

 <p>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: adi-mundra@gov.in</p>		 <p>आयुक्त अमृत महोदय</p>
A. File No.	:	GEN/ADJ/COMM/494/2021-Adjn-O/o Pr Commr-Cus-Mundra
B. Order-in-Original No.	:	MUN-CUSTM-000-COM- 047- 24-25
C. Passed by	:	K. Engineer, Principal Commissioner of Customs, Customs House, AP & SEZ, Mundra.
D. Date of order and Date of issue:	:	18.03.2025. 18.03.2025
E. SCN No. & Date	:	<p>1. SCN F. No. GEN/ADJ/COMM/494/2021-Adjn-O/o Pr Commr-Cus-Mundra, dated 01.02.2022 issued by the Commissioner of Customs, Mundra.</p> <p>2. SCN F. No. GEN/ADJ/COMM/494/2021-Adjn-O/o Pr Commr-Cus-Mundra, dated 08.05.2023 issued by the Commissioner of Customs, Mundra.</p> <p>3. SCN F. No. 553/2021-22 Gr.II (A-B) CAC/JNCH dated 15.12.2021 issued by the Dy. Commissioner of Customs, Gr.II AB, JNCH.</p>
F. Noticee(s) / Party / Importer	:	<p>1. M/s. QA Infotech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh-201309</p> <p>2. Shri Mukesh Sharma, Chief Executive Officer, M/s. QA Infotech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh-201309</p> <p>3. M/s. Noble Natural Resources India Private Limited, Survey No. 302/2, 303, opp. Rama Cylinder, Vil. Bhimasar, Taluka-Anjar, Kutch Gujarat, 370240.</p>

	<p>4. M/s Kundan Care Products Limited, Plot No. 70 & 81, Sector-6A, Integrated, Industrial Estate SIDCUL, Haridwar, Uttarakhand-249403</p> <p>5. M/s. Sovereign Metals Limited, Moje Muthia Al Paiki, P. NO. 35 PTO 37P, 38, 40/B, Revenue BL. 184, 185, 187, GIDC Phase III NARODA Ahmedabad, GUJARAT, 382330.</p> <p>6. M/s Kreedai Exim, Sahu Chowk, Near LalGodown, Latur, Maharashtra-413512.</p> <p>7. M/s Adani Wilmar Limited, Fortune House, Near Navrangpura Railway Crossing, Navrangpura, Ahmedabad, Gujarat-380009</p> <p>8. M/s Adani Wilmar Limited, Survey No. 169, Oleo Chem Division-II, Plot No. 212, Village-Dhrub, Mundra-Gujarat- 370421</p>
G. DIN	: 20250371MO000000CC3A

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

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

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 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 रुपये 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 बैंचआहरितट्रिब्यूनल 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/- रुपये 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 ऊटी/ 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 जहाँ शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहाँ 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 IN THE CASE

1. Intelligence gathered by the Directorate of Revenue Intelligence (DRI), Ahmedabad Zonal Unit, Ahmedabad indicated that M/s. QA Infotech Private Limited have obtained Service Export from India Scheme (hereinafter referred to as SEIS) Scrips/licences, though they were not providing any of the services notified under Appendix 3D of Foreign Trade Policy (FTP), 2015-2020. It appears that M/s. QA Infotech Private Limited, Noida is providing "Software/Information Technology Services related to Computer Programming and Consulting". The services provided by M/s. QA Infotech Private Limited, Noida, appear to be classifiable under Division 84 of UN Central Product Classification (CPC) Code, which are not included in Appendix 3D, and hence not eligible for SEIS benefit.

SEARCH CARRIED OUT AT PREMISES OF M/s. QA, Noida:-

2.1 Based on the above intelligence and as approved, the officers of DRI conducted search operation at office premises of M/s. QA Infotech Private Limited i.e. A-8, Sector-68, Noida, Uttar Pradesh on 30.05.2019 and recovered some documents viz. Email correspondence, Service Tax registration, GST registration, agreement with overseas clients etc., which were relevant for their further investigations under panchnama dated 30.05.2019.

2.2 During the panchnama, Shri Rajesh Sharma, one of the Directors of M/s. QA Infotech Private Limited informed that their company M/s. QA Infotech Pvt Ltd has two offices, one is located at A-8, Sector- 68, Noida, Uttar Pradesh and another one is situated at Plot No. 190, NSEZ, Phase-II, Noida; that unit of M/s. QA Infotech Pvt. Ltd. situated at Noida SEZ has taken benefit under SEIS scheme for the financial year 2015-2016, 2016-2017 & 2017-2018 and also informed that their unit situated at Noida SEZ is looked after by Shri Hemmanshu Sethh, Assistant Vice-President of M/s. QA Infotech Pvt Ltd.

2.3 During the panchnama, on being asked, Ms. Anu Bali, Manager Finance of M/s. QA Infotech Pvt. Ltd. stated that company is in the business of Software Testing Services since 2003. When asked about the benefits availed by M/s. QA Infotech Pvt. Ltd. from DGFT, Ms. Anu Bali replied that their company M/s. QA has two units, one unit is situated at A-8, Sector 68, Noida and other unit is situated in Noida SEZ; that the unit situated at Noida SEZ availed benefit under SEIS scheme for the services produced and exported to the overseas customers; that their company has availed benefit of SEIS for the services exported during financial year 2015-2016, 2016-2017 & 2017-2018 and this benefit availed totally amounts to **Rs. 3,03,11,734/-**. On being asked about description of services mentioned in the application submitted to DGFT

for SEIS scheme, Ms. Anu Bali stated that on the basis of recommendation of their consultant they mentioned the description of services as "Other Business Services (Technical Testing and Analysis Service)" whereas on export invoices they mentioned their service Accounting Code (SAC) as "998313- Information technology consulting and support service"; that Shri Hemmanshu Sethh looks after the overall functioning of the unit of M/s. QA Infotech Pvt. Ltd. situated in Noida SEZ. On being asked about invoicing of the services produced and exported to overseas from the unit situated in Noida SEZ, Ms. Anu Bali stated that Shri Hemmanshu Sethh along with other managers was responsible for making entry in the invoicing software of M/s. QA Infotech Pvt. Ltd. and sending it to the overseas customers; that Shri Hemmanshu Sethh was responsible for verification of the invoices, which were digitally signed by her.

STATEMENTS OF KEY PERSONS OF M/s. QA, NOIDA :-

During the course of inquiry, the statements of the following persons working with M/s. QA, Noida were recorded under Section 108 of the Customs Act, 1962:

- Statement of Shri Hemmanshu Sethh, Assistant Vice President, M/s. QA InfotechPvt. Ltd. Noida, recorded under Section 108 of Customs Act, 1962 on 30.05.2019.
- Statement of Shri Rajesh Sharma, Authorized Signatory and Director, M/s. QA InfotéchPvt. Ltd. recorded under Section 108 of Customs Act, 1962 on 30.05.2019.
- Statement of Shri Mukesh Sharma, Chief Executive Officer, M/s QA InfoTech Private Limited, Noida recorded under Section 108 of Customs Act, 1962 on 27.11.2019.
- Statement of Shri Kishan Mohan Sharma, Director, M/s. QA InfoTech Private Limited, Noida recorded under Section 108 of Customs Act, 1962 on 14.12.2020.

3. During the recording of statement on 30.05.2019, Shri Hemmanshu Sethh stated that M/s. QA Infotech Pvt Ltd is mainly engaged in the business of software testing which involves technical/consultancy services on development and implementation of software which includes:

"Automation- Execution of Basic Workflows in an Automated Manner. For example; a website requires user to create a new account, so we need to test this workflow every time a new version of software is available for testing. To optimize

overall process, we can automate this flow to save time and spend efforts on other priority efforts.

Steps Involved:

- Record/ Write code to interact with Application Elements.
- Create series of interactions in such a way that workflow is execute in an automated manner.
- Validate the interactions performed are as per expectations.

Example of Tools used:

- Selenium open source tool
- Appium open source tool

Performance – Validate Performance of Application under test. A application responds differently when no. of users accessing the application increase. So, we need to test that application is working as per expectation under expected user load. This is performed by putting virtual load on the application.

Steps Involved:

- Record Web Requests
- Parameterize Static Data
- Test for Single User
- Create Load Generators
- Execute the Workflow through Load Generators
- Measure the performance throughout the run to analyse performance under different system load

Example of Tools used:

- JMeter

Functional–Testing functionality of application based on the requirements provided by client. For instance, functionality, content, browser, operating system, etc. This may include backend testing as well.

Accessibility – testing performed to ensure that it is made in accordance with standards laid down by government for specially abled people. For example, a non-sighted used will use screen reader to read a login screen of the application. If the same has not been developed in accordance to the standards user won't be able to hear anything.

Localization/Globalization: One application might be released across different countries/language. In these cases, separate applications are created with different

languages. Testing application to ensure that the translation are as expected and have not resulted into any application errors.

Security Testing: *Testing done to ensure that only Authentic and Authorized users can access the application. Application/Data is not accessible otherwise.*

- *Different Type of attacks are performed on application to expose vulnerabilities.*
- *Lot of paid and free tools are used.”*

3.1 On being asked, Shri Hemmanshu Sethh stated that while carrying out the aforesaid tests, if any defect/bug is found, they advise their overseas clients about the same by way of raising a defect using bug tracking tool; it means they are providing technical assistance services of software products under test.

3.2 On being asked, he stated that they are conducting the aforesaid test as per the client's need and requirement. He further stated that they conduct the aforesaid tests either on the already used/launched software or sometimes it is the software which is to be newly launched in the market. Basically, these are the tests to be carried out by them before implementation/release of any Software.

3.3 On being asked about Invoice, Shri Hemmanshu Sethh shared a sample Invoice bearing number #QZ/18-19/11/493 with his dated signature. Below are the details/breakdown of the same:

End to End Services were provided against this invoice. Below is a quick summary for the same:

- *RAW data (Book Title: Economics For Today in 543 pages in pdf/xml format) provided by overseas client to us through FTP (File transfer Protocol) which includes requirements, specification & Standards to be tested against.*
- *Ingestion of Data into Clients application (software) and Validation of the same*
- *Validating the output on Client's Application (Online Library in this case)*
- *Validating the Application Across Different Platforms Combinations (Operating Systems and Browsers)*
- *Deploying the build to production environment.*
- *Validating the deployment by executing Basic Workflows of the application and ensuring everything is working as expected.*
- *The unit prices fixed was Rs. 6.00 per page inclusive of all the services.*

Invoice No: QA/18-19/11/493

Project Name: CenDoc E2E Conversion International Titles (Australia)

Billed To: Ronald

Description: ISBN: Unique Identifier [9780170416597]

Title : Economics For Today

Service Provided : End to End Service

Quantity: 543 Pages

Unit Price 6.00

3.4 On being asked, Shri Hemmanshu Sethh stated that the rest of the details mentioned in the above invoice is pre-configured and auto generated from their system as described above. He prepared other Invoices raised to overseas clients. On being asked about the documentation, he stated that he does not prepare or sign any document as such. His work includes interaction with overseas clients through email allotted to him by the Company i.e. hemmanshusethh@gainfotech.com. On demand he also produced the list of overseas clients of M/s. QA Infotech Pvt. Ltd. in a separate sheet.

3.5 Further Shri Hemmanshu Sethh was shown the copy of relevant print outs of Division 84 of Central Product Classification (CPC), taken from the DGFT website www.dgft.gov.in and having perused & understand the same, Shri Hemmanshu Sethh put his dated signature on the printout of two pages containing the description of services under Division 84 of CPC. Further his attention was drawn to description of services under Division 84 of CPC and in this regard after going through Division 84 of CPC, Shri Hemmanshu Sethh stated that all the services exported by their company M/s. QA viz. software testing services are classifiable under CPC Division 84.

4. During the recording of statement of on 30.05.2019, Shri Rajesh Sharma was shown the panchnama dated 30.05.2019 drawn at the office premises of M/s. QA InfoTech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh on 30.05.2019. In token of having read and its correctness, he put his dated signature on the last page of said panchnama.

4.1 In his statement dated 30.05.2019, Shri Rajesh Sharma interalia stated that M/s QA Infotech Private Limited, was founded in the year 2003 and he is the Director and Chief Information Officer of M/s QA Infotech Private Limited since 2003; that there are five Directors in the company and the other Directors are Shri Mukesh Sharma, Shri Kishan Mohan Sharma, Shri Minesh Upadhyay & Miss Palvesha Hakim; that Shri Mukesh Sharma is Director as well as Chief Executive

Officer of the Company and overall in charge of finance and account; that he also looks after and monitor the work relating to SEIS application etc.

4.2 On being asked, he stated that there are two units of M/s. QA Infotech Pvt Ltd in Noida. One is situated at A-8, Sector- 68, Noida, Uttar Pradesh and the other unit which was established in 2008 is situated at Plot No. 190, NSEZ, Phase-II, Noida, Uttar Pradesh; that M/s. QA Infotech Pvt Ltd is engaged in the business of independent software testing services since 2003; that the unit of M/s. QA Infotech Pvt. Ltd situated at A-8, Sector- 68, Noida, Uttar Pradesh is registered with STPI since 2004 and unit situated at Noida SEZ is a SEZ unit.

4.3 On being specifically asked about the benefits availed under the SEIS scheme, Shri Rajesh Sharma stated that M/s. QA Infotech Pvt Ltd has filed total three applications with DGFT, Delhi in ANF – 3B along with relevant enclosures for availing Scrips under SEIS scheme and all the three applications were filed in respect of export of “Software Testing Services” produced and exported from their unit situated at Noida SEZ to their overseas clients for the financial years 2015-2016, 2016-2017 and 2017-2018; that total 42 SEIS scrips totally amounting to **Rs. 3,03,11,734 /- (Three Crore Three Lacs Eleven Thousand Seven Hundred Thirty Four Only)** were obtained from DGFT, Delhi under SEIS scheme for exporting software testing services; that out of 42 scrips obtained under SEIS scheme by M/s. QA, 10 scrips amounting to **Rs. 50,00,000/- (Fifty Lacs Only)** were sold to M/s. India Exim, 30, Defence Enclave, 1ST Floor, Delhi- 110092 (GST No.: 07AGXPG5787B1ZY, PAN No. AGXPG5787B) and remaining 32 scrips amounting to **Rs. 2,53,11,734/- (Two Crore Fifty Three Lacs Eleven Thousand Seven Hundred Thirty Four Only)** (were sold to M/s. Top Trade Exim, E-33, 2nd Floor, Sector-3, Noida-201301 (GST No. 09AAJPU1221A2Z2, PAN No.: AAJPU1221A).

4.4 He voluntarily produced the copies of application made for availing benefit under SEIS scheme, Balance Sheets for the financial year 2015-2016, 2016-2017 & 2017-2018 bearing page No. 1 to 98, copies of Invoices for the year 2015-16, 2016-17 & 2017-18 of M/s. QA Infotech Pvt. Ltd. situated at Plot No. 190, NSEZ, Phase-II, Noida, Uttar Pradesh raised to overseas client and the copy of BRC for the year 2016-17 issued to M/s. QA Infotech Pvt. Ltd. situated at A-8, Sector -68, Noida. The first and last page of the said 01 to 271 serially numbered documents were signed with date by Shri Rajesh Sharma in token of being produced by him.

4.5 On being asked about description of services mentioned in the application submitted to DGFT for benefit under SEIS scheme, Shri Rajesh Sharma stated that they mentioned the description of services as “**Other business services (Technical testing and Analysis Service)**” whereas on export invoices they mentioned their

service Accounting Code (SAC) as "998313- **Information Technology Consulting and Support Service**".

4.6 On being asked, Shri Rajesh Sharma stated that they have made client agreement with their overseas clients for rendering various software services provided by the company. The said services include:

- Test Planning and Management, Automation Regression Testing, Manual Regression Testing;
- Functional Beta Testing of myNelson LTI and report defects in JIRA and regress defects that are fixed;
- Test Planning and Management, Functional Testing, Automation and API Testing, etc.;
- Regression Services of Xyleme Product suites;
- Functional Testing, Test Automation and Performance Testing Services;
- Clean up of auto generated video captions, ensuring text in the captions correctly and accurately represents the spoken audio from each file;
- Testing Services to Macmillan for its project PrepU based on the project requirements in defect tracking system used in Macmillan;

4.7 On being shown the copy of Public Notice 3/2015-20 dated 01.04.2015 incorporating Annexure 3D (pages numbered from 1 to 7) showing the list of services eligible for SEIS benefits & copy of the printout of relevant Central Product Classification (CPC) for the Division 84 and 86 taken from the DGFT website www.dgft.gov.in and after careful perusal of the above documents, Shri Rajesh Sharma stated that the services which are covered under CPC 84 are not eligible for SEIS benefits.

4.8 Further, during the recording of the statement, Shri Rajesh Sharma was shown Para-6 with heading 'Ineligible Categories' under SEIS (Ref: Paragraph 3.09 of the FTP) on page 4 & 5 of an E-Book, (nacenkanpur.gov.in) and in token of having seen Shri Rajesh Sharma put his dated signature on 4th and 5th page of above said E- Book in which in the said para it is mentioned that "Export turnover relating to services of unit operating under SEZ/EOU/EHTP/STPI/BTP schemes or supplies of services made to such unit" are mentioned as ineligible categories under SEIS.

4.9 On being asked, Shri Rajesh Sharma stated that they were mentioning purpose of remittance sent to their overseas clients as "software services export" and "consultancy expenses" (under code P0802) etc. in FIRC ; on being shown the list of "New purpose codes for reporting forex transactions receipt purposes" under

Annexure II issued by RBI, he finds that the Software testing Services exported by M/s. QA correctly classified under the code "P0802".

4.10 On being shown DGFT's Trade Notice No. 04/2018 dated 25.04.2018 & after understand the content mentioned in aforesaid DGFT Public Notice, Shri Rajesh Sharma stated that as per the said Trade Notice M/s. QA is not eligible for availing SEIS benefits for all software services exported by them which fall under Division 84 of CPC Code list i.e. "Computer and related service" as these services are not notified in Annexure to Appendix 3D for SEIS.

4.11 Further statement of Shri Hemmanshu Sethi dated 30.05.2019 was shown to Shri Rajesh Kumar and in token of having seen the said statement and its correctness, Shri Rajesh Sharma put his dated signature on last page of above said statement.

4.12 After going through various above mentioned documents & facts mentioned therein and the statement of Shri Hemmanshu Sethi etc., Shri Rajesh Sharma accepted and admitted that M/s. QA Infotech Pvt. Ltd., Noida has wrongly mentioned the description of services as "1 De -Other business services (Technical Testing and Analysis Service) 8676" in application filed before DGFT to fraudulently avail duty scrips under SEIS Scheme and wrongly obtained 42 SEIS scrips amounting to **Rs. 3,03,11,734/- (Three Crore Three Lacs Eleven Thousand Seven Hundred Thirty Four Only)** from DGFT. Shri Rajesh Sharma undertook to pay voluntarily the undue benefits amounting to **Rs. 3,03,11,734/- (Three Crore Three Lacs Eleven Thousand Seven Hundred Thirty Four Only)** availed by M/s. QA preferably within 7 days.

5. During the recording of statement of Shri Mukesh Sharma Chief Executive Officer of M/s. QA Infotech Pvt Ltd, Noida, under Section 108 of Customs act, 1962 on 27.11.2019, he was shown the panchnama dated 30.05.2019 drawn at the office premises of M/s. QA Infotech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh on 30.05.2019. Having seen and perused the said panchnama, Shri Mukesh Sharma agreed with the contents described in the said panchnama and in token of having seen and its correctness, Shri Mukesh Sharma put his dated signature on the last page of the above mentioned panchnama.

5.1 Further statement dated 30.05.2019 of Shri Rajesh Sharma, Authorized Signatory and Director of M/s. QA Infotech Private Limited was shown to Shri Mukesh Sharma and after having seen and perused the above mentioned statement, he agreed with the contents described in the said statement. In token of having seen and its correctness, Shri Mukesh Sharma put his dated signature on the last page of the above mentioned statement of Shri Rajesh Sharma dated 30.05.2019.

5.2 On being asked, Shri Mukesh Sharma stated that M/s. QA was started in the year 2003 for export of software services and he is Chief Executive Officer of M/s. QA since 2003; Shri Rajesh Sharma, his elder brother, is also one of the Directors & Authorized signatory of the company and he himself looks after and monitors the work relating to SEIS benefits i.e. classification of export services, filing of application with DGFT, sale of SEIS scrips etc.

5.3 On being asked about description of services mentioned in the application submitted to DGFT for benefit under SEIS scheme, Shri Mukesh Sharma stated that while filing application with DGFT they mentioned the description of services as "Other business services (Technical Testing and Analysis Service)" whereas they have actually exported services classifiable under "Other business services (Technical Testing and Analysis Service)" and the same has been mentioned in the export invoices issued to their foreign clients with service Accounting Code (SAC) as "998313- Information Technology Consulting and Support Service.

5.4 Having seen the copy of Public Notice No. 45/2015-2020 dated 05.12.2017 amending the Public Notice No. 3/2015-20 dated 1.4.2015 (serially numbered from 1 to 7) incorporating Annexure 3D - the list of services eligible for SEIS benefits and the copy of the printout of relevant Central Product Classification (CPC) for Division 84 & 86 taken from the DGFT website www.dgft.gov.in and after careful perusal of the above documents, Shri Mukesh Sharma stated that the services which are covered under CPC 84 are not eligible for SEIS benefits.

5.5 Having seen & understood the content mentioned in DGFT's Trade Notice No. 04/2018 dated 25.04.2018, Shri Mukesh Sharma stated that as per the said Trade Notice M/s. QA Infotech Pvt Ltd is not eligible for availing SEIS benefits for all software services exported by them which fall under Division 84 of CPC Code list i.e. "Computer and related service" as these services are not notified in Annexure to Appendix 3D for SEIS.

5.6 In view of above facts stated by him and various documents/public notices, statement etc. shown to Shri Mukesh Sharma and understanding it, Shri Mukesh Sharma accepted and admitted that M/s. QA Infotech Pvt. Ltd., Noida has wrongly mentioned the description of their export services as "Other business services (Technical Testing and Analysis Service) 8676" in application filed before DGFT to avail duty scrips under SEIS Scheme and wrongly obtained 42 duty scrips amounting to **Rs. 3,03,11,734/- (Three Crore Three Lacs Eleven Thousand Seven Hundred Thirty Four Only)** from DGFT under SEIS scheme. Further Shri Mukesh Sharma also stated that M/s. QA has voluntarily paid the undue benefits of amounting **Rs. 3,03,11,734/- (Three Crore Three Lacs Eleven Thousand Seven Hundred Thirty Four Only)** availed by them vide TR 6 Challan no. 01/QA/2019

dated 20.06.2019; that they have also voluntary deposited the interest amount of **Rs. 24,74,365/- (Twenty Four Lacs Seventy Four Thousand Three Hundred Sixty Five Only)** vide TR 6 Challan no. 02/QA/2019 dated 30.11.2019 (Demand draft bearing no. 006126 dated 22.11.2019 of HDFC Bank, Noida).

6. During the recording of statement of Shri Kishan Mohan Sharma, Director of M/s. QA, Noida under Section 108 of Customs Act, 1962, he was shown the panchnama dated 30.05.2019 drawn at the office premises of M/s. QA Infotech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh on 30.05.2019. Having seen and perused the said panchnama, Shri Mukesh Sharma agreed with the contents described in the said panchnama and in token of having seen and its correctness, Shri Kishan Mohan Sharma put his dated signature on the last page of the above mentioned panchnama.

6.1 Further statement dated 30.05.2019 of Shri Rajesh Sharma, Authorized Signatory and Director of M/s. QA Infotech Private Limited was shown to Shri Kishan Mohan Sharma and after having seen and perused the above-mentioned statement, he agreed with the contents described in the said statement. In token of having seen and its correctness, Shri Kishan Mohan Sharma put his dated signature on the last page of the above mentioned statement of Shri Rajesh Sharma dated 30.05.2019.

6.2 Further statement dated 27.11.2019 of Shri Mukesh Sharma, Chief Executive Officer (CEO) of M/s. QA Infotech Private Limited was shown to Shri Kishan Mohan Sharma and after having seen and perused the above-mentioned statement, he agreed with the contents described in the said statement. In token of having seen and its correctness, Shri Kishan Mohan Sharma put his dated signature on the last page of the above mentioned statement of Shri Mukesh Sharma dated 27.11.2019.

6.3 Shri Kishan Mohan Sharma further stated that M/s. QA Infotech Private Limited, was started by his son Shri Mukesh Sharma after his return from USA in November 2003. Shri Kishan Mohan Sharma was still working with BITS Pilani at that time. Shri Mukesh then asked eldest son Shri Rajesh Sharma also to join the company. The company became fully operational in 2006 from B-8, Sector-59, Noida and after couple of years the company started operation from Plot No. 8, Sector-68, Noida. At present there are about 1000 full time employees in the company.

6.4 On being asked about the business profile of the company, he replied that M/s. QA Infotech Private Limited is an independent quality assurance and testing services for software for the customers in USA. On being asked about his

responsibilities, he replied as the company was started by his son, and he was working at BITS Pilani, so after the company became fully operational in year 2006 his son requested him to resign from BITS Pilani and help him in the running and maintenance of the company. He further stated that he is basically looking after the upkeep and general maintenance of the office space, transportation and general administration of the company.

6.5 On being asked about the benefits availed by M/s. QA, he stated that he was looking after the general maintenance and he was not concerned with the financial or tax related matters, these matters are handled by his son Mukesh Sharma and he can give information in this regard.

6.6 On being shown the copy of application dated 14.12.2018 filed with Additional Director General of Foreign Trade for Duty Credit Script under Service Export India Scheme (SEIS)-FY 2017-2018 submitted under his signature and asked about benefits availed by M/s. QA, he stated and confirmed that he is not looking after financial, tax or DGFT issues of the company, however since he is Director and if his sons are on tour he signed the documents as per their (his sons) advice. The application must have been signed similarly as his son was not available.

6.7 On being asked to elaborate the services pertaining to the Company stated in application dated 14.12.2018, he again replied that he is not aware such issues as they are not being dealt by him, he has signed the application on direction of his son Shri Mukesh Sharma and he only can give information in this regard. On being asked about what services company is actually providing to his clients, he stated that though he is not technically conversant yet as per his knowledge company is providing software testing services to the customers.

6.8 He was further confronted with the Invoice dated 30.03.2018 issued by M/s. QA Infotech Pvt. Ltd. Noida in which the service provided by the Company had been declared as "Information Technology Consulting and Support services" and in the application dated 14.12.2018 filed before Additional Director General of Foreign Trade for Duty Credit Script under Service Export India Scheme FY 2017-18, and asked to explain the discrepancy in both the documents with regard to different description of export services in both documents. After perusing both the documents he stated that he has no idea about the same his son Shri Mukesh Sharma can explain and clarify the discrepancy.

DETERMINATION OF CLASSIFICATION:-

7. The Services (Software/Information Technology Services related to Computer Programming and Consulting) provided/exported by M/s. QA, Noida seems to be covered under CPC code 841 to 849 which are defined as under:

DIVISION 84 COMPUTER AND RELATED SERVICES

841 Consultancy services related to the installation of computer hardware

8410 84100 Consultancy services related to the installation of computer hardware

Assistance services to the clients in the installation of computer hardware (i.e. physical equipment) and computer networks.

842 Software implementation services

All services involving consultancy services on, development and implementation of software. The term "software" may be defined as the sets of instructions required to make computers work and communicate. A number of different programmes may be developed for specific applications (application software), and the customer may have a choice of using ready-made programmes off the shelf (packaged software), developing specific programmes for particular requirements (customized software) or using a combination of the two.

8421 84210 Systems and software consulting services

Services of a general nature prior to the development of data processing systems and applications. It might be management services, project planning services, etc.

8422 84220 Systems analysis services

Analysis services include analysis of the clients' needs, defining functional specification, and setting up the team. Also involved are project management, technical coordination and integration and definition of the systems architecture.

8423 84230 Systems design services

Design services include technical solutions, with respect to methodology, quality-assurance, choice of equipment software packages or new technologies, etc.

8424 84240 Programming services

Programming services include the implementation phase, i.e. writing and debugging programmes, conducting tests, and editing documentation.

8425 84250 Systems maintenance services

Maintenance services include consulting and technical assistance services of software products in use, rewriting or changing existing programmes or systems, and maintaining up-to-date software documentation and manuals. Also included are specialist work, e.g. conversions.

· 843 Data processing services

8431 84310 Input preparation services

Data recording services such as key punching, optical scanning or other methods for data entry.

8432 84320 Data-processing and tabulation services

Services such as data processing and tabulation services, computer calculating services, and rental services of computer time.

8433 84330 Time-sharing services

This seems to be the same type of services as 84320. Computer time only is bought; if it is bought from the customer's premises, telecommunications services are also bought. Data processing or tabulation services may also be bought from a service bureau. In both cases the services might be time sharing processed. Thus, there is no clear distinction between 84320 and 84330.

8439 84390 Other data processing services

Services which manage the full operations of a customer's facilities under contract: computer-room environmental quality control services; management services of in-place computer equipment combinations; and management services of computer work flows and distributions.

844 Database services

8440 84400 Database services

All services provided from primarily structured databases through a communication network.

Exclusions: Data and message transmission services (e.g. network operation services, value-added network services) are classified in class 7523 (Data and message transmission services). Documentation services consisting in information retrieval from databases are classified in subclass 96311 (Library services).

845 Maintenance and repair services of office machinery and equipment including computers

8450 84500 Maintenance and repair services of office machinery and equipment including computers

Repair and maintenance services of office machinery, computers and related equipment.

849 Other computer services

8491 84910 Data preparation services

Data preparation services for clients not involving data processing services.

8499 84990 Other computer services n.e.c.

Other computer related services, not elsewhere classified, e.g. training services for staff of clients, and other professional computer services.

(emphasis added)

8. WHY THE SERVICES EXPORTED BY M/s. QA INFOTECH, NOIDA APPEAR NOT COVERED UNDER “OTHER BUSINESS SERVICES (TECHNICAL TESTING AND ANALYSIS SERVICES) 8676”:-

8.1 It appears that M/s. QA Infotech Pvt Ltd, Noida had classified their Services under “Other Business Services (Technical Testing and Analysis Services) 8676” in their application before DGFT, New Delhi in order to get the SEIS Scrips. However, during investigation, based on the documents submitted and various statements recorded it appears that the Services provided/exported by them are not “Technical Testing and Analysis Services”, as defined under CPC.

8.2 The definition of “Technical Testing and Analysis Services” as under CPC is given below.

8676 Technical Testing and Analysis Services

86761 Composition and purity testing and analysis services

*Testing and analysis services of the **chemical and biological properties** of materials such as air, water, waste (municipal and industrial), fuels, metal, soil, minerals, food and chemicals. Included are testing and analysis services in related scientific fields such as microbiology, biochemistry, bacteriology, etc. Excluded are medical and dental testing services.*

86762 Testing and analysis services of physical properties

*Testing and analysis services of physical properties such as **strength, ductility, electrical conductivity and radioactivity of materials** such as metal, plastics, textiles, woods, glass, concrete and other materials. Included are tests for tension, hardness, impact resistance, fatigue resistance, and high-temperature effects.*

86763 Testing and analysis services of integrated mechanical and electrical systems

*Testing and analysis services of the mechanical and electrical characteristics of **complete machinery, motors, automobiles, tools, appliances, communication equipment and other equipment incorporating mechanical and electrical components**. The results of the testing and analysis generally take the form of an assessment of the performance and behavioural characteristics of the object tested. Tests may be performed using models or mock-ups of ships, aircraft, dams, etc.*

86764 Technical inspection services

Testing and analysis services of a technical or scientific nature which do not alter or affect the object being tested. Included are radiographic, magnetic, and ultrasonic testing of machine parts and structures conducted in order to identify defects. These tests are often conducted on site. Excluded are inspection services of a non-technical or scientific nature, such as visual inspection of buildings, machines, etc.

86769 Other Technical Testing and Analysis Services

All other Technical Testing and Analysis Services not elsewhere classified.

(emphasis added)

8.3 It also appears from the statement of Shri Hemmasnshu Sethh, Assistant Vice President, (discussed in paras such as 4, 4.1 & 4.2 above) that they are mainly engaged in the business of software testing which involves technical/consultancy services on development and implementation of software, that they conduct the aforesaid tests either on the already used/launched software or sometimes it is the software which is to be newly launched in the market; that basically, these are the tests to be carried out by them before implementation/release of any Software and all the services exported by their company M/s. QA viz. software testing services are classifiable under CPC Division 84.

8.4 It also appears from the statement of Shri Rajesh Sharma, Authorised Signatory & Director, (discussed in paras supra) that all the three applications were filed in respect of export of "software testing services" produced and exported from their unit situated at Noida SEZ to their overseas clients for the financial years 2015-2016, 2016-2017 and 2017-2018; that total 42 SEIS scrips totally amounting to Rs. 3,03,11,734.21/- were obtained from DGFT, Delhi under SEIS scheme for exporting software testing services; that they mentioned the description of services as "**Other business services (Technical Testing and Analysis Service)**" whereas on export invoices they mentioned their service Accounting Code (SAC) as "**998313-Information Technology Consulting and Support Service**"; that they have made client agreement with their overseas clients for rendering various software services provided by the company and stated the type of services provided, that they are mainly engaged in the business of software testing which involves technical/consultancy services on development and implementation of software, and all the services exported by their company M/s. QA viz. software testing services are classifiable under CPC Division 84; that they were mentioning purpose of remittance sent to their overseas clients as "software services export" and "consultancy expenses" (under code P0802).in FIRC for purpose of remittance. As per the NPCS Code list of the services covered under '998313' are detailed as under:

Division 998313: INFORMATION TECHNOLOGY (IT) CONSULTING AND SUPPORT SERVICES.

Group	Sub-class	Product Code	Description
		9983131	<i>IT consulting services</i>
		99831311	<i>Consultancy services related to hardware and software requirements and procurement</i>

99831312	<i>Consultancy services related to the installation of computer hardware including peripheral equipment</i>
99831313	<i>Consultancy services related to the maintenance of computer hardware including peripheral equipment</i>
99831314	<i>Consultancy services related to systems integration</i>
99831315	<i>Consultancy services related to systems security including antivirus and similar applications</i>
99831316	<i>Consultancy services relating to expert opinion on IT related issues like IPR/ copy right/ contract etc.</i>
99831319	<i>Other IT consulting services n.e.c.</i>

8.5 From the Mandatory returns i.e. Service Tax Returns (ST-3) & MGT-09, BRC Invoices, STP Certificate & agreement with overseas clients etc. submitted by M/s. QA Infotech Pvt Ltd Noida it appears that they are providing Software Services as defined under CPC Code 841 to 849 and not specialized Other Business Services (Technical Testing and Analysis Services). From the evidences gathered it appears that M/s. QA, Noida is providing software and its related services and software testing services which is different from Technical Testing & Analysis Services.

8.6 Further perusal of Technical Testing and Analysis Services under CPC code 8676 makes it amply clear that the services elaborated therein are related to testing of physical, chemical, biological properties of various materials and behavioural characteristics of equipments and instruments. The classification under 8676 of CPC by M/s. QA Noida appears to be incorrect as this code covers the testing and analysis of Chemical, biological, mechanical properties, electrical conductivity, radioactive properties of Matter, but not on application of software and fixing software bugs in software application. Hence it is clear that these services do not cover the testing and analysis of software.

9. WHY THE SERVICES EXPORTED BY M/s. QA INFOTECH, NOIDA APPEAR CLASSIFIABLE UNDER CPC 841 TO 849 ON THE BASIS OF INDEPENDENT DOCUMENTARY EVIDENCES:

9.1 In the Form MGT-7 (Annual Return) filed by M/s. QA, Noida with Ministry of Corporate Affairs, for the financial year 2015-16, the main product/services provided is shown as 'J2' i.e. 'Publishing of computer operating systems, system

software, application software, games, etc.' whereas in the same return filed for the financial year 2016-17 & 2017-18 the main product/services provided is shown as 'J6' i.e. Computer programming, consultancy and related activities.

(vii) Financial year From date: 01/04/2017 (DD/MM/YYYY) To date: 31/03/2018 (DD/MM/YYYY)																
(viii) Whether Annual general meeting (AGM) held: <input checked="" type="radio"/> Yes <input type="radio"/> No																
(a) If yes, date of AGM: 27/09/2018																
(b) Due date of AGM: 30/09/2018																
(c) Whether any extension for AGM granted: <input checked="" type="radio"/> Yes <input type="radio"/> No																
II. PRINCIPAL BUSINESS ACTIVITIES OF THE COMPANY																
*Number of business activities: 1																
<table border="1"> <thead> <tr> <th>S.No</th> <th>Main Activity group code</th> <th>Description of Main Activity group</th> <th>Business Activity Code</th> <th>Description of Business Activity</th> <th>% of turnover of the company</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>J</td> <td>Information and communication</td> <td>16</td> <td>Computer programming, consultancy and related activities</td> <td>95.6</td> </tr> </tbody> </table>		S.No	Main Activity group code	Description of Main Activity group	Business Activity Code	Description of Business Activity	% of turnover of the company	1	J	Information and communication	16	Computer programming, consultancy and related activities	95.6			
S.No	Main Activity group code	Description of Main Activity group	Business Activity Code	Description of Business Activity	% of turnover of the company											
1	J	Information and communication	16	Computer programming, consultancy and related activities	95.6											
III. PARTICULARS OF HOLDING, SUBSIDIARY AND ASSOCIATE COMPANIES (INCLUDING JOINT VENTURES)																
*No. of Companies for which information is to be given: 1 <input type="radio"/> Preliminary																
<table border="1"> <thead> <tr> <th>S.No</th> <th>Name of the company</th> <th>CIN / FCRN</th> <th>Holding/Subsidiary/Associate/ Joint Venture</th> <th>% of shares held</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>QA INFOTECH SOFTWARE SER</td> <td>U74999GJ2017PTC098705</td> <td>Subsidiary</td> <td>99.99</td> </tr> </tbody> </table>		S.No	Name of the company	CIN / FCRN	Holding/Subsidiary/Associate/ Joint Venture	% of shares held	1	QA INFOTECH SOFTWARE SER	U74999GJ2017PTC098705	Subsidiary	99.99					
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IV. SHARE CAPITAL, DEBENTURES AND OTHER SECURITIES OF THE COMPANY																
(i) SHARE CAPITAL																
(a) Equity share capital																
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Face value	Number of shares	Capital	Capital	Capital												
Total number of equity shares	1,500,000	1,500,000	1,500,000	1,500,000												
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Number of classes: 1																
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Face value	Number of shares	Capital	Capital	Capital												
Only 1 class	1,500,000	1,500,000	1,500,000	1,500,000												
Number of equity shares	1,500,000	1,500,000	1,500,000	1,500,000												

In the form MGT-09 (Extract of Annual Return for financial year ending on 31.03.2017) filed by M/s. QA, Noida with Ministry of Corporate Affairs, the principal business activity of the company is Computer software development/testing service under NIC Code No. 99831413.

FORM NO. MGT-9 EXTRACT OF ANNUAL RETURN Pursuant to Section 92(1) of the Companies Act, 2013 and rule 12(1) of the Company (Management and Administration) Rules, 2014 For the financial year ended on 31/03/2017			
I. REGISTRATION & OTHER DETAILS			
1. Registration No.	1722000120040000007	2. Registration Date	22/08/2004
3. Name of the Company	QA Infotech Pvt. Ltd.	4. Category/Sub-category of the Company	IT Services
5. Address of the Registered Office/Headquarters	28944, 4th floor, Mantri Computer Park, Sector 10, Noida	6. Whether Listed Company	No
7. Home Address & contact details of the Registrar	1/10, Sector 10, Noida	8. Registered office/Trade	
II. PRINCIPAL BUSINESS ACTIVITIES OF THE COMPANY (All the business activities contributing 10% or more to the turnover of the company shall be stated)			
1. Name and description of the products / services	IT Services	2. Name and description of the products / services	IT Services
3. Computer Software development / IT related services	IT Services	4. Computer Software development / IT related services	IT Services
III. PARTICULARS OF HOLDING, SUBSIDIARY AND ASSOCIATE COMPANIES			
1. Name	2. Date of incorporation	3. Total holding in the company	
IV. SHARE HOLDING PATTERN (Extracted from Annual Return. Specimen page is Total Shareholding)			
Group of Shareholders	No. of Shares held at the end of the financial year as on 31/03/2017	No. of Shares held at the end of the financial year as on 31/03/2016	Change during the year
	Number of Shares	Number of Shares	Number of Shares
1. Promoter			
2. Noida (SIC-1413)	100,000, 100,000, 100,000	100,000, 100,000, 100,000	NIL
3. Central Govt.	100,000, 100,000, 100,000	100,000, 100,000, 100,000	NIL
4. Employees	100,000, 100,000, 100,000	100,000, 100,000, 100,000	NIL
5. Directors	100,000, 100,000, 100,000	100,000, 100,000, 100,000	NIL
6. Others	100,000, 100,000, 100,000	100,000, 100,000, 100,000	NIL
7. Total	300,000, 300,000, 300,000	300,000, 300,000, 300,000	NIL
8. Total shareholding	300,000	300,000	NIL
9. Promoter Shareholding	100,000	100,000	NIL
10. Public Shareholding	200,000	200,000	NIL

In view of the MGT-9 (Extract of Annual Return) filed by M/s. QA, Noida and other documents submitted by M/s. QA, Noida, as stated in Para 3, it appears that:

M/s. QA, Noida have declared that the National Industrial Classification (NIC) code of the services provided by them are 99831413. The exact nature of services provided by M/s. QA Infotech Pvt. Ltd., Noida can be understood from the definition of these NPCS Codes which are as follows:

Division 998314: INFORMATION TECHNOLOGY (IT) DESIGN AND DEVELOPMENT SERVICES.

Group	Sub-class	Product	Description
		Code	

9983141	<i>IT design and development services for applications.</i>
99831411	<i>Design and development services of a web page including content development</i>
99831412	<i>Design and development services of a database</i>
99831413	<i>Design and development services of software applications including customized and packaged software</i>
99831414	<i>Geographical information systems services</i>
99831415	<i>Animation services including on-line games development services</i>
99831416	<i>Research and analytics services including data mining services and data management services.</i>
99831417	<i>Computer system development services other than programming services including embedded systems development services</i>
99831418	<i>Engineering services including plant engineering, product design, product development services</i>
99831419	<i>Other IT design and development services for applications n.e.c</i>

9.2 The sub class 99831413 of the said NPCS Codes deals with ***Design and development services of software applications including customized and packaged software.*** On perusal of these codes, it appears that the services provided/exported by M/s. QA, Noida are related to design and development of software applications which involves various step such as (i) Planning (ii) feasibility (iii) Design (iv) Development and Coding (v) Integration and testing (vi) implementation and deployment (vii) Operation and maintenance (viii) finality. The primary activity of the company appears to be on software development and its related issues. Comparison of description of services covered under NPCS Code 99831413 with CPC shows that these services are squarely covered under 841 to 849 of CPC.

9.3 Services registered in the Service Tax Registration Certificate of M/s. QA does not mention “Other Business Services (Technical Testing & Analysis Services)”, they

have taken registration under 'Technical Inspection and Certification Services' including other 4 services as mentioned below.

Sl. No.	Types of Services
1.	Advertising agency services
2.	Manpower recruitment services
3.	Commercial training or coaching services
4.	Technical Inspection and certification services
5.	Renting of Immovable property services

9.4 From the list of services above, it is clear that M/s. QA Infotech Pvt Ltd Noida has not obtained registration under "Other Business Services (Technical Testing & Analysis Services)" or similar such services as defined under the Service Tax regime. They have taken registration under 'Technical Inspection and certification services' which means inspection or examination of goods or process or material or information technology software or any immovable property to certify that such goods or process or material or information technology software or immovable property qualifies or maintains the specified standards, including functionality or utility or quality or safety or any other characteristic or parameters. 'Technical Inspection and Certification Services' is not listed in Appendix 3D of the FTP 2015-2020, whereas 'Technical Testing & Analysis Services' is listed under Annexure 3D.

9.5 Service Tax Returns filed for the year 2015-16 to 2017-18 – Upto June, 2017 shows export only of 'Information Technology Software Services'. However, they have not taken registration for providing services under "Information Technology Software Services" yet M/s. QA Infotech Pvt Ltd has shown exports only under Information Technology Software Services in the Service Tax returns filed by them. As per their ST-3 returns they have never exported any amount of services as "Other Business Services (Technical Testing & Analysis Services)", which were the services declared in the application filed before DGFT for procuring the SEIS Scrips. The definition of Information Technology Software Services as defined in Section 65 (105) (zzze) of Finance Act, 1994, is as under:

"any service provided or to be provided to any person, by any other person in relation to information technology software, including,

(i) development of information technology software,

(ii) study, analysis, design and programming of information technology software,

(iii) adaptation, upgradation, enhancement, implementation and other similar services related to information technology software,

(iv) providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specification for a database design, guidance and assistance during the start-up phase of a new system, specifications to secure a database, advice on proprietary information technology software,

(v) providing the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products,

(vi) providing the right to use information technology software supplied electronically.”

9.6 As evident from the Service Tax Returns, services under head ‘Information Technology Software Services’, were exported by M/s. QA InfoTech Pvt. Ltd. and by mis declaring the said exported services as “Other Business Services (Technical Testing and Analysis Services)” while applying before DGFT they procured the Scrips fraudulently. The only export service ‘Information Technology Software Services’ declared in ST-3 returns by M/s. QA, corresponds to heading 841 to 849 of the CPC Codes.

9.7 The Logo & letterhead of M/s. QA, Noida is affixed below which clearly indicates its aim & motto as “Your Software Testing Partner” which suggests and indicates that the business of the company is software testing.



“Software testing involves the execution of a software component or system component to evaluate one or more properties of interest. Test techniques include the process of executing a program or application with the intent of finding software bugs”. Comparison of the activities/services mentioned in the logo & letterhead with CPC codes makes it clear that these activities/services qualify to fall under CPC 841 to 849 which is not listed in Appendix 3-D (i.e. not eligible for SEIS benefits/scrips.)

9.8 Sample of Export Invoice No. QZ/18-19/11/493 dated 11.09.2018, has the description of service as “998313- Information Technology Consulting and support services”, - This service description mentioned in the sample invoice also correspond to the CPC codes 841 to 849 only and not the ones declared by M/s. QA, Noida in their SEIS application filed before DGFT (New Delhi).

Copy of Invoice

SCRUTINY OF DOCUMENTS & VIOLATIONS:

10. Therefore, in view of the discussion in foregoing paras, the corroborative documentary evidences available against M/s. QA, Noida, UP, which establish that the services provided actually fall under Division-84 of UN Central Product Classification (CPC) Code and not listed in Appendix 3D of the FTP 2015-2020, are as under:-

(i) Form MGT-7 (**Annual Return**) filed with Ministry of Corporate Affairs, the main activity group is shown as "Information and Communication" and description of business activity as "Computer programming, consultancy and related activities". However M/s. QA, Noida have declared that National Product Classification for Service Sector (NPCS) code of the services provided

by them are 99831413 (Computer Software development/testing services) as per MGT -09;

- (ii) Certificate issued by Software Technology Parks of India to M/s. QA, Noida have mention under head Item of manufacture as "Computer Software/IT Enabled Services" and do not have mention of Services 'Other business services (Technical Testing and Analysis Service).'
- (iii) Service mentioned in **Bank Realisation Certificate for Export** is 'Software services' and not the 'Technical Testing and Analysis Service'.
- (iv) ST-3 data (Service Tax Returns), shows export of only 'Information Technology Software Services', however this service is not included in their ST-2, i.e. Service Tax Registration Certificate.
- (v) The description of services in Export Invoice raised by M/s. QA, Noida to their overseas clients were declared as "Information Technology consulting and support Services" under Service Accounting Code (SAC) 998313.
- (vi) Service mentioned in Exhibit A-1 of the agreement with foreign clients i.e. Alexander Street Press, USA is Software Testing & Services and the description mentioned in the invoices is "LAZR Project QA-Functional Testing", as their export services, which are not eligible for SEIS benefits.
- (vii) Services registered in the Service Tax Registration Certificate i.e. ST-2, does not mention "Other business services (Technical Testing and Analysis Service)." They have taken registration under 'Technical Inspection and certification services' which means inspection or examination of goods or process or material or information technology software or any immovable property to certify that such goods or process or material or information technology software or immovable property qualifies or maintains the specified standards, including functionality or utility or quality or safety or any other characteristic or parameters. 'Technical Inspection and Certification Services' is not listed in Appendix 3D of the FTP 2015-2020, whereas 'Technical Testing & Analysis Services' is listed under Annexure 3D.
- (viii) Service mentioned in the agreement with foreign client i.e. Nelson Education Ltd., Canada is for "Functional Beta Testing of myNelson LTI"

5 QA resources will execute sanity test on the following platforms (Test duration = 1 day)

Tablets-

Apple iPad4
Apple iPad Mini
Samsung Galaxy Tab 10.1
Microsoft Surface Pro Tab

Desktops

Win/IE9, Chrome 33
Win8/IE 11
Mac 108/FF26, Safari 6.0
Win XP/IE8 (Admin Portal)

QAI will report defects in JIRA and regress that are fixed.

- (ix) As per para 4.1 above, Shri Hemmanshu Sethh, Assistant Vice-President of M/s. QA Infotech Pvt. Ltd. in his statement admitted/stated that M/s. QA Infotech Pvt Ltd is mainly engaged in the business of software testing which involves technical/consultancy services on development and implementation of software. Shri Hemmanshu Sethh, interalia in his statement stated that they conduct the aforesaid tests either on the already used/launched software or sometimes it is the software which is to be newly launched in the market (ref para 4.2 above). As per para 4.5 Shri Hemmanshu Sethh stated that all the services exported by their company M/s. QA viz. software testing services are classifiable under CPC Division 84. However export of services which are classifiable under CPC Division 84 are not eligible for SEIS benefits.
- (x) Shri Rajesh Sharma, authorised signatory and Director of M/s. QA Infotech Pvt Ltd in his statement that all the three applications were filed in respect of export of "software testing services" produced and exported from their unit situated at Noida SEZ to their overseas clients for the financial years 2015-2016, 2016-2017 and 2017-2018; that total 42 SEIS scrips totally amounting to Rs. 3,03,11,734.21 / - were obtained from DGFT, Delhi under SEIS scheme for exporting software testing services. He further admitted that they mentioned the description of services as "Other business services (Technical Testing and Analysis Service)" while applying before DGFT, whereas on export invoices they mentioned their service Accounting Code (SAC) as "998313-Information technology consulting and support service". Shri Rajesh Sharma,

interalia admitted that as per the Trade Notice No. 04/2018 dated 25.04.2018 M/s. QA, Noida is not eligible for availing SEIS benefits for all software services exported by them which fall under Division 84 of CPC Code list i.e. "Computer and related service" as these services are not notified in Annexure to Appendix 3D for SEIS. Shri Rajesh Sharma accepted and admitted that M/s. QA Infotech Pvt. Ltd., Noida has wrongly mentioned the description of services as "1 De -Other business services (Technical Testing and Analysis Service) 8676" in application filed before DGFT to fraudulently avail duty scrips under SEIS Scheme and wrongly obtained 42 duty scrips amounting to **Rs. 3,03,11,734.21/-** from DGFT under SEIS.

- (xi) Shri Mukesh Sharma, CEO of M/s. QA, Noida admitted that M/s. QA Infotech Pvt. Ltd., Noida has wrongly mentioned the description of services as "Other business services (Technical Testing and Analysis Service) 8676" in application filed before DGFT to avail duty scrips under SEIS Scheme and wrongly obtained 42 duty scrips amounting to Rs. 3,03,11,734.21/- from DGFT under SEIS.
- (xii) Shri Kishan Mohan Sharma, Director of M/s. QA Infotech Pvt Ltd, Noida agreed with the contents of the panchanama dated 30.05.2019, the statement dated 30.05.2019 of Shri Rajesh Sharma and statement dated 27.11.2019 of Shri Mukesh Sharma under which they both accepted that M/s. QA Infotech Pvt. Ltd., Noida has wrongly mentioned the description of services as "Other business services (Technical Testing and Analysis Service) 8676" in application filed before DGFT to avail duty scrips under SEIS Scheme and wrongly obtained 42 duty scrips amounting to Rs. 3,03,11,734.21/- from DGFT under SEIS.

EXPORTS INCENTIVES UNDER DUTY CREDIT SCRIPS – SERVICES EXPORT FROM INDIA SCHEME (SEIS):-

11. In terms of Chapter 3 of the Foreign Trade Policy (FTP) 2015-2020 exporters are issued duty credit Scrips under two schemes for exports of Merchandise and Services namely (i) Merchandise Exports from India Scheme (MEIS)& (ii) Service Exports from India Scheme (**SEIS**) with an objective to provide rewards to exporters to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India's export competitiveness.

12. Service Exports from India Scheme (SEIS) has been introduced by the Government of India w.e.f. 01.04.2015 under the Foreign Trade Policy 2015-20 (FTP 2015-2020) replacing the erstwhile 'Served From India Scheme (SFIS) under the FTP 2009-15. As per FTP 2015-2020, Service Providers of Notified Services, located in India, shall be rewarded under SEIS, subject to conditions as may be notified. Objective of Service Exports from India Scheme (SEIS) is to encourage and maximize export of notified Services from India. Only Services rendered in the manner as per Para 9.51(i) and Para 9.51(ii) of this policy shall be eligible for SEIS benefit. The notified services and rates of rewards are listed in Appendix 3D. SEIS is a reward computed based on the 'net' free foreign exchange realized and the percentage of this reward is specified in Appendix 3D of the FTP 2015-20. Benefit allowed under this scheme is 3% to 7% (as amended from time to time) as per nature of services supplied and the Scrips can be used for the payment of Custom duties on imports, payment of excise on domestic procurement, including capital goods and payment of service tax. The duty Scrips are freely transferable. The SEIS entitlements as per Public Notice No. 03 dated 01/04/2015 (as amended by DGFT) issued by the Directorate General of Foreign Trade (DGFT), Ministry of Commerce on all the list of services are as under:

Annexure to Appendix 3D

Note 1: The services and rates of rewards notified against them shall be applicable for services export made between 1-4-2015 to 30-09-2015 only. The list of services/rate is subject to review with effect from 1-10-2015.

Note 2: The rate of reward for eligible services is subject to conditions as specified in FTP and HBP.

Note 3: For Educational Services, SEIS reward shall not be available on Capitation Fee.

Note 4: Under Maritime Transport Services marked with *[9A (a), (b) and (c)], the reward shall be limited to Operations from India by Indian Flag Carriers only

List of Services

Sl. No.	SECTORS	Central Product Classification (CPC) Code	Admissible rate in % (on Net Foreign Exchange earnings)

			[As amended by DGFT]
1	BUSINESS SERVICES		
A.	<u>Professional services</u>		
a.	Legal services	861	5/7
b.	Accounting, auditing and bookkeeping services	862	5/7
c.	Taxation services	863	5/7
d.	Architectural services	8671	5/7
e.	<u>Engineering services</u>	8672	5/7
f.	Integrated engineering services	8673	5/7
g.	Urban planning and landscape architectural services	8674	5/7
h.	Medical and dental services	9312	5/7
i.	Veterinary services	932	5/7
j.	Services provided by midwives, nurses, physiotherapists and paramedical personnel	93191	5/7
B	<u>Research and development services</u>		
a.	R&D services on natural sciences	851	5/7
b.	R&D services on social sciences and humanities	852	5/7
c.	Interdisciplinary R&D services	853	5/7
C.	<u>Rental/Leasing services without operators</u>		
a.	Relating to ships	83103	5/7
b.	Relating to aircraft	83104	5/7
c.	Relating to other transport equipment	83101 83102 83105	5/7
d.	Relating to other machinery	83106- 83109	5/7
D	<u>Other business services</u>		
a.	Advertising services	871	3/5
b.	Market research and public opinion polling services	864	3/5

c.	Management consulting service	865	3/5
d.	Services related to management consulting	866	3/5
e.	Technical Testing and Analysis Services	8676	3/5
f.	Services incidental to agricultural, hunting and forestry	881	3/5
g.	Services incidental to fishing	882	3/5
h.	Services incidental to mining	883 5115	3/5
i.	Services incidental to manufacturing	884 885	3/5
j.	Services incidental to energy distribution	887	3/5
k.	Placement and supply services of personnel	872	3/5
l.	Investigation and security	873	3/5
m.	Related scientific and technical consulting services	8675	3/5
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	633 8861-8866	3/5
o.	Building ~ cleaning services	874	3/5
p.	Photographic Services	875	3/5
q.	Packaging services	876	3/5
r.	Printing, publishing	88442	3/5
s.	Convention services	87909	3/5
2	COMMUNICATION SERVICES		
	Audiovisual services		
a.	Motion picture and video tape production and distribution service	9611	5/7
b.	Motion picture projection service	9612	5/7
c.	Radio and television services	9613	5/7
d.	Radio and television transmission services	7524	5/7
e.	Sound recording	n.a.	5/7
3	CONSTRUCTION AND RELATED ENGINEERING SERVICES		
A.	General Construction work for building	512	5/7
B.	General Construction work for Civil Engineering	513	5/7
C.	Installation and assembly work	514	5/7

		516	
D.	<i>Building completion and finishing work</i>	516	5/7
4.	EDUCATIONAL SERVICES (Please refer Note-3)		
A.	<i>Primary education service</i>	921	5/7
B.	<i>Secondary education services</i>	922	5/7
C.	<i>Higher education services</i>	923	5/7
D.	<i>Adult education</i>	924	5/7
5	ENVIRONMENTAL SERVICES		
A.	<i>Sewage services</i>	9401	5/7
B.	<i>Refuse disposal services</i>	9402	5/7
C.	<i>Sanitation and similar services</i>	9403	5/7
6	HEALTH-RELATED AND SOCIAL SERVICES		
A.	<i>Hospital services</i>	9311	5/7
7	TOURISM AND TRAVEL-RELATED SERVICES		
A.	<i>Hotels and Restaurants (including catering)</i>		
a.	<i>Hotel</i>	641-643	3/5
b.	<i>Restaurants (including catering)</i>	641-643	3/5
B.	<i>Travel agencies and tour operators services</i>	7471	5/7
C.	<i>Tourist guides services</i>	7472	5/7
8.	RECREATIONAL CULTURAL AND SPORTING SERVICES (other than audiovisual services)		
A.	<i>Entertainment services (including theatre, live bands and circus services)</i>	9619	5/7
B.	<i>News agency services</i>	962	5/7
C.	<i>Libraries archives, museums and other cultural services</i>	963	5/7
D.	<i>Sporting and other recreational services</i>	964	5/7
9	TRANSPORT SERVICE (Please refer Note 4)		
A.	<i>Maritime Transport Services</i>		

a.	<i>Passenger transportation*</i>	7211	5/7
b.	<i>Freight transportation*</i>	7212	5/7
c.	<i>Rental of vessels with crew*</i>	7213	5/7
d.	<i>Maintenance and repair of vessels</i>	8868	5/7
e.	<i>Pushing and towing services</i>	7214	5/7
f.	<i>Supporting services for maritime transport</i>	745	5/7
B.	<u>Air Transport services</u>		
a.	<i>Rental of aircraft with crew</i>	734	5/7
b.	<i>Maintenance and repair of aircraft</i>	8868	5/7
c.	<i>Airport Operations and ground handling</i>		5/7
C	<u>Road Transport Services</u>		
a.	<i>Passenger transportation</i>	7121	5/7
		7122	
b.	<i>Freight transportation</i>	7123	5/7
c.	<i>Rental of Commercial vehicles with operator</i>	7124	5/7
d.	<i>Maintenance and repair of road transport equipment</i>	6112 8867	5/7
e.	<i>Supporting services for road transport services</i>	744	
D	<u>Services Auxiliary To All Modes of Transport</u>		
a.	<i>Cargo handling services</i>	741	5/7
b.	<i>Storage and warehousing services</i>	742	5/7
c.	<i>Freight transport agency services</i>	748	5/7

(emphasis added)

13. Further, DGFT vide Trade Notice No. 04/2018 dated 25.04.2018 has noted that “*the Appendix 3D does not mention any service as IT/ITeS Service and only has a positive list of the Services, with a CPC Provisional code which has been made eligible for claiming benefit under SEIS*” and also clarified that “*only the service categories which have been notified in Appendix 3D are allowed for claim under SEIS.*” From the above trade notice, it is clear that the underlying services provided by a company should be listed in Appendix 3D for them to be eligible for SEIS.

14. From the above list of services and their corresponding CPC codes which are eligible for SEIS benefits as defined in Appendix 3D of FTP 2015-2020, it appears that the services provided/exported by M/s. QA, Noida which are classifiable under

CPC 841 to 849 are not covered under Appendix 3D and hence not eligible for SEIS benefits.

15. As seen from various statutory and other documents as described in para 11 (point (i) to (viii)) it appears that, M/s. QA had correctly classified the services exported by them. However, it appears that while applying for SEIS benefits in the Form ANF-3B before the DGFT New Delhi, M/s. QA had wilfully mis-stated and mis-classified their services under "Other Business Services (Technical Testing and Analysis Services 8676) (SI. No. 1 De as per Appendix 3D), and had managed to fraudulently obtain the SEIS Scrips.

MODUS OPERANDI ADOPTED BY M/S. QA INFOTECH PVT LTD, NOIDA FOR WRONGLY OBTAINING SEIS SCRIPS:-

16. M/s. QA Infotech Pvt Ltd, Noida is engaged in the business of software testing which involves technical/consultancy services on development and implementation of software services to various clients. It appears that M/s. QA, Noida was exporting/providing 'Software/Information Technology Services related to Computer Programming and Consulting'. Further, it appears that M/s. QA, Noida, had wrongly classified their exported services as "Technical Testing and Analysis Services" and wrongly obtained SEIS scrips, which were otherwise not available to them. In terms of Para 3.02 of the Foreign Trade Policy, 2015-2020 read with sub-clause 2(5) of Notification No 25/2015-Cus., dated 8-4-2015 the SEIS Duty Credit Scrips and goods imported/domestically procured against the SEIS Duty Credit Scrips shall be freely transferable. Accordingly, M/s. QA, Noida had sold/transferred the SEIS Scrips issued to them to various other importers, who had utilised these SEIS Scrips against the duty free imports made by them.

WILFUL MISSTATEMENT AND SUPPRESSION OF FACTS:-

17. M/s. QA, Noida, has declared the exported services as IT software Consulting and support services in **Export Invoices**. The services to be provided by M/s. QA, Noida to their foreign clients mentioned in the sample **Service Agreements** are software testing & Services and the description mentioned in the invoices is "LAZR Project QA-Functional Testing". The services exported/provided by M/s. QA, Noida to their foreign clients was submitted by M/s. QA, Noida before DGFT alongwith SEIS applications and services were mentioned as Other business services (Technical Testing & Analysis Services (8676)". In **FIR** issued by the Bank for the remittance received by M/s. QA, Noida for the exported services, the purpose of remittance was mentioned as "Software Services". In **Form MGT-9 (Extract of Annual Return)** filed

by M/s. QA, Noida with Ministry of Corporate Affairs, name & description of main products and services were mentioned as (1) Computer Software development/testing services (NIC Code-99831413). Thus, it appears that M/s. QA, Noida had correctly classified the services exported/provided by them to their overseas clients in aforesaid documents and the said exported services are classifiable under Division 84 of UN CPC. But despite knowing the fact that they were provided IT Software Services M/s. QA, Noida had wilfully mis-stated and mis-classified their services under Other Business Services (Technical Testing and Analysis services) (8676)* to fraudulently avail SEIS scrips instead of correct services viz. IT Software Services classifiable under Division 84 of UN CPC which are not eligible for availing SEIS benefits. Thus, M/s. QA, Noida had fraudulently obtained SEIS Scrips by way of adopting above stated modus operandi and suppressed the facts while applying for obtaining the SEIS Scrips in order to avail wrongful benefits under SEIS scheme. This shows their malafide intention to misclassifying the services provided by them to avail the SEIS benefit which is not rightfully due to them and which resulted in violation of the provisions of the Customs Act, 1962 in the payment of customs duties w.r.t. import of goods by utilizing the SEIS scrips obtained through fraudulent means.

VOLUNTARY PAYMENT/REFUND OF SEIS INCENTIVES ALONGWITH INTEREST
BY M/s. QA, NOIDA:-

18. Shri Rajesh Sharma, Director & Shri Mukesh Sharma, CEO of the company M/s. QA Noida, in their statements recorded under Section 108 of Customs Act, 1962 on 30.05.2019 & 27.11.2019 respectively, had inter-alia admitted that the Services rendered by them do not fall under the Services eligible for SEIS and had agreed to pay the ineligible amount. M/s. QA, Noida accordingly voluntarily submitted DD No. 113425 dated 07.06.2019 of City Bank for amount of **Rs. 3,03,11,734/-** against payment of SEIS duty and DD No. 006126 dated 22.11.2019 of HDFC Bank Noida for amount of **Rs 24,74,365/-**, towards interest. The details of challans under which the amount of M/s. QA, Noida was credited to Government account are given in enclosed as **Annexure-B**.

19. CANCELLATION OF SEIS SCRIPS BY DGFT, NEW DELHI

19.1 During the course of investigation, this office vide letter F. No. DRI/AZU/GI-02/ENQ-62(INT-17)/2019 dated 12/06/2019 had requested the Additional Director General of Foreign Trade, "A" Wing Indraprastha Bhavan, IP Estate, New Delhi to cancel the SEIS Scrips issued to M/s. QA, Noida (IEC-

0503070688), as detailed in **Annexure 'A'**, to the extent of misuse of such SEIS Scrips by mis-classification of their export services in contravention of the relevant provisions of Foreign Trade Policy.

19.2 In response to above referred letter the Deputy Director General of Foreign Trade, "A" Wing Indraprastha Bhavan, IP Estate, New Delhi forwarded a Order in Original dated 21.10.2019 issued vide F. No. 05/21/098/80764/AM18/EPS-II/CLA, 05/21/094/80763/AM18/EPS-II/CLA, & 05/21/098/80214/AM18/EPS-II/CLA. As per which action under Section 11(3) of the Foreign Trade (Development & Regulation) Act, 1992 and Rule 10 of the Foreign Trade (Regulation) Rules, 1993 taken against M/s. QA, Noida for the (Licenses as mentioned in **Annexure 'A'**). The observation and findings of the OIO is reproduced below

OBSERVATIONS AND FINDINGS:

I have pursued the information and papers available on records and it is observed that you have availed the SEIS authorisation by mis-stating/mis-classifying the services. Action as per para 2.15(b) of FTP is warranted against you. Therefore, you have contravened the provisions of claiming SEIS benefits which calls for action under section 11(3) of Foreign Trade (Development & Regulations) Act, 1992 & Rule 10 of the Foreign Trade (Regulations) Rules, 1993.

ORDER

Penalty of Rs. 1,50,000/- is hereby imposed on M/s. QA Infotech Pvt. Ltd., Plot No. 190, NSEZ, Noida -201305 and its directors under section 11(3) of Foreign Trade (Development & Regulations) Act, 1992, as amended from time to time for contravening the condition of the Foreign Trade Policy. The name of the Noticee firm and its directors are placed on the denied entity list (DEL) and no license/authorisation or any other benefit would be made available to them from any office of the Directorate General of Foreign Trade.

VIOLATION OF STATUTORY PROVISIONS: -

20. Violation of various Statutory Provisions by M/s. QA Infotech Pvt Ltd, Noida :

20.1 From the independent documentary evidences as well as confirmatory statements on record it appears that M/s. QA Infotech Pvt Ltd, Noida have wilfully and fraudulently mis-stated and mis-classified the services exported, before the DGFT, New Delhi with an intent to avail undue benefit of SEIS. On the basis of such

wilful mis-statements and mis-classifications based on suppression of facts, SEIS Scrips were issued to them by DGFT. Such SEIS scrips fraudulently obtained by them are invalid ab-initio and have now been cancelled by DGFT. It appears that M/s. QA Infotech Pvt Ltd, Noida by resorting to such acts, have contravened provisions of Foreign Trade (Development and Regulation) Act, 1992, Foreign Trade (Regulation) Rules 1993, Foreign Trade Policy, 2015-20 etc., and of Customs notification, as detailed below:

- (a) **Section 11 of the Foreign Trade (Development and Regulation) Act, 1992**, read with **Rule-14 of Foreign Trade (Regulation) Rules, 1993**, in as much as they have made, signed and used the declarations, statements or documents for the purposes of obtaining SEIS Scrips knowing or having reason to believe that such declarations, statements or documents were not representing the true, correct, and actual classification of services, and they thereby have employed fraudulent practice for the purposes of obtaining the SEIS Scrips;
- (b) **Provisions of Exim policy related to SEIS scheme** in as much as they have availed benefit of SEIS scheme of Foreign Trade Policy 2015-2020 though they were not eligible for the services rendered by them, if classified correctly.

20.2 Violation of Notification No. 25/2015-Customs dated 8thApril, 2015 issued under Customs Act, 1962, by M/s. QA, Noida:

As per the Notification:

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods when imported into India against a Service Exports from India Scheme duty credit scrip issued by the Regional Authority under paragraph 3.10 read with paragraph 3.08 of the Foreign Trade Policy (hereinafter referred to as the said scrip) from,-

(a) the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as said Customs Tariff Act); and

(b) the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act.

2. The exemption shall be subject to following conditions, namely:-

(1) *that the duty credit in the said scrip is issued to a service provider located in India **against export of notified services listed in Appendix 3D of Appendices and AayatNiryat Forms of Foreign Trade Policy 2015-2020***

*

*

In the instant case it appears that M/s. QA, Noida exported Information technology consulting and support services related to software testing which involves technical/consultancy services on development and implementation of software, which are not notified in Appendix 3D of Appendices of Foreign Trade Policy, 2015-20 therefore M/s. QA, Noida has violated the condition 2 (1) of the Notification No. 25/2015-Customs dated 08th April, 2015 issued under section 25 of the Customs Act, 1962.

21. RECOVERY OF DUTY FROM M/s. QA, NOIDA:

Section 28AAA of the Customs Act, 1962 –

Section 28AAA was inserted in the Customs Act, 1962 in 2012 to provide for recovery of duties from the person to whom an instrument such as credit Scrips was issued, i.e. exporter, where such Scrips was obtained by means of collusion, or wilful misstatement or suppression of facts. It appears that M/s. QA, Noida had provided/exported Information technology consulting and support services related to software testing which involves technical/consultancy services on development and implementation of software and appears to have fraudulently obtained the SEIS Scrips and subsequently transferred/sold the Scrips to various importers. As per section 28AAA:

Recovery of duties in certain cases

(1) Where an instrument issued to a person has been obtained by him by means of-

*(a) collusion; or
(b) wilful misstatement; or*

(c) suppression of facts,

for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), by such person or his agent or employee and such instrument is utilised under the provisions of this Act or the rules made or notifications issued thereunder, by a person other than the person to whom the instrument was issued, the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued :

As per para 3.02 of the Foreign Trade Policy 2015-2020 SEIS Duty Credit Scrips holder was eligible to transfer/sell the entitlement freely. The Duty Credit Scrips can be used for (i) Payment of Customs Duties for import of inputs or goods, except items listed in Appendix 3A; (ii) Payment of excise duties on domestic procurement of inputs or goods, including capital goods as per DoR notification; (iii) Payment of service tax on procurement of services as per DoR notification; and (iv) Payment of Customs Duty and fee as per paragraph 3.18 of this Policy. In the instant case it appears that M/s. QA, Noida had wrongly obtained SEIS Scrips by mis-stating their exported Services as "Other business services (Technical Testing and Analysis Services)". M/s. QA, Noida had transferred/sold all the SEIS Scrips to various importers. The said importers had imported the goods by utilizing the said SEIS duty credit Scrips for payment of duties.

In view of the facts discussed in the foregoing paras and material evidences available on record, it appears that M/s. QA, Noida had obtained SEIS Scrips by means of suppression of facts regarding the nature of services exported by them and wilful mis-statement regarding the classification of services exported by them and M/s. QA, Noida subsequently sold/transferred the same to various importers. The said various importers had utilised the said ineligible SEIS amount for payment of Customs duties against the imports made by them. Therefore, the import duties equivalent to the duty credit Scrips utilised by the other importers for their imports, as detailed in **Column 15 of Annexure 'C'**, is required to be recovered from M/s. QA, Noida under Section 28AAA of the Customs Act, 1962 along with interest under Section 28 AA of the Customs Act, 1962.

Confiscation and Penalty:

21.1 The goods imported, against the SEIS Scrips which were fraudulently obtained and which have now been cancelled by DGFT, and which were not eligible

to the benefit of exemption under Notification No. 25/2015-Customs dated 08th April, 2015 issued under Section 25 of the Customs Act, 1962 are also liable for confiscation under Section 111(m) and 111(o) of Customs Act, 1962. M/s QA, Noida who in relation to the imported goods, did or omitted to do acts/omissions which rendered such goods liable to confiscation under section 111 are liable to penalty under Section 112(a) of the Customs Act, 1962.

The relevant legal provisions under Customs Act, 1962 are as follows:

As per **Section 111 of Customs Act, 1962:**

Confiscation of improperly imported goods, etc.

The following goods brought from a place outside India shall be liable to confiscation:

*

*

*

(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 transhipment, with the declaration for transhipment 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;*

21.2 M/s QA, Noida as a person, had mis-declared/mis-stated their exported Services in ANF-3B Form and fraudulently obtained SEIS Scrips. They had subsequently transferred/sold the Scrips to various importers. These Scrips were used by various importers for purpose of availing benefit of Customs Duty exemption available under Notification No. 25/2015-Customs dated 08th April, 2015 issued

under Section 25 of the Customs Act, 1962. Therefore M/s. QA, Noidahad knowingly or intentionally made, signed and used, or caused to be made, signed or used, Customs declarations/statements/documents and other declarations/statements/documents which were false or incorrect in material particular and were used in the transaction of business for the purposes of Customs Act, 1962. Therefore M/s. QA, Noida are liable for penalty under Section 114AA of the Customs Act, 1962.

SECTION 114AA

Penalty for use of false and incorrect material. — If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

21.3 Further, it appears that M/s. QA, Noida had obtained SEIS Scrips fraudulently by way of wilful mis-statement and suppression of facts and such SEIS Scrips have been utilised by other persons for discharging their duty liability and therefore M/s. QA, Noida have also rendered themselves liable for penalty under **Section 114AB** of the Customs Act, 1962.

SECTION 114AB

Penalty for obtaining instrument by fraud, etc. — Where any person has obtained any instrument by fraud, collusion, wilful misstatement or suppression of facts and such instrument has been utilised by such person or any other person for discharging duty, the person to whom the instrument was issued shall be liable for penalty not exceeding the face value of such instrument.

Explanation. — For the purposes of this section, the expression "instrument" shall have the same meaning as assigned to it in the Explanation I to section 28AAA

22. Violation of statutory provisions by Shri Mukesh Sharma CEO of M/s.QA, Noida:

22.1 It further appears that mis-declaration of classification of services in the SEIS application viz., Form ANF-3B presented by M/s. QA, Noida before DGFT, New Delhi, had been signed by Shri Mukesh Sharma of M/s. QA, Noida& other director

under his directions to suppress the facts and wilfully mis-state the true, correct, and actual classification of services to enable M/s QA, Noida to fraudulently obtain SEIS Scrips from DGFT. It therefore appears that Shri Mukesh Sharma of M/s. QA, Noida was primarily responsible for wrongful availment of export benefits under SEIS by M/s QA, Noida; thereby enabling and abetting M/s QA, Noida in availing undue benefit of SEIS Scheme and conversely facilitating various importers to utilise the wrongly obtained SEIS duty credit Scrips for their imports.

22.2 Therefore, it appears that by his deliberate acts of commission and omission he has rendered the goods which were imported (by utilising the ineligible Scrips) liable for confiscation. Thereby Shri Mukesh Sharma of M/s. QA, Noida is liable for penalty under section 112(a) of the Customs Act, 1962.

22.3. Further, Shri Mukesh Sharma had knowingly or intentionally made, signed and used, or caused to be made, signed or used, Customs declarations/statements/documents and other declarations/statements/documents which were false or incorrect in material particular and were used in the transaction of business for the purposes of Customs Act. Therefore, he is also liable for penalty under Section 114AA of the Customs Act, 1962.

23. Provisions for the confiscation of goods imported by various importers using ineligible SEIS Scrips fraudulently obtained by M/s. QA, Noida:-

23.1 From the discussion in foregoing paras, it appears that following Importers as mentioned in column (2) of below Table-X,

Table-X

SL No	Name & Address of the Importer (M/s.)	IEC Code of the Importer	Total Assessable Value (Item wise) of the Imported Goods (In Rs.)	Port of Import
(1)	(2)	(3)	(4)	(5)
1.	Noble Natural Resources India Private Limited, Add: Survey No. 302/2, 303, opp. Rama	311046975	11,38,19,850	Kandla Sea Port-INIXY1

	Cylinder, Vil. Bhimasar, Taluka-Anjar, Kutch, Gujarat, 370240.			
2	M/s Kundan Care Products Limited , Plot No. 70 & 81, Sector-6A, Integrated, Industrial Estate, SIDCUL, Haridwar, Uttarakhand-249403	0504074008	4,59,85,242	Delhi Air Cargo-INDEL4
3	M/s. Sovereign Metals Limited , Moje Muthia Ali Paiki, , P NO.35P TO , 37P,38,40/B, Revenue BL.184,185,187, GIDC Phase III NARODA Ahmedabad, GUJARAT, 382330	0813012864	7,29,01,439 7,47,13,158	Delhi Air Cargo-INDEL4 Ahmedabad Air Cargo- INAMD4
4.	M/s Kreedai Exim, Sahu Chowk, Near Lal Godown, Latur, Maharashtra- 413512	3111014461	27,37,745	Nhava Sheva (INNSA1)
5	M/s Adani Wilmar Limited , Survey No. 169, Oleo Chem Division-II, Plot No. 212 Village- Dhrub, Mundra, Gujarat-370421	0899000363	20,35,98,625	Mundra Sea Port-INMUNI
6	M/s Adani Wilmar Limited , Fortune House, Near Navrangpura Railway Crossing Navrangpura, Ahmedabad, Gujarat-380009	0899000363	6,94,37,454	Mundra Sea Port- INMUNI

[i.e. person/s other than the person to whom the instrument (SEIS Scrips) were issued] had imported goods as detailed in **Annexure 'C'** to this notice, by claiming exemption against the SEIS Scrips which were fraudulently obtained by M/s. QA, Noida (and against which action have been initiated by DGFT, New Delhi against M/s. QA, Ahmedabad for cancellation of the such licences / scrips by way of issuing a Show Cause Notice). Hence such imports can be termed as imports made without observing the conditions prescribed under Notification No. 25/2015 - Customs dated 08/04/2015, as amended; hence such imported goods valued at Rs.58,31,93,513/- (Rupees Fifty Eight Crore Thirty One Lakh Ninety Three Thousand Five Hundred Thirteen Only) are liable for confiscation under Sections 111(m) and 111(o) of the Customs Act, 1962.

24. IMPORTATION OF GOODS/QUANTIFICATION OF LIABILITIES:

24.1 From the above paras, it appears that M/s. QA, Noida have obtained 42 SEIS Scrips from DGFT, New Delhi, fraudulently, by wilful mis-statement and suppression of various facts, and the total duty involved in these 42 Scrips/Licences is **Rs. 3,03,11,734/- (Rupees Three Crore Three Lakh Eleven Thousand Seven Hundred and Thirty-Four Only).**

24.2. It also appeared that M/s. QA, Noida have transferred/sold the SEIS Scrips to importer as mentioned in the column 2 of the above Table -X. The said importer (person/s other than the person to whom the instrument (SEIS Scrips) were issued) have imported their goods by utilizing the said transferred SEIS duty credit Scrips which were fraudulently obtained from DGFT, New Delhi and later cancelled. The duty involved in these 42 SEIS Scrips which were transferred /sold to importers is rs. 3,03,10,032/- is required to be recovered from M/s. QA, Noida under Section 28AAA of the Customs Act, 1962 along with interest under Section 28 AA of the Customs Act,1962 as discussed in Para 22.

24.3 Accordingly, three SCNs were issued to the Noticees for different ports. The Charges levelled against Noticees in Show Cause Notices are as below:

24.3.1 Show Cause Notice No. Gen/Adj/Comm/494/2021-Adjn-O/o Pr Commr-Cus-Mundra dated 01.02.2022:

a) **M/s. QA Infotech Private Limited**, A-8, Sector- 68, Noida, Uttar Pradesh (IEC – 0503070688), are hereby called upon to show cause, in writing, to the Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat-370421, in respect of Bills of Entry covered in **Annexure 'C'**, within thirty days of receipt of this Notice, as to why:

(i) The duty payable amount aggregating to **Rs. 1,42,29,244/- (Rupees One Crore Forty Two Lacs Twenty Nine Thousand Two Hundred and Forty Four Only)**, as mentioned in Column - 4 of Table 'Y' mentioned in para 24.2 above relatable to utilisation of cancelled instruments (SEIS Scrips), utilised by person/s other than the person to whom the instruments (SEIS Scrips) were issued, as detailed in para 24.2.2 of the SCN, should not be demanded and recovered from them under Section 28AAA of the Customs Act, 1962 along with interest in terms of Section 28AA of the Customs Act, 1962.

- (ii) The goods totally valued at **Rs. 27,30,36,079/-** (Rupees Twenty Seven Crores Thirty Lakh Thirty Six Thousand and Seventy Nine Only), as mentioned in Column - 3 of **Table 'X'** in para 24.2 above, imported against Bills of Entry covered in **Annexure 'C'** to this Show Cause Notice, imported by wrongly availing duty exemption under Notification No. 25/2015-Customs dated 08/04/2015 as amended, should not be held liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962.
- (iii) Penalty should not be imposed upon them under the provisions of Section 112(a), 114AA and 114AB of the Customs Act, 1962.
- (iv) The amount already paid by them amounting to **Rs. 3,03,11,734/-** (**Rupees Three Crore Three Lakh Eleven Thousand Seven Hundred and Thirty-Four Only**) should not be adjusted and appropriated against the amount due to be recovered from them;

b) Shri Mukesh Shrama, Chief Executive Officer of M/s. QA Infotech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh (IEC – 0503070688), was called upon to show cause, in writing, to the Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat-370421 with respect to contraventions pertaining to Bills of Entry/SEIS Scrips referred in **Annexure 'C'**, within thirty days of receipt of this Notice, as to why penalty should not be imposed upon him under Section 112(a) and Section 114AA of the Customs Act, 1962 for his role as reflected at para 24 above.

c) Importer namely M/s Adani Wilmar Limited, Mundra/Ahmedabad (as detailed in Column 2 of the below mentioned TABLE 'Y') was called upon to show cause, in writing, to the Pr. Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat - 370421 with respect to contraventions pertaining to Bills of Entry/SEIS Scrips as detailed in Annexure 'C' to Show Cause Notice, within thirty days of receipt of this Notice,

TABLE – 'Y'

Sl. No.	Name & Address of the Importer	IEC Code of the Importer	Total Assessable Value (Item wise) of the Imported Goods (In Rs.)	Port of Import
(1)	(2)	(3)	(4)	(5)

1	M/s Adani Wilmar Limited Survey No. 169, Oleo Chem Division II, Plot no. 212 Village Dhrub, Mundra Gujarat -370421.	0899000363	20,35,98,625	Mundra Sea Port- INMUNI
2	M/s Adani Wilmar Limited Fortune House, Near Navrangpura Railway Crossing Navrangpura, Ahmedabad Gujarat- 380009	0899000363	6,94,37,454/-	Mundra Sea Port- INMUNI

as to why:

(i) The imported goods totally valued at Rs. 27,30,36,079/- (Rupees Twenty Seven Crore Thirty Lacs Thirty Six Thousand and Seventy Nine only) covered in Bills of Entry mentioned in Column 3 of Annexure 'C' to this Show Cause Notice for which duty exemption under the Notification 25/2015-Customs dated 08.04.2015 was availed by utilising SEIS Scrips which were obtained by wilful mis-statement and suppression of facts by M/s. QA, Noida, should not be held liable for confiscation under Section 111 (m) & 111(o) of the Customs Act, 1962.

24.3.2 Show Cause Notice No. Gen/Adj/Comm/494/2021-Adjn-O/o Pr Commr-Cus-Mundra dated 08.05.2023:

a) **M/s. QA Infotech Private Limited**, A-8, Sector- 68, Noida, Uttar Pradesh (IEC - 0503070688), are hereby called upon to show cause, in writing, to the Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat-370421, in respect of Bills of Entry covered in **Annexure 'C'**, within thirty days of receipt of this Notice, as to why:

(i) The duty payable amount aggregating to **Rs. 1,59,30,212/- (Rupees One Crore Fifty Nine Lacs Thirty Thousand Two Hundred and Twelve Only)**, as mentioned in Column - 4 of Table 'Y' mentioned in para 24.2 above relatable to utilisation of cancelled instruments (SEIS Scrips), utilised by person/s other than the person to whom the instruments (SEIS Scrips) were issued, as detailed in para 24.2 of the SCN, should not be demanded and recovered from them under Section 28AAA of the Customs Act, 1962 along with interest in terms of Section 28AA of the Customs Act, 1962.

- (ii) The goods totally valued at **Rs. 30,74,19,688/- (Rupees Thirty Crores Seventy Four Lakh Nineteen Thousand Six Hundred Eighty Eight Only)**, as mentioned in Column - 3 of Table 'Y' in para 24.2 above, imported against Bills of Entry covered in **Annexure 'C'** to this Show Cause Notice, imported by wrongly availing duty exemption under Notification No. 25/2015-Customs dated 08/04/2015 as amended, should not be held liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962.
- (iii) Penalty should not be imposed upon them under the provisions of Section 112(a), 114AA and 114AB of the Customs Act, 1962.
- (iv) The amount already paid by them amounting to **Rs. 3,03,11,734/- (Rupees Three Crore Three Lakh Eleven Thousand Seven Hundred and Thirty-Four Only)** should not be adjusted and appropriated against the amount due to be recovered from them;

b) Shri Mukesh Shrama, Chief Executive Officer of M/s. QA Infotech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh (IEC – 0503070688), were called upon to show cause, in writing, to the Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat-370421 with respect to contraventions pertaining to Bills of Entry/SEIS Scrips referred in **Annexure 'C'**, within thirty days of receipt of this Notice, as to why penalty should not be imposed upon him under Section 112(a) and Section 114AA of the Customs Act, 1962 .

c) Importers namely M/s Noble Natural Resources India Private Limited, Survey No. 302/2, 303, opp. Rama Cylinder, Vil. Bhimasar, Taluka-Anjar, Kutch, Gujarat, 370240 were called upon to show cause, in writing, to the Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat-370421 with respect to contraventions pertaining to Bills of Entry/SEIS Scrips as detailed in Annexure 'C' to this Show Cause Notice, within thirty days of receipt of this Notice, **as to why:**

- (i) The imported goods totally valued at **Rs. 11,38,19,850/- (Rupees Eleven Crores Thirty Eight Lakh Nineteen Thousand Eight Hundred Fifty Only)** covered in Bills of Entry mentioned in **Column 3 of Annexure 'C'** to the Show Cause Notice for which duty exemption under the Notification 25/2015-Customs dated 08.04.2015 was availed by utilising SEIS Scrips which were obtained by wilful misstatement and suppression of facts by M/s. QA, Noida, should not be

held liable for confiscation under **Section 111 (m) & 111(o)** of the Customs Act, 1962.

d) Importer namely **M/s Kundan Care Products Limited**, Plot No. 70 & 81, Sector-6A, Integrated, Industrial Estate, SIDCUL, Haridwar, Uttarakhand-249403 are hereby called upon to show cause, in writing, to the Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat-370421 with respect to contraventions pertaining to Bills of Entry/SEIS Scrips as detailed in **Annexure 'C'** to this Show Cause Notice, within thirty days of receipt of this Notice, **as to why:**

(i) The imported goods totally valued at **Rs. 4,59,85,242/- (Rupees Four Crores Fifty-Nine Lacs Eighty-Five Thousand Two Hundred and Forty-Two only)** covered in Bills of Entry mentioned in **Column 3 of Annexure 'C'** to this Show Cause Notice for which duty exemption under the Notification 25/2015-Customs dated 08.04.2015 was availed by utilising SEIS Scrips which were obtained by wilful mis-statement and suppression of facts by M/s. QA, Noida, should not be held liable for confiscation under **Section 111 (m) & 111(o)** of the Customs Act, 1962.

e) Importer namely **M/s. Sovereign Metals Limited**, Moje Muthia Ali Paiki, P NO.35P TO , 37P,38,40/B, Revenue BL.184,185,187, GIDC Phase III NARODA Ahmedabad, GUJARAT, 382330 are hereby called upon to show cause, in writing, to the Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat-370421 with respect to contraventions pertaining to Bills of Entry/SEIS Scrips as detailed in Annexure 'C' to this Show Cause Notice, within thirty days of receipt of this Notice, **as to why:**

i) The imported goods totally valued at **Rs.14,76,14,597/- (Rupees Fourteen Crores Seventy Six Lakhs Fourteen Thousand Five Hundred Ninety Seven Only)**, covered in Bills of Entry mentioned in **Column 3 of Annexure 'C'** to this Show Cause Notice for which duty exemption under the Notification 25/2015-Customs dated 08.04.2015 was availed by utilising SEIS Scrips which were obtained by wilful mis-statement and suppression of facts by M/s. QA, Noida, should not be

held liable for confiscation under **Section 111 (m) & 111(o)** of the Customs Act, 1962.

24.3.3 Show Cause Notice No. 553/2021-22 Gr.II (A-B) CAC/JNCH dated 15.12.2021

a) **M/s. QA Infotech Private Limited**, A-8, Sector- 68, Noida, Uttar Pradesh (IEC – 0503070688), were called upon to show cause, in writing, to the Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat-370421, in respect of Bills of Entry covered in **Annexure 'C'**, within thirty days of receipt of this Notice, as to why:

- i) The duty payable amount aggregating to **Rs. 1,50,576/- (Rupees One Lakh Fifty Thousand Five Hundred Seventy Six Only Only)**, as mentioned in Column - 4 of Table 'X' mentioned in para 24.2 above relatable to utilisation of cancelled instruments (SEIS Scrips), utilised by person/s other than the person to whom the instruments (SEIS Scrips) were issued, as detailed in para 24.2 of the SCN, should not be demanded and recovered from them under Section 28AAA of the Customs Act, 1962 along with interest in terms of Section 28AA of the Customs Act, 1962.
- ii) The goods totally valued at **Rs. 27,37,745/- (Rupees Twenty Seven Lakh Thirty Seven Thousand Seven Hundred and Forty Five Only)**, as mentioned in Column - 3 of **Table 'X'** in para 24.2 above, imported against Bills of Entry covered in **Annexure 'C'** to this Show Cause Notice, imported by wrongly availing duty exemption under Notification No. 25/2015-Customs dated 08/04/2015 as amended, should not be held liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962.
- iii) Penalty should not be imposed upon them under the provisions of Section 112(a), 114AA and 114AB of the Customs Act, 1962.
- iv) The amount already paid by them amounting to **Rs. 3,03,11,734/- (Rupees Three Crore Three Lakh Eleven Thousand Seven Hundred and Thirty-Four Only)** should not be adjusted and appropriated against the amount due to be recovered from them;

b) **Shri Mukesh Shrama**, Chief Executive Officer of M/s. QA Infotech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh (IEC – 0503070688), were called upon to show cause, in writing, to the Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat-370421 with respect to contraventions pertaining to Bills of Entry/SEIS Scrips referred in **Annexure 'C'**, within thirty days of receipt

of this Notice, as to why penalty should not be imposed upon him under Section 112(a) and Section 114AA of the Customs Act, 1962 .

c) Importer namely as detailed in the column 2 of the table below was called upon to show cause, in writing, to the Pr. Commissioner of Customs, 5B, Port User Building, Mundra Port, Mundra, Gujarat - 370421 with respect to contraventions pertaining to Bills of Entry/SEIS Scrips as detailed in Annexure 'C' to Show Cause Notice, within thirty days of receipt of this Notice,

TABLE

Sl. No.	Name & Address of the Importer	IEC Code of the Importer	Total Assessable Value (Item wise) of the Imported Goods (In Rs.)	Port of Import
(1)	(2)	(3)	(4)	(5)
1	M/s Kreedai Exim, Sahu Chowk Near Lal Godown, Latur, Maharashtra-413512	3111014461	27,37,745/-	Nhava Sheva

as to why:

(i) The imported goods totally valued at Rs. 27,37,745/- (Rupees Twenty Seven Lakh Thirty Seven Thousand Seven Hundred and Forty Five Only) covered in Bills of Entry mentioned in Column 3 of Annexure 'C' to the Show Cause Notice for which duty exemption under the Notification 25/2015-Customs dated 08.04.2015 was availed by utilising SEIS Scrips which were obtained by wilful mis-statement and suppression of facts by M/s. QA, Noida, should not be held liable for confiscation under Section 111 (m) & 111(o) of the Customs Act, 1962.

25. DEFENCE SUBMISSION:

25.1 M/s. QA Infotech Private Limited, (IEC - 0503070688) vide letter dated 20.12.2024 submitted their written submission which is reproduced as below:

a) The allegations made in the notice against the Noticee for mis-declaration of the description of the subject services provided by them so as to avail inadmissible SEIS scheme benefit, is wrong, improper and legally unsustainable. ***The services provided by the Noticee were in the nature of 'Technical Testing and Analysis' Services. The notice has not adduced any cogent and impeccable***

documentary evidence to show that the said service are not technical testing services and demand has been raised on the basis of assumption only.

- i) They submit that the notice has alleged that the services rendered by the Noticee to their overseas clients were not the "Technical testing and analysis" Services as declared by them while submitting the applications before the DGFT to avail SEIS scheme benefit in term of the DGFT's Public Notice No. 03/2015-20 dated 01.04.2015. The Notice has alleged that as the subject export services provided by the Noticee to their overseas clients were not eligible for SEIS benefits as it were not covered under the CPC Division 86.
- ii) The Noticee contends that the allegation made by the notice that the services provided by them were not in the nature of 'Technical Testing and Analysis' service covered under the CPC 8676, is not correct, proper and contrary to the facts available on record.
- iii) The Noticee contends that Shri Hemmanshu Seth vide his statement date 30.05.2019 (RUD-02) recorded before the officers of DRI, has clearly stated that the Noticee was engaged in providing **software testing which involves technical consultancy service on development and implementation of software** (emphasis supplied). The Noticee contends Shri Hemmanshu in his statement stated in unequivocal term that they were providing software testing which involved technical testing/consultancy service. He further explained that technical testing service of software includes inter-alia:

"Automation: Execution of basic work flows in an automated manner. For example; a website requires user to create a new account, so we need to test this work every time a new version of software is available for testing. to optimise overall process, we can automate this flow to save time and spend efforts on other priority efforts."
- iv) Shree Hemmanshu further explained the step-wise process undertaken by them for rendering technical testing services which are mentioned supra under statement of facts and the same are not being indicated here to avoid repetition.
- v) Shri Rajesh Sharma also vide his statement 30.05.2019 (RUD-3), stated that the Noticee company had entered into agreements with their overseas clients for rendering various software services which include, inter-alia -Test planning and management, Automation regression testing, Manual regression testing, Functional

testing, Automation and API testing etc. It was informed by him that these services were part of the services provided by their Noida-based company to overseas clients.

vi) The Noticee contends that from the above, it is clear that they were providing software services which were in the nature of testing and analysis of software applications. The Noticee submits that the notice has assumed that the services provided by them do not qualify to be regarded as 'Testing and Analysis services'. The Noticee contends that the DRI has not conducted any verification or enquiry with their overseas clients to ascertain the actual nature of the kind of services provided by them which were actually testing and analysis of software. The Noticee contends that the allegation of mis-declaration of description of services in the DGFT Application has been made by the notice on the basis of erroneous conclusion drawn because the Noticee has mentioned the description of services in export invoice as "Information Technology Consulting and Support Services under SAC 998313.

vii) The Noticee contends that in the export invoices and other related statements like ST-3 returns filed with the Service Tax Department, they have mentioned the broad description of service as "information Technology Service" which is a generic term. The Noticee contends that under the broad description – "Information and Technology Services", the various sub-categories of IT services are covered and that **'testing and analysis of software'** is one of such services. The Noticee contends that 'testing and analysis of software', is covered under the broad category of "Information and Technology Services" and as such the description mentioned by them in export invoices and other documents, is also correct and there is no irregularity in it.

viii) The Noticee contends that while filing applications before DGFT they mentioned specific description of the service provided by them as 'Other business services (Technical testing and analysis)', for the reason that under annexure to Appendix 3D , as notified by the Public Notice 03/2015-2020, the said service with specific description was covered under CPC 8676(9).

ix) The Noticee contends that the notice has alleged that they have mis-stated and mis-declared the said services provided by them in their Application filed before DGFT and alleged that the said services provided by them did not qualify to be regarded as 'Technical testing and analysis services of software'.

The Noticee contends that the allegation has been made by the notice without conducting any verification to ascertain the actual nature of services provided by the Noticee. It has not been shown by the notice as to whether any enquiry was conducted by the DRI with the overseas clients of the Noticee to verify the actual description and nature of services received by them.

x) It is pertinent to mention that from the statement of Shri Hemmanshu and Shri Rajesh Sharma, it is evident that they were undertaking testing and analysis of the software for the clients and as such the services provided by them aptly covered under the description of 'Testing and Analysis of software services'. The DRI has not adduced any evidence to rebut the assertion made by Shri Hemmanshu and Shri Rajesh Sharma under their respective statements (RUD-02 and RUD-3 respectively).

xi) The Noticee contends that therefore it is evidently clear that the services provided by them were covered under the category of other business services (Technical testing and analysis services) and that the allegation made by the notice as regards mis-declaration of description in the application filed before the DGFT to avail the SEIS benefit, is unsubstantiated, unfounded and it has been made on the basis of assumptions only without the support of any cogent and authentic evidence.

xii) The Noticee contends that it is well settled law that no demand can be raised on presumption and assumption. The Noticee intends to rely on following case law in support of their contention.

(i) CCE, Tiruchirapalli Versus Shree Rajeswari Mills Ltd
.....[2011 (272) ELT 0049 (Mad.)]

Held: *Clandestine removal of cotton yarn in cone and cheese forms in the guise of hank yarn has been established with cogent and tangible evidence. Tribunal pointed out that no responsible person belonging to the assessee's establishment was questioned in connection with the recovery of the slips. The statements of the Liaison Officer and the Security Assistant were not concerned with the production of yarn in the factory or its clearance*

therefrom. Even though statements from five buyers were recorded, subsequently they retracted their statement and those statements were not shown as relied on documents in the show cause notice. Tribunal held that there is no purpose in remanding the case back for fresh adjudication, as had been sought for by the Revenue. The author of the slips was not identified and no statement was recorded on the material covered by the slips. The Revenue could not seek a second innings for the purpose of establishing its case. **The issue of clandestine clearance could not be found on assumption and presumption without any material. Appeal of revenue rejected. (Paras. 6, 7, 8)"**

**(ii) Union of India V/s M.S.S. Food Products Ltd.
..... [2011 (264) ELT 0165 (M.P.)]**

Held: Tribunal was justified in holding that in absence of any evidence, no liability in respect of the transaction can be fastened upon the assessee, under the provisions of the Central Excise Act, so far as Gutkha is concerned. When, in the statement of Proprietor of the respondent company, it is clearly admitted that the company is engaged in manufacture of Gutkha and selling products under the Brand "Shimla" and further when dispute in this case also related to same goods or brand name "Shimla", Tribunal was justified in ignoring material piece of evidence for not implicating the respondent company in respect of the transaction. **Revenue has sought to levy excise duty and penalty on the respondent merely on the basis of assumptions and presumptions and such a course is not permissible in law.** Tribunal had not ignored the statement, while affirming the finding recorded by Deputy Commissioner as well as Commissioner Appeal. Appeal of revenue rejected. (Paras. 2, 8, 16, 17)"

(iii) CCE & ST V/s Juhi Alloys [2014 (302) ELT 487 (HC-Alld)]

Held: "reasonable steps. Whether an assessee has in fact taken reasonable steps, is a question of fact.

7. In the present case, both the Commissioner (Appeals) and the Tribunal have given cogent reasons to indicate that the assessee had taken reasonable steps to ensure that the inputs in respect of which he has taken the Cenvat credit are goods on which the appropriate duty of excise, as indicated in the documents accompanying the goods, has been paid. Admittedly, in the present case, the assessee was a bona fide purchaser of the goods for a price which included the duty element and payment was made by cheque. The assessee had received the inputs which were entered

in the statutory records maintained by the assessee. The goods were demonstrated to have travelled to the premises of the assessee under the cover of Form 31 issued by the Trade Tax Department, and the ledger account as well as the statutory records establish the receipt of the goods. In such a situation, it would be impractical to require the assessee to go behind the records maintained by the first stage dealer. The assessee, in the present case, was found to have duly acted with all reasonable diligence in its dealings with the first stage dealer.

The view which the Tribunal has taken is consistent with the judgment of the Jharkhand High Court in *Commissioner of C. Ex., East Singhbhum v. Tata Motors Ltd. - 2013 (294) E.L.T. 394 (Jhar.)*, where it was held as follows :-

“... Once a buyer of inputs receives invoices of excisable items, unless factually it is established to the contrary, it will be presumed that when payments have been made in respect of those inputs on the basis of invoices, the buyer is entitled to assume that the excise duty has been/will be paid by the supplier on the excisable inputs. The buyer will be therefore entitled to claim Modvat credit on the said assumption. It would be most unreasonable and unrealistic to expect the buyer of such inputs to go and verify the accounts of the supplier or to find out from the department of Central Excise whether actually duty has been paid on the inputs by the supplier. No business can be carried out like this, and the law does not expect the impossible.”

(iv) Shakti Roll Cold Strips (P) Ltd Vs Commissioner, Central Excise, Chandigarh [2008 (229) ELT 661]

Held: “5. We have heard Mr. Kamal Sehgal, learned counsel for the revenue and perused the record. However, we find no force in the contention raised by him. The Tribunal has recorded a finding of fact that the inputs supplied by the respondent were duly received by the manufacturers and were used in the goods manufactured, which were cleared on payment of duty. The Tribunal also found that the Department has not been able to prove that any other alternative raw material was received and used in the final products. The Tribunal also held that the findings of the Commissioner (Appeals) in favour of the respondent were not challenged by the Departmental Representative before the Tribunal. The Tribunal has also noted that the findings of the Commissioner clearly established that RT-12 returns have been assessed finally by the Range Officer which contains all the documents including the invoices under dispute on the basis of which

the Modvat Credit has been availed and utilised and that payments for the purchase of the inputs have been made through cheque/demand draft.

6. *Thus, there is no merit in the appeal as no question of law, much less substantial, arises from the order of the Tribunal wherein pure findings of fact have been recorded in favour of the respondent.*

Hence, the present appeal is dismissed.

Note: The appeal filed by the Revenue in the above case was dismissed by Hon'ble Supreme Court of India Commissioner v. Shakti Roll Cold Strips Pvt. Ltd. - **2009 (242) E.L.T. A83 (S.C.)**

The Technical testing and analysis of software services provided by the Noticee are covered under the Central Product Code 8676 under its sub-class 8676(9) as “other technical testing and analysis services”, hence it is eligible for SEIS scrips in terms of DGFT Public Notice No. 03/2015-20 dated 01.04.2015.

xiv) The notice has alleged that the services provided by the Noticee were liable to be classified under CPC 84 and not under CPC 8676 as claimed by the Noticee. The notice has alleged that the services provided by the Noticee are not covered within the scope of testing and analysis services as specified under CPC 8676. The Noticee contends that the conclusion drawn by the notice that the testing and analysis services as provided by the Noticee relating to IT sector, are not covered by the CPC 8676, is incorrect and legally untenable.

xv) The Noticee submits that the in the annexure to Appendix 3D as notified by the DGFT Public Notice No.. 03/2015-20 dated 01.04.2025, services namely “**Technical Testing and Analysis Service**” falling under CPC 8676, have been specified under sub-entry no (c) of entry No. -D for ‘Other Business services’. The Noticee submits that under the entry no -D (c) of the Annexure to Appendix-3D, the subject service- ‘Technical Testing and Analysis’ service has been covered with reference to CPC 8676. The Noticee contends that therefore it is clear that the description of the eligible service is required to be matched at four digit level only.

xvi) The Noticee submits that CPC 8676 covers ‘Technical Testing and Analysis Services’ and that different kind of ‘technical testing and analysis services have been further classified under its sub-classes of CPC 8676. The CPC 8676 and its sub-classes reads as under:

CPC class- 8676 : Technical Testing and Analysis Services

Sub-class: 86761- Composition and purity testing and analysis services

86762- Testing and analysis services of physical properties

86763- Testing and analysis services of integrated mechanical and electrical systems

86764- Testing and Inspection services

86769- Other Technical and Testing Services

All other technical testing and analysis services not elsewhere specified.

xvii) The Noticee contends that from plain reading of above, it is seen that under CPC-class- 8676, 'Technical Testing and Analysis services" have been classified. The Noticee contends that that the scope of term 'Technical Testing and Analysis Services' has not been defined and as such there is no legal basis to exclude the technical testing and analysis services relating to Information and Technology from its scope. The Noticee contends that under sub-class 8676(9) all other technical testing and analysis services not elsewhere specified , have been included without any rider or restriction. The Noticee contends that therefore it is clear without any doubt that the all other types of technical testing and analysis services which have not been specified elsewhere, shall be included in the scope of CPC 8676 and that 'Technical Testing and Analysis Services' of software would also be covered within the scope of CPC 8676.

xviii) The Noticee submits that as regards exclusion of software testing and analysis services provided by the Noticee in the scope of CPC Code 8676, the notice has alleged that:

"From perusal of Technical testing and analysis services under CPC code 8676 makes it amply clear that the services elaborated therein related to testing of Physical, Chemical, Biological properties of various materials and behavioural characteristics of equipment and instruments. The classification under 8676 of CPC by M/s QA Noida (the Noticee) appears to be incorrect as this code covers the testing and analysis of Chemical, biological, Mechanical properties, electrical conductivity, radioactive Properties of Matter, but not on application software and fixing software bugs in software applications. it is clear that these services do not cover the testing and analysis of software."

(Para-9.6 of the notice refers)

xix) The Noticee contends that the aforementioned interpretation drawn by the notice so as to restrict the scope of the CPC code 8676, is erroneous, incorrect, irrational and legally untenable. The Noticee contends that the CPC Code 8676 has specified 'Technical Testing and Analysis' services without any rider to restrict its scope to the services related to the certain services only, as inferred by the notice. The Noticee contends that CPC code 8676 classified certain specific Testing and analysis services under sub-classes 86761 to 86764 and sub-class 86769 covers all other Testing and Analysis services not specified elsewhere. The Noticee contends that nothing has been mentioned in CPC Code 8676 so as to exclude the testing and analysis service relating software from its scope.

xx) The Noticee contends that therefore it is evident that the notice has been issued on erroneous premise that CPC Code 8676 does not cover Testing and analysis services relating to software applications. Therefore, the ground taken by the notice to deny benefit of SEIS scrip in improper, invalid and legally tenable.

xxi) The Noticee contends that the scope of the CPC code 8676 can be defined by plain reading of entry specified therein. It has clearly specified the 'Technical Testing and Analysis Services under major class-8676 and after specifying certain class of services under sub-classes, it has classified 'Other Technical Testing and Analysis' services not specified elsewhere under sub-class 86769.

xxii) The Noticee contends that if rule of '**purposive interpretation**' is applied to interpret the scope of the CPC Code 8676, it can be seen that the 'Technical Testing and Analysis service relating to software applications are aptly covered therein. The Noticee, in support of their above contention, intends to rely on the case of Chairman, Indore Vikas ... vs M/S Pure Industrial Cock & Chem., (judgment delivered on 15.05.2007) wherein the Hon'ble Supreme Court has held that:

"87. The words "at any time" have to be interpreted in the context in which they are used. Since a town development scheme in the context of the Act is intended to implement the development plan, the declaration of intention to prepare a scheme can only be in the context of a development plan. The starting point of the declaration of the intention has to be upon the notification of development plan and the outer limit for the authority to frame such a scheme upon lapsing of the plan. That is the plausible interpretation of the words "at any time" used in Section 50(1) of the Act. [See State of H.P. & Ors. v. Rajkumar Brijender Singh &

Ors., (2004) 10 SCC 585] 88. For construing a statute of this nature, we are dealing with, rule of purposive construction has to be applied. 89. In *Francis Bennion's Statutory Interpretation*, purposive construction has been described as under : "A purposive construction of an enactment is one which gives effect to the legislative purpose by (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction)." [See also *Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors.*, (2006) 3 SCC 434 and *National Insurance Co. Ltd. v. Laxmi Narain Dhut*, 2007 (4) SCALE 36] 90. In *Maruti Udyog Ltd. v. Ram Lal and Others* [(2005) 2 SCC 638], while interpreting the provisions of *Industrial Disputes Act, 1947*, the rule of purposive construction was followed. 91. In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.* [(1987) 1 SCC 424] this Court stated: *Chairman, Indore Vikas ... vs M/S Pure Industrial Cock & Chem. ... on 15 May, 2007 Indian Kanoon - http://indiankanoon.org/doc/791131/* 21 "If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act" 92. In 'The Interpretation and Application of Statutes' by Reed Dickerson, the author at p.135 has discussed the subject while dealing with the importance of context of the statute in the following terms: "... The essence of the language is to reflect, express, and perhaps even affect the conceptual matrix of established ideas and values that identifies the culture to which it belongs. For this reason, language has been called "conceptual map of human experience"." [See also *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat*, (2003) 4 SCC 712, *Indian Handicrafts Emporium and Others v. Union of India and Others*, (2003) 7 SCC 589 and *Deepal Girishbhai Soni and Others v. United India Insurance Co. Ltd., Baroda*, (2004) 5 SCC 385, para 56]"

xxiii) The Noticee further submits that the Hon'ble High Court of Karnataka in the case of *Engec Industrial Services (P) ... vs Union Of India* (2004 (164) ELT 242, Kar) has observed that:

"22. It is also well settled that, while interpreting taxation laws, in a case where two views are possible, then, the one which is in favour of the assessee must be adopted. The Supreme Court in *Union of India and Ors. v. Onkar S. Kanwar and*

Ors. -, has held as follows : "In any event this would clearly be a case where two views are possible. It is settled law that if two views are possible then the one which is in favour of the assessee must be adopted."

23. Apart from the above position, the claim of the appellant is entitled to be allowed even otherwise solely in the light of the judgments of the Supreme Court in *Hyderabad Industries Ltd.'s case (supra)*; *Thermax Pvt. Ltd.'s case (supra)* and *Collector of Central Excise, Jaipur v. J.K. Synthetics.*"

The allegation of mis-classification of the services exported by the Noticee cannot be established on the basis of statements of Directors/manager without any cogent, reliable and tenable material evidence.

xxiv) The Noticee contends that statement of Shri Mukesh Sharma , CEO of the Noticee Company and Shri Rajesh Sharma, and other two persons of the Noticee company, have been relied upon by the notice to allege that the Noticee mis-classified the services exported by them while filing application before DGFT to avail the SEIS benefits irregularly and based on the same demand of substantial amount relatable to the SEIC scrips , has been raised against the Noticee.

xxv) The Noticee submits that from the perusal of the statement of Shri Rajesh Sharma and Shri Mukesh Sharma, it is seen that while recording of their statement, they were shown the copy of Public Notice 03/2015-20 dated 01.04.2015, including amending notices, entries as indicated in the CPC - Division 84 and CPC -Division-86 and on the basis of the same they were required to confirm the correct classification of the subject services exported by the Noticee company. They were convinced by the DRI officer while recording their statement to agree that the services provided by the Noticee merits classification under CPC 84 and not under CPC 86.

xxvi) The Noticee contends that it is pertinent to mention that the said persons were not the legal expert to understand the entries as shown in CPC code and to interpret the same with legal acumen and therefore they were not able to decide the classification matter.

xxvii) The Noticee contends that it is well settled legal proposition that demand of tax cannot be raised merely on the basis of statements. The Noticee intends to rely on the following case-laws in support of their above contention.

(i) **Commissioner of Central Excise, Raipur Vs. Anil Agarwal [2013 (287)****ELT 0489 (Tri. - Del.)]**

Held: "the charges against the Respondent are clandestine removal of their final products without payment of duty. Admittedly such charges made by the revenue are required to be proved by the way of sufficient evidences. In the present case the Revenue has solely relied upon the recovery of certain photocopies of the bills from the trading unit as also on the statement of the Director, accepting the clandestine removal. Apart from the above, there is no other evidence showing clandestine manufacture and removal of the final products. Appeal of revenue rejected. (Paras. 7, 8)"

(ii) **Vikram Cement Pvt. Ltd. Vs. Commissioner of Central Excise, Kanpur****[2012 (286) ELT 105 (Tri. - Del)]**

Held: "Revenue to establish the case of clandestine removal by production of concrete and tangible evidence. Apart from loose papers, which on the face of it cannot be related to the appellants business accounts and the sole statement of director, there is no other evidence to reflect upon the clandestine activities of the appellants. The appellants have also taken a stand that it is beyond their capacity to manufacture more than 1000 MT per month and as such the Revenue's allegation that they cleared more quantity in the month of February, 2004 have to be taken with the pinch of salt. Set aside the confirmation of demand against the appellant and imposition of penalties imposed upon them. Appeal of assessee allowed. (Paras. 10, 11, 12)"

(iii) **Commissioner Versus Modern Denim Ltd. 2006 (199) ELT A181 (S.C.)**

Held : "On 28-4-2006 the Supreme Court after condoning the delay had dismissed the Civil Appeal No. D4511 of 2006 filed by Commissioner of Central Excise, Ahmedabad against the CESTAT Order Nos. A/620-623/2005-WZB/C.I. dated 18-5-2005 on the following matters:

Whether the statement of witnesses that Modern Denim was not capable of manufacturing the goods, as machinery was not installed, was false and could not be relied on as it was without verification of facts and in direct conflict of several documents on record;

Whether the demand sustainable based on assumption and presumption or any correlation found between raw material received and consumed, and whether loom production report and RG 1 figures could form basis of quantification of goods removed as number of steps in between the two viz. folding, packing etc. was ignored by the Commissioner;

Whether fabric beyond quota of DTA is leviable to duty under Section 3 of Central Excise Act, 1944 and entitled to benefit of Notifications No. 125/84-C.E. and No. 174/84-C.E.”

(iv) **Commissioner of Central Excise, Tiruchirapalli Versus Sree Rajeswari Mills Ltd.** [2011 (2) ELT 0049 (Mad.)]

Held : “Clandestine removal of cotton yarn in cone and cheese forms in the guise of hank yarn has been established with cogent and tangible evidence. Tribunal pointed out that no responsible person belonging to the assessee's establishment was questioned in connection with the recovery of the slips. The statements of the Liaison Officer and the Security Assistant were not concerned with the production of yarn in the factory or its clearance therefrom. Even though statements from five buyers were recorded, subsequently they retracted their statement and those statements were not shown as relied on documents in the show cause notice. Tribunal held that there is no purpose in remanding the case back for fresh adjudication, as had been sought for by the Revenue. The author of the slips was not identified and no statement was recorded on the material covered by the slips. The Revenue could not seek a second innings for the purpose of establishing its case. The issue of clandestine clearance could not be found on assumption and presumption without any material. Appeal of revenue rejected. (Paras. 6, 7, 8) ”

(iv) **Union of India Versus M.S.S. Food Products Ltd.**

[2011 (264) ELT 0165 (M.P.)]

Held : “Tribunal was justified in holding that in absence of any evidence, no liability in respect of the transaction can be fastened upon the assessee, under the provisions of the Central Excise Act, so far as Gutkha is concerned. When, in the statement of Proprietor of the respondent company, it is clearly admitted that the company is engaged in

manufacture of Gutkha and selling products under the Brand "Shimla" and further when dispute in this case also related to same goods or brand name "Shimla", Tribunal was justified in ignoring material piece of evidence for not implicating the respondent-company in respect of the transaction. **Revenue has sought to levy excise duty and penalty on the respondent merely on the basis of assumptions and presumptions and such a course is not permissible in law.** Tribunal had not ignored the statement, while affirming the finding recorded by Deputy Commissioner as well as Commissioner Appeal. Appeal of revenue rejected. (Paras. 2, 8, 16, 17)"

Penal provisions under Section 112(a) and 114AA of the Customs Act, 1962 are not attracted against the Notice, hence No Penalty is liable to be imposed on the Noticee under section 112(a) and 114AA . Further, penalty under section 114AB cannot be imposed on the Noticee as the said penal provision came into force in 2019 only whereas the period covered by the notice relates to the financial years 2015-16, 2016-17 and 2017-18 only.

xxviii) The Noticee further submits that it has been alleged by the notice that the goods imported by the respective importers in respect of which said SEIS scrips transferred/sold by the Noticee, were utilized for payment of duty, are liable for confiscation under section 111(m) & 111(o) of the Customs Act, 1962 and accordingly, penalty has been proposed by the notice for imposition on the Noticee under section 112(a), 114AA and 114 AB of the Customs Act, 1962.

xxix) The Noticee contends the penal provision of section 112(a) and 114AA of the Customs Act, 1962 are not attracted against them as they are not the importer of the goods. The Noticee further contends that for any offence relating to irregular availment of scrips issued by the DGFT and its use in payment of duty of customs, there is specific penal provisions under section 114 AB of the Customs Act, 1962 which reads as under:

"114AB. Penalty for obtaining instrument by fraud, etc

Where any person has obtained any instrument by fraud, collusion, wilful misstatement or suppression of facts and such instrument has been utilised by such person or any other person for discharging duty, the person to whom the instrument was issued shall be liable for penalty not exceeding the face value of such instrument.

Explanation. "For the purposes of this section, the expression 'instrument' shall have the same meaning as assigned to it in the Explanation 1 to section 28AAA"

xxx) The Noticee contends that penal provisions as enumerated in above section 114AB can be attracted against the persons who has obtained the instruments wrongly by wilful mis-statement etc. The Noticee contends that the notice has proposed imposition of penalty against them under this section 114AB. The Noticee contends that no penalty can be imposed on them under the new section 114AB of the Customs Act, 1962 for the reason that the penal provision under section 114AB came into effect vide Finance Act, 2019 and that prior to that there was no such penal provisions.

xxxii) The Noticee contends that as the period of dispute in this case relates to the financial year 2015-16, 2016-17 and 2017-18, which is prior to the implementation of new penal provisions of section 114AB, therefore no penalty can be imposed against them under this provision of section 114AB.

No penalty is liable to be imposed on Shri Mukesh Sharma, the CEO of the Noticee company on the same grounds as mentioned supra.

The Noticee further prays the above defence reply may be considered as defence reply against other show cause notice Sl. No.553/2021-22 Gr.II(AB)/JNCH dated 15.12.2021 issued by the Dy. Commissioner of Customs, Gr.II(A-B)JNCH, Nava Sheva raising demand of Rs.1,50,576/- against the Noticee relatable to the utilisation of said SEIS scrip transferred/sold and utilised by the importer namely M/s Kreedai Exim, Latur, Maharashtra in respect of goods imported through NAVASHEVA Port (INNSA1).

25.2. M/s Adani Wilmar (Noticee No. 3 & 4 in SCN No. GEN/ADJ/COMM/494/2021-O/o Pr Commr-Cus-Mundra dated 01.02.2022) vide letter dated 05.03.2022 submitted their written submission. The same is reproduced as below:

- i) At the outset the Noticee denies each and every allegation made under the SCN under reply and nothing alleged therein is admitted or deemed to be admitted unless so specifically admitted herein.
- ii) It is submitted that the proceedings initiated against the Noticee vide the impugned SCN is ex-facie, erroneous and liable to be set aside.

IMPUGNED SCN IS NOT SUSTAINABLE

iii) It is submitted that the captioned SCN is issued to the Noticee proposing confiscation of the imported goods merely because the Noticee has utilized the SEIS scrips which is alleged to be fraudulently obtained by QIPL. It is submitted that in the captioned SCN, there is not a single mention of Noticee's role in alleged contravention of customs provisions and further there is no mention of Noticee's involvement or knowledge of such an alleged fraud or misrepresentation committed by QIPL.

iv) The captioned SCN has been issued by the Department is a result of summons proceedings carried out in QIPL's case, wherein the allegation has been made of wrongful classification of export of services to avail undue/excess benefit of SEIS scheme by QIPL. As such, if there is any contravention of the provisions of Act or Rules made thereunder it could be by QIPL and not the Noticee. Accordingly, the duty has been demanded along with interest and penalty from QIPL alleging fraudulent procurement SEIS scrips. It is reiterated that there is not a single mention of the role of the Noticee in the alleged contravention. In the entire SCN there is no reference made to Noticee apart from asking them to show cause for utilizing the disputed SEIS scrips and thereby proposing confiscation of goods imported using the disputed SEIS scrips. In view of the same, it is submitted that in so far as the Noticee is concerned the captioned SCN is void ab initio as same has been issued without making any allegation against them.

v) Reliance in this respect is placed upon the Hon'ble Supreme Court's judgment in the case of **Kaur & Singh V/s. Collector of Central Excise, New Delhi [1997 (94) ELT 289 (SC)]**, wherein it is held as under:

"3. This Court has held that the party to whom a show cause notice of this kind is issued must be made aware of the allegation against it. This is a requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him. This is all the more so when a larger period of limitation can be invoked on a variety of grounds. Which ground is alleged against the assessee must be made known to him, and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice. (See Collector of Central Excise v. H.M.M. Limited, 1995 (76) E.L.T. 497 and Raj Bahadur Narayan Singh Sugar Mills Limited v. Union of India, 1996 (88) E.L.T. 24)."

vi) Further reliance is placed upon the Hon'ble Supreme Court judgment in the case of **Commissioner of Central Excise, Nagpur V/s. Ballarpur Industries Ltd. [2007 (215) ELT 489 (SC)]**, wherein the Hon'ble Court has held that the show cause notice

is the foundation in the matter for levy and recovery of duty, penalty, interest and confiscation of goods.

vii) In view thereof, it is submitted that the captioned SCN would not have been issued to the Noticee in the first place, as the same is ambiguous and failed to mention any allegation against the Noticee. As such, the impugned SCN proposing confiscation of imported goods under Section 111(m) and 111 (0) of the Act, needs to be struck aside being untenable on this count alone.

GOODS ARE NOT AVAILABLE FOR CONFISCATION

viii) The captioned SCN is issued to the Noticee for confiscation of the imported goods without looking into the law laid down by the Hon'ble Supreme Court and various High courts in this regard.

ix) It is submitted that without making any allegation against the Noticee, the proposal of confiscation of goods is made under Section 111(m) and 111(0) of the Act which is merely based on the utilization of SEIS scrips procured by QIPL, is premature and arbitrary. There is not even an allegation in the SCN to the effect that the Noticee had any role in the issuance of the alleged fraudulent SEIS scrips.

x) It is submitted that the relevant Bills of Entry has been assessed finally and cleared for home consumption and as such the goods are not physically available for confiscation. It is a settled law that the imported goods once cleared after final assessment cannot be the subject matter of confiscation as no redemption fine can be imposed.

xi) Reliance in this regard is placed on the judgement of the Hon'ble Bombay High Court in the case of **Commissioner of Customs (Import), Mumbai V/s. Finesse Creation Inc. [2009 (248) ELT 122 (Bom)]**, wherein it is held as under:

"5. In our opinion, the concept of redemption fine arises in the event the goods are available and are to be redeemed. If the goods are not available, there is no question of redemption of the goods. Under Section 125 a power is conferred on the Customs Authorities in case import of goods becoming prohibited on account of breach of the provisions of the Act, rules or notification, to order confiscation of the goods with a discretion in the authorities on passing the order of confiscation, to release the goods on payment of redemption fine. Such an order can only be passed if the goods are available, for redemption. The question of confiscating the goods would not arise if there are no goods available for confiscation nor consequently redemption. Once goods cannot be redeemed no fine can be imposed. The fine is in the nature of computation to the state for the wrong done by the importer/exporter.

6. In these circumstances, in our opinion, the tribunal was right in holding that in the absence of the goods being available no fine in lieu of confiscation could have been imposed. The goods in fact had been

cleared earlier. The judgment in Weston (supra) is clearly distinguishable. In our opinion, therefore, there is no merit in the questions as framed. Consequently appeal stands dismissed."

The said judgment is upheld by the Hon'ble Supreme Court in the case of **Commissioner V/s. Finesse Creation Inc. [2010 (255) ELT A120 (SC)]**.

xii) In view of the same it is submitted that the issue has reached finality with the judgment of the Hon'ble Supreme Court and in view of the same the captioned SCN to the extent the same is issued to the Noticee deserves to be quashed and set aside.

xiii) Reliance is also placed upon below mentioned judgments to buttress the aforesaid argument:

a. Airport Authority of India v. CC (Exports-Seaport), Chennai [2016 (334) E.L.T. 529 (Tri. Chennai)],

b. New Drug & Chemical Co. v. CC (E.P.) [2016 (331) E.L.T. 600 (Tri. - Mumbai)]

c. Skoda Auto India Pvt. Ltd. v. CC (Import), Nhava Sheva [2014 (313) E.L.T. 600 (Tri. Mumbai)]

xiv) In view of the above since the captioned SCN is issued to the Noticee proposing confiscation of goods which admittedly are not available for confiscation, the proceedings initiated against the Noticee in respect of the confiscation of the goods deserves to be dropped.

ISSUE IS NO LONGER RES INTEGRA

xv) Without prejudice to the aforesaid and in any event it is submitted that it is not in dispute that the Noticee is a bonafide buyer of the SEIS scrips which are in dispute. In the present case as mentioned above there is no proposal to recover any duty from the Noticee. Even in cases where the department has tried to proceed against the bonafide transferees, law has been settled in their favour. The Hon'ble Supreme Court in the case of **Commissioner V/s. Vallabh Design Products [2016 (341) ELT A222 (SC)]**, has upheld the decision of Punjab & Haryana High Court reported as **[2007 (219) ELT 73 (P & H)]** wherein it is held that no duty can be demanded, no penalty can be imposed and no goods can be liable for confiscation from the bonafide transferees of license. ie to

xvi) The Hon'ble Punjab & Haryana High Court in the aforesaid case has held that since the transferee of DEPB scrip (which was obtained by fraud/forgery by the transferor) was not a party to fraud and has obtained it on payment of full price from open market on bona fide belief of it being genuine, demand of duty, interest and penalty and confiscation of imported goods is not sustainable.

xvii) In view of the same, it is submitted that the case of the Noticee squarely covered by the decision of Hon'ble Supreme Court in the case of Vallabh Design (supra). It is further submitted that Article 142 of the Constitution of India, 1950 stipulates that the judgments passed by the Hon'ble Supreme Court are to be enforced throughout country. In view of the same, when the Hon'ble Supreme Court has seized of the matter and decided the case in the favor of transferee of scrip, the issue is no more res integra and as such captioned SCN is not sustainable on this count, alone.

xviii) Further reliance is placed upon the Hon'ble Punjab and Haryana High Court Judgment in the case of Commissioner of Customs V/s. Leader Valves Ltd. [2007 (218) E.L.T. 349 (P & H)] which laid down the following three clear proposition of law in Paragraph 9:

"The assessee-respondent admittedly is not a party to the fraud. There are categorical finding that they had purchased FPS from the open market in the bona fide belief of its being genuine. They had paid full price and accordingly have availed the benefit. Merely because at a later stage, the FPS has been found to be fabricated and fake on the basis of BCER the assessee-respondent could not be deprived of the benefits which were legitimately available to them. It is also worth noticing that the assessee-respondent was never issued any show cause notice before cancelling the FPS which was obtained by M/s. Parker Industries and obviously the notice was also to be issued to them alone.

The revenue cannot avail the extended period because the assessee-respondent could not be accused of mis-representation, collusion or suppression of facts within the meaning of proviso postulated by Section 28 of the Customs Act."

Further the Punjab and Haryana High Court in para 9 of their judgement held that:

"We are of the considered view that this appeal is devoid of any merit. The assessee-respondent is admittedly not a party to the fraud. There are categorical finding that they had purchased the DEPB from the open market in the bonafide of its being genuine. They had paid full price and accordingly have availed the benefit. Merely, because at a later stage the DEPB has been found to be fabricated and fake on the basis of BCER, the assessee-respondent could not be deprived of the benefit which were legitimately available to them....."

xxix) An appeal filed by the Department against the above decision the P&H High Court has been dismissed by The Hon'ble Supreme Court of India as reported in 2008 (227) E.L.T. A29 (S.C.)] with following order:

"The Special leave petition is dismissed both on the ground of delay as also on merit". In view thereof, it is submitted that captioned SCN is not maintainable for this reason as well.

THE IMPORTED GOODS ARE NOT LIABLE TO CONFISCATION UNDER SECTION 111(m) AND 111(0) OF THE ACT

xx) Without prejudice to the aforesaid and in any event, it is submitted that the goods imported vide the impugned Bills of Entry are not liable for confiscation under 111(m) and 111(0) of the Act.

xxi) Further, Section 111(m) of the Act states that 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 transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54, the goods are liable to confiscation. Relevant extract of Section 111(m) is provided hereunder:

"Section 111- Confiscation of improperly imported goods, etc

The following goods brought from a place outside India shall be liable to confiscation:-

(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 transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54"

xxii) As it is seen from the afore stated factual and legal submissions, the Noticee has submitted all the documents alongwith the disputed SEIS scrips with the Department. Moreover, the Department has not even alleged or produced any evidence to prove any mis-declaration on the part of the Noticee. In fact, the disputed scrips were duly verified by the Customs authorities at the time of import and the goods were cleared on the strength of such scrips.

xxiii) It is submitted that there is no specific allegations against the Noticee in the captioned SCN pertaining to misdeclaration and in order for goods to be confiscated under Section 111(m) of the Act, there has to be some kind of misrepresentation on the part of the Noticee. However, as stated earlier, allegation regarding misdeclaration cannot be ascertained from the captioned SCN.

xxiv) It is further submitted that the burden of proof is on the Department to show that there was a mis-declaration on the part of the Noticee. Mere assertion by the Department was of no avail as heavy burden was on the Department to lay evidence of the alleged misdeclaration by the Noticee. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of ***Polyglass Acrylic Mfg. Co. Ltd. vs. Commissioner of Customs, Vishakhapatnam [2003] 153 ELT 276 (SC)***.

xxv) The Noticee submits that they are bonafide importers who purchased the disputed scrips from open market and cleared the disputed goods on the basis of the said scrips by clearly disclosing all the particulars in relation to the goods imported and the SEIS scrips utilized to pay the customs duty for such importation. The Department had knowledge of the utilization of the said SEIS scrips at the time of import and the SEIS scrips were also verified by the Department at the time of import.

xxvi) Hence, in view of the above, confiscation under Section 111(m) of the Act is not sustainable since the Department was unable to prove mis-declaration on the part of the Noticee in the captioned SCN.

xxvii) Without prejudice to the aforesaid and in any event, it is submitted that the goods imported vide the impugned Bills of Entry are not liable for confiscation under Section 111(o) of the Act.

Relevant extract of the Section 111(o) of the Act reads as under:

"Section 111-Confiscation of improperly imported goods, etc

The following goods brought from a place outside India shall be liable to confiscation:-

'(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'.

xxviii) It is submitted that as stated earlier, the Noticee has procured the SEIS scrips by paying consideration from open market. The said Scrips are freely transferable and the same can be used for payment of customs duties at the time of import. The Noticee have paid 98.57% of the amount of the SEIS scrips at the time of procurement and utilized the same following due process of law. It is submitted that the Customs Authority never objected the utilization of Scrips at the time of import and assessed the goods finally. It is further not in dispute that the SEIS scrips were valid at the time of import and therefore it is not open for the Customs Authorities to allege that the Noticee has imported the impugned goods without

observing the conditions prescribed under Notification No. 25/2015 as amended and propose confiscation of the impugned goods under Section 111 (o) of the Act.

xxxix) In this backdrop, as there is no misdeclaration on part of Noticee, the goods are not liable for confiscation under Section 111(0) of the Act.

xxx) Further, as is seen from the afore stated factual and legal submissions, the Noticee has declared everything that was communicated to them by the exporter. Moreover, even till date there is no definitive conclusion as to whether the actions of the exporter are incorrect.

xxxx) In view of the afore stated detailed submission, the imported goods are not liable for confiscation under Section 111(o) of the Act and as such the imported goods are not liable for confiscation and the said charges are required to be dropped being untenable.

NOTICEE IS A BONA FIDE HOLDER IN DUE COURSE

xxxi) Without prejudice to the aforesaid and in any event it is submitted that it is not in dispute that the Noticee is a bonafide buyer of the SEIS scrips which are in dispute. In the present case as mentioned above there is no proposal to recover any duty from the Noticee. Even in cases where the department has tried to proceed against the bonafide transferees, law has been settled in their favour.

xxxiii) The Noticee has paid consideration for the SEIS scrips purchased by it at the market-determined rate of 98.57% of the Duty Credit. The consideration was paid by RTGS for the bona fide purchase of SEIS scrips. The SEIS scrips were purchased and fully utilized by the Noticee well within its validity period. The Noticee at any stage was not aware or had reason to believe that the title of QIPL or any intermediary holder was defective whether at the time of purchase of the SEIS scrips or at the time of utilization thereof or at any subsequent point in time. The Noticee thus, is a holder in due course insofar as the SEIS scrips are concerned and the Noticee's claim to benefit under the SEIS in exercise of its choate and perfected rights cannot be defeated even for reasons of any alleged fraud that may operate against the title of the exporter-license holder.

xxxiv) Thus, it is submitted that once the DGFT had issued the scrips after proper verification of the exports, the doctrine of caveat emptor cannot be invoked. It is further not in dispute that the SEIS scrips were valid at the time of import and therefore it is not open for the Customs Authorities to allege that the Noticee has imported the impugned goods without observing the conditions prescribed under Notification No. 25/2015 as amended and propose confiscation of the impugned goods.

xxxv) Without prejudice to the aforesaid and in any event, it is trite law that where the SEIS scrips were issued on the basis of forged documents and the transferee was not a party to fraud, it has been held that demand as well as the confiscation of goods against the bona fide purchasers cannot be confirmed. Thus, it is submitted that once it has been held that the demand itself is not sustainable, the question of confiscation of goods does not arise at all.

xxxvi) The Hon'ble Delhi Tribunal in the case of Ajay Kumar and Co v. Commissioner of Customs reported in 2006 (205) ELT 747 (Tri-Del), after following the judgment of the Hon'ble Bombay High Court in the case of Taparia Overseas (P) Limited and the Hon'ble Supreme Court's judgments in case of Sampatraj Dugar and Sneha Sales Corporation, set aside the demand as well as the confiscation of goods against the bona fide transferee both on merits and on time bar. The Hon'ble Tribunal was pleased to hold as under:

"5. After hearing both the sides duly represented by Shri Mohan Jaikar, ld. Advocate and Shri S.M. Tata, ld. SDR, we find that the Hon'ble Supreme Court in the case of Union of India v. Sampatraj Dugar (1992 (58) E.L.T. 163 (S.C.)) has held that cancellation of Import License cannot be held to be retrospective and cannot be pressed into service when the same was valid at the time of importation of the goods. To the similar effect is another decision of the Hon'ble Supreme Court in the case of Collector of Customs, Bombay v. Sneha Sales Corporation (2000 (121) E.L.T. 577 (S.C.)) laying down that Import license having been cancelled after import and clearance of goods, import cannot be said to be in contravention of the provisions of Imports and Exports (Control) Act, 1947. In the case of Taparia Overseas (P) Ltd. v. Union of India [2003 (161) E.L.T. 47 (Bom.)] it was held that transfer of license to transferee for value without notice of fraud by original license holder is governed by common law and not by provisions of any statute. As such, transaction cannot be held to be void ab initio but voidable at the instance of party defrauded. The Hon'ble Court observed, that inasmuch as, the procedure was followed by the transferee while getting the license transferred in their names and the petitioner had obtained scrips for valuable consideration without any notice of the fraud alleged to have been committed by the original license holder while obtaining scrips. If that be so, the concept that fraud vitiated everything would not be applicable to the cases where the transaction of transfer of license is for value without notice arising out of mercantile transactions, governed by common law and not by provisions of any statute. Accordingly, the Hon'ble Court held that goods imported and Bill of Entry filed prior to cancellation of license has to be held as having been made under valid scrips and goods cannot be subjected to levy of Customs duty.

6. *By applying the ratio as laid down by the Court in the above decisions, to the fact of the present case, it has to be held that the imports made under the FPS Scrips, which were valid at the time of import, the subsequent cancellation of the same on the ground that original allottee procured them by fraud will not have any bearing upon the imports made by the Noticee. There is nothing in the impugned order to reflect upon any mala fide on the part of the Noticee or to show that he was a party to the fraudulent obtaining of scrips by M/s. Parker or had any knowledge about the tainted character of the scrips. As such, we are of the view that the imports made by the Noticee in terms of the said scrips cannot be held invalid."*

xxxvii) Upholding the aforementioned decision of the Hon'ble Tribunal, New Delhi, the Hon'ble Supreme Court in the case of Commissioner of Customs, Amritsar v. Ajay Kumar & Co. [2009 (238) E.L.T. 387 (S.C.)] set aside the demand as well as the confiscation of goods against the bona fide transferee both on merits and on time bar and held as under:

"4. It is seen that in view of the fact that in the show cause notices, there was no reference to the alleged infraction of M/s. Parker Industries, the transferor of the license in question. The judgments of the CESTAT and the High Court do not suffer from any infirmity to warrant interference. It is to be noted that in Commissioner of Customs (Import) Bombay v. M/s. HICO Enterprises [2008 (11) SCC 720] similar view was taken. The appeal is dismissed."

xxxviii) Further, the Hon'ble Delhi Tribunal in the case of Leader Valves Ltd. V/s Commissioner of Customs reported in 2006 (193) E.L.T. 459 (Tri. Del.), in Paragraph 3 held as under:

"3. Regarding the purchase of FPS scrips by the Noticees and their liability under Section 112 of the Customs Act, Id. Commissioner has observed as under:

"However, I find nothing on record to infer that M/s. Leader Valves Ltd., S-3&4, Industrial Area, Jalandhar had purchased the freely transferable FPS scrip otherwise than in a bona fide manner and utilized the same towards debit/exemption of duty and there is nothing to suggest of his having colluded with the exporter who obtained the FPS scrips by fraudulent manner. Therefore, I do not hold them liable to penal action under Section 112 of the Customs Act, 1962".

In the face of these findings Id. Commissioner could not legally order the recovery of the duty under Section 28 of the Customs Act. In this context, the law laid down by the Hon'ble Bombay High Court in the case of Taparia

Overseas (P) Ltd. v. Union of India reported in 2003 (161) E.L.T. 47 can be read with advantage. In that case the goods were imported by the transferee of the license for consideration and without knowledge of commission of fraud by the original holder of the license. But later on license was cancelled for having obtained by fraud and duty was demanded from the transferee of the license but the same was set aside by the Court by holding that import having been made under a license which was valid at the relevant time, having been not suspended or cancelled, the transferee being for consideration, the goods could not be subjected to levy of customs duty. The case of the Noticees squarely stands covered by the law laid down in that case, keeping in view the above referred facts and findings of the Commissioner reproduced above, in their favor. Therefore, the impugned order is set aside and the appeal of the Noticees is allowed with consequential relief as per law."

xxxix) Affirming the above order of the Hon'ble Tribunal, the Hon'ble Punjab and Haryana High Court in its judgment reported in 2007 (218) E.L.T. 349 (P & H) laid down the following three clear proposition of law in Paragraph 9:

"9. ... We are of the considered view that this appeal is devoid of any merit. The assessee-respondent admittedly is not a party to the fraud. There are categorical finding that they had purchased FPS from the open market in the bona fide belief of its being genuine. They had paid full price and accordingly have availed the benefit. Merely because at a later stage, the FPS has been found to be fabricated and fake on the basis of BCER the assessee-respondent could not be deprived of the benefits which were legitimately available to them. It is also worth noticing that the assessee-respondent was never issued any show cause notice before cancelling the FPS which was obtained by M/s. Parker Industries and obviously the notice was also to be issued to them alone. The revenue cannot avail the extended period because the assessee-respondent could not be accused of mis-representation, collusion or suppression of facts within the meaning of proviso postulated by Section 28 of the Customs Act."

xli) An appeal filed by the department against the above decision the P&H High Court has been dismissed by The Hon'ble Supreme Court of India as reported in [2008 (227) E.L.T. A29 (S.C.)] with following order:

"The Special leave petition is dismissed both on the ground of delay as also on merit".

xlii) Reliance is further placed on the following judgements in order to buttress the aforesaid contention:

- a. Commissioner of Customs, Amritsar v. Vallabh Design Products [2007 (219) E.L.T. 73 (P&H)] maintained by the Hon'ble Apex Court in Commissioner v. Vallabh Design Products [2016 (341) E.L.T. A222 (S.C.)];
- b. Pee Jay International v. Commissioner of Customs [2016 (340) E.L.T. 625 (P & H)];
- c. Binani Cement Ltd. & Ors. [2008 TIOL 2058 CESTAT, Ahmedabad].

xlii) Thus, in continuation of the contention above, it is submitted that firstly there is neither any allegation nor any finding to the effect that the Noticee was a party to the purported fraud played by QIPL and second that once the submissions of the Noticee that they were bona fide purchasers of the SEIS scrips is accepted, the allegation that the Noticee has imported the impugned goods without observing the conditions prescribed under Notification No. 25/2015 as amended and propose confiscation of the impugned goods does not sustain.

xliii) In view of the above judicial precedents, it is submitted that License users who had purchased the same from the market without any notice of the same being allegedly obtained with fraud, mis-representation and suppression of fact, cannot be held liable for confiscation of goods under the Act. Hence, for this reason as well the captioned SCN is not sustainable and ought to be set aside.

THE SEIS SCRIP WAS VALID AT THE TIME OF PROCUREMENT

xliv) Without prejudice to aforesaid and in any event, it is submitted that the captioned SCN proposes confiscation without attributing any role of the Noticee in the alleged contravention. The captioned SCN has been issued to the Noticee merely because they have utilized the SEIS scrips which have allegedly been procured by QIPL fraudulently. The Noticee is shocked and surprised to see the captioned SCN proposing confiscation of the imported goods, when there is no allegation made against them. It is not the case of the Department that Noticee are any which way involved in the alleged contravention. It is reiterated that the Noticee is a bonafide importer who have procured the said SEIS Scrips from an open market, for a valid consideration. In fact, the captioned SCN does not even allege that the Noticee, in any manner, involved in the alleged contravention of fraudulent ways of obtaining SEIS by QIPL.

xlv) Without prejudice to the aforesaid and assuming without admitting that the subject SEIS scrips are issued based on the fraudulent declaration, the Noticee submit that the same was valid at the time of their purchase. Further, even though it has been mentioned in the captioned SCN that the DGFT has cancelled the subjected Scrips vide its Order-in-Original dated 21.10.2019, the goods were

imported vide bills of entry dated 28.01.2019 and 30.01.2019 when the scrips were valid in full force.

xvi) Once it is not alleged that the scrip has been held to be invalid at the time of import, the Custom Authorities have no jurisdiction to move against the Noticee.

xvii) It is an admitted position that on the date, on which the goods were assessed by the Department, the said SEIS scrips were valid and subsisting. The transaction done under the said scrips therefore cannot be questioned by the Department.

xviii) The Noticee is a bona fide purchaser of the SEIS scrips for consideration and without notice of the alleged fraud. It is submitted that the Noticee in the present case was not involved in the export activity of QIPL and the Noticee had no privy of contract with QIPL. The Noticee had only purchased the said SEIS scrips from its agent Trident (I) Ltd. for valuable consideration and used the same for imports of their goods. It is pertinent to mention that the SEIS scrips used for imports of goods by Noticee were valid at the time of import.

xix) As stated in the facts above, it is pertinent to note that the exports were duly verified by the DGFT and only after being convinced that the conditions of the respective schemes are satisfied, the scrips were issued to the exporter i.e. QIPL.

L) Further, the said scrips were duly endorsed by the DGFT while the same was transferred to the Noticee evidencing the validity of the said scrips.

li) Thereafter, during the imports by the Noticee, the Customs Authorities verified the scrips and permitted the Noticee to clear the goods without paying any duty in lieu of the said scrips, which had duty credit in them. Thus, evidencing that the Customs Authorities were also satisfied that the said scrips were valid and accordingly permitted for utilization of the same for payment of duty.

lii) Thus, from the above it is clear that, the said SEIS scrips were validly issued by the DGFT and the same were duly verified in accordance with the prescribed procedure. Further, the DGFT itself believed the requisite documents to be genuine at the time of issuing the said SEIS scrips. The Noticee, therefore, submit that confiscation of goods cannot be proposed, assuming without admitting that the allegations made against the exporters are correct.

liii) It is not in dispute that the said SEIS scrips were issued by the DGFT and the same was duly verified in accordance with the prescribed procedure. The Noticee were therefore bona fide purchasers without notice and have taken all the reasonable care and diligence as required by a prudent person and did not omit to act in a manner, which omission would render the imported goods liable to confiscation under Section 111 of the Act.

liv) It is submitted that it was not possible for the Noticee to verify whether the said SEIS scrips issued by the DGFT was based on the mis declared/forged documents. It is pertinent to note that once the DGFT issues Scrips, it is implied that the export of the exporters is duly verified, and the said Scrips are valid. The issuance of the Scrips by the DGFT is proof enough for the Noticee to consider it valid and act upon it.

Iv) The endorsement of transferability by the licensing authority is conclusive evidence of all prior administrative acts having been completed in accordance with the law and the Customs Department and the licensing authority are estopped from disturbing the title and rights under the SEIS in the hands of a bona fide buyer for value. Thus, the SCN proposing confiscation of goods ought to be set aside on this count itself.

REVOCATION/CANCELLATION OF THE SCRIPS IS WITHOUT HEARING AND WITHOUT NOTICE AND THEREFORE NOT BINDING ON THE NOTICEE.

Ivi) Without prejudice to the aforesaid and in any event, the Noticee submit that the purported order of DGFT cancelling the SEIS Scrips are not binding on them. Admittedly, no opportunity of being heard was given to the Noticee before the purported suspension of the said SEIS Scrips. The Noticee's rights, as transferees of the said Scrips, were adversely affected and as such they were entitled in law to be heard before any order suspending the same is made by the DGFT.

Iviii) It is settled law that any orders which are passed in violation of principles of natural justice are nullity and such defence can be set in any collateral proceedings.

THE PURPORTED REVOCATION CANNOT BE RETROSPECTIVE AND CAN ONLY BE PROSPECTIVE.

Iviii) Without prejudice to the aforesaid and assuming without admitting that the subject SEIS Scrips are issued based on misclassification of exported goods, the Noticee submit that the purported cancellation of the subject Scrips by DGFT will be applicable from the date of its order and the purported cancellation cannot apply retrospectively.

ix) It is an admitted position that on the date, on which the goods were assessed by the department, the said scrips were valid and subsisting and the purported cancellation is subsequent thereto.

ix) The Hon'ble Supreme Court of India in the case of **Collector of Customs, Bombay vs. Sneha Sales Corporation [2000 (121) E.L.T. 577 (S.C.)]** in paragraphs 4 and 5 held as follows:

"4. Shri Anoop Choudhary, the learned Senior Counsel appearing for the appellant in support of the appeal, has urged that the Tribunal was in error in

interfering with the order passed by the Collector regarding confiscation of the goods as well as the imposition of penalty. As regards confiscation under Section 111(d) of the Act the submission of the learned counsel is that since the licences have been cancelled by Deputy Chief Controller of Imports and Exports ab initio the Collector was right in holding that there was no valid authorisation for the import of the goods and goods have been imported in contravention of the provisions of the Import (Control) Order, 1955 read with Imports and Exports (Control) Act, 1947. We are unable to accept this contention of the learned counsel in view of the law laid down by this Court in *East India Commercial Company Ltd. v. Collector of Customs, Calcutta (supra)* wherein this Court has said: -

"Nor there is any legal basis for the contention that licence obtained by misrepresentation makes the licence honest. With the result that the goods should be deemed to have been imported without licence in contravention of the order issued under S. 3 of the Act so as to bring the case within cl. (8) of s. 167 of the Sea Customs Act. Assuming that the principles of law of contract apply to the issue of a licence under the Act, a license obtained by fraud is only voidable; it is good till avoided in the manner prescribed by law."

5. In the aforementioned decision of this Court it has been clearly laid down that in a case where the licence is obtained by misrepresentation or fraud it is not rendered non est as a result of its cancellation so as to result in the goods that were imported on the basis of the said licences and being treated as goods imported without a licence in contravention of the order passed under Section 3 of the Import and Export Act that fraud or misrepresentation only renders a licence voidable and it becomes inoperative before it is cancelled. In the present case the licences were cancelled by order dated December 18, 1986 after the goods had been imported and cleared. The Tribunal was, therefore, right in holding that the import of the goods was not in contravention of the provisions of Import and Export Order, 1955 and Import and Export (Control) Act, 1947 and the goods were not liable to be confiscated on that basis under Section 111(d) of the Act."

lxii) Similar view has been taken by the Hon'ble Supreme Court in the case of *East India Commercial Co. Ltd., Calcutta vs. Collector of Customs 1983 (13) E. L. T. 1342 (S.C.)* and *Union of India vs. Sampat Raj Duggar [1992 (58) E.L.T. 163 (S.C.)]*.

lxiii) It is submitted that following the aforesaid judgements, this Hon'ble Court in Taparia Overseas (supra) observed as under:

"37. Alternatively, let us consider it from another angle assuming that licence comes to an end upon its suspension and/or cancellation, in catena of cases, it is laid down that the date of import of goods would be the date on which the Bill of Entry was presented under section 46. This legal position is clear from the decision of the Apex Court as laid down in *Union of India v. Apar Ltd.* 1999 (112) E.L.T. 3 (S.C.) and *Garden Silk Mills v. Union of India* 1999 (113) E.L.T. 358 (S.C.). The same is the view taken by the Apex Court in *Sampat Raj Durgar* case (*cited supra*). Imports against replenishment Licences were permitted duty free if the importers produced an import Replenishment Licence the goods or the materials were imported into India. In the instant cases when the goods were imported into India, and even when the Bills of Entry were filed, neither were the licences suspended nor the same cancelled. In all these cases, Bills of Entry were filed by the petitioners well before the suspension and/or cancellation of the licences in question, thus the imports were made under valid licences, the goods could not be subjected to levy of customs duty in the peculiar facts and circumstances of the cases in hand. In the circumstances, we hold that in all cases at hand, the goods were imported, under valid licences. The goods imported were neither prohibited nor restricted by or under the Customs Act, as such, it was not open for the Customs Authorities to withhold clearance thereof."

Ixiii) In view of the aforesaid it is submitted that the captioned SCN deserves to be quashed and set aside.

IN ANY EVENT, THE SCRIP OBTAINED IS VOIDABLE AND NOT VOID

Ixiv) Without prejudice to the aforesaid and assuming without admitting that the subject SEIS scrips were issued based on the illegal documents, the Noticee submit that the Licenses were valid at the time of imports by the Noticee and if at all the same gets revoked, subsequently, the said revocation of the License cannot be retrospective.

Ixv) It is an admitted position that on the date, on which the goods were assessed by the department, the said SEIS scrips were valid and subsisting. The transaction done under the said scrip is voidable and not void.

Ixvi) It is settled law that license which is obtained by fraud or mis-representation of facts is only voidable and not void. It is good in law until it is avoided. Thus, a license which is obtained by fraud or mis-representation is valid in law until such time that it is cancelled by the licensing authority.

Ixvii) Reliance is placed on the decision of the Hon'ble Tribunal, Mumbai reported in *Ineos Abs (India) and others v/s CC Kandla (Tri-Mumbai) 2015-TIOL-2090-CESTAT-MUM*. In this case the Hon'ble Tribunal has specifically held that bonafide

purchasers of Scrips for value without any notice of fraud are not liable for payment of Customs duty for imports under Scrips nor could availment of credit in MEIS scrips be denied and even the confiscation of goods was set aside. The relevant extract is reproduced for reference:

"Appellants being bonafide purchasers of Scrips for value without any notice of fraud, it has to be held that the concept of fraud vitiating everything is not applicable authorities themselves are also responsible to the extent of not having checked the fraud at the time of exports - scrips/ scrips were transferred to the appellant importers who had no knowledge of the misrepresentation by the exporters in obtaining them Bills of Entry were filed by the appellant importers well before the cancellation of scrips, thus imports were made under valid scrips - Therefore, goods could not be subjected to levy of Customs duty for imports under Scrips nor could availment of credit in MEIS scrips be denied confiscation of goods imported by the appellants who are transferees of the scrips/ scrips, demands of duty and interest and penalties set aside & appeals allowed".

lxviii) The facts of the present case is identical/similar to the case of Ineos Abs (India) (supra), hence the ratio of Hon'ble Tribunal squarely applies to the imports undertaken by Noticee. In view of the above, the proposal for confiscation of goods under the captioned SCN against the Noticee is not sustainable.

lxix) Reliance is further placed on the following judgements in order to buttress the aforesaid contention:

- a. Commissioner of Customs v. Leader Valves [2007 (218) E.L.T. 349 (P&H)] maintained by the Hon'ble Apex Court in Commissioner v. Leader Valves Ltd. [2008 (227) E.L.T. A29 (S.C.)];*
- b. Commissioner of Customs, Amritsar v. Vallabh Design Products [2007 (219) E.L.T. 73 (P&H)] maintained by the Hon'ble Apex Court in Commissioner v. Vallabh Design Products [2016 (341) E.L.T. A222 (S.C.)].*
- c. Pee Jay International v. Commissioner of Customs [2016 (340) E.L.T. 625 (P & H)];*
- d. Prayagraj Dyeing & Printing Mills Pvt. Ltd. v. Union of India [2013 (290) E.L.T. 61 (Guj.)];*
- e. Industrial Chem. Manufacturing Co. Ltd. v. C.C. (Import), Nhava Sheva [2015 (317) E.L.T. 262 (Tri. Mumbai)];*
- f. Commissioner of Cus., Amritsar v. Gopi Chand Krishan Kumar Bhatia [2013 (295) E.L.T. 739 (Tri. - Del.)];*

g. Union of India v. Sampat Raj Dugar [1992 (1) TMI 103 SUPREME COURT]

lxxi) In view of the above binding judicial precedents, it is submitted that the imports by the Noticee cannot be considered as void ab-initio and Noticee cannot be liable for the alleged contravention on the part of the Main Noticee and the proceedings against the noticee be dropped at this stage itself.

lxxii) In view of the aforesaid submissions, proceedings initiated vide the captioned SCN under reply deserves to be quashed and it is prayed that the same be quashed.

25.3. M/s Kreedai Exim (Noticee No. 3 in SCN No. SCN F. No. 553/2021-22 Gr.II(A-B) CAC/JNCH dated 15.12.2021 issued by the Dy. Commissioner of Customs, Gr.IIAB, JNCH) filed his reply vide letter dated 10.12.2024 which is reproduced as below:

i) It is submitted that the Noticee is a bonafide transferee of the said SEIS scrip and the Noticee in the instant case has purchased the said SEIS scrip No. 0519142962 dated 01-11-2018 from the open market as detailed in the Show Cause Notice and utilized the same for their import.

ii) It is submitted that the entire SCN revolves around the allegations levelled against the Exporter for mis-declaration and suppression of facts in claiming undue entitlements under MEIS Scheme for which the the notice is not accountable in any manner.

iii) Similarly, Section 110 AA of the Customs Act, 1962 deals with Action subsequent to inquiry, investigation or audit or any other specified purpose it is submitted that no investigation or inquiry or action has been initiated against the Noticee herein. The entire case was against M/s. QA (Exporter) who is alleged to have obtained SEIS Scrips through mis-statement and suppression of facts. Therefore in any event, the said Section 110AA cannot be applied against Noticee.

iv) It is submitted that the goods imported by Noticee are not liable for confiscation under Section 111(m) and 111 (o) of the Customs Act, 1962 and therefore the SCN to the extent adverse to the Noticee is baseless and needs to be dropped forthwith. The relevant provisions of 111 (O) are reproduced below:-

Section 111(o) in The Customs Act, 1962: 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;"

"In this case the decision of the Global Boards is relevant when the imported goods are freely importable, the Noticee has utilized the SEIS Scrip which has been validly issued by the Licensing Authority. The Noticee has not violated any of the conditions of the said SEIS scrip. In this case the decision of the Tribunal is relied upon: In the case of Global Boards Vs Commissioner of Customs, Mumbai (2019) which has made it abundantly clear that the Section 111(o) of the Customs Act, 1962 applies when 'post import conditions' are not fulfilled"

v) It is submitted that the SCN fails to demonstrate any act of omission on the part of importer which would have rendered goods liable for confiscation under section 111(m) & 111 (o) of the Customs Act, 1962.

vi) The aforementioned case is squarely covered by the the Hon'ble Supreme Court in the case of ***Commissioner of Customs Vs. Vallabh Design Products-2016(341) ELT A222(SC)*** upheld the decision of Hon'ble Punjab and Haryana High Court holding "Transferee being bona fide purchaser not liable to duty, penalty or interest. The Hon'ble High Court further held that Confiscation of goods not sustainable if transferee purchased such scrip bona fide.

(Hereto annexed and marked Annexure 'B' is a copy of the said judgement of Hon'ble Supreme Court of India).

vii). In view of the above submission, it is most respectfully submitted that the proposals contained in the said SCN to the extent adverse to the Noticee (M/s. Kreedai Exim) is legally unsustainable and therefore liable to be dropped forthwith.

25.4. M/s Cofco International India Private Limited earlier Known As Noble Natural Resources India Private Limited Noticee No. 3 in SCN F. No. GEN/ADJ/COMM/494/2021-Adjn dated 08.05.2023 submitted their written submission vide letter dated 27.10.2023 which is reproduced as below:

i) The Noticee is a private limited company incorporated and existing under the provisions of the Companies Act, 1956 and is engaged in the business of, interalia, refining of the edible oils. The name of the Noticee has, w.e.f. 10th June 2019, been changed to Cofco International India Pvt. Ltd. Copy of the Certificate of Incorporation after change of Name issued by the Registrar of Companies is attached herewith as ANNEXURE - 2.

ii) The impugned scrips valued at Rs. 40,00,000/- (Rupees Forty Lakhs Only) had been issued to QA INFOTECH and QA INFOTECH had sold the said scrips to one M/s. INDIA EXIM. Thereafter, the impugned scrips had been sold by the said INDIA EXIM to the Noticee at a discount of 1.30% for a total sum of Rs. 39,48,000/- (Rupees Thirty-Nine Lakhs Forty-Eight Thousand only) in respect of which invoice No. DLGST/18-19/080 dated 12-12-2018 had been issued by INDIA EXIM to the Noticee. Copy of Invoice No. DLGST/18-19/080 dated 12-12-2018 is attached herewith as ANNEXURE - 3.

iii) As per the SCN, scrips of a total value of Rs. 40,00,000/- had been issued by the Directorate General of Foreign Trade ('DGFT') to QA INFOTECH and the same were sold by QA INFOTECH to various parties who in turn had sold the same to various importers like the Noticee. As per the SCN, QA INFOTECH had obtained the SEIS licenses under the FTP 2015-2020 even though when they were not providing any of the services notified under Appendix 3D of the FTP 2015-2020.

iv) The Noticee, like the other bonafide importers, utilized these scrips for payment of duty on the goods imported by it in India. Details of the impugned scrips relevant to Noticee are set out hereunder:

Sl. No.	License No.	Date	Transfer Value (INR)	Discount	Consideration paid by Noticee to India Exim (INR)
1	0519142947	01-11-18	5,00,000.00	1.30%	4,93,500.00
2	0519142948	01-11-18	5,00,000.00	1.30%	4,93,500.00
3	0519142949	01-11-18	5,00,000.00	1.30%	4,93,500.00
4	0519142950	01-11-18	5,00,000.00	1.30%	4,93,500.00
5	0519142951	01-11-18	5,00,000.00	1.30%	4,93,500.00
6	0519142952	01-11-18	5,00,000.00	1.30%	4,93,500.00
7	0519142953	01-11-18	5,00,000.00	1.30%	4,93,500.00
8	0519142954	01-11-18	5,00,000.00	1.30%	4,93,500.00
			40,00,000.00		39,48,000.00

v) The impugned scrips were utilized by the Noticee to pay customs duty on the import of the impugned goods imported vide the Bill of Entry Nos. 9500691 dated 02-01-2019 ("impugned BOEs") by availing the benefit under Notification 24/2015 details whereof are as follows:

Sl. No	Bill of Entry No. & Date	SEIS Scrip/License No. utilized
	9500691 dated 02-01-2019	0519142947
	9500691 dated 02-01-2019	0519142948
	9500691 dated 02-01-2019	0519142949
	9500691 dated 02-01-2019	0519142950
	9500691 dated 02-01-2019	0519142951
	9500691 dated 02-01-2019	0519142952
	9500691 dated 02-01-2019	0519142953
	9500691 dated 02-01-2019	0519142954

Copy of the Bill of Entry No. 9500691 dated 02-01-2019 is attached herewith as ANNEXURE-4.

vi) Thus, the impugned scrips were originally issued by DGFT to QA INFOTECH and QA INFOTECH had in turn sold the same to M/s. INDIA EXIM who in turn had sold the same to the Noticee who had utilized the same while importing certain goods under bonafide belief.

vii) The SCN had been issued to QA INFOTECH alleging that it had wrongly claimed the benefit under the SEIS by deliberate misclassification.

viii) The SCN has also been issued to the Noticee proposing to confiscate the impugned goods imported by the Noticee by utilizing the impugned scrips which have been alleged to be fraudulently obtained by QA INFOTECH. The Noticee has been asked to show cause as to why the impugned goods should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962.

ix) The Noticee, at the very outset, denies all the allegations made in the SCN against it and submits that the SCN is liable to be dropped against it, interalia, on the following grounds, which are without prejudice to one another:

GROUND/LEGAL OBJECTIONS

THE SCN IS VAGUE, PERVERSE AND IN VIOLATION OF THE PRINCIPLES OF NATURAL JUSTICE

x) It is submitted that the SCN is vague, without reasons and violative of the principles of natural justice, as it does not provide any explanation/ reasons or supporting evidence for invoking provisions of confiscation for the impugned goods imported by the Noticee.

xi) It is submitted that no allegations whatsoever have been made in the SCN discussing the role of the Noticee in the alleged fraudulent availment of the impugned scrips by QA INFOTECH from the DGFT. Furthermore, the SCN does not even mention as to how the impugned goods have been rendered liable for confiscation under Section 111(0) of the Customs Act by the Noticee. Therefore, in absence of details regarding the same, the SCN is liable to be dropped against the Noticee on this ground alone. Reliance in this regard is placed on the case of Commissioner of C. Ex., Bangalore vs. Brindavan Beverages (P) Ltd., 2007 (6) TMI 4 - SUPREME COURT, wherein the Hon'ble Supreme Court observed that a show cause notice is the foundation on which the Department has to build up its case and if the allegations in the show cause notice are not specific and on the contrary are vague and lack details, it would be sufficient to hold that the Noticee was not given proper opportunity to meet the allegations. Further, reliance is also placed on the decision of the Hon'ble Bombay High Court in the case of Rajmal Lakhichand v. Commissioner of Customs, Aurangabad, 2010 (255) E.L.T. 357 (Bom.), affirmed by Supreme Court in 2011 (269) ELT 438, wherein it was observed that a show cause notice must be clear, specific and unambiguous and the changes should not be vague and uncertain. The object of notice is to give an opportunity to the person concerned, to present his case. Natural justice requires that the person directly affected by the proposed acts, decisions or proceedings be given adequate notice of what is proposed, so that he may be in a position to make representation on his own behalf, or to appear at the hearing or inquiry (if any), and effectively represent his own case and answer the case he has to meet. Besides the above, reliance is also placed on Amrit Foods vs. CCE, 2005 (190) ELT 433 (SC); Kaur & Singh vs. Collector of Central Excise, New Delhi, 1997 (94) E.L.T. 289 (S.C.); Royal Oil Field P. Ltd. vs. Union of India, 2006 (194) ELT 385 (Bom.); Oryx Fisheries (P) Ltd. vs. Union of India, (2010) 13 SCC 42; Batra Hospital & Medical Research Centre vs. Commissioner of Customs, New Delhi, 2012-TIOL-683-CESTAT-DEL; The PR Commissioner of Income Tax-I, Visakhapatnam vs. Smt. Baisetty Revathi, 2017-TIOL-1403-HC-AP-IT.

xii) It is submitted that before confiscating any goods, a show cause notice under Section 124 of the Customs Act must be issued to the owner of goods or such person, informing him of the grounds on which the goods are proposed to be confiscated. Section 124 of the Customs Act, 1962 mandates that no order confiscating any goods shall be made under Chapter XIV, unless the owner of the goods or such person is given a notice in writing, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty. In the instant case, the SCN proposes to confiscate the impugned goods under Sections 111 (m) and/or 111(0)

of the Customs Act and impose penalty under Section 112(a) of the Customs Act. Section 111 and Section 124 fall in the same chapter under the Customs Act, namely, Chapter XIV-Confiscation of Goods and Conveyances and Imposition of Penalties.

xiii) It is submitted that Section 124 of the Customs Act specifically provides for the following:

- i. Issuance of a show cause notice containing grounds for taking action,
- ii. For giving of an opportunity of making representation in writing in such reasonable time against the grounds mentioned in the show cause notice, and
- iii. For giving an opportunity of being heard in the matter.

It is submitted that the above three requirements are the real embodiment of the well-known principle of *audi alteram partem*. The fulfilment of these requirements of natural justice has been statutorily provided under Section 124 of the Customs Act. However, in the present case, the Ld. Pr. Comm. has not issued the instant SCN to the Noticee under Section 124 of the Customs Act.

xiv) Further, no ground or justification has been provided in the SCN for proposing to confiscate the impugned goods imported by the Noticee. The SCN merely refers the provisions of sections 111 (m) and/or 111(0) and proposes to confiscate the impugned goods under these provisions. However, Section 124(a) requires that a show cause notice must communicate the grounds for confiscating the goods. Merely citing provisions of confiscation and penalty in the show cause notice, cannot be equated to providing grounds based on which the proposals have been made in the SCN.

xv) It has been held in a catena of cases that a show cause notice must contain grounds for confiscation of goods. Reliance in this regard is placed on the case of VJA Glynn vs. Union of India, 2003 (159) ELT 92 (Del.), wherein it was held that what is required under Section 124 of the Customs Act is that before confiscating any goods, a show cause notice in writing should be issued to the Noticee informing him of the grounds on which the goods are proposed to be confiscated, meaning thereby that there should be sufficient material before the adjudicating authority which gives grounds for the proposed action. It is submitted that VJA Glynn (supra) has been maintained by the Hon'ble Supreme Court in the case of VJA Flynn vs. Union of India, 2004 (163) ELT A59 (SC). Further, review petition filed in the above matter was also dismissed by the Hon'ble Supreme Court in the case of VJA Flynn vs. Union of India, 2004 (167) ELT A177 (SC).

xvi) It is submitted that in the present case, the SCN does not even discuss or mention the role of the Noticee in the entire transaction and further fails to discuss any allegations in respect of the impugned goods imported by the Noticee. The SCN, thus, fails to provide the Noticee with the opportunity to defend its case. Therefore, the SCN is liable to be dropped for being vague, without reasons and has been issued in violation of the principle of natural justice.

xvii) It is submitted that although the SCN invokes the provisions of Sections 111 (m) and/or 111(O) as regards the impugned goods but it has been issued under section 28AAA of the Customs Act 1962 which provision is not applicable to the Noticee as the impugned scrips have been obtained by QA Infotech and not by the Noticee.

xviii) It is submitted that it is a well-established principle that a show cause notice ought to be issued under a specific provision of law, as has also been held by the Hon'ble Supreme Court in the case of Metal Forgings vs. Union of India, 2002 (146) ELT (241) (SC). Relevant portion of this judgment is extracted below for ready reference:

"10... This is because of the fact that issuance of a show cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand...

(Emphasis supplied)

THE NOTICEE HAS ALWAYS BEEN UNDER THE BONAFIDE BELIEF THAT THE IMPUGNED SCRIPS WERE VALIDLY ISSUED BY THE DGFT

xix) It is submitted that the Noticee had always been under the bona fide belief that the impugned scrips had been validly issued by the DGFT to QA INFOTECH only after duly verifying its application for grant of the scrips. Further, it is also submitted that the Noticee had no means to verify whether the services exported in relation to the issued impugned scrips had not been properly exported by QA INFOTECH by adopting incorrect classification. Further, it was practically impossible for the Noticee to verify the correctness of the declarations provided by QA INFOTECH to the DGFT in order to avail benefit under the SEIS Scheme.

xx) It is submitted that the Noticee was under a bona fide belief that all the aspects related to the eligibility for benefit under the SEIS Scheme had been duly examined by the DGFT, pursuant to which the impugned scrip was issued to QA INFOTECH.

The Noticee is a bona fide purchaser of the impugned scrips who had no notice of the alleged fraud committed by the exporter. It is also to be noted that none of the statements/documents relied upon in the SCN indicate any role of the Noticee in procurement of the impugned scrips which are alleged to be fraudulent.

xxi) It is submitted that the Noticee had undertaken reasonable care and diligence as is expected by a prudent person before procuring the impugned scrips. It is further submitted that the impugned scrips were bought by the Noticee from INDIA EXIM under the agreed terms of which, it was the responsibility of INDIA EXIM to ensure that the impugned scrips had been validly issued by the DGFT to QA INFOTECH i.e. the exporter.

xxii) It is submitted that at the time of import of the impugned goods, the impugned scrips were valid and had not been cancelled by the DGFT. Had the impugned scrips not been valid, the impugned goods would not have been allowed clearance for home consumption. It is submitted that the Noticee did not have any reason to believe that the impugned scrips were not validly issued.

xxiii) Assuming without conceding that the impugned scrips issued to QA INFOTECH were obtained by them fraudulently, it is submitted that the impugned goods imported by the Noticee shall not be liable to confiscation due to the following submissions:

a. Generally, there is a finality attached to every transaction - whether under a contract or otherwise. But the general principle fraud vitiates everything' affects the finality attached to a transaction.

b. However, such a transaction is voidable at the option of the person on whom fraud is committed. In other words, the person on whom fraud is committed, has the option of treating the transaction as binding or to repudiate the same.

c. It is pertinent to note that the DGFT had not exercised its right to treat the impugned scrips voidable when the impugned goods were cleared for home consumption. The impugned scrips were legally valid when the Noticee utilised it for import of the impugned goods. It is submitted that subsequent cancellation of the impugned scrips is inconsequential as at the time of import, the impugned scrips were valid and in operation. In this regard, the Noticee relies on the following cases:

i. ***CC vs. Leader Valves Ltd., 2007 (218) ELT 349 (P&H), maintained by the Hon'ble Supreme Court in 2008 (227) ELT A29 (SC);***

ii Binani Cement Ltd. vs. CC, Kandla, 2010 (259) ELT 247 (Tri-Ahmd.);

CC, Amritsar vs. Vallabh Design Products, 2016 (341) ELT A222(SC);

iv. DCW Ltd. vs. CC, Tuticorin, 2009 (241) ELT 421 (Tri.-Chen.);

V. Ram Pamnani vs. CC, Mumbai, 2003 (162) ELT 536 (Tri-Mum.);

vi. Indian Acrylics Ltd. vs. CC, Kandla, 2015 (325) ELT 753 (Tri.-Ahmd.) affirmed by Hon'ble High Court of Gujarat in 2016 (336) ELT 474 (Guj.)

vii. M/S. TVS Motor Company Ltd. Versus Cc (Port-Export), Chennai, 2018 (1) TMI 775 - CESTAT Chennai.

xxiv) It is a well-established general legal principle that one cannot give what he does not have. However, there are exceptions to this principle. This general principle and the exception thereto are provided under Section 29 of the Sale of Goods Act, 1930 (hereinafter referred to as the "Sale of Goods Act"). Section 29 of the Sale of Goods Act reads as under:

"29. Sale by person in possession under voidable contract. When the seller of goods has obtained possession thereof under a contract voidable under section 19 or section 19A of the Indian Contract Act, 1872 (9 of 1872), but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

The principle contained in Section 29 of the Sale of Goods Act will apply to the present case since the impugned scrips, which are in the form of licenses, are goods and subject to tax when the licences are bought and sold. It is submitted that the principle enunciated in Section 29 of the Sale of Goods Act has been applied by the Hon'ble Supreme Court in the case of Ningawwa vs. Byrappa Shiddappa Hireknrabar, 1968 (2) SCR 797. It was held in that case that there is a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable.

Similarly, in the present case, the Noticee had no means to verify the validity of the impugned scrips and had purchased the same only under the bona fide belief that the same were valid and subsisting. In view of the above submissions, it is submitted that the Noticee, i.e. the importer of the impugned goods has attained a good title to the impugned scrips and the same cannot be held to be invalid in the hands of the Noticee, who is a bona fide purchaser of the licence.

xxv) The present issue is squarely covered by the judgment of the Hon'ble High Court of Bombay in Taparia Overseas (P) Ltd. vs. Union of India, 2003 (161) ELT 47 (Bom). After referring to various decisions and the book titled 'Keer on Law of Fraud and Mistake', the Hon'ble High Court held as under:

"36. ... It is thus no doubt true that as a general rule, if a transaction has been originally founded on fraud, the original vice will continue to taint it, and not only is the person who has committed fraud is precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has been some consideration moving from himself. In the cases at hand, it is not in dispute that all the petitioners had obtained licences for valuable consideration without any notice of the fraud alleged to have been committed by the original licence holders while obtaining licences. If that be so, the concept that fraud vitiates everything would not be applicable to the cases where the transaction of transfer of licence is for value without notice arising out of mercantile transactions, governed by common law and not by provisions of any statute.

(Emphasis supplied)

The case of Taparia Overseas Pvt. Ltd. (supra) has been maintained by the Hon'ble Supreme Court in various cases and has also been followed by various Hon'ble High Courts in cases decided from time to time. It is submitted that the facts of the cases mentioned above are similar to the facts in the present case. Therefore, the ratio laid down in the aforesaid judgments is squarely applicable to the facts of the present case as well. It has been consistently held that cases covering similar facts must be decided by the subordinate court/jurisdictional authority by following the ratio already laid down by a court of higher jurisdiction.

xxvi) The principle of judicial discipline has been elaborated by the Apex Court in the case of Union of India vs. Kamlaakshi Finance Corporation Ltd., 1991 (55) ELT 433 (S.C.) wherein it was held that the decision of appellate authorities should be followed by the subordinate authorities. Relevant extract from this judgment is as under:

"6. ... The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws."

xxvii) Similarly, in the case of Commissioner of Income Tax, Bhopal vs. Ralson Industries Ltd., (2007) 2 SCC 126, the Hon'ble Supreme Court has again held that when an order is passed by a higher authority, the lower authority is bound by it keeping in view the principles of judicial discipline. It is submitted that the principle of judicial discipline ought to be followed in the present case and the SCN must be dropped against the Noticee in view of the Hon'ble High Court of Bombay's judgment in Taparia Overseas (supra), which has been maintained by the Hon'ble Supreme Court in various judgments.

xxviii) The Government of India, of which the Customs Department is only a wing, has framed the Foreign Trade Policy under which the duty credit scrips are issued against export performance under the SEIS Scheme. These duty credit scrips are freely transferable and the Government has introduced procedures which facilitate trading in such scrips. The policy of the Government is to allow importers to purchase these scrips from the market and use them to pay duty against imported goods. In order to prevent fraud and ensure that this benefit is given only against actual export performance, the method of verification and utilization by the Customs Department before such scrips are used for import was introduced. Detailed procedures have been laid down and have been publicized as is mentioned in the following submissions. The said procedures have also contributed to easy marketability of the scrips as the intending importers are assured of the authenticity of the scrips. As per Para 3.02 of the FTP 2015-2020, the duty credit scrips and goods imported/domestically procured against the said scrips shall be freely transferable. The sale and purchase of scrips granted under the SEIS scheme are not subject to any conditions. This is very much evident from a bare perusal of the said provision. The relevant portion of Para 3.02 of the FTP 2015-2020 is extracted below for ease of reference:

"3.02 Nature of Rewards

Duty Credit Scrips shall be granted as rewards under MEIS and SEIS. The Duty Credit Scrips and goods imported/domestically procured against them shall be freely transferable. The Duty Credit Scrips can be used for:

(i) Payment of Customs Duties for import of inputs or goods, including capital goods, as per DOR notification, except items listed in Appendix 3A.

xxix) The Noticee places reliance on the Trade Notice No. 42/2015-2020 dated 11.01.2019 (hereinafter referred to as "TN 42") and Trade Notice No. 03/2015-2020 dated 03.04.2019 (hereinafter referred to as "TN 3"). TN 42 read with TN 3 provides for detailed procedure for recording of transfer of MEIS and SEIS scrips as per which

the information about the new owner of such scrip has to be recorded on the DGFT website by the current owner (transferor), before the new owner (transferee) can utilize the scrip. Unless recorded on the DGFT website, the new owner (transferee) will not be able to utilize the scrip for duty payment. For preventing frauds, this procedure of recording transfer of scrips by the DGFT and verification by the Customs Department has been introduced by the Government.

xxx) It is submitted that the Noticee, being the transferee of the impugned scrips, has duly complied with all the procedures in this regard. The ownership of the impugned scrips was transferred in the name of the Noticee as was evident from the website of the DGFT even at the time of clearance of the impugned goods for home consumption. Further, the Noticee had paid the consideration for the purchase of the impugned scrips.

xxxi) Undisputedly, in the present case, the Noticee purchased the impugned scrips from the market after being satisfied that the impugned scrips were valid and had been duly issued to QA INFOTECH. Further, the impugned scrips were utilized to pay the customs duty at the time of clearance of the impugned goods for home consumption. It is submitted that the impugned scrips had neither been cancelled nor suspended at the time of clearance of the impugned goods. The confidence of the Noticee in the validity of the impugned scrips were borne out by subsequent clearance of the impugned goods by the Customs Department without any dispute in respect of payment of customs duty through the impugned scrips.

xxxii) It is submitted that the process of utilization of the impugned scrips is a clear representation by the Custom Department and is a promise. In light of these events, the law requires that the Customs Department be estopped from changing their position after the Noticee has acted on the basis of their previous position. The Noticee went by the definite representation of verification and utilization of the impugned scrips as also the actual act of clearance. Having already represented in the abovementioned manner, the Customs Department now seeks to change its position, but the Noticee has already suffered prejudice sufficient to constitute an estoppel against the Customs Department.

DEPARTMENT CANNOT SIT IN JUDGMENT OVER THE DECISION OF DGFT TO GRANT BENEFITS UNDER THE FTP

xxxiii) The Noticee submits that as long as the impugned scrips are valid and have not been cancelled by DGFT which is the competent authority, the Customs Department cannot challenge the validity of the same vide proceedings initiated under the SCN. In the present case, by alleging that QA INFOTECH had obtained

the impugned scrips fraudulently, the Department has effectively endeavoured to sit in judgment on the grant of the impugned scrips by the DGFT and utilization of the same by the Noticee. The Department is thus clearly exceeding its jurisdiction in the present case. It has been held in a catena of cases that when the licensing authority has not cancelled the license, the license remains legally valid and in case the Department finds any fraud, the correct course of action is for the Department to inform the licensing authority. The Noticee relies on the landmark case of *Titan Medical Systems Pvt. Ltd. vs. Collector of Customs, New Delhi, 2003 (151) ELT 254 (SC)*. In that case, the adjudicating authority as well as the Hon'ble Tribunal had held that the appellant had obtained advance license by misrepresentation. While setting aside the order of the Hon'ble Tribunal, the Hon'ble Supreme Court held as under:

"13. As regards the contention that the appellants were not entitled to the benefit of the exemption notification as they had misrepresented to the licensing authority, it was fairly admitted that there was no requirement, for issuance of a licence, that an applicant set out the quantity or value of the indigenous components which would be used in the manufacture. Undoubtedly, while applying for a licence, the appellants set out the components they would use and their value. However, the value was only an estimate. It is not the respondents' case that the components were not used. The only case is that the value which had been indicated in the application was very large whereas what was actually spent was a paltry amount. To be noted that the licensing authority having taken no steps to cancel the licence. The licensing authority have not claimed that there was any misrepresentation. Once an advance licence was issued and not questioned by the licensing authority, the Customs authorities cannot refuse exemption on an allegation that there was misrepresentation. If there was any misrepresentation, it was for the licensing authority to take steps in that behalf.

14. We are, therefore, unable to uphold the impugned order or the order of the Collector. Accordingly, the same are set aside. The show cause notice shall stand dismissed.

15. The civil appeals are, accordingly, allowed. There shall be no order as to costs,"

(Emphasis supplied)

xxxiv) Reliance is placed on the recent judgment of the larger Bench of the CESTAT in the case of *VRL Logistics Ltd. vs. Commissioner of Customs, Ahmedabad, 2022 (8) TMI 720 - CESTAT Ahmedabad (LB)* wherein the issue stands decided in favour of importers-assessee inter alia on the ground that Customs Authorities can take action on the basis of the undertaking submitted by the importers only when the

authority under the Civil Aviation Ministry holds that the conditions have been violated.

Relevant portion of the judgment is extracted below for ease of reference:

"Whether the customs authorities have the jurisdiction to decide violation of the exemption notification

91. A perusal of the exemption notification clearly shows that it merely requires the conditions set out by the DGCA and the conditions imposed by the Civil Aviation Ministry be complied with for the operations of the non-scheduled operators. It, therefore, follows that it should be the jurisdictional authorities under the Civil Aviation Ministry which alone can monitor the compliance. As stated above initially by exemption notification dated 01.03.2007, entry no. 346B and Condition No. 101 was introduced in the exemption notification dated 01.03.2002 whereby the effective rate of duty on import of aircraft for scheduled air transport service was made 'nil'. As no exemption was granted to non-scheduled air transport service and private category aircraft, the Ministry of Civil Aviation made a strong representation for granting exemption for non-scheduled (passenger) service and non-scheduled (charter) services under conditions to be specified and recommended by the Civil Aviation Ministry. It is for this reason, as would be apparent from the statement made by the Hon'ble Finance Minister in the Parliament, that the exemption notification dated 03.05.2007 was issued granting 'nil' rate of duty on import of aircraft for non-scheduled (passenger) service as well as non-scheduled (charter) services subject to Condition No. 104.

92. The alleged misuse of the aircraft, as suggested by the customs authority, has repeatedly been clarified by DGCA and the Civil Aviation Requirements relating to non-scheduled (passenger) services. It is the DGCA which is empowered to issue the Civil Aviation Requirements under rule 133A of the Aircraft Rules. The DGCA has not complained of any violation by the non-scheduled (passenger) services operator and in fact has been renewing the permits from time to time. It is only when the competent authority under the Director General of Civil Aviation Ministry finds as a fact that the permit holders have violated the conditions that it would be open to the customs authorities, in terms of the undertaking given by the permit holders, to require payment of the duty, which otherwise was exempted by the notification.

99. It, therefore, follows that it is the jurisdictional authorities under the Civil Aviation Ministry that alone can monitor the compliance of the conditions imposed and the Customs Authorities can take action on the basis of the undertaking submitted by the importer only when the authority under the Civil Aviation Ministry holds that the conditions have been violated.

(Emphasis Supplied)

xxxv) Relying on VRL Logistics supra, the Hon'ble CESTAT, New Delhi has also passed a judgment in the case of Reliance Commercial Dealers Ltd. vs. Commissioner of Customs, (Preventive), New Customs House, Delhi, 2022 (9) TMI 807-Cestat New Delhi on the same lines. The above ratio has been followed consistently in numerous cases:

- i. *Marmo Classic vs. Commissioner of Customs [2002 (143) ELT 153 (Tri-Mumbai)], maintained by the Hon'ble Supreme Court in 2003 (152) ELT A85 (SC);*
- ii. *Kobian ECS India Pvt. Ltd. vs. Commissioner of Customs, Mumbai, 2003 (157) ELT 662 (Tri.-Mumbai);*
- Tata Iron & Steel Co. Ltd. vs. CC, Visakhapatnam, 2004 (177) ELT 1004 (Tri-Bang);*
- iv. *Alphonse Joseph vs. Commissioner of Excise & Customs, Bangalore, 2006 (204) ELT 487 (Tri-Bang);*
- V. *United Phosphorous Ltd. vs. CC (Prev.), Mumbai, 2009 (240) ELT 94 (Tri.-Mumbai);*
- vi. *Blue Water Foods & Exports Pvt. Ltd. vs. Commissioner of Customs (Cochin), 2010 (251) ELT 305 (Tri-Bang); and*
- vii. *FNS Agro Foods Ltd. vs. CC (Preventive), Delhi, 2016 (337) ELT 31 (Del.).*

xxxvi) Thus, if the Customs Department had any doubt regarding the impugned scrips utilized by the Noticee, the correct course would have been to take up the matter with the DGFT. Had the DGFT found any irregularity with the impugned scrips, the DGFT could have taken appropriate action under the Foreign Trade (Development & Regulation) Act, 1992. However, in the present case, where the DGFT has not initiated any action in respect of the impugned scrips, the same ought to be regarded as legally valid and the Customs Department cannot sit in judgment over the impugned scrips and propose to confiscate the impugned goods imported on the strength of the impugned scrips. Therefore, the SCN to the extent it holds the impugned goods imported by the Noticee liable for confiscation, is liable to be dropped.

THE IMPUGNED GOODS IMPORTED BY THE NOTICEE ARE NOT LIABLE FOR CONFISCATION UNDER SECTIONS 111 (m) AND/OR 111(0) OF THE CUSTOMS ACT

xxxvii) The Noticee humbly submits that the impugned goods are not liable for confiscation under Sections 111 (m) and/or 111(o) of the Customs Act due to the following reasons as there are no allegations or reasons elaborated in the SCN as to why the impugned goods imported by the Noticee are liable for confiscation. Further, the SCN is silent as to how the impugned goods imported by the Noticee, being a bona fide purchaser of the impugned scrips, are liable for confiscation, therefore, the SCN, on this ground alone, is liable to be dropped.

xxxviii) The SCN has proposed to confiscate the impugned goods under Sections 111 (m) and/or 111(o) of the Customs Act. Section 111(o) of the Customs Act is applied in cases of violation of conditions which are to be complied with after the goods are cleared. In simple words, when any post import condition stipulated in an exemption notification is not observed, the goods imported claiming that exemption notification become liable to confiscation under Section 111(o) of the Customs Act. In the present case, there has been no violation of any condition of the Notification 24/2015. The SCN is also silent on this aspect as to which post-importation conditions have been allegedly violated by the Noticee. The impugned goods have been validly imported and all the conditions mentioned under the said notification have been duly complied with. The impugned scrips were registered at the port of registration and validly transferred to the Noticee on payment of consideration amount. Further, the impugned scrips were produced before the Customs Department at the time of clearance of the impugned goods and the duties liable to be paid were debited from the balance of the impugned scrips. The same were allowed to be utilized by the Customs Department.

xxxix) It is submitted that Section 111 of the Customs Act provides for liability for confiscation of "improperly imported goods". It is submitted that only "imported goods" can be confiscated under Section 111 of the Customs Act. Section 2(25) of the Customs Act defines the imported goods as under:

"(25) "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption."

In the case of Bussa Overseas & Properties P. Ltd. vs. Assistant Commissioner of Customs, Bombay, 2004 (163) ELT 304 (Bom.), the Hon'ble High Court of Bombay has held that once the goods are cleared for home consumption, they cease to be imported goods as defined in Section 2(25) of the Customs Act and consequently are

not liable to confiscation under Section 111 of the Customs Act. The Hon'ble High Court held as under:

"7.... The learned counsel urged that once the goods are cleared for home consumption, then the goods covered by the consignments cease to be imported goods in accordance with the definition of expression 'imported goods' under Section 2 of the Act and consequently such goods are not liable for confiscation. There is considerable merit in the submission of the learned counsel. The goods lose its character of imported goods on being granted clearance for home consumption and thereafter the power to confiscate can be exercised only in cases where the order of clearance is revised and cancelled..."

(Emphasis supplied)

- xli)** The above cited decision was maintained by the Hon'ble Supreme Court in the case of Asst. Collector vs. Bussa Overseas and Properties Pvt. Ltd., 2004 (163) ELT A160. In view of the above, the Noticee submits that the impugned goods are not liable for confiscation under the provisions of Section 111(o) of the Customs Act as the same have already been cleared for home consumption and do not come within the ambit of the term "imported goods".
- xlii)** Reliance is also placed on the case of Porcelain Crafts and Components Exim Ltd. vs. CC, Calcutta, 2001 (198) ELT 471, wherein it was observed that confiscation of the goods can be ordered only when there is a positive evidence to prove mala fide on the part of the importer and therefore, it was held that the order of confiscation and redemption fine in lieu thereof cannot sustain.
- xliii)** Since in the present case, the impugned scrip was valid on the date of clearance of the impugned goods and had not been cancelled or suspended by the DGFT, the impugned goods cannot be said to be "improperly imported" by the Noticee in terms of Sections 111 (m) and 111(o) of the Customs Act. In view of the above submissions, the Noticee submits that the proposals for confiscation of the impugned goods under Sections 111 (m) and 111(o) of the Customs Act are not sustainable and ought to be dropped forthwith.
- xliii)** In view of the above settled position of law it is prayed that
i. drop the proceedings initiated against the Noticee vide Show Cause Notice dated 8th May 2023 (received on 27th September 2023) DIN: 2023057IMO00003833F1
Re: QA Infotech Pvt. Ltd. and discharge it forthwith;

ii. drop the proposal for confiscation of goods imported vide impugned BoEs under Sections 111 (m) and 111(0) of the Customs Act, 1962;

25.4. Further, from the available records, I find that Noticee No 4 i.e. M/s Kundan Care Products Ltd. Haridwar, Uttrakhand-249403 and Noticee No 5, i.e. M/s Sovereign Metals Ltd, GIDC Phase-III, Naroda Ahmedabad-382330 did not file any reply to SCN F. No. GEN/ADJ/COMM/494/2021-Adjn dated 08.05.2023.

26. RECORD OF PERSONAL HEARING:

26.1. I observe that 'Audi alteram partem', is an important principle of natural justice that dictates to hear the other side before passing any order. Therefore, ample opportunities of personal hearing in the matter was granted to all the noticees for all three SCNs i.e. SCN No. **GEN/ADJ/COMM/494/2021-Adjn dated 08.05.2023, SCN No. **553/2021-22 Gr.II(AB)/JNCH dated 15.12.2021** and SCN F. No. **GEN/ADJ/COMM/494/2021-Adjn dated 01.02.2022**. Details of the PH are as under:**

26.2 On 27.09.2024, authorised representative of M/s Noble Natural Resources India Pvt Ltd appeared before me. They have reiterated the written submission dated 27.10.2023. Further, they have added in their submission the following points:

- (i) That they are the only bona fide purchaser of scrips. The Scrips were valid at the time of filing BE and goods were cleared. There were no other means by which they could have verified that the classification of goods by M/s QA Infotech was correct or not.
- (ii) That the authority can confiscate only imported goods but when they have filed BE for home consumption and goods were already cleared Hence, goods can't be confiscated.
- (iii) Scrips are issued by the DGFT as DGFT is the issuing authority, but how can be actions taken by the Customs. How can they be involve in this?
- (iv) Confiscation of goods can be done under Section 124 of Customs Act, However, the particular SCN was issued under Section 28(AAA).

26.3 On 13.11.2024 Noticee Shri Dhruvan Mehta and Shri Samarth Bajaj, the authorised representative of M/s Adani Wilmar Limited, attended personal hearing wherein they have reiterated their written submission dated 05.03.2022. Further,

they have submitted that the transaction was a bonafide transaction with M/s QA Infotech, they are the purchaser of scrips through third party broker. They have made the necessary payments against the invoices. They have provided copy of payment related to third party, therefore, they are not related to M/s QA Infotech. The allegation made against them does not hold good and liable to be dropped. They have requested to allow them to submit additional reply within a week. Vide additional submission dated 10.11.2024, Noticee submitted several Orders issued by various Customs Commissionerate in their favour.

26.4 Following Noticees attended personal Hearing on 17.12.2024:

- a)** M/s Kreedai Exim, through its authorized representative Mrs Soumiya Ail (Advocate), appeared in the personal hearing. In personal hearing they have reiterated the written submission dated 17.12.2024.
- b)** M/s QA Intotech through its authorized representative Shri Rajesh Kumar Yadav, Advocate, appeared in the personal hearing. In personal hearing, they have stated that they have exported Technical Testing and Analysis Services' and claimed the export benefit under SEIS scheme. The Department has denied the export benefit claimed by them stating that the services exported were not covered under CTH 8676 of the Appendix 3 D of the related DGFT Public Notice No. 3/2015-20 dated 01.04.2015 as it relates to services of different nature i.e relation to product, that is in relation to material etc.. It was pleaded by him the services exported by them covered under the notified SEIS scheme under CPC 8676 because only four-digit level matching is required, if 4-digit matching is matched, then this is covered as other Technical and Analysis Services, it should be covered there and that CPC 8676 has nowhere restricted its scope, so as to exclude the Technical testing and Analysis services relating to IT Sector. So therefore, they are fully covered. He further pleaded that there may be some mistakes in mentioning the description of subject service in other documents. There may be some variation in the description but matter of fact remains that what they had exported was Technical Analysis Services and as such the same is covered within the scope of CPC 8676 and therefore eligible for SEIS Scheme benefit. Further, they have requested to give them 2-3 days' time to submit their written submission.

27. DISCUSSION AND FINDINGS

27.1 After having carefully gone through all three Show Cause Notices i.e. **GEN/ADJ/COMM/494/2021-Adjn** dated **08.05.2023**, SCN No. **553/2021-22** **Gr.II(AB)/JNCH** dated **15.12.2021** and SCN **GEN/ADJ/COMM/494/2021-Adjn**

dated 01.02.2022, relied upon documents, submissions made by the Noticees 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 whether:

- (i) The duty payable amount aggregating to **Rs. 3,03,100,32/-** (Rupees Three Crore Three Lakh Ten Thousand Thirty Two Only), relatable to utilisation of cancelled instruments (SEIS Scrips), utilised by person/s other than the person to whom the instruments (SEIS Scrips) were issued, as detailed in three SCNs, is liable to be demanded and recovered from them under Section 28AAA of the Customs Act, 1962 along with interest in terms of Section 28AA of the Customs Act, 1962.
- (ii) The goods totally valued at **Rs. 58,31,93,513/-** (Rupees Fifty Eight Crore Thirty One Lakh Ninety Three Thousand Five Hundred and Thirteen Only), as mentioned in three SCN's and imported by different Importers wrongly availing duty exemption under Notification No. 25/2015-Customs dated 08/04/2015 as amended, is liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962.
- (iii) M/s QA Infotech is liable to be penalized under the provisions of Section 112(a), 114AA and 114AB of the Customs Act, 1962.
- (iv) Shree Mukesh Sharma, CEO M/s QA Infotech Pvt Ltd is liable to be penalised under Section 112(a) and 114AA of the Customs Act, 1962.
- (v) The amount already paid by them amounting to **Rs. 3,03,11,734/-** (Rupees **Three Crore Three Lakh Eleven Thousand Seven Hundred and Thirty-Four Only**) is liable to be adjusted and appropriated against the amount due to be recovered from them;

27.2 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 as to whether M/s QA Infotech had obtained the SEIS Scrips fraudulently through mis-declaration of their exported services in ANF-3B Form.

27.3 I find that on the basis of specific information, it was known that M/s QA Infotech Pvt Ltd had obtained SEIS Scrips though they were not providing any of the services notified under Appendix 3D of Foreign Trade Policy (FTP), 2015-20. It is

pertinent to mention here that SEIS is granted for the services notified under Appendix 3D of Foreign Trade Policy 2015-20. It came to the Notice that M/s QA Infotech were providing services classifiable under Division 84 of UN Central Product Classification Code which are not included in Appendix 3D. Hence, for the services provided by M/s QA Infotech Private Limited, no reward under SEIS scheme is admissible.

27.4 I find that M/s QA Infotech have mentioned the description of services in the application submitted to DGFT for SEIS scheme as "Other Business Services (Technical Testing and Analysis Services)" however on export invoices they mentioned their Service Accounting Code as "998313"- Information Technology consulting and support service".

27.5 I find that Shri Hemmanshu Seth, Assistant Vice President, M/s QA Infotech in his statement recorded under Section 108 of the Customs Act, 1962 stated that that all the services exported by their company M/s. QA viz. software testing services are classifiable under CPC Division 84.

27.6 I find that Shri Rajesh Sharma, authorised signatory and Director of M/s QA Infotech in his statement recorded on 30.05.2019 under section 108 of the Customs Act, 1962 interalia admitted that as per the Trade Notice No. 04/2018 dated 25.04.2018 M/s. QA, Noida is not eligible for availing SEIS benefits for all software services exported by them which fall under Division 84 of CPC Code list i.e. "Computer and related service" as these services are not notified in Annexure to Appendix 3D for SEIS. Shri Rajesh Sharma accepted and admitted that M/s. QA Infotech Pvt. Ltd., Noida has wrongly mentioned the description of services as "1 De -Other business services (Technical Testing and Analysis Service) 8676" in application filed before DGFT to fraudulently avail duty scrips under SEIS Scheme and wrongly obtained 42 duty scrips amounting to **Rs. 3,03,11,734.21/-** from DGFT under SEIS.

27.7 Further, in his statement dated 27.11.2019 recorded under section 108 of the Customs Act, 1962 Shri Mukesh Sharma, Chief Executive Officer of M/s QA Infotech stated that they have wrongly mentioned the description of services as "Other business services (Technical Testing and Analysis Service) 8676" in application filed before DGFT to avail duty scrips under SEIS Scheme and wrongly obtained 42 duty scrips amounting to Rs. 3,03,11,734.21/- from DGFT under SEIS. He also stated that they have voluntarily deposited Rs 3,03,11,734/- for undue benefit and Rs. 24,74,365/- for interest part.

27.8 In the statement recorded under Section 108 of the Customs Act, 1962 Shri Kishan Mohan Sharma, Director of M/s. QA, Noida agreed with the contents of the

panchanama dated 30.05.2019, the statement dated 30.05.2019 of Shri Rajesh Sharma and statement dated 27.11.2019 of Shri Mukesh Sharma under which they both accepted that M/s. QA Infotech Pvt. Ltd., Noida has wrongly mentioned the description of services as "Other business services (Technical Testing and Analysis Service) 8676" in application filed before DGFT to avail duty scrips under SEIS Scheme and wrongly obtained 42 duty scrips amounting to Rs. 3,03,11,734.21/- from DGFT under SEIS.

27.9 I find that CPC Code 84 covers computer and related services. Further its subheadings cover software implementation services, all services involving consultancy services on development and implementation of software, system and software consulting services, system analysis service, testing services etc. Details of the same has been elaborated in para 7. From perusal of above classification, it is crystal clear that the Services (Software/Information Technology Services related to Computer Programming and Consulting) provided by M/s QA Infotech is covered under CPC Code 841 to 849.

27.10 I find that M/s QA Infotech had classified their services under "Other Business Services (Technical Testing and Analysis Service 8676" in their application before DGFT, New Delhi. The "Technical Testing and Analysis Services" under CPC is defined as below:

8676 Technical Testing and Analysis Services

86761 Composition and purity testing and analysis services

*Testing and analysis services of the **chemical and biological properties** of materials such as air, water, waste (municipal and industrial), fuels, metal, soil, minerals, food and chemicals. Included are testing and analysis services in related scientific fields such as microbiology, biochemistry, bacteriology, etc. Excluded are medical and dental testing services.*

86762 Testing and analysis services of physical properties

*Testing and analysis services of physical properties such as **strength, ductility, electrical conductivity and radioactivity of materials** such as metal, plastics, textile's, woods, glass, concrete and other materials. Included are tests for tension, hardness, impact resistance, fatigue resistance, and high-temperature effects.*

86763 Testing and analysis services of integrated mechanical and electrical systems

Testing and analysis services of the mechanical and electrical characteristics of complete machinery, motors, automobiles, tools, appliances, communication equipment and other equipment incorporating mechanical and electrical components. The results of the testing and analysis generally take the form of an assessment of the performance and behavioural characteristics of the object tested. Tests may be performed using models or mock-ups of ships, aircraft, dams, etc.

86764 Technical inspection services

Testing and analysis services of a technical or scientific nature which do not alter or affect the object being tested. Included are radiographic, magnetic, and ultrasonic testing of machine parts and structures conducted in order to identify defects. These tests are often conducted on site. Excluded are inspection services of a non-technical or scientific nature, such as visual inspection of buildings, machines, etc.

86769 Other Technical Testing and Analysis Services

All other Technical Testing and Analysis Services not elsewhere classified.

From perusal of the above classification, it is clear that services to be classified in 8676 of CPC are related to testing of physical, chemical, biological properties of various materials and behavioural characteristics of equipment and instruments. It doesn't cover application of software and fixing software bugs in software application.

27.11 I find that in the Form MGT-7 (Annual Return) filed by M/s QA Infotech for 2015-16, 2016-17 & 2017-18 is 'J2' Publishing of computer operating systems, system software, application software, games and 'J6' Computer programming, consultancy and related activities respectively. Further, in the form MGT-09 (Extract of Annual Return for financial year ending on 31.03.17, the principal business activity of the company is Computer software development/testing service under NIC Code No. 99831413. NPSC Code list of services covered under 998314 is reproduced below:

Division 998314: INFORMATION TECHNOLOGY (IT) DESIGN AND DEVELOPMENT SERVICES.

Group	Sub-class	Product	Description
		Code	
	9983141		<i>IT design and development services for applications.</i>
	99831411		<i>Design and development services of a web page including content development</i>

99831412	<i>Design and development services of a database</i>
99831413	<i>Design and development services of software applications including customized and packaged software</i>
99831414	<i>Geographical information systems services</i>
99831415	<i>Animation services including on-line games development services</i>
99831416	<i>Research and analytics services including data mining services and data management services.</i>
99831417	<i>Computer system development services other than programming services including embedded systems development services</i>
99831418	<i>Engineering services including plant engineering, product design, product development services</i>
99831419	<i>Other IT design and development services for applications n.e.c</i>

Further on analysis of NPSC Code No. 99831413, I find that the description of services covered under NPCS Code 99831413 are squarely covered under 841 to 849 of CPC (as illustrated in para 7).

27.12 On scrutiny of documents, I find that Certificate issued by Software Technology Parks of India to M/s. QA, Noida have mention under head Item of manufacture as "Computer Software/IT Enabled Services" and do not have mention of Services 'Other business services (Technical Testing and Analysis Service.)' Further Service mentioned in **Bank Realisation Certificate for Export** is 'Software services' and not the 'Technical Testing and Analysis Service'. ST-3 data (Service Tax Returns), shows export of only 'Information Technology Software Services',

The definition of Information Technology Software Services as defined in Section 65 (105) of Finance Act, 1994, is as under:

"any service provided or to be provided to any person, by any other person in relation to information technology software, including,

- (i) *development of information technology software,*
- (ii) *study, analysis, design and programming of information technology software,*
- (iii) *adaptation, upgradation, enhancement, implementation and other similar services related to information technology software,*
- (iv) *providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specification for a database design, guidance and assistance during the start-up phase of a new system, specifications to secure a database, advice on proprietary information technology software,*
- (v) *providing the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products,*
- (vi) *providing the right to use information technology software supplied electronically.”*

The only export service “Information Technology Software Services” declared in ST-3 returns by M/s QA Infotech corresponds to CPC heading 841 to 849.

27.13 I find that the description of services in export invoices i.e. “998313-Information Technology Consulting and support services” also corresponds to the CPC Code 841 to 849 which is related to computer and related services extendable upto consultancy services, testing, system analysis services, system maintenance service etc (as illustrated in para 7).

27.14 I find the Noticee M/s QA Infotech has contended that Shri Hemmanshu and Shri Rajesh Sharma in their statement has stated that they were providing software testing which involves technical consultancy services, test planning, management etc. The Noticee here failed to appreciate the fact these services are well covered under CPC 841 to 849 which includes all services involving consultancies services on development and implementation of software, system analysis services, conducting tests on programming services etc. which were also admitted by Sh Hemmanshu and Rajesh Sharma in their statement.

27.5 Noticee further contended that allegation were made on them without conducting any verification to ascertain the actual nature of services provided by Noticee. I find that the noticee has himself raised the export invoice while mentioning the services provided by them as Information technology consulting and support services which is well covered under CPC 841 to 849. While making application before DGFT they wilfully change the description as "Technical Testing and Analysis Service" for wrongly claiming of SEIS Scrips. Further verification of various documents in form of MGT-7, MGT-9, certificate issued by software technology parks, agreement with foreign client, ST-3, it was crystal clear that the goods qualified from classification under Division 84 of CPC. During statement various key persons of M/s QA Infotech accepted that their services are to be classifiable under CPC 841 to 849 and the same is corroborated by a number of proofs mentioned in above paras. Hence, I find that verification has been done diligently by investigating agency and the contention of Noticee is improper and based on assumptions only.

27.16 Noticee has placed reliance on various judgments to contend that no demand can be raised on assumption and presumption and statements. Here Noticee has failed to appreciate the fact that various key persons of M/s QA Infotech has already accepted their mistakes univocally. The various evidences gathered by DRI like ST-3, MGT-7, MGT-9, Export Invoice, BRC etc. proves the fact beyond doubt that the goods are classifiable under CPC 841 to 849 and are not eligible for SEIS. Hence, the contention of the Noticee is not sustainable here. Accordingly, the judgments provided in support of their contention can't be relied upon.

27.17 Noticee further contended that interpretation made by department to exclude the testing and analysis services of Information technology from its scope is not justifiable. Here Noticee failed to appreciate the fact that there is specific heading in CPC 84 for software testing and analysis/consultancy services. The heading 8676 is totally different and it is related to testing and analysis of chemical, biological, mechanical properties, electrical conductivity, radioactive properties of matter, but not on application software. Further, 86769 covers those testing which are not specified elsewhere, but the services which Noticee is providing is well covered in CPC 841 to 849. Further, Noticee has relied on Apex Court judgment in case of Chairman, Indore Vikas vs M/s Pure Industrial Cock & Chem and Engee Industrial Services (P) vs Union of India. The fact of the cases are poles apart. Further these rulings are related to interpretation of law. However, in this case there is no interpretational issue. The services provided by Noticee is well covered under CPC 841 to 849 as discussed in above paras.

27.18 Further it is pertinent to mention here that in plethora of judgment pronounced by different courts it is well established law that statement recorded under Section 108 of the Customs Act, 1962 has evidential value.

Union of India vs. Padam Narain Aggarwal and Ors. 2008 (231) E.L.T. 397 (S.C.)

This section does not contemplate magisterial intervention. The power is exercised by a Gazetted Officer of the Department. It obliges the person summoned to state truth upon any subject respecting which he is examined. **He is not absolved from speaking truth on the ground that such statement is admissible in evidence and could be used against him.** The provision thus enables the officer to elicit truth from the person examined. The underlying object of Section 108 is to ensure that the officer questioning the person gets all the truth concerning the incident

N. J. Sukhawani vs. Union of India 1996 (83) E.L.T. 258 (S.C.)

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

Ramesh Chandra v. State of West Bengal 1999 (110) E.L.T. 324 (S.C.)

This case reaffirmed that statements recorded under Section 108 are admissible in evidence, reinforcing the legal principle established in earlier cases Bhana Khalpa Bhai Patel VS Assistant Collector Of Customs, Bulsar, Gujarat - Supreme Court.

Naresh Kumar Sukhwani Vs Union of India 1996(83) ELT 285(SC)

The 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.

Kanwarjeet Singh & Ors vs Collector of Central Excise, Chandigarh 1990 (47) ELT 695 (Tri)

It was 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

Assistant Collector of Customs Madras-I vs. Govindasamy Ragupathy-1998(98) E.L.T. 50(Mad.)

Hon'ble High Court decision in the case of Assistant Collector of Customs Madras-I vs. Govindasamy Ragupathy-1998(98) E.L.T. 50(Mad.) wherein it was held by the Hon'ble Court confessional statement under Section 108 even though later retracted is a voluntary statement-and was not influenced by threat, duress or inducement etc. is a true one

Govind Lal vs. Commissioner of Customs Jaipur (2000(117) E.L.T. 515(Tri))

In the case of **Govind Lal vs. Commissioner of Customs Jaipur (2000(117) E.L.T. 515(Tri))**- wherein Hon'ble Tribunal held that— 'Smuggling evidence-statement- when statement made under Section 108 of the Customs Act, 1962 never retracted before filing the replies to the Show Cause Notice- retraction of the statement at later stage not to affect their evidence value'.

Surjeet Singh Chabra vs. UOI 1997 (84) ELT (646) SC.

In the case of **Surjeet Singh Chabra vs. UOI 1997 (84) ELT (646) SC.** Hon'ble Supreme Court held that statement made before Customs Officer though retracted within six days, is an admission and binding since Customs Officers are not Police

Officers. As such, the statement tendered before Customs is valid evidence under law.

27.19 It is much relevant here to discuss the fact that DGFT vide OIO dated 21.10.2019 has observed that Noticee has availed the SEIS authorization by mis-stating/mis-classifying the services and imposed penalty of Rs 1,50,000/- under section 11(3) of Foreign Trade (Development & Regulations) Act, 1992. The name of the Noticee firm and its director were placed on the denied entry list and further stated that no licenses /authorisations or any other benefit would be made available to them from any office of DGFT.

27.20 From above discussion, it is clear and evident that the services exported by Noticee is rightly classifiable under CPC 84 and the same is not covered under Appendix 3D, hence these exported services don't qualify for reward under SEIS Scheme.

Invocation of Section 28AAA of the Customs Act, 1962 and interest thereon:

27.21 Now, I move forward to determine whether Section 28AAA of the Customs Act, 1962 is invocable for recovery of the benefits fraudulently taken by Noticee. Section 28AAA stipulates that:

- (1) Where an instrument issued to a person has been obtained by him by means of-
 - (a) collusion; or
 - (b) wilful misstatement; or
 - (c) suppression of facts,

for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), or ² [any other law, or any scheme of the Central Government, for the time being in force, by such person] or his agent or employee and such instrument is utilised under the provisions of this Act or the rules ³ [or regulations] made or notifications issued thereunder, by a person other than the person to whom the instrument was issued, the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued:

Provided that the action relating to recovery of duty under this section against the person to whom the instrument was issued shall be without prejudice to an action against the importer under section 28.

27.22 In the instant case, M/s QA Infotech Pvt Ltd has declared the exported services as "IT software Consulting and support services" (SAC-998313) in **Export Invoices**. The services to be provided by Noticee to their foreign clients mentioned in the sample **Service Agreements** are software testing & Services and the description

mentioned in the invoices is "LAZR Project QA-Functional Testing". In **FIRC** issued by the Bank for the remittance received by M/s. QA Infotech for the exported services, the purpose of remittance was mentioned as "Software Services". In **Form MGT-9 (Extract of Annual Return)** filed by M/s. QA Infotech with Ministry of Corporate Affairs, name & description of main products and services were mentioned as (1) Computer Software development/testing services (NIC Code-99831413). However, while filing the application before DGFT for issuance of SEIS, Noticee changed the description to "Other business services (Technical Testing & Analysis Services (8676)". From these facts, it is evident that M/s QA Infotech Pvt Ltd was in full knowledge that they were providing IT Software Services, however they had wilfully mis-stated and mis-classified their services under Other Business Services (Technical Testing and Analysis services) (8676)" to fraudulently avail SEIS scrips instead of correct services viz. IT Software Services classifiable under Division 84 of UN CPC which are not eligible for availing SEIS benefits. Thus, M/s. QA Infotech had fraudulently obtained SEIS Scrips by way of adopting above stated modus operandi and suppressed the facts while applying for obtaining the SEIS Scrips in order to avail wrongful benefits under SEIS scheme. This shows their malafide intention to misclassify the services provided by them to avail the SEIS benefit and which resulted in violation of the provisions of the Customs Act, 1962 in the payment of customs duties w.r.t. import of goods by utilizing the SEIS scrips obtained through fraudulent means. Hence, I find that as per Section 28AAA of the Customs Act, 1962, the duty related to the utilisation of instrument along with interest under Section 28AA of the Customs Act, 1962 is to be recovered from Noticee M/s QA Infotech Pvt Ltd.

Confiscation of Goods under Section 111 (o) and 111 (m) of the Customs Act, 1962

27.23 Section 111 of the Customs Act, 1962 stipulates that:

The following goods brought from a place outside India shall be liable to confiscation:

- (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;
- 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 77³ [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];

In the show cause notice it has been alleged that various importers have used the SEIS Scrips which were fraudulently obtained by M/s QA Infotech and DGFT has already cancelled those Scrips, hence such imports can be termed as imports made without observing the conditions prescribed under Notification No. 25/2015 dated 08.04.2015 and the imported goods are liable for confiscation under Section 111(o) and 111 (m) of the Customs Act, 1962.

27.24 However, in the Show Cause Notices there is no allegation on the users of SEIS License. There is nothing mention in the Notice that there was any role or connivance of Importers in the alleged offence done by M/s QA Infotech. All of them have submitted they have purchased the Scrips from open market with proper payment and the scrips were valid at the time of utilization. In this regard, I rely on the judgment of Hon'ble Bombay High Court in the case of M/s Taparia Overseas (P) Ltd vs UOI: 2003 (161) ELT47 wherein petitioner has acquired licenses from original license holder for valuable consideration by paying heavy premium without notice of any fraud alleged to have been played by original license holder. The licenses were suspended after the petitioner has filed Bill of Entry for home consumption and the goods were lying in docks pending customs clearances. Hon'ble High Court has observed that:

"In the case at hand, it is not in dispute that the petitioners had obtained licenses for valuable consideration without any notice of the fraud alleged to have been committed by the original license holder while obtaining licenses. If that be so, the concept that fraud vitiates everything would not be applicable to the cases where the transaction of transfer of license is for value without notice arising out of mercantile transactions, governed by common law and not by provisions of any statute.

In this behalf we are reminded of the observation of Kings Bench in case of Master v Miller made by justice Butler J. while dealing with the case arising out of contract.

"He who is guilty of fraud shall never be permitted to avail himself of it, and if a contract founded in fraud be questioned between the parties to that contract. I agree that as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and bonafide contract between two others. Even as between the parties themselves we must not forget figurative language of Lord Chief Justice Wilmot, who said that "statute law is like a tyrant, where he comes he makes all void, but a common law is like a nursing father and makes void only that part where the fault is and preserves the rest."

On the above canvas having examined the well settled, established and well recognised concept of law that the effect of fraud is not to render the transaction void

ab initio but renders it voidable at the instance of the party defrauded and transaction continues valid until the party defrauded has decided to avoid it....

In the instant cases when the goods were imported into India, and even when the Bills of Entry were filed, neither were the licences suspended nor the same cancelled. In all these cases, Bills of Entry were filed by the petitioners well before the suspension and/or cancellation of the licences in question, thus the imports were made under valid licences, the goods could not be subjected to levy of customs duty in the peculiar facts and circumstances of the cases in hand.

In the circumstances, we hold that in all cases at hand, the goods were imported, under valid licences. The goods imported were neither prohibited nor restricted by or under the Customs Act, as such, it was not open for the Customs Authorities to withhold clearance thereof. In the result, all the petitions are allowed. Action of respondent, the Revenue in all these petitions withholding clearance of goods imported by petitioners is declared as bad and illegal. Consequently, all import are held to be legal and proper."

The above judgment was maintained by Apex Court in *Union of India vs Blue Blends & Texture Mfg Co Ltd (2006)*. There are several other judgments which has been quoted by Noticees in their written submission, pronounced on the same issue. In case of **M/s Commissioner of Customs vs Vallabh Design Products 2007 (219) ELT 73 (P&H)** pronounced by Punjab & Haryana High Court later maintained by Hon'ble Supreme Court in 2016 (341) ELT A222 (SC), wherein it was held that:

"Since the transferee of DEPB Scrips was not a party to fraud and has obtained it on payment of full price from open market on bona fide belief of it being genuine, demand of duty, interest and penalty and confiscation of Imported goods is not sustainable.

In case of **M/s Leader Valves Ltd. V/s Commissioner of Customs reported in 2006 (193) E.L.T. 459**

(Tri. Del.), in Paragraph 3 held as under:

"3. Regarding the purchase of FPS scrips by the Noticees and their liability under Section 112 of the Customs Act, Id. Commissioner has observed as under:

"However, I find nothing on record to infer that M/s. Leader Valves Ltd., S-3&4, Industrial Area, Jalandhar had purchased the freely transferable FPS scrip otherwise than in a bona fide manner and utilized the same towards debit/exemption of duty and there is nothing to suggest of his having colluded with the exporter who obtained the FPS scrips by fraudulent manner. Therefore, I do not hold them liable to penal action under Section 112 of the Customs Act, 1962".

27.25 In view of above discussions, I find that the imported goods on which duty scrips were utilised by bonafide purchasers, are not liable for confiscation under section 111 (m) and 111 (o) of the Customs Act, 1962.

Penalty on M/s QA Infotech Private Limited and Mukesh Sharma CEO of M/s QA Infotech Private Limited.

27.26 I move forward to examine the proposed penalty on M/s QA Infotech Private Limited.

Section 112(a) of Customs Act, 1962 stipulates that :

Any person, -

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

27.27 In the foregoing paras, I have held that imported goods are not liable to be confiscated under Section 111 of the Customs Act, 1962. Accordingly, penalty under Section 112(a) of the Customs Act, 1962 is not applicable on M/s QA Infotech Private Limited.

27.28 Section 114AB of the Customs Act, 1962 stipulates that :

Where any person has obtained any instrument by fraud, collusion, wilful misstatement or suppression of facts and such instrument has been utilised by such person or any other person for discharging duty, the person to whom the instrument was issued shall be liable for penalty not exceeding the face value of such instrument.

27.29 Noticee vide his submission dated 20.12.2024 has contended that penal provision under Section 114AB of the Customs Act, 1962 came into effect vide Finance Act, 2019 and the alleged offence is done in the year 2015-2018. Hence, the same can't be invoked here. In case of M/s BNP Paribas Equities India Pvt Ltd vs Commissioner of Service Tax, 2013 (31) S.T.R. 22, Hon'ble Tribunal Mumbai held that

"In view of these observations, we hold that the Commissioner cannot go beyond the provisions applicable at the time of occurrence of offence. Therefore, we do not find any merit in the impugned order, the same is set aside."

Further, in case of Commissioner of C.Ex, Hyderabad vs Priyadarshini Cements Ltd 2008 (224) E.L.T. 429 (Tri. Bang), it was held that:

"On a very careful consideration of the issue, we find that the default of payments occurred in the year 2002. During that period the rate of interest prevailing was only

15%. In the present case, the respondent paid the actual duty after 1-3-2003 when the rate of interest changed. However, the fact remains that on the day of default the rate of interest was only 15%. The department wants to apply the higher rate w.e.f. 1-3-2003. The Commissioner (Appeals) has given a proper reasoning for not accepting the departments contention. The rate prevailing only at the time of default should be taken. The new rate will be applicable in cases of default which occur after 1-3-2003. Even when the money is borrowed, at the time of borrowing the money, there is a particular interest rate the same is normally followed and the interest rate is not arbitrarily changed even in respect of the post office, bank fixed deposits etc. At the time of making the deposit, a particular rate of interest is followed and the same rate is continued till the deposit matures. The general prevailing interest rate may vary, but the new interest rate will not be applicable to the deposits made earlier. The same principle should be applied here. On the date of default whatever rate of interest was in existence, the same thing will hold good, even though by another Notification the rate of interest has gone. The second Notification in the present case namely 12/2003 dated 1-3-2003 will be applicable only for the default which occurred after 1-3-2003. **The Commissioner is very correct in holding that as per article 20(1) of the Constitution no person should be punished under a law which is not in existence at, the time of Commission of the offence.** In the present case, the offence namely the default was committed in the year 2002 when the rate of interest was 15%. So, even if they had paid that interest after the rate of interest was enhanced to 24%, they would not be affected by the new rate. We do not find any infirmity in the Commissioners reasoning. Therefore, we reject the Revenues appeal."

Here, in this case, as discussed in above paras, it has been proved beyond doubt that instruments were obtained by way of wilful misstatement. Accordingly the Noticee is liable to be penalised, however I find that Section 114AB of the Customs Act, 1962 was inserted vide Finance (No. 2) Act, 2019 (23 of 2019) dated 01.08.2019 w.e.f 01.08.2019 however the offence was done in the year 2015-16, 2016-17 and 2017-18. As per the above discussed judgment, I find that the Noticee is not liable for penalty under Section 114AB which was not prevailing at the time of offence.

27.30 Section 114AA of the Customs Act, 1962 stipulates that :

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

27.31 Based on the evidences gathered during investigation, it is clear that Noticee was fully aware of the nature of services which was exported by them. They

knowingly and intentionally signed/used false declaration in terms of description of the goods exported and misclassify the same under CPC 8676 (Other Business Services (Technical Testing and Analysis Services) to get SEIS despite knowing the fact that their exported services were qualified under CPC 84 (IT Software Services) and were not eligible for SEIS. These Scrips were later used by various importers to pay the duty. Hence, I find that M/s QA Infotech Private has intentionally signed/used false declaration which were incorrect in material particular to get the SEIS scrips. Accordingly, they are liable to be penalised under Section 114AA of the Customs Act, 1962.

Penalty on Shri Mukesh Sharma CEO of M/s QA Infotech Private Limited, Noida

27.32 In the foregoing paras, as I have held that imported goods are not liable for confiscation under Section 111 of the Customs Act, 1962, hence no penalty under Section 112 is imposable on Shri Mukesh Sharma.

27.33 During investigation it was found that mis-declaration of classification of services in the SEIS application made before DGFT, New Delhi had been signed by/under direction of Shri Mukesh Sharma, to wilfully suppress and mis-state the facts by changing/mis-declaring the description of services before DGFT to fraudulently obtain the SEIS scheme despite knowing the fact that their exported services were not qualified for SEIS. Shri Mukesh Sharma has intentionally signed/caused to be made customs declaration/other declaration/statement/documents which were false and were used in the transaction of business for the purpose of customs act, 1962. Hence, I find that Shri Mukesh Sharma is liable to be penalized under Section 114AA of the Customs Act, 1962. Hence the last issue before me has been finalised.

27.34 In view of the above, I pass the following order:

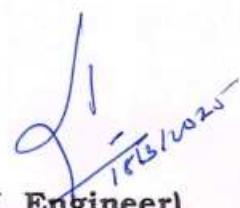
Order

- i) I confirm the demand of duty payable amount aggregating to **Rs. 3,03,10,032/-** (Rupees Three Crore Three Lakh Ten Thousand Thirty Two Only), relatable to utilisation of cancelled instruments (SEIS Scrips), utilised by person/s other than the person to whom the instruments (SEIS Scrips) were issued, as detailed in three SCNs, under Section 28AAA of the Customs Act, 1962 along with interest in terms of Section 28AA of the Customs Act, 1962 which shall be recoverable from M/s QA Infotech Private Limited.
- ii) I hold that the goods totally valued at **Rs. 58,31,93,513/-** (Rupees Fifty Eight Crore Thirty One Lakh Ninety Three Thousand Five Hundred and

Thirteen Only), as mentioned in three SCN's and imported by different Importers, are not liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962, for the reasons discussed above.

- iii) I refrain from imposing penalty on M/s QA Infotech Private Limited under Section 112 (a) and 114AB of the Customs Act, 1962, for the reasons discussed above.
- iv) I impose penalty of Rs **75,00,000** on M/s QA Infotech Private Limited under Section 114AA of the Customs Act, 1962.
- v) I impose penalty of Rs 50,00,000 on Shri Mukesh Sharma, CEO of M/s QA Infotech Private Limited under Section 114AA of the Customs Act, 1962.
- vi) I order to appropriate/adjust the amount **Rs. 3,03,11,734/- (Rupees Three Crore Three Lakh Eleven Thousand Seven Hundred and Thirty-Four Only)** and **Rs. 24,75,365/- (Rupees Twenty Four Lakh Seventy Five Thousand Three Hundred Sixty Five Only)** towards their liability against duty, interest and penalty thereon.

27.35 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.



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

By Speed Post /E-Mail/Notice Board
To (Noticees),

1. M/s. QA Infotech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh- 201309
2. Shri Mukesh Sharma, Chief Executive Officer, M/s. QA Infotech Private Limited, A-8, Sector- 68, Noida, Uttar Pradesh-201309

3. M/s. Noble Natural Resources India Private Limited, Survey No. 302/2, 303, opp. Rama Cylinder, Vil. Bhimasar, Taluka-Anjar, Kutch, Gujarat, 370240.
4. M/s Kundan Care Products Limited, Plot No. 70 & 81, Sector-6A, Integrated, Industrial Estate, SIDCUL, Haridwar, Uttarakhand-249403
5. M/s. Sovereign Metals Limited, Moje Muthia Ali Paiki, , P NO. 35P TO 37P, 38, 40/B, Revenue BL. 184, 185, 187, GIDC Phase III NARODA Ahmedabad, GUJARAT, 382330
6. M/s Kreedai Exim, Sahu Chowk, near Lal Godown, latur, Maharashtra-423512
7. M/s Adani Wilmar Limited, Survey No. 169, Oleo Chem Division-II, Plot No. 212, Village- Dhrub, Mundra, Gujarat-370421
8. M/s Adani Wilmar Limited, Fortune House, Near Navrangpura Railway Crossing, Ahmedabad-Gujarat-380009

Copy To: -

1. The Pr. Additional Director General, DRI, Ahmedabad Zonal Unit, Unit No. 15, Magnet Corporate Park, Off. Sola Over Bridge, Thaltej, Ahmedabad – 380054.
2. The Additional Director General, Central Economic Intelligence Bureau, 6th Floor, B Wing, Janpath Bhawan, Janpath, New Delhi-110001 for kind information please.
3. The Dy. Commissioner of Customs, CCO, Ahmedabad
4. The Dy Commissioner, TRC Section, Mundra Customs
5. The Dy Commissioner, EDI Section, Mundra Customs
6. The Deputy Director, DGFT, New Delhi for kind information please.
7. Guard File.
8. Notice Board.