Microland Ltd vs Airport, Mumbai on 8 October, 2014

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEALS NOS: C/472, 526 to 528, 550 & 551/2005

[Arising out of Order-in-Original No. COMMR/MCT/ADJN/ 05/05 dated 25/02/2005 passed by t

For approval and signature:

Hon ble Shri P.R. Chandrasekharan, Member (Technical)
Hon ble Shri Ramesh Nair, Member (Judicial)

1.
Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 o
:
No
2.
Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for public
:
Yes
3.
Whether Their Lordships wish to see the fair copy of the Order?
:
Seen
4.
Whether Order is to be circulated to the Departmental authorities?
:
Yes

Eastern Peripherals Pvt. Ltd.

Bhupendra V. Shah

Golden Computers Ltd.

Memory Electronics Pvt. Ltd.

Navin S. Kulkarni

V. Raghavendran

Microland Ltd.

Appellants
Vs

Commissioner of Customs

Airport, Mumbai

Respondent

Appearance:

Shri V. Sridharan, Sr. Advocate with Shri Prakash Shah and Shri T. Vishwanathan, Advocates for the appellants Shri K.M. Mondal, Special Consultant (AR) for the respondent CORAM:

Hon ble Shri P.R. Chandrasekharan, Member (Technical) Hon ble Shri Ramesh Nair, Member (Judicial) Date of hearing: 08/10/2014 Date of decision: 30/12/2014 ORDER NO: _____ Per: P.R. Chandrasekharan Captioned appeals arise out of the order-in-original no. COMMR/MCT/ADJN/05/05 dated 25/02/2005 passed by the Commissioner of Customs, Sahar International Airport, Mumbai. The appeals were heard on 19th, 24th and 25th of September and 8th October, 2014.

2. Brief facts relevant to the case are as follows:-

2.1. M/s. Eastern Peripherals Pvt. Ltd. (M/s. EPL, for short) established an industrial unit at Santacruz Electronics Export Processing Zone (SEEPZ), Mumbai, for manufacture of computer systems with an aggregate annual capacity of 2,50,000 nos. vide permission granted by the Ministry of Commerce in its letter dated 16/02/1990, subject to the following conditions,-

(i) M/s. EPL should achieve overall value addition in exports of not less than 20%;

(ii) M/s. EPL could import capital goods of a value of Rs.15.675 Crores for the said purpose;

(iii) The list of capital goods and imported raw materials would be as per the information furnished by EPL in its letter dated 04/09/1989 (revised application) read with its letter dated 28/08/1989;

(iv) Not less than 85% of the production by value shall be exported to General Currency Areas.

(v) Import of capital goods /raw materials and components would be allowed only where necessary approval of the concerned authorities had been taken and subject to the approval of the phased manufacturing programme being obtained, wherever it was required.

(vi) Foreign brand names would not be allowed for use on the products for internal sale, although there was no objection to their use on the products to be exported.

2.2. Investigation was carried out by the officers of the M&P Wing of the Preventive Commissionerate, Mumbai regarding the unit s manufacturing activities for export and sales of computer systems in the Domestic Tariff Area under its DTA sale entitlement claimed against its exports made during 1989-90 & 1990-91 respectively. The investigation revealed that the terms & conditions of the Industrial Licence as also the DTA sale entitlement were grossly violated. Foreign brand computers were imported under the guise of components and parts and sold under DTA sale entitlement. A show cause notice dated 04/10/1996 was issued in respect of the said clearances effected upto 31/03/1992 demanding customs duty and proposing confiscation of the goods. However, the said notice is not the subject matter of the present proceedings. The present proceedings relate to the subsequent clearances effected after 31/03/1992 against the DTA sale permission.

2.3. Upon scrutiny and verification of export documents, the following picture emerged.

S. No. Period Exports Imports of raw materials (Rs.) Interunit purchase of raw materials (Rs.) Inter unit sales (Rs.) Value addition achieved Quantity (Nos.) Value (Rs.) 1990-91 49557 60.75 crore 49.38 crore 2.14 crore 2.21 lakhs 10.85% 1991-92 21115 29.10 crore 25.29 crore 2.11 crore 79 lakhs 6.88% 1992-93 18941 16.60*crore 1.89 crore 10 lakhs 10.25% Note - * Though fob value was 16.60 crore approx., an amount of Rs.13.59 crore was not realised.

2.4. During the period 1993-94, value addition achieved was only 6.30% as per records of the Development Commissioner, SEEPZ. It has also been ascertained that for the period upto 31/03/1994, an amount of Rs.14,24,14,104/- of export value has not been realised. Vide its letter dated 10/03/1995, the RBI has confirmed that an amount of Rs.15.76 crores is outstanding against the exports made by M/s. EPL. This fact has also been confirmed by Shri B.V. Shah, Director of M/s. EPL in his statement dated 16/03/1995.

2.5. In view of non-realisation of export proceeds and non-fulfillment of the conditions governing the DTA sale entitlement by M/s. EPL, the Development Commissioner, vide letter dated 30/03/1995 deducted the DTA sale entitlement earlier issued to M/s. EPL from the DTA sale entitlement of M/s. Tancom Electronics, another EPZ unit belonging to Tandon Group of Companies, for unauthorized DTA sale entitlement earlier availed by M/s. EPL.

2.6. Scrutiny of the export documents indicated that M/s. EPL exported Top Assemblies and in some cases, Tandon Brand Systems. However, scrutiny of DTA related documents indicated that M/s. EPL had effected sale of foreign brand computer systems which were not part of its usual manufacture and export. Except for 943 nos. of systems of f.o.b. value of Rs.1,42,12,655/-, all other 2535 nos. of foreign brand computer systems of f.o.b. value of Rs.11,60,74,628/- were found to have been sold under DTA permission by M/s. EPL, in clear violation of the Export-Import Policy.

2.7. In view of the large sale of foreign brand computer systems to various dealers by M/s. EPL against its DTA entitlement, detailed verification was done of the DTA related records maintained by the Tandon Group of Companies. It was found that such foreign brand computers were exclusively meant for domestic sale under DTA sale entitlement to certain select dealers, namely, M/s. Microland Ltd., M/s. CMS Computes, M/s. Minicomp Ltd., M/s. Unicorp Industries Ltd., etc. In view of this, the officers carried out simultaneous searches of the office premises of these dealers, namely, (1) M/s. Unicorp Industries Ltd. on 02/12/1994, (2) M/s. Microland Ltd. at Fort, Bombay and its corporate office at Bangalore on 02/12/1994 and several files containing documents were taken over in the presence of Shri Anand Sudarshan, Vice President and Shri Pradeep Kar, M.D. of M/s. Microland.

2.8. Scrutiny of the seized records from the corporate office of M/s. Microland Bangalore, revealed that the said company was the dealer/distributor of M/s. Compaq Computer Asia Pte. Ltd., Singapore for selling their computer systems in India. It was also revealed that the Compaq brand computers marketed/sold by them were found to have been imported by EPZ units, mostly by M/s. EPL, who in turn, sold these computer systems under its DTA sale entitlement by virtue of which these systems were cleared at the concessional rate of duty and without any import restriction. It was also revealed that it was M/s. Microland Ltd. who had placed orders directly on M/s. Compaq Asia Pte. Ltd. for complete computer systems of various models of Compaq brand with instructions to bill & ship the said ordered goods to M/s. EPL, SEEPZ. It was also noticed that against above mentioned purchase orders of M/s. Microland, M/s. Compaq Asia Pte. Ltd., Singapore were issuing Proforma Invoices to EPZ units quoting Microland s purchase orders. Copies of such proforma invoices were also found forwarded to M/s. Microland Ltd. Although Purchase Orders placed by M/s. Microland were for complete computer systems, M/s. Compaq Asia Pte. Ltd. used to issue the Proforma Invoices describing them as computer parts and peripherals with specific reference to respective model nos. and complete assembly numbers of the computers ordered by M/s. Microland Ltd.

2.9. Based on the Proforma Invoices, M/s. EPL used to place its Purchase Orders on M/s. Compaq referring to Microland s Purchase Orders along with the annexures indicating the description of goods as per the Proforma Invoices. It was further noticed that against the Purchase Orders placed by M/s. EPL, the respective import invoices were issued by M/s. Compaq in conformity with the annexures forwarded along with the respective purchase orders of M/s. EPL. In the respective invoices, imports were described to be in the nature of configuration with reference to different models indicating the respective assembly no. identifiable for complete Computer Systems. The description in the invoices was found consisting of similar break-up identical to the description given in the respective purchase orders. Similarly, against the above said generic description, i.e.

casing with cover, Power Supply and Mother Board, Speaker, etc., no part no. was found mentioned, whereas in respect of other peripherals like Key Board, Mouse, Monitors, HDD, FDD, respective part nos. were found mentioned. There was no reference to the parts and components and the values were found furnished in terms of total no. of sets. The above position was corroborated supported by the correspondences of M/s. Microland, Bangalore. Most of the correspondences were made by Shri Ashok Radhakrishnan of M/s. Microland and sometimes by Shri Anand Sudarshan with M/s. Compaq, Singapore and also with M/s. EPL particularly with Shri Raghavendran and Shri Navin Kulkarni.

2.10. On scrutiny of the bills of entry with the respective invoices, it was found that the computer systems covered by the bills of entry and invoices were by and large described in the common configuration of Mother Board, Casing, Power Supply, etc. The rest of the items namely, Key Board, Monitors, Mouse, etc. were declared in the invoice and bills of entry as components of computer systems.

2.11. In his statement dated 05/05/1995, Shri Anand Sudarshan, Vice President of M/s. Microland had, inter alia, admitted that in 1992 M/s. Microland was appointed dealers for Compaq Asia Pte. Ltd., Singapore and that their procurement of Compaq computers commenced around September/October, 1992. On a query as to why the complete computer systems for which orders were placed on M/s. Compaq were needed to be SKDied and Proforma Invoices raised, he admitted that this was being done in view of the agreement between M/s. Compaq and M/s. Tandon so that DTA benefits would enable Compaq to exploit the market on a competitive basis, besides meeting the requirements of the EPZ unit and Microland used to procure the material at competitive prices with duty concession availed by the EPZ unit. In his statement dated 10/05/1995, Shri Pradeep Kar, MD of M/s. Microland also corroborated the above position. While confirming that they had purchased computers from M/s. EPL etc., he stated that they raised purchase orders on M/s. Compaq with instructions to bill & ship the Computers to the EPZ units. On being asked about the reason for routing the imports of complete computer systems through SEEPZ units, he stated that since EPZ Units were entitled to concessional duties, they preferred to route the imports through EPZ units of M/s. Tandon as that would give them a competitive edge in the market. He stated that although the orders were placed by them on Compaq for complete computer systems, the process of dismantling and issue of proforma invoice were as per requirement of EPZ units of M/s. Tandon.

2.12. Scrutiny of the bills of entry filed by M/s. EPL revealed that full computer systems were declared as components for computer systems such as, casing with monitor along with cable speaker and crew, system board, expansion board, HDD with cable, FDD with cable, key board, mouse and operative systems on disk and manuals. Thus full computer systems were mis-declared as components for computer systems only to get duty free clearance under customs Notification No. 227/79-Cus and 133/94-Cus. This was also done to circumvent the ITC restrictions in force.

2.13. The above facts were admitted by Shri Navin Kulkarni of M/s. EPL in his statement dated 02/02/19995. On being specifically asked to explain the reason for dismantling the said Compaq systems exported to India, he stated that as fully built up computer systems could not be imported

into SEEPZ for sale in DTA, the same were imported in dismantled condition to facilitate clearance of these as parts and peripherals of the systems. Shri V. Raghavendran of Tandon Group of Companies who was associated with the import and sales of computer systems under Domestic Tariff Area facility of M/s. EPL, in his statements dated 8/12/94 and 16/12/1994, admitted that the manufacture of computer systems by EPL was limited/confined to fitting of Hard Disc and floppy disk drives into the systems which were subjected to quality & reliability test. Shri M.L. Tandon, Chairman of Tandon Group of Companies, SEEPZ, in his statements dated 29/11/1994 and 05/12/1994, while corroborating the statement of Sri. Raghavendran, averred that earlier they had purchased computer kits of the following brands, namely, Compaq, ACER and a few unknown brands.

3. After completion of necessary investigation, a show cause notice dated 27/03/1997 was issued to M/s. EPL and others under Section 124 read with Section 28 of the Customs Act, 1962 by the Commissioner of Customs (Preventive), Mumbai answerable to the Commissioner of Customs, Sahar Airport, Mumbai, alleging contravention of the terms & conditions of LOP/LOI, contravention of various provisions of the Export-Import Policy as also the various conditions of the exemption notifications. The said notice sought to confiscate foreign brand complete computer systems, peripherals of an aggregate CIF value of Rs. 9,68,81,852/- and of an aggregate FOB ex-SEEPZ value of Rs.11,60,74,628/- sold under DTA and 21 nos. of foreign brand computer systems of a value of Rs. 13,25,197/-which were lying in the SEEPZ premises under Section 111(d), 111(o) & 111(m) of the Customs Act, 1962. The notice also sought to confiscate local/Tandon Brand Computer Systems of an aggregate CIF value of Rs.1,19,02,183/- and an aggregate ex-SEEPZ FOB value of Rs.1,42,12,655/- under Section 111(d) & (o) of the Customs Act. The notice also sought to impose penalty on M/s. EPL, Shri M.L. Tandon, Chairman & its executive staff S/Shri V. Raghavendran, B.V. Shah & Navin Kulkarni under Section 112(a) & (b) of the Customs Act, 1962. The notice also sought to recover customs duty of Rs. 13,62,09,753/- under Section 28 of the Customs Act chargeable on the complete computer systems and peripherals of an aggregate ex-SEEPZ FOB value of Rs. 13,02,87,283/- against aggregate collective CIF value of Rs. 10,87,84,034/- earlier cleared under DTA sales entitlement.

3.1. The notice also called upon M/s. Golden Computers Ltd. & its Director Shri B.V. Shah to explain as to why foreign brand Computer Systems of an aggregate ex-SEEPZ FOB Value of Rs. 6,59,91,325/- against an aggregate CIF Value of Rs.5,45,90,239/- and computer systems of local brand (Tandon Brand) of an aggregate ex-SEEPZ FOB value of Rs.4,41,550/- and of an aggregate CIF Value of Rs.3,63,141/- cleared under DTA sale entitlement of M/s. EPL should not be confiscated under Section 111(d), (o) & (m) of the Customs Act, 1962. They were also called upon to show cause as to why penalty should not be imposed on them under Section 112(a) and 112(b) of the Customs Act, 1962.

3.2. The notice also called upon M/s. Memory Electronics Ltd. and its Director, Shri B. V. Shah to explain as to why computer systems of an aggregate ex-SEEPZ FOB value of Rs.68,02,055/- against an aggregate CIF Value of Rs.56,67,490/- cleared under DTA sale entitlement of M/s. EPL should not be confiscated under Section 111(d) & (o) of the Customs Act, 1962 and why penalty should not be imposed on them under Section 112(a) & (b) of the said Act.

3.3. The notice also called upon M/s. Microland Ltd., Bangalore and its Managing Director, Shri Pradeep Kar, its Corporate Manager, Shri Ashok Radhakrishnan and its Vice President, Shri Anand Sudarshan to explain as to why the Computer systems and peripherals of an aggregate ex-SEEPZ FOB value of Rs.8,47,03,735/- against aggregate CIF value of Rs.7,04,80,653/- cleared under DTA sale entitlement should not be confiscated under Section 111(d), (o) and (m) of the Customs Act, 1962 and why penal action should not be taken against them under Section 112(a) & (b) of the said Act.

4. The above notice was adjudicated upon by the Commissioner of Customs, Sahar Airport, Mumbai vide his Order-in-Original No. COMMR/MCT/ADJN/05/05 dated 25/02/2005. In the said order, the Commissioner held that,-

> (1) duty is recoverable on the CIF value of the goods of Rs.10,87,84,034/- which was exempted from duty at the time of import and not on the value at which the goods were sold in DTA;
>
> (2) the foreign brand computer systems of an aggregate value of Rs. 9,68,81,852/- at the time of import and subsequently sold in DTA and local/Tandon brand computer systems of an aggregate CIF value of Rs.1,19,02,183/- at the time of import and subsequently sold in DTA were liable to confiscation under Section 111(d) & (o) of the Customs Act, 1962;
>
> (3) confiscated 21 nos. of foreign brand computer systems valued at Rs.13,25,197/- seized from the SEEPZ premises under Section 111(d) & (o) of the Customs Act with an option to redeem the same on payment of a fine of Rs.50,000/-.
>
> (4) confirmed the duty demand of Rs.11,48,66,320/- payable on the goods of CIF Value of Rs.10,87,84,034/- (as against the demand of Rs.13,62,09,753/-proposed in the notice) in terms of Section 28 read with the provisions of the Bonds executed in terms of Notification No. 227/79-Cus dated 30/11/1979 and 134/94-Cus dated 22/06/1994. However, the Commissioner gave setoff of Rs.6,40,75,434/- paid as central excise duty by EPL on account of sale in the DTA against the duty demand confirmed. The Commissioner also gave a setoff of Rs.1,68,66,497/- deposited in the name of M/s. Ultra Tech Devices Ltd., a Tandon Group Company against the confirmed demand. Thus the balance amount of duty payable by M/s. EPL was confirmed at Rs.3,39,24,389/-;
>
> (5) imposed a penalty of Rs. 25 lakhs on M/s. EPL, Rs .10 Lakhs on Shri B.V. Shah, Rs.2 Lakhs on Shri V. Raghavendran & Rs.1 Lakh on Shri Navin Kulkarni;
>
> (6) In respect of M/s. Golden Computers Pvt. Ltd. and its Director, Shri B.V. Shah, the computer systems cleared to DTA were liable to confiscation;

(7) imposed a penalty of Rs.5 Lakhs on M/s. Golden Computers Pvt. Ltd. under Section 112(a) of the Customs Act, 1962;

(8) Similarly in respect of M/s. Memory Electronics Ltd. & its Director Shri B.V. Shah, the Commissioner held that the Computer systems cleared to DTA liable for confiscation and imposed a penalty of Rs.1 Lakh on M/s. Memory Electronics Ltd. under Section 112(a) of the Customs Act, 1962;

(9) In respect of M/s. Microland Ltd. and its M.D., Shri Pradeep Kar, its Vice President, Shri Anand Sudarshan and its Corporate Manager, Shri Ashok Radhakrishnan, the Commissioner held them liable for penalty under Section 112(a) of the Customs Act for their active role in evolving and implementing the modus operandi. Accordingly he imposed a penalty of Rs.5 Lakhs on M/s. Microland Ltd., Rs.2 Lakhs on Shri Pradeep Kar, Rs.1 Lakh on Shri Anand Sudarshan and Rs.50 Thousand on Shri Ashok Radhakrishnan under Section 112(a) of the Customs Act, 1962. However, except M/s. Microland Ltd., other appellants are not here.

Aggrieved of the same, the appellants are before us.

5. The ld. Counsel for the main appellant, M/s EPL made the following submissions.

5(a) There is no demand of duty on capital goods and imported parts, components, etc., to the extent used in manufacturing of goods exported from SEEPZ. The duty demand as per the SCN and the impugned Order is only on the imported goods used for production & DTA sales. In other words, on the account of alleged non-fulfillment of value addition, no demand has been raised on capital goods or imported components used for export. In view of para (1A) of Notification No.227/79-Cus dated 13/11/1979, for alleged non-fulfillment of value addition, no customs demand of duty in respect of imported inputs can be raised to the extent used in DTA production and sales. If at all, customs duty can be demanded on imported capital goods and imported inputs used in export production & sales. If at all, excise duty on finished product at full rate can be demanded under Notification No.97/91-CE dated 07/10/1991.

5(b) Prior to 1982, the FTZ Scheme formulated by the Ministry of Commerce required the units to export 100% of its production. The scheme did not permit any DTA sales at all. There was amendment in Export-Import Policy in 1982-83.which permitted units in FTZ to sell 25% of their total production in DTA subject to the sale being made to persons holding valid import licence and subject to obtaining the requisite permission from the Development Commissioner. Consequential amendments were made was to Section 3(1) of the Central Excises and Salt Act, 1944 providing for levy and collection of excise duty on any excisable goods produced or manufactured in a free trade zone and brought to any other place in India at a rate equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962 on like goods produced or manufactured outside India if imported into India and on a to be determined in accordance with the provisions of the Customs Act, 1962 and the Customs tariff Act, 1975. The Finance Minister s Speech made in this regard corroborates this fact. Circular No. 202/21/82-CX.6 dated 17/02/1983

was issued by CBEC setting out the procedure for collecting excise duty on the goods produced in FTZ and allowed to be brought into rest of the country which reads as follows:

> . The Government have decided to allow units in the Kandla Free Trade Zone and the Santacruz Electronics Export Processing Zone to sell their goods not exceeding 25% of the production, in the domestic tariff area, on payment of excise duty equal to the duties of customs leviable on like goods imported from abroad. No excise/ customs duties are to be charged on the goods used in the manufacture of such goods. Such sale has to be to the parties holding valid general currency areas import licences. Necessary amendments in the Import Trade Control Order for making debit entry in the import licences in respect of supply of goods from the free trade zone are being made by the Ministry of Commerce.
>
> 2. Clearances to the domestic tariff area is to be allowed only after necessary permission has been obtained by the unit form the Development Commissioner/Administrator in charge of the free trade zone. A unit desiring to clear the goods to the domestic tariff area has, therefore to approach the Development Commissioner/Administrator of the zone for necessary permission.
>
> 3. Debit entry in the import licence will be made by the Development commissioner/ Administrator of the zone before granting permission to a unit to clear the goods to the domestic tariff area. He will also ensure that a unit has not exceeded the ceiling of 25% in respect of the goods cleared to the domestic tariff area before granting such permission in the light of the guidelines laid down in this regard.
>
> 4. In order to levy excise duty equal to the duties of customs leviable on the like goods imported from abroad, a proviso has already been inserted in Section 3 of the Central Excises and Salt Act, 1944 vide Section 46 of the Finance Act, 1982 (14 of 1982). In view of the provisions of this proviso, basic excise duty leviable on the goods produced outside the free trade zone in India at the rates set forth in the First Schedule to the Act, is not leviable on the goods produced in a free trade zone and cleared to the domestic tariff area. The basic excise duty leviable under Section 3 on the goods produced in a free trade zone and brought to any place outside the zone in India will be equal to the duties of customs (i.e. basic customs duty, auxiliary customs duty, cess, additional (customs) duty and any other customs duty as and when imposed) leviable on like goods produced or manufactured outside India if imported into India. The valuation of such goods will also be done with reference to the valuation provisions under the Customs law and not under Section 4 of the Central Excises and Salt Act, 1944. Having collected Customs duties on the finished goods in the garb and name of excise duties, it would be inequitable and unfair to levy Customs duty on imported inputs. Levy of Customs duty on imported goods used for DTA production & sale would amount to double taxation.

5(c) Notification No.227/79-Cus was amended on 21/06/1983 by Notification No. 183/83-Cus, permitting clearances of the goods in the DTA by inserting para 1A which reads as follows:-

> A. Notwithstanding anything contained in this notification, the exemption contained herein shall also applicable to those goods which on importation into India are used in connection with the production or manufacture or packaging of excisable goods even if not exported out of India, but brought to any other place in India, under and in accordance with import & Export Policy for April, 1983 March 1984 (Volume I), notified by the Government of India in the Ministry of Commerce Public Notice No. 10-ITC(PN)/83, dated the 15th April, 1983, as amended from time to time, and subject to such other limitations and conditions as may be specified under paragraph 2 of the notification of the Government of India in the Ministry of Finance (Department of Revenue and Insurance) No.186/75-Central Excise, dated the 21st August, 1975,as amended from time to time on payment of duty of excise leviable on such excisable goods under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) The rationale behind this notification was to permit the FTZ units to clear the goods within DTA on payment of excise duty on finished goods without payment of Customs duty on imported inputs. In view of the use of non-obstante clause , the effect of this para is that exemption to imported goods will continue to be available to the FTZ unit, even if the finished goods are not exported out of India, but cleared in the DTA. This para only provides that such clearances should be on payment of excise duty leviable on such goods and against valid DTA permissions given by the Development Commissioner. Even if it is assumed that fulfillment of value addition is a condition of Notification No. 227/79-Cus, however, in view of the non-obstante clause contained in Para 1A, even if the value addition is not achieved, exemption would still be available on imported inputs used for DTA clearance on payment of appropriate excise duty. The exemption availed on the imported inputs cannot be denied or recovered on the inputs used in the manufacture of resultant product cleared in the DTA in terms of the permissions given by the Development Commissioner and on payment of applicable excise duty. Any contrary interpretation would result in collection of the duty twice in by way of Customs duty on inputs at the time of import and the Customs duty on finished goods at the time of clearance in DTA. Such a situation is not contemplated by the amendment made by Finance Act, 1982.

5(d) The expression under and in accordance with the Export-Import Policy 1983-84 used in Para 1A does not refer to achieving any value addition. It refers to obtaining of licence by the DTA customer, obtaining of DTA permission by the FTZ unit, tendering the same for debit by Development Commissioner for payment of excise duty as assessed by the proper officer. This is clear from para 2 & 3 of the Circular dated 17/02/1983 and Rule 100D & Rule 100E of the erstwhile Central Excise Rules, 1944. In April, 1982, when amendments were made to permit DTA sales, full custom duties was payable on finished goods sold to DTA albeit in the name of excise duty. If value addition is not achieved and if customs duty is

demanded on imported inputs used for DTA sales, there would be an anomaly. Maybe, customs duty can be demanded on imported capital goods and imported inputs / components used for export production & sales, but never on inputs used for DTA production & sales. At that time, there were notifications like Notification No.97/91-CE dated 25/07/1991 or 2/95-CE saying that DTA sales will pay excise duty at 50% of custom duty. It is therefore clear that under and in accordance with Export-Import Policy could not refer to value addition, but only procedural provisions of the policy. The phrase under and in accordance with Export-Import Policy cannot have a different meaning from July,1991, merely because for DTA sales, concessional excise duty at the rate of 50% of Customs duty is involved. That phrase will have same meaning both prior to & after July 1991. The clearances in the DTA in question were effected by the appellants in accordance with the Notification No. 97/91-CE dated 07/10/1991 and Notification No.101/93-CE dated 27/12/1993. If at all, any duty is payable on non-achieving of value addition, it will be the excise duty as applicable without the benefit of these two exemption notifications. However, there is no such proposal in the present case either in SCN or in the impugned Order. Similar to Para (1A) of Notification No. 227/79-Cus, Para 3 of the Notification No.133/94-Cus too permits clearance of the finished goods in the DTA. Only ground to demand duty under Notification No. 227/79-Cus is non-fulfillment of Condition (7) is unsustainable because achievement of value-addition is not a criteria in Condition (7) which requires payment of an amount equal to the duty leviable: (a) on goods which are capital goods not installed within prescribed period; (b) on goods which are capital goods not put to use within prescribed period; (c) on electronic goods not exported or used within prescribed period. The goods in dispute are not covered by any of the above conditions as imported inputs were used for DTA production & sale. Similarly, only ground to demand duty under Notification No.133/94 is the non-fulfillment of condition (5).

5(e) Notification No. 227/79-Cus dated 30/11/1979 grants exemption from payment of customs duty in respect of goods imported for export by SEEPZ unit. The exemption under this notification is subject to the certain conditions. One of the conditions namely condition (4) is to execute bond as prescribed by the Development Commissioner which is reproduced below:

(4) the importer agrees to execute a bond in such form and for such sum as has been prescribed by the Development Commissioner of the Zone binding himself to fulfill the export obligations, and to fulfil, inter alia, the conditions stipulated in this notification and in or under the Import & Export Policy for April 1985 March 1988, notified by the Government of India in the Ministry of Commerce Public Notice No.1-ITC(PN)/85-88, dated 12th April, 1985 (hereinafter in this notification referred to as the said Import and Export Policy), as amended from time to time; Thus condition (4) requires the importer to execute a bond and execution of bond is fulfillment of condition 4. So long as the appellants execute the bond, the condition is fulfilled. Subsequent, alleged non-achieving of export obligation etc. is not

non-fulfillment or breach of condition 4.

5(f) In Union of India Vs. Rai Bahadur Shreeram Durga Prasad 1969 (1) SCC 91, the Supreme Court held that furnishing of a declaration is compliance with Section 12(1) of the Foreign Exchange Regulation Act, 1947 and incorrectness of the declaration does not amount non-fulfillment or breach of Section 12(1) of FERA. Same view was taken in Becker Gray Vs. UOI 1970 (1) SCC 352. The decision of Supreme Court in Rai Bahadur (supra) was followed by MP High Court in the case of Universal Cables 1977 (1) ELT J 92 (MP). In that case, Revenue contended that price mentioned in the Price List filed by the assessee under Rule 173C was false & incorrect and hence, penalty is leviable under Rule 173Q of the erstwhile Central Excise Rules, 1944. The hon ble high court rejected this contention and held that, even if price in Price List is false & incorrect, Rule 173Q(1)(a) & 173Q(1)(d) of the erstwhile Central Excise Rules, 1944 are not attracted. Once Price List is filed, Rule 173C is fulfilled and Rule 173Q(1)(a) & 173Q(1)(d) is not attracted. The present notification simply stipulates that the FTZ unit executes a bond. Nowhere, it is stipulated that the FTZ unit undertakes to pay duty in case of non-fulfillment of value addition or non-fulfillment of export obligation, unlike the other notifications pertaining to Advance Licence Scheme or EPCG Scheme. For example, there are notifications namely Notification Nos. 203/92-Cus, 204/92-Cus, 110/95-Cus stipulating execution of Bond by the importer undertaking to fulfill the export obligation and on failure, undertaking to pay duty. Similarly in CC Vs. Sameer Gehlot 2011 (263) ELT 129 (T) , the exemption Notification incorporates only pre-import conditions and no separate post-import condition is enumerated. The post-import conditions requiring an approval from DGCA and undertaking to be furnished at the time of importation have already been fulfilled and the exemption was granted at the time of import. In the circumstances, the Hon ble Tribunal has held that the importers cannot be charged with violation of pre-import conditions, on the basis of circumstances arising after the import. In view of the above, no demand can be raised for alleged non achieving value addition by relying on para 4 of the Notification.

5(g) Vide Notification No.61/99-Cus dated 11/05/1999, condition (3) of Notification No.133/94-Cus was amended. The condition (3) of this Notification No. 133/94-Cus (as it stood prior to 11/05/1999) was similar to condition (4) of Notification No. 227/79-Cus. Relevant portion of un-amended condition (3) of this Notification read as follows:

> . Notwithstanding anything contained in this notification the exemption contained herein shall also apply to the said goods which on importation into India are used for the purposes of production, manufacture, processing or packaging of articles in a unit in the Zone and such articles (including rejects, waste and scrap material arising in the course of production, manufacture, processing or packaging of such articles) even if not exported out of India, are allowed to be cleared outside the Zone under and in accordance with the Export-Import Policy and subject to such other limitations and conditions as may be specified in this behalf by the Development Commissioner of the Zone, on payment of duty of excise leviable thereon under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) or where such articles (including rejects, waste and scrap material) are not excisable, on payment of customs duty on the said goods used for the purpose of production, manufacture, processing or packaging of such

articles in an amount equal to the customs duty leviable on such articles as if imported as such : After the aforesaid amendment to condition (3), it has been provided that the FTZ unit is required to execute a bond binding to fulfill the export obligation and to fulfill the conditions stipulated in this Notification and in Export & Import Policy and on failure to pay duty an amount equal to duty leviable on the goods along with interest. Condition 3 (iv) of amended Notification reads as under:

(iv) in the case of raw materials, components, spares and consumables (other than capital goods) imported or produced duty free, the unit fails to achieve Net Foreign Exchange Earning as a Percentage of Exports (NFEP) and Export Performance (EP) as specified in Appendix-1 of the Export and Import Policy, within one year of importation or procurement of such goods or within such extended period, not exceeding one year, as the Assistant Commissioner of Customs or Deputy Commissioner of Customs may, on being satisfied that there is sufficient cause, allow:

Provided that the Commissioner of Customs may extend the period for achievement of Net Foreign Exchange as a Percentage of Exports (NFEP) or export Performance (EP) for further period not exceeding five years from the date of importation or procurement The CBEC vide Circular No.30/99-Cus dated 25.6.1999 explained the rationale of the amendment as under:

B. Demand of Duty from the Defaulting Units : ?

(i) It has now been provided, to demand duty and interest on the duty-free raw materials, components, spares and consumables (other than capital goods) etc., if the unit fails to achieve the stipulated NFEP and EP within a period of one year of importation/procurement of such goods or within such extended period, not exceeding further one year as the Assistant Commissioner may, on being satisfied that there is sufficient cause, allow. It has been further provided that, Commissioner may extend this period for achievement of NFEP or EP for further period not exceeding five years from the date of importation or procurement of such goods.

Post Notification No.52/2003 dated 31.3.2003 para 3(II), the EOU / FTZ Scheme stipulated payment of duty on raw materials and capital goods in case the unit does not achieve the value addition, on pro-rata proportionate basis. Thus, pre-1999, the Scheme did not contemplate demand of duty on capital goods or raw materials in case the unit does not achieve value addition. Between 1999-2003, the Scheme stipulated payment of duty on the raw materials, components, in case the unit does not achieve value addition. Post 2003, such duty is on pro-rata basis.

5(h) During the relevant period, the requirement of achieving value addition was not stipulated. This view is supported by the Form of LUT executed under FTP. The form does not prescribe for achievement of value addition. The only requirement mentioned in such form is that units must export 100% of the production. Relevant portion of Form of LUT reads as:

AND WHEREAS as a condition of the licence granted to the Unit, the Government has stipulated that the Unit must earn foreign exchange by exporting 100% of the production of the export product, namely, _____ for a period of _____ years beginning from the first day after completion of gestation period allowed by the Government (hereinafter referred to as the prescribed date) after allowing rejects upto _____ percentage The format of LUT executed under FTP remained same till March 1995. Relevant portion of Form of LUT reads as:

AND WHEREAS as a condition of the Licence granted to the Unit, the Government has stipulated that the Unit must earn Foreign Exchange by exporting 100% of the production of the export product, namely, _____ for a period of _____ years beginning from the first day after completion of gestation period allowed by the Government (hereinafter referred to as the prescribed date) after allowing rejects upto _____ percentage .

Post March 1995, the format of LUT to be executed by EOU units mentions that the unit must earn minimum foreign exchange by exporting the entire production (including the sales in the DTA as may be permissible under the policy). Relevant portion of Form of LUT reads as:

AND WHEREAS as a condition of the Licence granted to the Unit, the Government has stipulated that the Unit must earn minimum net Foreign Exchange of US $ _____by exporting its entire production (Including the sales in the DTA as may be permissible under the Policy) for the period of _____ years beginning from the first day after commencement of commercial production or from the date of agreement (hereinafter referred to as the prescribed date) after allowing rejects upto _____ percentage While seeking to confirm the demand in terms of the Bond on the impugned goods, the customs department has not even referred to or relied upon the bond alleged to be executed by the appellants with the customs department, either in the SCN or in the Order.

5(i) It is undisputed admitted fact in the present case that the entire clearances of the computer systems in DTA are covered by valid and subsisting DTA permissions granted by the Development Commissioner. Appropriate duty of excise as assessed was paid by the Appellants. Clearance were under physical control procedure as per Rule 100D & 100E of Chapter V-A of the erstwhile Central Excise Rules, 1944 read with paras 2 & 3 of Circular No. 202/21/82-CX6 dated 17/02/1983. Only after due verification and examination, the Development Commissioner has given permissions from time to time for clearance of goods into DTA. These permissions were neither cancelled nor revoked. Assuming without admitting that the permission granted by the Development Commissioner is not correct and proper in law, even then in the absence of cancellation or revocation thereof, it will bind the Excise /Customs department. The department, at this stage, cannot go beyond the permission granted

by the Development Commissioner and contend that DTA permission could not have been granted to the appellants. Reliance is placed on the decision of Hon ble Tribunal in Ginni International Vs. CCE 2002 (139) ELT 172 (T), wherein the Central Excise department demanded duty from the assessee in respect of DTA clearances effected on the ground that DTA entitlement granted by the Development Commissioner was not proper since it had taken into account deemed exports also and hence to that extent, there has been DTA clearances without the permission from the Development Commissioner. The Tribunal held that the permission given by the Development Commissioner to clear the goods in DTA was final and the same was binding. The departmental filed before the Supreme Court was dismissed as reported in -2007 (215) ELT A102 (SC).

5(j) The impugned Order-in-Original has confirmed the differential duty demand by invoking bond executed by the Appellants. The show cause notice, however, proposed to demand differential duty by denying the exemption under Notification No.227/79-Cus dated 13/11/1979 & 133/94-Cus dated 22/06/1994 in terms of the proviso to Section 28 of the Customs Act, 1962. The Show Cause Notice does not invoke the bond executed by the Appellants for demanding the duty. Therefore, the Commissioner of Customs in his impugned Order-in-Original has travelled beyond the show cause notice. It is settled that the adjudicating authority cannot travel beyond the show cause notice. Reliance is placed on the following decisions:

(i) CC Vs. Toyo Engineering India 2006 (201) ELT 513 (SC)

(ii)CCE Vs. Ballarpur Industries 2007 (215) 489 (SC).

In view of above, the impugned order, to the extent it purports to confirm the demand of differential duty in terms of the alleged bond, is beyond the show cause notice and to this extent the impugned Order is liable to be set aside. In any event, it is not shown under which bond the demand is confirmed by the impugned Order-in-Original. Copy of bond is not on record, not even referred to SCN, not referred as read upon document to SCN and annexed to the order.

5(k) The Show Cause Notice is dated 27.3.1997. The demand of duty pertains to the period from May 1992 to October 1994. The demand is raised beyond the normal statutory period of limitation of six months in terms of Section 28(1) of the Customs Act, 1962. The SCN & the impugned order confirmed the demand on the basis that the Appellants have imported complete computer system in SKD condition. The department has applied Rule 2(a) of General Rules of Interpretation of Customs Tariff for considering the goods imported as complete computer system and therefore denied the exemption of Notifications. At the time of import, the appellants filed bills of entry, duly accompanied by invoices and packing list duly accompanied by clearly indicating the description of the goods. The goods so imported were subject to physical examination by the customs department. In other words, the goods were allowed to be cleared extending the exemption of Notification No. 227/79-Cus dated 13/11/1979 & 133/94-Cus dated 22/06/1994, only after due verification and examination by the customs department. Therefore, the contention that computer systems were

imported in SKD form was something well known to the department at the time of imports itself. Notification Nos. 227/79-Cus & 133/94-Cus, as amended, exempted raw materials, components etc., imported for manufacture of finished goods for export etc. If it is the case of the department that the goods imported were complete computers in SKD condition and to be treated as computer in terms of Rule 2(a), it is not on account of suppression. It is based on change of opinion. Such cases are not governed by the proviso to Section 28(1) of the Customs Act, 1962. Reliance is placed on the decision of Orissa High Court in India Metals Ferro Alloys Vs. CCE 2000 (123) ELT 337 (Ori), wherein the High Court held the demand raised by the department to be barred by limitation. In that case, the contention of the department was that the carbon paste imported by the EOU was not raw material required for the manufacture of the resultant product. In that case, the department sought to sustain the demand in terms of B-17 Bond executed by the assessee-EOU. This decision has been affirmed by the Supreme Court in CC Vs. Indian Metals & Ferro Alloys 2002 (144) ELT A105 (SC).

5(l) It is submitted that Rule 2(a) applies for determination of classification. It does not apply for deciding the applicability of an exemption Notification. Therefore, denial of exemption by impugned order is by applicability of Rule 2(a) incorrect. These notifications apply to raw materials, components etc., falling under any chapter of the Customs tariff. Even if the imported goods are classified as computer system for the purpose of tariff, what was imported in fact was heap of components, these are duly covered by the exemption notifications. Reliance is also placed on the following decision & Circular:

> (a) Modi Xerox Ltd Vs.CC - 1998 (103) ELT 619 (Tri) Affirmed at 2001 (133) ELT A91 (SC) 7. ...It is noticed that Rule 1 of the general rules is of general application providing that for legal purposes classification shall be determined according to the terms of the headings and any relative section or chapter notes. Exemption notifications are part of the Tariff and there could be no doubt that Rule 1 of the general rules had its application for determination of the classification even when such classification is required for the goods described in the exemption notification. Thus for the purposes of the classification of the goods in terms of the particular heading/sub-headings are described in the exemption notification the classification had to be first determined in terms of headings of the Schedule read with applicable section/chapter notes. Resort to the general rules other than Rule 1 can be had only when the classification is not possible in terms of the headings/sub-headings read with applicable section/chapter notes. In the facts and circumstances of this case we consider that the appellants had sought to classify the goods in terms of the general rules while the classification in terms of the expressed language in the exemption notification could be settled within the ambit of the heading/sub-headings read with applicable section/chapter notes, without any resort to the general rules.
>
> (b) Circular No. 39/2005-Cus dated 03/10/2005. Relevant portion of the Circular reads as under:
>
> .?Under Sl. No. 276 (which has subsequently been withdrawn w.e.f. 1-3-2005) of the CN. 21/2002-Cus., dated 1-3-2002, all parts of the machines of heading 8471,

other than PPCB s, motherboards and power supply units attracted a concessional rate of duty @ 5%. In case the computer casing/chassis is pre-fitted with the power supply unit, it was not eligible for the benefit of the said entry of the notification and the rate of basic customs duty on the same use to be 15%. However, some importers had imported the chassis and the power supply as separate units in the same consignment. These units were meant to be fitted together after the clearance thereof, but in the form as presented, these were not assembled. The point of dispute is whether in cases where computer casing/chassis and power supply unit were imported in a form not fitted together as an assembly, but separately in the same consignment, the benefit of Notification No. 21/2002-Cus., dated 1-3-2002, (vide S. No. 276) can be denied by applying rule 2(a) of the General Rules for the Interpretation of the First Schedule (GIR).

...

5.?The Board had accepted the decision of the Conference. Accordingly, it is clarified that the goods have to be classified in the form as presented and rule 2(a) of the GIR cannot be applied for the sake of allowing/disallowing the benefit of a notification, unless the exemption notification is based on classification of the item under a particular heading of the Customs Tariff. For the purpose of classification, Rule 2(a) of the General Rules of Interpretation could be applied. Assembly of Computer from parts / sub-assembling amounts to manufacture even if parts / sub-assembling are treated as complete goods by virtue of Rule 2(a). The goods imported since goods imported in SKD condition are complete computer system in itself, is incorrect. The SCN as well as impugned Order alleges that the Appellants have imported complete computer system by virtue of Rule 2(a). According to the department, therefore, the imported goods are classifiable as computer and not as parts & components of a computer in terms of Rule 2(a) of General Rules of Interpretation. Therefore, a conclusion has been drawn that no manufacturing activity can be undertaken on computer system imported in SKD condition as it is complete computer in itself.

5(m) The above conclusion of Order-in-Original & SCN is incorrect & contrary to settled law. Activity of assembling of goods imported in SKD condition amounts to manufacture in terms of Section 2(f) of Central Excise Act, 1944. In BPL Vs. CCE 2002 (143) ELT 3 (SC) (Volume-II at Page No.117-121), the assessee had imported kits of Video Tape Recorder and colour monitors in SKD condition. In terms of Rule 2(a), they were assessed to CVD duties as complete Video Tape Recorder / Colour Monitor. BPL had undertaken assembling of the imported SKD components to form complete VTR system by using fasteners. The Supreme Court held that the process of assembly of imported kits of components into VTRs/Colour monitors constitute the process of manufacture and liable to excise duty. Similarly in Majestic Auto Vs. CCE 2001 (130) ELT 551 (T) , the Hon ble Tribunal has held that assembly of motor cycle out of parts of such motor cycle which were assessed to duty by application of Rule 2(a) of the interpreted rules as motor cycle, still amounts to manufacture of motor cycle under the Central Excise.

5(n) Collector of Customs (Preventive) is a Collector having jurisdiction over SEEPZ under the Customs Act. Appraiser under Collector (Preventive) is a Superintendent / Central Excise Officer. However, Collector of Customs (Preventive) is not Collector or Commissioner or any Central Excise Officer under Central Excise Act having jurisdiction over SEEPZ. Therefore, assessment under Central Excise Act cannot be disputed by a show cause notice issued by Collector of Customs (Preventive) or Order passed by Collector of Customs (Preventive). Assessments done & actions takes under Central Excise Act cannot be touched/disputed by a Show Cause Notice issued by the Collector of Customs (Preventive) under Central Excise Act. Notification No.11/83-CE dated 11/02/1983 provides for appointment of officers of the Customs in a free trade zone as Central Excise officers within the jurisdiction of the free trade zone. Significantly, this notification does not appoint Collector of Customs (Preventive) as Collector or Commissioner or any Central Excise Officer under Central Excise Act. Notification No.36/97-CE(NT) dated 19/08/1997 amended Notification No.11/83-CE dated 11/02/1983. The amending notification appoints Commissioner of Customs in FTZ as Commissioner of Central Excise of FTZ. In view of above, during the period under consideration, Collector of Customs (Preventive) was not appointed as Collector or Commissioner or any Central Excise Officer under Central Excise Act. Therefore, the Order is without jurisdiction & bad in law.

5(o) Decisions relied upon by the Revenue at time of hearing is not applicable to the facts of the present case. In those decisions, demand of customs for non-achievement of value additions where on imported inputs used for export and not on inputs used for DTA production & sales. However, in the instant case, demand is on imported inputs used in DTA production & sales.

5(p) On behalf of Microland and its officials, the following submissions were made. During the period of dispute, Microland Ltd. was acting as an authorized distributor of Compaq brand computers in India. The others are officials/employees of Microland Ltd. In the impugned order, the Commissioner has held that the appellants were knowingly concerned in import of Compaq brand computer systems through EPZ Unit thereby rendering the goods imported by M/s Eastern Peripherals Ltd liable to confiscation under Section 111(d) & 111 (o) of the Customs Act, 1962 and consequently, he has imposed penalty on each of the appellants under Section 112(a) of the Customs Act, 1962. Penalty has been imposed on the ground that the Microland, who are authorized dealers of Compaq in India, in collaboration with M/s Eastern Peripherals Ltd. (an EPZ unit), M/s Compaq Computer Asia Pvt. Ltd, Singapore (supplier of goods to EPZ), circumvented the Export-Import Export Policy in order to enjoy the exemption of concessional rate of duty available to DTA clearances made by EPZ unit with the motive of increasing the market share of this brand of computers in India. It is an admitted position even according to the customs department the appellants received complete computer systems from the EPZ unit under the DTA sale invoice issued by these EPZ units, upon payment of excise duty. This is evident from the fact that the adjudicating authority has allowed set off of the Central Excise duty paid by the EPZ Unit against the total customs duty demanded from the EPZ Unit. Such clearances were also in accordance with the permissions granted by the Development Commissioner. The appellants submit that the Show Cause Notice originally proposed to impose penalty under Section 112(a) and 112(b) of the Customs Act, 1962 but the impugned order has imposed penalty on the appellants under Section 112(a) only. A reading of Section 112(a) shows that it is primarily intended to impose penalty on a person who

does or omits to do anything which will render the imported goods liable to confiscation under Section 111. Section 111 of the Customs Act relates to confiscation of improperly imported goods. The various contraventions which are detailed in Section 111 are listed in sub section (a) to (p) of Section 111. The sub-section relevant to these proceedings are sub-section 111(d), 111(m) and 111(o) of the Customs Act, 1962 which have been invoked against the appellants. All these clauses of Section 111 will apply to importer and not to the appellants. The goods in question have been imported by the EPZ Unit and not by the appellants. The goods in question after import, were subjected to a process of assembly and manufacture and thereafter sold to the appellants under valid DTA sale invoices. Therefore, it cannot be said that the imported goods have been sold as such and the appellants purchased the imported goods. Similarly, Section 111(m) is applicable for mis-declaration of description or value of the imported goods. None of the appellants are concerned with the import and cannot comment upon the so called mis-declaration. The appellants further submit that the provisions of Section 111(o) are not attracted in this case as the imported goods have been taken into the EPZ unit and cleared thereafter, only after subjecting the goods to certain processes. As far as the appellants are concerned, it is not their business to know whether the goods in question were correctly imported by the EPZ Units, as long as the appellants can show that they have received the goods under the cover of valid duty documents from the EPZ units. The department has also not shown as to how the provisions of Section 111(o) have been contravened by the appellants. No specific allegations have been made against the appellants for contravention of Section 111(o). Further, no documentary evidence is brought on record to show that the appellants have acquired any goods which were subjected to any post importation condition or prohibition. If the allegation against the appellant is that they have acquired goods, which were subjected to any post importation condition or prohibition thereon, the department ought to have proceeded to impose penalty on the appellants under Section 112(b) of the Customs Act and not under Section 112(a) of the Customs Act. Accordingly, it is prayed that the appeals be allowed with consequential reliefs.

6. The ld. Special Consultant appearing for the Revenue made the following submissions:-

> 6(1) At the outset, it is submitted that the case of the Department as per the uncontroverted facts disclosed in the Show cause notice is that M/s. EPL, SEEPZ with the active support and connivance of M/s. Microland, Bangalore and M/s. Compaq Asia Pte Ltd., Singapore had imported complete Computer Systems in the guise of parts and components and cleared the same through Customs, free of duty, under Notification No. 227/79-Cus dated 30/11/1979 and later by Notification No. 133/94-Cus dated 22/06/1994. These Computers were later on sold mainly to M/s. Microland under so-called DTA sale entitlement by availing concessional rate of duty under Notification Nos. 97/91-CE dated 07/10/1991 and 101/93-CE dated 27/12/1993. Investigation has clearly established that complete Computer Systems were imported in dismantled condition after removing HDD & FDD from the Systems. Therefore, the Systems did not require any further processing or manufacture except for inserting the HDD & FDD into the Systems.
>
> 6(2) At the material time, i.e. during the Export-Import Policy, 1992-1997, Computer System was a restricted item, import of which required an Import Licence vide para

156 of the Policy. Hence, the import of complete Computer Systems in dismantled condition in the guise of parts and components was unauthorized without any licence. However, it served two purposes of the appellant, namely, to import complete Computer systems in the guise of parts and components without any license and then clear the same free of Customs duties under Notification No. 227/79-Cus and 133/94-Cus.

6(3) Notification No. 227/79-Cus dated 30/11/1979, inter-alia, exempted raw materials & components from Customs duties when imported by EPZ Units for manufacture of finished goods for export. This notification was also subject to various other conditions to be fulfilled after import. Similarly the Notification No. 133/94-Cus dated 22/6/1994 exempted raw materials, components, consumables etc. from Customs duties when imported by EPZ Units for manufacture of finished goods for export. This notification was also subject to various other conditions to be fulfilled by the importer after importation. However, M/s. EPL had failed to fulfill the conditions of the notifications.

6(4) In the present case, undisputedly M/s. EPL had imported full Computer Systems in the guise of parts & components after detaching or dismantling of floppy disk drive and hard disk drive from the Systems and in this endeavor, M/s. EPL was duly assisted by M/s. Microland and M/s. Compaq Asia Pte Ltd., Singapore. Therefore, at the threshold, M/s. EPL was not eligible for duty free import under the notifications.

6(5) Even otherwise, M/s. EPL was not eligible for duty free import under the notifications inasmuch as it had neither fulfilled its export obligation nor it had achieved the minimum value addition in respect of export of the Computer Systems in terms of provisions of paras 97 and 119 read with the provisions of para 102 of the Export-Import Policy, 1992-97. Even the Systems exported by it were not in the nature of complete Computer Systems. Majority of the Systems were in the nature of Top Assemblies only. Not only this, even the full export value of the goods had not been realised. An amount of Rs.15.76 Crores was outstanding against the exports made by M/s. EPL as per R.B.I. s letter dated 10/03/1995.

6(6) M/s. EPL had also failed to fulfill its export obligation as per the LOP/LOI. Upon fulfillment of its export obligation, EPZ Unit becomes entitled to effect sale of part of its manufactured goods in the Domestic Tariff Area. Investigation has brought out the fact that M/s. EPL had projected export obligation of 8,85,000 Nos. of Computers. However, it could export only 89,613 Nos. of Systems including top assemblies. This apart, as mentioned above, it had failed to achieve minimum value addition in exports. Value addition achieved in 1990-91, 1991-92, 1992-93 & 1993-94 was only 10.85%, 6.88%, 10.25% & 6.30% respectively. In terms of provisions of para 98 of the Export-Import Policy, 1992-97, in the event of failure to fulfill the obligations stipulated in the letter of approval/intent, EPZ Unit will be liable to penalty in terms of the bond/legal undertaking or under any other law for the time

being in force. Further, in terms of provisions of para 168 of the Handbook of Procedure, 1992-97, the importer shall adhere to the minimum value addition as stipulated by the Govt. He shall also abide by all other terms and conditions as per the LOP/LOI/Industrial Licence failure of which will be construed as violation of the conditions of import and the importer shall be liable to penal action under the provisions of the F.T./D.R.) Act, 1992 and the rules and orders made thereunder.

6(7) It was contended on behalf of the appellant M/s. EPL that for the purpose of classification, if the goods imported are held to be full Computer Systems, the fact remains that the same were imported in the form of parts and components of Computer systems. Hence the benefit of the exemption Notifications 227/79-Cus and 133/94-Cus could not be denied to it. This submission overlooks the fact that the benefit of the notifications was subject to fulfillment of export obligations which were not fulfilled by importer M/s. EPL. Consequently, the benefit of the notifications was not available to it.

6(8) Full Computer Systems of foreign brand of an aggregate CIF value of Rs. 9,68,81,852/- were imported by mis-declaration and the same were sold in the domestic market unauthorisedly claiming the DTA sale facility by paying concessional rate of duty as per Notification No. 97/91-CE dated 07/10/1991 and Notification No. 101/93-CE dated 27/12/1993. The notification 101/93-CE exempts excisable goods produced or manufactured in EPZ from so much of duty of excise leviable thereon under Section 3 of the Central Excise Act, 1944 as in excess of the amount calculated at 50% of each of the duties of Customs which would be leviable under Section 12 of the Customs Act, 1962. Thus the exemption under Notification 101/93-CE is applicable only if the goods are manufactured in the SEEPZ. Since these complete Computer Systems were not manufactured in SEEPZ, this notification will not be applicable. Since the goods were cleared without fulfilling the value addition norms as laid down in the Import Policy, normal Customs duty would be leviable on these goods as if they had been imported outside the SEEPZ.

6(9) It was contended on behalf of M/s. EPL that while Show cause notice has demanded duty under Section 28 of the Customs Act, 1962, in the impugned order, the Commissioner has confirmed the same under Section 28 read with the bonds executed by M/s. EPL at the time of import. Hence the impugned order is incorrect and unsustainable in law. This contention is bereft of any merit. This is a simple case of non-levy and non-payment of Customs duty. M/s. EPL had taken benefit of duty exemptions at the time of import of the goods by mis-representation and mis-description of the same. Therefore, the duty foregone has to be recovered only under Section 28 of the Customs Act. Even without enforcing the bonds, provisions of Section 28 are good enough to recover the foregone duties. Consequently, no fault can be found with the impugned order passed by the Commissioner.

6(10) Relying upon the Tribunal s decision in the case of CC V/s. Sameer Gehlot reported in 2011 (263) ELT 129, it was contended on behalf of M/s. EPL that execution of bond is a pre-importation condition. This condition has been fulfilled. Therefore, benefit of exemption notifications could not be denied. However, this decision has been dissented by the Tribunal in a subsequent decision in the case of King Rotors & Air Charter P. Ltd. reported in 2011 (269) ELT 343 (T) holding that execution of bond/undertaking is not merely a pre-importation condition, but it is also a post importation condition in exemption notification which was not fulfilled. Therefore, the reliance on the Tribunal s decision in Sameer Gehlot s case is of no consequence.

6(11) Relying upon the judgment of the Hon ble Apex Court in the case of UOI V/s. Rai Bahadur Shreeram Durga Prasad (P) Ltd. 1969 (1) SCC 91, it was contended that in this case a declaration was filed by the exporter at the time of export undertaking to bring back the amount representing the full export value of the goods exported. The Hon ble Apex Court held that as far as the Customs authorities are concerned, all that they have to see is that no goods are exported without furnishing a declaration prescribed under Section 12(1) of the Foreign Exchange Regulation Act, 1947. This declaration was sought to be compared with the bond executed by M/s. EPL and it was contended that all that the Customs authorities have to see is whether any bond was executed at the time of import of the goods. It is submitted that a declaration is just a statement. It cannot be compared with the bond executed by M/s. EPL binding itself to fulfill the export obligation, and to fulfill, inter-alia, the conditions stipulated in the notification and in the Import-Export Policy. Admittedly, the appellant M/s. EPL failed to do so. Consequently, the benefit of exemptions under the notifications was not available to it.

6(12) At the relevant time, Computer System was a restricted item of import which required an Import Licence. Since the full Computer Systems, though in dismantled condition, were imported in violation of the licensing restrictions, the same became liable for confiscation under Section 111(d) of the Customs Act, 1962. This apart, M/s. EPL failed to fulfill the post importation conditions, namely, to achieve the minimum value addition in export and failed to fulfill its export obligation, thereby attracting the provisions of Section 111(o) of the said Act. Further, full Computer Systems were imported in dismantled condition by mis-declaring the same as parts and components of Computer Systems. Consequently, the goods became also liable for confiscation under Section 111(m) of the said Act. Therefore, the impugned order holding the goods liable to confiscation under Section 111(d), (m) & (o) of the Customs Act, 1962 is correct in law.

6(13) In respect of 21 Nos. of foreign brand Computer systems seized, the Commissioner has held that the same to be liable to confiscation. However, he has allowed the same on payment of a redemption fine of ` 50,000/- on the ground that they have become very old. No fault can be found with the impugned order.

6(14) Since the goods have been held liable to confiscation, M/s. EPL and others concerned with the import are also liable to penalty under Section 112(a) & (b) of the Customs Act, 1962.

6(15) In the case of Mysore Minerals Ltd. vs. Commissioner of Central Excise, Mysore 2013 (293) ELT 108, the Hon ble Tribunal has upheld the duty demand, confiscation of the goods and imposition of penalties on the importers and others for failure to achieve minimum value addition and for failure to fulfill export obligation. In this decision, the Tribunal has also taken support from its earlier decision in the case of Noel Agritech Ltd. V/s. CCE&C, Mangalore 2011 (273) ELT 306.

6(16) M/s. Golden Computers Ltd. & M/s. Memory Electronics Ltd. were members of the Tandon Group of Companies of which Shri B.V. Shah was a common Director. In so far as M/s. Microland Ltd. is concerned, it was a willing partner in unauthorized importation of full Computer Systems in the guise of components and parts of computer systems. Subsequent to import, these Computer Systems were sold to them under undue DTA entitlements. Therefore, the penalties under Section 112(a) & (b) have been rightly imposed on them.

6(17) It was contended that the notice dated 27/3/97 is barred by limitation inasmuch as the period of duty demand was 1992-93 to 1994-95 (upto August 1994). Therefore, the duty demand is not sustainable. It is submitted that this is a clear case of mis-representation and mis-declaration of goods with respect to their description. Admittedly, full Computer Systems were cleared without payment of duty by mis-declaring the same as parts & components of Computer System. Therefore, in the facts of this case, extended period of limitation has been correctly invoked.

6(18) Learned Sr. Counsel for M/s. EPL submitted that the Commissioner of Customs (Prev.) who had issued the Show cause notice had no jurisdiction to do the same at the relevant time. However, he did not pursue this submission any further, presumably on account of the fact that Section 28 has been retrospectively amended by inserting sub-section (11) whereby the Commissioner of Customs (Prev.), amongst others, are retrospectively recognized as proper officers for the purpose of Sections 17 & 28 of the Customs Act, 1962. This has also been clarified by the Board vide its Circular No. 44/2011-Cus dated 23/9/2011.

6(19) In view of the foregoing, the appeals filed by the appellants have no merit. The same deserve to be dismissed and it is prayed accordingly.

7. We have carefully considered the rival submissions. Our findings and conclusions are discussed in the ensuing paragraphs.

7.1. One of the appellants, Sri. V. Raghavendran, passed away during the pendency of the proceedings. Therefore, the penal proceeding against him abates.

7.2. The ld. counsel for the appellant has raised a preliminary objection that since Collector of Customs (Preventive) has not been appointed as a Central Excise Officer, the impugned order is bad in law. We do not find any merit in this argument for the reason that the show cause notice and the impugned order seeks to demand customs duty in respect of the parts and components imported by the appellant under the provisions of Section 28 of the Customs Act. The said section was amended vide Customs Amendment and Validation Act, 2011, with retrospective effect conferring, inter alia, the power of assessment under sections 17 and 28 of the Customs Act on all officers appointed as officers of Customs under sub-section (1) of section 4. The said amendment was carried out in Section 28 of the Customs Act to overcome the adverse impact of the decision of the Apex court in the case of Commissioner of Customs v. Syed Ali and Anr. (Civil Appeal Nos. 4294-4295 of 2002) [2011 (265) E.L.T. 17 (S.C.)] wherein it was held that only a customs officer who has been specifically assigned the duties of assessment and re-assessment in the jurisdiction is competent to issue a notice for the demand of duty. Since the law has been amended retrospectively, conferring powers on the customs officers in the preventive commissionerates and also validating the actions taken by such officers, we do not find merit in the contention raised by the appellant in this regard and accordingly, we reject the same. The hon ble Bombay High Court in the case of Sunil Gupta [2014-TIOL-1949-HC-MUM-CUS] has also upheld the jurisdiction of the Customs Officers for issue of show cause notice consequent to the Customs (Amendment Validation) Act, 2011 w.e.f. 16/09/2009 retrospectively. The ratio of the said decision would also apply.

7.3. The main issue for consideration in these appeals is whether the importer appellants violated the provisions of the Export-Import Policy and the terms and conditions of the exemption notifications 227/79-Cus dated 30/11/1979 and 133/94-Cus dated 22/06/1994. To decide this question, it would be useful to peruse the provisions of Exim-policy 1992-97 which was prevalent at the material time. Chapter IX of the Policy governed export oriented units (EOU) and units in the export processing zones(EPZ) and the relevant provisions are as below:-

> (a) Para 93 of the said policy provided that units undertaking to export their entire production of goods (except the sales in the domestic tariff area (DTA)] may be set up under the EOU scheme or the EPZ scheme.
>
> (b) Para 97 governing value addition and export obligation stipulated that the unit shall achieve a minimum value addition of 20% subject to certain exceptions.
>
> (c) As per para 98, the unit was required to execute a bond/legal undertaking with the Development Commissioner concerned and in the event of failure to fulfill the obligations stipulated in the letter of approval/intent, it was liable to penalty in terms of the bond/legal undertaking or under any other law for the time being in force.
>
> (d) Para 102 governed DTA sales and sub-para (b) provided that 25% of the production in value terms may be sold in the DTA. DTA sale shall be subject to fulfillment of minimum value addition.

(e) Para 119 governed value addition and the formula prescribed for computing value addition was VA = [(A-B)/A] x 100 where VA is value addition, A is the fob value of exports realised by the unit, B is the sum total of the CIF value of all imported inputs, the value of all payments made in foreign exchange by way of commission, royalty, fees or any other charges and the value of all indigenous inputs purchased by the unit. Inputs mean raw materials, intermediates, components, consumables, parts and packing materials.

(f) Para 94 governing importability permitted import of all types of goods by the EOU/EPZ unit provided they are not prohibited items in the negative list of imports. The negative list of imports (Chapter XV of the policy) consisted of two parts - Part I covering Prohibited Items and Part II covering Restricted items . Restricted items included all consumer goods (including consumer electronic goods, equipment and systems, howsoever described) whether in SKD/CKD condition or ready to assemble sets or in finished form and were not permitted to be imported except against a licence or in accordance with a Public Notice issued in this regard.

(g) Chapter IX of the Handbook of Procedures governed EOUs and units in EPZs. Para 162 of the Handbook provided that Letter of Permission (LOP)/Letter of Intent (LOI) may be issued by the Development Commissioner for units in the EPZ and by SIA for EOUs. Para 163 provided that the LOP/LOI shall specify the items of manufacture, annual capacity, percentage of value addition to be achieved, limitation regarding sales of finished goods and rejects in the DTA and such other matters as may be necessary and also impose such conditions as may be required.

(h) Appendix XXXI provided the form of legal agreement for EOUs and units in EPZs. The said agreement inter alia provided that . The unit shall earn foreign exchange by exporting 100% of their production of .for a period of ..years, counting from the prescribed date after allowing rejects upto ..percentage of production as aforesaid. . In the event the Unit is not able to fulfill the export obligation undertaken by it as aforesaid, the unit shall, on the instructions of the concerned Development Commissioner pay to the Government, the amount of customs duty that would be leviable at the relevant time on the items of Plant, Machinery and Equipment and Raw materials, components and consumables allowed for import by the unit in terms of the licence granted to them and also the amount of excise duty leviable on the indigenous plant, machinery and equipment and raw materials, components and consumables purchased by the unit during the period. . Any customs duties/excise duties and interest at 18% from the date of import/supply to the date on which the payment is made due to Government under the agreement shall also, without prejudices to any other mode of recovery be recoverable in accordance with the provisions of section 142 of the Customs Act, 1962/Section 11 of the Central Excise & Salt Act, 1944 and rules made thereunder and/or from any other payment due to the unit from the Government. 7.4. From the policy provisions enumerated above, the following

picture emerges. A unit in EPZ could undertake manufacturing activity in respect of permitted products subject to 100% export of the goods manufactured subject to achieving a minimum value addition of 20% in terms of para 97 of the Exim policy 1992-97. The said EPZ unit could also undertake DTA sales upto 25% of its production in value terms subject to fulfillment of minimum value addition (of 20%) in terms of para 102 (b) of the said EXIM policy. Para 162 and 163 of the Handbook of Procedures also provided that the LOP/LOI shall specify the items of manufacture, annual capacity, percentage of value addition to be achieved, limitation regarding sale of finished goods etc and also subject to such conditions as may be required. In terms of para 98, the unit was required to execute bond/undertaking with the Development Commissioner concerned for fulfillment of the export obligation, failing which the unit will be liable to penalty under the bond/undertaking so executed. The bond/undertaking so executed also provided for payment of customs duty on the imported capital goods and equipment, raw materials, components and consumables allowed to be imported duty free in case there was failure to achieve the export obligation stipulated.

7.5. In terms of the aforesaid policy, M/s EPL made an application dated 28/08/1989 seeking permission for manufacture of a new product line (mini and micro computers such as PCs, PC-XTs, PC-ATs based on micro processors), they gave the details of the phased manufacturing programme for a period of 5 years, with a quantity of manufacture per annum of 45000 computer systems in the first year going upto 2,50,000 nos. in the 5th year. In the details of manufacturing process given in Part E, they stated as follows:-

In the initial stage, the manufacturing process will consist of procurement of different sub-assemblies and peripherals like power supplies, floppy disk drives, winchester disk drives, main boards, controller boards and assembling them in computer system units, testing the complete units and subjecting the complete units to extensive power cycled burn-in operations. Subsequently, all the sheet metal and plastic parts will be manufactured based on in-house facilities. In their subsequent application dated 4-9-1989 in continuation of their earlier application dated 28-8-89, they projected that they will achieve a value addition of 20.01%. The said application was considered by the Government and vide letter No. 7/22/89-EPZ of the Ministry of Commerce dated 16th February, 1990, it was agreed to issue an industrial licence for manufacture of computer systems mentioned therein with an annual capacity of 2,50,000 nos. As per the terms and conditions stipulated therein, it was specified that the distribution of various quantities within the capacity amongst the systems will be such that the overall value addition specified is adhered to. It was further stipulated that the overall value addition from exports will be not less than 20%. In terms of the Standard Conditions attached to the said letter of intent, it was further stipulated in para 4 f that the use of foreign brand names will not be permitted for the purpose of internal sales. In another letter of even No. dated 16-2-1990, the Ministry also conveyed approval of foreign collaboration for the manufacture of mini and micro computer systems along with their accessories and spares subject to

acceptance/adherence of the conditions stipulated in the annexure to the said letter. In the said annexure to foreign collaboration, it was stipulated in para 4 that for undertaking the export obligation specified in the approval letter, the requisite guarantee, i.e., legal undertaking/bank guarantee should be furnished as may be required. In para 12 of the said annexure, it was further stipulated that foreign brand names will not be allowed for use on the products for internal sales although there is no objection to their use on products to be exported. 7.6. The appellant EPL applied for DTA sales permission vide letter No. YBS:EPL:368:91 dated 1991 for April, 1990 to March 1991, based on their production and exports during 01/04/1990 to 31/03/1991 and vide letter No. DTA:Sale:20:85/7864 dated 10/12-9-91, permission was inter alia granted for DTA sale of 7237 nos. of computer systems for a value of Rs. 8,28,20,228/-by the office of the Development Commissioner. There was a condition stipulated in the said permission letter that Actual sale will be permitted if the acceptable level of value addition has been achieved . Vide letter dated 03/04/1992, the appellant sought for extension of the said permission for the period April, 1992 to March, 93 also and vide letter dated 10/04/1992, the permission for DTA sale was extended upto 30/09/1992 subject to the terms and conditions stipulated in the letter dated 12/09/1991. The appellant EPL again sought extension of permission vide letter dated 13/10/1992 which was granted by the Development Commissioner vide letter dated 13/10/1992 for a further period upto 31/03/1993 subject to fulfillment of the conditions stipulated in the letter dated 12/09/1991. M/s EPL again sought extension of the permission for DTA sale upto 30/09/1993 which was acceded to by the Development Commissioner vide letter dated 27/04/1993 subject to the same terms and conditions stipulated in the original permission granted vide letter dated 12/09/1991. M/s EPL also applied for DTA sales permission based on their production and export made during 01/04/1991 to 30/06/1991 and the same was granted vide letter No. DTA:Sale:20: 91/7872 dated 12/09/1991 for a quantity of 887 nos. of computer systems for a value of Rs. 1,00,13,343/- subject to the condition that actual sale will be permitted if the acceptable level of value addition has been achieved . The said permission was extended upto 30/09/1993 vide letter dated 24/05/1993. M/s EPL again sought DTA sale permission based on their production and exports during 01/07/1991 to 30/09/1991 and computer systems valued at Rs. 65,34,528/- was permitted vide letter No. DTA:Sale:20:92/730 dated 28/04/1992 subject to the condition that the sale will be governed by the provision laid down under para 102(b) of the I&E Policy, 1992-97, that is, regarding minimum value addition of 20%. Similarly based on the production and export during 1/10/91 to 31/12/91, permission for DTA sale was granted to the appellant vide letter No. DTA:Sale:20:92/731 dated 28/4/92 for sale of computer systems valued at Rs. 38,23,156/- again subject to satisfaction of the provisions of para 102 (b) of the Exim Policy, 1992-97. Thus from the above correspondence available in the seized and relied upon records, it is seen that the DTA sale of computer systems was also subject to achieving minimum value addition and non-use of foreign brand names in respect of the goods sold in DTA.

7.7. It will be useful at this juncture to see what were the conditions stipulated in the relevant customs notifications which operationalised the EPZ scheme. The relevant notifications are 227/79 Cus dated 30-11-79 as amended for the period prior to 22-6-94 and 133/94-Cus dated 22-6-94 as amended with effect from 22-6-94. Both these notifications provided exemption to goods specified in the annexure thereto and the coverage is more or less identical except that 133/94 Cus included captive power plants also within the scope of exemption. Otherwise, as far as the present appeals are concerned, the goods exempted included, machinery, raw materials, components, spare parts of machinery and consumables. The exemption under notification 227/79-cus was subject to the condition that the importer had been authorised to establish a manufacturing unit in the EPZ, had the necessary licence for the import of the goods and the goods imported will be used in connection with the manufacture or packaging of electronic goods for export out of India or with the promotion of such exports of electronic goods. The notification also stipulated an additional condition which read as follows:-

. The importer agrees to execute a bond in such form and for such sum as has been prescribed by the Development Commissioner of the Zone binding himself to fulfill the export obligations, and to fulfill, interalia, the conditions stipulated in the notification and in or under the Import and Export Policy for April1985 March, 1988, notified by the Govt. of India in the Ministry of Commerce s Public Notice No.1-ITC(PN)/85-88, dated the 12th April, 1985, as amended from time to time. Paragraph 1A to the notification further provided that -

A. Notwithstanding anything contained in this notification, the exemption contained herein shall also applicable to those goods which on importation into India are used in connection with the production or manufacture or packaging of excisable goods even if not exported out of India, but brought to any other place in India, under and in accordance with import & Export Policy as amended from time to time, and subject to such other limitations and conditions as may be specified under paragraph 2 of the notification of the Government of India in the Ministry of Finance (Department of Revenue and Insurance) No.186/75-Central Excise, dated the 21st August, 1975,as amended from time to time on payment of duty of excise leviable on such excisable goods under section 3 of the Central Excises and Salt Act, 1944 (1 of 1944). Notification 133/94-Cus prescribed more or less identical conditions and the exemption was subject to the condition that (3) the importer executes a bond in such form and for such sum as may be prescribed by the Assistant Collector of Customs binding himself-

(i) To bring the said goods into his unit in the Zone and use them within the zone for the purposes specified in clauses (a) to (d);

(ii) To dispose of the said goods or articles produced, manufactured, processed and packaged in his unit in the Zone or the waste, scrap and remnants arising out of such production, manufacture, processing or packaging in the manner as may be prescribed in the Export-Import Policy and in this notification.

(4) (5) The importer satisfies the Development Commissioner of the Zone that the goods so imported have been used for the purposes specified in clauses (a) to (d) or for any other purposes specified in Export-Import Policy and in this notification. The provision earlier contained in Para 1A was continued in para 3 without any substantial change in the 1994 notification.

7.8. The charge against the appellant is that M/s EPL imported complete computer systems by mis-declaring them as parts and components of computers so as to avail ineligible duty exemption under notification 227/79-Cus and 133/94-Cus. This was also done to circumvent ITC restrictions as import of computer systems required an import licence. This charge is based on the evidence that M/s Microland Ltd., Bangalore were dealers/distributors of M/s Compaq Computer Asia Pte. Ltd., Singapore and Compaq brand computers marketed by them were found to have been imported by EPZ units, mostly by M/s EPL, who in turn sold these computer systems under its DTA sales entitlement. Evidences available on record revealed that M/s Microland Ltd. had placed orders directly on Compaq Asia, Singapore for complete computer systems of various Compaq brand models with instructions to bill and ship the said goods to M/s EPL, SEEPZ, Mumbai. Against the purchase orders of Microland, M/s Compaq, Singapore issued invoices to EPZ units quoting Microland s purchase orders. In the invoices so issued, M/s Compaq, Singapore described the goods supplied as computer parts and peripherals with specific reference to respective model nos. and complete assembly nos. of the computers ordered by M/s Microland Ltd. The above modus operandi adopted is clearly evident from the correspondences exchanged between Mr. Ashok Radhakrishnan of Microland with Mr. Anand Sudarshan of M/s Compaq, Singapore and also with EPL particularly with Mr. Raghavendran and Mr. Navin Kulkarni. The above modus operandi is well documented in the incriminating documents seized during the investigation. There are large number of such documents and it is not possible to describe each and every one of them in this order. But nevertheless to understand and appreciate the evidence unearthed by the investigation, we would refer to a few of these documents. We refer to these documents by way of relied upon document nos. (RUD in short) annexed to the show cause notice.

(A) RUD 66 is a fax message dated 10-12-1991 from Shrikant H Joshi of EPL to Mr. Lim Soon Hock, Managing Director of Compaq Asia Pte. Ltd. Singapore. A s-w-o-t analysis for offering access to Indian Domestic Market to Compaq Computer Pte. Ltd. through Domestic Tariff Area Sale Licences available to Tandon Group of Companies in India is annexed to the said fax. The summary of the analysis is reproduced verbatim below:-

> (1) With its flexible, mass manufacturing facilities in SEEPZ in Bombay, Tandon can offer sub-assemblies like switch mode power supplies for Compaq s range of computers to be made in Singapore.
>
> (2) As a logical extension, COMPAQ can route its East European as well as USSR Trade via India in both hard currency as well as soft Indian Rupee currency.
>
> (3) COMPAQ can gain access to Indian domestic market by piggy-backing on Tandon-India s domestic tariff area licences.

(4) One of the domestic tariff area company of Tandon-India can offer stock and sale facility to COMPAQ at reasonable cost.

(5) (B) The second document is RUD 67 (i) which is a letter dated 13-5-92 from Srikant Rao, Business Manager of Microland Ltd., Bangalore to Shrikant H Joshi, General Manager Business Development, Tandon Group of companies, Bombay. The said letter encloses a statement indicating the gist of discussions between the two companies held on 12-5-1992. Some of the relevant entries from the said statement are reproduced below:-

Date 13-5-92 Gist of discussions between Tandon and Microland held on 12 May 1992 Sl. No. Item Status Action to be taken By who By when Tandon s meeting with Compaq Went off well To confirm details of SKDs, commercial and legal details of MOU. (Tandon s personnel may have to go to Singapore for finalisation) Compaq 12-Jun-92 Training for Tandon Required for assembly and quality control. Tandon willing to sign non-disclosure agreement Tandon s technical personnel will need to go to Compaq for technical certification training, preferable along with Microland team Compaq 02 Jun 92 Conversion of assembled systems to SKDs Tandon has indicated likely companies in Singapore. These companies are likely to charge 10% for their services.

To tie up with one company To ensure that certificate of origin can be obtained from the Chamber of Commerce, Singapore Compaq 12-Jun-92 12-Jun-92 Costing Premium will be 50% for all configurations. Value addition may come down to 15% Free of cost 2% has to be supplied To negotiate with Tandon To wait To take into account for costing Compaq All Compaq 27-Jun-92 02 Jun 92 Ordering procedure Stage I Microland to release P.O. along with part advance by cheque to cover CIF cost towards 100% margin money To work out cost implications To work out funds requirements Microland 2 Jun 92 Stage II Microland to pay by cheque for value addition, Octroi, customs duty and MST, CST applicable when material is ready after assembly Stage III Microland to pay balance by LC when material is ready outside SEEPZ Routing for non-Compaq systems through Tandon Feasible If IBM Tandon will approach IBM for clearance To get NOCs from Computer land or manufacturers To get NOCs from IBM Microland Microland (C) The next document is RUD 67 (ii) titled as Shipment Procedure dated 4th August, 1992. Relevant portion from the said document is extracted below:-

Following procedure for sending the consignments of M/s Compaq, Singapore to M/s Eastern Peripherals, Bombay has been explained to the concerned persons. The same was mutually agreed upon by the following:

From Eastern Peripherals Ltd., Mumbai Mr.N.B.Durka, Mr. Navin S Kulkarni From Compaq Computer Asia Pte. Ltd., Singapore Mr. Tan Kok Hin (Director, New Market), Mr. P.S.Raju (Business Development Manager), Mr. Goh Sock Too (Distribution Manager), Mr. Lee Chin Fook (Service Manager) Procedure for shipment of the Compaq systems to be shipped to M/s Eastern Peripherals Ltd.,

Bombay (India).

1) All the systems are to be broken down in SKD form as possible as shown and done by M/s. N.B. Durka & Navin Kulkarni of EPL, Bombay on 29/7 to 4/8/92.

2) All the sub-assys. or the SKD Kit has to be packed in the separate antistatic bags and are finally packed as per the instructions in Annexure No.2.

3) Part No. (Spare no.) has to be mentioned on the wrapper bag of the material/parts by way of sticker. No mis-match in the Part Number or description is acceptable to the Customs (India) at the time of clearance.

4) Documentation has to be prepared as per the instructions in Annexure No.1.

5)

6) ...

7) For all the future shipments the same procedure has to followed by the exporter.

Annexure No.2 Packing Procedure A) After breaking down the systems in SKD, all the parts/asslys. are to be packed individually in an anti-static bag, by putting a sticker of the description and the P/No. on it.

B) Pack up all the packed parts in one corrugated box.

(D) The next document is RUD 67 (iii) which is a letter dated 16th July, 1992 from N.B. Durka of M/s EPL to M/s Microland, Bangalore. The relevant portion from the said letter are extracted below:-

Sub:- Your purchase order for Compaq Systems Thank you for your above mentioned letter for your requirement of Compaq systems and spares by Mid August.

.

We would like to have the following information from you.

1) The number of models with configuration

2) Model wise CIF cost of SKD parts.

Please note that we need to configure the systems along with peripherals like monitors, keyboards and add-on cards as a computer systems. No spares will be allowed to be cleared from SEEPZ; therefore, you are requested to configure the systems for all the parts in SKD form ordered as complete computer systems in different models.

We require all the above information at the earliest so as to enable us to raise purchase order on Compaq Asia Pte. Ltd., Singapore and give you quote on behalf of M/s Sonal Electronics for your purchase order. (E) The next document is RUD 68 (i) which is a fax dated 17th July, 1992, from Tan Kok Hin, Regional Director- New Markets of Compaq Computer Asia Pte. Ltd., Singapore, to Mr. Tandon and Mr. Bhupendra V. Shah of Tandon Group of Companies with copy to Mr. Shrikant Rao of Microland, Bangalore. The subject is SKD for India . The relevant portion is extracted below:-

> . I will give you the breakdown of the Bill of Materials for the goods ordered by Microland when your engineers are here as I need to work with them on this together with our people here.
>
> .
>
> 4. I want to go through the whole process, including documentation, hence the requirement of 4 days.
>
> 5. There is an initial order for the launch, involving a few machines. We should try and get this order up as soon as possible so as to meet the 10th August target if possible. The rest of the orders should not be a problem.

(F) RUD 68(ii) is a telefax dated 23-7-1992 from Mr. Srikant Rao of Microland, Bangalore to Mr. N.B. Durka of EPL and the subject is Compaq systems required for our launch . The relevant portions from the said telefax is extracted below:-

> We had indicated the configurations of products required by us for the launch. As discussed, the exact configurations, as SKDs, could be finalised during your visit to Singapore.
>
> .
>
> Compaq has confirmed that the systems indicated by us would be ready except for some changes in configurations .. (G) RUD 68 (iii) is a fax dated 11-9-92 from N.B. Durka of EPL to P.S. Raju of Compaq Computer Asia, Singapore, with copy to Mr. Srikant Rao of Microland. The relevant portions from the said fax are extracted below:-
>
>) The purchase order No. EP-2/12/91061 dated 9-9-92 is finalised on the basis of fax message dated 22nd August, 92 from M/s Microland and after final discussions with M/s Srikant Rao and K.P.Nair on 10th September, 92 at our office.
>
> 2) You are hereby requested to refer the said fax dated 22nd August, 92 for model Deskpro 486/33M-M340.

4) Further we would like to mention here that the orders are placed by us, are properly discussed and mutually agreed by M/s Eastern Peripherals Ltd. and M/s Microland. (H) RUD 69(i) is fax message dated 10-2-1993 from Navin S. Kulkarni of EPL to P.S. Raju of Compaq Asia, Singapore regarding proforma invoices for lot No. VII pointing out certain discrepancies. The portion which is relevant to the facts of the case before us is extracted below:-

Also, understand from Srikant that the Prolinea prices indicated do not take into consideration the discounts agreed to between Compaq and Microland (8.5%).

Request you to kindly resend proforma invoices taking into account the above points (including the 8.5% discount for Prolinea Systems). We await your fax today in order to enable us to send you the purchase orders. Please note that in order to meet Microland s delivery requirements, we would need shipments from Compaq by this week end. 7.9. It would be useful at this juncture to peruse some of the statements recorded as part of the investigation.

(a) Sri. Anand Sudarshan, Vice-President of M/s Microland Ltd., Bangalore, in his statement dated 05/05/1995 recorded under section 108 of the Customs Act, admitted that order for complete computer systems were placed by them on M/s Compaq, Singapore and the purchase orders consisted of the list of various models, quantities and respective unit prices with an instruction to bill and ship them to Tandon Group of Companies such as Golden Computers, Ultra Tek Devices and Eastern Peripherals. M/s Compaq undertook conversion of the full computer systems into SKD forms and sent the proforma invoice to Tandon Group of companies endorsing a copy to Microland and based on the proforma invoice, the Tandon group of companies were advised to raise purchase orders on Compaq who supplied the computer systems in SKD forms to the Tandon Group of companies and raised commercial invoices. This modus was adopted in view of the agreement between M/s Compaq and Tandon so that DTA benefits would enable Compaq to exploit the market on competitive basis besides meeting the requirement of the EPZ unit and Microland procured the materials at competitive prices with duty concessions availed by the EPZ unit. As far as Microland was concerned, procurement through DTA could result in landed cost reduction of 12 to 15%.

(b) Mr. Pradeep Kar, Managing Director of M/s Microland in his statement dated 10/05/1995 admitted that Microland placed purchase orders for complete computer systems on M/s Compaq, Singapore and since EPZ units of M/s Tandon were entitled to concessional duties, Microland preferred to route the imports through the EPZ units of Tandon group of companies as that would give them a competitive edge in the market. In his statement Mr. Pradeep Kar also confirmed that although the orders were placed by them on M/s Compaq for complete computer systems, the process of dismantling and issue of proforma invoice were as per the requirement of EPZ units of M/s Tandon and copy of the proforma invoice was being sent to

Microland for the purpose of confirmation of the goods ordered on M/s Compaq by them.

(c) From the statements of Shri Manoj Vasudev Manage, Engineer and Manufacturing Officer of Tandon Group and working for M/s. Eastern Peripherals Ltd. (EPL), it is seen that the said company had no facility for manufacture of computers as they had no plant and machinery and other infrastructure and only certain testing equipments were available. He has further admitted that he was assembling Compaq and Acer and other models of computers from parts imported in SKD condition and it took only 30 minutes to check assemblies such as FDD, HDD, motherboard for physical damage and actual insertions of these cards and components took only about 10-15 minutes.

(d) Shri Navin S. Kulkarni, who was working as Executive Manager of Tandon Group of Companies, in his statement recorded under Section 108 of the Customs Act, has admitted that they have been procuring computers from Compaq Computers Asia Pvt. Ltd., Singapore; M/s. Acer Sales and Distribution, Taiwan; M/s. Golden Systems Inc., USA; and other computer manufacturers and what they were getting was full computers and their documents. These were shown as parts and peripherals and in the invoices/purchase orders raised for computers they were described as parts as instructed by his boss, Mr. Raghavendran. He has also admitted that they did not give any parts break up to their buyers for the various models of computers. He has also admitted that the description of the computer systems were configured manually in two parts, i.e., major configuration such as cases with motherboards, power supply unit, VGA card and other integrated assemblies which virtually constitute complete computer systems and did not bear any part numbers, whereas in respect of other peripherals such as monitor, keyboard, mouse and other accessories, they were bearing respective part numbers. Shri Kulkarni also admitted that no part number was quoted in respect of major configuration which virtually constitute complete computer systems minus FDD and HDD. He also admitted that they had visited Compaq factory at Singapore to ascertain and confirmed the possibility of dismantling completely manufactured computer systems which could thereafter be imported as SKD. He has also admitted to supplying Apple brand models to domestic buyers such as M/s. Sonal Electronics, M/s. Golden Computers, and Compaq brand model was supplied to M/s. Golden Computers and M/s. Microland and M/s. Unicorp; and Acer models were sold to M/s. CMS. On being asked to explain the reason for dismantling computer systems imported into India, he stated that as fully built up computer systems could not be imported into SEEPZ for sale in DTA, the same were imported in dismantled condition to facilitate clearance as parts and peripherals of the system.

(e) The said statement of Shri Kulkarni has also been corroborated by his boss Shri Raghavendran. Further, Shri Raghavendran has also admitted that the manufacturing undertaken in India was limited /confined to fitting of hard disk and

floppy disk drives into the systems, which were then subject to quality and reliability tests. He also confirmed that in the export processing zone, they were not permitted to import complete computer systems, and, therefore, they mis-declared the goods under import and classified them as parts/peripherals and components in view of the import restrictions on import of complete computers.

(f) The above position has been corroborated by Shri B.V. Shah, Manager (Finance) of the Tandon Group of Companies. In his statement, he has admitted that it was not practically possible to manufacture systems by importing discrete components and sub-assemblies which involve high degree of technology and required broad based infrastructure. Therefore, complete systems were imported and only HDD and FDD were inserted into the respective systems and thereafter, systems were subjected to reliability and operational capability tests. He has also admitted to the fact that EPL and UTD were not authorised or appointed as manufacturers/distributors for Compaq brand computers in India.

(g) Shri M.L. Tandon, Chairman of the Tandon Group of Companies has also corroborated the above position and has stated that they had imported computer systems where they were required to do the assembly of only Winchester Drive/ Floppy Drives into the respective systems which would be subjected to certain minor processes and on such systems they added the required valued addition and paid duty as per the Policy.

7.10. From the statements of the various officials of the appellant firm, it is clear that M/s. EPL and other Tandon Group of Companies imported complete computer systems without having any licence for the same thereby violating the EXIM policy. They did not have any manufacturing facility for manufacture of computers from the parts and components and the only activity undertaken by them was insertion of FDD and HDD into the system and conducting certain tests to ensure that the computer systems work properly.

7.11. From the evidence unearthed by the investigation, it is clear that, as against the requirement of value addition of 20%, the value addition actually achieved was only 10.8%, 6.8%, 10.25% and 6.30% during 1990-91, 1991-92, 1992-93 and 1993-94 and these figures have not been disputed at all by the appellant. It is also on record that the value addition norms were required to be fulfilled not only in respect of the exports made by the appellant but also in respect of the DTA sales effected as the permission to sell in DTA was subject to fulfilling the requirement of value addition in terms of para 102 (b) of the EXIM Policy 1992-97. From the evidence available on record these requirements of the EXIM Policy were not at all complied with by the appellants.

7.12. It is also on record that the appellant sold computers having foreign brand names in the DTA which was also not permissible. It is further seen that the appellant failed to repatriate the export proceeds to the extent of Rs.15.76 crores, which is yet to be realized as evidenced from RBI s letter dated 10/03/1995.

7.13. The learned counsel for the appellant has relied on the decisions of the hon ble apex Court in the case of Rai Bahadur Shreeram Durga Prasad, Becker Gray and Universal Cables (supra) in support of the contention that in terms of Notification 227/79-Cus and 133/94-Cus, they were only required to execute a bond for import of goods without payment of duty. Once the bonds are executed, the conditions of the Notification are satisfied and even if the terms and conditions of the bond are not fulfilled, the benefit of the aforesaid Notifications cannot be denied. We have carefully considered this contention raised by the appellant and we do not agree with the same. In the cases cited and relied upon by the appellant, the requirement was only making a declaration and there was no requirement of executing any bond. A declaration and a bond are entirely different and distinct and cannot be equated with one another. In the present case, the bonds executed by the appellants bind them to fulfill the export obligations in terms of the EXIM Policy (both in terms of the value of exports to be achieved and also the value addition required to be achieved both for export products and the products sold in the DTA in terms of the permission granted) and on failure to do so, the appellant has undertaken to pay to the Government the amount of duty foregone on the plant and machinery, raw materials, components and consumables allowed to be imported in terms of the licence granted under the EXIM Policy. Further, the bond also mandated payment of interest @ 18% on the duty payable and provided that recovery of duty along with interest has to be made in terms of Section 142 of the Customs Act, 1962 or Section 11 of the Central Excise Act. Therefore, to equate the bond executed with the declaration is an assault on the common sense and amounts to absurdity. It would also imply that execution of bond was a mere formality and the same is not binding on the importer. Such an interpretation of law would be a mockery of the EXIM policy provisions and the provisions of the Customs Notifications. The law cannot be interpreted in such a way so as to defeat the objects and purposes of the policy and the terms and conditions of exemption. Therefore, the contentions in this regard made by the appellants in this regard have to be rejected in toto.

7.14. It has also been argued that the show cause notice does not invoke the provisions of the bond executed by the appellants for the demand of duty, while the adjudicating authority has invoked the provisions of the bond for recovery of duty and, therefore, the order-in-original has travelled beyond the show cause notice and reliance has been placed on certain decisions in the case of Toyo Engineering India and Ballarpur Industries (supra). This contention is completely incorrect and bereft of any logic. In paras 336 and 337 of the show cause notice, it has been specifically alleged as follows:-

> 36. Further in terms of the Provisions of para 98 of the Export and Import Policy, 1992-97 read with the conditions of legal undertaking in terms of appendix XXXIII of the Handbook of Procedures, an E.P.Z. unit is required to undertake the compliance and fulfillment of the conditions as stipulated in the Letter of Permission (LOP)/Letter of Intent (LOI) and failure to do so will be liable to an action under the provisions of Foreign Trade (Development & Regulation) Act, 1992.
>
> 337. In terms of the provisions of Section 3(2) & 3(3) read with section 4 of the Foreign Trade (Development & Regulation) Act,1992, such prohibitions are deemed to have been imposed and applicable under section 11 of the Customs Act, 1962 and

all the provisions of that Act, shall have effect accordingly. Therefore, it cannot be said that the appellants were not put to notice with respect to their statutory obligations in terms of the legal undertaking (bond) executed by them at the time of importation of the goods. It is the appellant who has executed the bond at the time of importation, undertaking to fulfill the terms and conditions in relation to export obligations as also in relation to the sale made in the DTA. If those terms and conditions are violated, the department has power to recover the duty along with interest in terms of the provisions of the bond alone. Further, in the present case, Section 28 of the Customs Act, 1962 provides for demand of differential duty invoking the extended period of time for violation of the conditions of the Notifications under which the goods were allowed to be cleared without payment of duty. In the present case, from the documents referred to above and examined and the statements recorded, it is clear that the appellants have intentionally and deliberated violated the provisions of the EXIM Policy and the terms and conditions of the relevant Notifications and therefore, the extended period of time has been rightly invoked for confirmation of demand of duty. In fact, from the evidence available, it is absolutely clear that the appellant hatched a conspiracy with the foreign suppliers as well as the domestic purchasers of the goods to import restricted items without having any licence and, thereafter, sold the same in the DTA, the sale of which was prohibited, inasmuch as the goods sold bore the brand names of the foreign manufacturers. It is also evident that fully built computer systems were purchased which were dismantled before export to India and brought to India under the guise of parts and components. The action of the appellant is a fraud played on the exchequer.

7.15. In Commissioner of Customs vs. Candid Enterprises [2001 (130) E.L.T. 404 (S.C.)] a three Judges bench of the hon ble apex Court held that fraud nullifies everything and when a fraud is committed, statutory benefits cannot be extended. The same position was reiterated in the case of Commissioner of Customs, Kandla vs. Essar Oil Limited [2004 (132) ELT 4 (SC)] wherein the Apex Court was considering a situation where goods were sought to be cleared on payment of duty through cheques despite non-availability of sufficient funds. The hon ble apex Court while deprecating the action on the part of the respondent therein, held that fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter and suppression of material documents would also amount to fraud. The hon ble apex Court further noted that fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. In the present case, the appellants resorted to complete mis-declaration and suppression of facts, planned and executed evasion of customs duty by importing prohibited goods without having any valid licence and selling the same in DTA in complete disregard to the provisions of EXIM Policy and the Customs Notifications. It is in the above context, we have to examine the eligibility of the appellant to the exemptions under Notification 227/79 and 133/94.

7.16. As regards notification No. 227/79, condition No.4 stipulated that the exemption contained therein is subject to fulfillment of the conditions stipulated in the notification and in or under the Import & Export Policy. Similarly para 1A stipulated that exemption contained therein shall also be applicable to goods used in the manufacture of goods sold in the DTA in accordance with the Import and Export Policy. The same was the position in respect of notification 133/94 except that the condition No. was 3 and instead of para 1A, it was para 3 of the notification. Thus both these conditions stipulated in the notification made fulfillment of the value addition norms not only with respect to exports but also in respect of DTA sale. With respect to the DTA sale with which we are concerned, the LOP/LOI issued under the exim policy also stipulated an additional condition that foreign brand names shall not be used in respect of goods sold in DTA. It is on record as well as from the admissions of the appellant that both these conditions were violated. Therefore, the appellant was not eligible to avail the benefit these exemption notifications ab-initio. Further as admitted by the appellants the goods under import were not parts and components of computer systems but were fully manufactured computer systems which was dismantled before importation so as to camouflage the imports as parts and components. Fully manufactured computer systems were restricted for imports as per the Exim Policy as applicable at the relevant time and the appellants did not have the requisite licence for import of the same. These are all admitted positions and there are no disputes whatsoever about these facts. If that be so, the appellant was certainly not entitled to claim the benefit of the exemptions under these notifications. Both the customs notifications and the EXIM policy form an integrated code and violation of the exim policy is also a violation of the condition of customs exemption and we hold accordingly.

7.17. A similar issue was considered by this Tribunal in the case of Mysore Minerals Ltd. vs. Commissioner of Central Excise, Mysore (supra) wherein the appellant therein, a 100% EoU, imported capital goods and raw materials and consumables by availing customs duty exemption. Since the appellant could not achieve the export obligation and the required value addition, duty demands were raised. In that case also, the importer therein had executed a bond binding itself to fulfill the export obligations and the condition of value addition stipulated in the EXIM policy and the customs notification. This Tribunal held that on account of failure to fulfill the export obligations, provisions of Section 111(o) of the Customs Act would be attracted and the imported goods would be liable to confiscation. This Tribunal also held that the appellant is liable to pay differential duty liability in terms of the relevant Notifications.

7.18. The hon ble apex Court had an occasion to examine violation of exemption Notification in respect of raw materials imported under the advance licence scheme wherein the appellant, M/s. Sheshank Sea Foods Pvt. Ltd. failed to fulfill the post importation condition [1996 (88) ELT 626 (SC)]. A challenge was made as to the jurisdiction of the Customs authorities to investigate the matter under the provisions

of the Customs Act and the hon ble apex Court held that there is nothing in the EXIM Policy or in the Handbook of Procedures that even remotely suggest that the Customs authorities powers for investigation under the Customs Act has been abridged or taken away and any breach could be investigated only by the licensing authority. The hon ble apex Court further held that when conditions of exemption are not complied with, the goods become liable to confiscation under Section 111(o) and the Customs authorities have power to take action under the said Section. This Tribunal also considered an identical matter in the case of Noel Agritech Ltd. vs. Commissioner of Central Excise & Customs [2011 (273) ELT 306] wherein the appellant therein failed in fulfilling the export obligations and other conditions. This Tribunal, held that on failure to fulfill export obligations, the provisions of Section 111(o) are attracted and the Customs authorities can initiate action for confiscation of the goods and for demand of duty under the respective Customs Notifications.

7.19. A more or less identical issue came up for consideration before the hon ble apex court in the case of Rattan Exports Ltd. vs. CC, Calcutta [1987 (31) ELT 66 (SC)]. In the said case, the appellant under the advance licence scheme was required to import raw materials for the manufacture of finished products which were required to be exported after achieving a value addition of minimum 25% and the appellant importer also gave an undertaking to comply with the said terms and conditions. However, the appellant imported finished goods and therefore, the department held that the appellant was not eligible for the benefit of exemption and the infraction called for action under sections 111 and 112 of the Customs Act. The hon ble apex court noted that the goods imported were finished goods except for certain minor items such locks, handle and other fittings and upheld the action taken by the department in denying the benefit of duty exemption and holding the goods liable to confiscation and imposing penalties.

7.20. From the aforesaid decisions, the ratio of which, in our view, apply to the facts of the present case, for violation of the terms and conditions of the EXIM Policy and for failure to fulfill the export obligations, which envisage certain value addition norms not only in respect of the goods exported but also in respect of the goods sold in DTA, the Customs authorities can initiate action both in terms of the provisions of the Notification and the Customs Act, 1962 and also under the provisions of the bond executed by the appellant at the time of the importation of the goods. In the present case, the adjudicating authority has sought to demand duty only in respect of the SKD assemblies/ functional units of the computer systems sold in the DTA without achieving the necessary value addition and also for violating the provisions relating to the brand name. Therefore, the duty demand made in this regard is completely justified and cannot be faulted. The adjustment of excise duty paid on the goods sold in the DTA by the adjudicating authority was not really warranted and in our view an error committed by the adjudicating authority. Since the Revenue has not come in appeal against the said order of the adjudicating authority nor agitated the matter before us, we do not go into this issue. However, the balance of duty demanded is

clearly sustainable in law inasmuch as the goods have been imported by mis-declaring them as parts/components and the goods needed a licence for importation which the appellant did not have. Thus the goods are liable to confiscation under Sections 111(d). For non-achievement of the value addition norms and selling the goods in DTA under foreign brand names, the goods become liable to confiscation under 111(o) of the Customs Act, 1962 and we hold accordingly. Consequently, the appellants are liable to penalty.

7.21. As regards the penalties imposed on the various officials of the appellant-company, their role is clearly evident and they have undertaken all these activities fully knowing that they are contravening the provisions of the EXIM Policy and the Customs Notifications and, therefore, imposition of penalty on the officials of the appellants except Shri Raghavendran, who passed away during the proceedings, deserve to be upheld and we do so. Similarly, the penalty imposed on M/s. Microland Ltd. is also sustainable as it aided and abetted the evasion of Customs duty by the appellants and, therefore penalties imposed under Section 112(a)/(b) of the Customs Act, 1962 is justified and sustainable in law.

7.22. The appellants have relied on a few decisions of the Tribunal/Courts in support of their various contentions. In the Ginni International Ltd. case relied upon by the appellant, the question for consideration before the Tribunal was whether deemed exports could be counted towards fulfillment of export obligations and DTA sale permission could be granted on the basis of deemed exports. This Tribunal held that as provided for in the Exim policy, deemed exports could also be taken into account while determining quantum of DTA sale. We do not understand how the ratio of this decision has any relevance to the issue before us. Similarly in the Modi Xerox case relied upon by the appellant, the question for consideration was whether parts of fax machine could be extended the benefit of duty exemption available to complete fax machine and it was held that parts are different from complete machine and hence exemption could not be extended. In the facts of the case before us, what has been imported are not parts but complete computer systems in SKD condition and the appellants themselves have admitted that what they have ordered for and imported are complete computer systems. Thus the facts are completely different and distinguishable and hence the ratio of the said decision have no relevance to the case before us. It is a settled position in law that the ratio of a decision is applicable only if the facts are identical and if the facts are different and distinguishable, the ratio cannot be applied. There are a few other decisions relied upon by the appellant and we do not propose to specifically refer to each one of them and rebut the same for the reason that in our considered view these decisions are not relevant to the facts of the case before us and are distinguishable. On the other hand, the decisions which we have referred to and relied upon in the paragraphs 7.16 to 7.19 above are the ones which merit consideration and require to be applied. Though our analysis is mainly based on the facts of the case of M/s EPL, the facts are identical in the case of M/s Golden Computers and Memory Electronics Pvt. Ltd. which are the other group

companies of Tandon Group and the modus operandi adopted is also the same. The officials involved are also the same; only the buyers of the goods sold in the DTA differ. Therefore, the findings we have arrived at and the conclusions drawn equally apply to those cases as well.

8. In view of the foregoing discussion, we do not find any merit in these appeals and accordingly, we dismiss the same.

(Operative part of the order pronounced in Court on 30/12/2014) (Ramesh Nair) Member (Judicial) (P.R. Chandrasekharan) Member (Technical) */as