कार्यालय: प्रधान आयुक्त सीमा शुल्क, मुन्द्रा,
सीमा शुल्क भवन, मुन्द्रा बंदरगाह, कच्छ, गुजरात- 370421
OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CUSTOM HOUSE, MUNDRA PORT, KUTCH, GUJARAT-370421
PHONE:02838-271426/271423 FAX:02838-271425 Email: adj-mundra@gov.in

आज़ादी का अमृत महोत्सव

A. File No.	:	GEN/ADJ/COMM/157/2024-Adjn-O/o Pr Commr-Cus-Mundra
B. Order-in-Original No.	:	**MUN-CUSTM-OOO-COM- 048 - 24-25**
C. Passed by	:	**K. Engineer,** **Principal Commissioner of Customs,** **Customs House, AP & SEZ, Mundra.**
D. Date of order and Date of issue:	:	21.03.2025 21.03.2025
E. SCN No. & Date	:	SCN F.No. F.No. GEN/ADJ/COMM/157/2024-Adjn-Adjn Pr Commr-Cus-Mundra, dated 22.03.2024.
F. Noticee(s) / Party / Importer	:	**(1)** M/s. R.K. Traders (IEC: 2410007694), Plot No. 47, Block No. 57, Opposite Pagoda Rolling Mill, Mamsa, Ghogha, District – Bhavnagar, Gujarat. **(2)** Shri Abdul Kayum Kadarbhai Kaliwala, Partner of M/s. R. K. Traders, Plot No. 47, Block No. 57, Opposite Pagoda Rolling Mill, Mamsa, Ghogha, District – Bhavnagar, Gujarat.
G. DIN	:	**DIN-20250371MO0000053063**

1. यह अपील आदेश संबन्धित को नि:शुल्क 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 6(1) के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 129A(1) के अंतर्गत प्रपत्र सीए3-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 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

   "केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवाकर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ, 2nd फ्लोर, बहुमाली भवन, मंजुश्री मील कंपाउंड, गिर्धनगर ब्रिज के पास, गिर्धनगर पोस्ट ऑफिस, अहमदाबाद-380 004"

   "Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, 2nd floor, Bahumali Bhavan, Manjushri Mill Compound, Near Girdharnagar Bridge, Girdharnagar PO, Ahmedabad 380 004."

3. उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।
   Appeal shall be filed within three months from the date of communication of this order.

4. उक्त अपील के साथ -/ 1000 रूपये का शुल्क टिकट लगा होना चाहिए, जहाँ शुल्क, व्याज, दंड या शास्ति रूपये पाँच लाख या कम माँगा हो 5000/- रुपये का शुल्क टिकट लगा होना चाहिए, जहाँ शुल्क, व्याज, शास्ति या दंड पाँच लाख रूपये से अधिक किंतु पचास लाख रूपये से कम माँगा हो 10,000/- रुपये का शुल्क टिकट लगा होना चाहिए, जहाँ शुल्क, दंड व्याज या शास्ति पचास लाख रूपये से अधिक माँगा हो। शुल्क का भुगतान खण्ड पीठ बेंचआहरितट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीयकृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा।

   Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs.10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.

5. उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत 5/- रूपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची- 1, न्यायालय शुल्क अधिनियम, 1870 के मदसं.-6 के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए।

   The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.

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

7. अपील प्रस्तुत करते समय, सीमाशुल्क (अपील) नियम, 1982 और CESTAT (प्रक्रिया) नियम, 1982 सभी मामलों में पालन किया जाना चाहिए।

   While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

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

   An appeal against this order shall lie before the Tribunal 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.

BRIEF FACTS OF THE CASE:

Intelligence developed by the Directorate of Revenue Intelligence (DRI), Jamnagar indicated that M/s. R.K. Traders, Plot No. 47, Block No. 57, Opposite Pagoda Rolling Mill, Mamsa, Ghogha, District – Bhavnagar, Gujarat (IEC: 2410007694) (herein referred to as Importer) is importing "Iron & Steel Shaft" (under CTH - 7326 9080) and claiming preferential rate of duty under Notification No. 99/2011 dated 09.11.2011 (SAFTA) with the country of origin as Bangladesh.

2. Further, intelligence also indicated that the goods imported by M/s. R.K. Traders, Bhavnagar viz 'Old/Used Iron & Steel Shaft' which were obtained from ship breaking activity at Chattogram, Bangladesh, falls under the category of Second-Hand Goods other than Capital Goods which are restricted goods and requires Import Authorization as per Para 2.31 (II) of the Foreign Trade Policy 2015-2020.

STATEMENTS AND INQUIRY

3. On the basis of said intelligence, an enquiry was initiated against M/s. R. K. Traders who has imported **'Old & Used Iron & Steel Shaft'** obtained from broken ships under CTH 73269080 from M/s. Asha Trading, TC Gate, Port Link, Bhatiary, Sita Kunda, Chattogram, Bangladesh, M/s Anan Enterprise, BTC Gate, Port Link, Bhatiary, SitaKunda, Chattogram, Bangladesh and M/s. S. S. Corporation, Shitalpur, Sitakunda, Chattogram, Bangladesh, a team of officers from Regional Unit DRI Gandhidham and SIIB, Customs House, Mundra, examined the goods imported by M/s. R.K. Traders, Bhavnagar vide the Bill of Entry No.2229437/30.08.2022 **(RUD No. 01)** and Bill of Entry No. 2229078/30.08.2022 **(RUD No. 02)** under Panchnama proceedings dated 01/02.09.2022.

(i) at M/s. Honeycomb CFS, Adani Ports & SEZ, Mundra (Kutch):-

Sl. No.	BE No. & Date	Quantity	Assessable Value (Rs.)
1	**2229437/30.08.2022**	100 MTS	Rs.77,33,534/-

(ii) at M/s. TG Terminals Pvt. Ltd. CFS, Adani Ports & SEZ, Mundra (Kutch):-

Sl. No.	BE No. & Date	Quantity	Assessable Value (Rs.)
1	**2229078/30.08.2022**	100 MTS	Rs.67,56,667/-

During the course of examination of the goods declared as 'Iron & Steel Shaft' were found to be cut pieces of 'Old & Used Iron Steel Shafts' Therefore, the goods seized under Seizure Memo DIN-202209DDZ1000000D7B9 and Seizure Memo DIN 202209DDZ10000520934 both dated 07.09.2022 in respect of the aforesaid import consignment was issued to the importer.

4. The goods covered under the Bill of Entry No.2229437 dated 30.08.2022 and Bill of Entry No. 2229078 dated 30.08.2022 were examined by the Chartered Engineer Shri Ajayraj Singh B. Jhala, who vide his opinion certificates No. ABJ: INSP:MACHINERY:22-23:51 **(RUD No.03)** and ABJ: INSP:MACHINERY:22-23:52 **(RUD No.04)** both dated 06.09.2022 certified that the goods were Old and Used, Rusted, Uneven cut pieces of "Iron & Steel Shaft' of different sizes/shapes, which may be used after further processing.

Search of the registered premises and Godown of M/s. R.K. Traders, Bhavnagar.

5. A team of officers from Regional Unit, DRI, Jamnagar/Bhavnagar and Customs Division, Bhavnagar conducted a search at godown premises of M/s. R.K.

Traders, Plot No.7, Block No. 59, Opp. Pegoda Rolling Mill, Mamsa, Ghogha, Bhavnagar on 01.09.2022 under Panchnama proceedings dated 01.09.2022 **(RUD No. 05).** On preliminary investigation, it appeared that the stocks of rusted iron and steel cylindrical blocks of different sizes in terms of length, diameter and shapes which were imported from Bangladesh were lying at the said premises, along with some shorter iron cylindrical objects (identified as pins) which according to importer were locally procured from Alang.

6. During the search of the godown, many documents (made-up file), electronic evidence (laptop) and photographs were resumed/taken over under the Panchnama dated 01.09.2022, for further investigation in respect of the contravention of the provisions of the Customs Act, 1962.

7. The goods lying at the godown of M/s. R.K. Traders, Bhavnagar located at Plot No. 7, Block No. 59, Opp. Pegoda Rolling Mill, Mamsa, Ghogha, Bhavnagar were also examined by the Chartered Engineer Shri Ajayraj Singh B Jhala, who vide his opinion certificate No. ABJ:INSP:MACHINERY:22-23:50 dated 06.09.2022. **(RUD No. 06)** certified that the goods were Old and Used, Rusted, uneven cut pieces of **"Iron & Steel Shaft'** of different sizes/shapes, which may be used after further processing.

8. Further, a team of officers from Regional Unit, DRI, Jamnagar/Bhavnagar and Customs Division, Bhavnagar conducted a search at registered premises of M/s. R.K. Traders located Near Ice Factory, Alka Cinema Road, Bhavnagar – 364001 on 01.09.2022 under Panchnama proceedings dated 01.09.2022 **(RUD No. 07)** and resumed incriminating documents and mobile under panchnama dated 01.09.2022 for further investigation in respect of the contravention of the provisions of the Customs Act, 1962. On preliminary investigation, it appeared that the goods declared as 'Iron and Steel Shafts' were imported by importer without DGFT authorization/license were actually 'Old and Used Iron and Steel Shafts'.

9. The imported goods i.e. **'Iron & Steel Shaft'** appeared to be obtained from broken ships falling under the category of Second-Hand Goods other than Capital Goods which were **restricted goods** and requires Import Authorization as per Para 2.31(II) of the Foreign Trade Policy 2015-2020. It also appeared that the Importer did not possess any valid Import Authorization from DGFT for importing such goods. Therefore, the importer by importing the Old and Used Iron and Steel Shaft without any authorization/license appeared to have contravened the provisions of Foreign Trade Policy 2015-2020 issued by DGFT and hence the said goods appeared to be liable to be confiscated under Section 111(d) & 111(o) of the Customs Act, 1962.

10. In view of the above facts narrated Para-supra, the import consignment covered under above mentioned Bills of Entry having total assessable value as Rs.77,33,534/- and Rs.67,56,667/- respectively were seized vide Seizure Memo bearing DIN 202209DDZ10000520934 dated 07.09.2022 **(RUD No. 08)** under Section 110 of the Customs Act, 1962, as the same appeared liable to confiscation under Section 111(d) & 111(o) of the Customs Act,1962 having reasonable belief that the same have been imported without valid/proper authorization/license and in violation of the provisions of Customs Act, 1962. Details of the goods seized are as under:-

Sl. No.	BE No./Date	Item Description	Net Weight (kg) (As per BE)
1.	2229437 dated 30.08.2022	Iron & Steel Shaft CTH 73269080	100 MTS

2.	2229078 dated 30.08.2022	Iron & Steel Shaft CTH 73269080	100 MTS

11. Also, during the course of examination of the goods covered under panchnama dated 01.09.2022 drawn at the godown premises of M/s. R.K. Traders, Bhavnagar at Plot No. 7, Block No. 59, Opp. Pegoda Rolling Mill, Mamsa, Ghogha, Bhavnagar, quantity of 195.825 MTS of 'Iron & Steel Shaft' was declared by the importer. The goods declared as 'Iron & Steel Shaft' are also found to be cut pieces of 'Old and Used Iron and Steel Shaft' imported from Bangladesh under CTH 73269080.

12. Therefore, the import consignment lying in the godown of importer was also seized vide Seizure Memo having DIN 202209DDZ1000000D7B9 dated 07.09.2022 (**RUD No. 09**) under Section 110 of the Customs Act, 1962, as the same were liable to confiscation under Section 111(d) & 111(o) of the Customs Act, 1962, having reasonable belief that the same have also been imported without valid authorization/license and in violation of the provisions of Customs Act, 1962. Details of the goods seized are as under:

Sr. No.	Item Description	No. of pieces	As per Closing Stock Report dated 01.09.2022	Assessable Value
1.	Iron & Steel Shaft (CTH 73269080)	86	195.825 MTS (approx.)	Rs.1,54,94,455/- (approx.)

12.1. The importer vide letter dated 13.09.2022 requested for provisional release of goods, and O/o the Principal Commissioner of Customs, Mundra vide letter F.No. CUS/APR/INV/125-2022-Gr.4/O/o Pr.Commr.-Cus-Mundra dated 27.09.2022 (**RUD No. 10**) provisionally released the goods seized under Seizure Memo bearing DIN 202209DDZ10000520934 & DIN 202209DDZ1000000D7B9 both dated 07.09.2022 on submission of Bank Guarantee Rs.59,96,932/- (Rs. Fifty Nine Lakhs Ninety Six Thousand Nine Hundred and Thirty Two Only) and Bond of Rs.2,99,84,656/- (Rupees Two Crores Ninety Nine Lakhs Eighty Four Thousand Six Hundred Fifty Six Only).

Statement of Shri Abdul Kayum Kadarbhai Kaliwala, Partner of M/s. R. K. Traders, Bhavnagar

13. A Statement of Abdul Kayum Kadarbhai Kaliwala, Partner of M/s. R.K. Traders, was recorded under Section 108 on 01/02.09.2022 **(RUD No. 11)**, wherein he inter alia stated that:-

- M/s. R.K. Traders was importing 'Iron & Steel Shaft" (HSN 7326 9080) from Bangladesh. They had imported the iron & steel at Kolkata up to 2018. After 2018, they started importing 'Iron & steel shafts' at Mundra Port. At Mundra, their local broker was Paratpara Impex, in Kolkata their company agent is Madina Seayag Co., and their godown was located near Plot No. 47 Pagoda Rolling Mill, Mamsa.
- They have imported 'Iron & Steel Shafts from M/s. Anan Enterprises, Bangladesh and M/s. Asha Trading, Bangladesh.
- In BE No. 2229437 dated 30.08.2022 they had imported 100 MT of Iron and Steel Shaft, the invoice value of the goods is 95,000 USD. As per his knowledge the second Bill of Entry No. 2229078 dated 30.08.2022 was not cleared.
- Imported goods are pieces of old and used iron and steel shafts and they were selling them as scraps.

- He admitted that their firm does not possess any DGFT license/authorization in order to import such goods.
- Ongoing through the Para 2.3(II) of Foreign Trade Policy issued by DGFT, he stated that he came to know the fact that License/Authorization from DGFT is required to import 'old & used iron and steel shaft'. He also stated in relation of import of old and used iron steel shaft, he does not have any license/authorization from DGFT.
- He admitted that his firm M/s. R.K. Traders, Bhavnagar has been importing Old and Used Iron & Steel Shafts without any DGFT Authorization/License. At present around 190 MT of goods were lying in his Godown at Mamsa and those photographs of the goods were attached in the Panchnama.

14. Another statement of Shri Abdul Kayum Kadarbhai Kaliwala, Partner of M/s. R.K. Traders, under Section 108 of the Customs Act, 1962 was recorded on 03.09.2022 **(RUD No. 12)**, wherein, he inter alia stated that:-

- Ongoing through the import details of M/s. R.K. Traders, Bhavnagar he stated that he agreed with the import details. He also stated that from 2019, he was importing goods from Kolkata port and from 2021, he started import from Mundra Port.
- In respect of two imports made during the year 2019 under CTH 7204, he stated that in these Bills of Entry they had imported pieces of 'Iron & Steel Shaft' under CTH 7204 which was sold under the same CTH. In the same way goods imported under CTH 7326 9080, was sold under the same CTH as 73269080.
- They generally imported from M/s. Asha Trading, Chattogram, M/s. Anan Enterprise, Chattogram and M/s. S.S. Corporation, Chattogram.
- On going through the panchnama dated 01.09.2022 drawn at M/s. T.G. Terminals, CFS, Mundra in respect of BE No. 2229078 dated 30.08.2022 and panchnama dated 02.09.2022 drawn at Honeycomb CFS, Mundra in respect of BE No. 2229437 dated 30.08.2022, he admitted that the goods covered under these Bills of Entry were imported by his firm i.e. M/s. R.K. Traders, Bhavnagar.
- On being asked that as per the Bill of Entry goods imported were declared as 'Iron & steel shaft' (CTH 73269080), whereas as per panchnamas dated 01.09.2022 & 02.09.2022, the goods are found to be 'Old & Used Iron and Steel Shaft'. He admitted that in the above B/Es, wrong declaration was made and in token of his acceptance he put his dated signature on the panchnamas.
- He admitted that goods imported under B/E No. 2229437 dated 30.08.2022 and 2229078 dated 30.08.2022 are 'Old & Used Iron and Steel shafts' and also under previous Bills of Entry the imported goods were old & used iron and steel shaft, which were obtained from ship breaking activity in Bangladesh.
- On being shown/explained about provisions of Para 2.31(II) of Foreign Trade Policy issued by DGFT, he admitted that as per the relevant provisions of DGFT import of 'Old/Used Iron and Steel Shaft' are restricted and requires authorization/license for import of such goods.
- He was shown the provisions of Section 46 of the Customs Act, 1962 and after going through the provision he admitted that as per Section 46(4) of

the Customs Act, 1962, he had to provide complete, accurate, authentic and valid information and to comply with restriction or prohibition relating to the goods.

- After understanding the provisions of Para 2.31(II) of the Foreign Trade Policy and Section 46 of the Customs Act, 1962, he admitted that he had violated the provisions Para 2.31(II) of Foreign Trade Policy and Section 46 of the Customs Act, 1962.

15. Further, another statement of Shri Abdul Kayum Kadarbhai Kaliwala, Partner of M/s. R.K. Traders, Mamsa, Bhavnagar was recorded on 30.01.2023 **(RUD No. 13)**, wherein he stated that the goods imported by them under all the previous Bills of Entry were "Old/Used Iron and Steel Shafts". He admitted that the "Old/Used Iron and Steel Shafts" imported by M/s. R.K. Traders were obtained from ship breaking activity at Chattogram, Bangladesh.

15.1. He stated that in all the consignments of "Iron and Steel Shafts" which were imported by them, they have availed the benefit of Exemption Notification No.99/2011-Cus dated 09.11.2011 (SAFTA), on the basis of the Country of Origin Certificates issued by 'Export Promotion Bureau' Chattogram, Bangladesh.

15.2. Ongoing through the SAFTA Certificates bearing No. EPB(C)33576 dated 31.07.2022 and EPB(C)33578 dated 31.07.2022 issued by 'Export Promotion Bureau' Chattogram, he put his dated signature on the body of the certificate and he stated that the said goods i.e. "Old/Used Iron and Steel Shafts" imported by his firm were obtained from ship breaking activity at Chattogram, Bangladesh. He further stated that his firm does not have authorization as per Para 2.31(II) of the Foreign Trade Policy to import "Old/Used Iron and Steel Shafts" which were restricted goods. He also admitted that after understanding the provisions of Para 2.31(II) of FTP he had violated the said provisions by importing the restricted goods which has resulted in violation of the provisions of Section 46 of the Customs Act, 1962.

Statement of Shri Badal Chavda, Manager of CHA Firm M/s. Shree Malan Shipping, Mundra

16. Statement of Shri Badal Chavda, (G-Card Holder) Manager of M/s. Shree Malan Shipping, Mundra was recorded on 23.08.2023 **(RUD No. 14)** under section 108 of the Customs Act, 1962, wherein he inter-alia stated that:-

- After going through the Panchnamas dated 01.09.2022 drawn at M/s. TG Terminals Pvt. Ltd. CFS, Adani Ports & SEZ and dated 02.09.2022 drawn at M/s. Honeycomb CFS, Adani Ports & SEZ, he agreed with contents of the both the Panchnamas.
- He agreed with description/statement sheet of what M/s. R.K. Traders had imported. He stated that since 2019, M/s. R. K. Traders used to import goods from Kolkata Port and from 2021, they are importing from Mundra Port and his firm i.e. M/s. Shree Malan Shipping is looking after their Customs clearance work at Mundra Port.
- He stated that M/s. R. K. Traders, Bhavnagar approached them for their Customs clearance work in 2021, and informed them that they would import cut pieces of 'Iron & Steel shaft' from Bangladesh, which were recovered from ship breaking activity at Bangladesh and the goods were later used for manufacturing of bearings and hydraulic gears.
- With regards to the classification of the goods he stated that classification of goods was suggested by the importer i.e. M/s. R.K. Traders, Bhavnagar and after consultation with the importer, his firm has confirmed the classification

of the goods.

- He stated that the imported goods i.e. Iron & Steel Shafts were used goods which were imported at Mundra from Bangladesh Ship Breaking, Chattogram, after availing the benefit of Notification No. 99/2011 dated 09.11.2011 (SAFTA) with Country of Origin as Bangladesh.
- Ongoing through Rule 5 of Determination of origin of goods under the agreement of South Asia Free Trade Area (SAFTA) under Notification No.75-Cus. (NT) dated 30.06.2006, he admitted that the goods do not meet the criteria of 'Wholly Obtained' as per Rule 5 of Determination of origin of goods under the agreement of South Asia Free Trade Area (SAFTA).
- Ongoing through Para 2.31(I) of the Foreign Trade Policy of DGFT (2015-20), he accepted that the goods "Old/Used Iron and Steel Shafts" did not fall under the category of 'Capital Goods'. On being further asked, he admitted that the said goods ("Old/Used Iron and Steel Shafts") falls under the category "Second hand goods other than Capital goods".
- He also accepted that as per Para 2.31 (II) of the Foreign Trade Policy of DGFT the items i.e. "Old/Used Iron and Steel Shafts" are restricted as per the above guidelines of DGFT and requires authorization from DGFT and accepted that provisions of Para 2.31 (II) of the Foreign Trade Policy and Section 46 of the Customs Act, 1962, had been violated by the Importer.
- He further added that they had filed the Bills of Entry as per end-use details provided by the M/s. R.K. Traders, Bhavnagar, wherein, the importer had submitted that goods were 'inputs' for manufacturing of machinery components. In his support of his claim, he had submitted 'End Use certificate' dated 07.03.2022 issued by M/s. R.K. Traders, Bhavnagar in respect of BE No. 7604391 dated 22.02.2022.

Restricted Goods:

17.1. The imported goods are old and used shafts declared to be obtained from ship breaking and are classified under CTH 73269080 of Customs Tariff Heading. As per Para 2.31of the Foreign Trade Policy (FTP) 2015-20, following **Capital Goods** are covered under free import policy:-

S. No.	Categories of Second Hand Goods	Import Policy	Conditions, if any
I	**Second Hand Capital Goods**		
(a)	(i) Desktop computers, (ii) Refurbished/reconditioned spares of re-furbished parts of Personal Computers/Laptops	Restricted	Importable against Authorization
(b)	All electronics and IT Goods notified under the Electronics and IT Goods Order 2012	Restricted	Importable against authorization.
(c)	Refurbished/re-conditioned spares of Capital goods	Free	Subject to production of Chartered Engineer certificate to the effect that such spares have at least 80% residual life of original spare.
(d)	All other second hand capital goods {other than (a), (b) & (c) above}.	Free	
II	**Second Hand Goods other than Capital Goods**	**Restricted**	Importable against Authorization.

17.2. From the definition of the Capital Goods, it appeared that the imported "Old/Used Iron and Steel Shafts" does not fall under the category of Capital Goods, as these goods are not plant, machinery, equipment or accessories required for manufacture or production or purposes as defined in the definition above.

17.3. During the course of investigation, **Shri Badal Chavda, (G-Card Holder) Manager of M/s. Shree Malan Shipping, CHA,** had submitted The **'End Use Certificate'** dated 07.03.2022 **(RUD No. 15),** issued by the importer in respect of BE No. 7604391 dated 22.02.2022, wherein, the importer had made submission before the Superintendent, Customs House, Mundra Port & SEZ, Mundra, which are as under:-

'That goods were Shaft of the ship obtained during breaking of ship. The shafts were abruptly cut during the breaking of ship, which cannot be again used as shaft for ship. They had to process it in their factory to re-size them, cut them in various size of pieces and machining them and after that they are making parts of some machinery like hydraulic gear and bearings etc. So it is nothing but input for them for manufacturing of various parts of machinery components.

Further, regarding to the HSN classification the said goods cannot be classified in Scrap as the imported goods were not used for melting purpose nor being used in its original form. Hence, the declared HSN which truly describes the goods from which it was obtained.'

Whereas, from the above mentioned letter dated 07.03.2022, it is amply clear that the importer was well aware of the facts that the goods imported by them were not 'Capital Goods' and the goods are old/used shaft recovered from ship breaking activity which were used as **'input'** for manufacturing of machinery parts, they had engaged themselves in importing the subject goods without valid DGFT authorization.

17.4. The imported goods being old and used shafts recovered from ship breaking falls under the category of 'Second Hand Goods other than Capital Goods), which is restricted as per Para 2.31 of Foreign Trade Policy (FTP) 2015-20 and can only be imported against valid authorization. Whereas, the importer did not possess any such authorization at the material time of import, rendering the goods liable to confiscation under Section 111(d), 111(m), 111(o) & 111(q) of the Customs Act, 1962.

17.5. Shri Abdul Kayum Kaliwala in his statement recorded under Section 108 of the Customs Act on 01/02.09.2022, 03.09.2022 and 30.01.2023 had accepted the fact that his firm does not possess any *'import license (Authorization) issued by DGFT for restricted items'* at the time of import.

Scrutiny and Analysis of Documents/ Evidences:-

18.1. On scrutiny of import documents/data recovered/obtained from importer, it revealed that the importer had been importing 'Used Iron & Steel Shaft' products from Bangladesh since 2019 and availing the benefits of concession duty under FTA in terms of Notification No. 99/2011-Cus. dated 09.11.2011 on the said products, which were mainly exported by M/s. Anan Enterprise, Chattogram, M/s. Asha Trading, Chattogram and M/s. S.S. Corporation, Shitalpur, Sitakunda, Chattogram, Bangladesh on the basis of SAFTA certificates of origin (in form of `Form-AI) in respect of M/s. Anan Enterprise, Chattogram, M/s. Asha Trading, Chattogram and M/s. S.S. Corporation, Shitalpur, Sitakunda, Chattogram, Bangladesh. The `Form-A1' were submitted by the importer to Customs authorities for claiming the benefits of Notification No. 99/2011-Cus. Dated 09.11.2011 which

indicated the following:

a) The Form-AI was issued by Export Promotion Bureau in terms of South Asian Free Trade Area Agreement (SAFTA);

b) The Country of Origin shows as `Bangladesh;

c) The exporter is shown as (i) Anan Enterprise, Chattogram, (ii) Asha Trading, Chattogram and (iii) S.S. Corporation, Chattogram;

d) The origin criteria for the goods shown in the Forms-Al as "Wholly Obtained";

Preferential rate of duty:

18.2. The importer has claimed benefit of preferential duty under Notification No. 99/2011(Cus) dated 09.11.2011, on the strength of the Country of Origin Certificates issued by 'Export Promotion Bureau' Chattogram, Bangladesh wherein, the origin criteria of goods is/are mentioned as "Wholly obtained". The relevant Rules of Origin for the Notification No.99/2011-Cus dated 09.11.2011 is **"Determination of origin of goods under the agreement of South Asian Free Trade Area (SAFTA)"** under Notification No.75/2006-Cus (NT) dated 30.06.2006 as amended. **Rule 5** of the Rules of Origin prescribes details of "Wholly obtained" goods as under:-

Rule 5 : Wholly produced or obtained

Within the meaning of Rule 4(a), the following shall be considered as wholly produced or obtained in the territory of the exporting Contracting State.

(a) raw or mineral .....;

(b) Agriculture, vegetable and forestry products harvested there;

(c) Animal born and raised there;

(d) products obtained from animals referred to in clause (c) above;

(e) products obtained by hunting or fishing conducted there,

(f) products of sea fishing .....;

(g) products processed .....referred to in clause (f) above;

(h) raw materials recovered from used articles collected there;

(i) waste and scrap resulting from manufacturing operations conducted there;

(j) products taken from the seabed, ...;

(k) goods produced there exclusively from the products referred to in clauses (a) to (j) above.

18.3. Further, according to Rule 4 of the **Customs (Administration of Rules of Origin under Trade Agreements) Rules – 2020** (Carotar Rules – 2020), the origin related information is required to be possessed by importer for claiming the preferential rate of duty, the relevant extract is reproduced as under:-

*"4. **Origin related information to be possessed by importer:**-The importer claiming the preferential rate of duty shall –*

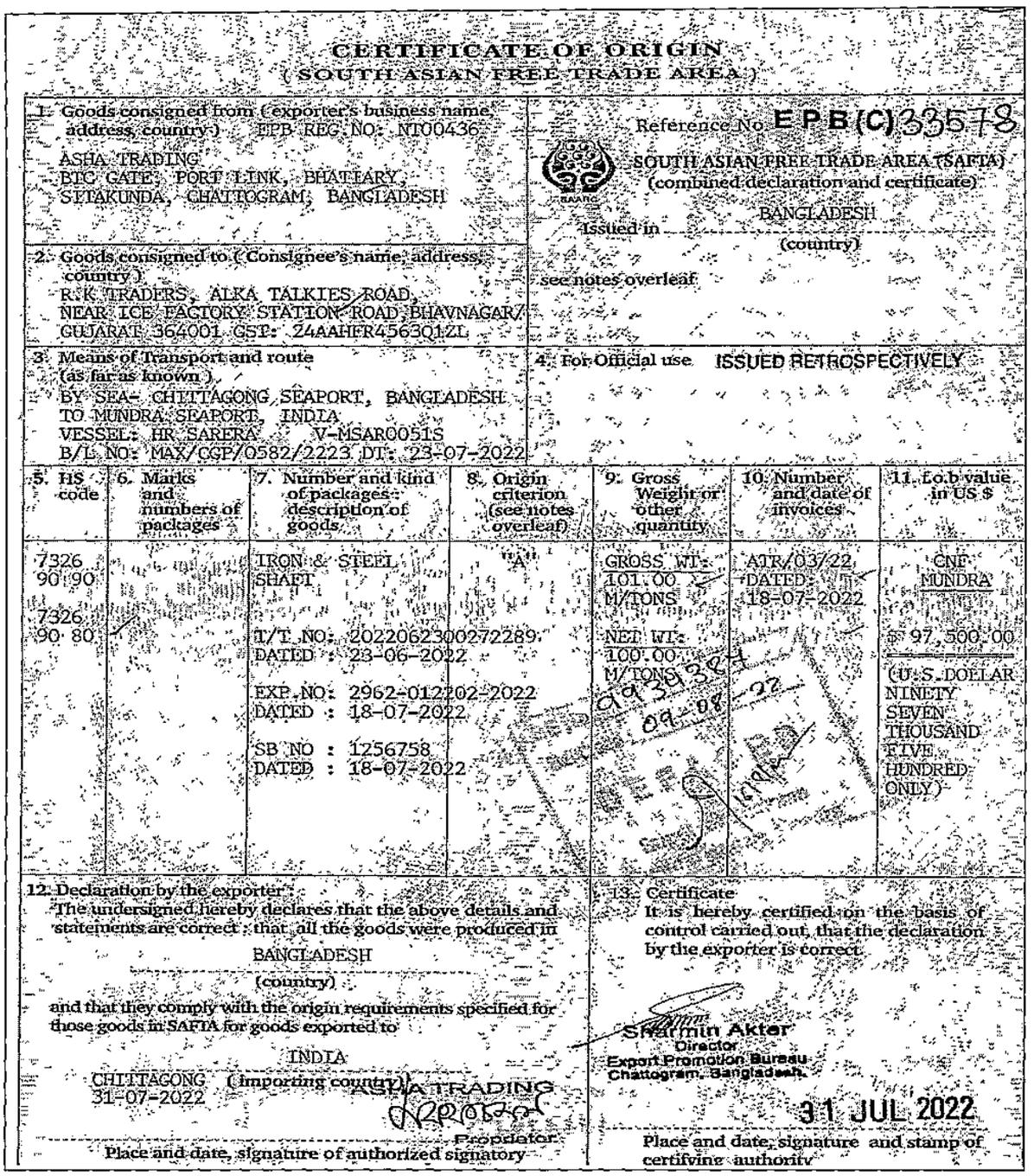
*(a) possess information, as indicated in **Form I,** .....*

(b) Keep all supporting documents related to Form I for at least five years from date of filing bill of entry and submit the same .....

(c) Exercise reasonable care to ensure the accuracy and truthfulness ....."

18.4. Further, the country of origin certificate uploaded in e-Sanchit by the

importer, in the origin criteria, the goods have been claimed to meet origin criteria as **'A'** under Box 8. For a better understanding of the above a sample copy of Form AI is scanned and juxtaposed below:-



CERTIFICATE OF ORIGIN
(SOUTH ASIAN FREE TRADE AREA)

1. Goods consigned from (exporter's business name, address, country) EPB REG. NO: NT00436
ASHA TRADING
BTC GATE, PORT LINK, BHATIARY,
SITAKUNDA, CHATTOGRAM, BANGLADESH

Reference No. EPB(C)33578

SOUTH ASIAN FREE TRADE AREA (SAFTA)
(combined declaration and certificate)

Issued in BANGLADESH
(country)

see notes overleaf

2. Goods consigned to (Consignee's name, address, country)
R.K. TRADERS, ALKA TALKIES ROAD,
NEAR ICE FACTORY, STATION ROAD, BHAVNAGAR/
GUJARAT 364001 GST: 24AAHFR4563Q1ZL

3. Means of Transport and route (as far as known)
BY SEA- CHITTAGONG SEAPORT, BANGLADESH
TO MUNDRA SEAPORT, INDIA
VESSEL: HR SARERA V-MSAR0051S
B/L NO: MAX/CGP/0582/2223 DT: 23-07-2022

4. For Official use ISSUED RETROSPECTIVELY

5. HS code	6. Marks and numbers of packages	7. Number and kind of packages; description of goods	8. Origin criterion (see notes overleaf)	9. Gross Weight or other quantity	10. Number and date of invoices	11. f.o.b value in US $
7326 90 90 7326 90 80		IRON & STEEL SHAFT T/T NO: 20220623002722897 DATED : 23-06-2022 EXP.NO: 2962-012202-2022 DATED : 18-07-2022 SB NO : 1256758 DATED : 18-07-2022	"A"	GROSS WT: 101.00 M/TONS NET WT: 100.00 M/TONS	ATR/037/22 DATED: 18-07-2022	CNF MUNDRA $ 97,500.00 (U.S.DOLLAR NINETY SEVEN THOUSAND FIVE HUNDRED ONLY)

12. Declaration by the exporter
The undersigned hereby declares that the above details and statements are correct ; that all the goods were produced in
BANGLADESH
(country)
and that they comply with the origin requirements specified for those goods in SAFTA for goods exported to
INDIA
CHITTAGONG (importing country)
31-07-2022 ASHA TRADING
Proprietor
Place and date, signature of authorized signatory

13. Certificate
It is hereby certified on the basis of control carried out, that the declaration by the exporter is correct.
Shahmin Akter
Director
Export Promotion Bureau
Chattogram, Bangladesh.
31 JUL 2022
Place and date, signature and stamp of certifying authority

"A" in the box of COO certificate denotes for products which meet the origin criteria according to **Rule 5 Determination of origin of goods under the agreement of South Asian Free Trade Area (SAFTA)"** under Notification No.75/2006-Cus (NT) dated 30.06.2006."

18.5. Whereas, on careful examination of Form No.1 (RUD No. 16) collected during the course of investigation, in respect of COO certificate No. EPB (C)3357 dated 31.07.2022 (juxta posed above), against Sl. No. 2(d) Is the originating criteria based on value content, the information furnished states as ***'Yes'*** *and (i) percentage of local value content: Material price is shown as 50%, (ii) Components which constitute value addition were shown as labour charges 25%, Gas Expenses 13%, Yard rent 7% and Machinery/equipment cost 5%, also, against Srl No.2(e)* ***HSN of Non-originating material/components*** *used in production of goods was given as '7326 9080' (CTH '7326 9080' which covers 'parts of ship, floating structure and vessels).*

18.6. Whereas, the imported goods as found upon examination are old & used shaft obtained which from dismantling of end of life ships either as a source of

parts (which can be re-used or for extraction of metals) and it is well-known fact that these ships were imported/acquired by ship-breakers from international market. Also, the importer has admitted that goods were recovered from Bangladesh Ship Breaking, Chattogram. The information relating to origin criteria in country of origin certificate does not match with that of information available on Form – I.

18.7. During the course of panchnama dated 01.09.2022 drawn at office premises of the importer located Near Ice Factory, Alka Cinema Road, Bhavnagar, 10 Bill of entry files were collected, later on 22 Bill of Entry files were submitted by importer to DRI on 02.09.2022 **(Appendix – 'A' to Panchnama).** On analysis of the said details, it has been observed from the country of origin certificates issued prior to January – 2021, that goods imported by the M/s. R.K. Traders, Bhavnagar from the same exporter(s), reflects the origin of criteria of goods as **'B'** i.e. according to Rule 8 of Determination of Origin of Goods under the Agreement on South Asian Free Trade Area (SAFTA). Whereas, in COO certificates issued after January – 2021, the origin criteria reflects as 'A' i.e. goods are wholly produced or obtained, as per the SAFTA.

18.8. The Chartered Engineer vide their inspection/opinion reports dated 06.09.2022 also confirmed the facts that the goods were old and used, rusted, uneven cut pieces of 'iron and steel shaft' of different sizes/shapes and these second hand goods may be used after further processing. Therefore, goods viz 'old/used iron & steel shaft' does not appear to be wholly obtained as claimed in COO Certificate and, therefore, the goods are liable to be disallowed the benefit of preferential rate of duty, as per section 28DA of the Customs Act, 1962 read with Rule 5(5) of Carotar Rules 2020 and thus liable for confiscation under Section 111(q) of the Customs Act, 1962.

Legal Provisions:-

19.1. In accordance with the relevant portion of Chapter V-AA, Administration of Rules of Origin Under Trade Agreement, Section 28DA of the Customs Act, 1962, states that:-

> ***"Section 28DA. Procedure regarding claim of preferential rate of duty.***
>
> .....
>
> *(4) Where importer fails to provide the requisite information for any reason, the proper officer may.-*
>
> *(i) cause further verification consistent with the trade agreement in such manner as may be provided by rules;*
>
> *(ii) pending verification, temporarily suspend the preferential tariff treatment to such goods:*
>
> *Provided that ..... without further verification.*

19.2. On the basis of statements recorded of Shri Abdul Kayum Kaliwala on 01 & 02.09.2022 & 03.09.2022, further investigation was carried out for the imports of the similar goods made by the said importer during the period from March, 2019 to September, 2022, wherein M/s. R.K. Traders had imported consignments under other 52 Bills of Entry wherein, they have availed the benefits of Notification No. 99/2011-Cus dated 09.11.2011 and all of them were assessed. The details of import of goods under all the Bills of Entries imported for the period from March, 2019 to September, 2022 and its duty calculation are annexed as **Annexure – 'A'** to this notice.

20. Retroactive **check of the true origin –**

20.1. CBIC Instruction No.31/2016-Customs dated 12.09.2016 stipulates that the country of origin verification may also be undertaken on random basis as a measure of due diligence.

20.2. Considering the intelligence and the facts which emerged during investigation, reference for verification of the Certificate of Origin was made to the Board in respect of the imports made by the M/s. R.K. Traders, Bhavnagar, as per the Rules of Origin for determining the origin of products eligible for the preferential tariff concessions. As per Para 2(b) of the instructions regarding implementation of Rules of Origin under Free/Preferential Trade Agreements and the verification of preferential Certificates of Origin, the following Preferential Certificates of Origin, were forwarded to the Director (International Customs Division), CBIC for verification.

Name of the Free/Preferential Trade Agreement	South Asian Free Trade Area (SAFTA
Relevant Custom Notification (Tariff & Non-Tariff)	Notification No. 99/2011-Customs dated 09.11.2011. Notification No. 75/2006-Customs (NT) dated 30.06.2006.
Reference No. of the Certificate of Origin	(i) EPB(C) 33837 dated 16.08.2022. (ii) EPB(C) 33841 dated 24.08.2022 (iii) EPB(C) 29105 dated 18.07.2021
Issuing Authority	Export Promotion Bureau, Chattogram, Bangladesh.
Name of the consignee	M/s. R. K. Traders, Bhavnagar
Name of the consignor	**1.** M/s. Anan Enterprise, BTC Gate, Port Link, Bhatiary, Sitakunda, Chattogram, Bangladesh. **2.** M/s. Asha Trading, BTC Gate, Port Link, Bhatiary, Sitakunda, Chattogram, Bangladesh. **3.** M/s. S.S. Corporation, Shitalpur, Sitakunda, Chattogram, Bangladesh
Description of Goods	'Iron & Steel Shaft'
Origin criteria as mentioned in the certificates	'Wholly owned'

20.3. The above certificates, purportedly issued by the Export Promotion Bureau, Chattogram, Bangladesh were forwarded by OSD (FTS Cell -1), Directorate of International Customs, New Delhi to Bangladesh Authorities, for retroactive verification in respect of genuineness, authenticity, cost of raw material and to verify the originating criteria along with the sample country of origin certificates with the issuing Authority in terms of Article 15(a) of Annex II "Operational Certification Procedures" for SAFTA Rules of Origin.

20.4. The Ministry of Foreign Affairs, Dhaka got the questionnaire answered from the exporter viz. M/s. Anan Enterprise, Chattorgram, M/s. Asha Trading, Chattorgram & M/s. S. S. Corporation, Chittagong and forwarded the same vide e-mail dated 10.12.2023 **(RUD No.17).** In the said questionnaire, the questions to ascertain the originating criteria mentioned in the COO have been answered as "N/A" by the said exporters. The reply in response to the production process carried out on the subject goods have also been given as "N/A". Moreover, all the three exporters, in the replies to the questionnaire, have stated that they are exporting various kinds of Ferrous & Non Ferrous Metal Scrap, whereas M/s. R. K. Traders have imported the goods falling under CTH 73269080 which is not for

scrap. Therefore, it appeared that the goods imported by the importer does not get qualified for exemption in absence of verification by the competent authority especially when the verification was sought.

In view of above, it appeared that the goods covered under the aforesaid COO do not qualify under Rule 4(a) i.e. wholly produced or obtained in the territory of exporting country as defined in Rule 5 Determination of Origin of goods under the Agreement on South Asian Free Trade Area (SAFTA), hence, importer is not eligible for availing the benefit of preferential duty vide aforesaid COO.

CONTRAVENTIONS AND CHARGES

21. Willful Mis-declaration of the imported goods

21.1. Further, CBIC vide Circular No.43/2005-Cus. Dated 24.11.2005 has introduced the 'Risk Management System' (RMS) in major Customs locations, where the Indian Customs EDI System (ICES) is operational. The purpose of RMS is to facilitate a large number of Bills of Entry, which are perceived to be compliant with the Customs Laws and Regulations. Such self-assessed Bills of Entry will be processed by the RMS to evaluate the risk in the Bill of Entry, if any, duty will be calculated and challan will be generated by ICES based on declaration/self-assessment made by the importer. The goods will be ready for out of charge on the basis of the importers declaration/self-assessment 'and without any assessment/examination by the officers, with the objective to strike an optimal balance between facilitation and enforcement and to enable low risk consignments to be cleared based on the acceptance of the importer's self-assessment and without examination. In RMS system, the stress is on self-assessment of the Bills of Entry which will be processed by the system based on declaration and if found compliant, such Bills may be sent to out of charge without any action and it is expected from all importers that they have suitable mechanisms in place to ensure that their declarations are accurate, sufficient and factually correct, while filing the fields in the Bill of Entry.

21.2. Therefore, it appeared that the importer has knowingly and deliberately availed undue benefit of exemption Notification on the goods imported from (i) M/s. Anan Enterprise, Chattogram, Bangladesh, (ii) M/s. Asha Trading, Chattogram, Bangladesh and (iii) M/s. S.S. Corporation, Chattogram, Bangladesh. It appeared to be indicative of their *mensrea.* Moreover, the importer appeared to have suppressed the said facts from the Customs authorities and also willfully availed undue benefit of exemption Notification No. 99/2011-Cus dated 09.11.2011 (as amended), during filling of the Bill of entry at Mundra Port and thereby caused evasion of Customs duty.

21.3. Whereas, M/s. R.K. Traders had also failed to file correct and factual fact that the goods imported by them were 'old/used iron and steel shafts' and requires DGFT authorization to import the same, and by declaring goods as 'Iron and Steel Shafts' in place of 'old/Used Iron & Steel Shafts', they have suppressed the fact from the Customs authorities and have imported the said goods which are liable for confiscation in absence of valid authorization. The fact that the imported goods are 'old/used iron and steel shafts' were obtained from ship breaking activity at Chattogram, Bangladesh was emerged only during the investigation initiated by DRI authorities. Accordingly, it appeared that provisions of Section 28(4) of the Customs Act, 1962, are invokable in this case. For the same reasons, the importer also appeared liable to penalty under Section 114A of the Customs Act, 1962.

21.4. From the foregoing paras, it appeared that M/s. R. K. Traders, Bhavnagar was always aware that the imported goods were not eligible for the imports without

proper DGFT authorization in accordance with Para 2.31 (II) of the Foreign Trade Policy 2015-2020, but had deliberately suppressed these facts at the material time of import. They were also aware of the fact that the goods imported by them were recovered from ship breaking activity at Chattogram, Bangladesh and does not fulfil the origin criterion as specified in the Rules of Origin of the Notification No.99/2011-Cus dated 09.11.2011 i.e. "Determination of origin of goods under the agreement of South Asian Free Trade Area (SAFTA)" under Notification No.75/2006-Cus (NT) dated 30.06.2006, as amended. However, they have availed the benefit of preferential rate of duty under Notification No. 99/2011-Cus dated 09.11.2011 on the basis of fraudulently obtained/issued country of origin certificates.

21.5. Therefore, the duties evaded by availing the benefit of exemption Notification No. 99/2011-Cus dated 09.11.2011, are liable to be demanded and recovered from M/s. R. K. Traders, Bhavnagar, under **Section 28(4)** of Customs Act, 1962 along with applicable interest under **Section 28AA** of Customs Act, 1962. The relevant legal provisions are as under:

21.6. As per **Section 11A (a) of the Customs Act, 1962**, 'illegal import' means the import of any goods in contraventions of the provisions of this Act or any other law for the time being in force. In event of the country of origin having been fraudulently obtained, the short payments of duties would become liable to be recovered from the importer under **Section 28(4)** along with applicable interest under **Section 28AA** of the Customs Act, 1962. The relevant legal provisions are as under:

SECTION 28(4). Recovery of duties not levied or not paid or short levied or short paid or erroneously refunded —

(1) ....

(2) ....

(3) ....

(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, —

(a) collusion; or

(b) willful misstatement; or

(c) suppression of facts,

by the importer ....., requiring him to show cause why he should not pay the amount specified in the notice.

21.7. SECTION 28AA. Interest on delayed payment of duty. —

(1) Notwithstanding anything .....

(2) Interest at such rate ....., as the case may be, up to the date of payment of such duty.

22. Improper Import:

22.1. Since the goods were imported by importer on the basis of fraudulently obtained country of origin certificates and also without any proper authorization/license issued by the DGFT, therefore, the goods are liable to be confiscated under **Section 111(d), 111 (m), 111(o)** & **111(q)** of the Customs Act, 1962. By these acts of omission and commission, the importer has rendered themselves liable to penalty under **Section 112(a) and 114A** of the Customs Act,

1962 for the goods imported by them. The relevant legal provisions are as under:

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

(a) ...

(b)...

(c) ...

(d)any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

...

...

(m) any goods which do not correspond in respect of value or in any other particular] with the entry made under this Act or in the case of baggage with the declaration made under section 77 [in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment referred to in the proviso to sub-section (1) of section 54;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer; ...

(q) any goods imported on a claim of preferential rate of duty which contravenes any provision of Chapter VAA or any rule made thereunder.

Sections 112. Penalty for improper importation of goods, etc.- Any person,-

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act,

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

shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;

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

.....

Section 114A. Penalty for short-levy or non-levy of duty in certain 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, the person who is liable to pay the duty or interest, as the case may be, as determined under [sub-section (8) of the section 28] shall also

be liable to pay a penalty equal to the duty or interest so determined:

23. Mis-declaration:

23.1. Vide Finance Act, 2011, "Self-Assessment" has been introduced w.e.f. from 08.04.2011 under the Customs Act, 1962. **Section 17** of the said Act provides for self-assessment of duty on import and export goods by the importer or exporter himself by filing a Bills of Entry or Shipping Bill as the case may be, in the electronic form, as per Section 46 or 50 respectively. Thus, under self-assessment, it is the responsibility of the importer or exporter to ensure that he declares the correct classification, applicable rate of duty, value, benefit or exemption notification claimed, if any in respect of the imported/exported goods while presenting Bills of Entry or Shipping Bill. In the present case, it appeared that the importer, have deliberately contravened the above said provisions with a malafide intention to avail the benefit of exemption Notification No 99/2011-Customs on fraudulently obtained COO certificate and imported 'Old & used Iron and Steel Shaft' without any authorization issued by DGFT.

23.2. Since the importer had violated the provisions of Sections 17 and 46 of the Customs Act, 1962 which was their duty to comply, but for which no express penalty is elsewhere provided for such contravention or failure, they shall also be liable to penalty under **Section 117** of Customs Act, 1962 which reads as under:

> *SECTION 117. Penalties for contravention, etc., not expressly mentioned. - Any person who contravenes ....., where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding four lakh rupees.*

23.3. Whereas from the foregoing paras, it also appeared that the importer have intentionally and willfully made declarations, statements, documents etc., which are false and incorrect in nature. This act of mis-declaration by the Importer during the transactions of their business has rendered them liable for penalty under **Section 114AA** too which reads as under:

> *SECTION 114AA. Penalty for use of false and incorrect material – If a person knowingly or intentionally ....., shall be liable to a penalty not exceeding five times the value of goods.*

24. Personal Penalty:

24.1. From the investigations, it appeared that Shri Abdul Kayum Kadarbhai Kaliwala, Partner of the importer was responsible for all the matters related to the said firm and he, in his statements dated 01.09.2022, 03.09.2022 and 16.01.2023, had admitted that he was looking after all the work of M/s. R.K. Traders, Bhavnagar and was responsible for all the matters related to the said firm. By this act, Shri Abdul Kayum Kadarbhai Kaliwala had knowingly and intentionally made or caused to be made documents which were false or incorrect in material particulars in the export of goods and contravened the Customs Act, 1962 as stated in para(s)-supra. Therefore, Shri Abdul Kayum Abdulkadarbhai Kaliwala has rendered himself liable for penalty under **Section 114AA** of the Customs Act, 1962.

24.2. It further appeared that Shri Abdul Kayum Kadarbhai Kaliwala, acting as Partner of M/s. R.K. Traders, Bhavnagar had consciously and deliberately dealt with the goods which he knew or had reasons to believe were liable to confiscation under the provisions of Section 111(d), Section 111(m), Section 111(o) and Section 111(q) of the Customs Act, 1962 in respect of imports made by them without any valid DGFT authorization and also by availing the undue benefit of exemption Notification No. 99/2011-Cus. dated 09.11.2011. He also played an important role

in availing undue benefit of exemption under Notification No.99/2011-Cus dated 09.11.2011 with read Notification No.75/2006-Cus (NT), and such acts and omissions on the part of Shri Abdul Kayum Abdul kadarbhai Kaliwala, acting as Partner of M/s. R.K. Traders, Bhavnagar have rendered him liable for penalty under **Section 112(a)** of the Customs Act, 1962 against the import goods.

24.3. Since Abdul Kayum Kadarbhai Kaliwala has also violated the provisions of Section 17 and 46 of the Customs Act, 1962 which was his duty to comply, but for which no express penalty is elsewhere provided for such contravention or failure, he shall also be liable to penalty under **Section 117** of the Customs Act, 1962.

25. As per Section 110AA of the Customs Act, 1962, ...

26. In view of above, a Notice bearing no. GEN/ADJ/COMM /157/ 2024-Adjn dated 22.03.2024 was issued to **M/s. R.K. Traders** (IEC: 2410007694), Plot No. 47, Block No. 57, Opposite Pagoda Rolling Mill, Mamsa, Ghogha, District – Bhavnagar, Gujarat, to show cause within thirty days from the date of receipt of the notice to **the Commissioner of Customs**, Customs House Mundra, First Floor, Port User Building, Custom House Mundra, Kutch, Gujarat-370421, as to why:--

(i) The concessional rate of duty under Notification No. 99/2011-Customs dated 09.11.2011, should not be denied to them in respect of Bills of Entry shown in Annexure –A attached, and the why the subject Bills of Entry should not be reassessed.

(ii) The goods valued at Rs. 2,99,84,656/- *(Rupees Two Crores Ninety Nine Lakhs Eighty Four Thousand Six Hundred and Fifty Six Only)* seized under Seizure Memo DIN-202209DDZ1000000D7B9 and Seizure Memo DIN 202209DDZ10000520934 both dated 07.09.2022 should not be confiscated under Section 111(d), Section 111(m) Section 111(o) and Section 111(q) of the Customs Act, 1962.

(iii) Fine in lieu of confiscation of the goods valued at Rs. 2,99,84,656/- *(Rupees Two Crores Ninety Nine Lakhs Eighty Four Thousand Six Hundred and Fifty Six Only)* under Section 125 of the Customs Act, 1962 in respect of above para (ii) should not be imposed.

(iv) The goods valued at Rs. 29,73,35,057/- *(Rupees Twenty Nine Crores Seventy Three Lakhs Thirty Five Thousand and Fifty Seven Only)* imported under various Bills of Entry where the goods are not available for seizure should not be held liable for confiscation under Section 111(d), Section 111(m) Section 111(o) and Section 111(q) of the Customs Act, 1962.

(v) Fine in lieu of confiscation of the goods valued at Rs. 29,73,35,057/- *(Rupees Twenty Nine Crores Seventy Three Lakhs Thirty Five Thousand and Fifty Seven Only)* under Section 125 of the Customs Act, 1962 in respect of above para (iv) should not be imposed as the said goods are not available.

(vi) The duty amounting to Rs.4,16,19,115/- *(Rupees Four Crores Sixteen Lakhs Nineteen Thousand One Hundred and Fifteen Only)* leviable on the goods imported under the Bills of Entry shown in Annexure – A should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962.

(vii) Interest leviable under Section 28AA of the Customs Act, 1962, on the differential duty not paid should not be recovered from the importer.

(viii) Penalties under Section 112(a), 114A, 114AA and 117 of the Customs Act, 1962, should not be imposed upon the Importer.

26.1 Vide above notice, Shri Abdul Kayum Kadarbhai Kaliwala, Partner of the importer, was also called upon to show cause within thirty days from the date of receipt of the notice to the Commissioner of Customs, Customs House Mundra, First Floor, Port User Building, Custom House Mundra, Kutch, Gujarat-370421, as to why:

(i) Penalties under Section 112(a), 114AA and 117 of the Customs Act, 1962, should be imposed upon him.

27. LETTER AND WRITTEN SUBMISSION

27.1 The importer, M/s R.K. Traders vide their letter dated 31.12.2024 received by email in this office on 02.01.2025, requested to furnish legible copy of Bills of Entry with all the import documents uploaded by the importer with query raised by the officers for examination of goods etc. with examination report for all 54 bills of entry listed in Annexure - A to the impugned SCN as the allegations are made on the basis of those documents and also said Annexure – A is also prepared on the basis of those documents. Only copies of two Bills of Entry No. 2229437 & 2229078 both dated 30.08.2022 are enclosed and out of that copy of Bill of Entry No. 2229078 dated 30.08.2022 is only screen shot which is not legible at all.

Authority and proof showing that Er. Ajayrajsinh B. Jhala is appointed by the Customs Department as Chartered Engineer for the purpose of certification of imported goods / goods to be exported etc. and issue Chartered Engineer Certificate/opinion etc.

Legible certified copy of documents seized under panchnama dated 01.09.2022 drawn at its business premises i.e. 1 made up file as well as legible colour photo of goods and also documents at Sr. No. 1 to 10 files referred at page 2 of the said panchnama drawn at office premises.

They also needed legible certified copy of panchnama under which goods were seized in the presence of panchnama as both seizure memos dated 07.09.2022 do not bear any reference of seizure panchnama nor signature of panchas as well as owner of the goods or representative of the owner of the goods or premises. Even copy of suprat namas for the goods of 3 bills of entry are not furnished so same may also be arranged. It may please be clarified that when and goods were placed under seizure and where the seizing officer had signed the seizure memo?

Even in statements dated 03.09.2022, 30.01.2023 of Shri Abdul Kayum Abdul Kabarbhai Kaliwala, partner of M/s. R K said to have been shown the "Vivran Sheet" (Answer to Question No. 2 of both the statements) and his signatures were taken. It needs legible certified copy of both the sheets bearing signature of partner as same are not enclosed with the copy of statement furnished to it with the SCN.

Similarly "Description Sheet" said to have been shown to Shri Badal Chavda, Manager of Shree Malan Shipping while recording his statement dated 23.08.2023 (Ans. Question No. 2) and his signature is also taken, however same is not enclosed with the said statement furnished with the SCN. Therefore, it is requested to arrange to furnish copy of such description sheet duly signed by Shri Badal Chavda.

27.2 The importer **M/s. R.K. Traders** (IEC: 2410007694), Bhavnagar, and its partner **Shri Abdul Kayum Kadarbhai Kaliwala** vide common letter dated 06.02.2025 filed their written submission. The written submission is reproduced as under: -

1. M/s. R K Traders (Hereinafter referred to as M/s. R K) having business premises at the above address and registered with GST department and allotted GSTIN 24AAHFR4563Q1ZL. It is also having Importer Exporter Code (IEC) – 2410007694). It is partnership firm inter alia engaged in supply of waste & scrap of iron and steel (especially Cutting Shaft – obtained from breaking of ships) of Chapter 72 of the Customs Tariff Act, 1975. For the supply, many times it imports waste & scrap of ship breaking especially "Re-rollable Scrap (Heavy Iron & Steel Scrap/Broken Shaft & Crank Shaft of 7204 4900 and "Iron & Steel Shafts of 7326 9080" from Bangladesh. Initially from 2018 it had imported the said goods at Kolkata Port and thereafter imported the goods at Mundra due to logistics issue and save additional cost of transportation from Kolkata to Bhavnagar in comparison to Mundra to Bhavnagar. Initially, the said goods were declared as waste & scrap of Iron and Steel under tariff item 7204 of the First Schedule to the Customs Tariff Act, 1975 by the suppliers in their invoice etc. and started to classify the same under tariff item 7326 90 80 as "Iron and Steel Shaft" by the suppliers in their invoices. Though the goods imported by is nothing but re-rollable waste & scrap of tariff heading 7204 obtained from breaking of old & used ship/vessel but to avoid undue allegations of mis-classification / mis-declaration of goods etc. it had declared the goods as per declaration and mentioned by the suppliers in their export documents. In the same way since goods were being imported from Bangladesh and the suppliers of goods had issued Certificate of Origin (South ASIAN FREE TRADE AREA - SAFTA) under claim of the benefit of exemption from duty of Customs under Notification No. 99/2011-Cus. Dated 09.11.2011 (SAFTA) and it is entitled for Input Tax Credit of IGST paid on import of said goods, for it whether goods classify under tariff item 7326 9080 or tariff heading 7204 makes no difference. On the contrary rate of Basic Customs duty is higher than Waste & Scrap but since goods were imported against COO under claim of benefit of said exemption notification there cannot be any intention to mis-declare the goods on whatsoever grounds.

2. M/s. R K had filed Check Lists for Bills of Entry through its customs broker based on the documents received from the foreign suppliers by submitting / uploading the documents viz. Invoice, Packing List, Bill of Lading, Country of Origin Certificate/Certificate of Origin SAFTA etc. The Bills of Entry specifically bears the Note for Examination and Compulsory Compliance. Thus, goods were not only examined but also checked from the angle of Compulsory Compliance for the goods of 73269080 including Registration under Steel Import Monitoring System (SIMS) and Country of Origin for SAFTA from time to time. Therefore, after all such verification etc. on payment of assessed duty goods were allowed to clear for home consumption by the proper officer only.

3. M/s. R K had filed check list for one of the Bills of Entry No. 8475967 dated 14.08.2020 online in EDI system with all necessary import documents declaring the goods as "Iron & Steel Shaft and Crank Shaft (Obtained from Ship) by classifying under tariff item 7326 90 80 of the First Schedule to the Customs Tariff Act, 1975 as per the documents furnished by foreign based exporter i.e. M/s. Anan Enterprise, Chittagong, Bangladesh under claim of benefit of exemption of customs duty under Notification No. 99/2011-Cus. dated 09.11.2011 (SAFTA Benefit).

Goods were to be 100% examined in the presence of AC/DC Docks in terms of Public Notice No. 64/4 and government approved chartered engineer so as to report whether the goods are secondary / defective or scrap. The Chartered Engineer has to certify especially (i) Whether the goods are old and used, other than prime

item or secondary/defective and the reason for the same; (ii) Whether the goods in their present condition are scrap or not and if yes, then the basis of the said opinion; (iii) Whether the Goods are melting scrap or iron or steel / non alloy steel / alloy steel / Alloy Steel / Stainless Steel; (iv) Whether the goods can be used as such or other purpose without melting; (v) Please specify the percentage of each material of the imported goods to ascertain its actual value pl check value of the goods. Clearance withheld till further order from group. (19.08.2020)

Original examination completed. Please check PSI and PCB CFT. Goods may be released after payment of duty and if submitted documents are in order. RMS instructions may be pl be complied with. (28.09.2020)

Mandatory Compliance Requirements Examination Instructions (CTH) 7326 90 80 Import under this CTI is free subject to compulsory registration under Steel Import Monitoring System (SIMS). Ref. DGFT NTFN 17/2015-20 Dt. 05.09.2019. Mandatory Compliance Requirements Examination Instructions (For Notification 99/11- I "VFY COO Certi. VFY Goods have originated in Bangladesh/..... per SAFTA origin rules per NTF 75/06-CU NT. VFY goods are other than those of CTH ...." Mandatory Compliance 50/2017- 377 VFY goods other than those at Sr. No. 377A . ..... Refer CBEC Notification No. 49/2018 dated 20.06.2018.

Opened and examined 7 pkgs in the presence of CHA special observation:

Examined 100% in terms of PN 64/04 in presence of AC(TW_CFS) and Govt. Approved Chartered Engineer ..... Check declaration w.r.t. import documents, further C.Eng. submitted report vide ..... Which was duly signed by shed officer & forwarded to group for further necessary action, checked COO CFT No. .... Clearance withheld till further order from GR. (09.09.2020)

3.1 M/s. R K submits that the officers had insisted for personal presence of one of the partners of M/s. R K and he remained present and the officers had orally informed that value declared by it is not correct and even country of origin needs verification and it may take time. Since, goods were imported at Kolkata Port and M/s. R K's principle place of business is at Bhavnagar in Gujarat, delay was already made by the officer in reassessment of the said Bills of Entry though no fault on its part and demurrage, detention and storage charges were increasing day by day, at the behest and under pressure of the officers of Kolkata Customs it had agreed with the proposal of the officer to re-classify the goods under 7204 49 00 with enhancement of declared value and to forego the benefit of SAFTA Notification that too without any Show Cause Notice/ Personal hearing / Assessment Order for early release of cargo and accordingly replied to the queries raised by the officers. Thus, on payment of re-assessed duty of Customs goods were allowed to clear for home consumption under tariff item 7204 49 00 without change in description of goods.

Hereto annexed and collectively marked as Exhibit – I is the copy of re-assessed Bills of Entry.

3.1.1 M/s. R K had paid the said amount so as avoid further delay but requested the officer to issue appealable order so that it could be challenged before Appellate Forum but it was told that re-assessment itself is an appealable order and it could go to appeal on its basis alone, if wish so.

3.1.2 Since, M/s. R K was not agreed with the said re-assessment order (online reply to queries were written at the behest of the officer in the circumstances stated in para supra) on being aggrieved by the said re-assessed bills of entry

preferred an appeal before the Commissioner(Appeals), Customs, Kolkata for speaking order, benefit of SAFTA Notification, not put to the proper notice for rejection of declared transaction value etc., who had allowed the appeal of M/s. R K by way of remand to the original assessing authority for sharing the basis for re-assessment with the importer i.e. M/s. R K and thereafter, speaking order in terms of Section 17(5) of the Customs Act, 1962 while passing Order-in-Appeal No. KOL/CUS(Port)/KS/437/2022 dated 19.10.2022 from F. No. CAPPL/COM/CUSP/1847/2020-ADMNO/o-COMMR-CUS-APPL-KOL-M.F. No.S5-859/ CUS/APPR/KOL:/PORT/2020 in Bill of Entry No. 8475967 dated 14.08.2020.

Hereto annexed and marked as Exhibit – II is the copy of said Order-in-Appeal dated 19.10.2022.

4. & 5. *In para 4 & 5 of their written submission M/s R. K. Traders have repeated excerpts from the Show Cause Notice, which are not again reproduced here for the sake of brevity.*

6. *In para 6 of their written submission M/s R. K. Traders have repeated contents of their letter dated 31.12.2024 referred above, which are not again reproduced here for the sake of brevity.*

6.1 M/s. R K once again request to arrange to furnish above referred all the documents, clarification, information etc. as it is not having copy of all the said and even files, laptops containing such documents are seized. It reserves its right to call for more documents in the matter and also cross examination of department's witnesses including investigating officer, chartered engineer etc.

7. M/s. R K while awaiting the above referred documents, clarification, information etc. submits this interim reply reserving its right to make further detailed submissions in the matter.

8. M/s. R K at the very outset denies the allegations made in the impugned SCN on the following grounds with a request that same may be considered independent and without prejudice to one another. Nothing may be construed as admission except specifically admitted herein under:

8.1 M/s. R K most respectfully submits that though it is admitted facts on records and also not even matter of dispute that it had Imported goods are pieces of old and used iron and steel shafts obtained from breaking of ship from Bangladesh against proper & valid Certificate of Country of Origin and it was selling them as scraps (as deposed by one of the partner under Section 108 of the Customs Act, 1962) and even as per chartered engineer who has inspected the goods lying at port of import as well as factory/godown premises and opined that "the goods were Old and Used, Rusted, Uneven cut Pieces of "Iron & Steel Shaft" of different sizes/shapes, which may be used after further processing." It had filed checks lists for bills of entry with tariff item 7326 90 80 – Iron and Steel Cutting Shaft (Obtained from Ship) except Sr. No. 3 and 6 of Annexure – A to the SCN. The said two check lists were filed for bills of entry with tariff item 7204 49 00 - Re Rollable Scrap (Heavy Iron & Steel Scrap/Broken Shaft & Crank Shaft). In all the cases, description of goods and even tariff items were same as mentioned by the supplier of goods in the invoices, packing list and other documents. For bills of entry at Sr. No. 22 of the Annexure – A to the SCN check list was filed with tariff item 7326 90 80 – Iron and Steel Cutting Shaft (Obtained from Ship) but bills of entry was re-assessed by the proper officer with tariff item 7204 49 00 without changing description of goods as submitted in para supra. It means goods imported by it was waste & scrap of iron & steel only and not old and used.

Hereto annexed and collectively marked as Exhibit – III are copies Bills of Entry at Sr. No. 3, 5, 6, 26, 43 and 53 of Annexure – B to the SCN with all import documents available with it.

On the basis of above referred admitted facts on record, it is respectfully submitted that the officers either do not have basic knowledge of the Customs Act, 1962, Central Excise Act, 1962, Foreign Trade Policy etc. and nature of goods obtained from ship breaking or intentionally twisted the facts for the reasons best known to them or so as to implicate the innocent importer who had not mis-declared anything so as to take undue benefit of any of the provisions of the Customs Act, 1962, Customs Tariff Act, 1975 and Notifications issued thereunder. In the same way as per detailed submission in foregoing paragraph Country of Origin was also well within all four of the provisions of the Rules of Determination of Origin of Good under the Agreement on South Asian Free Trade Area (SAFTA) and Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020, but again either the learned officers failed to understand all these or intentionally twisted the facts for the reasons best known to them or so as to implicate the innocent importer.

Thus, impugned SCN is liable to be quashed only on these grounds.

8.2 M/s. R K submits that as per Section Note 9 & 8 of Section XV of the erstwhile Central Excise Tariff Act, 1985 breaking of ships shall amounts to manufacture and "Waste and Scrap" means metal waste and scrap from the manufacture or mechanical working of metals, and metal goods definitely not usable as such because of breakage, cutting up, wear or other reasons, which read as under:

> *"9. In relation to the products of this Section, the process of obtaining goods and materials by breaking up of ships, boats and other floating structure shall amount to "manufacture".*
>
> *8. In this Section, the following expressions have the meanings hereby assigned to them:*
>
> *(a) Waste & scrap:*
>
> *Metal waste and scrap from the manufacture or mechanical working of metals, and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons. ...."*

The said Section XV – Base metals and Articles of Base Metal covering Chapter 72 to Chapter 83.

In the same way Section Note 8 of Section XV of the Customs Tariff Act, 1975 has given meaning of "Waste & Scrap" for the said Section XV covering the chapter 72 to 83, which reads as under:

> *"8(a) Waste and Scrap:*
>
> *(i) All metal waste and Scrap;*
>
> *(ii) Metal goods definitely not usable as such because of breakage, cutting up, wear or other reasons; ....."*

Thus, in view of the above provisions the said Imported goods are nothing but waste and scrap only as the same are pieces of old and used iron and steel shafts obtained from breaking of ship. The goods manufactured by the ship breakers into India was considered as amounts to manufacture till 30.06.2017 and classifiable as waste & scrap of respective metals for the purpose of levy of Central Excise duty but when the same goods imported into India by any cannot be considered as second hand

goods other than capital goods at all especially when Waste & Scrap of metal is defined in the section note.

8.3 M/s. R K further submits that First of all such waste and scrap by any standard cannot be considered as second hand goods and both are governed differently for all purpose including under FTP and Customs Tariff Act, 1975. Para 2.32 of the FTA provide for Import of Metallic Waste and Scrap which read as under:

"Import Policy for Metallic Waste and Scraps:

2.32 Import of Metallic Waste and Scrap

(a) Import of any form of metallic waste, scrap will be subject to the condition that it will not contain hazardous, toxic waste, radioactive contaminated waste/scrap containing radioactive material, any types of arms, ammunition, mines, shells, live or used cartridge or any other explosive material in any form either used or otherwise as detailed in Para 2.51 of Handbook of Procedures.

(b) The types of metallic waste and scrap which can be imported freely, and the Procedures of import in the shredded form; un-shredded, compressed and loose form is laid in Para 2.51 of Handbook of Procedures."

Thus, it was import of waste and scrap and freely importable and not second hand goods by any standard, especially when Chartered Engineer's Certificates relied upon by the investigation itself states that the goods are old and used, rusted, uneven cut pieces of "Iron & Steel Shaft" of different sizes /shapes **which may be used after further processing**. These goods which may be used after further processing. It means he has nowhere opined that "Iron & Steel Shaft" which can be used as Shaft nor it is the case of the investigation that goods can be used as such as Shaft. Even as per panchnama dated 01.09.2022 drawn at its business premises the materials lying are scrap materials of ship breaking imported from Bangladesh. Even as per statement dated 01.09.2022 of one of the partners deposed that Imported Iron & Steel Shaft or old & used and its pieces and same are sold as Scrap only. It means the goods cannot be used as Shaft as such. So it appears that the Chartered Engineer might have written or used the word second hand goods for such waste & scrap at the behest of the investigation only. In any case merely use of the word Second Hand in the Chartered Engineer cannot change the nature of goods from waste and scrap to second hand goods. If one may look the entire contradictory statement of one of the partners, confession on law instead of trying to know facts of the matter, SCN and allegations made therein it clearly shows that the officers has tried to make out the case or forcefully created the case or tried to implicate the innocent importer even after knowing the truth on nature of goods as well as genuineness of Certificate of Origin (SAFTA).

8.4 M/s. R K in view of submits that it has never claimed the goods imported by it as Capital Goods or Second Hand Goods. On the contrary as discussed in para supra that as per the investigation carried out by the Kolkata Customs and re-assessed bills of entry as waste & scrap of 7204 only and even as per para 17.3 of the impugned SCN end used certificate submitted during the assessment of the Bills of Entry No. 7604391 dated 22.02.2022 so as to clarify the nature of goods and its use also clearly states that "the goods were Shaft of the Ship obtained during the breaking of Ship. The shafts were abruptly cut during the breaking of ship, which cannot be again used as shaft for ship. They had to process it in their factory to re-size them, cut them in various sizes of pieces and machining them and after that they are making parts of some machinery like hydraulic gear and bearings etc....."

Hereto annexed and collectively marked as Exhibit – IV are the copies of documents

one each from each year of dispute viz. invoice with HSN/SAC 7326, Lorry Receipt and weigh bridge sleep etc. under which M/s. R K had made supplied the same goods to its recipient of supplies.

8.5 Though goods imported by it are Waste & Scrap only and to avoid undue litigation and allegation of mis-declaration etc. it had classified the goods under 73269080 without any intention to claim if any undue benefit, on the contrary declared the goods under tariff item which attracts higher rate of Customs duty then Waste & Scrap. However, for peace of mind and to avoid undue litigation, M/s. R K has started to purchase from M/s. Compass Shipping Agency, Bhavnagar who are importing the same goods by classifying under tariff item 7204 49 00 of the first schedule to the Customs Tariff Act, 1975 with claim of said notification No. 99/2011-Cus. Dated 09.11.2011 and exclusively supplying to M/s. R K.

Hereto annexed and marked as Exhibit – V is the copy of one of the BE No. 4628091 dated 13.02.2023 with all import documents.

8.6 M/s. R K in support of the above submission refers and relies upon following decisions:

SUJANA STEELS LTD. Versus COMMISSIONER OF C. EX., HYDERABAD - 2000 (115) E.L.T. 539 (Tribunal)

> *Import - Goods imported by appellants viz. rusted and used pipes to be treated as having satisfied the definition of waste and scrap under Note 6 of Chapter XV of Customs Tariff Act, 1975 - Licence not required for import - Goods not liable to confiscation - Sections 111(d) and 111(m) of Customs Act, 1962.*
>
> *- The present goods admittedly are used and rusted pipes and it is not usable as 'tubes, pipes and hollow profiles, seamless, of iron (other than cast iron) or steel' as described under Chapter sub-heading 7304.90. The goods are not usable as new ones. The goods which have exhausted its use and have rusted and are not usable as new one's cannot be equated. The contention of the importers that it is to melt the goods in the induction furnace has not been disputed by the Revenue. The Revenue having accepted the price as that of scrap cannot for the purpose of classification consider the same to be new ones. The same having been accepted as scrap for international purposes cannot in the absence of evidence of Indian Trade Parlance and understanding be called as 'pipes or tubes for classification under Heading 73.04. The appellant's trade understanding was to be considered as that of Indian trade market and the appellants have declared as such and produced evidence. Revenue not having produced any evidence to the contrary the appellant's understanding as that of trade understanding of Indian traders cannot be rejected. Hence the declaration given by the appellants and the report of physical examination showing the goods to be rusted and used pipes are to be treated as having satisfied the definition of waste and scrap under Note 6 of Chapter XV of Customs Tariff Act and they are not new and fresh goods in terms of value also. Therefore, the appellants have proved their case and their declaration ought to have been accepted. Such import of goods as waste and scrap, licence is not required and hence the goods are not confiscable. [1994 (74) E.L.T. 22 (S.C.); 1996 (87) E.L.T. 12 (S.C.) relied on]. [para 6]*

HEMANI INDUSTRIES Versus COMMISSIONER OF CUSTOMS, CALCUTTA - 1996 (83) E.L.T. 617 (Tribunal)

Plastics - Waste and scrap not synonymous - `Waste' something of an article no longer fit for use as that article - `Scrap' is that which arises during manufacture of various articles in a factory - Para 27 of Hand Book of Procedure - Heading 39.15 of CETA.

- Waste cannot be equated with scrap even in terms of para 27 of the Hand Book of Procedure. Inasmuch as the two expressions - "Waste" and "Scrap" - have been used in that para, therefore, they cannot on normal principle of construction of law, be treated as same. The expression "Waste" in para 27(2) has been treated as something of an article which is no longer fit for use as that article. For example, `PET bottle waste' means that a bottle which is no longer fit for being used as a bottle has become a waste. Scrap is that which arises in the course of manufacture of various plastic articles in a factory. [paras 8, 8A]

Confiscation - Not justified for not taking licence - Plastic scrap not covered by para 27(2) of Hand Book of Procedure and not requiring licence for its import.

- It is clear from various documents on record including the Test Report of the Chemical Examiner, that the goods imported are plastic scraps and not plastic wastes. In this view of the matter, Para 27(2) of Hand Book of Procedure as relied upon by the authorities below for confiscation of the goods in question has no application in the present case and confiscation of plastic scrap, imported without licence, not valid. [paras 3, 7]

Import policy - Licence requirement - To be seen from Policy and not from Hand Book of Procedure

. - It is the policy which lays down the substantive restriction. Hand Book merely prescribes certain administrative guidelines and may not necessarily flow from the policy. As such the requirement of a licence or otherwise, is to be seen from the Policy and not from the Hand Book of procedure. [para 9]

POOJA CIRCULAR SAW Versus COMMISSIONER OF CUSTOMS, KANDLA - 2003 (158) E.L.T. 466 (Tri. - Mumbai)

Expert's opinion - If the Commissioner had accepted the decision of the metallurgy expert in so far it pertains to new blades he should also accept the other part of his opinion that the rest of the consignment consisted of only scrap unless he had valid reasons for not doing so. [para 7]

Valuation (Customs) - Scrap cannot be considered as second-hand goods - Value declared by the appellant accepted - Section 14 of the Customs Act, 1962. [para 7]

Confiscation of goods - Material particulars of the consignment declared in the bills of entry do not correspond to the goods under import in as much as around 2,450 kgs of the consignment consisted of new blades and not scrap - Goods liable to confiscation under Section 111(m) of the Customs Act, 1962 - However impugned goods importable without the cover of an import licence. Hence, not liable to confiscation under Section 111(d) ibid. [para 8]

8.7 M/s. R K in view of the above further submits that the so called confession on law by one of the partners is nothing but the clear intention of the investigation to implicate the person. It is settled position of law that confession on law cannot have any evidential value. On the contrary the way investigation has been done, including contradictory confession and confession of law which is suitable to investigation, SCN is drafted and allegations are made against M/s R K and its partner, it clearly reveals that the investigating officers are either not clear or intentionally twisted the issues so as to raise undue demand of huge amount of differential duty. Therefore, in view of the above, the goods imported by it is not falling under the category of "Second Hand Goods other than Capital Goods", so same is not restricted and covered by para 2.31 of Foreign Trade Policy (FTP) 2015-20 and no authorization is required. Therefore, goods are not liable to confiscation under Section 111(d), 111(m), 111(o) and 111(q) of the Customs Act, 1962. Therefore, proposal made at para 26 (ii), (iii), (iv), (v), (viii) for M/s. R K and at Para 26.1(i) against Shri Abdul Kayum Kadarbhai Kaliwala is totally erroneous and liable to be withdrawn/quashed.

9. M/s. R K most respectfully submits that in the same way the investigation either miserably failed to understand the clear and simple provisions of Notification No. 75/2006-Cus. (NT) dated 30.06.2006 – "Rules of Determination of Origin of Goods under the Agreement on South Asian Free Trade Area (SAFTA) and Notification No. 81/2020-Cus. (N.T.) dated 21.08.2020 – "Customs (Administration of Rules of Origin Under Trade Agreements) Rules, 2020" or intentionally tried to twist the issue on claim of benefit of Notification No. 99/2011-Cus. dated 09.11.2011 or twisted the matter for the reasons best known to the investigation. The investigation has miserably failed to understand the nature of ship breaking activity and goods recovered from such breaking or intentionally twisted the facts. It is respectfully submitted that the investigation as stated in para supra mis-directed itself in considering the goods as old and used shaft even after taking note of the fact that goods were obtained from dismantling/breaking of ship. As submitted in para supra breaking of ship amounts to manufacture and therefore in the certificate of Origin, originating criteria of goods mentioned as "Wholly obtained" which is correct as those "Iron & Steel Shaft" cut pieces are nothing but wholly obtained in Bangladesh from the breaking of ship. These facts are admitted in the impugned SCN. As submitted in para supra the said goods is nothing but waste & scrap of ship breaking only. Therefore, as per Rule 5 – Wholly produced or obtained (i) – waste and scrap resulting from manufacturing operations conducted there is considered as wholly produced or obtained in the territory of the exporting contracting state. In the same way the learned investigating officers has misdirected themself ignoring the fact that foreign supplier/exporter of the goods is trader and not ship breaking unit and also in understanding Form No. 1 (RUD 16) by reading Sl No. 2(d) and 2(e) which read as under:

2(d) - Is the originating criteria based on value content? Yes is opted with right mark and since yes is opted further provide the details (i) percentage of local value content – Material price 50%, (ii) Components which constitute value addition Labour Charges (25%), Gas Expenses (13%), Yard Rent (7%), Machinery & Equipment Cost (5%).

9.1 There is no dispute about the criteria, but the officer has either failed to read the Sl. No. 2(e) or intentionally ignored so as to twist the issue:

2(e) Has CTC rule been applied for meeting originating criteria? No is opted with right mark, which the learned officer has either missed to note or intentionally ignored so as to book the case against the importer. Further details viz. "provide

○ HS of Non-originating material/components used in production of goods: 7326 90 80" is required to be give if Yes is opted. Since, No is opted question of reading the same does not arise. "CTC" is explained at Form I, Section I, Para 4(iv) – Change in Tariff Classification (CTC) Method". Since the exporter is not manufacturer of the goods but trader of the goods it is rightly opted "No" in clause 2(e) of the said form.

9.2 The investigation after discussing all these baselessly stated at para 18.6 of the SCN that "The information relating to origin criteria in country of origin certificate does not match with that of information available on Form – I. In the same way at para 18.7 without furnishing and documentary evidence it is stated that prior to January, 2021 in COO origin of criteria of goods as "B" and thereafter "A". It is stated for 32 Bills of Entry where as in Annexure – A show cause notice refers 54 Bills of Entry, so copy of the said Form – I may be arranged to furnish with the said Specific CCO as same are withdrawn by the DRI and not available with M/s. R K.

9.3 It is respectfully submitted that there is no dispute about genuineness of the COO issued but the investigation has again made futile attempt to read between the line at para 20.3 and 20.4 too of the impugned SCN. In fact there is no Annexure – II in Rule of Determination of Origin of Goods under the Agreement on South Asian Free Trade Area (SAFTA). It should be Annexure – B and Article 15 (a) – viz *"The importing Contracting State may request to the Issuing Authority of the exporting Contracting State for a retrospective check at random and/or when it has* ***reasonable doubt as to the authenticity of the document or as to the accuracy of the information regarding the true origin of the products in question or of certain parts thereof.***"

9.3.1 Accordingly, High Commission of India based to Dhaka had written with reference to COO dated 24.08.2022 and 21.07.2021 to the Ministry of Commerce, Bangladesh and Export Promotion Bureau to undertake a retroactive verification in terms of Article 15(d) of Annex II "Operational Certification Procedures" for SAFTA Rules of Origin **with regards to the genuineness and verification of the originating criteria for the Certificate of Origin.**

In the copy of correspondence exchanged and furnished with the impugned SCN as RUD nowhere doubted the genuineness and/or originating criteria and the investigation has again tried to read the Questionnaire which is signed and stamped by the exporters as in para 4 – Brief Description of the Commercial activity of the Exporter clearly stated that "The Commercial activities of the exporter are exporting various kinds of Ferrous & Non Ferrous Metal Scrap. The exported products is collected / purchased / bought from various Iron and Steel oriented Factories and Ship Breaking Yards, which are fully originated as Bangladesh Products. In this connection we never imported any goods/products from any other country. We are exporting various type of Iron and Steel Shaft based materials from last fourteen years to till now. We fully collect the exportable quality full goods/products for the buyers as our business commitment."

It means it clearly states the nature of export of goods is metal scrap only and purchased from ship breaking yard and fully originated as Bangladesh Product.

Since being a trader he had not manufactured the goods in column No. 6 – Provide the following information about the production processes carried out or the goods which have been certified as originating in the said CoO – N/A is written and the learned Officers has gone further that the exporters have stated that they are exporting various kind of Ferrous & Non Ferrous Metal Scrap and intentionally or inadvertently omitted further mentioned about export of **Iron and Steel Shaft**

○ **based materials**, based on the same learned officers/investigation has tried to dispute that too without defining how and why benefit of said exemption is not admissible. In facts being a trader on the goods exported by them there cannot be any production processes carryout by them and in any case for the goods they have clearly mentioned about obtained from ship breaking and very specifically fully originated as Bangladesh Products – Metal scrap in the form of Iron and Steel Shaft based material. Therefore, it has rightly availed the benefit of Notification No. 99/2011-Cus. Dated 09.11.2011 and the goods imported by it fully qualified under Rule 4(a) and Rule 5 of the Rules of Determination of Origin of goods under the Agreement of South Asian Free Trade Area (SAFTA).

10. M/s. R K further submits that customs authorities at the port of import were very well aware of the fact the goods covered under various bills of entry were imported in terms of Notification No. 99/2011-Cus. Dated 09.11.2011 (SAFTA) and also nature of goods viz. "Iron and Steel Cutting Shaft" obtained from breaking of ship therefore it cannot be alleged mis-declaration of goods and imported second hand goods without authorization and importer has fulfill the conditions mentioned in the Policy as well as Notification No. 99/2011-Cus. This fact also gets confirmation from the orders for examination as discussed in para supra as well as at the time of earlier investigation. It is respectfully submitted that all directions for examination, compulsory compliance etc. raised by the proper officer in all 54 Bills of Entry mentioned in Annexure – A to the SCN and their replies/comments/examination reports etc. may please be called for before taking any adverse decision in the matter and also made available to it so as to defend the matter properly, in the interest of principle of natural justice.

The above orders appearing on the bills of entry filed at the port of import do not leave any doubt about the fact that the examining / assessing officers were aware of the fact of the nature of goods were imported in terms of FTP as well as under Notification No. 99/2011-Cus. Therefore, if the goods were imported by M/s. R K in contravention of provisions of **Error! Hyperlink reference not valid.** or the customs notification, then in those cases department would have certainly seized the goods at the time of import and initiated further proceedings. It however appears that investigation has deliberately overlooked the above facts while making unfounded allegations in the impugned notice against M/s. R K.

In continuation of the above, it is once again submitted that two bills of entry at Sr. No. 1 & 2 of Annexure – RUD for the seized goods which were imported by M/s. R K do not have copies of the **examination reports** on said 2 bills of entry. It is, therefore, requested to obtain copies of the examination reports from the Mundra/Kolkata customs for all 54 BEs referred in Annexure – B to the impugned SCN, and to provide the same to M/s. R K for making further submissions. Besides, if no examination was conducted at the time of import by examining officer of customs, than in that case, it may please be informed of the reasons for not carrying out examination in spite of specific instructions on body of the bills of entry. It may also be allowed to cross examine the examining officers as well as assessing officers before taking any adverse decisions in the matter.

11. M/s. R K submits that in view of the above it had rightly claimed benefit of exemption from payment of customs duty on the strength of a valid COO against the import of disputed goods in terms of Notification No. 99/2011-Cus dated 09.11.2011. Therefore, duty demanded under Section 28(4) in the impugned notice is not sustainable. Consequently, when duty demand itself is devoid of merits, question of recovery of interest under Section 28AA of the Customs Act, 1962 does not arise.

12. M/s. R K in view of the above submits that it has rightly self-assessed customs duty under Section 17 of the Customs Act, 1962 on the imported goods and there was no suppression of facts etc. Therefore, imported goods referred in the notice cannot be confiscated and/or held liable to confiscation under Section 111(d), (m), (o) and (q) nor any differential duty can be demanded under Section 28 with interest under Section 28AA of the Customs Act, 1962 nor penalty under Section 112(a) or 114A, Section 114AA and Section 117 of the Customs Act, 1962 can be imposed upon it and its partner.

13. M/s. R K without admitting anything further submits that as discussed in para supra there was no willful mis-declaration nor suppression of facts etc., therefore, department was required to issue demand of customs duty if any short paid within two years from the relevant date in terms of Section 28(1)(a) of the Act. 'Relevant date' in this case, in accordance with Explanation 1(a) appended under Section 28, would be the date on which proper officer has made an order for clearance of goods, which were prior to 02.04.2022 in respect of Bills of Entry at Sr. No. 1 to 44 of Annexure – B to the impugned SCN. Therefore, even if the department wishes to demand differential duty, notice for such recovery was required to be served to M/s. R K on or before completion of two years from the relevant date in terms provisions of Section 28(1) of the Customs Act, 1962, whereas the impugned notice has been issued on 22.03.2024 and received on 03.04.2024 by M/s. R K without support of any tangible evidence to prove the allegation of suppression of facts etc. with intention to evade duty. Under such circumstances, impugned notice is not sustainable on account of time bar too at least for the said 44 bills of entry.

In this your kind attention is invited towards the benchmark judgment Hon'ble Supreme Court, in Civil Appeal No. 6060 of 2003 in the case of ***M/s. UNIWORTH TEXTILES LTD Vs COMMISSIONER OF CENTRAL EXCISE, RAIPUR*** (supra). In the said case, Apex court has minutely examined and explained provisions of the of Central Excise Act, 1944 as well as of the Customs Act, 1962 in relation to invoking extended period for demanding duty under the allegation of suppression of facts etc. with intent to evade payment of duty. It was inter alia held by Hon'ble Supreme Court in the above case that mere non-payment of duties is NOT equivalent to collusion or willful mis-statement or suppression of facts; that if that were to be true, the court failed to understand which form of non-payment would amount to ordinary default; that it is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it; that the allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility.

Before ruling in favour the appellant therein, Hon'ble Apex court in the above case has also discussed many other relevant judgments involving identical dispute about applicability of extended period. It was finally ruled by the Apex court at para 26 that:

> *"26. Hence, on account of the fact that the burden of proof of proving mala fide conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant."*

M/s. R K submits that law laid down by Hon'ble Supreme Court equally applies in

the present case, therefore, investigation has grossly erred in invoking extended period on flimsy grounds.

It further invites kind attention to one of such other decision rendered by Hon'ble Supreme Court in the case of GOPAL ZARDA UDYOG Versus COMMISSIONER OF CENTRAL EXCISE, NEW DELHI: 2005 (188) E.L.T. 251 (S.C.) wherein it was inter alia concluded that when default if any, is on account of bonafide belief of the assessee, department cannot allege suppression of facts etc. with intent to evade duty for invoking extended period.

> ***"11.*** *The main point which arises for determination in these civil appeals is whether the department was right in the facts and circumstances of this case in invoking the extended period of limitation.*
>
> ***12.*** *In the case of Padmini Products v. Collector of Central Excise reported in 1989 (43) E.L.T. 195, this Court held that in a given case where there is a scope for believing that the goods were not excisable and consequently no licence was required to be taken then the extended period of limitation was inapplicable. Mere failure or negligence on the part of the manufacturer either not to take out the licence or not to pay duty in cases where there is a scope for doubt, does not attract the extended period of limitation. Unless there is evidence that the manufacturer knew that the goods were liable to duty or he was required to take out a licence, there is no scope to invoke the proviso to Section 11A(1). For invoking the extended period of limitation, duty should not have been paid or short-levied or short-paid or erroneously refunded on account of fraud, collusion or willful suppression or misstatement of facts or willful contravention of the Act or the Rules with the intention to evade payment of duty. These ingredients postulate a positive act, therefore, failure to pay duty or to take out a licence is not necessary due to fraud, collusion etc. Likewise, suppression of facts is not a failure to disclose the legal consequences of a certain provision."*

Although the above decision is in relation to offence under the Central Excise Act, 1944, however, it is submitted that ratio set out there in clearly applies in the present case also as provisions of Section 11A of the Central Excise Act, 1944 and provisions of Section 28 of the Customs Act, 1962 are *pari materia.*

13.1 M/s. R K without admitting anything further submits that allegation of willful mis-statement and suppression of facts with intention to evade payment of duty is always required to be proved with cogent evidence. However, the impugned notice nowhere defines as to how M/s. R K was aware that goods under dispute were not permitted to be imported being second hand goods. Similarly, the notice also does not disclose or explain as to how investigation has inferred that M/s. R K intended to evade payment of duty. Statements of its partner recorded under Section 108 of the Customs Act, 1962 clearly reveals that the there was no malafide intention on the part of M/s. R K. It has been consistently held by higher appellate authorities that burden of proving allegation is lying on the shoulders of the person who makes the allegation. Attention is invited to one of such decision of Hon'ble Supreme Court in the case of M/s UNIWORTH TEXTILES LTD Vs COMMISSIONER OF CENTRAL EXCISE, RAIPUR reported at 2013-TIOL-13-SC-CUS. The said decision elaborately explains the meaning of 'suppression of facts with intention to evade payment of duty' vis-à-vis invocation of extended period on such allegations under provisions of the Customs Act, 1962. Finding with regard to invocation of extended period are discussed in para infra. However, in relation to allegation of suppression etc., it was inter alia held by Apex court that:

"24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that "the appellants had not brought anything on record" to prove their claim of bona fide conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. This Court observed in Union of India Vs. Ashok Kumar & Ors.((2005) 8 SCC 760) that "it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."

25. Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet...."

The facts and circumstances of the case read with depositions of its partner discussed in para supra also confirm that there was no malafide intention of M/s. R K, neither was anything suppressed from the department. It cannot be denied that the disputed goods were imported by M/s. R K consequent to issuance of the COO and other necessary Registration viz. Compulsory Registration under Steel Import Monitoring System (SIMS) with effect from 28.09.2020 which was issued only after scrutiny of the export documents submitted by it. Therefore, M/s. R K had a reason to believe that if the items imported were not covered under Second Hand Goods and CCO were correct. One more reason to believe that the impugned goods were rightly imported against the COO was that the proper officer of customs, after verification of the COO and other documents on the ground stated in notes for Examination of goods and compulsory compliance had permitted clearance of the goods under claim of benefit of Notification No. 99/2011-Cus. Dated 09.11.2011 at the relevant time.

14. M/s. R K further submits that in impugned Show Cause Notice dated 22.03.2024 for the period 30.03.2019 to 30.08.2022 is issued subsequent to inquiry initiated in Bills of Entry No. 8475967 dated 14.08.2020 (Sr. No. 22 of the Annexure – A to the SCN) and re-assessed bills of entry from tariff item 732690 80 to 7204 4900, which is set aside by the learned Commissioner (Appeals). Even department's appeal against the Order-in-Appeal passed by the Commissioner (Appeals), Customs, Kolkata in the said bill of entry re-assessment order is pending before Hon'ble CESTAT, Kolkata. Grounds for reassessment of the goods from one tariff item to another tariff item was same in the said BE and even CCO was also submitted with the said BE. Therefore, extended period cannot be invoked as all these facts were within the knowledge of the department while issue of impugned SCN under the given circumstances, department cannot claim suppression of fact with intent to evade payment of duty etc. for the purpose of demand and/or for imposition of penalty in subsequent period show cause notice. In the similar situation Hon'ble Apex court and Hon'ble High Court in the following cases with reference to the provisions of Section 11A of the Central Excise Act, 1944 have held the same. Provisions of Section 11A of the Central Excise Act, 1944 and Section 28 of the Customs Act, 1962 are pari materia. Therefore, ratio of the following decisions is squarely applicable in the facts and circumstances of the case.

<u>NIZAM SUGAR FACTORY Versus COLLECTOR OF CENTRAL EXCISE, A.P. - 2006 (197) E.L.T. 465 (S.C.)</u>

"Demand - Limitation - Suppression of facts - All relevant facts in knowledge of authorities when first show cause notice issued - While issuing second and third show cause notices, same/similar facts could not be taken as suppression of facts on part of assessee as these facts already in knowledge of authorities - No suppression of facts on part of assessee/appellant - Demands and penalty dropped - Sections 11A and 11AC of Central Excise Act, 1944. [paras 9, 10]"

ECE INDUSTRIES LIMITED Versus COMMISSIONER OF CENTRAL EXCISE, NEW DELHI - 2004 (164) E.L.T. 236 (S.C.)

"Dutiability - Parts used for repair or replacement during warranty period are excisable - Section 3 of Central Excise Act, 1944. [2003 (154) E.L.T. 10 (S.C.) followed]. [para 1]

Demand and penalty - Limitation - Extended period of limitation not invocable in subsequent proceedings when earlier proceedings on same subject matter pending/decided - Suppression or misstatement - Second show cause notice alleging suppression - Earlier show cause notice for demand of duty and imposition of penalty for wrong availment of Modvat and its non-reversal adjudicated - Extended period of limitation not invocable for willful suppression or misstatement in the second show cause notice - No penalty imposable - Section 11A of Central Excise Act, 1944. [2003 (153) E.L.T. 14 (S.C.) followed]. [paras 4, 5, 7]"

GUJARAT AMBUJA EXPORTS LTD. Versus UNION OF INDIA - 2012 (26) S.T.R. 165 (Guj.)

"Demand - Limitation - Suppression - Facts stated in earlier show cause notices as well as allegations made therein and in present show cause notices are more or less similar - Only difference is that in impugned show cause notices there is a reference to intelligence gathered by Central Excise authorities and statements recorded - Though there is a reference of visit by Central Excise officers to factory of petitioner the date of such visit has not been mentioned - Impugned show cause notices were issued after most of the statements were recorded and as such, the reference to intelligence in the impugned show cause notices is of no consequence, since all the said facts were already before Central Excise authorities at the time when earlier show cause notices came to be issued - Impugned show cause notices not based on new or different facts than earlier ones - Extended period of limitation cannot be invoked in respect of earlier periods by issuing impugned show cause notices - Section 11A of Central Excise Act, 1944. [paras 16, 17]"

COMMISSIONER OF CENTRAL EXCISE & CUSTOMS Versus RIVAA TEXTILES INDS. LTD. – 2015 (322) E.L.T. 90 (Guj.)

"Demand – Limitation extended period of 5 years would not be available to the Department where the relevant facts were in the knowledge of the authorities – On facts, the various show cause notices issued to the assessee being based on one inspection report, the averment of the Department that it discovered suppression, fraud, etc., subsequently, could not be accepted – Thus, the extended period of 5 years was not

available to the Department – Section 11A of Central Excise Act, 1944. [paras 8, 10, 11]"

In view of the above invocation of Section 28(4) of the Customs Act, 1962 are not correct at all.

15. M/s. R K in view of the above submits that proposal for confiscation of the seized goods as well as goods which were never seized under Section 111(d), (m), (o) and (q) of the Customs Act, 1962 is also not maintainable in addition to the grounds discussed in para infra.

15.1 M/s. R K submits that so called seizure of goods under Seizure Memos dated 07.09.2022 itself is illegal and void in as much as deemed seizure was affected by the officer while sitting in DRI office at Jamnagar. Any goods cannot be seized without visiting the spot of seizure that too without preparing proper panchnama, even if it may not be possible to take into possession such goods and the seizing officer may hand it over to owner of the goods for safe custody after effecting seizure. It submits that although meaning of the word 'seizure' is not given in the Customs Act, 1962 however, it can be easily inferred from various dictionary meanings that effective seizure takes place only when the goods are taken into possession by the officer who orders its seizure. Some of such dictionary definitions are appended below for ready reference please:

From Wikipedia, the free encyclopedia
(Redirected from Seizure (law))
Search and seizure is an act that police and other law enforcement authorities are allowed to do. It is when they search a place for evidence of a crime. If they find that evidence, they may take it. They usually knock the door down with a search warrant. Warrants are a document stating that the government has permission to go into a building due to found evidence.
https://simple.wikipedia.org/wiki/Search_and_seizure
Merriam-webser:
Definition of SEIZURE
1a :the act, action, or process of seizing **:**the state of being seized
b :the taking possession of person or property by legal process
https://www.merriam-webster.com/dictionary/seizure
Seizure *noun*
[C or U] **the action of taking something by force or with legal authority:**
http://dictionary.cambridge.org/dictionary/english/seizure

.....
When an organization such as the police or customs service makes a **seizure of** illegal goods, they find them and take them away.
https://www.collinsdictionary.com/dictionary/english/seizure

In view of the above, it is submitted that when the goods were not seized in accordance with provisions of Section 110, the same cannot be confiscated under Section 111 of the Customs Act, 1962, not of speak of any of the clauses invoked under the impugned SCN.

15.2 M/s. R K further submits that even otherwise seized goods are not liable to confiscation under provisions of Section 111(d), (m), (o) or (q) of the Customs Act, 1962.

It may please be seen from the said provisions that seized goods in the

present case can be held liable to confiscation only when goods imported by it prohibited or restricted or any mis-declaration of any goods or any condition or any prohibition in respect of import of subject goods or any contravention of any provisions of Chapter VAA or any rules made thereunder (Preferential rate of duty) under the Customs Act, 1962 or any other law is not observed by M/s. R K.

15.2.1 As against the above legal requirement, it is submitted that as submitted in detailed in para supra goods are not prohibited / restricted at all nor any mis-declaration about the particular declared in the Bills of Entry nor there is breach of any of the condition of exemption Notification No. 99/2011-Cus nor any violation of any provisions of Chapter VAA or rules made thereunder as discussed supra. Similarly, there is no question of contravention of any of the conditions of the FTP as explained supra.

15.3 M/s. R K respectfully further submits that even otherwise, the goods are not liable to confiscation for the reason that the issue involved in the case relates to interpretation of provisions of the **Error! Hyperlink reference not valid.** read with Notification No. 99/2011-Cus. M/s. R K entertains a bonafide belief that the imported goods are allowed to be imported in terms of relevant provisions of law whereas the investigation rightly or wrongly entertains a contradictory view as discussed in para supra. Under the given circumstances, it may kindly be appreciated that the goods cannot be held liable to confiscation owing to the reason that there is difference of opinion in interpretation of law.

15.4 M/s. R K submits that in view of the above the seized goods deserve to be released unconditionally in the interest of justice.

15.5 M/s. R K without admitting anything and without prejudice to above most respectfully submits that in the SCN the department has proposed to held goods liable for confiscation as same is not available for seizure and fine in lieu of confiscation of goods at para 26(iv) & (v) viz. goods.

M/s. R K without admitting any thing most respectfully further submits that it is admitted facts on record that goods viz. goods imported and allowed to clear for home consumption (which is no more imported goods within the meaning of Section 2(25) of the Customs Act, 1962) were never seized by the department and not available for confiscation therefore, in absence of seizure nothing can be confiscated under Section 111 of the Customs Act, 1962 and no fine can be imposed under Section 125 of the Customs Act, 1962. It further submits that it cannot be disputed that option to redeem the confiscated goods can be given under Section 125 of the Customs Act, 1962 only when such goods are physically available. It may be appreciated that if option to redeem confiscated goods on payment of fine in lieu of confiscation is not exercised by the concerned person, then ownership of such goods shall automatically vest in the Central Government in terms of Section 126 of the Customs Act, 1962. Subsequently, the officer adjudging confiscation shall take and hold possession of the confiscated goods as per provision of Section 126 ibid. In the instant case it is mentioned in the notice itself that goods (Para 26 (iv) of the impugned SCN) are not available for seizure and if the goods are confiscated with an option to pay redemption fine and if M/s. R K fails to pay redemption fine, then it will be a piquant situation. In other words, if fine in lieu of confiscation imposed is not paid, the confiscated goods will become property of the Central Government and the officer have to take possession of the same in view of above provisions of law which is not practically possible. It's contention also supported by law laid down in following judgments:

APPELLATE COLLECTOR OF CUSTOMS & C.E. Versus T.N. KHAMBATI - 1988 (37)

E.L.T. 37 (AP)

Confiscation - Illegal search and seizure - Goods not liable to confiscation if their continued seizure is bad in law - Sections 100, 110 and 124 of the Customs Act, 1962. -

It is difficult, nay impossible, to postulate confiscation without seizing any goods. Seizure necessarily forms part of confiscation. That is why the Act has always connected the idea of confiscation with search and seizure. Section 100 enables the officer to search any person only if he has reason to believe that that person has secreted about his person any goods liable to confiscation or any documents relating thereto. The same emphasis on confiscation is reiterated in Section 110 which provides for seizure. Under this section, goods or documents can be seized only if the proper officer has reason to believe that the said goods or documents are reliable to confiscation. ***Thus the idea of confiscation is metrically connected with power to seize.*** *Sub-section (2) of Section 110 brings out the inescapable connection between confiscation and seizure, for, if no notice under Section 124 is given within six months of the seizure, goods shall be returned to the person from whom they were seized. Therefore, the contention that the procedure laid down under Section 110 is not required to be followed for confiscating any goods and imposing penalty for which a separate procedure is provided under Section 124 cannot be accepted. [paras 8 & 7]*

COMMISSIONER Vs. FINESSE CREATION INC. - 2010 (255) E.L.T. A120 (S.C.)]

Confiscation and redemption fine not imposable when goods not available for seizure

The Supreme Court Bench comprising Hon'ble Mr. Justice D.K. Jain and Hon'ble Mr. Justice C.K. Prasad on 12-5-2010 after condoning the delay dismissed the Petition for Special Leave to Appeal (Civil) No. CC 7373 of 2010 filed by Commissioner of Customs (Import) against the Judgment and Order dated 25-8-2009 in C.A No. 66 of 2009 of the High Court of Bombay as reported in 2009 (248) E.L.T. 122 (Bom.) (Commissioner v. Finesse Creation Inc.).

The High Court vide its impugned order had distinguished the Apex Court decision in case of Weston Components Ltd. [2000 (115) E.L.T. 278 (S.C.)]. While holding that concept of redemption fine arises in the event the goods are available and are to be redeemed, and if goods are not available, there is no question of redemption of goods. The High Court held that since goods were cleared earlier, not available for confiscation nor consequently redemption, therefore, Tribunal was right in holding that fine in lieu of confiscation was not imposable.

COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI Versus FINESSE CREATION INC. - 2009 (248) E.L.T. 122 (Bom.)

Confiscation - Availability of goods - Whether goods cleared and not available for seizure, liable to confiscation - Redemption fine arises when goods are available and are to be redeemed - No question of redemption of goods when goods not available - Customs authorities

empowered to order confiscation with discretion to release them on payment of redemption fine - Confiscation not arises if goods are not available for confiscation and consequent redemption - Fine not imposable once goods cannot be redeemed - Impugned Tribunal order holding fine in lieu of confiscation not imposable when goods were not available, sustainable - Sections 111 and 125 of Customs Act, 1962. [paras 1, 5, 6]

Hon'ble Larger Bench of CESTAT, New Delhi in the case of SHIV KRIPA ISPAT PVT. LTD. Versus COMMISSIONER OF C. EX. & CUS., NASIK: 2009 (235) E.L.T. 623 (Tri. - LB) wherein it was held that:

"Confiscation and redemption fine - Non-availability of goods - Whether goods can be confiscated and redemption fine imposed even if they are not available for confiscation - Identical issue considered in 2008 (229) E.L.T. 185 (P&H) and such order is binding - High Court in said order held that redemption fine in lieu of confiscation was not imposable when goods were allowed to be cleared without execution of bond/undertaking - Similar view taken by Tribunal also in 1999 (112) E.L.T. 400 (Tribunal) and affirmed by Supreme Court [2005 (184) E.L.T. A36 (S.C.)] - Binding precedents under Customs Act, 1962 applicable to impugned case relating to excisable goods - Goods cannot be confiscated when not available and redemption fine not imposable - Sections 111 and 125 ibid - ***Rule 25 of Central Excise Rules, 2002.*** *[paras 2, 3, 9, 10,11, 12, 13]*

Precedents - Binding precedent - Appeal against Tribunal order dismissed and such decision affirmed by Supreme Court - Similar view taken by High Court is a binding precedent - SLP against contra decision of another High Court dismissed by Supreme Court and such High Court decision ceases to be good law and not having precedent value. [para 10] Reference answered"

COMMISSIONER OF C. EX., AMRITSAR *Versus* GARG FORGING & CASTING LTD.: 2009 (235) E.L.T. 472 (Tri. - Del.)

Confiscation - Drawback fraud - Misdeclaration of nature, quality and value of exports - Drawback denied - Department in appeal, as Commissioner though held goods liable for confiscation, not confiscated same and not imposed redemption fine - Goods already exported and not available for seizure during investigation - Redemption fine in lieu of confiscation is in nature of option and if party does not pay redemption fine only option available is to takeover goods and dispose them - Possession of confiscated goods required to be taken over by authorities - Question of confiscation not arises when goods already gone out of country - Finding of liability to confiscation only to enable Commissioner to impose penalties - Section 113 of Customs Act, 1962. [paras 4, 5.2]

Redemption fine - Nature of - Option to pay - Fine in lieu of confiscation is in nature of an option - If party does not pay redemption fine, only option available to Department is to takeover goods and dispose them - Section 125 of Customs Act, 1962. [para

5.2] ***Appeal rejected***

COMMISSIONER OF CUSTOMS, KANDLA Versus M.S. INTERNATIONAL LTD.: 2004 (174) E.L.T. 101 (Tri. - Del.)

Redemption fine - Customs - Goods not seized by Customs authorities but ordered to be confiscated by adjudicating authority when found to be liable to confiscation - Redemption fine not imposable - Section 125 of Customs Act, 1962. [para 3]

16. M/s. R K in view of the above most respectfully prays that entire demand cum show cause notice may be set aside and seized goods may be released unconditionally. Alternatively, demand for shorter period of 2 years can be confirmed and only seized goods can be confiscated with an option to pay fine in lieu of confiscation and not goods which are not seized.

17. M/s. R K without admitting anything further submits that proposal to impose penalty upon it under Section 112(a), Section 114A, Section 114AA and Section 117 of the Customs Act, 1962 is also not maintainable in view of the above submissions.

17.1 M/s. R K submits that it has been consistently held by various appellate authorities that no penalty is imposable if the issue in litigation is on account of interpretation/difference of opinion in interpretation of the provisions of law and the noticee has acted with bonafide belief. There are numerous decisions of higher appellate authorities holding that when an assessee has interpreted provision of law or a notification under bonafide belief for availing any benefit, no penalty can be imposed in such cases.

In the case of INDIAN EXPLOSIVES LTD. Versus COLLECTOR OF CUSTOMS: 1992 (60) E.L.T. 111 (Cal.) involving somewhat identical question, it was inter alia held by Hon'ble High Court that:

Penalty and fine not imposable when importer acted on a bona fide belief - Sections 111(d), 111(m) and 112 of Customs Act, 1962. -

Even assuming that the licencee violated the provision of the Import Policy, a further question then arises as to whether there is any deliberate contravention in this case. The applicant disclosed fully and truly the description of spares which have been imported. The applicant bona fide believed that each item, because of its type and specification and the purpose for which it was meant, would be treated as a single unit. In this context, it cannot be said that there was a deliberate violation in this case. The value of the goods imported was within the prescribed limit of the licence. The items were meant for use in the process of manufacture of the applicant. These seals were required to ensure safety in production of explosives, a highly combustible product. Each item was meant to replace an identical part. In our view, therefore, on these facts no penalty or fine ought to have been imposed. [para 16]

Interpretation of statute - Interpretation most beneficial to the subject to be adopted in case of reasonable doubt. -

It is no doubt true that there is no equity about a tax but in case of a reasonable doubt the construction most beneficial to the subject is to be adopted. If there are two interpretations possible, then effect is to be given to the one that favours the citizen and not the one that imposes a burden on him. [para 14]

Few of such other decisions are listed below for favour of ready reference please.

- KELLOGG INDIA PVT. LTD. Versus COMMISSIONER OF C. EX., BELAPUR: (340) E.L.T. 694 (Tri. - Mumbai)
- IVICA COSMAI Versus COMMISSIONER OF CUSTOMS, JAMNAGAR: 2013 (291) E.L.T. 305 (Tri. - Ahmd.)

❖ DURGADATTA MISHRA Versus COMMISSIONER OF CUSTOMS (EXPORT), MUMBAI2007 (214) E.L.T. 356 (Tri. - Mumbai)

17.2 M/s. R K without admitting anything further submits that proposal for imposing simultaneous penalty under Section 112(a) and Section 114A is also erroneous and unlawful. Your goodself's kind attention is invited to the fifth proviso to Section 114A which clearly mandates that *"Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114."* It, therefore, appears that penalties have been proposed to be imposed upon M/s. R K without even appreciating relevant provisions of those sections in a mechanical manner.

17.3 M/s. R K without admitting anything further submits that proposal to impose penalty under Section 114AA of the Customs Act, 1962 upon it is also without understanding the provisions as well was legislature intention to insert the said section. In view of the above submission no penalty is imposable upon it. Even otherwise said proposal is also devoid of merits. Plain reading of Section 114AA very much clears that it can be imposed only when somebody intentional use of false and incorrect material, which reads as under:

> **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.

The first and foremost requirement to bring any person under domain of Section 114AA is that he must be ***knowingly or intentionally*** using the declaration, statement or document and such declaration, statement or document should be for transaction under provisions of Customs Act, 1962. M/s. R K most respectfully submits that none of the above element applies to it. As already discussed in para supra there was no declaration etc. of false or incorrect particular in any material. Hence question of imposing penalty under Section 114AA does not arise.

17.3.1 M/s. R K without admitting anything, as regards to imposition of penalty under Section 114AA of the Customs Act, 1962 would further like to draw your kind attention towards the fact that same can be imposed only in the situation of export on paper without physical export or involving fraudulent export and cannot be invoked for any alleged violation in import of goods.

For the above submission attention is further invited towards paragraph 62 to 66 of Standing Committee on Finance 27th Report - (2005-2006) – The Taxation Laws (Amendment) Bill, 2005.

Based on the same it is submitted that intention of legislature was to impose penalty under said Section 114AA only on exporters who were claiming export on paper and claiming illicit benefit of export incentives as is evident from following:

> *"Section 114 provides for penalty for improper exportation of goods. However, there have been instance where export was on paper only and no goods had ever crossed the border. Such serious manipulators could escape penal action 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 up to 5 times the value of goods. A new section 114AA is proposed to be inserted after Section 114AA."*

Based on above, it is submitted that instant case is of import and not of export so in any case no penalty can be imposed under Section 114AA of the Customs Act, 1962.

18. The under signed being a partner of the firm in view of the above submissions most respectfully submits that since impugned SCN is liable to be withdrawn and no penalty is imposable upon him also. However, without prejudice to the above, I submit that it is settled principle of law that when penalty is proposed to be imposed upon firm, no separate penalty can be imposed on the partner for the same offence as partner is not a separate entity under the law. In this case, there is no offence at all. Even if it is presumed for sake of argument that so called short payment of duty etc. is payable by its firm even in that case also no penalty can be imposed upon me being a partner for the said so called offence.

It may kindly be appreciated from the above that proposal to impose penalty under Section 112(a), Section 114AA and Section 117 of the Customs Act, 1962 is unwarranted and non-judicious in nature. As submitted in para supra in any case no penalty can be imposed under Section 114AA of the Customs Act, 1962 upon firm as well as undersigned. I respectfully invite your kind attention towards amongst other following decisions rendered by higher judicial forum in support of the above:

C.C.E. & C., SURAT-II Versus MOHAMMED FAROOKH MOHAMMED GHANI: 2010 (259) E.L.T. 179 (Guj.)

Penalty on partner - Separate penalty when same also imposed on partnership firm - Tribunal upheld view that no separate penalties warranted on partners - Under law of partnership, firm having no legal existence apart from its partners and merely a compendious name to describe partners as distinguished from a company which stands as separate entity distinct from its shareholders - No question of penalizing partners separately for same contravention, unless intention to treat firm and partners or distinct entities borne out from statute itself as in case of Income Tax Act, 1961 - Explanation to Section 140 of Customs Act, 1962 equates partnership firm with company in respect of commission of offences but no such corresponding provision in relation to imposition of penalty - No separate penalty warranted - Section 112 ibid. [paras 8, 9] Appeals dismissed

COMMISSIONER OF CENTRAL EXCISE Versus JAI PRAKASH MOTWANI: 2010 (258) E.L.T. 204 (Guj.)

Penalty on partner - Shortage of imported goods in EOU - No specific role attributed to respondent/partner in firm - Once the firm has already been penalized, separate penalty cannot be imposed upon the partner - A partner is not a separate legal entity and cannot be equated with employees of a firm - Section 112(b) of Customs Act, 1962. [paras 5, 6] Appeal dismissed

COMMISSIONER OF CUSTOMS (E.P.) Versus JUPITER EXPORTS: 2007 (213) E.L.T. 641 (Bom.)

Penalty - Imposition of - When partnership firm is penalized, separate penalties cannot be imposed on partners - Section 112 of Customs Act, 1962. [para 19]

AMRITLAKSHMI MACHINE WORKS Versus COMMR. OF CUS. (IMPORT), MUMBAI 2016 (335) E.L.T. 225 (Bom.) – Larger Bench of Hon'ble High Court

"Penalty - Imposition of on partner and partnership firm, simultaneously - Section 140 of Customs Act, 1962 can be read into Section 112(a) ibid only in cases where notice to impose penalty makes out case of offence prima facie satisfying requirements of Section 135(1)(a) ibid - In such cases, penalty can be imposed both upon partner as well as firm - In cases of abetment under Section

112(a) ibid, specific case of abetment against partner would have to be made for separate penalty upon him - Notice issued by Revenue should make out case of partner having acted and/or omitted to act with knowledge in his individual capacity that such act and/or omission to act on part of firm would render goods liable to confiscation - This is so as breach on part of partner is independent of breach committed by partnership firm - To that extent, it is penalty imposed upon two separate persons for distinct breaches - It has nothing to do with Sections 135 and 140 ibid - However, penalty cannot be imposed on partner merely because penalty is being imposed upon firm - Burden is upon Revenue to make out case that penalty is imposable under Section 112 ibid upon partner for abetment of offence by firm - Otherwise, penalty imposed upon firm would be penalty imposed upon all partners of firm as this has nothing to do with knowledge of breach rendering goods liable for confiscation on part of partners concerned - Liability is strict, and imposed on all parties irrespective of fact, whether partner concerned is active or sleeping partner - Division Bench of Bombay High Court decision in Textoplast Industries [2011 (272) E.L.T. 513 (Bom.)] approved to the above extent, and disapproved to extent it relied on Apex Court decision in Standard Chartered Bank [2006 (197) E.L.T. 18 (S.C.)], as it was rendered under FERA, which provides scheme for imposition of penalty different than Customs Act, 1962 - Decision in Jupiter Exports [2007 (213) E.L.T. 641 (Bom.)] holding that no separate penalty upon firm and partner can be imposed under Section 112(a) ibid in all cases, found to be incorrect, and overruled. - Simultaneous penalty can be imposed both on the partners and partnership firm under Section 112(a) of the Act where the charge on the firm is of acting or omitting to act rendering the goods liable for confiscation and the notice issued to the partner makes out a separate case of abetment on his part. This abetment should be in respect of the act and/or the omission to act on the part of the firm which has rendered the goods liable for confiscation under Section 111 of the Act or where the allegation on the firm is of abetment and/or mens rea, then Sections 135(1)(a) and 140 of the Act is applicable and simultaneous penalty is imposable. It is made clear that in all other cases falling under Section 112(a) of the Act simultaneous penalties upon the firm and its partner cannot be imposed. It is made clear that no penalty can be imposed upon the partner ipso facto merely on account of the fact that penalty is being imposed on partnership firm. ..... [paras 20, 22, 30, 31, 37, 39]

Penalty - Imposition of - On partner and partnership firm, simultaneously - Under Section 112(a) of Customs Act, 1962 penalty is imposable upon any person whose act or omission to act renders imported goods liable for confiscation under Section 111 thereof - As 'person' is not defined under Customs Act, 1962, meaning has to be assigned to it as stipulated to it in Section 2(42) of General Clauses Act, 1897 which defines person to include any company or association or body of individuals whether incorporated or not - Partnership firm is person for purpose of Section 112 of Customs Act, 1962 - Even though under Sections 4, 25 and 26 of Indian Partnership Act, 1932 partnership firm, does not have entity distinct from its partners, where legislation specifically provides otherwise, partnership firm are accorded separate legal entity, as for Income Tax and Sales Tax purposes - Though under Customs Act, 1962 partnership firm is not given status of separate legal entity, in absence of invoking Section 140 ibid thereof, no separate penalties under Section 112 ibid could be imposed simultaneously on firm and its partners. [para 32]

Penalty - Imposition of - On firm and its partners, simultaneously - Under part of Section 112(a) of Customs Act, 1962 prescribing strict liability for commission/omission rendering imported goods liable to confiscation, when allegation against particular firm is not of abetment and it is in possession of IEC code number and filed Bill of Entry for import of goods - HELD : In such case penalty imposed on firm would be penalty imposed upon all partners of firm as it has nothing to do with knowledge of breach rendering goods liable for confiscation under Section 111 ibid - It is case of strict liability, having nothing to do with mens rea/ knowledge. [para 30]

Penalty - Imposition of - On partner and partnership firm, simultaneously - IEC number in name of partnership firm indicates that it collectively represents all partners as laid down under Partnership Act, 1932 - Section 140 of Customs Act, 1962 bestows independent identity upon firm and has application in respect of partner who is person responsible to firm for its business - However, it has limited application only in respect of offence specified under Chapter XVI of Customs Act, 1962 of which Section 140 ibid is part, and it cannot be read into Section 112(a) ibid, against firm unless notice issued invokes Section 135 ibid - This breach is not only for imposition of penalty under Section 112(a) but also offence under Chapter XVI ibid. [paras 32, 34]

Reference to Larger Bench - Scope of - It need not emanate only on account of difference of opinion between two coordinate benches - It could also arise where Bench of Court is unable to subscribe to earlier view of Bench of equal strength of same Court. [para 13]

19. M/s. R K in view of the above requests to drop the proceedings initiated under the impugned notice or documents etc as requested above may please be furnished. On receipt of the documents viz. examination reports and other documents viz. Form – I for all the bills of entry they wishes to make further submission in the matter and also cross examination of department's witnesses as per settled position of law."

PERSONAL HEARINGS

28. Opportunity of personal hearing in the case was given to the Noticees on 23.12.2024 and 18.02.2025 under the provisions laid down in Customs Act, 1962 and following the principles of natural justice.

28.1 1st PH on 23.12.2024

In reply to first Personal Hearing letter, M/s P R Associates Advocates, on behalf of M/s R. K. Traders and its partner Shri Abdul Kayum Kadarbhai Kaliwala, sought adjournment for 30 days.

28.2 2nd PH on 18.02.2025

The 2nd Personal Hearing was attended by Shri P.D. Rachchh, Advocate on 18.02.2025, at 11.00 AM via Virtual Mode on behalf of M/s R. K. Traders and its partner Shri Abdul Kayum Kadarbhai Kaliwala. The record of Personal Hearing is reproduced as under –

"Shri P.D. Rachchh, Advocate, representing M/s R.K. Traders (IEC: 2410007694) and its partner Shri Abdul Kayum Kadarbhai Kaliwala, appeared before me for scheduled Personal hearing on today, i.e. 18.02.2025, at 11.00 AM through virtual mode. During the PH, Shri Rachchh reiterated the written submissions dated 06.02.2025, for both the aforesaid Noticees sent by email on

07.02.2025 and submitted in hard copy on 11.02.2025.

He reiterated the contents of the Notice and invited attention towards Paragraphs 1, 2, last 3 lines of Para 4 and 7, Para 17.1, 17.3, 17.4, 18.2(i), 18.4, 18.5 and 18.6 of the SCN and submitted as under –

M/s. R. K. Traders, Bhavnagar is engaged in import and supply of Waste & Scrap of Iron & Steel of 7204 4900 especially Cutting Shaft Obtained from Ship Breaking from Bangladesh by classifying under 7326 90 80 as the suppliers in their export documents including invoices were classifying under the said tariff item. The same was done so as to avoid allegations of mis-declarations and undue litigation in the matter. Since, goods were imported against claim of benefit of Notification No. 99/2011-Cus. Dated 09.11.2011 (SAFTA) i.e. exemption from payment of Basic Customs Duty and goods waste & scrap of 7204 attracts only 2.5% BCD and Shaft of Ship of 7326 attracts 10% BCD so there cannot be any intention to mis-declare and mis-classify the goods that too with higher rate of basic customs duty. The said facts of nature of goods is admitted facts on records as per the investigation including chartered engineer's certificate, statement of one of the partners, panchnama, end use certificate etc. Thus, goods imported were nothing but waste & scrap of cutting pieces of shaft obtained from breaking of ship same cannot be considered as Second-Hand Goods at all and therefore no authorization is required under FTP para 2.31.

He further invited attention towards Section Note 9 and 8 of Section XV of the First Schedule to the Central Excise Tariff Act, 1985 and submitted that the process of obtaining goods and materials by breaking up of ships boats and other floating structures shall amount to "manufacture". Metal waste and scrap means waste and scrap obtained from the manufacture or mechanical working of metals, and metal goods, definitely not usable as such because of breakage, cutting-up, wear or other reasons. Thus, cut pieces of Iron and Steel shaft obtained from the breaking of ship is nothing but waste and scrap of iron and steel and by any standard same cannot be considered as parts of ship/vessel of tariff item 7326 90 80 of the First Schedule to the Customs Tariff Act, 1975 as same cannot be used as shaft as such or even after some process.

Attention was also invited towards meaning of Waste & Scrap of 7204 from Explanatory Note to HSN – waste and scrap from the manufacture or mechanical working of iron or steel, articles of iron or steel, definitely not usable as such because of breakage, cutting up, wear or other reasons. But the heading excludes articles which with or without repair or renovation can be used their former purposes.

Attention was also invited towards the tariff item 7326 90 80 – Parts of ships, floating structure and vessels, so goods imported by M/s. R K Traders were cut pieces of Iron and Steel which by any means cannot be classifiable as part of ship etc., though same were classified under the said tariff item in the circumstances stated in para supra, as per chartered engineer's certificate as well as End Use Certificate discussed at para 17.3 of the SCN, goods cannot be used as such and need further process, so such waste and scrap cannot be considered as Second Hand Goods so there is no restriction under para 2.31 FTP. Merely it was classified under 7326 90 80 as Iron and Steel Cutting Shaft – (Obtained from Ship) it cannot be said that same is second hand goods and for import of the same authorization is required.

He submitted that Benefit of said Notification No. 99/2011-Cus. Dated 09.11.2011 (SAFTA) is also rightly availed as it is nowhere opined that COO Certificate was not genuine as per investigation and as per Rule 5(i) – goods being waste and scrap of breaking of ship it has to be considered as Wholly obtained goods only. Even manner of reading of Form – I (RUD-16) discussed in the SCN is also

totally erroneous and there is no specific ground alleged in the SCN for denying benefit of said notification.

He further submitted that out of 54 Bills of Entry referred in Annexure – B to the SCN (Duty computation sheet), BE at Sr. No. 3, 6 and 22 are for the goods waste and scrap of 7204 49 00 and even BE at Sr. No. 22 the Kolkata Customs as assessed as Waste and Scrap without change in the classification of goods as per OIA No. KOL/CUS(Port)/KS/437/2022 dated 19.10.2022 of Commissioner of Customs (Appeals), Kolkata (copy enclosed at page 48 to 59 of the compilation sent by email before PH). Further, even goods imported under BE at Sr. No. 53 and 54 of Annexure – B which were examined and seized are Old and Used Iron and Steel Shaft obtained from breaking of ship. So by no means goods imported under all 54 BEs can be considered as Second Hand Goods at all.

Hence, no differential duty is payable on the said goods and benefit of SAFTA Notification is also rightly claimed.

He further submitted that even as per specific directions for Examination of Goods, goods were examined by the proper officer and allowed to clear for home consumption on payment of appropriate duty of customs. In the same way as submitted in para supra that for BE No. 8475967 dated 13.08.2020 (Sr. No. 22 of Annexure – B) investigation to the effect of valuation and COO Certificate was carried out, therefore, suppression, mis-declaration and mis-classification etc. cannot be alleged in the present case. Therefore, major demand beyond normal period of 2 years is time barred.

He also submitted that when all the facts were within the knowledge of the department in subsequent SCN extended period cannot be invoked as per settled position of law referred in reply to the SCN.

He argued that in view of above submissions that the goods are not liable to confiscation. Alternatively, he submitted that in any case goods which were never seized cannot be confiscated with an option to pay fine lieu of confiscation, as in absence of seizure of goods nothing will remain to redeem. For that he referred to decision of Bombay HC in the case of Finesse Creation Inc which is upheld by Hon'ble Apex Court. So at least for goods which are not seized same cannot be confiscated with an option to pay fine in lieu of confiscation.

He also submitted that investigation was not clear about nature of offence therefore invoked the provisions of Section 112(a), Section 114A, Section 114AA and Section 117 of the Customs Act, 1962. As per the provisions of Section 114A of the Customs Act, 1962 when penalty is imposed under the said section no further penalty is imposable under Section 112(a). In the same way as per standing committee's report as the time of insertion of provisions of Section 114AA, same can be imposed only when export is only on paper without any physical export of goods. Since, the impugned case is of import and not export no penalty is imposable under Section 114AA ibid.

He also submitted that there is proposal to impose penalty under Section 112(a), 114AA and 117 of the Customs Act, 1962 upon partner of the firm. It was submitted that as per settled position of law including decisions of Hon'ble High Court of Bombay Larger Bench, when penalty is imposed upon firm no separate penalty is imposable upon partner. Apart from that as submitted in para supra in any case penalty under Section 114AA cannot be imposed in the facts and circumstances of the case upon partner being a case of import.

Based on the above submissions Shri Rachchh requested to drop the

proceedings. Lastly, he prayed that documents etc. as requested at para 6 and 10 of the reply dated 06.02.2025 to the SCN may please be arranged and on receipt of the same they wish to make further submissions in the matter and also wish to be heard in person again".

DISCUSSION AND FINDINGS

29 After having carefully gone through the Show Cause Notice, relied upon documents, submissions made by the Noticee's and the records available before me, I now proceed to decide the case. The main issues involved in the case which are required to be decided in the present adjudication are as below:

(i) Whether the concessional rate of duty under Notification No. 99/2011-Customs dated 09.11.2011, is liable to be denied to M/ R. K Traders in respect of Bills of Entry shown in Annexure –A attached and the subject Bills of Entry is liable to be reassessed.

(ii) Whether the goods valued at Rs. 2,99,84,656/- *(Rupees Two Crores Ninety-Nine Lakhs Eighty-Four Thousand Six Hundred and Fifty-Six Only)* seized under Seizure Memo DIN-202209DDZ1000000D7B9 and Seizure Memo DIN 202209DDZ10000520934 both dated 07.09.2022 are liable to be confiscated under Section 111(d), Section 111(m) Section 111(o) and Section 111(q) of the Customs Act, 1962.

(iii) Whether fine in lieu of confiscation of the goods valued at Rs.2,99,84,656/- *(Rupees Two Crores Ninety Nine Lakhs Eighty Four Thousand Six Hundred and Fifty Six Only)* under Section 125 of the Customs Act, 1962 in respect of above para (ii) is liable to be imposed.

(iv) Whether the goods valued at Rs. 29,73,35,057/- *(Rupees Twenty Nine Crores Seventy Three Lakhs Thirty Five Thousand and Fifty Seven Only)* imported under various Bills of Entry where the goods are not available for seizure are liable for confiscation under Section 111(d), Section 111(m) Section 111(o) and Section 111(q) of the Customs Act, 1962.

(v) Whether fine in lieu of confiscation of the goods valued at Rs.29,73,35,057/- *(Rupees Twenty Nine Crores Seventy Three Lakhs Thirty Five Thousand and Fifty Seven Only)* under Section 125 of the Customs Act, 1962, in respect of above para (iv) is liable to be imposed as the said goods are not physically available.

(vi) Whether duty amounting to Rs.4,16,19,115/- *(Rupees Four Crores Sixteen Lakhs Nineteen Thousand One Hundred and Fifteen Only)* leviable on the goods imported under the Bills of Entry shown in Annexure – A is liable to be demanded and recovered from M/s M/s. R.K. Traders (IEC: 2410007694) under Section 28(4) of the Customs Act, 1962.

(vii) Whether Interest leviable under Section 28AA of the Customs Act, 1962, on the differential duty not paid by the importer, is liable to be recovered from them.

(viii) Whether the said Importer is liable to penalty under the provisions of under Section 112(a), 114A, 114AA and 117 of the Customs Act, 1962.

(ix) Whether **Shri Abdul Kayum Kadarbhai Kaliwala**, Partner of the importer firm, is liable to penalty under the provisions of Section **112(a), 114AA and 117** of the Customs Act, 1962.

30. After having framed the main issues to be decided, now I proceed to deal with

each of the issues herein below. The foremost issue before me to decide in this case is whether the concessional rate of duty under Notification No. 99/2011-Customs dated 09.11.2011, is liable to be denied to the importer in respect of the Bills of Entry, as shown in Annexure –A attached to the notice. Another important issue to be decided is whether the goods imported by M/s. R.K. Traders, Bhavnagar viz 'Old/Used Iron & Steel Shaft' which were obtained from ship breaking activity at Chattogram, Bangladesh, falls under the category of Second-Hand Goods other than Capital Goods which are restricted goods and requires Import Authorization as per Para 2.31 (II) of the Foreign Trade Policy 2015-2020.

30.1. I find that in the present case, the importer M/s. R.K. Traders, Bhavnagar have imported "Iron & Steel Shaft" (under CTH - 7326 9080) and claimed preferential rate of duty after availing the benefit of Notification No. 99/2011 dated 09.11.2011 (SAFTA) with Country of Origin as Bangladesh, wherein, the origin criteria of goods is mentioned as "Wholly obtained". The relevant Rules of Origin for the Notification No. 99/2011-Cus dated 09.11.2011 is **"Determination of origin of goods under the agreement of South Asian Free Trade Area (SAFTA)"** under Notification No. 75/2006-Cus (NT) dated 30.06.2006 as amended. **Rule 5** of the Rules of Origin prescribes details of "Wholly obtained" goods as under:-

Rule 5 : Wholly produced or obtained

Within the meaning of Rule 4(a), the following shall be considered as wholly produced or obtained in the territory of the exporting Contracting State.

(l) raw or mineral products .....;

(m)Agriculture, vegetable and forestry products harvested there;

(n) Animal born and raised there;

(o) products obtained from animals referred to in clause (c) above;

(p) products obtained by hunting or fishing conducted there,

(q) products of sea fishing .....;

(r) products processed and/or made on board its factory ships .....;

(s) raw materials recovered from used articles collected there;

(t) waste and scrap resulting from manufacturing operations conducted there;

(u) products taken from the seabed, ...;

(v) goods produced there exclusively from the products referred to in clauses (a) to (j) above.

30.2 Further, according to Rule 4 of the **Customs (Administration of Rules of Origin under Trade Agreements) Rules – 2020** (CAROTAR Rules – 2020), the origin related information is required to be possessed by importer for claiming the preferential rate of duty, the relevant extract is reproduced as under:-

*"4. **Origin related information to be possessed by importer:-**The importer claiming the preferential rate of duty shall –*

*(a) possess information, as indicated in **Form 1,** to demonstrate the manner in which country of origin criteria, including the regional value content and product specific criteria, specified in the Rules of Origin, are satisfied, and submit the same to the proper officer on request.*

(b) Keep all supporting documents related to Form I for at least five years from date of filing bill of entry and submit the same to the proper officer on request.

(c) Exercise reasonable care to ensure the accuracy and truthfulness of the

aforesaid information and documents."

30.3 On careful examination of **Form 1 (RUD No. 16 of the notice)** collected during the course of investigation, I find that, in respect of COO certificate No. EPB (C)3357 dated 31.07.2022 , against Sl. No. 2(d-) **Is the originating criteria based on value content,** the information furnished states as ***'Yes'*** *and (i)* ***percentage of local value content:*** *Material price is shown as 50%, (ii) Components which constitute value addition were shown as labour charges 25%, Gas Expenses 13%, Yard rent 7% and Machinery/equipment cost 5%, also, against Srl No.2(e)* ***HSN of Non-originating material/components*** *used in production of goods was given as '7326 9080' (CTH '7326 9080' which covers 'parts of ship, floating structure and vessels)* .

30.4 I find that the imported goods as found upon examination are old & used shaft obtained from dismantling of end-of-life ships as a source of parts (which can be re-used or for extraction of metals) and it is well-known fact that these ships were imported/acquired by ship-breakers from international market. The importer has declared them as Iron and Steel Shafts. Also, it is undisputed that goods were recovered from Bangladesh Ship Breaking, Chattogram. Further, I find that the information relating to origin criteria in country of origin certificate does not match with that of information available on Form – 1 being issued for CTH which covers *CTH '7326 9080' which covers 'parts of ship, floating structure and vessels)* and not Iron and steel scrap for which a specific entry 7204, has been given under the Tariff Act.

30.5. I refer to relevant portion of Chapter V-AA, Administration of Rules of Origin Under Trade Agreement, Section 28DA of the Customs Act, 1962, which states that:-

> *"Section 28DA. Procedure regarding claim of preferential rate of duty.*
>
> .....
>
> *(4) Where importer fails to provide the requisite information for any reason, the proper officer may.-*
>
> *(i) cause further verification consistent with the trade agreement in such manner as may be provided by rules;*
>
> *(ii) pending verification, temporarily suspend the preferential tariff treatment to such goods:*

Provided that on the basis of the information furnished by the importer or the information available with him or on the relinquishment of the claim for preferential rate of duty be the importer, the Principal Commissioner of Customs or the Commissioner of Customs may, for reasons to be recorded in writing, disallow the claim for preferential rate of duty, without further verification.

I find that the COO issued for CTH *'7326 9080' which covers 'parts of ship, floating structure and vessels)* does not cover Iron and Steel scrap as claimed by the importer in their defence submission, and, therefore, the goods are liable to be disallowed the benefit of preferential rate of duty under Notification No. 99/2011 dated 09.11.2011 (SAFTA), as per section 28DA of the Customs Act, 1962, read with Rule 5(5) of CAROTAR Rules 2020.

30.6 Further, I find that investigations were carried out for the imports of the similar goods made by the said importer during the earlier period from March, 2019 to September, 2022, wherein M/s. R.K. Traders had imported consignments under other 52 Bills of Entry wherein, they have availed the benefits of Notification No.

99/2011-Cus dated 09.11.2011 and all of them were assessed. Reference for verification of the Certificate of Origin was made to the Board in respect of the imports made by the M/s. R.K. Traders, Bhavnagar, as per the Rules of Origin for determining the origin of products eligible for the preferential tariff concessions. As per Para 2(b) of the instructions regarding implementation of Rules of Origin under Free/Preferential Trade Agreements and the verification of preferential Certificates of Origin, the following Preferential Certificates of Origin, were forwarded to the Director (International Customs Division), CBIC for verification.

Name of the Free/Preferential Trade Agreement	South Asian Free Trade Area (SAFTA
Relevant Custom Notification (Tariff & Non-Tariff)	Notification No. 99/2011-Customs dated 09.11.2011. Notification No. 75/2006-Customs (NT) dated 30.06.2006.
Reference No. of the Certificate of Origin	(i) EPB(C) 33837 dated 16.08.2022. (ii) EPB(C) 33841 dated 24.08.2022 (iii) EPB(C) 29105 dated 18.07.2021
Issuing Authority	Export Promotion Bureau, Chattogram, B'desh.
Name of the consignee	M/s. R. K. Traders, Bhavnagar
Name of the consignor	1. M/s. Anan Enterprise, BTC Gate, Port Link, Bhatiary, Sitakunda, Chattogram, B'desh. 2. M/s. Asha Trading, BTC Gate, Port Link, Bhatiary, Sitakunda, Chattogram, B'desh. 3. M/s. S.S. Corporation, Shitalpur, Sitakunda, Chattogram, B'desh
Description of Goods	'Iron & Steel Shaft'
Origin criteria as mentioned in the certificates	'Wholly owned'

30.7 I find that the Ministry of Foreign Affairs, Dhaka got the questionnaire answered from the exporter viz. M/s. Anan Enterprise, Chattogram, M/s. Asha Trading, Chattogram & M/s. S. S. Corporation, Chittagong and forwarded the same vide e-mail dated 10.12.2023 **(RUD No.17 of the Notice).** ***In the said questionnaire, the questions to ascertain the originating criteria mentioned in the COO have been answered as "N/A" by the said exporters***. *The reply in response to the production process carried out on the subject goods have also been given as "N/A"*. Moreover, all the three exporters, in the replies to the questionnaire, have stated that they are exporting various kinds of Ferrous & Non Ferrous Metal Scrap, whereas M/s. R. K. Traders have imported the goods falling under CTH 73269080 which is not for scrap. I find that for iron and steel scrap, a separate tariff heading 7204 is prescribed in the Customs Tariff, however, the COO submitted by the Noticee/Importer is for Tariff heading 7326. This further strengthens the finding that COO submitted by the importer is not valid considering it is issued for a different CTH which is other than the Iron and steel scrap covered under CTH 7204. In view of above, I find the goods imported by the importer previously also does not get qualified for exemption in absence of verification by the competent authority especially when the verification was sought. Hence, I find the importer is not eligible for availing the benefit of preferential duty vide aforesaid COO under No. 99/2011 dated 09.11.2011 (SAFTA), for current as well as previous Bills of Entry, as described in Annexure-A attached to the Notice, and the same is liable to be denied to them. I hold so.

30.8 Coming to the other issue to be decided, i.e. whether the goods imported by M/s. R.K. Traders, Bhavnagar viz 'Old/Used Iron & Steel Shaft' which were obtained from ship breaking activity at Chattogram, Bangladesh, falls under the category of Second-Hand Goods other than Capital Goods, which makes them restricted goods as per the Para 2.31(II) of the Foreign Trade Policy 2015-2020 in the absence of Import Authorization possessed by the importer. I find that *Shri Abdul Kayum Kadarbhai Kaliwala, Partner of M/s. R.K. Traders, in his statement dated 03.09.2022*, recorded under Section 108 of the Customs Act, 1962 inter alia stated that, as under –

> On being asked that as per the Bill of Entry goods imported were declared as 'Iron & steel shaft' (CTH 73269080), whereas as per Panchnamas dated 01.09.2022 & 02.09.2022, the goods are found to be 'Old & Used Iron and Steel Shaft'. He admitted that in the above B/Es, wrong declaration was made and in token of his acceptance he put his dated signature on the Panchnamas;

> He admitted that goods imported under B/E No. 2229437 dated 30.08.2022 and 2229078 dated 30.08.2022 are 'Old & Used Iron and Steel shafts' and also under previous Bills of Entry the imported goods were old & used iron and steel shaft, which were obtained from ship breaking activity in Bangladesh.

> On being shown/explained about *provisions of Para 2.31(II) of Foreign Trade Policy issued by DGFT, he admitted that as per the relevant provisions of DGFT import of 'Old/Used Iron and Steel Shaft' are restricted and requires authorization/license for import of such goods*.

> He was shown the provisions of Section 46 of the Customs Act, 1962 and after going through the provision he admitted that as per Section 46(4) of the Customs Act, 1962, he had to provide complete, accurate, authentic and valid information and to comply with restriction or prohibition relating to the goods.

> After understanding the provisions of Para 2.31(II) of the Foreign Trade Policy and Section 46 of the Customs Act, 1962, he admitted that he had violated the provisions Para 2.31(II) of Foreign Trade Policy and Section 46 of the Customs Act, 1962.

30.8.1 I find that in his another statement dated 30.01.2023, Shri Abdul Kayum Kadarbhai Kaliwala, Partner of M/s. R.K. Traders, stated that his firm does not have authorization as per Para 2.31(II) of the Foreign Trade Policy to import "Old/Used Iron and Steel Shafts" which were restricted goods (being second hand goods). He also admitted that after understanding the provisions of Para 2.31(II) of FTP he had violated the said provisions by importing the restricted goods which has resulted in violation of the provisions of Section 46 of the Customs Act, 1962.

30.8.2 I further observe that during recording of statement dated 23.08.2023 of Shri Badal Chavda (G-Card Holder), Manager of M/s. Shree Malan Shipping, Mundra, under section 108 of the Customs Act, 1962, he stated as under –

> M/s. R. K. Traders, Bhavnagar approached them for their Customs clearance work in 2021, through Shri Ashish Bhatt of M/s. Paratpara Impex, Rajkot, for clearance of containers imported by M/s. R. K. Traders, Bhavnagar. *They informed them that they would import cut pieces of 'Iron & Steel shaft' from Bangladesh, which were recovered from ship breaking activity at Bangladesh and the goods were to be later used for manufacturing of bearings and hydraulic gears*.

> On going through Para 2.31(I) of the Foreign Trade Policy of DGFT (2015-20), he accepted that the goods "Old/Used Iron and Steel Shafts" did not fall under the category of 'Capital Goods'. On being further asked, he admitted that the said goods ("Old/Used Iron and Steel Shafts") falls under the category "Second hand goods other than Capital goods".

> He also accepted that as per Para 2.31 (II) of the Foreign Trade Policy of DGFT the items i.e. "Old/Used Iron and Steel Shafts" are restricted as per the above guidelines of DGFT and requires authorization from DGFT and accepted that provisions of Para 2.31 (II) of the Foreign Trade Policy and Section 46 of the Customs Act, 1962, had been violated by them.

> He further added that they had filed the Bills of Entry as per end-use details provided by the M/s. R.K. Traders, Bhavnagar, wherein, the importer had submitted that goods were 'inputs' for manufacturing of machinery components. In his support of his claim, he had submitted 'End Use certificate' dated 07.03.2022 issued by M/s. R.K. Traders, Bhavnagar in respect of BE No. 7604391 dated 22.02.2022.

30.8.3 I find that during the course of investigation, Shri Badal Chavda, (G-Card Holder) Manager of M/s. Shree Malan Shipping, CHA, had submitted The **'End Use Certificate'** dated 07.03.2022 **(RUD No. 15 of the notice),** issued by the importer in respect of BE No. 7604391 dated 22.02.2022, wherein, the importer had made submission before the Superintendent, Customs House, Mundra Port & SEZ, Mundra, which are as under:-

'That goods were Shaft of the ship obtained during breaking of ship. The shafts were abruptly cut during the breaking of ship, which cannot be again used as shaft for ship. ***They had to process it in their factory to re-size them, cut them in various size of pieces and machining them and after that they are making parts of some machinery like hydraulic gear and bearings etc.*** **So it is nothing but input for them for manufacturing of various parts of machinery components.**

Further, regarding to the HSN classification the said goods cannot be classified in Scrap as the imported goods were not used for melting purpose nor being used in its original form. *Hence, the declared HSN which truly describes the goods from which it was obtained.*'

From the above End use certificate submitted by the G Card holder, of CHA firm, I find that importer was well aware of the facts that the goods imported by them were not 'Capital Goods' and *the goods are old/used shaft recovered from ship breaking activity which were used as* ***'input'*** *for manufacturing of machinery parts, they had engaged themselves in importing the subject goods without valid DGFT authorization.*

The imported goods being 'old and used shafts' recovered from ship breaking falls under the category of 'Second Hand Goods other than Capital Goods), which is restricted as per Para 2.31(II) of Foreign Trade Policy (FTP) 2015-20 and can only be imported against valid authorization. I find that Shri Abdul Kayum Kaliwala in his statement recorded under Section 108 of the Customs Act on 01/02.09.2022, 03.09.2022 and 30.01.2023 had accepted the fact that his firm does not possess any import license (Authorization) issued by DGFT for restricted items at the time of import. Hence, from the above, I find that the imported goods does not fall under the category of Iron and Steel Scrap which are covered under a separate CTH – 7204, as the importer has himself declared the said goods under CTH 7326. I hold so.

31. I observe that the noticee has referred to a number of case laws in his reply to Show Cause Notice. I observe that decisions from Higher Courts cannot straight away be used as precedents for other cases, and must be decided based after comparison of facts. Further, cases with different facts and circumstances cannot be relied upon. This is because the facts and circumstances of each case are unique, and the principles of natural justice must be applied to

the specific context of the case. A single additional or different fact can make a significant difference in the conclusions of two cases. Hence, I find that it is not proper to blindly rely on a decision when disposing of cases. In ***Bharat Petroleum Corporation Ltd. And ... vs N.R. Vairamani And Anr on 1 October, 2004***, the Supreme Court of India observed that "*Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.*" Further, I observe that the following words of Lord Denning in the matter of applying precedents have become locus classicus:

> "*Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*".

Further, I find that the *Case laws referred to by the noticee in their written submission cannot be relied upon, as they are based on different facts and circumstances.*

31.1 I find that the noticee has also asked for a number of documents to be provided to them by the adjudicating authority. I observe that the noticee has first asked for these documents only on 31.12.2024, whereas the notice clearly asks the noticees to submit their defence submission within 30 days of receipt of the notice, which has been emailed on the email IDs of the noticee on the same date of issuance of notice, i.e. 22.03.2024. I find it strange as to why the noticee has waited for 8-9 months for asking for such documents, most of which have already been enclosed with the notice itself. Further, the noticee has filed their defence submission only on 06.02.2025, i.e. more than 10 months after delivery of the notice to them. I observe that during the investigation proceedings the noticee has not imparted due diligence, as they could have asked for these documents from DRI at investigation stage, which they failed to do so. Asking for these documents after considerable time has passed, at adjudication stage, which is a time bound process, is nothing but an attempt to delay the adjudication proceedings, which cannot be permitted. Hence, plea of the noticee has no merit and deserve to be disallowed as all relevant documents relating to the case and his defence have already been given to him.

31.1.1 As regards the request made by the noticee in their written submission for cross examination of various persons, I observe that when there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross examination. Reliance is placed on Judgement of **Hon'ble Supreme Court in case of K.L. Tripathi vs. State Bank of India & Ors [Air 1984 SC 273]**, as follows:

> *"The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, right of cross-examination must inevitably form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action."*

Therefore, I find that cross examination in the instant case is not necessary, has not been sought citing valid reasons and sought as an opportunity to delay the quasi-judicial process of adjudication. Further, I observe that request for cross

examination of various persons / witnesses are to be made before the personal hearing, so that the cross examination can be conducted at the time of personal hearing, which the noticee has failed to do so. Further, I find that the denial of Cross-examination under the circumstances of the case does not amount to violation of principles of natural justice in every case. Reliance is placed upon the following case laws which expressly define the right to cross examination -

(i) In the case of Kanungo & Co. Vs. Collector of Customs, Calcutta & Others, as reported at 1993(13) E.L.T. 1486 (S.C.), wherein it was unequivocally held that for proceedings under Customs Act, the right to compliance to the principles of natural justice does not cover the right to cross examination of witnesses. Relevant Para is reproduced wherein the Hon'ble Supreme Court observed as follows:

"We must first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show cause notice issued on August 21, 1961, all the materials on which the Customs Authorities have relied was set out and it has then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant."

(ii) In the case of M/s. Suman Silk Mills M. Ltd. Vs. Commissioner of Customs & C. Ex., Baroda, as reported at 2002 (142) E.L.T. 640 (Tri.-Mumbai), Tribunal observed at Para 17 that-

"Natural Justice - Cross-examination - Confessional statements - No infraction of principles of natural justice where witnesses not cross-examined when statements admitting evasion were confessional."

(iii) In the case of Commissioner of Customs, Hyderabad V. Tallaja Impex, as reported at 2012 (279) ELT 433 (Tri.), it was held that-

"In a quasi-judicial proceeding, strict rules of evidence need not to be followed. Cross examination cannot be claimed as a matter of right."

(iv) In the case of M/s. Patel Engg. Ltd. vs UOI, as reported at 2014 (307) ELT 862 (Bom.), Hon'ble Bombay High Court has held that;

"Adjudication - Cross-examination - Denial of- held does not amount to violation of principles of natural justice in every case, instead it depends on the particular facts and circumstances - Thus, right of cross-examination cannot be asserted in all inquiries and which rule or principle of natural justice must be followed depends upon several factors - Further, even if cross-examination is denied, by such denial alone, it cannot be concluded that principles of natural justice had been violated." [para 23]

(v) Hon'ble Punjab and Haryana High Court in its decision in the case of M/s. Azad Engg Works v/s Commissioner of Customs and Central Excise, as reported at 2006 (2002) ELT 423, held that;

"... It is well settled that no rigid rule can be laid down as to when principles of natural justice apply and what is their scope and extent. The said rule contains principles of fair play. Interference with an order on this ground cannot be mechanical. Court has to see prejudice caused to the affected party. Reference mag be made to judgment of Hon'ble the Supreme Court in K.L. Tripathi v. State

Bank of India and others, AIR 1984 SC 273"

(vi) Hon'ble Tribunal in the case of P Pratap Rao Sait v/s Commissioner of Customs, as reported at 1988 (33) ELT (Tri) has held in Para 5 that:

"... The plea of the learned counsel that the appellant has not permitted to cross-examine the officer and that would vitiate the impugned order on grounds of natural justice is not legally tenable.

(vii) Similarly in A. L Jalauddia v/s Enforcement Director, as reported at 2010 (261) ELT 84 (Mad HC), the Hon'ble High Court held that;

" ... Therefore, we do not agree that the principles of natural justice have been violated by not allowing the appellant to cross-examine these two persons. We may refer to the paragraph in AIR 1972 SC 2136 = 1983 (13) E.L.T. 1486 (5.C.) (Kanungo & Co. v. Collector, Customs, Calcutta)"

(viii) Hon'ble Madras High Court, in the case of K. Balan Vs. Govt. of India, reported in 1982 ELT (386) Madras, had held that the *right to cross examine is not necessarily a part of reasonable opportunity and depends upon the facts and circumstances of each case.*

31.1.2 Further, from the records available before me, I find that none the aforementioned persons have retracted their respective statement. Further, the instant case is related to undue benefit of exemption Notification No. 99/2011-Cus dated 09.11.2011, as per SAFTA and import of restricted goods as per Para 2.31 of Foreign Trade Policy (FTP) 2015-20 and can only be imported against valid authorization issued by DGFT. The same has been corroborated by documentary evidences and corroborated by voluntary statements recorded under Section 108 of the Customs Act, 1962. I find that during the course of investigation carried out by the DRI the statements of various persons have been recorded under Section 108 of the Customs Act, 1962 which have sufficient evidentiary value to prove the fact that the importer has improperly imported the impugned goods. I place reliance on the following relevant judgements of various Courts wherein evidentiary value of statements recorded under Section 108 of the Customs Act, 1962 is emphasized.

- The Hon'ble Apex Court in the case of **Naresh Kumar Sukhwani vs Union of India 1996(83) ELT 285(SC)** has held that statement made under Section 108 of the Customs Act, 1962 is a material piece of evidence collected by the Customs Officials. That material incriminates the Petitioner inculpating him in the contravention of provisions of the Customs Act. Therefore, the statements under Section 108 of the Customs Act, 1962 can be used as substantive evidence in connecting the applicant with the act of contravention.
- In the case **Collector of Customs, Madras and Ors vs D. Bhoormull-1983(13)ELT 1546(S.C.)** the Hon'ble Supreme Court has held that Department was not required to prove its case with mathematical precision. The whole circumstances of the case appearing in the case records as well as other documents are to be evaluated and necessary inferences are to be drawn from these facts as otherwise it would be impossible to prove everything in a direct way.

Kanwarjeet Singh & Ors vs Collector of Central Excise, Chandigarh 1990 (47) ELT 695 (Tri) wherein it is held that strict principles of evidence do not apply to a quasi-judicial proceedings and evidence on record in the shape of various statements is enough to punish the guilty.

Hence, I find that the statements recorded under Section 108 of the Customs Act,

1962, also make for substantive evidences.

31.2. Further, I observe that the burden to prove the eligibility of exemption or concession notification is on importer; and that such notifications are subject to strict interpretation. I place reliance upon following relevant legal pronouncements:

- Hon'ble Supreme Court in the case of **Hotel Leela Venture Ltd. Vs. Commr. of Customs (General), Mumbai [2009(234) ELT-389(SC)** held that the burden was on the appellant to prove that the appellant satisfies the terms and conditions of the Exemption Notification. It is well settled that Exemption Notification have to be read in the strict sense.
- Hon'ble Supreme Court in the case of **Krishi Upaj Mandi Samiti v/s. CCE reported in 2022 (58) GSTL 129 (SC)** held that law of the issue of interpretation of taxing statute has been laid down in catena of decisions that plain language capable of defined meaning used in a provision has to be preferred and strict interpretation has to be adopted except in cases of ambiguity in statutory provisions.
- Hon'ble Supreme Court in the case of **Uttam Industries V/s. CCE reported in 2011 (265) ELT 14(SC)** held that it is well settled law that exemption notification should be construed strictly and exemption notification is subject to strict interpretation by reading it literally.

In the present case, as observed earlier, the Importer has misused and provided the Country of Origin Certificate for a different CTH, i.e. 7326, which is other than the category of Iron and steel scrap as claimed by them, to avail the benefits of **Preferential rate of duty** under FTA in terms of Notification No.99/2011-Cus. dated 09.11.2011, which were not available to them. This has also been proved by the verification done with Bangladesh Authorities, report given by the Chartered Engineer, and further corroborated by confessional statements of the Importer as well as the G-Card Holder of CHA firm engaged by the importer, which are admissible evidence under Section 108 of the Customs Act, 1962. In view of the investigation carried out and the corroborative facts emerging therefrom, it is evident that importer is not eligible for availing the benefit of preferential duty vide aforesaid COO.

32. DUTY DEMAND UNDER SECTION 28(4) OF CUSTOMS ACT, 1962

32.1. The relevant legal provisions of Section 28(4) of the Customs Act, 1962 are reproduced below: -

> *"28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.—*
>
> *(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,—*
>
> *(a) collusion; or*
>
> *(b) any willful mis-statement; or*
>
> *(c) suppression of facts."*
>
> *by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been [so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."*

32.1.1 I find that the noticee has contended that "*customs authorities at the port of import were very well aware of the fact the goods covered under various bills of entry were imported in terms of Notification No. 99/2011-Cus. Dated 09.11.2011 (SAFTA) and also nature of goods viz. "Iron and Steel Cutting Shaft" obtained from breaking of ship therefore it cannot be alleged mis-declaration of goods and imported second hand goods without authorization and importer has fulfill the conditions mentioned in the Policy as well as Notification No. 99/2011-Cus. This fact also gets confirmation from the orders for examination as discussed in para supra as well as at the time of earlier investigation.*" They have further contended that "*the orders appearing on the bills of entry filed at the port of import do not leave any doubt about the fact that the examining / assessing officers were aware of the fact of the nature of goods were imported in terms of FTP as well as under Notification No. 99/2011-Cus. Therefore, if the goods were imported by M/s. R K in contravention of provisions of* ***FTP-2015-20.*** *or the customs notification, then in those cases department would have certainly seized the goods at the time of import and initiated further proceedings*". They have further submitted in their defence submission that "*as discussed in para supra there was no willful mis-declaration nor suppression of facts etc., therefore, department was required to issue demand of customs duty if any short paid within two years from the relevant date in terms of Section 28(1)(a) of the Act. 'Relevant date' in this case, in accordance with Explanation 1(a) appended under Section 28, would be the date on which proper officer has made an order for clearance of goods, which were prior to 02.04.2022 in respect of Bills of Entry at Sr. No. 1 to 44 of Annexure – A to the impugned SCN. Therefore, even if the department wishes to demand differential duty, notice for such recovery was required to be served to M/s. R K on or before completion of two years from the relevant date in terms provisions of Section 28(1) of the Customs Act, 1962, whereas the impugned notice has been issued on 22.03.2024 and received on 03.04.2024 by M/s. R K without support of any tangible evidence to prove the allegation of suppression of facts etc. with intention to evade duty. Under such circumstances, impugned notice is not sustainable on account of time bar too at least for the said 44 bills of entry*".

I find merit in the above contention of the Noticee. I find that all the facts of claim of benefit of notification 99/2011 dated 09.11.2011 (SAFTA) were within knowledge of the department and examination orders were issued after observing all the facts of claim of benefit of Notification 99/2011 (SAFTA). Further, goods were always available for examination of concerned officers of the Department. No mala fide intention of the noticee has been made out in the impugned notice. For this, I rely on the decision of the Hon'ble Supreme Court of India in Civil Appeal No. 6060 of 2003, in the case of *M/s. UNIWORTH TEXTILES LTD Vs COMMISSIONER OF CENTRAL EXCISE, RAIPUR.* Hence, I find that in the absence of any malafide intention being proved in the Notice, suppression and extended period of limitation cannot be invoked in the present matter. However, as the Show Cause Notice has been issued on 22.03.2024 and delivered to the noticee on 22.03.2024 on their email IDs - rktraders11@yahoo.com and also on rktrader84@gmail.com, therefore, demand for a period within two years from the date of notice is sustainable in the present case under Section 28 of the act ibid, in respect of the remaining bill of entries after 23.03.2022, i.e. in respect of Bills of Entry from Sr. No. 44 to 54 of Annexure – A to the impugned SCN. The summary of Annexure-A for these **Eleven (11)** Bills of Entry is reproduced hereunder as Annexure-A1 for ease of reference –

Annexure-A1

S. No.	Port of Import	BE NUMBER	BE DATE	ITEM DESCRIPTION	ITEM WISE ASS VALUE	BCD_AMT @ 10%	SWS @10 of BCD	IGST @ 18%	Total Liability	IGST AMT. PAID	DIFF.
44	INMUN1	8059943	29-03-2022	IRON AND STEEL SHAFT (SAFTA NO: EPBC31981 DT 21.03.2022)(OTHER DETAILS AS PER INV, PL AND BL)	7620982.25	762098	76210	1522672	2360980	1371776.8	989204
45	INMUN1	8448968	27-04-2022	IRON AND STEEL SHAFT (SAFTA NO: EPBC32409) (OTHER DETAILS ASPER INV, PL AND BL)	7645757.88	764576	76458	1527622	2368656	1376236.4	992419
46	INMUN1	8679508	14-05-2022	IRON AND STEEL SHAFT (SAFTA NO: EPBC32596) (OTHER DETAILS ASPER INV, PL AND BL)	7402097.19	740210	74021	1478939	2293170	1332377.5	960792
47	INMUN1	8735542	18-05-2022	IRON AND STEEL SHAFT (SAFTA NO: EPBC32702) (OTHER DETAILS ASPER INV, PL AND BL)	15271695.25	1527170	152717	3051285	4731171	2748905.2	1982266
48	INMUN1	9322813	28-06-2022	IRON AND STEEL SHAFT (SAFTA COO NO: EPBC33036 DT 13.06.2022)(OTHER DETAILS AS PER INV, PL AND BL)	7345113.25	734511	73451	1467554	2275516	1322120.4	953396
49	INMUN1	9422842	07-05-2022	IRON AND STEEL SHAFT (SAFTA COO NO: EPBC33161 DT 23.06.2022)(OTHER DETAILS AS PER INV, PL AND BL)	7824142.38	782414	78241	1563264	2423919	1408345.6	1015574
50	INMUN1	9527564	13-07-2022	IRON AND STEEL SHAFT (SAFTA COO NO: EPBC33272 DT 04.07.2022)(OTHER DETAILS AS PER INV, PL AND BL)	7918289.75	791829	79183	1582074	2453086	1425292.2	1027794
51	INMUN1	9932810	08-09-2022	IRON AND STEEL SHAFT (SAFTA COO NO: EPBC33576 DT 31.07.2022)(OTHER DETAILS AS PER INV, PL AND BL)	7100871.09	710087	71009	1418754	2199850	1278156.8	921693
52	INMUN1	9934387	08-09-2022	IRON AND STEEL SHAFT (SAFTA COO NO: EPBC33578 DT 31.07.2022)(OTHER DETAILS AS PER INV, PL AND BL)	7912399.22	791240	79124	1580897	2451261	1424231.9	1027029
53	**INMUN1**	**2229078**	**30-08-2022**	**IRON & STEEL SHAFT (SAFTA COO NO:EPBC33837 DT:16.08.2022) (OTHER DETAILS AS PER INV,PL AND BL)**	**6756666.88**	**675667**	**67567**	**1349982**	**2093215**	**1216200**	**877015**
54	**INMUN1**	**2229437**	**30-08-2022**	**IRON AND STEEL SHAFT (SAFTA COO NO: EPBC33941 DT 24.08.2022)(OTHER DETAILS AS PER INV, PL AND BL)**	**7733534.38**	**773353**	**77335**	**1545160**	**2395849**	**1392036.2**	**1003813**
					90531550	**9053155**	**905316**	**18088203**	**28046673**	**16295679**	**11750995**

Hence, I find that for these 11 bill of entries which are within the period of limitation of two years, demand of differential duty of **Rs.1,17,50,995/- (Rupees One Crore seventeen lakhs fifty thousand nine hundred and ninety-five only)** is sustainable under CTH no. 7326 9080, as the benefit of the COO, and consequently that of Notification no. 99/2011 (SAFTA) cannot be extended to the importer for Bills of Entry after serial no. 43 of Annexure – A (as described in Annexure-A1 above) to the impugned SCN, being within period of limitation under Section 28 of the Act ibid. I hold so.

32.2 As duty demand is sustainable in respect of Bills of Entry after serial no. 43 of Annexure – A to the impugned SCN, by disallowing benefits of Preferential rate of duty claimed under Notification 99/2011, and the same is liable to be recovered from the importer in respect of above eleven Bills of Entry after Sr. no. 43 of the Annexure-A attached to the notice, I observe that in terms of Section 28AA (1) of the Customs Act, 1962 the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section. Therefore, I find that interest at the appropriate rate is also recoverable from M/s. RK Traders, Bhavnagar.

33. In view of above discussion, I find that duty demand within a period of two years from the date of issuance of notice is sustainable in the present case. Accordingly, differential Customs duty of **Rs.1,17,50,995/- (Rupees One Crore seventeen lakhs fifty thousand nine hundred and ninety-five only)** is recoverable from **M/s. R K Traders, Bhavnagar,** which was non levied/not paid on the goods covered under subject bills of entry filed by them, as detailed in Annexure-A1 as above, for current as well as past consignments, is liable to be recovered from the noticee, along with the interest at the appropriate rate thereon under Section 28AA of the Customs Act, 1962 and applicable penalty and benefit of preferential rate of duty is liable to be denied to them based upon the SAFTA agreement, for the two years within which notice was issued. Further contention of the noticee that their goods fall under the category of Iron and Steel scrap is also not sustainable in view of above discussion.

34. Confiscation of the goods under Section 111(d), 111(m), 111(o) & 111(q) of the Customs Act, 1962 and imposition of redemption fine:

34.1 I find that it is alleged in the subject SCN that the goods are liable for confiscation under Section **111(d), 111(m), 111(o) & 111(q)** of the Customs Act, 1962. In this regard, I find that as far as confiscation of goods are concerned, Section 111 of the Customs Act, 1962, defines the Confiscation of improperly imported goods. The relevant legal provisions of Section 111(d), 111(m), 111(o) & 111(q) of the Customs Act, 1962 are reproduced below: -

" (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

(q) any goods imported on a claim of preferential rate of duty which contravenes any provision of Chapter VAA or any rule made thereunder "

34.1.1 On plain reading of the above provisions of the Section 111(d), 111(m), 111(o) & 111(q) of the Customs Act, 1962, it is clear that any goods, *being imported, contrary to any prohibition imposed by or under this Act, or* imported by way of misdeclaration, or *any goods exempted, subject to any condition, in respect of which the condition is not observed or any goods imported on a claim of preferential rate of duty which contravenes any provision of Chapter VAA or any rule made thereunder,* will be liable to confiscation. As discussed in the foregoing paras, it is evident the Importer has deliberately imported second hand goods, without any authorization from DGFT, thereby contravening the provisions of Para 2.31 (II) of the FTP 2015-20. Further, they also failed to submit the correct Country of Origin Certificates prerequisite to avail the benefit of Notification No. 99/2011-Customs dated 09.11.2011 (SAFTA). In light of these acts of import of restricted goods, and misuse of exemption notification, I find that the impugned imported goods as described in Annexure A1 above (from Sr. no. 44 to 54 of the Annexure-A attached to the Notice) are liable for confiscation as per the provisions of Section 111(d), 111(m), 111(o) & 111(q) of the Customs Act, 1962. I hold so.

34.2. As the impugned goods as per Annexure-A1, as above, are found to be liable for confiscation under Section 111(d), 111(m), 111(o) & 111(q) of the Customs Act, 1962, I find that it is necessary to consider as to whether redemption fine under Section 125 of Customs Act, 1962, is liable to be imposed in lieu of confiscation in respect of the impugned goods as alleged vide subject SCN. The Section 125 ibid reads as under:-

*"**Section 125**. Option to pay fine in lieu of confiscation.—(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."*

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 case of ***M/s Venus Enterprises vs CC, Chennai 2006(199) E.L.T. 661(Tri-Chennai)*** it has been held that:

"We cannot accept the contention of the appellants that no fine can be imposed in respect of goods which are already cleared. Once the goods are held liable for confiscation, fine can be imposed even if the goods are not available. We uphold the finding of the misdeclaration in respect of the parallel invoices issued prior to the date of filing of the Bills of Entry. Hence, there is misdeclaration and suppression of value and the offending goods are liable for confiscation under Section 111(m) of the Customs Act. Hence the imposition of fine even after the clearance of the goods is not against the law."

Further in case of ***VISTEON AUTOMOTIVE SYSTEMS INDIA LIMITED Versus***

○ ***CESTAT, CHENNAI, 2018 (9) G.S.T.L. 142 (Mad.)*** Hon'ble High Court of Madras has passed the landmark judgement contrary to the judgement of tribunal passed earlier. In the said judgement it has been held that:

"The opening words of Section 125, "Whenever confiscation of any goods is authorized by this Act ....", brings out the point clearly. The power to impose redemption fine springs from the authorization of confiscation of goods provided for under Section 111 of the Act. When once power of authorization for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act."

In view of above discussions, based on the judgement of *M/s Venus Enterprises vs CC, Chennai 2006(199) E.L.T. 661(Tri-Chennai), M/s Asia Motor Works vs Commissioner of Customs 2020 (371) E.L.T. 729 (Tri. - Ahmd.)* & *M/s Visteon Automotive Systems India Limited Versus CESTAT, CHENNAI, 2018 (9) G.S.T.L. 142 (Mad.)*, I find that goods in the current case as described in Annexure A1 above (from Sr. no. 44 to 54 of the Annexure-A attached to the Notice) are liable for confiscation under Section 111(d), 111(m), 111(o) & 111(q) of the Customs Act, 1962 and redemption fine is liable to be imposed on the said confiscated goods. I hold accordingly.

35. Imposition of Penalties

35.1 As discussed above, since the goods were imported by importer on the basis of country of origin certificates, which are incorrect in material particulars and also without any proper authorization/license issued by the DGFT, therefore, the goods are liable to be confiscated under **Section 111(d), 111(m), 111(o)** & **111(q)** of the Customs Act, 1962. For these acts of omission and commission, the notice has proposed imposition of penalties under **Section 112(a), 114A** and **114AA** of the Customs Act, 1962, for the goods imported by them. The relevant legal provisions are as under:

Sections 112. Penalty for improper importation of goods, etc.- *Any person,-*

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act,

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

shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;

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

Section 114A. Penalty for short-levy or non-levy of duty in certain 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, the person who is liable to pay the duty or interest, as the case may be, as determined under [sub-section (8) of the section 28] shall also be liable to pay a penalty equal to the duty or interest so determined.

***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.*

35.2 As discussed in the foregoing paras, I have not observed any willful mala fide intention on the part of importer, and hence I have held that extended period is not invokable in the present case. However, as observed in above paras, the importer have wrongly availed benefit of Preferential rate of duty under Notification 99/2011 (SAFTA) by submitting improper COO and engaged in importation of Restricted/ prohibited goods, without the required DGFT authorization. By all these acts, I find the Importer liable to penalty under **Section 112(a) and 114AA** of the Customs Act, 1962.

However, as per above findings, as extended period under Section 28(4) is not invokable, I observe that penalty under section 114A are not imposable in the present case. Therefore, I refrain from imposing penalty on the Importer under section 114A of Customs act, 1962.

35.2.1 As regards imposition of penalty under Section 117 of the Customs Act, 1962, I find that Section 117 proposes penalty where no express penalty is elsewhere provided for such contravention or failure. As already penalty has been proposed in the Show Cause Notice under Section 112(a)(ii) and 114AA of the Customs Act, 1962, and nothing has been brought forth in the Show Cause Notices, which can justify additional penalty under Section 117 of the Act, ibid, therefore, I do not find any reason to impose penalty on the Importer under Section 117 of the Customs Act, 1962.

35.3 From the investigations conducted, I find that Shri Abdul Kayum Kadarbhai Kaliwala, acting as Partner of M/s. R.K. Traders, Bhavnagar had consciously and deliberately dealt with the goods which he knew or had reasons to believe were liable to confiscation under the provisions of Section 111(d), 111(m), Section 111(o) and Section 111(q) of the Customs Act, 1962, in respect of imports made by them without any valid DGFT authorization and also by availing the undue benefit of exemption Notification No. 99/2011-Cus. dated 09.11.2011. He also played an important role in availing undue benefit of exemption under Notification No. 99/2011-Cus dated 09.11.2011 with read Notification No. 75/2006-Cus (NT), and due to such acts and omissions on the part of Shri Abdul Kayum Abdul Kadarbhai Kaliwala, acting as Partner of M/s. R.K. Traders, Bhavnagar, I find him liable for penalty under **Section 112(a)** of the Customs Act, 1962, in respect of the imported goods.

35.3.1 I further find that Shri Abdul Kayum Kadarbhai Kaliwala, Partner of the importer was responsible for all the matters related to the said firm and he, in his statements dated 01.09.2022, 03.09.2022 and 16.01.2023, has admitted that he was looking after all the work of M/s. R.K. Traders, Bhavnagar and was responsible for all the matters related to the said firm. As the COO submitted by Shri Abdul Kayum Kadarbhai Kaliwala, on behalf of the Importer firm, was found to be

deficient and not meeting the criteria for claim of preferential rate of duty under Notification no. 99/2011 (SAFTA), I find that by these acts of omission and commission, Shri Abdul Kayum Kadarbhai Kaliwala, had knowingly used documents which were found incorrect in material particulars in the import of goods and contravened provisions of the Customs Act, 1962 as stated in para(s)-supra. Therefore, I find Shri Abdul Kayum Abdul Kadarbhai Kaliwala liable for penalty under **Section 114AA** of the Customs Act, 1962.

35.3.2 As regards imposition of penalty on Shri Abdul Kayum Abdul Kadarbhai Kaliwala under Section 117 of the Customs Act, 1962, I find that as already penalty has been imposed under Section 112(a) and 114AA of the Customs Act, 1962, therefore, I do not find any reason to impose additional penalty on the noticee under Section 117 of the Customs Act, 1962.

36. IN VIEW OF DISCUSSION AND FINDINGS SUPRA, I PASS THE FOLLOWING ORDER:

ORDER

i. I order to deny the benefit of the Notification No. 99/2011-Customs dated 09.11.2011, in respect of Eleven Bills of Entry as per Annexure-A1 as described in above paras (Sr. no. 44 to 54 of the Annexure-A to the notice) and order the subject Bills of Entry to be reassessed accordingly.

ii. I order to confiscate the impugned imported goods valued at **Rs.2,99,84,656/- *(Rupees Two Crores Ninety-Nine Lakhs Eighty-Four Thousand Six Hundred and Fifty-Six Only)*** seized under Seizure Memo DIN-202209DDZ1000000D7B9 and Seizure Memo DIN 202209DDZ10000520934 both dated 07.09.2022 under the provisions of Section 111(d), 111(m), Section 111(o) and Section 111(q) of the Customs Act, 1962;

iii. I Impose redemption fine of **Rs. 15,00,000/- (Rupees fifteen Lakhs only)** on the said goods above valued at Rs. 2,99,84,656/- *(Rupees Two Crores Ninety Nine Lakhs Eighty Four Thousand Six Hundred and Fifty Six Only)* as per (ii) above, under Section 125 of the Customs Act, 1962.

iv. I order to confiscate the impugned imported goods valued at **Rs.6,05,46,894/- (Rupees Six Crores Five Lakhs Forty-Six *Thousand Eight Hundred and Ninety-Four Only)*** imported under various Bills of Entry as described in Annexure-A1 in above paras, where the goods are not available for seizure; under the provisions of Section 111(d), 111(m), Section 111(o) and Section 111(q) of the Customs Act, 1962;

v. I impose redemption fine of **Rs. 30,00,000/- (Rupees Thirty Lakhs only)** on the above said goods valued at Rs.6,05,46,894/- (Rupees Six Crores five Lakhs Forty-*six Thousand eight hundred and ninety four Only)* imported under various Bills of Entry as per **(iv)** above, under Section 125 of the Customs Act, 1962;

vi. I confirm the demand of duty amounting to **Rs. 1,17,50,995/- *(Rupees One Crore Seventeen Lakhs Fifty Thousand Nine Hundred and Ninety Five Only)*** leviable on the goods imported under the Bills of Entry as described in Annexure – A1 in above paras and order to recover the same from **M/s. R.K. Traders** (IEC: 2410007694) under the provisions of Section 28(1) of the Customs Act, 1962.

vii. I order to recover the interest from **M/s. R.K. Traders** (IEC: 2410007694) at appropriate rate under Section 28AA of the Customs Act, 1962 on the above confirmed demand of duty as mentioned at **(vi)** above;

viii. I impose penalty of **Rs 7,00,000/- *(Rupees Seven Lakhs Only) on* M/s. R.K. Traders** (IEC: 2410007694) under the provisions of Section **112(a)(ii)** of the Customs Act, 1962, payable on the duty demanded and confirmed at **(vi)** above;

ix. I refrain from imposing penalty upon **M/s. R.K. Traders** (IEC: 2410007694) under Section of Section **114A** of the Customs Act, 1962, for the reasons as discussed above;

x. I impose penalty of **Rs 7,00,000/- *(Rupees Seven Lakhs Only) on* M/s. R.K. Traders** (IEC: 2410007694) under the provisions of **Section 114AA** of the Customs Act, 1962;

xi. I refrain from imposing penalty upon **M/s. R.K. Traders** (IEC: 2410007694) under Section of Section 117 of the Customs Act, 1962, for the reasons as discussed above;

xii. I impose penalty of **Rs. 5,00,000/- *(Rupees Five Lakhs Only) on* Shri Abdul Kayum Kadarbhai Kaliwala**, Partner of the importer firm under the provisions of **Section 112(a)(ii)** of the Customs Act, 1962;

xiii. I impose penalty of **Rs. 4,00,000/- *(Rupees Four Lakhs Only) on* Shri Abdul Kayum Kadarbhai Kaliwala**, Partner of the importer firm under the provisions of **Section 114AA** of the Customs Act, 1962;

xiv. I refrain from imposing penalty upon **Shri Abdul Kayum Kadarbhai Kaliwala**, Partner of the importer firm, under Section of Section 117 of the Customs Act, 1962, for the reasons as discussed above.

This OIO is issued without prejudice to any other action that may be taken against the claimant under the provisions of the Customs Act, 1962 or rules made there under or under any other law for the time being in force.

Dated 21.03.2025

21/3/2025

(K. Engineer)
Pr. Commissioner of Customs
Custom House, Mundra.

F. No. GEN/ADJ/COMM/157/2024-Adjn-O/o Pr Commr-Cus-Mundra

To, (The Noticees),

(1) M/s. R.K. Traders (IEC: 2410007694),
Plot No. 47, Block No. 57, Opposite Pagoda Rolling Mill,
Mamsa, Ghogha, District – Bhavnagar, Gujarat.

(2) Shri Abdul Kayum Kadarbhai Kaliwala,
Partner of M/s. R. K. Traders,
Plot No. 47, Block No. 57, Opposite Pagoda Rolling Mill,
Mamsa, Ghogha, District – Bhavnagar, Gujarat.

Copy for information and further necessary action / information/ record to:

a. The Additional Director General, DRI Zonal Unit, 15, Magnet Co-operate Park, Near Sola Bridge, S.G. Highway, Thaltej, Ahmedabad-380054;

b. The Assistant Commissioner of Customs (RRA), CCO, Ahmedabad Zone.

c. The Deputy/Assistant Commissioner (Recovery/TRC), Customs House, Mundra.

d. The Superintendent (EDI), Customs House, Mundra for uploading on Website.

e. Notice Board/Guard File.