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/48-28/Adj/ADC/MCH/18-19
B	Order-in-Original No.	MCH/ADC/SK/133/2019-20
C	Passed by	Shri Shushant Kumar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra
D	Date of Order	31.03.2020
E	Date of Issue	01.04.2020
F	SCN NO. & Date	F.No.DRI/HQ-CI/50D/ENQ(INT-24)/2015-Pt.dated 14.02.2019
G	Noticee / Party / Importer / Exporter	M/s Janki Dass Rice Mills, Nandana Road, Taraori-132116 (Karnal)
H	DIN No.	20200471MO00006N0830

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 सं°-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए ।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपील ज्ञापन के साथ ड्यूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये ।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम,1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए ।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (A)on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

Subject :- SCN F.No. DRI/HQ-CI/50D/ENQ(INT-24)/2015-Pt.dated 14.02.2019 issued to M/s Janki Dass Rice Mills, Nandana Road, Taraori-132116 (Karnal) and others.

1. BRIEF FACTS OF THE CASE:

1.1 Acting upon a specific information regarding violation of the provisions of the Customs Act, 1962, by M/s Janki Dass Rice Mills (IEC –3398000304) ***(hereinafter referred to as ' the noticee no. 1')*** located at Nadana Road, Taraori-132116 (Karnal), Haryana, an investigation was initiated by the office of Directorate of Revenue Intelligence (Hqrs.), New Delhi) ***(hereinafter also referred to as 'DRI')***.

1.2 In order to investigate the matter further, the statements of Shri Devinder Kumar, Export Manager, M/s. Janki Dass Rice Mills Nadana Road, Taraori-132116 (Karnal) ***(hereinafter referred to as 'the noticee no. 2)***, their Customs Broker and representative of Shipping Lines and Forwarder Were recorded under Section 108 of the Customs Act, 1962, as detailed below:-

1.3 Statement of Shri Devinder Kumar, Export Manager, Janki Dass Rice Mills, Nadana Road, Taraori, Distt. Karnal, Haryana was recorded on 05.02.2016 under Section 108 of the Customs Act, 1962 wherein he inter alia stated that he joined M/s Janki Dass Rice Mills in the year 1998 as an accountant; that he got promotion as Export Manager in the year 2006; that M/s Janki Dass Rice Mills was formed in the year 1986-87 in partnership of Mrs. Sushila Devi, his mother, Shri Ravinder Kumar, and Shri Rajesh Kumar, both his elder brothers; that it was their family business and he drew the money as per his requirement and expenses; that his mother Mrs. Sushla Devi was very old in age and not having any responsibility in the above said firm; that Shri Ravinder Kumar was suffering from brain disease from last 14 months and was not able to take any responsibility, Shri Rajesh Kumar was responsible for the procurement of raw material and production in M/s Janki Dass Rice Mills; that he was responsible for all activities of local sales and export of rice; that they exported rice to Saudi Arabia, Yemen, Iraq, Iran, Egypt, Turkey, Syria and Dubai; that they exported rice through the indenters; that they paid 1% commission to their brokers in case of export of rice to Saudi Arabia, Yemen and Dubai and they did not pay any commission in the case of export to other countries that they charged the commission from the buyers as per terms and conditions agreed; that they did not interact directly with their buyers, they interacted with indenters (brokers) for export of rice; that they export rice to Iran from Mundra port and ICD Garhi Harsaru; that their CHA for export of rice to Iran from Mundra Port Were M/s. Venus Clearing Agency (Shri Vipul Ghantra) and M/s V. Arjoon (Shri Gordhan Bhai) and from ICD Ghari Harsaru was M/s. Satkar Logistics (Shri Harman Baweja); that he interacted with above mentioned CHAs regarding export of rice to Iran; that they used the services of following shipping lines M/s Goodrich Maritime Pvt. Ltd., Balatic shipping, Maritime Shipping, Perma Shipping, Maxicon, Satline etc. for export of rice to Iran; that he did not interact with the above shipping lines, their CHAs interacted with the above Shipping Lines on their behalf.

On being asked about the documentation and payment of export of rice to Iran, he stated that brokers send them the purchase orders on behalf of buyers, they packed and exported the rice to the their buyers; that they received the payment of

rice exported to Iran through UCO Bank in INR and UCO Bank transfer the remittances to their Punjab National Bank, Taraori Branch Current Account No. 7122 thereafter PNB transfer the said amount in their PCL a/c No.2318 in the same branch; that some cases the payment had been received in advance; that in the case of export of rice to other than Iran they received the payment through Punjab National Bank, Taraori Branch in US$; that the remittances in Indian Rupees in respect of rice exported to Iran was allowed in INR 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.

On being asked, he stated that they had exported 30 consignments to Iran, 14 in the year 2014-15 and 16 in the year 2015-16; that out of these thirty consignments, the following eight consignments had been diverted to and delivered at Jabel Ali port (Dubai) instead of Bandar Abbas port (Iran)

S. No.	SB No.	SB Date	BL No.	Invoice No.	Invoice Value (INR)
1	9008852 9011037	15.04.2015 15.04.2015	GMAEMUNJEA009141	JDR/EXP/556/2015-16	3,16,25,000/-
2	9179127	23.04.2015	GMAEMUNJEA009231	JDR/EXP/559/2015-16	5,01,40,000/-
3	1269364	18.06.2015	BALMUNJEA009842	JDR/EXP/587/2015-16	2,32,30,000/-
4.	3878859	31.10.2015	GMAEMUNBND010818	JDR/EXP/629/2015-16	4,65,64,650/-
5.	4271905	24.11.2015	MERMUNBND500/15	JDR/EXP/630/2015-16	5,52,00,000/-
6.	3976705	05.11.2015	BALMUNBND010868	JDR/EXP/631/2015-16	1,72,50,000/-
7.	4028501	07.11.2015	GMAEMUNBND010898	JDR/EXP/633/2015-16	2,58,75,000/-
8.	4509957	04.12.2015	MERMUNBND559/15	JDR/EXP/641/2015-16	1,00,97,000/-
				TOTAL =	**25,99,81,650/-**

On being asked, he stated that these above eight consignments pertaining to nine shipping bills had been diverted to Jabel Ali Port (Dubai) on his oral instructions to their respective CHAs i.e. M/s. Venus Clearing Agency and M/s V. Arjoon; that the CHAs might have passed instructions in writing to their Shipping Lines to M/s Goodrich Lines for Sl. No. 1,2,4 and 7, M/s Baltic Lines for SL. No. 3 and 6 and M/s Meridian Shipping for Sl. 5 and 8 above to deliver the consignments at Jabel Ali Port (Dubai) instead of declared port as Bandar Abbas (Iran).

On being asked, he stated that they had not got carried out any amendment in the respective shipping bills for change of destination port. On being asked the reasons for the same, he stated that he was unable to 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 Jabel Ali Port; that the fact of discharge of these shipments at Jabel Ali port was never brought to the knowledge of UCO Bank. On being asked to explain the reasons for the same, he was unable to answer the same.

He submitted the list of consignments of rice exported to Iran during 2014-15 and 2015-16 alongwith documents serially numbered page No.1 to 134 under his dated signatures. Further, he stated that out of 30 consignments of rice exported to Iran during 2014-15 and 2015-16, 8 consignments had been diverted to Jabel Ali port (Dubai) instead of Bandar Abbas port (Iran); he undertook to submit the copy of landing certificates in respect of other 22 consignments by 12th February, 2016.

1.4 Statement dated 16.12.2015 of Shri Sunjjoy Salve, Vice President (Western Region) of M/s Goodrich Maritime Pvt. Ltd.,174, Sector-1A, Opposite Havmor, Gandhidham, Distt. Kutch, Gujarat was recorded, wherein he inter-alia stated that he was working as a Vice President, Western Region in M/s Goodrich Maritime Pvt. Ltd. since May 2015; that he was looking after Shipping Liner activities at Kandla, Mundra, Ahmedabad and Indore. On being asked he stated that as a Shipping Liner activities, they used to provide facilities to the exporters for exporting the goods by providing vessel as per their requirement mainly for exporting goods like Rice, Minerals, used clothing, pharmaceuticals etc.

On being asked about the shipping consignments of rice commodity, he stated that by their Shipping Line they mostly booked the vessel for delivery of Rice mostly for Jabel Ali (Dubai), Doha (Qatar), Bahrain, Dammam, Abu Dhabi, Bandar Abbas (Iran) etc.

On being asked he stated that during the last two years i.e. January, 2014 to till date, they had received the request from the Shipper (Exporter) to divert the cargo from one port i.e. Bandar Abbas to another port i.e Jabel Ali in respect of the Bill of Lading No. GMLMUNBND007643 dated 28.10.2014. The request of the shipper was under process; that he had submitted the relevant documents having pages 1 to 36 including the copy of the B/L, copy of shipping Bill, Check list and printout of the entire email communication related for the request, under his dated signatures On being further asked he stated that during the last two years i.e. from January, 2014 to till date, in one more case, they had received a request from the Shipper (exporter) to divert the cargo from one port i.e. Bandar Abbas to another port i.e Jabel Ali or Mundra in respect of the Bill of Lading No. BALMUNBND009958 dated 16.07.2015; that the request of the shipper was under process. He had submitted the relevant documents having pages 1 to 37 including the copy of the B/L, copy of shipping Bill alongwith printout of the entire email communication related for the request, under his dated signatures. He stated that their company neither received any request from the shipper nor entertained by them except the above two said cases.

On being asked he stated that the above said shipping consignments Were still lying at the port of Bandar Abbas. He submitted the list of the major rice exporters with whom their company was shipping.

On being further asked he stated that he will submit the copies of landing certificates in respect of the shipping consignments exported to Bandar Abbas and Jabel Ali as soon as he got the same from the port of discharge.

1.5 Statement dated 22.12.2015 of Shri Tushar H. Anam of M/s V. Arjoon, 6, Hafizain Bldg. 3rd Floor, 129/131, Kazi Syed Street, Masjid (W), Mumbai – 400 003, CHA was recorded under Section 108 of the Customs Act, 1962, wherein he inter-alia stated that he joined their family firm M/s V. Arjoon (CHA Code AAAFV2081LCH001) as a clerk and later on became a working partner in 1984; that besides him, Shri Hiralal Anam, his father, Shri Ashwin H. Anam, his elder brother, Shri Jai T. Anam, his son and Shri Sagar A. Anam, his nephew Were the partners in M/s V. Arjoon; that

they Were engaged in the Customs clearance activities at Mumbai Sea Port, Nhava Sheva Port, Kandla Port, Mundra Port and Hazira Port.

On being asked, he stated that their major exporter clients Were M/s Shiv Shakti Inter Globe Exports Pvt Ltd, M/s Bharat Cereals Pvt. Ltd., M/s Bharat Industrial Enterprises Ltd., M/s D.D. International, M/s Veer Overseas Ltd., M/s DRRK Foods Pvt. Ltd., Shri Jagdamba Rice Mills, M/s SSA International Ltd., M/s Bansal Finefood Ltd., M/s Guranditamal Tilakraj etc; that all these clients exported rice to Iran and various other countries.

On being asked, he stated that the remittance can be received in INR against export made to Iran; that he understood that there was a treaty between India and Iran that the remittance can be received only in INR against the export made from India to Iran; that he also understood that the remittance can be received in freely convertible currency against exports made to countries other than Iran.

On being asked, he stated that he was not aware that the remittance received in INR against exports made to other than Iran is a violation of Foreign Trade Policy. On being asked, he stated that he was not aware of the provisions of the Foreign Trade Policy. He stated that he was not in the position to guide their clients to ensure compliance of the provisions of Foreign Trade Policy. On being asked, he stated that they provided the services to their clients engaged in the export of rice to Iran like customs clearance, all logistics services through M/s. V. Arjoon Shipping Limited; that Shri Jai T. Anam, Shri Sagar A. Anam and himself Were the three directors of this company which was engaged in arranging transportation, warehousing, container booking etc. for their clients. On being asked, he stated that Shri Gordhan Bhawnani, H-card holder of M/s. V. Arjoon and himself interacted with all the shipping lines on behalf of their clients. On being asked, he stated that some shipments of rice, which Were cleared for export to Iran Were later on diverted at Jabel Ali port after customs clearance. He submitted under his dated signature some documents relating to request of such diversion from different parties and also undertook to provide copies of all such remaining documents by 28.12.2015. On being asked, he stated that the diversion of goods to Dubai after clearance for Iran was not brought to the notice of Customs authorities at the port of export by exporters or shipping lines, because cargo had already left Indian waters and had reached Jabel Ali and Exporters/Shipping Line had not requested for any amendment in the Shipping Bill.

1.6 Statement dated 30.12.2015 of Shri Sunjjoy Salve, Vice President (Western Region) of M/s Goodrich Maritime Pvt. Ltd., 174, Sector 1A, Opposite Havmor, Gandhidham, Distt. Kutch, Gujarat was recorded under Section 108 of the Customs Act, 1962, wherein he inter-alia stated that he joined Goodrich Maritime Pvt. Ltd., in the month of May, 2015 as Vice President – Western Region; that Shri Venkatraman and Shri Gopal Were the Joint Managing Directors of M/s Goodrich Maritime Pvt. Ltd; that they Were engaged in the shipping liner business at Nhava Sheva, Mundra, Pipavav, Kandla, Chennai, Tuticorin, etc; that his responsibilities included developing the shipping liners business in the Gujarat Region and Indore Region; that he reported to both the directors of M/s Goodrich Maritime Pvt. Ltd; that he looked after the

business activities having offices at Gandhidham, Ahmedabad, Indore and Pipavav with working manpower of approx 50 at these locations; that their major area of operation was Gulf, Upper Gulf and South East Asia.

On being asked about the documentation process, he stated that draft copy of Bill of Lading on the basis of shipping bill was forwarded by them to the concerned CHA by e-mail; that thereafter, CHA provided them the shipment allowed export documents i.e. shipping bill, commercial invoice and packing list; that thereafter, they generated the Bill of Lading according to Shipping Bill handed over to concerned CHA after collection of freight and other local charges as per the terms & conditions agreed upon.

On being asked about the Bill of Lading number, he stated that first three/four alphabets represented the shipping line, then three alphabet represented port of loading, then three alphabets for transshipment if applicable or final destination and Sequence number generated by the system. For example GMAEMUNBND****** for consignment shipped by them from Mundra port to Bandar Abbas.

He was shown copies of certain bills of Lading pertaining to export of rice including Bill of Lading No.GMAEMUNJEA009468 dated 25th May, 2015 of M/s Janki Dass Rice Mills issued by M/s Goodrich Maritime Pvt. Ltd. He put his dated signatures on all the copies of such Bills of Lading in token of their authenticity.

On being asked about the Bill of Lading No. GMAEMUNJEA009468 dated 25th May, 2015 of M/s Janki Dass Rice Mills, he stated that as per Bill of Lading Number this consignment had been routed via Jabel Ali Port to Bandar Abbas Port.

1.7 Statement of Shri Devinder Kumar, Export Manager, Janki Dass Rice Mills, Nadana Road, Taraori, Distt. Karnal, Haryana was recorded on 15.02.2016 under Section 108 of the Customs Act, 1962 wherein he inter alia stated that he submitted the copies of landing certificates issued by Shipping lines serially numbered page Nos. 1 to 30 under his dated signatures in respect of consignments of rice exported to Iran and discharged at Bandar Abbas (Iran); Further, he stated that out of the eight shipments stated by him vide his earlier statement dated 05.02.2016 as having been diverted to Jebel Ali, the shipment pertaining to Shipping Bill No. 9179127 dated 23.042015, BL No. GMAEMUNJEA009231 had been discharged at Bandar Abbas (Iran); that copy of landing certificate in respect of this shipment was also submitted by him on that day; that as such, the following seven consignments had been diverted to and delivered at Jabel Ali port (Dubai) instead of Bandar Abbas port (Iran) :

Sl. No.	SB No.	SB Date	BL No.	Invoice No.	Invoice Value (INR)
1.	9008852 9011037	15.04.2015 15.04.2015	GMAEMUNJEA009141	JDR/EXP/556/2015-16	3,16,25,000
2.	1269364	18.06.2015	BALMUNJEA009842	JDR/EXP/587/2015-16	2,32,30,000
3.	3878859	31.10.2015	GMAEMUNBND010818	JDR/EXP/629/2015-16	4,65,64,650
4.	4271905	24.11.2015	MERMUNBND500/15	JDR/EXP/630/2015-16	5,52,00,000
5.	3976705	05.11.2015	BALMUNBND010868	JDR/EXP/631/2015-16	1,72,50,000
6.	4028501	07.11.2015	GMAEMUNBND010898	JDR/EXP/633/2015-16	2,58,75,000
7.	4509957	04.12.2015	MERMUNBND559/15	JDR/EXP/641/2015-16	1,00,97,000
					20,98,41,650/-

that these above seven consignments pertaining to eight shipping bills had been diverted to Jabel Ali Port (Dubai) on his oral instructions to their respective CHAs i.e. M/s. Venus Clearing Agency and M/s V. Arjoon.

1.8 M/s Janki Dass Rice Mills vide their letter dated 16.03.2016 submitted a demand draft No. 847918 dated 16.03.2016 for Rs. 15,00,000/- (Rupees Fifteen Lakhs) in favtheir of the Principal Commissioner of Customs, Mundra, towards probable adjudication levies vide TR-6 Challan No.1352 dated 29.03.2016.

1.9 Shri Gordhan Bhavnani, Manager of M/s V. Arjoon, Plot No. 130, Lilashah Nagar, Gandhidham in his voluntary statement dated 09.01.2017 recorded under section 108 of the Customs Act,1962 inter alia stated that he was working as Manager in M/s. V. Arjoon and looking after documentation of all Customs related work of Exports side and other day to day client work; that he passed G-Card examination in 2016 but had been handling all the work relating to Customs clearance assigned to him by his Company in coordination with the clients; that he is Well versed with all the legal provisions and procedures for Customs clearance. On being asked about the procedure they follow in the case of export of rice to various countries, he stated that first of all they receive the Shippers (Exporters) documents i.e. Invoice, Packing List, APEDA Certificates and SDF (Self Declaration Form) for Banking purpose; that then on the basis of these documents, he used to file a checklist from his office on ICEGATE; that on the basis of declaration filed in the ICEGATE, they would take a printout of the checklist and check it and on finding it to be correctly entered and generated, they would submit it to ICEGATE for generating Shipping Bill; that then on receipt of the cargo from exporter, the goods Were presented to Customs for examination and on clearance by Customs, the goods Were stuffed in the containers.

On being asked as to how they get the containers from the Shipping lines, he stated that they place booking to the shipping line from the office email. Then they get a booking confirmation/Delivery Order from the Shipping line; that in the booking request, they have to intimate to the shipping line among other details about - shipper, exporter/consignee, port of discharge, no. of containers, size of container, commodity, port of stuffing; that as far as he could recall that they have handled customs clearance of the following exporters of rice to Iran / Dubai:-

i. M/s. DRRK Foods Pvt. Ltd.
ii. M/s. Bharat Industrial Enterprises Ltd.
iii. M/s. Bharat Cereal Pvt. ltd.
iv. M/s. Gurandittamal Tilak Raj
v. M/s. Shiv Shakti Interglobe Exports Pvt. Ltd.
vi. M/s. Veer Overseas
vii. M/s. Shree Jagdamba Agrico Export Pvt. Ltd
viii. M/s. D.D. International Pvt. ltd.
ix. M/s. Bansal Finefoods
x. M/s. Puranchand Rice Mills
xi. M/s. Gurdaspur Overseas.

He undertook to submit a detailed list of the exporters / shipping line / BLs / Date / Shipping Bill No. / Undertaking (LOI) / Release Order / booking request & confirmation etc. in respect of all the exports handled by them to Iran by 13.01.2017.

On being asked to state about the persons with whom he had dealt, he stated as under:-

S.No.	Name of the Exporter	Person who dealt with me
1	M/s. DRRK Foods Pvt. Ltd.	Mr. Vikram Narwah
2	M/s. Bharat Industrial Enterprises Ltd.	Mr Nathi Ram
3	M/s. Bharat Cereal Pvt. ltd.	Mr Sanjay Gupta
4	M/s. Gurandittamal Tilak Raj	Mr Mukesh Gumber
5	M/s. Shiv Shakti Interglobe Exports Pvt. Ltd.	Mr Aman Gupta
6	M/s. Veer Overseas	Mr Puneet Jain
7	M/s. Shree Jagdamba Agrico Export Pvt. Ltd	Mr Satish Goel
8	M/s. D.D. International Pvt. ltd.	Mr. SalilBhatia
9	M/s. Bansal Finefoods	Mr Musnish Bansal
10	M/s. Puranchand Rice Mills	Mr Rushil Gupta
11	M/s. Gurdaspur Overseas.	Mr. Aman Mittal, Mr. John Thomas

On being specifically asked, he stated that on behalf of these exporters he dealt with the shipping lines and got their customs clearance work with the help of other employees of their company; that whatever handling of export consignments with shipping line, Customs custodians and exporters and other related person was done by them as employees of the CHA firm, was in the knowledge of owner of the CHA firm and was done for the CHA firm as per the practice being followed by them.

On being asked about the consignments of rice meant for export to Iran and shown in the shipping customs documents as being exported to Iran but diverted to Jebel Ali, Dubai he stated that he always acted on the directions of exporter; that he has never done it without directions of the exporter; that he admitted that it was known to him in advance i.e. before leaving of the consignment from Indian shore that the goods Were actually going to Dubai in place of Iran as mentioned in the shipping bill but as CHA they had no choice but to act in accordance with the directions of the exporter; that even in some of the cases they came to know of the diversion of the goods to Dubai after loading of the goods in the vessel and leaving the vessel from Indian shore.

On being told that certain exporters have stated that he was aware about the fact of diversion at the time of export of goods in as much as the goods Were shown in the Shipping Bill to be destined at Iran but Were actually going to Dubai he stated that he agreed that the fact of mentioning port of discharge as Bandar Abbas in place of Jabel Ali in Dubai was in his knowledge but as explained above, he acted on behalf of his company, as per the directions of the exporters.

He was shown Section 50 of the Customs Act, 1962. He stated that he has read and understood the same; that in terms of provisions of this section, the exporter of any goods shall make entry thereof by electronically presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, in the prescribed form; that in terms of sub section (2) of section 50 the exporter of any goods, while presenting a shipping bill, shall make and subscribe to a declaration as to the truth of its contents.

He was also shown Shipping Bill (Electronic Declaration) Regulations, 2011 issued under Notification No. 80/2011-Cus. (N.T.), dated 25-11-2011, he admitted that at the time of filing of shipping bills they undertake as under

" I/They declare that the particulars given in the Checklist are true, correct and complete".

Further some questions Were asked from him. The questions and answers are reproduced as under:

"Question:- Since from the investigation conducted so far and admitted by the persons named above, who's statements have been referred above, who have categorically admitted that goods had been diverted to Dubai despite the place of destination was shown as Iran in the Shipping Bills, it appeared that the factual position with regard to the actual consignee/port of discharge have been mis-stated in the Shipping Bill.

Ans.- They had diverted the goods on the request of the exporter and as stated above acted at their directions and whatever mis-statement has been made is without any intention to avail any benefit. I admit that They could have filed amendment U/s- 149 of the Customs Act, 1962 which They did not do as no request from exporter or shipping line was received.

Question:- Your attention is drawn to Regulation No. 11 of CUSTOMS BROKERS LICENSING REGULATIONS, 2013 which requires a Customs Broker to advise his client to comply with the provisions of the Act and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be. As per your answer to above question, the exporter did not request you to get the amendment filed. Please explain as to was it not your obligation to advise the exporter to get the amendment done and in case of non-compliance, informed to the concerned Customs Officers in terms of this regulation.

Ans.- They never felt it to be such a major issue and whatever was happening was being done on the directions of exporter only. All the requirements of law as per practice Were being followed by us. I state that whatever omission has been done in filing of the shipping bills and non-compliance of the regulation 11(d) above was without any intention to violate any provisions of law. They just followed the practice of the trade."

1.10 Statement of Devinder Kumar, Export Manager, Janki Dass Rice Mills, Nadana Road, Taraori, Distt. Karnal, Haryana was recorded on 28.05.2018 under Section 108 of the Customs Act, 1962, wherein he inter alia stated that in total, seven

consignments pertaining to eight shipping bills had been diverted to Jabel Ali Port (Dubai) during the year 2014 & 2015. On being asked to produce the Landing Certificates in respect of the above mentioned seven shipments diverted to Jebel Ali, he stated that they had requested to their CHA M/s. Venus Clearing Agency, Gandhidham to produce the copies of the Landing Certificates to them; that they(CHA) had assured him to provide the Landing Certificates in respect of the above mentioned seven shipments 05.06.2018; that he would produce the Landing Certificates in respect of the above seven shipments, by 11.06.2018; that the consignments Were shipped by different shipping lines; that the details of Shipping Lines and their contact persons was as under:-

S.No.	SB No.	SB Date	BL No.	Shipping Line	Contact Person (Shipping Line)	Name of the CHA	Contact Person (CHA)
1	9008852 9011037	15.04.2015 15.04.2015	GMAEMUNJEA009141	Goodrich Maritime Pvt. Ltd. Gandhidham	Mr.Sanjjoy Salve,	Venus Clearing Agency	Mr.Vipul Ghanatra
2	1269364	18.06.2015	BALMUNJEA009842	Baltic Line, Gandhidham	Mr.Sanjjoy Salve,	Venus Clearing Agency	Mr.Vipul Ghanatra
3	3878859	31.10.2015	GMAEMUNBND010818	Goodrich Maritime Pvt. Ltd.	Mr.Sanjjoy Salve,	V. Arjoon	Mr.Gordhan Bhavnani
4	4271905	24.11.2015	MERMUNBND500/15	Winwin Maritime Pvt. Ltd., Gandhidham	Mr. Ajay Nair,	V. Arjoon	Mr.Gordhan Bhavnani
5	3976705	05.11.2015	BALMUNBND010868	Baltic Line	Mr.Sanjjoy Salve,	V. Arjoon	Mr.Gordhan Bhavnani
6	4028501	07.11.2015	GMAEMUNBND010898	Goodrich Maritime Pvt. Ltd.	Mr.Sanjjoy Salve,	V. Arjoon	Mr.Gordhan Bhavnani
7	4509957	04.12.2015	MERMUNBND559/15	Winwin Maritime Pvt. Ltd.	Mr. Ajay Nair	V. Arjoon	Mr.Gordhan Bhavnani

1.11 Statement of Shri Mahendra Tokarshi Ganatra, Proprietor of M/s Venus Clearing Agency, 101 Asopalav Arcade, Plot No. 04, Sector-9, Near Hotel Rishab, Gandhidham-370201 was recorded on 17.09.2018 under Section 108 of the Customs Act, 1962 wherein he inter alia stated that in the year 1976-77, he started his own company in the name of M/s. Venus Clearing Agency; he passed G-Card examination in 1998-99 and he had been handling all the work relating to Customs clearance in coordination with the clients. Further, he is Well versed with all the legal provisions and procedures for Customs clearance; that in the year 2015-16 M/s Venus Clearing Agency was closed due to his bad health; that after the closing of his firm M/s Venus Clearing Agency, he got a job in M/s SerWell Cargo India Private Limited, Mumbai based CHA firm and there his job was to look after clearing work of goods clearing through Kandla and Mundra port by the firm; that M/s SerWell Cargo India Private Limited was having a branch office at Gandhidham, Gujarat.

On being asked in detail, he stated that in the case of export of rice to various countries, they followed the procedure as under:-

That first of all they used to receive the Shipper's (Exporter's) documents i.e. Invoice, Packing List, APEDA Certificates and. Self-Declaration Form for banking purpose; that then on the basis of these documents, he used to file checklist from his

office on ICEGATE; that on the basis of declaration filed in the ICEGATE, they would take a printout of the checklist and check it and on finding it to be correctly entered and generated, they submitted it to ICEGATE for generating Shipping Bill; that then on receipt of the cargo from exporter, the goods Were presented to Customs for examination and on Clearance by Customs, the goods Were stuffed in the containers; On being asked as to how they got the containers from the Shipping lines, he stated that they placed booking -to the shipping line from the official email or through telephonically; that then they would get booking confirmation/Delivery Order from the Shipping line; that in the booking request, they had to intimate to the shipping line among other details about-shipper, exporter/consignee, port of discharge, no. of containers, size of container, commodity, port of stuffing.

On being asked, he stated that as far as he could recall they had handled customs clearance of the following exporters of rice to Iran / Dubai:-

i. M/s. Janki Dass Rice Mills.
ii. M/s. Ramdev International Ltd.
iii. M/s. Goyal International Pvt. Ltd.
iv. M/s. G.V. (God Vishnu) Rice Unit
v. M/s. Tirupati Basmati Rice Pvt. Ltd.
vi. M/s. Shakti Rice Mill
vii. M/s. Balaji Rice Mills.

That he produced copy of Bills of lading/ Shipping Bills Invoices in respect of export of rice to Iran by M/s. Ram Dev International Ltd and M/s Janki Dass Rice Mills during the period 2014-15 and 2015-16 for which export clearance was handled by his firm M/s Venus Clearing Agency; that he had put his dated signature on all the pages of the same in token of having produced by him; that he had produced the documents placed in 3 files- as under mentioned details-

Sr.No.	File No.	Name of the exporter	Period	Page no.
1	1	Ramdev International Limited	March 2015 to August 2015	1-117
	2	Ramdev International Limited	April 2014 to Oct. 2014	1-327
2	3	Janki Dass Rice Mills	March 2014 to July 2014	1-130

On being asked to state about the persons with whom he had dealt, he stated that he dealt with Mr. Devindra in respect of M/s. Janki Dass Rice Mills and with Mr. Surendra alia Mr. Suresh in respect to M/s. Ramdev International Ltd.; that on behalf of these exporters he dealt with the shipping lines and got their customs clearance done; that whatever handling of export consignments with shipping line, Customs, custodians and other related persons was done by him or his employees, was as per his approval and knowledge.

On being asked about the consignments of rice meant for export to Iran and shown in the shipping customs documents as being exported to Iran but diverted to Jebel Ali, Dubai he stated that he always acted on the directions of exporter; that he

had never done it without directions of the exporter, he stated that the exporters had given directions in writing to divert the goods to Jebel Ali; that as a CHA they had no choice but to act in accordance with the directions of the exporter.

On being asked regarding which shipping bills the goods Were diverted to Jebel Ali, Dubai instead of Iran, he stated that he could not tell the same at that stage as to which Were those shipping bills against which rice consignment Were diverted to Jebel Ali, Dubai instead of Iran, however, he would find out from his office and submit the same after locating from his old records within 20 days; that he might be provided time till 10th October 2018 as he had Prostrate problem and consulted doctor for the purpose during this period.

1.12 With reference to the statement dated 17.09.2018 of Shri Mahendra T Gantra, he, vide this office email dated 25.10.2018, was asked to provide the details of the shipments M/s. Janki Dass Rice Mills, which Were shipped for Iran but diverted to Jabel Ali and the communication/email/request done by the shipper to deliver the shipments of rice meant for Iran to Jabel Ali instead, and ii) to send the said details/documents and printouts of email/copies of communication of Shipper requesting/directing to divert the shipments. In reply to this mail, Shri Mahendra T. Ganatra of Venus Clearing Agency sent an email dated 26.10.2018, which is reproduced as under:-

> *"Refer to your below Email (dated 25.10.2018), that They didn't have any email conversation regarding all this shipments diverted.*
> *All the documents & Bill of landing was prepared for Bandar Abbas , then shipper has requested us verbally & said us to ask shipping company to discharge consignment at Jebel Ali,*
> *So They Had surrender the Original 3/3 OBL with surrender request letter to Shipping line, and accordingly the shipping line had given the delivery of consignment at Jebel Ali.*
> *Hence they had never made any email conversation of such diversion in Email, They have got only verbal instructions from their Client."*

1.13 Statement of Shri Devinder Kumar, Export Manager, Janki Dass Rice Mills, Nadana Road, Taraori, Distt. Karnal, Haryana was recorded on 10.10.2018 der Section 108 of the Customs Act, 1962 wherein he inter alia stated that during the year 2014-15 they had filed papers for export of 14 consignments to Iran and all these 14 consignments Were delivered at Iran as per details in shipping and export documents; that in the year 2015-16 they had filed papers for 16 consignments to Iran and out of these 16 consignments, 7 consignments (covering 8 shipping bills details of which had already been stated by him in his previous statements) had been delivered to Jabel Ali and 9 consignments Were delivered in Iran; that out of these 7 consignments, 5 consignments Were sent on FOB basis and rest two Were Cost & Freight basis; that he submitted a copy of the chart showing details of all such exports; that further, he also submitted landing certificates duly issued by the respective shipping lines and copy of their Commercial Invoices; that he had put his dated signatures on all the

documents submitted by him; that apart from these consignments no other consignments, for which export documents Were filed by them for Iran, had ever been diverted to any other country. The details of Landing Certificates submitted by Shri Devinder Kumar are as under:-

Sl. No.	SB No.	SB Date	BL No.	Discharged at
1	9008852	15.04.2015	GMAEMUNJEA009141	Jebel Ali
2	9011037	15.04.2015		
3	1269364	18.06.2015	BALMUNJEA009842	Jebel Ali
4	3878859	31.10.2015	GMAEMUNBND010818	Jebel Ali
5	4271905	24.11.2015	MERMUNBND500/15	Jebel Ali
6	3976705	05.11.2015	BALMUNBND010868	Jebel Ali
7	4028501	07.11.2015	GMAEMUNBND010898	Jebel Ali
8	4509957	04.12.2015	MERMUNBND559/15	Jebel Ali

1.14 Statement of Shri Rajesh Kumar, Partner of M/s. Janki Dass Rice Mills, Nadana Road, Taraori, Distt. Karnal, Haryana was recorded on 12.10.2018 under Section 108 of the Customs Act, 1962 wherein he inter alia stated that he, after completing his education, joined the business of his father in the name of M/s. Janki Dass Rice Mills in the year 1994 as a partner; that M/s Janki Dass Rice Mills was formed in the year 1986-87 in partnership; that the other partners Were Mrs. Sushila Devi, his mother, Shri Ravinder Kumar, his brother; that his responsibility in this firm was mainly related to the procurement of raw material and production in M/s Janki Dass Rice Mills; that main day to day business of this firm was looked after by his younger brother Devinder Kumar as his mother Mrs. Sushla Devi was very old in age and not having any responsibility in the above said firm and his elder brother Shri Ravinder Kumar was suffering from brain disease and was not able to take any responsibility; that all the documentation and export related work was looked after by his younger brother Shri Devinder Kumar; that he had never dealt in any export related activities such as dealing with CHA or Shipping Lines as he did not have knowledge about export work; that they had authorized Shri Devinder Kumar for all such works related to export and banking; that all the activities done by his brother Devinder Kumar for and on behalf of M/s. Janki Dass Rice Mills Were done by him on their authorisation their behalf and they stand by the same; that he was shown the statements dated 10.10.2018, 28.05.2018, 05.02.2016 and 15.02.2016 tendered by his brother Shri Devinder Kumar and documents submitted by his brother Devinder Kumar to this office; that he had read the same andhad put his dated signatures on all the above mentioned statements of his brother Shri Devinder Kumar / documents submitted by him(Devinder Kumar), in token of their being correct and his agreement with the same.; that he (Devinder Kumar) was working as Export Manager in the firm.

1.15. A perusal of these documents reveals that the goods in the case of the bills of lading as mentioned in the Table above, though originally booked for Iran but were delivered to Jabel Ali on the directions of M/s Janki Dass Rice Mills.

1.16 Relevant Legal Provisions : .

1.16.1 Section 2(33) of the Act defines "prohibited goods" 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."

1.16.2 Section 50: Entry of goods for exportation.—

(1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, allow an entry to be presented in any other manner.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.

1.16.3 Section 51: Clearance of goods for exportation.—*Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation.*

1.16.4 Section 113 of the Customs Act, 1962

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

(a.) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;

(b) any goods attempted or to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such goods;

(c) any goods brought near land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;

(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;

(e) any goods found concealed in a package which is brought with the limits of a customs area for the purpose of exportation;

(f) any goods which are loaded or attempted to be loaded in contravention of the provisions of section 33 or section 34;

(g) any goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;

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

(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77;

(ia) any goods entered for exportation under a claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;

(j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback under section 74;

(k) any goods cleared for exportation which are not loaded for exportation on account of any wilful act, negligence or default of the exporter; his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;

(l) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.]

1.16.5 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 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;

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

[(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.]

1.16.6 SECTION 114AA. 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.*

1.16.7 Shipping Bill (Electronic Declaration) Regulations, 2011:-

"As per Regulation 2(a) "authorised person" means an exporter or a person holding a valid license under the Custom House Agents Licensing Regulations, 2004 and authorised by such exporter;

Further as per Regulation - 3. the authorised person may enter the electronic declaration in the Indian Customs Electronic Data Interchange System by himself through ICEGATE or by way of data entry through the service centre by furnishing the particulars, in the format set out in Annexure..

At serial No 11 & 12 of the Annexure, Port of destination and country of final destination are required to be mentioned.

Further a declaration is signed for filing the checklist wherein the following undertakings are also made:

I/They declare that the particulars given hereinabove are true, correct and complete.

I/They undertake to abide by the provisions of Foreign Exchange Management Act, 1999, as amended from time to time, including realisation or repatriation of foreign exchange to or from India."

1.17. Foreign Trade Policy 2009– 2015

1.17.1 Payments and Receipts on Imports / Exports

17.1.1 Para 2.40 Denomination of Export Contracts

(a) *"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.*

1.17.2 Foreign Trade Policy 2015 – 2020

1.17.2.1 Payments and Receipts on Imports / Exports

1.17.2.2 Para 2.52 Denomination of Export Contracts

"(a) *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.*

(b) *However, export proceeds against specific exports may also be realized in rupees, provided it is through a freely convertible Vostro account of a non-resident bank situated*

in any country other than a member country of Asian Clearing Union (ACU) or Nepal or Bhutan. Additionally, rupee payment through Vostro account must be against payment in free foreign currency by buyer in his non-resident bank account. Free foreign exchange remitted by buyer to his non-resident bank (after deducting bank service charges) on account of this transaction would be taken as export realization under export promotion schemes of FTP.

(c) *Contracts (for which payments are received through Asian Clearing Union (ACU) shall be denominated in ACU Dollar. Central Government may relax provisions of this paragraph in appropriate cases. Export contracts and invoices can be denominated in Indian rupees against EXIM Bank/ Government of India line of credit."*

1.17.2.3 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.

1.17.3 Foreign Trade (Development & Regulation) Act, 1992

1.17.3.1 Section 11: *Contravention of provisions of this Act, rules, orders and export and import policy.*

(1) *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.*

(2) *Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty not exceeding one thousand rupees or five times the value of the goods in respect of which any contravention is made or attempted to be made, whichever is more.*

(3) *Where any person, on a notice to him by the Adjudicating Authority, admits any contravention, the Adjudicating Authority may, in such class or classes of cases and in such manner as may be prescribed, determine, by way of settlement, an amount to be paid by that person.*

(4) *A penalty imposed under this Act may, if it is not paid, be recovered as an arrear of land revenue and the Importer-exporter Code Number of the person concerned, may, on failure to pay the penalty by him, be suspended by the Adjudicating Authority till the penalty is paid.*

(5) *Where any contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy has been, is being, or is attempted to be, made, the goods together with any package, covering or receptacle and any*

conveyances shall, subject to such requirements and conditions as may be prescribed, be liable to confiscation by the Adjudicating Authority.

(6) *The goods or the conveyance confiscated under sub-Section (5) may be released by the Adjudicating Authority, in such manner and subject to such conditions as may be prescribed, on payment by the person concerned of the redemption charges equivalent to the market value of the goods or conveyance, as the case may be.*

1.17.4 Foreign Trade (Regulation) Rules, 1993

1.17.4.1 Rule 11: *"On the importation into, or exportation out of, any Customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act, 1962 (52 of 1962) state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of each Bill of entry or Shipping Bill or any other documents."*

1.17.4.2 Rule 14(2): "No persons shall employ any corrupt or fraudulent practice for the purposes of obtaining any license or importing or exporting any goods."

1.18 Section 8 of the Foreign Exchange Management Act, 1999

"Realisation and repatriation of foreign exchange.—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."

1.19 RELEVANT RBI PROVISIONS

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 in connection with various provisions of FEMA Notification No. 14 dated May 3, 2000. 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. With a view to further liberalising the procedure relating to payments for exports/imports and taking into account evolving international trade practices, it has been decided as under:

1.19.1 EXPORT TRANSACTIONS

"AD banks may allow payments for export of goods / software to be received from a third party (a party other than the buyer) subject to conditions as under:

a. Firm irrevocable order backed by a tripartite agreement should be in place;

b. *Third party payment should come from a Financial Action Task Force (FATF) compliant country and through the banking channel only;*

c. *The exporter should declare the third party remittance in the Export Declaration Form;*

d. *It would be responsibility of the Exporter to realize and repatriate the export proceeds from such third party named in the EDF;*

e. *Reporting of outstandings, if any, in the XOS would continue to be shown against the name of the exporter. However, instead of the name of the overseas buyer from where the proceeds have to be realised, the name of the declared third party should appear in the XOS; and*

f. *In case of shipments being made to a country in Group II of Restricted Cover Countries, (e.g. Sudan, Somalia, etc.), payments for the same may be received from an Open Cover Country."*

1.20. Based upon the legal provisions and factual position as discussed in the various statements above, it appeared that: -

1.20.1 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.

1.20.2 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.

1.21 Section 113(d) & 113 (i) of the Customs Act, 1962 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.

.....

.....

(i) [any goods entered for exportation 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;"

1.21.1 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.

1.21.2 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.

1.22 Section 2(33) of the Act defines "Prohibited goods" as under:

"(33) "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;"

1.22.1 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,

1.23 Power to prohibit importation or exportation of goods by Central Government is also 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;

1.24. 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", They 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 are 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).*

1.25. Further in the case Om Prakash Bhatia Versus Commissioner of Customs, Delhi {2003(155)-423 ELT} Hon'ble Supreme Court in a landmark judgment has *inter alia* settled the dispute on the following points:

- 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;

1.26 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", They 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."

1.27 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.

1.28 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. In that case as it was argued by the appellants that penalties under Sec.114 of the Customs Act, 1962 can only be imposed with respect to 'export goods' which are not yet exported.

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

1.30 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.*

1.30.1 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 liable to confiscation*".

1.31 M/s Janki Dass Rice Mills 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. 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. The acts of M/s Janki Dass Rice Mills do not appear simple cases of ordinary omissions or inadvertent failure to state correct details. The sequence of events which has come to fore in this case as a result of investigation clearly brings 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 Act.

1.32 Evidence/Important disclosures in the statements:

1.32.1 Statement dated 05.02.2016, 15.02.2016, 28.05.2018 and 10.10.2018 of Shri Devinder Kumar, Export Manager, M/s Janki Dass Rice Mills:

Shri Devinder Kumar has inter alia made the following important disclosures:-

- that he was responsible for all activities of local sales and export of rice;
- that they paid 1% commission to their brokers in case of export of rice to Saudi Arabia, Yemen and Dubai and they did not pay any commission in the case of export to other countries that they charged the commission from the buyers as per terms and conditions agreed;
- that they did not interact directly with their buyers, they interacted with indenters (brokers) for export of rice;
- that their CHA for export of rice to Iran from Mundra Port Were M/s. Venus Clearing Agency (Shri Vipul Ghantra) and M/s V. Arjoon (Shri Gordhan Bhai);
- that he interacted with abovementioned CHAs regarding export of rice to Iran;
- that they used the services of shipping lines - M/s Goodrich Maritime Pvt. Ltd., Balatic shipping, Maritime Shipping, etc. for export of rice to Iran;
- that he did not interact with the above shipping lines, their CHAs interacted with the above Shipping Lines on their behalf;
- that they received the payment of rice exported to Iran through UCO Bank, in INR and UCO Bank transfer the remittances to their Punjab National Bank, Taraori Branch Account;
- that in the case of export of rice to other than Iran they received the payment through Punjab National Bank, Taraori Branch in US$;
- that he was aware that the remittances in Indian Rupees in respect of rice exported to Iran was allowed in INR 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 these above consignments had been diverted to Jabel Ali Port (Dubai) on his oral instructions to their respective CHAs i.e. M/s. Venus Clearing Agency and M/s V. Arjoon;
- that the CHAs might have passed instructions in writing to their Shipping Lines to M/s Goodrich Lines, M/s Baltic Lines and M/s Meridian Shipping to deliver the consignments at Jabel Ali Port (Dubai) instead of declared port as Bandar Abbas (Iran);
- that they had not got carried out any amendment in the respective shipping bills for change of destination port;
- 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;
- that the fact of discharge of these shipments at Jabel Ali port was never brought to the knowledge of UCO Bank;
- that it was known to him in advance that the consignments would be discharged at the port of Jabel Ali and not Bandar Abbas and that it was made known in advance to the CHAs.

1.32.2 Statement dated 16.12.2015 and 30.12.2015 of Shri Sunjjoy Salve, Vice President (Western Region) of M/s Goodrich Maritime Pvt. Ltd: Sh. Sunjjoy Salve has inter alia made the following important disclosures:

- that they used to provide facilities to the exporters for exporting the goods by providing vessel as per their requirement mainly for exporting goods like Rice, Minerals, used clothing, pharmaceuticals etc;
- he accepted that he has received requests from certain shippers (exporters) to divert the cargo from one port i.e. Bandar Abbas to another port i.e Jebel Ali;
- that draft copy of Bill of Lading on the basis of shipping bill was forwarded them by the concerned CHA through e-mail;

1.32.3 Statement dated 22.12.2015 of Shri Tushar H. Anam of M/s V. Arjoon: Shri Tushar H. Anam has inter alia made the following important disclosures:

- he stated that he was not aware of the provisions of the Foreign Trade Policy and was not in the position to guide their clients to ensure compliance of the provisions of Foreign Trade Policy.
- That Shri Gordhan Bhavnani, H-card holder of M/s. V. Arjoon and he interacted with all the shipping lines on behalf of their clients.
- On being asked, he stated that some shipments of rice, which were cleared for export to Iran Were later on diverted at Jabel Ali port after customs clearance.
- that the diversion of goods to Dubai after clearance for Iran was not brought to the notice of Customs authorities at the port of export by exporters or shipping lines, because cargo had already left Indian waters and had reached Jabel Ali and Exporters/Shipping Line had not requested for any amendment in the Shipping Bill.

1.32.4 <u>Statement dated 09.01.2017 of Shri Gordhan Bhavnani, Manager of M/s V.Arjoon, Plot No. 130, Lila shah Nagar, Gandhidham:</u>

Shri Gordhan Bhavnani has inter alia made the following important disclosures:

- that they placed booking to the shipping line from the office email; then they get a booking confirmation/Delivery Order from the Shipping line; that in the booking request, they have to intimate to the shipping line among other details about - shipper, exporter/consignee, port of discharge, no. of containers, size of container, commodity, port of stuffing.
- that on behalf of the exporters he dealt with the shipping lines and got their customs clearance work with the help of other employees of their company;
- that whatever handling of export consignments with shipping line, Customs custodians and exporters and other related person was done by them as

employees of the CHA firm, was in the knowledge of owner of the CHA firm and was done for the CHA firm as per the practice being followed by them.

- on being asked about the consignments of rice meant for export to Iran and shown in the shipping customs documents as being exported to Iran but diverted to Jebel Ali, Dubai he stated that he always acted on the directions of exporter;

- that it was known to him in advance i.e. before leaving of the consignment from Indian shore that the goods Were actually going to Dubai in place of Iran as mentioned in the shipping bill but as CHA they had no choice but to act in accordance with the directions of the exporter;

- that even in some of the cases they came to know of the diversion of the goods to Dubai after loading of the goods in the vessel and leaving the vessel from Indian shore.

- that they had diverted the goods on the request of the exporter and as stated above acted at their directions and whatever mis-statement has been made is without any intention to avail any benefit

- on being asked to explain as to was it not their obligation to advise the exporter to get the amendment done and in case of non-compliance, he stated that they never felt it to be such a major issue and whatever was happening was being done on the directions of exporter only.

- that whatever omission has been done in filing of the shipping bills and non-compliance of the regulation 11(d) was without any intention to violate any provisions of law.

1.32.5 Statement dated 17.09.2018 of Shri Mahendra Ganatra Tokarshi, Proprietor of M/s Venus Clearing Agency, 101 Asopalav Arcade, Plot No.-04, Sector-9, Gandhidham:

Shri Mahendra Ganatra Tokarshi has *inter alia* made the following important disclosures:

- that he had been handling all the work relating to Customs clearance in coordination with the clients; that he was Well versed with all the legal provisions and procedures for Customs clearance;

- that on being asked in detail, he stated that in the case of export of rice to various countries, first of all they used to receive the Shipper's (Exporter's) documents i.e. Invoice, Packing List, APEDA Certificates and Self Declaration Form for banking purpose;

- that they placed booking to the shipping line from the official email or through telephonically; that then they would get booking confirmation/Delivery Order from the Shipping line; that in the booking request, they had to intimate to the shipping line among other details about -

shipper, exporter/consignee, port of discharge, no. of containers, size of container, commodity, port of stuffing.

- that as far as he could recall they had handled customs clearance of rice to Iran in respect of M/s. Janki Dass Rice Mills, inter alia other exporters,
- that on behalf of these exporters he dealt with the shipping lines and got their customs clearance done; that whatever handling of export consignments with shipping line, Customs, custodians and other related persons was done by him or his employees, was as per his approval and knowledge.
- that he always acted on the directions of exporter; that he had never done it without directions of the exporter, he stated that the exporters had given directions to divert the goods to Jebel Ali; that as a CHA they had no choice but to act in accordance with the directions of the exporter.

1.33. In view of the legal provisions and facts and circumstances of the case as discussed above, the following points appeared to have emerged:

- M/s Janki Dass Rice Mills has filed the export documents for export of goods to Iran;
- In their applications filed in terms of Shipping Bill (Electronic Declaration) Regulations, 2011 M/s Janki Dass Rice Mills /CHA had declared that all the facts stated in the declaration filed under this regulations to be true;
- The goods have been shown in the export documents to be consigned to Iran but in fact the goods have been delivered at UAE;
- Thus mis-declaration/mis-statement was made in the export documents filed by M/s Janki Dass Rice Mills
- 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 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 exported to UAE are mandatorily required to be realized in freely convertible foreign currency;
- The proceeds of impugned goods, exported to UAE have been realized in Indian Currency through Iran;
- By 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 M/s Janki Dass Rice Mills
- Shri Devinder Kumar, Export Manager of M/s Janki Dass Rice Mills is the key person who carried out the relevant operations for the purpose of export. His involvement in committing the violations as discussed above is clearly brought out by the facts and circumstances as discussed above;
- Customs Broker firms M/s V Arjoon and M/s. Venus Clearing Agency have also violated the relevant provisions of law inasmuch as they have facilitated the mis-declaration in export of goods to Jabel Ali under the garb of export to Iran, they Were fully aware about the alleged offence;

- M/s Janki Dass Rice Mills, its Export Manager Shri Devinder Kumar, Customs Brokers M/s. V Arjoon and M/s. Venus Clearing Agency have knowingly and intentionally made, signed and caused to be made, signed declaration in the export documents which are false and incorrect;
- M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar appeared to have exported the goods under mis-declaration to UAE under the veil of export to Iran under Rupee Trade Mechanism. They appeared to have exported the goods in violation of the prohibition discussed above.
- From the evidence available on record and discussed above, it appeared that the following goods exported by the M/s Janki Dass Rice Mills as declared to Iran has been diverted to Jebel Ali, Dubai:

Sl. No.	SB No.	SB Date	B/L No.	Declared FOB Value (INR)
1	9008852	15.04.2015	GMAEMUNJEA009141	31,111,850
2	9011037	15.04.2015		
3	1269364	18.06.2015	BALMUNJEA009842	22,822,320
4	3878859	31.10.2015	GMAEMUNBND010818	46,564,650
5	4271905	24.11.2015	MERMUNBND500/15	55,200,000
6	3976705	05.11.2015	BALMUNBND010868	17,250,000
7	4028501	07.11.2015	GMAEMUNBND010898	25,875,000
8	4509957	04.12.2015	MERMUNBND559/15	10,097,000
			TOTAL	**20,89,20,820**

1.34 The following prohibitions appeared to have been violated by M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar, attracting provision of section 113(d) of the Customs Act,1962:

Reference of the Relevant provisions	Provisions	How it is violated/not complied with by the noticees
Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992	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	M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar had exported the goods and realised the proceeds in violation of para 2.40 and 2.52 of the FTP as discussed above.
Rule 14(2) Foreign Trade (Regulation) Rules, 1993	No persons shall employ any corrupt or fraudulent practice for the purposes of obtaining any license or importing or exporting any goods.	The goods appear to have been exported by making mis-statement in the relevant documents. Foreign exchange which is mandatorily required to have been received from the actual buyer of the goods has not been received.
Section 8 of the Foreign Exchange Management Act, 1999	Realisation and repatriation of foreign exchange- 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. ."	Proceeds have been realised from a third party and not have been received from the actual buyer of the goods.

RBI/2013-14 /364, A. P. (DIR Series) Circular No.70 dated November 8, 2013	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.	Proceeds have been realised from a third party and not have been received from the actual buyer of the goods. *(AD banks may allow payments for export of goods / software to be received from a third party (a party other than the buyer) subject to certain conditions)*

1.35. Section 113(i) of the Customs Act,1962 provides that any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 are liable to confiscation.

1.36 M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar and Customs Broker firm M/s V Arjoon and M/s. Venus Clearing Agency have made the following violations attracting action in terms of section 113(i) of the Customs Act, 1962:

Reference of the Relevant provisions	**Provisions**	**How it is violated/not complied with by the noticees**
SECTION 50 (1) of the Customs Act,1962	The exporter of any goods shall make entry thereof by presenting [electronically] to the proper officer, in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.	M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar and Customs Broker firm M/s V Arjoon and M/s. Venus Clearing Agency made/got made false entries in the shipping bills with regard to actual destination of the export consignments
SECTION 50 (2) of the Customs Act,1962	The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.	M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar and Customs Broker firm M/s V Arjoon and M/s. Venus Clearing Agency had falsely certified/got certified the entries to be true whereas they have mis-stated the facts in the shipping bills.
Shipping Bill (Electronic Declaration) Regulations, 2011	At serial No 11 & 12 of the Annexure Port of destination and country of final destination are required to be mentioned. Further a declaration is signed for filing the checklist wherein the following undertakings are also made: I/we declare that the particulars given herein above are true, correct and complete. I/we undertake to abide by the provisions of Foreign Exchange Management Act, 1999, as amended from time to time, including realisation or repatriation of foreign exchange to or from India.	M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar and Customs Broker firm M/s V Arjoon and M/s. Venus Clearing Agency had made/got made false entries in the shipping bills declarations with regard to actual destination of the export consignments

1.37 Thus the various consignments of M/s Janki Dass Rice Mills (as per details above), which as per their respective shipping bills Were destined for Iran had

been diverted to UAE, appeared liable to confiscation in terms of Section 113(d) and (i) of the Customs Act, 1962.

1.38 Thus from the above, it appeared that the M/s Janki Dass Rice Mills and it's Export Manager Shri Devinder Kumar had violated the following provisions of law:

Sl.No	Relevant provisions	Description of violation
1.	**SECTION 50.** – (1) The exporter of any goods shall make entry thereof by presenting [electronically] to the proper officer, in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.	Making of false entries in the shipping bills with regard to actual destination of the export consignments
2	**SECTION 50.** (2) The exporter of any goods, while presenting a shipping bill or bill of export, shall make and subscribe to a declaration as to the truth of its contents.	False certification of the entries to be true whereas they have mis-stated the facts in the shipping bills
3	**Shipping Bill (Electronic Declaration) Regulations, 2011** At serial No 11 & 12 of the Annexure Port of destination and country of final destination are required to be mentioned. Further a declaration is signed for filing the checklist wherein the following undertakings are also made: I/we declare that the particulars given herein above are true, correct and complete. I/we undertake to abide by the provisions of Foreign Exchange Management Act, 1999, as amended from time to time, including realisation or repatriation of foreign exchange to or from India.	Making of false entries in the shipping bills declarations with regard to actual destination of the export consignments
4	**FTP 2009-14** **2.40 Denomination of Export Contracts** **(a)** 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.	The export proceeds have been realised in Indian rupees as against statutory requirement of their realisation in freely convertible foreign currency
5	**FTP 2015-20** **2.52 Denomination of Export Contracts** **(a)** 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.	The export proceeds have been realised in Indian rupees as against statutory requirement of their realisation in freely convertible foreign currency
6	Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992	Export proceeds have been realised in violation of para 2.40 and 2.52 of the FTP as discussed above.
7	Rule 14(2) Foreign Trade (Regulation) Rules, 1993	The goods appear to have been exported by making mis-statement in the relevant documents. Foreign exchange which is mandatorily required to have been received from the actual buyer of the goods has not been received.
8	Section 8 of the Foreign Exchange Management Act, 1999	Proceeds have been realised from a third party and not have been received from the actual buyer of the goods.
9	RBI/2013-14 /364, A. P. (DIR Series) Circular No.70 dated November 8, 2013	Proceeds have been realised from a third party and not have been received from the actual buyer of the goods. (AD banks may allow payments for

		export of goods / software to be received from a third party (a party other than the buyer) subject to certain conditions)

1.39 Thus from the above, it appeared that the Customs Broker firm M/s V Arjoon and M/s. Venus Clearing Agency had made/got made false entries in the export documents and thereby appear to have violated the provisions of section 50 of Customs Act, 1962 and Shipping Bill (Electronic Declaration) Regulations, 2011.

1.40. Imposition of penalty

Thus from the above, it appeared that M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar Customs Broker firms M/s V. Arjoon and M/s. Venus Clearing Agency are liable to penal action in terms of the following provisions of law:

Relevant Section	Description of offence warranting imposition of penalty
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 to penalty.	M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar and Customs Broker firms M/s V Arjoon and M/s. Venus Clearing Agency 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 section 114AA of the Customs Act, 1962.
SECTION 114AA **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.	

1.41 Further, it also appeared that the proceeds claimed to have been received in respect of the impugned exported goods are not relatable to these goods in view of the following points:

- The goods are declared to have been consigned to Iran;
- The goods had been delivered at UAE;
- In term of Para 2.40 and 2.52, as referred above, the proceeds Were mandatorily required to have been received in foreign currency

- In terms of Section 8 of the Foreign Exchange Management Act, 1999 the due amount of foreign exchange should have been realized and repatriated to India,
- Certain payments which had been received by M/s Janki Dass Rice Mills in their UCO bank account are claimed to be towards export of impugned goods;
- These payments had actually been received from Iranian entity in whose names the shipping bills had been filed as consignee of the goods;
- M/s Janki Dass Rice Mills was not able to demonstrate as to how this payment is related to the goods delivered in UAE;
- In the absence of their establishing relationship with the export goods the same cannot be considered to be the proceeds of export goods;

1.42. Thus, from the evidence on record, statements of the various persons and legal position in the matter, as discussed above, it appeared that the goods exported by M/s Janki Dass Rice Mills having collective FOB value of **Rs.20,89,20,820**/- (Rupees Twenty Crores Eighty Nine Lakhs Twenty thousand Eight hundred and Twenty only) 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. It further appeared that M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar, and Customs Broker firms M/s V Arjoon and M/s. Venus Clearing Agency are 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.

1.43. Therefore, a Show Cause Notice bearing F. No. DRI/HQ-CI/50D/ENQ (INT-24)/2015-Pt. dated 14.02.2019 was issued to M/s Janki Dass Rice Mills, Nandana Road, Taraori-132116 (Karnal) calling upon them to show cause to the Joint/Additional Commissioner of Customs, Mundra Port & SEZ, Mundra, Dist Kutch, Gujarat as to why:

i) The goods having declared FOB value of **Rs.20,89,20,820/- (Rupees Twenty Crores Eighty Nine Lakhs Twenty thousand Eight hundred and Twenty only)** exported under 08 Shipping Bills, as per details in the table above 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) Penalty under Section 114 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 of the Customs Act, 1962 should not be imposed upon them;

iii) Penalty under Section 114 AA 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 of the Customs Act, 1962 should not be imposed upon them;

iv) The amount of Rs.15 lakhs deposited by them vide demand draft No. 847918 dated 16.03.2016 during the investigation of the case should not be appropriated towards statutory levies imposed during adjudication of impugned show cause notice.

1.44 Further, a SCN bearing F. No. DRI/HQ-CI/50D/ENQ(INT-24)/2015-Pt. dated 14.02.2019 was issued to Sh. Devinder Kumar, Export Manager of M/s Janki Dass Rice Mills and Customs Broker firms M/s V Arjoon and M/s. Venus Clearing Agency calling upon them to show cause to the Joint/Additional Commissioner of Customs, Mundra Port & SEZ, Mundra, Dist Kutch, Gujarat as to why:

i) Penalty under Section 114 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 of the Customs Act, 1962 should not be imposed upon them in view of above;

ii) Penalty under Section 114 AA 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 of the Customs Act, 1962 should not be imposed upon them in view of above.

2. DEFENSE SUBMISSION:

2.1 M/s Janki Dass Rice Mills vide their letter dated 17.05.2019 requested to grant a further period of 12 weeks to submit reply to the Show Cause Notice dated 14.02.2019.

2.2 M/s Janki Dass Rice Mills through their Advocates M/s Ajay Singh & Associates vide their letter dated 19.08.2019 submitted their written reply to the Show Cause Notice. Wherein they submitted that:

2.3 On instructions and on behalf of their clients, they deny each and every allegation and charge as leveled against their said clients by the subject Show Cause Notice. The charges leveled against their clients are erroneous, misconceived & appear to have been alleged by misinterpreting the provisions of the Customs Act, 1962, extracting unwarranted conclusions from the facts on record & the statements recorded.

2.3.1 Before proceeding with the submissions on the merits of the case, they submitted that the allegations and charges as levelled by the Notice are solely based on the various statements recorded under section 108 of the Customs Act, 1962 as detailed in the list of RUDS to the SCN. These statements have been referred and relied for drawing adverse inference against their clients and to support the allegations and charges as contained in the Notice. It may kindly be appreciated that the

averments as contained in the statements are not corroborated by any independent evidence and therefore veracity of these averments is required to be tested before the Hon'ble Adjudicating Authority be way of examination/cross-examination. Statements of Shri Sunjjoy Salve, Vice President (Western Region) of M/s. Goodrich Maritime Pvt.Ltd., Shri Tushar H. Anam of M/s. V. Arjoon, CHA, Shri Gordhan Bhawnani, Manager of M/s. V. Arjoon, CHA and Shri. Mahendra T Ganatra, Proprietor of M/s. Venus Clearing Agency is relied upon at Sr.No. 2 to 4, 7, 10 & 11 of the list of Relied upon documents. In these statements, averments are made to implicate their clients. They requested the Joint/Additional Commissioner of Customs to grant their clients examination/cross-examination of the said witnesses before proceeding with the adjudication of the case, in compliance with the provisions of Section 138B of the Customs Act, 1962.

2.3.2 On behalf and instructions of above said clients, they have mentioned the provisions of Section 138B of the Customs Act 1962, and specifically to the sub clause (2) of the said Section which lays down as under:

> "(2) *The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.*"

In view of the above express provision of the act, examination of a person, whose evidence has been referred or relied upon, in support of the charges as leveled by the Notice is a must during adjudication proceedings also as they apply in the proceedings before a Court. Further, they cited the judgment of Hon'ble High Court of Punjab and Haryana at Chandigarh in the case of M/s Ambika International Vs. Union of India and others in CWP No.12615 of 2016 strongly underlined the requirement of adhering to the provisions as set out in Section 9D of the Central Excise Act, 1944 by holding that:

"22. *If none of the circumstances contemplated by clause (a) of Section 9D (1) exists, clause (b) of Section 9D (1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can beadmitted in evidence. Under this procedure, two steps are required to befollowed by the adjudicating authority, under clause (b) of Section 9D (1), viz. i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice."*

23. *There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the gazetted Central Excise officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D (1), makes it clear that, the provisions contemplated in the sub-Section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.*

24. *The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the gazetted Central Excise officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.*

25. *Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on investigation/inquiry before the gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudicating proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice."*

2.3.4 In view of the above, they submitted that examination of the persons whose evidence has been referred to and relied upon for issuance of the Notice is a must and denial of examination renders the evidences of the above said persons recorded during investigation as nullity, which cannot be relied upon by the Department and renders the entire proceedings as bad in law. Thus, in the facts and circumstances of the case, it is essential to cross examine these persons to ascertain the truth to prevent miscarriage of justice. They also submitted that the instant case falls in that category of cases where denial of cross examination will lead to denial of justice to their Clients.

2.3.5 The ratio of above judgment of the Hon'ble High Court has been affirmed by the Hon'ble High Court of Delhi in Him Logistics Pvt. Ltd. Vs. Pr. Commissioner of Customs 2016 (336) ELT 15 (Delhi)

"13. In the context of the present case, Section 138B of the Act is relevant and reads as under :

"138B. Relevancy of statements under certain circumstances. - (1) A statement made and signed by a person before any Gazetted Officer of customs during the Course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.

14. The above provision is in pari materia Section 9D of the Central Excise Act, 1944 ('CE Act'), which was explained by the Division Bench of this Court in Basudev Garg (supra) as under :

> *"10. In sofar as the general propositions are concerned, there can be no denying that when any statement is used against the assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee. This is clear from the observations contained in Swadeshi Polytex Ltd. (supra) and Laxman Exports Limited (supra). Apart from this, the decision of this Court in J&K Cigarettes Ltd. (supra) clinches the issue in favtheir of the appellant. In that case, the validity of Section 9D of the Central Excise Act, 1944 was in question."*
>
> *15. After noticing the decision in J&K Cigarettes Ltd. v. Collector of Central Excise reported in 2009 (242) E.L.L 189 (Del.) 2011 (22) S.T.R. 225 (Del.), which had upheld the validity of Section 9D of the CE Act, the Court in Basudev Garg (supra) observed as under:*
>
> *"14. The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi judicial proceeding is a valuable right given to the accused/ Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away, The Court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a statement is dead or cannot be found, or is incapable of giving evidence, or kept out of the way by the adverse party , or whose presence cannot be obtained without an amount of delay and expense which , under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings. The Division Bench also observed as under:-*
>
> *"29. Thus, when They examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not*

uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi judicial authority would confront the assessee as Well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."

16. The legal position explained in the above decisions was reiterated by another Division Bench of this Court recently in Flevel Internationa! v. Commissioner of Central Excise (supra) where again the decision of the AA to deny the assessee the right of cross-examination was held to be unsustainable in law being contrary to Section 9D of the CE Act.

17. In the present case, it is an admitted fact that the respondent Department is placing considerable reliance on the statements of Mr. Shyam Lal and Ms. Preeti, the partners of the importer, in support of the case made out in the SCN. The impugned order of the AA does not indicate that any prejudice would be caused to the Department by providing the petitioner the right of cross-examination. On the other hand the denial of such right would prejudice the petitioner since the said statements are adverse to the petitioner. In the circumstances, the denial of the petitioner's right of cross-examination is held contrary to the law explained in Basudev Garg (supra).

18. Consequently, the Court sets aside the order dated 17th February, 2016 passed by the AA declining the request of the petitioner for cross-examination of Mr. Shyam Lal and Ms. Preeti.

19. The AA shall now fix a date not later than within two weeks from today for the appearance of Mr. Shyam Lal and Ms. for cross-examination by the petitioner. The petitioner will proceed with their cross-examination without seeking any adjournment and conclude it not later than one week thereafter. The time-limit of completing the adjudication proceedings and passing the adjudication order is extended by a period of two months from the date of conclusion of the cross-examination."

Hon'ble High Court of Punjab and Haryana in G-Tech Industries Vs. Union of India 2016 (339) ELT 209 (P & H) and Jindal Drugs Pvt. Ltd. Vs. Union of India 2016 (340) ELT 67 (P & H) has held as under:

"4. In view of the fact that the case of the petitioner is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :

"9D. Relevancy of statements under certain circumstances. (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the Course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

5. A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazette rank,, during the Course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.

6. Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.&K Cigarettes Ltd v. CCE, 2009 (242) E.L. T. 189 (Del.) 2011 (22) S.TR. 225 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 91D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as Well.

7. There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.

8. As already noticed herein above, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a Gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents

thereof is concened, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).

9. The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.

10. Once the ambit of Section 9D(1) is thus recognized and understood, one has to turn to the circumstances referred to in the said sub-section, which are contained in clauses (a) and (b) thereof.

11. Clause (a) of Section 9D(1) refers to the following circumstances :
(i) when the person who made the statement is dead,
(ii) when the person who made the statement cannot be found,
(iii) when the person who made the statement is incapable of giving evidence,
(iv) when the person who made the statement is kept out of the way by the adverse party, and
(v) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense.

12. Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is self-evident inference that the decision flowing exercise of such discretion, i.e., the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of sub-section (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarenes Lad (supra) holds that the said challenge could be ventilated in appeal, the petitioner has also invited attention to an unreported short order of the Supreme Court in UOI and Another v. GIC India and Others in SLP (C) No. 21831/1994, dated 3-1-1995 (since reported in 1995 (75) EL.T. A177 (S.C.))., wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as Well. Therefore, it is clear that the adjudicating authority cannot invoke Section 9D(i)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.

13. If none of the circumstances contemplated by clause (a) of Section 9D(i) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.

(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority,

(ii) and the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

14. There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.

15. The rationale behind the above precaution contained in clause (b) of Section 9D (1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.

16. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice,

17. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

18. It is only, therefore,-

(i) after the person whose statement has already been recorded before a Gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

(ii) that the question of offering the witness to the assessee, for cross-examination, can arise.

19. Clearly, if this procedure, which is statutorily prescribed by plenary parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.

20. Reliance may also usefully be placed on Para 16 of the judgment of the Allahabad High Court in C.C.E. v. Parmarth Iron Pvt Ltd., 2010 (260) E.L.T. 514 (All.), which, too, unequivocally expound the law thus :

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

21. That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgment of the Supreme Court in C.C. v. Bussa Overseas Properties Ltd., 2007 (216) E.L.T. 659 (S.C.), which upheld the decision of the Tribunal in Bussa Overseas Properties Ltd, v. C.C., 2001 (137) E.L.T. 637 (T).

22. It is clear, from a reading of the Order-in-Original dated 4-4-2016 supra, that Respondents No. 2 has, in the said Orders-in-Original, placed extensive reliance on the statements, recorded during investigation under Section 14 of the Act. He has not invoked clause (a) of sub-section (1) of Section 9D of the Act, by holding that attendance of the makers of the said statements could not be obtained for any of the reasons contemplated by the said clause. That being so, it was not open to Respondent No. 2 to rely on the said statements, without following the mandatory procedure contemplated by clause (b) of the said sub-section. The Orders-in-Original, dated 4-4-2016, having been passed in blatant violation of the mandatory procedure prescribed by Section 9D of the Act, it has to be held that said Orders-in-Original stand vitiated thereby.

23. The said Order-in-Original, dated 4-4-2016, passed by Respondent No. 2 is, therefore, clearly liable to be set aside.

24. In view of the above facts and circumstances, the impugned Order-in-Original dated 4-4-2016 passed by respondent No. 2 stands set aside. Resultantly, the show cause notice issued to the petitioner is remanded to respondent No. 2 for adjudication denovo by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial Authorities in this regard including the principles of natural justice in the following manner :-

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the

Revenue would examine them in chief before the adjudicating authority, i.e., before Respondent No. 2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examination-in-chief before the adjudicating authority, i.e., before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent

matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assesse cannot be relied upon, in adjudication proceedings, without allowing the assessce an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I., 2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641 (S.C.)."

Hon'ble Punjab & Haryana High Court in case of Jindal Drugs Pvt. Ltd. Vs. Union of India 2016 (340) ELT 67 (P & H) has held as under:

"19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

20. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

21. It is only, therefore, -

(i) after the person whose statement has already been recorded before a Gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.

22. Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.

23. Reliance may also usefully be placed on Para 16 of the judgment of the Allahabad High Court in C.C.E. v. Parmarth Iron Pvt Ltd., 2010 (260) E.L.T. 514 (All.), which, too, unequivocally expound the law thus:

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

24. That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgment of the Supreme Court in C.C. v. Bussa Overseas Properties Ltd., 2007 (216) E.L.T. 659 (S.C.), which upheld the decision of the Tribunal in Bussa Overseas Properties Ltd. v C.C., 2001 (137) E.L.T. 637 (T).

25. In the light of the above, respondent no. 2 is directed to adjudicate the show cause notice issued to the writ petitioners by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial authorities in this regard, including the principles of natural justice, in the following manner :

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the Revenue would examine them in chief, before the adjudicating authority, i.e., before Respondent No. 2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined-in-chief before the adjudicating authority, i.e., before

Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and Well-settled position in law that statements recorded behind the back of cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I., 2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641(S.C.)".

Hon'ble Chattisgarh High Court at Bilaspur in the case of Hi Tech Abrasives Vs. Commissioner of Central Excise & Customs, Raipur - 2018 (362) E.L.T 961 (Chattisgarh) has held on the issue as under:

"9. Findings on Substantial Questions of Law (i) & (ii): They shall decide the first two substantial questions of law as they are overlapping. The submission of counsel for the appellant has been that firstly, the Director's statement was not admissible and secondly it cannot be treated as admission because in reply to Show Cause Notice, the said statement was stated to have been obtained under duress. They shall first examine the legal position with regard to the admissibility of the statement of Director which admittedly was taken during search operations by the investigation officers.

9.1 At the outset, it needs to be clarified that during the Course of argument, Learned Counsel for the parties agreed that second substantial question of law is with regard to legality of procedure adopted by the adjudicating authority and not the Tribunal as such because the Tribunal has only exercised appellate jurisdiction. This is quite obvious from orders passed by the Tribunal, the appellate authority and pleadings/ground in the appeal. There is no dispute that the adjudicating authority did not record the statement of the Director Mr. Narayan Prasd Tekriwall and the basis of the finding recorded by the adjudicating authority as Well as Customs, Excise and Service Tax Apellate Tribunal, has been the statement of the Director as recorded by the investigation officer during investigation. Section 9D of the Central Excise Act of 1944 reads as under:

Section 9D - Relevancy of statements under certain circumstances.- (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the Course of any inquiry or proceeding under this Act shall

be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or (b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before the Court.

On scanning the anatomy of the said provision, They find that the statement made and signed by a person before any Central Excise Officer of a gazetted rank during the Course of inquiry or proceeding under the Act shall be relevant for the purposes of proving truth of the facts which it contains only when it fulfills the conditions prescribed in clause (a) or as the case may be, under clause (b). While clause (a) deals with certain contingencies enumerated therein, clause (b) provides that statement made and signed would be relevant for the purposes of proving the truth of the facts contained in that statement only when the person whom made the statement is examined as witness before the Court. (the adjudicating authority).

9.2 At this juncture, They need to notice the provision contained in Section 9D which provides that sub-section (1) shall, as far as may be, applied in relation to the proceedings under the Act, other than the proceeding before the Court, as they apply in relation to proceeding before the Court. This provision when read in juxtaposition, the small clauses (a) and (b) under sub-section (1), requirement of law of recording of examination as witness would be in relation to the proceedings before the Adjudicating authority.

9.3 A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the Court (in the present case, Adjudicating Authority) and the Court (Adjudicating Authority) forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice.

9.4 The legislative scheme, therefore, is to ensure that the statement of any person which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The said

provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police power of the Investigating authorities by coercion or undue influence.

9.5 Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the Adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Therefore, they would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers. Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. They have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice. In taking this view, they find support from the decision in the case of Ambica International v. UOI rendered by the High Court of Punjab and Haryana.

Reliance has been placed by the Counsel for the Revenue on the decision in the matter of Commissioner of Central Excise v. Kalvert Foods India Private Limited (Laws (SC) 2011 838) = 2011 (270) E.L.T. 643 (S.C.). That decision turned on its own facts. In para 19 of the judgment, it was concluded as below:

"19. They are of the considered opinion that it is established from the record that the are said statements Were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure

being utilized the officers to extract the statements which corroborated each other. Besides the managing director of the Company of his own volition deposition the amount of Rs.11 Lakhs towards excise duty and therefore in the facts and circumstances of the present case, the aforesaid statement of the Counsel for the Respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress."

Accordingly, on the first and second question of law, They hold that the statement of the Director could not be treated as relevant piece of evidence nor could be relied upon without compliance of Section 91D of the Act. The two questions of law accordingly, stand answered in that manner."

2.3.6 Further, they stated that the provisions of Section 9D and 138B are pari-materia and are identically worded in the same context and the higher judicial forums have also confirmed the same and therefore the law laid down in context of Section 9D are equally applicable. It is also pertinent to point out here that these decisions of Hon'ble High Courts have been followed in plethora of orders passed by Hon'ble Tribunal and the law as laid down in these cases has virtually attained the status of settled law.

2.3.7 In view of the above, they requested to call for all the witnesses whose statements has been relied on in the impugned Notice so as to enable the examination and cross - examination of the witnesses, in compliance with the provisions of Section 138B of the Customs Act, 1962. For any reason, if the Hon'ble Adjudicating Authority is not inclined to accept their above submissions, then they may be communicated accordingly in writing keeping in view the law as laid down by Hon'ble Tribunal in the case of Bharati Bhutada Vs. CCE - 2011 (266) E.L.T. 97 (Tri. - Mumbai).

2.3.8 Further, Shri Tarun Govil Advocate on behalf of M/s Janki Dass Rice Mills and its Export Manager Shri Devinder Kumar, submitted further defence written reply-dated 19.12.2019 to the SCN wherein they enclosed (1) Photocopies of work sheet showing B/L No. wise export of the cargo from Jabel Ali Port, Dubai to Bandar Abbas, Iran (2) Copies of Sea Export Manifests issued by Dubai Creek Customs Centre (3) Photocopies of Certificates from M/s Royal Tooba Foodstuff Trading LLC & (4) Photocopies of certificates from Iranian Buyers . Further, they submitted as below:

2.3.8.1 They referred their letter-dated 10.12.2019, wherein they informed Adjudicating Authority that pursuant to letter F. No. VIII/48-28/ADJ/ADC/MCH/2018-19 dated 09.10.2019 cross-examination of the witnesses was fixed and the witnesses were also summoned and were directed to appear on 06.11.2019, however cross-examination could not be take place that date. In the circumstances they vide their letter-dated 10.12.2019 requested the Additional Commissioner to summon the witnesses on 19.12.2019 and also requested to grant them personal hearing after the cross-examination is concluded.

2.3.8.2 Further, If the Adjudicating Authority is not inclined to accept their above submissions, they referred their letter-dated 19.08.2019, requesting for Examination/ Cross Examination of certain witnesses, in terms of the provisions of Section 138B of the Customs Act, 1962, whose statements have been referred to and relied upon in the said notice as evidence in support of the allegations and charges as leveled by the Notice. In support of their above requests they also cited the statutory provisions and various case laws. They also submitted that the mandatory directions as contained in Master Circular No. 1053/2/2017-CX., dated 10-3-2017 issued from F. No. 96/1/2017-CX.I on Adjudication proceedings etc. and specifically to Para 14.9 thereof, whereby it has been specifically directed that where a statement is relied upon in the adjudication proceedings, it would be required to be established through the process of cross-examination, if the noticee makes a request for cross-examination of the person whose statement is relied upon in the SCN. They submitted that the above directions are mandatory and not discretionary. Hon'ble Apex Court in the case of DHIREN CHEMICAL INDUSTRIES 2002 (143) E.L.T. 19 (S.C.) has unequivocally held that the circular issued by CBEC is binding on the department and thus on departmental officers also and therefore Cross Examination of witnesses whose statements/evidences are relied on for sustaining the charges is must and denial thereof will amount to denial of Natural Justice.

2.3.8.3 They pointed out that cross examination of witnesses is utmost necessary in facts and circumstances of the present case, as detailed in their earlier letters, duly supported by citing the specific provisions of statute, case laws governing the issues and also the binding circular as detailed hereinabove, the Adjudicating Authority must communicate to the Noticees as to whether cross examination as requested for is being granted or denied in the interest of natural justice, so as to enable us to make effective submissions in their defense. In this regard they draw kind attention of the Hon'ble Adjudicating Authority to the Judgment in case of Bharti Bhutada v/s Commissioner of Customs 2011 (266) ELT 97 (Tri. Mum), wherein it is laid down that the Authority must communicate the outcome of request for cross-examination before proceeding with adjudication of the case.

2.3.8.4 Further, on behalf of their clients, they submitted that rice in the case, ultimately reached the destination country i.e. Iran and merely due to the fact that the containers were offloaded/discharged at Jebel Ali. As certified by Shipping Companies does not establish that the goods did not reach the consignee in Iran. Their clients pursued the matter with the foreign buyer and after prolonged period of time have ultimately received the irrefutable documentary evidences to show that the goods offloaded/discharged at Jabel Ali were further shipped to Iran through the Coastal Cargo System as revealed from the documents received from the Dubai Customs. They had made consistent efforts over attention of the Adjudicating Authority to the B/L No. GMAEMUNJEA009141, wherein the Port of Discharge and Delivery is shown as Bandar Abbas, Iran, but as per the Port Landing Certificate issued by shipping company namely M/s. Goodrich Maritime Pvt. Ltd. Port of Discharge/Country is shown as Jebel Ali, UAE. In this B/L, the notify party is shown as M/s. Sherkat E

Rahaavard E Sahraiem, Iran. On basis of the above document, it is alleged that the goods were delivered to the party at UAE and then solely on basis of above an assumption is drawn by the Notice that the exported goods did not reach the consignee at Iran. In view of the above, inquiries were conducted with the foreign buyer, who informed that the rice unloaded at Jabel Ali was further shipped to Iran by Coastal Vessels by the foreign buyers agent M/s Royal Tooba Foodstuff Trading Co. LLC, Dubai. Thereafter the said consignment was transshipped by M/s Royal Tooba Foodstuff Trading Co. LLC, Dubai to Iran in small boats. Foreign Buyers M/s. Sherkat E Rahaavard E Sahraiem, Iran, issued certificate to their clients that entire cargo of rice covered under the above Bill of Lading exported by M/s. Janki Dass Rice Mills was received by them in Iran and was transshipped via Dubai in partial shipments by small boats from Dubai to Iranian Port done by their counterpart M/s. Royal Tooba Foodstuff Trading LLC, Dubai. Similarly in all other consignments exported by other 6 Bills of lading exported by M/s. Janki Daas Rice Mills were transshipped via Dubai in partial shipments by small boats from Dubai to Iranian Ports and Copies of certificates issued Iran buyers about the receipt of Rice copies of "Sea Cargo Export Manifest" of Dubai Customs evidencing the rice being transshipped to Iran from Jabel Ali by M/s Royal Tooba Foodstuff Trading Co. LLC. Copies of these "Sea Cargo Export Manifest" of Dubai Customs serially numbered 1 to 105 are collectively marked and annexed herewith as Exhibit - "A". They further submitted that once foreign buyers have confirmed and certified the receipts of exported rice in Iran, then the entire allegations as leveled by the subject Notice are exclusively negated and the entire allegations and charges are liable to be dropped for this reason alone.

2.3.8.5 In the meantime inquiries were caused with Dubai Customs in UAE, in whose Jurisdiction the exported rice was unloaded and on payment of applicable fees, Dubai Customs provided copies of "Sea Cargo Export Manifest of Dubai Customs, under which M/s Royal Tooba Foodstuff Trading Co. LLC further transshipped the goods to Iran as confirmed by the foreign buyers above. These documents of Dubai Customs, conclusively established that the rice offloaded at Jabel Ali was in fact sent to Iran by smaller vessels and therefore the entire allegations and charges as leveled by Notice are erroneous, misconceived and cannot be sustained.

2.3.8.6 The quantity of rice in the above "Sea Cargo Export Manifest" of Dubai Customs is mentioned in the number of bags. in view of the above, a table showing the number of bags transshipped and the number of bags covered by the 7 Bills of Ladings under which the goods were exported, was prepared and annexed herewith as "Exhibit -B". **Quantity shipped through smaller coastal vessel is marginally lower due to reason of damaged bags and remaining quantity being shipped in other consignments. Their clients are trying to gather some more documents from port/customs/transporter at Dubai in support of their claim and request for some more time to submit the documents to the office of Adjudicating Authority and crave leave to request for hearing thereafter if required. Further, the above documents, which correlate to the extent of more than 95% and are issued & certified by Dubai Customs, clearly demonstrate that the exported goods**

ultimately reached Iran and therefore the charges and allegations as leveled by the impugned Notice cannot be sustained.

2.3.8.7 However for any reason, the Adjudicating Authority is having any reservation about the documents as submitted hereinabove, on behalf of their clients, they requested the Adjudicating Authority to kindly get these documents verified and satisfy himself about the claim of the their clients and in the meantime the adjudication proceedings may please be kept in abeyance and They may be given hearing after receipt verification report.

2.3.8.8 Further, they submitted that in the present case, it is a matter of record that Shipping Bills were filed by the Noticee Company showing the Iranian party as the Consignee and the Port of discharge was declared as Bandar Abbas (Iran). It is the case of the Notice that thereafter the changes were made in the Bill of Lading and the Port of discharge was changed, However the Notice fails to appreciate that such change has been made, as per the directions of the foreign buyer / consignee. It is pertinent to point out here that "Bill of Lading" is negotiable document and the person/party in whose favor the Bill of Lading stands or is endorsed is free to deal with the goods and can freely assign to any other party or person as the case may be. Addl. Commissioner of Customs may kindly appreciate that in terms of the Indian Bills of Lading Act, 1856, once the Bill of Lading is executed the property in goods are transferred to the consignee, in this case the Iranian party. It is their submission that once the property in goods is transferred to the consignee, the goods are at their complete disposal and is at liberty to deal with the goods in any manner as deemed fit by them. In this scenario any changes effected in the Bill of Lading after the Bills of Lading were issued by the shipping company, the exporter cannot be held liable. The consignee/purchaser chooses to take delivery of the goods at some other Port, after the property in goods is transferred/vested in them, then the exporter/shipper cannot be held liable in any manner whatsoever as proposed by the Notice. It is also to be appreciated that though the Notice records that the discharge Port was changed at the instance of CHA or the exporter but fails to take cognizance of the fact that it was at the behest of foreign buyer. In support of their above submissions, they reproduced the provisions of the Indian Bills Of Lading Act, 1856 and especially the Section 1 thereof which reads as under:

"1. *Rights under bills of lading to vest in consignee of endorsee.-*

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

In view of the above express provision of the law, it is their submission that the allegations and charges as leveled by the Notice are liable to be dropped on this ground alone.

2.3.8.9 It is relevant to note here that the rice exported under the Shipping Bills / Bills of Lading which are subject matter of the present Notice were packed in 10kg bags, bearing markings in Iranian language and the brands/trade names of the Iranian buyer, It is also relevant to point out here that as per the UAE laws, no goods such as rice can be sold into UAE, unless and until they are bearing the markings in Arabic language and also other relevant details, but for which the sale of goods is not permitted in UAE and therefore the allegation of the Notice that merely for the reason that 8 consignments were offloaded/discharged at Jabel Ali Port, the exported rice was destined for UAE and thus consumed in UAE is without any substance and at the most assumption and presumption, on basis of which no legal charges can be sustained.

2.3.8.10 It is also appreciated that the Iran rupee trade is akin to the Rupee Ruble trade with Russia in past, which was formulated to offset the balance of payment against supply of arms etc. by Russia. Similarly the Rupee Trade with Iran has been formulated to set off the balance of payment for oil being exported by Iran to India. It is their submission that in the Foreign Trade Policy there is no embargo of any kind as being proposed by the present Notice against us. There is no dispute in the case that the order was placed by the Iranian parties and the payments were received from them. In all 30 consignments of rice were exported by us to various parties in Iran and the allegations are in respect of only 8 consignments and thus it cannot be said that they had intentionally devised the acts as alleged by the Notice.

2.3.8.11 Changes in the Bill of Lading have been effected after the goods have sailed and the proceedings under the Customs Act, 1962 were over and therefore it is their submission that the provisions of Customs Act, 1962 have not been violated in any manner and more so it is their submission that each and every provision of the Customs Act evoked is not at all applicable in the facts of the present case. Section 113 of the Customs Act incorporates the irregularities for which the goods can be held liable for confiscation under the Customs Act and the present Notice invokes Section 113 (d) & (i) of the Customs Act as detailed in Para 31A of the Notice. For the sake of convenience the provisions of the said subsections are re-produced hereinafter:

> "(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 any other law for the time being in force.*"
>
> (i) *any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section* 77;"

Also, they submitted that provisions of sub section (d) above are not at all applicable in the case at hand as no prohibition has been imposed on export of rice, under Section 11 of the Customs Act or any other Rules/regulation/Notification. The Show Cause Notice also invokes the provisions of Section 11(1) of the Foreign Trade (Development and Regulation) Act 1992 and Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules 1993 read with provisions of Section 50 of the Customs act 1962. It

appears that these provisions have been invoked without appreciating the provisions being quoted. Section 11(1) of Foreign Trade (Development Regulation) lays down 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. Nowhere in the notice it has been alleged that the exports were made in violation of foreign trade policy and therefore the invocation of the above provisions are of no avail for sustaining the charges as proposed by the notice. Similarly the Rule 11 of the Foreign Trade (Regulation) Rules 1993 is regarding the value, quality and description of such as stated in export/import documents etc. in the case at hand there is no allegation that the details of goods, quantity or any other parameters was not declared/incorrectly declared or that the contents in the shipping bill were not correct. In absence of any such allegation the provisions as invoked are not at all applicable in the facts and circumstances of the present case. As far as the provisions of Rule 14 is concerned, they submitted that the said Rule deals with licenses issued under the policy and since no license was used and or obtained against the said exports the invoking of the said provision is totally erroneous and misconceived. Since the provisions of Section 113 (d) and (1) are not at all attracted, the provisions of Section 114 of the Customs act will not be applicable in the facts and circumstances of the present case. As far as invoking the Section 114 AA of the Custom act is concerned, they submitted that all the information and details as contained in the shipping bills were correctly declared by them to the best of their knowledge and belief it is only after exportation of the goods, at the behest of foreign buyer the request was made for changing the port of discharge and therefore it is their submission that the allegations as contained in the Notice are not at all sustainable in the facts and circumstances of the case.

2.3.8.12 Much emphasis is made and reliance is placed by the Show Cause Notice on a RBI circular No. RBI/2013-14/364 A. P. (DIR Series) Circular No.70 dated November 8, 2013 addressed to All Category-I, Authorised Dealer Banks regarding third-party receipt of payments in case of import/exports transactions. It is their submission that the said circular is of no relevance in the facts and circumstances of the present case. Firstly the said circular is addressed to the AD Banks and guiding them regarding the appropriation of payments being received or made against exports/imports from 3rd parties, which is not the case at hand. It is not the allegation of the notice that the payment in the case has been received from 3rd parties and therefore it is their submission that the said circular of RBI is of no relevance in the instant case. Secondly the circular starts "normally" and therefore it does not lay down any law/Rule but is only of guiding nature and therefore no adverse inference can be drawn by interpreting the same guideline and applying to the case at hand. Thirdly the exports to Iran are treated by the Foreign Trade Policy at par with other exports being made in convertible foreign currency and is not treated like Rupee exports to Nepal, where no export benefits like MEIS or any other incentive is available. The rupee trade with Iran is traded at par with other exports being made in convertible foreign currency and therefore that is a special category of exports for

which the normal regulations being laid down for regular exports will not be applicable.

2.3.8.13 Further, M/s Ajay Singh & Associates on behalf of M/s Janki Dass Rice Mills and Shri Devinder Kumar (Export Manager of M/s Janki Dass Rice Mills) vide letter-dated 31.12.2019 have submitted their further additional submission, wherein they referred their earlier letter-dated 24.12.2019 and stated that examination/ cross examination of the witnesses is must in the facts and circumstances of the present case and also keeping in view the provisions of Section 138B of the Customs Act and also directions contained in the Master Circular No. 1053/2/2017-CX., dated 10-3-2017 issued from F. No. 96/1/2017-CX.I on Show Cause Notice, Adjudication proceedings etc. and specifically to Para 14.9 thereof, wherein it has been specifically stated that where a statement is relied upon in the adjudication proceedings, it would be required to be established through the process of cross-examination, if the noticee makes a request for cross-examination of the person whose statement is relied upon in the SCN, They are giving following submissions for kind and sympathetic consideration of the Hon'ble Adjudicating Authority.

Further, in addition to the submissions made during the Course of personal hearing and the submissions vide their letter dated 18.12.2019, they drew attention of the adjudicating authority to the submissions made at para 5 & 6 of the said letter that goods (Rice), which are subject matter of the case were ultimately shipped to Iran and thus the allegations as levelled by the notice are devoid of any merit and therefore the entire charges and proposals of penalties are liable to be dropped. It was submitted that merely on the basis of ascertainment that the containers were offloaded/discharged at Jabel Ali Port, without causing any further verification, the investigating agency chose to issue notices in the case at hand. It appears that they purposefully stopped any further investigation and refrained from ascertaining as to what happened to the exported goods thereafter. In view of the above, their client made sincere endeavor and applied to the Customs department at Jabel Ali /UAE and got the documents from the Dubai Customs, which were submitted earlier and a chart tabulating and co-relating the export goods, was also submitted. Their client thereafter obtained documents, which show as to how the goods from Jabel Ali Port were transported to Creek/launch Customs, from where the goods were taken in small boats to Iran. These transport documents, show the bill of lading No. and also the container No. and therefore of immense importance as they co-relate to the exported goods directly. A table showing invoice No., Bill of lading No., Shipping bill No., Transport invoice No. and Payment voucher No. for all the 7 consignments is annexed and the further documents received from Dubai or enclosed from page 1 to 12. These documents also show that M/s Royal Tooba foodstuff trading Co LLC, whose name was already coming in the earlier document submitted, is the entity who was concerned with receiving, transporting the goods for further shipment to Iran. It is their submission that these documents along with the earlier documents submitted at the time of personal hearing, conclusively demonstrate that the goods which are subject matter of the present notice (Rice) was not diverted to UAE as alleged by the

notice, but taken to Iran from Jabel Ali in the smaller boats, through Creek Customs of Dubai and therefore the entire allegation as levelled by the impugned notice are bereft of any merit and therefore liable to be dropped in toto."

2.4 M/s Gupta Law Associates, on behalf of V. Arjoon, vide their letter dated 13.09.2019 , requested to grant an extension of a period of two months for filing their reply to the Show Cause Notice. Further, M/s V. Arjoon vide their letter dated 20-12-2019 have submitted their defense submission, wherein they *interalia* submitted the following:

2.4.1 This has reference to the aforesaid show cause notice issued to M/s Janki Dass Rice Mills and various other parties including them wherein they were called upon to show cause to you as to why penalty under Section 114 and 114AA of the Customs Act, 1962 read with various provisions of the Foreign Trade (Development & Regulation) Act, 1992 and the rules/regulation made thereunder, should not be imposed on us. They have noted that the aforesaid proposal has been predominantly raised on the alleged basis that They, as customs house agent, failed to discharge their obligation under law in correctly advising their client, M/s Janki Dass Rice Mills to report change of destination from Iran to Dubai, and also failed to bring to the notice of the department such change.

2.4.2 They submitted that the proposal raised in the show cause notice is without any merit in law as well as in the facts of the case and the same is therefore, required to be withdrawn. Further, they stated that there has been no violation/ contravention of any of the provisions of the Act to invite penalty on their. The allegations made by the department in the above referred show cause notice, even if accepted on its face value, does not go to show any contravention on their part and therefore, the proposal to impose penalty on them is clearly misplaced and unwarranted. Even assuming, that there had been dereliction of duty on their part as a Customs House Agent, no penal action would be invited under the Customs Act for such alleged carelessness and negligence. The requirements to attract section 113(i) as also 114 and 114A are also not fulfilled in the facts of the present case. They denied all the allegations levelled against them in this show cause notice, and they also submitted that the proposal levelled against them in the show cause notice deserve to be vacated because, as aforesaid, they are unsustainable in facts as well as in law.

2.4.3 In normal course of business, they were approached and engaged as Customs Broker by one, M/s Janki Dass Rice Mills (hereinafter referred to as the exporter) for export of various consignments of 'rice' to Iran. The exporter had issued an authorization letter in their favour for handling the export related work, and all documents required for customs purpose like commercial invoices, purchase order, export packing list, letter of credit etc. were submitted by them as a CHA of the exporter with various Shipping Bills filed during the period 2015-2016. The proper Customs Officers in charge of the concerned port duly verified and scrutinized all these documents and on the basis of the said documents concerned goods were permitted to be cleared and exported. They were exclusively engaged for handling merely the customs related work at the port of export and therefore, matters relating

to payment for the goods by the foreign parties to the exporter etc. are not matters for which they were concerned or aware about.

2.4.4 On the basis of some information received by the officers of the Directorate of Revenue Intelligence, investigations came to be initiated against various exporters of Rice. As a consequence of the said investigation, it was believed by the officers that out of all the consignments of rice exported to Iran, some of the consignments were instead of being cleared at the port in Iran, Were diverted to Dubai. It was consequently, alleged that payment for the said goods ought to have been received by the exporter in freely convertible currency instead of Indian currency. During the Course of investigation, statements of various persons including the statement of their partner and employee came to be recorded. On the basis of such investigation, it was alleged that the exporter had knowingly, declared the port of discharge as Iran even though the goods Were consigned to Dubai thereby violating the condition of receiving the payment of the goods in freely convertible currency. It was further alleged that they were aware of the said infraction on part of the exporter and despite such knowledge; they failed to bring the said violation to the knowledge of the department. It is on such basis that the present show cause notice has been issued to us.

2.4.5 They submitted that the imposition of penalty on them under Section 114 and 114AA of the said Act is devoid of any merit as no penalty under the Customs Act is attracted for failure to comply with obligations imposed on the Customs broker. A mere reference to allegation in the show cause notice shows that the department has alleged that they failed to advise their client to comply with the provisions of the Act and have further failed to bring to the notice of the customs authorities such non-compliance. In this regard, the investigating officer has duly referred to the Customs Brokers Licensing Regulations, 2013. They also submitted that violation, if any, of such regulations attract an action under the said regulations and no penalty can be imposed under the Customs Act for such dereliction. Reference in this regard, may be made to recent judgment of the **Hon'ble Madras High Court in the case of Commissioner of Customs vs. I. Sahaya Edin Prabhu reported in 2015 (320) ELT 264** , wherein the Hon'ble High Court has held that penal action under the provisions of the Customs Act cannot be pressed into service for any failure on part of the Customs Broker in discharge of its function. In the present case, the show cause notice has alleged against them holding that they did not advise their client to comply with the provisions and also did not bring the said non-compliance to the notice of the Department and hence, they had failed to discharge the duties imposed on them under the aforesaid regulations. This being the fact and situation and in light of the judgment of the Hon'ble High Court of Madras, penal provisions under the Customs Act could not have been invoked against them.

2.4.6 They further submitted that the penal action under Section 114 and 114A is even otherwise not maintainable in law as the same can only be pressed into service against a natural person and not a legal entity. A perusal of Section 114 of the act shows that penal action is warranted against 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. Similarly, Section 114AA also mandates imposition of penalty on any person who 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. Further, scheme of both the sections clearly show that the same is applicable to natural persons and not to legal entities like the noticee. They further submit that the said sections mandate either knowledge or an action or omission on part of the person and hence, the same can be attributed only to a natural person and not a legal entity. In this view of the matter also, the proposal to impose penalty on us is clearly unwarranted and legally untenable.

2.4.7 The proposal to impose penalty under Section 114 and 114AA is also clearly without any application of mind or authority in law. Section 114 of the Act 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 in terms of the said section. In the present case, the department has alleged that They have rendered the goods liable for confiscation under Section 113 (i) and therefore, to sustain the penalty against us under the said section, it would be pertinent to see if any action or omission on their part have rendered the goods liable for confiscation under Section 113 (i) of the Act. Sub-section (i) of Section 113 provides for confiscation of goods if the goods entered for exportation, does not correspond in respect of value or in any material particular with the entry made under this Act. They state that it has never been the case of the department that the goods in question i.e., rice, did not correspond in respect of any material particular concerning the said goods. The said sub-section is attracted in a case where the goods do not tally with the description, quantity, quality, classification and/or the valuation of the goods. In the present case, even if the allegation of the department is accepted on its face value, the contravention, if any, was in incorrect declaration of the port of discharge and not with regard to any material particulars concerning the goods in question. They, therefore, submit that Section 113 (i) was not at all attracted in the facts of the case so as to justify imposition of penalty under Section 114 of the Act.

2.4.8 As regards to provisions of Section 114AA, it is their contention that the said section is attracted only if the 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 under the Act. They submit that the said section is attracted only in a case where the person knowingly enters wrong information in any document submitted with the Customs authority. In the present case, it has come on record by way of series of statements of the exporter that the information of change in port of discharge was brought to their knowledge and notice only subsequent to filing of the export documents. It is, hence, an undeniable fact that they were not guilty of presenting any information which they knew was false or incorrect. This fact is further corroborated

in view of the specific averment in the show cause notice that the exporter had contravened the provisions of the Act by not applying for amendment of the shipping bills in question. They submitted that question of amendment of shipping bill arises only if the change in information or declaration is subsequent to the filing of the shipping documents. If that be the case, it can never be justifiably concluded against us that the information submitted by them was false or incorrect and that they were aware of such information being false or incorrect. In this view of the matter, it is clear and evident that proposal for imposing penalties on us under Section 114 and 114AA is without any authority of law.

2.4.9 They further submitted that the factum of change of destination was a subsequent development and was not within their knowledge at the time at which the documents were submitted. The said fact has been confirmed by the exporter themselves in series of statements recorded by the department. Moreover, the department has also alleged that the exporter had contravened the provisions by not amending the shipping bill. Question of amending a shipping bill would only arise if there is a change in circumstances subsequent to the date of filing the shipping bill. Keeping the said facts in mind, their responsibility and obligation as a Customs Broker ceased as on the date on which the export documents were filed and hence, any subsequent development warranting any amendment of documents could not be taken as the basis for alleging any violation on their part. Reference in this regard, may be made to decision of the Appellate Tribunal rendered in the case of **K.L. Alagu Murugappan vs Commissioner Of Customs reported in 2004 (163) ELT 352,** wherein in similar facts and circumstances, the penalty imposed on the CHA has been quashed and set aside.

2.4.10 They further stated that the grievance of the department in the present case in respect of the impugned transaction is that the remittance in respect of the impugned exports were received in INR and not in convertible foreign currency. They as Customs House Agent have no role whatsoever in the determination of the currency in which the remittance was received. Being merely a Customs Broker, they were simply concerned with preparing and filing export documents on the basis of the details shared by the exporter. As a bonafide Customs Broker, they cross verified the documents with the export documents submitted to them and on finding them to be in order and having no reason to suspect the genuineness of the same, They filed the same with the customs authorities as directed. Accordingly, it becomes amply clear that they had no role in the alleged violations and therefore the proposal in the show cause notice for imposing penalty on them deserves to be withdrawn in the interest of justice and fairness.

2.4.11 It may also be noted and appreciated that the allegation raised in the show cause notice is based on misconstruction and misinterpretation of some of the statements. The statements recorded during the course of investigation had apparent and irreconcilable contradiction and therefore, blind reliance on such statements which went against them while brushing aside other statements which were in their

favour was clearly unfair and unwarranted. They submitted that in series of initial statements, the exporter had confirmed the fact that the information regarding the change of port of discharge was not brought to their notice before the goods were exported. However, surprisingly, despite the said specific stand, the statements recorded at the fag end of the investigation took a complete U-turn suggesting that They were aware of the said information even prior to the export of goods. Similarly, reliance on statements of their employee was also misplaced. **Their Employee, Shri Bhawnani, in one statement confirmed that he was aware of the said aspect prior to the export of goods. However, in a subsequent statement he admitted that he could have filed for an amendment under Section 149 of the Act. They submitted that the said assertion by the employee clearly shows that the information of change in port of destination came to his knowledge subsequent to filing the documents** as otherwise there was no question of filing any application for amendment under Section 149 of the Act. They submitted that there is otherwise no material evidence on record which shows that they were aware of the fact of different port of discharge prior to filing the documents. Even the statement of the partner of their firm confirms that the said information was given to them only after the goods were already exported. In such circumstances, contradicting statements of the exporter ought not to have been the basis to conclude that they were aware of the fact of change in port of discharge prior to the date of filing the export documents.

2.5 M/s Venus Clearing Agency vide written submission-dated 07.01.2020 submitted the following:

2.5.1 The show cause notice issued to M/s Janki Dass Rice Mills and various other parties wherein they are also called upon us to show cause as to why penalty under Section 114 and 114AA of the Customs Act, 1962 read with various provisions of the Foreign Trade (Development & Regulation) Act, 1992 and the rules/regulation made thereunder, should not be imposed on. They have noted that the aforesaid proposal has been predominantly raised on the alleged basis that they have acted as customs broker on behalf of M/s Janki Dass Rice Mills and failed to discharge their obligation under law in correctly advising their client to report change of destination from Iran to Dubai and also failed to bring to the notice of the department such change.

2.5.2 They submitted that the proposal raised in the show cause notice is without any merit in law as well as in the facts of the case and the same is therefore, required to be withdrawn. They also submitted that there has been no violation/contravention of any of the provisions of the Act to invite penalty on them. The allegations made by the department in the above referred show cause notice, even if accepted on its face value, does not go to show any contravention on their part and therefore , the proposal to impose penalty on us is clearly misplaced and unwarranted. They say and submit that They are not Customs Broker as suggested in the show cause notice and hence, the proposal in the show cause notice on the premise that They have acted as Customs Broker and failed to discharge burden imposed on a Customs Broker under law is completely misplaced and without any merit. The

requirements to attract section 113(i) as also 114 and 114A are also not fulfilled in the facts of the present case. They therefore, emphatically deny all the allegations levelled against them in this show cause notice, and They also submitted that the proposal levelled against them in the show cause notice deserve to be vacated because, as aforesaid, they are unsustainable in facts as well as in law.

2.5.3 Before proceeding to the contentions against the proposal raised in the show cause notice, pertinent facts may be noted and appreciated. They are a partnership firm, inter alia, engaged in the business of rendering support services and freight forwarding service to various importers/ exporters. In normal Course of business, their partner, Shri Ganatara was approached by one, M/s Janki Dass Rice Mills (hereinafter referred to as the exporter) for assisting in export of various consignments of 'rice' to Iran. He was informed that the Customs Broker for the said consignments would be LARA Exim. The exporter had issued an authorization letter in the favour of the said Customs Broker for handling the export related work. It appears that the proper Customs Officers in charge of the concerned port duly verified and scrutinized all these documents and on the basis of the said documents concerned goods were permitted to be cleared and exported. As stated hereinabove, They Were exclusively engaged for acting as a link between the exporter and the CHA and for providing freight forwarding services and therefore, matters relating to payment for the goods by the foreign parties to the exporter etc. were matters with which they were neither concerned nor aware about.

2.5.4 On the basis of some information received by the officers of the Directorate of Revenue Intelligence, investigations came to be initiated against various exporters of Rice. As a consequence of the said investigation, it was believed by the officers that out of all the consignments of rice exported to Iran, some of the consignments were instead of being cleared at the port in Iran, were diverted to Dubai. It was consequently, alleged that payment for the said goods ought to have been received by the exporter in freely convertible currency instead of Indian currency. During the Course of investigation, statements of various persons including the statement of their partner came to be recorded. On the basis of such investigation, it was alleged that the exporter had knowingly, declared the port of discharge as Iran even though the goods Were consigned to Dubai thereby violating the condition of receiving the payment of the goods in freely convertible currency. To their utter shock and surprise, show cause notice was also issued to us on the wrongful premise that they had acted as the Customs Broker in the said transaction and being aware of the said infraction on part of the exporter, they failed to bring the said violation to the knowledge of the department.

2.5.5 Now coming to their contentions against the proposal raised in the show cause notice. They at the outset submit that they are not Customs Brokers and therefore, the entire premise of the department to initiate proceeding against us is without any merit whatsoever. They submitted that they do not hold Customs Broker license and therefore, the allegation of the department that They have failed to discharge the duty imposed on a Customs Broker is without any basis. A mere

reference to allegation in the show cause notice shows that the department has alleged that They have failed to advise their client to comply with the provisions of the Act and have further failed to bring to the notice of the customs authorities such non-compliance. In this regard, the investigating officer has duly referred to the Customs Brokers Licensing Regulations, 2013. They submitted that there could be no dispute to the fact that they are not registered as Customs Broker and accordingly, the entire notice has been evidently issued on a wrong factual premise warranting its withdrawal.

2.5.6 As regards penal action under Section 114 and 114A of the Customs Act, 1962 against M/s Venus Clearing Agency, they filed their reply as similar to M/s V. Arjoon as referred above; hence, the same is not repeated again.

3. CROSS EXAMINATION :

3.1 M/s Ajay Singh & Associates, on behalf of M/s Janki Dass Rice Mills and Shri Devinder Kumar, export manager of M/s Janki Dass Rice Mills **(Noticee No. 1 & 2 respectively)** vide their letter dated 19.08.2019 requested for cross examination of Shri Sanjjoy Salve (Vice President, West Region of M/s Goodrich Maritime Pvt. Ltd., Shri Tushar H. Anam of M/s V. Arjoon (CHA) , Shri Gordhan Bhavnani, Manager of M/s V. Arjoon and Shri Mahendra T. Ganatra, Proprietor of M/s Venus Clearing Agency.

The cross examination as requested by the advocate of Noticee No. 1 & 2 was granted on 17/18/19-09-2019 and the same has been intimated to them vide letter F. No. VIII/48-28/ADJ/ ADC/MCH/2018-19 dated 30.08.2019. In response, M/s Ajay Singh & Associates vide their letter dated 02.09.2019 requested for next date for cross examination with at least 3 weeks advance notice.

Subsequently, another date for cross examination was fixed on 16.10.2019 and the same has been intimated to them vide letter F. No. VIII/48-28/ADJ/ADC/MCH/2018-19 dated 12.09.2019. Further, M/s Ajay Singh & Associates on behalf of M/s Janki Dass Rice Mills and Shri Devinder Kumar (Noticee No.1 & 2) vide their letter dated 17.09.2019 requested to postpone the date for cross examination after 20.10.2019.

Again, date for cross examination was fixed on 06.11.2019 and was intimated to them vide letter F. No. VIII/48-28/ADJ/ADC/MCH/2018-19 dated 09.10.2019. Again, M/s Ajay Singh & Associates on behalf of M/s Janki Dass Rice Mills and Shri Devinder Kumar (Noticee No. 1 & 2) vide their letter dated 01.11.2019 requested to adjournment for the date for cross examination.

The adjudicating authority has not accepted request for further adjournment made by M/s Ajay Singh & Associates and the same was intimated to them vide letter F. No. VIII/48-28/ADJ/ADC/MCH/2018-19 dated 05.11.2019 by post as well as by e-mail.

Shri Sunjjoy Salve of M/s Goodrich Maritime Private Limited and Shri Mahendra Tokarshi Ganatra of M/s Venus Clearing presented themselves before the adjudicating authority on 06.11.2019 for cross examination but no authorized

person/advocate on behalf of Noticee No. 1 & 2 remained present for examining/cross examining the witnesses.

Again, M/s Ajay Singh & Associates on behalf of M/s Janki Dass Rice Mills and Shri Devinder Kumar (Noticee No.1 & 2) vide their letter dated 06.11.2019 requested for further adjournment of the date for cross examination. M/s Ajay Singh & Associates vide letter dated 08.11.2019 was called upon certain case details on their letter.

Further, M/s Ajay Singh & Associates vide their letter dated 10.12.2019 again requested for cross examination before personal hearing. The request was not accepted by the Adjudicating Authority on the grounds that ample opportunities for cross examination in this case have been granted and Shri Sunjjoy Salve and Shri Mahendra T. Ganatra had appeared for cross examination on 06.11.2019 but no authorized person on behalf of Noticees No. 1 & 2 appeared to examine/cross examine the witnesses on the scheduled date and time. The same has also been communicated to the advocate of Noticee No. 1 & 2 vide letter -dated 01.01.2020.

4. PERSONAL HEARING:

4.1 Personal hearing in this case was fixed on 12.12.2019 at 11.30 Hrs. and was communicated to the Noticees vide letter F.No. VIII/48-28/ADJ/ADC/MCH/2018-19 dated 20.11.2019 by post as well as by email. The date of Personal hearing was postponed to 19.12.2019 and was communicated to the Noticees vide letter F. No. VIII/48-28/ADJ/ADC/MCH/ 2018-19 dated 04.12.2019 by post as well as by email.

4.2 Shri Paritosh Gupta, Advocate on behalf of M/s V. Arjoon and M/s Venus Clearing Agency appeared for personal hearing on 19-12-2019 and submitted that the evidence on record in the SCN shows clearly that the knowledge that the goods are to be destined to Dubai instead of Iran came to the CHA only subsequent to filing of the S/Bills. Hence, there was no contravention of the Custom laws by the CHA in this case. Further, there has been no infraction of Customs laws at all but is dereliction of duty under Customs Brokers Licensing Regulations, 2013 for which no action can be taken u/s 114 of the Customs Act, 1962 and for this reliance is placed on the judgment of Hon'ble High Court of Madras in the matter of Commissioner of Custom (Export), Chennai V/s I. Sahaya Edin Prabhu (Copy submitted). He also stated that Section 113(i) of the Customs Act, 1962 *ibid* is otherwise also, not attracted under the fact of the case in hand. Further, the Advocate requested for 10(Ten) days' time to submit their written defence reply to the SCN, which will cover all the above-said points.

4.3 Shri Tarun Govil and Shri Ajay Singh, both Advocates and authrorised representatives of the Noticee company (M/s Janki Dasss Rice Mills) and Shri Devinder Kumar, Export Manager of M/s Janki Dasss Rice Mills appeared for personal hearing on 19.12.2019 and submitted additional written reply-dated 19.12.2019. They reiterated their written submission and requested for cross-examination of the CHA to further clarify the matter. Further, they stated that formal request letter for cross-examination of CHA will be submitted by them. In addition, they will submit further

evidences in support of their defense, if they will be able to gather the same, for which they requested for 15 (Fifteen) days' time.

5. DISCUSSION & FINDINGS:

5.1 I have carefully gone through the Show Cause Notice dated 14.02.2019, defence replies filed by the notices and oral submissions made during the course of personal hearings.

5.2 The issues to be decided by me in the instant case comes down to the following:

A. Cross examination of witnesses as requested by the Noticee No. 1 and 2.

B. Liability to confiscation of export goods under Section 113(d) & (i) of the Customs Act,1962.

C. Liability of the exporter to penalty under Section 114 & 114AA of the Customs Act, 1962.

D. Liability of Shri Devinder Kumar , Export Manager of the exporter, and Customs Brokers M/s V.Arjoon and M/s Venus Clearing Agency to penalty under Section 114 & 114AA of the Customs Act, 1962.

5.3. Before deciding the issues, it is proper to quote the relevant legal provisions, which are as below:

(i) Section 2(33) of the Act defines "prohibited goods" 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."

(ii) Section 50: Entry of goods for exportation.—

(1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

(iii) Section 51: Clearance of goods for exportation.—*Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation.*

(iv) Section 113 in the Customs Act, 1962

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;

(i) [any goods entered for exportation 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;"

(v) 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 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;

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

[(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.]

(vi) **SECTION 114AA. 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.*

(vii) Shipping Bill (Electronic Declaration) Regulations, 2011

"As per Regulation 2(a)"authorised person" means an exporter or a person holding a valid license under the Custom House Agents Licensing Regulations, 2004 and authorised by such exporter;

Further as per Regulation - 3. the authorised person may enter the electronic declaration in the Indian Customs Electronic Data Interchange System by himself through ICEGATE or by way of data entry through the service centre by furnishing the particulars, in the format set out in Annexure..

At serial No 11 & 12 of the Annexure, Port of destination and country of final destination are required to be mentioned.

Further a declaration is signed for filing the checklist wherein the following undertakings are also made:

I/We declare that the particulars given herein above are true, correct and complete.

I/We undertake to abide by the provisions of Foreign Exchange Management Act, 1999, as amended from time to time, including realisation or repatriation of foreign exchange to or from India."

(viii). (a) **Foreign Trade Policy 2009– 2014**

Payments and Receipts on Imports / Exports

Para 2.40 Denomination of Export Contracts

"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.

(b) Foreign Trade Policy 2015 – 2020

Payments and Receipts on Imports / Exports

Para 2.52 : Denomination of Export Contracts

"**(a)** *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.*

(b) *However, export proceeds against specific exports may also be realized in rupees, provided it is through a freely convertible Vostro account of a non resident bank situated in any country other than a member country of Asian Clearing Union (ACU) or Nepal or Bhutan. Additionally, rupee payment through Vostro account must be against payment in free foreign currency by buyer in his non-resident bank account. Free foreign exchange remitted by buyer to his non-resident bank (after deducting bank service charges) on account of this transaction would be taken as export realization under export promotion schemes of FTP.*

(c) *Contracts (for which payments are received through Asian Clearing Union (ACU) shall be denominated in ACU Dollar. Central Government may relax provisions of this paragraph in appropriate cases. Export contracts and invoices can be denominated in Indian rupees against EXIM Bank/Government of India line of credit."*

(ix) 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.

(ix) Foreign Trade (Development & Regulation) Act, 1992

Section 11: *Contravention of provisions of this Act, rules, orders and export and import policy.*

(1) *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.*

(2) *Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty not exceeding one thousand rupees or five times the value of the goods in respect of which any contravention is made or attempted to be made, whichever is more.*

(3) *Where any person, on a notice to him by the Adjudicating Authority, admits any contravention, the Adjudicating Authority may, in such class or classes of cases and in such manner as may be prescribed, determine, by way of settlement, an amount to be paid by that person.*

(4) *A penalty imposed under this Act may, if it is not paid, be recovered as an arrear of land revenue and the Importer-exporter Code Number of the person concerned, may, on failure to pay the penalty by him, be suspended by the Adjudicating Authority till the penalty is paid.*

(5) *Where any contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy has been, is being, or is attempted to be, made, the goods together with any package, covering or receptacle and any conveyances shall, subject to such requirements and conditions as may be prescribed, be liable to confiscation by the Adjudicating Authority.*

(6) *The goods or the conveyance confiscated under sub-Section (5) may be released by the Adjudicating Authority, in such manner and subject to such conditions as may be prescribed, on payment by the person concerned of the redemption charges equivalent to the market value of the goods or conveyance, as the case may be.*

(x) Foreign Trade (Regulation) Rules, 1993

1. **Rule 11**: *"On the importation into, or exportation out of, any Customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act, 1962 (52 of 1962) state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of each Bill of entry or Shipping Bill or any other documents."*

2. **Rule 14(2):** "No persons shall employ any corrupt or fraudulent practice for the purposes of obtaining any license or importing or exporting any goods."

(xi) Section 8 of the Foreign Exchange Management Act, 1999

"Realisation and repatriation of foreign exchange.—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."

(xii). RELEVANT RBI PROVISIONS

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 in connection with various provisions of FEMA Notification No. 14 dated May 3, 2000. 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. With a view to further liberalising the procedure relating to payments for exports/imports and taking into account evolving international trade practices, it has been decided as under:

(xiii) EXPORT TRANSACTIONS

"AD banks may allow payments for export of goods / software to be received from a third party (a party other than the buyer) subject to conditions as under:

g. *Firm irrevocable order backed by a tripartite agreement should be in place;*
h. *Third party payment should come from a Financial Action Task Force (FATF) compliant country and through the banking channel only;*
i. *The exporter should declare the third party remittance in the Export Declaration Form;*
j. *It would be responsibility of the Exporter to realize and repatriate the export proceeds from such third party named in the EDF;*
k. *Reporting of outstandings, if any, in the XOS would continue to be shown against the name of the exporter. However, instead of the name of the overseas buyer from where the proceeds have to be realised, the name of the declared third party should appear in the XOS; and*
l. *In case of shipments being made to a country in Group II of Restricted Cover Countries, (e.g. Sudan, Somalia, etc.), payments for the same may be received from an Open Cover Country."*

Based upon the legal provisions and factual position as discussed in the various statements above, it is clear that: -

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.

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.

(xiv) Section 113(d) & 113 (i) of the Customs Act, 1962 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.

.....

.....

(i) [any goods entered for exportation 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;"

(xv) 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.

(xvi) 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.

(xvii) Section 2(33) of the Act defines "Prohibited goods" as under :

"(33) "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;"

(xviii) 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,

(xix) Power to prohibit importation or exportation of goods by Central Government is also 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;

(xx) 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 are 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).

(xxi) Further in the case Om Prakash Bhatia Versus Commissioner of Customs, Delhi {2003(155)423 ELT} Hon'ble Supreme Court in a landmark judgment has inter alia settled the dispute on the following points:

- 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;

(xxii) 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."

(xxiii) 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.

(xxiv) It appears 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. In that case as it was argued by the appellants that penalties under Sec. 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."

A. Cross examination of witnesses as requested by the Noticee No. 1 and 2 .

5.4 The Advocate of the Noticee nos. 1 & 2, vide their letter dated 29.08.2019, requested for examination and cross examination of all the witnesses viz. Shri Sunjjoy Salve, Vice President (West Region) of M/s. Goodrich Maritime Pvt. Ltd., Shri Tushar H. Anam of M/s V. Arjoon (CHA) , Shri Gordhan Bhawnani Manager of M/s V. Arjoon (CHA) and Shri Mahendra T. Ganatra, proprieter of M/s Venus Clearing Agency in compliance with the provisions of Section 138 B of the Customs Act, 1962. As requested, the cross examination was allowed and the same was fixed for 17-09, 18-09 & 19-09-2019 at 04.00 pm and the same was intimated to all of them vide letter F. No. VIII/48-28/ADJ/ADC/MCH/2018-19 dated 30.08.2019. In response, M/s Ajay Singh & Associates, Advocate of Noticee No. 1 & 2, vide their letter dated 02.09.2019 requested for further date for cross examination and also for cross examination of all the four witnesses on the same date with at least 3 weeks advance notice. Accordingly, cross examination of all the four persons was fixed for 16.10.2019 at 10.30 am and the same was intimated to them vide letter of even no. dated 12.09.2019. Further, the Advocate of noticee no. 1 & 2, vide their letter dated 17.09.2019 requested to fix cross examination on any date after 20.10.2019. Date for cross examination was fixed on 06.11.2019 at 03.30 pm and the same was intimated to them vide letter of even no. dated 09.10.2019. Again the Advocate of Noticee No. 1 & 2 vide their letter dated 01.11.2019 (which was received in the office on 05.11.2019) requested for keeping the present proceeding in abeyance till the outcome of one appeal before Hon'ble CESTAT, WZB, Ahmedabad in matter of M/s Shivshakti Rice Mills and therefore adjourn the hearing and cross examination on 06.11.2019, which was not accepted and they were asked to appear for the cross examination as scheduled vide letter of even no. dated 05.11.2019 by post as well as by e-mail.

Shri Sunjjoy Salve of M/s Goodrich Maritime Private Limited and Shri Mahendra Ganatra of M/s Venus Clearing appeared on 06.11.2019 for cross examination but the notices No.1 & 2 did not come for cross examination.

Thereafter PH was granted to the Noticees on 12.12.2019 at 11.30 am vide letter dated 20.11.2019 which was subsequently adjourned to 19.12.2019 at 11.30 am vide letter dated 04.12.2019. The advocate of the Noticee no. 1 & 2 vide letter dated 10.12.2019 again requested for cross examination before filing their detailed written submissions. They were informed vide letter dated 18.12.2019 that their request was not accepted on the grounds that ample opportunities for cross examination in this case have been granted and Shri Sunjjoy Salve and Shri Mahendra T. Ganatra had appeared for cross examination on 06.11.2019 but they have not appeared to cross examine the witnesses on the scheduled date and time. They were further asked to appear for PH on 19.12.2019 at 11.30.am and the same was intimated to them by email on 18.12.2019.

5.4.1 Mr. Tarun Govil and Mr. Ajay Singh Advocates on behalf of Noticee No. 1 & 2 appeared on 19.12.2019 at 11.30 am and submitted their additional written reply dated 19.12.2019 and explained the same. They requested for cross examination of the CHA to further clarify the matter and also requested to submit further evidence in support of their defence if they are able to gather the same. Vide their above said written reply dated 19.12.2019, they have pointed out that it is binding on the adjudicating authority to communicate to them whether cross examination as requested is being granted or denied in the light of judgment in case of Bharti Bhutada Vs. Commissioner of Customs 2011(226)ELT 97(Tri.Mum) and accordingly they were informed vide letter dated 01.01.2020 that their request for cross examination was not accepted on following grounds :

(1) They had not availed the opportunity of cross-examination on three occasions i.e. 17/18/19-09-2019 , 16.10.2019 & 06.11.2019 .
(2) More than 10 days period from the date of PH was already over when their further written request for cross-examination was received.
(3) They had not indicated any reason for cross-examination in their aforementioned written request.

They have further drawn attention to master circular No. 1503/2/2017-CX dated 10.03.2017 issued from F.No. 96/1/2017-CX on Adjudication proceedings etc. and specifically to Para 14.89 thereof, whereby it has been specifically directed that where a statement is relied upon in the adjudication proceedings , it would be required to be established through the process of cross-examination, if the noticee makes a request for cross-examination of the person whose statement is relied upon in the SCN.

In the same para of the said circular, it is also provided that in cases where cross examination is not feasible, corroborative evidence can support the case of the department .

Vide letter dated 24.12.2019, their advocate requested for cross examination of witnesses (not only CHA as requested during personal hearing).

5.4.2 From the above discussion, it is clear that ample opportunities for cross examination of the witnesses sought was accorded to the Noticee no. 1 & 2 and the witnesses also appeared for cross examination but the noticees did not appear to cross examine them on the scheduled date and time . Therefore principles of natural justice are complied with in toto. Further, they were communicated the reasons for not allowing their request further vide letter dated 01.01.2020 as above. In this regard, it is worth to mention here that statements of the four witnesses (whose cross examination has been sought) are supported by a number of independent and corroborative evidences, viz. landing certificates, invoices & other shipping documents. Also these statements are not contradictory and therefore no new fact is likely to come out from their cross examination. Moreover, statement of Sh. Devinder Kumar, Export Manager of the Noticee company corroborates the statements of the above said witnesses. Further, the persons sought to be cross examined are also co-noticees except Sh. Sunjjoy Salve of M/s Goodrich Maritime Pvt Ltd and therefore they cannot

be permitted for cross examination. As discussed herein before, noticee No. 1 & 2 sought adjournment of cross examination on many occasions citing various reasons. Under the circumstances, I find that presence of all the witnesses as well as notices No. 1 & 2 cannot be achieved without an amount of unreasonable delay to decide the matter and also in view of the reasons cited above , I find it appropriate to take up the matter for adjudication without cross examination of witnesses as provided under Section 138B(1) of the Customs Act, 1962.

B. Liability to confiscation of export goods under Section 113(d) & (i) of the Customs Act,1962.

5.5.1 In the show cause notice, it is alleged that M/s Janki Dass Rice Mills (the Noticee) have shown in the export documents that the export goods are consigned to Bandar Abbas, Iran but in fact, the goods had been delivered at Jabel Ali UAE. This mis-declaration / mis-statement by the noticee violates section 50 (1) & 50(2) of the Customs Act, 1962 read with Shipping Bill (Electronic Declaration) Regulations, 2011.

5.5.2 Against this the Noticees Nos. 1 & 2 contends that the export goods i.e. rice ultimately reached the destination country i.e. Iran for which they have submitted documentary evidence to show that the said goods discharged at Jabel Ali were further shipped to Iran through the Coastal Cargo system as revealed from the documents received from the Dubai Customs. They further contend that merely due to the fact that the Containers were offloaded at Jabel Ali as certified by Shipping Companies, it does not establish that the goods did not reach the consignee in Iran.

As an example, they have referred to the B/L No. GMAEMUNJEA009141 wherein the notify party is shown as M/s. Sherkat E Rahaavard E Sahraiem, Iran and the Port of Discharge and Delivery is shown as Bandar Abbas, Iran but as per the port Landing Certificate issued by the shipping company namely M/s Goodrich Maritime Pvt Ltd, the Port of Discharge and Delivery is shown as Jebel Ali, UAE. In this regard , they submit that on inquiry, their foreign buyer informed that the rice unloaded at Jabel Ali was further shipped to Iran by Coastal vessels by the foreign buyers agent M/s Royal Tooba Foodstuff Trading Co. LLC, Dubai . Thus they contend that the said consignment was transshipped by M/s Royal Tooba Foodstuff Trading Co. LLC, Dubai to Iran in small boats. Their foreign buyers M/s. Sherkat E Rahaavard E Sahraiem, Iran issued Certificate to the Noticees that the entire cargo of rice covered under the said Bill of Lading and exported by the Noticees was received by them in Iran and was transshipped via Dubai in partial shipments by small boats from Dubai to Iranian Port done by their counterpart M/s Royal Tooba Foodstuff Trading Co. LLC, Dubai.

Similarly, they contend that all other consignments exported by the Noticees vide other 6(Six) Bills of lading were transshipped via Dubai in partial shipments by small boats from Dubai to Iranian port and they submit copies of certificates issued by Iranian buyers and copies of "Sea Cargo Export Manifest" of Dubai Customs evidencing the rice being transshipped to Iran from Jabel Ali by M/s Royal Tooba Foodstuff Trading Co. LLC, Dubai in support of their claim that the allegations and charges leveled against them by the impugned notice cannot be sustained . They further state that they have prepared and submitted a table showing the number of

bags transshipped and the number of bags covered by the seven Bills of lading. From this table it is seen that quantity shipped through smaller coastal vessels is marginally lower due to reason of damaged bags and remaining quantity being shipped in other consignments. They promised to submit further documents in support of their above said claim but did not submit the same. However, they contend that if the above documents co-relate to the extent of more than 95% and the same are issued and certified by Dubai Customs which clearly demonstrate that the exported goods ultimately reached Iran and therefore the impugned notice cannot be sustained.

They further contend that the changes were made in the Bill of lading and Port of discharge was changed as per the directions of foreign buyer or consignee and in terms of the Indian Bills of Lading Act, 1865, once the Bill of Lading is executed, the property of goods are transferred to the consignee, in this case the Iranian party. In this scenario , any changes effected in the Bill of Lading after the Bills of Lading were issued by the Shipping company, the exporter cannot be held liable in any manner and therefore, allegations and charges leveled against the said exporter vide the impugned notice are liable to be dropped .

5.5.3 In the backdrop of the above said contentions of the notices and the facts on record and circumstances relating thereto, I find that the export of the impugned goods was carried out during 2015-16 and investigation in the matter was initiated in 2015 by the DRI and on completion of the said investigation, the impugned SCN was issued in February-2019. Thus, the noticees had sufficient time and opportunity during the investigation to submit documentary evidence in support of their claim that the export goods discharged at Jabel Ali, UAE was further transshipped to Bandar Abbas,Iran (their final destination) . However, they kept mum during the investigation (when verification of their claim and supporting documents could have been done with certain degree of accuracy) and chose to submit such documents (i.e. Sea Cargo Export Manifest issued by Dubai Customs) on 31.12.2019, which put doubt on these documents. Further, the subject export goods were destined to Bandar Abbas, Iran for different consignees whereas for transshipment of cargo from Jabel Ali, UAE to Iran, only one firm M/s Royal Tooba Foodstuff Trading Co. LLC, Dubai is shown as exporter. It is hardly believable that all their foreign buyers wished to have M/s Royal Tooba Foodstuff Trading Co. LLC, Dubai as transshipper and it is very likely that the said firm was selected at the direction of the Exporter. The contention of the Noticee that the said export goods were transshipped from Jabel Ali UAE to Bandar Abbas, Iran; is not tenable as the transport invoices issued by M/s Mohmmed Zubair are showing details of goods B/L wise whereas the Noticees submitted that the goods were transshipped in small boats (details of goods in the Sea Cargo Export Manifests is shown in bags) from Dubai to Iran which is contradictory.

Some other observations in this regard are also noted below:-

(i) Though the Sea Cargo Export Manifests (SCEMs) show export of some goods by M/s Royal Tooba Foodstuff Trading Company LLC from Dubai to Iran, there is no mention of Bills of Lading Number/Import declaration regarding

import of the said goods. Thus, there is nothing to ascertain that the goods thus exported from Dubai to Iran had been imported from India.

(ii) It is also seen from the SCEMs that the goods have been exported from Dubai to Iran in bags and not in containers in which they would have been imported to Dubai from India therefore, the integrity of the consignment appears to have been breached and it cannot be said that the goods exported from Dubai were one and the same as had been imported from India.

(iii) Further, it is also seen that the number of bags covered under the bills of Lading with respect to goods exported from India to Dubai are not matching with the number of bags mentioned in corresponding SCEMs submitted by the noticee.

(iv) Also , the names of the recipients wherever mentioned in the SCEMs and the names of the buyers who have apparently certified the receipt of the gooods in Iran do not match the description of the goods mentioned in SCEMs is loosely translated as "Substance" and not "Rice" .

In the light of the above, I find that the goods exported from Dubai to Iran under the SCEMs cannot be considered to be the same as has been exported from India to Dubai.

The contention of the Noticees that the export goods were diverted from Iran to Dubai on the direction of their foreign buyers is not tenable as the date of message for diversion of goods to UAE was just after issuance of Bill of Lading. Further, in none of Bills of Lading and export documents, it was declared that the consignments were to be exported to Iran via UAE. Further, had such diversion been on request of their Iranian buyers, they must have some communications from them and they might have submitted the same to the Investigating agency i.e. the DRI. However, they have failed to bring out the same and therefore, they have failed to establish that such diversion of goods was done on request of their Iranian buyers. Their contention that once Bills of Lading were issued by the Shipping company, in terms of the Indian Bills of Lading Act, 1865, property in goods are transferred to the consignee (the Iranian buyers) , the Noticees had no control over the goods and the goods were at complete disposal of the consignees and any changes effected in the Bill of Lading was effected at the instance of foreign buyer is also not tenable as no documentary evidence with regard to any direction from their foreign buyers has been submitted by the Noticees . Rather in his statement dated 05.02.18, 15.02.2018, 28.05.2018 & 10.10.2018, Shri Devinder Kumar has confessed that all the eight consignments involved in the impugned notice were diverted to Jabel Ali Port (Dubai) on his oral instructions to their respective CHA i.e. M/s Venus clearing agency and M/s V. Arjoon . Shri Devinder Kumar further stated that the CHAs may have passed instructions in writing to their shipping lines i.e. M/s Goodrich Lines for consignments vide Shipping Bill Nos.90998852 & 9011037 dated 15.04.2015 , 9179127 dated 23.04.2015 & 3878859 dated 31.10.2015,4028501 dated 07.11.2015, M/s Baltic Lines for consignments vide Shipping Bill Nos. 1269364 dated 18.06.2015 & 3976705 dated 05.11.2015, M/s Meridian Shipping for consignments vide Shipping Bill Nos. 4271905 dated 24.11.2015 & 4509957 dated

04.12.2015 to deliver the consignments at Jabel Ali port Dubai instead of declared port as Bandar Abbas,Iran. Thus the Noticee have completely failed to establish that such diversion of goods was done on request of their Iranian buyers. Also it is an undisputed fact that containerized cargo was unloaded at Jabel Ali and no declaration was made by them at any stage regarding transshipment of such cargo. Also , it was mandatory for the exporter and CHA to get the Customs Documents amended at port of export , but the same was not done by either the exporter or the CHA or agents concerned at any stage. Rather in his statement dated 05.02.2016 Shri Devinder Kumar , Export manager has stated that they had not got carried out any amendment in the respective shipping bills for change of destination port and he was unable to answer the reasons for the same . Therefore submission of documents in support of the claim that the export goods discharged at Jabel Ali , UAE was further transshipped to Iran was an afterthought and cover up for their wrong doing . Even if it is taken to be exported from UAE to Iran, it was only further trade from UAE and not the export of goods from India to Iran. Moreover, the number of bags as declared in commercial invoices , Shipping Bills etc. filed before the Indian Customs and the same declared in the corresponding Sea Cargo Export Manifest issued by Dubai Customs as submitted by the Noticees do not match with each other . Identity of goods exported from India vis-à-vis the goods transshipped from UAE to Iran in small boats have also not been established and therefore, I find that the submissions of the Noticee No. 1 and 2 is not sustainable.

5.5.4 The Noticee contends that the impugned goods were packed in 10 Kgs. bags bearing markings in Iranian language and the brands /trade names of the Iranian buyer and hence as per the UAE Laws, no goods such as rice can be sold into UAE unless and until they are bearing the markings in Arabic language and also other relevant details but for which the sale of goods is not permitted in UAE. However, the Noticees has failed to produce any documentary evidence to the effect. Moreover, re-packing of the goods for making them compliant with UAE Laws cannot be ruled out and therefore to claim that the discharged goods at Jabel Ali Port were not consumed in UAE is without any substance and is totally baseless and illogical.

5.5.5 In addition to the statement of Shri Devinder Kumar, statements of various other persons (which are as under) have been relied upon in the SCN. All of them have given incriminating statements with regard to diversion of export consignments.

Shri Sunjjoy Salve, Vice President (Western Region) of M/s Goodrich Maritime Pvt Ltd in his statement dated 16.12.2015 has stated that they had received the request from the Shipper (Exporter) to divert the cargo from one port i.e. Bandar Abbas to another port i.e. Jabel Ali in respect of two Bills of Lading of the impugned goods .

Shri Tushar H. Anam of M/s V. Arjoon in his statement dated 22.12.2015 has stated that Shri Gordhan Bhawnani, H-Card holder of M/s V. Arjoon and himself interacted with all the shipping lines on behalf of their clients. Further, he stated that some shipments of rice, which were cleared for export to Iran were later on diverted at Jabel Ali port after customs clearance and such diversion of goods to Dubai after

clearance for Iran was not brought to the notice of Customs authorities at the port of export by the exporters or shipping lines, because cargo had already left Indian waters and had reached Jabel Ali and Exporters/Shipping Line had not requested for any amendment in the Shipping Bill.

Shri Gordhan Bhawnani, Manager of M/s V. Arjoon in his voluntary statement dated 09.01.2017 recorded under Section 108 of the Customs Act, 1962 stated that on behalf of exporters, he dealt with the shipping lines and got their customs clearance work. Further, handling of export consignments with shipping line, Customs custodians and exporters and other related person was done by them as employees of the CHA firm, was in the knowledge of owner of the CHA firm and was done for the CHA firm as per the practice being followed by them. Further, on being asked about the consignments of rice meant for export to Iran and shown in the shipping customs documents as being exported to Iran but diverted to Jebel Ali, Dubai he stated that he always acted on the direction of the exporter. Further, he admitted that it was known to him in advance i.e. before leaving of the consignment from Indian shore that the goods were actually going to Dubai in place of Iran as mentioned in the shipping bills but as CHA they had no choice but to act in accordance with the directions of the exporter; that even in some cases they came to know of the diversion of the goods to Dubai after loading of the goods in the vessel and leaving the vessel from Indian shore. Further, he confessed that he had diverted the goods on the request and direction of the exporter and whatever statement had been made is without any intention to avail any benefit. He also admitted that he could have filed amendment under Section 149 of the Customs Act, 1962, which he did not do as no request from exporter or shipping line was received.

Shri Mahendra Ganatra Tokarshi in his statement-dated 17.09.2018 *inter alia* stated that in the case of export of rice to various countries, first of all they used to receive the Shipper's (Exporter's) documents i.e. Invoice, Packing List, APEDA Certificates and Self Declaration Form for banking purpose. Further, they placed booking to the shipping line from the official email or through telephonically; that then they would get booking confirmation/Delivery Order from the Shipping line; that in the booking request, they had to intimate to the shipping line among other details about- shipper, exporter/consignee, port of discharge, no. of containers, size of container, commodity, port of stuffing. Also they had handled customs clearance of rice to Iran in respect of M/s. Janki Dass Rice Mills as well as other exporters. Also, on behalf of these exporters he dealt with the shipping lines and got their customs clearance done; that whatever handling of export consignments with shipping line, Customs, custodians and other related persons was done by him or his employees, was as per his approval and knowledge. Moreover, he always acted on the directions of exporter; that he had never done it without directions of the exporter, he stated that the exporters had given directions to divert the goods to Jebel Ali; that as a CHA they had no choice but to act in accordance with the directions of the exporter.

From the above detailed discussion, it is clear that the impugned goods were discharged and delivered at Jabel Ali Port, UAE and not in Bandar Abbas, Iran .

From the detailed discussion hereinbefore, I find that the Noticees M/s Janki Dass Rice Mills has filed the export documents for export of the goods to Iran. In their applications filed in terms of Shipping Bill (Electronic Declaration) Regulations, 2011 , the Noticee /CB had declared all the facts stated in the declaration filed under this regulations to be true under Section 50 of the Customs Act, 1962 . The goods have been shown in the export documents to be consigned to Iran but in fact the good had been delivered at UAE. Thus this mis-declaration of actual destination of the export consignments in the shipping bills and/mis-statement by way of falsely certifying the said mis-declaration to be true was made in the export documents in contravention of Section 50 of the Customs Act, 1962. In this process, they have also violated the Shipping Bill (Electronic Declaration) Regulations, 2011 as brought out amply in the SCN.

The export proceeds for the impugned goods had been realised in Indian rupees from Iranian buyers as against statutory requirement of their realization in freely convertible foreign currency for export to UAE. In terms of para 2.40 of FTP 2019-2014 or para 2.52 of FTP 2015-2020, all export contracts and invoices shall be denominated either in freely convertible currency or Indian Rupees but export proceeds shall be realised in freely convertible currency. In terms of para 2.53 of the FTP, export proceeds realised in Indian Rupees against exports to Iran are permitted to avail export benefits/incentives under the FTP at par with export proceeds realised in freely convertible currency. The fact that the impugned goods have been offloaded / discharged at UAE, even though the declared destination of the consignment was Bandar Abbas, Iran has not been successfully counted by the notices. Despite this, certain payments which have been received by M/s Janki Dass Rice Mills in their UCO Bank account are claimed to be towards export of impugned goods. These payments had actually been received from Iranian entities in whose names the shipping bills had been filed as consignees of the goods. M/s Janki Dass Rice Mills had been unable to demonstrate as to how this payment is related to the goods delivered in UAE in absence of their establishing relationship with the export goods, the same cannot be considered to be the proceeds of export goods. Thus, it is clear that the export proceeds have been realised from a third party and have not been received from the actual buyer of the goods. This results into violation of the RBI Circular No. RBI/13-14/364,A.P. (DIR Series) Circular No. 70 dated 08.11.2013 in as much as it's conditions have not been complied with. This violation further leads to contravention of Section 8 of the Foreign Exchange Management Act, 1999 (which requires that the due amount of Foreign Exchange should be realised and repatriated to India in such manner as may be specified by the Reserve Bank) . This further leads to violation of Rule 11 read with Rule 14(2) of the Foreign Trade Regulation Rules, 1993 in as much as they attempted to obtain export incentives. Receiving payment in Indian Rupees in lieu of freely convertible foreign currency in contravention of the FTP as discussed above, is violation of Section 11(1) of the Foreign Trade (Development & Regulation) Act. These violations have been taken to be covered under the expression "prohibition" used in Section 113(d) by referring to the Hon'ble Supreme Court Judgment in the matter in Sheikh Mohd. Omar Vs. Collector of Customs Calcutta & Others [(1970)2

SCC 728] read with the Apex Court judgment in case of Omprakash Bhatia Versus. Commissioner of Customs, Delhi {2003(155)423 ELT}. This matter has been amply elaborated in the show cause notice and in relevant legal provision section of this order. Owing to the above said violations, the impugned goods are rendered liable to confiscation under section 113(d) of the Customs Act, 1962. In view of the above, the contention of the Noticee that they have export 30 consignments to various parties to Iran and only in respect of eight consignments , the export goods were diverted to Jabel Ali ; which cannot be termed as intentional ; is not tenable.

As discussed hereinbefore, the exporter M/s Janki Dass Rice Mills made/got made false entries in the shipping Bills with regard to actual destination of the export consignments [Violation of Section 50(1) of the Customs Act, 1962 and Shipping Bill (Electronic Declaration) Regulations-2011]. They have also made and subscribed to a declaration as to the truth of its contain on the impugned shipping bills thus they have falsely certified / got certified the entries to be true whereas they have misstated the facts in the shipping bills. Thus the impugned goods entered for exportation do not correspond with the declaration in the shipping bills in respect of actual destination of the export consignments and therefore the export goods are rendered liable to confiscation in terms of Section 113(i) ibid.

5.5.6 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.*

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. In the matter of Commissioner of Customs (Imp.), Nhava Sheva *Vs.* S.B. Impex [2017 (358) E.L.T.358 (Tri. Mumbai)], it was held:

> *"6. It is noticed that the goods on which the Revenue has sought imposition of redemption fine were cleared and disposed of by the appellant. The said goods are not available for confiscation. The said goods were also not seized and released under any bond or undertaking. In these circumstances, the same cannot be confiscated and therefore, no redemption fine could have been imposed".*

Further, 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".

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 also 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.

In the matter of Lubrizol Advanced materials India Pvt. Ltd. *Vs.* C.C.E. Vadodara-I [2013 (290) E.L.T. 453 (Tri.-Ahmd.)], it was held by the Hon'ble Tribunal that:

"Moreover, in the case of Weston Components reported in [2000 (115) E.L.T. 278 (SC)], *the goods had been released provisionally under a bond and it is nobody's case in this case that goods were seized and released provisionally under a bond. In the absence of seizure, the decision of the Hon'ble Supreme Court in the case of Weston Components cannot be applied".*

In the matter of Commissioner of Central Excise, Surat-II *Vs.* Citizen Synthesis [2010 (261) E.L.T. 843 (Tri. Ahmd.)], it was held by the Hon'ble Tribunal that:

"Learned SDR on behalf of the Revenue submits that Revenue is in appeal against the conclusion of Commissioner that clandestinely cleared goods which are not available for confiscation, cannot be confiscated and setting aside redemption fine of Rs. 50,000/- imposed. He relies on the decision of Hon'ble Supreme Court in the case of M/s. Weston Components as reported in [2000 (115) E.L.T. 278 (SC)], *in support of his contention that redemption fine is imposable even when the goods are not available for confiscation. I find that the decision of Hon'ble Supreme Court in the case of M/s. Weston Components was rendered wherein the goods had been released to the appellant after execution of bond. Obviously, it was the case of provisional release. Learned SDR fairly admitted that in this case, the goods had not been provisionally released, but removed clandestinely. Therefore, the judgment cited by the learned SDR is not relevant.*

In the matter of Commissioner of Central Excise, Surat *Vs.* Gunjan Exports [2013 (295) E.L.T. 733 (Tri. Ahmd.)], it was held that:

"5. I have considered the submissions and I find myself unable to appreciate the submissions. The Hon'ble Supreme Court had clearly held in the case of Weston Components Limited that when the goods are released provisionally on execution of bond, confiscation can be affected even if the goods are not available. The natural conclusion is that the goods should have been released on bond which would mean that the goods have been taken possession of by way of seizure and subsequently released on execution of bond. Admittedly that is not the situation in this case also. In this case, respondents themselves have diverted the goods and after diversion, proceedings have been initiated. There is no seizure of the diverted goods and release of the same provisionally on execution of bond. Therefore, the issue is covered by the decision of the Hon'ble Supreme Court and in the absence of release on the basis of execution of a bond, goods could not have been confiscated. The decision of the Larger Bench of the Tribunal relied upon by the learned Commissioner is also applicable since in this case also there

is no bond with a security is available. The B-17 Bond is a general purpose bond undertaking to fulfil the conditions of notification and other requirements and does not help the Revenue to confiscate the goods not available and impose the redemption fine in lieu of confiscation. Further, the confiscation always presumes availability of goods and presumption normally is that goods have been seized and thereafter the proceedings would culminate into confiscation or release. Confiscation would mean that seized goods become the property of the Government and the party to whom it is ordered to be released on payment of fine, will have to pay fine and redeem the goods. When the goods have been diverted and not released on execution of bond with conditions, the question of confiscation of the same does not arise since goods have already become someone else's property. Under these circumstances, I find no merits in the appeal filed by the Revenue and accordingly, reject the same".

5.5.7 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 are neither available physically nor released provisionally on bond under Section 110A *ibid and* therefore, redemption fine cannot be imposed in this case.

C. Liability of the exporter to penalty under Section 114 & 114AA of the Customs Act, 1962.

5.6 The Show Cause proposes to impose penalty on the exporter under section 114 and 114AA of the Customs read with Section 11(1) of FTDR for violation of (Charging portion).

In this regards, the noticee contends that since the provisions of Section 113(d) and 113(i) are not at all attracted, provisions of Section 114 ibid are not applicable in the facts and circumstances of the present case. Further, they contend that all the information and details contained in the Shipping bills were correctly declared by them to the best of their knowledge and belief and it is only after exportation of the goods, at the behest of foreign buyer the request was made for changing the port of discharge and therefore the allegations as contained in the notice are not at all sustainable in the facts and circumstances of the case and Section 114AA ibid is not invokable.

5.6.1 In their defence reply, the exporter, M/s Janki Dass Rice Mills have not contended the fact that the impugned goods which was declared for export to Iran was offloaded/ discharged at Jabel Ali Port (UAE). They have not contended that the export proceeds were realised in Indian Rupees from Iranian buyers even though the goods were offloaded at Jabel Ali,Dubai . Only vide their written defence reply dated 19.12.2019, they claimed that the subject goods reached its ultimate destination i.e. Iran through small boats from Dubai. To support this claim, they have submitted some documents viz. copies of "Sea Cargo Export Manifests" of Dubai Customs and copies of certificates issued by Iranian buyers about the receipt of rice. However , the said claim of the exporter is not acceptable as discussed hereinbefore including on following grounds :

1. During the inquiry conducted by the DRI, no person from the Noticees have submitted that the impugned goods actually reached to Iran and to the real buyer as declared in their export documents.

2. No such declaration was made before the Customs Authorities regarding transshipment of impugned goods to Iran through Jabel Ali Port.

3. The noticee company have failed to submit any document / evidence to prove that their Iranian buyers sought delivery of their goods through Jabel Ali Port.

Moreover, the Noticees have failed to prove that there is any provision for export made from India to Jabel Ali Port, if further exported to Iran to be treated as export from India to Iran particularly when the export to Iran is carried out under a treaty between India and Iran; wherein no such provisions to transship the goods through any other Country is provided. Also no such provision is found in the FTP (2015-20). Hence, the contention of the noticee that the impugned goods reached Iran is not tenable.

5.6.2 Further, I find that Shri Devinder Kumar, Export Manager of M/s Janki Dass Rice Mills vide his statements dated 05.02.2016 had confessed that the subject consignments were delivered at Jabel Ali Port (Dubai) instead of Bandar Abbas Port (Iran) **on his oral instructions** to their CHAs and the CHAs might have passed instructions in writing to their Shipping Lines to deliver the consignments at Jabel Ali Port (Dubai) instead of declared Port as Bandar Abbas (Iran).He has also stated that they had not got carried out any amendment in the respective shipping bills for change of destination Port. He also stated that payment of all these consignments had been received in Indian Rupees through UCO Bank even though the goods were discharged at Jabel Ali Port and also that the discharge of these shipments at Jabel Ali Port was never brought to the knowledge of UCO Bank. In his statement dated 15.02.2016 he stated that these seven consignments pertaining to eight shipping bills had been diverted to Jabel Ali Port (Dubai) on his oral instruction to their respective CHAs i.e. M/s Venus Clearing Agency and M/s V. Arjoon. Further, I find that Shri Sunjjoy Salve, Vice President (Western Region) of M/s Goodrich Maritime Pvt. Ltd. in his statement dated 16.12.2015 has stated that they had received the request from the Shipper (Exporter) to divert the cargo from one Port i.e. Bandar Abbas to another Port i.e. Jabel Ali in respect of two consignments. Also Shri Tushar H. Anam of M/s V.Arjoon (CHA) in his statement dated 30.12.2015 has stated that some shipments of rice, which were cleared for export to Iran were later on diverted to Jabel Ali Port after Customs clearance. He also stated that diversion of the goods to Dubai after clearance for Iran was not brought to the notice of Customs authorities at the Port of export by exporters or shipping lines. Shri Gordhan Bhavnani, Manager of M/s V. Arjoon in his voluntary statement dated 09.01.2017 has admitted that it was known to him in advance i.e. before leaving the consignment from Indian shore that the goods were actually going to Dubai in place of Iran as mentioned in the impugned Shipping bills but as CHA, they had no choice but to act in accordance with the directions of the exporter. He also admitted that he could file amendment under Section 149 of the

Customs Act, 1962 which he did not do as no request from exporter or shipping line was received. Shri Mahendra T. Ganatra in his statement dated 17.09.2018 stated inter alia that the exporters have given directions to divert the goods to Jabel Ali, Dubai. That as a CHA , they had no choice but to act in accordance with directions of the exporter. I find that all these statements are in agreement with the statement of Sh. Devinder Kumar, Export Manager of M/s Janki Dass Rice Mills that the goods meant for export to Iran were diverted to Jabel Ali on his oral instructions .

5.6.3 From the above, it is clear that the goods declared in the export documents to be exported to Iran were diverted to Jabel Ali, UAE and no amendment for the same was sought either by the exporter or their agent. The export proceeds for the impugned goods had been realised in Indian rupees from Iranian buyers as against statutory requirement of their realization in freely convertible foreign currency for export to UAE. In terms of para 2.40 of FTP 2019-2014 or para 2.52 of FTP 2015-2020, all export contracts and invoices shall be denominated either in freely convertible currency or Indian Rupees but export proceeds shall be realised in freely convertible currency. In terms of para 2.53 of the FTP, export proceeds realised in Indian Rupees against exports to Iran are permitted to avail export benefits/incentives under the FTP at par with export proceeds realised in freely convertible currency. The fact that the impugned goods have been offloaded / discharged at UAE, even though the declared destination of the consignment was Bandar Abbas, Iran has not been successfully counted by the notices. Despite this, certain payments which have been received by M/s Janki Dass Rice Mills in their UCO Bank account are claimed to be towards export of impugned goods. These payments had actually been received from Iranian entities in whose names the shipping bills had been filed as consignees of the goods. M/s Janki Dass Rice Mills had been unable to demonstrate as to how this payment is related to the goods delivered in UAE in absence of their establishing relationship with the export goods, the same cannot be considered to be the proceeds of export goods. Thus, it is clear that the export proceeds have been realised from a third party and have not been received from the actual buyer of the goods. This results into violation of the RBI Circular No. RBI/13-14/364,A.P. (DIR Series) Circular No. 70 dated 08.11.2013 in as much as it's conditions have not been complied with. This violation further leads to contravention of Section 8 of the Foreign Exchange Management Act, 1999 (which requires that the due amount of Foreign Exchange should be realised and repatriated to India in such manner as may be specified by the Reserve Bank) . This further leads to violation of Rule 11 read with Rule 14(2) of the Foreign Trade Regulation Rules, 1993 in as much as they attempted to obtain export incentives. Receiving payment in Indian Rupees in lieu of freely convertible foreign currency in contravention of the FTP as discussed above, is violation of Section 11(1) of the Foreign Trade (Development & Regulation) Act. These violations have been taken to be covered under the expression "prohibition" used in Section 113(d) by referring to the Hon'ble Supreme Court Judgment in the matter in Sheikh Mohd. Omar Vs. Collector of Customs Calcutta & Others [(1970)2 SCC 728] read with the Apex Court judgment in case of Omprakash Bhatia Versus. Commissioner of Customs, Delhi {2003(155)423 ELT}. This matter has been amply elaborated in the show cause notice and in relevant

legal provision section of this order. Owing to the above said violations, the impugned goods are rendered liable to confiscation under section 113(d) of the Customs Act, 1962. In view of the above, the contention of the Noticee that they have export 30 consignments to various parties to Iran and only in respect of eight consignments , the export goods were diverted to Jabel Ali ; which cannot be termed as intentional ; is not tenable.

5.6.4 As discussed hereinbefore, the exporter M/s Janki Dass Rice Mills made/got made false entries in the shipping Bills with regard to actual destination of the export consignments [Violation of Section 50(1) of the Customs Act, 1962 and Shipping Bill (Electronic Declaration) Regulations-2011]. They have also made and subscribed to a declaration as to the truth of its contain on the impugned shipping bills thus they have falsely certified / got certified the entries to be true whereas they have misstated the facts in the shipping bills. Thus the impugned goods entered for exportation do not correspond with the declaration in the shipping bills in respect of actual destination of the export consignments and therefore the export goods are rendered liable to confiscation in terms of Section 113(i) ibid.

5.6.5 I find that M/s Janki Dass Rice Mills 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. In case of self-assessment, it is bounden duty of the exporter to make true declarations in the shipping bills and make and subscribe to an undertaking in the same shipping bills as regards truthfulness of its contents. The mis-declaration and mis-statement as detailed above on the part of M/s Janki Dass Rice Mills are not inadvertent failure to state correct details but are deliberate acts on their part and therefore, the impugned goods having collective fob value of Rs.20,89,20,820/- (Rupees Twenty Crores Eighty Nine Lakhs Twenty thousand Eight hundred and Twenty only) as per details in Table provided in the SCN, are liable for 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 and the exporters are liable to penalty under ection 114(i) and 114AA of the Customs Act, 1962.

D. Liability of Shri Devinder Kumar , Export Manager of the exporter, and Customs Brokers M/s V.Arjoon and M/s Venus Clearing Agency to penalty under Section 114 & 114AA of the Customs Act, 1962.

5.7 Penalty on Shri Devinder Kumar, Export Manager of M/s Janki Dass Rice Mills:-

5.7.1 In his statement dated 15.02.2016, he has stated that he joined M/s Janki Dass Rice Mills in 1998 as an accountant and promoted as export manager in 2006. M/s Janki Dass Rice Mills is a partnership of M/s Sushila Devi, his mother, Shri Ravinder Kumar and Shri Rajesh Kumar both his elder brothers. Mrs. Sushila Devi

being old is having no responsibility being old and Shri Ravinder Kumar, suffering from brain disease is also not able to take any responsibility. He further stated that he is responsible for all activities of local sales and export of rice. From his other statements also, it is seen that he was the key person who carried out the relevant operations for the purpose of export. Further, I find that Shri Devinder Kumar in his confessional statements dated 05.02.2018, 15.02.2018, 28.05.2018 and 10.10.2018 has already accepted the diversion of goods from Iran to Jebel Ali. Further, he has got no amendment made in the relevant shipping bills in this regard. Also, he got the export proceeds received in Indian currency from Iranian buyers. Thus he played an active role in smuggling the goods to UAE under the veil of export to Iran under Rupee Trade Mechanism. As discussed hereinbefore, he had exported the goods in violation of the relevant legal provisions rendering the impugned goods liable for confiscation under Section 113 (d) and (i) of the Customs Act, 1962. He has also made/got made false entries in the Shipping Bills with regards to actual destination of export consignments and certified / got certified the same to be true in the Shipping Bills and thus used false and incorrect material to get benefit of para 2.53 of the FTP . In view of the acts of omissions and commissions on his part, Shri Devinder Kumar, Export Manager of M/s Janki Dass Rice Mills is liable for penalty under Section 114(i) 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.

5.8 Penalty on Customs Brokers M/s V.Arjoon :

5.8.1 It is alleged in the SCN that M/s V Arjoon had made/got made false entries in the Shipping Bills with regard to actual destination of the export consignments [violation of Section 50(1) ibid and Shipping Bill (Electronic Declaration) Regulations, 2011]. Further, they had falsely certified / got certified the entries to be true whereas they have mis-stated the fact in the shipping bills [Violation of Section 50(2) ibid]. The goods which were actually destined for UAE have been shown to be destined to Iran. They facilitated in smuggling the goods to UAE under the veil of export to Iran under Rupee Trade Mechanism. Custom Broker firm M/s V. Arjoon have violated the relevant provisions of law in as much they have facilitated the mis-declaration in export of goods to Jabel Ali under the garb of export to Iran, they were fully aware about the alleged offence. Thus, they have knowingly and intentionally made , signed and caused to be made or signed declaration in the export documents which are false and incorrect . Thus, they appeared to have facilitated the export of the goods in violation of the prohibitions discussed hereinbefore rendering the goods liable to confiscation under Section 113 (d) and 113 (i) of the Customs Act, 1962. And thereby rendering themselves liable to penalty under Section 114 & 114AA ibid.

5.8.2 M/s V. Arjoon in their written defence submission dated 20.12.2019 have denied the charges framed against them. They contend that imposition of penalty on them under Section 114and 114AA ibid is *de hors* of any merit as no penalty under the Customs Act is attracted for failure to comply with obligations imposed on the

Customs Broker. In this regard, he has referred to the judgment of Madras High Court in case of Commissioner of Customs Vs. I Sahaya Edin Prabhu . In this regard, I find that in the impugned show cause notice , they have not been charged for their failure to discharge their obligations under the Customs Brokers Licensing Regulations- 2013 and hence this contention is totally irrelevant . They further contend that penalty under Section 114 & 114AA ibid can only be imposed on natural persons and not a legal entity. It is a trite that any person under these sections include a legal person and therefore, the contention of the noticee is not only absurd but also incorrect. They further contend that Section 113 (i) for confiscation of impugned is not attracted in the facts of the case so as to justify imposition of penalty under section 114ibid. In this regard, I find that confiscation of goods under section 113 (d) ibid has been proposed in the SCN for violation of Section 50(1) read with Shipping Bill (Electronic Declaration) Regulations, 2011 and section 50(2) ibid which have been discussed in detail hereinbefore and therefore the contention of the noticee is not tenable.

5.8.3 The noticee further contends that provisions of Section 114AA ibid is attracted only in a case where a person knowingly enters wrong information in any document submitted to the Customs authority. In the present case, it has come on record by way of series of statements of the exporter that the information of change of port of discharge was brought to their knowledge and notice only subsequent to filing the export documents. Therefore they are not guilty of presenting any information which was false or incorrect. They claim that this is further corroborated by the averment in the show cause notice that the exporter has contravened the provisions of the Act by not applying for amendment of the shipping bills in question. In this regard I find that in the show cause notice, the exporter have not been charged for contravention of provisions of the Act for not applying for amendment of the shipping bills in question. Moreover, as mentioned in para 4 of their reply, and also recorded in the statement of Sh. Gordhan Bhavnani , it is confirmed that it was known to him in advance i.e. before leaving of the consignment from Indian shore that the goods were actually going to Dubai in place of Iran as mentioned in the shipping bill but as CHA , they had no choice but to act in accordance with the directions of the exporter. Therefore, the contention of the noticee is not sustainable.

5.8.4 As regards, liability of the Custom Broker M/s V. Arjoon is concerned, it is alleged in the SCN that they have violated the provisions of Section 50 of the Customs Act and the Shipping Bill (Electronic Declaration) Regulations. At Sr. No. 11 & 12 of the Annexure, Port of destination and country of final destination are required to be mentioned. Further a declaration is signed for filing the checklist wherein the following undertakings are also made:

I/we declare that the particulars given herein above are true, correct and complete.

I/we undertake to abide by the provisions of Foreign Exchange Management Act, 1999 as amended from time to time, including realisation or repatriation of foreign exchange to or from India.

By making false entries in the Shipping Bills declarations with regard to actual destination of the export consignments, they have contravened the above said

regulation and also contravened section 50 of the Customs Act,1962. It has been amply discussed hereinbefore to conclude that the goods are liable to confiscation under section 113 (d) & (i) ibid. The custom broker M/s V.Arjoon have facilitated in mis-declaration and mis statement of facts in the export documents filed by them. The goods which was destined to UAE has been shown to be destined to Iran. Thus, they facilitated in smuggling the goods to UAE under the garb of export to Iran under Rupee trade mechanism. Therefore, I hold that they are liable to penalty under Section 114(i) and 114AA of the Customs Act,1962 .

5.9 Penalty on M/s Venus Clearing Agency:

It is alleged in the SCN that M/s Venus Clearing Agency had made/got made false entries in the Shipping Bills with regard to actual destination of the export consignments [violation of Section 50(1) ibid and Shipping Bill (Electronic Declaration) Regulations, 2011]. Further, they had falsely certified / got certified the entries to be true whereas they have mis-stated the fact in the shipping bills [Violation of Section 50(2) ibid]. The goods which were actually destined for UAE have been shown to be destined to Iran. They facilitated in smuggling the goods to UAE under the veil of export to Iran under Rupee Trade Mechanism. Custom Broker firm M/s Venus Clearing Agency have violated the relevant provisions of law in as much they have facilitated the mis-declaration in export of goods to Jabel Ali under the garb of export to Iran, they were fully aware about the alleged offence. Thus, they have knowingly and intentionally made, signed and caused to be made or signed declaration in the export documents which are false and incorrect. Thus, they appeared to have facilitated the export of the goods in violation of the prohibitions discussed hereinbefore rendering the goods liable to confiscation under Section 113 (d) and 113 (i) of the Customs Act, 1962. And thereby rendering themselves liable to penalty under Section 114 & 114AA ibid.

5.9.1 M/s Venus Clearing Agency in their written defence submission dated 07.01.2020 have denied the charges framed against them. They contend that they were not customs broker as suggested in the Show Cause Notice and hence proposal in the show cause notice against them that they failed to discharge the burden imposed on custom broker is completely misplaced and without any merit . They further contend that in normal course of business, their partner Shri Ganatra was approached by one M/s Janki Dass Rice Mills, Exporter for assisting in export of various consignments of rice to Iran. Shri Ganatra was informed that the custom broker for the said consignments would be Lara Exim. The exporter has issued authorization letter in the favour of the said custom broker for handling the export related work. They were exclusively engaged for acting as a link between the exporter and the CHA and for providing freight forwarding services. They submit that as they are not custom brokers, the entire premise of the department to initiate proceedings against them is without any merit whatsoever.

5.9.2 In this regard I find that Shri Devinder Kumar (contact no. 9896346576) , Export Manager, M/s Janki Das Mice Mills, Karnal Haryana in his statement dated 05.02.2016 has stated that the eight consignment had been diverted to Jabel Ali Port (Dubai) on my oral instructions to respective CHAs i.e. M/s Venus Clearing Agency

and M/s V. Arjoon . He has repeated the same in his statement dated 15.02.2016. Further, in his statement 25.08.2018, he has mentioned a list of shipping bill Nos. 9008852 dated 15.04.2015 , 9011037 dated 15.04.2015 and 1269364 dated 18.06.2015 showing name of CHA as M/s Venus Clearing Agency , Gandhidham with contact person (CHA) as Mr. Vipul Ganatra . In his statement dated 10.10.2018 , Shri Devinder Kumar submitted a list of shipping bills which contains the above said shipping bills with name of CHA as M/s Venus Clearing Agency and the same were diverted to Dubai .

5.9.3 On 17.09.2018, Shri Mahendra T. Ganatra appeared for statement under Section 108 of the Customs Act,1962 before SIO , DRI HQ , New Delhi as proprietor of M/s Venus Clearing Agency (RUD-10) . In his said statement dated 17.09.2018, he stated that he has handled Custom clearance of M/s Janki Dass Rice Mills for export of rice to Iran / Dubai. He also stated that he dealt with Mr. Devendra, contact no. 9896346576. He further stated that on behalf of M/s Janki Dass Rice Mills (Exporters), he dealt with the shipping lines and got their customs clearance done. Whatever handling of export consignments with shipping lines, Customs, custodians and other related persons was done by him or his employees are as per his approval and knowledge . On being asked about the consignment of rice meant for export to Iran and shown in the shipping Customs documents as being exported to Iran but diverted to Jabel Ali, Dubai, he stated that he always acted on the directions of exporter. He has never done it without directions of exporter. **He stated that the exporters had given in writing to divert the goods to Jabel Ali**. As a CHA, he had no choice but to act in accordance with the directions of exporter . On being asked regarding which shipping bills , the goods were diverted to Jabel Ali , Dubai instead of Iran , he stated that he cannot tell the same at that stage as to which were those shipping bills,against which rice consignments were diverted to Jabel Ali, Dubai instead of Iran. However, he would find out from his office and submit the same after locating from his old records within 20 days. Thereafter vide email dated 25.10.2018 , DRI HQ New Delhi asked him to provide the details of shipment of M/s Janki Dass Rice Mills , which were shipped to Iran but diverted to Jabel Ali and the communication /email/request done by the shipper to deliver the shipments of rice meant for Iran to Jabel Ali . He was once again requested to send the said details / documents and printouts of email / copies of communication of shipper requesting / directing to divert the shipments urgently. In reply to this email Shri Mahendra T. Ganatra of Venus Clearing Agency sent the email dated 26.10.2018 , which is reproduced as under :-

"Refer to your below Email (dated 25.10.2018), that They didn't have any email conversation regarding all this shipments diverted.

All the documents & Bill of landing was prepared for Bandar Abbas , then shipper has requested us verbally & said us to ask shipping company to discharge consignment at Jebel Ali,

So we Had surrender the Original 3/3 OBL with surrender request letter to Shipping line, and accordingly the shipping line had given the delivery of consignment at Jebel Ali.

"Hence they had never made any email conversation of such diversion in Email, we have got only verbal instructions from their Client."

His statement dated 17.09.2018 and email dated 26.10.2018 are contradictory in the sense that in his statement, he **stated that the exporters had given in writing to divert the goods to Jabel Ali** and in the said email he wrote "***hence they had never made any email conversation of such diversion in Email, Ihave got only verbal instructions from their Client***". *Thus, he has tendered the false statement which reflects his culpable state of mind and therefore, they are liable to penalty.*

They have also submitted two more documents with the said email. One of them is Port Landing Certificate issued by M/s Goodrich Maritime Pvt. Ltd. Showing Shipping Bill No.1269364 dated 18.06.2015 which is involved in the impugned SCN.

5.9.4 From the above, it is clear that he has been acting as a CHA from the very beginning and now once the show cause notice has been issued and being adjudicated, he has taken shelter to the plea that they had not acted as the custom broker in the said transaction and therefore proceedings against them under the Customs Act is totally misplaced and without any merit. In this regard , attention is invited to section 147 (3) of the Customs Act , which provides "*When any person is expressly or* ***impliedly*** authorised by the owner, importer or exporter of any goods to be his agent in respect of such goods for all or any of the purposes of this Act, such person shall, without prejudice to the liability of the owner, importer or exporter, be deemed to be the owner, importer or exporter of such goods for such purposes [including liability therefor under this Act]"

Therefore the contention of the Custom Broker M/s Venus Clearing Agency, Gandhidham (Proprietor Shri Mahendra T. Ganatra) is malicious, misleading, absurd and irrelevant. This also reflects that he was aware of the entire wrong doing from the very beginning and therefore he might have used the name of other CHA though in fact he was doing all the works connected to export of the impugned goods as is vividly clear from his above said statement and the statements of Shri Devinder Kumar, Export Manager of M/s Janki Dass Rice Mills . Thus *mens rea* on the part of M/s Venus Clearing Agency is established and they deserves penalty.

They further contend that penalty under Section 114 & 114AA ibid can only be imposed on natural persons and not a legal entity. It is a trite that any person under this section includes a legal person and therefore, the contention of the noticee is not only absurd but also incorrect. They further contend that Section 113 (i) for confiscation of impugned goods is not attracted in the facts of the case so as to justify imposition of penalty under section 114 ibid. In this regard, I find that confiscation of goods under section 113 (i) ibid has been proposed in the SCN for violation of Section 50(1) read with Shipping Bill (Electronic Declaration) Regulations, 2011 and section 50(2) ibid which have been discussed in detail hereinbefore and therefore the contention of the noticee is not tenable.

The noticee further contends that provisions of Section 114AA ibid applies to an exporter or his authorised custom broker and hence no penalty can be imposed on them under the said section. In this regard, it is to point out that section 114 applies

to any person who uses false and incorrect material knowingly or intentionally and therefore contention of the noticee is totally unfounded. They further contend that no evidence has been brought on record to show that they have knowledge of change of destination warranting proposed action against them.

5.9.5 In the present case, it has come on record by way of series of statements of the exporter that the information of change of Port of discharge was brought to their knowledge and notice only subsequent to filing the export documents. Therefore they are not guilty of presenting any information which was false or incorrect. They claim that this is further corroborated by the averment in the show cause notice that the exporter has contravened the provisions of the Act by not applying for amendment of the shipping bills in question. In this regard I find that in the show cause notice, the exporter have not been charged for contravention of provisions of the Act for not applying for amendment of the shipping bills in question.

As regards, liability of the Custom Broker M/s Venus Clearing Agency is concerned, it is alleged in the SCN that they have violated the provisions of Section 50 of the Customs Act and the Shipping Bill (Electronic Declaration) Regulations. At Sr. No. 11 & 12 of the Annexure, Port of destination and country of final destination are required to be mentioned. Further a declaration is signed for filing the checklist wherein the following undertakings are also made:

I/we declare that the particulars given herein above are true, correct and complete.

I/we undertake to abide by the provisions of Foreign Exchange Management Act, 1999 as amended from time to time, including realisation or repatriation of foreign exchange to or from India.

By making false entries in the Shipping Bills declarations with regard to actual destination of the export consignments, they have contravened the above said regulation and also contravened section 50 of the Customs Act,1962. It has been amply discussed hereinbefore to conclude that the goods are liable to confiscation under section 113 (d) & (i) ibid. The custom broker M/s Venus Clearing Agency have facilitated in mis-declaration and mis statement of facts in the export documents filed by them. The goods which was destined to UAE has been shown to be destined to Iran. Thus, they facilitated in smuggling the goods to UAE under the garb of export to Iran under Rupee trade mechanism. Therefore, I hold that they are liable to penalty under Section 114(i) and 114AA of the Customs Act,1962.

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

ORDER

(i) I hold the goods exported under 08 Shipping Bills by M/s Janki Dass Rice Mills, Nandana Road, Taraori (Haryana),valued at Rs.20,89,20,820/- (Rupees Twenty Crores Eighty Nine Lakhs Twenty thousand Eight hundred and Twenty only) liable for confiscation under provisions of 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 neither available physically for confiscation nor released provisionally on ~~any~~ bond under Section 110Aof the Customs Act, 1962.

(ii) I impose a penalty of a Penalty of Rs.75,00,000/- (Rupees Seventy Five Lakh only) on M/s Janki Dass Rice Mills, Nandana Road, Taraori (Haryana) under 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) I impose a penalty of a Penalty of Rs.75,00,000/- (Rupees Seventy Five Lakh only) on M/s Janki Dass Rice Mills, Nandana Road, Taraori (Haryana) 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 hereby order to appropriate an amount of Rs.15,00,000/- (Rupees Fifteen Lakh only) deposited by M/s Janki Dass Rice Mills , Nandana Road, Taraori (Haryana) vide Demand draft no. 847918 dated 16.03.2016 during the investigation towards penalty imposed on M/s. Janki Dass Rice Mills.

(v) I impose a penalty of Rs.45,00,000/- (Rupees Forty five Lakh only) on Shri Devinder Kumar, Export Manager of M/s Janki Dass Rice Mills under 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.

(vi) I impose a penalty of Rs.45,00,000/- (Rupees Forty five Lakh only) on Shri Devinder Kumar, Export Manager of M/s Janki Dass Rice Mills, Haryana under Section 114 AA 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.

(vii) I impose a penalty of Rs.30,00,000/- (Rupees Thirty Lakh only) on Custom Broker firm M/s V. Arjoon under 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.

(viii) I impose a penalty of Rs.30,00,000/- (Rupees Thirty Lakh only) on Custom Broker firm M/s V. Arjoon 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.

(ix) I impose a penalty of Rs.30,00,000/- (Rupees Thirty Lakh only) on Custom Broker firm M/s Venus Clearing Agency under 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.

(x) I impose a penalty of Rs.30,00,000/- (Rupees Thirty Lakh only) on Custom Broker firm M/s Venus Clearing Agency 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.

31/3/2020

[SUSHANT KUMAR]
ADDITIONAL COMMISSIONER

F. No. VIII/48-28/Adj/ADC/MCH/2018-19 Dated:31.03.2020

BY RPAD/SPEED POST TO :

1 M/s Janki Dass Rice Mills, Nadana Road, Taraori-132116 (Karnal), Haryana.
2. Shri Devinder Kumar, Export Manager, M/s Janki Dass Rice Mills, Nadana Road, Taraori-132116 (Karnal) Haryana.
3. M/s V. Arjoon, 6, Hafizain Building, 3rd Floor, 129/131, Kazi Syed Street, Masjid (W), Mumbai – 400003.
4. M/s. Venus Clearing Agency, 101-Asopalav Arcade, Plot No.-04, Sector-9, Near Hotel Rishab, Gandhidham-370201.

Copy to:

1. The Additional Director (CI), Directorate of Revenue Intelligence, 7th Floor, D-Block, I.P. Estate, New Delhi-110002.
2. The Deputy/Assistant Commissioner (RRA), Custom House Mundra
3. The Deputy/Assistant Commissioner (Export Assessment), C. H. Mundra
4. The Deputy Assistant Commissioner (EDI), Custom House Mundra
5. The Deputy/Assistant Commissioner (TRC), Custom House Mundra
6. Guard File

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS
65
13 APR 2020
INWARD SECTION
Custom House, Mundra