

		OFFICE OF THE COMMISSIONER CUSTOM HOUSE, KANDLA NEAR BALAJI TEMPLE, NEW KANDLA Phone : 02836-271468/469 Fax: 02836-271467
A	फाइल संख्या/ File No.	S/10-10/ADJ/COMMR/BALGOPAL/2017-18
B	आदेश में मूल सं./ Order-in-Original No.	KDL/COMMR/SKA/03/2018-19
C	पारित कर्ता/ Passed by	SHRI SANJAY KUMAR AGARWAL, COMMISSIONER OF CUSTOMS, KANDLA
D	आदेश की दिनांक/Date of order	14/06/2018
E	जारी करने की दिनांक/Date of issue	14/06/2018
F	एस.सी.एन. सं. एवं दिनांक/ SCN F. No. & Date	F.NO.VIII/48/04/2011-DRI-HRU DATED 29.06.2011
G	नोटीसी/ पार्टी Noticee/Party	M/s. Balgopal Shipping & Logistics and Others.

- यह अपील आदेश संबन्धित को नि शुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.
- Any person aggrieved by this Order - in - Original may file an appeal under Section 129A(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:

"केंद्रीय उत्पाद शुल्क एवं सेवाकर अपील अधिकरण"

पश्चिम क्षेत्रीय बेंच

द्वितीय तल, बहुमाली भवन आसरवा

गिरधर नगर ब्रिज के समीप, गिरधर नगर, अहमदाबाद- ३८० ००४

**Customs Excise & Service Tax Appellate Tribunal,
West Zonal Bench,**

2nd Floor, Bahumali Bhavan Asarwa,

Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad – 380004

- उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।
Appeal shall be filed within sixty days from the date of communication of this order.
- उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 2/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 2/- under Court Fee Act it must accompanied by –

(i) उक्त अपील की एक प्रति और

A copy of the appeal, and

(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-

1870 के मद सं.-6 में निर्धारित 5.00/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।

This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5.00/- (Rupees Two only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

- अपील ज्ञापन के साथ ड्यूटी/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.
- अपील प्रस्तुत करते समय, सीमा शुल्क नियम (अपील), 1982 और सीमा शुल्क अधिनियम, 1962, के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.
- इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग शुल्क का %7.5 भुगतान करना होगा।
An appeal against this order shall lie before the Appellate Authority on payment of 7.5% of the duty demanded wise duty or duty and penalty are in dispute, or penalty wise penalty alone is in dispute.

BRIEF FACTS OF THE CASE:

This is a case of *de-novo* adjudication consequent to the order passed by Hon'ble CESTAT, Ahmedabad vide its Order No. A/10697-10728/2017 dated 31.03.2017 under Section 129-A(4) of the Customs Act, 1962 against the OIO No. KDL/COMMR/13/2011-12 dated 26.12.2011 passed by the Commissioner of Customs, Kandla, wherein the Hon'ble CESTAT while dealing with the Appeal No. C/43/2012 filed by the Revenue for enhancement of penalties on M/s Balgopal Shipping & Logistics, Shri G. R. Dwivedi, Shri A. Rajesh, Shri Vivek Shukla, Shri Santosh Kumar & Shri Vipul Sharma under Section 114(i) and 114AA, observed that while imposing the penalties the Commissioner has not given any reasoning as to why the penalties imposed are low as compared to the maximum penalty that can be imposed. Hence, the Revenue Appeal No. C/43/2012 is allowed by way of remand to the Adjudicating Authority. Further, the following appeals have been filed by the Party/Noticee against the imposition of penalties upon them by the Commissioner of Customs, Kandla in the above referred order and their details are as under,-

Sr. No.	Appeal No.	Name of the Party (Shri)	Appeal filed for
1	C/44/2012	Vivek Shukla	Appeal against the imposition of Penalties under Section 114 & 114AA of the Customs Act, 1962
2	C/56/2012	Santosh Kumar	--do--
3	C/62/2012	Vipul Sharma	--do--

2. The above Partys'/Noticees' appeals have been set-aside and matter remanded to Adjudicating Authority on the ground that there is no discussion on the reasons for imposition of low penalties on them. Accordingly, the case is taken up for deciding afresh.

3. M/s. Balgopal Shipping & Logistics, Gandhidham, Kutch, (hereinafter referred to as 'M/s. BSL') is a merchant exporter engaged in the export of rice through Kandla Port. It is a partnership firm having Shri G.R Dwivedi and his son Shri Ashish Dwivedi are partners and day to day affairs of the firm were being looked after by Shri G.R Dwivedi.

4. Intelligence was gathered that M/s BSL were exporting non-Basmati Rice in the guise of Basmati Rice through Custom House, Kandla with the connivance of various persons along with his partner Shri G.R. Dwivedi. In

pursuance of the above intelligence, the officers of DRI, Hyderabad/Gandhidham conducted simultaneous searches on 18.02.2011 at the Business premises of M/s. BSL, Gandhidham, Office premises of M/s. Bharath Exports, Hyderabad, residential premises of Shri Aitha Rajesh, Hyderabad which resulted in recovery of certain incriminating records relating to procurement of non-basmati rice and its exports.

5. On same day, the officers of DRI, Hyderabad/Gandhidham also examined the goods attempted to be exported by M/s. BSL in three containers by mis-declaring non-basmati rice as basmati rice under Shipping Bills Nos. 2429321 and 2429323 both dtd 04.02.2011. It also revealed that the goods were of non-basmati nature and that the descriptions found on the packages of export goods were clearly indicated as 'Non-Basmati Rice'. Other 19 containers covered under five Shipping Bills duly exported in past were also called back. The officers drew the representative samples of rice for each variety of rice available in the said 22 containers and detained the said 22 containers under panchnama dated 18.02.2011 and 20.02.2011. Therefore, the 22 containers of rice vide 7 Shipping Bills were detained under panchnamas dated 18.02.2011 and 20.02.2011.

6. On scrutiny of documents recovered from the business premises of M/s. BSL during the search, it appeared that all the bills contained the description of goods procured by them as other than Basmati Rice viz. "Rice", "Sona Steam Rice", "BPT Rice", "NLR34449" and its prices varied between Rs. 17/Kg to Rs. 22/Kg.

7. Further, certain stock statements were maintained by M/s. BSL. These stock statements contained the details such as date on which M/s. BSL received the rice, truck number under which the rice were received, the supplier who had supplied the rice, number of bags and the total weight of the quantity received. This showed that M/s. BSL had received only non-basmati variety of rice and not Basmati Rice as mentioned in their Shipping Bills. Thus, it was clearly evident that M/s. BSL had mis-declared the variety of rice at the time of exports which was prohibited under the Foreign Trade Policy 2009-2014 [FTP] and also did not meet the requirements as mentioned in the relevant notifications.

8. The relevant notifications with regard to prohibition/ban/restrictions for export of non-basmati rice were issued by Director General of Foreign Trade, Ministry of Commerce, Government of India from time to time. The Notification No.38 (RE-2007)2004-09 dated 15.10.2007 of DGFT, prohibited export of Non-Basmati Rice, which was amended by Ntn.No.58(RE-2007)/2004-09 dated 26.11.2007 to the extent that the prohibition of export imposed was relaxed to

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

9. On summarizing the notifications issued from time to time referred to above, export of non-basmati rice was prohibited under the Foreign Trade Policy and not permitted to be exported. Even for certain period, i.e. during from 16.9.2008 to 05.11.2008, where certain conditions viz., length to be more than 7 or 6.61mm and ratio of length to breadth 3.5 or 3.6 as the case may be, were imposed for export of non-basmati rice, M/s.BSL had undertaken export of non-basmati rice during the period from September, 2009 to Feb.2011, which was prohibited during this period. Even assuming that M/s. BSL had exported Basmati Rice, it could not do so, as the restrictions, with regard to size, permission from APEDA, New Delhi, and the FOB price, were not fulfilled. The thirty three samples drawn from 22 containers and the test results given

by BEDF (Basmati Export Development Federation) thereof proved testimony to the fact beyond doubt that the rice was of non-basmati variety.

10. The officers have drawn representative samples from each and every variety of rice available from all the containers for the purpose of ascertaining the exact nature of rice.

11. BEDF conducted the DNA analysis and other required analysis for all the rice samples drawn on 18.02.2011 and 20.02.2011 and all the rice samples came out to be Non-Basmati Rice on testing. In regard to whether the rice sample met the specifications of Basmati Rice as per DGFT Ntn.No.57/2009-2014 dt.17.08.2010 (Grain of rice shall be more than 6.61 mm of length and the ratio of length to breadth (L/B) of the grain shall be more than 3.5), the analysis report confirmed that "sample **did not** meet the specifications as prescribed by DGFT for Export of Basmati Rice.

12. From the incriminating documents recovered during the search operations and statements recorded under the Customs provisions, it is revealed that,-

12.1 Shri G.R Dwivedi, Partner of M/s.BSL and Shri A. Rajesh of Hyderabad hatched a conspiracy to export non-basmati rice in the guise of Basmati rice as the demand for non-basmati rice was fetching more profits when compared to export of basmati rice. In this process, they devised a scheme to export rice from Kandla port by mis-declaring the description of export goods as Basmati rice and also by indicating the price (FOB Value) of the export goods as more than US\$ 850 in tune with the DGFT policy. In the scheme devised, Shri Rajesh used to procure non-basmati rice from various rice mills in the states of Andhra Pradesh, Karnataka, etc., and the same were being transported to Gandhidham for export. Shri G.R Dwivedi used to take care of export of rice from Gandhidham in the name of his firm M/s.BSL. In this process, Shri A. Rajesh also floated a firm in the name and style of M/s. V. Sai Pte. Ltd., at Singapore in the name of his relative, for import of rice from M/s.BSL. They (S/Shri Dwivedi & Rajesh) procured non-basmati rice and were exporting the same to various consignees at abroad including M/s. V. Sai Pte. Ltd., Singapore. They were getting only invoices indicating the description of goods as 'Basmati Rice' to show the same to Customs at the time of export as if they were procuring Basmati Rice for the purpose of export. In this process, both Shri Dwivedi and Shri Rajesh reaped the monetary benefits out of these transactions.

12.2 Shri G.R Dwivedi, Partner of M/s. Balgopal Shipping and Logistics, Gandhidham, was exporting Non-Basmati Rice in the guise of Basmati Rice right from the inception of his firm, i.e. from September 2009 to February 2011 being aware of the prohibition for export of non-basmati rice.

12.3 Shri G.R Dwivedi & Shri A. Rajesh had procured non-basmati rice from various rice millers and traders in the name of third parties but got the non-basmati delivered at their godowns for illegal export in the guise of basmati rice. This was done to suppress the fact of procurement of non-basmati rice by them. The intention to illegally export non-basmati rice was evident from the way the non-basmati rice was procured by them in the name of third parties. Various millers / traders of rice in their statement admitted that they had never supplied basmati rice to M/s.BSL.

12.4 M/s.BSL continued to smuggle non-basmati rice in the guise of Basmati Rice by not declaring the same in the relevant Shipping Bills and attempted to export the said prohibited goods vide seven Shipping Bills in twenty two containers as referred. At the time of drawing panchanama, Shri Vivek Shukla, office Assistant of M/s.BSL and Shri M. Santosh Kumar (Brother-in-law of Sri A. Rajesh) admitted that non-basmati rice was being exported in the guise of basmati rice.

12.5 All the rice samples drawn from the export consignments covered in this notice had been found to be non-basmati rice as per the report of Basmati Export Development Federation. It was reported that the rice samples did not meet the specification of basmati rice as per DGFT Notification No. 57/2009-14 dated 17-08-2010 for export of basmati rice.

12.6 Shri G.R Dwivedi, Partner of M/s.BSL admitted that he continued to export the prohibited item, i.e. non-basmati rice, including the seven Shipping Bills mentioned in the foregoing paragraph. Shri G.R Dwivedi advised his employees S/Shri Vipul Sharma, Vivek Shukla & Lalith to prepare documents for export of basmati rice despite the fact that non basmati rice was procured for export. Shri G.R. Dwivedi colluded with Shri A. Rajesh for procuring non-basmati rice through third parties. Payments to the suppliers of rice were routed through the third parties. Blank bill books of M/s. Shub Labh Agencies was obtained to show purchase of Basmati Rice from them. The whole criminal conspiracy was hatched to show purchase of basmati rice by M/s.BSL when the fact remained that non-basmati rice was purchased by M/s.BSL. In view of the various acts of willful commissions and omissions committed by Shri G.R

Dwivedi, as discussed in paras supra he was liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962.

12.7 Shri A. Rajesh, was instrumental in devising the scheme of fraud and also in procuring non-basmati rice from various rice millers / traders / brokers in the name of third parties and ensured that the non-basmati rice was delivered at Gandhidham for eventual export in the guise of basmati rice. He also procured orders from overseas buyers for supply of non-basmati rice. He arranged to export non-basmati rice through M/s.BSL and not in his own name so as to avoid detection of his offence. M/s. V.Sai Pte. Ltd., Singapore, [one of the overseas buyer], was a company floated by Shri A. Rajesh to export non-basmati rice. Shri A. Rajesh being aware that the rice being exported by him did not satisfy the conditions laid down for export of basmati rice in the DGFT notification, entered into a criminal conspiracy with Shri G.R Dwivedi to illegally export non-basmati rice and hence was liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962 for the willful acts of commission and omission on his part, as discussed in the paragraphs supra.

12.8 Shri Vipul Sharma, Clerk of M/s.BSL used to attend the documentation work for the exports to be undertaken by M/s.BSL. He filed Shipping Bills online from the office of M/s.BSL, for the export of non-basmati rice by declaring the same as basmati rice. He also ensured that the bags of non-basmati rice were loaded after 2000 Hrs into the containers at CONCOR-CFS, Gandhidham for the exports made by M/s.BSL, as there was no regular Officer of Customs posted at CONCOR-CFS. Shri Vipul Sharma also substituted basmati rice in the samples drawn and delivered the substituted samples of basmati rice to customs for the purpose of test/sampling. He admitted that M/s.BSL never exported basmati rice and they only exported non-basmati rice in the guise of basmati rice. For his active participation of illegal export of non-basmati rice Shri Vipul Sharma was liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962 in view of the willful acts of commission and omission on his part, as discussed in the paragraphs supra.

12.9 Shri Vivek Shukla, office Assistant of M/s.BSL, actually prepared the invoice, packing list, Shipping Bills and handed over the same to Shri Vipul Sharma for processing the same for eventual export of the goods by M/s.BSL. Shri Vivek Shukla, being aware that the goods to be exported was non basmati rice prepared the documents to show that the goods were basmati rice and abetted the illegal export of non-basmati rice and for this willful acts of commission and omission on his part as discussed in the paragraphs supra, he

was liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962.

12.10 Shri Santosh Kumar, Brother-in-law of Shri A. Rajesh actively participated in the illegal export of non-basmati rice by receiving non-basmati rice sent by Shri A. Rajesh at Gandhidham and assisting M/s.BSL in preparation of documents for export of non-basmati rice in the guise of basmati rice. Shri Santosh Kumar being aware of the prohibition of export of basmati rice indulged in illegal activity of export of non-basmati rice and was liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962 for the willful acts of commission and omission on his part, as discussed in the paragraphs supra.

12.11 M/s.Subh Labh Agencies, represented by Shri Sunny Kumar Jain admitted that he gave permission to Shri G.R Dwivedi to procure non-basmati rice in his name. In pursuance of this arrangement he provided his TIN number and address to Shri A. Rajesh to procure non basmati rice from various rice millers / traders / brokers. Shri Sunny Kumar Jain supplied empty bill books of M/s. Subh Labh Agencies to M/s.BSL, to enable them to fill in the details as per the requirement of M/s.BSL. For giving permission to procure non basmati rice by M/s.BSL in the name of M/s. Subh Labh Agencies and providing blank bill book of M/s.Subh Labh Agencies, he was receiving brokerage. By this acts of commission and omission on the part of M/s. Subh Labh Agencies, represented by Shri Sunny Kumar Jain as discussed in paras supra, they had willfully abetted in the smuggling of non basmati rice in the guise of basmati rice and hence were liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962.

13. Therefore, a show cause notice bearing F.No.VIII/48/04/2011-DRI-HRU dated 29.06.2011 was issued by the Additional Director General, Directorate of Revenue Intelligence, Chennai and the same was adjudicated by then Commissioner of Customs, Kandla vide O.I.O No. KDL/COMMR/13/2011-12 dated 26.12.2011 after considering the facts and circumstances of the case and passed the following order:

ORDER

- (1) Ordered for confiscation of 520.926 Metric Tons of Non-basmati Rice having declared valued at Rs.2,24,68,017/- seized on 25.02.2011, under section 113(d), 113(e), 113(h) and 113(h)(i) of the Customs Act, 1962.
- (2) However, given the exporter M/s. Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham an option to redeem the same, since the value of 520.926 MT of Non-basmati

Rice on the basis of current value of the cargo at around Rs.11/- per Kgs comes to Rs.57,30,186/-, on payment of a fine of Rs.15,00,000/- (Rupees Fifteen lakhs only) in lieu of confiscation.

- (3) Imposed penalty of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) on M/s. Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under section 114 of the Customs Act, 1962.
- (4) Imposed penalty of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) on M/s. Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under section 114AA of the Customs Act, 1962.
- (5) Imposed penalty of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) on Shri G.R. Dwivedi, Partner of M/s.Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under section 114 of the Customs Act, 1962.
- (6) Imposed penalty of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) on Shri G.R. Dwivedi, Partner of M/s.Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under section 114AA of the Customs Act, 1962.
- (7) Imposed penalty of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) on Shri A. Rajesh, Procurer / Broker for M/s.BSL, Flat No.506, Shantiniketan Apartment, Street No.2, Lane No.10, Barkatpura, Lingampally, Hyderabad, under section 114 of the Customs Act, 1962.
- (8) Imposed penalty of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) on Shri A. Rajesh, Procurer / Broker for M/s.BSL, Flat No.506, Shantiniketan Apartment, Street No.2, Lane No.10, Barkatpura, Lingampally, Hyderabad, under section 114AA of the Customs Act, 1962.
- (9) Imposed penalty of Rs.1,00,000/- (Rupees One Lakh only) on Shri Vipul Sharma, Clerk of M/s.BSL, 168 & 169, Sara Nagar, Galpadar, Gandhidham, under section 114 of the Customs Act, 1962.
- (10) Imposed penalty of Rs.1,00,000/- (Rupees One Lakh only) on Shri Vipul Sharma, Clerk of M/s.BSL, 168 & 169, Sara Nagar, Galpadar, Gandhidham, under section 114AA of the Customs Act, 1962.
- (11) Imposed penalty of Rs.50,000/- (Rupees Fifty Thousand only) on Shri Vivek Shukla, Office Assistant of M/s.BSL, B-508, Sapna Nagar, Gandhidham, under section 114 of the Customs Act, 1962.
- (12) Imposed penalty of Rs.50,000/- (Rupees Fifty Thousand only) on Shri Vivek Shukla, Office Assistant of M/s.BSL, B-508, Sapna Nagar, Gandhidham, under section 114AA of the Customs Act, 1962.
- (13) Imposed penalty of Rs.50,000/- (Rupees Fifty Thousand only) on Shri Santosh Kumar, 8-4-310, Ganesh Nagar, Karimnagar, A.P., under section 114 of the Customs Act, 1962.

- (14) Imposed penalty of Rs.50,000/- (Rupees Fifty Thousand only) on Shri Santosh Kumar, 8-4-310, Ganesh Nagar, Karimnagar, A.P., under section 114AA of the Customs Act, 1962.
- (15) Imposed penalty of Rs.50,000/- (Rupees Fifty Thousand only) on M/s.Subh Labh Agencies, represented by Shri Sunny Kumar Jain, 2745/2, 1st Floor, Naya Bazar, New Delhi, under section 114 of the Customs Act, 1962.
- (16) Imposed penalty of Rs.50,000/- (Rupees Fifty Thousand only) on M/s.Subh Labh Agencies, represented by Shri Sunny Kumar Jain, 2745/2, 1st Floor, Naya Bazar, New Delhi, under section 114AA of the Customs Act, 1962.

14. PERSONAL HEARING:

Personal Hearing (PH) in the case was first fixed on 15.03.2018, however, no one appeared on the said date. Second PH was fixed on 05.04.2018, Shri G.R.Dwivedi (partner of M/s BSL), Shri Vipul Sharma & Shri Vivek Shukla vide letters all dated 05.04.2018 have sought for adjournment of personal hearing and sought to re-fix after a fortnight. Accordingly, third PH was fixed on 19.04.2018, Shri Vikas Mehta, Advocates & Consultants of D'legal, Gandhidham, the authorized representative of M/s Balgopal Shipping & Logistics, Shri.G.R. Dwivedi (Partner of M/s BSL), Shri A. Rajesh, Shri Vipul Sharma, Shri Vivek Shukla & Shri Santosh Kumar vide letter dated 19.04.2018 sought one more opportunity of hearing on 26.04.2018 in the interest of natural justice. Fourth PH was fixed on 26.04.2018 as per their representative's request; however, the same was postponed to 10.05.2018. Finally the PH was held on 10.05.2018 and Shri Vikas Mehta, the authorized representative of the noticees appeared for PH. During the course of PH, he stated that he could obtain the copy of Department's appeal before the CESTAT only recently and he wanted at least one week's time to file written submissions. He also stated that no further PH was required in this matter.

15. DEFENCE REPLY:

15.1 M/s. Balgopal Shipping & Logistics (M/s BSL) and its active partner Shri G.R. Dwivedi vide letter dated 23.05.2018 have filed their defence reply and inter-alia submitted that,

15.1.1 The prayer made by department to Hon'ble Tribunal for enhancing the penalty imposed under section 114(i) and 114AA of Customs Act, 1962 has not been allowed inasmuch as the Hon'ble Tribunal has not ordered for enhancement of penalty imposed under section 114(i) and 114AA of Customs Act, 1962. The Hon'ble Tribunal has allowed the appeal filed by department by

asking the Ld. Adjudicating Authority to inter alia, give reasons for supposedly imposing low penalty.

15.1.2 Further, the Hon'ble Tribunal has nowhere ordered for enhancement of penalty. As such, there is no mandate or obligation cast upon Ld. Adjudicating Authority to enhance penalty imposed upon M/s. Balgopal Shipping & Logistics and Shri G. R. Dwivedi in denovo proceedings. Even otherwise, it is a settled law that a person should not be placed in the worst position than he was at the time of passing the original order at the first instance. Reliance is placed on the following amongst other case laws:

- (i) *Nandesari Rasayanee Ltd. v/s Commr. of C. Ex. & Cus., Vadodara, 2009 (244) E.L.T. 289 (Tri.-Ahmd.)*
- (ii) *George Kurian v/s Commissioner of Central Excise, Belgaum, 2002 (141) E.L.T. 827 (Tri.-Bang.)*

15.1.3 Thus, there is no cause for enhancing penalty imposed under section 114(i) and 114AA of Customs Act, 1962 upon M/s. Balgopal Shipping & Logistics and Shri G. R. Dwivedi, partner of M/s. Balgopal Shipping & Logistics.

15.1.4 Without prejudice to above, it is respectfully submitted that the allegations leveled against them in the Show Cause Notice are contrary to statements of Custom officers who had actually examined the goods and taken samples. The statements of officers have not been challenged in the Show Cause Notice and consequently, the officers have not been called upon to show cause. Hence, their statements must hold the field and prevail over all other narration.

15.1.5 Shri Parthiv Chavda, Inspector and Shri Manoj Kumar Sharma, Superintendent, in their respective statements have inter alia stated that,

- Samples were taken by them from goods covered by 07 shipping bills only.
- Goods of no other exporter were found.
- It is not possible to replace the samples.
- No brand of non-basmati rice mentioned in the panchanama was found during examination.

15.1.6 It may kindly be appreciated that neither Show Cause Notice nor appeal filed by department throws any challenge against the statements of its own officers.

15.1.7 Thus, they have not committed any offence of the nature narrated in the show cause notice and entire proceedings initiated against M/s. Balgopal Shipping & Logistics and Shri G. R. Dwivedi are liable to be dropped.

15.1.8 Without prejudice to above, separate penalty is not imposable on partner and partnership firm, as already settled by way of following decisions:

- (i) *Pravin N. Shah v/s CESTAT, 2014 (305) E.L.T. 480 (Guj.)*
- (ii) *C.C.E. & C., Surat-II v/s Mohammed Farookh Mohammed Ghani, 2010 (259) E.L.T. 179 (Guj.)*
- (iii) *Metal Recycling Industry v/s Commissioner of C.Ex., Surat-I, 2009 (246) E.L.T. 281 (Tri.-Ahmd.)*
- (iv) *Commissioner of Central Excise, Surat v/s Alfa Synthetics, 2009 (241) E.L.T. 480 (Tri.-Ahmd.)*
- (v) *Moontex Dyeing & Printing Works v/s Commissioner of C.Ex., Surat, 2007 (215) E.L.T. 46 (Tri.-Ahmd.)*
- (vi) *Aarem Chemicals v/s Commissioner of Central Excise, Madurai, 1999 (111) E.L.T. 237 (T)*
- (vii) *Sai Metal Industries Ltd. v/s Commissioner of C.Ex., Hyderabad, 2010 (256) E.L.T. 631 (T)*

15.1.9 In view of the above, it is prayed that proceedings against M/s. Balgopal Shipping & Logistics and Shri G. R. Dwivedi, partner may kindly be dropped.

15.2 Shri A. Rajesh vide letter dated 24.05.2018 has filed his defence reply and inter-alia submitted,

15.2.1 An identical reply as of M/s BSL & its partner covering as above Sr. No. 15.1.1 to 15.1.7, hence, it is not repeated again.

15.2.2 Further, he neither prepared nor filed any shipping bill for export of non-basmati rice by M/s. Balgopal Shipping & Logistics. He had nothing to do with any customs procedures regarding to export of rice by M/s. Balgopal Shipping & Logistics. Hence, it would be completely incorrect to allege that he is responsible for rendering the said rice liable to confiscation under the

provisions of section 113 of Customs Act,1962, thereby, rendering himself liable to penalty under section 114 of Customs Act,1962.

15.2.3 He has not made, signed or used or caused to be made, signed or used, any declaration, statement or document which is false or incorrect, or otherwise, in any material particular. Hence, he is not covered by the situation for which section 114AA of Customs Act, 1962 is envisaged.

15.2.4 Thus, he has not committed any offence of the nature narrated in the show cause notice and entire proceedings initiated against him are liable to be dropped.

15.3 Vide letter dated 21.05.2018, Shri Vipul Sharma has filed his defence reply and inter-alia submitted,

15.3.1 An identical reply as of M/s BSL & its partner covering Sr. No. 15.1.2, 15.1.4 & 15.1.5, hence, it is not repeated again.

15.3.2 Further, he added that he was working with M/s. Balgopal Shipping & Logistics, Gandhidham as clerk. He was paid salary of Rs. 8,000/- per month. He attended to documentation required for import and export work in Custom House. Shri Dwivedi (partner of M/s. Balgopal Shipping & Logistics) gave instructions to prepare documents for goods to be exported by M/s. Balgopal Shipping & Logistics. Accordingly, he had prepared documents for export of Indian Basmati Rice.

15.3.3 He, being aggrieved with the Order-in-Original, he filed appeal No. C/62/2012 with Hon'ble CESTAT. That a common appeal No. C/43/2012 was also preferred by the department with Hon'ble CESTAT on the ground that the penalty imposed on him is not commensurate with his role. The Hon'ble Tribunal has passed a common order bearing No. A/10697-10727/2017, dated 31.03.2017 and has allowed appeals filed by him as well as department.

15.3.4 He had not made any personal gain out of the alleged offence. This position is duly supported in the show cause notice inasmuch as it nowhere

alleges that he had derived any gain from his master or any other person while preparing the shipping bills for the rice entered for export by M/s. Balgopal Shipping & Logistic. Even the appeal memorandum filed by department does not point towards any personal gain flowing to him. Thus, he is not liable to any penalty under section 114AA and 114(i) of Customs Act, 1962. Accordingly, he relied upon following case laws where it is held that penalty is not imposable on an employee when he has acted under the directions of employer:

- (i) Commissioner of Customs, Surat v/s Iqbal Jusub Memon, 2012 (279) E.L.T. 157 (Tri.-Ahmd)
- (ii) Carpenter Classic Exim Pvt. Ltd., v/s Commissioner of Cus., Bangalore, 2006 (200) E.L.T. 593 (Tri.-Bang.)
- (iii) Gopi bhai Vaghji bhai Desai v/s Commissioner of Customs, Jaipur, 2004 (178) E.L.T. 1021 (Tri.-Del.)
- (iv) R. K. Srivastava v/s Commissioner of Customs, New Delhi, 2008 (225) E.L.T. 523 (Tri.-Del.)
- (v) O. P. Agarwal v/s Commissioner of Customs, Kandla, 2005 (185) E.L.T. 387 (Tri.-Del.)

15.3.5 In view of above, it is respectfully submitted that being an employee, who has not made any personal gains, he is not liable to penalty under section 114(i) and 114AA of Customs Act, 1962. Further, he is also not in a position to make payment of even the earlier penalty imposed by the then Commissioner of Customs, Kandla and hence, any enhancement in penalty by your Honour, notwithstanding the submissions made hereinabove, will be beyond my reach and impossible for him to comply with. In view of above, it is prayed that proceedings against him may kindly be dropped.

15.4 Shri Vivek Shukla vide letter dated 21.05.2018 has filed his defence reply and inter-alia submitted that,

15.4.1 He also filed identical replies as of M/s BSL covering Sr. No. 15.1.2 and Sr. No. 15.3.2 & 15.3.5 of Shri Vipul Sharma, hence, it is not repeated again.

15.4.2 He was working with M/s. Balgopal Shipping & Logistics, Gandhidham as office assistant and paid salary of Rs. 10,000/- per month. He prepared invoice, packing list, shipping bill, bill of entry, etc. and handed it over to Shri Vipul Sharma (who attended to further processing and attend examination of the goods).

15.4.3 He was working in office only. He has never visited port. He neither seen the goods nor dealt with them. He only prepared documents as per the instructions of partner. The description stated by him in his statement was based on his understanding and not on the basis of physical examination or verification of any quality of rice. Therefore, it would not be correct to attribute mens rea to him and prayed that proceedings against him may kindly be dropped.

15.5 Shri Santosh Kumar vide letter dated 24.05.2018 has filed his defence reply and inter-alia submitted that,

15.5.1 He also filed an identical reply as of Shri A. Rajesh covering Sr. No. 15.2.2 & 15.2.3, hence, it is not repeated again.

15.5.2 He has no background of export/import or clearing/forwarding. At the material time, he was not even aware about the prohibition against export of non-basmati rice. The only job entrusted to him was to receive the rice sent by Shri A. Rajesh to Gandhidham. He has not rendered any rice liable to confiscation under section 113 of Customs Act, 1962. Hence, he is not liable to penalty under section 114 of Customs Act, 1962.

15.5.3 He was sent to Gandhidham to learn documentation. Consequently, he had no control on anyone and hence, he is not covered by the situation for which section 114AA of Customs Act, 1962 is envisaged. In view of above, the proceedings against him may kindly be dropped.

16. DISCUSSION AND FINDINGS:

16.1 I have gone through the records of the case, the impugned Show Cause Notice dated 29.06.2011, written as well as oral submissions on record made during the adjudication proceedings of earlier OIO No. KDL/COMMR/13/2011-12 dated 26.12.2011, Hon'ble CESTAT, Ahmedabad Order No. A/10697-10728/2017 dated 31.03.2017 and written as well as oral submissions made during the present adjudication proceedings.

16.2 The Hon'ble CESTAT, Ahmedabad at Para 7 of the Order No. A/10697-10728/2017 dated 31.03.2017 has observed that ***"As regards, Appeal No. C/43/2012 filed by the Revenue for enhancement of penalties imposed on M/s. BSL, Shri G. R. Dwivedi and Shri A. Rajesh under Section 114 (i) and 114 AA, It is seen that the penalty of Rs. 2.50 Lakhs each has been imposed against the maximum possible penalty of Rs. 6.75 Crore and Rs. 11.25 Crore respectively under Section 114 (i) and 114 AA respectively. On the same grounds, it has been argued that penalties imposed on Shri Vipul Sharma and Shri Vivek Shukla and Shri Santosh Kumar are very low. It has been argued that the Commissioner has not given any grounds for imposing such low penalties. Shri Vipul Sharma, Shri Vivek Shukla and Shri Santosh Kumar and M/s. Subh Labh Agencies are in appeal against the penalties imposed against them under Section 114 (i) and 114 AA. However, Revenue has not challenged the quantum of redemption fine imposed in the said case. We find that while imposing the penalties Commissioner has not given any reasoning as to why the penalties imposed are low as compared to the maximum penalty that can be imposed. It is seen that the Commissioner has clearly held that these peoples were involved in the illegal export and were in knowledge of the facts. We find that there is no discussion on the reasons for imposition of low penalties. In view of above, the orders of imposition of penalties on Shri Vivek Shukla, Shri Vipul Sharma and Shri Santosh Kumar is set aside and matter remanded to Adjudicating Authority. The Revenue Appeal No. C/43/2012 is allowed by way of remand to the Adjudicating Authority to examine the issue of quantum of penalty imposed on these persons. In case of M/s Subh Labh Agencies, Revenue has not challenged the quantum of penalty imposed. From the impugned order, it is seen that the penalty of Rs. 50,000/- has been imposed under Section 114 and 114 AA on M/s. Subh Labh Agencies in Para 22.7 of the impugned order. We agree with the observations. We find that the penalty on M/s. Subh Labh Agencies has been rightly***

imposed. Therefore, the appeal of M/s. Subh Labh is dismissed. In view of the above appeal C/43/2012 is allowed by way of remand. Appeal of M/s. Subh Labh Agencies is dismissed. Appeals of Shri Vivek Shukla, Shri Santosh Kumar and Shri Vipul Sharma are allowed by way of remand”.

16.3 The directions of Hon'ble CESTAT, Ahmedabad in the remand order are very limited to the effect that, the adjudicating authority had not given any reasoning as to why the penalties imposed are low as compared to the maximum penalty that can be imposed under Section 114 (i) & 114 AA of the Customs Act, 1962. Thus, I had to restrict myself to take a decision on the issue of quantum of imposition of penalties under Section 114 (i) & 114AA of the Customs Act, 1962 upon M/s Balgopal Shipping & Logistics, Shri.G.R. Dwivedi (Partner of M/s BSL), Shri A. Rajesh, Shri Vipul Sharma, Shri Vivek Shukla & Shri Santosh Kumar.

16.4 I find that Notification No.38 (RE-2007)2004-09 dated 15/10/2007 of DGFT (as amended), prohibited export of basmati rice. The exporters and his accomplices were very well aware of the prohibition imposed by the Government of India for export of basmati rice and to circumvent the prohibition imposed, undertook exportation of non-basmati rice in the guise of basmati rice. However, subject to the certain conditions, the export of non-basmati Rice was also allowed. The conditions under which export of non-basmati rice was allowed, were not applicable to M/s. Balgopal Shipping & Logistics, as the exports of M/s. BSL were contrary to the conditions of the above notifications. Accordingly, the DRI had seized 520.926 MTs of Rice which was declared as Basmati Rice by M/s. BSL with a declared value of Rs.2.24 Crores approximately on the ground that the rice appeared to be Non-basmati Rice which was prohibited for export.

16.5 I find that the rice samples drawn from the export consignments covered in this notice had been found to be non-basmati rice as per the test report of Basmati Export Development Federation. It was also reported that the rice samples did not meet the specification of basmati rice as per DGFT Notification No. 57/2009-14 dated 17-08-2010 for export of basmati rice. Further, I find that Shri Santosh Kumar and Shri Vivek Shukla, Office Assistant of M/s.BSL had admitted that the goods in question were Non-basmati rice. The documents seized from the premises of M/s. BSL and the statements of the Partner of BSL Shri G. R. Dwivedi, Shri A. Rajesh and other persons clearly confirmed that the goods in question were Non-basmati rice. In this regard, I rely in the case of ***Surjeet Singh Chhabra v. Union of India,***

1997 (89) E.L.T. 646 (S.C.), the Supreme Court has held that confessional statement made before Customs officer is an admission and binding since Customs officers are not police officers in terms of Section 25, Evidence Act, 1973. The **Madras High Court in the case of Assistant Collector of Customs v. Govindasamy Ragupathy, 1998 (98) E.L.T. 50 (Mad.)** held that confessional statement made under Sec. 108 of Customs Act, 1962 before Customs officers are to be regarded as voluntary. It is settled legal proposition that statement recorded under section 108 of the Act is admissible unlike a statement recorded by a Police Officer. Even noticees have not retracted/rebutted from their confessional statements. Hence, their admitted facts need not be required to be proved.

16.6 Under the above circumstances, it is clear that the goods in question were Non-basmati rice and therefore, then Adjudicating Authority had correctly held that the impugned goods were liable for confiscation under Section 113(d), 113(e), 113(h) and 113(h)(i) of the Customs Act, 1962. Then, Adjudicating Authority correctly confiscated 520.926 MTs of Non-basmati Rice seized by the DRI on 25.02.2011 with the declared value of Rs.2,24,68,017/-.

16.7 To examine the issue of imposing penalty for violation, I reproduce the provision of Section 114 (i) and 114 AA of the Customs Act, 1962 as under;

SECTION 114:- Penalty for attempt to export goods improperly, etc. – Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -

- (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding **three times the value of the goods** as declared by the exporter or the value as determined under this Act, whichever is the greater;
- (ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded or five thousand rupees, whichever is the greater;
- (iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.

SECTION 114AA:- Penalty for use of false and incorrect material. - *If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding **five times the value of goods.***”

16.8 I find that the various noticees have played crucial role in export of the prohibited goods i.e. non basmati rice in the guise of basmati rice in order to mislead the department and defeat the Foreign Trade policy.

16.9.1 I find that Shri G. R. Dwivedi, Partner of M/s.BSL, exporter has admitted that the goods attempted to be exported and seized by DRI were in fact non-Basmati Rice and the same is also corroborated by test report of BEDF. Therefore, the undisputed position on records is that the goods entered for exportation are non-basmati rice. Export of Non-basmati Rice was prohibited at the relevant time as per the Notification issued by DGFT. It, therefore, becomes apparently evident that there was preparation and attempt on the part of the exporter to export non-basmati rice which was prohibited for export at the material time. Further, despite having knowledge about the said prohibition, the exporter had filed mis-stated Shipping Bills with the department to the effect that the goods sought to be exported was Basmati Rice, which they knew was false. I therefore, find that for his act and omission on his part render the goods liable for confiscation and penalty under Section 114(i) of the Customs Act, 1962. Further, he abetted/helped in preparing documents mentioning ‘basmati rice’ in place of ‘non-basmati rice’ i.e. forging of invoices/various documents and thus liable for penal action in terms of Section 114AA of the Customs Act, 1962.

16.9.2 I find that Shri G. R. Dwivedi has directed his employee Shri Vipul Sharma to substitute basmati rice in the samples drawn and deliver the substituted samples of basmati rice to Customs for the purpose of test/sampling and further hoodwinked the Customs Officers who visited the godowns of CONCOR for verification by showing the genuine basmati rice stored in the godown pertaining to other exporters as theirs and Shri Vivek Shukla, Office Assistant to prepare invoice, packing list, shipping bills etc., showing the description of the product as Indian Basmati 1121 White Rice. He knew that the export of non-basmati rice was prohibited under the Foreign Trade Policy and even then allowed Mr. Rajesh to export various non-basmati rice, i.e. BPT/Sona Masuri varieties of rice by using IEC code of his company. He through Shri Bhushan Jain, manager of M/s Subh Labh Agencies and M/s

Vardhman International, facilitated Shri Rajesh to purchase different variety of non-basmati rice on their account and Mr. Rajesh routed the same directly to Gandhidham; that these fake invoices were got prepared to show as if Basmati Rice was purchased by him and exported. He is the active partner of the exporter firm. He caused to file all mis-stated Shipping Bills with the department to defraud. I therefore find that he is liable for penalties under Section 114(i) and 114AA of the Customs Act, 1962.

16.9.3 M/s BSL and its partner Shri G. R. Dwivedi argued that, the Hon'ble Tribunal has nowhere ordered for enhancement of penalty. They argued that the statements of officers have not been challenged in the Show Cause Notice and no separate penalty is imposable on both its partner and partnership firm. Further, submitted that a person should not be placed in the worst position during the re-adjudication of the remand case than he was at the time of passing the original order at the first instance.

16.9.4 The Hon'ble CESTAT has appreciated the facts that the adjudicating authority has clearly held that the noticees were involved in the illegal export and were in knowledge of the facts. The Hon'ble CESTAT has also observed that the adjudicating authority has not given any reasoning as to why the penalties imposed are low as compared to the maximum penalty that can be imposed. Accordingly, the Hon'ble CESTAT has directed to consider the quantum of penalties after taking into reasoning.

16.9.5 On 18/02/2011, the officers of DRI, Hyderabad / Gandhidham also examined the goods i.e. non-basmati rice, which were attempted to be exported by M/s BSL, by declaring the description of the goods as 'Indian Basmati 1121 Rice' in the Shipping Bills Nos.2429321 dated 04.02.2011 and 2429323 dated 04.02.2011 filed with the Customs, at M/s CONCOR CFS, Gandhidham, in the presence of independent witnesses, staff of CONCOR, Superintendent of Customs - in-charge of CONCOR CFS, Preventive Officer (Dock Preventive), which revealed that the goods were of non-basmati variety and that the descriptions found on the packages of the goods clearly indicated as 'Non-Basmati Rice'. The said facts were also confirmed by Shri Vivek Shukla, Shri Santosh Kumar & Shri A. Rajesh during the panchnama proceedings. It is confirmed that M/s BSL were exporting non-basmati Rice such as Sona Masuri Rice or Idli Rice packed in PP bags. The description of goods "Indian Basmati 1121 White Rice" mentioned in the above Shipping Bills was contrary to the actual description of the goods described on the pp bags. Further, test results given by BEDF also reported the export of non-basmati variety and also the samples did not meet the specifications as prescribed by

DGFT for Export of Basmati Rice. The fact of export of non-basmati rice was proved beyond doubt. Hence, the statements of officers have not been challenged in the Show Cause Notice is not relevant.

16.9.6 The Order-in-Original dated 26.12.2011 passed by then the Commissioner has been reviewed by the proper authority with respect to imposition of low penalties under Section 114(i) & 114AA of the Customs Act, 1962 on various noticees. Accordingly, the department had filed appeal before the Hon'ble CESTAT, Ahmedabad. After taking into consideration of the facts and circumstances of the case, Hon'ble CESTAT, Ahmedabad has allowed the appeal filed by the department and set aside the appeals preferred by the noticees. Hence, noticees contention that they should not be put in worst position during the re-adjudication of the remand case than at the time of passing the original order at the first instance is not relevant in the instant case and their placed case laws are distinguishable.

16.9.7 Further, they argued that no separate penalty is imposable on both its partner and partnership firm and cited various case laws in support of that. I find that in plethora of cases, it is held that penalty can very well be imposed, both on firm and its partner, where if specific role is attributed to the partner. I rely on the decision of **CESTAT, Principal Bench, New Delhi [Court II] in case of Prince International Vs. Commissioner of Central Excise, Noida. [2014 (310) ELT 545 (Tri-Del)] [Final Order Nos. C/A/53645-53647/2014-CU(DB), dated 18-9-2014 in Appeal Nos. C/665-666/2009-CU(DB) and C/29/2010-CU(DB)]** under which CESTAT refused to interfere with the imposition of penalty of Rs. 10 lakh on M/s. Prince International and penalty of Rs. 2.5 lakh imposed on its partner Shri Gyan Chand. Further, in another such case **Hon'ble High Court of Madras in case of C. Eswaran Vs. Commissioner of Customs, Coimbatore [2014 (306) ELT 264 (Mad)] [final Order C.M.A. Nos. 811 & 812 of 2012 and M.P. Nos. 1 of 2012 (2 Nos.), decided on 19-7-2012]** held that the Appellant in his capacity as partner abetted the firm to commit the offence - Statutory authority fully justified in imposing fine on firm as well as partner. Thus, the arguments put forth by them do not hold any merits and their placed citations do not come to save them. Hence, I propose to impose penalty on both firm and its active partner who was instrumental for the whole episode.

16.10.1 I find that Shri A. Rajesh was instrumental in devising the scheme of fraud and also in procuring non-basmati rice from various rice millers / traders / brokers in the name of third parties and ensured that the non-basmati rice was delivered at Gandhidham for eventual export in the guise of

basmati rice. He also procured orders from overseas buyers for supply of non-basmati rice. He arranged to export non-basmati rice through M/s.BSL. M/s.V. Sai Pte. Ltd, Singapore (one of the overseas buyer) is a company floated by Shri A. Rajesh to export non-basmati rice. Shri A. Rajesh being aware that the rice being exported by him did not satisfy the conditions laid down for export of basmati rice in the DGFT notification, entered into a criminal conspiracy with Shri G.R Dwivedi to illegally export non-basmati rice.

16.10.2 Shri A. Rajesh argued that he neither prepared nor filed any shipping bill for export of non-basmati rice by M/s. Balgopal Shipping & Logistics. Hence, he is not responsible for rendering the said rice liable to confiscation under the provisions of section 113 of Customs Act, 1962. Further, argued that he has not made, signed or used or caused to be made, signed or used, any declaration, statement or document which is false or incorrect, or otherwise, in any material particular.

16.10.3 Statement of Shri Madishetty Santosh Kumar, Rice Trader and representative of Shri A. Rajesh was recorded on 19/02/2011, he, *inter alia*, stated that Shri Rajesh used to procure only non-basmati rice from different places from Karnataka and Andhra Pradesh States, for the purpose of sending abroad from Kandla/Gandhidham; that all the times, the rice procured by Shri A. Rajesh were of the quality of Sona Masoori Rice, Steam Rice/Boiled rice for Idly, Dosa and the same were supplied to M/s. BSL for export out of India. Further, Shri A. Rajesh, in his Statement dated 09.03.2011 stated, *inter alia* that he used to procure Sona Masoori rice from different parties; that the goods were delivered at Gandhidham and exported to M/s Suriya Trading Company, Singapore; M/s. Mustafa, Singapore; M/s V Sai, Singapore, Vatan International, USA; Loftus, Australia; that as he was not having any certificate of IEC issued by DGFT, he entered into an oral agreement with M/s Balgopal Shipping & Logistics, Gandhidham for the export of non-basmati rice; that to take care of his interests at M/s Balgopal Shipping & Logistics, Gandhidham, he sent his wife's brother Sri M. Santosh Kumar to Gandhidham; that export of non-basmati rice was prohibited under the Foreign Trade Policy and that due to his financial position and to take care of his family, he was forced to take up export of non-basmati rice in violation of Foreign Trade Policy.

16.10.4 Shri Boddu Sreenivas, Executive Director of M/s. Sree Skandha Food Processing (India) Pvt. Ltd., in his statement dt.21.04.2011 & Shri Kodulur Venkatesh, Partner of M/s Sri Srinivas Agro Foods, Koppal in his statement dated 21.04.2011, both have inter-alia stated that Shri A. Rajesh wanted to purchase non-basmati rice from them and also he wanted the bills to

be raised in the name of M/s.Subh Labh Agency, New Delhi and the rice should be delivered at Kandla for export.

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

16.10.6 I find that he actually abetted/participated in preparing mis-stated invoice, packing list, Shipping Bills and caused to file before the department. He actively engaged in export of prohibited goods. I therefore, find that for his act and omission on his part render the goods liable for confiscation and he is liable for penalty under Section 114(i). Further, he was instrumental in causing preparing documents mentioning 'basmati rice' in place of 'non-basmati rice' i.e. forging of invoices/various documents and thus liable for penal action in terms of Section 114AA of the Customs Act, 1962.

16.11.1 Shri Vipul Sharma argued that he attended to import and export documentation work as per the direction of the Shri Dwivedi. He had not made any personal gain out of the alleged offence; hence, penalty is not imposable on an employee when he has acted under the directions of employer.

16.11.2 I find that Shri Vipul Sharma, Clerk of M/s.BSL attended the documentation work for the exports to be undertaken by M/s.BSL. He filed mis-stated Shipping Bills online from the office of M/s.BSL, for the export of non-basmati rice by declaring the same as basmati rice despite knowing that he was doing illegal activities which were not permissible under the Law. He also substituted basmati rice in the samples drawn and delivered the substituted samples of basmati rice to Customs department for the purpose of testing/sampling. He also admitted that whenever the Customs Officers visited the godowns of CONCOR for verification, they used to show the genuine basmati rice stored in the godown pertaining to other exporters as theirs. It is noteworthy that he has acted under the direction, with full knowledge that he is doing an act which is not permitted by law and no law permit anybody, even under the direction of his employer, to do any illegal act.

16.11.3 They argued that they as an employee acted according to their employer's direction, hence penalty is not imposable on an employee and cited various case laws in support of that. Further they argued that they have not

gained any monetary benefits from their acts. In the instant case, the noticees have not denied any facts of their involvement in illegal exports. Further, the Hon'ble CESTAT has remand back the case with a direction to examine the low imposition of penalties only. Therefore, it is not possible to grant any relief and their various citations placed are not relevant.

16.11.4 I therefore, find that for his act and omission on his part render the goods liable for confiscation. I find him liable for penalty under Section 114(i) of the Customs Act, 1962. Further, he abetted/helped in preparing/processing documents mentioning 'basmati rice' in place of 'non-basmati rice' i.e. forging of invoices/various documents and thus liable for penal action in terms of Section 114AA of the Customs Act, 1962.

16.12.1 I find that Shri Vivek Shukla, Office Assistant of M/s.BSL, prepared the mis-stated & false invoice, packing list, Shipping Bills to show that the goods were basmati rice despite being aware that the goods to be exported was non basmati rice and handed over the same to Shri Vipul Sharma for processing the same for eventual export of the goods by M/s.BSL and thus he abetted the illegal export of non-basmati rice and the impugned goods liable for confiscation. I therefore hold him liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962.

16.12.2 Shri Vivek Shukla submitted certain points in his defence reply which are identical and are already discussed under paras supra and therefore, not separately discussed again here.

16.13.1 I find that Shri Santosh Kumar, actively participated in the illegal export of non-basmati rice by receiving non-basmati rice sent by Shri A. Rajesh at Gandhidham and assisting M/s.BSL in preparation of mis-stated & false documents for export of non-basmati rice in the guise of basmati rice despite being aware of the prohibition of export of non-basmati rice.

16.13.2 He argued that he has no background of export/import or clearing/forwarding. He was not even aware about the prohibition against export of non-basmati rice. The only job entrusted to him was to receive the rice sent by Shri A. Rajesh to Gandhidham. He was sent to Gandhidham to learn documentation. He had no control on anyone and hence, no penalties are imposable on him.

16.13.3 At the time of drawing panchanama, Shri Vivek Shukla, Office Assistant of M/s.BSL and Shri M. Santosh Kumar (Brother-in-law of Sri A. Rajesh) admitted that non-basmati rice was being exported in the guise of basmati rice. He knows about the illegal export. It is noteworthy that he has acted under the direction, with full knowledge that he is doing an act which is not permitted by law and no law permit anybody, even under the direction of his employer, to do any illegal act and therefore, his argument do not have any substance at all. I therefore hold that he is liable for penalty under Section 114(i) and 114AA of the Customs Act, 1962.

16.14.1 Further, I find that as per the records, 22 containers containing 520.926 MTs were sought to be exported under 7 Shipping Bills filed on various dates in February 2011. Documentary evidence like purchase bills, transport documents, weighment slip, price of the rice etc. shows that M/s. BSL have received only non-basmati rice. During the course of investigation, statements tendered by various suppliers to M/s BSL have agreed that they have not dealt with any basmati rice. Empty Bill Books were used in the name of M/s Shubhlabh Agencies & M/s Vardhman International to show that M/s BSL has procured basmati rice from various suppliers. The conspiracy was hatched between Shri G. R. Dwivedi of BSL and Shri A. Rajesh of Hyderabad, as admitted by the former in his statement dated 18.03.2011. M/s BSL has mis-stated the facts in all relevant documents like Shipping Bills, Invoice etc filed before the Customs to illegally export the prohibited goods. All the statements of the noticees point to the careful preparation for exporting the prohibited items. Thus, they have used false and incorrect material before the Customs knowingly and intentionally in the transaction of their export business.

16.14.2 I rely in the case of **M/s VAIBHAV OVERSEAS SHRI GYAN CHAN, PARTNER Vs COMMISSIONER OF CENTRAL EXCISE, NOIDA (FINAL ORDER NOS.53836-53837/2014 dated 09.10.2014), wherein the Hon'ble CESTAT, New Delhi** has observed that the record reveals that in the guise of Basmati rice, attempt was made to export non Basmati rice adopting questionable modus operandi - Containers were stuffed such that front row contained Basmati rice and second row contained non-Basmati rice, used to camouflage - Samples were tested which proved malafide intention since the test Results indicated that consignments were non basmati rice and the export of which is prohibited by DGFT Notification No.55/(RE-2008)/2004-2009 as amended - **intentional mis-declaration deserves no leniency** - confiscation of the goods and imposition of redemption fine is justified. This is being a similar case where the exporters and their accomplices

were aware of the true nature of the goods being exported in violation of the provisions of the Customs Act, 1962 and Foreign Trade Policy.

16.14.3 I also rely in the case of **M/s KUNAL TRAVEL (CARGO) Vs COMMISSIONER OF CUSTOMS & CENTRAL EXCISE (Customs Appeal No. 314 of 2015 dated November 28, 2016)**, wherein **the Hon'ble High Court of Allahabad - Cus - Mens rea - Penalty u/s 114AA of Customs Act, 1962** - has held that upon examination on the material available on record, it becomes abundantly clear that in fact, the assessee was found guilty of mens rea of tempering with the goods that he was seeking to export. In the garb of exporting basmati rice, the assessee was trying to take out non-basmati rice which was clearly prohibited. There is a clear finding of fact recorded by the tribunal that not only was the assessee attempting to play fraud but also upon re-examination of the sample reports, it was found that the assessee had actually tried to export consignments of non-basmati rice which were prohibited to be exported by a Notification No.: 39 (RE-2008)/2004-09 dated 19.9.2008 and in fact, it was found that every container was loaded with 55 bags of basmati rice and 430 bags of non basmati rice and, therefore, the plea as made by learned counsel for the assessee that it was a case of mishandling of goods during loading, cannot be taken to be true. It was a deliberate strategy to keep the basmati rice in the front of container in order to avoid the detection of the non-basmati rice which was sought to be taken out surreptitiously. Hence, the imposition of penalty, therefore, is justified.

16.14.4 The Appellant was aggrieved with the above said Hon'ble High Court of Allahabad order dated 28.11.2016 and preferred an appeal before the Hon'ble Apex Court vide **Special Leave to Appeal (C) No(s).10391/2017, Dated: April 13, 2017** and the Apex Court has found no legal and valid ground for interference. The Special Leave Petition is dismissed. **Imposition of penalty, therefore, is justified under Section 114AA of Customs Act, 1962.**

16.15 Thus, it is a case where *mens rea* is established. Therefore, imposing lower level of penalties will not be deterrent enough against deliberate and repeated exports made contrary to the law of the land and frustrate the export restrictions imposed by the Government.

16.16.1 Further, I observe that in a similar issue, the Officers of Directorate of Revenue Intelligence, Hyderabad has booked another case in respect of M/s BSL and others (same noticees in this case also). In the past also M/s BSL had exported non-basmati rice in the guise of basmati rice vide 35 Shipping Bills totaling to 3061.36 Mts having declared value of Rs. 12,82,64,172/-. Accordingly, an SCN F.No. VIII/48/04/2011-DRI-HRU dated

16.01.2015 has been issued and the same has been adjudicated vide OIO No. KDL/COMMR/PVRR/16/2015-16 dated 27.11.2015 by then Commissioner of Customs, Kandla and imposed penalties under Section 114(i) & 114AA of the Customs Act, 1962 on all noticees.

16.16.2 Against this OIO dated 27.11.2015, M/s Balgopal Shipping & Logistics, Shri Vipul Sharma, Shri Vivek Shukla and Shri G. R. Dwivedi have filed Condonation of Delay application in the Hon'ble CESTAT, Ahmedabad after delay of 435 days in filing the appeals. The Hon'ble CESTAT has observed that,

"We have carefully considered the application and the argument advanced by the Ld. A.R. for the revenue. We do not find any merit in the application in as much as the inordinate delay has not been explained, advancing sufficient cause warranting condonation. In the result, the applications seeking condonation of delay are dismissed. Consequently, the Appeals are also dismissed".

16.16.3 The all noticees were involved in this instant case to export the non basmati rice in the guise of basmati rice. I observe that they were regularly engaged in this business of exporting prohibited goods; hence I find that they are habitual offender.

16.16.4 I rely in the case of **M/s CSAV GROUP AGENCIES (INDIA) PVT LTD Vs COMMISSIONER OF CUSTOMS (EXPORTS), NHAVA SHEVA** wherein the Hon'ble CESTAT, Mumbai vide **ORDER NO.A/700/08/SMB/C-III dated 06.10.2008** has observed that appellant being a habitual offender. Therefore, they do not deserve any leniency. Accordingly, I find that the noticees were regularly engaged in the business of exporting prohibited non basmati rice; hence they were habitual offender to violate the law as they have exported the same goods several times on earlier occasion.

16.16.5 I also rely in the case of **M/s PRINCE INTERNATIONAL, SHRI GYAN CHAND & KUNAL TRAVEL (CARGO) Vs COMMISSIONER OF CENTRAL EXCISE, NOIDA** wherein the Hon'ble CESTAT, New Delhi vide **FINAL ORDER NOS.53645-53647/2014 dated 18.09.2014** has found that Customs Authority were right in recalling containers and subjecting them to retesting and unearthing smuggling racket. Confiscation of the goods and imposition of redemption fine of Rs.68 lakhs is upheld. **This is an exemplary case where higher penalty is warranted and no leniency is deserved** and no reason to interfere with order of redemption fine as it is appropriate and

justified. Similarly, there is no scope for reduction of penalty of Rs.10 lakh imposed on the appellant as their modus operandi proved that they were consciously involved in the export of non-basmati rice which were prohibited goods.

16.17.1 The **Section 114 (i)** of the Customs Act, 1962 prescribes a maximum penalty of **three times** of the value of goods declared by the exporter and hence maximum penalty that can be imposed in the instant case on each of the said persons would be **Rs.6.74 Crores**. However, vide OIO No. KDL/COMMR/13/2011-12 dated 26.12.2011, then Commissioner of Customs, Kandla imposed penalty on each of the said persons ranging from **Rs.2.50 Lacs to 0.5 Lacs** which is just about **0.37% to 0.07%** of the maximum penalty that can be imposed and the same is tabulated below for reference.

S.No.	Name of the Noticee	Penalty Imposed (in Lacs)	Maximum Penalty Imposable (in Lacs) i.e 3 times the value of the prohibited goods	% of Penalty Imposed
1	M/s. Balgopal Shipping & Logistics	2.5	674.04	0.37 %
2	Shri G.R Dwivedi (Partner of M/s BSL)	2.5	674.04	0.37 %
3	A. Rajesh	2.5	674.04	0.37 %
4	Shri Vipul Sharma	1	674.04	0.15 %
5	Shri Vivek Shukla	0.5	674.04	0.07 %
6	Shri Santosh Kumar	0.5	674.04	0.07 %

16.17.2 Further, under **Section 114AA**, a maximum penalty of **five times** of the value of goods declared by the exporter and hence maximum penalty that can be imposed in the instant case on each of the said persons would be **Rs.11.23 Crores**. However, vide OIO No. KDL/COMMR/13/2011-12 dated 26.12.2011, then Commissioner of Customs, Kandla imposed penalty on each of the said persons ranging from **Rs.2.50 Lacs to 0.5 Lacs** which is just about **0.22% to 0.04%** of the maximum penalty that can be imposed and the same is tabulated below for reference.

S.No.	Name of the Noticee	Penalty Imposed (in Lacs)	Maximum Penalty Imposable (in Lacs) i.e 5 times the value of the prohibited goods	% of Penalty Imposed
1	M/s. Balgopal Shipping & Logistics	2.5	1123.40	0.22 %

2	Shri G.R Dwivedi (Partner of M/s BSL)	2.5	1123.40	0.22 %
3	A. Rajesh	2.5	1123.40	0.22 %
4	Shri Vipul Sharma	1	1123.40	0.09 %
5	Shri Vivek Shukla	0.5	1123.40	0.04 %
6	Shri Santosh Kumar	0.5	1123.40	0.04 %

16.18 I observe that the penalties imposable on the persons concerned in the conspiracy of exporting non-basmati rice in the guise of basmati rice in this case is to be commensurate with the gravity of the offence. Their act of omission and commission on part of the exporter and his accomplices needs to be dealt with severely and sternly and any leniency shown would not act as a deterrent on the persons concerned. The penalties imposed on each of the three main conspirators viz. M/s. BSL, Shri G. R. Dwivedi and Shri A. Rajesh is mere Rs.2.50 Lacs which is not commensurate with the offence committed by them as compared to the maximum penalty imposable. Moreover, Shri Vipul Sharma, Shri Vivek Shukla & Shri Santosh Kumar have actively associated along with the main conspirators; the penalty imposed on them is very meager and deserves to be enhanced to deter them from violating the law of the land. Therefore, I do not accept the low penalties imposed by then the Commissioner of Customs, Kandla vide OIO No. KDL/COMMR/13/2011-12 dated 26.12.2011.

16.19 In the instant case, as per the Hon'ble CESTAT, Ahmedabad Order, I have to restrict myself to take a decision on the issue of imposition of penalties under Section 114 (i) & 114AA of the Customs Act, 1962 upon M/s.Balgopal Shipping & Logistics, Shri.G.R. Dwivedi (Partner of M/s BSL), Shri A. Rajesh, Shri Vipul Sharma, Shri Vivek Shukla & Shri Santosh Kumar. Accordingly, I pass the following order:

ORDER

- (1) I impose a penalty of Rs. 50,00,000/- (Rupees Fifty Lakhs only) on M/s. Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under section 114 (i) of the Customs Act, 1962.
- (2) I impose a penalty of Rs. 25,00,000/- (Rupees Twenty Five Lakhs only) on M/s. Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under section 114AA of the Customs Act, 1962.

- (3) I impose a penalty of Rs. 25,00,000/- (Rupees Twenty Five Lakhs only) on Shri G.R. Dwivedi, Partner of M/s.Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under section 114 (i) of the Customs Act, 1962.
- (4) Imposed a penalty of Rs. 10,00,000/- (Rupees Ten Lakhs only) on Shri G.R. Dwivedi, Partner of M/s.Balgopal Shipping & Logistics, Plot No.123/126, Sector 10A, GIDC, Gandhidham under section 114AA of the Customs Act, 1962.
- (5) I impose a penalty of Rs. 25,00,000/- (Rupees Twenty Five Lakhs only) on Shri A. Rajesh, Procurer / Broker for M/s.BSL, Flat No.506, Shantiniketan Apartment, Street No.2, Lane No.10, Barkatpura, Lingampally, Hyderabad, under section 114 (i) of the Customs Act, 1962.
- (6) I impose a penalty of Rs. 10,00,000/- (Rupees Ten Lakhs only) on Shri A. Rajesh, Procurer / Broker for M/s.BSL, Flat No.506, Shantiniketan Apartment, Street No.2, Lane No.10, Barkatpura, Lingampally, Hyderabad, under section 114AA of the Customs Act, 1962.
- (7) I impose a penalty of Rs. 2,00,000/- (Rupees Two Lakhs only) on Shri Vipul Sharma, Clerk of M/s.BSL, 168 & 169, Sara Nagar, Galpadar, Gandhidham, under section 114 (i) of the Customs Act, 1962.
- (8) I impose a penalty of Rs. 1,00,000/- (Rupees One Lakhs only) on Shri Vipul Sharma, Clerk of M/s.BSL, 168 & 169, Sara Nagar, Galpadar, Gandhidham, under section 114AA of the Customs Act, 1962.
- (9) I impose a penalty of Rs. 1,00,000/- (Rupees One Lakhs only) on Shri Vivek Shukla, Office Assistant of M/s.BSL, B-508, Sapna Nagar, Gandhidham, under section 114 (i) of the Customs Act, 1962.
- (10) I impose a penalty of Rs. 50,000/- (Rupees Fifty Thousand only) on Shri Vivek Shukla, Office Assistant of M/s.BSL, B-508, Sapna

Nagar, Gandhidham, under section 114AA of the Customs Act, 1962.

- (11) I impose a penalty of Rs. 1,00,000/- (Rupees One Lakhs only) on Shri Santosh Kumar, 8-4-310, Ganesh Nagar, Karimnagar, A.P., under section 114 (i) of the Customs Act, 1962.
- (12) I impose a penalty of Rs. 50,000/- (Rupees Fifty Thousand only) on Shri Santosh Kumar, 8-4-310, Ganesh Nagar, Karimnagar, A.P., under section 114AA of the Customs Act, 1962.



(SANJAY KUMAR AGARWAL)
COMMISSIONER

By REGD. POST A.D/Hand Delivery

F.No.S/10-10/ADJ/COMMR/Balgopal/2017-18

Dated: 14.06.2018

To,

1. M/s. Balgopal Shipping & Logistics, Plot No. 123/126, Ward No. 18A, GIDC, Gandhidham, Dist.- Kutch. (previously B-24, Sapna Nagar, Gandhidham, Dist.- Kutch)	2. Shri G.R Dwivedi, Partner of M/s.Balgopal Shipping & Logistics, Plot No. 123/126, Ward No. 18A, GIDC, Gandhidham, Dist.- Kutch (previously - B-24, Sapna Nagar, Gandhidham, Dist.- Kutch)
3. A. Rajesh, procurer/broker for M/s.BSL, Flat No.506, Shantiniketan Apartment, Street No.2, Lane No.10, Barkatpura, Lingampally, Hyderabad,	4. Shri Vipul Sharma, Clerk of M/s.BSL, 168 and 169, Sara Nagar, Galpadar, Gandhidham
5. Shri Vivek Shukla, Office Assistant of M/s.BSL, Flat No. 102, Ground Floor, Killol Apartment, Plot No. 94, Sector 3, Near OSLO Ambe Mata Mandir, Gandhidham. (previously- B-508, Sapna Nagar, Gandhidham)	6. Shri Santosh Kumar, 8-4-310, Ganesh Nagar, Karimnagar, A.P.

Copy to:

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad
2. The Additional Director General, DRI, Regional Unit, Chennai
3. The Additional Director, DRI, Regional Unit, Hyderabad
4. The Deputy/Assistant Commissioner (Prosecution), Custom House, Kandla
5. The Deputy/Assistant Commissioner (Recovery), Custom House, Kandla
6. Guard File