

Cc Vs. Kunal Metals (P) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-16-1997

Reported in : (1997)(69)LC537Tri(Delhi)

Judge : S Peeran, K D Shibben, J Balasundaram

Appellant : Cc

Respondent : Kunal Metals (P) Ltd.

Judgement :

1. This is a Revenue appeal against the order passed by the Collector of Customs, New Delhi. By this order, the Id. Collector dropped the proceedings initiated by the department vide show cause notice dt.

2/16.4.1992 by which the department initiated to confiscate 33.240 m.t.

of Brass Casting of burners valued at Rs. 34,94,546 imported by the respondents without a valid licence and by misdeclaring the weight of the goods. The allegation in the show cause notice in short was that the respondents had misdeclared the quantity, identity and the value of the goods imported under Bill of Entry No. 101585 dt. 25.10.1991 and attempted to clear the same. Thus, the department by the show cause notice called upon them to explain as to why the said (Brass Castings of Burners) should not be confiscated under Section 111(d)(1)(m) of the Customs Act, 1962 read with Clause 3(i) of the Import (Control) Order, 1955 and as to why penalty should not be imposed on the importer under Section 112(a)(v)

of the Customs Act, 1962 and also as to why penalty should not be imposed on Shri Pawan Goel and Shri Anil Goel, Shri B.Garg and Shri Sushil Goel, Directors of M/s. Kunal Metals (P) Ltd. under Section 112(a)(v) of the Customs Act, 1962. It was also indicated in the show cause notice to the respondents to indicate as to why- a) the quantity of goods covered under Bill of Entry No. 101585 dt.

25.10.1991 should not be taken as 43.675 m.t. instead of 34.240 m.t.

b) the identity of the goods should not be taken as castings of brass burners instead of brass scrap and should not be classifiable under subheading 7419.99 instead of 7404.

c) the value of goods covered under Bill of Entry 101585 dt.

25.10.1991 should not be determined at Rs. 34,94,000/- under Section 14 of the Customs Act, 1962 and Customs Valuation Rules made thereunder.

d) 43.675 m.t. valued at Rs. 34,94,000/- of Brass Castings of Burner should not be confiscated under Section 111(d)(p) and (m) of the Customs Act, 1962 read with Clause 3(i) of the Import (Control) Order, 1955.

e) A penalty should not be imposed on M/s. Kunal Metals (P) Ltd. and its Directors Shri Pawan Goel, Shri Anil Goel, Shri B. Garg and Shri Sushil Goel or any other person who claims the ownership of the goods.

2. Ld. Collector in his order while dropping the show cause notice allowed the importer M/s. Kunal Metals (P) Ltd. to re-export the impugned goods to the supplier, namely, M/s. Abu Shanab Metals Establishment, Jordan, without imposition of only fine or penalty under the Customs Act, 1962, within two months of the date of this order or such further period as may be allowed on the request of the importer.

The Id. Collector in his order framed two issues for determination: i) whether the impugned goods which are the subject matter of this case have been sent by the supplier to the importer through a genuine mistake in view of the goods actually ordered by the importer and if so ii) the importer can be allowed to re-export the

goods to the supplier without any penal action under the Customs Law.

Ld. Collector after drawing these issues went on to discuss the allegation of the department, in as much as the Deptt. alleged that the importer managed to fabricate evidence to show that they had already taken up the matter as regards the wrong supply of the goods on the basis of difference in the seal numbers on the containers vis-a-vis the seal numbers as shown in the Bill of Lading, with their supplier as early as 1.11.1991, only after the misdeclaration made by the importer had been detected by the department. In this behalf, the department had relied upon the statement of S/Shri R.S. Malik and M.S. Malik, the Directors of the CHA's firm, namely, M/s. Perfect Handling and Transport Ltd. wherein they had inter alia stated that the discrepancy in the seal numbers was noticed by the CHA's staff on 4.11.1991 and thereafter Shri Pawan Goel directed him (Shri Rajinder Singh Malik) to get it amended from the shipping line, which was done on 6.11.1991. The department had also relied upon the statement of the telex office after according to which no telex was made by the party from 30.10.1991 to 3.11.1993. The Id. Collector has noted that the importers denied this matter. In support of their contentions they had produced copies of the telex sent by them to their supplier on 1.11.1991 and the subsequent telexes sent back to them by their supplier confirming the wrong supply of the goods. They have also produced a copy of the telex dt. 1.11.1991 sent by them to their supplier M/s. Abu Shanab Metals Establishment, Jordan and proof of receipt by the aforesaid supplier, duly attested by one Shri N.G. Rao, Attache (Cons.) Embassy of India, Amman, stating "Seen the original in the Embassy of India, Amman. True copy attested".

There is also a certificate endorsed on the body of this copy of the telex by Deputy Regional Manager, GATEX certifying that "answer back of the calling party 31-65666 of called party 23351 (Jordan) has passed through GATEX. Date/timing can be confirmed on receipt of the Nov.Bill". This certificate is dt. 6.2.1992. Another certificate showing the party had not received the Bill for their telex for the month of Nov. was also produced. As against this, the only evidence produced by the Department that no telex was sent by the importer to their supplier is Annexure-J to the show cause notice which according to the Collector appeared is a record of some calls made. The Collector held that it does not show the name of the party to

whom it pertains. He has noted that the endorsement made on this sheet by one Shri S.S. Gokhar, DEC (GATEX) reads : "Calls made by Telex No. 3165666 RAUL IN for the period 30.10.1991 to 3.11.1991 were observed. There is no call made by the party from 1.11.1991 to 3.11.1991". The Collector has noted that this endorsement does not say that no calls were made to Jordan as alleged by the department. He has noted that it is further observed that the sheet of Annexure-J of the show cause notice mentions particulars of any 4 calls made on 30.10.1991 & 31.10.1991. There is no mention of calls made in November, 1991. Therefore, the Collector observed that on the face of it the endorsement made on the sheet by Shri S.S. Gokhar on 25.2.1992, without any official stamp saying that no calls were made by the party from 1.11.1991 to 3.11.1991, when the sheet does not indicate any calls made during Nov. 1991, does not appears to be in order. He held that it cannot be solely relied upon, especially in the face of evidence adduced by the importer. He held that the explanation given by the importer that they had sent a telex to their supplier on 1.11.1991 itself as soon as they came to know about the difference in the seal Nos. before the Customs examination which appears to be quite convincing. Hence he held that the importer had taken necessary action to inform the supplier about the discrepancy in seal Nos. before the discrepancy in the goods declared by the importer and those actually supplied was noticed on examination by the Customs Department. He held that as for the statements of the CHA's, there is no other independent evidence to corroborate the same, whereas on the contrary the evidence produced by the importer in his view is clinching enough to counter the statements of CHA's.

3. The Id. Collector examining the contentions of the importer regarding the wrong supply of the consignment has observed that it is further corroborated by the detailed submissions made on behalf of the supplier firm M/s. Abu Shanab Metals Establishment of Jordan in their letters dt. 29.5.1992 and 15.6.1992 from Shri N.C. Sogani, Consultant, although the aforesaid supplier firm is not a noticee in this case. The Collector has observed that the evidence adduced by the importer and supported by the suppliers in their respective submissions as already detailed above also shows that the consignment originally meant for M/s. Metall Services Engen Hardt. Benshein, West Germany were wrongly shipped to M/s. Kunal Metals Pvt. Ltd. which on the face of it and without their being anything contrary on

record in his view can be considered as acceptable and he accordingly held that the impugned consignment had been wrongly supplied contrary to the purchase order of importer in this case.

Ld. Collector noted that several representations made by the supplier M/s. Abu Shanab Metals Establishment, Jordan to the Collector of Customs, New Delhi, copies of which are available on record, and in the letters dt. 29.5.1992 and 15.6.1992 produced by the Consultant appearing wherein they asserted that the goods were supplied to the importer on 365 days DA basis and that they have not received any payment for the same so far. Therefore, the Collector held that this fact is also corroborated by the submissions made by the importer in this behalf. In the circumstances, he has held that the ownership of the goods still vests with supplier, who had also in their various submissions requested for permission to re-export of the goods to them even though they are not amongst the noticees in this case. On the other hand, he had held that the importers had stated that they had no interest in the goods as these were not in accordance with their purchase order. Therefore, in such circumstances, the Collector has noted that the exporter in the foreign country (Jordan) i.e. the supplier is the rightful owner of the goods and in this regard he relied on the judgment rendered in the case of Union of India v. Sampat Raj Dugar. Ld. Collector has answered the question whether the goods were brass scrap or prime castings of brass and burners in this manner, that the goods had been wrongly supplied. He does not consider it necessary to examine this aspect any further. Further, he held that on the basis of the following documents/evidence available on record he is prima facie inclined to agree with the contention of the importer that impugned goods are brass scrap "Honey" (NARI/ISRI specifications). In this regard he relied on the following: a) Declaration and confirmation certificate dt. 21.8.1991 from M/s.

Patel Brass Factory, Zar Ko Jordan, from whom the suppliers of the impugned goods had purchased them, to the effect that they have supplied the rejected and unusable scrap castings of Brass Burners which were of manufacturing defects and without holes and were completely rejected from factory to M/s. Abu Shanab Metals Establishment, a total quantity of 45 metric tonnes as they are Metal Scrap International Traders in Jordan.

b) In NARI Circular NF - 82 effective May 1, 1982, laying down the standard specifications for Non-ferrous Scrap Metals, Honey 26 -Yellow Brass Scrap had been specified as under: shall consist of brass castings, rolled brass, rods, brass tubing and miscellaneous yellow brasses, including plated brass. Must be free of manganese bronze, aluminium bronze, unsweated radiators or radiator parts, iron, excessively dirty and corroded materials.

Ld. Collector therefore held that "Honey" brass scrap as per above specifications includes brass castings. In view of these materials, Id.

Collector held that the importer is entitled to re-export the impugned goods to the supplier namely Shri Abu Shanab Metals Establishment, Jordan without imposition of any fine or penalty under the Customs Act, 1962.

4. The above order of the Collector was reviewed by Central Board of Excise & Customs and direct the Collector to file this appeal. The Board on examination of the records of the case have stated in their order that the order is not legally correct and proper on the following amongst other grounds: (1) The argument made by the importer and accepted in the order-in-original about wrong shipment of the cargo does not appear to be convincing, since except Seal No. of the containers, other aspect related to the import of documentation in question were found in order. Invoice, Packing list and containers according to order for purchasing. If shipment was wrongly made during physical loading of the cargo at the load port at least containers should be different. But surprisingly containers were correct, which were taken for loading. Therefore, it appears to be permissible that cargo was same, which was supposed to be shipped. If anything was wrong, that was seal and at the shipping of the cargo.

(2)(i) Quantity of the cargo was found excess against ordered quantity and the description of the goods was also misdeclared i.e.

instead of Scrap as declared it was identified as Brass Castings of Gas Stove burners in finished and semi-finished condition. The contention about excess quantity as well as finished and semi-finished condition of goods were never disputed by the importer. According to Section Note 6(a) of Section XV of the

Customs Tariff Act, 1962, "metal waste and scrap from the manufacture or mechanical working of metals and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons". In the instant case goods were eminently usable as certified by Manager of M/s. Sunflame.

(ii) It is to be noted that if goods were wrongly shipped as accepted in order-in-original, then why importers had tried again and again to establish the identity of the goods as a scrap. This should not have concerned the importers whether goods were scrap or otherwise, if they had not ordered to import the same. But it is interesting that importers have tried to establish the identity of the goods as scrap.

(iii) Importers contention about ignorance of the excess quantity of the goods does not appears to be convincing. It is hard to accept that any supplier can supply such costly goods in so much excess upto 10.435 m.t. without any consent of the buyer. The liberal terms of "DA 365 days" show that supplier and importers have close relationship and excess goods were with their knowledge.

(iv) The two facts about misdeclaration of description as well as quantity and circumstances of the import as stated above clearly show that importers had mala fide intentions from the very beginning and, on being detected, the theory of wrong shipment was introduced as an afterthought.

(v) Importers did not produce any documentary evidence regarding these were goods being meant for being shipped to Germany to another German Co. as importers say. Had it been true, in such a situation, suppliers would have pressed very hard from the beginning to re-export wrong supplied goods in India or in Germany. But surprisingly, no pressure about re-export of the so-called wrong-supplied goods and insistence of correct import of goods were made from either side. On the other hand, importers in India have expressed, directly or indirectly, their intentions that they may get clearance of the goods if suitable to them.

(3) Moreover, Order-in-Original has reference about importers declaration that since goods were wrongly shipped, hence they were not willing to take clearance. Even assuming for a moment that this was correct, once goods have been abandoned, then the ownership does not lie with the importers. And therefore they

should not have been given chance for re-export. In these circumstances, such goods appear to be liable for absolute confiscation.

(4) The reliance by the adjudicating authority on the matter of UOI. v. Sampat Raj Dugar is not correct as the circumstances of the two cases are different and the ratio is not applicable. Importers had filed all the documents for clearance of the goods in the subject case.

(5) As regard the telex dt. 9.11.1991 of the supplier, it appears that this telex is supposed to be a reply to a telex purported to have been sent by the party to the supplier on 1.11.1991. It may be noted here that this telex had been sent on 9.11.1991 only after the misdeclaration made by the party vide B/E No. 101585 dt. 25.10.1991 had been detected by the Customs department. It appears that the party had managed to get this telex from the supplier M/s. Abu Shanab Metal Establishment, Jordan to fabricate false evidence to prove that the goods were not meant for them and these goods have come to India due to an error on the part of supplier and it appears that no telex had been sent by the party on 1.11.1991 to the supplier, which is why the party has failed to submit their copy telex dt. 1.11.1991 to the department. It may be noted here that the supplier vide his telex dt. 9.11.1991 had given a summary of all the previous telexes from 1.11.1991 to 9.11.1991 whereas there was no reason for the supplier to send the summarised telex. The fact that no telex was sent by the party on 1.11.1991 at all finds further strength in the statement of telex office, New Delhi according to which the party has not made any telex to Jordan from 31st Oct. to 3rd Nov., 1991. Moreover, as per the statement of S/Shri M.S. Malik and R.S. Malik, Directors of M/s. Perfect Handling and Transport (P) Ltd., (CHA), the discrepancy regarding seal numbers was noticed on 4.11.1991 they had initiated a dialogue with the supplier on the issue of wrong seal numbers through the mode of telex messages.

Importers have sought to disown the acts carried out by their CHA which is not permissible under Customs Act, 1962.

(6) Importers have not convincingly explained as to why there was a delay of 4 months (i.e. from August 1991, the date of Bill of Lading and Nov. 1991) from the supplier in pointing out wrong shipment. The fact that the supposedly wrong

shipment went unnoticed for more than four months further indicates that the importer's explanation is an afterthought after their mala fide acts were detected by the department.

(7) The fact that the Directors namely S/Shri Pawan Goel, B.Garg, Anil Goel and Sushi) Goel did not comply this office summons dt.

12.11.1991, 15.11.1991, 19.11.1991, 28.11.1991, 4.12.1991, 9.12.1991, 23.12.1991, 11.2.1992 and 6.3.1992 but avoided appearance on various grounds. The failure to give evidence is also an indicator of their guilty intentions in respect of goods under import.

(8) The view of the adjudicating officer that since these castings had no holes, these automatically became rejects and cannot be used as brass castings for burners is not correct. There is no basis/evidence mentioned by the adjudicating officer to substantiate the averment that the goods were having blackish coating/carbon deposit because of their use and not due to a deliberate sign to camouflage them as scrap. Market enquiries done by Department have clearly shown that the goods imported can be used as burners in gas stoves/cooking range after doing required further finishing/processing and the market rate per kg. was Rs. 85-90 kg.

for such brass castings/burners. As such, there was misdeclaration of goods, value and quantity to evade Customs duty through misdeclaration of weight, misclassification and under invoicing.

(9) The brass castings under import being semi-finished goods/material are covered under para 23(7) of the ITC Policy 1990-93, therefore, the said goods, being not scrap, are not covered under OGL appendix 6 list 8 part II item No. 4 of the said ITC Policy. The said goods being engineering and allied items covered under appendix 3A serial No. 730 other than those listed in appendix 2, 5, 6, 8 & 10. They are classifiable under 7419.99 instead of 7404 as declared attracting higher duty at the rate of basic duty 100% + Aux. duty @ 50% + Addl. duty @ 15% + 10% of 15% instead of Rs. 9000/- P.M.T. + Aux. duty @ 40% + Addl. duty @ 15% + 10% of 15% as declared by the importer.

(10) In view of the above, the order is not legally correct and proper.

(11) The Board therefore, under the provision of Section 129D(1) of the Customs Act, 1962 directs the Commissioner of Customs, Delhi to apply to Customs, Excise and Gold (Control) Appellate Tribunal for correct determination of the points arising out of the said order.

(a) whether after taking into consideration the facts stated above, the said order of the Commissioner dropping charges and allowing re-export of impugned goods against M/s. Kunal Metals (P) Ltd. is legally correct and proper; and (b) whether by an order passed under Section 129B of the Act, the Tribunal set aside the said order and pass such other order as may be deemed fit.

5. We have heard Shri K.K. Jha, Id. DR for the Revenue and Shri L.P.Asthana, Id. Advocate for the importer.

6. Ld. DR took us through the entire bulk of documents in the present case and also the grounds made out by the Revenue in the Appeal. He pointed out to the examination report of the Customs appraiser, who has opined in the following terms: The CHA approached for examination and did visual examination. The goods were found lying in loose in both containers except 41 bags kept in front to avoid scattering of the goods. Asked the CHA, for making a galary/passage in LHS of each container for 10% examination which he assured to get within 1-2 days. Rep. samples (two sets) were drawn for inspection.

The goods were found as Brass Castings of Burners in unfinished condition and appear to be made as old and used by using blackish powder.

He also pointed out that the department sought the opinion from the manufacturers in India namely "SUPERFLAME" and "SUNFLAME" Industries (P) Ltd. Both the industries on examination of the goods gave their opinion. The same is extracted hereinbelow. The opinion of "Superflame" is as follows: This is to certify that the Brass Burner brought by Shri R.K.Tyagi, Superintendent Custom have been seen by me and I am of the opinion that these can be used for LPG Stoves/Cooking Ranges. The estimated cost of the fresh goods is Rs. 85/- per kg.

approximately as on today.

Some sample of unfinished brass casting in shape of burners have been shown to me by Custom Officer.

I am of the opinion that these can be used as burner in gas stove/cooking ranges after doing required further The market rates of these burners is Rs. 85/- to Rs. 90/- per kg.

approx. in the market.

Ld. DR pointed out that the categorical opinion of the leading manufacturers is that the item imported is "unfinished brass casting in shape of burners". They have given a very clear and categorical opinion that the item can be used as "burner in gas stove/cooking ranges after doing the required further finishing/processing". They have also indicated the market value of the goods. Ld. DR pointed out that this evidence had not been controverted by the importer or the supplier till date. He also referred to the statements made by the parties namely Anil Goel and Shri Mohinder Singh Malik, wherein there was a clear admission that the seal was changed and amended by contacting the shipping agent. However, there was no allegation of tampering of the seal number. He also pointed out that the differences in the seal number was discovered only on 4.11.1991 and therefore the attempt by the importer to explain that he came to know about the difference in seal number on 1.11.1991 is clearly an afterthought and incorrect. He submits that the supplier by his letter dt. 11.11.1991 which is at page 109 of paperbook had written a letter to the importer expressing his surprise about the mistake in shipment to India of the goods meant for Germany. Pointing out to all these correspondence, Id. DR pointed out to several loopholes in the hand of the party and demonstrated that these correspondences are cover-up and made-up ones and it is without any corroboration. He submits that the Bill of Entry was filed on 28.8.1991 and therefore, it was quite clear that there was four months delay on the part of the importer and supplier to discover about the wrong shipment, which has not been explained at all. The importer got wind about the investigating agencies going to proceed against them and therefore, being fully aware about imported item being brass castings of burners in unfinished forms and not scrap, they have

taken a stand of a wrong shipment. He also pointed out that the invoice and certificate of origin is dt. 3.9.1991. If there was a confusion in the shipment to Germany and India, then the supplier would not have remained silent for so long a period till the goods were sent for examination. Therefore, he submits that the importer imported "brass castings of burners in unfinished condition" and misdeclared the same as brass scrap "Honey" in order to take the benefit of the notification and availed duty benefit to a huge extent of Rs. 30 lakhs and above. He also pointed out that the material is not brass scrap and it does not come within the definition of scrap appearing in Section XV of the Customs Tariff Act. He pointed out to the definition of "Honey brass scrap" as per NARI/ISRI specifications and submitted that for a material to be shown as 'brass scrap honey' then the entire material should consist of brass castings, rolled brass, rods, brass, tubing and miscellaneous yellow brasses, including plated brass which should be free of manganese bronze, aluminium bronze, unsweated radiators or radiator parts, iron excessively dirty and corroded materials. In the present case, the item is not in such a nature and therefore, it is clear that the supplier and the importer colluded together to misdeclare the goods and clear the same as "Scrap". Therefore, he submits that the entire finding of the Collector is totally wrong on all issues. He also pointed out that the Collector had erred in rejecting the evidence and granting re-export. He also pointed out that the Collector had seriously erred in holding that there had been no sale in the matter. He also pointed out to the declaration in the Bill of Entry and about their deliberate attempt in misdeclaring the same.

He pointed out that the importer was duty bound to have declared the goods correctly. He also pointed out that the other Directors had deliberately evaded summons and had not explained their conduct to the authorities. He also pointed out that the supplier's certificate from M/s. Petro Brass Factory is totally fabricated evidence for the reason that it is difficult to believe that 45 m.t. of brass castings of burners in unfinished conditions could be considered as rejects from a factory. It is pointed out that no factory would clear such huge extent of goods as rejects. He also pointed out that there was a discrepancy in weightage of 10 tonnes out of 45 tonnes and this itself clearly shows about the intention of the importer to misdeclare and clear the goods. He submits that the brass castings of burners in

unfinished condition is not an OGL item and it is a licenced commodity. Therefore, it is his submission that it is not a case for re-export but a case for absolute confiscation and for imposition of penalty.

7. Ld. Advocate defending the order of the Collector submitted that the department has not produced any incriminating evidence. He explained that the Directors did not respond to the summons as it was clear that the investigating authorities would adopt third degree treatment and extract confessions from them. He submitted that the goods were brass scrap and hence an OGL item. He submitted that the supplier had not ordered for brass castings of burners in unfinished condition even otherwise the item had been rightly considered by the Collector as "scrap", to come within the ambit of "brass scrap Honey". Therefore, he submits that there was no violation of any provision of law. He pointed out to the correspondence of the supplier relied by the Collector, to come to conclusion about the mistake in shipment. He submitted that the supplier had also written letters to the Collector on this issue and therefore, the explanation given by the importer and the supplier is a genuine one and hence the Collector had rightly accepted the same. He also submitted that there was a clear corroboration in the telex message and the certificate issued from Telephone authorities in this context. He also pointed out that the supplier had also given option to the Party to clear the goods and make payments as there was no variation in price between the "brass burners" and "scrap", even the department itself had furnished the value of Rs. 85/- per kg. Ld.

Advocate submitted that the department had not brought any evidence to show that the importer had admitted about misdeclaration and attempting to clear the goods. He also submitted that there was nothing in the opinion furnished by the Indian Manufacturers against the party. He submitted that there is no deliberate misdeclaration and therefore, the Collector had rightly relied on the judgments rendered in the case of Union of India v. Sampat Raj Dugar The Id. Advocate also submitted that there cannot be an order for confiscation and imposition of penalty in the present case.

8. Countering the arguments, Id. DR pointed out to the telex dt.

1.11.1991 from Anil Goel which reads: Please check at your end as the matter has become very serious. We cannot take delivery of the goods till the problems...and argued that from this it is clear that Anil Goel had come to know about the department's intention to proceed against them.

He also pointed out to the telex, which was attested by Embassy of India on 12.2.1992. Another copy of the same telex at page 133 of the paperbook bore the seal of Traffic Manager GATEX dt. 6.2.1992. He pointed out that it clearly shows about the manipulation and fabrication adopted by the importer. Both the telex being the same copy at page 103 and 133, it is seen that there is no seal of Traffic Manager on the copy of the attested copy of the Embassy dt. 12.2.1992.

If the embassy had put the seal on 12.2.1992 the copy at page 103 should also bear the seal of Traffic Manager dt. 6.2.1992. He argued that it is very clear that the importer had got the seal of the Traffic Manager dt. 6.2.1992 subsequently to 12.2.1992, after date the attestation by embassy. He submitted that these documents clearly speak about the fabrication adopted by the importer. Therefore, Id. DR points out that the Collector had seriously erred in the order and hence the goods are required to be absolutely confiscated and penalty imposed.

9. We have carefully considered the submissions made by both the sides and have perused the entire correspondence, show cause notice, finding of the Collector and the grounds made out by the lower authorities before us. As has been already extracted, the allegations against the importer is that the importer had deliberately misdeclared the quantity of goods covered under Bill of Entry No. 101585 dt. 25.10.1991 as 33.240 MTs instead of 43.675 MTs. They had also misdeclared the identity of the goods as "Brass Scarp Honey" instead of goods being "Brass Castings of Burners" classifiable under sub-heading 7419.99 instead of 7404 of the Customs Tariff. The value of the goods covered under the said Bill of Entry had been mis-declared and the department had valued at Rs. 34,94,000/- under Section 14 of the Act. It had also been alleged that on the basis of examination done by the customs, it appear that the imported goods are "brass castings of burners in finished and semi-finished condition and not brass scrap in terms of the definition in Section Notes 6(a) of Section XV of the Customs Tariff

Act, 1962, which is as follows: Metal waste and scrap from the manufacture or mechanical working of metals and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons.

10. It is stated that the goods imported can be used as burners of L.P.G. Gas Stove/cooking range as gathered from the market enquiries.

The department alleged that as per para 23(7) of the ITC Policy 1990-93 reference to finished items would apply to semi-finished goods/materials as well. Since the items did not appear to be scrap, so that party's plea claiming the goods under OGL appendix 6 list 8 part II item No. 4 of the Import and Export Policy 1990-93, which is for brass scrap/Ash, dross and brass mill scale is not correct. It is also alleged that the description of the goods appearing in Appendix 3A Serial No. 730 is Engineering and allied items other than those listed in Appendix 2, 5, 6, 8 & 10. The subject item is not appearing in any of the appendices excluded from the Entry No. 730. Therefore it appears that the goods (Brass Castings of Burner in finished/semi-finished condition) are covered under S.No. 730 of Appendix 3A of ITC Policy, 1990-93.

11. Therefore, the department alleged that the goods were classifiable under 7419.99 instead of 7404 and the rate of duty applicable appears to be BED 100% plus Aux. duty at 50% + Addl. duty at 15% + 10% of 15% instead of BED at Rs. 9000/- P.M.T. + Aux. duty at 40% + Addl. duty at 15% + 10% of 15% respectively, as claimed by the party. It was also alleged that as per market enquiry, the value of goods should be taken as Rs. 80/- to Rs. 85/- per kg. After multiplying the quantity 43675 kg. to the rate of Rs. 80/- per kg. the total value of the goods comes to Rs. 34,94,000/-. Therefore, it was alleged that the importer and its Directors Shri B. Garg, Shri Pawan Goel, Shri Sushil Goel and Shri Anil Goel had imported 44.675 M.T. of Brass Castings of Burners in finished and semi-finished form valued at Rs. 34,94,000/- without valid licence as per Appendix 3A S.No. 730 of the Import and Export Policy and that the import of Brass Casting of burners into India is prohibited without the valid licence as specified. Therefore, it was alleged that as the goods were attempted to be cleared by misdeclaration, they are liable to confiscation under Section 111(d) of the Customs Act, 1962 read with Clause

3(1) of the Import (Control) Order, 1955.

12. The importers in the present case have not placed any counter evidence with regard to examination report and the opinion expressed by the Indian manufacturers on the imported item. There is no doubt with regard to the nature of the item in question and the manner in which it has been imported in the containers, as "the brass castings of burners in finished and semi-finished (condition)". It has been made to appear as old and used ones with the help of blackish colour powder. The defence taken by the importer is that these goods were not meant for them and even if the goods are taken in the condition in which they are, even then they are to be considered as brass scrap only. This plea has been accepted by the Collector and hence the Revenue is in appeal.

13. On a careful consideration of the pleas, we find force in the submissions made by the Revenue and on perusal of the evidence it is very clear that the importer in collusion with the supplier has attempted to clear the goods as brass scrap. The item is in semifinished/unfinished condition and it is brass burners. The leading Indian manufacturers has clearly opined that the item is unfinished brass castings in the shape of burners and they merely require further finishing/processing. There is no challenge to this evidence and examination report before us.

14. Now, the question is as to whether the brass castings of burners in semifinished/unfinished conditions can be considered as scrap in terms of Note 6(a) of Section XV of Customs Act, 1975. They have extracted the definition of the scrap. The scrap should be a metal waste and scrap from the manufacture or mechanical working of metals and metal goods which are definitely not usable as such because of breakage, cutting-up, wear or other reasons. The definition of brass scrap honey as given in NARI specifications has also been extracted above. As per the said definitions the scrap shall consists of brass castings, rolled brass, rod brass, tubing and miscellaneous yellow brasses including plated brass. It should be free of manganese-bronze-aluminium burners, unsweated radiators or radiator parts, iron, excessively dirty and corroded materials. Therefore, the goods are not in such a condition as per the definitions of scrap given in Note 6(a) of Section XV and NARI Circular, but the goods are burners in finished/semifinished

conditions as per the opinion given by the leading Indian manufacturers. As per the examination report, the supplier had applied blackish colour powder to give appearance to the goods of old and used ones. It is very clear that the goods are not scrap and that they are brass castings of burners in finished and semifinished condition. The value of the item has also not been disputed and so also its quality. Therefore, the department's allegation that the item is not brass scrap and that there has been a mis-declaration with regard to quantity and valuation is fully established beyond any reasonable doubt. The department had with evidence, pointed out to the importers that the item is not a scrap and that it required licence under law for import. The importer has not disputed the item being in such a condition as noted by us but only attempted to show that the goods even in such a condition are required to be treated as "brass scrap". The Learned Collector had upheld the said contention, which is totally erroneous and unsustainable. It is very clear that the goods are not brass scrap and hence, they clearly fall within SI. No. 730 of Appendix 3A of ITC Policy 1990-93. Hence the goods require valid licence under Appendix 3A SI. No. 730 of the Import and Export Policy and its import is prohibited without licence.

Therefore, the department has clearly proved the violation of law and hence the goods are liable for confiscation under Section 111(d) of the Customs Act, 1962 read with Clause 3(1) of the Import (Control) Order, 1955.

15. The other question raised is as to whether there has been a genuine mistake in supplying the goods to the importer and that they are liable for reexport? The importer has attempted to show that as per Bill of Lading No. 194767, 19673, the actual seal number found was 34311 and 34319. Therefore, he issued a telex to the supplier on 1st November, 1991 asking the supplier as follows: Please check at your end the matter has become very serious. We cannot take the delivery of goods till this problem is resolved.

16. It is seen that the Bill of Entry has been filed on 25.10.1991. The examination has been done on 6.11.1991. As pointed out by the Learned DR, it is surprising as to how the importer knew the contents of the container before hand on 1.11.1991 itself, before the examination of the goods. The telex which is produced at page

103 has seal of Attache (Cons.) Embassy of India. But the telex at page 133 has the seal of Dy.

Traffic Manager (G.T.A.C.) dt. 6.2.1992. It is surprising as to how the telex at page 103 did not have this seal and signature of Dy. Traffic Manager. If they had taken this telex for attestation to the Attache (Cons) dt. 12.2.1992 as on page 103, then it should have borne the seal of Dy. Traffic Manager dt. 6.2.1992. It is very clear that this is a manipulated document. Be that as it may, the point for consideration is as to whether the supplier had made a mistake in the shipment to the importer? The supplier had attempted to show that the goods meant for Germany had been sent to India. He had tried to show that the Germany buyer had specifically ordered for brass burners and what was meant for Germany was shipped to India. There is a serious contradiction in the stand and this statement is not at all corroborated by cogent and believable evidence as can be seen from the file. The supplier had attempted to show that he had purchased 45 Tons of brass scrap from M/s. Petra Brass Co. He has produced a certificate from them which states that they had supplied the rejected and unusable scrap castings of brass burners, which had manufacturing defects and without holes and were completely rejected from their factory. They had sold to M/s. Abu Shanab Metals Establishment a total quantity of about 45 M/Tons. On examination by manufacturers of similar item in India a opinion has been obtained from such leading Indian manufacturers, who have clearly opined that the item is not a reject and unusable brass casting.

Therefore, the letter dt. 28.1.1991 produced by the supplier is a concocted document. Further, the supplier had attempted to show that the German importer had placed an order in July, 1991 for 45 M/Tons of brass scrap honey as per the NARI Specifications and what was meant for them had been sent to the importer. As has been established in the present case that the item is not brass scrap honey as per NARI specifications. Therefore, the question of the supplier's supplying that scrap to either of them did not arise. The scrap which was also to go to the German authorities was supposed to have been supplied to India. The goods meant for India was not shipped to the Germany at all.

Therefore, the Germany buyer cancelled the order. The telex of the Germany buyer has been placed on record at page 177 which states that they had been chasing these containers through their Agents but the suppliers information has proved to be not correct so far. The telex further enquires as to whether they had shipped or not. Since the time passed by is too much and the vessel should have arrived long back, the supplier, therefore, by his telex dt. Oct. 1, 1991 informed the Germany party that they are seriously checking with their forwarding agents and with the relevant port cargo section and will revert to them with the exact shipment details within a few days. On 7th Nov., 1991 they had sent a telex to Jordan party that on their enquiries they had learnt that the goods had been sent to Bombay which was meant for Europe.

17. On 16.1.1992, the Germany party sent a telex to the supplier expressing their surprise that they are not going to get those containers. They stated that it is too late for them to wait and therefore, cancelled the contract. The supplier has not shown at all as to what happened to the goods meant for Indian supplier. If the contract of the Indian importer's order was for 34 MT brass scrap honey and Germany importer's order was 45 MT of the same product, then the total would come to 79 MT. It is the suppliers case that he purchased 45 MT from the M/s. Petra Brass Co. If that be the case then the supplier has not explained as to from where he has obtained the balance of 34 MT. When this question was posed to the Learned Advocate, the Learned Advocate submitted that he is not in a position to explain this aspect and expressed his helplessness on this point. It is also surprising to note that any factory could remove 45 MT of brass burners in semifinished and unfinished conditions as scrap. It is a well known technical fact that no factory will generate tons and tons of brass burners as manufacturing defects. It will lead to closure of the factory, if huge quantities of brass burners are found with manufacturing defects. In this case, on examination of the goods, it was found to be not having manufacturing defects, but they are found to be brass burners in finished and semifinished condition and could be marketed and used. Therefore, the certificate issued by the said Petra Brass factory is a fallacious certificate. It is also surprising to note that this certificate of 21.8.1991 was never produced by the supplier till 1995. The manner in which the supplier has suppressed the facts pertaining to the goods meant for Indian buyer not having

shipped to Germany and not having explained about extra quantity of 34 MT, clearly shows that the supplier and the buyer in India had colluded to clear the goods through customs by misdeclaring and by undervaluing the goods. It is also clear that the supplier had made payment towards these goods. It is surprising that such huge consignments could be purchased without payment. Therefore, the Collector's finding that the importer has not become owner is totally an erroneous finding for the simple reason that once the contract is accepted and the goods are shipped, the sale is completed. Non-payment of the price of the goods does not make the contract of sale incomplete. Further the telex of the supplier at page 101 of the paperbook indicates that they had sold the goods. The telex reads: Further to our various discussions, we have pleasure to confirm having sold you about 34 Tons of Brass Scrap 'Honey' as per terms and conditions hereunder: MATERIALS ABT 34 M/TONS OF BRASS SCRAP 'HONEY' (NARI/ISRIPRICE USD 1600/- PMT (USD ONE SIX ZERO PMT) C AND F BOMBAYTERMS OF PAYMENT AGAINST 365 DAYS D.A. BASIC THROUGH OUR BANKERSTOTAL VALUE USD 1600 x 34 TONS : 54,400/- APPROX.SHIPMENT IN 2 X 20 FT. CONTAINERS LOAD. We hope above order will be to your satisfaction and will advice full shipment details sonner cargo on board vessel.

18. In the light of this document, the Collector's finding that there has been no sale and the importer is not a purchaser is totally a perverse finding and the same is totally unsustainable. Further it is seen that the supplier by his letter dt. 11.11.1991 which at page 109 of the paperbook, is only with regard to quantity of goods only. The said letter is extracted below: Sub: 2 x 20FT. Containers from Aqaba/Jordon to I.C.D. New Delhi via Bombay on VSL 'Ledenice' VOY. 102 B/L No. AQB/BBY/1 dated 28 Aug., 1991 We take this opportunity to contact you by this letter with reference to our Telex Message cited above wherein we had informed you that we have been informed of the difference in seal numbers of the containers shipped under No. LMCU 0219020 and LMCU 0233521.

We have been surprised to have a very serious mistake in the above shipment of 2 x 20 ft. Containers which was originally destined to European port and the contents of the above 2 x 20 ft. containers were the same as per our contracts with our German buyers. After sailing of the vessel and submission of original shipping

documents, we have finally received the full shipping log sheets and warehouse tally reports wherein we have found that the shipment intended to Germany have been shipped to Bombay whereas the containers under the actual contract with M/s. Kunal Metals were not shipped.

We have already requested you to arrange to adjust the shipped goods against your contracts with us since the materials intended were of the same quality and if it is not possible, you can re-ship and rebound the containers back to us so that there will be no complications at both sides.

As we are in mutual business for a long time this happening should not be taken as serious and sometimes it is quite natural that mistakes happen and we will be very careful in our future shipments to you. We are ready even to take back your goods if it is found unsuitable to your requirements or found not as per our contract terms.

In this connection we have also found out on verification of the whole export cargo records that even the weight of the 2 x 20 ft.

containers shipped to you were not tallying with what we have with our actual records. Please note the following: CONTR.B/L WEIGHT ACTUAL WT. ACTUAL SEAL No.Nos.

SEAL No. FOUNDLMCU 021902-0 16540KGS 22040KGS 194167 34311LMCU 023352-1 16700KGS 22010KGS 196703 34319 We very much regret about this serious mistake which was due to heavy container movements and weigh bridge rush and reporting staff careless and unsystematic procedures which finally resulted in miscalculation and crossing with other container weights.

We have seriously instructed all concerned in the export cargo shipment fields right from our employees to the Port area to be very careful in the future so that nobody sustains unnecessary interruptions in releasing their consignments at the port of discharge.

We assure of our best services at all times and please do the needful what you think fit in this matter and we are at your disposal for any commitments.

19. The above letter clearly shows that the dispute between the supplier and the importer is only regarding the quantity of the goods.

The supplier in the above letter has clearly called upon the importer to arrange to adjust the shipped goods against their contracts with them, since the materials intended were of the same quality. The Learned Advocate relied on a letter dt. 29th December, 1992 issued by M.S. Suman, Counsellor (Commercial), Embassy of India, Amman-Jordan.

This letter merely states that on the request of the representatives of M/s. Abu Shanab Metals Est., Amman, he had gone through their original file dealing with two consignments of brass scrap. One was to be sent to M/s. Kunal Metals Pvt. Ltd., Shahdara, Delhi (about 34 tons honey valued at US \$ 54000) and the other to M/s. Metal Service, Germany (about 45 tons-"price to be fixed at arrival and analysis in Germany").

He stated that the consignment meant for Germany was wrongly sent to Bombay. The Delhi party was annoyed at this with M/s. Abu Shanab Metals Est., Amman and asked them to make arrangements for its re-import to Jordan. From this letter nothing comes out, hence this letter does not establish the case of the importer and it has no evidential value.

20. It is further noted that the supplier is supposed to have exported 45 MT of brass scrap honey to the German party. It is curious to note that the contract had not been finalised pertaining to price and payment and the price was said to be after analysing after arrival of goods at the buyers end. The manner in which the supplier was to supply the goods to the German party, without a proper contract, fixation of price, clearly discloses the minds of the supplier, that he was not to supply these goods to them and that the German party had been kept only as a front. This view is strengthened by the fact that the supplier has not placed any evidence to show that the goods meant for Indian party was mixed up. As, in fact, the goods of the Indian party had not been sent to Germany at all. The telex at page 177-A said to have been issued by the supplier to Metal Service, Jordan only stated that they have by these months chasing the whereabouts of the above containers and they were shocked to learn from the export cargo division in the

port city that these containers had already sailed but in wrong vessel and finally reaching Bombay Port. It states that these containers were actually for Europe and had another contract with Indian buyer, during the same time for the same material and got mixed up with their Indian buyers on Nov. 1/91 with the same seal Nos. What was meant for them had reached Bombay. This telex clearly shows that the supplier had never informed the German party that it had the same seal Nos. It is seen from the importers plea that the seal Nos. were different. It is also seen that the contract of the Indian and German party is not of the same time, as the document shows the contract with German party was entered by telex dt. 30th July, 1991, as can be seen from page 174-A of the paperbook. While the Indian buyer had confirmed it by their telex dt. 27th July, 1991 which is at page 101 of the paper book and the telex states that this is further to the various discussions they had and the delivery period is shown as Sept.-Oct., 1991 whereas as per the German telex at page 174A the delivery is to be done by July/Aug., 1991. As can be seen from these telexes, the date of supply to the German party and the Indian party are quite different. The German party was to get their goods by Aug., 1991 and the price was to be fixed after arrival of their goods at Germany. While the Indian party was to get their goods by Oct. 1991 and the payment was against 365 DA through the importers banker Cairo Amman Bank. Therefore, there is a very clear discrepancy and contradiction in the supplier's story. The alleged contract entered into with Germany was in July, 1991. The goods said to have been purchased from M/s. Petra Brass factory was in August, 1991 in terms of the German contract and these goods were to have left before August, 1991 itself. The supplier has not sent the goods at all to the German party. He has accepted the Indian party's contract and had not sent the goods to the Indian party for delivery before Oct., 1991. It is very clear from these documents that the supplier had not made any arrangements for supplying the goods to the German party and it is very clear that the German party is being used as a front for cover up operation. If the supplier was to send the goods to Germany, then he should have purchased the goods before August, 1991. However, he has purchased the goods from M/s. Petra Brass Co. only in August, 91. It follows that these goods purchased by the supplier in August, 91 could not have been shipped before August, 1991 to German party.

Therefore, the alleged goods purchased from Petra Brass Co. was meant for supply to the Indian party only, as the supply to the Indian party was to be completed as per telex at page 101 for delivery till Sept./Oct., 1991. The German party by their telex at page 177A clearly indicated that the seal number is the same. It is difficult to believe that such expensive and costly goods could be supplied to the German party without finalisation of the contract, without the price being paid at all. No supplier would supply the goods to distant places without fixing the price and that to agreeing to price fixation after test by the party at their end. If the buyer at the Germany rejected the goods then it would have only resulted in severe loss to the supplier and the consequences would be very grave. This is not an universal and international practice to supply the goods without entering into the contract, without price payment or without receiving any advance payments. Therefore, from all these documents it is very clear that the supplier and the Indian party had colluded and to keep the German party as a front to be used in case of any detection by customs authorities. It also follows that the supplier and the importer had colluded to misguide, misdeclare and undervalue the goods. The importer does not say that the contract was for a different goods and what has been supplied is totally different goods. Both the supplier and the importer clearly admit that the supply were against the contract. The importer having come to know about the possible initiation of investigation and proceedings send a telex on 1st Nov., 1991, when in fact, the proceeding had not been initiated by the department and no examination had been done. Therefore, the Learned DR's contention that there is a collusion and that there has been clear attempt to import of prohibited goods by misdeclaration undervaluing by showing less weight is fully proved.

21. As has been emphasised by the Hon'ble Supreme Court in the case of Collector of Customs v. D. Bhoormull the department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may on its basis, believe in the existence of the facts in the case. In this case, the department had brought the evidence against the importers, therefore, the department has discharged its burden in terms of Section 123 of the Customs Act.

Although Section 123 of the Customs Act deals with the smuggled goods but the fact remains that the importers were attempting to clear the prohibited goods as an OGL item. Therefore, Section 123 is attracted in the present case. The burden in the present case shifted to the importers and it was for them to have discharged the proof of innocence, which they have failed to do so as discussed by us (supra).

The Hon'ble Supreme Court in the cited case in para 26 held that large scale smuggling of gold or other goods into India may pose a threat to the economy and fiscal interests and policies of the state. Such illicit trade, the Hon'ble Supreme Court emphasised, is often carried on by organised international smugglers in the secrecy of the underworld. The more it is organized, the less are the chances of its detection, and greater the difficulty of proving the offences relating thereto. The Hon'ble Supreme Court further held that laws have therefore, been enacted in most countries, which mark a partial or wholesale departure in matters relating to smuggling, from the general principle of penal laws, viz., that it is for the State or its department to prove the offence against the accused or the defendant.

The Hon'ble Supreme Court further at para 32 have also emphasised that smuggling is clandestine conveying of goods to avoid legal duties.

Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the concerned accused; that if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. *Bhanabhai Khalpabhai v. Collector of Customs*, well known, that it is very difficult for the prosecution, to prove every link in respect of the commission of the offence under the Act by direct evidence. It has been further held that the whole process of smuggling for evading payment of customs duty consists of different links. The links aid and abet each other, sometimes through a remote control. That is why, the Parliament has introduced Section 138A in the

Act. The Hon'ble Supreme Court further referred to the judgment rendered in the case of State of Maharashtra v. Natwarlal Damodardas Soni , in which the trial had been completed before the introduction of Section 138A in the Act, examined as to what is the nature of proof required for establishing a charge for an offence under Section 135(1). It was said that the requisite guilty knowledge or mens rea under Clause (a) or (b) of Section 135(1), can be established by circumstantial evidence as well. Even without applying Section 138A of the Act, it was held that the burden of proving an innocent receipt of gold lay upon the appellant under Section 106 of the Evidence Act. The totality of the facts proved, was enough to raise a presumption under Section 114 of the Evidence Act, that the gold had been illegally imported into the country. It was further said that provisions of Section 135(1) had been designed to suppress smuggling, as such it has to be construed in accordance with the Mischief Rule first enunciated in Hey don's case [1984 (76) ER 73].

23. In the light of law laid down by the Hon'ble Supreme Court in this case it is very clear that the department has proved their case and the importer has failed to discharge their burden. In that event of the matter we hold that the allegation brought out by the department is fully established beyond any reasonable doubt.

24. The further question that arises for consideration is as to whether the imported item can be ordered to be re-exported? The answer is emphatic. No. In the case of Union of India and Anr. v. Sampat Raj Dugar and Anr. as reported in 1992 (39) ECR 189 : ECR C Cus. 1875 SC : the Hon'ble Supreme Court had ordered for re-export on the importer establishing that the goods had been imported under a valid licence at the time of import. Therefore, this judgment is clearly justifiable and the Learned Collector has misapplied this judgment. The Tribunal in the case of Supreme Electronics & Caditronics India v. Collector of Customs as reported in 1994 (55) ECR 600 while distinguishing the Hon'ble Supreme Court's judgment upheld the confiscation of the goods by a majority order as per para 18 and the same is noted hereinbelow: 18. I have gone through the order recorded by Ld. Brother Shri Lajja Ram. For the detailed reasons recorded by him in paragraphs 8 to 11 of his order, "I agree with his findings in paragraph 12 that declared prices have been rightly rejected by the Collector in respect of the goods in question. On

the licensing angle also I agree that there is no infirmity in the order passed by the Collector holding the goods as liable to confiscation on the ground that the imported assemblies/sub-assemblies being restricted items they could not be deemed as covered by REP Licences. I am, however, of the view that having regard to the overall facts and circumstances of the case and taking into account the finding that Collector's order holding the goods as liable to confiscation and appellants liable to penalty is sustainable the appellants request for permitting re-export of the goods in question does not merit consideration.

25. The Directors of the Company have not responded to the summons issued by the investigating authorities. This clearly shows that they had something to hide. The appreciation of the Learned Advocate that the investigating authorities would have adopted third degree method and accept function is a fallacious argument and does not meet the eye of the law. Such an argument is not appreciable. The facts and circumstances clearly disclose that the importer had filed the Bill of Entry declaring the goods as "brass scrap honey" when the goods were in fact "brass burners in unfinished and semifinished condition". If the investigating authorities had not detected and carried out the inspection and taken the opinion from the expert, then they would certainly have cleared the goods thereby causing serious revenue loss.

The importer respondents, therefore, are liable for penalty in the present case. In sum the order is as follows: iii) Each of the Directors in the show cause notice are liable to pay penalty of Rs. 5 lakhs each.

iv) The Revenue appeal is allowed in the above terms.

Sd/-Dt. 996 Member (J) 1. With respects to Ld. Member (J), I am writing a separate order as under: I first take up the matter relating to classification as 'Scrap'.

Section Note 6(a) of Section XV of the Customs Tariff, 1962, has been pressed into service that imported goods which are alleged to be castings of burners in finished and semifinished condition are not brass scrap in terms of this definition. The definition refers to "Metal Waste and scrap from the manufacture or

mechanical working of metals and metal goods, definitely not usable as such because of breakage, cutting, wear off or other reasons.

2. Examination Report of Customs at Page-3 of the appeal papers itself indicates that goods were in unfinished condition. The trade opinion in the form of statement given by General Manager of Sunflame itself indicates that the goods can be used only after further finishing/processing. The definition makes it clear that what is contemplated is that what is claimed as scrap must not definitely be usable as such. In other words, goods claimed to be only scrap which arise from the manufacture or mechanical working of metal or metal goods must not be usable as such (emphasis added) because of breakage, cutting, wear off or other reasons.

3. Collector has referred in Page-15 of his Order to the Department's applications for remand, where it is stated by the Deptt. that on examination of the container, it was noticed that the goods were "Castings of brass burners in finished and semi-finished condition predominantly without holes...." Department, therefore, itself admitted that what is alleged to be castings of brass burners were predominantly without holes. In that view of the matter, it is inconceivable that they could have been used as such, i.e., goods in the form in which they were imported could have been used as gas burners. When the Deptt.

itself admits that the goods needed further finishing/process and in fact, goods were predominantly without holes, these castings obviously could not be used as such to merit denial of their legitimate parentage under the category of scrap as defined under Section Note (6) of Section XV itself.

4. Ld. Member (J) has referred to testimony of leading Indian manufacturers in Para-13 of his order. The opinion of only two persons, as the records indicate, was taken. One of them, as was rightly contended by the Ld. Advocate, was only a Chartered Accountant, who could not have expressed opinion in regard to the nature of the goods as such. The other person, General Manager of Sunflame himself, however, qualified his opinion by unmistakably stating that the goods needed further finishing/processing before these could be used as burners. In this context, it is difficult to conceive that any leading Indian manufacturer had given any opinion adverse to the respondents and in favour of the Department.

5. It has been indicated by the Ld. Member (J) that even NARI Circular goes against the respondents. It is indicated that according to that definition scrap shall consist of brass cutting, rolled brass, rod brass, tubing and miscellaneous yellow brass. This perhaps follows from the premise that it can be considered according to NARI Circular as a yellow brass scrap only if it is a mixture of brass castings, rolled brass, rod brass, tubing, etc., and not if it consists only of defective brass castings. In my view that may not be a correct approach to look at the definition. This definition nowhere requires it to be a mixture of various items. It only indicates that brass cuttings, rolled brass, rod brass can be considered as brass scrap provided it is free of manganese, bronze, aluminium-bronze, unsweated radiators or radiator parts, iron, excessively dirty and corroded materials. The fact that scrap need not be a mixture is borne out by NARI Circular itself at various places, for instance, Item 43 consist only of brass rod ends.

At Page-163 again, we have mixed unsweated auto-radiators which indicate that this category of waste must consist of automobile radiators, to be free of aluminium radiators. Similarly, against item yellow brass cuttings it is indicated 'should consist of yellow brass cutting free of aluminium-bronze, etc.

6. In fact, in scrap trade proper segregation of scrap is done to ensure quality so that desired chemical composition is uniformly obtained. The letter from the supplier to the respondents at Page-III of the Paper Book categorically indicates that the contents of brass scrap are totally unusable and rejected parts of the gas ranges which specifically fall under scrap category of brass scrap under International Scrap Specifications of NARI Specifications. The rejected gas burners which were shipped to the respondents later were sold to them as unusable and rejected gas burners and this cannot be re-used again. The definition of scrap relied upon heavily by the Deptt. itself indicates that goods should not be usable as such. The Examination Report of the Customs itself indicate that these are unfinished. The testimony relied upon by the Deptt. particularly the statement of General Manager of Sunflame also indicates that these can be used after finishing/processing. The complaint filed in the Court at Page-184 of the Paper Book indicates that the Department itself referred to these goods as finished and semi-finished condition, "predominantly without holes". All

the evidence, therefore, leads to the conclusion that goods are not usable as such. If the Department intended to prove that these are usable as such, and therefore, not covered by definition of scrap, they ought to have led evidence in support of their claim. This has not been done and, on the contrary, the stand of the Department itself, including Examination Report and the complaint filed by them, indicates that these goods cannot be used as such.

In case of Plaza Steels & Alloys Ltd., New Delhi v. Commissioner of Customs, New Delhi 1995 (26) ETR 833, the Tribunal held that rejected steel ingots are nothing but re-melting scrap. In arriving at this conclusion, the Tribunal observed that this issue is covered by an earlier decision of the Tribunal in the case reported in 1992 (41) ECR 75 (Tri) : 1992 (57) ELT 171 in which it has been held that steel ingots produced out of defective ingots are deemed to have been produced out of steel re-melting scrap. The definition of scrap under Section Note XV itself would indicate that an item not usable as such is only scrap.

7. The question, however, is not so much relevant except to indicate that even assuming as an alternate plea that the goods had been imported as per orders, there was no misdeclaration as such and the goods, in fact, were scrap. The relevant question is that the Respondents throughout right from the beginning have maintained that this was not the consignment they had ordered since the Seal No. mentioned in the documents does not tally with the Number of the seal fixed in the container. As soon as they came to know of the variation in the Seal Nos., they immediately got in touch with the supplier and it is not that they have come out with this story after the goods have been examined. Examination Report at Page-3 of the Paper Book indicates that goods were examined on 6.11.1991. They, however, informed the supplier through telex placed at Page-103 on 1.11.1991 itself that at the time of inspection of the containers, they found that the Seal No. of the containers are different from that given in the Bill of Lading, Bill of Entry and invoice, etc. While Bill of Lading indicates Seal No. as 194167 in case of container 0219020 and Seal No. 196703 in case of container 0233521, the actual Numbers found were 34311 and Seal No. 34319. This telex was attested by Attache, Embassy of India, Amman, who recorded, "Seen the original in the Embassy of India, Amman, True copy attested." The reply of the supplier informing

them that they are checking the position has also been attested by the Embassy. Further, message from supplier at Page-105 of the Paper Book informing them that there is mistake and goods intended for Germany had been shipped to them and that their contracted goods are still to be shipped has also been attested by Embassy of India. The message further added that if they could adjust the goods, they can do so and send the extra quantity back to them or send the entire quantity back to them at their cost.

The telex dated 1.11.1991, was also certified by Traffic Manager, C.T.A.C., who. certified that Answer Book of the Calling Party 31-65666 and Called Party 23351 (Zordan) has passed through GATEX. The certification is dated 6.2.1992. This certification also bears the attestation by Embassy of India.

9. In fact in reply to the specific question how this copy bears certification of Embassy of India as also certificate from Traffic Manager, Telephone, when attestation is dated 12.2.1992 and 6.2.1992, the Ld. Advocate clarified that on 6.2.1992 they had got it certified by Traffic Manager. On 12.2.1992 another copy had been got attested by Embassy of India and, subsequently, a copy bearing Certificate of Traffic Manager was also attested by Embassy of India. This is how one copy came to have only attestation by Embassy, another copy bore attestation of Embassy after a certificate was recorded on photocopy of this telex. This was done to strengthen their case by indicating one copy with both certification as well as attestation whereas other copies have only attestation. This is a perfectly logical explanation and one cannot see any manipulation in it. Apart from this, it will not be reasonable to presume any manipulation on the part of responsible public officials.

10. Ld. Member (J), in Para-16 of his order, has referred to this certificate as a manipulated document. Revenue has not urged this ground in their appeal even though reference was clearly made to these certificates in Para 22(2) of Commissioner's Order at internal Page-13 of his order. Nor has any evidence been produced by Revenue that certificates are forged. Such a ground not pressed into service, nor disclosed to the respondents, cannot obviously be relied upon to draw an adverse inference against the respondents.

11. The Ld. Advocate also referred to the Certificate given by Embassy of India, Oman, which indicated that they had seen the original file and that consignment meant for Germany was wrongly sent to Bombay. The certificate is extracted below: On the request of the representatives of M/s. Abu Shanab Metals Est., Amman I have gone through their original file dealing with two consignments of brass scrap. One was to be sent to M/s Kunal Metals Pvt. Ltd., Shahdara, Delhi (about 34 tons honey valued at US \$ 54000) and the other to M/s Metal Service, Germany (about 45 tons - "price to be fixed at arrival and analysis in Germany"). However the consignment meant for Germany was wrongly sent to Bombay. The Delhi part was annoyed at this with M/s Abu Shanab Metals Est., Amman and asked them to make arrangements for its re-import to Jordan.

12. Fax dated 30.9.1991 at Page-176 of the Importer in Germany refers to brass scrap honey in containers 0219020 and 0233521 and informs the supplier that they are still waiting for the vessel and their clearing agent has no information about these containers. Again fax from supplier to buyer in Germany, i.e., M/s. Metal Service, Germany, informs them that they are checking the status of the shipment. There are other faxes from Metal Services, Germany, enquiring about these consignments. Fax placed at Page 177A from the supplier to the German buyer informs that the two containers have been put in wrong vessel which has finally reached Bombay Port. This also informs the German buyer that according to telex message dated Nov. 01, 1991, received from the Indian buyer the two containers with the same seal numbers that were meant for German buyer have reached Bombay. Again, through telefax dated 16.1.1992 from the buyer in Germany the supplier at Amman M/s. Abu Shanab Metals was informed that after taking notice of the telex they are surprised that they are not going to take these containers and, therefore, are compelled to cancel their contract.

13. So here we have got categorical statements from the supplier that wrong consignment which was meant for buyer in Germany was sent to the respondents in India, that telex message dated 1st Nov., 1991 was received informing the supplier about the discrepancy in Seal Numbers given in the documents and found on actual verification, attestation of the telex sent on 1st Nov., 1991, both by Traffic Manager as well as by Indian Embassy in Amman, a certificate from the

Indian Embassy in Amman who examined the original file of the supplier and thereafter certified that a consignment meant for a German buyer was sent to the respondents in India.

14. Above all, the variation in the Seal Numbers appearing in the documents and Seal Numbers actually found is not at all disputed. All this would unmistakably go to indicate that actually a wrong consignment which was meant for a German buyer was sent to India. The most clinching evidence in this regard in fact would be seal number.

The seal number is the basic safeguard in the system of containerized cargo traffic. It is meant to ensure that the consignments stuffed in the container is not tampered with or substituted and that what was actually shipped as evidenced by documents has been received. That is why seal numbers in the containers are always indicated in the shipping documents and they have to be compared with the seal on the containers.

Once the seal numbers differ obviously the consignment itself would be different. Taking a reverse case, suppose the description of the consignment as given on the documents exactly tallies with the consignment found on examination but the seal numbers indicated in the documents and those actually found vary, would, in such a situation, the consignment be accepted as genuine in accordance with documents and allowed clearance? The immediate presumption would be that it is not the consignment which has been contracted for and shipped.

15. In the case of Supreme Electronics & Codetonic 1994 (55) ECR 600 cited in connection with judgement in the case of Sampat Raj Duggar the facts were totally at variance with the facts in the present case. In that case, exporter had not claimed the ownership of the goods nor they had asked for re-shipment. In regard to that case, the appellants stand had been changing. In the present case, right from the beginning the supplier had claimed that a wrong shipment has been made and written to the respondent in India to re-export the goods. The case of Supreme Electronics, therefore, has no relevance to the present case. In fact, the facts are quite the reverse.

In the case of Pfaf Industriemaschinen MBH v. Additional Collector of Customs - Bombay High Court held as the goods belonged to the supplier in Germany they alone are interested in the goods. Since they are affected by the impugned order, they must be considered in these circumstances as the party aggrieved. The Bombay High Court held that the Order of Tribunal rejecting appeal of the petitioner on the preliminary ground that the aggrieved party was the agent of the shipping company in Bombay, who has filed the Bill of Entry in respect of these goods for the purpose of re-exporting these goods, was bad in law. The Bombay High Court relied on the Hon'ble Apex Court judgement in the case of Bar Counsel of Maharashtra v. M.B.Dabholkar held to be aggrieved by a decision if that decision is materially adverse to him. Again a person is aggrieved if a legal burden is imposed on him. In the present case, the supplier has been from the beginning claiming the ownership of the goods and even has been writing to the Customs for impleading him in the proceedings. His status as person aggrieved cannot, therefore, be doubted.

The case of H.A. Abdul Mustafa reported in 1987 (13) ECR 1052 (T) is a case of smuggling where goods were used to conceal contraband.

Similarly, case of D. Bhoormull 1985 ECR 2284 (SC) : ECR C Cus 908 SC : 1983 ELT 1546 again is a case of gold smuggling. Even here the Hon'ble Apex Court held that what is required is establishment of such a degree of probability that a prudent man may on its basis believe in the existence of facts in issue. In that case an opportunity of rebutting the first and foremost presumption that arise out of the telltale circumstance in which the goods were found regarding the smuggled goods by disclosing the facts by special knowledge was not rebutted. This is not the case here. In fact, the very fact of a wrong seal in the consignment would itself be enough to rebut the presumption raised against the respondents and to this has to be added the evidence by the supplier, fact of communication of wrong seal number to the supplier, evidence regarding existence of another buyer in Germany for whom the consignment was made. It is not, therefore, a case where the presumption was not rebutted. In fact, the presumption raised was adequately rebutted through all such evidence that respondents could procure. On the other hand, the Department has not produced any evidence in rebuttal. State of

Maharashtra v. Natvra Lal 1980 Cen-Cus 85D (SC) : ECR C Cus 1051 SC : 1983 ELT 1620 (SC), again a smuggling case, it was held that facts, if proved, are enough to raise presumption under Section 114 read with Section 106 of Evidence Act that the accused knew that goods are smuggled or imported in contravention of law. Here, no such facts have been proved. On the contrary, adequate evidence to explain the importation has been led by the respondents. In case of Bhanabhai Khalpabhai v. CCE, 3,274.98 Kgs. of silver were buried in the specified area in the garden of the accused who could not produce any material to discharge burden cast on him to disprove presumption of his culpable mental state. Here, however, all such material which could be produced by respondents to explain wrong importation has been submitted, and therefore, it cannot be said that presumption against him has not been rebutted.

16. In case of J. Jaidu v. State of Maharashtra 1983 ELT 1611 (SC) - it was held by Apex Court that to presume the appellant guilty unless he proved innocence was not the correct approach to the appreciation. The suspicion, however grave, cannot take the place of proof. Again, in case of EBENEZER Rubbers Ltd. v. CCE, Ahmedabad ,Oudh Sugar Mills Ltd. v. Union of India 1976 Cen-Cus 81D (SC) : ECR C 198 SC : 1978 ELT (J172) held that when charges are only in the realm of possibility such charges cannot be sustained. Relying on the Hon'ble Apex Court judgement in case of I. Naidu and Radha Krishan v. State of U.P. , Tribunal in case of Sharad Chander Bhandari v. Collector of Customs, Indore 1991 (33) ECR 474 held that suspicion is no proof as the Department has not been able to show any evidence which will go to prove that goods in question were in exclusive possession of the appellants.

17. On the other hand, this case would appear to be covered in favour of the respondents by the Tribunal's order in case of Uma Textiles v. Collector of Customs where on more or less similar set of facts, benefit was given to the appellants. In that case, an offer to supply 50 tonnes of viscose fibre had been made by suppliers.

However, after the goods were exported the appellants were informed after the shipment of the goods they had found some bales of polyester weighing about 48

tonnes had been shipped as these were similar in appearance and they have asked their Honkong Office to draw documents for viscose fibre only. They asked appellants either to return the goods or to remit the difference of amount. The appellants after receiving letter dated 14.8.1985 from the supplier had informed the Asstt. Collector vide their letter dated 21.10.1985 as to what had happened and asked for return of the entire lot. Giving benefit to the appellants, the Tribunal held that suspicion, however grave, cannot take the place of proof as no documents to prove the manipulation of the transaction to import the goods had been produced.

18. The fact that another buyer of these goods was in correspondence much before the containers were opened in India and the confirmation by the supplier himself that wrong goods have been sent would by itself prove the bona fides of the respondents. This is supported by the evidence in the form of wrong seal numbers relating to consignments and, as stated earlier, it is seal number which is an absolute guarantee of the identity of the goods in case of containerized cargo traffic. We have the evidence produced by the supplier, evidence in the form of fax messages much before the date of detection about wrong seal number, attestation by the Embassy of India, a Government agency, certifying about fax messages received and wrong shipment of the goods.

In fact, all the evidence, as the Ld. Advocate contended during hearing, which the respondents could have conceivably procured had been produced and, as against this, there is only presumption without any evidence against the respondents based on suspicion that they must have engineered evidence much before the actual landing of goods in India, all based on suspicion.

19. Between "may have happened" and "must have happened" there is a long distance to travel and even if, in a quasi-judicial proceedings every inch of such distance is not expected to be covered by unimpeachable evidence, it is required nevertheless to be covered, even according to the Doctrine enunciated by the Hon'ble Apex Court in Bhoormal's case, by Preponderance of Probability. Such preponderance of probability, considering the evidence produced, is lacking. Suspicion, as reiterated by Tribunal in case of Uma Textiles supra, is not proof.

No verdict of "Guilty" can be returned on mere suspicion.

20. In the result, for the reasons mentioned hereinbefore, 1 reject the Revenue Appeal and uphold the impugned order.

In view of the difference of opinion between the Members, the matter is referred to the Hon'ble President for referring the case to the Third Member for deciding the difference of opinion in terms of Section 129C(5) of Customs Act, 1962.

Whether the appeal of the Revenue is required to be allowed in terms of the order passed by the Member (Judicial)? The Revenue appeal is required to be rejected in terms of the order proposed by the Member (Technical)? Sd/- Sd/- (Shiben K. Dhar) (S.L. Peeran) Member (T) Member (J) Dt. 20.11.1996 Dt. 20.11.1996 21. The following difference has been referred to me for decision in terms of Section 129-C(5) of the Customs Act, 1962: Whether the appeal of the Revenue is required to be allowed in terms of the order passed by the Member (Judicial) The Revenue appeal is required to be rejected in terms of the order proposed by the Member (Technical)? 22. I have heard Shri K.K. Jha, learned SDR and Shri L.P. Asthana, learned Counsel and perused the records.

The facts of the case are already set out in the referring order and are, therefore, not repeated. The two issues which were framed by the Adjudicating authority in the impugned order and which have been decided both by the Collector of Customs and by the Tribunal, are as follows:

(1) Whether the impugned goods which are the subject matter of this case, have been sent by the supplier to the importer through a genuine mistake in view of the goods actually ordered by the importer; and

(2) If so, can the importer be allowed to re-export the goods to the supplier without any penal action under the Customs law?

23. I shall first take up the plea of genuine mistake in supply of the goods to the respondents herein. Right from the beginning, the respondents have maintained that the consignment which arrived was not the consignment that had been ordered since the seal numbers mentioned in the documents does not tally with

the seal numbers found on the container which arrived in India. The two seal numbers as per the Bill of Lading are

(1) 194167 and

(2) 196703 while the seal numbers actually found are

(1) 34311 and

(2) 34349. The seal numbers as found on the containers correspond to the seal numbers mentioned in the fax dated 2.4.1991 from the suppliers M/s Abu Shanab Metals Establishment, Jordan to M/s Metall Service, Engenhardt, West Germany, the German supplier (Page 175-A, 176-A and 177-A of the paperbook). The discrepancy in the seal numbers clearly lends credence to the respondents case that the goods which actually arrived were not meant for them and there was a mistake in the contents of the containers. Since the respondents came to know about the variation in seal numbers from their Customs House Agent, who found the variation at the time of inspection of the containers, they immediately got in touch with the supplier on 1.11.1991 (before the actual examination of the goods on 6.11.1991).

That the fax dated 1.11.1991 was sent by the respondents, has been noted by the learned Member (Judicial) at page 33 of his order and by learned Member (Technical) in para 13 at page 48. The original of this fax was seen by the Indian Embassy, Attache (CONS) who has attested the fax as a true copy on 12.2.1992 (Page 103 of the paperbook). The MTNL has also confirmed that this fax had passed through GATEX on 1.11.1991.

The date of attestation by MTNL i.e. 6.2.1992 however, which is relied upon by the learned SDR to contend that the fax dated 1.11.1991 is a fabricated document, is not material in view of the fact that both the learned Members agree that the fax was actually sent. Further, the Revenue has not taken the plea that the fax is a manipulated document and therefore, I am inclined to agree that the learned Member (Technical)'s findings in para 10 that in the absence of any evidence produced by the Revenue to show that the Certificate of the Indian Embassy was

forged, such a ground cannot be pressed into service at the above stage. In addition, the Embassy of India, vide certificate dated 29.12.1992 (page 179) had examined the original file dealing with the two consignments - one meant for Germany and one meant for India and confirmed that the consignment meant for Germany was wrongly sent to Bombay. My attention has also been drawn to the various faxes and letters sent by the supplier to the respondents and the Commissioner of Customs where they repeatedly confirmed that there was a mistake in shipment and that the supplier was zealously pursuing the matter of re-export of the goods with the Customs authorities. These letters and faxes have been referred to in para 12 of the order recorded by the learned Member (Technical). The learned Member (Technical) has also clearly set out the significance of seal numbers in para 14 of his order and noted that once the seal numbers differ, as in the present case, the consignment itself would be different. The respondents have produced sufficient evidence in the form of fax messages about the wrong seal numbers, attestation by the Embassy of India etc. in support of their plea of mistake in shipment. On the other hand, the Revenue has not produced adequate evidence to dislodge or disclaim the evidence adduced by the importers. I, therefore, agree with the finding contained in para 19 of the order of learned Member (Technical) that preponderance of probability of contravention of law is lacking in this case where the burden to prove the offence of mis-declaration is upon the department since this is not a case attracting the provisions of Section 123 of the Customs Act, 1962, as neither burners nor brass scrap are covered under that section nor are specified in any Notification issued under that section. Since the burden of proving mis-declaration has not been discharged by the department, I agree with the learned Member (Technical) that the impugned goods were sent by mistake to the importer/respondents and therefore, should be permitted to be re-exported without any fine or penalty.

24. On the question as to whether the goods are brass scrap or not, I find that the NARI specifications do not require that something can be considered as a brass scrap only if it is a mixture of brass casting, rolled brass, rod brass, tubing etc. as has been held by the Member (Judicial). The NARI circular noted indicates that brass cutting, rolled brass can be considered as brass scrap provided it is free of manganese bronze, aluminium bronze, unsweated radiators or radiator parts or

iron excessively dirty or eroded material. The examination report of the consignment in question clearly shows that the goods were 'Castings of brass burners in finished and semi-finished condition permanently without holes....' Therefore, the goods could not have been used as such i.e. they could not have been used as brass burners in the form in which they were imported and therefore, do not conform to the definition of scrap contained in Note 6(a) of Section XV of the Customs Tariff Act, 1975 which refers to metal waste and scrap from the manufacture or mechanical working of metals and metal goods, definitely not usable as such.... The NARI specification and the definition of scrap in the Customs Tariff Act have been discussed by the learned Member (Technical) in paras 1 to 6 of his order with which I see no reason to differ. I also note the submission of the learned Counsel for the respondents that the value as given by M/s Sunflame Industries in their opinion dated 16.1.1992 (page 63 of the paperbook) corresponds to the value of scrap for which the respondent has given evidence at page 114 and 132-A, 132-B of the paperbook. Hence the view expressed by the learned Member (Technical) that the goods are brass scrap and that the department has not discharged the burden of proving that the goods are other than scrap, is concurred with.

In the light of the above, I agree with the order proposed by Learned Member (Technical).

The file may now be placed before the referring Bench for passing majority order. Dt. 15.1.1997 Member (J) In terms of the Majority Order, the impugned order is upheld and as a consequence Revenue Appeal is dismissed.

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