



OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CUSTOM HOUSE: MUNDRA, KUTCH
MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421

Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62

A	File No.	VIII/48-46/Adj/ADC/MP & SEZ/2016-17
B	Order-in-Original No.	MCH/ADC/AS/110/2018-19
C	Passed by	Shri Amarjeet Singh Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra
D	Date of Order	20.02.2019
E	Date of Issue	20.02.2019
F	SCN No. & Date	DRI/HQ-CI/50D/Enq-26/INT-24/2015/Pt.-7 Dtd. 24.03.2017
G	Noticee / Party / Importer / Exporter	1. M/s. Lal Mahal Ltd., B-16, Bhagwan Dass Nagar, New Delhi-110026 2. Shri Anil Kumar Nair, Director of M/s. Lal Mahal Ltd., B-16, Bhagwan Dass Nagar, New Delhi-110026 3. Shri Prem Chand Garg, Director of M/s. Lal Mahal Ltd., B-16, Bhagwan Dass Nagar, New Delhi-110026.

1. यह अपील आदेश संबन्धित 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 7th 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/- रुपए 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 – 1, 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.

1. Subject:- SCN No. DRI/HQ-CI/50D/Enq-26/INT-24/2015/Pt.-7 Dtd. 24.03.2017 issued to M/s. Lal Mahal Ltd., B-16, Bhagwan Dass Nagar, New Delhi-110026 and Others..

Brief facts of the Case

Based on information, investigation was initiated against M/s Shri Lal Mahal Ltd., B-16, Bhagwan Dass Nagar, New Delhi, having IEC No. 0590007581 (hereinafter also referred to as "the noticee") by the officer of DRI, New Delhi (hereinafter also referred as "DRI") regarding violation of provisions of the Customs Act, 1962.

2. The residential premises of Ms. Anita Garg, Managing Director of M/s Lal Mahal Ltd at A-8, Bhagwan Dass Nagar, New Delhi were searched by the officers of DRI on 04.03.2016. An internal hard disc and two laptop computers were resumed from there for further investigation. The proceedings of search were recorded in panchnama dated 04.03.2016 (RUD-1 of the SCN).

3. The office premises of M/s Lal Mahal Ltd. at B-5 866, Bhagwan Dass Nagar, New Delhi were searched by the officers of DRI on 04.03.2016. Several records were resumed from there for further investigation. The proceedings of search were recorded in panchnama dated 04.03.2016 (RUD-2 of the SCN)

4. Statement of Shri Anil Kumar Nair, Director of Shri Lal Mahal Ltd. was recorded on 08.02.2016 (RUD-3 of the SCN) under Section 108 of the Customs Act, 1962 wherein he inter-alia stated that he joined M/s Shri Lal Mahal Ltd., in the year 1998 as Operation In-charge and was promoted as Branch Manager in the year 2007; that presently he was working as Director in M/s Shri Lal Mahal Ltd. since November, 2015; that Shri Harnarain Agarwal, Shri S.K. Valecha, Shri Ram Kishan, Ms. Anita Garg and himself were the directors on board in M/s Shri Lal Mahal Ltd.; that he reported to Shri S.K. Valecha. He was responsible for all activities relating to export of rice by M/s Shri Lal Mahal Ltd. Ms. Anita Garg and Sh. S. K. Valecha were the two responsible directors of the company who were also the signing authority for operation of the bank accounts of the company. They exported rice to Saudi Arabia, Yemen, Iraq, Iran, Egypt, Africa, Turkey, Australia, Syria, Dubai etc. Shri Parveen Kumar, Export Manager interacted with their Iranian buyers. They exported rice to Iran through Mundra port only and he interacted with CHA M/s Trinity Shipping and Allied Services Pvt. Ltd. regarding export of rice to Iran.

On being asked about the documentation and payment of export of rice to Iran, he stated that the buyers sent them the purchase orders, they packed and exported the rice to their buyers; that they received the payment for export of rice to Iran after delivery of consignment to consignees; that they received the payment in Indian Rupees against export of rice to Iran through UCO Bank, Mumbai and UCO Bank transferred the funds to their Current Account No. 54035554210 in State Bank of Mysore, Naya Bazar, Delhi; that in the case of export of rice to other than Iran, they received the payment in US\$ in the same account.

On being asked, he stated that the remittances in Indian Rupees in respect of rice exported to Iran was allowed in Indian Rupees and in respect of export of rice to all other countries, payment was required to be received in freely convertible currency in terms of Foreign Trade Policy; that the remittances in Indian Rupees cannot be received against exports made to countries other than Iran.

On being asked, he stated that they had exported 57 consignments to Iran in the year 2014-15 and 2015-16; that out of these 57 consignments following 33 consignments had been diverted

and delivered at Jebel Ali port (Dubai) instead of Bandar Bushehr port or Bandar Abbas port (Iran).

S. No.	SB No.	SB Date	BL No.	Invoice No.	Invoice Dt.	Invoice Value
1	8917196	09-Apr-15	OSPL/JEA/383/2015-16	SLML/001/15-16	02-Apr-15	34385000
2	8917230	09-Apr-15	OSPL/JEA/ 382/2015-16	SLML/ 001A/ 15-16	02-Apr-15	40365000
3	9107172	20-Apr-15	OSPL/ BUH/442/ 2015-16	SLML/ 008/ 15-16	14-Apr-15	43125000
4	9105679	20-Apr-15	OSPL/BUH/443/2015-16	SLML/ 008A/ 15-16	14-Apr-15	43125000
5	9188748	24-Apr-15	OSPL/BUH/445/2015-16	SLML/010/ 15-16	21-Apr-15	43125000
6	9316335	30-Apr-15	MUNJEA1510159	SLML/015/ 15-16	27-Apr-15	43125000
7	9503083	11-May-15	OSPL/JEA/ 526/2015-16	SLML/026/ 15-16	09-May-15	43125000
8	9593891	15-May-15	OSPL/JEA/537/2015-16	SLML/027/ 15-16	12-May-15	43125000
9	9659206	19-May-15	OSPL/JEA/ 553/2015-16	SLML/031/15-16	15-May-15	43125000
10	9659224	19-May-15	OSPL/JEA/ 554/2015-16	SLML/032/ 15-16	15-May-15	43125000
11	9729257	22-May-15	OSPL/JEA/ 555/2015-16	SLML/ 035/ 15-16	20-May-15	43125000
12	9891179	30-May-15	OSPL/JEA/ 568/ 2015-16	SLML/ 040/ 15-16	23-May-15	43125000
13	9876334	29--May-15	OSPL/JEA/ 590/2015-16	SLML/051/15-16	27-May-15	43125000
14	1029313	05-Jun-15	NCL/BUH/001/2015-16	SLML/ 062/ 15-16	04-Jun-15	43125000
15	1128224	11-Jun-15	NCL/BUH/010/2015-16	SLML/064/ 15-16	09-Jun-15	43125000
16	1128283	11-Jun-15	NCL/ BUH/012 /2015-16	SLML/066 / 15-16	10-Jun-15	43125000
17	1223007	16-Jun-15	NLL/MUN/JEA/01508	SLML/073/ 15-16	15-Jun-15	43125000
18	1223001	16-Jun-15	NLL/ MUN/JEA/ 01509	SLML/074/ 15-16	15-Jun-15	43125000
19	1295925	19-Jun-15	NLL/MUN/JEA/01517	SLML/ 076/ 15-16	16-Jun-15	17250000
20	1417875	26-Jun-15	NLL/MUN/JEA/01531	SLML/076A/ 15-16	16-Jun-15	25875000
21	1258223	18-Jun-15	NLL/ MUNI/JEA/ 01542	SLML/ 077/ 15-16	16-Jun-15	43125000
22	1472571	29-Jun-15	NLL/MUN/JEA/01541	SLML/083/ 15-16	26-Jun-15	34500000
23	1570827	03-Jul-15	NLL/MUN/JEA/01554	SLML/084/ 15-16	26-Jun-15	43125000
24	1596627	04-Jul-15	NLL/MUN/JEA/01555	SLML/090/ 15-16	02-Jul-15	43125000
25	1618277	06-Jul-15	NLL/MUN/JEA/01557	SLML/091/ 15-16	02-Jul-15	43125000
26	1955104	22-Jul-15	NLL/MUN/JEA/01591	SLML/097/ 15-16	07-Jul-15	48300000
27	2528570	21-Aug-15	NLL/MUN/JEA/01670	SLML/ 123/15-16	20-Aug-15	86250000
28	2582080	24-Aug-15	NLL/MUN/JEA/ 01684	SLML/ 127/ 15-16	24-Aug-15	43125000
29	2770324	02-Sep-15	NLL/MUN/JEA/01693	SLML/ 137/ 15-16	01-Sep-15	43125000
30	2806492	03-Sep-15	NLL/MUN/JEA/ 01704	SLML/ 139/ 15-16	03-Sep-15	43125000
31	3711349	23-Oct-15	NLL/MUN/JEA/ 01819	SLML/ 169/ 15-16	21-Oct-15	43125000
32	3753266	26-Oct-15	NLL/MUN/JEA/01829	SLML/171/15-16	26-Oct-15	43125000
33	3816030	29-Oct-15	NLL/MUN/JEA/ 01842	SLML/174/ 15-16	28-Oct-15	43125000

On being asked he stated that the above 33 consignments had been diverted to Jebel Ali Port (Dubai) instead of Bandar Abbas Port (Iran) on their company's instructions to the respective Shipping Lines; that on being asked to name the specific person or persons who had passed on the said instructions to the shipping lines, he replied that Shri Parveen Kumar, Export Manager used to interact with the Iranian buyer and was also responsible for documentation work of the export consignments and he might had passed on the instructions to the shipping lines; that Shri Parveen Kumar had resigned from the service in November 2015.

On being asked he stated that they had not got carried out any amendment in the respective shipping bills for change of destination port; that on being asked the reasons for the same he could not answer the same; that the payments for all these consignments had been received in Indian rupees through UCO Bank even though the goods were discharged at Jebel Ali Port; that the fact

of discharge of these shipments at Jebel Ali port were never brought to the knowledge of UCO Bank.

He submitted the list of the consignments of rice exported to Iran during 2014-15 and 2015-16 along with documents serially numbered from page No. 1 to 173 (RUD-4 of the SCN) under his dated signatures; that out of 57 consignments of rice exported to Iran during 2014-15 and 2015-16, 33 consignments had been diverted to Jebel Ali port (Dubai); that on being asked he undertook to submit the copy of landing certificates in respect of other 24 consignments by 15th February 2016.

5. Statement dated 07.03.2016 (RUD-5 of the SCN) of Mrs. Anita Garg, Managing Director of Shri Lal Mahal Ltd. was recorded under Section 108 of the Customs Act, 1962 wherein she inter-alia stated that presently, she is working as the Managing Director of this company; that other than herself, her father in law Sh. Harnarain Aggarwal, Sh. Anil Kumar Nair and Sh. Ram Kishan were the other directors of this company; that before she joined as the Managing Director of this company, her husband Sh. Prem Chand Garg was the Managing Director of this company; that her husband had floated a consultancy firm in Dubai and is living in Dubai for the last 2-3 years; that as far as she remember, last time he visited India in 2013.

On being asked, she stated that she is a Managing Director of this company for name sake only; that she was not aware about any activity of the company; that all the departmental heads/Directors have been working with them for a long period and all were their trusted employees and she acted upon their advice and signed the documents as and when required. She was shown statement dated 08.02.2016 of Sh. Anil Kumar Nair, Director of Shri Lal Mahal Limited, which was recorded under Section 108 of the Customs Act, 1962; that after seeing the same she stated that she was not in a position to offer any comments on the said statement as she was not aware about the activities of the company; that Shri Anil Kumar Nair is working with them for the last 18 years and had been appointed as a Director recently; that all the operations at Kandla including exports were being looked after by him and he was well aware about the activities of the company.

On being asked, she stated that as per her knowledge, before 4th March, 2016, no visit/raid was conducted by any enforcement agency at her residence or at the office premises of M/s Shri Lal Mahal Limited; that the Central Bureau of Investigation (CBI) is conducting some investigations against the company. However, she did not remembered the details thereof.

6. Statement of Shri Ganesh Gulati, (RUD-6 of the SCN) working as company secretary of M/s Shri Lal Mahal Limited, was recorded under section 108 of the Customs Act, 1962 on 09-03-2016 wherein he inter alia stated that he had qualified company secretary from ICSI in 2000 and was working with M/s Shri Lal Mahal Limited since April, 2005 with the responsibility of accounting and compliance of Income Tax, Sales Tax & Company law matters; that he was not looking after export or import related work of M/s Shri Lal Mahal Limited. However, he supervised the accounting work of the export and import of the said company.

On being asked to refer to his above statement that he was not looking after export/ import work of M/s Shri Lal Mahal Limited, as such, in what capacity, letter dated 07.03.2016 addressed to SIO, DRI, Hqrs. was written by him, he confirmed that letter dated 07.03.2016 addressed to SIO, DRI, Hqrs. was written by him as per the directions of Shri Prem Chand Garg who is husband of Smt. Anita Garg; that presently, Smt. Anita Garg, Shri Harnarain Aggarwal, Shri Anil Nair and Shri Ram Kishan are the directors of M/s Shri Lal Mahal Limited; that the details of other share holders as on 30.09.2015 of the said company was as under:

S. No.	No. Name of share holders	No. of Share	% of total share
1	Prem Chand Garg HUF	7947100	21.98
2	Shivnath Ray Harnarayan Pvt. Ltd.	1200000	3.32
3	Ram Avtar Aggarwal	2025000	5.6
4	K. Sera Sera Production Ltd.	1000000	2.77
5	B.L.S. Infotech Ltd.	6050000	16.73
6	Computech Point Ltd.	2950000	8.16
7	Ferndale Ltd.	2994840	8.28
8	CIF Investment Holding Ltd.	165157	0.46
9	Ram Kumar Gupta	1000	
10	Ravinder Gupta	1000	
11	Brij Mohan Gupta	1000	

On being asked he further stated that Shri Prem Chand Garg was out of India since, September, 2013; that during one of discussion over Skype, Shri Prem Chand Garg informed him that he had fallen from the stairs and his spine got and due to that he was unable to travel; that Shri Prem Chand Garg had resigned from the company as director from May, 2015.

On being asked as to who was looking after the export related work of rice of M/s Shri Lal Mahal Limited to Iran he stated that Mr. Anil Nair and Mr. Prem Chand Garg looked after all the work related to export of rice to Iran; that documentation of export of rice of M/s Shri Lal Mahal Limited to Iran was looked after by Mr. Praveen Kumar, Assistant Manager, Documents; that he left the job from December, 2015; that his address is B-2/461, Sultan puri, Delhi and as per their office records his contact No. is 9910889398; that CBI, Bangalore is investigating a case against M/s Shri Lal Mahal Limited, in the matter related to Iron Ore Fine, and present status of the case was not known to him.

7. Statement dated 21.03.2016 of Shri Devasish Garg, Executive of M/s Shri Lal Mahal Ltd. B-6, Bhagwan Dass Nagar, New Delhi 110026 (RUD-7 of the SCN) was recorded under Section 108 of the Customs Act, 1962 wherein he inter-alia stated that he started to learn management in M/s Shri Lal Mahal Ltd.; from June-2015; that presently, he did not had any major responsibility in M/s Shri Lal Mahal Ltd.; that Shri H.N. Agarwal, Mrs. Anita Garg, Shri Anil Kumar Nair and Shri Ram Krishan Ranga were the directors on Board in M/s Shri Lal Mahal Ltd. That one laptop Mac Book Pro bearing Serial No. S/N CO2Q43X4G8WP was switched on and checked the data of the said laptop by the officers of DRI: that this laptop had data pertaining to his university education and some data communication related to quality

control of rice.

That another laptop Mac Book Pro bearing Serial No. S/N CO2J55WHDKQ1 was switched on and checked the data of the said laptop by the officers of DRI; that this laptop had no data, as the data was transferred to his laptop S/N CO2Q43X4G8WP; that thereafter both the abovementioned laptops were re-sealed with paper slips bearing his dated signatures.

That on being asked about the export of rice to Iran made by M/s Shri Lal Mahal Ltd. during 2014-15 and 2015-16, he stated that during this period he was not associated with the management of M / s Shri Lal Mahal Ltd. and had no knowledge about the export of rice to Iran; that as per his knowledge, Shri Anil Kumar Nair, Director of M/s Shri Lal Mahal Ltd. looked after the export of rice to Iran.

8. Statement of Shri Anil Kumar Nair, Director of Shri Lal Mahal Ltd. was recorded on 12.04.2016 (RUD-8 of the SCN) under Section 108 of the Customs Act, 1962 wherein he reiterated his earlier statement dated 8.02.2016 and further stated that out of the total 57 consignments of rice purportedly exported to Iran during 2014-15 and 2015-16, 33 consignments had been discharged at Jebel Ali Port and only 24 consignments were delivered at Bandar Abbas and Bandar Bushehr (Iran); that he undertook to submit the landing certificates of 24 consignments of rice exported to Iran and discharged at Bandar Abbas and Bandar Bushehr (Iran) by 25.04.2016.

He further stated that they received the payment in Indian Rupees against export of rice to Iran through UCO Bank, Mumbai and UCO Bank transferred the funds to their Current Account No. 54035554210 in State Bank of Mysore, Naya Bazar, Delhi; that he undertook to submit the copy of Bank Statement for the period 2014-15 and 2015-16 of Current Account No. 54035554210 in State Bank of Mysore, Naya Bazar, Delhi by 25.04.2016. He also undertook to submit the details of remittances received in foreign exchange by them during 2014-15 and 2015-16 by 25.04.2016.

9. Statement of Shri M B V Krishna Rao Branch Manager, M/s Novel Lines & Logistics Pvt. Ltd., 120, Manali Tower, Plot No. 110, Sector-8, Gandhidham, Kutch, Gujarat was recorded under Section 108 of the Customs Act, 1962 on 17.02.2016 (RUD-9 of the SCN) wherein he inter alia stated that he Joined M/s Novel Lines 86 Logistics Pvt. Ltd., Gandhidham as Business Development Manager and promoted as Branch Manager in the year 2013; that his responsibilities include marketing, business development coordinating with various overseas agents, documentation and all other administrative work of Gandhidham Branch of M/s Novel Lines 86 Logistics Pvt. Ltd.; that they have their own offices in Mumbai, Delhi, Gandhidham, Ludhiana and Chennai; that they provide the shipping services for export of rice to Iran to following exporters:-

1	B.N.EXPORTS
2	BEST FOODS LTD
3	BHARAT CEREALS PVT.LTD
4	CAPITAL FASHIONS PVT. LTD.

5	D.D.INTERNATIONAL (P) LTD
6	G.V.(GOD VISHNU) RICE UNIT
7	GLOBAL AGRO CORP
8	GOLDEN ORCHIDS INTERNATIONAL
9	GURANDITTA MAL TILAK RAJ
10	H M AGRI EXPORTS PVT LTD
11	J. P. SORTEX PVT .LTD
12	JAGAT AGRO COMMODITIES (P) LTD.
13	NAV BHARAT TRAGING COMPANY
14	PJS OVERSEASE LTD.
15	PLATINUM GRAINS PVT. LTD.
16	RADIANT EXPORTS & INDUSTRIES PVT. LTD
17	SGREE BABA NAGA FOOD STUFF PVT LTD.
18	SHREE HANS RICE & GENERAL MILLS
19	SHRI LALA MAHAL LTD.
20	SSA INTERNATIONAL LTD.
21	STAR GLOBAL MULTY VENTURES PVT LTD.
22	UMACHI FOODS AND COMMODITIES PVT LTD.
23	VEER OVERSEASE LTD.
24	VINOD RICE MILL PVT. LTD.

On being asked, he stated that they have switched the Bill of Ladings from Bandar Bushehr (Iran) to Jabel Ali (Dubai) in respect of consignment of rice export to Iran by following exporter after clearance from the Customs:-

Sl No.	Name of Exporter	Nos. of Bill of Lading switched
1.	M/s. Umachi Foods and commodities Pvt. Ltd.	40
2.	M/s. Shri Lal Mahal Ltd.	17
3.	Platinum Grains Pvt. Ltd.	06
Total		63

He submitted the copies of Switched Bill of Lading in respect of the above exporters (Rud-10 of the SCN i.e. Bill of Lading pertaining to M/s. Lal Mahal Ltd.).

On being asked he stated that, they switched the BLs from Bandar Bushehr (Iran) to Jabel Ali (Dubai) in respect of M/s. Lal Mahal Ltd., after receiving the instruction from Shri Praveen Kumar, Export Manager of M/s. Lal Mahla Ltd. by e-mail/telephonically. He undertook to submit all such e-mail communicate received from Shri Praveen Kumar, Export Manager of M/s. Lal Mahla Ltd. by 18th February, 2016. On being asked, he admitted that all these 63 consignments were delivered at Jabel Ali port. He submitted list of these consignments under his dated signature (Rud-11 of the SCN).

On being asked about amendment in EGM after issuance of switched BLs, he stated that no such amendment was got done by them. On being asked to explain the reasons for the same, he stated that they did not have any idea for the same. He further stated that he understood that necessary amendment was required to be done in the EGM filled by us for change of port to Jabel Ali (Dubai). He undertook to careful in future in all such cases. He also undertook to provide the copies of EGMs filed by them in respect of above 63 consignments by 24th February, 2016.

10. Copies of Shipping Bills and Bill of Ladings are annexed with the Notice (RUD-12 of the SCN).

11.1 In terms of the provisions of the Foreign Trade Policy (FTP) all export proceeds are to be realized in freely convertible currency. However, a few exceptions had been made to allow realization of export proceeds in Indian rupees. Export of rice to Iran was such an exception and export proceeds of rice exported to Iran were allowed to be realized in Indian rupees.

11.2 A transaction can be considered bonafide only when the parties concerned exchange goods and payment with each other. Involvement of any other person/party in such transaction can only be considered when the said person/party is actually involved in such transaction either as a buyer or consignee or as a commission agent.

12. Power to prohibit importation or exportation of goods by central government is dealt in the section 11 of the Act which provides that import or export of goods of any specified description may be prohibited either absolutely or subject to such conditions (to be fulfilled before or after clearance) for several purposes including the prevention of smuggling; the conservation of foreign exchange and the safeguarding of balance of payments;

13. In terms of Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended), no export or import shall be made by any person except in accordance with the provisions of the said Act, the rules and orders made there-under and the Foreign Trade Policy for the time being in force. **Thus, it appeared that any goods exported in contravention of any of the provisions of the Foreign Trade Policy would bring such goods within the prohibition envisaged in the Foreign Trade (Development and Regulation) Act, 1992** which allows Section 113 (d) and Section 114 to be invoked for confiscation of export goods that breach the said Act.

14. It appeared that the liability of export goods, already exported, to confiscation under Section 113 of the Act *ibid* and subsequent imposition of penalty under Section 114 of the Act *ibid*, as in the present case, has already been settled in a catena of judgments. The Hon'ble Calcutta High Court in the case of *M/s. Euresian Equipments & Chemicals v. Commissioner of Customs and Others* (1980 (6) E.L.T. 38 (Cal.)) had the opportunity to deal with the said issue. In that case the issue before the Hon'ble Court was whether or not goods exported in violation of prohibition/restriction imposed under Sec.12 (1) of the Foreign Exchange Regulation Act, 1947 will be deemed to be a violation leading to penalty under Sec. 114, with respect to goods already exported.

15. Thus, it appeared that the liability to confiscation of the improperly exported goods does not get extinguished in case of already exported goods.

16. It also appeared that in case any mis-declaration is made in the entry made under the Act (Shipping Bill under Section 50 of the Customs Act, 1962), the said goods are liable to be confiscated in terms of Section 113 (i) of the Act *ibid*.

16.1. Section 113(i) clearly provides that the goods in respect of which a wrong entry has been made in the shipping bills the provisions of this section are attracted.

17. In terms of the provisions of the Foreign Trade Policy (FTP) all export proceeds are to be realized in freely convertible currency. However, a few exceptions had been made to allow realization of export proceeds in Indian rupees. Export of rice to Iran was such an exception and export proceeds of rice exported to Iran were allowed to be realized in Indian rupees.

18. A transaction can be considered bonafide only when the parties concerned exchange goods and payment with each other. Involvement of any other person/party in such transaction can only be considered when the said person/party is actually involved in such transaction either as a buyer or consignee or as a commission agent.

19. M/s Shri Lal Mahal Ltd. had not disclosed the fact of mis-statement in shipping bills on their own. The facts came to the knowledge of the Department only subsequent to initiation of investigation. In today's era of self-assessment, the department is not privy to the certain information which is in exclusive control of the exporter. The department had no means to find out the information about the covert act of the exporter. It may be seen that in the case of self-assessment there is a system in place where it is enjoined upon the exporter to make true declarations in the shipping bills and in the same shipping bills itself they have to make an undertaking with regard to truthfulness of the disclosures made in it. To thwart any attempt by any unscrupulous exporter to contravene provisions of Customs Act, 1962, department has devised methodology to detect such attempts and take suitable action for prevention of commissioning offence by the exporters. One such method is by way of analysis of the shipping bills. If a person makes false statement in the export documents then whole of the processing of his case is based upon the edifice of that false declaration. In the event of absence of any special circumstances leading to detection of that particular offence the exporter can be successful in hoodwinking the department on the basis of their dishonest manoeuvring. It is owing to the factor that such activities are done so covertly that department has no chance to find out it in the ordinary manner. It is also envisaged to provide for the legal action in the situation where the exporter is successful in hoodwinking the authorities by means of surreptitious activities which are not in the knowledge of department.

The act of Shri Lal Mahal Ltd. does not appear simple case of ordinary omissions or inadvertent failure to state correctly. The sequence of events which has come to fore in this case as a result of investigation clearly bring out deliberate acts on their part. The applicable law provides for liability for confiscation of the offending goods in such situation of mis-statement in shipping bills in terms of section 50 of the Customs Act, 1962.

20. Imposition of penalty:

M/s Shri Lal Mahal Ltd., Shri Prem Chand Garg, erstwhile Director and the actual controller of M/s Shri Lal Mahal Ltd and Shri Anil Kumar Nair, Director of Shri Lal Mahal Ltd appear liable to penal action in terms of the following provisions of law:

Relevant Section	Description of offence warranting imposition of penalty
<p>Section 114</p> <p>Penalty for attempt to export goods improperly, etc.</p> <p>Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable to penalty</p>	<p>M/s. Shri Lal Mahal Ltd., Shri Prem Chand Garg, erstwhile Director and the actual controller of M/s. Shri Lal Mahal Ltd., and Shri Anil Kumar Nair, Director of M/s. Shri Lal Mahal Ltd., have mis-stated the facts in the export documents filed by them. The goods which were actually destined for UAE have been shown to be destined to Iran. They appear to have smuggled the goods to UAE under the veil of export to Iran under Rupee Trade Mechanism. They appear to have exported the goods in violation of the prohibition discussed above and rendered the goods liable to confiscation. Therefore, they appear to have rendered themselves liable to imposition of penalty under Section 114 and 114AA of the Customs Act, 1962.</p>
<p>Section 114AA</p> <p>Penalty for use of false and incorrect material.—</p> <p>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 business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.]</p>	

21. Further M/s Shri Lal Mahal Ltd. in the shipping bills has made the declaration as under:

We claim rewards under merchandise exports from India Scheme(MEIS)

The relevant provisions of MEIS scheme as contained in Chapter 3 of the Foreign Trade policy are as under:

Merchandise Exports from India Scheme (MEIS)

3.03 Objective

Objective of Merchandise Exports from India Scheme (MEIS) is to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India's export competitiveness.

3.04 Entitlement under MEIS

Exports of notified goods/products with ITC [HS] code, to notified markets as listed in Appendix 3B, shall be rewarded under MEIS. Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code wise]. The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in free foreign exchange, whichever is less, unless otherwise specified.

As such the Para 3.04 above specifies that the eligibility for reward under this scheme is subject to realisation of export proceeds in free foreign Exchange. Thus this condition is mandatorily required to be fulfilled for claiming benefit of the scheme. In the case of impugned goods the proceeds of export have been realised in INR from Iran. Therefore it appeared that this benefit is not admissible to M/s Shri Lal Mahal Ltd.

22. **The details of goods exported from Mundra Port are as under:**

Customs House	Shipping Bill No.	Date	FOV Value (Rs.)	Quantity (MTS)
MUNDRA	1029313	05-06-15	4,24,92,500.00	575

MUNDRA	1128224	11-06-15	4,25,67,625.00	575
MUNDRA	1128283	11-06-15	4,25,67,625.00	575
MUNDRA	1223001	16-06-15	4,25,67,625.00	575
MUNDRA	1223007	16-06-15	4,25,67,625.00	575
MUNDRA	1258223	18-06-15	4,25,67,625.00	575
MUNDRA	1295925	19-06-15	1,70,27,050.00	230
MUNDRA	1417875	26-06-15	2,55,40,575.00	345
MUNDRA	1472571	29-06-15	3,40,55,500.00	460
MUNDRA	1570827	03-07-15	4,26,17,000.00	575
MUNDRA	1596627	04-07-15	4,26,17,000.00	575
MUNDRA	1955104	22-07-15	4,76,81,620.00	644
MUNDRA	2528570	21-08-15	8,40,15,510.00	1150
MUNDRA	2582080	24-08-15	4,20,07,755.00	575
MUNDRA	2770324	02-09-15	4,19,83,045.00	575
MUNDRA	2806492	03-09-15	4,19,83,045.00	575
MUNDRA	3711349	23-10-15	4,19,90,105.00	575
MUNDRA	3816030	29-10-15	4,19,90,105.00	575
MUNDRA	8917196	09-04-15	3,30,25,930.00	529
MUNDRA	8917230	09-04-15	3,87,69,570.00	621
MUNDRA	9105679	20-04-15	4,16,47,750.00	575
MUNDRA	9107172	20-04-15	4,16,47,750.00	575
MUNDRA	9188748	24-04-15	4,16,47,750.00	575
MUNDRA	9316335	30-04-15	4,16,47,750.00	575
MUNDRA	9503083	11-05-15	4,24,92,000.00	575
MUNDRA	9593891	15-05-15	4,24,92,000.00	575
MUNDRA	9659206	19-05-15	4,24,92,000.00	575
MUNDRA	9659224	19-05-15	4,24,92,000.00	575
MUNDRA	9729257	22-05-15	4,24,92,000.00	575
MUNDRA	3753266	26-10-15	4,19,90,105.00	575
MUNDRA	9891179	30-05-15	4,24,92,500.00	575
MUNDRA	9876334	29-05-15	4,24,92,500.00	575
MUNDRA	1618277	06-07-15	4,26,17,000.00	575
Total			1,37,92,77,540.00	18929

23. Thus from the evidence on record, statements of the various persons and legal position in the matter, as discussed above, it appeared

A. That the goods exported by M/s Shri Lal Mahal Ltd. having collective FOB value of Rs 1,37,92,77,540/- as per details in Table above, are liable to confiscation under Sections 113 (d) and 113 (i) of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended) Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993, read with provisions of Section 50 of the Customs Act, 1962.

B. That M/s Shri Lal Mahal Ltd., Shri Prem Chand Garg, erstwhile Director and the actual controller of M/s Shri Lal Mahal Ltd and Shri Anil Kumar Nair, Director of Shri Lal Mahal Ltd liable to penalty under Section 114 and 114AA of the Customs Act, read with Section 11 (1) of the Foreign Trade (Development & Regulation) Act, 1992(as amended) Rule 11 and 14 (2) of the Foreign Trade (Regulation) Rules, 1993, read with provisions of Section 50 of the Customs Act, 1962, in view of the acts of omission and commission as discussed above.

24. In view of the above, the said noticee M/s Shri Lal Mahal Ltd., were issued a Show Cause Notice bearing F.No. DRI/HQ-CI/50D/ENQ-26(INT-24)/2015-Pt-7 dated 24.03.2017 calling upon them to show cause to the Joint/Additional Commissioner of Customs, Mundra Port & SEZ, Mundra, Dist Kutch, Gujrat, as to why:-

- (i) The goods of the declared FOB value of Rs. 1,37,92,77,540.00 (Rupees One Hundred Thirty Seven Crores, Ninty Two Lacs Seventy Seven Thousand Five Hundred Forty only) exported under 33 Shipping Bills should not be held liable to confiscation under Section 113(d) and 113(i) of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992, Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993 and provisions of Section 50(2) of the Customs Act, 1962;
- (ii) The penalty under Section 114 of the Customs Act, 1962 with Section 11 (1) of the Foreign Trade (Development & Regulation) Act, 1992, Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993 and provisions of Section 50 of the Customs Act, 1962 should not be imposed upon them;
- (iii) The penalty under Section 114 AA of the Customs Act, 1962 with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992, Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993 and provisions of Section 50 of the Customs Act, 1962 should not be imposed upon them

25. Also, the said noticee, Shri Prem Chand Garg, erstwhile Director and the actual controller of M/s Shri Lal Mahal Ltd and Shri Anil Kumar Nair, Director of Shri Lal Mahal Ltd were issued a Show Cause Notice bearing F. No. DRI/HQ-CI/50D/ENQ-26(INT-24)/2015-Pt-7 dated 24.03.2017 calling upon them to show cause to the Joint/Additional Commissioner of Customs, Mundra Port & SEZ, Mundra, Dist Kutch, Gujrat, as to why:-

- (i) The penalty under Section 114 of the Customs Act, 1962 with Section 11 (1) of the Foreign Trade (Development & Regulation) Act, 1992, Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993 and provisions of Section 50 of the Customs Act, 1962 should not be imposed upon them in view of the acts of omission and commission as discussed above;
- (ii) The penalty under Section 114 AA of the Customs Act, 1962 with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992, Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993 and provisions of Section 50 of the Customs Act, 1962 should not be imposed upon them in view of the acts of omission and commission as discussed above;

Personal Hearing:

26. Despite providing sufficient time, none of the noticees have reply to the charges mentioned against them in the SCN. Therefore, Personal hearing in the case was fixed on

05.01.2018. In response to the PH letter dated 05.01.2018, M/s. Shri Lal Mahal Ltd. and Shri Prem Chand Garg vide their letter dated 16.01.2018 had requested for extension of 60 days for filing the reply of SCN in the interest of justice. Their request has been granted on 30.01.2018 but no defence reply has been received after given sufficient time period. Accordingly, another PH was fixed on 27.03.2018. A letter dated 26.03.2018 has been received from the Advocate of M/s. Shri Lal Mahal Ltd. under which they have informed that they have appointed newly counsel for M/s. Shri Lal Mahal Ltd. hence, they have requested for extension of four week to file a detailed reply to the said SCN. Therefore, another four week time is granted on 26.03.2018 but no reply had been received after laps of given time. Accordingly, another PH were fixed on 24.05.2018, 31.05.2018 and 25.07.2018 but no one appeared before the adjudicating authority as well as no defence reply was received by the noticees. Thereafter, adjudicating authority was changed and new adjudicating authority fixed PH in the matter on 30.10.2018. Shri Ritaj kacker, Advocate of M/s. Lal Mahal, Shri Prem Chand Garg and Shri Anil Kumar Nair sought adjournment vide letter dated 30.10.2018 for another date of PH on 06.12.2018. Accordingly next PH was fixed on 06.12.2018. A letter dated 04.12.2018 received from Shri D.K. Singh, Advocate of the above said Noticees regarding adjournment the PH till 2nd week of January-2019. As per their request, next date of PH was fixed on 22.01.2019. Shri D. K. Singh and Shri J. K. Bhatt both advocate appeared before the adjudicating authority on 22.01.2019 on behalf of all noticees. They furnished a written reply to the SCN during the PH dated 22.01.2019.

Defence Reply:

27. Shri D. K. Singh, Advocate of M/s. Lal Mahal Ltd., Shri Prem Chand Garg and Shri Anil Kumar Nair, Both Director of M/s. Lal Mahal Ltd., has made the following submission:

- It is not proven under the investigation that the goods were diverted on the instruction of the Noticees. It is important to note that following statements cannot be relied upon to conclude the goods were diverted on the instruction of the noticees because these statements were relied by the investigating agency without corroborative evidences as much as these statements are contradictory to each other:
 - It is important to note that in their statement dt. 08.02.2016 and 12.04.2016, the Noticee No.2 state that he was the responsible person for export of Rice to Iran and additionally Sh. Anita Garg and Sh. S. K. Valecha also two responsible director of Noticee No.1. However, instead of the fact that these three persons are only responsible as per the Noticee No.2, the Noticee No.2 was not in position to indicate the exact name of the person, on the instruction of which the alleged goods were diverted to UAE instead of Iran. The aforesaid fact proves that they had no actual knowledge of diversion of the exported goods. As the investigating agency confirmed him that the goods were diverted to the UAE instead of Iran, Noticee No.2, simple accepted that "it might be on the instruction of the company".
 - That only acceptance of the diversion cannot proved that the same should be only on the instruction of the company until unless, it is proved that, who is the key person, had

ordered for the diversion of the exported goods, when the alleged goods had been already proceeded for the export to Iran and Bill of Lading was issued after goods were shipped on Board.

- That from the statement of Noticee No.2 and other related person it is proved that there is nothing on record which proves that who is the actual responsible person for alleged diversion. It is not proven from the statement that the alleged diversion done on the company's instruction or any related person of the company.

- That in the present case the goods were shipped on the board and custody of the goods were handover to the shipper for supply to Iran. Subsequently, the shipper has issued the B/L for the said destination and charged the Freight upto Bushehr Port Iran. The export documents were also filed with the Customs department as per the B/L issued i.e. for Iran. Hence, after filing of the export documents and receipt of B/L, the Noticees has not the control over the shipper. However, after export goods shipped on board, the exporter may ensure the delivery status only after denial of the overseas buyer. However, in the present case, never such claim for non-delivery was made by the oversee buyers which proves that the goods shipped on board would ultimately deliver to the overseas buyer and confirmation of which the Noticee received the payment from the concerned buyer which is Iranian Entity confirms that the goods were received by them. Hence, in that scenario, there is no reason to state that the alleged diversion has been done in this case.

- It is important to note that the Noticee No.2 has not accepted that they have diverted the exported goods and no one other person from the company i.e. from Noticee No.1 has accepted that diversion has been made on the instruction any related person of Noticee No.1.

➤ That statement of Sh. Ganesh Gulati, Company Secretary of Noticee No.1 recorded on 09.03.2016 cannot be relied upon in view of the following submission:

- That on the basis of statement dt. 09.03.2016 recorded by the investigating agency, it is concluded at Para 21 & 22 of SCN that Sh. Prem Chand who is husband of Smt. Anita Garg were looking after all export work related to export of rice to Iran and Sh. Prem Chand Garg who is Noticee No.3 in this case was the actual controller of the affairs of Noticee No.1.
- It is important to note that in the state recorded on 09.03.2015 of Sh. Ganesh Gulati, it is not categorically confirmed that Sh. Prem Chand Garg was the person who issued instruction to divert the exported goods. Hence, statement of Sh. Ganesh Gulati cannot be relied upon. Only handling work related to exported goods cannot be instituted that Noticee No.3 has acted upon diversion of the case.

➤ That statement of Sh. M. B. V. Krishna Rao, Branch Manager of M/s Novel Lines and Logistics Pvt. Ltd. recorded on 17.02.2016 cannot be relied upon in view of the following submission:

- That in their statement dt. 17.02.2016, Sh. M. B. V. Rao has undertook to submit email correspondence received from Sh. Praveen Kumar towards the amendment of Shipping

Bills but till date he has not submitted the same which proves that the statement of Sh. M. B.V. Rao is just only imaginary and not factually correct and without support of any corroborative evidence.

- That from perusal of the BL which is Part of RUD's it can be found that it is modified Bill of Lading not switched as stated by Sh. M. B. V. Rao. However, for modification of BL it is necessary that a stamp of Shipper and name of signature of concerned person should be there. But in the present case, there is no such stamp and signature of any person of Noticee No.1 is appeared on the Original/Initial BL which is annexed under RUD's which were required for modification of BLs, which proves that for modification of BL no instruction has been issued by Noticee No.1
- The investigating agency has alleged that the goods were diverted to UAE (Dubai) and payment has been realized from the third party from Iranian Entity. However, till date the investigating agency has failed to prove that who were the actual buyers who received the alleged goods in this case, if the goods were not sold or received to the Iranian Entity.
- It is important to note that only copy of modified Bill of Lading has been produced by the Investigating authority in this case, not the Original which would proved that the Original BL were actually modified or switched or not?
- It is important to prove that the actual destination of delivery of the export goods in this case by way of producing landing certificates but landing certificate is still not produced in this case which would proved that the materials were actually delivered to the Port Jable Ali (Dubai) or not, which is alleged by the investigating Authority.
- That department has not given any specific reason behind committing such alleged transaction between Noticees and Overseas Buyers. Hence, it is evident there was no mens rea about the alleged miss-deeds of the Noticee No.1, 2 & 3.
- That the present case is made only on the basis of assumption and presumption and on the basis of statement recorded by the Investigating Agency from different person without support of any corroborative evidence to proves their allegation that the exported goods were actually diverted to the Jabel Ali Port (Dubai, UAE) instead of Iran. However, on the other hand the Noticee has proved that the goods were not diverted by him and remittance has been received from the same buyers name of which were mentioned in the Shipping Bills, which substantially proves that the goods were delivered to the Iranian Entity only. Hence, on the basis of Assumption and presumption the confiscation of goods and penalty on the noticees cannot be warranted in the present case.

Reply of the merits of proposition of Confiscation and penalty:

- That Section 113(d) of the Act requires any goods attempted to be exported or brought within the limits of Customs area for the purpose of being exported, contrary to any provisions imposed by or under the Customs Act, 1962 or any other law for the time being in force are liable to confiscation. Hon'ble Supreme Court in the case of Om Prakash Bhatia v. CCE, Delhi [2003 (155) E.L.T. 423 (S.C.)] in para - 7 held that Section 113(d) empowers the authority to confiscate any goods attempted to be exported contrary to any

prohibition imposed by or under the Act or any other law for the time being in force. Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force. Section 2(33) of the Act defines "prohibited goods" which reads as under :

"prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

[Emphasis supplied]

From the above definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 of the Customs Act, 1962 which empowers the Central Government to 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 the goods of any specified description. The notification can be issued for the purposes specified in subsection (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made dear by Apex Court in *Shekih Mohd. Omer v. Collector of Customs, Calcutta and Others* [(1970) 2 SCC 728 = 1983 (13) E.L.T. 1439 (S.C.)] wherein it was contended that the expression 'prohibition' used in Section 11(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus : -

"...What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act, "Any prohibition" means every prohibition. In other words all types of prohibitions. Restrictions is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is dear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

[Emphasis supplied].

In the present case, the investigation alleged that as per Para 2.52 Foreign Trade Policy 2015-20 relating to the exports realization, export proceeds should be realized in Freely Convertible currency. However, in very next Para 2.53 of FTP 2015-20, realization in INR

from IRAN is allowable for benefits of export, which means that the export proceeds for goods exported to IRAN is allowable in Indian Rupees. Accordingly such exports were made in violation of the instructions issued by the DGFT under para 2.52 of the FTP 2015-20 if goods were not exported to Iran and realization was made in INR, making the exported goods liable to confiscation under Section 113(d) of the Customs Act, 1962 by virtue of Section 11 of the Foreign Trade (Development & Regulation) Act, 1992 read with Section 3(2) & 3(3) of the Foreign Trade (Development & Regulation) Act, 1992. There is also an allegation that there was a violation of Rule 11(1) of the Foreign Trade (Regulation) Rules, 1993. All these violations rendered the goods to be confiscated being the prohibited goods.

- That alternatively even if confiscation is held to be proper, the goods have already gone out of India and not available for confiscation. Noticees relied upon decision made in the matter of **M/s Best International Vs. Commissioner of Customs (SEA), Chennai [2004(178)ELT 278(Tri.Chennai)]**, in the said matter, the Hon'ble Tribunal has held that when goods being already exported out of country and not being available for confiscation, not liable for confiscation. Accordingly, there cannot be imposition of redemption fine.
- That there is no violation of any provision of Customs Act, 1962 or any other law has been made by the Noticees in the present case, in view of the following submission:
 - That it is proven facts that at the time of filing of shipping bills there is no such declaration has been made in the documents which proves that the goods were meant for delivery to Jabel Ali Port (Dubai, UAE).
 - That the relevant BL was also issued by the shipping Line only after exported goods shipped on Board and an endorsement towards this effect is already mentioned in initial BL as claimed by the investigating Agency. This facts proves that the goods were rightly shipped on board to the vessel destined to the IRAN not the Jabel Ali Port (Dubai, UAE).
 - The Noticees are enclosing herewith copy of BRC issued in respect of all the alleged consignment exported which proves that there is acceptance of payment realization in INR from the Bankers and DGFT Department as well as Customs department also. The payment has been realized from the buyers only not from the third party as alleged by the Investigating Agency. Copy of All relevant BRCs are enclose herewith and marked as **Annexure-“B”**
- That penalty cannot be warranted in terms of Section 114 and 114AA of Customs Act, 1962 on the Noticee No.1 In view of the following submission:
 - It is not proved yet by way of record of statement or by documentary evidence that it was pre-decided before filing of export documents with the Customs department or before Goods of Board to vessel that the said alleged goods should be delivered or diverted to Jabel Ali Port Dubai, UAE.

- That at the time of export of the alleged goods it cannot be said as prohibited goods or false and incorrect materials particular were made in the export documentation because it is not proven yet that alleged diversion of the exported goods was pre-decided.
 - That Noticee No.3 is proposed for penalty only on the basis of Statement 09.03.2016 of Sh. Ganesh Gulati, Company Secretary of Noticee No.1 who said in their statement that Noticee No.1 & 3 was looking all work related to Rice to Iran. However, the said statement is contrary to the statement of Noticee No.2 recorded on 08.02.2016 and 12.04.2016 as Sh. Ganesh Gulati has told that Sh. Prem Chand Garg was controlling the work related to Export of Rice to Iran. However, Noticee No.2 i.e. Anil Kumar Nair stated that Smt. Anita Garg and S. K. Valecha was the responsible Director for company. The Noticees state that the contradictory statements and confessional statements of Co-Noticee without corroborative evidence cannot be relied upon. The Noticee rely upon judgment made by **Hon'ble Tribunal in the matter of Swapan Kumar Shah Vs. Collector of Customs, Bombay [1996(83)ELT 133 (Tri.)]**.
 - That the present case is made only on the basis of confessional statement of Noticee No.2 without supporting corroborative evidence on the basis of which penalty cannot be imposed on the Noticee No.3 and Noticee 1. The Noticees relied upon the decision of **Hon'ble Tribunal in the matter of M/s Vikram Singh Dahiya Vs. Commissioner of Customs (Exports) New Delhi [2008(223)ELT 619 (tri.-Del)]** vide which the Hon'ble Tribunal has held that Co-noticee's statement without any corroborative evidence cannot be made role basis for imposing penalty on another co-noticee.
 - As the confiscation is not warranted in the present case as goods were not available for confiscation, penalty as proposed towards Noticee No.3 is also not liable to be dropped under Section 114 and 114AA of Customs Act, 1962.
- That in view of submission Noticee demand for the cross examination from your goodself of Sh. M. B. V. Krishna Rao, Branch Manager –M/s Novel Line & Logistics Pvt. Ltd. Gandhinagar, who has given statement against Noticees without any corroborative evidences.

Discussion & Findings:

28. I have carefully gone through the records of the case and the Show Cause Notice dated 24.03.2017. Hence, I proceed to decide the case on the basis of available records.
29. I find that the following main issues are involved in the subject Show Cause Notice, which are required to be decided:
- (i) Whether the goods exported by M/s. Lal Mahal Ltd., under 33 Shipping Bills valued at Rs. 1,37,92,77,540/- are liable for confiscation under Section 113(d) and (i) of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended) Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993, read with provisions of Section 50 of the Customs Act, 1962.
 - (ii) Whether penalty can be imposed upon M/s. Lal Mahal Ltd., Shri Anil Kumar Nair and

Shri Prem Chand Garg under the provisions of Section 114 of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended) Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993, read with provisions of Section 50 of the Customs Act, 1962.

- (iii) Whether penalty can be imposed upon M/s. Lal Mahal Ltd., Shri Anil Kumar Nair and Shri Prem Chand Garg under the provisions of Section 114AA of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended) Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993, read with provisions of Section 50 of the Customs Act, 1962.

30. After having framed the main issues to be decided, now I proceed to deal with each of the issues individually, herein below:

31. On going through the case records and the SCN, I find that the fact of the case is that M/s Shri Lal Mahal Ltd., has filed the Shipping Bills/Export documents for export of goods i.e Rice to Iran but the goods were delivered at UAE (Jabel Ali Port). The remittance is received in Indian Rupee from Iran instead of freely convertible foreign currency. Thus, there appeared to be mis-declaration on part of M/s. Lal Mahal Ltd.

32. I find that Shri Anil Kumar Nair, Director of M/s Shri Lal Mahal Ltd., in his statement dated 08.02.2017 has himself admitted that they had exported 57 consignments of rice to Iran in the year 2014-15 and 2015-16. Out of these 57 consignments 33 consignments had been diverted and delivered at Jabel Ali port (Dubai) instead of Bandar Abbas port (Iran) on their company's instructions passed to him by Shri Praveen Kumar Verma, Export Manager of M/s. Shri Lal Mahal Ltd. Shri Anil Kumar Nair, Director of M/s Shri Lal Mahal Ltd., had also admitted that they had not got carried out any amendment in the respective shipping bills for change of destination port. Further he admitted that the payments for all these consignments had been received in Indian rupees through UCO Bank even though the goods were discharged at Jabel Ali port (Dubai) instead of Bandar Abbas port (Iran) and the fact of discharge of these shipments at Jabel Ali port were never brought to the knowledge of UCO Bank.

33. I find that, Mrs. Anita Garg, Managing Director of Shri Lal Mahal Ltd., under her statement dated 07.03.2016 stated that she is only name sake for this company i.e. Shri Lal Mahal Ltd. she was not aware about any activity of the company and all the departmental heads/Directors have been working with them for a long period and all were their trusted employees and she acted upon their advice and signed the documents as and when required. All the operations including exports were being looked after by Shri Anil Kumar Nair and he was well aware about the activities of the company.

34. I find that, M B V Krishna Rao, Branch Managare of M/s. Novel Line & Logistics Pvt. Ltd., in his statement dated 17.02.2016 inter alia stated that, they have switched 17 Bill of Ladings from Bandar Abbas (Iran) to Jabel Ali (Dubai) in respect of consignments rice exported by the Noticee after receiving the instruction from Shri Praveen Kumar, Export Manager of the

Noticee by email/telephonically. Further he admitted that, he understood that necessary amendment was required to be done in the EGM filled by them for change of port to Jabel Ali (Dubai) but no amendment in EGMs was done by them.

35. I find that, receipt of remittances in respect of export to Iran is regulated through provisions of FTDR/FEMA and other applicable provisions of law. In terms of para 2.40 of FTP 2009-14 and para 2.52 of FTP 2015-20 all export contracts and invoices shall be denominated either in freely convertible currency or Indian rupees but export proceeds shall be realized in freely convertible currency, thus the proceeds of **the goods sold in UAE are mandatorily required to be realized in freely convertible foreign currency.** It is also evident from the records that the proceeds of impugned goods, exported to UAE have been realized in Indian Currency through Iran.

Further, I find that the exports proceeds for exports to Iran are regulated as per para 2.53 of FTP 2015-20 read as under:

Para 2.53 Export to Iran - Realisations in Indian Rupees to be eligible for FTP benefits / incentives

Notwithstanding the provisions contained in Para 2.52(a) above, export proceeds realized in Indian Rupees against exports to Iran are permitted to avail exports benefits / incentives under the Foreign Trade Policy (2015-20), at par with export proceeds realized in freely convertible currency.

In terms of the provisions of the Foreign Trade Policy (FTP) all export proceeds are to be realized in freely convertible currency. However, a few exceptions had been made to allow realization of export proceeds in Indian rupees. Export of rice to Iran was such an exception and export proceeds of rice exported to Iran were allowed to be realized in Indian rupees.

Thus on the basis of above para the export proceeds from Iran only can be realised in Indian Rupees and realization of export proceed from UAE in Indian Rupees is not permitted and the same is in violation to the Foreign Trade Policy.

36. M/s. Lal Mahal Ltd. have contended in their defence that there is no violation of any provision of Customs Act, 1962 or any other law has been made in the present case. In this regard, I find that this is actually a case of violation of conditions of Section 113 (d) & 113(i) of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992, Rule 11 and 14(2) of the Foreign Trade (Development & Regulation) Act, 1993 and provisions of Section 50(2) of the Customs Act, 1962 which provide for confiscation of improperly exported goods, It reads as under:-

"Section 113: - Confiscation of goods attempted to be improperly exported etc. - The following export goods shall be liable to confiscation: -

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force.

(m) [any goods which do not correspond in respect of value or in any other particular] with

the entry made under this Act or in the case of baggage with the declaration made under section 77 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]."

36.1 The aforesaid Section empowers the competent authority to confiscate any:

- goods attempted to be exported contrary to any prohibition' imposed by or under the Act or any other law for the time being in force or
- the goods which do not correspond in any other particular with the entry made under the Customs Act, 1962.

Thus in view of the aforesaid Section the authorities are empowered to confiscate any goods attempted to be exported contrary to any 'prohibition' imposed by or under the Act or any other law for the time being in force.

36.2 Further, Section 2(33) of the Act defines "prohibited goods" which as under:-

"prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

Thus in terms of definition as provided by this section any goods are considered prohibited goods if,

- there is any prohibition of import or export of goods under the Act for the time being in force,
- there is any prohibition of import or export of goods under or any other law for the time being in force,
- the goods in respect of which conditions prescribed for import or export of goods are not complied with,

36.3 Power to prohibit importation or exportation of goods by Central Government is dealt in the section 11 of the Act which provides that import or export of goods of any specified description may be prohibited either absolutely or subject to such conditions (to be fulfilled before or after clearance) for several purposes including the prevention of smuggling; the conservation of foreign exchange and the safeguarding of balance of payments.

36.4 The dispute regarding scope of prohibition has been long ago settled by Hon'ble Apex Court in the case of SHEIKH MOHD. OMER Versus COLLECTOR OF CUSTOMS, CALCUTTA AND OTHERS {1983(13)1439 ELT} wherein while referring to section 111 of the Act it has been inter alia observed by the Court that Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. **The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions.** Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions

"prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111 (d) of the Act. "Any prohibition" means every prohibition, in other words all types of prohibitions. Restrictions is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."(emphasis supplied).

- ❖ Section 113 of the Customs Act, 1962 empowers the authority to confiscate any goods attempted to be exported contrary to any 'prohibition' imposed by or under the Act or any other law for the time being in force.
- ❖ Hence, for application of the said provision, it is required to be established that attempt to export the goods was contrary to any prohibition imposed under any law for the time being in force.
- ❖ If there is any prohibition of export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods;

This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 of the Customs Act, 1962 which empowers the Central Government to 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 the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This was also made clear by the Hon'ble Supreme Court in *Shekih Mohd. Omer v. Collector of Customs, Calcutta and Others* [(1970) 2 SCC 728] wherein it was contended that the expression 'prohibition' used in Section 111 (d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus

'...What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111 (d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restrictions is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues.'

36.5 In terms of Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended), no export or import shall be made by any person except in accordance with the provisions of the said Act, the rules and orders made there-under and the Foreign Trade Policy for the time being in force. **Thus, it is clear that any goods exported in contravention of any of**

the provisions of the Foreign Trade Policy would bring such goods within the prohibition envisaged in the Foreign Trade (Development and Regulation) Act, 1992 which allows Section 113 (d) and Section 114 to be invoked for confiscation of export goods that breach the said Act.

36.6 I find that the liability of export goods, already exported, to confiscation under Section 113 of the Act *ibid* and subsequent imposition of penalty under Section 114 of the Act *ibid*, as in the present case, has already been settled in a catena of judgments. The Hon'ble Calcutta High Court in the case of *M/s. Euresian Equipments & Chemicals v. Commissioner of Customs and Others* (1980 (6) E.L.T. 38 (Cal.)) had the opportunity to deal with the said issue. In that case the issue before the Hon'ble Court was whether or not goods exported in violation of prohibition/restriction imposed under Section 12 (1) of the Foreign Exchange Regulation Act, 1947 will be deemed to be a violation leading to penalty under Sec. 114, with respect to goods already exported. In that case as it was argued by the appellants that penalties under Section 114 of the Customs Act, 1962 can only be imposed with respect to 'export goods' which are not yet exported. Paras 26 to 30 of the order passed by Calcutta High Court in the above case are relevant and are reproduced below:

Quote

"26. It is quite clear that violation of any prohibition or restriction imposed under Section 12 of the Foreign Exchange Regulation Act, 1947 will result in a violation, of the prohibition or restriction under Section 11 of the Customs Act, 1962 by virtue of the deeming provisions contained in Section 23A of the Foreign Exchange Regulation Act; and necessarily, all the provisions of the Customs Act which may be attracted because of violation Section 11 of the Customs Act will have effect. The question is whether the violation of the prohibition or restriction imposed under Section 11 of the Customs Act will attract the provisions of Sections 113 and 114 of the Act in a case where goods had already been exported. The answer to this question will depend on proper construction of the relevant provisions of the Customs Act and of the provisions contained in Section 113 in particular. Section 113 lays down conditions when export goods become liable to confiscation. It makes provision as to under what circumstances 'export goods' incur the liability to confiscation. Section 113 does not deal with actual confiscation of the goods or the physical possibility of confiscation thereof. It only provides that 'export goods' shall be liable to confiscation, if any of the conditions stipulated in Section 113 are satisfied, in other words, it makes provision as to the incurring of liability to confiscation of the 'export goods'. Section 113(d) makes it clear that 'export goods' shall incur the liability to confiscation if the goods are attempted to be exported contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force. 'Export goods' as defined in Section 2(19) of the Customs Act means 'any goods which are to be taken out of India to a place outside India'. Any goods which are to be taken out of India to a place outside India will incur the liability to confiscation under Section 113(d), if the said goods are attempted to be exported contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force. The liability to confiscation arises and is incurred as soon as the 'export goods' are attempted to be exported contrary to any such prohibition and attempt to export the goods must necessarily precede the actual exportation of the goods. The liability of the goods to confiscation, therefore, arises as soon as the said goods are attempted or sought to be exported contrary to such prohibition. This liability which "accrues or arises as soon as the attempt to export the goods is made is in no way dependent and has not been made dependent on the possibility or feasibility of actual confiscation of the goods. This accrued liability of the goods to confiscation clearly under Section 114 of the Customs Act which provides that

any person who in relation to any goods, does or omits to do any act, which act or omission would render such goods liable to confiscation under Section 113 or abets the doing or omission of such an act, shall be liable to penalty as provided in the said Section. With the incurring of liability of the goods to confiscation under Section 113, any person who in relation to such goods has done or omitted to do any act which act or omission has rendered such goods liable to confiscation under Section 113 or abets the doing or omission of such an act, renders himself liable to penalty under Section 114. On a proper construction of Sections 113 and 114 of the Customs Act with reference to the language used in the said sections this position, in our opinion, clearly emerges. We fail to appreciate how the accrued liability of the goods to confiscation with the attempt made for exporting the same contrary to prohibition is extinguished or wiped out with the said illegal attempt succeeding, resulting in the actual exportation of the goods. A plain reading of Section 113 of the Customs Act providing for liability to confiscation of export goods and of Section 2(19) of the Act defining 'export goods' does not appear to indicate or suggest that the accrued liability to confiscation is so extinguished or wiped out. It may be noticed that this liability to confiscation attaches to the goods at the time the goods are sought to be exported contrary to prohibition and at that point of time the goods which are to be taken out of India to a place outside India have not been taken out of India to a place outside India. In other words at the point of time when the liability to confiscation accrues, the goods are 'export goods' well within the meaning of the definition of export goods in Section 2(19) of the Act.

27. In our opinion, this appears to be the proper interpretation of Sections 113 and 114 of the Customs Act, applying the well settled principles of construing the said sections with reference to the language used therein. This interpretation further appears to be in accord with the objects for which this particular legislation has been enacted by the Parliament.

28. We have earlier set out the provisions of Section 11 of the Customs Act which confers power on the Central Government to prohibit importation or exportation of goods for purposes mentioned therein. These purposes indeed cover very very wide fields. Some of the purposes for which the prohibition may be imposed as stated in Section 11 (2) are, prevention of smuggling, prevention of shortage of goods of any description and prevention of the contravention of any law for the time being in force. Section 113 provides for liability of the goods to confiscation in case of any violation of the prohibition imposed under Section 11 of the Act and Section 114 provides for personal penalty for those whose acts or omissions render the goods liable to confiscation under Section 113. To construe the said sections to mean that Section 114 can only be attracted when the goods are attempted to be exported and will have no application when goods have in fact been exported will defeat the purpose and object for which the said provisions have been introduced. The submissions that the legislature has so intended by using the words 'attempt to export' in Sections 113(a), (b) and (d) and the analogy of the offence of attempt to commit suicide given in this connection are, in our opinion, misleading and devoid of merit. An attempt to commit suicide is indeed an offence and the act of committing suicide resulting from the successful attempt may not be considered to be an offence. This is so for the simple reason that once a person attempting to commit suicide succeeds in his attempt he places himself beyond the reach of law and no punishment is intended to be inflicted on the dead person or his heirs and legal representatives by imposing any fine or penalty, as they may in no way be liable or responsible for the said act. As we have earlier observed, the liability of the goods to confiscation arises under Section 113(d), as soon as the goods are attempted to be exported and the attempt to export the goods necessarily precedes the actual export of the goods. Goods become liable to confiscation as soon as the attempt is made. There is no provision in the Act to suggest that this accrued liability is wiped out or extinguished with the exportation of the goods. It may be that after the goods had in fact been exported the liability of the goods to be confiscated may not be enforceable by actual confiscation of the goods. Personal penalty of any person who, in relation to the goods, does or omits to do any

act which act or omission renders the goods liable to confiscation under Section 113 or abets the doing or omission of such an act has been provided in Section 114. This provision is attracted as soon as the goods incur the liability to confiscation under Section 113 and such liability, as we have earlier held, arises when the goods are attempted to be exported contrary to any prohibition. It is to be noted that at the time when the goods are sought to be exported they are undoubtedly 'export goods' within the meaning of Section 2(19) of the Customs Act. The liability of personal penalty provided in Section 114 of the Act, which arises with the accrual of the liability of the goods to confiscation under Section 113 of the Act at the stage of the attempt to export the said goods, clearly remains and the said liability is capable of enforcement. In the case of illegal export of any goods contrary to prohibition the effect may be that the liability of the goods to confiscation which arises and accrues may not be capable of enforcement but the personal liability which arises with the accrual of liability of the goods to confiscation can be enforced and by enforcement of the personal liability the offender can still be brought to book and this kind of offence may be checked. We must, therefore hold that by virtue of Section 23A of the Foreign Exchange Regulation Act, 1947 the provisions of Sections 113 and 114 of the Customs Act, 1962 are attracted when there is a contravention of Section 12 (1) of the Foreign Exchange Regulation Act, 1947 in relation to goods which had in fact been exported. This was indeed the first question which came up for consideration before the Division Bench and has been referred to the Full Bench and our answer to this question is therefore in the affirmative.

29. An order by the proper officer permitting clearance and loading of the goods under Section 51 of the Customs Act does not affect the position.

30. We have earlier noticed that under Section 113 of the Customs Act export goods incur the liability to confiscation at the stage when they are attempted to be exported."

(emphasis supplied)

36.7 In view of the above discussion I find that the liability to confiscation of the improperly exported goods does not get extinguished in case of already exported goods. I also find that in case any mis-declaration is made in the entry made under the Act (Shipping Bill under Section 50 of the Customs Act, 1962), the said goods are liable to be confiscated in terms of Section 113 (j) of the Act *ibid*.

36.8 In views of the above legal provisions and facts/evidences of the case as discussed above, I find that M/s. Lal Mahal Ltd., has filed the export documents for export of goods to Iran (Bandar Abbas port) but the bill of lading switched for Dubai (Jabel Ali port) without amendment to the respective Shipping Bills/EGMs filed by them. Thus I find that, mis-declaration was made in the export documents filed by M/s. Lal Mahal Ltd. In terms of provisions of FTP all export contracts and invoices shall be denominated either in freely convertible currency or Indian rupees but export proceeds shall be realized in freely convertible currency, thus the proceeds of the goods sold in UAE (Dubai) are mandatorily to be realized in freely convertible foreign currency but the proceeds of impugned goods, exported to UAE (Dubai) have been realized in Indian Rupees through Iran. Thus I find that, the prohibition specified by FTP and provisions contained in the RBI Circular have been violated by the Noticee.

37. Further, I find that the Noticee, Shri Anil Kumar Nair, and Shri Prem Chand Garg, both Director of M/s. Lal Mahal Ltd., have violated the following prohibition which is attracting provision of section 113 (d) and 113(i) of the Customs Act, 1962:

(i) Section 11 (1) of the Foreign Trade (Development & Regulation) Act, 1992 has provided that

"No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made thereunder and the export and import policy for the time being in force". However, the Noticee and their Directors Shri Shri Anil Kumar Nair and Shri Prem Chand Garg erstwhile Director had exported the goods and realised the proceeds in violation of para 2.40 and 2.52 of the FTP 2009-14 and FTP 2015-20 as discussed above.

(ii) Rule 14 (2) Foreign Trade (Regulation) Rules, 1993 has provided that, "No persons shall employ any corrupt or fraudulent Rules, 1993 practice for the purposes of obtaining any license or importing or exporting any goods". I find that, the Noticee and their Directors Shri Shri Anil Kumar Nair and Shri Prem Chand Garg had exported the goods by making mis-declaration in the relevant documents. Foreign exchange which is mandatorily required to be received from the actual buyer of the goods has not been received.

(iii) Section 8 of the Foreign Exchange Management Act, 1999 has provided that "Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank."

I find that, the goods had been exported to UAE but the payments had been received from Iranian entity. The noticee has not produced any document to prove that the payment has been received from the person whom the goods have actually been sold and also not produced Landing Certificate. Thus I find that the payment has been received from third party and such third party remittances have no connection whatsoever to the impugned export goods and have been managed with the sole purpose to fulfill the condition for realisation of sale proceeds.

(iv) RBI has issued guidelines in respect of the third party payments for export/import transactions vide RBI/2013-14 /364, A. P. (DIR Series) Circular No.70 dated November 8, 2013. It is stated in the circular that normally payment for exports has to be received from the overseas buyer named in the Export Declaration Form (EDF) by the exporter and the payment shall be received in a currency appropriate to the place of final destination as mentioned in the EDF irrespective of the country of residence of the buyer. In view of the above I find that, the payment has been realised from the third party instead of the actual buyer of the goods. Hence, realization of proceeds in Indian currency, in respect of goods exported to UAE, the prohibition specified by FTP and provisions contained in the RBI circulars have been violated by the Noticee and their Directors Shri Shri Anil Kumar Nair and Shri Prem Chand Garg.

(v) In terms of para 2.40 of FTP 2009-14 and para 2.52 of FTP 2015-20 "(a) All export contracts and invoices shall be denominated Contracts either in freely convertible currency or Indian rupees but export proceeds shall be realised in freely convertible currency." Thus, I find that the impugned goods are declared to have been consigned to Iran but the impugned goods had been delivered at UAE (Jabel Ali Port). The export proceeds have been realised in Indian rupees by the Noticee as against statutory requirement of their realisation in freely convertible foreign currency. Thus in view of the above facts/evidences, I find that, the Noticee and its

Directors Shri Shri Anil Kumar Nair and Shri Prem Chand Garg had violated the provisions as discussed above.

37.1 In view of the above facts, I find that the 33 consignments of the Noticee (as discussed in para-28 of the SCN) which as per their respective shipping bills were destined for Iran (Bandar Abbas) but the same had been diverted to UAE (Jabel Ali). Therefore, I find that impugned exported goods i.e, rice having FOB value of Rs. 1,37,92,77,540/- are liable for confiscation under Section 113(d) and (i) of the Customs Act, 1962.

38. M/s. Lal Mahal Ltd., has contended in their defence that penalty cannot be warranted in terms of Section 114 and 114AA of the Customs Act, 1962 on M/s. Lal Mahal Ltd., Shri Prem Chand Garg and Shri Anil Kumar Nair as it is not yet proved by way of records of statement or by documentary evidence. They also contended in their defence that at the time of export of the alleged goods it cannot be said as prohibited goods or false and incorrect materials particular were made in the export documentation. In this regard, before deciding whether penalty can be impose on all noticee under Section 114 and Section 114AA of the Customs Act, 1962, it is necessary to read through the relevant provisions of Section 114 and Section 114AA of the Customs Act, 1962:

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

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

Section 114AA in the Customs Act, 1962: Penalty for use of false and incorrect material.—*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 business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.*

38.1 In the instant case, the goods have been shown in the export documents to be consigned to Iran but in fact the goods have been delivered at UAE as discussed in the foregoing paras. Thus, mis-declaration/ mis-statement was made in the export documents filed by M/s. Lal Mahal Ltd. Further, I find that M/s. Lal Mahal Ltd. have exported the goods in violence of the prohibition as discussed above and rendered the goods liable for confiscation. Therefore, I find that, M/s. Lal Mahal Ltd is liable for penalty under section 114 of the Customs Act, 1962 and under section 114 AA of the Customs Act, 1962.

38.2 Further, I find that Shri Anil Kumar Nair, Director of Shri Lal Mahal Ltd. was responsible for all activities relating to export of rice. He himself admitted under his statement dated 08.02.16 that they had exported 57 consignment of rice to Iran in the year 2014-15 and 2015-16, Whereas out of these 33 consignments had been diverted and delivered at Jabel Ali port (Dubai) instead of

Bandar Abbas (Iran) on their company's instructions. His involvement in committing the violations as discussed above is clearly brought out by the facts and circumstances as discussed above. I also find that, Shri Anil Kumar Nair has confirmed under his statement dated 08.02.2016 that he was well aware that the remittances in Indian Rupees in respect of rice exported to Iran is allowed as per agreement between India and Iran and respect of export of rice to all other countries payment was required to be received in freely convertible currency in terms of Foreign Trade Policy. The fact of the discharge of 33 shipments as mentioned above at Jabel Al port were never brought to the knowledge of UCO Bank. Therefore, I find that Shri Anil Kumar Nair, Director of Ms. Shri Lal Mahal Ltd., have knowingly and intentionally made, signed and caused to be made, signed declaration in the export documents which are false and incorrect. Therefore, I find that, Shri Anil Kumar Nair, Director of M/s. Lal Mahal Ltd. is liable for penalty under section 114 of the Customs Act, 1962 and under section 114 AA of the Customs Act, 1962.

38.3 I find that, Shri Prem Chand Garg was the director of M/s. Shri Lal Mahal Ltd. till May-2015. He was the largest shareholder of M/s. Lal Mahal as per detail mentioned at Para No. 6 of the SCN. Therefore he was the largest beneficiary of the company i.e., M/s. Lal Mahal Ltd. Shri Ganesh Gulati, Company Secretary of M/s. Lal Mahal Ltd., under his statement dated 09.03.2016 confirmed that Shri Prem Chand Garg and Shri Anil Kumar Nair both Director of M/s. Lal Mahal Ltd. looked after all the work related to export of rice to Iran. Several consignments of offending goods had been exported while Shri Prem Chand Garg was Director of M/s. Shri Lal Mahal Ltd. He was the actual controller of the affairs of M/s. Shri Lal Mahal Ltd. The company secretary of the M/s. Shri Lal Mahal Ltd., has very categorically unfolded the truth regarding extent of involvement of Shri Prem Chand Garg in the affairs of the company. I also find that, Shri Prem Chand Garg has knowingly and intentionally made, signed and caused to be made, signed declaration in the export documents which are false and incorrect. Therefore, I find that, Shri Prem Chand Garg, Director of M/s. Lal Mahal Ltd. is liable for penalty under section 114 of the Customs Act, 1962 and under section 114 AA of the Customs Act, 1962.

39. As the impugned goods are found to be liable for confiscation under Section 113(d) and Section 113(i) of the Customs Act, 1962, I find it necessary to consider as to whether redemption fine under Section 125(1) of the Customs Act, 1962, is liable to be imposed in lieu of confiscation. The Section 125(1) *ibid* reads as under:

Section 125. Option to pay fine in lieu of confiscation. — (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit.

39.1 A plain reading of the above provision shows that imposition of redemption fine is an option in lieu of confiscation. It provides for an opportunity to owner of confiscated goods for release of

confiscated goods, by paying redemption fine. First of all, I find that it is well settled legal position that when goods are not available for confiscation, redemption fine cannot be imposed. In the matter of Weston Components Ltd. Vs. Commissioner of Customs, New Delhi [2000 (115) E.L.T. 278 (SC)], it was held by the Hon'ble Supreme Court that:

It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent-authority. It is an admitted fact that the goods were released to the appellant on an application made by it and on the appellant executing a bond. Under these circumstances if subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine.

39.2 The above judgment was delivered on specific issue and facts of the case were not discussed in detail in the said judgment. The above judgment was delivered by the Hon'ble Supreme Court in Civil Appeal No. 7144 of 1999, filed against the order of Hon'ble Tribunal reported at 1999 (84) ECR 259 (Tri Delhi). In the said order, Hon'ble Tribunal discussed the issue in brief wherein it is mentioned that the goods involved in that case were provisionally released. Therefore, it emerges from the said judicial pronouncements that redemption fine can be imposed against those goods also which are not physically available but were provisionally released against bond.

39.3 In view of the above discussion and judicial pronouncements, I find that redemption fine can be imposed only in those cases where goods are either available or the goods have been released provisionally under Section 110A of the Customs Act, 1962, against appropriate bond binding concerned party in respect of recovery of amount of redemption fine as may be determined in the adjudication proceedings. In the instant case, the impugned goods were neither physically available nor bond for provisional release under Section 110A *ibid* covering recovery of redemption fine is available. Therefore, I find that redemption fine cannot be imposed in this case.

40. I find that Shri Lal Mahal Ltd., has sought cross examination of Sh. M. B. V. Krishna Rao, Branch Manager –M/s Novel Line & Logistics Pvt. Ltd. Gandhinagar through their written submission dated 22.01.2019 but do not sought/ made request during the course of personal hearing held on 22.01.2019. Therefore, I denied cross examination of Sh. M. B. V. Krishna Rao, Branch Manager –M/s Novel Line & Logistics Pvt. Ltd. Gandhinagar.

40.1 In their defence submissions, submitted by Shri D. K. Singh, Advocate of all the above said noticees, have contending that the present case is made only on the basis of assumption and presumption and on the basis of statement recorded by the Investigating Agency from different person without support of any corroborative evidence to proves their allegation that the exported goods were actually diverted to the Jabel Ali Port (Dubai, UAE) instead of Iran. In this regard, I

find that this is a clear case of diversion of exported goods, therefore it cannot be logically expected that the facts admitted by Shri Anil Kumar Nair, Director of M/s. Lal Mahal Ltd. is only result of duress/pressure and not voluntarily. In such a situation, confessional and corroborative statements recorded under Section 108 of the Customs Act, 1962, are the only tools in the hands of the department to establish the role of the offenders. All statements recorded under Section 108 of the Customs Act, 1962, are in the nature of substantive evidence and culpability of the concerned persons can be based on the same. The scope of these provisions of law have been the subject matter of a large number of authoritative pronouncements of the Supreme Court and the High Courts, as under:

40.2 It has been held by the Hon'ble Supreme Court in the judgment in *Bhana Khalpa Bhai Patel v. Asstt. Collector of Customs, Bulsar* - 1997 (96) E.L.T. 211 (S.C.):

“7. An attempt was made to contest the admissibility of the said statements in evidence. It is well settled that statements recorded under Section 108 of the Customs Act are admissible in evidence vide *Ramesh Chandra v. State of West Bengal*, AIR 1970 SC 940, and *K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin*, 1997 (90) E.L.T. 241 (S.C.) = (1997) 3 SCC 721.”

40.3 The Hon'ble Supreme Court has observed in the case of *Naresh J. Sukhwani v. Union of India* - 1995 Supp. (4) SCC 663 = AIR 1996 SC 5 = 1996 (83) E.L.T. 258:

“4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine.”

40.4 A Constitution Bench of Apex Court of India in the matter of *Romesh Chandra Mehta v. State of W.B.* - (1969) 2 SCR 461 : AIR 1970 SC 940, held that the Customs Officers are entrusted with the powers specifically relating to the collection of customs duties and prevention of smuggling and for that purpose they are invested with the power to search any person on reasonable suspicion, to summon, X-ray the body of the person for detecting secreted goods, to arrest a person against whom a reasonable suspicion exists that he has been guilty of an offence under the Act, to obtain a search warrant from a Magistrate, to collect information by summoning persons to give evidence and produce documents and to adjudge confiscation. He may exercise these powers for preventing smuggling of goods dutiable or prohibited and for adjudging

confiscation of those goods. For collecting evidence, the Customs Officer is entitled to serve summons to produce a document or other thing or to give evidence and the person so summoned is bound to attend either in person or by an authorised agent, as such officer may direct, is bound to state the truth upon any subject respecting which he is examined or makes a statement and to produce such documents and other things as may be required. The power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Officer for enforcing compliance with the provisions of the Customs Act. He is invested with the power to enquire into infringements of the Act primarily for the purpose of adjudicating forfeiture and penalty.

40.5 In the present proceeding, the case is based on the diversion of exported goods and the statements of the key persons involved in this case recorded under Section 108 of the Customs Act, 1962. Therefore, I find that it is settled law as discussed above that statements made to an officer of Customs/investigating agency are admissible as evidence under Section 108 of the Customs Act, 1962.

41. Further, I find that M/s. Lal Mahal Ltd. had made the declaration in the shipping bills that, "We claim rewards under merchandise exports from India Scheme (MEIS)". The relevant provisions of MEIS scheme as contained in Chapter 3 of the Foreign Trade Policy are as follows:

Merchandise Exports from India Scheme (MEIS)

3.03 Objective

"Objective of Merchandise Exports from India Scheme (MEIS) is to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India's export competitiveness".

3.04 Entitlement under MEIS

"Exports of notified goods/products with ITC [HS] code, to notified markets as listed in Appendix 3B, shall be rewarded under MEIS. Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code wise]. The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in free foreign exchange, whichever is less, unless otherwise specified".

41.1 In view of the above provisions I find that, the eligibility for reward under this scheme is subject to realisation of export proceeds in free foreign Exchange. Thus this condition is mandatorily required to be fulfilled for claiming benefit of the scheme. In the case of impugned goods the proceeds of export have been realised in INR from Iran. Therefore, I find that the benefit is not admissible to the Noticee.

42. In view of the forgoing discussions and findings, I pass the following order:-

ORDER

- (i) I confiscate the goods exported under 33 Shipping Bills by M/s. Shri Lal Mahal Ltd., valued at Rs. 1,37,92,77,540/- (Rupees One Hundred Thirty Seven Crores Ninty Two

Lacs Seventy Seven Thousand Five Hundred Forty Only) under Section 113(d) and (i) of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended) Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993, read with provisions of Section 50 of the Customs Act, 1962. However, I refrain from imposing redemption fine in lieu of confiscation as the goods are physically neither available for confiscation nor released under any bond or legal instruments.

- (ii) I impose penalty of Rs. 25,00,00,000/- (Rupees Twenty Five Crores Only) on M/s. Shri Lal Mahal Ltd., under Section 114 of the Customs Act, 1962 and Rs. 25,00,00,000/- (Rupees Twenty Five Crores Only) under Section 114AA of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended) Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993, read with provisions of Section 50 of the Customs Act, 1962.
- (iii) I impose a penalty of Rs. 5,00,00,000/- (Rupees Five Crores Only) on Shri Anil Kumar Nair, Director of M/s. Shri Lal Mahal Ltd., under Section 114 of the Customs Act, 1962 and Rs. 5,00,00,000/- (Rupees Five Crores Only) under Section 114AA of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended) Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993, read with provisions of Section 50 of the Customs Act, 1962.
- (iv) I impose a penalty of Rs. 5,00,00,000/- (Rupees Five Crores Only) on Shri Prem Chand Garg, erstwhile Director of M/s. Shri Lal Mahal Ltd., under Section 114 of the Customs Act, 1962 and Rs. 5,00,00,000/- (Rupees Five Crores Only) under Section 114AA of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992 (as amended) Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993, read with provisions of Section 50 of the Customs Act, 1962.

AS
20/2/19
(Amarjeet Singh)

Additional Commissioner
Customs House Mundra

F. No. VIII/48-46/Adj/ADC/MP&SEZ/2016-17

Date: 20.02.2019

BY Speed Post A.D

To,

1. M/s. Shri Lal Mahal Ltd., B-16, Bhagwan Dass Nagar, New Delhi-110026 (having IEC No. 0590007581).

2. Shri Anil Kumar Nair, Plot No. 1, Sector-7, Gandhidham, Kutch, Gujarat
3. Shri Prem Chand Garg, A-8, Bhagwan Dass Nagar, Near East Punjabi Bagh, New Delhi-110026 (erstwhile Director of M/s. Shri Lal Mahal Ltd., B-16, Bhagwan Dass Nagar, New Delhi-110026).

Copy To:

- 1) The Joint Director, Directorate of Revenue Intelligence, Directorate of Revenue Intelligence, 7th Floor, D Block, I.P. Bhawan, I.P. Estate, New Delhi – 110002
- 2) The Deputy/Assistant Commissioner (RRA) Customs House, Mundra.
- 3) The Deputy/Assistant Commissioner (Recovery Cell) Customs House, Mundra
- 4) The Deputy/Assistant Commissioner (Export), Customs House, MP & SEZ, Mundra.
- 5) Deputy/ Assistant Commissioner (EDI), Customs House, MP & SEZ, Mundra.
- 6) Guard File.