Ltd. Vs Commissioner of Customs (Preventive) 2004 (172) E.L.T. 145 (S.C.)*, *Commissioner of Central Excise, Goa Vs Sesa Goa Ltd., 2014 (299) E.L.T. 221 (Tri. - Mumbai)*, *Ruchi Soya Industries Ltd. Vs Commissioner of Customs, Jamnagar 2013 (296) E.L.T. 114 (Tri. - Ahmd.)*, *CCE, Kanpur vs. Flock (India) Pvt. Ltd. [2000 (120) E.L.T. 285 (S.C.)]*, *CC (Imports), Mumbai vs. Lord Shiva Overseas [2005 (181) E.L.T. 213 (Tri.-Mum.)]*, *Vittessee Export Import v. CC (EP), Mumbai [2008 (224) E.L.T. 241 (Tri.-Mum.)]*, *Brakes India Ltd. v. CC, Chennai [2008 (221) E.L.T. 300 (Tri.-Che.)]* and *Collr. of Central Excise, Kanpur v. Flock (India) P. Ltd. - 2000 (120) E.L.T. 285 (S.C.)*

(xiv) The Department has not adduced any evidence nor obtained any statement of suppliers so as to substantiate the enhancement of goods pressed upon the Noticee wherein the department itself not challenged the decision of enhancement of declared value made at the time of clearance of goods. Since the goods have already been enhanced at the time of assessment, subsequent enhancement vide issuance of SCN is not tenable. The onus is on the Department to prove that there is a deliberate suppression of facts on the part of the assessee with the intent to avoid payment of duty. The reliance is placed on the citation of *Tamil Nadu Housing Board Vs. CCE [1994 (74) ELT 9]*, *C.C.EX. Vs. Chemphar Drugs & Liniments (1989 (40) ELT- 276)*, *Padmini Products Vs. CCE [1989 (43) ELT 195]*, *Pushpam Pharmaceuticals Company Vs. CCE [1995 (78) ELT 401]*, *Godrej Foods Ltd Vs UOI [1993 (68) ELT 28]*

(xv) The impugned SCN being wholly and completely erroneous hence, the demand raised by invoking extended period of limitation, is liable to be set aside on this ground alone. The demand. if anv is liable to be

restricted only for the period of one year only and not the extended period in the present case. Reliance has been placed upon citation in the case of *Central Excise vs. Chemphar Drugs & Liniments* in Civil Appeal No.1632 of 1988 dated 14.02.1989.

(xvi) It is the bounden duty of the Department to discharge its liability of proving that the seized goods are liable for confiscation under Section 111 of the Act *ibid* by doing the specified acts or omission.

(xvii) The present impugned SCN has been issued after about 44 months from the commencement of enquiry. Reliance is placed on the citations in the cases of *Collector v. Mopeds India Ltd.* - 1991 (53) E.L.T. A79 (S.C), *Shree Renuka Sugars Ltd. (SRSL) v. Commissioner of C. Ex., Bangalore*, 2007 (210) E.L.T. 385 (Tri. - Bang.), *Studioline Interior Systems Pvt. Ltd v. Commr. of C. Ex., Bangalore-I*, 2006 (201) E.L.T. 250 (Tri-Bang), *Commissioner of Central Excise, Indore v. Prashant Electrode*, 2006 (196) E.L.T. 297 (Tri. - Del.), *Tisco Ltd v. Commissioner of C. Ex., Jamshedpur*, 2006 (199) E.L.T. 855 (Tri. - Mumbai), *Lovely Food Industries v. Commissioner of Central Excise, Cochin*, 2006 (195) E.L.T. 90 (Tri. - Bang.)

(xviii) The Department is required to establish its case beyond doubt with the evidences brought on record, to prove alleged violation on the part of the importer. The allegations made out against are very general in nature, there exist no specific allegation in respect of any particular Bill of Entry where the alleged discrepancy has been established. The Department candidly proceeded to re-assess the Bills of Entry without substantiating as to whether any such mis-declaration as to the value or quantity has been actually conducted, if so then up to what extent. The evidences specific to transaction prevail over general evidence. Relied upon citation of *M/s Siddhartha Polymer Limited vs Commissioner of Customs, New Delhi* 2007 (216) E.L.T. 604 (Tri. - Del.). The department has failed to make out a case, hence proceeded upon assumption, which is against the principles of natural justice as well as against the provision of Custom Act, 1962.

(xix) It is evident that entire allegations in the present impugned SCN are leveled on the basis of some alleged emails of co-Noticee Shri Avinash Jindal and alleged data retrieved from the hard disk of another co-Noticee Shri Rajendra Agarwal. There is no reference to specific data said to have been analyzed from the said imaged hard disks resumed. Even otherwise, there is nothing on record about any proceedings for analyzing the specific data said to have been obtained from the imaged hard disk before any witness and the Noticee.

(xx) The Department has not laid down any evidences of cash transfers or remittances in the whole case.

(xxi) The demand has been based upon the copies of e-mail correspondences made between the co-Noticee and others but the same are not the direct source of the evidence. The said emails are required to be corroborated with the other evidences as well as the statement of the Noticee. The said emails although were relied upon, however, from the mere perusal of emails it cannot be construed that the said transactions were actually made as per the details mentioned therein. 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 Noticee with suppliers of imported goods have been corroborated. The reliance is placed upon case laws *Shri Maruti Nandan Impex vs. Commissioner of Cus. (Import), Mumbai*

vide Final Order No. A/309/2013-WZB/C-I(CSTB), dated 26-2-2013 in Appeal No. C/498/2010-Mum, *M/s Asha Enterprises vs Commissioner of Customs, Cochin* vide Final Order No. 1855/2004, dated 22-11-2004 in Appeal No. C/297/2004.

(xxii) No corroborative evidence to made out in the present case to establish undervaluation. The stand of the department as to non-compliance of the law laid down by the Act is *void ab initio* in as much as there is no evidence to prove that the amount other than that declared was received by the Noticee at or about the time of Import. The statements of the co-Noticees have not been evidenced by corroborative evidence to establish undervaluation on the part of importer. In absence of any corroborated evidences, the mere statements of the co-Noticees or others cannot be used against the main Noticee, unless the same are been corroborated with the other evidences. Reliance is placed upon the case laws *Commr of C. Ex Ahmedabad-I vs Gopi Synthetics Ltd.* vide Final Order No. A/71/2008-WZB/AHD, dated 17-1-2008, *S.T. Texturiser vs. Commissioner of Central Excise, Surat-I* vide Order Nos. A/513 & 514/2006-WZB/IV(SM), dated 4-4-2006 in Appeal Nos. E/578 & 579/2003, *Shri Mohan Kumar @ Mohan Prasad, Shri Sri Lal Prasad and Shri Ratan Prasad Vs. Commissioner of Customs, 2008(221)ELT521(Tri. - Kolkata)*, *Jagannath Premnath Vs. Commissioner of Customs MANU/CE/0890/2005*, *Shirley Dyers versus Commissioner of Central Excise, Jalandhar, 2013 (293) E.L.T. 234 (Tri Del)*, *C.C. (Preventive) v. Puni Dhapa Lokeswara Rao* reported in 2009 (248) E.L.T. 141 (Cal.), *Francis Stanly @ Stalin v. Intelligence Officer, Narcotic Control Bureau, Trivandrum [MANU/SC/8783/2006]* and *Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. [MANU/SC/0486/2000]*, *MohteshamMohd. Ismail v. Spl. Director, Enforcement Directorate &Anr. [(2007) 8 SCC 254]*.

(xxiii) The declared value of the goods is the true and factual price paid for the goods and it cannot rejected arbitrarily in the absence of any contrary evidence. Reliance placed on case lawsof *Commissioner of Customs, Delhi v. Polyglass Acrylic MGF. Co. Pvt. Ltd. - 2011 (274) E.L.T. 419 (Tri. - Del.)*.

(xxiv) The method, modalities and mechanism available for arriving at higher value or the existence of the valid/ undisputed invoice for denying the misdeclaration renders the present impugned order cryptic and unsustainable in the eyes of law.

(xxv) The transaction value cannot be rejected arbitrarily. The transaction value is to be accepted for determination of Customs Duty liability on the imported goods. The value declared at the time of import is the actual transaction value between the importer and their overseas supplier i.e. the price which is to be paid for the goods when sold for export to India for delivery at the time and place of importation. The Department has not adduced any evidence to suggest that the value declared by the importerwas not the actual transaction value wherein the said fact has been duly substantiated with the invoice of the supplier and the same value is also been adduced in the Bill of lading which are the proper and valid documents. Reliance is placed upon case laws*R.V. Fashion vs. Commissioner of Customs (Export), NhavaSheva, 2009 (246) E.L.T. 535 (Tri. - Mumbai)*, *Commr. of Cus., New Delhi v. Century Metal Recycling Pvt. Ltd.* vide Final Order No. C/465/2011(PB), dated 19-10-2011 in Appeal No. C/730/2007, CC, *New Delhi v. Marble Art 2013 (289) E.L.T. 346 (Tri.-Del.)*, *Commissioner of Customs, New Delhi vs. Shri Gauatri Exports, 2013 (291) E.L.T. 549 (Tri. - Del.)*.

(xxvi) There exist no evidence of undervaluation in respect of demand raised using Rule 9 of Determination Rules. Rule 9 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 deals with residual method which is also known as best judgment method in valuation. In cases where direct evidence was not available with the department, demand has been raised by adopting Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. In this connection, it is submitted that the department itself has adopted the view that there were certain number of imports where direct evidence was not there and in that cases determination rules have been applied for quantification of demand. The fact of absence of direct evidence is apparent from the quantification made in RUD Annexure-C.2 & D.2 captioned as "Worksheet of differential duty calculation for values determined under Rule 9 of Valuation Rules 9 of Valuation Rules, 2007". The Department has erroneously resorted to residuary rule prescribed under Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 without adopting sequential use of Rule 4 to Rule 9 for determination of alleged demand on the Noticee.

(xxvii) The goods are not liable for confiscation. The goods have been released by the Department, the said goods have already sold in market, hence there exist no physical availability of the goods. Also the said goods were cleared for home consumption and not under the provisional assessment or Bond. It was only upon the examination and satisfaction about the goods being correct, the present goods were allowed for clearance. Reliance is placed upon case laws *Crafts Studio v. CCE, Mahalaxmi International Export v. CC, Sansui India v. CC, Shivalaya Spinning v. CC, Bussa Oversea v. C L Mahar* of the Mumbai High Court, *Southern Enterprises v. CC (SC)*.

(xxviii) The importer has not committed any act which renders the goods liable for confiscation under the provision of Section 111(m) of the Customs Act, 1962. Since the demand itself is not sustainable, goods cannot be held liable for confiscation. Reliance has been placed upon the case of *Navshiv Retail Pvt. Ltd. v. Commissioner of Customs, New Delhi* vide Order dated 17.04.2014 reported as 2014(307)ET 549(Tri-Delhi).

(xxix) In the present penalty against the importer is proposed under Section 112 of the Customs Act, 1962 without specifying the sub-Section (a) or (b). Section 112(a) and (b) cannot be invoked together against one person. Hence, no penalty can be imposed under Section 112 of the Act *ibid* as proposed in the SCN and no penalty can be imposed under the said sub-sections as the grounds for the same were not elicited specifically. Also it has not been established that the goods are liable to be confiscation under section 111(m) of the Custom Act, 1962. It is admitted fact that the goods were physically examined and also were documentarily got satisfied by the Customs Authorities at the respective ports at the time of import. There exist no ground for the confiscation under Section 111 the Act, and thereby the section 112 is also unwarranted in the present case in as much as that the penalty under Section 112(a) or (b) can only be imposed when the provisions of Section 111 of the Act *ibid* are applicable, which is not so in the instant case. It is pertinent to establish the intention or *mensrea* of the Noticee which was absent in the present case. Reliance placed on case laws *Collector of Customs, Bombay v. Sneha Sales Corporation 2000(121) E.L.T. 577 (S.C.)* and

UOI v. Sampat Raj Dugar, Taparia Overseas (P) Limited v. UOI, K. Uttamlal (Exports) Pvt. Limited v. UOI, Coolade Beverages Limited v. Commissioner of Central Excise, Meerut and H. Guru Investment (North India) Pvt. Limited v. CEGAT, New Delhi.

(xxx) Penalty cannot be imposed as per Section 114A of the Act. Since, there is no element of suppression or intention to evade payment of custom duty as explained above, hence, no penalty can be imposed under Section 114A of the Act *ibid*.

(xxxi) Since, no duty is liable to be paid under Section 28(4) of the Act *ibid* (erstwhile proviso to Section 28(1) of the Act *ibid*), the issue of paying interest under the said Section does not arise.

(xxxii) The importer requested to drop the proceedings.

2.3 Shri Sanjeev Kumar of La Tax Associates submitted defence reply on behalf of Shri Avinash Jindal and Shri Rajendra Agrawal, 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.

(iii) 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.

(iv) Shri Avinash Jindal and Shri Rajendra Agrawal are in the business of trade of timber through his friends in African countries. They act as an agent of the overseas suppliers and for which he receives remuneration/margin of profit from the overseas suppliers. Shri Avinash Jindal and Shri Rajendra Agrawal had never taken any remuneration for any purpose from the importer.

(v) 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 Noticees, 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.

(vi) It is also not the case as per Show Cause Notice that the Noticee 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.

(vii) It is evident on record that the impugned SCN is barred by time since the same has been issued on 18.03.2015 i.e. about 45 months after initiation of enquiry i.e. searches at the office & residential premise of the Noticee 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).

(viii) Noticee requested to refer to the Column No. 2 & 3 of Annexure C.1, C.2 D.1& D.2 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.

(ix) 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.).

(x) 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 is not specific to determine the role of the Noticee in the violation of the provision of the Customs Act, 1962 or in connivance to the importer, as to how Noticee has contributed in the evasion of the Customs Duty which attracts the penalty under Section 112 or Section 114AA of the Act.

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

(xii) In terms of Section 17(4) there is provision of for re-assessment where the proper officer finds on verification that self assessment is not done correctly. Assessment of Bills of Entry is an appealable order in itself and there is provision in Customs law for filing appeal against any such order. Hence, issuing of present SCN in the matter is a violation of provisions laid down in the Customs Act, 1962 read with the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

(xiii) Rule 4, 5 and 9 of the Valuation Rules, 2007 provides for taking transactional value of contemporaneous imports as the basis for determining the value of the impugned goods in question. The valuation of the goods is primarily concern of the importer, all the Bills of Entry whose valuation is being questioned have already been assessed by proper Customs Authorities at the relevant time and after due assessment and payment of appropriate Customs Duty, clearance was also given to the goods under all the referred Bills of Entry. This categorically implies that at the time of imports, the Customs Authorities were completely satisfied with the value declared by the importer.

(xiv) 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)*

(xvi) The present case is based on the misconceptions 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.

(xvii) 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.

(xviii) 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.)*.

(xix) 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.

(xx) 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.

(xxi) There is not even an iota of evidence in the impugned SCN in support of allegation of facilitating the importer in alleged undervaluation.

(xxii) 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. Noticee further rely on the decisions reported in *Shri Maruti Nandan Impex vs Commissioner of Cus.(Import) Mumbai*, and *M/s Asha Enterprises vs Commissioner of Customs, Cochin*.

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

(xxiii) 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.

(xxiv) Emails which are alleged/claimed to be recovered by the DRI during the investigation from the premises of the noticee are simply unrefined conjecture. The alleged data aid to be emails correspondence between the importer and the noticee were on no account prepared. It is beyond the stretch of mind that the alleged B/Es as detailed in Annexure- C.1, C.2, D.1 & D.2 of the SCN are neither considered to relied upon Documents by the investigating agency nor the same have been supplied to the Noticee.

(xxv) There is factual error that the Noticee has been treated as Supplier/Middleman in the present case hence, the prices of the goods, records found in the possession were erroneously considered as final. Most of the documents were merely presumed to be in favor whereas the same, in actual, connotes a different meaning.

(xxvi) The Noticee have the audacity to mention here that the celebrated writer, world known jurist and a sitting judge of the Supreme Court of India Hon'ble Krishna Iyer J. time and again in a number of cases has observed that economic offences which are deceptively committed by respectable members of the community by inflicting severe trauma on the wealth of the nation need a different treatment, because the members of this neo-criminal tribe are repeatedly escalating. Placed reliance upon case of Pyarali K. Tejani v. Mahadeo Ramchadra Dange and others AIR 1974 S.C. 228.

(xxvi) The DRI has also not produced any document which substantiates the allegation that there has been any cash or kind transaction in lieu of the sale of the timber by the exporter which has been given to the Noticee. The DRI are solely relying upon the statement of the Noticee. Which silent in respect of any transaction with co-Noticee import firm.

(xxvii) It is an undisputed fact that the consignments imported in the past, the details as mentioned in the impugned SCN, were been cleared by the Customs authorities after due inspection/examination and proper assessment of Customs Duty was made. On the assessment and after due verification, the importer paid the customs Duty. Hence, the investigation agency has absolutely unjustified by proposing the malafide intent or connivance upon the Noticee in respect of the Consignments which were already cleared by the Customs authorities after due examination & assessment/re-assessment.

(xxviii) 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.

(xxix) 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.

(xxx) 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.

(xxxi) The value declared by the importer is a price upon which the 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.

(xxxii) The transaction value is to be accepted for determination of Customs Duty liability on the imported goods. The value declared at the time of import is the legitimate transaction value between the importer and their overseas supplier i.e. the price which is to be paid for the goods when sold for export to India for delivery at the time and place of importation which is Kandla & Mundra ports in the present case.

(xxxiii) Section 14 of the Act states that the transactional value cannot be rejected by the department unless it is substantiated that the buyer and seller of the goods are related and price is not the sole consideration for the sale subject.

(xxxiv) The Importer and overseas suppliers or Noticee being commission agent of supplier firm are not related to each other in any manner, whatsoever, and the price is the sole consideration between the importer and their overseas suppliers. The investigating agency has not brought any evidence on record to suggest that any other element of consideration exists between the Noticee and the importer. Reliance placed on the citation in the case of Commissioner of Customs, New Delhi v. Prodelin India (P) Ltd.- 2006 (202) ELT 13 (SC), Eicher Tractors Ltd. v. Commissioner of Customs, Mumbai - 2000 (122) ELT 321 (SC),

(xxxv) Rule 9 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 deals with residual method which is also known as best judgment method in valuation.

(xxxvi) The acceptance of transaction value under Rule 3(1) *ibid* is subject to the provisions of Rule 12 *ibid* which provide for rejection of transaction value on the basis of reasons to doubt the truth or accuracy of the declared value.

(xxxvii) There exists no contravention of the provisions of the Customs Act by the Noticee.

(xxxviii) The SCN refers certain contemporaneous imports with respect to various Bills of Entry with respect to the so called contemporaneous imports said to have been imported under various other Bills of Entry but they have not been made part of RUDs in the SCN, nor provided as non-relied upon document.

(xxxix) 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 Mundra port by portraying him responsible for mis-declaration in respect to valuation, without substantiating it with cogent evidences on

(xxxx) 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.

(xxxxi) The association of the Noticee 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.

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.

(xxxixii) 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.

(xxxixiii) 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.

(xxxixiv) 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.

(xxxixv) Invoking the penal provisions under Section 112(a) of the Customs Act, 1962 against the Noticee no. 2, clearly shows that they have not followed the principle of natural justice and arbitrary 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.

(xxxixvi) The provisions of Section 114AA 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.

(xxxixvii) 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).

(xxxxviii) 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 no. 2 to violate the provisions of the Customs Act, 1962.

(xxxxix) The allegation that the Noticees have collecting the suppressed part of the transaction in cash as well as suppressed the quantities of material supplied are absolutely wrong and baseless inasmuch as, the Noticee is not the supplier of goods; the said goods are being directly imported by the importer from the supplier overseas; that 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 the Noticee; 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 hence; 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.

(xxxxx) 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 and Shri Rajendra Agarawal 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 during the period from March 2010 to November 2011, 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) and Rules 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007;
- (ii) the importer mis-declared the quantity and the same is liable to be re-ascertain;
- (iii) consequent to re-determination of value and quantity of imported timber, the differential duties of Rs. 4,00,552/- and Rs. 2,11,392/- in respect of Kandla Port and Mundra Port, respectively 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;

- (iv) the goods imported by resorting undervaluation and mis-declaration of quantity are liable to be held liable for confiscation under Section 111 (m) and Section 111 (l) of the Customs Act, 1962;
- (v) Shri Rajendra Agarwal and Shri Avinash Jindal are liable for penalty under 112(a) and Section 114AA of the Customs Act, 1962.
- (vi) 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. Tanzania and Mayanmar. 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 250 and 350 USD per CBM.

3.4 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 and Shri Rajendra Agrawal, officers of Directorate of Revenue Intelligence, initiate investigation with the importer, Shri Avinash Jindal and Shri Rajendra Agrawal. During investigation, searches at various premises of the importer, Shri Avinash Jindal and Shri Rajendra Agrawal were conducted and recovered incriminating documents and computer hard discs. Data contained in these hard disks was analysed and certain printouts of the documents were taken on record, which include various e-mail communication. Further Shri Avinash Jindal submitted various documents during investigation including copies of e-mail communication with suppliers and the importers along with attachments such as packing list of imported goods, account statement of suppliers the and importer showing details of quantity, rate, value of imported timber as well as payment particulars. Also, various statement of the importer, Shri Avinash Jindal and Shri Rajendra Agrawal were recorded wherein the importer, Shri Avinash Jindal and Shri Rajendra Agrawal explained the recovered evidences as well as modus operandi of import of timber by resorting undervaluation by the importer with help of Shri Avinash Jindal and Shri Rajendra Agrawal.

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

3.5.1 Documents retrieved from hard disk of Shri Rajendra Agrawal:

- (i) File path "17-12-2009(16x20 Contns Repla Packing list Sandeep Barad-Janki Exports)" (Annexure-A.3) is a document showing the container wise list of probably Tanzanian timber which is being imported at Mundra port.
- (ii) File path "live data/01/Accounts/Prakash Timber(23.12.2009)" (Annexure A.4) an account statement of material traded with details of rates, values etc.
- (iii) File path "live data/01/03-03-2010(67x20 Contns packing list (Narendra Patel/S-2(Details))" (Annexure-A.5) contains' details of various containers.
- (iv) File path "live data/01/accounts/Arunachal Timber (24.06.2011)"
- (v) File path "CCH 14&15-Ex-2 DATA/MS Exel Files/20110611 Tanzania 4 cont/Summary 4X20 Conts"

3.5.2 Documents recovered from Shri Avinash Jindal, retrieved from his hard disk or laptop as well as sent and received emails submitted by Shri Avinash Jindal:

- (i) A number of account statements of purchase and sale of imported timber could be seen in made-up file.
- (ii) The page nos. 522 to 527 of the sent emails of Shri Avinash Jindal is an email sent to one Sunil Gupta with attachment of container wise account;
- (iii) File path "live date/A.K. May con list/sheet1" (Annexure B.1.2)

3.6.1 From the evidences 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 and quantity of imported timber, which was declared by the importer in the B/Es were found less than the value and quantity as mentioned in the private records.

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

3.6.2.1 The importer has traded in various types of timber and apart from importing by themselves has also sold to various parties on high seas sale basis.

3.6.2.2 The Tanzanian timber imported in sawn form, qualities of which 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 quality known as silly/general silly 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. In a few cases, lower grade material of 1.5" & 2" thickness and 1.5' to 6' length is also shown as tukda which is different from the more regular tukda.

3.6.2.3 Also the quality of Tanzanian Swan timber can be ascertain by number of pieces in a container. A 20 feet container load of 8" and above width material contains about 400 to 600 pieces, the next quality of silly/general silly 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 3500 pieces in a container. The lesser quality timber known by their thickness of 1" and 0.5" come in excess of 3500 pieces in a container. Similar to this lower quality timber is timber known as repla. The general silly is also identified sometimes by the quality shown as 3" & 4". A summary to ascertain and identify the qualities of Tanzanian timber based on number of pieces in a container, is as under:

Sr. No	Material type	Width	Thickness	Length	No. of pieces
1	8" & UP (Silli)	8" & above	3" & 4"	6' & above	400 to 600
2	General Silli(also seen in packing lists as H,G,I etc)	Below 8"	3" & 4"	6' & above	700 to 1200
3	Tukda(also seen as 3'-6' & 3'-5'.9"	Below 8"	3" & 4"	Below 6'	1500 to 2000
4	1.5" & 2"	-	1.5" & 2"	Mixlength	2000 to 3500
5	1" & 0.5"	-	1" & 0.5"	-	Above 3500

3.6.2.4 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.

3.6.2.5 The actual rates at which the timbers were imported from various countries of Africa. The actual rates of Tanzanian timber per CBM for best quality shown as 8" & up/silly 8" @ the rates about \$900; quality 3" & 4"/silly is the next best quality timber known as general silly @ the rates per CBM is about \$800 to \$850 per CBM; the quality shown as 2" and 1.5" @ the rate \$600 per CBM; that quality shown as tukda silly/tukda (sometimes also referred to as 3-6') @ the rate about \$575 per CBM; material tukda @ about \$3500 and qualities of 1", 0.5" and repla @ the rate about \$4500 and \$6000 per container; outgrows/OT type of material at the rate around \$500 per CBM.

3.6.2.6 The document File path "live data/01/Accounts/Prakash Timber(23.12.2009)" contains the details of container numbers of Tanzanian timber imported by the importer. As per the details of the import documents filed by the importer, 11 containers mentioned in the list were purchased by the importer on high seas from another importer M/s Parekh Timber of Gandhidham and imported vide Bill of Entry No.148992 dated 3.3.2010 at Mundra port. These 11 containers appear to be part of the first lot of the material seen in account statement of M/s Parekh Timber, as the quality mentioned in the container list matches with those seen in the above account statement. The account statement of M/s Parekh Timber contains the material bought by them from Shri Rajendra Agarwal at the rates and values indicated therein. The rates and values mentioned in the account statement when compared with the rates/values declared at the time of import are found to be much higher.

3.6.2.7 The page nos. 522 to 527 of the sent emails of Shri Avinash Jindal is an email sent to one Sunil Gupta with attachment of container wise account of Tanzanian timber and few containers of Sudan timber sold. Shri Avinash Jindal stated that few of these containers have been imported by importer in the name of his proprietary concern with the majority having been sold to various importers in India. The rates/values seen in USD here are actual ones which are much higher than the rates/values declared at the time of import. On cross examining the above account statement with the import documents of the importer on the basis of the container numbers, number of pieces, invoice value etc. few containers of Tanzanian timber were matched with the details of Bill of Entry No.352563 dated 24.6.2010 filed at Kandla port. The rates as seen in the above document was found to be much higher than the rates declared in the import documents which was done in order to avoid paying higher duties.

3.6.2.8 An account statement with file path "live data/01/Accounts/ParekhTimber(23-12-2009)", retrieved from hard disk recovered from Shri Rajendra Agarwal, contains details of various containers of timber with qualities and rates/values. On the basis of the qualities mentioned therein like silly, tukda etc., the material is of Tanzania which were sold to the importer at different rates/values. Right hand side of the statement certain entries shown as LC amounts appear to be the declared import values of various consignments.

3.6.2.9 Document with file path "live data/01/03.03.2010(67X20 Contns packing list (Narendra Patel/S-2(Details))" retrieved from hard disk recovered Shri Rajendra Agarwal, amongst others, contains details of supply of 307.166 CBM of Tanzanian timber.

3.7.1 The importer has imported timber from various countries of Africa and others such as Tanzania by resorting to gross undervaluation as well as mis declaration of quantity with intention to evade payment of duties of Customs.

3.7.2 The evidences are on record in the form of documents, which were recovered, submitted and retrieved from seized hard discs, 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 mainly in respect of imported timber of Tanzanian origin. The timber of Tanzanian Origin of various qualities were imported at uniform rates ranging from \$250 to \$350. The undervaluation is 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.

3.7.3 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 in the documents/records/hard disks recovered and those submitted at the time of the depositions are required to be considered as true values and liable to constitute the correct transaction value of the imported timber for the purpose of payment of Customs duties.

3.7.3.1 The first situation arises, 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.

3.7.3.2 A made-up file recovered from Shri Avinash Jindal, and documents contained therein as well as e-mail communication submitted by him and documents retrieved from hard disc of the importer, Shri Avinash

Jindal and Shri Rajendra Agrawal. The details mentioned in these evidences, such as container numbers, quantity, number of pieces, quality, packing list, of imported timber were correlated with the import documents filed by the importer before the customs authority, resulted into variation in value and quantity of imported timbers as well as it is also shown particulars of cash payment toward the differential amount of imported timber. The variation unearthed along with particulars of cash payment, placed before the importer and Shri Avinash Jindal and all have categorically admitted and explained that the details mentioned in private records are correct as against the import documents.

3.7.3.3 In case of Tanzanian imports, the values of the same quality material of the contemporaneous imports of the importer as well as others were adopted. The rates of Tanzanian timber were determined based on the quality which is identified on the basis of the width, length and thickness of the material. The qualities are matched on the basis of either the quality in the form of 8" & up, Silly, Tukda, 1.5" etc. or on the basis of the number of pieces in container. A combination of both forms are adopted where the distinct quality like 8" & up in one Bill of Entry and the number of pieces in the other. In case of number of pieces are mentioned in both the Bills of Entry the same are considered similar.

3.7.3.4 For more clarity, I take an instance to understand the modus operandi of undervaluation and mis declaration of quantity of imported timber. Tanzanian Teak Swan Timbers was imported by the importer in two containers and sought clearances vide Bill of Entry No. 352563 dated 26.06.2010 at Kandla. The imported declared description as Teak Swan Timber Off Cut Size (Swan Wood), declared quantity as 30.09 CBM and value of imported timber was declared @420 Per CBM. The evidence in private records are correlated with the import document filed by the importer for clearance of these imported goods. Page No. 522 to 527 copies of sent email of Shri Avinash Jindal, showing details of container and quantity of timber. Based on quantity mentioned in the documents and then the container numbers seen in the packing list were matched with the container numbers of the import documents, where number of pieces in each container found match in packing list and import bill. On analysis of these documents it is found that the quality of the material actually imported was '2" and 1.5" quality of Tanzanian Sawn timber, and value of imported timber as per private record is USD 611 per CBM for 2" quality and USD 575 per CBM for 1.5" quality. The evidence File path "live date/A.K. May con list/sheet1" retrieved from laptop of Shri Avinash Jindal further revealed that total actual value of timber is USD 20042 and actual quantity is 36.09 CBM. Therefore, it is safe to conclude that the details mentioned in the recovered evidences have proper relation with the import documents of the importer and variation in value shown in private records are correct.

3.7.3.5 Accordingly, for the purpose to arrive at correct transaction value and to ascertain correct quantity of imported timber 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 and mis-declaration of quantity, corresponding admitted evidences are considered as detailed in Annexure C.1 for import at Kandla and D.1 for import at Mundra to SCN and differential duty payable arose on account of

undervaluation and mis declaration of quantity of imported timber, is worked out.

3.7.4.1 The second situation in which include those imports of timber by the importer, where neither direct evidences are available regarding value and quantity nor comparison of the price data for determination of value are available due to the variations in quality, quantity, grade, origin etc. Under these circumstances of timber import, determination of value cannot be resorted under Rule 4 & 5 of the CVR, 2007 as well as in absence of details relating to prices at which the goods were sold in the highest aggregate quantity and details of cost structure, the value of the goods cannot be determined under Rule 7 & 8 of the Customs Valuation Rules, 2007. Therefore, valuation of timber covered under these import is to be made under Rule 9 of Valuation Rules, 2007.

3.7.4.2 Accordingly, for the purpose of value to be determined under Rule 9 of the CVR, 2007, the value available in the documents corroborated by the averments of the importers and the suppliers, can be taken as the price, by using the reasonable means consistent with the principles of general provisions of rules and based on the data available in India read with sub section (1) of 14 of Customs Act, 1962.

3.7.4.3 The values arrived at under Rule 9 have also been calculated by same method used for value determined under Rule 5. The values of same average CFT of the evidences found in contemporaneous import of the importer as well as others in respect of imports from Ghana, Sudan, Panama, Ivory Coast and Ecuador were adopted for determining the transaction values under Rule 9 of the CVR, 2007.

3.7.4.4 For more clarity, an instance is taken as 60.32 CBM Teak Swan Timber was imported by the importer and sought clearances vide Bill of Entry No. 339947 dated 04.12.2010 at Kandla Port. The imported declared description as Teak Swan Timber (Swan Wood), declared quantity as 60.32 CBM and value of imported timber was declared @400 Per CBM. During the same period, M/s Beena Sales Corporation, Jaipur also imported Similar Teak Sawn Timber, which were cleared vide Bill of Entry No. 151367 dated 20.04.2010 at having identical number of pieces of swan timber in container, as shown in the document page number 257 & 258 of copies of sent email of Shri Avinash Jindal. Adopting method for arriving at quality of Tanzanian timber based on number of pieces in container, it is observed that considering number of pieces of 2612 Teak Sawn timber in the container, the quality is ascertained as Silly of Tanzanian Sawn Timber having 69.96 CBM, as per file path "live data/01/03-03-2010(67x20 Contns packing list (Narendra Patel/S-2(Details))" retrieved from hard disk of Shri Rajendra Agrawal. Rate of imported timber by M/s Beena Sales Corporation, Jaipur in the above mentioned import was found in private records, supra, as USD 805 per CBM. The import of M/s Beena Sales Corporation, Jaipur was contemporaneous to the import of the importer and from the same country, adopting of the import rate of material for the import made by the importer under Rule 9 of the Valuation Rules, 2007 is reasonable and appropriate as well as consistent with the general provisions of these Rules.

3.7.4.5 Accordingly, details of import with the required evidential details for valuation under Rule 9 of the Customs Valuation Rules, are incorporated

in Annexure C.2 (Kandla) and D.3 (Mundra) and differential duty is worked out on account of undervaluation as well as mis declaration of quantity.

3.8.1 It is worth mentioning here that during investigation evidence regarding huge cash payments by the importer are unearthed. The mention of huge cash details in the account statement which appears to be the amounts relating to the suppressed part of the transactions strengthens the charge of undervaluation of timber imported. The fact of cash transaction toward suppressed value as well as suppressed quantity of imported timber have categorically admitted by Shri Avinash Jindal on behalf of the Importer. There are clear admission regarding payment and receipt of cash towards suppressed quantity of timber. The cash payment by the importer 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.

3.8.2 In view of the above, the undervaluation of the imported timber as well as mis declaration of imported timber by the importer in import documents as against the actual value and quantity 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.

3.9 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.

3.10.1 In the present case, I find all the importer 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 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.

3.10.2 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."

3.10.3 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."

3.10.4 The present proceeding is based on documentary evidences corroborated by confessional statements by 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.).

3.10.5 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.

3.10.6 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.

3.10.7 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.

3.11.1 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 importer of timber had filed all required Export documents along with. 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.

3.11.2 Based on citations, the importer argued that some 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. Also no appeal was preferred against these assessment orders. 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. 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*.

3.11.3 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 pre-mature 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.

3.11.4 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.

3.11.5 The importer argued that depositions were recorded under duress and coercion as well as no cogent and tangible evidences to substantiate the allegations that they have declared the lower value of the imported goods for evasion of Customs duty. Statement of Shri Avinash Jindal were recorded on various dates 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. He had always option to correct his version of past statement when further statement was recorded, but he never came forward to state in his further statement that his version in past statement was not voluntarily, 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)

3.11.6 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/under-quantification was resorted to by the importer knowingly in connivance with Shri Avinash Jindal and Shri Rajendra Agrawal 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.

3.11.7 The contention of the Importer that DRI, Hyderabad 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.

3.12.1 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 as well as by mis declaring quantity in the Bills of Entry which resulted into short payment of Duty of Customs.

3.12.2 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 the importer, Shri Avinash Jindal and Shri Rajendra Agrawal, establish that the value declared by the importer were not correct transaction value. Also in some cases, the quantity of imported timber were also mis declared by the importer. I conclude that the investigating agency has proved their case with precision leaving no doubt about the undervaluation of the subject goods.

3.12.3 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 importer are required to be ascertained, as under:

(i). The Noticee imported timbers of various origin and got clearances under total 2 Bills of Entry. Out of which in respect of 1 of Bill of Entry file at Kandla and 1 Bill of Entry filed at Mundra, 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 and D1 to the SCN), Consequent to application of correct value and quantity, short payment of customs duty, in respect of 1 of Bill of Entry filed at Kandla and 1 Bill of Entry filed at Mundra, is workout to Rs. 49,566/- and Rs. 1,43,979/- respectively.

(ii) In respect of 3 Bills of Entry filed at Kandla and 2 Bills of Entry filed Mundra direct evidence is not available regarding value and quantity nor comparison of the price data for determination of value are available due to the variations in quality, quantity, grade, origin etc. Accordingly, determination of correct value cannot be resorted to under Rule 4 & 5 of the

Customs Valuation Rules, 2007 as well as in absence of details relating to prices at which the goods were sold in the highest aggregate quantity and details of cost structure, the value of the goods cannot be determined under Rule 7 & 8 of the Customs Valuation Rules, 2007. Therefore, valuation of timber covered under these Bills of Entry is to be made are Rule 9 of Valuation Rules, 2007 and the value available in the documents corroborated by the averments of the importers and the suppliers, can be taken as the price, by using the reasonable means consistent with the principles of general provisions of rules and based on the data available in India read with sub section (1) of 14 of Customs Act, 1962. Accordingly, valuation of each container covered under these Bills of Entry were examined with the required evidential details for valuation under Rule 9 of the Customs Valuation Rules, and detailed in Annexure C.2 and D.2 to the SCN. Consequent to application of correct value and quantity, short payment of customs duty, in respect of 3 of Bills of Entry file at Kandla and 2 Bills of Entry filed at Mundra, is workout to Rs. 3,50,986/- and Rs. 67,412/- respectively.

(iii) 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
1	Actual transaction value	1	49566	1	143979
2	Rule 9 of the CVR, 2007	3	350986	2	67412
	Total	4	400552	3	211391

3.13.1 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. 4,00,552/- and Rs. 2,11,391/-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.

3.13.2 The importer by resorting to the above mentioned wilful misstatement has rendered themselves liable to pay differential duty to the tune of Rs. 4,00,552/- and Rs. 2,11,391/- (as detailed in Annexures- C.1, C.2, D.1 and D.2, 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.

3.13.3 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.

3.13.4 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, D.2, C.2) 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.

3.14.1 Shri Avinash Jindal and Shri Rajendra Agrawal are 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. In the present case Shri Avinash Jindal acted on behalf of the importer.

3.14.2 The evidence unearthed during the investigation in the form documents, data retrieved from hard disks of computer, statement of the co-Noticees, it is evident that they acted as a commission agent between purchaser and seller. Shri Avinash Jindal and Shri Rajendra Agrawal caused to supply undervalued/under-quantified imported goods to the purchaser and collected additional consideration in cash transactions Further, from the evidences recovered from the hard Disc, Shri Avinash Jindal and Shri Rajendra Agrawal issued undervalued/under-quantified 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 Shri Avinash Jindal and Shri Rajendra Agrawal abetted in creation of fake documents (invoice, packing lists) presented before the Customs Authority with an intention to evade payment of duty of Customs.

3.14.3 Regarding contention of Shri Avinash Jindal and Shri Rajendra Agrawal that their role are misconstrued. I find that in connection with import transactions carried out by the importer, evidences of under valuation/under quantification were brought on record by conducting search of the premises of Shri Avinash Jindal and Shri Rajendra Agrawal and such evidences were corroborated through the depositions/admissions by Shri Avinash Jindal and Shri Rajendra Agrawal. They were 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).

3.14.4 Based on citations, Shri Avinash Jindal and Shri Rajendra Agrawal 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 their part 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) and 111(l) of the Customs Act, 1962, therefore Shri Avinash Jindal and Shri Rajendra Agrawal are liable for penalty under Section 112(a) of the Custom Act, 1962.

3.14.5 Shri Avinash Jindal and Shri Rajendra Agrawal also contended that no penalty under Section 114AA is leviable upon them. I find that in the present case, they 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 and Shri Rajendra Agrawal rendered themselves liable for penalty under Section 114AA of the Customs Act, 1962.

3.14.6 In view of the foregoing discussion, I find that Shri Avinash Jindal and Shri Rajendra Agarwal are also liable for penalty under Section 112(a) of Customs Act, 1962, *inasmuch*, as they were indulged with the importer in undervaluing and under-quantifying 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 and Shri Rajendra Agarwal in their statements. They have 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, they are 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 Sumerchand Jindal and Shri Rajendra Agarwal 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

3.15.1 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 C.1 & C2 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 C.1 & C2 to the SCN, in terms of Section 14(1) of the Customs Act, 1962 read with Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.
- (iii) I order to consider the actual quantities of goods imported as arrived at on the basis of various documents/records (as detailed in the Annexures-C.1, C.2 to the notice) for the purpose of calculation of differential duties.
- (iv) I confirm and order to recover differential duties of Rs. 4,00,552/- (Rupees Four Lakhs Five Hundred and Fifty Two Only) from M/s Jindal Wood Industries, Gandhidham under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962
- (v) I order to charge and recover interest from M/s Jindal Wood Industries, Gandhidham under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962.
- (vi) I impose a penalty of Rs.4,00,552/- plus an amount equivalent to interest payable on confirmed duty upon M/s Jindal Wood Industries, Gandhidham under Section 114A of the Customs Act, 1962.
- (vii) I order to confiscate the goods valued at Rs. 57,91,278/- imported against the Bills of Entry as detailed in Annexure-C-1& C-2 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.
- (viii) I impose a penalty of Rs. 30,000/- (Rupees Thirty Thousand Only) upon M/s Jindal Wood Industries, Gandhidham under Section 112(a) of the Customs Act, 1962.
- (ix) I impose penalty of Rs. 30,000/- (Rupees Thirty Thousand Only) upon Shri Avinsash Jindal under Section 112(a) of the Customs Act, 1962.
- (x) I impose a penalty of Rs. 20,000/- (Rupees Twenty Thousand Only) upon Shri Avinsash Jindal under Section 114AA of the Customs Act, 1962.

3.15.2 PART-II 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 D1 and D2 to the notice) 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 D1 and D2 to the SCN in terms of Section 14(1) of the Customs

Act, 1962 read with Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

(iii) I order to consider the actual quantities of goods imported(as detailed in the Annexures-C.1, C.2 to the notice) as arrived at on the basis of various documents/records for the purpose of proper calculation of duties;

(iv) I confirm and order to recover differential duties of Rs. 2,11,391/- (Rupees Two Lakhs Eleven Thousand Three Hundred and Ninety One Only) from M/s Jindal Wood Industries, Gandhidham under Section 28(4) [erstwhile proviso to Section 28(1)] of the Customs Act, 1962

(v) I order to charge and recover interest from M/s Jindal Wood Industries, Gandhidham under Section 28AA [erstwhile Section 28AB] of the Customs Act, 1962.

(vi) I impose a penalty of Rs. 2,11,391/- plus an amount equivalent to interest payable on confirmed duty upon M/s Jindal Wood Industries, Gandhidham under Section 114A of the Customs Act, 1962.

(vii) I order to confiscate the goods valued at Rs. 53,51,934 imported against the Bills of Entry (as detailed in Annexure- D1 and D2 to the notice) 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.

(viii) I impose a penalty of Rs. 20,000/- (Rupees Twenty Thousand Only) upon M/s Jindal Wood Industries, Gandhidham under Section 112(a) of the Customs Act, 1962.

(ix) I impose a penalty of Rs. 20,000/- (Rupees Twenty Thousand Only) upon Shri Rajendra Agarwal under Section 112(a) of the Customs Act, 1962.

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


[P.V.R.REDDY]

PRINCIPAL COMMISSIONER

BY RPAD/SPEED POST TO:

1. M/s Jindal Wood Industries,
Plot No.3 5, Survey No.29,
Meghpur Borichi, Anjar Road,
Gandhidham-370110
2. Shri Avinash Jindal,
Bungalow No.12, Plot No.291/292,
Near Gurukul,
Gandhidham-370201
3. Shri Rajendra Agarwal,
No.33, NRI Colony, Mandakini,
GK-IV, New Delhi-110019

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 Dy/Asstt Commissioner of Customs (Recovery), CH., Kandla.
5. The Dy/Asstt Commissioner of Customs (Gr-I), CH., Kandla.
6. Guard File.