6828

	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	Azadi Ka Amrit Mahotsav

A. File No.	:	GEN/ADJ/COMM/391/2023-Adjn-O/o Pr. Commr-Cus-Mundra
B. Order-in-Original No.	:	MUN-CUSTM-000-COM-28-24-25
C. Passed by	:	K.Engineer Commissioner of Customs, Customs House, AP & SEZ, Mundra.
D. Date of order and Date of issue:	:	12.11.2024 12.11.2024
E. SCN No. & Date	:	(i) SCN No. GEN/ADJ/COMM/391/2023-Adjn-O/o Pr. Commr- Cus-Mundra dated 17.11.2023.
F. Noticee(s) / Party / Importer	:	**1. M/s Toyota Tsusho India Pvt Ltd Tsusho India Pvt. Ltd (IEC No. 0799000973)**, Plot No. 33 & 34, Bidadi Industrial Area, Ramanagaram Taluka, Ramanagara, Karnataka-562109
G. DIN	:	**20241171MO000000A2BE**

1. यह अपील आदेश संबन्धित 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 सीमाशुल्क अपील नियमावली 1982 के नियम 6(1) के साथ पठित सीमाशुल्क अधिनियम 1962 की धारा 129A(1) के अंतर्गत प्रपत्र सी ए 3-में 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 रूपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज,दंड याशास्ति रूपये पाँच लाख या कम माँगा हो5000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, व्याज, शास्तिया दंड पाँच लाख रूपये से अधिक किंतु पचास लाख रूपये से कम माँगा हो 10,000/- रुपये का शुल्क टिकट लगा होना चाहिए जहाँ शुल्क, दंड व्याज या शास्ति पचास लाख रूपये से अधिक माँगा हो। शुल्क का भुगतान खण्डपीठ बेंच आहरित ट्रिब्यूनल के सहायक रजिस्ट्रार के पक्ष में खण्डपीठ स्थित जगह पर स्थित किसी भी राष्ट्रीयकृत 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 lakhs (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 मद सं°-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 ड्यूटि/ 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.

7. अपील प्रस्तुत करते समय, सीमाशुल्क (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.

8. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, न्यायाधिकरण के समक्ष मांग 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 Toyota Tsusho India Pvt Ltd Tsusho India Pvt. Ltd (IEC No. 0799000973), Plot No. 33 & 34, Bidadi Industrial Area, Ramanagaram Taluka, Ramanagara, Karnataka-562109 is an importer of electric motors and its parts. M/s Toyota Tsusho India Pvt Ltd has filed various Bill of Entries (BE for short) through their custom broker, M/s N.G. Joshi C & F Agents P. Ltd. (AABCN3322LCH001), for import of electric Motors at Mundra Ports.

2.1. Whereas, M/s Toyota Tsusho India Pvt Ltd vide letter dated 07.12.2021/received in the Inward Section, Customs House, Mundra on 20.12.2021 addressed to the Deputy Commissioner (Group-V), Custom House, Mundra communicated that they want to pay the differential customs duty for their import at Mundra Port due to HSN correction from 85015390 to 85013119. A list of 38 BEs for the period 04.12.2020 to 01.07.2021 was also forwarded with the letter.

2.2. Whereas, on being asked about the reason for re-classification of the goods imported by them, M/s Toyota Tsusho India Pvt Ltd vide reply dated 04.01.2022 & 13.01.2022 submitted that

- *Custom office, ICD, Patli has asked them to submit technical specification of the similar goods imported vide BE No. 9097127 dated 08.10.2020 for importing of Motor Assy W holder SPEC BYSD RH (COMPONENT PARTS FOR VEHICLE under CTH-85015390, wherein they had claimed benefit of Notification No. 046/2011-Customs Sr. No. 1294 (i), vide which applicable BCD is Nil and IGST @18% under Sr. No. 372 of Schedule-III.*
- *On examination, the imported goods were re-classified and re-assessed by the ICD, Patil custom Authorities.*
- *Now, they decided to pay the differential duty voluntarily for other ports also and hence they submitted the letter for re-assessment dated 20.12.2021.*

2.3. Whereas, the Deputy Commissioner of Customs, ICD, Patli vide letter dated 29.01.2022 was asked to provide the status of the investigation at their end. In reply, the Deputy Commissioner, ICD, Patli vide letter dated 03.02.2022 has submitted that

- *Custom office, ICD, Patli has asked them to submit technical specification of the similar goods imported vide BE No. 9097127 dated 08.10.2020 for importing of Motor Assy W holder SPEC BYSD RH (COMPONENT PARTS FOR VEHICLE under CTH-85015390.*
- *On the basis of technical specification submitted by the importer, it was noticed that the imported item appeared to be classifiable under CTH 85011319 having BCD @ 10% (Sl no. 485A of the Notification No. 50/2017-Cus) and FTA benefit vide Notification No. 06/2011-Cus is not applicable to them.*
- *M/s Toyota Tsusho India Pvt Ltd accepted the classification of imported item under CTH-85013119 and ready to pay the differential duty for the BE for prior period of 2 years, i.e. from October, 2020 along with interest and also requested to sort out the matter without issuing and personal hearing and Show Cause Notice.*

2.4. Whereas, in view of the reply received from the ICD Patli and M/s Toyota Tsusho India Pvt Ltd, inquiry was initiated for import of similar items at Mundra Port also.

2.5. Whereas, M/s Toyota Tsusho India Pvt Ltd vide letter dated 07.12.2021 & 04.01.2022 has submitted technical details of imported items as under:

- *M/s Toyota Tsusho India Pvt Ltd had imported motors assemblies consisting of electric rotary DC Motor for use in rotating the fan in the HVAC System of automobiles to blow air through the vents of a* ***"MOTOR VEHICLE"****.*
- *The sole function of the product is to rotate the fan in order to circulate air through cabin of motor vehicle.*
- *they had classified the said goods under CTH 85015390 and availed the benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (Country of origin-based exemption).*
- *However, the goods were rightly classifiable under CTH 85013119 wherein no exemption from BCD is available.*
- *BCD @ 10% applicable for the Motor assemblies falling under the CTH-85013119 which was being imported by them since,* ***December, 2020****. The rate has been increased from 10% to 15% vide the Finance Act, 2021, w.e.f. 02.02.2021.*
- *Central government vide entry no. 485A of Notification No. 50/17-Cus, prescribed the effective rate of BCD @ 10% for the motor assemblies falling under CTH-850131. Thus, w.e.f. 01.02.2021, they are eligible for benefit of concessional BCD @10% vide Sr.No.485 A of Notification No.50/2017-Cus dated.30.06.2017.*
- *Accordingly, they will quantify the differential customs duty from December, 2020 to July, 2021 and will pay the same.*
- *As per the worksheet submitted by M/s Toyota Tsusho India Pvt Ltd, the differential customs duty liability was worked out by them as Rs.3,36,94,612/- in respect of total 38 bills of entry starting from B.E.No.9822139 dated 04.12.2020 to B.E.No.4527741 dated 01.07.2021*

3. Whereas, on the basis of above facts and letters received from M/s Toyota Tsusho India Pvt Ltd & ICD Patli, the matter was taken up for examination by the SIIB section of the Custom House, Mundra and the BEs filed by M/s Toyota Tsusho India Pvt Ltd were checked on the ICES and it was noticed that:

3.1. M/s Toyota Tsusho India Pvt Ltd Tsusho India Pvt. Ltd. had filed total 38 bills of entry starting from B.E.No.9822139 dated 04.12.2020 to B.E.No.4527741 dated 01.07.2021 for the import of motors, wherein the description of the goods was shown as ***Motor Assy W Holder SPEC B YSD RH (PART NO. 27270- 066400L) (COMPONENT PARTS FOR VEHICLE/ Motor Assy Holder W/O Fan- RHD (PART NO. 272700- 2300)(COMPONENT PARTS FOR VEHICLE) etc.].***M/s Toyota Tsusho India Pvt Ltd had declared the CTH as 85015390 and availed the benefit of FTA based exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) and had paid only the IGST @ 18% in case of above said 38 BEs. For ease of reference, relevant portion of the Customs Tariff is reproduced hereinunder:

8501	*ELECTRIC MOTORS AND GENERATORS (EXCLUDING GENERATING SETS)*
8501 31	*– Of an output not exceeding 750 W:*
8501 31 19	*--- Other*
8501 53	*– Of an output exceeding 75 kW*
8501 53 90	*--- Other*

3.2. In view of the above, it appears that the Electric Motors having an output not exceeding 750 W are classifiable under HSN-850131 whereas, Electric Motors having an output exceeding 75 kW are classifiable under HSN-850153. In the present matter, as per letter dated 04.01.2022, M/s Toyota Tsusho India Pvt Ltd has submitted that the motor under consideration has an output of 154 watts to 182 watts, as the case may be and operates on DC power. Therefore, the motor assemblies under consideration merits classifications under sub heading ***85013119 which covers 'Other DC Motors, of an output not exceeding 750 W'.***

3.3. Further, M/s Toyota Tsusho India Pvt Ltd imported the Motor Assembles without payment of BCD by availing country of origin-based exemption provided under the **Notification No. 46/2011-Customs dated 01.06.2011 (Sr. No. 1294)**. Here, it is pertinent to mention that the entry no. 1294 of said Notification provides exemption from payment of BCD for the goods falling under CTH-850153. However, the said notification does not provide exemption for the goods falling under CTH-85013119. Therefore, as discussed above, the goods imported by M/s Toyota Tsusho India Pvt Ltd are classifiable under CTH-85013119, they are not eligible for the BCD exemption benefit provided vide Sr. No. 1294 of the Notification No.46/2011-Cus dated 01.06.2011.

3.4. Whereas, it appears that BCD @ 10% was applicable for the Motor assemblies falling under the CTH-85013119 which was being imported by M/s Toyota Tsusho India Pvt Ltd **since December, 2020**.

3.5. Whereas, it appears that from the Bill of Entry No. 4866559 dated 30.07.2021 onwards for import of the said motor assembly part, M/s Toyota Tsusho India Pvt Ltd have declared the CTH as 85015390 and availed the benefit of concessional BCD @10% vide Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 and paid the total duty @30.98% (BCD 10% + SWS 10% + IGST 18%).

3.6. Whereas, it appears that the BCD rate on the said items was increased from 10% to 15% vide the Finance Act, 2021, w.e.f. 02.02.2021. However, the Central government vide notification no. 02/2021- Customs dated 01.02.2021, specific entry no. 485A in the Notification No. 50/17-Cus, was inserted prescribing the effective rate of BCD @ 10% for the motor assemblies falling under CTH-850131 as under:

(77) after S. No. 485 and the entries relating thereto, the following S. No. and entries shall be inserted, namely: -

(1)	(2)	(3)	(4)	(5)	(6)
"485A.	8501 10, 8501 20 00, **8501 31,** 8501 32, 8501 33, 8501 34, 8501 40, 8501 51, 8501 52, 8501 53	All Goods	10%	-	-"

Thus, w.e.f. 01.02.2021, they are eligible for benefit of concessional BCD @10% vide Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017.

3.7. Whereas, another amendment was made in the said Sr.No.485A of Notification No.50/2017-Cus dated 30.06.2017 vide Notification No. 21/2021-Customs dated 31.03.2021 (w.e.f.01.04.2021) and the details of same are as under:

iii) against S. No. 485A, for the entry in column (3), the following entries shall be substituted, namely:-

" All goods other than those suitable for use in –

i. *motor vehicles falling under heading 8702 or 8704;*
ii. *motor cars falling under heading 8703; or*
iii. *motor cycles falling under heading 8711";*

3.8. Therefore, as per Sr. No. 485A of Custom Notification 50/2017, the Customs duty structure in respect of CTH 850131 of the Customs Tariff prevailing at the material time i.e. from 01.04.2021 onwards may be read as under:

CTH	**Description**	**Duty Structure**
850131	All goods other than those suitable for use in – i. motor vehicles falling under heading 8702 or 8704;	i. Basic Custom Duty: 10% ii. SWS: 10% iii. IGST: 18% (Total Duty rate: 30.98%)

	ii. motor cars falling under heading 8703; or iii. motor cycles falling under heading 8711";	
8501	Otherwise	i. Basic Custom Duty: 15% ii. SWS: 10% iii. IGST: 18% (Total Duty rate: 37.47 %)

3.9 Therefore, it appears that w.e.f. 01.04.2021, the benefit of reduced BCD @10% is available to all the goods (of various CTH including CTH 850131) other than those suitable for use in motor vehicles falling under heading 8702 or 8704, motor cars falling under heading 8703 or motor cycles falling under heading 8711.

3.10 Whereas, in view of the above facts, it appeared that

For the period December, 2020 to March, 2021:

Importer's claim for duty payment of differential duty for the period 04.12.2020 to 31.03.2021 as applicable @10% BCD (Sr. No. 485 A of the Notification No. 50/201- Cus) + other applicable duty appeared as acceptable.

For the period 01.04.2021 onwards:

Further, it was *prima facie* found that the imported goods/item viz. "Motor Assy Holder W/O Fan" were suitable for use in Motor Vehicles and motor cars falling under heading 8702, 8703 and 8704. Therefore, due to change in the condition of the reduced BCD benefit, it appeared that benefit of Sr. No.485A of Noti. No.50/2017-Cus as amended by Noti. No.21/2021-Cus dated 31.03.2021 was not applicable and duty was to be payable @15% BCD + other duties from 01.04.2021 onwards.

3.11 Accordingly, vide letter dated 26.03.2022, the Deputy Commissioner (Group-V), Custom House, Mundra was requested to re-assess the BEs filed by M/s Toyota Tsusho India Pvt Ltd in following manner-

(i) For the period 04.12.2020 to 31.03.2021 on payment of differential duty as applicable @10% BCD (Sr. No. 485 A of the Notification No. 50/2017- Cus) + other applicable duty

(ii) For the period 01.04.2021 onwards, on payment of differential duty as applicable @15% BCD + other applicable duty in terms of Sr. No. 485 A of the Notification No. 50/2017- Cus. read with Notification No. 21/2021-Cus. dated 31.03.2021).

Since, the matter was under investigation, it was requested to provisionally re-assess the BEs for the period 01.04.2021 onwards @10% BCD and other applicable taxes with applicable interest thereon.

4.1. Whereas, M/s Toyota Tsusho India Pvt Ltd vide letter dated 29.06.2022 submitted that they had paid the differential duty for the period from **Dec.2020**

to March 2021 in respect of 28 Bills of Entry and for the period from 01.04.2021 onwards, requested to allow the benefit of reduced rate of BCD in terms of Sr.No.485 A of Notification No.50/2017-Cus.). M/s Toyota Tsusho India Pvt Ltd has also submitted copy of the **Hon'ble Supreme Court Judgment in the matter of M/s Vareli Weavers Pvt. Ltd. vs. Union of India**, wherein the Hon'ble Court has held that the item has to be assessed as it is imported and not on the basis of subsequent process.

It was further submitted that the imported item is used in HVAC System. They as a trader, sell the item to the manufacturer of HVAC system. It is upto the manufacturer to decide the use of manufactured product. Therefore, the item will be used for manufacturing of HVAC system and requested to allow the benefit of notification.

5.1. Whereas, for investigating the matter further, summons dated 21.04.2023 were issued under Section 108 of the Customs Act, 1962 to M/s Toyota Tsusho India Pvt Ltd and their Custom Broker namely, M/s N.G. Joshi C & F Agents P. Ltd for recording of statement on 27.04.2023 and 26.04.2023 respectively and to submit documentary evidence regarding availment of the benefit of Sr.No.485 A of Notification No.50/2017-Cus. The Summons remained unanswered. Therefore, another summons dated 12.05.2023 were issued to the importer and their C.B. In response, M/s N.G. Joshi C & F Agents P. Ltd. vide letter dated 16.05.2023 submitted that they had filed all the Bills of Entry as per direction of importer and importer shall be appearing for recording of statement on 17.05.2023 and they being CHA- shall comply with the statement of the importer without any objection.

5.2 Whereas, Shri Vicky Kumar, Assistant Manager, M/s Toyota Tsusho India Pvt Ltd appeared on 17.05.2023 and his statement was recorded wherein he stated inter-alia that:

- *He was working as Assistant Manager, M/s Toyota Tsusho India Pvt Ltd Tsusho India Pvt. Ltd., Branch at Adani Logistic Park, Revenue Estate of Village Patli, Babra Bakipur and Jadula, Distt.Gurugram-122506 and his job is to look after import and export operation.*
- *He attends the work at Gurugram Branch but he will give his statement for the entire Imports from Mundra made by IEC No. 0799000973 of his company.*
- *His company is engaged in the trading of automobile and non-automobile parts. They import bolts, fasteners, nuts and motors (CTH 8501) etc. and export hub assembly (related to wheels) and vehicle steering parts (triodes) which are purchased from domestic market. Of their imported goods, motors are further supplied to M/s Subros Limited, H.O., at Noida.*
- *On being asked to explain in details about the import of motors (having Description as Motor Assembly holders w/o Fan under CTH No.85015390 (during the period from Dec.2020 to July 2021) and under CTH 85013119 (during the period from July 2021 onwards) as to what these goods are and why the CTH has been changed, he stated that these were electric motors having output 150-160 Watt which falls under CTH 8501.*
- *They have wrongly classified the said imported motors under CTSH 85015390 in the imports made from Dec.2020 to July 2021 (there was no imports of said goods prior to Dec.2020) but they realized that the correct*

classification is CTH 85013119 and accordingly, they have changed the classification to the correct heading.

- *He further stated that they have informed Mundra Customs vide their letters dated 07.12.2021 04.01.2022 and 13.01.2022 wherein they have explained in detail that the goods are rightly classifiable under CTH 85013119 and not under CTH 85015390 and requested for re-assessment and expressed their willingness to pay consequential duty difference which they, at our their will/wish, worked out as Rs.3.36 crore (for the period upto July, 2021)*
- *On being asked as to what was the duty implication due to change of above said classifications and on what basis they have worked out the said duty difference and for which period it pertains to and how much amount has been paid by them till date, he stated that they had classified the said goods under CTH 85015390 and availed the benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin based exemption). However, the goods are rightly classifiable under CTH 85013119 wherein no exemption from BCD is available and the period is from Dec.2020 to July 2021. He further stated that during the said period for working out the said duty difference of Rs.3.36 crore, they have taken into consideration their liability to pay basic duty @10% from Dec.2020 to 31.01.2021 and for the period from 01.02.2021 to July 2021, they have taken into consideration another notification No.02/2021 w.e.f.01.02.2021 which reduced the BCD from 15 % (increased by Finance Act, 2021) to @10% vide Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017. He further stated that they have requested for re-assessment and the Department has considered their request for the period from Dec.2020 to March 2021 only and the Bills of Entry were re-assessed accordingly and they have paid differential duty of Rs.2.58 crore.*
- *On being asked to inform as to why they have not paid the remaining duty of Rs.0.78 crore for the later period (upto July, 2021), he stated that their request for re-assessment was not considered by Department and therefore, the amount is yet to be paid for the period from April 2021 onwards to July 2021.*
- *On being asked to inform as to whether they intend to avail the benefit of Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 in respect of motors falling under CTH 85013119 for the period 01.04.2021 onwards and to inform as to whether they have availed the said benefit in the bills of entry filed during the period from 01.04.2021 to till date, he stated that, they had already filed the bills of entry (in respect of motors) for the period upto July 2021 wherein they could not avail the benefit of said Notification but for the Bills of entry in respect of said goods filed from Aug,2021 to 07.01.2023 they have availed the said benefit of reduced BCD@10%. He further stated that after 07.01.2023 to till date, in respect of their imports of motors, they have not availed the said benefit and paid the BCD @15% as the earlier motors were sold out and their new motors imported during this period are exclusively used in motor vehicles and they realized that exemption is not available to them.*
- *On being asked whether he is aware about the introduction of entry 485 A in Notification No. 50/2017 -Cus dated 30.06.2017 and its subsequent changes, he stated that he is not much aware.*
- *On being asked about the insertion of specific entry 485 A in Notification No. 50/2017 -Cus dated 30.06.2017 vide Notification No.02/2021-Customs*

dated 01.02.2021 and another amendment in the said Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 vide Notification No. 21/2021-Customs dated 31.03.2021 (w.e.f.01.04.2021) he declined to offer any comments.

- *On being asked whether he agreed that w.e.f. 01.04.2021, as per above Notification, the goods imported by the importer under CTH 850131 are liable to pay BCD @10% only if they are "other than those suitable for use in Motor vehicles" and for the goods which are suitable for use in Motor vehicles, the said benefit of 10% is not available and the applicable BCD @15% is required to be paid thereon w.e.f.01.04.2021 onwards, he stated that in respect of their imports made on 24.01.2023 and afterwards, they have realised that the benefit of 485 A is not for the motors suitable for use in Motor vehicles and they have started paying BCD@15%.*
- *On being asked to inform about the use of the motors (under CTH 85013119) imported by their company w.e.f. 01.04.2021 and as to whether these are suitable for use in Motor vehicles of Ch.87 of Customs Tariff Act or not, he stated that Imported motors are supplied to M/s Subros Limited, (H.O., at Noida or its various manufacturing plants) and use of this motors needs to be cross verified from the said recipient.*
- *On being referred to the bills of entry filed by their company during the period which are available with them and to peruse the description of goods declared by them and to bring to their notice that they are specifically mentioning some numbers of Parts and on being asked as what it indicates, he stated that he shall check the same with their business team and revert back.*
- *On being asked to peruse copy of Bill of Entry No.3493575 dated 09.04.2021 filed by their company (Branch -Gurugram) and to inform what is the description of goods mentioned therein, he stated that the description of imported goods is "MOTOR ASSY HOLDER W/O FAN -LHD (PART NO.272700-2310) (COMPONENT PARTS FOR VEHICLE).*
- *On being pointed out that from the above description, it is clear that the motors imported by them are the parts of Motor vehicles only and therefore, they are not eligible to exemption under Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 (amended vide Notification No. 21/2021-Customs dated 31.03.2021) for the period from 01.04.2021 onwards and to offer comments, he refrained from offering any comments on the same at present.*
- *On being asked to peruse the copy of letters dated 04.01.2023 wherein they have stated that the said imported goods are meant for use in HVAC which is used in motor vehicles to flow the air through vents of a motor vehicles and the sole function of the product is to rotate the fan in order to circulate air through cabin of motor vehicle and to offer comments and to further explain the meaning and full form of said HVAC and where it is used, he refrained from offering any comments on the same at present.*
- *He further stated that full form of HVAC is Heating, Ventilation and Air-Conditioning. The use of HVAC is not known to him.*
- *On being asked to inform what is the use of the motors (CTH 8501) imported by them as to whether they are suitable for use in Motor vehicles of Ch.87 of Customs Tariff Act or not, he stated that Imported motors are supplied to M/s Subros Limited, (H.O., at Noida or its various manufacturing plants) and use of this motors needs to be cross verified from the said recipients.*

- *On being informed that the website of their recipient company namely M/s Subros Limited (whom they supply Motors, as informed by him in above paras) is having website "https://www.subros.com/index.htm and it is declared therein :*

INDIA'S LEADING THERMAL PRODUCTS COMPANY FOR AUTOMOTIVE APPLICATIONS

Subros Limited, founded in 1985 as a joint venture public limited company with 36.79% ownership by Suri family of India, 20% ownership by Denso Corporation, Japan & 11.96% ownership by Suzuki Motor Corporation, Japan , is the leading manufacturer of thermal products for automotive applications in India, in technical collaboration with Denso.

Subros has manufacturing plants at Noida (2 nos.), Manesar, Pune, Chennai and Sanand with an annual capacity of 1.5 Million AC Kits per annum beside a well equipped R&D Center and Tool Room at Noida.

HVAC: It is abbreviation for heating, ventilation, and air conditioning systems — the technology of indoor or automotive environmental comfort.

Heating : In a vehicle heating stands for raising the temperature inside the vehicle using heat from the engine.

Ventilating : It is the process of replacing air in vehicle space to control temperature or remove moisture, odors, smoke, heat, dust, airborne bacteria, carbon dioxide, and to replenish oxygen. Ventilation includes both the exchange of air to the outside as well as circulation of air within the vehicle.

Air Conditioning: It means removal of heat from the vehicle using a refrigerant.

HVAC consists of Heater, Evaporator & Blower Unit.

And on being opined that it is clear that the motors supplied by them are suitable for use in motor vehicles and therefore, the benefit of Sr.No.485 A of Notification No.50/2017 is not available to them and to offer comments, he refrains from offering any comments.

On being asked whether he wants to say anything, he stated that he requests to re-assess all their Bills of Entry in respect of import of Motors under CTH 85013119 during the period from 01.04.2021 to 07.01.2023 and they do not intend to avail the benefit of Notification No.46/20211 (wrongly availed by them till July 2021) and Sr.485 A of Notification No.50/2017 -Cus as amended by Not.No.21/2021 dated 31.03.2021 (availed by them from July-Aug.2021 onwards) on similar terms and lines (of previous re-assessment) as was done in respect of their past bills of entry for the period from Dec.2020 to March 2021.

5.3. From the records submitted by M/s Toyota Tsusho India Pvt Ltd and details available on the ICES, it appears that during the period 04.12.2020 (BE No. 9822139) to 07.01.2023 (BE No. 4083524), M/s Toyota Tsusho India Pvt Ltd had filed total 75 BE for import of Motor Assembly holder w/o fan having total declared Assessable value of **Rs.48,79,67,211/-**.Further, during the period from **December, 2020 to July, 2021**, they classified their imported item under **CTH-85015390** and availed the benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin-based exemption) which was actually not available to them in as much as their

imported items merit classification under CTH-85013119 on which the benefit of exemption notification was not available.

5.4. Furthermore, **July, 2021 onwards**, they started classifying their products under **CTH-85013119**. During this period, they had availed the benefit of reduced rate of BCD as provided vide specific entry no. 485A in the Notification No. 50/17-Cus *(w.e.f. 01.02.2021)* prescribing the effective rate of BCD @ 10% for the motor assemblies falling under CTH-850131. However, it appears that w.e.f. 01.04.2021, the benefit of reduced BCD @10% was available to all the goods (of various CTH including CTH 850131) **other than those suitable for use in motor vehicles falling under heading 8702 or 8704, motor cars falling under heading 8703 or motor cycles falling under heading 8711**. In the present case, the imported Motors by M/s Toyota Tsusho India Pvt Ltd, are to be used in Motor vehicles, the benefit of reduced rate is also not available to them.

5.5. Further, during the investigation, **M/s Toyota Tsusho India Pvt Ltd agreed with the department's contention that they are not eligible for FTA based exemption of BCD due to change in the CTH of their imported item and agreed to pay the differential duty along with interest**. Further, initially they argued that that for the period **from April, 2021** they are eligible for benefit of reduced rate of BCD (i.e. @10%) as per specific entry no. 485A in the Notification No. 50/17-Cus (*w.e.f. 01.02.2021*. However, on being pursued, Shri Vicky Kumar, Assistant Manager, M/s Toyota Tsusho India Pvt Ltd in his statement dated 17.05.2023 shown their agreement to the fact that w.e.f. 01.04.2021, the benefit of reduced BCD @10% was not available to them in as much the imported Motors are to be used in Motor vehicles and agreed to pay the differential duty along with interest.

6. Legal Provision:

The Legal provisions of the Customs Act, 1962 (**Act** for the short) and Rule made thereunder relevant to the present matter are discussed herein under:

6.1 SECTION 17 of the Act, prescribes that An importer entering any imported goods under section 46, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

6.2 SECTION 46 of the Act prescribes that the importer while presenting a bill of entry stall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed.

6.3. SECTION 28 of the Act, ibid prescribes that *recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded. As per Sub Section (4) Of the said Section,*

> *(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.

Explanation- *For the purposes of this section, "relevant date" means,-*

(a] in a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in n case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;

(c)in a case where duty or interest has been erroneously refunded, the date of refund

(d) in any other case, the date of payment of duty or interest.

6.4. Further, Section 28 AA of the Act, provides the recovery of interest on delayed payment of duty. According to which

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

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

6.5. Further, **Section 111 of the Act**, prescribes the Confiscation of improperly imported goods, etc. as under

- The following goods brought from a place outside India shall be liable for confiscation:

(m) *any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54.*

6.6 Further, Section 112 of the Act provides the penal provisions for improper importation of goods, etc. which read as under:

Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is 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 knows or has reason to believe are liable to confiscation under section111,

shall be liable, -

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

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, 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;]*

[(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [4] [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;]

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty [5] [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [6] [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]

6.7. SECTION 114A of the Act enjoins the penal provision in case of short-levy or non-levy of duty in certain cases as under –

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 (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined.

Provided that where such duty or interest, as the case may be, 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 the 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 duty or interest, as the case may be, so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso sha11 be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AA, nod twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

Explanation. - For the removal of doubts, it is hereby declared that-

(i) the provisions of this section shall also apply to cases in which the order determining the duty or interest under sub-section (8) of section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;*

(ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.

6.8 SECTION 117 also provides the Penalties for contravention, etc., not expressly mentioned which prescribes that any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shrift be liable to a penalty not exceeding ten thousand rupees.

7. Outcome of Investigation:

7.1 Whereas, from the discussion above, it appears that in the instant case, following three issues are involved

(i) Proper classification of imported goods,

(ii) Eligibility of Exemption Notification

(iii) consequent differential duty liability

These issues are being discussed hereinunder separately:

7.2 Classification of imported goods:

7.2.1 The importer has imported the goods "Motor Assy W Holder SPEC B YSD RH (PART NO. 27270- 066400L)(COMPONENT PARTS FOR VEHICLE)/ Motor Assy Holder W/O Fan- RHD(PART NO. 272700- 2300)(COMPONENT PARTS FOR VEHICLE)" and declared the CTH as 85015390 in the bills of entry filed by them during the period from **Dec.2020 to July 2021** and **w.e.f. Aug.2021 onwards**, they have classified the same goods under CTH 85013119.

7.2.2 The CTH 8501 covered "Electric Motors and generators (excluding generating sets)" under which AC/DC motors have been classified based on their output of watts as under:

8501 ELECTRIC MOTORS AND GENERATORS (EXCLUDING GENERATING SETS)

8501 31 -- Of an output not exceeding 750 W:

8501 31 19 ---- Other

8501 53 -- Of an output exceeding 75 kW

8501 53 90 --- Other

7.2.3 In view of the above, it appears that the Electric Motors having an output not exceeding **750W** are classifiable under HSN-850131 whereas, Electric Motors having an output exceeding **75 kW** are classifiable under HSN-850153. In the present matter, as per letter dated 04.01.2022, M/s Toyota Tsusho India Pvt Ltd has submitted that the motor under consideration has an **output of 154 watts to 182 watts**, as the case may be and operates on DC power. Therefore, the motor assemblies under consideration merits classifications under sun heading ***85013119 which covers 'Other DC Motors, of an output not exceeding 750 w'.***

7.2.4 M/s Toyota Tsusho India Pvt Ltd admitted that the CTH 85015390 was wrong and the goods were rightly classifiable under CTH 85013119. Accordingly, from August, 2021 onwards they started classifying their imported product under CTH-85013119 instead of CTH-85015390.

7.2.5 In view of the above, it appears that the Electric Motors imported by M/s Toyota Tsusho India Pvt Ltd merits the classification under CTH- **85013119.**

7.3. Availment of Exemption Notification:

7.3.1. From the discussion in para supra, it appears that during the period from **December, 2020 to July, 2021**, M/s Toyota Tsusho India Pvt Ltd had wrongly availed benefit of exemption of BCD under **Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin-based exemption)** and paid only the IGST @18% by way of classifying their goods under CTH 85015390 wrongly. The said benefit was not available to them, if they would had classified their product correctly under CTH-85013119. The said fact has already admitted by the importer in their letters submitted to the department as well as in the statement recorded during investigation, as discussed above.

7.3.2. Furthermore, on the basis of inquiry conducted by the department, they shown readiness to pay the applicable customs duty. However, while making request for re-assessment for the period **April, 2021 to July, 2021**, they claimed reduced rate of BCD (*viz* @10%) under **Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017**, as amended vide Notification No. 02/2021-Customs dated 01.02.202. Further, for the imports made vide Bills of Entry No. 4866559 dated 30.07.2021 to 4083524 dated 07.01.2023, they had themselves assessed the goods under CTH 85013119 and availed exemption claimed under Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 and paid the BCD at 10%. However, in the next Bills of Entry No. 4338084 dated 24.01.2023 onwards, they have not availed the said exemption and paid the applicable BCD @15% alongwith other applicable tax.

7.3.3. Now, the issue involved is whether benefit of reduced BCD under Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 in respect of imported goods falling under CTH 85013119, as claimed by the importer, is available to them or not for the period from 01.04.2021 to 07.01.2023.

7.3.4. Whereas, it appears that BCD @ 10% was applicable for the Motor assemblies falling under the CTH-85013119 which was being imported by M/s Toyota Tsusho India Pvt Ltd since December, 2020.

7.3.5. Whereas, it appears that the BCD rate on the said items was increased **from 10% to 15% vide the Finance Act, 2021, w.e.f. 02.02.2021**. However, the Central government vide **Notification No. 02/2021- Customs dated 01.02.2021, specific entry no. 485A in the Notification No. 50/17-Cus**, was inserted prescribing the effective rate of BCD @ 10% for the motor assemblies falling under CTH-850131 as under:

(77) after S. No. 485 and the entries relating thereto, the following S. No. and entries shall be inserted, namely: -

(1)	(2)	(3)	(4)	(5)	(6)
"485A.	8501 10, 8501 20 00, **8501 31**, 8501 32, 8501 33, 8501 34,	All Goods	10%	-	-"

	8501 40, 8501 51, 8501 52, 8501 53				

Thus, w.e.f. 01.02.2021, they are eligible for benefit of concessional BCD @10% vide Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017.

7.3.6. Whereas, another amendment was made in the said Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 vide Notification No. 21/2021-Customs dated 31.03.2021 (w.e.f.01.04.2021) and the details of same are as under:

iii) against S. No. 485A, for the entry in column (3), the following entries shall be substituted, namely:-

" All goods other than those suitable for use in –

iv. *motor vehicles falling under heading 8702 or 8704;*
v. *motor cars falling under heading 8703; or*
vi. *motor cycles falling under heading 8711";*

7.3.7. Therefore, as per Sr. No. 485A of Custom Notification 50/2017, the Customs duty structure in respect of CTH 850131 of the Customs Tariff prevailing at the material time i.e. from 01.04.2021 onwards may be read as under:

CTH	**Description**	**Duty Structure**
850131	All goods other than those suitable for use in – iv. motor vehicles falling under heading 8702 or 8704; v. motor cars falling under heading 8703; or vi. motor cycles falling under heading 8711";	iv. Basic Custom Duty: 10% v. SWS: 10% vi. IGST: 18% (Total Duty rate :30.98%)
8501	Otherwise	iv. Basic Custom Duty: 15% v. SWS: 10% vi. IGST: 18% (Total Duty rate: 37.47 %)

7.3.8. Therefore, it appears that w.e.f. 01.04.2021, the benefit of reduced BCD @10% is available to all the goods (of various CTH including CTH 850131) other than those suitable for use in motor vehicles falling under heading 8702 or 8704, motor cars falling under heading 8703 or motor cycles falling under heading 8711.

7.3.9. M/s Toyota Tsusho India Pvt Ltd, in their letters submitted to the department had cited the Hon'ble Supreme Court judgment in the matter of **M/s Vareli Weavers Pvt.Ltd. vs. Union of India { 1996 (83) ELT 255 (S.C.) }** wherein the Hon'ble Court has held that the item has to be assessed as it is imported and not on the basis of subsequent process and claimed that the imported item is used in HVAC System. They as a trader, sell the item to the manufacturer of HVAC system. It is upto the manufacturer to decide the use of manufactured product. Therefore, the item will be used for manufacturing of HVAC system and requested to allow the benefit of notification.

7.3.10. On going through the said case law, it appears that it is not relevant to the facts and circumstances of instant case. In the said case pertain to demand of duty on the basis of circular issued by Board whereas the instant case pertains to availment of exemption notification. It is settled law that when an importer wants to claim an exemption, the onus is upon him to prove that he has rightly claimed the exemption and all the conditions of the notification are duly fulfilled. It appears that the importer has failed to appreciate that they are required to prove that the imported goods are **other than those suitable for use in the motor vehicles** for availing the benefit of Sr.No.485A of Notification No.50/2017-Cus. In the instant case, the goods are not being assessed on the basis of their end use as the classification of goods has been accepted under CH.85 and imported goods are not being assessed under Ch.87 as parts of Motor vehicles.

7.3.11. Further, M/s Toyota Tsusho India Pvt Ltd, vide their letter dated 04.01.2022 had stated that the said imported goods are meant for use in HVAC (Full form gathered from Internet is: Heating, Ventilation and Air-Conditioning) which is used in motor vehicles to blow the air through vents of a motor vehicles and the sole function of the product is to rotate the fan in order to circulate air through cabin of motor vehicle. Therefore, it appears that the imported goods are suitable for use in motor vehicles and therefore, it further appears that w.e.f.01.04.2021, the benefit of reduced BCD @10% is not available to them. It is pertinent to mention here that the importer has themselves realized the same and started paying duty @ 15% (i.e. full rate of BCD) without availing the said benefit of reduced BCD under Sr.No.485 A w.e.f.24.01.2023 onwards.

7.3.12. Further, in his statement recorded on 17.05.2023, the representative of the importer has requested to re-assess all their Bills of Entry in respect of import of Motors under CTH 85013119 during the period from 01.04.2021 to 07.01.2023 and submitted that they do not intend to avail the benefit of Notification No.46/20211 (wrongly availed by them till July 2021) and Sr.485 A of Notification No.50/2017 -Cus as amended by Not.No.21/2021 dated 31.03.2021 (availed by them from July-Aug.2021 onwards).

7.3.13. Whereas, in view of the above facts, it appeared that

For the period December, 2020 to March, 2021:

Importer's claim for duty payment of differential duty **for the period 04.12.2020 to 31.03.2021** as applicable @10% BCD (Sr. No. 485 A of the

Notification No. 50/201- Cus) + other applicable duty appeared as acceptable.

For the period 01.04.2021 onwards:

Further, since the imported goods/item viz. "Motor Assy Holder W/O Fan" were suitable for use in Motor Vehicles and motor cars falling under heading 8702, 8703 and 8704. Therefore, due to change in the condition of the reduced BCD benefit, it appeared that benefit of Sr. No.485A of Noti. No.50/2017-Cus as amended by Noti. No.21/2021-Cus dated 31.03.2021 was not applicable and duty was to be payable @15% BCD + other duties **from 01.04.2021 onwards**.

8. DUTY CALCULATION:

8.1. In view of the discussion in para supra, it appears that M/s Toyota Tsusho India Pvt Ltd has short paid the Customs Duty on import of motor assemblies during the period **December, 2020 to January, 2023** ***(in total 75 BEs)*** by way of mis classification of the imported item and wrong avaliment of benefit of exemption from BCD/ reduced rate of BCD.

8.2. Whereas, it appears that during the period **04.12.2020 to 01.07.2021**, M/s Toyota Tsusho India Pvt Ltd has filed **38 BEs** by declaring their goods under CTH-85015390. From the investigation as discussed above, it appears that the correct HSN for the imported goods was 85013119.

8.3. Whereas, it appears that initially M/s Toyota Tsusho India Pvt Ltd, vide letter dated 07.12.2021 has requested for re-assessment and undertaken to pay differential duty **Rs.3,36,94,612/-** for the above total **38 BE's** for the period **04.12.2020 to 01.07.2021** due to HSN code correction from 85015390 to 85013119. However, during the investigation, M/s Toyota Tsusho India Pvt Ltd vide letter dated 04.01.2022 & 29.06.2022 further requested to extend the benefit of Sr.485 A of Notification No.50/2017 w.e.f. 01.02.2021 for the period **upto July, 2021**. Their request was found in order only for the period from **04.12.2020 to 31.03.2021** as discussed above and accordingly, vide letter dated 26.03.2022 the Deputy Commissioner (Gr-V) was communicated to re-assess the BE's for the said period **(total 28 BEs).** Accordingly, these bills of entry were re-assessed involving the differential duty of **Rs.2,58,79,214/-** as under which is required to be recovered from the under Section 28 (4) of the Customs Act, ibid along with interest under Section 28AA of the Act ibid.

Period involved	Total Assessable value declared in the Bills of Entry	Total duty paid	Total duty payable after re-assessment	Differential duty/Duty short paid
Dec.2020 to March 2021	**19,93,77,613 /-**	**3,58,87,971/ -**	**6,17,67,185/ -**	**2,58,79,214/ -**

However, during the investigation **M/s Toyota Tsusho India Pvt Ltd has paid the said amount of differential duty of Rs.2,58,79,214/-.** Further, they have calculated their interest liability as per their calculation to the tune of Rs.1,36,003/- and paid the same during the process of re-assessment of the BEs by the Import Group.

8.4 Furthermore, as discussed in paras hereinabove that the exemption from basic duty was wrongly availed by them vide Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) for their imports from **April 2021 to July 2021** and since, it has been admitted by them that they are not eligible for said exemption, the same is required to be denied to them and consequential duty not paid/evaded by them is required to be recovered from them for the said period. Furthermore, it appears that since the imported goods are found suitable for use in Motor Vehicles and motor cars falling under CTH-8702/8703 & 8704, the benefit of Sr. 485 A of Notification No. 50/2017-Cus as amended vide Notification No. 21/2021-Cus dated 31.03.2021 was also not available to them and they were liable to pay BCD @ 15% along with other applicable duties from 01.04.2021 onwards. Therefore, out of total 38 BEs as discussed above, in case of 10, the differential liability has been calculated as under.

Period involved	Total Assessable value declared in the Bills of Entry	Total duty paid	Total duty payable	Differential duty/Duty short paid
01.04.2021 to 01.07.2021	**6,02,11,074/-**	**1,08,37,993/-**	**2,25,61,089/-**	**1,17,23,096/-**

Therefore, it appears that, in case of BEs No. 3417249 dated 01.04.2021 to the BE No 4527741 dated 01.07.2021, the differential liability to the tune of **Rs.1,17,23,096/-** has been calculated which is required to be recovered from the under Section 28 (4) of the Customs Act, ibid along with interest under Section 28AA of the Act ibid.

8.5. Further, for the period **from 30.07.2021 to 07.01.2023**, as discussed hereinabove, M/s Toyota Tsusho India Pvt Ltd started classifying their products under CTH-85013119. During this period, they had availed the benefit of reduced rate of BCD as provided vide specific entry no. 485A in the Notification No. 50/17-Cus *(w.e.f. 01.02.2021)* prescribing the effective rate of BCD @ 10% for the motor assemblies falling under CTH-850131. However, as discussed above, the said benefit was not available to them w.e.f. 01.04.2021. Therefore, the duty liability of the importer in respect of electric motors falling under CTH 85013119 is worked out for the period **from 30.07.2021 to 07.01.2023** is as under:

Period involved	Total Assessable value declared in the Bills of Entry	Total duty paid	Total duty payable	Differential duty/Duty short paid
30.07.2021 to 07.01.2023	**22,83,78,522/-**	**7,07,51,666/-**	**8,55,73,432/-**	**1,48,21,766/-**

8.6 Therefore, it appears that the importer has short paid the Customs duty of **Rs.1,48,21,786/-** during the period from **30.07.2021 to 07.01.2023** and the

same is required to be recovered from them Section 28 (4) of the Customs Act, ibid along with interest under Section 28AA of the Act, as applicable.

8.7 Further, initially M/s Toyota Tsusho India Pvt Ltd argued that for the period from April, 2021 onwards they are eligible for benefit of reduced rate of BCD (i.e. @10%) as per specific entry no. 485A in the Notification No. 50/17-Cus (w.e.f. 01.02.2021. However, on being pursued, Shri Vicky Kumar, Assistant Manager, M/s Toyota Tsusho India Pvt Ltd in his statement dated 17.05.2023 shown their agreement to the fact that w.e.f. 01.04.2021, the benefit of reduced BCD @10% was not available agreed to pay the differential duty along with interest. Accordingly, M/s Toyota Tsusho India Pvt Ltd has paid the differential duty of **Rs. 2,65,06,315/-.** Further, they have calculated their interest liability as per their own calculation and paid the interest amounting to Rs. 65,76,204/- vide TR-6 Challans. These BEs are still pending for re-assessment and need to be re-asses as per the outcome of the investigation.

8.8 In view of the above, it appears that in total, during the period **04.12.2020 to 07.01.2023**, M/s Toyota Tsusho India Pvt Ltd has short paid Customs duty amounting to **Rs. 5,24,24,077/- (BCD+SWC+IGST)** by way of mis-classifying their product, wrong avaliment of benefit of Notifications regarding Country of Origin based exemption and of reduced rate in the BEs having **total assessable value of Rs.48,79,67,210/-** which is required to be recovered from them under Section 28 (4) of the Customs Act, ibid along with interest under Section 28AA of the Act, as applicable.

8.9 However, during the investigation, M/s Toyota Tsusho India Pvt Ltd has paid differential duty of **Rs. 5,23,85,529/- (BCD+SWC+IGST).** Further, M/s Toyota Tsusho India Pvt Ltd has also paid interest amounting to **Rs. 67,12,207/-** on their own calculation. The same are required to be appropriated out of the total differential duty and applicable interest thereon.

9. Invoking of extended period

9.1 After introduction of self-assessment vide Finance Act, 2011, the onus lies on the importer for making true and correct declaration with respect to all aspects of the Bill of Entry and to pay the correct amount of duty. In the instant case, the said importer being an 'ACCREDITED CLIENT' and therefore, Assessment and Examination were not prescribed for their Bills of entry and therefore, entire onus is on the said importer to make truthful declarations and assess and pay their Govt. correctly.

9.2 The said importer had wrongly assessed the goods under CTH 85015390 and wrongly availed benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin-based exemption) and paid only the IGST @18% during the period from **Dec.2020 to July 2021**. Therefore, it amounts to willful mis-statement on the part of importer leading to evasion of duty. They were very well aware that their product merits classification under CTH- 85013119 due to its technical specification. Despite the fact, they continued classifying their product under wrong CTH just to avail the inadmissible duty exemption benefit. Had the customs department not initiated inquiry against them, the said fact would have not come to the notice. Even after correction of the HSN on their own violation w.e.f. July, 2021 onwards, though, they stopped availing benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011, they started availing another ineligible benefit of reduced rate of BCD, i.e. @10% in terms of Sr.No.485 A of Notification

No.50/2017-Cus dated 30.06.2017 . However, it appears that the importer has failed to appreciate that the said Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 was further amended vide Notification No. 21/2021-Customs dated 31.03.2021 (w.e.f.01.04.2021) which excluded the goods suitable for use in motor vehicles for the purpose of concessional duty @10%.

9.3 It further appears that, to establish their wrongful claim of benefit of reduced rate of BCD, the importer has attempted to mislead the investigation in as much as vide their letter dated 29.06.2022 they have stated that the imported item is used in HVAC System and they as a trader, sell the item to the manufacturer of HVAC system and it is upto the manufacturer to decide where to use the manufactured product and that the item will be used for manufacturing of HVAC system and requested to allow the benefit of notification whereas vide their letter dated 04.01.2022, they had stated that the said imported goods are meant for use in HVAC which is used in motor vehicles to blow the air through vents of a motor vehicles and the sole function of the product is to rotate the fan in order to circulate air through cabin of motor vehicle. Further, in their statement recorded on 17.05.2023, they tried to be evasive but finally admitted that no benefit of said Sr.No.485 A is available to them.

9.4 Therefore, it appears that that the importer had resorted to willful mis-declaration of correct classification of goods and their further use and wrongly availed benefit of exemption notification in the Bills of Entry of the said imported goods by suppressing the said material facts, which shows the ulterior motive of the importer to evade payment of applicable Customs Duty in respect of said imported goods cleared for home consumption. It further appears that by their act of omission and commission in as much as mis-declaration of CTH and wrong availment of exemption notifications with an intent to evade payment of Customs Duty, the subject goods valuing **Rs. 48,79,67,210/-** are liable to be confiscation under Section 111(m) of Customs Act, 1962. It further appears that the importer has rendered themselves liable for imposition of penalty under Section 112 (a)(ii) of the Customs Act, 1962 for the goods being liable for confiscation. It further appears that the importer is also liable for penalty under Section 114A of the Customs Act, 1962 for their act of omission and commission to evade duty on account of any willful mis-statement or suppression of facts.

10. Therefore, **M/s Toyota Tsusho India Pvt Ltd Tsusho India Pvt. Ltd. (IEC No. 0799000973)**, Plot No. 33 & 34, Bidadi Industrial Area, Ramanagaram Taluka, Ramanagara, Karnataka-562109 were called upon to show cause within thirty days from the date of receipt of this notice to **the Commissioner of Customs**, Mundra, having his office at First Floor, Port User Building, Custom House Mundra, Kutch, Gujarat-370421, as to why:-

i) Imported goods (electric motors) should not be classified under CTH 85013119 as against the CTH 85015390 declared in the Bills of entry during the period from 04.12.2020 to 07.01.2023;

ii) The benefit of duty exemption claimed by them under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) should not be denied to them for the period 04.12.2020 to 01.07.2021.

iii) the exemption under Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 as amended should not be denied w.e.f. 01.04.2021 to 07.01.2023;

iv) Imported goods, i.e. electric motors valued at **Rs.48,79,67,210/-** during the period 04.12.2020 to 07.01.2023 should not be confiscated under Section 111 (m) of the Customs Act, 1962

v) Differential duty of **Rs.5,24,24,076/- (BCD+SWC+IGST)** ***(Rupees Five Crore Twenty Four Lakhs Twenty Four Thousand Seventy Six only)*** for the period from **04.12.2020 to 07.01.2023** should not be demanded, confirmed and recovered from them under Section 28 (4) of the Customs Act, 1962;

vi) Differential duty amounting to **Rs.5,23,85,529/- (BCD+SWC+IGST)** Paid by M/s Toyota Tsusho India Pvt Ltd during the investigation should not be appropriated against the said demand.

vii) Interest at appropriate rates should not be levied and recovered from them under Section 28AA of the Customs Act, 1962.

viii) Interest amounting to **Rs.67,12,207/-** Paid by M/s Toyota Tsusho India Pvt Ltd during the investigation should not be appropriated out of the above total demand of interest.

ix) Penalty should not be imposed upon them under the provisions of Section 112 (a)(ii) of the Customs Act, 1962.

x) Penalty should not be imposed upon them under the provisions of Section 114A of the Customs Act, 1962.

16. SUBMISSION OF THE NOTICEES AGAINST THE INSTANT SCN:

16.1. I find that the noticees i.e. M/s Toyota Tsusho India Pvt Ltd Tsusho India Pvt. Ltd. (IEC No. 0799000973) vide letter dated 14.10.2024 stated that:

a. They have accepted the classification of Imported item under CTH-8501 3119.

b. The custom duty benefit availed for certain period under FTA benefit 46/2011 & Notfn 50/2017 Sr 485A the differential Custom duty along with Interest was paid in complete for all the Bill of Entries as stated in differential duty paid sheet.

c. Kindly note, prior to issue of aforesaid Show Cause Notice dated 17.11.2023 from your office they had already deposited viz. paid differential Custom duty along with Interest and Surrender of FTA benefit & Notification 50/2017 Sr. No. 485A amt Rs. 5,90,97,742/- at Mundra Custom locations. Copies of duty paid TR6 challan were submitted to Mundra customs.

d. During period 2020, based on the product details & FTA certificate got from their Supplier they filed the BOE under classification 85015390. Based on Query from Customs on classification they got the technical assessment of Import Item done. It was concluded that the future imports merits classification under 8501 3119.

e. There was no intentional claim of duty benefit: At reduced Basic duty & FTA benefit.

f. TTIPL is 100% compliant organization. Their Ulterior motive was not to evade payment of Custom duty, mis-declaration of CTH, wrong availment of exemption notifications or Suppression of Fact.

In view of above fact, they reiterated, the penalty should not be imposed on them under Section 114A of Act for 'Willful mis-declaration and mis-classification' as they have not intentionally mis-classified or wrongly availed the Custom Notification benefit, nor there was any wilful Mis-statement or Suppression of Facts.

They had voluntarily paid the differential custom duty of Rs 5.90 cr at Mundra Customs House prior to issue of Show Cause Notice dtd 17.11.2023 by your office.

It was purely an interpretational issue of HS code based on available Product information and on basis of Technical details of Import Item obtain from Suppliers they had classified the item. Subsequently they made correction by re-classifying the Import item under appropriate HS code and voluntarily deposited the differential duty at various Custom house locations.

Further, vide letter dated 25.10.2024, Noticee has given additional written submission. The same has been reproduced below:

EXTENDED PERIOD CANNOT BE INVOKED UNDER SECTION 28(4) OF THE CUSTOMS ACT

A.1 The Noticee submits that the impugned SCN has been issued under Section 28(4) of the Customs Act and it proposes to demand the differential BCD from the Noticee on the allegation that Noticee has claimed the alleged ineligible exemption.

A.2 The Noticee submits that as per Section 28(4) of the Customs Act, where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the

refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

A.3 The Noticee submits that Section 28(4) of the Customs Act prescribes two conditions for issuance of SCN under said Section which are as follows.

i. There should be duty which 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; and

A.4 Such non-payment or short payment or erroneous refund should be by reason of collusion or any wilful mis-statement or suppression of facts.The Noticee submits that it provided the appropriate description and other details of impugned goods in all the BEs as available in the import documents viz., FTA Certificate, bill of lading, etc. The Noticee did not suppress or misstate any factual positions in any of the import documents including the BEs.

A.5 The Noticee submits that the onus is on the department to prove that the Noticee has willfully mis-declared or suppressed facts with intent to evade payment of duty. In the impugned SCN, the department has not provided for any proof that the Noticee has acted with any *mala fide* intent. There is nothing on record to show the existence of fraud, collusion or suppression of materials facts or information. Reliance is placed on the following decisions in support of the above submission:

- ***Shahnaz Ayurvedics v. CCE – 2004 (173) ELT 337 (All),*** affirmed in ***2004 (174) ELT A34 (SC)***
- ***Devans Modern Breweries Ltd. v. CCE - 2006 (202) ELT 744 (SC)***

Proper description of goods in the BE. Hence, mis-declaration cannot be alleged against the Noticee

A.6 The Noticee submits that the Hon'ble Courts and Tribunals has held that allegation of wilful misstatement is not sustainable where the importer has declared appropriate description and other details of impugned goods. Mere claim of exemption or classification of impugned goods which are technical in nature cannot be treated as wilful misstatement on the part of importer.

A.7 The Noticee also place reliance on the decision of the Hon'ble High Court of Madras in the case of ***Commr. of. Cus. (Imports), Chennai-I v. G.M.Pens International*** reported in ***2009 (247) ELT 159 (Mad.)*** wherein the Hon'ble High Court has held *inter alia* that when the importer has given the correct description of goods as per the import documents the importer cannot be attributed with the intention of suppression of material facts so as to gain advantage in payment of the duty.

A.8 The Noticee submits that similar view has been taken by the Hon'ble Tribunals in plethora of cases including the following cases.

- ***Sirthai Supreware India Ltd.. v. Commr of Customs, Nhava Sheva-III,2020 (371) ELT 324 (Tri Mumbai)***
- ***Lotus Beauty Care Products Pvt Ltd v. Commissioner of Customs (import),2020-TIOL-1664-CESTAT-MUM.***
- ***Vesuvius India Ltd., v. Commissioner of Cus., Visakapatnam, 2019 (370) ELT 1134 (Tri Hyd).***

A.9 The Noticee submits that it is a settled position of law that in case the appropriate description of goods has been declared in the import documents including in the BEs no allegation of suppression of facts or wilful misstatement can stand against the importer.

A.10 In the instant case, the Noticee has declared the appropriate description of impugned goods in all BEs and not suppressed or misstated any factual positions in any of the import documents including the BEs.

A.11 The Noticee, therefore, submits that no allegation of willful suppression of facts or wilful misstatement can stand against the Noticee and thus, the proposal to demand the differential Customs duties under Section 28(4) of the Customs Act deserve to be dropped.

Declaring a classification and claiming of exemption in the BOEs does not amount to mis-declaration.

A.12 Even assuming without admitting that the Noticee has wrongly classified the impugned goods then mis-declaration cannot be alleged against the Noticee as no mala fide can be attributed to the Noticee and therefore extended period cannot not be invoked under Section 28(4) of the Customs Act

A.13 In this regard, the Noticee places reliance on the case of ***Densons Pultretaknik vs. Commissioner of Central Excise, 2003 (155) E.L.T. 211 (S.C.),*** wherein it was held by the Hon'ble Supreme Court that merely claiming classification did not necessarily amount to suppression of facts and therefore, extended period of limitation would not be invokable.

A.14 Similar decision has been passed in the following cases,

i. ***Sutures India Pvt. Ltd. vs. CC, Bangalore, 2009 (245) E.L.T. 596 (Tri.-Bang.)***
ii. ***Swathy Chemicals Ltd. vs. Commr. Of C. Ex., 1999 (114) E.L.T. 531 (Tribunal)***

A.15 Basis the above-discussions, it is submitted that there is no mis-declaration on the part of Noticee.

A.16 It is settled law that to impute "mis-declaration" on an assessee, it has to be shown that the declaration was deliberate or intentional to evade the duty payment. The courts have upheld the aforesaid proposition in the following cases,

i. ***Shahnaz Ayurvedics vs. Commissioner of Central Excise, Noida, 2004 (173) E.L.T. 337 (All) [affirmed by Supreme Court in Commissioner vs. Shahnaz Ayurvedics, 2004 (174) E.L.T A34 (SC)]***
ii. ***Kirti Sales Corpn. vs. CCU, 2008 (232) E.L.T. 151 (Tri.-Del.)***

A.17 In the present case, the declaration as mentioned in the BEs by the Noticee was not "wilful", "intentional" or "deliberate" to evade the payment of duty hence malafide cannot be imputed on the Noticee.

Issue involves interpretation of law, extended period is not invocable.

A.18 It is submitted that, it is an equally established canon of law, that extended period cannot be involved when the issue is interpretational in nature. The dispute entails examination and interpretation of subject notification, therefore, in such a situation, the allegation of wilful mis-statement is not justified. The Noticee relies on the following judgments in support of the contention that

suppression or wilful mis-statement cannot be alleged when the matter involves interpretation of legal provisions:

- **CRI Limited v. Commr. Of Customs (Airport & Administration), Kolkata, 2020 (12) TMI 805 - CESTAT Kolkata;**
- **Signet Chemical Pvt. Ltd. v. Commissioner of Customs, NS-1, Mumbai-II, 2020 (10) TMI 289 - CESTAT Mumbai;**
- **GT Cargo Fitting India Pvt. Ltd. v. Commissioner of Central Excise, Noida-Ii, 2019 (8) TMI 68 - CESTAT Allahabad;**

A.19 It is to be noted that a person, well aware of the legal provisions, may still be of a *bona* fide view that it is entitled to benefit under a certain subject notification, like the Noticee herein. Such *bona fide* conduct of a person does not result in suppression of facts or wilful mis-statement. Being of the *bona fide* view regarding non-dutiability of imported goods, does not mean willful suppression/ misstatement of facts, and therefore, extended period cannot be invoked.

A.20 Further reliance is placed on the case of **Sirthai Superware India Ltd. v. CC, 2019 (10) TMI 460-CESTAT Mumbai** where it has been held that where the assessee has provided all the pertinent details of the product in the declaration, then no mis-declaration can be alleged.

A.21 The Noticee also relies on the judgment of **Lewek Altair Shipping Private Limited v. CC, 2019 (366) E.L.T. 318 (Tri. - Hyd.)** wherein it was held that that claiming an incorrect classification, or the benefit of an ineligible exemption notification, even in the self-assessment regime, does not amount to making a false or incorrect statement because it is not an incorrect description of the goods or their value but only a claim made by the assessee. The Tribunal's decision in Lewek Altair Shipping (Supra) has been affirmed by the Hon'ble Supreme Court in **Commissioner v. Lewek Altair Shipping Pvt. Ltd., 2019 (367) E.L.T. A328 (S.C.).**

A.22 The Hon'ble CESTAT, New Delhi Bench in **Midas Fertchem Impex v. Principal CC reported at 2023 (1) TMI 998** held that in self-assessment regime, claiming a wrong classification or incorrect exemption is not mis-statement of facts.

A.23 As mentioned above, the Noticee has submitted all the required documents (such as impugned B/Es, corresponding invoices, packing list) to the Customs Authorities and has also provided appropriate description of the subject goods in the import documents. Therefore, it cannot be alleged that Noticee has suppressed any fact.

A.24 Further, the Noticee also submits that the extended period cannot be invoked as the present issue involves an interpretation of the law. The issue in the impugned order is one of eligibility of benefit given under the subject Notification. The Noticee places reliance on the following in support of the contention that extended period cannot be invoked in cases of interpretation of the law:

(i) ***Singh Brothers vs. Commissioner of Customs & Central Excise, Indore, 2009 (14) STR 552 (Tri.-Del.);***

(ii) ***Steelcast Ltd. vs. Commissioner of Central Excise, Bhavnagar, 2009 (14) STR 129 (Tri.-Del.);***

A.25 In view of the submissions made above, it is clear that Section 28(4) does not apply to the given case and therefore, the differential duty demand, if any, could only have been raised only under Section 28(1) of the Customs Act. As per Section 28(1) of the Customs Act, where any duty or interest has not been paid due to reasons other than collusion, willful misstatement or suppression of fact, demand for duty and interest can be made under Section 28(1).

Noticee has paid the Customs duties prior to the issuance of SCN

A.26 It is submitted that Section 28(1)(b) read with Section 28(2) of the Customs Act comes into operation in the instant case. Relevant provision of the Customs Act is extracted below:

> ***Section 28. Recovery of duties not levied or not paid or has been short levied or short paid or erroneously refunded.***
>
> *(1) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,*
> *(a)the proper officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty or*

interest which has not been so levied or paid or which has been 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;

***Provided** that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed;*

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

(2) The person who has paid the duty along with interest or amount of interest under clause (b) sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest :

A.27 On the perusal of the above, it can be seen that clause (b) to sub-section (1) of Section 28 of the Customs Act gives an option to the Appellant to pay the entire amount of duty along with interest payable thereon under section 28AA prior to the issuance of SCN as per the Appellant's own ascertainment or as determined by the proper officer. In such a situation, no SCN shall be served in respect of such duty or interest and penalty leviable under the provisions of this Customs Act or the rules made thereunder.

A.28 It is submitted that the Noticee has paid the said amount of differential duty of ₹ 2,58,79,214/- vide the various Challans, refer **Annexure 2** for the period from December 2020 to March 2021. Further, it calculated their interest liability as per their calculation to the tune of ₹ 1,36,003/- and paid the same during the process of re-assessment of the BEs by the Import Group.

A.29 Furthermore, the Noticee has also paid the differential duty of ₹2,65,06,315/- 30.07.2021 to 07.01.2023. Further, it have calculated their interest liability as per their own calculation and paid the interest amounting to ₹ 65,76,204/- vide the various Challans – refer **Annexure 3** (Total Differential duty paid for the period 30.07.2021 to 07.01.2023 amounting INR 3,30,82,519)

A.30 Thus, it is submitted that during the course of investigation the Noticee has paid differential duty of ₹ 5,23,85,529/- vide the Various Challans – Refer **Annexure 2 & 3** . Further, Noticee has also paid interest amounting to ₹ 67,12,207/-.

A.31 The Noticee submits that ₹ 5,23,85,529/- amount was paid voluntarily prior to the issuance of the SCN. This clearly shows the bona-fides of the Noticee.

A.32 Reliance in this regard is placed on the decision of ***Wockardt Ltd.v.Commr. of Cus. (I), Mumbai (Air Cargo Import), (2022) 1 Centax 65 (Tri.-Bom)*** wherein the Tribunal held as follows:

> *"In view of the principles laid down in the above referred decisions I am of the view that the no penalty could have been imposed on the appellant under section 114A of the Act.* ***Since appellant had even before the issuance of the Show Cause Notice deposited the differential duty along with interest the entire proceedings initiated against them by issuance of the show cause notice dated 31-5-2016, were unwarranted and the issue should have been settled as per the Section 28 (2) of the Customs Act, 1962."***
>
> ***(Emphasis applied)***

A.33 Further reliance in also placed on the decision of ***Hi-Tech Sweet Water Technologies Pvt. Ltd.v.Commr. of Cus. (I), Nhava Sheva, Raigad, (2022) 1 Centax 310 (Tri.-Bom)***, wherein it was held that the Assessee having admitted duty liability and paid same along with interest due then the proceedings should have been abated against him in view of Section 28(2) of Customs Act, 1962.

A.34 The Noticee submits that it has complied with the requirements under Section 28(1) and 28(2) of the Customs Act by way of depositing the Customs duties that were not paid at time of import on the basis of bona fide belief and intimating the concerned Customs Authorities.

A.35 The Noticee submits that in terms of Section 28(2) of the Customs Act no SCN should have been issued to the Noticee and consequently the impugned SCN should be dropped.

Extended period not invokable as the issue in the instant case is an industry wide issue involving divergent practice

A.36 It is a settled law that if two views are possible and Noticee under a *bona fide* belief has adopted one view, there is no suppression of fact and demand cannot be sustained for extended period.

A.37 In the case of ***Patel Air Freight vs. Commissioner of Service Tax, Delhi, 2017 (51) S.T.R. 61 (Tri.-Del.),*** the Hon'ble Tribunal held that, during the relevant period, taxability on airlines agent under Business Auxiliary Service was a subject matter of various litigations. In view of divergent practices, entertaining a bona fide belief by appellant on non-taxability of commission received by it could not be questioned. Consequently, extended period could not be invoked as there was no suppression or wilful misstatement.

A.38 Similarly, in the case of ***Infrasofttech India Ltd. vs. Commr. Of C. Ex., Mumbai-II, 2021 (46) G.S.T.L. 141 (Tri. - Mumbai),*** the Hon'ble Tribunal, inter-alia, held that the issue relating to the point of time for payment of service tax on the Information Technology Software service was prevailing in the industry. Therefore, there was no suppression of facts with any intention to evade payment of service tax and extended period was not invokable as the issue involved an interpretation of the law.

A.39 Further, reliance is placed on the following case laws

- ***Calcutta Dock Labour Board vs. Commissioner of S.T., Kolkata, 2017 (3) G.S.T.L. 465 (Tri.-Kolkata); a***
- ***Essar Logistics vs. Commissioner, 2016 (42) S.T.R. J203 (Tri.-Ahmd.***
- ***Commissioner of Central Excise, Jaipur-I vs. Gupta Fabtax Pvt. Ltd., 2017 (357) 1217 (Tri.-Del.).***

A.40 In the present case, the issue regarding claim of exemption under Sr. No. 485A of Notification No. 50/2017 is an industry wide issue and is a subject matter of litigation. Therefore, it is submitted that extended period of limitation under Section 28(4) of the Customs Act cannot be invoked.

WITHOUT PREJUDICE THE IMPUGNED GOODS ARE NOT LIABLE FOR CONFISCATION UNDER SECTION 111(M) OF THE CUSTOMS ACT

B.1 It is submitted that the SCN at para 9.4 alleges that the Noticee, by acts of omission and commission with an intention to evade the payment of

appropriate Customs duties, have rendered the impugned goods liable for confiscation under Section 111(m) of Customs Act.

B.2 Section 111(m) provides for the confiscation where the goods do not correspond in respect of value or in any other particular with the entry under the Customs Act. The relevant provision is extracted hereunder:

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

B.3 It is submitted that the term mis-declaration under Section 111(m) of the Customs Act would primarily include the following situations:

a) Misdeclaration in terms of value - This would include both undervaluation and overvaluation.

b) Misdeclaration in terms of other particulars - This would mean that the description and other details pertaining to the imported goods as provided in the bill of entry is different from that of the real description and details of the goods. This can be in terms of quantity, quality, nature etc. of the disputed goods.

B.4 On the basis of the aforementioned, it can be said that Section 111(m) of the Customs Act provides for confiscation of any goods, which do not correspond in respect of value or in any other particular with the entry made under the Customs Act. In terms of the provisions of Section 2(16) of the Customs Act, "entry" in relation to goods means an "entry" made in a bill of entry.

B.5 The Noticee submits that Section 111(m) of the Customs Act is not invokable in the present case for the reason that in the impugned BEs vide which the goods were imported, the Noticee has not mis-declared any material particulars in respect of the subject goods with the intent to evade duties.

B.6 The Noticee submits that since impugned goods correspond in respect of value, classification and other particulars entered in the BEs, the same is not liable for confiscation under Section 111(m) of the Customs Act.

The impugned goods are not liable for confiscation since dispute pertains to classification

B.7 The Noticee in its submissions above has clarified that the Noticee had classified the impugned goods under CTI 8501 5390 since it was of the bona fide view that the said goods were classifiable under the said CTI. Thus, there exists no mis-declaration on the part of the Noticee.

B.8 Also, there is a genuine dispute on the classification of the impugned goods, as is evident from the different classification practice adopted by various companies. In the case of ***Sandan Vikas (India) Ltd. vs. Commr. Of Cus. (ICD, TKD), New Delhi, 2017 (357) E.L.T. 893 (Tri.-Del.),*** the Hon'ble Tribunal, New Delhi had set aside confiscation, redemption fine and penalty imposed by the impugned order since the matter pertained to genuine dispute of classification of auto air-conditioner resistors.

Mis-classification does not amount to mis-declaration in order to invoke Section 111(m) of the Customs Act

B.9 It is submitted that Section 111(m) of the Customs Act cannot be invoked even if the allegation against the Noticee in respect of classification is held to be correct, as there is a clear distinction between misclassification and misdeclaration.

B.10 In the case of ***CC, Bangalore vs. A. Mahesh Raj, 2006 (195) E.L.T. 261,*** the Hon'ble Karnataka High Court highlighted the distinction between "mis-classification of goods" and "mis-declaration of goods", wherein an element of mischief was attributed to mis-declaration.

B.11 Reliance in this regard is placed on the judgment of ***M/s. Star Dimension India vs. Asstt. Commr. Of Customs, Nhava Sheva-II,*** **2021 (2) TMI 565 - CESTAT MUMBAI** ***and Rudra Vyaparchem Pvt. Ltd. vs. Commissioner of***

Cus. (Port), Kolkata, 2019 (370) E.L.T. 412 (Tri. – Kolkata) where the Hon'ble Tribunal while dealing with the classification of winches and LED bulbs of different sizes held that time and again it has been held by various authorities that mere misclassification of goods is not misdeclaration and for which the goods could not be held liable for confiscation under Section 111 (m) of the Customs Act.

B.12 Reliance is also placed on the decision in the case of ***Satron vs. Commissioner of Customs (Imports), JNCH, Nhava Sheva, 2020 (371) E.L.T. 565 (Tri. – Mumbai)***, wherein the Hon'ble Tribunal held that in absence of any evidence of misdeclaration of goods, the confiscation as a consequence of reclassification will not sustain.

B.13 It is also submitted that it is a settled law that classification of goods imported into India is a matter of interpretation, and in such a case, the subject goods cannot be confiscated in terms of Section 111(m) of the Customs Act just because the assessee has adopted a particular classification. Reliance in this regard is placed on the case of ***John Deere India Pvt. Ltd. vs. Commr. of Cus. (Preventive), Amritsar, 2018 (363) E.L.T. 509 (Tri.-Chan.)***.

B.14 Therefore, without prejudice to the above, it is submitted that Section 111(m) of the Customs Act cannot be invoked merely on the ground that the subject goods were allegedly misclassified by the Noticee.

Mere claim of benefit of Notification No.46/2011-Cus dated 01.06.2011 and Notification No.50/2017-Cus dated 30.06.2017 does not amount to misdeclaration under Section 111(m) of the Customs Act

B.15 It is submitted that the Noticee on the basis of bona fide belief claimed the exemption from Customs duties provided under the Notification No.46/2011-Cus dated 01.06.2011 and Notification No.50/2017-Cus dated 30.06.2017 during the relevant period. Hence, the Noticee deposited the differential duty along with applicable interest before the issuance of the SCN.

B.16 The Noticee submits that the mere claim of benefit of exemption on the basis of bona fide belief does not amount to the misdeclaration in Bills of Entry

and will not make the goods liable for confiscation under Section 111(m) of the Customs Act.

B.17 In the case of ***Aureole Inspecs India Pvt. Ltd. vs. Pr. Commr., Customs-New Delhi, Final Order No. 51024/2023 dated 09.08.2023***, the Hon'ble CESTAT, New Delhi decided the classification of imported "Snow Goggles" in favour of the appellant. It was held that the imported goods did not become liable to confiscation under Section 111(m)/ consequential penalty under Section 112 could not be imposed on the ground that the importer had classified the goods under a CTH different from the opinion of the officer on the basis of the following:

i. The importer was not an expert in taxation and could make mistakes and he could not be penalized for making mistakes.

ii. Classification was a matter of opinion and the importer's goods could not be confiscated nor could he be penalized for his opinion.

iii. Filing of Bill of Entry and the self-assessment preceded re-assessment by the proper officer, and it was impossible for the importer to anticipate under which heading the officer was likely to classify the goods and file the Bill of Entry accordingly.

B.18 There was no legal obligation on the importer to conform to the possible subsequent view of the officer. The law could not be read to obligate the importer to do the impossible task of predicting the views of the officer and following them

B.19 Reliance in this regard is placed on the decision of ***M/s. Samsung India Electronics Pvt. Ltd. Vs. Principal Commissioner of Customs, Air Cargo Complex (Import), New Delhi, 2023 (12) TMI 1155-CESTAT NEW DELHI,*** wherein the Hon'ble CESTAT, New Delhi held that if Section 111(m) was read to mean that goods could be confiscated if the classification of the goods and the exemption notifications claimed by the importer self-assessing the duty under Section 17 and indicated in the Bill of Entry did not match the classification of the goods or the exemption notifications which the proper officer may apply during re-assessment or later, it would result in absurd results. The importer could not predict the mind of the proper officer and self-assess duty so

as to conform to it. Even if the classification was not correct, it did not render the goods liable to confiscation under Section 111(m). Similarly, there could be cases where, according to the Revenue, the exemption notification claimed during self assessment would not be available to the imported goods. The importer self-assessing the goods must apply his mind when classifying the goods. Classification of the goods by the importer, even if it is not in conformity with the re-assessment by the proper officer or even if it is held to be not correct in any appellate proceedings does not render the goods liable to confiscation under Section 111(m). Consequently, no penalty can be imposed under Section 112 on the appellant for the alleged wrong classification. The appellant cannot be penalized for holding a different view than the proper officer. The department had filed an appeal against the order of the CESTAT which was dismissed by the Hon'ble Supreme Court in ***2024 (7) TMI 1220 - SC ORDER.***

B.20 Placing reliance on M/s. Samsung India Electronics Pvt. Ltd. (supra), the Hon'ble CESTAT, New Delhi in the case of ***M/s. Samsung India Electronics Pvt. Ltd. (supra)***, the Hon'ble CESTAT, New Delhi in the case of ***M/s. Oppo Mobiles India Pvt. Ltd. V and Ors. vs. Principal Commissioner of Customs, Final Order Nos. 50226-50232/2024 dated 09.02.2024***, *inter-alia*, it was held that classification of the goods in the Bill of Entry by the importer is essentially a part of the self-assessment under Section 17 which, even if found incorrect, does not attract confiscation of the goods under Section 111(m) or the consequential penalty under Section 112.

B.21 Reliance in this regard is placed on the decision of ***Northern Plastic Ltd. v. Collector of Customs & Central Excise, 1998 (101) E.L.T. 549 (S.C.),*** wherein the Hon'ble Supreme Court held that merely claiming the benefit of exemption / a particular classification under the bill of entry does not amount to misdeclaration of any other particular under Section 111(m) of the Customs Act.

B.22 Relying on the decision of the Apex court in Northern Plastic *(supra)*, the Bombay High Court in ***CC v. Gaurav Enterprises, 2006 (193) E.L.T. 532***

(Bom.) has held that claiming the benefit of exemption in the Bills of entry filed under the Act does not amount to suppression / mis-declaration on part of the assessee.

B.23 It is submitted that the Hon'ble Tribunal in the case of ***Lewek Altair (supra)*** has held that claiming an incorrect classification or the benefit of an ineligible exemption notification does not amount to making a false or incorrect statement because it is not an incorrect description of the goods or their value but only a claim made by the assessee. In the present case, the dispute with respect to the impugned goods relates claiming the benefit of an ineligible exemption notification. Therefore, the goods cannot be held liable for confiscation. The decision in Lewek Altair Shipping (Supra) has been affirmed by the Hon'ble Supreme Court in ***Commissioner v. Lewek Altair (S.C.) (supra).***

B.24 It is submitted that it is evident from the above that mere claiming benefit of exemption provided in a notification on the basis of bona fide belief while every other factual aspect has been declared appropriately does not amount to the mis-declaration which render the impugned goods liable for confiscation under Section 111(m) of the Customs Act.

B.25 In view of the above submissions, it is submitted that the Noticee had given the description of the impugned goods correctly and the same has not been disputed in the SCN. No attempt has been made by the Noticee to mis-declare the goods. Hence, the impugned goods cannot be held liable for confiscation under Section 111(m) of the Customs Act. Therefore, the proposal to confiscate the impugned goods under the SCN deserve to be dropped.

Section 111 of the Customs Act is not invokable for goods already cleared.

B.26 Without prejudice to the above, it is respectfully submitted that Section 111 of the Customs Act provides for liability for confiscation of the improperly imported goods. It is therefore submitted that only imported goods can be confiscated under Section 111. Section 2(25) defines the imported goods as under:

"imported goods means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption"

B.27 The Noticee submits that the impugned goods have been cleared for home consumption by the Noticee.

B.28 In the case of ***Bussa Overseas & Properties P. Ltd. v. C.L. Mahar, Assistant Commissioner of Customs, Bombay, 2004 (163) E.L.T. 304 (Bom.)***, the Hon'ble High Court of Bombay has held that once the goods are cleared for home consumption, they cease to be imported goods as defined in Section 2(25) of the Customs Act, 1962 and consequently are not liable to confiscation under Section 111 of the Customs Act, 1962. The decision of the Hon'ble High Court has been maintained by the Apex Court in Assistant Commissioner of Customs, ***Bombay v. Bussa Overseas and Properties Pvt. Ltd., 2004 (163) E.L.T. A160 (S.C.)***.

B.29 Reliance in this regard is also placed on the case of ***Knowledge Infrastructure Systems Pvt. Ltd.. & Ors. vs. Additional Director General, DRI, Mumbai, 2018 (6) TMI 1164 – CESTAT MUMBAI***, wherein it was held that in the absence of goods that are yet to be cleared for home consumption, there was no scope for invoking jurisdiction to hold the goods liable for confiscation. This case had been affirmed by the Hon'ble High Court of Bombay in the case of ***Additional Director General, DRI, Mumbai vs. Knowledge Infrastructure Systems Pvt. Ltd. & Ors., 2019 (6) TMI 1164 – BOMBAY HIGH COURT***.

B.30 The Hon'ble Tribunal in the case of ***Southern Enterprises vs. Commissioner of Customs, 2005 (186) E.L.T 324 (Tri.-Bang.)***, held that imported goods, already been cleared for home consumption, could not be confiscated as they cease to be in the nature of imported goods. Relevant portion of the aforesaid judgment has been reproduced below:

"6. ....Furthermore, Revenue cannot confiscate the goods which have already been cleared for home consumption as they ceased to be imported goods as defined in Section 2 of the Customs Act and as held

by the Bombay High Court in the case of Bussa Overseas & Properties P. Ltd. (cited supra). *The same view has been expressed by the Tribunal in the case of Kishandas & Sons; Sources India Impex P. Ltd. and in the case of Leela Dhar Maheswari vs. CCE."*

(Emphasis Supplied)

B.31 Further, reliance is placed on the judgment of the Hon'ble Tribunal in the case of ***Shiv Kripalspat Pvt. Ltd. vs. Commissioner of Central Excise and Customs, Nasik, 2009 (235) E.L.T 623 (Tri. – LB) [Affirmed in 2015 (318) E.L.T A259 (Bombay High Court)]***, wherein, it was held that when the goods are not available for confiscation, no confiscation can be made under Section 111 of the Customs Act.

B.32 In light of the aforesaid judgments, it is submitted that in the present case since the impugned goods imported vide impugned BEs have been cleared for home consumption, they have lost the character of being "imported goods" under the Customs Act and therefore, cannot be held liable for confiscation under Section 111 of the Customs Act.

The proposal for confiscation of the impugned goods is not sustainable as the Noticee acted in a bona fide manner

B.33 It is submitted that the Noticee has always acted in a *bona fide* manner and to show the same it deposited the differential duty demanded along with applicable interest prior to the issuance of the SCN.

B.34 It has been held in a catena of cases that there is no reason to confiscate goods where an importer acts in a *bona fide* manner. Reliance in this regard is placed on ***P. Ripakumar and Company vs. Union of India,1991 (54) E.L.T 67***, wherein demand of confiscation and redemption fine in lieu thereof was set aside on the ground that the importer had acted in a *bona fide* manner.

B.35 Reliance is also placed on the case of ***Porcelain Crafts and Components Exim Ltd. vs. Commissioner of Customs, Calcutta, 2001 (138) E.L.T 471***, wherein it was observed that confiscation of the goods could be ordered only when there was positive evidence to prove *mala fide* on the part of the importer

Therefore, it was held that the order of confiscation and redemption fine in lieu thereof could not sustain.

B.36 It is submitted that the Noticee classified the impugned goods under CTI 8501 5390 claimed benefit of BCD exemption under Notification No.46/2011-Cus dated 01.06.2011 and Notification No.50/2017-Cus dated 30.06.2017 for the impugned BEs as per its *bona fide* belief that the impugned goods are eligible for such benefit. In the present case, there is no intentional or deliberate wrong declaration or mis-declaration of any violation of condition on the part of the Noticee to attract mischief of Section 111(m) of the Customs Act. It is therefore respectfully submitted that the proposal for confiscation of the goods under Section 111 (m) of the Customs Act is not sustainable in law.

PENALTY IS NOT IMPOSABLE ON THE NOTICEE

C.1 The SCN contains proposal for imposing penalty on the Noticee under Section 112(a) and 114A of the Customs Act for various acts of commission and omission. In this regard, the Noticee submits the following:

Penalty cannot be imposed on the Noticee as there was no intention to evade duty

C.2 Without prejudice to the above submissions, it is submitted that in terms of various judgments of the Hon'ble Supreme Court, various High Courts and Tribunals, penalty cannot be imposed on the Noticee in the absence of *mens rea* on part of the Noticee.

C.3 The Hon'ble Supreme Court in the landmark case of ***Hindustan Steel Ltd. vs. State of Orissa, 1978 (2) E.L.T (J159)*** has held that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the *bona-fide* belief that the offender is not liable to act in the manner prescribed by the statute. Relevant portions of the judgment are reproduced below:

> ***"7****....An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding,* ***and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in***

conscious disregard of its obligation. *Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute....."*

C.4 It is submitted that the decision of the Hon'ble Supreme Court in ***Hindustan Steel Ltd. (supra)***, is apposite. The Hon'ble Supreme Court has held that penalty will not ordinarily be imposed unless the Appellant either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of his obligations. This decision was followed by the Apex Court under the Customs law in the case of ***Akbar Badruddin Jiwani vs. Collector of Customs, 1990 (47) E.L.T 161*** wherein the Hon'ble Supreme Court has specifically held that penalty is not imposable in the absence of *mens rea.*

C.5 In the case of ***West Coast Paper Mills Ltd. vs. Commissioner of Customs, Chennai, 2001 (130) E.L.T. 259 (Tri.-Chennai),*** the Hon'ble Tribunal, Chennai held that confiscation of goods under Section 111(m) of Customs Act or penalty under Section 112(a) were not sustainable especially when bona fides of importer were not in doubt.

C.6 The Noticee submits that the element of *mens rea* is absent in the present case. The Noticee submit that it deposited the differential Customs duties as applicable for the imports prior to the issuance of the SCN as provided under Section 28(1)(b) of the Customs Act.

C.7 In view of the settled position of law and considering the fact that there is complete absence of *mens rea* in the present case, it is submitted that the penalty proposed in the SCN is not sustainable and needs to be dropped.

Penalty cannot be imposed in cases involving interpretation of legal provisions.

C.8 It is submitted that the present case is relating to interpretation of legal provisions. The classification and consequential availment of exemption notifications is essentially an issue relating to interpretation wherein different

views may exist, even if it is held that the Noticee has wrongfully availed the benefit of Notification No.46/2011-Cus dated 01.06.2011 and Notification No.50/2017-Cus dated 30.06.2017 for, penalty cannot be imposed on the Noticee.

C.9 The Noticee further submits that since the issue involves bona fide interpretation of the provisions, penalty is not imposable as consistently held in a number of judgments. Reliance in this regard is placed on the decision in ***Vadilal Industries Ltd. vs. Commissioner Of C. Ex., Ahmedabad 2007 (213) E.L.T. 157 (Tri. - Ahmd.)***, wherein the Hon'ble Tribunal has held as follows:

> *"10. However, the learned Advocate submits the following alternative pleas that the price realised by them, should have been treated as cum-duty price and no penalty should have been imposed as this is a case of difference in interpretation. There is no issue of limitation involved as the show cause notices were issued within the normal period of limitation.*
> *11. There are merits in these alternative pleas of the ld. Advocate. We hold that on merits the appeal is to be rejected. However, there is no warrant for imposition of penalty and accordingly penalty is set aside. Further, the price charged by them should be treated as cum-duty price. Accordingly, the matter is remanded for the limited purpose of quantifying the duty taking the price charged by them as cum-duty price."*

C.10 In the present case, it is submitted that classification is essentially an issue relating to interpretation of law wherein different views may exist. Since the entire dispute in the present case has arisen out of difference in interpretation of entries of the Customs Schedule vis-à-vis the impugned goods, no penalty is liable to be imposed. For this purpose, reliance is being placed on the decision of Hon'ble Tribunal at Ahmedabad in ***Gujarat Borosil Ltd. vs. Commr. Of C. Ex. & S.T., Surat-II, 2018 (364) E.L.T. 281 (Tri. - Ahmd.)*** (subsequently maintained by Hon'ble Supreme Court in ***2019 (368) E.L.T A337 (SC)***. Therefore, penalty is not imposable considering the facts of the present case.

Penalty cannot be imposed under Section 112(a) of the Customs Act

C.11 The Noticee submits that the SCN at para 9.4 proposes to impose penalty under Section 112(a) of the Customs Act for alleged improper importation which allegedly render the impugned goods liable for confiscation under Section 111 of the Customs Act.

C.12 Section 112(a) of the Customs Act during the relevant period is extracted herein for ease of reference:

> ***"SECTION 112 - Penalty for improper importation of goods, etc. –*** *Any person, -*
>
> *(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or*
>
> *shall be liable, -*
>
> *(i).....*
>
> *(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, 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;*

C.13 Clause (a) of Section 112 has two limbs – the first being improper importation of goods by any person 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"; and the second limb starts with "or abets the doing or omission or such an act." For imposition of penalty under Section 112(a), a positive act or omission is to be established. For imposition of penalty, mala fide act/ omission is one of the requirements:

Penalty cannot be imposed under Section 112(a) unless the goods are liable for confiscation under Section 111 of the Customs Act

C.14 In the light of the preceding grounds, it is clearly noted that the provisions of Section 112(a) of the Customs Act can be invoked, inter-alia, against a person who, in relation to the goods, does or omits to do any act, which act, or omission renders the goods liable to confiscation under Section 111 of the Customs Act.

C.15 Since the Noticee in its submissions related to confiscation above has clarified that there was no mis-declaration of goods, consequentially, in light of ***Sirthai Supreware India Ltd.. v. Commr of Customs, Nhava Sheva-III,2020 (371) ELT 324 (Tri Mumbai)*** and ***Lotus Beauty Care Products Pvt Ltd v.***

Commissioner of Customs (import),2020-TIOL-1664-CESTAT-MUM, the proposal to impose penalty under 112(a) on the Noticee is not sustainable in law.

C.16 Reliance is placed in this regard on the cases ***of P & B Pharmaceuticals (P) Ltd. vs. Collector of Central Excise 2003 (153) E.L.T. 14 (SC)*** and ***Lewek Altair Shipping Pvt. Ltd. (supra)*** wherein the Hon'ble Court/Tribunal have held that in the absence of any liability for confiscation, penalty shall not be imposed on the assessee. Similarly, the Hon'ble Tribunals/Courts have held in the following caselaws, that to impose penalty under Section 112, the liability to confiscate the goods under Section 111 has to be established:

- ***Commr. Of Cus. (ACC & Import), Mumbai vs. Reliance Communications Ltd., 2014 (301) E.L.T. 571 (Tri.-Mumbai);***
- ***Lark Chemicals Pvt. Ltd. Vs. Commr. Of Cus., CSI Airport, Mumbai, 2014 (301) E.L.T. 138 (Tri.-Mumbai);***
- ***Lark Chemicals Pvt. Ltd. Vs. Commr. Of Cus., CSI Airport, Mumbai, 2017 (49) S.T.R. 99 (Tri.-Mumbai);***
- **Sona Casting vs. Commr. of Customs, Amritsar, 2006 (205) E.L.T 249 (Tri.-Del.); and**
- **Eastern Silk Industries vs. Commr. of Customs (Port), 2007 (207) E.L.T 714 (Tri.- Kol)**

C.17 It is to be noted that for the imposition of penalty under Section 112 of the Customs Act, a deliberate attempt must be made to mis-declare the nature of the goods. However, in the present case, no such attempt was made to mis-declare the impugned goods. Therefore, in the absence of a deliberate attempt to mis-declare the impugned goods in the BEs, the same would not amount to mis-declaration. Therefore, the charge of mis-declaration of the goods is not sustainable against the Noticee. Consequently, the penalty cannot be imposed on the imported and the SCN alleging wilful misstatement is erroneous and is therefore liable to be set aside. Reliance is placed on the decision of ***S.S. Enterprises Prabhudayal Agarwal, Consultant, Ankit Agarwal vs. CC, Hyderabad-II, 2018 (12) TMI 1196 - CESTAT HYD.***

C.18 In this regard, as already submitted in the foregoing ground, the Noticee humbly submits that the impugned goods are not liable for confiscation under Section 111(m) of Customs Act. Accordingly, the penalty under Section 112(a) of Customs Act is not imposable.

Penalty cannot be imposed on the ground that the Noticee has abetted in the wrongful act

C.19 The second limb of Section 112(a) of the Customs Act covers the abetment of commission/omission of any act which would render the goods liable to confiscation under Section 111 of the Customs Act. In the instant case, the Noticee did not abet the commission or omission of any act, which had rendered the imported raw wine liable for confiscation. As the words "abet" or "abetment" are not defined in the Customs Act, it is pertinent to refer to the General Clauses Act, 1897. Section 3(1) of the General Clauses Act, 1897 defines "Abet" as under:

> *"Abet" with its grammatical variations and cognate expressions, shall have the same meaning as in the Indian Penal Code (45 of 1860)"*

C.20 The relevant portion of Section 107 of the Indian Penal Code, 1860 defines "abetment" as under:

> ***"107. Abetment of a thing –***
> *"A person abets the doing of a thing, who—*
> *Firstly.-Instigates any person to do that thing; or*
> *Secondly.-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
> *Thirdly.-Intentionally aids, by any act or illegal omission, the doing of that thing.*
> ***Explanation 1 – A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to dis-close, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."***
>
> ***(Emphasis Supplied)***

C.21 Moreover, the Hon'ble Courts have in various cases enlisted the basic ingredients which must be present for an act to constitute "abetment". The main ingredients are as under:

a. There must be a *mala fide* intention on the part of the accused to provoke, incite or encourage the doing of an offence;

b. There must be a positive act on part of the accused;

c. A person should facilitate the commission of that act;

d. Mere negligence is not sufficient to constitute abetment;

e. Mere lack of care and diligence is not sufficient to constitute abetment; and

f. The accused must be proved to have derived a pecuniary benefit from the act.

C.22 In the judicial precedents, it has also been held that the presence of *mens rea* is an essential prerequisite for establishing abetment and for imposition of penalty under Section 112(a). In this regard Hon'ble Tribunal in the case of ***Harbhajan Kaur v. Collector of Customs, 1991 (56) E.L.T. 273 (Tribunal)***, observed the following:

> ***"3.*** *[...] Similarly "A mere giving of an aid will not make the act an abetment of an offence, if the person who gives the aid did not know that an offence was being committed or contemplated";* ***for it is the act of intentional aiding and therefore active complicity which is the gist of the offence of abetment made punishable by law****[...]"*
>
> ***(Emphasis Supplied)***

C.23 As already submitted, the conduct of the Noticee was bona fide and to show the same it deposited the differential duty demanded along with applicable interest prior to the issuance of the SCN. Therefore, it cannot be said that Noticee in any manner, abetted the doing or omission of an act, which act, or omission rendered the goods liable for confiscation.

C.24 Similarly, in the case of ***Commissioner of Customs (EP) v. P.D. Manjrekar, 2009 (244) E.L.T. 51 (Bom.)***, the Hon'ble Bombay High Court held that in case of abetment, Revenue must prove knowledge on the part of the assessee. No such proof has been furnished by the Ld. Commissioner (Appeals) in the present case.

C.25 Therefore, in the light of the foregoing, it is most humbly submitted that the penalty cannot be imposed against the Noticee in the absence of *mens rea.*

Penalty cannot be imposed under Section 112(a) in the absence of mens rea / mala fide intention

C.26 It is submitted that in order to impose penalty under Section 112(a) of the Customs Act, it must also be shown that the Noticee has acted with knowledge and *mala fide* intention.

C.27 Furthermore, it is submitted that *mens rea* or *mala fide* intention is a necessary requirement for imposition of penalty under Section 112, vide the decision in ***Sij Electronics Comp Tech Vs. CC – 2001 (129) ELT 528 (T).***

C.28 In view of the submissions made in the preceding paragraphs, it is submitted that there is no mens rea on the part of the Noticee, and hence penalty is not imposable under Section 112(a) of the Customs Act, 1962. Further, since the goods itself are not liable for confiscation under Section 111(m), therefore no penalty under Section 112 can be imposed upon the Noticee.

C.29 As stated above, it is submitted that the conduct of the Noticee was totally bonafide and in the absence of any mala fide, no penalty is imposable.

C.30 In the case of ***Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax – 1980 (6) ELT 295 (SC)***, the Hon'ble Supreme Court held that penalty cannot be imposed when the assessee raises a contention of bonafide belief.

C.31 Further reliance is placed on the decision in the case of ***V. Lakshmipathy vs. Commissioner of Customs, Cochin 2003 (153) E.L.T. 640 (Tri. -Bang.)*** wherein it has been held that imposition of penalty under section 112(a) presupposes existence of mens rea.

C.32 It is submitted that no false declaration / document was either made by the Noticee before the Central Excise and Customs authorities nor did the Noticee derive any personal benefit / advantage from the declarations / documents filed. The conduct of the Noticee was totally bonafide and therefore, no penalty under Section 112 is imposable on them.

C.33 In light of the above, it is submitted that penalty under Section 112(a) cannot be imposed on the Noticee in the absence of any mala fides on its part

Penalty under section 114A is not imposable when there is no short levy or non levy of duties of customs for the reason of collusion, willful misstatement, and suppression of facts.

C.34 It is submitted that, as per Section 114A of the Customs Act, where the Customs 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 misstatement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 of Customs Act should also be liable to pay a penalty equal to the duty or interest so determined. The relevant extract of Section 114A of the Customs Act is extracted below:

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

C.35 It is submitted that the ingredients of Section 28(4) (for invocation of extended period of limitation) and Section 114A are identical. Therefore, the Noticee refers to and relies upon the detailed submissions in Para A above with regard to the proposal for imposition of penalty under Section 28(4) to avoid repetition. It is submitted that in order to impose penalty under Section 114A of the Customs Act, there should be non-levy or short-levy of duty, or the interest has not been charged or paid or has been part paid, or the duty or interest has been erroneously refunded, and such short payment or non-payment or erroneous refund should be by the reason of collusion or any misstatement or suppression of facts.

C.36 It is submitted that, as demonstrated in the previous grounds, mere claiming of benefit of exemption notification on the basis of bona fide belief would not amount to misstatement or mis-declaration and thus, no penalty under Section 114A of the Customs Act is impossible.

C.37 The Noticee submits that in the case of ***Commissioner of Cus. (AIR), Chennai v. A.P.Pinherio reported at 2014 (306) ELT 349 (Mad)*** the Hon'ble High Court of Madras has held that for imposition of penalty under Section 114A of the Customs Act there should be clear finding that the importer had colluded or made a wilful misstatement or suppressed the facts and in absence of such clear finding no penalty under Section 114A of the Customs Act can be imposed.

C.38 It is submitted that the Courts and Tribunals in plethora of cases held that mere claiming of benefit of exemption notification declared in the Bill of Entry cannot be mis-declaration with the intention to evade payment of duty.

C.39 It is thus reiterated that mere claiming of benefit of exemption notification on the basis of *bonafide* belief while every other factual aspect has been declared appropriately does not amount to the willful misstatement or mis-declaration or suppression of facts, and thus no demand of Customs duty under Section 28(4) of Customs Act can be made against the Noticee and hence no penalty under Section 114A is imposable.

C.40 It is further submitted that legal requirements to invoke Section 114A for imposing penalty are the same as extended period of limitation under Section 28 of the Customs Act. In essence, if the extended period of limitation under Section 28 is held not to be invokable, penalty under Section 114A of the Customs Act is also not liable to be imposed.

C.41 In this regard, reliance is placed on the case of ***CC vs. Videomax Electronics, 2011 (264) E.L.T 0466 (Tri.-Bom.) [Maintained in 2011 (270) E.L.T A90 (Supreme Court)]*** and ***Wind World (I) Ltd. Vs. Commissioner of Cus., (I) Nhava Sheva, 2016 (340) E.L.T. 540 (Tri.-Mumbai.)***.

C.42 For the sake of brevity and in order to avoid unnecessary repetition, we request that the submissions made with regard to the invocation of extended period above (in Ground A), shall be considered as part of the submissions relating to the imposition of penalty as well. As mentioned in those submissions, there has been no *mala fide* intent on the part of the Noticee. For this reason alone, the penalty under Section 114A is not sustainable.

C.43 The above ratio has also been pronounced in the case of ***Union of India Vs. Rajasthan Spinning & Weaving Mills, 2009, (238) E.L.T. 3 (S.C.)*** in the context of Sections 11A and 11AC of the Central Excise Act, 1944 (which are *pari materia* to Sections 28 and 114A of Customs Act). The Hon'ble Supreme Court in this case observed the following:

> **"18.** *[...]* ***It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act.***
>
> ***19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee*** *with the intent to evade duty by adopting any of the means mentioned in the section."*
>
> ***(Emphasis Supplied)***

C.44 As has been demonstrated above, in the absence of any willful mis-statement or suppression of facts on the part of Noticee, provisions of Section 28(4) of the Customs Act are not invokable.

C.45 In the case of ***D & M Building Product Pvt. Ltd. vs. Commr. Of Customs, Bangalore, 2019 (370) E.L.T. 1183 (Tri.-Bang.),*** the Hon'ble Tribunal, Bangalore held that the issue related to interpretation of the headings of the Customs Tariff and ingredients for invoking extended period of limitation under Section 28 and for imposition of mandatory penalty under Section 114A of Customs Act, 1962 are identical. Since extended period cannot be invoked in the present case, penalty under Section 114A also cannot be imposed.

Without prejudice, penalty cannot be imposed simultaneously under both Section 112 and Section 114A of Customs Act

C.46 Without prejudice to the above submissions and without admitting that penalty can be imposed on the Noticee under Sections 112 and 114A of the Customs Act, it is submitted that penalty under Sections 112 and 114A of Customs Act cannot be imposed simultaneously. In this regard, the Noticee places reliance on the fifth proviso to Section 114A which reads as under:

> ***"114A. Penalty for short-levy or non-levy of duty in certain cases***
>
> *[...]*
>
> *Provided also that where* ***any penalty has been levied under this section, no penalty shall be levied under Section 112 or Section 114.***"
>
> ***(Emphasis Supplied)***

C.47 In this regard, reliance is placed on ***Shri Bhuvanesh Engineering Works vs. The Commissioner of Customs, 2018 (5) TMI 1680 - CESTAT BANGALORE*** wherein the Hon'ble CESTAT observed as follows:

> ***"6.*** *[...] Further, I find that as* ***per the proviso to Section 114A of the Act, the lower appellate authority ought to have set aside the imposition of penalty under Section 112(a) of the Customs Act but instead of doing that the appellate authority has set aside the penalty under Section 114A of the Customs Act and has wrongly sustained the penalty imposed under Section 112(a) of the Customs Act. Therefore, I hold that imposition of penalty on the appellant under Section 112(a) is set aside and penalty under Section 114A is sustained and upheld****.*
>
> *7. In the result, the appeal is partly allowed and the redemption fine is sustained and the penalty under Section 114A of the Customs Act is upheld or sustained. Penalty under Section 112(a) is set aside. Appeal is accordingly disposed of."*
>
> ***(Emphasis Supplied)***

C.48 In ***Videomax Electronics (supra),*** the Hon'ble Tribunal clarified that no penalty was imposable under Section 112 of the Customs Act as the same was barred by fifth proviso to Section 114A of the Customs Act.

C.49 In the case of ***Associate Marketing Services vs. Commr. Of Cus. (Airport), Chennai, 2006 (195) E.L.T. 287 (Tri.-Chennai) [Approved in 2009 (235) E.L.T 623 (Tribunal Larger Bench)],*** the Hon'ble Tribunal held that as per one of the provisos to Section 114A, any penalty could not be levied under this provision, where a penalty has been levied under Section 112 or under Section 114 of the Customs Act.

C.50 Therefore, it is submitted that the proposal to impose penalty under Section 114A of the Customs Act should also be dropped.

1. It is therefore submitted that there is no legal basis for imposition of penalty and/or invocation of extended period of limitation.

2. Hence, the SCN is incorrect in imposing penalty on the Noticee. Therefore, the SCN is erroneous and is liable to be quashed.

In view of the above submissions, the Noticee prays that the Ld. Commissioner of Customs may be pleased to:-

(a) Quash the impugned Show Cause Notice bearing Reference Number F.No.GEN/ADJ/COMM/391/2023-Adjn, DIN:20231171MO000032373D dated 17.11.2023;

(b) Set aside the confiscation the impugned goods under Section 111(m) of the Customs Act;

(c) Set aside the imposition of penalty under Section 114A and Section 112(a)(ii) of the Customs Act; and

(d) Pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case.

17. PERSONAL HEARING

Audi alteram partem', is an important principal of natural justice that dictates to hear the other side before passing any order, Therefore, Importer was given first personal hearing on 09.09.2024 wherein they requested for adjournment vide letter dated 09.09.2024. Hence, second opportunity for personal hearing was granted to importer on 27.09.2024, however Importer again sought adjournment. Accordingly, a final opportunity for personal hearing was given to importer on 15.10.2024 in which authorized representatives of Importer appeared before me. In the proceedings of personal hearing Importer stated that:

"Their firm is a trader company and they have imported electric motor assembly at Mundra Port under HSN Code 85015390 based on technical write up & hsn code mentioned on FTA certificate from supplier and hence availed notification 46/2011 (FTA benefit). Based on query from customs on classification, they re-checked about the output voltage of motor and re-classified the goods under HSN Code 85013119. After that re-assessment for Bills of Entry pertaining to the period Dec 20- March 21 was allowed by the customs and they paid differential duty along with interest.

Based on end use application confirmation from customer, that the goods are used in automobile, they surrendered the benefit of notification No. 50/2017 Sr No. 485A and paid the differential duty for the period from April 21- Jan 23 through TR 6 Challan.

Further, they stated that there is no intentional claim of duty benefit to reduce the basic duty and claim of FTA benefit. Their ulterior motive was not to

evade customs duty, mis-declaration of CTH, wrong availment of exemption notification benefit or suppression of facts.

They pleaded that the penalty should not be imposed on 114A of the Customs Act, 1962. They have voluntarily paid the customs duty of Rs 5.90 Cr at Mundra Customs House prior to issuance of SCN dated 17.11.23 by your office. It is purely an interpretational issue of HSN code based on product technical details. They stated that they are also submitting the written submission today. They pleaded for favourable order as they have already voluntarily deposited the differential duty."

18. DISCUSSION AND FINDINGS:

18.1. I have carefully gone through impugned **Show Cause Notices** SCN No. GEN/ADJ/COMM/391/2023-Adjn-O/o Pr. Commr- Cus-Mundra dated 17.11.2023 issued by the Pr. Commissioner of Customs, Custom House, Mundra, relied upon documents, legal provisions and the records available before me. The main issues involved in the case which are to be decided in the present adjudication are as below whether:

i) the imported goods (electric motors) is classifiable under CTH 85013119 as against the CTH 85015390 declared in the Bills of entry during the period from 04.12.2020 to 07.01.2023;

ii) the benefit of duty exemption claimed by them under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) is deniable to the goods imported between the period 04.12.2020 to 01.07.2021.

iii) the exemption under Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 as amended is deniable with respect to the goods importer during the period from 01.04.2021 to 07.01.2023;

iv) Imported goods, i.e. electric motors valued at **Rs.48,79,67,210/-** during the period 04.12.2020 to 07.01.2023 are liable to be confiscated under Section 111 (m) of the Customs Act, 1962

v) Differential duty of **Rs.5,24,24,076/- (BCD+SWC+IGST)** ***(Rupees Five Crore Twenty Four Lakhs Twenty Four Thousand Seventy Six only)*** for the period from **04.12.2020 to 07.01.2023** is recoverable from them under Section 28 (4) of the Customs Act, 1962 wih applicable interest under Section 28AA of the Customs Act, 1962.

vi) Deposited amount **Rs.5,23,85,529/- (BCD+SWC+IGST) and interest Rs 67,12,207/-** during the investigation and **Rs 38,547/(for duty) +Rs 16,332 (for interest)** on 25.10.2024 by M/s Toyota Tsusho India Pvt Ltd is liable to be appropriated against the said demand.

vii) Penalty is imposable upon them under the provisions of Section 112 (a)(ii) and 114A of the Customs Act, 1962.

18.2. I observe that Personal Hearing in case of Show Cause Notices GEN/ADJ/COMM/85/2023-Adjn-O/o Pr. Commr- Cus-Mundra dated 08.05.2023; was scheduled on three occasions i.e. 09.09.2024, 27.09.2024 and

15.10.2024 in order to provide natural justice to all the notices. On two occasions i.e. 09.09.2024 and 27.09.2024 Importer sought adjournment, however Importer appeared before me on 15.10.2024 and stated:

"Their firm is a trader company and they have imported electric motor assembly at Mundra Port under HSN Code 85015390 based on technical write up & hsn code mentioned on FTA certificate from supplier and hence availed notification 46/2011 (FTA benefit). Based on query from customs on classification, they re-checked about the output voltage of motor and re-classified the goods under HSN Code 85013119. After that re-assessment for Bills of Entry pertaining to the period Dec 20- March 21 was allowed by the customs and they paid differential duty along with interest.

Based on end use application confirmation from customer, that the goods are used in automobile, they surrendered the benefit of notification No. 50/2017 Sr No. 485A and paid the differential duty for the period from April 21- Jan 23 through TR 6 Challan.

Further, they stated that there is no intentional claim of duty benefit to reduce the basic duty and claim of FTA benefit. Their ulterior motive was not to evade customs duty, mis-declaration of CTH, wrong availment of exemption notification benefit or suppression of facts.

They pleaded that the penalty should not be imposed on 114A of the Customs Act, 1962. They have voluntarily paid the customs duty of Rs 5.90 Cr at Mundra Customs House prior to issuance of SCN dated 17.11.23 by your office. It is purely an interpretational issue of HSN code based on product technical details. They stated that they are also submitting the written submission today. They pleaded for favourable order as they have already voluntarily deposited the differential duty."

18.3 Before discussing the main issues to be decided in the case as elaborated in para 18.1, I proceed to examine the written submission of the Noticee in detail which is mandatory for determining the case:

In para A1-A3, Noticee has elaborated section 28(4) of the Customs Act, 1962. **In the para A.4** Noticee submitted that it provided the appropriate description and other details of the impugned goods in all BE's as available in the import document. They further stated that the Noticee did not suppress or misstate any factual position in any of the import documents including the BEs. However, on going through the facts of the case, it is apparently clear that noticee has not declared the output power of the motor through which the classification was to be decided. Once Custom department sought the clarification then only the importer came up with fact that the motor has output power in the range of 154 watts to 182 watts. I find that the classification was also not based on complex interpretation of facts, it was just to be decided on the basis of output power. The noticee here suppressed the material facts in the case.

ii. **In para A5**, noticee has submitted that onus is on department to prove that the noticee has wilfully mis-declared or supressed facts with intent to evade duty. In the impugned SCN, the department has not provided for any proof that the Noticee has acted with any malafide intent. There is no record to show the existence of fraud, collusion or suppression of material facts or information.

I find that in the para 9 of the Show Cause Notice it has been alleged that after introduction of self-assessment vide Finance Act, 2011, the onus lies on the importer for making true and correct declaration with respect to all aspects of the Bill of Entry and to pay the correct amount of duty. In the instant case, the said importer being an 'ACCREDITED CLIENT' and therefore, Assessment and Examination were not prescribed for their Bills of entry and therefore, entire onus is on the said importer to make truthful declarations and assess and pay their Govt. correctly.

The said importer had wrongly assessed the goods under CTH 85015390 as stated above in point 1 and wrongly availed benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin-based exemption) and paid only the IGST @18% during the period from **Dec.2020 to July 2021**. Therefore, it amounts to willful mis-statement on the part of importer leading to evasion of duty. They were very well aware that their product merits classification under CTH- 85013119 due to its technical specification. Despite these facts, they continued classifying their product under wrong CTH just to avail the inadmissible duty exemption benefit. Had the customs department not initiated inquiry against them, said fact would have not come to the notice. Even after correction of the HSN on their own violation w.e.f. July, 2021 onwards, though, they stopped availing benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011, they started availing another ineligible benefit of reduced rate of BCD, i.e. @10% in terms of Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 . However, it appears that the importer has failed to appreciate that the said Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 was further amended vide Notification No. 21/2021-Customs dated 31.03.2021 (w.e.f.01.04.2021) which excluded the goods suitable for use in motor vehicles for the purpose of concessional duty @10%. It further appears that, to establish their wrongful claim of benefit of reduced rate of BCD, the importer has attempted to mislead the investigation in as much as vide their letter dated 29.06.2022 they have stated that the imported item is used in HVAC System and they as a trader, sell the item to the manufacturer of HVAC system and it is upto the manufacturer to decide where to use the manufactured product and that the item will be used for manufacturing of HVAC system and requested to allow the benefit of notification whereas vide their letter dated 04.01.2022, they had stated that the said imported goods are meant for use in HVAC which is used in motor vehicles to blow the air through vents of a motor vehicles and the sole function of the product is to rotate the fan in order to circulate air through cabin of motor vehicle. Further, in their statement recorded on 17.05.2023, they showed tried to be evasive but **finally admitted that no benefit of said Sr.No.485 A is available to them**. From above facts, it is apparently clear that by suppressing the material fact that the output power of motor is in range of 154 watt to 182 watt, importer had wrongly assessed the goods under CTH 85015390 and wrongly availed benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin-based exemption) and paid only the IGST @18% during the period from **Dec.2020 to July 2021**. Therefore,

it amounts to willful mis-statement and suppression of material facts on the part of importer leading to evasion of duty. There was no complex interpretation of classification, it was just to decided on the output power of the motor. Further after accepting classification, they wrongly intended to take the benefit of Sr no 485A of Notification 50/2017 dated 30.06.17 by suppressing the facts that goods are to be used in motor vehicles.

The Noticees has relied on the following cases for justification of the above points.

Shahnaz Ayurvedic v CCE-2004 (173) ELT337 (ALL), affirmed in 2004 (174)ELT A34 (SC)

Ongoing through the judgement, it was found that there was nothing on record to show the existence of any kind of fraud, collusion or suppression of material fact:

The main paras of the judgement is quoted as below:

While dismissing the writ petition SC mentioned that:

"The Allahabad High Court in its impugned order had held that when there is nothing on record to show the existence of any kind of fraud, collusion or suppression of material fact with respect to classification, the extended period of limitation would not be invoked and demand would be barred by limitation. It was also held that burden to prove that a particular product falls within a particular chapter of Central Excise Tariff lies upon the Revenue and not upon assessee. Further, once classification list is approved by Revenue earlier and there is no concealment of fact, assessee should not suffer for fault of Revenue."

From above, it can be seen that facts of the case is not same in this case, there is on record, wilful misstatement, suppression of the facts and intent of evading customs duty, hence reliance cannot be placed on the above case.

Devans modern breweries ltd vs CCE-2006(202) ELT 744 (SC)

The main paras of the judgement are reiterated below

"Having gone through the show cause notices, we do not find that assessee was put to notice as to which of the various commissions or omissions stated in the proviso to Section 11A(1) of the Act had been committed by it and only general show cause notices were issued.

In view of the foregoing reasons, we accept these appeals on the points of limitation and penalty; set aside the order of the Tribunal and remand the case back to the Tribunal to decide these points afresh in accordance with law without being influenced by any of the observations made herein. It is made clear that no fresh evidence shall be taken into consideration by the Tribunal for deciding these issues."

Hence, I observe that in the above case, there were no omissions/ commissions explicitly mentioned in the show cause notice. But in the current case, the offences are explicitly mentioned, hence the case law appears not applicable.

iii. In para A.6, it has been mentioned by Noticee that the Hon'ble Courts and tribunals has held that allegation of wilful misstatement is not sustainable where the importer has declared appropriate description and other details of impugned goods. Mere claim of exemption or classification of impugned goods which are technical in nature cannot be treated as wilful misstatement on the part of importer. On observing the facts of the case as described in show cause notice, I find that the output power of the goods were not declared in B/E. It was once the department sought the specification of the goods, then only Importer accepted his mistakes. Here importer has claimed the exemption notification which was based on his mis-classification of goods. Further, there were no interpretation or technicality in deciding the classification of goods, it was merely based on the output power of the motor. Further after accepting classification, they wrongly intended to take the benefit of Sr no 485A of Notification 50/2017 dated 30.06.17 by suppressing the facts that goods are to be used in motor vehicles.

iv. In para A7, The Noticee has relied on the judgement of ***Hon'ble High Court in case of Commissioner of Customs (Import) Chennai (I) vs G.M. Pens International reported in 2009 (247) ELT 159 (Mad).*** On going through the fact of the case it was found that the said case was related to interpretation of classification where larger bench of Tribunal has accepted the classification in favour of revenue which is evident from the reproduced para of the judgement

"Prior to the decision of the Larger Bench, about the classification of the ink in favour of the Revenue, there were conflicting decisions of the Tribunal."

But in this case, the classification is just based on the output power of motor and the same was not declared in the Bill of Entry which amount to suppression of facts. After introduction of self-assessment vide Finance Act, 2011, the onus lies on the importer for making true and correct declaration with respect to all aspects of the Bill of Entry and to pay the correct amount of duty. In the instant case, the said importer being an 'ACCREDITED CLIENT' and therefore, Assessment and Examination were not prescribed for their Bills of entry and therefore, entire onus is on the said importer to make truthful declarations and assess and pay their Govt. correctly

Based on the above discussion, I find that the ratio of judgement of the mentioned case has differences in the fact from this case. Hence, the same can't be relied upon.

v. In para A8, Noticee has placed reliance on the mentioned below cases which are discussed in detail:

Vesuvius India Ltd vs Commissioner of Customs, Vishakhapatnam 2019 (370) E.L.T. 1134 (Tri.-Hyd)- On going through the fact of the case, I find that facts in both cases are at length, In that case, the exemption notification was available for both the CTH, The relevant para is reproduced below:

"As we have found that there was no misdeclaration at all and the appellant is entitled for the exemption notification in any case and there is nothing to be gained by the appellant by classifying their product under one heading or the other, we find the confiscation of the goods and imposition of penalties are also not sustainable and need to be set aside and we do so."

Accordingly, the case law is not reliable in this case.

SIRTHAI SUPERWARE INDIA LTD. VS COMMR. OF CUSTOMS, NHAVA SHEVA-III 2020 (371) E.L.T. 324 (TRI. Mumbai)

On going through the fact of case, it appears that importer has declared the full description of the goods as Pickle set, spoon, Casserole Bowl etc and the from the same description, the classification was decided. However in the current case, classification was based on the output power of the motor which was not declared by the importer leading to mis-classification and wrong availment of the exemption notification. So fact of the cases are different in the case and hence the ratio of judgement cannot be relied for this case.

LOTUS BEAUTY CARE PRODUCTS PVT LTD VERSUS COMMISSIONER OF CUSTOMS (IMPORT)

The case has been relied by the Noticee. While going through the above case it has been found that tribunal in its judgment has mentioned that:

"The eligibility of the impugned goods for concessional rate under notification no. 46/2011-Cus dated 1st June 2011 is not in dispute. The specific entry within the said notification appears to have been erroneously claimed and, upon it being pointed out, the importer accepted the error in the bill of entry. That this error is, as claimed by the appellant, inadvertent would appear to be tenable as the possibility of confusion between the numbers corresponding to the claimed entry and the eligible entry cannot be ruled out. Furthermore, as pleaded by Learned Counsel, the declaration of tariff item, as well as description of the goods, would also make it apparent that there has been no mis-declaration within the meaning of section 111 of Customs Act, 1962 and that such a patent error cannot be seen as an attempt at misleading the system. The appellant seeks the setting aside of the confiscation and penalty ordered by the original authority and upheld in the impugned order."

From above, it appears that in the aforesaid case, there were inadvertent error in mentioning the Sr No. of the notification, while claiming the notification benefit. However, in this case, there has been intentional misclassification of the goods by suppressing the material facts. Hence, the case appears not reliable in the current case.

vi. In para A9, A10 & A11, Noticee has submitted that it is a settled position of law that in case the appropriate description of goods has been declared in the import documents including in the BEs no allegation of suppression of facts or willful misstatement can stand against the importer. Hence, proposal to demand the differential duty under section 28(4) of the Customs Act, 1962. In this case, Importer has failed to appreciate the fact that the appropriate description of goods was not declared. Importer has not declared the output power of motor, hence, the same lead to the mis-classification and evasion of duty by claiming wrong exemption benefit. Therefore, it amounts to willful mis-statement on the part of importer leading to evasion of duty. There was no complex interpretation involved in determination of the classification of the goods, it was just to be decided on the output power of the motor. Further after accepting classification, they wrongly intended to take the benefit of Sr no 485A of Notification 50/2017 dated 30.06.17 by suppressing the facts that goods are to be used in motor vehicles. Hence, the intent of Noticee to evade duty deliberately is apparently clear.

vii. In para A12, Importer has submitted that even assuming without

admitting that Noticee has wrongly classified the impugned goods then mis-declaration can't be alleged against the Noticee as no malafide can be attributed to the Noticee and therefore extended period can't be invoked under section 28 (4) of the Customs Act, 1962. On going through the fact of the case, I find that importer had resorted to willful mis-declaration of correct classification of goods and their further use and wrongly availed benefit of exemption notification in the Bills of Entry of the said imported goods by suppressing the said material facts i.e. output power of motor, which shows the ulterior motive of the importer to evade payment of applicable Customs Duty in respect of said imported goods cleared for home consumption. Further after accepting classification, they wrongly intended to take the benefit of Sr no 485A of Notification 50/2017 dated 30.06.17 by suppressing the facts that goods are to be used in motor vehicles. It is apparently clear that Importer has a deliberate intention to evade duty in this case.

viii. In para A.13 Noticee has placed reliance on the judgement in case of ***Densons Pultretaknik vs Commissioner of Central Excise, 2003 (155) E.L.T. 211 (SC),*** while going through the case it was observed that Hon'ble Supreme Court has mentioned that

Next question is - whether the Tribunal was justified in invoking first proviso to sub-section (1) of Section 11A. Prima facie, it is apparent that there was no justifiable reason for invoking larger period of limitation. There is no suppression on the part of the appellant-firm in mentioning the goods manufactured by it. The appellant claimed it on the ground that the goods manufactured by it were other articles of plastic. For the insulating fittings manufactured by it, the tariff entry was correctly stated. The concerned officers of the Department, as noted above, after verification approved the said classification list. This Court has repeatedly held that for invoking extended period of limitation under the said provision duty should not have been paid, short-levied or short-paid by suppression of fact or in contravention of any provision or rules but there should be wilful suppression. [Re : M/s. Easland Combines, Coimbatore v. The Collector of Central Excise, Coimbatore, C.A. No. 2693 of 2000 etc. decided on 13-1-2003]. By merely claiming it under heading 3926.90 it cannot be said that there was any wilful misstatement or suppression of fact. Hence, there was no justifiable ground for the Tribunal for invoking the first proviso to sub-section (1) of Section 11A of the Act.

Hence, in the above case, classification was found to be correct and there was no suppression of facts observed by Hon'ble Supreme court. Further goods were also assessed by department, however in the current case, mis-classification has been accepted by Importer, further suppression of material facts are also found. Goods were also not assessed as the Noticee was given the status of accredited client. Hence, the ratio of judgement can not be applied in this case.

ix. Further In para A 14 and A15 , Noticee has quoted following judgement and stated that there is no mis-declaration on their part.

SUTURES INDIA PVT. LTD. VS COMMISSIONER OF CUSTOMS, BANGALORE, 2009 (245) E.L.T. 596 (Tri Bang)

Noticees has placed reliance on the above judgement, while going through the facts of the case, it has been found that in that case, the dispute was on the eligibility of notification benefit and mis-declaration in terms of claiming the notification benefit. The judgement relied was *Northern Plastics Ltd.* v. *CC & CE* (supra) in which facts were different from this case as there was no separate heading for the impugned goods. However, in this case, suppression of material fact led to the intentional mis-classification of the goods and subsequently wrong availment of exemption notification. Hence, I find that the quoted judgment cannot be relied in this case.

SWATHY CHEMICALS LTD. Versus COMMISSIONER OF C. EX., CHENNAI, 1999 (114) E.L.T. 531 (Tri)

Noticee has placed reliance on the above judgement, On going through the facts of the case, it has been found that hon'ble tribunal has in its order stated that:

"as has been noted above, all declarations were given in great details, classification lists filed and approved, subsequent queries replied by appellants and therefore there is no question of any misdeclaration with an intent to evade duty."

From above, it appears that the ratio of the judgement is not applicable in this case, as the declaration in that case was given in great details, queries were also replied, however in current case, being an accredited client no assessment was prescribed and the suppression of the material fact led to the wilful mis-declaration of classification and subsequently to the duty evasion.

x. **In para A16 & A17** Noticee has stated that it is settled law to impute mis-declaration as on assesse it has to be shown that the deliberate or intentional to evade the duty payment and the declaration in the BE was not willful, intentional or deliberate. The court have upheld in case of

Shahnaz Ayurvedic v CCE-2004 (173) ELT337 (ALL), affirmed in 2004 (174)ELT A34 (SC)

Kirti Sales Corporation vs CCU, 2008 (232) E.L.T. 151 (Tri-Del)

The case of Shahnaz Ayurvedic v CCE-2004 (173) ELT337 (ALL), affirmed in 2004 (174)ELT A34 (SC) has already been discussed in para 2.

In case of Kirti Sales Corporation vs CCU, 2008 it has been mentioned by Tribunal that:

"We are inclined to accept the case of the Revenue that the goods imported were texturized fabric. However, whether the declaration in the Bill of Entry amounts to 'misdeclaration' so as to attract the provisions of Section 111(m) of the Customs Act in a given case depend upon the facts of the case. To constitute 'misdeclaration', the declaration must be intentional. Misdeclaration cannot be understood as same as wrong declaration, of course, made bona fide, the possibility of which cannot be ruled out altogether. The question, therefore, is whether the appellant had intentionally and deliberately mis-declared the goods as non-texturized fabric rather than texturized fabric. On this point, we are inclined to accept the case of the appellant that the declaration had been made on the basis

of documents supplied by the foreign supplier and there was no intentional or deliberate wrong declaration or misdeclaration on its part so as to attract the mischief of Section 111(m) of the Customs Act."

In this case, the classification was to be decided on the output power of the motor and the same was suppressed and wilfully mis-declared by Importer in the corresponding bill of entry. Hence, the facts are not similar to the above mentioned case. Accordingly the ratio of judgment is not applicable here.

xi. In para A 18 Noticee has submitted that, it is an equally established canon of law that extended period cannot be invoked when the issue is interpretational in nature. The dispute entails examination and interpretation of subject notification, therefore in such a situation, the allegation of will full mis-statement is not justified. Noticee has placed reliance on various judgements. However, ongoing through the judgement and contention of Noticee, it has been found that in those case there were complex interpretation of the law/notifications, however in the current case, the classification was to be decided on the output power of the motor and uses of the goods. Hence, the ratio of judgement in the following mentioned below cases is not applicable.

1. CRI Limited vs Commissioner of Customs (Airport & Administration), Kolkata 2020 (12) TMI 805-CESTAT Kolkata

2. Signet Chemical Pvt Ltd Vs Commissioner of Customs, Nhava Sheva-1, Mumbai-II, 2020 (10) TMI 289- CESTAT Mumbai

3. GT Cargo Fitting India Pvt Ltd Vs Commissioner of Central Excise, Noida-II 2019 (8) TMI 68-CESTAT Allahabad

xii. In para A19, Noticees mentioned that a person, well aware of the legal provisions, may still be a bonafide view that it is entitled to benefit under a certain subject notification. Such bonafide conduct of a person does not result in suppression of facts or wilful mis-statement. Being of the bonafide view regarding non-dutiablity of imported goods, doesn't mean wilful suppression/mis-statement of facts, and therefore extended period not applicable. There has been allegation of suppression of material facts and wilful mis-statement in the Show Cause Notice. From going through the facts of the case and as discussed in point (vii) the importer's contention was of evasion of duty by suppressing the material facts and misleading the investigation.

xiii. In para A20, Noticee has placed reliance on the judgement in case ***of M/s Sirthai Superware India Ltd Vs CC, 2019*** where it was held that where the assesse has provided all the pertinent details of the product in the declaration, no mis-declaration can be alleged. I observe that Noticee has failed to appreciate the fact after introduction of self-assessment vide Finance Act, 2011, the onus lies on the importer for making true and correct declaration with respect to all aspects of the Bill of Entry and to pay the correct amount of duty. In the instant case, the said importer being an 'ACCREDITED CLIENT' and therefore, Assessment and Examination were not prescribed for their Bills of entry and therefore, entire onus is on the said importer to make truthful declarations and assess and pay their Govt. correctly. The importer has not only wrongly assessed the goods but also has not declared the output power of the motor which was crucial in determining the classification and subsequently claiming the

notification benefit. Further, he was also aware of the fact that the goods are to be used in the motor vehicle, however they have taken the non-applicable notification benefit and also mislead the investigation. Hence, the ratio of above judgement is not applicable.

xiv. In para A21, Noticee has quoted the judgement in case of ***M/s Lewek Altair Shipping Pvt Ltd vs CC, 2019*** , in the judgement it was held that :

"therefore held that in the entry made under Customs Act viz.; Bill of Entry, the Customs Tariff Heading was not correct and therefore the goods are liable to be confiscated under Section 111(m). As we have held that the goods in question are classifiable as claimed by the appellant, under CTH 8901 90 00, this allegation does not survive. Even otherwise, we find it hard to hold that an assessee who filed bill of entry with a Customs Tariff Heading which is not correct, will render his goods liable to confiscation under Section 111(m). The Customs Tariff Heading indicated in the Bill of Entry is only a self assessment by the appellant as per his understanding which is subject to re-assessment by the officers if necessary. Therefore, an assessee, not being an expert in the Customs law can claim a wrong tariff or an ineligible exemption notification and such claim does not make his goods liable to confiscation. It is a different matter if the goods have been described wrongly or the value of the goods has been incorrectly declared. In this case, although there was an allegation in the show cause notice that the invoices were initially submitted for a lower value and thereafter were revised for higher amount, the confiscation in the impugned orders were only on the ground that CTH in the bill of entry was incorrect."

So, in the above case, the CTH was found correct by Hon'ble Tribunal. Further in this case, there were suppression of material fact that output power of the motor is below 750W. After acceptance of classification by Noticee, they further took wrong notification benefit by knowingly hiding the fact (as discussed above) that goods were to be used in motor vehicles. Hence, the facts are at the length from the judgement quoted here. Accordingly, the reliance cannot be placed over M/s Lewek Altair Shipping Pvt Ltd vs CC, 2019 in the current case.

xv. In para A 22, Noticee has placed reliance on the judgement in case of ***M/s Midas Fertchem Impex Pvt Ltd vs Pr. CC reported at 2023 (1) TMI 998*** On going through the facts of the case, it was found that no suppression or wilful misstatement was found in the case. Further, goods were also assessed by officer in that case. The fact are different from the facts in case of quoted judgement. Accordingly, reliance cannot be placed.

xvi. In para A23, Noticee submitted that facts have not been suppressed, however, the suppression of material facts has been discussed in above paras.

xvii. In para A24, the noticee has again submitted that extended period can't be invoked in interpretation of law by quoting judgements. The same has been discussed in point 11 above. Further, in the quoted case, suppression element were not found, however in this case suppression and wilful misstatement has already been found.

xviii. In para A25, it has been mentioned that duty should not be demanded under Section 28(4). I found that the suppression and wilful misstatement has been discussed in details in above paras. Accordingly, duty to be demanded under Section 28(4) of the Customs Act, 1962.

xix. In para A 26 and A 27, Noticee has submitted that it can be seen that clause (b) of subsection (1) of Section 28 of the Customs Act gives an option to the Appellant to pay entire amount of duty along with interest payable thereon Section 28AA prior to the issuance of SCN. However, Noticee has failed to appreciate the fact that the above facts are applicable for the case other than collusion, suppression and wilful misstatement. In the present case elements of suppression of material fact and wilful misstatement has been found and discussed in details in above paras.

xx. Para A 28, A 29, A30 , A31 contains details of voluntarily payment.

xxi. In para A 32, Noticee has relied on the judgement of ***Wockardt ltd vs Commr of Customs (I), Mumbai Air Cargo (2022) I Centax 65 (Tri-Bom).*** On going through the judgement it was found that the judgement was issued based on Northern Plastic Ltd. (supra) and Thyssenkrupp Industries India (P.) Ltd. v. Commissioner of Customs (Import). The Northern Plastic Ltd. (supra) judgement has already been discussed in point (ix) and the fact in case Thyssenkrupp Industries India (P.) Ltd. v. Commissioner of Customs (Import) were different from the current case. Hence, the above judgement appears not reliable.

xxii. Further in para A33, Noticee has relied on the judgement in case of ***M/s Hi-Tech Sweet Water Technologies Pvt Ltd vs Commissioner of Customs NS-I 2022 1 Centax 310 (Tri-Bom)***, Ongoing through the above judgement I find that the facts of the case were different in the case as there were no suppression elements were found however in this case wilful misstatement and suppression of material facts are found. Hence, the ratio of judgement does not applicable.

Further facts in case of ***HOTLINE CPT LTD. Versus COMMISSIONER OF C. EX., INDORE 2016 (333) E.L.T. 356 (Tri. - Del.)*** is similar to the present case and the ratio of judgement is squarely applicable in this case. The main para of judgement is reproduced below:

"The appellant has contended that it had informed Revenue wayback in 2001 vide letter dated 23-5-2001 about such repairs. We have perused that letter dated 23-5-2001. In that letter it is not even indicated that it will be using goods imported at concessional rate of duty under Notification No. 25/99-Cus. for repair work. Indeed there is no evidence to show that the appellant ever informed Revenue about using goods imported at concessional rate of duty for such repair work. The appellant was a well-established manufacturer of CPTs and was fully aware that the concessional rate of duty was applicable to only such goods as were used for manufacture of excisable goods. It was also aware that its repair activity did not amount to manufacture as it was so held by CESTAT in its own case wayback in 2004. In spite of that it used such parts for repairs which clearly shows its intention to evade customs duty by indulging in suppression. Indeed, as has been brought out in the impugned order, when Revenue sought the information

regarding use of such goods it indulged in prevarication instead of providing specific answer. ***Thus wilful suppression of facts on the part of the appellant is clearly*** *evident. The judgments in the case of Chemphar Drugs & Liniments (supra) and Padmini Products (supra) essentially state that mere inaction or failure on the part of the appellant is not sufficient to invoke the extended period and there has to be conscious or deliberate withholding of information or some positive act on the part of the appellant to demonstrate suppression has to be brought out to invoke the extended period. In the present case it is evident that the appellant was fully aware that the repair of CPTs did not amount to manufacture, it was also aware that the goods imported at concessional rate of duty were to be used only for manufacture of excisable goods and still it used those goods for repair. Not only that when information was sought, it indulged in prevarication. Thus the said judgments do not come to the rescue of the appellant. As regards the judgment of CESTAT in the case of Tudor (I) Ltd. (supra) referred to by the appellant to advance the proposition that repair/remaking amounts to manufacture, suffice to say that in that case CESTAT held that the processes undertaken clearly supported the conclusion that they amounted to manufacture while in its own case, CESTAT had given a finding that repair of CPTs did not amount to manufacture."*

Accordingly, I find that due to the deliberate action of wilful misstatement and suppression of facts, section 28(4) of the Customs Act, 1962 is rightly applicable.

xxiii. In para A34 &35 Noticee has submitted that he has complied with the requirement of section 28(1) and 28(2) of customs act, by depositing duty that were not paid at the time of import and SCN was not to be issued in terms of section 28(2), however noticee has failed to appreciate the fact, that section 28(1) applies to the recovery of short paid duties for reasons other than collusions or any wilful mis-statement or suppression of facts but in this case, suppression of material facts and elements of wilful mis-statement has been found. Further subsection 2 of section 28 is applicable in case of pre-notice consultation letter issued in terms of section 28(1)(A). However the current notice has been issued in terms of section 28(4) of the Customs Act, 1962.

xxiv. In para A36- A40, Noticee has stated that extended period not applicable as the instant case is an industry wise issue involving divergent issue and quoted judgement related to this matter. However, noticee failed to appreciate that the notification Sr no 485A was applicable on the fact that goods were to be used other than in motor vehicle. Noticee was well aware about the goods were to be used in the HVAC in automotive. Further, nothing on record was found that the benefit of said both the notifications was disputed or challenged in court. Hence, the contention of the Importer is not acceptable and the judgements cannot be relied upon.

xxv. In para B1 to B6 the Noticee has described the various section of the Customs Act and submitted that section 111 (m) of the Customs Act is not invokable in the present case for the reason that in the impugned BEs vide which

the goods were imported, the Noticee has not mis-declared any material particulars in respect of the subject goods with the intent to evade duties.

The intention of the Noticee has been discussed in the foregone paras i.e. in point iii and vi. Goods were mis-classified by suppressing the material fact and wrong exemption benefit (with intent to evade duty by ways of suppression and wilful misstatement) does not correspond to the particulars in the entry.

xxvi. In para B7 and B8, the Noticee has repeated its contention that there was no mis-declaration and relied on the judgement in case of ***Sandan Vikas (India) Ltd vs Commr. Of Custom (ICD TKD) New Delhi, 2017 (357) E.L.T.893 (Tri Del)***. On going through the case it was found that there was complex interpretational issue while deciding the classification, while in the current case, the classification was just based on the output power of the motor, Hence the judgement can not be relied upon.

xxvii. In para B9 & B10, Noticee submitted that section 111 (m) can not be invoked even if the allegation against the Noticeee in respect of classification is held to be correct as there is difference in mis-classification and misdeclaration. The Noticee has referred the mentioned below case.

COMMISSIONER OF CUSTOMS, BANGALORE Versus A. MAHESH RAJ 2006 (195) E.L.T. 261 (Kar.) wherein it was ruled that :

"Chapter XIVA of the Act being an exception to the normal procedure contemplated under the Act and occurring in a fiscal statute, has to be necessarily construed strictly. The scope of the provisions cannot be unduly enlarged if the intendment of the Legislature to provide for settlement in cases of short levy or non-levy on account of misclassification or misdeclaration also, as there is a vast and considerable distinction between cases of misclassification of goods and misdeclaration of goods. A misclassification of goods will only result in duty liability being at a different rate in terms of entry under which it is classified, whereas misdeclaration can be a situation of suppression, distortion and misrepresentation. In a situation of misclassification, only goods are disclosed or declared but goods are not properly classified for the purposes of determination of rate of duty, whereas in a case of misdeclaration, goods might not have been declared correctly at all, in the sense description is not of the actual goods also quantity may varying and mischief being deliberate and designed to avoid payment of customs duty. In case of misclassification, it may be bona fide case of wrong classification as the importer or the person clearing the goods may not be fully conversant with the Schedule to the Act. In the case ***where there was no deliberate or intended desire on the part of the importer to evade or avoid payment of any customs duty, in tact,*** *to provide immunity and protection of such class of people, Chapter XIVA has been ushered in. I am of the view that such a provision cannot be interpreted to enlarge the scope unduly particularly to provide protection under this Chapter even to cases of smugglers and habitual*

offenders. If it is to be so interpreted, even as submitted by the learned Standing Counsel appearing for the petitioner, the provisions of Chapter X1VA can be utilized by such unscrupulous elements than any bona fide persons claiming benefit under such provisions. In this regard, I respectfully agree with the view taken by the Madras High Court that Chapter XIVA cannot be extended to cases of misdeclaration also."

Here, I find that for any decisions we have referred in this discussion either on part of revenue or Noticee, it has been found that the Hon'ble Courts has only one principal criteria to decide the case i.e. intent of the mis-classification or wrong availment of notification benefit. In the current case intent was to evade the customs duty despite having the knowledge of the goods and notification. In the above mentioned case, the Hon'ble High Court of Karnataka has clearly mentioned that mis-declaration happens where there is element of suppression, distortion or misrepresentation. The Hon'ble High court has also stated that in a case of misdeclaration, goods might not have been declared correctly at all. The current case squarely covers the definition of mis-declaration here. The classification of the goods was just to be decided on the output power of the motor. Had the Noticee declared the output power of the motor, the mis-classification and evasion of duty had not taken place. Once the Noticee was questioned, they accepted the classification. Again Noticee tried to take advantage of wrong notification benefit of Sr No. 485A of Notification 50/2017 dated 30.06.2017 by suppressing the fact that the goods were to be used in the motor vehicles. The Noticee was well aware of the fact that the goods are to be used in HVAC in automotive industries as can be seen from the statement of representative of Noticee. Hence the intent to evade the duty by suppressing the facts are clearly visible. Accordingly, the ratio of judgement is not applicable for this case.

xxviii. In point B11, B12 and B13 and B14 Noticee has placed reliance on mentioned below judgements where it was held that mere misclassification of goods is not misdeclaration and for which the goods could not be held liable for confiscation under section 111 (m) of the Customs Act, 1962.

a) ***M/s Star Dimension India vs Asstt. Commr. Of Customs, NS-II, Rudra Vyaparchem Pvt ltd vs Commissioner of Cus (Port) Kolkata, 2019 (370) ELT 412***

b) ***Satron vs Commissioner of Customs (Imports), JNCH Nhava Sheva, 2020 (371) E.L.T. 565 (Tri-Mum)***

c) ***John Deere India Pvt Ltd vs Commr of Cus (preventive), Amritsar, 2018 E.L.T. 509 (tri-Chan)***

On going through the fact of the case it was found that the issue involved in all these cases were of misclassification which were based on complex interpretation of General Interpretive Rules. Further, element of suppression of material facts and intent to evade duty was not proved. Hence, the ratio of the judgements can not be applied.

Further in case of ***M/S. SCANIA COMMERCIAL VEHICLES INDIA P LTD. VERSUS COMMISSIONER OF CUSTOMS (IMPORT) – MUMBAI 2022 (6) TMI 1140 - CESTAT MUMBAI*** **it was held that :**

"The discussion made herein above leads to an inevitable conclusion that the appellant had mis-classified the goods with an intention to evade payment of appropriate Custom duty. The appellant resorted to mis-classification / mis-declaration of description of goods showing number of packages as two instead of manifested number of packages as one and since the goods have been deliberately misdeclared/ mis-classified in the Bill of Entry they are liable for confiscation under Section 111(m) of the Customs Act, 1962 and appellants are therefore rightly held liable for penalty under Section 112(a) ibid. The appeal is accordingly dismissed."

Hence, I find that if the goods have been mis-classified with the intent to evade duty and any notification benefit has been claimed willingly and with full awareness and intent to evade duty, the same amounts to mis-declaration. The goods are liable to be confiscated under section 111 (m) of the Customs Act, 1962.

xxix. In point B15 and B 16, Noticee has held that they have claimed the notification on the basis of Bonafide belief hence the same doesn't amount to mis-declaration. The intent of Noticee has been discussed in the several points in this para iii, vi, xxvii.

xxx. Noticee in para B17 to B 25 has relied on several judgement and stated that on the basis of Bonafide belief does not amount to mis-declaration and hence not liable for confiscation under section 111 (m) of the Customs Act, 1962. The judgement referred has been discussed in details below:

a) ***M.s Aureole Inspecs India Pvt ltd vs Pr. Commr. Customs New Delhi, Final order No. 51024/2023 dated 09.08.23*** – The fact of the case were different, the Tribunal has ruled the classification in favour of appellant. Further classification was decided on basis of complex interpretation. No intent to evade duty was found.

b) ***M.s Samsung India Electronics Pvt ltd vs Pr. Commr of Customs ACC, New Delhi, 2023***- The fact of the case were different. There were complex interpretational issue while deciding the classification. The Tribunal has ruled the classification in favour of appellant. No intent to evade duty or suppression elements were found.

c) ***M/s Oppo Mobiles India Pvt ltd vs Pr Commissioner of Customs,, final order no. 50226-50232/2024 dated 09.02.2024***- The fact of the case were different. There were complex interpretational issue while deciding the classification. The Tribunal has ruled the classification in favour of appellant. No intent to evade duty or suppression elements were found.

d) ***Northern Plastic Ltd vs Collector of Customs and Central Excise, 1998 (101) ELT549 (SC)***- The same has already been discussed in detail in point 9.

e) ***CC vs Gaurav Enterprises, 2006 (193) E.L.T. 532 (Bom)***- Facts are different. No suppression element was found.

f) ***M/s Lewek Altair Shipping Pvt Ltd vs CC, 2019***- already discussed in point 14.

Hence, by above discussion, I find that the quoted judgements are not reliable for the current case. The goods in the current case are liable for confiscation under Section 111(m) of the customs act, 1962 as the suppression of material facts and intent to evade the customs duty deliberately has been clearly found in the case.

xxxi. In para B26-B32, Noticee has stated that section 111 of the customs act is not invokable for goods already cleared. Noticee has quoted several judgement as mentioned below:

a) ***Bussa Overseas and Properties Pvt ltd s C.L Mahar, Assistant Commissioner of Customs, Bombay 2004 (163) E.L.T. 304 (Bom)***

b) ***Knowledge Infrastructure Systems Pvt ltd & Ors vs Additional Director General, DRI, Mumbai***

c) ***Southern Enterprises vs CC 2005 (186) E.L.T. (Tri-Bang)***

d) ***Shiv KripaIspat Pvt ltd vs CCE, Nasik 2009 (235) E.L.T. (Tri-LB)***

At this point Tribunals and various courts have different opinion on this matter. In the case of ***M/s Venus Enterprises vs CC, Chennai 2006(199) E.L.T. 661(Tri-Chennai)*** it has been held that:

"We cannot accept the contention of the appellants that no fine can be imposed in respect of goods which are already cleared. Once the goods are held liable for confiscation, fine can be imposed even if the goods are not available. We uphold the finding of the misdeclaration in respect of the parallel invoices issued prior to the date of filing of the Bills of Entry. Hence, there is misdeclaraiion and suppression of value and the offending goods are liable for confiscation under Section 111(m) of the Customs Act. Hence the imposition of fine even after the clearance of the goods is not against the law."

If we read section 111 it has been mentioned that

111. Confiscation of improperly imported goods etc.

The following goods brought from a place outside India shall be liable to confiscation:

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 the declaration made under section 77.

The following goods brought from a place outside India shall be liable for confiscation .....This essential criteria is squarely applicable on this subject goods also as despite having secured OOC order does not change the fact that goods have indeed brought from outside India.

In case of M/s Asia Motor Works vs Commissioner of Customs 2020 (371) E.L.T. 729 (Tri. - Ahmd.) Hon'ble tribunal have demarcated between the words, ***"Liable for confiscation" and "Confiscation".***

Further in case of ***VISTEON AUTOMOTIVE SYSTEMS INDIA LIMITED Versus CESTAT, CHENNAI, 2018 (9) G.S.T.L. 142 (Mad.)*** Hon'ble High Court of Madras

has passed the landmark judgement contrary to the judgement of tribunal passed earlier. In the said judgement it has been held that:

"The opening words of Section 125, "Whenever confiscation of any goods is authorised by this Act ....", brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act."

After the passing of landmark judgement, vide finance act, 2018, first proviso was introduced which says that ***where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions to this section shall not apply.*** Behind the proviso, there is an assumption that goods become liable for confiscation when there is demand under Section 28. Interestingly, the liability to confiscation is assumed to arise even in cases that do not involve an extended period of limitation not being cases of collusion or wilful mis-statement or suppression of facts.

At this point, one has to understand that there can't be a demand of duty, where the goods are seized and are in possession of the government. It is a basic principle that goods and duty travel together. Thus, when that goods are in the possession of the government having been seized, there cannot be a demand for duty. Duty payment, even differential duty payment arises when the goods are confiscated and ordered for release to the importer. Section 125 (2) which provides that where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods, make this above position clear.

Thus the proviso, which is inserted in 125 referring to cases under section 28 which are essentially in respect of demand of duty where the goods are not seized/detained by the department or not available physical. It can be simply interpreted that goods are liable for confiscation and redemption fine is imposable even if the goods are not seized and are not available for confiscation.

In view of above discussions, based on the judgement of ***M/s Venus Enterprises vs CC, Chennai 2006(199) E.L.T. 661(Tri-Chennai), M/s Asia Motor Works vs Commissioner of Customs 2020 (371) E.L.T. 729 (Tri. - Ahmd.) & Visteon Automotive Systems India Limited Versus CESTAT, CHENNAI, 2018 (9) G.S.T.L. 142 (Mad.)*** I find that goods in the current case are liable for confiscation under Section 111 (m) of the Customs Act, 1962.

xxxii. In para 33-36, Noticee has reiterated the narration that noticee has acted in Bonafide matter hence proposal for confiscation of the impugned goods is not sustainable by quoting various judgement. In the foregone para the facts has been discussed and the element of suppression of material facts and wilful mis-

statement to deliberately evade the duty has been found. Hence, the quoted judgements can not be relied upon.

xxiii. In para C1 to C7 Noticee has stated that penalty can't be imposed on the noticee as there was no intention to evade duty. The noticee has quoted many judgements to rely on. However, the clear intention of the Noticee to evade duty by suppressing the material facts and wilful mis-statement has been discussed in details in many points i.e. 1,2,6,7,22 etc. in this para. Hence, the judgments cannot be relied upon as in these cases no intent to evade duty was found. However, in this case same has been proved.

xxxiv. In para C8 to C10, Noticee has submitted that penalty cannot be imposed in case involving interpretation of legal provisions by quoting several judgements.. This issue has been discussed in point 11. Noticee has placed reliance on various judgements. However, on going through the judgement and contention of Noticee, it has been found that in those case there were complex interpretation of the law/notifications, however in the current case, the classification was to be decided on the output power of the motor and uses of the goods. Hence, the ratio of judgement in the following mentioned below cases is not applicable.

xxxv. In para C 11 to C13 Noticee has explained the section 112 (a) of the customs act, 1962. In para C14 to C18, Noticee has stated that penalty cannot be imposed under Section 112(a) unless the goods are liable for confiscation under section 111 of the Customs Act, 1962. Noticee has relied on several judgement for this fact. I find that the discussion for liablity of the goods for confiscation has been done in sub para 31 of this para. The goods have been found liable for confiscation under section 111 (m) of the Customs Act, 1962. Hence the judgement quoted are not reliable.

xxxvi. In para C 19 to C25 Noticee has submitted that penalty cannot be imposed on the ground that the noticee has abetted in the wrongful act by relying on various judgement. However, Noticee has failed to appreciate the fact that it is the act of suppression of material facts and wilful misstatement by the Noticee that lead to the deliberate mis-classification and claiming wrong exemption notification benefit. Once being caught they chosed to surrender the notification benefit and started claiming another wrong notification benefit i.e. Sr No 485A of notification 50/2017 dated 30.06.17. This shows the clear intent of the noticee to deliberately evade the customs duty. Hence the act of commission and omission has led the goods liable for confiscation and further noticee liable for penalty under section 112(a) of the customs act, 1962. Hence, the quoted judgements are not so useful for determining the case.

xxxvii. In para C26-C33, Noticee has submitted that penalty cannot be imposed under section 112 (a) in the absence of mens-rea/malafide intention.

However, I find that on many occasions Hon'ble courts have ruled that no mens-rea required for penalty under section 112 (a) of the customs act, 1962. Few of them have been discussed below before examining the judgment quoted by the Noticee.

In case of Comex Co. vs Collector Of Customs, Madras-I on 5 February, 1997 997(96)ELT526(MAD) it was ruled that:

"For all the reasons stated above, we answer the question referred to us for our consideration by holding that the Tribunal was correct in holding that no mens rea as such was required as a condition precedent for levying a personal penalty under Section 112(a) of the Customs Act, 1962."

In case of Rajeev Khatri Vs Commissioner of Customs (Export) (Delhi High Court) dated 04.07.23 customs appeal no. CUSAA 3/21 it was held that :

"In respect of the show cause notice dated 8-7-2011, the imposition of the penalty has been made under Section 112(a) of the Act in respect of the goods which have been held to be liable to be confiscated under Section 111 of the Act. Here, the imposition of the penalty on the CHA is founded on the ground that he has abetted the offence. Though, for imposition of penalty in respect of the cases falling under Section 112(a) of the Act, mens rea may not be required to be provided as condition precedent, however, when it comes to imposition of the penalty on an abettor, it is necessary to show that the said essential element/ingredient is present."

Further in case of Indo-China Steam Navigation Co. Ltd v. Jasjit Singh, Additional Collector of Customs Calcutta & Ors.: AIR 1964 SC 1140, the Constitution Bench of the Supreme Court had rejected the contention that it was essential to establish mens rea in respect of levy of penalty under the Sea Customs Act, 1878 for violating the provision of Section 52A of the Sea Customs Act,1878.

In case of ***Hughes Communication India Ltd vs Commissioner Of Customs CUSAA 113/2018 & CM APPL 15658/2018*** *it was held that :*

"Section 112 (a) of Customs Act also applies on a strict liability concept. It does not require any mens rea. Section 112 (a) of the Customs Act may be contrasted with the provisions of section 112 (b) of the Customs Act. It is clear that for Section 112 (a) to be applicable, no mens rea is required whereas for Section 112 (b) to be applicable mens rea or knowledge is required. The expression used in Section 112(b) is "dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111". Section 112(b) imposes an obligation on the authorities to establish mens rea and/or knowledge."

Now we proceed to discuss the judgement on which Noticee has relied on ***M/s Sij Electronics Comp Tech Vs CC-2001 (129) ELT 528 (T)*** in which the relevant section of 112 was not quoted in O-I-O and it held that:

"the items in question were freely importable and the substantial portion of the import has been allowed so, therefore, penalty in such circumstances will not be called for, especially without determining the sub-section of section 112 of the Customs Act and determination of the conduct mentioned in the sub-sections. We are of the view that even if mens rea is not essential ingredient for certain acts under Section 112, the levy of penalty would certainly depend on its existence."

Hence, it is evident that the facts are clearly different from the case.

Further Noticee has placed reliance in case of ***Cement Marketing Co of India Ltd vs Asstt. Commr of sales tax-1980 (6) ELT 295 (SC)*** it was held that penalty cannot be imposed when the assessee raises a contention of Bonafide belief. The contention of the noticee was to evade the customs duty as discussed in various paras. Hence, judgement cannot be relied upon.

The Noticee has relied on the judgement of ***V. LAKSHMIPATHY Versus COMMISSIONER OF CUSTOMS, COCHIN 2003 (153) E.L.T. 640 (Tri. - Bang.)*** has held that imposition of penalty under section 112 (a) presupposes existence of mens-rea. However in case of ***Comex Co. vs Collector Of Customs, Madras-I on 5 February, 1997 997(96)ELT526(MAD),*** high court held that no mens rea required for penalty under Section 112 (a). Further in case of ***Hughes Communication India Ltd vs Commissioner Of Customs CUSAA 113/2018 & CM APPL 15658/2018*** *it was held that no mens-rea required for imposing penalty under section 112(a).* ***Hence, I find that higher court judgement on the same subject is more reliable.***

Accordingly, I find that mens-rea is not required for imposition of penalty under Section 112 (a) of the customs act, 1962.

xxxviii. In para C 34-C45, Importer has submitted that penalty under Section 114A is not imposable when there is no short levy or non-levy of duties of customs for the reason of collusion, willful misstatement, and suppression of fact by relying on the various judgement. I find that element of suppression of material facts and wilful mis-statement has been discussed in various para like 1,2,6,7,22 etc. It is apparently clear that Noticee's intent was to evade duty by suppression of material facts and claiming wrong exemption notification benefit twice. Hence, on the basis of the facts of the cases, I find that penalty under section 114A of customs act, 1962 is applicable as the element of suppression of material facts and wilful mis-statement in this case has been found beyond doubt.

xxxix. In para C-46-C49 Noticee has submitted that without prejudice, penalty cannot be imposed simultaneously under both section 112 and 114A of the customs act, 1962 by relying on various judgement.

I have gone through the judgement relied upon and I also agree with the fact that by fifth proviso to section 114A of the Customs Act, 1962, penalty under section 112 can't be imposed simultaneously with 114A of the Customs Act, 1962 and they are mutually exclusive.

The above discussions has also covered the contentions uttered during the personal hearing and it is clear that the written submission made by Noticee and the plead made during personal hearing is not sustainable in view of the law, judgements and Customs Act, 1962.

18.4 Now, I proceed further to decide the main issues involved in the case as elaborated in para 18.1.

Classification of Impugned Goods

I find that M/s Toyota Tsusho India Pvt Ltd vide letter dated 07.12.2021/received in the Inward Section, Customs House, Mundra on 20.12.2021 addressed to the Deputy Commissioner (Group-V), Custom House, Mundra communicated that they want to pay the differential customs duty for their import at Mundra Port due to HSN correction from 85015390 to 85013119. A list of 38 BEs for the period 04.12.2020 to 01.07.2021 was also forwarded with the letter. Deputy Commissioner of Customs, ICD Patli vide letter dated 29.01.2022 was asked to provide the status of the investigation at their end. In reply, the Deputy Commissioner, ICD, Patli vide letter dated 03.02.2022 has submitted that customs office *ICD,* Patli has asked Importer to submit technical specification of the similar goods imported vide BE No. 9097127 dated 08.10.2020 for importing of Motor Assy W holder SPEC BYSD RH(COMPONENT PARTS FOR VEHICLE under CTH-85015390 and On the basis of technical

specification submitted by the importer, it was noticed that the imported item appeared to be classifiable under CTH 85011319 having BCD @ 10% (Sl no. 485A of the Notification No. 50/2017-Cus) and FTA benefit vide Notification No. 06/2011-Cus is not applicable to them. M/s Toyota Tsusho India Pvt Ltd accepted the classification of the imported item under HSN 85013119 and ready to pay the differential duty for the BE prior period of 2 years i.e. from October 2020 along with interest and also requested to sort out matter without issuing Show Cause Notice and personal hearing. Following the reply received from ICD, Patli and M/s Toyota Tsusho India Pvt Ltd Thusho India Pvt Ltd, the enquiry/ investigation was started.

18.5. I find that total 38 bills of entry starting from B.E.No.9822139 dated 04.12.2020 to B.E.No.4527741 dated 01.07.2021 for the import of motors, wherein the description of the goods was shown as ***Motor Assy W Holder SPEC B YSD RH (PART NO. 27270- 066400L)(COMPONENT PARTS FOR VEHICLE/ Motor Assy Holder W/O Fan- RHD (PART NO. 272700- 2300)(COMPONENT PARTS FOR VEHICLE) etc.*** M/s Toyota Tsusho India Pvt Ltd had declared the CTH as 85015390 and availed the benefit of FTA based exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) and had paid only the IGST @ 18% in case of above said 38 BEs. Now, I observe that Tariff Heading 8501 states that:

8501	*ELECTRIC MOTORS AND GENERATORS (EXCLUDING GENERATING SETS)*
8501 31	*– Of an output not exceeding 750 W:*
8501 31 19	*--- Other*
8501 53	*-- Of an output exceeding 75 kW*
8501 53 90	*--- Other*

From carefully reading of the above reproduced Tariff headings it is apparently clear that that the Electric Motors having an output not exceeding 750 W are classifiable under HSN-850131 whereas, Electric Motors having an output exceeding 75 kW are classifiable under HSN-850153. In the present matter, as per letter dated 04.01.2022, M/s Toyota Tsusho India Pvt Ltd has submitted that the motor under consideration has an output of 154 watts to 182 watts, as the case may be and operates on DC power. Therefore, the motor assemblies under consideration merits classifications under sub heading *85013119 which covers 'Other DC Motors, of an output not exceeding 750 W'*. The same has also been accepted by Importer during investigation as evident from Importer letter dated 04.01.2022 and statement of Shri Vicky Kumar recorded on 17.05.2023. From August, 2021 onwards they started classifying their imported product under CTH-85013119 instead of CTH-85015390. **Hence, first issue of classification has been decided.**

Examination of Duty Exemption claimed under Notification No. 46/2011-Cus dated 01.06.2011 (Sr No. 1294)

18.6. I find that M/s Toyota Tsusho India Pvt Ltd imported the Motor Assembles without payment of BCD by availing country of origin-based exemption (ASEAN

Countries) provided under the **Notification No. 46/2011-Customs dated 01.06.2011 (Sr. No. 1294)**. The same is reproduced below for ready references.

Sr No.	Chapter Heading, Sub-Heading and Tariff Item	Description	Rate (in percentage unless otherwise specified)	
290	850133 to 850134	All Goods	0.0	0.0
1291	850140	All Goods	5.0	5.0
1292	850151	All Goods	0.0	0.0
1293	850152	All Goods	5.0	5.0
1294	850153	All Goods	0.0	0.0

Here, it is pertinent to mention that the entry no. 1294 of said Notification provides exemption from payment of BCD for the goods falling under CTH-850153. However, the said notification does not provide exemption for the goods falling under CTH-85013119. Therefore, as discussed above, the goods imported by M/s Toyota Tsusho India Pvt Ltd are classifiable under CTH-85013119, they are not eligible for the BCD exemption benefit provided vide Sr. No. 1294 of the Notification No.46/2011-Cus dated 01.06.2011. **The same has also been accepted by Importer during investigation as evident from Importer letter dated 04.01.2022 and statement of Shri Vicky Kumar recorded on 17.05.2023. Hence, I find that second issue involved in this case has been decided.**

Examination of Duty Exemption claimed under Notification No. 50/2017-Cus dated 30.06.2017 (Sr No. 485A)

18.7 I find that the BCD rate on the said items was increased from 10% to 15% vide the Finance Act, 2021, w.e.f. 02.02.2021. However, the Central government vide notification no. 02/2021- Customs dated 01.02.2021, specific entry no. 485A in the Notification No. 50/17-Cus; was inserted prescribing the effective rate of BCD @ 10% for the motor assemblies falling under CTH-850131 as under:

(77) after S. No. 485 and the entries relating thereto, the following S. No. and entries shall be inserted, namely: -

(1)	(2)	(3)	(4)	(5)	(6)
"485A.	8501 10, 8501 20 00, **8501 31**, 8501 32, 8501 33, 8501 34, 8501 40, 8501 51,	All Goods	10%	-	-"

	8501 52, 8501 53				

Thus, w.e.f. 01.02.2021, they are eligible for benefit of concessional BCD @10% vide Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017.

I further find that another amendment was made in the said Sr.No.485A of Notification No.50/2017-Cus dated 30.06.2017 vide Notification No. 21/2021-Customs dated 31.03.2021 (w.e.f.01.04.2021) and the details of same are as under:

iii) against S. No. 485A, for the entry in column (3), the following entries shall be substituted, namely:-

" All goods other than those suitable for use in –

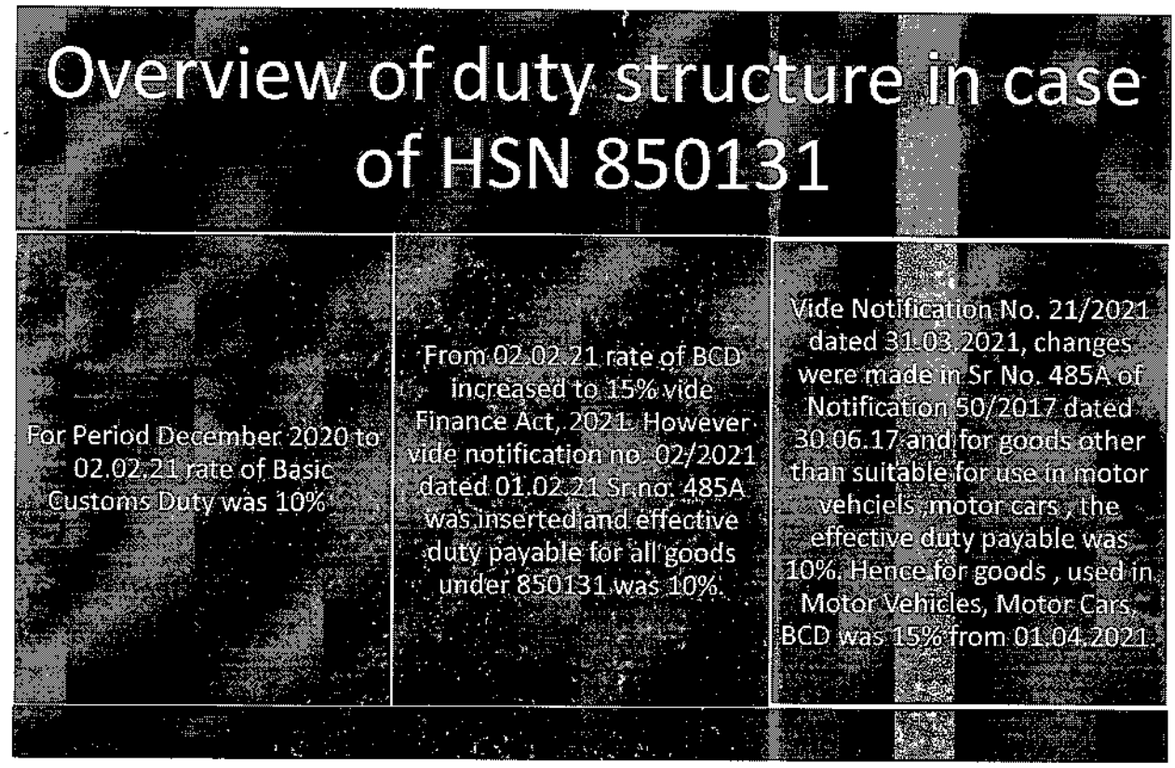
vii. *motor vehicles falling under heading 8702 or 8704;*
viii. *motor cars falling under heading 8703; or*
ix. *motor cycles falling under heading 8711";*

Therefore, as per Sr. No. 485A of Custom Notification 50/2017, the Customs duty structure in respect of CTH 850131 of the Customs Tariff prevailing at the material time i.e. from 01.04.2021 onwards may be read as under:

CTH	**Description**	**Duty Structure**
850131	All goods other than those suitable for use in – vii. motor vehicles falling under heading 8702 or 8704; viii. motor cars falling under heading 8703; or ix. motor cycles falling under heading 8711";	vii. Basic Custom Duty: 10% viii. SWS: 10% ix. IGST: 18% (Total Duty rate: 30.98%)
8501	Otherwise	vii. Basic Custom Duty: 15% viii. SWS: 10% ix. IGST: 18% (Total Duty rate: 37.47 %)

Therefore, I find that w.e.f. 01.04.2021, the benefit of reduced BCD @10% is available to all the goods (of various CTH including CTH 850131) other than those suitable for use in motor vehicles falling under heading 8702 or 8704,

motor cars falling under heading 8703 or motor cycles falling under heading 8711.



On Summarizing I find that for the subject goods:

From Dec-2020 to 31.03.2021	BCD payable was 10%
From 01.04.2021 to onwards	BCD payable was 15%

18.8. I find that during the investigation, Importer vide letter dated 04.01.2022 has requested to allow them to pay duty (@ 10% BCD) voluntarily for the Bills of Entry filed between the period from December 2020 to 01.07.2021. However, their request was not acceptable as the duty applicable from 01.04.2021 onwards was @ 15% BCD (as evident from above discussions). Accordingly, vide letter dated 26.03.2022, DC (SIIB) allowed the voluntarily payment of the Duty from the period December 2020-March 2021 through re-assessment of Bills of Entry.

18.9. Further, I find that M/s Toyota Tsusho India Pvt Ltd vide letter dated 29.06.2022 submitted that they had paid the differential duty for the period from Dec.2020 to March 2021 in respect of 28 Bills of Entry and for the period from 01.04.2021 onwards, requested to allow the benefit of reduced rate of BCD in terms of Sr.No.485 A of Notification No.50/2017-Cus.). M/s Toyota Tsusho India Pvt Ltd has also submitted copy of the Hon'ble Supreme Court Judgment in the matter of M/s Vareli Weavers Pvt. Ltd. vs. Union of India, wherein the Hon'ble Court has held that the item has to be assessed as it is imported and not on the basis of subsequent process.

It was further submitted that the imported item is used in HVAC System. They as a trader, sell the item to the manufacturer of HVAC system. It is upto the manufacturer to decide the use of manufactured product. Therefore, the item will be used for manufacturing of HVAC system and requested to allow the benefit of notification.

In the investigation process, Shri Vicky Kumar, Assistant Manager, M/s Toyota Tsusho India Pvt Ltd Tsusho India Pvt Ltd appeared on 17.05.2023 and in his statement he inter-alia stated that they had already filed the bills of entry (in respect of motors) for the period upto July 2021 wherein they could not avail the benefit of said Notification but for the Bills of entry in respect of said goods filed from Aug, 2021 to 07.01.2023 they have availed the said benefit of reduced BCD@10%. He further stated that after 07.01.2023 to till date, in respect of their imports of motors, they have not availed the said benefit and paid the BCD @15% as the earlier motors were sold out and their new motors imported during this period are exclusively used in motor vehicles and they realized that exemption is not available to them.

On being asked to inform about the use of the motors (under CTH 85013119) imported by their company w.e.f. 01.04.2021 and as to whether these are suitable for use in Motor vehicles of Ch.87 of Customs Tariff Act or not, he stated that Imported motors are supplied to M/s Subros Limited, (H.O., at Noida or its various manufacturing plants) and use of this motors needs to be cross verified from the said recipient.

On being informed that the website of their recipient company namely M/s Subros Limited (whom they supply Motors, as informed by him in above paras) is having website "https://www.subros.com/index.htm and it is declared therein :

INDIA'S LEADING THERMAL PRODUCTS COMPANY FOR AUTOMOTIVE APPLICATIONS

Subros Limited, founded in 1985 as a joint venture public limited company with 36.79% ownership by Suri family of India, 20% ownership by Denso Corporation, Japan & 11.96% ownership by Suzuki Motor Corporation, Japan , is the leading manufacturer of thermal products for automotive applications in India, in technical collaboration with Denso.
Subros has manufacturing plants at Noida (2 nos.), Manesar, Pune, Chennai and Sanand with an annual capacity of 1.5 Million AC Kits per annum beside a well equipped R&D Center and Tool Room at Noida.

HVAC:
It is abbreviation for heating, ventilation, and air conditioning systems —the technology of indoor or automotive environmental comfort.

Heating : In a vehicle heating stands for raising the temperature inside the vehicle using heat from the engine.

Ventilating : It is the process of replacing air in vehicle space to control temperature or remove moisture, odors, smoke, heat, dust, airborne bacteria, carbon dioxide, and to replenish oxygen. Ventilation includes both the exchange of air to the outside as well as circulation of air within the vehicle.

Air Conditioning: It means removal of heat from the vehicle using a refrigerant.

HVAC consists of Heater, Evaporator & Blower Unit.

And on being opined that it is clear that the motors supplied by them are suitable for use in motor vehicles and therefore, the benefit of Sr.No.485 A of Notification No.50/2017 is not available to them and to offer comments, he refrains from offering any comments. However On being asked whether he wants to say

anything, he stated that he requests to re-assess all their Bills of Entry in respect of import of Motors under CTH 85013119 during the period from 01.04.2021 to 07.01.2023 and they do not intend to avail the benefit of Notification No.46/20211 (wrongly availed by them till July 2021) and Sr.485 A of Notification No.50/2017 -Cus as amended by Not.No.21/2021 dated 31.03.2021 (availed by them from July-Aug.2021 onwards) on similar terms and lines (of previous re-assessment) as was done in respect of their past bills of entry for the period from Dec.2020 to March 2021.

Hence from above, discussion it is evident and apparently clear that Importer has accepted that they are not eligible for taking benefit of Sr No. 485A in the bills of entry filed between the period from 01.04.2021 to onward. Further, Importer has also voluntarily deposited the differential duty liability amount Rs 2,65,06,315/- and interest liability Rs 65,76,204/- (for period from April 2021-January 2023) through TR-6 Challan.

18.10 I find that after introduction of self-assessment vide Finance Act, 2011, the onus lies on the importer for making true and correct declaration with respect to all aspects of the Bill of Entry and to pay the correct amount of duty. In the instant case, the said importer being an 'ACCREDITED CLIENT' and therefore, Assessment and Examination were not prescribed for their Bills of entry and therefore, entire onus is on the said importer to make truthful declarations and assess and pay their Govt. correctly. The said importer had wrongly assessed the goods under CTH 85015390 and wrongly availed benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin-based exemption) and paid only the IGST @18% during the period from **Dec.2020 to July 2021**. Therefore, it amounts to willful mis-statement on the part of importer leading to evasion of duty. They were very well aware that their product merits classification under CTH- 85013119 due to its technical specification. The classification of the goods were just simply dependent on the Despite of the fact, they continued classifying their product under wrong CTH just to avail the inadmissible duty exemption benefit. Once ICD Patli objected to their self-assessment, then only they agreed for right classification of the goods. Had the customs department not initiated inquiry against them, the said fact would have not come to the notice. Further, it is also pertinent to mention here that classification was to be decided based on just the output power capacity of motor, that any importer/owner of the goods may know. It is hard to believe that without knowing the output power of motor, the order was placed by the Importer. Even after correction of the HSN on their own violation w.e.f. July, 2021 onwards, though, they stopped availing benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011, they started availing another ineligible benefit of reduced rate of BCD, i.e. @10% in terms of Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017. However, it appears that the importer has failed to appreciate that the said Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 was further amended vide Notification No. 21/2021-Customs dated 31.03.2021 (w.e.f.01.04.2021) which excluded the goods suitable for use in motor vehicles for the purpose of concessional duty @10%. To establish their wrongful claim of benefit of reduced rate of BCD, the importer has attempted to mislead the investigation in as much as vide their letter dated 29.06.2022 they have stated that the imported item is used in HVAC System and they as a trader, sell the item to the manufacturer of HVAC system and it is upto the manufacturer to decide where to use the manufactured product and that the item will be used for

manufacturing of HVAC system and requested to allow the benefit of notification whereas vide their letter dated 04.01.2022. M/s Toyota Tsusho India Pvt Ltd, in their letters submitted to the department had cited the Hon'ble Supreme Court judgment in the matter of **M/s Vareli Weavers Pvt.Ltd. vs. Union of India { 1996 (83) ELT 255 (S.C.) }** wherein the Hon'ble Court has held that the item has to be assessed as it is imported and not on the basis of subsequent process and claimed that the imported item is used in HVAC System. They as a trader, sell the item to the manufacturer of HVAC system. It is upto the manufacturer to decide the use of manufactured product. Therefore, the item will be used for manufacturing of HVAC system and requested to allow the benefit of notification. On going through the said case law, it appears that it is not relevant to the facts and circumstances of instant case. In the said case pertain to demand of duty on the basis of circular issued by Board whereas the instant case pertains to availment of exemption notification. It is settled law that when an importer wants to claim an exemption, the onus is upon him to prove that he has rightly claimed the exemption and all the conditions of the notification are duly fulfilled.

- Hon'ble Supreme Court in the case of **Hotel Leela Venture Ltd. Vs. Commr. of Customs (General), Mumbai [2009(234) ELT-389(SC)** held that the burden was on the appellant to prove that the appellant satisfies the terms and conditions of the Exemption Notification. It is well settled that Exemption Notification have to be read in the strict sense.

- Hon'ble Supreme Court in the case of **Krishi Upaj Mandi Samiti v/s. CCE reported in 2022 (58) GSTL 129 (SC)** held that law of the issue of interpretation of taxing statute has been laid down in catena of decisions that palin language capable of defined meaning used in a provision has to be preferred and strict interpretation has to be adopted except in cases of ambiguity in statutory provisions.

- Hon'ble Supreme Court in the case of **Uttam Industries V/s. CCE reported in 2011 (265) ELT 14(SC)** held that it is well settled law that exemption notification should be construed strictly and exemption notification is subject to strict interpretation by reading it literally.

- The constitutional bench dated July 30, 2018 of Hon'ble Supreme Court of India in the case of **COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI ...APPELLANT(S) VERSUS M/S. DILIP KUMAR AND COMPANY & ORS. (CIVIL APPEAL NO. 3327 OF 2007)** held that the benefit of ambiguity in exemption notification cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue/state. Exemption notifications are subject to strict interpretation.

Relevant Para the said judgement is reproduced hereunder;

> *"41.After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statue including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State."*

It appears that the importer has failed to appreciate that they are required to prove that the imported goods are **other than those suitable for use**

in the motor vehicles for availing the benefit of Sr.No.485A of Notification No.50/2017-Cus. Importer had himself admitted in letter dated 04.01.22 that the said imported goods are meant for use in HVAC which is used in motor vehicles to blow the air through vents of a motor vehicles and the sole function of the product is to rotate the fan in order to circulate air through cabin of motor vehicle. Further, in their statement recorded on 17.05.2023, they tried to be evasive but finally admitted that no benefit of said Sr.No.485 A is available to them. **Accordingly, I find that third issue regarding claim of notification no. 50/2017-Cus dated 30.06.2017 (Sr No. 485A) has been decided.**

Hence, from above discussions, I find that that the importer had resorted to willful mis-declaration of correct classification of goods and their further use and wrongly availed benefit of exemption notification in the Bills of Entry of the said imported goods by suppressing the said material facts, which shows the ulterior motive of the importer to evade payment of applicable Customs Duty in respect of said imported goods cleared for home consumption.

18.11 CONFISCATION OF THE GOODS UNDER SECTION 111(m) OF THE CUSTOMS ACT, 1962:

(i). I find that it is alleged in the subject 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 sub-section (1) of section 54;"*

(ii). On plain reading of the above provisions of the Section 111(m) of the Customs Act, 1962 it is clear that any goods, imported by way of misclassification, will be liable to confiscation. As discussed in the foregoing para's, it is evident the Importer has deliberately/wilfully misdeclared the classification of the imported goods with a malafide intention to evade duty. Further by way of mis-declaration, they have wrongly availed benefit of Notification No. 46/2011-Customs dated 01.06.2011 for the period from Dec 2020- July 21. Further, from July 21- Jan 23, they have wilfully suppressed the fact that the goods are to be used in the motor vehicle and claimed the Sr No. 485A of the notification No. 50/2017 dated 30.06.17 for which they were ineligible as the goods were to be used in the Motor vehicle and exemption notification was available for the goods other than to be used in motor vehicles. In light of these acts of mis-classification of goods and wrong claim of notification benefit in the bills of entry, I find that the impugned imported goods are liable for confiscation as per the provisions of Section 111(m) of Customs Act, 1962. I hold so.

(iii). As the impugned goods are found to be liable for confiscation under Section 111(m) of the Customs Act, 1962, I find that it is 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 impugned goods as alleged vide subject 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."*

***Provided** that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, [3] [no such fine shall be imposed]:*

***Provided** further that] , without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.*

[4] [(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.]

[5] [(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

***Explanation** .-For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date** on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received.]*

first proviso which was introduced vide Finance Act, 2018 which says that *where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply.* Behind the proviso, there is an assumption that goods become liable for confiscation when there is demand under Section 28. Interestingly, the liability to confiscation is assumed to arise even in cases that do not involve an extended period of limitation not being cases of collusion or wilful mis-statement or suppression of facts.

At this point, one has to understand that there cannot be a demand of duty, where the goods are seized and are in the possession of the government. It is a basic principle that goods and duty travel together. Thus, when the goods are in the possession of the government having been seized, there cannot be a demand for duty. Duty payment, even differential duty payment arises when the goods are confiscated and ordered for release to the importer. Section 125(2) which provides that *where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods,* makes this above position clear.

Thus, the proviso which is inserted in Section 125 referring to cases under Section 28 which are essentially in respect of demand of duty where the goods are not seized/ detained by the department, gives room for interpretation that Redemption fine is imposable even if the goods are not seized and are not available for confiscation.

Further, this points were already settled in case of Judgment dated 11.08.2017 of Hon'ble High Court of Madras in ***C.M.A. No. 2857 of 2011 in the case of Visteon Automotive Systems India Ltd. Vs. CESTAT, Chennai [2018 (9) G.S.T.L. 142 (Mad.)]***. Para 23 of the said Judgment is as follows:

"The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges, the improper and irregular importation is sought to be regularised, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the redemption fine. The opening words of Section 125, "Whenever confiscation of any goods is authorised by this Act ....", brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act."

Further, In the case of ***M/s Venus Enterprises vs CC, Chennai 2006(199) E.L.T. 661(Tri-Chennai)*** it has been held that:

"We cannot accept the contention of the appellants that no fine can be imposed in respect of goods which are already cleared. Once the goods are held liable for confiscation, fine can be imposed even if the goods are not available. We uphold the finding of the misdeclaration in respect of the parallel invoices issued prior to the date of filing of the Bills of Entry. Hence, there is misdeclaraiion and suppression of value and the offending goods are liable for confiscation under Section 111(m) of the Customs Act. Hence the imposition of fine even after the clearance of the goods is not against the law."

In case of M/s Asia Motor Works vs Commissioner of Customs 2020 (371) E.L.T. 729 (Tri. - Ahmd.) Hon'ble tribunal have demarcated between the words, ***"Liable for confiscation" and "Confiscation".***

Hence, from the above discussion and relying on the above judgements. I find that goods are liable for confiscation and redemption fine can be imposed in view of judgement in case of ***C.M.A. No. 2857 of 2011 in the case of Visteon Automotive Systems India Ltd. Vs. CESTAT, Chennai [2018 (9) G.S.T.L. 142 (Mad.)].***

Hence, from above discussion we have come to the conclusion regarding fourth issue in this case i.e. impugned goods are liable for confiscation under Section 111 (m) of the Customs Act, 1962.

19. DUTY DEMAND UNDER SECTION 28(4) OF CUSTOMS ACT, 1962

19.1. 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."*
>
> *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."*

19.2. I observe that in terms of Section 28AA (1) of the Customs Act, 1962 the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section. Therefore, interest at the appropriate rate also recoverable from Noticee.

19.3. I find it pertinent to discuss assessment of impugned Bills of Entry filed by the importer to import the impugned goods and wrongly availing the benefit of Notification No. 46/2011- Customs dated 01.06.2011 impugned goods by resorting to wilful mis-declaration of classification of the goods. Further, in terms of section 17 of the Customs Act, 1962, read with the definition of assessment specified under Section 2(2) ibid, it is obligatory for the importer to correctly self-assess the duty on the imported goods, with reference to the classification of the goods. It is specified that an incorrect self-assessment results in re-assessment of the duty and renders the importer liable to action in terms of the provisions of the Customs Act, 1962. I find that after introduction of self-assessment vide Finance Act, 2011, the onus lies on the importer for making true and correct declaration with respect to all aspects of the Bill of Entry and to pay the correct amount of duty. In the instant case, the said importer being an 'ACCREDITED CLIENT' and therefore, Assessment and Examination were not prescribed for their Bills of entry and therefore, entire onus is on the said importer to make truthful declarations and assess and pay their Govt. correctly. The said importer had wrongly assessed the goods under CTH 85015390 and wrongly availed benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin-based exemption) and paid only the IGST @18% during the period from **Dec.2020 to July 2021**. Therefore, it amounts to **willful mis-statement** on the part of importer leading to evasion of duty. They were very well aware that their product merits classification under CTH- 85013119 due to its technical specification. Despite the fact, they continued classifying their product under wrong CTH just to avail the inadmissible duty exemption benefit. Once ICD Patli objected to their self-assessment, then only they agreed for right classification of the goods. Had the customs department not initiated inquiry against them, the said fact would have

not come to the notice. Further, it is also pertinent to mention here that classification was to be decided based on just the output power capacity of motor, that any importer/owner of the goods may know. It is hard to believe that without knowing the output power of motor, the order was placed by the Importer. Even after correction of the HSN on their own violation w.e.f. July, 2021 onwards, though, they stopped availing benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011, they started availing another ineligible benefit of reduced rate of BCD, i.e. @10% in terms of Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017. However, it appears that the importer has failed to appreciate that the said Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 was further amended vide Notification No. 21/2021-Customs dated 31.03.2021 (w.e.f.01.04.2021) which excluded the goods suitable for use in motor vehicles for the purpose of concessional duty @10%. To establish their wrongful claim of benefit of reduced rate of BCD, the importer has attempted to mislead the investigation in as much as vide their letter dated 29.06.2022 they have stated that the imported item is used in HVAC System and they as a trader, sell the item to the manufacturer of HVAC system and it is upto the manufacturer to decide where to use the manufactured product and that the item will be used for manufacturing of HVAC system and requested to allow the benefit of notification whereas vide their letter dated 04.01.2022.

It appears that the importer has failed to appreciate that they are required to prove that the imported goods are **other than those suitable for use in the motor vehicles** for availing the benefit of Sr.No.485A of Notification No.50/2017-Cus. Importer had himself admitted in letter dated 04.01.22 that the said imported goods are meant for use in HVAC which is used in motor vehicles to blow the air through vents of a motor vehicles and the sole function of the product is to rotate the fan in order to circulate air through cabin of motor vehicle. Further, in their statement recorded on 17.05.2023, they tried to be evasive but finally admitted that no benefit of said Sr.No.485 A is available to them.

Hence from above discussions, I find that that the importer had resorted to willful mis-declaration/mis-statement of correct classification of goods and their further use and wrongly availed benefit of exemption notification in the Bills of Entry of the said imported goods by **suppressing the said material facts,** which shows the ulterior motive of the importer to evade payment of applicable Customs Duty in respect of said imported goods cleared for home consumption.

Calculation of Duty

Period involved	Total Assessable value declared in the Bills of Entry	Total duty paid	Total duty payable after re-assessment	Differential duty/Duty short paid
Dec.2020 to March 2021	**19,93,77,613/-**	**3,58,87,971/-**	**6,17,67,185/-**	**2,58,79,214/-**
01.04.2021 to 01.07.2021	**6,02,11,074/-**	**1,08,37,993/-**	**2,25,61,089/-**	**1,17,23,096/-**

30.07.2021 to 07.01.2023	**22,83,78,522/-**	**7,07,51,666/-**	**8,55,73,432/-**	**1,48,21,766/-**
Total				**5,24,24,076**

Hence, I find that Differential duty amounting to Rs 5,24,24,076/- (BCD+SWC+IGST) short paid by Importer should be demanded under Section 28 (4) of the Customs Act, 1962. As stated above, applicable interest under section 28AA of Customs Act, 1962 should also be demanded from Importer. Hence, fifth issue in this case has been decided.

20. <u>Appropriation of amount deposited during investigation against liability to pay differential duty and interest</u>

I find during the investigation, M/s Toyota Tsusho India Pvt Ltd Tsusho India Pvt ltd has voluntarily paid the differential duty Rs 5,23,85,529/- and interest amounting to Rs 67,12,207/-. Further vide email dated 25.10.2024, Importer has stated that they have paid Rs 38,547/- as remaining duty liability and Rs 16332/- as interest liability through TR-6 Challan No 1423 dated 25.10.2024 which has also been verified from the cash section. So, Importer has paid total Rs 5,24,24,076/- as duty liability and Rs 67,28,539 as interest liability. Accordingly, I find that the deposited amount during investigation of the case should be appropriated against the duty and interest liability. Hence, the sixth issue has been decided in this case.

21. Imposition of Penalty under Section 112(a) (ii) and 114A of the Customs Act.

Before deciding this issue, I would prefer to examine the role and culpability of Noticee first in this case:

21.1 Role and Culpability of M/s Toyota Tsusho India Pvt Ltd Tsusho India Pvt Ltd.

From the above discussion so far, it has been found that after introduction of self-assessment vide Finance Act, 2011, the onus lies on the importer for making true and correct declaration with respect to all aspects of the Bill of Entry and to pay the correct amount of duty. In the instant case, the said importer being an 'ACCREDITED CLIENT' and therefore, Assessment and Examination were not prescribed for their Bills of entry and therefore, entire onus is on the said importer to make truthful declarations and assess and pay their Govt. correctly.

The Noticee had wrongly assessed the goods under CTH 85015390 as stated above in point 1 and wrongly availed benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin-based exemption) and paid only the IGST @18% during the period from **Dec.2020 to July 2021**. Therefore, it amounts to willful mis-statement on the part of importer leading to evasion of duty. They were very well aware that their product merits classification under CTH- 85013119 due to its technical specification. Despite the fact, they continued classifying their product under wrong CTH just to avail the inadmissible duty exemption benefit. Had the customs department not initiated inquiry against them, the said fact would have

not come to the notice. Even after correction of the HSN on their own violation w.e.f. July, 2021 onwards, though, they stopped availing benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011, they started availing another ineligible benefit of reduced rate of BCD, i.e. @10% in terms of Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 . However, it appears that the importer has failed to appreciate that the said Sr.No.485 A of Notification No.50/2017-Cus dated 30.06.2017 was further amended vide Notification No. 21/2021-Customs dated 31.03.2021 (w.e.f.01.04.2021) which excluded the goods suitable for use in motor vehicles for the purpose of concessional duty @10%. It further appears that, to establish their wrongful claim of benefit of reduced rate of BCD, the importer has attempted to mislead the investigation in as much as vide their letter dated 29.06.2022 they have stated that the imported item is used in HVAC System and they as a trader, sell the item to the manufacturer of HVAC system and it is upto the manufacturer to decide where to use the manufactured product and that the item will be used for manufacturing of HVAC system and requested to allow the benefit of notification whereas vide their letter dated 04.01.2022, they had stated that the said imported goods are meant for use in HVAC which is used in motor vehicles to blow the air through vents of a motor vehicles and the sole function of the product is to rotate the fan in order to circulate air through cabin of motor vehicle. Further, in their statement recorded on 17.05.2023, they tried to be evasive but finally admitted that no benefit of said Sr.No.485 A is available to them. From above facts, it is apparently clear that by suppressing the material fact that the output power of motor is in range of 154 watt to 182 watt, importer had wrongly assessed the goods under CTH 85015390 and wrongly availed benefit of exemption of BCD under Notification No.46/2011-Cus dated 01.06.2011 (Sr.No.1294) (country of origin-based exemption) and paid only the IGST @18% during the period from **Dec.2020 to July 2021**. Therefore, it amounts to willful mis-statement on the part of importer leading to evasion of duty. There was no complex interpretation of classification, it was just to be decided on the output power of the motor. Further after accepting classification, they wrongly intended to take the benefit of Sr no 485A of Notification 50/2017 dated 30.06.17 by suppressing the facts that goods are to be used in motor vehicles. Accordingly, the intent of the Noticee was clear to evade duty by suppressing the material facts and wilful mis-statement that led to the short payment of duty which is recoverable under Section 28(4) of the Customs Act, 1962. The act of their omission and commission in as much as mis-declaration of CTH and wrong availment of exemption notifications with an intent to evade payment of customs duty, made the goods liable for confiscation under Section 111(m) of the Customs Act. This also made importer liable for penalty under section 114A and 112(a) of the Customs Act, 1962.

In the personal hearing dated 15.10.2024, Noticee has submitted that they have deposited Rs. 5,23,85,529 as liability towards the differential duty and Rs 67,12,207/- towards interest liability during the investigation, Hence penalty under Section 114A should not be imposed. I find that in the current case, amount was deposited by Noticee after questioning by Customs Department and during the investigation period.

I find that in case of ***Commissioner of Central Excise, Indore Vs Deepak Spinners Ltd*** 2005 (179) E.L.T. 93 (Tri. - Del.) it was held that:

"In all these cases, the Tribunal is said to have taken the view that, where duty has been voluntarily paid by the assessee before the issuance of the show cause notice, no penalty under Section 11AC is imposable. But, in our view, the ratio of the law laid down in these cases is not attracted to the case of the respondents. The respondents did not pay the duty voluntarily in this case. They deposited the duty when they were caught by the Department on scrutiny of their record of having wrongly availed the benefit of Notification No. 5/98 without complying its condition No. 17 which imposed a mandatory obligation on them to procure requisite certificate from the competent authority before the clearance of the goods. No sufficient cause has been shown by them as to why this condition of the exemption notification was not complied with by them and they cleared the goods without payment of duty. If they were not caught by the Department, they would have enjoyed the benefit of evasion of duty. There had been deliberate breach of mandatory condition of the notification by them with intent to cause wrongful gain to themselves and loss of revenue to the Government. Therefore, keeping in view the conduct of the respondents, it is not a fit case, in our view, where penalty and interest should have been quashed by the Commissioner (Appeals). That being so, the impugned order of the Commissioner (Appeals) in this regard cannot be sustained and is set aside. The order-in-original regarding imposition of penalty and interest, against the respondents, as passed by the adjudicating authority is restored. However, keeping in view the facts and circumstances of the case, the penalty is reduced to Rs. 10,000/- (Rupees ten thousand only) and interest will also be payable, as per law by the respondents. The appeal of the Revenue accordingly stands accepted in the above terms"

Further in plethora of judgements, Hon'ble courts has held the penalty sustainable even if amount has been deposited against liability of differential duty. Some of them are being quoted below:

(a) *CCE* v. *Deepak Spinners Ltd.* - 2005 (179) E.L.T. 93

(b) *Kanodla Technoplast Pvt. Ltd.* v. *CCE, Delhi* - 2004 (95) ECC 281

(c) *CCE, Indore* v. *Sai Machine Tools* - 2004 (170) E.L.T. 100

(d) *CCE, Delhi* v. *Toshi Auto Ind.* - 2005 (183) E.L.T. 48

(e) *CCE, Indore* v. *S.P. Tobacco Pvt. Ltd.* - 2005 (181) E.L.T. 136

(f) *J.K. Pharma & Ors & Shri Ramesh Patel* v. *CCE, Ahmedabad* - 2005 (102) ECC 406 (Tri-Mum.)

(g) *Siva Hygenic Products* v. *CCE, Madurai* - 2005 (186) E.L.T. 178 (T) = (68) RLT 771

(h) *Brakes India* v. *CCE, Chennai* - 2005 (184) E.L.T. 179

(i) *Jasch Indus* v. *CCE, Delhi* - 2005 (184) E.L.T. 190

(j) *CCE* v. *Ruby Strips* - 2005 (184) E.L.T. 176

Now, I come to examine the penalty imposable on the Noticee under Section 112(a) and 114A of the Customs Act, 1962.

(i). 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 be liable to pay penalty under Section 114A. These acts and omissions of the Importer rendered them liable for penal action under Section 114A of the Customs Act, 1962.

(ii). 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.

(iii). 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 opt to refrain myself from imposing penalty upon M/s. Toyota Tsusho India Pvt Ltd. under Section 112(a) (ii) of Customs Act, 1962. . Hence, the last issue involved has also been decided in the case.**

22. In view of above discussions and findings supra, I pass the following order.

ORDER

i. I reject the classification of goods (electric motors) under **CTH 85015390** declared in the Bills of Entry during the period 04.12.2020 to 07.01.2023 and order to re-classify the same in **CTH 85013119**.

ii. I deny the benefit of duty exemption claimed by Noticee under **Notification No. 46/2011-Cus dated 01.06.2011 (Sr No. 1294)** for the period 04.12.2020 to 01.07.2021.

iii. I deny the benefit of exemption claimed by Noticee under **Sr No. 485A of Notification No. 50/2017-Cus dated 30.06.2017** for the period 01.04.2021 to 07.01.2023.

iv. I hold that goods i.e. electric motors valued at **Rs. 48,79,67,210/- (Forty Eight Crore Seventy Nine Lakh Sixty Seven Thousand and Two Hundred Ten Only)** are liable for confiscation under the provisions of Section 111(m) of the Customs Act, 1962. Further, I impose redemption fine of **Rs. 5,00,00,000/-(Rupees Five Crore Only)** under Section 125 of the Customs Act, 1962 in view of above discussions in para 18.

v. I confirm the demand of differential duty amounting to **Rs. 5,24,24,076/- (BCD+SWC+IGST) (Rupees Five Crore Twenty Four Lakh Twenty Four**

Thousand and Seventy Six only) in terms of the provisions of Section 28(8) read with Section 28(4) of the Customs Act, 1962 with applicable interest under section 28AA of the Customs Act, 1962 **which is recoverable from Noticee M/s Toyota Tsusho India Pvt Ltd.**

vi. I order to appropriate the paid amount **Rs 5,24,24,076/- (Rupees Five Crore Twenty Four Lakh Twenty Four Thousand and Seventy Six Only)** and **Rs. 67,28,539/- (Rupees Sixty Seven Lakh Twenty Eight Thousand Five Hundred Thirty Nine Only)** during investigation period and adjudication period as discussed in para 20.

vii. I impose penalty of Rs. **Rs. 5,24,24,076/-(BCD+SWC+IGST) (Rupees Five Crore Twenty Four Lakh Twenty Four Thousand and Seventy Six only)** on M/s Toyota Tsusho India Pvt Ltd Tsusho India Pvt Ltd under section 114 A of the Customs Act, 1962. I refrain from imposing penalty under section 112 (a) (ii) of the Customs Act, 1962, since as per 5th proviso of Section 114A, penalty under Section 112 and 114A are mutually exclusive.

23. This OIO is issued without prejudice to any other action that may be taken against the claimant under the provisions of the Customs Act, 1962 or rules made there under or under any other law for the time being in force.

12/11/2024

(K. Engineer)
Pr.Commissioner of Customs
Custom House Mundra.

By Speed Post & through proper/official channel

To,

1. **M/s Toyota Tsusho India Pvt Ltd Tshusho India Pvt ltd.** Plot No. 33 & 34, Bidadi Industrial Area, Ramanagaram Taluka, Ramanagara, Karnataka-562109

Copy to:

1. The Chief Commissioner of Customs, CCO, Ahmedabad.
2. The Additional Commissioner of Customs, SIIB (I), Mundra Customs..
3. The Deputy Commissioner (EDI), Custom House, Mundra.
4. Guard File.
5. Notice Board.