 <p><b>OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS, CUSTOM HOUSE: MUNDRA, KUTCH MUNDRA PORT &amp; SPL ECONOMIC ZONE, MUNDRA-370421 Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62</b></p>	
A. File No.	: F. No. VIII/48-20/Adj./ADC/MCH/2018-19
B. Order-in- Original No.	: MCH/ADC/AK/96/2019-20
C. Passed by	: Shri Ajay Kumar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order /Date of issue	: 17.01.2020/17.01.2020
E. Show Cause Notice No. & Date	: S/15-82/Enq-Paban/SIIB/CHM/2017-18 Dated 09.10.2018
F. Noticee(s)/Party/ Importer	: 1.M/s Shorewood Enterprise Co. Ltd., Hong Kong C/o M/s Advani Sachwani and Heera Advocates, Nulwala Building, 41, Mint Road, Opp. GPO, Fort Mumbai- 400001. 2.Shri Paban Kumar Sonthalia, M/s Janti Enterprise, 4, Bon Behari Bose Road, Ground Floor, Shibpur, Howrah, West Bengal-711101

OFFICE OF THE PRINCIPAL  
COMMISSIONER OF CUSTOMS

2361°

20 JAN 2020

INWARD SECTION  
Custom House, Mon.

1. यह अपील आदेश संबंधित को निःशुल्क प्रदान किया जाता है।

This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए- 1- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-

Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

“ सीमा शुल्क आयुक्त (अपील), कांडला

7 वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009”

“THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA

Having his office at 7<sup>th</sup> Floor, Mridul Tower, Behind Times of India,  
Ashram Road, Ahmedabad-380 009.”

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।

Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-

Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –

- (i) उक्त अपील की एक प्रति और

A copy of the appeal, and

- (ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं०-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।

This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपील ज्ञापन के साथ ड्यूटी/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।

Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम, 1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।

An appeal against this order shall lie before the Commissioner (A) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

**Subject:- Show Cause Notice F. No. S/15-82/Enq-Paban/SIIB///CHM/2017-18 d ated 09.10.2018 issued to M/s Shorewood Enterprise Co. Ltd., Hong Kong C/o M/s Advani Sachwani and Heera Advocates , Fort Mumbai-400001 and Shri Paban Kumar Sonthalia, proprietor of M/s Janti Enterprise (IEC No.0214025381), Howrah, West Bengal-711101.**

## BRIEF FACTS OF THE CASE

The Deputy Director, DRI, Gandhidham, vide letter F.No.DRI/AZU/GRU/GI/Misc/2016 dated 16.10.2017 informed that consignment under BL No. COAU 7083048400 dtd: 29.08.2017 has been imported by Shri Paban Kumar Sonthalia, (IEC 0214025381), proprietor of M/s. Janti Enterprise, 4, Bon Behari Bose Road, Ground Floor, Shibpur, Howrah, West Bengal - 711101 (here-in-after referred to as "the importer"/"Noticee" for the sake of brevity). It was further stated that no amendment/re-export request in respect of the subject containers should be entertained and 100% examination should be carried out in presence of the DRI. Bill of Entry has not been filed in the said consignment. Accordingly, the Container No. FCIU9588410 under Bill of Lading No. COAU7083048400 dated 29.08.2017 was 100% de-stuffed and examined by the officers of Docks Examination, Mundra CFS, in presence of officers of DRI, Gandhidham, under Panchnama dated 24.10.2017, 30.10.2017, 31.10.2017, 01.11.2017 and 02.11.2017. During the examination, it was noticed that the imported cargo i.e. Electronic goods and Mobile Accessories comprising mainly of mobile screen guards, Mobile Battery with cover and sticker, Bluetooth Earphones and Speakers, Charger, Data cable, Mobile touch screen panel, portable music player, Smart music lamp, i-phone case, USB cable and Charger, Mac Book Case, Wireless Headphone and various other articles (as detailed in annexures to above referred panchnama). During examination, it was also found that major proportion of the goods (as detailed in various panchnama) imported were bearing trademarks and logo of various Brands viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Panasonic, Micromax, Bose, Sony, Xiaomi etc.

1.1 Information was received as per the Directorate General of Revenue Intelligence, Kolkata, letter F.No. DRI/KZU/Misc-03/2017 dated 20.10.2017 issued by Joint Director, DRI, Kolkata, addressed to the Additional Director General, DRI, Mumbai and DRI, Ahmedabad , which was later on referred to the Customs House Mundra, vide letter F.No. DRI/AZU/GRU/GIC/2017-18 dated 15.01.2018 issued by the Deputy Director, DRI, Gandhidham. Vide the said letter, it was stated that IEC No. 0214025381 issued in the name of the importer is being used for imports of miscellaneous goods (mostly mobile accessories and other electronic goods) apparently without the knowledge of the IEC holder. The importer was examined under Section 108 of the Customs Act, 1962 by the officers of the Directorate General of Revenue Intelligence, Kolkata. The importer in his statement dated: 17.10.2017, recorded under Section 108 of the Customs Act, 1962, stated that only two consignments at Kolkata were imported under the said IEC, one in August 2015 and another in April 2017. He expressed his total ignorance about the goods imported under the rest of consignments and he admitted that he gave his IEC to one Nirmal Goyal. Shri Nirmal Goyal, in his statement dated: 17.10.2017, recorded under Section 108 of the Customs Act, 1962 stated that he in turn, provided the IEC to one Praveen Jain of Howrah but he did not know about who are actually importing the goods

and what goods are being imported through his IEC except the two consignments stated above. The importer and Shri Nirmal Goyal could not provide the know-how of Shri Praveen Kumar Jain. Further, the residential premises of Shri Paban Kumar Sonthalia and the office address of M/s. Janti Enterprise were also searched by the DRI, Kolkata officers, both under Panchnama dated 17.10.2018, wherein nothing incriminating was found.

1.2 Further, as neither the importer claimed the imported goods nor any Bill of Entry had been filed against it and the goods appeared to be imported without the consent/authorization of the brand owners, under reasonable belief that the same were liable for confiscation under the Customs Act, 1962, the goods imported in container No. FCIU9588410 under Bill of Lading No. COAU 7083048400 dated: 29.08.2017, examined, under Panchnama dated 24.10.2017, 30.10.2017, 31.10.2017, 01.11.2017 and 02.11.2017 were seized vide seizure memo dated 19.04.2018 by the SIIB Section, Customs House Mundra and were handed over to the custodian/CFS Authorities for safe custody under Supratnama dated 19.04.2018.

1.3 Statement of Shri Altaf Husen, Manager of M/s. Darbshaw B. Cursetjees Sons (Gujarat) Pvt. Ltd., representative of M/s. Cosco (India) Shipping Pvt. Ltd. was recorded on 27.04.2018 under Section 108 of the Customs Act, 1962. Further, he stated that he report to M/s. Cosco Shipping Lines (India) Pvt. Ltd. wherein he produced copy of below mentioned documents related to the imported cargo:

- i. Bill of Lading No. COAU 7083048400 dtd: 29.08.2017 & Performa Bill of Lading No. COAU7083048400 dtd: 27.08.2017 issued by New Golden Sea Shipping Pte. Ltd. China.
- ii. Draft Bill of Lading issued by the M/s. Shoerwood Enterprise Company limited, China.
- iii. IGM issued by M/s. Darbshaw B. Curset jee's Sons (Gujarat) Pvt. Ltd.,
- iv. Booking Confirmation issued by New Golden Sea Shipping Pte. Ltd.,
- v. Invoice no. 101053 dtd: 18.08.2017 its packing list issued by M/s. Shorewood Enterprise Co. Ltd. issued to M/s. Janti Enterprises.

Further, he also stated that the charges in respect of freight and others are already paid to M/s. Cosco Office at China.

1.4 Statement of Shri Yogesh Panjwani, Manager of Export, Marketing & Sales, M/s. Cosco Shipping Line India Pvt. Ltd. was recorded under Section 108 of the Customs Act, 1962 on 30.05.2018. Shri Yogesh Panjwani stated that the charges in respect of freight and others were already paid to M/s. Cosco Office at China by M/s. Shenzhen Sino-Ocean International Transportation Limited, 4F, West Block, Building 428, No. 43, Bagru Road, Futian District, Shenzhen, China. He also confirmed that the Booking party is M/s. Shenzhen Sino-Ocean International Transportation Limited. He submitted documents viz. copy of IEC, Bill of Lading, Telex Message, booking confirmation copy, freight paying party details, invoice and packing list. He also stated that he did not have the contact details of the importer.

1.5 On going through the copy of booking confirmation issued by New Golden Sea Shipping Pte. Ltd. on 17.08.2017, it was seen that the document is most of the description is in Chinese language. However, the bill of Lading no. in the instant case i.e. COAU 7086048400 is mentioned there and other details as vessel name, voyage, POL, POD are same as in the instant case. However, cargo description was mentioned as "Furniture" and gross weight was mentioned as "14000Kgs" against "Screen Guard" and "19370 Kgs" respectively, as mentioned in the Bill of Lading.

1.6 A letter dated 01.08.2018 was received from M/s. Advani Sachwani and Heera Advocates, Nulwala Building, 41, Mint Road, Opp. GPO, Fort Mumbai-400001 requesting re-shipment of the subject consignment on behalf of their client M/s. Shorewood Enterprise Co. Ltd., Unit K 2/F, Metex, House No. 28, FUI Yiu Kok Street, Tsuen Wan NT, Hong Kong. They stated that their clients are importer and exporters of Merchandize Goods and had shipped consignment to M/s. Janti Enterprise under B/L No. COAU7083048400 containing Mobile accessories value of which is US\$ 36902.27; that as the consignment had not been cleared by the consignee at Mundra port, the title of the goods continues to vest in their clients and does not pass on to the consignee; that their clients had sent two letters for re-shipment of goods and for amendment of the bill of entry which were not replied by the customs office; that the cargo was lying at the Mundra port and incurring heavy demurrage and the value of the goods was also depreciating; that their client wished to record its right, title and claim in the above consignment and pray for necessary clearance for re-shipment; that their client were ready and willing to comply with all the formalities and to make necessary payment of such amounts which were liable to be paid for the said purpose. The advocate further stated as under;

*"due to geographical distance and for the sake of convenience, our client have also authorized me to look after all the legal matters and affairs in respect of the re-shipment of the above consignment in the dual capacity of its legal counsel/constituted attorney. In view of the same |I am ready to sign such papers and documents which may be necessary for the said purpose on behalf of our clients."*

1.7 Following documents were attached to the above referred letter by M/s. Advani and Sachwani Heera Advocates ;

- Copy of BL No. COAU7083048400 dated 27.08.2017, wherein description of goods is mentioned as 979 packages "Screen Guard."
- Copy of letter dated 01.05.2018 issued by M/s. Shorewood Enterprise Company Limited to M/s. Cosco Shipping lines Co. Ltd. for re-export and amendment of BL no. COAU7083048400.
- Copy of Invoice No. 101053 dated 18.08.2017 and its packing list issued by M/s. Shorewood Enterprise Company Limited to M/s. Janti Enterprise.
- Copy of letter dated 27.07.2018 issued by Shri. Aaron Poon, Gen. Manager, Shore wood Enterprise company Limited, on plane papers, to Shri. Anand M. Sachwani, Advocate, Bombay High Court, Mumbai stating *"it has become necessary to appoint a fit and*

*proper person to attend to the above legal matters and all other matters connected to and to facilitate the re-shipment of the above consignment and the said company proposed to appoint your goodself Attorney of the said Company”.*

1.8 M/s. Advani Sachwani & Heera Advocates wrote a reminder letter to above, vide letter dated 21.08.2018, requesting the same. The SIIB section, Customs House, Mundra vide letter dated 31.08.2018 requested them to provide the following documents;

- i. Copy of authorisation/agreement of the brand owners, to authorize the supplier, to manufacture and export the said goods.
- ii. Copy of authorisation/agreement of the Brand owners, to authorize the importer, for import and sale of the subject goods.
- iii. Copy of purchase order.
- iv. Copy of agreement between the exporter/supplier and the importer.
- v. Letter of confirmation of order.
- vi. Payment details.
- vii. Details of the importer viz. KYC available with the supplier.

However, in absence of any response from them, the SIIB section, Mundra again vide reminder letter dated 12.09.2018 requested M/s. Advani Sachwani and Heera Advocates to provide the above mentioned documents in respect of the consignment imported vide the BL No. COAU 7083048400.

1.9 M/s. Advani Sachwani & Heera Advocates vide their letter dated 01.10.2018, received on 05.10.2018, provided a copy of reply from M/s. Shorewood Enterprise Company Limited, wherein they replied as under;

- i. *“That we are not the manufacturer of the goods at Hong Kong. We are selling and purchasing, and export on a lot basis. Therefore there is no copy of authorization or agreement with the brand owner or authorized supplier to manufacturer or export for the said goods.*
- ii. *As we are traders, we do not have any agreement with the brand owners. We are only traders of the goods and after taking delivery we export the goods as done now from China. As our branch office is in Guangzhou.*
- iii. *There is no purchase order as the order was received telephonically through agents in the local market. In our local market, we have local commission agents supplying goods to Indian customers.*
- iv. *There is no copy of agreement between importer and exporter.*
- v. *There is no confirmation of letter of order, as the order was received by us on telephone through Agent to be supplied in the name of importer.*
- vi. *Regarding payment of goods was supplied on 180 days credit basis. But we are still waiting for the payment as the local agent and the importer has totally stopped replying for the said consignment.*

vii. We have documents of IEC of the importer. Document attached.

viii. As there are many local agent in our market working on introducing the traders and earning on commission basis we were introduced by Mr. Shan Tis, A local commission Agent +86 137 13908177, introducing us to the buyers for the container of all local goods available in Guangzhou and other part of China. Unfortunately not in touch in us."

1.10 Regarding the claim of the Advocates to re-export, the goods, in case of re-export of goods when the Indian importer does not release goods, the Supreme Court in the case - *UOI v. Sampat Raj Dugar* 58 ELT 163 = 88 STC 176 = AIR 1992 SC 1417 = (1992) 2 SCC 66= 1992 AIR SCW 1420 (SC – 3 member bench) has held as under;

"If the Indian importer does not release the goods, the foreign exporter continues to be owner of the goods and can apply for re-export or sale to other eligible buyer in India if

**(a) At the time of Importation, the import was legal.**

**(b) The foreign exporter was not party to fraud.**

**(c) The Indian importer has not paid for the goods or has not made arrangements for payment of goods."**

1.11 Further, during the course of investigation, letters dated 20.08.2018 & reminder letters dated 30.08.2018 were issued to all the Brand owners viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Micromax, Bose, Sony and Xiaomi requesting them to inspect / examine the consignments and to confirm whether the said seized cargo was genuine or otherwise. In response to the above mentioned letters, Authorised Representative from some of the Brand Owners appeared, inspected / examined the goods physically under various Panchnama dated 13.08.2018, 06.09.2018, 07.09.2018 & 14.09.2018 and further submitted their verification as detailed below:-

#### 1.12 **Inspection / Verification in respect of Apple Brand:-**

In respect of mobile accessories viz. Screen Guard, Batteries, USB cable, macbook cases etc. bearing the trademark/logo of Apple/Iphone, Mr. Darshak N. Parekh, Authorised representative on behalf of said Brand Owners duly authorised by M/s United Overseas Trade Mark Company appeared and the Inspection / Verification was done under Panchnama dated 13.08.2018. Shri. Darshak N Parekh stated that all the mobile accessories of Apple/Iphone were duplicate/counterfeit. He also stated that the mobile accessories of other brands, prima-facie looked duplicate, however it might be confirmed after consultation with the mobile company. Further, vide Inspection Report dated 30.08.2018, United Overseas Trade Mark Company confirmed that the goods are counterfeit.

#### 1.13 **Inspection / Verification in respect of goods bearing trademark/logo of Sony:-**

In respect of mobile accessories viz. Batteries, Wireless headphone etc bearing the trademark/logo of Sony, Mr. Bharat Himmatlal Kharecha, Authorised representative on behalf of said Brand appeared and Inspection / Verification was done under Panchnama dated 06.09.2018. Further, vide Inspection Report dated 13.09.2018, M/s Sony India Pvt. Ltd. New Delhi, confirmed that the mobile accessories are counterfeit.

**1.14 Inspection / Verification in respect of goods bearing trademark/logo of JBL:-**

In respect of mobile accessories viz. Wireless Headphone and Mini speakers bearing the trademark/logo of JBL, Mr. Shaileshbhai Amratlal Panchal, Authorised representative on behalf of M/s. Cyril Amarchand Mangaldas, duly authorised by M/s. Harman International Industries, appeared and the Inspection / Verification was done under Panchnama dated 07.09.2018. He stated that detailed report regarding the genuineness of the goods will be submitted by his office. However, no reply was received from them.

**1.15 Inspection / Verification in respect of goods bearing trademark/logo of Bose:-**

In respect of mobile accessories viz. Wireless Headphone bearing the trademark/logo of Bose, Mrs. Anita Joysam, Authorised representative of M/s. Bose Corporation India Private Limited, appeared and the Inspection / Verification was done under Panchnama dated 14.09.2018. She stated that the goods appear to be fake/counterfeit.

**1.16 Inspection / Verification in respect of goods bearing trademark/logo of Lenovo:-**

No one on behalf of M/s. Lenovo appeared for verification of genuineness of the good imported. However, M/s. Lenovo (India) Private Limited vide letter dated 03.10.2018, stated that they have not authorized any company to import Mobile phone accessories of Lenovo brand and that they have not directly imported any mobile phone accessories at Mundra Port.

1.17 Further, from the investigation carried out so far by the officers of DRI, Kolkata Zone, DRI, Gandhidham & Customs House, Mundra and various statements recorded, it appeared that M/s. Paban Kumar Sonthalia, (IEC 0214025381), proprietor of M/s. Janti Enterprise, 4, Bon Behari Bose Road, Ground Floor, Shibpur, Howrah, West Bengal and Shri Nirmal Goyal, it appeared that they did not know about who are actually importing the goods and what goods are being imported through his IEC. Further, they had not claimed the goods also. Further, in their statements, Shri Altaf Husen and Shri. Yogesh Panjwani, representatives of M/s. Cosco Shipping Line India Pvt. Ltd. had stated that the charges in respect of freight and others were already paid to M/s. Cosco Office at China by M/s. Shenzhen Sino-Ocean International Transportation Limited, 4F, West Block, Building 428, No. 43, Bagru Road, Futian District, Shenzhen, China. Further, the intellectual Property rights (imported goods) Enforcement Rules, 2007 empower the government to prohibit import of goods infringing intellectual property rights. Goods which are made, reproduced, put into circulation or otherwise used in breach of the intellectual property laws in India or outside India and without the consent of the right holder or a person duly authorized to so by the right holder are the goods infringing IPR.

As such it appeared that the goods imported under the Bill of Lading No. COAU 7083048400 dated 29.08.2017 is infringing IPR and further, it is not imported by a legal importer and the genuineness of the importer is doubtful.

1.18 Further, it was also noticed that in the Bill of Lading No. COAU 7083048400 dated 29.08.2017 goods imported were being described as Screen Guard. However, during the examination, it was noticed that various other goods comprising of mobile accessories and other electronic articles were also found in the consignment. Further, in the copy of Invoice and

Packing list submitted (after initiation of investigation) by the Shipping line and the Advocates M/s. Advani, Sachwani and Heera Advocates, the basic name of the goods was mentioned, however, the trademark/logo which was found during the physical examination had not been mentioned. It appeared that the importer had tried to conceal the actual identity of the goods in guise of these documents.

1.19 On going through the copy of booking confirmation issued by New Golden Sea Shipping Pte. Ltd. on 17.08.2017 (submitted by Shri Yogesh Panjwani on 30.05.2018), it was seen that the document was most of the description is in Chinese language. However, the bill of Lading no. in the instant case i.e. COAU 7086048400 was mentioned there and other details as vessel name, voyage, POL, POD were same as in the instant case. However, cargo description was mentioned as "Furniture" and gross weight was mentioned as "14000 Kgs" against "Screen Guard" and "19370 Kgs" respectively, as mentioned in the Bill of Lading.

1.20 Further, neither the importer in India nor the supplier from china could provide any authority which authorizes them to do the trade of the goods bearing the trademark/logo of various brands.

1.21 Section 7 of the Foreign Trade (Development & Regulation) Act, 1992 as amended read with Para 2.05 of the Foreign Trade Policy 2015-20, prohibits import and Export except under an IEC. Rule 2I of Foreign Trade (Regulation) Rules, 1993, defines Importer as a person who imports and holds a valid IEC granted under Section 7 of the Act, *ibid*. Therefore, any import made by a person, who is not the IEC holder is prohibited within the meaning of the Section 7 of the said Act. Section 2(33) of the Customs Act, 1962 defines prohibited goods, which includes all goods prohibited by any other law in force. Therefore, imports made by a person, other than the IEC holder, are prohibited for the purpose of the Customs Act, 1962 and accordingly, confiscable in terms of Section 111(d) of the Customs Act, 1962.

1.22 On being asked to submit documents related to the subject consignment, as detailed in para 3.3 above, the suppliers, M/s. Shorewood Enterprise Company Limited, vide letter dated 01.10.2018 of M/s. Advani Sachwani & Heera Adovcates submitted their reply as detailed in para 3.4. above. In the said reply, the supplier had themselves stated that they were a trader and not a manufacturer of the goods and neither they had any authorization or agreement with the brand owners nor they were authorized supplier to manufacture or export the said goods; that they did not have the know-how of the buyers in the instant case.

The Supreme court in the case - *UOI v. Sampat Raj Dugar* 58 ELT 163 = 88 STC 176 = AIR 1992 SC 1417 = (1992) 2 SCC 66= 1992 AIR SCW 1420 (SC – 3 member bench) has held as under; *"If the Indian importer does not release the goods, the foreign exporter continues to be owner of the goods and can apply for re-export or sale to other eligible buyer in India if ;*

**(a) At the time of Importation, the import was legal.**

**(b) The foreign exporter was not party to fraud.**

**(c) The Indian importer has not paid for the goods or has not made arrangements for payment of goods."**



In view of above, it appears that in the instant case, neither, the exporter is a legal exporter nor the importer is legal importer. Further, this renders the consignment imported under Bill of Lading No. COAU 7083048400 dated: 29.08.2017 as illegal import.

1.23 Further, in respect of letters written to the right-holders on dated 20.08.2018 and 30.08.2018 and Inspection / Verification done on various dates under Panchanama as discussed in the preceding paras, various right holders submitted their verification reports confirming the imported goods bearing the brand names of various brands were not original but counterfeit.

The details of the same are tabulated as below:-

Sr. No.	Letter to Brand Owners	Authorised Right Holder	Verification Report Date
1	Apple/ I phone	United Overseas Trade Mark Company, 52, Sukhdev Vihar, Mathura Road, New Delhi-110 025	30.08.2018
2	Sony India Pvt. Ltd.	Sony India Pvt. Ltd., A-18, Mohan Co-operation Industrial Estate, Mathura Road, New Delhi.	13.09.2018
3	Bose Corporation India Pvt. Ltd.	Bose Corporation India Pvt. Ltd., 3 <sup>rd</sup> floor, Salcon Aurum, Plot No. 4, District Centre, Jasola, New Delhi.	14.09.2018

From the above, it appears that the Mobile accessories and electronic goods bearing Trademark / Logo of Apple, Sony and Bose imported under Bill of Lading No. COAU7083048400 dated 05.09.2018 are counterfeit and appeared to be prohibited under Notification No. 51/2010-Customs (NT) dated 30.06.2010.

1.24 **Legal Provisions applicable to the present case:-**

1.24.1 **The Legal Provisions under the Customs Act, 1962 are as follows:-**

**Section 11.** *Power to prohibit importation or exportation of goods:- (1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.*

(2) *The purposes referred to in sub-section (1) are the following :-*

(a) *the maintenance of the security of India;*

(n) **the protection of patents, trademarks, copyrights, designs and geographical indications];**

(v) *any other purpose conducive to the interests of the general public.*

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

(a) *any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;*

(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;

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(m) 1[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, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,

shall be liable, -

(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 4[not exceeding the value of the goods or five thousand rupees], whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher :

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;]

1.24.2 Also, the relevant portions of Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 are re-produced here-under:-

**6. Prohibition for import of goods infringing intellectual property rights.-**

*After the grant of the registration of the notice by the Commissioner on due examination, the import of allegedly infringing goods into India shall be deemed as prohibited within the meaning of Section 11 of the Customs Act, 1962.*

**7. Suspension of clearance of imported goods.-**

*(1)(a) Where the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, based on the notice given by the right holder has a reason to believe that the imported goods are suspected to be goods infringing intellectual property rights, he shall suspend the clearance of the goods.*

*(b) The Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may, on his own initiative, suspend the clearance of goods, in respect of which he has prima-facie evidence or reasonable grounds to believe that the imported goods are goods infringing intellectual property rights.*

*(2) The Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall immediately inform the importer and the right holder or their respective authorised representatives through a letter issued by speed post or through electronic mode of the suspension of clearance of the goods and shall state the reasons for such suspension.*

.

.

*(5) Where the clearance of goods has been suspended, customs may, where it acts on its own initiative, seek from the right holder any information or assistance, including technical expertise and facilities for the purpose of determining whether the suspect goods are counterfeit or pirated or otherwise infringe an intellectual property right.*

*(6) Where the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, has suspended clearance of goods on his own initiative and right holder has given notice under rule 3 of the Rules and fulfilled the obligations under Rule 5, but, the right holder or his authorised representative does not join the proceedings within a period of ten working days from the date of suspension of clearance leading to a decision on the merits of the case, the goods shall be released provided that all other conditions of their import under the Customs Act, 1962, have been complied with:*

*Provided that the above time-limit of ten working days may be extended by another ten working days in appropriate cases by the Commissioner or an officer authorized by him in this behalf.*

*(7) In the case of perishable goods suspected of infringing intellectual property rights, the period of suspension of release shall be three working days which may be extended*

by another four days subject to the satisfaction of the Commissioner or the officer authorized by him in this behalf that such extension shall not affect the goods.

(8) Notwithstanding anything contained in these Rules, in the case of suspension of clearance of perishable goods on the basis of notice of the right holder or his authorized representative, the right holder or his authorized representative shall join the proceedings as required under these Rules within three working days or the extended period as provided in sub-rule (7) and in case of suspension of clearance of perishable good by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, on his own initiative, the right holder shall give notice, execute a bond and join the proceedings as required under these Rules within three working days or the extended period as provided in sub-rule (7) , as the case may be, failing which the goods shall be released.

(9) If within ten working days or the extended period under sub-rule (6), as the case may be, and within three working days or the extended period as provided in sub-rule (7) of this rule in the case of perishable goods, the right-holder or his authorized representative joins the proceedings, the Deputy Commissioner of Customs or Assistant Commissioner of Customs , as the case may be, having reasons to believe that the goods are goods infringing intellectual property rights and liable to confiscation under section 111 (d) of the Customs Act, may seize the same under section 110 of the Customs Act.

#### **8. Examination of goods by right holder.-**

The Commissioner or the officer duly authorized in this behalf shall allow a right holder and the importer or their duly authorized representatives to examine the goods, the clearance of which has been suspended, and may provide representative samples for examination, testing and analysis to assist in determining whether the goods are pirated, counterfeit or otherwise infringe an intellectual property right, without prejudice to the protection of confidential information.

#### **11. Disposal of infringing goods:-**

(1). Where upon determination by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, it is found that the goods detained or seized have infringed intellectual property rights, and have been confiscated under Section 111(d) of the Customs Act, 1962 and no legal proceedings are pending in relation to such determination, the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, shall, Destroy the goods under official supervision or dispose them outside the normal channels of commerce after obtaining 'no objection' or concurrence of the right holder or his authorized representative;

(2.) There shall not be allowed the re-exportation of the goods infringing intellectual property rights in an unaltered state.

#### **1.24.3 Re-Export if Indian importer does not release goods:**



whereas, regarding the claim of the Advani Sachwani and Heera Avocates to re-export, the goods, In case of re-export of goods when the Indian importer does not release goods, the Supreme court in the case - UOI v. Sampat Raj Dugar 58 ELT 163 = 88 STC 176 = AIR 1992 SC 1417 = (1992) 2 SCC 66= 1992 AIR SCW 1420 (SC – 3 member bench) has held as under;

*“If the Indian importer does not release the goods, the foreign exporter continues to be owner of the goods and can apply for re-export or sale to other eligible buyer in India if*

**(a) At the time of Importation, the import was legal.**

**(b) The foreign exporter was not party to fraud.**

**(c) The Indian importer has not paid for the goods or has not made arrangements for payment of goods.”**

1.25 The goods imported viz. Electronics and Mobile Accessories comprising mainly of mobile screen guards, Mobile Battery with cover and sticker, Blue tooth Earphones and Speakers, Charger, Data cable, Mobile touch screen panel, portable music player, Smart music lamp, Iphone case, USB cable and Charger, Mac Book Case, Wireless Headphone and various other articles (as declared under the Panchnama dated 24.10.2017, 30.10.2017, 31.10.2017, 01.11.2017 and 02.11.2017) were not declared in the Bill of Loading and were restricted, by way of concealing it with their import consignment of Screen Guards (as declared in the Bill of lading) and various electronics and mobile accessories as declared in the invoice No. 101053 dated 18.08.2018, submitted by the Shipping line, having declared assessable value of USD 36,092.27/-. The Invoice value in INR comes to Rs.23,51,412/- (as per value of dollar under Exchange notification no. 81/2017 dated 17.08.2017 on the Bill of lading dated i.e. 29.08.2017) The importer had not declared the actual details of goods viz. Electronics goods and Mobile Accessories bearing Brand names of various Brands Viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Panasonic, Micromax, Bose, Sony, Xiaomi etc. concealed in the unbranded goods viz. Earphone, Battery, Speaker, USB cable, charger etc. as mentioned in the invoice no. 101053 dated 18.08.2018. Here it is pertinent to mention that the importer had not filed Bill of Entry in the instant case and had not claimed the consignment. The documents viz. invoice, packing list were provided by the Shipping line after initiation of investigation. In view of the facts discussed in the previous Paras and material evidence available on record, it appeared the act of import of IPR infringing goods by way of concealment, without any legal importer, is defined as smuggling in terms of Section 2 (39) of the Customs Act, 1962.

1.26 Since non-declared goods viz. Electronics goods and Mobile Accessories bearing Brand names of various Brands Viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Panasonic, Micromax, Bose, Sony, Xiaomi etc. are prohibited and during the investigation of the instant case, it had been found that the said various articles bearing trademarks/logo of various Brands were not original but counterfeit. The said goods so smuggled was neither declared before the customs nor were mentioned in the Bill of Lading. Further, Bill of Entry had also not been filed. In addition to above, the Invoice and Packing list

submitted by the representative of the Shipping Line also did not have these details. Further, the importer mentioned in the documents had not been authorized by the right holders to deal with the goods bearing their Trademark/logo. Therefore, the prohibited goods viz. Electronics goods and Mobile Accessories bearing Brand names of various Brands Viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Panasonic, Micromax, Bose, Sony, Xiaomi etc., imported without declaring in Bill of Entry or without declaration in Import General Manifest (IGM), are liable for confiscation under Sections 111 (f), and 111 (i) of the Customs Act, 1962 read with Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007.

1.27 Further, the declared goods viz. the electronics and Mobile accessories without any brand trademark/logo, under the Bill of lading No. COAU 7083048400 dated 29.08.2017, being used as concealment of un-declared goods viz. Electronics goods and Mobile Accessories bearing Brand names of various Brands Viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Panasonic, Micromax, Bose, Sony, Xiaomi etc. are also liable for confiscation under Section 119 of the Customs Act, 1962.

1.28 Section 7 of the Foreign Trade (Development & Regulation) Act, 1992 as amended read with Para 2.05 of the Foreign Trade Policy 2015-20, prohibits import and Export except under an IEC. Rule 2(c) of Foreign Trade (Regulation) Rules, 1993, defines Importer as a person who imports and holds a valid IEC granted under Section 7 of the Act, *ibid*. Therefore, any import made by a person, who is not the IEC holder is prohibited within the meaning of the Section 7 of the said Act. Section 2(33) of the Customs Act, 1962 defines prohibited goods, which includes all goods prohibited by any other law in force. Therefore, imports made by a person, other than the IEC holder, are prohibited for the purpose of the Customs Act, 1962 and accordingly, confiscable in terms of Section 111(d) of the Customs Act, 1962.

1.29 As per the records & investigation and from the statements of relevant persons, it was revealed that the consignment which is liable to be confiscated in terms of Section 111(d), Section 111 (f), Section 111 (i), Section 111 (m) & Section 119 of the Customs Act, 1962 had been imported on the IEC 0214025381 of M/s. Janti Enterprise, 4, Bon Behari Bose Road, Ground Floor, Shibpur, Howrah, West Bengal. Shri. Paban Kumar Sonthalia being the proprietor is liable for all the acts and deeds of the said Janti Enterprise. Accordingly, the act of indulging in the import of the consignment which is liable to be confiscated in terms of Section 111(d), Section 111 (f), Section 111 (i), Section 111 (m) & Section 119 of the Customs Act, 1962 makes Shri Paban Kumar Sonthalia, proprietor of M/s. Janti Enterprise liable for penalty under Section 112 of the Customs Act, 1962.

1.30 Further, the supplier in the instant case, M/s. Shorewood Enterprise Co. Ltd., Unit K 2/F, Metex, House No. 28, FUI Yiu Kok Street, Tsuen Wan NT, Hong Kong, through their attorney M/s. Advani Sachwani and Heera Advocates requested for Re-shipment of the consignment imported under Bill of lading No. COAU 7083048400 dtd: 29.08.2017, which appeared to be liable for confiscation in terms of Section 111(d), Section 111 (f), Section 111 (i), Section 111 (m)

& Section 119 of the Customs Act, 1962. It appeared that the supplier had intentionally supplied the goods which is liable for confiscation as mentioned above, to an illegal importer which renders them liable for penalty under Section 114AA of the Customs Act, 1962.

2. Therefore, a Show Cause Notice bearing F.No. S/15-82/Enq-Paban/SIIB/CHM/2017-18 dated 09.10.2018 was issued to M/s. Shorewood Enterprise Co. Ltd, Hong Kong through their Attorney M/s. Advani Sachwani and Heera Advocates, Nulwala Building, 41, Mint Road, Opp. GPO, Fort Mumbai- 400001 to show cause to the Additional Commissioner having his office at the Office of the Principal Commissioner of Customs, First Floor, Port User Building, Custom House Mundra, Kutch, Gujarat-370 421, as to why:-

- (i) The un-declared goods i.e. counterfeit products of various brands viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Panasonic, Micromax, Bose, Sony, Xiaomi etc. and the declared goods i.e. electronics and mobile accessories without any brands' trademark/logo, imported vide Bill of Lading No. COAU 7083048400 dated 29.08.2017 valued at Rs. 23,51,412/- which were seized vide Seizure Memo dated 19.04.2018 should not be confiscated under Section 111(d), Section 111(f), Section 111(i) and Section 119 of the Customs Act, 1962 read with Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007.
- (ii) Penalty should not be imposed on them, for their acts of commission and omission discussed hereinabove under Section 114AA of the Customs Act, 1962.

2.1 The aforesaid Show Cause Notice dated 09.10.2018 has also proposed penalty on Shri Paban Kumar Sonthalia, proprietor of M/s. Janti Enterprise, under Section 112(a) of the Customs Act, 1962 for their acts of commission and omission discussed hereinabove under Section 112 of the Customs Act, 1962.

### **DEFENCE SUBMISSION**

3. M/s Advani Sachwani & Heera Advocates, the attorney of Noticee No. 01 i.e. M/s Shorewood Enterprise Co. Ltd., Hong Kong, vide their letter dated 05.11.2018, received in this office on 12.11.2018, have interalia, submitted written reply. The defence para of the same are reproduced as under -

3.1 " It is the case of our client as the goods were lying at the port and there was not attempt to clear the goods from the port there will be no violation any of Section of the Customs Act, 1962 as there is no declaration filed or any bill of entry for home consumption.

3.2 Regarding the allegation of para no. 2.1, there is a reference of invoice no 101053 dated 18.08.2017 issued by Sherwood Enterprises in favour of Janti Enterprise, Howrah. Therefore, along with the bill of lading, there was a declaration of goods kept in the container by the exporter. There is no allegation in the Show Cause Notice to the effect that what goods are mentioned in the notice was not found in the container.

3.3 As per the Show Cause Notice, the officers found some documents which were in Chinese language. The same could have been translated into English as there was a period of 1 year available for the purpose of investigation.

3.4 Our client say and submits that the above-mentioned consignment was lying at the port since August, 2017. The importer failed to clear the goods from the port. Therefore, the exporter had engaged the services of advocates for sending the letters on their behalf for the above-mentioned consignments. Therefore, on 1.08.2018, we had sent a letter to the office of concerned department for allowing the re-shipment of the goods. As per our client, the value of the said consignment were 36902.27 USD. We had annexed the copy of invoice and the packing list for the said consignment which was seized by the officers of DRI in the month of November, 2017 on the ground of IPR issues.

3.5 It was the case of our client that as the consignee failed to clear the goods. Therefore, the title of the goods will remain with our clients and therefore it is not passing to the consignee. In the letter dated 1.08.2018, it was pointed out to the investigating agency that the goods may be allowed to be re-shipped or amendment may be allowed for the said consignment. The same was not replied by the concerned Commissionerate. It was also pointed out that the detention and demurrage charges are escalating and the value of the goods is depreciating. Therefore on behalf of our client, we had requested for the reshipment.

3.6 On behalf of our client a letter dated 12.09.2018 was received from the office of Customs for supplying and replying to the queries.

3.7 After receipt of the above mentioned letter, we had replied the queries and submitted the documents, thereafter we had received a email wherein certain documents and queries were replied by our client. Accordingly, we had sent a letter dated 1.10.2018 to the office of investigating agency, the same was taken on record.

3.8 In para no. 3.5, it has been mentioned that in case the importer does not clear the goods, then the rights of exporter will remain on goods and the judgment of Supreme Court reported in UOI v. Sampat Raj Dugar 58 ELT 163 = 88 STC 176= AIR 1992 SC 1417 =(1992) 2 SCC 66= 1992 AIR SCW 1420 (SC- 3 member bench) held that "If the Indian Importer does not release the goods, the foreign exporter continues to be owner of the goods and can apply for re-export or sale to other eligible buyer in India if.

3.9 As per para 4.1, it is a case of DRI that the letters dated 20.08.2018 and reminder letters dated 30.08.2018 were sent to inspect and examine the consignments to confirm the seized cargo, if genuine or otherwise to the IPR holders It is the case of the officers that some brand owners appeared on 13.08.2018, 06.09.2018, 07.09.2018 and 14.09.2018 and examined the goods. The said companies details are mentioned in para no. 4.2, 4.3, 4.4, 4.5 and 4.6. Though they verified the goods but they did not give any bond or bank guarantee for the claim of goods as per the Intellectual Property Rights Imported Goods Enforcement Rule 2007 circular no. 41 of 2007 dated 29.10.2007. As per the said circular, the concerned person has to give bond and bank guarantee for Intellectual Property Rights Imported Goods Enforcement Rule 2007. None

2



3.29 Our client is not liable for penalty u/s. 112 of the Customs Act, 1962 as there is no attempt made to clear the goods by the importer in India.

3.30 As per the SCN, the value of the said consignment is Rs. 23,51,412/- which is as per the invoice value which was declared at the time of export of the goods.

3.31 Our client is relying upon a standing order issued by JNPT Nava Sheva No 23 of 2018 wherein it has been said that in case the right holder are not following the Intellectual Property Rights Enforcement Rules, 2007, then such goods can be allowed to be cleared to the Concerned person on bond and bank guarantee. It is submitted that the goods are lying at the port since August, 2017 the detention and demurrage is increasing day by day and the value of the goods is less than the detention and demurrage charges. Therefore, in the interest of justice, we are requesting immediately hearing in the above-mentioned file and immediate orders be passed in the abovementioned case considering the abovementioned written submissions.

3.32 Our client is relying upon the following judgments viz:-

(a) 2018 (360) E.L.T. 963 (Mad.) High Court of Judicature at Madras passed by T.S. Sivagnanam, J. in the matter of Legend Resources Groups Versus Asstt. Commr., Special Intelligence and Investigation Branch, Chennai in W.P. no. 1768 of 2018, decided on 12-4-2018 (b) 2017 (352) E.L.T. 34 (Tri.- Chennai) CESTAT, SZB, Chennai passed by Justice Dr. Satish Chandra, President and Shri. Madhu Mohan Damodhar, Member (T). Commissioner of Customs, Chennai Vs. Himachal Exim

(c) 2014 (299) E.L.T. 184 (Del.) High Court of Delhi, A.K. Sikri, J. and Rajiv Sahal Endral, J. Telefonaktiebolaget LM Ericsson Vs. Union of India L.P.A. No. 1104 of 2011, decided on 13.07.2012

(d) 2017 (358) E.L.T. 71 (Mad) High Court of Judicature at Madras. T.S. Sivagnanam, J. N.S. Plasters Vs. Principal Commr. Of Cus.

3.33 As per the above judgments, the companies who have claimed their rights for intellectual properties have not followed the Intellectual Property Rights Imported Goods Enforcement Rule 2007 passed in the year 2007 and further the circular no. 41 of 2007 and circular no.13 of 2012 dated 8.5.2012. Till the issuance of the SCN, therefore, they had no put their enforcement Rights as per the above rules and regulations. All these companies have failed to give Bond and Bank Guarantee for the seized goods for the purpose of IPR. Therefore, benefit of such notification cannot be extended to such companies.

3.34 Our client relies upon the intellectual properties rights (imported goods) enforcement Rules, 2007 passed in the year 2007, wherein Rule 1 (ii) the wordings are "They shall apply to imported goods." Our client has not imported these goods as no Bill of Entry is filed till SCN is issued. Therefore the goods may be allowed to be reshipped out of India."

4. Shri Paban Kumar Sonthalia, Proprietor of M/s Janti Enterprise, Howrah, West Bengal-711101 (the Noticee no. 02), in response to this office letter dated 09.07.2019 vide his letter dated 17.07.2019, submitted his interim written defence and further vide letter dated

15.11.2019 reiterated the submissions made vide earlier letter dated 17.07.2019 . The relevant defence portion are as under-

4.1 The allegations against your Noticee No 2 has been discussed at Para 1.2 of the show cause notice, wherein it has been admitted that your Noticee No. 2 in his statement dated 17.10.2017 stated that only 2 consignment at Kolkata were imported under the said IEC, one in August 2015 and another April, 2017. Further he admitted that he gave his IEC to one Shri Nirmal Goyal , who in his statement dated 17.10.2017 stated in turn that he provide the IEC to one Sri Pravin Jain of Howrah but he did not know who are actually importing the goods and what goods are being imported through his IEC except the 2 consignments stated earlier. Further the residential premises of your Noticee and his office M/s Janti Enterprise, were searched by DRI Kolkata but nothing incriminating was found .

4.2 After the said deposition duly recorded in the notice, without any discussion whatsoever relating to the import of the impugned goods and allegation has been drawn at Para 9.1 that your Noticee being the proprietor is liable for all act and deeds of the said Janti Enterprise. Accordingly the act of indulging in the import of consignment which is liable for confiscation makes the Noticee No. 2 liable to penalty u/s 112 of the Customs Act, 1962.

4.3 By plane reading of the notice, it will be evident that Your Noticee in the initial stage at the time of initial enquiry itself denied ownership of the goods or any knowledge about the import of such clandestine goods. The notice is silent about the investigation carried out in the instant case.

4.4 That on 17.10.2017 the house and office premise of Your Noticee was searched and pursuant to summons issued u/s 108 of the Customs Act,1962 statement of your Noticee was recorded. The investigation proceeded and summons was issued to Sri Pravin Kr Jain through Sri Nirmal Goyal, who reported on 24.10.2017 before the DRI Kolkata , since due to Deewali the date fix on 18.10.2017. Subsequently another summons was issued for appearance of Pravin jain on 26.10.2017, when again the said Pravin Jain appeared and deposed his statement before DRI, Kolkata. Your Honour may find that the said Sri Pravin Jain and or Sri Nirmal Goyal are not made Noticees to the instant SCN, which is violative of principles of natural justice.

4.5 That instant SCN does not reflect the depositions made by the said Sri Pravin Jain, neither the documents are annexed to the SCN as RUD. Further vide summons, Your Noticee No. 2 appeared and deposed his statement on 8-11-2017. However in the instant notice, nothing has been spelt out in the notice about depositions made on 15.11.17.

4.6 No allegations have been brought out in the SCN implicating Your Noticee No. 2's involvement in ensuing adjudication to be taken up by Your Honour. Neither there is any corroborative supporting evidence against the Noticee No 2 but penal clause has been proposed arbitrarily on suspicion . Ref : K.I. PAVUNY Vs A.C.(H.Q.) C E 1997(90) ELT 241 (SC);

4.7 It is well settled law that no amount of suspicion can form the foundation for a confiscation proceedings under the Customs Act Suspicion however, strong, cannot take the place of proof RAJENDRA PRABHU Vs UOI 1997(107)ELT 293(KAR). Suspicion however grave it



might, can scarcely take the place of proof KHARINATH GUPTA Vs CCE 1994(71) ELT 980(T); PAREKH & CO. Vs 1994(71)ELT 310 (T) ; KARUNGADAN ABDUL RAHMAN Vs CC & CE 1995(77) EKT 333(T); PUJA INTERNATIONAL Vs CC 1995 (76) ELT 69 (T) GAIN MATHANI Vs STATE OF MAHARASHTRA 1991(110) ELT 400(SC).

4.8 Since nothing has been brought out against the Noticee No. 2 and admittedly the investigation proceeded that the IEC has been wrongly used clandestinely by somebody without the conscious knowledge of the Noticee , he cannot be made to suffer. The Noticee right from the beginning has denied his ownership of the impugned goods since he never placed any order for those goods and do not have any knowledge whatsoever with regard to the goods he is not having any objection for confiscation of the impugned goods as deem fit by the department.

4.9 Your Noticee respectfully submits that in the case of M Natarajan Vs C.C. reported in 2010(261) ELT 629, the Hon'ble Tribunal held that penalty cannot be imposed by lending Import-Export Code (IE code) by the assessee as he had no knowledge that IE code would be misused by the importer in attempting to smuggle prohibited goods in the guise of declared items. The ratio of this judgment is squarely applicable because in the instant case the Noticee No. 2 did not lend his IEC to anybody and he does not know how his IEC has been used.

4.10 The Noticee No. 2 most respectfully submits that in the Notice nothing has been discussed about use or any false or incorrect material and or enclosed any corroborative evidence of such use or false or incorrect for invoking penalty/s 114AA of the Customs Act, 1962.

In view of the submissions made herein above, the Noticee No. 2 would pray your honour to drop the penal charges made in the SCN u/s 112(a) of the Customs Act,1962. "

### **PERSONAL HEARING**

5. Personal hearing in this case was fixed on 13.06.2019 or 14.06.2019 or 17.06.2019. Shri Anand M. Sachwani, Advocate from M/s Advani Sachwani & Heera Advocates, the attorney of Noticee No. 1 i.e. M/s Shorewood Enterprises Co. Ltd. Hongkong, vide their letter dated 08.06.2019, received in this office on 11.06.2019, requested to adjourn the date for personal hearing till 2<sup>nd</sup> week of July-2019 citing the reason that he was out of India till the end of June, 2019. Shri Paban Kumar Sonthalia (Noticee No. 2) vide his letter dated 10.06.2019 requested to supply him all the copies of relied upon documents so that he may submit his defence reply and to fix hearing thereafter. Thereafter, the personal hearing was fixed on 09.07.2019 but none of the noticees appeared for personal hearing on the said date. Thereafter, the personal hearing was fixed on 17.07.2019 but again none of the noticees appeared for personal hearing on the said date. However, in this regard, Shri Anand M. Sachwani, Advocate vide their letter dated 16.07.2019, received in this office on 22.07.2019, requested to fix the date for personal hearing in the first week of August-2019 citing the reason that they are unable to hearing on a short notice as train tickets are not available. Shri Paban Kumar Sonthalia (Noticee No.2) vide his letter dated 17.07.2019, received in this office on 22.07.2019, informed that the intimation

letter for personal hearing on 17.07.2019 was received by him on 17.07.2019 itself due to which it was not practical for him to appear personally on the said date and vide the said letter he also made interim defence submissions to the charges against him in the instant Show Cause Notice. Thereafter, due to change of adjudicating authority, the personal hearing was fixed on 22.11.2019 but none of the noticees appeared for personal hearing on the said date. However, Shri Paban kumar Sonthalia vide his letter date 15.11.2019, received in this office on 21.11.2019, interalia submitted to decide the case based on the records available with the department and submissions made by him vide his interim reply dated 17.07.2019. Thereafter, personal hearing was fixed on 05.12.2019 and 27.12.2019, however again the noticees or their authorised representative did not appear for personal hearing on the said dates.

### DISCUSSION AND FINDINGS

6. I have carefully gone through the Show Cause Notice dated 09.10.2018, the written submissions dated 05.11.2018 filed by the attorney of M/s Shorewood Enterprise Co. Ltd. (Noticee no.01) and the written submissions dated 17.07.2019 and 15.11.2019 filed by Shri Paban Kumar Sonthalia (Noticee no.2) and the available records of the case . I find that in the present case, as per the requirement of natural justice ample opportunities have been given to the noticees to remain present for personal hearing. However, none of the noticees appeared for any of the scheduled hearings. The adjudication process cannot go indefinitely waiting for the noticee to turn up for personal hearing. Therefore, I find that the principle of Natural Justice, as prescribed in Section 122A of the Customs Act, 1962 has been completed. Hence, I am going to proceed to decide the case on the basis of documentary evidences available with the department and merits of the case. I find that the following main issues are involved in the subject Show Cause Notice, which are required to be decided-

- (i) Whether the un-declared goods i.e. counterfeit products of various brands viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Panasonic, Micromax, Bose, Sony, Xiaomi etc. and the declared goods i.e. electronics and mobile accessories without any brands' trademark/logo, imported vide Bill of Lading No. COAU 7083048400 dated 29.08.2017 valued Rs. 23,51,412/- which were seized vide Seizure Memo dated 19.04.2018 are liable for confiscation under Section 111(d), Section 111(f), Section 111(i) and Section 119 of the Customs Act, 1962 read with Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007.
- (ii) Whether M/s. Shorewood Enterprise Co. Ltd, Hong Kong are liable for penalty under Section 114AA of the Customs Act, 1962.
- (iii) Whether Shri Paban Kumar Sonthalia, proprietor of M/s. Janti Enterprise, 4, Bone Behari Bose Road, ground Floor, shibpur, Howrah, west Bengal-711101, are liable for penalty under Section 112 of the Customs Act, 1962.

6.1. I find that the goods imported in Container No. FCIU9588410 under Bill of Lading No. COAU7083048400 dated 29.08.2017, by Shri Paban Kumar Sonthalia, proprietor of M/s Janti Enterprise(IEC 0214025381), 4, Bon Behari Bose Road, Ground Floor, Shibpur, Howrah, West Bengal - 711101 were 100% de-stuffed and examined by the officers of Mundra Customs, in presence of officers of Directorate of Revenue intelligence, Gandhidham, under Panchnama dated 24.10.2017, 30.10.2017, 31.10.2017, 01.11.2017 and 02.11.2017. Bill of Entry had not been filed in the said consignment. During the examination, it was noticed that the imported cargo i.e. Electronic goods and Mobile Accessories comprising mainly of mobile screen guards, Mobile Battery with cover and sticker, Bluetooth Earphones and Speakers, Charger, Data cable, Mobile touch screen panel, portable music player, Smart music lamp, i-phone case, USB cable and Charger, Mac Book Case, Wireless Headphone and various other articles (as detailed in annexures to above referred panchnama). The examination also revealed that major proportion of the goods imported were bearing trademarks and logo of various Brands viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Panasonic, Micromax, Bose, Sony, Xiaomi etc.

6.2 I find that during the course of investigation, the statement of the importer i.e. Shri Paban Kumar Sonthalia, proprietor of M/s Janti Enterprise (IEC 0214025381) under Section 108 of the Customs Act, 1962, was recorded on 17.10.2017 by the officers of DRI, Kolkata wherein he stated that only two consignments at Kolkata were imported under the said IEC, one in August 2015 and another in April 2017. He expressed his total ignorance about the goods imported under the rest of consignments. However, he admitted that he gave his IEC to one Shri Nirmal Goyal. Shri Nirmal Goyal, in his statement dated 17.10.2017, recorded under Section 108 of the Customs Act, 1962 stated that he in turn, provided the IEC to one Shri Praveen Jain of Howrah but he did not know about who are actually importing the goods and what goods are being imported through his IEC except the two consignments stated above. The importer and Shri Nirmal Goyal could not provide the know-how of Shri Praveen Kumar Jain.

6.3 Further I find that neither the importer claimed the imported goods nor any Bill of Entry was filed against it and the goods appeared to be imported without the consent/authorization of the brand owners, under reasonable belief that the same are liable for confiscation under the provisions of the Customs Act, 1962, the above mentioned goods imported in Container No. FCIU9588410 under Bill of Lading No. COAU7083048400 dated 29.08.2017, examined under Panchnama dated 24.10.2017, 30.10.2017, 31.10.2017, 01.11.2017 and 02.11.2017 were placed under seizure vide seizure memo dated 19.04.2018 by Customs Mundra and were handed over to the custodian/CFS Authorities for safe custody under Supratnama dated 19.04.2018.

6.4 I find that the statement of Shri Altaf Husen, Manager of M/s. Darbshaw B. Cursetjees Sons (Gujarat) Pvt. Ltd., representative of M/s. Cosco (India) Shipping Pvt. Ltd. was recorded on 27.04.2018 under Section 108 of the Customs Act, 1962, wherein he stated that he reports stated that all the documents pertaining to import of M/s Paban Kumar Sonthalia was arranged by M/s COSCO Shipping Line India Private Limited from their China office. Further, he also

stated that the charges in respect of freight and others are already paid to M/s Cosco Office at China. Further, Shri Yogesh Panjwani, Manager of Export, Marketing & Sales, M/s. Cosco Shipping Line India Pvt. Ltd., in his statement dated 30.05.2018, recorded under Section 108 of the Customs Act, 1962 stated that the charges in respect of freight and others were already paid to M/s. Cosco Office at China by M/s. Shenzhen Sino-Ocean International Transportation Limited, 4F, West Block, Building 428, No. 43, Bagru Road, Futian District, Shenzhen, China and also confirmed that the Booking party is M/s. Shenzhen Sino-Ocean International Transportation Limited. He submitted documents viz. copy of IEC, Bill of Lading, Telex Message, booking confirmation copy, freight paying party details, invoice and packing list.

6.5 I find that the copy of Booking confirmation issued by New Golden Sea Shipping Pte. Ltd. on 17.08.2017, revealed that in the document most of the description was in Chinese language. However, the bill of Lading no. in the instant case i.e. COAU 7086048400 was mentioned there and other details as vessel name, voyage, POL, POD was same as in the instant case, wherein, cargo description and gross weight was mentioned as "Furniture" and "14000Kgs" against "Screen Guard" and "19370 Kgs" respectively, as mentioned in the Bill of Lading.

6.6 Further, M/s. Advani Sachwani and Heera Advocates, Nulwala Building, 41, Mint Road, Opp. GPO, Fort Mumbai-400001, authorised legal counsel of M/s. Shorewood Enterprise Co. Ltd vide their letter dated 01.08.2018 along with concerned documents of the supplied goods requested for re-shipment of the subject consignment on behalf of their client M/s. Shorewood Enterprise Co. Ltd., Unit K 2/F, Metex, House No. 28, FUI Yiu Kok Street, Tsuen Wan NT, Hong Kong. They stated that their clients are importer and exporters of Merchandize Goods and had shipped consignment to M/s. Janti Enterprise under B/L No. COAU7083048400 containing Mobile accessories value of which is US\$ 36902.27 and as the consignment had not been cleared by the consignee at Mundra port, the title of the goods continues to vest in their clients and did not pass on to the consignee. They further stated that their client is ready and willing to comply with all the formalities and to make necessary payment of such amounts which were liable to be paid for the said purpose.

6.7 I find that the department vide letter dated 31.08.2018 and reminder dated 12.09.2018 requested M/s. Advani Sachwani & Heera Advocates to provide the documents in respect of the consignment imported vide the BL No. COAU 7083048400 viz. Copy of authorisation/agreement of the brand owners, to authorize the supplier, to manufacture and export the said goods, Copy of authorisation/agreement of the Brand owners, to authorize the importer, for import and sale of the subject goods, Copy of purchase order, Copy of agreement between the exporter/supplier and the importer, Letter of confirmation of order, Payment details, Details of the importer viz. KYC available with the supplier and in reply to that M/s Advani Sachwani & Heera Advocates vide their letter dated 01.10.2018, received on 05.10.2018, provided a copy of reply from M/s. Shorewood Enterprise Company Limited, wherein they replied that- " *They are not the manufacturer of the goods at Hong Kong. They are*

*selling and purchasing, and export on a lot basis. Therefore there is no copy of authorization or agreement with the brand owner or authorized supplier to manufacturer or export for the said goods, As they are traders, they do not have any agreement with the brand owners. They are only traders of the goods and after taking delivery they export the goods as done now from China as the branch office is in Guangzhou, There is no purchase order as the order was received telephonically through agents in the local market. In their local market, they have local commission agents supplying goods to Indian customers, There is no copy of agreement between importer and exporter, There is no confirmation of letter of order, as the order was received by them on telephone through Agent to be supplied in the name of importer, payment of goods was supplied on 180 days credit basis, but they are still waiting for the payment as the local agent and the importer has totally stopped replying for the said consignment, they have documents of IEC of the importer and they are attached, As there are many local agent in their market working on introducing the traders and earning on commission basis they were introduced by Mr. Shan Tis, A local commission Agent +86 137 13908177, introducing them to the buyers for the container of all local goods available in Guangzhou and other part of China. Unfortunately not in touch in them."*

6.8 I find that the Advocates of M/s. Shorewood Enterprise Company Limited has requested to re-export the said goods and cited the judgment of Hon'ble Supreme Court in the case of UOI v. Sampat Raj Dugar 58 ELT 163 = 88 STC 176 = AIR 1992 SC 1417 = (1992) 2 SCC 66= 1992 AIR SCW 1420 (SC – 3 member bench), wherein it was held that *"If the Indian importer does not release the goods, the foreign exporter continues to be owner of the goods and can apply for re-export or sale to other eligible buyer in India if*

*(d) At the time of Importation, the import was legal.*

*(e) The foreign exporter was not party to fraud.*

*(f) The Indian importer has not paid for the goods or has not made arrangements for payment of goods."*

However, I find that at the time of importation, the import was not legal in so far Section 7 of the Foreign Trade (Development & Regulation) Act, 1992(as amended time to time) read with para 2.05 of the Foreign Trade Policy 2015-2020, prohibits Import and Export except under an IEC. Further Rule 21 of Foreign Trade (Regulation) Rules, 1993 defines Importer as a person who imports and holds a valid IEC granted under Section 7 of the Act *ibid*. Therefore any import made by a person, who is not the IEC holder is prohibited within the meaning of the Section 7 of the Act. Further Section 2(33) of the Customs Act, 1962 defines prohibited goods, which includes all goods prohibited by any other law for the time being in force. Hence I find that the judgment of Hon'ble Supreme Court in case of Sampat Raj Dugar is not applicable in this case.

6.9 Further, I find that the Brand owners viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Micromax, Bose, Sony and Xiaomi inspected / examined the consignments physically under various Panchnama dated 13.08.2018,

06.09.2018, 07.09.2018 & 14.09.2018 and submitted their verification reports confirming the imported goods bearing the brand names of various brands were not original but counterfeit. The details of the same are tabulated as below:-

Sr. No.	Letter to Brand Owners	Authorised Right Holder	Verification Report Date
1	Apple/ I phone	United Overseas Trade Mark Company, 52, Sukhdev Vihar, Mathura Road, New Delhi-110 025	30.08.2018
2	Sony India Pvt. Ltd.	Sony India Pvt. Ltd., A-18, Mohan Co-operation Industrial Estate, Mathura Road, New Delhi.	13.09.2018
3	Bose Corporation India Pvt. Ltd.	Bose Corporation India Pvt. Ltd., 3 <sup>rd</sup> floor, Salcon Aurum, Plot No. 4, District Centre, Jasola, New Delhi.	14.09.2018

From the above, I find that the Mobile accessories and electronic goods bearing Trademark / Logo of Apple, Sony and Bose imported under Bill of Lading No. COAU7083048400 dated 05.09.2018 are counterfeit and prohibited under Notification No. 51/2010-Customs (NT) dated 30.06.2010.

6.10 I further find that the Noticee M/s Shorewood Enterprise Company Limited in their written defence submission dated 05.11.2018 have submitted that the goods have neither been cleared for home consumption nor any attempt is made to clear the goods for home consumption in India as no bill of entry has been filed and no declaration is there for the seized goods which are not imported into India merely they are lying at the port. Therefore, there is no violation of IPR or any other Circular in this case and hence all these goods are not liable for confiscation under the Customs act, 1962. In connection of such contentions in their defence, I find that vide Section 2(23) of the Customs Act, import means bringing any goods into India from outside India , and as such any goods which are brought into Indian territorial waters are deemed to be imported into India and whatever is imported into India , becomes subjected to applicability of the provisions of the Customs Act, 1962, and all other allied enactments.

In view of the above facts, I find that the goods are liable for confiscation under Section 111(d) of the Customs act, 1962 for the violation of various provisions of Customs Act, 1962 and the laws for the time being in force.

6.11 I find that Section 111(f) deals with any dutiable or prohibited goods required to be mentioned under the regulations in an arrival manifest or import manifest or import report which are not so mentioned, however I find that the goods are mentioned in the Bill of Lading as Screen Guard/furniture, whereas the goods found to be electronics goods and mobile accessories of various brands comprising mainly of Mobile Battery with cover and sticker, Blue tooth Earphones and Speakers, Charger, Data cable, Mobile touch screen panel, portable music player, Smart music lamp, iphone case, USB cable and Charger, Mac Book Case, Wireless



Headphone and various other articles, which were not mentioned in the manifest and therefore liable for confiscation under Section 111(f) of the Customs Act, 1962. Further the goods seized in Panchnama were concealed with screen guards declared in Bill of lading and therefore liable for confiscation under Section 111(i) of the Customs Act, 1962. I further find that Section 119 of the Customs Act, 1962 deals with the confiscation of goods used for concealing smuggled goods which states that any goods used for concealing smuggled goods shall also be liable to confiscation.

6.12 As regard proposal in Show Cause Notice for imposition of penalty on M/s Shorewood Enterprise Company Limited, Hong Kong, under Section 114AA of the Customs Act, 1962, I find that Section 114AA of the Customs Act, 1962 deals with penalty for use of false and incorrect material and states that if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

I find that M/s Shorewood Enterprise Company Limited, Hong Kong have supplied the imported goods to M/s Janti Enterprise, 4, Bon Behari Bose Road, Ground Floor, Shibpur, Howrah, West Bengal. They did not appear for Personal hearing on given time and dates, however Shri Anand M. Sachwani, Advocate of M/s Advani Sachwani and Heera Advocates vide his written submission dated 05.11.2018 denied the allegation made out in SCN. Firstly, It requires to be considered as to whether penalty under Section 114AA of the Customs Act, 1962, could be imposed on the Noticee viz. M/s. Shorewood Enterprise Company Limited, situated in Hong Kong. In this connection I find that in prevailing Section 1 of Customs Act, 1962 (As amended by Finance Act, 2018), it is explicitly mentioned that it extends to the whole of India [and, save as otherwise provided in this Act, it applies also to any offence or contravention there under committed outside India by any person.] Therefore, the question of non-applicability of Customs Act, 1962 (as amended time to time) for the suppliers, does not arise and they are liable to be penalized under Customs Act, 1962.

I find that M/s Shorewood Enterprise Company Limited, Hong Kong, being supplier of the goods facilitated the importer in importing the counterfeit electronic goods and mobile accessories, which are prohibited goods, in violation of policy provisions and also in contravention of the provisions of Customs Act, 1962 by way of providing them the documents showing the goods in Bill of Lading as Screen guards and not declaring the electronics goods and mobile accessories of various brands comprising mainly of Mobile Battery with cover and sticker, Blue tooth Earphones and Speakers, Charger, Data cable, Mobile touch screen panel, portable music player, Smart music lamp, iphone case, USB cable and Charger, Mac Book Case, Wireless Headphone and various other articles, **which were found to be concealed with the import consignment of Screen Guards.** For their acts of omission and commission M/s Shorewood Enterprise Company Limited have rendered themselves liable for penalty under Section 114AA of the Customs Act, 1962.

I also find from the records of the case that on being asked by the department to submit documents related to the subject consignment, the supplier M/s Shorewood Enterprise Co. Ltd. vide their letter dated 01.10.2018 through their attorney M/s. Advani Sachwani and Heera Advocates have submitted their reply wherein they have themselves stated that they are only a trader and not manufacture of the goods and neither they had any authorization or agreement with the brand owners nor they were authorized supplier to manufacture or export the said goods and also they did not have the know-how of the buyers in the instant case. They have stated that there is no purchase order from the importer as the order was received telephonically. I find that their claim that since it was open market purchase, there is no purchase order, is found to be difficult to digest, because the enormity of the quantity and its value involved rule out such an acquisition without any document. Their explanations indicating that such goods valued at Rs. 23,51,412/- have been shipped by them without any documents and without any arrangement for recovering the value of export through any bank is misleading. These facts clearly indicate that this is not a genuine transaction in the course of normal international trade, but a serious challenge to the Government of India by attempting to send goods with a false description. I therefore find that the supplier had intentionally supplied the goods which are held liable for confiscation as mentioned above, to an illegal importer and their such acts have made them liable for penalty under Section 114AA of the Customs Act, 1962. Accordingly, I hold that penalty under Section 114AA of the Customs Act, 1962 are attracted on M/s Shorewood Enterprise Company Limited, Hong Kong.

6.13 I find that the Attorney of the Noticee No (1) i.e. M/s Advani Sachwani & Heera Advocates and Shri Paban Kumar Sonthalia, proprietor of M/s. Janti Enterprise in their written defence submissions have placed reliance on various case laws/judgements in support of their contention on some issues raised in the SCN. In this regard, I am of the view that the conclusions arrived may be true in those cases, but the same cannot be extended to other case(s) without looking to the hard realities and specific facts of each case. Those decisions/judgements were delivered in different context and under different facts and circumstances, which cannot be made applicable in the facts and circumstances of this case. Therefore, I find that while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind. The Hon'ble Supreme Court in the case of CCE, Calcutta Vs Alnoori Tobacco Products [2004(170)ELT 135(SC) has stressed the need to discuss, how the facts of decision relied upon fit factual situation of a given case and to exercise caution while applying the ratio of one case to another. This has been reiterated by the Hon'ble Supreme Court in its judgement in the case of Escorts Ltd. Vs CCE, Delhi [2004(173) ELT 113(SC)] wherein it has been observed that one additional or different fact may make difference between conclusion in two cases, and so, disposal of cases by blindly placing reliance on a decision is not proper. Again in the case of CC(Port), Chennai Vs Toyota Kirloskar[2007(2013)ELT4(SC)], it has been observed by the Hon'ble Supreme Court that, the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of

a decision has to culled from facts of given case, further, the decision is an authority for what it decides and not what can be logically deduced there from.

6.14 Next issue to be decided by me is the proposal in Show Cause Notice for imposition of penalty on the importer Shri Paban Kumar Sonthalia, proprietor of M/s Janti Enterprise, under Section 112(a) of the Customs Act, 1962. In this regard, I find that in terms of Section 112(a) of the Customs Act, 1962-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 111, or abets the doing or omission of such an act, shall be liable to penalty."

In this regard, Shri Paban Kumar Sonthalia in his written defence submission has submitted that their IEC Code has been wrongly mis-used by someone without their consent; hence question of any omission or commission on their part does not arise for imposition of penalty under Section 112 of the Customs Act, 1962. However, from the available records, I find that Shri Paban Kumar Sonthalia, the proprietor of M/s Janti Enterprise in his statement dated 17.10.2017 has admitted himself that he gave his consent to one Shri Nirmal Goyal to open a firm and obtain Import-Export Code (IEC) in his name and in return Shri Nirmal Goyal would give him some money . He has further admitted that Shri Nirmal Goyal obtained IEC in his name and he (Paban Kumar Sonthalia) signed on the papers as and when told by Shri Nirmal Goyal. He has further also stated that his bank account with ICICI Bank Limited in the name of M/s Janti Enterprise was opened at the instance of Shri Nirmal Goyal, Shri Nirmal Goyal handles the account on behalf of him and he does not have any knowledge of this bank account. Also, the case records and statements of relevant persons recorded during investigation clearly establish that Shri Paban Kumar Sonthalia has consciously allowed the use of his IEC for certain illegal monetary considerations. The consignment had been imported on the IEC 0214025381 which is of M/s Janti Enterprise, 4, Bon Behari Bose Road, Ground Floor, Shibpur, Howrah, West Bengal. Hence, Shri Paban Kumar Sonthalia being the proprietor is liable for all the above stated acts of commission. Accordingly, I hold that penalty under Section 112 of the Customs Act, 1962 is attracted on Shri Paban Kumar Sonthalia, proprietor of M/s. Janti Enterprise.


7. In view of the above discussions and findings, I pass the following order:-

#### **ORDER**

- (i) I order absolute confiscation of the un-declared goods i.e. counterfeit products of various brands viz. Samsung, Apple, Sony, JBL, Nokia, HTC, Hope Star, Vivo, Lenovo, Oppo, Moto, Gionee, Intex, Panasonic, Micromax, Bose, Sony, Xiaomi etc. and the declared goods i.e. electronics and mobile accessories without any brands' trademark/logo, imported vide Bill of Lading No. COAU7083048400 dated 29.08.2017, valued Rs. 23,51,412/-, which were seized vide Seizure Memo dated 19.04.2018, under Sections 111(d), 111(f), 111(i) and Section 119 of the Customs Act, 1962 read with Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007.

- (ii) I impose penalty of Rs.5,00,000.00 (Rupees Five Lakh only) on M/s Shorewood Enterprise Co. Ltd., Unit K 2/F, Metex, House No. 28, FUI Yiu Kok Street, Tsuen Wan NT, Hong Kong, under Section 114AA of the Customs Act, 1962.
- (iii) I impose penalty of Rs 3,00,000.00 (Rupees Three lakh only) on Shri Paban Kumar Sonthalia, proprietor of M/s. Janti Enterprise, 4, Bone Behari Bose Road, ground Floor, Shibpur, Howrah, west Bengal-711101, under Section 112(a) of the Customs Act, 1962.

8. This order is issued without prejudice to any other action which may be contemplated against the importer or any other person under provisions of the Customs Act, 1962 and rules/regulations framed thereunder or any other law for the time being in force in the Republic of India.

  
(AJAY KUMAR)  
Additional Commissioner  
Custom House, Mundra

F.No. VIII/48-20Adj/ADC/MCH/2018-19

Dated 17.01.2020

**By SPEED POST**

To,

1. M/s. Shorewood Enterprise Co. Ltd., Hong Kong  
C/o M/s Advani Sachwani and Heera Advocates,  
Nulwala Building, 41, Mint Road, Opp. GPO,  
Fort Mumbai- 400001.
2. Shri Paban Kumar Sonthalia  
M/s Janti Enterprise, 4, Bon Behari Bose Road,  
Ground Floor, Shibpur,  
Howrah, West Bengal-711101.

Copy to :-

1. The Chief Commissioner (In situ), Custom House, Mundra.
2. The Deputy/Assistant Commissioner (SIIB/VA), Custom House, Mundra.
3. The Deputy/Assistant Commissioner (RRA) Custom House, Mundra.
4. The Deputy/Assistant Commissioner (Recovery Cell) Customs House, Mundra
5. Deputy/Assistant Commissioner (EDI), Customs House, Customs House, Mundra.
6. Deputy/Assistant Commissioner (Disposal), Custom House, Mundra
7. Guard File.