



**OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CUSTOM HOUSE: MUNDRA, KUTCH
MUNDRA PORT& SPL ECONOMIC ZONE, MUNDRA-370421
Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62**

A. File No.	:	CUS/ADJ/COMM/185/2022-Adjn -O/o Pr Commr-Cus-Mundra
B. Order-in-Original No.	:	MUN-CUSTM-000-COM-12-23-24
C. Passed by	:	Shri K. Engineer Commissioner of Customs, Customs House, AP & SEZ, Mundra
D. Date of order and Date of issue	:	04.09.2023/04.09.2023
E. SCN No. & Date	:	SCN F.No GEN/ADJ/COMM/185/2022-Adjn dated 09.09.2022
F. Noticee(s) / Party / Importer	:	1. M/s. GTPL Broadband (P) Ltd, 2. M/s. Vipul. R. Modi (Custom Broker), 3. M/s Swayam Shipping Services (Custom Broker)
G. DIN	:	DIN-20230971MO0000424417

1. यह अपील आदेश संबंधित को नि:शुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.
2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 6(1) के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 129A(1) के अंतर्गत प्रपत्र सीए-3में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है- Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:
“केन्द्रीय उत्पाद एवं सीमा शुल्क और सेवाकर अपीलीय प्राधिकरण, पश्चिम जोनल पीठ, 2nd फ्लोर, बहुमाली भवन, मंजुश्री मील कंपाउंड, गिर्धनगर ब्रिज के पास, गिर्धनगर पोस्ट ऑफिस, अहमदाबाद-380 004”
“Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench, 2nd floor, Bahumali Bhavan, Manjushri Mill Compound, Near Girdharnagar Bridge, Girdharnagar PO, Ahmedabad 380 004.”
3. उक्त अपील यह आदेश भेजने की दिनांक से तीन माह के भीतर दाखिल की जानी चाहिए।
Appeal shall be filed within three months from the date of communication of this order.
4. उक्त अपील के साथ 1000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, दंड या शास्ति रूपये पाँच लाख या कम माँगा हो -/5000 रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, शास्ति या दंड पाँच लाख रूपये से अधिक कितु पचास लाख रूपये से कम माँगा हो। शुल्क का भुगतान खण्ड पीठ बैंच आहरित टिक्कूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीय कृत बैंक की एक शाखा पर बैंक ड्राफ्ट के माध्यम से भुगतान किया जाएगा। Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs. 50 lakh (Rupees Fifty lakhs) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakh (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.
5. उक्त अपील पर न्यायालय शुल्क अधिनियम के तहत -/5 रूपये कोर्ट फीस स्टाम्प जबकि इसके साथ संलग्न आदेश की प्रति पर अनुसूची- 1, न्यायालय शुल्क अधिनियम, 1870 के मदसं 6-के तहत निर्धारित 0.50 पैसे की एक न्यायालय शुल्क स्टाम्प वहन करना चाहिए। The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.
6. अपील ज्ञापन के साथ ड्यूटी/दण्ड/जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये। Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम, 1982 और CESTAT (प्रक्रिया) नियम, 1982 सभी मामलों में पालन किया जाना चाहिए। While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.
7. इस आदेश के विरुद्ध अपील हेतु जहाँ शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहाँ केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष माँग शुल्क का 7.5% भुगतान करना होगा। An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

BRIEF FACTS OF THE CASE:

M/s GTPL Broadband (P) Ltd, (hereinafter referred to as “the noticee” or also as ‘GTPL’ for the sake of brevity), having registered address **at 202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmadabad -380004, Gujarat** (IEC: AADCG1959N) were engaged in importing Optical Line Termination, SFP Modules and Optical Network Terminals/Units (ONTs/ONUs) under the Tariff items **85176950, 85176930, 85176250, 85176990, 85177090, and 85176290** at nil/lower rate of duty by claiming exemption under Notification No.24/2005 Customs dated 01.03.2005, Notification No. 57/2017 Customs dated 30.06.2017 as amended.

1.2. Whereas, the Directorate of Revenue Intelligence (herein referred as DRI for the sake of brevity), Cochin Zonal Unit developed intelligence that ‘the Noticee’ have imported Optical Line Termination, SFP Modules and Optical Network Terminals/Units (ONTs/ONUs) and mis-declared these goods as “Subscriber End Equipment/Router/Networking Equipment” under the Tariff items **85176950, 85176930, 85176250, 85176990, 85177090, and 85176290** in order to wrongly avail the benefit of exemption Notification No. 24/2005 Customs dated 01.03.2005, Notification No. 57/2017 Customs dated 30.06.2017 as amended; and resultantly evading duties of Customs. Therefore, detailed investigation against the said noticee was initiated by the DRI as under:

1.3. Statements of Shri Hetalkumar Dilipkumar Kansara, Assistant General Manager of GTPL was recorded on 10.11.2021 under Section 108 of the Customs Act, 1962 wherein he inter alia stated

- i. that in order to provide broadband related services, equipment like GPON ONT, ONU alongwith other equipments are required which are imported from China through their main supplier M/s ZTE Corporation, Shenzhen, China.
- ii. that these equipments are used in accessing broadband services using FTTH/Fiber optics technology; and are capable of reception and transmission of voices, images or other data using GPON technology.
- iii. that upto August 2018 their imported goods GPON, ONT and ONU were classified by them under tariff item 8517 6990 by reading the description OTN products given at clause (d) of the heading; and later on they found heading tariff item 85176950 more appropriate for their goods, since these products are installed at subscriber end. Thereafter, since August, 2018 they have been availing benefit of Not No.24/2005-Cus, Sl. No.13P.
- iv. that M/s Vipul. R. Modi, the CHA attended the customs clearance work of import made through Mundra Port, on their behalf; who was asked to classify the goods under sub-heading 851769.

1.4 Further statement of Shri Hetalkumar Dilipkumar Kansara was recorded on 18.06.2021 wherein he stated that GTPL do not issue sales invoices, as they are not selling this product to the customers and the ownership of these products are with GTPL only. He also produced copies of commercial invoices, Bills of Entry and packing lists for the period from October, 2020 to 31-08-2021 and the purchase orders.

1.5. Statement of Shri Ajmal Hussain Mohd. Isha Siddiqui, General Manager (Technology) of GTPL was recorded on 08.12.2021 under Section 108 of the Customs Act, 1962 wherein he inter alia stated:

- i. that he looked after Operation management and new broadband connections in the state of Gujarat. He was responsible for any issues relating to new connections and the operational issues relating to the existing connections.
- ii. that they normally use OLT (Optical Line Terminal), with 16/32 ports, and each port can handle 64 customers. The said OLT is placed normally at a common place on terrace of the premises. From this OLT, each port is connected to splitter by optical fibre cables, which splits the optical signal into multiple output. Each output of the splitter is then connected to GPON/ONT/ONU, placed at subscriber’s end by optical fibre cable. That the functions of OLT are to receive optical signals from backend instruments like NOC or POP, and then send these optical signals in multiple output

ports. That GPON ONT/ONU receives optical signals from OLT. It is placed at the subscriber's end. It has single optical signal input and electrical signal output through Ethernet port and Wi-Fi signal output. That they normally install GPON ONU of models ZXHN F612, ZXHN F601 and ZXHN F660 manufactured by ZTE Corporation, Shenzhen, China; and Nokia 7368 ISAM, imported from France.

- iii. that the GPON/ONT/ONU with model ZXHN F660 of FTE is capable of carrying data for VoIP call and IPTV facilities. But, GTPL were not providing these facilities. Such VoIP calls and IPTV facilities can be availed through additional instruments. The models ZXHN F612, ZXHN F601 and Nokia 7368 ISAM do not have VoIP call facility, but they are capable of carrying data for IPTV facility. The GPON/ONT/ONU receives signals in optical signal format; and gives output in electrical signals through Ethernet port and transmits Wi-Fi signals through Wi-Fi antenna to a limited distance to the particular customer.
- iv. that he had perused the brochures produced by Shri Hetal Kansara, and confirmed that these brands of GPON ONUs are normally installed by them for their customers.
- v. that Optical fibre is a medium capable of carrying data in any form like voice, video etc. GPON ONUs are capable of receiving optical signals containing the data, and separate the same into voice, video etc. Such signals are then converted into electrical signals and sent through Ethernet ports; and convert into Wi-Fi signals and transmit through Wi-Fi antenna. GPON ONT/ONU are routing apparatus working with dynamic multiple IP usage facility to the particular customer, to whom the apparatus is assigned.
- vi. that the said goods imported by them are capable of transporting data, voice and video/images using GPON technology.

1.6. Statement of Shri. Vipul Rameshchandra Modi, Proprietor of M/s Vipul R. Modi, Customs Broker was recorded on 07.03.2022 under Section 108 of the Customs Act, 1962, wherein he inter alia stated:

- i. that as a custom broker, he helped the importers for clearance of imported goods, by filing Bills of Entry and completing other formalities required in Customs, including presenting of cargo for examination, if required, and duty payment formalities. Also, for export, they would file Shipping Bill on behalf of the exporters and present the goods before officers for examination, wherever required. First, the importer would send the details of goods to be imported, in email to them and after that, they prepare checklist as per the documents submitted by the importer, and send for verification and approval. If there would be any query in the checklist, the importer would inform them, and they accordingly send revised checklist to the importer. Once the checklist was approved by the importer, they would upload the documents in ICEGATE for filing Bill of Entry.
- ii. that they undertake Customs clearance of goods, namely "GPON ONT", imported by GTPL classifying the product "GPON ONT (Subscriber end equipment)" under tariff item 85176990, and they also approved the same upto 06-04-2018. Thereafter, when they sent the checklist under 85176990, the importer asked them to send revised checklist under 85176950, stating that the product falls under subscriber end equipment. Accordingly, they sent a revised checklist to them. They approved the revised checklist classifying the product under tariff item 85176950.
- iii. that he had verified the description of the goods and the classification, and since, he was not technically sound in respect of these goods, he was left with no option, but to accept the classification suggested by the importer and file the import documents accordingly.
- iv. that he had verified the information submitted by the importer in respect of value, rate of Customs duty, Customs Tariff heading and the exemption proposed to be availed in respect of the articles.
- v. with regard to a question as to whether they have received any special instruction from the importer regarding classification of the goods cleared under the CTH 85176950 and 85176290, he stated that when they sent checklist under CTH 85176990 by email 05-08-2019, the importer asked them by email dated 06-08-2019 to send revised checklist under 85176950 stating that the goods were not GPON equipment, and it falls under Subscriber end equipment. Accordingly, they sent

revised checklist on 06-08-2019 and the same was approved on the same day. They accordingly filed the import documents. Since they were not technically sound with regard to these imported goods, they accepted the classification suggested by the importer.

- vi. that he had not cleared the "Subscriber End Equipment or GPON-EPON - ONT/ONUs or the OLTs for any other importer.
- vii. With regard to benefit of exemption/ reduced duty rate on imported goods i.e. ONTs/ONUs and OLTs despite the articles falling under the category of Optical Network Products/Optical Transport Equipment that support MIMO Technology, he stated that the importer classified the product under 85176990 and later under 85176950. Since he was not conversant with MIMO technology and other network related equipments, he merely accepted their classification.
- viii. that he knew that these equipments are used for providing broadband internet services, but he was not aware of the technical details and working of these equipments.
- ix. with regard to the question as to why the import documents for these goods were filed for clearance wrongly claiming the benefits as available under Notifications: (i) 24/2005- Customs dated 01.03.2005 and (ii) 57/2017 -Customs dated 30.06.2017, he stated that they entered the tariff item 85176950 as instructed by the importer, for which the tariff rate itself is Nil. As soon as the said tariff item is entered, the system itself gives the Nof. No. 24/2005. He also stated that since they are not conversant about the detailed technical functions of the said equipment, they cannot comment on the same in detail. Since the importer specifically informed them that the item was a subscriber end equipment, they thought that the classification under CTH 85176950 could be correct and filed the import documents as per the instruction of the importer.
- x. he has submitted the copies of these email correspondences with the importer, copy of F Card and sample copies of check list.

1.7. Statement of Shri Jang Bahadur Singh, M/s Swayam Shipping Services, Customs Broker was recorded on 08.03.2022 under Section 108 of the Customs Act, 1962 wherein he inter alia stated:

- i. that he has been the holder of F-Card bearing No.CHA/F/1 1/2013 dated 04-05-2013. He assisted importers for clearance of imported goods. For this, first they get the KYC documents of the importer and verify their genuineness. As per the details and documents given by the importer regarding the cargo to be imported, they send checklist by email to them. After getting approval of the checklist from them, they file Bill of Entry and completing other formalities required in Customs, including presenting of cargo for examination, if required, and duty payment formalities. Also for export, they file Shipping Bill on behalf of the exporters and present the goods for officers for examination, wherever required.
- ii. with regards import of goods with the description "Subscriber End Equipment or GPON-EPON ONT/ONUs or the OLTs" made by GTPL, he stated that first, they called for KYC documents, Bank AD Code and other mandatorily required documents of the importer M/s. GTPL Broadband Pvt. Ltd., and documents relating to the goods to be imported. The importer also forwarded a copy of their previous Bill of Entry filed in case of import of similar goods at Ahmedabad Air Cargo, and asked them to classify the goods under CTH 85176950. Thereafter, they sent a checklist accordingly for approval. After the same was approved, they filed the Bill of Entry, submitted by the importer, checklist approved by the importer and copy of the Bill of Entry in respect of the first import clearance made by them on behalf of the said importer vide BoE. No.4987555 dated 20-09-2019 (duly signed by him while recording statement). Similarly, they always sent checklist in respect of these goods to the importer, and after getting approval from them they file corresponding Bill of Entry. That he had assisted for import clearance work of goods, namely "ONT", imported by M/s. GTPL Broadband Pvt. Ltd. at Mundra port.
- iii. with regard to the classification of the impugned imported goods, he stated that the importer had sent them a sample copy of a Bill of Entry in respect of their previous import of similar goods and they have also stated that the HSN Code is 85176950.

Accordingly, as per the documents sent to them and as per their instruction, they sent the checklist to the importer, classifying the product under CTH 85176950, and the importer also approved the same to them by email.

- iv. with regards cross checking of the declared classification and description of the goods with the relevant tariff item/chapter notes of Customs Tariff (Import Schedule), he stated that he had verified the description of the goods and the classification, and since, he are not technically sound in respect of these goods, they are left with no option but to accept the classification suggested by the importer and file the import documents accordingly. Moreover, they had sent a copy of their previous import Bill of Entry of similar goods classifying the goods under 85176950 at Ahmedabad.
- v. that they had verified the information. Initially they had sent a check list classifying the goods under CTH 85176990. Since the importer had sent a copy of their previous import Bill of Entry classifying the product under 85176950, with nil rate of duty availing the benefit of Not. No.24/2005, assessed at Ahmedabad Air Cargo, and specifically instructed them to classify the product under 85176950, they filed the documents accordingly.
- vi. that they are not technically sound with regard to these imported goods, they accepted the classification suggested by the importer. Moreover, the importer forwarded a copy of their previous Bill of Entry assessed at Ahmedabad Air Cargo.
- vii. that they have done import clearance work of "GPON OLT, ONT, imported under Bills of Entry No. 5699459, dated 15-11-2019 and 6185430, dated 21-12-2019 at Mundra port, for M/s. TATA Capital Financial Services, who was on a lease agreement with M/s. GTPL Broadband Pvt. Ltd. The classification done in that case was also the same HSN Code No.85176950, as the import was done under the instructions of the lesser M/s. GTPL Broadband Pvt. Ltd. of M/s. TATA Capital Financial Services.
- viii. with regard to the question why the import documents for these goods were filed for clearance wrongly claiming the benefits as available under Notifications: (i) 24/2005- Customs dated 01.03.2005 and (ii) 57/2017 -Customs dated 30.06.2017, he stated that the importer classified the product under 85176950 and also forwarded a copy of previous Bill of Entry. Also, they are not conversant with MIMO technology and other related equipments. Therefore, we just acted according to the instructions of the importer.
- ix. with regard to the question whether they were not aware that the above mentioned imported equipments/devices were being used to access high speed broadband internet using the FTTX technology and that they were essential "active" components in an Optical Network, he stated that they knew that the imported equipments are used for providing broadband internet services, but they are not aware of the technical details and working of these aware equipments. They used the HSN Code 85176950 as instructed by the importer, for which the tariff rate itself is Nil.
- x. with regard to a question that keeping in view the technical functions performed by the subject goods viz., Optical Network Terminals/Units and further requested to explain as to why the same would not fall under the 85176290 and also as to why the items along with Optical Line Terminals do not qualify to avail the benefits as available under (i) SI No. 13 P of Notification No. 24/2005 dated 01.03.2005 and (i) SI No. 20 of Notification No. 57/2017 dated 30.06.2017, he stated that since they are not a technical expert of such equipments, they cannot comment on the same in detail. Since the importer forwarded a copy of previous Bill of Entry, where the classification was done under 85176950, they accordingly filed the import documents as per the instruction of the importer.
- xi. he submitted the copies of these email correspondences, with the importer, copy of F Card and sample copies of check list.

1.8. During the course of recording of the statement, the importer has submitted copies of all Bills of Entry (along with Annexure thereof) filed for the import of ONTs/ONUs and OLTs during the period 23.09.2017 to 15.09.2021. Technical Write-up and data sheets pertaining to different models of the devices were also submitted.

Bills of Entry filed for the import of ONTs/ONUs and OLTs have been listed in **Annexure B-1 and B-2**.

Technical features/functions and regulatory requirements complied with - by each model of the import goods as provided in the Product Brochure is tabulated in **Annexure C-1** and **C-2**.

1.9. Analysis of the imports (detailed in **Annexure B-1, B-2, C-1 and C-2**) and the submissions made by GTPL, reveals the following:

- i. In the import consignments of **Optical Network Terminals/Optical Network Units (ONT/ONU)**, the items have been projected as “**Subscriber End Equipment/Networking Equipment**” and classified under the **Tariff Item – 85176250** and **85176950** and availed the exemption under Notification No. 24/2005-Cus (Sl.No.13P) and Notification No. 57/2017-Cus dated 30.06.2017 (Sl.No.20) respectively;
- ii. In the import consignments of **Optical Line Terminals (OLT)** the items have been projected as “**Networking Equipment**” and thereby classified under the **Tariff Item – 85176990** and duty @ 10% has been paid by availing exemption under Notification No.24/2005-Cus (BE Sl.No.21 & 29 of Annexure E) (Sl.No.13P) and Notification No.57/2017-Cus dated 30.06.2017 (Sl.No.20).
- iii. In the import consignments of **Small Form-Factor Pluggable Module (SFP Module)**, the items have been projected as “**Networking Equipment**” and initially classified under the **Tariff Item – 85177090**, availing the exemption under Sl.No.5 of No.57/2017. Subsequently the same item was classified under **Tariff Item – 85176290 and 85176990** and discharged BCD @ 10% by availing exemption under Notification No.57/2017 (Sl.No.20) on subsequent imports;
- iv. The imports of “routers” have been effected under the **Tariff Item – 85176930**; Nil BCD was paid by availing exemption under Notification No.24/2005 Cus (Sl.No.13N).
- v. Optical Line Terminals declared as “**Networking Equipment**” classified under the **Tariff Item – 85176990** and **85176290** have also been imported and BCD was paid @ 10% by availing exemption under Notification No.57/2017 (Sl.No.20).
- vi. It is seen that in certain cases of import, the noticee had paid the appropriate rate of Customs duty on a particular item and in other cases in respect of the same item, they have availed the benefit of exemption notifications.
- vii. The number of Bills of entry, assessable value and the period under investigation for the import of ONT/ONUs, OLT, and SFP Modules are given below.

Port	No. of BEs	Period from	Period to	Assessable Value (In Rs)
INAMD4	62	23.09.2017	15.09.2021	41,45,31,924
INMUN1	34	20.09.2019	25.09.2021	34,93,42,899
Total	96			76,38,74,823

1.10. Details of Products under Investigation

(i) Product description as **GPON ONT MODEL NO. ZXHN F660** per Bill of Entry:

Brand : ZTE
 Supplier's Name : M/s ZTE Corporation, Shenzhen, China
 Country of Origin : China

The Importer has classified this product under tariff item 85176950 claiming benefit under Notification No.24/2005 Customs dated 03.01.2005 Sl.No.13P claiming it as ‘Subscriber End Equipment’ and paying Nil Rate of Basic Customs Duty.

From the description of the product in the Bill of Entry and the product technical literature submitted by the Importer, it is noticed that as per the ‘Overview’ of the product “*The ZXHN F660 is a N300 Gigabit GPON Gateway. It comes with 1GE & 3FE, one phone ports, one IEE 802.11b/g/n (2x2 Wi-Fi interface. Based on customer requirements, the maximum 5dBi gain*

antennas can enhance the Wi-Fi coverage areas and improve the performance. It is used for access data, video and voice services, and enjoy high speed internet connection". As per the 'Features' of the product, it has "Superior Wireless 11n Transmission Performance". Adopting advanced 11n techniques including MIMO and channel bonding, the F660 creates a superior wireless performance, with data rates upto 300 Mbps, data transmission within the LAN becomes more efficient in high bandwidth application."

Further, Shri. Ajmal Hussain Mohd. Isha Siddiqui, General Manager (Technology) of M/s. GTPL Broadband (P) Ltd vide his statement dated 08.12.2021 stated that "they normally install GPON ONU of models ZXHN F612, ZXHN F601 and ZXHN F660 manufactured by ZTE Corporation, Shenzhen, China". In the above statement he has admitted that ZXHN F660 manufactured by ZTE Corporation is an GPON Optical Network Unit (ONU). As per the datasheet on which the General Manager has affixed his signature, the technical specifications of the item include TR-069/OMCI remote management, WEB GUI management, local built-in diagnostic function and remote upgrade by HTTP. The OMCI component complies with the ITU-T G.988.

From the overview and features in the technical literature and the admission made by the noticee, the said product is-a Gigabit Passive Optical Network Unit-ONTU/ONT).

(ii) Product description as **ONT F601 1GE WITHOUT WIFI**

per Bill of Entry:

Brand : ZTE

Supplier's Name : M/s ZTE Corporation, Shenzhen, China

Country of Origin : China

The Importer has classified this product under tariff item 85176950 claiming benefit under Notification No.24/2005 Customs dated 03.01.2005 (SI.No.13P) claiming it as 'Subscriber End Equipment" and paying Nil Rate of Basic Customs Duty.

From the description of the product in the Bill of Entry and the product technical literature submitted by the Importer, it is noticed that as per the 'Overview' of the product "*The ZXHN F601 is a Gigabit bridge GPON ONT, which features a 10/100/1000 Mbps auto-sensing LAN Port in a stylish yet compact enclosure for indoor use. It is ideal for FTTH or small business deployments in bridge mode and also operates well in conjunction with separate RGW devices to provide flexible triple-play services*". As per the 'Features' of the product "*GPON and XG-PON Coexistence- ITU-T G.984.5 has defined the WBF (Wavelength Block Filter) features to coexist with XG-PON ONT within one ODN network and one feed fiber*". The optical module installed in ZXHN F601 have integrated with WBF feature for future -proof evolution". From the overview and features in the technical literature and the details available in open source, said product- a Gigabit Passive Optical Network Gateway (GPON Home Gateway Unit-ONT/ONU). Further, Shri. Ajmal Hussain Mohd. Isha Siddiqui, General Manager (Technology), M/s GTPL Broadband (P) Ltd vide his statement dated 08.12.2021 stated that "they normally install GPON ONU of models ZXHN F612, ZXHN F601 and ZXHN F660 manufactured by ZTE Corporation, Shenzhen, China". In the above statement he has admitted that ZXHN F601 manufactured by ZTE Corporation is GPON Optical Network Unit (ONU).

As per the datasheet, the F601 supports batch-update, fault diagnosis, interface loop back checking and loop routes checking remotely by OMCI. The flexible authentication modes for zero-touch service provisioning, claimed in the datasheet and other features discussed above suggests that though located at the premises of the subscriber, it can be completely controlled/managed at the other end of the network architecture.

(iii) Product description as **ONT/ONU DUAL BAND F670L WITH WIFI**

per Bill of Entry:

Brand : ZTE

Supplier's Name : M/s ZTE Corporation, Shenzhen, China

Country of Origin : China

The Importer has declared the item as "**ONT/ONU DUAL BAND F670L WITH WIFI**", i.e. Optical Network Terminal/Optical Network Unit i.e. an Optical Transport Network Product and has classified this product under tariff item 85176950 availing benefit under Notification No.24/2005 Customs dated 03.01.2005 Sl.No.13P claiming it as 'Subscriber End Equipment" and paying Nil BCD.

As per the details available and datasheet downloaded from open source, ZTE-ZXHN-F670L Supplied by M/s. ZTE Corporation, Shenzhen, China- "The ZXHN-F670 is an AC1200 dual band Gigabit Premium triple-play GPON gateway. It comes with 1GE&3FE LAN ports, one phone port and next generation multi-stream Wi-Fi operating simultaneously in 2.4 GHz over 802.11n and 5GHz 2x2 over 802.11ac. Based on customer requirements, the maximum 5dBi gain antennas can enhance the Wi-Fi coverage and improve the performance.

(iv) Product description as **GPON INDOOR ONT 1 POTS 1GE 3FE WIFI per Bill of Entry:**

Brand : NOKIA
Supplier's Name : ALCATEL LUCENT INTERNATIONAL
Country of Origin : China

The Importer has classified this product under tariff item 85176250 projecting it as 'Networking Equipment" and availing benefit under Notification No.24/2005 Customs dated 03.01.2005 Sl.No.13I and paying Nil BCD.

As per the open-source data (<https://fiberking.en.made-in-china.com/product/WSNQPjGvZXUT/China-Alcatel-Lucent-160-G-140W-MD-Ont-FTTH-ONU-Gpon-Modem-Router.html>), the product has been described as Alcatel Lucent G-140W-MD ONT FTTH ONU GPON Modem Router. The description of the product make is clear that the product is a GPON ONT/ONU.

(v) Product description as **OLT C320 WITH 2 CONTROL CUM POWER CARDS AND 1 NO. PON CARD WITH SFP per Bill of Entry:**

Brand : ZTE
Supplier's Name : M/s ZTE Corporation, Shenzhen, China
Country of Origin : China

The Importer has classified this product under tariff item 85176990 claiming it as 'Networking Equipment". However, the importer is claiming benefit under Notification No.57/2017 Customs dated 30.06.2017 (Sl.No.20) and paying Basic Customs Duty at the Rate of 10%.

As per the description given in the data sheet submitted by the importer, it is noticed that the product "ZTE ZXA 10 C320, a small size, full-service optical access convergent platform, provides carrier class QoS and reliable network to meet the requirement for small-scale implementation of FTTx service. From the description of the product in the Bill of Entry and the product technical literature submitted by the Importer it is noticed that the product is an Optical Line Terminal/Termination (OLT).

(vi) Product description as **OLT C620L WITH 2 CONTROL CUM POWER CARDS 1NO PON CARD WITH SFP per Bill of Entry:**

Brand : ZTE
Supplier's Name : M/s ZTE Corporation, Shenzhen, China
Country of Origin : China

The Importer has classified this product under tariff item 85176990 claiming it as 'Networking Equipment" and paying Customs Duty at the Rate of 10% availing benefit under Notification No.57/2017 Customs dated 30.06.2017 (Sl.No.20).

As per the details available on the supplier's website (<https://www.zte.com.cn/global/products/access/xpon/PON-OLT/ZXA10-C620>) -"The ZXA 10 C620 is a piece of 2U high compact optical access equipment, it provides two service slots and is ideal for efficient and flexible FTTx deployment, satisfying ultra-high speed and ultra-low latency access requirements, and suiting diverse scenarios, including limited room space, remote coverage and low-density area scenarios. Provides flexible access options including GPON, XG(S)PON, Combo PON, and P2P." From the description of the product by the supplier and its function, and as per the discussion above, it is noticed that it is a **GPON Optical Line Terminal (OLT)**.

(vii) Product description as per Bill of Entry:

- 1. BNG CENTRAL SITE 7750 SR 12**
- 2. GATEWAY ROUTER 7750 SR 3E**
- 3. POP ROUTER 7750 SR 2E**

Brand : NOKIA
Supplier's Name : ALCATEL LUCENT INTERNATIONAL

The Importer has classified these products under tariff item 85176930 claiming benefit under Notification No.24/2005 Customs dated 03.01.2005 Sl.No.13N claiming it as 'Routers" and paying Nil BCD.

As per the details captured from the datasheet of **Nokia 7750 SR Service Router Release 20** and **21**, the following descriptions/features are attached for the **Nokia 7750 SR-12** product, which was declared as **BNG Central Site Router 7750 SR 12** by the Importer, are consolidated and reproduced as below:

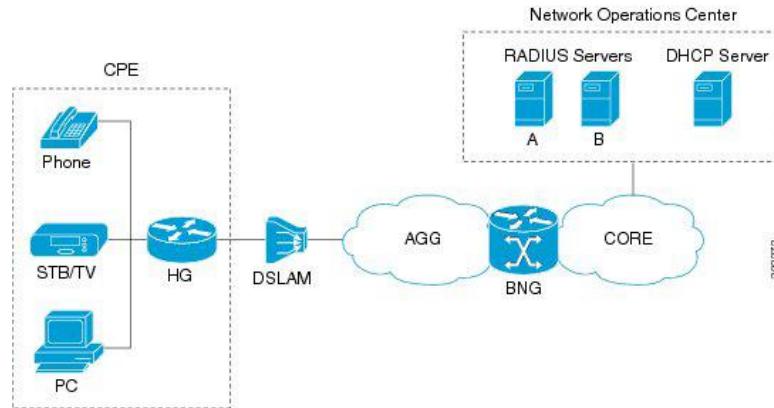
- For service providers, the 7750 SR is deployed in WAN and aggregation networks to support IP edge and gateway functions, including: access aggregation for broadband services and **Broadband Network Gateway (BNG) for residential subscriber management; provider edge (PE) for enterprise VPN, internet access, and cloud and data center interconnect (DCI) services**; and PE for backhaul, IPsec and security gateway, WLAN gateway and **hybrid access gateway in IP mobile anyhaul**. Value added services include application assurance (AA) and carrier-grade Network Address Translation (NAT). In data centers, support includes gateway, interconnect and internet/peering functions.
- **The 7750 SR also functions as a mobile gateway supporting the user plane function (UPF) in 5G networks, SGW/PGW in 4G networks, GGSN in 2G/3G networks, PCEF for 2G/3G/4G access and ePDG/ TWAG for Wi-Fi access—plus TDF and SSG for enhanced subscriber services.**
- For enterprises, the 7750 SR provides high performance IP routing, including connectivity to the data center, internet and WAN applications.
- **SDN integration and automation**- In combination with the Nokia Network Services Platform (NSP), the 7750 SR can be deployed to introduce scalable and integrated SDN control across IP, MPLS, Ethernet and **optical transport layers**.
- **Switch Fabric Module (SFM6-12e)**- Two full-height SFM6-12e modules provide the **switching functions** for the system as well as housing the pluggable Control Processor Module 5 (CPM5).

As per the details captured from the datasheet of **Nokia 7750 SR-e Service Router Release 20** and **21**, the following descriptions are given for the **Nokia 7750 SR-2e** and **Nokia 7750 SR-3e** products, which are declared as "**Gateway Router 7750 SR 3e and POP Router 7750 SR 2e** by the importer, are consolidated and reproduced as below: -

- The Nokia 7750 SR-e series of IP routers delivers the scale, comprehensive features and platform versatility needed to stay ahead of evolving demands driven by the cloud, 5G and the Internet of Things (IoT).
- For service providers the 7750 SR-e is deployed in WAN and aggregation networks to support multiple services and functions, including aggregation, **Broadband Network Gateway (BNG)**, **mobile backhaul (IP anyhaul)** and **provider edge (PE)** for the delivery of advanced residential, mobile and enterprise services. For webscale companies and enterprises, the 7750 SR-e provides high-performance IP routing, including connectivity to data center, internet and WAN applications.
- **Versatile platform-** The comprehensive features of the SR OS enable the 7750 SR-e to support full array of IP network functions and services.- Service providers can use the 7750 SR-e in WAN, aggregation and data center networks supporting multiple network functions, including: **Broadband Network Gateway (BNG)** for residential subscriber management; **provider edge (PE) router for MPLS enabled enterprise VPN**, internet access and cloud services and data center interconnect; **mobile applications, including as an aggregation router for 3G, LTE and LTE-A backhaul, a WLAN gateway for Wi-Fi® network aggregation**, and a security gateway for securing backhaul networks; and value-added services, including application assurance (AA) and carrier-grade Network Address Translation (NAT).
- For webscale companies, the 7750 SR-e delivers leading features for data center aggregation, gateway and interconnect, along with **PoP** edge and internet/peering functions. For enterprises, the 7750 SR-e provides high performance IP routing for cloud, data center and WAN applications.
- For synchronization requirements, they support ITU-T Synchronous Ethernet (Sync-E) and IEEE 1588v2. **Optical transport network (OTN) support** includes ITU-T G.709 and FEC.

As per open-source data (<https://netelastic.com/what-is-bng-and-which-one-is-right-for-your-network>), Customers are depending on service providers for increasingly critical services, and **Broadband Network Gateways (BNGs)** are the access point for customers to connect to the broadband network. Once connected, a subscriber can access the broadband services delivered by their provider. BNGs also enable service providers to authenticate and authorize users to establish and manage subscriber sessions, and ensure users receive the appropriate services. Similar to a home router that provides internet access for all devices, a BNG provides access for larger pools of subscribers. **It usually resides behind** a DSLAM in a DSL network, **or an OLT in a Fiber optic network** clearly indicating the nature as an **Optical Transport Network Product** or **Optical Network Equipment**. BNGs interact with RADIUS and DHCP servers to provide subscriber management functions and IP address allocation.

However, in the open-source data, the description of the product is “**Broadband Network Gateway (BNG)**”, it is the access point for subscribers, through which they connect to the broadband network. To put it differently, the BNG, also known as broadband remote access server (BRAS), is the network edge aggregation point used by subscribers to access the Internet service provider (ISP) network (www.intel.com). Through the BNG, subscribers connect to the ISP network to download Internet originating traffic and ISP services (e.g., web, voice, data, and video). When a connection is established between BNG and Customer Premise Equipment (CPE), the subscriber can access the broadband services provided by the Network Service Provider (NSP) or Internet Service Provider (ISP). The goal of the BNG architecture is to enable the BNG device to interact with peripheral devices (like CPE) and servers (like AAA and DHCP), in order to provide broadband connectivity to subscribers and manage subscriber sessions. The basic BNG architecture is shown in the following figure.”



As per Open source data (<https://www.gsma.com/futurenetworks/wiki/mobile-backhaul-an-overview/>), **Mobile backhaul** refers to the transport network that connects the core network and the RAN (Radio Access Network) of the mobile network. Recently, the introduction of small cells has given rise to the concept of fronthaul, which is a transport network that connects the macrocell to the small cells. Whilst mobile backhaul and fronthaul are different concept, the term mobile backhaul is generally used to encompass both concepts. Furthermore, innovations to reduce demand on mobile backhaul sometimes involve architectural changes in the antenna (also referred to as radio unit in 4G) and the controller (also referred to as digital unit in 4G). Therefore, the components labelled in red in the figure below will be covered for backhaul demand case studies within the GSMA Future Networks Network Economics.

As per the details available in the Nokia website (<https://www.nokia.com/networks/products/7750-service-router-mobile-gateway/>), The 7750 SR mobile gateway is a high-capacity, flexible, router-based gateway that is optimized to deliver enhanced mobile broadband services with exceptional performance and scale. It performs the following mobile gateway functions:

- User Plane Forwarding Function (UPF) in 5G networks
- **Serving and Packet Data Network gateway (SGW/PGW) in 4G networks**
- **GPRS Gateway Serving Node (GGSN) in 2G/3G networks**
- Non-3GPP Interworking Function (N3IWF) in 5G untrusted networks
- Trusted wireless access gateway (TWAG) for 3GPP trusted access networks
- Evolved Packet Data Gateway (ePDG) for untrusted non-3GPP networks
- Subscriber Services Gateway (SSG) for value-added, integrated IP services

Mobile Gateway -For 4G and 2G/3G radio access networks (RANs), the 7750 SR mobile gateway supports the Serving Gateway (SGW), PDN Gateway (PGW) and/or Gateway GPRS Support Node (GGSN) functions, either separately or in combination.

According to **Wikipedia**- *A router is a networking device that forwards data packets between computer networks. Routers perform the traffic directing functions on the Internet. Data sent through the internet, such as a web page or email, is in the form of data packets. A packet is typically forwarded from one router to another router through the networks that constitute an internetwork (e.g. the Internet) until it reaches its destination node.*

From the description in the Datasheets of the products and the details available in the open source, it is noticed that the instant product is not merely performing routing, but having many more essential features and that routing is one of the ancillary functions. It is evidently a product that supports the Broadband Network Gateway (BNG) for residential subscriber management; provider edge (PE) router for MPLS enabled enterprise VPN, internet access and cloud services and data center interconnect; mobile applications, including as an aggregation router for 3G, LTE and LTE-A backhaul, a WLAN gateway for Wi-Fi network aggregation. It also functions as GPRS Gateway Serving Node (GGSN) in 2G/3G networks and Serving and Packet Data Network gateway (SGW/PGW) in 4G networks. Further, it supports the Optical Transport Network and have a switching and

routing function. Hence it appears that the product is not a simple router; rather it is very much an Optical Transport equipment.

(viii) Product description as 16 PORT MINI OLT

per Bill of Entry:

Supplier's Name : ALCATEL LUCENT INTERNATIONAL

Country of Origin : China

The Importer has declared the item as 16 PORT MINI OLT (Networking Equipment), i.e Optical Line Terminal and has classified this product under tariff item 85176290/85176990. However, the importer has availed benefit under Notification No.57/2017 Customs dated 30.06.2017 (Sl.No.20) and paid Basic Customs Duty at the concessional rate of 10%.

(ix) Product description as OLT C610 (16 PORT 2 UPLINK SFP)

per Bill of Entry:

Brand : ZTE

Supplier's Name : M/s. ZTE Corporation, Shenzhen, China

Country of Origin : China

The Importer has classified this product under tariff item 85176990 claiming it as 'Networking Equipment" and paying Basic Customs Duty at the Rate of 10% availing benefit under Notification No.57/2017 Customs dated 30.06.2017 Sl.No.20.

As per the details available in the supplier's website (https://www.zte.com.cn/global/products/access/xpon/PON-OLT/ZXA10_C610) "the product ZXIA10 C610 is a pizza box PON OLT that meets flexible, fast and cost-effective FTTX access, suiting the scenarios such as sparse/remote/cost sensitive area, smart industrial part, commercial building and FTTM etc". From the description of the product by the supplier, it is noticed that it is an **Optical Line Terminal (OLT)**.

(x) Product description as OLT C620L WITH 2 CONTROL CUM POWER CARDS

per Bill of Entry: **1NO PON CARD WITH SFP**

Brand : ZTE

Supplier's Name : M/s ZTE Corporation, Shenzhen, China

Country of Origin : China

The Importer has classified this product under tariff item 85176990 claiming it as 'Networking Equipment" and paying Basic Customs Duty at the Rate of 10% availing benefit under Notification No.57/2017 Customs dated 30.06.2017 Sl.No.20.

As per the details available in the supplier's website (<https://www.zte.com.cn/global/products/access/xpon/PON-OLT/ZXA10-C620>) - "The ZXIA 10 C620 is a piece of 2U high compact **optical access** equipment, it provides two service slots and is ideal for efficient and flexible FTTx deployment, satisfying ultra-high speed and ultra-low latency access requirements, and suiting diverse scenarios, including limited room space, remote coverage and low-density area scenarios." It provides flexible access options including GPON, XG(S)PON, Combo PON, and P2P. From the description of the product by the supplier and its function, it is noticed that the instant item is a PON ONT-Passive **Optical Line Terminal (OLT)**. The datasheet as claims the item as supporting Combo PON, industry's first 3-in-1 combination; the WDM1r is embedded in the optical module without affecting existing GPON services.

As per the open-source data (Wikipedia), An **Optical Line Termination (OLT)**, also called an Optical Line Terminal, is a device which serves as the service provider endpoint of a passive optical network. It provides two main functions:

- 1. to perform conversion between the electrical signals used by the service provider's equipment and the fiber optic signals used by the passive optical network.**

2. to coordinate the multiplexing between the conversion devices on the other end of that network (called either optical network terminals or optical network units).

(xi) Product description as per Bill of Entry:

- 1. QSFP-40G-SR4: 40GBASE SR4 TRANSCEIVER MODULE**
- 2. QSFP-40G-LR4: 40GBASE LR4 OTN LC 10KM**
- 3. SFP-10G-ER: 10GBASE ER SFP MODULE**

Supplier's Name : INFLOW TECHNOLOGIES(SINGAPORE)PTE LTD
Country of Origin : USA

The Importer has classified this product under tariff item 85177090, availing benefit under Notification No.57/2017 Customs dated 30.06.2017 Sl.No.5 at Nil Rate of Duty.

As per the open-source data and the print out of the same (<https://www.optcore.net/product/qsfp28-100g-sr4-nok/>), it is noticed that the description given as "*This Nokia (Ex-Alcatel-Lucent) 3HE10551AA compatible QSFP transceiver provide a low cost 3rd party 100G QSFP transceiver solution, and allow you to avoid to overplay for the original 100G transceiver. It is suitable for 100GBASE Ethernet throughput up to 100m over OM4 multimode fiber (MMF) at a wavelength of 850 nm using an MTP/MPO-12 connector. The compatible 3HE10551AA offers a high-density and low-power 100 Gigabit Ethernet connectivity options for data centre, high-performance computing networks, enterprise ore and distribution layers, and service provider applications.*"

As per the open source data (<https://www.optcore.net/what-is-fiber-optic-transceiver/>), "*Fiber Optic Transceiver*" also was known as *Fiber Optical Transceiver, Optical Module, Optics Module* etc. It is a single, packaged device that uses fiber optic technology to transmit and receive data. 'Transceiver' is a combination of two words, 'transmitter' and 'receiver'. In other words, the fiber optic transceiver comprising both a transmitter and a receiver which are combined and share common circuitry or a single housing. It is an important part of optical network equipment that has electronic components to condition and encodes/decode data into light pulses and then sends them to the other end as electrical signals. To send data as light, it makes use of a light source, such as VSCEL, FP and DFB laser, which is controlled by the electronic parts, and to receive light pulses, such as Pin, APD, it makes use of a photodiode semiconductor."

According to open source data (<https://cleerlinefiber.com/2021/02/12/sfp-modules/>), "*An SFP module is a Small Form-Factor Pluggable. Simply put, it is a small transceiver that can send and receive data over fiber. SFPs plug into your network switch or media converter. They are hot-pluggable, so modules can easily be swapped in and out. SFPs are also sometimes referred to as miniGBIC (gigabit interface converter). At this point, SFPs have mostly replaced older and larger GBIC. As the name indicates, SFP modules are small, accommodating only 1-2 fiber optic connectors*".

According to Wikipedia, - "*An optical module is a typically hot-pluggable optical transceiver used in high-bandwidth data communications applications. Optical modules typically have an electrical interface on the side that connects to the inside of the system and an optical interface on the side that connects to the outside world through a fiber optic cable. The form factor and electrical interface are often specified by an interested group using a multi-source agreement (MSA). Optical modules can either plug into a front panel socket or an on-board socket. Sometimes the optical module is replaced by an electrical interface module that implements either an active or passive electrical connection to the outside world.*"

According to open-source data (<https://www.trentonsystems.com/blog/what-is-an-sfp-port>)- *SFP ports and their corresponding SFP modules are used to facilitate seamless, high-speed data communications or telecommunications connections over extended distances in a variety of applications. They're often used to connect a one-gigabit network switch to another, which, in turn, increases the size and improves the functionality of a network. This is helpful*

in military, industrial, and commercial settings where numerous devices in a widespread area require a wired, high-speed, reliable connection."

As per Wikipedia, "The small form-factor pluggable (SFP) is a compact, hot-pluggable network interface module used for both telecommunication and data communications applications. An SFP interface on networking hardware is a modular slot for a media-specific transceiver in order to connect a fiber-optic cable or sometimes a copper cable. The advantage of using SFPs compared to fixed interfaces (e.g. modular connectors in Ethernet switches) is that individual ports can be equipped with any suitable type of transceiver as needed."

The form factor and electrical interface are specified by a multi-source agreement (MSA) under the auspices of the Small Form Factor Committee. The SFP replaced the larger gigabit interface converter (GBIC) in most applications, and has been referred to as a Mini-GBIC by some vendors.

SFP transceivers exist supporting synchronous optical networking (SONET), Gigabit Ethernet, Fibre Channel, PON, and other communications standards. At introduction, typical speeds were 1 Gbit/s for Ethernet SFPs and up to 4 Gbit/s for Fibre Channel SFP modules. In 2006, SFP+ specification brought speeds up to 10 Gbit/s and the SFP28 iteration is designed for speeds of 25 Gbit/s.

A slightly larger sibling is the four-lane Quad Small Form-factor Pluggable (QSFP). The additional lanes allow for speeds 4 times their corresponding SFP. In 2014, the QSFP28 variant was published allowing speeds up to 100 Gbit/s. In 2019, the closely related QSFP56 was standardized doubling the top speeds to 200 Gbit/s with products already selling from major vendors. There are inexpensive adapters allowing SFP transceivers to be placed in a QSFP port.

Both a SFP-DD, which allows for 100 Gbit/s over two lanes, as well as a QSFP-DD specifications, which allows for 400 Gbit/s over eight lanes, have been published. These use a form factor which is directly backward compatible to their respective predecessors."

From the above description it is noticed that the product is an Optical Transport Equipment.

(xii) Product description as per Bill of Entry:

- 1. QSFP28 100BASE SR4 ROHS6/6 0/70C**
- 2. SFP 10GE SR LR ROHS6/6 0 70C**
- 3. QSFP28 100BASE LR4 ROHS6/6**

Brand : NOKIA
Supplier's Name : ALCATEL LUCENT INTERNATIONAL
Country of Origin : USA

The Importer has classified this product under tariff item 85176290 and 85176990 claiming benefit under Notification No.57/2017 Customs dated 30.06.2017 Sl.No.20 and paying Basic Customs Duty at the Rate of 10%. As the name suggests, the items are SFP modules/transceivers (detailed at (xi) above), which are Optical Transport Equipments.

1.11. Classification of Goods Imported:

1.11(a). It is pertinent to mention that principles for the classification of goods are governed by the Harmonized Commodity Description and Coding System (Harmonized System or HSN) issued by the World Customs Organization. Brussels and the General Rules for Interpretation specified there under. The General Rules for the Interpretation (GIR) specified in the Import Tariff are in accordance with the GIR specified in the HSN. In terms of GIR I of the HSN and the import Tariff-

*The titles of Sections, Chapters and sub-chapters are provided for ease of reference only: for legal purposes, **classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes...***

Further, GIR 6 of the HSN and the import Tariff specifies that -

The classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related

Subheading Notes...

1.11(b). From the above, it is apparent that as far as the entries at sub-heading level are concerned, sub-heading 851762 of the HSN and the Import Tariff specifically include 'switching and routing apparatus' and accordingly impugned goods are appropriately classifiable under the said sub-heading.

1.11(c). As per the additional notes given in the "General Notes" to Customs Tariff -

(a) "*heading*", in respect of goods, means a **description** in list of tariff provisions accompanied by a **four-digit number** and includes all sub-headings of tariff items the first four-digits of which correspond to that number;

(b) "**sub-heading**", in respect of goods, means a description in the list of tariff provisions accompanied by a **six-digit number** and **includes all tariff items the first six-digits of which correspond to that number**;

(c) "**tariff item**" means a **description of goods** in the list of tariff provisions accompanying the eight digit number and the rate of customs duty;

1.11(d). Entry under the Tariff Heading 8517 reads thus:

8517-TELEPHONE SETS, INCLUDING TELEPHONES FOR CELLULAR NETWORKS OR FOR OTHER WIRELESS NETWORKS: OTHER APPARATUS FOR THE TRANSMISSION OR RECEPTION OF VOICE, IMAGES OR OTHER DATA, INCLUDING APPARATUS FOR COMMUNICATION IN A WIRED OR WIRELESS NETWORK (SUCH AS A LOCAL OR WIDE AREA NETWORK), OTHER THAN TRANSMISSION OR RECEPTION APPARATUS OF HEADING 8443, 8525, 8527 OR 8528)

1.11(e). The above Heading covers goods classifiable under the following sub-headings at the single dash (-) level:

- a. Telephone sets, including telephones for cellular networks or for other wireless networks;
- b. Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as local or wide area network) &
- c. Parts:

Tariff Heading at the single dash (-) level mentioned at b above covers goods classifiable under the following sub-headings at the double dash (--) level:

1.11(f). Further, in terms of the Import Tariff and the Explanatory Notes to the HSN as shown below, heading 8517 pertaining to '*other apparatus for transmission or reception of voice, images or other data...*', specifically covers sub-headings (a) 'Base Stations' (851761) and (b) 'Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus'

- a. 851761 - Base stations
- b. 851762 - **Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus &**
- c. 851769 - Others (Others — i.e. Goods of the aforesaid single dash (-) heading, other than the goods of sub-headings 851761 and 851762).

(The sub-headings wider heading 8517 'other apparatus... 'in the Explanatory Notes to the HSN)

(i) 'Base Stations' (851761) and 'Machines for the reception, conversion... '(851762) being the specific sub-headings under the heading pertaining to 'other apparatus for transmission or reception of voice, images or other data ...', the apparatus discussed in the

Explanatory Notes viz. Base stations, entry phone systems. Video phones, switching apparatus, other communication apparatus, in relation to the said heading fall under sub-headings 851761 and 851762. Further, Base Stations of heading 8517 being covered under 851761, it is apparent that the apparatus of the said heading other than base stations, viz. the entry phone systems, videophones, switching apparatus, other **communication apparatus** are covered under sub-heading 851762 pertaining to '*Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus*'.

(ii) In terms of the Explanatory Notes and as shown below, '*communication apparatus*' covered under the heading pertaining to '*other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network*', allows for (a) the connection to a wired or wireless communication network or (b) the transmission or reception of speech or other sounds, images or other data within such a network.

(G) Other communication apparatus.

This group includes apparatus which allows for the connection to a wired or wireless communication network or the transmission or reception of speech or other sounds, images or other data within such a network.

Communication networks include, inter cilia. carrier-current line systems. digital-line systems and combinations thereof. They may be configured, for example, as public switched telephone networks. Local Area Networks (LAN). Metropolitan Area Networks (MAN) and Wide Area Networks (WAN), whether proprietary or open architecture.

This group includes:

- (1) *Network interface cards (e.g. Ethernet interface cards).*
- (2) *Modems (combined modulators-demodulators).*
- (3) *Routers, bridges. hubs, repeaters and channel to channel adaptors.*
- (4) *Multiplexers and related line equipment (e.g., transmitters. receivers or electro-optical converters).*
- (5) *Codecs (data compressors/decompressors) which have the capability of transmission and reception of digital information.*
- (6) *Pulse to tone converters which convert pulse dialled signals to tone signals.*

(Goods specified as Communication Apparatus of heading 8517 'other apparatus...' and sub-heading 8517 62 'Machines for the reception, conversion... ' iii the Explanatory Notes)

(iii) Thus, apparatus, such as Modems, Multiplexers, Routers, Interface cards, transmitters, receivers, electro-optical converters, etc. specified in the Explanatory Notes as '*communication apparatus*' of heading '*other apparatus for transmission or reception of voice. images or other data, including apparatus for communication in a wired or wireless network*', are covered under sub-heading 851762 pertaining to '*Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus*'.

(iv) Further, it is also clear that the apparatus falling under sub-heading 851762 not covered under any specific tariff item of the said sub-heading, are covered under tariff item **85176290**. **Accordingly, it is apparent that in terms of the HSN and the Import Tariff switching and routing apparatus is specifically included in sub-heading 851762 and such routing apparatus merit classification under tariff item 85176290.**

(v) The Import Tariff further includes Routers under sub-heading 851769 — tariff item 85176930. As regards the apparatus covered under sub-heading 851769 it is apparent that the same are '*apparatus for transmission or reception of voice, images or other data...*' **other than** '*base stations*' and '*Machines for the reception, conversion and transmission*' In other words, sub-heading pertaining to 'Others' (851769) covers only such apparatus, as not covered under sub-headings 851761 and 851762. Accordingly, the apparatus / machines which support reception, conversion and transmission etc. covered under sub-heading 851762 are excluded from sub-heading 851769.

(vi) As regards the term 'conversion' it is pertinent to mention that heading 8517 covers apparatus for the transmission or reception of speech or other sounds, images or other data between two points by **variation of an (a) electric current or (b) optical wave flowing in a wired network or by (c) electro-magnetic waves in a wireless network**. It is apparent that in order to transmit / receive signals carrying voice, image or other data over an optical / wireless network it is essential for the apparatus to support the conversion of the signals from the electric form to the optical / electromagnetic waves and vice-versa. From the terms of sub-headings 851762 and 851769, it is apparent that transmission or reception apparatus, including routers, covered under sub-heading 851769 do not support the functionality of conversion of the signals from electrical to the optical or electromagnetic domain and vice versa, whereas the apparatus, falling under sub-heading 851762, tariff item 85176290 support the said functionality of conversion.

(vii) As per the Import Tariff, sub-heading 851769 includes ISDN System, ISDN Terminal Adaptor, Routers, X 25 Pads, Subscriber End Equipment, Set top boxes for gaining access to internet and Attachments for telephones. Further, according to the information in the open source - ISDN (Integrated Services Digital Network) is a circuit-switched telephone network system, which also provides access to packet switched networks, designed to allow digital transmission of voice and data over ordinary telephone copper wires. The key feature of ISDN is that it integrates speech and data on the same lines, adding features that are not available in the classic telephone system. The entry level interface to ISDN is the Basic Rate Interface (BRI) a 128 kbit/s service delivered over a pair of standard telephone copper wires. The function of an ISDN terminal adapter is often delivered in the form of a PC card with an SIT interface. X.25 is also part of an ISDN protocol called "Always On/Dynamic ISDN" or AO / DI. X.25 can be carried over the Bearer (B) or Data (D) channels of a BRI line and over the B channels of a PRI line. The D channel can also be used for sending and receiving X.25 data packets and connection to X.25 packet network. Further, ISDN Router is a device that enables several users on a network to access the Internet via ISDN. It may also provide several Ethernet ports which lets it serve as a central Ethernet hub for a small workgroup. (source https://en.wikipedia.org/wiki/Integrated_Services_Digital_Network and <https://www.pcmag.com/encyclopedia/term/45462/isdn-router>).

(viii) It is thereby apparent that the apparatus covered under Tariff sub-heading 8517 69 such as the Terminal Adaptor, Routers, X 25 Pads, Subsciber End Equipment, Set Top Boxes for gaining access to the internet, etc. are the paraphernalia of the ISDN Network.

(ix) It is clear that the apparatus of the ISDN Network allow digital transmission of voice and data over ordinary telephone copper wires. As such there is no requirement for the said apparatus of the ISDN Network to support the conversion of electrical signals to either optical or radio waves. According to the terms of sub-headings in the HSN and the import tariff, the apparatus for the reception, conversion and transmission are specifically covered under sub-heading 8517 62 and that the apparatus of sub-heading 8517 69 exclude the functionality of conversion. As such, the inclusion of the copper-based ISDN system and the apparatus / paraphernalia thereof under sub-heading 851769 in the import tariff is in conformity with the terms of the said sub-heading.

(x) Thus, based on technology involved in the types of telecom equipments, it clearly emerges that in terms of the HSN and the Import Tariff—

- a. switching and routing apparatus are specifically covered under sub-heading 851762;
- b. Communication apparatus of sub-heading 851762 including support the reception, conversion and transmission of signals and allow for the connection to

a wired or wireless communication network; and

c. the apparatus of sub-heading 851769, including routers of tariff item 85176930 do not support the conversion of the signals to the optical electromagnetic waves.

1.11(g). Of the above, machines falling under the Tariff Heading 851762 are further categorised into the following sub-headings at the triple dash level (---).

<i>Telephone sets, including telephones for cellular networks or for other wireless networks:</i>				
8517 11	— <i>Line telephone sets with cordless handsets:</i>			
8517 11 10	— Push button type	u	Free	
8517 11 90	--- Other	u	Free	
8517 12	— <i>Telephones for cellular networks or for other wireless networks:</i>			
8517 12 10	— Push button type		Free	
8517 12 90	— Other		Free	
8517 18	— <i>Other:</i>			
8517 18 10	— Push button type	u	Free	
8517 18 90	— Other	u	Free	
	— <i>Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network):</i>			
8517 61 00	— Base stations	u	Free	
8517 62	— <i>Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:</i>			
8517 62 10	PLCC equipment	u	Free	
8517 62 20	— Voice frequency telephony	u	Free	
8517 62 30	— Modems (modulators-demodulators)		Free	
8517 62 40	— High bit rate digital subscriber line system (HDSL)	u	Free	
8517 62 50	— Digital loop carrier system(DLC)	u	Free	
8517 62 60	— Synchronous digital hierarchy system(SDH)	u	Free	
8517 62 70	— Multiplexers, statistical multiplexers	u	Free	
8517 62 90	— Other		10%	
8517 69	— <i>Other:</i>			
3517 69 10	— ISDN System	u	Free	
8517 69 20	— ISDN terminal adaptor	u	Free	
8517 69 30	— Routers	u	Free	
3517 69 40	— X25 Pads	u	Free	
8517 69 50	— Subscriber end equipment	u	Free	
8517 69 60	— Set top boxes for gaining access to Internet	u	u	Free
8517 69 70	— Attachments for telephones	u		Free
8517 69 90	— Other	u	10%	
8517 70	— <i>Parts:</i>			
8517 70 10	— Populated, loaded or stuffed printed circuit boards	u	Free	
8517 70 90	— Other	kg	Free	

1.11(h). Further, in terms of the Import Tariff the specific apparatus / machines covered under the single dash (-) heading pertaining to '*other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network*' are as under —

Single dash level Tariff Heading	Tariff Sub-heading / Tariff Item at double dash / triple dash level and Description of Goods			
Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (Such as a local or wide area	851761	Base Station		
			85176210	PLCC equipment
			85176220	Voice frequency telephony
			85176230	Modems (modulators-demodulators)
			85176240	High bit rate digital subscriber line system (HDSL)
			85176250	Digital loop carrier system (DLC)
			85176260	Synchronous digital

network)	including switching and routing apparatus			hierarchy system (SDH)
		85176270		Multiplexers, statistical multiplexers
		85176290		Other
		85176910		ISDN System,
		85176920		ISDN Terminal Adaptor
	851769	Other	85176930	Routers
			85176940	X 25 Pads
			85176950	Subscriber End Equipment
			85176960	Set top boxes for gaining access to internet
			85176970	Attachments for telephones
			85176990	other

1.11(i). It is accordingly apparent that switching and routing apparatus is covered under sub-heading 851762 and that routers are also mentioned under sub-heading 851769, tariff item 85176930. Further, the apparatus covered under sub-heading 851769 are '*apparatus for transmission or reception of voice, images or other data... other than base stations*' and '*Machines for the reception, conversion and transmission.....*'

1.11(j). It is pertinent here to mention that the principles for classification of goods are governed by the General Rules for Interpretation (GIR) of Import Tariff, **Rule 1** of which, reads as follows:

The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes.

As per Rule 3 of the GIR: *When by application of Rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: (a) The heading which provides the most specific description shall be preferred to headings providing a more general description.*

Rule 6 of the General Rules for Interpretation is also reproduced below for further understanding:

For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related sub-heading Notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

It thus follows that, the titles of sections, chapters and sub-chapters are provided for ease of reference only and for legal purposes classification has to be determined according to the terms of the headings and any relevant section or chapter notes and provided such headings or notes do not otherwise require, **according to subsequent rules**. Rules 2 to 5 of Rules for Interpretation speak of **heading** all through. Therefore, Rule 6 would be the relevant rule in the instant case, since this rule comes into play when the dispute arises between **two sub-headings** and **not between headings**.

1.11(k). Conjoint reading of the Item description at the "Heading" (8517)/ "Sub- Heading" (851762) / "Tariff Item"(85176290) with Rule 6 of General Rules of Interpretation therefore establishes that:

"a device/equipment/machine or an apparatus capable of performing the functions of reception, conversion and transmission or regeneration of voice, images or other data - both

in the wired and wireless mode – **not qualified to be classified** as any of the below mentioned goods

i.	85176210	- PLCC equipment
ii.	85176220	- Voice Frequency Telegraphy
iii.	85176230	- Modems (Modulators – demodulators)
iv.	85176240	- High bit rate digital subscriber line system (HDSL)
v.	85176250	- Digital loop carrier system (DLC)
vi.	85176260	- Synchronous digital hierarchy system (SDH)
vii.	85176270	- Multiplexers, statistical multiplexers

would fall under the 8 digit residuary Tariff Item - “**85176290**” of the **6 digit tariff sub-heading “851762”**. Conclusively, from the tariff description as detailed in Para 7 c above, the 6 digit tariff sub-heading “851769” would cover only such apparatus, **as not covered** under sub-headings “851761” and “851762”. As per point (b) of the additional notes to General Notes to Customs Tariff, a 6-digit sub-heading includes all tariff headings, the first 6 digits of which **correspond to that number**. In the instant case, the six-digit sub-heading - **851762** defines in toto, all the functionalities of the goods under investigation.

1.11(l). Relevant Heading and Sub-headings summarised below:

Heading (4-digit)	Sub-heading (6- digit)	Remarks
8517		No dispute at the “4-digit” Heading level
	851762	Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: - Specific Sub-Heading
	851769	Other – Residuary Sub-Heading

Thus the requisite condition for specificity as mandated in the General Rules of Interpretation is squarely met by the Tariff Description in the list of tariff provisions accompanied by the 6-digit sub-heading of 851762 in respect of the impugned goods.

1.12. RELEVANT NOTIFICATIONS REGARDING LEVY OF BCD ON THE GOODS UNDER TARIFF ITEM 85176290:

1.12.1. As mentioned above, Notification No. 24/2005-Customs, dated 01.03.2005, exempted all goods under heading 8517 from the levy of BCD. Further, the Finance (No.2) Bill. 2014 increased the BCD for Tariff Items 85176290 and 85176990 to 10% and Notification No. 11/2014-Customs dated 11.07.2014 withdrew the duty exemption on the goods specified therein.

1.12.2. Notification No. 56/2017—Customs dated 30.06.2017 amended the BCD for goods under Tariff Item 85177090 to 10% and Notification No. 57/2017-Customs dated 30.06.2017 (Sr. No. 5) inter alia, specified only the parts of cellular mobile phones falling under Tariff Item 85177090 as liable to levy of BCD.

1.12.3. Further, Notification No. 58/2017 - Customs issued on 30.06.2017 amended Notification No. 24/2005-Customs, dated 01.03.2005 and. inter alia, excluded all goods falling under tariff item 85176290. 85176990 and 85177090 from the duty exemption.

1.12.4. The Finance Bill, 2018 introduced in the Lok Sabha on 01.02.2018, amended the First Schedule to the Customs Tariff Act and inter alia, increased the BCD on Tariff Items 85171210. 85171290 and 85176290, to 20%. Notification No. 22/2018 Customs dated 02.02.2018, specified the BCD for the goods under tariff item 85176290 - other than wrist wearable devices as 10%.

1.12.5. Notification No. 74/2018 Customs dated 11.10.2018, amended the First Schedule to the Customs Tariff Act and inter alia, increased the BCD on Tariff Item 85176990 to 20 %.

1.12.6. Notification No. 75/2018 Customs dated 11.10.2018, specified the concessional BCD of 10% for goods under Tariff Items 85176290 and 85176990 as under:-

8517 62 90: All goods other than following goods, namely: -

- (a) Wrist wearable devices (commonly known as smart watches)
- (b) Optical transport equipment
- (c) Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS)
- (d) Optical Transport Network (OTN) products
- (e) IP Radios

8517 69 90: All goods other than following goods, namely: -

- (a) Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers
- (b) Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching-Transport Profile (MPLS-TP) products
- (c) Multiple Input/Multiple Output (MIMO) and Long-Term Evolution (LTE) products

1.12.7. Notification No. 2/2019-Cus dated 29.1.2019 further specified this concessional rate of BCD @ 10 per cent for goods falling under 85176290 or 85176990 other than:

- a Wrist wearable devices (commonly known as smart watches)
- b Optical transport equipment
- c Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS)
- d Optical Transport Network (OTN) products
- e IP Radio
- f Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers
- g Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching Transport Profile (MPLS-TP) products
- h Multiple Input / Multiple Output (MIMO) and Long Term Evolution (LTE) products.

1.13. Nature of Goods imported

The items covered in the instant investigation, as discussed at para **1.10** above, can be grouped as below:

1.13(a). PASSIVE OPTICAL NETWORK COMPONENTS AND DEVICES

Based on literature available in Public Domain and as per the statement of the importer:

A **telecommunication network** (source - *Wikipedia*) is a **group of nodes** interconnected by **links** that are used to exchange messages between the nodes. The links may use a variety of **technologies** based on the methodologies of circuit switching, message switching, or packet switching to **pass messages and signals**. The latest and the most widely deployed broadband technologies for high speed internet-access across the globe, viz., “Fibre to the Home” or “FTTH” employs **Fibre Optic Cables** as communication channels. An Optical Fiber Communications link (source - <https://www.britannica.com/topic/telecommunications-media/Optical-transmission>) consists of the following elements: an **electro-optical transmitter**, which **converts** analog or digital information into a modulated beam of light; a **light-carrying fibre**, which spans the **transmission** path; and an **optoelectronic receiver**, which converts detected light into an electric current. For long-distance links (greater than 30 km, or 20 miles), **regenerative repeaters** are usually required to offset the attenuation of signal power.

A passive optical network (PON) is a kind of fibre-optic network which utilizes the point-to-multipoint topology and optical splitters to deliver data from a single transmission point to multiple user end points. The term “**Passive**” in this context referring to the **unpowered** (not requiring electric power) condition of the **fibre** and **splitting** components along the

length of the network laid. Power in the PON system is required only at the **send** and **receive** points – namely, Optical Line Terminal (OLT) and the Optical Network Terminal/Units. Thus, OLTs and ONT/ONUs requiring power to send and receive optical signals are the **only active elements** in the entire Optical Distribution Network running between the Service Provider's premises down to the Customer's premise. PON Networks adopt a Point-to-Multipoint (P2MP) architecture which utilizes optical splitters to divide the downstream signal from a single OLT into multiple downstream paths to the end users, the same splitters combine the multiple upstream paths from the end users back to the OLT.

Working of a Passive Optic Network based on fiber optic technology is based on the following:

- the transmission medium used in the network are fiber optic cables;
- Data (voice, image and other data) in electrical form is converted to light signals (conversion);
- Data encapsulated into light packets are transported through Optic Cables (transmission)
- Data is received and regenerated at the OLT (placed in the premise of the service provider) to be further transmitted on to the subscriber's device (Computer, TV, Mobile, Telephone etc) through ONTs (ONUs/Home Gateway Units placed in the premise of the subscriber) – (reception and regeneration);

Hence, the subject of investigation in this case namely: ONT/ONUs and OLTs are an **integral part** of the entire network - transporting voice, images and data from the Internet down to the customer through the OLT and vice-versa.

1.13(b). OPTICAL NETWORK TERMINAL / OPTICAL NETWORK UNIT:

Shri. Ajmal Hussain Mohd. Isha Siddiqui, General Manager, (Technology) in his statement recorded on 08.12.2021, stated that, they normally install GPON ONU of models ZXHN F612, ZXHN F601 and ZXHN F660 manufactured by ZTE Corporation, Shenzhen, China; and Nokia 7368 ISAM, imported from France and that these brands of GPON ONUs are normally installed by them for their customers; that the GPON/ONT/ONU with model ZXHN F660 of FTE is capable of carrying data for VOIP call and IPTV facilities. But, they are not providing these facilities. Such VOIP calls and IPTV facilities can be availed through additional instruments. The models ZXHN F612, ZXHN F601 and Nokia 7368 ISAM do not have VOIP call facility, but they are capable of carrying data for IPTV facility; that GPON ONT/ONT receives optical signals from OLT. It is placed at the subscriber's end. It has single optical signal input and electrical signal output through Ethernet port and Wi-Fi signal output; that GPON/ONT/ONU gives output in electrical signals through Ethernet port and transmits Wi-Fi signals through Wi-Fi antenna to a limited distance to the particular customer; Optical fibre is a medium capable of carrying data in any form like voice, video etc.; that, these GPON ONUs are capable of receiving optical signals containing the data, and separate the same into voice, video etc. Such signals are then converted into electrical signals and sent through Ethernet ports; and converted into Wi-Fi signals and transmitted through Wi-Fi antenna. GPON ONT/ONU are routing apparatus working with dynamic multiple IP usage facility to the particular customer, whom the apparatus is assigned; that the said goods imported by them are capable of transporting data, voice and video/images using GPON technology.

In view of the above, as admitted by the importer, the subject goods therefore perform the multiple functions of

- reception
- transmission and
- regeneration of voice, image and other data in both
- Wired and
- Wireless modes

thus enabling the end-user (Customer/subscriber) to either download or upload data (Voice, Image and other data) as required. The device is therefore essentially **an integral**

part of the Fiber Optic Network granting last mile connectivity to customers who access the internet on their devices viz., PC, Mobiles, Television etc.

Therefore, a Telecommunication Network functioning on Fiber Optic Technology is - **incomplete** without an ONT/ONU for the devices (Computer/ Mobile / Television / Telephone) to connect to the core network / Internet / WAN. The data transported through the telecommunication network is **received, converted and then transmitted** by the subject goods either through a **wired mode** or a **wireless mode** on to the **subscriber's device**. The subscriber's device, being a computer or a Mobile or a Telephone or even a Television set performs only the function of delivering the data in a form decipherable to the subscriber.

Hence, by virtue of the Tariff Heads and General Notes to the Import Tariff (reproduced in **Paras - 1.11(a) to 1.11(e)**, the device viz., ONT/ONU imported by the noticee - capable of reception, transmission and regeneration of voice, image and other data in both Wired and Wireless modes being an "**Optical Transport Equipment**" appears to be rightly classifiable under the Tariff Item - 85176290.

1.13(c). OPTICAL LINE TERMINALS

Shri Ajmal Hussain Mohd. Isha Siddiqui, General Manager, (Technology) in his statement recorded on 08.12.2021, with regard to a question to explain the instruments used by them for giving a connection to the subscriber for broadband internet connection, he stated that- that they normally use OLT (Optical Line Terminal), with 16/32 ports, and each port can handle 64 customers. The said OLT is placed normally at a common place on terrace of the premises. From this OLT, each port is connected to splitter by optical fibre cables, which splits the optical signal into multiple output. Each output of the splitter is then connected to GPON/ONT/ONU, placed at subscriber's end by optical fibre cable; that the functions of OLT is to receive optical signals from backend instruments like NOC or POP, and then send this optical signal in multiple output ports; that GPON ONT/ONT, which is placed at the subscriber's end, receives optical signals from OLT.

As per the submission of the noticee and as per the information derived from the open source (<https://forum.huawei.com/carrier/en/thread-445963.html>) the functions/ features of an Optical Line Terminal can be summed up as under:

- OLTs are Service-Side Nodes of the access network in the GPON/EPON system located in the Central Office of the Service Provider;
- Works on Fibre Optic Technology;
- Receives, Converts and Transmits data in the form of optic signals;
- Is connected to ONTs/ONUs through Fibre Optic Cable;
- Controls the information float across the Optical Distribution Network going in both directions across the ODN;
- OLT has two float directions - upstream (getting and distributing different types of data and voice traffic from users) and downstream (getting data, voice and video traffic from metro network or from a long-haul network and send it to all ONT modules on the ODN)
- On the one hand, it converges signals that carry various services at the CO (Central Office) side, sends the signals to the access network in a certain format, and transmits the signals to subscribers. On the other part, it sends the signals received from subscribers to various service networks based on service types.

From the foregoing discussions on the functions performed by an OLT, it emerges that an Optical Line Terminal is a device which carries out major functions in the transport of optical information across the Optical Data Network System, thereby suitably subscribing to the item description mentioned against the Tariff sub-heading "851762" comprising of "Machines for the reception, conversion and transmission or regeneration of voice, images or other data including switching and routing apparatus". The device, thus being a major **Optical Transport Equipment** and finding no specific mention under the 6 digit sub-

heading “851762” requires to be classified under the residuary entry under the same sub-heading at -“85176290”.

1.13(d). SMALL FORM-FACTOR PLUGGABLE (SFP) TRANSCEIVER MODULE

As per the open source data (<https://www.optcore.net/what-is-fiber-optic-transceiver/>), “Fiber Optic Transceiver” also was known as Fiber Optical Transceiver, Optical Module, Optics Module etc. It is a single, packaged device that uses fiber optic technology to transmit and receive data. ‘Transceiver’ is a combination of two words, ‘transmitter’ and ‘receiver’. In other words, the fiber optic transceiver comprising both a transmitter and a receiver which are combined and share common circuitry or a single housing. It is an important part of optical network equipment that has electronic components to condition and encodes/decode data into light pulses and then sends them to the other end as electrical signals. To send data as light, it makes use of a light source, such as VSCEL, FP and DFB laser, which is controlled by the electronic parts, and to receive light pulses, such as Pin, APD, it makes use of a photodiode semiconductor.”

According to open-source data (<https://cleerlinefiber.com/2021/02/12/sfp-modules/>), “An SFP module is a Small Form-Factor Pluggable. Simply put, it is a small transceiver that can send and receive data over fiber. SFPs plug into your network switch or media converter. They are hot-pluggable, so modules can easily be swapped in and out. SFPs are also sometimes referred to as mini GBIC (gigabit interface converter). At this point, SFPs have mostly replaced older and larger GBIC. As the name indicates, SFP modules are small, accommodating only 1-2 fiber optic connectors”.

According to Wikipedia, - “An optical module is a typically hot-pluggable optical transceiver used in high-bandwidth data communications applications. Optical modules typically have an electrical interface on the side that connects to the inside of the system and an optical interface on the side that connects to the outside world through a fiber optic cable. The form factor and electrical interface are often specified by an interested group using a multi-source agreement (MSA). Optical modules can either plug into a front panel socket or an on-board socket. Sometimes the optical module is replaced by an electrical interface module that implements either an active or passive electrical connection to the outside world.”

According to open-source data (<https://www.trentonsystems.com/blog/what-is-an-sfp-port>) -SFP ports and their corresponding SFP modules are used to facilitate seamless, high-speed data communications or telecommunications connections over extended distances in a variety of applications. They’re often used to connect a one-gigabit network switch to another, which, in turn, increases the size and improves the functionality of a network. This is helpful in military, industrial, and commercial settings where numerous devices in a widespread area require a wired, high-speed, reliable connection.”

As per Wikipedia (https://en.wikipedia.org/wiki/Small_form-factor_pluggable_transceiver),- “The small form-factor pluggable (SFP) is a compact, hot-pluggable network interface module used for both telecommunication and data communications applications. An SFP interface on networking hardware is a modular slot for a media-specific transceiver in order to connect a fiber-optic cable or sometimes a copper cable. The advantage of using SFPs compared to fixed interfaces (e.g. modular connectors in Ethernet switches) is that individual ports can be equipped with any suitable type of transceiver as needed.

The form factor and electrical interface are specified by a multi-source agreement (MSA) under the auspices of the Small Form Factor Committee. The SFP replaced the larger gigabit interface converter (GBIC) in most applications, and has been referred to as a Mini-GBIC by some vendors.

SFP transceivers exist supporting synchronous optical networking (SONET), Gigabit Ethernet, Fibre Channel, PON, and other communications standards. At introduction, typical speeds were 1 Gbit/s for Ethernet SFPs and up to 4 Gbit/s for Fibre Channel SFP modules. In 2006, SFP+ specification brought speeds up to 10 Gbit/s and the SFP28 iteration is designed for speeds of 25 Gbit/s.

A slightly larger sibling is the four-lane **Quad Small Form-factor Pluggable (QSFP)**. The additional lanes allow for speeds 4 times their corresponding SFP. In 2014, the QSFP28 variant was published allowing speeds up to 100 Gbit/s. https://en.wikipedia.org/wiki/Small_form-factor_pluggable_transceiver - cite_note-sff-8665-6 In 2019, the closely related QSFP56 was standardized doubling the top speeds to 200 Gbit/s with products already selling from major vendors. There are inexpensive adapters allowing SFP transceivers to be placed in a QSFP port.

Both a SFP-DD, which allows for 100 Gbit/s over two lanes, as well as a QSFP-DD specifications, which allows for 400 Gbit/s over eight lanes, have been published. These use a form factor which is directly backward compatible to their respective predecessors.”

From the above, it can be concluded that the SFP module hot-pluggable network interface module used for both telecommunication and data communications applications. It is a fiber optic transceiver comprising both a transmitter and a receiver which are combined and share common circuitry or a single housing. It has electronic components to condition and encodes/decode data into light pulses and then sends them to the other end as electrical signals. SFP modules are a small transceiver that can send and receive data over fiber, accommodating only 1-2 fiber optic connectors.

From the foregoing discussions on the functions performed by an SFP Modules, it emerges that an SFP Modules is a device which carries out major functions in the transport of optical information across the Optical Data Network System, thereby suitably subscribing to the item description mentioned against the Tariff sub-heading “851762” comprising of “Machines for the reception, conversion and transmission or regeneration of voice, images or other data including switching and routing apparatus”. The device, thus being a major **Optical Transport Equipment** and finding no specific mention under the 6 digit sub-heading “851762” qualifies to be classified under the residuary entry under the same sub-heading at - “85176290”.

1.14. Implications on import duty of impugned goods as per Exemption Notification No. 24/2005 dated 01.03.2005 and 57/2017 dated 30.06.2017.

Extracts of relevant exemption notifications issued by the Government in this regard are tabulated in **(Annexure -D)**.

By virtue of Customs Notifications - No. (i) 24/2005 dated 01.03.2005, (ii) 57/2017 dated 30.06.2017 and corresponding amendments issued subsequently, the subject goods viz., ONTs/ONUs, SFPs and OLTs being “Optical Network Products” supporting MIMO technology (Multiple Input and Multiple Output technology) appear to be liable to Basic Customs Duty as shown below:

Sl No.	Period	Applicable Rate of Basic Customs Duty
1.	11.07.2014 to 10.10.2018	10%
2.	11.10.2018 onwards	20%

1.14(a). It is noteworthy in this context, to read through the DOT Notification dated 05.10.2012 issued by the Government of India on the subject – **“Policy for Preference to domestically manufactured telecom products...”**. Relevant telecom products considered for preferential market access, listed in Table A of the notification included the following:

1. Encryption/UTM platforms (TDM and IP)
2. Core Edge/Enterprise routers
3. Managed Leased line Network equipment
4. Ethernet Switches (12 and L3), Hubs, etc.
5. IP based Soft Switches Media Gateways
6. Wireless/wireline PABXs
7. CPE (including Wi Fi Access points and Routers, Media Converters) 2G/3G Modems, Leased-line Modems, etc.
8. Set-Top Boxes

9. SDH/Carrier-Ethernet/Packet Optical Transport equipments
10. DWDM/CWDM systems
11. GPON equipments
12. Digital Cross connects/MUXs
13. Small size 2 G/3 G GSM based Base Station Systems
14. LTE based broadband wireless access systems (eNodeB, EPC, etc.)
15. Wi-Fi based broadband wireless access systems (Access Point, Aggregation Block, Core Block, etc.)
16. Microwave Radio systems (IP/Hybrid)
17. Software Defined Radio, Cognitive Radio systems
18. Repeaters (R F/RF-over -Optical) IBS and Distributed Antenna System
19. Satellite based systems –
20. Hubs, VSAT etc.
21. Copper access systems (DSL/DSLAM)
22. Network Management systems
23. Security and surveillance Communication systems (video and sensors based)
24. Optical Fiber Cable

The objective of the Government of India as evident from the directions given to manufacturers / government agencies in the said Notification, is to mandatorily ensure 55% to 65% of LC (local content) of raw materials in the manufacturing of ONTs, ONUs and OLTs and thereby to boost **domestic manufacturing** in a highly evolving and widely deployed telecom sector with the ultimate aim to increase broadband coverage in the Country, in targeted phases upto 600 million by 2020. It is further felt that the **verticals of goods** listed in the Telecom notifications may differ in their classification from those listed in the Customs Tariff due to the reason that the **mode of implementation of Government Policies** by the Department of Revenue need not necessarily be in congruence with that of the Department of Telecommunications. While the Notification issued by the Department of Telecommunications considered the technical aspects of the equipments to be manufactured locally, the Department of Revenue complemented the scheme by amending the exemption Notification No. 24/2005 dated 01.03.2005 vide Notification No. 11/2014 dated 11-07-2014 (details in Annexure D) to exclude the subject goods, among others, from the benefits allowed therein. Simultaneously, the standard rate of goods falling under the CTH – 85176290 was raised to 10% vide Finance Act, 2014. Description of goods that were wholly exempted from payment of BCD as a consequence of the amendment effected vide the above referred Notification are reproduced below:

Goods *other than*

- I. Soft Switches and Voice over Internet Protocol (VoIP Phones, Media Gateways, Gateway controllers, Session Border Controllers);
- II. Optical Transport Equipment, Combination of one or more of Packet Optical Transport Product or Switch, Optical Transport Network Products or Switch, Optical Transport Network Products and IP Radios;
- III. Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching – Transport Profile (MPLS-TP) products;
- IV. Multiple Input/Multiple Output and Long-Term Evolution Products;

1.14(b). In concord with the DOT Notification dated 29.08.2018 on the subject : **Public Procurement (Preference to Make in India) Order 2017 – Notification of Telecom Products, Services or Works** issued to encourage “Make in India” and to promote manufacturing and production of goods and services (**36 categories**) in India with a view to enhancing income and employment, Department of Revenue effected yet another amendment to Notification No. 57/2017 dated 30.06.2017 vide Customs Notification No. 75/2018 dated 11.10.2018 (Parent Notification – 57/2017 dated 30.06.2017)to complement the said “Make in India” initiative excluding the following category of goods (**8 categories**) from the benefit of partial exemption of BCD at 10%:

- a. Wrist wearable devices (commonly known as smart watches)
- b. Optical transport equipment

- c. Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS)
- d. Optical Transport Network (OTN) products
- e. IP Radios under the **Tariff Item 85176290**

and

- a. Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers;
- b. Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching- Transport Profile (MPLS-TP) products;
- c. Multiple Input/Multiple Output (MIMO) and long-Term Evolution (LTE) products **under the Tariff Item 85176990;**

The impugned goods figures at S1 No. 11 of Table A of the cited Notification wherein, Table A enlists Telecom Products recommended for domestic manufacturing.

1.14(c). Conjoint reading of the DOT/Customs Notifications clearly reveals that the 36 specific entries listed under the DOT Notifications have been brought under the above 8 broad categories of goods under Customs Notifications. Keeping in view the large number of components used in the deployment of Optical Networks and the essential features/functions of the goods that often overlap across TARIFF SUB-HEADINGS (under 8517), Notification No. 75/2018 dated 11.10.2018 was further amended by merging the above two categories into 85176290 and 85176990 vide Notification No. 2/2019 dated 29.01.2019.

1.14(d). It is further observed that, all the above referred DOT Notifications were issued in line with the TRAI recommendations on Telecom Equipment Manufacturing Policy dated 12.04.2011 as per which, growth in the Country's telecom network cannot be sustained **without credible domestic manufacturing capabilities.** In the said recommendations, the telecom equipments for which, prospects for domestic manufacturing were being considered were broadly divided into two main categories: (i) **Telecom Network Equipment** and (ii) **End-user Equipments.** It is also mentioned in the TRAI recommendations that, transmission equipment is required to create links among other elements of the network. Thus, any equipment that links various elements of a network can be called a transmission equipment. Therefore, all telecommunication equipments, spanning from the service provider's end to the consumer's device appear to be covered under the above two categories and OLT and ONU/ONT would invariably fall under the said definition.

1.14(e). Additionally, a look into Table 1.16 of TRAI recommendations shows that the policy stipulations for telecommunication equipment manufacturing in the country intended to reduce imported goods from 70% to 20% by 2019-20.

Telecom Equipment Manufacturing Policy
Table 1.16 Summary of policy stipulations

		2012-13	2014-15	2016-17	2019-20
1	Demand	100	100	100	100
2	Imported/LVA	70	55	40	20
3	DMP	30	45	60	80
	(i) IMP	15	20	25	30
	(ii) IP	15	25	35	50
4	Min Value Addition	25	35	50	65

It cannot be disputed that - Optical Distribution Networks extending from the "OLTs", stationed at the Service Provider's premises to the "ONTs" located in the premises of the Customer are **essential active** components of Broadband Access Networks and that they perform the basic functions of receiving, converting and transmitting optical data both in the wireless and wired mode. Extending the benefit of '**NIL**' rate of BCD to goods such as

these is in contradiction to the above-mentioned policy framework espoused TRAI recommendations as early as 2011. It further defeats the “Make in India” initiative of the Government of India intended to protect the domestic industry and above all - **at the cost of Revenue to the exchequer.**

1.15(a). The goods under investigation viz., Optical Network Terminals / Optical Network Units (ONT/ONUs), Optical Line Terminals (OLTs) and Small Form-Factor Pluggable Modules/Quad Small Form-factor Pluggable (SFP/QSFP) are essential **components of the same network** working on the **same principle** differing only in the place of installation in the Network Topology.

As per the statement of Shri. Hetalkumar Dilipkumar Kansara, Assistant General Manager, recorded on 10.11.2021, M/s. GTPL Broadband (P) Ltd., Ahmedabad are engaged in the business of providing internet services to end users in retail and enterprise and they have a technical department to give technical advice to them regarding the features and functions of the products. From the statement of Shri. Ajmal Hussain Mohd. Isha Siddiqui, General Manager, (Technology) recorded on 08.12.2021, it is evident that the noticee is well aware of the technical features of the products imported and used by them for providing service. In this context the importer cannot plead ignorance of the technology/principle behind the functioning of EPON/GPON in a scenario where, Ethernet/Gigabit - Passive Optical Network is the latest technology being widely deployed globally for high speed internet access. Despite being conversant with the technical literature of the products imported and despite the relevant Notifications issued by the Government being amply - plain and clear with the wordings used to describe the nature of goods to be kept outside the purview of benefits allowed therein, the noticee conveniently preferred to wrongly classify the subject goods under the **Tariff Item - 85176950** as “**Subscriber End Equipment/Customer Premise Equipment/ Networking Equipment**” thereby availing the ineligible benefit of ‘NIL’ rate of BCD as available at Sl No. 13P of Notification No. 24/2005 Cus dated 01.03.2005, in **58** out of **96** bills of entry filed for the import of ONT/ONUs between the period **23.09.2017** to **25.09.2021** in respect of Air Cargo Complex, Ahmedabad and Mundra Port.

Air Cargo Complex, Ahmedabad (INAMD4)

During the period **2017-18**, the noticee have classified the Optical Line Termination (OLT) products in **4** Bills of Entry under **Tariff Item 85176930** as “**Routers/Networking Equipment**” thereby availing the ineligible benefit of ‘NIL’ rate of BCD as available at Sl No. 13 N of Notification No. 24/2005Cus dated 01.03.2005,

Further, during **2020-21**, in **5** Bills of Entry, they have classified the ONT/ONU Products under the **Tariff Item - 85176250** as “**Digital loop carrier system (DLC)/Networking Equipment**” thereby availing the ineligible benefit of ‘NIL’ rate of BCD as available at Sl No. 13I of Notification No. 24/2005Cus dated 01.03.2005,

During the period **01.04.2018 to 15.09.2021**, the noticee has classified the Optical Network Terminal/Optical Network Unit and SFP Modules in **14** Bills of Entry under **Tariff Item - 85176290** as “**Networking Equipment**”, and availed the ineligible benefit of reduced rate of BCD @ 10% as available at Sl No. 20 of Notification No. 57/2017 dated 01.03.2017.

During the period from **04.07.2020 to 15.09.2021** the noticee has classified OLT and SFP Modules under **Tariff Item – 85176990** as “**Networking Equipment**” in **10** Bills of Entry and availed the ineligible benefit of reduced rate of BCD @ 10% as available at Sl No. 20 of Notification No. 57/2017 dated 01.03.2017.

Further, in **1** Bill of Entry filed by the noticee in respect of SFP/QSFP Modules, these items were classified under **Tariff Item 85177090** and availed the exemption benefit under Sl No. 5 of Notification No. 57/2017 dated 01.03.2017 and paid Nil BCD.

Mundra Sea Port (INMUN1)

During the period **20.09.2019** to **25.09.2021**, the noticee have classified the Optical Line Termination (OLT) products in **4** Bills of Entry under incorrect **Tariff Item 85176990** as **“Networking Equipment”** and availed the ineligible benefit of reduced rate of BCD @ 10% as available at Sl No. 20 of Notification No. 57/2017 dated 01.03.2017.

During the same period, in **1** Bill of Entry, they have classified the ONT/ONU Products under the **Tariff Item – 85176290** as **“Subscriber End Equipment”** thereby availing the ineligible benefit of 'NIL' rate of BCD as available at Sl No. 13N of Notification No. 24/2005-Cus dated 01.03.2005,

During the same period, in **2** Bills of Entry, they have classified the ONT/ONU Products under the **Tariff Item – 85176250** as **“Subscriber End Equipment”** thereby availing the ineligible benefit of 'NIL' rate of BCD as available at Sl No. 13P of Notification No. 24/2005-Cus dated 01.03.2005,

1.15(b). On perusal of the purchase orders submitted by the noticee, addressed to the supplier M/s ZTE Corporation, China and Alcatel Lucent International, France and the Commercial invoices issued by M/s ZTE Corporation and Alcatel Lucent International, the suppliers, it is evident that the noticee has placed orders and imported/purchased Optical Network Terminals/ Optical Network Units (ONT/ONU) and Optical Line Terminals (OLT) and not for “Subscriber End Equipment” or “Network Equipment”. Being fully aware of the products purchased/imported, the noticee seemed to have deliberately declared the goods as “Subscriber End Equipment” and/or “Network Equipment” in the Bills of Entry in order to avail ineligible duty exemption. This act of the noticee allegedly showed the mala fide of the noticee by placing purchase order in the correct name of the product to their suppliers and declaring different name in the Bill of Entry and not declaring the actual function or technical details to the Customs Authorities in the documents presented for assessment.

1.15(c). Shri Hetalkumar Kansara in his statement dated 10.11.2021 had admitted that that initially upto August, 2018 they chose the heading 8517 6990 by reading the description OTN products given at clause (d) of the heading. Later on they realised that the right classification of the product is tariff item 8517 6950. Further, Shri. Vipul Rameshchandra Modi, Proprietor, M/s Vipul R. Modi, Customs Broker in his statement dated 07.03.2022 admitted that they have done clearance work of goods, namely "GPON ONT", to the noticee classifying the product "GPON ONT (Subscriber end equipment)" under tariff item 85176990 upto 06-04-2018. Thereafter, the product classification was changed to 85176950 as per the instruction of the noticee. From the above it seemed apparent that the noticee deliberately changed the classification of the goods from 85176990 to 85176950 on being aware that the Optical Network Products were excluded from the exemption Notification No.24/2005 Cus dated 01.03.2005 vide Sl.No.(d) of Notification No.75/2018 Cus dated 11.10.2018. From the act of the noticee it seemed that the noticee changed the classification of the product in order to avail an ineligible benefit which brings out the mala fide of the noticee to evade payment of Customs Duty, by choosing/changing classification to wrongfully avail exemption of duty.

1.15(d). The noticee also seemingly has deliberately withheld from disclosing to the Department, the technical nature of the items imported as OLTs, ONT/ONU and SFP/QSFP so as to avail the benefit of Nil rate of duty as available at Sl No.13N, 13P and 13I of Notification No. 24/2005 Cus dated 01.03.2005 and Sl No. 5 of Notification No. 57/2017 Cus dated 30.06.2017 and lower rate of duty as available at Sl No. 20 of Notification No. 57/2017 Cus dated 30.06.2017. Despite the fact that, OLTs, ONT/ONUs and SFP/QSFPs are Optical Network Products performed identical functions with the difference being in the volume of data handled, the decision of the importer to choose the different and wrong Tariff Item – 85176930 and 85176990 for classification of OLTs and Tariff Item – 85176250 and 85176950 for ONT/ONUs and Tariff Item – 85177090, 85176990 and 85176290 for SFP/QSFPs seems to be to evade Import Duty to the tune of **Rs.15,61,18,761/- (Rupees Fifteen Crore Sixty One Lakhs Eighteen Thousand and Seven Hundred and Sixty One Only).**

Port	Period from	Period to	Assessable Value (In Rs)	Total Duty (In Rs)
INMUN1	20.09.2019	25.09.2021	34,93,42,899	8,33,87,899
INAMD4	23.09.2017	15.09.2021	41,45,31,924	7,27,30,862
Total			76,38,74,823	15,61,18,761

1.15(e). From the analysis of import data in respect of the instant investigation, it is noticed that the noticee have classified the ONT/ONU, OLT, OTE and SFP products under Tariff Item 85176990 and paid appropriate duty (10%) applicable at the time of import, during the period 20.12.2017 to 09.03.2018 without availing any exemption as detailed in **Annexure E**. Hence, it seemed that the noticee is fully aware of the correct rate of duty applicable and the ineligibility of exemption for the impugned products. The impugned bills in the Annexure E appeared to have been all self-assessed in final assessment implying knowledge and agreement of the noticee with respect to ineligibility of concerned rate of duty albeit the goods being classified under 85176990.

From analysis of the import data, it is also noticed that the noticee was continuously changing the classification of the same products imported to different tariff items. This act seems to expose the mala fide of the importer to evade Import Duty in order to avail ineligible exemption under various exemption notifications, as detailed below:

Air Cargo Complex, Ahmedabad (INAMD4)

- (i) During the period 2017-18, they have classified Optical Transport Equipments under **tariff item 85176930** which stands for '**Router**' and availed the benefit of Sl.No.13N of the Notification No.24/2005 Cus dated 01.03.2005 as evident from the **Annexure B-2**.
- (ii) Further, during 2020-21, they have classified the ONT/ONU Products under the tariff item – 85176250 which stands for "**Digital Loop Carrier System (DLC)**" thereby availing the ineligible benefit under Sl No. 13I of Notification No. 24/2005 Cus dated 01.03.2005;
- (iii) The noticee has also classified the ONT/ONU Products under the tariff item- 85176950 – '**Subscriber End Equipment**' for availing the benefit of Sl.No.13 P of Notification No. 24/2005 Cus dated 01.03.2005;
- (iv) During the period 01.04.2018 to 15.09.2021, the noticee has classified the ONT/ONU Products and SFP/QSFP Modules under Tariff Item – 85176290 as "**Networking Equipment**" and availed the ineligible benefit of reduced rate of BCD @ 10% as available at Sl No. 20 of Notification No. 57/2017 dated 01.03.2017.
- (v) During the period from 04.07.2020 to 15.09.2021 the noticee has also classified OLT and SFP Modules under Tariff Item – **85176990** as "**Networking Equipment**" and availed the ineligible benefit of reduced rate of BCD @ 10% as available at Sl No. 20 of Notification No. 57/2017 dated 01.03.2017.
- (vi) The SFP/QSFP Modules were also classified under **Tariff Item 85177090** for availing the exemption benefit under Sl No. 13 of Notification No. 24/2005 Cus dated 01.03.2005.

Mundra Sea Port (INMUN1)

- (i) During the period under investigation (20.09.2019 to 26.08.2021), they have classified Optical Line Termination (OLT) products under **tariff item 85176990** and availed the ineligible benefit of reduced rate of BCD @ 10% as available at Sl No. 20 of Notification No. 57/2017 Cus dated 01.03.2017, as evident from the **Annexure B-1**.
- (ii) Further, they have classified the ONT/ONU Products under the tariff item- 85176950 – '**Subscriber End Equipment**' for availing the benefit of Sl.No.13 P of Notification No. 24/2005 Cus dated 01.03.2005;
- (iii) The noticee has also classified the ONT/ONU Products under the tariff item – 85176250 which stands for "**Digital Loop Carrier System (DLC)**" thereby

availing the ineligible benefit under Sl No. 13P of Notification No. 24/2005 Cus dated 01.03.2005;

1.15(f). Thus, it became evident that the noticee was fully aware of the matter of wrong classification and consequent wrong claim of exemption notification that had resulted in non-payment of BCD at (i) Nil rate in respect of **68** Bills of Entry having a total assessable value of **Rs.52,38,33,409/- (Rs.23,07,42,574/- + Rs. 29,30,90,835/-)** and short-payment of BCD at (ii) 10% in respect of **28** Bills of Entry having a total assessable value of **Rs.24,00,41,414/- (Rs.18,37,89,350/- + Rs.5,62,52,064/-)**. The noticee however suppressed the technical features from the Department to evade import duties amounting to **Rs.15,61,18,761/- (Rupees Fifteen Crore Sixty-One Lakhs Eighteen Thousand and Seven Hundred and Sixty-One Only)**.

1.15(g). From the facts and circumstances detailed in above discussions, it is felt that **M/s GTPL Broadband (P) Ltd** had violated Section 17 of the Customs Act, 1962, wherein it is envisaged that, an importer entering any goods under Section 46 of the Act, is bound to **self-assess** the duty, if any, leviable on such goods. The importer in the instant case, made an assessment of the duty of Customs by availing the ineligible benefit under the exemption notifications – No. 24/2005-Cus dated 01.03.2005 and 57/2017-Cus dated 30.06.2017 which led to loss of revenue by way of Import Duties to the Government Ex-chequer. The noticee chose to mislead the Department by preferring to suppress the functions defining the quintessential technical nature of the subject goods and opting to mention the generic name – “Subscriber End Equipment/Network Equipment” for their imports of OLT, SFPs, OTE and ONTs/ONUs and classifying the items under the different Tariff item-85176250, 85176290, 85176930, 85176950, 85176990 and 85177090 so as to avail the consequent benefit of exemption of BCD available for the goods falling under the same, leading to gross evasion of import duty leviable on the said items. In the import of OLTs, and SFP/QSFPs and other OTEs discussed at **Para 6** as well, the technical nature of the goods were deliberately concealed from the Department so as to avail the benefit of lower rate of import duty as available at Sl No. 20 of Notification No. 57/2017-Cus dated 30.06.2017, which resulted in short-payment of import duty leviable on the subject goods.

1.15(h). Evidently, the noticee had intentionally and deliberately caused to:

- i. mis-declare ONTs/ONUs as “Subscriber End Equipment” under the tariff item 85176950 and under tariff item 85176250 as Networking Equipment and availed the exemption under Notification No.24/2005-Cus at Sl.No.13P and 13I respectively;
- ii. mis-declared Optical Transport Equipments as routers under tariff item 85176930 and 85176290 and availed exemption under Sl.No.13N of Notification No.24/2005-Cus;
- iii. mis-declared OLTs as “Network Equipment” under tariff item 85176990;
- iv. mis-declared SFPs/QSFPs as “Network Equipment” under tariff item 85177090, and 85176990; and
- v. availed the ineligible benefit of
 - a. exemption from the whole of Basic Customs Duty as available under Sl No. 13N, 13 P and 13I of Notification No. 24/2005 Cus dated 01.03.2005 and Sl No.5 of Notification No. 57/2017 Cus dated 30.06.2017
 - b. lower rate of BCD @ 10% as available under Sl No. 20 of Notification No. 57/2017 Cus dated 30.06.2017;

1.16. It was also observed that the Customs brokers viz., **M/s. Vipul. R. Modi** and **M/s Swayam Shipping Services** did not exercise due diligence in classifying the subject goods by looking into the technical details of the items and ascertaining whether the same are eligible for the exemption claimed; instead they succumbed to the diktats of the clients and caused to file the subject Bills of Entry with incorrect and ineligible entry of the relevant notification issued in respect of Basic Customs Duty thereby allowing them to wrongly avail Nil/lower rate of BCD thus rendering the goods liable for confiscation under Section 111(m) of the Customs Act, 1962; they also caused to submit the Bills of Entry (**Annexure B-1, B-2 & C-1, C-2**) filed for the clearance of the impugned OLT, SFPs and ONTs/ONUs which are false in respect of the serial number of entry of BCD Rate as given in Notification

No.24/2005-Cus dated 01.03.2005 as amended and Notification No. 57/2017 Cus dated 30.06.2017. The above acts of omission and commission on the part of the Customs Brokers have rendered them liable to penalty under Section 112 and 114AA of the Customs Act, 1962.

1.17. Legal provisions:

Section 17(1):- An importer entering any imported goods under section 46 or an exporter entering any export goods under section 50, shall, save otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

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 willful 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 111(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 transshipment, with the declaration for transshipment referred to in proviso to sub-section (1) of Section 54; when brought from a place outside India shall be liable to confiscation.

Section 112 provides for penalty for improper importation of goods according to which, 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

Shall be liable,-

[(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of **Section 114 A**, to a penalty not exceeding ten per cent of the duty sought to be evaded or five thousand rupees, whichever is higher:

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the penalty so determined;]

Section 114 A: 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 willful 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 sub-section of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined.

Section 114 AA: 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.

1.18. Summary of investigation: From the investigations conducted so far, it appears that:

- (i) **M/s GTPL Broadband (P) Ltd** had imported items known in commercial parlance as “ONT/ONUs/Home Gateway Units”, Optical Line Terminal (OLT) and Small Form-Factor Pluggable Fiber Optic Transceiver Module(SFP/QSFP) and other OTEs by projecting them as “Subscriber End Equipment/Network Equipment/Routers” and thereby mis-classifying them under the Tariff Items- 85177090, 85176930, 85176950 and 85176250, instead of the correct Tariff Item – 85176290 in order to avail the benefits of Nil/lower rate of BCD as available at Sl No.13I, 13N and 13 P of Notification No. 24/2005 Cus dated 01.03.2005 & Sl No. 5 and 20 of Notification no. 57/2017 dated 30.06.2017;
- (ii) despite being aware that the description of goods namely, Optical Network Terminals/ Optical Network Units and Optical Line Terminals, Small Form-Factor Pluggable Fiber Optic Transceiver Module (SFP/QSFP), and other Optical Transport Equipments -by virtue of their technical functions/features correspond to the description of **items excluded** from the benefit of Nil rate of duty / reduced rate of Basic Customs Duty as available at No.13I, 13N and 13 P of Notification of Notification No. 24/2005 Cus dated 01.03.2005 & Sl No.5 and 20 of Notification No. 57/2017 Cus dated 30.06.2017, the bills of entry listed in **Annexure B-1, B-2 and C-1, C-2** were filed claiming the ineligible benefits by virtue of the said suppression and wilful mis-statement the differential duty of **Rs.15,61,18,761/- (Rupees Fifteen Crore Sixty One Lakhs Eighteen Thousand and Seven Hundred and Sixty One Only)** on goods having assessable value of **Rs.76,38,74,823/- (Rupees Seventy Six Crores Thirty Eight Lakhs Seventy Four Thousand Eight Hundred and Twenty Three only)**, appeared to be recoverable from them under Section 28(4) of Customs Act, 1962.
- (iii) The impugned goods appeared liable to confiscation under Section 111(m) and the importer appeared liable for penalty under Section 112/114A of Customs Act, 1962.
- (iv) By virtue of their acts of furnishing false material particulars like clarification, Sl.No. of Notification etc, they appeared to have rendered themselves liable to penalty under Section 114AA of Customs Act, 1962;
- (v) the Customs Brokers viz. **(1) M/s. Vipul. R. Modi**, FF126 Sayona Centre, Near Silver Point Restaurant, Opp. Memco Brts Bus Stop, Naroda Road, D-Colony, Ahmedabad-380025 and **(2) M/s Swayam Shipping Services**, 202, Rajkamal 1, Plot No.348, Ward 12-B, Gandhidham, Kutch, Gujarat-370201, overlooked the technical features and Customs Tariff Heading of the imported – ONT/ONUs, OLT and SFP/QSFP Modules and thereby caused evasion of customs duty by suppression of true nature of the goods resulting in ineligible availment of exemption available under Customs Notification No. 24/2005 Cus dated 01.03.2005 and 57/2017 Cus dated 30.06.2017 as discussed at Para 13 above. They have not discharged their duties as mandated by CBLR. In view of the above, they appear liable to penalty under Section 112 and 114AA ibid.

DEMAND

2.1. In view of above, vide SCN F.No GEN/ADJ/COMM/185/2022-Adjn dated 09.09.2022; **M/s. GTPL Broadband (P) Ltd** having registered office at 202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmedabad - 380004, Gujarat were called upon to show cause to the **Commissioner of Customs, Customs House, Mundra** as to why:

- a. the subject goods viz., ONTs/ONUs, OLTs and SFP/QSFP Modules should not be categorised as Optical Transport Equipment/Optical Network Products and the declared classification of 85177090, 85176930, 85176950, 85176990 and 85176250 of the imported ONTs/ONUs and OLTs imported under the Bills of Entry listed in

Annexure-B-1 and B-2 to the show cause notice should not be rejected and re-determined as 85176290;

- b. the already availed exemption of basic customs duty as per serial number-(i) 13I, 13N and 13P of Notification No.24/2005-Customs dated 01.03.2005 as amended and (ii) Sl.No.5 and 20 of Notification No.57/2017 Cus dated 30.06.2017 (as amended) claimed by them on the import of ONTs/ONUs, OLTs and SFP/QSFP Modules, as detailed in Annexure -B-1 and B-2 to the show cause notice should not be denied ab initio in view of (a) above;
- c. the import duty on the impugned goods having a total assessable value of **Rs. 76,38,74,823/- (Rupees Seventy Six Crores Thirty Eight Lakhs Seventy Four Thousand Eight Hundred and Twenty Three only)**, cleared by the importer vide Bills of Entry as given in Annexure-B-1, B-2 & C-1, C-2 to the show cause notice should not be redetermined in view of (a) and (b) above and the consequent total differential duty of **Rs. 15,61,18,761/- (Rupees Fifteen Crore Sixty One Lakhs Eighteen Thousand and Seven Hundred and Sixty One Only)** should not be demanded from them under Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act,1962;
- d. The consignments imported vide Bills of Entry listed in **Annexure-B-1, B-2 and C-1, C-2** to the show cause notice having a total assessable value of **Rs.76,38,74,823/- (Rupees Seventy Six Crores Thirty Eight Lakhs Seventy Four Thousand Eight Hundred and Twenty Three only)** should not be held liable to confiscation under Section 111(m) of the Customs Act,1962;
- g. Penalty should not be imposed on them under Section 112/114A of the Customs Act, 1962;
- h. Penalty should not be imposed on them under Section 114AA of the Customs Act, 1962

2.2. Vide the aforementioned Show Cause Notice dated 09.09.2022; **CB M/s. Vipul. R. Modi**, FF126 Sayona Centre, Near Silver Point Restaurant, Opp. Memco Brts Bus Stop, Naroda Road, D-Colony, Ahmedabad-380025; were also called upon to show cause to the **Commissioner of Customs, Customs House, Mundra** as to why penalty should not be imposed on them under Section 112 and 114AA of the Customs Act, 1962.

2.3. Vide the aforementioned Show Cause Notice dated 09.09.2022; **CB M/s Swayam Shipping Services**, having registered office at 202, Rajkamal 1, Plot No.348, Ward 12-B, Gandhidham, 370201, Kutch, Gujarat; were also called upon to show cause to the **Commissioner of Customs, Customs House, Mundra**, as to why penalty should not be imposed on them under Section 112 and 114AA of the Customs Act, 1962.

3. WRITTEN SUBMISSION:

3.1.1. The Noticee No. 1 i.e. M/s. GTPL Broadband (P) Ltd., made their written submissions vide their letters dated 20.10.2022 and 02.03.2023 wherein, they stated as under:

They have received the above referred Show Cause Notice and noted that a proposal to demand Rs. 15,61,18,761/- as differential Customs duty is levelled against them invoking Section 28(4) of the Customs Act, 1962. A proposal for recovering interest under Section 28AA of the Customs Act on the differential duty and also a further proposal to impose penalties on them under Section 112/114A and Section 114AA of the Customs Act are also made in the show cause notice. The differential duty above referred is demanded on the goods for which Bills of Entry listed in Annexures-B-1, B-2, C-1 and C-2 attached to the show cause notice were filed by them and impugned goods having assessable value of Rs.76,38,74,823/- are proposed to be held liable for confiscation under Section 111(m) of the Customs Act.

- a) They have noted that the above referred proposals are made on the basis that the goods imported by them were classified under CTH 85177090, 85176930, 85176950, 85176990 and 85176250, but the goods were meriting classification under CTH 85176290 and that benefit of exemption Notification Nos. 24/2005 Cus. dated 1.3.2005 as amended, and 57/2017-Cus. dated 30.6.2017 as amended, was not available for the imported goods; and that the goods were required to be re-classified under CTH 85176290 and the benefit of the above referred Notifications was required to be denied.
- b) It is observed in the very beginning of this show cause notice (i.e. in para 1 itself) that an intelligence was developed by the Directorate of Revenue Intelligence, Cochin Zonal Unit, that certain importers were importing goods like Optical Line Terminals, SFP Modules and Optical Network Terminals/Units (ONTs/ONUs) by mis-declaring them "Subscriber End Equipment/Router/Networking Equipment" under Tariff items 8517650, 85176930, 85176250, 85176990, 85177090 and 85176290 at nil/lower rate of duty by claiming exemption under Notification No.24/2005 Customs dated 1.3.2005 Notification No.57/2017 Customs dated 30.6.2017 as amended. It is further observed that the data analysis suggested that their company was one of the importers that had resorted to such mis-declaration/mis-classification for availing duty exemption. It is on this basis that the investigation was conducted against them, which had then resulted in the subject show cause notice.
- c) At the outset, they submit that the entire basis of the show cause notice is factually incorrect and legally unsustainable. They have not mis-declared or mis-classified the goods imported by them. Benefit of Notification Nos.24/2005-Cus. dated 1.3.2005 as amended, and 57/2017-Cus. Dated 30.6.2017 has not been availed by them in any irregular or unauthorised manner. The goods imported by them for which the show cause notice is issued to them are not classifiable under CTH 85176290; and the benefit of the above Notifications has been legally and lawfully admissible for the goods imported by them. Therefore, the proposals levelled against them in this show cause notice are unsustainable and unjustified in facts as well as in law.

At the further outset, they also submit that the goods imported by them were assessed to Custom duties by proper Customs officers in charge of the Customs stations of import, and the goods have been cleared for home consumption only after the Bills of Entry were assessed by proper Custom officers and the duties so assessed were paid by them. The assessment orders on the bills of entry still subsist, and the goods imported by them are not available for any action like confiscation at this stage. The proposal for holding the goods liable for confiscation is therefore liable to be withdrawn. Moreover, they have not been guilty of any omission or commission as regards import of the goods in question and clearance thereof for home consumption, and the ingredients of Sections 112, 114A and 114AA of the Customs Act are also not satisfied in the facts of the present case. Therefore, the proposal to impose penalty on them also does not deserve any consideration.

They deny the allegations levelled against them in the show cause notice; and they deny in particular the allegations of suppression of facts, mis-classification and mis-declaration of the goods imported by them. The show cause notice is issued in violation of the principles of natural justice because it is in nature of a conclusive decision by the Custom authorities. Therefore also, this show cause notice deserves to be withdrawn at once in the interest of justice.

3.1.2. The show cause notice apparently refers to the imports made by them at Air Cargo Complex, Ahmedabad, as well as at Mundra Sea Port. However, assessment of all the goods imported at Ahmedabad Air Cargo Complex as well as Mundra Port has been made by proper Custom officers, but the goods are still proposed to be re-classified without allowing benefit of the exemption notifications; and re-determination of classification and differential customs duty for the goods imported at Ahmedabad ACC and Mundra port is the subject matter of the present show cause notice, to be decided by the Commissioner of Customs, Mundra.

In this regard, the details of the bills of entry filed at both the Customs Stations are referred to under para 11a of the show cause notice.

3.1.2.1 It is alleged at para 14 of the show cause notice that they had imported the items known in commercial parlance as “ONT/ONUs/Home Gateway Units, OLT, SPP/QSFP” and other OTEs by projecting them as “Subscriber End Equipment/Network Equipment/Routers”, thereby mis-classifying the goods under various headings of the Customs Tariff, instead of the correct Tariff Item 85176290 for availing benefits of nil or a lower rate of Basic Customs duty available under SI.No.13I, 13N and 13P of Notification No.24/2005-Customs and SI.Nos. 5 as well as 20 of Notification No.57/2017-Customs. It is also alleged that they were aware that the goods, namely, Optical Network Terminals/Optical Network Units and Optical Line Terminals, Small Form-Factor Pluggable Fibre Optic Transceiver Module (SFP/QSFP), and other Optical Transport Equipments, were excluded from the benefit of nil rate of duty as well as reduced rate of Basic Customs duty under the above referred Notifications, but still however, they filed Bills of Entry claiming ineligible benefits by suppression and wilful mis-statement. It is also alleged at para 11d of the show cause that they deliberately withheld from disclosing to the Department, the technical nature of the items imported as OLTs, ONT/ONU and SEP/QSFP so as to avail the benefit of Nil rate of duty as available at SI.No.13N, 13P and 13I of Notification No.24/2005 Cus dated 1.3.2005 and SI.No.5 of Notification No.57/2017 Cus. dated 30.6.2017 and lower rate of duty as available at SI.No.20 of Notification No.57/2017 Cus dated 30.6.2017. It is also alleged that OLTs, ONT/ONUs and SFP/QSFPs are Optical Network Products for performing identical, functions with the difference being in the volume of data handled and therefore, their decision to choose the different and wrong Tariff Item 85176930 and 85176990 for classification of OLTs and Tariff Item – 85176250 and 85176950 for ONT/ONUs and Tariff Item - 85177090, 85176990 and 85176290 for SFP/QSFPs exposes their malafide to evade Import Duty to the tune of Rs.15,61,18,761/-.

3.1.2.2 On this basis, it is precisely alleged as under para 11h of the show cause notice:-

“11h. the noticee had intentionally and deliberately caused to:-

- i. mis-declared ONTs/ONUs as “Subscriber End Equipment” under the tariff item 85176950 and under tariff item. 85176250 as Networking Equipment and availed the exemption under Notification No.24/2005- Cus at SI.No.13P and 13I respectively.
- ii. mis-declared Optical Equipment as routers under tariff item 85176930 and 85176290 and availed exemption under SI.No.13N of Notification No.24/2005- Cus.
- iii. mis-declared OLTs as “Network Equipment” under Tariff item 85176990;
- iv. mis-declared SFPs/QSFPs as “Network Equipment” under tariff item 85177090, and 85176990; and
- v. availed the ineligible benefit, of
 - a. exemption from the whole Basic Customs Duty as available under SI.No.13N, 13P and 13I of Notification No.24/2005 Cus dated 01.03.2005 and SI.No.5 of Notification No.57/2017-Cus dated 30.06.2017.
 - b. lower rate of BCD @10% as available under SI.No.20 of Notification No.57/2017 Cus dated 30.06.2017.”

3.1.2.3 The above referred is the case made out against them in this show cause notice; and the proposals for re-determining the Classification of the imported goods under CTH 85176290 without benefit of the Customs Notifications above referred resulting in demand of differential Customs duty aggregating to Rs.15.61 crores (rounded off) are leveled.

But these proposals are incorrect and unsustainable because there is no mis- declaration or mis-classification of the goods imported by them, and also because the benefit of Notification Nos.24/2005-CUS. doted 1.3.2005 as amended, and 57/2017-Cus. dated

30.6.2017 as amended have been allowed in their favour lawfully and legally. There is no short payment or short levy of Custom duties on the goods imported by them; and there is no justification in the allegations of suppression of facts, malafide, mis- declaration, mis-classification and wrongful availment of benefit of Custom Notifications that have been leveled against them by the Revenue.

While denying all the allegations, they submit that the show cause notice and all the proposals made thereunder deserve to be dropped in the interest of justice.

3.1.3. The show cause notice is quite elaborate, and it runs into 46 pages. In this elaborate Notice, extensive reference are given to statement of their Assistant General Manager Shri Hetal Kumar Kansara recorded on 10.11.2021 as well as 18.6.2021, and also to the statement of their General Manager (Technology) Shri Ajmal Hussain Mohmedlsha Siddiqui. References are also made to statements of Shri Vipul R. Modi (Customs Broker) recorded on 7.3.2022 and to statement of Shri Jang Bahadur Singh of M/s. Swayam Shipping Services, Customs Broker. Moreover, various Explanatory Notes of Harmonious System of Nomenclature (HSN) and General Rules for interpretation of the Schedule to the Customs Tariff have also been extensively discussed in the show cause notice. Interestingly, various information appearing in Wikipedia are also reproduced in the show cause notice, though it is a settled legal position that any information or details appearing in Wikipedia cannot be relied upon for legal purposes like classification of goods or determining tax liability on any taxable transactions.

But, in this regard, they submit that the approach of the Revenue while issuing the show cause notice appears to be selective, because certain information or details from catalogues, websites etc. are picked up and relied upon out of context; and the conclusion that the goods were falling for classification under CTH 85176290 has been arrived at, disclosing a pre-determined approach for the proposals leveled in the show cause notice. It is a settled legal position that a show cause notice issued with pre-determined mind, and a show cause notice which was conclusive in nature, was a violation of principles of natural justice. In this regard, they may refer to Clause (x) on page 23 of the show cause notice where it is observed that it "clearly emerged" that classification of the goods was under sub-heading 851762; on page 26 of the show cause notice in para 7k also, it is observed that conjoined reading of certain provisions "establishes" that the device/equipment/machine or apparatus was not qualified to be classified under any of the classifications declared by them in the bills of entry. The observations made in para 11d also show that it is concluded by the Revenue that they "deliberately" withheld various information from the department and that "malafide" intention on their part to evade payment of duty. Such observations are not in the nature of allegations, but are in the nature of conclusions already arrived at by the Revenue, and therefore such conclusive notice is in violation of principles of natural justice, and consequently liable to be dropped at once on this ground itself.

3.1.4. The show cause notice has proposed to classify Optical Network Terminal (ONT) and Optimal Network Unit (ONU) under CTH 85176290. It is the case of the Department that these products are not subscriber end equipment and hence rightly classifiable under CTH 85176290. In this regard, it is submitted that the proposals in the show cause notice are completely baseless inasmuch as there is no specific definition of subscriber end equipment. In common parlance subscriber end equipment or customer end equipment is the class of equipment which is installed at the premises of the customer for enabling them to access the internet. Similar issue about classification of ONT equipment came up for consideration before the Customs Authority for Advance Ruling, Mumbai in the case of M/s. Netlink ICT Pvt. Ltd. reported at 2022 (381) ELT 116. For the very benefit of Notification No.24/2005-Customs dated 01.03.2005, the question before the authority of advance ruling was that whether GPON ONT which is a broadband telecommunication terminating devise installed at the customer's premises is subscriber end equipment or not. While considering the nature of the equipment and its usage the authority of advance ruling while placing reliance on ITU-T G.984.1 came to a conclusion that ONT is a subscriber end equipment and hence eligible to benefit of Notification No.24/2005-Customs. Furthermore, the authority of advance ruling also placed reliance upon Rule 1 of General Rules of Interpretation to hold that the device is designed to function at the customer's premises and thus being customer end equipment is classifiable under CTH 85176950 and eligible

to benefit of eligible to benefit of Notification No.24/2005- Customs. Therefore, when for the very same goods, the authority of advance ruling has considered all the literature, usage and the rules for interpretation to come to a conclusion that the goods namely ONTs are subscriber end equipment. the show cause notice cannot propose a different classification.

It is submitted that the show cause notice has not provided any specific allegation as to why the goods are not subscriber end equipment and that as per the department what goods would be subscriber end equipment. On the other hand, the authority of advance ruling has opined that the benefit of Notification No.24/2005-Customs is available to ONT equipment and hence their classification for ONTs and ONUs is justified. It is also pertinent to note that the show cause notice has been issued under the extended period of limitation and when the authority of advance ruling also holds the same opinion like them that ONT equipment is subscriber end equipment, then it cannot be said that there was any malafide intention on their part to misclassify the goods. Therefore, the demand under the extended period of limitation is even otherwise not sustainable in facts as well as in law. Without prejudice to the submission regarding their being an advance ruling on the subject matter and that the demand is beyond the period of limitation, they would like to explain in detail about the scope of ONT/ONU products and how they are subscriber end equipment.

Scope of ONT/ONU's

3.1.4.1 ONT devices are known as optical network terminal devices and such devices are subscriber end equipment, inasmuch as these ONT devices are affixed at the premises of the end customers and through such devices, broadband internet services are made available to the customers. They are engaged in providing broadband services to various classes of customers, and therefore, it is very essential to understand that an ONT device is of utmost importance at the customer's end, inasmuch as it is only through such device, that broadband internet services are made available to the customer. They deliver high speed broadband service at the customer's premises using fiber to the home (FTTH) technology and these ONT equipments are an optical network terminal, which form an integral part of such high speed broadband services. It is through this ONT equipment, being in the nature of an optical router, which communicates to the main server, enables them to provide internet services to the customers. It is submitted that in providing broadband services, there is a main central location which is also known as OLT, through such location through FTTH cables, internet is provided to the customer's premises and the ONT equipment is the equipment, which is present at the premises of the customer and communicates to the OLT at the central location, through such FTTH technology, to provide internet access to the end customer. Therefore, essentially ONT (optical network terminal) is an equipment which is used at the customer's premises to deliver high speed internet services and voice like services to the end subscriber. The optical network terminal is not a product of the OTN family, inasmuch as it is a terminal device for the GPON network to deliver high speed internet to the end subscriber. This ONT device functions as a medium for the purpose of delivering internet services and also contains Wi-Fi support in order to make such internet services, accessible over a wireless network.

3.1.4.2 The term subscriber end equipment is not the name of any particular product, but it is only a term, which refers to a various class of products like ONT equipment, which essentially are deployed at the customer's premises. Therefore, the declaration made in the bills of entry is that the goods in question are ONT networking equipment (Subscriber end equipment) because subscriber end equipment is an umbrella term for a various class of products, which are essentially used by the subscribers/ customers at their premises for the purpose of availing internet or voice like services. While GPON indoor. ONT networking equipment is the name of the product imported under the bills of entry, the term subscriber end equipment merely refers to a class of products, which are deployed at the end subscriber's premises. Therefore, subscriber end equipment, not being the name of a particular product, but being a class of such products, covers equipment like ONT equipment which is deployed at the end customer's premises in order to make it possible for such subscriber to get access to internet. They would like to place reliance upon the literature of the different products in the nature of ONT equipment, which are imported by them under the bills of entry, in order to show what function such devices essentially

perform. A copy of the product literature for the goods in question is enclosed as Annexure- "A".

3.1.4.3 The show cause Notice in Para 9(b) alleges that the imported equipment is OTN equipment (Optical Transport Network), however the scope of OTN and ONT equipment's is totally different. A perusal of the literature would reveal that such products are ONT equipment and they provide a wireless access point as well as are capable of transmitting data through Ethernet. It is further very important to note that this equipment is essentially deployed at the customer's premises whereby data is received through FTTH cables and it is through these devices, that internet service is accessed by the end customers at the home set up through Ethernet (LAN) connection or by use of wireless network (Wi-Fi). ONT equipment has its own distinct name which is optical network terminal and OTN equipment has its own separate definition which means Optical Transport Network. These goods, not only have a different name and terminology namely ONT and OTN, but the usage of these two products is also completely different. OTN equipments are not used at the site of the end subscriber. Optical transport equipment is also interchangeably known as optical transport network (OTN). The basic definition of OTN is that OTN is a set of optical network elements connected by optical fibre links which are able to provide functionality of transport, multi complex, switching, management, supervision and survivability of optical channels carrying client signals. An OTN indicates these functions and builds a service provider's network in metro and core networks. This OTN equipment is also used in data connectivity across multiple POP locations and such equipment is never used to connect to any direct subscribers. The capacity of carrying data of OTN is more than 10G and can go up To terabytes. For the purpose of showing what optical transport equipment is, reliance is being placed on the product literature from M/s. Furukawa Electric, which is a company manufacturing optical transport systems and also other equipments like OLT. A perusal of the different products manufactured by M/s. Furukawa Electric, it is very evident that there are different categories of products, one category is transport equipment and ONT is in a separate category, that the product line-up also differentiates both of these products. This also shows how these two products are different from each other and have different functions, that how even the end customers of these products treat them differently. A copy of the product literature from M/s. Furukawa Electric is being enclosed as Annexure- "B". A copy of literature from ITU on OTN is being enclosed as Annexure- "C".

3.1.4.4 The goods which are imported by them are ONT equipment and such ONT equipment's are a part of GPON systems and the International Telecommunication Union by virtue of publication G.987 and G.984.1 has categorically explained the scope of such ONT, OLT and GPON systems. A perusal of ITU-G.987 shows that GPON systems are systems of the PON family and such PON is referred to as point to two multi point fibre infrastructure composed of passive optical components. Such PON systems include systems like B-PON, G-PON and E-PON. These PON systems rely upon fibre infrastructure with no active electronic components between the central office interface and the user equipment interface, while making broadband network access possible to end customers. This architecture implements a point to multi point technology in which a single optical fibre serves multiple end points by using unpowered (passive) fibre optic splitters to divide the fibre bandwidth among the endpoints. A copy of ITU-G.987 is being enclosed as Annexure- "D".

ITU-G.984.1 explains in detail about GPON networks, it also shows the scope of a GPON network and also makes it clear that GPON systems are characterised in general by an optical line terminal system (OLT) and an optical network unit (ONU) or optical network termination (ONT), with a passive optical distribution network (ODN) interconnecting them. It also emphasizes that there is a one to many relationship between the OLT and the ONT respectively. The ONT is end user equipment generally fixed in the home to receive signals from the OLT, in order to make internet access possible. ITU-G.984.1 also in detail explains the different abbreviations of the term of OLT, ONT and other related terms while also giving details about the network architecture of the technology and how an OLT is used along with an ONT to make broadband access possible.

A perusal of this literature would show that ONT has nothing to do with an OTN or in other words optical transport equipment and that the ITU has categorically explained in different editions, the difference in between both the systems. For example in ITU-G.709 optical transport network has been described and in ITU-G.84.1, the scope of GPON system which includes ONT is explained. Therefore, it is an undisputed fact that OTN and ONT are two different kinds of equipment and that their role is also very different. A copy of ITU-G.709 is enclosed as Annexure- "E" and the copy of ITU- G.984.1 is enclosed as Annexure- "F".

3.1.4.5 In view of the above explanation and submissions, it is clear that the proposal of the Revenue to consider ONT as optical transport equipment is unjustified and contrary to the technical literature and nature of the product, hence such proposal being devoid of any merits is liable to be dropped in the interest of justice.

Scope of OLT equipment.

3.1.5. The Show cause Notice at Paragraph 9(c) has alleged that OLT devices imported by them are Optical Transport equipment and hence are classifiable under CTH 85176290. In order to understand the scope of both optical transport equipment and optical line terminal, they would like to emphasize that there are 3 different technology domains namely transport equipment, access network and home, they would like to emphasize that all these 3 terms are different and the purpose of an access network is different than that of transport equipment. For this purpose, reference may be made to the write up which they are enclosing with this reply and such write up is being enclosed and marked as Annexure- "G".

A perusal of this write up along with the extracts from the Department of Telecommunication, Government of India, it is clear that optical network equipment and an access network is very different and that both these terms are not the same. While as the imported goods are a part of the access network, the goods in the nature of optical transport equipment are a part of the technology domain namely transport. Optical transport equipment is also interchangeably known as optical transport network (OTN). The basic definition of OTN is that OTN is a set of optical network elements connected by optical fibre links which are able to provide functionality of transport, multi complex, switching, management, supervision and survivability of optical channels carrying client signals. An OTN indicates these functions and builds a client network in metro and core networks. This OTN equipment is also used in data connectivity across multiple POP Ideations and such equipment is never used to connect to any direct subscribers. The capacity of carrying data of OTN is more than 10G and can go up to terabytes. For the purpose of showing what optical transport equipment is, reliance is being placed on the product literature from M/s. Furukawa Electric, which is a company manufacturing optical transport systems and also other equipment's like OLT. A perusal of the different products manufactured by M/s. Furukawa Electric, it is very evident that there are different categories of products, one category is transport equipment and OLT is in a separate category, that the product lineup also differentiates both of these products. This also shows how these two products are different from each other and have different functions, that how even the end customers of these products treat them differently. A copy of the product literature from M/s. Furukawa Electric is already enclosed as Annexure- "B". A copy of literature from ITU on OTN is already enclosed as Annexure- "C".

3.1.5.1 The goods which are imported by them are OLT and such OLT is a part of GPON systems and the International Telecommunication Union by virtue of publication G.987 and G.984.1 has categorically explained the scope of such optical line terminal, access network and GPON systems. A perusal of ITU-G.987 shows that GPON systems are systems of the PON family and such PON is referred to as point to two multi point fibre infrastructure composed of passive optical components. Such PON systems include systems like B-PON, G-PON and E-PON. These PON systems rely upon fibre infrastructure with no active electronic components between the central office interface and the user equipment interface, while making broadband network access possible to end customers. This architecture implements a point to multi point technology in which a single optical fibre

serves multiple end points by using unpowered, (passive) fibre optic splitters to divide the fibre bandwidth among the endpoints. A copy of ITU-G.987 is already enclosed as Annexure- "D".

3.1.5.2 ITU-G.984.1 explains in detail about GPON networks, it also shows the scope of a GPON network • and also makes it clear that GPON systems are characterised in general by an optical line terminal system (OLT) and an optical network unit (ONU) or optical network termination (ONT), with a passive optical distribution network (ODN) interconnecting them. It also emphasizes that there is a one to many relationship between the OLT and the ONT respectively. The ONT is end user equipment generally fixed in the home to receive signals from the OLT, in order to make internet access possible. ITU-G.984.1 also in detail explains the different abbreviations of the term of OLT, ONT and other related terms while also giving details about the network architecture of the technology and how an OLT is used along with an ONT to make broadband access possible.

A perusal of this literature would show that OLT has nothing to do with an optical transport network or in other words optical transport equipment and that the ITU has categorically explained in different editions, the difference in between both the systems. For example in ITU-G.709 optical transport network has been described and in ITU-G.84.1, the scope of GPON system which includes OLT is explained. Therefore, it is an undisputed fact that OTN and OLT are two different kinds of equipment and that their role is also very different. A copy of ITU-G.709 is already enclosed as Annexure- "E" and the copy of ITUG.984.1 is already enclosed as Annexure- "F".

Classification of SFP's and QSFP's:-

3.1.6. It is submitted that the case of the department is that SFP and QSFP are classifiable under CTH 85176290. An SFP is known as small form-factor pluggable and QSFP means quad small form-factor pluggable. These are compact hot-pluggable network interface modules used for telecommunication and data communication applications. An SFP is hardware like a transceiver which is used to provide link to optical or electrical signals. These SFPs and QSFPs are plugged into Ethernet switches, routers, firewalls and network interface cards for transmission of optical or electrical signals. Generally the SFPs and QSFPs are imported as a part of the various equipments in which they are designed to be used. For example SFP's & QSFP's were imported as a part of networking equipment vide Bill of Entry No.5447903 dated 15.09.2021 and since the main equipment was classifiable under CTH 85176290 such SFPs were also classifiable under the same CTH. Similarly, QSFP is also classifiable as a part of networking equipment as and when it is imported with the networking equipment. A copy of the Bill of Entry No.5447903 dated 15.09.2021 along with the packing list and shipping invoice is being enclosed as Annexure- "H".

On a perusal of this bill of entry, it would be clear that when the SFP's and QSFP's are imported as a part of networking equipment which is generally the case, they are classified under CTH 85176290 which is applicable on the main equipment. Most of the time, they have imported these SFP and QSFP as a part of the main equipment and have classified such goods under CTH 85176290 inasmuch as that is the chapter heading applicable to the main equipment in which such goods are to be used as parts. However, during the relevant point of time, they imported these SFPs and QSFPs independently and since they were imported independently/they were classified under CTH 85177990. It is submitted that SFPs and QSFPs have wide range of uses and they are usable with various goods of CTH 85176910 to 85176970 and hence being parts of such goods, the SFP's and QSFP's were classified under CTH 85177090 as "other" parts. However, subsequently whenever these goods were imported as a part along with the main equipment, they have classified under CTH 85176290 which is the classification suggested by the department. Since at the relevant time, it was the first time they imported these goods, they were under a bona-fide impression that such goods being parts of equipment of CTH 85176910 to 85176970 would be classifiable under CTH 85177090. The classification adopted by them

was not with the intent to evade any payment of tax but was because of a bona-fide and genuine impression that since such SFPs were parts of various equipment's, that they were genuinely classifiable under CTH 85177090. The show cause notice has proposed to recover duty on the grounds that they have mis-declared the classification and hence the extended period of limitation should be invoked to collect the differential duty. However, as explained above, they have not adopted a classification under CTH 85177090 to evade the payment of tax but it is their genuine belief that such SFPs and QSFPs if imported standalone would be classifiable under CTH 85177090. Therefore, assuming without admitting, even if the classification adopted by them is wrong, that does not mean that they have suppressed or misrepresented facts in order to mis-declare the goods voluntarily so as to evade the payment of tax. Therefore, even otherwise the invocation of the extended period of limitation for levying differential amount of duty would not be sustainable and the demand being raised beyond the normal period of limitation is unsustainable, in the facts of the present case.

Classification of BNG equipment:-

3.1.7. It is submitted that in the show cause notice Broadband Network Gateway (BNG) is proposed to be classified under CTH 85176290. The Department has formed a view that BNG is not a product which only performs routing functions but has many other essential features and hence since it is not only a router, it should be classified under CTH 85176290. The show cause notice has also placed reliance on the definition of a router from Wikipedia.com and has also referred to details available on the website of M/s. Nokia. However, the opinion formed by the Department that BNG is not essentially a router is completely misconceived and in reality the essential function of a BNG is nothing but to perform routing functions. As per Wikipedia.com, a router is a networking device that forwards data packets between computer networks and sends and receives data in the form of data packets through a network. A perusal of the literature provided on Cisco.com shows that BNG is the access point for the subscribers through which they access the broadband network when a connection is established between BNG and the subscriber end equipment. Furthermore, it is also mentioned that BNG sends traffic from various subscriber sessions from an access network and routes it to the network of the service provider. The literature from M/s. Cisco also refers BNG as a BNG router. The literature on the website of M/s. Nokia shows that BNG plays an essential role in delivering broadband services by managing and controlling network access. On the website of vasexperts.com, it is mentioned that BNG is a device for regulating subscriber traffic and it is responsible for routing within the service network to enable the subscriber to receive various services like internet, telephony etc. in a single connection. Therefore, on a perusal of the literature as provided on various websites, it is clear that the essential function of a BNG is to function as a router to route data in between the internet service provider and the subscriber. The show cause notice other than stating that BNG has other functions which are essential has nowhere specified as to what are those other functions over and above routing which are essential and gives a different characteristic to the BNG other than a router. As per the general rules of interpretation, the classification which is the most appropriate and specific is to be adopted over and above the residuary entry which is to be preferred only if there is no other suitable classification. The classification proposed by the Department is a residuary entry which is to be preferred only there is no other appropriate classification. While as in the present case, it is an undisputed fact that the BNG performs the function of routing and such is also not disputed in the show cause notice. The show cause notice clearly states that routing is the function of a BNG but merely states that it is not the essential function and is only an ancillary function. However, according to them, a company which is involved in providing internet services and various other services, the essential function of a BNG is that of a router to route traffic in between the service provider and the subscriber. The most appropriate classification for the BNG is, therefore, CTH 85176930, which is for routing equipment. Therefore, since the essential function of the BNG is to route data/traffic, the residuary entry suggested by the Department cannot be resorted to. Furthermore, the show cause notice is also not specific as to what are the main functions of a BNG other than routing and hence the residuary entry cannot be resorted to based upon conjectures and surmises. Hence, the proposal to reclassify the BNG under CTH 85176290 is without any

merits and hence such proposal is liable to be dropped in the interest of justice. A copy of the literature show the scope and purpose of the BNG is enclosed as Annexure- 'I.

Non compliance of the provisions of Section 138B:-

3.1.8. A statement made and signed by a person before a Gazetted Officer of Customs during the course of any enquiry under the Customs Excise Act is relevant for the purpose of proving the truth of the facts which it contains only when the person who made such statement is examined as a witness in the case before the adjudicating authority, and the adjudicating authority was of the opinion that, having regard to the circumstances of the case, such statement should be admitted in evidence in the interests of justice. Section 138B of the Customs Act mandatorily provides for this procedure, and sub section (2) thereof also lays down that this procedure shall apply in relation to any proceedings under this Act, other than a proceeding before a Court. This provision of Section 138B of the Customs Act, 1962 has fallen for consideration before the Hon'ble Punjab & Haryana High Court in cases of Jindal Drugs Pvt. Ltd. reported in 2016 (340) ELT 67 (P&H) and M/s. G-Tech Industries reported in 2016 (339) ELT 209 (P&H), and the Hon'ble Punjab and Haryana High Court has held in both these cases that a statement recorded by an investigating officer was not admissible as evidence in adjudication proceedings unless and until the person who made the statement was examined before the adjudicating authority in the adjudication proceedings conducted under the Act. In case of M/s. J&K Cigarettes Ltd. reported in 2009 (242) ELT 189 (Delhi) and in a case of M/s. Dhariwal Industries Ltd. reported in 2015 (325) ELT 532 (KAR), the Hon'ble Delhi High Court and the Hon'ble Karnataka High Court respectively have also affirmed the above referred view that any statement made and signed by a person before the gazetted officer during the course of any enquiry cannot be relied upon for the purpose of proving what was contained in such statement unless the person concerned was examined before the adjudicating authority during the adjudication proceedings.

3.1.8.1 In the present case also, statements of various persons have been recorded by the DRI Officers and all such statements are relied upon for proposals of fastening liabilities against them on the basis that all such persons' statements prove the allegations levelled in the show cause notice, but none of these persons is examined as a witness in this adjudication proceedings; and therefore none of these statements is otherwise admissible as evidence in the adjudication being conducted. If these statements are discarded, then the whole case of the Revenue falls in view of contravention of Section 138B of the Customs Act, in the facts of this case.

3.1.8.2 Even otherwise, the only method recognized by law for establishing in quasi-judicial proceedings the truth and facts when there was dispute about correct facts, is cross-examination of the persons whose statements may have been recorded by the officers, and also the cross-examination of the concerned officers who conducted such enquiry. The Indian Evidence Act also lays down that truth or correct factual position could be established on record of a case by putting questions and cross questions to the concerned witness. Though the provisions of the Indian Evidence Act are not strictly applicable in quasi-judicial proceedings under the Central Excise law, the relevance of cross-examination is recognized by the Hon'ble Supreme Court, various High Courts and also by the Appellate Tribunal in a number of cases; and it is held therein that the question was not whether an assessee had a right to cross-examine a witness in quasi-judicial proceedings, the question was whether cross-examination of a witness was relevant in the overall facts and circumstances of a case or not. It is also held in all such cases that if the Department relied upon evidence of a particular person by recording his statement, then the assessee had a right to cross-examine such a person so as to establish whether the statement of the person was truthful, and whether relevant facts having a bearing on the issue involved in the case were left out when the statement of such person was recorded.

3.1.8.3 The land-mark judgement of the Hon'ble Supreme Court in case of State of kerala Vs Shaduli Grocery Dealer etc. reported in AIR 7977 SC 1627 may also be referred to, wherein the Hon'ble Supreme Court has held that refusal to summon certain witnesses for cross-examination vitiated the assessment order because the Assessing Officer was

required to summon such witnesses whose cross-examination was relevant for assessment. The said judgement of the Hon'ble Supreme Court is relied upon by the CEGAT in the case of Ankleshwari Paper Board Mills Vs. CCE, Baroda, reported in 1995 (60) ECR 680. It is held by the CEGAT in this case that the Collector erred in relying on the statements of witnesses who were not made available for cross-examination.

3.1.8.4 In the case of V.K. Singh Vs. CC, reported in 1996 (84) ELT 520, the CEGAT has held that opportunity must be given to the assessee to challenge the correctness of a statement by allowing cross-examination of such person, and if the cross-examination of such persons was not allowed, though the witnesses were available, it resulted in violation of principles of natural justice.

3.1.8.5 In another case of Arsh Casting Private Limited Vs. CCE- 1996 (81) ELT276, a Larger Bench of the CEGAT has held that no reliance could be placed on statements of those witnesses who did not turn up for cross-examination, whereas the CEGAT has once again under-lined the need of cross-examination of witnesses whose statements were recorded by the Department and relied upon against the assessee in adjudication proceedings. To the same effect is the decision in case of Messrs Asha Jyoti Spinning Vs. CCE, reported in 1995 (60) ECR 584, wherein also it is held that denial of opportunity of cross-examination of witnesses whose statements were relied upon to decide a case tantamount to violation of principles of natural justice.

3.1.8.6 There are several other decisions on the point, namely K.G. GlucoBiols Ltd. - 1996 (64) ECR 398; GTC Industries Ltd. Vs. UQI - 1991 (56) ELT 29 (Bom.), Shri H.P. Jain Vs. CC - 1988 (17) ECR 765; F.M. Potia Vs. DilipSinqhi-2000 (126) ELT 107 (Bom.), Sharma Chemicals Vs. CCE-2001 (42) RLT 631; Mahadev Prasad Saraf Vs. S.K. Srivastava-2000 (126) ELT 32 (Calcutta) and Eros Metal Works Pvt. Ltd. Vs. CCE - 1989 (43) ELT 361. All lay down the principles that cross-examination of witnesses whose, statements were relied upon by the Department should be allowed.

3.1.8.7 In view of the above referred legal position, it is clear that the veracity and reliability of statements recorded by the persons/witnesses could be checked up and established by way of only one method recognized by law, namely - cross-examination of such persons. It is also recognized that it is a right of a noticee to cross-examine such persons as no reliance could be placed on statements of such persons unless they were allowed to be cross-examined by the adjudicating authority. In any case, the Department is relying on these statements recorded and therefore, it would be in the interest of justice and fitness of things that cross-examination of such persons is allowed in these adjudication proceedings.

Confiscation of Goods is unsustainable:-

3.1.9. The goods imported by them are proposed to be held liable for confiscation under Section 111 (m) of the Customs Act. The basis for this proposal is alleged mis-declaration and alleged mis-classification of the imported goods under Tariff Headings other than CTH 85176290.

3.1.9.1 In law, any goods could be held liable for confiscation only when the goods were physically available for being confiscated. If the imported goods were seized and then released provisionally, then also such goods may be held liable for confiscation because they were released on provisional basis pending adjudication. But in this case, the goods imported by them have never been seized; on the contrary, the goods imported by them have been assessed by proper Custom officers and then legally allowed to be cleared for home consumption. These goods are not available for confiscation at this stage. In case of Manjula Showa Ltd. 2008 (227) ELT 330, the Appellate Tribunal has held that goods cannot be confiscated nor could any condition of redemption fine be imposed when there was no seizure of any goods. The Larger Bench of the Tribunal in case of Shiv Kripalspat Pvt. Ltd. 2009(235) ELT 623 has also upheld this principle. When no goods imported by them have

been actually seized nor are they available for confiscation, the proposal to confiscate such non-existent goods does not have any legs to stand.

3.1.9.2 In facts also, the goods imported by them cannot be held to be liable for confiscation; and certainly not under Section 111 (m) of the Customs Act. When any goods do not correspond in respect of value or any other particular with the entry made under this Act, then such goods are liable to confiscation under Section 111(m) of the Act. But in the present case, all the material particulars including description of the goods and value of the goods have been correctly and truthfully declared in the Bills of Entry filed for the imported goods. With each and every Bill of Entry, all import documents like the supplier's invoice, country of origin certificate, packing list, bill of lading etc. have also been submitted before the proper Customs officers; and no discrepancy has been found in the particulars mentioned in the bills of entry on one hand and such particulars appearing in the import documents on the other hand. Though it is alleged in the show cause notice that the goods in question were classifiable under CTH 85176290 but different Tariff headings/sub-headings were declared for the goods in the bills of entry, it is yet not decided that the classification of CTH 85176290 was the correct and most appropriate classification; and it is also not established that they were aware of the above classification being correct and most appropriate, but still however, they deliberately mis-classified the goods under other Tariff headings/sub-headings. Classification of goods is a question of law, and so is the case about claim for any exemption notification. It is a settled legal position that even when a wrong classification was declared by the assessee and/or benefit of a Notification was claimed though not available, such dispute would not ipso facto mean any malafide intention on part of the assessee, and omission or commission with malafide intention cannot be, inferred only because a wrong classification and/or a wrong benefit of exemption notification/s was claimed. In the facts of the present case, the classification declared in the bills of entry and also the claims for exemption notifications have been accepted and allowed by the proper Custom officers in charge of the Custom Stations of import. In this view of the matter, the proposal to hold the imported goods liable for confiscation is unjustified in facts also. Therefore, proposal of holding the imported goods liable to confiscation also deserves to be withdrawn at once in the interest of justice.

Penalty under Section 112/114A is not sustainable:-

3.1.10. Section 112/114A of the Customs Act is invoked for imposing penalty on them. Penalty is a quasi-criminal action, and therefore a specific case for penalty and a specific provision for imposing penalty have to be made out in a show cause notice. Referring to Section 112/114A of the Act is not a sufficient compliance of penal provisions, because it is not clear nor disclosed in the show cause notice whether Section 112 is attracted for penalty or Section 114A is applicable for penalty. The situations covered under these two provisions are different, and the ingredients of these two provisions are also not common. However, none of these provisions is attracted in the facts of the present case.

3.1.10.1 Under Clause (a) of Section 112 of the Customs Act, penalty can be imposed on any person who does or omits to do any act which act or omission would render the goods liable to confiscation under Section 111, or abets the doing or omission of such an act. In the present case, it is not shown in the show cause notice what was the action or omission by them, which rendered the goods liable to confiscation. Section 111 (m) of the Act is invoked for confiscation of the goods, but this provision is not attracted in the present case as explained hereinabove. Moreover, they have done everything which was expected of an importer like filing a bill of entry, submitting all import documents with the bill of entry, paying the Custom duties assessed by proper Customs officers and clearing the goods for home consumption when it was allowed by the proper Custom officer in charge of the Customs station. As regards omission, no case is made out in the show cause notice about any omission or failure in complying with provisions and requirements of the Customs Act by them. The question of abetment in any omission or commission does not arise in the present case. Therefore, Section 112(a) of the Act is not attracted in this case, and no penalty could be imposed thereunder on them.

3.1.10.2 Section 112(b) of the Customs Act is attracted only when a person acquired possession of, or was in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods

which he knew or had reason to believe were liable to confiscation. In this case, it is not shown by the Department as to how they were indulging in carrying, harbouring, keeping, concealing, selling or purchasing any goods which they knew or had reason to believe were liable to confiscation; nor is any evidence adduced in support of such allegations. A person could not be engaged in all the activities as referred in this Section. It is not pointed out in this proceedings as to which particular activity their company was concerned with. It is not even spelt out in the notice as to whether they were engaged in carrying or in removing or in depositing or in keeping or in selling the concerned cargo, which they knew or had reason to believe were liable to confiscation. Mere bald statement in the notice about one's involvement in any prejudicial activity would not prove that one was really engaged in or concerned with such activities. In the instant case, no evidence is adduced for their involvement in any of the above referred prejudicial activities with any knowledge or reason to believe that the concerned goods were liable to confiscation and they dealt with the same.

3.1.10.3 The facts of the present case even otherwise clearly show that they have not dealt with any goods which were liable for confiscation. For the imported goods, they have filed Bills of Entry with all relevant import documents. There is no lapse or irregularity on their part in complying with provisions of the Customs Act for declaring the imported goods and for seeking clearance of the imported goods for home consumption. As explained hereinabove, they had no knowledge nor any reason to believe that goods imported by them were liable to confiscation. The mandatory requirement of Section 112(b) about knowledge or reason to believe that the imported goods were liable for confiscation is not satisfied in this case, and the further mandatory requirement that the imported goods were actually liable for confiscation is also not satisfied in the present case. No penalty under Section 112(b) of the Customs Act can therefore be imposed on them.

10.4 Section 114AA of the Customs Act is also invoked in the present case, but this provision is applicable only if a person knowingly or intentionally made, signed or used, or caused to be made, signed or used, any declaration, statement or document which was false or incorrect in any material particular, in the transaction of any business for the purposes of the Customs Act. Here also, knowledge or intention on part of the person concerned are pre-conditions for imposing penalty.

3.1.10.5 There is no evidence to show that they knew that the cargo in question was classifiable under CTH 85176290, and there is also no evidence to show that they intentionally used false information about description of such cargo while transacting business for the purpose of the Customs Act. They had no reason to doubt declarations made by the overseas supplier in the normal course of business. It is not shown in the show cause notice as to how they had knowledge about the declared classification of the imported goods being incorrect and still they intentionally used such description for the cargo in any of the declarations, documents or the like submitted for fulfilling the obligations under the Customs Act. The mandatory condition of Section 114AA of the Act about knowledge and intention on part of the person while using false or incorrect declaration and documents is conspicuously missing in the present case, and therefore Section 114AA of the Customs Act is not attracted in the present case.

The extended period of limitation cannot be invoked in the facts of the present case:-

3.1.11. The Show Cause Notice has been issued invoking the extended period of limitation, however the invocation of the extended period of limitation is not sustainable in the facts of the present case, because the issue in the present case is pertaining to the classification of the goods and thus, no malafides can be attributed to them. It is submitted that there are myriads of judicial pronouncements on this issue and it is settled that the no suppression of facts or malafide intention can be alleged against an assessee when the dispute was about classification of goods. In this regard, a judgement of the Hon'ble Allahabad High Court in case of Shahnaz Ayurvedics 2004 (173) ELT 337 may be referred to; because in this leading authority on the subject, the Hon'ble Allahabad High Court has held that allegation of malafide would not be justified when the dispute was about interpretation of a statutory provision like classification of the goods. In case of Commissioner V/s. Ishaan Research Lab (P) Ltd. reported in 2008 (230) ELT 7 (SC), the Hon'ble Supreme Court also upheld this principle that suppression of facts or malafide intention cannot be alleged against an assessee when the dispute was about classification

of goods, because such dispute was about interpretation of legal provisions and the statutory entries. In a long chain of decisions rendered by the Appellate Tribunal in cases like Haryana Roadways Engineering Corporation Ltd. 2001 (131) ELT 662, Wipro Ltd. 2005 (179) ELT 211 etc. also, it is held that penal action against the assessee would not be justified when there was no evidence showing any positive act or omission indicating deliberate defiance of the statutory provisions, and the dispute was about interpretation of legal provisions like interpretation of classification or admissibility of exemption Notification. In this regard, a judgement of the Hon'ble Kerala High Court in case of Cochin Minerals and Rutiles Ltd. 2010 (259) ELT 182 (Ker.) and another judgement of the Hon'ble Delhi High Court in case of Bellarpur Industries Ltd. V/s. UOI 1994 (74) ELT 795 (Del.) may also be referred to, wherein the Hon'ble High Courts have held, while denying and rejecting the assessee's claim for benefit of an exemption Notification, that admissibility of such benefit depended on interpretation of the statutory provisions and therefore penal actions or demand of duty for the extended period would not be justified in such cases involving construction of statutory provisions unless there was evidence showing that the assessee knew that the benefit was not admissible but still however, the assessee claimed such benefit thereby showing dishonest or contumacious conduct.

3.1.11.1 In the present case, there is no evidence at all showing that they have deliberately mis-classified the goods in order to evade the payment of customs duty. On the contrary, the facts and position explained hereinabove shows that the nature of equipment concerned is such that any assessee can have a confusion regarding its classification. In the present situation, in a case involving dispute of classification of the goods, no malafide intention can be presumed in absence of any evidence indicating that they have deliberately acted dishonestly or contumaciously. Furthermore from the Show Cause Notice it is clear that the DRI conducted an all India investigation against all the importers of similar goods, which shows that there was a general impression in the trade regarding the classification of these goods. Also they have acted in accordance with the general impression and belief held by all concerned in the trade at the relevant time in respect of nature and classification of the imported goods. Therefore the extended period of limitation is not invocable in the present case.

3.2. The Noticee No. 2, i.e. M/s. Vipul. R. Modi, Customs Broker, made their written submission vide letter dated 13.02.2023 wherein he stated that vide the impugned Show Cause Notice No. GEN / ADJ/COMM/185/2022-Adjn (DIN: 20220971M00000318839) dated 09-09-2022, following charges were made against him:

- i. he did not exercise due diligence in classifying the subject goods by looking into the technical details of the items and
- ii. he failed to ascertain whether the subject goods were eligible for the exemption claimed by the importer.
- iii. he succumbed to the diktats of the clients and caused to file the subject Bills of Entry with incorrect and ineligible entry of the relevant notification issued in respect of Basic Customs Duty thereby allowing the importer to wrongly avail nil/lower rate of BCD
- iv. he caused to submit the Bills of Entry (Annexure B-1, B-2 and C-1, C-2 of the SCN) filed for the clearance of the impugned OLT, SFPs and ONTs/OMUs which were false in respect of the serial number of entry of BCD rate as given in Notification No.24/2005 Cus dt. 01.03.2005 as amended

3.2.2. In this regard, he completely deny the charges made against him since he has in no manner been involved in causing any loss to the Government Revenue through any of his actions.

3.2.2.1 His following submissions would prove his innocence and would certainly absolve him from the charged imposed on him by the department:

3.2.2.1.1 Charge No. 1: they did not exercise due diligence in classifying the subject goods by looking into the technical details of the items under import as Customs Broker.

Kind attention was drawn to his statement dt. 07.03.2022 and appearing in Para 3(i) of the impugned Show Cause Notice where in it was mentioned they were technically not sound in respect of the goods under import and therefore had accepted the classification suggested by the importer.

Due diligence was exercised by him by sending checklist to the importer by classifying the goods under CTH 85176990 as can be seen from sub para 6 of para 3(i) on page no. 5 of the SCN.

So the charge of non exercising due diligence in classifying goods by looking into technical details is false as the importer had asked to classify the goods under CTH 85176950. Since they are not technically sound the goods were classified as asked by the importer and Bills of Entry were filed accordingly. As per Sub-rule 10(e) of CBLR 2018, a Customs Broker is required to "exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage" which they have done while sending check-list to the importer on 05.08.2019. The department, in its Show Cause Notice has no where alleged that the check-list sent by them to the importer itself was incorrect classifying the goods under wrong CTH which may render the goods liable for confiscation. Further kind attention was drawn to Advisory No.01/2022 dated 29.12.2022 issued by the O/o The Pr. Chief Commissioner of Customs, Mumbai Zone-I where in, in para-2 of the advisory it is mentioned not to invoke the violation of provisions of CBLR 2018 and make the CBs co-noticees in cases involving interpretative disputes regarding classification, availment of exemption of notifications and valuation taking into consideration the objective of the Government towards Ease of Doing Business.

In view of above clarification and facts there is no omission and commission on their part as charged. Therefore the charge is denied being non sustainable.

3.2.2.2 In regard to charge of not exercising due diligence in ascertaining whether the subject goods are eligible for the exemption claimed, it is to submit that the charge is also baseless and without any evidence. It is to further submit that as already mentioned above, they are not technically sound and expert in classifying goods of technical nature and therefore had declared the goods to be classifiable under CTH as suggested by the importer according to which the goods under import attracted exemption of BCD. So the charge that due diligence in ascertaining whether the subject goods are eligible for exemption was not exercised is without any evidence on record to prove that they had suggested the importer to claim exemption by classifying the goods under wrong CTH. On the contrary importer had suggested to reclassify the goods and file documents accordingly as admitted by them in their statement dt. 07.03.2022 (para 3(i) of SCN).

Further kind attention was drawn to Advisory No.01/2022 dated 29.12.2022 issued by the O/o The Pr. Chief Commissioner of Customs, Mumbai Zone-I where in, in para-2 of the advisory it is mentioned not to invoke the violation of provisions of CBLR 2018 and make the CBs co-noticees in cases involving interpretative disputes regarding classification, availment of exemption of notifications and valuation taking into consideration the objective of the Government towards Ease of Doing Business.

In view of above clarification and facts there is no omission and commission on their part as charged. Therefore the charge is denied being non sustainable.

3.2.2.3 The charge that they succumbed to the diktats of the client and caused to file the subject Bills of Entry with incorrect and ineligible entry of the relevant notification issued in respect of Basic Customs Duty thereby allowing the importer to wrongly avail nil/lower rate of BCD is completely baseless and without any evidence and therefore they deny the charge. As per Rule 10(e) of the CBLR, a Customs Broker is obligated to only verify the correctness of any information which he imparts to a client and provided by the client. Since the goods under import were purely of technical nature and they are incapable of identifying its character for perfect classification, the information and instruction given by the client to classify the goods under CTH 85176950 was simply adhered to.

3.2.2.4 The charge that they caused to submit the Bills of Entry (Annexure B-1, B-2 and C-1, C-2 of the SCN) filed for the clearance of the impugned OLT, SFPs and ONTs/OMUs which are false in respect of the serial number of entry of BCD rate as given in Notification

No.24/2005 Cus dt. 01.03.2005 as amended is also baseless and without any evidence in as much as the client had asked them.

3.2.3 In para 14 (v) of the subject SCN it has been alleged that they overlooked the technical features and Customs Tariff Heading of the imported ONT./ONUs, OLT and SFP/QSFP modules and thereby caused evasion customs duty by suppression of true nature of the goods resulting in ineligible availment of exemption and thereby have not discharged their duties as mandated by CBLR and therefore appears liable to penalty under Section 112 and 114AA ibid. They deny this allegation having no documentary evidence supported with any relied upon documents. In this regard kind attention is once again drawn to para 3(i) of SCN where in their statement dt. 07.03.2022 has been referred to which indicates that they are not technically sound to classify the goods of technical nature and goods were classified under CTH as suggested by the importer, therefore the allegation of overlooking the technical features and Customs Tariff Heading of the imported ONT./ONUs, OLT and SFP/QSFP modules and thereby caused evasion customs duty by suppression of true nature of the goods resulting in ineligible availment of exemption by them is completely baseless and penal provisions are invoked without any evidence. While alleging the suppression the department has ignored their confession made in their statement dt. 07.03.2022 that the classification of goods were suggested by the importer. Further, there is no suppression of material fact in mentioning the complete and correct description of goods i.e ONT/ONUs, OLT and SFP/QSFP modules in bills of Entry, hence, there is no question of taking ineligible availment of exemption available under Customs Notification No. 24/2005 Cus. Dt. 01.03.2005 and 57/2017 Cus. Dt. 30.06.2017. They have discharged their duties as mandated by CBLR while sending the check-list first time to the importer. In view of this fact, the charge levelled against them is not sustainable and therefore no penalty can be imposed upon them under Section 112 and 114AA of Customs Act 1962. Further kind attention is drawn to Advisory No.01/2022 dated 29.12.2022 issued by the O/o The Pr. Chief Commissioner of Customs, Mumbai Zone-I where in, in para-2 of the advisory it is mentioned not to invoke the violation of provisions of CBLR 2018 and make the CBs co-noticees in cases involving interpretative disputes regarding classification, availment of exemption of notifications and valuation taking into consideration the objective of the Government towards Ease of Doing Business.

3.2.4. Furthermore, it is a settled law that the Customs Broker is not liable for penalty under Section 112 and 114AA of Customs Act 1962 when he has filed the Bills of Entry on the basis of the documents provided to him by his clients i.e. importer. To support their arguments they rely upon the various judgements as stated below.

3.2.4.1 In the case of Brijesh International v/s Commissioner of Customs, New Delhi, 2017 (352) ELT 229 (Tri-Del), Hon'ble Tribunal has held that a Customs House Agent is not expected to investigate and find out the correct classification or value of the goods. On this basis, penalty imposed on the CHA under Section 112 of the Customs Act, 1962 was set aside.

3.2.4.2 In the case of Commr. Of Customs (Import) v/s Trinetra Impex Pct. Ltd., 2020 (372) ELT 332(Del.) Hon'ble Tribunal set aside the penalty imposed on the CHA under Section 112(b) and 114AA of Customs Act, 1962 on the grounds that he had acted bona fide and merely facilitated the imports on the strength of the documents which were handed over to him by the importer.

3.2.4.3 Hon'ble Tribunal by relying upon the paras 65 and 66 of the Report of the Standing Committee on Finance has held in the case of Access World Wide Cargo v/s Commissioner of Customs, Bangalore, 2022(379) ELT 120 (Tri-Del) wherein it is held that ingredients of Section 114AA are not applicable to a CHA who has only filed the shipping bills on the basis of the documents furnished by the exporter.

3.2.5. As per Section 10(d) of Customs Broker Regulations, a CB is obligated only to advise his client to comply with the provisions of the Act, other allied Act and the Rules and Regulations thereof.

3.2.6. In the SCN, allegations/charges are made against them on assumption and presumptions only and no concrete documentary evidence are there to prove that they did not exercise due diligence in discharging their duty as Customs Broker. The SCN do not

bring out any evidence against them to prove that they overlooked the technical features and Customs Tariff Heading of the imported goods and thereby caused evasions of Customs duty by suppression of facts resulting in ineligible availment of exemption available under Exp. Noti No. 24/2005 and 57/2017 as alleged in para 13 of the SCN.

3.2.7. Therefore, since there is no iota of evidence to establish knowledge or intention on their part, they are not liable for penalty under Section 112 and 114AA of the Customs Act 1962.

3.3 Further submission was made by M/s. Vipul. R. Modi, Customs Broker vide their letter dated 17.07.2023 wherein they stated that:

- a. A case of mis-declaration/ misclassification in order to avail the duty exemption was booked by Directorate of Revenue Intelligence, Cochin Zonal Unit against M/s GTPL Broadband (P) Ltd, having registered address at 202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmadabad -380004, Gujarat (IEC: AADCG1959N) who are importing Optical Line Termination, SFP Modules and Optical Network Terminals/Units (ONTs/ONUs) by mis-declaring them as "Subscriber End Equipment/Router/Networking Equipment" under the Tariff items 85176950, 85176930, 85176250, 85176990, 85177090, and 85176290 at nil/lower rate of duty by claiming exemption under Notification No.24/2005 Customs dated 01.03.2005 Notification No. 57/2017 Customs dated 30.06.2017 as amended.
- b. On completion of investigation, Show Cause Notice bearing F. No. GEN/ADJ/COMM/185/2022-Adjn dated 09.09.2022 was issued to M/s GTPL Broadband (P) Ltd., by the Commissioner of Customs, Mundra asking them to show cause as to why:
 - i. the subject goods viz., ONTs/ONUs, OLTS and SFP/QSFP Modules should not be categorised as Optical Transport Equipment/Optical Network Products and the declared classification of 85177090, 85176930, 85176950, 85176990 and 85176250 of the imported ONTs/ONUs and OLTS imported under the Bills of Entry listed in Annexure-B-1 and B-2 to the show cause notice should not be rejected and re-determined as 85176290;
 - ii. the already availed exemption of basic customs duty as per serial number- (i) 131, 13N and 13P of Notification No.24/2005-Customs dated 01.03.2005 as amended and (ii) Sl.No.5 and 20 of Notification No.57/2017 Cus dated 30.06.2017 (as amended) claimed by them on the import of ONTs/ONUs, OLTS and SFP/QSFP Modules, as detailed in Annexure -B- 1 and B-2 to the show cause notice should not be denied ab initio in view of (a) and (b) above;
 - iii. the import duty on the impugned goods having a total assessable value of Rs. 76,38,74,823/- (Rupees Seventy Six Crores Thirty Eight Lakhs Seventy Four Thousand Eight Hundred and Twenty Three only), cleared by the importer vide Bills of Entry as given in Annexure-B-1, B-2, & C-1, C-2 to this show cause notice should not be redetermined in view of (a) and (b) above and the consequent total differential duty of Rs. 15,61,18,761/- (Rupees Fifteen Crore Sixty One Lakhs Eighteen Thousand and Seven Hundred and Sixty One Only) should not be demanded from them under Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act, 1962;
 - iv. The consignments imported vide Bills of Entry listed in Annexure-B-1, B-2 and C-1, C-2 to this show cause notice having a total assessable value of Rs.76,38,74,823/- (Rupees Seventy Six Crores Thirty Eight Lakhs Seventy Four Thousand Eight Hundred and Twenty Three only) should not be held liable to confiscation under Section 111(m) of the Customs Act, 1962;
 - v. Penalty should not be imposed on them under Section 112/114A of the Customs Act, 1962;
 - vi. Penalty should not be imposed on them under Section 114AA of the Customs Act, 1962

c. Apart from the above, M/s. Vipul. R. Modi and M/s Swayam Shipping Services, Custom Brokers, were also asked to show cause as to why Penalty should not be imposed on them under Section 112 and 114AA of the Customs Act, 1962.

3.3.3. On going through the Show Cause Notice it is seen that the demand of duty has been made under Section 28(4) of the Customs Act, 1962 on the goods worth Rs.76,98,74,823/- imported at Mundra Port as well as Air Cargo Complex, Ahmedabad. It can be seen from para 5(vii) of the subject SCN that goods worth Rs. 76,98,74,823/- were imported by M/s GTPL. Out of the said import, goods worth Rs. 41,45,31,924/- were imported at Air Cargo Complex, Ahmedabad and goods worth Rs. 34,93,42,599/- were imported at Mundra Port. Thus, the Commissioner of Customs, Customs House, Mundra has in addition to the demand on goods imported from Mundra port has also raised demand on goods imported from Air Cargo Complex, Ahmedabad which falls under the jurisdiction of Principal Commissioner of Customs, Ahmedabad.

3.3.4. In this regard it is to bring to kind notice that Under Section 28 of the Customs Act, 1962, the proper officer has the authority to demand payment of duty in addition to or instead of confiscation of goods or imposition of penalties. The demand of duty is made when it is determined that the imported goods were not properly declared or valued, resulting in an under-assessment of customs duty. In the context of the Customs Act, 1962, the term "proper officer" refers to an officer appointed by the government or the customs authorities who has the authority and responsibility to perform specific functions under the Act. Sections 17 and 28 of the Customs Act, 1962, also mention the "proper officer" in their provisions.

i. Section 17: This section deals with the assessment of duty on imported goods. The "proper officer" referred to in this section is the officer who is authorized to assess the value of the imported goods and determine the amount of customs duty payable on those goods. The proper officer may examine the goods, consider the relevant documents, and apply the valuation rules to arrive at the assessed value and applicable duty.

ii. Section 28: This section relates to the adjudication of confiscated goods and imposition of penalties. The "proper officer" mentioned in this section is the officer who is responsible for conducting inquiries, issuing show cause notices, and passing orders regarding the confiscation of goods and imposition of penalties for violations under the Customs Act. The proper officer ensures compliance with the provisions of the Act and takes necessary actions based on the facts and circumstances of each case. The nature of the power conferred by Section 28 (4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake re-assessment.

3.3.4.1 A Commissioner of Customs typically has jurisdiction over a specific geographical area or customs territory. Their authority is limited to that jurisdiction, and they are responsible for overseeing customs operations, enforcement of customs laws, and related matters within that area.

In general, a Commissioner of Customs does not have the power to issue a show cause notice outside of their jurisdiction. Show cause notices are legal documents that are issued to individuals or entities suspected of violating customs laws or regulations. These notices provide the recipient with an opportunity to present their case and explain why penalties or other actions should not be taken against them.

If a Commissioner of Customs becomes aware of a potential violation or irregularity occurring outside their jurisdiction, they may need to refer the matter to the appropriate customs authority or agency with jurisdiction over that area. The relevant authority in that jurisdiction would then be responsible for initiating the necessary legal actions, including issuing a show cause notice if deemed appropriate.

3.3.4.2 Considering the present case, the jurisdiction of Principal Commissioner of Customs, Mundra is over the whole of the Taluka of Mundra in the District of Kachchh in the State of Gujarat including the area of Gujarat Adani Port and Special Economic Zone Limited (including Port and Airport) and Gujarat Maritime Board Port (Minor Port) (source

https://mundracustoms.gov.in/?page_id=2848) whereas the geographical jurisdiction of this Ahmedabad Customs Commissionerate covers the Districts of Ahmedabad, Gandhinagar, Mehsana, Patan, Banaskantha, Sabarkantha, Bharuch, Valsad, Surat, Kheda, Anand, Vadodara, Dangs, Panchmahal, Dahod, Navsari and Narmada. Further, Customs Commissionerate, Ahmedabad has three Customs Divisions at Ahmedabad, Surat and Valsad, one Air Cargo Complex at Ahmedabad and International Airports at Ahmedabad & Surat. Customs Ahmedabad has 07-Export Promotion Circles at EPC-1-Customs HQ, Ahmedabad, EPC-2-Customs, Paldi, Ahmedabad, EPC-3-Customs, Vadodara, EPC-4-Customs, Bharuch, EPC-5, Customs, Surat, EPC-6, Customs, Valsad and EPC-7, Customs, Nani Daman (source: <https://ahmedabadcustoms.gov.in/jurisdiction.html>). Thus, Commissioner of Customs, Mundra can issue show cause notice for demand of Customs duty on goods imported at port falling within his jurisdiction only. He, under any circumstances, cannot demand customs duty on goods imported at ports falling outside his jurisdiction as he is not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside.

3.3.4.3 Further, kind attention is invited to Instruction No.04/2021-Customs dated 17.03.2021 issued from F.No.450/72/2021-Cus-IV by Deputy Secretary (Customs), Ministry of Finance Department of Revenue Central Board of Indirect Taxes and Customs. The said instruction is produced herein below for reference:

“Instruction No.04/2021-Customs
F.No.450/72/2021-Cus-IV
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs

Room No.227B, North Block, New Delhi

Dated the 17th of March, 2021.

To

*Principal Additional Director General,
Directorate General of Intelligence (DRI),
New Delhi.*

Sir,

Subject: Show Cause Notice (SCN) dated 19.03.2019 issued by DRI against Sh. Anil Aggarwal and 11 others –

Directions to keep SCN pending –reg.

Reference is invited to the letters from your office drawing attention to the judgement dated 09.03.2021 of the Hon'ble Supreme Court in Civil Appeal No. 1827 of 2018 in the case of M/s Canon India Private Limited vs Commissioner of Customs. Vide the said judgement, the Hon'ble Apex Court has ruled that the Additional Director General (ADG) of Directorate of Revenue Intelligence (DRI) is not the proper officer to issue Show Cause Notice (SCN) under sub-section (4) of section 28 of the Customs Act, 1962. The Apex Court has concluded that the entire proceeding in the present case initiated by ADG (DRI) by issuing SCN, as invalid and without any authority of law. The Apex Court has accordingly set aside the subject SCN.

2. Further, attention is drawn to the specific reference for seeking Board's direction with respect to SCN dated 19.03.2019 against Sh. Anil Aggarwal and 11 others where the adjudication of the SCN would get barred by the limitation of time on 18th March, 2021 under sub-section (9) of section 28 of the Customs Act, 1962, on account of the inability to proceed further due to the said judgement of the Hon'ble Supreme Court.

3. The matter has been examined. The implications of the said judgement are under active examination in the Board. Therefore, the Board has decided that for the present and until further directions, the said SCN may be kept pending.

4. Further, all the fresh SCNs under Section 28 of the Customs Act, 1962 in respect of cases presently being investigated by DRI are required to be issued by jurisdictional Commissionerates from where imports have taken place.

5. Difficulties, if any, may please be brought to the notice of Board. Hindi version follows."

3.3.4.3.1 Para 4 of the above Instruction clearly states that "all the fresh SCNs under Section 28 of the Customs Act, 1962 in respect of cases presently being investigated by DRI are required to be issued by jurisdictional Commissionerates from where imports have taken place". Considering the present case it is seen that demand of duty has been made under Section 28(4) of the Customs Act, 1962 on the goods worth Rs. 76,98,74,823/- imported at Mundra Port as well as Air Cargo Complex, Ahmedabad. It can be seen from para 5(vii) of the subject SCN that goods worth Rs. 76,98,74,823/- were imported by M/s GTPL. Out of the said import, goods worth Rs. 41,45,31,924/- were imported at Air Cargo Complex, Ahmedabad and goods worth Rs. 34,93,42,599/- were imported at Mundra Port.

Thus, the Commissioner of Customs, Customs House, Mundra has in addition to the demand on goods imported from Mundra port has also raised demand on goods imported from Air Cargo Complex, Ahmedabad which falls under the jurisdiction of Principal Commissioner of Customs, Ahmedabad. This is in complete contraventions of above referred instruction.

Accordingly, since the demand of duty on imports made at Air Cargo Complex, Ahmedabad have been made outside his jurisdiction by the Commissioner of Customs, Mundra, the same needs to be dropped. Similarly, and any action proposed against the CHA who was responsible for imports at Ahmedabad also needs to be dropped.

3.3.4.4 In this regard, The Hon'ble Supreme Court in case of Commissioner of Customs Versus Sayad Ali, 2011 (265) ELT 17 (SC) has clearly held that proper officer means an officer who has been specifically entrusted functions either by Board or by Commissioner of Customs. It has further been stated that as per settled law, once the show cause notice has been issued by a incompetent authority, then the entire proceeding subsequent to the same, is also illegal in law. They further place reliance upon the judgment of the Supreme Court in M/s Canon India Pvt. Ltd. (supra), wherein it was held that:

20. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions."

Further reliance is also placed upon the judgment of the Division Bench of Karnataka High Court in Writ Petition No.10773 of 2018 dated 14.07.2021 titled 'Shri Mohan C. Suvarna Vs. Principal Commissioner of Customs' to contend that once the show cause notice was bad in law then even the order passed in pursuance of the same was required to be set aside.

3.3.4.4.1 The Supreme Court referred to the provisions of Section 28 of the Act and held that it is plain from the provision that the "proper officer" being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the "proper officer". Definition of "Proper Officer" under Section 2(34) of the Act was also perused.

It was held that it is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be "proper officers" in terms of Section 2(34) of the Act. Specific entrustment of function by either the Board or the

Commissioner of Customs is therefore, the governing test to determine whether an "officer of customs" is the "proper officer". It was held that from a conjoint reading of these two provisions, it is manifested that only such a customs officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions.

3.3.5. His firm, M/s. Vipul. R. Modi has been asked to show cause as to why Penalty should not be imposed under Section 112 and 114AA of the Customs Act, 1962 for import of Optical Line Termination, SFP Modules and Optical Network Terminals/Units (ONTS/ONUS) on behalf of M/s GTPL Broadband (P) Ltd. The doctrine of Mens rea runs through the Customs Law through various words such as abetment, knowingly, fraudulently and intentionally. For example, under Section 30, Section 41, Section 114AA Section 112, Section 114, section 117, Section 132 to 136, the said words are reflected. Customs Brokers are assisting the exporter/importer in clearance of imported/export cargo. Their role is limited and they are subordinate to the principal i.e exporter/importer. The Act has recognized this relation by the mandate of Section 147 of the Act. In some exceptional cases they are deemed as exporter/importer but they are not the principal. It is presumed that they may not be involved in the wrongdoing or malfeasance of main offender. Therefore, without being in knowledge or hand in hand with the exporter/importer, they cannot be penalized.

3.3.5.1 Under the Customs Act, 1962, penalties can be imposed under Section 112 and 114AA for certain violations related to customs duties and import/export procedures. Section 112 of Customs Act, 1962 deals with the penalty for improper importation or exportation of goods. It covers offenses such as:

- a. Evading customs duties by false declaration, undervaluation, or misclassification of goods.
- b. Importing or exporting prohibited or restricted goods without proper authorization.
- c. Smuggling or attempting to smuggle goods across the border.

Further, Section 114AA of the Customs Act, 1962 specifically deals with the penalty for certain offenses committed by a person who is a Custom House Agent or a carrier. It covers violations such as:

- a. Knowingly making false statements, declarations, or documents in connection with the import or export of goods.
- b. Assisting in the evasion of customs duties or any other prohibited activities.
- c. Engaging in fraudulent activities or any act that undermines the integrity of customs procedures.

Thus, requirement of mens rea is a sine qua non for imposing a penalty on Customs Broker under Sections 112 and 114AA of the Customs Act i.e Sections 112(a) and 114AA of the Customs Act include an intentional or deliberate act or omission and even the motive is attributable to the act of abetment to do any act or omit to do any act.

However, ongoing through the subject Show Cause Notice it is seen that the revenue has not established that M/s. Vipul. R. Modi handled the work of clearance with malafide motive and therefore penalty under Sections 112(a) and 114AA of the Customs Act are not imposable on them.

3.3.5.2 It further submitted that M/s. Vipul. R. Modi has been issued the CHA license under CBLR Rules, 2018 to operate from Ahmedabad only and cannot operate at Mundra. Thus, if the CHA is operating solely in Ahmedabad and falls under the jurisdiction of a different Commissioner of Customs or a different customs office altogether, then the Commissioner of Customs in Mundra would not have the authority to issue a show cause notice to that CHA. Since, there is no evidence of contravention of any of the Rules and Sections under the provisions of Customs Act and Rules made there under, it is improper to impose any penalty on them and that too, without any jurisdiction.

Since, the present show cause notice has been issued outside the jurisdiction of the relevant customs authority, it impacts the validity of the notice and any penalties imposed under Section 112 and 114AA of the Customs Act, 1962. Jurisdictional limitations play a crucial role in determining the authority of customs officers and the applicability of relevant provisions and therefore as the show cause notice has been issued to me without jurisdiction, the penalties proposed under Section 112 and 114AA of the Customs Act, 1962 cannot be imposed on me as I have been instrumental in importing the goods on behalf of M/s GTPL at Air Cargo Complex, Ahmedabad only.

3.3.6. In view of the above submissions, it was requested to drop the proceeding against them.

3.4. The Noticee No. 3, i.e. M/s Swayam Shipping Services, made submission vide their letter dated 12/13.10.2022 whereby they acknowledged the receipt of the impugned SCN asking them to show cause as to why penalty should not be imposed on them under Section 112 and 114AA of Customs Act, 1962.

3.4.2. That the above proposal is based on the following averment contained in para 12 of the SCN:

“12. It is also felt that the Customs brokers viz. M/s. Vipul R. Modi and M/s. Swayam Shipping Services did not exercise due diligence in classifying the subject goods by looking into the technical details of the items and ascertaining whether the same are eligible for the exemption claimed; instead they succumbed to the diktats of the clients and caused to file the subject Bills of Entry with incorrect and ineligible entry of the relevant notification issued in respect of Basic Customs Duty thereby allowing them to wrongly avail Nil/lower rate of BCD thus rendering the goods liable for confiscation under Section 111 (m) of the Customs Act, 1962; they also caused to submit the Bills of Entry ..filed for the clearance of the impugned OLT, SFPs and ONTs/ONUs which are false in respect of the serial number of entry of BCD Rate as given in Notification No. 24/2005-Cus dated 01.03.2005 as amended and Notification No. 57/2017-Cus dated 30.06.2017. The above acts of omission and commission on the part of the Customs Brokers have rendered them liable to penalty under Section 112 and 114AA of the Customs Act, 1962.”

3.4.3. At the outset, the allegations and averments leveled in the SCN are hereby denied. Save and except what is specifically admitted herein, no part of SCN which is not expressly dealt with, shall be deemed to be admitted.

3.4.4. They hereby say and submit that acting as Custom Broker, they had filed the bills of entry on the basis of documents like invoice, bill of lading, certificate of origin, etc. clearly containing the full and complete declaration of the goods under consideration. Moreover, they had prepared the bill of entry also on the basis of an assessed bill of entry filed by the importer before Air Cargo Complex, Ahmedabad.

3.4.5. The bills of entry claiming exemption were assessed only after due examination of goods by the Customs officers at the port of import where the goods were found tallying with the description declared in the bills of entry prepared by them in the capacity of Custom Broker.

3.4.6. Therefore, there is no justification behind the allegation that they failed to exercise due diligence with regard to classification or they succumbed to the diktat of client (sic) in making any incorrect classification.

3.4.7. Without prejudice to above, it is a settled law that a Custom Broker is not liable to penalty under Section 112 and 114AA of Customs Act, 1962 when he has filed the bill of entry on the basis of documents placed in his hands by the importer. They take this opportunity to rely upon the ratio of the following among a large number of decisions to buttress their submissions.

3.4.7.1 In the case of Jeena and Company v/s Commissioner of Customs, Bangalore, 2021 (378) ELT 528 (Tri. – Bang), Hon’ble Tribunal has held that it is not appropriate to punish the CHA for filing the document in good faith and on the basis of documents

supplied by the importer. On this basis, Penalty imposed on the CHA under Section 112 of Customs Act,1962 was set aside.

3.4.7.2 In the case of Commissioner of Customs (Import) v/s Trinetra Impex Pvt. Ltd., 2020 (372) ELT 332 (Del.), Hon'ble Tribunal set aside penalty imposed on the CHA under Section 112 (b) and 114AA of Customs Act,1962 on the ground that he had acted bona fide and merely facilitated the imports on the strength of the documents which were handed over to him by the importer. To the same effect are the decisions of Hon'ble Tribunal in Kunal Travels v/s Commissioner of Customs, NOIDA, 2005 (183) ELT 299 (Tri. – Del.), Prime Forwarders v/s Commr. of Customs, Kandla, 2008 (222) ELT 137 (Tri.-Ahmd.), Savithri Jewellers Pvt. Ltd. v/s Commissioner of Customs, Mumbai-III, 2020 (374) ELT 754 (Tri.-Mumbai), S. Rajendra & Co. v/s Commr. of Cus., Air Cargo Complex, Mumbai, 2008 (227) ELT 224 (Tri.-Mumbai).

3.4.7.3 In the case of Kismat Clearing Agency v/s Commr. of Cus (ACC & Import), Mumbai, 2016 (344) ELT 0314 (Tri. – Bom), Hon'ble Tribunal set aside penalty imposed on CHA under Section 114AA of Customs Act,1962 on the ground that CHA was not aware about the alleged mis-declaration.

3.4.7.4 In the case of Brijesh International v/s Commr. of Cus. (Import & General), New Delhi, 2017 (352) ELT 229 (Tri – Del.), Hon'ble Tribunal has held that a Custom House Agent is not expected to investigate and find out the correct classification or value of the goods. On this basis, penalty imposed on the CHA under Section 112 of the Customs Act,1962 was set aside.

3.4.7.5 In the case of Commr. of Cus., Tuticorin v/s Moriks Shipping and Trading Pvt. Ltd., 2008 (227) ELT 677 (Tri.- Chennai), Hon'ble Tribunal has held that a CHA is not required to go into the authenticity of the declarations made in the export documents. His job is confined to submission of the documents given by the exporter as also to identify the exporter to the Customs authorities. When department carried this matter further, Hon'ble High Court dismissed the appeal filed by department by observing that a CHA be expected to know of the exact nature of the product at sight. The decision of Hon'ble High Court is reported at 2015 (317) ELT 3 (Mad.)

3.4.8. Kind attention is also invited to the decision where Hon'ble Tribunal by relying upon the paras 65 and 66 of the 27th Report of the Standing Committee on Finance has held in the case of Access World Wide Cargo v/s Commissioner of Customs, Bangalore, 2022 (379) ELT 120 (Tri. – Del.) wherein it is held that ingredients of Section 114AA are not applicable to a CHA who has only filed the shipping bills on the basis of the documents furnished by the exporter.

3.4.9. Moreover, the impugned SCN does not bring out any evidence against them to establish that acting as CB, they had "knowingly or intentionally" made, signed or used, or caused 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 under the provisions of Customs Act,1962. On the contrary, the allegations leveled against them in para 12 of the SCN are failure to exercise due diligence and succumbing to the *diktat* of importer which is sufficient to establish that they had no knowledge or intention about alleged mis-declaration and mis-classification by the importer.

3.4.9.1 In the course of inquiry, the officers have recorded statement of the importer as well as their authorized person and there is nothing to show that they had knowingly or intentionally made, signed or used any declaration, statement or document, which is false, or incorrect.

3.4.9.2 The requirement of law under Section 114AA is bring out knowledge or intention and not false or incorrect statement or document.

3.4.9.3 Inasmuch as there was not an iota of evidence to establish knowledge or intention on their part, they are not liable to penalty under Section 114AA of Customs Act,1962.

3.4.10. Hence, it was prayed to drop the proceedings initiated against M/s. Swayam Shipping Services (Custom Broker) by giving due consideration to the above submissions and citations and oblige.

3.5. Further written submission made by the M/s Swayam Shipping Services, vide their letter dated 04.08.2023 wherein in addition to their reply vide their letter dated 13.10.2022 they made additional submission as under:

3.5.2. They have filed a detailed defence reply dated 13.10.2022 in response to the SCN. The same may kindly be given due consideration.

3.5.3. Further, following additional submissions are advanced for kind consideration:

3.5.3.1 The impugned SCN is principally directed against M/s. GTPL Broadband (P) Ltd. who have imported ONT/ONU (Optical Network Terminal/Units), OLT (Optical Line Terminal), SFP/QSFP (Small Form-Factor Pluggable/Quad Small Form-factor Pluggable) by alleging that these items are required to be “categorized as Optical Transport Equipment/Optical Network Products” falling under CTH 85176290 (instead of CTH 85177090, 85176930, 85176950 and 85176250).

3.5.3.2 It may be appreciated that the above allegation is based on the evidence gathered from the statement of a senior technical person working with M/s. GTPL, namely, Shri Ajmal Hussain Mohd. Isha Siddiqui, General Manager (Technology).

3.5.3.3 Shri Hetalkumar Dilipkumar Kansara, Assistant General Manager of M/s. GTPL, whose statement was recorded in the initial phase of inquiry, is on record stating that he was not well aware of the functions performed by the imported equipment; that their technical person would be in a better position to give details about the same; that they had made the declarations regarding description and classification on the basis of feedback received from their technical team.

3.5.3.4 The SCN is issued after a detailed analysis of the statement of the technical person of M/s. GTPL and material available on a large number of website, by drawing an inference that goods under consideration are capable of use as Optical Transport Equipment/Optical Network Products.

3.5.3.5 Thus, it may be appreciated that the SCN is not based on an apparent mismatch in description, etc., which a Custom Broker could have noticed at a first glance. The SCN is an opinion formed by the department over a complex technical issue involving utility/multi-utility of goods, which a Custom Broker is not expected to decipher. As such, it is humbly submitted that this is not a case where goods are not matching with the description declared in the bill of entry prepared by them on the basis of documents like invoice, etc. placed in their hands by the importer but this is a case where department has expressed disagreement with the use to which these items may be put by the importer.

3.5.3.6 Thus, it is their humble submission that this is not a case of mis-declaration of description for which a Custom Broker can be held liable to penalty under Section 112 and 114AA of Customs Act,1962.

3.5.4. They place reliance on the decision of Hon'ble Tribunal in the case of M/s. Chakiat Agencies v/s Commissioner of Customs, Chennai, 2023 (2) TMI 490- CESTAT CHENNAI, wherein, penalty imposed on a CHA under Section 114 of Customs Act, 1962 (which is pari materia with Section 112 dealing with import) by holding that a CHA cannot be expected to examine and ensure the nature of the goods in the consignment.

3.5.4.1 Reliance is also placed on the decision of Hon'ble Tribunal in the case of M/s. HIM Logistics Pvt. Ltd. v/s Commissioner of Customs, New Delhi, 2016 (340) ELT 388 (Tri.-Del.), wherein, penalty imposed on CHA under Section 112 of Customs Act, 1962 is set aside by holding that issue of classification is of complex nature and it cannot be said that the CHA should have information that the goods were “Food Supplements” and not “Medicaments”.

3.5.5. It was reiterated that the SCN does not pass the muster insofar as the criteria of “knowingly or intentionally” that is required to be satisfied for invoking Section 114A. Hence, they are not liable to penalty under Section 114AA of Customs Act,1962.

4. RECORDS OF PERSONAL HEARING:

The personal hearing in the case was held virtually through Webex meeting on 02.08.2022.

4.1 Shri Amol Dave, authorised representative of Noticee No. 1 i.e. **M/s. GTPL Broadband (P) Ltd.** appeared for the virtual hearing through Webex meeting on 02.08.2023 at 04.00 PM wherein he reiterated their written submission and he submitted that there are departmental as well as advance ruling decisions supporting their classification of their certain products and in support of remaining item he has relied to the technical literature in their support. Accordingly, he sought dropping of charges against them.

4.2 Shri D.P. Zala, authorised representative of the Noticee No. 2 i.e. **M/s. Vipul. R. Modi**, Customs Broker, appeared for virtual hearing through Webex meeting on 02.08.2023 at 04.15 PM wherein in addition to drawing attention to their submission dated 13.02.2023 and 17.07.2023 he stated that the notice lacks jurisdiction for action against him by the Commissioner of Customs, Mundra. Therefore, he sought dropping of the proceedings.

4.3 Shri Vikas Mehta authorised representative of the Noticee No. 3 i.e. **M/s Swayam Shipping Services** appeared for virtual hearing through Webex meeting on 02.08.2023 at 05.00 PM wherein he stated that the issued raised vide the said Show Cause Notice is a complex technical classification case and it would not be appropriate any motive or wrong doing on the CB. He further has referred to a ruling wherein any role of CB in classification was denied. He sought one week's time to submit the case laws and their written submission. Subsequently, reply was received vide letter dated 04.08.2023 which is discussed at para 3.5 above.

5. DISCUSSION AND FINDINGS:

I have carefully gone through the Show Cause Notice, relied upon documents, submissions made by the Noticee(s) and the records available before me. The main issues involved in the case which are required to be decided in the present adjudication are as below:

- a) whether the classification of the goods mentioned in table-A below is liable to be rejected and re-determined.
- b) whether the benefit of Sl No.13N, 13P and 13I of Notification No. 24/2005 Cus dated 01.03.2005 and Sl No. 5 & 20 of Notification No. 57/2017 Cus dated 30.06.2017, as amended, is available to the impugned goods.
- c) whether differential duty amounting to Rs. 15,61,18,761/- (Rupees Fifteen Crore Sixty One Lakhs Eighteen Thousand and Seven Hundred and Sixty One Only), in respect of the Bills of Entry mentioned in Annexure -B1, B2 to the SCN, is required be recovered from them under Section 28(4) of the Customs Act, 1962.
- d) whether the impugned goods mentioned in Table-A below are liable for confiscation under section 111(m) of the customs act,1962.
- e) whether penalty under section 112(a), 114A and/or 114AA of customs act, 1962 is liable to be imposed on Importer, M/s GTPL Broadband (P) Ltd.
- f) whether penalty under section 112(a) and/or 114AA of Customs Act, 1962 is liable to be imposed on Customs Brokers, M/s. Vipul. R. Modi and M/s Swayam Shipping Services.

5.1 The impugned products which are under present adjudication are summarised below:

Table-A

Sr. No.	Declared Declaration	Declared CTH
1	GPON ONT MODEL NO. ZXHN F660	85176950
2	ONT F601 1GE WITHOUT WIFI	85176950
3	ONT/ONU DUAL BAND F670L WITH WIFI	85176950
4	GPON INDOOR ONT 1 POTS 1GE 3FE WIFI	85176250

5	OLT C320 WITH 2 CONTROL CUM POWER CARDS AND 1 NO. PON CARD WITH SFP	85176990
6	OLT C620L WITH 2 CONTROL CUM POWER CARDS 1NO PON CARD WITH SFP	85176990
7	16 PORT MINI OLT	85176990/ 85176290
8	OLT C610 (16 PORT 2 UPLINK SFP)	85176990
9	OLT C620L WITH 2 CONTROL CUM POWER CARDS 1NO PON CARD WITH SFP	85176990
10	1.QSFP-40G-SR4: 40GBASE SR4 TRANSCEIVER MODULE 2. QSFP-40G-LR4: 40GBASE LR4 OTN LC 10KM 3. SFP-10G-ER: 10GBASE ER SFP MODULE	85177090
11	1.QSFP28 100BASE SR4 ROHS6/6 0/70C 2. SFP 10GE SR LR ROHS6/6 0 70C 3. QSFP28 100BASE LR4 ROHS6/6	85176290/ 85176990
12	1. 1. BNG CENTRAL SITE 7750 SR 12 2. 2. GATEWAY ROUTER 7750 SR 3E 3. POP ROUTER 7750 SR 2E	85176930

6. Classification of the impugned goods:

6.1 Before discussing the classification of items in question, basic of Telecom Network is being discussed as under:-

6.1.1 Telecommunications are the means of electronic transmission of information over distances. The information may be in the form of voice telephone calls, data, text, images, or video. Today, telecommunications are used to organize more or less remote computer systems into telecommunications networks. These networks themselves are run by computers. Telecommunication is the exchange of signs, signals, messages, words, writings, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems. A complete, single telecommunications circuit consists of two stations, each equipped with a transmitter and a receiver. The transmitter and receiver at any station may be combined into a single device called a transceiver. The medium of signal transmission can be via electrical wire or cable ("copper"), optical fiber, electromagnetic fields or light. The free space transmission and reception of data by means of electromagnetic fields is called wireless communications.

A telecommunications network is an arrangement of computing and telecommunications resources for communication of information between distant locations. A telecommunications network includes the following components:

1. Terminals for accessing the network.
2. Computers that process information and are interconnected by the network.
3. Telecommunications links that form a channel through which information is transmitted from a sending device to a receiving device.
4. Telecommunications equipment that facilitates the transmission of information.
5. Telecommunications software that controls message transmission over the network.

6.1.2 In telecommunication network, a group of nodes interconnected by links that are used to exchange messages between the nodes. The links may use a variety of technologies based on the methodologies of circuit switching, message switching, or packet switching to pass messages and signals. The latest and the most widely deployed broadband technologies for high speed internet-access across the globe, viz., "Fiber to the Home" or "FTTH" employs Fiber Optic Cables as communication channels. An Optical Fiber Communications link (source-<https://www.britannica.com/topic/telecommunications-media/Optical-transmission>) consists of the following elements: an electro-optical transmitter, which converts analog or digital information into a modulated beam of light; a light-carrying fiber, which spans the transmission path; and an optoelectronic receiver,

which converts detected light into an electric current. For long-distance links (greater than 30 km, or 20 miles), regenerative repeaters are usually required to offset the attenuation of signal power.

A passive optical network (PON) is a kind of fiber-optic network which utilizes the point-to-multipoint topology and optical splitters to deliver data from a single transmission point to multiple user end points. The term “Passive” in this context refers to the unpowered (not requiring electric power) condition of the fiber and splitting components along the length of the network laid. Power in the PON system is required only at the send and receive points-namely, Optical Line Terminal (OLT) and the Optical Network Terminal/Units.

6.1.3 Thus OLTs and ONT/ONUs requiring power to send and receive optical signals are the active elements in the entire Optical Distribution Network running between the Service Provider’s premises down to the Customer’s premise. PON Networks adopt a Point-to-Multipoint (P2MP) architecture which utilizes optical splitters to divide the downstream signal from a single OLT into multiple downstream paths to the end users, the same splitters combine the multiple upstream paths from the end users back to the OLT.

Working of a Passive Optic Network based on fiber optic technology is based on the following:

- the transmission medium used in the network are fiber optic cables;
- Data (voice, image and other data) in electrical form is converted to light signals (conversion);
- Data encapsulated into light packets are transported through Optic Cables (transmission)
- Data is received and regenerated at the OLT (placed in the premise of the service provider) to be further transmitted on to the subscriber’s device (Computer, TV, Mobile, Telephone etc.) through ONTs (ONUs/Home Gateway Units placed in the premise of the subscriber)-(reception and regeneration).

6.1.4 In a PON network, a device called OLT is placed at the head end of the network. A single fibre optic cable runs from the OLT to a passive optical beam splitter, which multiplies the signal and relays it to several ONTs. End-user devices (which are placed at the subscriber’s end) such as PCs and telephones are connected to the ONTs as well as the optical splitter. In addition, the optical distribution network (ODN) is also used during the transmission between OLT and ONU/ONT.

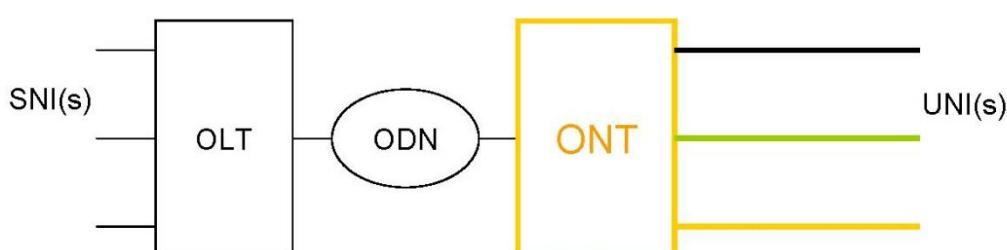


Figure I.7 – Residential gateway ONT scenario

As illustrated above, the network topology of GPON is an OLT, which is placed at the service provider’s central office, ONTs/ONUs which are placed at the subscriber’s / customer’s premises and ODN which are placed between the OLT and ONT to split and distribute the signal travelling along the GPON.

6.1.5 Also to understand OLT & ONT/ONU, the reference from Technical literature as contained in International Telecommunication Unit (ITU) is placed. As per the Recommendations of International Telecommunication Union [ITU-T G.984.1], Gigabit-capable passive optical networks (GPON) systems are characterized, in general, by an optical line termination (OLT) system and an optical network unit (ONU) or optical network termination (ONT) with a passive optical distribution network (ODN) interconnecting them. There is, in general, a one-to-many relationship between the OLT and the ONU/ONTs, respectively.

Optical Distribution Network (ODN): In the PON context, a tree of optical fibres in the access network, supplemented with power or wavelength splitters, filters or other passive optical devices.

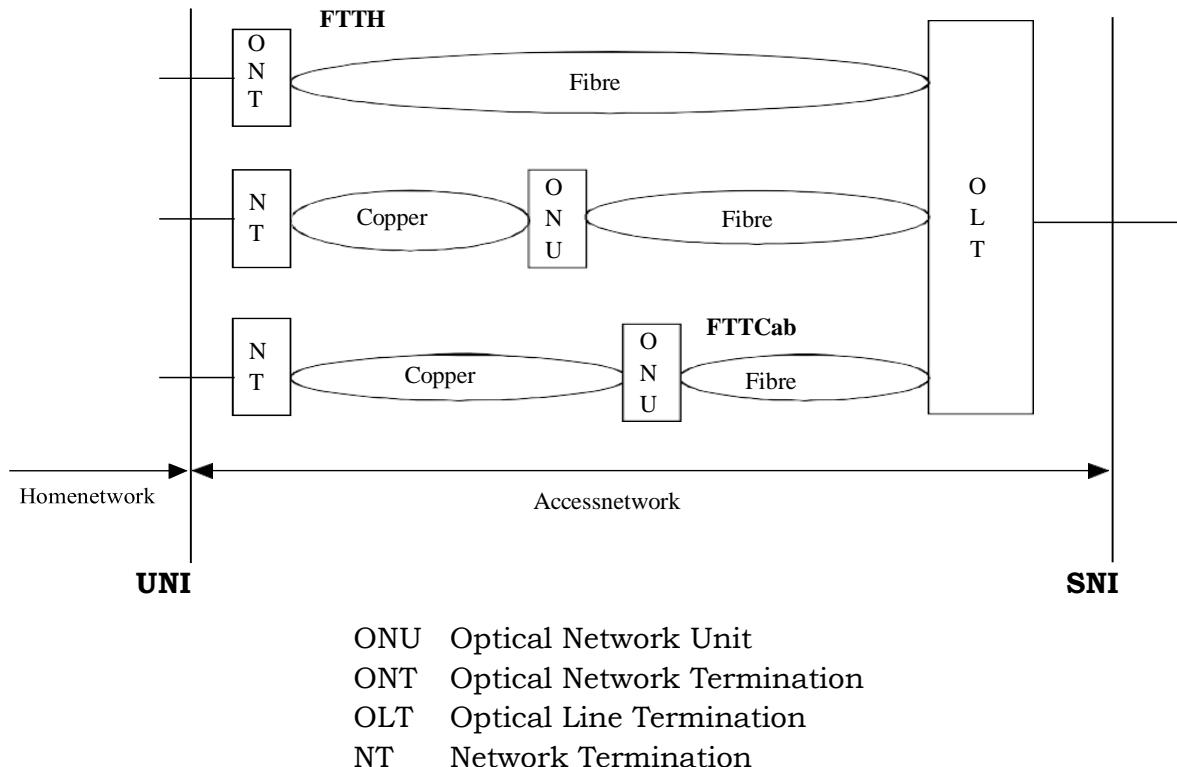
Optical Line Termination (OLT): A device that terminates the common (root) endpoint of an ODN, implements a PON protocol, such as that defined by [ITU-T G.984], and adapts PON PDUs for uplink communications over the provider service interface. The OLT provides management and maintenance functions for the subtended ODN and ONUs.

Optical Network Termination (ONT): A single subscriber device that terminates any one of the distributed (leaf) endpoints of an ODN, implements a PON protocol, and adapts PON PDUs to subscriber service interfaces. An ONT is a special case of an ONU.

Optical Network Unit (ONU): A generic term denoting a device that terminates any one of the distributed (leaf) endpoints of an ODN, implements a PON protocol, and adapts PON PDUs to subscriber service interfaces. In some contexts, an ONU implies a multiple-subscriber device.

6.1.6 Network architecture:

The optical section of a local access network system can be either active or passive and architecture can be either point-to-point or point-to-multipoint. Figure shows the architectures considered, which range from fibre to the home (FTTH), through fibre to the building/curb (FTTB/C) to fibre to the cabinet (FTTCab). The optical access network (OAN) is common to all architectures shown in Figure 1, hence the commonality of this system has the potential to generate large worldwide volumes.



The differences of the FTTB, FTTC, FTTCab and FTTH network options are mainly due the different services supported, so they can be treated the same and clubbed as FTTx as mentioned in Board's circular number 08/2023.

6.2.1 I find that principles for the classification of goods are governed by the Harmonized Commodity Description and Coding System (Harmonized System or HSN) and the General Rules for Interpretation specified there under. The General Rules for the Interpretation (GIR) specified in the Import Tariff are in accordance with the GIR specified in the HSN. In terms of GIR I of the HSN and the import Tariff-

*The titles of Sections. Chapters and sub-chapters are provided for ease of reference only: for legal purposes, **classification shall be determined according to the terms of the headings** and any relative Section or Chapter Notes...*

Entry under the Tariff Heading 8517 reads thus:

8517-TELEPHONE SETS, INCLUDING TELEPHONES FOR CELLULAR NETWORKS OR FOR OTHER WIRELESS NETWORKS: OTHER APPARATUS FOR THE TRANSMISSION OR RECEPTION OF VOICE, IMAGES OR OTHER DATA, INCLUDING APPARATUS FOR COMMUNICATION IN A WIRED OR WIRELESS NETWORK (SUCH AS A LOCAL OR WIDE AREA NETWORK), OTHER THAN TRANSMISSION OR RECEPTION APPARATUS OF HEADING 8443, 8525, 8527 OR 8528)

6.2.2 In the instance case, I find that there is no dispute of classification at heading level. It is undisputed that the subject goods are classifiable under heading 8517. The dispute is at sub-heading and tariff item level.

The Heading 8517 covers goods classifiable under the following sub-headings at the single dash (-) level:

- a. Telephone sets, including telephones for cellular networks or for other wireless networks;
- b. Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as local or wide area network) &
- c. Parts:

6.2.3 I also find that there is no dispute of classification at sub-headings at the single dash (-) level except for some SFD Module which were classified as parts by the importer. Indisputably, the remaining goods were classified at the single dash (-) level mentioned at b above.

Tariff Heading at the single dash (-) level mentioned at b above covers goods classifiable under the following sub-headings at the double dash (--) level:

- a. 851761 - Base stations
- b. 851762 - Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus
- c. 851769 - Others

6.2.4 I find that the main dispute of classification is between above sub-headings at the double dash (--) level mentioned at b & c and subsequently at triple dash(---) only.

6.2.5 Further, in terms of the Import Tariff the specific apparatus / machines covered under the single dash (-) heading pertaining to '*other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network*' are as under:

Single dash level Tariff Heading	Tariff Sub-heading / Tariff Item at double dash / triple dash level and Description of Goods
-------------------------------------	---

Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (Such as a local or wide area network)	851761	Base Station		
	851762 Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus	85176210	PLCC equipment	
		85176220	Voice frequency telephony	
		85176230	Modems (modulators-demodulators)	
		85176240	High hit rate digital subscriber line system (HDSL)	
		85176250	Digital loop carrier system (DLC)	
		85176260	Synchronous digital hierarchy system (SDH)	
		85176270	Multiplexers, statistical multiplexers	
		85176290	Other	
	851769	Other	85176910	ISDN System,
			85176920	ISDN Terminal Adaptor
			85176930	Routers
			85176940	X 25 Pads
			85176950	Subscriber End Equipment
			85176960	Set top boxes for gaining access to internet
			85176970	Attachments for telephones
			85176990	other

6.2.6 As regards the apparatus covered under sub-heading 851769, it is apparent that the same are '*apparatus for transmission or reception of voice, images or other data...*' **other than** '*base stations*' and '*Machines for the reception, conversion and transmission*'. In other words, sub-heading pertaining to '*Others*' (851769) covers only such apparatus, as not covered under sub-headings 851761 and 851762. Accordingly, the apparatus / machines which support reception, conversion and transmission etc. covered under sub-heading 851762 are excluded from sub-heading 851769.

6.2.7 As regards the term 'conversion' it is pertinent to mention that heading 8517 covers apparatus for the transmission or reception of speech or other sounds, images or other data between two points by **variation of an (a) electric current or (b) optical wave flowing in a wired network or by (c) electro-magnetic waves in a wireless network**. It is apparent that in order to transmit / receive signals carrying voice, image or other data over an optical / wireless network it is essential for the apparatus to support the conversion of the signals from the electric form to the optical / electromagnetic waves and vice-versa. From the terms of sub-headings 851762 and 851769, it is apparent that transmission or reception apparatus, including routers, covered under sub-heading 851769 do not support the functionality of conversion of the signals from electrical to the optical or electromagnetic domain and vice versa, whereas the apparatus, falling under sub-heading 851762, tariff item 85176290 support the said functionality of conversion.

6.2.8 As per the Import Tariff, sub-heading 851769 includes ISDN System, ISDN Terminal Adaptor, Routers, X 25 Pads, Subscriber End Equipment, Set top boxes for gaining access to internet and Attachments for telephones. ISDN (Integrated Services Digital Network) is a circuit-switched telephone network system, which also provides access to packet switched networks, designed to allow digital transmission of voice and data over ordinary telephone copper wires. The key feature of ISDN is that it integrates speech and data on the same lines, adding features that are not available in the classic telephone system. Further, ISDN Router is a device that enables several users on a network to access the Internet via ISDN.

It may also provide several Ethernet ports which lets it serve as a central Ethernet hub for a small workgroup.

6.2.9 Therefore, the apparatus covered under Tariff sub-heading 8517 69 such as the Terminal Adaptor, Routers, X 25 Pads, Subscriber End Equipment, Set Top Boxes for gaining access to the internet, etc. are the paraphernalia of the ISDN Network.

6.2.10 I find that the apparatus of the ISDN Network allow digital transmission of voice and data over ordinary telephone copper wires. As such there is no requirement for the said apparatus of the ISDN Network to support the conversion of electrical signals to either optical or radio waves. According to the terms of sub-headings in the HSN and the import tariff, the apparatus for the reception, conversion and transmission are specifically covered under sub-heading 8517 62 and that the apparatus of sub-heading 8517 69 exclude the functionality of conversion. As such, the inclusion of the copper-based ISDN system and the apparatus / paraphernalia thereof under sub-heading 851769 in the import tariff is in conformity with the terms of the said sub-heading.

6.2.11 Thus, based on technology involved in the types of telecom equipment, I find that:

- a. switching and routing apparatus which supports the conversion of signals are specifically covered under sub-heading 851762;
- b. Communication apparatus of sub-heading 851762 support the reception, conversion and transmission of signals and allow for the connection to a wired or wireless communication network; and
- c. the apparatus of sub-heading 851769, including routers of tariff item 85176930 do not support the conversion of the signals to the optical electromagnetic waves.

Based on above conclusions, I would discuss the classification of each items by grouping them in below categories:

6.3 OPTICAL NETWORK TERMINAL / OPTICAL NETWORK UNIT:

This category covers the following items:

Sr. No.	Declared Declaration	Declared CTH	Product Category
1	GPON ONT MODEL NO. ZXHN F660	85176950	Optical Network Terminal/Unit
2	ONT F601 1GE WITHOUT WIFI	85176950	
3	ONT/ONU DUAL BAND F670L WITH WIFI	85176950	
4	GPON INDOOR ONT 1 POTS 1GE 3FE WIFI	85176250	

6.3.1 I find that these products were presented as subscriber end equipment by the importer. In his submission dated 02.03.2023, the importer submitted that in common parlance subscriber end equipment or customer end equipment is the class of equipment which is installed at the premises of the customer for enabling them to access the internet and their ONT products are installed in the premises of the subscriber, therefore, their ONT products are rightly classifiable under tariff item 85176950 which is for subscriber end equipment. They also rely upon the advance ruling in the case of **M/s. Netlink ICT Pvt. Ltd. reported at 2022 (381) ELT 116.**

The relevant part of the Advance Rulings dated 20.01.2022 which is concerned with classification and exemption notification benefit of imported goods 'GPON ONT', is reproduced below:

"2.2 In relation to the above-mentioned device, the questions on which advance rulings have been sought are as follows:-

1. *Whether GPON ONT is subscriber end equipment that merits classification under sub-heading 85176950 of the Customs Tariff Act, 1975? If yes, whether the applicant is eligible for nil rate of duty as per Sr. No. 13P of the Notification No. 24/2005-Customs, dated 01.03.2005?"*

The operative part of the Rulings is as under:

"6. In view of the foregoing discussions, I rule that the imported goods are classifiable under sub-heading 85176950 of the first schedule to the Customs Tariff Act, 1975 and would be eligible to avail benefit of Sr. No. 13P of the Notification No. 24/2005-Customs as amended."

(i) I have gone through the aforesaid order of Advance Ruling given in the case of M/s Netlink ICT Private Ltd and found that said Ruling has not been accepted by Department and Chennai Customs has filed appeal against said ruling and, therefore, the referred Ruling has not attained finality.

(ii) So far as arguments given in aforesaid CAAR Ruling for classification of GPON ONT under 8517 69 50 is concerned, I find that Advance Ruling erred in its findings observing that 8517 69 50 sub-heading is more specific than the general sub-heading of 8517 62 90 by applying Rule 2(b) of General Rule for the Interpretation of the Customs Tariff and the same is being discussed in subsequent paras.

(iii) It is imperative that first of all General Rules for the Interpretation (GRI) be discussed. Rules (1), (2), (3), (6) and General Explanatory note of General Rules for the Interpretation (GRI) are reproduced as under:-

"1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

*3. When by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:*

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub headings and any related sub headings Notes and, mutatis mutandis, to the above rules, on the understanding that only sub headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

General Explanatory Note

1. Where in column (2) of this Schedule, the description of an article or group of articles under a heading is preceded by “-”, the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of articles is preceded by “--”, the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has “-”. [where the description of an article or group of articles is preceded by “---” or “----”, the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has “---.”]

(iv) Cogent reading of Rule 1 and Rule 6, it transpires that classification of ONT has to be first determined according to the terms of heading & determined to be classifiable under heading 8517. Subsequently classification of goods in the sub-headings of a heading shall be determined according to terms of those sub-headings.

(v) Therefore, applying Rule 1 and Rule 6 of GRI, ONT are appropriately classifiable under “8517 62 -- Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:”. Therefore, classification of ONT under heading “8517 69 -- Others” in the referred Order of Advance Ruling is bad in law. The CAAR Ruling failed to discuss as to why GPON OLT will not merit first classification under heading 8517 62 as per its functionality, uses and technicality.

(vi) For legal purpose, 8517 69 being residual sub heading of heading 8517, recourse of 851769 has to be taken only when the items are neither classifiable under 8517 61 or 8517 62. The findings of Advance Authority ruling referred above is therefore bad in law and is not based on proper interpretation of General Rules for Interpretation.

(vii) Further, I find that the importer is agreed that the goods which are projected as subscriber end equipment are Optical Network Terminal/Unit (ONT/ONU). They are classifying under tariff item no. 85176950 only on the ground that they are installed at premises of subscribers.

(viii) Further, I find that Shri. Ajmal Hussain Mohd. Isha Siddiqui, General Manager, (Technology) in his statement recorded on 08.12.2021, stated that the GPON/ONT/ONU with model ZXHN F660 of FTE is capable of carrying data for VOIP call and IPTV facilities. But, they are not providing these facilities. Such VOIP calls and IPTV facilities can be availed through additional instruments. The models ZXHN F612, ZXHN F601 and Nokia 7368 ISAM do not have VOIP call facility, but they are capable of carrying data for IPTV facility; that GPON ONT/ONT receives optical signals from OLT. It is placed at the subscriber's end. It has single optical signal input and electrical signal output through Ethernet port and Wi-Fi signal output; that GPON/ONT/ONU gives output in electrical signals through Ethernet

port and transmits Wi-Fi signals through Wi-Fi antenna to a limited distance to the particular customer; Optical fibre is a medium capable of carrying data in any form like voice, video etc.; that, these GPON ONUs are capable of receiving optical signals containing the data, and separate the same into voice, video etc. Such signals are then converted into electrical signals and sent through Ethernet ports; and converted into Wi-Fi signals and transmitted through Wi-Fi antenna. GPON ONT/ONU are routing apparatus working with dynamic multiple IP usage facility to the particular customer, whom the apparatus is assigned; that the said goods imported by them are capable of transporting data, voice and video/images using GPON technology.

(ix) In view of the above, as admitted by the importer, the subject goods therefore perform the multiple functions of

- reception
- transmission and
- regeneration of voice, image and other data in both
- Wired and
- Wireless modes

(x) I find that the ONT/ONU receive the data then convert it and then transmit it. Therefore, due to capability of conversion, the merit classification of ONT/ONU is under subheading 851762 instead of 851769.

6.3.2 I have to now examine which of the aforesaid sub-classification of 8517 62 will merit classification for ONT/ONU. To appropriately classify the ONT, it is imperative that the meaning of different items appearing under different sub-heading and its technicalities be understood. As per the technical definitions of items available on internet, the technical meaning of different items of aforesaid items preceded by three single dash “---” are as under:-

PLCC Equipments- Power-line carrier communication (PLCC) is mainly used for telecommunication, tele-protection and tele-monitoring between electrical substations through power lines at high voltages, such as 110 kV, 220 kV, 400 kV.

Voice frequency telegraphy- Voice-frequency telegraphy provides low-speed channels for the transmission of telegrams and for data transmission. Methods of voice-frequency telegraphy are used in multiplexing standard high-frequency telephone channels and radio channels. From 6 to 48 telegraph transmissions may be carried simultaneously by one such channel, and the entire frequency bandwidth of the channel is usually used. Voice-frequency telegraphy is also used for simultaneous telephone and telegraph communication over a common telephone channel.

Modem- A modulator-demodulator or modem is a computer hardware device that converts data from a digital format into a format suitable for an analog transmission medium such as telephone or radio. A modem transmits data by modulating one or more carrier wave signals to encode digital information, while the receiver demodulates the signal to recreate the original digital information. The goal is to produce a signal that can be transmitted easily and decoded reliably. Modems can be used with almost any means of transmitting analog signals, from light-emitting diodes to radio.

High-bit-rate digital subscriber line (HDSL)- HDSL is a telecommunications protocol standardized in 1994. It was the first digital subscriber line (DSL) technology to use a higher frequency spectrum over copper, twisted pair cables. HDSL was developed to transport DS1 services at 1.544 Mbit/s and 2.048 Mbit/s over telephone local loops without a need for repeaters. Successor technology to HDSL includes HDSL2 and HDSL4.

Digital Loop Carrier System (DLC) - A digital loop carrier (DLC) is a system which uses digital transmission to extend the range of the local loop farther than would be possible using only twisted pair copper wires. A DLC digitizes and multiplexes the individual signals carried by the local loops onto a single data stream on the DLC segment.

Synchronous Digital Hierarchy System (SDH)- SDH is a group of fiber optic transmission rates that transport digital signals with different capacities. SDH technology enables low-bit rate data streams to combine with high-rate data streams.

Multiplexers, statistical multiplexers - Multiplexer, also known as a data selector, is a device that selects between several analog or digital input signals and forwards the selected input to a single output line. The selection is directed by a separate set of digital inputs known as select lines.

From the technical description of ONT/ONU as discussed in foregoing paras, I find that ONT functionality doesn't tally with the technical functionalities of items i.e., PLCC Equipment, Voice frequency telephony, Modems (modulators-demodulators), HDSL, DLC, SDH and multiplexers mentioned above. Therefore, the item ONT/ONU under discussion will not fall under any of aforesaid items sub-heading and will be appropriately classifiable under residuary sub-heading of 8517 62 i.e., under "8517 62 90 --- Other".

6.4 OPTICAL LINE TERMINALS:

This category covers the following items:

Sr. No.	Declared Declaration	Declared CTH	Product Category
1	OLT C320 WITH 2 CONTROL CUM POWER CARDS AND 1 NO. PON CARD WITH SFP	85176990	Optical Line Terminal
2	OLT C620L WITH 2 CONTROL CUM POWER CARDS 1NO PON CARD WITH SFP	85176990	
3	16 PORT MINI OLT	85176990 / 85176290	
4	OLT C610 (16 PORT 2 UPLINK SFP)	85176990	
5	OLT C620L WITH 2 CONTROL CUM POWER CARDS 1NO PON CARD WITH SFP	85176990	

6.4.1 I find that these products were presented as networking equipment by the importer. In the written reply dated 02.03.2023, the importer submitted that The goods which are imported by them are OLT and such OLT is a part of GPON systems. The importer argued that the SCN alleged that OLT devices imported by them are Optical Transport Equipment and it is an undisputed fact that OTE and OLT are two different kinds of equipment and that their role is also very different.

6.4.2 I agree with the above contention of importer that OTE and OLT are two different kinds of equipment and that their role is also very different. However, I find that the classification of OLT is not dependent on the fact whether OLT and OTE are same or different.

6.4.3 Further, I noted that the importer is agreed that the goods which are projected as networking equipment are Optical Line Terminal (OLT). I find that before deciding the classification at tariff item level, classification is to be decided at sub-heading level, i.e. whether the impugned goods are classifiable under sub-heading 851762 or 851769.

6.4.4 Shri Ajmal Hussain Mohd. Isha Siddiqui, General Manager, (Technology) in his statement recorded on 08.12.2021, with regard to a question to explain the instruments used by them for giving a connection to the subscriber for broadband internet connection, he stated that- that they normally use OLT (Optical Line Terminal), with 16/32 ports, and each port can handle 64 customers. The said OLT is placed normally at a common place on terrace of the premises. From this OLT, each port is connected to splitter by optical fibre cables, which splits the optical signal into multiple output. Each output of the splitter is then connected to GPON/ONT/ONU, placed at subscriber's end by optical fibre cable; that the functions of OLT is to receive optical signals from backend instruments like NOC or POP, and then send this optical signal in multiple output ports; that GPON ONT/ONT, which is placed at the subscriber's end, receives optical signals from OLT.

6.4.5 I find that an Optical Line Terminal is a device which carries out major functions in the transport of optical information across the Optical Data Network System by receiving the electric signals and **converted** them into optic signals, thereby suitably subscribing to the item description mentioned against the Tariff sub-heading “851762” comprising of “Machines for the reception, conversion and transmission or regeneration of voice, images or other data including switching and routing apparatus”. The device has no specific mention under the 6 digit sub-heading “851762” qualifies to be classified under the residuary entry under the same sub-heading at -“85176290” on the same ground as discussed in Para 6.3 above.

6.5 SMALL FORM-FACTOR PLUGGABLE (SFP) TRANSCEIVER MODULE:

This category covers the following items:

Sr. No.	Declared Declaration	Declared CTH	Product Category
1	1.QSFP-40G-SR4: 40GBASE SR4 TRANSCEIVER MODULE 2. QSFP-40G-LR4: 40GBASE LR4 OTN LC 10KM 3. SFP-10G-ER: 10GBASE ER SFP MODULE	85177090	SFP/QSFP Module
2	1.QSFP28 100BASE SR4 ROHS6/6 0/70C 2. SFP 10GE SR LR ROHS6/6 0 70C 3. QSFP28 100BASE LR4 ROHS6/6	85176290/ 85176990	

6.5.1 I find that at some instances, the importer has classified these SFP modules under tariff item number 85176290 as “Machines for the reception, conversion and transmission or regeneration of voice, images or other data including switching and routing apparatus” which was also proposed in the SCN, however, in some other instances, these SFP/QSFP modules are classified as a part.

6.5.2 Therefore, in deciding the classification of SFP/QSFP modules, the only question before me is whether the SFP/QSFP module is considered as part or machine/apparatus.

6.5.3 I find that section note 5 of section XVI of Schedule-I to Customs Tariff Act, 1975 provides the definition of the “Machine”. Section Note 5 is as below:

“5. For the purposes of these notes, the expression “machine” means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.”

Heading 8517 reads as:

“.....; other apparatus for the transmission or reception of voice, images or other data,”

I find that any apparatus which is capable of transmission or reception of data are considered as machine.

6.5.4 I find that the SFP module is used for both telecommunication and data communications applications. It is a fiber optic transceiver comprising both a transmitter and a receiver which are combined and share common circuitry or a single housing. It has electronic components to condition and encodes/decode data into light pulses and then sends them to the other end as electrical signals. SFP modules are a small transceiver that can send and receive data over fiber, accommodating only 1-2 fiber optic connectors.

6.5.5 From the foregoing discussions on the functions performed by an SFP Modules, it emerges that an SFP Modules is a device which carries out major functions in the transport of optical information across the Optical Data Network System, thereby suitably subscribing

to the item description mentioned against the Tariff item number “85176290” on the same manner as discussed in para 6.3 above.

6.6 Optical Transport Equipment:

This category covers the following items:

Sr. No.	Declared Declaration	Declared CTH	Product Category
1	1. BNG CENTRAL SITE 7750 SR 12 2. GATEWAY ROUTER 7750 SR 3E 3. POP ROUTER 7750 SR 2E	85176930	Optical Transport Equipment

6.6.1 I find that these items were classified by importer under tariff item number 85176930 which is for routers, however, the SCN proposed their classification under tariff item no. 85176290 alleging that these products not only performs routing function but has many other essential feature. In the defence submission dated 02.03.2023, the importer submitted that the essential function of a BNG is nothing but to perform routing functions. As per the general rules of interpretation, the classification which is the most appropriate and specific is to be adopted over and above the residuary entry which is to be preferred only if there is no other suitable classification. The classification proposed by the Department is a residuary entry which is to be preferred only there is no other appropriate classification.

6.6.2 Prima facie, the above argument appears to be convincing. However, I find that the importer has relied upon the general rules of interpretation and the general rules of interpretation applicable on heading first, then, by virtue of Rule 6 of the general rules of interpretation, Rule 1 to 5 applies on the subheading level.

6.6.3 I find that at sub-heading level, the sub-heading 851762 covers, “Machines for the reception, conversion and transmission or regeneration of voice, images or other data including switching and routing apparatus” and the sub-heading 851769 covers, “Others”. Therefore, I find that sub-heading 851762 specifically covered routing apparatus, on the other hand, the sub-heading 851769 is a residuary entry.

6.6.4 Therefore, by applying the same logic as provided by importer that the residuary entry is to be preferred only if there is no other suitable classification, the merit sub-heading of the said routers is 851762.

6.6.5 I find that all the above three items are of “Nokia” Brand and a common series, i.e. 7750SR of Nokia. Therefore, all three perform similar type of function.

6.6.6. From the description in the Datasheets of the products and the details available in the open source, it is noticed that it is a product that supports the Broadband Network Gateway (BNG) for residential subscriber management; provider edge (PE) router for MPLS enabled enterprise VPN, internet access and cloud services and data center interconnect; mobile applications, including as an aggregation router for 3G, LTE and LTE-A backhaul, a WLAN gateway for Wi-Fi network aggregation. It also functions as GPRS Gateway Serving Node (GGSN) in 2G/3G networks and Serving and Packet Data Network gateway (SGW/PGW) in 4G networks. Further, it supports the Optical Transport Network and have a switching and routing function. Hence it appears that the product is very much an Optical Transport equipment and I find that its functionality doesn't tally with the technical functionalities of items i.e., PLCC Equipment, Voice frequency telephony, Modems (modulators-demodulators), HDSL, DLC, SDH and multiplexers mentioned above. Therefore, the item BNG/Router under discussion will not fall under any of aforesaid items sub-heading and will be appropriately classifiable under residuary sub-heading of 8517 62 i.e., under “8517 62 90 --- Other”.

7. Notification Benefit:

7.1 I find that after finalisation of classification, the ground of contention in the present proceedings is that whether the benefit of exemption/concessional rate of basic customs duty, as envisaged at Sl No.13N, 13P and 13I of Notification No. 24/2005 Cus dated 01.03.2005 and Sl No. 5 & 20 of Notification No. 57/2017 Cus dated 30.06.2017 is admissible to the goods imported by the said Noticee.

7.2 In this regard, I find that the benefit of exemption of basic customs duty, as envisaged at Sl No.13N, 13P and 13I of Notification No. 24/2005 Cus dated 01.03.2005 and Sl No. 5 of Notification No. 57/2017 Cus dated 30.06.2017 were available on the CTH other than 85176290. By virtue of change of classification to the tariff item no 85176290, benefit of exemption of basic customs duty, as envisaged at Sl No.13N, 13P and 13I of Notification No. 24/2005 Cus dated 01.03.2005 and Sl No. 5 of Notification No. 57/2017 Cus dated 30.06.2017 is no longer available on the impugned goods.

7.3 I find that the only contention in the present proceeding is that whether the benefit of concessional rate of basic customs duty, as envisaged at Sl No. 20 of Notification No. 57/2017 Cus dated 30.06.2017 is admissible to the goods imported by the said Noticee.

7.4 I find that it is well settled position of law as held by the Tribunal in the case of **Commissioner of Central Excise, Mumbai-V V/s. GTC Industries Limited reported at 2008 (12)STR 468 (Tri. LB)** that statue and notification should be construed with reference to the context in which it is issued. A bare mechanical interpretation and application of legislative intent, devoid of concept and purpose reduces most of remedial and beneficial legislations to futility. Just while interpreting the statue or notification, it is to ensure that while seeing the skin, the soul is not missed.

7.5 In addition to above, I find that similar views have earlier been echoed by the Supreme Court of India in their judgement dated 20-02-1978 reported as **Polestar Electronic(P) Ltd vs Addl. Commissioner, Sales Tax reported as 1978 AIR 897 = 1978 SCR (3) 98**. Earlier also, I find identical view was taken by various judicial forums including Hon'ble Supreme Court in the case of **(i) R. V. Dakkees [1959] 2 All E.R 350 (ii) Federal Steam Navigation Co. Ltd V/s. Department of Trade & Industry [1959] 2 All E.R. 97 and (iii) Narayanaswami V/s. Pannersalvam & Ors. [1973] 1 SCR 1720**.

7.6 In backlog of above, I find that DOT has issued notification dated 29.08.2018 on the subject : **Public Procurement (Preference to Make in India) Order 2017 – Notification of Telecom Products, Services or Works** issued to encourage “Make in India” and to promote manufacturing and production of goods and services **(36 categories)** in India with a view to enhancing income and employment, Department of Revenue effected yet another amendment to Notification No. 57/2017 dated 30.06.2017 vide Customs Notification No. 75/2018 dated 11.10.2018 (Parent Notification – 57/2017 dated 30.06.2017) to complement the said “Make in India” initiative excluding the following category of goods **(8 categories)** from the benefit of partial exemption of BCD at 10%:

- a. Wrist wearable devices (commonly known as smart watches)
- b. Optical transport equipment
- c. Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS)
- d. Optical Transport Network (OTN) products
- e. IP Radios under the **Tariff Item 85176290**

and

- a. Soft switches and Voice over Internet Protocol (VoIP) equipment, namely, VoIP phones, media gateways, gateway controllers and session border controllers;
- b. Carrier Ethernet Switch, Packet Transport Node (PTN) products, Multiprotocol Label Switching- Transport Profile (MPLS-TP) products;
- c. Multiple Input/Multiple Output (MIMO) and long-Term Evolution (LTE) products **under the Tariff Item 85176990**;

7.7 Further, CBIC Board in consultation with Department of Telecommunication (DoT) identified the products covered under above eight categories for better understanding of stakeholders for a more effective identification of products and equipment covered under abovementioned eight categories. The CBIC Board has issued circular 08/2023 and products were identified and categorised in annexure-A and B of that circular which is as below:

Annexure-A to Circular 08/2023

Notfn item	Notification description	Identification of products/equipment covered
(b) and (d)	Optical transport equipment and Optical Transport Network products	Machines and apparatus covered include – i. OTN equipment; ii. Dense Wavelength Division Multiplexer (DWDM); iii. Coarse Wavelength Division Multiplexer (CWDM); iv. Elements of (i), (ii) or (iii) above: ROADM, Booster Amplifiers, Pre-Amplifiers, Inline Amplifiers, Raman Amplifiers, Mux- demux, Transponders, Mux-ponders, OADM and Regenerators, Optical Power Monitoring and Optical Line Protection equipment.
(c)	Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS)	The Machines/apparatus covered under this category include- i. Optical Line Terminal (OLT) for FTTX (GPON/ EPON/ XGSPON/ 10GEAPON/ NG-PON2 / 25GPON / 50GPON etc.); ii. Optical Network Terminal (ONT) for FTTX (GPON/ EPON/ XGSPON/ 10GEAPON/ NG-PON2 / 25GPON / 50GPON etc.).

Annexure-B to Circular 08/2023

Identifier	Product/equipment against tariff heading 85176290 or 85176990
A	Wrist wearable devices (Commonly known as smart watches)
MAA001	WWD-smart watches
B&D	Optical Transport Equipment & Optical Transport Network (OTN) Products in item (b) & (d) of notification
TEB001	OTE-ROADM
TEB002	OTE-Booster Amplifiers
TEB003	OTE-Pre-Amplifiers
TEB004	OTE-Inline Amplifiers
TEB005	OTE-Mux-Demux
TEB006	OTE-Transponders
TEB007	OTE-Muxponders
TEB008	OTE-Raman Amplifiers
TEB009	OTE-OADM
TEB010	OTE-Regenerators
TEB011	OTE-Optical Power Monitoring
TEB012	OTE-Optical Line Protection
TEB999	OTE-Others
C	Combination of one or more of Packet Optical Transport Product or Switch (POTP or POTS) in item (c) of notification
(C1)	Optical Line Terminal
TEC101	OLT-GPON
TEC102	OLT-EPON
TEC103	OLT-XGSPON
TEC104	OLT-10GEAPON

TEC105	OLT-NG-PON2
TEC106	OLT-25GPON
TEC107	OLT-50GPON
TEC199	OLT-Others
(C2)	Optical Network Terminal/Unit
TEC201	ONT-GPON
TEC202	ONT-EPON
TEC203	ONT-XGSPON
TEC204	ONT-10GEAPON
TEC205	ONT-NG-PON2
TEC206	ONT-25GPON
TEC207	ONT-50GPON
TEC299	ONT-Others

7.8 I find that ONT-GPON is specifically covered under Identifier Code TEC201, similarly, OLT-GPON is also specifically covered under Identifier Code TEC101 and all OTN Equipment also covered under Identifier Code from TEB001 to TEB999.

7.9 Therefore, it is evident that Optical Line Terminal (OLT), Optical Network Terminal/Unit (ONT/ONU) and Optical Terminal Equipment (OTE) are specifically included in the list which are excluded from the benefit of exemption under SI No 20 of Notification No 57/2017.

7.10 I further find that Hon'ble Supreme Court in the case of **Union of India V/s. Wood Papers Limited reported at 1990 (47) ELT 500 SC** while setting the guidelines when the exemption is to be interpreted strictly or liberally has held that an exemption provision is like an exception and on normal principle of interpretation of statutes it is to be construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment state revenue. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject. A notification has to be read in its entirety and construed as a whole. But a construction which results in inequitable results and is incongruous is to be avoided.

7.11 Thus, in view of above discussions and findings, I have no hesitation in holding that the benefit of concessional rate of duty as envisaged at the SI. No. 20 of the Notification No. 57/2017-Cus dated 30-06-2017, as amended is not available to the said importer for the goods imported vide various Bills of Entry, appearing in Annexures B1 and B2 to the Show Cause Notice.

8. Extended period under section 28(4):

8.1 The relevant legal provisions of Section 28(4) of the Customs Act, 1962 are reproduced below: -

“28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.—

(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.”*

8.2 M/s GTPL vide letter dated 02.03.2023 submitted that invoking the extended period under section 28(4) is not sustainable as there is no malafide intention or suppression of facts in classification of the goods. In this regard, they rely upon the following judgements:

the Hon'ble Supreme Court in case of **Commissioner V/s. Ishaan Research Lab (P) Ltd. reported in 2008 (230) ELT 7 (SC)**, the Appellate Tribunal in cases like **Haryana Roadways Engineering Corporation Ltd. 2001 (131) ELT 662, Wipro Ltd. 2005 (179) ELT 211** etc. Kerala High Court in case of **Cochin Minerals and Rutiles Ltd. 2010 (259) ELT 182 (Ker.)** and Hon'ble Delhi High Court in case of **Bellarpur Industries Ltd. V/s. UOI 1994 (74) ELT 795 (Del.)**.

8.3 As per the statement of Shri. Ajmal Hussain Mohd. Isha Siddiqui, General Manager, (Technology) recorded on 08.12.2021, it is evident that the noticee is well aware of the technical features of the products imported and used by them for providing service. In this context, the importer cannot plead ignorance of the technology/principle behind the functioning of EPON/GPON in a scenario where, Ethernet/Gigabit - Passive Optical Network is the latest technology being widely deployed globally for high speed internet access. Despite being conversant with the technical literature of the products imported and despite the relevant Notifications issued by the Government being amply - plain and clear with the wordings used to describe the nature of goods to be kept outside the purview of benefits allowed therein, the noticee conveniently preferred to wrongly classify the subject goods as "**Subscriber End Equipment/Customer Premise Equipment/ Networking Equipment**" thereby availing the ineligible benefit of exemption notifications.

8.4 Further, on perusal of the purchase orders submitted by the noticee, addressed to the supplier M/s ZTE Corporation, China and Alcatel Lucent International, France and the Commercial invoices issued by M/s ZTE Corporation and Alcatel Lucent International, the suppliers, I find that the noticee has placed orders and imported/purchased Optical Network Terminals/ Optical Network Units (ONT/ONU) and Optical Line Terminals (OLT) and not for "Subscriber End Equipment" or "Network Equipment". Being fully aware of the products purchased/imported, the noticee deliberately declared the goods as "Subscriber End Equipment" and/or "Network Equipment" in the Bills of Entry in order to avail ineligible duty exemption. This act of the noticee clearly shows the mala fide of the noticee by placing purchase order in the correct name of the product to their suppliers and declaring different name in the Bill of Entry and not declaring the actual function or technical details to the Customs Authorities in the documents presented for assessment.

8.5 Shri Hetal kumar Kansara in his statement dated 10.11.2021 had admitted that that initially upto August, 2018 they chose the heading 8517 6990 by reading the description of OTN products given at clause (d) of the heading. Later on they realised that the right classification of the product is tariff item 8517 6950. Further, Shri. Vipul Ramesh chandra Modi, Proprietor, M/s Vipul R. Modi, Customs Broker in his statement dated 07.03.2022 admitted that they have done clearance work of goods, namely "GPON ONT", to the noticee classifying the product "GPON ONT (Subscriber end equipment)" under tariff item 85176990 upto 06-04-2018. Thereafter, the product classification was changed to 85176950 as per the instruction of the noticee. From the above it is apparent that the noticee deliberately changed the classification of the goods from 85176990 to 85176950 on being aware that the Optical Network Products were excluded from the exemption Notification No.24/2005 Cus dated 01.03.2005 vide Sl. No.(d) of Notification No.75/2018 Cus dated 11.10.2018. From the act of the noticee, it is evident that the noticee changed the classification of the product in order to avail an ineligible benefit which brings out the mala fide of the noticee to evade payment of Customs Duty, by choosing/changing classification to wrongfully avail exemption of duty.

8.6 The noticee also deliberately withheld from disclosing to the Department, the technical nature of the items imported as OLTs, ONT/ONU and SFP/QSFP so as to avail the benefit of Nil rate of duty as available at Sl No.13N, 13P and 13I of Notification No. 24/2005 Cus dated 01.03.2005 and Sl. No. 5 of Notification No. 57/2017 Cus dated 30.06.2017 and lower rate of duty as available at Sl. No. 20 of Notification No. 57/2017 Cus dated 30.06.2017. Despite the fact that OLTs, ONT/ONUs and SFP/QSPFs are Optical Network Products performed identical functions with the difference being in the volume of data handled, the decision of the importer to choose the different and wrong Tariff Item – 85176930 and 85176990 for classification of OLTs and Tariff Item – 85176250 and

85176950 for ONT/ONUs and Tariff Item – 85177090, 85176990 and 85176290 for SFP/QSFPs exposes the mala fide of the noticee to evade Import Duty.

8.7 In view of the above, I find that the importer, in the instant case, made an self-assessment to mislead the Department by preferring to suppress the functions defining the quintessential technical nature of the subject goods and opting to mention the generic name – “Subscriber End Equipment/Network Equipment” for their imports of OLT, SFPs, OTE and ONTs/ONUs and classifying the items under the different Tariff item-85176250, 85176290, 85176930, 85176950, 85176990 and 85177090 so as to avail the consequent benefit of exemption of BCD available for the goods falling under the same, leading to gross evasion of import duty leivable on the said items. In the import of OLTs, and SFP/QSFPs and other OTEs, the technical nature of the goods were deliberately concealed from the Department so as to avail the benefit of lower rate of import duty as available under Notifications No. 24/2005-Cus dated 01.03.2005 and 57/2017-Cus dated 30.06.2017, which resulted in short-payment of import duty leivable on the subject goods.

Therefore, I hold that the extended period is rightly invoked and duty is recoverable under section 28(4) of the Customs Act, 1962.

9. Confiscation of the goods under section 111(m) of the customs act, 1962:

9.1 I find that it is alleged in the SCN that the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962. In this regard, I find that as far as confiscation of goods are concerned, Section 111 of the Customs Act, 1962, defines the Confiscation of improperly imported goods. The relevant legal provisions of Section 111(m) of the Customs Act, 1962 are reproduced below: -

(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 transhipment, with the declaration for transhipment referred to in the proviso to subsection (1) of section 54;”

9.2 On plain reading of the above provisions of the 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.

9.3 As discussed in the foregoing para's, it is evident the importer has deliberately misclassified the goods and claimed ineligible notification benefits by suppressing the technical details and projecting them as “subscriber end equipment” and/or “Networking equipment with a malafide intention to evade customs duty.

9.4 In light of these acts of mis-declaration of classification in import documents, I find that the subject import goods as detailed in Annexure-B1 & B2 to SCN, are liable for confiscation as per the provisions of Section 111(m) of Customs Act, 1962.

9.5 As the impugned goods are found to be liable for confiscation under Section 111(m) of the Customs Act, 1962, I find that it necessary to consider as to whether redemption fine under Section 125 of Customs Act, 1962, is liable to be imposed in lieu of confiscation in respect of the goods imported under the Bills of Entry, as detailed in Annexure-B1 & B2 to SCN. The Section 125 ibid reads as under:-

“Section 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 1/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."

9.6 A plain reading of the above provision shows that imposition of redemption fine is an option in lieu of confiscation. It provides for an opportunity to owner of confiscated goods for release of confiscated goods, by paying redemption fine. I find that redemption fine can be imposed in those cases where goods are either physically available or the goods have been released provisionally under Section 110A of Customs Act, 1962 against appropriate bond binding concerned party in respect of recovery of amount of redemption fine as may be determined in the adjudication proceedings.

9.7 The importer in their written reply dated 02.03.2023 submitted that any goods could be held liable for confiscation only when the goods were physically available for being confiscated. If the imported goods were seized and then released provisionally, then also such goods may be held liable for confiscation because they were released on provisional basis. But in this case, the goods imported by them have never been seized; on the contrary, the goods imported by them have been assessed by proper Custom officers and then legally allowed to be cleared for home consumption. These goods are not available for confiscation at this stage. In case of **Manjula Showa Ltd. 2008 (227) ELT 330**, the Appellate Tribunal has held that goods cannot be confiscated nor could any condition of redemption fine be imposed when there was no seizure of any goods. The Larger Bench of the Tribunal in case of **Shiv Kripalspat Pvt. Ltd. 2009(235) ELT 623** has also upheld this principle. When no goods imported by them have been actually seized nor are they available for confiscation, the proposal to confiscate such non-existent goods does not have any legs to stand.

9.8 In this regard, I find that the goods imported under the Bills of Entry, as detailed in Annexure-B1 & B2 to SCN, were neither seized, nor released provisionally. Hence, neither the goods are physically available nor bond for provisional release under Section 110A *ibid* covering recovery of redemption fine is available. I, therefore, find that redemption fine cannot be imposed in respect of imported goods pertaining to Bills of Entry as detailed in Annexure-B1 & B2 to SCN.

10. Liability of Penalty on M/s GTPL under Section 112, 114A and/or 114AA of the Customs Act, 1962.

10.1 I find that section 112(a) stipulates the penalty for improper importation of goods on any person who in relation to 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 omissions of such an act.

10.2 In the instant case it is pertinent to mention that the importer has imported the subject goods in violation of Section 111 of the Customs Act, 1962. For the said violation, the goods are liable to confiscation under Section 111 of the Customs Act, 1962. Therefore, I find that for these acts and omissions, the importer is liable for penal action under Section 112(a) of the Customs Act, 1962.

10.3 I find that M/s GTPL Broadband (P) Ltd, suppressed the technical details of the subject goods, willfully mis-classified the goods and claim ineligible exemptions with sole purpose of executing this modus of evasion of customs duty, therefore, liable to pay duty under section 28 (4) of the customs act, 1962.

10.4 I find that section 114A stipulates that the person who is liable to pay duty by reason of collusion or any wilful mis-statement or suppression of facts as determined under section 28, is also liable to pay penalty under section 114A. I find that for these acts and omissions, the importer is liable for penal action under Section 114A of the Customs Act, 1962.

10.5 However, I find that as per 5th proviso of section 114A, penalties under section 112 and 114A are mutually exclusive. When penalty under section 114A is imposed, penalty under section 112 is not imposable.

10.6 I find that there is a mandatory provision of penalty under section 114A of customs act, 1962 where duty is determined under section 28 of customs act, 1962. Therefore, I refrain from imposing penalty under section 112(a) of customs act, 1962.

10.7 I find that Penalty under Section 114AA is leviable in case of any “material particular” being declared false or incorrect.

10.8 By virtue of their acts of furnishing false material particulars like clarification, Sl. No. of Notification etc, I find that the importer have rendered themselves liable to penalty under Section 114AA of Customs Act, 1962

11. Liability of Penalty on Customs Broker under Section 112, and/or 114AA of the Customs Act, 1962.

11.1 I have examined the allegation against Custom Broker noticees **M/s. Vipul. R. Modi** and **M/s Swayam Shipping Services** that they did not exercise due diligence in classifying the subject goods by looking into technical detail of the items and ascertaining whether the same are eligible for exemption claim; that they bowed to interpretation of noticees and caused to file subject Bills of Entry with incorrect and ineligible entry relevant notification allowing importer noticee to wrongly avail nil/concessional rate of BCD. I have also gone through the submission made by the Custom Brokers in their defence reply.

11.2 I find that the Custom Broker has filed Bills of Entry on behalf of importer noticee on the basis of documents submitted by the importer. The invoices submitted by the importer to customs brokers clearly mentioned “subscriber end equipment”/ “Networking Equipment” along with description of goods. The item under dispute being technical in nature, Custom Broker having limited technical knowledge appears to have acted as per the content of documents as supplied by the importer. There is nothing on record in the SCNs that Customs Brokers were in knowledge of wrong declaration by importer in documents furnished by importer and they connived with importer to extend ineligible exemption benefit of Custom notification referred above.

11.3 I find that during investigation, no connivance of CB with importer in evasion of duty by wrongly claiming exemption came out, therefore, the Customs Brokers cannot be penalised.

11.4 Therefore, I hold that these noticees i.e. CB M/s. Vipul. R. Modi and CB M/s Swayam Shipping Services are neither liable to penalty under section 112 of Customs Act, 1962 nor under Section 114 AA of the Act ibid.

12. Provision of section 138B:

12.1 As regards necessity of cross examination of persons who had given statement under section 108, I find that chapter XVI of the customs act,1962 pertains to ‘Offences and Prosecutions’ and wherein section 138B deals with ‘offences to be tried summarily. The entries of section 138B are as follows.

“138. Offences to be tried summarily

138A. Presumption of culpable mental state.

138B. Relevancy of 138 B in certain circumstances

(1) A statement made and signed by a person before any Gazetted Officer of customs during the course of any enquiry or proceeding under this act shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable, or

(b) When the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub section (1) shall so far as may be, apply in relation to any proceeding under this act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.”

12.1.1 In view of above statutory provisions of section 138B(i), I find that the provisions of section 138 pertain to the prosecution proceedings before a court of law and the same have nothing to do with the proceeding before a quasi-judicial authority.

12.1.2 As per the provisions of chapter XVI the provision of section 138 are applicable during a proceeding before a court of law wherein offences are summarily tried.

12.1.3 I find that in case where offences are being summarily tried the provisions of section 138(B) ensures cross examination of the persons whose statements have been relied during a summary trial of offences by courts of law under the Customs Act, 1962.

12.1.4 The provisions of section 138(B) are relevant for summary trial wherein test of the evidence remains that offence should be proved beyond doubt.

12.1.5 The principles of proving beyond doubt and cross examination cannot be applied to a quasi-judicial proceeding where principle remains that as per the preponderance of probability the charges should be established.

12.1.6 I find that cross examination of persons can be allowed during a quasi-judicial proceeding. It is true that as per 138B(2) the provision regarding cross examination shall so far as may be apply in relation to any other proceedings under the customs act. The usage of phrase 'so far as may be' in section 138B (2) shows that cross examination is not mandatory in all cases but the same may be allowed as per circumstances of the case.

12.2 On the issue of cross examination of all the witnesses, I find that cross examination of witnesses is no longer res integra. I find that there are only four witnesses in this case and all the witnesses are Employee/CB of Noticee, M/s GTPL Broadband pvt ltd. Therefore, cross examination of witnesses was not necessary. Further, it is a settled position that proceedings before the quasi-judicial authority is not at the same footing as proceedings before a court of law and it is the discretion of the authority as to which request of cross examination to be allowed in the interest of natural justice. I also rely on following case-laws in reaching the above opinion: -

a. Poddar Tyres (Pvt) Ltd. v. Commissioner - 2000 (126) E.L.T. 737:- wherein it has been observed that cross-examination not a part of natural justice but only that of procedural justice and not 4 'sine qua non'.

b. Kamar Jagdish Ch. Sinha Vs. Collector - 2000 (124) E.L.T. 118 (Cal H.C.):- wherein it has been observed that the right to confront witnesses is not an essential requirement of natural justice where the statute is silent and the assessee has been offered an opportunity to explain allegations made against him.

c. Shivom Ply-N-Wood Pvt. Ltd. Vs Commissioner of Customs & Central Excise Aurangabad- 2004(177) E.L.T 1150(Tri.-Mumbai):- wherein it has been observed that cross-examination not to be claimed as a matter of right.

d. Hon Andhra Pardesh High Court in its decision in Sridhar Paints v/s Commissioner of Central Excise Hyderabad reported as 2006(198) ELT 514 (Tri-Bang) held that :

.....denial of cross-examination of witnesses/officers is not a violation of the principles of natural justice, We find that the Adjudicating Authority has reached his conclusions not only on the basis of the statements of the concerned persons but also the various incriminating records seized. We hold that the statements have been corroborated by the records seized (Para 9)

e. Similarly in A.L Jalauddin v/s Enforcement Director reported as 2010(261)ELT 84 (mad) HC the Hon High court held that ;

".....Therefore, we do not agree that the principles of natural justice have been violated by not allowing the appellant to cross-examine these two persons: We may refer to the following paragraph in AIR 1972 SC 2136 = 1983 (13) E.L.T. 1486 (S.C.) (Kanungo & Co. v. Collector, Customs, Calcutta)".

13. ORDER:

In view of the above discussion and findings, I pass the following order:

- 13.1 I order to reject the declared classification of the goods mentioned in Table-A covered under Bills of Entry as detailed in Annexure B1 and B2 to the SCN and order to classify the goods mentioned in Table-A covered under Bills of Entry as detailed in Annexure B1 and B2 to the SCN under Custom Tariff Item No. 85176290.
- 13.2 I order to reject the benefit of SI No.13N, 13P and 13I of Notification No. 24/2005 Cus dated 01.03.2005 and SI No. 5 & 20 of Notification No. 57/2017 Cus dated 30.06.2017 on the goods mentioned in Table-A covered under bills of entry as detailed in Annexure- B1 and B2 to the SCN.
- 13.3 I confirm the demand of differential Customs duty amounting to **Rs. 15,61,18,761/- (Rupees Fifteen Crore Sixty-One Lakhs Eighteen Thousand Seven Hundred and Sixty-One Only)**, in respect of the Bills of Entry as detailed in annexure B1 and B2 to the SCN, and order the same to be recovered from them under Section 28(4) of the Customs Act, 1962 along with applicable interest at appropriate rate under Section 28AA ibid.
- 13.4 I order that the impugned goods having a total assessable value of **Rs. 76,38,74,823/- (Rupees Seventy-Six Crores Thirty-Eight Lakhs Seventy-Four Thousand Eight Hundred and Twenty-Three only)**, cleared by the importer vide Bills of Entry as given in Annexure-B-1, B-2 to the show cause notice, are liable for confiscation under Section 111(m) of the Customs Act 1962. Since, the subject goods are not physically available for confiscation, therefore, I refrain from imposing any redemption fine under Section 125 of the Customs Act, 1962.
- 13.5 I impose a Penalty of **Rs. 15,61,18,761/- (Rupees Fifteen Crore Sixty One Lakhs Eighteen Thousand Seven Hundred and Sixty-One Only)** on M/s. **GTPL Broadband (P) Ltd**, 202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmadabad -380004, Gujarat under Section 114A of the Customs Act, 1962.
- 13.6 I impose a penalty of **Rs 50,00,000/- (Rs. Fifty Lakh Only)** on M/s. **GTPL Broadband (P) Ltd**, 202, 2nd Floor, Sahajanand Shopping Centre, Opp. Swaminarayan Temple, Shahibaug, Ahmadabad -380004, Gujarat under Section 114AA of the Customs Act, 1962.
- 13.7 I refrain from imposing penalty on M/s. Vipul. R. Modi and M/s Swayam Shipping Services under section 112 and/or section 114AA of the Customs Act 196, from the reason discussed above.

This Order is issued without prejudice to any other action that may be contemplated against the importer or any other person under the provisions of the Customs Act, 1962 and rules/regulations framed thereunder or any other law for the time being in force in the Republic of India.



(K. Engineer)

Commissioner of Customs
Custom House, Mundra

BY SPEED POST/BY EMAIL/BY HAND/ NOTICE BOARD OR BY OTHER LEGALLY PERMISSIBLE MEANS:

To:

- 1. M/s. GTPL Broadband (P) Ltd,**
202, 2nd Floor, Sahajanand Shopping Centre,
Opp. Swaminarayan Temple, Shahibaug,
Ahmadabad -380004, Gujarat.
- 2. M/s. Vipul. R. Modi (Custom Broker),**
FF126 Sayona Centre, Near Silver Point Restaurant,
Opp. Memco Brts Bus Stop, Naroda Road,
D-Colony, Ahmedabad-380025
- 3. M/s Swayam Shipping Services (Custom Broker)**
202, Rajkamal 1, Plot No.348, Ward 12-B,
Gandhidham, Kutch, Gujarat -370201

Copy to:

1. The Chief Commissioner of Customs, CCO, Ahmedabad.
2. The Principal Commissioner of Customs, Air Cargo Complex, Old Airport, Shahibaug, Ahmedabad-380012.
3. The Additional Director General, DRI, Cochin Zonal Unit, Building No.32/641 A, St. Thomas Lane, Vylopilli Road, Pallinada, Palarivattom, Cochin-682025.
4. The Deputy/Assistant Commissioner (Legal/Prosecution), Customs House, Mundra.
5. The Deputy/Assistant Commissioner, TRC Section, Customs House, Mundra.
6. The Deputy/Assistant Commissioner, EDI, Customs House, Mundra.
7. Guard File