Commissioner Of Customs, Mumbai vs M/S B.V. Jewels And Ors on 14 September, 2004

Equivalent citations: AIR 2005 SUPREME COURT 1231, 2004 AIR SCW 6970, (2004) 22 ALLINDCAS 52 (SC), 2004 (9) SRJ 44, (2004) 7 JT 460 (SC), 2004 (22) ALLINDCAS 52, 2004 (5) SLT 728, 2004 (7) JT 460, 2004 (7) SCALE 690, 2004 (4) LRI 578, 2004 (12) SCC 720, (2004) 8 SUPREME 352, (2004) 7 SCALE 690, (2004) 172 ELT 3, (2004) 116 ECR 321

Author: Arijit Pasayat

Bench: S.N. Variava, Arijit Pasayat

```
           CASE NO.:
Appeal (civil)  4254-4260 of 2003

PETITIONER:
Commissioner of Customs, Mumbai

RESPONDENT:
M/s B.V. Jewels and Ors.

DATE OF JUDGMENT: 14/09/2004

BENCH:
S.N. VARIAVA & ARIJIT PASAYAT

JUDGMENT:
```

J U D G M E N T ARIJIT PASAYAT,J.

Customs authorities question correctness of the judgment rendered by the Customs Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai (hereinafter referred to as the 'CEGAT') setting aside the order passed by the Commissioner of Customs (Airport) confirming demand of duty and penalty. Background facts in a nutshell are as follows:

> Show cause notice was issued to the respondents alleging shortage of gold and diamonds, capital goods and unauthorized usage of capital goods. It is to be noted that the show cause notice was issued on the basis of certain intelligence gathered regarding infraction of various provisions of the Customs Act, 1962 (in short the 'Act') and Customs Rules, 1966 (in short the 'Rules'), the EXIM policy and violation of conditions of certain Notifications on the basis of which the respondents had availed benefits. The purported action was in terms of Sections 111(d), 111(j), 111(l), 111(o), 111(m), 112 (a), 112(b), 113(d), 113(i), 114(i) and 114(A) of the Act. The premises of the

respondents M/s. B.V. Jewels and M/s B.V. Star were searched. Both the units were situated at plot No.55 of Santacruz Electronics Export Processing Zone (in short 'SEEPZ'), Andheri East, Mumbai. Officers of Customs visited the unit on 31.1.2000, recorded statements of the Accounts Manager and stock taking was done. Verification continued for several days. Partner Suresh Mehta joined the verification on 3.2.2000. After completing verification it was found that there was large scale evasion of duty, shortage of stocks of certain items while excess stock was found in respect of some other items. Additionally, it was found that there was shortage of capital goods and unauthorized usage of capital goods. The unaccounted diamonds, and capital goods were seized and show cause notice was issued granting opportunity to the respondents to have their say in the matter. The Commissioner considered the show cause reply and after considering the materials brought on record by departmental authorities and the reply furnished by the respondents, passed the order to the following effect:

(1) The demand of duty of Rs.2,57,90,900/- under the proviso to Section 28(2) of the Act on M/s B.V. Star was confirmed. A similar amount was imposed as penalty under Section 114(A) of the Act.

(2) 8604.5 gms. of gold and 844.16 cts. of diamonds valued at Rs.62,86,823/- and capital goods of Rs.58,58,696/- were held to be liable for confiscation under Sections 111(d), 111(j), 111(o) of the Act.

(3) Confiscation of capital goods under seizure valued at Rs.1,06,37,742/- found in the premises of M/s B.V. Jewels along with motors, hand pieces and carbon brushes valued at Rs.36,70,765/- under the aforesaid provisions were directed to be confiscated. However, M/s B.V. Star was given an option to clear the goods on demand of fine of Rs.15,00,000/- in lieu of confiscation in terms of Section 125(1) of the Act. It was clarified that the fine in lieu of confiscation was to be in addition to any duty payable in respect of such goods as prescribed under Section 125(2) of the Act.

(4) Penalty of Rs.12,00,000/- was imposed on M/s B.V. Star under Section 112(a).

(5) The demand of duty of Rs.12,94,12,122/- under the proviso to Section 28 (2) of the Act on M/s B.V. Jewels was confirmed. Similar amount was imposed as penalty in terms of Section 114(A) of the Act.

(6) It was held that 73730 cts. of diamonds valued at Rs.26,29,54,490/- and capital goods found missing valued at Rs.58,54,698/- were liable for confiscation under Sections 111(d), 111(j) and 111(o) of the Act. It was noticed that these items were not available for confiscation. 23 pieces of high value diamonds valued at Rs.39,63,286/- under the aforesaid provisions were directed for confiscation.

(7) Broken diamonds valued at Rs.6,91,139/- under Sections 111(o) and 119 of the Act was also directed for confiscation. The redemption of seized goods on payment of fine of Rs.70,000/- was allowed.

(8) Confiscation of diamonds and diamond studded in semi-

finished gold jewellery valued at Rs.4,03,72,667/- along with inseparable gold weighing 6423.32 gms. valued at Rs.26,81,736/- were directed to be confiscated. Redemption fine of Rs.43,00,000/- was fixed. Unaccounted diamonds valued at Rs.27,00,76,393/- was held to be liable for confiscation but it was observed that these were not available for confiscation.

(9) Penalty of Rs.5 crores was imposed on M/s B.V. Jewels under Section 112(a) and 114(i) of the Act.

(10) Penalty of Rs.10,00,000/- was imposed each on Mr. Suresh Mehta and Mr. Suken Mehta.

(11) Penalty of Rs.2,00,000/- was imposed on Mrs. Saroj Mehta, Mrs. Sapna Mehta, Shivani Mehta, Mr. B.V. Shah, Mr. Rajesh B. Shah and Mr. Bharat S. Shah.

(12) Penalty of Rs.1,00,000/- was imposed on Mr. Vijay Shah.

The order of the Commissioner was questioned in appeal before CEGAT which by the impugned judgment set aside the same holding that the accusations were not established. The shortage or excess as claimed were not substantiated and various departmental notifications were not properly construed by the Commissioner. The order of the CEGAT is challenged in these appeals.

Learned senior counsel appearing for the appellant submitted that the show cause notice elaborately detailed the various infractions. The Commissioner analysed the materials collected in the background of the show cause reply furnished by the respondents and came to hold that the accusations were established. Accordingly, the directions as noted above were given. Unfortunately, the CEGAT did not examine the materials in their proper perspective. By abrupt conclusions without any material to support them and/or without indicating reasons the conclusions of the Commissioner were nullified. The judgment which is the result of perfunctory manner of disposal by the CEGAT needs to be set aside and the order of the Commissioner deserves to be restored.

Learned counsel for the respondents on the other hand submitted that the Commissioner had not analysed the show cause reply, had acted on mere surmises and conjectures without keeping in view the applicable provisions and the notifications and had confirmed the demands proposed in terms of the show cause notice. According to him, the CEGAT had analysed the issues in great detail and arrived at the correct conclusions.

The various infractions for which duty and/or penalty were imposed which were highlighted by the Customs Authorities are essentially as follows:

In respect of M/s B.V. Star the allegations and levies were as follows:

(1) Levy of duty on gold shortage of 8604.5 gms. valued at Rs.34,66,889/-. The duty component is Rs.23,65,652/-. (2) Duty on shortage of 844.16 cts. of diamonds valued at Rs.26,92,014/-, the duty component on which was Rs.11,84,372/-.

(3) Duty levied on missing capital goods which were imported duty free the value of which was Rs.2,22,48,876/-. This essentially related to three items i.e. (i) duty on capital goods valued at Rs.1,06,37,742/- which were imported by M/s B.V. Star were found to be in illegal possession and usage of M/s B.V. Jewels; (ii) capital goods valued at Rs.58,58,696/- which were not found in the unit; and (iii) un-installed motors, hand pieces and brushes valued at Rs.36,70,675/- for violation of the notification No.196/87.

(4) Penalty of Rs.12 lakhs imposed under Section 112(a) of the Act.

So far as issues relating to M/s B.V. Jewels are concerned, they are as follows:

(1) Duty on shortage of 73730 cts. of diamonds valued at Rs.

26,29,54,490/-, the duty on which payable was Rs.12,54,80,309/-.

(2) Broken diamonds of 1607.3 carats valued at Rs.6,91,139/-. (3) Confiscation of high value diamonds valued at Rs.39,63,286/-.

(4) Duty on unaccounted capital goods of Rs.58,54,698/-. (5) Confiscation of 10631.39 carats of diamonds valued at Rs.4,03,72,667/- that were unaccounted along with 6423.32 gms. of gold.

(6) Confiscation of unaccounted diamonds exported during 1998-99, 1999-2000 valued at Rs.27,00,76,393/-.

At this juncture, it would be necessary to note a few factual aspects.

The partners of M/s B.V. Star and M/s. B.V. Jewels are the same except that M/s B.V. Jewels had an additional partner i.e. Mr. Vijay Shah. Both the firms are gems and jewellery units set up in SEEPZ and engaged in the manufacture and export of studded gold jewellery. Originally B.V. Star was allotted a plot No.55 in the Zone where they had constructed a building having four floors. In 1995 a request was made by B/s B.V. Star to the Development Commissioner to permit M/s B.V. Jewels to shift their factory from Gala to operate from Ist and 3rd floor of M/s B.V. Star's building. Same was permitted. Accordingly, M/s B.V. Star operated from the 2nd and 4th floors while M/s B.V. Jewels operated from the other two floors. During stock taking, as noted above, the Accounts Manager, Shri Ramesh Iyer informed the department officials that partners Mr. Suresh Mehta and Mr. Suken Mehta had kept some diamonds separately. On 3.2.2000, Suresh Mehta produced 3861.65 carats of diamonds the value of which varied between $40 to 50 per carat. By letter dated 3.2.2000 the

physical stock of gold and diamonds as per the inventory sheet prepared by the departmental authorities was confirmed. It was specifically stated that there was no separate stock of gold and diamonds of M/s B.V. Star as it was included in the stock of M/s B.V. Jewels. The seized stock of diamond and gold were revalued by an appraiser.

The conclusions of the Commissioner and the Tribunal need to be noted.

First the case of M/s B.V. Star is dealt with. The issues and seriatim are as follows:

> (a) Duty on gold shortage of 8604.5 grams valued at Rs.34,66,889 is Rs.23,65,652
>
> (b) Duty on shortage of 844.16 cts. of diamonds valued at Rs.26,92,014 is Rs. 11,84,372 As regards gold and diamond, Commissioner observed that the unit's claim that their stock was mixed up with that of M/s. B.V. Jewels was not accepted as there is no provision available in Custom Notification or EXIM Policy whereby two units can have joint stock of exempted material. Customs Notification 177/1994-

Cus at Para 7 (i) stipulates the goods imported by a unit in EPZ can be transferred to other unit only with the prior permission of Asstt. Commissioner of Customs of the Zone, which has not been done. Diamonds are restricted for import and import without licence allowed only to EPZ unit under EXIM Policy and as per Para 9.10 of Handbook of Procedures, goods are to be imported into units' premises. Transfer of goods so imported, to any other unit is in violation of EXIM Policy and Custom Notification. The claim that the stock of gold, diamonds of M/s. B.V. Star is available with M/s. B.V. Jewels was not accepted as detailed stock position of M/s. B.V. Jewels indicated total shortage of 202 grams of gold without considering stock of M/s. B.V. Star. Hence, Commissioner confirmed the custom duty on gold and diamonds, which were found short.

CEGAT held that no stock taking report was prepared by department and have accepted the unit's contention that while stock taking, department mixed up all stock of diamond and gold and that for working out excess or shortage, the stock position of both units have to be compared together. CEGAT further stated that the expected recovery of 6812.36 grams of gold is not real recovery and if percentage of recovery changes slightly, the figure 6812.36 may be twice or thrice and if both stocks are taken together, alleged shortage of 8604.50 grams of gold in respect of M/s B.V. Star will not exist as total recovery will be much more.

In respect of diamonds, CEGAT observed that while taking stock, stock of both the units are mixed and the stock position of both units are considered with physical records, there would be shortage of 73 carats and observed to be marginal difference since commencement of the units. CEGAT observed that Commissioner has not dealt with this issue as department did not raise demand on physical shortage of diamonds found in respect of M/s B.V. Jewels.

) Duty foregone on missing capital goods which were imported duty free by M/s B.V. Star valued at Rs.2,22,48,876/-

(i) Duty on Capital goods value at Rs.1,06,37,742/- imported by M/s B.V. Star illegally under possession and usage of M/s B.V. Jewels.

The Commissioner observed that as per records and as confirmed by letter of Estate manager dealing with allocation of space in SEEPZ dated 17.2.2000, the area allotted to M/s B.V. Jewels is Ist and 3rd floor and to M/s B.V. Star is 2nd and 4th floor of a self built factory constructed by M/s B.V. Star. The unit's argument of having applied for permission obtaining oral permission was discussed and rejected. It was observed that the 20 machines with accessories were found installed in premises allotted to M/s B.V. Jewels and were in exclusive use of M/s B.V. Jewels. The Administrative officer of SEEPZ vide note dated 11.5.2000 had clarified that the capital goods limit of M/s B.V. Jewels had already been utilized and they were not entitled for duty free import or procurement of capital goods by way of inter unit transfer. Accordingly, the Commissioner observed that there was a deliberate attempt of diversion of capital goods imported by M/s B.V. Star to M/s B.V. Jewels, as the stipulated permission for such inter unit transfer to be obtained from Development Commissioner under para 9.16 (b) of EXIM Policy, from Asstt. Commissioner of Customs vide Para 7(i) of Notification 177/94 Customs, had not been obtained by any of these units. The unit's argument of working as one unit being sister concerns was rejected, as vide Para 9.37 (x) of Handbook of Procedures of EXIM policy. Units need to obtain specific permission from Development Commissioner for merger.

CEGAT observed that the appellants have answered a CRA objection in 1997 stating that M/s B.V. Star spared their Machinery to M/s B.V. Jewels for effecting exports, and the department closed the CRA objection. Thus not only were they aware that M/s B.V. Star's Machinery was used by M/s B.V. Jewels in the same Zone, but also were satisfied with the reply. Thus it is not a case of transfer of machinery to M/s B.V. Jewels, but use of machinery by M/s B.V. Jewels for manufacture of jewellery for exports. Condition No 4 of Notification No.177/94 required importer to execute a bond binding himself to bring such goods into his unit and use them within the zone for the purpose specified in the notification. Thus the said goods were brought into their units and those were used within the same zone for the purpose of export. Further importer has to satisfy the Development Commissioner that the goods so imported have been used for that purpose. Notification No.177/94 Cus. gets violated only if goods are to be transferred to another unit in the same zone. In this case there is no transfer to another unit but use of machinery by M/s B.V. Star for manufacture of jewellery for M/s B.V. Jewels with the knowledge of department. Therefore question of permission of Assistant Commissioner does not arise.

(ii) Confiscation of Capital goods valued at Rs.58,58,696/- which are not found in the unit.

Commissioner noted that M/s B.V. Star had worked for a brief period of 15 days or so where they exported only five consignments during 6.5.1997 to 14.5.1997 and quantum of jewellery produced is observed to be negligible, compared to quantum of capital goods imported by the unit. Capital goods worth Rs.58,58,696/- were not accounted for in the unit, and it cannot be considered as consumed/worn out considering a negligible export effected. It was accordingly held that the duty foregone at the time of clearance is payable.

CEGAT observed that Notification No.196/87 Cus. Condition xiv (b) (i) required importer to pay duty on consumable goods if not used in connection with the manufacture of the jewellery in the same zone. Since goods have been used in the same zone and there is no condition that the goods should be used by the same unit, there is no violation of condition of Notification.

(iii) Confiscation of un-installed motors/brushes/hand pieces valued at Rs. 36,70,675/- for violation of Notification 196/87 Cus.

Commissioner found that 238 pieces of Bench Motor, 79 hand pieces, 500 carbon brushes were found in original packages having remained unused and uninstalled for a period over six and half years violating condition xiv(b)(i) contained in Notification 196/87 Cus., which stipulated that the equipment had to be installed and used within a period of 1 year from the date of importation.

CEGAT observed that condition xiv(b)(i) to Notification 196/87 as held by Commissioner is not applicable, but the condition xiv (b) (ii) is applicable, which permits retention of such goods within the zone in connection with the promotion of export of gems and jewellery. The condition of retaining the goods within the said zone for purpose of export is satisfied. There is no violation of the Notification and therefore demand of duty and confiscation of goods is not sustainable.

(d) Imposition of Penalty The commissioner confirmed duty of Rs.2,57,90,900/- and imposed equivalent penalty apart from confiscating capital goods installed in the premises of M/s. B.V. Jewels with an option to redeem the same on payment of fine of Rs. 15,00,000/-.

CEGAT observed that as there was no shifting or transfer, these goods were lying in plot No.55 only which is repeatedly accepted as address for both units, and were not removed and use of machinery by M/s B.V. Jewels was for purpose of manufacture. Section 111(d)(j) & (o) invoked by Commissioner has not been violated, and hence confiscation, imposition of redemption fine and demand of duty are not warranted.

So far as M/S. B.V. JEWELS is concerned, the issues are as follows:

(a) Duty on shortage of 73,730 Ct of diamonds valued at Rs.

26,29,54,490/- Duty of Rs. 12,54,80,309/-.

Commissioner observed that Custom Notification 177/94 Cus; Stipulates that the importer to dispose the diamonds in a manner as specified in EXIM Policy as well as in the Notification. Para 8.29 of the EXIM Policy stipulates that the Exporter is required to achieve an additional value addition of 5% over the imported value of cut and polished diamonds. Para 8.34 of Hand book of Procedure of Exim Policy stipulates that the invoice presented to the Customs has to contain description of item, purity, Weight of gold, wastage claimed thereof and the total weight including wastage. Similarly in the case of studded jewellery, apart from above details of precious metal, the Exporter has also to indicate weight and the value of the diamonds. Para 8.35 of Handbook stipulates that the exports shall be allowed by Customs Authorities provided endorsements made on

Shipping Bill and Invoice are correct and value addition achieved is not below the minimum prescribed limit. It was observed that as all details cannot be brought on the same Invoice, Public Notice 20/96 contemplated that the Exporters shall file 'Value Addition Statement'. Para 9.10

(d) of Handbook stipulates that the diamonds are to be utilized within a period of two years from the date of import, and remaining unutilized diamonds thereafter would become dutiable. Hence the importers have to maintain the record of consumption Bill of Entry wise, and the details of Bill of Entry are to be shown in Export documents so as to show consumption within prescribed time. Even the Bond executed with Customs is debited and credited based on import and export, and therefore import content in export consignment has to be known, for which import value of the diamonds studded in the jewellery exported has to be furnished.

As regards Par 8.78 B of Handbook, Commissioner observed that there is no amendment made with reference of Para 8.34, 8.35 of handbook and 8.29 of EXIM Policy while introducing this new Para. Therefore even with the new provision the requirement of furnishing the import value of the diamonds in an Export consignment cannot be dispensed with. The Commissioner did not accept the argument, that accounting of diamonds is not required to be done value wise, observing that the diamonds are imported with value ranging from 25 US $ per carat to 3500 US$ per carat and one cannot equate all such diamonds. In many cases of import effected by the Unit, the difference in rate per carat with reference to various lots of diamonds in single invoice, is varying only in fraction of a dollar, and argument of the unit about having variation in prices up to 30% within the diamonds of the same lot after assortment, was not accepted. Commissioner relied on a specific Bill of Entry No. 2977 cited by the unit, and brought out that the difference within the lots of similar range of diamonds is only a fraction of a dollar and rejected the unit's arguments that the diamonds imported at the rate of 50 US dollar per carat can have rate varying from US $ 35 to 65. As an example Commissioner observed that against 1894 carats of diamonds valued at 75 US $ per carat imported by the unit, the unit exported 29931 carats of diamonds at this rate, whereby there was no account for 28037 carats and no explanation was provided by the unit. Based on above method of verification of stock total shortage of 73,730 carats of diamonds valued at Rs.26,29,54,490/- was confirmed and duty demanded.

CEGAT observed that whenever diamond is valued, different people will give different values and variation may be large and that is why value of diamonds declared in the Value Addition Statement can never be the same as declared in the Bills of Entry and declaration of Bill of Entry number in 'Value Addition Statement' is based only on approximation. As no method of co-relating or accounting of imported diamonds is specifically provided in the exemption notification or in EXIM Policy, on representation from Gem and Jewellery Export Council, Para 8.78 B was introduced in EXIM Policy on 1.4.2000 prescribing the method of co- relation with reference to total quantity of imports and exports. It was specifically provided that under no circumstances co-relation will be done consignment wise.

CEGAT referred the observation of Commissioner that although the amendment was made effective after the detection of the case, method adopted for cross checking proper accounting of diamonds by the investigation does not militate against the amendment. Commissioner by agreeing that the

amendment of Para 8.78 B is applicable to the facts of the case, method adopted by the department for co-relation was to be as per this para. Findings of the Commissioner are not correct, as shortage of diamonds and duty demanded is worked out by co-relating individual Bills of Entry and wherever exact weight has not tallied department has considered the shortage of diamonds and demanded differential duty and that no demand of Customs duty is made in the show cause notice on physical shortage with reference to total quantity of exports and imports. Unit's contention that diamonds after mixing and sorting cannot be co-related with individual Bill of entry and jewellery is made, was accepted. Shipping Bill was filed along with Value Addition Statement, and the value of diamonds indicated therein may not tally with rates mentioned in the Bills of Entry and therefore only Bills of Entry numbers showing values of imported diamonds closest to value of diamonds used in export jewellery were indicated in the relevant columns of 'Value Addition Statement'. CEGAT held that the demand of duty on 73730 carats of diamonds found short was unsustainable and set aside the same.

CEGAT observed that the alleged shortages have arisen due to wrong method of co-relation and are imaginary shortages. In physical term shortage/excess by weight of diamonds is insignificant. This fact stands compounded by faulty documentation of search as there is no Panchanama and some data given by an employee was adopted. There is no admission of shortage by appellant and no incriminating documents have been recovered, therefore, the shortage is deemed and based on lack of co-relation of value/cartage of diamonds.

(b) Confiscation of broken diamonds of 1607.3 carats of value Rs. 6,91,139/-

Commissioner rejected the unit's claim to consider 1607.30 carats of broken diamonds produced by Shri Suresh Mehta on 07.02.2000 on the ground that the stock taking of the unit was first conducted on 31.01.2000 and Shri Suresh Mehta who was in New York came to SEEPZ specifically to explain the stock and after his arrival in SEEPZ on 03.02.2000, he produced 3861.65 carats of diamonds valued between 42 to 50 US $ per carat from his personal cupboard, which also was taken into account for stock taking and stock taking was concluded on 03.02.2000. Shri Suresh Mehta confirmed in writing that the stocks found are as per inventory prepared by the Customs staff and counter signed by his employees. Thereafter as Shri Suresh Mehta requested for valuation of diamonds by an expert, the stock was kept in the safe of the unit and sealed by Customs officials, and valuation was done on 07.02.2000. The unit never indicated that they had any further stock of diamonds in stock, in their several letters between 03.02.2000 to 07.02.2000. In the EPZ, there is no physical control of goods by customs and all controls are accounts based, and it is for the unit to produce material available for verification at the time of stock taking, and production of any exempt material after five days of conclusion of stock taking has no relevance, as premises or the persons working in the unit were not under the control of the department. Records do not indicate the unit to have so much broken diamonds, as between 01.10.1999 to 31.01.2000 quantity of diamonds that were broken for the purpose of manufacturing was only 110.57 carats, as indicated in Annexure 5 of Show Cause Notice. This quantity, added to earlier reported stock of broken diamonds, amounted to total stock of broken diamonds as 750.31 carats only, and the unit did not explain how they could have the additional stock of 856.72 carats of broken diamonds in their possession.

CEGAT observed that entire SEEPZ is a customs bonded area, which is under the joint control of Customs and Development Commissioner and exit or entry of vehicles and persons is restricted through the main gate and subject to security check. In fact all the physical stock available was only produced commencing from 1.2.2000. It accepted the contention of appellants before it that there is nothing like broken diamonds and even such diamonds will continue to be utilized depending on the requirement of the particular purchase order and only when such broken pieces cannot be utilized for any purchase order they are considered as broken diamonds and entered in the register. Though Commissioner accepted the physical stock as legitimate stock, he proceeded to confiscate the entire broken diamonds. CEGAT set aside the demand based on above conclusion.

) Confiscation of High Value diamonds valued at Rs. 39,63,286/-

On 07.02.2000, 27 seven pieces of high value diamonds of which 23 pieces were in blister packing accompanied by certificate issued by European Gemological laboratory and 4 pieces were in loose condition. It was claimed by the assessee to have been legally imported stock which were produced by the unit. Commissioner observed that, in case of three Bills of Entry, the certificate numbers of diamonds do not tally with the numbers mentioned in the import invoices. In case of seven other diamonds, they were imported with certificate Numbers of Gemological Institute of America, whereas the certificates produced were of European Gemological Laboratory. Seven diamonds imported vide Bill of Entry No. 7602 dated 12.10.1998 were neither exported nor found in stock. Same was in case of 03 heart shaped diamonds, imported vide Bill of Entry No. 3809 dated 22.01.1999. Commissioner did not agree with unit's claim about certain quantity of diamonds against a particular invoice, as the invoice had endorsement of certificate number for seven diamonds whereas for others, no number was mentioned. Claim that though invoice does not mention invoice number, diamonds were having certificate numbers. It was observed that, a supplier will not supply some certified diamonds mentioning certificate number only in respect of some diamonds and supply other diamonds in the same consignment without indicating certificate number. The Commissioner confiscated the 23 high value diamonds valued at 39,63,286/-, as the unit was not able to prove beyond doubt that these diamonds were imported legally. Import details of diamonds furnished were not found to be in order and certificate numbers of the said diamonds were not found mentioned in the import documents. As diamonds were found to be in original packing of foreign origin and no documentary proof for legal import were produced, the goods were held liable for confiscation.

CEGAT observed that weight and description of the diamonds tallies with that of invoice. Seizure and confiscation was not justified because supplier issued invoice. Certificates are issued by another agency and supplier in all cases may not indicate the certificate numbers on the invoices and packing list. In respect of some diamonds, where the clarity was highlighted to be not tallying, CEGAT observed that there are different standards for indicating the clarity as seen from the grading given in U.K., USA. For example VS is standard adopted in U.K. where as VS1 and VS2 are adopted by Gemological Institute of America and therefore it is not correct to say that the clarity does not tally. Accordingly, it set aside the confiscation of 23 pieces of High Value Diamonds by Commissioner.

(d) Duty on unaccounted capital goods of value Rs.58,54,698/- (duty of Rs. 39,31,813/-) Commissioner found that goods valued at Rs.

58,34,698/- imported by M/s. B.V. Jewels was accepted by the unit to have been sold to M/s. S.B.T. International Ltd., based on alleged oral permission from the Development Commissioner. The Development Commissioner vide letter 11.05.2000 confirmed that they neither received nor granted any permission for inter unit transfer cum sale or de- bonding of capital goods by M/s. B.V. Jewels. Commissioner rejected their argument about notification No. 196/87, that duty is payable only on capital goods, which are not proved to the satisfaction of customs to have been installed, or otherwise used in the zone. Para 3 (ii) of Notification No.177/94, which rescinded notification No.196/87, clearly stipulates that anything done under rescinded notification, shall be deemed to have been done under corresponding provision of Notification No. 177/94. The notification stipulates permission of customs for inter unit transfer or sale. Para 110 of EXIM policy 1992-97 stipulates that imported goods were permitted to be given only with the specific permission of Development Commissioner. The unit failed to satisfy both the above said provisions of Customs Notification and EXIM Policy and duty forgone at the time of import of such goods amounting to Rs.39,31,813/- became payable.

CEGAT observed that Notification 196/87-CUS provides that importer has to pay on demand an amount equal to the duty when capital goods are not proved to the satisfaction to have been installed or otherwise used within the same Zone. Since in this case capital goods were installed or used within the same Zone, the Notification does not permit the demand of customs duty. CEGAT further observed that in respect of notification 177/94-CUS, condition 4 of para 1 required the importer to execute a bond, to bring the said goods to his unit and to be used within the said Zone. As the goods had been brought into their unit and goods were being used in the same Zone, the notification does not permit demand of Customs duty so long as goods remain within the said Zone and are used for the purpose of exports.

(e) Confiscation of 10631.39 carats of diamonds valued at Rs. 4,03,72,667/- that were unaccounted along with 6423.32 of gold.

Commissioner observed the unit was in possession of 10631.39 carats of diamonds for which no evidence of legal acquisition existed or was produced. Part of diamonds was claimed to have been studded in jewellery in finished and semi finished form. The contention that no Panchanama was drawn for seizure of such goods was false as the same were seized under Panchanama dated 26.02.2000, copy of which was received by M/s. B.V. Jewels. There was large scale export of substituted diamonds and these diamonds also would have been exported in similar fashion and these being un- authorised goods brought in SEEPZ, a Customs Area, such articles were liable for confiscation under Section 113 (d) of Customs Act, 1962.

CEGAT observed that these diamonds were considered as excess, because value given in respect of the quantity was not tallying with Bills of Entry in possession of the units. CEGAT accepted the unit's submission that value taken in inventory sheets is different from the value taken by the assessor, and as the entire stock was seized from "work in progress" of 'setting department', 'quality

control department' after sorting and mixing, these diamonds lost their identity with reference to a particular Bill of Entry and values indicated in 'valuation report' may or may not tally with rate indicated in the Bill of Entry. The excess quantity was observed as legitimately imported and the confiscation was set aside.

(f) Confiscation of unaccounted diamonds exported during 1998- 99, 1999-2000 valued at Rs. 27,00,76,393/-.

Commissioner observed that M/s. B.V. Jewels exported jewellery studded with diamonds valued at Rs.27,00,76,393/- for which no documentary evidence about legal possession was produced. The corresponding quantity of diamonds were found short in stock and exports effected using unaccounted diamonds by mis-declaring the source of procurement was an act to cover up un-authorised removal of duty free imported diamonds from SEEPZ.

CEGAT observed that the co-relation, which was done with each shipping bill and Bill of Entry, is not correct and was set aside as above. It was concluded that since method adopted was not correct, there was no unaccounted stock of diamonds and hence question of confiscation does not arise.

We shall deal with the correctness of the conclusions of the Commissioner vis-`-vis those of CEGAT in respect of each issue hereinafter.

So far as the shortage of gold and diamond is concerned, the Commissioner found as a matter of fact on the basis of statements recorded of employees that the stock of M/s B.V. Star was mixed up with that of M/s B.V. Jewels. Customs Notification No.177/1994-Cus clearly stipulates that goods imported by a unit in SEEPZ can be transferred to another unit only with the prior permission of the concerned Assistant Commissioner of the Zone. The EXIM policy as well as para 9.10 of Handbook of Procedures makes the position clear that goods are to be imported into the importer unit's premises. It was, therefore, not permissible for M/s B.V. Star to claim that the goods imported by it were mixed up with the stock of M/s B.V. Jewels. CEGAT has proceeded on entirely erroneous premises that it is the department which mixed up the stock in working out the excess or shortage. So far as the expected recovery of 6812.36 grams of gold is concerned, learned counsel for the respondents submitted that the position of expected recovery as worked out by the department is artificial and hypothetical. There was no material brought on record to show that the expected recovery would be the actual. It is to be noticed as submitted by learned counsel for the appellant that the expected recovery was worked out on the basis of the figures supplied by the concerned respondents and the average has been worked out. It is of relevance to note that the assessee's employees who are accustomed with the process of recovery have accepted the figure worked out by the departmental authorities.

So far as the shortage of diamond is concerned, it is to be noted that there was practically no manufacturing activity carried out by M/s B.V. Star and, therefore, the question of any staff being there does not arise.

Shortage of diamond was worked out at 844.16 carats. It is to be noted that the mixing up of stock of two units is not legally permissible. CEGAT has recorded a very confused finding that if the stock position of both the units varies there shall be marginal difference, overlooking the fact that mixing was not done by the department as concluded by it; but by the concerned respondents. It was for them to explain the stock position. The department has worked out the details with reference to the official records. It was for the concerned respondents-assessees to reconcile the figures. To put it plainly what was required to explain is as follows:

> Opening stock as on 1.4.1998, receipts by way of imports are to be added to it to work out the availability of stock from which the outgoings were to be for exports, and the balance has to be the stock as per the records. It has to tally with the physical stock. If it does not tally, the concerned assessee has to explain as to why the discrepancy arose. The department has worked out the details on that basis. Therefore, the duty as levied on the shortage of gold and diamond was rightly worked out by the Commissioner. CEGAT without considering the factual position on the basis of some abrupt conclusions which are also not supportable factually held that there is no discrepancy. The duty as levied by the Commissioner on the shortage of gold and diamond needs to be confirmed, and we direct accordingly.
>
> Next item relates to the missing capital goods. In this case the stand of both M/s B.V. Star and M/s B.V. Jewels was that the capital goods imported duty free by M/s B.V. Star was installed in the premises allotted to M/s B.V. Jewels and were in exclusive use of the latter. The Administrative Officer of SEEPZ vide his letter dated 11.5.2000 had clarified that the capital goods limit of M/s B.V. Jewels had already been utilized and they were not entitled to import any duty free capital goods. It was also not permissible for it to procure capital goods by way of inter unit transfer. Therefore, the diversion of capital goods imported by M/s B.V. Star to M/s B.V. Jewels is clearly impermissible.
>
> CEGAT proceeded on the basis as if there is no transfer and mere usage and there is no violation. This is clearly contrary to para 9.16 (b) of EXIM policy, in the absence of stipulated permission and also in terms of condition No.7(i) of Notification No.177/94-Customs. Permissible transfer has to be in the mode noted at para 9.16 of EXIM policy which relates to inter unit transfer. It is not that only in the case of transfer permission is necessary. Usage also would be covered because for duty free import the pre-requisite is that it must be used in the premises of the unit. Notification 196/87-Customs makes the position clear. The goods imported were to be used by the imported unit. Permitting another unit to use it is clearly in violation of the stipulations in the notification which clearly mandate use by the imported unit only, except with the requisite permission stipulated which in the instant case was not there. Therefore, the duty on capital goods imported by M/s B.V. Star and under possession and usage of M/s B.V. Jewels as ordered by Commissioner needs confirmation which we direct.

> So far as the confiscation of capital goods valued at Rs.58,58,696/- is concerned, the Commissioner found that M/s B.V. Star had worked for a brief period of two weeks during the period from 6.5.1997 to 14.5.1997. Five consignments were exported and the quantum of jewellery produced was quite negligible compared to the quantum of capital goods imported by the unit. As laid in para 9.10(b) of the EXIM policy and in terms of para 7(i) of the Notification 177/94-Cus dated 21.10.1994, the transfer from one unit to another unit had to be preceded by permission from the Development Commissioner and proper accounting in the registers prescribed by the department. In the instant case neither M/s B.V. Star nor M/s B.V. Jewels had obtained any permission from Development Commissioner or the Assistant Commissioner (Customs).

Stand that both the units being sister concerns and promoted by same partners and was practically using as one unit is clearly untenable. Even for merger of two or more units in terms of para 9.37(x) of Handbook of Procedures of EXIM policy 1997-2002, specific permission from the Development Commissioner is required to be obtained. Prior to delegation of powers to the Development Commissioner the powers were vested with the SEEPZ Board. As the manufacturing activity of M/s B.V. Star is admittedly negligible it could not have held by CEGAT that the goods have been consumed or worn out during manufacture of jewellery by M/s B.V. Star. As the consumption and utilization of capital goods valued at Rs.58,58,696/- has not been properly accounted for and these goods were found short while working out the details, the duty foregone at the time of clearance of the goods is clearly leviable. The confirmation of demand by the Commissioner as was done is in order.

So far as the missing installed motors, brushes, hand pieces are concerned, these were found to be in the original packings and were cleared by bills of entry Nos. 3126 and 7382 dated 8.7.1993 and 19.6.1993 respectively. Evidently, the goods remained unused and uninstalled for a period of six and a half years. According to the Commissioner this was in clear violation of conditions xiv(b)(i) of Notification 196/87-Cus dated 5.5.1987.

Learned counsel for the respondents submitted that in the present case as rightly observed by CEGAT, condition xiv(b)(i) is not applicable and it is a case where condition xiv(b)(ii) is applicable. The CEGAT observed that retention of the goods within the Zone in connection with the promotion of export of gems and jewellery is permissible. For retaining the goods within the same zone a satisfaction is required to be recorded that the same was for the purpose of export.

Clause xiv(b) in its entirety reads as follows:

> "the importer shall pay, on demand, an amount equal to the duty leviable:
>
> (b) on goods, other than capital goods as are not proved to the satisfaction of the Assistant Collector of Customs to have been:

> (i) used in connection with the manufacture or packaging of gem and jewellery within the said Zone for export out of India or for the promotion of export of such goods or re-exported within a period of one year from the date of importation thereof or within such extended period as the Assistant Collector of Customs may, on being satisfied that there is sufficient cause for not using them or for not re-exporting them within the said period allow;
>
> (ii) retained within the said Zone in connection with the promotion of exports of gem and jewellery.

Undisputedly, clause (b)(i) has not been complied with because the articles have not been used in connection with manufacture or packaging of gems and jewellery within the Zone for export out of India or for the promotion of export of such goods or re-export. The time limit of one year period is fixed. According to learned counsel for the respondents-assessees the articles can be retained within the Zone in connection with the promotion of exports. The Assistant Collector of Customs has to be satisfied that the retention of goods within the Zone was in connection with the promotion of exports of gem and jewellery. No material was placed before the Commissioner though it was clearly indicated in the show cause notice as to how the retention of the goods was in connection with the promotion of exports. On a bare reading of the details of the goods in respect of which the demand was confirmed, goes to show that it has nothing to do with the promotion of exports of gem and jewellery. The vital requirement is that the retention should be in connection with "the promotion of exports". The burden lay on the assessee to establish that the condition was satisfied. No material whatsoever was placed before the Commissioner to satisfy the requirement. CEGAT was therefore not justified in annulling the demand. The demand as confirmed by the Commissioner stands revived.

So far as the working out of shortage/excess are concerned we shall deal with the case of M/s B.V. Star and M/s B.V. Jewels together.

The Departmental authorities placed reliance on clauses 8.34 and 8.35 of EXIM Policy Handbook to contend that the details should be as noted in the shipping bills and invoices in the background of conditions of export.

Learned counsel for the assessees-respondents, however, relied on para 8.78 B which reads as follows:

> "8.78 B- For the purpose of monitoring in case of gem and jewellery units at the time of scrutiny at any point of time the unit shall be able to account for by way of fulfillment of export obligation and realization of prescribed NFEP, the entire quantity of imports as might have been made by the units. The exporter shall also account for the total quantity of imports by way of total quantity of exports and the balance stocks including broken diamonds and other gemstones. However at no point of time the unit shall be required to co-relate every export consignment with the corresponding import consignment."

Paras 8.34 and 8.35 operate in a field different from para 8.78 B. The exercise to be undertaken so far as the requirements of 8.78 B are concerned, relate to a stage when the exporter is required to account for the total quantity of imports and the comparison has to be made with total quantity of exports and the balance stock including broken diamonds and other gemstones.

Paragraphs 8.34 and 8.35 operated at the time of export when the bills have to be verified in the prescribed manner. That is a stage different from one contemplated in para 8.78 B. Paras 8.34 and 8.35 read as follows:

> "8.34- At the time of export of jewellery, the shipping bill and the invoice presented to the customs authorities shall contain the description of the item, its purity, weight of gold/silver/platinum content, wastage claimed thereon, total weight of gold/silver/platinum content plus wastage claimed and its equivalent quantity in terms of 0.995/0.999 fineness for gold/silver and in terms of 0.9999 fineness for platinum and its value, fob value of exports and value addition achieved. If the purity of gold/silver/platinum used is the same in respect of all or some of the items made out from each of these metals for export, the exporter may give the total weight of gold/silver/platinum and other details of such similar items which are of the same purity. In case of studded items, the shipping bill shall also contain the description, weight and value of the precious/semi-precious stones/diamonds/pearls used in manufacture, and the weight/value of any other precious metal used for alloying the gold/silver.
>
> 8.35-The exports shall be allowed by the customs authorities provided the endorsement made on the shipping bill and the invoice are correct and the value addition achieved is not below the minimum prescribed in the policy".

The Departmental authorities have adopted the view that the working out of the details are to be done in terms of paras 834 and 8.35 and not in the line of 8.78 B. That is clearly erroneous.

As the stages of adopting provisions referred to above stand on a different footing the relevant provisions have to be applied at the stages they are intended to be applied. The Commissioner seems to have not taken note of para 8.78 B. However, the respondents have the obligation to otherwise reconcile the stock. They cannot claim immunity from verification of stocks and its obligation for reconciliation of differences, if any. By way of illustration it may be indicated that Manufacture and Other Operations in Warehouses Regulations 1966 throws beacon light in this regard, more particularly Regulations 9 & 10 thereof. Power of the departmental authorities to verify the records to find out whether imports and exports have been properly recorded cannot be denied. Such verification shall not be only for the purpose of finding out the compliance of paragraphs 8.34 and 8.35 and 8.78 B but the same shall be to test the correctness of the accounts maintained. Therefore, it would be appropriate to direct the CEGAT to work out the details so far as the alleged shortage of 73,730 carats of diamonds valued at Rs.26,29,54,490 are concerned.

We may note that in the case of high value diamonds undisputedly certain diamonds along with connected records were produced by partner Suresh Mehta some days after the verification started. According to the department the production of such valuable articles at a later point of time clearly shows that an attempt has been made to substitute the actual diamonds with items which were not covered by the import documents. Similar is the position relating to confiscation of 10631.39 carats of diamonds and alleged unaccounted gold and diamonds.

The Tribunal shall permit the respondents-assessees to produce the original records which shall be verified by it. Definite stand of the department as to how there are suppressions resulting in either excess or shortage of gold shall be considered. CEGAT shall consider the basic features to work out the details and find out whether there is any excess or shortage as alleged by the departmental authorities. If after considering the explanation of the respondents-assessees and that of the departmental authorities already on record it finds that the plea of the concerned assesses, is without substance it shall work out the suppression, if any, and the duty payable. The quantum of penalty would be equal to the sum of duty leviable in terms of confirmation of Commissioner's order as done by us supra. The penalty to that extent stands confirmed. The balance of penalty, if any, would depend upon re-examination by CEGAT as directed supra.

Respondents also urged before us that the demands raised were clearly barred by limitation and though the plea of limitation was specifically raised the same was not considered by the Commissioner and since the CEGAT accepted the plea of the respondents on merits it did not refer to that plea.

We find that reference was made by departmental authorities to the proviso appended to sub-section (2) of Section 28 of the Act. No plea about its non-applicability was taken in the grounds of appeal before the CEGAT and though it was vehemently urged that the point was specifically taken before the Tribunal, we find no mention thereof in the CEGAT's order. The matter can be looked at from another angle. If, in reality, the CEGAT found that the action taken by the departmental authorities was beyond the period of limitation, it could have disposed of the appeals before it only on that ground without examining the merits. On the contrary, in the absence of any specific plea in the grounds of appeal, the point does not seem to have been urged before the CEGAT, particularly, in view of the consideration of the merits and non- consideration of the question of limitation. That being so we find no substance in the plea of learned counsel for the respondents that the action taken by authorities was beyond the period of limitation. Even otherwise, the proviso to sub-section (2) of Section 28 is clearly applicable as the materials clearly indicate non levy and short levy on account of mis-representation of facts by the respondents.

The appeals are allowed to the extent indicated. There will be no order as to costs.