OFFICE OF THE COMMISSIONER OF CUSTOMS
CUSTOM HOUSE KANDLA
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A	File No.	S/10-28/ADJ/COMMR/SIMBHAOLI/2017-18
B	Order-in-Original No.	KDL/COMMR/SKA/04/2018-19
C	Passed by	Shri Sanjay Kumar Agarwal Commissioner, Custom House, Kandla.
D	Date of order	03.07.2018
E	Date of issue	03.07.2018
F	Show Cause Notice No. & Date	DRI/NRU/ENQ/Simbhaoli/45/2016/
G	Noticee(s)/Co-Noticee(s)	M/s. Simbhaoli Sugars Limited, Post:- Simbhaoli, Dist:- Hapur, UP.

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,
2nd Floor, Bahumali Bhavan Asarwa,
Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad - 380004

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

Intelligence gathered by officers of Directorate of Revenue Intelligence (hereinafter also referred to as '*DRI*') indicated that M/s. Simbhaoli Sugars Limited, Simbhaoli, District-Hapur, UP (hereinafter also referred to as '*noticee*') (IEC 0593021401) contravened provisions of Customs Notification No. 96/2009-Cus dated 11.09.2009, as amended, Para 4.1.3, 4.1.5 and 4.1.9 of the Foreign Trade Policy (2009-14) and Para 4.22, 4.24 and 4.28 of the Hand Book of Procedures, Volume-I (2009-14). It was gathered that they imported "Brazilian Cane V.H.P. Raw Sugar of Fair Average Quality" (hereinafter also referred to as '*raw sugar*') vide two Bills of Entry under Advance Authorization No. 0510336650 dated 08.10.2012. They availed benefit of exemption under above mentioned notification but failed to comply with the conditions laid down in the said notification inasmuch as they did not discharge their complete Export Obligation (hereinafter also referred to as '*EO*'). Despite having failed to complete EO, the noticee did not pay the differential amount of Customs duty as stipulated under the said FTP and the subject notification. They cleared the goods manufactured from said duty free input materials in domestic market.

1.2 On scrutiny of relevant records, the officers of DRI found that the noticee cleared 12800 MT of raw sugar, having assessable value of Rs. 33,79,36,775/-, under Bill of Entry No. 8670024 dated 04.12.2012 and availed exemption of duty amounting to Rs. 4,73,32,288/- against the above mentioned Advance Authorization. Further, under Bill of Entry No. 8670092 dated 04.12.2012, they cleared 8200 MT of raw sugar having assessable value of Rs. 21,65,90,360/- and availed exemption of duty amounting to Rs. 3,03,32,508/- against the same Advance Authorization. Thus, the subject advance authorization was used for clearance of total 21000 MT of raw sugar, having total assessable value of Rs. 55,45,27,135/- and exemption of duty totally amounting to Rs. 7,76,64,795/- was availed by the noticee.

1.3 Officers of DRI verified stock of imported raw sugar on 19.08.2016 at the premises of the noticee situated at Simbhaoli, District-Hapur (UP) and on 20.08.2016 at their premises situated at Brijnathpur, District- Hapur (UP).

1.3.1 During the verification of stock of imported raw material at their unit situated at Simbhaoli, noticee's General Manager (Finance) Shri

Anrudh Gupta informed that physical stock of imported raw sugar was not lying there; that quantities of all the imported raw sugar whether duty paid or under Advance Authorization were first recorded in a register titled as "*RG-1 Imported Raw Sugar*" and after that, as per requirement, quantities of imported raw sugar were issued for production, mentioning closing stock in the said register; that they used to prepare a monthly report titled as "*RT-7C*" showing details of total raw material of different kinds like cane, imported raw sugar, domestic raw sugar etc. consumed in that particular month and final production of sugar obtained in that month. He submitted photocopies of the RT-7C reports for the sugar season 2010-11 to 2015-16 and a statement of monthly consumption of imported raw sugar in manufacture of sugar during the period from October 2010 to August 2014. He further informed that no imported raw sugar was used for manufacturing after March 2014. The whole proceedings were recorded under Panchnama dated 19.08.2016.

1.3.2 During verification of stock of imported raw sugar at their unit situated at Brijnathpur, Shri Irfan Ali, Assistant Manager (Sales) of the noticee, informed the officers of DRI that documentation of import/ export was done by their corporate office at Noida so the Advance Authorization and original documents of import/ export were not available in the unit; that quantities of all the imported raw sugar (duty paid as well as under Advance Authorization) were first recorded in a register titled as "*Register Under - Rule 16 of Central Excise 2002 for Raw-Sugar IMP, season 2011-12 W.E.F. 01/11/2011*"; that then as per requirement of production, quantities of imported raw sugar were issued for production and closing stock was mentioned in the said register; that they used to prepare a monthly report titled as "*RT-7C*" containing details of total raw material of different kinds like cane, raw sugar (irrespective of domestic and imported) etc. consumed in that particular month and final production of sugar obtained in that month. Shri Irfan Ali submitted photocopies of the RT-7C reports for the sugar season 2010-11 to 2015-16 and photocopies of register for receipt and issue of raw material, month-wise statement of receipt and consumption of imported raw sugar from March 2009 to June 2013. He further informed that no physical stock of imported raw sugar was lying in the factory and no imported raw sugar was used for manufacturing sugar after May 2013. The whole proceedings were recorded under Panchnama dated 20.08.2016.

1.4 Officers of DRI recorded statements of various persons under Section 108 of the Customs Act, 1962, as summarized below:

1.4.1 Statement of Shri Anrudh Gupta, General Manager (Finance) of the noticee was recorded under Section 108 of the Customs Act, 1962 on 19.08.2016, wherein he stated, inter alia, that a common purchase order was placed by their corporate office for all the group units; that the quantity was distributed by their corporate office to the units; that their production department used to inform godown personnel about quantity of imported raw sugar required for re-processing; that the godown personnel used to issue slips for the quantity desired by the production department from the available quantity of imported raw sugar; that as per Page No. 20 of register titled as "*RG-1 Imported Raw Sugar from 01.10.2010 to 05.04.2012*" and entry dated 05.04.2012, the closing stock of imported raw sugar was "nil" which means that stock of imported raw sugar had been issued for re-process and no quantity of imported raw sugar was lying in stock as on 05.04.2012. In respect of page No. 09 of register titled as "*RG-1 Imported Raw Sugar from 26.12.2012 to* -------", entry dated 28.03.2014 showed closing stock of imported raw sugar as "nil". He stated that the stock of imported raw sugar had been consumed in re-process and no quantity of imported raw sugar was lying in stock as on 28.03.2014. He further stated that no quantity of imported raw sugar was received in the unit after 28.03.2014; that total sugar manufactured on any particular day was recorded through a consolidated single entry in RG-1 register (Daily Stock Account), irrespective of its raw material *viz.* cane or imported raw sugar; that entire stock of sugar irrespective of its raw material was stored in godown within the premises; that a monthly report titled as RT-7C was prepared in Lab reflecting quantities of different materials *viz.* cane and raw sugar (domestic as well as imported) used in that particular month. He submitted photocopies of RT-7C for the sugar season 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16. He further stated that as per the RT-7C for the year 2014-15 and 2015-16, no imported raw sugar was consumed in the two sugar seasons for manufacturing sugar, which means, that the raw sugar imported under Advance Authorization scheme was completely consumed by the sugar season 2013-14; that the imported raw sugar was lastly used in manufacturing sugar in the month of March 2014 and after that neither the imported raw sugar was received nor consumed; that the entire quantity of sugar manufactured till the sugar season 2014-15 was sold either in domestic market or exported; that no record in respect of raw sugar imported under duty payment and under Advance Authorization scheme was maintained in the unit; that occasionally inter-unit transfer of

raw material i.e. sugar cane and imported raw sugar took place amongst their units.

1.4.2 Statement of Shri Atul Sharma, Deputy General Manager (Commercial) of the noticee was recorded under Section 108 of the Customs Act, 1962 on 20.08.2016. He submitted photocopies of Advance Authorization No. 0510336650 dated 08.10.2012, Bills of Entry No. 8374200 dated 01.11.2012 (WH Bill of Entry), 8670024 and 8670092 both dated 04.12.2012 (Ex-bond Bills of Entry). He stated, inter alia, that the noticee had three sugar manufacturing units located at (i) Simbhaoli, (ii) Brijnathpur and (iii) Chilwaria, Distt. Behraich; that in Behraich unit only cane is used for manufacturing sugar but in Simbhaoli and Brijnathpur units, sugar was manufactured out of crushing of cane and raw sugar (domestic as well as imported); that total nine Advance Authorizations for import of duty free raw sugar were issued to the noticee; that EODC was granted in eight authorizations but export was pending in respect of Advance Authorization No. 0510336650 dated 08.10.2012; that the said authorization permitted them to import 30000 MT of duty free raw sugar subject to export 28571.4 MT of sugar; that under that authorization the noticee imported 21000 MT of duty free raw sugar for Simbhaoli and Brijnathpur units and exported only 8383.96 MT of sugar; that the entire quantity of 21000 MT of duty free imported raw sugar was used in manufacturing sugar by the end of March, 2014; that as the closing stocks of sugar in Simbhaoli and Brijnathpur units, as on 19.08.2016, consisted of sugar manufactured in sugar season 2015-16, sugar manufactured out of 12195.7 MT of duty free imported raw sugar was sold/ disposed off by the company in a way other than export as required under Advance Authorization; that Hon'ble High Court, Allahabad vide its interim direction dated 13.08.2014 put a restriction on sale of sugar by sugar factories in U.P. at a price less than Rs. 3100/- per quintal but at that time the international prices were much lower than Rs. 3100/- per quintal, therefore, the noticee could not export the sugar manufactured out of duty free imported raw sugar; that the said facts were brought to the notice of the DGFT and extension of time for export was sought. He submitted copy of application made before the DGFT and a two page note on reasons for pending export obligation; that by April, 2014 they could not export the quantity as required under the subject Authorization; that application for extension was filed in March 2014 and six months extension i.e. up to October 2014 was granted; that the noticee could not export such quantity in extended time so again application for extension was filed before the DGFT on 09.10.2014; that no communication was received from DGFT for

second extension; that in FTP 2015-20 the regional authorities of DGFT were empowered for granting second extension so on 23.06.2015 they applied before the regional authority at Delhi but it was rejected on the ground that 50% of its obligation was not fulfilled; that though the noticee would pursue the matter with DGFT and other competent authorities, however, in the meantime the noticee decided to pay duty involved on 12195.7 MT of duty free imported raw sugar along with interest; that due to non-payment of cane prices to the farmers, the State Government Authorities seized their bank accounts so they were not in a position to pay their duty immediately; that the noticee had submitted three Bank Guarantees for total amount of Rs. 11.6 Crore before the Commissioner of Customs, Kandla. He submitted photocopies of the Bank Guarantees.

1.4.3 Statement of Shri Irfan Ali, Assistant Manager (Sales) of the noticee was recorded on 20.08.2016 under Section 108 of the Customs Act, 1962 wherein he stated, inter alia, that from 01.04.2012 to May 2013 they received total 1,15,026.19 quintal of imported raw sugar but could not state numbers of relevant Bills of Entry as documents were not readily available with him; that no quantity of imported raw sugar was received in the unit after 21.05.2013; that the production department used to inform godown personnel for the quantity of imported raw sugar required for re-processing as per requirement of the day and accordingly the godown staff used to issue the same; that after weighment of the same, a consolidated entry for issue of total quantity was entered in SAP system; that as per their records, complete stock of imported raw sugar was issued for reprocessing and no quantity of imported raw sugar was lying in stock as on 03.01.2012; that as per records w.e.f December 2012 to April 2014, the stock of imported raw sugar was consumed in reprocessing and no quantity of imported raw sugar was lying in stock as on 21.05.2013; that no quantity of imported raw sugar was received in the unit after 21.05.2013; that total sugar manufactured on any particular day was recorded separately in respective RG-1 register (Daily Stock Account) irrespective of its raw material i.e. cane, imported raw sugar and domestic raw sugar; that entire stock of sugar irrespective of its raw material was stored in godown within the premises and a monthly report titled as RT-7C was prepared in Lab reflecting quantities of different materials i.e. cane and raw sugar (irrespective of domestic and imported) used in that particular month; that from RT-7C it was not clear whether the raw sugar consumed for manufacturing was procured domestically or imported; that they maintained separate record of receipt and issue of each type of raw material i.e. raw sugar (domestic) and raw sugar (imported) but no

record was maintained in respect of consumption of imported or domestic raw-sugar; that entire quantity of sugar manufactured till the sugar season 2012-13 was sold either in domestic market or exported; that no record was maintained in the unit in respect of raw sugar imported under Advance Authorization scheme and under duty payment; that it was maintained at their corporate office; that depending upon requirement and availability, inter-unit transfer of sugar cane and domestic raw sugar had taken place between the units located at Simbhaoli and Brijnathpur; that as on that day, they had 60855 quintal of sugar in stock and the entire stock pertained to sugar manufactured in sugar season 2015-16.

1.4.4 Statement of Shri S. N. Misra, Chief Operating Officer in M/s Simbhaoli Sugars Limited, Simbhaoli, Hapur was recorded under Section 108 of the Customs Act, 1962 on 22.09.2016, wherein he stated, inter alia, that separate records of the stock of refined sugar made from imported raw sugar and domestic raw sugar were maintained in their unit by the Lab and a consolidated entry for a particular day production was maintained in RG-1 register.

1.5 From the scrutiny of records, the officers of DRI observed that total 9 Advance Authorizations were issued to the noticee for duty free import of raw sugar and out of which they had obtained Export Obligation Discharge Certificate (EODC) from DGFT in respect of 8 authorizations but EODC in respect of Advance Authorization No. 0510336650 dated 08.10.2012 was pending. The noticee was supposed to fulfill export obligation against the imported quantity of raw sugar under the said Advance Authorization as detailed below:

Advance Authorization No. 0510336650 dated 08.10.2012				
	Item	Qty.(MT)	Value(USD)	Value(INR)
Import allowed	Raw Sugar	30000	1,51,50,000	82,94,62,500
EO Imposed	White Sugar	28571	1,74,22,500	95,38,81,875
Actual Raw Sugar Imported				
BE No. 8670024	04.12.2012	12800	62,89,302	33,45,90,866
BE No. 8670092	04.12.2012	8200	40,29,808	21,44,45,902
	Total	**21000**	**1,03,19,110**	**54,90,36,768**
Required E.O. of White Sugar		20000	1,18,66,977	63,13,92,283
Actual Export Quantity		8383.96	42,38,438	25,64,35,023
Balance Export Obligation		11616.04	76,28,539	39,49,57,260

1.6 The noticee exported 8383.96 MT of white sugar vide 49 Shipping Bills having total FOB value of USD 42,38,437.90 during 04.09.2013 to 20.10.2014, against the subject Advance Authorization. They were supposed to fulfill 100% export obligation against the said

Authorization by 30.04.2014. However, as they could not fulfill the export obligation, they applied for extension of 6 months to fulfill export obligation which was allowed by DGFT on 21.05.2014. Despite the extension of time of 6 months they could not fulfill 100% EO and vide their letter dated 09.10.2014 they again requested DGFT for further extension of another 6 months. However, the said request was rejected by DGFT vide letter dated 22.09.2015.

1.7 From the above, it appeared that the noticee failed to fulfil EO against subject Authorization even after expiry of the extended period of EO. The duty free import of raw material under Advance Authorization scheme was covered under Notification No. 96/2009-Cus dated 11.09.2009, as amended. The noticee was liable to fulfil the conditions stipulated under the above said notification. The relevant Para of the said notification provided:

***iv**: that in respect of imports made before the discharge of export obligation, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen percent per annum from the date of clearance of the said materials;*

***viii**: that the export obligation as specified in the said authorization (both in value and quantity terms) is discharged within the period specified in the said authorization or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorization and in respect of which facility under rule 18(rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 has not been availed:*

***ix**: that the importer produces evidence of discharge of export obligation to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within a period of sixty days of the expiry of period allowed for fulfilment of export obligation, or within such extended period as the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may allow;*

***x**: that the said authorisation shall not be transferred and the said materials shall not be transferred or sold;"*

1.8 The proportionate customs duty against unutilized quantity of raw sugar, imported duty free under subject Authorization has been calculated as under:

Import Quantity of raw sugar as per AA (MT)	Total quantity actually importe d (MT)	Amount of duty foregone (Rs.)	Quantity of white sugar Exported against the AA (MT)	Total Quantity of duty free raw sugar consumed in export (MT)	Unutilized quantity of raw sugar, imported against the AA (MT)	Customs Duty forgone per MT on the duty free Imported raw sugar (Rs.) [(3)/(2)]	Proportionate Customs Duty involved on unutilized quantity of Raw sugar (Rs.) [(6)X(7)]
1	2	3	4	5	6	7	8
30000	21000	77664795	8,383.96	8,802.618	12,197.382	3,698.324	**4,51,09,866/-**

1.9 In view of the above, it appeared that the noticee is liable to pay duty saved/ foregone amounting to Rs. 4,51,09,866/- along with interest, on the 12197.382 MT of raw sugar, which was imported duty free against the Advance Authorization No. 0510336650 but not utilized towards fulfillment of export obligation as mandated in terms of the Notification No. 96/2009-Cus dated 11.09.2009, as amended. The noticee executed bond (accepted on 04.12.2012 by AC Customs) along with security/ surety in terms of condition No. (iv) of the Notification No. 96/2009 - Cus dated 11.09.2009, at the time of import of duty free raw material against subject Authorization at Kandla Port. The relevant clauses of the said bond are as under:-

i) We, the obligor(s) shall observe all the terms and conditions of the said notification.

ii) We, the obligor(s) shall observe all the terms and conditions specified in the license.

iii) We, the obligor(s) shall fulfill the export obligations as specified in the said notification and the license and shall produce evidence of having so fulfilled the export obligations within 30 days from the expiry of specified export obligation period to the satisfaction of the Government.

iv) In the event of failure to fulfill full or part of the export obligations as specified in the said notification and license. I/ We the obligor(s) herein undertake to pay the customs duty for the exemption and also interest @ 15% per annum thereon forthwith and without any demure, to the Government.

v) We, the obligor(s) shall comply with the conditions and limitations stipulated in the said Import and Export Policy as amended from time to time.

vi) We, the obligor(s) shall not change the name and style under which we, the obligor(s) are doing business or change the location of the manufacturing premises except with the written permission of the Government.

1.10 As per above discussions, the noticee appeared to have failed to observe obligations undertaken vide above clauses of the bond, therefore, in terms of the provision of the clause (iv) they are required to pay the customs duty along with interest @ 15% per annum thereon. Understanding their failure to fulfill export obligation against the imported quantity of 12197.382 MT of raw sugar, the noticee deposited amount of Rs. 4,51,09,866/- towards their Customs duty liability on the unfulfilled portion of EO and intimated the same vide letter dated 12.10.2016 along with copies of below mentioned 11 TR-6 challans:

Sl. No	TR-6 Challan No. & Date	Duty (Rs.)	Bills of Entry No. and date
1	3254/02.09.2016	50,00,000	8670024/ 04.12.2012
2	3260/03.09.2016	50,00,000	
3	3261/03.09.2016	50,00,000	
4	3279/06.09.2016	50,00,000	
5	3280/06.09.2016	50,00,000	
6	3284/21.09.2016	26,22,338.65	
7	3297/15.09.2016	50,00,000	8670092/ 04.12.2012
8	3298/15.09.2016	50,00,000	
9	3285/21.09.2016	24,22,912.96	
10	3292/28.09.2016	25,00,000	
11	3295/30.09.2016	25,00,000	
	TOTAL:	**4,51,05,251.61**	

Though the payment of duty was made voluntarily but later on vide their letter dated 28.11.2016 the noticee informed that the same is under protest.

1.11 A letter C. No. 1216 dated 24.11.2016 was issued to the noticee asking to pay the due interest on the Customs duty as well as to submit the documents related to all the advance authorizations obtained so far by them and their present status. Vide their letter dated 28.11.2016, the noticee informed that they have deposited total duty liability on the non fulfilled portion of EO against the subject authorization under protest and they had approached Hon'ble Delhi High Court for interim relief vide WP(C) No. 9723/2016 against the DGFT.

1.12 In their submissions, authorized representative of the noticee accepted and admitted their omission on account of reasons beyond their control which led to non-fulfillment of conditions of the notification resulting in non-payment of duty of customs to the extent of **Rs. 4,51,09,866/-** on the un-fulfilled portion of EO (59.30%). The noticee paid the said amount and deposited amount **Rs. 4,51,05,251/-** under protest towards payment of duty liability but did not deposit amount of interest stating that they had approached Hon'ble Delhi High Court for interim relief under WP(C) No. 9723 of 2016 against DGFT.

1.13 Advance Authorizations are issued by Directorate General of Foreign Trade (DGFT) to importers for import of various raw materials without payment of Customs duty. At the relevant time, said export promotion scheme was governed by Chapter 4 of the Foreign Trade Policy (2009-14) and corresponding Chapter 4 of the Hand Book of Procedures (2009-14), Volume-I & II. Para 4.1.3 of the said Policy allowed duty free import of inputs which were to be physically incorporated in the export products. Further Para 4.1.5 of the said Policy restricted use of such duty free imported goods and stipulated that such import would be with actual

user condition. It would not be transferable even after completion of export obligation. However, Authorization holder would have option to dispose off product manufactured out of duty free inputs after fulfilment of export obligation.

1.14 Thus, as per the said Policy, benefit of such duty free import was extended on specific condition that materials so imported before fulfillment of export obligation was subject to condition that such materials were to be used in manufacturing export products only. Physical incorporation of such materials in the export goods was made mandatory. Further as per the Policy, even if the export obligations was fulfilled, remaining goods were to be used for the purpose of manufacturing dutiable goods only, the same were not allowed to be transferred or sold.

1.15 Notification No. 31/2013 (RE-2013)/ (2009-14) dated 01.08.2013 was issued by DGFT to incorporate a new Para No. 4.1.15 in the said Foreign Trade Policy. The Para 4.1.15 provided that the inputs actually used in manufacturing of the export product should only be imported under the authorization. Similarly inputs actually imported must be used in the export product. Circular No. 3/2013 (RE-2013)/ (2009-14) dated 02.08.2013 was issued by the Ministry of Commerce which reiterated that duty free import of inputs under Duty Exemption/ Remission Schemes under Chapter-4 of FTP should be guided by Notification No. 31 issued on 1.8.2013. A combined reading of Para 4.1.3 of the said Policy and the aforesaid notification and the circular makes it clear that benefit of exemption from payment of Customs duty was extended to the input materials subject to strict condition that such materials would be exclusively used in manufacturing export goods which would be ultimately exported.

1.16 Para 4.22 of the Hand Book of Procedures (2009-14), Volume-I, (pertaining to FY 2012-13) required an importer to fulfill export obligation under an Advance Authorization within a period of 18 months from the date of issue of the authorization. As per provision of the Foreign Trade Policy in force at that point of time and as confirmed from the copy of the subject Authorization, they were supposed to complete their export obligation within 18 months i.e. by 07.04.2014, unless extension was granted by DGFT. The noticee could not complete their export obligation liability within the stipulated period in respect of the Advance Authorization No. 0510336650 dated 08.10.2012 and they approached DGFT authority for

extension of time by 6 months to fulfill export obligation (EO) which was allowed by DGFT on 21.05.2014. But they could not fulfill EO within extended period. Vide letter dated 09.10.2014 they again made a request to the DGFT to further extend the time to fulfill EO by another 6 months i.e. upto 30.04.2015 but the request was rejected by the DGFT, New Delhi vide letter dated 22.09.2015.

1.17 Para 2.12 of the Hand Book of Procedures (2009-14), Volume-I, deals with validity of import/export authorizations and Sub-para 2.12.1 stipulates that when an Authorization expires during the month, such Authorization shall be deemed to be valid until last day of the concerned month. Sub-Para 2.12.4 provides that similarly EO period shall be deemed to be valid until month end. In view of the same the Authorization No. 0510336650 dated 08.10.2012 was valid till 31.10.2014 (including 6 months extended time). In view of the provisions of the subject Para, validity of the Authorization was considered till 31.10.2014 and exports made till that date were considered and taken into account towards fulfilment of EO.

1.18 In view of Para 4.24 of the Hand Book of Procedures (2009-14), Volume-I it was mandatory for authorization holder to submit evidence in support of discharge of export obligation within a period of two months from the date of expiry of EO.

1.19 Para 4.42(c) of the Foreign Trade Policy (2015-20) provided for allowing a second extension to an importer subject to payment of composition fee and with condition that by the end of original EO period or extended EO period, the importer had completed at least 50% of its export obligation. The subject provision limited discretion of the authority by fixing a cap value of 50%, which is a pre-condition for getting further extension. It restricted and imposed direct prohibition on granting any relaxation in respect of extension, unless at least 50% of EO was fulfilled. The noticee appealed before the Policy Relaxation Committee (PRC). In the PRC meeting held on 08.03.2016, the committee while rejecting plea of the noticee for further extension in respect of the impugned Advance Authorization on the ground that less than 50% EO was completed by them (only 40.70% EO fulfilled by the noticee), also instructed the noticee to get their case regularised in terms of Para 4.28 of the Foreign Trade Policy (2009-14).

1.20 As per Para 4.28 (iii) of the Hand Book of Procedures (2009-14), Volume-I, in the event of non-fulfilment of export obligation in terms of

quantity and value, the Authorization holder was liable to pay Customs duty on unutilized value of imported/ indigenously procured material along with interest as notified.

1.21 Condition (viii) of the Notification No. 96/2009-Cus dated 11.09.2009, as amended, required an importer to discharge export obligation as specified in the Authorization both in terms of value and quantity within the period specified in the Authorization or within the extended period as may be granted by the regional authority by exporting resultant products manufactured out of the duty free materials imported. Condition (ix) of the said notification required an importer to produce evidence of discharge of export obligation to the satisfaction of the Customs authority within a period of sixty days of the expiry of period allowed for fulfillment of export obligation. Failure on the part of the noticee to furnish such particulars indicates that they could not complete their export obligation within the stipulated period of time allowed under the Policy and the notification. Such failure led to outright violation of the conditions of the notification read with the Policy in vogue, rendering the duty free imported goods liable to confiscation under section 111(o) of the Customs Act, 1962.

1.22 Until the investigation was taken up by DRI, the noticee did not pay the Customs duty voluntarily in respect of the impugned Authorization despite the fact that they could not fulfill export obligation within the stipulated period including extended period. It was within the knowledge of the noticee that they failed to comply with the conditions of Notification No. 96/2009-Cus dated 11.09.2009, as amended, but they did not disclose the same to the Customs authority and did not pay the proportionate amount of duty equivalent to the unfulfilled export obligation. The noticee grossly failed to comply with the legal provisions laid down under the notification and the Policy and suppressed the fact of such failure by not submitting documents before the Customs authority and/or the DGFT evidencing quantum of exports made by them and enabling the Customs authority to determine the amount of Customs duty to be recovered for their failure to complete export obligation. This clearly indicates their malafide intent of evading duty of Customs.

1.23 Para 4.22 of the Hand Book of Procedures (2009-14), Volume-I, as well as Condition No. (viii) of Notification No. 96/2009-Cus dated 11.09.2009, as amended, made it mandatory on the part of the importer to discharge their export liability within the stipulated period. In the instant

case the noticee could not discharge their export liability within the extended EO period in respect of the Advance Authorization No. 0510336650 dated 08.10.2012 and were not granted with any subsequent (second) extension. This resulted in non-discharge of export obligation to the extent of about 59.30%. Therefore, it appeared that by their act of non-compliance of the aforesaid provisions, the noticee contravened the respective provisions of the FTP (2009-14), and conditions of Notification No. 96/2009-Cus dated 11.09.2009, as amended. They did not have any further extension granted by the DGFT, therefore, they were duty bound to pay the amount of Customs duty on pro rata basis for the unfulfilled portion of EO in compliance with Para 4.28 of the Policy and the provisions of the notification, which they did not do.

1.24 Para 4.24 of the Hand Book of Procedures (2009-14), Volume-I and Condition No. (ix) of the Notification No. 96/2009-Cus dated 11.09.2009, as amended, stipulated that an importer should furnish details of evidence of discharge of export obligation to the satisfaction of the Customs authority within a period of sixty days of the expiry of period allowed for fulfillment of export obligation. In the instant case even after lapse of two years from the date of expiry of the EO period i.e. 31.10.2014, the noticee failed to observe the subject conditions of the Policy and the notification and also preferred to suppress the fact of their failure from the Government Authorities with mala fide intention of evading duty of Customs. The onus was on the noticee to bring it to the notice of the Customs authority within two months from expiry of EO period about their inability to discharge export liability in full and at the same time they should have paid the differential amount of Customs duty attributable to the materials imported in proportion with the unfulfilled EO. Such deliberate act of suppression on the part of the noticee resulted in non-payment of Customs duty and thus provision of Section 28(4) appeared to be invokable.

1.25 With the introduction of self-assessment under the Customs Act, 1962 more faith is bestowed on importers. As a part of self-assessment by an importer, it was duty of the noticee to present correct facts and declare to the Customs authority about their inability to fulfill export obligation and also they should have volunteered to pay duty, the moment statutory 60 (sixty) days from the expiry of the EO period was over. However, contrary to this, they availed benefit of the subject notification for the subject goods but did not comply with the conditions laid down in the

exemption notification. It is only because of the vigilance and detailed scrutiny of the documents by the officers of DRI, that the leakage of revenue could come to light. The noticee did not come forward to pay such duty voluntarily. Without intervention of DRI, the said duty evasion would have remained undetected due to suppression of facts by the noticee. Therefore, on this ground Section 28(4) of the Customs Act, 1962 appeared invokable in this case.

1.26 The noticee grossly failed to comply with the conditions of the notification and imported goods duty free by availing benefit of the same without observing conditions, which they were duty bound to comply. This has led to contravention of the provisions of the Notification No. 96/2009-Cus dated 11.09.2009, as amended and the Foreign Trade Policy (2009-14), which appeared to have rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962.

1.27 The Customs duty was not paid in respect of the goods imported under Notification No. 96/2009-Cus dated 11.09.2009, as amended, for which export obligation was not fulfilled. For the fact that the benefit of the said notification is not available in respect of the material goods, it appeared that the goods should be considered to have been imported without payment of duty of Customs. As per statements of their employees, the noticee fulfilled export obligation to the extent of 40.70% in respect of the subject Advance Authorization. In course of import under the subject Advance Authorization, the noticee saved an amount of Customs duty of Rs. 7,76,64,795/-. Therefore, amount of Customs duty proportionate to the unfulfilled export obligation (59.30%) amounting to Rs. 4,51,09,866/- appeared to be recoverable from them along with applicable interest in terms of Condition No. (iv) of Notification No. 96/2009-Cus dated 11.09.2009, as amended read with Section 28(4) of the Customs Act, 1962.

1.28 In his statement authorized representative of the noticee admitted failure of the noticee in complying with the conditions and accepted that even after expiry of EO period of 24 months (including extended period), they could not fulfill export obligation and they failed to furnish requisite documents in support of such EO to the Customs authority. They admitted that they should have paid differential amount of Customs duty attributable to the quantity of goods imported, against which export obligation could not be fulfilled. The noticee accordingly paid an amount of Rs. 4,51,05,251/- vide 11 (eleven) TR-6 Challan. Admission of

the noticee and subsequent payment towards Customs duty confirms the charges framed against them for non-compliance of conditions of the Customs Notification No. 96/2009-Cus dated 11.09.2009, as amended and the relevant FTP.

1.29 Section 124 of the Customs Act, 1962, states that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person –

(a) is given a notice in writing with the prior approval of the officer of customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter;

1.30 Therefore, the goods imported by availing benefit of an exemption notification for which the importer fails to comply with and/ or observe conditions laid down in the notification, such goods are liable to confiscation under Section 111(o) of the Customs Act, 1962 and the Section 124 ibid authorises the proper officer to issue Show Cause Notice with conditions as aforesaid before confiscation of the goods and imposition of penalty.

1.31 In the case of M/s Pennar Industries Ltd. [2015(322) E.L.T. 402], the Hon'ble Supreme Court has held that as importer executed bond to pay on demand, an amount equal to duty leviable, but for exemption, on imported materials in respect of which conditions specified in Notification No. 30/97-Cus were not complied with and thus dues have to be paid.

1.32 Section 114A of the Customs Act, 1962 stipulates that where the duty has not been levied or has been short-levied by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined. It appeared that the noticee suppressed the fact of their failure to fulfil export obligation and rendered themselves liable to penalty under Section 114A of the Customs Act, 1962.

1.33 From the facts and discussion hereinabove it appeared to officers of DRI that:

a) The noticee imported raw sugar covered under Customs Tariff Item No. 17011490, vide two Bills of Entry without payment of duty of Customs under Advance Authorization No. 0510336650 dated 08.10.2012, issued by Directorate General of Foreign Trade (DGFT), New Delhi. The noticee availed benefit of exemption extended by Notification No. 96/2009-Cus, dated 11.09.2009, as amended.

b) The said notification does not offer absolute exemption rather it is a conditional notification. The notification stipulates that such exemption is exclusively on actual user condition and the noticee availing benefit of the same should use such materials for production of exports goods only, unless and until specifically allowed otherwise and the same can neither be sold nor transferred.

c) Para 4.1.5 of the Policy restricts use of such duty free imported goods and stipulates that such import will be with actual user condition. It will not be transferable even after completion of export obligation.

d) A combined reading of Para 4.1.3 of the Foreign Trade Policy, in force at the time of issuance of the authorization and the Notification No. 31/2013(RE-2013) dated 01.08.2013 along with Circular No. 3/2013(RE-2013) dated 02.08.2013 indicate that benefit of exemption from payment of Customs duty is extended to the imported input materials subject to strict condition that such materials would be exclusively used in manufacturing export goods which would be ultimately exported.

e) Para 4.22 of the Hand Book of Procedures (2009-14), Volume-I, (pertaining to FY 2012-13) required an importer to fulfill export obligation under an Advance Authorization within a period of 18 months from the date of issue of the license. The Authorization No. 0510336650 dated 08.10.2012 was issued to the noticee as per provision of the Foreign Trade Policy in force at that point of time and as confirmed from the copy of the subject license and other supporting documents, they were required to complete their export obligation within 24 months from that date i.e. by 31.10.2014.

f) The noticee failed to comply with the provisions of Para 4.22 of the Hand Book of Procedures (2009-14), Volume-I, as discussed above. The

noticee could not fulfill export obligation within the stipulated period of 24 months. They could not fulfill export obligation within or even after the completion of EO period of 24 months. The noticee did not have any further extension.

g) The noticee failed to comply with the provision of Para 4.24 of the Hand Book of Procedures (2009-14), Volume-I, which requires that within two months from date of expiry of period of obligation, Authorisation holder shall submit requisite evidence in discharge of export obligation in accordance with Para 4.25. It was beyond their capacity to submit such documents in support of export as they did not make any export towards fulfilment of export obligation.

h) Sub Para (iii) of Para 4.28 of the Hand Book of Procedures (2009-14), Volume-I demands that if export obligation is not fulfilled both in terms of quantity and value, the Authorization holder shall pay Customs duty on unutilized value of imported/ indigenously procured material along with interest as notified.

i) The noticee failed to comply with the condition of the said Para 4.28 of the Hand Book of Procedures (2009-14), Volume-I and did not pay duty of Customs with interest till the matter was taken up for investigation by the DRI, NOIDA.

j) The Condition (ix) of Notification No. 96/2009-Cus dated 11.09.2009, as amended, requires an importer to produce evidence of discharge of export obligation. The noticee could not make complete export obligation within the stipulated period of time allowed under the Policy and the Customs notification for fulfillment of export obligation. Such a failure lead to outright violation of the conditions of the notification read with the Policy in vogue rendering goods so imported duty free, liable to confiscation under section 111(o) of the Customs Act, 1962.

k) As a part of self-assessment, it was duty of the noticee to present correct facts and declare to the Customs authority about their inability to fulfill export obligation and also they should have volunteered to pay duty, the moment statutory 60 days from the expiry of the EO period was over. The noticee did not come forward to pay such duty voluntarily. Without intervention of DRI, the said duty evasion would have remained undetected due to suppression of facts by the noticee. Therefore, Section 28(4) of the Customs Act, 1962 appeared invokable in this case for demanding duty & interest for extended period.

l) It appeared that Customs duty was not paid in respect of the 12197.382 MT of goods imported under Notification No. 96/2009-Cus dated 11.09.2009, as amended, for which export obligation has not been fulfilled. Therefore an amount of Rs. 4,51,09,866/- appeared to be recoverable from the noticee under the conditions of Bond executed at the port of import at the time of clearance of imported goods under the said notification.

m) It appeared that for such non-payment of duty of Customs, interest on the said amount of duty is also payable by the noticee under the conditions of Bond executed at the port of import at the time of clearance of imported goods under the said notification.

n) In his statement, the authorized representative of the noticee admitted their failure to fulfill the EO to the extent of 59.30%. The noticee accordingly paid an amount of Rs. 4,51,05,251/- towards payment of Customs duty (without interest) to the Commissioner of Customs, Kandla vide 11 (eleven) TR-6 Challan.

o) The amount of Rs. 4,51,05,251/- paid towards Customs duty by the noticee is liable to be appropriated and adjusted against their liability of Customs duty.

p) The contraventions of the provisions of subject Customs notification, Customs Act, 1962 and Foreign Trade Policy appeared to have rendered the goods liable to confiscation under section 111(o) of the Customs Act, 1962, as the said goods were imported duty free subject to observance of certain conditions of the Notification No. 96/2009-Cus dated 11.09.2009, as amended. But deliberate non-observance of those conditions of the notification has rendered the goods liable for confiscation under Section 111(o) of the Customs Act, 1962.

q) Their acts of omission and/or commission, which resulted in non-levy of duty by reasons of deliberate suppression of facts causing issuance of notice under section 28(4) of the Customs Act, 1962, appears to have also rendered the noticee liable to penalty under Section 114A of the Customs Act, 1962 for improper importation of goods by availing exemption under notification without observing conditions laid down under such notification. While considering the amount of Penalty, the fact of payment of duty under protest may also be taken into consideration.

1.34 In view of above, show cause notice F. No. DRI/NRU/ENQ/Simbhaoli/45/2016 dated 31.10.2017 was issued by the Additional Director General, DRI, Zonal Unit, Lucknow, calling upon M/s. Simbhaoli Sugars Limited to show cause in writing to the Principal Commissioner/ Commissioner of Customs, Custom House, Kandla as to why:

a) 12197.382 MT of raw sugar imported duty free under Notification No. 96/2009-Cus. dated 11.09.2009, as amended, having assessable value of Rs. 32,20,84,729/- should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported under Notification No. 96/2009-Cus. dated 11.09.2009, as amended, without observing various conditions laid down under the said notification read with Section 28(4) of the Customs Act, 1962 as well as for contraventions of the provisions of the Foreign Trade Policy (2009-14) read with the Hand Book of Procedures (2009-14), Volume-I.

b) Duty of Customs amounting to Rs. 4,51,09,866/- payable on the aforesaid quantity of 12197.382 MT of goods in respect of which export obligation could not be fulfilled, which were imported by availing the benefit of Notification No. 96/2009-Cus. dated 11.09.2009, as amended, and subsequent non-observance of the various conditions stipulated in the said notification and also for contravening the provisions of the Foreign Trade Policy (2009-14) read with the Hand Book of Procedures (2009-14), Volume-I, should not be demanded and recovered from them along with interest under the conditions of Notification No. 96/2009-Cus dated 11.09.2009 read with Section 28(4) and Section 28AA of the Customs Act, 1962.

c) Amount of Customs duty to the tune of Rs. 4,51,05,251/-, deposited vide 11 (eleven) TR-6 Challan, should not be appropriated and adjusted towards payment of duty of Rs. 4,51,09,866/-.

d) Penalty should not be imposed upon them under Section 114A of the Customs Act, 1962, for improper importation of goods availing exemption of notification and without observance of the conditions set out in the notification, and also by reasons of misrepresentation and suppression of facts as elaborated above resulting in non-payment of duty, which rendered the goods liable to confiscation under section 111(o) of the Customs Act, 1962.

DEFENCE:

2.1 Vide letters dated 16.02.2018, the noticee has filed their reply contending that:

2.1.1 The failure to fulfill the export obligation within the stipulated time is unintentional. The failure to fulfill the export obligation, as mandated under Para 4.22 of the HBP 2009-14 and Condition No. (viii) of Notification No. 96/2009-Cus dated 11.09.2009, is attributable to reasons beyond their control.

2.1.2 As per the HBP and the condition sheet of the authorization, the period for fulfillment of export obligation was mandated to be 18 months i.e. up to April 2014. It was further extended up to October 2014, pursuant to their application for an extension of six months, under para 4.22 (b) of the HBP. However, even after the said extension, they could export only 8383.96 MT of sugar against the export obligation of 20,000 MT.

2.1.3 The non-fulfillment of export obligation within the stipulated time period was contributable to the economic situation prevalent at the time. In the year 2014, the entire sugar industry was gravely impacted wherein the economic situations were not congenial for the sugar manufacturers. This was due to the huge outstanding dues to the cane cultivators by the sugar manufacturers, wherein several factories/ stocks of final products of sugar manufacturers were seized by the state authorities. There was an unprecedented crisis in the sugar industry and the international prices were all time low and this continued even in the extended period.

2.1.4 In addition to the economic slowdown, in PIL No. 29523/2014 in the year 2014, the Hon'ble Allahabad Court passed an interim order dated 13.08.2014 directing sugar mills to sell 15% of the available stock within a period of three weeks at a price not less than Rs. 3100 per quintal. Further, the Collectors of every districts were directed to monitor the sale and to certify whether the price was reasonable before every transaction. The sale of the remaining total stock of the sugar with the sugar mills was prohibited until further directions.

2.1.5 By way of order dated 05.09.2014, the Hon'ble Allahabad High Court, directed the sugar mill owners to sell the remaining stock by 31.10.2014 to meet the dues of the cane growers. During the extended period, the international prices of sugar were lower than Rs. 3100 per quintal so the noticee was mandated to sell the same in the domestic market and their request dated 18.08.2014 for release of stock to fulfill the export obligation was denied by the District Magistrate. Due to the aforesaid reasons, they were restrained from exporting the white sugar to fulfill export obligation. Therefore, there was no malafide intention on their part. However, even during such circumstances, they continued their endeavor to obtain an extension in order to fulfill its export obligation and consequently obtain a discharge certificate.

2.1.6 Absence of any malafide intention on their part is established by way of letters dated 09.10.2014, 23.06.2015 and 07.12.2015, wherein they again requested for extension of period for fulfillment of export obligation, *inter alia,* explaining in great detail the aforesaid supervening circumstances placing a complete restriction on them to export white sugar for fulfillment of their export obligation. Therefore, the failure to fulfill the export obligation cannot be attributed to them.

2.1.7 To the extent possible, they complied with the applicable provisions of FTP 2009-14, HBP v.1 and Notification No. 96/2009-Cus. All the conditions of the FTP have been duly complied with by them and all the records are duly maintained. They have taken all possible steps to fulfill the export obligation. However, the denial of extension by DGFT, PRC and DGFT, CLA without even considering the aforesaid supervening circumstances, resulted in non-compliance of the provisions, after which they paid the differential amount of duty. The act of payment of differential duty by them was voluntary and it was done despite the fact that Writ Petition No. 9723/2016 was filed by them before the Delhi High Court *inter alia* seeking extension of time period for fulfillment of export obligation and the same was pending adjudication.

2.1.8 In absence of any intention to evade duty, the allegation of suppression of facts does not sustain. There is no suppression or willful default on their part in complying with the provisions of FTP and HBP and Notification No. 96/2009-Cus. Thus, the allegation of suppression of facts is misleading. They were under the bona fide belief that in view of the discretionary power vested with DGFT/ PRC under Para 2.5 of the FTP 2009-14, a further extension would be granted to them. Only with such belief, they continued to pursue the application for second extension before DGFT, PRC and DGFT, CLA. However, when the applications for extension were denied, they paid the duty despite the fact that their writ petition was pending before the Delhi High Court. This shows that there was no intention on their part to evade payment of duty.

2.1.9 In the case of Anand Nishikawa Co. Ltd. *Vs.* Commissioner of Central Excise, Meerut 2005 (188) E.L.T.149 (S.C.), the Hon'ble Supreme Court held that suppression of facts can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Extended period of limitation under Section 28 of Customs Act cannot be invoked. Section 28 of the Customs Act imposes a limitation period of two years within which the concerned authorities must commence action

against an importer/assessee if duties are not levied, short-levied or erroneously refunded. It allows the said limitation period to be read as five years only in specific circumstances of collusion, wilful misstatement or suppression of facts. It is not a case of suppression on their part. Thus, extended period of limitation cannot be invoked in the present case. It is a settled principle of law that mere non-payment of duties will not be equivalent to collusion or wilful misstatement or suppression of facts as held by the Hon'ble Supreme Court in Easland Combines Coimbatore *Vs.* Collector of Central Excise, Coimbatore (2003) 3 SCC 410.

2.1.10 Assuming without admitting, if the duty is payable by the noticee, there is no finding in the SCN to the effect that they had not paid the duty with an intention to evade payment of duty. It is submitted that there is neither conscious effort to suppress the facts nor any intent to evade payment of duty. In the absence of '*mens rea*', the levy of interest and penalty is clearly unsustainable in law.

2.1.11 Under Section 28AA of the Act, if a person is made liable to duty under Section 28, he shall be liable to pay interest. Further, section 114A provides that where the duty has not been levied or has been short-levied or interest has not been charged or paid or has been part paid; or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, then the person who is liable to pay the duty or interest, as the case may be, as determined under section 28(8) shall also be liable to penalty equal to the duty or interest so determined. As per these sections, interest and penalty can be levied only when notice is issued under Section 28 of the Act. It is pertinent to note that in the present case, the notice has been issued after invoking the extended period of limitation under Section 28(4) of the Act. It is submitted that in the absence of any justification to prove collusion, wilful misstatement or suppression, the SCN deserves to be dropped and consequently, there can be no demand for payment of interest and penalty.

2.1.12 In the present case, levy of interest and penalty flows from the imposition of duty under Section 28(4). However, it is pertinent to note that in the absence of '*mens rea*' i.e. intention on part of the noticee to evade payment of duty, the entire demand, along with interest and penalty is liable to be set aside.

2.1.13 In the present case, they obtained the advance authorization for import of duty free raw sugar, which was allowed on the condition of fulfilment of export obligation within 18 months from that date of

08.10.2012, i.e. by 07.04.2014. However, due to the non-congenial circumstances, the noticee sought an extension of 6 months which was allowed by DGFT on 21.05.2014. However, even during such extended time period, due to the economic situation coupled with the order passed by the Hon'ble Allahabad High Court, the noticee was restrained from fulfilling its export obligation. In order to comply with the order of the Hon'ble Allahabad High Court, the noticee was forced to sell the goods in the domestic market so as to avoid the penal consequences which would have otherwise been imposed on the noticee. It is further noteworthy that even during such circumstances, the noticee applied for extension of time, only with a bona fide intention to fulfil its export obligation. This clearly establishes the fact that they had no intention of either abstaining from fulfilling the export obligation or evading duty. Therefore, in the absence of evidence to show their ill-intent to evade duty, no interest and penalty can be imposed on them.

2.1.14 It is settled principle that no penalty can be imposed in the absence of *mens rea*. In Akbar Badruddin *Vs.* CC [(1990) 41 ELT 161 (SC)], the Hon'ble Supreme Court, while citing Merck Spares *Vs.* Collector of Central Excise and Customs, New Delhi [(1983) 13 ELT 1261], Shama Engine Valves Ltd., Bombay *Vs.* Collector of Customs, Bombay [(1984) 18 ELT. 533] and Madhusudan Gordhandas and Co. *Vs.* Collector of Customs, Bombay [(1987) 29 ELT 904], held that in imposing penalty, the requisite *mens rea* has to be established. Further, in Hindustan Steel Ltd. *Vs.* State of Orissa [(1969) 2 SCC 627] it was held that the discretion to impose a penalty must be exercised judicially and a penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation, but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. As held in the matter of Pratibha Processors *Vs.* UOI 1996 (88) ELT 12 (SC) penalty can be levied for some contumacious conduct or deliberate violation by the assessee, which is not present in the present case.

2.1.15 In Hindustan Steel Ltd. *Vs.* State of Orissa [1978 (2) ELT 159] and Akbar Badruddin Jiwani *Vs.* Collector of Customs [1990 (47) ELT 161 (SC)], the Hon'ble Supreme Court has held that any technical or venial breach of the law without intention to evade duty does not invite the levy of penalty. In the present case, the Show Cause Notice completely fails to

bring on record any intention on the part of the noticee to the effect that they have consciously avoided payment of customs duty or have violated the provisions of any statute. Therefore, levy of penalty is unjustified and uncalled for.

2.1.16 The goods are not liable for confiscation under Section 111(o) ibid. The Noticee have not intentionally violated any provision of Notification No. 96/2009-Cus and therefore, the provisions of Section 111(o) will not be applicable and no liability towards penalty and interest can survive against the noticee. In view of the submissions made above, it is submitted that the entire demand in the captioned SCN is unsustainable and should be dropped.

Personal hearing:

2.2 Personal hearing in the matter was fixed on 17.04.2018 but vide letter dated 12.04.2018, the noticee requested for adjournment. Further, personal hearing was fixed on 26.04.2018 but vide their e-mail dated 23.04.2018, they again requested for adjournment. Further, personal hearing was fixed on 10.05.2018 wherein Shri Somnath Shukla, Advocate and Shri Yogesh Bhattar, Asstt. General Manager (Commercial) appeared on behalf of the noticee and reiterated the submissions made in written reply. In addition, they requested to make a further written submission within a week in which they want to refer the case laws which they referred during P.H. in support of their contention that demand cannot raised under Section 28(4) of Customs Act or in terms of conditions of bond given before Customs. Considering their request, time for further submission was allowed up to 17.05.2018. They also mentioned that they do not desire any P.H. thereafter.

Further submissions:

2.3 The noticee submitted additional submissions dated 28.05.2018 stating that:

2.3.1 The demand of duty invoking Section 28(4) of the Customs Act is barred by limitation since there is no allegation or act of diversion of imported raw sugar or any other act of willful mis-statement, suppression of facts or collusion. The Section 28 ibid imposes a limitation period of two years within which the concerned authorities must commence action if duty is not levied, short-levied or erroneously refunded. It allows the said limitation period to be read as five years only in some specific circumstances, *viz.* collusion, wilful misstatement or suppression of

facts. As there is no case of suppression on their part, the extended period of limitation cannot be invoked. While issuing the SCN the department has not alleged any diversion of the imported raw sugar. It is an admitted fact and also agreed by the department that the raw sugar imported by them was completely utilized by them for manufacturing the export product i.e. white sugar. Thus, in absence of any allegation qua diversion of inputs and the same being not utilized for the purpose of manufacturing of the export product, the extended period of limitation under Section 28(4) cannot be invoked. In the case of Moser Baer India Pvt. Ltd. *Vs.* Commissioner of Customs [2015 (325) ELT 236 (SC)], it was held that where the imported goods were utilized for the intended purposes and there is no allegation of diversion, the duty cannot be demanded by invoking extended period of limitation under Section 28(4) even in reference to the conditions of bond furnished at the time of import. In the matter of CCE *Vs.* Emcure Pharmaceuticals [2014 (307) ELT 180 (Tri)] as affirmed by the Bombay High Court in [2016 (342) ELT 172 (Bom)], it was held that the conditions of bond cannot override the provisions of the limitation provided under the law and even though bond is executed, in absence of any act of fraud, misrepresentation or suppression, duty cannot be demanded beyond the normal period of limitation by invoking extended period.

2.3.2 It is a settled principle of law that mere non-payment of duties will not be equivalent to collusion or wilful misstatement or suppression of facts. There was no intention on their part to evade the payment of customs duty. Therefore, the allegation of suppression of facts does not sustain. Further, there is no suppression or wilful default on their part in complying with the provisions of FTP and HBP and Notification No. 96/2009-Cus. Thus, the allegation of suppression of facts is misleading. The failure to fulfil the export obligation, as mandated under Para 4.22 of the HBP 2009-14, as well as Condition No. (viii) of the Notification No. 96/2009-Cus dated 11.09.2009, is attributable to reasons beyond their control. The non-fulfilment of export obligation within the stipulated time period was contributable to the economic situation prevalent at the time. In the year 2014, the entire sugar industry was gravely impacted wherein the economic situations were not congenial for the sugar manufacturers. This was due to the huge outstanding due to the cane cultivators by the sugar manufacturers, wherein several factories/ stocks of final products of sugar manufacturers were seized by respective state authorities. There was an unprecedented crisis in the sugar industry and the international prices were all time low and this continued even in the extended period.

2.3.3 In addition to the economic slowdown, in the year 2014, the Hon'ble Allahabad Court in PIL No. 29523/2014 passed an interim order dated 13.08.2014, granting permissions to the sugar mills to sell 15% of the available stock within a period of three weeks at a price not less than Rs. 3100 per quintal. Further, the collectors of every district were directed to monitor the sale. The sale of the remaining total stock of the sugar with the sugar mills was prohibited until further directions. Further, by order dated 05.09.2014, the Hon'ble Allahabad High Court directed the sugar mill owners to sell the remaining stock by 31.10.2014 to meet dues of the cane growers. As the international prices of sugar during the extended period were quite lower than Rs. 3100 per quintal, the noticee was mandated to sell the same in the domestic market since the request for release of stock in order to fulfil the export obligation made vide letter dated 18.08.2014 was denied by the District Magistrate. Due to the aforesaid reasons, they were restrained from exporting the white sugar in order to fulfil its export obligation. There was no malafide intention on part of the noticee.

2.3.4 The economic slowdown and the restrictions imposed by the Hon'ble Allahabad High Court resulted in failure to fulfil the export obligation by the noticee within stipulated time. However, even during such circumstances, the noticee continued its endeavor to obtain an extension in order to fulfil its export obligation and consequently obtain a discharge certificate.

2.3.5 The absence of any mala fide intention on their part is established by letters dated 09.10.2014, 23.06.2015 and 07.12.2015, wherein they requested for extension of period for fulfilment of EO, explaining aforesaid supervening circumstances placing a complete restriction on them to export white sugar for fulfilment of its export obligation. Therefore, the failure to fulfil the export obligation cannot be attributed to them.

2.3.6 They took all possible steps to fulfil the export obligation. However, the denial of extension by DGFT, PRC and DGFT, CLA without even considering the aforesaid supervening circumstances, resulted in non-compliance of the provisions, after which they paid the differential amount of duty. It is noteworthy that the act of payment of differential duty by them was voluntary and it was done despite fact that Writ Petition No. 9723/2016 filed before the Delhi High Court, seeking extension of time period for fulfilment of export obligation, was pending.

2.3.7 The levy of interest and penalty flows from the imposition of duty under Section 28(4). However, it is pertinent to note that in the absence of '*mens rea*' i.e. intention on part of the noticee to evade payment of duty, the entire demand, along with interest and penalty is liable to be set aside.

2.3.8 Penalty can only be levied for some contumacious conduct or deliberate violation which is not present in this case. In the present case, the Show Cause Notice completely fails to bring on record any intention on the part of the Noticee to the effect that the Noticee has consciously avoided the payment of customs duty or has violated the provisions of any statute. In such circumstances, the levy of penalty is unjustified and uncalled for.

2.3.9 In view of above, they requested that the entire demand in the captioned SCN is unsustainable and liable to be dropped.

Discussion and findings

3.1 I have carefully gone through the show cause notice, relied upon documents, submissions made by the noticee in writing as well as during personal hearing and other materials available on record.

3.2 Following issues are to be decided in this case:

- Whether in the facts and circumstances of this case, duty and interest can be demanded and recovered from the noticee against the bond filed by them at the time of clearance of imported inputs?
- Whether provision of extended period of demand under Section 28(4) of the Customs Act, 1962 is attracted in this case?
- Whether the involved goods are liable to confiscation under Section 111(o) of the Customs Act, 1962?
- Whether penalty under Section 114A of the Customs Act, 1962 is imposable?

3.3 From the statements of employees of the noticee and the panchanama in respect of physical verification of stock at the premises of the noticee, it emerges that the impugned consignments of imported raw sugar were consumed by the noticee and the resultant product was either exported or sold in domestic market. I find from the statements and panchanama that export obligation against the impugned Advance Authorization was partly fulfilled. The noticee has also not contested these facts. From the impugned SCN, defense submissions of the noticee and

records available before me, I find that following are the admitted facts of this case:

(a) Advance Authorization No. 0510336650 dated 08.10.2012 was issued to the noticee for duty free import of 30,000 MT of raw sugar, with obligation to export 28,571.400 MT of white sugar within 18 months from the date of issuance of the Authorization.

(b) The subject advance authorization was used for clearance of total 21000 MT of imported raw sugar, having total assessable value of Rs. 55,45,27,135/- and exemption of duty totally amounting to Rs. 7,76,64,795/- was availed by the noticee. At the time of clearance of duty free imported goods, they filed bond and Bank Guarantee which have not been cancelled/ discharged till date.

(c) They were supposed to fulfill 100% export obligation against the said Authorization by 30.04.2014. They applied for extension of 6 months period to fulfill export obligation and DGFT authorities granted the same. In view of the said extension the noticee was required to fulfill the export obligation by October 2014.

(d) Against the subject Advance Authorization, the noticee exported 8383.96 MT of white sugar up to October 2014. Thus, they could fulfill only a part of their export obligation.

(e) They again requested DGFT for further extension but it was not granted. In the PRC meeting held on 08.03.2016, the committee rejected request for further extension and instructed the noticee to get their case regularised in terms of Para 4.28 of the Foreign Trade Policy (2009-14).

(f) The noticee filed W.P.(C) No. 9723 of 2016 before the Hon'ble Delhi High Court against the decision of DGFT dated 22.09.2015 and decision of PRC dated 08.03.2016. However, the said W.P.(C) was found unmerited and accordingly dismissed by the Hon'ble Delhi High Court vide order dated 28.11.2017.

3.4.1 On perusal of defense submissions of the noticee, I observe that they have attempted to show that the failure to fulfill the export obligation within the stipulated period was not intentional but it was attributed to reasons beyond their control. In this connection, they have submitted that at the relevant time entire sugar industry was gravely impacted due to adverse economic situation. The international prices of sugar were all time low. Considering a PIL, vide order dated 13.08.2014, the Hon'ble Allahabad High Court directed sugar mills to sell 15% of available stock within three weeks at a price not less than Rs. 3,100/- per quintal and sale of remaining stock was prohibited. Their request for release of stock to fulfill export

obligation was rejected by the District Magistrate. Further, vide order dated 05.09.2014, the Hon'ble Allahabad High Court directed to sell the remaining stock by 31.10.2014. Citing these circumstances, the noticee have submitted that the non-fulfilment of export obligation was due to circumstances beyond their control.

3.4.2 As discussed above, from the SCN and their defense reply, I find that the noticee made attempts to obtain extension of period of export obligation. An extension of six months period was granted to them by DGFT authorities and applications for further extension were rejected. The noticee then approached Hon'ble High Court at Delhi by filing Writ Petition (Civil) No. 9723/2016 against the decision of DGFT and PRC. However, the said Writ Petition was dismissed by Hon'ble Delhi High Court.

3.4.3 I have gone through the judgment of Hon'ble Delhi High Court dated 28.11.2017 in Writ Petition No. 9723 of 2016, filed by the noticee. From the said judgment, I find that the above discussed hardship and adverse circumstances were also pleaded before the Hon'ble Delhi High Court. However, the Hon'ble Delhi High Court was not convinced to accept these contentions. It was observed in the judgment that the noticee was to complete its export obligation by 30.04.2014. At that time, there was no order passed by any Court preventing them from completing their export obligation. They did not move any application before the Hon'ble Allahabad High Court to seek variation of the interim order to permit them to perform their export obligations. It was noted in that judgment that it was difficult to accept that the Hon'ble Allahabad High Court would have interdicted them from exporting sugar as the Hon'ble Allahabad High Court was only concerned with ensuring that the sale proceeds were utilized to discharge the dues of banks and sugarcane growers. With these observations, the Hon'ble Delhi High Court did not accept their explanation of hardship and circumstances beyond their control. The Hon'ble Court found these arguments as mere ruse. It is further mentioned in the said judgment that PIL in question was finally disposed of by Hon'ble Allahabad High Court on 05.09.2014, that is, approximately one month prior to the expiry of the extended export obligation period. The noticee had no reasonable explanation why they could not complete the export during that period.

3.4.4 Thus, the grounds raised before the Hon'ble Court have also been contended by the noticee before me. The Hon'ble Delhi High Court did not find force in the contentions of hardship and circumstances beyond

their control. These issues stand finally decided by the Hon'ble Delhi High Court. In the instant case, no new ground has been submitted before me to show as to why the export obligations could not be fulfilled. As the issues pleaded before me have already been decided by the Hon'ble Delhi High Court, I am bound to follow the above discussed observations of Hon'ble Delhi High Court. Accordingly, I find no merit in these contentions of hardship and circumstances beyond control of the noticee.

3.5 I proceed to decide as to whether duty and interest can be demanded and recovered from the noticee in this case. In the SCN demand has been raised for non-observance of the various conditions stipulated in the subject notification read-with Section 28(4) of the Customs Act, 1962. Before considering applicability of Section 28(4) ibid, I consider demand raised on the ground of non-observance of conditions of the notification. I find from the available records that export obligation to the extent of 11616.04 MT of white sugar against the impugned Advance Authorization was not fulfilled by the noticee. The last date for fulfillment of export obligation and its extended period has already elapsed. The noticee has already exhausted all available remedies for obtaining further extension but the same has not been granted. Therefore, after expiry of period of export obligation, export obligation to the extent of 11616.04 MT has remained unfulfilled. Para 4.28 (iii) of the Hand Book of Procedures (2009-14), Volume-I (in force at the relevant time), provided that in the event of non-fulfillment of export obligation, in terms of quantity and value, the Authorization holder becomes liable to pay Customs duty on unutilized value of duty free imported material along with interest as notified. I find that this case is squarely covered under the said provision and thus the noticee is liable to pay duty on unutilized value of duty free imported material along with interest.

3.6 Further, the exemption against subject Advance Authorization was covered under Notification No. 96/2009-Cus dated 11.09.2009. It was a conditional exemption. Conditions stipulated in the said notification, *inter alia*, reads:

(viii) *that the export obligation as specified in the said authorization (both in value and quantity terms) is discharged within the period specified in the said authorization or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorization and in respect of which facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 has not been availed :*

Provided that an Advance Intermediate authorization holder shall discharge export obligation by supplying the resultant products to exporter in terms of paragraph 4.1.3 (ii) of the Foreign Trade Policy;

(ix) *that the importer produces evidence of discharge of export obligation to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within a period of sixty days of the expiry of period allowed for fulfilment of export obligation, or within such extended period as the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may allow;*

3.7 It is alleged in the impugned SCN that the above mentioned conditions have not been observed by the noticee. The noticee has also not submitted anything contesting the allegation of non-observance of these conditions. Contention of the noticee is limited to the effect that the non-observation of these conditions was not intentional but was circumstantial, which has already been discussed above. I find that the above conditions were not observed by the noticee inasmuch as they failed to discharge export obligation specified in the said authorization in respect of value as well as quantity within the period specified in the said authorization/ extended period and they failed to produce evidence of discharge of export obligation to the satisfaction of the Assistant Commissioner of Customs within the stipulated period.

3.8 The condition (iv) of the said notification reads:

(iv) *that in respect of imports made before the discharge of export obligation, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen percent per annum from the date of clearance of the said materials;*

3.9 In view of the above mentioned condition, at the time of clearance of imported material against Advance Authorization, the noticee filed bond with Bank Guarantee binding himself to pay on demand an amount equal to the duty leviable plus interest at the rate of 15% per annum thereon, for that portion of goods in respect of which the conditions specified in the notification are not complied with. The bond filed by the noticee with the Assistant Commissioner of Customs, Custom House, Kandla has not been cancelled/ discharged till date. Vide the said bond, the noticee has given legal undertaking, *inter alia*, that:

Now the conditions of this bond are that:

1) *We, the obligor(s) shall observe all the terms and conditions of the said notification.*
2) *We, the obligor(s) shall observe all the terms and conditions specified in the license.*
3) *We, the obligor(s) shall fulfill the export obligations as specified in the said notification and the license and shall produce evidence of having so fulfilled the export obligations within 30 days from the expiry of the specified export obligation period to satisfaction of the Government.*
4) *In the event of failure of fulfill full or part of the export obligations as specified in the said notification and the license, we the obligor(s), hereby undertake to pay the Customs duty for the exemption and also interest @ 15% per annum thereon forthwith and without any demure, to the government.*
5) *We, the obligor(s) shall comply with the conditions and limitations stipulated in the said import and export policy/ Foreign Trade Policy as amended from time to time.*
6) *We, the obligor(s) shall not change the name and style under which we, the obligor(s) are going business or change the location of manufacturing premise except with the written permission of the government.*
7) *If each and every one of the above condition is duly complied with by us, the obligor(s), the above written bond shall be void and no effect, otherwise the same shall remain in full force and effect and virtue.*

3.10 In view of the above conditions of subject notification and the terms of bond, I find that the noticee is liable to pay duty on unutilized value of duty free imported material along with interest at the rate of 15%. This issue has been decided in following judicial pronouncements:

3.10.1 In the matter of Prapath Enterprises *Vs.* Commissioner of Customs Visakhapatanam [2010(252) E.L.T. 309 (Tri. – Bang)], it was held by the Hon'ble Tribunal that:

> *As regards the fact that the appellant has not fulfilled the export obligation, the matter is not disputed by the learned Counsel and it is an admitted fact that the appellants could not comply with the export obligation. In view of the foregoing, we hold that the appellant has defaulted in satisfying the conditions of Notification No. 51/2000 and hence, liable to pay duty forgone by the Revenue.*

3.10.2 In the matter of R. N. Shetty *Vs.* Commissioner of Customs Kandla [2017(357) E.L.T. 210 (Tri. – Ahmd.)], it was held by the Hon'ble Tribunal that:

> *9. As regards the plea of limitation, it is observed that the goods were imported and cleared under License No. 0001145, dated 21-2-1990 availing the benefit of exemption under Notification No. 140/87-Cus., dated 27-3-1987, which prescribes certain conditions, according to which they were to use the imported goods for manufacture of specified goods which were to be exported. These conditions are in the nature of continuing obligation which would be satiated only on fulfilment of the conditions and the Bond and licence are discharged. It is settled law that when the goods are imported under certain conditions and under*

Bond, limitation does not apply till the conditions are fulfilled and the Bond is discharged.

3.10.3 In the matter of NCS Sugars Ltd. *Vs.* Commissioner of Customs Visakhapatanam [2011(265) E.L.T. 136 (Tri. – Bang)], it was held by the Hon'ble Tribunal that:

> *4.2 ..... Duty demanded cannot be claimed to be time-barred since the appellant had executed a bond undertaking to meet such liability in case of its failure to fulfill the conditions of the Notification No. 43/02-Cus., dated 19-4-02. We also note that the decisions of the Tribunal in Pennar Industries Ltd. and Jay Engg. Works Ltd. dealt with cases where the appellants therein were found to have fulfilled the conditions of the relevant notification and had fulfilled export obligation as per policy clarified by CBEC. These decisions are distinguishable.*

3.10.4 Relying on the above judicial pronouncements, I find that it is settled legal position that while clearing goods against a license if a bond is filed, undertaking to pay duty in the event of non-observation of conditions of the exemption notification, duty can be demanded and recovered at any time till such bond is live. As the bond filed by the noticee is alive and it is admitted fact that conditions of fulfilment of export obligation has not been observed by the noticee, I find that duty is liable to be demanded and recovered from the noticee against the bond filed by them.

3.11.1 Next issue for consideration is in respect of applicability of Section 28(4) of the Customs Act, 1962 which has also been invoked in the impugned Show Cause Notice. The noticee have challenged the demand of duty and interest on the grounds of limitation contending the extended period of demand is not invokable in this case. They have submitted that there is neither conscious effort to suppress the facts nor any intent to evade payment of duty. In the absence of any justification to prove collusion, willful misstatement or suppression, there can be no demand of duty under Section 28(4) of the Customs Act, 1962. Further, it has been argued that while issuing the SCN, the department has not alleged any diversion of the imported raw sugar. They have argued that in the absence of '*mens rea*' i.e. intention on part of the noticee to evade payment of duty, the demand along with interest and penalty is liable to be set aside.

3.11.2 I find that it is a case of violation of conditions of notification and legal undertaking. The question as to whether violation of legal undertaking amounts to suppression of facts or not was decided by Hon'ble Tribunal in the matter of Patel Engineering Ltd. *Vs.* Commissioner of

Customs (Import), Mumbai [2013(295) E.L.T. 243 (Tri. – Mumbai)], wherein it was held that:

> *13. As per the condition of the Notification, the undertaking was given by the appellant at the time of import that the impugned paver finisher shall be used only and only for construction of roads for a period of 5 years. From the facts ascertained hereinabove, we find that the paver finisher was not used for the intended purpose as undertaken by the appellant. In view of this finding, the department has rightly issued show-cause notice to the appellant for violation of condition of their undertaking and thereby for denying the exemption under Notification 21/2002. As show-cause notice has been rightly issued and in the adjudication order it is also found that the impugned paver finisher was not used for construction of road, therefore they have not fulfilled the condition terms of undertaking/ bond at the time of import. As they have violated the terms of condition of their bond /undertaking, therefore they are liable to pay duty as demanded in the impugned order. On limitation, we find that the show-cause notice has been issued for violation of undertaking given at the time of importation for intended use and the fact that the imported paver finisher was not found to be used for intended purpose during investigation which amounts to suppression, therefore, the show-cause notice issued is within limitation.*

3.11.3 Vide Civil Appeal Nos. 4842-4846 of 2012, the above decision was challenged before the Hon'ble Supreme Court but the Civil Appeals were dismissed. Thus the said order of Hon'ble CESTAT has attained finality. There is no allegation of diversion of raw sugar. The allegation is that the duty free imported raw sugar was used in manufacturing of white sugar, however, the resultant product i.e. white sugar was not exported but sold locally by the noticee. I find that it is violation of Condition (viii) of the said notification. As provided under Condition (iv) of the said notification, the noticee filed a bond with the Department, binding themselves to observe all the terms and conditions of the said notification and the license and to fulfill the export obligations. In the said bond they also undertook to produce evidence of export of resultant product, within 30 days from the expiry of the specified export obligation period and to pay the Customs duty with interest @ 15% per annum thereon in the event of failure of fulfill full or part of the export obligations. In the instant case, the noticee did not fulfill export obligation and resultantly did not produce evidence to Custom House, Kandla in respect of fulfillment of export obligation. The same is clearly violation of terms and conditions of bond/ legal undertaking filed by them. In the instant case, the SCN has been issued alleging violation of undertaking given at the time of importation. In the matter of Patel Engineering Ltd. (supra), show-cause notice was issued for violation of undertaking given at the time of importation for intended use but the imported goods were not used for intended purpose and the Hon'ble

Tribunal hold violation of legal undertaking as suppression of facts. The present case also involves violation of legal undertaking given at the time of importation. The raw sugar was to be used for manufacturing of white sugar for export but the white sugar was sold in domestic market in violation of conditions of the notification and also the bond filed by the noticee. The diversion of finished product manufactured from the material imported duty free against Advance Authorization, was not informed to the Department. Therefore, relying on the decision of the Hon'ble Tribunal in the matter of Patel Engineering Ltd. (supra), I find that the above violations amount to suppression of facts and thus extended period of demand under Section 28(4) of the Customs Act, 1962 is invokable in this case.

3.12 In view of above discussion, I find that duty on unutilized value of duty free imported material is required to be demanded and recovered from the noticee as provided under Para 4.28 (iii) of the Hand Book of Procedures (2009-14), Volume-I (in force at the relevant time) as well as under Section 28(4) of the Customs Act, 1962.

3.13 After deciding the issue of demand of duty, I take up the issue of demand of interest on duty. The demand of interest on duty has been made under Section 28AA of the Customs Act, 1962 read with conditions of Notification No. 96/2009-Cus dated 11.09.2009 and relevant FTP and Hand Book of Procedure. In respect of demand of interest, the noticee has contended that levy of interest flows from the imposition of duty under Section 28(4) of the Customs Act, 1962. However, in the absence of '*mens rea*' i.e. intention on part of the noticee to evade payment of duty, the demand of interest is liable to be set aside.

3.14 As discussed above, condition (iv) of the Notification No. 96/2009-Cus. dated 11.09.2009 provides for filing of bond by the importer binding themselves to pay duty along with interest at the rate of 15% per annum in the event of non-fulfillment of export obligation. Accordingly, the noticee filed a bond binding themselves to pay duty along with interest at the rate of 15% per annum. It has been found that the noticee did not discharge their liability of export obligation and accordingly they are liable to pay duty. Since the Condition No. (iv) of the said notification stipulates for recovery of duty along with interest at the rate of 15% per annum, I find that the noticee is also liable to pay interest at the rate of 15% per annum on the demanded amount of duty. Further, Para 4.28 (iii) of the Hand Book of Procedures (2009-14), Volume-I, stipulates that duty and interest is

payable when export obligation is not fulfilled in terms of quantity and value. On this ground also the noticee is liable to pay involved duty with interest.

3.15 In the instant case, along with conditions of the notification, the provisions of Section 28AA of the Customs Act, 1962 have also been invoked for demand of interest on duty. The sub-section (1) of Section 28AA of the Customs Act, 1962 reads:

> *Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.*

From the above provision, it is evident that when a person is liable to pay duty in accordance with the provisions of section 28 ibid, in addition to such duty, he is liable to pay interest also. Thus, the provision of Section 28AA ibid flows from the provisions of Section 28 ibid. Therefore, I find that when demand of duty is confirmed under Section 28 ibid, demand of interest is also liable to be confirmed under Section 28AA ibid. Since in the instant case, it has been found that duty is liable to be demanded and recovered under Section 28(4) ibid, provisions of Section 28AA are automatically attracted and thus I find that interest is also liable to be recovered from the noticee under Section 28AA of the Customs Act, 1962.

3.16 In view of above discussion, I find that the provisions of Section 28AA of the Customs Act, 1962 as well the condition (iv) of the impugned notification are attracted in this case. Therefore, interest on the demanded duty is liable to be demanded and recovered under both these provisions. The Para 4.28 (iii) of the Hand Book of Procedures (2009-14), Volume-I, is also attracted according to which interest along with duty is payable when export obligation is not fulfilled in terms of quantity and value.

3.17 Towards their total liability of Rs. 4,51,09,866/-, the noticee made payment of total Rs. 4,51,05,251/- vide total eleven Challan during the month of September 2016. Thereafter, vide letter dated 28.11.2016 they informed that the payment was under protest. However, as it has been found that the duty is payable in this case, I find that the balance amount of duty and interest payable on the total amount of duty involved is liable to be recovered by enforcing bond and encashing Bank Guarantee, vacating the protest which was filed much later than partial payment of duty.

3.18 I proceed to consider proposal of confiscation under Section 111(o) of the Customs Act, 1962. The noticee have submitted that they have not intentionally violated any provision of the notification and thus the goods cannot be confiscated. The section 111(o) ibid provides for confiscation of imported goods which are exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under the Customs Act, 1962 or any other law for the time being in force, in respect of which the conditions are not observed, unless the non-observance of the conditions is sanctioned by the proper officer. The said provision does not require *mens rea* for confiscation of goods in respect of which condition of any notification has not been observed. Therefore, I do not find force in this contention of the noticee.

3.19 The Notification No. 96/2009-cus. dated 11.09.2009 provides for conditional exemption from customs duty. It has been alleged that the noticee violated conditions binding themselves to use such imported goods in manufacturing of export goods and to fulfill export obligation in specified period. The condition (iv) of the said notification provides for executing bond by the importer, binding himself for payment of duty with interest at the rate of 15%, on the imported materials in respect of which the conditions of the notification are not complied. In the instant case, I find that the noticee failed to observe condition of fulfilling export obligation and submitting evidence of the same to the department in stipulated period. When DRI initiated investigation, they made payment of Rs. 4,51,05,251/- towards their duty liability on the imported materials in respect of which the conditions of the notification were not complied. The said amount is less than actual duty payable. Further, the noticee did not pay interest on the duty payable by them, as provided under condition (iv) of the Notification No. 96/2009-cus. dated 11.09.2009. Thus condition No. (iv), (viii) and (ix) of Notification No. 96/2009-Cus dated 11.09.2009 have not been complied by the noticee.

3.20 There is a clause in the section 111(o) stating that imported goods are liable to confiscation for violation of conditions, unless such non-observance is sanctioned by the proper officer. I find that the noticee failed to fulfill condition of export obligation and also consequential action of making payment of duty with interest. The noticee did not inform these facts to the Department. The non-observance of conditions of the notification was not sanctioned by the proper officer. The violations involved

in this case are squarely covered under Section 111(o) ibid. In view of these facts, I hold the impugned goods liable to confiscation under section 111(o) of the Customs Act, 1962.

3.21.1 As the subject goods have been found to be liable for confiscation under Section 111(o) of the Customs Act, 1962, I find it necessary to consider as to whether redemption fine under Section 125(1) of the Customs Act, 1962 is liable to be imposed in lieu of confiscation. The Section 125(1) ibid reads:

> ***Section 125****. Option to pay fine in lieu of confiscation. — (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit.*

3.21.2 A plain reading of the above provision shows that imposition of redemption fine is an option in lieu of confiscation. It provides for an opportunity to owner of confiscated goods for release of confiscated goods, by paying redemption fine. First of all, I find that it is well settled legal position that when goods are not available for confiscation, redemption fine cannot be imposed. In the matter of Commissioner of Customs (Imp.), Nhava Sheva *Vs.* S.B. Impex [2017(358)E.L.T.358(Tri.Mumbai)], it was held:

> *6. It is noticed that the goods on which the Revenue has sought imposition of redemption fine were cleared and disposed of by the appellant. The said goods are not available for confiscation. The said goods were also not seized and released under any bond or undertaking. In these circumstances, the same cannot be confiscated and therefore, no redemption fine could have been imposed.*

The above view has been consistently reiterated by various higher forums/ courts in various cases.

3.21.3 Further, in the matter of Weston Components Ltd. Vs. Commissioner of Customs, New Delhi [2000(115)E.L.T.278(SC)], it was held by the Hon'ble Supreme Court that:

> *It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent-authority. It is an admitted fact that the goods were released to the appellant on an application made by it and on the appellant executing a bond. Under these circumstances if subsequently it is found that the import was not valid*

or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine.

3.21.4 The above judgment was delivered on specific issue and facts of the case were not discussed in details in the said judgment. The above judgment was delivered by the Hon'ble Supreme Court in Civil Appeal No. 7144 of 1999, filed against the order of Hon'ble Tibunal reported at 1999 (84) ECR 259 (Tri Delhi). In the said order, Hon'ble Tribunal discussed the issue in brief wherein it is also mentioned that the goods involved in that case were provisionally released. Therefore, it emerges from the said judicial pronouncements that redemption fine can be imposed against those goods also which are not physically available but were provisionally released against bond.

3.21.5 In the matter of Lubrizol Advanced materials India Pvt. Ltd. Vs. C.C.E. Vadodara-I [2013(290)E.L.T.453(Tri.-Ahmd.)], it was held by the Hon'ble Tribunal that:

Moreover, in the case of Weston Components reported in 2000 (115) E.L.T. 278 (S.C.), the goods had been released provisionally under a bond and it is nobody's case in this case that goods were seized and released provisionally under a bond. In the absence of seizure, the decision of the Hon'ble Supreme Court in the case of Weston Components cannot be applied.

3.21.6 In the matter of Commissioner of Central Excise, Surat-II Vs. Citizen Synthesis [2010(261)E.L.T.843(Tri.Ahmd.)], it was held by the Hon'ble Tribunal that:

Learned SDR on behalf of the Revenue submits that Revenue is in appeal against the conclusion of Commissioner that clandestinely cleared goods which are not available for confiscation, cannot be confiscated and setting aside redemption fine of Rs. 50,000/- imposed. He relies on the decision of Hon'ble Supreme Court in the case of M/s. Weston Components as reported in 2000 (115) E.L.T. 278 (S.C.), in support of his contention that redemption fine is imposable even when the goods are not available for confiscation. I find that the decision of Hon'ble Supreme Court in the case of M/s. Weston Components was rendered wherein the goods had been released to the appellant after execution of bond. Obviously, it was the case of provisional release. Learned SDR fairly admitted that in this case, the goods had not been provisionally released, but removed clandestinely. Therefore, the judgment cited by the learned SDR is not relevant.

3.21.7 In the matter of Commissioner of Central Excise, Surat Vs. Gunjan Exports [2013(295)E.L.T. 733(Tri. Ahmd.)], it was held that:

5. I have considered the submissions and I find myself unable to appreciate the submissions. The Hon'ble Supreme Court had clearly held in the case of Weston Components Limited that when the goods are released provisionally on execution of bond, confiscation can be affected even if the goods are not available. The natural conclusion is that the goods should have been released on bond which would mean that the goods have been taken possession of by way of seizure and subsequently released on execution of bond. Admittedly that is not the situation in this case also. In this case, respondents themselves have diverted the goods and after diversion, proceedings have been initiated. There is no seizure of the diverted goods and release of the same provisionally on execution of bond. Therefore, the issue is covered by the decision of the Hon'ble Supreme Court and in the absence of release on the basis of execution of a bond, goods could not have been confiscated. The decision of the Larger Bench of the Tribunal relied upon by the learned Commissioner is also applicable since in this case also there is no bond with a security is available. The B-17 Bond is a general purpose bond undertaking to fulfil the conditions of notification and other requirements and does not help the Revenue to confiscate the goods not available and impose the redemption fine in lieu of confiscation. Further, the confiscation always presumes availability of goods and presumption normally is that goods have been seized and thereafter the proceedings would culminate into confiscation or release. Confiscation would mean that seized goods become the property of the Government and the party to whom it is ordered to be released on payment of fine, will have to pay fine and redeem the goods. When the goods have been diverted and not released on execution of bond with conditions, the question of confiscation of the same does not arise since goods have already become someone else's property. Under these circumstances, I find no merits in the appeal filed by the Revenue and accordingly, reject the same.

3.21.8 From the above judgments/ orders, I find that redemption fine can be imposed when goods are seized and then provisionally released against a bond. In this case also a bond was filed by the noticee at the time of clearance of the duty free imported goods. The impugned goods were not seized and provisionally released. The bond filed by the noticee was a requirement for clearance of goods in accordance with the condition (iv) of impugned notification. I have gone through the clauses of bonds used for provisional release under Section 110A of the Customs Act, 1962 as well as the bonds filed for clearance of goods against Advance Authorizations. I find that the bonds used for provisional release under Section 110A ibid contains clauses binding concerned party/parties to the effect that they will produce seized goods being released provisionally, whenever so directed. It also contains clause of undertaking payment of redemption fine. Whereas, vide bond used for clearance of goods against Advance Authorizations, the party/parties undertake to pay the Customs duty and interest thereon and it does not contain any undertaking relating to payment of redemption fine. In the instant case, the bond filed by the noticee was related to Advance Authorization and it contains clauses binding the noticee for payment of

duty and interest. This bond does not bind the noticee for production of goods when directed or any undertaking for payment of redemption fine. Thus, I find that both the bonds are meant for different purposes, contain different clauses and thus effect of the two cannot be equated.

3.21.9 In view of the above discussion and judicial pronouncements, I find that redemption fine can be imposed only in those cases where goods are either available or the goods have been released provisionally under Section 110A of the Customs Act, 1962 against appropriate bond binding concerned party in respect of recovery of amount of redemption fine as may be determined in adjudication proceedings. In this case goods were neither seized not released provisionally. In this case, neither the goods are available nor bond for provisional release under Section 110A ibid covering recovery of redemption fine is available. Therefore, I find that redemption fine cannot be imposed in this case.

3.22.1 I proceed to consider proposal of penalty against the noticee under Section 114A of the Customs Act, 1962. The noticee has contended that there is neither conscious effort to suppress the facts nor any intent to evade payment of duty. In the absence of '*mens rea*' penalty cannot be imposed on them. Further, they have submitted that penalty cannot be imposed in the absence of any justification to prove collusion, willful misstatement or suppression. They have submitted that in Akbar Badruddin *Vs.* CC [(1990) 47 ELT 161 (SC)], the Hon'ble Supreme Court, while citing Merck Spares *Vs.* Collector of Central Excise and Customs, New Delhi [(1983) 13 ELT 1261], Shama Engine Valves Ltd., Bombay *Vs.* Collector of Customs, Bombay [(1984) 18 ELT. 533] and Madhusudan Gordhandas and Co. *Vs.* Collector of Customs, Bombay [(1987) 29 ELT 904], held that in imposing penalty, the requisite *mens rea* has to be established.

3.22.2 I find that the judgment in the matter of Akbar Badruddin *Vs.* CC [(1990) 47 ELT 161 (SC)] was delivered while considering penalty under Section 112 of the Customs Act, 1962, whereas, in this case there is proposal of imposition of penalty under Section 114A ibid. Therefore, I find that the ratio of the cited case law is not applicable in the instant case. I find that in the case of UOI *Vs.* Dharmendra Textile Processors [2008(231) ELT 3(SC)], the Hon'ble Supreme Court observed that *mens rea* is not an essential ingredient in a civil liability. In the case of Chairman SEBI *Vs.*

Shriram Mutual Fund [2006(5) SCC 361], the Hon'ble Apex Court has held that:

> *"Mens rea is not an essential ingredient for contravention of the provisions of a Civil Act. Unless the language of the statute indicates the need to establish the element of mens rea, it is generally sufficient to prove that a default default in complying with the statute has occurred and it is wholly unnecessary to ascertain whether such a violation was intentional or not. The breach of a civil obligation which attracts a penalty under the provisions of an act would attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not."*

3.22.3 I find that the provisions of Section 114A ibid covers penalty for short-levy or non-levy of duty in certain cases. It provides that where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty or interest as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined. From the above provision, I find that the penalty under Section 114A flows from the invocation of provisions of Section 28AA ibid. From the language of the Section 114A ibid, it is amply clear that imposition of penalty under that provision is mandatory when demand of duty is confirmed under Section 28(4) ibid. Since it has been found that this case involves suppression of facts and the duty is liable to be demanded and recovered under Section 28AA ibid, I find that penalty under Section 114A is imposable on the noticee.

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

ORDER

a) I hold the 12197.382 MT of raw sugar imported duty free under Notification No. 96/2009-Cus, dated 11.09.2009, as amended, having assessable value of Rs. 32,20,84,729/- (Rupees Thirty Two Crore Twenty Lakh Eighty Four Thousand Seven Hundred and Twenty Nine only) liable for confiscation under Section 111(o) of the Customs Act, 1962.

b) I confirm the demand of Customs duty amounting to Rs. 4,51,09,866/- (Rupees Four Crore Fifty One Lakh Nine Thousand Eight Hundred Sixty Six Only) on the aforesaid quantity of 12197.382

MT of raw sugar in respect of which export obligation could not be fulfilled, under the conditions of Notification No. 96/2009-Cus dated 11.09.2009 read with Section 28 (4) of the Customs Act, 1962.

c) I also confirm and order to recover interest at appropriate rate on the aforesaid amount of Customs duty under the conditions of Notification No. 96/2009-Cus dated 11.09.2009 read with Section 28AA of the Customs Act, 1962.

d) I order to appropriate and adjust the amount Rs. 4,51,05,251/- (Rupees Four Crore Fifty One Lakh Five Thousand Two Hundred Fifty One Only) deposited vide 11 TR-6 Challan, towards their duty liability of Rs. 4,51,09,866/- (Rupees Four Crore Fifty One Lakh Nine Thousand Eight Hundred Sixty Six Only). I also order to recover the balance amount of duty amounting to Rs. 4,615/- which has not been paid by M/s. Simbhaoli Sugars Limited.

e) I order to enforce the Bond and encash Bank Guarantee filed by M/s. Simbhaoli Sugars Limited towards their liability of duty and interest.

f) I impose penalty of Rs. 4,51,09,866/- plus an amount of interest payable on confirmed duty upon M/s. Simbhaoli Sugars Limited under Section 114A of the Customs Act, 1962.

O/C

[SANJAY KUMAR AGARWAL]
COMMISSIONER

BY RPAD/ SPEED POST:

To,
M/s. Simbhaoli Sugars Limited, Post:- Simbhaoli, Dist:- Hapur, UP.

COPY TO:

(1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad.
(2) The Additional Director General, DRI, Noida Regional Unit, Ground & First Floor, G-10, Sector-63, Noida.
(3) The Commissioner of Customs, Central Excise & Service Tax, Hapur.
(4) The Deputy/Assistant Commissioner (Recovery), CH, Kandla.
(5) The Deputy/ Assistant Commissioner (Prosecution), CH, Kandla.
(6) The Deputy/ Assistant Commissioner (Gr.I), CH, Kandla.
(7) Guard file.