

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Custom Appeal No. 50111 of 2020-SM

(Arising out of order-in-original No. 8-10/ COMMR/CUS/ IND/2019-20 dated 30.08.2019 passed by the Commissioner, Central Goods & Service Tax and Central Excise, Indore).

M/s Fakhri Steels and Iron

801, Paresh Tower, Lohamandi
Indore (M.P.)

Appellant

VERSUS

Commissioner of Customs

Manik Bagh Palace,
P.O. Box No. 10, Indore, (M.P.)

Respondent

APPEARANCE:

Sh. Jitendra Singh, Advocate for the appellant

Sh. Ishwar Charan, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50564/2022

DATE OF HEARING: 11.03.2022

DATE OF DECISION: 04.07.2022

ANIL CHOUDHARY:

The appellant is a dealer of iron and steel products namely M.S. Pipes etc. They are in appeal against order of confiscation and redemption fine of Rs. 8 lakhs and penalty of Rs. 25 lakhs.

2. Brief facts of the case are that M/s New Tech Pipe Limited (NTPL in short) is a SEZ unit, Pithampur engaged in manufacture of M.S. Pipes. On the basis of intelligence that the said NTPL was engaged in evasion of duty by resorting to clandestine

removal of finished goods, simultaneous searches were carried out by the Officer of DGCEI at eight places as follows:-

- i) Factory of M/s New Tech Pipe Ltd., situated at F-21, 22, 23 SEZ, Pithampur.
- ii) Factory premises of M/s New Tech Abrasive Ltd., situated at F-59, 60, 61, SEZ, Pithampur.
- iii) Office of M/s Swastik Udyog Ltd., and residence of Sh. Hemant Sharma, Director at 84, Siddhipuram, Indore.
- iv) Residence premises of Sh. Dinesh Sharma, Director, 2, Mahaveer Nagar, Dewas.
- v) M/s Vipul Trading Co. 38, Kothi Road, Dewas.
- vi) M/s Srikrishna Food & Beverages Ltd., E-99, Industrial Area, Dewas
- vii) Residential premises of Sh. Ganpat, Machine Operator of M/s NTPL, 11, Kaanch Building, Jeevan Vihar colony, Pithampur.
- Viii) Business premises of M/s Fakhri Steel & Iron, Indore

3. During the search some incriminating documents were recovered. In the search at the residential premises of Sh. Ganpat, Machine Operator of NTPL, resulted in recovery of a computer. This computer had the data in respect of sales made by NTPL during the period 01.04.2009 to 23.11.2009 as well as partywise ledger for the same period. When this sales data was compared with the information in respect of clearances affected by NTPL (received from customs), a huge difference was noticed. On further scrutiny of documents which were recovered during search, it appeared that NTPL have been submitting information in respect of purchase, sales and stock to State Bank of India. Further, on enquiry from the bank officials, they stated that the information provided by NTPL was physically verified by them from time to time and was found in order. On enquiry with the security staff posted at the SEZ revealed

that NTPL and its Director Sh. Dinesh Sharma used to receive the raw materials as well as clear the finished goods during the night when no customs personnel was available for checking the inward and outward movements of the goods. The security persons allowed the movement of the goods on the basis of invoices signed by the staff of NTPL. It further appeared that NTPL was clearing the goods both accounted (on payment of duty) and unaccounted or clandestinely. The payment for sales made clandestinely was collected in cash, which was deposited in various bank accounts as per the directions of Sh. Dinesh Sharma, Director of NTPL.

4. In his statement dated 25.11.2009 Sh. Dinesh Sharma, Director of M/s NTPL on going through invoices seized from the factory, admitted that these invoices pertain to clearance of goods without payment of duty leviable thereon. He further stated that the goods were removed in the night hours, when there was no customs staff on duty.

5. Scrutiny of documents seized and the data recovered from the seized CPU revealed that M/s NTPL had received huge quantity of unaccounted raw material in as much as per customs record of NTPL, during period 27.03.2009 to 23.11.2009, they have received and accounted 1083.82 MT valued at Rs. 3,22,60,098/- however, as per the data retrieved from CPU, during this period i.e. 27.03.2009 to 23.11.2009 they received 7134.117 MT of raw material valued at Rs.21,92,31,184/- from the various suppliers, as detailed in these documents. Thus, it appeared that 6050.29 MT (7134.117 – 1083.82) of unaccounted raw material was received by

them for clandestine manufacture and clearance thereof without payment of customs duty.

6. Enquiry made with the respective supplier (as per records of M/s NTPL) also confirmed the supplies as detailed in the records of M/s NTPL. In his statements dated 06.04.2010 recorded during investigation, Sh. Dinesh Sharma, Director of M/s NTPL also admitted that they had received 7005.519 MT of raw materials (CR/HR Strips/ CRCA) in the unit and the total production during period March, 2009 to October, 2009 was 7284.11 MT.

7. M/s NTPL have procured term loan and cash credit limit from State Bank of India and therefore they were required to file periodical stock statement of their transactions to the bank authorities. As per these statements during period March, 2009 to Oct. 2009, M/s NTPL had received total raw material of 7157.238 MT valued at Rs. 22,03,66,150/-. The total pipes manufactured was CR Pipe 3081.64 MT valued Rs. 11,75,00,595+H.R. Pipe 3764.64 MT valued Rs. 13,01,90,349/- and clearances were CR Pipe 2698.13 MT valued Rs. 10,69,40,603/- H.R. Pipe 3415.97 MT valued Rs. 12,17,01,904/-

8. As per information received from the Appraiser, during period 27.03.2009 to 23.11.2009 M/s NTPL had cleared 509.73 M.T. of M.S. pipes, whereas, as per their own ledger actual clearance of pipes was 6532.19 M.T. valued at Rs. 24,46,47,724/-. This indicated that that M/s NTPL were engaged in massive evasion of Custom duty.

9. Scrutiny of seized documents revealed that while M/s NTPL had cleared goods to some genuine purchasers on payment Customs duty, they had also cleared goods on invoices to following six firms, on which they have not paid Customs duty:

- a) M/s Chamunda Iron & Steel P. Ltd. 2569.044 MT
- b) M/s Neesa Infrastructure Ltd. Indore 1441.39 MT
- c) M/s Siddhi Iron & Steel Ltd. Pithampur, 697.69 MT
- d) M/s Swastik Udhog 993.215 MT
- e) M/s Vipul Trading Company 304.48 MT
- f) M/s New Tech Abrasive Ltd. Pithampur 16.642 MT

10. Investigation further revealed that these firms were created in the name of persons associated with M/s NTPL, which is evident from the following details:

Name of the firm	Director/ Proprietor
M/s Chamunda Iron & Steel P. Ltd.	Shri Dhanaram Chadokar Accountant, authorized signatory of M/s NTPL and issued invoices with his signature
M/s Siddhi Iron & Steel Ltd.	--do--
M/s Swastik Udhog	Shri Hemant Sharma Proprietor- Brother of Shri Dinesh Sharma, Director of M/s NTPL

11. Shri Dhanaram Chadokar Accountant of M/s NTPL in his statement dated 30.04.2010 admitted that the invoices were issued/signed by him and Shri Sanjay Bandi (another Accountant) and that payments for these were received by cheques were

accounted in the books of M/s NTPL. He further stated that the goods purchased by M/s Chamunda and M/s Siddhi were sold to different parties including M/s Fakhri Steel (Appellant) and the payment of the said material was directly received by Shri Dinesh Sharma in cash. Shri Hemant Sharma Director of M/s NTPL in his statement dated 25.11.2009, had deposed that the major portion of the pipes removed without payment of Customs duty by New Tech Pipe Ltd. were sold and delivered to M/s Fakhri Steel (Appellant). Shri Nikhil Tiwari and Shri Vikas Atre both Marketing Executive of M/s NTPL, Pithampur in their respective statements dated 28.11.2009, stated that M/s Fakhri Steel & Iron, Lohamandi, Indore was the larger buyer.

12. It further appeared that M/s Fakhri Steel & Iron were receiving pipes from NTPL on which no custom duty was discharged. In the course of search in the premises of M/s Fakhri Steel & Iron on 23.11.2009, 1,46,723 kgs. of pipes valued at Rs. 50,62,013/- were found stored in their premises. It appeared to Revenue that these were cleared to them by M/s NTPL both under invoice on payment of customs duty and also without invoice being without payment of duty. Under the belief that the goods/ pipes found in the premises of the appellant are liable to confiscation and same were detained by the officers under panchnama dated 23.11.2009 and were subsequently placed under seizure vide panchnama dated 15.12.2009. A separate show cause notice was issued with regard to the seized goods of M/s Fakhri Steel & Iron being show cause notice No. IV(6)INV/RUI/09-15591 dt. 19.05.2010.

13. Based on the aforementioned facts and circumstances, Revenue issued show cause notice dated 07.08.2013 to M/s NTPL, its directors and others, including this appellant, alleging inter alia that M/s NTPL, a SEZ unit was engaged in clandestine clearance of part of their production and accordingly duty was demanded from them and penalty was proposed on others including this appellant for alleged clandestine receiving and storage of goods, on which appropriate custom duty was not paid, allegedly removed by M/s NTPL clandestinely.

14. This appellant contested the show cause notice and filed detailed reply inter alia stating that the goods found and seized from his premises have been purchased from the open market for which payment was made through banking channels. He also led documentary evidence in the form of purchase invoices and ledger account in support of stock in hand found at the time of search, and also requested for release of the goods. It was also stated that the statement recorded during the investigation including of Mr. Murtaza Hussain, employee of the appellant as well as the statement of Sh. Dinesh Sharma, Director of M/s NTPL and others, have been given under coercion and are not reliable. It was also pointed out that the statement of Sh. Dinesh Sharma, Director of M/s NTPL and others stating that this appellant was buyer of the goods manufactured by NTPL, does not lead to the conclusion that the appellant have received goods in a clandestine manner. It was further urged that the most of the purchase deals are done through the Dalal/ Traders, from the open market.

15. The show cause notice was adjudicated vide order-in-original dated 30.08.2019 by the learned Commissioner who inter alia recorded the following findings:-

(a) There are ample proof of evidence that the appellant was involved in the clandestine receiving of goods from M/s NTPL. That Sh. Dinesh Sharma, Director of M/s NTPL, Pithampur in his voluntary statement recorded under section 108 of the Customs Act, 1962 on 25.11.2009, has deposed that major portion of the pipe removed without payment of customs duty by M/s NTPL were sold and delivered to the appellant.

(b) That Sh. Nikhil Tiwari and Sh. Vikas Atre both marketing Executive of NTPL have in their voluntary statements dt. 28.11.2009 deposed that the appellant were the largest buyer of the NTPL. Further, the owner of vehicles whose trucks were used for transport of goods without payment of duty, in their voluntary statement recorded under Section 108 of the Customs Act, stated that they had delivered the goods at the premises of the appellant. These vehicle owners have stated that they had received part payment of freight from M/s NTPL and rest from the appellant. Further, Sh. Abbas Ali, the authorised representative of the appellant has clearly deposed on 23.04.2010 under Section 108 that the goods might have come to their premises as they were placing orders to the agents, who in turn purchased goods from the manufacturers.

(c) That Sh. Dhanram Chadokar, Director of M/s Chamunda Iron & Steel Pvt. Ltd., in his voluntary statement dt. 30.04.2010 has deposed that the invoices of clandestine removal was issued

in their name but the goods were actually sent to M/s Fakhri Steel & Iron.

(d) That during search in the appellant's premises certain incriminating documents like handwritten kachhi diaries were recovered, which appeared showing the details of sale of goods by the appellants without raising bills. Opportunities were given to the appellants to explain the same, however, they did not submit any information in this regard.

(e) As per the amended Section 28 of the Customs Act, 1962 show cause notices issued prior to 06.07.2011 by officers of Customs, which would include officers of Commissionerates of Directorate General of Central Excise Intelligence and similarly placed officers stand validated since these officers are retrospectively recognized as 'proper officers' for the purpose Sections 17 and 28 of the said Act. As far as judgement of Hon'ble Supreme Court in the case of M/s Canon India Pvt. Ltd., it is submitted that department has filed the review petition before the Hon'ble Supreme Court.

(f) That on the issue of cross-examination, the following case laws are relied by the Revenue:-

- i) N. S. Mahesh vs. Commissioner of Customs, Cochin - 2016 (331) ELT 402 (Ker.)
- ii) Surjeet Singh Chhabra vs. UoI -1997 (89) ELT 646 (SC)
- iii) Kanungo & Co. vs. Collector of Customs, Kolkata & Others - 1993 (13) ELT 1486 (SC).
- iv) Kiri Shrimankar vs. Commissioner of CGST & Central Excise - 2019 (367) ELT 759 (M.P.)
- v) M/s A.V. Agro Products Ltd., vs. CC, CE and CGST, new Delhi -2020 (373) ELT 258 (Tri. Del.)

16. Based on the aforementioned observations and findings, the learned Commissioner confirmed demand of Rs. 12,36,212/- from M/s NTPL, confiscated 1,46,723 kg. of pipes seized in the premises of M/s Fakhri Steel & Iron valued at Rs. 50,62,013/- under Section 111(j) of the Customs Act giving option to redeem on payment of fine of Rs. 8 lakhs, also imposed penalty under Section 112(iii) and 114AA of the Act on M/s NTPL. Further, imposed penalty of Rs. 5 lakhs on this appellant under Section 112(ii) of the Customs Act.

17. In respect of show cause notice dated 02.07.2010, 245.626 MT of pipes valued at Rs. 84,74,097/- seized in the premises of M/s NTPL were ordered to be confiscated under Section 111(j) of the Act with option to redeem on payment of fine of Rs. 15 lakhs alongwith penalty under Section 112(ii). In respect of show cause notice dated 07.08.2013, confirmed demand of Rs. 5,59,58,977/- on M/s NTPL under Section 28(1)/ 28(4) of the Customs Act. Further, ordered confiscation of raw materials alleged to be improperly procured by M/s NTPL. However, the goods were not available and no redemption fine was demanded, with further penalty of Rs. 50 lakhs imposed under Section 114(ii) on M/s NTPL.

18. Further, finished goods alleged to be cleared improperly by NTPL, were ordered to be confiscated, however, fine was not imposed, the goods were not physically available and penalty of Rs. 50 lakhs was imposed under section 112(ii) of the Act. Further, penalty was imposed on M/s NTPL under Section 114A and 114AA of the Act.

19. So far this appellant M/s Fakhri Steel & Iron is concerned penalty of Rs. 20 lakhs have been imposed under Section 112(ii) of the Act. Penalty was also imposed on other co-noticee under Section 114(ii) and 114AA of the Act.

20. Being aggrieved, this appellant is in appeal before this Tribunal inter alia on the following grounds:-

A. learned Commissioner has erred in relying on the statements of Dinesh Sharma Director of NTPL, Nikhil Tiwari and Vikas Atre, and some transporters, recorded at the back of the Appellant, to support the allegation that the appellant aided and abetted in clandestine removal of goods from the factory of NTPL, without first examining and giving opportunity to cross examine these witnesses. This is contrary to the provisions contained under section 138B of the Customs Act 1962 (which is pari passu of Section 9D of CEA 1944) and the law is settled through various judgements of higher judiciary. Appellant respectfully relies on the following case laws ;-

- I) 2002(143) ELT 25(SC) Arya Abhushan Bhandar vs Union of India
- II) 2016(340) ELT 67(P&H)- Jindal Drugs Pvt Ltd versus Union of India
- III) 2016(334) ELT 302(Guj) Manek Chemicals Pvt Ltd versus Union of India

B. Because learned Commissioner has erred in holding the goods seized from the appellants premises as liable to confiscation, on the mere assumption that the same might have been removed from the factory premises of M/s NTPL, brushing aside the

appellants claim of ownership of the goods based on tangible evidence in the form of purchase invoices and ledger account showing payments made to the suppliers towards price of the purchased goods.

C. Ld Commissioner's finding in para 85 of his Order-in-Original are as under- "85 during the search conducted in the premises of M/s Fakhri Steel and Iron, Indore, it was noticed that 1,46,723 kg of pipes valued at Rs. 50,62,013/-were stored. The intelligence along with other circumstantial evidences, collected at other searched premises, indicated that M/s Fakhri Steel and Iron were receiving pipes from NTPL on which customs duty was not discharged. It also appeared that sometimes goods were cleared to M/s Fakhri Steel and Iron without any invoice and sometimes invoices having names of other consignees. Therefore on the reasonable belief that the goods were stored there had not suffered customs duty and therefore were liable to confiscation under the provisions of Section 111(j) of the customs Act 1962, the same were detained. Therefore, on the basis of confessional statements of Sh. Dinesh Sharma and supporting statement of Nikhil Tiwari and Vikas Atre it appeared that the goods stored in premises of M/s Fakhri Steel and Iron were cleared by NTPL without payment of customs duty, the 1,46,723 kg of pipes valued at Rs. 50,62,013/-were seized under section 110 of Customs Act 1962.

D. In this regard, it is urged, Dinesh Sharma have submitted that his confessional statement could not be relied upon, as he has filed his retraction. **M/s Fakhri Steel & Iron have submitted that the goods seized from their premises were obtained from local suppliers through an agent. They have further argued that the statement of Murtaza Husain had been extracted under coercion and therefore has no evidential value in this case"**

21. With the above observation Ld. Commissioner ignored the detailed submissions made by the Appellant in reply to the SCN, qua the source of seized goods from the market place (not from NTPL) supported by invoices, ledger account for the financial year 2009-10, stock in hand on the date of search and copies of the relevant purchase and sales invoices. The order in original passed by Ld Commissioner, without giving any finding for rejecting the cogent evidence, being sub- silentio is liable to be set aside.

22. Section 124 of the Customs Act stipulates that No order Confiscating any goods or imposing any penalty on any person shall be made under this chapter, unless the owner of the goods or such person is given a notice in writing with the prior approval of the officer not below the rank of Assistant Commissioner, informing him of the grounds on which it is proposed to confiscate the goods or to impose penalty. Appellant having purchased the goods using in stock, stored in his shop premises at the time of search, being the lawful owner ought to have been served a notice asking him to explain as to why the goods should not be confiscated. However the department without comparing the stock in trade as per his books of account at the time of seizure, and without serving him any notice proposing confiscation of the goods, has subsequently confiscated the goods, which in respectful submission of the appellant is liable to be set aside as being contrary to the provisions of section 124 of the customs Act 1962.

23. Without prejudice to the appellants submission that the goods seized from his shop premises are his lawful possession and

should be restored to him and that he is not concerned with the evasion of customs duty if any on the part of noticee No 1-M/s NTPL, learned tribunal may kindly appreciate that in order to allege that Appellant abetted with NTPL in evasion of duty, the department has heavily relied on the statements of third parties recorded under threat and coercion, at the back of the appellant and documents allegedly resumed during investigation, as mentioned hereinabove, wherein the details of clearances made by NTPL on payment of customs duty, as per the official records provided by SEZ authorities have been compared with data said to be compiled on the basis of bilties of Sri Sai transport for the period 08.08.2009 to 05.11.2009 and for the period 09.04.2009 to 19.11.2009 the SEZ office data is compared with an 'outward register' seized by the officers during the search at NTPL (seizure doc 36).

24. The two set of records namely, outward register and entries taken from the bilties of Sai transport, though pertaining to the concurrent period, but are contrary to each other and therefore the conclusion that the goods cleared from the factory of NTPL were further dealt by the Appellant is patently perverse. Department should first decide which set of document is reliable, while the outward register recovered from the factory of the manufacturer NTPL and containing data for longer period may merit more weightage as it contains entries both of the goods cleared on payment of duty as well as those allegedly cleared without payment of duty. As per entries in the outward register out of total 93 consignments, admittedly 82 are cleared on payment of duty,

whereas 11 appear to be cleared without duty, as these are not appearing in the record of duty paid clearances provided by SEZ authorities.

25. As per the owner of vehicle number MP09- GE 6461, Anil Kushwaha in his statement dated 14.02.2010, said to have stated that he cleared goods on 09.04.2009, and on other dates he transported goods from NTPL to Fakhri Steel, and no document except bilty was given to him . In the chart at para 8 of SCN, consignment of 1.500 MT on 09.04.2009 by vehicle MP09GE6461 is shown as **cleared on payment of duty (COPOD** in short). Similarly on 24.09.2009, 20.10.2009, and 28.10.2009 the consignments transported by his vehicle are **cleared on payment of duty (COPOD)**, same truck on dated 24.09.2009, though mentioned in the bilty of Sai transport, but the clearances are on payment of duty. Therefore the allegation that in this vehicle the goods were sent by NTPL to appellant without payment of duty are unsubstantiated and contrary to facts on record. The order passed relying on the wrong facts is liable to be rejected.

26. Similarly it is mentioned in para 9.1.1 of SCN, that one Sh. Govind Mittal said to be the owner of vehicle No. MP09K C - 5170 in his statement dated 19.02.2010 allegedly stated that he transported steel pipes from NTPL to Fakhri Steel on 01.05.2009, 06.05.2009 and 09.06.2009, and at the time of transportation no document except bilty was given to him. However, the chart under para 8 of the SCN, compiled on the basis of the data of duty paid clearances from SEZ, and entries in outward register recovered

during search at NTPL shows that on 01.05.2009 as well as on 09.06.2009 the same vehicle transported goods which were **cleared on payment of duty (COPD). When as per the relied upon record, the goods are duty paid, the same are not offending goods liable to confiscation and the question of Appellant abetting NTPL in evasion of duty and consequential imposition of penalty does not arise.**

27. Ld Commissioner-respondent in passing order of confiscation of the goods seized, has erred in assuming that the goods recovered and seized from the Appellant's premises are the very same goods as have been cleared without payment of customs duty from the factory premises of NTPL, without there being any tangible evidence as-

- I)** There is no seizure of any goods during transit from NTPL to the Appellants premises.
- II)** No record of purchase and sale of unaccounted goods received from NTPL. No Instances of sale of such goods to identified parties.
- III)** No recovery of unaccounted cash attributable to sale proceed of goods clandestinely received from NTPL
- IV)** Even from the data compiled on the basis of outward register/ bilties as per para 7.1 or para 8 of the SCN, not having details of any identifying marks, quantitative details or value on the basis of which it can be confirmed that these particular seized goods belong to which particular consignments, does not support the allegation against the Appellant that the goods in their possession are non duty paid goods received from NTPL. Ld. Commissioner has relied upon the uncorroborated statements without testing the same by way of cross examination before him, ignoring the documentary

evidence of acquisition of the goods being purchase of goods by the Appellant from other Traders (registered under Sales Tax/VAT).

28. Confiscation of goods on the basis of mere assumptions and presumptions and without there being any tangible evidence to correlate that the same are received from NTPL on which no duty of customs has been paid by the manufacturer, is contrary to the law propounded by this Tribunal in the case of Arya Fibers Pvt. Ltd. Vs. Commissioner of C. Ex., Ahmedabad-II - 2014 (311) ELT 529 (Tri.-Ahmd.) which is upheld by Hon'ble High Court of Delhi in the case of M/s Flevel International versus Commissioner of C. Ex. - 2016 (332) ELT 416 (Del.). Appellant respectfully relies on the judgement of Hon'ble Supreme Court in the matter of Oudh Sugars vs. Assistant Collector - 1978 (2) ELT (J172) (SC),. holding that duty demand cannot be based on inferences involving unwarranted assumptions.

29. In terms of the law propounded by Hon'ble Supreme court in the case of Canon India Pvt. Ltd., only the officer who was authorized to assess the goods cleared from SEZ, during the relevant period or his successor in the same post can issue demand of additional / differential customs duty which escaped levy for any reason, under section 28 of the Customs Act 1962, and no other officer can issue Show cause notice. Thus, the SCN is wholly without jurisdiction.

30. Hon'ble Delhi High Court in the W. P. (CRL) 821/2021CRL MISC 5945/2021of Gopal Gupta Vs. Principal

Additional Director General, DRI, issued notice to the Department and stayed proceedings initiated vide SCN dated 26.09.2019 in view of the petitioners challenge to the authority of DRI officers under section 104, 100/102, 105, 110 and 124 of the Customs Act 1962, following the judicial precedent of the verdict of Hon'ble Supreme Court in the matter of M/s Canon India Pvt. Limited. Accordingly, he prays for allowing the appeal with consequential relief.

31. Having considered the rival contentions, I find that the goods under dispute are not the specified goods under Section 123 of the Customs Act. In such facts and circumstances, when admittedly it is a case of town seizure, the onus lies on Revenue to prove that the goods/ pipes lying in the premises of this appellant have been received by him in a clandestine manner from SEZ unit, on which Custom duty have not been paid. The General Rule is that the goods which are available in the open market, are presumed to have suffered the duty. If it is alleged by Revenue that the goods lying or found in the shop/godown premises of the assessee are not duty paid, it is the onus on Revenue to establish such allegation. I find that save and except assumption and presumption, no cogent evidence has been led by Revenue in support of its allegation. Strong reliance have been placed on the statement of several persons, which have either been retracted and/or not tested by cross-examination in the adjudication proceedings. Thus the statements have no evidentiary value, for ignoring the mandate of Sec. 138B of the Act. I further find that this appellant has led cogent evidence in support of their contentions that the goods found in the

stock in their premises have been purchased from the open market, for which payments have been made through banking channels. When the transaction is through banking channels there is prima facie proof of genuineness of the transaction. The purchase invoices are supported with Road permit (pre-authenticated) under the Sales Tax/VAT law.

32. I further find that admittedly M/s NTPL – manufacturer is situated in the SEZ premises. Such premises are bonded premises under physical control of the officers of Revenue. There is no allegation that the officers who were posted at the said SEZ Pithampur, were hand in glove with M/s NTPL and this appellant. It is nowhere adequately found how the finished goods went out from the factory premises (under physical control) without there being proper documents and entry in appropriate records. Neither it has been explained as to how M/s NTPL received raw material clandestinely. I find that the show cause notice is prima facie based on bald allegation, which did not stand the test of adjudication.

33. I further find that the impugned order of confiscation and penalty is also bad, as no SCN have been issued for confiscation on the owner-appellant, as required u/s 124.

34. In the facts and circumstances, I also hold that the show cause notice is bad as the same has been issued by the Officers of DGCEI, who are not the proper officer as required under Section 28(1)/28(4) of the Customs Act, as has been held by the Hon'ble

Supreme Court in the case of **Canon India Pvt. Limited** which has also affirmed order of Hon'ble Delhi High Court in the case of **Mangli Impex**. I find that the ruling of **Canon India Pvt. Limited** have been further relied by Hon'ble Supreme Court itself in similar other matters, and also by some of the High Courts. In this view of the matter, I hold that the show cause notice is wholly without jurisdiction.

35. In view of my findings and discussions hereinabove, I allow this appeal and set aside the impugned order with consequential relief, so far as this appellant is concerned. Appeal allowed. The confiscated/seized goods are also released by way of consequential relief.

(Pronounced on 04.07.2022).

(Anil Choudhary)
Member (Judicial)