



भारत सरकार

वित्त मंत्रालय/ राजस्व विभाग

केंद्रीय अप्रत्यक्ष कर एवं सीमाशुल्क बोर्ड - मुंबई अंचल-1, भारतीय सीमाशुल्क

आयुक्त सीमाशुल्क (आयात-1) का कार्यालय

द्वितीय मंजिल, नवीन सीमाशुल्क भवन, शूरजी वल्लभदास मार्ग, बेलार्ड एस्टेट,
मुंबई-400001.

दूरध्वनि-22757401 फैक्स-22757402

ई-मेल: adjn-commr-imp1nch@gov.in

फा.सं. : S/10-19/02 Adj & E-OFFICE F NO. GEN/ADJ/COMM/56/2021-ADJN

के द्वारा जारी किया गया : विवेक पाण्डेय
आयुक्त सीमाशुल्क (आयात-1)

आदेश दिनांक: 28.03.2024
जारी दिनांक: 28.03.2024

सी.ए.ओ. क्रमांक : 88/2023-24/CAC/CC(IMPORT-1)/VP/ADJ(IMP-1)
DIN No. 20240377000000777B45

मूल आदेश

- 1- यह प्रति उस व्यक्ति के प्रयोग के लिए निः शुल्क है, जिसके लिए यह पारित किया है।
- 2- इस आदेश के विरुद्ध क्षेत्रीय पीठ, सीमाशुल्क, उत्पाद एवं सेवाकर अपीलीय अधिकरण, जय सेन्टर, चौथा एवं पांचवा तल, 34 पी. डी. मेलो रोड, पूना स्ट्रीट, मस्जिद बन्दर (पूर्व) मुंबई 400 009 को अपील की जा सकती है।
- 3- सीमाशुल्क (अपील) नियमों 1982 के नियम 6 के आधार पर अपील फॉर्म सी ए-3 में जैसा कि उक्त नियम में संलग्न है के आधार पर की जानी चाहिए। अपील चार प्रतियों में की जानी चाहिए एवं 90 दिनों के अन्दर दायर की जानी चाहिए एवं उसके साथ उस आदेश की चार प्रतियां संलग्न होनी चाहिए जिसके विरुद्ध अपील की गई हो (इन प्रतियों में कम से कम एक प्रति अभिप्रमाणित प्रति होनी चाहिए)। अपील के साथ सीमाशुल्क अधिनियम 1962 की धारा 129A की उपधारा (6) के अन्तर्गत लागू रु.1,000/-, रु.5,000/- अथवा रु.10,000/- का, क्रास किया हुआ बैंक ड्रॉफ्ट अधिकरण की पीठ के सहायक रजिस्ट्रार के नाम जारी किया होना चाहिए। यह बैंक ड्राफ्ट ऐसे राष्ट्रीय बैंक का होना चाहिए जिसकी शाखा उस जगह स्थित हो जहां अधिकरण पीठ स्थित है।
- 4- अपील अधिकरण पीठ के सहायक रजिस्ट्रार अथवा इस संबंध में उनके द्वारा अधिकृत किसी भी अधिकारी के कार्यालय में प्रस्तुत की जानी चाहिए अथवा सहायक रजिस्ट्रार या ऐसे अधिकारी के नाम पंजीकृत डाक द्वारा भेजी जानी चाहिए।
- 5- जो व्यक्ति इस आदेश के विरुद्ध अपील करना चाहता है वह इस अपील के लंबित रहने तक दंडराशि या अपेक्षित शुल्क की साढ़े सात प्रतिशत धनराशि को जमा करे और ऐसे भुगतान का साक्ष्य प्रस्तुत करे। ऐसा न करने पर यह अपील सीमाशुल्क अधिनियम, 1962 की धारा 129E के प्रावधानों के अनुपालन न करने के आधार पर निरस्त मानी जाएगी।



GOVERNMENT OF INDIA

MINISTRY OF FINANCE/ DEPARTMENT OF REVENUE

CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS, INDIAN CUSTOMS - MUMBAI ZONE - I

OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORT-I)

2nd FLOOR, NEW CUSTOM HOUSE, SHOORJI VALLABHDAS ROAD, BALLARD ESTATE,
MUMBAI - 400001.

Tel. No. 22757401 Fax No. 22757402

e-mail: adjn-commr-imp1nch@gov.in

F.No. : S/10-19/02 Adj & E-OFFICE F NO. GEN/ADJ/COMM/56/2021-ADJN

Passed by: VIVEK PANDEY
COMMISSIONER OF CUSTOMS (IMPORT-I)

Date of Order: 28.03.2024

Date of Issue: 28.03.2024

C.A.O. No.: 88/2023-24/CAC/CC(IMPORT-I)/VP/ADJ(IMP-I)

DIN No. 20240377000000777B45

ORDER-IN-ORIGINAL

1. This copy is granted free of charge for the use of the person to whom it is issued.
2. An appeal against this order lies to the Regional Bench, Customs, Excise and Service Tax Appellate Tribunal, Jai Centre, 4th & 5th Floor, 34 P. D'Mello Road, Poona Street Masjid Bunder (East), Mumbai 400 009.
3. The appeal is required to be filed as provided in Rule 6 of the Customs (Appeals) Rules, 1982 in form C.A.3 appended to said rules. The appeal should be in quadruplicate and needs to be filed within 90 days and shall be accompanied by Four copies of the order appealed against (at least one of which should be certified copy). A crossed bank draft drawn in favour of the Asstt. Registrar of the Bench of the Tribunal on a branch of any nationalized bank located at a place where the bench is situated for Rs. 1,000/-, Rs. 5,000/- or Rs. 10,000/- as applicable under Sub Section (6) of the Section 129A of the Customs Act, 1962.
4. The appeal shall be presented in person to the Asstt. Registrar of the bench or an Officer authorized in this behalf by him or sent by registered post addressed to the Asstt. Registrar or such Officer.
5. Any person desirous of appealing against this decision or order shall pending the appeal deposit seven and a half per cent of the duty demanded or the penalty levied therein and produce proof of such payment along with the appeal failing which the appeal is liable to be rejected for non-compliance with the provisions of Section 129E of the Customs Act, 1962.

Subject: Second round adjudication of SCN dated 13.03.2002 issued vide F. No. DRI/BZU/D/21/2001¹ by ADG DRI Mumbai to M/s Bhumish Shah & others; in pursuance of Hon'ble CESTAT's Remand Order No. A/87967/17/CB dated 12.06.2017², regarding undervaluation of cloves and seizure of Indian currency of Rs. 1.02 Crore recovered and seized from the residence of Sh. Bhumish Shah³-reg.

The said SCN dated 13.03.2002 issued vide F. No. DRI/BZU/D/21/2001 was adjudicated in first round vide Order-in-Original No. 12/2005/CAC/CC/RJM dated 28.04.2005 vide F.No. S/10-19/2002-Adjn.⁴, wherein all the charges levelled therein on all the noticees were dropped. Department preferred an appeal against the said OIO dated 28.04.2005 in Hon'ble CESTAT, Mumbai. Hon'ble CESTAT disposed of the said appeal vide Order No. A/87967/17/CB dated 12.06.2017 and observed:

"8. We find in the impugned order that the Adjudicating Authority has failed to examine the facts arising from the various statements and has failed to test the conclusions derived therefrom for validity and reliability. Without such ascertainment of smuggling of goods, of disposal of smuggled goods, of knowledge that the goods are smuggled, and of the currency having been received from the buyers of smuggled goods, a decision to drop proceedings or to confiscate would lack the authority of law. This we find the impugned order to be.

9. The consequence of this finding is that the impugned order must be set aside. With the setting aside of the impugned order, all that remains the proceedings is the show cause notice. It is therefore necessary that this notice be brought to its logical conclusion by a fresh adjudication. To enable that to be done we remand the matter back to original authority to examine the evidence and to determine the matter afresh."

In pursuance of the said Hon'ble Tribunal's Order, the said SCN is now before me for adjudication.

Brief facts of the case

2. The officers of the Directorate of the Revenue Intelligence (DRI), Mumbai Zonal Unit had received an intelligence indicating that cloves of Madagascar, Zanzibar, Indonesia and Cameroon origin were being imported at grossly undervalued price of US \$ 2800-2900 PMT (per metric Ton) as against the prevailing international price of US \$ 4900-5500 PMT. The investigations were initiated by the DRI, Mumbai Zonal Unit. During the course of investigations, it was gathered from the circulars issued by the Directorate of Valuation and the price published in "The Public Ledger" (a weekly published from London giving world

¹ Also referred to as the notice or the SCN

² Also referred to as the Hon'ble Tribunal's Remand Order

³ Noticee No. 1

⁴ Also referred to as 1st OIO

commodity prices and specializing in agricultural commodities established since 1760 and generally accepted as the last word on the subject) that prevailing international price of cloves in the month of January/February 2001 was around US \$ 5500 which reached to US \$ 6500 PMT by the end of February / beginning of March 2001 and that cloves were not traded at price less than US \$ 4200 PMT during the year 2000 except in the beginning of January 2000.

3. The Commissioners of Customs at Mumbai, namely, Import, Nhava Sheva and Export Promotion were requested by the officers of D.R.I., Mumbai in the beginning of March 2001 to forward Bills of Entries in respect of live consignments of cloves for scrutiny /examination by DRI. Bills of Entry relating to 24 live consignments of cloves (22), and two consignments of cloves stems, pending clearance at that time, were forwarded. After scrutiny of these documents and on the basis of further intelligence, searches were carried out by the DRI officers on 16.03.2001 at premises connected with some importers, market brokers and indenting agents. Searches were also carried out at two cold storage godowns, where large quantities of cloves imported in the past were stored.

4. During the course of investigations, office and residential premises of one Sh. Bhumish Shah, working as an agent for M/s. IJIMASIA, Singapore, engaged in export of various spices to India, was searched. Search of his residential premises on 16.03.2001 situated at 1709/57, Pantnagar, Ghatkopar (East), Mumbai-75 resulted in the recovery of incriminating documents indicating actual, as well as the declared invoice value in respect of several imported consignments of cloves and other spices. Officers also recovered Indian currency amounting to Rs. 1.02 Crores. Documents seized indicated both actual and invoice value of the consignments of cloves shipped to India and consigned to various buyers in India. Value of cloves as per the documents recovered from the residence of Sh. Bhumish Shah varied from 2900 US \$ PMT to 3200 US \$ PMT as declared price against actual price of 4625 US \$ PMT to 5400 US \$ PMT and the value of clove stem varied from 350 US \$ PMT to 500 US \$ PMT as declared price against actual price of 700 US \$ PMT to 735 US \$ PMT.

4.1 Statement of Sh. Bhumish Mohanlal Shah was recorded on 16.03.2001, 17.03.2001, 27.04.2001, 06.03.2002, and 07.03.2002, under section 108 of the Customs Act, 1962 (hereinafter referred as 'Act') wherein he interalia stated that he deals in the brokerage of imported spices like cloves, cassia, star aniseeds, maize, dried ginger etc; that these goods were imported by various firms and stored in warehouses and godowns; that he solicited customers for these goods and arranged the delivery and collection of payments on behalf of the actual importers/owners; that he received a commission of 0.5%; that payments were mostly made in cash; that on knowing from Sh. Bhaskar Shah of Jabs International, he contacted Mr. Shabbir and Mr. Fuad of IJIMASIA and began working as an indenting agent for them; that he had acted on behalf of local importers like M/s. Esjaypee Impex, M/s. Sachha Saudha Pedhi⁵, M/s. Poonam

⁵ Noticee No. 2

Trading Co⁶, M/s. Radha. V. Company⁷, M/s. Sunil Daulatram⁸, and M/s. Aroma International; that he did not have any proprietorship or partnership firm; that he was working only as indenter in imports of spices from IJIMASIA, Singapore; that for the purpose of indenting he took daily quotation from them on phone. He further stated that such prices obtained in respect of various spices were conveyed to local buyers; that the buyers negotiated with M/s. IJIMASIA, Singapore and confirmation of the transactions were conveyed to the local buyers by M/s. IJIMASIA, Singapore, through him; that for this work he received a commission of 1% which was paid to him by D.D. in US \$. When confronted with specific documents contained in a file recovered from his residence showing particulars of several consignments imported by various importers wherein the value was shown as actual value, invoice value, difference etc, Sh. Bhumish Shah explained the details and informed that there was a wide difference between the value declared to the Customs at the time of clearance and the actual price at which the goods were transacted and paid for.

4.2 On being specifically asked about the wide variation between the actual price of the consignment and the price at which these consignments were declared to the Customs, Sh. Bhumish Shah informed that though the consignments of clove were regularly purchased by importers at higher prices, the shippers were obliging to the request of the importers and issued invoices of much lower value and thus differential value arised; that the payment of differential value between the invoice value and the actual value were paid by the importer to the shipper. He also gave the price at which cloves of Zanzibar, Madagascar and Indonesian origin were sold in the Mumbai market for the last 10 months which were ranging from 4100 to 6100, from 3800 to 5900 and from 3800 to 5100 US \$ PMT, respectively. He further informed that since June 2000 approximately 22 consignments had been indented through him to the firms namely M/s Sachha Saudha Pedhi, Pune, M/s. Esjaypee Impex (P) Ltd, M/s. Aroma International, M/s Poonam Trading Co, M/s, Ganesh International, M/s. Radha V. Company, and M/s. S. Dolatram; that apart from the above, two importers i.e. M/s. Mulji Gokuldas and M/s. Ashwin Traders had imported cloves directly from IJIMASIA, Singapore; that for these two importers also he had received 0.5% commission as these two firms were also from Mumbai; that he started the job of indenting for M/s. IJIMASIA, Singapore, from June 2000, and that the importers had declared much less price than the actual price; that not a single consignment of clove indented and imported through him was at actual price; he is an income tax payee since 1999- 2000, and that has got PAN number; On specifically asked about the source of Rs. 1.02 Crore recovered from his residence under panchanama dated 16.03.2001, he informed the same belonged to various traders of APMC market for he was doing commission basis; that the cloves imported by the traders were sold in APMC market mostly by cash; that he collected the cash payment from purchasers and settled the account periodically after deducting the 0.5% brokerage; that the amount of Rs. 1.02 Crores was the sale proceeds of various traders, the names of which he did

⁶ Noticee No. 7

⁷ Noticee No. 6

⁸ Noticee No. 5

not remember; that the purpose of sending details of consignments imported by various firms to him was for pursuing the importers to expedite their dues to M/s. IJIMASIA, Singapore; that he also held back the sale proceeds of such traders whose payments were pending.

4.3 He produced copy of three invoices bearing No: 624/2k-01 dated 07.02.2001, IA/RR/IMP/07/02 dated 07.02.2001 and IA/SSP/INF-1001/01 dated 10.1.2001 of M/s. IJIMASIA Singapore, indicating the actual transaction value of the consignments in respect of three consignments. Further about the recovery of Rs. 1.02 Crores from his residence on 16.03.2001, he stated that he also sold imported spices indented through him to local traders; that mostly such transactions were on cash basis; that the accounts of the amount so collected were settled periodically; that the goods belonged to M/s. Sachha Saudha Pedhi, M/s. Esjaypee Impex, M/s Poonam Trading Co, M/s. Ganesh International, M/s. Radha V. Company and M/s. Sunil Dolatram indented and imported through him from IJIMASIA, Singapore has been sold in the market; that the sale proceeds of the goods were released to the respective firms after receipt of the confirmation from M/s. IJIMASIA, Singapore about the receipt of their dues from the importers. He was specifically shown the copies of the documents mentioned at Sr. No. 151 to 163, recovered from his residence and when asked to explain its contents, he stated that the said documents were the particulars of consignments indented and imported through him from M/s. IJIMASIA, Singapore, to various importers in Mumbai; that the same gave details of the importers, export ref. Number, description of the goods, actual value, invoice value and differential amount payable etc; that the same was periodically faxed from M/s. IJIMASIA, Singapore, for the purpose of pursuing the importers for payment of their dues that he was appointed as indenter/consultant by M/s. IJIMASIA, Singapore, vide their letter dated 30.05.2000; that since then he was looking after the indenting of consignments of various importers based in Mumbai; that all the consignments indented through him since his appointment as indenting agent were imported at undervalued price; that most of such consignments imported through him were also sold by him in the market and sale proceeds of such consignments sold in the market were held back by him so as to pursue and expedite payments to IJIMASIA, Singapore; that the Indian currency amounting to Rs. 1.02 Crores recovered from his residence on 16.03.2001 was the sale proceeds of goods held back by him for pursuing the payments to M/s. IJIMASIA. Singapore; to the best of his memory out of the total amount approximately Rs. 75 to Rs. 80 lacs belonged to M/s. Sachha Saudha Pedhi, Pune, Rs. 12 lakhs belonged to M/s. Laxmi Impex and the balance amount belonged to M/s. Samudri International⁹, Mumbai. He also informed that he had no concern with the said amount of Rs. 1.02 Crores as the same was accumulated out of the sale proceeds of spices of foreign origin belonging to the above firms; that he did not have any documents co-relating the amount with the parties. He confirmed all his statements as true and correct.

5. Sh. Biharilal G. Ghura, proprietor of M/s. Radha.V. Company, F/53 APMC Market, Phase II, Vashi, New Mumbai and director of M/s. Ghura Impex (P) Ltd, 330, Narsinatha Street,

⁹ Noticee No. 3

2nd Floor, Katha Bazar, Mumbai-9, in his statement recorded on 16.03.2001 under section 108 of the Act stated that both the firms dealt in the import as well as trading of various spices including cloves and that he had imported six consignments of cloves and declared the rate ranging between US \$ 2400 to 2900 whereas the actual rate per metric ton was between US \$ 3700 to 5200 PMT. He also informed that one of the consignments had been indented and imported through Sh. Bhumish Shah where the invoice price declared to Customs was US \$ 2900 PMT as against the actual price of US \$ 5500 PMT.

6. During the course of the investigation statement of Sh. Kejal Harendra Mehta was recorded on 01.05.2001, 25.02.2002 and 04.03.2002 under section 108 of the Act wherein he inter alia stated that he was doing trading in spices and after learning the demands of various spices in the market decided to import directly and due to the opposition from his father, he requested his friend Sh. Alpesh Mehta to open two firms so that goods can be imported for which he was paid a commission of 3% of the document value, accordingly he had opened two firms namely M/s. Mayur Enterprises¹⁰ and M/s. Samudri International; that during this period he met indenting agent Sh. Bhumish Shah who suggested to him to import various spices at under invoiced price so that a substantial amount of customs duty can be evaded; that Sh. Bhumish Shah's suggestion tempted him to go for importation of six consignments, i.e. four consignments of star aniseeds and one consignment of cubebs in the name of M/s. Samudri International and one consignment of cubebs in the name of M/s. Mayur Enterprises, at the invoice price of 1450 US \$ PMT against actual price that varied from 4650 to 7475 US \$ PMT; that the differential amount in respect of all these consignments was either collected by Sh. Bhumish Shah or by unknown persons by using code words or code numbers; that he did not know as to how they were sending the differential amount abroad. He further informed that for the purpose of booking consignments and negotiating the price, he always used to contact Sh. Bhumish Shah; that on the basis of the offer made by Sh. Bhumish Shah, orders were placed for few consignments of star aniseeds and cubebs and on its arrival in Mumbai/ Nhava Sheva ports he used to release the documents from banks by making remittances by documentation done with the signatures of Sh. Alpesh Mehta and Sh. Mayur Ravani in whose name the two firms were registered; that thereafter he used to hand over the documents of star aniseeds to Custom House Clearing Agent M/s. Durga International (CHA No: 11/962) and documents of cubebs to Custom House Clearing Agent M/s S. Rajendra & Co (CHA No: 11/955). He further stated that about 50% of the goods imported were sold by him in the up markets and the balance were sold through Sh. Bhumish Shah in APMC Market; that the differential amount was adjusted with the sale proceeds of the goods sold through Sh. Bhumish Shah or handed over to the representative of Sh. Bhumish Shah. When confronted with the documents recovered from Sh. Bhumish Shah's residence pertaining to the import of star aniseeds and cubebs imported by M/s. Samudri International and M/s. Mayur Enterprises, he confirmed having imported four consignments of star aniseeds and two consignments of cubebs at grossly undervalued price for evading customs duty; that he had also imported two consignments of mace and one consignment of star aniseeds in the name of M/s.

¹⁰ Noticee No. 4

Madhu Enterprises whose proprietor was also shown as Sh. Mayur Ravani to whom an amount of 3 % commission was given; that he confirmed having imported two mixed consignments i.e. a consignment of star aniseeds/gum benzoin and another consignment of dumber batty/cubebs; that in those consignments also the value had been understated to evade customs duty and promised to produce the documents in respect of the same; that in the above case of star aniseeds and mace also the goods were indented and imported through Sh. Bhumish Shah from M/s. IJIMASIA, Singapore; that the mixed consignments were imported from M/s. Ketan Trading Co, Singapore for which he had contacted Sh. Kamallesh Maniar of the firm; that part of the sale proceeds of the goods sold through Sh. Bhumish Shah was retained by him for adjusting the differential amount and for repatriating the same to M/s. IJIMASIA, Singapore, through non-banking channels; that he had not maintained any purchases register.

7. Sh. Ashok Raghuvir Goyal, Manager of M/s. Sachha Saudha Pedhi in his statement recorded on 19.03.2001 and 20.03.2001 under section 108 of the Act, stated that he was working with his brother Sh. Shivkumar Raghuvir Goyal, proprietor of M/s. Sachha Saudha Pedhi, Pune for the last five years; that his firm was engaged in the import of various types of spices like clove, cassia, ginger, poppy seed and star aniseeds etc; that he looked after all the negotiations of import, completion of Customs formalities; that M/s. Vasudev Ranchoddas was their Customs House Agent for all imports; that they did not export anything; that Sh. Bhumish Shah was their indenter for import of spices from M/s. IJIMASIA, Singapore; that from M/s. IJIMASIA, Singapore, they had imported several consignments of spices; that they had also imported spices from other suppliers also; that they recently imported four consignments of cloves of Madagascar and Zanzibar origin from Esmail Ahmed Bros, Dubai and M/s IJIMASIA, Singapore at declared unit price ranging from 2625 US \$ PMT to 2750 US \$ PMT as against actual unit price ranging from 4925 US \$ PMT to 5200 US \$ PMT; that he paid the differential duty and cleared the consignments provisionally, that in respect of the consignments supplied from M/s. IJIMASIA, Singapore, the price quotations were taken from Sh. Bhumish Shah and accordingly the transaction was negotiated and finalized; that spices in the Mumbai as well as Pune market were transacted mostly in cash; that their entire sales in Mumbai was done through Sh. Bhumish Shah only and they did not have any other broker for local sale. Several summons were issued to Sh. Ashok Raghuvir Goyal for recording further statement, however he did not respond for the same.

8.1 Statement of Sh. Dilip Poonamchand Maru, Manager and power of attorney of M/s. Poonam Trading Co, 316, Arneja Corner, Sector 17, Vashi, New Bombay, was recorded on 19.03.2001 wherein he inter alia stated that he is looking after the day to day affairs of the firm and that the firm dealt in the import and trading of various spices including cloves; that they had imported three consignments under Bills of Entry no 113681 dt 11.03.2000, 171452 dt. 22.02.2001 and 169861 dt. 09.02.2001 and in all three the declared price was US\$ 2400 to 2900 PMT against the actual price of US\$ 4000 to 5250 PMT; that he admitted having declared understated price to the Customs at the time of clearance and voluntarily paid the differential

duty amounting to Rs. 14,92,279.66 for the past as well as live consignments, while taking provisional release of goods pending further investigations. Further for payment of differential value of the goods to the supplier he stated that the price was normally finalized through phone and the differential amount was paid to the supplier in cash.

8.2 In his further statement recorded on 11.03.2002 under section 108 of the Act, Sh. Dilip P. Maru stated that the clove consignments imported from M/s. IJIMASIA, Singapore, through Bhumish Shah were at grossly undervalued price; that through Sh. Bhumish Shah, he had also sold few of the consignments Indented and imported from M/s. IJIMASIA, Singapore; that Sh. Bhumish Shah also used to withhold the sale proceeds of such goods sold through him to expedite the actual amount due to M/s. IJIMASIA; and on account of goods sold through Sh. Bhumish Shah, he is yet to recover an amount of Rs. 12 to 17 lakhs.

9. Sh. Sunil Daulatram Chabria, proprietor of the firm M/s. Sunil Daulatram, in his statement recorded on 23.10.2001 under section 108 of the Act stated having imported two consignments of cloves at under stated prices; that one consignment of 11.313 MTs from M/s. International Merchantile, Singapore and another consignment of 5 MTs from M/s. IJIMASIA, Singapore; that he accepted that the goods were imported at undervalued prices and offered to pay the differential duty. On being specifically asked, he further stated that the goods were purchased through Sh. Bhumish Shah and the differential duty had been settled with him.

10. On the basis of documents recovered from the residence of Sh. Bhumish M. Shah, a comparative chart as shown in SCN was prepared and on scrutiny of this, it was confirmed that several consignments of goods imported through Sh. Bhumish M. Shah at undervalued price from IJIMASIA, Singapore had already been cleared under bills of entries filed by several importers, the investigations of which were being dealt separately. The Present Adjudicating proceeding is limited to the seizure of Indian currency amounting to Rs. 1.02 Crores from the residential premises of Sh. Bhumish M. Shah.

Findings of investigation:

11. Scrutiny of the documents seized from the residential premises of Sh. Bhumish M. Shah and those tendered during the course of investigations mentioned above along with the depositions given by the importers for whom he was indicated, it appeared that: -

- (i) M/s. IJIMASIA, Singapore, vide their letter no. Nil dated 30 May, 2000 had appointed Sh. Bhumish Shah as the consultant/indenter for the various products supplied to Indian market mainly comprising of spices and food additives. The job involved regular feedback of local market information and booking of orders on behalf of M/s. IJIMASIA, Singapore, for which adequate commission was assured.

- (ii) Interaction between Sh. Bhumish Shah and M/s. IJIMASIA, Singapore had been on a regular basis as can be seen from the admitted fact that daily telephonic conversation had been taking place exchanging current developments in the local market.
- (iii) Copies of the several fax messages recovered from his residence indicated that Sh. Bhumish Shah was acting as a conduit for all the illegal activities of M/s. IJIMASIA, Singapore, for their business interests in India. These fax messages also indicated that Sh. Bhumish Shah was fully aware of the fact that the consignments were being imported at grossly undervalued prices.
- (iv) The periodical fax messages received from M/s. IJIMASIA, Singapore clearly indicated the particulars of consignments and importers, reference number of export, actual price, invoice price, difference, status of the consignments and action warranted etc. Fax messages at sr. no. 25,83,109 etc clearly indicated that Sh. Bhumish Shah was receiving directions from M/s. IJIMASIA, Singapore to follow up and expedite the local importers to pay the differential amount in respect of the consignments,
- (v) Sh. Bhumish Shah in his statements admittedly confessed to have withheld the sale proceeds of such undervalued consignments indented and imported through him by local importers until message from M/s. IJIMASIA, Singapore was received to the extent that their dues have been cleared by the importers. The importers also stated that on behalf of M/s. IJIMASIA, Singapore, Sh. Bhumish Shah used to collect the differential amount of undervalued goods for repatriating it to the suppliers through non-banking Channels.
- (vi) Sh. Bhumish Shah had confirmed in his statements that the entire amount of Rs. 1.02 Crores was the sale proceeds of the goods imported through him at undervalued price which he had held back so as to pursue at expedite payments to M/s. IJIMASIA Singapore.
- (vii) Sh. Bhumish Shah was acting as indenting agent for M/s. IJIMASIA, Singapore and was fully aware about the correct price of the goods at which the sale of the goods imported from M/s. IJIMASIA was finalized. These goods imported by M/s. Saccha Saudha Pedhi, Pune, M/s. Samudri International, Mumbai, M/s. Mayur Enterprises, Mumbai, M/s. Sunil Daulatram, Delhi, M/s. Radha V. Company, Mumbai and M/s. Poonam Trading Co., Mumbai were later on sold by Sh. Bhumish Shah who had knowledge and reasons to believe that the goods were imported at undervalued price and were therefore smuggled goods. Rs. 1.02 Crores seized from the residential premises of Sh. Bhumish Shah, being the sale proceeds of smuggled goods sold by Sh. Bhumish Shah with knowledge that there

were smuggled goods are therefore liable to confiscation under section 121 of the Act.

- (viii) In view of the above, Sh. Bhumish Shah was fully aware that he was selling smuggled goods indented and imported through him from M/s. IJIMASIA, Singapore for M/s. Saccha Saudha Pedhi, Pune, M/s. Samudri International, Mumbai, M/s. Mayur Enterprises, Mumbai, M/s. Sunil Daulatram, Delhi, M/s. Radha V. Company, Mumbai and M/s. Poonam Trading Co., Mumbai, were aiding and abetting the above firms as also M/s. IJIMASIA, Singapore in the selling of the smuggled goods, rendering himself liable to penal action under section 112 of the Act.
- (ix) Sh. Bhumish Shah also informed that he did not have any documents to co-relate the seized currency with any particular importer or firms for which he was doing brokerage or indenting. It therefore appeared that the entire amount had been collected by Sh. Bhumish Shah for the purpose of repatriating the same to M/s. IJIMASIA, Singapore through non-banking channels rendering it liable to confiscation under section 121 read with section 112 of the Act.

12. A Show Cause Notice, bearing F. No. DRI/BZU/D/21/2001 dated 13.03.2002 was issued to Sh. Bhumish Mohanlal Shah, M/s. Sachha Saudha Pedhi, M/s. Samudri International, M/s. Mayur Enterprises, M/s. Sunil Daulatram, M/s. Radha V. Company M/s. Poonam Trading Co. & others asking them to show cause why: -

- (i) The Indian currency totally amounting to Rs. 1.02 Crore, recovered and seized from the residence of Sh. Bhumish Shah at 1709/57 Gaga Sagar Co-op. Housing Society, Pantnagar, Ghatkopar (EAST) Mumbai on 16.03.2001 should not be confiscated under section 121 of the Act, and
- (ii) Penalty under 112 (a) (b) of the Act should not be imposed on him.

Details of the first round of adjudication

13. The above said SCN dated 13.03.2002 issued vide F. No. DRI/BZU/D/21/2001 was adjudicated by the Commissioner of Customs (Adjudication), NCH, Mumbai in first round vide Order-in-Original No. 12/2005/CAC/CC/RJM dated 28.04.2005 vide F. No. S/10-19/2002 Adjn. Vide said Order, the Adjudicating Authority has held that Indian currency of Rs. 1.02 Crores was not liable to confiscation under the provisions of section 121 of the Act and thereby dropped the proceedings against all the noticees and further directed to return the Indian currency of Rs. 1.02 Crores to the person from whom it was recovered.

Grounds of dropping the seizure of currency in first round of adjudication

14.1 The search of the residence of Sh. Bhumish Shah was done on 16.03.2001 and that panchanama copy was given to the noticee only on 30.04.2002. It is observed that as per the panchanama copy, available on record, the noticee namely Sh. Bhumish Shah signed on the panchanama on 07.01.2002, with a remark "seen" this fact clearly supports the contention of the noticee that no copy was given to him immediately after the search of his premises. This lacuna of not supplying the panchanama promptly on the same day, vitiates the proceedings under decision.

14.2 Further, a perusal of the said panchanama clearly brings out the fact that no seizure was effected and that the documents and Indian currency were either "recovered" or "detained". As per section 110 of the Act, goods or documents can be seized "if the proper officer has a reason to believe that any goods are liable for confiscation under this Act.....". This leads to the conclusion that at the time of search the officers had no reason to believe that the Indian currency recovered was liable for confiscation under the Act. Further, from the evidence on record, it is seen that the show cause notice issued in this case in para 15.1 (page 20) the noticees have been asked to show cause as to why the Indian currency totally amounting to Rs. 1.02 Crore recovered and seized from the residence of Sh. Bhumish Shah..... should not be confiscated. There is no indication on record to indicate that the amount recovered was subsequently seized. Further, it is also observed that immediately after the search, the statement of Sh. Bhumish Shah was recorded (16.03.2001). In this statement, there is no mention of the recovery and detention of a huge amount of Rs. 1.02 Crore. If the officers had a reason to believe that the amount recovered was sale proceeds of smuggled goods, the logical thing would have been to accost and question the source of the currency recovered. It is also seen that in the subsequent statement recorded on 17.03.2001, Sh. Bhumish Shah, on being asked regarding the source for Rs. 1.02 Crore found in his house, he has stated that this money belongs to various traders of APMC Market for whom he was doing the commission business. The goods i.e. cloves imported by the traders, were sold in the APMC Market by him and majority of the sales was on cash basis and that he collected cash payments from purchasers and kept the same with him. Periodically the accounts were settled and after deducting the "0.5% brokerage, he handovers the cash to respective traders. On being further asked, he stated that the Rs. 1.02 Crores pertains to cash sale for various traders and at that time, he was not in a position to give the names of traders and how much money belongs to whom. And that entire money belongs to the sale of cloves and other imported spices indented through him and sold by him in local market in cash." From this submission of the noticee, it is seen that the amount recovered pertains to sale of cloves and other commodities and that after deducting 0.5% as brokerage the rest of the amount is given to the various traders. Even in this statement, there is no mention of any specific importation effected contrary to law, thereby rendering the same liable for confiscation. It is only in the statement of Sh. Bhumish Shah recorded on 07.03.2002 i.e. nearly after one year after the search of his premises, that the noticee has stated as to whom the recovered money belongs to. In this context, the Advocate

representing Sh. Bhumish Shah had argued that if the investigating agency sincerely believed that the amount recovered were sale proceeds of smuggled goods, then they should have recorded the statement of M/s. Laxmi Impex (to whom Rs. 12 lakhs of the recovered amount belongs). Perusal of the record indicates that the investigating agency had not recorded any statement from the owners of M/s. Laxmi Impex. This again gives credence to the contention of the noticee that the amount recovered is not sale proceeds of smuggled goods and that his statements were recorded under duress and hence do not reflect true facts.

14.3 Another main contention of the noticee pertains to the fact that there is no evidence to indicate that any of the consignments listed in the show cause notice was directly imported by him. Evidence on record does not show that the noticee had imported any consignment involved in the present case. The other noticees, whose statements have been recorded in the instant case, have admitted to the importation by them and there is no allegation by any one of them that any consignment was imported by Sh. Bhumish Shah. In this context, the investigating agency, based on the documents recovered, contended and alleged that Sh. Bhumish Shah had withheld the sale proceeds of undervalued consignments indented and imported by local importers. If this be so, evidence would be available to indicate that the goods- (which were imported and undervalued), were in the actual custody of Sh. Bhumish Shah. Since this is the only way he could sell the goods and retain the sale proceeds.

14.4 Thus, it was the contention of the noticee that there is no evidence to indicate that any of the imported goods were in the custody of Sh. Bhumish Shah. Consequently, it cannot be said that the undervalued goods were sold by him. After receipt of replies to the show cause notice, the same were sent to the investigating agency namely DRI, for comments, since the noticees had raised certain legal issues. One of the specific points related to the storage of goods and issue of delivery challans. While submitting their reply (letter dated 17.03.2002) the investigating agency contended that the storage of cloves in the godown of Sh. Bhumish Shah is not the point of contention in the show cause notice. If this be the case, then it is not certain as to who was the custodian of the goods and in whose possession the goods were at the point of sale. In the very same letter, in the last but one paragraph, the investigating agency says that "Sh. Bhumish Shah in his statements admittedly confessed to have withheld the sale proceeds of such undervalued consignments intended and imported through him by local importers. There is no explanation as to who sold the goods, whether after sale, the sale proceeds were handed over to Sh. Bhumish Shah or actually Bhumish Shah sold the goods. It is observed that the investigating agency has not been able to produce any evidence to indicate the actual custodian of the goods and actual seller of the said undervalued goods.

14.5 Further, there appears to be contradictions and variations in the statements recorded from Sh. Bhumish Shah. In the statement recorded on 06.03.2002, Sh. Bhumish Shah has stated

"On asking specifically to explain the particulars of figures mentioned in the set of documents appears to faxed from M/s. IJIMASIA to me. I say that the set document gives

particulars about the consignments indented and imported through me by various importers from M/s. IJIMASIA, Singapore. The said statement of account also mention about the name of the party, exp. ref. no., description of goods, actual value, invoice value and differential amount etc. The said statement of account is periodically faxed to me from Ms. IJIMASIA for the purpose of pursuing the importers for payment of their dues."

From this statement, it is seen that the documents recovered from the residence giving details of importer etc. were kept by Sh. Bhumish Shah for the purpose of faxing the same to M/s. IJIMASIA-the supplier for the purpose of pursuing the importers for payment of their dues. This indicates that the dues were directly collected by the supplier from the importer. However, in the statement recorded on the next day i.e. 07.03.2002, Sh. Bhumish Shah has stated as follows:

"I further say that most of the consignments imported through me were also sold in the market through me in the local market. On your asking, I say that many times the sale proceeds of such goods sold in the market through me were held back so as to expedite payment of the consignment Imported from M/s. IJIMASIA, Singapore."

This admission of holding back of sale proceeds is in direct conflict of admission made on the previous day.

14.6 A perusal of the other statements recorded from other parties connected to the case also do not throw any clear light on the actual role laid by Sh. Bhumish Shah especially regarding the fact whether he was the sole seller of all imported and undervalued goods. From the statement of Sh. Kejal Harendra Mehta, proprietor of M/s. Samudri International (dated 25.02.2002) it has been stated that Sh. Mehta on arrival of the imported goods used to release the documents from banks by making remittances. In the same statement, he has also stated that Sh. Bhumish Shah was the indenter for the import of spices and that they also imported spices from other suppliers. This statement clearly indicates that the money transaction was through banks and that Sh. Bhumish Shah was only an indenter. This contention of Sh. Mehta is indirect contradiction to the earlier statement given on 01.05.2001, wherein, he has stated that the differential amount in respect of all these consignments were either collected by Sh. Bhumish Shah or by unknown persons by using code words or code numbers. Similarly, it is seen that Sh. Dilip Punam Chand Maru, Manager and Power of Attorney holder of M/s. Punam Trading in a statement dated 19.03.2001 has stated that the differential value of the goods is paid to the supplier and at the price normally finalized through phone and that the differential amount is paid to supplier in cash. From this admission, it is presumed that the monetary transactions were between the supplier of the goods and the importer. However, in a further statement recorded on 11.03.2002 i.e. nearly after one year, Sh. Maru states that Sh. Bhumish Shah used to withhold the sale proceeds of goods sold through him in order to expedite payments to M/s. IJIMASIA. This contention of Sh. Maru is indirect contradiction to the earlier admission made near a year back wherein, he had stated that any differential amount was paid to the supplier in cash.

14.7 As regards the source of the amount recovered from the premises of Sh. Bhumish Shah, in a statement dated 07.03.2002, has stated that about Rs.75 to Rs.80 lakhs belongs to Ms. Sachha Saudha Pedhi, Rs. 12 lakhs belongs to M/s. Laxmi Impex and the balance amount belongs to M/s. Samudri International. As stated earlier, the investigating agency has not recorded any statement from M/s. Laxmi Impex. As regards the other two companies, they have in their respective submissions made after receipt of the show cause notice and also at the time of personal hearing have categorically denied that any amount is kept or due from Sh. Bhumish Shah. From the evidence on record, no further light is thrown as regards the source of money recovered. In fact, as already discussed above, there are contradictions in the statements of Sh. Kejal Mehta who is the actual owner of M/s. Samudri International. The details given above lead to the conclusion that the said statements are to be accepted with a pinch of salt and it is felt that in the absence of any other corroborative data, the evidentiary value of these statements are considerably diluted. They in no way help the case at hand.

14.8 While on this issue, it is also observed that some of the importers connected to the present case have already paid or offered to pay the differential duty. From the statement of Sh. Ashok Raghuveer Goyal, recorded on 20.03.2001, it is seen that the differential duty on the imported goods have been paid and the consignment cleared provisionally. Similarly, from the statement of Sh. Dilip Punam Chand Maru, Manager of M/s. Punam Trading Company, recorded on 19.03.2001, it is gathered that he had admitted to undervaluation and has paid differential duty amounting to Rs. 14,92,279.66. Again, from the statement of Sh. Sunil Daulatram Chabria, proprietor of the firm M/s. Sunil Daulatram recorded on 23.10.2001, it is seen that he has admitted to the undervaluation of the goods and offered to pay the differential duty. These factors clearly point out that the investigating agency has already collected the differential duty or is in the process of collecting the same in some of the importations connected to the case at hand. This being the case, it cannot be said with any authority that the amount recovered from Sh. Bhumish Shah's house is the sale proceeds of the smuggled goods.

14.9 It is seen that in order to invoke or attract section 121, it has to be established that.

- (i) there must be a sale,
- (ii) the sale must be of smuggled goods; and
- (iii) the sale must be by a person having knowledge or reason to believe that the goods were of smuggled origin.

If the above conditions are applied to the present case in hand, it is seen that the evidence on record only establishes the fact that the main person involved namely Sh. Bhumish Shah had knowledge of the prices quoted by the supplier and the prices declared by the importers. Apart from these, there is no evidence to indicate that there has been a sale / sales, which can be directly connected to the Indian currency seized. Secondly, the condition that the sale must be of smuggled goods cannot also apply to the present case in as much as there has been no conclusive

evidence to convincingly prove that any of the consignments involved in the present case have been undervalued and cleared and sold by Sh. Bhimish Shah. This conclusion is further strengthened by the fact that the investigating agency has admitted to the fact that independent enquiries are on regarding some of the consignments involved and further there is evidence also to indicate that in some of the cases the importers have admitted to undervaluation and paid differential duty or have offered to pay the differential duty.

14.10 In the preceding paragraphs a detailed analysis has been done to consider the evidentiary value of the data, as available on record. It is seen that the statements on which the investigating agency relies upon have vital contradictions. There is no evidence to indicate and connect the actual importation/s, wherein, undervaluation has taken place and where such goods have been disposed of. Even if disposal of such goods, for argument's sake, is taken to be established, there is no specific co-relation connecting the sale proceeds of such goods to the amount recovered from Sh. Bhumish Shah's house. More importantly, the investigating agency has admitted that based on the documents recovered from the residence of Sh. Bhumish Shah, further action under the Act is contemplated against the importers involved in the present case. This being the case, it cannot be said with certainty that the Indian currency recovered are the sale proceeds of smuggled goods. Consequently, section 121 of the Act cannot be invoked for the confiscation of the said Indian currency. The data and evidence available on record may lead to a suspicion regarding the involvement of Sh. Bhumish Shah, but this suspicion cannot be taken as proof. In this context, it would be relevant to cite the judgment in the case of **Malar**¹¹, wherein it has been observed "seizure and confiscation of currency without reasonable belief of its being sale proceeds of contraband goods, not tenable- mere possession of currency without satisfactory explanation does not cause such belief but may engender only suspicion. Suspicion cannot take the place of proof." Based on the above reasoning and after careful consideration of the evidence, available on record and after considering all the relevant case laws cited, it is concluded that the Indian currency of Rs. 1.02 Crores detained by the investigating agency cannot be confiscated as sale proceeds of smuggled goods under section 121 of the Act. Consequently, no penal action is maintainable against the noticees.

15. The Committee of Chief Commissioners of Customs in exercise of the powers vested under section 129D(1) of the Act, reviewed the said Order-in-Original No. 12/2005/CAC/CC/RJM dated 28.04.2005 and didn't find the subject Order-in-Original legal and proper.

Grounds of Appeal against OIO No. 12/2005/CAC/CC/RJM dated 28.04.2005

16.1 The adjudicating authority has failed to appreciate the confessional statements given by Sh. Bhumish Shah as well as other importers who were co-noticees in this case and who in their statements recorded under section 108 of the Act, have categorically and unambiguously admitted that the seized/recovered Indian currency of Rs. 1.02 Crores was sale-proceeds of

¹¹ Malar [1988 (33) ELT 444 (T)]

consignments of imported cloves/ spices, which was withheld by Sh. Bhumish Shah for pursuing the payments to M/s IJIMASIA, Singapore.

16.2 The Hon'ble Supreme Court in the case of **D. Bhoormull**¹², has held that it is not necessary for the Customs to prove that the particular person was concerned with the importation or exportation. It is enough if the Department furnished prima facie proof of the goods being smuggled in nature.

16.3 Seizure is not a precondition for invoking the liability of goods to confiscation under the provisions of the Act. Seizure vis-à-vis the detention have common implications, which has also been supported by the judgment passed in the case of **Sh. Rajesh Arora**¹³ and also in the case of **Vilayat Hussain**¹⁴.

16.4 Sh. Bhumish Shah had explained the contents of fax messages and also reiterated the factual position relating to the recovery of Rs. 1.02 Crores from his Premises which were admitted to be the sale proceeds of consignments imported through him by different importers. He has denied to have maintained any records containing details of imports vis-à-vis their disposal and realization of sale proceeds thereof. Sh. Bhumish Shah had not claimed the Indian currency and had not given any explanation (except the same was the sale proceeds of undervalued imported spices) about the possession of such a huge amount even in his reply to SCN.

16.5 The ratio of the judgements relied upon is not applicable to the present case, as there was a conscious knowledge on the part of Sh. Bhumish Shah about the nature of Indian currency recovered from his possession, which was admitted by him in his statements recorded under section 108 of the Act. Indian currency was recovered along with the fax messages showing undervalued import of spices by various importers and there is evidence by one of the such importers stating that Sh. Bhumish Shah was the person who used to sell all their imported spices.

17. Department filed an appeal against the said OIO dated 28.04.2005 in Hon'ble CESTAT Mumbai and Hon'ble CESTAT disposed of the said appeal vide Order No. A/87967/17/CB dated 12.06.2017. Observation of Hon'ble CESTAT are reproduced as below: -

"6. We find that the Adjudicating authority has placed emphasis on the seizure proceedings. According to us, a flaw in the seizure proceedings may be visited with the outcome of vacation of the seizure but here we are concerned with the legality and propriety of the confiscation proceedings that the impugned order deals with. Therefore, we would not like to examine that aspect since the scope for such a scrutiny has ended with the issue of show cause notice proposing confiscation of the seized Indian currency under section 121 of the Act.

¹² Commissioner of Customs, Madras and others V/s. V. D. Bhoormull 1983 (013) ELT-1546-SC

¹³ Sh. Rajesh Arora V/s Commissioner of Customs 1998 (101) ELT 246 (DEL)

¹⁴ Vilayat Hussain V/s. Union of India reported in 1997(95) ELT 19 (MP)

7. *It is very clear that the said section permits the competent authority to confiscate the sale proceeds of smuggled goods if the seller was established as having the reasonable belief that he was dealing with smuggled goods. Crucial evidence to establish the existence of such a reasonable belief are the statements of persons who have dealt with the goods in question and have also participated in its sale. It is not relevant whether the person from whom it was seized is concerned with the sale or with the goods.*

8. *We find in the impugned order that the Adjudicating Authority has failed to examine the facts arising from the various statements and has failed to test the conclusions derived therefrom for validity and reliability. Without such ascertainment of smuggling of goods, of disposal of smuggled goods, of knowledge that the goods are smuggled, and of the currency having been received from the buyers of smuggled goods, a decision to drop proceedings or to confiscate would lack the authority of law. This we find the impugned order to be.*

9. *The consequence of this finding is that the impugned order must be set aside. With the setting aside of the impugned order, all that remains the proceedings is the show cause notice. It is therefore necessary that this notice be brought to its logical conclusion by a fresh adjudication. To enable that to be done we remand the matter back to the original authority to examine the evidence and to determine the matter afresh."*

18. In pursuance of re-organization of the commissionerates under Mumbai Customs, the Commissioner of Customs (Import-1), NCH Mumbai was appointed as Common Adjudicating Authority for the said SCN dated 13.03.2002 vide Notification No. 30/2021-Customs (N.T./CAA/DRI) dated 12.08.2021.

Record of Personal Hearing (PH) & Written Submission

19. Personal Hearings on 18.02.2020, 25.04.2023, 10.07.2023, 07.08.2023, 23.08.2023, 12.09.2023, 19.10.2023, 22.11.2023 and 07.03.2024 were granted during this second round of adjudication. The submissions made during these personal hearings are summed up in paras below.

19.1 Sh. Stebin Mathew, Advocate on behalf of noticee Shri Bhumish Shah submitted on 17.11.2022 that the contentions of the revenue were that the issue in the matter were subject matter of section 138B & the Hon'ble Tribunal was pleased to remand the matter back for proper appreciation of evidence. He also requested that the provisions of section 138B are adhered to, in respect of the all the statements that are sought to be relied on in the matter since the matter has been remanded for examination of evidence and he may be intimated of the examination of the witnesses so as to remain present during the same. He further requested that his client i.e. Sh. Bhumish Shah may also be examined in terms of the provisions of section 138B of the Act.

19.2 A Personal Hearing was held on 10.07.2023 in which Sh. Stebin Mathew, Advocate appeared in person on behalf of noticee Shri Bhumish Shah and who inter-alia re-iterated his defence reply submitted on 17.11.2022 and stated that he will submit the final defence reply by 20.07.2023. Advocate Ms. Dishya Pandey attended PH on behalf of Shri Bhumish Shah on 19.10.2023 and Advocate Sh. Stebin Mathew vide letter dated 18.10.2023 submitted that Show Cause Notice dated 13.03.2002 is issued for the limited purpose of proposing confiscation of the seized cash under section 121 of the Act and requested to keep the proceedings in respect of SCN dated 13.03.2002 in abeyance till such time the SCN dated 13.10.2003 is not adjudicated and the issue whether the undervaluation of goods took place resulting in smuggling, has been addressed. In the event, the Adjudicating Authority finds that there was no undervaluation in respect of the consignments covered under the SCN dated 13.10.2003, would not be sustainable and requested to take up the SCN dated 13.10.2003 for adjudication first.

19.3 Ms. Priyasha Pawar, Advocate on behalf of M/s Mayur Enterprises attended Personal Hearing (PH) on 23.08.2023 and requested for relevant documents being the case very old, which were provided to her. She once again attended PH on 05.09.2023 and submitted preliminary submission dated 05.09.2023, wherein she stated that this matter is closed by OIO dated 28.04.2005 and M/s Mayur Enterprises is unaware about any order passed by the Appellate Authority in this subject matter. She further submitted that no hearing intimation or appellate order was served to M/s Mayur Enterprises. She further submitted that proceedings are hit by delays and laches and the instant proceedings deserve to be dropped on this ground alone referring the following case laws:

- (a) Rachana Garments Pvt.Ltd. - 2023 (383) ELT 15 (Bom.)
- (b) Bombay Dyeing & Mfg. Co.Ltd.-2022 (382) ELT 206 (Bom.)
- (c) Mckinsey & Co. Inc. -2022 (382) ELT 179 (Bom.)
- (d) Sushitex Exports (India) Ltd. 2022 (380) E.L.T. 244 (Bom.)
- (e) Parle International Ltd. 2021 (375) E.L.T. 633 (Bom.)
- (f) Lanvin Synthetics Pvt.Ltd.-2015 (322) ELT 429 (Bom.)
- (g) Reliance Industries Ltd.- 2019 (368) ELT 854 (Bom.)
- (h) Raymond Ltd. 2019 (368) ELT 481 (Bom.);
- (i) Premier Ltd. 2017 (354) ELT 365 (Bom)
- (j) UOI v Premier Ltd.-2018 (360) ELT A181(SC)
- (k) Reliance Transport & Travel P.Ltd.-2022 (3)TMI 1169-B.H.C
- (l) ATA Freight Line (1) Pvt.Ltd. - 2022 (3) TMI 1161-B.H.C.

Ms. Priyasha Pawar, Advocate also submitted that Indian currency of Rs. 1.02 Crore was never claimed by M/s Mayur Enterprises and the Department is free to deal with the same as deemed fit. She prayed to drop the penal proceeding against M/s Mayur Enterprises. Sh. Anil Balani & M/s. Priyasha Pawar, Advocate on behalf of M/s Mayur Enterprises attended PH on 05.10.2023 & vide letter dated 06.10.2023 submitted that one single appeal was preferred by the Department only against noticee Sh. Bhumish Mohanlal Shah. Since, the Department was never aggrieved by the Order dropping the proceedings against his client i.e. M/s Mayur Enterprises. Ms. Priyasha Pawar also attended PH on 19.10.2023. Sh. Anil Balani vide letter dated 22.11.2023 submitted that Order-in-Original dated 28.04.2005 proves that the proceedings were dropped by the Commissioner of Customs (Adjudication), NCH, Mumbai. Ms. Priyasha Pawar attended PH on 22.11.2023 and confirmed that she has received all RUDs; she has mentioned the need of cross-examination on 22.11.2023 for the first time, but no names of witnesses have been mentioned in her letter dated 22.11.2023, the Adjudicating Authority observed that already 4 PH have been given and no demand for cross-examination was made earlier, this appears to be an afterthought; she mentioned that RUDs were not complete; final defence reply to be given on 24.11.2023. No further reply was submitted.

19.4 On request vide letter dated 07.07.2023, noticee M/s Radha V. Company was also provided SCN along with RUDs. M/s Radha V. Company has submitted letters dated 03.10.2023 & 21.11.2023, stating that they have no claim whatsoever and have no involvement in the matter.

19.5 Sh. Dilip Maru on behalf of M/s Poonam Trading Co. attended PH on 05.10.2023, and submitted his final reply. He also re-iterated his earlier submissions dated 21.10.2002 and others. He said that he does not have connection with the Indian currency seized from Sh. Bhumish Shah and there was no undervaluation for imports belonging to him and he should not be imposed any penalty.

19.6 M/s Sachha Saudha Pedhi, M/s Samudri International & M/s Sunil Daulatram have neither attended any Personal Hearing nor submitted any reply for the Personal Hearing Memo.

DISCUSSIONS AND FINDINGS

20. The case involves charges against 7 noticees regarding seizure of Indian currency of Rs. 1.02 Crores from the residence of Sh. Bhumish Shah. The noticees are:

Noticee-1 (Shri Bhumish Shah)

Noticee-2 (M/s. Sachha Saudha Pedhi)

Noticee-3 (M/s. Samudri International)

Noticee-4 (M/s. Mayur Enterprises)

Noticee-5 (M/s. Sunil Daulatram)

Noticee-6 (M/s. Radha V. Company)

Noticee-7 (M/s. Poonam Trading Co.)

21. I have gone through all the case records especially SCN, OIO dated 28.04.2005, Department's Review Order, Hon'ble Tribunal Order dated 12.06.2017, defence replies of the noticees and their submissions made during the personal hearings. Copies of RUDs were again emailed to the noticees during this second round of adjudication.
22. The subject SCN was adjudicated in first round vide Order-in-Original No. 12/2005/CAC/CC/RJM dated 28.04.2005 issued in F. No. S/10-19/2002-Adj. by Commissioner of Customs (Adjudication) New Customs House, Mumbai. Department appealed against the said Order in Hon'ble Tribunal, WZU vide Appeal Number C/243/06-MUM in the year 2006. Hon'ble Tribunal vide Final Order No. A/87967/17/CB dated 12.06.2017 remanded the case back to the original Adjudicating Authority with direction to examine the evidence and to determine the matter afresh. The case remained in the call book for long due to the impact of Mangali Impex and Canon India Judgements. In compliance with the Order of the Hon'ble Tribunal, the matter is now being taken up for denovo adjudication.
23. The SCN alleges confiscation of Indian currency of Rs. 1.02 Crores recovered and seized from the residence of Sh. Bhumish Shah, being the sale proceeds of undervalued imported spices and proposed penalty under section 112 (a) & (b) of the Act on all noticees.
24. **Issues for determination:** Based on the records of the case including submissions of the noticees and observations of the Hon'ble Tribunal, the following issues arise for determination in this adjudication:
- I. Whether this SCN dated 13.03.2002 can be adjudicated prior to the adjudication of SCN dated 13.10.2003 in the same matter?
 - II. Since a single appeal was preferred by the Department only against noticee Sh. Bhumish Mohanlal Shah, whether other noticees can be adjudicated?
 - III. Whether proceedings are hit by delays and laches and the instant proceedings deserve to be dropped on this ground alone ?
 - IV. Whether Indian currency of Rs. 1.02 Crores is liable for confiscation under section 121 of the Act or not?
 - V. Whether penalty against the noticees under section 112 (a) of the Act is imposable?
 - VI. Whether defence of section 138B is available to the noticees ?
 - VII. Since the seized currency was detained and not seized by DRI , whether this shows lack of reasonable belief on the part of the Department ?
 - VIII. Whether lack of correlation of evidence with the actual import as details of BEs were not available?

Now let me take up the issues one by one:

25. Whether this SCN dated 13.03.2002 can be adjudicated prior to the adjudication of SCN dated 13.10.2003 in the same matter?

25.1 Both the SCNs dated 13.03.2002 and dated 13.10.2003 were issued in the same matter. However, both the SCNs deal with the different issues as SCN dated 13.03.2002 is regarding confiscation of Indian currency of Rs. 1.02 Crores under section 121 of the Act and SCN dated 13.10.2003 is regarding the undervaluation and demand of duty for import of spices. These two SCNs were issued separately and were adjudicated separately vide two different OIOs in the first round of adjudication. Hon'ble CESTAT, Mumbai has also issued two separate Orders against the above said Orders-in-Original. Hence, in the second round of adjudication also, these two SCNs are being adjudicated separately but concurrently.

26. Since a single appeal was preferred by the Department only against noticee Sh. Bhumish Mohanlal Shah, whether other noticees can be adjudicated?

26.1 Departmental appeal filed in the case has been examined though there is only one appeal number C/243/06-MUM filed in March, 2006 by the Department at Hon'ble CESTAT, Mumbai. It is seen from the prayer at serial no. (iii) "*whether in the facts and circumstances of the case, the Adjudicating Authority was right in dropping the proceedings against all the noticees;*" Thus it appears that the Department's appeal covered all the noticees and not only Sh. Bhumish Shah as wrongly claimed by Sh. Anil Balani, advocate for Noticee-4, M/s. Mayur Enterprises.

26.2 Further, from the Hon'ble CESTAT, Mumbai Order dated 12.06.2017 para 9 states: "*The consequence of this finding is that the impugned order must be set aside. With the setting aside of the impugned order, all that remains the proceedings is the Show Cause Notice.*" Hence, the Hon'ble Tribunal has also indicated that the entire Show Cause Notice becomes alive on remand and the entire case has to be adjudicated afresh implying case against all noticees. Hence, I do not agree with the claim of the advocate of the Noticee-4 that this case is to be adjudicated only against Sh. Bhumish Shah.

27. Whether proceedings are hit by delays and laches and the instant proceedings deserve to be dropped on this ground alone?

27.1 It is relevant here to go through chronology of the case ss shown below:

Dated	Details
13.03.2002	SCN F. No. DRI/BZU/D/21/2001 issued to 7 noticees by DRI, Mumbai Zonal Unit
28.04.2005	First round Order in Original No. 12/2005/CAC/CC/RJM issued by Commissioner of Customs, Adjudication, Mumbai

12.06.2017	Hon'ble CESTAT, Mumbai Order No. A/87967/17/CB against the Appeal No. C/243/06-Mum filed in March 2006, remanding the case back for fresh adjudication
29.06.2016 & 28.12.2016	CBIC Instruction F. No. 276/104/2016-CX.8A (Pt.) directed all the Commissioners to keep the SCNs pending and not to adjudicate in view of Mangali Impex matter
03.11.2017	CBIC Office Memorandum F. No. 437/143/2009-Cus.IV not to adjudicate in view of Mangali Impex matter
27.11.2017	Transferred to call book due to the Judgement of Mangali Impex Ltd.
17.03.2021 & 16.04.2021	CBIC Instruction F. No. 450/72/2021-Cus IV directed all the Commissioners to keep the SCNs pending and not to adjudicate in view of Canon India
26.03.2021	Continued in call-book due to the Judgement of Canon India
12.08.2021	DRI vide Notification No. 30/2021-Customs (N.T./CAA/DRI) appointed Commissioner of Customs (Import-I), NCH as Common Adjudicating Authority
13.07.2022	Case taken out of call book & taken up for adjudication after Finance Act, 2022 came into force
27.11.2017-13.07.2022	Matter was in the call book for 5 years

As seen from the chronological table above, this matter was remanded back by Hon'ble CESTAT, Mumbai vide Order no. A/87967/17/CB dated 12.06.2017 for de novo adjudication. It could not be adjudicated due to Order dated 03.05.2016 of the Hon'ble High Court, Delhi in the matter of M/s Mangali Impex Ltd. CBIC vide Instruction F. No. 276/104/2016-CX.8A (Pt.) dated 29.06.2016 & 28.12.2016 and Office Memorandum F. No. 437/143/2009-Cus.IV dated 03.11.2017 directed to keep pending all the SCNs issued by DRI, DGCEI, SIIB, Preventive prior to 06.07.2011. Hence, this case was transferred to the call-book on 27.11.2017. Further, it could not be adjudicated due to the Judgement of Hon'ble Supreme Court in the matter of Canon India. CBIC vide Instruction F. No. 450/72/2021-Cus IV dated 17.03.2021 and 16.04.2021 directed to keep the said SCNs pending for the present and till further orders. Hence, this matter was in the call-book from 27.11.2017 to 13.07.2022. After re-designation of the post of Commissioner of Customs(Adjudication) in 2015 as ADG (Adjudication) DRI; Commissioner of Customs (Import-I), NCH, Mumbai was appointed as Common Adjudicating Authority (CAA) vide Notification No. 30/2021-Customs (N.T./CAA/DRI) dated 12.08.2021. Hence, the matter was pending in compliance of various CESTAT, High Court & Supreme Court Orders relating to the cases of Mangali Impex & Canon India and also due to CBIC directions relating to these cases. This matter was taken up for adjudication on 13.07.2022 after coming into force of the Finance Act, 2022. Further, extensions dated 14.03.2023 & 21.09.2023 were taken from the competent

authority i.e. Pr. Chief Commissioner of Customs under section 28(9) of the Customs Act, 1962 and duly communicated to the noticees. However, these extensions were taken without prejudice to the official stand of the Department taken before the Bombay High Court in Writ Petition no. 33946 of 2023 (Kejal Mehta Vs. Union of India & Ors) that Show Cause Notices issued prior to 29.03.2018 will not have the mandatory time limit (as also explained in explanation 4 to amended section 28 of the Act). Hence, there is no unjustifiable or undue delay in the adjudication of the case as argued by the noticees.

27.2 Law does not compel a person to do something impossible: - As seen from the discussion above, the reasons for not adjudicating the case were beyond the control of the Adjudicating Authority i.e. the Commissioner of Customs (Import-I), NCH. The principles embodied in the legal maxims 'lex non cogit ad impossibilia' and 'impotentia excusat legem' (Impossibility excuses the law and Inability excuses the non-observance of the law) simply put that law does not compel a man to do that which cannot possibly be performed (lex non cogit ad impossibilia), and law will generally excuse a default if a party is unable to perform a duty created by law without any default in him and where he has no remedy (impotentia excusat legem).

27.3 Noticees have also relied upon the cases on the issue of delay in adjudication proceedings.

- (a) Rachana Garments Pvt.Ltd. - 2023 (383) ELT 15 (Bom.)
- (b) Bombay Dyeing & Mfg. Co.Ltd.-2022 (382) ELT 206 (Bom.)
- (c) Mckinsey & Co. Inc. -2022 (382) ELT 179 (Bom.)
- (d) Sushitex Exports (India) Ltd. 2022 (380) E.L.T. 244 (Bom.)
- (e) Parle International Ltd. 2021 (375) E.L.T. 633 (Bom.)
- (f) Lanvin Synthetics Pvt.Ltd.-2015 (322) ELT 429 (Bom.)
- (g) Reliance Industries Ltd.- 2019 (368) ELT 854 (Bom.)
- (h) Raymond Ltd. 2019 (368) ELT 481 (Bom.)
- (i) Premier Ltd. 2017 (354) ELT 365 (Bom)
- (j) UOI v Premier Ltd.-2018 (360) ELT A181(SC)
- (k) Reliance Transport & Travel P.Ltd.-2022 (3)TMI 1169-B.H.C
- (l) ATA Freight Line (1) Pvt.Ltd. - 2022 (3) TMI 1161-B.H.C.

27.3.1 In the above cases, the matter was not adjudicated for a long period of time. Petitioners were not informed/intimated about the SCN/matter being kept in the call book by the

respondent. Even in the case of **Mckinsey & Co. Inc.**¹⁵, the Adjudicating Authority was given a time period of 6 weeks to adjudicate the SCN and to pass a detailed reasoned order. However, this present case was already adjudicated vide 1st round OIO dated 28.4.2005. Appeal was filed by the Revenue vide Appeal no. C/243/06-Mum in March, 2006. Hon'ble CESTAT, Mumbai vide Order dated 12.06.2017 remanded back the matter. However, this matter could not be adjudicated till 2022 due to transfer of case to call-book due to the Hon'ble Court Orders in Mangli Impex and Canon India cases and to appoint Common Adjudicating Authority(CAA). Noticees were duly intimated about the transfer of case to call-book vide letters dated 07.12.2017 & 31.03.2021.

27.3.2 As evident from the above discussion, the case was pending with Hon'ble CESTAT, Mumbai for 11 years and in the call book for 5 years; there has been regular action during the rest of the period. The notices have been duly informed about the case being taken out of the call book and the extensions granted in adjudication period by the competent authority. Personal hearings have been given and the noticees have participated in those hearings. The delay in adjudication of the SCN, if any, was due to justifiable grounds well beyond the control of the Adjudicating Authority. Hence, the present case is different from the cases relied upon by the noticees. Therefore, I find that these case laws are of no help to the noticees in the present case.

27.4 Direction of Hon'ble Supreme Court on issue of delay in adjudication: - I also find that Department had filed SLP (C) No. 20072/2021 (converted into Civil Appeal No. 4320/2023) before the Hon'ble Supreme Court against the Hon'ble High Court of Punjab & Haryana Order dated 17.05.2021 in CWP No. 9340/2021, whereby, 2 SCNs issued to M/s. Swati Menthol & Allied Chemicals Ltd., Rampur, were quashed on the grounds of delay in adjudication. The Hon'ble Supreme Court has disposed the aforesaid SLP vide Order dated 10.07.2023, whereby, aforesaid Order dated 17.05.2021 of the Hon'ble High Court has been set aside and the matter has been remanded back to the Commissioner of GST (Adjudicating Authority) with a direction to conclude the proceedings within the time-period specified in the Order. Hon'ble Supreme Court, vide Order dated 18.02.2022 in SLP (C) No. 18214/2017, has held that if the assessee raises the issue of delay in adjudication on the ground of correctness of the call-book regime, that contention must await the outcome of the proceedings pending before the Hon'ble Supreme Court.

27.5 Hence, I find there is no unjustifiable or undue delay in the adjudication of the case as argued by the noticees. I reject the demand of the noticees to drop the instant proceedings on this ground alone.

28. Whether Indian currency of Rs. 1.02 Crores is liable for confiscation under section 121 of the Act or not ?

28.1 for easy reference, the provisions of section 121 of the Act are reproduced below: -

¹⁵ Mckinsey & Co. Inc. -2022 (382) ELT 179 (Bom.)

“section 121 Confiscation of sale-proceeds of smuggled goods - Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale-proceeds thereof shall be liable to confiscation.”

28.2 Reading both the SCNs dated 13.03.2002 and dated 13.10.2003 together with the submissions of the noticees and other available records; I find that there is sufficient evidence regarding undervaluation of imported spices in the form of communications that were held with foreign supplier M/s. IJIMASIA, Singapore, through fax messages retrieved from the residence of Sh. Bhumish Shah under Panchanama dated 16.03.2001. Analysis of the fax messages makes it clear that directions to follow up and expedite the local importers to pay the differential amount in respect of the consignments were received from M/s IJIMASIA, Singapore by Sh. Bhumish Shah (as can be seen from snapshot-2 below). Further, it is evident that the modus operandi of undervaluation of imported spices was well known to Sh. Bhumish Shah as the details of actual value, invoice value and differential value for particular consignment were communicated through faxes (as can be seen from snapshot-1 below). To illustrate these points, snapshots of two out of the many fax messages recovered from the residence of Sh. Bhumish shah on 16.03.2001 are reproduced below as sample:

(intentionally kept blank)

11:15

IJIMASIA PTE LTD

P.01



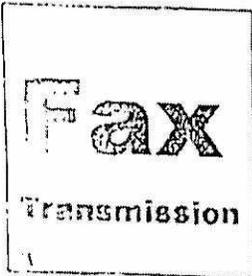
IJIMASIA PTE LTD

Industrial & commercial enterprise

1 North Bridge Road
#17-05 High Street Centre
Singapore 179094
Republic of Singapore

Tel : (65) 339 7860 Fax : (65) 339 5963
Telex : 39157 IJIMAS HS
E-Mail : ijimasia@singnet.com.sg
Website : www.ijimasia.com

Mailing Address:
Raffles City
P.O. Box 71880
Singapore 911799



TO	BHUMISH SHAH / Mumbai
ATTN	Mr Bhumish Shah
FAX	91 22 5158825
DATE	19/01/01
REF	2628/00
PAGES	1 of 3
CC	

- USA Parcel rechecked! today - not arrived - will have to push faster otherwise process too slow.
- Cubebs awaiting fresh offer as still one container to ship. Please inform when can go ahead with shipment. It is important to clear old pending first pls as 3 FCL 's of Star anis seeds, have been shipped already.
- Zanzibar cloves - Dubai yesterday is bidding Singapore at US\$ 5,300/- pmt because market has improved even there. We are not selling. We have given this price especially for Indian market. Will call you later.
- Star anis seeds - Singapore daily empty. Vietnam now closed for 10 - 15 days for New Year.
- Star anis seeds - we have rechecked all our documentation - final tally is as follows :-

EXP/ 2592/00 - SSP (declared 3 kgs less)

Actual: 3,3925 tons x US\$ 7,175.00 = US\$ 25,358.94
Invoice: 2,9125 tons x US\$ 1,450.00 = US\$ 4,266.63
Diff: US\$ 21,092.31

EXP/ 2593/00 - Mehta (declared 3 kgs less)

Actual: 3,3875 tons x US\$ 7,475.00 = US\$ 25,321.56
Invoice: 2,9375 tons x US\$ 1,450.00 = US\$ 4,259.38
Diff: US\$ 21,062.19

Seen
and other items
16/3/2001

TOTAL P.01

21-FEB-2001 09:35

IJIMASIA PTE LTD

P.01



IJIMASIA PTE LTD

Industrial & commercial enterprise

1 North Bridge Road
#17 05 High Street Centre
Singapore 178094
Republic of Singapore

Tel: (65) 339 7800 Fax: (65) 339 5963
Telex : 39157 IJIMAS RS
E-Mail : ijimasia@singnet.com.sg
Website : www.ijimasia.com

Mailing Address:
Raffles City
P.O. Box 7800
Singapore 911799

Fax

Transmission

TO	BHUMISH SHAH / Mumbai
ATTN	Mr Bhumish Shah
FAX	91 22 5158825
DATE	21/02/01
REF	2818/01
PAGES	1 of 1
CC	

- 1) Samples 60K still not received - taking too long - request give more details as process slow.
- 2) Laxmi cubebs - + stems - Shipped, please ask him to process funds.
- 3) Jain Bros - Difference 2,295 we received 2,076 = Balance 219. This is only for your info.

Thanks + regards / FUAD

28.3 I find that Sh. Bhumish Shah in his statement dated 07.03.2002 recorded under section 108 of the Act has confessed to have withheld Rs. 1.02 Crores, the sale proceeds of undervalued consignments indented and imported through him by local importers. He also accepted that he had no concern with the said amount of Rs. 1.02 Crores as the same was accumulated out of the sale proceeds of spices of foreign origin. Co-noticees in this case in their statements have also categorically and unambiguously admitted that the seized/recovered Indian currency of Rs. 1.02 Crores was sale-proceeds of consignments of imported Spices at undervalued prices, which was withheld by Sh. Bhumish Shah for pursuing the payments to M/s IJIMASIA, Singapore. He clearly stated that this money belonged to various traders of APMC Market for whom he was doing the commission business. He also stated that the goods i.e. Cloves/Spices imported by traders, were sold in the APMC Market by him and majority of sale was on cash basis and he collected the cash payment from purchasers and kept with him.

28.4 Evidence given in SCN F. No. DRI/BZU/D/21/2001 dated 13.03.2002 on the issue of seized Indian currency of Rs. 1.02 Crores has to be read with evidence given in SCN F. No. DRI/MZU/D/25/2001 dated 13.10.2003 issued for duty demand, interest and penalty due to undervaluation of imported spices under 10 Bills of Entry. Both SCNs have been issued to Sh. Bhumish Shah, M/s Samudri International and M/s Mayur Enterprises. I find that Sh. Bhumish Shah has not claimed the seized currency at any stage of investigation. He has not given any explanation (except that the same was the sale proceeds of undervalued imported spices) about the possession of such a huge amount even in his reply to the Show Cause Notice. Only during the first round of adjudication, his Advocate Sh. Anil Balani for the first time challenged the seizure through his written submissions.

28.5 It is relevant here to refer to some landmark judicial pronouncements on the issue of acceptability of statements recorded under section 108 of the Act.

(i) The Hon'ble Supreme Court in the case of **Romesh Chandra Mehta**¹⁶ and in the case of **Percy Rustomji Basta**¹⁷ has held "*that the provisions of section 108 are judicial provisions within which a statement has been read, correctly recorded and has been made without force or coercion. The provisions of section 108 also enjoin that the statement has to be recorded by a Gazetted Officer of Customs and this has been done in the present case. The statement is thus made before a responsible officer and it has to be accepted as a piece of valid evidence*".

(ii) The Hon'ble Supreme Court in the case of **Badaku Jyoti Svant**¹⁸ has decided that "*statement to a Customs Officer is not hit by section 25 of Indian Evidence Act, 1872 and would be admissible in evidence and in conviction based on it is correct*".

¹⁶ Romesh Chandra Mehta Vs State of West Bengal (1969) 2 SCR 46 1, AIR 1970 SC 940]

¹⁷ Percy Rustomji Bastis Vs. State of Maharashtra [AIR 1971 SC 1087]

¹⁸ Badaku Jyoti Svant Vs. State of Mysore [1966 AIR 1746]

(iii) Hon'ble Supreme Court regarding the evidentiary value of statements under section 108 under the Act in the case of **Duncan Agro Industries Ltd**¹⁹ has decided that "*section 108 of the Customs Act does not contemplate any magisterial intervention. The power under the said section is intended to be exercised by a gazetted officer of the Customs Department. Sub-section (3) enjoins on the person summoned by the officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such a statement could be used against him. The said requirement is included in the provision for the purpose of enabling the gazetted officer to elicit the truth from the person interrogated. There is no involvement of the magistrate at that stage. The entire idea behind the provision is that the gazetted officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue its utility for the officer gets lost*".

(iv) Hon'ble Punjab and Haryana High Court in the case of **Jagjit Singh**²⁰ has decided that "*It is settled law that Customs Officers were not police officers and the statements recorded under section 108 of the Customs Act were not hit by section 25 of the Evidence Act. The statements under section 108 of the Customs Act were admissible in evidence as has been held by the Hon'ble Supreme Court in the matter of **Ram Singh**²¹, in which it is held that recovery of opium was from accused by officers of the Narcotic Bureau. Accused made a confession before the said officers. officers of Central Bureau of Narcotics were not police officers within the meaning of section 25 and 26 of the Evidence Act and hence, confessions made before them were admissible in evidence*"

(v) The confession statement of an accused could be relied upon to prove the prosecution case against the co-accused tried in the same case, considered in **Kashmira Singh**²² before Three Judges Bench of the Hon'ble Supreme Court and later by four Judges Bench in **Balbir Singh**²³ and subsequently before the Constitutional Bench in **Haricharan Kurmi and Jogia Hajam**²⁴.

(vi) In **Naresh J. Sukhawani**²⁵, the appellants contended that the statement of co-accused could be used only to corroborate other evidence as one of the circumstances under section 30 of the Evidence Act, but it cannot be used as substantive evidence without corroboration from other independent evidence. This contention was negated by the Bench of the Hon'ble Supreme Court, consisting two Judges holding that, it must be remembered that the statement made before the Customs officials is not a statement recorded under section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under section 108 of the Customs Act. The material which incriminates the co-noticee inculpating him in the contravention of the provisions of the Customs Act can certainly be used to connect the co-noticee. It can, therefore, be used as substantive evidence.

¹⁹ Assistant Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd. [(2000) 7 SCC (53)]

²⁰ Jagjit Singh Vs State of Punjab and other, Cri. Appeal No. S-2482-SB of 2009

²¹ Ram Singh Vs Central Bureau of Narcotics, 2011(2) RCR (Criminal) 850

²² Kashmira Singh Vs State of Madhya Pradesh (AIR 1952 SC 159)

²³ Balbir Singh Vs State of Punjab (AIR 1957 SC 216)

²⁴ Haricharan Kurmi and Jogia Hajam Vs State of Bihar (AIR 1964 SC 1184)

²⁵ Naresh J. Sukhawani Vs Union of India reported in 1995 Supp (4) SCC 663

(vii) In view of the foregoing discussion, I find that the statements recorded by DRI under the provisions of section 108 of the Act cannot be held as coerced and are correctly revealing the facts of this undervaluation scam. Even the statements recorded in this case are corroborative with the documents recovered along with the Indian currency from the residence of Noticee-1.

28.6 Advocate of Noticee-1 (Sh. Bhumish Shah) had submitted that there is no evidence to indicate that any of the consignments listed in the SCN was directly imported by him. The other noticees, whose statements have been recorded in the instant case have admitted to the importation by them and there is no allegation by any of them that any of the consignment was imported by Sh. Bhumish Shah. Advocate further submitted that there is no such evidence that the goods (which were imported and undervalued) were in the actual custody of Sh. Bhumish Shah; goods never came to the godown of Sh. Bhumish Shah and in fact the goods were at some other warehouses. He further submitted that delivery orders do not bear the name of Sh. Bhumish Shah; so, it was obvious that the said goods were not sold by Sh. Bhumish Shah. In this regard, it is observed that evidence unearthed by DRI clearly shows that Sh. Bhumish Shah as indenter has managed the entire chain of foreign trade of undervalued spices and has also managed the flow of finances including cash for differential amounts. Faxes and incriminating documents proving undervaluation in imports have been seized from the premises of Sh. Bhumish Shah. He never retracted his confessional statement that the Indian currency was from the sale proceeds of smuggled goods. The Hon'ble Supreme Court in the case of **D. Bhoormull**²⁶, has held that it is not necessary for the Customs to prove that the particular person was concerned with the importation or exportation. It is enough if the Department furnished prima facie proof of the goods being smuggled in nature.

28.7 Based on the above discussion, Sh. Bhumish Shah was fully aware of the fact that the goods were imported at undervalued price and were therefore smuggled goods. Thus, I conclude that the said Indian currency was the sale proceeds of the smuggled goods and hence the same is liable to confiscation under the provisions of section 121 of the Act.

29. Whether penalty against the noticees under section 112 (a) of the Act is imposable?

29.1 The goods imported by M/s. Saccha Saudha Pedhi, Pune, M/s. Samudri International, Mumbai, M/s. Mayur Enterprises, Mumbai, M/s. Sunil Daulatram, Delhi, M/s. Radha V. Company, Mumbai and M/s. Poonam Trading Co. Mumbai were later on sold by Sh. Bhumish Shah who had knowledge and reasons to believe that the goods were imported at undervalued price and were therefore smuggled goods. Sh. Bhumish Shah has accepted in his statement dated 06.03.2002 that he sold imported spices indented through him to local traders and the goods belonged to M/s Sachha Saudha Pedhi, M/s Esjaypee Impex, M/s Poonam Trading Co, M/s Ganesh International, M/s Radha V. Company and M/s. Sunil Dolatram indented and imported through him from M/s IJIMASIA, Singapore has been sold in the market.

²⁶ Commissioner of Customs, Madras and others V/s D. Bhoormull 1983-(013) ELT-1546-SC

29.2 Sh. Bhumish Shah is the main noticee in the matter. He has accepted that the Indian currency recovered and detained from his residence under panchanama dated 16.03.2001 was from the sale proceeds of the smuggled goods i.e. imported spices by way of undervaluation. He was aware about the fact that these spices are imported by way of undervaluation and the faxes and documents recovered and seized from his residence support the same. Co-noticees have also confirmed the same. Hence, I find that the penalty under section 112(a) of the Act is imposable on Noticee-1, Sh. Bhumish Shah in relation to this cash seizure.

29.3 Sh. Ashok Raghuvir Goyal, Manager of M/s Sachha Saudha Pedhi in his statement dated 19.03.2001 & 20.03.2001 has stated that Sh. Bhumish Shah was their indentor for import of spices from M/s. IJIMASIA. Singapore. Most of the goods imported by them are sold through Sh. Bhumish Shah. Sh. Bhumish Shah has accepted in his voluntary statement dated 06.03.2002 that around Rs. 75-80 Lakhs out of Rs. 1.02 Crores belonged to M/s Sachha Saudha Pedhi. Hence, I find that the penalty under section 112(a) of the Act is imposable on Noticee-2, M/s Sachha Saudha Pedhi in relation to this cash seizure.

29.4 Sh. Kejal Mehta with respect to M/s Samudri International and M/s Mayur Enterprises has accepted in his statement dated 25.02.2002 that about 50% of the goods imported were sold by him in the Market and the balance were sold through Sh. Bhumish Shah in APMC Market. Differential amount was adjusted with the sale proceeds of the goods sold through Sh. Bhumish Shah or handed over to the representative of Sh. Bhumish Shah. Sh. Kejal Mehta also confirmed that he had imported consignment through M/s Samudri International and M/s Mayur Enterprises at grossly undervalued price for evading customs duty. Sh. Bhumish Shah has accepted in his statement that around Rs. 8 Lakhs out of Rs. 1.02 Crore belonged to M/s Samudri International. But there is no mention of any amount for M/s Mayur Enterprises with Sh. Bhumish Shah. Hence, I find that the penalty under section 112(a) of the Act is imposable on Noticee-3, M/s Samudri International and not on Noticee-4, M/s Mayur Enterprises in relation to this cash seizure.

29.5 Sh. Sunil Daulatram Chabria, proprietor of the firm M/s. Sunil Daulatram, in his statement recorded on 23.10.2001 under section 108 of the Act accepted that the goods were imported at undervalued prices and offered to pay the differential duty. He further stated that the goods were purchased through Sh. Bhumish Shah and the differential duty had been settled with him. However, there is no mention of any amount with Sh. Bhumish Shah. Hence, I find that the penalty under section 112(a) of the Act is not imposable on Noticee-5, M/s. Sunil Daulatram in relation to this cash seizure.

29.6 Sh. Biharilal G. Ghura, proprietor of M/s. Radha V. Company has accepted in his statement dated 16.03.2001 that he had imported six consignments of cloves and declared the rate ranging between US \$ 2400 to 2900 whereas the actual rate per metric ton was between US \$ 3700 to 5200 PMT. He also accepted that one of the consignments had been indented and imported through Sh. Bhumish Shah. However, there is no mention of any amount with Sh.

Bhumish Shah. Hence, I find that the penalty under section 112(a) of the Act is not imposable on Noticee-6, M/s. Radha V. Company in relation to this cash seizure.

29.7 Sh. Dilip Poonamchand Maru, Manager and power of attorney of M/s. Poonam Trading Co in his voluntary statements dated 19.03.2001 & 11.03.2002 has accepted that the clove consignments imported from M/s. IJIMASIA, Singapore, through Bhumish Shah were at grossly undervalued price. He had also sold a few of the consignments indented through Sh. Bhumish Shah and imported from M/s. IJIMASIA, Singapore. Sh., Bhumish Shah also used to withhold the sales proceeds of such goods sold through him to expedite the actual amount due to M/s. IJIMASIA. He stated that he is yet to recover an amount of Rs. 12 to 17 lakhs on account of goods sold through Sh. Bhumish Shah. Hence, I find that the penalty under section 112(a) of the Act is imposable on Noticee-7, M/s. Poonam Trading Co. in relation to this cash seizure.

30. Whether defence of section 138B is available to the noticees ?

30.1 Sh. Steben Mathew, Advocate for Sh. Bhumish Shah has tried to take shelter under section 138B of the Act. His argument is that relied upon statements of Noticees cannot be admitted in the absence of cross examination. Even though, during the present 2nd round adjudication, noticees Sh. Kejal Mehta & M/s Mayur Enterprises were provided the opportunity of cross-examination of Sh. Bhumish Shah and vice-versa on 11.12.2023. However, none of them appeared for the same, probably as they were opposing the adjudication process itself on grounds of delay and laches. In this regard, it is observed that *Law aids the vigilant and not the sleepy (Vigilantibus non dormientibus subvenit lex)*. When they themselves have not appeared for cross-examination given on 11.12.2023, they cannot now take the defence of cross examination not being given.

31. Since the seized currency was detained and not seized by DRI , whether this shows lack of reasonable belief on the part of the Department ?

31.1 It was held by the Adjudicating Authority in the 1st round OIO that the lacuna of not supplying the copy of panchanama promptly on the same day vitiates the proceedings under decision. It has been further observed that the DRI officers upon recovery had detained the seized currency which was not subsequently seized. While distinguishing between detention and seizure, the Adjudicating Authority attributed it to lack of reasonable belief on the part of the Department. In this regard, the Adjudicating Authority also observed that in the statement of Sh. Bhumish Shah, recorded immediately after the search, there has been no mention of the recovery and detention of Indian currency to the tune of Rs. 1.02 Crores.

31.2 In this regard, I find that that seizure is not a precondition for invoking the liability of goods for confiscation under the provisions of the Act. Further, the detention /seizure are governed by the provisions of section 110 of the Act which stipulate issue of Show Cause Notice within a period of six months from the date of detention /seizure failing which such goods stands released. Hence, the detention of goods (Indian currency in this case), by no legal parameters

vitiates the proceedings. It is equally relevant to mention here that the formation of a reasonable belief is the only requirement before the act of detention / seizure and to support and justify the seizure. Based on the findings of investigation, Show Cause Notice is required to be issued for invoking the liabilities under the provisions of the Customs Act. Thus the issue and relevance of formation of reasonable belief cease to exist upon issue of Show Cause Notice. Seizure vis-à-vis detention has common implications, which has also been supported by judgments passed in the cases of **Sh. Rajesh Arora**²⁷ and in **Vilayat Hussain**²⁸.

32. Whether lack of correlation of evidence with the actual import as details of BEs were not available ?

32.1 The Adjudicating Authority in the 1st round OIO dated 28.04.2005 also observed that there was lack of correlation of evidence with the actual import and their disposal. In this regard, I find that Sh. Bhumish Shah in his statements has denied to have maintained any records containing details of imports vis-a-vis their disposal and realization of sale proceeds thereof. Further, the import and sale of spices and with-holding of the sale proceeds was a continuous process and as he was not maintaining any accounts/records for the same, the amount recovered from him, therefore could not be correlated Bill of Entry wise; still there is ample evidence in the form of faxes, documents and corroborating confessional statements to provide clear proof of the cash having originated from the undervaluation in imports.

33. Let me now deal with the case laws relied upon by the Adjudicating Authority in its 1st round OIO dated 28.04.2005 in dropping the seizure and penalty.

(i) Kantilal Manilal Vyas [(2001 (138) ELT 843 (T)]

In the case of Kantilal Manilal Vyas [(2001 (138) ELT 843 (T)], an amount of Rs. 12 lakhs were seized from the possession of a Manager of the firm and only on the basis of the statement of the person, it was concluded that the currency was sale proceeds of the smuggled goods. In that case, the said statement was immediately retracted after 5 days. Further the person who had sent the money could not be located. Under the circumstances, it was held that mere fact that a large quantity of currency has been deposited and there was no claimant to the currency alone would not be sufficient to conclude that it must be sale proceeds of smuggled goods. It was also considered that while invoking the provisions of section 121 towards the liability to knowledge and reason to this effect are also required to be substantiated. In this case, many statements of Sh. Bhumish Shah were recorded on various dates over a long period and the statements were never retracted, by Sh. Bhumish Shah. Further, it has been admitted by Sh. Bhumish Shah in his statements that the amount recovered was the part of the sale proceeds of the undervalued imports indented through him by various importers. One of such importers M/s. Saccha Sauda Pedhi had also stated that Sh. Bhumish Shah was their agent for selling the imported spices. In view of this position, the ratio of the above said judgment is not applicable in the present case.

²⁷ Sh. Rajesh Arora V/s Commissioner of Customs 1998 (101) ELT 246 (DEL)

²⁸ Vilayat Hussain V/s. Union of India 1997(95) ELT 19(MP)

(ii) Suresh Chandra I. Chapatwala [(2001 (138) ELT 1103 (T))]

The judgement in the case of Suresh Chandra I. Chapatwala [(2001 (138) ELT 1103 (T))] referred, is also not applicable to this case as in the said case except the admission made by the accused in his statement, there was no satisfactory evidence to the effect that the seized currency was the sale proceeds of smuggled goods. However, in the subject case, fax messages showing the undervalued import of spices by various importers indented through him were recovered. Further, such importers had also stated in their statements that Sh. Bhumish Shah used to sell these undervalued imported spices. The said fact was admitted by Sh. Bhumish Shah in his various statements was never retracted.

(iii) Brij Kishor Prasad [2003 (152) ELT 275 (Gau)]

The facts of the case of Brij Kishor Prasad [2003 (152) ELT 275 (Gau)] is entirely different from the present case as in the case of Brij Kishore Prasad, the money recovered as sale proceeds of alleged gold biscuits from the other person, who had claimed that the money seized being sale proceeds of rice and grocery shops of his brother. However, in the present case, the Indian currency as well the fax messages evidencing the undervalued import of cloves and various spices were recovered from Sh. Bhumish Shah who had admitted that the amount recovered was part of the sale proceeds of the undervalued imports. Sh. Bhumish Shah neither had claimed the amount and had also not retracted his statements that the amount was not the sale proceeds of undervalued imports.

(iv) Hukumichand Gevarchand Saraf [1994 (74) ELT 56 (T)]

In the case of Hukumichand Gevarchand Saraf [1994 (74) ELT 56 (T)], the Indian currency was recovered and seized from the car which according to the occupant of the car belonged to one Hukumichand Gevarchand Saraf. However, the said money was found accounted for in the cash book of the Hukumichand's firm. Further the admitted statement that the said money belonged to sale proceeds of the smuggled gold had been retracted immediately on the next day before the Magistrate and further the other person also did not implicate Hukumichand and stated that the seized money belonged to the firm. Whereas in the present case, no retraction has been filed by Sh. Bhumish Shah in respect of the seizure of the Indian currency and besides his own admission that the money was the sale proceeds of the undervalued import of cloves indented through him, the co-noticees have also stated that Sh. Bhumish Shah was a broker and was selling the undervalued imported spices.

(v) Ramchandra [1992 (60) ELT 277 (T)]

In the case of Ramchandra [1992 (60) ELT 277 (1)], the person was apprehended with Indian currency of Rs. 2,55,000/- and in his statement he stated that the said currency was sale proceeds of smuggled gold which was given to him by one Sh. Satram Das to be delivered to one Sh. Bhaghu Sudhir. However, Sh. Satram Das and Bhaghu Sudhir denied all connections with the

dealings and also denied knowledge of the appellant. Therefore, in that case, the currency was released. However, in the present case, the currency was recovered from the residence of Sh. Bhumish Shah alongwith incriminating documents showing the undervalued import of spices by various importers. Sh. Bhumish Shah admitted that the amount recovered was the part of the sale proceeds of undervalued imported spices which were sold through him. In the present case there was a sale of undervalued imported spices by the person i.e. Sh. Bhumish Shah who had knowledge that they were undervalued imported spices. In this case, the quantity could not be ascertained as the sale was found to be a continuous process and no accounts were found maintained. In view of the above, the ratio of the above judgment quoted by the Adjudicating Authority is not applicable in the present case.

(vi) Malar [1988 (33) ELT 144 (T)]

In the case of Malar [1988 (33) ELT 144 (T)], it has been held that mere possession of currency without satisfactory explanation does not cause such belief as sale proceeds of contraband goods but may endanger only suspicion. In that case there was absolutely no evidence on record to indicate that the currency in question represented the sale proceeds of contraband goods. However, in the present case, the Indian currency was recovered alongwith the fax messages showing undervalued import of spices by various importers and there is evidence by one of such importers stating that Sh. Bhumish Shah was the person who used to sell all their imported spices. This fact was also admitted by Sh. Bhumish Shah and was never retracted by him. In view of the same, the above judgment is not applicable in this case.

34. I also observe that with reference to the recovery and detention of seized currency, the onus lies on the owner/possessor to justify and substantiate its legal acquisition. Sh. Bhumish Shah, from whom the Indian currency of Rs. 1.02 Crores has been recovered, has denied its ownership. He has also failed to attribute the same to any legal transaction/acquisition. Evidence shows that there was a conscious knowledge on the part of Sh. Bhumish Shah about the nature of Indian currency recovered from his possession which differentiates the present case from the above mentioned case laws. Sh. Bhumish Shah has accepted in his voluntary statement dated 06.03.2002 that around Rs. 75-80 lakhs out of Rs. 1.02 Crores belonged to M/s Sachha Saudha Pedhi. Sh. Bhumish Shah has also accepted around Rs. 8 lakhs out of Rs. 1.02 Crore belonged to M/s Samudri International. Sh. Kejal Mehta, with reference to M/s Samudri International and M/s Mayur Enterprises, has accepted in his voluntary statement dated 25.02.2002 that about 50% of the goods imported were sold by him in the market and the balance were sold through Sh. Bhumish Shah in APMC Market. Sh. Dilip Poonamchand Maru, Manager and power of attorney of M/s. Poonam Trading Co. in his voluntary statements dated 19.03.2001 & 11.03.2002 has accepted that the clove consignments imported from M/s. IJIMASIA, Singapore, through Bhumish Shah were at grossly undervalued price. He stated that he is yet to recover an amount of Rs. 12 to 17 lakhs on account of goods sold through Sh. Bhumish Shah. Thus, I conclude that the said currency is liable for seizure under section 121 of the Act being sale proceeds of the undervalued imported spices (which includes about Rs. 75 lakhs of importer M/s Sachha Saudha

Pedhi, Rs. 8 lakhs of importer M/s Samudri International and around Rs. 17 lakhs of importer M/s. Poonam Trading Co); Sh. Bhumish Shah, M/s. Sachha Saudha Pedhi, M/s. Samudri International and M/s. Poonam Trading Co. are liable for penal action under section 112(a) of the Act.

35. Accordingly, I pass the following Order: -

ORDER

35.1 I order confiscation of Indian currency of Rs. 1.02 Crore recovered and seized from the residence of Sh. Bhumish Shah at 1709/57 Gaga Sagar Co-op. Housing Society, Pantnagar, Ghatkopar (East), Mumbai on 16.03.2001 under section 121 of the Act.

35.2 I impose a penalty of Rs. 10,00,000/- (Rs. Ten Lakhs only) on Sh. Bhumish Shah under section 112 (a) of the Act.

35.3 I impose a penalty of Rs. 8,00,000/- (Rs. Eight Lakhs only) on M/s. Sachha Saudha Pedhi under section 112 (a) of the Act.

35.4 I impose a penalty of Rs. 80,000/- (Rs. Eighty Thousand only) on M/s. Samudri International under section 112 (a) of the Act.

35.5 I impose a penalty of Rs. 1,50,000/- (Rs. One Lakh Fifty Thousand only) on M/s. Poonam Trading Co. under section 112 (a) of the Act.

35.6 I refrain from imposing any penalty on M/s. Mayur Enterprises in the absence of any evidence of their relation to the said cash seizure.

35.7 I refrain from imposing any penalty on M/s. Sunil Daulatram in the absence of any evidence of their relation to the said cash seizure.

35.8 I refrain from imposing any penalty on M/s. Radha V. Company in the absence of any evidence of their relation to the said cash seizure.

35.9 This order is issued without prejudice to any other action that may be taken in respect of the goods in question and/or on the persons, companies concerned, covered and/or not covered by this order or under any other provisions of the Act and/or any other law for the time being in force in the Republic of India.



Vivek
28.03.2024
(Vivek Pandey)
आयुक्त सीमा शुल्क (आयात-I)
Commissioner of Customs (Import-I),
नवीन सीमा शुल्क भवन, मुंबई।
New Customs House, Mumbai.

To,

1. Sh. Bhumish Shah,
F/48, APMC-1, Vashi, Navi Mumbai-400703
2. M/s. Sachha Saudha Pedhi,
410/411, Market Yard, Pune-411 037.
3. M/s. Samudri International,
131/3605, Pant Nagar, Ghatkoper(E), Mumbai-400 077.
4. M/s. Mayur Enterprises,
197/5429. Shantivan BLD Pantnagar, Ghatkoper(E), Mumbai-75.
5. M/s. Sunil Daulatram,
Malbar House, Office No.12A, 619-620, Katra Ishwar Bhavan, Khari Baoli, Delhi.
6. M/s. Radha V. Company,
F/53 APMC Market, Phase II, Vashi, New Mumbai
7. M/s. Poonam Trading Co.
316, Arneja Corner, Sector 17, Vashi, New Bombay.

Copy to:

- 1) The Pr. Chief Commissioner of Customs,
New Customs House, Mumbai Customs Zone-I,
Mumbai-400001.
- 2) The Principal ADG,
Directorate of Revenue Intelligence, Mumbai Zonal Unit,
13, Vithaldas Thackersay Marg, Opp. Patkar Hall,
New Marine Lines, Mumbai - 400 020.
- 3) The Additional Director General,
Central Economic Intelligence Bureau,
A-Wing, 1st Floor, Janpath Bhawan, Janpath, New Delhi-
- 4) The Commissioner of Customs (Import-II)
New Customs House, Mumbai Customs Zone-I
(For record in their arrears register & necessary recovery action as per law)
- 5) Office copy
- 6) Notice Board