SGA
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"Taxes are what we pay for a civilized society."

— Oliver Wendell Holmes Jr

NOMINAL INDEX

NEWS OF YOUR INTEREST

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News From Court Rooms

CESTAT, KOLKATA : Central Excise : Water Cooling System structure assembled at site and firmly embedded/attached to the concrete pillar becomes immovable during assembling and cannot be considered as marketable goods attracting central excise duty. (***Shamraj Engineering Works – August 12, 2016***).

ALLAHABAD HC : UP VAT : In the case of replacement of vehicle spares during the warranty, the manufacturer is the warrantor and the consumer is warrantee to whom the warrantor has made a statement or representation with regard to his product i.e. motor vehicle. Thus, the manufacturer being warrantor has made certain promise with regard to its product to consumers (warrantee) called warranty. The respondent assessee has not given warranty to consumers. Supply of parts by him is a sale for consideration received by him through credit notes from manufacturer is liable for payment of VAT. Revision allowed (***Maskat Motors Pvt. Ltd – December 8, 2016***).

DELHI HC : Service Tax : Although the non compliance with Section 78 of the Finance Act, 1994 does not per se invalidate the penalty, at the same time and also that the appellant had deposited a substantial amount at the stage of adjudication and did not contend that it was not liable. The appellant has the option to deposit the balance service tax together with accumulated interest and penalty of 25% of the entire tax due, within the period indicated in the third proviso to Section 78(1). (***Future Link India – December 6, 2016***)

PATNA HC : The law on this point is also very much clear, as held in the several decisions that a subsequent reversal of legal position by the judgment of the Supreme Court does not authorize the Department to reopen the assessment which stood closed on the basis of law at the relevant time. [2] There must be reason to believe that there has been under-assessment or escaped assessment, etc. and as has been held in the case of Kelvinator (supra) by the Apex Court, it should not be a mere change of opinion, otherwise it would amount to arbitrary exercise of power by the assessing officer to reopen the assessment. (***Samsung India Electronics Pvt. Ltd. 14/12/2016***)

DELHI HC : Service Tax : Although the non compliance with Section 78 of the Finance Act, 1994 does not per se invalidate the penalty, at the same time as appellant had deposited a substantial amount at the stage of adjudication and did not contend that it was not liable. The appellant has the option to deposit the balance service tax together with accumulated interest and penalty of 25% of the entire tax due, within the period indicated in the third proviso to Section 78(1). (***Future Link India – December 6, 2016***)

MADRAS HC : Central Excise : - Penalty for evasion of duty due to under billing can be imposed on the partner as well as the partnership Firm simultaneously and of course imposition of penalty both on the Firm and its partners depends upon the facts of each case. (***N Chittaranjan – December 2, 2016***).

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SUBJECT INDEX

Issue 1
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PUNJAB & HARYANA HIGH COURT

CWP NO. 10021 OF 2016

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SHRI LAKSHMI STEELS
Vs
UNION OF INDIA AND OTHERS

RAJESH BINDAL AND HARINDER SINGH SIDHU, JJ.

23rd December, 2016

HF ▶ Assessee

Port Trust cannot claim demurrage for detention of goods by Customs but Customs and DRI will have to bear the charges of shipping line if the consignments are not detained in a bonafide manner

CUSTOMS – DETENTION – COLD ROLLED SHEETS/COILS – NON-CLEARANCE OF GOODS BY CUSTOMS AFTER FILING OF BILL OF ENTRY – INSTRUCTIONS FROM DRI – NON-EXAMINATION OF GOODS FROM PROPER LAB FOR A LONG TIME – CONSIGNMENTS CONTINUED TO BE DETAINED EVEN AFTER REPORT FAVOURING IMPORTER RECEIVED – NO EFFORTS MADE FOR DE-STUFFING OF GOODS – GOODS ALSO NOT RELEASED ON PROVISIONAL ASSESSMENT – DETENTION AND DEMURRAGE CHARGES CONTINUED TO SPIKE EVEN EXCEEDING THE VALUE OF GOODS – GOODS FOUND TO BE DECLARED CORRECTLY AFTER TESTING GOT DONE BY HIGH COURT – GOODS DIRECTED TO BE RELEASED ON PAYMENT OF DUTY AS PER DECLARATION MADE BY IMPORTER – DETENTION CHARGES OF SHIPPING LINE TO BE BORNE BY CUSTOMS/DRI – CAN SEEK WAIVER FROM SHIPPING LINE – DEMURRAGE CHARGES NOT PAYABLE TO PORT TRUST IN VIEW OF HANDLING OF CARGO IN CUSTOMS AREA REGULATIONS, 2009 – ACTION OF OFFICERS FOUND NOT BONAFIDE – COSTS IMPOSED TO BE RECOVERED FROM GUILTY OFFICERS - *SECTIONS 7, 8, 45, 49, 141, 157, 159, 160 OF CUSTOMS ACT, 1962; SECTIONS 47A, 48, 53, 54, 58, 59, 111 OF MAJOR PORT TRUST ACT, 1963; RULES 2, 4, 5, 6, 7, 9 OF HANDLING OF CARGO IN CUSTOMS AREA REGULATIONS 2009; CIRCULARS DATED 23.03.2009, 29.12.2011*

Facts

The petitioner importer had imported three consignments of goods, i.e. imported defective/secondary Cold Rolled sheets/coils from South Korea for which three Bills of Entries were filed on 4.12.2015, 11.12.2015 and 29.12.2015.

No action was taken by Customs for clearance of Bills of Entries submitted on 4.12.2015 and 11.12.2015. On 14.12.2015, a communication was received from DRI Ludhiana by Customs that the consignments be put on hold for 100% examination by DRI/Customs. Neither any action was taken for examination of consignments nor the importer was given an opportunity

for de-stuffing the goods to avoid demurrage and shipping line charges. The importer made request to the Customs for clearance of consignments on 22.12.2015 and 28.12.2015. Thereafter, the Bill of Entry for third consignment was filed on 29.12.2015. Since no action had been taken for clearance of either of the consignments, the petitioner-importer wrote a subsequent letter dated 30.12.2015 to DRI Ludhiana and Customs. Having failed to persuade, a writ petition was filed before the High Court. The Notice was issued by High Court and during the period interregnum, the sampling process was started which was completed on 11.01.2016.

The Chartered Engineer appointed by DRI submitted his Report dated 19.1.2016 alongwith a Test Report from Govt. approved laboratory suggesting that the goods imported were Cold Rolled sheets/coils and not Hot Rolled as suspected by DRI. It was, however, observed that there was some difference in thickness in 10% of the consignments. The said Report was ignored by the authorities and the samples were drawn and sent to Testing Lab, namely TCR Engineering Services Pvt. Ltd on 20.01.2016, which was received by it on 22.1.2016. The Lab opined that "Structure appears to be Hot Rolled condition" despite the fact that said Lab did not have the facility for testing as to whether the goods were Hot Rolled or Cold Rolled steel. The Report dated 28.1.2016 from TCR Engineering was received but was referred back to the Lab to clarify the Bill of entry No., which was not mentioned on the Report. Revised Report dated 17.02.2016 was received mentioning the Bill of Entry.

In the meanwhile, the petitioner was asked to furnish PD Bonds and Bank Guarantee vide letter dated 28.01.2016. However, the said letter was not served upon the petitioner but was handed over only during hearing in the High Court on 03.02.2016.

On 04.02.2016, Commissioner of Customs, Mumbai wrote to Deputy Commissioner of Customs, Mumbai informing that DRI Ludhiana had instructed on telephone to draw random samples of all the consignments and send the same for testing as to whether the subjected material is Hot Rolled or Cold Rolled which should be done under the guidance of Customs approved Chartered Engineer. The communication regarding furnishing of PD Bonds and Bank Guarantee was merely an eye-wash as the samples were again to be drawn. The contents of aforesaid letter also established the fact that the Reports received from the Labs were not informed by Customs to DRI Ludhiana.

Though TCR Engineering did not have complete facilities for testing of samples, but still relying upon the Report thereof vide communication dated 23.02.2016 by DIR Ludhiana, the goods pertaining to two bills of Entries dated 11.12.2015 and 29.12.2015 were seized on the allegation of mis-declaration of consignments being Cold Rolled steel, though it was opined by the Lab to be hot-rolled steel. On 7.3.2016, Customs informed the petitioner that on recommendation made by DRI, Ludhiana, the consignments are ordered to be released provisionally on payment of full Customs Duty of Rs. 73,44,970/-, preferential provisional safeguard duty of Rs. 45,75,661/- and on furnishing of Bond as per list attached. Goods were to be released after measurement of thickness by DRI Office. The earlier communication dated 28.01.2016 requiring the petitioner to furnish PD Bonds and Bank Guarantee was superseded despite there being no power of review or recall with the officers of the Department only with an objective to harass the petitioner.

Vide order dated 04.04.2016, the High Court in the pending writ petition directed to de-stuff the disputed consignment as the petitioner was incurring demurrage and detention charges but nothing was done as some dispute arose during the process between the authorities and the importer Since lot of developments had taken place during the earlier writ petition, petitioner sought permission to withdraw the petition with liberty to file the fresh one, which was granted vide order dated 09.05.2016.

After the filing of fresh writ petition, the dispute was still not clear as to whether the imported consignments were Hot Rolled or Cold Rolled sheets/coils. The High Court vide order dated

03.06.2016, directed to send the samples freshly drawn to Bokaro Steel Plant, Jharkhand for testing. The said Report was received for hearing on 08.07.2016 giving the opinion that material was Cold Rolled steel thereby vindicating the stand of petitioner-importer.

After the receipt of Report from Bokaro Steel Plant, the only pending issues were with regard to effect of thickness of imported material which could entail levy of small amount of additional Duty that too on part of the consignments and the claim of Port Trust and Shipping Line regarding detention and demurrage charges. The High Court passed an interim order dated 12.07.2016 directing the release of goods to petitioner on payment of Duty after adjusting the Duty already paid as the material was found to be Cold Rolled steel/sheets/coils. The issue regarding detention and demurrage charges was to be considered later. For certain disputed amount of Duty and Interest, the petitioner was directed to furnish Bank Guarantee. The said order was also not complied with as the Department raised some avoidable issues. Vide order dated 02.08.2016, the High Court comprehensively recorded as to what was to be done by each of the party before release of the goods. The order was challenged by Port Trust before Supreme Court and the matter was remanded back vide order dated 15.09.2016 for deciding the entire matter finally.

In the meanwhile, the imported consignments of the petitioner were finally assessed by Customs vide order dated 08.08.2016 and the petitioner paid the amount of Duty assessed but still the goods were not released. DRI, Ludhiana who was apparently inimical to the petitioner, directed the Customs to file appeal against the order of assessment before release of goods as the additional Duty found payable by Customs was only few thousand rupees in addition to the amount assessable as per Declaration made by petitioner.

On consideration of all the aspects, the High Court finally

Held:

1. ***Regarding de-stuffing of the goods***

The star point to be considered is that the goods were sought to be detained only to ascertain as to whether the material imported was Hot Rolled or Cold Rolled steel. Second issue sought to be raised subsequently was regarding thickness thereof. For the purpose of testing of the material, sampling could be done immediately after the bill of entry was furnished and the same should have been sent to the laboratory having facility for such testing. As is evident from the two reports on record, the testing took only 3 to 4 days. The thickness could also be tested simultaneously. It is not the case of the department that the goods imported by the petitioner were prohibited under any law. In case, there was some variation in thickness, additional duty of 0.63% was leviable, as claimed by the petitioner. As per the report of the Chartered Engineer, thickness of goods above 1 mm was only of 10% of the consignment. The goods imported were defective/secondary Cold Rolled sheets. There could be some variation in thickness. The whole process of testing and examination, which could be over within a week or 10 days of landing of goods at the port, was not completed even in months together. The correspondence between DRI, Ludhiana and customs went in circles. Even at the time of arguments, blame was sought to be put on each other, but the fact of the matter is that the petitioner cannot be said to be at fault for detention of goods. For that, DRI, Ludhiana and customs are to be blamed. Though there was no good reason for detention of goods for so long, if seen in the light of the instructions issued by the department, but still if required, the petitioners should have been given opportunity to get it de-stuffed immediately, which was not given immediately.

2. ***Responsibility for detention and demurrage charges***

In view of the enunciation of law by different High Courts, once it is found that detention of goods was not on account of any fault of the petitioner, rather, found to be illegal action on the port of DRI and customs, the petitioner cannot be burdened for detention and demurrage

charges and the liability has to be put on customs department, who shall be at liberty to seek waiver thereof.

3. Regarding application of the 2009 Regulations

Regulation 6(1) clearly provides that Customs Cargo Service provider shall, subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the proper officer. Section 111 of the 1963 Act gives power to the Central Government to issue any direction on questions of policy, which is binding on the Port Trust. No doubt, the 2009 Regulations have been framed by the Board, however, vide circular dated 23.3.2009 issued by the Government of India, Ministry of Finance (Department of Revenue), it is specifically provided that major ports, as notified under the 1963 Act and the airports constituted under the Airports Authority of India Act, 1994 will continue to be authorised as custodian under their respective Acts and the 2009 Regulations shall not impact their approval as a custodian. Port Trust will be required to discharge responsibilities cast upon them in terms of Regulation 6 of the 2009 Regulations. Non-charging of rent or demurrage charges for the period the goods are detained by customs officers is one of them. Answer to the issue raised by learned counsel for Port Trust that the 2009 Regulations framed by the Board cannot be taken to be a direction issued by the Government is taken care of by the circular dated 23.3.2009, which not only said about applicability of the 2009 Regulations but also exempted it from filing application. Merely because before issuing the instructions, hearing was not afforded to the Port Trust, as required under Section 111 of the 1963 Act is concerned, for that Port Trust can raise the grievance before the appropriate forum. The applicability thereof cannot be disputed.

The Authority, as constituted under the 1963 Act, is only meant to fix the rates to be charged by the port authorities. Under Section 53 of he 1963 Act, the Board can deal with only such cases which seek waiver of charges. In the case in hand, the direction of the Government is as a matter of policy, which is applicable uniformly in all cases, where detention of goods is by customs and the certificate is issued. It is not in dispute that in the case in hand, the certificate has been issued, hence, in terms of Regulation 6(1) of the 2009 Regulations, which are binding on the Port Trust, customs can waive off the demurrage charges.

4. Regarding malafide of respondent No.7-Santokh Singh Senior Intelligence Officer and respondent No. 8-Roopesh Kumar, Intelligence Officer, DRI.

Though the applications seeking to place on record the written statements are accompanied by affidavit of the respondent concerned, however, the facts stated in the written statements are not verified. The same have merely been signed by the respondents' concerned. Meaning thereby, the allegations regarding mala fide alleged against respondents No. 7 and 8 have not been denied by filing affidavit. This court is not going into much detail on this aspect, but it can safely be opined that the action was not bonafide, if not strictly mala fide. Things could have been taken in right perspective with positive attitude ensuring that neither the revenue suffers any loss nor the importer on account of merely delay of clearance of goods. The instructions issued by the department, time and again, were blatantly violated. The stand taken by the petitioner was vindicated when finally the goods were found to be Cold Rolled steel. It was never the case of the department that the goods imported were prohibited. The only issue raised about these being Hot Rolled or Cold Rolled steel or its thickness could be taken care of without any delay.

5. Payment of detention charges of Shipping Line

No doubt, the 2009 Regulations are not applicable on the Shipping Line, however, once it is found that detention of goods for inordinate period was not on account of any fault on the part of the petitioner, he is not liable to be burdened with that cost. It is only the DRI and customs,

who should bear the cost, demanded by the Shipping Line. It was so opined in Sanieev Woollen Mills' case (supra). The DRI or customs may get those charges waived off or reduced from the Shipping Line, however, whatever is payable in addition to the freight agreed between the importer and the Shipping Line shall be borne by DRI or customs.

It was pointed out at the time of hearing that detention charges demanded by the Shipping Line has run into crores of rupees, which are even more than the value of the goods imported and may be even more the value of the container itself, which has been detained along with goods. The Department should examine the issue whereby the containers of the Shipping Line can be made free immediately by de-stuffing and the goods are shifted to other containers locally available in cases where the goods cannot be de-stuffed in a warehouse in open on account of fear of pilferage or damage, however, if not already dealt with, as nothing was pointed out in this regard at the time of hearing.

Conclusion

For the reasons mentioned above, the writ petitions are allowed. The amount of customs duty having already been paid by the petitioners, the respondents are directed to release the goods. The Port Trust cannot charge any demurrage in view of Regulation 6(1) of the 2009 Regulations, customs having issued the detention certificate. The detention charges demanded by the Shipping Line shall be borne by DRI and/or customs. However, they shall be entitled to get the same waived off or reduce from the Shipping Line. The petitioners shall be entitled to cost of Rs. 50,000/- each to be paid by the department, however, with liberty to recover from the guilty officer/official(s).

Before parting with the judgment, we would like to observe that our country imports goods worth about $ 33 billions annually and in large number of cases, the issue arises regarding alleged mis-declaration of the goods with reference to the declaration made in the bills of entry, but as is seen, the infrastructure in the form of laboratories or otherwise available with the department is lacking. That needs to be upgraded immediately to avoid any delay in clearance of goods or giving undue benefit to the unscrupulous importers on account of delay in the process.

Cases referred:

- *International Airports Authority of India and others v. Grand Slam International and others, (1995) 3 SCC 151*
- *Union of India and others v. R. C. Fabrics (P) Ltd, and another, (2002) 1 SCC 718*
- *Om Shankar Biyani v. Board of Trustees, Port of Calcutta and others, (2002) 3 SCC 168*
- *Continental Carbon India Ltd, v. Union of India. 2016 (335) ELT 423 (All.)*
- *Mumbai International Airport Pvt. Ltd, v. The Union of India, New Delhi and others, 2014-TIOL-1819-HC-MUM-CUS*
- *Delhi International Airport Private Limited v. Union of India and others, Delhi High Court in W.P. (C) 374 of 2014, decided on 27.10.2016*
- *Union of India v. Sanjeev Woollen Mills, 1998 (100) ELT 323 (SC);*
- *Shipping Corpn. of India Ltd. v. C. L. Jain Woollen Mills, 2001 (129) E.L.T. 561 (SC);*
- *Donald & Macarthy (P) Ltd. v. Union of India, 1997 (89) ELT 53 (Cal.);*
- *Sujana Steels Ltd v. Commr. of Cus. & C. Ex. (Appeals), Hyderabad, 2002 (141) ELT 343 (A.P.);*
- *Austin Engineering Co. Ltd. v. Commr. of Cus. (Exports), Chennai-I, 2009 (244) ELT 15 (Mad.);*
- *R.K. Enterprises v. Board of Trustees, Chennai Port Trust, 2010 (257)ELT 67 (Mad.);*
- *Ideal Sheet Metal Stampings & Pressings Pvt. Ltd. v. Union of India, 2012 (276) ELT 59 (Guj.);*
- *Champion Photostat Industrial Corporation v. Union of India, 2012 (276) ELT 33 (P&H);*
- *Express Clearing Agency v. Chennai Port Trust, 2016 (336) ELT 217 (Mad.);*
- *Paswara Chemicals Ltd. v. Union of India, 2016 (335) ELT 408 (All.);*
- *Shalini Shyam Shetty and another v. Rajendra Shankar Patil, (2010) 8 SCC 329*
- *Suren International Ltd. v. Union of India and others, 2011 (263) ELT 75 (Del.)*
- *Dewan Steel Industries v. Union of India and others, 2014 (304) ELT 520 (P&H)*

- *Kurmanchal Inst. of Degree and Diploma and Ors. v. Chancellor, M J. P. Rohilkahdn University and Ors., (2007) 6 SCC 35*
- *Union of India and others v. S. Srinivasan v. Union of India and others, (2012) 7 SCC 683.*
- *Sai Sales Corporation v. Union of India and another, CWP No. 9882 of 2006*
- *Worldline Tradex Pvt. Ltd. v. Commissioner of Customs (Import), 2016 (340) ELT 174 (Del.)*
- *Mumbai Port Trust v. M/s Inder Internationl and others, SLP (C) No. 23479-480 of 2016*

Present: Mr. Puneet Bali, Senior Advocate with
Mr. Saurabh Kapoor and Mr. Rishabh Kapoor, Advocates for
the petitioner in CWP No. 10021 of 2016 and
Mr. Akshay Bhan, Senior Advocate with
Mr. Saurabh Kakpoor and Mr. Rishabh Kapoor, Advocates
for the petitioner in CWP No. 10036 of 2016.

Mr. Arun Gosain, Advocate for Union of India.

Mr. Satish Aggarwala, Mr. R. K. Handa,
Mr. Pritpal Singh Nijjar and Mr. Aditya Singla, Advocates
for respondents No. 2, 3, 5 to 8-DRI.

Mr. Anshuman Chopra, Advocate for respondent No. 4.

Mr. Rajiv Atma Ram, Senior Advocate with

Mr. Ashim Aggarwal, Advocate for Mumbai Port Trust.

Mr. Rajinder Goyal, Mr. Kapil Arora and Mr. S.V. Singh, Advocates
for respondents No. 10 and 11 in CWP No. 10036 of 2016.

Mr. Amardeep Sheoran, Advocate and Mr. Akshay Jindal, Advocate
for respondent No. 12 in CWP No. 10036 of 2016 and for respondent No. 10 in
CWP No. 10021 of 2016.

Mr. Rajesh Sethi, Mr. Gaurav Kamboj, Mr. Tushar Gera,
Mr. Arun Biriwal, Advocates for respondent No. 13 in CWP No. 10021 of 2016
and for respondent No. 15 in CWP No. 10036 of 2016.

Mr.Sharad Aggarwal, Advocate for
respondents No. 13 and 14 in CWP No. 10036 of 2016 and
for respondents No. 11 and 12 in CWP No. 10021 of 2016.

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RAJESH BINDAL, J.

1. This order will dispose of CWP Nos. 10021 and 10036 of 2016, as common questions of law and facts are involved.

2. *Inter-alia*, the issue raised is regarding illegal detention of the goods imported by the petitioners and demand of detention and demurrage charges from the petitioners.

3. The facts have been taken from CWP No. 10021 of 2016, unless otherwise referred to.

Arguments of the petitioner

4. Learned counsel for the petitioner submitted that the petitioner imported defective/secondary cold rolled sheets/coils from South Korea with varied thickness vide commercial invoice dated 27.10.2015. Pre¬inspection report was also annexed with the documents showing the goods to be defective/secondary/cold rolled sheets/coils with other details. Preferential certificate of origin was also annexed, which entitled the petitioner to duty free import. It was in terms of Korea-India Comprehensive Partnership Agreement. In the packing list, attached with the invoice, same product details were mentioned. In the bill of entry dated 4.12.2015,submitted with the Customs at Mumbai, same description of goods was mentioned. The goods were not released. Vide letter dated 14.12.2015 from Directorate of Revenue Intelligence (for short, 'DRI') to the Commissioner of Customs (Import), Mumbai, request was made for putting on hold the import consignment of the petitioner as well as five other importers based at Ludhiana. The letter further provided that even in future, no import consignments of the firm be released without NOC from DRI. As the goods imported by the petitioner were not prohibited goods, request was made for provisional release thereof. A reminder to that effect was sent vide communication dated 22.12.2015 to the DRI and Customs. It was specifically mentioned in the letter that the goods may be released within 48 hours on provisional assessment. Early intervention was requested as the goods were incurring demurrage and detention charges. Vide communication dated 28.12.2015 from DRI to the Commissioner of Customs (Import), Mumbai, it was informed that consignment was put on hold on a specific intelligence that the firms had been importing goods to come out of the rigors of notification No. 02/2015 Cus (SG) dated 14.9.2015. It was requested that import consignments of Ludhiana based importers be examined 100% with the assistance of local Chartered Engineer pending custom clearance. The report of examination be prepared and copy be forwarded to DRI. It was also requested that photographs of the import consignments be taken. If the goods imported appeared to be offending the notification dated 14.9.2015, the same be dealt with under Section 110 of the Customs Act, 1962 (for short, 'the 1962 Act'). Proper samples be drawn and sent for testing to an authorised Government Laboratory. When nothing was done, the petitioner sent another reminder vide letter dated 30.12.2015 to DRI and Customs for provisional release of goods specifically pointing out that till date, the goods had not been examined. The delay was incurring demurrage and detention charges. It was followed by another reminder on 1.1.2016, when no action was taken by the Customs authorities in terms of the letter from DRI.

5. It was further argued that under these circumstances, the petitioner had no choice but to approach this court by filing CWP No. 572 of 2016—***M/s Shri Lakshmi Steels v. UOI and others***, in which notice of motion was issued for 11.1.2016. Prior thereto, without any intimation to the petitioner, Positive Material Identification test was got done by the customs authorities on 5.1.2016 with reference to bill of entry No. 3480776 dated 4.12.2015. He further submitted that it was only after filing of the writ petition by the petitioner in this court that the goods imported were got inspected from the Chartered Engineer. The inspection report dated 19.1.2016 has been produced on record. The inspection was done only in the presence of the customs officials under their guidance. The petitioner was not present. Despite this fact, the conclusion was that the goods were cold rolled defective sheets/coils, as was declared by the petitioner in the bill of entry. Despite this fact, the goods were not released.

6. The Chartered Engineer appointed by the customs, i.e., Rajendra S. Tambi to confirm the contents of the consignment sent the samples thereof for testing to Perfect Laboratory Services. Vide report dated 16.1.2016, it was opined that the material was cold rolled steel. On the basis of the report from the Laboratory, Chartered Engineer-Rajendra S. Tambi, vide his report dated 19.1.2016, pertaining to bill of entry No. 3749151, opined the consignment to be containing cold rolled steel. The report stated that the material meets the

requirement of IS:513 for cold rolled steel. To similar effect were the reports for other consignments. Though the reports dated 19.1.2016 were received by the customs and the DRI and the goods were found to be confirming to the declaration made by the petitioner, but still the consignments were not released.

7. Learned counsel further submitted that though in the letter initially written by the DRI to the Customs at Mumbai, names of seven importers with similar allegations were mentioned and their import consignments were put on hold, but despite the receipt of reports from the Chartered Engineer in January, 2016, the consignment of the petitioner was not released, whereas DRI directed for release of consignments pertaining to M/s Singal Overseas, M/s Narayan Steels and M/s Hinkan Exports. All the importers were identically placed.

8. Despite the fact that customs authorities had already got the goods imported by the petitioner tested from Perfect Laboratory Services and the report from Chartered Engineer-Rajendra S. Tambi dated 19.1.2016 had been received, still samples were sent by the Commissioner of Customs, Mumbai vide letter dated 15.1.2016, signed on 20.1.2016, to TCR Engineering Services Pvt. Ltd. for testing and certifying the composition of the goods and also whether it was cold rolled or hot rolled. This was a mala fide action, as the letter was sent after receipt of report from the Chartered Engineer opining the consignment to be cold rolled steel. The object was to harass the petitioner. The samples so sent were not drawn in the presence of the petitioner. He was not even aware of the process followed. Vide report dated 28.1.2016, TCR Engineering Services Pvt. Ltd. opined that the structure appeared to be hot rolled. Method of testing was also specified. No bill of entry was mentioned. Twenty days thereafter, revised report dated 17.2.2016 was received from the same laboratory mentioning the bill of entry number. It further mentioned that the samples were received in the laboratory on 22.1.2016, i.e., after the earlier report had already been received. To similar effect were two other reports of TCR Engineering Services Pvt. Ltd.

9. Learned counsel for the petitioner referred to order dated 3.2.2016, passed by this court in CWP No. 185 of 2016, in the case of M/s Inder International. Though by that time reports from Chartered Engineer- Raj endra S. Tambi and one from TCR Engineering Services Pvt. Ltd. were produced in court, nothing was pointed out regarding any order of detention having been passed.

10. Though the Commissioner of Customs passed order on 28.1.2016 directing production of PD Bond and bank guarantee for provisional release of goods, however, the copy was not supplied. It was supplied only in court at the time of hearing on 3.2.2016.

11. Letter dated 19.1.2016 from DRI to the Commissioner of Customs (Import), Mumbai was referred, directing release of goods on provisional assessment after drawing representative samples. The letter referred to an earlier letter from the customs authorities dated 14.1.2016 stating that report from the Chartered Engineer was received by the customs, but apparently the same was not communicated to DRI. Despite letter dated 19.1.2016 from DRI to Customs and after receipt of report from Raj endra S. Tambi, the goods were not released. As if the report from Chartered Engineer-Raj endra S.Tambi after testing from the laboratory was not sufficient, vide letter dated 4.2.2016, the Commissioner of Customs directed Deputy Commissioner of Customs, Mumbai that a telephonic communication has been received from Deputy Director, DRI, Ludhiana to draw random sealed samples of all the consignments to test as to whether the goods imported are hot rolled or cold rolled. The laboratory, to which the samples were to be sent for testing, was to be informed later on. The goods were to be released only after completing the process notified in the letter.

12. Vide communication dated 23.2.2016 (Annexure P-3) referring to the report from TCR Engineering Services Pvt. Ltd. opining that the consignment imported by the petitioner was hot rolled steel and not cold rolled, for alleged mis-declaration to avoid duty, the goods

were seized. The petitioner was informed to approach the competent authority for provisional release thereof in terms of Section 110A of the 1962 Act. With reference to the report from TCR Engineering Services Pvt. Ltd., he referred to the written statement (Annexure P-10) filed by the respondents in the earlier litigation, wherein it was stated that the laboratory did not have proper testing facility. Despite this fact, its report was relied upon ignoring the earlier report. He further submitted that the written statement filed in M/s Inder International case has been referred to. The cases of the petitioner and M/s Inder International were being taken up together. The position was identical.

13. Learned counsel then referred to a communication dated 7.3.2016 (Annexure P-19) from Commissioner of Customs (Export-I), Mumbai informing the petitioner that on recommendations made by DRI, Ludhiana, the consignment is being released provisionally subject to deposit of duty and furnishing of bonds. Lurther condition was put in that the goods will be released only after measurement of thickness of the imported goods by DRI office. The earlier order dated 28.1.2016 was superseded despite there being no power of review under the 1962 Act. The thickness was sought to be measured despite there being two earlier reports already available. The department had been changing its stand time and again. Sometimes, the issue was whether the goods imported were hot rolled or cold rolled steel and now the issue sought to be raised was regarding its thickness. Order dated 4.4.2016 passed in earlier CWP No. 572 of 2016 was referred to. The aforesaid petition was filed by the petitioner in the earlier round of litigation. In the aforesaid order, the customs authorities were directed to de-stuff the consignment, subject to petitioner's making necessary arrangement within one week. Sampling of the disputed consignments was to be done by the customs authorities in the presence of representatives of the DRI and the petitioner. When the petitioner approached the authorities for de-stuffing the goods, he was man-handled and de-stuffing was not permitted. He referred to affidavit of Shailesh M. Gondhalekar in the earlier round of litigation. The deponent therein was associate of Rajendra S. Tambi, who was Chartered Engineering. He stated on oath that he was pressurized by Santokh Singh, Senior Intelligence Officer and Roopesh Kumar, Intelligence Officer, to sign a statement that earlier samples were handed over to him outside the customs area. As the consignment had not been released by the authorities, to recover the charges, the shipping line notified the cargo for auction. Intimation was received by the petitioner vide letter dated 22.4.2016.

14. Learned counsel further submitted that earlier CWP No. 572 of 2016 filed by the petitioner was dismissed as withdrawn on 9.5.2016, in view of subsequent events with permission to file a fresh petition. Statement of the counsel for Customs and Mumbai Port Trust was recorded that the goods, de-stuffed or lying in the containers, will not be put to auction for one week. Thereafter, the present petition was filed. He referred to order dated 3.6.2016 passed by this court in the present writ petition directing for sending the samples for testing to Bokaro Steel Plant, Jharkhand, as the issue sought to be raised was regarding the goods being either cold rolled or hot rolled steel. The report was received from Bokaro Steel Plant, as is noticed in the order passed by this court on 8.7.2016. It was opined that the consignment contained cold rolled steel. On 12.7.2016, noticing the contentions raised by leaned counsel for the parties and finding that the stand of the petitioner was vindicated and the goods were not found to be mis-declared to the extent that these were found to be cold rolled steel, these were directed to be released on payment of duty due. The issue regarding demurrage and detention charges was to be decided later on. On 28.7.2016, learned counsel for the petitioner pointed out that the goods had not been released. On 2.8.2016, this court again ordered for release of the goods specifically directing the amount to be paid after adjusting the amount already deposited. The aforesaid order was challenged by the respondents before Hon'ble the Supreme Court in Special Leave to Appeal (C) No.(s) 23479-23480 of 2016— ***Mumbai Port Trust v. M/s Inder International and ors. Etc.***. Initially release of goods was

stayed, however, finally the matter was remanded back vide order dated 15.9.2016 for the case to be decided finally.

15. As the claim made by the petitioner regarding the goods being cold rolled steel was found to be correct after testing of the material from Bokaro Steel Plant, the customs authorities issued out of charge order on 8.8.2016 calculating the duty payable. Learned counsel referred to a communication dated 18.8.2016, which is in the form of detention/ demurrage certificate issued as per Handling of Cargo in Customs Area Regulation, 2009 (for short, 'the 2009 Regulations'), which was addressed to the Port Trust as well as the Shipping Line. It clearly mentioned that the goods detained vide bills of entry have been finally assessed on 8.8.2016. They were directed that the certificate be considered as per the 2009 Regulations. The certificate was issued with the approval of the Commissioner of Customs (Export-I). Despite the final assessment, the goods were still not released on account of the pending dispute regarding demand of detention and demurrage charges by the Port Trust and Shipping Line. The authorities refused to honour the detention certificate issued by the customs authorities.

16. With reference to the allegations of mala fide alleged against respondents No. 7 and 8, namely, Santokh Singh and Roopesh Kumar, learned counsel for the petitioner referred to the allegations contained in para Nos. 14 to 17 and 29 of the petition and submitted that there is no affidavit filed by them, against whom personal malice has been alleged. The allegations are deemed to be admitted. In fact, the entire fact situation in the case clearly establishes that the petitioner was harassed by the aforesaid two officers for ulterior motive. The petitioner had even made request for change of the aforesaid two officers, which was not acceded to. The conduct of the aforesaid two officers is established from the fact that initially the DRI raised the issue regarding import by seven parties, however, for five the procedure followed was different, whereas in the case of the petitioner, it was different. Their consignments were released without any testing or bank guarantee, merely on furnishing of bonds, though the suspicion raised initially was same. In fact, the petitioner was harassed merely because in the earlier litigation, the officers were summoned to be present in person in court. They were having a grudge. They need to be burdened with special costs so that they do not dare to harass any importer unnecessarily. The order should serve as a message. He further submitted that with the action of the aforesaid respondents, in fact, the petitioner has been made to suffer. He had raised loans from financial institutions, on account of non-payment thereof, his house was sought to be auctioned. The conduct of officials of the DRI is further evident from the fact that customs authorities being satisfied had finally assessed the duty after considering the report from Bokaro Steel Plant. Though DRI had not been able to specify any Government laboratory, still it was aggrieved against the order and directed the customs authorities to file appeal against their own order.

17. With reference to the provisions of the 1962 Act and the instructions issued by the customs authorities regarding release of goods or de-stuffing thereof, learned counsel for the petitioner referred to various Sections of the 1962 Act and the circular issued by the Government of India, Ministry of Finance on 13.2.2012 (Annexure P-5) directing all customs authorities for time-bound clearance of cargo from port/land customs stations etc. It clearly mentioned that despite earlier instructions issued on the subject, the same were not being followed resulting in undue harassment of the importers with levy of detention and demurrage charges. It further provided that where for justifiable reasons under exceptional circumstances, release of consignment is not considered advisable even on provisional basis, option must be given to the importer by sending intimation in writing to keep the goods in warehouses in terms of Section 49 of the 1962 Act. Any default by the officer was to be viewed seriously and accountability fixed. He referred to subsequent circular No. 22/2004-Cus. dated 3.3.2004 issued by the Central Board of Excise & Customs (for short, 'the Board') reiterating the same

view and further adding that even disputed or offending consignment should not be held up, unless the import is totally prohibited or banned under any law or where prosecution is contemplated. In other cases, the importer should be given option for provisional clearance/assessment, if the enquiry is going to take time. He further referred to instruction No. 0172006:CCO (D2) dated 22.8.2006 (Annexure P-20). In the aforesaid instructions, while referring to the order passed by this Court in CWP No. 9882 of 2006 regarding undue delay in clearance of goods without any valid justification, comprehensive instructions were issued, prescribing the procedure with regard to examination/assessment of the import goods for the purpose of speedy clearance of cargo under first and second appraisement systems. Any delay was to be taken seriously. If it is found to be necessary to detain the goods, the importer is to be informed in writing to enable him to shift the goods in a bonded warehouse under Section 49 of the 1962 Act. If assessment of bill of entry is not possible in the stipulated time, the procedure of provisional assessment can be invoked. The importer is to be informed in writing. The circumstances under which provisional assessment is not to be resorted to are also specified. Despite the aforesaid circular being there, neither the goods imported by the petitioner were provisionally assessed nor he was given option to get these de-stuffed for storage in a bonded warehouse. The goods imported were not prohibited under any law. The only dispute sought to be raised was whether the material was hot rolled or cold rolled steel, which could be ascertained by drawing samples and getting those tested from any Government laboratory. The conduct of the officers shows that by not following the instructions of the department, they have made themselves liable for even departmental action.

Regarding demurrage and rent charges

18. Learned counsel further submitted that in the facts and circumstances of the case, the petitioner is not liable to pay any demurrage charges to the Port Trust, or rent or any other charges except the freight to the shipping line. Section 2(11) of the 1962 Act defines 'customs area'. Section 2(12) defines 'customs port'. Section 2(13) defines 'customs station'. Mumbai Port has been notified as 'customs port' under the Indian Ports Act, 1908 (for short, 'the 1908 Act'). Section 7 of the 1962 Act enables the Board to appoint any port or airport to be customs port. Section 8 of the 1962 Act enables the Principal Commissioner of Customs or Commissioner of Customs to approve any place to be customs port and specify the limits in customs area. Section 45 of the 1962 Act provides that all imported goods in customs area shall remain in custody of such person, as may be approved by the Principal Commissioner of Customs or Commissioner of Customs, unless these are cleared. The person having custody of the imported goods in a customs area is required to keep a record thereof and shall not permit such goods to be removed unless the permission is granted by the competent authority. Section 49 of the 1962 Act provides that if the goods cannot be cleared within reasonable time, pending clearance, the same can be permitted to be stored in a warehouse. Section 141 of the 1962 Act provides that conveyances and goods in a customs area shall be subject to control of officers of customs. Such goods are to be handled in the manner prescribed. The Board is authorised to issue instructions to the officers for the purpose of implementation of the 1962 Act, under Section 151 A. Section 156 thereof enables the Board to make Regulations. Section 159 provides for placing the Rules and the Regulations so framed before each House of the Parliament.

19. Learned counsel for the petitioner referred to Section 2(j) of the Major Port Trusts Act, 1963 (for short, 'the 1963 Act'), which defines that “Indian Ports Act” means Indian Ports Act, 1908. Section 2(aa) of the 1963 Act defines that “Authority” to mean the Tariff Authority for Major Ports constituted under Section 47A of the Act. Section 2(b) of the 1963 Act defines “Board” to mean the Board of Trustees, as constituted under the Act. Chapter VI thereof provides for imposition and recovery of rates at ports. Section 48 of the 1963 Act, inter alia, provides that the authority shall determine the scale of rates chargeable for various services,

which include charges for wharfage, storage or demurrage of goods. Section 53 of the 1963 Act grants power to the Board to grant exemption from payment of any charges. Section 54 of the 1963 Act enables the Central Government by an order to cancel any of the scale in force or modify the same. The charges are to be paid before removal of goods in terms of Section 58 thereof. The Board has lien on goods for recovery of any amount as per Section 69 of the Act. Section 111 of the 1963 Act enables the Central Government to issue any direction on the question of policy to the Board, which is binding on it.

20. It was submitted that the issue regarding charging of demurrage by the Port Trust and the shipping line had been getting attention of the Government and the Courts from time to time. There have been numerous cases where on account of default on the part of the authority, there was abnormal delay in clearance of goods. The importers/exporters were held liable to pay demurrage/rent charges. The Courts in various cases had put that burden on the customs. The matter was considered by the Public Accounts Committee. After carrying out necessary amendments in the 1962 Act, Handling of Cargo in Customs Area Regulation, 2009 were framed in exercise of powers conferred under Section 141(2) read with Section 157 of the 1962 Act by the Board. The 2009 Regulations define 'customs cargo service provider'. The 2009 Regulations are applicable for handling of import and export of goods in the customs area. It has retrospective application in the sense that all persons, who were already providing cargo service, were deemed to be doing so under the corresponding provisions of the 2009 Regulations. They were to comply with the conditions laid down in the 2009 Regulations within certain specified time. Regulation 5 of the 2009 Regulations lays down certain conditions to be fulfilled by the customs cargo service provider for custody and handling of goods. They were to execute bond and furnish bank guarantee/cash deposit of the amount specified, however, condition of furnishing of bank guarantee/cash deposit was not applicable to the ports notified under the Major Ports Act, 1962 (38 of 1963) or the State Government, Central Government or their undertakings. Regulation 6 of the 2009 Regulations provides for responsibilities of the customs cargo service provider. Clause (6)(1) thereof provides that subject to any other law for the time being in force, the customs cargo service provider shall not be entitled to charge any rent or demurrage on the goods seized or detained or confiscated by the proper officer. Other provisions provide for filing of application for grant or renewal of licence. The explanatory memorandum attached with the above Regulations mentions that the 2009 Regulations have been framed to comply with the recommendations made by the Public Accounts Committee (2005-2006) to the Government to formulate appropriate provisions in this regard. The object is to provide for a comprehensive mechanism for handling of goods in a customs area. It also provides for the conditions and responsibilities of the persons handling consignments and adequate control over them. The 2009 Regulations were notified on 17.3.2009. It was further submitted that Section 159 of the 1962 Act provides that all Rules and 2009 Regulations framed under the 1962 Act are to be placed before both the Houses of Parliament. In the case in hand, the needful was done and there was no change proposed, hence, the same have force of law.

21. Immediately the issue arose as regards fulfilment of certain conditions laid down therein by the major ports, as notified under the 1963 Act and airports notified under the Airports Authority of India Act, 1994 (for short, 'the 1994 Act'). It was clarified by the Government of India, Ministry of Finance (Department of Revenue) vide M.F. (D.R.) Circular No. 13/2009-Cus., dated 23.3.2009 that all major ports notified under the 1963 Act and airports notified under the 1994 Act shall continue to be authorised to function as custodians under their respective Acts and the 2009 Regulations shall not impact their approval as a custodian. They were not required to make applications under 2009 Regulations 4 or 9 for approval or renewal, however, they were bound to discharge the responsibilities cast upon them, as specified in the Regulation 6 of the 2009 Regulations. It was further clarified therein that the

2009 Regulations supersede the instructions issued by the Board earlier on 14.12.1995 and 26.6.2002. He further referred to Public Notice No. 1 of 2001 dated 27.1.2011 and Public Notice No. 8 of 2011 dated 4.2.2011 issued by the Commissioner of Customs, Mumbai, which are in consonance with the 2009 Regulations and the clarification issued by the Government.

22. Time and again the importers/exporters had been raising the issue regarding delay in clearance of consignments, as a result of which they were held liable to pay demurrage/rent charges to the shipping line. Government of India, Ministry of Finance (Department of Revenue) issued instructions vide circular No. 22/2004-Cus., dated 3.3.2004. The instructions provide that except in the cases where offending consignment is prohibited or banned under any law or where prosecution is contemplated, it should be released on provisional basis as a matter of right. If not possible, it should be shifted to the customs warehouse. The matter was even considered by Hon'ble the Supreme Court, as is referred to in the instructions issued by Government of India, Ministry of Finance (Department of Revenue) vide circular dated 13.2.2012. The instructions mention that the Board had taken serious note of the issue and stated that where for justifiable reasons, in exceptional situation, release of consignment is not advisable even on provisional basis, option must be given to the importers/exporters by sending intimation in writing to keep the goods in warehouses. Non-compliance of the instructions were to be viewed seriously. The instructions dated 14.3.2012 were issued by the Government of India, Ministry of Finance (Department of Revenue) with reference to the 2009 Regulations. It noticed that in large number of cases, the containers detained by DRI etc. are not released even after lapse of considerable time, which resulted in hardship to the importers and all concerned. It was felt that one of the reasons for longer detention can be lack of adequate space for storing such goods in a customs area. It was desired that customs cargo service provider should provide sufficient space for storage of goods after de-stuffing the containers.

23. It was submitted that despite there being enabling provisions under the 1962 Act for de-stuffing of the goods and number of instructions issued by the Govemment/Department on the issue, the petitioner was not given an opportunity to de-stuff the same and store in a warehouse, which entails small amount of storage charges as compared to demurrage and other charges payable.

24. He further referred to the stand taken by the Customs and DRI before Hon'ble the Supreme Court that Port Trust is bound by the 2009 Regulations, though the Port Trust claims that it is not a customs cargo service provider in terms of the 2009 Regulations. The stand is totally misconceived, as every one operating in customs area and providing various services is bound to comply with the conditions as laid down in the 2009 Regulations, which prior to that were specified in various instructions.

25. Distinguishing the judgment of Hon'ble the Supreme Court in ***International Airports Authority of India and others v. Grand Slam International and others,*** (1995) 3 SCC 151, it was submitted that considering the fact situation at that time, Hon'ble the Supreme Court opined that merely by issuing instructions, the customs authorities cannot direct the Port Trust for not levying demurrage charges. It specifically noticed that there were no Regulations framed by the competent authority in this regard. The position has changed now after framing of the 2009 Regulations. The judgments of Hon'ble the Supreme Court in ***Union of India and others v. R. C. Fabrics (P) Ltd, and another,*** (2002) 1 SCC 718 and ***Om Shankar Biyani v. Board of Trustees, Port of Calcutta and others***, (2002) 3 SCC 168 were also distinguished while stating that these were also the cases before framing of the 2009 Regulations or the specific issue was not raised therein.

26. In support of his arguments, he referred to a Division Bench judgment of Allahabad High Court in ***Continental Carbon India Ltd, v. Union of India,*** 2016 (335) ELT 423 (All.) to

submit that applicability of the 2009 Regulations regarding non-levy of demurrage charges by the licensees in the port area was upheld. The submission is that Port Trust also sails in the same boat. They are all customs cargo service providers. The only difference is that the State Government or the Central Government or the authorities constituted by them had been exempted from filing any application for grant or renewal of licences or furnishing any bank guarantee. It will not mean that they are not bound by the conditions laid down in the 2009 Regulations. The judgment of Bombay High Court in ***M/s Mumbai International Airport Pvt. Ltd, v. The Union of India, New Delhi and others***, 2014-TIOL-1819-HC-MUM-CUS was cited, wherein vires of the 2009 Regulations were challenged by a licensee customs cargo service provider, which were upheld. SLP (C) No. 3420 of 2015 filed against the aforesaid judgment was withdrawn, however, the question of law was left over. The judgment of Delhi High Court in W.P. (C) 374 of 2014— ***Delhi International Airport Private Limited v. Union of India and others***, decided on 27.10.2016 was also cited, where challenge to the vires of the 2009 Regulations was negated.

27. Learned counsel further referred to the following judgments by different courts opining that on account of default on the part of the customs authorities, they were liable to pay demurrage and detention charges etc.:

(i) Union of India v. Sanjeev Woollen Mills, 1998 (100) ELT 323 (SC);

(ii) Shipping Corpn. of India Ltd. v. C. L. Jain Woollen Mills, 2001 (129) E.L.T. 561 (SC);

(iii) Donald & Macarthy (P) Ltd. v. Union of India, 1997 (89) ELT 53 (Cal.);

(iv) Sujana Steels Ltd v. Commr. of Cus. & C. Ex. (Appeals), Hyderabad, 2002 (141) ELT 343 (A.P.);

(v) Austin Engineering Co. Ltd. v. Commr. of Cus. (Exports), Chennai-I, 2009 (244) ELT 15 (Mad.);

(vi) R.K. Enterprises v. Board of Trustees, Chennai Port Trust, 2010 (257)ELT 67 (Mad.);

(vii) Ideal Sheet Metal Stampings & Pressings Pvt. Ltd. v. Union of India, 2012 (276) ELT 59 (Guj.);

(viii) Champion Photostat Industrial Corporation v. Union of India, 2012 (276) ELT 33 (P&H);

(ix) Express Clearing Agency v. Chennai Port Trust, 2016 (336) ELT 217 (Mad.);

(x) Paswara Chemicals Ltd. v. Union of India, 2016 (335) ELT 408 (All.);

28. Regarding release of goods after the order was passed by this court on 4.4.2016, learned counsel for the petitioner referred to a letter dated 4.4.2016 addressed to the customs and 7.4.2016 addressed to the Port Trust (CM No. 13183 of 2016). The goods were not released as the Port Trust was asking for substantial charges on account of demurrage and rent. He further referred to affidavit dated 26.10.2016 of G. Manigandasamy, Deputy Commissioner of Customs, Mumbai (CM No. 14102 of 2016). He mentioned in the aforesaid affidavit that customs received a letter from DRI, Ludhiana dated 14.12.2015 on whatsapp. The only direction was to put the consignment on hold as these required 100% examination. Vide letter dated 28.12.2015, the reason assigned by DRI Ludhiana for holding release of consignment was with reference to notification No. 2/2015-Cus (SG) dated 14.9.2015. The direction was for examination by the officer of customs with assistance of local Chartered Engineer and

goods were to be dealt with in terms of the provisions of Section 110 of the 1962 Act. The samples were to be drawn and sent to authorised Government laboratory. Though the goods were detained, however, despite circulars issued by the customs, the petitioner was not offered the facility of warehousing the goods after de¬stuffing, rather the process of exchange of letters between DRI and customs continued. Letter dated 25.1.2016 written by DRI, Ludhiana to customs to offer warehousing facility to the petitioner has been referred to. It was claimed that customs received the letter on 25.2.2016 and on the same day, the petitioner was offered warehousing facility, which was two months after the receipt of consignment. As the matter was pending before this court, with a view to apprise the court of the latest status, a letter was written by DRI to customs on 5.3.2016 for passing provisional release order after measurement of thickness of the imported consignment in terms of para 6 (iii) of the letter dated 26.2.2016. Though in the letter dated 5.3.2016, DRI, Ludhiana directed customs regarding provisional release of the consignment after measuring thickness, the petitioner vide letter dated 7.3.2016 was informed that consignment is seized and the same is ordered to be released provisionally on payment of duty and on compliance of other conditions. Letter dated 27.9.2016 (Annexure R-4/21) from DRI, Ludhiana to customs was referred to, whereby customs was directed to assess the consignment provisionally.

Mala-fide

29. Learned counsel for the petitioner referred to a letter dated 26.2.2016 (CM No. 13183 of 2016) addressed to the Chairman of the Board, Director General of Revenue Intelligence and other senior officers for transfer of investigation from Santokh Singh and Roopesh Kumar (respondents No. 7 and 8), who had been harassing the petitioner for ulterior motive. He further referred to letter dated 18.8.2016 from customs to Port Trust and Shipping Line informing that the goods have been finally assessed on 8.8.2016 and that detention/demurrage certificate may be considered as per the 2009 Regulations. He further submitted that as per the 2009 Regulations, Port Trust charges can be waived off as the Port Trust is bound by the directions of the customs, however, there is nothing about the charges of Shipping Line. As DRI, Ludhiana and customs are responsible, they should be burdened to bear those charges.

30. Learned counsel referred to various paragraphs in the writ petition, where specific allegations of mala fide have been levelled against respondents No. 7 and 8, namely, Santokh Singh and Roopesh Kumar and submitted that there is no affidavit filed by them in response to those allegations, meaning thereby there is no denial. Written statement has been filed by Varinder Kaur, Deputy Director, DRI on behalf of all the respondents. He further submitted that after hearing in the petition had already commenced, application had been filed by respondents No. 7 and 8 to place on record of the written statement, which is neither in the form of affidavit nor has been verified. The same is to be treated as a waste paper.

Additional arguments in CWP No. 10036 of 2016

31. Mr. Akshay Bhan, learned senior counsel appearing for the petitioner in CWP No. 10036 of 2016 submitted that Section 110 of the 1962 Act talks of seizure or confiscation of goods. Withholding or detention of goods are not the terms used in the 1962 Act. In the case in hand, all actions have been taken on the directions of DRI, which is not the controlling authority, rather, it shows the intention to harass the petitioner with ulterior motive. The goods imported were not prohibited under any law. Two of the consignments were found to be as per the declaration made in the bills of entry, but still not released. On account of mala fide intention of the officers, the amount of detention and demurrage charges has exceeded the value of goods. In fact, the petitioner has been put to a situation that his bank account has been declared as Non-Performing Asset and his property has been put to sale. Initially, consignments of seven importers were put on hold. The consignments of five of them were

released immediately, whereas the petitioner was being harassed for no rhyme or reason. If the issue was only whether the goods were hot rolled or cold rolled steel or about the thickness thereof, the same could very well be released on provisional basis immediately on landing subject to testing in a Government laboratory. Initial report by the Chartered Engineer appointed by the customs was in favour of the petitioner, however, the same was discarded without any reason. The second report was taken from a laboratory, which did not have the facility for testing. It opined the material to be hot rolled steel. When finally this court got the same tested from Bokaro Steel Plant, Jharkhand, the opinion was in favour of the petitioner. The stand of the petitioner was vindicated, which clearly establishes that very initiation of proceedings against the petitioner was bad. He further submitted that against the allegations of mala fide levelled in the petition, there is no specific affidavit filed by any of the respondents impleaded by name, hence, those allegations are established.

Arguments of respondents No. 10 and 11-Shipping Line

32. Mr. Rajinder Goyal and Mr. Kapil Arora, learned counsel for respondent No. 10 submitted that there are no allegations made against the Shipping Line in the entire petition except at some places, where generally all the respondents have been referred to. Shipping Line has otherwise nothing to do with the dispute between DRI, customs and the petitioner. It had merely carried the goods of the petitioner from one port to another in terms of a contract entered into between the parties. In fact, no writ petition is maintainable against the Shipping Line. The 2009 Regulations do not apply to the Shipping Line, as it is not a service provider, hence, there cannot be any prayer for waiver of charges of the Shipping Line. In support reliance was placed upon a judgment of Hon'ble the Supreme Court in ***Shalini Shyam Shetty and another v. Rajendra Shankar Patil***, (2010) 8 SCC 329. There is no allegation in the petition that there was any connivance of the Shipping Line with the Government. As per the agreement between the parties, there is an arbitration clause and the Shipping Line has lien on the goods for the charges payable.

Arguments of Customs-respondent No. 4.

33. Mr. Anshuman Chopra, learned counsel appearing for customs, while referring to a fact stated in the affidavit of G. Manigandasamy, Deputy Commissioner of Customs, Mumbai, submitted that customs received a communication dated 14.12.2015 to hold release of the consignments received by seven importers, as the same were to be examined 100% by DRI/customs. As no further communication was received till 28.12.2015, the customs kept quiet. In the letter dated 28.12.2015, DRI informed the customs that the firms had been importing consignments in violation of the notification No. 2/2015-Cu. (SG) dated 14.9.2015 to evade levy of provisional safeguards duty. The consignments be examined 100% with the assistance of local Chartered Engineer. After detailed examination, the report be prepared and copy of the same be forwarded to DRI. The report should be regarding nature of goods, which should include description, quality, thickness and width. In case, any of the firm is found to be offending the provisions of the notification dated 14.9.2015, the same may be dealt with under Section 110 of the 1962 Act.

34. He further argued that as the goods were put on hold on the directions of DRI, no offer was made to the petitioner for de-stuffing, as no such direction was given. On 8.1.2016, DRI directed the customs to get the material properly tested to ascertain as to whether the imported material was hot rolled or cold rolled. Vide letter dated 13.1.2016, DRI directed the customs to measure even thickness of the goods imported. He further submitted that customs had never authorised Rajendra S. Tambi, Chartered Engineer to send the samples to any laboratory for testing. He could not refer to any communication appointing Rajendra S. Tambi as the Chartered Accountant and his scope of inspection. The sampling of the consignment was completed on 11.1.2016 in the presence of the representative of the petitioner. It was sent for

testing to TCR Engineering Services Pvt. Ltd. on 20.1.2016. On the same day, a communication dated 19.1.2016 was received from DRI mentioning that report of the Chartered Engineer has not been received and the samples have not been forwarded to the laboratory for testing and the process may take some time, hence, provisional assessment be made under Section 18 of the 1962 Act, however, before release of the goods, representative samples be drawn, especially the lots which are suspected to be hot rolled. The report was received from TCR Engineering Services Pvt. Ltd. on 28.1.2016. Vide communication dated 28.1.2016, the petitioner was requested to submit PD bond and bank guarantee in order to release the consignment on provisional basis, which was followed by another reminder on 8.2.2016, however, the petitioner did not fulfil the requirements. As the report dated 28.1.2016 did not contain the bill of entry numbers, TCR Engineering Services Pvt. Ltd. was directed to clarify vide letter dated 10.2.2016. Reminder was sent on 16.2.2016. The revised report was received from TCR Engineering Services Pvt. Ltd. on 17.2.2016 mentioning bill of entry number, which was forwarded to DRI, Ludhiana. As per report, eight out of 10 samples were hot rolled steel. In terms of the directions by DRI, Ludhiana, vide letter dated 23.2.2016, the goods were seized. Vide letter dated 26.2.2016, DRI issued 'No Objection Certificate' to the customs for provisional release of goods on the terms as specified in the letter. On 29.2.2016, customs wrote to the petitioner informing that officer from DRI, Ludhiana will conduct examination regarding thickness of the goods imported. Vide letter dated 5.3.2016, DRI, Ludhiana again wrote to customs mentioning that no order for grant of provisional release has been passed by it. The signatory of the letter referred to a telephonic discussion with the Deputy Commissioner of Customs, who informed that provisional release order will be passed after measurement of thickness. DRI opined that measurement of thickness can be done at the time before actual release of goods and provisional order be passed immediately to apprise the court of the latest status in the pending case. Immediately thereafter, on 7.3.2016, provisional order of release was passed which superseded the earlier order dated 28.1.2016.

35. It was further submitted that consignment has finally been assessed on 8.8.2016 and the only difference found was of thickness on account of which, some additional duty was found to be payable, which was less than Rs. 1,00,000/-.

36. He further submitted that other importers mentioned in the letter of DRI dated 14.12.2015 got the goods released in January, 2016 on payment of the duty assessed after receipt of report of Chartered Engineer. Some of the charges levied against them were waived off by the Port Trust and Shipping Line and some were paid by them. It needs to be mentioned here that though entire record of the case was required to be produced in court, no record pertaining to these consignments was available for perusal. He further argued that though customs had finally assessed the consignments after report from Bokaro Steel Plant, but on the direction of DRI, appeal has been filed against the order of assessment. Customs is not responsible for any delay in the process as the consignments were put on hold on the directions of DRI and all actions were being taken as guided by them. When the goods were released, the petitioner failed to avail of the facility, as he failed to furnish PD bond and bank guarantee.

Arguments of DRI

37. Mr. Satish Aggarwala, Mr. R. K. Handa, Mr. Pritpal Singh Nijjar and Mr. Aditya Singla, learned counsel appearing for DRI submitted that affidavit dated 4.4.2016 of Shailesh M. Gondhalkar, as is stated to have been filed in CWP No. 4648 of 2016, is in fact not on record in that case, as there is no order for that taking on file. The petitioner herein is a habitual offender, as entire effort was not to cooperate with the authority and delay testing of samples, resulting in delay in payment of duty and evade demurrage charges. The writ petition was filed merely at the stage when the matter was being investigated when even show cause notice had not been issued. When show cause notice is issued, the petitioner would be at liberty to raise

all the pleas. He referred to earlier conduct of the petitioner regarding import of material. Learned counsel sought to address arguments on three issues, namely, (i) there was no delay on the part of DRI; (ii) conduct of the petitioner and mis-declaration of import and (iii) interference by the court in investigation.

38. He further contended that DRI got intelligence information that certain parties are trying to import hot rolled steel by declaring the same as cold rolled to come out of rigors of notification dated 14.9.2015 in order to evade payment of provisional safeguard duty. The notification dated 14.9.2015 only provided for levy of provisional safeguard duty on certain goods which, according to the department, included the goods imported by the petitioner. The duty was levied as open import of such goods was found to be causing serious injury to the domestic industry or producers of such goods. Vide letter dated 14.12.2015, DRI asked customs to withhold the import and not permit any further import by the parties mentioned in the letter. He referred to communication dated 21.12.2015 from Shipping Line to DRI in response to their letter dated 17.12.2015 informing that Shipping Line had noticed that the matter was under investigation, hence, destination and name of importer will not be changed. Though he referred to various letters exchanged between DRI and customs and even the request made by the petitioner for release of goods to avoid detention and demurrage charges, but we have referred to only the arguments addressed by the petitioner as well as customs. He also referred to the fact that on 14.12.2015, search was carried out at the premises of the petitioner, where certain incriminating documents were found. That also caused credence to the intelligence information regarding mis-declaration of the import by the petitioner. Under these circumstances, DRI was fully justified in withholding release and ask for testing the samples. He referred to certain facts stated by DRI in the Special Leave Petition filed before Hon'ble the Supreme Court against the order dated 2.8.2016 passed by this court. All the actions taken by DRI at different stages were bonafide with no malice. Timely action was taken wherever required. He sought to refer to certain facts and the communications, which were not pleaded in the reply filed or any of the application filed before this court at a subsequent stage to which other side had no opportunity to respond.

39. He referred to letter dated 14.1.2016 (reply to CM No. 13183 of 2016) from Customs to DRI informing that examination of the containers was completed by 11.1.2016. Some delay was explained while stating that weighbridge was not working properly. It was informed that final report will be forwarded to DRI as soon as received. At this stage, the petitioner filed the writ petition in this court. The object was to hamper investigation, otherwise the petitioner should have co-operated in the process of investigation. The department was just to ensure that there was no mis- declaration. There was no interim stay granted by this court. Vide letter dated 8.1.2016 (CM No. 14102 of 2016), DRI asked customs to send the samples for testing to find out whether the imported consignment was hot rolled or cold rolled steel. He further referred to letter dated 12.1.2016 from customs to the petitioner that his agent was not co-operating in the process of examination, the statement made by the partner of the firm during search at Ludhiana on 12.1.2016 and also a panchnama, where the partner was found to be recording the proceedings without any authority. On 13.1.2016, DRI wrote to customs regarding mis-declaration. Vide letter dated 19.1.2016, DRI enquired about the status of the report of Chartered Engineer appointed and further directed for release of the goods on provisional basis, which was not accepted by the petitioner. Chartered Engineer-Rajendra S. Tambi had sent the samples for testing to the laboratory himself without any authorisation by customs. It was so informed by customs vide letter dated 17.1.2016. He referred to letter 22.1.2016 from Shipping Line to the petitioner mentioning that on 19.1.2016, it was decided to send samples to TCR Engineering Services Pvt. Ltd. for testing. He further referred to letter dated 1.2.2016 by the petitioner to customs admitting that the goods were examined in his

presence by the Chartered Engineer and he got the same tested from Perfect Laboratories Services, Pune.

40. On 28.1.2016, provisional release of goods was allowed. The importer was directed to submit PD bonds and bank guarantee, however, despite reminder, the petitioner failed to get the goods released. In the same letter, the petitioner requested for issuance of detention certificate to claim waiver of demurrage and other charges from Port Trust and Shipping Line. DRI informed the petitioner vide letter dated 5.2.2016 (CM No. 14102 of 2016) that such a request was not maintainable at this stage, as the matter was under investigation. A letter was written by the Shipping Agent to the petitioner on 17.2.2016 informing about latest position, which shows that there was no delay on the part of DRI. On 25.2.2016, the petitioner was offered de-stuffing and warehousing. The same was not availed of by the petitioner. It could be only on the request of the petitioner in terms of Section 49 of the 1962 Act and no request was made by the petitioner. On 26.2.2016, DRI informed customs that as the goods had been seized on 23.2.2016, provisional release be allowed on payment of duty as mentioned.

41. It was contended that as the effort of the petitioner was to delay the process, he made a complaint to the higher authorities vide letter dated 26.2.2016 to transfer the investigation to some other officer. Vide letter dated 29.2.2016 (CM No. 13183 of 2016), the petitioner was informed that officer from DRI will conduct examination regarding thickness of the goods. The petitioner or his representative was to remain present. Vide letter dated 1.3.2016 (reply to CM No. 13183 of 2016), the request made by the petitioner for re-testing of the samples was rejected. Vide letter dated 3.3.2016, the petitioner requested customs to keep the process of re-examination in abeyance as the matter was pending in this court on 8.3.2016, Vide letter dated 4.3.2016, DRI requested the petitioner to co-operate in examination of the goods to measure its thickness. On 5.3.2016, DRI asked customs to pass provisional release order immediately. On 7.3.2016, provisional release order (CM No. 14102 of 2016) for part of the consignment was passed. Immediately on 10.3.2016, the petitioner preferred fresh writ petition. In the aforesaid writ petition, vide order dated 4.4.2016, this court directed de-stuffing of the goods. Despite the order passed by this court, there was no co-operation from the petitioner for inspection. A complaint was made on 7.4.2016 to the police against the petitioner for obstructing departmental officials from discharging their duty. He referred to a panchnama prepared on 22.4.2016 at the time of inspection showing non- cooperation by the petitioner. As the petitioner was not co-operating, even this court had to pass an order on 12.4.2016 directing the petitioner to co-operate in the inspection of goods. He referred to examination report dated 19.4.2016 and a letter from customs to the petitioner on 21.4.2016 requesting the petitioner to co-operate in the process of examination in terms of the order passed by this court. Vide letter dated 5.5.2016, DRI informed customs that the officer was present for drawal of samples, however, needful could not be done in the absence of importers. On 9.5.2016, the petitioner withdrew his earlier writ petition, however, filed fresh one on 10.5.2016. This shows that effort of the petitioner was totally non- cooperative.

42. Regarding conduct of the petitioner and mis-declaration made by him, it was submitted that for claiming exemption for import of cold rolled steel, thickness had to be between .5 to 1 mm. On examination, thickness was found to be more. Exemption could not be claimed in terms of notification dated 31.12.2009. As the petitioner had declared the thickness to be between .5 to 1 mm, to that extent there was mis- declaration. He referred to ***Suren International Ltd. v. Union of India and others***, 2011 (263) ELT 75 (Del.) and M/s ***Dewan Steel Industries v. Union of India and others***, 2014 (304) ELT 520 (P&H) with reference to application of the 2009 Regulations in the facts and circumstances of the case. To conclude, he submitted that DRI being not at fault and acted in discharge of official duty is not responsible for any delay whatsoever. It is a case in which the petitioner is responsible for the entire delay,

which he caused for the reasons best known to him. Instead of approaching this court time and again, he should have co-operated in the investigation and got the goods released.

Arguments of respondent No. 12

43. Mr. Sharad Aggarwal, learned counsel appearing for Rajender S. Tambi (respondent No. 12) submitted that appointment of the answering respondent as a Chartered Engineer was admitted by the respondents in the reply filed to earlier writ petition filed by the petitioner. He submitted that after inspection, wherever any doubt was found, the samples were sent to Perfect Laboratories Services with the consent of customs. The report was submitted on 19.1.2016 opining the consignment to be cold rolled steel. Same process was followed in the case of two other importers, where the reports submitted by Chartered Engineers were acepted. He further referred to affidavit dated 4.4.2016 filed by Shailesh M. Gondhalekar stating therein that the petitioner was called upon by the officers of customs to examine the consignment to ascertain as to whether the imported material was hot rolled or cold rolled steel. The consent was given to the customs on 4.1.2016. The inspection was carried out in the presence of the officers of customs. In order to determine composition of the material, on request of officers of customs, services of Perfect Laboratory Services were engaged, who personally visited the dockyard and collected the samples. The samples were received by Perfect Laboratories Services, on 11.1.2016. The report was given on 18.1.2016, which was sent to customs by the Chartered Engineer on 19.1.2016. He further submitted that on 19.2.2016, Shailesh M. Gondhalekar was called by the officers of customs on the pretext of examination of some consignment, where he was illegally detained by the officers present there including Roopesh Kumar and Santokh Singh. He was forcibly made to acknowledge a summon and sign the statement to admit that the samples were handed over to Perfect Laboratories Services outside the customs area. He was threatened of removal from panel. On 20.1.2016, he was again detained to force him to re-examine the goods and change his report, however, he refused. If the report submitted by him was wrong, no show cause notice was ever issued to him for anything done wrong. He had given his complete report mentioning even about thickness of the material. In fact, finally the report submitted by him was found to be correct and matching with the report submitted by Bokaro Steel Plant. He is still on the panel of the department as a Chartered Engineer. Learned counsel submitted that there is no relief claimed against the answering respondent, that is why he has not filed any reply to the petition, however, he owns the affidavit filed earlier.

Arguments of Port Trust

44. Mr. Rajiv Atma Ram, Senior Advocate appearing on behalf of Port Trust submitted that consignments were received at the Port Trust on 4.12.2015, 11.12.2015 and 29.12.2015. On the asking of DRI, the authorities of Port Trust were informed on 28.12.2015 to withhold release of consignments. De-stuffing was done from 19.4.2016 to 25.4.2016 in pursuance to the order passed by this court on 4.4.2016. The duty was paid by the petitioner only on 5.8.2016 when release order was issued by customs. Against the order dated 2.8.2016 passed by this court, Special Leave Petition was filed by the Port Trust, in which the matter was remitted back to be decided in totality.

45. He further submitted that on 28.1.2016, order for provisional release was passed, but the petitioner failed to avail of that. On 25.2.2016 and 5.4.2016, offer was made for de-stuffing, which the petitioner failed to avail of. He further submitted that Port Trust is not a service provider under the 2009 Regulations, which otherwise are also subject to any other law. Port Trust has been constituted under the 1908 Act. Charges are statutorily payable as per the rates approved by the authority constituted under the 1963 Act. There is power with the Board of the Port Trust to waive off any charges leviable under the 1963 Act. The power can be exercised on an application of any party. The payment of charges has to be made before

removal of goods. Port Trust has lien on the goods for the charges payable. All the conditions and provisions made in the 2009 Regulations clearly show that none of the procedure was followed or is required to be followed by the Ports as constituted under the 1908 Act, hence, not applicable. It further provides that earlier agents could continue for a period of five years. Even that period has also expired as the 2009 Regulations were notified on 17.3.2009 that too by the Board and not by the Government. There is no power conferred under the 1962 Act on any authority to frame Regulations with reference to any charges payable to the Port Trust. These are two different enactments operating in their own independent fields. The 2009 Regulations are otherwise also beyond the 1963 Act, as it exceeds the authority delegated for framing the 2009 Regulations. There is no direction given by the Central Government. In support, reliance was placed upon ***Kurmanchal Inst. of Degree and Diploma and Ors. v. Chancellor, M J. P. Rohilkahdn University and Ors.***, (2007) 6 SCC 35 and ***Union of India and others v. S. Srinivasan v. Union of India and others***, (2012) 7 SCC 683..

46. He further submitted that the judgments relied upon by learned counsel for the petitioner regarding application of the 2009 Regulations in the case in hand are distinguishable as those are the cases pertaining to the licensees under the 2009 Regulations and not of the Port Trusts, which are independent. As the space of the Port has been used by the party, may be on fault of the importer, customs or DRI, to which the Port Trust has no concern, it is to be re-imbursed of the charges for the same. Even for claiming reduced rates of tariff on account of detention of goods by customs, a certificate has to be produced from customs in the manner prescribed. He further submitted that none of the circulars or letters issued by the department is relevant, as there is no such power conferred. It is merely opinion of the department.

47. In CWP No. 10036 of 2016, the submission made by learned counsel for the Port Trust is that there is no relief claimed against it. Even the detention certificate issued by customs merely states that it may be considered as per the 2009 Regulations. There is no mandate. He further submitted that M/s Inder International is an un-registered firm, hence, writ petition is not maintainable on his behalf.

48. Heard learned counsel for the parties and perused the relevant referred documents.

Discussions

49. The case in hand is an example of the mess, which could possibly be created by the parties to the dispute in court. The documents have been produced before the court piece-meal. These have not been arranged date-wise whenever the events took place. Application after application was filed to place on record the documents, whichever suited the parties. At the time of arguments, reference to various documents was made either from the main petition or from different Civil Misc. Applications. Some of the facts/ documents not pleaded in any of the reply or the application filed are sought to be referred to from the Special Leave Petition filed before Hon'ble the Supreme Court against the order dated 2.8.2016. Some were still not on record and sought to be referred to in court, which were not taken into consideration as there was no opportunity to the other side to respond to those documents. Complete record was not produced by the respondents before the court despite ample opportunities. This Court has taken note of the documents, which were referred to by learned counsel for the parties at the time of arguments. Various Civil Misc. Applications filed by the parties in both the writ petitions at different stages including when the case was being heard are summed up as under:

CWPNo. 10021 of 2016

50. The writ petition was filed on 13.5.2016 placing on record 32 annexures. At page 355 on record is the written statement filed by Varinder Kaur, Deputy Director, DRI on behalf of respondents No. 1 to 3 and 5 to 8 (DRI and two officers impleaded by name). It is dated 30.5.2016.

CM No. 7009-10 of 2016 dated 1.6.2016 were filed by the petitioner for preponing the date of hearing in the main petition.

CM Nos. 9623-24 of 2016 dated 9.8.2016 were filed by the petitioner for placing on record Annexures P-39 and P-40 and for a direction to respondent No. 9 for release of the goods.

CM Nos. 11845-46 of 2016 dated 19.9.2016 were filed by the petitioner for preponing the date of hearing and for placing on record Annexures P-39 to P-44.

CM No. 13183 of 2016 dated 15.10.2016 was filed by the petitioner for placing on record Annexure P-45, a bunch of documents.

CM No. 13309 of 2016 dated 17.10.2016 was filed by DRI for placing on record affidavit of Varinder Kaur, Deputy Director, DRI on behalf of respondents No. 1 to 3 and 5 to 8.

CM No. 14102 of 2016 dated 27.10.2016 was filed by respondent No. 4 for placing on record Annexures R-4/1 to R-4/20. However, Annexure R-4/21 was also attached with the application.

CM No. 14300 of 2016 dated 4.11.2016 was filed by respondent No.7-Santokh Singh for placing on record written statement.

CM No. 14201 of 2016 dated 4.11.2016 was filed by respondent No. 8 for placing on record written statement.

CM No. 14231 of 2016 dated 5.11.2016 was filed by the petitioner for placing on record additional affidavit along with documents Annexures P-46 to P-50.

CWPNo. 10036 of 2016

51. The writ petition was filed on 13.5.2016 placing on record 33 annexures. Annexure P-33 has been mentioned twice. At page 406 on record are the submissions on behalf of respondents No. 3 and 5 to 8 (DRI and two officers impleaded by name). It is dated 3.6.2016. It is not signed by either the parties or the counsel.

CM No. 7280 dated 17.6.2016 was filed by M/s Shanker Mercantile Private Limited for placing on record Annexure A-l, which was allowed on 20.6.2016.

Short reply dated 17.6.2016 filed by Port Trust (respondent No. 4) with two annexures is on record.

Written statement dated 17.6.2016 filed by respondent No. 4- Commissioner of Customs along with 19 annexures is on record.

Additional affidavit dated 28.7.2016 filed by the petitioner with Annexures P-31 to P-41 is on record.

Reply filed by customs to the aforesaid affidavit by way of affidavit dated 1.8.2016 along with three annexures is on record.

CM No. 9621 of 2016 dated 9.8.2016 was filed by the petitioner for placing on record certain documents shown in the index as Annexures P-42 and P-43, which are letters of different dates.

CM No. 11847 of 2016 dated 19.9.2016 was filed by the petitioner for placing on record Annexures P-42 to P-47.

CM No. 13148 of 2016 dated 15.10.2016 was filed by the petitioner for placing on record Annexure P-44, a bunch of documents of various different dates.

CM No. 14106 of 2016 dated 27.10.2016 was filed by respondent No. 4 along with 27 annexures.

CM No. 14208 of 2016 dated 5.11.2016 was filed by the petitioner along with his affidavit and Annexures P-49 to P-51.

Provisions of law

52. The relevant provisions of the Customs Act, 1962 and Major Ports Trusts Act, 1963, Handling of Cargo in Customs Area Regulation, 2009 and the circulars are extracted below:

> ***"The Customs Act, 1962***
>
> ***SECTION 2.*** *Definitions.- In this Act, unless the context*
>
> *otherwise requires.*
>
> *xx* *xx* *xx*
>
> *(11) "customs area' means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities.*
>
> *(12) "customs port" means any port appointed under clause (a) of Section 7 to be a customs port (and includes a place appointed under clause (aa) of that section to be an inland container depot);*
>
> *(13) "customs station" means any customs port, customs airport or land customs station;*
>
> *xx* *xx* *xx*
>
> ***SECTION 7. Appointment of customs ports, airports, etc. -***
>
> *The Board may, by notification in the Official Gazette, appoint-*
>
> *(a) the ports and airports which alone shall be customs ports or customs airports for the unloading of imported goods and the loading of export goods or any class of such goods;*
>
> *(aa) the places which alone shall be inland (container depots or air freight stations) for the unloading of imported goods and the loading of export goods or any class of such goods;*
>
> *(b) the places which alone shall be land customs stations for the clearance of goods imported or to be exported by land or inland water or any class of such goods;*
>
> *(c) the routes by which alone goods or any class of goods specified in the notification may pass by land or inland water into or out of India, or to or from any land customs station from or to any land frontier;*
>
> *(d) the ports which alone shall be coastal ports for the carrying on of trade in coastal goods or any class of such goods with all or any specified ports in India.*
>
> *(2) Every notification issued under this section and in force immediately before the commencement of the Finance Act, 2003 shall, on such commencement, be deemed to have been issued under the provisions of this section as amended by section 105 of the Finance Act, 2003 and shall continue to have the same force*

and effect after such commencement until it is amended, rescinded or superseded under the provisions of this section.

SECTION 8. Power to approve landing places and specify limits of customs area.- The Commissioner of Customs may,-

(a) approve proper places in any customs port or customs airport or coastal port for the unloading and loading of goods or for any class of goods;

(b) specify the limits of any customs area.

xx xx xx

SECTION 45. Restrictions on custody and removal of imported goods. *- (1) Save as otherwise provided in any law for the time being in force, all imported goods, unloaded in a customs area shall remain in the custody of such person as may be approved by the Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII. (2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force,-*

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.

(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilferred after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under section 30 or for the arrival of the conveyance in which the said goods were carried,

xx xx xx

SECTION 49. Storage of imported goods in warehouse pending clearance.- *Where in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, the goods may, pending clearance, be permitted to be stored for a period not exceeding thirty days in a public warehouse, or in a private warehouse if facilities for deposit in a public warehouse are not available; but such goods shall not be deemed to be warehoused goods for the purposes of this Act, and accordingly the provisions of Chapter IX shall not apply to such goods:*

Provided that the Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time.

xx xx xx

SECTION 141. Conveyances and goods in a customs area subject to control of officers of customs- *(1) All conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of customs.*

(2) The imported or export goods may be received, stored, delivered, despatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.

xx xx xx

SECTION 157. General power to make regulations.- *(1) Without prejudice to any power to make regulations contained elsewhere in this Act, the Board may make regulations consistent with this Act and the rules, generally to carry out the purposes of this Act.*

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

(a) the form of a bill of entry, shipping bill, bill of export, import manifest, import report, export manifest, export report, bill of transhipment, declaration for transhipment boat note and bill of coastal goods;

(ai) the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the proper officer under clause (d) of sub-section (1) of section 26A;

(aii) the form and manner of making application for refund of duty under sub-section (2) of Section 26A;

(aa) the form and manner in which an application for refund shall be made under section 27;

(b) the conditions subject to which the transhipment of all or any goods under sub-section (3) of Section 54, the transportation of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67, may be allowed without payment of duty;

(c) the conditions subject to which any manufacturing process or other operations may be carried on in a warehouse under section 65.

(d) the manner of conducting audit of the assessment of duty of the imported or export goods at the office of the proper officer or the premises of the importer or exporter, as the case may be.

SECTION 159. Rules, certain notifications and orders to be laid before Parliament.- *Every rule or regulation made under this Act, every notification issued under sections 11, 11B, 11H, 11-1, 11K, 11N, 14, 25, 28A, 43, 66, 69, 70, 74, 75, 76, 98, 98A, 101 and 123 and and every order made under sub-section (2) of section 25, other than an order relating to goods of strategic, secret, individual or personal nature, shall be laid, as soon as may be after it is made or issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or notification or order, or both Houses agree that the rule or regulations should not be made or notification or order should not be issued or made, the rule or regulation or notification or order shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or*

annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification or order,

xx *xx* *xx*

SECTION 160. Repeal and savings.-

xx *xx* *xx*

(9) Nothing in this Act shall affect any law for the time being in force relating to the constitution and powers of any Port authority in a major port as defined in the Indian Ports Act, 1908 (15 of 1908)

xx *xx* *xx*

Major Ports Trusts Act, 1963

2. Definitions

xx *xx* *xx*

(j) "Indian Ports Act" means the Indian Ports Act, 1908;

xx *xx* *xx*

47A. Constitution and incorporation of Tariff Authority for Major Ports.-

(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint there shall be constituted for the purposes of this Act an Authority to be called the Tariff Authority for Major Ports.

(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal and shall by the said name sue and be sued.

(3) The head office of the Authority shall be at such place as the Central Government may decide from time to time.

(4) The Authority shall consist of the following Members to be appointed by the Central Government, namely:-

(a) a Chairperson from amongst persons who is or who has been a Secretary to the Government of India or has held any equivalent post in the Central Government and who has experience in the management and knowledge of the functioning of the ports;

(b) a Member from amongst economists having experience of not less than fifteen years in the field of transport or foreign trade;

(c) a Member from amongst persons having experience of not less than fifteen years in the field of finance with special reference to investment or cost analysis in the Government or in any financial institution or industrial or services sector,

xx *xx* *xx*

48. Scales of rates for services performed by Board or other person.-

(1) The Authority shall from time to time, by notification in the Official Gazette, frame a scale of rates at which, and a statement of conditions under which, any of the services specified hereunder shall be performed by a Board or any other person authorised under section 42 at or in relation to the port or port approaches-

(a) transhipping of passengers or goods between vessels in the port or port approaches;

(b) landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or erection, land or building in the possession or occupation of the Board or at any place within the limits of the port or port approaches;

(c) carnage or porterage of goods on any such place;

(d) wharfage, storage or demurrage of goods on any such place;

(e) any other service in respect of vessels, passengers or goods,

(2) Different scales and conditions may be framed for different classes of goods and vessels.

53. Exemption from, and remission of rates or charges.-

A Board may, in special cases and for reasons to be recorded in writing, exempt either wholly or partially any goods or vessels or class of goods or vessels from the payment of any rate or of any charge leviable in respect thereof according to any scale in force under this Act or remit the whole or any portion of such rate or charge so levied.

54. Power of Central Government, to require modification or cancellation of rates.-

(1) Whenever the Central Government considers it necessary in the public interest so to do, it may, by order in writing together with a statement of reasons therefor, direct the Authority to cancel any of the scales in force or modify the same, within such period as that Government may specify in the order.

(2) If the Authority fails or neglects to comply with the direction under sub-section (1) within the specified period, the Central Government may cancel any of such scales or make such modification therein as it may think fit;

Provided that before so cancelling or modifying any scale the Central Government shall consider any objection or suggestion which may be made by the Authority during the specified period.

(3) When in pursuance of this section any of the scales has been cancelled or modified, such cancellation or modification, shall be published by the Central Government in the Official Gazette and shall thereupon have effect accordingly.

58. Time for payment of rates on goods.-

Rates in respect of goods to be landed shall be payable immediately on the landing of the goods and rates in respect of goods to be removed from the premises of a Board, or to be shipped for export, or to be transhipped, shall be payable before the goods are so removed or shipped or transhipped.

59. Board's lien for rates.-

(1) For the amount of all rates leviable under this Act in respect of any goods, and for the rent due to the Board for any buildings, plinths stacking areas, or other premises on or in which any goods may have been placed, the Board shall have a lien on such goods, and may seize and detain the same until such rates and rents are fully paid.

(2) Such lien shall have priority over all other liens and claims, except for general average and for ship-owner's lien upon the said goods for freight and other charges where such lien exists and has been preserved in the manner provided in sub-section (1) of section 60, and for money payable to the Central Government under any law for the time being in force relating to customs, other than by way of penalty or fine.

xx xx xx

111. Power of Central Government to issue directions to Board.-

(1) Without prejudice to the foregoing provisions of this Chapter, the Authority and every Board shall, in the discharge of its functions under this Act, be bound by such directions on questions of policy as the Central Government may give in writing from time to time;

Provided that the Authority or the Board, as the case may be, shall be given opportunity to express its views before any direction is given under this sub-section.

(2) The decision of the Central Government whether a question is one of policy or not shall be final.

The 2009 Regulations

2. Definitions.-*(l) In these regulations, unless the context otherwise requires,-*

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(b) "Customs Cargo Services provider" means any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and export goods and includes a custodian as referred to in Section 45 of the Act and persons as referred to in sub-section (2) of section 141 of the said Act;

(c) "specified" means specified by a notification or an order issued under the provisions of the Act;

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4. Retrospective Application.- *Any action taken or anything done in respect of appointment of Customs Cargo Service providers, immediately preceding the coming into force of these regulations, shall be deemed to have been done under the corresponding provisions of these regulations. Customs Cargo Service providers already approved on or before the date of coming into force of these regulations shall comply with the*

conditions of these regulations within a period of three months or such period not exceeding a period of one year as the Commissioner of Customs may allow from the date of coming into force of these Regulations.

5. Conditions to be fulfilled by an applicant for custody and handling of imported or export goods in a customs area.-

Any person who intends to be approved as a Customs Cargo Service provider for custody of imported goods or export goods and for handling of such goods, in a customs area, hereinafter referred to as the applicant, shall fulfill the following conditions, namely:-

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(3) The applicant shall execute a bond equal to the average amount of duty involved on the imported goods and ten per cent, of value of export goods likely to be stored in the customs area during a period of thirty days and furnish a bank guarantee or cash deposit equivalent to ten per cent, of such duty:

Provided that the condition of furnishing of bank guarantee or cash deposit shall not be applicable to ports notified under the Major Ports Act, 1962 (38 of 1963) or to the Central Government or State Governments or their undertakings;

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6. Responsibilities of Customs Cargo Service provider.

(1) The Customs Cargo Service provider shall

(j) be liable to pay duty on goods pilfered after entry thereof in the customs area,

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(1) subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the proper officer;

7. Power to relax and regulate. - *(1) if the Commissioner of Customs is satisfied that in relation to the custody and handling of imported or export goods in a customs area, the Customs Cargo Service provider, for reasons beyond his control, is unable to comply with any of the conditions of regulation 5, he may for reasons to be recorded in writing, exempt such Customs Cargo Service provider from any of the conditions of regulation 5.*

(2) The Commissioner of Customs may regulate the entry of goods in a customs area for efficient handling of such goods.

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9. Application for approval of Customs Cargo Service provider.- *(1) An application to act as a Customs Cargo Service provider for custody of imported or export goods and for handling of such goods in a customs area shall be made in the form of a letter to the jurisdictional Commissioner of Customs containing details as prescribed in 'Form A'.*

(2) The Commissioner of Customs shall dispose of the application within forty five days of the receipt of the application.

EXPLANATORY MEMORANDUM

Handling of Cargo in Customs Areas Regulations, 2009 provide for a comprehensive mechanism for handling of goods in a customs area and set out the terms and conditions for all facilities where customs cargo is handled. It also provides for the conditions and responsibilities of the persons handling import or export cargo in Inland Container Depot (CD) or Container Freight Station (CFS) or seaport or airport or Land Customs Stations (LCS) and provide adequate control over the cargo handling entities to ensure that the adequate infrastructure is set up at such facilities for efficient handling of import or export goods. This also fulfills the recommendation made by the Public Accounts Committee (2005-06) for the Government to formulate

appropriate provisions in this regard. [Notification No. 26/2009-Cus. (N.T.),, dated 17.3.2009]

Circular dated 23.3.2009

M.F. (D.R.) Circular No. 13/2009-Cus., dated 23.3.2009

F. No. 450/55/2008-Cus. IV

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject: "Handling of Cargo in Customs Areas Regulations, 2009"- Regarding.

A reference is invited to Notification No. 26/2009- Customs (N.T.), dated 17.3.2009 bringing into effect the "Handling of Cargo in Customs Areas Regulations, 2009" (referred in short as 'regulations'). The regulations provide for the manner in which the imported goods/export goods shall be received, stored, delivered or otherwise handled in a customs area. The regulations also prescribe the responsibilities of persons engaged in the aforesaid activities. It may be recalled that the Public Accounts Committee (2005-06) in its twenty-seventh report had recommended for formulating appropriate legal provisions and guidelines to control the activities of custodians. In pursuance of the recommendations made by the Public Accounts Committee (PAC), the Government had inserted a new sub-section (2) to section 141 of the Customs Act, 1962. These Regulations have been framed by the Department in pursuance of the recommendations of the PAC and consequent to the amendment of the Customs Act, 1962 as aforesaid. The salient features of the regulations are indicated in the following paragraphs.

2.1 The regulations shall be applicable to all 'Customs Cargo Service Providers' (CCSPs) that is to say all persons operating in a customs area and engaged in the handling of import/export goods. These include the Custodians holding custody of import/export goods and handling such goods and all persons working on behalf of such custodians such as fork lift or material handling equipment operators, etc. The regulations would also cover consolidators/break bulk agents and other persons handling imported/export goods in any capacity in a customs area. The regulations provide for various responsibilities and conditions for different kinds of CCSPs. The conditions prescribed under Regulation 5 would apply to the CCSPs who desire to be approved as custodians of imported/export cargo and thus handle goods in customs areas. These conditions shall not apply to those persons who only provide certain services on their own or on behalf of the custodians referred above.

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3. As specified in Regulation 3, these regulations shall apply to handling of imported goods and export goods in customs area specified under section 8 of the Customs Act, 1962. This would cover all customs facilities such as ports, airports, Inland Container Depots (ICDs), Container Freight Stations (CFSs) and Land Customs Stations (LCSs). Imported goods would cover goods under transshipment and all goods held under the custody of CCSP. However, these

regulations shall not apply to Customs bonded warehouse or to the warehoused goods which are covered under Chapter IX of the Customs Act, 1962.

4.1 It may be noted that in view of the transitional provisions under Regulation 4, the existing appointments of custodians under section 45 of the Customs Act, 1962 shall continue and there would be no disruption in their operations. However, the existing custodians would be required to provide facilities and fulfill the conditions mentioned in Regulation 5 and 6, as applicable, within the specified time period. On fulfillment of the prescribed conditions, approval letters shall be issued to the existing custodians approving the facility for a period of five years and its renewal thereafter, as per Regulation 13.

4.2 Further, major ports notified under the Major Port Trusts Act, 1963 and airports notified under the Airports Authority of India Act, 1994 will continue to be authorised to function as custodians under their respective Acts and these regulations shall not impact their approval as a custodian. In this regard, it may be noted that section 45 of the Customs Act, 1962, which provides for approval of custodians makes an exception to these custodians who are otherwise approved under any law for the time being in force. Accordingly, the Port Trusts of the notified major ports and the Airports Authority of India shall not be required to make an application under Regulation 4 or 9 for approval or renewal under these regulations. However, they would be required to discharge the responsibilities cast upon them as specified in Regulation 6.

4.3 It is clarified that the normal time within which the existing custodians are required to comply with the conditions of these regulations has been stipulated as three months from the date of coming into force of these regulations. However, this can be extended by the Jurisdictional Commissioner of Customs in deserving cases for a further period not exceeding nine months. Thus, the total period within which the custodians are required to comply with the requirements of these regulations shall not exceed a total period of one year.

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12. Any difficulties in implementation of these Regulations may be brought to the notice of the Board immediately.

Circular dated 29.12.2011

Circular No. 54/2011-Customs

F.No. 450/55/2008-Cus.IV (Pt. Ill)

Government of India

Ministry of Finance

Department of Revenue

Central Board of Excise and Customs

229-A, North Block,

New Delhi, dated 29th December, 2011

To
All Chief Commissioners of Customs/Customs (Prev.)
All Chief Commissioners of Customs & Central Excise All Commissioners of Customs/Customs (Prev).

All Commissioners of Customs & Central Excise All Director General under CBEC.

Sub: Handling of Cargo in Customs Areas Regulations, 2009-Clarification-regarding.

xx xx xx

5.1 The matter was examined in detail. At the time of introduction of the said Regulations itself it was clarified vide Board's circular No. 13/2009-Customs dated 23.3.2009 that Port Trusts of the notified major ports shall not be required to make an application for approval of renewal under these regulations, since section 45 of the Customs Act, 1962, which provides for approval of custodians, makes an exception to major ports. However, they are required to discharge the responsibilities cast upon them as specified in Regulation 6 which include obtaining written permission from the Commissioner of Customs prior to outsourcing or leasing part of the premises within a customs area. This has been provided in order to take into account the concerns of the revenue for safeguarding the duty on imported goods.

xx xx xx

Earlier rounds of litigation

M/s Shri Lakshmi Steels

53. CWP No. 572 of 2016 was filed on 5.1.2016 challenging the action of the respondents of detaining the goods imported by the petitioner and further prayer was for a direction to the respondents to waive of demurrage and detention charges on the goods illegally detained. During the pendency of the above petition, the petitioner filed CWP No.4641 of 2016 on 9.3.2016 challenging the seizure memo dated 23.2.2016 with a prayer for release of the goods. Challenge was also made to communication dated 5.2.2016 rejecting the petitioner's request for waiver of demurrage and detention charges or for a direction to the respondents to bear those charges, they being at fault. The writ petitions were dismissed as withdrawn on 9.5.2016 with liberty to file a fresh one on the statement made by learned counsel for the petitioner in the light of subsequent events. As the Port Trust was taking action to auction the goods, learned counsel appearing for the Port Trust fairly submitted that the goods shall not be put to auction for one week.

M/s Inder International

54. CWP No. 185 of 2016 was filed on 5.1.2016 challenging the action of the respondents of detaining the goods imported by the petitioner and further prayer was for a direction to the respondents to pay demurrage and detention charges on the goods illegally detained. During the pendency of the above petition, the petitioner filed CWP No.4648 of 2016 on 5.3.2016 challenging the seizure memo dated 23.2.2016 with a prayer for release of the goods. Challenge was also made to communication dated 5.2.2016 rejecting the petitioner's request for waiver of demurrage and detention charges or for a direction to the respondents to bear those charges, they being at fault. The writ petitions were dismissed as withdrawn on 9.5.2016 with liberty to file a fresh one on the statement made by learned counsel for the petitioner in the light of subsequent events. As the Port Trust was taking action to auction the goods, learned counsel appearing for the Port Trust fairly submitted that the goods shall not be put to auction for one week.

Facts

CWP No. 10021 of 2016

55. The petitioner vide invoice dated 27.10.2015 (p. 238) imported 48 packages of defective/secondary cold rolled sheets. When the goods landed at the Port, bill of entry was filed on 4.12.2015 (p.235). Vide invoice dated 29.10.2015 (p. 243), the petitioner imported 586 defective/secondary cold rolled coils and when the goods landed at the Port, bill of entry was filed on 11.12.2015 (p.241). Vide invoice dated 24.11.2015 (p. 249), the petitioner imported 435 coils and when the goods landed at the Port, bill of entry was filed on 29.12.2015 (p. 248). The invoices were accompanied by pre-shipment inspection certificate, stating the goods to be defective/secondary cold rolled sheets/rolls and the preferential certificate of origin, which entitled the petitioner to import goods from Korea in terms of Korea-India Comprehensive Partnership Agreement. Nothing from the record was pointed out at the time of hearing as to what action was taken on the bills of entry submitted by the petitioner on 4.12.2015 and 11.12.2015.

56. Vide letter dated 14.12.2015 (p. 62), DRI, Ludhiana directed the Port Trust to put on hold the imported consignments by the parties, namely, M/s Inder International, Ludhiana; M/s Shri Lakshmi Steels; Ms Narayan Steels, Ludhiana; M/s Gurbachan Sales Corporation; M/s Singal Overseas; M/s Global Impex; M/s Signal Udhyog and M/s Kapil Steel Industries. These were to be examined 100% by DRI/customs.

57. Vide letter dated 22.12.2015 (p.77), the petitioner sent a reminder to DRI, Ludhiana as well as customs requesting for provisional assessment of the imported consignments and release of the goods within 48 hours, as the consignments were incurring detention and demurrage charges.

58. Vide letter dated 28.12.2015, DRI, Ludhiana directed customs that it had put on hold the imported consignments on a specific intelligence input that import was being made to come out of the rigors of notification No. 2/2015-Cus (SG) dated 14.9.2015. It was further directed that imported consignments be examined 100% by customs officers with the assistance of local Chartered Engineer and a detailed report be prepared and sent to DRI, Ludhiana. It should be regarding nature of the goods imported including its description, quality, thickness and width. Photographs were also to be sent. It was further mentioned in the aforesaid communication that in case the goods are found to be in violation of notification dated 14.9.2015, the same may be dealt with under the provisions of Section 110 of the 1962 Act. The samples be drawn and got tested from an authorised Government laboratory under intimation to DRI, Ludhiana. On 30.12.2015, the petitioner sent another reminder to DRI, Ludhiana as well as customs informing that shipment has not been examined till date, as a result of which the party is facing heavy detention charges of shipping line and demurrage charges of the Port Trust. The petitioner is not liable to pay the same as the goods have been detained by DRI, Ludhiana and customs. A request was made for early examination of the material and release thereof within 48 hours. Another reminder was sent by the petitioner to the same effect on 1.1.2016 (p. 81), but no action was taken by the department.

59. At this stage, the petitioner filed CWP No. 572 of 2016 with a prayer for release of the goods, in which notice of motion was issued for 11.1.2016. During the interregnum, customs got Positive Material Identification report of the consignments (p. 139) from Paras, PMI Testing Service on 5.1.2016. It was without notice to the petitioner.

60. Even though first bill of entry was filed by the petitioner on 4.12.2015 and the second was filed on 11.12.2015 and the letter of DRI, Ludhiana to put on hold the consignments for 100% examination was dated 14.12.2015, but no action for release of goods was taken by customs till such time Rajendra S. Tambi was appointed as a Chartered Engineer.

Nothing from the record was pointed out to show as to when he was engaged. The certificate dated 19.1.2016 (p. 143) submitted by Rajendra S. Tambi shows the date of inspection as 5.1.2016 regarding bill of entry No. 3480776 dated 4.12.2015. In his report, he pointed out the background of difference between cold rolled and hot rolled steel. His inspection findings, which contained number of bundles each container had, weight, thickness, width and length. He further mentioned that the material was examined 100% in the presence of customs officials under their guidance. The thickness range was found to be from 0.532 mm to 2.80 mm. Around 10% material was found to be having thickness above 1 mm. It was concluded that the material was cold rolled defective steel. He also annexed photographs of the material alongwith the report. A certificate from Perfect Laboratory Services, which admittedly was a Government approved laboratory, was also attached opining the consignments imported to be of cold rolled steel. It was the admitted stand of counsel for the parties that sampling of the material was done between 5.1.2016 and 11.1.2016. Samples were sent to Perfect Laboratory Services on 13.1.2016. In the affidavit of Shailesh M. Gondhalekar filed in the earlier writ petition filed by the petitioner, he retracted the statement taken from him by DRI, Ludhiana at the Port Trust under pressure. He claimed that he was illegally detained by the officers including Santokh Singh, Senior Intelligence Officer and Roopesh Kumar, Intelligence Officer, DRI at Mumbai. He was forced to admit that samples were handed over to him outside the customs area. He was threatened of his removal from the panel of Chartered Engineer. However, the counsel appearing for him in court stated that he is still on the panel.

61. Similar process was followed in other two consignments.

62. The inspection report, as submitted by the Chartered Engineer clearly opined that the goods imported by the petitioner were cold rolled sheets/coils, as claimed by the petitioner in the bills of entry. There was some issue raised regarding thickness of part of the consignments which, according to the Chartered Engineer, was only to the extent of about 10%. As the requirement of DRI, Ludhiana for 100% examination of the consignments before release had been satisfied, the same should have been released. Minor variation of thickness in about 10% of the consignments could be expected for the reason that the material was defective/secondary cold rolled sheets/coils. It was defective and there could be various reasons for that and one could be its varied thickness. In any case, as claimed by counsel for the petitioner, the only difference, which could possibly be made out of the thickness of part of the consignments being above 1 mm, was levy of marginal duty of 0.63%, which was a few thousand rupees, as was even finally levied. It was not a case where the goods were prohibited, which could not be imported. In any case, release could be permitted after provisional assessment to avoid demurrage and detention charges.

63. Nothing was pointed out from any paper on file or from the record produced by the respondents in court as to what procedure was followed in the cases of five other importers whose consignments were also put on hold by DRI, Ludhiana. The stand taken by counsel for the petitioner was that after the reports from the Chartered Engineer, they got the consignments released accepting the reports of the Chartered Engineer. In their case, the only condition put was regarding furnishing of PD bond. Bank guarantee was waived off. What other proceedings were initiated against them was not known to the counsel.

64. In letter dated 19.1.2016 addressed by DRI, Ludhiana to customs giving reference to its earlier letter, which did not include the letter dated 14.12.2015, it was pointed out that vide letter dated 14.1.2016, customs had pointed out that the Chartered Engineer had not submitted his report and that samples are yet to be forwarded to the laboratory for testing. It was observed that customs will take more time as final opinion can be formed only after receipt of the laboratory test report as to whether the imported sheets/coils are cold rolled or hot rolled. The letter also noticed that the petitioner had been making representations regarding

delay in examination of the imported consignments with reference to detention/demurrage charges. It further directed that pending live import consignments be released by resorting to provisional assessment under Section 18 of the 1962 Act, if deemed fit, however, before release representative samples be drawn, especially from the lots, which are suspected to be hot rolled.

65. Nothing from the record was pointed out to show that DRI, Ludhiana was ever informed about the opinion expressed by the Chartered Engineer. Despite clear direction issued by DRI, Ludhiana for release of goods after provisional assessment and drawal of samples, no action was taken by customs. Without there being any material pointed out on record as to why the report of the Chartered Engineer was not considered, vide communication dated 15.1.2016 signed on 20.1.2016, the samples were sent for testing to TCR Engineering Services Pvt. Ltd, stated to be a Government approved laboratory, to test and certify the composition of the material and as to whether it is hot rolled or cold rolled. The petitioner claimed that the samples, which were sent to TCR Engineering Services Pvt. Ltd. were not drawn in his presence. The report dated 28.1.2016 (p. 197) was received from TCR Engineering Services Pvt. Ltd. The samples were received by the laboratory on 22.1.2016. It mentioned CHA No., vide which the samples were sent for testing by customs to the laboratory. The report also mentioned the test method applied and finally remarked that structure appears to be of hot rolled condition. Though the test certificate could very well be linked by customs with the samples sent for testing vide CHA No. mentioned on the requisition letter dated 16.1.2016, but still request was made to the laboratory by customs to send a revised report containing bill of entry number. The revised report dated 17.2.2016 was received. For two bills of entry, the report remarked that "structure appears to be hot rolled condition" and for one bill of entry, it was mentioned that "structure appears to be cold rolled condition". So much of time was taken despite the fact that customs office and even the laboratory, both were located in Mumbai. As the remarks were made in the report, even the laboratory was not sure about the material as the only opinion expressed was that "structure appear to be hot/cold rolled condition". In the written statement dated 11.2.2016 filed by customs in CWP No. 185 of 2016, it was stated as under:

> *"7. The Test Reports were received by the Respondent on 28.1.2016. Copy of the said test report is being annexed herewith as Annexure R-2/5. As per the Test Report, it was evident that out of the total 10 samples sent for testing atleast 8 have been found to be Hot Rolled condition. However it was informed by the laboratory that testing facility for ascertaining HROP is not available with them..."*
>
> *[Emphasis supplied]*

66. The department needs to consider the accreditation granted to TCR Engineering Services Pvt. Ltd. for giving a wrong report resulting in avoidable litigation and creating problems for the importers, department and the shipping line. If the laboratory did not have the facility for testing a sample as per the requirement, it should have flatly refused and informed the department instead of giving a wrong report. An approved Government laboratory does not mean that any sample could be sent for testing there. The accreditation also means and the department should have the data-base to find out what kind of samples could be tested by the laboratory. The facilities available in any laboratory and the kind of infrastructure with reference to technical man-power has to be reviewed periodically. It should not be that permission once granted is valid for all times to come. It is also required to be reviewed that in how many cases, the report given by a particular laboratory has been found to be incorrect/false with or without notice. A lot depends on the opinion expressed by the laboratories. They all have to be above-board and perfect in testing of the samples sent to them.

67. Though on the one hand, the stand sought to be taken was that the report received from TCR Engineering Services Pvt. Ltd. could not be acted upon for the reason that it did not contain the bill of entry number and a request was made for sending revised report, which admittedly was received after 17.2.2016, as it is of that date, but still vide letter dated 28.1.2016, the petitioner was directed to furnish PD bonds and bank guarantee for all three consignments. As claimed by the petitioner, the aforesaid letter was not served upon him, rather, handed over in court when the case was listed for hearing on 3.2.2016.

68. As harassment of the petitioner was not to end here, vide letter dated 4.2.2016 from Commissioner of Customs (Export-I), Mumbai to Deputy Commissioner of Customs, Docks (Import), Mumbai giving reference to earlier two letters dated 3.2.2016, it was informed that DRI, Ludhiana had instructed on telephone to draw random samples of all the consignments and send the same for testing as to whether the subjected material is hot rolled or cold rolled, which should be done under the guidance of customs approved Chartered Engineer. The approved laboratory for testing of samples was to be informed after consultation with DRI, Ludhiana. The samples were to be kept in safe custody till further direction. Meaning thereby, the communication regarding furnishing of PD bonds and bank guarantee was merely an eye-wash as the samples were again to be drawn. The contents of the aforesaid letter established one fact that neither the report received from Perfect Laboratories Services nor from TCR Engineering Services Pvt. Ltd. was informed to DRI, Ludhiana by customs.

69. Though on the one hand, the stand taken in the written statement filed before this court was that TCR Engineering Services Pvt. Ltd. did not have complete facility for testing of samples, but still relying upon the report thereof, vide communication dated 23.2.2016 by DRI, Ludhiana, the goods pertaining to two bills of entry No. 3552261 dated 11.12.2015 and 3749151 dated 29.12.2015 were seized on the allegation of mis-declaration of the consignments being cold rolled steel, though it was opined by the laboratory to be hot rolled steel.

70. Vide communication dated 7.3.2016, customs informed the petitioner that on recommendations made by DRI, Ludhiana, the consignments are ordered to be released provisionally on payment of full customs duty of Rs. 73,44,970/-, preferential provisional safeguard duty of Rs. 45,75,661/- and on furnishing of bonds as per list attached. The goods were to be released after measurement of thickness by DRI office. The earlier communication dated 28.1.2016 requiring the petitioner to furnish PD bonds and bank guarantee was superseded. It was claimed by the petitioner that there was no power of review or re-call with the officers of the department, but still such an action was taken. The object was to harass the petitioner.

71. Vide order dated 4.4.2016 passed in the earlier writ petition filed by the petitioner, this court directed to de-stuff the disputed consignment as the petitioner was incurring demurrage and detention charges. The stand of the petitioner was that he was man-handled when went to customs office for de-stuffing. The fact that atmosphere there was not cordial is not in dispute, however, who was at fault cannot be made out. As the stand of the petitioner from the very beginning was that the consignments contained cold rolled steel, this court further directed for drawing fresh samples.

72. As lot of developments had taken place during the pendency of the earlier writ petition, the petitioner sought permission to withdraw that petition with liberty to file fresh one, which was granted vide order dated 9.5.2016.

73. In the present writ petition, after the service of the respondents was complete and the dispute still was as to whether the imported consignments were hot rolled or cold rolled steel sheets/coils, there being two contradictory opinions available with the department, vide order dated 3.6.2016, this court directed to send the samples freshly drawn to Bokaro Steel

Plan, Jharkhand for testing. When the case was listed for hearing on 8.7.2016, report from Bokaro Steel Plant was received. Sealed envelope was opened in court. The report opined that the material was cold rolled steel. The report was furnished to counsel for the parties.

74. Vide order dated 12.7.2016, after hearing learned counsel for the parties, taking into consideration the report received from Bokaro Steel Plant and the only pending issue being the effect of thickness of the material imported, which could entail levy of small amount of additional duty on part of the consignments and further the claim of the Port Trust and the Shipping Line regarding detention and demurrage charges, this court directed that the goods be released to the petitioner on payment of duty after adjusting the duty already paid, as the material was found to be cold rolled steel/sheets/coils. The issue regarding detention and demurrage charges was to be considered later. For certain disputed amount of duty and interest, the petitioner was directed to furnish bank guarantee. The order was not immediately complied with. Certain avoidable issues were raised by the department as they were caught on a wrong foot. The stand of the petitioner was vindicated. Vide order dated 2.8.2016, this court comprehensively recorded as to what all was to be done by each of the party before release of the goods. The order was challenged by Port Trust before Hon'ble the Supreme Court. The matter was remanded back vide order dated 15.9.2016 for the entire issue to be decided finally.

75. After passing of the order dated 2.8.2016 by this court, the imported consignments of the petitioner were finally assessed by customs vide order dated 8.8.2016. The petitioner paid the amount of duty assessed, but still the goods were not released.

76. Though customs had finally assessed the duty payable by the petitioner on the imported consignments, but still DRI, Ludhiana was not satisfied, as they are apparently inimical to the petitioner. As a result of the assessment, additional duty payable by the petitioner was found to be few thousand rupees in addition to the amount assessable as per the declaration made by the petitioner. DRI, Ludhiana directed customs to file appeal against the order of assessment before release of goods. The appeal filed by customs is stated to be pending.

77. From the narration of facts, it is clear that stand of the DRI and customs had never been that the goods being imported by the petitioner were prohibited goods, which could not be imported. The only suspicion by DRI had that the consignments contained material, which is hot rolled steel and further the issue regarding thickness was also raised. For first consignment, bill of entry was furnished by the petitioner on 4.12.2015. For second and third consignments, bills of entry were furnished on 11.12.2015 and 29.12.2015, respectively. Such an issue could be resolved without any delay. For that purpose, the goods were not required to be detained for months together. It was not disputed that there was no facility available in the Government laboratory for testing as to whether a product is a hot rolled or cold rolled steel. The samples could very well be got tested from a laboratory of repute having testing facility. The report received from Rajendra S. Tambi, Chartered Engineer, along with test certificate from Perfect Laboratories Services Ltd. was ignored altogether without assigning any justifiable reason. TCR Engineering Services Pvt. Ltd., to which the samples were sent for testing again, did not have the facility for testing as to whether the goods were hot rolled or cold rolled steel. The authorities were expected to take immediate effective steps for testing of samples and even during the pendency thereof if the goods were not prohibited, order release thereof by provisional assessment.

78. The net result of the action/in-action of the authorities is that parties have been involved in avoidable litigation resulting in levy of detention and demurrage charges, part of which may go to Shipping Line, which is a foreign company. The action of the authorities had to be immediate taking into consideration that undue delay does not result in harassment to any party. Even on the other side, as is evident from various documents and communications

produced on record, the officers of the department had also been indulging in avoidable correspondence resulting in delayed release of consignments. The time could have been better utilised for other pressing needs.

Regarding de-stuffing of the goods

79. Section 49 of the 1962 Act provides that in case the officer concerned is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, pending clearance the goods may be permitted to be stored in a public/private warehouse. There is certain time allowed for clearance of goods from port and for de-stuffing the container. Beyond that, detention and demurrage charges are leviable.

80. To take care of such an eventuality, the Government and the Board had issued instructions from time to time. Vide circular No. 22/2004- Cus., dated 3.3.2004, Government of India, Ministry of Finance, while referring to the representation made by the trade on the issue of delay in release of consignments clarified that the items involved in classification disputes should not be withheld but should be released on provisional assessment if the enquiries are going to take time. It was further desired that disputed or offending consignment should also not be held up unless its import/clearance is totally prohibited or banned under any law for the time being in force or where the prosecution is contemplated. At the most, samples should be drawn and the consignment should be allowed to be cleared on provisional basis, as a matter of right. This will prevent congestion at ports and warehouses. Adequate bank guarantee/security should be taken to safeguard the revenue. In case, still it is decided to detain the consignment, action should be taken to shift the same to a customs warehouse under Section 49 of the 1962 Act. Relevant part thereof is extracted below:

> *"I am directed to say that the trade has represented to the Board that the items involved in classification disputes should not be withheld but should be released by resorting to provisional assessment.*
>
> *2. The matter has been examined by the Board. It may be mentioned that in case of classification disputes, by and large, option is given for provisional clearance/assessment, if the inquiries are going to take time. However, the Board desires that a disputed or offending consignment should also not be held up unless its import/clearance is totally prohibited or banned under any law for the time being in force (E.g. PFA, CITES, Weight & Measures Act, etc.) or where prosecution is contemplated. At most, samples should be drawn and consignment should be allowed to be cleared on provisional basis as a matter of right. This will prevent congestion at ports and warehouses. Adequate B.G./security may be taken to safeguard revenue (including possible fine and penalty). In case where it is decided to detain the consignment action should be taken to shift the same to a Customs Warehouse under Section 49 of the Customs Act, 1962 (Board's Circular No. 84/95-Cus., dated 25.7.95 may be referred to – 1995 (79) E.L.T. 12)."*
>
> *[Emphasis supplied]*

81. Similar instructions were issued vide circular No. 1/2011-Cus., dated 4.1.2011 (p. 86) with regard to export consignments. Expeditious action was suggested. As the issue cropped up time and again, some of the officers of the department being insensitive, there had been instances where on account of unlawful detention of goods, which resulted into levy of heavy detention and demurrage charges without any fault on the part of the importer, the department was burdened to bear those charges. Taking note of the order passed by this court in CWP No. 9882 of 2006— ***M/s Sai Sales Corporation v. Union of India and another***, where undue delay in clearance of goods was noticed without any valid justification and the

instructions issued by the Board from time to time, procedure was prescribed by the Chief Commissioner of Central Excise regarding examination/assessment of imported goods for the purpose of speedy clearance. Vide instructions dated 22.8.2006 (Annexure P-20), system of first and second appraisal was devised. In the case of first appraisement, examination of goods should take place within 48 hours and the assessment thereafter in 24 hours. In the case of second appraisement, the assessment should be done within 24 hours of the filing of bill of entry and examination within next 48 hours. In case, it becomes necessary to detain the goods, the importer must be intimated in writing to shift the same to a bonded warehouse, making it clear that if the facility is not availed of, liability of detention and demurrage charges shall be at his cost. Any request for provisional assessment should be considered immediately. Provisional assessment was not sought to be resorted to in case of import of goods of prohibited nature; if the goods do not meet the prescribed specification/ conditions/ requirements of various orders/Acts; release may seriously jeopardise further investigation and when final assessment is to be made within 3-4 days.

82. Government of India, Ministry of Finance issued instructions dated 13.2.2012 on the subject "Time bound Customs clearance". These instructions were issued after taking note of directions by Hon'ble the Supreme Court. It was noticed therein that despite earlier guidance, it came to the notice of the Board that the same were not being followed by the field staff. The goods are being detained on the grounds other than those mentioned in the instructions. These avoidable detentions result into mounting detention and demurrage charges. In some cases, the department was burdened to bear the same. The Board has taken serious note of it. It desired that the field staff has to take action to avoid any unwarranted delay, which can lead to levy of detention and demurrage charges. In case, for some justifiable reasons in exceptional circumstances, release of consignment is not considered advisable, even on provisional basis, option must be given in writing to the importers/exports to keep the goods in warehouses. It should be made clear that in case the facility is not availed of, any liability on account of detention and demurrage charges shall be at their risk. Non-compliance of the instructions was to be viewed seriously and accountability fixed. Relevant part thereof is extracted below:

> *"Kind attention is invited to Board's instructions issued from F. No. 450/82/95-Cus.IV, dated 7th July, 1997, Member (Customs)'s D.O. Letter F. No. 450/82/99-Cus.IV, dated 2nd June, 2001 and Circular No. 42/2001 dated 31st July, 2001 for the time bound Customs clearance and to avoid detention of Cargo from Ports/Land Customs Stations/Air Cargo*
>
> *Complexes, CFSs/ICDs. These instructions, inter-alia, have laid emphasis on measures to avoid unnecessary demurrage and difficulties to importers. These instructions have been issued after taking due note of directions of Hon'ble Supreme Court.*
>
> *2. Despite clear guidelines issued by the Board and reiterated from time to time, it has come to notice of the Board that these guidelines are not being complied with by the field formation. As a consequence of that goods are being detained on grounds other than that are mentioned in these instructions. These avoidable detention results into mounting demurrage in most of the cases. Recently in a case, department has been asked to pay substantial demurrage charges pursuant to Hon'ble High Court order, which is being contested.*
>
> *3. Board has taken a serious note of it and desires that special care will have to be taken by field formation to avoid any unwarranted delays which may lead to possible demurrage liability on Customs field formation. It is reiterated that where for justifiable reasons in certain types of exceptional situations, release*

of consignments is not considered advisable even on provisional basis, options must be given by sending intimation in writing to the importers/exporters or their agents to keep the goods in ware houses in terms of Section 49 of the Customs Act. It should be made clear that if the facility is not availed and the goods incur any demurrage, the importers/exports will be wholly responsible for its payments.

4. Non compliance of the Board's instructions and in cases of consignments being detained by Customs in routine disputes/ cases without valid grounds causing demurrages would be viewed seriously and accountability be fixed on erring officer."

83. In the case in hand, after the goods landed at Port, the petitioner filed three bills of entry on 4.12.2015, 11.12.2015 and 29.12.2015.

84. Nothing from the record was pointed out as to what action was taken on the bill of entry submitted by the petitioner on 4.12.2015 and even on the bill of entry dated 11.12.2015 till such time communication was received by customs dated 14.12.2015 from DRI, Ludhiana. The consignments were directed to be put on hold for 100% examination by DRI/customs. No one could have any exception to the examination of the consignments as it is the lawful duty of the importer to get the needful done and the right of the department under the 1962 Act. However, if the consignments were to be detained for a longer period, opportunity should have been given to the petitioner immediately for de-stuffing. Needful was not done despite request made by the petitioner vide letters dated 22.12.2015 and 28.12.2015. Thereafter, when third consignment was received, the petitioner submitted bill of entry on 29.12.2015. The position remained the same. When even subsequent letter dated 30.12.2015 by the petitioner to DRI, Ludhiana and customs was not acted upon, the petitioner approached this court. Even then no action was taken for de-stuffing. Though DRI directed that consignments be put on hold for 100% examination and one month had passed after first bill of entry was submitted on 4.12.2015, the sampling process started only on 5.1.2016, which was completed on 11.1.2016.

85. The petitioner cannot be said to be at fault for this delay. Thereafter, Chartered Engineer was appointed as directed by DRI, Ludhiana, who submitted his report dated 19.1.2016 along with the test report from a Government approved laboratory, but the same was ignored. The report of the Chartered Engineer clearly suggested that the goods imported were cold rolled sheets/coils and not hot rolled, as was suspected. There was some difference in thickness in 10% of the consignment. The stand taken by the department was that testing of samples got done by Rajendra S. Tambi, Chartered Engineer, was not authorized by customs. Be that as it may, if the Chartered Engineer was not authorized to get the samples tested from a laboratory, the fact remains that though the samples were drawn from 5.1.2016 to 11.1.2016, these were sent for testing to a laboratory, namely, TCR Engineering Services Pvt. Ltd. on 20.1.2016, which was received by the laboratory on 22.1.2016. It has also come on record that the laboratory did not have the facility for testing, as to whether the goods were hot rolled or cold rolled steel. The only opinion given by it was that 'structure appears to be hot rolled condition'. The report dated 28.E2016 was received by customs from TCR Engineering Services Pvt. Ltd., however, the matter was referred back to the laboratory to clarify as the bill of entry number had not been mentioned on the report. Revised report dated 17.2.2016 was received mentioning the bill of entry, however, prior to that, the petitioner was asked to furnish PD bonds and bank guarantee vide letter dated 28.E2016. There are two situations. Firstly, the boggy of bill of entry not mentioned in the report given by TCR Engineering Services Pvt. Ltd. and seeking clarification, was merely to delay the process as the report could otherwise be linked with reference number mentioned thereon, by which the samples were dispatched. Secondly, if the report was not to be awaited for seeking PD bonds and bank guarantee from

the petitioner, such an action should have been taken immediately when the bills of entry were submitted by the petitioner.

86. Even thereafter, the goods were not released, though as is claimed by the petitioner, the goods pertaining to other five parties, which were detained along with the petitioner, were released without even obtaining bank guarantee. The fact that the laboratory did not have the testing facility is evident from the fact that prior to this, in the test report of Perfect Laboratories, the goods were found to be cold rolled sheets/coils and subsequently when the samples were sent for testing to Bokaro Steel Plant, same report was received. Customs thereafter finally assessed the import while accepting the declaration made by the petitioner, however, additional duty of a few thousand rupees was levied on account of thickness of the part of the consignment being above 1 mm. There is no justification available and could not possibly be as to why the officers of the department sent the samples for testing to a laboratory, which did not have requisite facility. The apparent object may be to harass in the garb of testing of samples. Even thereafter, there had been lot of communications inter-se between DRI and customs requiring testing/ re-testing, checking thickness of the goods imported etc. and as a consequence, the goods were not released. DRI, Ludhiana had been communicating with customs even on telephone. It is so noticed in letter dated 4.2.2016 (p. 72). The instructions were to draw samples to find out whether the goods imported were hot rolled or cold rolled. Apparently, the earlier opinion from Rajendra S. Tambi, Chartered Engineer, was concealed from DRI by customs. The offer of de-stuffing made to the petitioner at a later stage could not materialise for the reason that the department failed to issue detention certificate and in the absence thereof, the Port Trust and the Shipping Line were requiring payment of detention and demurrage charges before release of goods. The charges had accumulated to the tune of more than the value of the goods by that time.

87. The action/in-action of the respondents has briefly been reiterated above. For the period subsequent thereto, it has been noticed in the portion of the judgment noticing the facts of the case in paras No. 55 to 60. The star point to be considered is that the goods were sought to be detained only to ascertain as to whether the material imported was hot rolled or cold rolled steel. Second issue sought to be raised subsequently was regarding thickness thereof. For the purpose of testing of the material, sampling could be done immediately after the bill of entry was furnished and the same should have been sent to the laboratory having facility for such testing. As is evident from the two reports on record, the testing took only 3 to 4 days. The thickness could also be tested simultaneously. It is not the case of the department that the goods imported by the petitioner were prohibited under any law. In case, there was some variation in thickness, additional duty of .63% was leviable, as claimed by the petitioner. As per the report of the Chartered Engineer, thickness of goods above 1 mm was only of 10% of the consignment. The goods imported were defective/secondary cold rolled sheets. There could be some variation in thickness. The whole process of testing and examination, which could be over within a week or 10 days of landing of goods at the port, was not completed even in months together. The correspondence between DRI, Ludhiana and customs went in circles. Even at the time of arguments, blame was sought to be put on each other, but the fact of the matter is that the petitioner cannot be said to be at fault for detention of goods. For that, DRI, Ludhiana and customs are to be blamed. Though there was no good reason for detention of goods for so long, if seen in the light of the instructions issued by the department, but still if required, the petitioners should have been given opportunity to get it de-stuffed immediately, which was not given immediaterly.

Responsibility for detention and demurrage charges

88. As far as the goods are concerned, those have been finally assessed by customs and detention certificate has also been issued. The amount of duty has been paid by the petitioner,

however, the same are yet to be actually released for the reason that the issue regarding detention and demurrage charges demanded by Port Trust and the Shipping Line is to be settled. There are two aspects as to who shall be responsible to pay those charges and the second issue connected with this that arises for consideration is as to whether in terms of the 2009 Regulations, Port Trust charges can be waived off.

89. This court has already opined that for detention of goods, the petitioner was not at fault. It was the illegal action of customs and DRI, Ludhiana on account of which goods remained in their custody. De-stuffing was not offered and allowed immediately, as a result of which detention and demurrage charges have accumulated, which are much more than even the value of the goods.

90. The case in hand is not in isolation, where the conduct of the department in delaying the process of release of goods despite the same being not prohibited has been commented upon. The issue earlier came up for consideration before a Division Bench of this Court in Om Udyog v. Union of India, 2010(254) ELT 547 (P&H), wherein it was observed that the goods should be cleared without delay unless these are prohibited goods. Non-clearance of goods can be justified for minimum period required for assessment. Delay of months together cannot be justified, as non-clearance seriously affects rights of lawful importer and no authority can be permitted to plead unlimited power for delaying clearance for its own incompetence as a justification beyond reasonable period. Relevant paras thereof are extracted below:

> *"10. We called upon learned counsel for the respondents to show the provision of law under which the goods were detained. It is not the case of the respondents in the reply or otherwise that power of seizure had been invoked as formation of satisfaction under Section 110 of the Act, which is condition precedent for exercise of such power, has not been shown. As held in Mapsa Tapes, exercise of power of seizure requires recording of reasons before exercise of such power. Only question is whether detention could be justified pending clearance under Chapter VII of the Act. Section 47 of the Act, provides for clearance of goods on payment of duty, unless goods are prohibited goods. It is not the case of the respondents that goods are prohibited goods. It is also not their case that duty assessed under Section 17 or 18 has not been paid. In such a situation, non clearance of goods may be justified for minimum period required for assessment. In no case, non clearance of goods for months can be justified. Non clearance seriously affects rights of lawful importer and fair procedure being constitutional mandate, no authority can plead unlimited power of non clearance for its own incompetence as a justification beyond reasonable period. Learned counsel for the respondents submitted that the petitioners could get the goods released on furnishing requisite bond under Section 110A of the Act. This contention is misconceived as Section 110A applies only when seizure is effected under Section 110.*
>
> *11. We are of the view that while officers of Custom Department may have justification to verify whether goods were prohibited or were otherwise liable to confiscation or to assess and recover duty, they are not immune from accountability against abuse of power by detaining goods for indefinite period on the ground that they were in the process of checking the value or nature of goods. They are under legal obligation to do so promptly and if by reason of their incompetence they are unable to do so, detention of goods beyond reasonable time cannot be allowed."*

91. In ***Sujana Steels Ltd.'s*** case (supra), the issue regarding responsibility for payment of demurrage was considered by a Division Bench of Andha Pradesh High Court. While finding that detention of goods by customs authorities was illegal, the burden of payment of demurrage was shifted to customs authorities, as the importer could not be absolved from payment of storage and demurrage charges. The aforesaid order was passed before framing of the 2009 Regulations while rejecting the stand taken by customs that they had power to direct Central Warehousing Corporation not to collect the storage and demurrage charges on the goods detained by customs.

92. In ***Austin Engineering Co. Ltd.'s*** case (supra), Madras High Court had the same view and put the liability on customs for the period the goods were found to be illegally detained. Customs Department was given liberty to apply to the Port Trust for refund/waiver of the charges under Section 53 of the 1963 Act. Import of the 2009 Regulations was not under consideration in the aforesaid case as the period pertained was prior to that.

93. In ***R. K. Enterprises*** and ***Donald & Macarthy (P) Ltd.'s*** cases (supra), Madras and Calcutta High Courts, finding that detention of goods was not on account of any fault of the importer, customs department was held liable to bear the demurrage charges.

94. In a recent judgment in ***Worldline Tradex Pvt. Ltd. v. Commissioner of Customs (Import)***, 2016 (340) ELT 174 (Del.), a Division Bench of Delhi High Court finding that detention of goods was illegal, directed that the petitioner therein cannot be saddled with warehouse charges. The responsibility was put on DRI. For future, it was directed that DRI and customs should ensure that there is no such indefinite detention of goods without any justification. The Board was directed to issue instructions in this regard.

95. The issue under consideration before Hon'ble the Supreme Court in ***Grand Slam International and others'*** case (supra) was regarding release of imported goods without payment of demurrage charges for the period for which detention certificate had been issued by customs authorities. It was a case prior to the issuance of the 2009 Regulations. At that stage, only a public notice had been issued by customs authorities for waiver of demurrage charges. That was held to be not binding on airport authority, as the authority which issued the public notice was not held to be competent. In the dissenting view, one of the Hon'ble Judge, constituting the Bench, held the public notice to be reasonable and practicable solution to the problem, where the goods are detained unnecessarily.

96. The matter under consideration before Hon'ble the Supreme Court in ***R.C. Fabrics (P) Ltd. and another's*** case (supra) was also for the period prior to the framing of the 2009 Regulations. Similar was the position in ***Om Shankar Biyani's*** case (supra).

97. In ***Continental Carbon India Ltd.'s*** case (supra), the issue under consideration before a Division Bench of Allahabad High Court was regarding demand of demurrage charges from the importer. In that case, the goods were detained by customs for verification. The demand was raised by Customs Cargo Service provider, who had been given licence under the 2009 Regulations. The writ petition was filed seeking a direction to the official respondents to release the goods without demand/payment of demurrage charges for the period the goods were detained by customs. The Division Bench, while referring to a judgment of Hon'ble the Supreme Court in ***Grand Slam International and others'***case (supra) with reference to Section 45 of the 1962 Act opined that custodian has power to levy demurrage charges. As the custodian had been given approval under the 2009 Regulations, it was held to be bound by Regulation 6 of the 2009 Regulations and the court held that service provider was not entitled to charge demurrage charges. Paragraphs 21 to 24 thereof are extracted below:

"21. The aforesaid provision indicates that subject to any other

law for the time being in force, the Custom cargo service provider shall not charge any rent or demurrage on the goods assessed or detained or confiscated by the Customs department.

22. In the light of the aforesaid provisions, the contention of the learned counsel for the petitioner that the Customs Act does not provide any provision to levy any demurrage charges and, therefore, custodian, namely, Respondent No. 4 has no authority of law to levy demurrage charges under Section 45 (2) of the Act is patently misconceived. We are of the opinion that in view of the provision of Section 45 of the Act read with the Regulation 2(b), 5 and 6 of the Regulations of 2009 the Customs cargo service provider is responsible for providing storage facilities for the purpose of unloading imported goods and, consequently, is entitled to charge demurrage charges.

23. However, we are of the opinion that the custodian, namely, the service provider-respondent No. 4 is not entitled to charge demurrage charges where the goods have been detained, seized or confiscated by the Customs department, in view of the terms of condition of the appointment order of Respondent No. 4 read with Regulation 6(1) of the Regulations of 2009. Reliance by Respondent No. 4 on the decision in the case of ***International Airports Authority of India*** *(supra),* ***Shiping Corporation of India*** *(supra),* ***Trustees of Port of Madras*** *(supra) is misplaced, inasmuch as the said decisions are not applicable. At this stage, we may state that the International Airport Authority of India and Trustees of Port of Madras were charging demurrage charges on the basis of Rules and Regulations framed under the Act by which they were being governed. The Supreme Court in that scenario held that there was no embargo upon the custodian, namely International Airport Authority and Trustees of Port of Madras to recover demurrage charges under Regulation 2(g) of the Regulations framed under the Regulations of 1980 and the bye-laws framed under the Port Trust Act.*

24. In the instant case, Respondent No. 4 has been appointed as the custodian under Section 45 of the Act read with Regulations of 2009. Clause 6(1) of the Regulations of 2009 prohibits the service provider, namely, Respondent No. 4 to charge demurrage charges on the goods seized or detained or confiscated by the Customs department. We are, therefore, of the opinion that Respondent No. 4 had no authority of law to charge demurrage charges on the goods seized or detained or confiscated by the Customs department."

[Emphasis supplied]

98. As stated by learned counsel for the petitioner, Special Leave Petition filed against the aforesaid judgment was dismissed as withdrawn leaving the question of law open.

99. Similar view was expressed in ***Paswara Chemicals Ltd.'s*** case (supra) by Allahabad High Court.

100. In ***Mumbai International Airport Pvt. Ltd.'s*** case (supra), a Division Bench of Mumbai High Court upheld the vires of Regulation 5(2) of the 2009 Regulations. While referring to Section 141 of the 1962 Act, it was opined that prior to the framing of the 2009 Regulations, sub-section (2) was added in Section 141 w.e.f. 10.5.2008 providing that imported and export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner, as may be prescribed, and the responsibilities of the person engaged in the aforesaid activity shall be such, as may be prescribed. The prescription was by way of framing the 2009 Regulations.

101. It was pointed out at the time of hearing that the 2009 Regulations were placed before both the Houses of Parliament and there was no change proposed.

102. In ***Sanieev Woolen Mills'*** case (supra), Hon'ble the Supreme Court dismissed an appeal filed by the department against the judgment of Delhi High Court, opining the detention of goods to be unjustified, had directed that no demurrage charges were payable by the importer. The liability was put on the department.

103. In ***C. L. Jain Wollen Mills***' case (supra), Hon'ble the Supreme Court opined that there is no inconsistency between the two earlier judgments of Hon'ble the Supreme Court in ***Grandslam and Sanjeev Woolen Mills'*** cases (supra), as the facts in the case of ***Sanieev Woolen Mills'*** case were similar. In this case, Hon'ble the Supreme Court gave liberty to the department to move application to the Shipping Corporation and Container Corporation for waiver of the charges as the liability put by the High Court was not challenged any further.

104. The prayer of the petitioner before Madras High Court in ***Express Clearing Agency's*** case (supra) was for release of goods without payment of demurrage charges. The goods were detained therein for verification and testing. Part of the goods, which were detained by customs, were directed to be released without insisting for payment of any demurrage charges. Refund of the demurrage charges already paid was also directed.

105. In ***Champion Photostat Industrial Corporation's*** case (supra), finding of the act of the department for detention of goods to be illegal, the writ petition was accepted by a Division Bench of this Court; the respondents therein were directed to release the goods; demurrage charges were to be borne by the department and even personal cost was also imposed on the officer. In appeal before Hon'ble the Supreme Court in ***Union of India v. Champion Photostat Indusl. Corp.,*** 2012 (278) ELT 29 (SC), the only grievance raised by Union of India was regarding imposition of personal cost on the officer. The same was accepted. Order on merits was not challenged.

106. In ***Ideal Sheet Metal Stampings & Pressings Pvt. Ltd.'s*** case (supra), Gujarat High Court opined that where in a dispute between the department and the importer, the stand of the department is justified, the burden of payment of demurrage will necessarily fall on the importer. If it is otherwise, the department must take the liability of demurrage charges of the approved custodian. To hold otherwise would be unjust to the petitioners therein who have met with success in such litigation with the department.

107. In view of the aforesaid enunciation of law by different High Courts including this court, once it is found that detention of goods was not on account of any fault of the petitioner, rather, found to be illegal action on the port of DRI and customs, the petitioner cannot be burdened for detention and demurrage charges and the liability has to be put on customs department, who shall be at liberty to seek waiver thereof.

Regarding application of the 2009 Regulations

108. In the previous paras of the judgment, this Court has already been opined that the inordinate delay in testing and release of goods was on account of action/in-action on the part of the officers of customs and DRI, Ludhiana. They have been held liable to bear detention and demurrage charges, the petitioner being not at fault.

109. Another issue raised by learned counsel for the parties was regarding applicability of the 2009 Regulations and the power of customs to waive off demurrage charges demanded by Port Trust by issuing a detention certificate. At the time of ordering release, customs had issued detention certificate to the petitioner.

110. Section 2(11) of the 1962 Act defines 'customs area', to mean an area of a customs station and includes any area in which imported goods or export goods are ordinarily kept

before clearance by Customs Authorities. 'Customs port' has been defined in Section 2(12) of the 1962 Act, to mean any port appointed under clause (a) of Section 7 of the 1962 Act to be a 'customs port'. 'Customs station' has been defined in Section 2 (13) of the 1962 Act, to mean any customs port, customs airport or customs station. Section 7(a) of the 1962 Act gives power to the Board to notify any port or airport to be customs port or airport for unloading of imported goods and loading of export goods. Section 45 of the 1962 Act provides for certain restrictions on custody and removal of goods. All imported goods are to remain in custody of such person, as may be approved by Principal Commissioner of customs until cleared for home consumption. The person, who has been given custody of the goods, is liable for any pilferage etc.

111. Section 49 of the 1962 Act provides that where the goods cannot be cleared within reasonable time, on an application filed by the importer, pending clearance, these cannot be permitted to be stored in a public warehouse. The object is to save detention and demurrage charges, as the charges payable in a public warehouse are far less as compared thereto. The circular issued by the Board authorising the authorities to issue notice in writing to the importer to get the goods de-stuffed in case these cannot be cleared within reasonable time have been referred to in para No. 17 of the judgment. The circular clearly mentions that in case on intimation the importer fails to avail of the facility, it shall be at his own risk. The request made by the petitioner for early clearance of goods to avoid levy of detention and demurrage charges have been referred to in para No. 40 of the judgment. His repeated requests were not acceded to.

112. Section 141 of the 1962 Act provides that for the purposes of enforcing the provisions of the Act, all conveyances and goods in a customs area shall be subject to control of officers of customs. It further prescribes that the imported goods or export goods may be received, stored, delivered, despatched or otherwise handled in a customs area in such manner, as may be prescribed and the responsibility of the person engaged in the aforesaid activity shall be such, as may be prescribed. Section 157 of the 1962 Act provides for power to make Regulations, whereas Section 159 of the 1962 Act provides that every Rule or Regulation framed under the 1962 Act is to be placed before each House of Parliament.

113. Section 3(8) of the 1908 Act defines 'major port', to mean any part, which is notified by the Central Government in the official gazette to be a major port.

114. Section 2(d) of the 1963 Act gives 'Collector of Customs' the same meaning as is there in the 1962 Act. It provides for constitution of Board of Trustees. Section 43 of the 1963 Act provides that the Board shall be responsible for any loss, destruction and deterioration of goods, which are in its charge. Section 47A of the 1963 Act provides for constitution of Tariff Authority for Major Ports. The Authority is empowered to notify the scale of rates chargeable including wharfage, storage or demurrage charges for goods. Section 53 thereof provides that the Board has the power to exempt whole or in part any charges payable under the Act for the reasons to be recorded in writing. Section 54 of the 1963 Act gives power to the Government to direct the authorities to cancel any of the scales in force or modify the same. Section 58 of the 1963 Act provides that the rates so fixed are to be paid immediately on landing thereof and the Board has lien on the goods for the rates leviable under the Act in terms of Section 59 of the Act. Section 111 of the 1963 Act gives power to the Central Government to issue any instructions to the Board. Any decision of the Central Government is final.

115. In exercise of powers conferred under Section 141(2) read with Section 157 of the 1962 Act, the Board framed the 2009 Regulations. Regulation 2(b) defines 'Customs Cargo Service provider', to mean any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and export goods and includes a custodian, as referred to in Section 45 of the 1962 Act and the person as referred to in Section 141(2) of the 1962 Act.

The 2009 Regulations are applicable for handling of imported and export goods in customs area as specified in Section 8 of the 1962 Act. The 2009 Regulations have retrospective application to the extent that any action taken or anything done in respect of appointment of Customs Cargo Service providers prior to the coming into force of the 2009 Regulations, shall be deemed to have been done under the 2009 Regulations, however, such service providers have to comply with the conditions laid down in the 2009 Regulations within the period specified. Regulation 5 provides for conditions to be fulfilled by an applicant for custody and handling of imported or export goods in a customs area and the applicant is required to execute a bond of the specified amount and also furnish bank guarantee or cash deposit, however, the ports notified under the 1962 Act are exempted from furnishing the bank guarantee or cash deposit. Meaning thereby that they are also treated at par with other licensees.

116. Regulation 6 provides for various responsibilities of Customs Cargo Service provider, which include maintenance of proper record, demarcation of specific area for specific purpose, responsibility for safety and security of goods under its custody. And one of the important responsibility, which is under consideration in the present petition, is that it is not to charge any rent or demurrage on the goods seized, detained or confiscated by the proper officer under the 1962 Act. Regulation 9 of the 2009 Regulations provides for filing of application for approval as Customs Cargo Service provider and the provisions thereafter provide for approval of such application, suspension or revocation of approval.

117. The 2009 Regulations were framed in view of the recommendations made by Public Accounts Committee (2004-06), as is mentioned in the explanatory memorandum attached to the 2009 Regulations. It provides that the 2009 Regulations have been framed to provide adequate control over the cargo handling entities. The fact that port trust is providing services in a customs area and is custodian of the goods under Section 45 of the 1962 Act, could not be disputed.

118. The 2009 Regulations were notified on 17.3.2009. On 23.3.2009, clarification was issued by the Government of India, Ministry of Finance (Department of Revenue) vide F. No. 450/2008-Cus.IV, indicating the salient features of the newly framed Regulations. It specifically clarified that major ports notified under the 1963 Act, airports notified under the Airports Authority of India Act, 1994 will continue to be authorised to function as custodians under their respective Acts and the 2009 Regulations shall not have any impact on their approval as custodian, as even Section 45 of the 1962 Act provides for an exception to the approval of such person. Accordingly, the Port Trusts of the notified Major Ports and Airport Authority of India were not required to file application for approval under the 2009 Regulations, however, they were required to discharge the responsibilities cast upon them as specified in Regulation 6 of the 2009 Regulations. The responsibilities, as prescribed in Regulation 6, are in tune with what is provided in Section 45 of the 1962 Act.

119. The definite stand of customs and DRI before this court and Hon'ble the Supreme Court was that Port Trust is a Customs Cargo Service provider, though it has been exempted from obtaining any approval by filing application, being a Government entity. Reference can be made to counter affidavit dated 26.8.2016 filed by DRI in SLP (C) No. 23479-480 of 2016— ***Mumbai Port Trust v. M/s Inder Internationl and others*** in para 8T thereof, wherein it is stated that the "Board vide circular No. 13/2009-Cus. dated 23.3.2009 in para 4.2 mentioned that the Port Trust of the notified major ports and the Airports Authority of India shall not be required to make an application under Regulation 4 or 9 for approval or renewal under these Regulations. However, they would be required to discharge the responsibilities cast upon them as specified in Regulation 6". To similar effect is the stand taken by customs in the affidavit dated 29.8.2016 filed before Hon'ble the Supreme Court.

120. The Port Trust has been constituted under the 1908 Act. Section 7 of the 1962 Act enables the Board to appoint any port or customs airport for unloading of imported goods and loading of export goods by way of a notification. It is not in dispute that Mumbai Port is a customs port, which is operating in the customs area, as approved under Section 8 of the 1962 Act. It is a custodian in terms of Section 45 of the 1962 Act. As per Section 141 of the 1962 Act, all conveyances and goods in a customs area shall be subject to the control of the officer of customs. Section 141 of the 1962 Act was amended w.e.f. 10.5.2008 with addition of sub-section (2) providing that imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner, as may be presribed and the responsibilities of the persons engaged in the aforesaid activity shall be such, as may be prescribed.

121. Section 157 of the 1962 Act enables the Board to make Regulations for carrying out the purposes of the Act. In exercise of powers conferred under the aforesaid provision, the 2009 Regulations were framed by the Board. In fact, these Regulations were required to be framed to streamline their working on account of various disputes coming to the court where for detention of goods by customs, demurrage was levied by the Port Trust, namely, Customs Cargo Service provider and the liability thereof was put on customs department. The 2009 Regulations have been given retrospective application. All existing Customs Cargo Service providers are deemed to have been appointed under the 2009 Regulations, however, they are required to comply with the conditions within specified time. Certain duties have been assigned to the service providers. They are also required to furnish bonds and bank guarantee. The ports notified under the 1963 Act or the Central Government or the State Governments or their undertakings have specifically been exempted from furnishing of bank guarantees or cash deposit. Regulation 6(1) clearly provides that Customs Cargo Service provider shall, subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the proper officer. Section 111 of the 1963 Act gives power to the Central Government to issue any direction on questions of policy, which is binding on the Port Trust. No doubt, the 2009 Regulations have been framed by the Board, however, vide circular dated 23.3.2009 issued by the Government of India, Ministry of Finance (Department of Revenue), it is specifically provided that major ports, as notified under the 1963 Act and the airports constituted under the Airports Authority of India Act, 1994 will continue to be authorised as custodian under their respective Acts and the 2009 Regulations shall not impact their approval as a custodian. These authorities will be required to discharge responsibilities cast upon them in terms of Regulation 6 of the 2009 Regulations. Non-charging of rent or demurrage charges for the period the goods are detained by customs officers is one of them. Answer to the issue raised by learned counsel for Port Trust that the 2009 Regulations framed by the Board cannot be taken to be a direction issued by the Government is taken care of by the circular dated 23.3.2009, which not only said about applicability of the 2009 Regulations but also exempted it from filing application. Merely because before issuing the instructions, hearing was not afforded to the Port Trust, as required under Section 111 of the 1963 Act is concerned, for that Port Trust can raise the grievance before the appropriate forum. The applicability thereof cannot be disputed. Here Union of India and its undertakings are fighting against each other.

122. The Authority, as constituted under the 1963 Act, is only meant to fix the rates to be charged by the port authorities. Under Section 53 of he 1963 Act, the Board can deal with only such cases which seek waiver of charges. In the case in hand, the direction of the Government is as a matter of policy, which is applicable uniformly in all cases, where detention of goods is by customs and the certificate is issued. It is not in dispute that in the case in hand, the certificate has been issued, hence, in terms of Regulation 6(1) of the 2009

Regulations, which are binding on the Port Trust, customs can waive off the demurrage charges.

Regarding malafide of respondent No.7-Santokh Singh Senior Intelligence Officer and respondent No. 8-Roopesh Kumar, Intelligence Officer, DRI.

123. The allegations of personal malice have been raised by the petitioner against respondents No. 7 and 8 in paragraphs No. 14 to 17 and 29 of the writ petition. It has been alleged that action of respondents No. 7 and 8 was mala fide. They had visited TCR Engineering Services Pvt. Ltd. to get the report in their favour. The sampling was directed time and again and so the testing. They had been dictating customs. The petitioner was discriminated as the other consignments containing similar material were released. The petitioner had even made representation to the senior officers for transfer of investigation from respondents No. 7 and 8 to some other officer. They had misused their power. Learned counsel further referred to the fact that respondents No. 7 and 8 are inimical to the petitioner, as this court had adversely observed against them while calling them in person in court in the earlier litigation between the parties. There also, the department was found to be at fault. As Hon'ble the Supreme Court had desired for expeditious disposal of the petition vide order dated 15.9.2016, the case being in motion list, the hearing commenced on 4.11.2016. Whatever time was available on day-to-day basis, was utilised.

124. Learned counsel submitted that specific allegations of *mala fide* having not been denied by respondents No. 7 and 8 by filing affidavit, these are deemed to be admitted, hence, the action being mala fide, the petitioner deserves to be granted the relief prayed for. The common written statement dated 30.5.2016 was filed by respondents No. 1 to 3 and 5 to 8, which has been signed by Varinder Kaur, Deputy Director, DRI, Ludhiana. He further submitted that along with CM Nos. 14300 of 2016 and 14201 of 2016 filed by the counsel, written statement of respondents No. 7 and 8, respectively, are sought to be filed. The same were listed in court on 7.11.2016 after the petitioner had already addressed arguments regarding mala fide of respondents No. 7 and 8. This fact is even admitted in the application for placing on record the written statement. He further submitted that the written statements so filed are otherwise nothing more than a waste paper and are liable to be ignored. Though the applications seeking to place on record the written statements are accompanied by affidavit of the respondent concerned, however, the facts stated in the written statements are not verified. The same have merely been signed by the respondents' concerned. Meaning thereby, the allegations regarding mala fide alleged against respondents No. 7 and 8 have not been denied by filing affidavit. This court is not going into much detail on this aspect, but it can safely be opined that the action was not bonafide, if not strictly mala fide. Things could have been taken in right perspective with positive attitude ensuring that neither the revenue suffers any loss nor the importer on account of merely delay of clearance of goods. The instructions issued by the department, time and again, were blatantly violated. The stand taken by the petitioner was vindicated when finally the goods were found to be cold rolled steel. It was never the case of the department that the goods imported were prohibited. The only issue raised about these being hot rolled or cold rolled steel or its thickness could be taken care of without any delay.

Payment of detention charges of Shipping Line

125. The issue regarding payment of detention charges of the Shipping Line is also required to be considered. The stand taken by the petitioner was that since detention of goods even by the department was also not justified, he is not liable to pay any detention charges demanded by the Shipping Line. The stand taken by the petitioner that the goods imported were cold rolled steel was found to be correct finally. On the other hand, the stand taken by the Shipping Line was that transportation of goods by the Shipping Line was in pursuance to a contract entered into between the parties, this court does not have the jurisdiction to go into the

issues in writ jurisdiction. In fact, no relief has been claimed against the Shipping Line in the writ petition. The grievance raised is only against DRI and customs. The 2009 Regulations are not applicable on the Shipping Line, as it is not a Customs Cargo Service provider. There is no allegation that there was any connivance of the Shipping Line with the Government or any other agency. It has first charge as lien on the goods transported for payment of freight and other charges.

126. No doubt, the 2009 Regulations are not applicable on the Shipping Line, however, once it is found that detention of goods for inordinate period was not on account of any fault on the part of the petitioner, he is not liable to be burdened with that cost. It is only the DRI and customs, who should bear the cost, demanded by the Shipping Line. It was so opined in Sanieev Woollen Mills' case (supra). The DRI or customs may get those charges waived off or reduced from the Shipping Line, however, whatever is payable in addition to the freight agreed between the importer and the Shipping Line shall be borne by DRI or customs.

127. It was pointed out at the time of hearing that detention charges demanded by the Shipping Line has run into crores of rupees, which are even more than the value of the goods imported and may be even more the value of the container itself, which has been detained along with goods. The Department should examine the issue whereby the containers of the Shipping Line can be made free immediately by de-stuffing and the goods are shifted to other containers locally available in cases where the goods cannot be de-stuffed in a warehouse in open on account of fear of pilferage or damage, however, if not already dealt with, as nothing was pointed out in this regard at the time of hearing.

128. For the reasons mentioned above, the writ petitions are allowed. The amount of customs duty having already been paid by the petitioners, the respondents are directed to release the goods. The Port Trust cannot charge any demurrage in view of Regulation 6(1) of the 2009 Regulations, customs having issued the detention certificate. The detention charges demanded by the Shipping Line shall be borne by DRI and/or customs. However, they shall be entitled to get the same waived off or reduce from the Shipping Line. The petitioners shall be entitled to cost of Rs. 50,000/- each to be paid by the department, however, with liberty to recover from the guilty officer/official(s).

129. Before parting with the judgment, we would like to observe that our country imports goods worth about $ 33 billions annually and in large number of cases, the issue arises regarding alleged mis-declaration of the goods with reference to the declaration made in the bills of entry, but as is seen, the infrastructure in the form of laboratories or otherwise available with the department is lacking. That needs to be upgraded immediately to avoid any delay in clearance of goods or giving undue benefit to the unscrupulous importers on account of delay in the process.

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PUNJAB & HARYANA HIGH COURT

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VATAP NO. 111 OF 2012

CHERRYHILL INTERIORS LTD
Vs
STATE OF HARYANA

RAJESH BINDAL AND HARINDER SINGH SIDHU, JJ.

9th December, 2016

HF ▶ None

Contractor cannot absolve himself from liability to pay interest in case of late deposit of tax deducted at source by the contractee unless he is not a party to the fraud committed by contractee.

WORKS CONTRACT – TAX DEDUCTION AT SOURCE – CONTRACTOR FILING THE RETURN AND ATTACHING THE CERTIFICATE ISSUED BY THE CONTRACTEE SHOWING PAYMENT OF TAX – ON VERIFICATION, NO TAX FOUND PAID AND THE CERTIFICATE WAS BOGUS – NO PRESUMPTION ABOUT THE PAYMENT OF TAX BY CONTRACTEE – CONTRACTOR CANNOT ABSOLVE HIMSELF ROM LIABILITY TO PAY TAX – IF THE CERTIFICATES ISSUED BY CONTRACTOR ARE FOUND TO BE BOGUS AND CONTRACTOR NOT PARTY TO THE FRAUD, THE POSITION WOULD BE DIFFERENT – CASE OF ASSESSEE TO BE EXAMINED IN THE LIGHT OF LAW LAID DOWN IN THE JUDGMENT – APPEAL DISPOSED OF. - *SECTIONS 9, 14, 24 OF HVAT ACT, 2003 AND RULES 16(1), 33, 49 OF HVAT RULES, 2003*

Assessee in the present case is a contractor who had executed works of various contractees. He also being a Lump-Sum Contractor filed its Returns and the tax was calculated as Rs. 95,02,695/-. The payments to the tune of Rs. 94,05,576/- were verified and credit of the same was given. The Assessing Authority, however, levied interest u/s 14(6) on the ground that contractees had deposited the tax late with Revenue. On appeal, Tribunal remanded the case only for re-computation upholding levy of interest. On appeal before the High Court.

Held:

Principal liability of payment of tax is on the contractor. In case his tax has been deducted by the contractee, then he can claim the credit of tax paid on his behalf by a contractee only to the extent Certificate has been issued to him by the contractee and the same has been attached by him alongwith Returns. A contractor cannot absolve himself from liability to pay tax as per Returns filed merely on presumption about the deduction or payment of tax by the contractee on his behalf. Liability to pay interest and penalty on the contractor and levy of penalty on the contractee are independent for their respective defaults and cannot be set off against each other. However, even in case of late deposit of tax, the credit thereof is required to be given as there can be no double charging of tax on the same tranwaction. In case a contractor has attached the Certificate issued by the contractee showing payment of tax on his behalf and on verification it has been found that tax has not been paid by the contractee and the Certificate

was bogus and the contractor was not party to that fraud, the position may be different. In that event, the case will have to be examined in facts of a particular case. The questions of law are accordingly answered and the case of appellant is required to be dealt with in terms of the law laid down above. Appeal stands disposed of.

Cases referred:

- *Gheru Lal Bal Chand vs The State of Haryana and another (2011) 40 PHT 145*

Present: Mr. Avneesh Jhingan, Advocate, for the appellant.
Ms. Mamta Singla Talwar, Deputy Advocate General, Haryana.

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RAJESH BINDAL, J.

1. The assessee is in appeal against the order dated 9.8.2011 passed by the Value Added Tax Tribunal, Haryana, Chandigarh. The substantial questions of law as pressed at the time of final hearing are as under:-

i) Whether in the facts and circumstances of the case on combined reading of Section 14(6), Section 24 and Rule 33, can interest be charged from the contractor for late deposit of TDS by contractee?

ii) Whether in the facts and circumstances of the case the liability of the contractor to deposit tax due according to the returns can be extended to mean that he is liable for timely deposit of TDS deducted by the contractee?

2. Learned counsel for the appellant submitted that the appellant is a contractor executing works of various contractees. As per the provisions of the Haryana Value Added Tax Act, 2003 (for short, 'the Act'), the contractee is liable to deduct tax from the payment to be made to the contractors and deposit the same with the department. In terms of the certificate issued to the contractor by the contractees, the credit of the amount reflected therein is granted to the contractor out of the tax payable by him. The assessment of the appellant for the year 2006-07 was framed by the Assessing Authority vide order dated 23.3.2010. The works contract tax was determined at Rs. 95,02,695/-. The payments to the tune of Rs. 94,05,576/- were verified, the credit for which was given. In addition, interest was levied under Section 14(6) of the Act. Aggrieved against the order of assessment levying interest, the appellant preferred appeal before the Joint Excise & Taxation Commissioner (Appeals), Faridabad, who vide order dated 6.1.2011, dismissed the same. The order was upheld by the Tribunal vide order dated 9.8.2011. The matter was remanded back only for the purpose of recomputation of the interest liability, as the Tribunal opined that the interest is chargeable on quarterly basis and not on monthly basis.

3. It is the aforesaid order, which is under challenge in the present appeal.

4. Learned counsel for the appellant argued that Section 24 of the Act cast a liability on a contractee to deduct tax at the rate specified from any payment made to a contractor and deposit the same with the department. The contractee is liable to file periodic returns and deposit the amount of tax so deducted with the department. For any amount of tax deducted, a certificate is issued to the payee on whose account the deduction was made. On the strength of the certificate, the payee is entitled to get the credit from the tax payable by him. If a contractee fails to deduct whole or part of the tax or fails to deposit with the department whole or part of the tax, at any time within five years from the close of the year in which default occurred, penalty equal to the amount of tax can be levied. Rule 16 of the Haryana Value Added Tax Rules, 2003 (for short, 'the Rules'), provides for the period when the returns are to be filed by

the contractees. Rule 33 of the Rules provides for procedure for deduction of tax at source and deposit with the department. The tax is to be deducted monthly and to be deposited with the department in next 15 days after the close of the month. Original copy of the challan is to be affixed with the return to be filed by the contractee and 5th copy is to be furnished to the contractor as a certificate of tax deduction and payment, who is to annex the same with his return to claim the credit thereof.

5. Section 14 of the Act provides for filing of return and payment of tax. On failure to make payment of tax in accordance with the provisions of the Act and the Rules, there is liability to pay interest under Section 14(6) of the Act.

6. As per Rule 49(3) of the Rules, a contractor opting to pay tax on lump sum basis is liable to make payment of tax calculated @ 4% of the payments received or receivable by him during the quarter for execution of a contract. The payment of lump sum so calculated is to be made within thirty days following the close of the quarter after reducing the amount paid on his behalf by any contractee under Section 24 of the Act for that quarter. The receipt for proof of the amount paid by the contractee is to be attached with the returns to be furnished quarterly.

7. While referring to the aforesaid provisions of the Act and the Rules framed thereunder, the submission is that the provisions for deduction of tax at source were added in the statutes only to safeguard the interest of the revenue. Duty was cast on a contractee to deduct the tax for any work got executed by him for better compliance of the provisions of the Act. Once the contractee has been made liable to deduct tax and deposit the same with the department for any default on his part, action is to be taken against him and not against the contractor. While deducting the tax, a contractee is working as an agent of the government. The contractor has no means to ensure that a contractee is complying with the provisions of the Act. He is only to furnish the certificate to the contractor showing deposit of tax in the Treasury. A contractee can be penalised for default in deduction or deposit of tax. The interest of the department is well protected as action can be and should be taken against him. Interest is compensatory. Once the contractee can be penalised to the extent of 100% of the amount in dispute, that takes care of the amount of interest which could possibly be charged by the department on account of delayed payment of tax. In the case in hand, the appellant had filed returns, produced the certificate issued by the contractee, default was noticed only at the time of assessment. Had it been pointed out at the time of filing of return by the appellant, the matter could be sorted out there and then. There was delay in deposit of tax by the contractee. He utilised the money and hence, he should be liable to pay the interest.

8. Learned counsel for the appellant further submitted that interest can be charged from the contractee under Section 14 (2) of the Act.

9. Referring to a judgment of this Court in ***M/s Gheru Lal Bal Chand vs The State of Haryana and another*** (2011) 40 PHT 145, it was submitted that the contractee is working as an agent of the government, so action should be taken against him.

10. Learned counsel for the appellant further contended that even though at the time when the assessment of the appellant was framed and it came to the notice of the department that there was delay in deposit of tax by the contractee and the period of limitation was still available, but no action was taken against the contractee.

11. On the other hand, learned counsel for the State submitted that a contractor is liable to be registered under the Act, whereas a contractee is not. Concept of levy of tax and penalty are different. Special provisions providing for TDS under Section 24 of the Act talk about levy of penalty. Only this action can be taken against the contractee. Against the contractor, the action can be taken under Section 14(6) of the Act. In case a contractee is a registered dealer then only the provisions of the Section 14(6) of the Act will apply. Interest is to be charged and

the contractee is liable to pay the same. There is liability on the appellant to file returns and deposit tax. He is entitled to claim credit of the amount of tax deducted/ paid on his behalf by a contractee. Balance amount is to be paid by him along with the returns. The payment is to be made every quarter within 30 days from the close of quarter. As the liability to pay tax on the transaction is of the contractor, he is liable to pay tax. In case of default, he is liable for payment of interest and penalty. The collection of tax from a contractee is merely an advance payment on behalf of the contractor. The default in the case in hand is not of few days, rather of years in some transactions, hence, the appellant cannot escape from liability to pay interest.

12. Learned counsel for the State further submitted that at present she has no information about any action taken against the contractee.

13. Heard learned counsel for the parties and perused the paper book.

14. The relevant provisions of the Act and the Rules are reproduced hereunder:-

Section 14 of the Act

"Submission of returns and payment of Tax

14. *(1) Tax payable under this Act shall be paid in the manner and at such intervals as hereinafter provided.*

(2) The following dealers or class or classes of dealers, whether or not liable to pay tax, namely: -

(a) *such class or classes of dealers as may be prescribed;*

(b) *such dealer as may be required so to do by the assessing authority by notice in the prescribed form served in the prescribed manner,*

(c) *a dealer who has applied for the grant of registration certificate but no final decision on his application has been taken; and*

(d) *every registered dealer, shall furnish such returns including for statistical purposes at such intervals, verified by such persons, by such dates and to such authority, as may be prescribed and different returns may be prescribed for different class or classes of dealers, and if the tax due according to such returns is more than the tax paid under sub-section (3) or sub-section (4), as the case may be, he shall, in the manner prescribed, pay the balance with interest at the rate specified in sub-section (6) before furnishing the returns and attach therewith the proof thereof.*

xx *xx* *xx*

(6) If any dealer fails to make payment of tax as required by sub-sections (3), (4) and (5), he shall be liable to pay in addition to the tax payable by him, simple interest at one-and- a-half per cent per month if the payment is made within ninety days from the last date specified for the payment of tax, but if the default continues thereafter, he shall be liable to pay simple interest at three per cent per month for the whole of the period from the last date specified for the payment of tax to the date he makes the payment.

Section 24 of the Act

Special provisions relating to deduction of tax at source in certain cases

24. *(1) The State Government may, having regard to the effective recovery of tax, require in respect of contractors or any other class or classes of dealers*

that any person making payment of any valuable consideration to them for the execution of a works contract in the State involving transfer of property in goods, whether as goods or in some other form or for sale of goods in the State, as the case may be, shall, at the time of making payment, whether by cash, adjustment, credit to the account, recovery of dues or in any other manner, deduct tax in advance therefrom which shall be calculated by multiplying the amount paid in any manner with such rate not exceeding ten per cent, as the State Government may, by notification in the Official Gazette, specify and different rates may be specified for different works contracts or class or classes of dealers, and that such person shall keep record, of the payments made and, of the tax deducted in advance therefrom, for a period of five years from the close of the year when the payments were made and shall produce such record before the prescribed authority when so required for carrying out the purposes of this Act.

(2) The provisions of sub-section (1) shall not apply where the amount or the aggregate of the amounts paid or likely to be paid during a year by any person to a dealer does not or is not likely to exceed one lakh rupees or such other amount as may be prescribed.

(3) Every person who is required to deduct tax in advance under sub-section (1) shall furnish such returns at such intervals by such dates in such manner to such authority as may be prescribed and shall pay the tax deducted according to such returns to the State Government in such manner as may be prescribed.

(4) Every person referred to in sub-section (3) shall issue to the payee a certificate of tax deduction and payment in such form in such manner as may be prescribed.

(5) Any tax paid to the State Government in accordance with sub-section (3) shall be adjustable by the payee, on the authority of the certificate issued to him under sub-section (4), with the tax payable by him under this Act and the assessing authority shall, on furnishing of such certificate to it, allow the benefit of such adjustment after due verification of the payment.

(6) If any person fails to deduct the whole or any part of the tax as required by or under the provisions of sub-section (1), or fails to pay the whole or any part of the tax as required by or under sub-section (3), then, the authority referred to in sub¬section (3) may, at any time within five years of the close of the year when he failed to do so, by order in writing, direct him, after giving him a reasonable opportunity of being heard, to pay, by way of penalty, a sum equal to the amount of tax which he failed to deduct or pay as aforesaid.

Rule 16 (II of the Rules

Submission of Return and Payment of Tax

(1) The class of dealers or the assessees of the description specified in column 2 of the Table below shall for such period and at such intervals as mentioned in column 3 thereagainst furnish to the appropriate assessing authority on or before the last day of the month following the said period, a return in such form as is specified in the corresponding entry in column 4.

Sr. No.	*Description of class or Classes of dealers*	*Return period and interval*	*Return Form*
1	*2*	*3*	*4*

1	*Dealers who are required by the assessing authority to file returns by serving upon them a notice in Form VAT-N1 under clause (b) of sub-section (2) of section 14 so long as they are not covered by entry 3 below.*	*Quarter*	*VAT-R12*
2	*Registered dealers in whose case composition of tax under section 9 is made and is in force*	*As specified in the relevant rule relating to payment of lump sum for the specified class of dealers*	
3.	*Registered dealers holding registration certificate or whose application for registration is pending and who are not covered under entry 2 above*	*Quarter*	*VAT-R1*
4.	*Government agencies, public sector undertakings or corporations procuring food grains in the State at the minimum support price who are liable to deduct tax in advance under sub-rule (1) of rule 33*	*Quarter*	*VAT-R4*
5.	*Contractees who are liable to deduct tax in advance under sub-rule (2) of rule 33*	*Quarter*	*VAT-R4A*

CHAPTER V

Payment of Tax and Other Dues and Refund

Rule 33

Deduction of Tax at Source

(1) Every Government agency, public sector undertaking or corporation procuring food grains in the State at the minimum support price (with or without bonus) fixed from time to time for such grains or any person authorised by such agency, undertaking or corporation in this behalf and acting as such, shall, at the time of making payment, whether by cash, adjustment, credit to the account, recovery of dues or in any other manner to the commission agent as valuable consideration for selling the grains, deduct tax in advance from such payment calculated by multiplying the amount paid in any manner with four per cent or such other rate, as notified under sub-section (1) of section 24.

(2) Every contractee shall, at the time of making payment, whether by cash, adjustment, credit to the account, recovery of dues or in any other manner, deduct from the payment made to the contractor for execution of a works contract in the State involving transfer of property in goods, whether as goods

or in some other form, tax in advance calculated by multiplying the amount paid in any manner with four per cent or such other rate, as notified under sub-section (1) of section 24.

Explanation. - For the purpose of the foregoing sub-rules, the valuable consideration shall not include the amount of tax, if any, forming part of the consideration.

(3) The provisions of sub-rules (1) and (2) shall not apply where the amount or the aggregate of the amounts paid or likely to be paid during a year to the supplier of grains or the contractor, as the case may be, does not or is not likely to exceed one lakh rupees.

(4) The provisions of sub-rule (2) shall not apply where both the contractee and the contractor are dealers registered under the Act and the contract relates to manufacture or processing of goods for sale.

(5) The amount, which any person is required to deduct in a month under the foregoing sub-rules, shall be paid by him within fifteen days of the close of the month into the appropriate Government Treasury in challan in Form VAT- C1 separately for each payee in the manner laid down in rule 35. The person making the payment shall affix the original copy of the challan with the return filed by him and shall furnish the fifth copy to the payee concerned as a certificate of tax deduction and payment, who shall affix it with his return.

Provided that the Commissioner may by order in writing permit such person to pay by grouping a number of payees in a single challan or challans subject to each such challan showing the name of each payee and the amount deposited in respect of him separately:

Provided further that such person shall provide to each payee whose name appears in the challan a self-authenticated copy of the challan:

(6) The payee to whom a certificate of tax deduction and payment referred to in sub-rule (5) has been furnished shall, subject to verification of genuineness and correctness of the certificate, be entitled to deduct the amount shown in it from the amount of tax due from him for the period specified in the certificate and shall pay the balance in the manner laid down in rule 35 and any amount paid in excess shall be refundable on assessment.

xx xx xx

Rule 49 of the Rules
Lumpsum Scheme in Respect of Contractors

1 to 2 xx xx xx

(3) The lump sum contractor shall be liable to make payment of lump sum quarterly calculated at four per cent of the payments received or receivable by him during the quarter for execution of the contract. The payment of lump sum so calculated shall be made within thirty days following the close of the quarter after deducting therefrom the amount paid by the contractee on behalf of the contractor under section 24 for that quarter. The treasury receipt in proof of payment made and certificate(s) of tax deduction and payment obtained from the contractee shall be furnished with the quarterly return.

(4) The lump sum contractor shall file returns at quarterly intervals in Form VAT - R6 within a month of the close of the quarter and shall pay lump sum, if

any, due from him according to such return after adjusting the amount paid under sub-rule (4).

15. It is not in dispute that the appellant is liable to pay tax as he is a works contractor. Section 9 of the Act enables the State Government to accept from any class of dealers in lieu of tax payable under the Act, by way of composition, a lump sum tax, determined in the manner prescribed. Rule 49(3) of the Rules prescribed for the year in question tax @ 4% of the payments received or receivable by a contractor during the quarter for execution of contract. It further provides that payment of lump sum so calculated is to be made within 30 days following close of the quarter, regularly. A contractor is entitled to deduct from the amount of tax payable by him, the amount paid by the contractee on his behalf under Section 24 of the Act. Treasury receipt in proof of payment made by the contractee is required to be furnished along with the returns, which are to be filed quarterly, within one month after the close of the quarter. The appellant being a contractor and liable to pay tax under the Act is a dealer registered under the Act. On failure of a dealer to pay tax in accordance with the provisions of the Act and the Rules, interest can be charged from him at the rates prescribed under Section 14(6) of the Act. Proviso thereto provides that the interest leviable under the Act shall not exceed the amount of tax or penalty on account of non-payment or late payment of which interest is charged.

16. Section 24 of the Act is a special provision providing for deduction of tax at source. It provides that in case of payment made by a contractee to a contractor for execution of a works contract, at the time of making payment, he is liable to deduct tax in advance at the rates specified by the government, subject to maximum of 10%. If the amount payable by a contractee is upto Rs. 1 lac, the provisions for deduction of TDS are not applicable. The contractee is liable to furnish returns at specified intervals and pay tax in accordance with the returns, in the manner prescribed. Certificate for the tax deducted and paid is to be issued to the person on whose behalf tax was deducted and paid to Government. Any tax paid in accordance with the provisions of Section 24(2) is adjustable by payee on the authority of the certificate so issued against the tax payable by him. The claim is admissible on due verification of the payment. In case of failure of any person to deduct whole or any part of the tax to the department, the competent authority at any time within five years from the close of the year, to which the failure relates can levy penalty equal to the amount of tax which he failed to deduct or pay.

17. Rule 33 of the Rules provides for procedure for deduction of tax at source and deposit with the department. Rule 33(5) of the Rules provides that the amount of tax deducted by a contractee is to be paid by him to the department within 15 days of the close of the month. Original copy of the challan is to be furnished by him along with his returns, whereas 5th copy is to be supplied to the payee, a contractor as a certificate of deduction and payment of tax on his behalf. This copy is to be furnished by the contractor along with his returns. The payee to whom certificate of deduction and payment of tax has been furnished, shall be entitled to take credit thereof subject to verification of documents and correctness of the certificate.

18. Aforesaid Scheme of the Act and the Rules clearly defines rights and duties of the contractor and the contractee. Principal liability of payment of tax is on the contractor. He is liable to file periodic returns and pay tax accordingly. Parallel on the other side for advance collection of tax and for better compliance, liability has been put on the contractee to deduct tax from the payments to the contractor. The amount of tax deducted is to be paid to the department as prescribed. The contractor is entitled to get credit of the tax paid on his behalf by the contractee from the tax payable by him. A contractor can claim credit of the tax paid on his behalf by a contractee only to the extent certificate has been issued to him by the contractee and the same has been attached by him along with the returns. Rest of the tax is to be paid by

him along with the returns. Merely on presumption about deduction or payment of tax by the contractee on his behalf, a contractor cannot absolve himself from liability to pay tax as per the returns filed. The liabilities to pay interest and penalty on the contractor and levy of penalty on the contractee are independent for their respective defaults. It is not to be set off against each other. If the contractor has failed to pay tax as per the returns filed by him, he shall be liable to pay interest for the period of delay. Even if there is delayed payment of tax by the contractee, the contractor shall be entitled to claim benefit thereof at the time of framing of assessment and circulation of interest and entitlement of refund, if any, shall be determined at that time. In no case, there can be double charging of tax on the same transaction.

19. However, in case a contractor has attached the certificate issued by the contractee showing payment of tax on his behalf but on verification it is found that the tax had, in fact, not been paid by the contractee and the certificate was bogus and the contractor was not party to the fraud, the position may be different. In that eventuality, cases will have to be examined in facts of a particular case.

20. In the case in hand, it is not in dispute that the appellant is a contractor executing works for different contractees. For the year in question, he got payments from them. As per provisions of the Act and the Rules, he is liable to pay the tax. His receipts are to the tune of Rs. 23,75,67,368/-. Tax payable by him was calculated at the rate of 4% to the tune of Rs. 95,02,695/-. On account of proofs attached by the appellant along with the returns showing payment of tax on his behalf by the contractees, deduction to the tune of Rs. 94,05,576/- was granted. As the assessing authority found that the tax had not been deposited in time, interest on account of delayed payment of tax was levied. As the order of assessment suggests part of the additional payment was also on account of less payment of tax. The delay in payment of tax as available in the calculation-sheet annexed with the order of assessment runs upto 1,384 days. For different payments, delay was for different periods.

21. The substantial questions of law, as referred to above, are answered accordingly. The case of the appellant be dealt with in terms of the law laid down above.

22. The appeal stands disposed of.

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PUNJAB VAT TRIBUNAL

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MISC. NO. 55 OF 2015

IN

APPEAL NO. 165 OF 2011

KIRPAL EXPORTS

Vs

STATE OF PUNJAB

JUSTICE A.N. JINDAL, (RETD.)
CHAIRMAN

6th September, 2016

HF ▶ Revenue

Export Sales claimed by assessee cannot be allowed in absence of evidence supporting its claim

SALES – EXPORT SALES – ASSESSING AUTHORITY REJECTING THE EXPORT SALES HOLDING IT TO BE INTER-STATE SALE – NO EVIDENCE PRODUCED SHOWING EXPORT OF GOODS FROM INDIA TO FOREIGN COUNTRY – H FORMS NOT TALLYING WITH VAT INVOICES – BILLS ISSUED IN THE YEAR AND BILL OF LADING ISSUED NEXT YEAR AFTER LONG GAP – MISMATCH IN THE BILL NO. AND H FORMS AS WELL AS ICC DATA – TRANSACTIONS NOT GENUINE – EXPORT CLAIM REJECTED – ORDER OF ASSESSING AUTHORITY UPHELD – APPEAL DISMISSED *– SECTION 84 OF PVAT ACT, 2005, SECTION 5(3) OF CST ACT, 1956.*

The assessee filed its Returns claiming export sales of Rs. 2,28,92,807/-. During assessment, mismatch was found with H Forms submitted by assessee. It was found that H forms do not tally with the VAT invoices and ICC data also does not support the movement of goods for export as claimed by assessee. The goods have been shown to have been dispatched to the foreign buyers on 12.12.2005 whereas bill of lading shows the dispatch of goods on 11.6.2006. The amounts in H Form also differ from the amounts shown in the invoices of export. Accordingly, the Assessing Authority raised the demand rejecting export sales and creating additional demand. The assessee filed an appeal before first appellate authority which was dismissed and on further appeal before Tribunal.

Held:

The assessee has failed to produce proper evidence to prove the export of goods out of India. The H-Forms submitted by assessee do not match with the export bills and even the ICC data does not support the claim of assessee. The appellant has shown the dispatch of goods to the foreign buyer on 12.12.2005 whereas the bill of lading shows dispatch on 11.06.2006. The H

Form has not been produced in respect of one transaction. The assessee was required to prove export by producing invoices, bill of lading, H-Forms and copy of purchase order issued by the buyer endorsed by merchant exporter to the person selling goods against the said form. Since the assessee has failed to lead evidence to prove export of goods, the Designated Officer was right in rejecting its claim and held the transactions to be inter-state sale. Appeal dismissed.

Present: Mr. Mavpreet Singh, Advocate Counsel for the appellant.
Mr. B.S. Chahal, Dy. Advocate Counsel for the State.

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JUSTICE A.N. JINDAL,(RETD.) CHAIRMAN

1.This appeal is directed against the order dated 23.5.2011 passed by the First Appellate Authority, Ludhiana Division, Ludhiana framing the assessment to the tune of Rs.2,10,029/- U/s Punjab Value Added Tax Act and Rs.26,20,799/- under the Central Sales Tax Act, 1956.

2. The case relates to the assessment year 2005-06. The appellant filed annual statement for the said year on time. However, on scrutiny, the Assessing Authority observed that though the appellant has tried to develop the case of the export of goods yet he has failed to produce any export orders, purchase vouchers for claiming ITC and the same could not be allowed without production of VAT invoices. When the appellant was confronted with calculation sheet on "H" form as submitted on 1.10.2005, then it came out that the total export sales were Rs.2,28,92,807/- (total interstate sales Rs.2,62,07,984/-) , and the remaining sales to the tune of Rs.2,85,996/- were declared as interstate sales taxable @ 10%. The appellant has sought to prove the total export sale against "H" Forms worth Rs.2,16,88,476/-, but it is not proved that these are export sales. As such the appellant was imposed tax as referred to above vide order dated 20.11.2009 by the Designated Officer.

3. Feeling aggrieved, the appellant preferred the appeal against the said order which was dismissed on 23.5.2011 by the First Appellate Authority.

4. Still aggrieved, the appellant preferred the second appeal before the Tribunal, but the same was also dismissed on 27.2.2012. Still not satisfied, the appellant preferred the rectification application which was also dismissed.

5. The appellant went in appeal against both the orders i.e. dated 127.2.2012 and 24.8.2012 passed by VAT Tribunal, Punjab. However, the Division Bench of Hon'ble Punjab and Haryana High Court vide order dated 13.10.2015 allowed both the appeals while observing as under:-

> *"In view of the above the appeals are allowed and the orders Annexure A-3 and Annexure A-4 respectively passed by the Tribunal are set-aside. The matter is remanded back to the Tribunal with direction to pass a fresh and speaking order in accordance with law after affording an opportunity of hearing to the appellant. The appellant shall appear before the Tribunal on 15.12.2015.*
>
> *(RAMENDARA JAIN)*
>
> *JUDGE*
>
> *(AJAY KUMAR MITTAL)*
>
> *JUDGE*
>
> *13.10.2015*

6. Hence this appeal has come up for hearing before this Tribunal. Brief facts inviting the lis between the parties is that M/s Kirpal Exports, Focal Point, Ludhiana (herein referred as

the appellant) is registered under the Punjab Valued Added Tax Act, 2005 as well as the Central Sales Tax Act, 1956. He had been carrying on business of readymade garments. On examining the annual statement for the year 2005-06, it was noticed that according to bill of lading, the goods were sold by the appellant on 25.11.2005 and were dispatched to foreign buyers on 12.12.2005 and that the goods were dispatched abroad vide bill of lading on 11.6.2006 i.e. in the next year. Further ICC data did not tally with the export sale as mentioned in the "H" Form. The appellant was asked to explain and produce the evidence to prove the genuineness of transactions by producing the BRC and party account in respect of the payment but no such evidence could be produced in support of ITC claim. When confronted with the calculation sheet vide which "H" form was submitted on 1.10.2005, it indicated that the total export sales were Rs.2,28,92,807/-(total interstate sale Rs.2,62,07,984/-) and remaining sales was to the tune of Rs.2,85,996/- which were declared as interstate sales at the rate of 10% and tax was also calculated at Rs.28,600/-. Later on, the documents showed the total export to the tune of Rs.2,31,78,747/- and 'thus he tried to convert the taxable interstate sales of Rs.2,85,996/- into export sales. The "H" forms did not tally with the interstate sale dispatches as well as the VAT invoices. No export document in respect of bill No.3 was produced. He also failed to produce the account books, bank statement, BRC and details of payment received from the exporters to whom the goods were sold and thus the documents were found to be improper and in genuine. Thus while finding so the Assessing Authority created additional demand to the tune of Rs.26,20,799/- under the Central Sales Tax Act, 1956. The appeal filed against the said order was dismissed by the First Appellate Authority on 23.5.2011.

7. While arguing this second appeal, Mr. Aman Bansal and Mr. Mavpreet Singh, Advocates, in addition of the oral arguments, have submitted the written arguments also. The counsel has submitted that the orders passed by the authorities below are non speaking and have been passed without application of mind. The tax has been wrongly imposed on export sales made by the appellant. The appellant has rightly claimed the ITC. The appellant also produced all the documents like export invoices bill of lading, shipping bill, BRC and other relevant documents. He also produced "H" forms in order to prove that he had exported the goods. He has also taken me through Section 84 of-the Punjab Value Added Tax Act and has stated that no tax could be imposed on the goods which have been exported by the appellant. There was no time limit for dispatching of goods under Punjab Value Added Tax Act, 2005 or Central Sales Tax Act, 1956. No form-I was required in the case.

8. To the contrary, the state counsel has vehemently contended that the appellant has failed to prove, by any evidence, that he exported the goods from India to the foreign Country. No sufficient documents were produced to prove the genuineness of the transactions. The "H" Forms do not tally with the VAT invoices. The appellant was also confronted with, these discrepancies to the effect that the calculation sheet vide which "H" form was submitted on 1.10.2015 proves that total export were sales worth Rs.2,28,92,807/- but as per the list of export sales submitted earlier revealed that the total export sales were to the tune of Rs.2,31,78,747/-. Thus, the appellant tried to convert the taxable inter-state sales of Rs.2,85,996/- into export sales. It may further be observed that the "H" Forms were not produced matching with interstate dispatches. The "H" Form as produced by the appellant is quo bills No.7 & 8, dated 25.11.2005 for Rs.59,18,360 and Rs.59,26,815/- but on very deep probe, it transpires that the appellant dispatched the goods as per ICC data against bills No.2 & 3 and not against bills No.7 & 8 for Rs.50,23,200/- and Rs.50,30,376/- and not as mentioned in the "H" form. It may further be noticed that the appellant has shown the dispatch of the goods to the foreign buyers on 12.12.2005, whereas the bill of lading shows dispatches on 11.6.2006. The form against bill No.4 produced for Rs.28,10,052/- and "H" Forms showed the dispatch of goods relating to bills No.5 & 6 for Rs.27,21,411/- and Rs.55,16,169/- whereas ICC data showed the sales to the tune of Rs.31,32,900/-, Rs.40,00,000/- and Rs.45,00,000/-respectively.

The form in respect of export of the bill No.3 has not been produced. It is also further .noticed that the present case is a case of exports as such the appellant was required to prove such export by producing ultimately invoices, bill of lading, "H" Forms and a copy of the purchase order issued by the buyer endorsed by merchant exporter to the person selling goods against the said form. The Merchant exporter could buy the taxable goods on the strength of "H" Form only, after having obtained the purchase order from the foreign buyer. As revealed from the order dated 23.5.2011, the counsel tried to make of the case that the appellant was functioning in the Special Economic Zone. In this case, since the appellant had the goods after more than six months of the sale, then form-I was required. As the exporter had shown the dispatch of the goods to the foreign buyers on 12.12.2005, but the bill of lading shows the dispatch on 11.6.2006. As such it is difficult to say that the transactions as pleaded by the appellant were genuine in any manner so as to claim any concession regarding tax. The Designated Officer was quite right to treat the transaction as interstate sale, as such no fault could be found with the orders passed by the authorities below.

8. Resultantly, finding no merit in the appeal, the same is hereby dismissed.

9. Pronounced in the open court.

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PUNJAB VAT TRIBUNAL

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MISC. (RECT.) APPLICATION NO. 11 OF 2016

IN

APPEAL NO. 422 of 2014

HEINZ INDIA PVT. LTD.
Vs
STATE OF PUNJAB

JUSTICE A.N. JINDAL, (RETD.)
CHAIRMAN

20th September, 2016

HF ▶ Revenue

Penalty under section 53 is attracted in a case where the assessee continues to classify its goods in a lower tax rate schedule.

PENALTY – NON-PAYMENT OF TAX – MENS REA – ASSESSEE CLAIMED THE CLASSIFICATION OF GOODS UNDER SCHEDULE-B – PAYING TAX @ 4% - ASSESSING AUTHORITY HELD GOODS TO BE TAXABLE UNDER RESIDUAL ENTRY ATTRACTING HIGHER RATE OF TAX – PENALTY ALSO IMPOSED – ASSESSEE ACTING IN CLEAR DEFIANCE OF STATUTORY PROVISIONS – NOT REPLYING TO THE NOTICES ISSUED BY ASSESSING AUTHORITY FOR IMPOSITION OF PENALTY – CONTINUED TO FILE RETURNS EVEN AFTER CLARIFICATION GIVEN BY COMMISSIONER – MENS REA STANDS PROVED – PENALTY IMPOSABLE – RECTIFICATION APPLICATION DISPOSED OF - *SECTION 53 AND 66 OF PUNJAB VAT ACT, 2005*

Assessee had earlier filed appeals before Tribunal contending that Glucon-D sold by it is taxable @ 4% falling under Schedule-B and the Assessing Authority had classified it under the Residual Entry. The appeals filed against said order were dismissed by Tribunal – Rectification Applications were moved contending that issue with regard to penalty has not been decided. Tribunal held:

Though the assessee did not make submissions regarding penalty at the time of hearing till the Tribunal sets to decide the same lest the appellant be not prejudiced in any manner for deciding the issue of penalty. A proper notice was issued to the assessee asking him to show cause as to why penalty should not be imposed u/s 53 but no reply was filed by the assessee. It cannot be therefore claimed that no reasonable opportunity was given to it before imposing penalty. Further the assessee has acted in clear defiance of law as he has failed to follow the statutory provisions of the Act and the Rules framed thereunder. The assessee continued to file its Returns in the manner he likes even after decision given by Commissioner u/s 85 of the Act deciding it in favour of Revenue. All this shows the malafide intention of the appellant-assessee and mens rea stands proved. The penalty and interest have been rightly levied. Rectification Application disposed of.

Present: Mr. Amarpartap Singh, Advocate counsel for the appellant.

Mr. B.S. Chahal, Dy. Advocate General for the State.

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JUSTICE A.N. JINDAL,(RETD.) CHAIRMAN

1. This order of mine shall dispose off four Misc. (Rect.) Application Nos. 11 to 14 of 2016. The appellant, by way of these applications, has sought to rectify the judgment dated 25 January, 2016 passed by the Value Added Tax Tribunal, Punjab, so as to decide the issue with regard to penalty U/s 53 and Section 60 of the Punjab Value Added Tax Act, 2005.

2. The factual background of the case is that Heinz India Pvt. Ltd. (herein referred as the appellant) had filed appeal Nos. 422, 424, 425, 426, 427 and 428 of 2014 for the assessment year 2007-08 to 2010-11 challenging the orders passed by the Assessing Authority as well as the Deputy Excise and Taxation Commissioner i.e. First Appellate Authority framing the assessment and creating additional demands. However, the First Appellate Authority had dismissed the appeals, whereupon the appellant filed the aforesaid appeals.

3. Since the judgment under challenge in appeals No. 425 and 427 of 2014 was that of remand of the cases to the Assessing Authority for reconsideration, therefore, these two appeals relating to the assessment year 2008-09 and 2009-10, respectively were not pressed before me, whereas the appeal Nos. 422, 424, 426 and 428 were pressed before the Tribunal.

4. It may also be noticed that Dabur India Ltd. Village Bhankharpur, Derabassi, Mohali had also filed appeal Nos. 255, 391 and 522 of 2013.

5. All the appeals filed by Heinz India Pvt. Ltd. as well as Dabur India Ltd. involved the only question of law which reads as under:-

> *"whether Glucose-D in the powder form packed in the different small packs of 100gms, 200gms, 500gms and 1kg sold in whole sale and retail, in the brand, name of "Dabur" and not as an "industrial Input" could be treated as an Industrial Input falling in entry No.218 of item 58 under Schedule-B of the Punjab Value Added Tax Act, 2005 or whether it is an unclassified item attracting VAT @ 13%?"*

6. Thus both the counsel for the appellant i.e. Mr. K.L. Goyal, Sr., Advocate as well as Mr. Amarpartap Singh, Advocate pressed for deciding the only the aforesaid issue and no other issue was pressed or argued therefore, this Tribunal vide the judgment delivered in the case of Dabur India Ltd. Vs State of Punjab recorded the' said contention in para No.2 of the judgment which reads as under:-

> *"The-sole, issue raised in all the three appeals is "whether Glucose- D in the powder form packed in the different small packs" of 100gm, 200gm, 500gm and 1kg sold in whole sale and retail in the brand name of "Dabur" and not as an "industrial input" could be treated as an Industrial Input falling in entry No.218 of item 58 under Schedule-B of the Punjab Value Added Tax Act, 2005 or whether it is an unclassified item attracting VAT @ 13%?"*

7. No doubt the appellant had raised the issue of penalty U/s 53 and 60 in his grounds of appeals amongst the other grounds but no arguments were raised qua this issue and also the other grounds as set out in the grounds of appeal. Even now the appellant has not sought any rectification qua the decision on the other grounds as set out in the ground of the appeal including interest. However, lest the appellant be not prejudiced in any manner in for not

deciding the issue of penalty U/s 53 and 60 of the Punjab Value Added Tax Act, 2005. This Tribunal sets to decide the same.

8. The counsel for the appellant, in order to contend that penalty U/s 53 and 60 of the Act is not leviable, has urged that the element on mensera is missing in the case and the penalty proceedings are quasi criminal. The element of mensera has to be proved before imposition of penalty, the Appellate Authority did not make any such observations regarding the validity of the imposition of penalty by the Assessing Authority. No notice as required U/s 53 and-60 (1) of the Act has been issued against the appellant, therefore, no penalty could be imposed.

9. Having given my thoughtful consideration to the aforesaid 0 arguments, the same do not weigh with the mind of the Tribunal. The notice issued upon the appellant for the year 2012-13 clearly reveals that it was U/s 53, 46,32, and 29 (2) of the Punjab Value Added Tax Act, 2005 as well as Section 9 (2) of the Central Sales Tax Act, 1956. The notice clearly calls upon the appellant to show cause as to why the penal action U/s 53 and 32 of the Punjab Value Added Tax Act be not taken. The notice was duly served upon the appellant. The appellant though filed reply to the notice yet he did not explain about imposition of penalty and interest upon the appellant. Rather, the company insisted through their reply that Glucose-D product is attracted by entry No.218 of Schedule-B attracting tax @ 4%.

10. It would not be wrong to mention here that the appellant also did not raise the plea before the authorities below that the product as manufactured by the appellant was a medicine. Anyway, the issue of penalty and interest was raised before the Deputy Excise and Taxation Commissioner, Patiala Division, Patiala who disagreed with the contentions raised by the Counsel for the appellant and observed that the plea of the appellant cannot be accepted because he acted deliberately in defiance of law by falling to comply with the statutory obligations. In fact, he misinterpreted the express, clear and statutory provisions of the Punjab Value Added Tax Act, 2005 as well as the settled law of the land over the issue involved, so penalty U/s 53 has been rightly imposed for non compliance of obligations as prescribed by the law. It is also noticed that before levy of penalty, reasonable opportunity was given to him to show cause as to why the penalty and interest should not be imposed. It was further observed that the Designated Officer has already levied lowest rate of interest U/s 32(1) of the Punjab Value Added Tax Act. It was also noticed by him that on failure to pay the amount of tax due from him as per provisions of this Act, the assessee was, in addition to the amount of tax, would be liable to pay simple interest on the amount of tax due from him @ ½ % per month from the due date of payment till the date he actually paid the amount of tax.

11. Even otherwise, according to Section 53, penalty could be imposed in the following circumstances:-

(a) If assessee has acted deliberately in defiance of law.

(b) He has failed to perform a statutory obligation.

(c) If the mistake is malafide.

12. The object of introducing this provision was to enforce strict compliance of the statutory provisions of the Act and Rules framed thereunder. The legislature in its wisdom did not confer any discretion on the authority concerned. A specific provisions has been made to impose the penalty in certain circumstances as referred to above but the appellant could claim protection on account of such natural calamities i.e. loss of books of account; death of the J proprietor sealing or closure of the business premises of the tax payers by any statutory authority, non issue of TDS certificates by government departments and other authorities to tax payers who are works contractors, transfer of the tax payers file from one jurisdiction to another authority without prior intimation to the tax payers and if they exempted any law not to

or pay the tax under the Act. Similar observations were made in case of Assistant Commissioner of .Commercial Tax Bangalore Vs Pink City (2012) 52 VST page/484. The case of the appellant does not fall in any of the exceptions as referred to above. Specific notice was issued to the appellant to explain as to why the penalty be not imposed upon him but he did not reply in that regard. Therefore, he is estopped to say that no opportunity of being heard was given to him. The intention to evade tax is also proved from the circumstances that {he matter came up for decision by the commissioner U/s 85 of the Act thrice and the issue was decided in favour of the revenue. The commissioner, vide his order dated 18.2,2008 in case of M/s Bala Ji Chemicals Barnala again on 13.11.2009 in case of Daulat Ram Chaman Lal Barnala and again in another case on 18.10.2010 specifically observed that Glucose-D is not an industrial input. In the given circumstances of the case and knowing fully well that the commissioner had answered the question U/s 85 of the Act in favour the revenue and the said orders were not set-aside by any higher authority, he continued to file the return in the way as it suited to him, whereupon the malafide intention of the appellant stands established inviting penalty and interest from the department.

13. There, is no defect in the order imposing penalty U/s 60 of the Punjab Value Added Tax Act as the appellant filed the return in contravention of the provisions of the Act and the Rules made thereunder.

14. In the wake of aforesaid discussion, this tribunal is of the opinion that the order of penalty was passed by the Assessing Authority after due -consideration of the contentions raised by the assessee before him and due notice was issued U/s 53 and 60 as well as 32 of the Punjab Value Added Tax Act before imposition of penalty.

15. Resultantly, these applications stand disposed off and this order of mine would be treated as a part of the consolidated order passed in appeal Nos. 422, 424, 426 and 428 of 2014 and would be read in continuation of the earlier order dated 25 January, 2016 passed by this Tribunal. Copy of this order be placed in each rectification application as well as in the appeal files. This disposes of the application Nos. 11 to 14 of 2016.

16. Pronounced in the open court.

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PUNJAB VAT TRIBUNAL

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APPEAL NO. 35 OF 2016

BHASEEN SPORTS PVT. LTD.
Vs
STATE OF PUNJAB

JUSTICE A.N. JINDAL, (RETD.)
CHAIRMAN

5th May, 2016

HF ▶ Revenue

First appellate authority has rightly remanded the case back for independent enquiry where the penalty order was passed ex-parte without granting a proper opportunity.

PENALTY – ATTEMPT TO EVADE TAX – ROADSIDE CHECKING/CHECK POST – PENALTY IMPOSED EX-PARTE – ON APPEAL – APPELLATE AUTHORITY REMANDED THE CASE BACK FOR HOLDING INDEPENDENT ENQUIRY AND PRODUCTION OF ACCOUNT BOOKS – ON APPEAL BEFORE TRIBUNAL – NO GROUND FOR INTERFERENCE – DESIGNATED OFFICER DIRECTED TO PASS THE SPEAKING ORDER AFTER PROVIDING AN OPPORTUNITY TO THE APPELLANT OF BEING HEARD ABOUT VALIDITY OF TRANSACTION WITHIN THREE MONTHS POSITIVELY – APPEAL DISMISSED - *SECTION 51 OF PUNJAB VAT ACT, 2005*

A penalty was imposed u/s 51(7) of Punjab VAT Act against the appellant. The proceedings were carried out ex-parte without granting proper opportunity of hearing to the dealer. An appeal was filed before the 1st appellate authority who remanded the case back directing an independent enquiry into the matter and also directing the appellant to produce account books before the authorities concerned. It was further observed that penalty is to be imposed in case of goods imported from outside the territory of India if there is an attempt to evade the tax. Feeling aggrieved by the remand, the appeal was filed before the Tribunal.

The Punjab VAT Tribunal held that order was passed by Designated Officer ex-parte without providing an opportunity to the appellant of being heard. The first appellate authority has directed the Designated Officer to pass a speaking order after making independent enquiry and said order cannot be held to be suffering from any illegality. However, on request of counsel for the assessee, the Designated Officer is directed to pass a speaking order within three months. Appeal dismissed.

Present: Mr. J.S. Bedi, Advocate counsel for the appellant.
Mr. B.S. Chahal, Dy. Advocate General for the State.

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JUSTICE A.N. JINDAL,(RETD.) CHAIRMAN

1. This appeal is directed against the order dated 25.8.2015 passed by the Deputy Excise and Taxation Commissioner,(H.Q.) camp at Jalandhar (herein referred as the 1st appellate authority) whereby, he while accepting the appeal remitted the case back to the Designated Officer to Pass a speaking order after making independent inquiry for verifying the transaction. The relevant observations made by the Deputy Excise and Taxation Commissioner are reproduced as under:-

> *"The arguments put forth by the appellant counsel have been considered at length and the record of the Department has also been perused. The orders passed by the Hon'ble Chairman VAT Tribunal in Appeal No. 88 of 2015 dated 16.7.2015 in the case of M/s Rail Feb, Kapurthala has also been gone through. In view of the observations made by the Hon'ble Chairman in the case of goods imported from outside the territory of India, attempt to evade/avoid payment of tax has to be established before imposing penalty u/s 51 of the Act. In the instant case, the orders were passed in the absence of the appellant and that too without conducting any independent enquiry. Keeping in view the facts the order passed by independent enquiry for verifying the transaction. The appellant counsel is directed to produce account books before the authorities concerned."*

2. Now, this order is under challenge before me. Having perused the order passed by the authorities below, it cannot be denied that the order passed by the Designated Officer was ex-parte without providing an opportunity to the appellant of being heard. Deputy Excise and Taxation Commissioner has directed the Designated Officer to pass a speaking order after making the independent enquiry for verifying the transaction, the order cannot be said to be in any way suffering from any Illegality.

3. Faced with the situation, the counsel for the appellant has requested that the assessing authority-cum- Designated Officer be directed to decide the case within stipulated time.

4. Resultantly, this appear is dismissed with the direction to the Designated Officer to pass a speaking order after providing an opportunity to the appellant of being heard about the validity of the transaction within three months positively. The remand order would not tantamount to any adverse remark against the appellant.

5. Pronounced in the open court.

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HARYANA TAX TRIBUNAL

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STA 52 OF 2014-15

AND

STA 746 OF 2014-15

NUMALIGARH REFINERY LTD.
Vs
STATE OF HARYANA

JUSTICE L.N. MITTAL (RETD.), CHAIRMAN
SUKHPAL SINGH KANG, MEMBER
SACHIN JAIN, MEMBER

14th December, 2016

HF ▶ Assessee

ITC claim under HVAT Act 2003 is allowed in full even if sale price is lower than the purchase price

INPUT TAX CREDIT – GOODS PURCHASED FROM TAXABLE PERSON – SOLD AT A LOWER PRICE – WHETHER INPUT TAX CREDIT IS AVAILABLE IN FULL – HELD YES – NO PROVISION UNDER THE ACT FOR REDUCING THE INPUT TAX CREDIT IF GOODS SOLD AT A LOWER PRICE – SIMILAR CASES OF THE ASSESSEE FOR SUBSEQUENT YEARS DECIDED IN FAVOUR BY THE 1ST APPELLATE AUTHORITY AND REVISIONAL AUTHORITY – NO DISPUTE ABOUT SALE PRICE CHARGED BY THE ASSESSEE – CLAIM COULD NOT BE DISALLOWED – APPEAL ALLOWED – ORDER OF REVISIONAL AUTHORITY SET ASIDE - *SECTION 8 AND SCHEDULE-E OF HVAT ACT 2003*

Appellant is an oil company which is subsidiary of Bharat Petroleum Corporation Ltd. (BPCL), a Public Sector undertaking. The assessee had purchased the goods, i.e. petroleum products from BPCL and Input Tax Credit was claimed on the purchase value. Subsequently, the goods were sold at prices lower than the purchase prices. Assessing Authority allowed the claim in toto. Revisional authority took up the matter in revision and held that ITC cannot be allowed in excess of the tax payable on sale price. On appeal before Tribunal.

Held:

Case of the assessee for subsequent assessment years i.e. 2009-10 and 2010-11 have been decided in its favour by 1st appellate authority and Revisional Authority respectively. ITC claim of the appellant could not be disallowed merely because the sale price was less than the purchase price. ITC claim also does not fall under any of the exceptions specified in Schedule-E to the HVAT Act. The assessee had also sold its products at the rates fixed by Ministry of Petroleum and Natural Gas. Sale price has nothing to do with the ITC claim as ITC is based on the tax paid by the purchaser assessee to the seller and there is no dispute that appellant has paid the amount of tax to the seller which has been claimed as ITC. It is not the case of revenue

that appellant actually sold its products at higher rates than shown in the Account Books. Consequently, ITC claim of the appellant could not be disallowed or reversed and had been rightly allowed by the Assessing Authority. Resultantly, appeals are allowed and the orders passed by Revisional Authority are set aside.

Present: Mr. Sandeep Goyal, Advocate counsel for the Appellant
Sh. N.K. Gupta, JD(L) for the State

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JUSTICE L.N. MITTAL, CHAIRMAN:

1. By this common order, we are disposing of two appeals STA no. 52 and 746 of 2014-15 preferred by the same assessee M/s Numaligarh Refinery Ltd. for assessment years 2007-08 and 2008-09 because both the appeals involve similar issue. These appeals have been filed against orders dated 14/03/2014 and 03/06/2014 passed by Deputy Excise and Taxation Commissioner cum Revisional Authority, Rewari, thereby proportionately reversing input tax credit (ITC) claimed by the appellant assessee.

2. The appellant is an oil company which is subsidiary of Bharat Petroleum Corporation Ltd. (BPCL) - a public sector undertaking (PSU). ITC claimed by the appellant was allowed by the Assessing Authority. However, the Revisional Authority has found that ITC on gross loss amount of the assessee is required to be reversed. It was observed that the assessee could not have sold its products petrol and diesel at prices lower than the purchase prices.

3. We have heard learned counsel for the appellant and learned State Representative and perused the case files.

4. Counsel for the appellant contended that ITC cannot be disallowed or reversed merely because sale price was less than the purchase price. ITC is based on tax paid by the assessee purchaser to the seller. It was pointed out that ITC claim of the appellant does not fall in any of the exceptions provided in Schedule E to the Haryana Value Added Tax Act 2003(HVAT Act). Counsel for the appellant submitted that first Appellate Authority, Faridabad vide order dated 20/11/2015 in appeal no. RAW/47/VAT/19/8/2014 in the case of the assessee-appellant itself for assessment year 2010-11 has upheld ITC claim of tire assessee in similar circumstances and the said order has attained futility as it was not challenged by the State. Based on the same order, Revisional Authority, Rewari vide order no.03 of 2009-10 dated 9/3/2016 pertaining to assessment year 2009-10 of the assessee upheld the order of the Assessing Authority allowing ITC claim of the appellant in similar circumstances. Reliance has also been placed on judgment dated 5/10/2016 of Punjab and Haryana high court in VATAP no. 65 of 2012 M/s Modem Dairies Ltd. Vs The State of Haryana and another, (2015) 1 NTR 398(Rajasthan) Commercial Tax Officer Vs Jyoti Electronics, (2009) 33 PHT 651(HTT) Monga Trading Company and others Vs State of Haryana and others, and (2015)1 NTR 364(Delhi) Challenger Computers Ltd. Vs Commissioner of Trade and Taxes, Delhi.

5. Learned State Representative defended the impugned orders of the Revisional Authority.

6. We have carefully considered the matter. Case of the same assessee appellant for assessment year 2010-11 has been decided in its favour by first Appellate Authority vide order dated 20.11.2015. Similarly case of the same assessee for Assessment year 2009-10 has been decided in its favour by the Revisional authority vide order dated 09.03.2016. Both the present appeals are on identical footings. Besides it, claim of the appellant is also supported by M/s Modern Dairies Ltd. (supra), Monga Trading Company (supra) and Challenger Computers Ltd. (supra). Even otherwise, ITC claim of the appellant could be disallowed merely because the

sale price was less than the preferred price. ITC claim of the appellant does not fall in any of the exceptions specified in Schedule E to the HVAT Act. On the Other hand, the assessee sold its products at the rates fixed by the Ministry of Petroleum and Natural Gas. Moreover, sale price has nothing to do with the ITC claim of an assessee because ITC claim is based on the tax paid by the purchaser assessee to the seller. There is no dispute that the assessee appellant paid the amount of tax to the seller which is claimed as ITC. It is also not the case of the Revenue (State) that the appellant actually sold its products at higher rates than shown in the account books. In other words, there is no dispute regarding the sole price recorded by the appellant although it was lower than its purchase price. Consequently ITC claim of the appellant could not be disallowed or reversed. It had been right allowed by the Assessing Authority.

7. Resultantly, both the appeals are allowed and impugned orders dated 14/03/2014 and 03/06/2014 passed by the Revisional Authority are set aside.

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INDIA NEEDS LOWER TAXES, HIGHER COMPLIANCE: JAITLEY

The Finance Minister said he foresaw an India in the coming decades where voluntary compliance increases.

Union Finance Minister Arun Jaitley on Monday said India needs lower taxes to compete globally and that voluntary tax compliance by citizens should be encouraged by a friendly administration.

Mr. Jaitley was inaugurating professional training of the 68th batch of the Indian Revenue Service officers at the National Academy of Customs, Excise and Narcotics.

"We have lived through the last seven decades in India under the impression that if avoidance could be done of government revenue, then there was nothing immoral about this. That was considered commercial smartness," he said.

"Payment of legitimate taxes is part of a citizen's duty, and non-payment is visited with severe consequences."

According to the Minister, "extraordinarily high taxation rates in the past" had encouraged people to evade taxes. "What you need is lower level of taxation, to provide services more competitive in nature."

"Competition is not domestic, it is global. This is one important change you will witness while you will be in service."

Voluntary compliance

He said he foresaw an India where voluntary compliance increases. "Tax authorities are judged by the quality of what they write or decide. The level of fairness followed by authorities will define the quality of interpretation of tax laws by authorities. The voluntary compliance by citizens by payment of due taxes needs to be reciprocated by authorities through a tax-friendly administration."

Mr. Jaitley also told the trainees that tax officers should have high integrity.

Courtesy: The Hindu

26th December, 2016

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DEMONETISATION, GST HAVE POTENTIAL TO TRANSFORM INDIA; NPAS KEY RISK: RBI

MUMBAI: RBI today said GST and demonetisation have the potential to transform the economy, "notwithstanding some inconvenience to public and momentary adverse impact on growth", even as it flagged elevated risks due to continuous deterioration in banks' asset quality.

It also observed that while the financial performance of the corporate sector has improved in 2016-17, the risk of lower turnover remains. It also said large borrowers registered significant deterioration in their asset quality.

"The measures such as transition to the nationwide GST and the withdrawal of legal tender status of specified bank notes (old Rs 500/1000) could potentially transform the domestic economy, notwithstanding some inconvenience to public and the momentary adverse impact on growth," RBI said.

These observations were made in the Report on Trend and Progress of Banking in India 2015-16 (RTP) and the 14th issue of the Financial Stability Report (FSR).

In his foreword to FSR, RBI Governor Urjit Patel said the withdrawal of Rs 500/1000 notes "will impart far reaching changes going forward".

"It is expected to significantly transform the domestic economy in due course in terms of greater intermediation, efficiency gains, accountability and transparency through increasing adoption of digital modes of payments, notwithstanding the short-term disruptions in certain segments of the economy and public hardship," he said.

The Governor also cautioned that there is "little room" for complacency and it is important to guard against sporadic volatility in financial markets.

RBI further said that the banking stability indicator shows that the risks to the banking sector remained elevated due to continuous deterioration in asset quality, low profitability and liquidity.

The business growth of banks remained subdued with public sector banks (PSBs) continuing to lag their private sector peers. System level profit after tax (PAT) contracted on y-o-y basis in the first half of 2016-17.

The asset quality of banks deteriorated further between March and September 2016. PSBs continued to record the lowest capital to risk-weighted assets ratio (CRAR) among the bank groups with negative returns on their assets.

"The GNPA (gross non-performing advances) ratio of SCBs increased to 9.1 per cent in September 2016 from 7.8 per cent in March 2016, pushing the overall stressed advances ratio to 12.3 per cent from 11.5 per cent.

"The large borrowers registered significant deterioration in their asset quality," said the central bank.

Courtesy: The Economic Times
29th December, 2016

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FROM GST TO DEMONETISATION: SIX MAJOR EVENTS THAT ROCKED INDIAN ECONOMY IN 2016

The year of 2016 has been an eventful one for the Indian economy. While the parliament passed the GST Bill which is expected to boost growth, the demonetisation drive by Prime Minister Narendra Modi is expected to contract economy in the near-term.

Here's a quick recap of the big decisions taken in 2016:

1. Goods and Service Tax (GST) bill: One of the biggest tax reforms the country has seen till date was the passage of the GST bill in both houses of parliament in early August this year.

The 'One Nation, One Tax' would subsume many excise duties which were prevailing at centre and state levels, it would be a value addition tax at each stage of production and the final consumer would bear the tax.

The rates proposed to be implemented from next year were a 'five-slab' structure. The rates were - 0% on food grains and other agricultural products, 5% on items of mass consumption (edible oils, spices, tea, coffee), 12% on electronics, processed food, 18% on soaps, oils, shaving cream and 28% on luxury commodities.

The GST council which met yesterday decided on clauses on Central GST which is a part of three categories – Integrated GST and State GST.

2. Six month maternity leave: With the modification of the 1961 Maternity Benefit the government increased paid maternity leave from 3 months to 6 months on August 11 in both government and private sectors.

An option to work from home was also provided for in the law which new mothers who are employed by companies that employ more than 50 persons could avail.

3. Regional Connectivity scheme: The scheme which sought to provide air services between un-served and under-served areas, was part of larger plans to boost the domestic aviation sector.

The scheme introduced in the second week of September is estimated to take off in early January.

Seeing as how there were 394 un-served and 16 under-served airports in India, Minister of Civil Aviation, Ashok Gajapathi, advocated affordable air travel along with improving connectivity to remote regions like North-East India.

A slew of incentives were proposed under RCS, including Rs 2,500 cap on airfare for one-hour flights and airlines under RCS will be extended viability gap funding (VGF) while the states concerned are required to offer certain concessions such as providing police and fire services free of cost.

4. High speed trains: The railways mulled bringing high speed, Spanish make –Talgo trains to Indian tracks in mid-September.

After successfully completing its test run between Mumbai to Delhi in less than 12 hours the Ministry of Railways said they were all set to lease two to five Talgo trains from the Spanish manufacturer in less than a year's time.

Media reports said that the Executive class car can seat up to 20 people and has rich looking black seats that are quite comfortable; while the general chair car can seat up to 36 people.

5. PM Modi's Cashless Society: The long propagated 'cashless society' ideal by PM Modi finally saw material results after the government decided to ban old currency notes.

Initiatives that were spoken about by Finance Minister, Arun Jaitley in the Union Budget 2015 like full utilisation of Jan Dhan Yojana accounts, optimum usage of RuPay debit cards and Aadhar and mobile usage to implement direct benefits to citizens, took shape this year.

Payments Bank, a 'harbinger' of a revolution by the Indian banking sector which was introduced last year was carried out this year by Airtel that launched its bank on a pilot basis in Rajasthan in November.

Other companies like Paytm said it would convert its digital wallet platform into a payments bank once it is granted license by RBI and Vodafone m-pesa limited said it will launch its bank latest by March.

The Unique Identification Authority of India planned to increase biometric authentication capacity through Aadhaar to 40 crore a day from 10 crore to encourage more use of the platform for realising a cashless society.

In November, Amul's Chairman Jethabhai Patel said that the group will credit payments to its milk producers directly through the bank. The government also said it is looking into digital payments and benefit transfer to farmers.

Jan Dhan Yojana accounts saw an 11% hike in deposits to Rs 90 crore by December.

6. Demonetisation: BJP led government banned old Rs 500 and Rs 1,000 notes in India on November 8.

Although much has been said about the demonetisation move it was introduced to eradicate black money as overnight 86% of the higher currency denominations were made illegal tenders.

Due to the lack of available currency, digital transactions has become the rule of thumb and also promoted many other forms of digital payments in India.

Seeing a higher traction on RuPay card and Paytm platforms the government also promoted digital payments in other arenas like railway ticket booking, insurance premium, toll booths, petrol and diesel pumps by offering discounts.

Courtesy: Zee Business
30th December, 2016

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DEMONETISATION, GST TO TAKE CENTRE-STAGE AT VIBRANT GUJARAT SUMMIT NEXT MONTH

GANDHINAGAR: The Centre's demonetisation measure and its effects on the economy would take centre-stage at the 8th edition of the Vibrant Gujarat Global Summit, to be held at Mahatma Mandir convention center in Gandhinagar next month. Prime Minister Narendra Modi is also expected to attend and inaugurate the event.

"On January 11, there is an important seminar about GST implementation, which will be chaired by Finance Minister Arun Jaitley. I firmly believe that dignitaries would discuss the demonetization move and its subsequent effects on the economy during that seminar," Additional Chief Secretary (Industries and Mines) PK Taneja said, according to PTI.

Nearly 20 heads of state and ministers from around the world are expected the high-profile event.

"We are privileged to host these leaders from around the world. These leaders include Prime Ministers, ministers and Presidents of various countries," said Mr Taneja. The bureaucrat added nine Nobel laureates and 58 chief executives from India and abroad would grace the occasion with their presence.

Dignitaries who have confirmed their attendance include Nisha Desai Biswal, US Assistant Secretary of State for South and Central Asian Affairs; Presidents of Kenya and Uganda; Prime Ministers of Serbia and Portugal; senior ministers from Russia, Poland, France and Japan among others.

Mr Taneja informed that 12 countries including USA, UK, Canada and UAE, have agreed to be partners of the event.

The 7th edition of the Vibrant Gujarat summit, which was held in 2015, was attended by dignitaries such as World Bank chief Jim Yong Kim, US Secretary of State John Kerry and UN Secretary-General Ban Ki-moon among others.(With inputs from PTI)

Courtesy: NDTV
30th December, 2016

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GO SLOW ON GST, UNION TELLS TRADERS

The Kerala Vyapari Vyavasayi Ekopana Samithi has asked its member merchants not to rush into signing up for the Good and Services Tax regime. The samithi said the GST was yet to be approved by Parliament and hence there was no need to register for the GST regime in haste. It said some officials and tax practitioners were campaigning for registering by January 15. It was not yet clear who will be the registering authority and who will inspect the merchants' establishments.

Courtesy: The Hindu

31st December, 2016

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GST WILL BE IMPLEMENTED IN 2017, DIGITIZED ECONOMY WILL BE FUTURE OF INDIA: JAITLEY

"The last year was a very successful year for India as we continued to remain the fastest economy in the world, and I'm sure that we will maintain the same position," Jaitley said.

Finance Minister Arun Jaitley on Sunday said that he is hopeful of the Goods and Service Tax (GST) being implemented in 2017 and confident that a digitised economy would be the future of India. "I see 2017 as a year in which GST will be implemented, and a digitized economy will be future of India," he added.

"The last year was a very successful year for India as we continued to remain the fastest economy in the world, and I'm sure that we will maintain the same position," Jaitley said in an interview to ANI.

Arun Jaitley Thanks People For Supporting Note Ban, Says No Incident Of Unrest Reported

"We are now keeping the inflation under control, consequently we have seen interest rates coming down," he added.

Jaitley also said that the process of 'remonetisation' has progressed extremely well and it is certain that in the days to come it will be completed. "A large amount of money, including black money, has come back into the banking system. It increases banks' ability to lend more," said Jaitley, citing that the activity of demonetisation was completed in a peaceful manner and well supported by citizens.

Jaitley's statement came a day after Prime Minister Modi announced major tax rebates for farmers, small traders, senior citizens and women in a New Year's eve address to the nation. He also urged the nation's banking system to work for the poor and the marginalised and complimented the people for joining and supporting the government's cleansing drive against corruption and black money.

Courtesy: The Indian Express
1st January, 2016