

(2013) 07 GUJ CK 0001
In the Gujarat High Court

Case No : First Appeal Nos. 2399 to 2401 of 2008, C.A. Nos. 5933 of 2008 in F.A. No. 2399 of 2008, C.A. No. 440 of 2009 in F.A. No. 2399 of 2008, C.A. No. 6634 of 2011 in F.A. No. 2399 of 2008 to C.A. No. 6636 of 2011 in F.A. No. 2400 of 2008), challenging order da

Rajesh Shantilal Adani

APPELLANT

Vs

Special Director, Enforcement Directorate, Mumbai

RESPONDENT

Date of Decision : 17-07-2013

Acts Referred:

Citation : (2014) 1 GLR 819 : (2014) 26 GSTR 536

Hon'ble Judges : Bhaskar Bhattacharya, C.J.;J.B. Pardiwala, J

Bench : Division Bench

Final Decision : Allowed

Judgement

J. B. Pardiwala, J.—Since, the subject-matter of all the three appeals is the same and the challenge in these appeals is also to a selfsame order passed by the appellate Tribunal for Foreign Exchange, these were heard analogously and are being decided by this common judgment and order. These Appeals under Sec. 35 of the Foreign Exchange Management Act, 1999 (hereinafter referred to as "F.E.M.A.") are directed against the order dated 25th February, 2008 passed by the Appellate Tribunal for Foreign Exchange (hereinafter referred to as "the Tribunal") in Appeal Nos. 499 to 501 of 2005 dismissing the appeals filed by the appellants, and thereby, confirming the Adjudication Order No. ADJ/47/AAO/RPR/B/2005 dated 4th May, 2005 passed by the Additional Director, Enforcement Directorate, Mumbai, imposing penalty on each of the appellants respectively.

2. All the three Appeals were admitted in terms of the following substantial questions of law.

(1) Whether judicial discipline requires the Appellate Tribunal for Foreign Exchange ("Tribunal" for short) to unreservedly follow its own Order dated 28th November, 2007 of the same Co-ordinating Bench in the case of M/s. Contessa Commercial Company Pvt. Ltd. v. Special Director, ("Contessa" for short) which

is on identical facts and circumstances as the present case and when the entire case against the present Appellant including the issuance of the show-cause notice (Memorandum) and the documentary evidence relied upon, is a result of the investigations conducted against Contessa?

(2) Whether the Tribunal was duty-bound to follow the Order passed by the Customs, Excise & Service Tax Appellate Tribunal ("C.E.S.T.A.T." for short) passed in the appellant's own case holding that there was no misdeclaration or undervaluation, and therefore, there was no question of violation of the provisions of Sec. 8(3) and Sec. 8(4) of the erstwhile Foreign Exchange Regulation Act, 1973 (F.E.R.A.) and whether the Tribunal was correct in law in not following the Order of C.E.S.T.A.T. in appellant's own case, when it followed the C.E.S.T.A.T. order in the case of Contessa vide order dated 28th November, 2007?

(3) Whether the Tribunal was correct in not following the judgment of the Hon'ble Supreme Court in Commissioner of Customs, Chennai Vs. Pentamedia Graphics Ltd., to the effect that the said goods are computer software, and therefore, were correctly assessed at nil rate of duty at the time of clearance for home consumption by the customs authorities, and therefore, when there was no misdeclaration by the appellants under Sec. 8(3) and Sec. 8(4) of F.E.R.A. and in the absence of machinery for assessment of goods including the assessment of value of goods including the assessment of value of the goods imported into India under F.E.R.A., was the Tribunal correct in law in upholding contravention of provisions of Sec. 8(3) and Sec. 8(4) of F.E.R.A., when the C.E.S.T.A.T. has held that there was no misdeclaration of either description or value on the part of the appellant in relation to the said imported goods and that the said goods were computer software as held by the Hon'ble Supreme Court in the aforesaid case of Pentamedia Limited?

(4) Whether the appellants are liable for abetment of the contravention of Sec. 8(3) and Sec. 8(4) of F.E.R.A. by virtue of having opened a Letter of Credit as a status holder in terms of the provisions of the Export Import Policy and the Handbook of Procedure, in force at the relevant time, and consequently, whether the appellant is liable for penalty under Sec. 50 of F.E.R.A. for the contravention of the Sec. 64 of F.E.R.A. read with Sec. 8(3) and Sec. 8(4) of F.E.R.A., when the appellant is neither the importer of the goods nor has acquired foreign exchange on their own account, but as agent of the importers who made a declaration as to the correctness of the description and value of the goods at the time of filing the Bill of Entry under Sec. 46 of the Customs Act?

(5) When proceedings commenced prior to 31-5-2002 under erstwhile Sec. 51 of the F.E.R.A. are sought to be saved under Sec. 49(3) of the Foreign Exchange Management Act, 1999 ("F.E.M.A." for short), whether a show-cause notice signed on 31-5-2002 and posted thereafter, which came to be received by the appellant on 3-6-2002, can be said to be saved by the aforesaid Sec. 49(3) of the F.E.R.A.?

3. The facts relevant for the purpose of deciding the issues arising in these Appeals may be summarised as under :

3.1. It is the case of the department that during the period between March, 1998 and August, 1998, one Mr. Dharmesh P. Shah, appellant of First Appeal No. 2401 of 2008 and proprietor of M/s. Vaishal Impex imported 2,96,200 pieces of computer software on C.D. R.O.Ms. under O.G.L. for a total invoice value of U.S. \$ 44,55,500/- at the rate of \$ 15 per piece, according to 16 invoices and connected import documents, which were submitted by M/s. Vaishal Impex to the Customs Authorities. In furtherance of the same, M/s. Vaishal Impex through their clearing agent M/s. C.S. Narendra and Company, Hyderabad, submitted Bills of Entry bearing different numbers dated 25th April, 1998, 29th August, 1998 and 22nd August, 1998 respectively and all of them consisted of C.D. R.O.Ms. imported by M/s. Vaishal Impex, Ahmedabad. The customs house agent cleared the same from the Air Cargo Complex, Hyderabad and forwarded eleven consignments (120 baggages) covered under the Bills of Entry Nos. 4486 to 4496 dated 25th April, 1998 through M/s. Speed King Carrier Pvt. Ltd., Chennai, which were received in Ahmedabad by the said firm.

3.2. It is the case of the department that the payments to the customs house agent were made by M/s. Vaishal Impex, Ahmedabad, by way of eight cheques/drafts of the Corporation Bank, Hyderabad, aggregating to Rs. 6,17,253/- drawn from the Current Account No. 2361 of the said firm, after receiving payments by cheques of equal amounts drawn from the Current Account No. 2025 of M/s. Adani Exports Limited, Ahmedabad (Appellant of First Appeal No. 2400 of 2008) also maintained with the Corporation Bank, Ahmedabad, around the same time, thereby evidencing that the payment made to the customs house agent was by M/s. Adani Exports Limited, Ahmedabad.

3.3. According to the department, M/s. Adani Exports Limited had opened irrevocable letters of credit between March, and August, 1998 for a total value of US \$ 44,55,500/- in different banks on the account of said M/s. Vaishal Impex, Ahmedabad, favouring M/s. Computer Point at Dubai for the import of the aforesaid goods and the amounts were duly paid to the overseas suppliers. M/s. Adani Exports Limited had opened an irrevocable letter of credit on account of M/s. Contessa Commercial Company Pvt. Ltd., Kolkata, favouring M/s. Gulf Software, Dubai, for import of C.D. R.O.Ms. during the year 1998.

3.4. It is the case of the department that the officers of the Directorate of Revenue Intelligence, Ahmedabad, conducted searches at the godown premises of M/s. Vaishal Impex on 5th January, 2001 and seized 1,99,077 pieces of C.D. R.O.Ms. imported by it under a panchnama of the same date. The officers also conducted the search of the godown premises of M/s. Brisk Plastics and Chemicals Pvt. Ltd., Ahmedabad, on 1st August, 2000 and seized the C.D. R.O.Ms. which were imported by M/s. Contessa Commercial Company Pvt. Ltd., Kolkata.

3.5. The investigations carried out by the officers of the Directorate of Revenue Intelligence and Customs Authorities in regard to the software on C.D. R.O.Ms. imported by M/s. Contessa Commercial Company Pvt. Ltd., Kolkata, during the year 1998 i.e. from M/s. Gulf Software, Ajman, U.A.E., revealed that M/s. Adani Exports had opened a letter of credit on behalf of the above-referred importers in the similar manner like in the case of M/s. Vaishal Impex and the importers had declared the price of the software on the C.D. R.O.Ms. as US \$ 15 per piece. In the case of M/s. Contessa Commercial Company Pvt. Ltd., Kolkata, the declared value before the Indian Customs was found to be on a very higher side than the actual value of the C.D. R.O.Ms. i.e. the value declared by the exporters, M/s. Gulf Software, Dubai before the Dubai Customs.

3.6. According to the department, the actual value of each of the software on the C.D. R.O.Ms. imported by M/s. Contessa Commercial Company Pvt. Ltd., Kolkata, was US \$ 1.11 per piece and not U.S. \$ 15 per piece as declared by the importer and also the software on C.D. R.O.Ms. imported by M/s. Contessa Commercial Company Pvt. Ltd., Kolkata and M/s. Vaishal Impex, Ahmedabad, were reportedly different in description than those to be designated as computer software. It was also found by the department that the C.D. R.O.Ms. were found lacking in interactivity and failed to run on the automatic data processing machine not loaded with an operating system. Accordingly, the department reached to the conclusion that the C.D. R.O.Ms. imported were not computer software so as to claim the benefit of the nil duty under the Customs Notification No. 11 of 1997 dated 1st March, 1997 as amended by the Notification No. 3 of 1998 dated 11th February, 1998.

3.7. It is also the case of the department that out of 30 C.D. R.O.Ms. imported during the contemporaneous period in the name of M/s. Vaishal Impex, 28 titles had also been imported in the name of M/s. Contessa Commercial Company Pvt. Ltd., Kolkata, and all the C.D. R.O.Ms. were having a uniform declared price of U.S. \$ 15 in all the eleven invoices submitted by M/s. Vaishal Impex. The department also reached to the conclusion that the title of the C.D. R.O.Ms. did not appear to have affected its value in the import of the C.D. R.O.Ms. from M/s. Computer Point, Dubai and M/s. Gulf Software, Dubai, and therefore, identical C.D. R.O.Ms. imported by both the companies from the different exporters of Dubai during that period had the same export price i.e. US \$ 1.11 per piece.

3.8. The department of the Customs has determined the total F.O.B. value of 1,10,000 pieces of C.D. R.O.Ms. (total 30 titles) to the tune of Rs. 51,00,561/- and determined the C.I.F. value to the tune of Rs. 61,78,054/- instead of the declared total value of US \$ 16,50,000/- (C.I.F.). The F.O.B. value per piece of the C.D. R.O.Ms. was determined at U.S. \$ 1.11 per piece instead of U.S. \$ 15 per piece, thereby, suggesting that the importer M/s. Vaishal Impex, Ahmedabad, had suppressed the actual value of the imports.

3.9. During the year 1998, Shree Dharmesh P. Shah, the proprietor of M/s. Vaishal Impex, Ahmedabad, residing in a two bed-room flat in Ahmedabad

acquired foreign exchange to the tune of U.S. \$ 16,50,000/- for importing computer software C.D. R.O.Ms. (1,10,000 pieces), according to 11 invoices all bearing logo of software on C.D. R.O.Ms from M/s. Computer Point, Dubai, but at the same time failed to import the goods of the value, representing the foreign exchange so acquired by him and failed to use the said foreign exchange for the purpose for which the same was acquired by him.

3.10. According to the department, the investigations also revealed that Shri Rajesh Shantilal Adani (the Appellant of First Appeal No. 2399 of 2008) was in-charge of and responsible to the said company for the conduct of the business of the company at the relevant time.

3.11. Accordingly, in view of the above, the Special Director, Enforcement Directorate, Government of India, under the provisions as contained in Sec. 8, clause (3) and Sec. 8, clause (4) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "F.E.R.A.") read with Sec. 64, clause (2) and Sec. 68, clause (1) of the Act issued a memorandum dated 31st May, 2002 calling upon the appellants to show-cause in writing within 10 days from the date of the receipt of the memorandum as to why the adjudication proceedings as contemplated under Sec. 51 of the Foreign Exchange Regulation Act, 1973 read with Sec. 49, clauses (3) and (4) of the Foreign Exchange Management Act, 1999 should not be held against them for the aforesaid contravention.

3.12. On receipt of the show-cause notice to each of the appellants, individual replies were filed submitting that although the show-cause notice is dated 31st May, 2002, the same was received by them only on 4th June, 2002 which was subsequent to the repeal of F.E.R.A. It was submitted that in view of the provisions as contained in Sec. 49 of the F.E.M.A., the adjudicating authority was bound to take notice of the contravention within the period of two years i.e. from 31st May, 2000 to 31st May, 2002 and not thereafter.

3.13. The adjudicating authority i.e. the Additional Director General, after hearing the parties concerned came to the conclusion that M/s. Adani Exports had gone beyond the scope of a mere facilitator of opening Letter of Credit in the present case. While providing such huge finances for opening L.Cs., the adjudicating authority reached to the conclusion that no adequate care had been taken by M/s. Adani Exports to safeguard their interest in the event of non-payment of amount by M/s. Vaishal Impex, which was not in conformity with the prudent business practice. The adjudicating authority also recorded a finding that no securities were insisted upon by M/s. Adani Exports from M/s. Vaishal Impex for advancing such finances. Accordingly, the adjudicating authority recorded a finding that all the appellants were guilty of the charges levelled against them, and accordingly, in terms of the powers conferred on it under Sec. 50 of the F.E.R.A., 1973 read with Sec. 49, clause (3) and Sec. 49, clause (4) of the F.E.M.A. imposed penalties vide order dated 4th May, 2005 as under :

(i) Penalty of Rs. 7,50,00,000/- (Rupees Seven Crore Fifty Lac only) on Shri

Dharmesh P. Shah, proprietor of M/s. Vaishal Impex (appellant of First Appeal No. 2401 of 2008)

(ii) A penalty of Rs. 4,00,00,000/- (Rupees Four Crore only) on M/s. Adani Exports Ltd. (appellant of First Appeal No. 2400 of 2008)

(iii) A penalty of Rs. 2,00,00,000/- (Rupees Two Crore only) on Shree Rajesh Adani, Director of M/s. Adani Exports Ltd. (appellant of First Appeal No. 2399 of 2008).

3.14. The appellants being dissatisfied with the order passed by the Additional Director imposing penalty, as referred to above, preferred the appeal before the Appellate Tribunal for Foreign Exchange, New Delhi.

3.15. The Appellate Tribunal reached to the conclusion that the adjudicating officer committed no error, not to speak of any error of law, in imposing the penalty upon the respective appellants. Accordingly, the Appellate Tribunal confirmed the order of the Additional Director, Enforcement Directorate, Mumbai, dated 4th May, 2005 and dismissed all the three appeals by a common order.

3.16. Feeling dissatisfied the appellants have come up with their respective appeals under Sec. 35 of F.E.M.A.

Submissions on behalf of the Appellants :

4. Mr. Kamal B. Trivedi, the learned Senior Advocate appearing with Mr. Rakesh Gupta for the appellants of First Appeal Nos. 2399 and 2400 of 2008 and Mr. Vikram Nankani, learned Senior Counsel appearing with Mr. Hardik P. Modh. for the appellants of First Appeal No. 2401 of 2008, made the following submissions :

4.1. When the authorities under F.E.R.A. while issuing notice solely relied upon the customs authorities investigation and when the appellants have been exonerated by the customs authorities, in such circumstances, it was not open for them to take a contrary stand to the one taken by the customs. It has been vehemently submitted that judicial discipline mandates quasi-judicial authorities to be consistent in their views and not to take different stand when the question arising for consideration and the facts are similar/identical to the previous case wherein the department has accepted the earlier decisions of the adjudicating authority under F.E.M.A. as well as the Appellate Tribunal in the case of M/s. Contessa Commercial Company Pvt. Ltd., Adani Exports Limited and its Director, Shri Rajesh Adani and has not thought fit to challenge the same. In support of the aforesaid submission, Mr. Trivedi has relied on the following case-law :

(1) Birla Corporation Ltd. Vs. Commnr. of Central Excise, .

(2) Jayaswals Neco Ltd. v. Commissioner of Central Excise, Nagpur, 2006 (195) ELT 142 (SC)

(3) Jindal Dye Intermediate Ltd. v. Collector of Customs, Mumbai, 2006 (197) ELT 471 (SC)

(4) Indian Oil Corporation Ltd. v. Collector of Central Excise, Baroda, 2006 (202) ELT 37 (SC)

(5) Boving Fouress Ltd. v. Commissioner of Central Excise, Chennai, 2006 (202) ELT 389 (SC)

(6) Commissioner of Central Excise, Hyderabad v. Novapan Industries Ltd., 2007 (209) ELT 161 (SC)

(7) The Punjab University, Chandigarh Vs. Vijay Singh Lamba and Others, .

4.2. Mr. Trivedi submitted that the way in which the customs authorities are obliged to follow the decision of the licensing authority in the matter of issuance of licence, the decision of the customs authorities in the matter of classification and valuation are final vis-?-vis the F.E.R.A. authorities, more particularly, when the customs authorities are statutory authorities empowered to decide the issue of classification and valuation of goods at the time of import as well as export thereof, and therefore, the Appellate Tribunal under F.E.M.A. ought to have allowed the appeal of the appellants by relying upon the judgment of C.E.S.T.A.T. rendered in their own case. In support of this submission, Mr. Trivedi has relied on the following case-law :

(1) Titan Medical Systems Pvt. Ltd. Vs. Collector of Customs,

(2) 2007 (210) ELT 443

(3) Contessa Commercial Co. Pvt. Ltd. v. Commr. of Customs, Faridabad, 2007 (208) ELT 299 (CESTAT)

(4) Commissioner of Customs, Chennai Vs. Pentamedia Graphics Ltd., .

4.3. Mr. Trivedi submitted that the adjudication order and the order in appeal have been passed in violation of the principles of natural justice inasmuch as the appellant's specific request for cross-examination of the D.R.I. officer was turned down without any valid reason, resulting in grave injustice to the appellants. The sum and substance of Mr. Trivedi's submission is that when the authorities decided to ignore the report of the Electronics and Computer Software Export Promotion Council and the Department of Electronics, Government of India, as regards the price of the software which supports the case of the appellants, and the authorities decided to rely on a report issued by officers of the National Informatics Centre, Government of India, in that regard, in such circumstances, the appellants were justified in requesting the authorities to permit them to cross-examine the concerned officer so as to bring on record what actually weighed with such officer and what was taken into consideration while giving such report, more particularly, when the same is in conflict with the other reports. In support of this submission, Mr. Trivedi placed strong reliance on the following decisions :

(1) Commissioner of Income Tax, Gujarat-II Vs. Surendra Gulabchand Modi (L/r of Gulabchand B. Modi), .

- (2) State of Kerala Vs. K.T. Shaduli Yusuff etc., .
- (3) Arya Abhushan Bhandar Vs. Union of India (UOI),
- (4) Lakshman Exports Limited Vs. Collector of Central Excise,
- (5) Jha Shipping Agency Vs. Union of India (UOI),
- (6) Transmission Corporation of A.P. Ltd. and Others Vs. Sri Rama Krishna Rice Mill,

4.4. Mr. Trivedi further submitted that the impugned order travels beyond the scope of the show-cause notice dated 31st May, 2002 and on this ground alone, the order impugned deserves to be quashed and set aside. According to Mr. Trivedi, the observations made in Paragraph Nos. 4, 5, 15, 19 to 26, 31 to 41 of the impugned order are not part of the averments in the show-cause notice dated 31st May, 2002. To fortify this submission, Mr. Trivedi has placed strong reliance on the following four decisions :

- (1) Nasir Ahmad Vs. Assistant Custodian General, Evacuee Property, Uttar Pradesh, Lucknow and Another, .
- (2) Kaur & Singh v. Collector of Central Excise, New Delhi, 1997 (94) ELT 289 (SC).
- (3) Raphael Pharmaceuticals Pvt. Ltd. Vs. Superintendent of Distilleries, .
- (4) Commissioner of Customs, Mumbai Vs. Toyo Engineering India Limited, .

4.5. Lastly, according to Mr. Trivedi, the impugned order deserves to be quashed and set aside on the ground that F.E.R.A. came to be repealed and F.E.M.A. came into operation with effect from 31st May, 2000 and by virtue of the provisions contained in Sec. 49 of F.E.M.A., the adjudicating authority is debarred to take notice of any contravention of the provisions of F.E.R.A. after the expiry of two years from the date of commencement of F.E.M.A. meaning thereby, after 31st May, 2002, none of the contraventions of the provisions of F.E.R.A. could be pressed into service. According to Mr. Trivedi, for adjudication upon any contravention of F.E.R.A., the adjudicating authority is obliged in law to take notice of the contravention within the period of two years i.e. from 31st May, 2000 to 31st May, 2002 and not thereafter. Although, according to Mr. Trivedi, the memorandum taking notice of the contravention is dated 31st May, 2002, the same was received by the appellants on 4th June, 2002 and on that ground also, the show-cause notice should have been discharged. In short, the submission of Mr. Trivedi is that the command of Sec. 49, clause (3) of F.E.M.A. is that no adjudicating officer shall proceed under Sec. 51 of F.E.R.A. and deal with the inquiry and eventually impose penalty if the adjudicating officer finds that there has been any contravention. Mr. Trivedi submits that the inquiry commences when the adjudicating officer starts the process of adjudication," and in the case at hand, the adjudication had commenced after the sunset period. In essence, the submission of Mr. Trivedi is that there is a mandatory command prescribing a

cut-off date by way of limitation and after the expiry of the said period no action is envisaged, and in the case at hand, the adjudicating officer, in essence, took action on 3rd June, 2002, which is beyond the prescribed period. In support of this submission, Mr. Trivedi has placed strong reliance on the following decision :

Star India Private Ltd. formerly known as News Television India Pvt. Ltd. and Shri Ajay K. Sharma being the Director of the 1st Petitioner Company Vs. Union of India (UOI) and The Assistant Director, Enforcement Directorate,

4.6. In such circumstances, referred to above, Mr. Trivedi, the learned Senior Advocate appearing for the appellants submits that the impugned order deserves to be quashed and set aside and the appeals be allowed accordingly. Submissions on behalf of the Department :

4. Mr. Pankaj Champaneri, the learned Assistant Solicitor General of India appearing for the department vehemently opposed these appeals and submitted that no error, not to speak of any error of law, could be said to have been committed by the Tribunal in passing the order impugned. Mr. Champaneri submitted that all the relevant aspects of the matter have been discussed threadbare by both the authorities, namely, the adjudicating authority and the Appellate Tribunal.

5.1. Mr. Champaneri, in reply to the first submission canvassed on behalf of the appellants submitted that it is settled law that it is not binding on the Tribunal to follow its own order as it is always open for the department to correct an erroneous view taken, if any, at a later stage. Mr. Champaneri submitted that there is no illegality going to the root of the matter in not following the order passed in Appeal No. 61 of 2005 in the case of M/s. Contessa Commercial Company Pvt. Ltd. (supra). Each case needs to be judged independently on the facts of that case. There cannot be any estoppel in a taxing statute and the Tribunal is in no manner precluded from taking a stand different than the one taken by the department.

5.2. In reply to the second submission of Mr. Trivedi, as regards the violation of the principles of natural justice, Mr. Champaneri, relying on the Adjudication Proceedings and Appeal Rules, 1974 submitted that the adjudicating officer is not bound to observe the provisions of the Evidence Act, 1872. Mr. Champaneri submitted that it is evident from Rule 3 of the Adjudication Rules framed under Sec. 79 of F.E.R.A. that the rules of procedure do not apply to the adjudication proceedings. In such circumstances, according to Mr. Champaneri, the plea of breach of principles of natural justice is without any merit and deserves no consideration.

5.3. Mr. Champaneri also submitted that there is no merit in the contention raised on behalf of the appellants that the order impugned travels beyond the scope of the show-cause notice.

5.4. Mr. Champaneri submitted that there is also no merit in the submission of

Mr. Trivedi as regards Sec. 49, clause (3) of the Act is concerned. According to Mr. Champaneri, the authority was justified in taking notice of the contravention on 31st May, 2002. The adjudicating officer, on taking notice of the alleged contravention of F.E.R.A., has signed the show-cause notice on 31st May, 2002. Since, the adjudicating officer took notice of the alleged offence on 31st May, 2002, it was within the period of two years from the commencement of F.E.R.A. as contemplated under Sec. 49, clause (3) of F.E.M.A. and the adjudicating officer possessed the requisite jurisdiction to adjudicate the notice dated 31st May, 2002. According to Mr. Champaneri, the fact that the said notice was received by the appellants on 4th June, 2002 would not invalidate the proceedings initiated by show-cause notice dated 31st May, 2002.

5.5. In such circumstances, referred to above, Mr. Champaneri prays that there being no merit in any of the submissions raised on behalf of the appellants, the order impugned may not be disturbed and the appeals may be dismissed accordingly.

6. Having heard the learned Counsel for the respective parties and having gone through the materials on record, the only question that falls for our consideration in these appeals is whether the Tribunal committed any error in passing the order impugned.

7. We propose to deal with the last submission of Mr. Trivedi first as regards Sec. 49, clause (3) of F.E.M.A. because if we come to the conclusion that the adjudicating officer could not have taken notice of the contraventions as alleged against the appellants as the proceedings were time-barred, then in such circumstances, we may not have to enter into the merits of the other submissions.

8. To appreciate the rival submissions raised at the bar, we may refer with profit to Sec. 49 of F.E.M.A. which deals with repealed sub-secs. (3) and (4), which are relevant for our purpose, read as thus :

(3) Notwithstanding anything contained in any other law for the time-being in force, no Court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under Sec. 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of sub-sec. (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

9. Section 79 of F.E.R.A. confers power on the Central Government to make Rules for carrying out the provisions of the said Act. The set of Rules has been framed which has been called 1974 Rules. Rule 3 of the said Rules is as follows :

3. Adjudication proceedings :-(1) In holding an inquiry under Sec. 51 for the purpose of adjudging under Sec. 50 whether any person has committed

contravention as specified in Sec. 50, the adjudicating officer shall, in the first instance, issue a notice to such person requiring him to show-cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why adjudication proceedings should not be held against him.

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him.

(3) If, after considering the cause, if any, shown by such person, the adjudicating officer is of the opinion that adjudication proceedings should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or after authorised representative.

(4) On the date fixed, the adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence alleged to have been committed by such person indicating the provisions of the Act or of the rules, directions or orders made thereunder in respect of which contravention is alleged to have taken place.

(5) The adjudicating officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry, and if necessary, the hearing may be adjourned to a future date; and in taking such evidence the adjudicating officer shall not be bound to observe the provisions of the Evidence Act, 1872 (1 of 1872).

(6) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the adjudicating officer, the adjudicating officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so.

(7) If, upon consideration of the evidence produced before the adjudicating officer, the adjudicating officer is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit in accordance with the provisions of Sec. 50 :

Provided that the notice referred to in sub-rule (1), and the personal hearing referred to in sub-rules (3), (4) and (5) may, at the request of the person concerned, be waived.

10. Section 51 of the F.E.R.A., 1973 reads as follows :

For the purpose of adjudging under Sec. 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that Section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter, and if on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that Section.

11. It deserves to be noted that Sec. 49, clause (3) of F.E.M.A. uses the words no adjudicating officer shall take notice of any contravention under Sec. 51 of the repealed Act. The words used shall take notice of are very significant. Section 51 postulates holding of an inquiry in the prescribed manner. Rule 3 of the adjudication proceedings and Appeal Rules, 1974 deal with the adjudication proceedings. The Rule stipulates various stages in the adjudication proceedings. Rule 3 lays down that in holding an inquiry under Sec. 51 for adjudication, the adjudicating officer is required, in the first instance, to issue a notice to such person requiring him to show-cause within such period as may be specified in the notice. Thereafter, the adjudicating officer, after considering the show-cause/reply, as required under sub-rule (4) of the said Rule, is required to explain to a person proceeded against or his lawyer or the authorized representative about the contravention, and thereafter, proceed according to the Rule. Our attention has been drawn to a Division Bench decision of the Madras High Court in the case of Deputy Director, Enforcement Directorate, Madras and another Vs. Naina Maricair, . The Bench was dealing with the question whether the show-cause notice issued under Rule 3 is the commencement of the adjudication proceeding under Sec. 51 of F.E.R.A. or not. The Division Bench, after referring to various provisions of the Act and Rule 3, expressed its view as under :

A reading of the rule would show that the rule contemplates that the enforcement officer shall initially place before the adjudicating officers materials which would make out contravention of any of the provisions of the Act On that, the adjudicating officer issues a show-cause notice to the person wherein the nature of the offence alleged to have been committed by him is to be stated. The person is called upon to show-cause, if any, as to why adjudication proceedings ought not to be held. In the event of a person showing sufficient cause, which the adjudicating officer accepts, the proceedings under Sec. 51 of the Act come to an end. If, however, no cause is shown or the cause shown is unacceptable, the proceedings continue and the person is required to appear before the adjudicating officer, either in person or through his lawyer. The oral enquiry then commences. Under Rule 3(4) the adjudicating officer is to explain to the person or his Counsel, as the case may be, the offence that is alleged to have been committed by such person, indicating the provisions of the Act. Then the person is given an opportunity to produce oral or documentary evidence and on the consideration of the evidence placed before the adjudicating officer suitable orders are passed. The only document that is supplied to the person which contains the materials placed against him as also the contravention, is the show-cause notice issued under Rule 3(1). The second notice under Rule 3(3) is a mere intimation of the date of hearing for the further proceedings.

After so stating, the Bench proceeded to hold as follows :

Section 51 calls upon the adjudicating officer to hold an enquiry in the prescribed manner. Rule 3 prescribed the manner. If the enquiry is to commence only from Rule 3(3) stage, there could be no statutory basis for the adjudicating officer to

issue notice under Rule 3(1) or decide whether or not to accept the cause shown by the person and pass consequential orders, either dropping the proceedings or continuing the proceedings.

In *S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and Others*, , Supreme Court held as under :

19. The expression "cognizance" has not been defined in the Code. But the word cognizance is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of and when used with reference to a Court or a Judge, it connotes "to take notice of judicially". It indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

20. "Taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.

Thereafter, the Apex Court referred to Sec. 190 of the Code of Criminal Procedure which empowers the Magistrate to take cognizance of an offence in certain circumstances and Sec. 204 which deals with the issue of process and stated thus :

24. From the above scheme of the Code, in our judgment, it is clear that "Initiation of Proceedings", dealt with in Chapter XIV, is different from "Commencement of proceedings" covered by Chapter XVI. For commencement of proceedings, there must be initiation of proceedings. In other words, initiation of proceedings must precede commencement of proceedings. Without initiation of proceedings under Chapter XIV, there cannot be commencement of proceedings before a Magistrate under Chapter XVI. The High Court, in our considered view, was not right in equating initiation of proceedings under Chapter XIV with commencement of proceedings under Chapter XVI.

In the said case, after referring to a catena of decisions, their Lordships held thus :

36. Undoubtedly, the process was issued on 3-2-2003. In our judgment, however, it was in pursuance of the cognizance taken by the Court on 24-5-2002 that a subsequent action was taken under Sec. 204 under Chapter XVI. Taking cognizance of offence was entirely different from initiating proceedings; rather it was the condition precedent to the initiation of the proceedings.

37. Order of issuance of process on 3-2-2003 by the Court was in pursuance of,

and consequent to taking cognizance of an offence on 24-5-2002. The High Court, in our view, therefore, was not right in equating taking cognizance with issuance of process and in holding that the complaint was barred by law and criminal proceedings were liable to be quashed. The order passed by the High Court, thus, deserves to be quashed and set aside.

12. We also have to our profit a Division Bench decision of the Delhi High Court rendered in the case of Dr. S. Ramkrishna v. Enforcement Directorate, in Letters Patent Appeal No. 397 of 2010 decided on 4th October, 2010, His Lordship Deepak Mishra, C.J. (as His Lordship then was) has dealt with this issue at length. After taking note of decision of the Apex Court in the case of Videocon International Ltd. (supra) and Naina Maricair (supra) His Lordship observed in Paragraphs 16 and 17 as under :

16. We have reproduced the aforesaid Paragraphs from Videocon International Ltd. (supra) as Mr. Mukund has submitted that the said decision is not applicable to the adjudicatory proceeding as it relates to taking of cognizance. It is worth noting that their Lordships have opined that taking cognizance means application of mind by the Magistrate to the suspected commission of an offence and the same is done prior to commencement of criminal proceeding and further taking cognizance is the sine qua non or the condition precedent for holding a valid trial. Quite apart from the above, their Lordships have held that initiation of proceeding must precede commencement of proceeding. Section 51 of F.E.R.A. deals with holding an enquiry. The enquiry, we are disposed to think, has insegregable nexus with the issue of a show-cause as the rule so mandates. Thus, the reliance placed on by the learned Single Judge on the decision rendered in Videocon International Ltd. (supra) cannot be found fault with.

17. We have already referred to the decisions in Bhaskaran Pillai (supra) and Naina Maricair (supra) and we are in agreement with the said view. As the language employed in the Rule deals with various steps and Sec. 49(3) employs the terms shall take notice of, the period prescribed has to be computed from the date the contravention is taken notice of by the adjudicating officer. If the said words are not given their requisite meaning and not read in the real context, it would cause violence to the language of the statute.

12.1. The Division Bench, after taking note of the decisions of the Supreme Court on the issue of interpretation of statute finally took the following view as reflected from Paragraph 22 and 23, which are reproduced hereinafter :

22. In the case at hand, the language employed in Sec. 49(3) is absolutely clear, precise and certain and does not admit of any other interpretation and the legislative intention is absolutely clear. The legislative purpose is that the adjudicating officer shall not take notice of any contravention after the expiry of period of two years from the date of commencement of F.E.M.A. What is submitted by Mr. Mukund is that the date of commencement of hearing for adjudication should be reckoned as the date. The said interpretation is not in

accord with the language employed in the statute. It is the sacrosanct duty of the Court to interpret the law, to examine the words of the statute and on an examination of the same in a studied manner, we are unable to persuade ourselves to accept the submission of the learned Counsel for the appellant.

23. It is so as the first show-cause notice, which was issued on 28th February, 2010, clearly shows application of mind to the proceeding which is sought to be adjudicated. The entire allegations have been brought on record. Similarly, from the second show-cause notice, it is clear as day that the entire allegations were put to the appellant. There cannot be any dispute over the same. The word enquiry used in Sec. 51 has its own significance and the enquiry commences from the stage of issue of a notice to show-cause under Rule 3(1) and such an interpretation is in accord with the terms of Sec. 49(3) of F.E.M.A.

13. The same view has been expressed by a Division Bench of the Bombay High Court in the case of Star India Private Ltd. formerly known as News Television India Pvt. Ltd. and Shri Ajay K. Sharma being the Director of the 1st Petitioner Company Vs. Union of India (UOI) and The Assistant Director, Enforcement Directorate, with which we are in complete agreement and we propose to follow the dictum as laid in the decisions referred to above. It may not be out of place to state that dissatisfied with the judgment, the petitioner Star India Pvt. Ltd. had also filed a Special Leave to Appeal (Civil) No. 8491 of 2011 against the judgment and order passed by the Division Bench of the Bombay High Court. The Supreme Court vide order dated 18th April, 2011 dismissed the SLP keeping the question of law open for being decided in an appropriate case.

14. Having regard to the materials on record and the position of law, we are of the opinion that the adjudicating officer took notice of the alleged contravention of F.E.R.A. within the period of two years from the commencement of F.E.M.A. and had the jurisdiction to adjudicate upon such contravention of F.E.R.A. under the provisions of the F.E.M.A.. Since, F.E.R.A. is repealed with effect from 1-6-2000, no proceedings under F.E.R.A. can be initiated for the alleged contravention of F.E.R.A. after 1st June, 2000. However, Sec. 49, clause (3) of F.E.M.A. provides that the adjudicating officer can initiate the proceedings under F.E.M.A. in respect of the alleged contravention of F.E.R.A., provided the adjudicating officer takes notice of the said contravention on or before 31st May, 2002.

15. In the present case, on the basis of the materials on record, it is manifest that the adjudicating officer formed a prima facie opinion that the appellants had contravened the provisions of F.E.R.A. and decided to issue a show-cause notice to the appellants under Rule 3, clause (1) of the Appeal Rules. It is not in dispute that the show-cause notice, was in fact, prepared and signed by the adjudicating officer on 31st May, 2002. The question is, whether signing of the show-cause notice amounts to taking notice under Sec. 49, clause (3) of F.E.M.A.?

16. We have noticed that on plain reading of the provisions contained in Sec. 51

of F.E.R.A. that the adjudication proceedings under Sec. 51 of F.E.R.A. read with Rule 3 of the Appeal Rules framed under F.E.R.A. consists of two stages. First, when the adjudicating officer forms a prima facie opinion on the basis of the materials placed before him that a person has contravened the provisions of F.E.R.A., and accordingly, issues a notice (first notice) calling upon that person to show-cause within such period as may be specified (being not less than ten days from the date of service thereof) as to why adjudication proceedings should not be held against such a person. The second stage is, when the adjudicating officer, after considering the cause, if any, shown by such a person forms an opinion that the adjudication proceedings should be continued and accordingly issues a notice (second notice) in respect of the alleged contravention of F.E.R.A. by fixing a date for the appearance of that person, either personally or through his representative.

17. In the present case, the show-cause notice dated 31st May, 2002 is the first stage notice. In our opinion, the adjudicating officer can be said to have taken notice of the alleged contravention of F.E.R.A. on 31st May, 2002. The first notice issued under Rule 3, clause (1) is a show-cause notice, which requires the notice to show-cause, why adjudication proceedings should not be initiated for the alleged contravention of F.E.R.A. Rule 3, clause (2) requires that the show-cause notice issued under Rule 3, clause (1) must indicate the nature of the offence allegedly committed under F.E.R.A. Unless the adjudicating officer forms a prima facie opinion that the provisions of F.E.R.A. have been violated, he may not issue a show-cause notice calling upon the notice to show-cause why adjudication proceedings should not be held for the alleged contravention of F.E.R.A. Since, the first notice is the foundation for initiating the adjudication proceedings, the adjudicating officer cannot issue the first notice casually or without forming a prima facie opinion that the provisions of F.E.R.A. have been contravened.

18. Therefore, in our opinion, the words take notice in Sec. 49, clause (3) of F.E.M.A. are referable to the prima facie opinion formed before issuance of the first notice under Rule 3, clause (1) of the Appeal Rules. We are not impressed by the submission of Mr. Trivedi, the learned Senior Advocate appearing for the appellants that the notice of the alleged contravention of F.E.R.A. can be said to have been taken only when the adjudicating officer considers the cause, if any, shown in the first notice and forms an opinion to continue with the adjudication proceedings by issuing a second notice under Rule 3, clause (3).

19. In the aforesaid context, we may refer to the observations made by the Division Bench of the Bombay High Court in *Star India Pvt. Ltd.* (supra) with which we are in complete agreement and we propose to follow the same line of reasoning in the present case also.

26. The argument that it is only after the expiry of ten days from the date of service of the first notice, the adjudicating officer can take notice of the alleged contravention of F.E.R.A. is also without any merit because, where the notice fails to show-cause within the period specified in the first stage notice, then the

adjudicating officer is empowered to continue with the adjudication proceedings by forming an opinion on the basis of the materials placed by the enforcement officer that the notice has contravened the provisions of F.E.R.A. If the adjudicating officer, in the absence of any cause shown, can form an opinion on the basis of the materials placed by the enforcement officer that a person has contravened the provisions of F.E.R.A., then there is no reason as to why he cannot form such opinion on the basis of the materials placed by the enforcement officer before issuance of the first notice. Forming an opinion as to the alleged contravention of F.E.R.A. on the basis of the materials placed by the enforcement officer, obviously means that the adjudicating officer takes notice of the alleged contravention of F.E.R.A. on the basis of the materials placed by the enforcement officer. If the contention of the petitioners that the adjudicating officer takes notice of the alleged contravention of F.E.R.A. only after ten days of issuance of the first notice and after considering the cause shown by the notice is accepted, then it would mean where the notice fails to show-cause, the adjudicating officer cannot take notice that there is contravention of the provisions of F.E.R.A. Such a construction would defeat the very object of initiating adjudication proceedings under F.E.R.A. and must be avoided.

27. Moreover, if the argument of the petitioners that the adjudicating officer applies his mind to the materials placed before him only after the first notice is issued and the period prescribed in the notice to show-cause has expired is accepted, it would mean that the first stage show-cause notice can be issued without considering the materials placed before him. When the Legislature mandates under Rule 3(2) of the Appeal Rules that the first stage show-cause notice shall indicate the nature of the offence alleged to have been committed by the notice, it is evident that the adjudicating officer must apply his mind to the materials placed before him and only when he entertains the prima facie belief that there is contravention of the provisions of F.E.R.A. he is required to issue show-cause notice under Rule 3(1) calling upon the notice to show-cause. Thus, the adjudicating officer takes notice of the alleged contravention of F.E.R.A., and only thereafter, issues first notice under Rule 3(1) and not after the issuance of first notice.

28. The alternative argument of the petitioners that the words "take notice" has to be interpreted ejusdem generis to the words "take cognizance" appearing in Sec. 49(3) of F.E.M.A. is also unacceptable. As rightly contended by the Counsel for the Revenue, criminal proceedings and adjudication proceedings are independent proceedings. The scope and ambit of the two proceedings are different. That is why the legislature has used two different words, namely, "take cognizance" in relation to criminal proceedings and "take notice" in relation to adjudication proceedings. As held by the Apex Court in the case of Videocon Industries Limited (supra) the words "take cognizance" may connote "to take notice of judicially". In other words, in criminal proceedings "taking cognizance" by a Magistrate would mean taking notice of the offence judicially and issue further process. Similarly, in adjudication proceedings the adjudicating officer on

taking notice of the alleged contravention of F.E.R.A. initiates adjudication proceedings through the process of issuing show-cause notice under Rule 3(1) of the Appellate Rules. In criminal proceedings, the Magistrate even after taking cognizance of the alleged offence has the option of ordering the police to investigate the offence under Sec. 156(3) of the Criminal Procedure Code, whereas, the adjudicating officer is not conferred with such power because the two proceedings stand on different footing. Therefore, when the legislature has specifically provided different modes for conducting the criminal proceedings and the adjudication proceedings, in our opinion, it would not be proper to construe the words "take notice" in adjudication proceedings ejusdem generis with the words "take cognizance" in the criminal proceedings, so as to hold that the notice under Rule 3(1) amounts to issuing notice for further investigation without taking notice of the alleged contravention of F.E.R.A. Once, the show-cause notice is issued under Rule 3(1) there is no scope for making any further investigation and the adjudicating officer on considering the cause, if any, shown by the notice has to form an opinion, either to drop the adjudication proceedings or continue with the adjudication proceeding and issue notice accordingly. Therefore, the argument that the notice under Rule 3(1) is for further investigation cannot be accepted.

29. The argument of the petitioners that if the words "take notice" is not construed to be equivalent to "take cognizance", then anomalous situations would arise and result in hostile discrimination is also without any merit. A Magistrate takes cognizance of an offence on perusal of the complaint filed before him, whereas the adjudicating officer takes notice of the alleged offence on perusal of the materials placed by the enforcement officer. Further steps to be taken thereafter in the respective proceedings are entirely different. Failure to take cognizance in the criminal proceedings or failure to take notice in the adjudication proceedings about the alleged contravention of F.E.R.A. within a period of two years from the commencement of F.E.M.A., (i.e. on or before 31-5-2002) would obviously be barred under Sec. 49(3) of F.E.M.A. Where for the same offence the adjudicating officer takes notice and the Magistrate does not take cognizance within two years from the commencement of F.E.M.A., then, the adjudication proceedings would continue and the criminal proceedings would be barred. In such a case, even if there is any anomaly on account of the failure to take cognizance within the stipulated period the same cannot be a ground to hold that the two proceedings should be interpreted as ejusdem generis.

30. The alternative contention of the petitioners that assuming issuance of the notice under Rule 3(1) constitutes "taking notice", then in view of Sec. 49(5)(a) of F.E.M.A., such notice under Rule 3(1) of the Appellate Rules must be served upon the noticee before 31-5-2002 is also devoid of any substance. Section 49(5)(a) of F.E.M.A. does not dilute any of the specific requirements contained in F.E.R.A. or the Appeal Rules. It merely provides that wherever a notice is required to be served under F.E.R.A., the same shall be deemed to have been done or taken under the corresponding provisions of F.E.M.A. The adjudication

proceedings under Sec. 51 of F.E.R.A. read with Rule 3 of the Appeal Rules provide that the adjudicating officer must on taking notice of the alleged contravention of F.E.R.A. issue first notice under Rule 3(1) and if not satisfied with the cause shown, then issue second notice under Rule 3(3) fixing a date of hearing of the show-cause notice issued under Rule 3(1).

20. Thus, we reject the fifth contention canvassed on behalf of the appellants as regards Sec. 49, clause (3) of the Act is concerned. In the present case, the adjudicating officer, on taking notice of the alleged contraventions of F.E.R.A., had signed the show-cause notice on 31st May, 2002. Since, the adjudicating officer had taken note of the alleged offence on 31st May, 2002, which was within the period of two years from the commencement of F.E.M.A. as contemplated under Sec. 49, clause (3) of the F.E.M.A., the adjudicating officer had the jurisdiction to adjudicate the notice dated 31st May, 2002. The fact that the said notice was served upon the appellant on 4th June, 2002 would not invalidate the proceedings initiated by show-cause notice dated 31st May, 2002, because for the purpose of Sec. 49, clause (3) of F.E.M.A., what is relevant is taking notice and not issuance or service of notice.

21. With the above, we now proceed to consider the merits of the other submissions canvassed on behalf of the appellants.

22. We have given our anxious considerations to the very first submission of Mr. Trivedi regarding the different stand taken by two authorities, namely, Customs and F.E.R.A. on the same set of evidence.

23. The officers of Directorate of Revenue Intelligence ("D.R.I." for short) and the Customs Authorities carried out investigation with regard to the alleged over valuation and wrong classification of "Software on C.D. R.O.Ms.", imported by M/s. Contessa Commercial Co. Pvt. Limited and M/s. Vaishal Impex with the support of the finance i.e. Appellant M/s. Adani Exports Limited and its director Shri Rajesh Adani.

24. Based on the aforesaid investigation, the D.R.I. issued a show-cause notice dated 25-1-2001 answerable to the Commissioner of Customs against M/s. Contessa Commercial Co. Pvt. Ltd. and Shri Rajesh Adani. D.R.I. issued another show-cause notice dated 24-12-2001 against M/s. Vaishal Impex, M/s. Adani Exports Ltd. and Shri Rajesh Adani. In both the cases, it was alleged that there was a gross misdeclaration of value and description in respect of the imports of the aforesaid goods.

25. The adjudicating authorities under the Customs Act, 1962 confirmed the aforesaid show-cause notices vide order dated 29-4-2004 in case of M/s. Contessa and vide order dated 23-3-2004 in case of M/s. Vaishal Impex and others i.e. the appellants herein.

26. The final fact-finding authority in respect of Customs, i.e. C.E.S.T.A.T. allowed the appeals filed by M/s. Contessa Commercial Pvt. Ltd., M/s. Vaishal Impex, M/

s. Adani Exports Ltd., and Shri Rajesh Adani, both on the count of value and description i.e. classification. Appeals have been filed by Customs before the Hon"ble Supreme Court, which are only admitted but no stay has been granted.

27. Based on the very investigation of D.R.I. referred to above, the Special Director, Directorate of Enforcement, New Delhi issued a show-cause notice dated 3-11-2000 under Rule 3(1) of the Adjudication Proceedings and Appeal Rules, 1974 read with Sec. 51 of Foreign Exchange Regulation Act, 1973 read with Sec. 49 of the Foreign Exchange Management Act, 1999 for the alleged violation of Secs. 8(3), 8(4), 64(2), 68(2) of F.E.R.A. and punishable under Sec. 50 of F.E.R.A., against M/s. Contessa Commercial Co. Pvt. Ltd., M/s. Adani Exports Ltd., and Shri Rajesh Adani, the relevant portion of which is reproduced hereunder :

3. And Whereas it appears from the investigation made that during the period February, March, 1998, M/s. Contessa Commercial Co. P. Ltd., a company/ persons resident in India, imported Computer Software on C.D. (C.D. Rom) under O.G.L. in 834 cartons of 4,54,800 pieces for a total invoice value of US \$ 68,22,000/- (at US \$ 15 per piece) as per nine invoices and connected import documents produced by them to the Customs Authorities as shown in Annexure "A" to this Memorandum.

17. And Whereas by opening irrevocable documentary L./Cs. to the extent of US \$ 68,22,000/- on account of M/s. Contessa Commercial Co. Pvt. Ltd. favour M/s. Gulf Software, Ajman, U.A.E. for the aforesaid import of goods in the aforesaid manner, the said M/s. Adani Exports Ltd., Ahmedabad and its Director Shri Rajesh S. Adani appear to have abetted the said M/s. Contessa Commercial Co. Pvt. Ltd., in the aforesaid transaction and appear to have contravened the provisions of Sec. 8(3) read with Sec. 8(4) of the Foreign Exchange Regulation Act, 1973 read with Sec. 64(2) of the said Act, and have thereby rendered themselves liable to be proceeded against under Sec. 50 of the said Act read with sub-secs. (3) and (4) of Sec. 49 of the Foreign Exchange Management Act, 1999.

28. Similarly, based on the above investigation, the Special Director, Directorate of Enforcement, Mumbai also issued a show-cause notice dated 31-5-2002 (which has culminated into the present proceedings) came to be issued to M/s. Vaishal Impex, M/s. Adani Exports Limited and Shri Rajesh Adani. In the said notice, the role attributed to the appellants and the observations made against them are reproduced hereinunder :

And Whereas it further appears from the investigations made by the Officers of D.R.I. and the Customs Authorities in regard to the Software on C.D. R.O.Ms. imported by M/s. Contessa Commercial Co. Pvt. Ltd., Calcutta, during the year 1998 (i.e. the relevant period) from M/s. Gulf Software, Ajman, U.A.E. it has been revealed that, in both cases M/s. Adani Exports Ltd., Ahmedabad have opened L./Cs. on behalf of the above-mentioned importers, in similar manner

and the importers had declared the price of Software on C.D. R.O.MS. as US \$ 15 per piece and in the case of M/s. Contessa Commercial Co. Pvt. Ltd., Calcutta, the declared value before Customs was found to be highly inflated than the actual value of C.D. R.O.Ms. i.e. the value declared by the exporter M/s. Gulf Software, Dubai before Dubai Customs;

And Whereas by opening irrevocable documentary L./Cs. to the extent of US \$ 16,50,000/- on account of M/s. Vaishal Impex, Ahmedabad, favouring M/s. Computer Point, Dubai for the aforesaid import of goods in the aforesaid manner, the said M/s. Adani Exports Ltd., Ahmedabad and its Director Shri Rajesh S, Adani appears to have abetted the said M/s. Vaishal Impex in the aforesaid transaction and to have contravened the provisions of Sec. 8(3) read with Sec. 8(4) of the Foreign Exchange Regulation Act, 1973 read with Secs. 64(2) and 68(2) of the said Act and have thereby rendered themselves liable to be proceeded against under Sec. 50 of the Foreign Exchange Management Act, 1999.

29. Both the aforesaid notices issued under F.E.R.A./F.E.M.A., charged the appellants with similar allegation to the effect that Foreign Exchange was acquired for bringing into India the goods of-(i) specific value; and (ii) specific description, but what was brought into India were goods of different value and different quality, and hence, there was misutilisation of foreign exchange and consequent breach of Secs. 8(3) and 8(4) of F.E.R.A. with reference to M/s. Contessa Commercial Co. Pvt. Ltd. and M/s. Vaishal Impex whereas, Secs.64(2) and 68(2) of F.E.R.A. were pressed in service against Adani Exports Ltd. (A.E.L.) and its Director for abetment as if they had also committed breach of Secs. 8(3) and 8(4) of F.E.R.A.

30. As far as the F.E.R.A. proceedings in case of M/s. Contessa Commercial Pvt. Ltd., M/s. Adani Exports Ltd., and Shri Rajesh Adani, initiated vide show-cause notice dated 3-11-2000, are concerned, the Special Director dropped the charges in the show-cause notice against M/s. Adani Exports Ltd. and Shri Rajesh Adani. Against this, no appeal has been preferred by the Department. In case of M/s. Contessa Commercial Pvt. Ltd. on appeal being filed, the Appellate Tribunal allowed the appeal, against which also no appeal has been preferred.

31. As far as the F.E.R.A. proceedings in the case of M/s. Vaishal Impex, M/s. Adani Exports Ltd. and Shri Rajesh Adani are concerned, the same are decided by the Tribunal against them.

32. We find substance in the submission of Mr. Trivedi that when the authorities under F.E.R.A. while issuing notice solely relied upon the investigation carried out by the Customs authorities then in such circumstances the authorities under F.E.R.A. should not have taken a stand contrary to what was taken by the customs. The rational of this Rule is the need for consistency, certainty and predictability in the administration of justice. The judicial discipline demands that a quasi-judicial authority should not take a different stand when a question arising for consideration is set at rest in a previous case, and more particularly,

when the department has accepted the earlier decision of the adjudicating authority under F.E.M.A. as well as of the Appellate Tribunal in the case of M/s. Contessa Commercial Company Pvt. Ltd., Adani Exports Limited and its Director, Shri Rajesh Adani. The case-law on which reliance has been placed by Mr. Trivedi fortifies our view.

33. We also find merit in the submission of Mr. Trivedi that the manner in which the Customs Authorities are expected to follow the decision of the licensing authorities in the matter of issuance of licence, the Customs authority's decision in the matter of classification and valuation are also final vis-à-vis F.E.R.A. authorities, more particularly, when the Customs authorities are the statutory authorities empowered to decide the issue of classification and valuation of goods at the time of import as well as export thereof. We are of the opinion that this aspect ought to have been kept in mind by the appellate Tribunal under F.E.M.A. The case-law relied upon by Mr. Trivedi in support of this submission fortifies our view. We may refer to one such decision of the Supreme Court in the case of Indian Oil Corporation Ltd. v. Collector of Central Excise, Baroda, reported in 2006 (202) ELT 37 (SC). We quote Paragraphs 9, 10 and 11 as under :

9. Mr. Mohan Parasaran, the learned Additional Solicitor General has fairly conceded that against the order passed by the Tribunal in the case of Hindustan Petroleum Corporation Ltd. (supra), no appeal was preferred by the department and the said order has attained finality. Since, no appeal was preferred against the order passed by the Tribunal in Hindustan Petroleum Corporation Ltd. (supra) and the same has become final, the department is not entitled to raise the same point in other cases in view of the decisions of this Court in Union of India and Others Vs. Kaumudini Narayan Dalal and Another, ; Collector of Central Excise, Pune Vs. Tata Engineering and Locomotives Co. Ltd., ; Birla Corporation Ltd. Vs. Commnr. of Central Excise, ; and Jayaswals Neco Ltd. v. Commissioner of Central Excise, Nagpur, reported in 2006 (195) ELT 142 (SC) wherein it has been held that if no appeal is filed against an earlier order or the earlier appeal involving the identical issue was not pressed by the revenue, the revenue is not entitled to press the other appeals involving the same question. In Birla Corporation Ltd. (supra), this Court observed as follows :

In the instant case, the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed, and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in 2001 (73) ECC 813 cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assesses in a quandary.

10. Birla Corporation Ltd. (supra) is being followed consistently.

11. Since the point involved in the present case is identical to the point involved

in Hindustan Petroleum Corporation Ltd. (supra) and the department having accepted the principle laid down in Hindustan Petroleum Corporation Ltd. (supra), the department cannot be permitted to take a different stand in the present appeals.

34. At this juncture, it will be also profitable to refer to the decision of the Supreme Court in the case of Jayaswals Neco Limited v. Commissioner of Central Excise, Nagpur, reported in 2006 (195) ELT 142 (SC), wherein the Supreme Court has laid down a proposition of law that if the department accepted a principle laid down in an earlier case, it should not be permitted to take a contrary stand in a subsequent case. It was further pointed out that the classification of goods adopted in earlier decision must not be slightly disregarded in the subsequent decisions.

35. Thus, we are of the firm opinion that the appeals should succeed on this ground alone.

36. We shall now consider the third submission as regards the violation of the principles of natural justice.

37. A very strong grievance has been redressed on behalf of the appellants that despite making a specific request before the adjudicating officer for cross-examination of the D.R.I. officers, the same was ignored on the ground that the strict rules of evidence are not applicable in the proceedings of the present nature, and more particularly, considering the provisions of law as contained in Rule 3, clause (5) of the Adjudication Proceedings and Appeal Rules, 1974, which says that in taking evidence, the adjudicating officer shall not be bound to observe the provisions of the Evidence Act, 1872. To appreciate this submission, it is necessary for us to go in a little detail, why such a request for cross-examination had to be made by the appellants. Before looking into this aspect, it is necessary for us to look into the position of law. In A.S. Motors Pvt. Ltd. Vs. Union of India (UOI) and Others, , which has been relied upon by Mr. Champaneri, the learned Assistant Solicitor General of India, the Supreme Court in Paragraph 8 made the following observations :

8.....Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in strait-jacket nor have the same been so evolved as to apply universally to all kind of domestic Tribunals and enquiries. What the Courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of Audi alteram partem is thus aimed at striking at arbitrariness and want of fair-play. Judicial pronouncements on the subject, have therefore, recognised that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the Tribunal and the rules and regulations under which it

functions. A Court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are a legion.

38. In *Kanungo and Company Vs. Collector of Customs and Others*, , the Supreme Court was considering a matter under the Sea Customs Act, 1878. Before the Supreme Court, the contention was one with regard to the burden of proof and contravention of natural justice. The Supreme Court made the following observations in Paragraphs 11 and 12, which are as under :

11. The learned Counsel for the appellant contended that the burden on the Customs Authorities has not been discharged. He urged that there was no evidence that the watches had not been brought into India lawfully. He urged, secondly, that the impugned order wrongly placed the burden on the appellant, thirdly, that the impugned order was made in contravention of natural justice; and fourthly, that there was no evidence that watches had been imported in contravention of law.

12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August, 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant.

39. In *State of Kerala Vs. K.T. Shaduli Yusuff etc.*, , the Supreme Court was dealing with the matter arising under the Kerala General Sales Tax Act, 1963 and the issue was whether opportunity of being heard included the right to cross-examine the witness relied upon by the adjudicating authority. The Supreme Court in Paragraph Nos. 2, 3, 4 and 5 of the decision observed as under :

2. Now, the law is well settled that tax authorities entrusted with the power to make assessment of tax discharge quasi-judicial functions and they are bound to observe principles of natural justice in reaching their conclusions. It is true, as pointed out by this Court in *Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal*, , that "a taxing officer is not lettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a Court of law", but that does not absolve him from the obligation to comply with the fundamental rules of justice which have

come to be known in the jurisprudence of administrative law as principles of natural justice. It is, however, necessary to remember that the rules of natural justice are not a constant: they are not absolute and rigid rules having universal application. It was pointed out by this Court in *Suresh Koshy George Vs. University of Kerala and Others*, , that "the rules of natural justice are not embodied rules" and in the same case this Court approved the following observations from the judgment of Tucker, L.J. in *Russel v. Duke of Norfolk*, 1949 (1) ALLER 109 (CA).

There are in my view, no words which are of universal application to every kind of inquiry and every kind of domestic Tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

3. One of the rules which constitutes a part of the principles of natural justice is the rule of *Audi alteram partem* which requires that no man should be condemned unheard. It is indeed a requirement of the duty to act fairly which lies on all quasi-judicial authorities and this duty has been extended also to the authorities holding administrative enquiries involving civil consequences or affecting rights of parties because as pointed out by this Court in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, , "the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice" and justice, in a society which has accepted socialism as its article of faith in the Constitution, is dispensed not only by judicial or quasi-judicial authorities but also by authorities discharging administrative functions. This rule which requires an opportunity to be heard to be given to a person likely to be affected by a decision is also, like the genus of which it is a species, not an inflexible rule having a fixed connotation. It has a variable content depending on the nature of the inquiry, the framework of the law under which it is held, the constitution of the authority holding the inquiry, the nature and character of the rights affected and the consequences flowing from the decision. It is therefore, not possible to say that in every case the rule of *Audi alteram partem* requires that a particular specified procedure is to be followed. It may be that in a given case the rule of *Audi alteram partem* may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the inquiry should be permitted to be cross-examined by the party affected while in some other case it may not. The procedure required to be adopted for giving an opportunity to a person to be heard must necessarily depend on the facts and circumstances of each case.

4. Now, in the present case, we are not concerned with a situation where the rule of *Audi alteram partem* has to be read into the statutory provision empowering

the taxing authorities to assess the tax. Section 17, sub-sec. (3), under which the assessment to sales tax has been made on the assessee provides as follows :

If no return is submitted by the dealer under sub-sec. (1) within the prescribed period, or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such enquiry as it may consider necessary and after taking into account all relevant materials gathered by it, assess the dealer to the best of its judgment :

Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of being heard, and where a return has been submitted, to prove the correctness or completeness of such return.

It is clear on a plain natural construction of the language of this provision that it empowers the Sales Tax Officer to make a best judgment assessment only where one of two conditions is satisfied: either no return is submitted by the assessee or the return submitted by him appears to the Sales Tax Officer to be incorrect or incomplete. It is only on the existence of one of these two conditions that the Sales Tax Officer gets the jurisdiction to make a best judgment assessment. The fulfilment of one of these two prerequisites is, therefore, a condition precedent to the assumption of jurisdiction by the Sales Tax Officer to make assessment to the best of his judgment. Now, where no return has been submitted by the assessee, one of the two conditions necessary for the applicability of Sec. 17, sub-sec. (3) being satisfied, the Sales Tax Officer can, after making such inquiry as he may consider necessary and after taking into account all relevant materials gathered by him, proceed to make the best judgment assessment and in such a case, he would be bound under the proviso to give a reasonable opportunity of being heard to the assessee. But in the other case, where a return has been submitted by the assessee, the Sales Tax Officer would first have to satisfy himself that the return is incorrect or incomplete before he can proceed to make the best judgment assessment. The decision making process in such a case would really be in two stages, though the inquiry may be continuous and uninterrupted: the first stage would be the reaching of satisfaction by the Sales Tax Officer that the return is incorrect or incomplete and the second stage would be the making of the best judgment assessment. The first part of the proviso which requires that before taking action under sub-sec. (3) of Sec. 17, the assessee should be given a reasonable opportunity of being heard would obviously apply not only at the second stage, but also at the first stage of the inquiry, because the best judgment assessment, which is the action under Sec. 17, sub-sec. (3), follows upon the inquiry and the "reasonable opportunity of being heard" must extend to the whole of the inquiry, including both stages. The requirement of the first part of the proviso that the assessee should be given a "reasonable opportunity of being heard" before making best judgment assessment merely embodies the Audi alteram partem rule and what is the content of this opportunity would depend, as pointed out above, to a great extent on the facts and circumstances of each case. The question debated before us was whether this opportunity of

being heard granted under the first part of the proviso included an opportunity to cross-examine Hazi Usmankutty and other wholesale dealers on the basis of whose books of accounts, the Sales Tax Officer disbelieved the account of the assessee and came to the finding that the return submitted by the assessee were incorrect and incomplete. But it is not necessary for the purpose of the present appeals to decide this question since we find that in any event the assessee was entitled to this opportunity under the "second part of the proviso."

5. The second part of the proviso lays down that where a return has been submitted, the assessee should be given a reasonable opportunity to prove the correctness or completeness of such return. This requirement obviously applies at the first stage of the enquiry before the Sales Tax Officer comes to the conclusion that the return submitted by the assessee is incorrect or incomplete so as to warrant the making of a best judgment assessment. The question is what is the content of this provision which imposes an obligation on the Sales Tax Officer to give and confers a corresponding right on the assessee to be afforded, a reasonable opportunity "to prove the correctness or completeness of such return". Now, obviously "to prove" means to establish the correctness, or completeness of the return by any mode permissible under law. The usual mode recognised by law for proving a fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correctness or completeness of the return would, therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to Cross-examine witnesses examined by the Sales Tax Officer. Here, in the present case, the return filed by the assessee appeared to the Sales Tax Officer to be incorrect or incomplete because certain sales appearing in the books of Hazi Usmankutty and other wholesale dealers were not shown in the book of account of the assessee. The Sales Tax Officer relied on the evidence furnished by the entries in the books of account of Hazi Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Hazi Usmankutty and other wholesale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously, the assessee could not do, unless he was given an opportunity of cross-examining Hazi Usmankutty and other wholesale dealers with reference to their accounts. Since, the evidentiary material procured from or produced by Hazi Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete, the assessee was entitled to have Hazi Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood. Here, it was not disputed on behalf of the Revenue that the assessee in both cases applied to the Sales Tax Officer for summoning Hazi

Usmankutty and other wholesale dealers for cross-examination, but his application was turned down by the Sales Tax Officer. This act of the Sales Tax Officer in refusing to summon Hazi Usmankutty and other wholesale dealers for cross-examination by the assessee clearly constituted infraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee.

39.1. The observations of His Lordship S. Murtaza Fazl Ali, J. in a separate but a concurring judgment are also worth taking note of.

.....The proviso expressly requires the assessing authority to give to the assessee a reasonable opportunity of being heard even if the assessee had committed default in not filing the return. Since, the statute itself contemplates that the assessee should be given a reasonable opportunity of being heard, we are not in a position to agree with the contention of the learned Counsel for the appellant that if such an opportunity is given, it will amount to condonation of default of the assessee. The tax proceedings are no doubt quasi-judicial proceedings and the sales-tax authorities are not bound strictly by the rules of evidence, nevertheless the authorities must base their order on materials which are known to the assessee and after he is given a chance to rebut the same. This principle of natural justice which has been reiterated by this Court in the decisions cited above has been clearly incorporated in Sec. 17(3) of the Act as mentioned above. The statute does not stop here, but the second part of the proviso confers express benefit on the assessee for giving him an opportunity not only of being heard but also of proving the correctness or completeness of such return. In view of this provision it can hardly be argued with any show of force that if the assessee desires the wholesale dealers whose accounts are used against him to be cross-examined in order to prove that his return is not incorrect or incomplete he should not be conceded this opportunity. Apart from anything else, the second part of the proviso itself confers this specific right on the assessee. It is difficult to conceive as to how the assessee would be able to disprove the correctness of the accounts of Hazi P.K. Usmankutty or the other wholesale dealers, unless he is given a chance to cross-examine them with respect to the credibility of the accounts maintained by them. It is quite possible that the wholesale dealers may have mentioned certain transactions in their books of account either to embarrass the assessee or due to animus or business rivalry or such other reasons which can only be established when the persons who are responsible for keeping the accounts are brought before the authorities and allowed to be cross-examined by the assessee. This does not mean that the assessing authority is bound to examine the wholesale dealers as witnesses in presence of the assessee: it is sufficient if such wholesale dealers are merely tendered by the sales-tax authorities for cross-examination by the assessee for whatever worth it is. In view of the express provision of the second part of the proviso, we are fully satisfied that the respondents had the undoubted right to cross-examine the wholesale dealers on the basis of whose accounts the returns of the assessee were held to be incorrect and incomplete.

40. In *Telestar Travels Pvt. Ltd. and Others Vs. Special Director of Enforcement*, , the Supreme Court while dealing with the matter under F.E.R.A. discussed at length the issue of giving an opportunity of cross-examination of witness. The Supreme Court in the facts of that case took the view as reflected from the observations made in Paragraph 18 of its decision.

18. There is, in our opinion, no merit even in that submission of the learned Counsel. It is evident from Rule 3 of the Adjudication Rules framed under Sec. 79 of the F.E.R.A. that the rules of procedure do not apply to adjudicating proceedings. That does not, however, mean that in a given situation, cross-examination may not be permitted to test the veracity of a deposition sought to be issued against a party against whom action is proposed to be taken. It is only when a deposition goes through the fire of cross-examination that a Court or Statutory Authority may be able to determine and assess its probative value. Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen. The question, however, is whether failure to permit the party to cross-examine has resulted in any prejudice so as to call for reversal of the orders and a de novo enquiry into the matter. The answer to that question would depend upon the facts and circumstances of each case.....

41. In *Surjeet Singh Chhabra Vs. Union of India and others*, , on which strong reliance has been placed by Mr. Champaneri, the Supreme Court was dealing with a matter under the Customs Act, 1962 and the issue before the Supreme Court was one of giving an opportunity to cross-examine a witness. In the facts of that particular case, the Supreme Court made the following observations in Paragraph 3 as under :

3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a Kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also F.E.R.A. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since, the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him, and therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though

retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner.

41.1. The aforesaid decision on which strong reliance has been placed by Mr. Champaneri will have no application so far as the case at hand is concerned. This decision is easily distinguishable on facts. What weighed with the Supreme Court was the confession of the petitioner before the Customs officials and the Supreme Court accordingly took the view that the confession which is in the form of admission would bind the petitioner, and therefore, the failure to give him the opportunity to cross-examine the witnesses was not violative of the principles of natural justice.

42. Thus, what is discernible from the various decisions, referred to above, is that the phrase natural justice is not capable of a precise definition. To underline the principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly, i.e. fair-play in action. The requirements of natural justice are not fixed and immutable. They depend upon the character of the Tribunal, the nature of inquiry, and the effect of adjudication.

43. Natural justice as is well known is founded on two basic principles :

(a) Audi alteram partem.

(b) Nemo judex in causa sua

44. In Halsbury's Laws of England, Vol. 1(i), 4th Edition, it is stated :

85.....Thus, a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry or where the decision is one entailing the determination of disputed questions of law and fact. Prima facie, moreover, a duty to act in accordance with natural justice will arise in the exercise of a power to deprive a person of his livelihood or of his legal status where that status is not merely terminable at pleasure, or to deprive a person of liberty or property rights or another legitimate interest or expectation, or to impose a penalty on him; though the conferment of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation so to act. Where a discretionary power to encroach upon individual rights is exercised, factors to be taken into account in deciding what fairness requires in the exercise of the power include the nature of the interests to be affected, the circumstances in which the power falls to be exercised and the nature of the sanctions, if any, involved. The content of the duty to act fairly will normally be very limited where the authority is in the course of exercising a function not culminating in a binding decision, but that may not be the case if the wording of the grant of powers or the context indicates that a fair hearing ought to be extended to persons likely to be prejudicially affected by an investigation or recommendation.

44.1. It has further been observed therein :

94. Audi alteram partem: The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial Tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a Court. Moreover, even in the absence of any charge, the severity of the impact of a discretionary decision on the interests of an individual may suffice in itself to attract an implied duty to comply with this rule.

45. In our opinion, natural justice means and can only mean that the action of the Tribunal or the authority in question must have been taken in good faith, that the party affected must have an opportunity of explaining or correcting any relevant fact or statement prejudicial to his interests. To put it in other words, the person accused should know the nature of the accusation made; consequently that he should be given an opportunity to state his case, and thirdly, that the Tribunal should act in good faith.

46. In the present case, the appellants requested to permit them to cross-examine those persons who gave an opinion as regards the nature of the C.D. R.O.Ms. and the price of the C.D. R.O.Ms. quite contrary to the one which was given by the Electronics and Computer Software Export Promotion Council dated 14th July, 1998 and the Department of Electronics, Government of India, dated 8th July, 1998. Since, we are on a very vital issue, we are of the opinion that we should quote both the opinions referred to above.

Government of India Department of Electronics Electronics Niketan 6, C.G.O. Complex New Delhi-110 003.

.....23 (2)/98-I.P.C.

Date: 8-7-1998

To,

The Asstt. Commissioner of Customs, LCD. Faridabad, Sector-59, Ballabgarh, Faridabad.

Subject: Clarification on contents of CD-R.O.Ms..

Sir,

Kindly refer to your letter No. VIII (I.C.D. F.B.D.)6/imp/26/98/347 dated 18-6-1998 on the subject mentioned above.

2. The matter has since been examined by the Technical Division of this Department and it is to inform that the contents of the 91 titles of the C.D.-R.O.MS., as per the attested list enclosed have been found to be interactive in functionality and qualify under the category of Computer Software.

3. As regards the remaining CDs. It is to inform that in the absence of proper

literature, instruction manual, etc., it has not been possible to load/test the remaining CDs. The software being intellectual property, the price is normally governed by the market conditions and as such specific comments cannot be offered.

4. All the 112 CDs., duly sealed, are returned herewith.

Yours faithfully, Sd/- (S.K. Marwaha)

Electronics and Computer Software Export Promotion Council

(Sponsored by the Ministry of Commerce, Government of India) ESC/
EDP/98/22710

Date: 14-7-1998

The Assistant Commissioner of Customs I.C.D.-Faridabad.

Sub.: Clarification on Contents of C.D. R.O.MS.

Ref.: Your letter No. VIII/ICD(FBD)6/IMP/26/98/408 dated 7-7-1998.

Dear Sir,

In continuation to our letter No. ESC/EDP/98/22691 dated 13-7-1998 on the above-cited subject, it is to inform that all the 23 samples with the following titles of the C.D.-R.O.M. forwarded by you vide your above-referred letter have been examined in the Council and the contents of all the 23 titles (including the 16 titles already reported to you vide our letter No. ESC/EDP/98/22691 dated 13-7-1998) are found to be interactive in functionality and qualify under the category of Computer Software :

Sr.No. Title Names

1. 1300 New Cities Mega Metros
2. Bill Board Music Guide
3. Campaign Each Germany
4. Crazy Pool
5. Dinosaur Safari
6. Hello Kitty
7. Image Ecstasy
8. Pipe Mania
9. Quantam Gate
10. Shadow President
11. Solid Gold

12. Speed Way
13. The Madness of Roland
14. Encyclopaedia of Lawman and Outlaws
15. Pro-Football Handicapper
16. Cooking Companion
17. Astro Force
18. Critical Path
19. Electric Reading Land
20. Hungry Hedgehogs
21. Click Art Select
22. Reflux
23. The Magic Death

The samples of the above C.D. R.O.Ms. are being retained by this Council for its records.

Thanking you,

Yours faithfully, Sd/- (D.P. Gupta) Chief (Co-ordination)

47. As against that, F.E.R.A. authority relied on the opinion obtained from National Informatics Centre (N.I.C.), a Government of India undertaking, dated 31st July, 2001 and the opinion of Software Technology Parks of India dated 18th October, 2001. We propose to quote both the opinions.

Government of India Ministry of Information Technology, National Informatic Centre, Gujarat State Unit, Block No. 13, 2nd Floor, New Sachivalaya, Gandhinagar-382010.

Ref.: nic/gsu/2001/884

dated: 31-7-2001

To,

Shri Rajesh Pandey Deputy Director, Directorate of Revenue Intelligence, Ahmedabad

Sir,

Sub.--Enquiry regarding import of C.D. R.O.Ms..

This is in reference to your letter F. No. D.R.I./AZU/INV-14 of 1998 dated 15th February, 2001 and the thirty C.Ds. send in sealed cover along with the above letter. The said sealed cover was opened in front of the party and the officers of

D.R.I. under Panchnama dated 18th April, 2001.

I am to inform you that we have checked all the 30 C.D. R.O.Ms.. With the facilities available to us, we are not in a position to judge whether these C.Ds. can be run in an automatic data processing machine not loaded with O.S. But none of the C.Ds. contain any software as per the definition as mentioned in your aforesaid letter except one C.D., titled Complete House. The C.D.-wise list of finding is attached for reference. All the thirty C.Ds. are returned with this letter.

Yours Sincerely, Sd/- (Rajnish Mahajan) Technical Director.

End: (1) CD-wise finding list

(2) 30 C.Ds.

Software Technology Parks of India

(An Autonomous Society under Ministry of Information Technology, Government of India)

S.T.P.G. Complex, A/78/7/2, Flatted Factory Shed, G.I.D.C., Electronic Estate, Sector # 25, Gandhinagar-382044, Gujarat-INDIA.

Confidential

S.T.P.I.G./DRI/C&CE/EVAL/4674

Dated 18-10-2001

To,

The Dy. Director, Director of Revenue Intelligence, 78, Pankaj Society, B/h. Mangalya Building, Bhatta, Paldi, Ahmedabad-380007.

Sub: Your Letter with F. No. DRI/AZU/INV-14 of 1998 dated 1-10-2001 and Fax. dated 5-10-2001

Sir,

This is in respect of the captioned subject. We have gone through the details of the 30 C.Ds. and the observation is as below :

1. All 30 C.Ds. can be run on a computer (an automatic data processing machine) containing the operating system of Windows. The contents brief as noted is Appended at Annexure-I.
2. All 30 C.Ds. on its back side contains the remark Runs on Windows 95 and Windows 3.1. Windows 95 and Windows 3.1 are operating systems.
3. All 30 C.Ds. on its back side gives the system requirements which contains Machintosh: System 7.0 or Later where Machintosh System 7.0 is an operating system.
4. Out of 30 C.Ds., only one C.D. could run on V.C.D. Player (which is generally

used automatic data processing machine not loaded with operating systems like Windows 95, Windows 97, UNIX, etc.). The content brief as noted is at Annexure-II

5. In the event if any other Automatic Data Processing Machine not loaded with an Operating System is provided by the Importer/User of the C.D. that run the said 30 CDs. the same can be counter-verified.

Your faithfully, For Software Technology Park, Gandhinagar Sd/- Ajay Sharma
Director.

48. Thus, when there is an apparent conflict between the two sets of opinion, in such circumstances, in our opinion, the appellants were justified in making a request to cross-examine those officers, who had expressed the opinion quite contrary to the one on which the custom authorities had relied upon. We fail to understand what prejudice could have been caused to the department if at all such permission would have been granted. On the other hand, the prejudice seems to have been caused to the appellants as they were not in a position to convince the adjudicating authority and the Appellate Tribunal why the adverse opinion which was in conflict with the first two opinions should have been ignored in absence of opportunity to cross-examine the person who gave such a opinion in writing. It is also not the case of the department that such request was made only with a view to protract the proceedings.

49. In the aforesaid context, we may quote with profit the observations made by a Division Bench of this Court in the case of Commissioner of Income Tax, Gujarat (II) v. Surendra Gulabchand Modi (supra). The issue before the Bench was whether the revenue as also the assessee be obliged to litigate upto the Supreme Court of India unnecessarily and should they be obliged to do so if, without committing any irregularity or illegality, or causing injustice or hardship to any side, parties could be saved from being involved in a multiplicity of avoidable proceedings and avoidable legal expenses. The Bench in Paragraph 4 made the following observations, which, in our opinion, would squarely apply in support of the submission so far as the breach of principles of natural justice is concerned.

4.....When multiplicity of proceedings can be avoided and parties can be saved from unnecessary expenditure, it was legal and proper as also pragmatic to grant the request to block the proceedings and to adjourn the matter awaiting the decision of the Supreme Court on the crucial question on which the decision of the appeal would ultimately turn. The mere fact that the matter was old and would have remained on the file of the Tribunal was no legal or valid ground for driving the parties to a number of avoidable proceedings in higher Courts and obliging them to incur avoidable expenditure. In our opinion, therefore, the ends of justice demanded that the request be granted. So, also, legality, propriety and pragmatic considerations demanded that the request was granted, for ultimately, the paramount consideration must be to avoid multiplicity of proceedings, to

avoid necessary litigations and to save the parties from unnecessary costs required to be incurred in connection with such proceedings, if there was no prejudice to any side. These considerations have not been taken into account by the Tribunal. It has not even shown an awareness of this vital dimension of the matter. The request has been turned down merely on the ground that the matter was old. The matter would have continued to remain old even if the parties were obliged to carry the matter initially to the High Court, and subsequently, to the Supreme Court, and the matter would have remained old and indisposed of till the Supreme Court finally decided the crucial question on the decision whereof one way or the other, the matter turned on merits.

50. We may also quote with profit the observations made by a Division Bench of the Kolkata High Court in the case of Jha Shipping Agency Vs. Union of India (UOI), on which strong reliance has been placed by Mr. Trivedi and with which we are in complete agreement. In Paragraph 3, the Bench made the following observations :

3..... At the outset, the appellant asked for cross-examination of those persons or even if it is not asked, whether the first authority offered to the appellant for cross-examination of those persons ought to have been looked into. Unfortunately this was not done by the learned Tribunal. According to us if the decision in the justice delivery system results in evil and civil consequences, natural justice has to be followed. One of the facets of the natural justice is to afford to the adversary to cross-examine the person or persons whose testimony or statements were relied on in decision making process. This enquiry should have been made by the learned Tribunal when a complaint was made in this respect. As we have already noted the learned Tribunal overlooked this aspect, on this ground alone this appeal succeeds and impugned judgment and order of the learned Tribunal is set aside.....

51. Thus, we come to the conclusion that the refusal on the part of the adjudicating authority to permit the appellants to cross-examine the experts, who had given their opinions as regards classification and valuation of the goods, has really vitiated the entire proceedings. We have gone through the observations of the Appellate Tribunal made in Paragraph 50 of its order, wherein the Tribunal took the view that cross-examination of a witness should not be permitted merely on demand, unless and until certain reasons and circumstances are brought out or established. The Tribunal has observed that no such situation was brought out by the appellants for demanding cross-examination. With respect to the learned Members of the Tribunal, we are in complete disagreement with the view expressed in Paragraph 50. On one hand, the Tribunal relied upon the opinion of the officers as regards the classification and pricing of the goods which favoured the department whereas on the other hand, the Tribunal refused to look into the opinion of the experts which favoured the appellants and which was accepted by the Customs authorities. The appellants were absolutely justified in such circumstances to request the adjudicating authority to permit

them to cross-examine those experts on the line as to on what basis they had reached to such a conclusion, which was contrary to the other set of opinion.

52. We shall now deal with the submission canvassed by Mr. Trivedi that the impugned order travels beyond the show-cause notice dated 31st May, 2002 and the observations made by the Tribunal in its order completely makes out a new case against the appellants.

53. It is settled law that a party to whom a show-cause notice of this kind is issued must be made aware of the allegations against it. As observed by the Supreme Court in *Kaur Singh v. Collector of Central Excise, New Delhi*, reported in 1997 (94) ELT 289 (SC), that this is a requirement of natural justice. Unless the party concerned is put to such notice, he has no opportunity to meet the case against him. Which ground is alleged against the party must be made known to him, and there is no scope for assuming that the ground is implicit in the issuance of show-cause notice. We have observed that many of the findings recorded by the Tribunal are much beyond the case set up by the department in the show-cause notice. For example, the show-cause notice does not set out any particulars in respect of fraud or collusion or conspiracy. We have noticed that in Paragraph 4 of the impugned order, it has been observed that the case of M/s. Vaishal Impex was not an isolated case, but it was a part of conspiracy played by M/s. Adani Exports Limited in collusion with some other companies with an intention to siphon off the foreign exchange. It has also been observed that M/s. Adani Exports Limited and its associated companies formed a group with M/s. Padmini Polymers Limited to defraud the exchequer by exporting pirated and outdated C.D. R.O.Ms. at a grossly over invoiced/F.O.B. value to earn excessive D.E.P.B. credit by purchasing them from M/s. Padmini Polymers Limited. Although there is a reference of M/s. Padmini Polymers Limited in the show-cause notice, we do not find any case of conspiracy in the show-cause notice. Over and above, that from Paragraph 34 upto Paragraph 41, there is discussion about the opinion as regards classification of the goods including the price. The Tribunal also seems to have relied upon the opinion expressed by Professor S. Raman, Associate Professor, Department of Computer Science and Engineering at I.I.T., Madras, and has also referred to the book of Computers and Microprocessors by A.C. Downton. However, we do not find anything of this kind in the show-cause notice.

54. Thus, we are of the opinion that there is substance in the submission of Mr. Trivedi that the order impugned travels much beyond the scope of the show-cause notice and his clients had no opportunity to explain many relevant aspects which the Tribunal has taken into consideration.

55. For all the foregoing reasons, our final conclusions are as under :

- (i) The first question of law is answered in the affirmative.
- (ii) The second question of law is also answered in the affirmative.
- (iii) The third question of law is answered in the negative.

(iv) The fourth question of law is answered in the negative.

(v) The fifth question of law is also answered in the negative.

For the foregoing reasons, all the three appeals are hereby allowed. The order passed by the Appellate Tribunal for Foreign Exchange dated 25th February, 2008 in Appeal Nos. 499 to 501 of 2005 is hereby quashed and set aside. However, on the facts and in the circumstances there shall be no order as to costs. In view of the order passed in main appeals, connected Civil Applications do not survive and the same are disposed of accordingly.

Further Order :

After this order is passed, Mr. Champaneri, the learned Assistant Solicitor General of India appearing for the Department prays for stay of operation of our order.

In view of what has been stated above, we find no reason to stay our order. Therefore, the prayer is refused.