



**OFFICE OF THE COMMISSIONER OF CUSTOMS
CUSTOM HOUSE KANDLA
NEAR BALAJI TEMPLE, NEW KANDLA**

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A	File No.	S/10-27/2008/ADJ
B	Order-in-Original No.	KDL/COMMR/SKA/5/2018-19
C	Passed by	Shri Sanjay Kumar Agarwal Commissioner, Custom House, Kandla.
D	Date of order	24.07.2018
E	Date of issue	24.07.2018
F	Show Cause Notice No. & Date	S/20-53/2006/Gr.VII dated 10.06.2008
G	Noticee(s)/Co-Noticee(s)	1. M/s. Sheel Chand Agroils Pvt. Ltd., 7 th Km. Stone, Rudrapur-Kichha Lalpur, District Udham Singh Nagar, Rudrapur (UP). 2. M/s. Rochees Watches Pvt. Ltd., B-21, Shri Ji Ki Mori, Tripolia Bazar, Jaipur - 302002 (Rajasthan).

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 paise 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:

M/s. Sheel Chand Agroils Pvt. Ltd., situated at 7th Km. Stone, Rudrapur-Kichha Lalpur, District Udham Singh Nagar, Rudrapur (UP), (hereinafter also referred to as "Noticee No. 1") imported Crude Palm Oil (CPO) Edible grade and CDSO covered under Customs Tariff Item 15119090 and 15071000, respectively. They filed total five Bills of Entry claiming exemption from payment of Customs duties on the basis of the DEPB Scrips purchased by them. The DEPB scrips were issued by DGFT Authorities to M/s. Rochees Watches Pvt. Ltd., Jaipur (hereinafter also referred to as "Noticee No. 2") and transferred to the Noticee No. 1 for duty free imports of goods specified in the scrips.

1.2 The Notification No. 45/2002 dated 22.04.2002 allows exemption from various customs duties/ CVDs subject to certain conditions prescribed therein. Relevant part of the said notification is reproduced below:-

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods imported into India from -

- (1) the whole of the duty of Customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975);*
- (2) the whole of the additional duty leviable under Section 3 of the said Customs Tariff Act where specifically claimed by the importer, and*
- (3) the whole of the Special Additional Duty of Customs leviable under section 3A of the said Customs Tariff Act;*

subject to the following conditions, namely :-

- (i) that the importer has been issued a Duty Entitlement Pass Book by the Licensing Authority in terms of paragraph 4.3 of the Export and Import Policy.*
- (ii) the importer has been permitted credit entries in the said Duty Entitlement Pass Book by the Licensing Authority at the rates notified by the Government of India in the Ministry of Commerce for the products exported;*
- (iii) the said Duty Entitlement Pass Book is produced before the proper officer of Customs for debit of the duties leviable on the goods but for exemption contained herein :*
Provided that exemption from duty shall not be admissible if there is insufficient credit in the said Duty Entitlement Pass Book for debiting the duty leviable on the goods but for this exemption
- (iv) the said Duty Entitlement Pass Book shall be valid for twelve months from the date of issue or such extended period as may be granted by the Licensing Authority for import and export only, at the port of registration which shall be one of the sea ports at Mumbai, Kolkata, Cochin, Kandla,*
- (v)*
- (vi) where benefit of exemption from duty is claimed by a person, who is not a Duty Entitlement Pass Book holder, such benefit shall be permissible only against specific amount of credit transferred by a Duty Entitlement Pass Book holder to such person.*

1.3 An investigation in respect of overvaluation in exports by the Noticee No. 2 and others was conducted by Customs authorities at Jaipur and a Show Cause Notice No. VIII(H)10/64/Adj/2007 dated 31.01.2008 was issued to the Noticee No. 2 and others. In the said Show Cause Notice, it was alleged, inter alia, that the licenses were procured fraudulently by the Noticee No. 2 by massively over-invoicing the export products and as such, the credits against such certificates were invalid. Based on some of these licenses, the transferee *i.e.* Noticee No. 1 got issued Release Advices for imports at Kandla port and utilized the same for duty free imports.

1.4 The Noticee No. 2 produced Release Advices issued by Customs Authorities at Jaipur before the Customs Officer at the port of clearance for debiting Customs duties and countervailing duties and obtaining out of charge of the imported goods.

1.5 The duties were debited on licenses obtained fraudulently and Release Advice credits were utilized by the Noticee No. 1 for debiting the duties for clearance under the DEPB scheme (Notification No. 45/2002-Cus). As these licenses were fraudulently obtained by resorting to willful mis-statement and suppression of facts with regard to the value of export goods, the duty credits appeared to be invalid and therefore, it also appeared that the conditions of Notification No. 45/2002-Cus were not complied with for entitlement of exemption. Therefore, the Noticee No. 1 was ineligible for the duty free clearances under the said scheme and the duties as applicable on merits were required to be discharged.

1.6 The Noticee No. 1 obtained and utilized such Release Advices for procurement of duty free goods involving total duty amounting to Rs. 54,52,291/- against ineligible DEPB credit. Therefore, it appeared that removal of imported goods were in the nature of removal of non-duty paid goods rendering the imported goods liable for confiscation under Section 111(d) and Section 111(j) of the Customs Act, 1962 read with the provisions of Foreign Trade Policy [previously known as Exim Policy]. Further, it appeared that by such act, the Noticee No. 1 rendered themselves liable for penalty under Section 112(a) of the Customs Act, 1962.

1.7 The Noticee No. 2 obtained DEPB license for higher credit by resorting to overvaluation of export goods and passed on the ill-earned DEPB credits to the Noticee No. 1, which were subsequently utilized in the clearance of goods under consideration, rendering them liable for confiscation under Section 111(d) and section 111(j) of the Customs Act, 1962. Therefore,

it appeared that they are also liable for penal action under Section 112(a) of the Customs Act, 1962

1.8.1 In view of the above discussed facts, Show Cause Notice F. No. S/20-53/2006/Gr.VII dated 10.06.2008 has been issued calling upon the Noticee No. 1 as to why:

- (i) The Customs duties including Additional duties totaling to Rs. 54,52,291/- chargeable/ leviable should not be charged/ levied under proviso to Section 28(1) of the Customs Act, 1962 on the goods cleared without payment of duty.
- (ii) Interest at appropriate rates should not be charged on the aforesaid duties under Section 28AB of the Customs Act, 1962.
- (iii) the goods, totally valued at Rs. 90,38,697/-, removed under such invalid RAs should not be considered as non duty paid goods and the same should not be confiscated under Section 111(d) and Section 111(j) of the Customs Act, 1962;
- (iv) Penalty under Section 114A/ 112(a) of the Customs Act, 1962 should not be imposed on them.

1.8.2 Vide the said Show Cause Notice F. No. S/20-53/2006/Gr.VII dated 10.06.2008, the Noticee No. 2 have also been called upon to show cause as to why penalty under section 114A/ 112(a) of the Customs Act, 1962 should not be imposed on them.

Defense Reply:

2. Vide letters dated 21.02.2009 and 27.01.2016, the Noticee No. 1 has filed their reply contending that:

2.1 They purchased DEPB scrips from the Noticee No. 2, who was holding valid DEPB licenses at the relevant time when negotiations had started. The scrips were allowed to be traded. They were not concerned with export undertaken by the Noticee No. 2, DEPB Licenses or Transfer advices. As per normal trade practice seller of DEPB scrips is responsible for making available the valid transfer advices against which buyers of such scrips should be able to import goods using the credit limits available in the RAs. Therefore, in the subject case, the charge that they have obtained the Release Advices fraudulently is false. It is undisputed in this case that DEPB licenses were in the name of the Noticee No. 2 and they were entitled to apply for issue of Release Advices. They (Noticee No. 1) never obtained Transfer Advice

and therefore, the charge of fraudulently obtaining of the TA is false and untrue. The charge that they obtained and utilized such Release Advices for procurement of duty free goods having duty amounting to Rs. 54,52,291/- against ineligible DEPB credit is also false and untrue as each of the Transfer Advice was issued by the Customs Authorities at Jaipur on the request of the Noticee No. 2.

2.2 The DEPB licenses have been issued by DGFT and not by Customs. Therefore, if the DEPB licenses are in dispute, Customs is required to approach DGFT for taking action in respect of fraudulent issuance of DEPB license and get it revoked by DGFT Authorities. However, it has not been done by Customs. Therefore, the charge against them is not sustainable. As Customs cannot demand credit of DEPB allowed by DGFT and hence denial of credit utilized is not permissible. The DEPB license has been issued by DGFT. Therefore, unless it is revoked by DGFT or held as having been fraudulently obtained, credit cannot be denied by Customs.

2.3 There is separate mechanism of adjudication under Foreign Trade (Development & Regulation) Act, 1992. Further, Sections 10, 11 and 12 of the said Act empowers the Officers of DGFT to conduct search, seizure and impose penalty including confiscation. The Officers of DGFT are entrusted with powers to take action in case of fraudulent act of import and export but no such action has been initiated in this matter by the DGFT Officers. Therefore, Customs cannot charge that DEPB licenses issued by DGFT were fraudulent. In support of these contentions, they have relied upon following judgments:

- (i) *Renuga Soft-X Towels Vs. CC, Tuticorin 2006 (206) ELT 948 (T)*;
- (ii) *TTK Prestige Ltd. Vs: CC, Banglore 2005 (188) ELT 385 (T)*;
- (iii) *Blue Water Food & exports (P) Ltd. Vs. CC, Cochin [2010(251)ELT305 (T)]*

2.4 They have obtained Release Advices from Customs Authorities at Jaipur against DEPB licenses issued to the Noticee No. 2, which were validly transferred to them and produced before Customs. All the subject DEPB licenses were issued in the year 2003.

2.5 The demand of Customs duty including the additional duties has been issued on 10.06.2008 and received on 19.06.2008 i.e. beyond the time prescribed for issuance of notice under proviso to Section 28(1) of Customs Act, 1962. The SCN was issued to them beyond the normal period of limitation without alleging collusion, willful misstatement of facts or similar

other charges for invoking extended period of limitation. Therefore, the SCN is unsustainable, barred by limitation and liable to be quashed. In the subject case, no such charge is applicable on them as no fraud has been committed by them. Even if the charge as made in the notice is considered valid and true, the same has been committed by Noticee No. 2. Therefore, if the Noticee No. 2 have committed the fraud, the proviso to section 28(1) can be made applicable on the Noticee No. 2 only and not on them. They have relied upon the judgment CC Vs. Binani Cement Ltd. 2009 (238) ELT 33 (HC-Guj.).

2.6 The Noticee No. 1 is a bona fide purchaser of the DEPB licenses. They purchased the same through proper channel without holding or suppressing any fact. It is not the case of the department that they were in any way concern with over-invoicing in export and taking credit by mis-declaration. The department has also not alleged any illegal conduct on their part. The notice has been issued to them demanding duty only on the ground that the credits in the DEPB licenses utilized by them for clearance of duty free imported goods are invalid. It is a settled position of law that benefit of legal and valid DEPB licenses cannot be denied to a bona fide purchaser due to its subsequent cancellation. Further, they relied upon the judgment in the matter of Binani Cement Ltd. Vs. CC, Kandla [2010 (238) ELT 33 (Tri-Ahd.)].

2.7 The duty is demanded by the department from them because department's investigation against seven exporting firms had revealed that those exporting firms had over-invoiced their export products. However, the Show Cause Notice intends to demand duty from the Noticee No. 1 in context of clearance of goods against the credit in DEPB Licenses issued to the Noticee No. 2. No information about other exporting firms is revealed in the notice and they are completely unaware about the other exporting firms against which the proceedings have been initiated by the department. The SCN refers to Annexure-A, which enumerates list of DEPB Licenses against which they cleared their imported goods but the list reproduced in Annexure-A to the SCN has certain license numbers which do not pertain to the Noticee No. 2. Following licenses were issued to parties other than the Noticee No. 2:

1. DEPB licence No. 1310009426/22.04.03 for duty credit of Rs. 3,95,907/- granted to M/s. HMD Exim Pvt. Ltd.
2. DEPB licence No. 1310009288/08.04.03 for duty credit of Rs. 2,70,000/- granted to M/s. HMD Exim Pvt. Ltd.
3. DEPB licence No. 1310009457/24.04.03 for duty credit of Rs. 4,32,000/- granted to M/s. Rajasthan Watch Manufacturers.

2.8 The SCN reveals name of only M/s Rochees Watches Ltd. (Noticee No. 2) amongst the seven exporting firms against whom the proceedings were initiated by the department, which means that department intends to demand duty from them only on the imported goods which have been cleared against the credit reflected in DEPB licenses issued to the Noticee No. 1 (M/s Rochees Watches Ltd.). They do not know whether any proceedings against M/s. HMD Exim Pvt. Ltd. and M/s. Rajasthan Watch Manufacturers (other two sellers of DEPB Licenses) have been initiated by the department or not. The demand of duty on the imported goods cleared against the credit reflected in DEPB licenses issued to other parties mentioned above is illegal, unsustainable and needs to be dropped.

2.9 In respect of demand of interest, they have relied on judgment of Hon'ble Supreme Court in the matter of Pratibha Processor Vs. UOI [1996 (88) ELT 12 (SC)], wherein it has been held:

"14. Calculation of interest is always on the principal amount. The "interest" payable under Section 61(1)(2) of the Act is mere "accessory" of the principal and if the principal is not recoverable/ payable, so is the interest on it"

2.10 The SCN proposes to confiscate the goods imported by utilizing the credit in DEPB Licenses, which were purchased by them from the Noticee No. 2. Provisions of Section 111(d) and Section 111(j) of the Customs Act, 1962 have been proposed. The goods to be confiscated under Section 111(d) should have been imported or attempted to have been imported contrary to prohibition imposed under the Customs Act, 1962 or any other Act. In the present case, the goods have been imported under valid licenses which were legally transferred to them. There was no charge that goods imported were prohibited or prohibition was imposed on the goods imported by them under the Customs Act or any other law for the time being in force. Besides it is not the case of the department that the licenses have been cancelled by the licensing Authority before the goods were imported by them utilizing the credit in DEPB License. Therefore the goods imported by them are not covered under ambit of Section 111(d) of the Customs Act, 1962 and thus, not liable for confiscation under that provision.

2.11 The SCN proposed to impose penalty under Section 112(a) of the Customs Act. The penalty under Section 112(a) is consequential. It envisages imposition of penalty on a person whose act of omission results in

confiscation of goods under Section 111 of the Customs Act, 1962 as the goods imported by the Noticee No. 1 under valid and legal license is not liable for confiscation. Therefore, no penalty is sustainable under Section 112(a) of the Customs Act, 1962.

2.12 The SCN proposed to impose penalty under Section 114A of the Customs Act, 1962. Penalty under Section 114A can be imposed only in cases of non-payment or short payment of duty or interest or erroneous refund of duty or interest by reason of collusion or any willful mis-statement etc. However, no such charge is imputed on them in the SCN. Therefore, penalty under section 114A of the Customs Act, 1962 is non-sustainable.

2.13 The allegations against them are limited to the DEPB Licenses procured by them from the Noticee No. 2 who are co-noticee in the present case and the name of other firms have not been revealed in the SCN. Therefore, they (Noticee No. 1) are not answerable for the DEPB licenses transferred by M/s. HMD Exim Pvt. Ltd. and M/s. Rajasthan Watch Manufacturers.

2.13 PERSONAL HEARING:

2.13.1 Personal hearing in the matter was fixed on 07.01.2016. Shri Sahdev Singh, authorized signatory of the Noticee No. 2 appeared and filed written submission at the time of personal hearing. He argued that as the main SCN is pending for adjudication, this case may be kept in abeyance.

2.13.2 Due to change in adjudicating authority, personal hearing in the matter was again fixed as 15.02.2018 for both the noticees. Vide letter dated 15.02.2018, the notice No. 1 requested for adjournment. The Noticee No. 2 neither appeared nor responded. Further, second opportunity of personal hearing was granted to both the noticees by fixing date as 29.05.2018. Vide letter dated 21.05.2018, the Noticee No. 1 again requested for adjournment and the Noticee No. 2 neither appeared nor responded. Further, third date for personal hearing was fixed as 28.06.2018. No one appeared for the Noticee No. 2. However, on behalf of the Noticee No. 1, Shri Vikas Mehta, Consultant and their Authorized Representative, appeared and reiterated the submissions made in written reply. During personal hearing, he stated that the final outcome of SCN issued to the exporting firm as referred in para 3 of SCN is not known. It is also not known whether matter was referred to Licensing Authority and any action has been taken at their end or not. He submitted that it is a premature notice to them who utilized such licenses for

imports. He further argued that there are case laws that if licenses purchased by third parties, duty cannot be demanded from the parties who imported goods utilizing such licenses. He prayed to drop the proceedings against them.

2.13.3 The Noticee No. 2 did not appear on the three dates fixed for personal hearing on 15.02.2018, 29.05.2018 and 28.06.2018. The letters intimating date of personal hearing were delivered to the noticee but they neither appeared for personal hearing nor responded.

DISCUSSION AND FINDINGS:

3.1 I have carefully gone through the Show Cause Notice dated 10.06.2008, defence replies filed by the noticees, oral submissions made during the personal hearing and the available records.

3.2 The Noticee No. 2 have not appeared before me for personal hearing on any of the three dates granted to them. The only reply submitted by them is dated NIL. It was submitted during personal hearing held on 07.01.2016 before the then Principal Commissioner of Customs, Kandla. Vide the said letter, they have requested to keep the matter in abeyance in view of pendency of proceedings relating to exports, against them, before the Customs Authorities at Jaipur. By granting three opportunities of personal hearing, sufficient opportunity of defense has been granted to them. I find that the principles of natural justice have been followed and thus, I proceed to decide the case. From the available records, I find that the Customs Authorities at Jaipur investigated a case of overvaluation of exports by various exporters including the Noticee No. 2. Against the said exports, alleged to be overvalued, the Noticee No. 2 had obtained DEPB scrips and transferred to the Noticee No. 1. However, three Scrips No. 1310009426/ 22.04.2003, 1310009288/ 08.04.2003 and 1310009457/ 24.04.2003, involved in this case were purchased by the Noticee No. 1 from the parties other than the Noticee No. 2. The said investigation of Customs Authorities at Jaipur culminated in Show Cause Notice dated 31.01.2008, issued to the Noticee No. 2 and others, inter alia, proposing re-determination of declared export value, confiscation of export goods and imposition of penalty under Section 114 of the Customs Act, 1962. The said SCN was adjudicated against the Noticee No. 2 vide O-I-O No. 07/2009 dated 30.09.2009. However, it was remanded to the Adjudicating Authority by Hon'ble CESTAT vide Final Order dated 14.01.2015 and Misc. Order dated 31.03.2016. Therefore, de-novo adjudication proceedings were conducted by the Commissioner of Customs, Jodhpur (office at Jaipur) and O-I-O dated 18.05.2017 was issued. Vide the

said O-I-O, the export values were re-determined, the export goods were held liable for confiscation for mis-declaration and penalty of Rs. 13 Crore was imposed on the Noticee No. 2. In view of the Show Cause Notice dated 31.01.2008 issued by the Commissioner of Customs, Jodhpur (Office at Jaipur), the present Show Cause Notice has been issued. I also find that Customs Authorities at Jaipur have made a reference to DGFT Authorities for initiating action against the Noticee No. 2 in respect of the DEPB scrips issued to them. As per records available with me, till 27.02.2018 nothing has been heard by Customs Authorities at Jaipur from DGFT Authorities in respect of action against the subject DEPB scrips.

3.3 The issues to be decided in this case are:

- (i) Whether Customs duty can be demanded and recovered from the Noticee No. 1 under erstwhile proviso to Section 28(1) of the Customs Act, 1962 along with interest under erstwhile Section 28AB *ibid*.
- (ii) Whether the imported goods can be held liable for confiscation under Section 111(d) and 111(j) of the Customs Act, 1962.
- (iii) Whether penalty under Section 112(a)/ 114A of the Customs Act, 1962 can be imposed on the Noticee No. 1 and the Noticee No. 2.

3.4 The Noticee No. 1 has made submissions on various counts against the demand of duty from them. Their first contention in this regard is that the SCN has been issued to them beyond the normal period of limitation without alleging collusion, willful misstatement of facts etc. for invoking extended period of limitation as the fraud has not been committed by them. They have submitted that if the Noticee No. 2 have committed the fraud, the proviso to section 28(1) of the Customs Act, 1962 can be made applicable on the Noticee No. 2 only and not on them. They have relied upon the judgment *CC Vs. Binani Cement Ltd. 2009 (238) ELT 33 (HC-Guj.)*. I find that there is nothing in the impugned Show Cause Notice to show that the Noticee No. 1 was aware of any overvaluation/ fraud by the Noticee No. 2. Further, the Show Cause Notice has not brought out any act of collusion, mis-statement or suppression of fact on the part of the Noticee No. 1. These are essential ingredients of the then proviso to Section 28(1) *ibid*. I have gone through the cited case law of *Binani Cement Ltd.* In that case also the importer had procured DEPB licenses from an exporter and later on it was found that the exporter had obtained the licenses fraudulently and duty in respect of the imports was demanded from the importer by invoking extended period. In that matter, the Commissioner (Appeals) set aside the demand on the grounds of limitation. The order of Commissioner (Appeals) was challenged before the Hon'ble CESTAT. Vide Order dated 23.03.2007, reported at 2008 (231) E.L.T. 177 (Tri. Ahmd.), the Hon'ble CESTAT rejected the department's

appeal holding that for invocation of longer period against the importer, the circumstances of collusion, wilful misstatement or suppression of facts should be present against the importer and not against the exporter who procured the DEPB passbook and transferred the same to the importer; that the DEPB originally procured by the exporter by fraud will not vitiate the imports. On these reasoning, the order of Commissioner (Appeals) was held to be legal and proper. The department challenged the said order before the Hon'ble High Court of Gujarat vide Tax Appeal No. 1592 of 2007. The judgment in that Tax Appeal has been cited by the Noticee No. 1. In that judgment, the Hon'ble High Court affirmed the Order of Hon'ble CESTAT stating that no error in law was committed by the Tribunal. Further, I find that the same view was also taken by Hon'ble CESTAT in the matter of Balarpur Industries Ltd. Vs. Commissioner of C. Ex. (Adj.), New Delhi [2012 (275) E.L.T. 88 (Tri. - Del.)]. I find that in the present case also, there is no allegation of collusion, willful misstatement or suppression of facts against the Noticee No. 1. Therefore, relying on the above judgment of Hon'ble High Court of Gujarat, I hold that extended period of demand under erstwhile proviso to Section 28(1) ibid cannot be invoked in this case against the Noticee No. 1.

3.5 Further, the Noticee No. 1 has contended that the Show Cause Notice was issued on 10.06.2008 and received by them on 19.06.2008 i.e. beyond the time prescribed for issuance of notice under proviso to Section 28(1) of Customs Act, 1962. The duty has been demanded under erstwhile proviso to Section 28(1) of the Customs Act, 1962 [Now Section 28(4)] by invoking extended period which provides for demand of duty within five years from the relevant date. The relevant date has been defined in Explanation 1 of Section 28 as the date on which proper officer grants order for clearance of goods or the date on which provisional assessment is finalized or the date of refund (in the matter of refund) or in any other case, the date of payment of duty/ interest. I find that in the instant case, the clause of date of granting order for clearance of goods is attracted. Total five Bills of Entry are covered in the impugned Show Cause Notice. The Bills of Entry were filed during 30.06.2003 to 15.10.2003. The dates of granting out of charge are not readily available on record before me. However, even if it is assumed that on the date of filing of Bills of Entry, out of charge was granted, the impugned SCN was required to be delivered to them on or before 29.06.2008. The same has been received by the Noticee No. 1 on 19.06.2008, i.e. within five years from the dates of clearances. In view of these facts, I find that this contention of the Noticee No. 1 is not tenable. However, as held above, the extended period of demand in this case is not attracted. Therefore, the duty was required to be

demanded within normal period under Section 28(1) without invoking extended period i.e. within six months from the relevant date. As the impugned Show Cause Notice has been issued after the period of six months, I find that the demand of duty from the Noticee No. 1 is time barred.

3.6.1 The Noticee No. 1 has also raised contention that the matter pertains to DEPB scrips and thus it is an issue to be dealt by the DGFT Authorities under the provisions of the FTDR Act, 1992. They have contended that on this count, the issuance of the present Show Cause Notice is without jurisdiction. They have relied on various judicial pronouncements in support of their contention. I have gone through the same.

3.6.2 Officers in DGFT are competent officers for implementation and functioning under the provisions of the Foreign Trade (Development and Regulation) Act, 1992. Vide Notification No. 1/2002-07 dated 31.03.2002 issued under Section 5 of the said Act, the Central Government notified the Export and Import Policy 2002-07. The impugned DEPB Licenses were issued under the said policy. The Para 4.3 to 4.3.2 of the said Exim Policy covered the matters relating to issuance of scrips against exports, granting credits etc. Therefore, I find that the being a part of the Exim Policy, granting credits in DEPB Scrips was within purview of the DGFT Authorities.

3.6.3 In respect of duties and powers of Customs Officers, I find that the same is governed by the provisions of the Customs Act, 1962. As examination, assessment, demand, confiscation, penalty etc. in respect of export goods are governed by the provisions of the Customs Act, 1962. The exemption in imports against the DEPB scrips was subject to conditions stipulated in notification issued under Section 25 of the Customs Act, 1962 which is within the jurisdiction of Customs Officers.

3.6.4 In view of above discussed statutory provisions in respect of DEPB scheme, I find that the Customs authorities and DGFT Authorities were entrusted with different matters pertaining to DEPB under the Foreign Trade (Development and Regulation) Act, 1992 and Customs Act, 1962, respectively. Issuance of scrips/ licenses, granting credits, cancellation of the same etc. are covered under FTP/ Exim Policy and HBP (framed under FTDR Act) and thus comes within purview of DGFT Authorities. Whereas, assessment, monitoring of conditions of customs notifications, demand of duty under Section 28 of the Customs Act, 1962, confiscation and penalties under the Customs Act, 1962 are within purview of Customs Authorities. Further, the issue of jurisdiction of DGFT and Customs authorities was

decided by the Hon'ble Supreme Court in the matter of Sheshank Sea Foods Pvt. Ltd. Vs. Union of India [1996 (88) E.L.T. 626 (SC)], wherein it was held:

9. Section 111(o) states that when goods are exempted from Customs duty subject to a condition and the condition is not observed, the goods are liable to confiscation. The case of the respondents is that the goods imported by the appellants, which availed of the said exemption subject to the condition that they would not be sold, loaned, transferred or disposed of in any other manner, had been disposed of by the appellants. The Customs authorities, therefore, clearly had the power to take action under the provisions of Section 111(o).

10. We do not find in the provisions of the Import and Export Policy or the Hand Book of Procedure issued by the Ministry of Commerce, Government of India, anything that even remotely suggests that the aforesaid power of the Customs authorities had been taken away or abridged or that an investigation into such alleged breach could be conducted only by the licensing authority. That the licensing authority is empowered [to] conduct such an investigation does not by itself preclude the Customs authorities from doing so.

11. The communication of the Central Board of Excise and Customs, dated 13th May, 1969 refers to the breach of the condition of a license and suggests that it may not be possible to take action under Section 111(o) in respect thereof. It is true that the terms of the said Exemption Notification were made part of the appellants' licences and, in that sense, a breach of the terms of the said Exemption Notification is also a breach of the terms of the license, entitling the licensing authority to investigate. But the breach is not only of the terms of the license; it is also a breach of the condition in the Exemption Notification upon which the appellants obtained exemption from payment of Customs duty and, therefore, the terms of Section 111(o) enable the Customs authorities to investigate.

3.6.5 In view of above, I find that the issue relating to credits of DEPB Scrips (covered under Para 4.3.1 of the Exim Policy 2002-2007) is a matter of jurisdiction of DGFT Authorities. In the instant case duty has been demanded stating that the duty credits were invalid and thus conditions of Notification No. 45/2002-Cus have been violated. As duty has been demanded without alteration/ cancellation of DEPB Scrips by DGFT Authorities I find that the basis of demanding duty in this case is not valid.

3.7 The Noticee No. 1 has contended that the DEPB Scrips No. 1310009426/ 22.04.2003, 1310009288/ 08.04.2003 and 1310009457/ 24.04.2003 were obtained by them from parties other than the Noticee No. 2. However, the SCN has been issued covering these three scrips also. They have submitted photocopies of these three scrips. On perusal of the same, I find that these scrips were issued to parties other than the Noticee No. 2. The same were issued to M/s. HMD Exim Pvt. Ltd. and M/s. Rajasthan Watch Manufacturers, who are not party to the impugned SCN. Therefore, I find force in the contention of the Noticee No. 1.

3.8 Further, the Noticee No. 1 has submitted that benefit of legal and valid DEPB Licenses cannot be denied to a bona fide purchaser. I find that at the time of import, the DEPB scrips were valid scrips. The Show Cause Notice does not discuss as to whether the issue of cancellation was taken up by issuing authorities (DGFT) or not. As per records available before me, nothing has been heard from DGFT Authorities. There is nothing to show that the Noticee No. 1 was a party to the fraud in exports which resulted in issuance of impugned DEPB scrips. The contentions raised by the Noticee No. 1 have been addressed in a number of cases by Hon'ble Supreme Court, Hon'ble High Courts and Hon'ble Tribunal. I discuss some of such orders/ judgments here-in-below:

3.8.1 In the matter of CC Vs. Leader Valves Ltd. [2007(218)E.L.T. 349 (P&H)], the Hon'ble Punjab and Haryana High Court has held:

9. After hearing learned Counsel for the parties, we are of the considered view that this appeal is devoid of any merit. The assessee-respondent admittedly is not a party to the fraud. There are categorical finding that they had purchased DEPB from the open market in the bona fide belief of its being genuine. They had paid full price and accordingly have availed the benefit. Merely because at a later stage, the DEPB has been found to be fabricated and fake on the basis of BCER the assessee-respondent could not be deprived of the benefits which were legitimately available to them.

The above judgment was maintained by the Hon'ble Supreme Court and relied/ followed in various cases.

3.8.2 In the matter of East India Commercial Co. Ltd., Calcutta Vs. Collector of Customs, Calcutta [1983(13) E.L.T. 1342 (SC)], the Hon'ble Supreme Court has held:

In the circumstances, we must hold that when the goods were imported, they were imported under a valid licence and therefore it is not possible to say that the goods imported were those prohibited or restricted by or under Chapter IV of the Act within the meaning of Clause (8) of Section 167 of the Sea Customs Act.

3.8.3 In the matter of M/s. Ineos ABS (India) Vs. CC, Kandla [2015-TIOL-2891-CESTAT-AHM], the Hon'ble CESTAT has held:

Cus - It is undisputed fact that the DEPB scrip/licence had been issued by the DGFT, against the export of goods, produced by the exporter - Appellants purchased DEPB scrips on payment of valuable consideration and it was valid document at time of import - There is neither any allegation nor evidence that the appellants were aware of the fraud committed by the exporter M/s. Trisuns - goods were imported in the year 2000 and DEPB scrip was cancelled only on 28.01.2010 - DEPB scrips issued by DGFT is itself genuine, at the time of import and valid till it is set-aside - transaction on the basis said document was good and it is good title to holder for valuable consideration and the rights of such third party are required to be protected - demand of duty for the

extended period of limitation cannot be sustained and, therefore, the imposition of penalty would not be warranted – appeals allowed.

3.8.4 In the matter of Commissioner of Customs, Amritsar Vs. Vallabh Design Products [2007 (219) E.L.T. 73 (P&H)], the Hon'ble Punjab and Haryana High Court has held:

9. After hearing learned Counsel for the parties, we are of the considered view that this appeal is devoid of any merit. The assessee-respondent admittedly is not a party to the fraud. There are categorical finding that it had purchased DEPB from the open market in the bona fide belief of its being genuine. The assessee-respondent had paid full price and accordingly had availed the benefit.

The above order was affirmed by the Hon'ble Supreme Court of India.

3.8.5 In the matter of Pee Jay International Vs. Commissioner of Customs [2016 (340) E.L.T. 625 (P&H)], the Hon'ble Punjab and Haryana High Court has held:

16. In the case in hand, as has already been noticed above, there is a specific finding recorded by the first appellate authority and even by the Tribunal that the appellant was not party to the fraud with the seller of DEPB. DEPB was found to be a genuine document, though obtained by seller by producing some forged documents, to which the appellant was not a party.

17. In view of our aforesaid discussion, we find merit in the present appeals. The same are allowed. First substantial question, as referred to in Para No. 3 is answered in favour of the assessee and against the revenue and as a consequence, there is no requirement to deal with other questions.

3.8.6 Further, a matter wherein duty was demanded from the importers, who had purchased and used DEPB scrips which were later on found to be obtained by the exporter fraudulently, was considered by the Additional Director General (Adjudication), DRI, Mumbai. In order-in-original No. 05/KVSS(05)ADG(ADJ.)/DRI, Mumbai/2017-18 dated 28.04.2017, issued from F. No. S/26-24/ADJ.DRI/AMRESH MISHRA/2015-16, the Additional Director General (Adjudication) has relied upon various judicial pronouncements, some of which are discussed above and dropped the proposal of demand of duty from the importers.

3.8.7 It is settled law that no credit can be derived from a forged DEPB license/ scrip. However, this case is different in the sense that the DEPB scrips involved in the present matter were not forged/ fake but were obtained against overvalued exports. It is not the allegation that the scrips were not issued by appropriate authority. It is not the case that the scrips never existed in the eyes of law or were void. In the case of M/s. Prayagraj Dyeing & Printing Mills Pvt. Ltd. Vs. UOI [2013 (290) E.L.T. 61 (Guj.)], the Hon'ble

Court distinguished between void and voidable documents. The relevant portion of the said decision reads:

"10. In this connection, we find substance in the contention of Mr. Parikh, the learned senior advocate appearing on behalf of the appellants, that there is a marked distinction between a forged document and a document issued by practising fraud. If it appears that a document is a forged one or a manufactured one, it is concocted or a created one in the eye of law and it is in the eye of law a non-existent document. On the other hand, a document issued in the context of a fraud or misrepresentation, is by itself a genuine document and according to settled law, such document is, at the most, voidable and is valid till it is set aside. A transaction that takes place on the basis of such document is good one and can even give a good title to the holder in due course for valuable consideration. At this juncture, we may profitably refer to the observations of the Supreme Court made in the case of *CCE v. Decent Dyeing Co.*, reported in 1990 (45) E.L.T. 201 = (1990) 1 SCC 180 wherein, the Supreme Court held that it would be intolerable if the purchasers were required to ascertain whether excise duty had already been paid as they had no means of knowing it. It was further pointed out that duty of excise is primarily a duty levied on a manufacturer or purchaser in respect of a commodity manufactured or produced. As pointed out by a Division Bench of this Court in the case of *Commissioner of Central Excise v. D.P. Singh* reported in 2011 (270) E.L.T. 321, the judgment of the Supreme Court in the case of *New India Assurance Company (supra)*, was distinguished, being one relating to a forged document which renders a document null and void, and as such, has no application to this type of cases. Similarly, reliance over the judgment of the Supreme Court in the case of *Commissioner of Customs (Preventive) v. Aafloat Textiles (I) P. Ltd.* reported in 2009 (235) E.L.T. 587, cannot be supported as Afloat case is one pertaining to a forged document but not in respect to a document otherwise genuine, issued by practising fraud. The facts stated in the case of Afloat indicated that the same was a case of a forged invoice and thus, the principles laid down therein cannot have any application to an invoice which is, otherwise, genuinely issued by a manufacturer registered with the Revenue. Justice Arijit Pasayat who delivered the judgment of the Supreme Court in the case of Afloat (*supra*), in a subsequent case of *Commissioner of Customs v. Ajay Kumar & Company*, reported in 2009 (238) E.L.T. 387, clearly indicated that the same being not a case of forged document but one of issue of license by practising fraud, the Tribunal was right in holding that the transferee of the license should not be made liable. It may not be out of place to mention here that the Tribunal, in its judgment, reported in 2006 (205) E.L.T. 747 indicated in paragraph 7 as follows :

"if that be so, the concept that a fraud vitiates everything would not be applicable to cases where a transaction of transfer of license is for value consideration without notice, arising out of mercantile transactions, governed by common law and not provisions of any statute."

.....
14.7.1 In the case before us, we have already pointed out that the Revenue has not alleged that the appellants had any role in the fraud, and if any fraud has been practiced by the person registered with the Revenue, the Revenue cannot get the benefit of extended period of limitation when the appellant is not party to the fraud. In the absence of any collusion between the appellants and such registered licensees, we find that the principles laid down in the aforesaid decision cannot have any application to the facts of the present case."

11. In the present case, there is no dispute that the importer imported the goods on the basis of the documents, which were valid at the time of importation and therefore, such document is valid, till it is not set aside, extended period cannot be invoked. The demand of duty along with interest is not sustainable as barred by limitation. As the demand of duty is not sustainable, imposition of penalty is also not warranted.

3.8.8 In the present case, it is not the allegation that the subject DEPB licenses were fake or not issued by appropriate authorities. The issue involved is that the DEPB scrips were obtained by way of overvaluation in exports by the Noticee No. 2 to which the Noticee No. 1 was not a party. The SCN and other available records do not show that the Noticee No. 1 had any knowledge of fraudulent/ overvalued exports by the Noticee No. 2 against which the subject DEPB scrips were obtained. There is no allegation/ evidence to show that at the time of imports, the Noticee No. 1 knew that the DEPB scrips were obtained by overvaluation in exports. The DEPB scrips have not been held invalid/ void till date. There is no allegation against authenticity of the Release Advices. Therefore, in view of above judgment of Hon'ble Gujarat High Court, if importers purchase and utilize scrips bonafidely, without having any role in any fraud in exports by other parties who have obtained such scrips fraudulently, Customs Duty cannot be demanded from such importers. In the instant case, there is neither any allegation nor evidence that the Noticee No. 1 were aware of the fraud committed by the exporter (Noticee No. 2). The DEPB scrips issued by DGFT were found to be genuine at the time of import and accordingly clearances were allowed. Since the subject DEPB scrips were not set-aside by DGFT, the same were valid at the time of clearances of subject import consignments. In view of these facts, as settled vide the above discussed judgments, I find that demand of Customs Duty from the Noticee No. 1 is not tenable.

3.8.9 As per the records available before me, Customs Authorities at Jaipur have made a reference to DGFT Authorities for initiating action against the Noticee No. 2 in respect of the DEPB scrips issued to them but nothing has been heard from DGFT Authorities. The issue wherein scrips issued by DGFT were utilized by buyers before its cancellation have been decided by various judicial forums. In the matter of Taparia Overseas (P) Ltd. Vs. Union of India [2003 (161) E.L.T. 47 (Bom.)], the Bombay High Court has observed that when the goods were imported into India and the Bills of Entry were filed, the licenses were not suspended or cancelled and it was held that as the imports were under valid licenses and goods cannot be subjected to levy of customs duty. The said judgment has been maintained by the Hon'ble Supreme Court [2017 (349) E.L.T. A93 (S.C.)]. Similarly, in the matter of Bansilal Jesasingh Vs. Union of India and others [1988 (36) E.L.T. 52 (Bom.)], the Hon'ble Bombay High Court did not accept the contention that the license was *non est* at the time of import on the ground that it was obtained by misrepresentation or fraud. Further, in the matter of Sumit Wool Processors Vs.

Commissioner of Customs (Import)/(Export)Nhava Sheva/ Mumbai/ Delhi III/Tuticorin/ Kandla [2015-TIOL-2090-CESTAT-MUM], the Hon'ble CESTAT has held that the importers purchased Scrips without knowledge of fraud by exporters and filed Bills of Entry well before cancellation of Scrips, thus the imports were made under valid licenses and Customs duty cannot be levied and availment of credit in DEPB scrips cannot be denied. It was also held that goods imported against such Scrips were not liable for confiscation. Accordingly, demand of duty and interest and penalties were set aside. In the matter of Union of India Vs. Sampat Raj Dugar [1992(58) E.L.T. 163 (SC)], the Hon'ble Supreme Court has held subsequent cancellation of license is of no relevance nor does it retrospectively render the import illegal. In view of these judgments/ orders, if at the time of import the goods are covered by a valid import license, duty cannot be demanded even after subsequent cancellation of license. Subsequent retrospective cancellation also does not render the import illegal. Therefore, I find that duty cannot be demanded in this case from the Noticee No. 1 even after cancellation of subject Scrips by the issuing authority.

3.9.1 I proceed to consider the proposal of confiscation of goods imported against the impugned DEPB scrips for which provisions of Section 111(d) and 111(j) of the Customs Act, 1962 have been invoked. The Section 111(d) ibid provides for confiscation of goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed under the Customs Act, 1962 or any other law for the time being in force. The term 'prohibited goods' has been defined under Section 2(33) of the Customs Act, 1962 as any goods, import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include the goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with. In the Show Cause Notice the proposal of confiscation has been invoked on the grounds that the removal of imported goods were in the nature of removal of non-duty paid goods. The SCN does not describe nature of prohibition in respect of subject imported goods. Further, as discussed above, the respective DEPB scrips were valid on the dates of imports of subject consignments. As per records available before me, even till 27.02.2018, the impugned scrips were not cancelled/ held void. Therefore, the credits granted by the DGFT Authorities in the impugned DEPB scrips were available for utilization and accordingly the goods were cleared after debiting the DEPB scrips. There is neither any allegation nor any evidence to show that the

Noticee No. 1 was aware of any fraud in exports against which the impugned DEPB scrips were issued.

3.9.2 I rely upon the judgment of the Hon'ble Supreme Court in the matter of Union of India Vs. Sampat Raj Dugar [1992 (58) E.L.T. 163 (SC)], wherein it was held:

21. The next question is whether the import of the said goods was contrary to law in any manner and whether the said goods are liable to be confiscated under the Customs Act. The only provisions relied upon by the appellants are Clauses (d) and (o) in Section 111 of the Customs Act which we have set out hereinabove. In our opinion none of these clauses are attracted in the present case. Clause (d) contemplates an import which is contrary to any prohibition imposed either by the Customs Act or any other law for the time being in force. No such prohibition can be pleaded in this case since on the date of the import the said goods were covered by a valid import licence. The subsequent cancellation of licence is of no relevance nor does it retrospectively render the import illegal. [East India Commercial Co. Ltd. v. The Collector of Customs, Calcutta -1963 (3) S.C.R. 338 at 372.]

3.9.3 The issue in hand is similar to issue decided by the Hon'ble Supreme Court in the above referred case. Therefore, looking to the facts discussed above and relying upon the above judgment of Hon'ble Supreme Court, I hold that Section 111(d) of the Customs Act, 1962 is not attracted in this case.

3.9.4 Further, there is proposal of confiscation under Section 111(j) *ibid* also. According to the said provision, any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission is liable for confiscation. I find that the said provision covers two situations. One is in respect of the goods which are removed without permission of proper officer and the other is in respect of goods which are removed contrary to the terms of permission of proper officer. In the instant case, there is no allegation of removal of subject imported goods without permission of the proper officer. Therefore, I find that the first part of the above provision is not attracted. It is mentioned in the SCN that the removal of the subject imported goods was in the nature of non-duty paid goods. I find that out of charge was granted to the imported goods under Section 47 of the Customs Act, 1962 after debiting the DEPB scrips. The DEPB scrips were valid on that date. The credits available in the scrips were also not altered/denied by the DGFT Authorities. Therefore, the credits available in the scrips were used in debiting duty from the scrips. I do not find any infirmity in the clearances by the proper officer. In view of these facts, it cannot be said that the imported goods were removed contrary to the terms of permission of

proper officer. Therefore, the second part of Section 111(j) *ibid* is also not attracted. Under these facts and circumstances of the case, I hold that the impugned imported goods are not liable for confiscation under Section 111(j) of the Customs Act, 1962.

3.10 I proceed to consider the proposal of imposition of penalty under Section 112(a) of the Customs Act, 1962 on the Noticee No. 1. The said Section reads:

Penalty for improper importation of goods, etc. — Any person, -
(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or
(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,
shall be liable, -

.....
.....

3.11 The above provision provides for imposition of penalty on a person who commits any act/ omission which renders imported goods liable for confiscation. It also provides penalty on a person who knows or has reason to believe that the imported goods are liable for confiscation under Section 111 of the Customs Act, 1962 and deals with such imported goods. Thus, Section 112 *ibid* is applicable only in those cases where imported goods are found to be liable for confiscation under Section 111 *ibid*. In the instant case, I have hold that the imported goods are not liable for confiscation under Section 111 *ibid*. Therefore, the proposal of penalty under Section 112 is not sustainable.

3.12 Further, vide the impugned SCN, penalty under Section 114A of the Customs Act, 1962 has also been proposed against the Noticee No. 1. The said Section provides that where duty or interest has not been levied or has been short-levied or has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest shall also be liable to penalty equal to the duty or interest so determined. In the instant case, it has been found that there is neither allegation nor evidence of collusion, wilful mis-statement or suppression of facts against the Noticee No. 1. It has also been found that the demand of duty under extended period is not tenable against them. Therefore, I find that the provisions of Section 114A are not attracted in the instant case against the Noticee No. 1.

3.13 Penalty under Section 112(a) of the Customs Act, 1962 has also been proposed against the Noticee No. 2. As discussed above, it has been found that proposal of confiscation of the imported goods under Section 111 *ibid* is not tenable. As the penalty under Section 112 *ibid* is a consequence of confiscation under Section 111 *ibid*, I find that the penalty under Section 112 cannot be imposed against them. Further, I find that the Noticee No. 2 has no role in imports. Allegations against them were overvaluation in exports for which a separate Show Cause Notice has been issued by Customs authorities at Jaipur which has also been adjudicated. This view was also expressed by the Hon'ble CESTAT in the matter of Binani Cement Ltd. Vs. Commissioner of Customs, Kandla [2010 (259) E.L.T. 247 (Tri. Ahmd.)], wherein it was held:

27. Admittedly, in the present case, the DEPB licences were cancelled long after the importer used the documents for clearance of coal. On the date of import, the licences, lawfully issued by the competent authority, were valid and operative. In other words, the imports were made under valid licences. Hence the emphasis placed on "ab initio" by the JCDR is inconsequential. Yet another case law cited by the learned counsel is on the question whether the rights of a bona fide purchaser of DEPB licence could be affected by its subsequent cancellation. Here again, the answer is against the Revenue and in favour of the importer vide Hico Enterprises (supra). In this context, it needs mention that M/s. Binani Cement Ltd. acted upon the DEPB licences believing that they were legally valid documents under which they could claim benefit. The Revenue also acted upon the transaction with the same belief. I am of the considered view that it is not open to the Revenue to say that the DEPB licences used by the importer were not legally valid documents at the time of the imports.

28. I am also in agreement with the arguments advanced by the Senior Advocate Shri B. Kumar. Penalties were imposed on his clients under Section 112 (a) of the Customs Act. These penalties are associated with imports and not with exports. The show-cause notice did not allege any association of these parties with the imports. For this simple reason, the penalties are liable to be vacated. What the show-cause notice alleged was to the effect that these appellants had indulged one way or the other in abetment of the fraud committed by M/s. Sri Vishnu Merchants, original licensee. It is noticed that, for such abetment, separate show-cause notice was issued by the department for imposing penalties on these parties and that the dispute is pending before the Tribunal. No penalty can be sustained on these appellants under Section 112 (a) of the Customs Act on a ground which is part of the subject-matter of the pending case.

I find that the above case law also support the views expressed above in respect of inapplicability of penalty under Section 112 *ibid* upon the importer.

3.14 Vide the impugned Show Cause Notice, penalty under Section 114A of the Customs Act, 1962 has also been proposed against the Noticee No. 2. Penalty under Section 114A *ibid* can be imposed only upon those persons against whom demand of duty under proviso to Section 28(1) *ibid* is confirmed. There is neither any allegation nor any evidence to show that they

evaded duty in respect of subject imported goods by way of collusion, wilful mis-statement or suppression of facts. Duty has not been demanded from them. In view of these facts, I hold that penalty under Section 111A ibid is not imposable upon the Noticee No. 2. Their alleged role in the matter was in respect of overvaluation in exports. For those allegations a separate Show Cause Notice was issued by Customs authorities at Jaipur which has been adjudicated and penalties have been imposed upon them in those proceedings.


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

ORDER

I hereby drop the proceeding initiated vide Show Cause Notice F. No. S/20-53/2006/Gr.VII dated 10.06.2008 in respect of M/s. Sheel Chand Agroils Pvt. Ltd., Rudrapur (UP) and M/s. Rochees Watches Pvt. Ltd., Jaipur.

(2)
24.07.18
Time: 16:35

OIC


[SANJAY KUMAR AGARWAL]
COMMISSIONER

BY RPAD/SPEED POST

TO:

1. M/s. Sheel Chand Agroils Pvt. Ltd., 7th Km. Stone, Rudrapur-Kichha Lalpur, District Udham Singh Nagar, Rudrapur (UP).
2. M/s. Rochees Watches Pvt. Ltd., B-21, Shri Ji Ki Mori, Tripolia Bazar, Jaipur - 302002 (Rajasthan).

COPY TO:

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad.
2. The Commissioner of Customs (Preventive), Jodhpur (HQ at Jaipur), New Central Revenue Building, Statue Circle, C-Scheme, Jaipur - 302 005.
3. The Assistant/Deputy Commissioner (Gr.I), CH, Kandla.
4. The Assistant/Deputy Commissioner (EODC), CH, Kandla.
5. The Assistant/Deputy Commissioner (Recovery), CH, Kandla.
6. The Assistant/ Deputy Commissioner (Prosecution), CH, Kandla.
7. Guard file.

