F. No. VIII/10-172/ICD-Khod/O&A/HQ/2024-25
OIO No. 228/ADC/SRV/O&A/HQ/2024-25

प्रधान आयुक्त का कार्यालय, सीमा शुल्क ,अहमदाबाद

"सीमाशुल्क भवन ,"पहली मंजिल ,पुराने हाईकोर्ट के सामने ,नवरंगपुरा ,अहमदाबाद – 380 009.

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DIN: 20250171MN0000616666

PREAMBLE

A	फ़ाइल संख्या/ File No.	:	VIII/10-172/ICD-Khod/O&A/HQ/2024-25
B	कारण बताओ नोटिस संख्या–तारीख / Show Cause Notice No. and Date	:	VIII/10-34/ICD-Khod/O&A/HQ/2016 Dated 11.06.2020
C	मूल आदेश संख्या/ Order-In-Original No.	:	**228/ADC/SRV/O&A/2024-25**
D	आदेश तिथि/ Date of Order-In-Original	:	**16.01.2025**
E	जारी करनेकी तारीख/ Date of Issue	:	**16.01.2025**
F	द्वारापारित/ Passed By	:	**SHREE RAM VISHNOI**, Additional Commissioner, Customs Ahmedabad.
G	आयातक का नाम औरपता / Name and Address of Importer / Passenger	:	(1) **M/S. MIDAS POLYCHEM LLP** 401,SPAN TRADE CENTRE OPP. KOCHRAB ASHRAM,PALDI AHMEDABAD-380007 (2)**M/S CENTRAL WAREHOUSING CORPORATION** OPP. UNNATI VIDYALAYA, NEAR MAHALAXMI CROSS ROAD. PALDI, AHMEDABAD-380007
(1)	**यह प्रति उन व्यक्तियों के उपयोग के लिए निःशुल्क प्रदान की जाती है जिन्हे यह जारी की गयी है।**		
(2)	**कोई भी व्यक्ति इस आदेश से स्वयं को असंतुष्ट पाता है तो वह इस आदेश के विरुद्ध अपील इस आदेश की प्राप्ति की तारीख के 60 दिनों के भीतर आयुक्त कार्यालय, सीमा शुल्क)अपील(, चौथी मंज़िल, हुडको भवन, ईश्वर भुवन मार्ग, नवरंगपुरा, अहमदाबाद में कर सकता है।**		
(3)	**अपील के साथ केवल पांच) 5.00) रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए और इसके साथ होना चाहिए:**		
(i)	**अपील की एक प्रति और;**		
(ii)	**इस प्रति या इस आदेश की कोई प्रति के साथ केवल पांच) 5.00) रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए।**		
(4)	**इस आदेश के विरुद्ध अपील करने इच्छुक व्यक्ति को 7.5 %(अधिकतम 10 करोड़) शुल्क अदा करना होगा जहां शुल्क या ड्यूटी और जुर्माना विवाद में है या जुर्माना जहां इस तरह की दंड विवाद में है और अपील के साथ इस तरह के भुगतान का प्रमाण पेश करने में असफल रहने पर सीमा शुल्क अधिनियम, 1962 की धारा 129 के प्रावधानों का अनुपालन नहीं करने के लिए अपील को खारिज कर दिया जायेगा।**		

BRIEF FACTS OF THE CASE:

M/s. Midas Polychem LLP Ahmedabad - 380007 (hereinafter referred to as "the importer" or "the noticee-1" or "M/s. Midas" for the sake of brevity) imported "Low

Density Polyethylene (LDPE) off grade" (hereinafter referred to as "imported goods" or “impugned goods” or “LDPE” for the sake of brevity) classifiable under Chapter sub-heading 39011090 of the First Schedule to the Customs Tariff Act, 1975 vide Four (04) Bills of Entry. These Bills of Entry were assessed provisionally and representative samples were drawn and sent to Central Revenues Control Laboratory (CRCL), Vadodara for test result as to whether the imported goods were of ‘Off Grade’ as declared or otherwise.

2. It was revealed by the test results given by CRCL, Vadodara that the goods were "Low Density Polyethylene (LDPE) **Prime Grade**” instead of “Low Density Polyethylene (LDPE) off grade". The rates of LDPE Prime Grade are higher than that of LDPE Off grade according to PLATTS' rates. The test report results were communicated to the importer and clarification was sought from the importer.

3. In response to above, the importer replied that they did not agree with the outcome of test reports and requested for re-testing from other agency. With the approval of the Additional Commissioner of Customs, Ahmedabad the remnant samples sent for testing to Chemical Examiner, CRCL, New Delhi. However, CRCL, New Delhi returned the sample ‘untested’, as the test of ‘off grade’ required virgin material and in absence, it is not possible to test the sample.

4. As the articles of plastics are evasion prone by way of undervaluation of imported goods therefore, to facilitate and smoothen the customs clearance process, details guideline was issued vide standing order 7493/99 - dated 03.12.1999 by the Chief Commissioner of Customs, JNCH, Nhava Sheva, for valuation and assessment of imports of Plastic materials on International PLATTS rates. As per above Standing Order No. 7493/99 - dated 03.12.1999 read with Rule 8 and 10(2) of the Customs Valuation Rules, 2007, for the purpose of valuation, PLATT’s price is considered as FOB value, and freight and insurance as per the said standing orders, are added to the FOB.

5. On verification of declared values of the imported goods with and contemporaneous import prices of plastics as reflected in ICES/NIDB data, it appeared that the values declared by the importer were on lower side since they declared the value for LDPE ‘Off Grade’ whereas the test results stated as LDPE ‘Prime Grade’. Hence the value declared by the importer is undervalued and cannot be accepted, liable for rejection and needs to be re-assessed, as per the provisions of Section 17(4) of the Customs Act, 1962 read with the provisions of Rule 12 of the Customs Valuation Rules, 2007. It also appeared that the re-assessment has to be made at the higher value in consonance with the Standing Order No.7493/99 - dated 03.12.1999 read with Rule 8 and 10(2) of the Customs Valuation Rules, 2007.

6. Thus, all four (04) Bills of Entry which had been assessed provisionally earlier, were finally assessed at the rate as available for "LDPE Prime Grade" as reflected in National import Data Base (NIDB data) as detailed below in Table-1:-

Table-1

S. No.	BE No./date	Qty. (MT)	Decl. rate /MT (USD)	Assessed Rate /MT (USD)	Supplier Invoice No & Date	Ex- Bond BE No/date	Qty. (MT)
1	3176422/05.11.2015 (HC)	49.50	1075	1195	90014139/ 16.09.2015	-	123.750
2	3176424/05.11.2015 (HC)	74.25	1075	1195			
	Total	**123.750**	**-**	**-**			**123.750**
3	3386983/26.11.2015 (WH)	138.875	1000	1195	90014139/ 19.10.2015	582577/ 02.07.2016	138.875
	Total	**138.875**	**-**	**-**	**-**	**-**	**138.875**
4	3387431/26.11.2015 (WH)	445.50	1100	1235	90014584/ 15.10.2015	4415368/ 29.02.2016	198.000
	Total	445.500	-	-		5572658/ 09.06.2016	99.000
		708.125				5780352/ 27.06.2016	24.750
						7240990/ 26.10.2016	24.750
						7536342/ 21.11.2016	24.750
						7621929/ 28.11.2016	24.750
					(*) Balance Qty. (MT)	**-**	**49.500**
-	**Total**	**445.500**	**-**	**-**	**-**	**-**	**445.500**
	Gross Total	**708.125**	**-**	**-**	**-**	**-**	**708.125**

7. However, the imported goods were cleared by the importer under Ex-Bond Bills of Entry as given in above Table-1 except 49.5 MT. In respect of Bill of Entry (In-Bond) No.3387431 dated 26.11.2015, the importer submitted that they had incurred losses to their consignment weighing 49.5 MT, due to fire on 23/24.06.2016 stored at Central Warehousing Corporation, CFS Adalaj (hereinafter referred to as “CWC” or “the noticee-2” or “the custodian”). The Manager, CWC confirmed that LDPE cargo 49.500 MT of the importer under BE No.3387431 dated 26.11.2015 was stored at their warehouse at CFS, Adalaj and said cargo was damaged and destroyed in fire. CWC also paid Customs duty of Rs. 9,59,899/- vide TR-6 Challan No. 3678 dated 11.06.2018 involved on the 49.500 MT of LDPE on provisionally assessed value.

8. The said Bill of Entry for warehouse for total quantity of 445.500 MT of LDPE of Off Grade was finally assessed on 21.08.2018 @ USS 1235MT for clearance of LDPE declaring the imported goods as "Prime Grade". The assessable value for 49.5 MT was worked out to Rs. 41,20,161/- and accordingly total Customs duty of Rs. 10,88,875/- was recoverable. Central Warehousing Corporation, CFS Adalaj is therefore required to pay differential duty of Rs. 1,18,976/- [Rs. 10,88,875/- (-) Rs. 9,69,899/-] for "Prime Grade" of LDPE along with interest and liable to pay fine/penalty under the provisions of the Customs Act,1962.

9. After re-assessment, the value of the imported goods having total quantity of 708.125 MT, was valued at **Rs. 5,80,30,492/-.** The differential customs duty worked

out to **Rs. 16,88,323/- (Rupees Sixteen Lakh Eighty-Eight Thousand Three Hundred Twenty Three only)** is required to be recovered for undervalued products imported on all four (04) Bills of Entry, which were initially assessed provisionally and finally assessed at a rate considering product imported as 'LDPE Prime Grade' in place of 'LDPE off Grade' declared by the importer.

10. Out of above differential Customs duty, **Rs. 15,69,348/-** on the imported goods cleared by the importer were to be demanded and recovered from the importer M/s. Midas under Section 28(4) of the Customs Act, 1962, along with applicable interest thereon, under Section 28AA of the Customs Act, 1962. It also appeared that the importer has paid Rs. 6,55,952/- under protest, which is required to be appropriated as against the above said liability of the importer.

11. Customs Duty amounting to **Rs. 1,18,976/-** were to be demanded and recovered from CWC, Ahmedabad under Section 28(4) of the Customs Act, 1962, along with applicable interest thereon, under Section 28AA of the Customs Act, 1962 read with section 73 of the Customs Act, 1962 respectively and also liable to penalty as per the provisions under Section 73A of the Customs Act, 1962.

12. It appeared that the offending goods i.e. "LDPE Prime Grade" declared as "LDPE Off Grade", having total quantity of 708.125 MT, totally valued at Rs. 5,80,30,492/- were mis-declared and undervalued and hence same are liable to confiscation under Section 111(m) of the Customs Act, 1962, and thereby the importer has rendered themselves liable for penal action under Section 112(a) of the Customs Act,1962.

13. The deliberate effort to mis-declare the description of goods and the value of imported goods and to mis-lead the department into hoodwinking the department to circumvent correct amount of Customs duty is utter disregard to the requirement of law and breach of trust deposed on them, such outright act in defiance of law appears to have rendered the importer liable for penal action as per the provisions of Section 114A and Section 114AA of Customs Act,1962, for suppression, concealment and furnishing inaccurate description of the goods and mis-declared value thereof for imported goods with an intent to evade payment of applicable customs duty.

SHOW CAUSE NOTICE:

14. Thereafter, a **Show cause Notice dated 11.06.2020 was issued from F. No. VIII/10-34/ICD-KHOD/O&A/2016** to the importer i.e. M/s Midas Polychem LLP and M/s Central Warehousing Corporation, Adalaj for asking them to show cause as to why:-

A. For M/s Midas Polychem LLP:

(i) The value declared by M/s Midas Polychem LLP should not be rejected and enhanced to Rs. 5,80,30,492/- of imported goods in terms of the

provisions of Section 14 of the Customs Act,1962 read with the provisions of Rule 12 of the Customs Valuation Rules 2007?

(ii) The imported goods appropriately valued at Rs. 5,80,30,492/- should not be confiscated under Section 111(m) of the Customs Act,1962?

(iii) Customs duty of Rs.15,69,348/-(Rupees Fifteen Lakhs Sixty Nine Thousand Three Hundred Forty Eight only) should not be demanded and recovered under section 28(4) of Customs Act,1962 along with interest under Section 28AA of the Customs Act, 1962? Duty amounting to Rs. 6,55,952/- already paid should not be appropriated against the above demand?

(iv) Penalty should not be imposed under Section 114A, 114AA and 112 of the Customs Act, 1962?

B. For Central Warehousing Corporation, CFS, Adalaj:

(i) 49.500 MT of LDPE prime Grade valued at Rs. 41,20,116/- should not be confiscated under Section 111(m) of the Customs Act,1962?

(ii) Customs duty of Rs.10,88,875/-(Rupees Ten Lakhs Eighty Eight Thousand Eight Hundred Seventy Five only) should not be demanded and recovered under section 73A read with section 28(4) of the Customs Act, 1962 alongwith interest at appropriate rate under the provisions of Section 73A read with Section 28AA of the Customs Act, 1962? Duty of Rs. 9,69,899/- (Rs. Nine Lakhs Sixty Nine Thousand Eight Hundred Ninety Nine Only) already been paid should not be appropriated against the above demand?

(iii) Penalty should not be imposed under Section 73/114A/114AA and 112 of the Customs Act, 1962?

WRITTEN SUBMISSIONS AND PERSONAL HEARINGS BEFORE THE ORIGINAL ADJUDICATING AUTHORITY:-

15. Defence reply in response to the show cause notice by M/s Midas Polychem LLP on 08.03.2021:

i. The allegations made in the SCN, are not at all convincing, justified and also not based on proper legal foothold as they are not supported by the corroborative evidences.

ii. The Test Reports are vague as no specific reason has been given while stating that the goods are other than off grade and are prime, even after specifically observing that the granules vary in size and shape.

iii. The authority paid no need to the request for re-testing and without assigning any sound reasons.

iv. The letter declaration of the supplier of the goods stating that the goods are off grade in respect of some of the parameters, submitted by the noticee, was also not considered.

v. The noticee had furnished the entire documents viz. contract/purchase order with the supplier/exporter of the goods who is marketing division of reputed manufacturer Sahara International Petrochemical Company, Saudi Arabia. The goods have been purchased directly from the marketing company of the manufacturer and the relevant document (invoice of the seller) showing transacted price as USD 1000/1100 to support the value of the goods declared by them and there is not an iota of evidence to doubt the truth or genuineness of the value of the goods declared by them. The noticee is regular bulk purchaser of polymers from reputed manufacturers.

vi. In the present case, the declared value and the transaction value is the price actually paid by the noticee when sold for export to India for delivery at the time of and place of importation, the noticee and the supplier/exporter of the goods are not related and the price is the sole consideration for the sale. The declared value is correct transaction value for the purpose of the assessment of the goods.

vii. Loading of the value on the basis of PLATT prices which are not conclusive without any corroborative evidences is not acceptable. PLATT prices are just indicative and shall not be a base for rejection of transaction value. They relied upon the decision in the case of Royal Oil Field Pvt. Ltd. 2005 (180) ELT 394.

viii. The reliance on contemporaneous imports shall not be in the dark and in back of the importer. Nothing specific has been made known to the importer so that the same can be distinguished. For contemporaneous import prices many factors like Country of Origin, Supplier/Manufacturer, Quantity and Quality, Relevant date/Time etc. shall be considered first and only thereafter such prices can be applied for rejection of the transaction value. They rely upon the decisions in the cases of Reshmi Petrochem Ltd. 2009 (237) ELT 307 and Angel Overseas Pvt Ltd. 2012 (286) ELT 221 in their support.

ix. The Commissioner (Appeals) has already held in favour of the importer on the issue of valuation on the basis of PLATT and his order has not only been upheld by the Honorable Tribunal but has also been accepted by the Department.

x. Every bill of entry was assessed after loading of value on the basis of price published in PLATT even at the time of first assessment and therefore further loading of value is not sustainable. When In-Bond Bills of Entry were assessed provisionally, how Ex-Bond Bills of entry were assessed finally.

xi. The chronology of the events is quite confusing and therefore misleading. As can be seen from the above, the invoice price of the imported goods was 1000/1100; the goods were provisionally assessed at 1050/1100 on the basis of PLATT; during the clearance of the warehoused goods the goods were provisionally/finally assessed at 1195 or 1235/1100; the goods were again stated to have been re-assessed on 21.08.2018, that too without affording reasonable opportunity to the noticee to put forth his case, at 1195/1235 and once again by this SCN it is proposed that why the value declared by the

noticee should not be rejected and be re-assessed under the provisions of the Customs Act. 1962. Quite surprising and shocking actions by the Department. It appears that the officers have confused themselves in dealing with the matter and has made it total mess. It doesn't end here. The SCN, under Para 5.1 and Para l0 states that it appears that the value declared by the noticee was undervalued, couldn't be accepted and needs to be re-assessed as per the provision of Section 17(4) of the Act. In terms of that provision, the assessing officer was required to issue well-reasoned order within stipulated time under Section 17(5) of the Act as re-assessment done under Section 17(4) was admittedly contrary to the self-assessment done by the noticee. Such action or order is missing. Without specifying any reasons and in the back of the noticee, the goods were assessed finally on 21.08.2018 as stated under Para 12 of the SCN and it is also stated further that the noticee was required to pay differential duty as per the provisions under Section 18(2) of the Act. It is not made clear about who finally assessed the goods on 21.08.2018 under Section 18(2) of the Act. Had it been factually so, what is the requirement to issue the present SCN? And by doing that the Department has, it seems, without understanding the provisions made under the Act, has converted the confirmed demand into unconfirmed demand. In terms of such progress in the matter, the SCN is not tenable and is liable to be set aside forthwith.

xii. Confiscation of the goods under Section 111(m) of the Act and imposition of redemption fine is not tenable when the goods are not available for seizure.

xiii. The SCN issued on 11.06.2020 is barred by limitation and is required to be dropped. The noticee relied upon the decision in the case of Glencore India Ltd. 2004 (170) ELT 309.

xiv. The test reports, based on which the allegation of mis -declaration is made are not acceptable to the noticee as even after observing/recording in writing the variation in size, shape and MFI of the goods, without any proper reason, the goods are reported as 'Prime Grade'. The valuation purely based on PLATT is also not just and proper. There is no evidence of any flow back of money to support undervaluation, not even any documentary support to suggest undervaluation of the goods by the noticee. There is no comparative data of contemporaneous imports and in absence of the same, the invoice value can't be rejected and the goods can't be re-assessed in terms of the Valuation Rules. In the absence of any substantial evidence, allegation of mis-declaration and suppression of any fact is based merely on vague test reports. A simple statement that the goods are of Prime Grade will not substantiate the grave charge of mis-declaration.

xv. The charges so framed are primitive in nature and the Department has no legal or moral right to state that the noticee has contravened any provisions of the Act which are liable for imposition of penalty under the Sections 112 (a), 114A and/or 114AA of the Act.

xvi. The Department has thus failed to shift the burden of proof to the noticee and till then the proposal of imposition of penalty upon the noticee is devoid of merits and the entire SCN is required to be dropped forthwith in the interest of justice.

16. Defence reply by M/s Central ware housing Corporation, CFS Adalaj dated 24.12.2020:

i. The Noticee was never in the picture until the subject show cause notice issued for the differential duty, interest, and penalty.

ii. The noticee denies the allegations made in the Show Cause Notice and also denies the authority of the customs to levy any duty, penalty, and interest. As these provisions do not apply to the Customs bonded warehouse licensed under Section 57 of the Customs Act, 1962.

iii. The noticee is a Government of India undertaking and is a statutory authority created and constituted under the provisions of the Warehousing Corporation Act, 1962. Admittedly by the Commissioner of Customs in the exercise of the powers conferred under Section 8/45(1) of the Customs Act, 1962, appointed the appellant as the custodian of the Container Freight Station (CFS) Adalaj, Ahmedabad, for the handling of imported and export cargo in Customs notified area, i.e., CFS, Adalaj vide Customs Notification No.4/90 (CCP) Dated 5.10.1990. The CFS has the obligation inter-alia to abide by the provisions of Handling of Cargo in Customs Areas Regulations, 2OO9 (HCCAR, 2OO9). On application of CWC and after due verifications, CWC Godown No.6located in CWC Complex, Adalaj was granted license of Public Bonded Warehouse under Sec-57 of the Act for warehousing of the bonded goods.

iv. It has been alleged that CWC premises (Godown No. 6), where the fire broke out and the bonded warehoused goods were destroyed/burnt, was a Customs area approved under Section 8 of the Customs Act, 1962 and the provisions of Handling of Cargo in Customs Areas Regulations, 2OO9 (HCCAR, 2OO9) are applicable to the warehoused/stored in the said godown. The fact is that the said premises of CWC i.e. Godown No. 6 was licensed under Section 57 of the Customs Act, 1962. In terms of Regulation 3 of the HCCAR, 2OO9, the provisions of HCCAR,2OO9 are applicable to the handling of imported & export goods in Customs areas approved or specified under Section 8 and not to the bonded goods warehoused in the Customs Bonded Warehouse which is licensed under Section-57.

v. That fire broke down at godown No. 6 CWC Complex, Adalaj on24.06.2016, which was duly informed by the Manager of the noticee on the same day and supplied the details of the stocks stored in the said godown. Subsequently, the joint exercise of the survey was done, and details of Customs Duty on the sound/ salvaged/ segregated stock of the bonders after the Fire incidence and Customs Duty of Fire affected Bonded stock position of Godown no. 6 was also submitted.

vi. The 49.500 MTs of LDPE Cargo of M/s. Midas Polychem LLP, Ahmedabad, was stored at godown no. 6 when the fire occurred in June 2O16. There were cargos of other importers also got destroyed in the fire. M/s. Midas Polychem LLP, Ahmedabad, had submitted an undertaking dated 29.12.2016 that losses were incurred to their consignment stored at warehouse no. 6 at CWC, Adalaj due to fire on23/24.06.2016, and they had identified the sound stock from a lot of segregated items. The Importer further stated in the said undertaking that they had not taken any insurance policy coverage during the period in question for their stocks stored at warehouse no. 6, and confirmed that the declaration was made with CWC only and the insurance company has no binding to accept it in full either. The Insurance Company had all right to assess the loss as per merit of documents, and they will not interfere in the same.

vii. 16.9 Since the licensee noticee had taken sufficient insurance claim for the goods stored at their godowns, a claim was lodged with the Insurance Company totaling Rs.2,76,52,609/-. The noticee paid Rs. 9,69,899/-vide TR-6 challan no. 3678 dated I 1.06.2018 to the Customs Authority out of insurance claim amount involved on the 49.5O0 MTs of LDPE of the importer M/s. Midas.

viii. Liabilities of Customs Bonded Warehouses licensed under Section -57of Customs Act, 1962 are as under: -Customs Bonded Warehouses are licensed under Section 57 of the Customs Act, 1962. The said warehouses are governed/ regulated under the provisions of Section 57 to 73A under Chapter IX WAREHOUSING of the Customs Act, 1962 and the warehouse (Custody and Handling of Goods) Regulations, 2016. Licenses to Customs Bonded Warehouses are granted as per procedure & conditions laid down in the Public

ix. Warehouse Licensing Regulations, 2016. Manner/procedure for operating the Public Bonded Warehouses have been given in the Warehouse (Custody & Handling of Goods) Regulation, 2O16. Central Warehousing Corporation (herein after referred to as notice) Godown No. 6 is a Customs Bonded Warehouse licensed under Section-57 of the Customs Act, 1962 vide Assistant Commissioner of Customs, CFS/ICD Sabarmati, Ahmedabad office letter No. VIII/48-01/CFS/201O dated05.03.2O10.

x. Regulation 4(a) and 4(c) of the Public Bonded Warehouse LicensingRegulations, 2O16 provides as under:-

“Principal Commissioner of Customs or Commissioner of Customs, as the case may be shall require the applicant to;

4(a) 'provide an all risk insurance policy, that includes natural calamities, riots, fire, theft, skillful pilferage and commercial crime, in favour of the President of India, for a sum equivalent to the amount of duty involved on the dutiable goods proposed to be stored in the public warehouse at any point of time";

4(c) 'provide an undertaking indemnifying the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, from any liability arising on account of loss suffered in respect of warehoused goods due to accident, damage, deterioration, destruction or any other unnatural cause during their receipts, delivery, storage, dispatch or handling."

xi. In compliance to the above provisions/undertaking the loss of duty on the goods suffered amounting to Rs. 9,69,899/- has already been paid by the noticee as demanded by Deputy Commissioner of Customs, ICD, Khodiyar vide his office letter F No. VIII/48-45/CFS/Adalaj/Fire/2016/445 dated, 22.4.2017.

xii. Regulation 4(b) provides for payment of duty, interest, fine, penalty etc. for removal of goods under Section 73(A) i.e. in contravention of Section71. In this case the goods were burnt in fire. The goods were not removed and as such these provisions are not applicable to the subject case.

xiii. The noticee was never informed or a party to the provisional assessment proceedings, and therefore, they cannot be held liable, or answerable for the duty difference after the provisional assessments get into final assessment. However, suddenly after more than 4 years, the noticee has been served with the subject notice for the demand of differential duty of customs invoking an extended period of limitation for the alleged violation of the provision of law by the Importer. The subject Show Cause Notice in paragraph 9, 10 to 11.1 mentions the contraventions of the Importer and allegedly liable to discharge the duty liability.

xiv. The noticee is called upon to pay customs duty along with interest and penalty under the provisions of Section 73A of the Customs Act, 1962 for the goods destroyed in the fire. The issue is, whether the provision of Section 73A can be invoked against the custodian? Whether the demand can be made without specific averments as to how the custodian has contravened the provisions of Section 73A of the Customs Act, 1962. The subject notice proposes to levy penalty by invoking Section 73A of the Customs Act, 1962. Though there is no specific allegation or invoked sub-section (3) of Section 73 in the notice, which provides that where any warehoused goods are removed in contravention of Section 71, the licensee shall be liable to pay duty, interest, fine and penalties, but except the said sub-section of Section73, there is no provision for demanding duty, and levy interest, fine and penalties. To appreciate the correct applicability of sub-section (3) of Section 73, one needs to read Section 71 as a whole. By going through the provisions of Sec-73 A and 71, it is clear that if the goods are removed in contravention of Sec-71(i.e. removal other than for home consumption or export or for removal to another warehouse or as otherwise provided in this act) duty, interest, fine and penalty are payable. In the case at hand the goods were not removed. They were destroyed in fire. By no stretch of imagination it can be interpreted

that destruction of the goods in fire is removal in contravention of Sec-71. It may be seen that duty, interest, fine &penalty are payable on removal of the goods illegally. In this case the goods were destroyed in fire and were not removed and as such the provisions of Sec-73 A are not applicable in this case. In view of the provision, the burden is on the customs authorities to aver specifically with evidence that the goods were removed from the warehouse by the noticee. There are no allegations in the Show Cause Notice that goods were removed from the warehouse, but it is an admitted fact that the goods were destroyed in the fire, and no one was held guilty for the same. In this view of the fact, and law, the invocation of Section 73A of the Customs Act 1962, for demand of Customs duty, interest & penalty is not tenable, unjustified, and without the authority of law.

xv. The Noticee is also called upon to Show Cause as to why the duty, interest, and penalty should not be levied under Section 28(4) of the Customs Act, 1962. The language of the provision is clear and evident that this provision applicable to the importer or the exporter or the agent or employee of the importer or exporter, but it does not apply or cover any person. The noticee is a licensee under Section 57 of the Act who acts on behalf of the Customs Department as per provisions of Warehouse (Custody and Handling of Goods) Regulation 2016. Treating the noticee as an importer or its agent or employee or the person chargeable with duty or interest is not as per provisions of the act. Therefore, the invocation of Section 28(4) of the Customs Act, 1962 is misplaced. Further, the allegations in the show cause notice have expanded the scope of the provision and held the Noticee vicariously liable to pay duty, interest, and penalty, which is without the authority of law. That the authority has no jurisdiction to invoke sub-section (4) of Section 28 of the Customs Act, 1962 because the same is contrary to the principle laid down by the Hon'ble Supreme Court in the case of Uniworth Textiles Limited Vs. Commissioner of Central Excise, Raipur reported in (2013) 9 SCC 753.

xvi. The demand for the interest under Section 73A read with Section28AA of the Customs Act, 1962 for alleged late payment of customs duty and for non-payment of differential customs duty is untenable. In view of the above submission, it is established that the noticee was not liable to pay any duty or the differential duty. Further, there is no provision under the law, which obliges the noticee to discharge the duty liability of the goods destroyed in the fire. Therefore, in the absence of any provisions of law and in the absence of any liability to pay the duty, no interest is leviable on the purported non-payment or short payment of duty. As per the provisions it is clear that the person who is liable to pay duty as per Section 28 shall be liable to pay interest. The noticee is not the importer. It is Customs Bonded Warehouse licensed under Section 57 of Act and as such it is liable to pay neither duty as stated above nor any interest under Section 28 AA. Also as stated above the goods were burnt in accidental fire in CWC Godown No. 6 and were not

removed as per Section 73 A of the Act. In view of these provisions no interest under Section 73A read Section 28AA can be charged from the noticee.

xvii. Payment of duty & interest of the warehoused goods is the liability of the Importer:-The warehoused goods may be cleared by the importer for home consumption on payment of duty, interest, fine, penalty etc. as per provisions of Section 68 of the Act. The goods can also be cleared for export as per Section 69. Interest on the duty of the warehoused goods is chargeable under Section-61 of the Customs Act, 1962 from the importer invoking the provisions of Section 28(4) or Section 28AA is not as per the scheme and not applicable to Customs bonded warehouse licensed under Section 57 of the Act.

xviii. The noticee is called upon to explain why penalty under Section 114A/112(a) of the Customs Act, 1962 should not be imposed. However, the proposal to impose the penalty is vague and general in nature, for imposing a penalty under Section 114A/112(a) there have to be specific allegations of how the provisions are attracted in the background of the case.

xix. The Section 114A provides that where the duty has not been levied or has been short-levied, or the interest has not been charged or paid or has been partly paid or the duty or interest has been erroneously refunded by reasons of collusion or any willful-misstatement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of Section 28 shall also be liable to pay the penalty equal to the duty or interest so determined. Therefore, the basic requirement of this provision is that the penalty can be levied against the person who is liable to pay the duty or interest. Admittedly, the noticee is neither liable to pay duty or interest, and secondly, there is no provision in the Customs Act, which obliges the custodian to discharge the duty liability of the goods destroyed in the fire. Therefore, penalty under Section 114A is not tenable.

xx. The Penalty under Section of 112(a) of the Customs Act, 1962 is also not justified in the background of the fact that the noticee had not done or omits any act, which would render the goods liable to confiscation under Section 111, or abets the doing or omission of such an act. The subject show cause notice does not allege against the noticee that due to any of their act, goods became liable for confiscation. As a matter off act, goods had been destroyed in the fire, and proper intimation was also given to the customs authorities. There is no dispute on this aspect, and further, the noticee had paid the amount received from the insurance company as customs duty involved in the goods destroyed in the fire. The noticee had discharged all its obligations as a Licensee under Section-57 of Customs Act and other related regulations. Therefore, the proposal to levy a penalty under Section 114A/112(a) is not tenable.

xxi. The proposal to impose the penalty is also not justified and not tenable in the absence of any specific reasons and grounds to invoke Section 73A of the Customs Act, 1962. The licensee is liable to pay duty, interest, fines, and

penalties if any warehoused goods are removed in contravention of Section 71 of the Customs Act, 1962.Therefore, the authority must allege and establish that the goods had been removed from the warehouse illegally. It is an admitted fact that goods were destroyed in the fire and not removed from the warehouse. Therefore, Section 73A of the Customs Act, 1962 cannot be invoked, and no penalty can be levied from the noticee.

xxii. The most important and crucial aspect, which is missed out by the authority before issuing the subject Show Cause Notice and demanding duty, Interest, fines, and penalty is that the Assistant Commissioner or Deputy Commissioner of Customs as the case maybe, had the power to remit the duty on the imported goods lost or destroyed (other than pilferage), at any time before clearance for home consumption, though the Customs authorities got themselves satisfied that the goods were destroyed in the fire for no fault of any party, the duty could have been remitted under the provision of Section 23 of the Customs Act, 1962. The authority did not exercise the said provision, and the noticee had compensated the said loss to the revenue. The custodian cannot be held liable vicariously for any loss occurred at the warehouse. Further, it is submitted that there is no time limit prescribed under Section 23 to lodge a claim for the remission of duty, therefore, the Assistant Commissioner of Customs may consider granting remission of duty in consultation with the importer under Section 23 of the Customs Act, 1962.

xxiii. There is no dispute that the fire took place, and no one was responsible for the same. There is clear evidence that the customs authorities were duly informed about the incident, and inventory was also taken. In this view of the matter present is a fit case to grant remission of duff under Section 23 of the Customs Act, 1962.

17. Personal hearing were attended by Shri K.J. Kanariwala Consultant on 21.05.2021 for M/s. Midas Polychem LLP and they reiterated his earlier submission dated 08.03.2021.

18. Personal hearing was attended by Shri Dhaval Shah, Advocate, Shri Maulik Nanawati, Advocate, Shri Juggilal, SIO, CWC, Isanpur and Shri Hariom Singh, CWC, RO, Ahmedabad on 23.02.2021 for M/s Central Warehousing Corporation, Adalaj in virtual mode. They reiterated their written submission dated 24.12.2020 and contended that the good were destroyed in fire and therefore it could not be construed as removal in contravention ofsection 71 of the Customs Act, 1962 and therefore the provisions under section 73 (A) of Customs Act, 1962 was not applicable to the present case, hence demand of differential duty, interests and penalty under Section 73(A) of Customs Act, 1962 is not justified. They submitted that the provisions for demand of duty under section 28(4) of the Customs Act, 1962 were not applicable to their case as the same related to the importer, or the exporter or the agent or employee of the importer or exporter. Further it was contended that the said provisions can be invoked in the case of suppression, mis-statements etc, and there is no allegation in the SCN against the

noticee. Hence extended period of limitation under Section 28(4) cannot be invoked. They further submitted that the amount paid by them to the Customs department was not the duty but it was compensation. The Custodian was obliged to take insurance of the value of the goods, which they have fulfilled and upon receipts of the insurance claim towards duty, noticee had paid the said amount to the department only because amount of duty component paid as compensation, it cannot be construed that custodian was liable to pay any duty.

ORIGINAL ADJUDICATION ORDER:-

19. After considering submissions and records of personal hearings, the Joint Commissioner of Customs, Ahmedabad passed the following order-in-original vide OIO No. 21/JC/AKM/O&A/2020-21 dated 28.05.2021:-

A. For M/s Midas Polychem LLP:

(i) The value declared by M/s Midas Polychem LLP was enhanced to Rs. 5,80,30,492/- of imported goods in terms of the provisions of Section 14 of the Customs Act,1962 read with the provisions of Rule 12 of the Customs Valuation Rules 2007.

(ii) The imported goods valued at Rs. 5,80,30,492/- were confiscated under Section 111(m) of the Customs Act,1962 and allowed redemption on payment of redemption fine of Rs. 58,00,000/- (Rupee Rs. Fifty Eight Lakhs only)under Section 125(i) of the Customs Act,1962, in lieu of Confiscation.

(iii) Demanded Customs duty of Rs.15,69,348/-(Rupees Fifteen Lakhs Sixty Nine Thousand Three Hundred Forty Eight only) under section 28(4) of Customs Act,1962 along with interest under Section 28AA of the Customs Act, 1962. Duty amounting to Rs. 6,55,952/- paid by was appropriated against the demand confirmed.

(iv) Imposed penalty of Rs.15,69,348/- Rupees Fifteen Lakhs Sixty Nine Thousand Three Hundred Forty Eight only) under section 114A of the Customs Act, 1962.

(v) No penalty was imposed under section 112(a) of the Customs Act, 1962 as per proviso to Section 114A of Customs Act, 1962.

(vi) Imposed a penalty of Rs.10,00,000/- (Rupees Ten Lakhs only) under section 114AA of the Customs Act,1962 on M/s Midas Polychem LLP.

(vii) The bond executed at the time of provisional assessment of the goods was enforced to recover the above discussed dues.

B. For Central Warehousing Corporation, CFS, Adalaj:

(i) Did not find fit to confiscate 49.500 MT of LDPE prime Grade valued at Rs. 41,20,116/- again as the entire quantity of goods i.e. 708.125 MT of LDPE Prime grade already confiscated on the part of the importer.

(ii) Demanded Customs duty of Rs.10,88,875/-(Rupees Ten Lakhs Eighty Eight Thousand Eight Hundred Seventy Five under section 73A read with section 28(4) of the Customs Act, 1962 alongwith interest at appropriate rate under the provisions of Section 73A read with Section 28AA of the Customs Act, 1962. Duty of Rs. 9,69,899/- (Rs. Nine Lakhs Sixty Nine Thousand Eight Hundred Ninety Nine Only) has already been paid vide Bank Challan No. 3678 dated11.6.2018, was appropriated against the demand confirmed.

(iii) No penalty was imposed under Section 114A and 112(a) of the Customs Act, 1962.

(iv) Imposed a penalty of Rs. 5000/- (Rupee Five Thousand only) under Section 73A of Customs Act, 1962.

APPEAL BEFORE COMMISSIONER OF CUSTOMS (APPEALS), AHMEDABAD AND ORDER-IN-APPEAL:-

20. Aggrieved by the above said OIO, both the noticees filed appeals in the Commissioner of Customs (Appeals), Ahmedabad. The Commissioner of Customs (Appeal), Ahmedabad vide his order-in-appeal (OIA) no. AHM-CUSTM-000-APP-163 & 164-23-24 dated 14.09.2023 upheld the OIO that the imported goods were LDPE 'Prime Grade' which was based on Test Report of the CRCL Vadodara. Further, the case was remanded for de-novo adjudication for supplying the contemporaneous import price data to M/s. Midas Polychem LLP and taking their submissions on record and deciding on limitation and invocation of Section 28 (4) of the Customs Act, 1962 and penalties imposed under Section 114A and 114AA. The Commissioner of Customs (Appeals) further ordered to consider the submissions made by M/s. CWC regarding limitation and invocation of Section 28 (4) of the Customs Act, 1962 before passing an order.

DEFENCE SUBMISSIONS AND PERSONAL HEARINGS DURING DE-NOVO ADJUDICATION:

21. M/s. Central Warehousing Corporation submitted a written submission on 05.09.2024 vide which they reiterated their earlier submission dated 24.12.2020 and additionally submitted the following:-

a. Regarding mis-declaration of value of goods-

i. The mis-declaration happened before fire incidence. The Custodian should not be held responsible for actions of the importer resulting in Customs duty difference. The relevant portion of Section 18 – Provisional Assessment of duty :-

"[(3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order 10 [or re-assessment order] under sub-section (2), at the rate fixed by the Central Government under section 11 [28AA] from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.]"

ii. Regarding relinquishment of title of goods by M/s. Midas Polychem LLP, Customs provisions (Section 23) are as under:-

"[(2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon;]"

In instant case goods were already deposited in warehouse (In-bond) and two ex-bond operations on 29.02.2016 and 09.06.2016 were also undertaken i.e. Bonder cannot relinquish his title on subject bonded goods & for any consequences arise due to mis-declaration of value Bonder is responsible.

iii. As the importer has not relinquished his titles, any consequences resulted due to 'Mis-declaration of Value', Custodian is not responsible.

b. Regarding invoking Section-73A:

i. Invoking Section 73A to Custodian/ Warehouse keeper is illegal and untenable as none of the limbs of the said provisions are satisfied in the present case in respect of M/s. CWC.

(a) The goods stored in godown No. 6 always remained in the warehouse and custodian had complied all its responsibilities as prescribed and there are no allegations or evidence that the fire occurred at the behest of the CWC.

(b) The third sub-clause can be placed in service only if the goods are removed in contravention of Section 71

(c) Section 71 provides that "no warehouse goods shall be taken out of a warehouse except on clearance for home consumption or export or for removal to another warehouse, or as otherwise provided by this act". The goods were destroyed in the fire, which cannot be said to be removed from the warehouse.

ii. "Improper removal of warehoused goods from warehouse" is not applicable in the said case. They relied upon order of Hon'ble Supreme Court of India dated 20.03.2024 in the matter of M/s. Bisco Limited vs. Commissioner of Customs and Central Excise.

21.1 Opportunities to be heard was given on 29.07.2024, 21.08.2024, 30.08.2024 and 05.09.2024, however, The Central Warehousing Corporation submitted that they do not want any personal hearing and submitted to consider their above written submission on record.

22. M/s. Midas submitted a written submission on 10.10.2024 vide which they submitted the following:-

i. All the points of the defence submission dated 08.03.2021 to be considered.

ii. The Para 8.1 of the OIA dated 14.09.2023 states that "*However on perusal of the impugned order, it is observed that the adjudicating authority has not recorded any contemporaneous import data as reflected in NIDB data. Further, there is nothing on record to suggest that any such data was provided to the*

appellant and their submissions were taken on record before re-determining/enhancing the assessable value of the goods. I am of the considered view that before enhancing the declared value on the basis of the contemporaneous import data, the relevant contemporaneous import data should have been provided to the appellant." Under para 8.2 of the OIA, the appellate authority has further recorded - "*therefore, in light of the above observation, I am of the considered view that the impugned order is a non-speaking order and has been passed in violation of principles of natural justice. Hence, the impugned order suffers from legal infirmity on this count and I find remitting the case mentioned above for passing fresh order, after supplying the contemporaneous import price data relied upon by the department in the impugned order to the appellant and taking submissions made by the appellant on record, becomes sine qua non to meet the ends of justice.*". The same view has been recorded by the appellate authority under Para 10 of his order dated 14.09.2023.

iii. Therefore, in terms of the observation and the direction of the appellate authority, the adjudicating authority is required to provide the noticee all kind of information related to the contemporaneous import data before taking any decision in respect of the valuation of the imported goods. If such contemporaneous data is not available, the transaction value is required to be accepted.

iv. The noticee would like to submit that the value declared was just and fair value keeping the import quantity and track record of the noticee. The noticee is regular importer of all kind of plastic granules and in majority directly from manufacturer supplier. In the present case, the supplier is a marketing company of the manufacturer and not any normal trader. Further, the payment terms were on the basis of the letter of credit opened by the noticee in advance in favour of the supplier. Declared value cannot be rejected simply based on standing order 7493/99 dated 03.12.1999 and the declared value is actual price paid by the noticee. There is not allegation that the noticee and supplier are related and the price is not the sole consideration for the sale. None of the circumstances of Rule 3(2) of the Valuation Rules is present and declared value is required to be accepted. Loading of the value of the basis of PLATT prices without any corroborative evidences or on the basis of contemporaneous details which are not disclosed to the importer is not acceptable as held in catena of decisions.

v. The arbitrary enhancement of the value of the imported goods is not legal and proper and is clearly in violations of the provisions of the section 14 of the Customs Act, 1962 read with Customs Valuation Rules, 2007.

vi. The extended period is not invokable in the present case.

vii. The SCN is not sustainable and is required to be dropped forthwith and substantive benefit is required to be extended to the noticee.

22.1 Opportunities to be heard was given on 19.12.2024, which was attended by Shri K. J. Kinnariwala, Consultant. They reiterated their written submission and submitted that in terms of the Appellate Order, the Contemporaneous Import Data were required to be provided to the noticee. The Contemporaneous Import Data was provided to the noticee during personal hearing. They requested for 15 days' time for their submission, however no submission has been received by this office till date. Therefore, now I proceed further to decide the matter.

DISCUSSIONS AND FINDINGS:

23. I have carefully gone through the show cause notice, defence replies furnished in course of original adjudication as well as de-novo adjudication and records of personal hearings and order-in-appeal in the matter. I have also gone through the documents available on records.

24. Ongoing through the Order-in-Appeal (OIA) No. AHM-CUSTM-000-APP-163 & 164-23-24 dated 14.09.2023 passed by the Commissioner of Customs (Appeals), Ahmedabad, I find that the OIA upheld the OIO that the imported goods were LDPE 'Prime Grade' which was based on Test Report of the CRCL Vadodara. Therefore, I hold that M/s. Midas Polychem LLP has mis-declared the imported goods as LDPE 'Off Grade' instead of LDPE 'Prime Grade' and I reject all the submissions by the noticee M/s. Midas regarding imported goods not being 'Prime Grade'.

24.1 Further, the present case was remanded by the OIA for de-novo adjudication for supplying the contemporaneous import price data to M/s. Midas Polychem LLP and taking their submissions on record and deciding on limitation and invocation of Section 28 (4) of the Customs Act, 1962 and penalties imposed under Section 114A and 114AA. The Commissioner of Customs (Appeals) further ordered to consider the submissions made by M/s. CWC regarding limitation and invocation of Section 28 (4) of the Customs Act, 1962 before passing an order. Therefore, the issues for consideration before me in these proceedings are as under-

(a) Whether the value enhancement to Rs. 5,80,30,492/- of imported goods i.e. LDPE 'Prime Grade' in light of Contemporaneous import price data is correct in terms of the provisions of Section 14 of the Customs Act,1962 read with the provisions of Rule 12 of the Customs Valuation Rules 2007?

(b) Whether extended period is invocable under Section 28(4) against M/s. Midas Polychem LLP and they are liable to pay the differential amount of Customs Duty, under Section 28(4) of the Customs Act, 1962 along with interest under Section 28AA of the Customs Act, 1962?

(c) Whether the impugned goods imported by M/s. Midas should be held liable to confiscation under Section 111 (m) of the Customs Act, 1962?

(d) Whether M/s. Midas are liable to penalty under the provisions of Section 112/114A and 114AA of the Customs Act, 1962?

(e) Whether extended period is invocable under Section 28(4) against M/s. CWC and they are liable to pay the differential amount of Customs Duty, under section 73A read with section 28(4) of the Customs Act, 1962 along with interest at appropriate rate under the provisions of Section 73A read with Section 28AA of the Customs Act, 1962?

(f) Whether the 49.500 MT of LDPE prime Grade valued at Rs. 41,20,116/- destroyed in fire incidence in custody of M/s. CWC should be held liable to confiscation under Section 111 (m) of the Customs Act, 1962?

(g) Whether M/s. CWC are liable to penalty under the provisions of Section 112/114A and 114AA and 73A of the Customs Act, 1962?

M/S. MIDAS POLYCHEM LLP:-

24.2 Whether the value enhancement to Rs. 5,80,30,492/- (Rupees Five Crore Eighty Lakhs Thirty Thousand Four Hundred and Ninety Two Only) of imported goods in light of Contemporaneous import price data is correct in terms of the provisions of Section 14 of the Customs Act,1962 read with the provisions of Rule 12 of the Customs Valuation Rules 2007?

24.2.1 I find that the M/s. Midas imported "Low Density Polyethylene (LDPE) off grade" vide Four (04) Bills of Entry, with declared values as given in Table-2 below:

Table-2

S. No.	BE No./date	Qty. (MT)	Decl. rate /MT (USD)
1	3176422/05.11.2015	123.750	1075
2	3176424/05.11.2015	74.25	1075
3	3386983/26.11.2015	138.875	1000
4	3387431/26.11.2015	445.50	1100
	Gross Total	**708.125**	-

24.2.2 I find that test results given by CRCL, Vadodara revealed the imported goods being "Low Density Polyethylene (LDPE) **Prime Grade**" instead of "Low Density Polyethylene (LDPE) off grade". The same was also upheld by the Commissioner of Customs (Appeals), Ahmedabad vide his Order-in-Appeal (OIA) No. AHM-CUSTM-000-APP-163 & 164-23-24 dated 14.09.2023. I find that on verification of declared values of the imported goods with contemporaneous import price data as reflected in ICES/NIDB data the values declared by the importer were on lower side since they declared the value for LDPE 'Off Grade' by the proper officer and he rejected the same in terms of

Section 14 of the Customs Act, 1962 read with Rule 12 of Customs Valuation (Determination of value of imported goods) Rules, 2007 as amended.

24.2.3 Section 14 is reproduced below:-

> *"**14. Valuation of goods.** -*
> *"(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **the value of the imported goods and export goods shall be the transaction value of such goods**, that is to say, **the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation**, or as the case may be,*
> *…*
> *(iii) **the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section**:*
> *2[(iv) the additional obligations of the importer in respect of any class of imported goods and the checks to be exercised, including the circumstances and manner of exercising thereof, as the Board may specify, where, the Board has reason to believe that the value of such goods may not be declared truthfully or accurately, having regard to the trend of declared value of such goods or any other relevant criteria]*
> *Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50."*

24.2.4 Rule 12 of Customs Valuation (Determination of value of imported goods) Rules, 2007.

> *"**12. Rejection of declared value**. — (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.*
> *(2) At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).*

Explanation. - (1) For the removal of doubts, it is hereby declared that :-

(i) This rule by itself does not provide a method for determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 9.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth and accuracy of the declared value after the said enquiry in consultation with the importers.

(iii) The proper officer shall have the powers to raise doubts on the truth or accuracy of the declared value based on certain reasons which may include -

(a) the significantly higher value at which identical or similar goods imported at or about the same time in comparable quantities in a comparable commercial transaction were assessed;

(b) the sale involves an abnormal discount or abnormal reduction from the ordinary competitive price;

(c) the sale involves special discounts limited to exclusive agents;

(d) the misdeclaration of goods in parameters such as description, quality, quantity, country of origin, year of manufacture or production;

(e) the non declaration of parameters such as brand, grade, specifications that have relevance to value;

(f) the fraudulent or manipulated documents."

24.2.5 The original adjudicating authority while passing order re-assessed above Bills of Entry with finally assessed values as given in Table-3 below on the basis of contemporaneous data:-

Table-3

S. No.	BE No./date	Qty. (MT)	Decl. rate /MT (USD)	Assessed Rate /MT (USD)
1	3176422/05.11.2015	123.750	1075	1195
2	3176424/05.11.2015	74.25	1075	1195
3	3386983/26.11.2015	138.875	1000	1195
4	3387431/26.11.2015	445.50	1100	1235

24.2.6 I further find that while re-determining value of the subject goods under Rule 3 to 9 of the Customs Valuation Rules, 2007 (as amended), the proper officer relied upon the following Bills of Entry for contemporaneous import price data as given in in Table-4 below. The Data was provided to the noticee during the personal hearing held on 19.12.2024.

Table-4

For assessment of BEs at Sr. No. 1 to 3

BE No.	Date	Country of Export	Description	Qty. (in MT)	Declared Value (US$)
2439688	01-09-2015	SA	LDPE - LD 2023 CC	24750	1320
2748178	29-09-2015	SA	LDPE - LD0823 HA	24750	1195
2748178	29-09-2015	SA	LDPE - LD0322 GO	24750	1195
2748178	29-09-2015	SA	LDPE - LD2023 OO	24750	1195
2768474	30-09-2015	SA	LLDPE SABIC M500026	49500	1370
2817337	06-10-2015	SA	LLDPE SABIC M500026	99000	1240
2845598	07-10-2015	SA	EXXONMOBIL LD150AC 5073095	24750	1280
2839735	07-10-2015	SA	LDPE LUPOLEN 2427K	51000	1225
2852649	08-10-2015	SA	LDPE LUPOLEN 2427K	51000	1215
2855509	08-10-2015	SA	LDPE LUPOLEN 2427K	51000	1215
2862425	09-10-2015	SA	LUPOLEN 2421K	49500	1215
2946914	16-10-2015	SA	LOW DENSITY POLYETHYLENE LD1925AS	34000	1195
2966632	17-10-2015	SA	LDPE - LD 0823 HA S	49500	1225
2966634	17-10-2015	SA	LDPE - LD 2023 OO S	49500	1225
3045419	26-10-2015	SA	EXXONMOBIL LD150AC 5073095	24750	1200
3093304	29-10-2015	SA	LOW DENSITY POLYETHYLENE LD4025AS	49500	1225
3093303	29-10-2015	SA	LOW DENSITY POLYETHYLENE LD4025AS	49500	1225

In view of above contemporaneous data, the Bills of Entry No. 1 to 3 were assessed at the lowest of prices found for similar or identical goods imported in identical quantities from the same country which is found to be **1195 USD**. For re-determining of value of subject goods under Bill of Entry No. 4, weighted average method was adopted which comes out to 1234.56, hence value taken as **1235 USD**. In above table-4, I noticed that 02 Bills of entry pertain to the noticee themselves, where value was declared as **1225 USD**. Hon'ble Tribunal, Ahmedabad in the matter of ***KUMAR IMPEX VS. CC JAMNAGAR (PREV.) vide Order No. A/11108/2023 DATED 03.05.2023*** held that:

> *"4.4 Clause iii (a) of the said explanation clearly prescribes that wherever a significantly higher value of identical or similar goods is noticed in comparable transactions at roughly the same time the declared value can be rejected. In the instant case it is notice that the declared assessable value was USD 1.2/-kg and contemporaneous imports were noticed that USD 2.1 to 2.85 USD kg. As can be seen from the tables in para 2.4 above.*
>
> *4.5 It is also notice that the products has been described as Polyester Knitted Fabrics in all these entries in table in para 2.4. The quantity imported by the appellant is 21540 kgs.,and the quantity imported against bill of entries No.*

2198984 dated 1.01.2021 and 2198928 dated 01.01.2021 is 23905 kg.,and 24265 kg., is comparable. All the imports were made from China. In this background, we find that the imports are comparable in all respects.

5. In the above factual scenario, we do not find any error in the impugned order rejecting the declared value and accepting the lowest of the contemporaneous import value of identically described goods falling under the identical heading imported at roughly the same time. The appeal is consequently dismissed."

24.2.7 In view of the above, I hold that the values arrived at by the original adjudicating authority for re-assessing the above said Bills of Entry are correct and proper in terms of Section 14 of the Customs Act, 1962. I also hold that contemporaneous import price data has been disclosed to the importer at this stage in compliance to the order of the Commissioner of Customs (Appeals), Ahmedabad.

24.3 Whether extended period is invocable under Section 28(4) against M/s. Midas Polychem LLP and they are liable to pay the differential amount of Customs Duty, under Section 28(4) of the Customs Act, 1962 along with interest under Section 28AA of the Customs Act, 1962?

24.3.1 I find that Differential duty of **Rs.15,69,348/-(Rupees Fifteen Lakhs Sixty Nine Thousand Three Hundred Forty Eight only)** has been proposed to be recovered under Show Cause Notice under Section 28(4) of the Customs Act, 1962 along with interest under Section 28AA of the Customs Act, 1962 from M/s. Midas Polychem LLP.

24.3.2 Section 28 (4) is reproduced below as:-

*"**Section 28(4)**- Where any duty has not been levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-*
(a) collusion; or
*(b) **any wilful mis-statement**; or*
*(c) **suppression of facts,***
by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

Section 28AA of the Customs Act, 1962 states that:

*"[**28AA. Interest on delayed payment of duty**--[(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court,*

Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(2) Interest at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,--

(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 151A; and

(b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.]"

24.3.3 I find that the importer had not disclosed full truth and correct information about the description of the imported goods and the value of the goods imported by them, there is a deliberate attempt on part of the importer to withhold essential material information from the department about the imported goods and value thereof. I find that all these material information have been concealed from the department deliberately, consciously and purposefully so as to evade payment of applicable customs duty. Therefore, in this case, all essential ingredients exist to invoke the extended period in terms of Section 28(4) of Customs Act, 1962, to demand the applicable Customs duty, not paid by them, and to appropriate the Customs duty amounting to Rs. 6,55,952/- already been paid by them under protest. I find that the importer is also liable to pay interest on Customs duty demanded under Section 28AA of the Customs Act, 1962.

24.3.4 Further, to rebut the above contention of M/s Midas that there is no scope of invocation of extended period, I rely on the ratio of the decision of jurisdictional Hon'ble Gujarat High Court rendered in case *OF* ***M/S. COMMISSIONER OF C.EX. SURAT-I VS. NEMINATH FABRICS PVT. LTD. REPORTED IN 2010 (256) E.L.T. 369 (GUJ.).*** Though the said case is relating to Section 11A of the Central Excise Act, 1944 but Section11A of the Central Excise Act, 1944 is pari materia with Section 28 of the Customs Act, 1962 as held by the Hon'ble Supreme Court in the case *OF* ***UNIWORTH TEXTILES LTD. VS. COMMISSIONER REPORTED IN 2013 (288) E.L.T. 161 (S.C.).*** Hon'ble Gujarat High Court in the said case, interalia has held as under:

"11. *A plain reading of sub-section (1) of Section 11A of the Act indicates that the provision is applicable in a case where any duty of excise has either not been levied/paid or has been short levied/short paid, or wrongly refunded, regardless of the fact that such non levy etc. is on the basis of any approval, acceptance or assessment relating to the rate of duty or valuation under any of the provisions of the Act or Rules thereunder and at that stage it would be open to the Central Excise Officer, in exercise of his discretion to serve the show cause notice on the person chargeable to such duty within one year from the relevant date.*

12. *The Proviso under the said sub-section stipulates that in case of such non levy, etc. of duty which is by reason of fraud, collusion, or any mis-statement or suppression of facts, or contravention of any provisions of the Act or the rules made thereunder, the provisions of sub-section (1) of Section 11A of the Act shall have effect as if the words "one year" have been substituted by the words "five years".*

13. *The Explanation which follows stipulates that where service of notice has been stayed by an order of a Court, the period of such stay shall be excluded from computing the aforesaid period of one year or five years, as the case may be.*

14. *Thus the scheme that unfolds is that in case of non levy where there is no fraud, collusion, etc., it is open to the Central Excise Officer to issue a show cause notice for recovery of duty of excise which has not been levied, etc. The show cause notice for recovery has to be served within one year from the relevant date. However, where fraud, collusion, etc., stands established the period within which the show cause notice has to be served stands enlarged by substitution of the words "one year" by the words "five years". In other words the show cause notice for recovery of such duty of excise not levied etc., can be served within five years from the relevant date.*

15. *To put it differently, the proviso merely provides for a situation whereunder the provisions of sub-section (1) are recast by the legislature itself extending the period within which the show cause notice for recovery of duty of excise not levied etc. gets enlarged. This position becomes clear when one reads the Explanation in the said sub-section which only says that the period stated as to service of notice shall be excluded in computing the aforesaid period of "one year" or "five years" as the case may be.*

16. *The termini from which the period of "one year" or "five years" has to be computed is the relevant date which has been defined in sub-section (3)(ii) of Section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the*

superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.

***17. The proviso cannot be read to mean that because there is knowledge, the suppression which stands established disappears**. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.*

18.** The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. **Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term "relevant date" nugatory and such an interpretation is not permissible.

19. The language employed in the proviso to sub-section (1) of Section 11A, is, clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified thereunder, the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the only requirement of the provision. Once it is found that the ingredients of the proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom.

***20.** Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of Section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept of date of knowledge and has imported into the proviso a new period of limitation of six months from the date of knowledge. The reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of Section 11A would be applicable. However such reasoning appears to be fallacious inasmuch as once the suppression is admitted, **merely because the department acquires knowledge of the irregularities the suppression would not be obliterated**."*

24.3.5 In the present era of self-assessment, department largely relies on the declaration of description and valuation thereof made by importers. The onus of declaring legitimates value for the imported goods have been passed on the importer. I find that in the present case, there was suppression of material facts about the description of the imported goods by way of mis-declaration and under valuing the goods, which were not disclosed in the Bills of Entry filed by them, thus, the importer has failed to discharge the statutory obligation cast on them under the provisions of the Customs Act, 1962; it was only known when the Assessing Officer sent samples for testing purpose and when the results thereof revealed that the imported goods were of LDPE Prime Grade not the LDPE Off Grade, which resulted in revenue loss to the Government. Thus, the importer had contravened the provisions of the Customs Act, 1962, with intent to evade payment of applicable Customs duty. The deliberate effort to mis-declare the description of goods and the value of imported goods and to mis-lead the department into hoodwinking to circumvent correct amount of Customs duty is utter disregard to the requirement of law and breach of trust deposed on them. In view of the above, I find that the extended period is invocable and M/s. Midas is liable to pay Customs duty of Rs.15,69,348/-(Rupees Fifteen Lakhs Sixty Nine Thousand Three Hundred Forty Eight only) under section 28(4) of Customs Act,1962 and interest at appropriate rate under the provisions of Section 28AA of the Customs Act, 1962. Since, the differential Custom duty amounting to Rs. 6,55,952/- (Six Lakhs Fifty Five Thousand Nine Hundred Fifty Two Only) paid by them from time to time under protest, I hold the protest is vacated and amount is appropriated against the demand confirmed.

24.4 Whether the impugned goods imported by M/s. Midas should be held liable to confiscation under Section 111 (m) of the Customs Act, 1962?

24.4.1 I find that in the Show Cause Notice, it is alleged that the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962. Section 111(m) of the Customs Act, 1962 reads as follows:

> *"**Section 111**. Confiscation of improperly imported goods, etc. – The following goods brought from a place outside India shall be liable to confiscation: -*
>
> *…*
>
> *(m) [any goods which do not correspond in respect of value or in any other particular] with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under trans-shipment, with the declaration for trans-shipment referred to in the proviso to sub-section (1) of section 54;"*

From the perusal of Section 111(m) of the Customs Act, 1962 it is clear that any goods which are imported by way of the mis-declaration, will be liable to confiscation. As discussed in the foregoing paras, it is evident that M/s. Midas has deliberately mis-declared the Grade and value of the impugned to evade payment of due customs duty.

24.4.2 I find that in terms of Section 46 (4) of the Customs Act, 1962, M/s. Midas was required to make declaration as regards the truth of contents of the Bill of Entry submitted for assessment of Customs Duty but they have contravened the provisions of Section 46(4) of the Customs Act, 1962 in as much as they have mis-declared the goods imported, thereby short paid the duty with clear intent to evade payment of Customs Duty. Thus, I find that M/s. Midas have violated the provisions of Section 46 (4) of the Customs Act, 1962. All these acts on part of M/s. TATA Capital have rendered the imported goods liable to confiscation under Section 111 (m) of the Customs Act, 1962.

24.4.3 As the impugned goods are found liable to confiscation under Section 111 (m) of the Customs Act, 1962, I find it necessary to consider as to whether redemption fine under Section 125(1) of Customs Act, 1962 is liable to be imposed in lieu of confiscation in respect of the imported goods, which are not physically available for confiscation. The Section 125 (1) of the Customs Act, 1962 reads as under:-

> "***125 Option to pay fine in lieu of confiscation*** –
>
> *(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit…"*

24.4.4 M/s. Midas have contested that the Provisions of Section 111(m) of the Customs Act, 1962 are not invokable for the goods already cleared. I find that though, the goods are not physically available for confiscation and in such cases redemption fine is imposable in light of the judgment in the case of ***M/S. VISTEON AUTOMOTIVE SYSTEMS INDIA LTD. REPORTED AT 2018 (009) GSTL 0142 (MAD)*** wherein the Hon'ble High Court of Madras has observed as under:

> "….
> ….
> ….
>
> 23. *The penalty directed against the importer under Section 112 and the fine payable under Section 125 operates in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges, the improper and irregular importation is sought to be regularised, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the redemption fine. The opening words of Section 125, "Whenever*

confiscation of any goods is authorised by this Act ....", brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act. We accordingly answer question No. (iii).

...."

24.4.7 Hon'ble High Court of Gujarat by relying on this judgment, in the case of ***SYNERGY FERTICHEM LTD. VS. UNION OF INDIA [2020 (33) G.S.T.L. 513 (GUJ.)],*** held that even in the absence of the physical availability of the goods or the conveyance, the authority can proceed to pass an order of confiscation and also pass an order of redemption fine in lieu of confiscation. In other words, even if the goods or the conveyance has been released under Section 129 of the Act and, later, confiscation proceedings are initiated, then even in the absence of the goods or the conveyance, the payment of redemption fine in lieu of confiscation can be passed. The ratio of the above case law is squarely applicable to the facts of the instant case and as such I hold that redemption fine is imposable on the subject goods under Section 125 of the Act.

24.5 Whether M/s. Midas are liable to penalty under the provisions of Section 112/114A and 114AA of the Customs Act, 1962?

24.5.1 Section 112(a) reads as follows:

"Section 112. Penalty for improper importation of goods, etc.-
Any person, -
(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

...
shall be liable, -
(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [1] [not exceeding the value of the goods or five thousand rupees], whichever is the greater;"

Section 114A reads as follows:

*"**Section 114A. Penalty for short-levy or non-levy of duty in certain cases**. -*
Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has 2 [****]been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under 3 [sub-section (8) of section

28] shall also be liable to pay a penalty equal to the duty or interest so determined"

24.5.2 Penalty under Section 114A of the Customs Act, 1962: In forgoing paras, it is held that M/s. Midas is liable to pay the differential duty under Section 28(4) of the Customs Act, 1962, which provides for demand of Duty not levied or short levied by reason of collusion or wilful mis-statement or suppression of facts. Hence as a naturally corollary, penalty is imposable on the Importer under Section 114A of the Customs Act, which provides for penalty equal to Duty plus interest in cases where the Duty has not been levied or has been short levied or the interest has not been charged or paid or has been part paid or the Duty or interest has been erroneously refunded by reason of collusion or any wilful mis statement or suppression of facts. In the instant case, the ingredient of suppression of facts by the importer has been clearly established as discussed in foregoing paras and hence, I find that this is a fit case for imposition of quantum of penalty equal to the amount of Duty plus interest in terms of Section 114A ibid as proposed in the Show Cause Notice.

24.5.3 Penalty under Section 112 of the Customs Act, 1962: I find that fifth proviso to Section 114A stipulates that *"where any penalty has been levied under this section, no penalty shall be levied under Section 112 or Section 114"*. Hence, I refrain from imposing penalty on M/s. Midas under Section 112 of the Customs Act, 1962 as penalty has been imposed on them under Section 114A of the Customs Act, 1962.

24.5.4 Penalty under Section 114AA of the Customs Act, 1962: I also find that the Show Cause Notice proposes to impose penalty on M/s. Midas under Section 114AA of the Customs Act, 1962. The text of the said statute is reproduced under for ease of reference:

*"If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, **any declaration**, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."*

24.5.5 I find that M/s. Midas in spite of being fully aware of the products purchased/imported, deliberately declared the grade and value of imported goods incorrect at the time of filing the said Bill of Entry in order to evade Customs Duty. Thus, I find that for suppression, concealment and furnishing inaccurate description of the goods and mis-declared value thereof for imported goods with an intent to evade payment of applicable customs duty, M/s. Midas is liable for penalty under Section 114AA of the Customs Act, 1962.

24.5.6 Further, to fortify my stand on applicability of Penalty under Section 114AA of the Customs Act, 1962, I rely on the decision of Principal Bench, New Delhi in

case of ***PRINCIPAL COMMISSIONER OF CUSTOMS, NEW DELHI (IMPORT) VS. GLOBAL TECHNOLOGIES & RESEARCH (2023)4 CENTAX 123 (TRI. DELHI)*** wherein it has been held that *"Since the importer had made false declarations in the Bill of Entry, penalty was also correctly imposed under Section 114AA by the original authority".*

CENTRAL WAREHOUSING CORPORATION, CFS ADALAJ

24.6 Whether extended period is invocable under Section 28(4) against CWC and they are liable to pay the differential amount of Customs Duty, under section 73A read with section 28(4) of the Customs Act, 1962 alongwith interest at appropriate rate under the provisions of Section 73A read with Section 28AA of the Customs Act, 1962?

24.6.1 I find that 49.500 MT 'LDPE Prime Grade' valued at Rs.41,20,116/-and stored at Godown no. 6 of Central Warehousing Corporation, CFS Adalaj, got destroyed in fire on 23/24.06.2016, pertaining to M/s. Midas Polychem LLP. I find that the Assistant Commissioner of Customs, ICD Khodiyar demanded Customs duty on the imported goods lost in the fire and CWC subsequently paid Custom duty of Rs. 9,69,899/- (as per rate of provisionally assessed value) vide TR-6 Challan No. 3678 dated 11.06.2018. I find that the Show Cause Notice alleges that CWC were required to pay customs duty of Rs. 10,88,875/-on the above destroyed goods on finally assessed value and proposed to demand and recover the differential duty from CWC along with interest under the provision of section 73A read with provisions of Section 28(4) and 28AA of the Customs Act, 1962.

24.6.2 I find that CWC in their defence contended that they were not in picture until the show cause notice issued to them and specifically denies that the provisions invoked in the show cause notice to levy duty, interest, and penalty do not apply to the Customs bonded warehouse licensed under Section 57 of the Customs Act,1962.

24.6.3 I find that the Central Warehousing Corporation (CWC) is a Government of India undertaking and is a statutory authority created and constituted under the provisions of the Warehousing Corporation Act, 1962 and appointed as the Custodian of the Container Freight Station (CFS) Adalaj, Ahmedabad by the Commissioner of Customs in the exercise of the powers conferred under Section 8/45(1) of the Customs Act, 1962, for the handling of imported and export cargo in Customs notified area, i.e., CFS, Adalaj vide Customs Notification No. 4/90 (CCP) Dated 5.10.1990. I also find that The CFS has the obligation inter-alia to abide by the provisions of Handling of Cargo in Customs Areas Regulations, 2OO9 (HCCAR, 2OO9). I also find that Godown No.6 located in CFS Adalaj was granted license of Public Bonded Warehouse under Section 57 of the Customs Act, 1962 for warehousing of the bonded goods vide letter F. No. VIII/48-01/CFSI/2010 dated 5.3.2010 issued by the Assistant Commissioner of Customs, CFS/ICD, Sabarmati, Ahmedabad and was a Customs area approved under Section 8 of the Customs Act, 1962 and the provisions of Handling of Cargo in Customs Areas

Regulations, 2OO9 (HCCAR, 2OO9) are applicable to the warehoused/stored in the said godown.

24.6.4 Therefore, I reject the arguments of CWC in view of a conjoint reading of Section 57, Section 8 and Section 2(11) of the Customs Act, 1962. I find that "***warehouse***" has always been "***customs area***" being area in which imported goods or export goods are ordinarily kept before clearance by the Customs (prior to 04.05.2017) and inclusion of "***warehouse***" in the definition of "***customs area***" (w. e. f. 04.05.2017). The Sections are reproduced herein under;

> ***"SECTION 57.*** *Licensing of public warehouses. - The Principal Commissioner of Customs or Commissioner of Customs may, subject to such conditions as may be prescribed, licence a public warehouse wherein dutiable goods may be deposited."*

And

> ***"Section 8. Power to approve landing places and specify limits of customs area.*** *The Principal Commissioner of Customs or Commissioner of Customs may, -*
>
> *(a) Approve proper places in any customs port or customs airport or coastal port for the unloading and loading of goods or for any class of goods;*
>
> *(b) Specify the limits of any customs area."*

And

Section 2(11):-

Prior to amendment by Act of 2018 (w. e. f. 04.05.2017)

> *"....*
> *(11) "customs area" means the area of a customs station and includes* ***any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities****;"*

After amendment by Act of 2018 (w. e. f. 04.05.2017)

> *"....*
> *(11) "customs area" means the area of a customs station 14[or* ***a warehouse****] and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities;"*

24.6.5 I find that Regulation 4 of Public Warehousing License Regulations, 2016 are quite relevant and they are crystal clear. It reads as under:-

> ***4. Conditions to be fulfilled by applicant.*** *– Where, after inspection of the premises, evaluation of compliance to the conditions under regulation 3 and conducting such enquiries as may be necessary, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, is satisfied that licence may be granted, he shall require the applicant to,-*
> *(a) provide an all risk insurance policy, that includes natural calamities, riots,* ***fire****, theft, skillful pilferage and commercial crime, in favour of the President of India,* ***for a sum equivalent to the amount of duty involved on the dutiable goods proposed to be stored in the public warehouse at any point of time****;*
> *(b) provide an undertaking binding himself to pay any duties, interest, fine and penalties payable in respect of warehoused goods under sub-section (3) of section 73A or under the Warehouse (Custody and Handling of Goods) Regulations, 2016;*
> *(c****) provide an undertaking indemnifying the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, from any liability arising on account of loss suffered in respect of warehoused goods due to accident, damage, deterioration, destruction or any other unnatural cause during their receipt, delivery, storage, dispatch or handling;*** *and*
> *(d) appoint a person who has sufficient experience in warehousing operations and customs procedures as warehouse keeper*

I find that CWC had provided undertaking and bound themselves to "*any liability arising on account of loss suffered in respect of warehoused goods due to accident, damage, deterioration, destruction or any other unnatural cause during their receipt, delivery, storage, dispatch or handling*" which includes payment of Customs duty and interest both on the goods lost in fire. In view of above, I find that if the goods are lost due to any unnatural cause including fire, the Custodian's undertaking furnished under Regulation 4 of Public Warehousing License Regulations, 2016 made it obligatory on their part to pay duty and interest. I find in present case, that CWC has paid the Customs duty of Rs. 9,69,899/- on the goods lost in fire on provisionally assessed value and are liable to pay differential duty and interest liability arisen due to final assessment on the grounds of mis-declaration and undervaluation of the imported goods by the importer.

24.6.6 I find that CWC has contended that M/s. Midas has not relinquished the titles of imported goods as per their records and being a bonder cannot relinquish his title on subject bonded goods & liable for any consequences arise due to mis-declaration of value. Sub-section 2 of Section 23 of the Customs Act, 1962 which reads as under:-

> ***SECTION 23. Remission of duty on lost, destroyed or abandoned goods.-***
> *(1)……. ……..*
>
> *(2) The owner of any imported goods may, at any time before an order for*

clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon;]

[Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.]

24.6.7 I find that the relinquishment of titles by importers does not arise in this case when goods are destroyed in custody of the Custodian. I find that CWC as custodian of the goods was required to discharge obligation cast upon them by virtue of Handling of Cargo in Customs Areas Regulations, 2009 read with Warehouse (Custody & Handling of Goods) Regulations, 2016. I find that CWC has paid the Customs duty of Rs. 9,69,899/- on the goods lost in fire on provisionally assessed value and also did not seek remission of duty at the relevant time before the competent authority. I apply the emphasis of the judgment in the case of ***MAERSK LINE INDIA PVT. LTD. VS. COMMISSIONER OF CUS. (PREV.), JAMNAGAR REPORTED AT 2024 (389) E.L.T. 230 (TRI. - AHMD.)*** wherein the Tribunal stated that:-

"we find that the appellant have availed benefit of Notification No. 104/94 which permits Duty Free Import of the container subjected to the condition that they are re-exported within six months. In the instance case, same could not be re-exported within six months purportedly due to some fire on the port and damage to other containers, out of 39 containers brought in at the port. Thus, ***there was clearly a breach of condition of exemption notification and in the absence of any remission or waiver of duty having been granted by the competent authorities and the same not having been sought by the party for considerable length of time. The department through a valuer got duty worked out and same was duly discharged by the appellant after paying R.I. The reliance on the matter of Pol India Agencies Ltd. v. CC, Raigad reported in 2009 (237) E.L.T. 354 (Tri. - Mum.) has been properly place by the Commissioner (Appeals) while demanding and confirming the duty.*** *However, we find that in the instant case there has a clear cut finding that the container was damaged due to fire and could not be re-exported. But we find that valuation has not been done with full transparency and such valuation report has not been allowed to be commented upon by the appellants. The grievance thus appears genuine.* ***While in principle, we agree that duty in absence of remission was payable, as import which is subject matter of levy can even take place when goods enter in territorial waters. And only in normal case, the collecting point is deferred till Bill of Entry is filed. However, if goods get destroyed on port, the remission provision comes into play, which in this case was not sought****."*

I find that in absence of any remission of duty application in relevant time, the Customs duty had to be collected from CWC. Had they not deposited the amount of customs duty received by them from insurance company, it would have not only resulted into unjust enrichment but would have resulted into violation of other provisions of the Customs Act, 1962. It is a settled law that the amount collected as Customs duty has to be paid to the credit of the Central Government. Section 28B of the Customs Act, 1962 is the relevant Section for application of the principle that any amount collected as Customs Duty has to be deposited with the Central Government.

24.6.8 I further find that the Customs Act, 1962, itself provides for recovery of duty and interest by virtue of provision of Section 73A of the Customs Act, 1962 which is reproduced below:-

> *"**73A Custody and removal of warehoused goods** - (1) All warehoused goods shall remain in the custody of the person who has been granted a licence under section 57 or section 58 or section 58A until they are cleared for home consumption or are transferred to another warehouse or are exported or removed as otherwise provided under this Act.*
>
> *(2) The responsibilities of the person referred to in sub-section (1) who has custody of the warehoused goods shall be such as may be prescribed.*
>
> *(3) Where any warehoused goods are removed in contravention of section 71, the licensee shall be liable to pay duty, interest, fine and penalties without prejudice to any other action that may be taken against him under this Act or any other law for the time being in force."*
>
> Section 71 is as under:-
>
> *"**71. Goods not to be taken out of warehouse except as provided by this Act**.*
> *- No warehoused goods shall be taken out of a warehouse except on clearance for home consumption or re-exportation, or for removal to another warehouse, or as otherwise provided by this Act."*

I find that in the present case the goods were lost in fire and not transferred/exported nor removed as provided in the Customs Act, 1962. Therefore, provisions contained in Section 71 of the Customs Act, 1962 were violated as far as custody or safekeeping of goods with the custodian of warehouse was concerned. This being the case, I find that provision of Section 73A of the Customs Act, 1962 gets immediately attracted and therefore I am of the considered view that CWC is required to pay duty as well as interest on the goods lost in fire. Since he duty has been partially paid that is required to be appropriated, differential duty is to be recovered along with interest. I further find there being an express provision for safeguarding the government revenue in the Customs

Act, 1962 in the form of Section 28 and Section 73A of the Customs Act, 1962, the cause of revenue is not harmed even if recourse to Handling of Cargo in Customs Area Regulation is not taken.

24.6.9 I further find that the Commissioner of Customs (Appeals), Ahmedabad vide his OIA has ordered to re-examine the applicability of the provisions of Section 28 (4) of the Customs Act, 1962 in the present case. I find that section 28(4) of the Customs Act, 1962 empowers proper Customs officer to demand customs duty/interest not paid or short paid from importer, exporter, agent or employee of importer or exporter. Does this mean that custodian of the goods cannot be "person chargeable to duty"? I find that answer to this question is "NO". Had the intention been simply importer or exporter, the same would have been mentioned in Section 28 (1) as reference of importer, exporter, agent or employee of importer or exporter has been given in Section 28(4) of the Customs Act, 1962. I find that this being the factual position, the Custodian of goods cannot escape from liability to pay Customs duty as such custodian can be chargeable to duty if the circumstances so warrant and in the present case before me the fire in godown harming the cause of revenue has indeed warranted such circumstances. Hence I find that provision of Section 28 (4) of the Customs Act, 1962 has been rightly invoked.

24.6.10 CWC, in his defence contended that before issuing the subject Show Cause Notice and demanding duty, Interest, fines, and penalty is that the Assistant Commissioner or Deputy Commissioner of Customs as the case maybe, had the power to remit the duty on the imported goods lost or destroyed (other than pilferage), at any time before clearance for home consumption, though the Customs authorities got themselves satisfied that the goods were destroyed in the fire for no fault of any party, the duty could have been remitted under the provision of Section 23 of the Customs Act, 1962. I find that it is an undeniable fact that CWC has paid the Customs duty partially on the goods lost in fire on provisionally assessed value. It is also an undeniable fact that CWC did not seek remission of duty at the relevant time before the competent authority before making partially payments of Customs duty. I am of considered view that benefit of remission is available to importer and not to custodian as Section 23 of the Customs Act, 1962 is applicable to the owner of the goods and not to the custodian of the goods which in the present case is CWC.

24.7 Whether the 49.500 MT of LDPE prime Grade valued at Rs. 41,20,116/- destroyed in fire incidence in custody of M/s. CWC should be held liable to confiscation under Section 111 (m) of the Customs Act, 1962?

24.7.1 I find that there was a proposal of confiscation 49.500 MT of LDPE Prime Grade valued at Rs. 41,20,116/- destroyed in fire incidence in custody of M/s. CWC under section 111(m) of the Customs act,1962 in the Show Cause Notice. I find that there was mis- declared and undervalued of the imported goods by the importer and the entire quantity of goods i.e. 708.125 MT of LDPE Prime grade already made liable to confiscation on the part of the Importer. Hence, I do not find fit to again made 49.500

MT of LDPE prime Grade valued at Rs. 41,20,116/- liable to confiscation on the part of CWC.

24.8 Whether M/s. CWC are liable to penalty under the provisions of Section 112/114A and 114AA and 73A of the Customs Act, 1962?

24.8.1 I find that there is a proposal to impose penalty under section 114A/ 112(a) and Section 73A of the Customs Act, 1962 on CWC. As regards penalty under section 114A and 112 (a) of the Customs Act, 1962 on M/s CWC. I briefly discussed Section 114A and 112(a) as under:

SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under 23[sub-section (8) of section 28] shall also be liable to pay a penalty equal to the duty or interest so determined:]

SECTION112 Penalty for improper importation of goods, etc. - Any person, - (a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, ---

It is evident from the above that the same is leviable to the importer of goods and not the custodian, therefore I refrain them from penalty under section 114A and 112 (a) of the Customs Act, 1962.

24.8.2 I find that CWC as being custodian of goods could not keep warehoused goods in its custody, safe, which caused harm to the cause of revenue, however there is nothing on record which suggest that such harm was intentional and CWC has also furnished that fire was non on account of any mala-fide intention on their part. CWC has also paid the partially amount of Customs duty involved in the goods lost in fire. Therefore, I am inclined to take lenient view and of the opinion that imposition of harsh penalty, in such case would amount to stretching the limit too far. Justice would not be seen to be served if penalty for violation of the provisions of law due to circumstances which was not in control of the noticee, I find that it will not be a justifiable act. Thus I impose a meager amount of penalty under section 73 A of the Customs Act, 1962.

24.9 I also find that the ratio of case laws cited by the noticee in their submission are not squarely applicable in this case.

25. I pass the following order -

ORDER

A. M/s. MIDAS POLYCHEM LLP:

(i) I hold that the value of the imported goods by M/s Midas Polychem LLP is enhanced to **Rs. 5,80,30,492/- (Rupees Five Crore Eighty Lakhs Thirty Thousand Four Hundred and Ninety Two Only)** in respect of LDPE Prime Grade imported under guise of LDPE Off Grade in terms of the provisions of Section 14 of the Customs Act,1962 read with the provisions of Rule 12 of the Customs Valuation Rules 2007 as discussed in foregoing paras.

(ii) I hold the total quantity of 708.125 MT of LDPE prime grade having enhanced value of **Rs. 5,80,30,492/- (Rupees Five Crore Eighty Lakhs Thirty Thousand Four Hundred and Ninety Two Only)** liable to confiscation under Section 111(m) of the Customs Act,1962. However, I allow the same to be redeemed on payment of redemption fine of **Rs. 58,00,000 (Rupees Fifty Eight Lakhs Only)** under Section 125 (i) of the Customs Act,1962, in lieu of Confiscation.

(iii) I confirm demand of Customs duty of **Rs.15,69,348/-(Rupees Fifteen Lakhs Sixty Nine Thousand Three Hundred Forty Eight Only)** and recovery of the same from M/s. Midas Polychem LLP under section 28(4) of Customs Act,1962 as discussed in foregoing paras. Since, the Custom duty amounting to Rs. 6,55,952/- (Six Lakhs Fifty Five Thousand Nine Hundred Fifty Two Only) has been paid by them from time to time under protest, I order to vacate the protest and to appropriate the said amount against the demand.

(iv) I confirm the demand of interest at appropriate rate under the provisions of Section 28AA of the Customs Act, 1962 and order to recover the same on the deferential Customs duty as discussed at point (iii) above.

(v) I impose a penalty of **Rs.15,69,348/- Rupees Fifteen Lakhs Sixty Nine Thousand Three Hundred Forty Eight only) PLUS Interest as determined under Section 28AA in (iv) above,** under section 114A of the Customs Act, 1962 on M/s Midas Polychem LLP as discussed in foregoing paras. I refrain M/s Midas Polychem LLP for penalty under section 112(a) of the Customs Act, 1962 as per proviso to Section 114A of Customs Act, 1962.

(vi) I impose a penalty of **10,00,000/- (Rupees Ten Lakhs only)** under section 114AA of the Customs Act,1962 on M/s. Midas Polychem LLP as discussed in foregoing paras.

(vii) The bond executed at the time of provisional assessment of the goods is enforced to recover the above discussed dues.

B. M/s. CENTRAL WAREHOUSING CORPORATION, CFS, ADALAJ:

(i) I do not find fit to confiscate 49.500 MT of LDPE prime Grade valued at Rs. 41,20,116/- again as the entire quantity of goods i.e. 708.125 MT of LDPE Prime grade already order to confiscated on the part of the importer.

(ii) I confirm demand of Customs duty of **Rs. 10,88,875/- (Rupees Ten Lakhs Eighty Eight Thousand Eight Hundred Seventy Five Only))** and recovery of the same from M/s. Central Warehousing Corporation under section 73A read with section 28(4) of the Customs Act,1962 as discussed in foregoing paras. Since, the demand of Rs. 9,69,899/- (Rs. Nine Lakhs Sixty Nine Thousand Eight Hundred Ninety Nine Only) has already been paid, I order to appropriate the same against the demand confirmed.

(iii) I confirm the demand of interest at appropriate rate under the provisions of Section 73A read with Section 28AA of the Customs Act, 1962 and order to recover the same.

(iv) I refrain them from imposing any penalty under Section 114A and 112(a) of the Customs Act, 1962 as discussed in foregoing paras.

(v) I impose a penalty of **Rs. 5000/- (Rupee Five Thousand only)** under Section 73A of Customs Act, 1962, as discussed in foregoing para.

26. The Show Cause Notice No. VIII/10-34/ICD-Khod/O&A/HQ/2016 Dated 11.06.2020 is disposed of in above terms.

Signed by
Shree Ram Vishnoi
Date: 16-01-2025 17:21:10

(SHREE RAM VISHNOI)
Additional Commissioner

DIN: 20250171MN0000616666
F. No. VIII/10-172/ICD-Khod/O&A/HQ/2024-25 Date**: 16.01.2025**

(I) M/S. MIDAS POLYCHEM LLP
401, SPAN TRADE CENTRE
OPP. KOCHRAB ASHRAM, PALDI
AHMEDABAD-380007

(II) M/S. CENTRAL WAREHOUSING CORPORATION
CFS ADALAJ,
PO ADALAJ
DISTRICT- GANDHINAGAR

[NEW ADDRESS-
M/S. CENTRAL WAREHOUSING CORPORATION
OPP. UNNATI VIDYALAYA,
NEAR MAHALAXMI CROSS ROAD.
PALDI, AHMEDABAD-380007]

Copy to:-

(i) The Principal Commissioner, Customs Ahmedabad (Kind Attention: RRA Section).

(ii) The Deputy Commissioner of Customs, ICD – Khodiyar, Ahmedabad

(iii) The Superintendent, Customs, H.Q. (Systems), Ahmedabad, in PDF format for uploading on website of Customs Commissionerate, Ahmedabad

(iv) The Superintendent (Task Force), Customs-Ahmedabad

(v) Guard File