(2013) 05 GUJ CK 0067

In the Gujarat High Court

Case No : Special Civil Application No. 204 of 2011 and S.C.A. No. 3031 of 2011

Baboo Ram Hari Chand APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 02-05-2013

Acts Referred:

Citation : (2014) 304 ELT 371

Hon'ble Judges : R.R. Tripathi, J;R.D. Kothari, J

Bench : Division Bench

Judgement

R.R. Tripathi, J.—Special Civil Application No. 204 of 2011 is filed by M/s. Baboo Ram Hari Chand-a Partnership Firm being aggrieved by the action of the respondents. It is prayed by the petitioner in para 8-prayer clause as under:-

8.(B) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction to quash and set aside the impugned Panchnama (seizure order) dated 29-12-2010 issued by the office of the respondent No, 4 (Annexure ''A'') and be pleased to restrain the respondents, their agents and servants from interfering with in any manner with the goods of the petitioner, cleared under the Bills of Entry Nos. 2293960, 2294164, 2315553, 2311881 and 2314171 against the Duty Free Import Authorization;

(C) Your Lordships may be pleased to issue appropriate writ, order or direction inter alia holding that the goods imported by the petitioner narrated herein above, is included in the list notified by SION and therefore, does not call for any further clarification;

(CC) This Hon''ble Court may be pleased to issue a writ of certiorari or any other appropriate writ, order or direction to quash and set aside the impugned order-in-original No. KDL/851/AC VII/PS/2011, dated 12-5-2011 passed by the Assistant Commissioner of Customs (GR. VII), Customs House, Kandla.

(CD) xxxxx

(D) Your Lordships may be pleased to issue a writ or mandamus or any other appropriate writ, order or direction inter alia directing the respondents, their agents and servants not to cause any interference in the free movement/ utilization of the goods of the petitioner.

1.1. So far as Special Civil Application No. 3031 of 2011 is concerned, the same is also filed by the same petitioner being aggrieved by the action of the respondents, seeking following reliefs:-

8.(B) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction to quash and set aside the seizure of the subject goods being 2238 M.T. being affected vide Panchnama and the seizure memo, both dated 7-2-2011 by the office of the respondent No. 2, through the respondent No. 3 (Annexure ''A'') and;

(C) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction inter alia directing the respondents more particularly respondent Nos. 4 and 5 to pass assessment order in respect of Bills of Entry, which are referred to herein above in paragraph No. 3.13 by accepting the DFIA;

(C-1) This Hon''ble Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction to quash and set aside the order/action dated 17-3-2011, whereby, the respondent authority changed the concerned 16 Bills of Entry, from Group-VII to Group-I.

(C-2) This Hon''ble Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction, directing the respondents to produce the assessment orders in respect of Bills of Entry No. 2354426, (23-11-2010), 2366849 (26-11-2010), 2314075 (9-11-2010), 2311695 (9-11-2010), 2339092 (18-11-2010), 2323651 (11-11-2010), 2324157 (11-11-2010), 2323465 (11-11-2010), 2323467 (11-11-2010), 2338022 (18-11-2010), 2324192 (11-11-2010), 2354387 (23-11-2010), 2361302 (25-11-2010), 2325403 (12-11-2010) & 2339019 (18-11-2010) and be pleased to quash the same for the reasons and grounds set out in the petition;

IN THE ALTERNATIVE

This Hon''ble Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction to quash and set aside the communication dated 25-3-2011 issued by the Assistant Commissioner of Customs (Gr. I), Customs House, Kandla and the assessment orders referred to therein (Annexure "R") and further be pleased to grant all consequential reliefs, including for the payment made.

1.2. So far as Special Civil Application No. 3031 of 2011 is concerned, the petitioner had filed Civil Application No. 13523 of 2011 seeking amendment to incorporate later development. The Court was pleased to issue Rule on 21-3-2013 and after hearing the learned Advocates for both the parties, allowed the same.

1.3. Learned Senior Advocate for the petitioner was requested to furnish his submissions in writing so that any submission does not go unnoticed. Learned Senior Advocate for the petitioner was also requested to see that the submissions made by him during the course of arguments, by learned Senior Advocate for respondent Nos. 2 to 4 and learned Advocate for respondent No. 1 are included in the written submissions. The written submissions were submitted and the same are considered by this Court.

The present writ petitions raise a common legal issue as to whether Betel Nut-Industrial Grade (the said goods) imported by the petitioner are permissible for import under the Duty Free Import Authorization (DFIA) Scheme under the Foreign Trade Policy (FTP) read with the Standard Input Output Norms (SION) thereunder, and are entitled to exemption under Customs Notification No. 40/2006, dated 1-5-2006 (the said Notification). In Special Civil Application No. 204/2011, the petitioner has further questioned the legality and validity of the seizure of 708 M.T. of the said goods vide Panchnama dated 29-12-2010 and has also challenged the Order-in-Original dated 12-5-2011 passed by the authority pending these proceedings, finally assessing five Bills of Entry filed in respect of 756 M.T. of the said goods including the seized quantify referred to above, confirming duty of Rs. 3,02,56,350/- by denying the benefit of exemption under the said Notification on the ground that the said goods are not permissible to be imported under the DFIA and consequently not entitled to exemption under the said Notification. In Special Civil Application No. 3031/2011, the petitioner has also challenged the legality and validity of the seizure of 2238 MT of the said goods vide Panchnama dated 7-2-2011 and has also questioned the assessment of 16 Bills of Entry filed by the petitioner in respect of the aforesaid quantity of the said goods purportedly undertaken by the authorities on 23/24-3-2011 pending the petition, by denying the benefit of exemption under the said Notification without giving any reasons whatsoever.

Brief Facts

2. The petitioner imported the above referred quantity of the said goods in or about October/November, 2010 and for clearance of the goods for home consumption, filed 21 Bills of Entry on various dates during that period. Of the aforesaid 21 Bills of Entry, 08 were initially filed in Group-1 which were subsequently transferred to Group-7 on the request of the petitioner, and the others were filed in Group-7 since the petitioner was seeking benefit of exemption from payment of duty under the said Notification.

2.1. Out of the aforesaid 21 Bills of Entry, referred to above, for 05 Bills of Entry covering 756 MT of the said goods, the authorities undertook provisional assessment of duty as contemplated u/s 18 of the Customs Act, 1962, on various dates in October/November, 2010 and permitted clearance of the said consignment upon the Provisional Duty (PD) bonds being submitted by the petitioner. It is on record that the authorities thought it necessary to seek further information and clarification as to whether the said goods i.e. Betel Nut Industrial Grade were permissible for import under the DFIA read with SION and under item No. 12(c) of the List of Imported Items appended to the DFIA. According to the petitioner, import of the said goods as Vegetable Tanning Agents was permitted, though they were not specified by name in the said list unlike Wattle, Mimosa/Quebracho and others which were included by name. The authorities appears to have sought for such a clarification from the D.G.F.T. Bombay, vide its letter dated 22-11-2010 at the time of assessment of 05 Bills of Entry and provisionally assessed the said Bills of Entry pending receipt of clarification and also called upon the petitioner to seek an amendment of the licenses so as to get specifically (by name) included the said goods.

2.2. After the provisional assessment of 05 Bills of Entry, the petitioner took delivery of the goods which were then transported from the Customs Freight Station (CFS) to the godown of the transporter at Asian. On 10-12-2010, the Assistant Director, DRI, Gandhidham asked the Customs House Agent (CHA) of the petitioner to bring back the goods to the CFS, Gandhidham. By letter dated 13-12-2010, the petitioner submitted a detailed representation contending that he could not be asked to bring back the goods after provisional clearance by the Department as in any case, the final assessment of the Bills of Entry is yet to be done which should be undertaken by the Department. On 29-12-2010, the DRI seized the consignment of the said goods covered under the five Bills of Entry, referred to above, on the ground that the same were liable for confiscation since it had been confirmed after investigation that Areca Nut/Betel nut was not covered under the SION and had been illegally cleared without payment of duty. The Panchnama records that out of 756 MT of the said goods, 48 MT had already delivered, but the balance 708 MT is seized.

2.3. Aggrieved by the aforesaid action of the DRI, the petitioner filed the first writ petition being Special Civil Application No. 204/2011, seeking a declaration that the said goods were included in the SION and permissible for import under the DFIA under Item G-7 and prayed for quashing and setting aside the seizure of the said goods vide Panchnama dated 29-12-2010. After hearing the parties and after considering the reply of the DRI, this Court passed an order on 10-2-2011, issuing Rule and granting interim relief, suspending the seizure order subject to the petitioner furnishing Bank Guarantee to the extent of 25% of the Customs Duty payable, in addition to the Provisional Duty (PD) bonds which had been submitted and also extended in the meanwhile.

2.4. The respondent No. 4-Assistant Commissioner of Customs thereafter on 6-5-2011 issued a notice to the petitioner for the purpose of final assessment of the said five Bills of Entry, recording, inter alia, that the D.G.F.T. had clarified that Areca Nut did not fall under G-7 category of SION and was therefore not eligible for the benefit under DFIA as a tanning agent. The petitioner responded to the notice by its letter dated 10-5-2011, requesting the respondent No. 4 to supply a copy of the clarification received by it and proposed to be relied upon for the purpose of making the final assessment and also to give a reasonable time of at least two weeks for filing reply before proceeding with the final assessment. However, without any further notice, the respondent No. 4 passed an order of final assessment in respect of those five Bills of Entry and confirmed the demand of duty of Rs. 3,02,56,350/-, denying the benefit of exemption claimed by the petitioner. This order is challenged by the petitioner in the present proceeding (SCA No. 204/2011) by moving an amendment which was granted on 21-3-2013. However, pending the grant of amendment, out of abundant caution to avoid the issue of an appeal becoming time barred, without prejudice to the rights of the petitioner to challenge the said order in the present proceedings (SCA No. 204/2011) as specifically mentioned in the appeal memo, the petitioner filed a statutory appeal against the said order before the appellate authority.

2.5. In so far as the remaining 16 Bills of Entry in respect of 2238 MT of Betel Nut/Areca Nut is concerned, after notice was issued in the first writ petition on 13-1-2011, the said goods covered under the 16 Bills of Entry pending assessment by the proper Officer, were seized vide Panchnama dated 7-2-2011. The petitioner, therefore, filed second writ petition being Special Civil Application No. 3031/2011, challenging the legality and validity of the seizure of the said goods and for a direction to the authorities to pass assessment orders in respect of these 16 Bills of Entry covering the seized goods, by accepting the DFIA and by granting the exemption under the said Notification.

2.6. The Court issued notice in the second petition on 14-3-2011 which was served on the respondent No. 5 on 16-3-2011. It is a matter of fact, which is brought on record during the course of submissions, that on the next day i.e. on 17-3-2011, the authorities on their own, transferred these 16 Bills of Entry from Group-7 to Group-1 which, as per the authorities, is the relevant group for considering the assessment of Bills of Entry (Group-1 is where exemption is not claimed or not available to the importer). Immediately thereafter the authorities entered into some correspondence with the CHA of the petitioner for the purpose of producing original documents.

The respondents appeared in the second petition on 21-3-2011 and sought time which was granted up to 28-3-2011. While seeking an adjournment, the respondents did not disclose that they have already undertaken the process of assessment of the 16 Bills of Entry. This is despite the fact that the very issue is directly involved in the petition. On the contrary, an affidavit is filed on behalf of the respondents Nos. 2 and 3 on 24-3-2011, wherein it is contended in para 18 that vide letter dated 24-3-2011 of the Kandla Customs, the subject 16 Bills of Entry submitted by the petitioner were examined and it was found that the importer did not have DFIA licence to cover Areca Nut and, therefore, all the 16 Bills of Entry are assessed without benefit of DFIA and in light of this, the importer''s petition has become infructuous. The authorities then addressed a letter dated 25-2-2011 to the petitioner with a copy to the CHA that assessment orders had been passed in respect of 13 Bills of Entry on 23-3-2011 and the other 03 Bills of Entry on 24-3-2011 and the same were pending for payment of duty. This letter was received by the CHA on 25-3-2011, but not by the petitioner.

2.7. On a grievance being made by the petitioner regarding the conduct of the respondents and the fact that the purported assessment orders were not supplied to the petitioner, this Court kept the matter on 29-3-2011, inter alia, for enabling the authorities to produce the orders of final assessment on record. On 29-3-2011, the respondents produced one Bill of Entry filed by the petitioner containing an endorsement of assessment. After hearing the parties on the question of interim relief, the Court suspended the seizure of the subject goods effected vide Panchnama dated 7-2-2011 on condition, inter alia, that the petitioner would pay 50% of the Customs duty assessable under the order of final assessment on the basis of non-applicability of the DFIA claim, and for the remaining 50%, the petitioner would furnish an appropriate Bank Guarantee. It was further recorded that upon receipt of the so-called (purported) assessment orders, the petitioner would take steps for making necessary amendment in the petition [Baboo Ram Harichand Vs. Union of India,]. It is the case of the petitioner that no assessment order is served upon the petitioner in respect of the 16 Bills of Entry till date.

2.8. The Department challenged the aforesaid order of this Court in SLP (Civil) No. 11700/2011 before the Hon''ble Supreme Court and by interim order dated 12-5-2011, after considering the readiness and willingness of the petitioner to deposit the entire amount of duty assessable on the goods under protest and without prejudice to its rights and contentions, the Court directed that the goods covered under the 16 Bills of Entry would be released. Accordingly, subject consignment was cleared on the payment of duty under protest, as aforestated. Thereafter the Hon''ble Supreme Court finally disposed of the SLP by its order dated 24-11-2011 with a request to this Court to take up Special Civil Application No. 3031/2011 and take a final decision thereon as expeditiously as possible. It was further agreed that the petitioner would not seek release of the subject licenses till the petition was disposed off and if the issue before the Hon''ble Court was decided in favour of the petitioner, it would be open to him to seek revalidation of the licenses. The petitioner sought for amendment to bring the aforesaid subsequent facts on record and also to challenge the decision of the respondents to deny the benefit of exemption under the said notification. The amendment was granted by order dated 25-3-2013.

2.9. It is in the context of the aforesaid facts, the issues set out above, arise for consideration.

3. Learned Senior Advocate Mr. Joshi with learned Advocate Mr. Mithani for the petitioner submitted that Areca Nut/Betel Nut is a Vegetable Tanning Agent used in the manufacture of finished leather and is covered in the SION at item 12(b) and 12(c) of G-7 relating to leather goods. The petitioner relied upon Certificates and technical literature which has been annexed to the petition to contend that

Areca nut is a known vegetable tanning agent used in the leather industry. The petitioner submits that though Areca Nut/Betel Nut is not specifically mentioned in the list, the fact that vegetable tanning agents are permissible for imports under DFIA as inputs for the finished goods-finished leather, and that the words ''Vegetable Tanning Agent'' are followed by the words ''such as'', clearly establishes that the list of tanning agents is illustrative and not exhaustive and Areca/Betel Nut being a tanning agent is clearly permissible for import under FTP read with SION. The petitioner relied upon a judgment of the Hon''ble Supreme Court in the matter of Good Year India Ltd. Vs. Collector of Customs, , wherein the Hon''ble Apex Court has held that the words ''such as'' indicates that list is only illustrative and not exhaustive. It is, therefore, contended that Areca/Betel Nut is, clearly permissible for import under DFIA and entitled to exemption under the above referred Customs Notification No. 40/2006.

3.1. Learned Senior Advocate for the petitioner further contended that in any case, the issue has been set at rest by the D.G.F.T. itself. In the case of one M/s. Raghu Exports (India) Pvt. Ltd. relied upon by the respondents themselves in support of their case, on the complaint of DRI of having fraudulently imported Areca nut which was not allowed under SION and obtaining DFIA fraudulently by misrepresentation, a show cause notice was issued by D.G.F.T. on the said firm on 4-3-2011, which is produced in these proceedings. The record indicates that said firm then sought a clarification from D.G.F.T. vide its letter dated 17-8-2011 on the issue whether other tanning agents including Areca Nut, though not specifically named at item 12(b) and 12(c) of G-7 in SION were permissible for import under DFIA. D.G.F.T. placed this issue before the Norms Committee on 20-10-2011 which, after considering the technical aspects of the matter, concluded (at page 204) that the inputs under Sr. No. 12 of SION G-7 contained ''tannins'' and hence were capable of use in the tanning process, and that the use of the words ''such as'' mentioned therein was merely to indicate that there could be several items that could fall in the SION and under that entry the inputs allowed clearance should be capable of being used for the purpose mentioned in each subject category. Based on the aforesaid decision of the Norms Committee, the D.G.F.T. vide its communication dated 20-11-2012 clarified that "as regards whether Areca Nut is covered under Sr. No. 12 of the goods Group-7 in SION, it has confirmed that Areca Nut is covered", which clarification was extracted in communication dated 22-11-2012 addressed by the D.G.F.T. to M/s. Raghu Exports (page 212) pursuant to which the show cause notice issued against the said importer was dropped, (emphasis supplied).

Learned Senior Advocate for the petitioner submitted that under Paragraph 2.3 of the FTP, the decision of the D.G.F.T. on interpretation of the Policy or Classification of any item is final and binding. In view of this, the entire inquiry made by the DRI relating to interpretation of the provisions of the FTP, SION and the licence is clearly without jurisdiction and authority of law. The petitioner relied upon a judgment of the Hon''ble Supreme Court in the matter of Titan Medical Systems Pvt. Ltd. Vs. Collector of Customs, , wherein it is held by the

Hon''ble Apex Court that once an advance licence is issued and not questioned by the licensing authority, the Customs Authorities could not refuse the exemption on the ground that there was any misrepresentation and if there was any misrepresentation it was for the licensing authority to take steps in that behalf. The said judgment is followed by this Court in judgment and order dated 28-1-2011 rendered in Tax Appeal No. 1263/2006. Even in the present case, no action has been taken against the petitioner for misrepresentation in obtaining the DFIA license by the issuing authority, (emphasis supplied).

3.2. Therefore, on the principal issue involved in the petition, the petitioner submitted that Areca/Betel Nut is permissible for import under DFIA and SION and is, therefore, entitled to exemption from payment of duty under Customs Notification No. 40/2006.

3.3. On the issue of the legality and validity of seizure of goods by the respondents under Panchnamas dated 29-10-2010 and 7-2-2011 challenged in the respective petitions, the petitioner submitted that subject goods are not liable to confiscation u/s 111 of the Customs Act, 1962 and, therefore, could not be seized under the provisions of Section 110 of the said Act under which only those goods which are liable for confiscation can be seized. The contention of the respondent that the goods are liable for confiscation u/s 111(o) of the said Act since the petitioner had made a misrepresentation of the goods being covered under the DFIA at the time of seeking clearance of the goods, is unsustainable in law. The petitioner submits that it had claimed exemption from payment of duty on the basis that the said goods were covered under the DFIA. The goods were correctly described as Betel Nut-Industrial Grade in the Bills of Entry and the claim for exemption was made on the basis that the same were covered under the item ''vegetable tanning agent'' permitted for import under the DFIA, which was also submitted. A mere claim for exemption does not amount to misrepresentation and there is no misdescription of goods by the petitioner. The petitioner relied upon a judgment of the Hon''ble Supreme Court in the matter of M/s. Northern Plastic Limited Vs. Collector of Customs and Central Excise, , wherein the Hon''ble Apex Court has held that laying claim to some exemption whether admissible or not, is a matter of belief of assessee and does not amount to misdeclaration. (emphasis supplied).

3.4. Learned Senior Advocate for the petitioner, therefore, submitted that the proper officer could not have held a valid or rational reason to believe that the goods were liable for confiscation at the time of effecting the seizure of the subject goods and the belief which was held at the relevant time was sham, illusory and no belief in the eye of law which would justify the seizure of goods. Therefore, the action of the seizure is wholly without jurisdiction and authority of law.

3.5. In so far as the issue regarding the legality and validity of the Order-in-Original dated 12-5-2011 is concerned, the petitioner submitted that the same deserves to be quashed and set aside for the following grounds:

a. The impugned order is in breach of principles of natural justice since the petitioner was not afforded an opportunity of hearing nor was the petitioner supplied the copy of the clarification of D.G.F.T. relied upon by the respondents for the purpose of making final assessment of the Bills of Entry by denying the benefits of the exemption notification.

b. That in any case the order suffers from non-application of mind as the authority has relied upon the purported findings of this Hon''ble Court under order dated 10-12-2011 at paragraph 4 thereof, which, in fact, are the contentions raised on behalf of the respondents. The same are not the findings of the Hon''ble Court.

c. That even otherwise the order appears to have been passed in haste, without due application of mind during the pendency of the present proceedings with a view to render the same infructuous. This is clear from the fact that even the clarification sought for by the Department from D.G.F.T., Bombay to enable it to undertake final assessment of the subject Bills of Entry, was not received at the time of passing the impugned order. This is recorded in the impugned order itself.

d. That in any case ''the basis'' of denying the benefit of exemption notification that is, the goods Areca nut/betel nut are not covered under SION and consequently under DFIA, is itself erroneous for the reasons stated above and the impugned order is, therefore, illegal.

3.6. So far as the purported assessment orders dated 23/24-3-2011 in respect of the 16 Bills of Entry are concerned, the petitioner submitted that same deserve to be quashed and set aside like Order-in-Original dated 12-5-2011, inter alia, on the following grounds:

a. That the impugned orders have been passed in breach of principles of natural justice and no notice has been issued to the petitioner before assessing the bills of entry by denying the exemption claimed by the petitioner under the DFIA Scheme. The petitioner relied upon the following judgments. A judgment of this Court dated 4-7-2000 in Special Civil Application No. 167/2000; Special Civil Application No. 1616/2000 and a judgment of the Hon''ble Apex Court in the matter of Kothari Filaments and Another Vs. Commissioner of Customs (Port) Kolkata and Others, for the proposition that, ''assessment orders cannot be passed in violation of principles of natural justice''. (emphasis supplied).

b. That the purported assessment orders are not in bona fide exercise of powers by the respondent authorities, but done at the back of the petitioner, pending the present proceedings, without disclosing these facts before the Hon''ble Court, and with a view to render the petition pending before this Hon''ble Court infructuous.

c. That the lack of bona fides is further clear from the fact that copies of the assessment orders have deliberately not been served on the petitioner and an averment is made that, ''the petitioner should be deemed to be aware about the passing of the assessment orders in view of documents produced in the petition''. This is done solely with a purpose to contend that, ''an appeal has become time barred'', rendering the petitioner remediless.

d. That in any case on merits there is no justification for denying the exemption under the said notification to the petitioner for the reasons which have been narrated above and therefore the purported orders of assessment are illegal.

4. Learned Senior Advocate Mr. R.J. Oza for respondent Nos. 2 to 4 strenuously submitted that the principal issue is, whether ''the subject goods are covered under FTP, SION and the DFIAs submitted by the petitioner for claiming exemption from the payment of duty under the said Notification''. The learned Counsel invited the attention of the Court in detail to the provisions of the Act, FTP, SION and last but not the least DFIA to give a detailed idea of the ambit and scope of the matter.

i. That ''Betel Nut/Areca Nut'' is not included specifically under Item No. 12(b) or 12(c) of G-7 of SION and, therefore, is not permissible for import under DFIA and consequently the said goods are not eligible for exemption from payment of customs duty under the said Notification, (emphasis supplied).

ii. That on perusal of the relevant provisions of the Foreign Trade Policy and the Hand Book of Procedures, it is evident that under the DFIA, the goods can only be validly imported by an Actual User and the petitioner being a trader is not entitled or eligible to import goods under the DFIA.

iii. That contrary to what is contended by the petitioner, the D.G.F.T. has clarified vide notification dated 26-4-2013, that import of Areca Nut is available only to manufacturers under Actual User condition and therefore the import of the said goods by the petitioner was clearly impermissible and the Department was justified in denying the exemption to the petitioner.

iv. That in any case the exemption under the said notification could only be granted if the goods imported were specifically included in the list of inputs permissible under the DFIA and SION, and since Areca nut/Betel nut was admittedly not included, the petitioner was not entitled to the benefit under the exemption notification.

The respondents relied upon a judgment of the Hon''ble Apex Court in the matter of Novopan India Ltd. v. Collector of C. Ex. And Customs, Hyderabad, reported in 1994 (73) E.L.T. 769 in support of the proposition that, ''exemption notifications must be strictly construed and in case of ambiguity whether the assessee falls within its terms or not, benefit of doubt must go in favour of the State''.

4.1. So far as ''legality of the seizure of goods'' learned Senior Advocate for respondent Nos. 2 to 4 contended that the same is justified, inter alia, on the following grounds:

i. That the petitioner intentionally made a false claim that the imported goods were covered under DFIA and were therefore entitled to exemption from duty under the aforesaid notification, though this claim was untenable, which rendered the goods liable for confiscation u/s 111(o) of the Act and the seizure was, therefore, justified.

ii. That the petitioner had indulged in misrepresentation and misdescription of goods at the stage of seeking clearance of the goods without payment of duty and therefore the goods were liable for confiscation, therefore the seizure was valid.

iii. That the petitioner having itself undertaken to obtain an amendment in the DFIA and having got the goods provisionally released on this basis, upon failure of the petitioner to obtain such specific amendment, the subject goods became liable for confiscation under the Act and, therefore seizure was justified.

iv. That the petitioner had an alternative remedy of seeking provisional release of goods u/s. 110A of the Customs Act, 1962 and therefore the petition ought not to be entertained.

4.2. On the issue of ''validity of the Order-in-Original dated 12-5-2011'', the respondents contended that the challenge is misconceived and the prayer should be rejected on the following grounds:

i. That the Assistant Commissioner has correctly held that the petitioner was not entitled to the benefit of the exemption under notification since the subject goods were not covered under the DFIA and SION.

ii. That the order has not been passed in breach of principles of natural justice since a notice had been issued to the petitioner indicating that the Bills of Entry were being taken up for final assessment but the petitioner did not avail of the opportunity and only sought for time.

iii. That the clarification referred to by the Assistant Commissioner in the notice for hearing was the letter dated 7-12-2010 written by the Foreign Trade Development Officer, Kanpur, to the DRL deleting the item Areca Nut from DFIA licence dated 14-7-2009 issued to M/s. Model Tanners which had been relied upon by the petitioner at the time of provisional clearance, and such clarification had already been produced by the respondents by way of affidavit in the present proceedings and the petitioner was aware of the same and therefore, cannot complain any breach of principles of natural justice by non-supply thereof.

iv. That in any case the petitioner had an alternative adequate remedy available to it under law by way of statutory appeal u/s 128 of the Customs Act, 1962, and in fact had availed of the same and the relief of quashing the subject Order-in-Original ought not to be granted to the petitioner. The respondents relied upon a judgment of the Hon''ble Apex Court in the matter of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, and also on a judgment of the Hon''ble Apex Court in the matter of Union of India (UOI) and Another Vs. Guwahati Carbon Ltd., , for the proposition that, ''once a law provides for remedies of appeals, it is a complete code to seek redress and in such circumstances, a petition would not be maintainable irrespective of the vast powers of the High Court under Article 226 of the Constitution of India''.

4.3. On the issue of legality and validity of the purported assessment orders made by the authorities of the 16 Bills of Entry on 23-3-2011 and 24-3-2011 by denying the benefit of the exemption to the petitioner was concerned, the respondents contended that the challenge to the same must fail on account of the following grounds:

i. That the Assistant Commissioner has correctly held that the petitioner was not entitled to the benefit of the exemption under the said notification since the subject goods were not covered under the FTP, SION and the DFIAs, for the reasons elaborated earlier.

ii. That the CHA of the petitioner had been informed of the proceedings of assessment and had been called upon to submit the original documents and therefore it could not be contended that the petitioner was not heard before finalizing the assessment since the CHA represents the petitioner before the Customs Authorities.

iii. That the petitioner was well aware that the assessment orders had been passed or in the alternative could have known with due diligence that the bills of entry had been assessed and, therefore, the petitioner cannot be heard to complain that the copies of the assessment orders were not served upon it.

iv. That in any case the petitioner had an alternative efficacious remedy available to it for challenging the assessment orders and if such remedy had become time barred on account of inaction of the petitioner, the petitioner could not challenge the orders by seeking to amend the pending writ petition. For this proposition, the respondents relied upon the judgments of the Hon''ble Apex Court, referred to above.

5. Learned Senior Advocate Mr. Joshi appearing for the petitioner made the following submissions in rejoinder.

6. In response to the contentions of the respondents on the merits of the issue summarized above, the petitioner submitted as under:

i. The contentions of the respondent that the item has to be specifically included in SION runs counter to the very language of SION as stated earlier and such interpretation is contrary to the judgment of the Hon''ble Apex Court referred to above.

ii. Such an interpretation by the respondents in substance ignores the words ''such as'' used in the relevant entry of SION, and it is settled law that, ''no interpretation is permissible if it renders any word surplus, otiose or redundant'', (emphasis supplied).

iii. That in any case the D.G.F.T. and the Norms Committee have expressly clarified that various other goods including Areca nut would fall under the SION though not being specifically enumerated thereunder-pages 202 to 204 of SCA No. 204/2011.

iv. That the DFIAs are admittedly endorsed to be transferable under Paragraph 4.2.6 of the FTP and there is no Actual User condition imposed by the Licensing Authority. In fact, the Notes to the SION page 42 of SCA No. 204/2011 specifically stipulate that, ''only import of supplementary Vegetable Tanning Agents is subject to Actual User condition''. (emphasis supplied).

v. That the clarification of the D.G.F.T. dated 26-4-2013-pages 343 and 344 of SCA No. 204/2011 has to be read in conjunction with Public Notice No. 112 as stipulated therein. Public Notice No. 112, dated 15-5-2012 seeks to amend the ''General Notes for Leather'' and ''Leather goods of the SION'' by inserting additional Notes. The Public Notice in fact confirms that Betel Nut technically falls under the generic description given in the SION G-7, though not mentioned specifically. Thereafter additional conditions are incorporated in the General Notes, imposing a condition of Actual User if Betel Nut is only covered by the generic description in SION and not specifically mentioned in the SION of the export product and if the same is specifically mentioned, the said goods could be imported by any importer without an Actual User condition. Paragraph No. 4 of the Public Notice then makes it clear that these conditions would apply ''henceforth'' i.e. prospectively, from the date of the Public Notice. Admittedly, there is no amendment in SION G7, which clearly means that both before and after 15-5-2012, Areca/Betel Nut would be covered under the generic description in G-7 as expressly accepted in the Public Notice, (emphasis supplied).

vi. That the above Public Notice read with Paragraph 1.5 of the FTP makes it clear that licences/authorizations issued under the FTP continues to be governed by the provisions under which they were issued.

vii. That the contention that exemption ought to be denied irrespective of the above interpretation since the requirement of the said notification is that the goods imported must be specifically included in the List of Permissible Imports attached to DFIA, is misconceived and there is no such requirement stipulated in the said notification. The petitioner relied upon a judgment of this Court in the matter of Inter Continental (India) v. Union of India, reported in 2003 (154) E.L.T. 37 for the proposition that, ''the benefit of a notification cannot be curtailed by rewriting the notification by imposing additional conditions''. Further, the item imported is a vegetable tanning agent and the DFIA permits import thereof. When SION stipulates inputs by their generic name, there is no question of curtailing the benefit of the exemption upon import of such goods on such grounds since the notification is essentially issued in furtherance of the FTP in order to make it operational and is not meant to curtail the benefit assured under the FTP. In any case, such a contention has been specifically rejected by the CEGAT (Special Bench) in the case reported in 1991 (37) ECR 707 , wherein it was held that, ''since the subject goods (Glyoxal 40%) was used as a tanning agent, it was entitled to the exemption, thought the import licence covered Synthetic Organic Tanning Agent generally, and did not specifically include Glyoxal''. The contention of the Department regarding condition of ''actual use'' being implied was also considered and not accepted since it was not a condition stipulated in the licence. The aforesaid judgment of the CEGAT was challenged before the Hon''ble Apex Court and the Hon''ble Apex Court dismissed the Civil Appeal on 27-2-1996 [1997 (94) E.L.T. A129 (S.C.)] and the order of the Tribunal merged in the order of the Hon''ble Apex Court since the Hon''ble Apex Court exercised its appellate jurisdiction and the dismissal was not at the stage of grant of special leave and the same is, therefore a binding precedent.

6.1. Learned Senior Advocate Mr. Joshi for the petitioner submitted that the contentions of the respondents justifying the seizure are untenable for the following reasons:

i. The petitioner is neither guilty of misrepresentation or misdescription as stated above and in any case making a claim for exemption does not amount to misrepresentation as contended by the respondents.

ii. That there is absolutely no misdescription which has been pointed out by the respondents and in fact, this contention is raised only in the argument and does not form part of the pleadings.

iii. That the justification for seizure on the ground that the petitioner has not obtained the clarification, is misconceived since the record indicates that a clarification was required on the issue either by way of amendment of the licence or clarification of D.G.F.T.-page 109, 112 and 113 of SCA No. 204/2011 and since the clarification had been sought for by the respondents themselves, the petitioner could not be denied the exemption on the clarification issued by D.G.F.T. In fact the clarification makes it clear that, ''Betel Nut is included in the generic description of goods in G7 of SION and the requirement of obtaining amendment in the DFIA is rendered redundant''. In any case such non-production would not automatically disentitle the petitioner to claim the benefit of the exemption under the said notification and for this proposition, the petitioner relied on a judgment of the Hon''ble Apex Court in the matter of Commnr. of Customs (Imports), Mumbai Vs. Tullow India Operations Ltd., .

iv. The contention of alternative remedy is also not valid since s. 110A cannot be considered as an alternative remedy for challenging the validity of the seizure and in any case, as by the interim orders, the Court suspended the seizures, there is no question of relegating the petitioner to the remedy of seeking provisional release of goods as contemplated u/s. 110A of the Act.

6.2. Learned Senior Advocate Mr. Joshi for the petitioner submitted that so far as the contentions of the respondents against challenge to the validity of the Order-in-Original dated 12-5-2011 are concerned, the same do not deserve to be accepted for the following reasons:

i. That Areca Nut is covered under the generic description in SION and this stands established on a plain reading of the SION and the clarification of the D.G.F.T. and therefore on merits, the order which seeks to deny the claim, is not sustainable in law.

ii. That the authority had admittedly not given any effective opportunity of hearing to the petitioner and proceeded to pass the order on 12-5-2011, ignoring the petitioner''s request for documents and for adjournment made on 10-5-2011, without even responding to the same.

iii. That the contention that the petitioner ought to know which clarification was being relied upon since it was produced in the writ petition is misconceived since the petitioner was not even aware that any clarification had been sought for from D.G.F.T., Kanpur and in fact record clearly indicates that the petitioner and the respondent authorities were awaiting clarification sought for by the respondents from D.G.F.T., Bombay, which, even according to the Assistant Commissioner, had not been received till the time of passing the subject order. In any case, the letter of the FTO Kanpur cannot be considered to be a clarification on the issue, least of all, by the D.G.F.T.

iv. That contention of alternative remedy overlooks the fact that the impugned order is clearly in breach of principles of natural justice, which constitutes an exception to the self-imposed limitation regarding availability of alternative remedy, and in any case the same has been passed pending the present proceeding where the principal legal issue is being considered and departmental adjudication would necessarily abide by the decision on merits in the present case and no useful purpose would be served by relegating the petitioner to the alternative remedy.

v. That filing of an appeal against the impugned order was, ''pending grant of the amendment application, to save the period of limitation since there is no power to extend the same by the appellate authority, without prejudice to the rights and contentions of the petitioner'', as recorded by the petitioner in its affidavit-para 6 page 200 of SCA No. 204/2011 and also in the appeal memo and, therefore, cannot preclude the petitioner from agitating the issue in the pending proceedings as contended by the respondents.

6.3. Learned Senior Advocate Mr. Joshi for the petitioner, in response to the contentions of the respondents regarding the validity of the assessment orders dated 23/24-3-2011, submitted that the petitioner reiterates that impugned orders deserve to be quashed and set aside and the contentions of the respondents ought not to be accepted for the following reasons:

i. That Areca Nut is covered under the generic description in SION and this stands established on a plain reading of the SION and the clarification of the D.G.F.T. and therefore on merits, the order which seeks to deny the claim, is not sustainable in law.

ii. That the authorities have admittedly not given any opportunity of hearing to the petitioner and have passed orders on 23/24-3-2011.

iii. That the purported assessment orders have not been served on the petitioners and if the respondents contend that the endorsement on the Bill of Entries, one of which was produced for the perusal of the Court, constitutes an order of assessment, the same does not contain any reason for denying the claim for exemption and deserves to be quashed on this ground alone.

iv. That the chronology of events and the correspondence clearly indicates that the respondent authorities were more interested in creation of record rather than offering an adequate and effective opportunity of hearing to the petitioner. The petitioner has never been put to notice that the assessments were being finalized pending the petition and formal intimation to the CHA to produce original documents cannot be a substitute for a notice granting adequate opportunity of hearing. Moreover if the respondents proposed to deny the benefits of the exemption claimed by the petitioner it was incumbent on the authorities to give a specific opportunity of hearing on this issue to the petitioner and pass a reasoned order, which has admittedly not been done in this case.

v. The contention that the petitioner had an alternative efficacious remedy by way of an appeal, but has not availed of the same within time, is misconceived and not bona fide. In the first place the purported orders of assessment are without hearing and without reasons and, therefore, illegal and the same can be challenged in a writ petition, inasmuch as it is well settled that failure to observe principles of natural justice is an exception to the self-imposed rule of alternative remedy. Secondly, the orders are illegal even on merits as the same ignore the provisions of the FTP, SION and seek to go beyond the DFIA, which is impermissible under law as stated above. Thirdly, the conduct of the respondents indicates a deliberate attempt to bring about a situation whereby the petitioner would be rendered remediless. As stated above, on service of the notice of the petition on 16-3-2011, the respondent authorities on their own transferred the Bills of Entry from Group-7 to Group-1 on 17-3-2011 effectively denying the claim of exemption made by the petitioner, without any intimation to the petitioner whatsoever. The respondents then made a show of calling for original documents from the CHA and despite the fact that the present petition raises the grievance that respondents were not passing order of assessment on Bills of Entry filed since October/November, 2010 and the petitioner had sought for directions for passing the assessment orders, without disclosing the facts before the Court, the respondents proceeded to pass the assessment orders in a hot hurry within seven days of receiving notice of the writ petition, denying the benefit of the exemption claimed by the petitioner without hearing the petitioner, and then promptly raised the contention that ''the petition had become infructuous''. The purported assessment orders were never served on the petitioner and a contention was raised that, ''the assessment was endorsed on the Bills of Entry''. The petitioner stated that since the authority has proceeded to deny the benefit of the exemption claimed by the petitioner, it was incumbent on the authority to pass a reasoned order denying the claim, which was not done and a procedure was deliberately adopted so as to deny the petitioner an opportunity of challenging such orders. In any case, the copies of the assessment orders endorsed on the Bills of Entry were also not served on the petitioners and submitting one copy of the Bill of Entry for perusal of the Hon''ble Court is not sufficient compliance of, ''the requirement of service'' upon the petitioners.

vi. The contention that information was available to the petitioner from the correspondence that assessment orders had been passed, is no substitute for the, ''requirement of communicating the orders to the petitioner'', as sought to be contended by the respondents. In any case, information that, orders have been passed would not enable the petitioner to challenge the same in the absence of copy of the order being made available to the petitioner. The respondents, therefore, clearly cannot be permitted to contend that the petitioner has lost the opportunity of challenging the assessment orders before the appellate authority since it is the respondent authorities who have engineered a situation for the purpose of rendering the petitioner remediless and they cannot be permitted to take advantage of their own wrong. The respondents cannot be permitted to contend on one hand that the petition deserves to be dismissed since it has become infructuous because assessment orders have been passed and submit in the same breath that the assessment orders cannot now be challenged by the petitioner since the appeal had not been preferred in time. As stated above, such action is unfair, inequitable and illegal.

6.4. Learned Senior Advocate Mr. Joshi for the petitioner emphatically submitted that the petitioner is entitled to the relief of setting aside the decision of the respondent authorities of denying the benefits of the exemption claimed by the petitioner for the reasons stated above. In any case the orders have been passed pending the present proceedings where a pure legal issue is being considered and departmental adjudication would necessarily abide by the decision on merits in the present case and no useful purpose would be served by relegating the petitioner to the alternative remedy.

7. Learned Senior Advocate for the petitioner, therefore, submitted that in view of the submissions made above, the petitioner is entitled to a declaration that the said goods viz. Areca/Betel Nut imported by the petitioner in October/November, 2010 prior to the Public Notice No. 112, dated 15-5-2012, are permissible for import under the FTP, SION and the DFIAs of the petitioner submitted before the Customs Authorities and the petitioner is consequently entitled to exemption from payment of duty as envisaged under Customs Notification No. 40/2006.

7.1. The seizure orders dated 29-10-2010 and 7-2-2011 challenged in the writ petitions are illegal since there is no misdeclaration or misdescription of goods by the petitioner and the goods are not liable to confiscation u/s 111 of the Customs Act, 1962. The proper officer could not have held a valid reason to believe that the goods were liable for confiscation and in absence thereof, the exercise of powers of seizure u/s 110 of the said Act is without jurisdiction and illegal.

7.2. The assessment orders dated 12-5-2011 (Special Civil Application No. 204/2011) and 23/24-3-2011 (Special Civil Application No. 3031/2011) deserve to be quashed and set aside on merits since the petitioner is entitled to the exemption under Customs Notification No. 40/2006 for the reasons stated above and the impugned orders which deny such benefits to the petitioner are illegal on merits and for this reason it would not be necessary to remand the matter for fresh adjudication to the Proper Officer on account of breach of principles of natural justice, which is also established in the facts of the case.

8. Since pending the present proceeding, the petitioner has deposited the amount of duty demanded under protest, and the DFIAs submitted to the Customs Department lying with them under orders of the Hon''ble Apex Court have expired in the meantime, a direction may kindly be given to the D.G.F.T. as contemplated in the order of the Hon''ble Apex Court dated 24-11-2011 to revalidate the DFIAs within a specified time frame and for that purpose the Customs authorities be directed to hand over the DFIAs to the petitioner for the purpose of revalidation, within a specific time frame.

9. The Proper Officer be further directed that upon submission of the revalidated DFIAs to him by the petitioner, appropriate orders be passed granting benefit of the exemption claimed by the petitioner under Customs Notification No. 40/2006 for the reasons stated above.

10. Since the amount of duty has been deposited pending the proceedings under protest, the consequential orders of refund may also be kindly passed in favour of the petitioner. The Bank Guarantee submitted by the petitioner pursuant to the interim orders of this Hon''ble Court, if the same has not been encashed, would stand discharged and if the same has been encashed, then the amount realized may abide by the direction of the consequential relief of refund.

11. Heard learned Senior Advocate Mr. Mihir Joshi, with learned Advocate Mr. Amar Mithani for the petitioners; learned Senior Advocate Mr. R.J. Oza for respondent Nos. 2 to 4 and learned Advocate Mr. Hriday Buch, for respondent No. 1.

12. In view of the reasons set out herein above, the petitions are allowed.

(i) The assessments are quashed and the respondents authorities are directed to pass consequential orders of assessment on revalidation of licences including the orders of refund.

(ii) The respondents are directed to grant the benefit of exemption notification for the goods mentioned in the Bills of Entry Nos. 2293960, 2294164, 2315553, 2311881 and 2314171 against the duty free import authorization as the goods mentioned in the Bills of Entry Nos. 2293960, 2294164, 2315553, 2311881 and 2314171 are covered under the D.F.I.A. Licences. Since the D.F.I.A. has expired during the pendency of these petitions, the same be returned to the petitioner for being sent to D.G.F.T. for revalidation.

(iii) The respondents shall ensure that the licences are returned within two weeks from the date of receipt of this order. After the licences are received by the petitioner, the same should be sent to D.G.F.T. within two weeks from the date of the receipt of the licences for revalidation of the licences.

(iv) The D.G.F.T. is directed to revalidate the licences in accordance with law as early as possible, but not later than three weeks from the date of receipt and return them to the petitioner.

(v) Once the revalidated licences are furnished to the respondents by the petitioner, the respondent authorities will act in accordance with law and in light of the discussion made in the judgment.

13. Rule is made absolute. No costs.

14. At this juncture, Mr. R.J. Oza, learned Senior Advocate for the respondents prayed for stay of this order. In light of reasons recorded herein above, as this Court is of the opinion that the D.R.I., has not acted within its bounds, more particularly, when an apprehension is expressed by D.R.I. that these goods are likely to be diverted for the human consumption, this Court finds no substance in the request and hence, it is rejected.

[Per: R.D. Kothari, J. (concurring)].-I respectfully agree with my learned brother. I may add few lines.

15. The petitioner has exported finished leather prepared from hide of cow/ buffalo. The petitioner''s firm claims to be in the business since 1933. A scheme called "DFIA" [Duty Free Import Authorisation] framed by the Government, which is aimed at allowing duty free inputs that are required for production of export products. In other words, under the scheme, duty free import of material is permissible if the said material is to be utilized in preparing export products. List of such different items of permissible import, i.e. "inputs" against the products specified as output prepared by the Government is known as "SION" [Standard Inputs Outputs Norms], the authority that looks after the scheme is "D.G.F.T." [Directorate General of Foreign Trade].

16. It is not clear from the record that actually when the petitioner had exported finished leather. However, it is not in dispute between the parties that the petitioner has duly earned DFIA licence by fulfilling the export obligation. The petitioner has said to have imported 3006.88 M.T. areca nuts/betel nuts. These were imported through 21 bills known as Bill of Entry ["B/E" for short] in 163 containers. It all started when the petitioner had submitted 5 B/Es for clearance of 708 M.T. areca nuts. These B/Es were submitted between 29-10-2010 and 9-11-2010 before Kandla Customs Authority. It appears that before the Customs Authority, the petitioner had undertaken to produce amended Authorisation, i.e. amended DFIA Licence. Upon such undertaking given by the petitioner, Customs

Authority, Kandla, after verifying the papers submitted by the petitioner, cleared the goods on execution of PD Bonds by the petitioner.

17. At this stage, Directorate of Revenue Intelligence ("DRI" for short) appears on the scene. On 10-12-2010, DRI has written a letter to "CHA" (Customs House Agent) of the petitioner, wherein CHA was called upon to bring back the goods cleared under the above-referred 5 B/Es. The goods cleared under the above 5 B/Es came to be seized by the authority on 29-12-2010.

18. The petitioner has filed SCA 204/2011 on 11-1-2011. Therein, the petitioner has, inter alia, challenged the Seizure Order passed by DRI on 29-12-2010. Pending the said petition, the Customs Authority proceeded to. assess finally the goods that were earlier cleared by them upon execution of PD Bonds by the petitioner. Accordingly, in respect of these 5 B/Es, Customs Authorities passed an order on 12-5-2011 and called upon the petitioner to pay duty of over Rs. 3 crores. Passing of this order led the petitioner to amend the petition accordingly. Then the authority has proceeded to seize remaining 2238 M.T. of areca nuts by drawing panchnama-cum-seizure order dated 7-2-2011, which led the petitioner to file SCA 3031/2011.

19. The case of the petitioner can be considered as under:

20. First about validity of final assessment order.

It is not in dispute that the order of final assessment whereby the petitioner is called upon to pay duty of over Rs. 3 crores is passed without hearing the petitioner. The said order is passed on 12-5-2011. It is not in dispute that the authority has served a notice to the petitioner on 6-5-2011 whereby the petitioner was informed that hearing was kept on 10-5-2011. On 10-5-2011, the petitioner had asked for some documents from the said authority by applying for the same and had also prayed for time. The authority passed the impugned order of assessment on 12-5-2011, presumably no separate order is passed on the application dated 10-5-2011 of the petitioner.

21. The authority justifies their action by advancing two grounds, viz. one, prayer made by the petitioner for adjournment appears to be an attempt to delay the assessment, and secondly, by asking the petitioner to make representation, if any, on 10-5-2011, the authority has complied with the principles of natural justice.

22. Both the above grounds have no substance. Taking the second ground first, the principles of natural justice are not to be observed on paper only. Its importance lies in its effective compliance. It does not lie in the mouth of the authority that it has complied with the principles of natural justice when the authority called upon the party to remain present on 10-5-2011, wherein notice was served on the party on 6-5-2011 and when the party prays for time on 10-5-2011, the authority proceeded to pass final assessment order on 12-5-2011. The compliance of the principles of natural justice consists of

"hearing"-one of the basic ingredients-the other side or at least giving of sufficient opportunity of hearing to the party. Intimating to the party the date of hearing that by itself cannot be said to be in compliance of the principles of natural justice. It is step towards compliance of natural justice. Intimation of date of hearing to the party affected is initial part of compliance of principles of natural justice as the "hearing" is inevitable aspect of natural justice. Intimation is not "hearing". Scope of ''hearing'' must not be so constricted or pressed that it obliterates the distinction between ''absence of hearing'' and ''hearing''. As to the first ground, in the circumstances of the present case, it cannot be said that the petitioner''s prayer for time was intended to delay the assessment. It may be stated that attempt to delay the proceedings by the party by itself cannot be said to be sufficient ground to dispense with the compliance of principles of natural justice. Further, refusing ''the prayer for time'', on the very first date of hearing cannot be defended by urging that party indulges in dilatory tactics.

23. I am therefore of the opinion that the order passed on 12-5-2011 is vitiated, as it is passed without complying with the principles of natural justice.

24. The seizure order dated 29-12-2010 is also bad and illegal. It is the panchnama-cum-seizure order. Such composite order is unheard off. That apart, it is the say of the respondent that the seizure order is passed u/s 110(1) of the Customs Act. It empowers ''proper officer'' to seize the goods when said officer has reason to believe that such goods is liable to be confiscated. It is the say of the respondent in the affidavit (P.120) that officer has reason to believe that the petitioner''s goods is liable to be confiscated. The relevant part of general and omnibus order-cum-panchnama reads thus:

Shri R.R. Rai informs us that the undersigned duly empowered to act u/s 110 of the Customs Act, 1962, has reason to believe that the above said Areca nut imported vide above said Bills of Entry valued as per copy of invoice produced by the importer before Customs House, Kandla, Rs. 280 Lacs and cleared duty free by misusing the DFIA License is liable for confiscation under the provisions of the Customs Act, 1962, do hereby seize the goods in 708 MT in total 8105 bags as stated above. The said goods are presently under the custody and stored in godown of M/s. Lalji Moolji Transport Co., Aslali, Ahmedabad, the importer M/s. Babooram Hari Chand are directed not to remove or otherwise deal with the goods described above except with written permission of the proper authority.

25. It is possible to raise doubt about the belief of the authority that Areca nut were liable to confiscation. The reason is this. Just four days prior, i.e. 24-12-2010, to the date of seizure, the authority had asked the petitioner to renew the period of PD Bonds for six months. The relevant part of that order reads as under:

Following BE''s have been cleared under DFIA licence provisionally with PD Bonds valid for one month only, pending documents clarification from D.G.F.T., Mumbai. Since no such clarification is received from D.G.F.T., Mumbai and also by you, you are hereby directed to submit the fresh PD Bonds, extend validity in all cases for further period of six months or till the outcome of DRI investigation.

26. Technically, asking the party to submit fresh PD Bonds for a period of six months on one hand and proceeding to seize the goods on the other hand may not perhaps be faulted with, however, burden lies on the authority to explain rationale to rush into seizure/confiscation of the goods in such circumstances, the reason is the ''proper officer'' cannot proceed to seize the goods u/s 110 of the Act unless he has reason to believe. The authority would exercise drastic powers to seize the goods only in case wherein it has reason to believe that the goods is liable to be confiscated. The powers to seize and the powers to confiscate are quite drastic powers. Little elaboration would show apparent inconsistency in the conduct of the respondent, from which it can be said that formation of belief for seizure by the respondent is vitiated. Initially, on the basis of bonds submitted by the petitioner, the respondent after verifying all the documents that were presented by the petitioner has released the goods on provisional assessment. It is the say of the respondent that it has provisionally assessed the goods at "Nil" rate of duty. Then it is say of the respondent on the one hand that on 15-12-2010, it had directed the petitioner to pay "whole duty" on 5 B/Es with "appropriate interest", while on the other hand, on 24-12-2010, it had asked the petitioner to submit PD bonds for the period of six months. Asking the petitioner to submit fresh PD Bonds implies that prima facie the goods were not liable to pay duty, or in any case, the matter requires investigation; while the proceedings to seize implies that prima facie goods is liable to confiscation. It may be stated that the respondent has tried to support the seizure order by stating that the order of seizure was passed only after lapse of one month, i.e. on expiry of the period for which initial PD Bonds were issued [P.192, Para 3.2]. On the face of letter dated 24-12-2010, directing the petitioner to submit fresh PD Bonds for further period of six months, the respondent cannot proceed to seize the goods. Seizure should precede by belief. Belief ought to have basis. Unexplained inconsistent conduct makes dent on the belief. It would shake the basis and vitiate the seizure.

27. The respondent''s above referred inconsistent conduct on record apart, the case of the petitioner rests on more surer ground, therefore, the Court need not indulge into examining the other alleged deficiencies in respondent''s case like the deficiencies in seizure order-cum-panchnama, etc.

28. The respondent contends that the issue involved is not whether ''Areca nut'' contains tannin agents or not, but whether ''Areca nut'' can be imported under subject DFIA licence (P.123 etc.). Let us examine the case of the petitioner on this line.

DFIA scheme was introduced by the Government in its new policy declared as Foreign Trade Policy of 2009-2014. Therein DFIA scheme is stated at 4.2.1 to 4.2.7. As stated above, the fact of the petitioner holding DFIA licence is not in dispute. It is also not in dispute that the petitioner had acquired licence in lawful manner. In order to appreciate properly, two relevant materials on record, status of D.G.F.T. may be considered. Section 6 of Foreign Trade (Development and Regulations) Act, 1992 empowers the Central Government to appoint D.G.F.T. Section 6(2) reads thus:

Section 6(2): Director General shall advise the Central Government in the formulation of the (Foreign Trade Policy) and shall be responsible for carrying out that policy.

Thus, on the one hand the Central Government has clothed the D.G.F.T. with the powers to advise to itself (to Central Government) for formulating the policy and on the other hand, D.G.F.T. is held responsible for carrying out the said policy. Further, paragraph 2.3 of the Policy of 2009-2014, provides for "interpretation of policy". It reads as under:-

2.3: Interpretation of Policy.

(a); The decision of D.G.F.T. shall be final and binding on all matters relating to interpretation of Policy, or provision in HBP v1, HBP v2 or classification of any item for import/export policy in the ITC (HS).

(b): A Policy Interpretation Committee (PIC) may be constituted to aid and advise D.G.F.T.

29. The Entry in issue herein is Entry No. 12 in G-7 in SION. Broadly and roughly it can be said that Entry No. 12 contains name of different items that has ''tannin'' content. As Areca nut does not specifically occurs in the said Entry, meaning of "such as" occurring therein, preceding the other items stated therein was taken up for consideration by the authority. In this regard, D.G.F.T. had held meeting on 20-10-2011. The Chairman of D.G.F.T. and Joint D.G.F.T. were present in the meeting. Therein they have resolved as under:-

Under Sr. No. 12 of SION G7 & G46, the inputs allowed contain tannin, hence are capable of use in the tanning process. The use of words ''such as'' mentioned herein is merely to indicate that there could be several items that could fall in the SSONs. Under this entry, the inputs allowed clearance should be capable of being used for the purpose mentioned in each such category.

(emphasis supplied)

30. The say of the respondent on the above clarification issued by the D.G.F.T. is better to state in the words of the respondent itself. It reads thus:-

From the above minutes of Norms Committee, it cannot be concluded that Areca nut is covered in SION. Thus, the clarification of D.G.F.T. that Areca nut is covered under Sr. No. 12 of the product group G-7 of the SION, is not correct and has no bearing in law because of the reason that it has been issued without considering the facts. It prima facie appears that this clarification is arbitrary and non-speaking. The Directorate of Revenue Intelligence is taking up the matter with D.G.F.T. Therefore, sufficient time may kindly be given to DRI to seek proper documents etc. based on which the above clarification is issued. It is therefore, prayed that sufficient time may be granted in the interest of justice. (P.217). (emphasis supplied)

31. The say of the respondent on clarification issued by the D.G.F.T. does not require any comments. It speaks for itself.

32. From the other material produced on record at Annexure-A/1 (P.121), it would appear that the proceedings initiated against one Raghu Export Pvt. Ltd., precisely for the use of DFIA Licence for Areca nut, were later on closed by the authority. The copy of the order produced on record shows that in that case the Authority had referred the matter to D.G.F.T. for clarification and the clarification received by the authority from the D.G.F.T. is as under:-

As regards whether Areca Nut is covered under Sr. No. 12 of the product group G-7 under SION, it is confirmed that Areca Nut is covered.

In pursuant to the said clarification, the Authority had concluded that the matter is closed.

33. The respondent has tried to distinguish the above order passed in the case of Raghu Export Pvt. Ltd., by urging that Raghu Export is engaged in the business of manufacturing and export, while the present petitioner is engaged in trading only. Therefore, the above-referred order passed in the case of Raghu Export Pvt. Ltd., cannot help the petitioner. Such a distinction sought to be made by the respondent is not found in the order passed in the case of Raghu Export Pvt. Ltd., in the sense that it does not say that the benefit of duty free import is available to Raghu Export Pvt. Ltd. Because it is the manufacturer. On the other hand, the above quoted clarification in that case made by D.G.F.T. is amply clear and it does not place rider of any nature, limiting the operation of its opinion. It concludes the controversy.

34. In the last, before concluding I may refer clarification dated 26-4-2013. It was heavily relied on by the respondent. The said clarification affirmed public notice dated 15-5-2012 and has withdrawn the clarification issued earlier i.e. on 22-11-2012.

35. The circle of clarifications is not less interesting. The first clarification was issued by D.G.F.T. on 24-3-2009, then on 1-11-2011, then on 22-11-2012/26-11-2012, then on 26-4-2013. In order to appreciate the clarification dated 26-4-2013, clarification dated 22-11-2012/26-11-2012 and public notice dated 12-5-2012 may be referred. It is material to note that in clarification dated 26-4-2013, D.G.F.T. had approved and affirmed the public notice dated 15-5-2012. In that public notice, the authority has clarified that "Areca nut shall be permitted for import", if it is specifically included in SION OR if not included specifically, then by actual user provided Areca nut "technically" falls under the description. In short, it says that either Areca nut ought to be specifically mentioned in SION or, if not, then if Areca nut "technically" comes

within the description, then such importer should be actual user. Though this public notice is fairly clear, it is the say of the respondent that it had issued clarification on 22-11-2012, as the clarification was sought. From the notes of submissions submitted by the learned advocates for the parties, it would appear that clarification dated 22-11-2012/26-11-2012 is produced at page 142 in Special Civil Application No. 3031/2011. The relevant part of the said clarification reads thus:-

As regards whether Areca Nut is covered under Sl. No. 12 of the product group G-7 under SION, it is confirmed that Areca Nut is covered.

36. Then, by clarification dated 26-4-2013, the respondent-authority withdraws the clarification dated 22-11-2012. In the clarification dated 26-4-2013, it is stated that ''Areca Nut'' can be considered under Serial No. 12 of product G.7 in SION provided it is imported by manufacturer under actual using condition and secondly, Areca nut cannot be imported under DFIA licence by endorsement of transferability.

37. It is not possible to accept the submission of the respondent based on clarification dated 26-4-2013. The reason is, said clarification, as observed above, approves and affirms public notice dated 15-5-2012. The contents of said public notice are referred above. In substance, this public notice is also a clarification. The said notice is prospective in its operation as it would appear from para 4 of that notice.

4. Effect of this Public Notice:

Henceforth, import of Areca nut (i.e. Betel nut) as an input would be permitted only when it is by an actual user, or by anybody (including the actual user) if it is specifically mentioned in the SION of the export product.

38. Further, it was not pointed out specifically by the respondent that how this clarification of 2013, minus confusion created by clarification of 2012 can apply retrospectively to the import that has already taken place. In respect of the imports that were made after issuance of public notice dated 15-5-2012 also the authority felt that there was need for clarification and that it issued clarification dated 22-11-2012. However, as per the say of the authority, clarification dated 22-11-2012 has created confusion. Hence, it considered it to be proper to withdraw the said clarification and it issued fresh clarification dated 26-4-2013. In this situation, the respondent can hardly contend with any force on the aspect of ''retrospective application of clarification dated 26-4-2013''. Further still, in a sense it is not a question of retrospective operation. Pending the petition, the authority examines, re-examines and re-examines the issue and clarifies, withdraws and again clarifies the issue. The authority then comes up with clarification issued on 26-4-2013. The very fact that the department required to issue clarification at regular interval and as per their own say, their clarification had created confusion and, therefore, they had issued another clarification, gives way for the other side to make alternate submission that considering lack of

certainty prevailing on the issue, Court should adopt construction favourable to the subject. It cannot be denied that as per the well settled principle of construction of taxing statutes, in case of doubt or when two views are possible, the view favorable to the subject should be preferred. So the respondent has fairly weak case on clarification dated 26-4-2013. On the other hand it can also be said that the practice of issuing, withdrawing and again re-issuing "clarification" is not a proper practice. If this practice is tolerated as acceptable, then no administration can work satisfactorily. The department frames a policy and when subject claims benefits under the policy, the department disputes the claim, driving subject to approach the Court and thereafter, department continues to improve upon interpretation of the policy till the interpretation of negativing the benefit of policy is arrived at by it. This cannot be held to be permissible.

39. We had a privilege to have a brief journey into the world of ''Areca nut/betel nut''. Parties have produced some material in support of their respective submissions, viz. on ''tannin'' contents of ''Areca nut''. It was pointed out that ''Areca nut'' may be dry, hard, whole or cut or it may be fresh, green, soft, etc. That it undergoes three stages of development. It was asserted by the respondent that the ''Areca nut'' cannot be commercially viable for the ''tannin'' purposes. It is not for this Court to give any opinion on ''tannin'' content of Areca nut or to say about propriety of reading Areca nut in SION. It is for the D.G.F.T. to say on this. The say of the D.G.F.T. is in favour of the petitioner.

40. I respectfully agree with the conclusion recorded by my learned Brother that both the petitions require to be allowed. The Special Civil Application stand disposed of in terms of the concurring judgment.