



OFFICE OF THE COMMISSIONER
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A	File No.	GEN/ADJ/COMM/68/2020-Adjn-O/o Commr-Cus-Kandla
B	Order-in-Original No.	KND-CUSTM-000-COM-18-2024-25
C	Passed by	M. Ram Mohan Rao, Commissioner of Customs, Custom House, Kandla
D	Date of Order	10.02.2025
E	Date of Issue	10.02.2025
F	SCN No. & Date	DRI/CZU/VIII/26/33H/2018 dated 03.09.2020
G	Noticee / Party / Importer / Exporter	(i) M/s. Continental Carriers Pvt. Ltd (ii) Shri Surjit Singh, Director, M/s. Continental Carriers Pvt. Ltd (iii) Shri Vaibhav Vora, M.D, M/s. Continental Carriers Pvt. Ltd (iv) Shri Ajay kumar Gupta, Chartered Accountant, M/s. M.A.M & Associates, Chartered Accountants, FA-36, 2 nd Floor, Shivaji Enclave (v) M/s. Cargil India Pvt. Ltd.

1. This Order - in - Original is granted to the concerned free of charge.
2. 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:

Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench,

2nd Floor, Bahumali Bhavan Asarwa,

Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad - 380004

3. Appeal shall be filed within three months from the date of communication of this order.
4. 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. 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. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
7. While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules, 1982 should be adhered to in all respects.
8. An appeal against this order shall lie before the Appellate Authority on payment of 7.5% of the duty demanded wise duty or duty and penalty are in dispute, or penalty wise penalty alone is in dispute.

BRIEF FACTS OF THE CASE-

M/s Continental Carriers Private Limited, having its registered Office at 76-77, Kapashera, Bijwasan Road, New Delhi-110037 bearing IEC No.0599002841, hereinafter referred to as M/s. CCPL is a freight forwarder. Shri Vaibhav Vohra is the Managing Director and Shri Viraj Vohra and Surjit Singh are the other Directors in the firm.

2. Intelligence was gathered by the Chennai Zonal Unit of the Directorate of Revenue Intelligence (DRI-CZU) that freight forwarders have obtained SEIS Scrips (Service Exports from India Scheme) from the Directorate General of Foreign Trade (DGFT) by intentionally mis-stating that foreign exchange remittances received towards air freight and sea freight as "freight transport agency" charges and amount earned in INR from exporters/importers as amount earned from foreign liner and such scrips were being utilized for payment of customs duty by other persons on their imports.

SEIS Scheme

3. The Foreign Trade Policy 2015-2020 (henceforth referred as FTP), which was notified under Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 by Director General of Foreign Trade with effect from 01.04.2015, introduced two new schemes viz. Merchandise Exports from India Scheme (MEIS) for exports of specified goods to specified markets and Service Exports from India (SEIS) for increasing export of notified services, in the place of plethora of schemes existing earlier, as per Chapter 1 of FTP.

4. The SEIS scheme as notified in FTP from Para 3.07 to 3.12 are reproduced as below:-

3.07 Objective -

Objective of Service Exports from India Scheme (SEIS) is to encourage export of notified Services from India.

3.08 Eligibility

(a) Service Providers of notified services, located in India, shall be rewarded under SEIS, subject to conditions as may be notified. Only Services rendered in the manner as per Para 9.51(I) and Para 9.51(ii) of this policy shall be eligible. The notified services and rates of rewards are listed in Appendix 3D.

(b) Such service provider should have minimum net free foreign exchange earnings of US\$15,000 in preceding financial year to be eligible for Duty Credit Scrip. For Individual Service Providers and sole proprietorship, such minimum net free foreign exchange earnings criteria would be US\$10,000 in preceding financial year.

(c) Payment in Indian Rupees for service charges earned on specified services, shall be treated as receipt in deemed foreign exchange as per guidelines of Reserve Bank of India. The list of such services is indicated in Appendix 3E.

(d) Net Foreign exchange earnings for the scheme are defined as under: Net Foreign Exchange = Gross Earnings of Foreign Exchange minus Total expenses / payment / remittances of Foreign Exchange by the IEC holder, relating to service sector in the Financial year.

(e) If the IEC holder is a manufacturer of goods as well as service provider, then the foreign exchange earnings and Total expenses / payment remittances shall be taken into account for service sector only.

(f) In order to claim reward under the scheme, Service provider shall have to have an active IEC at the time of rendering such services for which rewards are claimed.

3.09 Ineligible categories under SEIS

(1) Foreign exchange remittances other than those earned for rendering of notified services would not be counted for entitlement. Thus, other sources of foreign exchange earnings such as equity or debt participation, donations, receipts of repayment of loans etc. and any other inflow of foreign exchange, unrelated to rendering of service, would be ineligible.

(2) Following shall not be taken into account for calculation of entitlement under the scheme

(a) Foreign Exchange remittances:

I. Related to Financial Services Sector

- (i) Raising of all types of foreign currency Loans;
- (ii) Export proceeds realization of clients;
- (iii) Issuance of Foreign Equity through ADRs GDRs or other similar instruments;
- (iv) Issuance of foreign currency Bonds;
- (v) Sale of securities and other financial instruments;
- (vi) Other receivables not connected with services rendered by financial institutions; and

II. Earned through contract/regular employment abroad (e.g. labour remittances);

- (b) Payments for services received from EEFC Account;
- (c) Foreign exchange turnover by Healthcare Institutions like equity participation, donations etc.
- (d) Foreign exchange turnover by Educational Institutions like equity participation, donations etc.
- (e) Export turnover relating to services of units operating under EOU I EHTP STPI BTP Schemes or supplies of services made to such units; (Amended vide Notification No 8/2015-20 dated 4th June, 2015)
Clubbing of turnover of services rendered by SEZ I EOL I /EMT STPI I BTP units with turnover of DTA Service Providers;
- (g) Exports of Goods.
- (h) Foreign Exchange earnings for services provided by Airlines, Shipping lines service providers plying from any foreign country X to any foreign country Y routes not touching India at all.
- (i) Service providers in Telecom Sector.

3.10 Entitlement under SEIS

Service Providers of eligible services shall be entitled to Duty Credit Scrip at notified rates (as given in Appendix 3D) on net foreign exchange earned.

3.11 Remittances through Credit Card and other instruments for MEIS and SEIS:

Free Foreign Exchange earned through international credit cards and other instruments, as permitted by RBI shall also be taken into account for computation of value of exports.

3.12 Effective date of schemes (EIS and SEIS)

The schemes shall come into force with effect from the date of notification of this Policy, i.e. the rewards under MEIS/SEIS shall be admissible for exports made/services rendered on or after the date of notification of this Policy.

5. Relevant definitions of terms used in FTP as given in Chapter 9 are reproduced below:

9.00 For purpose of FTP, unless context otherwise requires, the following words and expressions shall have the following meanings attached to them:-

9.02 'Act' means Foreign Trade (Development and Regulation) Act, 1992 (Aro.22 of 1992) [FT (D&R) Act] as amended from time to time.

9.06 'Applicant' means person on whose behalf an application is made and shall, wherever context so requires, includes person signing the application.

9.20 "Export" is as defined in FT (D&R) Act, 1992, as amended from time to time.

9.38 "Person" means' both natural and legal and includes an individual, firm, society, company, corporation or any other legal person including the DGFT officials.

9.50 "Services" include all tradable services covered under General Agreement on Trade in Services (GATS) and earning free foreign exchange.

9.51 "Service Provider" means a person providing:

- (i) Supply of a 'service' from India to any other country; (Mode- Cross border trade)
- (ii) Supply of a 'service' from India to service consumer(s) of any other country in India; (Mode 2- Consumption abroad)
- (iii) Supply of a 'service' from India through commercial presence in any other country. (Mode 3- Commercial Presence.)
- (iv) Supply of a 'service' from India through the presence of natural persons in any other country (Mode 4- Presence of natural persons.)

6. Definition of "export" in relation to services or technology as given in Section 2(e) of Foreign Trade (Development & Regulation) Act, 1992 is reproduced as below:

(ii) supplying, services or technology--

- (A) from India into the territory of any other country;
- (B) in India to the service consumer of any other country;
- (C) by a service supplier of India, through commercial presence in the territory of any other country;
- (D) by a service supplier of India, through presence of Indian natural persons in the territory of any other country;

7. The Public Notice No.3/2015-20 dated 01/04/2015 issued by DGFT notified Appendix 3D which listed the services with the provisional Central Product Classification (CPC) code pertaining to the services listed and admissible rate in % (on net foreign exchange earnings) as the reward for such export of services. The services related to the investigations, as in Appendix 3D, are tabulated below:

TABLE A

S. No.	Sectors	Central Product Classification (CPC Code)	Admissible rate in % (on Net Foreign Exchange earnings)
9	TRANSPORT SERVICES (Please refer Note 4)		
A.	Maritime transport Service		
a.	Passenger Transportation Service *	7211	5
b.	Freight Transportation *	7212	5
c.	Rental of vessels with crew *	7213	5
d.	Maintenance and repair of vessels	8868	5
e.	Pushing and towing service	7214	5
f.	Supporting service for maritime transport	745	3
B.	Air Transport Service		
a.	Rental of aircraft with crew	734	
.....			
C.	Road Transport Service		
a.	Passenger transportation	7121, 7122	5
b.	Freight transportation	7123	5
D.	Service Auxiliary to all modes of Transport		

a.	Cargo-Handling Service	741	
b.	Storage and Warehousing service	742	3
c.	Freight transport agency service	748	5

As per Note 4 of the annexure to Appendix 3D, under Maritime Transport Service marked with *[9A(a), (b) and (c)], the reward shall be limited to Operations from India by Indian Flag Carriers only.

8. The Public Notice No.7/2015-20 dated 04/05/2016 issued by DGFT notified Appendix 3E which contain certain services, out of the services notified [vide Appendix 3D], that are rendered to a foreign liner in a customs notified area where a meats for e sorts are said in INR out of amount remittable to foreign liner (including by its agent) in foreign exchange or out of remittances received from overseas buyer in foreign exchange, are deemed to be earned in foreign exchange and eligible for SEIS reward/scrip. During the period upto 2016-17, the services of Maritime Transport Services viz., 9(A)(c) — Rental of vessels with crew, 9(A)(d) Maintenance & repair of vessels, 9(A)(e) — Pushing and Towing services and 9(A)(f) — Supporting Services for maritime transport were only listed in Appendix 3E. Under supporting service for maritime transport, 44 services were listed as eligible service. It includes, "terminal handling service- A(f)(XIV)", "cargo dispatch services — A(1)(XVI)", "cargo storage services- A(f)(XVII)" and "handling service not specified elsewhere A(f)(XXXV)".

9.1 The Provisional Central Product Classification (CPC) was issued by the Department of International Economic and Social Affairs, Statistical Office of the United Nations, constitutes a complete product classification covering goods and services. The CPC is a system of categories covering both goods and services that is both exhaustive (i.e. all goods and services are covered) and mutually exclusive (i.e. a given good or service may only be classified in one CPC category). The coding system of CPC is hierarchical and purely decimal. The classification consists of Sections (identified by the first digit), Divisions (identified by the first and second digits), Group (identified by the first three digits), Class (identified by the first four digits) and Subclass (identified by the first five digits). The first five sections classify products and second five sections classify services.

9.2 The CPC prescribes Rules of Interpretation for both products and services. The Rules of Interpretation as in the WCO-HSN is adopted for products. It states that the classification of services shall be according to the terms of the categories as described in sections, divisions, groups, classes or subclasses of CPC. It devise rules when services are prima facie classifiable under two or more categories on the understanding that only categories at the same level (sections, divisions, groups, classes or subclasses) are comparable. It states that-

1. When services are, prima facie, classifiable under two or more categories, classification shall be effected as follows, on the understanding that only categories at the same level (sections, divisions, groups, classes or subclasses) are comparable:

(a) The category, which provides the most specific description, shall be preferred to categories providing a more general description.

(b) Composite services consisting of a combination of different services that cannot be classified by reference to 1(a) shall be classified as if they consisted of the service that gives them their essential character, in so far as this criterion is applicable.

(c) When services cannot be classified by reference to 1(a) or 1(b), they shall be classified under the category that occurs last in numerical order among those which equally merit consideration.

2. Services, which cannot be classified in accordance with the above rules, shall be classified under the category appropriate to the services to which they are most akin.

93 The CPC contains explanatory note for each sector. The explanatory note for "Transport Service" which is relevant for the investigations is under section 7 and it contains 5 Divisions, namely, Land Transport Services (71), Water Transport Services (72), Air Transport Services (73), Supporting and Auxiliary Transport Services (74) and Post and Telecommunication Services (75). The Land Transport Service consists of two Groups, Transport services by railway (711) and Other Land Transport Service (712).

94 The Land, Water and Air transport services (Division 71, 72 and 73), all consists a class/subclass for transportation of containerized freight. In general, the transportation of containerized freight is explained as transportation (by rail/road/marine vessel/air) of individual articles and packages assembled and shipped in specially constructed shipping containers designed for ease of handling in transport. The related class/subclass for Land, Water and Air transport services are 71123, 7212 and 73220 respectively.

95 The Supporting and Auxiliary Transport Services contains 9 Groups. They are Cargo Handling service (741), Storage and Warehousing Service (742), Supporting service for railway transport (743), Supporting Service for Road Transport (744), Supporting Service for Water Transport (745), Supporting Service for Air Transport (746), Travel Agency and tour operator services (747), freight transport agency service (748) and Other Supporting and Auxiliary Transport Service (749).

9.6 The cargo handling services consist of class container handling services (7411) and other cargo handling services (7419). The cargo handling services is defined as handling services provided for freight in special containers or in non-containerized freight, which include services of freight terminal facilities and stevedoring services for all modes of transport.

9.7 The freight transport agency service is explained as freight brokerage services, freight forwarding services (primarily transport organization or arrangement services on behalf of the shipper and consignee), ship and aircraft space brokerage services and air freight consolidation and break bulk services.

10. As per Para 2.52(a) of FTP, all export contracts and invoices shall be denominated either in freely convertible currency or Indian rupees but export proceeds shall be realized in freely convertible currency.

11. As per Pam 3.04 of Hand Book of Procedures for FTP, the application for the SEIS reward for eligible services **rendered** shall be filed in ANF-3B form.

12. As per ANF-3B form, the applicant undertakes to certify that he/she makes a true declaration therein and certifies that the foreign exchange earned is on account of services **rendered** from India alone in terms of Para 9.51(i) and Para 9.51(ii) of FTP and do not fall under ineligible category or service as per Para 3.08 and Para 3.09 of FTP and the Chartered Accountant/Cost and Works Accountant/Company Secretary certifies those declarations/claims after due examination.

13. As per Section 2(j) of Foreign Trade (Development & Regulation) Act, 1992, "services" means service of any description which is made available to potential users and includes all the tradable services specified under the General Agreement on Trade in Services entered into amongst India and other countries who are party to the said Agreement and provided that, this definition shall not apply to the domain of taxation.

14.1 The international federation of freight forwarders, termed as "FIATA", prescribe FIATA model rule for freight forwarding services. It defines freight forwarding service, freight forwarder and carrier as below:-

"Freight Forwarding Services means services of any kind relating to the carriage, consolidation, storage, handling, packing or distribution of the goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the goods for official purposes, procuring insurance of the goods and collecting or procuring payment or documents relating to the goods." (Paragraph 2.1)

"Freight Forwarder means the person concluding a contract of Freight Forwarding Services with a Customer" (Paragraph 2.2)

"Carrier means any person actually performing the carriage of the Goods with his own means of transport (performing Carrier) and any person subject to carrier liability as a result of an express or implied undertaking to assume such liability (contracting Carrier)" (Paragraph 2.3).

14.2 The FIATA differentiates the freight forwarder's liability upon their relationship with customers as an agent or as a principal. In respect of the freight forwarder's liability other than principal, it states that the basis of liability is the freight forwarder's duty of care and when there is breach of his duty of care, he has to compensate the customer for loss or damage and he is not liable for acts and omission of third parties such as carrier, port authorities etc. (Paragraph 7 of FIATA Model Rule for Freight Forwarding Services.

14.3 In respect of freight forwarder's liability as Principal, the FIATA model of rules states that the freight forwarder by issuing transport document undertook to assume the carrier liability and he is responsible to his customers for the acts and omissions of third parties he has engaged for the performance of the contract of carriage or other services as if such acts and omission were his own and his rights and duties shall be subject to the provisions of the law applicable to the related mode of transport or service concerned. In other words, in respect of freight forwarders' liability for air transport, ocean freight and land transportation, the provisions applicable to relevant mode of transport (air, ocean or land) are made applicable to the freight forwarder. (Paragraph 7)

15.1 As per Manual on Statistics of International Trade in Services 2010 (MSITS 2010) published by United Nations Statistical Commission and as per the System of National Accounts (SNA), and Balance of Payment Manual [an internationally agreed standard set of recommendations on how to compile measures of economic activity], and related classification such as "Central Product Classification", and for CATS related negotiations the concepts related to trade in services are detailed as below: -

(i) *It defines "services" as*

"Services are the result of a production activity that changes the conditions of the consuming units, or facilitates the exchange of products or financial assets. These types of service may be described as change-effecting services and margin services, respectively. Change-effecting services are outputs produced to order and typically consist of changes in the conditions of the consuming units realized by the activities of producers at the demand of the consumers. They can also be referred to as "transformation services". Change-effecting services are not separate entities over which ownership rights can be established. They cannot be traded separately from their production. By the time their production is completed, they must have been provided to the consumers. "

Margin services result when one institutional unit facilitates the change of ownership of goods, knowledge-capturing products, some services or financial assets between two other institutional units. Margin services are provided by wholesalers and retailers and by many types of financial institutions. Margin services resemble change-effecting services in that they are not separate entities over which ownership rights can be established. They cannot be traded separately from their production. By the time their production is completed they must have been provided to the consumers

(ii) With respect to service classification of transport, it states that *Transport covers the*

process of carriage of people and objects from one location to another as well as related supporting and auxiliary services and rentals (charters) of carriers with crew. Transport can be classified according to mode of transport and what is carried passengers or freight. A transport provider may subcontract in order to be able to use the services of other operators in providing part of the final transport service. Such services should be recorded on a gross basis. Sea transport covers all international freight and passenger transport services undertaken by seagoing vessels but does not include transport by underwater pipelines (included in pipeline transport) and cruise fares (included in travel). Air transport covers all international freight and passenger transport services provided by aircraft. Space transport includes satellite launches. Rail Transport covers international transport by trains. Road transport covers international freight transport by lorries and trucks and international passenger transport by buses and coaches. Inland waterway transport covers international transport on rivers, canals and lakes. Included are waterways that are internal to one country and those that are shared among two or more countries. Pipeline transport covers the transport of goods in pipelines, such as the transport of petroleum and related products, water and gas. Other supporting and auxiliary transport services covers all other transport services that cannot be allocated to any of the components of transport services previously described. Other supporting and auxiliary transport services include services that are auxiliary to transport and not directly provided for the movement of goods or people. Those services that are not covered above and that relate to one mode of transport only are recorded under the *other* category of the appropriate mode of transport (sea, air, rail, road or inland waterway transport). Included, for example are: cargo handling (such as loading and unloading of containers) that is billed separately from freight; storage and warehousing; packing and repackaging; towing not included in freight services; pilotage and navigational aid for carriers; air traffic control; cleaning of transport equipment performed in ports and airports; and salvage operations and associated agents' fees (including freight forwarding and brokerage services). Services that relate to more than one mode of transport and that cannot be allocated to individual modes of transport are recorded under other supporting and auxiliary transport services (749). Some related items that are excluded from transport services are freight insurance (included in insurance service); goods procured in ports by non-resident carrier (goods, not services; repairs and maintenance of transport equipment (included in maintenance and repair n.i.e); repairs of railway facilities, harbours and air field facilities (included in construction); and rental of charters of carriers without crew (included in operating leasing services).

- iii) In para 3.246 the operating leasing services is explained. It states that it encompasses the activity of renting out a product asset under an arrangement that provides use of the asset to the lessee, but does not involve bulk transfer of risks and benefits of ownership to the lessee. The services include resident /non-resident leasing (rental) and charterers without crew of ships, aircraft and transport equipment such as railway cars, containers and rigs.

16. As per Article XXVIII(i) of the General Agreement on Trade in Services, "service consumer" is defined as "any person that receives or uses a service. "

17. From the combined reading of above-mentioned provisions and definitions including Para 3.08 of FTP, it appears that SEIS scheme is subject to following eligibility and entitlement criteria:

- a) Applicant of SEIS reward/scrip shall be actual providers of the notified service/services i.e. who actually renders or performs the services and not who arranges or otherwise deals with the notified service. (Para 3.08 (a) and Para 3.09 (I) of FTP)

- b) Applicant of SEIS reward should have either supplied the notified service to the service consumer in any other country or supplied the notified service to service consumer of any other country in India. (Para 9.51 (i) & 9.51(ii) of FTP)
 - e) Applicant should have earned the foreign exchange towards performing the notified service for which the SEIS reward is sought. (Para 9.50 & Para 3.09 (1) of FTP)
 - d) Reward is calculated at the rate notified in Appendix 3D on the net foreign exchange earned by the applicant in performing the service after deducting the expenses/payments made in foreign exchange relating to service sector in the Financial Year (Para 3.08(a) and Para 3.08(d) of FTP).
- e) Supporting service for maritime transport is only listed as services eligible for reward under Appendix 3E (Public Notice No.0712015-20 dated 04/05/2016).
- f) In respect of services listed under Appendix 3E, the service should be rendered to a foreign liner in a customs notified area and the INR payment would be treated as deemed foreign exchange, provided the amount is received by the service provider from the agent out of amount remittable to the overseas principal or out of remittances to be sent by the overseas buyer (Public Notice No.07/2015-20 dated 04/05/2016).
- g) Remittances received towards statutory dues/levies or remittances received for payment or payable to the third-party service providers who provide the notified service to the service consumers of any other country in India are not eligible for claim of SETS benefit. (Para 9.50 of FTP)
- h) Documentary evidence of payments which are approved by RBI as deemed to be received in foreign exchange and deemed to be earned in foreign exchange are required for claiming services listed in Appendix 3E (Para 3.08(c) of FTP).
- l) Earnings of income related to export of goods cannot be termed as service income for claim of SETS benefit (Para 9.09 (2)(g) of FTP)
- j) The CPC being a decimal system, a reference to an aggregate category must be understood as a reference to all of the constituent parts of that category. Put differently, a reference to a three-digit CPC Group should, in the absence of any indication to the contrary, be understood as a reference to all the four-digit Classes and five-digit Sub-classes that make up the group; and a reference to a four-digit Class should be understood as a reference to all of the five-digit Sub-classes that make up that Class. (Interpretative Rules of CPC)
- k) Transport as per CPC is classified according to mode of transport and what is carried passenger or freight in Division 71 to 73. The "supporting and auxiliary transport services" described in Division 74 of CPC covers all other transport services that cannot be allocated to any of the components of transport services previously described in Division 71 to 73. It only includes services that are supporting or auxiliary to transport and not for services provided for the movement of goods or people. In other words, the income related to international trade in service of this group cannot include income related to freight, which is provided for movement of goods.
- l) An agency is a consensual relationship created by contract or by law where one party, the principal, grants authority to another party, the agent, to act on behalf of and under the control of the principal to deal with third party. When the relationship between the freight forwarder and his customer or the relationship between the freight forwarder and the shipping line/airline are on principal to principal basis and the freight forwarder issues "contract of carriage" and undertakes to assume the carrier liability with his customers, the income derived as "freight" or "others" cannot be termed as income under "freight transport agency service".
- m) "Freight transport agency services" (CPC 7480, 74800) are described as "Freight Brokerage services, freight forwarding services (primarily transport organisation or arrangement services on behalf of the shipper or consignee), ship and aircraft space brokerage services, and freight consolidation and break-bulk services." The description of services does not include the actual shipping or movement of goods by

airline or shipping line (or any other means) for any of these service providers and thereby the charges related to it are excluded from the "freight transport agency service".

n) Under Maritime Transport Service, for Ocean Freight, the reward is not eligible for the goods carried by foreign liner as it would be evident that carriage by foreign vessel would become import of service (Note 4 of Appendix 3D). Under Air Transport Service, "freight transportation of air" is not included in Appendix 3D.

- o) The transport as per CPC does not have specific division/group/class for service provided for movement of goods/person by multimodal transport. The components of multimodal transport are separately listed in Division 71 to 73. The multi-modal courier described in class 75121 consists of pickup, transport and delivery service rendered by courier by using one or more mode of transport, considered (multi-modal transport). Hence, multi-modal as described in CPC means, transport of goods using one or mode of transport and cannot be termed as "cargo handling service", "storage and warehousing service" or "freight transport agency service".
- p) The Appendix 3E excludes all modes of freight transport (Division 71 to 73 of CPC) and services supporting and auxiliary to air and land mode of transport.

18. The criteria of Paragraph 3.10 and paragraph 3.09 of the FTP, 2015-20 discussed above, are further explained by the Trade Notice 11/2015-20 dt. 21.07.2016 issued by DGFT and it is stated that only foreign exchange remittances earned as amounts in lieu of services rendered by the Service Exporter would be counted for computation of the entitlement under the scheme and the state/central taxes payable by the customer to Government are collected from the Customer by the Service Provider on behalf of the Government concerned are not earnings of the service provider.

C. Investigation

19. In pursuance of the intelligence gathered, under summon proceedings, the copies of ANF3B Form filed before the DGFT, financial statements filed before the Ministry of Corporate Affairs for the year 2015-16 and sample copies of invoices issued were called for and obtained from M/s CCPL vide their letter dated 30/05/2018. The ANF-3B Form as submitted by M/s. CCPL to this office for the years 2015-16 was filed before the Regional Authority, Directorate General of Foreign Trade, New Delhi on 30.03.2017. Shri Ajay Kumar Gupta, Chartered Accountant, M/s M.A.M. & Associates, Chartered Accountants, FA-36, 2nd Floor, Shivaji Enclave, Near Mehta Chowk, Rajouri Garden, New Delhi — 110 027 has certified the claim made by M/s CCPL. Along with the application, they have filed Annexure A and Annexure C listing the invoices relating to service rendered for calculating the foreign exchange earnings for services covered under Appendix 3D and Appendix 3E respectively.

20. In the ANF-3B Form as received from M/s. CCPL, M/s CCPL had claimed to have rendered

- "cargo handling service — 9(D)(a)" "storage and warehousing services — 9(D)(b)" and "freight transport agency services — 9(D)(c)" listed in Appendix 3D and
- "terminal handling service XIV", "cargo dispatch services XVI" and "handling service not specified elsewhere - XXXV" listed in Appendix 3E as "supporting service for maritime transport — 9(A)(f)"

under Para 9.51(i) of the FTP, 2015-20 and mentioned the earnings for the service rendered by them as below: -

TABLE B-

Year		Gross foreign exchange earned in USD	Total expenses/payment/remittances of foreign exchange in USD	Net foreign exchange earned in USD
2015-16	Appendix 3D	44,75,380.13	24,74,653.73	20,00,726.40
	Appendix 3E	1,56,44,124.35	—	1,56,44,124.35

Total	2,01,19,504.48	24,74,653.73	1,76,44,850.75
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21. The statement for calculation of foreign exchange earnings received against service rendered by M/s CCPL in the said ANF-3B Form given in Annexure A, wherein the invoices issued by M/s CCPL with earnings in USD for claim under Appendix 3D were declared. Similarly, the statement of calculation of supply of an eligible service and INR received against services rendered by M/s. CCPL in the said ANF-3B form given in Annexure C, wherein the value of realized exports paid in Indian rupees, converted into USD for claim under Appendix 3E were declared. Both the annexures were duly certified by M/s. CCPL and the Chartered Accountant. The statement of calculation of expenditure (total expenses/payment/remittances) during the financial year in USD is declared in Annexure D. All the annexures were duly certified by M/s. CCPL and the Chartered Accountant.

22. M/s. CCPL worked out the net entitlement of SEIS benefit for the years 2015-16 as Rs.5,74,09,286.56 (after the late cut @ 2% amounting to 211,71,618.10) and the said claim was examined and certified by the Chartered Accountant as correct.

23. In the ANF-1, filed along with the ANF-3B, they have claimed that the service rendered by M/s. CCPL as business auxiliary services and supporting service for maritime transport.

24. M/s. CCPL in their application filed during the year 2015-16 have further
- Claimed that SEIS benefit was only for services rendered by them under para 9.51(i) and 9.51(ii) of FTP, 2015-20 and their services were listed in Appendix 3D or listed in Appendix 3E relating to supply of service from India.
 - They had undertaken not to have taken benefit on in-eligible services as given in para 3.09 of FTP
 - Claimed that they are service provider exporter and have supplied the services auxiliary to all modes of transport service under category of Appendix 3D.
 - Claimed that they are service provider exporter and have supplied the services under transport services (supporting service for maritime transport) of Appendix 3E and realised payment in INR which can be treated as receipt in Deemed Foreign Exchange as per Para 3.08(c) of FTP, 2015-20.
 - Declared that the stated SEIS claim is exclusive of all taxes collected as per Trade Notice 11 dated 21/07/2016 of FTP, 2015-20

25. The Regional Authority, Directorate General of Foreign Trade, New Delhi vide Scrip/licence numbers 0519101677 dated 01.01.2018 in file no.INTKD60401201801.xml had granted scrips for duty credit for Rs.5,74,09,286.57 under the category of license "Service Exports from India Scheme". The FOB value for the scrip issued for the year 2015-16 was Rs. 117,16,18,089.80. M/s. CCPL has transferred the said scrip No.0519101677 dated 01.01.2018 to M/s. Cargil India Private Limited [IEC 0596044330], Survey No.415, National Highway Road, No.8-A, PO Bhimasar, Taluka Anjar, Gujarat — 370 240 who in turn utilized the scrip for payment of customs duty on import of crude degummed soya bean oil (edible grade) in bulk through Kandla Sea Port, vide bills of entry Nos. 4934854 dated 24.01.2018, 4953708, dated 25.01.2018 and 4955243 dated 25.01.2018 as detailed in Annexure I to the show cause notice.

Discussion of statements/letters recorded/received from the personnel of M/s CCPL and the Chartered Accountant who certified the SEIS

26. Statement was recorded from Shri Surjit Singh, Director, M/s. CCPL on 30.05.2018 under section 108 of the Customs Act, 1962. He in his statement has *interalia* stated that
- M/s. CCPL is engaged in the business of logistics which include freight forwarding, cargo handling service and storage and warehousing; that M/s. CCPL have their branches all over India; that there are 3 Directors which include himself, Shri Vaibhav Vohra, and

Shri Viraj Vohra. Shri Vaibhav Vohra is the Managing Director and he looks after the sales and operations and report to the Board.

- ii. that M/s. CCPL has claimed SEIS benefit during the year 2015-16, for the services "freight forwarding agency" and "supporting services for maritime transport" stipulated in serial no. 9D(c) and 9A(f) of Appendix 3D for foreign exchange earned and have claimed "terminal handling service XIV", "cargo dispatch services XVI" and "handling service not specified elsewhere XXXV" as "supporting service for marine transport" under Appendix 3E for INR earned;
- iii. the components of charges for which M/s CCPL have claimed benefit under "freight transportation agency" and "maritime transport charges" for foreign exchange earned include "ocean freight", "air freight", "warehousing charges", "ADC clearance charges", "palletisation charges", "terminal handling charges", "inland haulage charges", "bill of lading charges", "storage facility charges", "demurrage charges" etc.
- iv. When asked how the income earned as foreign exchange against the above components can be termed as service for providing supporting service for maritime transport / freight transport agency service, he explained that M/s. CCPL have agents outside India and through them they rendered freight forwarding services and supporting service for maritime transport to their customers abroad; that their agent reimbursed freight charges and cargo handling charges on delivery of goods at the destination port or airport in foreign currency; that similarly for the services rendered by the agents for their customers in their country, M/s CCPL pays them in foreign currency and for the net foreign exchange earned, they have claimed SEIS benefit;
- v. When asked about the income under Appendix 3E, he stated that they have taken benefit for ocean freight, air freight, inland haulage charges for benefit and all these incomes were received from exporters in India in INR.
- vi. When shown explanation given in Prov. Product Classification for freight transport agency and air freight income and was asked to offer comments relating to correctness of availment of benefit, he stated that air freight amount is not eligible for SEIS benefit and ocean freight charges is eligible for SEIS benefit as per Appendix-3D if freight was transported by Indian Flag vessel; that freight transportation by air is not listed in Appendix-3D.
- vii. When shown the public notice no.7 dated 04/05/2016 and requested to offer his comments, he stated that M/s. CCPL do not render service to foreign liner; that M/s CCPL takes service from foreign liner on behalf of their customer to deliver containers from one port to another port; that M/s CCPL has rendered service only to the exporters located in India and have received money in INR from those exporters.
- viii. When asked to explain the entries made with regard to revenue from operations in the balance sheet for the years 2015-16 and 2016-17, he stated that the revenue from operations for 2015-16 was shown as Rs.144,26,65,547/- and Rs. 120,30,85,010/- was shown as freight purchase expenses, similarly, the revenue from operations for 2015-16 was shown as Rs.123,92,50,649/- and Rs.101,11,53,798/- was shown as freight purchase expenses.
- ix. When sample invoices was shown and asked to clarify whether the terminal handling charges and inland haulage charges were done by M/s. CCPL and whether M/s. CCPL have the necessary infrastructure to provide palleting service, he stated that M/s. CCPL does not have any infrastructure or wherewithal to render such services and all these services were rendered by ports and other agencies, wherein M/s. CCPL have raised the bill to its customers as reimbursement of the amount paid to those agencies.

On completion of statement, he stated that he would come back on the above issues in consultation with Shri Vaibhav Vohra, Managing Director.

27. Shri Vaibhav Vohra, Managing Director was summoned to appear on 31st July 2018. He

did not appear for the summons issued. Instead, prior to his summoned date, one Shri Vipal panda, Vice President, Business Excellence appeared on 29/06/2018 and submitted Rs. 25 Lakh towards paying back the SEIS claim and submitted sample copies of invoices. Again, Shri Vaibhav Vohra was summoned to appear on 07/09/2018. He sought adjournment after adjournment and the Directorate sent letter dated 20/09/2018 to Shri Vaibhav Vohra to appear on 05/10/2018. Shri Vaibhav Vohra vide his letter dated 05/10/2018 has stated that they have approached DGFT for clarification through PHD chamber of Commerce & Industry and he authorizes Shri Surjit Singh to appear and give statement before this Directorate. So far, they have not submitted any document clarifying their position and instead it is learnt that based on proceedings initiated by this Directorate, DGFT has issued show cause notice to them questioning the scrip issued to them. However, on 05/10/2018, they submitted copies of all invoices in a compact disc, based on which claim was made during 2015-16 and paid another Rs.25 Lakh towards repayment of claim taken. On 26/10/2018, they submitted invoice wise break up sheet in excel with respect to SEIS benefit claim for the financial year 2015-16. On perusal of the same it appeared to reveal that they have taken benefit in excess, for value of USD 1,92,304.72/- and Rs.11,00,977.757- without any invoices in Annexure A and Annexure C respectively in their claim. On 29.02.2020, M/s CCPL has made further payment of Rs.50 Lakhs towards refund of the SEIS benefit availed for 2015-16, pending reassessment of the actual entitlement. All the payments made were credited to the Government account and the details are listed in Annexure II to this notice.

28. Shri Ajay Kumar Gupta, Partner M/s. M.A.M. & Associates in his statement dated 08.01.2019 has interalia stated that

- i. On the request of M/s. CCPL, he had given the certificate of Chartered Accountant which was submitted by M/s. CCPL along with ANF-3B form.
- ii. He had seen and verified the invoice/ bills and given the certificate and on queries raised, admitted that he had certified the claim for its legal eligibility, without going through the provisions of FTP 2015-20 based on the claim made by M/s CCPL.
- iii. When asked to explain how the services rendered by M/s CCPL would fit in "services auxiliary to all modes of transport" with CPC code 741, 742, 745 and 748, he stated that he had given the certificate based on the declaration given by the management of M/s. CCPL; that he did not know anything about CPC.
- iv. The provisions of para 3.09 of the FTP, 2015-20 as in the certificate given by him was shown to him along with sample invoices claimed to be verified by him and was asked to explain as to how the services of air freight, air freight cargo handling service would fit in Appendix 3E, he reiterated that he had not gone through the provision of the FTP, 2015-20 and related public notices; that air freight is not listed as a notified service in Appendix 3D or Appendix 3E, that the charges viz. AWB charges, terminal handling charges, etc. shown in the invoices were related to "supporting service for air freight" and the same is not listed in Appendix 3E; that these services cannot be termed as "supporting service of maritime transport".
- v. When the sample invoice related to ocean freight was shown and asked whether the ocean freight was made through Indian Flag Carrier, he stated he did not know the same and further stated that "ocean freight" cannot be classified as "services auxiliary to all modes of transport" and it has to be classified under "water transport service" with CPC 7212.
- vi. When the Annexure C filed with ANF-3B form was shown and was asked to explain whether CCPL has rendered service to foreign liner, he stated that M/s. CCPL has rendered service to exporters/importers in India.
- vii. When the invoices related to Annexure A filed with ANF-3B form was shown and was asked to explain as to whether the charges with respect to ocean freight such as terminal handling charge, shipping line charge etc., and charges with respect air freight such as terminal charges, air ride truck charges, forklift charges etc., were performed/rendered by M/s. CCPL, he stated that these services were rendered by terminals, shipping line or

airline and were paid by M/s CCPL and claimed the amount from their customers at overseas.

viii. When the sample invoice, wherein, M/s. CCPL has paid customs duty for the imported consignment and claimed the amount from the freight forwarder in foreign exchange and taken benefit on customs duty was shown and was asked to explain how he has certified the claim, he stated that the amount is not eligible for benefit and he has certified wrongly by oversight.

ix. It was brought to his notice that it appeared M/s CCPL has mis-represented or mis-stated before the DGFT in the ANF-3B form, filed for SEIS claim and wrongly claimed SEIS benefit by

- o Availing SEIS benefit on "ocean freight", "air freight" and "air freight related handling income" as services listed in Appendix 3E,
- o Availing SEIS benefit on "ocean freight" received in foreign exchange from abroad where ocean freight was not rendered through Indian Flag vessel,
- o Availing SEIS benefit on "air freight" received in foreign exchange as service listed in Appendix 3D and
- o Availing SEIS benefit on receipted charges such as "terminal handling income", shipping line charge" etc., without rendering any service.
- o Availing benefit on "customs duty" paid by M/s CCPL on behalf of their clients in India or abroad, when the duty cannot be termed as service

and for availing wrong benefits, Mis M.A.M. & Associates had certified the claim as correct. For this he stated that, he as partner in M/s M.A.M. & Associates issued the certificate in good faith believing the management of the company without going into the provisions of the Foreign Trade Policy and its public notices and admitted that it was his mistake and the management of M/s CCPL has put facts before him wrongly and made him to sign the certificate.

VIOLATION OF STATUTORY PROVISION, CONFISCATION OF GOODS AND PENALTIES.

29. From the above, it appeared that:

- i) The freight charges relate to transportation of goods. The standard ocean based freight charge related to transportation includes ocean freight, bunker adjustment factor, currency adjustment factor, international security port surcharge, BL charges. The standard air ocean freight charge related to transportation include air freight, fuel surcharge, insurance, war risk surcharge, security charge, x-ray charge and airway bill charge. The CPC under "Transport Service" covers the process of carriage of person and goods from one location to another and related supporting and auxiliary services. The Division 71, 72 and 73 explains the transportation of person and goods and Division 74 explains the "supporting and auxiliary transport service". As discussed in paragraph 15.1 (ii) above, the supporting and auxiliary transport service covers all other transport services that cannot be allocated to Division 71 to 73 and covers services that are auxiliary to transport and not directly provided for movement of goods or people. The freight service charged by M/s CCPL was for transportation of goods and appears to be covered well within the Division 71 to 73 of the CPC. However, M/s CCPL in the SEIS claim, in violation of Rules of Interpretation of CPC, have claimed the freight charges as service under group 741 (Cargo Handling service), 742 (Storage and warehousing) and 748 (Freight Transport Agency Service) within Division 74.
- ii) The "Freight transport agency service" (CPC 7480, 74800) is described in CPC as "Freight Brokerage services, freight forwarding services (primarily transport organisation or arrangement services on behalf of the shipper or consignee), ship and aircraft space brokerage services, and freight consolidation and break-bulk services." M/s CCPL being a contractual carrier, wherein they undertake to customer as

transporter, have done all transaction on principal to principal basis, the collection of freight charges appears to be necessarily for transporting the goods and not for providing auxiliary service or agency service. Hence, it appears, M/s CCPL has violated the provisions of Para 3.08(a) of FTP, 2015-20 read with policy circular 3/2015-20 dated 01/04/2015 by wrongly claiming freight income under 9(A)(D)(c) of the said policy circular which relates to Freight transport agency service.

- iii) As per paragraph 3.07 of the FTP, 2015-20, the objective of SEIS is to encourage export of notified service from India and not for any inflow of foreign exchange. The eligibility criteria to claim SEIS benefits is based on both the nature of service rendered and foreign exchange earnings, and only foreign exchange earnings do not qualify for a claim. When the freight forwarder (M/s CCPL) purchased freight and sold freight, the character of freight, which relates to service of transportation of goods would not undergo any change and remain as service of transportation of goods, but outsourced and rendered by shipping line and airline, classifiable under CPC 7212 or CPC 732 as ocean freight transportation or air freight respectively. When these services are not notified under FTP, 2015-20 the claim on amount earned in foreign exchange due to freight would not be eligible for benefit and it violates the Para 3.08 and Para 3.09 of the FTP, 2015-20.
- iv) M/s CCPL had shown earning in INR, received from exporters' which apparently included air/ocean freight charges and have availed rewards for entire earnings though the actual freight transportation service has been performed by foreign liners in which they had imported the freight service **and sold such freight service in INR** to exporters. Again, this appeared to vitiate the paragraph 3.07 of the FTP, 2015-20 being the basic objective of SETS is to encourage export of service from India.
- v) M/s CCPL has shown earning in INR, received from exporters' which apparently included air related cargo handling expenses and have availed reward for entire earnings though the air related cargo handling expenses are not listed in Appendix 3E.
- vi) In respect of amount billed and collected from the exporters/importers under the heads "terminal handling charges" classifiable under CPC as "supporting service for maritime transport", the terminals have rendered the actual service and have claimed amount from the freight forwarders directly or through shipping lines. Therefore, as per paragraph 3.09(1) of the FTP, it appeared the service was not rendered by M/s CCPL, and it is only a receipted charge.
- vii) In respect of amount billed as "shipping line charge" the shipping line has charged their fees or to compensate their payments made to terminals etc. It appears the said charge is only a receipted charge billed to their customers and hence would not be eligible for benefit as per paragraph 3.09(1) of the FTP, 2015-20
- viii) In respect of amount billed and collected as "on carriage", "cargo data declaration" "Entry summary declaration" the service would not be eligible under paragraph 3.08 (a) of the FTP, as the said services was not rendered in the manner as per Para 9.51(i) and Para 9.5 (ii) of the FTP.
- ix) the services actually provided by the third parties (terminal handling service, inland haulage service by rail) to the containers of shipping line as arranged and paid by M/s. CCPL, do not earn any foreign exchange for M/s. CCPL as those services are physically and documentarily received from third parties by the containers in India and hence do not constitute "**service**" for M/s. CCPL as per Para 9.50 of the FTP read with Para 9.00 *ibid*.

30. Hence, for the reasons stated above,

- a) In respect of income shown in Annexure A, related to Appendix 3D, it appeared that the benefit taken in respect of freight income (both ocean freight and air freight), receipted charges and income under mode 3 of paragraph 9.51 were not eligible for SEIS benefit,

as the services related were not notified as per paragraph 3.08 of the FTP or were not rendered as per paragraph 3.08 and paragraph 3.09 of the FTP. The ineligible incomes were worked as in sub-Annexure A1 to Annexure I and the Gross foreign exchange not eligible for SEIS benefit with respect to Annexure-A works out to USD 1503463.06 as detailed row (i) of Annexure-I.

b) In respect of the entire claim made under Appendix 3E, as seen from Annexure C, the services were billed to exporters/importers in India. Apart from the above, the benefits claimed therein include air freight, air freight related cargo handling charges, ocean freight and ocean freight related cargo handling service, inland haulage service etc., The air freight and air freight related cargo handling expenses and ocean freight as detailed in para 39 to 41 above cannot be termed as "supporting service for maritime transport". The freight charges are not notified as service under Appendix 3D and consequently not notified under Appendix 3E. Moreover, these charges are obviously not a service rendered (exported) to foreign liner in a customs notified area and instead were import of service from a foreign liner. Hence these charges are also not eligible for claim under SEIS. In respect of other charges such as terminal handling service, cargo handling services related to ocean transport, they have claimed the said services billed, relates to terminal handling service, cargo dispatch service and handling service of "supporting service for maritime transport" under Appendix 3E. These services they have claimed as service rendered to a foreign liner in a customs notified area. M/s CCPL is a freight forwarder and they do not own any terminals, container freight stations and inland container depots. Instead, they arrange with the terminals, container freight stations and inland container depots to store and handle the cargo related to their clients (exporters) through the containers of the shipping line. The terminals, container freight stations and inland container depots render the service and bill their charges to M/s CCPL and M/s CCPL in return charge the exporters. Thus, the terminal handling service and handling service are receipted charges for M/s CCPL and are not eligible for claim under Appendix 3E. With respect to all handling expenses related to import cargo, the service was rendered within India to an Indian customer and hence cannot be termed as export under FTDR. Thus, it appeared, the entire service under Appendix 3E, other than service rendered to foreign line as detailed in paragraph 31 (e) above, claimed to have been rendered by M/s. CCPL as stated in para 20 above, would not be eligible for SEIS claim. The ineligible service with respect to Appendix 3E works out to USD 1,56,44,014/- as detailed in sub-Annexure A-2 to Annexure-I [row (k)] to this notice.

c) M/s CCPL has given Annexure D showing the expenses in foreign currency and deducted the said amount from gross foreign exchange earned for claiming benefit. The amount claimed as expenses in foreign currency was \$27,74,653.73/-. The financial statement discussed in paragraph 42.1 above, mention the entire expense in foreign exchange as "freight expenses". As the freight is not eligible service for claiming SEIS, the said expenses is also excluded while calculating the net foreign exchange earned. Based on the above, the calculation of net benefit is worked out as in Annexure I to this notice.

31. In the ANF-3B forms filed with the DGFT, M/s CCPL has claimed the services rendered as "cargo handling service", "supporting service for maritime transport" and "freight transport agency service". Accordingly, they filed the statement Annexure A and Annexure C listing the documents/details relevant for taking such benefits. From the foregoing, it appeared to reveal that for claiming SEIS benefit, M/s CCPL has mis-declared

a) Air freight received from their associate concern as "freight transport agency" service income under Annexure A (Appendix 3D);

b) Ocean freight received from their associate concern, when freight was transported through foreign line as "cargo handling service"/"freight transport agency"/"storage and warehousing" income under Annexure A (Appendix 3D);

- c) Terminal handling charges, air freight and ocean freight all billed and received from the associate concern which were receipted charges as "freight transport agency income" under Annexure A (Appendix 3D) as the actual services were rendered by ports, airline and shipping line;
- d) Air freight, ocean freight and air related cargo handling charges received in INR as "supporting service of maritime transport" income under Annexure C (Appendix 3E);
- e) Ocean freight received in INR from exporter, which was actually bought from foreign line and sold to exporter, as service rendered to foreign liner under Annexure C (Appendix 3E);
- f) Air freight and air related cargo handling income received in INR from exporters in India as service rendered to foreign line under Annexure C (Appendix 3E) and
- g) On carriage income received as service rendered in the manner as per para 9.51(i) of the FTP, 2015-20.

32. The notification No. 25/2015 dated 08.04.2015 issued under Section 25 of the Customs Act, 1962 as amended exempts goods when imported into India against a Service Exports from India Scheme duty credit scrip issued by the Regional Authority under paragraph 3.10 read with paragraph 3.08 of the Foreign Trade Policy (hereinafter referred to as the said scrip) from (a) the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as said Customs Tariff Act) and (b) the whole of the additional duty leviable thereon under Section 3 of the said Customs Tariff Act subject to certain conditions listed under paragraph 2. The condition in paragraph 2(1) is that the duty credit in the said scrip is issued to a service provider located in India against export of noted services listed in Appendix 3D of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020.

33. The foreign exchange or INR received and claimed as deemed foreign exchange, to the extent of Rs.117.16 Crore as detailed in Annexure I to this notice, appears to be not earned for rendering of notified service against which scrip under dispute i.e. 0519101677 dated 01.01.2018 in file no.INTKD60401201801.xml is issued and that cannot be considered as export of notified services and therefore the condition 2(1) of the Notification 25/2015- Cus. dated 08.04.2015 as well as the Paragraph 3.08, 3.09 and 3.10 of FTP, are not complied with and therefore it appears that corresponding SETS scrips/rewards are not eligible for the benefit of the exemption of Customs Duty vide Notification 25/2015- Cus. dated 08.04.2015.

34. As the said ineligible scrip/reward issued to M/s. CCPL was transferred by M/s. CCPL to the actual importers listed in **Annexure-I** who utilized them in payment of Customs duty exemption on goods imported vide Bills of Entry at the port referred therein, those goods are liable for confiscation under Section 111(o) of the Customs Act, 1962.

35. As the said ineligible SEIS scrip under dispute is instrument referred in Section 28AAA of the Customs Act, 1962, which were obtained by M/s. CCPL by willful mis-statement and suppression of facts in collusion with Shri Ajay Kumar Gupta, the Chartered Accountant, and were utilized for payment/debit of Customs duties as referred in **Annexure-I**, such duty so debited was liable to be demanded under Section 28AAA of the Customs Act, 1962 from M/s. CCPL and the interest was liable to be demanded under Section 28AA *ibid*.

SHOW CAUSE-

A show cause notice F.No. DRI/CZU/VIII/26/33H/2018 dated 03.09.2020 was issued by the Additional Director General, DRI, CZU, Chennai to the following noticees:-

- (i) M/s. Continental Carriers Private Limited, 76-77, Kapashera, Bijwasan Road, New Delhi — 110037.
- (ii) Shri Vaibhav Vohra, Managing Director, M/s Continental Carriers Private Limited

(iii) Shri Surjit Singh, Director, M/s Continental Carriers Private Limited

(iv) Shri Ajay Kumar Gupta, Chartered Accountant, M/s M.A.M. & Associates, Chartered Accountants

(v) M/s. Cargil India Pvt. Ltd

36. M/s. Continental Carriers Private Limited, 76-77, Kapashera, Bijwasan Road, New Delhi — 110 037, were called upon to show cause, in writing, to the Commissioner of Customs, Custom House, Near Balaji Temple, Kandla 370210 in respect of Bills of entry covered in Annexure -1, within thirty days of receipt of this Notice, as to why:

- (i) The goods covered in bills of entry Nos. 5866637 dated 05.04.2018, 6004663 dated 16.04.2018, 6005340 dated 16.04.2018 and 6010704 dated 17.04.2018 valued at 15,57,46,219/- as detailed in Annexure 1 to this notice, imported vide SEIS scrips obtained by willful mis-statement and suppression of facts for availing duty exemption under the Notification 25/2015-Cus. dated 08.04.2015, should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962;
- (ii) The duty payable amount aggregating Rs.5,57,91,027/- (Rupees Five Crore Fifty Seven Lakh Ninety One Thousand and Twenty Seven only) as detailed in Annexure I to the notice should not be demanded and recovered from them under Section 28AAA of the Customs Act, 1962 along with interest in terms of Section 28AA of the Customs Act, 1962
- (iii) Penalty should not be imposed on them under Section 112 of the Customs Act, 1962 for rendering the goods imported vide the SEIS scrips under dispute liable for confiscation.
- (iv) Penalty should not be imposed on them under Section 114AA of the Customs Act, 1962, for the declarations made knowing that they were incorrect.
- (v) Penalty should not be imposed on them under Section 114AB of the Customs Act, 1962 for having obtained instrument by willful misstatement as explained above.
- (vi) The amount of Rs. 1,00,00,000/- paid by Mis CCPL on various dates as detailed in Annexure II should not be adjusted towards the adjudicating liabilities above.

37. Further, Shri Surjit Singh, Director, M/s Continental Carriers Private Limited, 76-77, Kapashera, Bijwasan Road, New Delhi — 110 037 was called upon to show cause, in writing, to the Commissioner of Customs, Custom House, Near Balaji Temple, Kandla 370210 in respect of Bills of entry covered in Annexure -I, within thirty days of receipt of this Notice, as to why:

- (i) Penalty should not be imposed on him under Section 112 of the Customs Act, 1962 for rendering the goods imported vide the SEE scrips under dispute liable for confiscation.
- (ii) Penalty should not be imposed on him under Section 114AA of the Customs Act, 1962, for the declarations made knowing that they were incorrect.

38. Further, Shri Vaibhav Vohra, Managing Director, M/s Continental Carriers Private Limited, 76-77, Kapashera, Bijwasan Road, New Delhi — 110 037 was called upon to show cause, in writing, to the Commissioner of Customs, Custom House, Near Balaji Temple, Kandla 370210 in respect of Bills of entry covered in Annexure -I, within thirty days of receipt of this Notice, as to why:

- (i) Penalty should not be imposed on him under Section 112 of the Customs Act, 1962 for rendering the goods imported vide the SEIS scrips **under** dispute liable for confiscation.
- (ii) Penalty should not be imposed on him under Section 114AA of the Customs Act, 1962, for the declarations made knowing that they were incorrect

39. Further, Shri Ajay Kumar Gupta, Chartered Accountant, M/s M.A.M. & Associates, Chartered Accountants, FA-36, 2nd Floor, Shivaji Enclave, Near Mehta Chowk, Rajouri Garden, New Delhi— 110 027 was called upon to show cause, in writing, to the Commissioner of Customs, Custom House, Near Balaji Temple, Kandla 370210 in respect of Bills of entry covered in Annexure -I, within thirty days of receipt of this Notice, as to why:

- (i) Penalty should not be imposed on him under Section 112 of the Customs Act, 1962 for rendering the goods imported vide the SEIS scrips under dispute liable for confiscation.
- (ii) Penalty should not be imposed on him under Section 114AA of the Customs Act, 1962, for the declarations made knowing that they were incorrect.

40. Further, M/s Cargil India Private Limited [KC 0596044330J, Survey No.415, National Highway Road, No.8-A, PO Bhimasar, Taluka Anjar, Gujarat — 370 240 were hereby called upon to show cause, in writing to the Commissioner of Customs, Custom House, Near Balaji Temple, Kandla 370210, in respect of Bills of entry Nos. 4934854 dated 24.01.2018, 4953708, dated 25.01.2018 and 4955243 dated 25.01.2018 as detailed in Annexure I within thirty days of receipt of this Notice, as to why the declared assessable value of imported goods of Rs.22,55,89,181.10 as detailed in Annexure-I to the show cause notice for which duty exemption under the Notification 25/2015-Cus. dated 08.04.2015 was availed based on SEIS scrips obtained by willful mis-statement and suppression of facts for availing duty, should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962;

ORDER OF SETTLEMENT COMMISSION-

41. M/s. Continental Carriers Private Limited, Shri Vaibhav Vohra, Managing Director and Shri Sujit Singh, Director filed settlement applications no. 5904-5906/2021 on 25.02.2021 under Section 127B of the Customs Act, 1962 for dispute arising out of SCN No. DRI/CZU/VIII/26/33H/2018 dated 03.09.2020 issued by Additional Director General, DRI, Chennai Zonal unit, Chennai and made answerable to Commissioner of Customs, Kandla.

42. Shri Ajay Kumar Gupta, Chartered Accountant, M/s. M.A.M & Associates, Chartered Accountants and M/s. Cargil India Pvt. Ltd. did not file an application before the Settlement Application.

43. The Hon'ble Customs, Central Excise and Service Tax Settlement Commission, Principal Bench, New Delhi vide Order F-3832-3834/CUS/2023-SC(PB) dated 01.08.2023 settled the case of Applicant and Co-Applicants under Section 127C(5) of the Customs Act, 1962 on the following terms and conditions:-

- (i) Duty: The Bench settles the duty liability to duty at Rs. 5,57,91,027/- and such amount already paid by M/s. CCP, the applicant is appropriated towards such liability.
- (ii) Interest: The Bench settles the interest amount on delayed payment of duty at Rs.2,20,66,416/- and such amount already paid by M/s. CCPL, the applicant is appropriated towards such liability.

43.1 The Hon'ble Bench granted immunity to the Applicant (M/s. Continental Carriers Pvt. Ltd), Co-Applicant-1(Shri Vaibhav Vohra) and Co-Applicant-2(Shri Surjit Singh) from penalty and prosecution under the Customs Act, 1962.

43.2 Shri Ajay Kumar Gupta, Chartered Accountant of M/s. M.A.M & Associates, Chartered Accountants and M/s. Cargil India Pvt. Ltd, the other co-noticees had not approached the Settlement Commission. Hence, the Hon'ble Bench allowed the adjudicating authority to decide their case as per the provisions of the Customs Act, 1962.

43.3 In pursuance of the order of Hon'ble Settlement Commission, the proceedings in respect of M/s. Continental Carriers Pvt. Ltd, Shri Vaibhav Vohra and Shri Surjit Singh are concluded in terms of Section 127(J) of the Customs Act, 1962. Therefore, the instant adjudication proceedings are in respect of other two co-noticees viz. Shri Ajay Kumar Gupta, Chartered Accountant of M/s. M.A.M & Associates, Chartered Accountants and M/s. Cargil India Pvt. Ltd.

PERSONAL HEARING-

44. Shri Shreya Ganju, Custom Analyst appeared for personal hearing on behalf of M/s. Cargill India Pvt. Ltd on 15.10.2024. She reiterated the submission dated 25.09.2024. She further referred to OIO issued at JNCT & Delhi dropping proceedings in similar circumstances. She prayed for dropping of proceedings on the strength of being a bonafide buyer of the scrips.

45. Opportunities of personal hearings were provided to Shri Ajay Kumar Gupta, Chartered Accountant of M/s. M.A.M & Associates, Chartered Accountants vide this office personal hearing letters dated 02.05.2024, 10.05.2024 and 05.08.2024. All the letters of personal hearings returned undelivered with a remark "Left". The said letters were affixed on the notice board of Kandla Customs. However, neither Shri Aay Kumar Gupta nor his representative appeared for personal hearings.

SUBMISSION-

46. M/s. Cargill India Pvt. Ltd vide its submission dated 25.09.2024 and 31.01.2025, interalia, stated that-

(i) They were the bonafide purchaser of the scrip in question and that they had made payment for the purchase of impugned scrips.

(ii) The similar issue of Cargill India had been adjudicated by the office of Commissioner of Customs (NS-V), JNCH, Nhava Sheva wherein the co-noticee importers were not held liable for penalty.

(iii) They requested to quash/set aside the current proceedings.

DISCUSSION AND FINDINGS-

47. I have carefully gone through the Show cause notice dated 03.09.2020, written submission dated 25.09.2024, Order dated 01.08.2023 of the Hon'ble Settlement Commission and all the evidences placed on record.

48. I find that the Hon'ble Settlement Commission vide order dated 01.08.2023 has settled the disputes arising out of SCN dated 03.09.2020 in respect of M/s. Continental Carriers Pvt. Ltd, Shri Vaibhav Vohra and Shri Surjit Singh.

49. I find that once the Settlement Commission passes an order under Section 127C(5) of the Customs Act, the same is treated as conclusive in terms of Section 127(J) of the Customs Act, 1962. Therefore, the instant adjudication proceedings are in respect of other co-noticees viz. Shri Ajay Kumar Gupta, Chartered Accountant of M/s. M.A.M & Associates, Chartered Accountants and M/s. Cargil India Pvt. Ltd. only.

FINDINGS IN RESPECT OF SHRI AJAY KUMAR GUPTA, CHARTERED ACCOUNTANT, M/s. M.A.M & ASSOCIATES, CHARTERED ACCOUNTANTS-

50. I find that the Show cause notice has alleged that as per ANF-3B form, the applicant undertook to certify that he/she made a true declaration therein and certified that the foreign exchange earned was on account of services rendered from India alone in terms of Para 9.51(i) and Para 9.51(ii) of FTP and the same did not fall under ineligible category of service as per Para 3.08 and Para 3.09 of FTP and the Chartered Accountant/Cost and Works Accountant/Company Secretary certified those declarations/claims after due examination.

51. Further, the show cause notice alleges that Shri Ajay Kumar Gupta, Chartered Accountant, M/s M.A.M. & Associates, Chartered Accountants had examined and certified the SEIS claim of M/s. CCPL as correct for compliance of non-inclusion of ineligible services and remittances as listed under Para 3.09 of FTP 2015-20 [as required under ANF-3B].

52. In this regard, I find that Shri Ajay Kumar Gupta, being the Chartered Accountant certified the claims or declaration made by M/s. CCPL without examining the provisions of FTP 2015-2020. Further, it is observed that all the mischiefs were done by the M/s. CCPL while mis-declaring or mis-stating the rendered services. Shri Ajay Kumar Gupta during his statement admitted that he had merely certified the documents *as per the declaration* of M/s. CCPL without going through the provisions of FTP.

53. Further on perusal of the statement tendered by Shri Sujit Singh, Director, I find that there is no admission of involvement of Shri Ajay kumar Gupta in the wilfull mis-statement of services by M/s. CCPL. I find no evidence on record to suggest that Shri Ajay kumar Gupta was actively engaged in willful mis-statement before the DGFT authorities to obtain scrips fraudulently. Merely certifying the documents submitted by an exporter does not warrant imposition of penalties under Section 112 and 114AA as both the sections require 'mens rea' on part of the abettor.

54. In this regard, I rely on the decision of High Court in case of 'Trinetra Impex Pvt. Ltd.' [2019-TIOL-2506-HC-DEL-CUS] wherein the Hon'ble High Court held that "a perusal of the said provisions clearly reveals that 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 proved as condition precedent, however, when it comes to imposition of the penalty on an abettor, the presence of an element of mens rea or conscious knowledge, which is a sine qua non for imposition of the penalty, is a must for imposing penalty on the Customs Broker under the Customs Act, 1962. The element of abetment as well as pre-knowledge on part of the Customs Broker should be clearly elaborated in the Show Cause Notice.

55. Thus, in absence of the proven abetment or mens rea on part of the Chartered Accountant, penalty is not imposable on him under the provisions of Section 112(a) of the Customs Act, 1962.

56. Further, it is pertinent to note that the act of certifying the declaration in ANF-3B form doesn't render the imported goods liable for confiscation as the said declaration was in respect of claim of SEIS benefit for export of services.

57. Without prejudice to the above, it is clear that the Hon'ble Settlement Commission while considering the penalties under Section 112(a) and 114AA on M/s. CCPL observed that the penalties are not attracted on the basis of following facts:

57.1 In this regard, the Hon'ble Settlement Commission while setting aside the penalty under 112(a) has recorded in its finding that *"penalty under Section 112 of the Customs Act is in relation to any person, whose act is improper in relation to "any goods" and the Applicants are in no way connected with the import of goods or dealing with the goods in any manner. On this ground too, the proposal in the SCN regarding imposition of penalty on the applicant parties is not sustainable."*

57.2 Further, the Hon'ble Settlement Commission while setting aside the penalty under 114AA has recorded in its finding, that *"the filing of false information in Form ANF-3B to wrongly claim SEIS incentive is liable for penalty under the said Act (Foreign Trade Act, 1992), by the competent authority in DGFT, but not under Section 114AA of the Customs Act, 1962"*.

57.3 I find that the order dated 01.08.2023 of the Hon'ble settlement Commission has been accepted by the department. Therefore, the said findings are applicable to the proposal of penalties under Section 112(a) and 114AA upon Shri Ajay kumar Gupta also. In view of the same, I hold that penalties under Section 112(a) and 114AA are not sustainable.

FINDINGS IN RESPECT OF M/s. CARGILL INDIA PRIVATE LIMITED-

58. Before moving further, it is pertinent to refer the relevant Sections involving confiscation and recovery in cases of instruments as given below:-

Section 111 of Customs Act, 1962:

Confiscation of improperly imported goods, etc.

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

*

*

*

.....

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

59. I find that Section 111(o) states that the goods brought from a place outside India shall be liable to confiscation if those goods were exempted subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, *in respect of which the condition is not observed* unless the non-observance of the condition was sanctioned by the proper officer. Therefore, clearly the section 111(o) mandates that all the conditions laid out under Customs Act, 1962 or any other law must be observed. It is pertinent to note that the provisions of Section 111(o) doesn't talk about the *intent of the importer of goods*, therefore, whether the scrip was purchased with malafide or bonafide is immaterial insofar as to the extent of confiscation of goods is concerned. It is further pertinent to note that such intent gains significance while imposing penalty under Section 112 for

improper importation of goods as the said section clearly contains words or phrases "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 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 Section 111, ". Therefore, on careful reading of the Section 111(o) and 112, it is clear that section 111(o) mandates confiscation of goods even if the intent of the importer of goods was bonafide.

60. It is important to examine whether any condition of the Notification No. 25/2015-Customs dated 8th April, 2015 is violated or otherwise.

Notification No. 25/2015-Customs dated 8th April, 2015 issued under Customs Act, 1962

As per the Notification:

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods when imported into India against a Service Exports from India Scheme duty credit scrip issued by the Regional Authority under paragraph 3.10 read with paragraph 3.08 of the Foreign Trade Policy (hereinafter referred to as the said scrip) from,-

(a) the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as said Customs Tariff Act); and

(b) the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act.

2. The exemption shall be subject to following conditions, namely:-

- (1) that the duty credit in the said scrip is issued to a service provider located in India against export of notified services listed in Appendix 3D of Appendices and Aayat Niryat Forms of Foreign Trade Policy 2015-2020
- (2) *at the imports and exports are undertaken through the seaports, airports or through the inland container depots or through the land customs stations as mentioned in the Table 2 annexed to the Notification No. 16/2015- Customs dated 01.04.2015 or a Special Economic Zone notified under section 4 of the Special Economic Zones Act, 2005 (28 of 2005): Provided that the Commissioner of Customs may within the jurisdiction, by special order, or by a Public Notice, and subject to such conditions as may be specified by him, permit import and export through any other sea-port, airport, inland container depot or through any land customs station;*
- (3) *that the said scrip is registered with the Customs Authority at the port of registration specified on the said scrip;*
- (4) that the said scrip is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods and the proper officer of customs, taking into account the debits already made under this exemption and debits made under the notification Nos. 21 of 2015 - Central Excise, dated the 8 th April, 2015 and 11 of 2015 -

Service Tax dated the 8 th April, 2015, shall debit the duties leviable on the goods, but for this exemption;

61. I find that the condition no. 2(1) is not fulfilled as the services rendered were not notified in Appendix 3D/3E as discussed in the foregoing paras and held by the Hon'ble Settlement Commission in its order. Clearly the condition no. 2(1) is violated which has rendered the goods liable for confiscation under Section 111(o) of the Customs Act, 1962.

62. Further it is important to examine the argument of the importer that the said scrips were valid at the time of importation. I find that the Notification No. 25/2015-2020 dated 08.04.2015 exempts the goods imported against SEIS duty credit scrip and as per Sr.No. 2(4) such duty credit scrip is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods and proper officer debits the duties leviable on the goods, but for this exemption.

63. In this regard, it is relevant to reproduce the provisions of Section 28AAA of the Customs Act, 1962-

28AAA- Recovery of duties in certain cases:

(1) Where an instrument issued to a person has been obtained by him by means of -

- (a) collusion; or*
- (b) wilful misstatement; or*
- (c) suppression of facts,*

for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), by such person or his agent or employee and such instrument is utilised under the provisions of this Act or the rules made or notifications issued thereunder, by a person other than the person to whom the instrument was issued, the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued:

On perusal of the above mentioned section, I find that in cases where the instrument has been obtained by way of collusion/wilful misstatement/suppression of facts and the same has been utilised, the duty relatable to such utilisation of instrument *shall be deemed never to have been exempted or debited*. The words and phrases *shall be deemed never to have been exempted or debited* clearly implies that the duty, which was debited or exempted by the proper officer while import of goods as per Sr.No. 2(4) of the Notification No. 25/2015-2020, is made void ab initio by the provisions of Section 28AAA of the Customs Act, 1962. Clearly the provisions of Section 28AAA retrospectively invalidates the benefits of the fraudulent scrips and make the exemption of duty and validity of scrip void ab initio. Therefore, the argument of the noticee that they utilised the valid scrip at the time of import has no merit.

64. I find that the importer has referred to an OIO issued by ACC, Import Docks, NS-V, JNCH. On perusal of the same, I find that the adjudicating authority has held that since there was no evidence suggesting that they were aware of the incorrect availment of the MEIS scrips, and the scrips were valid at the time of utilization, therefore the importers were not liable for penalty. However, in the instant case, the issue is of confiscation of goods and not penalty.

Whether the goods can be confiscated even though the same are not available for physical confiscation-

65. In the instant case, it is evident that the goods are not physically available for confiscation. However, the provisions of Section 125(1) and Judgements of Hon'ble High Court of Madras and Hon'ble high Court of Gujarat, as discussed below, don't necessitate the requirement of physical availability of goods for confiscation and imposition of redemption fine.

Section 125 of the Customs Act, 1962 provides for an option to pay fine in lieu of confiscation. Relevant paras of Section 125 are reproduced hereunder:-

"Section 125: Option to pay fine in lieu of confiscation:--

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

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, 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.

(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."

66. It is apparent from the sub-section (1) of Section 125 that whenever confiscation of goods is authorized by this Act, the officer adjudging it shall in the case of goods other than prohibited goods give an option to pay fine in lieu of confiscation. The pre-requisite for making an offer of fine under Section 125 of the Act is pursuant to the finding that the goods are liable to be confiscated. In other words, if there is no authorisation for confiscation of such goods, the question of making an offer by the proper officer to pay the "redemption fine", would not arise. Therefore, the basic premise upon which the citadel of Section 125 of the Act rests is that the goods in question are liable to be confiscated under the Act. It is clear that the goods, imported against the scrip fraudulently obtained by the exporter, are liable to confiscation under the provision of Section 111(o) of the Customs Act, 1962 as discussed above, therefore the imposition of fine under Section 125 in lieu of confiscation is sustainable even though the goods are not available for confiscation.

67. In this regard, I rely on the Judgement of Hon'ble High Court of Madras in the case of M/s. Visteon Automotive Systems vs the Customs, 2017, wherein the Hon'ble Court in Para 23 categorically held that the physical availability of goods doesn't have any significance for imposition of redemption fine under Section 125, which is reproduced as under:-

"23. 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. We accordingly answer question No.(iii)"

68. I further find that the decision of Hon'ble Madras High Court in case of M/s. Visteon Automotive Systems India Limited has been relied upon by the Hon'ble High Court of Gujarat in the matter of SYNERGY FERTICHEM PVT. LTD. Versus STATE OF GUJARAT {2020 (33) G.S.T.L. 513 (Guj.)}.

69. In view of the above discussion, case laws and provisions of Section 111(o) and 125 of the Custom Act, 1962, I hold that the goods are liable to confiscation under Section 111(o) of the Customs Act, 1962 and find it apt to impose fine upon the importer, being the owner of goods, in lieu of confiscation under section 125(1) of the Custom Act.

70. In view of the above discussion and findings, I hereby pass the following order-

ORDER

A. ORDER IN RESPECT OF M/S. CONTINENTAL CARRIERS PVT. LTD., SHRI SURJIT SINGH AND SHRI VAIBHAV VOHRA-

In terms of Section 127J of the Customs Act, 1962-

(i) The recovery of duty of Rs. 5,57,91,027/- (Rupees Five Crore Fifty Seven Lakh Ninety One Thousand Twenty Seven Only) under Section 28AAA and interest amount of Rs. 2,20,66,416/- (Rupees Two Crore Twenty Lakh Sixty Six Thousand Four Hundred and Sixteen Only) under Section 28AA readwith Section 28AAA(2) of the Customs Act, 1962 and appropriation of the same as already paid by M/s. Continental Carriers Pvt. Ltd shall be as per Para 8(i) and 8(ii) of Order dated 01.08.2023 of the Hon'ble Settlement Commission, Delhi.

(ii) No confiscation of goods under Section 111(o) of the Customs Act, 1962 as held by the Hon'ble Settlement Commission in Para 7.7 of the Order dated 01.08.2023.

(iii) No penalty under Sections 112, 114AA and 114AB upon M/s. Continental Carriers Pvt. Ltd as the Hon'ble Bench has granted immunity to the Applicant (M/s. Continental Carriers Pvt. Ltd), Co-Applicant-1 (Shri Vaibhav Vohra) and Co-Applicant-2 (Shri Surjit Singh) from penalty and prosecution under the Customs Act, 1962.

B. ORDER IN RESPECT OF SHRI AJAY KUMAR GUPTA, CHARTERED ACCOUNTANT, M/S. M.A.M & ASSOCIATES


I drop the proceedings in respect of SHRI AJAY KUMAR GUPTA, CHARTERED ACCOUNTANT, M/S. M.A.M & ASSOCIATES for the reasons discussed in Para No. 50 to 57 above.

C. ORDER IN RESPECT OF M/s. Cargill India Private Limited

(i) I order to confiscate the goods, already cleared, valued at Rs. 22,55,89,181.10/-, as detailed in Annexure-I, imported by utilising the fraudulently obtained SEIS scrips under Section 111(o) of the Customs Act, 1962.

However, I impose redemption fine of Rs. 20,00,000/- (Rupees Twenty lakhs only) upon M/s. Cargill India Private Limited under Section 125 of the Customs Act, 1962.

69. This order is issued without prejudice to any other action that can be taken against the exporter or importer or any other person under this Act or any other law for the time being in force.

 10.02.2023

(M. Ram Mohan Rao)
Commissioner of Customs
Custom House Kandla

F. No. GEN/ADJ/COMM/68/2020-Adjn-O/o Commr-Cus-Kandla

DIN- 20250271ML0000663330

By Speed Post /E-Mail/Notice Board

To (Noticees),

- (i) Shri Ajay Kumar Gupta, Chartered Accountant, M/s M.A.M. & Associates, Chartered Accountants, FA-36, 2nd Floor, Shivaji Enclave, Near Mehta Chowk, Rajouri Garden, New Delhi— 110 027
- (ii) M/s Cargil India Private Limited [KC 0596044330J, Survey No.415, National Highway Road, No.8-A, PO Bhimasar, Taluka Anjar, Gujarat — 370 240
- (iii) M/s. Continental Carriers Pvt. Ltd., 76-77, Kapashera, Bijwasan Road, New Delhi-1100037
- (iv) Shri Surjit Singh, Director, M/s. Continental Carriers Pvt. Ltd.
- (v) Shri Vaibhav Vohra, Managing Director, M/s. Continental Carriers Pvt. Ltd.

Copy To:-

1. The Additional Director General, DRI, CZU, Chennai
2. The Office of Chief Commissioner, Customs, Ahmedabad Zone, Ahmedabad for the purpose of Review.
3. The Superintendent (EDI/TRC) for necessary action at their end.