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THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on : 13.02.2009

CUS A.A 6/2008

JASJEET SINGH MARWAHA

..... APPELLANT

versus

UNION OF INDIA & ORS.

..... RESPONDENT

Advocates who appeared in this case:

For the appellant : Ms Jyoti Singh, Mr Ankur Chibber & Ms Kimmi Brara
Marwaha.
For the Respondent : Mr Rajan Sabharwal.

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. This is an Appeal under Section 130 of the Customs Act, 1962 (hereinafter referred to as the 'Act') against the judgment of the Customs Excise & Service Tax Appellate Tribunal, Principal Branch, New Delhi (hereinafter referred to as the 'Tribunal') passed in Custom Appeal No. 484/2007-Cus.

2. The main grievance of the appellant which is a proprietorship concern, is that, its licence as a Custom House Clearing Agent (hereinafter referred to as the 'CHA') has been suspended by Respondent no.2.

2.1 By an order dated 12.11.2008, we had admitted the Appeal and framed the following substantial questions of law:-

“1. Whether any violation under the Customs Act, 1962 or imposition of penalty can be a ground to suspend Clearing House Agent License under regulation 20 of the Customs House Agents Licensing Regulation, 2004 without there being any violation of the provisions of the said Regulations?

2. Whether the suspension order can be sustained solely on the basis of the confessional statement recorded under Section 108 of the Customs Act, 1962?

3. Whether the delay of 4-1/2 years on the part of the Department for not taking immediate action against the alleged violation would not cause the suspension order to be revoked?

4. Whether the Clearing House Agent can be penalized for the mis-declaration, if any, even though it is not his duty/obligation under the Customs House Agents Licensing Regulation, 2004, while the importer is left free to work?”

3. In order to adjudicate upon the Appeal, it would be necessary to note the facts given hereinafter to the extent they are relevant for the said purpose.

3.1 In the year 1996-97, the appellant had applied to get appointed as a CHA under the then prevailing Custom House Agent Licensing Regulations Act, 1984 (hereinafter referred to as ‘CHALR, 1984’). The appellant’s application was processed and he was issued a licence.

3.2 It appears that in 2002-03, the appellant acted as a CHA for certain importers, including, E.I. Dupont India Ltd, M/s Sight & Sound India and M/s Sound Terrific. The appellant in his capacity as the CHA filed 14 bill of entries in respect of imports made by E.I. Dupont India Ltd. The

description of the goods was given as tags/labels. Similarly, in the case of M/s Sight & Sound India and M/s Sound Terrific, 4 bill of entries each were filed by the appellant, again in his capacity as CHA, wherein, the description set out was Flat Panel Display for Automatic Data Processing Machine, under tariff item 8531.80, and Plasma Monitor for Computer, under tariff item 8471.60.

3.3 It is not disputed that the said goods after appraisal were cleared by the Customs Department upon payment of requisite customs duty.

3.4 On 15.09.2003, the Directorate of Revenue Intelligence (hereinafter referred to as the 'DRI') conducted a raid at the office premises of the appellant based on an information, that the appellant, was evidently clearing Heat Transfer Printing Paper and other miscellaneous goods, through ICD, Tughlakabad by resorting to undervaluation and misdeclaration. It seems that the information received by the DRI suggested that the goods were cleared through customs by forging and fabricating invoices with an intent to evade customs duty. As a result, the records available at the office of the appellant were taken away, and a Panchnama was drawn, in the presence of, the witnesses present at the time of the raid. The officials of the DRI also recorded, the statement of, Shri Jasjeet Singh Marwaha, i.e, the appellant under Section 108 of the Act. It is important to note that in the statement given under Section 108 of the Act, the appellant has accepted the fact that he had misdeclared the goods at the time of clearance. However, in subsequent proceedings,

both before the Additional Commissioner (Customs), as well as, before the Commissioner and other fora including this Court, it has been averred that the said statement was made under coercion.

3.5 Continuing with the narration, immediately after the DRI raid, that is, within two days thereafter, on 17.09.2003 the appellant on behalf of the three importers i.e, M/s E.I. Dupont India Ltd, M/s Sight & Sound India and M/s Sound Terrific, deposited the differential duty, the details of which are as follows:-

Name	Differential Duty paid
M/s E.I.Dupont India Ltd	Rs 3,03,416/-
M/s Sight & Sound	Rs 3,18,181/-
M/s Sound Teriffic	Rs 2,37,985/-

3.6 As a consequence of the aforesaid events, on 17.08.2004 a show cause notice was issued by the DRI to not only the three importers, but also, to the appellant. By way of the said notice, the afore-mentioned noticees were, *inter alia*, called upon to show cause as to why: (i) differential duty ought not to be recovered from them which was proposed to be levied on the ground of evasion by resorting to mis-declaration and suppression of facts; (ii) duty already deposited ought not to be appropriated towards the demand of differential customs duty; (iii) goods imported/cleared be not confiscated under Section 111(d)(m) of the Act; (iv) penalty under Section 112(a) and 114A be not imposed for

various offences of omission and commission and; (v) lastly, interest be not recovered on duty under Section 28AB of the Act. The noticees were given an opportunity to file their response and also to indicate as to whether they were desirous of being heard in person.

3.7 Accordingly, the appellant filed a reply and also availed of an opportunity of personal hearing.

3.8 After considering the reply of the appellant and the submissions made before him, the Additional Commissioner (Customs), by an order dated 20.10.2006 sustained the show cause notice. The three noticees-importers were called upon to pay customs duty, interest and penalty. In so far as, the appellant, was concerned, a penalty of Rs 5 lacs was imposed. It is important to note that in coming to the conclusion in respect of the each of noticees/importers the Additional Commissioner (Customs) *inter alia* made the following observations:-

“.....Now I first take up the issue of import of hangtags or paper tags of ‘Lycra’ brand by M/s E. I. Dupont (hereinafter refer to as Noticee-1). On examination of Bill of Entry filed by Noticee -1, it is observed that they have cleared the Tags at nil rate of duty under Notification No. 21/2002 dated 01.03.02 and prior to 01.03.02 under Notification No. 17/2001 dated 01.03.01. On going through these Noticees I find that Tags are mentioned at S. No. 140 of Notification No. 21/02 and its description of goods is given as;

“Tags, labels, printed bags, stickers, belt, buttons or hangers, imported by bonfides exporters” therefore the paper tags of Noticee - 1, are covered under this

description if they are bonafides exporter. In the present case the Noticee 1 is not bonafide exporter.

In his reply dated 21.09.04, the Noticee-1, had stated that they are supplying free of cost Lycra brand hangtag to various manufacturers of readymade garments. Though the Noticee-1 has claimed that these hangtags are supplied to manufacturer exporters for fixing on articles but had failed to give any documentary evidence regarding these hangtags being used only in garments meant for export. It appears that the Noticee 1 is not supplying these imported hangtags on such condition to various persons that the same are to be used only in goods for export. Therefore it cannot be held that the hangtags were meant only for garments to be exported. Now coming to the exemption claimed by the Noticee 1 under Notification No. 17/2001 and 21/2002, I find that they are not doing any export and are also not even registered with Apparel Export Promotion Council (AEPC), as such they are not bonafide exporter, and submitted forged AEPC certificate and claimed exemption from Customs duties under above Noticee on the basis of forged documents and misdeclaration on Bill of Entries as they were aware that the exemptions under Notification No. 17/01 and 21/02 are not admissible to them on hangtags imported by them as they are not doing any export. In reply to show cause notice, the Noticee I have claimed that they are entitle to get exemption under Notification No. 153/94 dated 13.07.94. The exemption under this Notification No. 153/94 is admissible only when.

(i) the said goods have been imported for fixing on articles for export or for the packaging of such article,

(ii) the importer by execution of a bond in such form and for such same as may be prescribed by the Assistant Commissioner of Customs or Deputy Commissioner of Customs binds himself to pay on demand in respect of the said goods as are not proved to the satisfaction of the Assistant Commissioner of Customs or Deputy

Commissioner of Customs to have been used for the aforesaid purposes, an amount equal to the duty leviable on such tags or labels or printed bags but for the exemption contained herein;

(iii) the importer satisfies the Assistant Commissioner that the articles so imported have been exported within six months of the date of importation or within such extended period as may be permitted by the said Assistant Commissioner.

But the Noticee 1, have(has) not fulfill(ed) any of the conditions mentioned above nor he had claimed exemption under Notification No. 153/94 in Bill of Entry filed by them and as such they are not entitle to the exemption available under Notification No. 153/94.....”

“.....Now, I take up the issue of import of Plasma monitor by M/s Sight & Sound India (hereinafter refer to as “Noticee 3”) and by M/s Sound Terrific (hereinafter refer to as “Noticee 4”). I find that both in their statements recorded under Section 108 of Customs Act, 1962 have admitted that they have actually imported Television and had misdeclared them as “Flat Panel Display for Automatic Data Processing Machine/Plasma Monitor for Computer just to evade customs duty. As the Television attract(s) higher rate of duty, the Noticee 3 & 4 have also deposited the differential amount of duty voluntarily after admitting that they have paid lesser rate of duty. However, in reply to show cause notice, they denied that they have imported Television and again claimed that their product is “Flat Panel Display for Automatic Data Processing Machine”. This appear to be only after thought on part of Noticees 3 & 4 and it is not understood how they will use 61” and 42” screen plasma monitor in computer. They have also not given any printed literature of these plasma monitor showing that these plasma monitor can be used only as computer monitor. To get further detail of plasma monitor, the Web-site www.plasmaconcepts.com was

also seen. At this various models of plasma monitor were seen and it found that all are nothing but Television system with many attached systems. Therefore, it is quite clear that Noticees 3 & 4 actually imported Plasma Television system and misdeclared the same just to evade customs duty. By misdeclaring the Noticees 3 & 4 are also liable to penal action. The Noticees 3 & 4 have contended that penalty cannot be imposed on both company and its Proprietor and have relied upon this issue on.....”

“.....Now, I discuss the issue of involvement of CHA M/s J. D. Enterprises in evasion of Customs Duty by Noticees 1 to 4. In reply to the notice issue to CHA, he had denied the allegation leveled against him in the notice. He had denied the contents of his statement and have stated that he was made to tender a statement as per the whims and wishes of officers. Such claim by the CHA appears after thought as for clearing hangtags from Customs he submitted forged certificates which he had not denied even in reply to the show cause notice. As regard Plasma Monitors, as discussed above, it is quite clear that there was misclassification of same to evade Customs duty. In view of above there appear to be no ground to believe that his statement recorded under Section 108 of Customs Act 1962 was not given voluntarily without any pressure. In his reply the CHA have stated that in case of M/s Sound Terrific and M/s Sight and Sound India the goods were examined and catalogues were seen but I find that the party has not produced any catalogues during reply to SCN or at the time of personal hearing. Even the examination of goods does not exclude the possibility of that not being able to be used as Reception apparition for Television, more over as already discussed above the same are used as T.V. being of size 42” to 61” and on verification through internet it has been found that these are actually T. V. of various sizes. The CHA the Noticee is Customs House Agent and by involving himself in evasion of Customs Duty in case of M/s E. I. Dupont India Pvt. Ltd. M/s Sound Terrific and M/s

Sight & Sound India have become liable for penalty under Section 112 (a) of the Customs Act 1962.....”

3.9 It transpires that in view of the order of adjudication dated 20.10.2006, a communication dated 28.12.2006 was sent by the DRI to Respondent no. 2, bringing this fact to his notice and requesting that necessary action against the appellant be initiated under the CHALR, 2004. It is important to note that the said communication, which is, annexed as Annexure A-6 at Page 102 of the paper book has several dates affixed on it, beginning from 02.01.2007 to 05.01.2007. Suffice it to say that this communication would have been received in the office of Respondent no. 2, if at all, not earlier than 02.01.2007. The appellant has asserted in the Appeal that despite the aforesaid adjudication order dated 20.10.2006, on 29.12.2006, an order was passed renewing the appellant's licence under the extant CHALR, 2004 for a period of 10 years. It is also averred that such endorsement on the licence was made on 02.01.2007. The submissions based on these facts which have been made by the counsel for the appellant shall be referred to and dealt with in the latter part of our judgment.

3.10 In view of the communication of the DRI dated 28.12.2006, Respondent no. 2, by an order dated 29.01.2007, in exercise of his power under Regulation 20(2) of the CHALR, 2004, ordered an immediate suspension of the appellant's licence. Aggrieved by the same, the appellant filed an appeal bearing No. 73/2007 with the Tribunal. The Tribunal by an order dated 29.03.2007 disposed of the Appeal with a

direction that the appellant be accorded a post-decisional hearing by the Commissioner even while keeping in view the totality of the facts and circumstances and the gravity of situation in mind. Accordingly, the appellant was directed to appear before the Commissioner on 09.04.2007 at 11.00 am for a hearing. The Commissioner after hearing the Appellant was required to pass an order within a period of one week from the date of the hearing.

3.11 In view of the Tribunal's direction on 17.04.2007, Respondent no. 2 after noting the fact that the appellant had asked for postponement of the date of hearing from 09.04.2007 to 10.04.2007, passed a reasoned order whereby, he confirmed the order suspending the licence of the appellant taking into account the findings recorded against the appellant in the adjudication order dated 20.10.2006.

3.12 As a consequence, a show cause notice dated 18.07.2007 was also issued to the appellant calling upon the appellant to demonstrate as to why the CHA licence be not revoked. The appellant being aggrieved by both; the order dated 17.04.2007, whereby Respondent no. 2 had confirmed the order of suspension dated 29.01.2007, as well as, by the show cause notice dated 18.07.2007 calling upon him to furnish an explanation, in respect of, proposed revocation of his CHA licence; filed a statutory Appeal with the Tribunal, in so far as order dated 17.04.2007 was concerned. While, in respect of, show cause notice dated

18.07.2007, the appellant preferred to file a writ petition bearing No. 8168/2007 under Article 226 of the Constitution of India.

3.13 The writ petition bearing No. 8168/2007 was disposed of by a single Judge of this Court by an order dated 7.11.2007. By the said order, the respondents were restrained from taking any further action with respect to the show cause notice dated 18.07.2007 seeking to revoke the CHA licence of the appellant till such time the result of the appeal against the adjudication order dated 20.12.2006 which, at the relevant time was pending before the Commissioner (Appeals), was known. The operative portion of the learned Single Judge's order is set out in Paragraph 10 of the said order. The relevant extract is given hereinbelow:-

“In view of the above, the best course of action would be, in my opinion, to direct the respondents not to take any further action upon the impugned show cause notice awaiting the result by the appeal pending before the Commissioner (Appeal) under Section 128. The said Commissioner shall, therefore, endeavour to decide the petitioner's Appeal against the adjudicatory order dated 20.12.2006 pending before him at the earliest and in any case within four months from today. The respondents shall, in the meanwhile, not proceed with the impugned show cause notice and make any final order. The continuation and resumption of the said proceedings shall be guided by the final order of the CESTAT”

3.14 The respondents being aggrieved by the aforesaid order of the learned Single Judge preferred an appeal to the Division Bench being, LPA No. 1368/2007.

3.15 The Division Bench by an order dated 07.02.2008 noted that, in the interregnum, the Commissioner (Appeals) by an order dated 31.12.2007 had disposed of the appellant's Appeal whereby he had partly allowed the appeal by holding in favour of the appellant. Consequently, the Division Bench observed that it would be open to the respondents to now file a reply to the show cause notice dated 18.07.2007. It also noted the fact that, against the order of the Commissioner (Appeals), an appeal had been preferred to the Tribunal, both by the appellant, as well as, one of the importers M/s Sound Terrific being Appeal Nos. 79/2008 and 80/2008 respectively. The Division Bench, therefore, observed that the authority, while taking a decision on the show cause notice would not only take into consideration the contention of the respondents as contained in the reply to the show cause notice but would also take into consideration the effect of the order dated 31.12.2007 passed by the Commissioner (Appeals) as also any other order which the appellate authority may pass in Appeal Nos. 79/2008 and 80/2008.

3.16 To complete the narration of facts on 27.02.2008, the Tribunal in Customs Appeal Nos. 79/2008 and 80/2008 disposed of the interlocutory application for stay by observing that in view of the fact that the dispute was in respect of classification of goods imported by M/s Sound Terrific and given the fact that the differential rate of duty had already been paid by the importer, the condition of pre-deposit of penalty was required to be

waived. With these observations, the interlocutory applications were allowed.

3.17 We are informed that on 14.03.2008 the appellant alongwith M/s Sound Terrific had moved an application for early hearing of their respective Appeals being Appeal Nos. 79/2008 and 80/2008, which was rejected by the Tribunal.

3.18 By the impugned judgment dated 04.06.2008, the Tribunal dismissed the Appeal of the appellant against the Commissioner's Order dated 17.04.2007, thereby confirming the order suspending the appellant's licence. The Appellant being aggrieved by the impugned judgment as noted hereinabove, has preferred the present appeal before us.

4. In the background of the aforesaid facts, the counsel for both the Petitioner and the Respondents made their respective submissions before us.

4.1 It was contended by the counsel for the petitioner, that the, impugned judgment of the Tribunal deserves to be set aside as it had failed to appreciate the following issues which arose in the matter;

(i) there was no urgency to pass an order dated 29.01.2007 suspending the licence by invoking powers under Regulation 20(2) of CHALR, 2004 in view of the fact, that the suspension related to imports which took

place in 2002-03. The delay of 4-1/2 years was writ large on the impugned order of suspension and hence was bad in law;

(ii) the goods which had been imported had admittedly been cleared by the Customs Department after due appraisal. There was nothing on record to show that the description of goods in the bills of entries pertaining to M/s Sight & Sound and M/s Sound Terrific to the effect that, they were flat panel display for computers and automatic data processing machines, was incorrect. It was contended that the Customs Department had no evidence whatsoever to demonstrate that they were in fact capable for being used as television sets;

(iii) the basis for suspension of the licence was the purported forgery of the All-India Export Promotion Council (AEPC) Certificate, in respect of, the goods imported by E.I. Dupont India Limited; a charge which stood refuted by virtue of the order of the Commissioner (Appeals) dated 31.12.2007. In these circumstances, the order of suspension could not have been sustained by the Tribunal;

(iv) the Tribunal failed to appreciate that the statement of the appellant i.e, Shri Jasjeet Singh Marwaha recorded under Section 108 of the Act cannot be used in evidence. If that be so, the Tribunal failed to appreciate that there was no material whatsoever, available with the Customs Department, to justify the continued suspension of the appellant's licence. Reliance in this regard was placed on the judgment of the Tribunal in **Varma & Sons vs CC (G), Mumbai: 2008 (88) RLT 749;**

(v) and lastly, it was contended that the Tribunal failed to appreciate that no penalty was imposable once duty was paid before the issuance of show cause notice. In this case, the duty was paid on 17.09.2003 whereas the show cause notice was issued on 17.08.2004. In support of this submission, reliance was placed on the judgment of the Tribunal in the case of **Rashtriya Ispat Nigam Ltd vs CCE; 2003 (161) ELT 285 and 2004 (163) ELT A53 (SC).**

4.2 As against this, the learned counsel for the respondents submitted that the impugned judgment of the Tribunal deserved to be sustained as:

(i) the respondent no. 2 had correctly exercised the power under Regulation 20(2) of the CHALR, 2004. It was submitted that in view of the adjudication order dated 20.12.2006 the Customs Department could not have but passed the order of suspension of the appellant's licence. It was, thus, submitted that there was not an inordinate delay, as alleged, by the learned counsel for the petitioner; (ii) in the statement made by the noticees including the appellant under Section 108 of the Act, it has been admitted that while clearing the goods the imports pertaining to M/s Sight & Sound and M/s Sound Terrific had been incorrectly described i.e., there was a mis-declaration; only with a view to avail the benefit of a lower rate of duty, and that the noticee- importers had clearly assigned the job of filing and filling bills of entry to the appellant in his capacity as the CHA; (iii) the importers had paid the differential custom duty. In view of this, the infraction of law stood admitted and hence, no fault could be

found with the order of the Tribunal; (iv) till date, the respondents have not filed their reply to the show cause notice dated 18.07.2007 calling upon the appellant to demonstrate as to why the licence should not be revoked. It was submitted that the suspension order clearly indicated that an enquiry under Regulation 22 of CHALR, 2004 was under contemplation. In these circumstances, given the seriousness of the charges against the appellant, the Customs Department could not have permitted the appellant to continue working as a CHA till such time the enquiry under Regulation 22 was concluded. It was submitted that despite the order of the Division Bench dated 07.02.2008 in LPA No. 1368/2007, till date, no reply has been filed by the appellant to the said show cause notice; (v) as regards the other contentions of the learned counsel for the appellant pertaining to the observations in the order dated 31.12.2007 passed by Commissioner of Appeals that charge of forgery was not made out, the learned counsel for the respondents submitted that these were issues on merits, in respect of, which an appeal was pending before the Tribunal. In any event, the charge of mis-declaration having been accepted by the Commissioner (Appeals) the order of suspension, pending enquiry with respect to revocation of licence, cannot be found fault with; (vi) it was contended that it is trite law that a statement under Section 108 of the Act could be relied upon subject to usual checks and balances as provided in law, which are matters, which would be examined in the appeal pending before the Tribunal; and (vii) lastly, with respect to

the issue whether a show cause notice could be issued after duty had been paid was also an issue which is the subject matter of the appeal pending before the Tribunal. Any decision on the matter could impact the decision in the appeal.

5. Having heard the submissions of the learned counsel for the petitioner, as well as the respondents, we are of the view that the order of the Tribunal deserves to be sustained for the following reasons:-

5.1 The admitted facts in the present case are that in respect of imports in issue pertaining to the three importers, namely, E.I. Dupont India Limited, M/s Sight & Sound and M/s Sound Terrific, the imports were during the period 2002-03. The description with respect to imports made by E.I. Dupont India Limited, in the 14 bills of entry was that, what had been imported were tags/labels, entitled to clearance under notification Nos. 17/2002 and 21/2002. Evidently, as per the stand of E.I. Dupont India Ltd taken before the adjudicating authority; the tags/labels were issued free of cost by the manufacturers of lycra and were imported into the country for the purposes of publicity in order to gain market for lycra in the country; and that the importers had cleared the said tags/labels at a concessional rate of duty by claiming the benefit of Notification no. 21/2002 dated 01.03.2002 (which prior to 01.03.2002 was *pari materia* to Notification no. 17/2001 dated 01.03.2001). We may note, a fact which was not disputed, that the condition prescribed for claiming exemption as per the said Notification no. 21/2002 was that the tags/labels ought to

have been imported by a bonafide exporter. It transpires that E.I. Dupont India Limited were supplying the lycra brand tags, free of cost, to various manufacturers-exporters of readymade garments. Thus, to avail of the benefit of the afore-mentioned notification export was necessary. It is in that context, the AEPC Certificate became an issue. The department based on the search carried out at the premises of the appellant discovered a forged AEPC certificate. In this regard the statement of the appellant concerned requires to be noted. The relevant extract reads as follows:-

“M/s E.I. Dupont India Ltd.:- I have attended to the clearance of labels on behalf of M/s EI- Dupont India P. Ltd, vide 14 Bill of Entris through Air Cargo Complex, New Delhi for the period 2002-2003. These goods have been cleared without payment of duty by providing a forged Apparel Export Promotion Council Certificate prepared in the name of M/s EI-Dupont India (P) Ltd. It is a fact M/s EI Dupont India (P) Ltd. have not registered with AEPC N. Delhi but I made this bogus certificate to get their goods duty free and get regular business from them. Today I have been shown a chart containing the particulars of imports and the amount of duty foregone and I have put my dated signatures on the same, agreeing to its contents. I have identified the forged/ bogus AEPC certificate used by me for clearance of goods without payment of duty which is placed at page 2 and 11 of the file recovered from my premises mentioned at S. No. 28 of the another attached with panchnama dated 15.9.2003. I have put my dated signature on the said certificate.”

5.2 In this context, the Additional Commissioner (Customs) in the order in-original has returned a finding to the effect which has been extracted by us hereinabove that, though E.I. Dupont India Limited had claimed that the said hand tags were supplied to manufacturer-exporters of readymade garments for fixing on articles, it had failed to furnish any

documentary evidence that these tags were used only in garments made for exports. He also returned a finding of fact that E.I. Dupont India Limited was not able to demonstrate that the said imported tags were supplied to the said manufacturers-exporters with a condition that the tags could only be used in goods meant for exports. Based on this stand, the Additional Commissioner (Customs) in the said order of adjudication came to the conclusion that it could not be held that the tags were meant only for garments to be exported. He also returned a finding of fact that E.I.Dupont India Ltd was not carrying out any export and they were not registered with AEPC. In these circumstances, he concluded that E.I.Dupont India Ltd was not a bonafide exporter and hence, it was not entitled to exemption under Notification no. 17/2001 and 21/2002 as they were not carrying out any export. He also dealt with the submission of E.I.Dupont India Limited that they were entitled to an exemption under notification 153 of 1994 dated 13.07.1994 and rejected the same on the ground that firstly, E.I.Dupont India Limited had not claimed exemption in the bill of entry under Notification no.153/1994 and secondly, the said exemption was available only if the importer was in a position to satisfy the Assistant Commissioner that the articles had been exported within six months from the date of importation or within such extended period as may be permitted by the Assistant Commissioner. In view of the above, since the condition stipulated under Notification no. 153/1994 was not fulfilled, the Additional Commissioner (Customs) held that the importer

was not entitled to the benefit of the said exemption notification. It may be pertinent to note here that in Paragraph 23 of the adjudication order one of the submissions of the representatives of E.I. Dupont India Limited clearly establishes that the importer decided to pay the differential customs duty of Rs 5,79,217/- in respect of the 14 bills of entry in issue as E.I. Dupont India Limited felt that it may not be in a position to corroborate by documents that all hand tags were supplied to exporters. It is in this context that the Additional Commissioner (Customs) came to the conclusion that in order to claim exemption from custom duty the importer through the appellant i.e., CHA had submitted forged AEPC Certificate and made a mis-declaration in the bill of entry to the effect that E.I. Dupont India Limited was entitled to the benefit of Notification no. 17/2001 and 21/2002.

5.3 The petitioner of course has made an issue that the AEPC Certificate is not a document which has been relied upon by the Customs Department. It is important to note that the Commissioner (Appeals) in its order dated 31.12.2007, while accepting the plea of the appellant herein that allegation of forgery of AEPC Certificate cannot be accepted has based his conclusion on the premise that there was no necessity for forging the AEPC Certificate as that was not a condition for seeking an exemption from custom duty; the only condition being that the goods in issue i.e., the tags/labels had to be exported by a bonafide exporter and since, the department had not stated in the show cause notice or in the

impugned order the fact that E.I.Dupont India Limited was not a bonafide exporter. The Commissioner (Appeals), however, went on to hold that it was a case of mis-declaration. The afore-mentioned reasons find mention in Paragraph 5 of the Commissioner (Appeals) order; which to our minds seems contrary to what has been observed by the Additional Commissioner (Customs) in the adjudication order. The Additional Commissioner (Customs) in Paragraph 19 of the adjudication order has clearly found that the E.I. Dupont (India) Limited is not an exporter. The relevant extract from the impugned order would make that evidently clear:-

“I find that they are not doing any export and are not even registered with the Appellate Export Promotion Council as such they are not bonafide exporter.”

5.4 Similarly, a reference to the fact that E.I. Dupont India Ltd was not an exporter is also made out in Paragraph 4 of the show cause notice wherein a reference has been made to the statement of one Shri Sasi Kumar, Manager, Regional Sales and Commerce. On the reading of the show cause notice it is clear that the gravamen of the charge was that what was recorded in the 14 bills of entry that the importer was entitled to the benefit of Notification no. 21/2002 was incorrect as they were aware of the fact that the said benefit of exemption from custom duty was available only to those importers which were bonafide exporters. It is another thing that the representative of E.I. Dupont India Ltd had explained that the work of clearance of goods had been handed over to

CHA i.e., the appellant and that they had no knowledge whatsoever of the AEPC Certificate having been forged and submitted by the CHA. We find that in the context of the findings in the adjudication order, as well as, the allegations made in the show cause notice, the observations of Commissioner (Appeals) in paragraph 5 of his order to the effect; that the department has not stated in the show cause notice or in the impugned order the fact that E.I. Dupont India Ltd was not a bonafide exporter is not quite correct. This is more so as we have noticed hereinabove, which is in fact recorded in sub-paragraph 23 of para 1 pertaining to E.I. Dupont India Ltd, of the adjudication order, that the, representative of E.I. Dupont India Ltd in his reply before the Additional Commissioner (Customs) had clearly stated that they had paid the differential duty as they were not in a position to corroborate documents that all the tags/labels were supplied to the exporters. In view of these findings and the fact that the matter is now pending in appeal before the Tribunal we need not say more as this could prejudice the case of either party which is pending adjudication before the Tribunal. It is clear that in view of the findings recorded in the adjudication order, the Tribunal will have to decide, one way or the other de hors, the AEPC Certificate as to whether the imports carried out by E.I.Dupont India Ltd through the agency of the appellant would amount to a mis-declaration in view of the fact, and one which is not disputed, that the goods were cleared by making a reference to Notification no 21/2002 in the said bills of entry.

5.5 As regards imports carried out by M/s Sight & Sound and M/s Sound Terrific, the allegation, broadly, in the show cause notice was that they had actually imported televisions and mis-declared them as flat panel displays for automatic data processing machines or plasma monitors for computers to evade customs duty as television attracts a higher rate of duty. In the adjudication order, the Additional Commissioner (Customs), while noticing the fact that in the reply to the show cause notice both M/s Sight & Sound and M/s Sound Terrific had denied that they had imported televisions by mis-declaring the product as flat panel displays for automatic data processing machine or plasma monitors for computers, he observed that it was not understood how a 61” and 42” screen plasma monitor could be used in a computer. He also observed that he was not given any printed literature, in respect of, the plasma monitors which the said importers claim to have imported so as to suggest that they could be used only as a computer monitor. It seems that the Additional Commissioner (Customs) also collected data, with respect, to plasma monitors from the website www.plasmaconcepts.com and also saw various models of plasma monitors, based on which he came to the conclusion that what the said importers i.e. M/s Sight & Sound and M/s Sound Terrific had imported were nothing but plasma television systems which were mis-declared to evade customs duty. In so far as the appellant was concerned, the Additional Commissioner (Customs) even while noticing the fact that the appellant had denied the charge of mis-

declaration, concluded, based on the statement of the appellant, as also, the fact that no catalogues had been produced either in reply to the show cause notice or at the time of personal hearing, that the goods, in issue were 'reception apparatus' for television.

5.6 It was contented before us by the learned counsel for the appellant that there is no reference to the said fact i.e. the goods imported are a 'reception apparatus' for television in the show cause notice. This submission is factually incorrect as a perusal of the paragraph 5 and paragraph 7 (3) of the show cause notice dated 17.08.2008 would clearly show that an allegation has been made that 'reception apparatus' for television have been mis-declared as flat panel display for automatic data processing machine. The Commissioner (Appeals) in his order dated 31.12.2007 has upheld the charge of mis-declaration against M/s Sight & Sound and M/s Sound Terrific on the ground that both the importers, as well as, the appellant have accepted the fact that the goods were mis-declared, which according to the Commissioner (Appeals) was reinforced by the fact that the differential customs duty had been paid. The Commissioner (Appeals), however, has also made an observation that apart from the said admission the Department has not brought on record any documentary evidence to establish this fact, as also, that the goods have been cleared after examination by the officers of Customs. Given the findings both in the adjudication order and that those returned by the Commissioner (Appeals), it seems that the Tribunal will have to deal with

this issue, amongst others, as to what would be the impact of statement under Section 108 of the Customs Act made by the importer, as well as, the appellant herein. In the circumstances, that the appeals are pending before the Tribunal any observation by us, would in our view impact the merits of the matter. However, we may state that in law, there is no bar to a statement made under Section 108 being admitted as evidence by the Tribunal. In this regard see the observations of the Supreme Court in the Case of Assistant Collector of Central Excise, Rajamundry vs Duncan Agro Industries Ltd & Ors.: (2000) 7 SCC 53 in paragraph 11, 12 and 17 at pages 58 & 59 and in the case of K.I.Pavunny vs Assistant Collector (HQ), Central Excise Collectorate, Cochin: (1997) 3 SCC 721 in paras 19, 20, 21, 25 & 31 at pages 739-741, 742, & 745-746..

5.7 The submission of the learned counsel for the appellant that licence of a CHA can only be suspended if there is a violation of the regulation contained in CHALR, 2004 irrespective of the fact there has been a violation of the provisions of the Act and consequent thereto, imposition of penalty on the CHA is according to us untenable.

5.8 In order to deal with this submission, it may be necessary to note certain provisions of the Act, the Customs Valuation Rules, 1988 (in short 'CV Rules'), the provisions of the Foreign Trade (Development and Regulation) Act, 1992 and the Foreign Trade (Regulation) Rules, 1993.

5.9 The Chapter VII of the Act provides for provisions for clearance of imported goods and those exported out of the country. As per Section 46

of the Act, upon import of any goods other than those which are intended for transit or shipment, an entry is required to be made by an importer by presenting to a proper officer a bill of entry for home consumption or warehousing in a prescribed Form. Under sub-section (4) of Section 46 the importer, while presenting a bill of entry, makes a declaration as regards the truth of the contents of such bill of entry and in support of such declaration he is required to produce before the proper officer the invoice, if any, relating to the imported goods.

5.10 In Section 146 of the Act, it is provided that no person shall carry on business as an agent relating to the entry or departure of a conveyance or import or export of goods at any custom station unless such a person holds a licence granted in this behalf in accordance with the regulations. Sub-section (2) of Section 146 empowers the Board to make regulations for the purpose of carrying out the provisions of this section and, in particular such regulation may provide for matters as stated in sub-clause (a) to (f) pertaining the subject matter of a licence. Sub-clause (e) of sub-section (2) of Section 146 clearly states that the regulations may provide for circumstances in which a licence may be suspended or revoked.

5.11 Similarly, Section 147 provides that where an Act requires anything to be done by the owner, importer or exporter of any goods it may be done on his behalf by his agent. Sub-section (2) of Section 147 provides that it shall be deemed, that the, acts undertaken by the agent on behalf of the owner, importer or exporter have been taken with their knowledge

and consent unless the contrary is proved, so as to hold the owner, importer or exporter liable for all such acts of the agent as if they had been done by the owner, importer or exporter. Sub-section (3) of Section 147 makes the agent, who is expressly or impliedly authorized by the owner, importer or exporter of any goods, also liable which is, without prejudice to the liability of the owner, importer or exporter. Sub-section (3) contains a proviso that where any duty is not levied or short-levied or erroneously refunded, such duty shall not be recovered from the agent other than in a case where any of the aforementioned eventualities occur on account of any willful act, negligence or default of the agent or unless in the opinion of the Assistant Commissioner of Customs or Deputy Commissioner that the same cannot be recovered from the owner, importer or exporter.

5.12 The power to frame rules is, of course, available to the Central Government under Section 156 of the Act. Under sub-section (2) of Section 156, it is clearly provided that the rules may provide for *inter alia* the manner of determining the transaction value of the imported goods and export goods under sub-section (1) of Section 14.

5.13 Rule 10 of the CV Rules provides that the importer or his agent shall furnish a declaration disclosing (a) full and accurate details relating to the value of imported goods and (b) any other statement, information or document including an invoice of the manufacturer or producer of the imported goods where the goods are imported from or through a person

other than the manufacturer or producer as may be considered necessary by the proper officer so as to facilitate determination of the value of imported goods under the said Rules. Sub-rule (3) of Rule 10 states that the provisions of the Act relating to confiscation, penalty and prosecution shall apply to cases where wrong; declaration, information, statement or document are furnished under these Rules.

5.14 Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 (in short 'Foreign Trade Act') provides for the consequences of export or import being made by any person in violation of the provisions of the Act. Sub-section (2) of Section 11 provides that, in the event of violation there shall be a penalty which may not exceed Rs 1,000/- or five times of value of the goods, whichever is more.

5.15 Sub-section (4) of Section 11 of the Foreign Trade Act provides for recovery of penalty by way of land revenue, and in the event the person concerned does not pay the penalty, the adjudicating authority is empowered to suspend the importer/exporter code number till penalty is paid. The rules made under the Foreign Trade Act, that is, the Foreign Trade (Regulation), Rules 1993 (in short 'Foreign Trade Rules') provide for various aspects, including in Rule 11, issues pertaining to declaration as to the value and quality of imported goods. Rule 11 of the Foreign Trade Rules imposes an obligation on the owner on importation of any goods whether or not liable to duty, to state the value, quality and description of such goods to the best of his knowledge and belief in the

bill of entry and further that at the foot of the bill of entry he subscribes to the declaration of truth of such statement made in the bill of entry. Rule 14 prohibits a person from making, signing or using or caused to be made, signed or used in the declaration inter alia for importing any goods which he knows or has reason to believe contains a declaration or a statement or document which is false in material, particulars.

6. Looking at entire gamut of the provisions, that is, the Customs Act, 1962, the Foreign Trade Act, 1992, the CV Rules framed under the Customs Act, 1962 and the Foreign Trade Rules, 1993, it is quite clear that upon the import of goods an entry is to be made with the proper officer in the form of a bill of entry in the Form prescribed. For the purposes of correct valuation and, in turn to, determine the correct Customs duty, which is to be imposed on the goods, in issue, it is important that the description and the value is accurate.

6.1 For this purpose amongst others, that is, both for filing as well filing of the bill of entry, the owner or the importer of goods can either engage an agent or act by himself. If the owner or importer of the goods decides to act through an agent, the agent would have to be one who necessarily has a licence granted to him in accordance with the provisions of Section 146 of the Act and the Regulations framed thereunder, in the instant case, CHALR, 2004.

6.2 Furthermore, if the owner or importer of goods acts through an agent, then, under Section 147, the owner or the importer shall be deemed

to have not only knowledge but also presumed to have given his consent to any such thing done by an agent unless the contrary is proved for the purposes of proceedings under the Act, thus making the owner or importer liable for the acts of the agent. Similarly, under sub-section (3) of Section 147 in addition to the owner or the importer being liable for any infraction of law the agent who is authorized, impliedly or expressly by the owner or exporter shall also be liable. Under the proviso to sub-section (3) of Section 147 as noticed hereinabove, in so far as, it is a case of duty not levied or short-levied or erroneously refunded then except where the such an eventuality had occurred on account of any willful act, negligence or default of the agent it is provided that the duty shall not be recovered from the agent unless the concerned authority as indicated under the provision comes to the conclusion that the duty cannot be recovered from the owner or the importer.

6.3 The provisions referred to hereinabove make it clear that an owner or importer can act through an agent. In the instant case, the appellant who is admittedly the CHA of the importers, both filed as well as filled up the contents of the bill of entry, a fact which is not denied, on behalf of the three importers referred to hereinabove. In view of these facts and the provisions referred to hereinabove, it cannot be said that the agent cannot be held to be liable for violation of the provisions of the Act. The purpose of providing for appointment of an accredited agent, that is, an agent who has been issued a licence under the Regulations framed under

the Act, is not only to facilitate the clearance of goods, but in doing so, to hold either one of them or both accountable for the actions which they take, based on which the clearance of goods imported into the country is brought about. The contention that the licence of a CHA can be suspended only for violation of the Regulations framed under the Act i.e., CHALR, 2004 is clearly untenable given the purpose for which the licence is issued and the provisions of the Act.

6.4 This aspect is also brought out upon a bare perusal of the provisions of the CHALR, 2004. Sub-regulation (1) of Regulation 20 provides for revocation of licence of a CHA, amongst others, subject to compliance of the procedure prescribed in Regulation 22 under clause (c), on the ground of any mis-conduct on the part of the CHA which renders him unfit to transact any business in the Customs Station. Sub-regulation (2) of Regulation 20 empowers the Commissioner of Customs in appropriate cases where immediate action is necessary to suspend the licence of a CHA, where an inquiry against such CHA is pending or contemplated.

6.5 Regulation 13 prescribes various obligations of the CHA including those contained in clause (d) of Regulation 13 which oblige a CHA to advice his client to comply with the provisions of the Act and in case of non-compliance, he is duty bound to bring the same to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs. Similarly, under clause (e) of Regulation 13, the CHA is required to exercise due diligence to ascertain the correctness of any

information which he imparts to a client with reference to any work which is related to clearance of cargo or baggage and under clause (f) of Regulation 13, he is obliged not to withhold information contained in any order, instruction or public notice relating to clearance of cargo or baggage issued by the Commissioner of Customs, to which his client is entitled.

6.6 The procedure for revocation under Regulation 22 involves issuance of notice by the Commissioner of Customs in writing to the CHA, stating grounds on which it is proposed to suspend or revoke his licence; requiring the CHA to submit, a written statement within a period, which would not be less than 45 days and also communicating therein whether he is desirous of being heard in person. The Commissioner of Customs is required on receipt of the written statement from the CHA or where no written statement is received to direct, within the time limit specified, an inquiry into the matter by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, in respect of, the grounds which are not admitted by the CHA. The procedure for conducting the inquiry and the rights available to the CHA during the course of inquiry are detailed out in sub-regulation (3) & (4) of Regulation 22. Under sub-regulation (5), the Deputy Commissioner of the Customs or Assistant Commissioner of Customs upon conclusion of the inquiry is required to prepare a report recording his findings. The Commissioner of Customs under sub-regulation (6) is required to give a

copy of the inquiry report to the CHA, seeking his representation within a period prescribed which is not less than 60 days. Upon receipt of the representation, the Commissioner of Customs is obliged to consider both the inquiry report and the representation and thereafter pass any order as he deems fit. If the CHA is aggrieved by the decision of the Commissioner of Customs, under sub-regulation (8), he has a right to appeal to the Tribunal under Section 129A of the Act.

6.7 In the present case, it is quite clear that the inquiry has not proceeded beyond the stage of issuance of show cause notice under Regulation 22. However, a combined reading of Regulation 13 (d) & (e) read with sub-regulation (1) of Regulation 20 and Rule 10 of CV Rules and the provisions of the Act referred to hereinabove clearly lead to the conclusion that the CHA's licence can be suspended under Regulation 20 even for violation of the provisions of the Act or where there is a penalty imposed on the CHA on account of infraction of the provisions of the Act. This is quite clear from a bare reading of Regulation 13, in particular, sub-clause (d) and (e) and clause (c) of sub-regulation 1 of Regulation 20.

6.8 In the instant case, when the order for suspension of licence was first issued on 29.01.2007; the adjudicating authority, that is, the Additional Commissioner (Customs) had on 20.12.2006 passed an order where findings with regard to mis-declaration and forgery had been returned in respect of the appellant. Based on these findings, the

immediate suspension of licence had to follow. There was thus, according to us, no infirmity in the order of suspension as in the circumstances it was both expedient and in fairly close proximity from the date of order of the adjudicating authority. It is also to be noted that the findings with respect to mis-declaration at least in respect of actions of the appellant pertaining to imports made by the M/s Sight & Sound and M/s Sound Terrific have been sustained by the Commissioner (Appeals) vide his order dated 31.12.2007. Even in the case of E.I. Dupont India Ltd clearance had been made by the appellant by seeking to take benefit of Notification no. 21/2002. We do not wish to dilate on any of these aspects of the matter any further, it would suffice to say that we cannot find fault in the impugned judgment of the tribunal by which the order of suspension of licence has been sustained. The matter is now pending in appeal before the Tribunal. The Tribunal will be required to look into various aspects of the matter including the impact of the statements made by the noticees, which includes appellant, made under Section 108 of the Act. It is also to be noted, that the appellant, for some strange reason, at least till the date when this appeal was heard, as per submissions made at the bar, had not filed his reply to the show-cause notice dated 18.07.2007 calling upon the appellant to demonstrate as to why his licence be not revoked under Regulation 20 of CHALR, 2004.

6.9 The reliance by the learned counsel for the petitioner on the judgment of the Tribunal in the case of *Varma & Sons vs CC(G), Mumbai; 2008*

(88) *RLT 749*, which in turn, relies upon two other judgments of the Tribunal itself, that is, in *Thakkar Shipping Agency vs Collector of Customs; 1994 (69) ELT 90* and *Smita International vs Commissioner of Customs (General); 2008 (225) ELT 439*, for the proposition that the statement under Section 108 of the Customs Act, 1962 cannot be relied upon in the proceedings undertaken under CHALR, 2004 is not tenable in law for the reasons which follows.

6.10 In all three cases the Tribunal proceeds on the premise that, both under CHALR, 1984 and CHALR, 2004, while conducting an enquiry the concerned authority is required to offer the delinquent CHA a chance of cross-examining the person who is examined in support of grounds which form the basis of the proceedings. The Tribunal in the case of *Smita International* (*supra*) has referred to Regulation 22 sub-clause (3) & (4) of CHALR, 2004 which has been held to be in *pari materia* with Regulation 23 of CHALR, 1984. Regulation 22 (3) and (4) of CHALR, 2004 to the extent necessary is extracted hereinafter:-

“(3) The Deputy Commissioner of Customs or Assistant Commissioner of Customs shall, in the course of inquiry, consider such documentary evidence and take such oral evidence as may be relevant or material to the inquiry in regard to the grounds forming the basis of the proceedings and he may also put any question to any person tendering evidence for or against the customs House Agent, for the purpose of ascertaining the correct position.

(4) The Customs House Agent shall be entitled to cross-examine the persons examined in support of the grounds forming the basis of the proceedings, and where the Deputy

Commissioner of Customs or Assistant Commissioner of Customs declines to examine any person on the ground that his evidence is not relevant or material, he shall record his reasons in writing for so doing.”

6.11 A perusal of the aforesaid sub-clauses (3) & (4) of Regulation 22 would show that it refers to the CHA's right to cross-examine where oral evidence is recorded by an inquiry officer, that is, the Deputy Commissioner of Customs or Assistant Commissioner of Customs, in support of grounds forming basis of such a proceeding. It is pertinent to point out that the Tribunal in both *Varma & Sons (supra)* and *Smita International (supra)* followed the judgment of the Tribunal in *Thakkar Shipping Agency (supra)*. It is, therefore, important to note the facts and the correct ratio of *Thakkar Shipping Agency (supra)*. In *Thakkar Shipping Agency (supra)* the appellants before the Tribunal were holders of a temporary CHA Licence. The said licences were suspended pending an enquiry under Regulation 23 of CHALR, 1984. The grounds of inquiry communicated to the appellants were:

- (i) that the appellants have failed to obtain proper authorization from two passengers namely, K. Gangadhar and C. Abdulla as required under Regulation 14(a);
- (ii) they failed to advise the two passengers to comply with the provisions of the Customs Act, 1962 and also failed to bring to the notice of the concerned Assistant Commissioner about the non-

compliance of the provisions by the two passengers as required under Regulation 14(c);

- (iii) they had refused access to their records relating to the said transactions to the officers of the Central Intelligence Unit as was obligatory for them vide Regulation 14(j);
- (iv) they had failed to maintain records as required under Regulation 14(k) & (l);
- (v) they had acted in a manner unbecoming of a CHA licence.

6.12 In as much as, the CHA i.e., Vijay Thakkar was concerned he was charged with carrying on business other than that of a CHA agent, and that he had attempted to smuggle contraband goods in the guise of an unaccompanied baggage as was evident from the statements of the passengers i.e., K. Gangadhar and C. Abdulla and had as such rendered them liable for punishment under Regulation 21(c) of the Regulation.

6.13 This position was contested by the appellant-CHA. The appellant-CHA in their representation before the Inquiry Officer contended that they had *inter alia* not acted as agents for the two passengers. They also pleaded that uncorroborated statements of the two passengers could not be relied upon. It was also contended by the appellant-CHA i.e., Vijay Thakkar that he had retracted from his statement, and thus pleaded that no adverse conclusion could be drawn on the basis of uncorroborated statement of the two passengers. Lastly, it was contended that the two passengers, namely, K. Gangadhar and C. Abdulla had not been offered for cross-examination,

though it was demanded, and it was not proved that the Appellant/CHA i.e., Vijay Thakkar had acted as the CHA for them.

6.14 It is in this context that the Tribunal held, by relying upon clauses (3) & (4) of Regulation 23 of CHALR, 1984, that the very purpose of making use of oral evidence is that such evidence has to be recorded by the Inquiry Officer and the person giving such oral evidence has to be offered to the delinquent for cross-examination. The Tribunal further went on to hold that there does not exist any provision which authorises the use of statement recorded under Section 108 of the Customs Act, 1962 as evidence. While it is true that Section 108 of the Customs Act, 1962 has been given special status as to its acceptability in relation to proceedings under the Customs Act, 1962, there is no provision like the one found in sub-clause (3) of Regulation 23 of CHALR, 1984 which exists for the purpose of adjudication under the Act. The Tribunal referred to the provisions of Section 124 of the Act to hold that notice has to be given in respect of statements recorded under Section 108 of the Act which the authority proposes to use against the delinquent, giving the delinquent an option to seek production of such persons for cross-examination. The Tribunal held that under the Regulation 23 recording of evidence and offering the persons for cross-examination was mandatory in view of the word 'shall' used in clause (4) of Regulation 23. It thus held that in these circumstances non-examination of the two passengers and not offering them for cross-examination to the delinquent made their statements inadmissible. The

Tribunal also went on to hold that the use of statement of the two passengers even for the purposes of corroborating the statement of Vijay Thakkar was not permissible. The Tribunal also noted the fact in paragraph 12 of its judgment that the statement recorded of Vijay Thakkar was retracted by him and that in a subsequent statement he has not reaffirmed his earlier statement.

6.15 It is to be noted that the Tribunal was impressed by the fact that the statement of the delinquent, that is, Vijay Thakkar which he had retracted could not have been used in drawing an adverse conclusion unless it was corroborated in material particulars. What follows upon the reading of the said decisions is that, it was a case where there were statements recorded under Section 108 of the Customs Act of the CHA i.e., Vijay Thakkar and the two passengers. The CHA/appellant i.e., Vijay Thakkar was not given an opportunity to cross-examine the two passengers who had made statements before the authority under Section 108 of the Customs Act, 1962. On the other hand the statement made by the CHA/appellant i.e., Vijay Thakkar under Section 108 had been retracted. It is in these circumstances, that the Tribunal observed that since the statements of the two passengers had not been subjected to cross-examination by the appellant/CHA i.e., Vijay Thakkar and given the fact that Vijay Thakkar himself had retracted his own statement under Section 108, the statements could not be relied upon. In our view, the Tribunal did not understand the law to be that statements made by a CHA under Section 108 cannot be used

against him in proceedings under the CHALR, 1984. The same position would obtain viz-a-viz CHALR, 2004. This is quite clear upon reading paragraph 11 and 12 of the decision of the Tribunal. In our view the Tribunal in the subsequent decisions in the case of *Varma & Sons (supra)* and *Smita International (supra)* had misconstrued the ratio of the decision in the case of *Thakkar Shipping Agency (supra)*. In our view a statement recorded under Section 108 of the Customs Act, 1962 of the CHA by the Custom authorities is admissible in evidence and can form the sole basis for suspending the CHA's licence, however, subject to the usual safeguards that it is voluntarily and truthful. Where the statement under Section 108 of the Act is retracted it can only be relied upon if on examination of evidence one arrives at a conclusion, that the, retracted statement is true and voluntary. Therefore, in the instant case the Tribunal will have to determine as to whether the statement of the appellant i.e., Jasjeet Singh Marwaha passes the safeguards adumbrated in the judgment of the Supreme Court in the case of *K.I. Pavunny (supra)* and *Duncan Agro Industries Ltd (supra)*.

6.16 Furthermore, the crucial distinction is that, in the instant case, the inquiry has not gone beyond the stage, we were told, of the appointment of an Inquiry Officer, largely on account of the fact that the appellant has not filed his written statement till date. It is at that stage, if the Inquiry Officer chooses to rely upon the statement of those, other than the appellant/CHA, under Section 108 of the Customs Act, 1962, the requirement of clause (4) of Regulation 22 of CHALR, 2004 would come into play. In the instant

case as against that of *Thakkar Shipping Agency (supra)* where the CHA i.e., Vijay Thakkar had retracted his statement, there has been no retraction of the statement by the appellant/CHA except for an averment before the authorities below that the same was taken by resorting to coercion. The Tribunal will have to examine whether this would amount to retraction keeping in mind the fact that within two days of recording of the statement the differential rate of customs duty had been paid by the noticees/importers through the appellant/CHA.

6.17 As regards statement of the learned counsel for the appellant that in view of the fact that duty had been paid prior to issuance of the show cause notice and hence no duty was imposable, according to us is a submission which the Tribunal would have to deal with in the appeals pending before it. This aspect of the matter cannot be commented upon by us at this stage in the present proceedings. Therefore, reference to the judgment of the Tribunal in *Rashtriya Ispat Nigam Ltd (supra)* is not relevant in respect of the present proceedings. In any event *Rashtriya Ispat Nigam Ltd (supra)* dealt with penalty imposed under Section 11AC of Central Excise Act, 1944 and Rule 173Q of the Central Excise Rules, 1944.

7. In view of discussions hereinabove, our answers to the questions of law framed are as follows:-

7.1 In so far as question no. 1 is concerned, we are of the view that the licence of a CHA can be suspended where there is a violation of the provisions of the Act or imposition of penalty, the power of suspension of

licence is not confined to only those situations where there is a violation of the CHALR, 2004 Regulation.

7.2 In so far as question no. 2 is concerned, the CHA's licence can be suspended based on the confession made under Section 108 of the Act provided it is voluntary and the statement is truthful and is not the result of such inducement, threat or promise as mentioned in Section 24 of the Indian Evidence Act, 1872.

7.3 In so far as question no. 3 is concerned, in the given circumstances, we are of the view that there was no inordinate delay on the part of the respondents in suspending the licence of the CHA if one were to account for the fact that the order of the adjudication was passed on 20.10.2006 and also, the subsequent events which lead to the suspension of licence by an order dated 29.01.2007.

7.4 In so far as question no. 4 is concerned, we are of the view that since a CHA acts on behalf of the importer, it is not only his obligation to ensure that the entries made in the bill of entry are correct but also that a true and correct declaration of value and description of goods is made, and in the event of any infraction such as mis-declaration, he can be penalized under the Regulation 20 of CHALR, 2004 if it results in a misconduct which is of the nature which renders him unfit to transact the business of a CHA, at the Customs Station.

8. In the aforesaid facts and circumstances, the Tribunal's order cannot be faulted. Hence, the appeal is dismissed. We are, however conscious of the fact that any further delay in hearing the pending the appeals, has the effect of gravely prejudicing the interest of the appellant. This was, according to us, a case where the Tribunal ought to have heard the matter early, as a matter of fact, the appellant had made an application for early hearing of the appeal nos. 79/2008 and 80/2008 which was dismissed by the Tribunal on 14.3.2008.

8.1 We, therefore, request the Tribunal to hear the appeal nos. 79/2008 and 80/2008 at the earliest, given the fact that the delay in disposal of the appeal is prejudicial to the interest of the appellant. We make it clear that observations made in our order have been made only for the purposes of disposal of the issues raised in the present appeal. The Tribunal, in deciding the appeal nos. 79/2008 and 80/2008, is not to be influenced by any observation made hereinabove on the merits. In the circumstances, there shall be no orders as to cost.

RAJIV SHAKDHER, J

February 13, 2009
mb/kk

BADAR DURREZ AHMED, J