

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.2003 OF 2009

M/s. Renaissance Global Limited)
a Company Incorporated under the provisions)
of the Companies Act, 1956, having its)
Registered Office and factory at Plot No.36A &)
37, SEEPZ, Andheri (E), Mumbai – 400 096)Petitioner

V/s.

1. Union of India)
through the Joint Secretary in the Ministry of)
Law, Justice and Company Affairs, Aayakar)
Bhawan, M.K. Road, Churchgate, Mumbai –)
400 020)
2. The Commissioner of Customs)
Chhatrapati Shivaji International Airport,)
having his office at Avas Corporate Point,)
Makwana Lane, Behind S.M. Centre, Andheri –)
Kurla Road, Andheri (East), Mumbai – 400 059)
3. The Assistant Commissioner of Customs)
Air Intelligence Unit having his office at Avas)
Corporate Point, Makwana Lane, Behind S.M.)
Centre, Andheri – Kurla Road, Andheri (East),)
Mumbai – 400 059)
4. The Secretary, Ministry of Commerce &)
Industry, having his office at Udyog Bhavan,)
New Delhi – 110 001)
5. The Development Commissioner)
SEEPZ Special Economic Zone, Ministry of)
Commerce & Industry, Andheri (East), Mumbai)
– 400 096)Respondents

WITH

WRIT PETITION NO.2004 OF 2009

M/s. Gold Star Jewellery Designs Pvt. Ltd.)
a Company incorporated under the provisions)
of the Companies Act, 1956, having its)
Registered Office and factory at Unit Nos.38)

and 39 SDS-II, SEEPZ, SEZ, Andheri (East),)Petitioner
Mumbai – 400 096)

V/s.

1. Union of India)
through the Joint Secretary in the Ministry of)
Law, Justice and Company Affairs, Aayakar)
Bhawan, M.K. Road, Churchgate, Mumbai –)
400 020)
2. The Commissioner of Customs)
Chhatrapati Shivaji International Airport,)
having his office at Avas Corporate Point,)
Makwana Lane, Behind S.M. Centre, Andheri –)
Kurla Road, Andheri (East), Mumbai – 400 059)
3. The Assistant Commissioner of Customs)
Air Intelligence Unit having his office at Avas)
Corporate Point, Makwana Lane, Behind S.M.)
Centre, Andheri – Kurla Road, Andheri (East),)
Mumbai – 400 059)
4. The Secretary, Ministry of Commerce &)
Industry, having his office at Udyog Bhavan,)
New Delhi – 110 001)
5. The Development Commissioner)
SEEPZ Special Economic Zone, Ministry of)
Commerce & Industry, Andheri (East), Mumbai)
– 400 096)Respondents

WITH

WRIT PETITION NO.1945 OF 2009

M/s. Jewel Art)
a Partnership Firm registered under the)
provisions of the Partnership Act 1932, having)
its Office and factory at Unit II, Unit Nos.G-19)
& 22, G & J Complex II, SEEPZ, SEZ, Andheri)
(East), Mumbai – 400 096)Petitioner

V/s.

1. Union of India)
through the Joint Secretary in the Ministry of)
Law, Justice and Company Affairs, Aayakar)
Bhawan, M.K. Road, Churchgate, Mumbai –)

400 020)
 2. The Commissioner of Customs)
 Chhatrapati Shivaji International Airport,)
 having his office at Avas Corporate Point,)
 Makwana Lane, Behind S.M. Centre, Andheri –)
 Kurla Road, Andheri (East), Mumbai – 400 059)
 3. The Assistant Commissioner of Customs)
 Air Intelligence Unit having his office at Avas)
 Corporate Point, Makwana Lane, Behind S.M.)
 Centre, Andheri – Kurla Road, Andheri (East),)
 Mumbai – 400 059)
 4. The Secretary, Ministry of Commerce &)
 Industry, having his office at Udyog Bhavan,)
 New Delhi – 110 001)
 5. The Development Commissioner)
 SEEPZ Special Economic Zone, Ministry of)
 Commerce & Industry, Andheri (East), Mumbai)
 – 400 096)Respondents

WITH

WRIT PETITION NO.1993 OF 2009

M/s. Jewalex India Pvt. Limited)
 a Company incorporated under the provisions)
 of the Companies Act, 1956, having its)
 Registered Office at 124-C, Mittal Court,)
 Nariman Point, Mumbai 400 020 &)
 manufacturing unit at Plot No:56-B, Seepz,)
 Andheri (East), Mumbai – 400 096)Petitioner

V/s.

1. Union of India)
 through the Joint Secretary in the Ministry of)
 Law, Justice and Company Affairs, Aayakar)
 Bhawan, M.K. Road, Churchgate, Mumbai –)
 400 020)
 2. The Commissioner of Customs)
 Chhatrapati Shivaji International Airport,)
 having his office at Avas Corporate Point,)
 Makwana Lane, Behind S.M. Centre, Andheri –)
 Kurla Road, Andheri (East), Mumbai – 400 059)

3. The Assistant Commissioner of Customs)
 Air Intelligence Unit having his office at Avas)
 Corporate Point, Makwana Lane, Behind S.M.)
 Centre, Andheri – Kurla Road, Andheri (East),)
 Mumbai – 400 059)
4. The Secretary, Ministry of Commerce &)
 Industry, having his office at Udyog Bhavan,)
 New Delhi – 110 001)
5. The Development Commissioner)
 SEEPZ Special Economic Zone, Ministry of)
 Commerce & Industry, Andheri (East), Mumbai)
 – 400 096)Respondents

WITH

WRIT PETITION NO.2039 OF 2009

1. M/s. Bombay Jewellery Manufacturers)
 A partnership firm registered under the Indian)
 Partnership Act, 1932 having its head office at)
 G-47, GNJ Complex – I, SEEPZ SEZ, MIDC)
 Andheri (E), Mumbai – 400 096)
2. M/s. Bombay Jewellery Manufactures Pvt.)
 Ltd.)
 a Company incorporated under the provisions)
 of the Companies Act, 1956, having its)
 Registered Office at 2301, Panchratna, Opera)
 House, Girgaon, Mumbai – 400 004 and)
 factory at Complex – I, SEEPZ SEZ, Andheri)
 (East), Mumbai – 400 096)Petitioners

V/s.

1. Union of India)
 through the Joint Secretary in the Ministry of)
 Law, Justice and Company Affairs, Aayakar)
 Bhawan, M.K. Road, Churchgate, Mumbai –)
 400 020)
2. The Commissioner of Customs)
 Chhatrapati Shivaji International Airport,)
 having his office at Avas Corporate Point,)
 Makwana Lane, Behind S.M. Centre, Andheri –)
 Kurla Road, Andheri (East), Mumbai – 400 059)

3. The Assistant Commissioner of Customs)
 Air Intelligence Unit having his office at Avas)
 Corporate Point, Makwana Lane, Behind S.M.)
 Centre, Andheri – Kurla Road, Andheri (East),)
 Mumbai – 400 059)
4. The Secretary, Ministry of Commerce &)
 Industry, having his office at Udyog Bhavan,)
 New Delhi – 110 001)
5. The Development Commissioner)
 SEEPZ Special Economic Zone, Ministry of)
 Commerce & Industry, Andheri (East), Mumbai)
 – 400 096)Respondents

WITH

WRIT PETITION NO.2053 OF 2009

- M/s. M.K.)
 is a Partnership Firm registered under the)
 provisions of the Partnership Act 1932, having)
 its Office and factory at Unit No.103, Building)
 No.1, SEZ, SEEPZ, Andheri (E), Mumbai – 400)
 096)Petitioner

V/s.

1. Union of India)
 through the Joint Secretary in the Ministry of)
 Law, Justice and Company Affairs, Aayakar)
 Bhawan, M.K. Road, Churchgate, Mumbai –)
 400 020)
2. The Commissioner of Customs)
 Chhatrapati Shivaji International Airport,)
 having its office at Avas Corporate Point,)
 Makwana Lane, Behind S.M. Centre, Andheri –)
 Kurla Road, Andheri (East), Mumbai – 400 059)
3. The Assistant Commissioner of Customs)
 Air Intelligence Unit having his office at Avas)
 Corporate Point, Makwana Lane, Behind S.M.)
 Centre, Andheri – Kurla Road, Andheri (East),)
 Mumbai – 400 059)
4. The Secretary, Ministry of Commerce &)
 Industry, having his office at Udyog Bhavan,)

New Delhi – 110 001)
 5. The Development Commissioner)
 SEEPZ Special Economic Zone, Ministry of)
 Commerce & Industry, Andheri (East), Mumbai)
 – 400 096)Respondents

WITH
 NOTICE OF MOTION NO.565 OF 2010
 WITH
 INTERIM APPLICATION (L) NO.10284 OF 2021
 IN
 WRIT PETITION NO.2003 OF 2009
 WITH
 NOTICE OF MOTION NO.569 OF 2010
 WITH
 INTERIM APPLICATION (L) NO.10307 OF 2021
 IN
 WRIT PETITION NO.2004 OF 2009
 WITH
 NOTICE OF MOTION NO.564 OF 2010
 WITH
 INTERIM APPLICATION (L) NO.10373 OF 2021
 IN
 WRIT PETITION NO.1945 OF 2009
 WITH
 NOTICE OF MOTION NO.567 OF 2010
 WITH
 INTERIM APPLICATION (L) NO.10376 OF 2021
 IN
 WRIT PETITION NO.1993 OF 2009
 WITH
 NOTICE OF MOTION NO.568 OF 2010
 WITH
 INTERIM APPLICATION (L) NO.10281 OF 2021
 IN
 WRIT PETITION NO.2039 OF 2009
 WITH
 NOTICE OF MOTION NO.186 OF 2015

**WITH
NOTICE OF MOTION NO.566 OF 2010
WITH
INTERIM APPLICATION (L) NO.10303 OF 2021
IN
WRIT PETITION NO.2053 OF 2009**

Mr. Vikram Nankani, Senior Advocate a/w. Mr. Prithwiraj Choudhuri, Mr. Malcolm Siganporia, Mr. Dhiren Durante and Mr. Sahil Namavati i/b. Lexicon Law Partners for petitioner in Writ Petition No.2003 of 2009.

Mr. Vikram Nankani, Senior Advocate a/w. Mr. Naresh Thacker, Mr. Jitendra Motwani, Mr. Chirag Shetty, Ms. Shilpi Jain, Mr. Mehul Talera, Mr. Prithwiraj Choudhuri and Ms. Diva Devarsha i/b. Economic Laws Practice for petitioner in Writ Petition No.2004 of 2009, Writ Petition No.1945 of 2009, Writ Petition No.1993 of 2009, Writ Petition No.2039 of 2009 and Writ Petition No.2053 of 2009.

Mr. Vijay H. Kantharia a/w. Mr. Jitendra B. Mishra and Mr. Dhananjay B. Deshmukh for Custom Authorities in all petitions.

Mr. Advait M. Sethna a/w. Mr. Ashutosh Misra, Mr. Sandeep Raman and Mr. Rangan Majumdar i/b. Mr. A.A. Ansari for Union of India and SEEPZ in all petitions.

**CORAM : K.R. SHRIRAM & A.S. DOCTOR, JJ.
RESERVED ON : 29th SEPTEMBER 2022
PRONOUNCED ON : 18th NOVEMBER 2022**

JUDGMENT (PER K.R. SHRIRAM, J.) :

1 The facts in all the petitions listed are almost identical barring minor differences. In all the matters, Sections 111(d) and 111(m) and Section 112(a) and Section 114A of the Customs Act, 1962 have been invoked and penalty imposed. In some cases, Section 118(a) of the Customs Act, 1962 has been invoked. Section 118(a) basically deals with confiscation of package.

2 The common issue which arises for consideration is whether petitioners were permitted to import new/unused jewellery for remaking after melting. If the answer is no then what are the consequences. If the answer is yet then what will be the further orders. Therefore, for convenience, we are taking up Writ Petition No.2003 of 2009 as lead petition.

3 Petitioner is engaged in the manufacture and export of gold, platinum and silver jewellery. Its unit is located within the Santacruz Electronic Export Processing Zone (**'SEEPZ'**). SEEPZ is a notified export processing zone and is covered by the Special Economic Zone Act, 2005 (**'SEZ Act'**). Petitioner was granted a Letter of Permission (**'LOP'**) dated 17th March 2000 by the Joint Development Commissioner, SEEPZ (**'DC'**) being a license to manufacture and export all kind of jewellery – plain as well as studded. Upon coming into force of the SEZ Act, in terms of the proviso to Section 15(1) thereof, existing units did not require approval under the SEZ Act.

4 Prior to the amendment to the SEZ Act, imports into the SEZs were governed by the provisions of the Foreign Trade Policy, 2002 (**'FTP'**) issued under the Foreign Trade (Development & Regulation) Act, 1992 (**'FTDR Act'**) and erstwhile Chapter XA of the Customs Act, 1962 (**'Customs Act'**). The SEZ Act came into force on 10th February 2006 to provide for the establishment, development and management of the Special Economic

Zones for the promotion of exports and for matters connected therewith or incidental thereto. The Special Economic Zones Rules, 2006 (**‘SEZ Rules’**) were formulated under Section 55 of the SEZ Act and came into force on 10th February 2006. The Government of India issued a notification dated 14th March 2006 declaring SEEPZ shall be deemed to be a port under Section 7 of the Customs Act and the provisions contained in Chapter XA of the Customs Act and the SEZ Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 shall not apply to the Special Economic Zones. Section 51, 52 and 53 of SEZ Act read as under :

“Section 51 – Act to have Overriding Effect

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Section 52 – Certain Provisions to not apply

(1) The provisions contained in the Chapter XA of the Customs Act, 1962 (52 of 1962) and the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 made thereunder shall not, with effect from such date as the Central Government by notification appoint, apply to the Special Economic Zones.

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Section 53 -Special Economic Zones to be ports, airports, inland container depots, land stations, etc., in certain cases.

(1) A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorised operations.

(2) A Special Economic Zone shall, with effect from such date as the Central Government may notify, be deemed to be a port, airport, inland container depot, land station and land customs stations, as the case may be, under section 7 of the Customs Act,

1962 (52 of 1962):

Provided that for the purposes of this section, the Central Government may notify different dates for different Special Economic Zones.”

5 It is petitioner's case that it has been importing jewellery for remaking, which is subsequently melted, and the precious metal derived therefrom is used for the manufacture of fresh pieces of jewellery. During the period April 2005 to May 2009, an aggregate of 1160 consignments of finished unsold jewellery were imported by petitioner. Petitioner states that it manufactures branded jewellery for international buyers and exports its entire production. Petitioner states that when some of the jewellery which is exported remains unsold, for various reasons, the said foreign buyers resell the said jewellery back to petitioner based on oral / written agreements and petitioner reimports the said jewellery on an outright purchase basis. The jewellery so imported is melted and used for remaking of fresh jewellery with or without additions.

6 However, petitioner is not merely importing finished jewellery as its only raw material for the manufacturing process and the majority of its raw material, imports comprise of gold and other precious metals in its raw form. Petitioner states that only 16.70% of its total imports are reimported finished jewellery which are repurchased from overseas buyers and is the subject matter of the present dispute.

7 In the course of its business, petitioner imported a consignment of gold and silver jewellery for remaking vide Bill of Entry No.100856 dated 9th February 2009 (**‘Bill of Entry’**) declaring the same as ‘Gold and Silver Jewellery Dia Studded 9 and 18 KT Gold and Silver Jewellery (REMAKING ON OUTRIGHT BASIS)’ (**‘the Consignment’**) with an assessable value of Rs.5,36,781/- (Rupees Five Lakhs Thirty Six Thousand Seven Hundred and Eighty One Only). The Consignment was to be delivered at the SEZ CARGO as can be seen printed at the top right of the Bill of Entry. A declaration was also filed with the Bill of Entry which *inter alia* declared that the goods covered by the Bill of Entry have been imported on an out-right purchase / consignment account. In support of these declarations, petitioner had also enclosed an Invoice cum packaging list No.2009 K-040 dated 2nd February 2009 issued by M/s. Signet Group, Imperial Palace, 3 Maxwell Road Borehamwood, London, UK where the description of goods was mentioned as ‘Jewellery supplied for remaking’.

8 The Consignment was intercepted by the Air Intelligence Unit of the Office of the Commissioner of Customs at Sahar Airport on 11th February 2009 even before it reached SEEPZ. The Consignment was examined on 16th February 2009 and the same was detained by respondent no.3. Petitioner’s representative one Mr. Dilip Joshi was questioned and his statements were recorded (under Section 108 of the Customs Act) on

4th March 2009, 5th March 2009, 18th March 2009, 24th March 2009 and 25th March 2009 (**‘the statements’**). The statements, *inter alia*, clarified the purpose of import of the Consignment, i.e., for remaking of jewellery, which was permitted. It was also explained that the jewellery in the Consignment was purchased as a raw material wherein they melt the product and used the recovered material for manufacture of jewellery. Pertinently, the statements recorded that the goods forming a part of the Consignment were manufactured in petitioner’s unit at the SEZ and the same were exported earlier by petitioner between 28th April 2008 and 1st November 2008 and further the designs also pertain to petitioner.

9 Respondent no.3 vide its letter dated 17th April 2009 ordered the provisional release of the Consignment on the terms set out therein. Petitioner did not avail of the provisional release as according to petitioner, the detention of the Consignment was ab-initio null and void.

10 Respondent no.2 also addressed a letter dated 5th May 2009 to the DC (incharge of SEEPZ) – which called for ‘information urgently’. This information sought posed questions such as whether the (SEZ) unit has the approval of the competent authority to import / re-melt and export the imported finished jewellery. The DC (incharge of the SEEPZ) by his letter dated 22nd May 2009 addressed to respondent no.2 *inter alia* clarified and confirmed that petitioners were eligible to import the goods forming a part

of the Consignment.

11 Respondent no.3, thereafter issued a Show Cause Notice dated 14th July 2009 calling upon petitioner to show case as to why the consignment should not be confiscated under Section 111(d) and (m) and penalty under Section 112 and 114A of the Customs Act be not imposed. This was followed by an Addendum / Corrigendum dated 21st July 2009 to the show cause notice issued by Respondent No.3. Another Addendum / Corrigendum dated 18th August 2009 to the show cause notice was issued by Respondent No.3 whereby amendments to the show cause notice were effected and now sought to include Sections 28, 28AB of the Customs Act.

12 Petitioner filed this writ petition on 4th September 2009 *inter alia* seeking an order to set aside or quash the show cause notices. Affidavit/s in reply to the petition were filed by the Deputy DC on 10th February 2010 and 29th April 2010 which *inter alia* stated that (i) the provisions of the SEZ Act is a code in itself and has an overriding effect by virtue of Section 51 of the SEZ Act, (ii) by virtue of Section 53 of the SEZ Act, a SEZ shall on and from the appointed date be deemed to be a territory outside the Customs territory of India for the purposes of undertaking the authorised operations, (iii) placed on record Instruction No.51 dated 25th March 2010 which *inter alia* records that all SEZ units are required to file a declaration in Form F while submitting an application for setting up of

a unit and that the approval committee shall consider the same before granting approval for issuance of LOA and (iv) finished jewellery imported by petitioner under Rule 27(1) of SEZ Rules are permitted for import for carrying out authorised operations, i.e., manufacture of jewellery which has been specifically permitted by the DC in the Letter of Approval.

13 The DC and the Secretary, Ministry of Finance were added as respondent no.5 and respondent no.4, respectively, pursuant to leave granted by this Court on 26th November 2009.

14 Petitioner and the Customs Department entered into an arrangement and filed minutes of order dated 3rd May 2010 and an order in terms of minutes came to be passed on 3rd May 2010. The same recorded that petitioner shall participate in the adjudication proceedings without prejudice to its rights and contentions that respondent nos.2 and 3 have no jurisdiction to seize and/or adjudicate and petitioner shall be at liberty to raise all issues including the issue of jurisdiction before respondent no.2. The Minutes also provided timelines for petitioner to file its reply to the show cause notice which was to be decided by respondent no.2 within a period of 4 weeks from the date of receipt of the reply to the show cause notice. The Consignment was also provisionally released upon execution of Bond and submitting a Bank Guarantee for 25% of the amount equivalent to the duty demanded in respect of the seized goods. The said order passed by

respondent no.2 shall be subject to the outcome of the petition.

15 Petitioner filed its reply dated 13th July 2010 to the show cause notice and *inter alia* primarily contended that the unit was governed by the provisions of the SEZ Act and not the Customs Act and that respondent no.3 had no jurisdiction to even issue the show cause notice.

16 Respondent No.2 vide its order dated 19th August 2010 (“**Impugned Order**”) confirmed the allegations made against petitioner in the show cause notice thereby imposing:

A. In respect of goods imported vide Bill of Entry No.100856 dated 09.02.2009

(i) A penalty of Rs. 50,000/- and

(ii) Redemption fine of Rs.1,50,000/- and

(iii) Duty of Rs. 61,200/-.

B. In respect to goods imported in the past:

(i) Confiscation of goods cleared in the past alongwith fine of Rs.80,00,00,000/-

(ii) Recovery of duty of Rs.43,77,44,781/- alongwith applicable interest

(iii) Penalty of Rs. 43,77,44,781/-.

17 The petition was subsequently amended by way of a chamber summons and the aforesaid reply to the show cause notice and impugned order was brought on record and the challenge in the petition was modified to include a challenge to the impugned order as well.

18 The short point involved is whether petitioner is permitted to import new/unused jewellery for remaking after melting the same. As aforesaid, Customs say “no”, while the DC says “yes”.

19 At the outset, Mr. Kantharia submitted that Rule has been issued only on the issue of jurisdiction and petitioner has an alternative remedy to challenge the order dated 19th August 2010 by filing an appeal. Petitioner had approached this Court in its writ jurisdiction under Article 226 of the Constitution of India on the ground that the Customs Department did not have jurisdiction to investigate, seize and issue show cause notice against petitioner after coming into force of SEZ Act. In the affidavit in reply dated 25th November 2009, the Customs Department has asserted that the show cause notice has been correctly issued by exercising its jurisdiction under the Customs Act in the facts and circumstances of the case. The Customs Department has further raised preliminary objection that petitioner has alternate and efficacious remedy of statutory appeal under the provisions of Customs Act in the event the show cause notice culminates into Order-in-Original and the same is adverse and against petitioner. This Court has, after hearing petitioner and respondents, admitted the petition only on the issue of jurisdiction of the Customs Department under the provisions of the Customs Act.

Mr. Kantharia further submitted that the issue of jurisdiction of customs authorities to issue notice or take penal action under the Customs Act against unit situated in the Special Economic Zone, came to be considered by the Gujarat High Court in the matter of ***Union of India V/s. Oswal Agricom Pvt. Ltd.***¹, wherein the Hon'ble Gujarat High Court, *inter alia*, held that the competent authorities under the Customs Act are still empowered to confiscate any goods under Sections 111 and 112 and impose penalty under Sections 113 and 114, in appropriate case, even with regard to the units situated within the Special Economic Zone. The competent authorities are also empowered to take penal action under any other Central Act, if such violation is found to have been committed by any or other unit of SEZ including the writ petitioners with regard to which no notification has been issued either under sub-section (i) or sub-section (2) of Section 21 or sub-section (1) or sub-section(2) of Section 22 of the SEZ Act. The show cause notice has now culminated into Order-in-Original, which was passed on merits and the facts of the case after giving full opportunity of hearing to petitioner and upon application of mind on the material on record consisting of various documents and statements recorded under Section 108 of the Customs Act and the reply of petitioner to the show cause notice. Petitioner has not alleged violation of principle of natural justice. Petitioner has not alleged any breach of fundamental rights, there is no challenge to the virus of the

1. 2011 (268) E.L.T. 21 (Guj.)

statute. Thus, this Court may not exercise its extra-ordinary Writ Jurisdiction under Article 226 of the Constitution of India *inter alia* in view of the alternate and efficacious remedy of statutory appeal available to petitioner under the provisions of the Customs Act. Courts have consistently taken the view that when there is an alternate remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under constitutional provisions.

Mr. Kantharia concluded, on the issue of alternate remedy that in view of the settled position in law as laid down by the plethora of judgments of the Hon'ble Supreme Court of India and other High Court on the issue of alternate and efficacious remedy of statutory appeal, the petition deserves to be disposed *inter alia* with directions to petitioner to pursue the alternate and efficacious remedy of statutory appeal following due process of law. Mr. Kantharia relied upon various judgments in support of this submission.

20 At this stage of final hearing, we are not inclined to relegate petitioner to pursue the alternate remedy in as much as it is settled law that availability of an alternate remedy does not prohibit the High Court from entertaining a writ petition. The High Court may entertain a writ petition notwithstanding the availability of an alternate remedy particularly, where the writ petition seeks enforcement of any of the Fundamental Rights or where there has been a violation of the principle of

natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is under challenge. (*Radha Krishan Industries V/s. State of Himachal Pradesh and Ors.*²).

As held by the Apex Court in *Union of India V/s. Tarachand Gupta*³, the phrase “jurisdiction” is of a wide import and will not only include questions of its existence or lack thereof, but will also include issues on whether the authority has acted within the contours of its jurisdiction or has acted in an improper manner in excess of its jurisdiction.

In the case at hand, the issue is whether respondents have properly exercised jurisdiction and whether the provisions of the Customs Act as stated in the show cause notice are applicable in the facts of the present case. Moreover, there are divergent views taken by two Government of India authorities, viz., Development Commissioner under SEZ Act and the Customs Authorities. We have to, therefore, validate which of the conflicting views is correct, that is, whether the view of the DC, respondent no.5, that import of new/unused jewellery for remaking by petitioner was permissible under the SEZ Act and the Rules or whether the provisions of the Customs Act under which the impugned order has been passed. Moreover, over 13 years have passed since filing of the petition and if after 13 years petitioner is directed to exhaust any alternate remedy, it would cause grave injustice to petitioner. Further, there are no disputed question of facts.

2. (2021) 6 SCC 771

3. (1971) 1 SCC 486

21 Now let us consider Section 111(d) and 111(m), Section 112(a), Section 114A and Section 28 of the Customs Act, which read as under :

SECTION 111. *Confiscation of improperly imported goods, etc.*
- The following goods brought from a place outside India shall be liable to confiscation :-

(d) any 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 by or under this Act or any other law for the time being in force;

(m) any goods which do not correspond in respect of value or in any other particular] with the entry made under this Act or in the case of baggage with the declaration made under section 77 2[in respect thereof or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;

SECTION 112. *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.

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

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty 1[2[not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act]], whichever is the greater.

SECTION 28. *Notice for payment of duties, interest, etc.—*

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,—

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

*(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice: Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted: [***] Explanation.—Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be. [(1A) When any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, to whom a notice is served under the proviso to sub-section (1) by the proper officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under section 28AB and penalty equal to twenty-five per cent. of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.]*

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined: [Provided that if such person has paid the duty in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notice is served under sub-section (1) shall, without prejudice to the provisions of sections 135, 135A and 140, be deemed to be conclusive as to the matters stated therein: Provided further that, if such person has paid duty in part, interest and penalty under sub-section (1A), the proper officer shall determine the amount of duty or interest not being in excess of the amount partly due from such person.] [(2A) Where any notice has been served on a person under sub-section

(1), the proper officer,—

(i) In case any duty has not been levied or has been short-levied, or the interest has not been paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year; and

(ii) In any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub-section (1).

(2B) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid: Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment. Explanation 1.—Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or the interest was not paid or was part paid or the duty or interest was erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter. Explanation 2.—For the removal of doubts, it is hereby declared that the interest under section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.

(2C) The provisions of sub-section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.]*

(3) For the purposes of sub-section (1), the expression “relevant date” means,—

(a) in case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;

(c) in a case where duty or interest has been erroneously refunded, date of refund;

(d) in any other case, the date of payment of duty or interest.]

Mr. Nankani’s submissions :

22 Under Section 111 of the Customs Act goods which are liable for confiscation are those which have been imported or attempted to be imported contrary to any prohibition under the Customs Act or any other law for the time being in force. In connection therewith it lists out various scenarios how the goods could be improperly imported. Section 11 of the Customs Act provides for power of the Central Government to prohibit importation or exportation of goods. The prohibitions under the Customs Act are imposed by way of notifications issued under Section 11 of the Customs Act. There is no notification or prohibition issued under Section 11 of the Customs Act prohibiting the import of finished jewellery into a SEZ for the purpose of remaking. This has not been controverted.

22.1 The DC of SEZ, viz., respondent no.5, has even filed an affidavit stating that petitioner did nothing wrong and there was no bar in petitioner

importing finished jewellery as raw material because even finished jewellery will have to be melted and remade into fresh jewellery. Consequently, there can be no confiscation under Section 111(d) of the Customs Act.

22.2 Rule 2(r) and Rule 27(1), (2), (10), Rule 28 (1), (2), (5) and 29 (5), (7) of SEZ Rules and Section 5 of FTDR Act were also relied upon.

22.3 The SEZ Rules also provides that manufacture means and includes remaking of jewellery and under Rule 27(2) it is only the DC who can decide whether any goods or services as required by a unit or developer are for authorised operations or not. The DC has clarified by his letter dated 22nd May 2009 addressed to the Commissioner of Customs, Sahar Airport that petitioner, in short, did nothing wrong. Though in the affidavit dated 10th February 2010 of the DC, respondent no.5, it was brought to the notice and attention of respondent no.2 and in the reply to the show cause notice it also referred to the Circular / Instruction dated 7th September 2009, respondent no.2 totally ignored the affidavit of DC and has not even considered the same in his order.

22.4 As regards Section 111(m) of the Customs Act is concerned, it would apply only to goods improperly imported that is to say any goods which do not correspond in respect of value or in any other particular with the declaration made under section 77 of the Customs Act, in respect thereof. For invoking Section 111(m) of the Customs Act, the declaration

made in an entry under the Customs Act, which is the Bill of Entry filed under Section 46 of the Customs Act, must fail to correspond, in value or any other particular, to the goods actually imported by petitioner. It deals with intentional mis-declaration and mis-match between what has been declared in the Bill of Entry and what has actually been imported by the importer. In the present case, there is no mis-declaration whatsoever and, therefore, the question of Section 111(m) of the Customs Act being invoked does not arise.

22.5 Respondent no.2 has proceeded on an erroneous interpretation and construction of Section 111(m) of the Customs Act and has invoked the said sub-section on the ground that (a) petitioner has filed Bill of Entry and imported goods which does not find mention as raw materials in the LOP issued by the DC and (b) petitioner ought to have filed a declaration in terms of Rule 29(7) of the SEZ Rules for reimporting goods which were earlier exported by it. If petitioner had not complied with the requirements of the LOP issued by respondent no.5 – DC, respondent no.5 would have taken action under the provisions of SEZ Act and SEZ Rules framed thereunder. Not even a notice has been issued to petitioner for alleged violation of LOP Rules and on the contrary, DC has filed an affidavit stating that petitioner did nothing wrong.

22.6 As regards the alleged violation of Rule 29(7) of the SEZ Rules, there is not even a reference thereto in the show cause notice. The show cause notice must contain all allegations for a party to effectively deal with it and respondents cannot be permitted to improve upon the show cause notice or the impugned order by way of filing an affidavit in Court. This entire issue was raised for the first time in the affidavit dated 25th November 2009. Consequently, the charge under Section 111 of the Customs Act has to fail.

22.7 As regards Section 28 of the Customs Act, respondent no.2 has invoked Section 28 by way of a Corrigendum to the show cause notice without even dealing with as to how violations, if any, of provisions of SEZ Act or SEZ Rules, disturbs the blanket exemption available to petitioner in terms of Section 26 of the SEZ Act. The customs duty under Section 28 of the Customs Act can only be imposed on imports into SEZ if the exemption under Section 26 of the SEZ is withdrawn and since both the show cause notice and the impugned order are totally silent on any such withdrawal of exemption, question of levying any duty under Section 28 of the Customs Act could not arise.

22.8 As regards Section 114A of the Customs Act, there was no proposal in the show cause notice to impose penalty under Section 114A of the Customs Act and respondent no.2 cannot, in the impugned order,

traverse beyond the show cause notice as held by the various judgments of the various Courts.

23 Mr. Kantharia, in reply, submitted as under :

(a) this petition was filed by petitioner *inter-alia* challenging the show cause notice dated 14th July 2009. According to petitioner, who are engaged in manufacture and export of gold, platinum and silver jewellery, both for plain and studded jewelries and for which purpose, petitioners have the unit located within the SEEPZ, which has been notified as Export Processing Zone and presently covered by the SEZ Act. Petitioner has sought to challenge the action on the part of the Customs Department in investigating, seizing and issuing show cause notice as being *ex-facie* without jurisdiction and without authority of law after the coming into force of the SEZ Act.

(b) The Customs Department resisted the writ petition and has filed an affidavit in reply dated 25th November 2009.

(c) By an order dated 3rd May 2010, the aforesaid writ petition was admitted specifically on the issue of jurisdiction. However, the provisional release of the goods was allowed with specific directions to petitioner that they shall not dispute the identity of the seized jewellery and that the Department may continue with the adjudication of show cause notice, but shall not to give effect to the Adjudication Order during the

pendency of the writ petition.

(d) The Customs Department has correctly exercised jurisdiction and the powers under the provisions of the Customs Act, 1962. Petitioner has not submitted a full self-declaration, while filing Bills of Entry *inter-alia* whether the jewellery being imported is “New or Old” or “out of fashion/trend” or scrap jewellery or manufactured and exported by it or re-import of self-exported jewellery because of payment issues suffered by petitioner. The declaration in the import invoice and the bill of entry is silent on these aspects. Further, as brought out in the investigations, petitioner, by its admittance, resorted to route the goods through remaking with full awareness that the self-exported jewellery attracted the provisions of Rule 29(7) to hoodwink the Customs and committed gross willful violations of the SEZ provisions read with Section 46(4) of the Customs Act and Rule 11 of Foreign Trade (Regulation) Rules, 1993.

(e) Petitioner imported their self-exported jewellery for remaking, allegedly under outright purchase basis. However, there is no self-declaration at the time of import that the jewellery being imported was earlier exported by them. New jewellery, which is neither damaged nor defective, is not covered under Rule 29(7) of the SEZ Rule, 2006. Petitioners have re-imported their earlier exported jewellery, which should have been declared and imported as per the provisions of Rule 29(7) of the SEZ Rules.

That the case of mis-declaration was *prima facie* made out against petitioner.

(f) Further Section 46 of the Customs Act, 1962 deals with the clearance of imported goods and section 46(1) stipulates the procedure to be followed for clearance of imported goods, which reads “The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form”. Section 46(4) reads “the importer while presenting a bill of entry shall, at the foot thereof, make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods. Further, as per Rule 11 of Foreign Trade (Regulation) Rules, 1993, “on the importation into, or exportation out of, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bill or the Shipping Bill or any other documents prescribed under the Customs Act, state the value, quantity and description of such goods to the best of his knowledge and belief and in case of exportation of the goods as stated in those documents, state such goods are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the good are being exported and shall subscribe a declaration of the truth of such

statement at the foot of such Bill of Entry or Shipping Bill or any other document.

(g) Even in the past, from April, 2005 to March, 2009, as per the data submitted by petitioner, it is indicated that they had imported 1160 consignments of finished jewellery. The total assessable value of these consignments is Rs.274,43,07,664/- and the exemption from Customs duty availed under the provisions of SEZ Rules, is to the tune of Rs.43,77,44,781/-. Since petitioner was not entitled for any exemption from customs duties on these consignments under SEZ Rules, a duty amount of Rs.43,77,44,781/- alongwith an interest as applicable is recoverable from petitioner in terms of provisions of proviso to Section 28 and Section 28(A) (B) respectively, of the Customs Act, read with Rule 25 and Rule 34 of the SEZ Rules. That the 1160 consignments of finished jewellery, imported by petitioner during 1st April, 2005 to 6th March 2009, and the consignment under seizure, were/are imported in violation of the provisions of para 4A 21 of the Foreign Trade Policy in vogue at the relevant time. These goods, therefore, were liable to confiscation under the provisions of Section 111(d) and (m) of the Customs Act and for the acts of omission and commission, petitioner is also liable to penal action under Section 112(a) of Customs Act.

(h) Petitioner has violated Section 28 of the Customs Act. Moreover, Instruction No.6 dated 3rd August 2006 issued by the Ministry of

Commerce, categorically mentions that the provisions of Sections 20, 21, and 22 of the SEZ Act are not operationalized. Hence, so long as these sections are not operationalized, different agencies and officers, as empowered under the relevant legislations before enactment of the SEZ Act will continue to operate till such time these provisions of the SEZ Act take effect. Respondent Custom authority has therefore rightly exercised its powers under the Customs Act.

(i) The Customs Department has recorded the statements of one Dilip Bhogilal Joshi, Vice President of petitioner and Mr. Sudhir Padave, Officer of petitioner under Section 108 of the Customs Act. During investigation, the consignment imported vide Bill of Entry No.100856 dated 9th February 2009 was examined in the presence of independent panchas and Shri Suhas R. Suvarna, the unit representative and Panchnama dated 16th February 2009 was drawn. Petitioner has also submitted various invoices and other documents to the investigating agency. Petitioner has also submitted the copy of the Bond-cum-LUT and copy of application for setting up a SEZ unit alongwith annexure for raw material, capital goods and manufacturing process and details of all the past remaking consignment submitted by the unit.

(j) The Order-in-Original dated 19th August 2010 is passed after giving full opportunity of hearing to petitioner and following the principle of

natural justice. The Adjudicating Authority has considered the entire material on record and after application of mind passed the Adjudication Order. The said Order is well reasoned speaking order and is sustainable on the facts and circumstances of the case.

(k) The Adjudicating Authority has given finding of fact, *inter alia*, that at the time of submitting their application for setting up unit in SEZ, petitioner has not declared new / finished jewellery as part of raw material and the same also does not find mention in the list of raw material required by the unit by way of import procurement, in the Bond-cum-Legal Undertaking entered into by the unit with SEZ administration, in terms of Rule 22(1)(i).

(l) The Adjudicating Authority has given categorical findings of the facts that the goods involved in the instant case were neither covered under the list of required raw materials nor was their utilization method mentioned and declared under the manufacturing process by the notice, in their application for approval under the SEZ Scheme. The scope of the Letter of Approval granted by the Competent Authority in terms of Section 14 of the SEZ Act read with Rule 19 of SEZ Rules in pursuance of petitioner's Application thereof, cannot be enlarged to include the process of operations and the list of goods and raw materials, which were not mentioned or intimated in their application. The goods in the instant case

were brand new jewellery in show-room condition with respective bar codes and tags affixed on it. The assessment of import and domestic procurement was on the basis of self-declaration.

(m) The Adjudicating Authority has given categorical findings of facts that the unit's declaration in the Bill of Entry was not true and lacked full particulars. The unit had also not declared the true nature of the goods in the Bill of Entry or the invoice as to whether, the jewellery being imported, was new or old or self-exported or scrap jewellery. This is also evident from the statement of the Manager EXIM, of the unit, who had deposed that the consignment imported vide Bill of Entry No.100856 dated 9th February 2009, was imported as scrap jewellery. However, no such particulars found mentioned in the Bill of Entry or the corresponding Invoice. On the contrary, on physical examination of the subject consignment, it was found to contain brand new jewellery in show room condition, complete with tags and bar codes.

(n) Thus in terms of the provisions of the Section 46 of the Customs Act an importer is under obligation to declare the true and correct description and value in the Bill of Entry. This obligation is strict and absolute. Under the circumstances, it was incumbent upon petitioner to ensure that no omission takes place. Therefore, petitioner has violated the provisions of the SEZ Act as well as the Rules and the provisions of para

4A21 of the Foreign Trade Policy, in as much as the jewellery imported by petitioner for re-making was not for the purpose of “Authorized Operation” as defined under section 2(c) of the SEZ Act and the same were not properly declared in the Bill of Entry.

(o) There is categorical finding of fact that no tenable explanation was also forthcoming from the unit, as to why all such details of the subject goods were not mentioned in the Bill of Entry. Upon application of mind on the findings on the facts of the case the Adjudicating Authority has held that to invoke the provisions of Section 111 (m) of the Customs Act, *mens rea* is not an essential ingredient, because this clause does not even require intentional non-disclosure; simple mismatch or non-correspondence is sufficient. In ***Pine Chemicals Suppliers V/s. Collector of Customs⁴***, it was held that as the case of mis-declaration of description and value of imported goods, the question of *mens rea* was not relevant for liability to confiscation and that penalty was possible under Sections 111(m) and 112 of Customs Act. Thus the Adjudicating Authority has correctly held the subject goods liable for confiscation under Section 111 (d) and (m) of the Customs Act.

(p) The Adjudicating Authority has given finding of facts *inter alia* that in the present case petitioner has filed the Bill of Entry alongwith the declaration certifying the correctness of the declared descriptions of the

4. 1993(67) E.L.T. 25 : 1993 Supp (2) Supreme Court Cases 124

goods and this declaration has not turned out to be true. It is well settled legal position now that filing of the true and correct declaration under the Customs Act is an absolute and strict civil obligation and if such declaration turns out to be not correct, then the penalty in the form of civil liability has to be imposed on the importer irrespective of the fact whether *mens rea* or knowledge or malafide exists or not. In terms of Section 112 (a) of the Customs Act, the importer shall be liable to penal action for the acts of omission and commission which had rendered the goods liable to confiscation. Under the circumstances, the Adjudicating Authority has correctly held that the unit was liable to penal action under Section 112 (a) of the Customs Act.

(q) The Adjudication authority has arrived at findings of facts from the records submitted by the unit during investigation, that they had imported 1160 consignments of finished jewellery during the period April, 2005 to March, 2009. The total assessable value of these consignments was Rs.276,43,07,644/- and the exemption from the Customs duty availed under the provisions of SEZ Rules, is to the tune of Rs.43,77,44,781/-. The unit claimed the subject goods to be scrap jewellery used as part of raw material for the manufacture of jewellery. That claim is devoid of merit. The unit by their own submissions and admittance has accepted that they never declared in any of the documents, including the import documents, filed for

the clearance of these consignments, that the said consignments of jewellery were the same which were earlier exported by them, or whether the jewellery in question was new or old / used or out of fashion. The unit has, therefore, by such acts of suppression, availed the benefit of the Customs duty exemptions on the goods which were otherwise not permissible to them under the given circumstances. Their claim, that the unit was audited by the Department at least once during the last seven years is not substantiated with verifiable documentary evidence as to date, period and details of such claimed audit. Hence, no merit in their claim. In view of the findings above, that invoking the extended period under proviso in Section 28(1), is fully justified and well within the scope of the law.

(r) In the facts and circumstances of the case, the Adjudicating Authority has correctly held that petitioner's unit was not entitled to any exemption from Customs duties on subject consignments under the provisions of the SEZ Rules and, therefore, duty amount of Rs.43,77,44,781/- was recoverable from petitioner in terms of proviso to Section 28, alongwith interest as applicable under Section 28 AB of the Customs Act read with Rules 25 and 34 of the SEZ rules. In view of the above, petitioner had wrongfully availed exemption of Customs Duties by wilful suppression of facts and misdeclaration of the subject goods, imported during the period, from April 2005 to March, 2009. Therefore, petitioner

has been correctly held liable to penal action under Section 114A of the Customs Act.

24 Mr. Sethna reiterated the contents of the affidavit filed by respondent no.5.

25 Having heard Mr. Nankani, Mr. Kantharia and Mr. Sethna and having considered the pleadings, records and proceedings, our views are as under :

26 It would also be useful, before we proceed further, to reproduce Rule 2(r), Rule 27(1), (2), (10), Rule 28 (1), (2), (5) and 29 (5), (7) of SEZ Rules and Section 5 of FTDR Act, which read as under :

***Rule 2.(r)** “Import Trade Control (Harmonized System) Classifications of Export and Import Items” means the items notified from time to time by the Central Government under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992);*

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***Rule 27. Import and Procurement — (1)** A Unit or Developer may import or procure from the Domestic Tariff Area without payment of duty, taxes or cess or procure from Domestic Tariff Area after availing export entitlements or procure from other Units in the same or other Special Economic Zone or from Export Oriented Unit or Software Technology.*

Park unit or Electronic Hardware Technology Park unit or Bio-technology Park unit, all types of goods, including capital goods (new or second hand), raw materials, semi-finished goods, (including semi-finished Jewellery) component, consumables, spares goods and materials for making capital goods required for authorized operations except prohibited items under the Import Trade Control (Harmonized System) Classifications of Export and Import Items :

(2) In case of any doubt as to whether any goods or services are required by a Unit or Developer for authorized operations or not, it shall be decided by the Development Commissioner.

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(10) The assessment of imports and domestic procurement by a Developer or a Unit, shall be on the basis of self-declaration and shall not be subjected to routine examination except in case of procurement from the Domestic Tariff Area under the claim of export entitlements :

Provided that where based on a prior intelligence the examination becomes necessary the same shall be carried out by the Authorised Officer(s) after obtaining written permission from the Development Commissioner or the Specified Officer.

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Rule 28. (1) *A Unit or Developer may import goods directly into the Special Economic Zone or through any other —*

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(2) Goods imported through ports or airports, land customs stations, or inland container depots shall be allowed to be transferred in full cargo load or less than container load cargo by direct transfer from such port or airport or inland container depot or land customs station to the Special Economic Zone.

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(5) The goods imported by the Unit or Developer shall be allowed to be transferred from the port or airport to the Special Economic Zone without examination by the Customs Authorities at the port or airport, as the case may be :

PROVIDED that the goods may be examined with the prior permission of the Assistant or Deputy Commissioner of Customs in writing in case there is specific adverse information or intelligence.

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Rule 29 (5) *The units may import goods including precious goods namely gold or silver or platinum or gem and jewellery as personal baggage through an authorized passenger subject to the following procedure, namely :—*

(i) the authorized passenger bringing the precious goods shall declare the goods with the customs authorities at the airport in the arrival hall in the declaration form as specified by Commissioner of Customs in charge of the airport alongwith a duly acknowledged copy of intimation submitted to the authorized officer;

(ii) the authorized passenger shall hand over the goods duly packed indicating name and address of the consignee Unit and accompanied by invoice and packing list to the customs authorities at the airport for detention in the warehouse under a detention receipt;

(iii) the customs officer of the airport shall detain the goods and issue detention receipt;

(iv) the Unit shall file Bill of Entry in quintuplicate alongwith a copy of invoice, packing list and declaration with the authorized officer and the detention receipt number issued by the customs officer at the airport shall be treated as Import General Manifest and item number;

(v) after assessment of Bill of Entry, original Bill of Entry shall be retained by the authorized officer and the remaining copies shall be handed over to the authorized representative of the Unit for presenting at the airport detention counter where goods shall be allowed clearance after receiving the original detention receipt alongwith the authorization from the Unit, by making entries in the warehouse register and detention receipt register;

(vi) after release, the goods shall either be moved to the Unit under the Customs escort or shall be delivered to the Custodian or authorized representative of the Unit after sealing;

(vii) the goods shall be allowed to be taken to the Unit after verification of marks and number of packages by the Authorized Officer at the gate of entry of the Special Economic Zone.

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(7) A Unit may import the goods exported by it which are either found to be defective or damaged by the overseas buyer or have not been taken delivery of by the overseas buyer or when the payment is not forthcoming from the buyer as per agreed schedule after having taken delivery of goods or when buyers return goods due to change of fashion and other market factors by following the procedure under sub-rule (2) and subject to the following conditions, namely :—

(i) the identity of the goods is established at the time of re-import; and

(ii) the goods are re-imported within the warranty period or the validity of the maintenance contract or a period of one year from the date of export, whichever is later.

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Section 5. Foreign Trade Policy. —The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy: Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette.

I. Section 111(d) of the Customs Act :

27 In terms of Rule 27(1) of the SEZ Rules, a SEZ unit is entitled to import without payment of customs duty all goods which are required for its authorised operations except goods which have been specifically prohibited under the “Import Trade Control (Harmonized System) Classifications of Export and Import Items” which phrase has been defined to mean “the items notified from time to time by the Central Government under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992)”. Therefore, only those goods which are prohibited under a notification issued under Section 5 of the FTDR Act will be construed as being “prohibited” for the purpose of the SEZ Act. Respondents have been unable to show any such notification issued under Section 5 of the FTDR which prohibits import of finished jewellery. Therefore, the jewellery importer by petitioner without payment of customs duty was a permissible import in terms of Rule 27(1) of

the SEZ Rules.

Further, there is no prohibition under the SEZ Act or the Rules for import of jewellery into SEZ. In terms of Rule 29 (5) of the SEZ Rules, the units may import “goods” including precious goods, viz., gold or silver or platinum or gem & jewellery as personal baggage through an authorized passenger subject to the prescribed procedures mentioned thereunder.

It is clear from Rule 29(5) of the Rules that the term ‘Goods’ includes jewellery and hence qualifies for import for authorized activity of manufacture of jewellery under Rules 27 (1) of the SEZ Rules.

28 The definition of raw material under Rule 2 (u) of the SEZ Rules, also means any material or goods which are required for the manufacturing process (including catalysts for initial charge), packing material, whether they have actually been previously manufactured or are processed or are still in a raw or natural state. In view of Rule 2 (u) of the SEZ Rules, read with Rule 27 (1) of the SEZ Rules, there is no restriction on the import of jewellery for authorized operations as even previously manufactured items, viz., finished jewellery earlier exported in the present case, can be imported into a SEZ as “raw material”. The definition of ‘raw material’ as per Rule 2 (u) of the SEZ Rules is reproduced hereunder:

(a) basic materials which are needed for the manufacture of goods, but which are still in a raw, natural, unrefined or unmanufactured state, and

(b) any materials or goods which are required for the manufacturing process (including catalysts for initial charge), packing material, whether they have actually been previously manufactured or are processed or are still in a raw or natural state.

Further, this position has also been clarified by the Ministry of Commerce vide its Instruction No.37 dated 7th September, 2009, the relevant extract of which is reproduced hereunder :

2. In view of the provisions contained in Section 2 (r) of SEZ Act, 2005 read with Rule 27(1) of SEZ Rules, it is clarified that import of jewellery and its remaking is an authorised manufacturing activity by an SEZ unit holding letter of approval for manufacturing of jewellery. Further import would include re-import of exported jewellery.

In view of the above, import of finished jewellery for the purpose of remaking in a SEZ is a permitted / authorised operation and there is no prohibition whatsoever on such an activity. In this connection the definition of “manufacture” as contained in Section 2(r) of the SEZ Act is important. The same is reproduced below:

(r) “manufacture” means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining.

(emphasis supplied)

29 Further, in view of what is stated in Rule 27 of the SEZ Rules, it is patently clear that only the DC (respondent no.5) can decide whether any

goods or services as required by a unit or developer are for authorised operations or not. This position has also been clarified by the DC (respondent no.5) vide letter dated 22nd May, 2009 addressed to the Commissioner of Customs, Sahar Airport. However, respondent no.2, even though being fully aware of this position, has failed to consider the said letter while adjudicating the case and passing the impugned order.

Additionally, the same position has been reiterated by the DC (respondent no.5) in the affidavit dated 10th February, 2010 filed in this petition, the relevant extract of which is reproduced hereunder :

"I further say and submit that the provisions of Rule 18 and 19 of the SEZ Rules, 2006 regarding issue of LOA and the formal annexed as Form-G for such a letter do not envisage any specification of the process to be undertaken to manufacture the authorized items or provide service activities as authorized operations by the SEZ unit. The LOA issued to the units, therefore, cannot be restricted to any one or more of the activities covered under the definition of manufacture as given in Section 2(r) of the SEZ Act, 2005, which reads as under :

"Manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining".

I therefore say and submit that in terms of Sec.2 (r) of the SEZ Act, 2005, manufacture among other things, mean repair, re-making, re-engineering, etc.

9. I say that the definition of manufacture given in the SEZ Act, 2005 prevails over other definitions given in any other statute and the same shall have no relevance in interpreting the terms defined and the meaning given in the SEZ Act, 2005. The definition of manufacture given in the SEZ Act shall prevail over other definitions of manufacture given in other enactments. I

say that by virtue of Sec. 9 (3) of the Act, the power to decide as to whether a particular activity constitutes "Manufacture" is vested in the Board of Approval constituted under Sec. 8 (1) of the Act and its decision shall be binding on all Ministries and Departments of the Central Government.

10. I say and submit that the SEZ Act and Rules do not envisage that the LOA issued has to be specific for anyone or more of the processes mentioned in the said definition of manufacture. LOA is for authorised operations for manufacture / providing of service. It is for the unit to decide what technology or process they opt to achieve the manufacture of the items authorized. I say and submit that the Department of Commerce, Ministry of Commerce & Industry vide Instruction No.37 dated 07.09.2009 has clarified as follows" -

"Reference has been received in this department seeking clarification on whether re-melt, re-make and export of imported finished jewellery is an authorized activity in SEZ."

2. In view of the provisions contained in Section 2(r) of SEZ Act, 2005 read with Rule 27 (1) of SEZ Rules, it is clarified that import of jewellery and its remaking is an authorized manufacturing activity by an SEZ unit holding letter of approval for manufacturing of jewellery. Further import would include re-import of exported jewellery."

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12. I say and submit that in terms of Rule 29 (5) of the SEZ Rules, 2006, the units may import goods including precious goods, viz. gold or silver or platinum or gem & jewellery as personal baggage through an authorized passenger subject to following the prescribed procedures mentioned thereunder. I say and submit that it is clear from this Rule that the term 'Goods' includes jewellery and hence qualifies for import for authorized activity of manufacture of jewellery under Rules 27 (1) of the SEZ Rules, 2006. I further say and submit that the definition of raw material under Rule 2 (u) of the SEZ Rules, 2006 also means any material or goods which are required for the manufacturing process (including catalysts for initial charge), packing material, whether they have actually been previously manufactured or are processed or are still in a raw or natural state. I state that in view of Rule 2 (u) of the SEZ Rules, 2006 read with Rule 27 (1) of the SEZ Rules, there is no restriction on the import of jewellery for authorized operations.

13. I further say and submit that in the clarification given by the Board for Approval in the case of M/s. Yash Jewellery Pvt. Ltd., the Board had clarified that repair can be considered as covered

under manufacture in terms of Section 2(r) of the SEZ Act, 2005 and import for repair of finished products manufactured elsewhere is allowed in the SEZ Act, 2005 and Rules. Thus, it is evidence from the clarification given that repairs can be considered as covered under manufacture, irrespective of where the items have been manufactured and the second part of the clarification makes it very clear that repairs even for finished products manufactured elsewhere is permitted under SEZ Act, 2005 and Rules and thereby giving a wider connotation to the meaning of the "Repair" under definition of manufacture in the SEZ Act, 2005.

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16. I further say and submit that Para 4(A.21) of the Foreign Trade Policy is not applicable to SEZ units, as Chapter VII of the Foreign Trade Policy very clearly states that the Policy relating to the Special Economic Zone is covered by SEZ Act, 2005 and the Rules framed thereunder.

17. I say and submit that the finished jewellery imported by the Petitioners under Rule 27 (1) of the SEZ Rules are permitted for import for carrying out the authorized operation, i.e. Manufacture of Jewellery, which has been specifically permitted by the DC in the Letter of Approval issued to the unit."

(emphasis supplied)

30 This affidavit of DC, respondent no.5 before this Court was brought to the notice and attention of respondent no.2 through the reply dated 13th July 2010 to the show cause notice filed by petitioner, which also referred to the Circular / Instruction dated 7th September 2009. However, respondent no.2 has completely ignored the DC's affidavit as well as the Circular while passing an absolutely contrary and diametrically opposite finding in the impugned order. Such a finding recorded by respondent no.2 without considering any of the submissions made by petitioner and relevant documents available on record is in violation of the principles of natural

justice and consequently liable to be set aside.

31 Further, the allegation raised in the show cause notice as well as the finding recorded in the impugned order for invoking Section 111(d) of the Customs Act is the alleged violation of paragraph 4.A21 of the extant Foreign Trade Policy (FTP) prevalent at that point in time. The said paragraph 4.A21 has been referred to in the show cause notice at paragraph 14(a) to state that FTP allows import of raw material only in the form of metal scrap / used jewellery. Accordingly, it has been alleged that since petitioner has reimported unused finished jewellery, they have imported the goods in violation of the said paragraph 4.A21 of the FTP

At the outset, we have to note, paragraph 4.A21 of the FTP governs general import policy of jewellery for the purpose of import in the whole of India. However, for the purpose of the imports into SEZ, provisions of the FTP are not applicable to the facts of the present case, as Chapter VII of the extant FTP which was prevalent at that point in time clearly states that provisions of the FTP are not applicable to the imports into SEZ, which fact has also been accepted by the DC (respondent no.5) in affidavit dated 10th February 2010.

32 In our view, accordingly Section 111(d) of the Customs Act has been incorrectly invoked in the facts of these petitions.

II. Section 111(m) of the Customs Act :

33 Section 111 (m) of the Customs Act provides :

*“SECTION 111. Confiscation of improperly imported goods, etc.
- The following goods brought from a place outside India shall be liable to confiscation:-*

(m) [any goods which do not correspond in respect of value or in any other particular) with the entry made under this Act or in the case of baggage with the declaration made under section 77 [in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54];

Respondent no.2 has completely failed to appreciate the true intent and purport of Section 111(m) of the Customs Act while invoking the same. For invoking Section 111(m) of the Customs Act, the declaration made in an entry under the Customs Act, which is the Bill of Entry filed under Section 46 of the Customs Act, must fail to correspond, in value or any other particular, to the goods actually imported by petitioner. Accordingly, in our view, Section 111(m) deals with intentional mis-declaration and mis-match between what has been declared on the Bill of Entry and what has actually been imported by the importer.

In the facts of the present case, there is absolutely no mis-declaration between the description and / or value declared in the Bill of Entry and the goods actually imported by petitioner, both being diamond studded gold and silver jewellery. Accordingly, question of invoking Section 111(m) of the Customs Act does not arise at all in the present case. It is also

noteworthy that there is no such requirement under the SEZ Act.

34 Respondent no.2 on an erroneous interpretation and construction of Section 111(m) of the Customs Act, has invoked the said sub-section on the following two grounds :

(a) That petitioner has filed Bill of Entry and imported goods which does not find mention as raw materials in the LOP issued by the DC.

(b) Petitioner ought to have filed a declaration in terms of Rule 29(7) of the SEZ Rules for reimporting goods which were earlier exported by it.

None of the above-mentioned allegations/ findings are permissible grounds for invoking Section 111(m) of the Customs Act. None of the above grounds are even sustainable on its own merits for reasons stated below :

A. Raw materials not mentioned in LOP :

(a) The LOP has been issued under Form-G by the DC after considering all the relevant information furnished by petitioner regarding its manufacturing process of remaking imported finished jewellery;

(b) Further, Form-G does not have any place to indicate the raw materials to be used by the SEZ manufacturer. Accordingly, non-mentioning of raw materials in Form-G is not on account of any act or omission or failure of petitioner;

(c) This fact has also been noted specifically by the DC both in letter dated 22nd May, 2009 as well its Affidavit dated 10th February 2010 thereby supporting petitioner's stance;

(d) If the LOP has been issued on account of any alleged suppression or mis-declaration by petitioner at the time of making the application for obtaining the SEZ License, it is the DC who is competent to take action on it and cancel the SEZ license of petitioner, which has not been done till date. The Customs officers cannot sit in judgment over a permission / license issued by a competent authority under another statute, as has been held by the Hon'ble Supreme Court in the case of ***Titan Medical Systems Pvt. Ltd. v. Collector of Customs, New Delhi***⁵ where paragraph 12 reads as under :

12. As regards the contention that the appellants were not entitled to the benefit of the exemption notification as they had misrepresented to the licensing authority, it was fairly admitted that there was no requirement, for issuance of a licence, that an applicant set out the quantity or value of the indigenous components which would be used in the manufacture. Undoubtedly, while applying for a licence, the appellants set out the components they would use and their value. However, the value was only an estimate. It is not the respondents' case that the components were not used. The only case is that the value which had been indicated in the application was very large whereas what was actually spent was a paltry amount. To be noted that the licensing Authority having taken no steps to cancel the licence. The licensing authority have not claimed that there was any misrepresentation. Once an advance licence was issued and not questioned by the licensing authority, the customs authorities cannot refuse exemption on an allegation that there was misrepresentation. If there was any misrepresentation, it was for the licensing authority to take steps in that behalf.

5. 2003 (151) E.L.T. 254 (S.C.)

B. Alleged Violation of Rule 29(7) of the SEZ Rules :

(a) At the outset, there is no allegation in the SCN and / or no finding in the impugned order with respect to any alleged violation of Rule 29(7) of SEZ Rules. This entire issue was raised for the first time in the affidavit dated 25th November 2009 filed by respondent no.2 before this Court. It is settled law that a show cause notice is sacrosanct and all allegations must find mention therein for an assessee to effectively deal with it and respondents cannot be permitted to improve upon the show cause notice or the impugned order by way of filing an affidavit in the Court;

(b) In any event the ingredients of Rule 29(7) of the SEZ Rules are not applicable to the facts of the present case. The imports in question do not correspond to any of the four (4) scenarios mentioned in Rule 29(7) of the SEZ Rules. Accordingly, it cannot be said in any manner that petitioner has not followed the due procedure under Rule 29(7) of the SEZ Rules as petitioner was in law never required to do so;

(c) Also, it is an undisputed fact that Rule 29(7)(b) of the SEZ Rules is not an issue in question in the present case, as it has been clearly stated in the statements and also noted in the show cause notice the goods detained in February 2009 were imported within a period of 1 year prior to the date of import;

(d) Further, in so far as the identification of the goods is concerned, respondent no.2 himself has admitted in the show cause notice that *“However, it could not be ascertained as to when the Jewellery was exported, whether the same piece was exported and whether it was exported within the past one year as required under the provisions of Rule 29(7) of the SEZ Rules”*. When respondent no.2 has himself admitted that the period of earlier export and co-relation to present import cannot be ascertained, it is absolutely unjustified and arbitrary to hold that petitioner ought to have followed the procedure under Rule 29(7) of the SEZ Rules;

(e) Violation, if any, of non-adherence to procedure of Rule 29(7) of SEZ Rules, is only a procedural violation under the SEZ Rules for which appropriate action may be taken by the DC, and cannot be said to be a violation material for the purpose of invoking the provisions of Section 111(m) of the Customs Act. It was also in the course of arguments sought to be contended that petitioner would benefit from such acts. Apart from the fact that there is no embargo of any nature whatsoever on the import of the Consignment and that no benefit whatsoever has accrued to petitioner, petitioner submitted that it has exported 100% of its production and that was not contested.

35 In view of the above, respondent no.2 has completely erred in invoking Section 111(m) of the Customs Act.

III. Section 28 of the Customs Act :

36 Apart from making sweeping and bald statements both in the show cause notice as well as in the impugned order, respondent no.2 has not dealt with the issue of demanding customs duty under Section 28 of the Customs Act at all. Respondent no.2 has arbitrarily invoked Section 28 that too by way of a Corrigendum to the show cause notice, without even dealing with as to how violations, if any, of provisions of SEZ Act or SEZ Rules, disturbs the blanket exemption available to petitioner in terms of Section 26 of the SEZ Act, the relevant extract of which is reproduced hereunder :

(1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely :--

(a) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods imported into, or services provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur.

37 Customs duty under Section 28 of the Customs Act can only be imposed on imports into SEZ if the exemption under Section 26 of the SEZ is withdrawn. However, since there is not a whisper in either the show cause notice or impugned order of such withdrawal of exemption, duty under Section 28 of the Customs Act, cannot be demanded from petitioner.

38 During the course of the hearing, Mr. Kantharia argued that exemption from payment of Customs Duty will not be available since petitioner has violated / breached the conditions of the LOP issued by the DC. Firstly, no such allegation has ever been raised in the adjudication proceedings. Further, and in any event, in case the conditions of the LOP had been breached, until and unless the SEZ permission was cancelled and the area was delicensed by the DC, it cannot be said that the customs duty exemption will not be available to petitioner.

39 In this connection, Sections 15 and 16 of the SEZ Act, the relevant extract of which is reproduced hereunder, would be relevant :

Section 15- Setting up of Unit

(1) Any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, may submit a proposal to the Development Commissioner concerned in such form and manner containing such particulars as may be prescribed:

Provided that an existing Unit shall be deemed to have been set up in accordance with the provisions of this Act and such Units shall not require approval under this Act.

(2) On receipt of the proposal under sub-section (1), the Development Commissioner shall submit the same to the Approval Committee for its approval.

(3) The Approval Committee may, either approve the proposal without modification, or approve the proposal with modifications subject to such terms and conditions as it may deem fit to impose, or reject the proposal in accordance with the provisions of sub-section (8):

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Section 16 - Cancellation of letter of approval to entrepreneur.

(1) The Approval Committee may, at any time, if it has any reason or cause to believe that the entrepreneur has persistently contravened any of the terms and conditions or its obligations subject to which the letter of approval was granted to the entrepreneur, cancel the letter of approval:

Provided that no such letter of approval shall be cancelled unless the entrepreneur has been afforded a reasonable opportunity of being heard.

(2) Where the letter of approval has been cancelled under sub-section (1), the Unit shall not, from the date of such cancellation, be entitled to any exemption, concession, benefit or deduction available to it, being a Unit, under this Act.

(3) Without prejudice to the provisions of this Act, the entrepreneur whose letter of approval has been cancelled under sub-section (1), shall remit, the exemption, concession, drawback and any other benefit availed by him in respect of the capital goods, finished goods lying in stock and unutilised raw materials relatable to his Unit, in such manner as may be prescribed.”

A proposed unit submits application for a SEZ LOP under Section 15(1) of the SEZ Act. The said application after due consideration by the Approval Committee alongwith the DC is either rejected or processed under Section 15(3) of the SEZ Act. Once the Unit's application is accepted and the LOP is issued, the Unit attains a SEZ Unit status and is thereafter entitled to all the exemptions provided under Section 26 of the SEZ Act including but not limited to the exemption from payment of duties of customs.

Subsequently, if the Approval Committee has reasons to believe that an SEZ Unit has persistently violated any provisions of the SEZ Act,

then after giving due opportunity of being heard can cancel the SEZ registration of the said Unit under Section 16(1) of SEZ Act. On such cancellation, the following two consequences arise :

(i) The exemptions under Section 26 of the SEZ Act stand withdrawn. However, such withdrawal of exemption is from the date of cancellation of registration and does not relate back to the date on which the license was granted.

(ii) The Unit has to remit the exemption, concession, drawback and any other benefit availed by him in respect of the capital goods, finished goods lying in stock and unutilised raw materials relatable to his Unit.

40 In facts of the present case, petitioner's SEZ license has not been cancelled under Section 16(1) till date, let alone during the impugned period. Accordingly, petitioner has rightly and legally continued to avail of the customs duty exemption under Section 26 of the SEZ at all points in time. Further, and in any event, even if the SEZ registration of petitioner is cancelled, then petitioner is only liable to remit the duty concessions which have been availed with respect to capital goods and unused raw material / unsold finished stock only. Even at the highest, there is no question whatsoever of going back 5 years and demanding Customs Duty on all imports made in the past.

IV. Section 114A of the Customs Act :

41 The show cause notice did not even propose to impose penalty under Section 114A of the Customs Act. However, despite the same respondent no.2 has imposed penalty under Section 114A of the Customs Act in the impugned order. It is settled law that the impugned order cannot traverse beyond the show cause notice as has been held in the following decisions of the Hon'ble Supreme Court of India :

(a) ***Commissioner of Central Excise V/s. Gas Authority of India***⁶.

Paragraphs 9 and 10 of the said judgment read as under :

9. If the case of the Department itself in the show-cause notice was that lean gas is a by-product, then we fail to understand as to the basis for denying the benefit of MODVAT credit to the assessee during the relevant period (October 1998 to January 1999) under Rule 57-D. As repeatedly held by this Court, show-cause notice is the foundation of the demand under the Central Excise Act and if the show-cause notice in the present case itself proceeds on the basis that the product in question is a by-product and not a final product, then, in that event, we need not answer the larger question of law framed hereinabove.

10. On this short point, we are in agreement with the view expressed by the Tribunal that nowhere in the show-cause notice it has been alleged by the Department that lean gas is a final product. Ultimately, an assessee is required to reply to the show-cause notice and if the allegation proceeds on the basis that lean gas is a by-product, then there is no question of the assessee disputing that statement made in the show-cause notice.

(b) ***Commissioner of Customs V/s. Toyo Engineering***⁷. Paragraph 16

of the said judgment reads as under :

16. Learned counsel for the Revenue tried to raise some of the submissions which were not allowed to be raised by the Tribunal

6. (2008) 232 ELT 7 SC

7. (2006) 7 SCC 592

before us, as well. We agree with the Tribunal that the revenue could not be allowed to raise these submissions for the first time in the second appeal before the Tribunal. Neither adjudicating authority nor the appellate authority had denied the facility of the project import to the respondent on any of these grounds. These grounds did not find mention in the show cause notice as well. The Department cannot be travel beyond the show cause notice. Even in the grounds of appeals these points have not been taken.

42 Accordingly, on this count itself, the imposition of penalty under section 114A of the Customs Act ought to be set aside.

CONCLUSION :

43 In view of the above, we hereby quash and set aside the impugned notices dated 14th July 2009 read with the addendums dated 21st July 2009 and addendum/corrigendum dated 18th August 2009 to the impugned notice, as well as the impugned orders dated 18th August 2010/19th August 2010 in all petitions.

44 We also discharge petitioner from its obligation to renew the Bank Guarantee as furnished for provisional release at the time of admission of petitions. The Bank Guarantees be cancelled and returned to petitioners within eight weeks from the date this judgment is uploaded. Where consignments have not been released, such parties may apply for release. The application shall be granted within eight weeks.

45 All petitions disposed. No order as to costs. All interim applications also accordingly stand disposed.

(A.S. DOCTOR, J.)

(K.R. SHRIRAM, J.)