

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

E-Hearing
REGIONAL BENCH - COURT NO.I

Customs Appeal No.70692 of 2019

(Arising out of Order-in-Original No.04/Commr./NOIDA-CUS/2018-19 dated 09.07.2019 passed by Commissioner of Customs, Noida)

M/s Eence International NSEZ,Appellant
(Plot No.158, NSEZ, Noida)

VERSUS

Commissioner of Customs, NoidaRespondent
(Concor Complex Greater Noida-201311)

APPEARANCE:

Shri J. M. Sharma Authorized Representative & Ms. Pooja Agarwal,
Chartered Accountant, for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

WITH

- (I) **Customs Appeal No.70693/2019(Shri Rajnish Jain);**
- (II) **Customs Appeal No.70706/2019 (Jayashree Jewellers);**
- (III) **Customs Appeal No.70707/2019 (Shri Chakshu Sharma).**

(Arising out of Order-in-Original No.04/Commr./NOIDA-CUS/2018-19 dated 09.07.2019 passed by Commissioner of Customs, Noida)

APPEARANCE:

Shri Devesh Tripathi, Advocate for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NOs.- 70011-70014/2025

DATE OF HEARING : 09 February, 2024
DATE OF DECISION : 09 January, 2025

P. K. CHOUDHARY:

The present matter deals with four customs appeals i.e.
Appeals No.C/70692/2019, C/70693/2019, C/70706/2019 and

C/70707/2019 filed by M/s Eence International ("Appellant No.1"), Shri Rajnish Jain ("Appellant No.2"), M/s Jayashree Jewellers ("Appellant No.3") and Shri Chakshu Sharma ("Appellant No.4") respectively, challenging Order-in-Original No.04/Commr./Noida-Cus/2018-19 dated 09/07/2019 passed by Commissioner of Customs, Noida.

2. On the basis of some intelligence, on 29.08.2018, Officers of Noida Special Economic Zone¹ Customs visited factory premise of Appellant No.1 which is a partnership concern and Appellant No.2 is a partner in Appellant No.1. During the visit, three workers namely Shri Nandan Bera, Shri Sujit Kumar Bera and Shri Subhash Chandra Pal were present in the factory and 5 machines used for making jewellery were found. The Officers found that the factory was operational. On being demanded, Sujit Kumar Bera produced all the gold available in the factory. Total quantity of gold was found to be 2417 grams. All three workers found present in the factory were unable to produce any documentary evidence in respect of stock of gold and consequently, gold was detained under Section 110 of the Customs Act, 1962². Statement of Shri Sujit Kumar Bera and Shri Nandan Bera was recorded on 29.08.2018 under Section 108 of the Act, wherein they stated that they were manufacturing jewellery on the instruction of the owners.

3. Summon dated 31-08-2018 was issued to Appellant No.2 and in reply to the above summon, Appellant No.2 vide letter dated 31/08/2018 informed the investigating officers that the detained gold alloy was received from Appellant No.3 for manufacturing of jewellery on job work basis against voucher No.2018/69 dated 28.08.2018. The Appellant No.3 vide letter dated 04/09/2018 claiming ownership of the detained gold alloy, submitted that they imported 27,000 grams of pure gold under B/E No.1006893 dated 28.08.2018 out of which 2,470 grams of gold alloy of 22 karat was sent to Appellant No.1 under Challan

¹ NSEZ

² The Act

No.2018/069 dated 28.08.2018 for manufacturing jewellery on job work basis.

4. The statement of Appellant No.2 was recorded on 04/09/2018 under Section 108 of the Act, where contrary stand was taken. In the statement recorded on 04/09/2018, Appellant No.2 stated that the detained gold alloy was received at the factory of Appellant No.1, from Appellant No.3, through one Shri Sanjay Sahoo for manufacturing of jewellery on job work without any challan. Appellant No.2 in the above statement further stated that the letter dated 31/08/2018 alongwith Challan/Voucher No.2018/069 dated 28.08.2018 was sent on the advice of father of Appellant No.4 namely, Shri B.P. Sharma. The Challan/Voucher No.2018/069 dated 28.08.2018 was prepared and handed over on 31/08/2018. Later, gold alloys detained earlier were seized vide seizure memo dated 06.09.2018.

5. The Appellant No.2 on 08/09/2018 retracted the above statement alleging threat and pressure from the investigating Officers. Later, statement of Appellant No.4 who is the partner of Appellant No.3, was recorded on 12.09.2018 and while confirming the stand taken by the Appellant No.2 in his letter dated 31/08/2018 and Appellant No.3 in letter dated 4/09/2018, stated that the gold alloy seized was sent for job work to the Appellant No.1 by Appellant No.3 against the Voucher No.69/2018 dated 28/08/2018 and he had no knowledge about the fact that the LOA of Appellant No.1 had expired.

6. Summon dated 07/09/2018 was also issued to Shri Sanjay Sahoo, contractor who delivered seized gold alloy at the factory of Appellant No.1. Shri Sanjay Sahoo vide letter dated 09/09/2018 responded to the above summon wherein, he confirmed the stand taken by Appellant No.2 in his letter dated 31/08/2018 stated that seized gold alloy was sent to the factory of Appellant No.1 against Voucher/Challan No.69/2018 dated 28/08/2018.

6. On the basis of above investigation, the Customs Officers arrived at the following conclusion:-

- a) The Appellant No.1 illegally imported the subject goods into NSEZ which is deemed to be port within the meaning of Section 7 of the Act as per Rule 11(11) of SEZ Rules, 2006 r/w Section 53(2) of SEZ Act, 2005 and as per Rule 2(o) of SEZ Rules, 2006 receiving goods or services by unit or developer from another unit or developer of the same SEZ falls under the definition of import.
 - b) As per statement of Appellant No.2, it appears that the Voucher No.069/2018 dated 28.08.2018 was only prepared after the detention of goods by the Customs Officers during their visit to the premise of Appellant No.1 in order to cover up the illegally possessed gold and unauthorized operation contravening Rule 41(f) of the SEZ Rules, 2006.
 - c) Since Appellant No.1 did not possess valid LOA, they had no authority to undertake any operations within NSEZ and exemption available thereunder, making the subject goods liable for confiscation u/s 111(o) of the Customs Act, 1962.
 - d) Since Appellant No.1 had illegal possession of gold without any proper documents, the subject goods were liable to be confiscated u/s 111(o) of the Customs Act, 1962.
 - e) The Appellant No.1 violated Rule 36 of SEZ Rules, 2006 as it did not file proper documentation before authorized Officer of Customs for bringing the yellow metal into NSEZ which were brought inside the designated port in a clandestine manner for carrying out illegal activities.
 - f) Appellant No.2 had played key role in illegal activity of possession of gold, manufacturing of gold jewellery in the factory premises
 - g) Appellant No.4 had connived with Appellant No.1 in fabricating vouchers to coverup the illegal activity and illegal possession of the gold.
7. Despite the fact that the ownership of the goods was claimed by the Appellant No.3 and all the other Appellants have also confirmed that the seized gold alloy belonged to Appellant No.3, the Respondents conspicuously failed to issue Show Cause

Notice³ to the Appellant No.3. The SCN dated 22/02/2019 was issued by the Commissioner of Customs Noida, directing Appellant No.1 to explain as to why the gold detained under Panchnama dated 29.08.2018 should not be confiscated absolutely u/s 111 (o) and as to why the penalty should not be imposed u/s 112 (a) & (b) and 114AA of the Act. Appellant No.2 and 4 were asked to give reasons as to why penalty should not be imposed u/s 112 (a) and 114AA of the Act.

8. The Appellant No.1, 2 and 4 submitted their replies to the SCN and attended personal hearing on 09/05/2019. Appellant's case before the Adjudicating Authority was that the gold was legally imported into the NSEZ by the Appellant No.3. Appellant No.3 after converting the pure gold to gold alloy, sent the same to different units in the same NSEZ for manufacturing jewellery on job work basis. The Appellant No.3 sent 2470 grams of gold alloy to Appellant No.1 for manufacturing the jewellery as per Rule 41 and 42 of the Special Economic Zone⁴ Rules, 2006. Appellant No.1 admits that LOA allotted to its factory has expired. Appellant No.4 categorically states that he had no knowledge about the expiry of the Appellant No.1's LOA. Appellants submits that expiry of LOA is a default being technical in nature and is punishable under SEZ Act, 2005 and Rules made thereunder and not under the Act. Appellant No.1 and 2 requested for cross examination of Appellant No.4 and Appellant No.4 requested for cross examination of Appellant No.2. The Adjudicating Authority rightly allowed the cross examination of Appellants No.2 and 4.

9. During the cross examination both, Appellants No.2 and 4 stated that the Seized gold alloy was received by Appellant No.1 for manufacturing of jewellery on job work basis against Voucher No.69/2018 dated 28/08/2018.

10. After cross examination, the Appellants No.1, 2 and 4 submitted their final written submissions before Adjudicating

³ SCN

⁴ SEZ

Authority submitting that the seized gold alloy was legally imported by Appellant No.3 and same was sent to the factory of Appellant No.1 against voucher No.69/2018 dated 28/08/2018 for manufacturing jewellery on job work basis.

11. The NSEZ officers on the instructions of the Adjudicating Authority, issued notice to Appellant No.3 directing Appellant No.3 to submit copies of stock register as on 29.08.2018 and record of movement of goods as per proviso of Rule 35 of the SEZ Rules, 2006. Appellant No.3 in compliance of the same submitted following documents:-

- i) Copy of Stock Register as on 29/08/2018
- ii) Copy of Job work register maintained as per proviso of Rule 35 of the SEZ Rules, 2006 for the movement of goods in the SEZ
- iii) Copy of import register
- iv) Copy of export register
- v) Copies of Voucher issued for Job Work including Voucher No.69/2018 dated 28/08/2018 issued to Appellant No.1 for issue of gold alloy weighing 2470.500 Gms of 22 KT for manufacturing of Gold Jewellery.
- vi) Copy of import Invoice No. USG210 dated 27/08/2019 of M/s Kanak Gold & Diamond Jewellery LLC, Dubai
- vii) Copy of Bill of Entry No.1006893 dated 28/08/2018

12. The Appellants as their preliminary ground challenged the Jurisdiction of the Customs Officers to investigate and adjudicate the matters pertaining to SEZ. It was the Appellants case that under SEZ it was Developmental Commissioner who has the jurisdiction to investigate and adjudicate the issues under dispute and not the Customs officers. The Adjudicating Authority on 09/07/2019 passed the impugned order holding that the Commissioner of Customs have jurisdiction over Noida SEZ in view of Circular No.11/2017 dated 31.03.2017 issued by CBEC. The Adjudicating Authority further held that in view of Notification in F.NO. C/1/1/2009 SEZ, in respect of notified offences, jurisdictional Commissioner of Customs have powers to carry out investigation, inspection, search or seizure in SEZ with prior intimation to the Development Commissioner.

13. On the merits of the matter, the learned Adjudicating Authority accepted the findings recorded in the SCN holding that the Appellant No.1 did not have valid LOA and the seized gold was transferred to Appellant No.1 without any valid documents and the Voucher No.69/2018 was an after-thought and an attempt to cover up unauthorized possession of seized goods. The Adjudicating Authority chose to dismiss the voucher as it was the only voucher issued in the name of Appellant No.1. Rest of the vouchers were issued by Appellant No.3 in the name of their sister concerns. In view of above, Adjudicating Authority passed the impugned order directing absolute confiscation of goods u/s 111 (o) of the Customs Act, 1962 and imposed penalty on the Appellants in the following Manner:-

Party	Section under which penalty imposed	Amount of penalty imposed
Appellant No. 1	112 (b)(i)	Rs 6,20,000/-
Appellant No. 1	114 AA	Rs 10,00,000/-
Appellant No. 2	114 AA	Rs 10,00,000/-
Appellant No. 4	112 (a) and 112 (b)	Rs 6,20,000/-
Appellant No. 4	114 AA	Rs 10,00,000/-

14. Aggrieved by the above order, Appellants have filed the instant appeals. Shri Devesh Tripathi, Advocate appeared for Appellants No.3 and 4 and Shri J.M. Sharma, Authorised Representative appeared for the Appellants No.1 and 2 whereas, Respondents were represented through learned Departmental Representative for the Revenue.

15. Heard both the sides and perused the appeal records. Appellants have also filed their Written Submissions.

15.1 We find that the allegation against Appellant No.1 is that the seized goods were found at the factory of Appellant No.1 without any valid documentation and it did not have valid Letter

of Approval⁵. Allegation against Appellant No.2 is that he played key role in illegal activity of possession of gold and allegations against Appellant No.4 is that he connived with Appellant No.1 in fabricating vouchers to cover-up the illegal activities. The Appellants have contended that the above allegations ought to be investigated and adjudicated by the Development Commissioner of SEZ and same is beyond the jurisdiction of the Customs Officers whereas, the learned DR relied upon Circular No.11/2017-Cus dated 31/03/2017 and Notification No.C.1/1/2009-SEZ dated 05/08/2016 to establish that the Customs Officers have jurisdiction to investigate, issue SCN and adjudicate the issues under consideration.

15.2 Before delving into the issue of jurisdiction, it is imperative to highlight the relevant facts which can be borne out from the available records. On the basis of records, we find that it was Appellant No.3 which imported the subject goods into the NSEZ. The Appellant No.3 imported 27 Kg of Gold (.995 purity) into NSEZ under B/E No.1006893 dated 28/08/2018. The import is also reflected in the stock register maintained by Appellant No.3.

15.3 Further, during the period from 11.04.2018 to 22.09.2018, the Appellant No.3 had issued 17 Voucher/challans under which Appellant No.3 sent imported pure gold/gold alloy to three different units for manufacturing jewellery on job work. All 17 vouchers are serially numbered from 61/2018 to 77/2018. Vouchers No.61-68, 72, 75-77 were issued in the name of M/s Jayashree General Trading Co. Vouchers No.70, 71 and 74 were issued to M/s S.I. Overseas Jewellers and Voucher No.69 was issued to the Appellant No.1. All the vouchers were also reflected in the job work register maintained by the Appellant No.3. The Appellant has also placed on record 16 vouchers issued by M/s Jayashree General Trading Co. and M/s S.I. Overseas showing receipt of manufactured jewellery from the job workers between 09.04.2018 – 24.09.2019.

⁵ LOA

15.4 The preceding paragraphs makes it clear that the goods under consideration belong to Appellant No.3 who legally imported the goods into NSEZ and sent part of the gold after converting the same into gold alloy to Appellant No.1 to be manufactured into jewellery on job work basis. The Department's case is that Appellant No.1 did not have valid "LOA" issued under Section 15 of the SEZ Act, 2006 and the seized goods were found at the factory of Appellant No.1 without any valid documentation. It is pertinent to place on record herein that it is not the Department's case in the SCN that the Appellants were trying to remove the seized goods from NSEZ.

15.5 In view of the above, the question arises whether Customs Officers have jurisdiction to investigate, issue SCN and adjudicate the issues under consideration or it is the authority under the SEZ Act and Rules who are authorised to deal with the matter. The Adjudicating Authority relied upon Circular No.11/2017-Cus dated 31/03/2017 to hold that the jurisdictional Customs Officers have jurisdiction in the matters pertaining to Refund, Demand, adjudication and Review. On the face of it can be said that the instant matter does not pertain to Refund, Demand and Review. Only question arises whether the adjudication mentioned in the above circular also covers adjudication of the issues raised in the present case.

15.6 Perusal of the above circular makes it clear that Circular No.11/2017 dated 31/03/2017 was issued by CBEC in order to clarify amendments made in SEZ Rules, 2006 by way of inserting a new Rule 47 (5) vide Notification No. GSR 772 (E) dated 05/08/2016 which stated that the functional operations like Refund, Demand, Adjudication, Review and Appeals are to be made by the Jurisdictional Customs and Central Excise authorities in accordance with the relevant provisions contained in the Customs Act, Central Excise Act & Finance Act.

15.7 Rule 47 is placed under Chapter-V of the SEZ Rules, 2006. Chapter-V of SEZ Rules, 2006 lays down conditions subject to which goods may be removed from a SEZ to the Domestic Tariff

Area⁶. Rule 47 deals with sales in the DTA. As per Section 53 of the SEZ Act, 2005 SEZ is deemed to be an area outside the Customs Territory of India. Therefore, any sale of goods from SEZ to DTA is considered as an import and has to be done as per Rule 48. In conspectus of above, it can be said that Review, Demand, Adjudication, Review and Appeal mentioned under Rule 47 (5) deals with the demand and adjudication of the same arising in the matters related to sale goods from SEZ to DTA and the instant matter does not deal with the sale/removal of subject goods from SEZ to DTA hence, Circular No.11/2017 dated 31/03/2017 is not applicable in the instant case.

16.1 The Appellants have further challenged the jurisdiction of Customs Officers to conduct investigation, inspection, search or seizure in the Instant matter. It is the Appellants case that the two issues are involved in the instant matter firstly, validity of LOA and secondly, sub-contracting/sending goods for job work. Both the issues are confined to the SEZ Act and Rules. Grant and cancellation of "LOA" falls under the domain of Development Commissioner as per Section 15 and 16 of the SEZ Act whereas, sub-contracting/sending goods for job work has been dealt under Rule 41 and 42 of SEZ Rules, 2006.

16.2 The Adjudicating Authority in order to establish that the jurisdictional Customs Officers have jurisdiction in the instant matter to investigate and seize the goods, relied upon Notification No. C.1/1/2009 SEZ dated 05/08/2018 issued by Dept of Commerce. The above Notification notify act and/or commission made punishable under Customs Act, Central Excise Act and Finance Act as offense for the purpose of SEZ Act in terms of Section 21 of the SEZ Act, 2005. Above notification notified Section 111 of the Act as one of the notified offence under SEZ Act, 2005. The Adjudicating Authority in order to establish jurisdiction of Customs Officers in the instant matter has invoked Section 111 (o) of the Customs Act, 1962⁷. The

⁶ DTA

⁷ The Act

Adjudicating Authority records that illegal possession of seized goods without any valid documents by Appellant No.1 and not having valid LOA makes the subject goods liable for absolute confiscation under Section 111(O) of the Act.

16.3 Section 111 deals with the goods improperly brought from a place outside India and sub section (o) deals with the goods exempted from any duty and prohibition, subject to any condition and that condition is not observed. Though SEZ is deemed as a territory outside the customs authority but in the present matter issues are non-validity of the LOA and possession of goods without any proper documentation by Appellant No.1. It is not the case of the Department that the goods were bought into SEZ illegally or attempts were made to remove the goods from SEZ to DTA. The Adjudicating Authority fails to record any finding as to how Section 111 (o) of the Act can be invoked in the instant case particularly, when Appellant No.3 has placed on record documents establishing gold were brought into SEZ legally and gold alloy was sent to Appellant No.1 for job work. The matter pertaining to invalid LOA falls squarely under the domain of Development Commissioner. And the issue of sub-contracting goods on job work from one unit to another in the same SEZ cannot be equated with bringing the goods from outside India into Indian Territory. In view, of the same it can be said that Section 111(o) of the Act was wrongly invoked. Consequentially, reliance placed by the Adjudicating Authority on Notification No.C.1/1/2009 SEZ dated 05/08/2018 in order to establish jurisdiction of Customs Officers to investigate and seize goods in the instant matter was not as per the law.

17.1 Now coming onto the merits of the matter, it can be said that the Department gravely erred by not making Appellant No.3 as a noticee in the SCN when Appellant No.3 brought on record the documents before investigating Officers as well as Adjudicating Authority establishing that it was Appellant No.3 who legally imported pure gold into NSEZ and sent part of the gold after converting the same into gold alloy to Appellant No.1 for manufacturing of jewellery on job work basis. The Appellants

brought on record Voucher No.69/2018 in order to establish that the seized goods were legally sent to Appellant No.1 for manufacturing Jewellery on job work basis. The Adjudicating Authority has recorded that the Voucher No.69/2018 was fabricated. The Adjudicating Authority relied on the statement dated 04/09/2018 of Appellant No.2 where he stated that the Voucher No.69/2018 dated 28/08/2018 was prepared and handed over on 31/08/2018 on the advice of father of the Appellant No.4 Shri B.P. Sharma in order to justify the receiving of gold. The Adjudicating Authority further questioned the authenticity of the above voucher on the ground that Appellant No.4 have issued only one Voucher to Appellant No.1 and rest of the Vouchers were issued to sister concern of Appellant No.3.

17.2 The Adjudicating Authority has wrongly relied upon on the statement dated 04/09/2018 of Appellant No.2 as the same was retracted on 08/09/2018 by the Appellant. It is a settled law that reliance can be placed on the retracted statement if same is being corroborated by any other evidence. In the instant case there is no corroboratory evidence. The fact that the seized goods were sent by Appellant No.3 to Appellant No.1 for manufacturing jewellery on job work under Voucher No.69/2018 was established by the statement dated 12/09/2018 of Appellant No.4, letter dated 31/08/2018 of Appellant No.2 and letter dated 04/09/2018. Moreover, cross examination of Appellants No.2 and 4 was conducted before the Adjudicating Authority and during cross examination also, Appellants No.2 and 4 categorically stated that the seized goods were sent by Appellant No.3 to Appellant No.1 for manufacturing jewellery on job work basis under Voucher No.69/2018. Conspicuously, the Adjudicating Authority has not even discussed the statements recorded during cross examination. Further, the Appellant No.2 mentioned in his statement dated 04/09/2018 that the voucher No.69/2018 was produced on the advice of one Shri B.P. Sharma who was father of Appellant No.4, but the investigating officers failed to record the statement of Shri B.P. Sharma.

17.3 The authenticity of the Voucher No.69/2018 cannot be disputed merely because out of 17 vouchers issued during the relevant time, Appellant No.3 issued only one voucher to the Appellant No.1 and rest to the others. Voucher No.69/2018 is part of 17 vouchers which were issued by the Appellant No.3 during the relevant time. All the vouchers were serially numbered and were also recorded in the job work register. In view of the same, the authenticity of the voucher No.69/2018 cannot be questioned. The Adjudicating Authority failed to discuss the stock registers and vouchers submitted by the Appellant No.3 on the instruction of Department itself.

18. Rule 41 of SEZ Rules, 2006 deals with sub-contracting. Sub clause (1) permits sub-contracting a part of its production process to a unit in SEZ with the prior permission of the Special Officer. Whereas, clause (f) of Rule 41 allows the sub-contracting without permission of Special Officer in any financial year, when the consolidated value of the sub-contracted part of production of a unit and of the sub-contracted production process of a unit, does not exceed the total value of goods cleared by the unit either for exports or for sale in DTA in the immediately preceding financial year; provided both the supplying unit and the receiving units maintain proper accounts of goods involved in the sub-contracting. It is the case of the Appellants that the sub-contracting has been done under Rule 41 (1)(f) under which prior permission of the Special Officer was not required. On the other hand, Department has not contended that Rule 41(1)(f) does not apply to Appellant's case or the consolidated value of the sub-contracted part of production of Appellant No.3 and of the sub-contracted production process of Appellant No.3 has exceeded the total value of goods cleared by them either for exports or for sale in DTA in the immediately preceding financial year.

18.1 Further, as per Rule 42 (4) of the SEZ Rules, 2006 unit may sub-contract a part of production or production process in another unit within the same SEZ if the movement of goods has been recorded under serially numbered challans and the record

of movement has been maintained. In the present matter, Appellant No.3 is maintaining records of movement of goods sub-contracting under serially numbered vouchers and have also maintained job work register showing inward and outward movement of goods. Therefore, as far as Appellant No.3 is concerned, it has maintained complete record as per the requirement of the law.

19. Issues or problems can be found at the end of the Appellant No.1. It has been found that Appellant No.1 not only failed to maintain any record of the goods received on sub-contracting but also did not have valid LOA. It is apparent from the record that neither the Appellant No.3 nor its partner Appellant No.4 had any knowledge about the fact that the Appellant No.1 did not have valid LOA.

19.1 As discussed under paragraphs 16.2 and 16.3 issues pertaining to invalid LOA and non-maintenance of records by Appellant No.1 falls under the jurisdiction of the Development Commissioner/ Special Officer and action may be taken against Appellant No.1 under SEZ Act and Rules according to the law but invocation of Section 111 (o) of the Act absolutely confiscating the seized gold and imposing penalties on the Appellants under Sections 112 (a), (b) and 114 AA of the Act is not tenable and is liable to be set aside and we do so.

20. In view of the above discussions, the Order-In-Original No.04/Commr./Noida-Cus/2018-19 dated 09/07/2019 passed by the learned Commissioner of Customs, Noida is set aside. All the four appeals filed by the Appellants are allowed with consequential relief, as per law.

(Order pronounced in open court on.....)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

-separate order
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS

PER SANJIV SRIVASTAVA

21.1 I have gone through the order prepared by the Learned Brother - Member (Judicial) but after long persuasion I do not find myself in agreement with the same.

21.2 The basic reason why the impugned order is proposed to be set aside, as evident from the order of Learned Brother, as evident from para 19.1 of the order is that Commissioner was not having the jurisdiction in the matter, the case being related to an SEZ Unit.

22.1 Facts as recorded in the impugned order are reproduced below:

"2.1 On the basis of intelligence, the team of NSEZ Customs Officers visited the factory premises of M/s Encee International, Plot No 158, NSEZ Noida on 29.08.2018 to conduct investigation enquiry in regard to such an activities being conducted in contravention of the provisions of Custom aCT, 1962 and SEZ Act, 2005 and the rules made thereunder.

2.2 During the visit, three persons namely Shri Nandan Bera, Shri Suit Kumar Bera and Shri Subhash Chandra Pal were found present in the factory and five machines were found installed in the factory premises. Out of five machines, three machines were meant /.used for chain making, one machine for gold rolling and one for wire drawing and, all five machines were found in working condition

2.3 During the checking, the officers conducted inspection/verification in the presence of two independent witnesses and proceedings were recorded under Panchnama dated 29.08.2018. The factory was found operational and yellow metal was found loaded on the chain making machines and also there was stock of yellow metal in the form of yellow metal wire, raw yellow metal chains and small yellow metal granules /cuttings. On being demanded by the officers, Shri Sujit Kumar

Bera produced all the yellow metal available in the factory premises besides the yellow metal being processed on the machines. On being asked by the officers, none of the three employees namely Shri Nandan Bera, Shri Sujit Kumar Bera and, Shri Subhash Chandra Pal could produce any documentary evidence in respect of the-stock of yellow metal found in the factory or any records accounting the same in any manner. The officers, in the absence of any such documentary evidence or any satisfactory explanation by them, detained the entire stock of yellow metal collectively weighing 2471 grams as detailed in Annexure-A to the Panchnama dated 29.08.2018 under Section 110 of Customs Act, 1962. The detained goods as detailed in Annexure-A to the Panchnama dated 29.08.2018 were handed over to the Manager, CWC, NSEZ Noida for safe custody

2.4 During the visit on 29.08.2018, Statements of Shri Sujit Kumar Bera and Shri Nandan Bera were recorded under Section 108 of the Customs Act, 1962. In their statements dated 29.08.2018 both inter alia stated that:-

- (i) they were working as gold jewellery artisans in the said factory and they had only been involved in making of the gold jewellery;*
- (ii) all the function of the unit were being done on the direction of the owner of the Company namely Shri Sanjeev Kumar Jain and such instructions were conveyed to them telephonically;*
- (iii) the gold as raw material was received by them through a messenger sent by Shri Sanjeev Kumar Jain and after preparation of gold jewellery, the same was handed over to the messenger sent by said Shri Jain*
- (iv) No documents were prepared by them for receiving and disposal of goods*

2.5 Summons dated 30.08.2018 were issued to Shri Sanjeev Kumar Jain. In response to the said summons Shri Vipul Jain

instead of Shri Sanjeev Kumar Jain appeared before the investigating officer. The statement of Shri. Vipul Jain was recorded on 30.08.2018. In his statement dated 30.08.2018, Shri Vipul Jain inter alia stated that:

(i) Shri Sanjeev Kumar Jain did not hold any position in the company and that Shri Sujit Kumar Bera and Shri Nandan Bera had mistakenly uttered the name of Shri Sanjeev Kumar Jain as owner of the company

(ii) Shri Rajnish Kumar Jain, his father was looking after all the work of the company but that day he was out of the town

2.6 On being summoned on 31.08.2018., Shri Rajnish Kumar Jain appeared for his statement on 04.09.2018. The statement of Shri Rajnish Jain was recorded on 04.09.2018 wherein, he inter alia stated that:

- M/s Encee International, Plot No. 158, NSEZ, Noida is a partnership firm with him, his son Vipul Jain, his brother Neeraj Jain and his sister in law Smt. Bindu Jain were four partners in the above firm;*
- that he was looking after day to day working of the firm and take care all the activities of the firm and the other partners are silent partners that the firm was established in the year 2002;*
- they were granted LOA for manufacturing of Plain Gold Jewellery which was valid only upto 17.08.2017 the same was not renewed*
- on being asked about 2471 grams yellow metal recovered from his factory premises, he stated that the recovered yellow metal was 22 Carat Gold which his workers informed him that they had received from Shri Sanjay Sahooo contractor of M/s Jayshree Jewellers, NSEZ, Noida;*

- *he further admitted that the gold was received in his factory without any challan/ document through Shri Sanjay Sahoo, Contractor and they have been informally doing job-work i.e. making gold chains from the gold received from M/s Jayashree Jewelers, NSEZ, Noida for past two years and the entire activity was being carried out by Shri Sujit Kumar Bera, his care taker and other labor after his approval.,*
- *He. was not visiting the factory but the work was being carried out in his knowledge and he used to give instructions or they used to talk to his younger brother Shri Sanjeev Jain in his absence telephonically and the entire activity was being carried out on word of mouth basis and there was no written documents accounts being maintained the entire transaction were carried out verbally;*
- *that they made the last export in 2009-10 after that they had no orders so the entire work of our factory stopped;*
- *they were just doing some job-work to sustain the salary of their workers / care taker and to meet the regular expenses like rent, electricity, etc;*

2.7 In this regard, the party submitted a letter dated 31.08.2018 wherein they tried to justify receiving of the gold from one M/s Jayashree Jewellers Plot No. 129G/57. 58, NSEZ, Noida for job work purposes and also enclosed a voucher No. 2018/069 dated 28.08.2018 to the said effect. However, on being asked about the said letter dated 31.08.2018, he in his statement dated 31.08.2018 deposed that on receiving the Summons and information about the recovery of 2471 grams yellow metal (22 Carat Gold) he became desperate and could not understand what to do, then Shri B.P. Sharma, (CA) father of Shri Chakshu Sharma, Partner of M/s Jayashree Jewellers, NSEZ Noida advised him to submit such letter; that Shri B.P. Sharma (CA) only prepared and handed over the voucher No.

2018/069 dated 28.08.2018 to him on 31.08.2018 and advised him to submit the same along with letter which he signed on 31.08.2018 and submitted to the department in response to the summons and also sent the same through speed post on 31.08.2018. Thus, it is alleged that the party attempted to cover up the unauthorized possession and activity being conducted in the factory by fabricating documents in connivance with Ms Jayashree Jewellers. Further in his statement, Shri Rajnish Kumar Jain accepted that his Unit's LOA was not valid / renewed and therefore, the factory was working illegally, and he regretted-for the same

2.8 From the facts and statements mentioned supra it thus appears evident that Shri Rajnish Kumar Jain was unable to disclose the proper source of procurement of said yellow metal had acquired the same in contravention of the provisions of Customs Act, 1962 read with SEZ Rules, 2006. Therefore, on reasonable belief that the goods were liable for confiscation under Customs Act, 1962, the same were seized under Seizure Memo dated 06.09.2018 under Section 110 of Customs Act 1962 after appraisal, by the Jewellery Appraiser, NSEZ, Noida. After the appraisal it was found that the recovered yellow metal was 22 carat Gold of 2471 grams and valued at Rs,62,00,326/- (approximately). The value of said gold has been calculated as per Notification Nos. 76/2018-Cus (NT) dated 31.08.2018 and 74/2018-Cus (NT) dated 16.08.2018. The seized 22 Carat Gold weighing 2471 grams sealed with Customs Brass Seal No.5 was handed over to Central Warehousing Corporation (CWC), SEZ, Noida under Supurdnama dated 06.09.2018 for safe custody.

2.9 Summons were also issued to Shri Chakshu Sharma, partner in M/s Jayashree Jewellers and his statement was recorded under Section 108 of Customs Act, 1962 on 12.09.2018. In his statement dated 12.09.2018 Shri Chakshu Sharma deposed as under-

- *That M/s Jayashree Jewellers was partnership firm and he is partner of the firm with his mother Smt. Manju Sharma*
- *That the firm was established in the year 2009 and was granted LOA form manufacturing of Plain Gold Jewellery*
- *That he all the manufacturing process are done by their contractors*
- *That an incident of transfer of gold without proper document had already been-occurred in past and regarding this a letter for strict compliance for sub-contracting procedure was issued to them by the Customs authority*
- *That 2470.500.gms (22 carat gold) was handed over to Shri Sanjay Shau through a voucher dated 28.08.2018 issued by Shri Praveen Kumar Srivastava, Authorized Signatory*
- *The gold recovered from the factory premises Ms Encee International, Plot No. 158, NSEZ, Noida belong to them it was sent for job-work by Shri Sanjay Kumar Sahoo, his contractor under voucher dated 29.08.20 19;*
- *That he was not aware about the LOA status of the factory and he was nor aware how the voucher issued by him was not found along with the gold recovered from the factory-premises of M's Encee International, Plot No 158; NSEZ, Noida*

2.10 During the course of investigation, the facts revealed that 2471 grams gold recovered from the factory premises M/s Encee International, Plot No. 158, NSEZ Noida was not accompanied by any document viz voucher / challan as stated by the employees namely Shri Nandan Bera, Shri Sujit Kumar Bera working in the factory In their statement referred supra and also evidenced from the statement dated 31.08.2018 of Shri Rajnish Kumar Jain recorded under Section 108 of Customs Act,1962.

2,11. It is alleged that during investigation of the case, following facts emerge -

- *M/s Encee International does not have a valid Letter of Approval presently, and accordingly, they are not authorized to undertake any operations within the NSEZ viz. procurement of raw material. manufacture, job work or any such activity,*
- *During the visit of the said unit no records pertaining to receipt, stocking, processing and disposal of the yellow metal in M/s Encee International were found;*
- *All the workers, involved in the manufacturing of the Jewellery in M/s Encee International were not having NSEZ Gate Entry Pass and residing in the unit in unauthorized way in violation of Rule 70 of SEZ Rules r/w Section 46 of SEZ Act;*
- *Shri Sujit Bera, Gold artisan working in the factory and present at the time of visit by the officers, stated that the gold in the factory was supplied through a messenger for making jewellery and the same was handed over to the messenger after making jewellery. As stated by them the said messenger was sent by Shri Sanjeev Kumar Vain. It thus makes it clear that the activity was entirely unauthorized and without any document*
- *As per statement of Shri Rajnish Kumar Jain, he was unable to disclose the proper source of procurement of said yellow metal and he also stated that Shri Chakshu Sharma, Partner of M/s Jayashree Jewellers, NSEZ Noida advised him to submit a letter and he also stated that Shri B.P. Sharma (CA) only prepared and handed over the voucher No. 2018/069 dated 28.08.2018 to him on 31.08.2018 and advised him to submit the same along with letter which he signed on 31.08.2018. Whereas, Shri Chakshu Sharma in his statement dated 12.09.2018 stated that the said Voucher was prepared by Shri Praveen*

Kumar Srivastava, Authorized Signatory on 28.09.2018. Thus it is amply evident that the facts stated by both are contrary to each other. Hence it appears . that the .voucher/challans are prepared after the incident only to impose the possession of the gold by Partner of M/s Jayashree Jewellers, NSEZ Noida.

- *The party-in connivance with Jayashree Jewellers fabricated a concocted story of Shri Sanjay Sahoo, so called contractor to whom goods were . purportedly handed over by M/s Jayashree Jewellers creating vouchers for doing job work in NSEZ in ordered to cover up unauthorized activity after it was detected by the officers during their visit to the factory*

2.12 It, therefore, alleged that M/s Encee Jewellers have contravened following provisions-of Custom Act, 1962 and SEZ statute as explained below:-

- (a) As per Rule 11(11) of SEZ Rules, 2006 r/w Section 53(2) of SEZ Act,2005, the NSEZ is a deemed port within the meaning of Section 7 of Customs Act, 1962. Further, as per Rule 2(o) of SEZ Rules, 2006, 'import' means "(i) bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other. mode, whether physical or otherwise; or (i) receiving goods, or services by, Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone, Thus, the party illegally imported the subject goods into NSEZ.*
- (b) As per statement of Shri Rajnish Kumar Jain, it appears that the voucher No.2018/069 dated 28.08.2018 was only prepared after the detention of goods by the Customs officer during their visit to the premises of the party in order to cover up .the illegally possessed gold and*

authorized operation contravention of Rule 41(f) of The Special Economic Zones Rules, 2006

- (c) *As per Section 111(0) of 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," are liable for confiscation Since the party did not possess a valid LOA, they did not had the authority to undertake any operations within NSEZ and exemption available thereunder Accordingly, the subject goods are liable for confiscation*
- (d) *The party had illegal possession of the gold in the area of Noida Special Economic-Zone without any proper documents. They 'did not have any valid LOA for undertaking any authorized operation under Section 15(9) of the Special Economic Zone Act, 2005. Hence as per section 111(0) of the Customs Act, 1962, the-good seized under Seizure Memo dated 06.09.2018 are liable to confiscation.*
- (e) *Rule 36 of SEZ Rules, 2006 as the party did not file proper documents before Authorized Officer of Customs for bringing the yellow metal into NSEZ which were brought inside the designated port in a clandestine manner for carrying out illegal activities.*
- (f) *Section 111(O) of Customs Act, 1962 in as much as they brought into (imported) 'NSEZ (which is a deemed Custom port) yellow metal (gold) contrary to prohibition imposed under SEZ Act and SEZ Rules as they were not holding a valid LOA for operations inside the NSEZ. No permission was sought from. the proper officer and no documents were presented before such officer in violation of Rule 36 of SEZ Rules,2006.*

It is, therefore, alleged that Goods namely Yellow Metal (Gold) detained in the factory premises of the party on 29.08.2018 under Panchnama dated 29.08.2018 and later seized. vide Seizure Memo dated 06.09.2018, valued at Rs Rs.62,00,326/- are liable to confiscated under the provisions of Section111(0) of the Customs Act,1962; and the party have rendered themselves liable to penal action in terms of-the provisions of Section 112(a) & (b) and 114AA of the Customs Act, 1962.

2.13 Shri Chakshu Sharma, Partner of M/s Jayashree Jewellers, NSEZ Noida has connived with the party in fabricating vouchers to cover up the illegal activity and illegal possession of the gold by the party which are liable for confiscation and thus it appears that he abated the same rendering himself liable to penal action in terms of Section 112(a) and 114AA of the Customs Act, 1962

2.14 Shri Rajnish Kumar Sharma, Partner in M/s Encee International has played the key role in illegal activity of possession of gold, manufacture/making of gold jewellery in the factory premises and all such procurements of gold being liable for confiscation, therefore it appears that said Shri Rajnish Kumar Sharma has rendered himself liable to penal action in terms of Section 112(a) and 114AA of the Customs Act, 1962.

3. CASE FOR THE DEPARTMENT

3.1 Now, therefore, M/s Encee International, Plot No. NSEZ, Noida are hereby required to show cause, as to why:-

- a. Goods namely Yellow Metal (Gold) detained at their factory premises on. 29.08.2018 under panchnama dated 29.08.2018 and later seized vide 'Seizure Memo dated 06.09.2018, valued at Rs. Rs.62,00,326/- should not be confiscated under the provisions of Section111(o) of the Customs Act,1962; and*
- b. Penalty should not be imposed upon them under the provisions of Section 112(a)& (b) and 114AA of the Customs Act, 1962*

3.2 *Shri Chakshu Sharma, Partner of M/s Jayashree Jewellers NSEZ Noida is required to show cause as to why penalty should not be imposed on him in terms of Section 112(a) and 114AA of the Customs Act, 1962;*

3.3 *Shri Rajnish Kumar Sharma, Partner in M/s Encee International, NSEZ Noida to the Commissioner, Noida Customs Commissionerate, Dadri, Concor Complex, Gautam Budh Nagar, as to why penalty should not be imposed on him in terms of Section 112(a) and 114AA of the Customs Act, 1962;*

23.1 Before we delve into the issue it is very important to note following provisions of SEZ Act, 2005 and the notifications issued by the Government of India, Ministry of Commerce in this regard.

Section 21

(1) The Central Government may, by notification, specify any act or omission made punishable under any Central Act, as notified offence for the purposes of this Act.

(2) The Central Government may, by general or special order, authorise any officer or agency to be the enforcement officer or agency in respect of any notified offence or offences committed in a Special Economic Zone.

(3) Every officer or agency authorised under sub-section (2) shall have all the corresponding powers of investigation, inspection, search or seizure as is provided under the relevant Central Act in respect of the notified offences.

Notification SO 2665 (E) dated 5th August 2016, issued under sub-section (1) of Section 21, specifies the Sections under various Central Acts which are considered as sections specified under the SEZ Act, 2005 in relation to notified offences. . The text of the said notification is reproduced below:

MINISTRY OF COMMERCE AND INDUSTRY

(Department of Commerce)

NOTIFICATION***New Delhi, the 5th August, 2016***

S.O. 2665(E).—In exercise of the powers conferred by sub-section (1) of section 21 of the Special Economic Zones Act, 2005 (28 of 2005) (hereinafter referred as the Act), the Central Government hereby, notifies the offences contained in the under-mentioned sections of the Customs Act, 1962 (52 of 1962), the Central Excise Act, 1944 (1 of 1944) and the Finance Act, 1994 (32 of 1994) as offences under the Act:-

<i>The Customs Act, 1962</i>	
<i>1</i>	<i>Section 28, 28AA and 28AAA</i>
<i>2</i>	<i>Section 74 and 75</i>
<i>3</i>	<i>Section 111</i>
<i>4</i>	<i>Section 113</i>
<i>5</i>	<i>Section 115</i>
<i>6</i>	<i>Section 124</i>
<i>7</i>	<i>Section 135</i>
<i>8</i>	<i>Section 104</i>
<i>The Central Excise Act, 1944</i>	
<i>9</i>	<i>Section 9</i>
<i>10</i>	<i>Section 9AA</i>
<i>11</i>	<i>Section 11, 11A and 11AA</i>
<i>The Finance Act, 994</i>	
<i>12</i>	<i>Section 73, 73A, 73B and 75</i>
<i>13</i>	<i>Section 76</i>
<i>14</i>	<i>Section 89</i>
<i>15</i>	<i>Section 91</i>

Notification SO 2666 (E) dated 5th August 2016, issued under sub-section (2) of Section 21, specifies the officers who have jurisdiction to proceed against the offenders. The text of the said notification is reproduced below:

NOTIFICATION

New Delhi, the 5th August, 2016

S.O. 2666(E).—In exercise of the powers conferred by sub-section (2) of section 21 and second proviso to section 22 of the Special Economic Zones Act, 2005 (28 of 2005) (hereinafter referred as the Act), the Central Government hereby authorises the Additional Director General, Directorate of Revenue Intelligence for offences under the Customs Act, 1962 (52 of 1962) and the Additional Director General, Directorate General of Central Excise Intelligence for offences under the Central Excise Act, 1944 (1 of 1944) and the Finance Act, 1994 (32 of 1994) to be the enforcement officer(s) in respect of any notified offence or offences committed or likely to be committed in a Special Economic Zone. The enforcement officer(s), for the reasons to be recorded in writing, may carry out the investigation, inspection, search or seizure in the Special Economic Zone or Unit and shall intimate the details of any action initiated under sub-section (3) of section 21 of the Act to the Joint Secretary in charge of Special Economic Zones Division in the Department of Commerce immediately and in any case not later than seven days of initiation of any action.

Notification SO 2667 (E) dated 5th August 2016, issued under sub-section (2) of Section 21, specifies the officers who have jurisdiction to proceed against the offenders. The text of the said notification is reproduced below:

NOTIFICATION

New Delhi, the 5th August, 2016

S.O. 2667(E).—In exercise of the powers conferred by section 22 of the Special Economic Zones Act, 2005 (28 of 2005)

(hereinafter referred as the Act), the Central Government authorises the jurisdictional Customs Commissioner, in respect of offences under the Customs Act, 1962 (52 of 1962) and Commissioner of Central Excise in respect of offences under the Central Excise Act, 1944 (1 of 1944) and the Finance Act, 1994 (32 of 1994) and notified under the Act, for the reasons to be recorded in writing, to carry out the investigation, inspection, search or seizure in a Special Economic Zone or Unit with prior intimation to the Development Commissioner, concerned.

Section 55

55. (1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

.....

MINISTRY OF COMMERCE AND INDUSTRY

(Department of Commerce)

NOTIFICATION

New Delhi, the 5th August, 2016

G.S.R. 772(E).—In exercise of the powers conferred by section 55 of the Special Economic Zones Act, 2005, the Central Government hereby makes the following rules further to amend the Special Economic Zones Rules, 2006, namely:-

1. Short title and commencement: -

(1) These rules may be called the Special Economic Zones Rules (Amendment) Rules, 2016.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Special Economic Zone Rules, 2006 (herein after referred to as the principal rules) in rule 47, after sub-rule (4), the following sub-rule shall be inserted, namely: -

“(5) Refund, Demand, Adjudication, Review and Appeal with regard to matters relating to authorised operations under Special Economic Zones Act, 2005, transactions, and goods and services related thereto, shall be made by the Jurisdictional Customs and Central Excise Authorities in accordance with the relevant provisions contained in the Customs Act, 1962, the Central Excise Act, 1944, and the Finance Act, 1994 and the rules made there under or the notifications issued there under.”.

3. In the principal rules, after rule 78, the following rule shall be inserted, namely: -

“79. Audit in Special Economic Zones for indirect taxes- All the authorised operations under Special Economic Zones Act, 2005 and transactions relating thereto in Special Economic Zones and Units in the Special Economic Zones shall be audited by the Customs officers from a panel drawn by the Jurisdictional Development Commissioner in consultation with the Jurisdictional Chief Commissioner of Customs and Central Excise.”.

23.2 From the plain reading of the above provisions and Notification it is evident that provisions of Section 111 and Section 124 of the Customs Act, 1962 have been notified are Section 21(1) of the and the Jurisdictional Commissioner have been notified as the specified officer under Section 21 (2), *ibid* for investigating the cases under the said Section. Also in terms of Rule 47 of SEZ Rules, 2006, the jurisdictional Custom Officers have been notified for adjudication of the cases.

23.3 In case of Hon’ble Andhra Pradesh High Court Divine Chemtee Ltd [Order dated 05.05.2022 in Writ Petition No.13794 of 2020] has observed as follows:

"19. In order to appreciate the rival contention, it would be appropriate for us to refer certain provisions of the SEZ Act, which are as under:-

"The Special Economic Zone Act, 2005 („SEZ Act“ for brevity) provides for establishment, development, and management of special economic zones for the promotion of exports. Under Section 11 of SEZ Act, a Development Commissioner would be appointed, to perform the functions specified in Section 12 of SEZ Act. The SEZ Act was given overriding effect and Section 51 of the Act reads as under:

51. Act to have overriding effect:- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

20. Having regard to the wordings used in Section 51 of the Act, which we have referred to earlier, it is clear that SEZ Act prevails over other enactments to the extent of special provisions being made under SEZ Act. Therefore, the SEZ Act would prevail over the Customs Act, 1962 in all aspects in view of the non-obstinate clause. It would also be appropriate to refer Section 53 of the Act, which is as under:-

"53. Special Economic Zones to be ports, airports, inland container depots, land stations, etc., in certain cases.--A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorised operations.

A Special Economic Zone shall, with effect from such date as the Central Government may notify, be deemed to be a port, airport, inland container depot, land station and land customs stations, as the case may be, under section 7 of the Customs Act, 1962 (52 of 1962):

Provided that for the purposes of this section, the Central Government may notify different dates for different Special Economic Zones".

21. A reading of the above provisions makes it clear that the Customs authorities (DRI officials) have no power or jurisdiction to inspect or seize goods in respect of units situated in SEZ area. The power to investigate in respect of any offence committed in SEZ unit is conferred on Officers empowered under Section 22 of the SEZ Act.

22. Further, section 52 of the Act also spells out that the Customs Act is not applicable in respect of units situated in SEZ unit. It would be appropriate to extract Section 52 of the Act, which is as under:-

"52. Certain provisions not to apply.--(1) The provisions contained in the Chapter XA of the Customs Act, 1962 (52 of 1962) and the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 made thereunder shall not, with effect from such date as the Central Government by notification appoint, apply to the Special Economic Zones.

(2) Notwithstanding anything contained in sub-section (1), all offences committed, before the commencement of this Act, under any provisions of the Customs Act, 1962 (52 of 1962) and the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 made thereunder, shall continue to be governed by the said Act or rules, as the case may be.

(3) Anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any permission or authorisation or exemption granted or any document or instrument executed under the said provisions of the Act, rules and regulations referred to in sub-section (1) shall, in so far as they are not inconsistent with the provisions of this Act, be deemed to have

been done or taken or made or issued or granted under the corresponding provisions of the Act or rules or regulations referred to in that sub-section."

23. In exercise of power under Section 52 of the Act, the Central Government by its Notification dated 14.03.2006 declared that the provisions contained in Chapter XA of the Customs Act, 1962 shall not apply to Special Economic Zone, the same is as under:

Notification - SEZ - Special Economic Zone Ministry of Commerce and Industry Department of Commerce New Delhi Dated 14/03/2006 S.O. 320(E) - In exercise of the powers conferred by Sub- Section (1) of the Special Economic Zones Act, 2005 (28 of 2005), the Central Government hereby appoints the 14th day of March, 2006 as the date from which the provisions contained in the Chapter XA of the Customs Act, 1962 and the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 shall not apply to the Special Economic Zones.

24. Probably for the reason, the Central Government in exercise of powers conferred under Sections 21 and 22 of the Act issued a Notification dated 05.08.2016, authorizing the Additional Director General, Directorate of Revenue Intelligence to investigate into offences under Customs Act committed in a SEZ. The said notification is as under:

Notification - SEZ - Special Economic Zone Ministry of Commerce and Industry (Department of Commerce) NOTIFICATION New Delhi, the 5th August, 2016 S.O. 2666(E):-

But, the same cannot be invoked in the instant case as the alleged violation was prior to 2016."

23.5 In case of India Exports [Neutral Citation 2011:AHC:20398-DB] Hon'ble High Court of Allahabad observed as follows:

"20. We do not find any substance in the argument of Shri Bharat Ji Agrawal that the Central Sales Tax cannot be levied on

the sales made by the petitioner from SEZ unit to a unit in DTA. The SEZ Unit under the SEZ Act, 2005 is deemed to be territory outside the territory of India under Section 51, 53 (1) for a limited purpose; Sub-section (2) provides that SEZ shall with effect from the date of notification by the Central Government be deemed to be a port, airport, inland container port, land station and land customs station under Section 7 of the Customs Act.

21. The SEZ Act, 2005 has taken into consideration and has provided for amendment of the various taxing statutes, or modified them, for fulfilling the object and purpose of the Act. Section 7 provides for exemption from tax, duties or cess on any goods or services exported out of or imported into or produce from DTA by unit in SEZ or a developer subject to terms and conditions as may be prescribed and be exempt from the payment of tax, duties or cess under all enactment specified in the First Schedule. Section 27 of the SEZ Act, 2005 applies Income Tax Act with certain modifications in relation to developers and entrepreneurs carried out authorised operations in SEZ and modifications are specified in Second Schedule. Section 57 amends the enactment specified in the Third Schedule, which are amended by SEZ Act, 2005. The Central Sales Tax is not included in any of these Schedules.

22. We also do not find any substance in the contention of Shri Bharat Ji Agrawal that the sales from SEZ unit to unit in DTA shall be deemed to be imports. No such presumption can be drawn from Section 5 (2) of the Central Sales Tax Act or any of the provisions of the SEZ Act of 2005.

23. The deeming provision is not to be inferred in law. It has to be either provided by legislation validly elected and competent to declare such deeming provision with its consequences. There can be no inference drawn from deeming provisions from the provisions of any Act. The deeming provision also cannot be inferred from the analogy drawn from different Acts. The fiction in law is to be created by law itself and not by any inference to be drawn from the law.

24. *A fiction in law cannot be extended beyond its purpose. In construing Clause 5 (3) (ii) of the Imports (Control) Order it was held that fiction created was for the proper implementation of the Imports and Exports (Control) Act, 1947, and to hold the licensee responsible for anything and everything that happens from the time of import till the goods are cleared through customs. In Union of India Vs. Sampat Raj Dugar, AIR 1992 SC 1417 it was held that the fiction cannot be employed to attribute ownership of the imported goods to the importer in a case, where he abandons them i.e. in a situation where he does not pay and receive the documents of title.*

25. *In Bengal Immunity Co. Ltd. Vs. State of Bihar, AIR 1955 SC 661 (p.680) Justice S.R. Das said that the legal fictions are created only for some definite purpose. A legal fiction is to be limited to that purpose for which it was created and should not be extended beyond that legitimate field. It was held in modification to the view expressed in United Motor's case, AIR 1953 SC 252 that the Explanation to Article 286 (1) (a) of the Constitution (As it stood before the Constitution Sixth Amendment Act) could not be extended to Article 286 (2) either as an exception or as a proviso thereto so as to convert inter-State transactions into intra-State transactions qua the delivery State. The Explanation on its true construction was for the purpose of explaining an outside sale referred to in sub-clause (a) of Article 286 (1) and the fiction created by it could not be extended beyond that purpose."*

23.6 In the case of RHC Global Exports Private Limited [Order dated 06.06.2023 R/SPECIAL CIVIL APPLICATION NO. 5978, 5979 & 5980 of 2023] Hon'ble High Court of Gujarat has held as follows:

"17. Now, for this purpose, we may refer to Section 22 of the SEZ Act which deals with investigation, inspection or search or seizure, same reads as under:-

"22. Investigation, inspection and search or seizure: The agency or officer, specified under section 20 or section 21, may, with prior intimation to the Development Commissioner concerned, carry out the investigation or search or seizure in the Special Economic Zone or in a Unit if such agency or officer has reasons to believe (reasons to be recorded in writing) that a notified offence has been committed or is likely to be committed in the Special Economic Zone:

Provided that no investigation, search or seizure shall be carried out in a Special Economic Zone by any agency or officer other than those referred to in sub-section (2) or sub-section of section 21 without prior approval of the Development Commissioner concerned.

Provided further that any officer of agency, if so authorised by the Central Government, may carry out the investigation, inspection, search or seizure in the Special Economic Zone or Unit without prior intimation or approval of the Development Commissioner."

Reading of the aforesaid provisions would suggest that any officer or agency who is authorized by Central Government may carry out search or seizure or investigation or inspection in the special economic zone or units situated therein and it also suggests that authorized officer of Central Government is empowered to carryout such process without any prior approval or intimation. So, moment authorization is reflecting, such measure can be undertaken against special economic zone or unit. Section 6 of the GGST Act in this context is also relevant to the issue which deals with authorization of the officer of Central Tax as proper officer in certain circumstances, which reads as under:-

"Section 6: Authorisation of officers of central tax as proper officer in certain circumstances.

(1) Without prejudice to the provisions of this Act, the officers appointed under the Central Goods and Services Tax Act are

authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify.

(2) Subject to the conditions specified in the notification issued under sub-section (1),-

(a) where any proper officer issues an order under this Act, he shall also issue an order under the Central Goods and Services Tax Act, as authorised by the said Act under intimation to the jurisdictional officer of central tax;

(b) where a proper officer under the Central Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

(c) Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act, shall not lie before an officer appointed under the Central Goods and Services Tax Act."

18. A close perusal of above-stated provisions indicates that respondent authorities are empowered to carry out proceedings in SEZ. Their jurisdiction is unquestionable as Central Government has already authorized those officers by virtue of notification dated 5.8.2016. Sub-section (2) of Section 6 of GGST Act indicates that where any proper officer issues an order under this Act, he is also issuing an order under CGST Act as authorized by Act or under intimation to jurisdictional officer of Central Government and as such it appears that respondents are empowered to carry out search proceedings in SEZ. Therefore, it cannot said that they were acting without the authority of law or jurisdiction. Further, by virtue of circular dated 5.7.2017, functions of proper officers under CGST Act are also defined. Hence, once Central Government has notified the functions of proper officers, said functions shall also be applicable to be carried out by the officers under CGST Act and hence it cannot

be said that there was any lack of authority on the part of respondents, as contended.

21. At this stage, out of few decisions which are tried to be relied upon by learned Government Pleader, we may observe from one of the decisions in the case of Essar Steel Limited (supra) issued by the Coordinate Bench of this Court, wherein provisions of SEZ Act are analyzed to some extent, of-course in background of said facts, but to our conclusion, few observations contained in paragraphs 41.3.2, 41.3.3 and 41.3.4 are of assistance and as such, we quote the same hereunder:-

41.3.2 The movement of goods from the Domestic Tariff Area to the Special Economic Zone has been treated as export by a legal fiction created under the SEZ Act, 2005. A legal fiction is to be restricted to the statute which creates it. Reference is made to the decisions of the Apex Court in the case of State of West Bengal V/s. Sadan K. Bormal and another, (2004) 6 SCC 59, Meghraj Biscuits Industries Limited V/s. Commissioner of Central Excise U.P., (2007) 3 SCC 780, MORIROKU UT INDIA (P) LIMITED V/s. State of Uttar Pradesh and others, (2008) 4 SCC 548. Moreover, such legal fiction should be confined to the purpose for which it has been created. Reference is made to the decisions of the Apex Court in the case of State of Karnataka V/s. K. Gopalakrishna Shenoy and antoher, (1987) 3 SCC 655; Mancheri Puthusseri Ahmed and others V/s. Kuthiravattam Estate Receiver, (1996) 6 SCC 185. As stated above, such movement has been treated as export under the SEZ Act 2005 for the purpose of making available benefits as in the case of actual exports like duty drawback, DEPB benefits, etc. to the Special Economic Zone Unit / Developer or the Domestic Tariff Area supplier at their option. Construing this movement of goods as entailing a liability of payment of duty runs absolutely counter to the purpose of the legal fiction created under the SEZ Act, 2005.

41.3.3 Section 51 of the SEZ Act, 2005 providing that the Act would have overriding effect does not justify adoption of a

different definition in the Act for the purposes of another statute. A non-obstante clause only enables the provisions of the Act containing it to prevail over the provisions of another enactment in case of any conflict in the operation of the Act containing the non-obstante clause. In other words, if the provision/s of both the enactments apply in a given case and there is a conflict, the provisions of the Act containing the non-obstante clause would ordinarily prevail. In the present case, the movement of goods from the Domestic Tariff Area into the Special Economic Zone is treated as an export under the SEZ Act, 2005, which does not contain any provision for levy of export duty on the same. On the other hand, export duty is levied under the Customs Act, 1962 on export of goods from India to a place outside India and the said Act does not contemplate levy of duty on movement of goods from the Domestic Tariff Area to the Special Economic Zone. Therefore, there is no conflict in applying the respective definitions of export in the two enactments for the purposes of both the Acts and therefore, the non-obstante clause cannot be applied or invoked at all.

41.3.4 Similarly, reliance on Section 53 of the SEZ Act 2005 to contend that a Special Economic Zone is a territory outside India, is misconceived. Section 53 provides that the Zone would be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations. The term 'customs territory' cannot be equated to the territory of India and in fact, such term has been defined in the General Agreement of Tariffs & Trade, to which India is a signatory, to mean an area subject to common tariff and regulations of commerce and that there could be more than one customs territory in a country. Moreover such an interpretation would lead to a situation where a Special Economic Zone would not be subject to any laws whatsoever. The entire SEZ Act 2005 would be rendered redundant since it is stated to extend the whole of India. In any case, various provisions of the SEZ Act would be rendered redundant and unworkable if the Special Economic

Zone was to be considered an area outside India. This is apart from the fact that such a declaration would be constitutionally impermissible. So from aforesaid discussion and perusal of provisions, as indicated above, we are satisfied that respondent Nos.4, 5 and 6 authorities are acting not beyond their authorities and facts are such in which we are of the considered opinion that this is not a fit case in which we may exercise our extraordinary jurisdiction, which is equitable in nature, and as such, petition being merit less, deserves to be dismissed.

23. In fact, we find that this is an attempt on the part of petitioners by filing these kind of petitions to thwart and belay the legal proceedings which are initiated by respondent authorities and as such this move of petitioners appears to be an abuse of process of law looking to the manner in which the irregularities alleged to have been committed. Such attempt on the part of petitioners deserves to be dealt with firmly so that litigants may not take disadvantage of situation by bringing such kind of litigation. Record has indicated that after issuance of notice, petitioners appear to have started not cooperating and have indicated to wait for orders from the Court. This conduct on the part of petitioners is not appreciable and as such we find it proper to impose costs upon the petitioners to have adopted such course of action.

24. At this stage, we remind ourselves to one of the salutary observations which have been made by Hon'ble Apex Court in paragraphs 13 and 14 in the case of Dnyandeo Sabaji Naik v. Pradnya Prakash Khadekar reported in (2017) 5 SCC 496), which read as under :-

"13. This Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. A litigant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial

leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth.

14. Courts across the legal system - this Court not being an exception – are choked with litigation. Frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the infrastructure. Productive resources which should be deployed in the handling of genuine causes are dissipated in attending to cases filed only to benefit from delay, by prolonging dead issues and pursuing worthless causes. No litigant can have a vested interest in delay. Unfortunately, as the present case exemplifies, the process of dispensing justice is misused by the unscrupulous to the detriment of the legitimate. The present case is an illustration of how a simple issue has occupied the time of the courts and of how successive applications have been filed to prolong the inevitable. The person in whose favour the balance of justice lies has in the process been left in the lurch by repeated attempts to revive a stale issue. This tendency can be curbed only if courts across the system adopt an institutional approach which penalizes such behavior. Liberal access to justice does not mean access to chaos and indiscipline. A strong message must be conveyed that courts of justice will not be allowed to be disrupted by litigative strategies designed to profit from the delays of the law. Unless remedial action is taken by all courts here and now our society will breed a legal culture based on evasion instead of abidance. It is the duty of every court to firmly deal with such situations. The imposition of exemplary costs is a necessary instrument which has to be deployed to weed out, as well as to prevent the filing of frivolous cases. It is only then that the courts can set apart time to resolve genuine causes and answer the concerns of those who are in need of justice. Imposition of real time costs is also necessary to ensure that access to courts is available to citizens with genuine grievances. Otherwise, the doors would be shut to legitimate

causes simply by the weight of undeserving cases which flood the system. Such a situation cannot be allowed to come to pass. Hence it is not merely a matter of discretion but a duty and obligation cast upon all courts to ensure that the legal system is not exploited by those who use the forms of the law to defeat or delay justice. We commend all courts to deal with frivolous filings in the same manner."

25. Thus, in view of the aforesaid peculiar background of facts and in view of the overall circumstances prevailing on record, we deem it proper to dismiss the petitions with costs of Rs.10,000/- (Rupees Ten Thousand only) for each petition to be paid to Gujarat State Legal Service Authority within TEN DAYS from today."

23.7 In view of decisions as above I am of the view that Commissioner, adjudicating this case had jurisdiction to proceed against the appellants and the impugned order cannot be faulted for this reason

24.1 On the merits of the case I observe that the proceeding was initiated against appellant 1, when during the search/ visit on 29.08.2018 by the officers of NSEZ Customs (working within the office of Development Commissioner, NSEZ) on basis of intelligence certain unaccounted gold was found, and the persons available there were neither in possession of any documents with regards the said gold nor were able to give any explanation in this regards. Appellant 1 though within NSEZ, was not engaged in any authorized operations as per the SEZ Act, 2005 as their permission to function as SEZ Unit, for carrying out the authorized operation had expired long back on 17.08.2017. It is further worth noting that the gold, is one of the specified commodity under section 123 of Customs Act, 1962. In case of D Bhoormull [1983 (13) ELT 1546 (SC)] Hon'ble Supreme Court has observed as follows:

"On receiving information that some packages containing smuggled goods had been left by a person in the premises of

M/s Shah Rupaji Rikhabdas at 98, Narayana Mudali Lane, Madras-I and that these packages were about to be despatched to Bangalore for disposal, a posse of Preventive Officers of the Customs House went to the said shop on June 4, 1962. They found ten packages in that shop. Baboothmull of M/s Shah Rupaji Rikhabdas was present there. The officers questions Baboothmull about those packages. Baboothmull replied that he was not the owner of those packages and that somebody next to his shop had left them outside the premises and since that person had not returned for a considerable time, he got them removed into the shop. Baboothmull was unable to throw any light with regard to the owner or the contents of the packages.

3. *The Officers seized these goods under a mahazarnama.*

4. *On June 9, 1962, a letter was addressed by the said Baboothmull to the Collector of Customs, informing that on that date, the owner of the packages, one Mr. D. Bhoormull turned up to claim the goods; that his other partner was absent at the time of the seizure of the goods who knew about this affair and that he had subsequently learnt from this partner that those goods belonged to D. Bhoormull who had left instructions for their storage in the shop. Subsequently the name of this partner was given as Indermul. The Customs Officers attempted to find out and contact this Indermul but without success.*

5. *Eight days after the seizure, a letter dated June 12, 1962 was received by the Collector of Customs from one D. Bhoormull (Poonawala, temporarily at 98, Narayana Mudali Lane. Madras-1) claiming ownership of the goods. In this letter it was stated that he had purchased these goods on June 3, 1962 in the local market at Madras through brokers; that he was packing the same till late in the evening, and since he was forced to leave for Bangalore on the call of a friend immediately, he instructed one of the staff of Shah Rupaji Rikhabdas to keep the goods in their shop until his return. This letter of Bhoormull did not contain the names or the particulars of the brokers from whom the goods*

were allegedly purchased; nor did it refer to any bill, voucher or other document to support the allegation of their having been purchased locally in the normal course of business. On receipt of this letter, the Collector made an attempt to contact Bhoormull for further investigation. Bhoormull, however, could not be contacted as he had gone away to Poona which was said to be his normal place of activity.

6. Another letter, dated June 25, 1962, was received by the Collector from Bhoormull urging for release of his goods at an early date.

25. Section 178A provides for burden of proof. It says :

"(i) Where any goods to which the section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

(2) This section shall apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf.

(3) Every notification issued under sub-section (2) shall be laid before both Houses of Parliament as soon as may be after it is issued."

26. Large scale smuggling of gold or other goods into India may pose a threat to the economic and fiscal interests and policies of the State. Such illicit trade is often carried on by organized international smugglers in the secrecy of the underworld. The more it is organized, the less are the chances of its detection, and greater the difficulty of proving the offences relating thereto. Laws have therefore been enacted in most countries, which mark a partial or wholesale departure in matters relating to smuggling, from the general principle of penal law, viz., that it is for the State or its Department to prove

the offence against the accused or the defendant. Thus in England, Section 290(2) of the Customs and Excise Act, 1952 provides that where in any proceeding relating to Customs or Excise any question arises as to the place from which any goods have been brought or as to whether or not any duty has been paid or any goods have been lawfully imported etc., then the burden of proof shall lie upon the other party to the proceeding. In India Parliament inserted Section 178A by the Amending Act 10 of 1957, but it did not in its wisdom, go as far as Section 290(2) of the English Act. Section 178A in terms applies to "gold, gold manufacture, diamonds and other precious stones, cigarettes and cosmetics". With regard to these specified goods if seized under this Act in the reasonable belief that they are smuggled goods, the burden of proof that they are not such goods shall be on the person from whose possession, they are seized. But with regard to any other goods, the rule in sub-section (1) of Section 178A would not apply unless the Central Government had specifically applied the same by notification in the Official Gazette. It is common ground that at the material time, no such notification applying the Section to the categories of the goods in question had been issued. In respect of such goods the provisions of the Evidence Act and the Code of Criminal Procedure, do not, in terms, govern the onus of proof in proceeding under Section 167(8) of the Act. In conducting these penal proceedings, therefore, the Collector of Customs is to be guided by the basic canons of criminal jurisprudence and natural justice.

27. *With the above prefatory remarks, we now advert to the contentions canvassed before us.*

30. *It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the*

contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, or universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it-"all exactness is a fake". El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in *Blatch v. Archar* (1774) 1 Cowp. 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned : and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the

Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence' (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, presumptio juris : but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property," though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice.

33. *Another point to be noted is that the incidence, extent and nature of the burden of proof for proceedings for confiscation under the first part of the entry in the 3rd column of clause (8) of Section 167 may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to this aspect of the matter. It will be sufficient to reiterate that the penalty of confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personam which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes prima facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was concerned in the smuggling.*

37. *In the view that the initial onus of proof on the Department can be sufficiently discharged by circumstantial evidence, we are*

supported by the decision, of this Court in Issardas Daulat Ram's case, (1962) Supp. (1) SCR 358. There, on September 14, 1954, that is, long before insertion of Section 178A in the Act, a quantity of gold to a refinery in Bombay was sent for the purpose of melting. The Customs authorities seized this gold when it was being melted. The gold was found to be of foreign origin and had been imported into India in contravention of the Foreign Exchange Regulation Act, 1947. The Collector of Customs confiscated it under Section 167(8) of the Act. The legality of confiscation was challenged by a petition under Article 226 of the Constitution before the High Court, on the ground that there was no evidence before the Collector to show that the gold had been imported into India after restrictions had been imposed in March 1947 on its importation. The High Court rejected this contention and dismissed the petition. The same argument was advanced before this Court in appeal by special leave. This Court also negated this contention. While conceding that there was no direct evidence that the gold had been smuggled after March 1947, it was held that a finding to that effect could be reached by referring to "the conduct of the appellant in connection with (a) the credibility of the story about the purchase of this gold from three parties, (b) the price at which the gold was stated to have been purchased which was less than the market price and (c) the hurry exhibited in trying to get the gold melted at the refinery with a small bit of silver added so as to reduce the fineness of the gold and thus approximate the resultant product to licit gold found in the market".

40. *In the case before us, the circumstantial evidence suggesting the inference that the goods were illicitly imported into India, was similar and reasonably pointed towards the conclusion drawn by the Collector. There was no violation of the rules of natural justice. The Collector had given the fullest opportunity to Bhoormull to establish the alleged acquisition of the goods in the normal course of business. In doing so, he was*

not throwing the burden of proving what the Department had to establish, on Bhoormull. He was simply giving him a fair opportunity of rebutting the first and the foremost presumption that arose out of the tell-tale circumstances in which the goods were found, regarding their being smuggled goods, by disclosing facts within his special knowledge."

The reason why I refer to this judgment of the Hon'ble Supreme Court in so much detail, is that I find great similarity between the facts of the case in hand and this case. The premises of Appellant which was visited by the officers and where the gold was recovered was an unauthorized premises, whose LOA issued by the Development Commissioner NSEZ had expired more than a year back and still the activities of processing of the gold in the said premises were being undertaken in clandestine manner. No documents in respect of the receipt of the gold were produced by the persons available and engaged in processing the gold. Even the Appellant 2 who is Partner in appellant 1 was not in position to produce any documents and showed his total unawareness about the gold being process as is evident from his his initial statement recorded on 04.09.2018 under Section 108 of the Customs Act, 1962, stated as under:

"Q.13 What was the source of the 2471 -grams yellow metal recovered from your factory premises ?

Ans. state that 2471 grams yellow metal recovered from our factory premises is 22 Carat Gold which my workers have informed me they had received from Shri Sanjay Sahoo, contractor of Ms Jayshree Jewellers, NSEZ, Noida.

Q. 14 Why was there no records available in the factory premises for the said 2471-grams yellow metal stated to 22 Carat Gold by you?

Ans. I state that today i.e. 04.09.2018 visited NSEZ, Noida after two years and the gold was received in my factory without any challan/document through Shri Sanjay Sahoo, Contractor, we

were informally doing job-work i.e. making gold chains from the gold received from Ms dayshree Jewellers, NSEZ, Noida off and on for the past two years. The entire activity was being carried out by Dy Shri Sujit Kumar Bera, my care taker and other labour after my approval I was not visiting the factory but the work was being carried out in my knowledge and I used to give instructions or they used to talk to my younger brother Shri Sanjeev Jain in my absence telephonically. However, I submit that the entire activity was being carried out on word of mouth basis and there was no written documents / accounts being maintained the entire transaction were carried out verbally,

Q.15 Since when you were doing job-work for various parties and since when this unauthorized / irregular job-work without any documents being carried out.

Ans. I state that the activities of job-work were being carried out for the last two - three years but I do not remember for what other parties it was being carried out.

Q.16 In response to Summon dated 31.08.2018 you have submitted letter dated 31-08.2018 wherein the facts mentioned are contrary to your above stated facts, it was also claimed that the gold was received from proper voucher/ challan.?

Ans. I state that on receiving the Summons and information about the recovery of 2471 grams yellow metal (22 Carat Gold) became desperate and could not understand what to do and Shri B.P. Sharma, (CA) father of Shri Chakshu Sharma of M/s Jayshree Jewellers, NSEZ Noida had advised me to submit such letter and he only prepared and handed over the voucher No. 2018/069 dated 28.08.2018 to me on 31.08.2018 and advised me to submit the letter which signed on 31.08.2018 and sent through speed post on 31.08.2018 copy of which I have personally submitted to you today i.e. on 04.09.2018."

In his statement recorded under Section 108 of the Customs Act, 1962, on 12.09.2018, Appellant 4 who is partner in Appellant 3 stated as follows:

Q.8 How do you develop your job work process within Zone?

Ans. I have to state that generally we get our job work through our sister concern M/s Jayashree General trading company situated at NSEZ having same partners. Further both the firms maintain proper documentation of movement of goods in their respective book of records. I have to further state that we get manufactured our jewellery through our contractors mainly Shri Sanjay Kumar Sahu, Shri Tufan Chandra Pradhan etc. Generally our contractors manufacture the jewellery in the premises of our unit but sometimes in emergency cases our contractors use other premises of NSEZ for job work with my permission with proper documentation. I have also to state that the units except M/s Jayashree General trading company are Ms S.L. Overseas and Ms Encee International through which we get job work.

Q.9. Please state how many times you have sent your gold to units except Ms Jayashree General trading company in NSEZ for job work?

Ans. I have to state that earlier in May 2018 some gold were sent to M/s Ms Jayashree General trading company for job work with proper documentation but my contractor Tufan Chandra Pradhan further transferred the gold to Ms S.I. Overseas for job work unofficially. In this incident a letter was received from Customs for strict compliance of sub-contracting under SEZ provisions. After receiving the above mentioned letter from Customs I never send the goods for sub-contracting without documentation.

Q.10. Please state that how goods i.e. gold from your unit were moved to M/s Encee International, Plot No. 158 NSEZ, Noida on 29.08.2018

Ans. I have to state that at around 15.00 Hrs on 28.08.2018 I arrived at my factory premises in NSEZ and called Mr. Sanjay Kumar Shau, my contractor and apprised him about the import of 27 Kgs of gold and gave him detailed order for making the jewellery. At around 18.30 hrs the said 27 kgs gold was received

in the unit and the same was handed over to Shri Shau for making of gold jewellery., Further he told me telephonically (Mob No. 9971944588) on 20..30 hrs that he would not be able to complete the order in the unit by his own within given time frame and also asked me to send the gold to M/s Encee International for job work for part production. Thereafter listening to him, I have given permission for the same with proper documentation. Thereafter a voucher on 28.08.2018 for 2470.500 gms (22 carat gold) was issued by Shri Praveen Kumar Stivastava, Authorized Signatory and gold was sent through Sanjay Shau to Ms Encee International. On being asked I have to state that the acknowledged copy of voucher Was received in my office later.

Q.12 During the visit of Customs Officer on 29.08.2018, no such documents were found in the premises of M/s Encee International for such transaction, if issued by you?

Ans. I have no knowledge about the non availability of documents issued by me.

Q.13 Please state whether you were having knowledge of the LOA status of the unit namely M/s Encee International even after issuance of letter from Customs for strict compliance?

Ans. I have to state that I was not aware about the status of LOA of M/s Encee International at that time.

From the above statements it is quite evident that Appellant 2 and Appellant 4 tried to manipulate the documents of Appellant 3 to cover up the gold recovered and seized from the premises of Appellant 1 by way of issuing voucher No 2018/069 dated 28.08.2018. Thus for their acts of omission and commission they have rightly been held liable to penal action under section 112 & 114AA of the Customs Act, 1962.

24.4 It is also necessary to point out that the entire investigations and proceedings were initiated and conducted by NSEZ Customs which is very much part of the office of

Development Commissioner. The copy of certain correspondences and summons are reproduced below to set at rest the issue of jurisdiction:

GOVERNMENT OF INDIA
Ministry of Commerce & Industry, Deptt. Of Commerce
Office of the Development Commissioner (Customs Wing)
NOIDA SPECIAL ECONOMIC ZONE
Noida Dadri Road, Phase II, Noida-201305

**SUMMON UNDER SECTION 108
OF THE CUSTOMS ACT, 1962.**

R. No. NSEZ/CUS/INVESTIGATION/09/2018 Dated - 07.09.2018

To
Shri Sanjay Sahoo, Contractor
M/s J. S. Jewellers, 1294/57258
NSEZ, Noida.

Whereas I, Sunil Kumar Sharma, Superintendent of Customs, NSEZ, Noida, am making enquiries in connection with investigation against M/s ENCEE INTERNATIONAL, NSEZ unit and whereas I consider your attendance is necessary to record your statement in the said enquiry.

Now, therefore, in exercise of the powers vested in me under Section 108 of the Customs Act, 1962, I do hereby summon you to appear before me in person and/or through your authorized representative in Room No. 109, Customs Wing NSEZ office, Noida on 10. 9. 18 at 11.00 hrs.

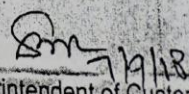
You are not to leave this office without leave and if the case is adjourned without ascertaining the date of adjournment.

Non-compliance of this summons is an offence under Section 174-175 of the Indian Penal Code, 1890.

You are warned that giving false evidence in these proceedings is an offence punishable Under Section 193 of the Indian Penal Code, 1890

Issued today, this 7th day of September, 2018.

Place:- NSEZ, Noida


Superintendent of Customs
NSEZ, Noida.



28



GOVERNMENT OF INDIA
Ministry of Commerce & Industry
Office of the Development Commissioner (Customs Wing)
NOIDA SPECIAL ECONOMIC ZONE
Noida Dadri Road, Phase II, Noida-201305

F. No. NSEZ/CUS/Inv/09/2018 6406
6/6/19

Dated: 06.06.2019

To,

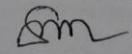
M/s Jaya Shree Jewellers,
Plot No. 129 G/57-58,
NSEZ, Noida.

Sir,

Sub: Show Cause Notice issued to M/s Encee International, Plot No. 158, NSEZ, Noida and others - reg.

Please refer to the above mention subject.

In this regard, I have been directed to ask you to submit the copy of Stock Register as on 29.08.2018 and the Register/Records of movement of goods under proviso of Rule 35 of the Special Economic Zone Rules, 2006 of your unit situated in NSEZ and supporting documents thereof.

Yours Sincerely,

Appraiser (Customs)
NSEZ, NOIDA

Above documents clearly establish that the entire proceedings have been initiated and drawn by the **"Office of Development Commissioner (Customs Wing) NOIDA SPECIAL ECONOMIC ZONE, Noida Dadri Road, Phase II Noida-201305"**. Power to adjudicate these notices have been conferred as per Rule 47 of the SEZ Rules, 2006 (referred earlier) on the jurisdictional Commissioner of Customs.

24.5 In view of discussions as above I do not find any merits in the appeals.

25.1 Appeals filed by the Appellant 1, Appellant 2, Appellant 3 and Appellant 4 are dismissed.

(Sanjiv Srivastava)
Member (Technical)

Difference of Opinion

As there is difference in the opinion between the Member (Judicial) and Member (Technical) on the issues involved in the present appeals, following point of difference is referred to Hon'ble President for the referring to third member for determination of the same.

(i) Whether Commissioner (Customs) Noida, is having jurisdiction to adjudicate the present case, Member (Judicial) hold the view against the proposition whereas Member (Technical) is of the view that impugned order cannot be faulted for this reason?

(ii) Whether the appeals filed by the four appellants should be allowed as have been held by Member (J) or dismissed as have been held by Member (T)?

(Pronounced in open court on - **29/07/2024**)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

S.S. GARG:

26. The difference on the following two issues recorded in terms of two separate orders passed by two learned Members of the original Division Bench has been placed before me to give my opinion as a Third Member:

- i. Whether Commissioner of Customs, Noida is having jurisdiction to adjudicate the present case; Member (Judicial) hold that view against the preposition, whereas Member (Technical) is of the view that impugned order cannot be faulted for this reason.
- ii. Whether the appeals filed by the four appellants should be allowed as have been held by Member (Judicial) or be dismissed as have been held by Member (Technical)?

27. Though the facts of the case have already been recorded in the Interim Order by the Members of the Original Bench, therefore, I shall not repeat the facts of the case.

28. Heard both the sides and perused the material on records.

29.1 The learned Counsel for the appellants submits that the opinion recorded by the Member (Judicial) in the Interim Order dated 29.07.2024 is legally correct. He further submits that the Member (Judicial) after hearing both the sides, considered all the facts and documents particularly the appellants' reply to show cause notices, submissions made before the Commissioner of

Customs, Noida, cross examinations of the Shri Rajneesh Jain and Shri Chakshu Sharma and submissions made before the Tribunal and allowed the appeals of the appellants and recorded his clear findings in para 16.2, 16.3 and 19.1 of the Interim Order. He also submits that the order passed by the Member (Judicial) is a well-reasoned speaking order passed after taking into consideration all the evidences, legal provisions of Customs Act, 1962 as well as SEZ Act, 2005 and SEZ Rules, 2006, and the submissions made by the parties.

29.2 The learned Counsel further submits that the Member (Technical) without examining various documents and facts placed on records in appeal paper books and without analyzing the legal provisions of the Customs Act, 1962, the SEZ Act 2005 and SEZ Rules, 2006, has simply reproduced and repeated the contents of the impugned order dated 09.07.2019 which shows that the Member (Technical) has not considered the facts and circumstances of the case, the evidences and the submissions made before the Tribunal and applicable legal provisions of Customs Act, 1962, SEZ Act, 2005 and SEZ Rules, 2006 and has simply reiterated the contents of impugned order dated 09.07.2019 which contents are also reproduction of the show cause notice dated 22.02.2019.

29.3 The learned Counsel further submits that the Member (Technical) in para 23.1 of the Interim Order has reproduced the following Sections/Rules/Notifications:-

- Section 21 of SEZ Act, 2005
- Notification No. SO 2665 (E) dated 05.08.2016 u/s 21
- Notification No. SO 2666 (E) dated 05.08.2016 u/s 21
- Notification No. SO 2667 (E) dated 05.08.2016 u/s 22
- Section 55 of SEZ Act, 2005
- GSR 772(E) dated 05.08.2021 SEZ (Amendment) Rules, 2016
- Rule 47 (5) of the SEZ Rules, 2006

He also submits that after reproducing the above legal provisions, the Member (Technical) has entered a non-speaking finding in para 23.2 of the Interim Order which is recorded as follows:

"23.2 From the plain reading of the above provisions and Notification it is evident that provisions of Section 111 and Section 124 of the Customs Act, 1962 have been notified are Section 21(1) of the and the Jurisdictional Commissioner have been notified as the specified officer under Section 21 (2), ibid for investigating the cases under the said Section. Also in terms of Rule 47 of SEZ Rules, 2006, the jurisdictional Custom Officers have been notified for adjudication of the cases."

He also submits that the Member (Technical) in his findings, has neither discussed the details of the offence committed under Custom Act, 1962 nor has identified and specified the provisions of Custom Act, 1962 violated by the appellants. No reason has been recorded by the Member (Technical) in his findings to say that seized goods are covered under the provisions of Section 111(o) of Customs Act, 1962 and Rule 47 of the SEZ Rules, 2006 dislodging the findings given by the Member (Judicial) in para 16.2 and 16.3 of the Interim Order. He further submits that Rule 47 of SEZ Rules, 2006 is applicable to goods sold in DTA and it is

nobody's case that the articles of gold seized were being removed for sale into DTA; therefore, Rule 47 is not applicable in facts and circumstances of the present case.

29.4 The learned Counsel further submits that the Member (Technical) in para 23.3 of the Interim Order has extracted the judgment of Hon'ble Andhra Pradesh High Court in the case of Divine Chemtee Ltd [order dated 05.05.2022 passed in the W.P. No. 13794 of 2020]; but has not given any finding as to how the said judgment supports his order or dislodges the Member (Judicial)'s order.

29.5 The learned Counsel further submits that issue of Notification dated 05.08.2016 under Section 21 of the SEZ Act, 2005 is not in dispute; however the reasons why the Notification dated 05.08.2016 is not applicable, are given in para 16.2, 16.3 and 19.1 of the order passed by the Member (Judicial). He also submits that the Member (Technical) has not given any finding to contradict the finding of the Member (Judicial) in para 16.2, 16.3 and 19.1 of the Interim Order.

29.6 The learned Counsel further submits that the Member (Technical) in para 23.5 of the Interim Order has extracted the findings of the Hon'ble Allahabad High Court in the case of India Exports (supra), but after extracting the said decision of Hon'ble Allahabad High Court, no finding has been given as to how the said decision supports his order or dislodges the Member (Judicial)'s order.

29.7 The learned Counsel further submits that the Member (Technical) in para 23.6 of the Interim Order has further extracted the findings of the Hon'ble Gujarat High Court in the case of RHC Global Exports Private Limited (supra), but perusal of the said judgment shows that the said judgment deals with the dispute related to applicability of SEZ Act vis a vis GST Act wherein the goods were removed from SEZ to DTA; whereas, in the present case, there is no such allegation that the goods were being removed or even attempted to be removed from SEZ for DTA Sales; hence, the facts of the case are clearly distinguishable.

29.8 The learned Counsel further submits that the Member (Technical) in para 23.7 of the Interim Order has given a cryptic finding which is recorded as follows:

"23.7 In view of decisions as above I am of the view that Commissioner, adjudicating this case had jurisdiction to proceed against the appellants and the impugned order cannot be faulted for this reason."

29.9 The learned Counsel further submits that the Member (Technical) in para 24.1 of the Interim Order has not appreciated all the facts and circumstances of the case on record. The real facts are as under:

- a) That the gold was imported legally by appellant No.3;
- b) That the gold alloy articles for manufacture of jewellery for export were being manufactured in unit of appellant No.1;
- c) That the appellant No.1 an approved unit of SEZ allowed to undertake the activity of manufacturing of gold jewelry on

job work basis, however, the Letter of Approval (LOA) of appellant No.1 had expired and was not renewed;

d) That there is no allegation in the show cause notice as well as in the impugned order that the gold was illegally brought into or removed or even attempted to be removed from the SEZ unit to DTA.

He also submits that the only allegation in the present case is that the appellant No.1's unit was undertaking manufacturing of jewellery for export on job work basis for appellant No.3, when the LOA of appellant No.1 had expired and was not renewed.

29.10 The learned Counsel also submits that despite the sufficient facts on record, the Member (Technical) has recorded a finding in para 24.1 that the appellant No.1 was not engaged in any authorized operations as per the SEZ Act, 2005 as their permission to function as SEZ unit for carrying out the authorized operation had expired long back on 17.08.2017. He also submits that the matter pertaining to manufacturing activity by SEZ unit within SEZ unit, without valid LOA, falls within the jurisdiction of Development Commissioner and is not a contravention of Custom Act, 1962 under the jurisdiction of Commissioner of Customs, Noida as recorded in Member (Judicial)'s findings in para 16.2 and 16.3 of the Interim Order.

29.11 The learned Counsel also submits that the provisions of Section 123 of the Customs Act, 1962 are not applicable in the present case as it is nobody's case that the gold was admitted

into SEZ or removed for SEZ. Moreover, Section 123 of the Customs Act, 1962 is not included in Notification No. SO No. 2665(E) dated 05.08.2016.

29.12 The learned Counsel further submits that certain letters issued by Authorized Officers performing customs work in SEZ, will not give jurisdiction to the Commissioner of Customs.

29.13 The learned Counsel further submits that the Member (Technical) has relied on the judgment of the Hon'ble Apex Court in the case of D. Bhoormull [1983 (13) ELT 1546 (SC)] and has also extracted the relevant portion of the said judgment in his opinion, wherein the Member (Technical) has found similarity with the present case and the case of D. Bhoormull (supra) but not explained the similarities in his findings.

29.14 The learned Counsel also submits that in the case of D. Bhoormull (supra) certain smuggled goods were seized in town (in year 1962) under Sea Customs Act, 1878 and during the last 62 years, the law has undergone a great change; the provisions of SEZ Act, 2005 have been introduced with overriding provisions in Sections 52 & 53 of SEZ Act, 2005. Also in the case of D. Bhoormull (supra) the goods were alleged to be smuggled, however, in the present case, there is no allegation of smuggling etc; therefore, there is no similarity between the present case and the case of D. Bhoormull (supra).

29.15 The learned Counsel also submits that the Member (Technical) in his findings has selectively extracted the

statements of appellant No.2 Shri Rajnish Jain (recorded on 04.09.2018), but ignored the appellant's No.2's letter dated 31.08.2018 and retraction letter dated 08.09.2018 and the statement given during cross examination on 09.05.2019 during the adjudication proceedings. The learned Counsel also submits that the Member (Technical) has also selectively extracted the statements of appellant No.4 Shri Chakshu Sharma (recorded on 12.09.2018), and nothing adverse can be read from the above statement of appellant No.4. The Member (Technical) has also ignored his statement given during cross examination on 09.05.2019.

29.16 The learned Counsel further submits that the irregularity, if any, related to the sub-contracting of manufacturing activity within SEZ area by approved SEZ units; the operations of SEZ unit are monitored by the Unit Approval Committee (UAC) under various provision of the Act to ensure that the terms and conditions of SEZ scheme are adhered to and for violation of such terms and conditions, suitable action is to be taken by the SEZ authorities and which action has already been taken by appropriate authority wherein the Board of Approval has rejected the appellant No.1's appeal for renewal of LOA; however the unit has not been formally de-bonded till date.

29.17 The learned Counsel further submits that the impugned order has been passed in gross violation of principles of natural justice in as much as despite the ample evidences on record to

suggest that the owner and importer of the gold was M/s Jayashree Jewellers (appellant No.3) but no show cause notice was issued to M/s Jayashree Jewellers.

29.18 The learned Counsel further submits that the order of the adjudicating authority absolutely, confiscating the disputed gold articles under Section 111(o) of the Customs Act, 1962, is not sustainable even on merits.

29.19 The learned Counsel further submits that the order of the adjudicating authority, rejecting the documentary evidence i.e. job work challan dated 28.08.2018 on the ground that only once challan was issued by the appellant No.3 to appellant No.1, is contrary to evidences available on record i.e. copies of gold issue challans, copies of vouchers showing receipt of manufacturing jewellery, statement showing details of job work for the period 01.04.2018 to 24.09.2018, stock register etc which are clearly establishing that the appellant No.3 regularly imported gold and sent it for job work in normal course of business.

29.20 The learned Counsel further submits that penalties imposed on the appellants under Sections 112(a)&(b) and 114AA of the Customs Act, 1962 are also not sustainable in law.

30. On the other hand, the learned Authorized Representative for the Revenue supports the opinion expressed by the Member (Technical) in the Interim Order and submits that the Member (Technical) has considered all the provisions of the relevant Acts involved in the present dispute and after considering the various

judgments recorded in the Interim Order, has rightly come to the conclusion that the impugned order absolutely confiscating the disputed gold and imposition of penalties on the appellants, is correct in law and the learned Commissioner who has passed the impugned order has the jurisdiction to adjudicate the matter.

31. I have considered the oral and written submissions made by both the parties containing evidences, statements on record, copies of SEZ Act, 2005 and SEZ Rules, 2006 and notifications; I have also have gone through the opinions recorded by both the learned Members in the Interim Order dated 29.07.2024. According to me, the basic issues involved in the present case are:

(A) Whether the impugned order dated 09.07.2019 passed by the Commissioner of Customs absolutely confiscating the gold articles (22 carats) under section 111(o) of the Customs Act, 1962 and imposition of consequential penalties under Sections 112(a)&(b) and 114AA on the ground that jewellery for export was being manufactured by the appellant No.1's NSEZ unit on job work basis, whose LOA had expired and was not renewed, is sustainable in law or not?

(B) Whether the disputes regarding subcontracting/sending goods for job work under Rule 41 and Rule 42 of SEZ Rules, 2006 are required to be adjudicated by Development Commissioner, NSEZ or by the Commissioner of Customs, Noida?

32. Further, I find that the learned Member (Judicial) after considering all the facts and documents including the appellants' reply to show cause notices and also the cross examinations of the Shri Rajneesh Jain and Shri Chakshu Sharma and also the legal provisions of Customs Act, 1962 as well as SEZ Act, 2005 and SEZ Rules, 2006, has recorded the detailed findings in para 16.2, 16.3 and 19.1 of the Interim Order and has clearly held that that the issue pertaining to invalid LOA and non-maintenance of record by the appellant No.1 falls under the jurisdiction of the Development Commissioner, NSEZ/Special Officer and action may be taken against appellant No.1 under SEZ Act and SEZ Rules according to law, but invocation of Section 111(o) of the Customs Act absolutely confiscating the seized gold and imposing penalties on the appellants under Section 112(a)&(b) and Section 114AA of the Customs Act is not tenable and is liable to be set aside.

33. Further, I find that the learned Member (Technical) while holding that the jurisdictional Commissioner of Customs has the jurisdiction under the Customs Act, 1962, has not identified/specified the provisions of the Customs Act violated by the appellants; and no specific reason was stated in his findings as to how the seized goods are covered under the provisions of Section 111(o) of the Customs Act and Rule 47 of the SEZ Rules, 2006.

34. Further, I find that Rule 47 of SEZ Rules, 2006 is applicable to the goods sold in DTA, whereas, it is nobody's case that the

articles of gold seized were being removed for sale into DTA. Therefore, according to me, Rule 47 of SEZ Rules is not applicable in facts and circumstances of the present case.

35. Further, I find that though the learned Member (Technical) has extracted various paras of the judgment of Hon'ble Andhra Pradesh High Court in the case of Divine Chemtee Ltd (supra) but has not recorded any finding as to how the said judgment supports his view. Similarly, reliance placed by the learned Member (Technical) on the judgment of Hon'ble Gujarat High Court in the case of RHC Global Exports Private Limited (supra), is not applicable in the facts and circumstances of the present case because the said decision deals with the dispute related to applicability of SEZ Act vis a vis GST Act wherein the goods were removed from SEZ to DTA; whereas, in the present case, there is no such allegation; hence the facts of the said case are clearly distinguishable from the facts of the present case. Further, I find that the decision of the Hon'ble Apex Court in the case of D. Bhoormull (supra) relied upon by the learned Member (Technical) is not applicable in the facts and circumstances of the instant case.

36. Further, I find that there are sufficient evidences on record to suggest that M/s Jayashree Jewellers are the owner and importer of the gold because during the search operations on 29.08.2018, Shri Sanjay Sahoo appeared before the Customs Officers and showed them Challan No. 69/2018 dated

28.08.2018, however, the Customs Officers did not take note of the Challan showed by Shri Sanjay Sahoo. Further, on 31.08.2018, Shri Rajnish Jain submitted a letter stating that the disputed gold alloy was received from M/s Jayashree Jewellers for manufacture of jewellery on job work basis. Further, on 04.09.2018, a letter was submitted by M/s Jayashree Jewellers to the Deputy Commissioner, NSEZ, along with Bill of Entry and copy of Challan. Further, Shri Rajnish Jain in his statement dated 04.09.2018, again confirmed that the gold alloy belonged to M/s Jayashree Jewellers. Further, Shri Chakshu Sharma in his statement dated 12.09.2018 confirmed that the gold was imported by M/s Jayashree Jewellers and was sent to M/s Encee International for job work. But despite these evidences on record, no show cause notice was issued to M/s Jayashree Jewellers. Further, I find that during the adjudication proceedings, additional evidences were submitted before the Adjudicating Authority and during the cross examinations, on 09.05.2019, both Shri Rajnish Jain and Shri Chakshu Sharma confirmed that the gold was imported and owned by M/s Jayashree Jewellers. Further, I find that on 06.06.2019, M/s Jayashree Jewellers submitted their Stock Register as on 29.08.2018 and record of movement of the goods etc. All the details were submitted to the department including import invoice, bill of entry etc evidencing import and ownership of the primary gold, conversion into gold alloy and dispatch to M/s Encee International for job work. Despite these

evidences on record, the Adjudicating Authority without taking into cognizance, has absolutely confiscated the gold by holding that M/s Encee International have not claimed the ownership of the same.

37. Further, I find that Rule 47 of the SEZ Rules is a part of Chapter V of the said rules which specifies "conditions subject to which goods may be removed from Special Economic Zone to Domestic Tariff Area". Rule 47 deals with sales in DTA, however, in the present dispute, it is nobody's case that the disputed goods were removed or being removed or even attempted to be removed from SEZ into DTA without payment of duty, requiring recovery of such duty by issuing the demand etc. Hence, Rule 47 is not applicable in the facts and circumstances of the present case and is not relevant.

38. Further, I find that Notification No. SO 2665 (E) dated 05.08.2016 specifies the "notified offences" in the matter of SEZ units but the said notification does not mention the offences regarding the job work undertaken within the same SEZ under Rules 41 and 42 of SEZ Rules, 2006.

39. Further, I find that in this case, the matter was pertaining to manufacturing activity by SEZ unit within SEZ unit without valid LOA which falls within the jurisdiction of Development Commissioner, NSEZ and is not a contravention under the Customs Act, 1962 which can be adjudicated by the Commissioner of Customs, Noida for the reasons recorded by the learned

Member (Judicial) in para 16.2 and para 16.3 of the Interim Order.

40. In view of my analysis above, I am of the considered view that the opinion expressed by the learned Member (Judicial) is legally correct and I also hold the same view; accordingly, I affirm the findings recorded by the learned Member (Judicial). Further, in my view, the opinion expressed by the learned Member (Technical) is not correct in law.

41. Now, let the matter be placed before the Regular Division Bench for drawing majority view.

(Order pronounced in court on 18.12.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

In view of the majority order, all the four appeals are allowed with consequential relief, as per law.

(Order pronounced in open court on **-09 January, 2025**)

**(P. K. CHOUDHARY),
MEMBER (JUDICIAL)**

**(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**

LKS