



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.	:	F. No. VIII/48-38/Adj./ADC/MCH/2017-18
B. Order-in- Original No.	:	MCH/ADC/AS/40/2019-20
C. Passed by	:	Shri Amarjeet Singh Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order / Date of issue	:	23.07.2019/ 31.07.2019
E. SCN No. & Date	:	DRI/AZU/GRU-64/Rasna/INT-33/2017 dated 19.12.2017
F. Noticee(s)/Party/ Importer	:	1. Shri Sunil Garg, resident of 1/6959/17, East Rohtash Nagar, Shadhara, Delhi-110032 2. M/s. Rasna Corporation, House No.0766/002A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra-400706 3. Shri Shekdar Rashid, Proprietor of M/s Rasna Corporation, House No.0766/002A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai Thane, Maharashtra-400706

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

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

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए- 1- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

“ सीमा शुल्क आयुक्त (अपील), कांडला
7 वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009”
“THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
Having his office at 7th Floor, Mridul Tower, Behind Times of India,
Ashram Road, Ahmedabad-380 009.”

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

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

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

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

(i) उक्त अपील की एक प्रति और

A copy of the appeal, and

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

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

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

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

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

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

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

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

Sub: SCN F. No: DRI/AZU/GRU-64/Rasna/INT-33/2017 dated 19.12.2017 issued to M/s. Rasna Corporation, House No.0766/002A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra-400706 and others

Brief facts of the case:-

An intelligence gathered by officers of Directorate of Revenue Intelligence, AZU, Ahmedabad (*hereinafter referred as 'DRI' for short*) indicated that, substantial quantity of Chocolate Powder was being attempted to be smuggled into India in concealed manner in container No. OOLU1308628 sought clearance vide Bill of Entry No. 2225641 dated 24.06.2017 filed in the name of M/s. Rasna Corporation, Swagat Co-op, Hsg. Soc. Ltd., Bldg No. A-6, R. No. 1/13, 1st Floor, Sector-24, Nerul, Navi Mumbai -400706. In this regard, the goods (*hereinafter also referred to as "subject import goods"*) imported in said container were examined by officers of Directorate of Revenue Intelligence (*hereinafter referred as 'DRI' for short*) under Panchanama dated 29.06.2017(RUD No. 1 of the SCN). As per Bill of Entry No. 2225641 dated 24.06.2017 and import documents (RUD No.2 of the SCN), the description of import goods was "*Cocoa Husk (Non Edible and Industrial use only) (consumption to generate thermal energy)*". Examination carried out by DRI officer revealed that subject import goods imported in above said container consisted of three types of goods. As per their physical appearance, following types of goods were found in the said container sought clearance for home consumption under Bill of Entry No. 2225641 dated 24.06.2017. Quantity of each type of goods and location as found in above said container is mentioned in the Table against each type of goods.

Table 1

Sr. No.	Type of cargo	Found in the rows (from Container Gate)	No. of Bags	Weight (in MTS)
1.	Brown Coloured Dry Husky	First Three Rows	223	8.610
2.	Dark Brown Coloured Powder	Middle Rows	114	5.642
3.	Dark Brown/Black Thick Paste	Last Two Rows	35	2.578
Total Weight				16.830

2. Representative samples were drawn by the DRI from each type of material found in the aforesaid imported consignment and further clearance of goods was withheld vide the same Panchanama dated 29.06.2017. Since, investigation into the matter was expected to take time, importer was offered the option of warehousing the goods as per provisions of Section 49 of Customs Act, 1962 vide letter F. No. DRI/AZU/GRU/Rasna/Int-33/2017 dated 04.07.2017 by the Deputy Director, DRI, Gandhidham (RUD No. 3 of the SCN).

Testing of the goods and Seizure

3.1 Representative samples, of each of three types of goods, so drawn from the subject import goods were forwarded to Custom House Laboratory, Kandla vide Test Memo No. 02/03.07.2017, 03/03.07.2017 and 04/03.07.2017 (RUD No. 4 of the SCN) for testing. Joint Director, Custom House Laboratory, Kandla in its reports (RUD No. 5 of the SCN) opined, inter alia, as under in respect of each of the three types of goods.

Table 2

TM No.	Type of goods	Opinion of Customs Laboratory, Kandla
2	Brown Coloured Dry Husky	Sample is in the form of brownish coarse powder Ash content: 7.54 %, Moisture 7.98%. As per literature Cocoa husk may be used as asbestos free brake pad, anti-oxidant and feed supplement.
3	Dark Brown Coloured Powder	Sample is in the of brownish moist powder Ash content: 9.0 %, Moisture 7.30%.
4	Dark Brown/Black Thick Paste	The sample is in the form of dark / brown black thick paste. It is alkalized cocoa paste. It is other than cocoa husk powder.

3.2 Since the test reports of Customs Laboratory, Kandla were not conclusive, remnants samples received back from the said Customs Laboratory were forwarded to Food and Drug Laboratory, Vadodara vide Test Memo No. 06/28.07.2017, 07/28.07.2017 and 08/28.07.2017 (RUD No. 6 of the SCN) with specified queries. Food Analyst, Food and Drug Laboratory, Vadodara in its reports dated 31.08.2017 & dated 27.09.2017 (RUD No. 7 of the SCN) opined, inter alia, as under in respect of each of the three types of goods.

Table -3

TM No.	Type of goods	Opinion of Food and Drug Laboratory, Vadodara
6	Brown Coloured Dry Husky	It seems to be a mixture of cocoa husk and cocoa powder; Not fit for human consumption; Fat 4.16%
7	Dark Brown Coloured Powder	It seems to be cocoa powder; Fit for human consumption; Fat 10.12%
8	Dark Brown/Black Thick Paste	It seems to be cocoa powder mix with fat (Chocolate Slab); Fit for human consumption; Fat 44.64%

The reports of Food Analyst, Drug and Food Laboratory, Vadodara conclusively confirmed two out of three types of products to be different from Cocoa Husk. The said items were opined to be **cocoa powder and chocolate slab**. Since the goods covered under Bill of Entry No. 2225641 dated 24.06.2017 had been confirmed to be mis-declared with respect to description and other parameters, the subject goods were placed under seizure vide Seizure Memo dated 13.10.2017 (RUD No. 8 of the SCN) and handed over to Operation Manager, M/s. Saurashtra Freight Private Limited, Mundra vide Supratnama dated 13.10.2017 (RUD No. 9 of the SCN).

Statements of concerned persons recorded under Section 108 of Customs Act, 1962 during the course of investigation.

4.1 Statement of Shri Insaf Mohammed Qureshi, Proprietor and F card Holder of Custom Broker Firm M/s. Bhavya Shipping was recorded on 25.07.2017 (RUD No. 10 of the SCN), wherein, *inter alia* stated that he got the work of M/s. Rasna Corporation, Mumbai through Mr. Ankit Travadi of M/s. Dabke Clearing and Forwarding, Mundra; that he received documents related to subject consignment of Cocoa Husk from his email ID rudraxenterprises@gmail.com; KYC documents in respect of M/s. Rasna Corporation, Navi Mumbai were received through whatsapp (9825245679) from Mr. Ankit (8140408485). On being asked he stated that Shri Ankit Travadi (email rudraxenterprises@gmail.com) had informed him that the work of M/s. Rasna Corporation, Navi Mumbai was received from Shri Kishor Bhanusali; that Shri Kishor bhai told that M/s. Rasna Corporation, Navi Mumbai is engaged in import and trading of food products; that the present consignment was husk of cocoa shells; that they told that the said husk was to be used in furnace. On being asked about the goods being found different during examination under Panchanama dated 29.06.2017, he stated that he told that Shri Ankit Travadi was of the view that front goods were cocoa husk and other powdered material may be cocoa powder and he was not sure about identity of third item.

4.2 Statement of Shri Shekdar Nuruddin Rashid, Proprietor of M/s. Rasna Corporation was recorded on 24.08.2017 (RUD No. 11 of the SCN) , wherein, he, *inter alia*, stated that plot at Swagat Co-op Hsg. Soc. Ltd., Bldg No. A-6, R. No. 1/13, 1st Floor, Sector -24, Nerul, Navi Mumbai had been sold in 2013 and vacated in 2014; that address of M/s. Rasna Corporation was House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706 which is his residential address; that he did not apply to DGFT for change of address; that he had not informed Customs about change of address; that he had received letter written by DRI giving him option of keeping goods in bonded warehouse; that he did not want to keep goods in warehouse and ready to wait till goods are cleared by DRI and Customs. On being asked about subject goods he stated that he was not aware of actual goods and as to how the goods were purchased; that the said goods were purchased by Shri Sunil Garg (M: 9711135351); that he asked him to clear his consignment in his name; that he (Sunil) promised to give him 5% of value of goods; that he was get 5% of value at which Customs would clear the subject goods.

4.3 Statement of Shri Sunil Garg, resident of 1/6959/17, East Rohtash Nagar, Shadhara, Delhi - 110032 was recorded, on 15.09.2017 (RUD No. 12 of the SCN), wherein he *inter alia* stated that he was director of private limited company M/s. Sunbeen Impex Private Limited (IEC No. 0514015764) which was engaged in import and trading of cocoa powder, cocoa butter; that they also manufacture Cocoa Paste by mixing cocoa powder and cocoa butter substitute, lecithin powder (works as binder) and sugar. On being asked about consignment covered under B/E No. 2225641

dated 24.06.2017 filed in the name of M/s. Rasna Corporation, Navi Mumbai, he stated that he contacted Shri Shekdar Rashid of Mumbai and offered him the said consignment of cocoa husk, low quality Cocoa powder and Cocoa paste from M/s. Vinco Palm Oil Sdn Bhd; that the suppliers treated the said material as waste type product; that he was hesitant to import said item in the name of his company; that the suppliers had offered the said consignment on credit. On being asked he stated that since he was little hesitant that the items may not be passed, only husk was declared in the import documents; he admitted that it was mistake to not declare these items in documents. On being asked as to who decided to mis-declare the goods in import documents, he stated that it was mutual decision of both he and Shri Shekdar Rashid; As per his knowledge, Customs Broker had not been informed that about consignment containing Cocoa Powder / Cocoa paste.

Discussion of Evidences and facts about mis- declaration of goods

5.1 Whereas, subject import goods were sought clearance in the name of M/s. Rasna Corporation, Mumbai vide Bill of Entry No. 2225641 dated 24.06.2017 as "Cocoa Husk (Non Edible and Industrial use only) (consumption to generate thermal energy)". However, examination of goods by officers of DRI under Panchanama dated 29.06.2017 has revealed that there were three types of goods in the container sought clearance under above Bill of Entry. The representative samples drawn from the each of the three types of goods have been tested at Food and Drug Laboratory, Vadodara. The said laboratory has opined the goods to be 1. **Mixture of Cocoa Husk and Cocoa Powder**, 2. **Cocoa Powder** and 3. **Cocoa Powder mix with fat (Chocolate Slab)**. The summary of different types of goods found during Panchanama as per their description confirmed by Food and Drug Laboratory, Vadodara is as under:

Table-4

Sr. No.	Type of cargo as per appearance	Found in the rows (from Container Gate)	Description confirmed by Testing	Weight (in MTS)
1.	Brown Coloured Dry Husky	First Three Rows	mixture of cocoa husk and cocoa powder	8.610
2.	Dark Brown Coloured Powder	Middle Rows	cocoa powder	5.642
3.	Dark Brown/Black Thick Paste	Last Two Rows	cocoa powder mix with fat (Chocolate Slab)	2.578
Total Weight				16.830

5.2 From the Panchanama dated 29.06.2017 and factual position as summarized in above Table, it emerged that the cocoa husk was stuffed in first three rows towards gate of container and other two items cocoa powder and Chocolate Slab were concealed behind bags of cocoa husk. Shri Sunil Garg who purchased and imported the subject goods has admitted the import items to be Cocoa Husk, Cocoa Powder and

Chocolate Paste. It, therefore, clearly emerged that description of subject import goods were mis-declared as “Cocoa Husk (Non Edible and Industrial use only) (consumption to generate thermal energy)” and that Cocoa Powder. Further appeared that Cocoa Powder and Chocolate Paste were smuggled into India concealed behind Cocoa Husk and attempted to be cleared from Customs illegally.

5.3 Bill of Entry No. 2225641 dated 24.06.2017 seeking clearance of subject import goods was filed in the name of M/s. Rasna Corporation, Mumbai. Its Proprietor, Shri Shekdar Rashid, in his statement has stated that the said consignment was purchased and imported by Shri Sunil Garg. Further Shri Sunil Garg has admitted in his statement recorded under Section 108 of Customs Act, 1962 that import consignment consisted of three items i.e. Cocoa Husk, Cocoa Powder and Chocolate Paste. These are the same items which have been independently confirmed by Food and Drug Testing Laboratory, Vadodara to be three types of items examined under Panchanama dated 29.06.2017. It is therefore clear that the actual items imported and sought clearance illegally under Bill of Entry No. 2225641 dated 24.06.2017 were Cocoa Husk, Cocoa Powder and Chocolate Paste.

Rejection of value declared before Customs and re-determining assessable value of the goods, classification of goods and demand of differential duty:

6.1 The Section 14 of Customs Act, 1962 stipulates that the value of the imported goods shall be the transaction value of such goods, i.e. the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. In the present consignment, 5.642 MT of Cocoa Powder and 2.578 MT of Chocolate Paste were also found concealed behind declared goods i.e. Cocoa Husk. There is huge difference in price of Cocoa Husk and that of Cocoa Powder and Chocolate Paste. While Cocoa Husk is a waste material, Cocoa Powder and Chocolate powder are used in preparation of premium products viz Chocolates, Ice Creams, Bakery products, Beverages etc. Therefore, transaction value declared for purchase of Cocoa Husk can't be accepted as transaction value for Cocoa Powder and Chocolate Paste. As such value declared before Customs in Bill of Entry No. 2225641 dated 24.06.2017 is required to be rejected in terms of Section 14 of Customs Act, 1962 read with provisions of Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter also referred to as “*Valuation Rules 2007*”) and their value is required to be re-determined in terms of Section 14 of Customs Act, 1962 read with provisions of Rule 3(4) of Valuation Rules 2007 by proceeding sequentially through Rule 4 to Rule 9 of Valuation Rules 2007.

6.2 Shri Sunil Garg has stated in his statement that the subject goods were purchased from M/s. Vinco Palm Oil Sdn. Bhd., Malaysia. The subject goods have been imported packed in PP bags. The packing was non-standard. Further, the goods were

un-branded. Import data of all three types of goods has been retrieved from website of Directorate General of Valuation, Government of India, and is attached with the Show Cause Notice as **Annexure I (Cocoa Husk)**, **Annexure II (Cocoa Powder)** and **Annexure III (Chocolate Powder)**. Therefore, identical goods having all parameters of are not available in the NIDB data. However, goods with similar description, same country of origin and imported during contemporary period for all three types of goods are available in the NIDB data of respective products. Therefore, value of all three types of import goods has to be determined as per provisions of Rule 5 of Valuation Rules 2007. Per kilogram assessable values of all three products i.e. Cocoa Husk, Cocoa Powder and Chocolate Paste as per NIDB data in Annexure I, Annexure II and Annexure III is tabulated below.

Table 5

Sr. No.	Product Name	Assessable Value Rs. / Kg	Reference Bill of Entry & Date
1	Cocoa Husk	23.40	8930306/17.03.2017
2	Cocoa Powder	152.78	2233262/24.06.2017
3	Chocolate Paste	216.83	9574720/05.05.2017

While identifying similar goods, different aspects of reference consignments have been considered in the order viz Description of Goods, Branded / Un Branded, Unit of Quantity, Country of Origin, proximity to date of import of subject goods, Quantity of Goods.

6.3 Cocoa and Cocoa preparations are classified under an exclusive Chapter 18 of Customs Tariff. Customs Tariff Heading (“CTH” for short) 1802 covers “Cocoa Shells, husks, skins, and other cocoa waste”. One of the product in the consignments i.e. Cocoa Husk (mixture of Cocoa Husk and Cocoa Powder) is classifiable under Customs Tariff Item (“CTI” for short) 18020000. CTH 1805 covers “Cocoa Powder, not containing added sugar or other sweetening matter”. The second product of consignment i.e. Cocoa Powder thus merits classification under CTI 18050000. Further, CTH 1806 covers “Chocolate and other food preparations containing cocoa”. The third product i.e. Chocolate Slab / Paste, which was not imported in any standard packing, would merit classification under residuary CTI 18069090 under CTH 1806.

6.4 As discussed at Para 5.1 and 5.2 above, subject import goods which were sought clearance as “Cocoa Husk (Non Edible and Industrial use only) (consumption to generate thermal energy)” were found to be three different types of products namely Cocoa Husk, Cocoa Powder and Chocolate Paste upon examination and testing. The bags of Cocoa Powder and Chocolate Paste (the products which are much costlier than declared goods) were found concealed behind bags of Cocoa Husk indicating towards,

inter -alia, illegal clearance of costlier goods i.e. Cocoa Powder and Chocolate Paste and intention of evasion of duty. Further, Shri Sunil Garg who has emerged as the actual importer and owner of subject goods has admitted in this statement that he was aware that subject import consignment consisted of three items i.e. Cocoa Husk, Cocoa Powder and Chocolate Paste and that he and Shri Shekdar Rashid knowingly mis-declared the value, description and other parameters of the goods in the Bill of Entry No. 2225641 dated 24.06.2017 filed before Customs. As such, value and other facts about the subject import goods were willfully mis- stated in Bill of Entry No. 2225641 dated 24.06.2017 and other import documents filed before Customs Department and facts of actual goods, their transaction value, description etc. were deliberately suppressed from Department with obvious motive of evasion of Customs Duty. The duties of customs not levied and not paid on the goods namely Cocoa Husk, Cocoa Powder and Chocolate Paste imported and sought clearance under Bill of Entry No. 2225641 dated 24.06.2017, on the basis of the Assessable Value thereof as ascertained at **Para 6.2 above**, are calculated in **Annexure IV** attached to the Show Cause Notice. Therefore, in place of duty levied amounting to Rs. 52,065/- levied in the Bill of Entry No. 2225641 dated 24.06.2017, duties of customs, aggregating to **Rs. 8,68,707/-** (as detailed in Annexure IV), are required to be levied and demanded, jointly and severally, from Shri Sunil Garg and M/s. Rasna Corporation, Mumbai, as per provisions of Section 28(4) of Customs Act, 1962 along with applicable interest in terms of Section 28 AB of Customs Act, 1962. Exemption from Customs Duty, in terms of Notification No. 46/2011-Cus dated 01.06.2017 on the basis of Country of Origin (RUD No. 13 of the SCN), had been claimed in respect of subject import goods imported under Invoice No. 0241 dated 30.05.2017 (RUD No. 14 of the SCN) at the time of clearance. The description of goods, their quantity, as mentioned in said Invoice, have been found to be false in light of Panchnama dated 29.06.2017 and as such said Invoice appear to be false / incorrect. Therefore, benefit claimed on the basis of apparently false / incorrect documents is liable to be denied for the subject goods and differential duties of customs, in **Annexure IV**, have been ascertained accordingly.

Confiscation of goods

7. From the facts and evidences discussed above at Para 5.1 to 5.3, Bill of Entry No. 2225641 dated 24.06.2017 was filed seeking clearance of 16852 Kilograms of "Cocoa Husk (Non Edible and Industrial use only) (consumption to generate thermal energy)". However upon physical examination, the actual goods were found to be as under

1. Mixture of Cocoa Husk and Cocoa Powder	-8,610 Kgs
2. Cocoa Powder	-5,642 Kgs
3. Cocoa Powder Mix With Fat (Chocolate Slab/Paste)	-2,578 Kgs

Cocoa Powder and Chocolate Paste were not declared in Bill of Entry or in import documents. Nor were said two products declared in the IGM filed in respect of subject consignment. Even the Cocoa husk has been found to be mixture of Cocoa Husk and Cocoa Powder. Moreover, bags of Cocoa Powder and that of Chocolate Paste were found concealed behind three rows of bags of Mixture of Cocoa Husk and Cocoa Powder separated by corrugated sheet. Since, the Bill of Entry No. 2225641 dated 24.06.2017 was filed for whole consignment consisting of three different products by declaring only one product in the documents, it involved attempt to illegally remove other two products i.e. Cocoa Powder and Chocolate Paste from Customs Area without permission of proper officer. Still further, 8,610 Kgs of Cocoa Husk packed in 223 bags was used to conceal Cocoa Powder and Chocolate Paste. In view of the above, products covered under Bill of Entry No. 2225641 dated 24.06.2017 have been rendered liable to confiscation as per following provisions of Customs Act, 1962

Table 6

Product Name	Quantity (Kgs)	Assessable Value (Rs.)	Liable for confiscation under Customs Act, 1962	Reason for confiscation
1	2	3	4	5
Mixture of Cocoa Husk as per Testing	8,610	2,01,474/-	i. Section 111 (m) ii. Section 119	Quantity and Value of goods mis-declared. Subject Goods were used to conceal other two products.
Cocoa Powder	5,642	8,61,985/-	i. Section 111 (f) ii. Section 111 (i)	Subject two products were not mentioned in IGM The subject two products were found concealed behind bags of Cocoa Husk.
Cocoa Powder Mix With Fat (Chocolate Slab/Paste)	2,578	5,58,988/-	iii. Section 111 (j) iv. Section 111 (l)	Whole consignment imported in container No. OOLU1308628 was sought clearance under Bill of Entry No. 2225641 dated 24.06.2017. Since these two products were not declared in Bill of Entry, the said goods were attempted to be removed from customs area without permission of proper officer of Customs. Subject two products were not included / declared in the Bill of Entry.

Roles of various persons and penalties:

8.1 As discussed at Para 5.1 to 5.3 and at Para 7 above, Cocoa Powder and Chocolate Paste were smuggled into India concealed behind bags of Cocoa Husk and were attempted to be cleared illegally vide Bill of Entry No. 2225641 dated

24.06.2017 by declaring description of whole consignment as “Coca Husk goods as “Cocoa Husk (Non Edible and Industrial use only) (consumption to generate thermal energy)”. As such all three types of products i.e. Cocoa Husk, Cocoa Powder and Chocolate Paste have been rendered liable to confiscation as per various provisions of Customs Act, 1962 as mentioned in Table 6 at Para 7, above. Shri Shekdar Rashid, Proprietor of M/s. Rasna Corporation, Mumbai admitted in his voluntary statement that the consignment belonged to Shri Sunil Garg who had purchased said consignment and approached Shri Shekdar Rashid to filed Bill of Entry in the name of M/s. Rasna Corporation, Mumbai. Shri Shekdar Rashid admitted that for said purpose he was to get 5% of assessable value of the goods. Shri Shekdar Rashid lent his IEC and authorized illegal clearance of subject import goods by allowing filing Bill of Entry No. 2225641 dated 24.06.2017 in the name of M/s. Rasna Corporation, Mumbai. Shri Sunil Garg, in his statement has stated that decision to mis-declare goods in Bill of Entry No. 2225641 dated 24.06.2017 was taken mutually by him and Shri Shekdar Rashid. Even otherwise, he allowed use of IEC for clearance of import consignments which was not purchased and imported by him. These acts of commission and omission on his part have rendered goods covered under Bill of Entry No. 2225641 dated 24.06.2017 (i.e. mentioned in column 1 to 3 of Table 6) liable to confiscation under various provisions of Customs Act, 1962 as mentioned in column 4 and 5 of Table 6 above and Shri Shekdar Rashid liable to penalty under Section 112 (a) of Customs Act, 1962. Further, Shri Shekdar was aware that Invoice No. 241 dated 30.05.2017 did not reflect true and correct description and value of the goods imported in container No. OOLU1308628. Despite being aware that said Invoice was other connected documents were not true and correct documents, he allowed use of said documents in illegal clearance of subject import goods and thereby rendered himself liable to penalty under Section 114 AA of Customs Act, 1962.

8.2 As stated by him in his statement recorded under Section 108 of Customs Act, 1962, Shri Sunil Garg purchased the consignment consisting of Cocoa Husk, Cocoa Powder and Chocolate Paste. However he imported said consignment as Cocoa Husk thereby smuggling Cocoa Powder and Chocolate Paste concealed behind Cocoa Husk. He, then, in connivance with Shri Shekdar Rashid, attempted to clear the whole consignment as Cocoa Husk under Bill of Entry No. 2225641 dated 24.06.2017. These actions on part of Shri Sunil Garg have rendered goods covered under Bill of Entry No. 2225641 dated 24.06.2017 (i.e. goods mentioned in column 1 to 3 of Table 6) liable to confiscation under various provisions of Customs Act, 1962 as mentioned in column 4 and 5 of Table 6 above and Shri Sunil Garg liable to penalty under Section 112 (a) of Customs Act, 1962. Further, Shri Sunil Garg caused preparation of Invoice No. 241 dated 30.05.2017 and other connected import documents which reflected false and incorrect description and value of the goods imported in container No. OOLU1308628 and used said documents in clearance of subject goods from Customs. As such Shri

Sunil Garg has rendered himself liable to penalty under Section 114 AA of Customs Act, 1962. Further, as discussed at Para 6.4 above, since, duties of customs, aggregating to **Rs. 8,68,707/-** are required to be levied and demanded, jointly and severally, from Shri Sunil Garg and M/s. Rasna Corporation, Mumbai, as per provisions of Section 28(4) of Customs Act, 1962, Shri Sunil Garg and M/s. Rasna Corporation, Mumbai, are also liable to penalty as per provisions of Section 114 A of Customs Act, 1962.

9. On the basis of above investigations, Show Cause Notice from F. No. DRI/AZU/GRU-64/Rasna/Int-33/2017 dated 19.12.2017 was issued by the Joint Director, Directorate of Revenue Intelligence (DRI) Zonal Unit, Ahmedabad, vide which-

9.1 Shri Sunil Garg, resident of 1/6959/17, East Rohtash Nagar, Shadhara, Delhi - 110032 and **M/s. Rasna Corporation**, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706 were jointly and severally called upon to show cause in writing to the Additional/Joint Commissioner of Customs, Mundra within thirty days from the receipt of this notice as to why :

- (a) Cocoa Husk, Cocoa Powder, Chocolate Paste (as mentioned in Column 1 to 3 of Table 6 at Para 7) should not be confiscated under provisions of Section 111 (f), 111 (i), 111 (j), 111 (l), 111 (m) and Section 119 of Customs Act, 1962 (i.e. as mentioned in Column 4 of Table 6, respectively).
- (b) Assessment done in Bill of Entry No. 2225641 dated 24.06.2017 should not be rejected and the said Bill of Entry be re-assessed for three separate products as mentioned in Column No. 3 to 7 of Annexure IV and duty aggregating to **Rs. 8,68,707/-** (as detailed in Column 8 to 12 of Annexure IV) should not be levied and demanded from them under Section 28 (4) of the Customs Act, 1962, along with applicable interest under Section 28 AA of the Customs Act, 1962.
- (c) Penalty should not be imposed on them under Section 114 A of the Customs Act, 1962.

9.2 Shri Sunil Garg, resident of 1/6959/17, East Rohtash Nagar, Shadhara, Delhi - 110032, vide said SCN F. No. DRI/AZU/GRU-64/Rasna/Int-33/2017 dated 19.12.2017 was called upon to show cause in writing to the Additional /Joint Commissioner of Customs, Mundra as to why:

- (a) Penalty should not be imposed on him under Section 112 (a) of the Customs Act, 1962.
- (c) Penalty should not be imposed on him under Section 114 AA of the Customs Act, 1962.

9.3 Shri Shekdar Rashid, Proprietor of M/s. Rasna Corporation, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706, vide said SCN F. No. DRI/AZU/GRU-64/Rasna/Int-33/2017 dated 19.12.2017 was called upon to show cause in writing to the Additional /Joint Commissioner of Customs, Mundra as to why:

- (a) Penalty should not be imposed on him under Section 112 (a) of the Customs Act, 1962.
- (b) Penalty should not be imposed on him under Section 114 AA of the Customs Act, 1962.

DEFENCE REPLY:

10. Ria Chanda, Advocate on behalf of the Noticee Shri Sunil Garg, filed reply to the Show Cause Notice vide their letter dated 25.04.2019 wherein, inter alia, they stated as under-

- i) During the course of investigation, Shri Shekdar Nuruddin Rashid, Proprietor of M/s Rasna Corporation informed that the goods were purchased by Shri Sunil Garg, the Noticee, that said Noticee had asked him to clear his (Sunil Garg's) consignment in his (Rashid's) name, that he was to get only 5% of the value of the goods. Further, DRI Officers pressurized and threatened the Noticee Shri Sunil Garg to accept their dictated terms/version and obtained his signature on some written statements on 24.08.2017 typed at the DRI printer. At the end of the statement, they also pressurized him to write certain sentences in his own hand writing. Thus, the said so called statement of the Noticee was involuntarily.
- ii) Noticee respectfully submits that the Show Cause Notice is patently misconceived being contrary to the facts of the case and attendant provisions of law and hence deserves to be dropped in limine.

Noticee is not liable to pay duty

- iii) As per Section 2(26) of the Customs Act, 1962 "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, beneficial owner or any person holding himself out to be the importer". In the instant case, goods are still pending for customs clearance. Noticee has never claimed the ownership or beneficial ownership of the goods. Also, he is not connected with the instant goods. The whole case of the Department against the Noticee is based on the statements dated 24.08.2017 of Shri Shekdar Nuruddin Rashid, Proprietor of M/s Rasna Corporation and the Noticee. As already submitted Noticee was harassed, threatened to dire consequences and coerced to sign on

the typed statement prepared on DRI's computer. Even there are contradictions in the statements of the said two persons inasmuch as Shri Shekdar Nuruddin Rashid in his statement dated 24.08.2017 has stated that he was to get only 5% of the value of the goods imported while the Noticee in his statement dated 24.08.2017 has repeatedly stated that "I was to get 5% of price of consignment which Rashid would have earned." Thus, both of them were claiming that they were to get only 5% of the value of the imported goods. It is settled that such contradictory statements have no evidentiary value.

- iv) M/s Bhagya Shipping were the Customs Broker in the matter who had filed the Bills of Entry for clearance of the goods. Statement of Shri Insaf Mohammad Qureshi, the Proprietor of the said concern was recorded on 25.07.2017 running into 1 to 4 pages wherein at no place he had named the Noticee to be the importer in the matter or the Noticee had asked him to file the Bill of Entry. Therefore, the Noticee is not the person chargeable with duty as envisaged under Section 28 read with Section 2 (26) of the Act. No duty demand could be fasten against the Noticee. It is M/s Rasna Corporation, who are the importer and person chargeable with duty in the matter.
- v) It is settled that no case can be made only on the basis of statement. There needs some positive evidence to establish any issue. Hon'ble Supreme Court in the matter of Union of India Vs. Bal Mukund and Others – (2009) 12 Supreme Court Cases 161 has held that "conviction should not be based merely on the basis of a statement without any independent corroboration, especially when retracted; confessional statement of co-accused cannot be taken as substantial evidence against other co-accused in the absence of independent corroboration." Further, Hon'ble High Court of Gujarat, in the matter of Commissioner of Central Excise Vs. Saakeen Alloys Pvt. Ltd. - 2014 (308) ELT 655 Guj.) has held that confessional statements cannot form the foundation for levying excise duty, much less retracted statements. There needs to be positive evidence for establishing the evasion. The said order of the Hon'ble High Court has been upheld by the Hon'ble Supreme Court as reported in 2015 (319) ELT A117 (S.C.). Further, in the matter of Commissioner of Central Excise Vs. Shakti Zarda Factory (I) Ltd. reported in 2015 (321) ELT 438 (Del.) Hon'ble High Court of Delhi has held that "Evidentiary value of retracted statement under Section 14 of Central Excise Act, 1944, revenue not discharged its burden by corroborative evidence such as clandestine purchase of raw materials and manufacture and removal of finished product – Dealer's statement under Section 14 ibid which stands retracted not admissible in evidence in absence of any corroboration thereof." The said order of the Hon'ble High Court has been upheld by the Hon'ble Supreme Court as reported in 2015 (321) ELT A-210 (S.C.). In view of aforesaid, only on the basis of retracted and contradictory statements, no duty or penal liability could be fastened against the Noticee.

Duty demand jointly is not sustainable in the eyes of law.

vi) Noticee submits that Noticee along with M/s Rasna Corporation jointly and severally has been demanded a duty amount of Rs. 8,68,707/-. It is settled law that no liability could be fixed jointly without any apportionment of the same. Hon'ble Supreme Court in the matter of Gajanan Fabrics Distributors Vs. Collector of Central Excise Pune-1997(92) ELT 451(S.C.) has held that "the Tribunal failed to give due attention to the fact that the Collector had confirmed, in the sum of Rs. 11,84,708.51/-, the demand made in the Show Cause Notice upon all seven units and their partners or Directors. Having regard to his conclusion that all units other than Gajanan Weaving Mills were fictitious units, the sequitur, one would have assumed could only be that it was Gajanan Weaving Mills which was the assessee and liable to satisfy the demand. By confirming the demand upon all the seven units, the Collector appears, however, to have treated them all as assesses and, implicitly recognized their independent existence". Also, in the matter of Expansion Fastner Bold (I) Pvt. Ltd. Vs. Commissioner of Central Excise, Mumbai III-2005 (185) ELT 72 (Tri. Mumbai), Hon'ble CESTAT has held that "The person mentioned in Section 11A of the Central Excise Act is required to be determined by the adjudicator and specified in the order. Since this has not been done the order of both the authorities below are set aside and matter remanded back to the Joint Commissioner, with direction to rehear the Appellant and thereafter re-determine the issues." Similar views have been held by the Hon'ble CESTAT in under mentioned cases:

- i) Hardic Food Industries – 2009 (243)ELT 322 (Tribunal).
- ii) Kiran Biscuits and Foods Pvt. Ltd. – 2005 (179) ELT 566 (Tribunal).
- iii) Highland Dye Works Pvt. Ltd. –2000 (121) ELT 502(Tribunal)

In view of above, joint demand in the matter cannot be countenanced. The duty demand, if any, may be made from M/s Rasna Corporation only who have imported the goods in their own IEC.

Cross examination of Shri Shekdar Nuruddin Rashid.

(vii) The whole case of the Department evolves around the self statement of the Noticee and that of Shri Shekdar Nuruddin Rashid. It has already been submitted that Noticee's statement was taken per force and therefore the same has been retracted by the Noticee. Shri Shekdar Nuruddin Rashid in his statement dated 24.08.2017 indicting the Noticee has stated that the goods were purchased by Shri Sunil Garg who had asked him to clear his consignment in his (Rashid's) name and that Sunil had promised him to give 5% of the value of the goods. In view of the same, Noticee requests the cross examination of said Shri Shekdar Nuruddin Rashid, Proprietor of M/s Rasna Corporation to ascertain

the veracity of his statement.

(viii) Noticee submits that in terms of the provisions of Section 138B of the Act, the cross examination of the persons whose statement has been relied upon by the Department cannot be refused unless the Adjudicating Authority had after hearing the party given a finding to the effect that the presence of the witnesses cannot be obtained without undue delay or expense which the officer concerned considers unreasonable. Also, in terms of said Section the Adjudicating Authority before relying upon the statement of a witness against a Noticee, has to ascertain its correctness by examining him and permitting his cross examination. Therefore, the examination in chief of the persons whose statements have been relied upon in the Show Cause Notice are essential to ascertain the truth. In view of above, cross examination of said Shri Shekdar Nuruddin Rashid may be allowed

Penalty is not imposable on the Noticee under Section 114A of the Customs Act, 1962 as Noticee is not a person liable to pay duty.

(ix) Under the provision of Section 114A of the Act where the duty has not been levied or has been short levied by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay duty or interest shall also be liable to pay a penalty equal to duty so determined. In the instant case, as discussed in detail under para 4 above, Noticee is not a person liable to pay duty, therefore, no penalty could be imposed upon the Noticee under Section 114A of the Act.

Penalty is not imposable on the Noticee under Section 112(a) of the Act

(x) Under the provision of Section 112 (a) of the Act, any person who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act is liable for penalty as understood therein. In the instant matter Noticee is neither importer nor has abetted the importer M/s Rasna Corporation in doing any act of omission in any way. Therefore, no penalty could be imposed upon Noticee under Section 112(a) of the Act.

(xi) Further, they have submitted that as per 5th proviso of Section 114A of the Act where any penalty has been levied under this Section, no penalty shall be levied under Section 112 or Section 114. In view of aforesaid, provisions of Section 112 and that of Section 114A are mutually exclusive.

(xii) Otherwise, also penalty cannot be imposed for the sake of imposing penalty. In this regard, the Noticee relies upon the case of Akbar Baddrudin Jiwani Vs. C.C. reported in 1990 (47 (ELT 161 (SC)), wherein the Hon'ble Supreme Court held that "the discretion to impose penalty must be exercised judiciously. A penalty will ordinarily be imposed in cases where party acts deliberately in defiance of law or guilty of contumacious or dishonest conduct or acted in conscious disregard of its Application but not in cases where there is technical

or venial breach of the provisions of the Act or where the breach flows from bona fide belief that he is not liable to act in the manner prescribed in the statute. In the case of Hindustan Steel V/s State of Orissa 1978 (2) ELT J 159 (SC), it was held that an order imposing penalty for failure to carry out the statutory obligation is the result of quasi criminal proceedings and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. In Summeet Industries Ltd. V/s Commissioner of C. Ex., Surat reported in 2004 (164) E.L.T 335 (Tri. Mumbai), the tribunal held that "Power to levy the penalty should not be ordinarily imposed unless there is a deliberate defiance of law or contumacious or dishonest conduct or as conscious disregard to an obligation is established in the facts of a case". In the case of "GODREJ SOAPS LTD. V/S COMMISSIONER OF CENTRAL EXCISE, MUMBAI" reported as 2004 (170) ELT 102 (Tri. Mumbai), the Hon'ble CESTAT has observed that, "Penalty cannot be imposed just because it is provided for in the rules, there has to be a consideration of the conduct and the circumstances in which the violation took place cannot be ignored." In, ASIAN PAINTS (INDIA) LTD. V/S COMMISSIONER OF C. EX., HYDERABAD –I" reported in 2004 (167) E.L.T. 224 (Tri. Mumbai), it has been observed by the Hon'ble Tribunal that, "Penalty imposition powers are not a crop given in the hands of the officers to crack at every opportunity. Penalty is therefore not upheld in the facts of the case."

Penalty not imposable on the Noticee under Section 114AA of the Act

- (xiii) Noticee submits that the provisions of Section 114AA provide for imposition of penalty on a person who knowingly or intentionally makes, signs or uses any declaration, statement or documents which is false or incorrect in any material particular in the transactions of any business under the Customs Act while in the instant matter, Noticee has no knowledge about the import of the instant goods. Also, he had neither signed, made, used or caused to be signed, made or used any document, declaration or statement which were false are incorrect.
- (xiv) It is submitted that penalty under Section 114AA will be applicable only to those cases where export benefits are claimed without exporting the goods and presenting forged documents knowingly or intentionally while the instant one is not such a matter. It is pertinent to mention the intention of the legislature behind inserting Section 114AA. In twenty seventh report of the standing committee of finance, insertion of Section 114AA was discussed at paragraph 62. For the ease of perusal the entire discussion is reproduced below:

Clause 24 (Insertion of new Section 114AA)

62. Clause 24 of the Bill reads as follows:

After Section 114A of the Customs Act, the following Section shall be

inserted, namely:-

"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.

63. The information furnished by the Ministry states as follows on the proposed provision:

"Section 114 provides for penalty for improper exportation of goods. However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulators could escape penal action even when no goods were actually exported. The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and for giving false statements, declarations, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty upto 5 times the value of goods. A new section 114AA is proposed to be inserted after Section 114A."

64. *It was inter alia expressed before the committee by the representatives of trade that the proposed provisions were very harsh, which might lead to harassment of industries, by way of summoning an importer to give a false statement' etc. Questioned on these concerns, the Ministry in their reply stated as under."*

"The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported but papers are being created for availing the benefits under various export promotion schemes. The apprehension that an importer can be summoned under Section 108 to give a statement that the declaration of value made at the time of import was false etc., is misplaced because persons summoned under Section 108 are required to state the truth upon any subject respecting which they are being examined and to produce such documents and other things as may be required in the inquiry. No person summoned under Section 108 can be coerced into stating that which is not corroborated by the documentary and other evidence in an offence case."

65. The Ministry also informed as under;

"The new Section 114AA has been proposed consequent to the detection of several cases of fraudulent export where the exports were shown only on paper and no goods crossed the Indian border. The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported, but papers are being created for availing the number of benefits under various export promotion schemes."

66. *The committee observes that owing to the increased instances of willful fraudulent usage of export promotion schemes the provisions of levying of penalty upon five times the value of goods has been proposed. The proposal appears to be in the right direction as the offences involve criminal intent which cannot be treated at par with other instances of evasion of duty. The committee, however, advice the Government to monitor the implementation of the provision with due diligence and care so as to ensure that it does not result in undue harassment."*

(Emphasis supplied)

The aforesaid extract from the report of the standing committee explains the purpose for which Section 114AA has been inserted in the Customs Act. The purpose is to punish those people who avail export benefits without exporting anything. It is thus submitted that Section 114AA has been introduced to counter serious frauds not every kind of violations under Customs Act. The perusal of the aforesaid extract makes it clear that Section 114AA was inserted to penalize in circumstances where export benefits are availed without exporting any goods which is not the case here. In the light of aforesaid discussion, it is vehemently submitted that in the present case Section 114AA is not invocable against Shri Sunil Garg, the Noticee. Annexed hereto is a copy of 27th report of Standing Committee on Finance (2005-2006) Fourteenth Lok Sabha marked as Annexure-1.

(xv) Hon'ble Supreme Court in case of Loka Shikshana Trust V. CIT reported in AIR 1976 SC 10, Indian Chamber of Commerce V. Commissioner of Income Tax reported in AIR 1976 SC 348 and Additional Commissioner of Income Tax Vs. Surat Art Silk Cloth Manufacturers' Association reported in AIR 1980 SC 387 Novartis AG v Union of India (2013) 6 SCC 1 relied upon the speeches made by the Finance Minister for the purpose of ascertaining what was the reason for introducing a particular clause. In view of recent Constitution Bench Judgment of the Hon'ble Supreme Court, in case of Kalpana Mehta Vs Union of India & Ors. (W.P. (C) 558 OF 2012), Hon'ble Apex Court has held that Parliamentary committee report, is to be considered to see the purpose for which a statutory provision has been brought in. Thus, in view of parliamentary standing committee report on introduction of Section 114AA, penalty cannot be

imposed upon Noticee under Section 114AA.

(xvi) At the cost of repetition, Noticee requests the cross examination of Shri Shekdar Nuruddin Rashid, the Proprietor of M/s Rasna Corporation as mentioned under para 7 above, a final reply in the matter will be submitted upon completion of cross examination of said Shri Rashid.

(xvii) In view of above, Noticee requests Hon'ble Additional Commissioner to drop the instant Show cause Notice and proceedings against the Noticee emanating therefrom.

11. **Shri Shekdar Rashid, Proprietor of M/s Rasna Corporation**, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706, have not filed any defence reply on behalf of self as well as M/s Rasna Corporation.

PERSONAL HEARING:

12. Personal Hearing in the instant case was first fixed on 27.03.2019. None of the noticees turned up for the Personal Hearing on the said date. However, Advocate Reena Rawat, on behalf of the Noticee Shri Sunil Garg, vide their letter dated 27.03.2019 requested for adjournment to some other date due to some personal difficulty. Another dates for personal hearing were fixed on 18.04.2019 and thereafter on 25.04.2019. Again no one appeared for Personal Hearing on the said dates, however, an interim reply dated 25.04.2019 to the SCN, on behalf of Shri Sunil Garg had been received from Advocate Ria Chanda (Piyush Kumar & Associates). Thereafter, Personal Hearing was fixed on 15.05.2019 and 30.05.2019 but again none of the noticees turned up for the same. Further, in view of the defence reply dated 25.04.2019 of Advocate Ria Chanda, on behalf of Shri Sunil Garg, cross-examination of Shri Shekdar Rashid, Proprietor of M/s Rasna Corporation had been fixed on 24.06.2019. Reena Rawat, Advocate, appeared for cross examination on 24.06.2019 on behalf of Shri Sunil Garg. But Shri Shekdar Rashid did not appear for the same. Advocate Reena Rawat requested that, since Shri Shekdar Rashid has not come for cross-examination today, therefore, Personal Hearing may be granted in the matter on same day i.e., 24.06.2019 and adjudicating authority may hear the noticee on merit and & requested to conclude the matter on the basis of their submissions. She also stated that no further personal hearing in the matter is required. As per the request, the personal hearing was held on 24.06.2019. During said personal hearing, Reena Rawat, Advocate reiterated the contents of their written submission dated 25.04.2019. She pointed out that there are many contradictions in the statement and there is no evidence against their client.

DISCUSSION & FINDINGS:

13. I have carefully gone through the records of the case, including the Show Cause Notice dated 19.12.2017 and the written submission dated 25.04.2019 as well as the oral submissions made during the course of personal hearing held on 24.06.2019. Hence, I proceed to decide the case on the basis of available records.

14. I find that the following main issues are involved in the subject Show Cause Notice, which are required to be decided-

- (i) Whether Cocoa Husk, Cocoa Powder, Chocolate Paste (as mentioned in Column 1 to 3 of Table 6 at Para 7 of the SCN) are required to be confiscated under provisions of Section 111 (f), 111 (i), 111 (j), 111 (l), 111 (m) and Section 119 of Customs Act, 1962 (i.e. as mentioned in Column 4 of Table 6, respectively).
- (ii) Whether assessment done in Bill of Entry No. 2225641 dated 24.06.2017 is required to be rejected and the said Bill of Entry is required to be re-assessed for three separate products (as mentioned in Column No. 3 to 7 of Annexure IV) and duty aggregating to **Rs. 8,68,707/-** (as detailed in Column 8 to 12 of Annexure IV) is required to be levied and demanded from them under Section 28 (4) of the Customs Act, 1962, along with applicable interest under Section 28 AA of the Customs Act, 1962.
- (iii) Whether penalty is required to be imposed on importer under Section 114 A of the Customs Act, 1962.
- (iv) Whether penalty is required to be imposed on **Shri Sunil Garg** under Section 112 (a) of the Customs Act, 1962.
- (v) Whether penalty is required to be imposed on **Shri Sunil Garg** under Section 114 AA of the Customs Act, 1962.
- (vi) Whether penalty is required to be imposed on **Shri Shekdar Rashid**, Proprietor of M/s. Rasna Corporation under Section 112 (a) of the Customs Act, 1962.
- (vii) Whether penalty is required to be imposed on **Shri Shekdar Rashid**, Proprietor of M/s. Rasna Corporation under Section 114 AA of the Customs Act, 1962.

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

16. Confiscation of goods

16.1 The first issue to be decided is whether Cocoa Husk, Cocoa Powder, Chocolate Paste (as mentioned in Column 1 to 3 of Table 6 at Para 7 of the SCN) are required to be confiscated under provisions of Section 111 (f), 111 (i), 111 (j), 111 (l), 111 (m) and Section 119 of Customs Act, 1962 (i.e. as mentioned in Column 4 of Table 6, respectively).

In the context of this issue, I find that subject import goods were sought clearance in the name of M/s. Rasna Corporation, Mumbai vide Bill of Entry No. 2225641 dated 24.06.2017 as "Cocoa Husk (Non Edible and Industrial use only) (consumption to generate thermal energy)". However, physical examination of goods by DRI officers under Panchnama dated 29.06.2017 revealed that there were three types of goods in the container, as under-

1. Mixture of Cocoa Husk and Cocoa Powder -8,610 Kgs
2. Cocoa Powder -5,642 Kgs
3. Cocoa Powder Mix With Fat (Chocolate Slab/Paste) -2,578 Kgs

I further find that the representative samples drawn from the each of the three types of goods have been tested at Food and Drug Laboratory, Vadodara. The said laboratory has opined the goods to be 1. **Mixture of Cocoa Husk and Cocoa Powder**, 2. **Cocoa Powder** and 3. **Cocoa Powder mix with fat (Chocolate Slab)**. The summary of different types of goods found during Panchanama as per their description confirmed by Food and Drug Laboratory, Vadodara is as under:

Sr. No.	Type of cargo as per appearance	Found in the rows (from Container Gate)	Description confirmed by Testing	Weight (in MTS)
1.	Brown Coloured Dry Husky	First Three Rows	mixture of cocoa husk and cocoa powder	8.610
2.	Dark Brown Coloured Powder	Middle Rows	cocoa powder	5.642
3.	Dark Brown/Black Thick Paste	Last Two Rows	cocoa powder mix with fat (Chocolate Slab)	2.578
Total Weight				16.830

I find that Cocoa Powder and Chocolate Paste were not declared in Bill of Entry or in import documents. Nor were said two products declared in the IGM filed in respect of subject consignment. Even the Cocoa husk has been found to be mixture of Cocoa Husk and Cocoa Powder. Moreover, I find that bags of Cocoa Powder and that of Chocolate Paste were found concealed behind three rows of bags of Mixture of Cocoa Husk and Cocoa Powder separated by corrugated sheet. I find that Shri Sunil Garg has also admitted in his statement dated 15.09.2017 recorded under Section 108 of Customs Act, 1962 that import consignment consisted of three items i.e. Cocoa Husk, Cocoa Powder and Chocolate Paste. These are the same items which have been independently confirmed by Food and Drug Testing Laboratory, Vadodara to be three types of items examined under Panchanama dated 29.06.2017. It, therefore, clearly emerges that description of subject import goods were mis-declared as "Cocoa Husk

(Non Edible and Industrial use only) (consumption to generate thermal energy)". Since, the Bill of Entry No. 2225641 dated 24.06.2017 was filed for whole consignment consisting of three different products by declaring only one product in the documents, it involved attempt to illegally remove other two products i.e. Cocoa Powder and Chocolate Paste from Customs Area without permission of proper officer. Still further, 8,610 Kgs of Cocoa Husk packed in 223 bags was used to conceal Cocoa Powder and Chocolate Paste.

In view of the above, I find that the products covered under Bill of Entry No. 2225641 dated 24.06.2017 are liable to confiscation as per following provisions of Customs Act, 1962

Product Name	Quantity (Kgs)	Assessable Value (Rs.)	Liable for confiscation under Customs Act, 1962	Reason for confiscation
1	2	3	4	5
Mixture of Cocoa Husk as per Testing	8,610	2,01,474/-	i. Section 111 (m) ii. Section 119	Quantity and Value of goods mis-declared. Subject Goods were used to conceal other two products.
Cocoa Powder	5,642	8,61,985/-	i. Section 111 (f) ii. Section 111 (i)	Subject two products were not mentioned in IGM
Cocoa Powder Mix With Fat (Chocolate Slab/Paste)	2,578	5,58,988/-	iii. Section 111 (j) iv. Section 111 (l)	The subject two products were found concealed behind bags of Cocoa Husk. Whole consignment imported in container No. OOLU1308628 was sought clearance under Bill of Entry No. 2225641 dated 24.06.2017. Since these two products were not declared in Bill of Entry, the said goods were attempted to be removed from customs area without permission of proper officer of Customs. Subject two products were not included / declared in the Bill of Entry.

In view of above, I hold that Cocoa Husk, Cocoa Powder, Chocolate Paste (as mentioned in Column 1 to 3 of Table 6 at Para 7 of the SCN) are liable for confiscation under provisions of Section 111 (f), 111 (i), 111 (j), 111 (l), 111 (m) and Section 119 of Customs Act, 1962 (i.e. as mentioned in Column 4 of Table 6 of the SCN, respectively).

16.2 However, I find that there is a difference between “confiscation” and “liable for confiscation”. It is settled law that that the goods which are “liable for confiscation” can be ordered for to be confiscated, and fine in lieu of confiscation can be imposed. Mis-declaration of the description, value of the imported goods etc. are one of the modalities to derive illegal benefit by evasion of customs duty. In cases where description, value of the imported goods are not correctly declared for some purpose, then it would not only amount to violation of the conditions for import/export of the goods but it would certainly amount to illegal/unauthorized imports and against the statute.

16.3. As the subject goods are found “liable for confiscation” under the provisions of Section 111 (f), 111 (i), 111 (j), 111 (l), 111 (m) and Section 119 of Customs Act, 1962, I find it necessary to consider as to whether redemption fine under Section 125 of the Customs Act, 1962 is liable to be imposed.

The Section 125 of the Customs Act, 1962 -Option to pay fine in lieu of confiscation stipulates as under-

(1) Whenever confiscation of any goods is authorized 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 1[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: Provide that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of of imported goods the duty chargeable thereon. 2(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods]

Further, Hon'ble Supreme Court in case of Commissioner of Customs, Ahmedabad Vs M/s Jayant Ointments Pvt Ltd[(100) ELT 10] and Jain Exports Pvt Ltd Vs UOI[1996(66) ELT 537] has held that quantum of redemption fine depends on facts and circumstances of each case and no hard and fast rules may be laid down. Fine could be imposed even in cases of bonafide imports. However, Section 125 of the Customs Act, 1962 provides that such fine shall not exceed the market price of the goods less the duty chargeable thereon and working rule could be to levy redemption fine so as to neutralize any benefit that may accrue to the importer from such illegal act of importation of impugned goods. In view of the above

narrated facts, I hold that M/s Rasna Corporation, Mumbai is liable for redemption fine under Section 125 of the Customs Act, 1962 in lieu of confiscation.

17. Rejection of value declared before Customs and re-determining assessable value of the goods, classification of goods and demand of differential duty:

17.1 I find that the Section 14 of Customs Act, 1962 stipulates that the value of the imported goods shall be the transaction value of such goods, i.e. the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation. I find that in the present consignment, 5.642 MT of Cocoa Powder and 2.578 MT of Chocolate Paste were also found concealed behind declared goods i.e. Cocoa Husk. There is huge difference in price of Cocoa Husk and that of Cocoa Powder and Chocolate Paste. While Cocoa Husk is a waste material, Cocoa Powder and Chocolate powder are used in preparation of premium products viz Chocolates, Ice Creams, Bakery products, Beverages etc. Therefore, transaction value declared for purchase of Cocoa Husk can't be accepted as transaction value for Cocoa Powder and Chocolate Paste. As such value declared before Customs in Bill of Entry No. 2225641 dated 24.06.2017 is liable to be rejected in terms of Section 14 of Customs Act, 1962 read with provisions of Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and their value is liable to be re-determined in terms of Section 14 of Customs Act, 1962 read with provisions of Rule 3(4) of Valuation Rules 2007 by proceeding sequentially through Rule 4 to Rule 9 of Valuation Rules 2007.

The valuation Rules provide that when there is reasonable doubt that the declared value does not represent the transaction value, where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with Rules 4 to 9. Therefore, now I proceed to examine applicability of Rules 4 to 9 sequentially. Rule 4 of the Valuation Rules provide for transaction value of identical goods and Rule 5 provides for transaction value of similar goods. I find that Shri Sunil Garg, in his statement recorded on dated 15.09.2017 under Section 108 of Customs Act, 1962 has stated that the subject goods were purchased from M/s. Vinco Palm Oil Sdn. Bhd., Malaysia. The subject goods have been imported packed in PP bags. The packing was non-standard. Further, the goods were un-branded. I find that the import data of all three types of goods has been retrieved from website of Directorate General of Valuation, Government of India, and is attached with the Show Cause Notice as Annexure I (Cocoa Husk), Annexure II (Cocoa Powder) and Annexure III (Chocolate Powder). Therefore, identical goods having all parameters are not available in the NIDB data. However, goods with similar description, same country of origin and imported during contemporary period for all three types of goods are available in the NIDB data of respective products. Therefore, value of all three types of import goods has to be determined as per provisions of Rule 5 of Valuation Rules 2007. Per kilogram assessable values of all three products i.e. Cocoa Husk, Cocoa

Powder and Chocolate Paste as per NIDB data in Annexure I, Annexure II and Annexure III of the SCN are tabulated below.

Sr. No.	Product Name	Assessable Value Rs./ Kg	Reference Bill of Entry & Date
1	Cocoa Husk	23.40	8930306/17.03.2017
2	Cocoa Powder	152.78	2233262/24.06.2017
3	Chocolate Paste	216.83	9574720/05.05.2017

While identifying similar goods, different aspects of reference consignments have been considered in the order viz Description of Goods, Branded / Un Branded, Unit of Quantity, Country of Origin, proximity to date of import of subject goods, Quantity of Goods.

17.2 I further find that Cocoa and Cocoa preparations are classified under an exclusive Chapter 18 of Customs Tariff. Customs Tariff Heading (“CTH” for short) 1802 covers “Cocoa Shells, husks, skins, and other cocoa waste”. One of the product in the consignments i.e. Cocoa Husk (mixture of Cocoa Husk and Cocoa Powder) is classifiable under Customs Tariff Item (“CTI” for short) 18020000. CTH 1805 covers “Cocoa Powder, not containing added sugar or other sweetening matter”. The second product of consignment i.e. Cocoa Powder thus merits classification under CTI 18050000. Further, CTH 1806 covers “Chocolate and other food preparations containing cocoa”. The third product i.e. Chocolate Slab /Paste, which was not imported in any standard packing, would merit classification under residuary CTI 18069090 under CTH 1806.

17.3 Now I come to the proposal in Show Cause Notice regarding demand of Customs duty of Rs.8,68,707/-under section 28(4) along with applicable interest under Section 28AA of the Customs Act,1962 jointly and severally from **Shri Sunil Garg**, resident of 1/6959/17, East Rohtash Nagar, Shadhara, Delhi - 110032 and **M/s Rasna Corporation**, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra.

In this regard, I find that on behalf of Noticee Shri Sunil Garg, the Advocate Ria Chanda in their defence reply vide letter dated 25.04.2019 have interalia submitted that the Noticee (Shri Sunil Garg) is not liable to pay the duty and also the duty demand jointly is not sustainable in the eyes of law as it is M/s Rasna Corporation, who are the importer and person chargeable with duty in the matter.

In context of their reply, I have gone through the definition of Importer as given in Section 2(26) of the Customs Act, 1962. I find that in terms of Section 2(26) of the Customs Act,1962, “Importer” in relation to any goods at any time between their importation and the time when they are cleared for home consumption,

includes [any owner, beneficial owner] or any person holding himself out to be the importer.

I further find that jointly and severally is a legal phrase which is used when two or more persons are held liable for an event, incident or contract breach. Under this legal phrase, any member can be held liable for the total damages arising from a lawsuit regardless of that persons individual responsibility for whatever went wrong. Also, the definition of joint and several liability as per Duhaime's Law Dictionary is "**Liability of more than one person for which each person is liable to pay back the entire amount of a debt or damages**". I therefore find that jointly and severally is a legal phrase that means two or more persons are fully responsible equally for the liability and each person is independently liable to pay the entire amount of debt or damages.

I find that the investigations have revealed that M/s. Rasna Corporation, Mumbai, was a surrogate importer and their IEC was used for import of the impugned goods by Shri Sunil Garg who was the financier and beneficiaries of the said transaction. However, in terms of Section 2(26)ibid, I find that the importer of the consignments covered under Bill of Entry No. 2225641 dated 24.06.2017 was M/s Rasna Corporation, Mumbai in as much as Shri Shekdar Rashid (Proprietor of M/s Rasna Corporation) consciously allowed the use of his IEC for the said imports. In view of the above facts, I find that in the instant case, M/s Rasna Corporation, is to be considered as the importer for the subject consignments. Consequently, the differential duties, along with interest, is required to be recovered from M/s Rasna Corporation, Mumbai. I further find that exemption from Customs Duty, in terms of Notification No. 46/2011-Cus dated 01.06.2017 on the basis of Country of Origin, had been claimed in respect of subject import goods imported under Invoice No. 0241 dated 30.05.2017 at the time of clearance. The description of goods, their quantity, as mentioned in said Invoice, have been found to be false in light of Panchanama dated 29.06.2017 and as such said Invoice appear to be false / incorrect. Therefore, benefit claimed on the basis of apparently false / incorrect documents is liable to be denied for the subject goods and differential duties of customs, in **Annexure IV**, have been ascertained accordingly. I, therefore, find that duties of customs, aggregating to **Rs. 8,68,707/-** (as detailed in Annexure IV attached to the SCN), is required to be paid by M/s. Rasna Corporation, Mumbai, under Section 28(4) of Customs Act, 1962 along with applicable interest in terms of Section 28 AA of Customs Act, 1962.

17.4 With regard to Noticee's defence that he was harassed, threatened to dire consequences and coerced to sign on the typed statement dated 15.09.2017 prepared on DRI's computer, I find that the statements recorded under Section 108 of the Customs Act, 1962 are considered as valid evidence in the legal proceedings and by mere retraction, the original statement does not lose all evidentiary value. Further, Shri Sunil Garg never ever after his statement dated 15.09.2017 under Section 108 of

the Customs Act, 1962 informed the authorities regarding the said threatening/harassment. It is only in his defence reply dated 25.04.2019 that he is making mention of the threatening/harassment, therefore, I Find that there is no merit in his narration. The allegation made by the noticee at the stage of adjudication that the statement had been obtained forcefully is nothing but an afterthought and can not be given cognizance. There is a catena of judgments on the acceptability of a statement given to a Custom Officer. I rely upon the pronouncements of the various judicial fora as under:-

- a. *Hon'ble Supreme Court's judgment in the case of Shaikh Mohammed Azam V Commissioner reported at - 2015(319) E.L.T. A 177 (S.C.) wherein the apex court has observed that the Bombay High Court in its impugned order had held that the appellants argument that penalty was not imposable for charge of smuggling on the ground that confessional statement of the main accused which formed the basis thereof had been retracted, was not acceptable as there were other independent materials which implicated the appellants and therefore no interference was warranted in the order of the Tribunal.*
- b. I also find that in *Re: G Subramaian; 2002 (142) ELT 224 (G.O.I)*, it is held that__

"7. Government observes that through sustained and well directed investigation, the Department was able to crack the organised gang which specialized in illegal exportation of foreign currency and import of foreign goods. The role of Shri G. Subramanian, in this organised activity is established by the investigation carried out. It has been held by the Hon'ble Supreme court of India that Customs officers are not police officers and therefore statements given before Customs Officers are valid as substantive evidence. It has been categorically held that statements mad before the customs official is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by the Custom officials under Section 108 of the Customs Act. Hon'ble Supreme Court had also held that the statements made before Customs Officers through retracted within six days is an admission and binding because it has been made before a Custom Officer and not a police officer. There aspects have been dealt with in detail by the Hon'ble Supreme Court in the judgements (i) Surjit Singh Chhabra Vs Union of India reported in 1997 (89) E.L.T. 646, Naresh J. Sukhawani Vs Union of India - 1996 (83) E.L.T. 258 (S.C.) etc.
- c. In case of *K.M.T.S. Mohammed and another Vs UOI reported at 1992 (40) ECC 352*, Hon'ble Supreme Court while considering the retraction of statement held that

"merely because a statement is retracted, it can not be recorded as involuntary and unlawfully obtained. It is only the maker of the statement who

alleges inducement, threat, promise etc. to establish that such improper means have been adopted. However, even if the maker of the statement fails to establish his allegations or inducement, threat etc. against the officer who recorded the statement, the authority, while acting on the inculpatory statement of the maker, is not completely relieved of his obligation at least subjectively to apply its mind to the subsequent retraction to hold that the inculpatory statement was not exhorted. It thus boils down to this that the authority or any court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing”.

- d. Surjeet Singh Chhabra Vs UOI, 1997 (89) ELT 646 (SC), wherein Hon’ble Apex Court has held as under:-

“But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violation of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority take a decision on proof of the offence. We find no force in this contention. The Customs Officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the petitioner”.

- e. In the case of Naresh Sukhawani Vs. UOI[1996(83) ELT 258(SC)] the Hon’ble Supreme Court has held that:

“.....It must be remembered that the statement made before the Customs Officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by the Custom Officials under Section 108 of the Customs Act. That material incriminates the petitioner inculcating him in the contravention of the provisions of the Customs Act, 1962.....”.

- f. In the case of Rajesh Tarachand Sajdeh V/s Collector of Customs, Bombay[1983(12) E.L.T.623(C.E.G.A.T.)], it was held that:

“ If the Appellant was summoned under Section 108 of the Customs Act under which he is required to give a correct statement, it can not be said that his statement was not voluntary and truthful when the statement was signed by him with the Certificate that the statement was read, correctly recorded and was made without force or coercion [para4]”

17.5 As regard request of Advocate of Shri Sunil Garg in their letter dated 25.04.2019 for cross-examination of Shri Shekdar Nuruddin Rashid, Proprietor of M/s Rasna Corporation to ascertain the veracity of his statement dated 24.08.2017, I find that date for the said purpose i.e. cross examination was fixed on 24.06.2019. Reena Advocate Rawat, appeared for cross examination on 24.06.2019 on behalf of Shri Sunil

Garg. She vide her letter dated 24.06.2019 requested that, since Shri Shekdar Rashid has not appeared for cross-examination therefore, Personal Hearing may be granted in the matter on same day i.e., 24.06.2019 and adjudicating authority may hear the noticee on merit and further stated that no further personal hearing in the matter is required & requested to conclude the matter on the basis of their submissions. Moreover, I find that in the instant case, the facts are well recorded in the documents relied upon in the Show Cause Notice and by cross examination, the facts of the case will not be altered. I also find that the Hon'ble Apex Court in the case of Kanungo Company-[1983(13)ELT 1486(SC)] and the Hon'ble High Court of Andhra Pradesh in the case of M/s Shalini Steels Pvt. Ltd. (supra) have held that there is no absolute right for cross examination and if sufficient corroborative evidence exist, cross examination of the deponent of the statement is not necessary.

18. Imposition of penalty on the importer M/s Rasna Corporation under Section 114A of the Customs Act, 1962

Now, I proceed to consider the proposal of penalty against the importer i.e. M/s Rasna Corporation. In this regard, I find that the demand of Customs duty total amounting to Rs. 8,68,707/- has been confirmed for recovery from M/s Rasna Corporation (proprietor Shri Shekdar Rashid) under Section 28(4) of the Customs Act, 1962, which provides for demand of duty not levied or short levied by reason of collusion or any willful mis-statement or suppression of facts. Hence, as a natural corollary penalty is imposable on the respective importer under Section 114A of the Customs Act, 1962, which provides for penalty equal to duty plus interest *in cases where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts*. In the instant case, the ingredients of willful mis-statement or suppression of facts by the importer M/s Rasna Corporation has been clearly established as discussed in the foregoing paras and hence, I find that this is a fit case for imposition of quantum penalty equal to the amount of duty plus interest in terms of Section 114Aibid on the importer M/s Rasna Corporation, Mumbai.

19. Imposition of penalty on Shri Sunil Garg under Section 112(a) and 114AA of the Customs Act, 1962

19.1 In regard to proposal in SCN for imposition of penalty on Shri Sunil Garg under Section 112(a) of the Customs Act, 1962, it is contended interalia in defence reply dated 25.04.2019 that the noticee is neither importer nor has abetted the importer M/s Rasna Corporation in doing any act of omission in any way, therefore, no penalty could be imposed on them under Section 112(a) of the Act.

In this connection, I have gone through the provisions of Section 112(a) of the Customs Act, 1962, which reads as under-

“ Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act shall be liable for penalty [as prescribed under the said section]. “

In this context, I find that Shri Sunil Garg in his statement dated 15.09.2017 recorded under Section 108 of Customs Act, 1962 has admitted that he in connivance with Shri Shekdar Rashid, attempted to clear the whole consignment consisting of Cocoa Husk, Cocoa Powder and Chocolate Paste consignment as Cocoa Husk under Bill of Entry No. 2225641 dated 24.06.2017. As I have already hold that goods covered under Bill of Entry No. 2225641 dated 24.06.2017 (i.e. goods mentioned in column 1 to 3 of Table 6) are liable to confiscation under various provisions of Customs Act, 1962 as mentioned in column 4 and 5 of Table 6 of the SCN, therefore, the aforesaid contention of the Noticee in defence reply dated 25.04.2019 is baseless and not acceptable to me. Accordingly, I hold that Shri Sunil Garg, therefore, is liable to penalty under Section 112 (a) of Customs Act, 1962.

19.2 Further, in context of proposal for imposition of penalty under Section 114AA of the Customs Act, 1962 on Shri Sunil Garg, it is interalia contended in their defence reply dated 25.04.2019 that penalty under Section 114AA will be applicable only to those cases where export benefits are claimed without exporting the goods and presenting forged documents knowingly or intentionally while the instant one is not such a matter. For this contention, they have referred to report of the Standing Committee on Finance, 2005-06 of 14th Lok Sabha.

In this connection, I have gone through the provisions of Section 114AA of the Customs Act, 1962 which reads as under-

“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.”

From plain reading of aforesaid Section 114AA, I find that it nowhere suggests that penalty is imposable only in cases of exports and not on import of goods. Since, there is no explicit mention in this regard, the section 114AA shall apply to all the cases irrespective whether it is related to import or export. Therefore, the aforesaid contention of the Noticee in their defence is not acceptable to me.

I find that penalty is imposable on merits taking into consideration of the role played by Shri Sunil Garg and gravity of offence. Shri Sunil Garg caused preparation of Invoice No. 241 dated 30.05.2017 and other connected import documents which reflected false and incorrect description & value of the goods imported in container No. OOLU1308628 and used the said documents in clearance of subject goods from Customs. These facts have been admitted by Shri Sunil Garg in his statement dated 15.09.2017 recorded under Section 108 of the Customs Act, 1962. I therefore find that

for such use of false and incorrect material & documents, Shri Sunil Garg is also liable to penalty under Section 114 AA of Customs Act, 1962. In view of the above, I hold that penalty under Sections 114 AA of Customs Act, 1962 are attracted on Shri Sunil Garg, resident of 1/6959/17, East Rohtash Nagar, Shadhara, Delhi - 110032.

20. Imposition of penalty on Shri Shekdar Rashid, Proprietor of M/s Rasna Corporation under Section 112(a) and 114AA of the Customs Act, 1962

20.1 Further, penalty has also been proposed on Shri Shekdar Rashid, Proprietor of M/s Rasna Corporation under Section 112(a) of the Customs Act, 1962. In this regard, I find that proviso to Section 114A stipulates that “ *where any penalty has been levied under this section, no penalty shall be levied under Section 112 or Section 114.*” Since, I have already imposed penalty on M/s Rasna Corporation under Section 114A of the Customs Act, 1962, hence, I refrain from imposing penalty on Shri Shekdar Rashid, (proprietor of M/s Rasna Corporation) under Section 112(a) of the Customs Act, 1962.

20.2 In regard to proposal for imposition of penalty on Shri Shekdar Rashid, (Proprietor of M/s Rasna Corporation) under Section 114AA of the Customs Act, 1962, I find that Shri Shekdar Rashid, have not filed their defence submissions to the SCN nor they have appeared for personal hearing fixed on various dates. I find that they have nothing to say against the allegations made against them in the Show Cause notice and in a way by not defending themselves they have admitted their wrongful acts of commission and omission. I find that Shri Shekdar Rashid being aware that Invoice No. 241 dated 30.05.2017 and other connected documents were not true and correct documents, he abetted the use of invoices showing false value and description in illegal clearance of subject import goods. I, therefore, hold that Shri Shekdar Rashid is liable for penalty under Section 114 AA of Customs Act, 1962.

21. I find that the Advocate of the Noticee Shri Sunil Garg in their written defence submission dated 25.04.2019 have placed reliance on various case laws/judgements in support of their contention on some issues raised in the SCN. In this regard, I am of the view that the conclusions arrived may be true in those cases, but the same can not be extended to other case(s) without looking to the hard realities and specific facts of each case. Those decisions/judgements were delivered in different context and under different facts and circumstances, which can not be made applicable in the facts and circumstances of this case. Therefore, I find that while applying the ratio of one case to that of the other, the decisions of the Hon’ble Supreme Court are always required to be borne in mind. The Hon’ble Supreme Court in the case of CCE, Calcutta Vs Alnoori Tobacco Products [2004(170)ELT 135(SC) has stressed the need to discuss, how the facts of decision relied upon fit factual situation of a given case and to exercise caution while applying the ratio of one case to another. This has been reiterated by the Hon’ble Supreme Court in its judgement in the case of Escorts Ltd.

Vs CCE, Delhi [2004(173) ELT 113(SC)] wherein it has been observed that one additional or different fact may make difference between conclusion in two cases, and so, disposal of cases by blindly placing reliance on a decision is not proper. Again in the case of CC(Port), Chennai Vs Toyota Kirloskar[2007(2013)ELT4(SC)], it has been observed by the Hon'ble Supreme Court that, the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of a decision has to culled from facts of given case, further, the decision is an authority for what it decides and not what can be logically deduced there from.

22. In view of the foregoing discussions and findings, I pass the following order-

ORDER

- (i) I order the confiscation of Cocoa Husk, Cocoa Powder, Chocolate Paste (as mentioned in Column 1 to 3 of Table 6 at Para 7 of SCN) under the provisions of Section 111 (f), 111 (i), 111 (j), 111 (l), 111 (m) and Section 119 of Customs Act, 1962 (i.e. as mentioned in Column 4 of Table 6, respectively of the SCN). However, I allow the redemption of the confiscated goods on payment of redemption fine of Rs.4,00,000/- (Rupees Four Lakh only) in terms of Section 125 of the Customs Act, 1962.
- (ii) I hereby reject the declared transaction value of Rs.2,99,396.82/- in Bill of Entry No. 2225641 dated 24.06.2017 under Rule 12 of Customs Valuation (Determination of value of imported goods) Rules, 2007 and re-assess the same as Rs.16,22,447/- for three separate products as mentioned in Column No. 3 to 7 of Annexure IV of the SCN, under Rule 5 read with Rule 3(4) of Customs Valuation (Determination of value of imported goods) Rules, 2007 .
- (iii) I confirm the demand of Customs duty aggregating to Rs. 8,68,707/- (as detailed in Column 8 to 12 of Annexure IV of the SCN) evaded by **M/s Rasna Corporation**, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706 under Section 28 (4) of the Customs Act, 1962, along with interest applicable under provisions of Section 28 AA of the Customs Act, 1962.
- (iv) I order to impose penalty equal to the duty i.e. Rs.8,68,707/- plus interest thereon, on the importer **M/s Rasna Corporation**, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706, under Section 114A of the Customs Act, 1962.
- (v) I impose a penalty of Rs.80,000/- (Rupees Eighty Thousand only) on **Shri Sunil Garg** resident of 1/6959/17, East Rohtash Nagar, Shadhara, Delhi - 110032 under Section 112(a) of the Customs Act, 1962.

- (vi) I impose a penalty of Rs.10,00,000/- (Rupees Ten Lakh only) on **Shri Sunil Garg**, resident of 1/6959/17, East Rohtash Nagar, Shadhara, Delhi - 110032 under Section 114 AA of the Customs Act, 1962.
- (vii) I refrain from imposing penalty on **Shri Shekdar Rashid**, proprietor of M/s. Rasna Corporation, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706 under Section 112 (a) of the Customs Act, 1962 as penalty is already imposed under Section 114A of the Customs Act, 1962.
- (viii) I impose a penalty of Rs.2,00,000/- (Rupees Two Lakh only) on **Shri Shekdar Rashid**, Proprietor of M/s. Rasna Corporation, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706 under Section 114 AA of the Customs Act, 1962.

23. This order is issued without prejudice to any other action that may be taken against the above mentioned firm and the persons under provisions of the Customs Act, 1962 and rules framed thereunder or any other law for the time being in force in the Republic of India.


(AMARJEET SINGH)
Additional Commissioner
Custom House, Mundra

F. No.VIII/48-38/ADJ/ADC/MCH/2017-18

Dated: 31.07.2019

BY SPEED POST:-

- (a) Shri Sunil Garg, resident of 1/6959/17, East Rohtash Nagar, Shadhara, Delhi - 110032
- (b) M/s. Rasna Corporation, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706
- (c) Shri Shekdar Rashid, Proprietor of M/s. Rasna Corporation, House No. 0766 / 002 A, Sadguru Apartment, Dwarka Hotel, Nerul Gaon, Sector 20, Nerul West, Navi Mumbai, Thane, Maharashtra - 400706

Copy to:-

- (1) The Joint Director, Directorate of Revenue Intelligence, Ahmedabad Zonal Unit, Unit No.15, Magnet Corporate Park, S.G. Highway, Thaltej, Ahmedabad-380059
- (2) The Deputy/Assistant Commissioner(RRA), Custom House, Mundra
- (3) The Deputy/Assistant Commissioner(Recovery), Custom House, Mundra
- (4) The Deputy/Assistant Commissioner(EDI), Custom House, Mundra for uploading on website of Custom House, Mundra.
- (5) Guard File